

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Licensing of IP rights and competition law – Note by Korea

6 June 2019

This document reproduces a written contribution from Korea submitted for Item 6 of the 131st OECD Competition committee meeting on 5-7 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/licensing-of-ip-rights-and-competition-law.htm>

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03447634

Korea

1. Intellectual property law and competition law

1. Intellectual property rights (hereinafter referred to as “IPRs”) are legal rights given by law to intellectual creations that are worth protecting.¹ Intellectual property law encompasses all areas of intellectual creation and refers to a set of laws that protect intellectual property.

2. The purpose of intellectual property law is to promote creativity by giving legal protection on their creation as well as to protect the rights of creators while preventing over-protection of such rights to ensure that the society enjoys the fruits of intellectual creations. As stipulated that “the purpose of this Act is to promote the development of technologies and to contribute to industrial development by protecting and supporting inventions and promoting the use of inventions” in Article 1 of the Patent Act, the Korean intellectual property law also protects benefits of both inventors and consumers.

3. On the other hand, competition law is a system that maintains market order and maximizes consumer welfare by prohibiting or rectifying any anti-competitive conduct or system. Accordingly, many countries including Korea apply and enforce competition law when IPRs holders abuse their rights in a way that hinders competitive order. To be more specific, patent ambush where a company hides the fact that it owns IPRs essential for a standard in the process of discussion for the designation of standard technologies, violation of FRAND (Fair, Reasonable, And Non-Discriminatory) commitment while granting standard essential patents (hereinafter referred to as “SEPs”) license, abusive litigation, and reverse payment agreement to settle patent disputes (pay-for-delay agreement) are examples subject to competition law enforcement.

4. The following focuses on laws that apply to the abuse of IPRs in the context of Korean competition law, and the KFTC’s enforcement case. It introduces the KFTC’s regulations regarding the abuse of IPRs and recent amendments, and then explains the enforcement case applying the revised guidelines.

2. Provisions in the Monopoly Regulation and Fair Trade Act and guidelines governing the abuse of IPRs

2.1. Provisions in the Monopoly Regulation and Fair Trade Act

5. Article 59 of the Korean Monopoly Regulation and Fair Trade Act (hereinafter referred to as the “MRFTA”) stipulates that the MRFTA does not apply to the legitimate exercise of IPRs. According to an *argumentum a contrario*, it means that the MRFTA should be applied in case of unfair exercise of IPRs beyond the scope of its purpose of recognizing the rights.

¹ According to Article 3 of Framework Act on Intellectual Property, the term "intellectual property" means knowledge, information, technology, the expression of thoughts or feelings, the indication of business or goods, varieties of organism or genetic resources and other intangibles created or discovered by creative activities, experience, etc. of human beings, the value of property of which may be realized (Subparagraph 1), the term "new intellectual property" means intellectual property that appears in new fields in line with economic, social or cultural changes or the development of science and technology(Subparagraph 2), and the term "intellectual property right" means any right relating to intellectual property recognized or protected according to Acts and subordinate statutes, treaties, etc. (Subparagraph 3) respectively.

<Article 59 of the MRFTA>

Article 59(Exercising Intangible Property Rights) This Act shall not apply to any act that is deemed the legitimate exercise of any right under the Copyright Act, the Patent Act, the Utility Model Act, the Design Protection Act, or the Trademark Act.

2.2. Review Guidelines on Unfair Exercise of Intellectual Property Rights

6. The KFTC, in August 2000, established the 'Review Guidelines on Unfair Exercise of Intellectual Property Rights' (hereinafter referred to as "IPR Guidelines"). It is to apply the MRFTA to a conduct that externally and formally constitutes an exercise of IPRs but goes beyond the purpose of IPRs system which is designed to encourage invention and creation in case such conduct restricts competition in the technology market, goods market, etc.

7. In particular, the IPR Guidelines emphasize that exercising patents related to standard technologies may have anti-competitive effect as such technologies can have a significant long-term impact on the relevant market. In order to address these problems, international standard organizations disclose patent information before setting standard technologies, and ensure consultations in advance to license such patents on FRAND terms. Therefore, in the IPR Guidelines, the fulfillment of these procedures is regarded as an important consideration when judging the unreasonableness in the exercise of SEPs.

8. The IPR Guidelines illustrate the followings as examples of unfair exercise of SEPs.

1. In the process of discussion for selecting standard technologies, acts of unfairly agreeing to conditions limiting the price, volume, regions, counterparts and technology improvement of the trade;
2. Acts of unfairly not disclosing information of patents applied for or registered in order to increase the possibility of being selected as a standard technology or to avoid prior consultations on the conditions of granting of license(patent ambush);
3. Acts of avoiding or circumventing licensing on FRAND terms to strengthen market dominance or to exclude competitors;
4. Acts of unfairly rejecting the licensing of SEPs;
5. Acts of unfairly imposing discriminatory conditions when licensing SEPs or of imposing an unreasonable level of royalty.

9. In addition, the IPR Guidelines also illustrate cases in which exercise of patent rights by filing suits are viewed as acts of abusing IPRs.

1. An act of filing a patent infringement suit while the licensor knows that the patent infringement is invalid or the patent is invalid;
2. An act of filing a patent infringement suit, despite the fact that it is objectively clear that patent infringement is not valid.

10. However, it clarifies that when expectations of a licensor on suits are recognized as reasonable and rightful, the fact that a licensor lost suits does not constitute a presumption that patent infringement suits were abused.

11. Meanwhile, on March 23, 2016, the KFTC revised the IPR Guidelines in order to rationalize regulations on SEPs and increase enforcement predictability of the MRFTA on

the abuse of IPRs. The revised IPR Guidelines include 1) a clear distinction between SEPs and de facto SEPs, and 2) clear standards for assessing unreasonableness of patent holders rejecting the grant of non-SEPs licenses.

12. To be more specific, first of all, it clarifies that 'de facto SEPs' are clearly distinguished from SEPs. De facto SEPs are technologies used as standards in relevant industries through competition. On the other hand, SEPs are adopted by international standard organizations as a standard on a condition that patent holders are voluntarily committed to FRAND terms. Reflecting opinions that it is inappropriate to regulate both equally despite their difference, the IPR Guidelines are revised to apply standards that are used in assessing the unfair exercise of patent in general to de facto SEPs. The revised IPR Guidelines clarify the definition of standard technology by deleting controversial de facto SEPs, and stipulating that SEPs are patents adopted as a standard on the condition that patent holders are voluntarily committed to FRAND terms.

13. Second, the revised IPR Guidelines clearly stipulate standards for assessing unreasonableness of patent holders rejecting a grant of a non-SEP license. A right to refuse a grant of a non-SEP license is generally recognized. However, under the previous IPR Guidelines, the unreasonableness of such refusal was rather broadly acknowledged.

14. In this regard, The revised IPR Guidelines clarify that the unreasonableness of a refusal to grant a non-SEP license is recognized only in very exceptional cases, and that in assessing the unreasonableness of a refusal to grant a license, the intent or purpose of such refusal, whether the patented technology concerned is replaceable, whether the technology is essential for market competition, etc. should be taken into account.

3. Enforcement case regarding the abuse of IPRs: Qualcomm

3.1. Facts of violation

15. Qualcomm declared to international standard organizations including ITU and ETSI that it would commit to FRAND terms so that its cellular communication technology can be adopted as an industry standard. However, despite its FRAND commitment, Qualcomm refused requests by competing modem chipset manufacturers to license the cellular SEPs that are essential in manufacturing and selling the chipsets. In addition, although competing chipset manufacturers requested complete patent license agreements, Qualcomm instead entered into incomplete agreements that restrict to whom they can sell or coerce them to report sensitive business information such as their sales amount by product model, or name of customers, etc.

16. Meanwhile, Qualcomm established a business policy in which it did not supply modem chipsets to handset makers that were not licensed by Qualcomm and incorporated it into its modem chipset supply agreement. Accordingly, if handset makers did not conclude or execute the license agreement, it could refuse or suspend supply of its chipsets at any time. Furthermore, in order to gain the upper hand in license agreement negotiations with handset makers, Qualcomm threatened that it would suspend its chipset supply to them.

17. Furthermore, Qualcomm offered a license to its entire cellular patents only in the form of a comprehensive package that includes both SEPs and other non-SEPs. Qualcomm didn't even provide them with an opportunity to reasonably assess the value of its patents. It also coerced handset makers to license their patents to Qualcomm for free.

3.2. Relevant markets and market dominance

18. The cellular communication industry largely consists of the patent license market, the components market including modem chipsets, the handset market, and the cellular communication service market. Qualcomm is a vertically integrated monopolistic enterprise that operates business in the patent license market, which is upstream market in the overall market structure, and the modem chipset market. Even in the midst of cellular standards shifting to CDMA, WCDMA, and LTE, Qualcomm has long maintained its market dominance in both the global patent license market and modem chipset market.

3.3. Assessment of illegality

19. The KFTC viewed that Qualcomm's refusal to license its SEPs to competing chipmakers restricted their sales channel. Competing chipset makers could face a patent attack from Qualcomm if they sell their chipsets to handset makers that are not licensed by Qualcomm or to handset makers that are in dispute with Qualcomm. As a result, competing chipset makers could only sell to handset makers that have signed license agreements with Qualcomm, making it difficult for them to actively do business in the handset markets.

20. Anti-competitive effects of Qualcomm's acts were evident in the modem chipset market index. As of 2015, the global modem chipset market has more than doubled in size compared to 2008, but nine of the world's 11 major modem chipsets in 2008 were driven out of the market by 2015. As a result, Qualcomm's market share as well as market concentration in the modem chipset market has steadily increased.

21. Meanwhile, the KFTC concluded that Qualcomm virtually nullified its FRAND commitment by using its supply of modem chipset as a leverage to coerce the conclusion and execution of its unfair patent licensing agreements. Handset makers that had no other option but to use Qualcomm's chipset were forced to accept the terms demanded by Qualcomm because if the modem chipset supply is suspended, they cannot run their business. As a result, handset makers were not able to negotiate for SEPs licensing terms on an equal footing.

22. In addition, the KFTC viewed it is rather contradictory that Qualcomm received licenses from other patent holders such as handset makers but never licensed its patents to competitors. Accordingly, Qualcomm's chipsets became products safe from patent attacks while competitors' chipsets became flawed products without patent licenses. This created a competition structure absolutely favorable to Qualcomm, i.e. an unlevel playing field.

3.4. Measures imposed

23. In January 2017, the KFTC imposed remedial orders and an administrative fine of 1.3 trillion won.² The orders include the followings: 1) Upon modem chipset makers' request, Qualcomm should engage in good-faith negotiations for patent license agreements, 2) Qualcomm should not coerce patent license agreements by using its modem chipset supply as a leverage, and should amend or delete relevant provisions in the agreements, and 3) In concluding a patent license agreement with handset makers, Qualcomm should

² However, Qualcomm dissatisfied with the KFTC's [decision](#) and as of April 2019, the administrative litigation is still ongoing at the Seoul High Court.

not coerce unfair agreement terms, and upon handset makers' request, Qualcomm should re-negotiate existing patent license agreements.

4. Conclusion: the abuse of IPRs and international cooperation.

24. As in the case of Qualcomm above, most recent IPRs abuse cases are taking place in the field of information and communication technology (ICT). Since the technology life cycle is short and market competition environment changes drastically in the ICT market, promptness is a key factor in enforcing competition law. However, it takes a lot of time to handle cases in the high-tech industry such as ICT since they are often complicated, and require a high level of economic analysis and various judicial reviews.

25. Today, most IPRs are registered not only in a specific country or a specific jurisdiction but also all over the world. Consequently, the abuse of IPRs also affects the entire global market. Competition authorities around the world including the United States, EU, China, and Taiwan, as well as Korea, have brought Qualcomm case to the courts or already imposed corrective measures against its abusive conducts.

26. In the case of abuse of IPRs by a global business, the likelihood of asymmetry of information between a global business and each competition authority is relatively high. While global companies with IPRs can contact with various competition authorities and collect information, individual competition authority has difficulty in understanding the investigative status of other competition authorities and access to limited information. In order to overcome this asymmetry, cooperation between competition authorities is essential.

27. Of course, due to different systems and market conditions of each jurisdiction, international cooperation may not be easy in dealing with the abuse of IPRs unlike cartel cases. However, in order to achieve the common goal of restoring competitive order in the market, it is necessary to promote cooperation in enforcement between competition authorities in a consistent manner. The KFTC has successfully handled various cartel cases through close cooperation with other competition authorities including dawn raids and information exchange. As for IPRs abuse cases, it is necessary for each competition authority to garner successful enforcement experience by spreading the successful cooperation model for international cartel cases to IPRs abuse cases.