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# DOJ and FTC Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property

By J. Alexander Hershey / Jan 31, 2017

On January 12, 2017, the United States Department of Justice and Federal Trade Commission issued updated Antitrust Guidelines for the Licensing of Intellectual Property. The updates refine the federal government's original Guidelines issued on April 6, 1995. The adjustments seek to account for statutory amendments and case law developed over the last 20 years as well as public comment received following the release of a draft revision in August of 2016.

On the whole, the updated Guidelines continue to emphasize the importance of assessing the actual economic impacts of conduct to determine whether it is reasonable and permissible under the antitrust laws. While certain conduct remains automatically per se unlawful, various concerted or unilateral actions will be assessed for their pro- or anti-competitive effects on markets. Under the traditional rule of reason analysis, only those arrangements that are likely to reduce output or increase prices in the relevant market are likely to be found unlawful.

The Guidelines now note that the "characteristics" of the particular intellectual property, as opposed to other types of property, will be considered in this assessment. Moreover, the reasonableness of an arrangement will be largely dependent on the availability of "actual or potential close substitutes" offered by remaining competitors, and the updates specifically note case law establishing "that a patent does not necessarily confer market power upon the patentee[.]" While the antitrust laws typically do not require a firm to engage in business against its will, however, the Guidelines now expressly note that the law may "impose licensing requirements to remedy anticompetitive harm or, in the case of a merger, to prevent the substantial lessening of competition."

Finally, separate from markets for particular goods or transferrable technologies, the Guidelines now address "research and development markets" for "assets comprising research and development related to the identification of a commercializable product[.]" In doing so, the Guidelines signal concern for anticompetitive conduct that may constrain the innovations that could lead to new marketable products and services. Thus, conduct undertaken in the course of product development may raise antitrust concerns separate from those related to the marketing and sale of goods and services themselves.

Generally, the new 2017 Licensing Guidelines reaffirm the flexible assessment of economic conditions that now pervades antitrust analysis both by the federal agencies and by private parties. The Guidelines continue to encourage joint innovation and cooperation that facilitates competition while also continuing to prohibit collusive conduct that is likely to restrain trade and harm competition.

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