



September 26, 2016

United States Federal Trade Commission (USFTC)
Office of Policy Planning
600 Pennsylvania Avenue, NW
Washington, DC 20580

United States Department of Justice (USDOJ)
Legal Policy Section, Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Via Email – ATR.LPS.IPGuidelines@usdoj.gov

RE: *Intel Comments on DOJ/FTC Proposed Update of the Antitrust Guidelines for IP Licensing*

Dear Agency Representatives,

Intel Corporation is grateful for the opportunity to comment on the proposed update to the Antitrust Guidelines for the Licensing of Intellectual Property (“IP Guidelines” or “Guidelines”) issued by the U.S. Department of Justice and the Federal Trade Commission (“the Agencies”). Intel commends the agencies for retaining the key principles of the 1995 IP Guidelines, which have withstood the test of time, while updating parts of the guidelines to reflect developments in the case law. For this reason, Intel’s comments will be brief.

Intel is particularly pleased that the Agencies maintained the unifying principle of the 1995 Guidelines that the key competitive issue raised by licensing arrangements is whether they include provisions that “are likely to harm competition among entities that would have been actual or likely potential competitors in the absence of the arrangement.” This is an important affirmation of antitrust’s role in preserving existing or potential competition but not in creating competition that otherwise would not have existed. The affirmation of this principle is especially important in providing guidance to foreign competition agencies that are developing their own intellectual property guidelines and may seek to expand the role of competition enforcement in the intellectual property area beyond the preservation of competition.

Intel also commends the agencies for affirming in section 2.1 that “[t]he 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.” However, because a number of foreign antitrust agencies will likely find the Agencies’ IP Guidelines instructive in developing their own policies, it would be valuable for the Agencies to spell out any exception to this principle more specifically. The new qualifier that the principle applies “generally” unfortunately allows for possible interpretations that are broader than what the Agencies intend by their use of this qualifier. We suggest the following revision to the proposed language in Section 2.1:

Except in very narrow circumstances, [T]he antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so is likely to undermine incentives for investment and innovation and require antitrust agencies and courts to dictate terms of dealing. For these reasons, antitrust liability for mere unilateral, unconditional refusals to license will not play a meaningful part in the Agencies' enforcement program. An obligation to deal may exist only where an intellectual property owner created reasonable reliance interests in its promise to license competitors, but failed to fulfill its promise.

This approach and suggested language would be consistent with the U.S. Supreme Court's position that it "has been *very cautious* in recognizing ... exceptions [to the right not to deal with rivals], because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."¹ The additional clarifying language included above also would ensure that foreign antitrust agencies that erroneously believe the essential facilities doctrine is well established in the United States do not misunderstand Section 2.1 of the IP Guidelines.

For similar reasons, the Agencies also should reconsider the addition of the word "ordinarily" to the sentence in section 3.1 of the 1995 Guidelines, which currently states that "[t]he Agencies will not require the owner of intellectual property to create competition in its own technology." Although limited exceptions to the general principle may exist, and the proposed footnote 25 to that sentence suggests that the exceptions arise in the remedial context, it would be preferable to specifically identify the exceptions to the principle instead of using the word "ordinarily," which lends itself to broader interpretations than the Agencies likely intend. For example, the sentence could be revised to read as follows: "The Agencies will not ~~ordinarily~~ require the owner of intellectual property to create competition in its own technology except where necessary as a remedy in the case of a merger or acquisition so as to prevent the substantial lessening of competition." Forced sharing alone does not necessarily make a market more competitive, but it would require that the Agencies act as central planners.

Revised Section 2.2 states that "even if [an intellectual property owner] lawfully acquired or maintained [market] power, the owner could still harm competition through unreasonable conduct in connection with such property." Intel urges the Agencies to delete the phrase "unreasonable conduct" and make it clear that conduct will not be found unlawful absent a finding of anticompetitive effects that outweigh procompetitive benefits. We understand that the phrase "unreasonable conduct" was included in the 1995 IP Guidelines, but it is ambiguous. For that reason, it may unintentionally suggest to foreign agencies that are in the nascent stages of developing antitrust policies in the intellectual property area that it applies to conduct that is not anticompetitive under U.S. law but deemed "unreasonable" for some other reason. This concern is particularly acute with nascent competition regimes that may draft rules which include catch-all phrases such as "unreasonable conduct" or "unjustified conduct" instead of engaging in effects-based analysis.

¹ *Verizon Comm's, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-408 (2004) (emphasis added).

Lastly, we note that the proposed update to the IP Guidelines does not contain any discussion of the specific issues that arise in the context of standard-essential patents that are subject to commitments to license on RAND or FRAND terms. The omission makes sense in light of the extensive guidance that the Agencies already have issued on this subject, a point they may want to reference briefly. Intel respectfully requests that, in the event that the Agencies are inclined to address this topic broadly in the revised Guidelines, interested parties be given an opportunity to submit comments.

Sincerely,

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Greg S. Slater
VP and Associate General Counsel
Intel Corporation