

## Korea Fair Trade Commission Amends Guidelines for Review of Unreasonable Exercise of Intellectual Property Rights

The Korea Fair Trade Commission (hereafter "KFTC") amended the Guidelines for Review of Unreasonable Exercise of Intellectual Property Rights (hereafter "IPR Guidelines"), which became effective as of December 24, 2014. Through such amendment, a framework has been set for the regulation of abuse of patent rights by Non-Practicing Entities (hereinafter "NPE(s)") and Standard-Essential Patent (hereinafter "SEP(s)") holders.

### 1. Key Points of Amendment

- **(Newly established definitions)** Definitions for (i) NPE and (ii) SEP have been newly established in the amended IPR Guidelines.
  - The amended IPR Guidelines adopted a definition of a SEP as including a de facto SEP.
- **(Detailed specifications in regard to abuse of patent rights by NPEs)** The amended IPR Guidelines designated the following five types of acts as examples of abusive or unreasonable acts: (i) imposing markedly unreasonable level of royalties, (ii) not complying with FRAND terms, (iii) engaging in an unreasonable agreement, (iv) filing an unreasonable patent infringement lawsuit or threatening to do so and (v) engaging in patent privateering.
  - However, it was specifically stipulated that other acts besides the five types of acts above may also constitute an abuse of patent rights.
- **(Contents regarding filing of injunctive relief by SEP holders newly added as a type of abusive act)** The amended IPR Guidelines specify that the act of filing for injunctive relief by a SEP holder that has committed to grant a license on FRAND terms, against willing licensees that intend to receive the license, can be determined to constitute an abusive act.
  - In particular, the amended IPR Guidelines stipulate that, if a SEP holder does not negotiate the granting of a license in good faith with a willing licensee and files for injunctive relief, there is a greater likelihood that this will be viewed as an abusive act.
  - Additionally, exemplary circumstances where the filing of injunctive relief will not likely be considered as an abusive act are also stipulated.
- **(New types of abusive acts by SEP holders newly added)** The amended IPR Guidelines have newly added the following acts to the types of abusive acts by SEP holders: (i) an act of unreasonably evading or circumventing the granting of a license on FRAND terms and (ii) an act of imposing a condition that would unreasonably restrict the licensee's exercise of related patents.

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- **(General standards for examination related to the exercise of intellectual property rights (“IPRs”) have been added / supplemented)** The amended IPR Guidelines have added/supplemented the general standards for examination, such as adding “innovation market” as an additional relevant market.

Key Points of Amendment	
<b>1</b>	<ul style="list-style-type: none"> <li>➤ Clear general standards for examination have been set with respect to the <b>justifiable exercise of IPRs</b> that are excluded from the application of the Monopoly Regulation and Fair Trade Act (“MRFTA”).               <ul style="list-style-type: none"> <li>• Even if an exercise of IPR may seem justifiable, if it goes against the fundamental purpose of the intellectual property system, it cannot be viewed as justifiable, and;</li> <li>• Whether an exercise of IPR is justifiable will be determined by comprehensively considering the Patent Act and related laws, the nature of the IPRs, and the impact the exercise of the IPR will have on the relevant market.</li> </ul> </li> </ul>
<b>2</b>	<ul style="list-style-type: none"> <li>➤ The focus of examination standards has shifted from unfair trade practices to <b>abuse of dominance</b> in the relevant market.               <ul style="list-style-type: none"> <li>• In principle, in cases where a licensee exercises IPRs independently, the standards for examination will only apply to the extent that they possess market power.</li> </ul> </li> </ul>
<b>3</b>	<ul style="list-style-type: none"> <li>➤ <b>The relationship between IPRs and market power</b> has been specified.               <ul style="list-style-type: none"> <li>• The amended IPR Guidelines provide that holding IPRs does not automatically mean that such party has market power, and that factors such as the influence of the relevant technology, the existence of alternative technology, and the competition status in the relevant market, will all need to be considered in determining market power.</li> </ul> </li> </ul>
<b>4</b>	<ul style="list-style-type: none"> <li>➤ An <b>innovation market</b> has been adopted as an additional relevant market.               <ul style="list-style-type: none"> <li>• In circumstances where the exercise of IPRs will have an influence on the competition of new or developed products or processes, the innovation market can be considered separately from the product market and the technology market.</li> </ul> </li> </ul>

- (Provision regarding package licensing newly added) The amended IPR Guidelines provide that coercing the licensing of unnecessary patents as a condition for package licensing\* can constitute a type of tying.
  - \* Licensing one or multiple closely-related patents while also licensing a majority of patents together.

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## 2. Significance of amendment

- The KFTC expects that the amended IPR Guidelines, by providing a framework that effectively regulates NPEs' and global companies' potential abuse of monopoly power through their patent rights, will enhance consistency and predictability in its enforcement against the abuse of IPRs.
- The current amendment reflects and incorporates the areas of interest by the KFTC in regard to abuse of IPRs. As such, companies and relevant personnel in industry will benefit by confirming the contents of the amendment and taking appropriate measures.

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