AIPLA
American Intellectual Property Law Association
美国知识产权法协会

July 28, 2023
2023 年 07 月 28 日

State Administration for Market Regulation
First Department of Anti-monopoly Execution
No. 8 Sanlihe East Road, Xicheng District,
Beijing, People's Republic of China
100820
中华人民共和国北京市西城区三里河东路 8 号
国家市场监督管理总局
反垄断执法一司
100820

Via Email: *fldys@samr.gov.cn*
通过电子邮件: *fldys@samr.gov.cn*

Re: Comments regarding "Draft Anti-monopoly Guidelines in the Field of Standard Essential Patents" (June 30, 2023)
关于《关于标准必要专利领域的反垄断指南（征求意见稿）》（2023 年 06 月 30 日）的意见

Dear Sir or Madam,
尊敬的先生或女士：

The American Intellectual Property Law Association ("AIPLA") appreciates the opportunity to comment on the June 30, 2023, China State Administration of Market Regulation (SAMR) draft Antimonopoly Guidelines in the Field of Standard Essential Patents.

美国知识产权法协会（"AIPLA"）很高兴有机会就国家市场监督管理总局（SAMR）于 2023 年 6 月 30 日发布的《关于标准必要专利领域的反垄断指南（征求意见稿）》发表评论。

AIPLA is a national bar association of approximately 7,500 members engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members

represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

AIPLA 是一个全国性律师协会，拥有大约 7500 名成员，参与私人或公司业务、政府服务和学术界。AIPLA 成员代表广泛多样的个人、公司和机构，他们直接或间接参与专利、商标、版权、商业秘密和不正当竞争法以及影响知识产权的其他法律领域的实践。我们的成员同时代表知识产权的所有者和使用者。我们的使命包括帮助建立和维护公平有效的法律和政策，以激励和奖励发明，同时平衡公众对良性竞争、合理成本和基本公平的利益。

The absence of comments on any part does not reflect support or lack of support of this part by AIPLA.

任何部分未发表意见并不代表 AIPLA 支持或不支持该部分。

We appreciate the opportunity to provide these comments on the Draft Anti-monopoly Guidelines in the Field of Standard Essential Patents, and we would be happy to answer any questions that our comments may raise.

我们很高兴有机会就《关于标准必要专利领域的反垄断指南（征求意见稿）》提出这些意见，我们很乐意回答就我们的意见可能提出的任何问题。

Sincerely,
诚挚感谢！

Brian H. Batzli
President
American Intellectual Property Law Association
布赖恩 • H • 巴茨利
主席
美国知识产权法协会

关于标准必要专利领域的反垄断指南（征求意见稿） Draft Guidelines	Proposed Changes 建议的修改	AIPLA comments 美国知识产权法协会建议
5. 参与标准制修订的专利权人或者专利申请人应按照标准制定组织规定，在标准制修订的任何阶段及时充分披露其拥有的专利，并可以披露其知悉的其他专利，同时提供相应证明材料，并对真实性负责…	5. A patentee or patent applicant participating in the formulation and revision of a standard shall, in accordance with the rules of the standard-setting organization, timely and fully disclose the patents that it owns <u>containing claims the participant believes to be essential claims</u> at any stage of the formulation and revision of the standard <u>to the SDO relevant to the standard</u> , and may disclose other patents of which it is aware<u>.</u>~~, and at the same time provide corresponding supporting materials and be responsible for their authenticity~~…. <u>If the SDO normally accepts disclosure after the standard is finalized and published such disclosure is considered timely.</u>	First, the proposed regulations are unclear regarding the scope of disclosure. In disclosing patents as essential, almost all SDO's permit disclosure of patents that may be essential; they do not require a representation or declaration that the patent is in fact essential. The draft fails to address this critical distinction. Second, Section 5 appears to require disclosure of all patents owned by a participant, rather than only those patents participant is disclosing relative to a standard. . This would impose an undue burden and likely result in over-disclosure of irrelevant patents. Over disclosure is also likely if disclosure is required before the standard or claims are finalized. AIPLA proposes that Section 5 be amended to reflect that only patents with claims believed to be essential need be disclosed and that doing so after the standard has been finalized may be considered timely if

		the SDO's policy permits disclosure after finalization. . Also, it is unclear what supporting materials required by Section 5 might include. AIPLA would not support a requirement for claim charts or other costly measures to enable statements of essentiality.
6 … 对于已经基于公平、合理和无歧视原则作出许可承诺的专利，标准必要专利权人转让或者转移该专利时，应当事先告知受让人该专利实施许可承诺的内容，并保证受让人同意受该专利实施许可承诺的约束，即标准必要专利许可承诺对受让人具有同等效力。 …	6. "Where a specific patent ~~has~~ is known to have been covered by license commitment on the basis of the principles of fairness, reasonableness and non-discrimination, or the SDO's patent policy definition of fair, reasonable and non-discriminatory licensing, the standard essential patentee shall, when assigning or transferring the patent, inform the assignee in advance of the content of the patent implementation license commitment and ensure that the assignee ~~agrees to be~~ is legally bound by the patent implementation license commitment, i.e. the standard essential patent license commitment shall have the same effect on the assignee…"	Some standards development organizations, have a "blanket" patent declaration system, under which patents are not specifically identified when declared. In such cases, the patent holder may not know what patents are covered by a FRAND commitment. AIPLA offers language to correct that. Principles of FRAND may be different from the language used in the SDO's patent policy, and where it is, should use the patent policy definitions. For example, the regulations could require that the assignor require that the assignee accept the patent subject to all standards-essential obligations.

7. … 在具体个案中，须对谈判的过程和内容进行全面评估，非善意的标准必要专利许可谈判将提高相关市场中排除、限制竞争的风险。标准必要专利权人和标准实施方均需对其上述过程中不存在过错进行证明，提供相应证明材料，并对所提供证明材料的真实性负责。	7 (second unnumbered paragraph) In specific case, the process and content of the negotiation must be thoroughly evaluated, and non-good faith negotiation on the licensing of standard essential patent will increase the risk of exclusion and restriction of competition in the relevant market. Both the SEP owner and the standard implementer <u>may</u> prove that they are not at fault <u>or that the other party is at fault</u> in the above-mentioned process, provide the corresponding supporting documents and take responsibility for the authenticity of the supporting documents provided."	Paragraph 2 of Article 7 stipulates that "*Both the SEP owner and the standard implementer are required to prove that they are not at fault in the above process*". However, in practice, due to nature of evidence, "*prove that they are not at fault in the above process* " faces issues, such as difficulty in proving evidence, poor operability, etc. On the contrary, "prove that the other party is at fault" may be more feasible. Therefore, it is suggested that Paragraph 2 of Article 7 be amended to " *Both the SEP owner and the standard implementer <u>may</u> prove that they are not at fault <u>or that the other party is at fault</u> in the above process*".
11.(1) … （一）标准必要专利权人在相关市场的市场份额，以及相关市场的竞争状况。通常情况下，标准必要专利权人在其持有的标准必要专利许可市场中，占有100%的市	11.(1) The market share of the standard essential patentee and the competition situation in the relevant market. ~~Generally, the standard essential patentee has a 100% market share in the market for licensing standard essential patents held by it,~~	As written, the first paragraph of Article 12 ignores the possibility of opportunistic conduct by the users of standards essential patents. This proposed edits solves this problem, and also brings it in line with subsection (1) of article 12 which

场份额，不存在市场竞争； …	~~and there is no competition;~~	acknowledges that the behavior of both parties is relevant. Factor 2 does not account for either (a) the many failures that may have been tested before a solution was found that was the subject of the essential patent claim, nor (b) that the value to the consumer is measured in what the consumer will pay for the feature enabled by the patented invention being used by the product or service. Factor (3) is confusing since there may not be any historical royalty rate for the specific invention being licensed. Moreover, rates depend on other terms and conditions in the negotiated patent license. Comparing rates requires a comparison of all of the terms of the license agreements and the interests and business models of the parties to such agreements. AIPLA objects to Factor (6) because it does not reflect how licensing is conducted.
Article 12 … 但是，标准必要专利权人可能滥	"However, the standard essential patentee may abuse its dominant position	As written, the first paragraph of Article 12 ignores the possibility of opportunistic conduct

用其市场支配地位，以不公平的高价许可标准必要专利或者销售包含标准必要专利的产品，排除、限制竞争，具体分析时可以考虑以下因素： … （二）许可费是否明显高于研发成本； （三）许可费是否明显高于可以比照的历史许可费或者许可费标准； … （六）标准必要专利权人是否根据标准必要专利数量和质量发生的变化合理调整许可费用；	in the market and license the standard essential patent or sell products implementing the standard essential patent at an unfairly high price to exclude or restrict competition, At the same time, the technology user may engage in abusive tactics to avoid paying FRAND rates. ~~and the~~ Therefore, the following factors may be taken into account in the specific analysis: (Factors of concern to AIPLA) (2) Whether the royalty rate is significantly higher than ~~comparable historical royalty rate or royalty rate levels~~ a reasonable return on the patentee's R&D investment and the value the patented feature provides to the user ; (3) ~~Whether the royalty rate is significantly higher than comparable historical royalty rate or royalty rate levels;~~ … ~~(6) Whether the standard essential patentee has~~	by the users of standards essential patents. This proposed edits solves this problem, and also brings it in line with subsection (1) of article 12 which acknowledges that the behavior of both parties is relevant. Factor 2 does not account for either (a) the many failures that may have been tested before a solution was found that was the subject of the essential patent claim, nor (b) that the value to the consumer is measured in what the consumer will pay for the feature enabled by the patented invention being used by the product or service. Factor (3) is confusing since there may not be any historical royalty rate for the specific invention being licensed. Moreover, rates depend on other terms and conditions in the negotiated patent license. Comparing rates requires a comparison of all of the terms of the license agreements and the interests and business models of the parties to such agreements.

	~~reasonably adjusted the royalty rate in accordance with the changes in the quantity and quality of the standard essential patents;~~	AIPLA objects to Factor (6) because it does not reflect how licensing is conducted.
Article 13: The article provides a list of seven factors to be considered.	Suggest adding another factor, as sub-section 8 as follows: "(8) Once a specific unit of product is licensed, the patentee's right is "exhausted" with respect to that unit of product, and the patentee may not demand additional royalties for the same unit of product, either upstream or downstream suppliers or purchasers. "	Under the patent exhaustion doctrine, once a specific unit of product is licensed, the patentee's right is "exhausted" with respect to that unit of product, and the patentee may not demand additional royalties for the same unit of product, either upstream or downstream suppliers or purchasers.