COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST LAW, INTELLECTUAL PROPERTY LAW, SCIENCE & TECHNOLOGY LAW, AND INTERNATIONAL LAW ON DRAFT TEMPLATE FOR IPR POLICIES IN INDUSTRY STANDARDS ORGANIZATIONS ISSUED BY THE ELECTRONIC INTELLECTUAL PROPERTY CENTER OF THE MINISTRY OF INDUSTRY AND INFORMATION TECHNOLOGY

January __, 2015

The views stated in this submission are presented only on behalf of the Antitrust Law, Intellectual Property Law, Science & Technology Law, and International Law Sections of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the Association.

The Sections of Antitrust Law, Intellectual Property Law, Science & Technology Law, and International Law of the American Bar Association (ABA) (together, the Sections) welcome the opportunity to comment on the Draft Template for Intellectual Property Rights (IPR) Policies in Industry Standards Organizations (Draft Template) issued by the Electronic Intellectual Property Center (EIPC) of China’s Ministry of Industry and Information Technology (MIIT). The Sections’ comments are based upon the experience and expertise of its members who practice intellectual property law and competition law in the United States, Canada, the European Union, and other jurisdictions around the world.

General Comments

The Sections commend EIPC for its efforts to offer a template for standard-development organization (SDO) Intellectual Property Rights Rules (IPR rules). However, the Sections respectfully submit that these are complicated and highly disputed issues that are best left to individual SDOs and their members to decide. There are many complexities involved in SDO IPR rules, many different views and interests involved, and many different ways that a particular SDO might validly choose to go. Indeed, many of the issues addressed in the Draft Template are still under active discussion and debate among policymakers, SDOs, and market participants around the world.

Issuance of a template by a governmental agency, or an entity sponsored by a governmental agency, may unduly influence private SDOs and their members to adopt policies that might not otherwise gain consensus support within a particular SDO and that may not best address the particular issues of that SDO, its members, and the public. This could occur because the SDO believes failing to adopt the specified policy is not permitted or because failing to adopt the policy could subject the SDO and its members to other legal liabilities.

In the event that EIPC and/or MIIT decide to issue a template, the Sections note that their review of the Draft Template identified many aspects that raised contentious issues on which there is no consensus, as well as a number of areas of technical inconsistency, incompleteness, and lack of clarity. As a result, the Sections strongly urge EIPC and MIIT to exercise caution in determining whether to issue a template and to avoid mandating the use of a specific licensing policy for SDOs based on any template. If EIPC and/or MIIT decide to issue a template, the Sections suggest that they amend the Draft Template to explicitly state that any template is provided for informational purposes only and is only one possible starting point. Without such language (and perhaps even with it), there is a risk that any template endorsed by MIIT, even if only indirectly, may be perceived as government policy. The result could be a de
template, the Sections suggest that they amend the Draft Template to explicitly state that any template is provided for informational purposes only and is only one possible starting point. Without such language (and perhaps even with it), there is a risk that any template endorsed by MIIT, even if only indirectly, may be perceived as government policy. The result could be a de facto “one-size-fits-all” approach to the complex subject of SDO IPR policy, which could dampen the creativity and adaptability of SDOs and make it unnecessarily difficult for SDOs in China to achieve success and thereby to deliver efficiency benefits.

Therefore, if EIPC and/or MIIT issue a template, the Sections urge that the template (1) allow for alternative approaches to the issues addressed, and (2) not conflict with other laws that SDOs and their members may be subject to. The Sections recommend that any template should be accompanied by a discussion of the various factors an SDO should consider when adopting such provisions — for example, the intended goals of each particular provision, under what circumstances the provision would be useful, and under what circumstances the provision may be harmful. Such discussions of IPR policies by SDOs are consistent with best practices in the United States and Europe.

Conclusion

The Sections appreciate the opportunity provided by EIPC to comment on the Draft Template. We would be pleased to respond to any questions EIPC or MIIT may have regarding these comments, or to provide additional comments or information that may be of assistance to EIPC and MIIT.