



Tuesday, 14 March, 2017, : BRUEGEL

Intellectual Property and Competition Policy in Europe and Japan

Intellectual Property and Competition Policy in Japan

Japan Fair Trade Commission
Commissioner
Reiko AOKI



Anti-Monopoly Act (AMA)

- 1947 (69years old)
- The 3rd competition law in the world
(after US and Canada)
- **PURPOSE:** “.....to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers.”



Japan Fair Trade Commission (JFTC)

- 1947 (69years old)
- 1 chairman + 4 commissioners
- about 800 staffs in the general secretariat





Comparison of Substantive Provisions: US-EU-Japan

Competition law structure			US	EU	Japan
After-the-fact regulation	Concerted practices	Horizontal restriction	Unreasonable restraint of trade (Sherman Act, Section 1)	Concerted practices (EU Treaty, Article 101)	Unreasonable restraint of trade (Article 3 (latter part), Article 8)
		Vertical restriction			Unfair trade practices (Article 19)
	Monopolization / Abuse of dominant position	Monopolization (Sherman Act, Section 2)	Abuse of dominant position (EU Treaty, Article 102)	Private monopolization (Section 3 (former part)) Unfair trade practices (Article 19)	
Ex-ante regulation	Merger regulation		Clayton Act, Section 7, Section 7A	Council Regulation (EC) No 139/2004	Chapter IV of the law (Articles 10-18)
Unique regulation			Robinson-Patman Act (Price discrimination)	State aids (EU Treaty, Article 107)	Subcontract Act

(Note) In addition to the above, the prohibition of “unfair methods competition” is stipulated in Article 5 of the Federal Trade Commission Act in the U.S.A.



Intellectual Property Rights and Competition Policy (1)

○ IP has positive effect on competition

- Stimulates R&D activities of enterprises
- Serves as the driving force in creating new technologies
- Activates competition in the existing and newly created market
- Makes transaction of technologies possible = further positive impact of competition
 - Combination of new technologies further increases firm efficiency
 - Enhances competition among firms with newly acquainted technologies



Complimentary Relationship between Competition Law and IP Law

➤ The Anti-Monopoly Act (Article 1: purpose)

“...to **promote fair and free competition**, stimulate the creative initiative of enterprises, encourage business activity...and thereby promote the democratic and wholesome **development of the national economy**...”

➤ The Patent Act (Article 1: purpose)

“...to encourage inventions, and thereby to **contribute to the development of industry.**”

➤ Intellectual Property Basic Act (Article 10: Consideration for promoting competition)

“In promoting measures for the creation, protection and exploitation of intellectual property, consideration shall be paid to secure the fair exploitation of intellectual property and public interests and **to promote fair and free competition.**”

Intellectual Property Rights and Competition Policy (2)

However, **IP may have negative effect** on competition if IP holder

- Refuses to license its technology, or
- Imposes strictly restrictive conditions



Competition Law can

- Protect competition from negative effect of restrictions inconsistent with IP protection systems
- Promote competition through by enhancing IP protection systems



General Principles of Competition Law and IP in Japan

- Japanese competition law gives an **exemption** on the exercise of IP rights
 - **Article 21 of the Anti-Monopoly Act**
“The provisions of this Act do not apply to **acts found to constitute an exercise of rights** under the Copyright Act, Patent Act, Utility Model Act, Design Act or Trademark Act.”



Exercise of IP rights (1)

- In case where the conducts in question **deviate** from IP rights protection system, it **cannot** be regarded as the “exercise of IP rights”.
- Determining conduct that **deviate** from IP rights protection
 - Does conduct may stimulate the firms’ efforts for creativity and practice of new technologies ?
 - Taking into account
 - Firm’s intention and manner of the conduct
 - Impact on competition



Exercise of IP rights (2)

- When **restriction*** concerning use of technologies results in excluding or controlling other firms' business, this may be **Private Monopolization** (Article 2, Paragraph 5 of the AMA)
 - * Inhibiting the use of technology, limiting the scope of use of technology, imposing conditions for the use of technology, etc.
- When right holder's conduct is likely to impede fair competition, even if it does not match the requirements of Private Monopolization, the conduct may be **Unfair Trade Practices** (Article 2, Paragraph 9 of the AMA)



Revision of IP Guidelines in 2016: Background

- JFTC published **Guidelines for the Use of Intellectual Property under the Anti-Monopoly Act** in 2007
 - Clarified application of Antimonopoly Act on the issues related to **the SEP (Standard Essential Patent)**
 - IP related cases judged based on the guidelines.
- It became unsatisfactory
 - Some conducts not included (e.g., **injunction** by SEP holder) or limited guidance
 - New cases and issues related to the SEP (e.g., Apple – Samsung case in Japan)
- Therefore, the JFTC **reviewed the Guidelines** and added description on **SEP holder's** behavior.

Apple - Samsung case (civil litigation) in Japan

- Main issue
 - Is it illegal to demand an **injunction** relating to a FRAND-encumbered standard-essential patent for the communication by Samsung

- Summary of judgment by the Intellectual Property High Court
(May 16, 2014)
 - The execution of the right to demand an injunction based on the FRAND-encumbered patent is an **abuse of rights** (paragraph 3, article 1 of the Civil Code) if the other party is **willing to take a license** under FRAND conditions.



Revision of IP Guidelines in 2016: Points of revision (1)

- Conducts by a FRAND-encumbered essential patent holder **not regarded as exercise of rights** under the patent laws as follows;
 - **Refusal to license** or claim for injunction to a party who is **willing** to take a license on FRAND terms, or
 - **Withdrawal** of FRAND Declaration for Essential Patent and **refusal** to license or claim for **injunction** to a party who is **willing** to take a license of the Essential Patent on FRAND terms
- **Implication:**

The conducts mentioned above are subject to Anti-Monopoly Act (Private Monopolization or Unfair Trade Practice).



Revision of IP Guidelines in 2016: Points of revision (2)

- Whether or not a party is the one who **is willing to take a license** on FRAND terms (willing licensee) should be decided on **case-by-case** basis, taking into account the behavior of **both sides** in licensing negotiations process, etc.
- **For example,**
 - What is the infringement ?
 - How is it infringed ?
 - What are the conditions offered for license and is it reasonable ?
 - Have parties responded promptly to the offers and reasonably ?
 - Are the responses in good faith in light of the normal business practices ?



Recent case on IP right: One - Blue case (1) Overview of One-Blue

- One-Blue is a patent pool that manages Blu-ray Disc (BD) SEPs
 - Acts as licensor under contracts with certain holders of the BD SEPs (SEP Owners).
- SEP Owners have declared that they will license the BD SEPs on FRAND terms.
 - Some One-Blue Licensors engage in the manufacturing and sales of recordable BDs.
- A person or entity that wishes to be granted a license may enter into an agreement with One-Blue.
 - Agreement grants the person or entity right to negotiate a license to manufacture and sell BD standard products .
 - Person or entity may also negotiate a license with each of the SEP Owners.

Recent case on IP right: One - Blue case (2) Backgrounds of the case

- **Imation** is manufacturer and seller of recordable BDs.
- **Imation** and **One-Blue** engaged in negotiation to license SEPs since 2012 but unable to agree on the fee.
- **Imation** presented to **One-Blue**
 - Willingness to pay One-Blue a fair and reasonable license fee
 - Proposed a license fee.
 - Asked One-Blue to explain the rational for license fee proposed by One-Blue.
- **One-Blue** gave no explanation
 - Refuses to negotiate the license fee in order to provide non-discriminatory terms.



Recent case on IP right: One - Blue case (3) Conduct in Violation of the AMA

- June 2013, **One-Blue** sent notice to **three of major customers** of **Imation** in Japan (= retails Imation recordable BDs).
 - Informed them that **One-Blue Licensors could** seek injunction against them for SEP infringement.
- **One of the three** suspended the sale of **Imation** recordable BDs from mid-June 2013 through March 2015.

Recent case on IP right: One - Blue case (4) Conduct in Violation of the AMA (cont'd)

- August 2013, **Imation** filed a lawsuit to the Tokyo District Court seeking injunction against One-Blue conduct (threaten to file injunction)
- February 18, 2015 Tokyo District Court ruled that
 - **One Blue** were not allowed to exercise the right to seek injunction because it constituted an “abuse of rights.”
 - Therefore, notifying the retailers that **One-Blue** was entitled to exercise such right deemed making false allegation
 - Falls under **unfair competition** in Unfair Competition Prevention Act (became final judgment).
- Subsequent to the final and binding judgment, **the customer** resumed the sales of **Imation** BDs (April 2015).
- December 2015, **Imation** withdrew from the manufacture and sales of recordable BDs (not expecting future growth).

Recent case on IP right: One - Blue case (5) Decision by the JFTC

- JFTC found **One-Blue** unjustly interfered with Imation's transaction
 - **Imation** was willing to obtain a license BD SEP on FRAND terms
 - **Imation** is a competitor for **SEP Owners**
- Paragraph 14 of the Designation of Unfair Trade Practices (Interference with a Competitor's Transactions) and consequently is in violation of Article 19 of the Antimonopoly Act.
- **Imation customer** resumed sales of such BDs around April 2015. Therefore, the JFTC found **One-Blue** has not been engaged in the conduct of violation at issue since the said month at latest.
- JFTC found there to be no necessity to issue a cease and desist order and case was closed.



JFTC's character :
DOKKIN

Thank you very much for your kind attention.

JFTC Website: <http://www.jftc.go.jp/en/index.html>

JFTC Video: <http://youtu.be/QcXKTU3s480>

*The contents of this presentation do not necessarily reflect the views of the JFTC.