AIPLA
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

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Mr. Liu Jian
Price Supervision and Anti-Monopoly Bureau
National Development and Reform Commission
People's Republic of China

刘健先生
价格监督检查与反垄断局
国家发展和改革委员会
中华人民共和国

Re: AIPLA Comments on Questionnaire on IP Misuse Antitrust Guidelines

主题：美国知识产权法协会(AIPLA)对《滥用知识产权反垄断规制指南》意见征询的答复

Dear Mr. Liu:

亲爱的刘先生：

The American Intellectual Property Law Association ("AIPLA") welcomes this opportunity to submit comments to the Questionnaire issued by the National Development and Reform Commission ("NDRC") on issues related to competition and intellectual property.

美国知识产权法律协会（"AIPLA"）感谢此次国家发展和改革委员会（简称"发改委"）给予我们机会就发改委关于竞争和知识产权意见征询提出我们的建议。

The American Intellectual Property Law Association is a national bar association of approximately 14,000 members who are primarily lawyers 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 global laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

美国知识产权法律协会是个全国性律师协会，拥有大约 14,000 名会员，主要由各界律师组成，来自律师事务所、 政府司法机构、和学术机构。AIPLA 成员广泛代表直接或间接从事与专利、商标、版权、商业秘密、及不正当竞争法相关业务的个人、企业、及机构，或与其它影响知识产权的法律领域相关的个人、企业、及机构。我们的会员既代表知识产权所有权人，也代表知识产权使用者。我们的使命包括帮助建立和保持促进公平有效的全球法律和政策以鼓励奖励发明创造，同时能平衡公众利益，达到良性竞争、费用合理、和基本公正。

We appreciated the opportunity last year to comment on rules on intellectual property rights and competition, and we are grateful for this opportunity to follow up with comments in this related area. Please find below AIPLA's comments on these issues as raised by the draft IP Guidelines.

我们感谢去年有机会对知识产权和竞争法规能够提供我们的建议，以及有这个机会就相领域提出补充意见。以下是 AIPLA 针对《滥用知识产权反垄断规制指南》（简称《指南》）草案就这些问题引发的一些建议。

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Question 1. What do you think about the choices of scope of intellectual property rights as regulated by the Guidelines? What are your general comments and suggestions on the principles, legal framework, and major issues?

AIPLA respectfully suggests that the NDRC proceed with caution when considering IPR and Anti-Monopoly Guidelines ("Guidelines"), mindful of the important balance between competition and IP laws, each having a role in promoting both innovation and competition. China has emphasized increasing domestic innovation,[1] and the thoughtful approach to applying the PRC Anti-Monopoly Law ("AML") to intellectual property rights ("IPRs") has no doubt helped to bring many benefits to the Chinese economy and consumers. Rigid guidelines lacking flexibility to deal with varied situations in which IPRs are licensed and used would run a serious risk of stifling innovation and prohibiting conduct that is pro-competitive. AIPLA suggests that the following principles are relevant.

[1] In the December 14, 2014 "Further Implementation of the National IP Strategy Action Plan (2014-2020)", China's State Intellectual Property Office described "significant increase in IPR innovation capacity" as a "major goal", and included "promot[ing] the development of IPR-intensive industries" and "strengthen[ing] IPR protection and creat[ing] a favorable market environment" among "major actions".
在二〇一四年十二月十四日 "深入实施国家知识产权战略行动计划 （2014-2020）"中，中国国家知识产权局提到"知识产权创造水平显著提高"是一个"主要目标"，并在"重大行动"中包括"推动知识产权密集型产业发展"，和"加强知识产权保护，营造良好市场环境"。

AIPLA尊敬地建议，希望国家发改委在考虑知识产权和反垄断指南（“指南”）时，能谨慎考虑竞争与知识产权法之间平衡的重要性。竞争与知识产权在促进创新和竞争中有各自作用。贵国近来一直在强调增加国内创新[1]，谨慎地将贵国反垄断法（“反垄断法”）应用到知识产权（“知识产权”）方面无疑有助于给中国经济和消费者带来了很多好处。用缺乏弹性的硬性规定去应对不同情况下的知识产权许可转让，将有可能扼杀创新和限制有利于竞争做法。 AIPLA建议考虑以下相关原则。

First, intellectual property rights do not violate anti-monopoly laws when exercised in accordance with the laws and administrative regulations relating to intellectual property rights. AIPLA believes that this principle should be at the core of any guidelines. This basic premise is contained in the AML itself, which states in Article 55 that "[t]his Law shall not apply to the exercise of its intellectual property rights by an undertaking in accordance with the relevant provisions of intellectual property laws or administrative regulations; provided that this Law shall apply to any conduct of an undertaking whereby intellectual property rights are abused to eliminate or restrict competition." AIPLA believes that Article 55 is an appropriate and sensible limitation and, consistent with that provision, any guidelines should regulate only situations in which IPRs "are abused to eliminate or restrict competition."

首先，按照有关知识产权的法律、行政法规规定行使知识产权的行为并不违犯反垄断法。AIPLA 认为，这一原则应该在《指南》中居核心地位。这个基本前提在反垄断法中就有体现，其中第 55 条规定：“[反垄断与知识产权保护] 经营者依照有关知识产权的法律、行政法规规定行使知识产权的行为，不适用本法；但是，经营者滥用知识产权，排除、限制竞争的行为，适用本法。”AIPLA 认为第 55 条的限制是恰当、合理的，与该条相一致，《指南》也应只管理“滥用知识产权，排除，限制竞争”的行为。

Second, it is important that the Guidelines be flexible and not prohibit conduct which, under the particular facts and circumstances of a given case, is pro-competitive. IPR can be used and licensed in numerous different situations and any guidelines should be broad and flexible enough to be workable in the many different situations that could arise. To that end, AIPLA respectfully submits that the Guidelines should reflect the widely accepted requirement that a finding of a violation of the AML must be based on evidence of injury to competition. Requiring evidence of harm to competition is important to preserve the balance of interests of innovators who own IPRs and invest in risky technology development, as well as the interests of those seeking to adopt the patented technologies and make use of them through licenses. In general, competition law dispenses with proof of market impact only when the conduct in question is virtually always anticompetitive and almost never has redeeming justifications.

其次，《指南》需具备灵活性，而不应限制禁止在特定情况下事实上促进竞争的行为。这一点很重要。 行使或许可使用知识产权可出现在许多不同的场合和情况下，《指南》应该有足够的广泛性和灵活性，从而能适用于可能出现的各种不同情况。为此，AIPLA 尊敬地建议，《指南》应反映一条得到广泛接受的原则，违犯反垄断法行为必须根据对竞争造

成损害的证据来判定。这一点的重要性在于，这样才能既维护那些敢于投资高风险技术开发并拥有知识产权的创新者的利益， 又能维护那些寻求通过许可使用专利技术的用户的利益，达到平衡。在一般情况下，竞争法只有在某种行为几乎总是反竞争而几乎从来不会公正的情况下，才会省略对市场影响证据的要求。

Third, the Guidelines should not disturb efficient and pro-competitive licensing in the area of standards essential patents ("SEPs"). The Guidelines should recognize the patent holder's exercise of its legitimate right to realize compensation for its effort in developing innovative technologies, particularly in connection with standardization. Any competition law analysis made in connection with a claim of improper assertion of a SEP should rely on objective evidence and economic analysis. To act otherwise could disrupt the careful balance of interests that make up the standard-setting environment.

第三，本《指南》不应干扰有效和有利于竞争的标准必要专利（ "SEP"）领域的使用许可。《指南》应承认专利权人合法行使专利权，以补偿其在开发创新技术，特别是在标准化方面的努力。对认定不当主张标准必要专利的竞争法分析与要依据客观证据和经济分析。不这样做，会破坏标准制定环境中小心得到的利益均衡。

Many SEP holders have contractually agreed to FRAND commitments, which are agreements among willing parties to make licenses available on specified terms. However, the Guidelines should recognize that the failure to consummate a FRAND license as a result of a commercial dispute between a licensor and licensee can result from a number of causes, and does not necessarily rise to the level of a violation of the AML, simply because of such failure to license. Indeed, the mere threat of an AML charge could provide the licensee with substantial unwarranted negotiating leverage. Such a threat might discourage innovation or development in standardized technologies at the outset by making it difficult for innovators to negotiate in the future with potential licensees or infringers.

许多 SEP 持有人签约认同 FRAND 承诺。，这是各方自愿参与的协议，其规定授予使用许可的特殊条件。然而，《指南》应认识到，造成因许可方和被许可方之间的商业纠纷未能授予 FRAND 许可的原因可能是多种多样的，并不一定仅仅是因为违反了反垄断法。事实上，以违反反垄断法相要挟会给被许可人提供一个大而不当的谈判筹码。这样的要挟可能会从一开始就阻碍创新或发展标准化技术，因为创新者会很难在将来与潜在的被许可人进行协商谈判。

Question 2. In your opinion, how to handle the relationship between the protection of intellectual property rights and antitrust regulations governing IP misuse? In what ways the Guidelines may accomplish this [handling of the relationship]?

First, the Guidelines should recognize the basic premise that lawful use of intellectual property rights is acceptable, and only abuses of intellectual property rights will be scrutinized as potentially implicating competition laws. Specifically, AIPLA recommends that the Guidelines

clarify that the AML applies only when behavior both: (1) involves the exercise of monopoly power (market dominance) that unreasonably eliminates or restricts competition; and (2) is either outside the scope of the IPRs or the IPRs are being misused. Indeed, AIPLA respectfully submits that an exercise of an IPR as provided under the applicable IPR laws and regulations should not be sufficient to establish liability under the AML, even where an enterprise has market dominance, and even where the exercise arguably eliminates or restricts competition. In order to be held liable, the enterprise in question also must be using the IPR in a manner not contemplated by the IPR laws and administrative regulations.

第一，《指南》应认识到的基本前提是合法使用知识产权是可以接受的，而只有滥用知识产权的行为才有可能触犯竞争法而需要加以检查。具体而言，美国知识产权法协会建议，《指南》明确指出反垄断法只适用于同时满足下列两项的行为：（1）涉及行使垄断权力（市场支配地位）造成不合理的消除、限制竞争；（2）或者不涉及知识产权，或者滥用知识产权。AIPLA 尊敬地指出，按照有关知识产权的法律、行政法规规定行使知识产权的行为应被判违犯反垄断法，即使相关企业拥有市场支配地位，甚至其行为可以说是排除、限制竞争。为建立法律责任，相关企业还必须在知识产权法律、行政法规的规定范围之外使用其知识产权。

Second, in all cases, the Guidelines should recognize that the determination of whether actions constitute a violation of the AML should be based on findings of an adverse impact on competition based on an analysis of the particular situation at issue. A detailed analysis that considers all facts and circumstances is particularly important to ensure that the competition laws are not being used to limit pro-competitive and efficient uses of IPRs or in a manner that will impact the dynamic competition created by IPRs, and the innovation incentives they provide.

其次，在所有的情况下，《指南》应认识到，判定某一行为是否违反 AML 应基于，根据对具体特殊情况的分析发现其行为对竞争有不利影响。考虑所有的事实和情况进行详细分析是十分重要的，这样才能保证竞争法不被用来限制有利竞争和有效使用知识产权的方式，或者影响知识产权所提供的活跃竞争和创新动力。

Question 3. What [are] the special characteristics in the analysis of the impact of the exercise of IPR on competition? What elements need to be analyzed in the determination?

AIPLA respectfully suggests that the Guidelines reflect the widely accepted requirement that a finding of a violation of the AML must be based on evidence of injury to competition. As in other areas, analyzing the impact on competition of a claim of improper assertion of an IPR should be based on objective evidence and economic analysis. Because of the many different ways in which IPRs can be licensed and used, the analysis will need to proceed on a case-by-case basis based on the specific facts and circumstances of each particular situation.

美国知识产权法协会谨建议，《指南》应反映一条得到广泛接受的原则，违犯反垄断法行为必须根据对竞争造成损害的证据来判定。与在其他领域一样，在分析不当主张知识产权

对竞争的影响时，要依据客观证据和经济分析。由于知识产权有许多不同的转让和使用方法，必须具体情况具体分析。

When analyzing the impact on competition of an exercise of IPR, it is important to recognize that the essence of IPR is the right to exclude and that the lawful exercise of IPR does not violate competition laws.

在分析行使知识产权对竞争的影响时，意识到知识产权的本质是排除他人使用的权力，而且合法行使知识产权并不不违反竞争法，是很重要的。

It is also important to recognize that patents are necessarily territorial rights granted by individual governments that are enforceable only in the country where they are issued. Consequently, the Guidelines should not infringe on the right of each sovereign country to determine whether particular exercises of IPR impact competition within their respective jurisdictions and not attempt to regulate competition or the use of IPRs beyond their borders.

同样重要的是要认识到专利的必然地域性，是各国当地政府给与的权利，只能在当地强制实施。因此，《指南》不应侵犯其他各主权国家的权利，而去决定某一知识产权行使行为是否在其它各国管辖范围内影响竞争，也不应试图规范其它各国境内的竞争或知识产权使用。

Question 4. In addition to the monopoly agreements specifically enumerated in Article 13, 14 of the Anti-Monopoly Law, what are the other types of monopoly agreements involving intellectual property rights? Please give a brief description of the harm of these monopoly agreements caused to the competition and innovation.

AIPLA agrees that Articles 13 and 14 of the AML provide a general list of the types of agreements that have been found to be anticompetitive in certain circumstances, whether or not they involve intellectual property rights, and recognizes that the list is not exhaustive. AIPLA recommends that the Guidelines should make clear that any such agreement would be unlawful only where it is established by objective evidence that it causes actual anticompetitive harm in a properly defined relevant market and that such harm outweighs any procompetitive justifications.

AIPLA同意反垄断法第13和第14条列出了一般已被发现在某些情况下是反竞争协定，无论是否涉及知识产权，也认识到所列项目不完全。美国知识产权法协会建议，《指南》应明确指出，只有在由客观证据证实这样的协议会导致在一个恰当确定的相关市场中实际的反竞争损害，而且这种损害远远超过任何促进竞争的理由，才能判断这样的协议是违法的。

Question 5. Do you think whether there is the existence of monopoly agreements involving intellectual property which is specifically enumerated in Article 13, 14 of the Antimonopoly Law but needs to be exempted from AML? Which factors need to be considered in granting exemption to such monopoly agreements? Please briefly state the reasons.

AIPLA recommends that the Guidelines should make clear that agreements involving intellectual property which is specifically enumerated in AML Articles 13 or 14 would be unlawful only where it is established by objective evidence that it causes actual anticompetitive harm in a properly defined relevant market and that such harm outweighs procompetitive justifications.

美国知识产权法协会建议,《指南》应明确指出，在反垄断法第13，14条中具体列出的涉及知识产权的垄断协议，只有在由客观证据证实这一协议会导致在一个恰当确定的相关市场中实际的反竞争损害，而且这种损害远远超过任何促进竞争的理由，才能判断这一协议是违法的。

It is further noted that some behaviors applicable to "products" are not suitable for patents. For example, AML Article 13(3) prescribes that "splitting the sales market or the purchasing market for raw and semi-finished materials" is one of the monopoly agreements between competing undertakings in the market. However, it is a common practice in intellectual property licensing to limit field, scope, geography, and/or license period. It is not clear how the market splitting scenario applies to patents, where materials are human resources and research facilities.

还需要注意的是，有些适用于"产品"行为并不适用于专利。例如，反垄断法第13条第三段规定，"分裂销售市场或者购买市场对原材料和半成品材料"是在市场上竞争企业之间的垄断协议之一。然而，知识产权许可通常的做法是限制适用领域、范围、地域、及期限。目前尚不清楚市场分割怎样能应用在专利方面，专利的原料是人力资源和研究设施。

Similarly, an agreement that "limits output or sales" is listed as a monopoly agreement. In that the patent holder can decide not to license others, licensing on a limited basis can be pro-competitive. Allowing a licensee to make a certain quantity of infringing products should not be considered a monopoly agreement even if it outlines the number of licensed items. Practically, a patent holder may license others to fill the demand the licensor cannot satisfy or the licensee may wish to limit expenses and pay royalties on a defined number of sold products. These business reasons, which do not appear to be included in the AML Article 15 exemptions, explain how this category of agreement does not fit with good patent and competition policy.

同样，"限制产量或销售量"被列为垄断协议之一。可是，专利持有人可以决定不许可他人使用，或者只给与局限性许可，是有利于竞争的。允许被许可人制造一定质量的侵权产品，即使它还规定了许可产品的数量。实际上，专利持有人可以许可他人填补许可人不能满足的需求空白。或者，被许可人也许希望限制开销，只想支付一定限量产品的专利使用费。这些商业上的原因（目前并没有被包括在反垄断法第15条的豁免中）解释了为什么这一类的协议与良好的专利和竞争政策不谐和。

China's State Administration For Industry & Commerce ("SAIC") Rules at Article 5(i) provide

that there is no monopoly violation under the last clauses of Articles 13 and 14 if "there are at least four substitutable technologies that can be obtained at reasonable costs." It is unclear what the basis is for the number "four." It is not clear why the existence of two competing technologies avoids monopoly when one undertaking has a 30% market share but four competing technologies are needed to avoid monopoly when the aggregate share of multiple undertakings is only 20% (see Article 5(ii)). AIPLA recommends that the Guidelines should address and clarify this ambiguity in the SAIC rules.

国家工商行政管理总局(SAIC)规章第五条第一款规定，如果"有能以合理的成本获得至少四个替代技术"，就不违反垄断法13、14条的最后条款。 不清楚数字"四"的依据是什么。也不清楚为什么，如果有两个竞争技术，其中一家拥有30%的市场份额，就无垄断问题，但需要有四个竞争技术才能避免垄断，尽管多个企业的市场总份额只占20%（见第5条第二款）。美国知识产权法协会建议，《指南》应澄清说明SAIC规章中的这一模糊之处。

Question 6. Do you think if it is possible to establish safe harbor rule in the guidelines? Does the safe harbor rule conflict with the provisions of the Anti-Monopoly Laws? How to design such safe harbor rule, if needed?

Enforcement agencies often establish a safe harbor market share level under which an agency generally will not find either monopoly power (market dominance) or substantial market power. As noted by the ICN Unilateral Conduct Working Group:

执法机构常常会设立一个市场占有率的安全港标准，对于低于该标准的企业，执法机构就不会认定其具有垄断力（市场垄断地位）或可观的市场支配力。正如国际竞争网络单方行为工作小组指出的：

> Jurisdictions use different types of safe harbors, based on different market share levels. Some agencies use safe harbors that guarantee that dominance/substantial market power will not be found below the safe harbor level, which maximizes certainty and reduces agency burdens, while others establish only a rebuttable presumption against a finding of dominance/substantial market power. The benefits of safe harbors have to be weighed against their risks, in particular potential over-emphasis on market shares and thus potential enforcement errors.[2]
>
> 各司法管辖区基于不同的市场占有率标准使用不同类型的安全港。一些机构使用的安全港可以确保低于安全港标准的企业将不具有市场支配地位/可观的市场支配力，这样可以最大化的确保和减少机构的负担，而一些机构则仅设立一个针对发现市场垄断地位/可观的市场支配力的可反驳的推定。安全港的益处必须要大于其风险，尤其是潜在的过于强调市场占有率，以及由此导致的潜在的执行错误的风险。[2]

[2] http://www.internationalcompetitionnetwork.org/uploads/library/doc317.pdf

The 1995 U.S. DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, § 4.3, provide the following "safety zone":

美国司法部/联邦贸易委员会于 1995 年颁布的《与知识产权许可有关的反垄断指南》的第 4.3 条就"安全区"作出了如下规定：

> Absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement if (1) the restraint is not facially anticompetitive and (2) the licensor and its licensees collectively account for no more than twenty percent of each relevant market significantly affected by the restraint.
>
> 在非异常情况下，主管机关对于下列情形中知识产权许可安排存在的限制将不会有什么异议：（1）该限制表面并不具有反竞争性，（2）许可人及其被许可人一起在受限制影响的各相关市场中所占比重不足 20%。

AIPLA supports the establishment of a similar safe harbor under the AML. Given the general procompetitive and efficient nature of intellectual property licenses, AIPLA suggests that a more lenient safe harbor (50 percent of the relevant market) would be appropriate.

AIPLA 支持根据中国反垄断法设立一个类似的安全港。考虑到知识产权许可的促进竞争和效率的通性，AIPLA 建议最好设立一个较为宽松的安全港（相关市场的 50%）。

In addition, AIPLA recommends including a statement clarifying that failing to qualify for a safe harbor in no way infers or presumes that an arrangement is likely to be anticompetitive. While the notion of a "safe harbor" has value, given the typically pro-competitive nature of patent licensing, the opening presumption should be that licensing agreements do not violate the AML.

另外，AIPLA建议发表一项声明表明，如果未能达到安全港的标准，则不能推断或假设此安排可能是反竞争性的。考虑到专利许可一般都有促进竞争的性质，虽然"安全港"的概念具有价值，但最初的推测应该是该许可协议没有违反中国反垄断法。

Question 7. What are the special characteristics in defining relevant market involving intellectual property rights? What are the factors that should be considered in defining relevant market?

AIPLA agrees with the definition of the relevant markets based on published guidance in SAIC Article 3, pursuant to which the relevant market can be either the technology market or the goods market covering specific IPR. Of course, the Guidelines should use caution and be flexible when basing analysis on technology markets, which may be continuing to evolve.

AIPLA同意根据已公布的SAIC中第3条对相关市场的定义为指南，依据该定义，相关市场可

以是技术市场或是包含特殊知识产权的商品市场。当然，在对可能持续发展的技术市场进行基点分析时，应小心灵活地运用指南。

Importantly, the relevant market should not automatically be limited to particular patents, standards, or SEPs. There are often alternatives available to the patented invention such that other firms could create a similar product using alternatives. This fact is reflected in the relevant antitrust guidelines in several jurisdictions, including the United States, which permits the consideration of competing technologies and products when defining a relevant market. Thus, AIPLA recommends that the Guidelines also consider alternative technologies, including whether there are other processes for making the downstream product, and alternative products and standards, when defining the relevant market.

重要的是，相关市场不得自动地被限制在个别专利、标准或标准必要专利上。经常会有可以替代专利发明的其他方法，使其他公司能够采用其他方法制造出类似的产品。该事实反映在包括美国在内的几个司法管辖区的相关的反垄断指南中，允许在界定相关市场时考虑到竞争性的技术和产品。因此，AIPLA建议该指南在界定相关市场时也考虑替代技术，包括是否存在制作下游产品的其他工艺，以及替代产品和标准。

Question 8. What are the factors that should be considered in making a determination or making presumptions that IPR holders have dominant market position? Please briefly state the reasons.

AIPLA notes that intellectual property rights do not necessarily confer monopoly power and proof of dominant market position should be based on evidence of monopoly power, apart from the existence of the intellectual property right.[3] Consequently, IPR holders should never be presumed to have a dominant position. Assessing dominance of IPR holders requires a case-by-case consideration using the same general tests that are used to assess dominance with respect to any other product. However, when considering whether a particular entity is dominant, the Guidelines must be mindful of the right to exclude, which is central to IPR. AIPLA recommends that this right should not be curtailed merely because the patent holder is found to be dominant.

AIPLA注意到知识产权不一定会给予垄断的市场力，且市场支配地位的证明除了要有知识产权存在的证明之外，还需要有证据证明垄断的市场力。[3] 所以，知识产权持有人绝不能被推测为具有支配地位。知识产权持有人支配地位的评估需要采用同样的用以评估任何其他产品支配地位的通用测试方法逐案考量。尽管如此，当考虑某一特殊企业是否具有支配地位时，指南必须注意到对于知识产权极为重要的排除权。AIPLA建议该项权利不得仅因为专利持有人被发现具有支配地位而被剥夺。

[3] *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

Question 9. What kind of the impact and to what extent standard essential patents have on the market position of IPR holders. Please briefly state the reasons. What factors need to be considered in determining whether the standard essential patent holder has a dominant position in the market? Please briefly state the reasons.

While ownership of SEPs is a relevant factor to be considered in assessing the existence of dominant position, AIPLA believes predominance should not be given to just this factor alone. Dominance of SEP holders should be assessed in the holistic and general framework that is applicable to all entities, rather than attempting to evolve/create different benchmarks or assessment tools for SEP holders. There should not be any rules or presumptions. This allows for due consideration to all relevant factors, including the presence of other SEP holders in the same "market", the scope and extent of the SEPs held by the concerned entity as it relates to the product or service in the relevant "market", and whether the SEP holder has the ability to control the price or output of products or other trading conditions in the relevant market or to block or affect the entry of other undertakings into the relevant market.[4]

虽然在评估存在支配地位时，标准必要专利所有权是需要考虑的一个相关因素，然而AIPLA认为不应仅就该一个因素而认定其具有支配地位。标准必要专利持有人的支配地位应该从整体和总体框架上进行评估。该总体框架应适用于所有企业，不得企图为标准必要专利持有人滋生/创造不同的基准或测评工具，不应有任何其他规则或推定。允许适当考虑所有相关因素，包括其他标准必要专利持有人在同一"市场"的存在，与相关"市场"产品或服务的有关企业拥有的标准必要专利的范围和程度，以及是否标准必要专利持有人有能力控制相关市场的价格或产品产量或其他贸易条件，或者有能力阻止或影响其他企业进入相关市场。[4]

Standard Setting Organizations ("SSOs") diversity has created a dynamic and flexible standards ecosystem, able to respond to market needs as they change and, importantly, able to ensure that standards do not limit competition but instead promote competition and innovation. In general, competition law dispenses with proof of market impact only when the conduct in question is virtually always anticompetitive and almost never has redeeming justifications. For example, an SEP-owner may seek an injunction, e.g., if a licensee is unwilling to license on FRAND terms. To presume that there will virtually always be an anticompetitive effect from refusing to license or seeking injunctive relief would be contrary to basic principles of competition law and may harm innovation. Any competition law analysis made in connection with the licensing or assertion of an SEP should rely on objective evidence and economic analysis, as is the case with other competition issues.

标准制定组织("SSOs")的多元性已经创造出一个动态的、灵活的标准生态体系，其能够在市场变化时对市场需求做出响应。重要的是，其还能保证这些标准不仅不限制竞争，反而促进竞争和创新。一般来说，竞争法仅在受质疑的行为一直明显有反竞争性，并且几乎从来没有补救措施的情况下，才不用市场影响的证明。例如，如果被许可人不愿意在公平合理和非歧视条款的基础上进行许可，标准必要专利所有人可以寻求禁令等。假设拒绝许可或寻求禁令性救济实质上将总是具有反竞争的效果的，将与竞争法的基本原则相对立，

[4] AML, Art. 17.

且可能损害创新。与其他竞争事项一样，任何与标准必要专利许可或主张有关的竞争法分析都应依靠客观的证据和经济的分析。

Question 10. How to determine that IPR holders with a dominant market position charged unfairly high royalty fee? What is the basic principle of determining whether the royalty fee is unfairly high? What are the specific factors that should be considered?

AIPLA is unaware of a specific framework or factors that can be used to determine whether IPR holders with dominant market positions charged unfairly high royalty fees, and would urge that the Guidelines not attempt to create a fixed framework for assessing royalty fees.

AIPLA不知道有特殊框架或因素能够用于确定是否拥有市场支配地位的知识产权持有人不公平地收取了高额的特许权费，AIPLA强烈要求该指南不要试图创造一个评估特许权费的固定框架。

First, royalty fee regulations have broad implications and may affect incentives to develop innovations that lead to patents. Of course, licensees will want to minimize royalty fees, while licensors will want to maximize royalties. In light of the tension between those positions, AIPLA recommends that the Guidelines proceed cautiously and not make competition authorities price regulators, which would have the potential to suppress incentives to innovate and adversely affect competition.

首先，特许权费的规定具有广泛的影响，且可以影响对发展专利发明的激励。当然，被许可人想要使特许权费减到最低，而许可人想要最大限度的收取特许权费。鉴于两者之间的张力，AIPLA建议该指南慎重进行，且不要使得竞争主管机构变成价格监管机构，这将有可能抑制对创新的激励，并对竞争带来不利地影响。

Second, any attempt to regulate royalty fees would need to take into account the complete, and often complex, commercial relationship between the parties. The royalty fees agreed to in license agreements are often the result of complex and multifaceted commercial negotiations between the parties addressing far broader cross licenses, portfolio licenses, and other business issues between specific parties. Fundamentally, all licensing terms have value, whether in monetary or non-monetary terms, and negotiating parties cannot consider monetary terms in isolation. Any Guidelines regarding royalty fees should be broad and flexible enough to permit consideration of all aspects of the license agreement.

其次，任何对规定特许权费的企图都将需要考虑当事方之间完整的和常常很复杂的商业关系。许可协议中同意的特许权费经常是寻求特定当事人之间更广泛的交叉许可、组合许可和其他业务问题的当事方之间复杂的和多层次的商业谈判的结果。基本上，所有的许可条款，无论是货币或非货币条款，都具有价值，且谈判双方不能孤立地考虑货币条款。任何

有关使用费的指南都应该具有足够的广泛性和灵活性，以允许考虑到许可协议的各个方面。

Third, the Guidelines should also proceed cautiously with respect to assessing royalty fees for patents that are subject to FRAND commitments. The FRAND obligations are a representation of a patentee's willingness to license its technology to willing counterparties, and do not, standing alone, contain any other express substantive limitations on royalties associated with the licensing of SEPs, provided that the ultimate terms are "reasonable." However, FRAND compensation should be closely tied to the patented technology, and not to a value for something that the patent holder did not invent or claim in its patent. As the U.S. Court of Appeals for the Federal Circuit stated: "The patentee's royalty must be premised on the value of the patented feature, not any value added by the standard's adoption of the patented technology. [This is] necessary to ensure that the royalty award is based on the incremental value that the patented invention adds to the product, not any value added by the standardization of that technology."[5] Because a FRAND commitment does not define "reasonable" terms for licensing SEPs, existing and developing patent law for calculating a "reasonable royalty" provides guidance, at least with respect to pure monetary licensing terms. Nevertheless, we support SSOs' traditional approach of not establishing specific licensing terms, including monetary terms, which should be left to the negotiations of the parties. AIPLA believes that the Guidelines should proceed in the same way, and not create a specific framework for assessing royalty fees.

再其次，对于从属于公平合理和非歧视性承诺的专利特许权费的评估，指南也应该谨慎地进行。如果最终条款是"合理的"，公平合理和非歧视性义务表示专利权人愿意将其技术许可给愿意接受该技术的相对方，且不独自表示包含任何其他明确的、对于与标准必要专利许可有关的特许权费的实质性限制。然而，公平合理和非歧视性补偿应该与专利技术紧密关联，且非去评价专利持有人的发明没有价值或没有在其专利中声称的价值。正如美国联邦巡回上诉法庭所述："被许可人的特许权费必须有专利特征的价值，而非由对专利技术的标准采用所增加的任何价值，这对确保特许权费的授予是基于专利发明加入到产品里所带来的增值，而非基于由该专利技术的标准化采用产生的任何增值是必要的。"[5]由于公平合理和非歧视性承诺不界定许可标准必要专利的"合理的"条款，现存的和正在开发中的计算"合理的特许权费"的专利法至少就纯货币许可条款规定了指导意见。然而，我们支持SSOs的不设立特殊许可条款的传统方法。特殊许可条款包括应该留给当事方协商的货币条款。AIPLA认为该指南应该以同样的方式进行，且不要制定一个明确的评估特许权费的框架。

All of these different considerations underscore the importance of flexibility in setting royalties and, thus, AIPLA suggests that the Guidelines should exercise caution in reciting anything that could be construed as establishing a mandatory framework for establishing royalty rates.

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[5] *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1201 (Fed. Cir. 2014); *see also Microsoft Corp. v. Motorola, Inc.*,795 F.3d 1024 (9th Cir. 2015).

所有这些不同的考量强调了在设定特许权费方面的有灵活性的重要性，也因此，AIPLA建议该指南应谨慎引用任何可能被解读为为设立特许权费税率而设立一个强制性框架的表述。

Question 11. Under what circumstances do you think IPR holders with a dominant market position may refuse to license? Please briefly state the reasons.

The U.S. antitrust agencies' general approach to unilateral refusal to license intellectual property detailed in the 2007 extensive FTC-DOJ patent report that was published on the basis of a series of public hearings.[6] In it, the agencies concluded that:

美国反垄断机构对于单方拒绝许可专利的一般方法详细记录在 2007 年发布的广泛的联邦贸易委员会-司法部专利报告上，这些报告是在一系列公众听证会上发布的。[6]在报告里，机构得出了如下结论：

> "Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections. Antitrust liability for refusals to license competitors would compel firms to reach out and affirmatively assist their rivals, a result that is "in some tension with the underlying purpose of antitrust law." Moreover, liability would restrict the patent holder's ability to exercise a core part of the patent—the right to exclude."[7] The agencies also found that "Conditional refusals to license that cause competitive harm are subject to antitrust liability."[8]
>
> "仅单方面的、无条件地拒绝许可专利的反垄断责任，将不会在专利权和反垄断保护之间的交界面上扮演一个有意义的角色。拒绝许可竞争对手的反垄断责任将强迫企业求助并肯定协助他们的竞争对手，导致"在反垄断法的标的下产生一些紧张关系"的结果。此外，责任将限制专利持有人行使专利核心部分-排除权的能力。"[7] 机构还发现"导致竞争性伤害的有条件的拒绝许可是受制于反垄断责任的。"[8]

In the context of FRAND licensing and the use of injunctions, please see AIPLA's answers to questions 16 and 17 below.

在公平合理和非歧视许可和使用禁令的情况下，请查看下面 AIPLA 对于第 16 和第 17 问的回答。

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[6] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), Chapter I, pp. 15-31, *available at* https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf.

[7] *Id.* at 6, footnotes omitted.

[8] *Id.*

Question 12. What are the legitimate reasons that IPR holders with a dominant market position may have in giving differential treatments to licensees in same conditions? Please briefly state the reasons. How should "the same conditions" be determined? What factors should be considered in the process of the determination?

The right to exclude is one of the essential rights that IPR holders are granted, and this right means that IPR holders can generally refuse to license their patents, or choose to license to different companies on different terms. The flexibility and complete control over licensing decisions is a legitimate and lawful use of a company's patent rights, and the Guidelines should not limit this practice.

排除权是授予知识产权持有人的一项基本权利，且该权利意味着知识产权持有人能够普遍地拒绝许可其专利，或选择以不同的条款许可不同的公司。灵活和完整的控制许可决定是对公司专利权的合法使用，且该指南不应对此实践进行限制。

In connection with participation in standard setting organizations, some IPR holders will commit to license their SEPs on FRAND terms. If an IPR holder has made a FRAND commitment, then it has agreed to license its IPRs subject to that commitment – which are generally SEPs – on non-discriminatory terms. A FRAND commitment, however, does not necessarily mean that all licensees must be offered the same terms. In general, this means only that similarly-situated licensees should be offered economically similar terms. There may be significant differences between license agreements reached based on the particular facts and circumstances, and commercial needs and desires of the companies.

对参与标准设定有关的组织，一些专利权持有人将承诺在公平合理和非歧视条款上许可其标准必要专利。如果某一知识产权持有人已经做出了一个公平合理和非歧视承诺，那么其就已经同意了根据该承诺在非歧视条款上许可其专利权–通常是标准必要专利。然而，一个公平合理和非歧视承诺不一定意味所有被许可人都必须被授予同样的条款。一般来说，这仅意味着处于类似情形的被许可人应该从经济上被授予类似的条款。基于特殊的事实和情况、商业需求和公司要求，许可协议之间可能存在着显著的差异。

Given the many different forms that license agreements can take, and the different monetary and non-monetary consideration that can be exchanged, AIPLA recommends that the Guidelines not attempt to define what it means for contracts to be non-discriminatory. If, however, the Guidelines nevertheless address this issue, AIPLA recommends that they recognize the flexibility needed by all parties to IP licensing agreements, so that companies can continue to make deals that are similar for similarly-situated participants, but nevertheless take into account the unique circumstances of each.

考虑到许可协议能够采用许多不同的形式，以及不同的货币和非货币考量可能被交换，

AIPLA建议该指南不要试图界定什么是无歧视合同。然而，如果该指南提出了该事项，AIPLA建议他们能够认识到知识产权许可协议的所有当事方都需要灵活性，以便于公司能够继续与处于类似情形的参与者进行类似交易，然而也要考虑个案的特殊情况。

Question 13. How to determine whether IPR holders with dominant market position conducted bundling and whether such justifications for bundling are legitimate?

AIPLA supports the effort to address directly the issue of bundling, which may be pro-competitive or anti-competitive, depending on the circumstances. Experience has shown that, for these reasons, bundling should be considered under a rule of reason analysis. Because bundling is frequently pro-competitive, it is particularly important to perform a rule of reason analysis that considers all facts and circumstances.

AIPLA支持对于以直接方式解决捆绑问题所做的努力，该问题由于其情形不同，可能促进竞争也可能是反竞争的。经验表明，基于这些原因，捆绑问题应该在“合理规则”下进行考虑。因为捆绑行为常常是促进竞争的，进行对实行考虑全部实际情况和情形的“合理规则”分析尤其重要。

It appears that the SAIC Rules on Prohibition of Abusing Intellectual Property Rights to Eliminate or Restrict Competition address bundling in Art. 9 apply an analysis similar to the rule of reason analysis. In other words, bundling would be unlawful only where it is established by objective evidence that the IPR holder is using market power in a tying market to cause an anticompetitive effect in the market for the tied product. AIPLA supports this approach.[9]

国家工商总局公布的《关于禁止滥用知识产权排除、限制竞争行为的规定》似乎在第九条解决了捆绑问题，其采用了与“合理规则”相似的分析。换言之，捆绑只有在基于客观证据，当知识产权所有人在捆绑市场利用市场势力在该市场对捆绑产品造成反竞争影响成立时才会是非法的。AIPLA支持该方式。（参考《知识产权特许反垄断准则》，美国司法部和联邦贸易委员会，5.3部分）[9]

Question 14. What factors do you think should be considered when determining whether IPR holders with dominant market position impose additional unreasonable terms on the transaction?

AIPLA respectfully submits that the exercise of intellectual property rights within their lawful scope should not be considered to eliminate or restrict competition in the relevant market.

[9] See also “Antitrust Guidelines For The Licensing Of Intellectual Property,” U.S. Department of Justice and the Federal Trade Commission, Section 5.3.

Temporary restriction on competitors using the IPR is inherent in the exclusive rights granted by IPR. It is this right to exclude that provides incentives to innovate. In order to be liable under the AML, the patent holder must also be acting outside the scope of its IPR to exclude competition in a relevant market.

AIPLA 认为对于知识产权在其合法范围内的应用不应该被认为是在相关市场排除或限制竞争的。基于运用知识产权，对竞争对手面对临时约束在知识产权所赋予的专有权中是固有的。正是该权利的排他性提供了创新动力。专利所有人必须在其知识产权的范围外同样进行活动以在相关市场排除竞争才可以违反反垄断法。

The SAIC Rules enumerate a number of factors that shall be taken into consideration when analyzing and assessing competitive impact of exercising IPR by an undertaking, i.e., (i) the market position of the undertaking and its trading parties; (ii) the concentration ratio of the relevant market; (iii) the difficulty of entering into relevant market; (iv) industry practices and development stage of the industry; (v) the duration and scope of restraints in respect of output, region, consumers, etc; (vi) the impact on innovation and technology promotion; (vii) the undertaking's innovation capacity and the pace of technology advancement; (viii) other factors related to assessing competitive impact of exercising IPR. AIPLA supports the inclusion of the first five factors, but recommends removing the sixth and seventh factors. Because they are predictive and hypothetical, they may introduce unpredictability and speculation into the analysis.

工商局《规定》列举了多个当分析和评估企业实施知识产权的竞争影响时应考虑到的因素，例如：（1）该企业的市场地位及其贸易伙伴；（2）相关市场的集中度指数；（3）进入相关市场的难度；（4）该行业的行业实践和发展阶段；（5）输出、地区、消费者等等的限制持续时间和限制范围；（5）创新和技术进步的影响；（6）企业的创新能力和技术进步的速度；（7）与评估实施知识产权的竞争影响相关的其他因素。AIPLA支持包括前5点因素，但建议取消第6和第7点因素。因为该两点是预定和假设的，其可能将不可预测性和推断性内容带入分析中。

Question 15. What is your opinion as to demands of reverse licensing and grant back by licensors? Under what circumstances do you think that reverse licensing and grant back demands may affect innovation and competition?

AIPLA respectfully submits that reverse licensing and grant back demands should be considered unlawful only where it is established by objective evidence that they cause actual anticompetitive harm in a properly defined relevant market, and that such harm outweighs any procompetitive effect.

AIPLA 认为反向许可和回授需求只有在客观证据证明该行为在经恰当定义的相关市场中造成实际的反竞争损害，且该损害胜于任何促竞争效果时才应该被视为非法。

Licensing back is a highly procompetitive practice in various respects. First, it encourages the licensor to authorize others to practice its invention(s) and compete in the patented space. Second, it enables the licensor to practice improvements made by the licensee who has access to the underlying inventions. Third, where the license back is nonexclusive, the licensee and the consumer can benefit from further licensing and competition.

反向许可在很多方面都是一种高度促进竞争的行为。首先，其鼓励许可人授权他人实施其发明并在已专利领域参与竞争。第二，这使得许可人能够实施获得基础发明的被许可人所做出的改良。第三，反向许可是非排他性时，被许可人和消费者可以从进一步的许可和竞争中受益。

Subject to agreed upon contractual limitations, the licensor and the licensee should be free to negotiate the scope of the license and the license back of patents. These scopes may be adjusted to address the needs of the parties and may be a factor in assessing royalties and consideration. Without the license back, the licensor could be foreclosed from making and selling the improved product, adversely impacting it as a competitor. Where the license back is nonexclusive, the enabled licensee still has incentives to innovate. Artificially imposing restrictions on the negotiation can adversely impact licensing and competition.

基于认可合同义务，许可人和被许可人应该可以自由商议专利许可和反许可的范围。这些范围可能会有所调整以解决参与方的需求，并且其可能是评定许可费和条件的考虑因素。如果没有反向许可，许可人可能被排除制造和销售改良产品的权利，对其作为竞争者造成负面影响。反向许可是非排他性时，具备能力的被许可人仍然具备创新动力。人为地对转让实施限制会对许可和竞争产生负面影响。

Question 16. How to evaluate the legal effect of FRAND licensing commitment made by standard essential patent holders? What is the relationship between the commitment and anti-monopoly regulations? How should the guideline improve such systems?

Promises to disclose patents or to license on FRAND terms are enforceable under contract law, which in turn looks to the intent of the parties. That intent generally reflects the necessary balance between (1) the innovators' incentives to invest in R&D and contribute to standards development and (2) the implementers' access to technologies under reasonable terms. A FRAND commitment generally is enforceable by those who wish to implement the standard and secure a license to the patented technology, as third-party beneficiaries to the agreements between an SEP holder and the relevant SSOs. Certainly, nothing in the FRAND commitment imposes a substantive limit on royalties or requires that they be calculated in any particular way, provided they are "reasonable."

根据合同法，承诺依照公平、合理、非歧视原则（FRAND）公开或许可专利是可执行的，其相应依照涉及方的目的。该目的通常反映了以下两方面之间的必要平衡：（1）创新者投资 R&D 和对标准发展作出贡献的动机；以及（2）在合理条款下实施者的技术获取。通常情况下，通过希望实施标准并且确保获得专利权的技术的被许可者，其作为标准必要专

利所有人和相关标准化组织之间协定的第三方受益人，公平、合理、非歧视原则承诺是可被执行的。当然，公平、合理、非歧视原则承诺中没有对许可费强加实质性限制的内容或者要求许可费应以任何一种特定方式计算（前提是许可费“合理”）。

What is the relationship between the commitment and anti-monopoly regulations? How should the guideline improve such systems?

The traditional SSO approach of leaving the definition of FRAND terms to bilateral negotiations generally has been successful. Thousands of FRAND license agreements have been reached through such a process. The failure to consummate a FRAND license as a result of a commercial dispute between a licensor and licensee should not rise to the level of an unfair trade practice issue in every case. To invoke competition law as a way to resolve disputes in this context without first determining if contract remedies are unavailable or inadequate could disrupt the balance of interests that standards agreements attempt to strike.

传统的把定义公平、合理、非歧视原则条款交给双边谈判的标准化组织方法通常一直是成功有效的。数千公平、合理、非歧视原则许可协定通过该程序已经得以达成。由于许可人和被许可人之间的商业纠纷未能达成 FRAND 许可不应该在每一个案例中上升至不平等贸易实务问题的层面。不首先确定契约救济制度是否可行或是否恰当就借助竞争法作为上述情况下解决纠纷的途径，可能破坏标准协定致力于达成的利益平衡。

Question 17. How to determine whether IPR holders seeking injunction is justified? Under what circumstances such act of seeking injunction constitute abuse of dominant market position? Do you think whether it is necessary to impose restrictions on the applications for injunctive relief of standard essential patent holders? What conditions should be set? Please briefly state the reasons.

There may be circumstances in which injunctive relief should remain available, as where the patentee, for example, has offered a FRAND rate and the licensee has refused. Of course, the patentee will not necessarily be entitled to injunctive relief in all situations, and a court should consider questions of equity, such as whether the patentee has honored its representations.

可能存在可获得禁令救济应的情况，例如当专利权人提供了公平、合理、非歧视比率并且被许可人拒绝。当然，专利权人不会在所有情况下都能够得到禁令救济，并且法院应该考虑到公平问题，例如专利权人是否自重。

However, injunctive relief might also be appropriate where an infringer effectively refuses to negotiate in good faith, or takes unreasonable positions, or prolongs negotiations for an unreasonably long time while other licensees are paying FRAND royalties. For example, if the cost of a license is not what an IPR user decides he wants to pay, the IPR user may simply use the technology without paying and then later allege a FRAND violation by the IPR holder.

然而，在当其他被许可人缴纳公平、合理、非歧视原则许可费时而侵权者实际上拒绝诚心谈判，或采取不合理立场，或不合理地长时间拖延谈判时，禁令救济可能也是恰当的。例如，许可花费不是知识产权使用人决定的理想数额，则该知识产权使用人可以使用技术而不进行支付，并且随后指称知识产权所有人违反了公平、合理、非歧视原则。

Do you think whether it is necessary to impose restrictions on the applications for injunctive relief of standard essential patent holders? What conditions should be set? Please briefly state the reasons.

It would be against good public policy to deny patent holders the full range of enforcement options provided by the patent law of the relevant jurisdiction. Moreover, the availability of injunctive relief is a matter of discretion for the tribunal hearing a complaint, and such discretion should accommodate the concerns of unfair competition.

否定相关地区的专利法赋予专利所有人全面的执行选择违背良好的公共政策。而且，是否颁发禁令救济对处理投诉的法庭听证来说是自行判断的，且该判断应该包括对于不公平竞争的顾虑。

Question 18. What is your opinion about the injunction rules as set by the European Court of Justice in Huawei v. ZTE case regarding SEPs? What would be your suggestions and advice to improve such rules?

Although a FRAND commitment is a representation of an SEP holder's willingness to license its technology to willing licensees, it is not a blanket waiver of the right to seek injunctive relief. In *Huawei v. ZTE*, the European Court of Justice ("*ECJ*") confirmed the importance of that relief and set guidelines to determine when a SEP holder is able to seek an injunction against an unwilling licensee. The ECJ's decision reiterates that enforcement of Essential Patents can be considered an abuse of market dominance in specified circumstances, and AIPLA also appreciates the balance the ECJ was attempting to achieve between the exercise of the statutory right to exclude by the SEP holder with the special nature of Essential Patents that may trigger abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union.

尽管公平、合理、非歧视原则是标准必要专利所有人表达将其技术许可给自愿的被许可人的意愿，但这并不是对寻求禁令救济的权利的全面豁免。在华为与中兴的案件中，欧洲法院（ECJ）确认了这种救济的重要性并且制定了指导方针以确定何时标准必要专利所有人能够寻求禁令打击非自愿的被许可人。欧洲法院的决定重申了必要专利的执行可以被认为是特定环境下市场支配的滥用，且 AIPLA 认可欧洲法院试图实现的标准必要专利所有人法定排他权利的实施平衡，该实施带有必要专利的特性，此特性可能引发《欧盟运行条约》第 102 条中的支配位置滥用。

Question 19. What special considerations do you think should be considered in the cases of merger review where IPR issues are involved? What are effective remedies?

AIPLA respectfully submits that failing to qualify for a safe harbor in no way implies or presumes that an arrangement is likely to be anticompetitive. See AIPLA's comments to Questions 5 and 6 above.

AIPLA认为不能以未能达到合格的安全港协议为由，强调或者假定了协议可能是反竞争的。参见AIPLA对于问题5和6的上述评论。

Question 20. Some companies acquire IPR through alliances or similar forms of joint-financing, and then assert rights against other companies. Do you think whether such activities will have impact on market competition? Under what circumstances such activities may harm fair competition.

To date, U.S. Antitrust Agencies have not brought any enforcement actions in this area, although they have examined a few cases.[10] The Agencies have stated that patent transfer transactions "'highlight the complex intersection of intellectual property rights and antitrust law and the need to determine the correct balance between the rightful exercise of patent rights and a patent holder's incentive and ability to harm competition through the anticompetitive use of those rights.' The [U.S. Antitrust] Agencies continue to monitor how competitors are transferring ownership of their patent rights, particularly when the patents at issue are F/RAND-encumbered and could affect the implementation of a standard."[11]

直到今天为止，美国的反垄断机构没有在此范围内进行任何执法行动，尽管他们审查过一些案子。[10]【STATEMENT OF THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION ON ITS DECISION TO CLOSE ITS INVESTIGATION OF GOOGLE INC.'S ACQUISITION OF MOTOROLA MOBILITY HOLDINGS INC., THE ACQUISITIONS BY APPLE INC., MICROSOFT CORP. AND RESEARCH IN MOTION LTD. (RIM) OF CERTAIN NORTEL NETWORKS CORPORATION PATENTS, AND THE ACQUISITION BY APPLE OF CERTAIN NOVELL INC. PATENTS (February 13, 2012) , 从 http://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations可得到】这些机构声称专利转移交易"强调知识产权和反垄断法的复杂交叉，和确定合法执行专利权、和专利权人通过反竞争使用该等权利去伤害竞争的诱因和能力之间取得合适平衡的需要"。【美国反垄断】机构继续监控竞争对手之间如何转移他们专利权的拥有权，特别是有关专利是妨碍

[10] See STATEMENT OF THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION ON ITS DECISION TO CLOSE ITS INVESTIGATION OF GOOGLE INC.'S ACQUISITION OF MOTOROLA MOBILITY HOLDINGS INC., THE ACQUISITIONS BY APPLE INC., MICROSOFT CORP. AND RESEARCH IN MOTION LTD. (RIM) OF CERTAIN NORTEL NETWORKS CORPORATION PATENTS, AND THE ACQUISITION BY APPLE OF CERTAIN NOVELL INC. PATENTS (February 13, 2012) *available at* http://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations.

[11] See INTELLECTUAL PROPERTY AND STANDARD SETTING -- Note by the United States – submitted to an OECD December 2014 Roundtable on "Intellectual Property and Licensing").

公平、合理、非歧视原则和会影响标准的实施。【INTELLECTUAL PROPERTY AND STANDARD SETTING -- Note by the United States - submitted to an OECD December 2014 Roundtable on "Intellectual Property and Licensing")】[11]

Patentees' right to transfer patents is protected under the WTO TRIPS agreement, to which the U.S., China and most of the world's jurisdictions are signatories.[12]

专利权人转让专利权的权力得到WTO TRIPS协议的保护，其中美国、中国和大部分国家都是签署国。【WTO TRIPs 协议, § 28.2】[12]

Question 21. What do you think of the issue of effectively regulating the competition problems that arise from NPE standard essential patents holders.

Many NPEs, such as universities, research entities, and individual inventors, serve a necessary and important role in [the U.S.] economy by focusing on the development of new innovations and improvements to technology rather than on manufacturing or selling products that embody their innovations. Other NPEs may seek to abuse the patent system. NPEs should be evaluated based on their conduct and the facts of the particular matter.

众多 NPE, 例如大学、研究机构、和个人发明家，通过集中新的创新的发展和技术的改进而不是生产或销售包含他们创新的产品，在【美国】经济中扮演必要和重要的角色。其他 NPE 可能选择滥用专利系统。NPE 应该基于他们的操行和个别事件的事实来评估。

The status of an SEP-holder as an NPE or operating company should not play a role in analyzing competition issues that may arise from a dispute over licensing an SEP. Rather, courts or regulators should center any competition analysis on the specific conduct at issue, including any relevant actions by either the licensor or licensee(s) involved in the dispute. Evaluating conduct, rather than status, will allow for a rigorous analysis of competition issues, one that properly focuses on whether there is any adverse impact of the conduct at issue on competition.

在分析由于 SEP 许可的带来的争议的竞争问题时，SEP 拥有者是 NPE 或运作公司的身份不应该扮演任何角色。反而，法院或监管者应该集中在有关的特定操行上的任何竞争分析，包括任何牵涉在有关争议的许可人和被许可人（们）的有关行为。评估操行而不是身份可容许竞争问题的缜密分析，而该分析合适地聚焦在有关操行是否对竞争带来任何不利影响。

Question 22. Under what circumstances patent pools may cause potential impact on market competition? How to regulate?

[12] See WTO TRIPs agreement, § 28.2: "Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts."

AIPLA notes that the U.S Antitrust Agencies addressed patent pools at length in a 2007 report. In analyzing patent pools under the rule of reason, the Agencies concluded that "combining complementary patents within a pool is generally procompetitive" and that "including substitute patents in a pool does not make the pool presumptively anticompetitive; [but rather] competitive effects will be ascertained on a case-by-case basis.[13] US Antitrust Agencies analyze the competitive significance of a pool's licensing terms on a case-by-case basis considering both procompetitive benefits and anticompetitive effects. The Agencies will not generally assess the reasonableness of royalties set by a pool. The focus of the Agencies' analysis is on the pool's formation and whether its structure would likely enable pool participants to impair competition. AIPLA recommends that the Guidelines should take a similar approach.

AIPLA注意到美国反垄断机构在 2007 年的一份报告中详尽地探讨专利池问题。通过在合理规则下分析专利池，该机构总结“在专利池中结合互补性专利通常有助于竞争”并且“将替代专利包括在专利池内不会令专利池假定地反竞争；（相反地）对竞争的影响应依据具体情况来确定。”[13] 美国反垄断机构在视具体案例情况分析专利池许可条款的竞争意义时，同时考虑促进竞争的益处和反竞争产生的影响。该机构通常不会评估专利池所设定的许可费的合理性。该机构分析焦点是专利池的形成以及其结构是否有可能使得专利池参与者削弱竞争。AIPLA建议《指导原则》应该采取相似方式。

Question 23. What do you think of the issues related to NPE SEP holder in the antitrust practice? China is a nation where significant use of IPR happens. What to do with the anti-competition problems caused by NPE?

As Philip S. Johnson explained in his written testimony to the United States House Subcommittee on Courts, Intellectual Property, and the Internet:

如 Philip S. Johnson 在其致美国众议院法院、知识产权以及互联网小组委员会的书面证明中所说明的：

> For some NPE’s, the decision not to pursue manufacturing and marketing is a matter of choice. They may, for example, prefer to concentrate their energies on originating inventions rather than in developing them, leaving the commercialization to licensees who are better positioned to manufacture and market them. Or they may sell or license their patents to venture capitalists who will attend to raising the capital needed for commercialization.
>
> 对于一些非实施主体（NPE），不进行生产和出售的决定是其选择。例如，其可能更偏向集中于原创发明而不是发展这些发明，将商业化交给更适合做

[13] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), Chapter III, pp. 57-86, available at https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf

生产和出售的被许可人。或者这些主体可能将其专利出售或许可给将筹集商业化所需资本的投机资本家。

For others, superseding circumstances may effectively prevent or limit the inventors from commercializing their inventions. For example, if the invention is an improvement on existing patented technology, the owner of the original patent rights on that technology may be the only licensee for the improvement, at least until the original patents expire. Or should an existing unlicensed competitor copy and begin marketing the inventor's invention before the inventor is able to, the inventor's ability to later market that invention may be substantially impaired. In those circumstances, the only recourse available to the inventor may be to bring suit against the infringing company to abate the infringement and/or to recover fair compensation for the unlicensed use of the invention. By the same token, when an inventor's invention relates to an improvement useful in an industry with high barriers to initial entry and/or one in which the market is shared by just a few well entrenched competitors, the only practical way for an inventor to commercialize his invention may be to license one or more of those competitors[14]

对于其他人来说，情况转变实际上可能阻碍或限制发明人对其发明进行商业化。例如，如果该发明是现有专利技术的改良，至少直至原始专利逾期，该技术的原始专利权所有人可能是该改良的唯一被许可人。或者如果现有未被许可的竞争者仿照或在发明人能够出售其发明之前出售该发明人的发明，发明人日后出售该发明的能力可能实质上受到损害。在这些情况下，发明人唯一可以依靠的可能就是起诉侵权公司以打击侵权行为并且/或者获得对于未经许可使用该发明的合理补偿。同样，当发明人的发明涉及一些初始进入门槛高的产业以及/或只有少数实力竞争者分享市场的产业中的有用改良时，发明人唯一可行的将其发明商业化的方法可能就是许可其中一个或多个竞争者。[14]

A FRAND commitment by an NPE is basically a commercial agreement among willing parties to make licenses available on specified terms. However, the failure to consummate a FRAND license as a result of a commercial dispute between a licensor and licensee should not necessarily rise to the level of an anti-monopoly issue by that fact alone. Indeed, the mere threat of an anti-monopoly charge could provide the licensee with substantial unwarranted negotiating leverage. Such a threat might discourage innovation or development in standardized technologies at the outset by making it difficult for innovators to negotiate in the future with potential licensees or infringers.

非实施主体所作出的公平、合理、非歧视原则承诺基本上是自愿参与者之间的基于明确条款的商业协议。然而，由于许可人和被许可人之间的商业纠纷导致达成 FRAND 许可失败，在只基于此事实的情况下，不应该上升至反垄断问题层面。实际上，反垄断控诉的唯一威

[14] AIPLA Comments to FTC-DOJ on PAEs, at 4 (5 Apr 2013).

胁可能是为被许可人提供实质上没有根据的谈判筹码。这一威胁使得创新人士未来很难与潜在的被许可人或侵权人谈判，从而可能阻碍标准化技术的创新或发展。

Any competition law analysis made in connection with a claim of improper assertion of a SEP should rely on objective evidence and economic analysis. To act otherwise could disrupt the careful balance of interests that make up the standard-setting environment.

通常，公平、合理、非歧视原则纠纷被更恰当地作为当事人之间的合同纠纷处理，只有在很少情况下竞争法可介入。

In general, FRAND disputes are more properly treated as contract disputes between the parties to which the competition laws should rarely apply.

与标准必要专利的不正当主张要求有关的任何竞争法分析都应该取决于客观证据和经济分析。反向而行可能破坏构成标准设置环境的利益平衡。

AIPLA agrees that it is appropriate to hold a NPE liable if it issues warning letters with respect to expired or voided IPR, provided that it is proven that the conduct causes actual harm to competition in a relevant market. Likewise, it is appropriate to hold an NPE liable if it issues warning letters or initiates legal proceedings without an objectively reasonable basis to assert its IPR. It should be recognized that where equitable factors are applied in considering injunctive relief, as in the U.S. *eBay* case, it is difficult and rare for NPEs to be awarded injunctions, which reduces NPE leverage and can diminish competition issues.

AIPLA 认同如果发出了关于逾期或无效知识产权的警告函，只要证明了该行为对相关市场中的竞争造成了实质损害，则 NPE 应该负有责任。同样地，如果发出了警告函或在不具备客观合理基础的情况下启动法律程序以主张其知识产权，则非实施主体也应该负有责任。应当意识到，当正当因素成为考虑禁令救济时的参考因素时，例如在美国 eBay 案件中，很难也很少将禁令判给非实施主体，这一行为削弱了非实施主体优势并且会减少竞争。

Again, AIPLA appreciates the opportunity to provide these comments in response to the Questionnaire on patents and standards. Please contact us if you would like us to provide additional information on any issues discussed above.

再一次，对于可以有机会就专利与标准问卷提供上述意见，AIPLA 心存感激。如需我们就以上讨论问题提供任何进一步的资料，请随时联系我们

Sincerely,

Sharon A. Israel
President
American Intellectual Property Law Association