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# *Facelift for Two Millennial Antitrust Enforcement Policies: DOJ and FTC Update Guidelines for IP Licensing and International Enforcement*

**Hartmut Schneider, James W. Lowe, Leon B. Greenfield, and Mi Hyun (Angela) Yoon**

*Hartmut Schneider, a partner at WilmerHale in Washington, DC, has extensive experience in securing merger clearance for transactions in a diverse range of industries. He also regularly counsels clients on legal issues at the intersection of antitrust and intellectual property law, as well as on the compliance of joint ventures, other horizontal cooperation agreements, and vertical distribution agreements with antitrust laws.*

*James W. Lowe, a partner at WilmerHale in Washington, DC, has extensive experience handling merger and civil and criminal non-merger investigations at the Department of Justice, the Federal Trade Commission and other state and federal agencies. He also serves as a business counselor on antitrust issues. He joined WilmerHale in 1994 after four years at the Antitrust Division of the US Department of Justice.*

*Leon B. Greenfield, a partner at WilmerHale in Washington, DC, has a wide breadth of experience representing clients in complex antitrust-related matters. He has represented clients in cutting edge Section 2 litigation and agency matters, and he has secured antitrust clearance for major acquisitions, litigated cases in federal and state court and counseled clients on many types of antitrust issues.*

*Mi Hyun (Angela) Yoon, a Senior Associate at WilmerHale in Boston, MA, has a practice that focuses on antitrust law, including merger clearance, civil litigation, and criminal cartel investigations. She has represented clients in cross-border investigations with the Department of Justice, the Federal Trade Commission and foreign authorities, as well as litigation involving claims related to standard-setting participation and FRAND licensing commitments.*

More than 21 years ago, the US antitrust agencies issued guidance to the business community on two critical topics of antitrust enforcement: (1) the

licensing of intellectual property rights,<sup>1</sup> and (2) international enforcement and agency cooperation.<sup>2</sup> Published only one day apart, the twin guidelines have proven influential. Many major competition jurisdictions have followed the US example and issued guidance on one or both topics. Several of these non-US guidelines have since been updated, with significant revisions especially on intellectual property matters during the past two years. Earlier this month, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued the very first update to their IP Licensing Guidelines since April 1995.<sup>3</sup> The agencies also published updated International Antitrust Guidelines.<sup>4</sup>

## **What Is New in the Two Revised Guidelines?**

For the IP Licensing Guidelines, the short answer is—not very much. The guidelines still explain the agencies’ analytical framework and enforcement policy regarding licensing of IP in largely the same terms as in 1995, with moderate adjustments for developments in law and enforcement policy. The guidelines do not address some of the more controversial emerging IP and antitrust issues, such as those involving standard-essential patents (SEPs), patent assertion entities (PAEs), and “reverse payment” settlements. This can be seen as a missed opportunity,<sup>5</sup> but may reflect the agencies’ inability to reach a consensus regarding these issues.

The International Antitrust Guidelines underwent more significant changes, especially in the section addressing the application of US antitrust law to conduct involving foreign commerce under the Foreign Trade Antitrust Improvement Act (FTAIA).<sup>6</sup> The revised guidelines incorporate developments in case law since 1995 and, overall, reflect the agencies’ aggressive enforcement approach even to conduct

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that arguably has limited anticompetitive effects on US markets. The revised guidelines add a new chapter on international cooperation and revised illustrative examples that aim to capture “the types of issues most commonly encountered.”<sup>7</sup>

## Main Changes: IP Licensing Guidelines

The new IP Licensing Guidelines reaffirm the agencies’ general approach to analyzing IP licensing arrangements under antitrust law and revise the 1995 guidelines to reflect intervening changes in enforcement policy and law. They do not, however, expressly address recent controversial IP and antitrust issues. Specifically:

- The new guidelines reaffirm three “golden rules” for applying antitrust law to conduct involving IP rights: (1) IP conduct is analyzed like every other conduct involving property rights—there is no special antitrust law for IP; (2) IP rights are not, as such, presumed to convey market power; and (3) licensing generally is procompetitive and subject to the rule of reason (§ 2.0).
- The new guidelines incorporate Supreme Court rulings acknowledging the longstanding agency view that a patent does not necessarily confer market power on the patentee;<sup>8</sup> clarifying that a unilateral refusal to assist competitors generally does not result in antitrust liability;<sup>9</sup> and holding that resale price maintenance agreements are not *per se* illegal and are evaluated under the rule of reason.<sup>10</sup>
- The new guidelines reflect intervening enforcement and policy work, including the agencies’ approach to (1) market definition as set forth in the 2010 Horizontal Merger Guidelines and (2) enforcement in—primarily pharmaceutical—“innovation markets” (now called “research and development markets,” although this seems mainly a change in nomenclature, not substance) (§ 3.2.3). Other changes include: clarification that the agencies will analyze a license as having a horizontal component if the licensor and licensee are actual or potential competitors in a relevant market in the absence of the license, despite any existing vertical relationship the parties may have (§ 3.3).
- The new guidelines, in contrast to updates issued in other jurisdictions, do not incorporate explicit guidance regarding controversial recent developments at the IP and antitrust interface, including (1) licensing and enforcement

of SEPs subject to fair, reasonable, and non-discriminatory (FRAND) licensing commitments; (2) “reverse payment” patent settlements in the pharmaceutical industry after the Supreme Court’s decision in *FTC v. Actavis, Inc.*, 133 S. Ct. 2233 (2013); or (3) licensing conduct of PAEs. Instead, the accompanying press release directs the business community to the “wide body of DOJ and FTC guidance available to the public—in the form of published agency reports, statements, speeches and enforcement decisions—which... further illuminate each agency’s analysis of a variety of conduct involving intellectual property, including standards-setting activities and the assertion of standards-essential patents.”<sup>11</sup> The reference to “each agency’s analysis” is noteworthy because DOJ and FTC operate under different statutes and have not always pursued identical paths in this area, especially in matters involving FRAND-encumbered SEPs.

FTC Commissioner Maureen Ohlhausen issued a statement emphasizing her view that the new guidelines reflect “key principles to which the Agencies commit to adhere,” such as that:

- The guidelines observe that the “antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors” (§ 2.1);
- There is no liability for excessive pricing without anticompetitive conduct—indeed, “[i]f an intellectual property right does confer market power, that market power does not by itself offend the antitrust laws” (§ 2.2); and
- The rule of reason governs vertical IP-licensing restraints, including minimum resale price maintenance (§§ 5.2, *passim*).<sup>12</sup>

None of these principles are particularly novel, but the fact that the sole sitting Republican Commissioner and potential future FTC Chair chose to emphasize them may signal that she may take a relatively non-interventionist approach to certain aspects of antitrust enforcement for issues involving IP.

## Main Changes: International Antitrust Guidelines

The DOJ and the FTC also issued their update of the 1995 Antitrust Enforcement Guidelines for International Operations after publishing proposed

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revisions in November 2016 and considering public comments. According to the agencies, the updated International Antitrust Guidelines “reflect the growing importance of antitrust enforcement in a globalized economy and the agencies’ commitment to cooperating with foreign authorities on both policy and investigative matters.”<sup>13</sup> They also “describe the current practices and methods of analysis the agencies employ when determining whether to initiate and how to conduct investigations of, or enforcement actions against, conduct with an international dimension.”<sup>14</sup>

As the agencies note, the revised International Antitrust Guidelines reflect the following key changes to the 1995 guidelines:

- The discussion of the application of US antitrust law to conduct involving foreign commerce is substantially revised, largely to reflect intervening case law and agency practice on the scope of the Foreign Trade Antitrust Improvements Act. The updates reaffirm the agencies’ broad view of the reach of US antitrust law. The new guidelines also update the discussion of foreign sovereign immunity, foreign sovereign compulsion, the act of state

doctrine, and petitioning of sovereigns, in light of developments since 1995.

- A new chapter on international cooperation addresses the agencies’ investigative tools, confidentiality safeguards, legal basis for cooperation, types of information exchanged and waivers of confidentiality, remedies, and special considerations in criminal investigations.
- The new guidelines provide revised illustrative examples for the application of US antitrust law to conduct involving foreign commerce.<sup>15</sup> Here, the guidelines take an expansive approach to the reach of the US antitrust laws—even to conduct that may bring only limited, if any, actual anti-competitive effects to US markets and primarily affects non-US markets.

The new International Guidelines also describe the investigation and prosecution of international criminal cartels as one of the DOJ’s top priorities. They note the importance of Mutual Legal Assistance Treaties (MLATs) for international cooperation in criminal antitrust enforcement, including for obtaining evidence located outside the United States and information exchange and coordination among the agencies to increase efficiency and lessen the burden on parties.

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1. US Dep’t of Justice & Federal Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property (Apr. 6, 1995).
  2. US Dep’t of Justice & Federal Trade Comm’n, Antitrust Enforcement Guidelines for International Operations (Apr. 1995).
  3. US Dep’t of Justice & Federal Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property (Jan. 12, 2017).
  4. US Dep’t of Justice & Federal Trade Comm’n, Antitrust Enforcement Guidelines for International Enforcement and Cooperation (Jan. 13, 2017).
  5. See Letter from Joseph Farrell, Richard Gilbert, and Carl Shapiro, to Fed. Trade Comm’n and Antitrust Division, Dep’t of Justice (Sept. 7, 2016) (“We are concerned that issuing such a minor update to the IP Guidelines will delay or forestall the issuance of a much-needed major update, and that it might be misinterpreted as a departure from guidance that the Agencies have previously offered.”).
  6. 15 U.S.C. § 6a.

7. US Dep’t of Justice & Federal Trade Comm’n, “Justice Department and Federal Trade Commission Announce Updated International Antitrust Guidelines” (Jan. 13, 2017).
8. *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).
9. *Verizon Commc’ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).
10. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).
11. *Supra* n.7.
12. Statement of Commissioner Maureen K. Ohlhausen, US Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property (Jan. 13, 2017).
13. US Dep’t of Justice & Federal Trade Comm’n, “Justice Department and Federal Trade Commission Announce Updated International Antitrust Guidelines” (Jan. 13, 2017).
14. *Id.*
15. *Id.*

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