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DOJ and FTC Seek Views on Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property

Revisions Undertaken Jointly by the Two Agencies

The Department of Justice's Antitrust Division and the Federal Trade Commission seek public comment on a proposed update of the Antitrust Guidelines for the Licensing of Intellectual Property, also known as the IP Licensing Guidelines. The IP Licensing Guidelines, which state the agencies' antitrust enforcement policy with respect to the licensing of intellectual property protected by patent, copyright and trade secret law and of know-how, were issued in 1995 and are now being updated.

In the past 20-plus years, the IP Licensing Guidelines have served their intended purpose of providing guidance to businesses and the public regarding potential antitrust issues that may arise in the context of intellectual property licenses. In their 2007 joint report entitled *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (the "Antitrust IP Report"), the agencies reaffirmed the integral role of the IP Licensing Guidelines in their analysis of antitrust and intellectual property issues. With the IP Licensing Guidelines as an analytical tool, the agencies have accumulated additional antitrust enforcement experience and policy expertise in this area. The proposed update announced today reflects this knowledge. It is intended to modernize the IP Licensing Guidelines without changing the agencies' enforcement approach with respect to intellectual property licensing or expanding the IP Licensing Guidelines to address other topics and areas that are addressed, for example, in the 2007 Antitrust IP Report.

"The IP Licensing Guidelines have been invaluable to the department's investigative and enforcement efforts since they were issued in 1995," said Acting Assistant Attorney General Renata Hesse, in charge of the Department of Justice's Antitrust Division. "They have also guided business planning, and they have been cited by courts, in numerous government briefs, business review letters and policy documents. Although the guidelines are sound, it is time to modernize them to reflect changes in the law since they were issued."

"Licensing is a cornerstone of a strong system of IP rights because it offers one way that firms can maximize the value of their IP and realize an appropriate return on their investment," said Chairwoman Edith Ramirez of the Federal Trade Commission. "These updated guidelines reaffirm our view that U.S. antitrust law leaves licensing decisions to IP owners, licensees, private negotiations and market forces unless there is evidence that the arrangement likely harms competition."

In the agencies' view, the IP Licensing Guidelines remain soundly grounded, as a matter of antitrust law and economics, in three basic principles:

- The agencies apply the same antitrust analysis to conduct involving intellectual property as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right.
- The agencies do not presume that intellectual property creates market power.
- The agencies recognize that intellectual property licensing allows firms to combine complementary factors of

production and is generally procompetitive.

Nevertheless, the agencies have determined that some revisions are in order because the IP Licensing Guidelines should accurately reflect intervening changes in statutory and case law. For example, Congress recently enacted the Defend Trade Secrets Act of 2016, creating for the first time a federal cause of action for misappropriation of trade secrets. Also, the change from a 17-year patent term (from the date of grant) to a 20-year patent term (from the date of filing) effectuated by the Uruguay Round Agreements Act of 1994 was on the verge of taking effect when the IP Licensing Guidelines were issued in 1995. Similarly, copyright terms are longer now than when the IP Licensing Guidelines were issued. The proposed updated IP Licensing Guidelines account for these statutory developments.

Case law developments include the Supreme Court's decision in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, in which the Court subscribed to the agencies' view in the IP Licensing Guidelines that a patent does not necessarily confer market power on the patentee. Another important development is the Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, which held that resale price maintenance (RPM) agreements should be evaluated under the rule of reason, overturning a nearly century-old view of per se illegality. Although *Leegin* arose in the context of resale price restrictions on goods sold by retailers, the agencies find that its analysis applies equally to pricing restrictions in intellectual property licensing agreements. The IP Licensing Guidelines therefore have been amended to reflect rule-of-reason treatment of vertical price agreements.

The agencies are also updating the IP Licensing Guidelines' discussion of general principles to reflect the research in the FTC's 2011 [Evolving IP Marketplace report](#). The agencies also added language to reinforce their longstanding view that "the antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation."

In addition, the agencies are updating the analysis of markets affected by licensing arrangements to mirror the approach taken in the 2010 Horizontal Merger Guidelines. The IP Licensing Guidelines' approach to innovation markets has been revised to reflect the agencies' actual experience with this mode of analysis. The proposed update retains the concept of "innovation markets," but refers to them as "Research and Development Markets" to more accurately reflect how these markets have been defined in enforcement actions.

The agencies are interested in receiving comments on the proposed update from interested parties, including attorneys, economists, academics, consumer groups and the business community. Interested parties may submit public comments to [ATR-LPS-IP Guidelines until Monday, Sept. 26](#). Submitted comments will be made publicly available on the agencies' websites.

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Antitrust Division

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