Global Antitrust Institute's Comments on Draft DOJ-FTC IP Guidelines are on the Mark

Alden Abbott — 20 September 2016

The Global Antitrust Institute (GAI) at George Mason University's Antonin Scalia Law School released today a set of comments on the joint U.S. Department of Justice (DOJ) – Federal Trade Commission (FTC) August 12 Proposed Update to their 1995 Antitrust Guidelines for the Licensing of Intellectual Property (Proposed Update). As has been the case with previous GAI filings (see here, for example), today's GAI Comments are thoughtful and on the mark.

For those of you who are pressed for time, the latest GAI comments make these major recommendations (summary in italics):

Standard Essential Patents (SEPs)*: The GAI Comments commended the DOJ and the FTC for preserving the principle that the antitrust framework is sufficient to address potential competition issues involving all IPRs—including both SEPs and non-SEPs. In doing so, the DOJ and the FTC correctly rejected the invitation to adopt a special brand of antitrust analysis for SEPs in which effects-based analysis was replaced with unique presumptions and burdens of proof.*

o The GAI Comments noted that, as FTC Chairman Edith Ramirez has explained, "the same key enforcement principles [found in the 1995 IP Guidelines] also guide our analysis when standard essential patents are involved."

o This is true because 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.

o Again, as Chairwoman Ramirez has stated, "it is important to recognize that a contractual dispute over royalty terms, whether the rate or the base used, does not in itself raise antitrust concerns."

Refusals to License*: The GAI Comments expressed concern that the statements regarding refusals to license in Sections 2.1 and 3 of the Proposed Update seem to depart from the general enforcement approach set forth in the 2007 DOJ-FTC IP Report in which those two agencies stated that "[a]ntitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections." The GAI recommended that the DOJ and the FTC incorporate this approach into the final version of their updated IP Guidelines.*

"Unreasonable Conduct"*: The GAI Comments recommended that Section 2.2 of the Proposed Update be revised to replace the phrase "unreasonable conduct" with a clear statement that the agencies will only condemn licensing restraints when anticompetitive effects outweigh procompetitive benefits.*

R&D Markets*: The GAI Comments urged the DOJ and the FTC to reconsider the inclusion (or, at the very least, substantially limit the use) of research and development (R&D) markets because: (1) the process of innovation is often highly speculative and decentralized, making it impossible to identify all market participants to be; (2) the optimal relationship between R&D and innovation is unknown; (3) the market structure most conducive to innovation is unknown; (4) the capacity to innovate is hard to monopolize given that the components of modern R&D—research scientists, engineers, software developers, laboratories, computer centers, etc.—are continuously available on the market; and (5) anticompetitive conduct can be challenged under the actual potential competition theory or at a later time.*

While the GAI Comments are entirely on point, even if their recommendations are all adopted, much more needs to be done. The Proposed Update, while relatively sound, should be viewed in the larger context of the Obama Administration's unfortunate use of antitrust policy to weaken patent rights (see my article here, for example). In addition to strengthening the revised Guidelines, as suggested by the GAI, the

DOJ and the FTC should work with other component agencies of the next Administration – including the Patent Office and the White House – to signal enhanced respect for IP rights in general. In short, a general turnaround in IP policy is called for, in order to spur American innovation, which has been all too lacking in recent years.

Rate this:

2 Votes

Share this:

Print Twitter Facebook 3 Google LinkedIn 1 Email

Like

Be the first to like this.

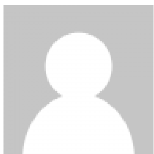
Related

The DOJ-FTC IP Guidelines: Suggestions for Promoting Innovation
In "antitrust"

The Case Against Antitrust Challenges to Standard Essential Patent "Abuses" Intensifies – Will DOJ and the FTC Finally Get the Message?
In "antitrust"

Global Antitrust Institute Comments on Chinese Draft Antitrust Guidelines Regarding Disgorgement and Fines Have Broader Implications for Sound Antitrust Enforcement Policy
In "antitrust"

In antitrust, federal trade commission, intellectual property antitrust, doj, ftc, Intellectual property



Alden Abbott

Website Posts

I am a Senior Legal Fellow at the Heritage Foundation. I write on antitrust, domestic and international regulatory policy, and law and economics. I am an Adjunct Faculty Member at George Mason Law School.

Search

Search...

Authors

Adam Mossoff

Alden Abbott

Ben Sperry

Eric Helland

Geoffrey Manne

Gus Hurwitz

Joanna Shepherd

Kristian Stout

Mike Sykuta

Paul Rubin

Thom Lambert

Posts by Author

Adam Mossoff

Alden Abbott

Ben Sperry

Eric Helland

Geoffrey Manne

Gus Hurwitz

Joanna Shepherd

Kristian Stout

Manne & Sperry

Manne & Stout

Manne & Wright

Mike Sykuta

Paul Rubin

Thom Lambert

Posts by Past Authors & Guests

Bill Sjostrom

Dan Crane

Darian Ibrahim

David Balto

Elizabeth Nowicki

Hal Singer

Henry Manne

J.W. Verrett

Josh Wright

Keith Sharfman

Larry Ribstein

Mary Coleman

Steve Salop

Thomas McCarthy

Todd Henderson

The Present State and Future Prospects of the International Competition Network (ICN)
19 May 2017

The Internet Conduct Rule Must Die
18 May 2017

A Brief Assessment of the Procompetitive Effects of Organizational Restructuring in the Ag-Biotech Industry
9 May 2017

Global Antitrust Institute Points the Way Toward Sounder Japanese Antitrust Guidelines
4 May 2017

Are rules incompatible with the web? Let’s hope not: A response to Tim Wu
2 May 2017

Categories

administrative announcements antitrust behavioral economics blogging business cartels constitutional law consumer protection contracts copyright corporate crime corporate governance corporate law credit cards disclosure regulation doj economics error costs exclusionary conduct executive compensation federal communications commission federal trade commission financial regulation google health care health care reform debate insider trading intellectual property international center for law & economics international trade Jurisdictional competition law and economics law school lawyers legal profession legal scholarship litigation markets merger guidelines mergers & acquisitions monopolization musings patent politics privacy regulation sarbanes-oxley scholarship section 5 securities regulation sports SSRN Sykuta technology telecommunications truth on the market Uncategorized uncorporations universities

Blogroll

10b-5 daily
antitrust & competition policy
antitrust division
antitrust review
antitrust world reports
atlanticblog
austrian economists
becker-posner blog
broken symmetry
business law prof blog
cafe hayek
charles rowley's blog
chicago law profs
committee on capital markets regulation
competition policy blog
competition policy international

concurring opinions
conglomerate
core economics
crooked timber
deal lawyers
delaware litigation
digital society
digitopoly
econlog
economics of information
economics one
ed dolan
empirical legal studies
federal trade commission
finreg21
freakonomics
global competition policy
green economics
grumpy economist
harvard corporate governance blog
hodak value
hoover project on commercializing innovation
houston's clear thinkers
int'l econ law & policy
international center for law & economics
knowledge problem
legal theory
libertarianism from a to z (jeffrey miron)
liberty law blog
m&a law prof
madisonian
management r&d
marginal revolution
modeled behavior
notre dame center for the study of financial regulation
organizations and markets
patently-o
prawfs blawg
professor bainbridge
reverse merger blog
right coast
sox first
streetwise professor
talk standards
tap blog