



September 26, 2016

To: Federal Trade Commission  
Antitrust Division, Department of Justice  
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From: Innovation Alliance

Subject: Proposed Update of the 1995 Joint DOJ/FTC “Antitrust Guidelines for the Licensing of Intellectual Property”

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The Innovation Alliance appreciates the opportunity to present its views on the proposed update of 1995 DOJ/FTC IP Licensing Guidelines, which was issued in draft form on August 12, 2016.

### **About the Innovation Alliance**

The Innovation Alliance (IA) represents innovators, patent owners and stakeholders from a diverse range of industries that believe in the critical importance of maintaining a strong patent system that supports innovative enterprises of all sizes. Innovation Alliance members can be found in large and small communities across the country, helping to fuel the innovation pipeline and drive the 21st century economy.

### **General Observations**

First, the IA would like to commend the U.S. Department of Justice, Antitrust Division and U.S. Federal Trade Commission (hereinafter “the Agencies”) for publishing the proposed draft update and seeking public comment before issuing the updated guidelines in final form. We appreciate the open and transparent manner in which the Agencies are soliciting the views of stakeholders on the important issue of intellectual property licensing.

Second, we also commend the Agencies for the considered decision to omit from the draft guidelines any language pertaining to the licensing of standard-essential patents (SEPs) or attempts to define the necessarily flexible

and situation-specific concept of “fair reasonable and non-discriminatory” (FRAND) licensing. In recent years, the Agencies have opined extensively on these topics in numerous speeches and other public statements, and will likely continue to comment in response to new developments. In addition, the law in this area continues to evolve and it would be imprudent for the Agencies to articulate a rigid or one-size-fits-all statement of their current enforcement policy.

We disagree with those commentators that have, in our view, improperly characterized the conscious omission of language on SEPs and FRAND from the draft guidelines as a ‘missed opportunity.’ We also disagree with the claim that the issuance in final form of the draft guidelines, which reflect relatively modest changes, would constrain the Agencies from issuing additional guidance in the future.

Third, we commend the Agencies for not including specific guidance on the politically charged topic of Non-Practicing Entities (NPEs) or Patent Assertion Entities (PAEs). The political debate and ensuing rhetoric about these types of patent owners often lacks empirical foundations and has not been based on objectively factual and verifiable information. As with any legal regime, we acknowledge that patents can be and are sometimes abused; but we remain concerned that the rhetoric and proposed remedies against abuse of patent rights are too broad, overly prescriptive, and do not adequately distinguish between abusive actors and legitimate licensors and licensing activity. We, therefore, appreciate the Agencies’ sensitivity and restraint.

## **Specific Comments**

### Section 2

We agree with and commend the Agencies for retaining the important guiding principles in section 2 of the draft guidelines. We refer specifically to the following language:

“(a) for the purpose of antitrust analysis, the Agencies apply the same 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 ; (b) the Agencies do not presume that intellectual property creates market power in the antitrust context; and (c) the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive.”<sup>1</sup>

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<sup>1</sup> Proposed Update, Antitrust Guidelines for the Licensing of Intellectual Property, issued by DOJ and the FTC on Aug. 12, 2016, p. 4. Available at [https://www.ftc.gov/system/files/documents/reports/antitrust-guidelines-licensing-intellectual-property-proposed-update-1995-guidelines-issued-us/ip\\_guidelines\\_published\\_proposed\\_update.pdf](https://www.ftc.gov/system/files/documents/reports/antitrust-guidelines-licensing-intellectual-property-proposed-update-1995-guidelines-issued-us/ip_guidelines_published_proposed_update.pdf).

It is important to reiterate the importance of these core principles, and the Agencies' continued adherence to them, as reflected in other sections of the proposed update.

## Section 2.1

We agree with and commend the Agencies for recognition of two additional principles, namely (1) the fundamental right of IPR holders to exclude others, and (2) the international nature of IPR licensing in today's global economy.

With respect to the right to exclude, we are gratified in particular that the Agencies reiterate the following:

"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."<sup>2</sup>

With respect to the international nature of licensing, we appreciate the Agencies' acknowledgement of and sensitivity to consideration of jurisdictional limitations and comity.<sup>3</sup>

## **Conclusion**

Again, the Innovation Alliance appreciates this opportunity to share its views and commends the Agencies for producing a proposed update to the 1995 Guidelines that is both modest and rational in design. We would be pleased to respond to any questions or further clarify the above views.

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<sup>2</sup> Id., p. 5.

<sup>3</sup> Id., p. 6.