Restrictions on the exercise of intellectual property rights related to technological standards under Japanese Law and EU Law

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Preface

This book is sincerely dedicated to my wife, daughter, supervisor and all other people who kindly support my research work.

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I. Introduction

Under Japanese AMA, the criteria of "existence of exceptional conduct", "negative effect on competition in relevant market" and "technological impossibility for entry" are historically required for intervention in refusal of license cases. On the other hand, under EU competition law it is required for the intervention that "blocking the appearance of a new product" "elimination of all competition in the secondary market" and "indispensability" are fulfilled under the exceptional circumstances test.

This paper will clarify the details of those criteria and propose the most favorable approach to refusal of license cases in view of the balance between protection of market competition and promotion of technological innovation.

1. Uniqueness of refusal to license for intellectual property rights incorporated in standardized technology

1-1. Uniqueness of refusal to license for IP rights related to technological standards in IT market

It is widely recognized that standardization of technology is an important key factor for wining in the global competition in the market especially in the new market such as information technology market (hereinafter "IT market"). This situation is accelerated by the recent movement of collaborative innovation in technological development[1]. Under this situation, a wide variety of technological standards, such as de jure standards, forum standards and de facto standards, are now widely spread to the global technology market, and standards have become essential tools for accelerating global innovation in technology[2].

In Japanese scholarly research, "technological standard" is rather broadly defined as "a protocol that defines characteristics in basis of measurement, units, objectives, movement, procedures and establishes concrete expression about characteristics"[3].

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1 Takigawa, *High-tech sangyou no chitekizaisannken to dokukinnhou [Intellectual Property Rights and Antimonopoly Act in IT market], (*Tsushousangyou Chousakai, 2000), p.162 (hereinafter referred as "*Takigawa*"); Asabane, *Strategy of competition and corporation,* 1994:Yuuhikaku, p.3 (hereinafter referred as "*Asabane*").

2 Fujino, *Tokkyo to gijutsu hyoujun [Patents and Technological Standard]* (Hassakusha, 1998) pp.28-31 (hereinafter referred as "*Fujino*"). See also Shapiro & Varian, *Information Rules,* (Harvard Business School Press, 1998) pp.173-183 (hereinafter referred as *"Shapiro & Varian"*); Greenhalgh & Rogers, *Innovation, Intellectual Property, and Economic Growth (*Princeton University Press, 2010) pp.320-322 *(hereinafter referred as "Greenhalgh & Rogers"*).

3 *Asabane* p.3,

On the other hand, in terms of anti-monopoly law analysis it is widely accepted to define "technological standard" as "a series of technological specification which are followed by manufacturers through implied or implicit agreement or in accordance with implicit regulation"[4]. Furthermore, definition of "standardization" is specified as "work of establishing and using technological standard for a purpose of promotion of mutual functionality, maintenance of compatibility/adjustment of interface, adjustment of general purpose, clarification of quality standard, or other purposes"[5].

Also, technological standards can be classified as "de facto standards" which are established through market competition without support from public organization or forum activity, "forum standards" that are formed by private standard setting organizations or companies groups, and "de jure standard" that are established by public standard setting organizations[6].

Furthermore, in the IT market a technological standard's role is reinforced by special market factors such as network effects caused by end user's network related products on product users or other special factors in market[7]. As a result of reinforcement, this can lead to a majority of market entities investing excessive amounts of funds into one specific technological standard, and, consequently, product manufacturers and users could be locked-in to the products based on one specific standard due to their sunk cost for investment and the convenience of products advanced by network effects.

It is true that this situation brings an economic benefit to manufacturers and users of the products.[8] However, there is a concern that, after waiting widespread of standard and serious lock-in of manufacturers or end users into standardized technology, some rights holders of standardized technology could refuse to license for their intellectual property rights (hereinafter "IP rights") incorporated in standardized technology to other manufacturers or end users for a purpose of obtaining excessive amount of royalty or obtaining a dominant position in relevant market[9].

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4 Kawahama, "Gijustsu hyoujun to dokusenkinshi hou [Technological standard and antimonopoly act]" (2000) 146-3&4 *Hougakuronsou* 115, at 116 (hereinafter referred as "*Kawahama*").

5 Yamada, *Gijutsu kyousou to sekai hyoujun [Technology competition and global standard]* (NTT Shuppan, 1999) p.162 (hereinafter referred as "*Yamada*").

6 *Yamada* p.15; *Takigawa* p.162; see also *Fujino* pp.32-33, Anton & Yao, "Standard Setting Consortia, Antitrust, and High-Technology Industries" (1995) *64 Antitrust L.J. 247, 248;* David "Standardization policies for network technologies: the flux between freedom and order revisited" in Hawkins, Mansell & Skea (eds.), *Standards, Innovation and Competitiveness : The Politics and Economics of Standards in Natural and Technical Environments,* 1995: Edward Elgar Publishing, pp.16-17 (hereinafter referred as *"David"*).

7 Yorida, *Network Economics* (Nihon Hyouronsha, 2001) pp.102-105 (herein after "*Yorida"*); Tsuchii, *Gijutsu hyoujun to kyousou [Technological Standard and Competition]* (Nihonkeizai Hyouronsha, 2001) p.93. See also *Greenhalgh & Rogers* pp.321-323.

8 Wakui, *Gijutsu hyoujun wo meguru hou sissutemu [Law system regarding technological standards] (*Kobundo, 2010) pp.72-76 (hereinafter referred as "*Wakui*").

9 *Takigawa* pp.163-165; *Fujino* p.12-15.