Compulsory Licensing Based on Competition Considerations, and on the Concurrence of Competition Law and Patent Law

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Abstract

Competition and the protection of patents share the common goal of encouraging innovation. In order to harmonize the tense relationship that exists between them, a compulsory licensing system has been established. Pursuant to Article 87 of the Patent Law, compulsory licensing will be applied when the patentee violates the competition law, and the license will be issued by the intellectual property office. The Fair Trade Commission may also request the issue of such a license according to Article 40 of the Fair Trade Law. Although the competent authority differs according to which law is used, when the appropriate procedures are adopted, any resulting conflicts may only be small. However, whichever law is used, the license may apply retroactively. If a party had already put the patent into practice before the license was obtained, it will not avoid litigation. It would, nevertheless, be protected in advance by claiming the defense of compulsory licensing through the hypothetical contract and good faith.

Keywords: Compulsory License, Refusal to License, Abuse of Monopoly, Differential Treatment, Defense of Compulsory Licensing, Hypothetical Contract, Patent Misuse.

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