Korea-China Market & Regulation Law Center's 2014 International Conference: Recent Trends of IT Industry Restructuring Worldwide & Regulatory Reactions of Korea and China – with an Emphasis on Antitrust and IPR

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*The views expressed here are those of the author and do not necessarily represent the views of the Commission or any of its Commissioners.

The Link Between Competition and Wealth

McKinsey Global Institute Study

The study found that:

(1) levels of productivity were associated with increasing wealth; and

(2) that differences in the amount of competition in a nation's domestic markets were far more important drivers of national wealth than were other differences, for instance, in the labor or capital markets.

> --William Lewis, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY (2004) at 13.

The U.S. Approach: The Evolution from the "Nine No-Nos" to the Rule of Reason

In the United States, we have evolved from a time when the U.S. antitrust agencies treated a host of licensing restraints as *per se* unlawful to a time when the vast majority of licensing restraints are analyzed under the rule of reason.

The U.S. Approach: The Evolution from the "Nine No-Nos" to the Rule of Reason

Under the old approach, which was developed in the 1970s and was known as the "Nine No-Nos," the U.S. antitrust agencies treated as *per se* unlawful restraints such as:

- tying the purchase of unpatented materials as a condition of the license;
- requiring the licensee to assign back subsequent patents;
- minimum resale price provisions for the licensed product;
- royalty provisions not reasonably related to the licensee's sales;
- mandatory package licenses;
- restricting the right of the purchaser of the product in the resale of the product;
- restricting the licensee's ability to deal in products outside the scope of the patent; and
- a licensor's agreement not to grant further licenses.

1995 DOJ/FTC *Antitrust Guidelines for the Licensing of Intellectual Property*

Basic Principles:

- for the purpose of antitrust analysis, the agencies regard IP as being essentially comparable to any other form of property, although the agencies do recognize the need to take account "the special characteristics" of IP, such as the ease of misappropriation;
- IPRs do not necessarily confer market power as there will often be sufficient actual or potential close substitutes to prevent the exercise of market power;
- IP licensing allows firms to combine complementary factors of production and is generally procompetitive; and
- when analyzing competitive effects, they must be analyzed in comparison to what would have happened in the absence of a license.

Presumptions

- In the United States, the vast majority of licensing restraints—both horizontal and vertical—are evaluated under the rule of reason.
- Presumptions that conduct is anticompetitive are created only when experience has shown that the nature and necessary effect of a restraint is "so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality."
- Thus, the *per se* rule in the United States applies only to agreements to fix prices, allocate markets, or allocate customers, all of which extensive experience has shown have clear anticompetitive effects and rarely if ever have plausible efficiency justifications.

Price Regulation

In the United States, entities are free to privately negotiate price, and a monopolist is free to charge monopoly prices, which induces risk taking that produces innovation and economic growth. -- *See, e.g.*, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004).

Discriminatory Licensing, Compulsory Licensing, and the "Essential Facilities" Doctrine

- In the United States, companies are generally free to choose with whom they will do business.
- The U.S. Antitrust Agencies do not typically prohibit discriminatory refusals to license or licensing on different terms to different entities. This is because, in the U.S. experience, such restraints very rarely have any anticompetitive effects.
- The U.S. Supreme Court has never recognized the essential facilities doctrine, and it has never been applied to cases involving IPRs.

Standard-Setting Activities

- Standard setting is generally procompetitive.
- Rules that lead to below-market fair, reasonable, and non-discriminatory (F/RAND) rates may discourage participation in standard-setting, reducing the quality of standards and social welfare.

Conclusion

- The U.S. approach to issues involving IPRs seeks to promote innovation and enhance consumer welfare, both of which are served by rigorous and undistorted competition.
- When competition is distorted, an entire economy can become less competitive.
- Conversely, rigorous competition creates efficient, productive firms, which are better able to compete domestically and globally. This, in turn, increases domestic economic growth and standards of living.

Resources

- Websites:
  - www.ftc.gov
  - www.justice.gov/atr