Microsoft's Maintaining Monopoly through Tie-in Sale and Exclusionary Conduct

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I. Introduction

Recently the monopolistic business operations of Microsoft Corporation ("Microsoft") have been a target of world-wide regulation and sanctions. For example, in South Korea, the administrative fine of more than 33 million dollars was levied against Microsoft's monopolistic business practices in 2005. This anti-competition ruling surprised Microsoft as well as its Korean competitors.[1]

When Microsoft started its MSN services based on network in Korea in 1995, its competitors claimed that Microsoft violated the anti-trust law by bundling MSN services to MS Windows 95. Then the Korean Fair Trade Commission (KFTC) ruled that MSN services had no harm to the relevant market in Korea because the Korean law did not cover anti-competitive conduct without harm against market.[2]

When reviewing KFTC's rulings in light of the United States anti-trust law regarding maintaining monopoly through exclusionary conduct, this article will explore what is appropriate as a global approach in oder to promote the innovation of technology and market. To survey the history and background of Microsoft will be helpful to understand the Microsoft cases. Finally KFTC's decision on December 7, 2005 will be examined in the context of global strategy.

II. Microsoft Operations in the United States and Korea
A. Microsoft at a Glance

William Henry III Gates (hereinafter referred as "Bill Gates") and Paul Allen founded Microsoft[3] in 1975. Microsoft.[4] launched its business to develop, manufacture, license,

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1) MA at Kyung Hee Univ. Graduate School of International Legal Affairs; LL.M. at Boston Univ. School of Law.

1) See Jung Ho Seo, "Fair Trade Commission, Levy Thirty three million dollars "Hindrance fair competition and Monopolization, harm against consumer's interest"," Newstown, December 7, 2005, available at http://www.newstown.co.kr/newsbuilder/service/article/mess_main.asp?P_Index=28018

2) See Yonhab news, "Fair Trade Commission - Windows 95 MSN service is lawful," Hangre, July 10, 1996, p. 8.

3) Microsoft has hired 91,000 persons as employees; its total sales would be $ 66.9 billion in 2007-2008 - see Amy Thomson, "Microsoft Profit Drops; Forecast May Miss Estimates (Update4)," Bloomberg, 4/24/08, available at http://www.bloomberg.com/apps/news?pid=20601087&sid=aQ7_iN1SxJ.c&refer=worldwide

4) Steven A. Ballmer is a Chief Executive Officer of Microsoft after Bill gates resigned CEO and became the

and support a variety of software for a lot of digital media.[5]   Under the laws of the State of Washington, it is corporation whose headquarters are located in Redmond, Washington.[6]

Microsoft has involved in four kinds of business: Operating system such as Windows Vista™, Application software such as Windows Office™, LIVE.com™ as a portal service including search engine like google.com™ and X-box and video game software products. Until Windows 2.0™, Microsoft had licensed Apple Computer, Inc.'s operating system; therefore, people used to think that Microsoft followed Apple Computer, Inc. products. Moreover, after IBM's suffering in 1980's troubled with Anti-trust Laws in the US, Microsoft has been next thing for the Anti-trust authority not only in the US, but also abroad including European Union and Korea.

The first dominant position of Microsoft had been caused by the release of Microsoft Disk Operating System (hereinafter referred as "MS-DOS") in 1981. Of course, the International Business Machines Corporation (hereinafter referred as "IBM") made Microsoft obtain a dominant status in OS industry by selecting MS-DOS for its PCs, including Intel-compatible PCs.

By licensing Apple Computer, Inc.'s OS, Microsoft had begun a Windows™ as operating system (hereinafter referred as "OS") with graphical user interface (hereinafter referred as "GUI") which had been introduced by Xerox researchers and bought by Apple Computer, Inc. since 1985. However, from Windows 3.0 succeeded by Windows 1.0, 2.0, Microsoft had created their own GUI based OS without license of Apple Computer, Inc.'s OS. Actually, Apple Computer, Inc. brought a lawsuit against Microsoft, but the court decided that some of GUI had already been in public domain since it is common technology in that industry; therefore, Microsoft. might make their unique OS which would become de facto standard. Ironically, in 1985, Steven Paul Jobs (hereinafter referred as "Steve Jobs") resigned Apple Computer, Inc. due to a struggle with Steve Wozniak who had been hired by him as a founder of Apple Computer, Inc. since he allegedly had developed too innovative products such as Macintosh computer™.

In 1995, Microsoft launched the most successful Windows 95™ with MSN service which was based on X-25 protocol like TCP-IP protocol. In South Korea, this merger between OS and MSN service caused a trouble with PC communication companies; they complained this problem to Korean Fair Trade Commission (hereinafter referred as "KFTC") as illegal tie-in[7] in 1995; however, KFTC decided that Windows 95 and its MSN service was not illegal which had not been distinguished by KFTC in 2006.[8]   KFTC should have distinguished the illegal tie-in case on the merger between Windows 98™ and Internet Explorer™ in 2006 from its decision on the merger between Windows 95™

Chairman of Microsoft. - available at http://zenobank.com/index.php?symbol=MSFT&page=quotesearch

5) See http://zenobank.com/index.php?symbol=MSFT&page=quotesearch

6) *United States v. Microsoft Corporation*, Civil Action No. 98-1232 (TPJ), 1999.11.5., available at http://www.usdoj.gov/atr/cases/f3800/msjudgex.htm

7) Tie-in sale means that, when a company sells popular products of monopolized products, it forces others to buy other products by using monopoly power. - see Seung Hwa Jang, "Review on Case: The Standard of Judgment on illgality of "Tie-in Sale" in Fair Trade Act," Seoul Natioanlal University Law (Seouldaehakyo Bubhak), Vol.45, No.4, 2004, p. 492.

8) See Yonhab news, *supra* note 2, p. 8.

and MSN service as Internet Access Provider in 1996.

Windows 98™ in 1998, Windows 2000 and XP™ in 2000, and Windows Vista in 2006 were successors of Windows 95; they have been based on independent PCs without network resources. According to the news, Microsoft would introduce Network-based OS which has no OS pre-installed on hard disk drive of PCs. It is because new trend for users to use PCs is based on Internet such as Google, Inc.'s application software products. With so-called middleware such as Internet Explorer™, Firefox™ web browser and Opera™ web browser, and Sun Microsystems, Inc.'s Java language, Microsoft has confronted the dangerous decline in their OS market. For example, Windows Vista™'s total sales have not been satisfied with stock market.

However, Microsoft has been on the dominant position in OS industry with at least ninety-five (95) percent in 1999, which could be eighty (80) percent in the OS market including Apple Computer Inc.'s OS. Microsoft is still the dominant supplier of OS for PCs. Its business covers the US and most countries. Moreover, most of its business is to license the OS to original equipment manufacturers (hereinafter referred as "OEM"), such as the Samsung Electronics Corporation and LG Electronics Corporation. Moreover, it licenses its software products directly to end users.[9]

B. Korea Fair Trade Commission v. Microsoft
1. Background

In September 5, 2001, Daum Communications corp. claimed on bundling MSN Messenger™ with Microsoft Windows™ in Korean Fair Trade Commission (hereinafter "KFTC").[10][11] Moreover, in November 28, 2004, RealNetworks INC. also claimed on bundling Windows Media Service™ (hereinafter "WMS") with Microsoft Windows™ in KFTC followed by KFTC's investigation with its discretion. However, Microsoft settled this case with RealNetworks INC. in October 13, 2005, and with Daum Communication corp. in November 11, 2005. Then, Daum Communications corp. and RealNetworks INC. withdrew their own claim. However, KFTC had continued to reviewing this case since claim is a just clue for KFTC to investigate anti-trust issues.[12][13]

KFTC found that Microsoft bundled WMS 4.1™ and Windows 2000 server since February 2000, and it bundled WMS 9™ with Windows 2003 server since April 2003.[14] Since July 1999, Microsoft has bundled Windows Media Player™ (hereinafter "WMP") with Windows 98 SE™ and other versions of Windows™.[15] Besides, since September

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9) *United States v. Microsoft Corporation*, Civil Action No. 98-1232 (TPJ), 1999.11.5., available at http://www.usdoj.gov/atr/cases/f3800/msjudgex.htm

10) See Jae Hong Kim/Se Hoon Bang/Soon Ju Hwang, "Anti-competitiveness of Tying in the Messenger Market," Study on Industrial Organization (Sanupjojikyeongu), Vol.13, No.3, 2005, p. 2.

11) Daum Communications corp. also brought lawsuit to seek damage up to $ ten (10) million in April 2004. - see Bong Eui Lee, "Articles : Tying as an Abuse of de facto Monopolist, Microsoft," Law and Society (Bungua Sahe), Vol.27, 2004, p. 331; See also Seung Hwa Jang, *supra* note 8, pp. 492-493.

12) See Tae Jin Kim, "Contributed Articles : Microsoft Case In Korea - Study on Bundling of Messenger Program -," Study on Commercial Law (Sangsabubyeongu), Vol.26, No.3, 2007, pp. 227-228.

13) *In re Microsoft Corporation*, KFTC 2006-042ho, 2002kyungchok0453, 2005Kyongchok0375, 2006.2.24, pp. 18-19, available at http://www.ftc.go.kr/fileupload/data/hwp/case/20060217_9653.hwp

14) *Id.* p. 27.

15) *Id.* p. 103.

2000, Microsoft has bundled MSN Messenger™ (hereinafter "WM") with Windows ME and other versions.[16)17)]

2. Decision and its Reasoning

a. Microsoft cannot provide Windows™ bundled with WMS, WM, and WMP.

Relevant Market in this case is "PC server OS" as a main market and "Media Server Program" as a subordinate market. Main market is "PC server OS" since other server OS cannot be substitute for "PC server OS" due to operability, its price, and business strategy.[18)] Subordinate market is "Media Server Program" because other server programs such as web server program and mail server program are different from media server program because of function and usage; it is because media server program is different from web server program based on download due to difficulty of download.[19)] Moreover, relevant geographical market for "PC server OS" is not only Korea, but also global since Microsoft's business strategy is not different by cases. It is also because clients who lives in Korea has no difficulty to use foreign programs in stead of Microsoft products. However, relevant geographical market for "Media Server Program" is domestic due to domestic supply line, technical support by domestic staff even with service plan, and WMS's higher market share in Korea than it in global market.[20)]

Microsoft's bundle WMS and Window server OS is not justly to force end user to buy WMS by using the power to control the market for PC server OS; it infringes end user's right to select program, and it causes harm to make end users to pay unnecessary cost; it also limit the opportunity for end user to use superior products; therefore, its bundle WMS and Window server OS falls into the category to force end user unprofitable deal and its bundle falls into the group to be risky on the disturbance of end users' benefit.[21)] Furthermore, its bundle WMS and Window server OS falls into the class to hinder the competitors' business by using dominant power in the market for PC server OS due to taking superior status compared competitors and the harm against the competition by limiting it.[22)] What is more, its bundle falls into the set of tie-in sale and unfair trade to force end user to buy WMS although end users do not want to buy it.[23)24)]

Microsoft must provide independent WMS, WM, and WMP separated from Windows™ 180 days after KFTC's order of correction.[25)] However, with Microsoft providing separated WMS, WM, and WMP, Microsoft must maintain WMS's, WM's, WMP's and Windows™'s performance and safety.[26)]

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16) *Id.* p. 182.
17) See Fair Trade Commission, "Report resource on Dismissal against MS's objection," May 23, 2006, available at http://ftc.go.kr/data/hwp/20060523_100722.hwp
18) *In re Microsoft Corporation*, KFTC 2006-042ho, 2002kyungchok0453, 2005Kyongchok0375, pp. 28-33.
19) *Id.*, pp. 33-37.
20) *Id.*, pp. 37-38.
21) *Id.*, pp. 49, 84.
22) *Id.*, p. 75.
23) *Id.* pp. 86-87, 89.
24) KFTC's decision and reasoning on WM and WMP of Microsoft is similar to its decision and reasonsing against WMS; therefore, this article may omit the reasoning for WM and WMP.
25) *In re Microsoft Corporation*, KFTC 2006-0027ho, 2002simui1163, 2006.6.16, pp. 49, 50-51, available at http://www.ftc.go.kr/fileupload/data/hwp/case/20060529181129449_.hwp
26) *In re Microsoft Corporation*, KFTC 2006-042ho, 2002kyungchok0453, 2005Kyongchok0375, pp. 2, 5.

Microsoft and its subsidiary Microsoft Korea Ltd. also must pay $ thirty (30) million as an administrative fine; Microsoft Korea Ltd., shall have paid $ 600 thousand; then, Microsoft must pay $ 530 thousand.[27]

3. Conclusion

While KFTC decided that Microsoft's launching of MSN service as Internet service provider is not violation of anti-trust law in July 1996, without distinguishing it from 1996 case, KFTC decided that the administrative fine and separation of software convergence against Microsoft and its Korean affiliates. Even though other Korean competitors had the first rank in messenger market and media player market, KFTC still found Microsoft violated anti-trust law.[28] Further, KFTC reasoned that WM and WMP's fault made Microsoft's market share decreased. I do not agree with KFTC's reasoning because there are three factors in considering harm against market share: Intellectual Property effect, Anti-competitive effect, and competitors' incapacity to follow frontier.

First of all, due to intellectual property effect, the lawful benefit which sound holders who hold intellectual property such as copyright, patent, and etc. enjoy in the course of nature should not be calculated as benefit from anti-competitive effect. Fair Trade Act also provides whether it cannot be applied to reasonable conduct as exercise of intellectual property. In history, intellectual property is a special exception to the anti-trust. Therefore, by nature, the anti-trust authority should exclude the benefit from intellectual property effect.

Second, people should take a consider on anti-competitive effect. The purpose of US anti-trust laws is to regulate lazy corporations which are reluctant to innovate technology, satisfying anti-competitive benefit. As a result, corporations are willing to develop their technology in order to avoid the risk on anti-trust regulations. However, Fair Trade Act in Korea adopts a policy which the government authority is to regulate the disadvantage arisen out of anti-trust. Thus, Korean Fair Trade Act may not regulate a corporation which is not willing to innovate their technology to keep their maximum profit. If the anti-competitive effect is overweighed intellectual property effect, the concerned authority can regulate it.

Finally, in balancing social welfare arise out of innovative technology convergence and anti-competitive effect, the incapability of rival to follow frontier is a critical element. It is because, if it regulates a monopolist because of the inability to develop innovative technology, not because of intellectual property holders' laziness on the innovation, the government authority could be risky to eliminate the reason why intellectual property laws exists. Moreover, it is also because, as a policy, helping the regulation against anti-trust contribute innovation of technology is more helpful than aggressive strategy only to punish corporation. In addition, a free rider who are reluctant to research and develop technology could have moral hazard., and it just enjoys the fruit of innovation through technology convergence.

As a result, considering the harm against competition, the authority must consider three

27) *In re Microsoft Corporation*, KFTC 2006-0027ho, 2002simui1163, *supra* note 26, p. 54.
28) See Tae Jin Kim, *supra* note 13, p. 221.

elements: intellectual property effect, anti-competitive effect, and the inability to follow frontier. Consequently, KFTC should have taken a consider how different bundling WM or WMP, and Windows™ is from bundling MSN and Windows™ before it imposed about $ thrity (30) million as an administrative fine in February 2006. At least, KFTC should have separated anti-competitive effect from either intellectual property effect or incapacity to follow frontier to consider the harm of Microsoft's reasonable conduct.

Even though Microsoft's products had fault on Korean character or other disadvantage, WM or WMP had not been first rank in the market in South Korea compared to other software products. Thus, KFTC should have separated anti-competitive effect from other effects.[29][30][31] However, there is a counter-argument on this assertion: even though anti-competitive effect is lower than benefit of efficiency and consumers' benefit from innovative convergence, we cannot adopt efficiency test as a theory to interpret the prohibition of abuse.[32][33]

III. Comparison of US vs. Microsoft to KFTC's Decision
A. The Operating System Market

As to the operating system market, I would like to expand the concept up to application like Internet Explorer™, WM or WMP. It is because convergence among different technology can have a pro-competitive effect like de facto standard. Even though "network effect" may threaten competitors' entering market,[34] technology convergence makes consumers efficiently use computer software without further training.[35] Further, by definition, software itself can include not only computer program, but also manual like book and etc. Besides, Windows™ already consists of lots of accessory programs like calculator or memo software. Thus, unless Microsoft uses their power to maintain monopoly, expanding the operating software market is appropriate in Information Age.

However, KFTC's 2005 decision on bundling WM and WMP with Windows had adopted

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29) See Fair Trade Commission, *supra* note 18.

30) Tie-in sale with Internet Explorer could have the efficient benefit; therefore, US' appeal court reversed district court decision aganst MS, and ramand it. - Byung Jun Kim, "MS, Recent Issues Relating a Violation of Fair Trade Act," Information Society Development (Jeongbotongsinjeongchek), Vol.13, No.15, 2001, p. 55.

31) People have a doubt on how to distinguish illegal tie-in sale from innovative integration. - see Sang Seung Lee/Seung Hwa Jang, "Regulation of Tying Computer Software under the Fair Trade Act -An Analysis of the Competitive Effects of Incorporating Windows Messenger into Windows XP -," Seoul Natioanlal University Law (Seouldaehakyo Bubhak), Vol.43, No.3, 2002, p. 303.

32) See Bong Eui Lee, *supra* note 12, p. 334.

33) When it comes to economic approach on MS's tie-in sale, some economists think that Internet Explorer is a complementary with operating system. However, tie-in sale with complementary goods makes the main market smaller since other competitors' goods can help the market boast with the expanded demand for end user to operate that application program. Therefore, MS's operating system and a complementary software like application program cannot be illegal tie-in sale unless MS has different purpose which could be a violation of Fair Trade Act. - see Ill Tae Ahn, "Economic Perspectives on Microsoft`s Bundling," Study on Industrial Organization (Sanupjojikyeongu), Vol. 9, No.1, 2001, p. 194; See also Jae Hong Kim/Se Hoon Bang/Soon Ju Hwang, *supra* note 11, pp. 4-5.

34) *United States v. Microsoft Corporation*, 253 F.3d 34, 51 (D.C. Cir. 2001).

35) Microsoft asserted that the government hinder corporations' try to make consumers enjoy benefit from innovation through technology convergence. - see Byung Jun Kim, "Legal Dispute against MS with a Potential Violation of Fair Trade Act," Information Society Development (Jeongbotongsinjeongchek), Vol.10, No.20, 1998, p. 54.

narrow definition on the operating system market. Further, KFTC ordered the separation and Microsoft made 4 different versions of Windows™ August 2006. One kind of windows™ had WM and WMP with link for facilitating access to competitors' product, which has more than 1% of using rate instead of 5% of market share. Another Windows ™ had neither WM nor WMP.

When it comes to the order for providing link, I think there is a free riding problem. "This must-carry injunction … would give an unfair advantage to one of the competitors."36)   It is because web link site, which connected to competitors' product installment, has limited to products, which had 1% of using rate in the market. Thus, other competitors had disadvantage against a kind of "must-carry injunction." For example, google.com™ has lower than 25th rank in Internet search engine in South Korea and it could not qualified this kind of limitation with Internet Explorer™ 7.0. Therefore, some Korean competitors as a free rider had a big advantage against not only small company, but also new company in South Korea.

B. Monopolization

1. Monopoly Power v. KFTC's Abuse of Dominant Position

While US courts considered market share in the relevant market,37) KFTC considered gross income and market share at the same time to appoint a company as a dominant position. Further, if a company in a dominant position would abuse their monopoly power under the code,38) it could be punished by anti-trust law. Thus, when Microsoft was not a dominant position because of lack of gross income in South Korea, even though Microsoft abused their monopoly power, KFTC decided that there is no violation of anti-trust law. However, in 2005, Microsoft's gross income and market share was qualified so that KFTC decided there is violation of Section 3_2 (1)3 and the later part of 5.39)

Even though Korean law has specific code, since it must follow the government's guideline like president order, it is very ambiguous for private party. The reason why I criticize the KFTC's 2005 decision is that KFTC did not distinguish 2005 case with WM and WMP from 1996 decision with MSN™ service especially for restrict on unfair trade.40)   It is because technology convergence is not rejection or discrimination against

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36) See Amanda Cohen, "Surveying The Microsoft Antitrust Universe," 19 Berk. L. J. 333, 358 (2004).
37) *United States v. Microsoft Corporation*, 253 F.3d 34, 53 (D.C. Cir. 2001).
38) Section 3_2 of Fair Trade Act (Korean anti-trust law) reads:
   (1) a company in a dominant position should not abuse their position like these:
   1. to decide, maintain or change unreasonably the price of goods or service;
   2. to control unreasonably to sell goods or provide service;
   3. to impede unreasonably other company's business;
   4. to hinder unreasonably new competitors' entry to the market; or
   5. to trade goods or provide service for unreasonably excluding competitors or significant harm against consumers' interest.
   (2) the kind or standard of the abusive conduct can be decided by president order.
39) *Id.*
40) Section 23 (Restrict on Unfair Trade) of Fair Trade Act (Korean anti-trust law) reads:
   (1) a company should not conduct like unfair trade or force affiliate or other company to conduct these:
   1. to unreasonably reject trade or discriminately treat other party in trade;
   2. to unreasonably exclude competitors;

competitors.

2. Anti-competitive Conduct v. Unreasonable Conduct in KFTC's Decision

On the one hand, US courts "held Microsoft liable for: (1) the way in which it integrated IE into Windows[41]; (2) its various dealings with Original Equipment Manufactures ("OEMs"), Internet Access Providers ("IAPs), ⋯ Independent Software Vendors ("ISVs"), and Apple Computer; (3) its efforts to contain and to subvert Java technologies[42]; and (4) its course of conduct as a whole."[43][44]

On the other hand, KFTC decided that bundling WM and WMP with Windows™ Server or Client version should be condemned as Unreasonable conduct of Section 23 (1) 1 of anti-trust law. Unlike US courts, KFTC just focused on specific competitors' interest. It is because Korean anti-trust policy mainly based on post regulation on abuse of a dominant position. Even though KFTC's 2005 decision carried injunction against bundling WM or WMP with Microsoft Office™ as an exception of post regulation, KFTC cancelled their decision in 2006 since FTC alleged when Microsoft would bundle WM or WMP with Microsoft's other product, then FTC would punish that.

a. KFTC's Decision on Unreasonable Conduct
(1) Competitors' Higher Market Share Defense

While Microsoft asserted that other competitor, Nate.com, has a higher market share than WM, KFTC decided that WM's lower market share caused by WM's fault on Korean character error. Thus, KFTC reasoned that lower market share does not mean that there is no anti-competitive effect.[45]

However, even though WM suffered system error, Nate.com's NateOn™ had first rank in Internet instant messaging service market. It is because NateOn™ had a free SMS service and tied service like cyworld.com™.[46] Further, WM's present market share is still next to NateOn™. Since Korean anti-trust law prohibit from unfair conduct only if those unreasonable conduct adversely affect market. Further, WMP's competitor's

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3. to unreasonably force or pull competitors' clients to trade with itself;
4. to unreasonably use their position in trade in dealing with other party;
5. to unreasonably trade with other party in using their position in deal or impede other party's business;
6. ⋯

41) Under the given circumstances, there are two reasons for MS to be in trouble in anti-trust lawsuit in the US on tie-in sale: maintaining monopoly power by decrease of sale of Netscape and excludiing potential rival in the market of operating system. – see Ill Tae Ahn, "Economic Approach on Microsoft Case," Korea Information Society Development Institute (Jeongbotongsinjeonchekyeonguwon), 2001, p. 73.

42) Through Java language developed by Sun Microsystems Inc., the market for Internet Explorer as a middle ware could threaten MS's monopoly power in the future. – see Kim, Hee Su/Jae Hong Kim, "A Dynamic Model of Microsoft's Tying Behavior," Study on Industrial Organization (Sanupjojikyeongu), Vol.6, No.2, 1998, p. 3.

43) *United States v. Microsoft Corporation*, 253 F.3d 34, 60 (D.C. Cir. 2001).

44) When it comes to tying Internet Explorer into Windows, US appeal court decided that district court should deal with tying issue, especially on efficiency test, with the rule of reason. – see Sang Seung Lee/Seung Hwa Jang, *supra* note 32, p. 302.

45) See Jae Suck Sim, "When MS had monopoly power, it never updated _ KFTC decision," Digital Daily, April 3, 2006, available at http://www.ddaily.co.kr/news/?fn=view&article_num=9229

46) Cyworld.com™ is similar to myspace.com™, which is social network service (hereinafter referred as "SNS").

product, Gomplayer™, has also higher market share than WMP has. Therefore, even though Microsoft had monopoly power and integrated WM and WMP to Windows, when real market had no anti-competitive effect, Microsoft should never been blamed on anti-trust law. Consequently, I do not agree with KFTC's denial of Microsoft's market share defense.

However, when Microsoft had the same license issued to Original Equipment Manufacturers (hereinafter "OEM"), even though Microsoft's market share defense could be qualified by the Korean Appeal court, it could be blamed as violation of anti-trust law. It is because US courts decided "that …, all the OEM license restrictions at issue represent uses of Microsoft's market power to protect its monopoly."[47]

Even though Netscape™ or FireFox™ seems like a little different market from the operation system, in considering Google.com™'s trial to include Web version of office software or Network Computer, which has no permanent memory device, I totally agree with US court's finding that, via monopoly browser market, Microsoft tried to maintain monopoly power.[48]

(2) Copyright Holder's Defense

Microsoft asserted that their license issued to OEM is subject to kind of moral right to prevent from alternating software without permission. In the civil law country, moral right defense would be helpful to defend anti-trust suit against copyright holders. Further, like technology convergence defense, integrated copyrighted works like opera or movies could not be blamed as violation of anti-trust by itself. However, US courts decided "Intellectual property rights do not confer a privilege to violate the anti-trust laws. *In re indep. Serv. Orgs. Antitirust Litig.*, 203 F.3d 1322 (Fed. Cir. 2000)."[49] Even though Korean anti-trust law declared IP holders can enjoy as exemption from violation of anti-trust law,[50] IP right holders' unreasonable conduct, which could be violation of anti-trust law, could be charged by KFTC. Further, KFTC had a specific guideline for the standard, which conduct cannot be a lawful enforcement by IP rights.

(3) Integration of Internet Explorer and Windows

While KFTC decided that integration of MSN service and Windows 95™ is not violation of anti-trust law in 1996 because of no harm against market, in 2005, KFTC decided that integration of WM and WMP with Windows™ is bundling prohibited in anti-trust law. On the other hand, US courts decided that "Microsoft's exclusion of IE from the Add/Remove Programs utility and its commingling of browser and operating system code constitute exclusionary conduct, in violation of Section 2."[51]   I think that this decision is appropriate for Microsoft to exercise unreasonably its copyright with Add/Remove option. In WM and WMP case in Korea, they have Add/Remove option. Therefore, I think that

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47) *United States v. Microsoft Corporation*, 253 F.3d 34, 66 (D.C. Cir. 2001).
48) *Id.*, p. 62.
49) *Id.*, p. 65.
50) Section 59 of Fair Trade Act (Korean anti-trust law) reads:
  This law cannot be applied to a specific conduct only if the conduct is a lawful enforcement by copyright law, patent law, quasi-invention protection law, design protection law, or trademark law.
51) *United States v. Microsoft Corporation*, 253 F.3d 34, 69 (Fed. Cir. 2001).

Korean appeal court should vacate KFTC's decision on unreasonable conduct.

However, Microsoft asserted that efficiency of integration of Internet Explorer™ and Windows™ outweighed beyond anti-competitive effect. For example, "users [can] move seamlessly from local storage devices to the Web in the same browsing window."[52]

(4) Innovation Barrier Defense with Technology Convergence's Benefit Assertion

Microsoft also asserted that blaming integration WM and WMP to Windows as tying can be risky.[53] Microsoft reasoned that prohibiting from technology convergence could be barrier for continuous innovation.[54] However, KFTC found that, before Microsoft's monopolization on Browser market, Internet Explorer™ had updated three times a year and Netscape™ had updated two times a year until 2001. Further, KFTC also found that there is no update after Internet Explorer v. 6.0™ from 2001 to 2005.[55]

Even though there are major updates on Internet Explorer™ before emerging FireFox ™, I think that this is not enough to show the evidence on Technology convergence's anti-competitive effect. It is because Internet Explorer™ had updated a lot of times on minor problems including correcting security defect. Further, it is because people had enjoyed the technical benefit from integration like no further training required to search file in the desktop and to find information in Internet. Especially, for WM and WMP, there is no monopolization in South Korea by themselves. It is because other competitors had first rank in the market share.

On the other hand, KFTC alleged that other competitors' higher position could be caused by WM's error. Further, KFTC tried to show evidence with end users' complaint on WM's error. Besides, other competitors also supported this reason.[56]

However, without harm against market, KFTC could not show enough evidence to persuade Korean Appeal Court. It is because, when KFTC can allege that WM's lower market share caused by WM's technological disadvantage, Microsoft also can assert that alleged potential harm of integration WM and WMP to Windows™ can be caused by other competitor's incapacity to get continuous innovation. Further, it is also because other competitors' higher market share without any remedy after a victim's allegation in 2001 could show enough explanation for Korean Appeal Court to vacate KFTC's separation order.

(5) Analysis on Inner Report of Subsidiary of Microsoft on Bundling Effect on Market Share

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52) *Id.*
53) If the efficiency of innovative convergence is high enough, technology convergence helps social welfare expanded. Consequently, regulation against innovative integration can be harmful against social welfare. – see Hee Su Kim/Jae Hong Kim, "Microsoft's Strategy on Tie-in Sale and Application of Fair Trade Act," Korea Information Society Development Institute (Jeongbotongsinjeonchekyeonguwon), 1998, p. 169.
54) See Jae Suck Sim, "When MS had monopoly power, it had never updated _ KFTC decision," Digital Daily, April 3, 2006, available at http://www.ddaily.co.kr/news/?fn=view&article_num=9229
55) See Jae Suck Sim, "KFTC decision analysis – While other OS's price went down, only Windows Server OS's price increased," Digital Daily, April 3, 2006, available at http://www.ddaily.co.kr/news/?fn=view&article_num=9226
56) See Jae Suck Sim, "KFTC decision analysis – NateOn's higher market share caused by MSN messenger's error," Digital Daily, April 3, 2006, available at http://www.ddaily.co.kr/news/?fn=view&article_num=9220

KFTC found that Microsoft's MSN department made a report in 2004, which asserted integration MSN service, including WM, to further versions of Windows should increase gross income per membership and usage of MS's core products.[57]

I cannot agree with KFTC's analysis on Microsoft's inner report. It is because MSN™ department's report just described the effect of technology convergence.[58] Further, it is also because, even if KFTC could allege Microsoft's intent to use network effect to maintain monopolization, KFTC should have gathered sufficient evidence to show that, without IP right's lawful effect and other competitors' incapacity, only network effect could harm real market. However, there is no evidence like that. Evenly, other competitors' products like NateOn™ and Gomplayer™ are more popular than WM and WMP although WM's error, which KFTC and other competitors alleged, has disappeared.

IV. Conclusion

In July 1996, KFTC decided that Microsoft's launching of MSN service as Internet service provider is not violation of anti-trust law. However, in February 2006, KFTC ordered $ thirty(30) million as an administrative fine and separation of software convergence against Microsoft and its Korean affiliates. Although other rivals in Korea had a large market share in messenger market and media player market, KFTC still found that Microsoft violated anti-trust law due to tie-in sale.[59] Moreover, KFTC explained that Microsoft itself made a mistake enough to lose market share. However, we should consider three elements in considering harm against competition: Intellectual Property effect, Anti-competitive effect, and competitors' incapacity to follow frontier. Therefore, KFTC should have distinguished 2006's case from 1996's case and considered the separation of anti-competitive effect from other effects.[60]

Unlikely *United States v. Microsoft Corporation*,[61] Korean appeal court should have vacated KFTC's decision. It is because WM and WMP's competitor had already overcome Microsoft's monopoly power and became the first rank in relevant market. Further, as to copyright holder's defense, it is also because Korea has moral right to prohibit licensee from alternating copyrighted works. Besides, the integration of not only Internet Explorer™, but also WM and WMP, and Windows™ has technical benefit for consumers, which overweighed anti-competitive effect only if Microsoft included Remove/Add utility program for WM and WMP. What is more, when Korean government would prohibit Microsoft from technology convergence, it could be risky on innovation for consumers as another goal of anti-trust law.

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57) *Id.*
58) In case of innovative, new products, we need to adopt the efficiency test in addition to separate need test. - Hwang Lee, "Articles : Tying Arrangement as a kind of Unfair Trade Practices: Discussions about a Recent Case," Study on Anti-trust Law (Gyungjengbubyeongu), Vol.14, 2006, p. 262.
59) See Tae Jin Kim, *supra* note 13, p. 221.
60) Fair Trade Commission, *supra* note 18; See also Byung Jun Kim, "MS, Recent Issues Relating a Violation of Fair Trade Act," p. 55; See also Sang Seung Lee/Seung Hwa Jang, *supra* note 32, p. 303.
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국문초록

최재원[62]

1995년 마이크로소프트사가 윈도95를 출시하면서, 당시 한국의 온라인 서비스 제공자 핵심그룹이었던 하이텔 등 PC통신회사들이 마이크로소프트 네트웍("엠에스엔")과 윈도95의 결합판매에 대해 공정거래위원회에 신고를 하였다. 이에 공정거래위원회는 심의를 거쳐 1996년 7월 마이크로소프트사의 윈도95와 엠에스엔의 번들판매가 공정거래법에 위반되지 않는다고 결정하였다. 반면에, 2006년 2월에 공정거래위원회는 1995년 심결에 대한 언급 없이 마이크로소프트사와 그의 한국자회사인 마이크로소프트 코리아 유한회사에 대해 300억원에 가까운 과징금을 부과하고, 윈도우 메신저와 미디어 서버, 그리고 윈도우 미디어 플레이어를 윈도에서 분리하여 판매하도록 하고, 소비자의 희망에 따라 결합버전과 분리버전을 구매할 수 있도록 결정하였다.

특히 한국에서는 네이트온과 곰플레이어 등 경쟁사 소프트웨어들이 메신저 시장과 미디어 플레이어 시장에서 더 높은 시장 점유율을 보유하고 있음에도 불구하고, 공정거래 위원회는 끼워팔기에 의한 공정거래법 위반을 결정하였다. 그 이유에 대해서 공정거래위원회는 마이크로소프트사의 시장 점유율이 낮은 것은 한글오류, 네트웍 오류 등 자신의 실수 때문일 뿐 그것이 운영체제 소프트웨어인 윈도와 메신저 프로그램, 미디어 플레이어 프로그램의 끼워팔기에 대한 면책사유로 항변될 수 없다고 설명하였다.

원칙적으로 경쟁에 대한 손상을 고려할 경우에는 세 가지의 요소가 반드시 고려되어야 할 것이다. 첫째, 지적재산권 효과로 인해 정당한 저작권, 특허권 등의 지적재산권 소유자가 그 권리의 대가로 당연히 누리는 헌법과 법률상의 이익을 독점효과로 인한 이익으로 계산해서는 아니 된다 할 것이다. 공정거래법 역시 지적재산권의 행사로 인한 행위에는 동법이 적용되지 않음을 명시적으로 규정하고 있다. 지적재산권의 연혁상 독점금지의 예외로 출발한 것이므로 그 법리상 당연히 지적재산권 소유효과로 인한 독점효과는 배제되어야 하는 것이다.

둘째, 비경쟁적 효과를 고려하여야 한다. 미국에 있어 독점규제법의 목적은 기술혁신에 태만한 독점 혹은 과점사업자를 규제하여, 그들 기업들 스스로가 규제를 회피하려고 끊임없이 혁신하게 하려는 데에 있다. 따라서 연구개발비를 줄이기 위해 담합하거나, 경쟁자가 기술을 개발하기 전까지는 신기술에 의한 신제품을 출시하는 것을 지연하는 등의 영업정책을 택할 경우 역시 독점규제 당국에 의해 규제된다. 우리 공정거래법은 폐해규제주의를 택하고 있어서 공정거래법 위반자를 규제하는 것만을 목적으로 하고 있을 뿐, 기술혁신의 지연에 대한 규제는 하지 않는 다는 의견이 있다. 그러나 단지 지적재산권을 보유만 하고, 경쟁업자들이 기술개발로 시장점유율에 있어서 추격을 해오기 전까지는 혁신을 하지 않는다면, 그 비경쟁적 효과를 고려해서 앞서의 지적재산권 효과에도 불구하고 공정거래법에 의해 규제할 수 있다고 하겠다.

셋째, 혁신적 기술 통합의 사회후생의 증대 효과와 독점에 의한 경쟁에 반하는 효과의 비교 형량 시에 경쟁자의 기술 및 영업노하우 부족에 의거 선행자를 추격할 수 없는 경우도 고려해야만 한다. 왜냐하면, 지적재산권을 보유한 독점 및 과점 사업자의 기술혁신노력의 부족 때문이 아니라, 경쟁자의 연구개발 투자 부족으로 인한 시장점유율 변화까지 규제한다면, 기술혁신과 문화발전을 목적으로 하여 독점금지의 예외를 인정하는 인센티브를 인정하는 지적재산권 법제의 존립이유를 몰각하는 것이기 때문이다. 또한 독점규제가 기술혁신에도 기여하도록 하는 것이 국가 정책상, 처벌만 하는 공격적 전략보다 국익에 도움이 될 것이기 때문이다. 마지막으로, 기술혁신에 태만한 경쟁자들의 무임승차로 인한 도덕적 해이가 문제될 수 있다 하겠다.

따라서, 경쟁에 대한 손상우려를 고려하는데 있어서 반드시 지적재산권 효과, 비경쟁 효과, 그리고 선행자를 따라잡기 위한 경쟁자의 능력부족이라는 세 가지 요소를 고려해야 한다. 결과적으

로 공정거래위원회는 2006년 2월 마이크로소프트사에 대한 300억원에 가까운 과징금을 부과하기 전에 1996년 7월의 심결과 어떻게 법적, 사실요소가 다른지 판단했었어야 했다. 최소한 지적재산권 효과 및 경쟁자의 기술부족 등으로 인한 경쟁손상 효과와 비경쟁 효과를 분리해서 독점의 폐해를 판단했어야 했다.

미국 연방항소심 판결(*United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001)과는 달리, 한국 법원은 공정거래위원의 심결을 파기했어야 했다. 왜냐하면 마이크로소프트사의 윈도 메신저와 윈도우 미디어 플레이어의 경쟁자는 이미 마이크로소프트사의 독점력을 극복했으며, 관련 시장인, 메신저와 미디어 플레이어 시장에서의 경쟁우위를 확보하고 있다. 시장의 독점 및 과점 사업자를 규제하여야 하는 공정거래법이 한국에서 낮은 시장점유율을 나타내고 있는 구글과 같은 글로벌 대기업들에 적용된다면 통상마찰을 부를 뿐, 기술혁신 등 경쟁의 긍정적 효과가 얻기 힘들 것이다.

나아가, 저작권 소유자의 항변과 관련해서, 우리나라는 심지어 이용허락을 받은 자라 해도 저작권 있는 저작물을 변경하는 것을 금지하는 저작인격권을 가지고 있다. 게다가, 인터넷 익스플로러뿐만 아니라 윈도 메신저, 윈도 미디어 플레이어와 운영체제 소프트웨어인 윈도에 통합하는 것은 소비자후생을 증대시키는 기술적 이익이 있으며, 단지 마이크로소프트사가 윈도 메신저와 미디어 플레이어에 대해 삭제 및 추가 프로그램만 갖추고 있다면, 이들 혁신적 통합으로 인한 기술적 이익은 비경쟁 효과를 초과하는 것이라 하겠다. 더해서, 우리나라 정부가 마이크로소프트사로 하여금 혁신적, 기술적 통합을 금지한다면, 우리가 참고할 만 한 미국 독점금지법의 목적인 기술의 혁신을 위한 달리는 말에 채찍질을 가하는 "주마가편"이라는 목적에도 부합하지 않으며, 소비자후생 증대를 위한 기술혁신에 위험을 부과하고, 기업경영의 불확실성을 확대하는 것으로 바람직하지 않다고 하겠다.