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South Korea

Patent Act Amended With Regard to Compulsory Licensing Requirements

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On December 29, 2009, the National Assembly amended portions of the Korean Patent Act relating to compulsory licensing.

In Korea, a compulsory license can be sought by third parties who intend to work a patented invention, or the government can directly seek a compulsory license. The amended act relates to the government's use of compulsory licensing — making it somewhat easier for the government to obtain compulsory licensing in certain situations. The revised act also clarifies that the working of a patented invention for research and testing in order to obtain regulatory approval is exempted from patent infringement.

Act Published in January

The new Act was published on January 27, 2010. Thus, the patent-infringement exemption portion of the Act is now effective and the compulsory licensing requirements will go into effect on July 28, 2010.

More specifically, the revisions include the following changes:

Under the new Act, the government may work or have a third party work a patented invention where non-commercial working of the patented invention is necessary in the case of a national emergency, extremely urgent situation, or in the public interest. Prior to the change, the government could work or have a third party work a patented invention if the non-commercial working of the patented invention was necessary for the public interest in time of war, uprising or other similar emergency.

In other words, prior to the amendment, *both* the "for the public interest" and "emergency" situation requirements needed to be satisfied before a compulsory license was granted. However, under the revised Act, a compulsory license may be granted if non-commercial working is necessary *either* for the public interest *or* in case of national emergency.

The new Act also clarifies that working a patented invention for research and testing in order to obtain regulatory approval under the Pharmaceutical Affairs Act or the Agricultural Management Act is exempted from patent infringement. Prior to the change, working of a patented invention for research and testing was exempted from patent infringement. Thus, there had been some debate regarding whether working a patented invention for testing in order to obtain regulatory approval qualified for the exception. It is now clear that testing for the purpose of obtaining regulatory approval is protected from claims of patent infringement.

In principal, the amendments should make it easier for the government to obtain a compulsory license and have third parties manufacture necessary products. However, we will have to wait and see if any practical differences result from the amendment.

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