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DOJ and FTC Issue Updates to Antitrust Guidelines for the Licensing of Intellectual Property for the First Time Since 1995

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For the first time, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have updated the Antitrust Guidelines for the Licensing of Intellectual Property ("IP Licensing Guidelines"). First issued in 1995, the IP Licensing Guidelines describe the FTC's and DOJ's enforcement policies regarding intellectual property licensing. The updated IP Licensing Guidelines maintain three of the agencies' core principles:

(1) conduct involving intellectual property will be analyzed the same as conduct involving any other kind of property;

(2) intellectual property does not give rise to a presumption of market power; and

(3) intellectual property licensing is generally procompetitive.

The update aims to bring the IP Licensing Guidelines in line with developments in statutory and case law. The update also seeks to modernize them so that the IP Licensing Guidelines will provide more certainty and predictability to parties engaged in licensing intellectual property. Despite the intended guidance, it will always be important for parties licensing intellectual property to work closely with their counsel in negotiating and entering into license agreements.

Updated IP Licensing Guidelines

The agencies continue to view intellectual property licensing as procompetitive, but will examine the actual or likely effects of a given licensing arrangement rather than its formal terms. Typically the competitive effects of licensing agreement will be analyzed within the market for the goods or services connected to the license. However, the agencies may, where appropriate, also evaluate effects in technology markets or research and development markets.

- A technology market generally includes the licensed technology and the technologies or goods that are close substitutes. The agencies may examine a technology market if the relevant intellectual property rights are marketed separately from the goods in which they are used.

- A research and development market (formerly referred to as an innovation market) generally consists of assets used in research and development related to identifying new products or creating new or improved goods. By including research and development related to the mere identification of a product, the updated IP Licensing Guidelines appear to broaden the concept of research and development markets beyond the original version of the guidelines. Whether this apparent change in terms leads to changes in practice remains to be seen.

In addition, the recently enacted federal Defend Trade Secrets Act, which could lead to more uniform standards of trade-secret protection, may impact the agencies' analysis of markets and market power with respect to licenses covering trade secrets.

Consistent with the agencies' determination to analyze intellectual property licenses no differently than other forms of property, the IP Licenses Guidelines explain that intellectual property licenses will generally be evaluated under the sliding-scale rule of reason approach. Moreover, the agencies will apply a rule of reason analysis to price maintenance in intellectual property licenses. The updated IP Licensing Guidelines do not, however, substantively alter the agencies' views or analyses with respect to exclusive dealing, cross-licensing or pooling, grantbacks, or the acquisition of intellectual property rights.

Further, the updated IP Licensing Guidelines maintain the agencies' views on horizontal and vertical relationships. This distinction has meaningful consequences from an antitrust perspective, as restraints connected to a horizontal relationship (i.e., between direct competitors) are usually given more scrutiny than restraints in vertical relationship (e.g., between a manufacturer and a distributor). Although intellectual property licenses ordinarily create vertical relationships between the licensees and licensors, the agencies recognize that horizontal relationships may also exist. This may occur where a manufacturer of a product licenses a patented process to a competing manufacturer of the same product—the license creates a vertical relationship between the manufacturers as licensee and licensor, but also has a horizontal aspect as between the parties as competitors. The existence of a horizontal relationship does not automatically lead to a finding of anticompetitive effects, but will garner more attention from the agencies.

As in the original guidelines, and absent extraordinary circumstances, the agencies continue to recognize antitrust "safety zones" in order to provide some degree of certainty and encourage innovation and competition. The "safety zones" vary depending on the type of market at issue (that is, goods, technology or research and development), but generally apply where a restraint in a license is not facially anticompetitive and market conditions prevent the parties from raising prices or controlling output in the relevant market. Importantly, the agencies emphasize that an intellectual property licensing arrangement is not anticompetitive simply because it does not fall within a recognized "safety zone."

Conclusion

Having been issued in the Obama Administration's final days, it is uncertain whether the updated IP Licensing Guidelines accurately reflect the Trump Administration's views on antitrust enforcement or its economic priorities. Still, the updated IP Licensing Guidelines should continue to provide useful guidance to parties engaged in intellectual property licensing. We will continue to monitor the agencies' application of the updated guidelines and provide our analysis of any important developments.

If you have any questions about the IP Licensing Guidelines or antitrust law, please reach out to a Miller Canfield attorney.

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