



# US Competition Guidelines for Intellectual Property Licensing: Overview and Comparison with Korean Guidelines

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# Introduction

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- US Competition Laws
- US Competition Enforcement
- US Licensing Guidelines
- Comparison with Korean Guidelines
- Current Issues



# Summary

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- US and Korean Guidelines are more similar than different.
- Same basic goal, same basic principles.
- US Guidelines indicate a desire to permit licensing arrangements.
- Korean Guidelines indicate potential for strong enforcement of the competition laws.

# US Competition Laws

## "The Antitrust Laws"

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### **The Sherman Antitrust Act**

- 1890 – “The Grandfather”
- Prohibits unreasonable restraints:
  - by firms acting collectively (conspiracy)
  - by firms acting alone (monopoly)

# US Competition Laws *continued*

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## **The Clayton Act—1914**

- Prohibits mergers, acquisitions and other conduct if it may substantially lessen or destroy competition.

## **The Federal Trade Commission Act –1914**

- Prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."

# US Enforcement System

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## Two Government Agencies:

- Federal Trade Commission (FTC)
  - computer hardware, energy, pharmaceuticals (among others)
- Department of Justice (DOJ)
  - computer software, telecommunications, beer (among others)

*The Licensing Guidelines were jointly created by the two Agencies.*



# US Licensing Guidelines

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The Agencies' policy for enforcing the competition laws with respect to licensing intellectual property

- *Patent*
- *Copyright*
- *Trade Secrets*
- *Know-How*

# US Guidelines *continued*

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Not "hard and fast":

- Applied "reasonably and flexibly."
- Each case evaluated on its facts.
- Focus on arrangement's effects, not formal terms.

# US Guidelines *continued*

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## General principles:

- Standard antitrust analysis applies.
- Intellectual property not presumed to create market power.
- Licensing is generally beneficial.
  - Firms combine complementary factors —achieve efficiencies.



# Comparison to Korean Guidelines

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US Guidelines indicate a desire to allow licensing arrangements.

- General approach
- Specific mechanisms

Korean Guidelines indicate potential for strong enforcement of competition laws.

- General approach
- Fewer protective mechanisms

# Comparison to Korean Guidelines

## *continued*

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### US "Safety Zone"

Agencies will not challenge (most) restraints that:

- are not a type that always / almost always reduce output or raise prices; and
- the parties, together, comprise less than 20% of the affected markets.

*Korean Guidelines do not appear to guarantee such protection for any particular arrangements.*

# Comparison to Korean Guidelines

## *continued*

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US Guidelines always consider efficiencies.

- Even if they would not be considered in other contexts.
  - Including restraints that are illegal on their face (per se), like price-fixing and market allocation.<sup>1</sup>
- First step is always to consider efficiencies.
  - If none, and the restraint is a per se illegal type, then challenge without further analysis.
- Otherwise apply "rule of reason":
  - Likely anticompetitive effects?
  - If so, necessary to achieve (greater) procompetitive effects?

*Korean Guidelines do not consider efficiencies for certain restraints.*

1. Minimum resale price maintenance is no longer per se illegal in the US (since *Leegin*, 2007).

# Illustration: Korea Ex. 1

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## *Tying Technology License to Product Purchase*

- A has mobile communications technology patent.
- A also sells modem chips.
- A's communications technology is designated as standard.
- A becomes dominant in technology market.
- Competitor enters modem chip market.
- A then charges discriminatory royalty for technology license based on whether licensee purchases A's chip.
- A becomes dominant in chip market.

# Illustration: Korea Ex. 1 *continued*

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## *Tying Technology License to Product Purchase*

Korean Guidelines: **UNFAIR.**

US Guidelines:

- Does A have power in communications technology (tying) market?
- Does the discriminatory royalty harm the chip (tied) market?
- Do efficiency justifications outweigh anticompetitive effects?
  - *Not addressed in Korea Ex. 1.*

Potentially not unfair, depending on other (unknown) facts.

# Current Issue

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## Excess Royalties for Technology Designated as Standard (Korea Ex. 3)

Problem: *After* technology designated as standard and users switch, patent holder claims ownership and charges excess royalties. ("Hold-up")

DOJ recently advised:

- Clear rules about disclosing property claims in standard-setting.
- Clear definition of "reasonable and non-discriminatory" terms.
- Disclosing royalty costs before designating as standard.
- BUT rules should not be too harsh.
  - Standard-setting has many benefits.
  - Do not want to discourage participation.

*May 26, 2010 Remarks of US Assistant Attorney General Christine Varney to US Patent Office, FTC & DOJ.*

# Current Issue

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## Pharmaceutical Patent Litigation Settlements Delaying Generic Entry (Korea Ex. 4)

Problem: Pharmaceutical patent holders pay generics to delay market entry in settlement of patent litigation. ("Exclusion payment," "reverse payment," "pay-for-delay")

- Costs consumers billions of dollars each year.

FTC recently advised:

These payments should be per se illegal.

*May 18, 2011 FTC Amicus Brief, In re K-Dur Antitrust Litigation.*



# Conclusion

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Thank You!

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