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Re: Public Comments to ATR-LPS-IP Guidelines

We are pleased to see that the updated IP Licensing Guidelines confirm the basic concept and the three principles as mentioned below to remain in place as the basis going forward.

The Basic Concept

These updated guidelines reaffirm agencies' view that U.S. antitrust law leaves licensing decisions to IP owners, licensees, private negotiations and market forces unless there is evidence that the arrangement likely harms competition.

The agencies also added language to reinforce their longstanding view that "the antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation."

The Three Principles

In the agencies' view, the IP Licensing Guidelines remain soundly grounded, as a matter of antitrust law and economics, in three basic principles:

- * The agencies apply the same antitrust analysis to conduct involving intellectual property as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right.
- * The agencies do not presume that intellectual property creates market power in the antitrust context.
- * The agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive.

In connection with the SEPs (standard essential patents), DOJ Business Review Letters on the representative pool licensing programs after 1995 were cited to reaffirm the view of DOJ for the pool licensing activities of the SEPs. On the other hand, the updated IP Licensing Guidelines did not take up the recent debate in and among the standard setting bodies, the regulators and courts in various countries on the issue of the patent owners' FRAND (Fair, Reasonable and Non-discriminatory Terms and Conditions)

declarations and how they relate to IP and Antitrust laws. Panasonic recognizes and supports that this is a confirmation of the agencies' notion that the agencies shall consider and decide the FRAND issue with Rule of Reason for each dispute by applying the basic concept and the three principles, as they do with any other intellectual property rights.

There is a debate to restrict the injunctive reliefs for the FRAND-declared SEPs. However, depending on the various implementations of these FRAND-declared SEPs in the relevant markets and the extent to which they are implemented, the impact of these patents to the market competition may vary such that market dominance is not always accompanied with the exercise of SEPs. In addition, it is required to consider the confusion to the market and the disincentives to create innovations by allowing the infringers a free-hand.

In light of that, it is so desired that the SEPs are considered and decided with each market condition and dispute using the basic concept and the three principles in accordance with IP Licensing Guidelines, and the fact that the FRAND issue was not taken up in the IP Licensing Guidelines in itself showed a notion of agencies on how they see the FRAND issue, we express our recognition and respect to the decision making based on the basic concept and the three principles.

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