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

INTELLECTUAL PROPERTY AND STANDARD SETTING

-- Note by Korea --

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KOREA¹

1. Introduction

1. The patent system provides inventors with incentives for creative investment by guaranteeing exclusive rights in innovative technology or idea and granting the right to deny free rides. When intellectual property rights are fully protected through such primary function of the patent system, it is possible to lay a foundation on which innovative enterprises can emerge constantly.

2. However, the role of the patent system in contemporary meaning is more than just protecting an inventor's interests for a certain period. It is also emphasized its role as public utility to promote creative innovation through the publication of new inventions to facilitate sharing such inventions in the markets as sources of new technology.

3. In the meantime, competition law is a regime for maintaining the order in markets and maximizing consumer welfare by prohibiting and rectifying practices and systems harmful to competitions. Therefore, the enforcement of competition law in connection with intellectual property rights is limited to cases where a person who owns an intellectual property right abuses the right to disturb the order in competition. More specifically, the restriction on competition by patent ambush for concealing information in the course of setting a standard or by a patent pool, the breach of an obligation to ensure FRAND (Fair Reasonable And Non-Discriminatory) terms in the course of granting a license to use a standard-essential patent, the abuse of patent litigation, reverse payment agreements, and other unfair agreements made in the course of settlement of patent disputes.

4. This report will focus on various issues that arise in connection with standard-setting and standard-essential patents (SEPs) in making judgment on the abuse of intellectual property rights under competition law. This report begins with the introduction of statutes and regulations of the Korea Fair Trade Commission (hereinafter, the "KFTC") on standard-essential patents and the Samsung Electronics case on which the KFTC made a decision in February 2014 and will show the effectiveness of consent decrees in cases of the abuse of intellectual property rights in the IT industry.

2. Fair Trade Statutes and Guidelines and Regulations Relevant to Standard-Essential Patents in the Republic of Korea

2.1 *The Monopoly Regulation and Fair Trade Act*

5. The Monopoly Regulation and Fair Trade Act of the Republic of Korea (hereinafter, the "MRFTA") declares the principle that the proper exercise of intellectual property rights is free from the enforcement of the Fair Trade Act. To put it another way, the principle can be interpreted as a clause that makes it clear that the improper exercise of an intellectual property right is subject to the Fair Trade Act.

1. KFTC's Efforts to Preclude the Abuse of Patents, Focused on Changes in Regulations on Standard-Essential Patents and Cases of Enforcement of Competition Law -

Box 1. Article 59 of the Fair Trade Act

Article 59 (Exercise of Right to Intangible Property)

This Act shall not apply to an act deemed the proper exercise of a right under the Copyright Act, the Patent Act, the Utility Model Act, the Design Protection Act, or the Trademark Act.

2.2 Guidelines for examination of improper exercise of intellectual property rights

6. Based on the principle referred to above, the KFTC has enforced the "Guidelines for Examination of the Improper Exercise of Intellectual Property Rights" as established rules for the enforcement of the Fair Trade Act to intellectual property rights. The Guidelines were enacted initially in August 2000 and wholly amended in 2010 to explicitly include foreign businesses in the scope of application of the Guidelines and cover recently raised issues in connection with intellectual property rights, such as patent pool, technical standards, and the abuse of patent litigation.

7. According to the amended "Guidelines for Examination of the Improper Exercise of Intellectual Property Rights," there is a great necessity of a procedure for the disclosure of patent information and the negotiation on terms and conditions concerning the practice of patents to prevent the abuse of patents selected as technical standards, and whether the relevant procedure has been followed is an important consideration in making judgment on impropriety in the exercise of a patent related to a technical standard.

8. More specifically, as the conducts that constitute the abuse of an intellectual property right are enumerated in the Guidelines; (i) an unfair agreement on any term or condition concerning the price, quantity, an adverse party, restriction on technological improvement in the course of negotiations for the selection of a technical standard; (ii) unfair non-disclosure of information about a patent sought in a pending application or a patent registered with intent to increase the possibility of being selected as a technical standard or to avoid prior negotiations on terms and conditions concerning the practice of the patent (patent ambush); (iii) unreasonable denial of granting a license to practice a patented invention widely used as a technical standard (including not only technical standards selected through a standard-setting organization but also technical standards adopted in biddings called for by public agencies as essential technologies in practical use or widely used in the relevant sector); and (iv) unreasonable discrimination in terms and conditions concerning the practice of a patented invention or the imposition of unreasonable license fees.

9. On the one hand, according to the Guidelines, it is highly probable that a patent infringement lawsuit will be held as an abuse, if the patentee files such a lawsuit, knowing that a *prima facie* case of patent infringement or that the relevant patent is invalid or if it is objectively obvious that the patentee is unable to establish a *prima facie* case of patent infringement. On the other hand, the Guidelines make it clear that a patent infringement lawsuit shall not be presumed to be abuse based only on the subsequent court decision against the patentee, if the patentee's expectations of the lawsuit are held reasonable and proper.

10. Furthermore, the KFTC has paid keen attention to issues arising in connection with intellectual property rights of non-practicing entities (NPEs) that used to assert their patents rights only through patent litigation, royalty negotiations, etc. without participating in manufacturing activities. The KFTC is planning to amend the Guidelines for examination of the improper exercise of intellectual property rights this year to supplement the types and cases of NPEs' abuses of intellectual property rights and the criteria for judgment on violations.

2.3 *Other relevant regulations*

11. In January 2012, the KFTC established the "Guidelines for Exemplary Management of Standard-Setting Organizations for Ensuring Compliance with the Fair Trade Act" in order to prevent violations that might be committed in the course of standard-setting, such as the abuse of standard-essential patents. The Guidelines for Exemplary Management were not a statute that each business or standard-setting organization should observe in its nature, but the purpose of the Guidelines was to prevent the abuse of standard-essential patents, such as fraudulent patent ambush, by presenting proactive guidelines for exemplary management in regard to standard-essential patents.

12. The Guidelines enumerated unfair concerted acts, such as cartels in pricing, the exclusion of competitors in the course of standard-setting (the restriction on participation of particular businesses in the course of standard-setting or the restriction on the establishment of standards for particular technologies), and the restriction on the possibility of use of an established standard (patent ambush or the breach of a FRAND obligation) in detail as anticipated violations of the Fair Trade Act in the course of standard-setting. In addition, the scope of participants and discussions, the procedure for making decisions for the establishment of standards, the policy on the publication of intellectual property rights, terms and conditions of a license to practice a standard-essential patent, means to ensure effectiveness, restrictions on participants' external activities, and public notification of, and education on, the guidelines for management were presented item by item as detailed guidelines for exemplary management of standard-setting organizations.

3. Case of Enforcement of Competition Law Relevant to Standard-Essential Patents: Samsung Electronics vs. Apple

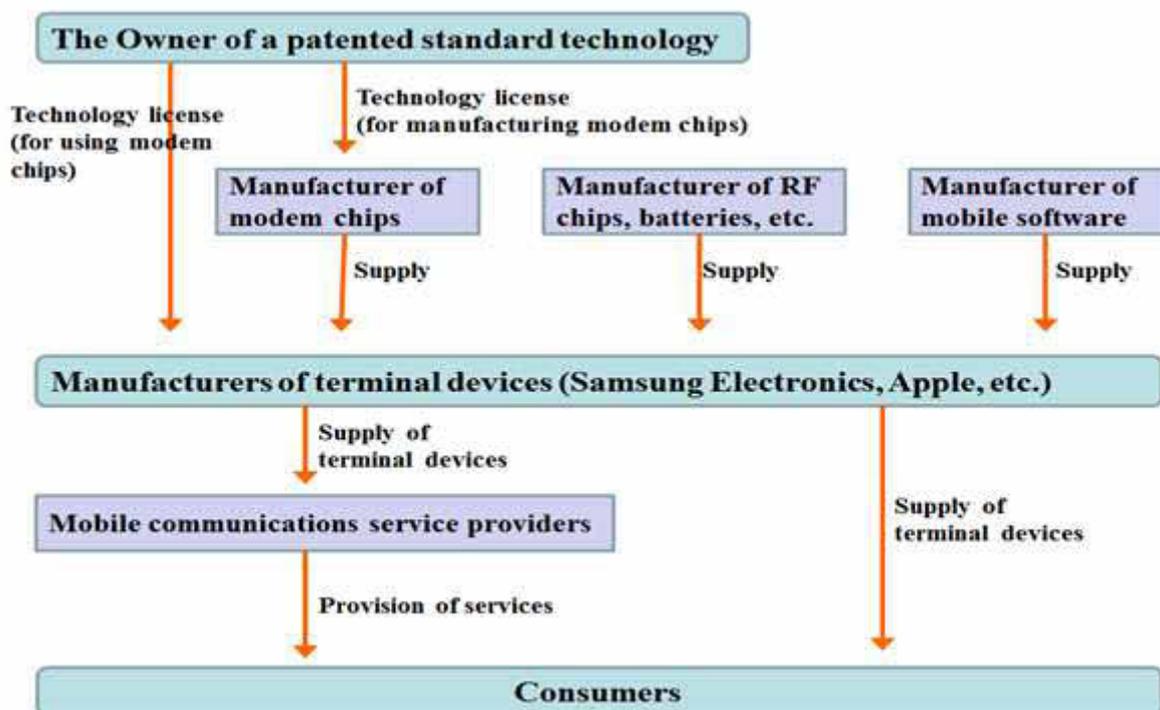
3.1 *Summary*

13. While Samsung Electronics and Apple continued negotiations to resolve disputes over patents, Apple filed a lawsuit seeking an injunction to prohibit infringements on designs and non-standard-essential patents and damages against Samsung Electronics with a court in the United States on April 15, 2011.

14. In response to the lawsuit, Samsung Electronics filed a lawsuit against Apple with the Seoul Central District Court in the Republic of Korea on April 21, 2011, about one week later, seeking an injunction to prohibit infringements on four standard-essential patents and non-standard-essential patents related to technology for the third generation mobile communications systems, along with damages therefor. Samsung Electronics sought an injunction to prohibit Apple from selling four products, namely, iPhone 3GS, iPhone 4, iPad1(Wifi+3G), and iPad2(Wifi+3G), on the ground of the alleged infringements on standard-essential patents.

15. The third generation communication systems are communications systems that use worldwide common frequency band of 2 Ghz for data communications, video phone, global roaming, etc. in addition to voice communications, and a broadband greater than those for the second generation communications systems is used as a band for each channel. In order to determine international standards for the third general mobile communications systems, the 3GPP (3rd Generation Partnership Project) was formed mainly by European countries and Japan, while the 3GPP2 (3rd Generation Partnership Project 2) was formed under the initiative of the United States to adopt different standards. The 3GPP supports Wideband Code Division Multiple Access (WCDMA), while the 3GPP2 supports CDMA2000.

Figure 1. Structure of Mobile Communications Markets



16. In response to the Samsung's lawsuit, Apple Inc. in the United States and Apple Korea, Ltd. filed a complaint report on April 3, 2012 on the alleged violation by Samsung Electronics of Article 3-2 (1) 3 (Market-Dominant Firm's Interference with Business Activities) of the Fair Trade Act, alleging (i) that Samsung Electronics' filing a lawsuit seeking an injunction constituted an unfair use of patent infringement by market dominant firm and (ii) that its breach of the obligation of timely disclosure of patent information in the course of setting a standard of technologies constituted the interference of the competitor's business activities.

3.2 Judgment on illegality

3.2.1 Whether Samsung Electronics is a market-dominant firm

17. As a result of examination on whether Samsung Electronics was a market-dominant firm, the KFTC concluded that Samsung Electronics was a market-dominant firm in the domestic market for mobile communication devices, taking into consideration market shares, the barrier to access, the relative scale of competitors, and the power to block market access, etc. comprehensively, as Samsung Electronics had monopolistic strength in the market for technologies for each of four standard-essential patents.

3.2.2 Whether Samsung's lawsuit constitutes the unfair use of a lawsuit seeking an injunction to prohibit patent infringements>

18. The KFTC examined the report to find whether the lawsuit filed by Samsung Electronics against Apple, seeking an injunction to prohibit patent infringements, constituted "unfair interference with another business firm's business activities" under Article 3-2 (1) 3 of the Fair Trade Act.

19. In order to conclude that filing a lawsuit to seek an injunction to prohibit patent infringements on the basis of a standard-essential patent has resulted in the effect of restriction on

competitions, it shall be proved that the patentee promised to grant a license to practice the patent at issue under FRAND terms and that the potential licensee was willing to obtain the license under FRAND terms.

20. In other words, it is hard to regard a potential licensee as a willing licensee who is willing to obtain a license, (i) if the potential licensee is unable to accept, or refuses to accept, FRAND terms; (ii) if the potential licensee refuses to sign a contract under the FRAND terms finalized by a decision from a court or an arbitration board; or (iii) if the potential licensee refuses to pay royalty in accordance with FRAND terms or does not actively engage itself in the negotiation for finalizing FRAND terms or uses any strategy for delay.

21. As a result of comprehensive examination on the course of negotiations between Samsung Electronics and Apple, Apple's position in the negotiations, and other relevant facts, the KFTC concluded in this case that it was hard to agree that Apple engaged itself in negotiations in earnest in the course of granting a license for the patents. Taken into account as the grounds for the conclusion were:

22. First, that Apple created an atmosphere to turn negotiations into litigation by filing a patent infringement lawsuit alone in the midst of negotiations; second, that it was hard to agree that Apple made good faith efforts to reduce or remove any gap in royalty rates since it made another proposal on terms and conditions of the practice of the patents by reevaluating the value of Samsung's patents lower than the value that it had previously recognized, when the situation of patent disputes tended to be favorable to Apple as consequences of the EU competition authority's issuance of a Statement of Objection of Samsung Electronics (December 21, 2012) and the USTR exercise of the veto against a exclusion order of the United States international Trade Commission (USITC) (August 9, 2013); and third, that Apple's attitude showed a typical pattern of reverse patent hold-up as it was not willing to pay any amount of royalty to Samsung Electronics until the closing of the litigation.

23. It could be argued whether Samsung, as a patentee of standard-essential patents who promised to offer FRAND terms, has engaged in negotiations for licensing patents in earnest, but the KFTC concluded that it was hard to hold that Samsung was not earnest in negotiations. More specifically, the KFTC reflected the facts that Samsung Electronics offered various terms and conditions of licensing to Apple before and after filing a lawsuit and continued substantive negotiations in order to remove the gap in the royalty rates proposed by Apple in its conclusion. Furthermore, the KFTC concluded that it was hard to hold that the royalty rates offered by Samsung were excessive in breach of FRAND terms, since royalty rates used to be determined by various factors, such as particular claims and technological value of the patent to be licensed, the scope and duration of the license, whether a cross license was to be granted, and turnover of related products.

24. In conclusion, in order to hold that a claim filed by a patentee to seek an injunction to prohibit infringements on a standard-essential patent constitutes a market-dominant business firm's interference with business activities, it must be found that the market-dominant business firm has made it difficult for another business firm to engage in business activities, such as production and sales, by unfairly using a patent infringement lawsuit. However, the KFTC held that Samsung's filing a lawsuit hardly constituted unfair interference with business activities, even if the sales of Apple's products could be suspended by a court judgment on the ground of patent infringements, since the judgment was nothing but a consequence of the patentee's proper exercise of rights.

3.2.3 Whether Samsung Electronics breached the obligation of timely disclosure

25. In the meantime, the KFTC held that Apple's argument that Samsung Electronics committed patent ambush in the course of setting a standard of technologies was groundless.

26. Generally, a patentee owes an obligation to disclose his/her own patents on time at the stage when any of his/her patents is adopted as a standard-essential patent in order to prevent the patentee from committing patent ambush with intent to use withheld information later for hold-up.

27. With regard to this case, the KFTC held that it was hard to agree on the argument that Samsung Electronics had concealed information for a considerably longer period than 1 year and 5 months by Nokia or 3 years and 8 months by Motorola, since the average period during which a standard-essential patent disclosed by Samsung Electronics was approximately 1 year and 7 months, and that the alleged breach of the obligation of timely disclosure was also groundless, since there was no evidence supporting the argument that Samsung had concealed patents in the course of standard-setting for the purpose of excluding other business firms from the standard-setting process.

4. Conclusion: Abuse of Intellectual Property Rights and Consent Decree System

28. As explained above, recent abuses of intellectual property rights have occurred mostly in the information and telecommunications (IT) sector, as seen in the case of Samsung Electronics vs. Apple. Since the IT market is characterized by a short life cycle of technology and the rapidly changing market environment, speediness is the most important, among other things, also in the enforcement of competition law. However, it takes a considerably long time to settle a case where the high-tech industry such as IT is involved, because relevant facts are so complicated and highly advanced economic analysis or examination of various legal theories is necessary in many cases.

29. In Qualcomm case, a typical case examined by the KFTC with regard to the abuse of intellectual property rights; it took more than 3 years to close the case.

30. The consent decree system is a system under which the KFTC can close a case promptly without necessarily making judgment on illegality, if the business firm investigated by the competition authority voluntarily presents a reasonable remedy, which was introduced into the Fair Trade Act of the Republic of Korea in December 2011. The consent decree system is regarded as a system that enables the rectification of activities restrictive to competition through prompt settlement of cases and strengthens consumer protection without undergoing litigation proceedings additionally.

31. Such advantages are confirmed by the commitment decision made by the EU with regard to the Rambus case of suspected patent ambush in 2009, the consent order made by the United States Federal Trade Commission in 2013 with regard to the Google's suspected abuse of standard-essential patents, the commitment decision made by the EU with regard to the Samsung Electronics case of suspected abuse of standard-essential patents in 2013, and other cases settled by major competition authorities with regard to abuses of intellectual property rights of global IT enterprises.

32. The KFTC will pro-actively utilize the consent decree system to promptly and flexibly rectify practices that are highly likely to be restrictive to competitions in the sector of intellectual property rights related to IT. The system is expected to enable more effective response to competition issues in the IT technology market with respect to intellectual property rights.