

January 19, 2013

Standardization Administration of the People's Republic of China (SAC)  
No. 9 Madian East Road  
Haidian District  
Beijing, 100088  
P. R. China

**Re: AIPLA Response for Request for Comments Solicited on Regulatory Measures on National Standards Involving Patents (Interim) (Draft for Public Comments)**

Dear Mr. Zhang:

The American Intellectual Property Law Association ("AIPLA") welcomes this opportunity to submit comments on the *Regulatory Measures on National Standards Involving Patents (Interim) (Draft for Public Comments)* ("2012 Draft Measures"), published by the Standardization Administration of China ("SAC") on December 19, 2012. AIPLA is pleased to submit these comments for SAC's consideration.

Introduction

AIPLA is a U.S.-based national bar association with approximately 14,000 members who are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, unfair competition, and trade secret law, as well as other fields of law affecting intellectual property. Our members practice or are otherwise involved in patent and other intellectual property law in jurisdictions throughout the world, and do so quite extensively in China. AIPLA, thus, has a strong interest in the 2012 Draft Measures.

AIPLA is pleased to see that SAC has considered the feedback provided in response to the *Draft Provisional Rules Regarding Administration of the Establishment and Revision of National Standards that Involve Patents*, published by SAC in November 2009 ("2009 Draft Rules"), to make the 2012 Draft Measures more aligned with the policies of many international standards setting organizations. This alignment helps in creating a balance between unrestricted implementation of standards and providing incentive for investments in innovation.

AIPLA would like to commend SAC for taking additional steps in drafting the 2012 Draft Measures that seek to protect the interests of the public while simultaneously protecting patent holders' rights. Because China is such a large player in the global economy, the laws, rules, regulations, and guidelines affecting patent holder rights in any Chinese National Standard are of utmost interest to the members of AIPLA. The area of standardization and patents can be complex and presents many challenges in balancing the interests of all stakeholders. The 2012 Draft Measures show that China understands that although standards may be viewed as a public good, private ownership of intellectual property, in this case patents, and the potential return on investment play an important role in providing incentives for companies to invest in research and development to further technological advances. These technological advances can then serve as the basis for efficient, high quality standards. Providing a reasonable and non-discriminatory licensing option without further limitations, and dispensing with compulsory licensing, which was provided for in the 2009 Draft Rules, will promote efficient, high quality Chinese National Standards.

In acknowledging and applauding the progress made in bringing the 2012 Draft Measures more in line with international practices, AIPLA requests that SAC (1) provide clarification of some terms used in the 2012 Draft Measures so that our members better understand the obligations of those who participate in or contribute to the development of Chinese National Standards, (2) provide clarification for the term "legally liable" so that our members understand potential legal implications of participating in or contributing to the development of Chinese National Standards, and (3) furnish copies of the documents referenced in the 2012 Draft Measures so that our members and the general public are aware of all supplementary rules in relation to Chinese National Standards.

#### Our Members' Understanding of Certain Provisions; Further Clarification Requested

AIPLA members have the following understanding of some provisions in the 2012 Draft Measures. It is acknowledged that any difficulty with this understanding may stem from translation ambiguities, for which we apologize. However, our members are very interested in fully understanding the obligations of participating in or contributing to the development of Chinese National Standards.

AIPLA therefore respectfully requests that SAC consider our understanding regarding the following provisions and, if that understanding is not correct, provide clarification of the actual meaning of these provisions.

- "Patent": The word "patent" is used throughout the 2012 Draft Measures. It is our understanding that the 2012 Draft Measures apply solely to Chinese patents and patent applications.
- "Active": The word "active" is used in Article I, Section 3. It is our understanding that "active" patents refer to patents that are currently in force.
- "Patents" in Article III: It appears that the modifications to the 2012 Draft Measures were meant to reflect the ITU-T/ITU-R/ISO/IEC Common Patent Policy. AIPLA

understands that the definition of “patents” in Article III is the same as the definition for patents used in Annex 2 of the IEC/ISO/ITU Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC (23/04/2012), which is:

The word “Patent” means those claims contained in and identified by patents, utility models and other similar statutory rights based on inventions (including applications for any of these) solely to the extent that any such claims are essential to the implementation of the same above document. Essential patents are patents that would be required to implement a specific Recommendation | Deliverable.

- Assignees/Transferees: We believe that the intent of Article III, Section 5 is for patentees and patent applicants to notify assignees or transferees of license declarations such that the provision may be interpreted to mean:

When patentees/patent applicants transfer or assign patents which the patentees/patent applicants have made licensing declarations to the technical committee or the responsible entity, the patentees/patent applicants shall notify the assignees or transferees of any licensing declaration and shall have the assignees or transferees agree to be bound by the above license declaration.

- Mandatory National Standards: AIPLA understands in looking at Article IV, Sections 1 and 2 that the intent is that Section 1, stating “[i]n principle, mandatory national standards shall not involve patents,” is, practically speaking, only applicable in situations in which no license is available. In addition, AIPLA would like to note that it believes that joint negotiation should occur between the licensor and the licensee. To best encourage invention and competition, intellectual property rights (“IPR”) owners and users – i.e., licensees – of IPR-protected technology must remain free to negotiate all the terms of their licenses to strike the right balance for their particular circumstances. Such negotiations are customary in the international standards’ context; see, for example, the Common Patent Policy for ITU-T/ITU-R/ISO/IEC.<sup>1</sup>
- Customary License Terms: AIPLA understands that reasonable and non-discriminatory terms and conditions referenced in the license declaration may include other customary license terms such as reciprocity. By way of example, reciprocity<sup>2</sup> is expressly referenced in the Patent Statement and Licensing Declaration form that can be found in the Common Patent Policy for ITU-T/ITU-R/ISO/IEC. AIPLA notes that it is common practice for the patentee/patent applicant making a licensing commitment to be able to

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“The detailed arrangements arising from patents (licensing, royalties, etc.) are left to the parties concerned, as these arrangements might differ from case to case.” International Telecommunications Union, Common Patent Policy for ITU-T/ITU-R/ISO/IEC, <http://www.itu.int/en/ITU-T/ipr/Pages/policy.aspx> (last visited Jan. 10, 2013).

<sup>2</sup> The Patent Statement and Licensing Declaration form for the Common Patent Policy for ITU-T/ITU-R/ISO/IEC states that reciprocity “means that the Patent Holder shall only be required to license any prospective licensee if such prospective licensee will commit to license its Patent(s) for implementation of the same above document Free of Charge or under reasonable terms and conditions.” INTERNATIONAL TELECOMMUNICATION UNION, PATENT STATEMENT AND LICENSING DECLARATION FOR ITU-T OR ITU-R RECOMMENDATION | ISO OR IEC DELIVERABLE, available at <http://www.itu.int/oth/T0404000002/en> (Apr. 23, 2012).

seek reciprocal licenses and other customary terms or conditions.

#### Clarification of the Term “Legally Liable”

AIPLA commends SAC for removing the language from the 2009 Draft Rules regarding compulsory licenses. Of concern to our members, however, is that the notion of legal liability remains in the 2012 Draft Measures in Article II, Section 4:

- Organizations or individuals participating in the formulation or revision of national standards shall be legally liable for their failure to follow the aforementioned requirements to disclose the essential patents held by them.

Because the term “legally liable” is not defined and because language in the 2012 Draft Measures may be interpreted in different ways (as is the case with any set of rules, not solely with the 2012 Draft Measures), this notion of legal liability is of utmost concern to our members who participate in Chinese standards setting.

Our request for clarification of the term “legally liable” is two-fold. First, AIPLA is hopeful that SAC will provide guidance as to what is meant by “legally liable” so that our members understand which Chinese laws could apply and the potential remedies that those found legally liable could face. Second, we request that SAC provide clarification regarding which 2012 Draft Measures provisions could produce this legal liability.

#### Access to Documents

AIPLA is hopeful that SAC will provide access to documents referenced in the 2012 Draft Measures such that the meaning of terms that appear to be ambiguous, if only because of translation issues, may be better clarified. Access to these documents will also allow our members to fully understand the obligations they will have if they participate in Chinese standards setting. These documents are referenced in Article V, Sections 2 and 3 and are the GB/T “Special Procedures for the development of Standards Part 1: Standard Related to Patents” and the GB/T 1 “Directives for Standardization”. AIPLA respectfully suggests that it would be beneficial to provide an opportunity to submit comments on these documents.

#### Conclusion

AIPLA appreciates and applauds SAC’s willingness to not only consider, but also to solicit, various views on SAC’s Regulatory Measures on National Standards Involving Patents (Interim).

AIPLA concurs with the recent policy statement made jointly by the U.S. Department of Justice and the U.S. Patent & Trademark Office:

[S]tandards serve the public interest in a variety of ways, from helping protect public health and safety to promoting efficient resource allocation and production by facilitating interoperability among complementary products. Interoperability standards have paved the way for moving many important innovations into the marketplace, including the

complex communications networks and sophisticated mobile computing devices that are hallmarks of the modern age.<sup>3</sup>

Thus, AIPLA believes “standards-setting activities benefit consumers and are in the public interest.”<sup>4</sup>

Again, AIPLA appreciates the opportunity to comment on the 2012 Draft Measures.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey I.D. Lewis". The signature is fluid and cursive, with the first name "Jeffrey" being the most prominent.

Jeffrey I.D. Lewis

President

American Intellectual Property Law Association

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<sup>3</sup> U.S. DEPARTMENT OF JUSTICE AND U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS 3 (JAN. 8, 2013).

<sup>4</sup> *Id.* at 8.