CPI's Asia Column Presents:

Recent trends in KFTC enforcement activities regarding IPRs

By Kyoung Yeon Kim, Yulchon LLC[1]

July 2017

Korea's antitrust authority has, especially in recent years, come to aggressively regulate the use of intellectual property rights (IPRs). One might guess this to be the case merely based on the fact that the Korea Fair Trade Commission (the "KFTC") has come to be perceived as one of the more aggressive competition authorities in the world, having been very active in enforcing general competition law, overall, throughout approximately the last 40 years.[2] However, in fact, one can clearly perceive this reality if one examines the KFTC's history of rulemaking, guidance, and investigative activities and enforcement actions related to IPRs.

I will first outline some of the major milestones in that history. Then, based on my understanding of past regulatory and enforcement activities, I will try to offer a few observations and questions as a practitioner directly and indirectly experienced in competition-law enforcement by the KFTC in relation to IPRs.

Brief Overview of the KFTC's Past Rulemaking and Enforcement Activities

The Monopoly Regulation and Fair Trade Act (the "MRFTA") has a provision, Article 59, that expressly addresses the application of antitrust law to IPRs. Article 59 currently reads: "This Act shall not apply to any act which is deemed the justifiable exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Protection Act, or the Trademark Act."[3]

More specific regulations intended to limit the abuse of IPRs in Korea were issued by the KFTC in 1990, under the heading "Types and Criteria of Unfair Trade Acts in International Agreements."[4] Licensing agreements between Korean companies and foreign companies were the first target for application of these restrictions. These regulations were issued after a period of increasingly robust foreign direct investment and introduction of foreign technology into Korea during the 1980s and 1990s, and they were intended to protect the rights of Korean companies that, in most cases, entered into licensing agreements in the capacity of a licensee not a licensor. However, ironically, the penalty for violating this regulation was only applicable to companies incorporated and existing in Korea over which the KFTC has jurisdiction. As a result, the victim of unfair terms and conditions in an international licensing agreement was the party subject to sanctions. This led to some degree of controversy over the effectiveness of the regulation, from a practical perspective. But in actuality, the regulation did give Korean companies a basis to insist on rejecting unfair terms and conditions in licensing agreements when negotiating with foreign counterparties, namely that those terms may contravene Korean law (without necessarily focusing on who would be subject to the resulting sanctions).

Later, on April 7, 1997, certain types of conduct involving abuse of IPRs were included in the KFTC's guidelines titled "Types and Criteria of Abuse of a Market-Dominant Position."[5] And specific, more directly targeted guidelines on the exercise of IPRs (the "IP Guidelines") were finally issued in August 2000, applicable only to agreements/trades in Korea.

---

[1] Kyoung Yeon Kim is a partner at Yulchon LLC. The opinions contained herein are Ms. Kim's personal opinions. They do not represent the official view of Yulchon, and they are not based on any particular cases Ms. Kim is involved in. The author wishes to thank Christopher Mandel, foreign counsel at Yulchon LLC for his valuable thoughts, suggestions and editing assistance.

[2] The KFTC was named agency of the year for Asia-Pacific, Middle-East and Africa at the Global Competition Review Awards 2017, having also been chosen in 2016.

[3] Before being amended on December 31, 2004, this provision did not explicitly require the protected act to be a "justifiable" exercise of intellectual-property rights. However, although there are no precedents to refer to prior to that time, it is unlikely that this provision would have been interpreted even then as exempting *all* exercises of IPRs from the reach of antitrust regulation. The Supreme Court has in fact expressed that very position. See Supreme Court decision rendered February 27, 2014, 2012*Du*24498 (*GSK-DongA* case).

[4] Originally issued by the Economy Planning Board on July 18, 1981, and finally repealed in August 2009.

[5] Later repealed and replaced with the KFTC's "Guidelines on the Assessment of Abuse of a Market-Dominant Position" in 2000.

In December 2014, the then existing IP Guidelines were amended with a view to making them more centered on regulating enterprises with market power. These updated IP Guidelines included new SEP-related regulations—such as a definition of SEPs, criteria to determine the illegality of an injunction request by an SEP holder, and specific cases exhibiting an abuse of patent rights by an SEP holder—and also introduced NPE-related regulations.[6] Additional amendments were made in March 2016, to further fine-tune the existing IP Guidelines. This most recent amendment removed "de facto standard" from the definition of standard technology, defined SEPs in terms of FRAND-incumbent patents, and supplemented the existing regulations on unfair refusal to grant a license.

The KFTC's efforts to regulate IPR-related areas have not been limited to rulemaking and administrative guidance. Enforcement has become more active after 2000, and we have seen a series of headline-generating aggressive enforcement actions targeting alleged abuse of IPRs by global IT companies beginning in 2006[7] with Microsoft (February 24, 2006), and continuing with Intel (November 11, 2008) and Qualcomm (December 30, 2009).

The KFTC's actions were, earlier on, prompted largely by investigations in other jurisdictions; however, after gaining substantial knowledge and experience handling these cases for a number of years, the KFTC launched its own fact-finding survey (investigation) targeting the pharmaceutical and IT industries with respect to abuse of IPRs in 2010, and another investigation into the chemical and steel industries in 2011, followed by a written survey (investigation) of the machinery industry in 2012.

From 2013, KFTC investigations have consistently focused on alleged abuses by global ICT companies, such as Google, Samsung Electronics, Apple, Dolby, Oracle, and Qualcomm. The latest case of international renown is the KFTC's enforcement action against Qualcomm due to its alleged anticompetitive business model.[8]

Application of Competition Law to the Exercise of Patent Rights

It is undoubtedly difficult to discern whether an exercise of a right is "justifiable" or not, under Article 59 of the MRFTA or any similar rule elsewhere. The Korean Supreme Court has held that even if an act is, in appearance, a mere exercise of a patent right, it is not a fair exercise of that right if the substance of the act goes beyond the intent of the patent system and is inconsistent with the essential purpose of that system. And the Court held that whether an act is a fair exercise of a patent right or not should be determined based on the purpose and intent of the patent law, the nature of the concerned patent right, the impact of the act on fair and free competition, and other circumstances.[9] This position has been understood as requiring a combined approach considering IP law and competition law together.[10]

However, there are in fact few precedents in which a court has actually applied Article 59 to decide whether an act is an unfair exercise of patent-law rights that would trigger the application of the MRFTA. There are also few, if any cases where the KFTC has conducted an in-depth review into the intent and essential purpose of the patent system—from a patent-law perspective—which is perhaps

---

6 To be more precise, the first attempt to prevent unfair acts in relation to standard patents, such as patent ambush, was made in 2012 by introducing the "Recommended Operation Standards for Standard Setting Organizations to Assist Voluntary Compliance with the MRFTA."

7 The dates of these cases are based on the date of the KFTC's written decision in each case.

8 See KFTC Press release dated December 28, 2016, "KFTC imposes sanctions against Qualcomm's abuse of SEPs of mobile communications," p.2.

9 See Korean Supreme Court Decision rendered on February 27, 2014, Case No. 2012Du24498 (Glaxo). The IP Guidelines of the KFTC take a similar view to this decision (II. 2. A.).

10 This Korean Supreme Court case is understood to be in line with FTC v. Actavis, Inc. 133 S. Ct. 2223 (2013).

natural given that the KFTC is not a patent authority but a competition authority. Rather, the KFTC has mostly taken a soft-law approach by listing, in its IP Guidelines, specific patterns (forms) of patent-right use that it views—without a deep explanation as to why—as highly likely to be violations of the MRFTA, reflecting an apparent assumption that the MRFTA is in principle applicable to every exercise of a patent right (at least by a market-dominant enterprise).[11]

At the beginning of the IP Guidelines, the KFTC provides an overview of its approach to IPRs emphasizing that IP law and competition law share the same ultimate goal, under the title of "Intellectual Property Rights and the Fair Trade Act." It states:

> [T]he system of intellectual property rights, such as patent rights, is aimed at encouraging creative business activities and promoting sound development of related industries and the national economy by promoting technical innovation by fairly rewarding innovative technology. In this regard, the Act and the system of intellectual property rights ultimately pursue a common objective. . . . [F]ree competition and fair trade, both of which the Act is designed to protect, are the preconditions for achieving the objectives of the intellectual property rights system. Therefore, intellectual property rights should provide inducement for innovative technology and be exercised justly to the extent of not distorting the order of the relevant market. The act of impeding the development and use of innovative technology by abusing intellectual property rights is against the fundamental objectives of not only the Act, but also the intellectual property right system. Thus, the Act can contribute to achieving the objectives that the Act itself and the intellectual property right system pursue in common by respecting the due exercise of intellectual property rights and, at the same time, regulating acts that go against the original purpose of the intellectual property right system.[12]

However, even if one accepts that both legal regimes pursue a common goal, that does not eliminate the need to judge whether an exercise of intellectual property rights is justifiable or not, as a prerequisite to, or at least an issue to be examined in parallel with, determining whether the MRFTA applies. A meaningful examination of that question requires an understanding of the technology and industry and an in-depth consideration of the nature of the IPRs and their appropriate use in that context, as opposed to an inflexible application of standard antitrust principles without regard to the purpose of the IP regime.

FRAND Commitments v. Competition law

The KFTC seems to take the position that, in principle, an act listed in the IP Guidelines does not always necessarily constitute a violation of the MRFTA, based on its statement in those guidelines that:

> [T]o decide whether an exercise of a specific intellectual property right is in violation of the following provision of the MRFTA, all of the requisite elements of a violation as set forth in each provision must be considered: Article 3-2 (Prohibition of Abuse of Market-Dominating Position), Article 7 (Restriction on Combination of Enterprises), Article 19 (Prohibition of Unfair Collaborative Acts), Article 23 (Prohibition of Unfair Trade Practices), Article 26 (Prohibited Activities of Trade Associations), Article 29

[11] The IP Guidelines are applied to unilateral acts by a market-dominant enterprise. Particularly, in the case of acts such as refusal to deal, discriminatory treatment, and excessive license fees, committed by an enterprise while exercising intellectual property rights, the IP Guidelines are applicable only when the enterprise has significant market power. Besides which, "whether an exercise of an intellectual property right constitutes an unfair trade practice or not shall be determined based on the guidelines for assessment of unfair trade practices." (II. 2. B.).

[12] IP Guidelines II. 1.

(Restrictions on Resale Price Maintenance).[13]

However, in the case of a market-dominating enterprise or monopolist's conduct in relation to Standard Essential Patents (SEPs) to which the IP Guidelines are applicable, it seems that the KFTC, at least on a practical level, sees per se anti-competitiveness in violations of FRAND (Fair, Reasonable and Non-Discriminatory) commitments as much as it focuses on the fulfilment of the specific requirements for establishment of a particular violation under the MRFTA. There is of course a possibility that a holder of a standard essential patent may possess market power as a result, and commit an abusive act such as discriminatorily granting licenses. And the KFTC believes that treating FRAND commitment violations as anticompetitive may protect markets and consumers from such abusive acts. In this sense, the KFTC seems to perceive FRAND commitments as a valuable safeguard under competition law.[14]

However, a FRAND commitment is a promise made by the owner of certain technology to a specific standards organization in the course of agreeing on that technology's inclusion in an adopted standard under the intellectual-property-rights policy of the organization. Therefore, the interpretation of a FRAND commitment must be governed by the particular composition of such promise, considering the nature and purpose of the organization, the intent of the parties, and the law governing the promise. Therefore, with respect to violations of FRAND commitments, the KFTC must first correctly ascertain the nature and contents of the FRAND commitment and only then can it determine whether violation of the FRAND commitment is an unjustifiable use of IPRs under Article 59 and fulfils the requisite elements of a particular violation of the MRFTA.

However, to the contrary, the KFTC's apparent view seems to be that basically every violation of a FRAND commitment constitutes an abusive act by a market-dominating enterprise, and thus is a violation of the MRFTA. This view can be seen expressed in one of the KFTC's recent decisions, in which it states:

> The FRAND commitment required of patent holders by SSOs is the sole method of controlling the abuse of dominant power by an SEP holder and is regarded as substituting for any competing technologies that might have existed had there not been that procedure for selecting a standard. As such, any violation of the FRAND commitment for SEPs results in removing the only method of preventing anti-competitive behavior, considering that there is no other substitute technology within the relevant standard.[15]

This approach, however, is risky and may lead to unfortunate results by interpreting FRAND commitments from a one-sided perspective. On this subject, a recent British court's decision is notable for having distinguished the scope of FRAND commitments from that of competition law, providing that "the boundaries of FRAND and competition law are not the same. A rate may be above the FRAND rate but not contrary to competition law."[16]

Finding unfairness in the exercise of IPRs

According to the IP Guidelines, unlike in the assessment of general abuse of market dominance under the MRFTA,[17] the KFTC takes the position that the exercise of intellectual property rights is unjustified

13 IP Guidelines II. 2. B.

14 Kim Yoonhee & Hui-Jin Yang, "A Brief Overview of Qualcomm v. Korea Fair Trade Commission," CPI Antitrust Chronicle March 2015(1) (2015), p.7; Dae Sik Hong, "Legal Analysis on SEP Holders' Abuse of Patent Rights Case – Focused on Qualcomm Case – ," Bupjo (Korean Lawyers Association) 2015-11 (Vol. 710) recited at pp. 322-323.

15 KFTC's written decision on Qualcomm case II (2016), paragraph 30.

16 Unwired Planet v. Huawei, [2017] EWHC 711 (Pat) ¶ 806(3) (Apr. 5, 2017) (underline added).

17 The Guidelines on the Assessment of Abuse of a Market-Dominant Position do not address this kind of efficiency assessment. As an element of several types of abuse of market dominance, the MRFTA and the aforementioned Guidelines require the conduct to be

only when the anti-competitive effect exceeds the increase in efficiency. And, in evaluating such cases, the IP Guidelines provide that the anti-competitive effect should be evaluated not only based on the immediate anti-competitive effect of the exercise of the IPRs but also based on several other potentially longer-term factors in terms of promotion of utilization and innovation of technology, price reductions as a result of the promotion of technological innovation, quality improvement, and expansion of consumer choice that may contribute to the increase of efficiency of the relevant market.[18] It seems that the KFTC takes this position based on an appropriate and reasonable empirical judgment, which is that efficiency gains as a result of the exercise of intellectual property rights are generally highly probable. Nevertheless, it is somewhat doubtful that the KFTC will very actively consider, analyze, measure, or judge the efficiency-increasing effect of an exercise of IPRs in the disposition of a given case, compared to its analysis of the anti-competitive effect.

Particularly when the manner and result of the exercise of IPRs is economically reasonable and efficient in the overall market, the KFTC should place significant value on the efficiency-enhancing effect to the same extent that it does regarding the anti-competitive effect. And it is reasonable for one to view the KFTC as having primary responsibility to compare the degree of the two effects, since the IP Guidelines were established by the KFTC in order to apply them to its own practice. When we consider such efficiency-enhancing effects, we should fully consider the dynamics of the technology market, and the characteristics of R&D in the modern technology market (such as the emergence of open-platform and open-source R&D, which contrasts with more traditional in-house R&D).

* * *

Around the time of issuing its decision in the so-called "Qualcomm Case II" which is now attracting attention worldwide, a new KFTC knowledge-industry division under the anti-monopoly bureau was established for the purpose of dedicated investigations into exercises of IPRs, especially in the ICT field and other cutting edge technology areas. By establishing this new division in charge of a specific type of behavior in a specific area, the KFTC has clearly revealed its view on the importance of this area and its confidence therein, which is based on experience accumulated during the last 20 years. One of the industries the new division has been focusing on is the pharma industry. So far, the KFTC's enforcement of competition law in that industry has focused on the regulation of illegal rebates, except for one reverse-payment case in 2011.[19] However, in a change of direction and as one of its primary focuses for enforcement at the beginning of 2017, the KFTC announced its intent to more closely investigate reverse payments and various types of abuses of patent rights in the pharma industry, as well as the exclusion of competitors in the medical-device A/S market.

I expect that as the issues discussed herein continue to be discussed and developed, the applicable legal principles will continue to mature thanks to the KFTC's enforcement activities and court decisions. And as the KFTC creates more precedents through its active enforcement activities, new issues that have never been addressed will arise, in new areas, and disputes over these new issues will also continue to arise at the KFTC, in the courts, and among scholars.

carried out "without a justifiable reason" or to be "unfair." However, neither the MRFTA, its Presidential Decree nor the aforementioned Guidelines provides more specific guidance as to what would satisfy such "justifiable reason" or "unfairness" prong.

[18] "If any exercise of the intellectual property right creates both the anti-competitive effect and increase of efficiency, whether it violates the law or not shall be assessed by comparing the proportions of the two effects. When the increase of efficiency exceeds the anti-competitive effect, the exercise may be deemed to be lawful. The term 'unfairly' in this [Part] II means that the anti- competitive effect exceeds the increase of efficiency." IP Guidelines II. 2. C. Meanwhile, the KFTC's guidelines on the assessment of the abuse of dominance do not compare the anti-competitive effect with any increase of efficiency.

[19] See Supreme Court decision rendered February 27, 2014, 2012Du24498 (*GSK-DongA* case).