

April 21, 2017

Mr. Qiu Yang
Office of the Anti-Monopoly Commission
Of the State Council of the People's Republic of China
No. 2 East Chang'an Avenue, Beijing
P.R. China
100731

By Email to: qiuyang@mofcom.gov.cn

RE: Comments on the People's Republic of China State Council's Guidelines for Anti-Monopoly Enforcement Against Abuse of Intellectual Property Rights

Dear Mr. Qiu:

ACT | The App Association (the App Association) appreciates the opportunity to provide input to the People's Republic of China State Council on its the *Guidelines for Anti-Monopoly Enforcement Against Abuse of Intellectual Property Rights* (Draft Guidelines).

The App Association represents more than 5,000 small- and medium-sized application developers and connected device companies from the People's Republic of China and around the globe. Organization members leverage the connectivity of smart devices to create innovative solutions that make our lives better. The App Association is the leading industry resource on market strategy, regulated industries, privacy, and security.

We are committed to preserving and promoting innovation generally, and accelerating the growth of technology markets through robust standards development and a balanced intellectual property system. To innovate and compete, members of the App Association rely on patents, trademarks, copyrights, and trade secrets. The App Association supports the State Council's work on these Draft Guidelines which seek to combine the efforts of the National Development and Reform Commission of the State Council (NDRC); State Intellectual Property Office (SIPO); and State Administration for Industry and Commerce (SAIC). The harmonization of Chinese policies regarding the abuse of intellectual property will provide needed certainty, contributing to business continuity.

While the App Association fully appreciates the breadth of intellectual property addressed in the Draft Guidelines, we submit these views to address standard essential patents (SEPs), specifically those that are subject to commitments to license on fair, reasonable, and non-discriminatory (FRAND) terms. Many of the App Association's members include innovators who are both SEP holders and standards implementers that are the victims of abusive licensing practices by other SEP holders. As the mobile economy moves toward increasing interconnectivity—a phenomenon more commonly described as the “internet of things” (IoT), it becomes imperative that governments develop a strong patent system to advance the extraordinary growth this economic space experiences.

These small businesses, including many software companies located and doing business in China, do not have the resources to effectively deal with abusive SEP licensing practices and are forced to accept excessive royalty demands made by such SEP holders. In the worst case, if they cannot afford the expensive SEP licenses, they may have to change their product market or abandon their business plans altogether. It follows that SEP licensing abuses pose a major threat to the competitiveness of any Chinese industry that relies on standards in its innovation cycle.

The convergence of computing and communication technologies will continue as a diverse array of industries come together to build IoT. Technological standards make the IoT's seamless interconnectivity possible, like WiFi, LTE, Bluetooth, etc. Often, several companies will collaborate to develop these standards by contributing their patented technologies to these efforts. These technological standards, which are built on contributions through an open and consensus-based process, bring immense value to consumers by promoting interoperability and concurrently enabling healthy competition between innovators.

When an innovator gives its patented technology to a standard, this can represent a clear path to being rewarded in the form of royalties from a market that likely would not have existed without the standard being widely adopted. To balance this potential with the need for access to the patents that underlie the standard, many standard development organizations (SDOs) require holders of patents on standardized technologies to license their patents on FRAND terms. FRAND commitments prevent the owners of patents that must be used in order to implement the standard (known as SEPs) from exploiting the unearned market power that they would otherwise gain as a consequence of the broad adoption of a standard. Once patented technologies are incorporated into standards, manufacturers are compelled to use them to maintain product compatibility. In exchange for making a voluntary FRAND commitment with an SDO, SEP holders gain the ability to obtain reasonable royalties from a large number of standard implementers who might not have existed absent the standard. Without the constraint of a FRAND commitment, SEP holders would have the same power as a monopolist that faces no competition.

Unfortunately, a number of owners of FRAND-committed SEPs are flagrantly abusing their unique position by reneging on those promises with unfair, unreasonable, or discriminatory licensing practices. These practices, which have been closely examined by antitrust and other regulators in many jurisdictions, not only threaten healthy competition and unbalance the patent system, but also impact the viability of new markets like the nascent IoT ecosystem. The negative impacts on small businesses are only amplified because they can neither afford years of litigation to fight for reasonable royalties nor risk facing an injunction if they refuse a license that is not FRAND compliant.

Patent policies developed by SDOs, influenced by key government actors such as the People's Republic of China, do and will directly impact the way every Chinese consumer works, lives, and plays for decades to come. The importance of these issues to app developers and entire industries is why the App Association has launched the All Things FRAND (<http://www.allthingsfrand.com/>) project. The App Association urges the State Council to utilize All Things FRAND as a resource to better understand how regulators and courts around the world are defining FRAND. We believe any intellectual property rights policies requiring SEP owners to make FRAND commitments should include the following to prevent patent “hold up” and anti-competitive conduct:¹

- Fair and Reasonable to All – A holder of a SEP subject to a FRAND commitment must license such SEP on FRAND terms to all companies, organizations, and individuals who implement or wish to implement the standard.
- Injunctions Available Only in Limited Circumstances – Injunctions and other exclusionary remedies should not be sought by SEP holders or allowed except in limited circumstances. The implementer or licensee is always entitled to assert claims and defences.
- FRAND Promise Extends if Transferred – If a FRAND-encumbered SEP is transferred, the FRAND commitments follow the SEP in that and all subsequent transfers.
- No Forced Licensing – While some licensees may wish to get broader licenses, the patent holder should not require implementers to take or grant licenses to a FRAND-encumbered SEP that is invalid, unenforceable, or not infringed, or a patent that is not essential to the standard.
- FRAND Royalties – A reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on several factors, including the value of the actual patented invention apart from its inclusion in the standard, and cannot be assessed in a vacuum that ignores the portion in which the SEP is substantially practiced or royalty rates from other SEPs required to implement the standard.

¹ See <http://www.allthingsfrand.com/about/about-allthingsfrand.com/>.

We congratulate the State Council in releasing its Draft Guidelines for public comment. Based on the above, the App Association provides the following input on select Articles in the Draft Guidelines:

Article 10 (Standard Setting)

The App Association agrees with the State Council that open standard setting promotes efficiency, interoperability, and competition; as well as reduces cost while improving quality. However, as we believe the State Council also appreciates, standard setting can also be leveraged by bad actors to engage in anti-competitive behavior, and we urge the State Council to resolve ambiguities in its proposed factors to be used in determining whether competitive undertakings participating in standard development may exclude and restrict competition.

Regarding the first proposed factor (“whether or not to exclude other specific undertakings”), we urge the State Council to ensure that the legitimate operations of standards bodies are not impeded. Both those within and outside of China, standards bodies utilize a reasonable gating method to assemble parties that develop a proposed technical standard in advance of it being provided in draft form to the public for input.² For example, the European Commission addressed this concept as far back as 1986 in the *X/Open* decision, which concluded that “[t]he way in which access to the Group is limited is indispensable to the attainment of the positive objectives of the Group.”³

Regarding the second proposed factor (“whether or not to exclude the related program of a particular undertaking”), we again urge the State Council to ensure that the legitimate operations of standards bodies, both those within and outside of China, are not impeded. Similar to the way that standards bodies will take reasonable steps to define *who* may participate in the development of a standards, these standards bodies must have the ability to limit *what* must be considered in the standards development process. The consideration of technical contributions in the standard setting process is complex and includes the consideration of including patented technology that may become essential to the implementation of the standard (some single standards contain thousands of patents). It is not feasible to require a SDO to consider every proposal submitted to it by third parties or to cast such decisions as anti-competitive in nature. Other competition authorities have acknowledged this concept in key decisions.⁴ In addition, the subject matter of the standard may be commented on by the public during that phase of the standard development process.

² See, e.g., The IEEE-SA Public Review Process, available at <https://standards.ieee.org/develop/publicreview.html> (last visited Apr. 20, 2017).

³ OJ [1987] L 35/36, ¶ 45.

⁴ See, e.g., Case No. COMP/M.6381 - *Google/Motorola Mobility*, 13 February 2012, § 54 (“*The very purpose of choosing a standard is that the industry coordinates on a specific technological solution at the expense of alternative technologies.*”).

We therefore urge the State Council to appropriately refine both the first and second factors in Article 10 to state that the exclusions described in each factor, respectively, shall be considered when the exclusion is exercised for anti-competitive reasons. In the alternative, the State Council could combine these two factors to state that consideration be given to whether the standard development process excluded a type of stakeholder that results in harm to consumers.

Article 13 (Affirmation of intellectual property rights and dominant market position)

The App Association applauds the State Council for appropriately recognizing the important distinctions between patents and SEPs, particularly in the context of a dominant market position. We believe that the factors proposed to be used in determining whether an undertaking with a SEP has a dominant market position provide a framework for a reasoned evaluation. We agree that an analysis under these factors will allow for the proper distinction between a SEP contained in a widely-adopted standard (resulting in a finding of market dominance) as opposed to a SEP in a standard that is not (in which case market dominance may or may not exist). Further, we support Article 13's SEP factors including consideration of the interoperability with earlier versions of a standard, a key aspect of compatibility with older products, as a new standard's adoption may or may not affect existing market dominance by an SEP holder of a previous version of the standard.

Article 14 (Licensing intellectual property rights at unfairly high price)

The App Association appreciates the State Council's addressing unfairly high licensing prices in the context of abuse of a dominant market position, and we do not hold a view as to the competition implications of demanding unfairly high prices in a licensing negotiation outside of the SEP-FRAND context. However, we believe that the factors proposed in Article 14 will be essential to evaluating dominant market position in instances where a patent holder has voluntarily declared their patent a SEP and provided a FRAND commitment. In the SEP-FRAND licensing scenario, demands for unfairly high prices are direct violations of earlier-made voluntary commitments, and carry significant competition and consumer harm impacts. Therefore, the App Association urges the State Council to revise the proposed Article 14 to apply to SEPs only (and not ordinary patents). Not only would this revision to the proposed Article 14 be consistent with 2015's *Opinions on Accelerating the Process of Building an IP Strong Nation under New Circumstances*, in which the State Council committed to, in addressing the regulation of abusive IP conduct, "[p]erfect the FRAND licensing policy for SEPs and applicable rules for cease of infringement;"⁵ but also with the approach taken by competition regulators including the European Commission and the U.S. Federal Trade Commission.

⁵ http://www.gov.cn/zhengce/content/2015-12/22/content_10468.htm.

Article 15 (Refusals to License)

The App Association appreciates the State Council's inclusion of the refusal to license in the Guidelines. For ordinary patents, we support the concept that patent owners may refuse to license their patents for legitimate business reasons, and urge the State Council to ensure that Article 15 does not create a *de facto* compulsory licensing regime for all patents.

However, in the context of SEPs for which the holder has voluntarily committed to license on FRAND terms, the refusal to license to a licensee willing to pay a FRAND rate, whether explicit or indirectly through a collection of tactics that in total translate to a refusal to license, represents *per se* anti-competitive behaviour. By ensuring that Article 15 reflects this view (through, for example, retaining the first suggested factor ["The commitment made by the undertaking to license IPRs"]), the State Council will align its approach to that of other major competition regulators including those in the European Union and the United States.

Article 16 (Tying involving intellectual property rights)

The App Association supports Article 16's application to evaluating dominant market position of SEP holders. In the context for FRAND-encumbered SEPs, tying may be a tactic used by SEP holders with a dominant market position to, in effect, refuse to license to willing implementers in violation of the FRAND commitment.

Article 17 (Additional unreasonable transaction conditions involving intellectual property rights)

Article 17 lists a variety of means by which SEP holders have abused the FRAND obligations voluntarily made during the standardization process. The App Association supports the factors proposed in the evaluation of dominant market positions in the context of SEP holders. Our views on Article 17 are limited to the context of FRAND-encumbered SEPs.

Article 18 (Discriminatory Treatment Involving IPR)

The App Association believes that the factors in proposed Article 18 are all relevant to an examination of whether a dominant market position is being abused in the context of FRAND-encumbered SEPs. Article 18's application to ordinary (in other words, not standards-essential) patents may impede legitimate and pro-competitive decisions made by patent holders. Moreover, this would represent a fragmented approach to that taken by other leading competition regulators. Therefore, the App Association urges the State Council to limit Article 18's application to the FRAND-encumbered SEP context.

Article 25 (Patent pool)

The App Association agrees that patent pools have the potential to reduce transaction costs and increase accessibility to patents. We note that, in the context of FRAND-encumbered SEPs, patent pools may be a means through which licensees access SEPs on FRAND terms, but the fact that a SEP is available via a patent pool should not alter the FRAND commitment made on an SEP in any way.

Article 26 (Injunction)

The App Association's views on the appropriateness of seeking an injunction for patent infringement is limited to the FRAND-encumbered SEP context. In the FRAND-encumbered SEP licensing scenario, the systematic seeking of injunctions against a licensee willing to pay a FRAND rate represents a violation of the FRAND obligation on the SEP holder's part except for a very limited set of circumstances. We urge the State Council to ensure that it aligns its approach in the application of Article 26 with our statement above, which are also consistent with other leading competition regulators in the European Union and the United States. Therefore, we urge that Article 26's scope be restricted to FRAND-encumbered SEPs.

In conclusion, the App Association urges the State Council to consider its views expressed above regarding the importance of FRAND obligations and their adherence generally, and our views on specific proposed Articles.

We thank the State Council in advance for its consideration of our concerns.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive, flowing style.

Morgan Reed
President
ACT | The App Association
1401 K St NW (Ste 501)
Washington, DC 20005
United States