

Agencies Release Updated Guidelines for IP Licensing and International Enforcement and Cooperation

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01/19/17

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On January 13, 2017, the U.S. Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC) (collectively, the Agencies) issued revised Antitrust Guidelines for the Licensing of Intellectual Property (IP Licensing Guidelines), as well as revised Antitrust Guidelines for International Enforcement and Cooperation.

Updated Antitrust Guidelines for the Licensing of Intellectual Property

The revised IP Licensing Guidelines are an attempt to modernize the previous IP Licensing Guidelines, last updated in 1995. The Agencies updated the guidelines to address changes in statutory and case law, as well as relevant enforcement and policy work, including the 2010 Horizontal Merger Guidelines. The changes are modest, but, per FTC Chairwoman Edith Ramirez, reflect a reaffirmation of the Agencies' "commitment to an economically grounded approach to antitrust analysis of IP licensing," and a recognition that IP licensing is generally procompetitive.¹ Acting Assistant Attorney General Renata Hesse, in charge of the DOJ's Antitrust Division, noted that the guidelines will continue to apply an "effects-based analysis" focusing on "evaluating harm to competition, not on harm to any individual competitor" and will continue to support "procompetitive intellectual property licensing that can promote innovation."²

The revised guidelines continue to apply an effects-based analysis as to *all* IP areas and do not adjust that practice for any specific IP licensing activity. Indeed, the Agencies emphasize in the guidelines that for the purpose of antitrust analysis, they apply the same analysis to conduct involving intellectual property as to conduct involving other forms of property. The guidelines note that the Agencies do not presume that intellectual property creates market power in the antitrust context, and that the antitrust laws generally do not impose liability on a firm for a unilateral refusal to assist its competitors. The guidelines also note that there is no liability for excessive pricing without anticompetitive conduct; even if an intellectual property right confers market power, that market power alone does not violate the antitrust laws. Moreover, the guidelines make clear that while some licensing activities among horizontal competitors may be so plainly anticompetitive as to be challenged under the *per se* rule, the rule of reason governs purely vertical IP licensing restraints, including minimum resale price maintenance — a change to the prior guidelines in light of the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS*, 551 U.S. 877 (2007).

The Agencies also address the global nature of IP licensing and acknowledge that if a sufficient nexus to the United States exists, and considerations of international comity and foreign government involvement do not preclude investigation or enforcement, the guidelines will apply equally to *all* licensing arrangements.

Updated Antitrust Guidelines for International Enforcement and Cooperation

The updates to the Antitrust Guidelines for International Enforcement and Cooperation attempt to give businesses transacting overseas a roadmap of the Agencies' current practices and an analytical framework for determining whether to initiate and how to conduct investigations with an international dimension. Acting Assistant Attorney General Renata Hesse explained the impetus for the revised international guidelines: "Anticompetitive conduct that crosses borders can adversely affect our commerce with

¹ Press Release, FTC, FTC and DOJ Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property (Jan. 13, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-doj-issue-updated-antitrust-guidelines-licensing-intellectual>.

² *Id.*

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foreign nations. The Department's antitrust enforcement is focused on ending that conduct in order to protect consumers and businesses in the United States.³ The revisions reflect developments in the Agencies' practices and in the law since the guidelines were last updated in 1995, particularly in light of increasing globalization and the tremendous expansion in trade between the United States and other countries in the last two decades.

The revised guidelines provide several important updates to the previous guidelines. Notably, the revised guidelines add a chapter on international cooperation. This chapter explains that the Agencies are committed to cooperating with foreign authorities on both policy and investigative matters. This cooperation may include initiating informal discussions and informing cooperating authorities of the different stages of investigations, engaging in detailed discussions of substantive issues, exchanging information, conducting interviews at which two or more agencies may be present, and coordinating remedy design and implementation. The new chapter also addresses the Agencies' use of investigative tools (such as civil investigative demands and subpoenas) outside of the United States, application of confidentiality safeguards under U.S. law to information received

³ Press Release, FTC, Federal Trade Commission and Department of Justice Announce Updated International Antitrust Guidelines (Jan. 13, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/federal-trade-commission-department-justice-announce-updated>.

both domestically and abroad, the legal basis for cooperation with foreign authorities, types of information exchanged with foreign authorities and waivers of confidentiality, remedies and potential conflicts with remedies contemplated by the Agencies' foreign counterparts, and special considerations in criminal investigations.

This update to the guidelines also provides more clarity as to the application of U.S. antitrust law and agency practice to conduct involving foreign commerce, particularly with respect to the Foreign Trade Antitrust Improvements Act, foreign sovereign immunity, foreign sovereign compulsion, the act of state doctrine and petitioning of sovereigns. The guidelines include revised illustrative examples focused on commonly encountered issues in order to provide more effective guidance to businesses engaged in international activities.

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The updates to the Antitrust Guidelines for the Licensing of Intellectual Property and the Antitrust Guidelines for International Enforcement and Cooperation are likely to be the last formal guidance by the Agencies in the Obama administration. These updates should not prove controversial in the incoming Trump administration, however, as the revisions are more a modernization of the 1995 guidelines to reflect developments in the law and advances in the way business is conducted, rather than a major overhaul of the guidelines.

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