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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Comparing Antitrust Guidelines In The US And Korea

Law360, New York (January 30, 2012, 1:52 PM ET) -- Like their Korean counterparts, the United States' laws governing intellectual property and competition, respectively, share the common purposes of promoting innovation and enhancing consumer welfare.[1] Also as in Korea, in the U.S. there is significant tension between intellectual property (IP) rights and competition (antitrust) regulation.

Competition laws prohibit unreasonable restrictions on competition; IP laws legalize certain restrictions, giving "creators of new and useful products, more efficient processes and original works of expression" the right to restrict competition regarding their creations.[2]

As the U.S. Court of Appeals for the Federal Circuit has observed[3], however, "the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition." Atari Games Corp. v. Nintendo of Am. Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990).

The Korean and U.S. competition agencies[4] recognize that the tension between robust competition and IP rights can make it difficult for entities to predict whether particular conduct will be considered legal.[5] This includes transferring, or licensing, of IP rights.[6]

IP is typically one factor among many in a production process, and derives value from being combined with complementary factors such as manufacturing and distribution facilities. The IP owner may seek to arrange such a combination, and she will often do so through licensing. For instance, she might contract with others for complementary factors, or sell her IP rights, or enter a joint venture.

To lend some predictability to the legality of a given licensing arrangement, the Korean and U.S. competition authorities have issued guidelines stating their respective antitrust policies with respect to IP licensing.[7] This article offers some observations on how, at least on their face, the U.S. guidelines compare to their Korean counterparts.

The U.S. Guidelines

The U.S. Guidelines apply to patent, copyright and trade secret IP, and "know-how."[8] They are not "hard and fast" rules, and are to be applied "reasonably and flexibly" to each case in light of its own facts. They embody three general principles.[9]

First, IP is essentially comparable to other property for antitrust purposes. Although there are important differences between IP and other property, such as the greater ease with which IP can be misappropriated, as with other property, conduct involving IP can be anti-competitive. Such conduct will be afforded the same antitrust analysis as other property.

Second, IP ownership is not presumed to create market power. Though an IP holder can exclude others as to a particular item, so long as there are sufficient substitutes, the holder will not be able to exercise market power for any significant time.

Third, IP licensing is generally pro-competitive and welfare-enhancing because it can facilitate integration of IP with complementary factors, leading to efficiencies. Potential efficiencies include reduced consumer costs, introduction of new products and greater investment in research and development (R&D).

However, despite these potential benefits, IP licenses, like other business arrangements, can raise antitrust concerns in certain circumstances.[10] These circumstances include where the licenses:

- Are likely to affect adversely the prices, quantities, qualities or varieties of goods and services available;
- Divide markets among firms that would have competed using different technologies;
- Could decrease competition in a relevant market;
- Could harm competition among entities that, absent the license, would have been potential competitors[11]; and
- Could harm competition in another market.

When antitrust concerns arise, the agencies review the licensing arrangement, focusing on its "actual effects[,] not its formal terms."[12] Their primary inquiry is whether the arrangement "harms competition among entities that would have been actual or likely potential competitors ... in the absence" of the arrangement.[13]

Comparison to the Korean Guidelines

A comparative review of the Korean and U.S. guidelines shows that they are more similar than different. They share the same basic goal and the same basic principles.

The primary difference lies in their respective approaches to IP versus competition.

As drafted, the U.S. guidelines reflect a greater proclivity toward IP rights. The Korean guidelines, on the other hand, indicate potential for stronger competition enforcement. Two areas that illustrate this difference are the safety zone and consideration of efficiencies.

The Safety Zone[14]

Unlike the Korean guidelines, the U.S. guidelines guarantee some arrangements freedom from antitrust scrutiny. This "safety zone" is intended to provide IP holders some certainty as to when licensing arrangements will be deemed so unlikely to have anti-competitive effects that the agencies presume they are not anti-competitive.

When a restraint's competitive effects can be assessed in the goods market, as with most licensing restraints[15], it falls into the safety zone if (1) it is not facially anti-competitive[16] and (2) the parties to it collectively account for no more than 20 percent of each significantly affected relevant market.[17]

A restraint affecting competition in a technology market falls into the safety zone if (1) it is not facially anti-competitive and (2) there are four or more independently controlled substitutes for the licensed technology.

A restraint affecting competition in an innovation (R&D) market falls into the safety zone if (1) it is not facially anti-competitive and (2) four or more other independent entities possess the assets, characteristics and incentive to engage in R&D that is a close substitute of the R&D in the arrangement.[18]

In contrast, the Korean guidelines do not guarantee protection for any given restraint. This unwillingness to presume fairness of any exercise of IP rights indicates a vigilant approach to protecting competition.

Efficiencies

Another difference between the Korean and U.S. guidelines is that the U.S. begins its analysis of all licensing arrangements by asking "whether the restraint ... can be expected to contribute to an efficiency-enhancing integration of economic activity."[19]

The answer to this question dictates whether the restraint will be among the "vast majority" evaluated under the rule of reason[20], or if it will be among the rare cases in which the "'nature and necessary effect are so plainly anti-competitive' that it should be treated as unlawful per se[.]"[21]

Under the Korean guidelines, efficiencies "shall, in principle," be considered when a restraint "imped[es] fair trade and improv[es] efficiency at the same time"[22], and if the efficiencies outweigh the impediment of trade, the restraint "may" not breach the competition laws.[23]

This language is not particularly reassuring, especially considering the Korean guidelines' unwillingness to guarantee protection for any particular arrangement (supra). Moreover, the Korean guidelines do not identify any examples of efficiencies that could be deemed to immunize even a hypothetical restraint.

And the Korean guidelines decline to consider efficiencies at all for certain restraints, such as minimum resale price maintenance.[24] This distinction also indicates a stronger predilection in Korea toward protecting competition, versus a U.S. propensity to permit licensing arrangements.

Conclusion

Entities conducting business in both Korea and the U.S. face numerous challenges in dealing with the different competition enforcement schemes.

On balance, the IP licensing guidelines may be among the less daunting of those challenges. Nonetheless, navigating their differences can be tricky. Anyone required to do so is wise to secure counsel well-versed in these issues.[25]

--By Kerin E. Coughlin, Constantine Cannon LLP

Kerin Coughlin is based out of Constantine Cannon's New York office. She is currently vice chairwoman of the New York State Bar Association antitrust section class action committee.

[1] See Korea Fair Trade Commission (KFTC), Review Guidelines on Undue Exercise of Intellectual Property Rights (Mar. 31, 2010) (English version) (Korean Guidelines) § II.1; United States Department of Justice (DOJ) and the Federal Trade Commission (FTC), Antitrust Guidelines for the Licensing of Intellectual Property (Apr. 6, 1995) (U.S. Guidelines) § 1.0.

[2] See U.S. Guidelines § 1.0. See also Korean Guidelines § II.1.

[3] The Federal Circuit Court of Appeals was created specifically to handle patent and

copyright appeals. See SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, REPORT ON THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 6 (2002) ("ABA Report"). It has been criticized for favoring intellectual property rights over antitrust enforcement. See, e.g., DOUGLAS ROSENTHAL, DO INTELLECTUAL PROPERTY LAWS PROMOTE COMPETITION & INNOVATION?, VII Sedona Conference Journal 145, 149 (2006). However, others have suggested that the antitrust claims before the court — not the court itself — may be to blame. See ABA Report at 4, 69-71 (addressing whether "antitrust claimants' relatively poor record before the Federal Circuit ... reveals [the court's] antipathy toward antitrust principles or simply the weakness of the antitrust theories involved").

[4] In Korea, this is the Korean Fair Trade Commission (KFTC). In the U.S., it is the DOJ and the FTC (the "Agencies").

[5] U.S. Guidelines § 1.0, n.2; see generally Korean Guidelines § I.1.

[6] See U.S. Guidelines § 2.3 regarding the discussion in this paragraph. As used herein, "licensing" generally refers to all transfers of intellectual property. See id.

[7] Korean Guidelines § I.1; U.S. Guidelines § 1.0 n.2.

[8] U.S. Guidelines § 1.0. Unlike the Korean Guidelines, the U.S. Guidelines do not cover trademarks. Compare id. n.1 with Korean Guidelines § I.2.

[9] Except as otherwise noted, see U.S. Guidelines § 2 regarding these general principles.

[10] Except as otherwise noted, see U.S. Guidelines § 3 regarding the following discussion generally, and § 3.1 regarding the circumstances listed, specifically.

[11] A firm will be treated as a likely potential competitor if there is evidence that entry by that firm is reasonably probable absent the licensing arrangement. Id. § 3.1 n.14.

[12] Id. § 3.1.

[13] See also ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1101 (6th ed. 2007) ("ALD").

[14] Except as otherwise noted, see U.S. Guidelines § 4.3 and ALD 1102-03 regarding this discussion.

[15] To the extent possible, the Agencies analyze licensing arrangements in the relevant goods market(s) — i.e., the markets for goods made using the IP, or for goods used with the IP as inputs to other goods. U.S. Guidelines § 3.2; see also ALD at 1102. If that is not feasible — such as where IP rights "are marketed separately from the products in which they are used" or an arrangement affects the development of goods that do not yet exist — the Agencies will analyze the effects in a technology or R&D market. Id.

[16] "Facially anti-competitive" restraints are those normally warranting per se treatment, or that would always or almost always tend to reduce output or increase prices. U.S. Guidelines § 4.3 n.30. Examples are naked price-fixing, output restraints, horizontal market allocation and certain group boycotts. See id. § 3.4. The U.S. Guidelines, issued in 1995, identify resale price maintenance as a per se restraint, but that has been treated under the rule of reason since Leegin in 2007. Compare KFTC Monopoly Regulation and Fair Trade Act Art. 29 (2007) (English version); Korean Guidelines § III.1.D(1) (both identifying minimum resale price maintenance as per se illegal).

[17] The safety zone does not apply to outright sales of all IP rights or to exclusive licenses (e.g., licenses precluding all other persons, including the licensor, from the IP). Those are

analyzed as mergers. U.S. Guidelines §§ 4.3, 5.7.

[18] The U.S. Agencies note that "[t]he status of a licensing arrangement ... may change over time ... [and] inclusion in the safety zone is based ... the time of the conduct at issue." Id. § 4.3.

[19] Id. § 3.4 (emphasis added).

[20] The rule of reason asks "whether the restraint is likely to have anti-competitive effects and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anti-competitive effects." Id. (citing cases).

[21] Id. (quoting FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 433 (1990), and Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

[22] Korean Guidelines § II.2.C.

[23] Id. (emphasis added).

[24] Id. § II.2.

[25] This article is adapted from a paper prepared by the author in connection with her presentation in the June 10, 2011 seminar of the Innovation, Competition and Regulation (ICR) Law Center in Seoul, Korea, entitled "Comparison & Analysis of IPR Licensing Guidelines of Several Competition Authorities, in an International Context." That paper has been published in REGULATORY FRAMEWORK FOR LICENSING INTELLECTUAL PROPERTY RIGHTS (ICR Law Center 2011), a collection of papers from the Center's seminar series.