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A Study of Competition Law and Intellectual Property in the EU:

Comparative Perspectives in Licensing Agreements

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Contents

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Abstract

Although competition or antitrust laws in different jurisdictions vary in enforcement, they have an unambiguous factor in common. That is the control on the oppressive use of market power. Therefore, implementation of competition law means challenging the firms that possess market power or exercise a similar power through agreements. Powers by means of intellectual property rights (IPRs) are no exception. It is true that there has been a never-ending conflicting opinion which has persistently claimed antitrust challenges for protecting the process of innovation by a vigorous competition.

The intersection of IPRs and antitrust has, therefore, brought attention to scholars. One of the main objectives of competition law is to improve competition in the market, by means of preventing acts of abuse of market dominance or anti-competitive agreements. On the contrary, the IPRs allow firms to stimulate invention through permitting IP owners to exploit their market power. This seems that there is some conflict between these two areas. However, they are understood as in harmony since both eventually aim at achieving the goal for social welfare or efficiency.

For this complex reason, most countries that legislate competition law also provide exemption regulations or guidelines for approving benign technology licensing. This article studies various legal techniques in the EU, the US, and Korea, illustrating the convergence through establishing the regulations and guidelines. It is somewhat difficult to decide whether positive outcome from a certain licensing agreement can offset anti-competitive one. However, a study of comparative law can offer a significant and diverse answers for the problem. Therefore, this article aims to provide a better solution for the existing problems in antitrust provisions on IPRs.

This article explains the substantive law of EU competition law, including the unique block exemption provision on technology transfer, and compares it with reference to the current provisions on IPRs in the US and Korea. Then, it discusses the benefits from learning the EU block exemption regulation for its legal certainty outcomes. The provisions of the EU have proved their positive outcomes such as ensuring legal certainty through market share threshold guidance with hard-core prohibition. The Korean competition authorities can learn much from these legal techniques.

Keywords

European Union, Competition Law, Antitrust Law, Monopoly Regulation and Fair Trade Act, Research and Development, Block Exemption Regulation, *Per Se* Illegality, Rule of Reason, Licensing Agreement

I. Introduction

The very body of law to maintain and restore competition is called antitrust in the US,[1] and outside of the US, it is normally called as competition law. These terms can be compatible with each other.[2] Since the first adoption of antitrust act in the US, most of jurisdictions around the world have legislated competition law due to the development of global market and international trade. In the absence of competition law, it is almost impossible to achieve the goal of free competition in the market because private firms' restraints can inhibit trade. Therefore, competition law is a crucial resource for ensuring free trade and sound market competition in the global market. In particular, since the late 1980s, the number of countries that adopt competition law has increased significantly.[3]

Of course, competition laws in different jurisdictions vary in enforce-

1) The first antitrust act, the Sherman Act (as amended in 15 U.S.C.A. §§ 1–7), was legislated in 1890, and other acts, such as the Clayton Act and the Federal Trade Commission Act, were adopted in 1914.

2) Gavil, Andrew et al., *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Law*, Second Edition, Thomson/West, St. Paul, MN, 2008, pp. 2–4; Sullivan, Lawrence & Grimes, Warren, *The Law of Antitrust: An Integrated Handbook*, Second Edition, Thomson/West, St. Paul, MN, 2006, p. 1.

3) Fox, Eleanor, "Competition Law", in Andreas F. Lowenfeld, *International Economic Law*, Second Edition, Oxford University Press, New York, 2008, p. 418. Fox argues that "competition law and policy have taken a prominent place amongst international economic concerns because markets normally transcend borders between trading countries. There are two major issues regarding the effectiveness of the international free trade organisation. They are public and private restraints, in other words, norms governing the conduct of member states and norms governing the conduct of private firms that have sufficient power to impede international trade and competition in the market." Regulations on market competition are not only the issues in the domestic market but also those in the global. For further discussion, see also Gerber, David, "Competition Law and the WTO: Rethinking the Relationship", in William J. Davey & John Jackson (editors), *The Future of International Economic Law*, Oxford University Press, New York, 2008, pp. 269–286; Kennedy, Kevin, *Competition Law and the World Trade Organization: The Limits of Multilateralism*, Sweet & Maxwell, London, 2001, pp. 2–5.

ment.[4] However, they have a clear enforcement factor in common. That is the control on the monopolisation or abuse of market dominance and anti-competitive agreements that prevent competition. Therefore, implementation of competition law usually refers to challenging firms that hold market power or exercise a similar power through agreements.[5] Powers by means of intellectual property rights (IPRs) are no exception. In effect, IPRs are an important element in state economic policy worldwide because they are considerably related to economic development.[6] Many commentators agree that dynamic economies for growth require appropriate legal provisions of competition and IP laws. Some argue that government agencies should focus on positive outcomes from IPR by offering IP owners exemptions from antitrust scrutinies. Nevertheless, there has been a never-ending conflicting view that has claimed antitrust challenges for protecting the process of innovation by a vigorous competition rather than simply granting exemption benefits.[7]

Besides, IP becomes an uneasy subject in competition law, especially as the economy has grown to be more "new economy"-focused,[8] such as

4) There are a number of reasons why competition law legislations vary considerably. One of them is the difference in aims of law. See Pitofsky, Robert et al., *Trade Regulation: Cases and Materials*, Sixth Edition, Foundation Press, New York, 2010, p. 6.

5) Sullivan & Grimes, op cit., p. 2.

6) For further discussion regarding monopoly power and "Creative Destruction", see Schumpeter, Joseph, *Capitalism, Socialism, and Democracy*, HarperPerennial, New York, 1976 (reprinted) pp. 100–106. In particular, the history of the early patent monopoly illustrates that IP considerably involves the public interest, responding economic and political power. See Francis, Daniel, "Exclusion, Invasion and Abuse: Competition Law and Its Constitutional Context", in Barnard, Catherine & Odudu, Okeoghene (editors), *The Cambridge Yearbook of European Legal Studies*, Vol. 12, 2009–2010, Hart Publishing, Oxford and Portland, OR, 2010, pp. 191–198.

7) Gavil et al., op. cit., pp. 1153–1154; Leslie, Christopher, *Antitrust Law and Intellectual Property Rights: Cases and Materials*, Oxford University Press, New York, 2011, pp. 3–5. Competition is normally understood as to lead to cost efficiency, low prices and innovation. For further discussion, see also Bishop, Simon & Walker, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Third Edition, Sweet & Maxwell, London, 2010, pp. 15–16.

8) For issues of antitrust related to the new economy, see also Posner, Richard, "Antitrust in the

internet, computer, and telecommunications, etc.[9] The issues in the new economy are somewhat difficult in examining the interaction between IP and competition law because of the rapid technology development in the market and the unique feature of exclusivity of IPRs.[10] However, competition law scholars have studied how these two subjects can interact and what the major issues and answers for certain problems should be.

According to Sullivan and Grimes,[11] the matters in IPRs and competition law often interact, and they are often understood as conflicting since competition law reacts against any abuse of market power by unilateral or collusive manners. For example, a licensing agreement would be made amongst competitors who may influence the price or output, which can bring attention to competition authorities.[12] In other words, IP owners often attempt to license it to earn as much as possible because it would be a better practice than they could get if they did not offer technology licensing. As stated above, then, a competition authority is concerned about a possible agreement of price fixing or other types of restrictions that inhibit competition amongst licensees or with other licensors.[13] Likewise, there is

New Economy", *Antitrust Law Journal*, Vol. 68 (2001), pp. 925-943.

9) Co-ordination arrangements over technology-intensive industries, which usually have large fixed costs and low marginal costs, often bring challenges for competition law. See Fox, Eleanor & Crane, Daniel, *Global Issues in Antitrust and Competition Law*, West, St. Paul, MN, 2010, p. 182.

10) Myers, Gary, *The Intersection of Antitrust and Intellectual Property: Cases and Materials*, Thomson/West, St. Paul, MN, 2007, p. 3.

11) Sullivan & Grimes, op cit., p. 841-858. The authors assert that the possible anti-competitive practices are as following: (i) engaging in litigation which increases a rival's costs; (ii) using patents to prevent a rival from accessing to necessary technology; and (iii) using grant back licences or cross-licences to establish a cartel-like arrangement that limits competition amongst rivals.

12) Hovenkamp, Herbert, *Federal Antitrust Policy: The Law of Competition and Its Practice*, Third Edition, Thomson/West, St. Paul, MN, 2005, p. 241.

13) Areeda, Phillip et al., *Antitrust Analysis: Problems, Text, and Cases*, Sixth Edition, Aspen Publishing, New York, 2004, p. 340.

a possibility that IPR holders may engage in certain anti-competitive practices; they can involve price fixing or market division.[14] However, there is no doubt that IPRs can enhance social welfare through technological development and can eventually foster efficiency, thereby improving state economy.[15] The aim for efficiency in competition law is, thus, related to IP protection because it can spur innovation, although excessive protection can still inhibit incentives by chilling innovation motive of non-IP holders.[16]

For this complex reason, most of developed countries that implement competition law also provide a certain type of exemption regulations or guidelines for approving benign technology licensing, which scrutinise anti-competitive and pro-competitive practices in arrangements for the trade-off or balance test. The US antitrust authorities, Department of Justice (DOJ) and Federal Trade Commission (FTC), adopted the Antitrust Guidelines for the Licensing of Intellectual Property in 1995.[17] The Korea Fair Trade Commission (KFTC) adopted the revised Review Guidelines on Unlawful Exercise of Intellectual Property Rights[18] in April 2010.[19] The European Union (EU) Commission also amended its provisions of exemption

14) Hovenkamp, Herbert, *The Antitrust Enterprise: Principles and Execution*, Harvard University Press, Cambridge, MA, 2005, p. 259.

15) The maximisation of social welfare should be the ultimate goal that both the competition law and IP law should pursue. See Burtis, Michelle & Kobayashi, Bruce, "Intellectual Property and Antitrust Limitations on Contract", in Ellig, Jerry (editor), *Dynamic Competition and Public Policy: Technology, Innovation, and Antitrust Issues*, Cambridge University Press, Cambridge, 2005, p. 256.

16) Fox, Eleanor, "The Efficiency Paradox", in Pitofsky, Robert (editor), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford University Press, New York, 2008, p. 79.

17) US Department of Justice, 〈http://www.justice.gov/atr/public/guidelines/0558.pdf〉, accessed on 13 Apr., 2011.

18) KFTC Guidelines No. 80, amended on 31 Mar., 2010.

19) For further detail, see also the KFTC's English Webpage, 〈http://eng.ftc.go.kr/bbs.do〉, accessed on 13 Apr., 2011.

regulations on R&D[20] and specialisation[21] in December 2010. Although the newly adopted regulations in the EU did not bring any significant changes, the methods of enforcement and legal techniques of market share threshold for offering block (or group) exemptions to undertakings[22] are still noteworthy. In addition to the currently revised regulations, the EU applies the 2004 block exemption regulation for technology transfer. All of the legal provisions above illustrate how the competition authorities establish the guidance to firms in order to balance negative and positive effects of IPRs.

This article aims to provide a better solution for the existing problems in the Korean competition law provisions on IPRs, through a comparative study since it can offer significant and various solutions.[23] Part II of this article will illustrate the substantive law of EU competition law, including the unique block exemption provisions on technology transfer.[24] It will further discuss and compare it with the current provisions on IPRs in the US and Korea. Part III will articulate the benefits from learning block exemption provisions in the EU for its legal certainty outcomes and suggest a regulatory reform for Korean competition law and policy on IPR. Finally, Part IV will summarise and conclude.

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20) EU Commission, 〈http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:335:0036:0042:EN:PDF〉, accessed on 13 Apr., 2011.

21) EU Commission, 〈http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:335:0043:0047:EN:PDF〉, accessed on 13 Apr., 2011.

22) Undertaking refers to firm or enterprise in the EU.

23) Zweigert, K & Kotz, H, *An Introduction to Comparative Law*, Third Edition, Oxford University Press, New York, 1998, p. 15.

24) EU Commission, 〈http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:123:0011:0017:EN:PDF〉, accessed on 13 Apr., 2011.

II. A Comparative Study of Competition Law Provisions on IPRs

1. The European Union

A. Overview: EU Competition Law

The first meaningful treaty in Europe, the Treaty of Rome, was signed by six states, thereby created European Economic Community (EEC) in 1957, and this has developed to the EU, as a recognised international legal person, since the Treaty of Lisbon entered into force in December 2009.[25] The renumbered Articles 101 and 102 (*ex* Articles 81 and 82 of the European Community Treaty) of the Treaty on the Functioning of the European Union (hereinafter, TFEU) contain the EU's fundamental competition policy. These provisions prohibit anti-competitive agreements[26] and abuse of market dominance[27] in the internal market.[28]

25) For detail of historical development of the EU, see Hartley, T.C., T*he Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union*, Seventh Edition, Oxford University Press, New York, 2010, pp. 1–11. Many seem to agree that the Lisbon Treaty indicates the extent to which the EU is going towards more political union by establishing a EU–level minster of foreign affairs. However, it is difficult to confirm that a full union is likely prospect at this moment since Member States are unwilling to hand over powers to the EU, with regards to sensitive sectors such as foreign policy and state welfare. See Bernard, Catherine, *The Substantive Law of the EU: The Four Freedoms*, Third Edition, Oxford University Press, New York, 2010, p. 14.

26) E.g., Case 193/83 *Windsurfing International v. Commission*, [1983] 3 CMLR 489. The case was related to non–territorial restraints, and the Commission found that a number of terms of the licences violated Article 101 TFEU. For further case detail, see also Furse, Mark, *Competition Law of the EC and UK*, Sixth Edition, Oxford University Press, New York, 2008, p. 440.

27) E.g., C 241–242/91P, *Radio Telefis Eireann and Indepdent Television Publications Ltd v. Commission (Magill)* [1995] 4 CMLR 718. Competition cannot play a role to prohibit the existence of monopoly since monopoly normally arises legitimately. Furthermore, it is difficult to say that, in these days, the grant of IP creates a monopoly as defined in law. The EU competition law, thus, prohibits exercise of monopoly power instead of existence. See Furse, op. cit., p. 437.

28) For further discussion, see also Fox, "Competition Law" op. cit., p. 422.

The EU competition policy on agreements and abuse of market dominance has played an important role within the EU internal market, thereby caused the convergence of competition laws in the Member States.[29]

European scholars have identified several aims of EU competition law, such as keeping the market open and integration;[30] maintaining a level of competition, thereby improving consumer welfare[31] or efficiency;[32] and ensuring fairness in the market, which is influenced by the German *Ordoliberalism*.[33] In particular, unlike other competition regimes, in the EU an additional element plays a crucial role, such as free movement of

29) Maher, Imelda, "Competition Law Modernization: An Evolution Tale?", in Craig, Paul & de Burca, Grainne (eds), *The Evolution of EU Law*, Second Edition, Oxford University Press, New York, 2011, p. 719. For further information about EU competition law in Korean, see also Shin, Hyun Yoon, *Economic Law (Kyoung-jae-beob)*, Third Edition, Beobmunsa, Seoul, 2010, pp. 97-106.

30) When market entities restrain the flow of trade between Member States, they can undermine EU market integration, thereby violating competition law, e.g., Cases 56, 58/64, *Consten and Grundig v. Commission* [1966] ECR 299. See Fox, Eleanor M., *The Competition Law of the European Union: In Comparative Perspective*, West, St. Paul, MN, 2009, pp. 17-22; Buttigieg, Eugene, *Competition Law: Safeguarding the Consumer Interest: A Comparative Analysis of US Antitrust Law and EC Competition Law*, Wolters Kluwer, Alphen aan den Rijn, Netherlands, 2009, pp. 47-51. There is a noteworthy difference in purpose of IP law between the EU and other regimes since other regimes constitute a single jurisdiction, but in the EU, each Member State may constitute a separate jurisdiction. This sometimes brings tensions between national protection and market integration. See Furse, op. cit., p. 438.

31) With regards to consumer welfare, it is somewhat difficult to clarify where consumer interest lies in competition law. See Lopatka, John & Page, William, "Monopolization, Innovation, and Consumer Welfare", *George Washington Law Review*, Vol. 69 (2001), p. 393.

32) Efficiency, especially allocative efficiency, has become understood as an important competition goal. This is the influence of the US antitrust policy in the context of economics language. See Marco Colino, Sandra, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes*, Hart Publishing, Portland, OR, 2010, p. 27.

33) Maher, op. cit., p. 724. The author argues that EU competition policy has been focusing on more economics-based approach, in other words, efficiency-oriented. *Ordoliberalism* is the ideology of the German Freiburg School, the matrix of a new brand of liberal thought that has much influenced the evolution of social and economic policy in Europe. This idea has played an important role in the development of EU competition law and policy. For further detail, see Gerber, David J., *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, New York, 2003, pp. 232-233.

goods and services amongst Member States. IP protection in the EU can often bring concerns about both free movement[34] and competition.[35] For example, in the *GlaxoSmithKline* case,[36] the question whether EU law should allow pharmaceutical firms to inhibit parallel trade for enhancing innovation in R&D arose.[37] However, the incentive enhancing argument for the undertaking was not accepted in the Court of Justice of the European Union (CJEU).[38] To summarise, market integration or free movement between Member States is one of the most essential aims in the EU law.

B. The Technology Transfer Block Exemption Regulation

In order to solve the problems with IPRs interconnected with competition and free movement in the internal market, the EU Commission eventually adopted legal provisions in the form of the block exemption for technology licensing (or so-called technology transfer block exemption regulation, TTBER)[39] and guidelines, with regards to the licensing of

34) For further detail about the general IP principles, with regards to free movement, such as existence and exercise of IPRs, the specific subject matter of IPRs, and the doctrine of exhaustion of IPRs in the EU, see Barnard, Catherine, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, New York, 2004, pp. 158–162.

35) E.g., *Merck & Co. v. Stephar BV*, Case 187/80, [1981] ECR 2063, [1981] 3 CMLR 417. Fox, "Competition Law" op. cit., p. 440. In fact, patent protection in the EU is more complicated than those in other jurisdictions since patent protection in the Member States varies.

36) Joint cases C–501/06P, C–513/06P, C–515/06P, and C–519/06P, *GlaxoSmithKline v. Commission*, 2009 ECR I–0000.

37) Drexl, Josef, "Real Knowledge is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation–Related Competition Cases", *Antitrust Law Journal*, Vol. 76, No. 1 (2010), p. 679.

38) Without legal protection, the IP holders cannot recoup their investment costs because other firms can free ride on it. The Court seemed to consider this, but free movement in the EU market was more important than the free–riding problem in IPR. For free–riding problem arguments, see also Posner, Richard, *Antitrust Law*, Second Edition, University of Chicago Press, Chicago, 2001, p. 246.

39) Commission Regulation (EC) No. 772/2004 on the application of Article 81(3) of the Treaty to

patents, know-how, and software copyright. This provision was designed as a part of the European modernisation project in 2004 in order to facilitate favourable licensing by establishing the safe harbour based on a market-share scrutiny and to allow efficiency-enhancing IPR licensing. Market share in the TTBER is important to decide whether the EU competition rules are applicable.[40] For example, although a licensing of technology is made between competitors, the agreement may fall within the safe harbour if the total market share of the two firms is below 20 percent. For non-competitors, a safe harbour threshold for each rather than total is 30 percent because an agreement between non-competitors does not bring significant concerns of anti-competitive effects.[41] The 2010 block exemptions on R&D and specialisation also provide exemption provisions of 25 percent[42] and 20 percent[43] respectively of the combined market share of the parties.

However, similar to other types of EU block exemption regulation,[44] the TTBER contains a list of hard-core restrictions. The list includes horizontal or vertical price fixing, output restrictions, market sharing, restricting a licensee's exploitation of its own technology, and restricting parties' R&D,[45] restricting licensees' passive sales, and restricting licensees' active and passive sales inside a selective distribution system. If a licensing

categories of technology transfer agreements.

40) Slot, Piet Jan & Johnston, Angus, *An Introduction to Competition Law*, Hart Publishing, Oregon, OR, 2006, p. 19.

41) Article 3 TTBER.

42) Article 4 R&D block exemption regulation.

43) Artciel 3 Specialisation block exemption regulation.

44) E.g., block exemption regulations on vertical agreements or insurance, etc.

45) R&D investments are crucial for state economic growth. Therefore, the EU takes unique approach to R&D aid by Member States through controlling Member States' subsidies on private firms when these distort competition in the internal market. For further discussion about EU State Aid policy and R&D development with regards to competition law, see Choi, Yo Sop, "EU Competition Policy Via Controlling State Aid", *International Area Review,* Vol. 13, No. 2 (Summer 2010), pp. 303–322.

agreement includes a hard-core restriction, the firm cannot receive benefit from the block exemption although its market share satisfies the safe harbour criteria.

2. The United States

A. Overview: US Antitrust Law

Similar to, but not exactly same as, the competition law provisions in the EU, the US Sherman Act sections 1 and 2 prohibit anti-competitive agreements and monopolisation or attempts to monopolise.[46] In addition to the similar structure of substantive provisions, there is no doubt that both the US enforcement authority and EU Commission continue to struggle with the interface between IP and competition law.[47]

In the 1960s and 1970s, the IPR holders were normally recognised as quasi-monopolists and, thus, had to deal with constraints when they had licensing practices.[48] The prohibitions on licensing practices were expressed as 'The Nine No-Nos':[49] the US antitrust authorities were very

46) For further comparison of substantive provisions of competition laws amongst the EU, the US, and Korea, see Choi, Yo Sop, "Comparative Analysis of Competition Laws on Buyer Power in Korea and Japan", *World Competition: Law and Economics Review*, Vol. 33, No. 3 (2010), p. 501.

47) Fox, "Competition Law" op. cit., pp. 441–442.

48) The influence of the doctrines of the US Supreme Court about patent monopoly and the Nine No-Nos in respect of patent licensing during this period also influenced the EU regime. The Commission was concerned about the harmful outcomes from IP licensing in the 1960s and 1970s as well. See Anderman, Steven & Schmidt, Hedvig, *EU Competition Law and Intellectual Property Rights: The Regulation of Innovation*, Second Edition, Oxford University Press, New York, 2011, p. 251.

49) Gavil et al., op cit., pp. 1194–1195. The now-outmoded Nine No-Nos are as following: (1) tying of unpatented to patented products; (2) mandatory know-how grant backs from the patent licensee to the patent licensor, (3) post-sale resale restrictions on purchasers of patented product, (4) tie-out agreements, whereby the purchase of a patented product was

hostile to several types of patent licensing practices at that time.[50] The prohibited practices were tie-in sales, grant backs, and royalties after the relevant patent expired. However, this classification of violation of antitrust law was changed in the 1980s. Since inventiveness for acquiring IPRs was understood as the favourable factor, in other words creating marketable products,[51] which would make domestic businesses more competitive and robust in the global market, enforcement agencies and courts changed their opinions and offered them to have exploit their IPRs more freely.[52] Furthermore, the Nine No-Nos were the subject of considerable criticism due to its strait-jacket style, and this criticism resulted in a noteworthy change in IPR policy.[53]

As stated above, the US antitrust agencies, based on the case-law development by the courts, gave up the strait-jacket style hard-core list of Nine No-Nos in favour of a more lenient attitude towards IP licensing. The authorities have recognised the complex intrinsic nature and the pro-competitive potential from incentive creation of IPRs and their exercise.[54] As a result, the balance of IP protection and competition improvement has

conditioned on the purchaser's agreement not to purchase another product not covered by the patent, typically one supplied by the patent holder's rivals, (5) exclusive licensing, (6) mandatory package licensing, (7) compulsory payment of royalties in amounts not reasonably related to sales of the patented product, (8) restrictions on sales of unpatented products made by a patented process, and (9) utilising resale price maintenance in connection with the licensing of patented products.

50) Hovenkamp, *Federal Antitrust Policy*, op. cit., p. 245.

51) Carrier, Michael A., *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law*, Oxford University Press, New York, 2009, p. 35.

52) Eventually, the Nine No-Nos were withdrawn. For further detail, see Fox, "Competition Law" op. cit., pp. 440-441.

53) Myers, op. cit., p. 79. For further detail about history of the Nine No-Nos, see Arquit, Kevin, "Canaries in the Coal Mine: Has Neo-Classical Economics Lost Ground at the Intersection of IP Licensing and Antitrust Law in the United States?", in Anderman, Steven & Ezrachi, Ariel (editors), *Intellectual Property and Competition Law*, Oxford University Press, New York, 2011, pp. 443-445.

54) Gavil et al., op. cit., p. 1203.

become a complex paradox.[55] Likewise, the US antitrust policy in patent licensing schemes[56] has always been deeply related to the patent law's doctrine of misuse.[57]

B. The US IP Licensing Guidelines

Given the fundamental harmony between IP law's grant of exclusive power and antitrust, it was necessary to question whether the challenged practice under antitrust law may contribute more to innovation efforts than its possible anti-competitive outcomes in licensing arrangements.[58] Consequently, the US DOJ and FTC provided "the Antitrust Guidelines for the Licensing of Intellectual Property (IP Licensing Guidelines)". The US IP Licensing Guidelines declare that the IP and the antitrust laws share the common goal of enhancing innovation and improving consumer welfare.

The US IP Guidelines stipulate the type of market definitions, such as goods markets and technology markets under section 3.2. As the EU rule provides the safe harbour of 20 percent market share threshold, the US Guidelines designate the antitrust safety zone. Section 4.3. of the Guidelines prescribes that, due to innovation promotion and enhancement of competi-

55) Kallay, Dina, *The Law and Economics of Antitrust and Intellectual Property: An Austrian Approach*, Edward Elgar, Cheltenham, UK & Northampton, MA, 2004, p. 5.

56) Patent licensing is usually considered efficient in the US, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). The Court held that blanket licences allowed noteworthy efficiencies by reducing the cost of a quite number of individual negotiations. See Bork, Robert, *The Antitrust Paradox: Policy at War with Itself*, Free Press, New York, 1993, pp. 434–435.

57) Hovenkamp, *Federal Antitrust Policy*, op. cit., pp. 242–245. The concept of this misuse of patent is quite broad. The court clarified that the misuse defence must either (i) identify a practice by the patent owner that is a per se violation or (ii) show the evidence of the overall effect of the licensing agreement tends to restrain competition unlawfully in the relevant market. See case, *Windsurfing International, Inc. v. AMF, Inc.*, 782 F.2d 995 (Fed.Cir.), cert. denied, 477 U.S. 905, 106 S.Ct. 3275 (1983).

58) Areeda et al., op. cit., p. 344.

tion from licensing, the US antitrust authorities believe a safety zone is useful in order to set some degree of legal certainty, thereby to encourage such innovative activities. Where there is no extraordinary circumstance, the authorities will not challenge a restraint in the licensing agreement unless the restraint is facially anti-competitive, and the licensor and the licensees collectively account for less than 20 percent in the relevant market.[59)]

3. The Republic of Korea

A. Overview: Korean Competition Law

The Korean lawmakers have adopted and developed competition law and policy through learning from those in other competition regimes. Therefore, the major structure and substantive legal provisions of the Korean competition act, the Monopoly Regulation and Fair Trade Act (MRFTA), are quite similar to those in the Western World and Japan. Article 19 and Article 3-2 MRFTA prohibit unfair concerted act (horizontal anti-competitive agreements) and abuse of market dominant position respectively.[60)] Similar to other jurisdictions, the Korean policymakers have acknowledged the monopolistic position and exclusivity of the IPRs that ensure incentives for creativity and innovations etc. For this reason, Article 59 MRFTA allows IP owners to obtain exemption benefits for IP practices

59) However, this safety zone does not apply to those transfers of IPRs to which a merger analysis is applied.

60) Article 23 MRFTA also prohibits unfair business practices that can cover almost all business practices. For further detail about the overlap issues of Articles 3-2 and 23 MRFTA, see Choi, Yo Sop, "The Enforcement and Development of Korean Competition Law", *World Competition: Law and Economics Review*, Vol. 33, No. 2 (2010), pp. 307-309. For discussion about patent pool and enforcement of anti-competitive agreements, see also Choi, Sung-Jai, *Regulation on the Patent Misuse through Antitrust Law*, Sechang, Seoul, 2010, pp. 306-308. In addition to

done by Copyright Act, Patent Act, Design Protection Act, etc. Nevertheless, the MRFTA may still be applicable to the IP practices when the practices do not satisfy the exemption criteria.

B. The Korea IP Guidelines

In order to clarify and solve the problems of this complex nature of intersection between IPR and competition law, the KFTC issued the newly revised Review Guidelines on Unlawful Exercise of Intellectual Property Rights (hereinafter, Korea IP Guidelines),[61] aiming at enforcing competition law for abuse of IPRs or licensing arrangements. The Korea IP Guidelines illustrate the scope of application of the MRFTA and definitions of the relevant terms. Moreover, the amended Guidelines contain reinforced rules on issue of abuse of patent pool,[62] patent, patent ambush, and patent lawsuit abuse etc. This guidance is expected to improve predictability of enforcement against IPR abuse and prevent violation of competition law by business entities.

The IP Guidelines state the first step of market definition for scrutiny of infringement of law: product and technology markets which are similar to those illustrated in the EU and US provisions. In both regimes, the technology market has been defined as the essentially licensing market, which comprises markets for a licensed technology and its close alternatives.[63] The Korean provision seems to follow this rationale. Then,

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the legal provisions above, Article 26 (control on business associations) MRFTA can be applicable to licensing arrangements.

61) Notice No. 80, Amended on 31 Mar., 2010.

62) Unlike the provisions in the US and Korea, the EU TTBER recital 7 prescribes that it does not cover the technology pool. For further detail, see Whish, Richard, *Competition Law*, Sixth Edition, Oxford University Press, New York, 2009, pp. 781–782.

63) Anderman, Steven, "The IP and Competition Interface: New Developments", in Anderman,

the Korea IP Guidelines illustrate the approaches to the analysis of anti-competitive effects including unfairness and also efficiency justification assessment in IPRs. The Guidelines list the anti-competitive or unfair practices and exercises of IPRs, which may violate the MRFTA. Unlike the EU TTBER, the Korean Guidelines do not include hard-core restrictions or market share threshold guidance, but rather it seems that the Korean provision is considerably similar to most of the US IP provisions although the Korean Guidelines do not follow *per se* illegality and the safety zone in the US.[64)]

It states that Articles 3-2, 19, and 23 (prohibitions on unfair business practices) MRFTA can be applicable to licensing arrangements when they go beyond what is necessary in the IPR exercise. The Guidelines proscribe any act of unfairly demanding consideration for the granting of licence, which threatens to restrict fair trade, such as following: (i) unfairly collaborating with other firms to decide royalty rates, (ii) imposing unreasonable level of royalty in the light of normal trade practices, (iii) unfairly imposing discriminatory royalty rates, (iv) unfairly requesting royalty, including royalty for the portion of the licensed technology that is not used yet, (v) unfairly imposing royalty by including the period after the expiry of patent rights, and lastly (vi) acts by patentees of unilaterally deciding or altering the method of calculating royalty without prescribing the calculation method in the contract.[65)]

The KFTC addresses that, through the amendment to the guidelines, it is expected to ensure consistency and predictability of public enforcement

Steven & Ezrachi, Ariel (editors), *Intellectual Property and Competition Law*, Oxford University Press, New York, 2011, pp. 10–11.

64) Section 3.4 US Guidelines. Under the principle of rule of reason, the US courts examine the effect on competition in order to determine whether a certain restraint is reasonable, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

65) Section III.1. of the Korea IP Guidelines.

against abusive practices of IPRs. In addition, this guidance is substantial as a guidepost for small and medium-sized enterprises (SMEs) that may usually get harms from the large firms' unfair request in contract for patent licensing from the unequal bargaining power.[66] The current Guidelines aim at balancing of IPR and competition laws, thereby continuously improving technology and innovation and also enhancing consumer welfare. Many scholars assert that competition policy should ascertain the innovation (or dynamic) efficiency since this can, as a result, protect the consumer interest through preserving competitive processes over the long term.[67] Overall, this explains that Article 59 MRFTA, the exemption clause for IPRs, does not mean an absolute immunity from antitrust scrutiny: misuse of IPR can violate Korean competition law.[68]

III. Mutual Learning of Legal Techniques from Other Jurisdictions

1. Efficiency Justification through the Balance Test

A. Scrutinies on Pro- and Anti-competitive Effects in the EU

One of the most noteworthy antitrust developments worldwide in the past decades is the adoption of more economics-oriented approach to competition law analysis. In particular, since the EU modernisation programme in 2004, the EU Commission has accepted and applied economics principles through legislating new block exemption regulations,

66) The KFTC English Website, Press Release on 30 Apr., 2010, 〈http://eng.ftc.go.kr/bbs.do〉.

67) Brodley, Joseph, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress", *New York University Law Review,* Vol. 62 (1987), p. 1021.

68) Choi, Sung-Jai, "On Korean Intellectual Property Guidelines: From Antitrust Law's Standpoint", *Journal of Korean Competition Law*, Vol. 22 (Nov. 2010), p. 316.

and these repealed the old provisions because the old ones had problems of too rigid and formal structure, creating a strait-jacket effect.[69]

In fact, the balance for pro- and anti-competitiveness of IPR and its exercise is crucial when a competition authority applies competition law provisions. As argued above, there is a common purpose of promoting innovation and enhancing consumer welfare in IPR and competition laws. Therefore, for enforcement agencies, both laws require a balancing of the value and spur to innovation that IPR protection and competition each provides.[70] It is reasonable that IPR allows innovators to set higher prices than their post-invention costs, thereby helping them recoup the investment costs. This can, of course, ensure further incentives for innovation.[71] Nevertheless, some arrangements between licensor and licensee distort competition by means of restraints, such as quantity restrictions, royalty payments, grant backs, territorial restrictions, and filed-of-use restrictions, etc.[72]

However, as explained in the US DOJ and FTC's report,[73] a portfolio cross-licensing, despite its possible anti-competitive outcomes, may be useful in certain industries such as of the semiconductor and computer when they are categorised by large numbers of overlapping patent rights. Transaction costs of licensing can be significant since licensees must

69) Whish, Richard, "Recent Developments in Community Competition Law 1998/99", *European Law Review*, Vol. 25, No. 3 (2000), pp. 228–9.

70) Valentine, Debra A., *Intellectual Property and Antitrust: Divergent Paths to the Same Goal*, 〈http://www.ftc.gov/speeches/other/speech35.shtm〉

71) Merges, Robert P. et al., *Intellectual Property in the New Technological Age*, Fourth Edition, Wolters Kluwer, New York, 2007, p. 1160. From this economics argument, many commentators argue that economic theory encourages licensing since it enables market entities to use IPRs to the most productive user of that right.

72) Carrier, op. cit., pp. 71–72.

73) US DOJ & FTC, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, April 2007, Chapter 3.
〈http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf〉

identify, search out, and negotiate with a number of licensors.[74] Moreover, patent pools may also reduce costs by eliminating infringement litigation.

The EU also recognises that licensing of technology agreements usually improve economic efficiency and, thus, are often pro-competitive because they may reduce duplication of R&D, improve incentives for initial innovation, and generate product market competition.[75] In summary, IPR law has the powerful tool for better innovation. Hence, its aim should be to encourage invention. Competition law also influences on innovation. It can improve competition in the market and solve the problem of market entry barriers,[76] which inhibit innovations through controlling market power. However, some scholars argue that the market power of IP holder is often understood by an increased rate of innovation, relative ease of entry, and instability of market shares. In other words, a new technology can often replace the old ones. Therefore, it is argued that cartels and monopoly power in IP markets will usually be short-lived,[77] and the competition authorities do not need to intervene the market since the monopoly power will be defeated quickly. In short, IPR holds intrinsic uncertain durability of market power.[78] If the antitrust agencies prohibit or scrutinise licensing agreements, the enforcement can retard innovation.[79] Therefore, excessive control on IPRs by competition enforcement may cause harms to

74) Gilbert, Richard J., "Ties That Bind: Policies to Promote (Good) Patent Pools", *Antitrust Law Journal*, Vol. 77, No. 1 (2010), p. 2.

75) Recital (5) of the TTBER.

76) There are three types of entry barriers in IPRs: patents, brand loyalty, and scale advantages in R&D. See Viscusi, W. Kip et al., *Economics of Regulation and Antitrust*, Fourth Edition, MIT Press, Cambridge, MA, 2005, pp. 886-891.

77) The attainment of a short-term monopoly position is the best way that an innovator can do for recoupment of investment. See Hylton, Keith, *Antitrust Law: Economic Theory and Common Law Tradition*, Cambridge University Press, Cambridge, 2003, p. 20.

78) Pitofsky et al., op. cit, pp. 790-791.

79) Carrier, op. cit., p. 3.

innovation. However, it is also true that too much IP protection can result in significant social costs of the rights that can be more significant than the de facto value of innovations the IP owners produce.[80]

B. Demands for the Regulatory Reform in the Korea IP Guidelines

The Korea IP Guidelines clearly state the consideration of positive effects of IPRs from dynamic efficiency. Likewise, the KFTC seems to follow the US rule of reason approach. When there are certain pro-competitive or efficiency outcomes, such as price reduction, product quality improvement, or extension of consumers' choice, the KFTC will carefully examine whether the positives outweigh the negative ones.[81] However, given the positive and negative outcomes from IPRs, the Korean lawmakers need to re-consider a legislation for ensuring the balance test, through a clear legal technique, rather than the simple white and black-list provision. The existing statements in the Guidelines are, to some extent, vague. Thus, the KFTC needs to frame a provision of hard-core restrictions with market share threshold since these can give a coherent idea to businessmen and practitioners.

2. Legal Certainty: Market Share Threshold Guidance and Hard-core Restrictions

A. Reasons for the Adoption of Safe Harbour and Hard-core Provisions

80) Hovenkamp, *The Antitrust Enterprise*, op. cit., p. 249.

81) Choi, Sung-Jai, "On Korean Intellectual Property Guidelines" op. cit., p. 320.

The EU and the US competition authorities are well aware of the importance of safe harbour for creating legal certainty in IPR protection in competition law enforcement. The EU TTBER and Guidelines provide the market share threshold guidance. It is difficult to say that a mere market share can be the one and only measure for deciding anti-competitiveness in the IP case. However, there is no doubt that it is one of the important indicators of firms' market position although the enforcement agencies should examine other factors, such as the degrees of entry barrier and demand elasticity.[82)]

Some critics, before the legislation of the TTBER, were concerned about the safe harbour provision when the EU Commission proposed the draft. They argued that it is sometimes difficult to assess market share in IP licensing arrangements because of the difficulty in market definition. In addition, it may be an improper indicator of the real competitive circumstance in the new economy market. In general, this provision was criticised for the Commission's *ex post* control rather than ex ante. However, the Commission defended its safe harbour approach by stating that, in most industry sectors where licensing arrangements are made, market shares still do matter since most of sectors are mature. Licensing with regards to products is likely to continue to compete with existing products or to replace them.[83)]

Besides, the competition authorities in the EU have developed market definition skills significantly. In particular, Article 3(3) TTBER provides that the market share can be defined in terms of the existence of the licensed technology on the relevant product market. The Commission can

82) Choi, Yo Sop, "The Vertical Regulation of Economics in the EU: Ten Years of Experience", *Journal of Korean Competition Law*, Vol. 21 (May 2010), pp. 201–202.

83) Jones, Alison & Sufrin, Brenda, *EU Competition Law: Text, Cases, and Materials*, Fourth Edition, Oxford University Press, New York, 2011, pp. 728–729.

scrutinise that a licensor's market share on the technology market is the combined market share in the relevant product market on the contract, e.g., the sales on the product market incorporating the licensed technology by the licensor and licensee.[84]

The US Guidelines, although they are not legally binding, also provide a safety zone. Section 4.3 of the US Guidelines stipulates that the enforcement agencies accept that antitrust safety zone is very useful in order to provide some degree of certainty,[85] thereby to encourage promotion activity, since licensing agreements often improve innovation and enhance competition in the market. The US agencies declare that they will not challenge a restraint in the IP licensing agreement where (i) the restraint is not a *per se* type agreement, which is similar to the EU hard-core restriction, and (ii) the licensor and its licensees collectively account for no more than 20 percent of each relevant market. In other words, the total market share of the parties is below 20 percent. However, whether a restraint falls within the scope of safety zone will be concluded by reference only to goods markets.

B. The Importance of Legal Certainty for the Korean Market

In effect, the market share threshold in IP seems very important nowadays even though it is not an absolute measure for the balance test since IPR does not mean possession of market power. This can be observed

84) The EU Technology Transfer Guidelines, paragraph 23. See also Jones & Sufrin, op. cit., p. 742.

85) Some argue that the IP guidelines are related to general principles and hypothetical situations. However, they cannot substitute for actual cases. They may mislead firms practising licensing arrangements. See Shapiro, Carl, "Technology Cross-Licensing Practices: FTC v. Intel (1999)", in Kwoka, John & White, Lawrence (editors), *The Antitrust Revolution: Economics, Competition, and Policy*, Fourth Edition, Oxford University Press, New York, 2004, pp. 352-353.

in the case-law development in the US courts. Although a number of commentators had argued that patents did not automatically express holders' monopoly power, the US Supreme Court precedent on the issue was to the contrary. As explained in *United States v. Loew's*,[86] the Court confirmed this by stating that the requisite economic power is presumed when the tying product is patented or copyrighted. In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,[87] the Court however overturned this automatic market power presumption. In other words, IPR does not necessarily mean market power.[88] Therefore, the better way to examine market power seems to be understood through the market share scrutiny since the incentive for innovation efforts can be determined by the market structures, including potential competitors' market entry.[89]

Accordingly, the existing market share can be a critical signal of market power in the new economy as shown in *Microsoft* and *Intel* cases in many jurisdictions, such as in Korea, the EU, and Japan. In these cases, it seemed that efficiency defence did not successfully work in the courts due to the firms' high market shares. Each competition regime already started learning enforcement techniques in other jurisdictions. Most of competition regimes share a quite number of characteristics and features.[90] Each competition regime has different purposes of competition and IP laws because of their diverse economic, cultural, and jurisprudence background.[91] However, an

86) 371 U.S. 38, 45 (1962).

87) 126 S. Ct. 1281 (2006).

88) Carrier, op. cit., pp. 81–82. Many commentators argue that most IPRs confer little monopoly power, but the courts often assume that there is an inherent tension between IPR and competition laws, which is a very mistake. Landes, William & Posner, Richard, *The Economic Structure of Intellectual Property Law*, Harvard University Press, Cambridge, MA, 2003, p. 374.

89) Carlton, Dennis & Perloff, Jeffrey, *Modern Industrial Organization*, Fourth Edition, Addison–Wesley, USA, 2005, p. 560.

90) Dabbah, Maher M., International and Comparative Competition Law, Cambridge University Press, Cambridge, 2010, p. 13.

91) Choi, Yo Sop, "The Meaning of Consumer Welfare in Competition Law Revisited", *HUFS Law*

effort for convergence in competition law enforcement will lead to the point of standardisation in legal techniques through mutual learning, since the world economy influences on the domestic market.[92)]

To conclude, although a market share threshold cannot be an absolute indicator for assessing market power in the technology market, there are some advantages from the exemption clauses by means of designing a market share threshold with the hard-core restriction statements.[93)] First, as emphasised earlier, they can ensure legal certainty for innovators. This is particularly suitable for the Korean Civil Law system that prefers legal certainty in enforcement, as developed through codification like in the EU. Second, it can provide a clear efficiency justification based on the US-type rule of reason and a quick-look assessment. This quick-look approach, through market share scrutiny with hard-core provisions, reduces litigation costs since it allows plaintiffs to avoid the full burden of proof that may be required under the balance test.[94)] In particular, the EU Commission faced the unmanageable work load in enforcement from the widening of the Union: as the EU becomes larger and larger, the enforcement investigation burden of the Commission has increased. Therefore, efficient enforcement through legislating a set of block exemption regulations was expected and

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Review, Vol. 34, No. 3 (2010), pp. 221–224.

92) Choi, Yo Sop, "Analysis of the *Microsoft*, *Intel* and *Qualcomm* Decisions in Korea", *European Competition Law Review*, Vol. 31, No. 11 (2010), pp. 470–475.

93) Competition authorities need to examine overall market situations. For example, if one firm possesses a small number of patents that exist for producing widgets, it may not be considered a market dominant firm. However, where a firm has only plant capable of making widgets in the relevant market, it is likely to be considered a dominant one. For this illustration, see Elhauge, Einer & Geradin, Damien, *Global Competition Law and Economics*, Hart Publishing, Portland, OR, 2007, p. 192.

94) For further discussion about the development of quick-look assessment, see Goetz, Charles J. & McChesney, Fred S., *Antitrust Law: Interpretation and Implementation*, Foundation Press, New York, 2009, pp. 199–201; Choi, Yo Sop, "Adoption of New Block Exemption Regulations in the European Union", H*UFS Global Law Review*, Vol. 2, No. 1 (June 2010), pp. 72–73.

considered desirable from the very beginning.[95] The Korean policymakers can consider the adoption of these efficient enforcement techniques, thereby improving a balance assessment in the IP cases.

IV. Concluding Remarks

The intersection of IPR and antitrust has brought attention to scholars, agencies, and courts, and it has become an area of never-ending debate. IPRs help investments in innovation by conferring exclusive power on the innovator within a certain period. However, antitrust aims at ensuring competitive markets, thereby helping him have the incentive to find new or better ways to innovation through preventing abusive conducts of IPRs. Some commentators also argue that IP is just another type of property. Thus, it is not necessary to treat it under competition laws. Nonetheless, the competition law provisions in the US, the EU, and Korea continue to identify characteristics that substantially distinguish IP from other forms of property,[96] and this classification based on the balance test argument is very robust.

One of the main objectives of competition law is to improve competition or to protect the process of competition in the market, by means of preventing acts of abuse of market dominance or anti-competitive agreements. On the contrary, IPRs allow firms to encourage invention through permitting IP holders to exploit their monopolistic power, avoiding undesirable competition with the belief of its enhancement of incentives. This explains that there is a conflict between the two areas. However, they

95) For further detail about historical development of block exemption regulation legislation, see Fox, *The Competition Law of the European Union*, op. cit., pp. 245–247.

96) Pitofsky et al., op. cit., pp. 789–790.

are understood as in harmony since both eventually aim at achieving the goal for public interest.[97]

The EU's TTBER allows licensing agreements for ensuring better innovation except when they are not bilateral agreements, exceeding certain market share, or containing hard-core restrictions. As Jorde and Teece argue, a market share threshold for examining market power clarifies and ensures legal treatment of co-operation by scrutinising an objective test (or hard-core test).[98] This measure is very technical and can create legal certainty which is crucial for the Civil Law tradition.

Some scholars argue that a quite number of international cartels in the 1940s involved patent pools and networks of cross-licensing. In addition to the fear of this type of international cartels, it is necessary to remind there is always a tension between free trade and exclusive rights to exploit in invention. Furthermore, most of competition regimes in the developed world recognise that protection of IPRs enhances incentives to creativity, thereby improving economic growth.[99] This view as a whole has been already analysed by a quite number of lawyers and economists who explain the connection between innovation and economic growth.[100] Likewise, the Korean competition authority needs to re-examine whether the existing competition law provision is sufficient to ensure the balance test for positive outcomes from IP, especially for economic development.

97) For further discussion, see Areeda et al., op. cit., p. 343.

98) Jorde, Thomas & Teece, David, "Innovation, Cooperation, and Antitrust", in Jorde, Thomas & Teece, David (editors), *Antitrust, Innovation, and Competitiveness*, Oxford University Press, New York, 1992, p. 56; Enchelmaier, Stefan, "Hardcore Restrictions in Technology Transfer Agreements under Regulation (EC) 722/2004", in Anderman, Steven & Ezrachi, Ariel (editors), *Intellectual Property and Competition Law,* Oxford University Press, New York, 2011, p. 431. However, Enchelmaier argues that the EU provision, especially on hard-core restrictions, is excessively complex and, thus, fails to provide legal certainty.

99) Fox, "Competition Law" op. cit., p. 439.

100) Carrier, op. cit., p. 31.

This article examined various legal techniques in the EU, with reference to the US and Korea, illustrating the near-convergence through establishing the regulations and guidelines. It is not an easy task to decide whether positive outcome from a certain licensing agreement can offset anti-competitive one. In addition, the issues related to incentive enhancement through IPRs and the balance approach often raise internal difficulties because the necessary rewards for invention is almost always vague.[101] However, the provisions of the EU have proved their successful outcomes such as ensuring legal certainty and trade-off test through market share threshold with hard-core prohibitions. The Korean policymakers can learn much about its legal techniques.

In conclusion, there is no doubt that it is necessary to create a certain degree of harmonisation in order to solve the problems in conflicts between IP and competition law in the international level. Nevertheless, it is almost impossible to achieve one voice for all. The best way is, thus, to establish a balance-provision for the localised harmonisation that would not distort competition in the domestic market and would not inhibit trade in the global market.

101) Elhauge, Einer, *United States Antitrust Law and Economics*, Thomson/West, New York, 2008, p. 154.

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라이선싱과 관련 유럽연합의 경쟁법과 지적재산에 관한 비교법적 연구

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국문초록

경쟁법의 집행에 있어서 각국은 다양한 모습을 보여주고 있으나, 시장지배력과 관련된 사안들을 규제하는 태도는 비슷하다. 또한 여러 가지 행위를 통하여 시장지배적지위에 영향을 주거나 그것을 이용하는 행위도 경쟁법의 주요 규제 대상이므로, 지적재산권 행사를 통한 시장지배력지위의 남용 가능성 여부가 경쟁법의 규제대상이 되는 것은 당연하다. 그러나 공정한 경쟁을 유도하여 기술개발과 혁신을 보호하려는 측면에서 보면, 경쟁법을 통해 지적재산권의 남용을 규제한다는 것이 많은 논쟁의 대상인 것이 사실이다.

결국 지적재산권과 경쟁법의 목적과 관련하여 공통된 부분을 찾는 것이 학자들 사이에서 주요한 논제였다. 특히 두 분야는 궁극적으로 서로 목적이 배치되는 것으로 인식되어 온 것도 사실이다. 지적재산권과 시장지배적지위를 연결하여 살펴보면, 경쟁법의 주요 목적은 시장지배적지위의 남용 혹은 반경쟁적인 합의를 제한함으로써 시장에서의 경쟁을 증진시키는 것이다. 반면에 지적재산권의 보호는 지적재산권 소유를 통한 시장지배력을 어느 정도 용인함으로써 창의성을 장려하는 목적을 가진다. 그러나 두 분야는 모두 사회후생 및 효율성의 극대화를 목적으로 하고 있다는 점에서는 공통분모를 가지고 있다.

위와 같은 논쟁의 문제 때문에 경쟁법을 제정한 대부분의 국가는 기술라이선싱과 관련하여 적용제외규정(Block Exemption Regulation) 혹은 같은 취지의 지침을 운용하고 있다. 물론 라이선싱에서 반경쟁적 결과를 상쇄하는 긍정적인 효과를 판단하기 위한 기술적 방법을 찾는 것이 쉽지는 않은 일이다. 그러나 비교경쟁법적 연구를 통하여 다양한 법의 적용방법을 알아보고, 현재 관련 규정의 문제점을 파악하면 보다 효율적인 법제를 제안할 수 있을 것이다.

본 연구는 유럽연합, 미국 그리고 국내에서 실행하고 있는 지적재산권에 대한 관련 경쟁법 규정을 연구하여 공통점을 도출한다. 우선 유럽연합 경쟁법의 실체규정을 중심으로 관련 내용을 조사하고, 특히 유럽연합의 기술이전 관련 일괄적용제외법률(Technology Transfer Block Exemption Regulation)을 지적재산

권과 연결 지어 분석한다. 이후 국내 경쟁법 및 미국 반독점규제법과 그 내용을 비교한다. 유럽연합 및 미국의 라이선싱 법률과 지침은, 시장점유율제한(Market Share Threshold) 규정과 더불어 당연위법(*Per se* Violation) 및 강력하게 규제해야 할 행위(혹은 경성제한 행위: Hard-core Restraints)를 설정함으로써 법적확실성을 보장한다. 아울러 이 규범들은 관련 행위에서의 친경쟁적 혹은 반경쟁적 효과를 비교형량하는 판단요소를 포함하고 있다. 본 연구를 시작으로 더욱 많은 비교법제연구를 통하여 각국의 규정을 연구하여 시장점유율제한 및 경성제한 행위설정을 구체적으로 규범화하여 국내 관련 규정을 발전시킬 수 있을 것이다.

주제어

유럽연합, 경쟁법, 반독점규제법, 독점규제 및 공정거래에 관한 법률, 연구개발, 적용제외규정, 당연위법, 합리의 법칙, 라이선싱