

Wright, Ginsburg critique IP guidance in China

Wednesday, 13 January 2016 (1 hour ago)

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John T Hazel, Jr Hall, George Mason University School of Law (Credit: Ron Cogswell / Flickr)

The Global Antitrust Institute has pointed to “problematic provisions” in the draft guidelines separately proposed by two Chinese competition agencies that enforce against intellectual property abuse.

Experts at the institute, affiliated with George Mason University, filed comments this week on draft anti-monopoly guidelines on intellectual property abuse issued by China’s State Administration for Industry and Commerce (SAIC) and National Development and Reform Commission (NDRC).

The SAIC and NDRC are responsible for non-price and price-related antitrust enforcement, respectively. Alongside the country's merger-control authority, the Ministry of Commerce, the authorities will be submitting competing draft guidelines to China's State Council, which will choose the guidance that binds all three authorities.

The antitrust institute's comments were penned by former US Federal Trade commissioner Joshua Wright, now senior counsel at Wilson Sonsini Goodrich & Rosati; federal appellate judge Douglas Ginsburg; institute director Koren Wong-Ervin, formerly advisor on international intellectual property at the FTC; and Bruce Kobayashi, a George Mason professor.

SAIC's draft guidelines apply presumptions of anticompetitive conduct, while NDRC proposes a more effects-based approach, said Wong-Ervin. "Both, however, contain problematic provisions which the [institute] has sought to remedy with our recommended fixes."

SAIC recommendations

Wright, Ginsburg, Wong-Ervin and Kobayashi urged eliminating presumptions of anticompetitive conduct, and moving IP enforcement guidelines to an effects-based approach. This approach, Wong-Ervin said, condemns licensing restraints only when any anticompetitive harm they may cause outweighs any procompetitive benefits they create.

As an example, she pointed to conduct such as entering into exclusive grant-backs, tying and bundling or pooling arrangements, charging for expired or invalid patents, and prohibiting a licensee from challenging the validity of its IP right.

The institute also expressed concern with provisions that would sanction seeking injunctive relief, charging for invalid patents, or including no-challenge clauses in licensing agreements.

"Given the possibility for reverse holdup and holdout, there are likely to be detrimental consequences to disrupting the carefully balanced [fair, reasonable and non-discriminatory] ecosystem by creating an anti-monopoly law sanction for seeking injunctive relief," the report said.

NDRC recommendations

The institute said NDRC's draft guidelines set out a list of factors to consider when analysing potential anticompetitive conduct, but do not explain the significance of each factor or how it will be weighed in the authority's decision-making process.

This allows the Chinese authorities broad enforcement discretion "without providing the guidance stakeholders need to protect incentives to innovate and transfer technology that could be subject to anti-monopoly law jurisdiction", the institute said.

It has suggested the NDRC instead "adopt a more compliance-based approach that sets forth basic principles that would allow parties to self-advise", while also providing specific examples to illustrate how the agencies will apply the basic principles, similar to those found in the US antitrust agencies' 1995 guidelines for the licensing of intellectual property.

The institute went into a line-edit level of detail on four provisions: general analysis, charging "unfairly high" royalties, discriminatory treatment, and injunctive relief.

In November, the institute commented on a previous version of NDRC's draft guidelines, and last year also suggested amendments that would bring China's anti-monopoly law in line and Japanese enforcement rules on standard-essential patent holders in line with western standards.

