

'Modest' changes to IP guidelines worth considering, Baer says

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While the country's two-decade-old guidance on intellectual property and antitrust enforcement might need some minor amendments to reflect significant changes in thinking over the past 20 years, there is little motivation to rewrite the guidelines entirely, the head of the Department of Justice's antitrust division said yesterday.

Bill Baer's predecessors at the antitrust division issued the joint guidelines along with the Federal Trade Commission in 1995, well before patent battles among the technology companies and drug makers defined the intersection of antitrust and IP law. Now, Baer says he would consider tweaks to those guidelines in light of current changes to the law and jurisprudence.

"There are some modest modifications that are probably worth talking about between the commission and the Justice Department," Baer said during a discussion on the guidelines yesterday.

Baer suggested that there have been some developments to technical areas of IP law, including statutory changes and Supreme Court precedent, that it is probably worthwhile to consider including in any update of the guidelines.

But other than those marginal areas, Baer said, the problem with undertaking a fully fledged redrafting of the IP guidance is much the same as with issuing guidance about vertical mergers: there have been too few cases that could serve as a basis for specific guidance that businesses and their lawyers would find useful.

"It really would be too general at this stage in our learning," Baer said. "We really don't have a lot of court precedent to refer to."

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But outside of formal guidance, the antitrust division does use speeches, policy papers and other informal guidance to help practitioners judge where the enforcer stands on issues related to antitrust and IP, he said.

FTC chair Edith Ramirez, speaking alongside Baer at the American Bar Association event, said that in her view, the 1995 guidelines are working “incredibly well” at outlining the core principles of the agencies’ IP and antitrust enforcement policies.

For more modern issues not addressed in the guidelines, the FTC has given speeches and, in the area of standard-essential patent enforcement, brought two major cases that have helped to outline the FTC’s approach to the issues, Ramirez said.

Those cases, one against Google and its Motorola Mobility subsidiary and the other against refrigeration company Bosch, both resulted in consent decrees and agency statements outlining the FTC concern about the companies’ use of their essential patents.

The topic of potential changes to the IP guidelines was raised by Alden Abbott, a former FTC official who now works at the Heritage Foundation and mobile phone maker Research in Motion.

Crowell & Moring partner and former FTC official Lisa Kimmel moderated the discussion.