China - Korea IP & Competition Law Annual Report 2 0 1 6

Volume I

Edited by
MENG Yanbei and LEE Hwang



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Published by China-Korea Market & Regulation Law Center CJ Law Building, Room 403 145 Anam-ro, Seongbuk-gu Seoul, Republic of Korea 02841

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ACKNOWLEDGEMENTS

The China-Korea Market and Regulation Law Center (the "MRLC") is publishing the third edition of the China-Korea IP & Competition Law Annual Report (the "Annual Report"). This Annual Report was initiated with the goal of providing the most authoritative analysis of legal enforcement and developments in the fields of intellectual property law and competition law by the foremost experts in practice and academia of China and Korea. Intellectual property laws and competition laws are rapidly developing as one of the most influential elements in supporting economic development in the two countries. In the meantime, China and Korea lead global economic development and are complementary to each other in many aspects. It is very important that our work leads to faster progress and greater synergy between China and Korea. Further, it will be more meaningful if we would be able to share such achievements globally while acting as a catalyst for symbiosis and prosperity.

The global economy is in a transitional period trying to find a new economic development paradigm that promotes balanced development of the economy and advancement of the quality of life in replacement of the paradigm of neoliberalism which has exposed many deficiencies in the wake of the 2008 global financial crisis. But it is not easy to find new ways to sustain growth while also finding ways to share the fruits of such growth theoretically or practically in the so-called age of polarization.

MRLC believes that it is necessary to continuously pursue globalization through reform and openness, utilizing intellectual property rights and market competition as key tools. In addition, it would be very meaningful if China and Korea could hone the 'wisdom of the East' that they have accumulated through their long histories to contribute in solving the challenges of the global economy. For example, the fairness doctrine has been recently discussed as an alternative to deal with the deficiencies of efficiency-centered neoliberalism, although its substance remains unclear. We, however, continue to research ways to incorporate self-reflection based on Eastern wisdom and community consciousness into intellectual property law and competition law. In the film "Paths of the Soul" introduced in the Preamble by Professor LIU Chuntian, one can see a side of globalization. We hope that this series of Annual Reports is a perhaps meager but meaningful stepping stone in the journey to make great contributions to China and Korea.

MRLC has made various efforts to promote the development of intellectual property laws and competition laws through comparative and interdisciplinary research, and this Annual Report is one such effort. Next year, we will try to make the content and analysis of the cases discussed more helpful to researchers, and launch a timelier publication at an earlier date.

The publication of the 2016 Annual Report was possible due to the contributions of many experts. First of all, I would like to thank Professor LIU Chun Tian for generating the idea of publishing an annual report and showing outstanding leadership throughout the publication process. Professor SHI Ji Chun and Professor KIM Yeon Tae, thank you for your continued support as Representative Commissioners of MRLC. I would also like to recognize the many scholars and practitioners that have put in great efforts for the research, writing and translation of the Annual Report. Special thanks to Adrian Emch and his team at Hogan Lovells LLP who have translated the entire part on Chinese laws into English with their profound expertise in both antitrust and IP law in China, Hogan Lovells has been an important partner for us.

The MRLC Annual Report is the fruit of MRLC and its sister institutes, the Innovation, Competition and Regulation Law Center of Korea University (the "ICR Law Center") and the Economic Law Center of Renmin University of China. We would like to thank Professor Sun Hyung Sonya KIM, who has taken overall responsibility for publishing the Annual Report every year. Without Professor Kim's efforts, it would have been difficult for the Annual Report to see light. Next, we would like to thank researcher CHOI Jipil and Dr. Yun Seok PARK from the ICR Law Center and YUAN Shuai, WU Chenfei and DONG Yumeng from the Economic Law Center who have reviewed the drafts of the Annual Report and assisted in countless tasks in publication. As usual, we are deeply grateful to HONG Ji Seon for her outstanding support of this project.

Lastly, we have some unfortunate news. CHO Yong Sig, Managing Partner of Darae, who has been writing for the Annual Report since its initiation with more passion and delight than anyone, has passed away on October 15, 2017, after finishing his chapter on Korean copyright law. We would like to express our sincere gratitude for his kind support of the Annual Report and share our deepest condolences in the passing away of one of the brightest stars in Korean copyright law.

Editors-in-Chief
MENG Yanbei and LEE Hwang

PREFACE: GLOBALIZATION AND INTEGRATION AS IRREVERSIBLE TRENDS OF HISTORY

As far as the world situation is concerned, 2016 was not a particularly peaceful year. The American Presidential Election was like a raging fire, affecting global interests. Trump's "America First" slogan and threat of withdrawal from the Trans-Pacific Partnership made the Pacific Rim stakeholder countries feel like on pins and needles.

In June 2016, the "Brexit" impact impeded the process of European integration and left people all around the world speechless. Since then, conservatism and ideological antiglobalization movements arose. Today, globalization is facing unprecedented challenges. At the same time, the system of intellectual property was challenged and criticized.

In contrast, China moves against these trends. On the domestic level, China deepens relationships and continues the reform process. On the international level, China steadily promotes its idea of globalization – the "One Belt and One Road Initiative" is a good example of that trend.

The main parts of China's economy are balance, but there are still many questions which need more attention. Nowadays, people are facing new options on the road forward. What is different from the past is that any country cannot step back to the "closed era" when each does things in its own way. The times when countries hid in the small building into unification, closed the doors to come to the throne and cleared away the snow in front of their own door has gone forever. Living in the global village, there are no countries that can behave entirely on their own, like mavericks without the background of globalization. In the internet era, there are limits on countries' options.

China is at crossroads of re-choosing its path of development. There was an old saying: "those who understand others are clever, but those who know themselves are truly wise." A great nation should be good at introspection, recognizing its weakness, learning from others

and co-existing harmoniously with others. Whether a country can achieve this goal depends, to a great extent, on whether it is able to interpret history and modernity objectively, to view itself and others rationally, to stand by the values of on objectivity and common sense, and to soundly predict future developments. These are the pre-conditions for China to take the next step in its development and evolve into an innovation-oriented society.

First, how should one interpret China's history of falling behind, poverty and weakness in modern times, and the increasing prosperity today?

The fact acknowledged by Eastern and Western historians is that during the entire Classical Ages and most time of the Middle Ages, the East undeniably was technologically superior to the West. Early Chinese civilizations might be even more developed in technology. Like other agricultural civilization, the handcraft-based craftwork which is passed on from generation to generation by few professional craftsmen may be considered as displaying great originality and a high degree of professional skills.

Until now no one has reached the excellence level of that craftwork. In ancient times, and even during a long period of history in modern times, China's economy and national power have been far ahead of the West.

It took centuries for the gunpowder, the compass and the art of printing to spread into Europe.

However, the situation had started to change before the end of the Middle Ages. In the past three centuries, natural science has made an essential contribution to the rapid development of European technology. Europe has stepped into a great, creative instead of imitative era of science. The West resorted to the traditional scientific spirit, invention and the basis of communications to advance. Effectiveness and responsiveness to market demands became the benchmark for technology development, and cost and benefit became key parameters for business success. As a result, the advantages of Western Europe started to show.

Hence, in modern times, the West was not only known for its "clever tricks and wicked craft or strong vessels and artillery" by our ancestors. In fundamental terms, comparing to China, the West also developed more systematic and comprehensive advantages of keeping science and technology as a key factor for development.

History has proven that technological progress cannot be stopped and globalization cannot be reversed. The entire modern history is the history of globalization fuelled by technological progress. It is also the history of global expansion and exportation from the West of the mode of production based on advanced technology.

As for as China is concerned, its modern history ranged from conservatism, fear and refusal to accept advanced modes of production, to passive acceptance, and then to proactive learning, initiative integration, assimilation and promotion.

There are many reasons to explain why China was poorly developed. But ultimately, the country had to look inward to detect the main cause: it was the country's closedness, conservatism, concentration of power and autarchy. Until today, we can still see the vestiges of fear and refusal to accept new thoughts.

What needs to be emphasized is that Chinese people need to rationally look at the achievements and the status of the country today. Basically, success or failure is up to us. But we cannot neglect or even ignore external factors. There is no doubt that internal causes are decisive for the development of the country, and that external causes only play a secondary role. Baby chickens can only hatch out from eggs under certain temperature. Yet baby chickens can never hatch out from stones.

But under certain circumstances, external causes can also play a decisive role. If we put the eggs into the freezer of the refrigerator, baby chickens can never hatch out. If only China opens up yet there is no acceptance, coordination and cooperation of the system with industrial societies around the world, there is an imperfect opening-up as by the former Soviet Union, or even integration into a more laggard and conservative system, then we could not have the developments we see today.

Through its opening-up process, China integrates into the mainstream international society, establishes the rule of law, promotes democracy, and has achieved initial prosperity as its citizens increasingly acquire wealth and freedom. Therefore, China can be emboldened to regain the confidence as a great power.

However, deep down, we must admit that our achievements are influenced by multiple factors. We must admit that the global system today is established under the dominance of Western countries. Neither is China a key constructor of the global system now, nor does China have the capacity to lead the international system, with which it is not yet sufficiently familiar. China is just a student, a follower, a beneficiary and a co-developer.

In recent years, America has become more conservative; the European Union started to split; Japan's economic development almost stopped; and Russia was in crisis. Accordingly, some international opinion leaders called upon China to take over the role as a "leader." Similar voices appeared in China. However, China should remain sober about these proposals and grasp the fundamental realities of the country.

Before the reform and opening-up policy, China was still a backward agricultural country with lagging technology and low productivity. In spite of the significant developments over the span of close to 40 years, as a whole country, China still has considerable disparity comparing to developed counties.

We need to spend comparatively long time to absorb the "lessons" from industrial and market economies to complete the transition from a developing to a developed country. The transition process is the primary stage of socialism, and long-term. These are the fundamental realities of the country. Therefore, we must keep the "willpower" to handle things which match our national power. We need to avoid being arrogant, and also be wary of lavish praise. We should be even more sober when we have certain advantage. The world ruled by the internet technology belongs to each country in the world, neither to America nor to China.

Second, how should globalization and localization trends be interpreted, and how to deal with the relation between the world's "background color" and Chinese "features."

The relation of "background color" and "features" is the relation of globalization and localization. For China, it is the relation between China and the world, or the relation between the West and China. The particularity of this question is how to deal with the relation of being advanced and backward at the same time. This should be a simple question, but it has confused Chinese people for several centuries.

During the past centuries, we have gone through the absurdity of sticking to traditions and refusing to acknowledge Western scientific achievements, leading to frustration about "traditional Chinese values aided with modern Western ideology", ignorance of "rather

socialist grass instead of capitalist seedling", and the paradox of "introducing Western technology while resisting Western culture."

We still need to self-examine this issue before we can solve it once for all. In some fields, and about some certain issue, we lack confidence due to our conservatism and fears and we switch between arrogance and self-abasement. If we cannot completely change this opinion and relieve the burden, then there would always be a "psychological shadow" which affects China's development in this century. Otherwise, any "confidence" would be form without content. Globalization is the inevitable trend in history. Conservatism, avoidance, fear and rejection mean going backward.

Until now, the ways of life of all ages, including basic necessities of life, production, life, entertainment, sports and others are all dominated by knowledge and technology. Civilization is the total sum of people's knowledge and technology. Civilization is the essential nature of people. Leaving knowledge and technology aside mean departing from civilization, and people would not exist anymore.

The history of human civilization is the history of globalization. From the moment of starting to create knowledge and technology, mankind has interfered with mother nature, and started changing the world. This has initiated the long process of "globalization."

The penetrating power of knowledge and technology is irresistible for any material and spiritual strength. People rely on productivity dominated by technology to break through the natural barriers of space and atmosphere formed by mountains, rivers and seas, and to break through the political barriers constructed by human factors. Through knowledge and technology, humans have gradually extended their mode of existence, behavior and life – dominated and supported by technology – to each corner of our planet, thus establishing increasingly converging ways of life. Knowledge and technology are like superheroes. They are everywhere, and they can conquer every tough thing.

No matter where we are in the world, we can strongly feel the power of knowledge and technology, and the power of globalization.

China has a movie named "Kangrinboqe". It describes a story of several families in Markam, Tibet – men and women, old and young – go on pilgrimage to Lhasa and the holy mountain Kangrinboqe to achieve the greatest ambition in life. They go along with each

other, just repeating what the devout Tibetan people have done over thousands of years: crawling step by step, with hands, knees and heads touching the ground at times. This tough "expedition" would last for thousands of miles.

On the way, they experience birth, senility, illness and death, but they are persistent and never turn back.

The persons in the movie are ordinary people and the movie plot is also simple. Although there is no grand script for the movie, the native ethnic characteristics and the dogged religious spirits deeply dissolved in the blood still make a huge impression on the audience. The core of this story reflects an old theme: following tradition yet being highly distinctive at the same time.

If one looks closer, the religious "pilgrimage" only seems invariable for thousands of years, yet in practice is experiencing great changes in terms of the behavior's process and methods – from tractors that carry daily necessities, tents and other tools, to wearing boots, jackets and jeans on a group of people, carrying mobile phones to keep contact with family members thousands of miles away. The movie includes images of young men on the pilgrimage who enjoy the hair salon so much that they forget to leave.

These universal ways of life tell people that anyone – no matter how distant or secluded they are – will feel like opening the inner eyes as soon as they step out of their closed living environment and the sunlight from the outside world pours in. The process by which advanced technology leads them to enter the larger world is irreversible. Associating the Buddhists in Lhasa's Drepung Monastery chanting scriptures, while at the same time skillfully using Wechat to maintain their contact with the rest of the world and enjoying the pleasure of "knowing all wide world's affairs without stepping outside of the gate", shows us a vivid picture of "globalization". No matter who you are, white-collar employees, fashionistas, musicians, relatives of an emperor or Buddhists, your speech and behavior, cloths, eating, living and travelling habits are all within the range of globalization dominated by Internet technology.

Although the various kinds of peoples on earth have preserved their own features, they have to involuntarily board the boat of modernization and navigate the ocean of globalization. Marx thought that man's essence is the sum of all social relations. Following this logic, man is also the sum of all ways of life, or to say it differently, the sum of ways of

existence, behaviors and thinking. The sum of technology created by mankind constructs and supports all ways of life of mankind.

The so-called world of mankind is actually the world of knowledge and technology, which is just the "background color" of the world we live in. This "background color" is made up by the countless individuals and human groups from created and re-created generation by generation. Among them, under the influence of congenital and acquired conditions, different regions, different moments in time and different individuals and groups contribute differently to the pool of knowledge and technology collected by mankind as whole. The contributions are different in their modality, variety, extent and sequence. However, each kind of contribution is indispensable. All these achievements constitute the "harmony in diversity" and "seeking common points while reserving difference" of the diversified world which we rely and survive on.

With globalization, mankind has gradually formed a "community of common destiny". Humans are co-authors of a diversified world's way of life.

In modern times, as a result of the advancement of science and technology, the industrial revolution occurred in Europe. It had a huge effect on productivity, the economy and social developments. The entire world including China is studying from the West, this is an indisputable fact. But science, innovation, advancement and modernity are not patents belonging to any region, individual or group. "The West" is essentially an iconic symbol set by scholars or politicians in Europe and America in the discourse system.

During certain historical periods, "the West" represented advancement, and even monopolized the concept of "universal value". Thus the "background color" was abstracted by the commonness of "features". The "background color" is like a black hole in universe, devouring everything relentlessly. No-one can be independent from it and remain away from it, or else it would be weeded out from history. Therefore, "features" should be compared with the "background color" and any "feature" cannot be established without "background color". The "feature" will lose its basis for existence without a "background color". Conversely, without a "feature", there will be no special contribution made to the "background color".

China's close to 40 years of implementing the Reform and Opening-up Policy is the history of applying the "background color" as the script, continuously shaking off its backwardness, moving towards forward, reducing "features" and enhancing the "background color". Therefore, we need an adequate balance between globalization and localization, and the issue of the relationship between China and the world. These continue to be important projects that we are facing.

The world today is entering into a great era where all things are interconnected globally. As a historical trend, globalization and integration ultimately are a kind of systematization of mankind's ways of existence. Everyone of insight and every nation of achievement are struggling to integrate into the global system and spare no effort, through innovation, to try to become the leader, the master and the technical decision-maker in a part or the whole of the system.

China needs to reflect deeply and understand the past and the present in an unbiased way. It needs to deal rationally with the relationship between China and the world, and look for sensible paths into the future.

China is still faced with such tasks as ideological emancipation, concept transformation, deepening reform and expanding the opening-up process. In this context, it is a challenge for every nation's intellectual property and competition law fields. As a rule-based system of wealth production and change, compared with science and technology, this could be considered as a macro-technological system.

Limited by technological progress and gradual convergence of technological systems, intellectual property and competition laws are naturally close to globalization. The exchange and cooperation in the area of intellectual property and competition laws between China and South Korea are an integral part of globalization. Therefore, any progress we have made is to contribute to the promotion of globalization.

LIU Chuntian

Professor, Renmin University of China President of Intellectual Property Institute, Renmin University of China President, China Intellectual Property Law Research Association

BOOK ONE

MRLC IP & COMPETITION LAW 2016 ANNUAL REPORT OF CHINA

PART I.

OVERVIEW OF POLICY AND LAW IN INTELLECTUAL PROPERTY AND COMPETITION

CHAPTER 1.

OVERVIEW OF INTELLECTUAL PROPERTY POLICY

CHAPTER 2.

OVERVIEW OF COMPETITION POLICY

CHAPTER 3.

OVERVIEW OF COMPETITION POLICY AND ECONOMIC ANALYSIS

CHAPTER 1.

OVERVIEW OF INTELLECTUAL PROPERTY POLICY

LIU Chuntian*

In 2016, the governments in China at all levels actively promoted intellectual property ("IP") strategies, and gradually improved the construction of the IP system and institutions.

I. National Strategy for the Protection and Application of Intellectual Property in the 13th Five-Year Plan by the State Council

The National Strategy for the Protection and Application of Intellectual Property in the 13th Five-Year Plan ("National Strategy") deployed "Four Projects" and "Four Specials" with the aim to promote the development of China's IP cause. The top priority of the "Four Projects" is to improve IP laws and regulations. It clearly put forward the legislative tasks in inheritance, traditional knowledge and other fields. In the project of IP protection, the National Strategy announced the goal of building a diversified work structure for large-scale IP protection, supplementing and enhancing the "dual track" protection system; enhancing patent quality measures within the "Patent Quality Improvement Project" to cover all links of the chain, ranging from patent invention to protection and application, in order to improve the quality-benefit of patents; through the "Building a Powerful Intellectual Property Enterprise" project, boosting the building of a "powerful intellectual property nation" by means of enhancing enterprises' IP comprehensive strength, cultivating IP advantageous enterprises and improving the support system construction of building a powerful IP enterprise.

^{*} Professor, Renmin University of China; Dean, Intellectual Property School of Renmin University of China; President, China Intellectual Property Society. E-mail: chuntian.liu@163.com.

The "Four Projects" focus on fundamental aspects such as IP application capabilities, IP talent cultivation and cultural development, etc. Further, the primary goals of setting up IP trading operation systems and IP public service systems are to promote the establishment of innovation management and operational mechanism suitable for market competition, and to strive to provide high-quality public services. As to the construction of the IP talent cultivation system and IP cultural development, the National Strategy put forward clear thoughts and comprehensive and concrete measures to provide intellectual support and cultural foundation for the development of IP.

II. Several Opinions on Implementing the Knowledge Value Enhancement-Oriented Distribution Policies by the General Office of the CPC Central Committee and the General Office of the State Council

In November 2016, the Several Opinions on Implementing the Knowledge Value Enhancement-Oriented Distribution Policies were issued in order to accelerate the implementation of the innovation-driven development strategy, to stimulate scientific research personnel's innovation and entrepreneurship and to create an environment where knowledge, talent and innovation are respected.

The Several Opinions' goal is to strengthen the long-term incentives of scientific and technological achievements property to scientific research personnel in the following ways:

- (1) Strengthen the performance to implement long-term incentives for scientific and technological achievements and for scientific research institutions, colleges and universities. Adhere to long-term property rights incentives and cash bonus simultaneously, explore the implementation of stock options and dividend incentives, enhance equity, post dividends and other aspects of the incentive system from patent rights, copyrights, rights to new plant varieties, exclusive rights to layout designs of integrated circuits and other IP rights and scientific and technological achievements.
- (2) Improve the equity incentive management system of scientific and technological achievement transformation for scientific research institutions and university leaders. Any equity acquired by the key leaders and members of leadership of scientific research institutions, colleges and universities who are subordinate to the central government and those acting as legal representatives in these bodies as a result of a scientific and

technological achievement obtained before they have assumed their position are to be transferred in time after taking office, and failure to do so will affect the transaction.

- (3) Improve the medium and long-term incentive mechanism for scientific research staff at state-owned enterprises. Respect enterprises as participants in the market economy as to the autonomy in distribution of income, improve the reward system linking income of scientific research personnel in state-owned enterprises with their scientific and technological achievements as well as innovation performance.
- (4) Enhance equity incentives and other relevant tax policies. Implement deferred tax payment policies for the eligible stock options, equity options, restricted stocks and equity rewards and investment with scientific and technological achievements etc. Encourage innovation and entrepreneurship by scientific research staff, further promoting scientific and technological achievements.

III. Overall Plan for the Pilot Reform of the Integrated Administration of Intellectual Property Rights by the General Office of the State Council

Based on the needs of implementing the innovation-driven development strategy and supply-side structural reform, the *Overall Plan for the Pilot Reform of the Integrated Administration of Intellectual Property Rights* focuses on the following three aspects:

- (1) Establish a high-efficiency integrated IP management system. Scientifically divide IP responsibilities and explore effective and feasible integrated IP management systems and mechanisms. In accordance with the requirements of implementing strict IP protection, streamline the administrative law enforcement reform, integrate and optimize law enforcement resources and coordinate administrative IP law enforcement work streams. Through the set-up of a IP leadership coordination mechanism, effectively connect administrative with judicial IP enforcement.
- (2) Establish an easy-to-use public service IP system. Create IP authority lists, responsibility lists and set up a negative list system. Simplify administrative IP procedures, delegate powers and reasonably reduce approval requirements and regulatory obligations. Strengthen the interim and post-event supervision of IP service intermediaries. Integrate public service IP resources and optimize the provision of IP public services. Enhance

coordination, planning and industrial management and improve IP trading markets. Establish an IP rights protection and assistance network with full integrity and high efficiency.

(3) Enhance IP capabilities to promote the innovation-driven development. Establish an integrated IP review and patent navigation mechanism, and improve the IP risk early warning system. Formulate and implement industry promotion policies for IP-intensive industries. Encourage market participants to comprehensive strategies for combined use of patents, trademarks and copyright to protect products, technologies industrial designs etc. Guide market players to coordinately operate IP, promote the development of military and civilian integration in the IP field, and accelerate the effective application of expired patent technologies in the pharmaceuticals field etc.

IV. Interpretation (II) on Several Issues concerning the Application of Law in the Trial of Patent Infringement Dispute Cases by the Supreme People's Court

In March 2016, the Supreme People's Court issued the *Interpretation (II) on Several Issues concerning the Application of Law in the Trial of Patent Infringement Dispute Cases* ("SPC Interpretation"). The SPC Interpretation mainly involves guidance on claims, indirect infringement, defenses of standard exploitation, defenses of legal source, cessation of infringing actions, calculation of damages amount, effect on an infringement action where the patent is declared invalid and other key points in the practice of patent trials.

The SPC Interpretation can be summarized into the following three aspects:

(1) Enhance judicial protection of patent rights and, to the extent possible, resolve prominent problems such as long trial periods, difficulties of taking into account evidence and low damages amounts in patent litigation under the existing legal framework. In terms of difficulties of taking into account evidence and low damages amounts, to a certain degree, Article 27 of the SPC Interpretation improves the rules on evidence collection related to the damages compensation amount in patent infringement litigation. In terms of long trial periods, Article 2 sets up a system of "ruling first, followed by separate prosecution."

- (2) Adhere to the principle of compromise interpretation, strengthen publicity and demarcation functions of claims, and enhance the certainty of the protection scope of patent rights. Articles 5, 10 and 12 focus on the technical features recorded in the preamble, preparation method in the claims, and terms of the numeric features to define the protection scope of patent rights. In turn, Article 7 clarifies the interpretation principle for claims for enclosed composition, based on the publicity of claims.
- (3) Follow the principle of balance of interests and clarify the legal boundaries between patent rights and other civil rights. Article 25 of the SPC Interpretation excludes the situation where a bona fide user proves the legal source and pays a reasonable consideration for a product from the cease-of-use application. In turn, Article 26 provides that where the cessation of the infringing act may be detrimental to the interests of the state or the public, the court may not order the defendant to cease the act, but instead order it to pay the corresponding reasonable expenses. In addition, the SPC Interpretation also contains provisions for functional features, standard essential patents, the principle of estoppel, temporary protection period of patents for an invention etc.

V. Guiding Opinions on Fully Implementing the Promotion Program for the Intellectual Property Strategy for Small and Medium-Sized Enterprises by the State Intellectual Property Office and the Ministry of Industry and Information Technology

The Guiding Opinions on Fully Implementing the Promotion Program for the Intellectual Property Strategy for Small and Medium-Sized Enterprises proposes seven key tasks:

- implement the patent navigation system, use patent information resources to guide industry operational decision-making, promote the establishment of a patent navigation enterprise development work mechanism and support the innovation development of small and medium-sized enterprises;
- create incentive mechanisms, guide colleges, universities, scientific research institutions
 and small and medium-sized enterprises to establish a sound order-based patented
 technology research mechanism and optimize IP evaluation systems to stimulate IP-

- generating creativity of small and medium-sized enterprises;
- adopt multiple measures to improve IP operational capabilities of small and mediumsized enterprises. Make use of the systematic effect of national IP operation platforms, establish specialized service modules to promote IP transfer and transformation of small and medium-sized enterprises, and improve and develop direct and indirect financing channels which support the IP operation of small and medium-sized enterprises;
- consolidate the working foundation, improve the rights protection and assistance
 working mechanisms of small and medium-sized enterprises, and enhance IP law
 enforcement to strengthen IP protection to the benefit of small and medium-sized
 enterprises;
- strengthen scientific instructions, optimize IP management systems for small and medium-sized enterprises, strengthen their IP asset management, and implement IP trusteeship projects allowing them to enhance the their level of IP management
- deepen foreign exchanges, carry out IP cross-border cooperation benefitting small and medium-sized enterprises, and strengthen risk prevention concerning foreign-related IP; and
- transform government functions, improve the public IP service system for small and medium-sized enterprises, and encourage industry organizations to provide optimized IP services to small and medium-sized enterprises.

VI. Smart Manufacturing Development Planning (2016-2020) by the Ministry of Industry and Information Technology

The Smart Manufacturing Development Planning ("Planning") proposes to promote a two-step strategy of smart manufacturing implementation:

- by 2020, the development foundation and supporting capacity for smart manufacturing
 will have been significantly strengthened and the technology transformation of key
 industries will have made significant progress;
- by 2025, the supporting foundation of smart manufacturing will have been basically

established and key industries will have initially achieved the transformation to smart manufacturing.

To this end, the Planning proposes ten tasks for implementation:

- (1) accelerate the development of smart manufacturing equipment, overcome key technological equipment, increase quality and reliability and promote the integration application in key areas;
- (2) enhance key generic technology innovation, achieve break-throughs in a number of key generic technologies, and accumulate a number of core IP.
- (3) set up a smart manufacturing standard system, and speed up the revision, promotion and application of standards;
- (4) establish the foundation of industrial internet, R&D for brand-new industrial internet equipment and systems as well as information security software and hardware products, build up test verification platforms and establish a sound risk evaluation, inspection and information sharing mechanism;
- (5) carry out a new pilot model for smart manufacturing, select smart manufacturing benchmarking enterprises, transplant and promote experience in relevant fields;
- (6) promote technology transformation in key fields, tentatively establish digital workshops/ smart factories in the ten key fields proposed in "Made in China (2025)" and promote and apply digital technologies, systems-integrated technology and smart manufacturing equipment in traditional manufacturing industries;
- (7) promote technology transformation of small and medium-sized enterprises, guide them to engage in automation transformation and establish cloud manufacturing platforms and service platforms;
- (8) cultivate the smart manufacturing eco system, strengthen a number of systems-solution suppliers and a number of supporting enterprises with specialty, proficiency and distinctiveness;

- (9) promote the coordinated development of regional smart manufacturing, advance the construction of clusters for smart manufacturing equipment industries and strengthen Internet-based inter-regional smart manufacturing resource collaboration; and
- (10) set up smart manufacturing talent teams, enhance talent training and establish training bases.

VII. 13th Five-Year Development Plan of Science and Technology for Universities and Colleges by the Ministry of Education

As key goals, the 13th Five-Year Development Plan of Science and Technology for Universities and Colleges ("U&C Development Plan") aims to enhance the capabilities of colleges and universities to lead the national innovation-driven development. Among these goals, the research institutions are encouraged to take the lead or participate in the formation of a number of national technological innovation centers and a number of iconic industrial technology innovation alliances, and establish professional IP operators and technical brokers.

In accordance with this goal, by 2020, the scientific and technological innovation quality and international academic influence of China's colleges and universities will have made a new leap; the capabilities of serving economic and social developments and the effect of high-quality talents will be significantly enhanced; the open, coordinated and efficient mechanism of modern universities and scientific research institutions will be basically formed; universities and colleges will have become leaders to support the national innovation-driven development and will have become a strategic supporting force of establishing an innovative state and reinvigorating China through human resource development.

The U&C Development Plan also points out that China needs to accelerate the technology transfer and the transformation of scientific and technological achievements, strengthen scientific service functions such as R&D, technology transfer, inspection and detection certification, business incubation, IP, science and technology consulting, scientific finance etc. to support the cluster construction of science and technology enterprises.

In addition, according to the U&C Development Plan, China should develop the public

space to support college students with innovation and entrepreneurship, and encourage students to make use of independent IP rights to implement achievement transformation and industrialization. China's research institutions are also expected to actively participate in the platform establishment of technology and IP trade, and build up a scientific and technological innovation financing mode comprising the complete cycle of experimental study and pilot-testing to production.

The U&C Development Plan further aims to promote the establishment of an efficient defense technology transformation mechanism, and coordination among the departments of defense science, technology and weapon equipment. It proposes to enhance the national defense IP information from colleges and universities to gradually incorporate it into the national defense information platform, increase the integral exploitation and protection of national defense IP information resources of colleges and universities and promote the national defense scientific and technological achievements transformation and application of colleges and universities to support the sustainable development of China's national defense.

VIII. Several Opinions concerning the Innovation-Driven Development of Intellectual Property Services by the General Office of the Guangdong Provincial People's Government

In order to effectively give play to the function and role of IP services concerning innovation-driven development, promote and accelerate the formation of basic security system of innovation incentives, the *General Office of the Guangdong Provincial People's Government* issued the Several Opinions concerning the Innovation-Driven Development of Intellectual Property Services.

This document contains the following recommendations/aims:

- build up an efficient IP protection mechanism in key industries and key markets;
- establish an IP protection training system for key enterprises, speed up administrative IP law enforcement and intensify regular investigational study;
- accelerate the improvement of rapid IP rights protection and assistance mechanism, support high-tech zones, professional towns and other key industry cluster to establish

a rapid IP rights protection and assistance mechanisms depending on the existing resources, and cultivate and establish provincial IP rights rapid assistance centers;

- enhance IP quality and quantity, and improve the provincial and municipal IP rights financing application and incentive policies;
- establish comprehensive IP service platforms in high-tech zones and incubators, accelerate the establishment of provincial IP big data platforms to provide information support for IP service platforms in the zones;
- for strategic emerging industries, major science and technology projects, advanced equipment manufacturing industry etc., strengthen the patent risk early warning system and guide enterprises to establish patent alliances;
- actively establish risk compensation mechanisms for IP pledge financing, support the set-up of new varieties of IP insurance and enhance IP-related financial services;
- improve the disposal and income distribution methods of IP achievements, establish a sound service mechanism for benefit attribution of patent for service invention, incentive compensation mechanisms and IP transformation; and
- promote the construction of IP training bases.

IX. Implementation Opinions concerning Strengthening Intellectual Property Application and Protecting and Supporting the Construction of Science and Technology Innovation Center by the Shanghai Municipality

Built around building blocks including "enhancing protection, promoting application, improving service and propelling reform" etc., the Shanghai Municipality enacted the Implementation Opinions concerning Strengthening Intellectual Property Application and Protecting and Supporting the Construction of Science and Technology Innovation Center ("Implementation Opinions").

The Implementation Opinions propose to rely on the IP strategy throughout the process for constructing the Shanghai science and technology innovation center. Their further goal is to make Shanghai one of the preferred places for IP application review, IP dispute arbitration and litigation in Asia-Pacific.

More in particular, the Implementation Opinions propose the adoption of 12 concrete measures. The concrete supporting policies are as follows:

- implement strict IP judicial protection;
- enhance administrative IP law enforcement;
- improve multiple resolution mechanisms for IP disputes, and establish a mediation committee and mediator team;
- improve IP credit management and explore to establish credit standards for IP management and protection;
- enhance IP management with scientific and technological innovation, and set up an IP review and target evaluation system;
- enhance the IP working mechanism with enterprises as the main players, and improve IP supporting policies;
- explore IP-related financial innovation, improve IP investment and financing policies, and encourage commercial banks to develop IP financing service products;
- actively develop IP service industries and formulate guidelines on promoting the development of IP services;
- enhance public information services on IP and enhance basic information services in relation to IP;
- accelerate the IP talent cultivation and establish the Shanghai international intellectual property school;

- speed up the accumulation of IP resources and build Shanghai into an IP center in Asia-Pacific; and
- deepen the reform in IP field and explore off-site trial mechanisms for cross-regional cases.

X. Intellectual Property Rights 13th Five-Year Plan for Shenzhen Municipality by the Shenzhen Market and Quality Supervision Commission and Development and Reform Commission

The Intellectual Property Rights 13th Five-Year Plan for Shenzhen Municipality was issued to achieve Shenzhen's transformation into a modern and internationally recognized innovation city, and a national science and technology and industry innovation center.

The plan to undertake five major tasks related to IP, which are to improve IP system and mechanism, to enhance IP competitiveness, to improve IP quality, to boost the IP market value and develop an IP-friendly environment, and to carry out the work around IP protection, enhancing IP application, stimulating IP creation, improving IP management, promoting IP services, popularizing IP cultures and expanding IP talents etc.

In addition, this plan also proposes three major special projects:

- IP construction project in free trade zones. In free trade zones, the plan proposes to
 promote IP system and mechanism innovation, enhance IP financial innovation, explore
 the establishment of an IP operation center of South China and establish a sound IP
 rapid rights protection and assistance mechanism to support the development of the IP
 industry itself;
- Internet + IP promoting projects. The plan aims to innovate law enforcement methods for Internet + IP, enhance IP services for entrepreneurship and innovation, increase the awareness on the need for IP protection, and launch a IP-related big data study;
- IP-intensive industry cultivation projects. The plan further proposes to enhance the IP
 layout for strategic emerging industries, accelerate the IP layout for future industries,
 strengthen the IP support for manufacturing industries and enhance regional IP
 cooperation.

CHAPTER 2.

OVERVIEW OF COMPETITION POLICY

MENG Yanbei*

Competition policy is as a key policy to boost the development of the market-oriented economy. It has played an important role in streamlining the market order, safeguarding fair competition, encouraging innovation, and promoting market efficiency and social benefits. In 2016, the Chinese government continued to strengthen the fundamental status of competition policy in the national policy system, which has given a boost to competition policy and competition law. Competition policy was identified as a priority, and competition policy coordination mechanism was set up. The competition culture was enhanced and the implementation of competition policy was rendered more effective.

1. Achieve Fundamental Status of Competition Policy through the Establishment and Implementation of Fair Competition Review System

The Fair Competition Review System ("FCRS") is a regime that, through analysis and assessment of the competition effects that have been produced or may be produced by draft or current policy or legislation, government departments or competition enforcement agencies can achieve competition improvements and minimize harm to market competition. Currently, the national economic development faces problems like extensive mode of economic growth, excess capacity in some industries, and insufficiency of effective supply. Misallocation of resources was due to multiple reasons, but the restriction to market competition and free movement of resources caused by administrative protection, improper government intervention, soft budget constraint of enterprises and other factors was undoubtedly one of the most important reasons. In this situation, the establishment and implementation of the FCRS to prevent and correct anti-competitive measures and policy

^{*} Professor, Law School of Renmin University of China; Member, China-Korea Market & Regulation Law Center (MRLC). E-mail: mengyb@ruc.edu.en.

became a vital and urgent mission.

As a current development condition of China, the key to establishing the fundamental status of competition policy was to how to restrain anti-competitive government actions, specify the limit of government powers, and solve the problems of excessive intervention and abuse of preferential policies. Therefore, in June 2016, the State Council issued the *Opinions on Establishing a Fair Competition Review System During the Development of Market-Oriented Systems* to establish the FCRS. The system's aim is to prevent the introduction of policy measures that exclude or restrain competition, and gradually clean up and abolish provisions and practices that hinder fair competition and the development of a unified national market. This means the fundamental status of competition market is better recognized.

In addition, the FCRS also highlighted the principle of showing respect for the market and giving priority to competition, ensuring consistency by bearing the bigger picture in mind, making scientific planning, carrying out an implementation step by step, and conducting the review pursuant to the law. Furthermore, supervision shall be reinforced in order to establish and implement the FCRS, streamline government activities, and speed up the establishment of a unified, open, competitive and orderly market-oriented system.

During the policy-making process, government bodies need to conduct a fair competition review. The review applies to rules, regulatory documents and other policy measures that involve the economic activities of market players, such as those on market entry, industrial development, foreign investment, bidding and tenders, government procurement, business codes of conduct, qualification standards, and so on. As regards administrative regulations, other policy measures and local regulations formulated by the State Council, the departments in charge of drafting the documents are to conduct the fair competition review during the drafting process.

In July 2016, the general office of the National Development and Reform Commission ("NDRC") issued the *Notice of implementing the inner working procedure of Opinions on Establishing a Fair Competition Review System During the Development of Market-Oriented Systems*. These opinions require that each department or bureau follow the principle of "who drafts is who reviews."

As a follow-up, local governments issued a dozen of local regulations of implementation

opinions on the FCRS. However, the implementing measures issued by local governments did not include more detailed content beyond the framework and principles set out in the *Opinions on Establishing a Fair Competition Review System During the Development of Market-Oriented Systems*. This fact is an indication that the fair competition review concept was accepted by the local governments, but detailed implementing measures are still required to further explore how to operate the FCRS in practice.

On December 12, 2017, the general office of the State Council issued the Letter on Approval of the Establishment of the Inter-Ministerial Joint Meeting System for Fair Competition Review Work, approving of the establishment of the inter-ministerial joint meeting system for fair competition review work led by NDRC. Pursuant to this letter, the joint meeting shall be responsible for overall planning and coordination to make the FCRS operation under the leadership of the State Council. The letter also asks for additional research and drafting of implementation rules for the FCRS, further refinement of the review standard, and continuous improvement of review work, etc.

2. Enhance the positive implementation of the Anti-Monopoly Law through the formulation of implementing regulations and guidelines

Nowadays, antitrust challenges are complex in China. Even though China has formulated a great number of anti-monopoly regulations, the precise and effective implementation of the AML requires that legally-binding laws, regulations or guidelines provide sufficiently clear guidance on AML enforcement to both enforcement authorities and market players. Through to the end of 2016, the *Guidelines on the Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition* were submitted to the office of Anti-Monopoly Commission for final draft. The *Guidelines on Commitments by Business Operators in Anti-Monopoly Cases*; the *Guidelines on the Use of the Leniency Policy in Horizontal Monopoly Agreement Cases*; the *Anti-Monopoly Guidelines on the Automotive Industry*; and the *Guidelines on the General Conditions and Procedure for the Exemption of Monopoly Agreements* were in the signing/further negotiation process among relevant government departments. The *Guidelines on the Calculation of Illegal Gains from Monopoly Conduct by Business Operators and Determination of Fines* are expected to be sent to the member units of Anti-Monopoly Commission for signature shortly.

According to the Anti-Monopoly Commission's Letter of relevant draft work on

the Guidelines on the Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition, NDRC, the Ministry of Commerce ("MOFCOM"), the State Administration for Industry and Commerce ("SAIC") and the State Intellectual Property Office have all prepared drafts for antitrust guidelines on the exercise of intellectual property rights. In addition, on December 31, 2017, the Anti-Monopoly Guidelines of the Anti-Monopoly Commission under the State Council on the Abuse of Intellectual Property Rights were released by NDRC to solicit public comments. In February 2016, SAIC circulated its version of the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights to seek comments from stakeholders. Although there were some important differences in the guideline drafts of the above-mentioned four departments, there were also common features. For example, the various drafts attempt to outline the basic principles, analytical framework, theories and assessment factors for antitrust enforcement of intellectual property. The drafts also discuss specific problems for antitrust enforcement like patent pools, crosslicensing, exclusive grant-backs, refusal to license, royalty overcharges, tie-in sales, anticompetitive conduct in the setting and implementation of standards, competition assessment and remedies related to intellectual property in the merger control procedure, etc.

In February 2016, NDRC released the *Guidelines on Commitments by Business Operators in Anti-Monopoly Cases (Draft for Comments)* to solicit public comments. During the investigation of an anti-monopoly case, the business operator under investigation may make a commitment to adopt specific measures to eliminate the consequence of its conduct. In turn, the law enforcement agency may accept that commitment and decide to suspend and terminate the investigation.

The guidelines specifically regulate the applicable scope of the commitment system, the legal consequences of the decisions to suspend and terminate an investigation, the commitment procedure to be followed by applicants, and the measures and duration of the commitments.

The commitment system grants some limited new administrative powers to antimonopoly enforcement agencies, in order to maintain competition and protect public interest. At the same time, it is also necessary to restrict the subject, condition and procedure of the commitment system tightly, in order to prevent anti-monopoly enforcement agencies from abusing of administrative power, ignoring the regulation of AML, and damaging the legal interest of the parties involved or public interest. At present, the guidelines need further improvement to prevent enforcement agencies from abusing of the commitment system thus deviating from the goal of the AML.

In February 2016, the *Guidelines on the Use of the Leniency Policy in Horizontal Monopoly Agreement Cases (Draft for Comments)* were released to solicit public comments. The guidelines state that, under normal circumstances, a law enforcement agency may grant leniency to up to three business operators in the same monopoly agreement case. Where a case is major and complex and involves numerous business operators, and the business operators who applied for leniency have indeed provided different types of important evidence materials, the enforcement agency may consider granting leniency to more than three business operators.

As regards a business operator ranked first in leniency application, an antitrust enforcement agency may fully exempt from fines, or reduce the amount of the fine imposed on the business operator by at least 80%. Where a business operator applies for leniency before the relevant law enforcement agency has activated its investigation procedures and was determined as being the first in leniency application, the enforcement agency shall exempt the business operator from the full amount of fines. As regards a business operator ranked second in leniency application, the enforcement agency may reduce the amount of the fine imposed by at least 30% but not higher than 50%. As regards a business operator ranked third or lower, the enforcement agency may reduce the amount of fine imposed oby a maximum of 30%.

To encourage business operators to take the initiative to report monopoly agreements and provide important evidence, law enforcement agencies may consider exempting business operators from the punishment of confiscation of illegal gains, or reducing the amount of illegal gains to be confiscated at the same time as considering the exemption or reduction of fines. At present, there is still a discussion on whether the leniency policy is applicable to vertical monopoly agreements, and whether the "ringleaders" of cartel agreements can be exempted from punishment.

In March 2016, the Anti-Monopoly Guidelines on the Automotive Industry (Draft for Comments) were published for stakeholder comments. The draft guidelines aim to prevent and curb anti-competitive conduct in the automobile industry, reduce administrative law enforcement costs and the cost for compliance by operators. The draft is structured in six parts, first laying out the basic issues, then followed by guidance on monopoly agreements, abuse of market dominant position, merger control, anti-competitive abuse of administrative

powers. According to current state of competition in the Chinese automobile market, the guidelines laid emphasis on vertical monopoly agreements and abuses of dominance in the supply and after-sale markets.

In May 2016, NDRC issued the *Guidelines on the General Conditions and Procedure* for the Exemption of Monopoly Agreements (Draft for Comments) for public comments. The guidelines specify the general conditions and procedures for monopoly agreement exemption, facilitating business operators to understand and make use of the exemption regime, guiding antitrust agencies to apply this regime, and enhancing the transparency and predictability of enforcement operations.

The guidelines draft proposes to regulate the applications for exemption and consultation on exemption. Substantive assessment aspects were not covered in detail in the draft, for example the key factors to be considered in deciding whether an agreement falls under any of the circumstances of the exemption, key factors to be considered in deciding whether an agreement significantly restrains competition in the relevant market, and factors to be considered for deciding whether an agreement enables consumers to share the benefits it produces.

In June 2016, the public comment period for the Guidelines on the Calculation of Illegal Gains from Monopoly Conduct by Business Operators and Determination of Fines (Draft for Comments) was launched. The AML itself failed to specify the detailed methods for recognizing illegal gains and determining the amount of fines. In particular, the calculation of illegal gains was always theoretical and technological problem of the anti-monopoly enforcement practice.

The Anti-Monopoly Commission is fully aware that, in assessing illegal gains from monopolistic acts, a comparison against an assumed status of the market is involved. In addition, the choices of different parameters, variables and models will lead to vastly different results. As such, an accurate calculation of illegal gains from monopolistic acts is naturally difficult, and has always been a challenge for AML enforcement. Therefore, the draft guidelines strive to learn from the experience of anti-monopoly law enforcement practices, refer to the legislative experience of other countries and regions and provide an analytical framework and basic methods for antitrust enforcement agencies to recognize illegal gains and determine the amount of fines when investigating and handling monopoly agreements or abuse of dominance cases.

In recognizing illegal gains, an anti-monopoly law enforcement agency is to take into consideration the changes in the prices and sales volume of the relevant products, changes in the market share of the players in the relevant market and changes in the profit margins that are caused by the implementation of monopolistic activity, the industry characteristics and other factors. Where necessary, antitrust agencies may conduct their analyses by using economics.

As regard the fines, the antitrust agencies shall determine the exact amount in three steps: first, to determine the sales revenue of the business operator in the preceding year; second, to determine the base percentage of fines by considering the nature and duration of the illegalities committed; and, third, to adjust the base percentage of the fines by considering other aggravating factors or mitigating factors and make adjustments according to the extent of the illegalities, to determine the finalized percentage of the fines accordingly. At present, the biggest controversies in the draft guidelines are the issue of how to calculate the illegal gains and how to ensure overseas revenues are not counted twice, and produce repeated fines during confirmation of turnover for fines.

In addition, in April 2016, SAIC issued the Announcement on the Protruding Issues concerning the Acts of Public Utility Enterprises to Restrain Competition and Practice Monopoly. With this announcement, SAIC decided to carry out a special law enforcement campaign from April to October 2016 to tackle anti-competitive conduct by public utility enterprises across the country.

At the same time, due to revised *Law on the Protection of Consumes' Rights and Interests*, consumer associations are now able to file civil public interest actions before courts. As such, they can become the bridge between antitrust enforcement and civil actions. Consumers harmed by anti-monopoly conduct can request consumer associations to launch anti-monopoly-related civil public interest actions for protection of their rights. Similarly, consumer associations also can take these actions based on their own initiative.

The Interpretations of the Supreme People's Court on Certain Issues concerning the Application of Law in the Trial of Consumer-related Civil Public Interest Actions came into force on May 1, 2016. These interpretations further specify the application of civil public interest actions, in order to provide guidance on antitrust actions filed by consumer associations.

3. Improve the Competition Law System through the Revision of the Anti-Unfair Competition Law

In response to new market competition conduct like malware, hyperlinking, pop-up ads, cybersquatting, isolating technology, rank-bidding rank tampering with or covering webpages, there has been an increasing feeling that the Anti-Unfair Competition Law ("AUCL") needs to adjust to the Internet economy. In addition, the AML and the AUCL have overlapping provisions, and, for the overlapping problem, the relevant departments have decided to speed up the paces to amend the AUCL.

According to the *Notice of State Council on issuing 2016 Legislative Work Plan of the NPC Standing Committee*, the amendment of AUCL was listed among the urgent projects for comprehensively deepening reform, requiring the draft and review work to be completed as soon as possible. On February 25 2016, the Legal Affairs Office of the State Council released the *Anti-Unfair Competition Law (Draft for review)* to solicit public comments. The draft deleted the relevant articles relating to the AML overlap, added stipulations on regulating the abuse of a relative dominant position and on unfair competition in the Internet space. The draft also proposed to significantly amend the enforcement powers, supervision and inspection, and legal liabilities.

The biggest controversy in the draft AUCL amendment was the addition of a new prohibition on abuse of a relative dominant position. In particular, the newly added Article 6 stated: Business operators must not exploit a relatively dominant position to carry out the following acts of unfair competition: (1) Limiting the trading partners of trading counterparts without just cause; (2) Limiting trading counterparts to purchase of goods they [the business operators] designated, without just cause; (3) Limiting the trade terms of its trading counterparts and other business operators, without just cause; (4) Collecting abusive fees or unreasonably requiring trading counterparts to provide other economic benefits; (5) Attaching other unreasonable trade conditions. "Relatively dominant position" as used in this law refers to the situation where, during the course of specific transactions, one trading party occupies a dominant position in areas such as finance, technology, market access, sales channels, or raw material purchasing; and where its trading counterpart is reliant upon that business operator and it would be difficult to turn to other business operators.

Under the AML, a violation of Article 17 on abuse of dominance requires a showing that the company is dominant. Even for a vertical monopoly agreement, a detailed analysis

of the conduct and its effect is required. Against this background, the new Article 6 in the AUCL would complement the AML framework and provide the authorities with broader enforcement options. However, there were many problems associated with this legislative option. In particular, freedom of contract and autonomy of will are the foundations of the market economy, and laws should not restrict freedom of contract except for the most exceptional circumstances. Hence, without careful consideration or the unscientific elements o in the legislative design, the introduction of a prohibition against abuses of relative dominance system would have the potential to cause unnecessary interference with the normal market order, excessively restrict the freedom of business, and undermine the abuse of dominance prohibition in the AML.

As a result, although the new prohibition may have its own value, the abuse of relative dominance provision was discussed heavily in the legislative process and may ultimately be deleted from the subsequent AUCL revision draft.

CHAPTER 3.

OVERVIEW OF COMPETITION POLICY AND ECONOMIC ANALYSIS

Vanessa Yanhua ZHANG*

Since the Anti-Monopoly Law of the People's Republic of China went into force on August 1, 2008, economic analysis has played a vital role in the legislation and enforcement of competition policies. The Anti-Monopoly Law ("the AML") supervises and regulates competition in the overall markets, ensuring full competition among enterprises and protection of consumer welfare. The three enforcement authorities and judicial systems have issued a series of anti-monopoly guidelines and judicial explanations during the past eight years, which provide policy and practical foundations for the application of economic analysis in competition policies, jointly with the relevant anti-monopoly cases.

I. DESIGN BASICS OF CHINA'S COMPETITION POLICIES

The AML includes provisions on concentration of business operators, abuse of market dominance and monopoly agreements. The distribution of jurisdiction is divided three ways: the Anti-Monopoly Bureau of the Ministry of Commerce is responsible for issues related to the concentration of business operators, the Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission is responsible for price-related monopoly conduct, and the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the State Administration for Industry and Commerce is responsible for non-price monopoly conduct.

Right after the release of the AML, the State Council distributed the Provisions of the State Council on the Standard for Declaration of Concentration of Business Operators on

^{*} Managing Director, Global Economics Group. Email: vzhang@globaleconomicsgroup.com.

August 3, 2008. The standards for declaration of a concentration of business operators stipulated in the Provisions refer to the international practices and the characteristics of China's economy, which are typical representatives of scientific legislation.² During the past eight years, the Anti-Monopoly Committee of the State Council, jointly with these three enforcement authorities, issued series of legislation guidelines and regulations respectively, in order to cooperate with the smooth implementation of competition enforcement. It is worth mentioning that the Anti-Monopoly Committee of the State Council announced the Guideline for the Definition of the Relevant Market on May 24, 2009, which provides detailed guidelines for competition analysis and the basis for anti-monopoly enforcement. Article 7 of the Guideline emphasizes "the AML enforcement authority encourages business operators to define the relevant market per specific conditions of the case by using objective and true data and through the economic analysis method." As the definition of the relevant market is the starting point of anti-monopoly competition analysis, the Guideline once again lays out the economic analysis method as the basis of anti-monopoly competition analysis. In the next section, we explain the legislation and enforcement of the AML and how economic analysis has been applied by the three enforcement authorities.

II. ANTIMONOPOLY LEGISLATION, ENFORCEMENT AND ECONOMIC ANALYSIS BY THE THREE ENFORCEMENT AGENCIES

(I) Ministry of Commerce (MOFCOM)

The Anti-Monopoly Bureau of MOFCOM is responsible for merger filing reviews. From August 1, 2008, when the *AML* took effect, to December 31, 2016, MOFCOM had settled 1692 cases, including 30 cases with conditional approvals and 2 cases in which M&A deals were prohibited.³ Among more than one thousand cases settled by MOFCOM, 97% of

See Provisions of the State Council on the Standard for Declaration of Concentration of Business Operators , http://www.gov.cn/zwgk/2008-08/04/content 1063769.htm.

See Xinzhu Zhang & Weigang Dong, Mechanism Design of M&A Declaration of Chinese Enterprises, China Industrial Economy, Vol.8 2008, 87-97.

See Special Press Conference on the "Antimonopoly Work" of MOFCOM, February 28, 2014, available at: http://www.mofcom.gov.cn/article/i/jyjl/m/201402/20140200503445.shtml; Year-end Work Review of MOFCOM for 2014, January 29, 2015, available at:

http://www.mofcom.gov.cn/article/ae/ai/201501/20150100882509.shtml; Year-end

Work Review of MOFCOM for 2015, January 15, 2016, available at:

http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml; Year-end Work Review of

MOFCOM for 2016, January 11, 2017, available at:

http://www.mofcom.gov.cn/article/ae/ai/201701/20170102499312.shtml.

the cases were approved unconditionally, which is similar to the practices in the European and the American jurisdictions. In many cases with unconditional approvals, conditional approvals, and prohibited deals, the responsible MOFCOM officials and the external experts used modern mainstreaming competition analysis frameworks and methods, as well as forefront economic analysis tools in some cases, both of which led to relatively objective and fair judgments. With the accumulation of case review experience and the deepening difficulties of the cases, the review results of MOFCOM's public cases are more detailed and specific and mainly cover definition of relevant markets, market concentration, competition harm theory, buyer's power, market entry, etc. The economic methods include the ratio of market concentration HHI and market share analysis, regression analysis, Upward Pricing Pressure(UPP) and Gross Upward Pricing Pressure Index (GUPPI), illustrative Price Rise (IPR), etc.

Among the cases with conditional approvals that MOFCOM settled in 2016, the shareholding acquisition of SAB Miller plc (SAB Miller) by Anheuser-Busch InBev SA/ NV (AB InBev) is representative. MOFCOM defined the relevant product market into the market of popular beer and the market of premium/super premier beer based on the prices. For the definition of geographic markets, most geographic markets in the conditional approvals were defined as the national market or the global market. However, MOFCOM took into consideration the high transportation cost in the beer industry and the provincebased production and distribution in this case, and defined the provincial market as the relevant geographic market. In addition, MOFCOM focused on inspecting 24 provincial regions where both parties of the transaction had horizontal overlaps. Meanwhile, with the improved transportation, the scope where beer is sold, especially for premium/super premium beer, tends to be further expanded. MOFCOM took it into consideration and assessed the beer market on a national basis as well. The analysis result tends to be that in the provincial geographic markets for both popular beer and premium/super premier beer, there were several provinces where the combined market share of AB InBev and China Resources Snow (49% shares held by SAB Miller) after the merger would exceed 50%, while the combined share would even exceed 70% in certain provinces. This finding increased MOFCOM's competition concern regarding the market power of the merged enterprise and the lack of effective competition restraints in these markets. MOFCOM also analyzed the vertical control of the upstream and downstream industrial chains, and concluded that the transaction would increase the entry barriers in the relevant market and

^{1.} See http://fldj.mofcom.gov.cn/article/ztxx/201607/20160701369044.shtml.

harm the interests of downstream distributors. Therefore, MOFCOM decided to approve the acquisition with restrictive conditions, requiring both parties to divest the 49% interest held by SAB Miller in China Resources Snow and sell the 49% interest in China Resources Snow to China Resources Beer. From this case, we can find that MOFCOM focused more on the characteristics of China's domestic industry and the markets and the effects of the merger on the domestic market in its merger reviews. In cross-border M&As, the analysis of the global industry only is not enough. Both the M&A filing and the design of the remedies should fully analyze and consider the unique circumstances in China's domestic industries and markets, in order to reach the best solution that may eliminate MOFCOM's competition concerns.

MOFCOM has released a series of instructions, guidelines, interim regulations, measures, etc. to clarify the procedures, methods, competition analysis and factors that are considered when designing the remedies, etc. in the case reviews. These include the Measures for the Declaration of Concentration of Business Operators, Measures for the Review of Concentration of Business Operators, Guiding Opinions on the Declaration of Concentration of Business Operators, Interim Measures for Investigating and Handling Failure to Legally Declare the Concentration of Business Operators, Interim Provisions for the Assessment of the Effects of Concentration of Business Operators on Competition, Provisions on Additional Restrictive Conditions on Concentration of Business Operators (Trial), Interim Rules of the Criteria for Simple Cases of Concentration of Business Operators,

(II) National Development and Reform Commission (NDRC)

The Price Supervision and Anti-Monopoly Bureau of NDRC is responsible for monopoly conducts relevant to prices. Monopoly cases that NDRC handles involve horizontal and vertical agreements, abuse of market dominance, etc., which specifically

Measures for the Declaration of Concentration of Business Operators, http://www.mofcom.gov.cn/article/b/g/201001/20100106766707.shtml.

Measures for the Review of Concentration of Business Operators, http://www.mofcom.gov.cn/article/b/g/201001/20100106766692.shtml.

Guiding Opinions on the Declaration of Concentration of Business Operators, http://fldj.mofcom.gov.cn/article/i/201406/20140600614679.shtml

Interim Measures for Investigating and Handling Failure to Legally Declare the Concentration of Business Operators, http://www.mofcom.gov.cn/article/b/c/201201/20120107914884.shtml

Interim Provisions for the Assessment of the Effects of Concentration of Business Operators on Competition, http://www.mofcom.gov.cn/article/b/g/201111/20111107820531.shtml

Provisions on Additional Restrictive Conditions on Concentration of Business Operators (Trial), http://www.mofcom.gov.cn/article/b/fwzl/201412/20141200835207.shtml.

Interim Rules of the Criteria for Simple Cases of Concentration of Business Operators, http://www.mofcom.gov.cn/article/b/g/201405/20140500586519.shtml

include collusion and price cartels, bundling and tying, resale price maintenance, excessive pricing, abuse of intellectual property rights, margin squeeze, etc., covering the industries of pharmaceuticals, high technology, shipping, automobile, public utilities, consumer goods, finance, etc. NDRC's law enforcement highlight of 2016 was that the national and local development and reform commissions cooperated and jointly investigated illegal monopoly conducts.

By the end of 2016, NDRC had released the Regulation against Price Fixing and the Provisions on the Administrative Procedures for Law Enforcement against Price Fixing, and distributed the drafts of the antimonopoly guidelines for public comments, including the Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights, Anti-Monopoly Guidelines for Auto Industry, Guidelines for Commitments of Undertakings in Anti-Monopoly Cases, Guidelines for Applying Leniency Program to Horizontal Monopoly Agreements, Guidelines on Determining the Illegal Gains Generated from Monopoly Conduct of Business Operators and on Setting Fines, Guidelines on General Conditions and Procedures for the Exemption of Monopoly Agreements, etc. Many of the regulations and guidelines above provide guiding opinions on the application of economics in antimonopoly analysis and enforcement. NDRC's large team of economists, and the professors of economics that provide consultation to NDRC in the long term, are the solid foundation in the practical application of economic analysis.

As far as legislation is concerned, the establishment of the fair competition review system in 2016 is a milestone in China's competition policy history. NDRC led the design and drafting of the system, and pushed forward its implementation and enforcement. Relying on the current situation of China's economic and political systems, the fair competition

^{1.} Regulation against Price Fixing, http://fgs.ndrc.gov.cn/flgz/201507/t20150701_710376.html.

Provisions on the Administrative Procedures for Law Enforcement against Price Fixing, http://www.ndrc.gov.cn/zcfb/zcfbl/201101/W020110104333527987891.pdf.

Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights , http://jjs.ndrc.gov.cn/fjgld/201512/t20151231 770233.html.

Anti-Monopoly Guidelines for Auto Industry , http://www.sdpc.gov.cn/gzdt/201603/t20160323 795743.html.

Guidelines for Commitments of Undertakings in Anti-Monopoly Cases, http://jjs.ndrc.gov.cn/fjgld/201602/t20160203_774286.html.

Guidelines for Applying Leniency Program to Horizontal Monopoly Agreements, http://www.sdpc.gov.cn/gzdt/201602/t20160203_774297.html.

Guidelines on Determining the Illegal Gains Generated from Monopoly Conduct of Business Operators and on Setting Fines, http://jjs.ndrc.gov.cn/fjgld/201606/t20160617_807541.html.

Guidelines on General Conditions and Procedures for the Exemption of Monopoly Agreements, http://www.ndrc.gov.cn/gzdt/201605/t20160512_801562.html.

review system aims to eliminate and prevent administrative monopoly, and serves as an aid in establishing and promoting the socialist market economy with Chinese characteristics.

(III) State Administration for Industry and Commerce (SAIC)

The Anti-monopoly and Anti-Unfair Competition Enforcement Bureau of SAIC is responsible for non-price monopoly conducts. In 2016, the administrations for industry and commerce investigated 14 suspected monopoly cases, and settled 12 of them, which involved monopoly agreements and abuse of market dominance. The punishment decision regarding Tetra Pak's abuse of market dominance was announced on November 16, 2016, which is SAIC's most detailed investigation announcement so far. First, SAIC defined the relevant market into three product markets including the market of paper-based aseptic packaging equipment for liquid food, the market for technology service for paper-based aseptic packaging equipment, and the market for paper-based aseptic packaging materials based on the substitution analysis, and defined Mainland China as the relevant geographic market. Second, SAIC identified Tetra Pak's dominance in the relevant markets and found Tetra Pak used traditional tying, exclusive dealing, and other typical abuse of dominance conducts to eliminate and restrict market competition. Third, SAIC analyzed loyalty rebates for the first time, and used economic analytical tools to conclude that the retroactive rebates in the packaging material market under Tetra Pak's special market circumstances had loyalty inducing effects. When the purchase of downstream clients reaches a certain threshold, the rebates can be applied to all the purchases during a period in the recent past, which leads to the sharp drop of the clients' account payables at the threshold. Therefore, when the purchase amount is close to the threshold, the client will increase the purchase amount continuously to the threshold to purchase more packaging materials with less total payment. This rebate system forced Tetra Pak's competitors to offer more preferential prices to offset the inducing effect of Tetra Pak's rebate system. The cumulated amount of the packaging materials that the client purchased from Tetra Pak in the previous period is called "monopoly demand" controlled by Tetra Pak, and the additional purchase of the client at a later period is called "competitive demand" that the competitors may fight for. Through the retroactive cumulated rebates, Tetra Pak controlled "monopoly demand" and increased the competitors' costs of fighting for "competitive demand." This strategy increased competitors' costs (or reduced competitors' earnings) finally led to foreclosure effects in the packaging material market, which is key to understand why Tetra Pak's "loyalty rebates" led to anti-competitive effects.

By the end of 2016, SAIC had released the Rules of Administration for Industry

and Commerce on Prohibition of Monopoly Agreements, Rules of Administration for Industry and Commerce on Prohibition of Abuse of Dominant Market Position, Rules of Administration of Industry and Commerce on Prohibition of Abuse of Administrative Power for the Purposes of Eliminating or Restricting Competition, Procedural Rules by Administration of Industry and Commerce regarding Investigation and Handling of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position, Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition, etc. Some of the regulations above also emphasize the importance of economic analysis.

III. APPLICATION OF ECONOMIC ANALYSIS IN COURTS AND JUDICIAL JUSTICE

Since the implementation of the *AML*, anti-monopoly civil lawsuits have played a vital role. The Supreme People's Court released the *Provisions on Several Issues Concerning the Application of Law in Hearing Civil Disputes Caused by Monopoly Conducts* on May 3, 2012.⁶ Article 13 of the *Provisions* specifically emphasizes that the interested party may apply to the court to entrust professional institutions or professionals to issue market surveys or economic analysis reports on specific questions of a case, and the people's court may review and make its judgments of the market surveys or economic analysis report with reference to the regulations on identification conclusions in the Civil Procedure Law and relevant judicial interpretations. This judicial interpretation provides a policy basis for the application of economic analysis in anti-monopoly civil lawsuits.

In practice, economists were involved in some cases with tremendous influence. In

Rules of Administration for Industry and Commerce on Prohibition of Monopoly Agreements, http://www.gov.cn/fffg/201101/07/content 1779945.htm.

Rules of Administration for Industry and Commerce on Prohibition of Abuse of Dominant Market Position, http://www.gov.cn/flfg/2011-01/07/content 1779980.htm.

Rules of Administration of Industry and Commerce on Prohibition of Abuse of Administrative Power for the Purposes of Eliminating or Restricting Competition,

http://www.gov.cn/flfg/201101/07/content_1780003.htm

Procedural Rules by Administration of Industry and Commerce regarding Investigation and Handling
of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position,
http://www.gov.cn/flfg/2009-06/16/content 1341338.htm.

Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition, http://www.saic.gov.cn/fldyfbzdjz/zcfg/xzgz/201507/t20150724_233535.html

Provisions on Several Issues Concerning the Application of Law in Hearing Civil Disputes Caused by Monopoly Conducts, http://www.chinacourt.org/law/detail/2012/05/id/145752.shtml.

2014, the Supreme People's Court concluded the appeal by Qihoo 360 in its monopoly lawsuit against Tencent, rejected all the appeal requests of Qihoo, and maintained the first-instance judgment. Both the plaintiff and the defendant had hired teams of economic experts since the first trial to provide evidentiary support and defense with economic analysis. This case involved frontier theories of economics, among which the theory of two-sided markets and dynamic competition were recognized and accepted by both the court of first instance and the court of final appeal. This case also makes practical and theoretical contributions to the international anti-monopoly law enforcement. Being the first case against monopoly disputes that the Supreme People's Court concluded, this case is a benchmark of the monopoly cases in China's judicial system and a milestone in the history of China's anti-monopoly civil lawsuits.²

On August 1, 2013, Shanghai Higher People's Court concluded the lawsuit of Beijing Rainbow against Johnson & Johnson regarding disputes on horizontal monopoly agreements. This was the first civil lawsuit on vertical monopoly agreements, and the first anti-monopoly civil case in which the appeal court revoked the judgment of the court of first instance and favored the plaintiff.³ In this case, the Shanghai Higher People's Court clarified that the elimination or restriction of competitive effects should be the essential element in the identification of monopoly agreements. The appeal court also established the basic position of the "rule of reason" doctrine in analyzing the anti-competitive effects of resale price maintenance agreements. In this case, both the plaintiff and the defendant retained economics experts to provide economic analysis reports.

On June 29, 2016, Shanghai No.1 Intermediate People's Court made the judgment of first instance in the lawsuit of Rijin Electric Co. against Panasonic and its distributors for a market division scheme.⁴ In this case, the court continued the line of reasoning in the judgment of second instance of Shanghai Higher People's Court in *Beijing Rainbow v. Johnson & Johnson*, and advocated that vertical agreements restricted intra-brand competition and promoted inter-brand competition. Panasonic, the defendant, retained the economics expert to provide the economic analysis report for the defense, and eventually won.

Civil Decision of the Supreme People's Court of the People's Republic of China, (2013) Min San Zhong Zi No. 4, October 8, 2014, available at: http://www.chinaiprlaw.com/index.php?id=160, http://www.chinaiprlaw.com/index.php?id=161, http://www.chinaiprlaw.com/index.php?id=162.

^{2.} See http://www.chinacourt.org/article/detail/2014/10/id/1460979.shtml.

^{3.} See http://www.chinacourt.org/article/detail/2013/10/id/1110845.shtml.

^{4.} See http://cclp.sjtu.edu.cn/Show.aspx?info_lb=672&info_id=3943&flag=648.

IV. SUMMARY

In Summary, economic analysis plays an important role in the AML legislation, enforcement, and judicial justice. Both the anti-monopoly enforcement agencies and the judicial system have recognized the importance of economic analysis, and often consulted economics scholars for theoretical and empirical analysis. The interested parties and enterprises also cooperate with economics scholars to fully conduct detailed quantitative and qualitative analysis based on economics theories and data in the review of anti-monopoly cases, which provides supports to the scientific judgment.

PART II.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF INTELLECTUAL PROPERTY LAW OF CHINA

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PATENT LAW

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADEMARK LAW

CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COPYRIGHT LAW

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADE SECRETS

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PATENT LAW

GUO He*

I. OVERVIEW

Various laws and regulations related to the patent field in China were in an amendment process in 2016. Most notably, the forth revision of the *Patent Law* has been going on for years and the draft amendment (consultation paper) has been summited to the Legal Affairs Office of the State Council for the second time. Even though a number of alterations were made by the State Intellectual Property Office ("SIPO") to the originally published consultation paper, many provisions in the proposed *Patent Law* amendment remain controversial.

In addition, an extensive revision of the *Regulations on Patent Commissioning* has been put on the table. The draft is anticipated to go for deliberation before the State Council in 2017. As to the content of the draft *Regulations on Patent Commissioning*, published for public consultation, the proposed amendments reflect the practical experience in the area of patent commissioning over the past 30 years. The draft aims to further improve the patent commissioning system. Proposed changes include renaming patent agents to patent attorneys, further clarifying rights and obligations of the patent attorney, improving its qualification obtaining system and strengthening the management of patent agencies and so forth. However, with regard to some specific matters, such as the establishment and management of patent agencies and coordination between patent attorneys and lawyers, there are still wide differences in opinions among stakeholders.

As a further legislative development, the *Regulations on Employee Invention* (Draft) are under deliberation by the State Council as well. However, there appears to be

^{*} Professor, Law School of Renmin University of China. Email: guohe@ruc.edu.cn.

substantial divergence in relation to the employee invention management model involved in *Regulations on Employee Invention* among stakeholders, especially with regard to reward and remuneration for employee inventions. Against this background, it can be predicted that there will be a long time before the regulations can be officially promulgated.

In 2016, there was no promulgation of new laws or regulations relating to patents. However, there were quite some developments in terms of issuance of judicial interpretations, patent policies and law enforcement. As such, in 2016, the Supreme People's Court ("SPC") promulgated the *Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Patent Infringement Dispute Cases*. The State Council, SIPO and other administrative departments successively promulgated a series of policies and plans relating to patent law implementation. Courts and administrative law enforcement departments of all levels dealt with a number of patent cases.

IL LEGISLATION AND POLICY DEVELOPMENT

A. SPC Interpretation (II) on Several Issues concerning the Application of Law in the Trial of Patent Infringement Dispute Cases

Although the courts primarily exercise the judicial function in a traditional sense (that is, deciding cases), the SPC also has quasi-legislative powers: it can formulate so-called "judicial interpretations" in accordance with the original intention of the underlying laws, for the purpose of streamlining the decision-making at all levels of the courts nationwide and based on existing judicial experience. All levels of courts must comply with the SPC's judicial interpretations when conducting trials. In this sense, judicial interpretations are quasi-legislative in nature.

Now, the SPC Interpretation (II) on Several Issues concerning the Application of Law in the Trial of Patent Infringement Dispute Cases ("Interpretation (II)") is based on learnings through judicial practice after the revised Patent Law became effective in 2008. This is a follow-up normative document on how to litigate patent infringement cases after the promulgation of an earlier judicial interpretation.

Interpretation (II) contains 31 provisions, covering: the protective coverage of patents, forms of patent infringement, defences against infringement claims, determination of

infringement liability, and other relevant procedural matters etc. Compared to the prior judicial interpretation made in 2009, Interpretation (II) further specifies provisions in relation to matters of patent application. Interpretation (II) also contains stipulations on standard essential patents for the first time. In addition, it interprets matters with respect to infringement identification of industrial design, cessation of infringing conduct, calculation of damages, legitimate source defense and effects of suit for declaring patents invalid following infringement suits. Interpretation (II) further specifies what conduct can amount to patent infringement, which helps all levels of courts to streamline their judging criterion in infringement cases and ensures that the *Patent Law* is implemented correctly.

B. Patent related policies promulgated by the State Council and SIPO

In August 2016, the State Council promulgated the 13th Five-Year Plan of National Technological Innovation. The plan lists 12 technological innovation indexes for the period of the 13th five-year plan, which includes the invention patent ownership amount per 10,000 population and PCT patent application amount.

According to the plan, the invention patent ownership quantity per 10,000 population will increase from 6.3 to 12 by 2020, and the PCT patent application quantity will increase from 30,500 by the end of 2015 to 61,000. These indexes have become the symbol of implementing the national intellectual property strategy and constructing a country strong in intellectual property.

It should be noted that the patent application quantity, as a specific quantity index, can to some degree reflect the general level of national scientific technology and economic development as well as national patent consciousness and the degree of "trust" toward the patent system. In recent years, the increasing velocity of China's patent application quantity was far beyond that of national technology and economy development, which indicates the gradual improvement of social intellectual property consciousness.

Moreover, China has been leading in the quantity of patent application for consecutive years worldwide, both in the volume of domestic patent applications and in PCT patent applications. The relative numbers of Chinese patent applications exceed the position China holds in the global economy and technology leadership. The main reason is the government's policy to encourage patent applications. The patent application index in the 13th Five-Year Plan will definitely benefit patent-application-related industries in the upcoming several

years.

On 27 October 2016, SIPO issued the draft for the revision of the *Patent Examination Guideline* (Consultation Paper) for public comments. The draft of the revised *Patent Examination Guideline* mainly involves the following:

- in relation to patent application rejections;
- in relation to several regulations on examining patent applications of computer program invention:
- in relation to several regulations on examining patent application in the chemistry field;
- in relation to examining applications for declaration of invalidity;
- in relation to patent application archives; and
- in relation to term, restoration and abeyance of rights etc.

Judging from the breadth and depth of these revisions, one can see that the implementation of China's patent examination system is on its way to an internationally leading level.

Apparently, both computer programs and inventions in the chemistry field are the focus in international patent law in recent years. In China, the draft of the revised *Patent Examination Guideline* is meant to adjust the Chinese legislation to the new situation of technological progress and new requirements of the market place will help to raise the level of patent protection in China.

Similarly, the further improvement of procedural rules, such as for patent invalidation, will undoubtedly help to further raise the level of sophistication of SIPO's implementation efforts. Indeed, the *Patent Examination Guideline* is the most important normative document that SIPO complies with when reviewing patent applications. Compared to the *Patent Law*, the *Patent Examination Guideline* is more operational and specific. In this sense, the impact of the revisions to the *Patent Examination Guideline* on the level of China's patent protection must not be underestimated. For example, the incorporation of the graphical user interface

into the scope of the design patent protection a few years ago was achieved by revising the *Patent Examination Guideline*.

III. IMPORTANT CASES

A. Apple/Zhongfu v. Intellectual Property Office

In December 2014, Shenzhen Baili Marketing Service Company ("Baili") filed an application with the Beijing Intellectual Property Office ("BIPO") to determine that Apple Computer Trade (Shanghai) Company ("Apple") and Beijing Zhongfu Telecommunication Facility Company ("Zhongfu") had infringed the design right for mobile phone (100C) (Patent No. ZL201430009113.9) and imposed administrative penalty on Apple and Zhongfu. Baili demanded that Apple and Zhongfu stop the sale of iPhone6 and iPhone6 plus in Mainland China. In March 2015, Apple applied to the Patent Re-examination Board ("PRB") under SIPO, requesting the involved design right to be declared void. However, the PRB upheld the legality of the design right in December 2015 (PRB decision No.27878).

In May 2016, the BIPO made administrative decision (Jing IP Enforcement No. (2016)854-16) regarding the design right infringement dispute over mobile phone (100C). In its decision, the BIPO stated that the iPhone6 and iPhone6 plus sold on the market had infringed Baili's design right, demanding Zhongfu to stop "offering for sale and selling" and Apple stop the "sale" of iPhone6 and iPhone6 plus. This is the first injunction of "forbidding to sale" received by Apple in China.

Both Apple and Zhongfu challenged the decision and filed an administrative lawsuit with the Beijing Intellectual Property Court ("IPC"). Apple and Zhongfu believed that the alleged infringing products had many obvious differences compared to the involved design right and argued that the alleged infringing product was not the same as or similar to the involved design right. Against this background, Apple and Zhongfu requested the Beijing IPC to overturn the BIPO's decision and determine that the alleged infringing products did not fall within the protection scope of involved design right. On 7 December 2016, the Beijing IPC conducted a public hearing in this case. The parties from both sides debated on many contested aspects including as to whether courts had the right to adjudicate civil issues in an administrative lawsuit and whether the BIPO had exceeded its authority in the administrative decision, according to which Apple was required to stop infringement

nationwide. At the time of writing, the Beijing IPC had issued its judgment, in favour of Apple and Zhongfu, but the BIPO appealed the judgment.

B. USB key case (Woqi v. Hengbao)

Beijing Woqi Data System Company ("Woqi ") owned a patent for the invention of "a physics certification method and an electronic device." After Woqi found out that USB keys sold by Hengbao Company Limited ("Hengbao") to dozens of banks throughout China fell within the patent scope, it filed an infringement lawsuit with the Beijing IPC. In its lawsuit, Woqi requested the IPC to order Hengbao to stop infringement and pay RMB 49 million as compensation for damages and RMB 1 million as legal expenses to Woqi.

The Beijing IPC found out the actual number of infringing products sold to twelve banks and determined the reasonable profit of every piece of the products, thus calculating part of actual loss at more than RMB 48 million. During the trial, the IPC demanded the respondent to provide the number of products sold to other banks, which the respondent did not do. In this situation, the court presumed that the infringement compensation proposed by the plaintiff was well established given that the respondent refused to provide evidence in his possession. On 8 December 2016, the Beijing IPC held that the respondent Hengbao had infringed the patent for invention of USB keys held by Woqi and ordered it to compensate Woqi for an economic loss of RMB 49 million and supported the compensation claim for 1million as legal expense.

The damage amount in this case is the highest amount of damages adjudicated by the Beijing IPC since its establishment. This judgment echoed the opinion proposed in the Opinion about Refining IP Protection System and Protecting IP in Accordance with Law issued by CPC Central Committee and the State Council. That opinion stipulated the degree of punishment, and increased the statutory ceiling of compensation for, IP infringements. The opinion also started exploring the punitive damage mechanism for infringements of IP including patents. At the same time, this is the first case that a Chinese court affirmed that lawyers may collect their fees in the form of timekeeping. The Beijing IPC believed that charging in the form of timekeeping by law firm is the standard payment form for the legal profession, in line with laws and regulations. The bills based on timesheets can be used as evidence for the fees charged by lawyers as part of the reasonable expenses for the lawsuit. However, the court still said that a comprehensive evaluation needs to be made, depending on the necessity of intermediaries, the level of complexity of the case and actual work of the

lawyers etc. to determine whether the amount of legal fees is reasonable.

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADEMARK LAW

ZHANG Guangliang *

I. OVERVIEW

On December 12, 2016, with a view to correctly adjudicating administrative cases on granting and affirming trademark-related rights, the Judicial Committee of the Supreme People's Court("SPC") adopted the Provisions on Several Issues Concerning the Adjudication of Administrative Cases on Granting and Affirming Trademark-related Rights ¹ ("Provisions"). This judicial interpretation came into effect on March 1, 2017.

For adapting to the third amendment of the *Trademark Law*, the State Administration for Industry and Commerce ("SAIC") issued the newly-revised *Standards for Trademark Review and Adjudication* ("Standards") in December, 2016. The revised Standards have been adopted by the Trademark Office and the Trademark Review and Adjudication Board in the process of trademark review and adjudication.

SAIC also facilitated the vigorous reform of trademark registration, and released the Opinions on Making Vigorous Reform Efforts to Facilitate Trademark Registration² ("**Opinions**") on July 14, 2016.

II. DEVELOPMENT OF LEGISLATION AND POLICY

^{*} Associate Professor, Law School, Renmin University of China. E-mail: zhangguangliang@hotmail.com.

¹. Supreme People's Court Fa Shi $\left[2017\right]$ No. 2.

^{2.} SAIC Gong Shang Biao Zi [2016] No. 139.

A. Provisions on Several Issues Concerning the Adjudication of Administrative Cases on Granting and Affirming Trademark-related Rights

The amount of administrative cases on granting and affirming trademark-related rights¹ increased rapidly. The Beijing Intellectual Property Court, for example, accepted 7,545 first-instance cases in 2015, of which 5,501 were administrative cases on granting and affirming trademark-related rights, nearly 73% of total. Not only was the amount of such cases great, but many cases also drew the attention of the society. The cases involved a great number of articles in the *Trademark Law*. Responding to the need to streamline applicable legal standards, the SPC released the *Opinions on Certain Issues concerning the Adjudication of Administrative Cases on Granting and Affirming Trademark-related Rights*. The Provisions were drafted on the basis of these opinions.

The general principles laid out in the Provisions were:

- Straightening out the border of legal articles and applying the law accurately. For example, Article 3 of the Provisions states that, under the *Trademark Law*, "being identical with or similar to" the State name, etc. of the People's Republic of China shall mean that a trademark logo is identical with or similar to the State name, etc. on the whole. As regards a logo that contains the State name, etc. but is not identical with or similar to the same on the whole, the competent people's court may determine that the circumstance prescribed in Article 10(1)(8) of the *Trademark Law* is present.
- Encouraging compliance with the principles of honesty and credibility, and maintaining good order of trademark application and granting. Article 7 of the *Trademark Law* revised in 2013 specifically set the principle of honesty and credibility as the general principles of trademark application for registration and use. The Provisions reflect the legislative spirit in the application of the *Trademark Law* involving the consistent judicial guidance of the protection of honest business and curb of malicious intent for pre-emptively registering the trademark.
- Highlighting the judicial review function, and strengthening the enforcement on substantive resolution of disputes. Granting or affirming trademark-related rights is

The cases referred to the administrative lawsuits brought by parties to competent people's courts on the ground of objections
to the administrative acts committed by the trademark review and adjudication board, such as review of trademark dismissal,
review of non-registration of trademarks, review of cancellation of trademarks, declaration of the invalidity of trademarks,
review of the declaration of the invalidity of trademarks, etc.

close to a quasi-judicial judgment, not a mere exercise of administrative power. Hence, administrative cases on granting and affirming trademark-related rights had different characters from normal administrative cases, and the design of relevant regulations in the Provisions fully reflect the general idea of playing a judicial leading role, avoiding the reciprocation of procedure and recycled litigations.

The Provisions included 31 articles in total, involving substantive contents like the scope of examination, judgment of distinctiveness, protection of well-known trademarks, protection of prior rights, etc. and procedural contents like violation of statutory procedures, *ne bis in idem*, etc. The Provisions clearly regulate key issues of administrative cases on granting and affirming trademark-related rights and point to the difficulties of judicial practice, including:

- Strengthening substantive resolution of disputes. Article 2 of the Provisions stipulates that the scope within which the competent court examines an administrative act of granting or affirming trademark-related rights shall, in general, be determined according to the litigation requests of the plaintiff and the grounds given thereby. Where the plaintiff has not raised relevant claims in the lawsuit at hand, but the relevant determination by the Trademark Review and Adjudication Board is apparently improper, the competent court may examine the relevant matters and render a judgment or ruling thereon after all parties concerned have stated their opinions.
- **Determining the likelihood of confusion.** The regulations on trademark infringement in the *Trademark Law* revised in 2013 clearly noted the element of "likely to create confusion." Now Article 12 of the Provisions clearly sets out that the way to assess the likelihood of confusion is by looking at the degree of similarity between the disputed trademark and the unregistered well-known trademark, the degree of similarity between the products in question, the degree of distinctiveness and the extent of the well-known status of the trademark under request for protection, and the degree of attention paid by the relevant public as factors of reference. In addition, the subjective intentions of the trademark applicant and the evidence proving actual confusion can also be taken into account as factors of reference in determining the likelihood of confusion.
- Openness of prior rights. Article 18 of the Provisions specifies the openness of prior rights (including prior rights clearly regulated by law, and other legitimate rights and interests worthy of protection). Four articles in the Provisions regulate the prior

copyrights, name rights, interests of trade name and the protection of character images, the titles of the work and the names of character.

For example, where a party concerned claims a violation of his/her name right based on specific names such as his/her pen name, stage name, translated name, etc., Article 20 of the Provisions focuses on whether the specific name is well known to a certain degree, and has established a stable corresponding relationship with a natural person. In addition, if the relevant public uses the specific name referring to the natural person, the court shall uphold the claim.

According to Article 22 of the Provisions, if the title of a work, the name of a character in the work, etc. enjoys high awareness and the use of the title or name as a trademark on products is likely to mislead the public into believing that such products are licensed by, or have specific connections to, the right holder, then the competent court should uphold the claim on the grounds that prior rights and interests have been satisfactorily asserted.

• Presumption of improper means. Article 23 of the Provisions stipulates that, if the trademark of prior usage already has a certain influence and the trademark applicant knows or should have known of that usage, then the applicant shall be presumed to have pre-emptively registered the trademark by improper means. This rule does not apply where the trademark applicant furnishes evidence to prove that it has no bad-faith intent for taking advantage of the commercial goodwill of the trademark of prior usage.

On the one hand this rule in the Provisions specifies that improper means refer to the bad-faith intent for taking advantage of the commercial goodwill. On the other hand, the presumption of bad-faith intent for registration of trademark of prior usage which already had a certain influence can be rebutted by the trademark applicant upon presentation of counter-evidence. This solution in the Provisions actually reflects the judicial practice.

B. Standards for Trademark Review and Adjudication

For adapting to the third amendment of the *Trademark Law*, and further regulating and refining the work of trademark review and adjudication, the Trademark Office and the Trademark Review and Adjudication Board listened to the opinions of various parties, analysed foreign review standards to revise the Standards based on the practice of trademark review and adjudication for many years.

The revised Standards newly added the examination of sound trademark, the application of written opinions on examination in the practice, application of Section 19.4, Article 50 and adjudication of Section 15.2 of the *Trademark Law*, and standard of interested parties. In addition, the revised Standards made a number of revisions on part of examination standard for Article 10 of the *Trademark Law*:

• Examination standard of sound trademark. Sound trademark was newly added type protected by the *Trademark Law*, and the Standards listed procedural examination and substantive examination condition of registration application of sound trademark.

The substantive examination of sound trademark includes an examination of prohibitive regulations, an examination of distinctiveness, and same or similar examination. The examination of prohibitive regulations was that sound trademark did not violate Article 10 of the *Trademark Law*; the examination of distinctiveness was that sound which just expressed directly designated goods or services, consuming objects, qualities, functions, uses and other characteristics shall not be registered; same or similar examination included same or similar examination between sound trademarks, and sound trademarks and visible trademarks as well.

- Application standard of written opinions on examination. Newly added content to the *Trademark Law* was about written opinions on examination. The Trademark Office argued that, in exceptional circumstances, applications for registration of trademarks running counter to the relevant regulations of the *Trademark Law* could be amended within the statutory period. To achieve that, the application needs to make the correction within 15 days from the date of receiving the notice b the Trademark Office.
- Adoption standard of Section 19.4, Article 50 and Section 15.2 of the *Trademark Law*. The Standards provide guidance on Section 19.4 and Article 50 of the *Trademark Law*: "During the procedural examination of trademarks, the application for trademarks of goods or services except agent services shall not be entertained; if it was entertained, it shall be rejected during the substantive examination." "For prior same or similar registered trademarks which were revoked (except the revocation of non-use for three years), declared invalid, or was not renewed upon expiry of its validity period within one year from the date of revocation, the review period for the declaration of invalidity or the date of expiration of the period of the exclusive trademark right shall apply for Article 50 to confirm." The Standards refine the legal application of Section 15.2, listing

which relationships belong to contracts, business transactions and other relationships, and also listing the required evidence. In addition, the Standards highlight that a showing of the well-known status of the trademark is not required.

- **Determination of interested parties.** According to Articles 33 and 45 of the *Trademark Law*, interested parties who were entitled to file for objection and invalidation include licensed users, legal successors and trademark pledgee of prior trademark rights and other prior rights. The revised Standards ensure that a party which did not intervene in the registration process but has an interest during the litigation phase can be considered an interested party.
- Relevant amendments to Article 10 of the *Trademark Law*. The revised Standards provide a specific description of the national flag, national emblem, national anthem, military flag, army emblem and the names of State organs which cannot be registered as trademarks in Article 10 of the *Trademark Law*.

C. Opinions on Making Vigorous Reform Efforts to Facilitate Trademark Registration

The Opinions, issued by SAIC, have as their main objectives the facilitation of trademark registration, expansion of trademark application channels, simplified trademark registration procedures, optimized trademark registration processes, improvement to the trademark examination mechanism and the trademark credit regulation to further facilitate applicants to apply for registering trademarks, increase in efficiency of the trademark examination, and improvement of the level of trademark-related public services.

The main content of Opinions includes:

- Trademark application channels shall be expanded to provide convenience for applicants. Local authorities are entrusted to accept trademark registration applications, and there is a plan to establish trademark examination collaboration centres outside Beijing, and local offices to accept registration applications for pledges against registered trademarks, online application, etc.
- Formalities shall be simplified and procedures optimized to provide quality services for applicants. The timeframe needed for issuing a trademark registration application

acceptance notice will be shortened to around three months; trademark registration evidence shall be processed on the spot and; efforts shall be made to gradually promote the entire process of trademark registration to be electronic.

- The trademark examination mechanism shall be improved, and the efficiency of trademark examination shall be raised. Certain parts of the trademark examination process shall be entrusted to local authorities, while the service-oriented jobs involved in trademark examination are to be outsourced; the sole examiner examination system shall be actively promoted; trademark examination manpower shall be reasonably allocated; quality management and supervision mechanisms shall be improved; and the mechanism to disburse examination funding shall be improved.
- Trademark credit regulation shall be strengthened, and the trademark brand strategy shall be implemented in an in-depth manner. Research and guidance shall be stepped up for the pilot work of intellectual property rights comprehensive management and law enforcement under a local unified market regulatory framework.

III. KEY CASES

A. Qiaodan Trademark Retrial Case¹

In October 2012, Michael Jeffrey Jordan ("retrial applicant") filed a request to revoke the "Qiaodan" trademark of Qiaodan Sports Co., Ltd. ("Qiaodan Co."). In April 2014, the Trademark Review and Adjudication Board made a ruling to maintain the disputed trademark, for the main reason that the words of the trademark "Qiaodan" were certainly different from Michael Jordan and its Mandarin transliteration Maikeer Qiaodan. The board also held that Jordan was a common surname, and hence it was hard to affirm there was a certain corresponding association between this surname and retrial applicant; what the retrial applicant and its business partner Nike used was not Qiaodan; Qiaodan Co. had a long-term and wide advertising for the disputed trademark and relevant signs, winning a high market reputation, in parallel to the commercial activities of the retrial applicant and Nike company for nearly 20 years. The board found that both the retrial applicant/Nike and Qiaodan Co.

See Trademark Review and Adjudication Board Shang Ping Zi [2014] No. 052058 Ruling; Beijing High People's Court [2015] Gao Xing (Zhi) Zhong Zi No. 1915 Administrative judgment; SPC [2016] Zui Gao Fa Xing Zai No. 27 Administrative Judgment.

had their own consumers and market reputation.

In short, the Trademark Review and Adjudication Board held that the registration of disputed trademark by Qiaodan Co. did not damage the name right of the retrial applicant.

Not satisfied with the board's ruling, the retrial applicant filed an administrative lawsuit, yet at first instance and on appeal the courts upheld the ruling of the Trademark Review and Adjudication Board. Hence, the retrial applicant filed a request for retrial (revision) with the SPC.

On 8 December 2016, the SPC issued its judgment, siding with the retrial applicant. The court said that the retrial applicant was entitled to the name right of Qiaodan. In particular, the court found that a natural person who claims the protection of prior name rights for specific name shall follow necessary conditions as below: this specific name enjoys a high awareness, has been widely known to the relevant public and is used to refer to this nature person; this specific name has an established stable corresponding association with this natural person. The actual use of the name by owner of name right was not a necessary condition to acquire the protection of prior right.

If an applicant of a trademark knows the well-known status of other names but still applies to register the name as trademark, and is not able to make reasonable and convincing explanations of use of the trademark, it will be held to act in bad faith, in violation of principles of honesty and credibility. Hence, an infringement of prior rights to names of owners would be found. Even if the trademark applicant made certain contribution to the business reputation on a long term, it is not entitled to register the trademark in bad faith.

• Establishing the criteria for protection of prior rights to names. For the establishment condition of prior rights to names, there was confusion in the practice. With this judgment, the SPC clarified some of the problems. The court held that the protection standard of prior rights to names needs to balance the interests between the owners of prior rights to names and the trademark owners. A disputed trademark used or included in what people knew or the temporary use of natural person name was not sufficient to confirm the infringement of name rights by disputed trademark.

In addition, the Trademark Review and Adjudication Board's position to look only at the corresponding link between the name and this natural person as the standard for the protection of name rights was not correct. Instead, the SPC determined three criteria for the protection of prior rights to names: the name enjoys high awareness; t has been widely known to the relevant public and is used to refer to the nature person; and has an established stable corresponding association with this natural person.

- Determining that part of Chinese transliteration of foreigners can be the basis for name rights. When examining whether foreigners are entitled to claim the protection of part of the Chinese transliteration for their name, the SPC held that the customary name of the foreigner among the relevant public is the key criterion. Because of the difference of languages and cultures, and for easy use purposes, the relevant public was accustomed to use part of Chinese transliteration of the short foreign name, not the full foreign name. The court found that sometimes the public did not even understand and was not familiar with the Chinese transliteration of full foreign names. In this case, the retrial applicant was known as "Qiaodan" by the relevant public. Accordingly, the SPC held that the three criteria, and needed to be protected legally.
- Determining the influence of confusion and bad faith in the protection of name rights. The SPC ruled that the evidence in this case was enough to prove that Qiaodan Co. clearly knew that the retrial applicant and its name Qiaodan enjoyed high social awareness, yet it still registered a great number of closely related trademarks including the disputed trademark. In the court's view, the company was aware of the harmful effect as a result of the relevant public mistakenly assumed that goods with the disputed trademark had a specific association with the retrial applicant. This allowed Qiaodan Co. not to pay too much cost and yet to achieve the same result as an official endorsement by the retrial applicant. Hence, the SPC found the conduct of Qiaodan Co. to run counter to the the principle of honesty and credibility, and amounted to bad faith in the registration of the disputed trademark.
- Determining the affirmation of uses without infringement of name rights. One of the questions before the SPC was whether owners of name rights need to effectively make use of their rights in order to be able to protect them. Relying on Article 99 of the General Principles of Civil Law, the court held that actual use was the right of owners of the name rights, not an obligation. The law did not feature actual use as a statutory precondition for the protection of name rights. Therefore, the SPC concluded that the lack of actual use did not affect the affirmation of an infringement of name rights.

Another, related question was whether the use of the name by the trademark owner has an impact on the infringement question. The judgment of the SPC held that business condition of Qiaodan Co. and the advertising, use, award or protection of the name of the company and relevant trademarks were not enough to render the registration of disputed trademark reasonable. The detailed reasons of the SPC were as follows: first, a name right is a personal right, while a trademark right is a property right. The rights are different in nature, and the constitutive elements of infringing other prior rights to name and the affirmation of infringing trademark rights were different. Second, the market order or business success of Qiaodan Co. was based on the confusion by the relevant public to some extent. This state of affairs was not only detrimental to the protection of legal interest of owners of name rights, but also to safeguarding consumer interests and a sound trademark registration and use regime.

• Determining the acceptance standard of market survey reports. In this case, the SPC accepted two market survey reports, and clarified its reasons in detail: the process of the survey was notarized by a notarization authority, the survey procedure was standard, the constitution of the survey object, method of interview, sampling method, the formation of survey result were all fully described, there were technical instructions, questionnaires and problem cards in detail after the survey report, and the authenticity and power of the survey result were high which, combined with other pieces of evidence, were able to prove the relevant facts jointly. This acceptance standard of market survey reports by the SPC will become an important judicial rule.

In short, the Qiaodan trademark retrial case established the criteria for protection of prior rights to names, determined the acceptance standard for market survey reports, offered an example of the principles of honesty and credibility, reflects the judicial concept of protection of personal right and importance of judicial rules. These standards were the accurate application of laws and regulations, and brought a further clarification of certain issues as well, which will have a significant influence on similar cases going forward.

B. Feichengwurao Trademark Retrial Case¹

In February 2009, JIN Ahuan ("Jin") applied for the registration of the "Feichengwurao"

Guangdong Shenzhen Nanshan District People's Court [2013] Shen Nan Fa Zhi Min Chu Zi No. 208 Civil Judgment, Guangdong Shenzhen Intermediate People's Court [2015] Shen Zhong Fa Zhi Min Zhong Zi No.927 Civil Judgment, Guangdong High People's Court [2016] Yue Min Zai No.447 Civil Judgment.

trademark. In September 2010, Jin obtained the trademark with No. 7199523 certificate of trademark registration, verified under the Class 45 service category including dating service, marriage service, etc. "If You Are the One" (Chinese name "Feichengwurao") was also a large dating show of Jiangsu TV, owned by Jiangsu Broadcasting Corporation ("JSBC").

Jin accused JSBC and Shenzhen Zhenai Information Technology Co., Ltd. ("Zhenai") of trademark infringement. The first-instance court rejected Jin's claim, for the main reason that the use of the trademark for different kinds of goods/services did not constitute infringement. In contrast, on appeal, the second-instance court found an infringement on the grounds that the service purpose, content, approach and objective of the dating show "If You Are the One" related to marriage-seeking, matchmaking and dating services, same as the "dating service and marriage service" under which the disputed trademark was registered. Hence, JSBC was found to use the Feichengwurao trademark in the show, leading to an infringement of Jin's trademark right. The case was then appealed for retrial (revision). The retrial court held that the show was not same or similar to Class 45 dating services and marriage services and there should not have been any customer confusion. For this reason, the use of the name did not constitute trademark infringement. The retrial court overturned second-trail judgment and upheld first-instance judgment.

The learnings from this case are as follows: When determining whether a TV show was same as or similar to a class of service (dating and marriage-making), one should not look at a limited pattern or certain content from the overall TV show in isolation in an inflexible way. Instead, an integrated analysis of overall TV show and key characteristic and seizing the essence of conduct should be made to reach a comprehensive, proper and correct review decision. In addition, the purpose of the *Trademark Law* should be closely followed, and a key factor in the analysis is whether the conduct in question led to confusion. For this analysis, a common sense approach is needed to make a proper judgment.

The implications of this case include the following:

Criteria on similar goods (services) of TV show shall be confirmed. In recent years, infringement litigation against the names of TV shows frequently emerged. Many times, the key question was whether TV shows provided the same or similar services. In this case, retrial court reasoned that a TV show cannot be simply judged from its main theme or pattern. Instead, the court analysed the essence of the distinguishable function of a trademark in commercial circulation, and made a comprehensive assessment based on

the purpose, content, pattern and object of the relevant services, and public common sense.

• Distinctive function of a trademark. What the *Trademark Law* aims to protect is the distinguishable and distinctive function of a trademark. Hence, the degree of distinctiveness and the extent of the well-known status of the trademark need to be taken into consideration. The possibility of relevant public confusion must be considered based on the scope and strength of protection. In this case, the disputed trademark "Feichengwurao" was a common word in commercial activities. It had a lower degree of distinctiveness in the marriage services area. The scope and strength of protection of the registered trademark in this case must be assessed in relation to Jin's contribution to the degree of distinctiveness and the extent of the well-known status of the trademark. The defendant TV show was known to the public as an entertaining and recreational variety show. Even if the show involved aspects of making friends, the audience was able to distinguish clearly its service resource, and was not subject to confusion. Hence, the TV show's name did not amount to a trademark infringement.

C. WeChat Trademark Dispute¹

In November 2010, Trunkbow Asia Pacific applied to the Trademark Office for the registration of No. 8840949 "Weixin" trademark ("disputed trademark"), assigning it under Class 38 of message transfer, telephone services, telephone communication and mobile phone communication. Within the statutory objection period, Xinhe Zhang made an objection about the disputed trademark. The Trademark Office and the Trademark Review and Adjudication Board successively ruled that the disputed trademark was not eligible for registration, as it would have a negative influence on public interests and the public order. Hence, the disputed trademark was found to have constituted one of the prohibitive conditions of Article 10(1)(8) of the *Trademark Law*.

The first-instance court upheld the ruling of the Trademark Review and Adjudication Board. It held that the status of prior applications, public interests and the established stable market system are to be taken into consideration for the verification of trademark registration applications. In this case, the protection of practical interests of a majority of

See Trademark Office [2013] Shang Biao Yi Zi No.7726 Wechat Trademark Objection Ruling; Trademark Review and Adjudication Board Shang Ping Zi [2014] No. 67139 Objection Review Ruling Regarding No.8840949 Wechat Trademark; Beijing Intellectual Property Court [2014] Jing Zhi Xing Chu Zi No.67 Administrative Judgment; Beijing High People's Court [2015] Gao Xing Zhi Zhong Zi No. 1538 Administrative Judgment.

unspecified public had priority. On appeal, the second-instance court upheld the original judgment, merely arguing that the registration application of the disputed trademark did not violate Article 10(1)(8) of the *Trademark Law* but, instead, Article 11(1)(2) of that law. The court found that the disputed trademark was just direct description of service functions, purposes or other characteristics. The lack of distinctive features and the evidence presented were not enough to prove that the disputed trademark established a stable association with Trunkbow Asia Pacific, to have a recognizable effect on distinguishing resources of services. The second-instance court upheld original decision based on the revision of some of the reasoning made by the Trademark Review and Adjudication Board and the first-instance court.

What does this case teach us? When reviewing and assessing whether a sign has negative effects, the impact on public interests and the public order of national politics, economics, culture, religion and nationality shall be taken into consideration.

The implications of this case include:

- Identified examples of "other negative effects." The second-instance court argued that the disputed trademark was constituted by Chinese words "Weixin" and that the existing evidence was not sufficient to prove this trademark or its factors which might have a negative influence on public interests and the public order of national politics, economics, culture, religion and nationality. In addition, the "Weixin" trademark has been applied and approved in the classes of several goods or services by various parties including Tencent, which further proved that the use of "Weixin" as a trademark did not have other negative effects.
- Exception of prior application principle. The second-instance court ruled that the prior application principle is one of key principles in the national trademark registration regime. However, in the court's view, this principle mainly solves the issue of priority in the case of two trademark registration applications, in line with other regulations of the *Trademark Law*. For the signs that do not have distinctive features and cannot be used and registered as a trademark, irrespective of the time of application, the signs do not fall under scope of the prior application principle.

CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COPYRIGHT LAW

LI Chen*

I. OVERVIEW

During 2016, the State Administration of Press, Publication, Radio, Film and Television issued the Provisions on the Administration of Electronic Publishing (Draft for Comments). Furthermore, the National Copyright Administration issued several regulatory documents, the majority of which were aimed at the infringement of copyright in the network environment. In parallel, the Beijing High People's Court issued the Guidelines for Adjudication of Network-related Intellectual Property Cases, which fully illustrates that tackling infringements in the network environment was the focus of Chinese copyright law in 2016.

While focusing on the full protection of copyrights, Chinese courts also put emphasis on the balance of interests. There were notable cases emerging in the coordination of the relationship between the right of adaptation and the right of integrity, and the affirmation of proper citation.

II. DEVELOPMENT OF LEGISLATION AND POLICY

A. Provisions on the Administration of Electronic Publishing issued Provisions on the Administration of Electronic Publishing (Draft for Comments)

^{*} Professor, Law School, Renmin University of China; Director, Copyright and Neighboring Rights in United Nations Educational, Scientific and Cultural Organization; Executive Director, China Intellectual Property Law Association. E-mail address: lichen2003@ruc.edu.cn

With a view to streamline the publication and production of electronic publishing, the State Administration of Press, Publication, Radio, Film and Television drafted the Provisions on the Administration of Electronic Publishing (Draft for Comments) ("Publishing Provisions"), and released the draft by announcement on February 6, 2016 to solicit public comments.

The draft Publishing Provisions contain 62 articles in total, including general provisions, establishment of publishers, administration of publication, establishment and administration of the publishing entity of electronic publications, administration of not-for-sale works, administration of entrusted replication, annual inspection, and legal liabilities.

These Publishing Provisions are applied to activities relating to the publication and production of electronic works undertaken within the territory of the People's Republic of China. For the purpose of these provisions, electronic works mean media of mass communication that, by means of numeric codes, store contents with voice and image upon editing and processing, on magnetic, optical, electronic and other media that have a fixed physical form, with access via electronic reading, and play devices, including computer, intelligent terminal, electronic reading device, electronic display device, digital audio/video player, electronic game device, navigator and other media of similar function, to express ideas, popularize knowledge and accumulate culture.

B. Notice by the National Copyright Administration on Standardizing Works Registration Certificate

On February 15, 2016, the National Copyright Administration issued the Notice on Standardizing Works Registration Certificate. This notice regulates that, from June 1, 2016 onwards, new works registration certificate and seal pattern needed to be adopted. New version of the works registration certificate is manufactured under the unified supervision of the National Copyright Administration, and the sample of certificate is issued in electronic form. The template can be downloaded from the website of the National Copyright Administration (www.ncac.gov.cn), and the applicant needs to follow the template strictly.

C. Guidelines of Beijing High People's Court for Adjudication of Network-related Intellectual Property Cases

On April 13, 2016, the Beijing High People's Court issued the Guidelines for Adjudication of

Network-related Intellectual Property Cases. The guidelines consist of three parts: network-related copyright; network-related trademark; and network-related unfair competition.

The main content of network-related copyright includes guidance on how the burden of proof is to be allocated between the plaintiff and the defendant; how to identify that the defendant was the provider of information storage space service; how to identify that the defendant was the provider of linking services; the judgment of joint infringement; the proper judgment of providing webpage snapshot, etc.

D. Joint Ministerial Notice on the Launch of Jian Wang 2016 Special Campaign to Crack Down on Piracy and Infringements in Cyberspace

On June 14, 2016, the National Copyright Administration, the State Internet Information Office, the Ministry of Industry and Information Technology and the Ministry of Public Security jointly issued the Notice on the Launch of Jian Wang 2016 Special Campaign to Crack Down on Piracy and Infringements in Cyberspace.

The notice states that the key missions of this campaign include:

- (1) Launch of special action against infringements and piracy of online literature. The enforcement and supervision of literature websites are to be reinforced. In addition, infringements of illegally spreading online literature works via websites, post bars, micro blogs and WeChat, and illegal conduct of selling piratic books and audio/video products via e-commerce platform are to be tackled.
- (2) Launch of special action against infringements and piracy of apps. The enforcement and supervision on app uploaders need to be enhanced and the enforcement on piracy of aggregated apps and apps associated with network TV stick and TV set-top boxes are to be increased. Copyright regulatory responsibilities of app stores and app uploaders which offered literature, news, films and music works shall also be strengthened.
- (3) Launch of special action to streamline cooperation in online advertising. The supervision and administration of cooperation in online advertising must be strengthened to increase copyright protection, and cooperation supporting infringements and piracy shall be cracked down on.

E. Guidelines by the National Copyright Administration on the Management of Genuine Software

On July 11, 2016, the National Copyright Administration issued the Guidelines on the Management of Genuine Software. The main content of these guidelines is as follows:

- (1) **Genuine software work accountability system.** The members of a leading group and work responsibilities for the use of genuine software shall be specified, in addition to laying out the department of software use and staff duties
- (2) Regulations on the management of software use. The workflow and requirements shall be specified for the management of software use, involving work plan, budgeting, software procurement, software maintenance, publicity training, assessment, final report, etc.
- (3) **Regulations on the management of software allocation.** The principle and process of software allocation shall be specified.
- (4) **Regulations on the management of software account.** The variety and method of software account are to be laid out.
- (5) **Regulations on the management of software installment and maintenance.** The process of installation, uninstallation, and update shall be specified.

F. Notice by the National Copyright Administration on Strengthening the Administration over Copyright to Network Literary Works

On November 4, 2016, the National Copyright Administration issued the Notice on Strengthening the Administration over Copyright to Network Literary Works.

The notice focuses those network service providers, which provide (1) literary works via information network and provide relevant network services, (2) searching engine, browser, BBS, network disks, app stores as well as the services such as post bars, micro blogs and WeChat, or (3) information storage space services. These network service providers are required to perform review obligations and safeguard copyrights.

The notice also states that the National Copyright Administration is to maintain a "black and white list system" for supervision and administration over copyright to network literary works.

III. KEY CASES

A. Zhang Muye v. China Film Group Corporation¹

The plaintiff ZHANG Muye was the author of Candle in the Tomb. The defendants were China Film Group Corporation ("China Film"), Dreamer Company, LeTV Company as investors of Chronicles of the Ghostly Tribe, and Chuan LU as director of this film.

Chronicles of the Ghostly Tribe was adapted from the novel of the plaintiff, indicating in the title that it was an "adaption according to Candle in the Tomb of Ghost Blows out of Light." The plaintiff argued that its right of authorship was violated. It also argued that the content of film twisted and falsified the original novel to a significant extent, violating the right of integrity.

In addition, the social comments on the film caused great mental damage on the plaintiff. The plaintiff requested the court to order that the release and dissemination of Chronicles of the Ghostly Tribe shall be stopped. In addition, the plaintiff requested that four defendants shall be ordered to apologize publicly, to eliminate the impact of the illegal conduct, and compensate the plaintiff in the amount of RMB 1 million for mental damage.

In turn, the defendants argued that the film Chronicles of the Ghostly Tribe indicated the original novel in the titles, which was enough to allow the audience to understand that film was adapted from the original novel; the film producer performed the right of adaption of the original work in a legal and proper way, not violating the right of integrity of the plaintiff; if the claims of the plaintiff were to succeed, this would violate the basic principles behind film-making and would have an immense negative effect on the adaption of films and the film market in the future, which would be contrary to the public interest.

In its decision, the court held that indicating the name of the underlying work was not

^{1.} Civil Judgment No.83 [2016], Beijing Xicheng District People's Court (first-instance).

equal to authorship, and the defendants had therefore violated the right of authorship of the plaintiff.

When assessing whether the defendant had violated the right of integrity, the court laid out a number of factors to be taken into consideration:

- (1) whether the use of the work was made with authorization. The part or all of property rights in the works need to be acquired by legal way, based on the principles of honesty and creditability of contract performance and principle of interest balance between the creation and dissemination of works. This shall be limited to some extent for the exercise of right of integrity.
- (2) whether the use of works was a replication or adaption. Compared with original novel, adaption of work was equipped with new creation and expression of adaptor, which necessarily made some changes on the contents and ideas of original novel, therefore, whether decreasing the social comments of original novel and damaging the reputation of original author shall be consider for judging violation of right of integrity.
- (3) whether the work was published. If the work was published, the integrity of the work shall be respected. Subsequent changes to the work would not only violate the expression freedom of the author, but also affect the public understanding of the content and idea underlying the work. After the work was published, the ideas and expressions of the author are public, and readers know the entire content of original work. This mainly raises the question as to whether the reputation of the original author was damaged.
- (4) whether the laws contain special provisions. According to Article 10 of the Regulations for the Implementation of Copyright Law, where a copyright owner authorizes others to make a cinematographic work or a work created by means similar to cinematography based on a copyright owner's work, he or she shall be considered to have agreed to the necessary alteration of that work, provided that such alteration does not falsify or distort the original work. Based on the fundamental spirit of this provision when assessing whether a film violated the right of integrity of the original author, special techniques of expression and rules of film-making need to be fully considered.

In this case, the court held that the defendants had legally acquired the right of adaption

for the original works, considering the film-making principles. In order to assess whether the right of integrity was violated, the court held that the key was whether the adaption damaged the social comments of the author, rather than the meaning of the author. Generally, the audience is able to distinguish the differences between films and novels quite clearly, and in this case there was no misunderstanding about the content and idea underlying the original novel. The criticism of the film was aimed at the film itself, not the original work and the author. Hence, the court concluded that the defendants had not violated the author's right of integrity.

As for the remedies of right of authorship, the court found that the defendants had invested a huge amount of capital and manpower. If requested to stop the film distribution, this would cause a larger imbalance of interest between the parties. So the court merely held that the defendants publish a statement, and ensured proper identification of authorship in the subsequent advertising of film works. The court dismissed the remaining claims of the plaintiff.

In short, the key focus of this case was four-fold:

- (1) Putting forward four factors for assessing whether the right of integrity is violated: whether the use of work was made with authorization; whether the use was a replication or adaption; whether the work was published; whether the laws contain special provisions.
- (2) Considering the rules of film-making and allowing freedom for film adaption.
- (3) When assessing whether the authorized film adaption violated the right of integrity of the original work, the objective criterion of "whether it damaged the reputation of the author" must be used, not the subjective standard of "whether it violated the meaning of author."
- (4) Under the precondition of infringement, if the dissemination of the work would cause an imbalance of interests between parties, remedies other than injunctions should be adopted.

B. Shanghai Animation Film Studio v. Zhejiang Xinying Time Culture Communication Co., Ltd./Huayi Brothers Shanghai Cinema Management Co., Ltd.¹

In this case, the plaintiff Shanghai Animation Film Studio is the copyright owner of animated images for the calabash brothers and a black cat detective. The defendant Zhejiang Xinying Time Culture Communication Co., Ltd. ("Xinying Time") used such animated images in the poster of the declaration of independence of the generation born after the 1980s, and Huayi Brothers Shanghai Cinema Management Co., Ltd ("Huayi Brothers") released that poster on its official micro blog.

In its lawsuit, the plaintiff argued that the two defendants violated the copyright of fine art. In turn, the defendants claimed that the film at issue described the entrepreneurial story of the generation after the 1980s, and the use of the works involved were included to illustrate the age characteristics of the leading roles, which constituted "fair reference" under copyright law.

At first stance, the court held that, when judging whether the use of a work is "fair reference", a court should look at a variety of factors, in particular whether the work was published, the purpose of others' reference of the work, the proportion of referred work in the whole work, whether it had negative influence on the normal use or market sales of the original work.

From the nature of the referred work, the *calabash brothers* and *black cat detective* was a role art work in the cartoon world. The cartoon was broadcast in the 1980s, so the referred work was published work.

Looking at the purpose of reference, the film described an inspirational story that a young, self-employed man born after the 1980s, and the name of film was also clearly targeted at the group of this generation. The *Calabash brothers* and *black cat detective* were created in the 1980s. They became a childhood memory for the generation born after the 1980s, and had a higher combination with age characters. In the background of the poster produced by Xinying Time, except the *calabash brothers* and *black cat detective*, black and white TV, top and other typical scenes were also included. As a result, the court concluded

Civil Judgment No.258 [2014], Shanghai Putong District People's Court (first-instance); Civil Judgment No.730 [2015], Shanghai Intellectual Property Court (first-instance).

that the defendants' use of the work was just for explaining a certain problem related to the age characters of the roles in the involved film.

As to the proportion of referred work in the whole work, the referred work was used in an auxiliary and subordinate role. The involved poster highlighted the couple roles which occupied 1/2 of the whole poster, and the *calabash brothers*, *black cat detective* and more than twenty other items of the 1980s were used as background. Together, they occupied a small area and proportion of each was almost same, and the *calabash brothers* and *black cat detective* were not specifically highlighted. Hence, the court held that the defendants were protected under the "fair reference" defense.

As to the result of reference, the use of the poster did not have any effect on the normal use of the original work. The first-instance court found that the use of the defendants did not conflict with the normal use of the plaintiff's work, as the two pieces of work did not compete with each other in the market. Although the use by the defendants was commercial in nature, the fair use regime did not exclude the possibility of commercial use, as long as the criteria laid out in the laws and regulations are met.

The Copyright Law requires that fair reference indicates the source of the original work; however, despite the fact that the poster did not indicate the author name of the *calabash brothers* and *black cat detective*, the first-instance court held that this did not put the fair use defense in jeopardy. Instead, the court made an overall assessment including the features of use methods of the work. According to work properties and creation characters of the poster, and also based on the requirement of integrity in the poster, the court held that the fact that the source of work was not indicated in the poster was normal and reasonable.

In short, the first-instance court took the view that the use of defendants constituted fair use. The plaintiff was not satisfied with the verdict and made an appeal. At second instance, it argued that the age characters of the roles cannot be indicated through works, because through the name of the film in the poster, the age characters were clearly known. The plaintiff also claimed that the defendant had not indicated the source in the poster, but used the protected work just to enrich the content of the poster. The plaintiff claimed that this does not meet the definition of fair use.

The second-instance court closely followed the reasoning of the first-instance court. It did accept the plaintiff's reasoning that indicating a certain problem referred that reference of work was for indicating other problems, not merely displaying the artistic value of referred work, and the original artistic value and function of referred work were transformed. However, the court also found that the referred work was not necessary in the new work as a precondition, and the reference would be fair use in any event. Hence, the appeal court upheld the first-instance judgment.

In a nutshell, the takeaways from this case are as follows:

- (1) The courts put forward four factors for assessing "fair reference": whether the referred work was published; the purpose of others' work; the proportion of referred work in the whole work; whether it had a negative influence on the normal use or market sales of original work;
- (2) The courts held that commercial use was able to constitute fair use;
- (3) The court affirmed that the use of work could omit the signature of the author;
- (4) The court affirmed that, for fair reference of work for indicating a certain problem, it was not required that the reference was necessary in the indication, and the key of this reference was transformational use, not merely displaying the artistic value of the referred work.

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADE SECRETS

JIN Haijun*

I. OVERVIEW

The Central Committee of the Communist Party of China and the State Council released the Outline of National Innovation-driven Development Strategy ("Outline"). In the part on strategic security, the Outline proposes "to speed up the construction of a powerful country in terms of intellectual property rights ("IPRs"), by deepening the IPR reform and fully implementing the IPR Strategic Action Plan in order to improve the creation, application, protection and management of IPRs; to provide guidance and support for market players in creating and utilizing IPRs, and take the IPRs interests sharing mechanism as the approach to help results of innovations to be converted into objects of IPRs."

Looking at the new draft of the General Principles of Rules Law submitted for deliberation to the National People's Congress ("NPC"), trade secrets are included within the scope of IPRs. Therefore, from the perspective of the national innovation-driven strategy, it is clear that China will further improve the application, protection and management of trade secrets in the future.

In its final decision this year on the dispute of infringement of trade secrets between Nantong Factory of Synthetic Material and Nantong Wangmao Industries Company, the Supreme People's Court provided a clear interpretation on taking reasonable protection measures which forms a constitutive condition of trade secrets. Furthermore, the Beijing High People's Court's decision in the "hush money" contract dispute between GOME and Chen Xiao involved using a contract to protect trade secrets.

^{*} Professor, Renmin University School of Law. E-mail: jinhaijun@ruc.edu.cn.

II. LEGISLATIVE AND POLICY DEVELOPMENTS

The year 2016 has been a key moment for enacting the new General Rules of Civil Law. In the third draft for review, released at the end of 2016 "trade secrets" were listed among the IPR provisions. In contrast, the original version of the General Principles of Civil Law enacted in 1986, the predecessor of the General Rules of Civil Law, did not include "trade secrets." This means that, with over 30 years of development, "trade secrets" have been widely acknowledged as a part of the IPR framework.

The most important law in China involving the protection of trade secrets is the Anti-Unfair Competition Law ("AUCL"). According to the revised draft for review of the AUCL, released on 25 February 2016, the legislature intends to make significant revisions affecting the regulation of trade secrets. To be specific, in terms of the definition and constitutive requirements of trade secrets, simpler and clearer language was added, indicating they "have commercial value"; "fraud" has been added to the list of acts of infringing on trade secrets; it was also added that a third party's act of "allowing another person to use the owner's trade secrets" forming the infringement on trade secrets; sanctions were strengthened, providing that the involved act "shall be subject to a fine of not less than RMB 100,000 but not more than RMB 3 million in light of the circumstances; if the violation constitutes a crime, criminal liability shall be imposed in accordance with the law" (currently infringing on business secrets is outlawed by Article 219 of the Criminal Law); the burden of proof was reversed in that "where the owner of the trade secrets can prove that the information used by another person is substantially identical to the trade secrets of such owner and such another person possesses conditions for obtaining the trade secrets of such owner, such another person shall bear the burden of proving that the information used by it was obtained from a lawful source."

Apart from that, several other laws enacted in 2016 also affect the regulation of trade secrets, such as Article 45 of the Network Security Law, Article 76 of the Charity Law, and Articles 9 and 56 of the National Defence Transport Law.

III. IMPORTANT CASES

A. Nantong Synthetic Material Factory v. Nantong Wangmao Industries Company

The Nantong Synthetic Material Factory of the Ministry of Chemical Industry ("Synthetic Material Factory") was founded in 1990. Subsequently, this factory established the PBT Synthesis Workshop, conducting a number of test runs with PRT devices afterwards. Polybutylene terephthalate ("PBT") is one of the five most commonly used types of engineering plastic. PBT modification research has been widely carried out at home and abroad. This research aims to modify the mechanical property, fire retardancy, heat resistance, ageing resistance, etc. of PBT through chemical or physical methods, in order to meet all sorts of property requests set by customers. PBT has been modified which is called modified PBT or PBT-modified product.

In 200, Nantong Xingchen Synthetic Material Company ("Xingchen Company") was founded as a joint venture by the Synthetic Material Factory and Blue Star New Chemical Material Co., Ltd. The productive assets used as subscribed capital from Synthetic Material Factory include "modified engineering plastic, PBT resin synthesis..." In turn, Nantong Zhonglan Engineering Plastics Company ("Zhonglan Company") was jointly founded by Xinchen Company and Sino Hero Industries (HK) Ltd in 2002, and the investments to be contributed by the parent companies include their own modified PBT engineering plastic formulas and process technologies.

Zhou Chuanmin was designated as the vice director and, subsequently, the director of the Synthetic Material Factory in 1998 and 2000 respectively, and as the director as well as manager of Xingchen Company in 2000 and then chairman of the board of Zhonglan Company in 2002.

The predecessor of Nantong Wangmao Industries Company ("Wangmao Company") was Dongfang Company, which was jointly established by four individuals including Chou Chuanmin's father. Currently, Wangmao Company mainly produces and sells PBT-modified products. After some time, Zhou Chuanmin, as well as other four people in charge of the management, research and development, and sales of Zhonglan Company left this company successively, and then took on jobs at Wangmao Company.

The Synthetic Material Factory, Xingchen Company and Zhonglan Company then filed a civil lawsuit with the Jiangsu High People's Court against Wangmao Company and Zhou Chuanmin on the grounds of infringement upon business secrets. After losing first instance,

the three companies appealed to the Supreme People's Court.

Due to the complexity of relations between the involved parties and relevant facts, this article will concentrate on the main points, only illustrating the part involving technological secrets of PBT-modified products.

The Supreme People's Court held in its judgment that one of the main questions of this case was whether or not the three companies have taken reasonable measures to protect the secrecy of the involved information. According to Article 10(3) of the AUCL and Article 11 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition, for information to be considered as a business secret and be protected under the AUCL, it is necessary that the owner has taken reasonable protective measures. If the owner has not taken such measures to protect its technological and operational information, then this information cannot be considered as a business secret, and thus cannot obtain protection under the AUCL.

The Supreme People's Court discussed a number of key points.

First, the appellants of the case, the three companies, held that they had joint ownership over the involved technological information, and that therefore collectively claimed trade secret protection for the involved information.

However, the court held that the protective measures taken by the Synthetic Material Factory only applied to the relevant involved information formed in this factory and thus cannot be considered as protective measures taken for the benefit of the other involved information, acquired by or formed by Xingchen Company and Zhonglan Company. Similarly, the measures taken by Xingchen Company cannot be taken as measures taken for the benefit of the involved information acquired by or formed by Zhonglan Company.

Hence, the court ruled that it was only be able to decide whether particular involved information has been protected by reasonable measures if the three companies make clear at which specific times and which corresponding owners were involved in technologies and operational information. However, in the court's view, this was not the case, as the companies had not provided sufficient evidence.

Second, the three appellants had established successive investment relationships with one another, and had contributed technological assets as subscribed capital. The appellants alleged that they had actually hired the same employees and should be considered as a whole operating group. Accordingly, they alleged that the involved trade secrets were jointly owned by them.

In response, the first-instance court held that "under the circumstance of shared ownership, 'reasonable protective measures' also mean that every joint owner is supposed to have taken reasonable protective measures for this undisclosed information." On appeal, the Supreme People's Court did not view this as joint ownership and instead decided that Zhonglan Company should be the owner of the involved information. Hence, the Supreme People's Court did not agree with the claim that "once one appellant has taken reasonable protective measures, it should be considered that all three appellant have taken relevant measures." Consequently, the court dismissed the argument, due to the lack of factual and legal supporting evidence.

Third, Zhonglan Company was found not to have taken reasonable measures to protect the information at issue. Before the three appellant are able to base their claim on shared ownership, Zhonglan Company, as the sole owner of the information, should have taken reasonable protective measures. Following the claim of shared ownership by the three appellants, Zhonglan Company, as one of the co-owners, should also have taken reasonable protective measures.

In reality, however, Zhonglan Company only submitted a number of documents such as the "Management regulation on the manufacturing technological formula", the "Rules of positions", the "Borrowed archives registry", etc., which the court found to be lacking in detail in respect of the time and other details. As a result, the court did not accept them as evidence.

To sum up, due to the fact that Zhonglan Company had not taken reasonable protective measures itself for the information at stake, this information was found not to constitute a trade secret, and therefore could not be protected under the AUCL. As a result, the judgment by the Jiangsu High People's Court – (2008) Su Min San Chu Zi No. 0004 Civil Judgment – dismissed the plaintiffs' claims. By judgment on 26 September 2016 —Civil Judgment No.3 [2014] — the Supreme People's Court decided to dismiss the appeal and uphold the original judgment.

The judgment of this case explained the constitutive requirement that the owner must take reasonable measures to protect its information as prescribed in the AUCL. In particular, all co-owners of trade secrets bear this obligation. Each co-owner alleging shared ownership during the litigation bears the burden to provide evidence to prove that it has taken reasonable protective measures according to the times when it became obliges. Under shared ownership, the requirement to adopt reasonable secret protective measures also means that every co-owner must take specific protective measures to maintain the information undisclosed. It cannot rely on the measures taken by just one of them. Therefore, before claiming shared ownership over information, if one of the co-owners is the sole owner, it needs to have taken reasonable protective measures, no matter before or after the claim.

B. "Hush money" contract dispute between GOME and Chen Xiao

GOME is the biggest electrical appliances chain in China. The chairman of its board of directors was once the wealthiest individual in the country. In turn, Chen Xiao is the founder of Yongle Appliance ("Yongle"), a competitor of GOME. In 2006, Yongle was acquired by GOME and Chen Xiao became CEO of GOME. In 2008, Huang Guangyu, chairman of GOME's board, was sent to prison. Subsequently, GOME and Chen Xiao signed the so-called Labour Contract for Senior Management Staff, and the latter was appointed as the new chairman.

According to this contract, if the two parties were to dissolve the contract, GOME should pay an indemnity for contract cancellation to Chen Xiao. Also, GOME signed with Chen Xiao a separate agreement, named the Non-Compete Agreement for Senior Management Staff. The agreement provides the standard of the non-compete indemnity, namely GOME or its subsidiary should pay Chen Xiao a post-tax amount of RMB 10 million; in exchange for this, Chen Xiao made several promises under the agreement and, in case he were to breach these promises, he should return the full amount.

In particular, Chen Xiao promised in the agreement that he would not, in any way or to anyone, release or give publicity to materials that other directors and senior management staff of GOME have not released, including business operation strategies. He also committed not to make any speech that is harmful to other directors and senior management staff as well as the company. The amount of money pledged under the agreement was dubbed "hush money" in subsequent media coverage.

In early 2011, Chen Xiao left GOME and received RMB 10 million from GOME according to the agreement. Two months later, however, the 21st Century Business Herald reported a GOME-related private talk between Chen Xiao and the journalist on the front page, entitled "GOME incident appears again—Chen Xiao just revealed the financial bug of GOME." The interview was immediately and widely reproduced in the media.

As a result, GOME filed a lawsuit against Chen Xiao alleging breach of the abovementioned agreement, requesting him to refund the RMB 10 million.

On 19 November 2014, the Second Beijing Intermediate People's Court released its judgment –Judgment No. 01464 – supporting GOME's claim for refund from Chen Xiao. On 30 December 2016, the Beijing High People's Court's judgment –Judgment No.297 [2016] – dismissed Chen Xiao's appeal and upheld the first-instance verdict.

The "hush money" contract dispute between GOME and Chen Xiao had gone through six years and ended with GOME's success. The focus of the dispute was whether the RMB 10 million paid by GOME constituted a consideration for Chen Xiao not disclosing any relevant information after his departure.

In contrast, the content of the confidentiality promise and whether the information was a trade secret were not in dispute. This circumstance allowed GOME to avoid the burden of producing evidence to prove that the information was a trade secret, and also prevented the confidential information from being disclosed before court. This approach which protects trade secrets by signing a contract or imposing non-compete obligations has its unique advantage, on the assumption that the consideration is clear and reasonable.

PART III.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COMPETITION LAW OF CHINA

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION OF MONOPOLY AGREEMENTS

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE IN ABUSE OF DOMINANT POSITION

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DEVELOPMENTS IN LEGISLATION AND PRACTICE TACKLING ADMINISTRATIVE MONOPOLY CONDUCT

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DEVELOPMENTS IN LEGISLATION AND PRACTICE IN THE ANTI-UNFAIR COMPETITION AREA

CHAPTER 6.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF IPR-RELATED ANTITRUST

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION OF MONOPOLY AGREEMENTS

TAN Yuan*

I. OVERVIEW

During 2016, the National Development and Reform Commission ("NDRC") issued several drafts guidelines relating to enforcement against monopoly agreements in China.

At the same time, the antitrust agencies effectively carried out law enforcement against monopoly agreements, not only finding and punishing a large number of companies engaging in horizontal and vertical monopoly agreements in general, but also achieving breakthroughs against monopoly agreements in special industries like the medical equipment sector. There were also many s cases before court. In particular, the judgments in two vertical monopoly agreements cases deserve close attention. In one of them, the court analyzed the probative force of pre-existing penalty decisions by antitrust agencies in private antitrust litigation. For the other case, the court in question put forward the pre-conditions for conduct to amount to an antitrust offense by way of vertical monopoly agreements.

The legislative efforts in the area of monopoly agreements in China were conduct in a smooth way in 2016. Actual cases emerged in large numbers in the antitrust practice in 2016, many of which involved new industries and new issues. This novelties brought by the antitrust agencies and courts should be noted.

^{*} Lecturer, China Youth University of Political Studies School of Law; Postdoctor, Institute of Law of Chinese Academy of Social Sciences, majoring in antitrust law, finance law and securities law. Email: tanyuan8702@163.com.

II. DEVELOPMENT OF LEGISLATION AND POLICIES

In China, NDRC and the State Administration for Industry and Commerce ("SAIC") are the authorities in charge of antitrust law enforcement against monopoly agreements. Accordingly, in line with the vertical allocation system of antitrust enforcement powers of China, the development and reform commissions and administrations for industry and commerce at the provincial level also have such enforcing power. However, the legislation as to monopoly agreements and the enactment of relevant policies are mainly undertaken by NDRC and SAIC at the national level in Beijing. During 2016, SAIC did not establish any specific regulations regarding monopoly agreements, while NDRC has conducted considerable antitrust legislation work throughout the year.

A. Guidelines for the Application of the Leniency Regime to Cases of Horizontal Monopoly Agreements (Draft for Comments)

NDRC enacted the Guidelines for the Application of the Leniency Regime to Cases of Horizontal Monopoly Agreements (Draft for Comments) on 2 February 2016. This draft provides that a business operator which applies for leniency has to submit the following information:

- The participants of the monopoly agreement and their basic information (including their names, addresses, contact details, participating representatives, etc.);
- the basic information on the monopoly agreement (including the time, place, contents and specific participants of such contact);
- the products or services, prices, quantity, etc. involved in the monopoly agreement;
- the geographical scope and market size affected by the monopoly agreement;
- the duration of the monopoly agreement; and
- a description of the evidence submitted by the business operator.

The draft also provides specific information on how the antitrust agencies can exempt business operators from fines, or reduce the amount of fines. As regards a company ranked first in the order of its leniency application, the competent antitrust agency may exempt the applicant from the full amount of fines, or reduce the amount of fines by at least 80%.

Guidelines for Application of the Leniency Regime to Cases of Horizontal Monopoly Agreements (Draft for Comments), see http://jjs.ndrc.gov.cn/fjgld/201602/t20160203_774287.html, accessed on March 11, 2017.

Where a company applies for leniency before the authority has initiated its investigation procedures and is confirmed to be the first in the leniency application order, it should be granted immunity from fines. If it is ranked second, the authority may reduce the amount of fines by 30% to 50%. If a company is ranked third or subsequently, the authority can give a maximum amount of 30% fine reduction.

This draft also details the procedure by which the authorities accept applications for leniency, the ways to apply for leniency by companies, the registration and acceptance of the applications for leniency, other conditions to be satisfied for being granted leniency, determination of the application order, and confidentiality obligations on law enforcement agencies.

B. Anti-Monopoly Guidelines for Automobile Industry (Draft for Comments)

On 23 March 2016, NDRC released the Anti-Monopoly Guidelines for Automobile Industry (Draft for Comments). This draft mainly regulates vertical agreements in the automobile industry, including the fixing of resale prices and setting of minimum resale prices; recommended prices, guided prices and guaranteed maximum prices; geographical restrictions and customer restrictions; imposing vertical restriction on after-sale maintenance services and the circulation of accessories indirectly through warranty terms; other vertical restrictions relating to the sales and service capacity of dealers and repairers. Additionally, the draft contains guidance on exemptions generally and in individual case. It also discusses horizontal monopoly agreements and abuse of dominance issues in the automobile industry.

C. Guidelines on the General Conditions and Procedures for Monopoly Agreement Exemption (Draft for Comments)

On 12 May 2016, NDRC released the Guidelines on the General Conditions and Procedures for Monopoly Agreement Exemption (Draft for Comments)² for public comment.

These draft guidelines provide that an applicant for an exemption has to submit a written application for exemption covering the following aspects:

Anti-Monopoly Guidelines for Automobile Industry (Draft for Comments), see http://jjs.ndrc.gov.cn/fjgld/201603/ t20160323 795740.html, accessed on March 11, 2017.

Guidelines on the General Conditions and Procedures for Monopoly Agreement Exemption (Draft for Comments), see http:// jjs.ndrc.gov.cn/fjgld/201605/t20160512_801559.html, accessed on March 11, 2017.

- The names, domiciles, business scopes and registration certificates of all applicants. Where the application is submitted by an agent entrusted, the power of attorney signed or sealed by the applicant(s) shall be submitted;
- The agreement under application for exemption and relevant documents;
- Reasons and evidence supporting the application for exemption;
- The business operators affected by the agreement and their contact details;
- Information as to whether parallel applications for exemption have been submitted to authorities in other countries or regions and, if such applications have been made, the replies of the authorities need to be submitted; and
- Other materials required by the antitrust agency in charge.

When reviewing whether an agreement falls under any of the exemption circumstances, the handling antitrust agency shall mainly consider the following factors:

- The specific forms and effects by which the agreement falls under any of the circumstances of exemption prescribed by items (1) to (6) of Article 15(1) of the Anti-Monopoly Law;
- Causation between the agreement and the circumstance realized;
- The importance of the agreement to realizing the circumstance; and
- Other factors that serve to prove that the agreement qualifies for the exemption.

When reviewing whether an agreement severely restricts competition in the relevant market, the antitrust agency should take into consideration the following factors:

- The definition of the relevant market affected by the agreement;
- The market shares of the parties to the agreement and their major competitors, and the competitive landscape in the relevant market;
- The ability of the parties to the agreement to control the sales market or the raw materials procurement markets;
- The financial strength and technical conditions of the parties to the agreement;
- The degree of dependence of other business operators on the parties to the agreement;
- The degree of difficulties to enter the relevant market;
- The existence of potential entrants to the market; and
- Other factors that serve to prove whether the agreement will severely restrict competition.

The antitrust authority also needs to examine whether the agreement in question enables consumers to share the benefits it produces. In that examination, the authority is to mainly consider whether the agreement can bring:

- innovation in products or services;
- increase in product types or production output;
- enhancement in quality or safety;
- decreases in prices;
- more convenience for consumers; or
- any other circumstances that enable consumers to share the benefits produced by the agreement.

The draft guidelines also contain provisions regarding the time of application, soliciting third party opinions, the exemption decision, the revocation or invalidation of exemption decisions, consultations, etc.

III. IMPORTANT CASES

A. Medtronic Case¹

On 8 December 2016, NDRC announced its administrative punishment decision against the medical equipment price monopoly agreement in the areas of cardiovascular, restorative therapy and diabetes, between Medtronic (Shanghai) Management Co., Ltd. and its distributors.

NDRC had launched the antitrust investigation in April 2016. Following its investigation, NDRC found that, at least since 2014, Medtronic had imposed fixed resale prices and minimum resale prices of the involved medical equipment products on its distributors, by way of methods of distribution agreements, email notices, verbal negotiations, etc.

The content of the restrictive agreement included:

^{1.} NDRC administrative penalty decision No. 8 [2016], see http://jjs.ndrc.gov.cn/fjgld/201612/t20161209 829716.html.

- **Directly fixing resale prices.** Since 2014, Medtronic set a price list for the involved products, with listed prices of every sales link, and sent the lists to platform providers and distributors to follow them.
- Fixing gross profit rates for platform providers. After starting to use platform
 providers to sell the products, the prices of products sold via platforms to the secondlevel distributors have been fixed.
- Setting minimum bid prices for distributors. Medtronic provided in the 2014 distribution agreement that "in every bidding, the distributors shall completely comply with the guided price set by the supplier, and shall receive the written confirmation from the supplier before any change over the price." The distribution agreement from 2015 further stipulated that "in every bidding, the distributors shall submit information about the bid price to the supplier for record." Additionally, Medtronic engaged in conduct to control the bidding resale price through many ways like bid management rules of different departments and email notices.
- Setting minimum sales prices to hospitals. Medtronic was found to have made product
 price systems of every sales link and sent them to distributors to perform, including the
 minimum sales prices to hospitals.

NDRC held that, through reaching and carrying out monopoly agreements with other parties, Medtronic had fixed resale prices, bid prices and minimum prices to hospitals for the involved medical equipment products. In that way, the authority found, Medtronic restricted competition in the marketplace and harmed consumers' interests. The specific effects were as follows:

- excluding and restricting price competitions among distributors;
- excluding and restricting inter-brand competition in the medical equipment industry;
- harming the legal rights and benefits of end consumers.

NDRC found Medtronic to have engaged in severe violations of antitrust rules, involving platform providers, distributors, end customers and other sales channels. The authority found the restrictions to be very broad, encompassing vertical restrictions over sales targets and sales regions, as well as banning the sales of products of rival brands, fixing resale prices and minimum resale prices. At the same time, Medtronic was found to be cooperative in the

middle and toward the end of the investigation and made positive corrections. Following its investigation, NDRC ordered Medtronic to immediately stop fixing resale prices and minimum resale prices, and imposed a fine 4% of the company's revenues for involved products in 2015 from in, around RMB 118.52 million.

This was one of the first cases of investigation and punishment over medical equipment price monopoly agreements by an antitrust agency in China. In this case, NDRC decided that the vertical agreement reached by Medtronic violated the Anti-Monopoly Law, concluding that the agreement restricts competition among distributors and different medical equipment brands, thus impairing consumers' interests.

B. Dongguan Guochang Appliances v. Shengshi Co. & Heshi Co. 1

The first defendant Shengshi Co. was the sole management agency of Gree Electric Appliances, Inc. in Dongguan. The second defendant Heshi Co. was the authorized supplier of Shengshi, and the plaintiff Guochang was the second authorized Gree appliances distributor by Shengshi.

In 2012 and 2013, the plaintiff Guochang entered the Dongguan Gree Appliances Sales Tripartite Agreement with the two defendants Shengshi and Heshi,. The Agreement provided that Shengshi has the power to authorize and terminate the distribution by Heshi and the franchise by Guochang. Shengshi may assign different sales policies and price systems according to different times, and Heshi and Guochang shall follow. Heshi is to carry out uniform distribution prices, retail prices and relevant policies as required by Shengshi, and guide Guochang to positively perform these policies.

Guochang was requested to open an account in Shengshi and pay RMB 25,000 deposit as showing good faith, and to comply with the rules and requirements for Shengshi market management. Guochang was prohibited from setting a minimum retail price below the set minimum retail price of every period by Shengshi, and was precluded from taking any action with low prices.

Subsequently, Heshi claimed that, in February 2013, Guochang breached the agreement and sold an air conditioner of a certain model at a price lower than the minimum set by

^{1.} Civil Judgment No. 33 [2015], Guangzhou Intellectual Property Court (first-instance).

Shengshi. Accordingly Shengshi fined Guochang RMB 13,000 RMB and did not fully refund the "good faith deposit" paid by Guochang. In early 2015, Guochang intended to rescind the cooperation agreement with the two defendants, and filed a lawsuit. It claimed that the acts of Shengshi, as Gree's chief franchisee in Guangdong, controlling the sales prices restrict Guochang's minimum retail prices to be not below the one Shengshi set. In its view, this conduct amounted to an illegal vertical monopoly agreement, and that the act of Heshi, the distributor of Shengshi, not fully refunding Guochang's deposit, allegedly harmed Guochang's rights.

In its defense, Shengshi refuted it had a position of market power or dominance, and denied that the contested conduct was anti-competitive. It also argued that the household air-conditioning market was very competitive, with a large numbers of air-conditioned brands. As a result, Shengshi claimed, Gree had to promote through annual large-scale advertising, and did not have dominance. Besides, the distributors of Gree did not only distribute Gree air-conditioning products, but also other brands of air-conditioners. Hence, there was no coercion by Gree to force its distributors to only distribute its air-conditioners.

In its judgment, the court decided that the involved tripartite agreement was not the kind the agreement defined by Article 13(2) of the Anti-Monopoly Law, and thus the conduct of Shengshi was not anti-competitive. The court held that – according to common sense and from the perspective of competition market and consumers – there were many other domestic air-conditioning brands of similar reputation as Gree, as well as foreign brands. The evidence submitted by the defendant showing Gree's promotion actions proved that the air-conditioner market in Dongguan was highly competitive. Therefore, the court concluded, Gree did not have a market dominant position.

The court further reasoned that consumers were able to choose other brands of air-conditioners if Gree sets minimum sales prices. As to the supply chain, there was no evidence in the file showing that competition among air-conditioner related players would be influenced by Gree's restrictions on sales prices. Against this background, the court concluded that the tripartite agreements containing restrictions on sales prices of Gree air-conditioners by the defendant Shengshi and the plaintiff Guochang did not have the objective to exclude or restrict competition, neither in the horizontal air-conditioner brand market, nor vertical related supply market.

The court recognized that, as Gree's chief franchisee in Dongguan, Shengshi's

restrictions on the minimum sales prices within every air-conditioner model might restrict price competition within a single model among distributors like the plaintiff. However, in the court's view, the plaintiff Guochang would still be able to compete with other distributors in terms of pre-sale publicity, sales promotions and after-sale services. In other words, consumers still have the freedom of choice even just facing the same air-conditioner brand.

To sum up, the court decided that the conduct by the defendant Shengshi did not amount to an illegal agreement, and thus the plaintiff Guochang's allegations were dismissed.

The key learning from this case is that the finding of an illegal monopoly agreement cannot be solely determined by a formal analysis as to whether it precludes and restricts competition. Instead, the court held that if the defendant does not have dominance in the upstream market, the vertical agreement reached to set the minimum sale price would not restrict competition, and there is no violation of the Anti-Monopoly Law.

At the same time, the court held that, although the limitation on the minimum resale price by the chief franchisee in the upstream market is likely to restrict the intra-brand price competition among downstream franchisees, these franchisees can still compete in broad respects of pre-sales publicity, sales promotion and after-sale services. Therefore, consumers still have options over products of the same brand.

C. Tian Junwei v. Carrefour Beijing Shuangjing Branch & Abbott Laboratories¹

On 2 August 2013, NDRC issued its administrative penalty decision against Abbott Laboratories ("Abbott"). In the decision, the authority claimed that Abbott had fixed the milk powder resale prices of downstream operators through methods like contractual agreements since 2011. NDRC held that Abbott had entered into anti-competitive agreements fixing product resale prices with distributors, thus excluding and restricting competition in the market and impairing the interests of consumers and the public. As a result, Abbott was fined 3% of its sales revenues in the preceding year, around RMB 77.34 million.

On 7 February 2013, the plaintiff Tian Junwei, an individual, bought a set of infant formula milk powder at RMB 261 at Carrefour's Shuangjing branch in Beijing. Before court,

Civil Judgment No. 146 [2014], Beijing Intellectual Property Court (first-instance); Civil judgment No. 214 [2016], Beijing High People's Court (second-instance).

Tian Junwei argued that NDRC's penalty decision demonstrated that there was an illegal price monopoly agreement between Abbott and Carrefour, forcing the plaintiff to buy the infant formula milk powder at an overcharged price and damaging his interests. Therefore, Tian Junwei filed a lawsuit.

At first instance, the court held that the effect of excluding and restricting competition is a pre-condition for a finding of a vertical monopoly agreement. The plaintiff has the burden to produce evidence to prove that the agreement of fixing resale prices existed, that the agreement restricted competition, and that there is a causal relation between the involved agreement and the loss of the plaintiff.

In the case at hand, however, NDRC's penalty decision did not disclose the details of the evidence that the authority had relied on. More in particular, the decision was only addressed to, and only mentioned the names of, the upstream manufacturers engaging in resale price maintenance, not the downstream distributors.

Against this background, the court found that the NDRC penalty decision could not be the sole basis for determining that Abbott and Carrefour had a fixing resale price agreement in place. What the penalty decision did say was that Abbott had entered into illegal resale price maintenance agreements with distributors, and the Commodity Contract between Abbott and Carrefour was in force when the NDRC decision was made. Upon the court's request, Abbott and Carrefour submitted the Commodity Contract between them separately, in which there was no clause fixing resale prices.

Although suggested prices are mentioned in this contract, they were not binding and were not found to exclude or restrict competition.

In general, Tian Junwei did not prove successfully that there was an agreement on fixing resale prices in the Commodity Contract between Abbott and Carrefour. As a result, the court could not decide that there is a monopoly agreement based on the existing evidence. Therefore, the court of first instance turned down Tian Junwei's claims.

Tian Junwei appealed to the Beijing High People's Court. He held that, according to the facts on file, Abbott and Carrefour had an earlier version of contract, but they refused to submit it. Therefore, it should be presumed that there was a monopoly agreement between them. At the same time, Tian Junwei argued that Abbott's conduct had the effect of excluding and restricting competition, among wholesalers and retailers. Wholesalers and retailers reached monopoly agreements with Abbott, no matter passively or actively, with unreasonable and unfair prices. Tian Junwei argued that this would harm the rights of consumers and Abbott should be held accountable.

In its judgment, the court of second instance held that the NDRC penalty decision proved Abbott had entered into vertical agreements to fix resale prices with its downstream operators, the names of these operators were not specifically mentioned. Hence, the court concluded, the NDRC decision cannot directly be evidence that there was a vertical monopoly agreement between Abbott and Carrefour L.

At the same time, Abbott and Carrefour submitted the Commodity Contract with appendices between them separately, in which there was no agreement on fixing resale prices.

On this basis, the court held that Tian Junwei did not fully fulfill his burden of proof, which was to prove the existence of the monopoly agreement. Under this circumstance, Tian Junwei should assume corresponding responsibilities. Therefore, the decision by the court of first instance was upheld by the court of second instance. The second-instance court held that Tian Junwei's grounds of appeal lacked factual and legal basis,. As Tian Junwei did not prove that a monopoly agreement existed between Abbott and Carrefour, his claim of damages lacked factual basis, and thus the court of second instance decided to turn down the appeal and affirm the judgment of first instance.

The key questions/takeaways of this case are as follows:

- Where the court determines that there is no counter-evidence to overturn, should the facts contained in a given penalty decision from an antitrust agency be presumed to be true?
- The court in this case held that the effect of eliminating or restricting competition should be a necessary pre-condition to determine that a vertical agreement violates the Anti-Monopoly Law.
- The court also found that a vertical agreement with a non-binding suggested retail price

does not restrict competition, thus not violating the Ant-Monopoly Law.

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE IN ABUSE OF DOMINANT POSITION

DONG Dudu*

I. OVERVIEW

In China, the main developments in the area of abusing of dominance mainly took the form of law enforcement actions in 2016. The State Administration for Industry and Commerce ("SAIC") and the National Development and Reform Commission ("NDRC") announced 11 administrative law enforcement cases involving abuses of a dominant market position, and China Judgments Online posted 12 cases of civil abuse of dominance disputes.

Besides important issues like the application of the "single entity" doctrine and the feasibility of arbitration in private antitrust disputes, the abuse of dominance cases in 2016 mainly feature abuses committed by public utility enterprises of their market dominant position. These cases also highlight the dilemma of coordination among the Anti-Unfair Competition Law, Anti-Monopoly Law, and Law on the Protection of Consumer Rights and Interests.

II. DEVELOPMENT OF LEGISLATION AND POLICY

A. Abuse of dominance rules in the Anti-Unfair Competition Law

^{*} Doctor of Laws, Post-doctor, Renmin University of China, School of Economics. E-mail: tungtutu@hotmail.com.

Article 6 of the Anti-Unfair Competition Law provides that a public utility enterprise or any other business operator with a statutory monopoly cannot restrict its business partners to only purchase products from an operator it designated thereby precluding competition from other operators. SAIC's Certain Provisions on Prohibition of Public Utility Enterprises' Restriction on Competition, from 1993, define public utility enterprises as those business operators that are involved in public utilities, including in such industries as water supply, power supply, heating supply, gas supply, post, telecommunications, and transportation.

The 2000 Reply of the State Administration for Industry and Commerce to the Issue Concerning the Determination of Other Business Operators in a Monopoly Position Pursuant to the Law provides that for the purpose of Article 6 of the Anti-Unfair Competition Law, "any other business operator in a monopoly position pursuant to the law" refers to a business operator, other than a public utility enterprise, which is qualified for exclusive dealing in a specific product (including services) by the laws, regulations, or other legally regulatory documents.

A monopoly position means the position by which a business operator conducts business exclusively or with insufficient competition in the relevant market and the users or consumers are relatively strongly dependent on the products provided by that business operator because the access of business operators to the market is specially restricted by the laws, rules, regulations, or other legally regulatory documents.

In 2000, SAIC also issued its Reply to the Issue Concerning the Determination of the Nature of, and Imposition of Punishment against, a Petroleum Company's or a Petrochemical Company's Restriction on Competition. That reply provides that the types of "business operators that is in a monopoly position pursuant to the law" are primarily those engaging in monopoly sectors, such as those engaging in the industries that provide financial, insurance, and other fundamental economic conditions for the development of the national economy, and those engaging in other industries that are subject to the State's special regulation.

In practice, SAIC emphasizes that business operators like telecommunications enterprises, post enterprises, power enterprises or power management stations, power supply enterprises or power supply stations, water supply enterprises and train stations are public utility enterprises; credit cooperatives, cable television stations, insurance companies and their branches, Xinhua Bookshop, petroleum and petrochemical enterprises, salt companies, tobacco companies and motor vehicle driving training schools are operators in a monopoly

position pursuant to the law.1

Now, on 25 February 2016, a proposed amendment of the Anti-Unfair Competition Law was published. In particular, Article 6 of the draft provides that a business operator shall not abuse its relatively advantageous position to commit any of the following acts of unfair transaction:

- (1) without justified reasons, restrict transaction counterparties to having to deal only with designated parties;
- (2) without justified reasons, restrict transaction counterparties to the purchase of products is designated by it;
- (3) without justified reasons, impose conditions for the transaction between transaction counterparties with other business operators;
- (4) indiscriminately collect fees or unreasonably require transaction counterparties to provide other economic benefits; or
- (5) attach other unreasonable conditions to transaction.

The draft amendment also proposes a definition of "relatively advantageous position" meaning an advantageous position in terms of funds, technologies, market entry, sales channels, purchase of raw materials and other aspects in the course of a specific transaction and where the transaction counterparty is dependent on such business operator and has difficulty in turning to other operators.

B. Announcement of the State Administration for Industry and Commerce on the Protruding Issues concerning the Acts of Public Utility Enterprises to Restrain Competition and Practice Monopoly

This announcement from April 2016 states that the actions by public utility enterprises, which provide the public with basic public utility products or public services, have an

See Fair Trade Bureau of SAIC, Centre of International Law of China Academy of Social Sciences: Selected Anti-monopoly
Cases and The Investigation and Analysis on the Chinese Administrative Anti-monopoly Enforcement. Law Press, 2007:
p.309-331.

impact on the legitimate rights and interests of the vast majority of other market players and consumers.

At present, there are strong public concerns over actions by dominant companies in industries such as water supply, electricity supply, gas supply, public transport, funeral services, etc. forcing consumers into concluding transactions, arbitrarily charging fees, engaging in tying, imposing additional unreasonable transaction conditions or otherwise restraining competition and engaging in monopoly conduct.

In response, SAIC decided that it was necessary to carry out a special law enforcement campaign from April to October of 2016 to rectify, on a focused basis, the anti-competitive actions by public utility enterprises across the country. The general public and consumers were invited to lodge complaints and tip-offs to local administrations for industry and commerce or departments of market supervision and administration against the alleged violations of the Anti-Unfair Competition Law or the Anti-Monopoly Law by enterprises engaging in industries such as water supply, electricity supply, gas supply, public transport, funeral services, etc. Major forms in which the protruding issues during the business operations of public utility enterprises are manifested as the following three types:

- (1) Public utility enterprises of water, electricity or gas supply.
- a. Where such public utility enterprises compel, directly or in any disguised form, business operators or consumers who apply for access to water, electricity or gas supply to purchase the supply access equipment and materials provided thereby, such as: refusing to provide, or delaying in providing, water, electricity or gas services for the equipment and materials provided by users on their own that meet relevant quality requirements on the ground that the quality of such equipment and materials fail to meet the required standards or that they do not understand the installation technology, or on the ground of other excuses;
- b. Where such public utility enterprises compel, directly or in any disguised form, users to accept the services provided by their designated business operators, such as: compelling users to accept water meter entrusted inspection and calibration services that should have been provided by the public utility enterprises themselves, or the design, installation engineering and other services provided by their designated construction entities, in the name of charging service fees, installation fees, etc. as a package;
 - c. Where such public utility enterprises charge minimum water (electricity or gas) use

fees from users either forcibly or in any disguised forcible form, or forcibly charge "deposits for water (electricity or gas) use" or "bonds" from users, or forcibly set or charge minimum "prepaid water (electricity or gas) fees";

- d. Where such public utility enterprises compel, directly or in any disguised form, users to purchase insurance (such as property loss insurance, personal accident insurance, etc.) or any other unnecessary products;
- or e. Where public utility enterprises of water, electricity or gas supply and their subordinate entities or designated business operators charge fees arbitrarily, such as refusing to process applications for electricity cards or provide electricity services unless residents in newly-built residential buildings are forced to pay service access fees (electricity network construction fees), refusing to supply gas unless users are forced to pay cylinder inspection fees or cylinder cleaning fees, etc.
 - (2) Public transport enterprises.
- a. When a user applies for a public transportation IC card for the first time, a public transport enterprise charges, directly or in any disguised form, material production fees or deposits in an amount apparently higher than the cost of production of the public transportation IC card;
- b. Where a public transport enterprise compels, directly or in any disguised form, passengers to purchase accident insurance;
- or c. Where a public transport enterprise, when processing applications for public transportation IC cards, compels, directly or in any disguised form, passengers to accept the extended services provided by its designated business operators or charges fees from passengers arbitrarily.
 - (3) Enterprises engaging in the funeral services industry.
- a. Where such an enterprise compels the family members of the deceased to purchase caskets or memorial items sold thereby, and refuses to provide funeral services, keep the ashes of the deceased or provide other extended services unless the family members make such purchase;
 - b. Where such an enterprise directly includes the expenses for caskets, memorial items,

etc. in funeral services expenses, and charges fees from the family members of the deceased arbitrarily;

or c. Where such an enterprise compels, directly or in any disguised form, the family members of the deceased to accept other chargeable memorial services.

C. Opinions on Strengthening Market Supervision and Public Services to Guarantee the Performance of Medium- and Long-term Coal Contracts

This document, jointly issued by NDRC and the State-owned Assets Supervision and Administration Commission (SASAC) on 30 November 2016, states that illegal acts including fixing or changing prices by reaching and performing monopoly agreements, selling or purchasing coal at unfair prices by abusing market dominant position, etc., shall be seriously investigated and punished according to Anti-trust Law.

III. IMPORTANT CASES

A. Tetra Pak case¹

SAIC determined that Tetra Pak committed the act of abusing market dominance and thus imposed an administrative fine on parties involved.

Parties of this case are generally called Tetra Pak, including Tetra Pak International Company Limited by Share Ltd., Tetra Pak China Co., Ltd., Tetra Pak (Kunshan) Co., Ltd., Tetra Pak (Foshan) Co., Ltd., Tetra Pak (Beijing) Co., Ltd., and Tetra Pak (Huhehaote) Co., Ltd.

Tetra Pak International is in charge of general management and coordination of global business of Tetra Pak, including making business policies regarding sales, techniques, finance, etc. Tetra Pak China is the operation headquarter in China of the Tetra Pak group, responsible for managing Chinese businesses of Tetra Pak, making detailed regional commercial rules, and operating sales of filling equipment at the meantime. Tetra Pak (Kunshan) operates businesses including sales and lease of filling equipment, sales of spare parts, maintenance and repairs of equipment, and packaging materials. Tetra Pak (Beijing),

Public Notice of SAIC on Competition Law Enforcement (2016 No.10), Case of Tetra Pak's abuse of market dominant position, Civil Judgment No.1 [2016].

Tetra Pak (Foshan) and Tetra Pak (Huhehaote) mainly run business of packaging materials. Tetra Pak International created illegal commercial policies, and those relevant companies of Tetra Pak committed illegal operations.

What is worth attention for this case is that: After the 2013 Huawei v. IDC case¹, the Tetra Pak Administrative Penalty Case adopted an opinion similar to the Single Entity Doctrine. Also, in the Tetra Pak Antitrust Case, antitrust law enforcement agencies, when evaluating and analyzing the anti-competition effect of the acts of loyal discount of related enterprises of Tetra Pak group, audaciously introduced economic analysis model and used relevant industrial data to analyze the effect of anti-competition, and effectively combined this economic analytic result with legal analysis. The result is that the acts of loyal discount of Tetra Pak had the effect of loyalty induction, which would cause obvious anti-competition effect under particular market circumstances and influence the conclusion of the packaging material market competition.

B. Nanjing Chongxu Technology Co., Ltd. av. Samsung (China) Investment Co., Ltd.²

The plaintiff Chongxu Co. thought that the defendant Samsung Co. abused the dominant position of the displayer distribution market by controlling the pricing power, selling products to distributors at unreasonably high prices, forcing tie-in sales, etc.

The defendant Samsung raised objection to jurisdiction: Chongxu Co. and Samsung Co. had agreed on arbitration as resolution of any dispute in the dispute resolution clause. According to relevant provisions of the arbitration law, arbitration rules and many cases promulgated by the Supreme Court, People's Courts did not have jurisdiction over this case. Even if the legal relation Chongxu Co. held for this case was monopoly dispute, no laws or regulations provided that a monopoly dispute, under a clear arbitration clause, should only be brought to the court instead of arbitration. It was against the international custom of the feasibility of arbitration on monopoly disputes if this case would go through court hearings. To sum up, due to the fact that Chongxu Co. and Samsung Co. already agreed upon the arbitration clause, this case should be brought to the arbitration instead of the people's court. Therefore, the defendant requested the Court to dismiss the complaint of Chongxu Co.

Civil Judgment No.858 [2011], the Intermediate People's Court of Shenzhen, Guangdong (first-instance); Civil Judgment No.306 [2013], the Higher People's Court of Guangdong Province (second-instance).

Civil Judgment No.44 [2014], the Intermediate People's Court of Nanjing, Jiangsu (first-instance); Civil Judgment No.72 [2015], the Higher People's Court of Jiangsu Province (second-instance).

The Court of second instance held that, as the law to regulate market competition order, the antitrust law was clearly a kind of public law. Because of the strong public policy nature of the antitrust law, monopoly disputes had been non-arbitrable in all countries for a long time. Although in recent years, the public policy nature was no longer a deciding factor of the issue about feasibility of arbitration on monopoly dispute, in the judicial practices of some countries of the US and the Europe. These countries already brought monopoly disputes into the category of arbitration matters. However, in China, due to the short-term enforcement of the antitrust law and few practices in antitrust law enforcement and judicial actions, mature experience of antitrust law enforcement and judicial actions was not formed yet, and thus the public policy nature of antitrust would definitely be an important factor in deciding the feasibility of arbitration. Currently, China did not have any specific laws providing whether or not monopoly disputed could be arbitrated, and had not seen any practices of arbitration on monopoly disputes so far.

The dispute of this case not only involved Chongxu Co. and Samsung Co., but also involved public interests. Claims of Chongxu Co. not only involved the dispute between Chongxu Co. and Samsung Co., but also involved sales relationships between Samsung Co. and all distributors, and also directly influenced interests of all Samsung consumers. Therefore, although Chongxu Co. and Samsung Co. agreed on arbitration clause in two contracts, agreeing that any dispute arising during the performance of the contracts or related to the contracts themselves should be brought to arbitration, this agreement had contract relativity, only relative to disputes during performance of the contracts within the two parties. However, the monopoly dispute of the case involved interests of the third party and consumers, going beyond contracts between the two parties, and thus could not accordingly be decided for arbitration. Under the circumstances that monopoly disputes involved public interests and Chinese law did not clearly provide the feasibility of arbitration of monopoly disputes, the arbitration agreement involved between Chongxu Co. and Samsung Co. should not be taken as evidence for deciding jurisdiction, and therefore this case should be under the jurisdiction of the people's court.

What should be attached importance to in this case is that, the Court of second instance held that, monopoly civil disputes involved interests of the third party and consumers, and thus they could not be decided to be settled by arbitration according to arbitration agreements.

C. Wu Xiaoqin v. Shanxi Broadcast & Television Network Media (Group) Ltd. 1

The plaintiff Wu Xiaoqin was a consumer of the defendant Broadcast & Television's digital television services. According to the provisions of "Notice of the basic standard of viewing maintenance fees of digital televisions around the whole province" by Price Bureau of Shanxi Province, the basic standard of viewing maintenance fee was RMB 25 per month per terminal. The Broadcast & Television Network told her that the minimum fee standard had risen to RMB 30 from March 2012, for the reason that the system had been upgraded and would increase several programs for consumers. From 10 May 2012 to 9 August 2012, Wu Xiaoqin was charged digital television basic viewing maintenance fee of RMB 75 and digital television program fee of RMB 15.

Wu Xiaoqin thought that She had the option right over the digital television program fee (RMB 15) charged by Broadcast & Television Network, because this was actually additional services beyond the above services. As an operator with market dominance, the above acts of Broadcast & Television Network violated Item 5, Paragraph 1, Article 17 of the Antitrust Law, thus invading her legal rights and interests.

Broadcast & Television Network thought that although it owned the market dominance over the cable television of Shanxi Province, it did not abuse this market dominance, nor did it make forcible regulation about services required to be consumed beyond basic viewing business. Broadcast & Television Network currently had 4.5 million consumers, the majority of whom chose various and individual cable sets beyond the basis viewing fees, while there were also large numbers of consumers only choosing the basic programs. Therefore, mass consumers had sufficient selection right.

The Court of first instance held that, Broadcast & Television Network did not tell Wu Xiaoqin that she had the selection right over relevant television programs when the trade was happening. Rather, it directly required Wu Xiaoqin to pay all the fees including basic digital television viewing fee and digital television chargeable program fee, which was actually bundling digital television chargeable program service with basic digital television viewing service and selling to Wu Xiaoqin. Additionally, it forced Wu Xiaoqin to accept the digital television chargeable program service by using its dominant position in the market of

Civil Judgment No.438 [2012], the Intermediate People's Court of Xi'an, Shanxi Province (first-instance); Civil Judgment No.38 [2013], the Higher People's Court of Shanxi Province (second-instance); Civil Judgment No.98 [2016], the Supreme People's Court (second-instance).

cable telecast service within Shanxi Province, which was against Wu Xiaoqin's willingness. Wu Xiaoqin had to accept the above unreasonable condition due to Broadcast & Television Network's market dominance, and thus the acts of Broadcast & Television Network were conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions that were forbidden by the antitrust law. Broadcast & Television Network did not provide any evidence to prove the legitimacy of conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions, but only alleged that it had the responsibility to provide more television programs for consumers, and had the power to charge beyond basic programs viewed to guarantee the normal maintenance and upgrade of the Internet system. This allegation was not capable of forming a legitimate reason for conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions.

The Court of second instance held that not all acts with effects on selecting rights could be regulated by applying the antitrust law. If Broadcast & Television Network did not tell Wu Xiaoqin that she could only choose the basic service when it was providing service to her, and caused the consumer to misunderstand the items consumed and prices, it was invading Wu Xiaoqin's right to know and other relevant rights, to which the Law on the Protection of Consumer Rights and Interests or the Contract Law should apply, rather than the antitrust law.

In the antitrust law, whether or not the selecting right to purchase separate commodity or service exists is the key factor to distinguish tie-in sales from normal combined sales. Based on the fact found by second hearing, before and after Wu Xiaoqin bought the service, Broadcast & Television Network also provided the RMB 25 monthly basic service for unspecified consumers. It could be decided that Broadcast & Television Network provided not only the RMB 30/month value-added service, but also the RMB 25/month basic service. Therefore, Broadcast & Television Network did not take the method of tie-in sale, and the selecting right existed, which thus did not match the constructive conditions of the tie-in sale.

The Court of retrial held that, although Broadcast & Television Network submitted relevant notes and receipts proving that it provided services charging the basic digital television viewing maintenance fees to the Court of second instance, the notes and receipts it submitted to this Court happened after the hearing of the case, not sufficient to prove the circumstances during the litigation. This Court did not adopt and accept this evidence.

Therefore, the decision by the Court of second instance that Broadcast & Television Network provided combined services as well as basic services was not fully supported and should be corrected. Broadcast & Television Network charged the value-added services together with basic digital television viewing maintenance services by using its market dominance, which in reality influenced consumers' choices over other service providers' relevant pay digital programs, and meanwhile held back other service providers to enter this television service market. This resulted in negative effects on the market competition.

What should be paid attention to in this case is that, the Court of first instance, the Court of second instance and the Court of retrial all held that in the antitrust law, whether or not the selecting right to purchase separate commodity or service exists is the key factor to distinguish tie-in sales from normal combined sales. Whereas, the issues of regulations on tie-in sales and how to coordinate the Law Against Unfair Competition, the Antitrust Law and the Law on Protection of Consumer Rights and Interests.

CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF CONTROL ON CONCENTRATION OF UNDERTAKINGS

Adrian EMCH*

I. OVERVIEW

The Anti-Monopoly Bureau under the Ministry of Commerce ("MOFCOM") is the antitrust agency in charge of merger control in China. From the enactment of the Anti-Monopoly Law ("AML") until the end of 2016, MOFCOM has cleared around 1,700 notifications. Among these cases, 28 transactions were approved subject to conditions and two transactions were prohibited. MOFCOM also enacted implementing rules on the review of concentration between business operators to improve the merger review regime.

In 2016, according to its statistics, MOFCOM cleared 395 cases, which represents an increase of around 19% relative to 2015.² Among these cases, two were conditional approval decisions: the acquisition by Anheuser Busch InBev ("ABI") of SABMiller, and Abbott's acquisition of St. Jude Medical.³ No transaction was blocked in 2016, though the

^{*} Partner, Hogan Lovells International LLP-Beijing Office. Email: adrian.emch@hoganlovells.com.

Coca-Cola/Huiyuan, MOFCOM Public Announcement No.22 [2009], see http://fldj.mofcom.gov.cn/article/ ztxx/200903/20090306108494.shtml published on 18 March 2009; and Maersk/MSC/CMA CGM, MOFCOM Public Announcement No. 46 [2014], see http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml published on 17 June 2014.

MOFCOM Press Release, MOFCOM year-end working summary No. 12: comprehensively promote antitrust works and create legal business environment, see http://www.mofcom.gov.cn/article/ae/ai/201701/20170102499312.shtml published on 11 January 2017.

AB InBev/SABMiller, MOFCOM Public Announcement No. 38 [2016], see http://fldj.mofcom.gov.cn/article/ ztxx/201607/20160701369044.shtml published on 29 July 2016; and Abbott/St. Jude Medical, MOFCOM Public Announcement No.88 [2016], see http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml published on 31 December 2016.

parties in *Lam Research/KLA-Tencor* abandoned the deal, apparently partially due to MOFCOM's antitrust concerns.¹ In 2016, MOFCOM further streamlined its merger review process and shortened its average duration. MOFCOM also continued sanctioning failures to file reportable transactions.

II. ENFORCEMENT EFFORTS

A. Developments in Relation to Legislation and Policy

In 2016, MOFCOM's continued to improve the merger control regime through the adoption and amendment of AML implementation rules, though perhaps not as intensely as in previous years.

During the course of 2016, MOFCOM researched on how to Measures on the Review of Concentrations between Business Operators, to further improve the procedural rules. MOFCOM also cooperated tightly with NDRC and other ministries, to enhance the introduction of Opinions on Establishing a Fair Competition Review System During the Development of Market-oriented Review System.²

Apart from that, MOFCOM appeared as amicus curia in the US antitrust lawsuit against North China Pharmaceuticals, a Chinese vitamin C producer, to support its position. 2016 saw the final judgment come out, favourable to the Chinese defendant.

In the arena of global antitrust cooperation, MOFCOM and the Japanese Fair Trade Authority signed an antitrust cooperation memorandum, and carried out law enforcement cooperation with European and US competition agencies in over 10 major cross-border merger cases to safeguard the market competition.³ After the retirement of first director general of MOFCOM's Anti-Monopoly Bureau, Mr Shang Ming, the second director

MOFCOM press release, Lam Research give up acquiring KLA-Tencor, see http://fldj.mofcom.gov.cn/article/ i/201610/20161001411275.shtml published on 17 October 2016.

^{2.} MOFCOM Press Release, MOFCOM year-end working summary No. 12: comprehensively promote antitrust works and create legal business environment, see

http://www.mofcom.gov.cn/article/ae/ai/201701/20170102499312.shtml published on 11 January 2017.

MOFCOM Press Release, MOFCOM year-end working summary No. 12: comprehensively promote antitrust works and create legal business environment, see http://www.mofcom.gov.cn/article/ae/ai/201701/20170102499312.shtml published on 11 January 2017.

general, Mr Wu Zhenguo, took office in 2016.1

B. Procedural Streamlining

In 2016, MOFCOM continued to streamline its merger review process. One important aspect of these efforts is the increased number of cases that go through the "simple case" procedure. MOFCOM had introduced this procedure in early 2014. Under the simple case procedure, cases that do not raise obvious antitrust concerns can usually be cleared in phase 1 (within 30 calendar days after case acceptance). In 2016, the number of simple cases was around 300, which represents around 76% of all cases approved by MOFCOM in 2016.²

III. MAJOR CASES

A. AB InBev/SABMiller

In July 2016, MOFCOM conditionally approved AB InBev's acquisition of SABMiller. According to MOFCOM's assessment, the acquisition would have the effect of restricting competition in the markets of popular beer and premium/super-premium beer in China.

However, MOFCOM found that the final remedies submitted by AB InBev and SABMiller were able to remove the negative effect that the transaction was said to have on competition, and hence MOFCOM eventually granted conditional approval. The key remedy was for the merged entity to divest SABMiller's 49% interest in CR Snow within 24 hours after completion of acquisition of shares of SABMiller by AB InBev.

B. Abbott/St. Jude Medical

In December 2016, MOFCOM approved Abbott Laboratories' acquisition of St. Jude Medical, subject to conditions. According to MOFCOM, the relevant markets in this case were the Chinese market of small vascular closure devices. With a combined market share of over 95%, MOFCOM considered the transaction might be anti-competitive in the Chinese

Anti-Monopoly Bureau of MOFCOM, resume of Director Wu Zhenguo, see http://fldj.mofcom.gov.cn/article/ gywm/201102/20110207406162.shtml.

MOFCOM Press Release, MOFCOM year-end working summary No. 12: comprehensively promote antitrust works and create legal business environment, see http://www.mofcom.gov.cn/article/ae/ai/201701/20170102499312.shtml published on 11 January 2017.

market of small vascular closure devices.

After Abbott submitted the final proposal on restriction conditions to MOFCOM on December 12, 2016, and the Purchase Agreement concerning the business to be divested signed among Abbott, St. Jude Medical and Terumo on December 6, 2016, MOFCOM eventually granted approval subject to the condition. Abbott and St. Jude Medical were required to divest the small vascular closure device business of St. Jude Medical within 20 days of the date on which Abbott completes the acquisition of St. Jude Medical.

C. Monitoring Remedies

In 2016, MOFCOM also continued to publish its decisions on waiving or revising remedies imposed in previous conditional approvals. In May 2016, MOFCOM waived the remedies imposed in Walmart's acquisition of 33.6% of the shares in Newheight Holdings imposed back in May 2015.¹

D. Sanctions for non-filing

In 2016, MOFCOM posted four decisions on its website in which it announced sanctions on companies for failing to file transactions that should have been notified, i.e. Dade Holdings/Jilin Sichang Pharmaceuticals, Xinyu Group/Bombardier Transportation, Beijing Beiche/Hitachi and Canon/Toshiba Medical Systems.

Two of the decisions were based on the unreported establishment of joint ventures (Xinyu Group/Bombardier Transportation with 50/50%, and CNR/Hitachi with 51/49%).² The fines imposed in the Xinyu Group/Bombardier Transportation case were RMB 300,000 and RMB 400,000 respectively. In CNRe/Hitachi, the fines imposed on the joint venture parents were RMB 150,000 respectively.

In the Dade Holdings/Jilin Sichang Pharmaceuticals case, the acquirer signed an agreement with a subsidiary of Sihuan Pharmaceuticals, Smart Baskets Investments Limited,

Walmart/Neweight Holdings lifting decision, MOFCOM Public Announcement No. 23[2016], see http://fldj.mofcom.gov.cn/ article/ztxx/201606/20160601335200.shtml published on May 30, 2016.

Xinyu Group/Bombardier Transportation, MOFCOM Administrative Penalty Decision No. 174[2016], see http://fldj.mofcom.gov.cn/article/ztxx/201605/20160501311081.shtml published on 21 April 2016; and CNR/Hitachi, MOFCOM Administrative Penalty Decision No. 175[2016], see http://fldj.mofcom.gov.cn/article/ztxx/201605/20160501311092.shtml published on 21 April 2016.

through its subsidiary Shandong Buchang Pharmaceuticals to acquire 50% shares of Jilin Sichang. The acquisition was split into two steps (19%, 31%). The first step (the 19% stake acquisition) was completed with the change of corporate registration in November 2011. The second step (the 31% stake acquisition) was completed in January 2015. The parties failed to file with MOFCOM, which found a violation of the AML's merger filing obligation.¹

In the fourth transaction – Canon's acquisition of Toshiba Medical Systems – the parties designed a two-step deal structure. When MOFCOM started to investigate Canon, the first step of the acquisition was already completed (the transfer of all shares and rights to new shares were done, and the entire purchase price for Toshiba was paid). MOFCOM considered that the two steps were closely related to each other and indispensable components of a single transaction, which allowed Canon to acquire all shares in the target company. Therefore, MOFCOM considered that the first step was already part of the "concentration" and the lack of filing at that point was deemed a violation of the AML.²

Dade Holdings/Jilin Sichang, MOFCOM Administrative Penalty Decision No. 173[2016], see http://fldj.mofcom.gov.cn/ article/ztxx/201605/20160501311079.shtml published on 21 April 2016.

Canon/Toshiba Medical Systems, MOFCOM Administrative Penalty Decision No. 965[2016], see http://fldj.mofcom.gov.cn/ article/ztxx/201701/20170102495433.shtml published on 16 December 2016.

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE TACKLING ADMINISTRATIVE MONOPOLY CONDUCT

MENG Yanbei*

I. OVERVIEW

In 2016, when tackling administrative monopoly conduct – that is, restrictions to competition imposed by governmental actors – the Chinese antitrust enforcement authorities did not merely continue their enforcement efforts of 2015. Instead, a new regime – the fair competition review system ("FCRS") was established and implementation of this system at the local level in provinces began. The FCRS aims to more effectively prevent administrative monopoly conduct. At the same time, the authorities brought several administrative monopoly cases with large impact nationwide in 2016.

II. LEGISLATIVE AND POLICY DEVELOPMENTS

A number of regulations, rules and guidelines regarding administrative monopoly were enacted in 2016. A series of policy documents were issued as well, among which the document establishing the FCRS was clearly the most significant.

A. Opinions on Key Work for Deepening the Reform of the Economic System in 2016

^{*} Professor, Law School, Renmin University of China; Member, China-Korea. Market & Regulation Law Center (MRLC). E-mail: mengyb@ruc.edu.cn.

In March 2016, the State Council approved the *Opinions on Key Work for Deepening the Reform of the Economic System in 2016* drafted by the National Development and Reform Commission ("NDRC"). These opinions put forward 50 goals and key missions for the reform of the economic system in ten fields, and particularly stress the importance of ensuring fair market competition. The pilot program of using a negative list for market access is to be put in place in Shanghai, Guangdong, Tianjin and Fujian. The opinions provide guidance on how to implement the FCRS, improve coordination between industry policy and competition policy, and breaking up territorial restrictions and sectorial monopolies.

B. Opinions on Establishing a Fair Competition Review System during the Establishment of a Market Regime

In June 2016, the State Council issued its *Opinions on Establishing a Fair Competition Review System during the Establishment of a Market Regime* ("FCRS Opinions"). The FCRS Opinions set up the FCRS, aimed at aligning government activities, preventing the introduction of policies which restrict competition, and gradually abolishing provisions and practices which hinder fair competition and the development of a unified national market. To that end, all government departments including local governments are prohibited from formulating rules or policies which harm the legitimate rights and interests of market players or increase their obligations without legal basis. Governments are reminded not to issue anti-competitive policies which violate the provisions of the *Anti-Monopoly Law* ("AML"). Importantly, the FCRS Opinions set up the FCRS in accordance with the following principles:

- Free market entry and exit principle. Governments should not impose unreasonable and discriminatory market entry and exit conditions. The conditions for public concession projects need to be made public, and concession rights shall not be granted to companies without going through a fair competitive process. Governments cannot oblige market players to do business, purchase from or use the goods and services by a company designated by them. No new review, approval or record-filing procedures can be established without clear legal basis, and no such procedures are possible for industries and sectors which are not included in the negative list for market access.
- Principle of free movement of goods and input materials. There cannot be
 discriminatory policies against non-local and imported goods and services in terms
 of pricing and subsidies. More generally, entry of non-local and imported goods and

services to the local market cannot be restricted. Conversely, the export of local goods and services shall not be impeded. Non-local businesses shall not be restricted from participating in local tenders and bids. Equally, local governments cannot restrict non-local businesses from investing or setting up branches in the local market, or be forced to invest or set up branches in the local market. For any investments made or branches set up, non-local business operators are subject to equal treatment vis-a-vis local operators.

• Principle of non-discrimination in relation to production and operating costs.

Government bodies are prohibited from granting preferential policies to specific companies in violation of the law. In general, the availability of tax breaks should not be pegged to the local tax or non-tax revenue contributed by enterprises. There should not be exemptions from social insurance premiums for individual companies. Governments are also prohibited from requiring market players to provide various types of deposits — beyond the text of the law — or withhold their deposits in violation of the law.

Principle of non-discrimination in relation to production and operations.

Government actors are prohibited from forcing market players to engage in anticompetitive conduct outlined in the AML. In particular, market players cannot be forced to disclose sensitive information on production and business operations to facilitate cartel activities. Likewise, it is prohibited to determine government prices in excess of pricing authority. Governments should not interfere with pricing of companies in sectors open to market competition, in violation of the law.

C. Implementing Opinions on Establishing a Fair Competition Review System during the Establishment of a Market Regime

On July 27, 2016, NDRC's general office issued the *Notice for Implementing the Internal Work Procedure for the Opinions on Establishing a Fair Competition Review System during the Establishment of a Market Regime*. This notice requires that each department or bureau within NDRC should follow the principle of "who drafts, also reviews." This means each of them needs to implement the fair competition review for their proposed policy and regulations. In that pursuit, the department or bureau needs to conduct a thorough self-review according to FCRS review benchmarks, standards and requirements.

In August 2016, the Jiangsu government issued the Implementing Opinions of

Jiangsu Province on Establishing a Fair Competition Review System, which is the first local regulation for implementing the FCRS after the promulgation of the Opinions on Establishing a Fair Competition Review System during the Establishment of a Market Regime. Shortly after, Beijing, Hubei, Shaanxi, Hunan, Liaoning, Ningxia and other a dozen provinces issued their respective local regulations for FCRS implementation.

D. State Council's National Plan for the Development of Strategic Emerging Industries under the 13th Five-Year Plan

In December 2016, the State Council released the *National Plan for the Development* of Strategic Emerging Industries under the 13th Five-Year Plan, with clear goals, key missions, polices, etc. The national plan also stresses the need to establish and improve work mechanisms, to ensure the orderly implementation of the FCRS, to break up regional blockades and industry monopolies in the fields of renewable energy, medical equipment, medicine bidding, etc. and to strengthen enforcement efforts.

E. Letter of Approval to Establish the Inter-Ministerial Joint Meeting System for Fair Competition Review Work

On December 22, 2017, the general office of the State Council issued the *Letter of Approval to Establish the Inter-Ministerial Joint Meeting System for Fair Competition Review Work*. As its name indicates, the letter contains the State Council's approval for the establishment of the inter-ministerial joint meeting system for NDRC's work to operate the FCRS.

Without the need for specific formalities such as seals and official documents, the joint meeting to be set up is responsible for

- overall planning and coordination to enhance fair competition reviews, FCRS macroguidance, and resolution and coordination of key issues arising during the FCRS implementation under the leadership of the State Council;
- enhancing communication and teamwork of each region or department in the FCRS implementation, summarizing the impact of implementation, and promoting the sharing of bets practices;

- research and draft FCRS implementing rules, further refinement of review standards, review procedures and other review work improvements; and
- carrying out other tasks assigned by State Council.

The joint meeting consists of 28 governmental departments and units including NDRC and the Ministry of Industry and Information Technology.

III. KEY CASES

During the course of 2016, NDRC has completed 17 investigations against administrative monopoly conduct. For example, the conduct of provincial governments in construction and power supply and distribution was investigated. Following its investigation, NDRC urged 12 provincial governments to adjust relevant policies to bring them in line with the AML and the FCRS. In response, the 12 governments rectified and reformed their offending conduct.

At the same time, local governments reportedly have completed 21 investigations against administrative monopoly conduct. Remarkably, on December 30, 2016, the Hubei Price Bureau released the scanned original copy of an administrative monopoly rectification commitment, in which the Jianli Urban Administrative Bureau laid out in writing the 20 rectification measures it committed to take. This is the first case in China where detailed commitments by the infringing government entities were released during the administrative monopoly enforcement procedure. This information disclosure has the potential to become a significant influence for curbing administrative monopoly, supervising the change of the infringing conduct and providing guidance to government actors on how to comply with the AML.

A. Abuse of administrative power by the Beijing Municipal Commission of Housing and Urban-Rural Development in the concrete industry

On December 24, 2014, the Beijing Municipal Commission for Housing and Urban-Rural Development ("BMCH") had issued notice on quality control prices for premixed concrete. Through the notice, BMCH communicated its decision that, from February 1, 2015 onwards, the price for the concrete quality control would be made public. The quality

control price was first calculated by the Beijing Concrete Association – actually, simply using the average cost price of concrete by all members – and then submitted that number to BMCH for assessment and decision.

In June 2016, the Beijing Concrete Association held two meetings to discuss taking measures to restrict concrete sales prices and stabilize the concrete market, and issued the "decision on implementing quality control prices" and "guidelines of good faith and self-discipline in the Beijing concrete industry." In these measures, the association required that "from July 1, 2016, the price in newly premixed concrete agreements would not be allowed to be below the quality control price released by BMCH website on May 5, 2016. Signed agreements, which do not meet the above requirements, shall be changed before July 15, 2016."

On June 29, 2016, the association held its general meeting, requiring that all members sign the self-discipline guidelines on site and highlighting that the price for premixed concrete should not be the below quality control price. BMCH participated in that meeting, and even stressed that it would enhance supervision to ensure all members abide by the self-discipline guidelines.

On July 26, 2016, BMCH held a seminar where representatives of concrete enterprises and construction and building companies attended. During the seminar, BMCH discussed the situation of the future quality control price, bringing about a consensus among the enterprises. The price was defined the average cost of the entire industry.

Later in 2016, NDRC's Beijing branch received a complaint, and started to investigate BMCH for abuse of administrative power to restrict competition.

NDRC found that – as the administrative agency in charge of regulating and supervising the engineering and construction sector – it was reasonable for BMCH to use price signals to indicate concrete quality. In contrast, it was not reasonable for BMCH to release a policy on quality control prices, to arrange for association member companies to agree on self-discipline guidelines for future quality control prices, and to supervise and coordinate the implementation of the guidelines. NDRC held this to interfere with the rights of businesses to determine their prices independently, restricted competition in the concrete market and violated the AML.

On October 19, 2016, BMCH issued a new notice on quality control prices for the concrete industry, which came into force on November 1, 2016. The new notice specifically abolished the earlier notice, additionally requiring that premixed concrete should not be sold below cost.

The key question of this case was where to set the boundaries on when government bodies exceed the legitimate scope of their administrative powers. Here, BMCH tried to ensure the quality of concrete through price signals as part of its industry regulatory tasks. But, by issuing a specific policy on prices and setting the stage for the companies to enact self-discipline guidelines – which actually amounted to a price cartel between independent businesses – BMCH had exceeded limits of its administrative powers.

B. Drug procurement plan by the Suzhou Health and Family Planning Commission

In May 2015, a group of entities in Suzhou announced the joint procurement of drugs and medical consumables in bulk. The group included 139 medical agencies like municipal hospitals, people's hospitals and community and township hospitals, and concerned 50 drugs in bulk. The total envisaged amount of the announced joint procurement for 2015 was RMB 390 million.

From November 17, 2016 to December 23, 2016, the Anhui Price Bureau carried out an antitrust investigation against the Suzhou Health and Family Planning Commission ("SHFPC"). The Price Bureau's specific concern was about a specific provision in a joint procurement plan formulated by SHFPC (formerly the Suzhou Sanitary Bureau) on March 23, 2015. That provision stated that "entities which participate in this unified procurement bidding (bidding companies) are original production companies or authorized agents which had distribution rights of this drug in Suzhou." The Anhui Price Bureau took the view that this provision precluded non-local business from taking part in local bidding processes, and thereby restricted market competition in violation of Articles 34 and 37 of the AML on administrative monopoly conduct.

On December 13, 2016, SHFPC issued a notice which abolished its prior joint procurement plan and announced that development on its website. On December 22, 2016, SHFPC issued a report on its procurement practices, stating that it had learned its lesson and promising not to repeat the conduct in the future.

Due to SHFPC's timely and effective rectification measures, the Anhui Price Bureau decided not to continue the case and instead closed the investigation.

In this case, because SHFPC's joint procurement in bulk not only determined the variety, specification and form of drugs, but also determined the production companies directly or at least limited the opportunities for non-local operators to participate in tenders, it restricted competition between competing drug producers. This ran against the principle that prices should be determined through free competition among market players, and hence the conduct violated the AML.

Due to a variety of reasons, there has been a long-term phenomenon that drug prices in China always remain at high levels, beyond the means of many patients. For this reason, the control of drug prices was a key point in the reform of the national pharmaceuticals and healthcare regime. In order to achieve this goal, the State Council and the National Health and Family Planning Commission successively issued rules and plans, requiring each region to further regulate the centralized drug procurement processes for public hospitals. The two authorities also encouraged each pilot city of public hospital reform to explore and innovate, optimize centralized procurement, decrease fake drug pricing, enhance fair competition between drug manufacturers or distributors, and promote the healthy development of the pharmaceutical industry. However, the question of how to prevent abuses of administrative powers in the centralized drug procurement processes remained unanswered.

In short, 2016 was the year not only of further reform of pharmaceuticals and healthcare sector, but also of intensified antitrust enforcement in the pharmaceutical industry including beyond into 2017.

CHAPTER 5.

DEVELOPMENTS IN LEGISLATION AND PRACTICE IN THE ANTI-UNFAIR COMPETITION AREA

YAO Haifang

I. OVERVIEW

The revision on the Anti-Unfair Competition Law ("AUCL") has become a hot issue and been put on the 2016 Legislation Work Plan of the State Council as an urgent project concerning comprehensively deepening the reform.

On 25 February 2016, the Legislative Affairs Office of the State Council issued the revised draft for comments of the AUCL, previously submitted by the State Administration for Industry and Commerce ("SAIC") to the State Council, in order to collect feedbacks from all sectors of society. After hearing from stakeholders, the Legislative Affairs Office and SAIC, together with invited judges from the Supreme People's Court, started research and revisions, and prepared the revised draft of the AUCL ("Revised Draft"). The Revised Draft was then passed by the 155th executive meeting of the State Council on 23 November 2016. In February 2017, the State Council proposed to the Twenty-sixth Meeting of the Standing Committee of the Twelfth National People's Congress to deliberate the Revised Draft. Subsequently, SAIC Minister Zhang Mao of SAIC gave a presentation explaining the Revised Draft.

In parallel, law enforcement and judicial work of the currently effective AUCL was carried out in a steady and orderly way. In 2016, the administrations for industry and commerce launched a special action plan to tackle restrictions of competition and monopoly

^{*} Associate Professor, Renmin University of China School of Law. E-mail: yaohaifang@ruc.edu.cn.

conduct in the area of public utilities. By the end of October 2016, a total of 1,267 cases were brought throughout the country, and 585 of them had ended. The total case value amounted to RMB 1.9 billion and the amount of the fines and confiscated gains to RMB 167 million. At the same time, courts all over the country accepted 2,286 civil unfair competition cases at first instance, 4.81% higher than in 2015, and accepted 156 private antitrust cases.

II. DEVELOPMENT OF LEGISLATION AND POLICY

The Revised Draft includes the following four aspects of revisions of the current law:²

- (1) To increase the adaptability of the law, Article 2(2) provides a general definition of "unfair competition."
- (2) Additional types of unfair competition conduct which should be prohibited were added, such as improving the provisions about commercial bribery and trade secrets, or adding a provision about cyber acts of unfair competition.
- (3) The Revised Draft aims to coordinate the relationship between the AUCL and other relevant laws and regulations, and keep up consistency among laws and regulations.
- (4) The Revised Draft intends to improve the legal liability system by focusing on private compensation for damages, in parallel with administrative sanctions.

In 2016, the State Council continued issuing many documents to promote the development of innovation and fair competition. In particular, the issuance of the Opinions of the State Council on Establishing a Fair Competition Review System During the Development of Market-oriented Systems (Guo Fa [2016] No. 34) acts as a fundamental system for "standardizing relevant government activities, preventing the introduction of policy measures that exclude or restrict competition, and gradually cleaning up and abolishing provisions and practices that hinder fair competition and the development of a unified national market."

 ²⁰¹⁶ Report on the Protection of Consumer Rights and Interests in the National Commerce and Industry System, 21 March 2017, see http://www.saic.gov.cn/zwgk/tjzl/zxtjzl/xfzbhj/201703/t20170321 175876.html.

See Zhang Mao, Explanation Anti-Unfair Competition Law (Revised Draft), Twenty-sixth Meeting of the Standing Committee of the Twelfth National People's Congress, 22 February 2017.

In turn, the Notice of the State Council on Printing and Distribution of the Key Points of the Work for Promoting the Reform in Streamlining Administration and Delegating Powers to Lower Levels, Combination of Deregulation with Regulation and Optimizing Services in 2016 (Guo Fa [2016] No. 30) emphasizes that "it is imperative to accelerate the construction of the uniform, open, competitive and orderly market system, break up local protectionism, organize the implementation of the fair competition review system, crack down on conduct such as infringements of intellectual property rights and manufacture or sale of counterfeits or substandard goods, improve intellectual property right protection measures, prevent bad money from driving out good and create the market environment featuring honesty, trustworthiness and fair competition."

Further, the fourth part of the Notice of General Office of the State Council on Further Work on Non-government Investment (Guo Ban Fa Ming Dian [2016] No.30) lays the focus on "striving for the construction of an unbiased market environment of fair competition." In addition, at the executive meeting of the State Council, Prime Minister Li Keqiang stressed several times that China should "create a fair competition environment" and "promote fair competition."

III. IMPORTANT CASES

A. JDB (China) Beverage Co., Ltd. V. Guangzhou Pharmaceutical Co., Ltd. 1

Guangzhou Pharmaceutical Co., Ltd. ("Guangyao Co.") is the trademark holder of Wang Laoji, and authorized Guangzhou Wang Laoji Health Industry Co., Ltd. ("Health Co.") to use that trademark to manufacture and sell canned Wang Laoji Herbal Tea. The two companies investigated and found out that, since March 2014, JDB (China) Beverage Co., Ltd. ("JDB China") and Guangdong JDB beverage & Food Co., Ltd. ("Guangdong JDB") had released six advertising lines like "JDB Herbal Tea has won the award of 'Chinese No. 1 Canned Beverage' in consecutive 7 years", "JDB has won 'Seven Consecutive Championships' in the canned beverage market of China", through their official websites, newspapers and media and major supermarkets in Beijing.

Third Intermediate People's Court (2014) San Zhong Min Chu Zi No. 8077 Civil Judgment; Beijing Higher People's Court (2015) Gao Min Zhong Zi No. 879 Civil Judgment; Supreme People's Court (2015) Min Shen Zi No. 2802 Civil Ruling.

Guangyao Co. and Health Co. thought that these acts were false propaganda and infringed their legal rights, and thus filed a lawsuit with the Beijing Intermediate People's Court. In its judgment, the court held that "the involved advertising lines were not expressed in a genuine and proper way, and omitted important information, enough to lead to the misunderstanding of related consumers, which infringed upon the legal rights of the two plaintiffs and damaged the orderly fair and equal competition" and thus formed false propaganda.

As a result, the court ordered that the defendants stop using the marketing slogans, clear up the posted statements on websites and newspapers, and compensate for the plaintiffs' losses and reasonable expenses of RMB 3 million.

JDB (China) and Guangdong JDB disagreed with the first-instance judgment and appealed to the Beijing High People's Court. That court issued its final judgment dismissing the appeal and upholding the original judgment. The two JDB companies again disagreed with the second-instance judgment and applied for a retrial to the Supreme People's Court. On 30 March 2016, the Supreme People's Court issued its ruling. It dismissed the retrial application from the two companies.

The controversial issue of this case was whether or not the above six advertising slogans amounted to false propaganda. The court of second instance analysed the issue from the following three aspects:

- The first analysis was a definition analysis. The court held that, if the judgment was put in the context of the AUCL, the advertising slogans should not be analysed literally, but rather should be focused on if they as a whole would give consumers a false impression. The slogans generally left consumers an impression that JDB Herbal Tea had won the first place of sales in consecutive 7 years in the beverage market of China and JDB Herbal Tea was the Chinese first canned herbal tea.
- The second of the court's analyses was to examine whether or not the content and method of expressions were genuine. The JDB group had received a "certification of statistic investigation information" from China Industrial Information Issuing Center (CIIIC) from 2007 to 2013, proving that the sales of its Herbal Tea ranked first in the Chinese canned beverage market.

However, this means of expression led to confusion between the fact that JDB group was using the Wang Laoji trademark to produce herbal tea before 2012 and that JDB group only started using the brand of JDB independently after 2012. Hence, the used advertising slogans did not accurately and comprehensively quote the statistics resources, while using superlative expressions, likely liable to affect consumers' right to know and interests of other competitors.

• The third analysis was meant to enquire whether the advertising slogans were easily misunderstood. In the case at hand, the slogans were found to make consumers believe that JDB Herbal Tea won the first place of the Chinese canned beverage market in consecutive 7 years, which invisibly made people overlook the contribution of the trademark Wang Laoji to the sales.

To sum up, the advertising slogans at issue were found to amount to "false propaganda" prohibited by the AUCL.

Additionally, the ruling of the retrial court emphasized the Wang Laoji trademark licensing relationship between Guangyao Co. and the JDB companies, spanning over 10 years. After the end of the trademark licensing contract, the two parties produced herbal tea products separately and were direct competitors in the same industry.

Hence, in the court's view, the companies should comply with the principle of faithful operation and commercial ethics, and try to clearly separate the market boundaries between each other. This would allow the market mechanisms to function well and normal competition could be kept. On the other hand, the companies should not try to earn improper benefits by all sorts and methods of unfair competition, and neither could the litigation be abused as a means of market competition, leading to waste of judicial resources.

B. Yi Ting Company, Ze Av. Zhongguang Jinqiao¹

Zhongguang Jinqiao Corporation ("**Zhongguang**") organized and held "Miss Tourism International" ("**MTI**") provincial contests on a regular basis, and the China final contest and the global final contest since 2010. These events have been widely covered by the media.

^{1.} Beijing Intellectual Property Court (2016) Jing 73 Min Zhong No. 78 Civil Judgment.

In 2014, Yi Ting Company hosted "the 41st MTI", and authorized Ze A Culture to hold the "2014 41st MTI Beijing Competition" and Wuxianjie Company to hold the "2014 41st MTI China Final."

Zhongguang thought Yi Ting and the other two entities were its competitors, whose false propaganda had caused damages to its interests, constituting unfair competition. As a result, Zhongguang filed a lawsuit with the Beijing Chaoyang District People's Court for protection of its legal rights and benefits.

The court decided that the three defendants should stop the contested unfair competition conduct and undo the harm caused through newspapers, and that Yi Ting and Ze A Culture were jointly liable to pay compensation of RMB 20,000, and Yi Ting and Wuxianjie Company together RMB 30,000.

Ze A Culture and Zhongguang disagreed with the decision, and appealed to the Beijing Intellectual Property Court. That court then issued its judgment to dismiss the appeal and affirmed the original decision.

One of the controversial issues this case was whether or not Zhongguang had standing as a plaintiff. The court held that the Civil Litigation Law requires that the plaintiff have a "direct interest in the case." However, due to different breadths and depths in aspects of general competitive regional scope, business scope and means of competition in business operations, competitive relations between operators tend to be of abstract existence. Connections between competitors cannot be specified via specific legal acts and legal relationships, therefore it was hard to determine a direct interest relation between competitors.

At the same time, the court found, the legislative purpose of the AUCL is not only to prohibit unfair competition, but also to encourage and protect fair market competition. For direct competitive competitors, the law prohibits the acquisition of competitive advantages or damage to others' competitive advantages by improper means. Therefore, Zhongguang had the right to sue against the above acts of unfair competition. The interpretation by the appeal court in this case of the plaintiff's standing in anti-unfair competition cases can also be reflected in similar wording in the unfair competition dispute between Beijing Chuangci Space Visual Culture Media Co., Ltd. and Mu Deyuan etc. ¹

^{1.} Beijing Intellectual Property Court (2016) Jing 73 Min Zhong No. 156 Civil Judgment.

C. SPIC Shijiangzhuang Heating v. Shijiangzhuang Cunfang Watch¹

Over the period from 2012 to 2013, Shijiangzhuang Cunfang Watch Co., Ltd. ("Cunfang") and Shijiazhuang Jinshi Real Estate Development Co., Ltd. ("Jinshi") signed three Ultrasonic Heat Meter Purchase Contracts, with a total value of RMB 1,823,250. According to the contracts, Cunfang should supply products, while Jinshi would be responsible for installation of the ultrasonic heat meters.

Subsequently, SPIC Shijiangzhuang Heating Co., Ltd. ("SPIC") issued the Regulation on Standardization of Heat Exchange Stations for Hear Users, requiring that "water network users' heat exchange stations install ultrasonic heat meters in over a round of water supply and ultrasonic flow meters over a return of water, and Shijiangzhuang Gongda Keya Energy Technology Co., Ltd. should be responsible for the installation of automatic devices of heat exchange stations and technical support designation."

In November of 2014, Jinshi wrote to Cunfang complaining that Cunfang had not fulfilled the requirement laid out in the above regulation, as a result of which SPIC refused to supply causing the failure of heat supply. Following this, Jinshi had no choice but to remove the original heat meters and replace them with the ones from Shijiazhuang Gongda Keya Energy Technology Co., Ltd., and therefore it did not make the contract payment to Cunfang. After the communications with SPIC failed to achieve a positive result, Cunfang filed a lawsuit with the Shijiazhuang Intermediate People's Court, claiming compensation for damages in the amount of RMB 2 million from SPIC.

In its judgment, the court held that SPIC should compensate Cuanfang for loss of RMB 1,823,250 with interests. SPIC appealed the judgment to the Hebei High People's Court.

At second instance, the Hebei High People's Court decided, based on the administrative penalty decision by Shijiazhuang Administration for Commerce and Industry (Shishi Gongshang Chuzi [2015] 03002), that SPIC had committed that act of "restricting people to purchasing products from business operators designated by it by using its monopoly status," in violation of Article 6 of the AUCL.

At the same time, the appeal court ruled that it was clearly inappropriate for the court

^{1.} Hebei High People's Court (2016) Ji Min Zhong No. 772 Civil Judgment.

of first instance to define the contract payment as "loss". Considering factors including the involved contract value, subsequent handling of the contract involved, depreciated value after removal of the products involved, profit from the products, costs of installation and removal, character of the infringement, the appeal court decided that SPIC should compensate Cunfang in the amount of RMB 1.5 million.

In 2016, SAIC also carried out a special campaign to curb restrictions of competition and monopoly practices in the area of public utilities.¹ This campaign involved conduct by public utilities with statutory exclusive rights restricting and squeezing out fair competition by other operators' contracts.

In this lawsuit, the court found SPIC's conduct to amount to unfair competition based on the penalty decision from the administration of industry and commerce. At the same time, the court took specific factors related to the amount of compensation for damages into consideration, which helped to detail decisions on the civil liability of compensation in unfair competition cases.

Announcement of SAIC on Outstanding Problems of Restrictions of Competition and Monopoly in Public Utilities, see http:// www.saic.gov.cn/zwgk/zyfb/zjwj/fld/201604/t20160408_167829.html. Published on 8 April 2016.

CHAPTER 6.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF IPR-RELATED ANTITRUST

WANG Chunyan*

I. OVERVIEW

In 2016, the main IPR-related antitrust legislative development was the issuance of various versions of the antitrust guidelines on the abuse of intellectual property rights¹ ("Guidelines") prepared by China's antitrust agencies – the Ministry of Commerce ("MOFCOM"), the State Administration for Industry and Commerce ("SAIC") and the National Development and Reform Commission ("NDRC") – and one of China's IPR regulators, the State Intellectual Property Office ("SIPO").

Several NDRC drafts were released to seek public opinions between 31 December 2015 and 20 January 2016.² Then, SAIC issued the seventh draft of its Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for comments) to solicit public feedback during the period from 4 to 23 February 2016.³ The drafting of the guidelines was one of the

^{*} Associate Professor of Law, Renmin University of China School of Law. E-mail: wangchunyan@ruc.edu.cn.

^{1.} The various guidelines have had different names during different stages of drafting. Initially, the first version was called the Guidelines on the Prohibition of Conduct Abusing Intellectual Property Rights to Eliminate or Restrict Competition. Subsequently, the version by SAIC was named the Guidelines for Anti-monopoly Law Enforcement against the Abuse of Intellectual Property Rights, and the one by NDRC was called the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights. Finally, in the "draft for comments" released by MOFCOM in the name of the Anti-monopoly Commission (through the State Council office) on 23 March 2017, the name of the guidelines was featured as the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights.

NDRC released the notice of circumstances of solicitation on public opinions on the Anti-monopoly Guidelines for the Abuse of Intellectual Property Rights, at http://www.sipo.gov.cn/zscqgz/2016/201602/t20160202_1236495.html, published on 2 February 2016.

Notice of solicitation of public opinions on the Anti-monopoly Guidelines for the Abuse of Intellectual Property Rights (Seventh SAIC Draft), at http://www.gov.cn/xinwen/2016-02/04/content_5039315.htm, published on 4 February 2016.

important pieces of work for the Anti-Monopoly Commission under the State Council and the antitrust enforcement agencies in the year 2016.

Through a note by the State Council's office for the Anti-Monopoly Commission, on relevant issues regarding the draft of the guidelines on the prohibition of conduct abusing intellectual property rights to eliminate or restrict competition (Guo Fan Long Wei Ban Han [2015] no. 32, the above-mention four agencies would be responsible for drafting different versions of the guidelines, and then the Anti-Monopoly Commission under the State Council would take over and draft the formal text of the guidelines based on the various versions.

At the end of 2016, all versions of the guidelines drafted by the different agencies had been submitted to the State Council office for the Anti-Monopoly Commission. That office, together with the commission's expert and counselling team, started drafting the consolidated Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Comments).

Drafted according to the legislative intent of the Anti-Monopoly Law ("AML"), the guidelines aim to provide guidance to apply the AML to acts of abuse of IPRs and further clarify the boundary between legitimate conduct of IPR exercise and IPR abuses excluding or restricting competition. All in all, the guidelines are considered as important supporting legislation of the AML. They aim to regulate relevant acts of abusing IPRs to exclude or restrict competition in order to protect competition, stimulate innovation and protect the interest of consumers.

NDRC points the reasons for drafting the guidelines in the preamble of its released version: "In anti-monopoly law enforcement practices, the analysis and determination of the acts that eliminate or restrict competition by abusing intellectual property rights are of a certain special nature, and as a result, a number of specific issues need to be further clarified on the basis of applying the basic analytical framework of the Anti-Monopoly Law."

The two versions of the draft guidelines released by NDRC and SAIC in 2016 have somewhat different focuses, to some extent. That said, both drafts discuss basic principles and basic issues regarding antitrust law enforcement in the area of IPRs, including basic antitrust analysis framework, definition of relevant market, IPR-related monopoly agreements, IPR-related abuses of market dominance, etc.

In 2016, there were no judicial judgments or administrative decisions involving IPR-related monopoly. During 17-18 December 2015, the Ningbo Intermediate People's Court held a public hearing over the dispute in which four magnet companies, Ningbo Ketian Magnet Co., Ltd., Ningbo Huahui Magnet Co., Ltd., Ningbo Tongchuang Strong Magnet Material Co., Ltd. and Ningbo Permanent Magnet Co., Ltd. filed a lawsuit against Hitachi Metals Co., Ltd. The plaintiffs claimed that the defendant had engaged in a refusal to license prohibited by the AML and restricted competition by abusing its patent of Sintered NdFeB.

The contested issues between the two parties included the definition of the relevant market under the AML, the determination of dominant market position and the alleged abuse of dominance. Because the parties could not reach an agreement on these issues, this case would further undergo court hearings and be decided then.¹

In addition, SAIC also continued with the antitrust investigation into alleged antitrust offenses by Microsoft, since June 2014.²

II. DEVELOPMENT OF LEGISLATION AND POLICY

A. NDRC Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Comments)

The Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Comments) drafted by NDRC were open to public comment from 31 December 2015 to 20 January 2016.

These draft guidelines consist of four parts: preamble and basic issues; intellectual property right agreements eliminating or restricting competition; intellectual property rights-related abuse of a dominant market positions; and intellectual property rights-related concentrations between business operators. The fourth part on concentrations between business operators was left empty, to be complemented by MOFCOM who is responsible for merger control.

Four magnet companies in Ningbo filed a lawsuit against Hitachi Metals: the dispute of 'market of monopoly' became the outstanding contradiction, at http://epaper.21jingji.com/html/2015-12/30/content_28573.htm.

SAIC special case group conducted an anti-monopoly inquiry and investigation against Microsoft Corporation, at http://www.saic.gov.cn/xw/yw/zj/201601/t20160106_210623.html, published on 6 January 2016.

During the period of public consultation, more than 260 opinions and suggestions were submitted from over 60 institutions and individuals including foreign antitrust agencies, international standard organizations, domestic and foreign enterprises, industry associations, research institutions, law firms, etc. These opinions and suggestions involves aspects such as the guiding principles of the guidelines, the basic framework, writing style, etc. Frequently voiced feedback was that the guidelines would further improve transparency in antitrust law enforcement, provide market players with clearer legal certainty, and lower the cost of compliance for business operators. In response to the comments, NDRC stated that it would take into consideration these opinions.

B. SAIC Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Comments)

As early as in 2009, SAIC first started the drafting work for IPR-related antitrust guidelines. After years of systematic researches and field trips, SAIC managed to get a good grip of the issues of ant-competitive IPR abuses in China. Several times in the past, SAIC sought feedback from stakeholders and made revisions to the draft guidelines.

In 2012, SAIC issued the fifth round of draft IPR abuse guidelines, and in April 2015 it enacted the Regulation on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition.

When the effort to issue guidelines in the name of the Anti-Monopoly Commission under the State Council was launched, the overall framework of the previously drafted fifth version of SAIC draft guidelines was recognized as a model, including by the other three codrafting departments. That version thus became the framework for the future guidelines to be issued by the Anti-Monopoly Commission under the State Council.¹

From January to February 2016, SAIC released two texts of the further revised guidelines, namely the sixth and seventh draft version of its guidelines. The sixth draft was named Guidelines on the prohibition on eliminating or restricting competition by abusing intellectual property rights ("Sixth SAIC Draft"), which was drafted on the basis of the overall framework of the fifth version, combined with the latest developments in the area of IPRs overseas. Subsequently, opinions and suggestions on the Sixth SAIC Draft were

SAIC held a symposium to solicit opinions on the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Sixth SAIC Draft), at http://www.saic.gov.cn/fldyfbzdjz/gzdt/201601/t20160108_165816.html.

collected from stakeholders, in writing and holding symposiums and special seminars. Then, the seventh draft of the SAIC guidelines ("Seventh SAIC Draft") was prepared, based on the feedback from stakeholders.

Until February 2016, SAIC had obtained written comments on the fifth version of the guidelines (Fifth draft) and the Sixth SAIC Draft from 22 governmental departments and its provincial offices, such as from the National People's Congress, the Supreme People's Court, the Legislative Affairs Office of the State Council and MOFCOM. The total amount of comments went over 300 opinions and suggestions. Also, through symposiums and written opinions on the fifth draft and the Sixth SAIC Draft), more than 500 comments were submitted from organizations and enterprises such as industry associations in Europe and the US, law firms, representatives from domestic enterprises of the ICT industry, as well as opinions from relevant scholars. Some of these comments were incorporated in the Seventh SAIC Draft.¹

In general it is recognized that antitrust issues are usually complex, but the IPR-related issues in anti-competitive conduct are even more complicated. Many issues involve interdisciplinary questions, requiring input from both legal and economic studies. During the process of drafting the various draft guidelines, SAIC consulted with experts in law and economics, and some of the feedback from the consultation is reflected in Seventh SAIC Draft.

The Seventh SAIC Draft contains the following main content:

- 1. Preamble, including the aims of the guidelines;
- Basic principles, including the relationships between antitrust and IPR protection and between IPR abuse and anti-competitive conduct, the definition of eliminating or restricting competition by abusing IPRs, the basic principles of IPR-related antitrust enforcement, the method and procedure of analysis, the factors of analysis and the scope of application;
- 3. Definition of the relevant market, including the overall principles of how to define the relevant market, the relevant product market, the relevant technology market and the

See Explanations of the drafting of the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Seventh SAIC Draft).

relevant innovation market;

- 4. IPR-related monopoly agreements, including general provisions, output limitation and price control between competitors, market divisions, restrictions to research and development and collective boycott, exclusive grant-backs, resale price maintenance, territorial and customer restrictions between non-competitors, certain "safe harbours" for IPR-related monopoly agreements, etc.;
- 5. IPR-related abuses of a dominant market position, including the determination and presumption of dominance, licensing IPRs at unfairly high prices, refusal to license, IPR-related tying and imposing unreasonable conditions and discriminatory treatment;
- 6. IPR-related concentrations between business operators (left empty);
- 7. Antitrust analysis of several particular types of IPR-related conduct, including during the setting and implementation of standards, patent pools, collective copyright management issues, etc.;
- 8. Supplementary provisions, including legal liabilities and remedies, and the date of entry into force of the forthcoming guidelines.¹

Notice of solicitation of opinions on the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Seventh SAIC Draft), at http://www.gov.cn/xinwen/2016-02/04/content 5039315.htm.

APPENDIX.

RELEVANT DATA OF INTELLECTUAL PROPERTY AND COMPETITION LAW FIELD

APPENDIX 1.

RELEVANT DATA IN THE FIELD OF INTELLECTUAL PROPERTY OF CHINA

APPENDIX 2.

RELEVANT DATA IN THE FIELD OF COMPETITION LAW OF CHINA

APPENDIX 1.

RELEVANT DATA IN THE FIELD OF INTELLECTUAL PROPERTY OF CHINA¹

ZHANG Guangliang*

A. PATENTS

1. Amount of applications

In 2016, the State Intellectual Property Office ("SIPO") accepted 3,465,000 patent applications, an increase of 23.8% compared to the previous year. Among them, there were 1,339,000 invention applications, increased by 21.5%, ranking first worldwide for the sixth consecutive year, 1,476,000 utility model applications, increased by 30.9%, and 650,000 design applications, increased by 14.3%. Overall, there were 3,305,225 domestic applications, increased by 25.2%, and 159,599 foreign applications, increased by 0.3%.

2. Amount of approvals

During 2016, SIPO granted 1,753,000 patents, representing an increase of 2.1%. Among them, there were 404,000 invention patents, increased by 12.5%; 903,000 utility model patents, increased by 3.1%; and 446,000 design patents, decreased by 7.6%.

Among the granted invention patents, the granted domestic invention patents were 302,000, increased by 39,000 or 14.5% compared with 2015. Among domestic invention patents granted, service inventions were 276,000, accounting for 91.4%; non-service

^{1.} Unless otherwise marked, all data in this section come from SIPO 2016 China's Intellectual Property Protection Status.

^{*} Associate Professor, Law School, Renmin University of China. E-mail: zhangguangliang@hotmail.com.

See SIPO Monthly Report on Patent Work and Integrated Management Statistics http://www.sipo.gov.cn/tjxx/tjyb/2016/201701/P020170309587380602895.pdf.

inventions were 26,000, accounting for 8.6%.1

3. Amount of PCT applications and approvals

SIPO accepted 44,992 international applications submitted through the Patent Cooperation Treaty ("PCT") in 2016, which is an increase of 47.3% compared to the prior year. Among them, 42,200 applications came from domestic entities, increased by 48.5%; 2,800 applications came from abroad, increased by 31.2%. In 2016, 19 provinces (autonomous regions and municipalities) had more than 100 PCT international applications, increased by 3 provinces compared with 2015. Among them, Guangdong had 23,600 applications ranking in the first place; Beijing, Jiangsu, Shanghai, Shandong and Zhejiang had more than a thousand; PCT international applications in the foregoing 6 provinces accounted for approximately 90% of the national total.²

4. Amount of ownership

As of the end of 2016, invention patent ownership from China domestically (excluding Hong Kong, Macao and Taiwan) amounted to 1,103,000. After the US and Japan, China was the third country in the world owning more than a million invention patents. The amount of invention patent ownership per 10,000 people in China (excluding Hong Kong, Macao and Taiwan) reached 8.0 pieces. The top ten provinces (autonomous regions and municipalities) of most ownership of invention patent per 10,000 people were: Beijing (78.6 pieces), Shanghai (35.2 pieces), Jiangsu (18.4 pieces), Zhejiang (16.5 pieces), Guangdong (15.5 pieces), Tianjin (14.7 pieces), Shanxi (7.3 pieces), Liaoning (6.4 pieces), Anhui (6.4 pieces) and Shandong (6.3 pieces).³

5. Amount of cases

In 2016, the Patent Reexamination Board accepted 13,107 reexamination requests and concluded 17,623; accepted 3,969 invalidation announcement requests and concluded

See Live broadcast: 2016 SIPO's Main Work Statistics and information Briefing http://www.sipo.gov.cn/twzb/2016ngjzscqjzy gztjsjjygqkxwfbh/.

See Live broadcast: 2016 SIPO's Main Work Statistics and information Briefing http://www.sipo.gov.cn/twzb/2016ngjzscqjzyg ztjsjjygqkxwfbh/.

See Live broadcast: 2016 SIPO's Main Work Statistics and information Briefing http://www.sipo.gov.cn/twzb/2016ngjzscqjzyg ztjsjjygqkxwfbh/.

4,100.1

6. Other

In 2016, Chinese public patent applications in "Belt and Road" countries were 4,834, increased by 47.1%. 18 countries were the destination of patent applications, increased by 3 compared with 2015. In 2016, patent applications submitted in China by "Belt and Road" countries were 3,697 pieces, increased by 18.2%.²

In 2016, the patent examination cycle basically remained stable in China. The patent examination cycle was stable for 22 months, while utility model and design conclusion cycles were stable for 3 months. In 2016, the average reexamination conclusion cycle reached 11.9 months, the average invalidation case conclusion cycle reached 5.1 months, respectively increased by 1.8 months and 0.7 month.³

B. TRADEMARKS

1. Amount of applications

In 2016, Chinese trademark applications amounted to 3,691,000, increased by 28.4%. The increase rate was 1.5% compared with 2015, ranking in the first place in the world for 15 consecutive years. Among them, the online application amount increased significantly to 3,001,000 pieces, accounting for 81.3% of the total applications, increased by 12%. The top 5 provinces (autonomous regions and municipalities) of most domestic application amount were Guangdong, Beijing, Zhejiang, Shanghai and Jiangsu. ⁴As of the end of 2016, the cumulative total amount of trademark application was 22,094,100.

In 2016, Chinese applicants submited 3,104 applications for international registration of Madrid trademarks, increased by 29.8%, ranking among the top 5 for the first time and

See Live broadcast: 2016 SIPO's Main Work Statistics and information Briefing http://www.sipo.gov.cn/twzb/2016ngjzscqjzy gztjsjjygqkxwfbh/.

See Live broadcast: 2016 SIPO's Main Work Statistics and information Briefing http://www.sipo.gov.cn/twzb/2016ngjzscqjzy gztjsjjygqkxwfbh/.

See Live broadcast: 2016 SIPO's Main Work Statistics and information Briefing http://www.sipo.gov.cn/twzb/2016ngjzscqjzy gztjsjjygqkxwfbh/.

See SAIC introducing to the press national development of market subjects and other relevant circumstances in 2016 http://www.gov.cn/xinwen/2017-01/20/content_5161619.htm#1.

the cumulative valid registration amount reaching 22,270. Applications for international registration of Madrid trademarks in China specified by foreign applicants were 21,238, ranked first in the Madrid League for 12 consecutive years. The cumulative valid registration application amount reached 236,000.

2. Amount of examinations/registrations

During 2016, the examination amount of trademark registrations in China reached 3,111,000 pieces, increased by 33%. As of the end of 2016, the cumulative trademark application amount was 22,094,100 and the cumulative registration amount was 14,508,800.

In 2016, approved and registered collective trademarks of geographic indication and certification marks were 394. As of the end of 2016, cumulative approved and registered collective trademarks of geographic indication and certification marks were 3,374.

3. Amount of ownership

As of the end of 2016, the valid trademark registration amount in China reached 12,376,000 and the ownership amount of trademark per 10,000 market subjects reached 1,422, increased by 6.5% compared with 1,335 ownerships as of the end of 2015.¹

4. Amount of cases

In 2016, applications for trademark appeal case reached 156,000 pieces, average 13,000 cases per month, increased by 32.8%. Among them, the amount of rejected appeal applications was 13,100, increased by 31.3%; the amount of application for complicated cases involving both parties was 26,000, increased by 40.9%.²

5. Other

During 2016, Chinese applications for trademark pledge registration were 1,410, increased by 20%, helping enterprises financing RMB 64,990,000,000, increased by 90%.

See SAIC introducing to the press national development of market subjects and other relevant circumstances in 2016 http://www.gov.cn/xinwen/2017-01/20/content_5161619.htm#1.

See SAIC introducing to the press national development of market subjects and other relevant circumstances in 2016 http://www.gov.cn/xinwen/2017-01/20/content 5161619.htm#1.

In 2016, the reform of trademark registration facilitation had been carried out steadily. 15 trademark registration counters had been set up and operating for the convenience of applicants to apply nearby, and 30 local registration application counters for pledge of registered trademark had been set up.

C. COPYRIGHT

1. Amount of registration

In 2016, China total registration amount of copyright reached 2,007,600, increased by 22.33%. Among them, work registrations were approximately 1,599,600, increased by 18.65%; registrations of computer software copyright were some 410,000, increased by 39.48%.

The regions and institutes with a large number of work registrations were Beijing, Shanghai, Jiangsu, Copyright Protection Center of China, Sichuan, Chongqing and Shandong. In terms of the types of registered works, written works were 610,000 and more, accounting for 38.16% of the total registration; the rest were photographic works, art works, cinematographic works and musical works, etc.

The top ten regions of most software copyright registrations were Guangdong, Beijing, Shanghai, Jiangsu, Zhejiang, Sichuan, Fujian, Shandong, Hubei and Anhui, accounting for more than 80% of the total registrations. Among them, Guangdong's software registration amount was 90,000 and more, accounting for about 22.49% of the total registration, ranking first nationwide.

2. Other

In 2016, the whole country completed 327 registrations of copyright pledge, decreased by 46%. Among them, registrations of work copyright pledge were 64, decreased by 84.4%; registrations of software copyright were 263, increased by 33.5%.

D. OTHER

During 2016, registration applications for layout-design of integrated circuits were 2,360 pieces, and certificates issued were 2,154. As of the end of 2016, cumulative received registration applications for layout-design of integrated circuits were 15,535 pieces, relating to which the registration notice and issued certificates were 14,043.

In 2016, 2,523 applications for right of new varieties of agricultural plants were accepted, and the annual acceptance amount ranked first among members of the International Union for The Protection of New Varieties of Plants for the first time. Among them, the application by inbound subject for right of variety accounted for 94.0% and by outbound subject accounted for 6.0%. The amount of granted rights of new varieties of agricultural plants was 1,937, among which inbound subjects account for 94.9% and outbound subjects account for 5.1. As of the end of 2016, cumulative accepted applications for right of new varieties of agricultural plants were 18,075 pieces, 8,195 of which were granted with right of variety.

In 2016, 400 applications for right of new varieties of forestry plants were accepted, 195 of which were granted with right of variety. As of the end of 2016, cumulatively 2,188 applications for right of new varieties of forestry plants were accepted, 1,198 of which were granted with right of variety. 389 preliminary examinations on applications for right of new varieties had been completed, 189 DUS (Distinctness, Uniformity, Stability) Expert Onsite Examinations on varieties under application had been organized and completed, and 195 rights of varieties that lost the conditions for right of new varieties of plants were early terminated and publicly announced.

In 2016, 12,050 applications for archival filing of customs protection of intellectual property rights were accepted, among which 11,510 were concluded and 8,844 were approved. The review cycle was average 22.5 workdays, faster than legal requirement by about 25%. Among them, 3,130 user applications for rights holder were accepted and all concluded. As of the end of 2016, the amount of application for archival filing of customs protection of intellectual property rights reached 27,873, accounting for 52.5% of the total valid archival filing.

E. ADMINISTRATIVE PROTECTION

1. Administrative protection for patents

In 2016, the total amount of handling cases in patent administrative enforcement was 48,916, increased by 36.5%. Among them, patent disputes cases were 20,859 (among which patent infringement disputes were 20,351), increased by 42.8%; counterfeit patent cases were 28,057, increased by 32.1%.

97.5% of patent cases were concluded, increased by 4.3%; among them 94.4% of patent infringement cases were concluded, increased by 0.8%. The efficiency of law enforcement and case handling further improved.¹

2. Administrative protection for trademarks

In 2016, administrations of industry and commerce and departments of market supervision nationwide had investigated and dealt with 49,000 cases of infringed and counterfeit trademarks throughout the year, concluding 45,000 pieces, involving RMB 560,000,000 and more. Among them, the investigation of trademark infringement and counterfeiting cases more than 28,000 pieces, involving RMB 350,000,000 and more; unfair competition cases of infringement of intellectual property rights 5,710 pieces, worthy of RMB 110,000,000, the amount of the confiscated was RMB 58,270,000.

3. Administrative enforcement on copyright

The fight against internet piracy "Sword Net 2016" special action investigated 514 administrative cases and fined RMB 4,670,000. "Fall Wind 2016" special action confiscated more than 4,600,000 infringing piracy publications and dealt with 1,500 infringing piracy cases.

F. JUDICIAL PROTECTION

See key the intellectual property rights system investigated and dealt with patent infringement and counterfeiting cases with remarkable results in 2016 http://www.sipo.gov.cn/zscqgz/2017/201701/t20170123_1308087.html

1. Civil lawsuits

In 2016, courts nationwide newly accepted 136,534 civil IP cases of first instance and concluded 131,813, increased respectively 24.82% and 30.09%, case conclusion rate of first instance is 83.18%. Among them, newly accepted patent cases 12,357, increased by 6.46%; trademark cases 27,185, increased by 12.48%; copyright cases 86,989, increased by 30.44%; technology contract cases 2,401, increased by 62.23%; unfair competition cases 2,286 (among which 156 pieces were monopoly cases), increased by 4.81%; other IP civil disputes cases 5,316, increased by 71.87%. 1,667 foreign-related IP civil cases of first instance were concluded throughout the year, increased by 25.62%; 1,130 HK/Macao/Taiwan-related IP civil cases of first instance were concluded, increased by 291.99%.

Courts nationwide newly accepted 20,793 pieces of IP civil cases of second instance and concluded 20,334, increased respectively by 37.57% and 35.33%. Courts nationwide newly accepted 79 retrial IP civil cases and concluded 85, decreased respectively by 31.30% and 25.44%. The Supreme People's Court newly accepted 369 IP civil cases, decreased by 3.15%; concluded 383 pieces (including existed), increased by 1.59%. Among them, newly accepted 7 cases of second instance and concluded 11; newly accepted 319 applications for retrial and concluded 331; newly accepted 32 retrial cases and concluded 32.

2. Administrative lawsuits

In 2016, courts nationwide newly accepted 7,186 IP administrative cases of first instance and concluded 6,250, decreased respectively by 26.96% and 42.80%; the case conclusion rate was 53.16%. Among them, newly accepted patent cases 1,123, decreased by 34.75%; trademark cases 5,990, decreased by 19.89%; copyright cases 37, increased by 270%; other administrative cases 36, decreased by 94.45%. Among the concluded administrative cases of first instance, 4,241 were judged to maintain concrete administrative act, 1,263 were judged to revoke. Local people's courts nationwide newly accepted 3,233 IP administrative cases of second instance and concluded 3,069, increased respectively by 44% and 31.77%. The Supreme People's Court newly accepted 355 IP administrative cases and concluded 352, decreased respectively by 6.08% and 6.63%. Among them, newly accepted 282 applications for retrial and concluded 283.

3. Criminal lawsuits

In 2016, courts nationwide newly accepted 8,352 IP cases of first instance involving criminal and concluded 8,601, decreased respectively by 23.9% and 20.43%; the case conclusion rate was 89.06%. The effective judgments involved 10,431 persons, among which 10,334 were given penalties. Newly accepted criminal cases of second instance involving IP were 787 pieces, broadly flat on a year; 812 pieces were concluded, increased by 3.83%.

4. Other

In 2016, procuratorial authorities nationwide approved 2,251 cases and 3,797 persons relating to infringement of IP right throughout the year, prosecuted 3,863 cases and 7,059 persons; suggested administrative law enforcement authorities to transfer 145 criminal cases and 180 persons suspected of infringing IP rights; supervised on public security authorities to docket 135 cases and 159 persons.

In 2016, public security authorities nationwide detected kinds of infringement and counterfeiting criminal cases of 17,000 pieces, involving a total value of RMB 4,626,000,000.

APPENDIX 2.

RELEVANT DATA IN THE FIELD OF COMPETITION LAW OF CHINA

ZHANG Jiaming*

In China, three authorities have jurisdiction to enforce the Anti-Monopoly Law ("AML"): the Ministry of Commerce ("MOFCOM"), the National Development and Reform Commission ("NDRC"), and the State Administration for Industry and Commerce ("SAIC"). In addition, the courts have jurisdiction over private antitrust lawsuits and administrative law appeals against decisions by the authorities.

Below, we will look at each of the three authorities separately, followed by an analysis of the courts.

I. MINISTRY OF COMMERCE

MOFCOM is in charge of merger control. According to MOFCOM unconditional cases lists¹ and MOFCOM press conferences,²MOFCOM reviewed a total of 1,693 cases from August 1, 2008 (the entry into force of the AML) through to the end of 2016. Among these cases, 1,621 were unconditionally approved (about 96% of the total); 28 were conditionally approved; and two were prohibited (about 2% of the total). By way of comparison, this proportion is similar to the proportion of conditional clearance cases of the European Commission.

In 2016, MOFCOM approved 351cases without conditions. Among these cases, 270

^{*} Associate, Hogan Lovells International LLP. E-mail: jiaming.zhang@hoganlovells.com

^{1.} See http://fldj.mofcom.gov.cn/article/zcfb/.

MOFCOM press release, MOFCOM 2016 annual work overview XII: comprehensively promoting antitrust
enforcement and creating legalized business environment, 11 January 2017, See http://www.mofcom.gov.cn/article/ae/
ai/201701/20170102499312.shtml.

satisfied the simple case standards and were cleared under the simple case procedure, which represents 76% of all cases.¹ The remaining cases were approved in the standard review procedure. In 2016, among all 351 cases, 324 were completed within "phase 1" – that is, the preliminary review period (30 days) – representing 82% of all cases. Among all the cases qualifying for the simple case procedure, 98.6% were cleared within phase 1.² In 2016, MOFCOM also approved two cases subject to conditions.³ Separately, MOFCOM made public four penalty decisions, sanctioning companies for failing to file cases.⁴

II. NATIONAL DEVELOPMENT AND REFORM COMMISSION

NDRC is responsible for enforcement of the AML against monopoly agreements, abuse of dominant market position, and anti-competitive government conduct which relates to pricing.

By the end of 2016 53 penalty decisions were published on NDRC's website, eight of which were adopted in 2016.⁵

III. STATE ADMINISTRATION FOR INDUSTRY AND COMMERCE

SAIC has jurisdiction to enforce the AML against monopoly agreements, abuse of dominant market position, and anti-competitive government conduct which does not relate to pricing.

^{1.} See MOFCOM website, http://fldj.mofcom.gov.cn/.

^{2.} See MOFCOM website, http://fldj.mofcom.gov.cn/.

^{3.} Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in respect of the Acquisition of Shares of SABMiller Plc. by AB InBev S.A / N.V, MOFCOM public announcement [2016] No.38, July 29, 2016, see http://fldj.mofcom.gov.cn/article/ztxx/201607/20160701369044.shtml; Announcement on the Decision of Conditional Approval upon Anti-monopoly Review of the Concentration of Business Operators by the Acquisition of the Equity of St. Jude Medical, Inc. by Abbott Laboratories, MOFCOM public announcement [2016] No.88, December 30, 2016, see http://fldj.mofcom.gov.cn/article/ztxx/201612/20161202440204.shtml.,

^{4.} MOFCOM Administrative Penalty Decision (Shang Fa Han No. [2016]965), 12 December 2016, see http://fldj.mofcom.gov.cn/article/ztxx/201701/20170102495433.shtml; MOFCOM Administrative Penalty Decision (Shang Fa Han No. [2016]175), 21 April 2016, see http://fldj.mofcom.gov.cn/article/ztxx/201605/20160501311092.shtml; MOFCOM Administrative Penalty Decision (Shang Fa Han No. [2016]174), 21 April 2016, see http://fldj.mofcom.gov.cn/article/ztxx/201605/20160501311081. shtml; Administrative Penalty Decision (Shang Fa Han No. [2016]173); 21 April 2016, see http://fldj.mofcom.gov.cn/article/ztxx/201605/20160501311079.shtml.

^{5.} See http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/index.html.

By the end of 2016 there were 47 penalty decisions published on SAIC's website, including seven cases where SAIC accepted commitments and agreed to suspend the investigations. According to the official statistics, SAIC and its local offices investigated 72 antitrust cases since the AML became effective until the end of 2016, 36 of which have been concluded by the end of 2016. During the course of 2016, SAIC launched 14 new antitrust investigations.

SAIC and its local offices also have jurisdictions over anti-unfair competition cases. SAIC did not publish detailed statistics for anti-unfair competition cases prosecuted by itself and its local offices. According to other official statistics as published by SAIC from 2013 to 2016, SAIC together with all of its local offices in China has prosecuted in total 25,965 anti-unfair competition cases.³

IV. COURTS

Courts have jurisdiction over private and administrative law litigation in relation to AML cases.

For private litigation, since the AML came into force until the end of 2015, courts in China reportedly accepted a total of 415 private antitrust lawsuits.⁴ In 2015, courts in China reportedly accepted 141 private antitrust lawsuits.⁵ In 2016, according to search results from public sources, courts in China completed at least 46 private antitrust lawsuits. As the official numbers are not made public in a reliable manner, I would estimate that the actual amount of cases would be higher. According to its official statistics, in 2016, the Beijing IP Court concluded 161 antitrust lawsuits.⁶

For administrative litigation, there have been only very few court challenges of authority decisions in the AML enforcement history. In 2015, there was no public court judgment

^{1.} See http://www.saic.gov.cn/zwgk/gggs/jzzf/.

^{2.} See http://www.saic.gov.cn/ywdt/gsyw/mtjj/201612/t20161226_173712.html.

See http://www.saic.gov.cn/fldyfbzdjz/gzdt/201708/t20170807_268215.html; http://www.chinacourt.org/article/detail/2014/02/id/1220212.shtml; http://www.saic.gov.cn/zt/jg/fldybzdjz/201501/t20150128_219978.html; and http://www.saic.gov.cn/sj/tjsj/201604/t20160421 171346.html.

See http://www.saic.gov.cn/jgzf/fldyfbzljz/201507/t20150701_158420.html, and Xinmin Report, China will promote the normalization and refinement of antitrust enforcement, 20 January 2016, http://tech.xinmin.cn/2016/01/20/29351826.html.

See http://www.saic.gov.cn/jgzf/fldyfbzljz/201507/t20150701_158420.html, and Xinmin Report, China will promote the normalization and refinement of antitrust enforcement, 20 January 2016, http://tech.xinmin.cn/2016/01/20/29351826.html.

See http://www.chinaiprlaw.cn/index.php?id=4592.

following an administrative law appeal against a decision by the antitrust authorities. In 2016, according to search results from public sources, there was at least one court case challenging the AML enforcement decision.¹

Similarly, courts have jurisdiction over civil and administrative law litigation in relation to anti-unfair competition cases.

In 2016, since SAIC at central level did not prosecute any anti-unfair competition cases, there is no administrative law litigation against SAIC itself. At its local offices level, due to the fact that the cases are rather scattered and there is no consolidated official statistics, there are no official numbers as to of administrative law litigation against various local offices of SAIC.

For private litigation, according to our research in legal databases, Chinese courts concluded around 646 anti-unfair competition cases in 2016. to anti-unfair competition cases.

Shandong Hongxin Accounting Firm v SAIC, [2016], Jing 0120 Xing Chu 1070 Hao, Beijing Xicheng District People's Court, 28 December 2016, see http://wenshu.court.gov.cn/content/content/PocID=a2766782-4e36-4982-a973-a73d000e4bc5.

BOOK TWO

MRLC IP & COMPETITION LAW 2016 ANNUAL REPORT OF KOREA

PART I.

OVERVIEW OF POLICY AND LAW IN INTELLECTUAL PROPERTY AND COMPETITION

CHAPTER 1.

OVERVIEW OF INTELLECTUAL PROPERTY POLICY

CHAPTER 2.

OVERVIEW OF COMPETITION POLICY

CHAPTER 3.

OVERVIEW OF COMPETITION POLICY AND ECONOMIC ANALYSIS

CHAPTER 1.

OVERVIEW OF INTELLECTUAL PROPERTY POLICY

AHN, Hyo Jil*

In 2016, there were no major revisions of the law in the field of intellectual property law except for trademark law. In particular, cases related to intellectual property disputes have been steadily increasing. Especially cases related to unfair use of 'achievements made by significant investment or effort of others' newly established in Article 2.1(i) of the Unfair Competition Prevention Act (revised in 2013) have noticeably increased. Since this regulation has the nature of a general provision, and its standards and scope of application need to be clarified by precedents, the accumulation of relevant precedents is positive. It is also noteworthy that recent precedents are particularly concerned with the overall appearance or impression of the product, such as shape, size, color and design, that is, the protection of 'trade dress'. Such issues will be analyzed in more detail below.

(1) Legislative amendments in the field of patent law include the introduction of a data submission order system for the verification of infringement and damages. Under the former Patent Act, the court could only order the submission of the documents necessary for the calculation of the damages in accordance with the application of the patentee. In the amended Patent Act enacted from June 30, 2016, the court can make such orders for not only calculation of the damages but also proof of infringement, while also being able to order submission of non-documents such as infringing goods or digital files. In addition, the infringer is prohibited from refusing submission by claiming that the material is a trade secret. In addition, if the infringer refuses to submit the order without justifiable reason, the court may accept the claims of the owner of the contents of the data as true (Article 132). By doing so, patent infringement lawsuits and proof of damages has become easier than in the

^{*} Professor, Korea University School of Law.

past.

Important cases in the field of patents include a judgment that sets the criteria for denying inventiveness of an invention when some parts of the prior art have conflicts (Supreme Court Judgment in Case No. 2013Hoo2873 delivered on January 14, 2016). In another case, the court ruled that the so-called 'Protest of Free Practice Technology' does not apply to cases where an invention infringes on the scope of a patented invention by document (Patent Court Judgment in Case No. 2015Hu4019 delivered on January 15, 2016). The court held that constituent elements of a patented invention cannot be recognized as publicly known only by the fact that they are described in the preamble of an application or described in the specification as background or prior art (Supreme Court Judgment in 2013Hoo37, en banc, delivered on January 19, 2017). Another significant judgment ruled that amendments allowed in a patent invalidation proceeding should be limited to reduction of the scope of application or the correction of errors, including correcting contradictions when the detailed description of the invention and the scope of application conflict (Supreme Court Judgment in Case No. 2014Hoo2184 delivered on November 25, 2016). In addition, in a patent infringement case in which a product or method of use infringes the patent rights of a patented invention, it was ruled necessary to disclose the patent registration number in relation to the infringed product to identify the patented invention as the object of the infringement. This judgment also held it necessary to distinguish the infringing products from others by describing the product name, product number, etc., of the infringing product or the composition of the infringing product (Supreme Court Judgment in Case No. 2015Do17674 delivered on May 26, 2016). This judgment is meaningful in that it was the first case to present the specific degree of technology used by an infringer necessary for criminal indictments related to patent infringement.

(2) The Trademark Act was fully revised on February 29, 2016. These revisions were discussed in detail in the last edition of this Annual Report.

In an important case concerning trademark law, the court held that even if a trademark appears to imply or emphasize the quality, efficacy or use of a designated product, if a general consumer does not perceive the simple quality, efficacy or use of a designated product when looking at the whole trademark, it cannot be recognized as a technical mark (Supreme Court Judgment in Case No.2015Hu1911 delivered on January 14, 2016). If a trademark holder of a Treaty Country abandoned or created belief that he was not willing to acquire the rights to the trademark in Korea, trademark registration by an agent of a

trademark holder may not be cancelled as long as it does not harm fair international trade order (Supreme Court Judgment in 2016Hoo717, 724, 748, 755, 762, 779, 786 delivered on July 27, 2016). In another case, the court ruled that a registered trademark similar to an unregistered trademark should be canceled if it causes confusion regarding the origin of the goods for consumers by misusing a trademark similar to an unregistered trademark (Supreme Court Judgment in Case No. 2016Hoo663 delivered on August 18, 2016). The court also held that a party cannot claim damages equivalent to usage fees when a registered trademark is not used, and can claim statutory damages only if a trademark identical to or having identical elements to a registered trademark is used (Supreme Court Judgment in Case No. 2014Da59712, 59729 delivered on September 30, 2016).

(3) The Copyright Act was amended on March 22, 2016. The revised law includes provisions regarding the definition of 'records' as the digitization of sound, and change of the term 'record for sale' to 'commercial record' to include digital sounds transmitted through streaming (Article 2, Article 21, Article 29, Article 75, etc.). Also, in relation to the fair use provision, purposes of fair use provisions (reporting, criticism, education, research, etc.) were deleted, and 'for-profit or non-profit' considerations in application of fair use provisions have been repealed (Article 35.3) to facilitate its use. In addition, the Minister of Culture, Sports and Tourism has streamlined the collection process of royalties by allowing the copyright trust service provider to demand that the collection of royalties and compensation be consolidated according to methods prescribed by a Presidential Decree (Article 106). The Korea Copyright Protection Agency was established in addition to the 'Korea Copyright Commission' (Article 122.2).

In the field of copyright law, the court ruled that a copyright holder of a record under the former Copyright Act (before the full-scale revision in 1986) should also be considered a current copyright holder. Since transfer rights were introduced in the revision of the Copyright Act in 2000, unless retroactive effect is limited, the transfer rights of records produced before 2000 need to be recognized (Supreme Court Judgment in Case No. 2013Da56167 delivered on April 28, 2016). In another case, the court held that if a copyright holder possesses rights to both original work and secondary work, and transfers his copyrights relating to the secondary work, his rights to the original work cannot be seen to have transferred together (Supreme Court Judgment in Case No. 2014Da5333 delivered on August 17, 2016). The court held that even if most of contents of a video consist of sex scenes, it is protected as copyrighted work in principle, and the copyright holder has a right to request a suspension of infringement to prevent unauthorized distribution of the video

work. (Seoul High Court Judgment in Case No. 2015La1490 delivered on November 29, 2016). When an operator of a User Created Contents (UCC: user-created content) website made substantial investment in the production and management of the website, he has rights as a database creator under the Copyright Act (Seoul High Court Judgment in 2015Na2074198 delivered on December 15, 2016). The court dismissed a case in which the defendants filed a joint lawsuit against 116 defendants who had no relation to each other, determining it to be a 'settlement lawsuit' creating undue burden on District Courts (Incheon District Court Judgment in Case No. 2014GaHab51899 delivered on April 1, 2016).

- (4) There was no amendment of the Trade Secret Protection Act in 2016. An important case in the field of trade secret law concerned a company that had developed security software used for internet banking and managed its secrecy with considerable effort. Although the court acknowledged the software to be a trade secret based on such findings, it ruled that since the software developed by the other company that had received plaintiff's software data had developed software with little common elements, it would not constitute a trade secret infringement (Supreme Court Judgment in 2014GaHab563794 delivered on January 15, 2016). The court held that when an employee had at first legally moved material that is important for the business (although not a trade secret) but then leaks or does not return or discard the material to use it for his own profit even when there is an obligation to return or discard the material when leaving the company, such act constitutes a violation of fiduciary duties (Supreme Court Judgment in Case No. 2015Do17628 delivered July 7, 2016).
- (5) The Unfair Competition Prevention Act was revised on January 27, 2016. Until now, the Commissioner of the Korean Intellectual Property Office (KIPO) could only investigate the business facilities of a company if he 'found it necessary' to investigate acts of unfair competition. However, the revised law applies stricter standards by only allowing inspection of business facilities when 'found necessary and there are no other means to investigate' (Article 7.1). This helps guarantee the freedom of business activities for companies.

Important cases in the field of unfair competition prevention law include a case involving inhalers for asthma treatment. The initial developer's product was purple, and the follower company's product had some purple included. But the shape of the products was clearly different, and both products were medications that needed prescriptions by doctors, whereby the consumers were doctors or pharmacists, negating any possibility of confusion between the products from an expert standpoint. The follower company's partial use of the

color 'purple' was not deemed to constitute 'using achievements made with considerable investment or effort by others in a manner contrary to fair commercial practice' (Seoul High Court 2015Na2049390 delivered on March 31, 2016). In another case, when a conglomerate group related economically or organizationally is separated, the act of using a business mark that includes the corporate group's mark among subsidiaries was not considered an 'act to confuse the business principal' (Supreme Court Judgment in Case No. 2014Da24440 delivered on January 28, 2016). In the case of the Korean Doctor Association claiming that the Korean Oriental Medicine Doctor Association's use of an identical English name 'The Association of Korean Medicine' constitutes unfair competition, the court ruled that since the plaintiff's English name was not well known in Korea and the plaintiff's western medical practice and the defendant's oriental medicine practice were clearly distinguishable, it would not constitute confusion of business principal (Seoul High Court Judgment in Case No. 2015Na2037144 delivered on March 24, 2016). Ice cream products with honeycomb honey (honey in its natural state of honeycomb) served on soft-serve ice cream in a transparent cup or on a cone could not be a 'form of product' protected under product form imitation prohibitions since they did not have a regular product form as each ice cream product had a different form (Supreme Court Judgment in Case No. 2015Da240454 delivered on October 27, 2016). In addition, there was a case concerning Article 2.1(i) of the Unfair Competition Prevention Act, which was newly implemented along with the 2013 revisions. In this case, the design of Hermes Birkin bags and Kelly bags were printed on polyester fabric to produce fake 'print bags'. The court held that such production and sales did not constitute an act of source confusion but did constitute 'unfair use of achievement made with considerable investment or effort by others' (Seoul High Court Judgment in Case No. 2015Na2012671 delivered on January 28, 2016). The court designated five stages of development for unregistered trademarks, and held that 'profits worthy of legal protection' only existed for trademarks at the fourth (well-known trademark) and fifth (famous trademark) stages (Supreme Court Judgment in Case No. 2015Na2045381 delivered on March 17, 2016). In another case, the court ruled that the mark, external signage, layout and design of a bakery store were achievements made with considerable investment and effort in order to differentiate the store from existing stores. Thus, the court held that opening and operating a nearly identical store constituted unauthorized use of another's efforts and investments (Seoul High Court Judgment in Case No. 2015Na2044777 delivered on May 12, 2016). On the other hand, in the case of providing and distributing programs that enable changing the entire design of a screen (including addition, deletion, repositioning of content and changing skins and colors) provided by a specific company's portal site, the court ruled that such provision and distribution could not be seen to harm the uniformity of the portal site, or interfere with performance of the contract between the individual internet users and the portal site or between the portal site and its advertisers, or infringe on any rights by illegal means. Hence, no illegality could be found and such acts were not considered an infringement on the achievements of others under the Unfair Competition Prevention Act (Supreme Court Judgment in Case No. 2013Da42953 delivered on April 29, 2016).

CHAPTER 2.

OVERVIEW OF COMPETITION POLICY

LEE Hwang*

I. OVERVIEW

Between the end of 2016 and beginning of 2017, there has been dramatic change in the political terrain that is comparable to the democratization movement of the 1980s in Korea. As a result of the "Candlelight Revolution" led by citizens, the conservative regime, which had dominated Korea for nearly 10 years, fell among criticism that it destroyed the democratic political process and burdened the lives of citizens. Progressive political forces took power in the May 2017 presidential election. In line with the overall direction of its economic and social policies, competition policies are likely to be significantly different from the past. Competition policy is expected to be a key means of economic democratization, a policy emphasized by the new government.

Ever since the conservative regime took power in 2008, competition policies have been criticized for being indifferent to enforcement of competition laws that focus on efficiency and consumer welfare and measures to curb concentration of economic power (which have large social support). This has been accepted as resulting from competition policy subject to political and economic policies biased towards large corporations. While there was a focus on economically inferior parties such as small-to-medium enterprises (SMEs), those policies were criticized for not being systematically enforced and ineffective. Overall, competition law enforcement did not gain much public support, including the year of 2016. But it is true that the KFTC demonstrated long-honed capabilities to issue corrective actions in a few important competition law cases, such as the investigation and corrective actions concerning standard patent abuse by Qualcomm in 2016. As a result, the KFTC was selected as a top competition authority in 2016 by the Global Competition Review (GCR) following its 2015

^{*} Professor, Korea University School of Law; Secretary Commissioner, MRLC; Director, ICR Law Center.

selection.

Despite the fundamental excellence of competition policies and some achievements, it is difficult to deny that the issues of "competition law enforcement being transformed into a means to protect socially underprivileged parties", and "enforcement procedures not satisfying due process principles" were serious, as discussed in the Overview of Competition Policy in the last edition of this Annual Report. As a result, voices calling for "more independent and procedurally constitutional competition law enforcement that requires faithful implementation of due process principles" have grown, and hopes that "competition law will significantly contribute to address serious economic issues such as economic polarization in addition to promoting the economy and consumer welfare" have been raised. Despite such calls, competition authorities have failed to provide a satisfactory solution. As social and economic polarization has intensified, and demands for due process and resolution of overall conflict have not been satisfied, it is regretful that competition policies have continuously been unable to reach expectations in most of its objectives, such as increasing efficiencies and consumer welfare, protecting economic inferior parties such as SMEs, and restricting economic polarization. Foremost, it was painful that the KFTC's independence was criticized in some cases.

II. OVERVIEW OF COMPETITION LAWS

The Monopoly Regulation and Fair Trade Act (the "MRFTA") was enacted at the end of 1980. The MRFTA is unique in that it was introduced voluntarily without influence from other countries or international organizations but rather in response to a public demand to counter the tyranny of chaebols and establish a free and fair market economy among political and economic turmoil. This is similar to the U.S., where competition law was first enacted in 1890 to counter economic concentration by a small number of monopolistic companies, consequential economic instability and threats to democracy.

The Korean competition law system is based on the so-called economic clause of Article 119.2 of the Constitution. With the MRFTA serving as the main body of law, competition laws also include special laws such as the Fair Transactions in Subcontracting Act, Fair Franchise Transactions Act and the Large-Scale Retail Fair Trade Practices Act, and Distributorship Agreement Fair Trade Practices Act. The MRFTA can be divided into three (3) main types of regulations. The first category protects and promotes free competition

in the market, a traditional area of competition law. Prohibition of abuse of market dominant position, restriction of competition-limiting business combinations, and prohibition of cartels fall under this category. The second category concerns prohibition of unfair trade practices which aim to maintain fair trade between the market and market participants. Four (4) special laws including the Fair Transactions in Subcontracting Act have been enacted to protect economically-inferior parties. These laws are based on the regulation of 'Abuse of Superior Bargaining Position' which prohibit a party with a superior bargaining position from abusing its power in private transactions, with each law applying such regulations to a specific industry or pattern of behavior. The third category concerns measures to restrict and mitigate concentration of economic power which has been caused by unbalanced government-led export-concentrated economic development policies carried out since the 1960s. But regulations under this category have been significantly relaxed since the mid-2000s so that they are now largely insignificant, excluding prohibition of cross-shareholding and regulation of illegal support and illegal insider transactions. But this category is expected to be reinforced in 2017.

First, prohibitions on abuse of market dominant positions apply when there is a concern that businesses with market dominance abuse their power to limit market competition. In the past, there was debate over whether unfair acts (and not only anti-competitive acts of market dominating parties) were covered under this regulation in the legal community. But the 2007 Supreme Court POSCO judgment settled this controversy, at least in practice, by establishing the effect-based approach, stipulating that anti-competitive effects need to be proven to regulate a refusal to deal by a market dominating party. Although both exclusionary acts and exploitative acts committed by a market-dominating party are subject to regulation, there has been almost no cases of enforcement for exploitative acts due to the limited scope of conducts that are covered by such category and difficulty in enforcement. Proving exclusionary acts is understood to entail proving the anti-competitive intent/purpose and anti-competitive effect per the POSCO judgment. Proving abuse of market-dominating positions is difficult because it usually involves sophisticated economic analysis. For this reason, the Korea Fair Trade Commission (the "KFTC") has been reluctant to devote its limited resources to this category, and recently, enforcement activities in this category tend to be reserved for major cases.

Second, regulating anti-competitive mergers has special significance in Korea where monopolistic and oligopolistic market structures are deeply entrenched. Such regulation has been actively applied since the 2000s. Also, extraterritorial application is actively enforced

in cases of mergers abroad that affect Korea. Recently, however, there has been criticism that the KFTC tends to rely on behavioral measures (for which follow-up monitoring is difficult) rather than structural measures for anti-competitive mergers.

Third, prohibitions concerning undue collaborative acts, or cartels, have been defined as "public enemy no. 1" by the KFTC since the 2000s. Correspondingly, this category has been a top enforcement priority with proactive enforcement and outstanding regulatory performance. More than 70 percent of the annual amount of surcharges imposed by the KFTC (approximately KRW 1 trillion) are related to cartel cases. International cooperation with other competition authorities for regulation of international cartels affecting Korea is also active. In addition, the leniency program granting reductions in penalties to cartel participants who voluntarily report their conduct is understood to have made significant contribution to successful cartel enforcement as the KFTC has limited capacity to investigate charges as an administrative agency.

Fourth, apart from the three (3) types of prohibitions discussed above, prohibitions of unfair trade practices (which focus on the unfairness of conduct) account for more than 50 percent of the 500-800 cases handled by the KFTC every year. This is because providing relief for economically inferior parties disadvantaged by unfair conduct is perceived as one of the main functions of the KFTC since polarization due to concentration of economic power and domination by economically superior parties (such as large corporations) are considered serious issues in Korea. But, recently, cases which concern simple private economic disputes are led to be voluntarily settled among the parties involved or through private litigation so that limited enforcement resources can be better concentrated on traditional core areas of competition law. But with the fall of the conservative government at the end of 2016, the KFTC tends to be more active in law enforcement than in the past with regards to protecting economically inferior parties. Unfair trade practices are classified into nine (9) categories, which are further specified into 29 types of acts. The scope is extensive although focused on regulating vertical restraints by a single business. It also covers acts by multiple businesses (such as group boycotts), measures for consumer protection (such as unfair luring of customers) and measures to restrict economic concentration (such as unfair support). This category restricts not only patterns of behavior but also acts with certain effects, including acts with anti-competitive effects and acts that may interfere with fair trade. Thus, there has been criticism because the illegality standards of unfair trade practices are vague and extensive, and are seen to excessively expand its regulatory scope. On the other hand, it has also been pointed out the KFTC has often relied on the legal

scheme of unfair trade practices (which is relatively easier to prove), rather than meet the more stringent requirements of abuse of a market-dominating positions for cases concerning anti-competitive acts. This phenomenon has been somewhat alleviated since the 2000s, but continues, creating a larger possibility for KFTC enforcement to act on a false positive which would ultimately hinder efficiency.

With the regulatory categories described above serving as the four (4) pillars of competition enforcement, competition advocacy is also one of the most important functions of the MRFTA, utilizing its administrative nature. Accordingly, the KFTC has suggested policies promoting competition and measures easing regulations to improve monopolistic and oligopolistic market structures. All government agencies are required to consult with the KFTC when they establish or revise anticompetitive legislations. Also, reflecting competition policies in general governmental policies has been highly effective through the Chairman of the KFTC being able to make remarks at cabinet meetings or providing opinions in establishing legislation. However, over the past 10 years, the function of competition advocacy has been considerably weakened compared to the past.

Sixth, in the category of restriction of concentration of economic power, regulation of cross-shareholding, illegal support and illegal insider transactions is important. Prohibition of unfair support was introduced into the MRFTA in 1996, successively regulating tunneling between companies within a conglomerate group so that the family of the head of the conglomerate group may not exercise excessive and unfair power with a small amount of equity. Although a director's violation of duty of care or duty of loyalty should be governed by corporate law and tax law, due to the limited institutional limitations (including lack of guarantees for the rights of minority shareholders), the MRFTA covers a considerable range in this category. However, there is a clear limit in regulating unfair inheritance of chaebols through legal schemes like unfair insider transactions since the legal precedents abide by very strict standards of proof. As a result, the MRFTA was amended in 2013, and a regulatory system has been implemented to deal with the family of the head of the conglomerate group acquiring private gains, and the first case was enforced in 2016.

Seventh, private enforcement such as damage actions for violations of the MRFTA have increased significantly. Competition enforcement had depended primarily on public enforcement by the KFTC (like most countries excluding the US). But since the 2000s, private enforcement is on the rise especially in the form of damage actions against cartel participants. As cartel enforcement has strengthened, victims have become more proactive

and the legal system has developed. In general, however, it is difficult to say that private lawsuits are active since it is still difficult for victims to obtain evidence of illegality or prove specific damages, along with the lack of other procedural measures (including a class action system not being introduced in Korea yet). However, as a result of the damage action in the Military Oil Bidding case, the Defense Acquisition Program Administration was awarded KRW 135.5 billion in damages from five (5) refiners in 2013. Since then, it has become a general trend for damage actions to be filed by government agencies following detection of cartels by the KFTC or Prosecutor's Office. Even in the case of private companies, following KFTC enforcement in the price fixing case of eight (8) flour companies in 2006, a baking company filed a damage action against them and was awarded KRW 1.2 billion by the Supreme Court in 2012. Recently, the number of damages lawsuits has been rapidly increasing due to the two (2) cases discussed above. As such, private enforcement based on follow-on action derived from KFTC corrective actions is encouraged by the government since it is seen to greatly contribute to deter cartels along with the public enforcement by the KFTC and Prosecutor's Office. The most important issue in damage actions is the calculation of damages. Recently, Korean courts tend to adopt the before and after comparison method as a basic method.

III. MAJOR TRENDS IN COMPETITION LAW CASES

Since 2008, despite its many achievements, the KFTC has been criticized for focusing on protecting economically inferior parties, rather than maintaining its original mission of promoting free market competition to enhance efficiencies and consumer welfare. The situation is similar in 2016, and it is hard to find any notable achievements in traditional areas of competition, except for a few cases dealing with cartels and the Qualcomm case.

Actual enforcement of the MRFTA in 2016 can be summarized in a few points. First, since the late 1990s, cartel regulation, a perennial priority of law enforcement, has steadily continued. The penalties imposed by the KFTC in 2016 amounted to KRW 803.8 billion, up by 36.5% from 2015, of which KRW 756 billion was for cartels, accounting for 94%. During the period from 2012 to 2015, multiple bid-rigging cases were detected in which domestic construction companies colluded on several large civil engineering and construction projects, including the government-initiated subway and Honam Express Railway construction projects and the four (4) major river comprehensive development project started in the late 2000s. The number of cartel cases detected in 2016 was only 64 cases, compared with

88 cases in 2015. But because large-scale cases such as the bid-rigging case concerning liquefied natural gas (LNG) storage tank construction resulted in surcharges of KRW 350.5 billion, and the cement production cartel case resulted in surcharges of KRW 199.2 billion, the amount of surcharges imposed increased significantly. By industry, there were more cases in the manufacturing sector than the civil engineering and construction sector. Among these cases, in cases against the state, many damage actions have been filed by state agencies.

In recent cartel cases, it appears that companies engaging in collusion are routinely reporting the fact of collusion voluntarily to the KFTC and reducing fines. To further promote the amnesty program which greatly contributes to enforcement efficiencies, the KFTC revised its specifics in 2016. As a result, Korea's amnesty program is considered well maintained and effective. However, there is a criticism that this program excessively restricts the prosecutorial rights of the Prosecutor's Office by excluding criminal punishment of voluntary reporters. Thus, discussions for further improvement in the exclusive accusation system are necessary.

Second, there were few major cases in 2016 regarding regulation of abuse of market dominant position. Oracle's maintenance service case attracted some attention, but was determined to be not illegal after KFTC review. The only major case was the corrective action imposed on Qualcomm's abuse of standard patent case. Being a leading example of regulation of intellectual property rights under the MRFTA, this case attracted much attention domestically and internationally. Even more so since the U.S. Federal Trade Commission filed a case at the U.S. Federal Court in January 2017 on similar grounds. In this case, the KFTC ruled that Qualcomm abused the standard essential patents (SEPs) required for mobile communication-related chips (such as WCDMA and LTE) by not granting licenses to competing chipset manufacturers, after a long-term investigation and several hearings. In late 2016, the KFTC imposed a stop order and surcharges amounting to KRW 1.30 trillion. It was the largest penalty imposed on one (1) company in the history of the MRFTA. As seen in the Oracle and Qualcomm cases the main issue related to the abuse of market dominant position in Korea in 2016 concerned abuse of patents and after-market issues in relation to foreign companies.

Thirdly, there were not many significant cases in relation to regulation of business combinations that limit competition. This seems to be mainly due to the decline in the number and size of business combinations since the recession and increase of uncertainties. Among them, KFTC's prohibition of the merger between SK Telecom (the largest mobile

telecommunication service provider and the second largest IPTV service provider in Korea) and CJ HelloVision (a leading provider of pay-TV service (through cable TV)) and a CJ subsidiary (a major player in the mobile communications and high-speed Internet markets) was notable.

Fourth, the most significant case of KFTC enforcement in 2016 concerned the regulation of unfair trade practices. In particular, the regulation of abuse of superior bargaining position was important. With increasing demand for the KFTC to directly contribute to protection of economically inferior parties in the context of economic polarization, the 'Fairness for Dealer Transactions Act (the 'Dealer Act') was enacted and promulgated in December 2016. This Act specified regulations of abuse of transactional status (an act covered by unfair competition conduct under the MRFTA) in the context of dealer transactions similar to franchise-related laws or large-scale retail-related laws. In an era of economic development, many manufacturers had established distribution systems through their exclusive dealers. But recently, with the rise of distribution channels such as large discount stores and internet commerce companies, the status of dealers has deteriorated relatively. In the meantime, some manufacturers abused their superior positions in transactions through various means, such as forcing products on dealers. This has created controversy since it makes it difficult for dealers to survive as marginal operators in a dichotomized economy. Against such backdrop, the Dealer Act began strong enforcement in 2017. But there remains doubt about the extent to which it is desirable to apply strong regulation on the vertical restraining acts in the distribution field (which are often economically efficient) based on unfairness.

Fifth, it is worthy to note that the effectiveness of prohibition of unfair support has weakened in relation to economic concentration regulation. Also, the first case of enforcement has emerged since provisions regarding unfair insider transactions have been introduced. Since the late 1990s, regulations on unfair support practices have been introduced and actively implemented, leading to a significant decrease in obvious cases of violation. In 2016, the Supreme Court overturned a corrective measure imposed by the KFTC (in 2012) on SK Telecom and SK Innovation for paying SK C&C (a subsidiary) a higher than market rate price for labor costs and maintenance expenses required for IT outsourcing. This seems to be the result of the court 's tendency to apply a high level of burden of proof on KFTC enforcement in unfair support cases similar to other cases (cartels, etc.). As a result, the effectiveness of regulations against unfair support practices are expected to weaken in the future. On the other hand, regulation of the group head's family gaining private profits has

been enforced since 2015. The KFTC first applied the new law in 2016 and took corrective action on the grounds that Hyundai and KAL provided unfair economic benefits to private companies owned by the group head's family. This system is expected to play an important role in preventing illegal economic succession of chaebol groups in the future.

Sixth, there has been an increasing number of private litigation filed after corrective action by the KFTC. In particular, in 2016, many economists have been increasingly inclined to participate in the litigation process as appraisers to develop economic analysis for calculating loss amounts, a trend that is expected to expand further in the future. If the private litigation against bid-rigging are successfully carried through, civil litigation related to other types of competition laws are expected to grow in the future.

IV. MAJOR TRENDS FOR COMPETITION LAW ENFORCEMENT PROCEDURES

In 2016, as in 2015, criticism and demands continued to call for the improvement of the KFTC's investigation and review procedures based on due process. Accordingly, the KFTC endeavored to supplement such procedures to strengthen the right of defense for respondents. Foremost, voices calling for the strengthening of criminal punishment and raising issues concerning the independence of competition authorities emerged.

First, there is much criticism that it is necessary to strengthen deterrence by reinforcing criminal punishment for violations of the MRFTA, including cartels. In this light, many call for repealing or improving the exclusive right to accuse. While criticism has pointed to the KFTC's exclusive right to accuse as the reason why criminal punishment has not become more active by prosecutors, it is believed that there will be some form of visible improvement effort in 2017. However, if the exclusive right to accuse is repealed, criminal punishment can be enforced in cases of illegal acts other than cartels. As a result, complaints and accusations may become too rampant in relation to trivial issues, leading to social unrest. The current MRFTA includes a wide range of criminal penalties including imprisonment for most illegal acts, including competition-limiting business combinations and unfair trade practices, causing such problems. Many difficult tasks, including improving criminal enforcement provisions, remain to be solved.

Second, there is a growing demand for strengthening procedural guarantees in the

investigation and trials of the KFTC. The KFTC has been constantly raising the need to ensure that the right of defense is protected at the same level of prosecutors and courts in the process of exercising its quasi-judicial powers to investigate, impose corrective actions and sanction violations of the MRFTA. Although the KFTC's decision-making process has continuously improved in this direction, it seems that it does not meet the expectations of businesses. However, there are many who question the extent to which the KFTC can realistically enhance procedural guarantees when handling thousands of cases every year with a limited staff of 500 people. At the same time, there is also a problem of reverse discrimination between domestic and foreign companies and between SMEs and large corporations. While foreign companies and large corporations are generally able to argue against the KFTC over longer terms with the help of large law firms, realistically, domestic companies and SMEs can only exercise a relatively low level of defense rights, raising complaints of unfair discrimination. This is an important consideration for the KFTC's procedural improvements.

Third, there has been claims that the recently impeached conservative regime has undermined the independence of the KFTC enforcement. Although it is accepted as obvious that the KFTC, a quasi-judicial body, should maintain strict independence in its organization and operation, it is true that the KFTC (organized under the Prime Minister's Office) has limited independence in its legal basis. Despite these institutional limitations, the KFTC has been striving to secure independence in its work and has attained considerable achievements. It is unfortunate that such criticism has grown recently. In particular, the KFTC has been accused of being unfairly influenced by Samsung and politicians relating to the disposition of stocks to resolve cross-shareholding issues raised in the merger between Samsung subsidiaries, Samsung C&T and Cheil Industries. This merger was criticized for being an evasive way to inherit control of the Samsung Group, the largest conglomerate group in Korea. Hence, the task of strengthening the independence of the KFTC remains.

V. CONCLUSION

The MRFTA pursues a variety of goals compared to other countries, and the KFTC performs many tasks beyond promoting market competition to realize such goals. In the United States, economic efficiency is seen as the nearly sole purpose of competition laws and the EU has made regional integration its primary objective. In many cases, competition laws in other countries also cover various purposes, such as protection of economically

inferior parties such as SMEs and consumer protection depending on economic conditions. Generally, the purpose of competition laws evolves according to the stage of economic and social development of the region in the same period. The purpose and method of enforcement of U.S. Competition laws has constantly evolved through the introductory period in the late 19th century, the Great Depression of the 1930s, the economic boom of the 1950s, the age of global competition in the 1970s, the neoliberal period of the 1980s, and the age of the new economy and isolation since the 21st century, according to the continuously changing economy and social circumstances. The fact that competition policy changes like a pendulum according to the change of the aptitudes and strategies of politics and economics may be justified by the nature of the competition law, which is a core principle of economic policy. Nevertheless, competition policies should not lose sight of promoting market competition and increasing consumer welfare, the primary objectives of competition policies, while striving to resolve other issues.

Korea introduced the MRFTA at the end of 1980, and starting with protecting economically inferior parties such as SMEs and consumers, the KFTC restricted economic concentration by chaebols by regulation of unfair competition conduct. This was accomplished mainly as a result of efforts intending to complement government-led large enterprise-centered, export-oriented economic development strategies. As the contradictions of the past economic development era emerged with the financial crisis at the end of 1997, the government began to utilize new economic developmental strategies of promoting market competition and improving productivity. Accordingly, the MRFTA strengthened the regulation of unfair support practices and cartel regulation. In the 21st century, as the Korean economy developed further and joined the wave of globalization, competition law enforcement began to concentrate on competition-limiting business combinations and abuse of market dominant positions along with extraterritorial application of its competition laws and abuse of patent rights. This was highly praised as leading the way for new economic policies by focusing on raising economic efficiency and innovation capacities.

The global financial crisis in 2008 presented a major challenge in the development of the competition laws. In the past, issues of polarization were intensified due to the government's inability to overcome past economic development strategies. Although growth in productivity and service industries were proposed as countermeasures, there were not many concrete results. In the meantime, MRFTA enforcement has been criticized as a failure of the conservative regime to set proper direction and unable to escape from the framework of the large-enterprise-centered and form-oriented economic policies developed in the past. Of

course, in the meantime, the specifics of competition law enforcement have been developed and refined. Although it is hard to deny that there have been considerable achievements, it is also difficult to deny that there remains many regrets. Competition policies, which have been steadily evolving along with economic development to focus on economic efficiency based on market competition, have not been able to provide a new direction to raise market competition in the past ten (10) years. It is unfortunate that it has only been able to deal with incidental tasks to soothe economically inferior parties while growth-oriented economic policies relying on large corporations have been implemented.

2016 marked a period of seeking a new direction in the chaos of such competition policy as the administration was changed by the so-called "candle revolution". Whether to focus on enhancing economic efficiency by promoting market competition similar to policies prior to 2008 or to concentrate on the protection of economically inferior parties in self-reflection of former policies is a choice and task given to competition policies in 2017. In any case, it seems clear that fairness will be highlighted as much as economic efficiency pursued by traditional competition policies. However, considering the limited human and material resources of the KFTC, it may create an excessive burden if the KFTC tries to resolve issues of fairness in transactions among individuals.

The biggest challenges for the Korean economy concern issues of limited growth potential and polarization due to the decline of population and limitations of the existing industrial structure concentrated on large corporations. Against the backdrop of a difficult world economy and domestic circumstances, the question of how Korea's competition policies will utilize its limited resources to effectively solve complex and wide-ranging policy goals to achieve a balance between efficiency and fairness will need deep reflection on what the essence of competition policies is.

CHAPTER 3.

OVERVIEW OF COMPETITION POLICY AND ECONOMIC ANALYSIS

KIM Chongmin* & LEE In Ho**

I. OVERVIEW

The resource allocation efficiencies and welfare enhancement brought about by business activities and transactions in a competitive market can be said to be the primary reason countries around the world, including Korea, protect free competition. Since competition policy plays a pivotal role in the smooth operation of a market economy, upkeep efforts are made through the establishment and enforcement of competition laws. The Monopoly Regulation and Fair Trade Act of Korea (the "MRFTA")¹ and U.S. Supreme Court case law² clearly state that the purpose of competition law is to guarantee and pursue free competition. This shows that ultimately the purpose of competition policy is to weaken or eliminate factors that hinder free competition. Therefore, the goals of competition law can only be attained by obtaining a clear understanding of the effect of a business activity on competition. In this regard, an understanding of how competition works in the market must be prioritized. This illustrates how economic theory should contribute to the establishment and enforcement of competition policy, especially when considering how economic analysis can contribute to determining the illegality of specific acts.

Until recently, however, the enforcement of competition laws or determination of the illegality of specific acts have been mostly executed within the scope of legal

^{*} Professor of Economics, Kookmin University.

^{**} Professor of Economics, Seoul National University.

Article 1 of the MRFTA, which provides the objective of the competition law, emphasizes the importance of promoting free competition.

In Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958), U.S Supreme Court reasoned that the Sherman Act was
designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of
trade.

interpretation, while strict economic analysis of the effects of suspect business activities have only recently started to be applied in full scale. To determine whether any action damages competition, or further, damages consumer welfare, it is necessary to undertake a sophisticated analysis that comprehensively analyzes the given market environment and competitive structure which entails a comprehension of economic theories.

Competition economics or antitrust economics relating to application on competition law have shown rapid theoretical and empirical developments in the past few decades. In addition, due to these developments the principles and application of competition policies around the world have greatly developed to rapidly transition from a form-based approach (which simply focuses on whether a specific act satisfies the requirements of the law) to an effect-based approach (which analyzes the real effects of an act on competition) in recent years. In keeping with these changes, economic analysis, which analyzes the economic effects of suspect behavior, has become a very important element of law enforcement. Countries around the world, including Korea, are making institutional arrangements to secure such changes. In the following sections, we will examine the experience and status of economic analysis in Korea, and examine issues of systematic improvements for economic analysis opinions.

II. LEGISLATION AND POLICY DEVELOPMENTS

1. Experiences in Applying Economic Analysis to Competition Law Cases

Rigorous economic analysis has only recently started to be attempted and play an important role in Korean competition cases for determination of illegality. The Muhak-Daesun merger case decision by the High Court³ is commonly discussed as a pioneering case of rigorous economic analysis applied according to international standards (global standards). In this case, the focus of the dispute was the definition of the relevant geographical market. The merging parties attempted to dissuade concerns of restrictions on competition by defining a wider relevant market. But the Korea Fair Trade Commission (the "KFTC") could prove restriction on competition by defining a narrow relevant market. This was the first case in which Critical Loss Analysis was introduced to economic analysis to define a relevant market. Since this analysis was the basis of the High Court's judgment, the

^{3.} Seoul High Court Judgment in Case No. 2003Nu2252 delivered on October 27, 2004.

importance of economic analysis grew in subsequent competition cases.⁴

The Microsoft case in 2006 led to a shift from a form-based approach to an effect-based approach in determining the illegality of a unilateral act by focusing on the effects of abuse of market dominance on competition. It also brought the KFTC's review under the spotlight of the international community. In addition, it triggered the trend of international law firms and foreign scholars actively participating in the analysis of domestic competition law cases. This showed that internationally recognized analytical methods and standards need be applied to domestic competition law cases so that the latest economic theories and empirical analysis methods became more actively accepted. Thus, this case is regarded to have led the KFTC's rise to the center of international competition enforcement through the investigation and enforcement in Intel's abuse of market dominant position case in 2008 and Qualcomm's abuse of market dominant position case in 2008 and Qualcomm's

Economic analysis has not only influenced the KFTC's determination of illegality and subsequent judgments at the High Court, but has also influenced private enforcement through civil litigation, which is recognized as one of the main enforcement channels of competition law. A significant case in this regard is the military oil bidding collusion case⁵. This case showed how the results of economic analysis affected the most critical issue of a damages claim, the calculation of the damage amount. Many economists (from the Korea Development Institute, Seoul National University, etc.) were mobilized to calculate damages in this bid-rigging case, and scientific economic analysis in calculating damages was highlighted as a key issue. At the District Court, the difference in difference method was adopted to calculate the loss amount as the difference between the competitive price that would have been realized if there was no collusion on price and actual price, leading to a damage award of approximately KRW 81 billion.

At the High Court, the loss amount was estimated at KRW 196 billion according to the standard market comparison method (Yardstick method), which is a quantitative analysis method that considers the uniqueness and temporal trend effects of military supply agreements while comparing collusion and competitive prices. The Supreme Court accepted the District Court's rulings and the case was eventually settled at remand. Consequently,

The Muhak-Daesun merger case heavily affected the adoption of rigorous economic analysis in the subsequent cases, such as Hite-Jinro merger in 2005 and E-land-Carrefour merger and E-mart-Walmart merger in 2006.

Supreme Court Judgment in Case No. 2010Da18850 delivered on July 28, 2011 and Seoul High Court Judgment in Case No. 2007Na25157 delivered on December 30, 2009.

due to bid-rigging the military fuel supply for three years from 1998 to 2000 by collusion of bidding volume and bid price, the defendants admitted to causing losses estimated at KRW 81 billion and paid KRW 135.5 billion in damages and delayed interest for compensation to the state. Expert economic analysis is considered to have provided the basis for calculating damages in this judgment.

Hence, the achievements of economic analysis in Korean competition law enforcement can be considered highly significant in light of its relatively recent introduction compared to other advanced countries. As the trend of economic analysis influencing law enforcement has grown in the last decade, the submission of economic analysis reports is also on the rise⁶. However, as the number of economic analysis reports submitted increases along with the interest of the courts, the need for clear and concrete standards for the submission of economic analysis evidence has also increased. This is because when economic analysis relies on the interests of a specific company without being based on reliable and objective data, it has the side effect of raising the cost of regulation by undermining the reasoning of legal enforcement and reducing general reliability of economic analysis. In the following sections, we will review KFTC regulations on basic principles and other procedures that govern economic analysis reports submitted as evidence in competition cases.

2. Systems for the Submission of Economic Analysis Opinions

Effect-based approaches to specifically analyze effects in competition law cases to determine illegality are becoming a general trend recognized globally. That this trend has been inevitably accepted in Korea can be seen in the recent increase of the number of economic analysis reports submissions⁷, as active use of economic analysis is expected to expand further. Economic analysis as proof of actual market circumstances in a competition case is very important evidence for clearly determining illegality. Therefore, securing the reliability of economic analysis is a necessary condition to strengthen the role of economic analysis in competition law enforcement.

To secure the credibility of economic analysis, the KFTC issued the 'Guidelines for the Submission of Economic Analysis Evidence', which provides basic principles for economic

According to the KFTC Press Release on July 23, 2010, there were 14 submissions of economic analysis reports during 2006-2009. On the other hand, the economic analysis division of the KFTC handled 13 economic analysis reports in a single year in 2016.

^{7.} See supra note 6.

analysis evidence on July 21, 2010, the first such issuance in Asia. and it has since been enacted and enforced as a "Notice regarding Regulations for the Submission of Economic Analysis Evidence". This Notice states that its purpose is to establish standards for general principles, standards of production and procedures for submission of economic analysis statements (in relation to the KFTC's operation and case procedures) in cases where the examiner or the defendants submit economic analysis opinions.

The enactment of such Notice can be considered a response to cases in which incorrect data was used to submit distorted economic analysis reports or cases in which expert reports were submitted without rigorous verification while focusing on special interests to justify the conduct of defendants when it should have taken an objective position. The abuse of unreliable economic analysis tied to certain interests is likely to result in disbelief in the entire system of economic analysis, leading to a situation in which economic evidence, which should play a crucial role in enforcement of competition law, is not recognized as standard of review. Therefore, the enactment of the Notice should be considered a self-regulatory effort to promote the submission of highly reliable opinions.

The Notice states that an economic analysis requires a description of the reasons for selection of the data and analytical methods used and that the results should be based on a theoretical or empirical model consistent with the economic theory related to the relevant case. The contents of an opinion and documents necessary to verify the credibility of the writers' expertise need to be submitted together, and procedures to involve a neutral expert to provide comments at meetings of the commission before deliberations start were put in place. Once verification of the economic analysis is systemized in this process, incentives to submit written opinions with caution will be strengthened, ultimately enhancing the objectivity of economic analysis. This will be an opportunity to emphasize the role of economic evidence in the enforcement of competition law, and further, is expected to establish the practice of determining illegality based on objective and empirical evidence.

III. MAJOR CASES

It was enacted as the KFTC public notification No. 2013-7, December 26, 2013 and revised as the KFTC Public Notification No. 2017-1, Mar 2, 2017.

1. SK Telecom - CJ Hello Vision Merger Case (KFTC Case No. 2016GiGyul1393)

The KFTC prohibited the acquisition of CJ HelloVision by SK Telecom and the merger of SK Broadband and CJ Hello Vision believing that it may substantially limit competition in the broadcasting and telecommunication markets including the pay-TV market, mobile telecommunication retail market and mobile telecommunication wholesale market. The KFTC examined the possibility of competition restriction by organizing a dedicated taskforce which included an economic analysis expert, since this case concerned the first such merger in Korea between a broadcasting company and telecommunication company while also involving a field which affected ordinary people's lives. In particular, it is significant that the KFTC factored in whether the merger would cause a price increase in the future to determine the anti-competitive effects of the merger rather than limiting its analysis to prior market shares based on examination of the economic analysis opinions submitted by the merging companies and its competitors. The Upward pricing pressure (UPP) method used is a method frequently used by advanced competition authorities to analyze the possibility of price increase after a merger in differentiated markets. The KFTC had already used the UPP method in the Essilor merger case in 2014. In this case, to analyze the possibility of a license fee increase due to the horizontal merger in the pay-TV market, both defendants and stakeholders used the UPP or the upgraded gross upward pricing pressure index (GUPPI) as proof of their positions in the reports submitted. The KFTC analyzed these economic analysis reports and conducted a quantitative analysis of its own to determine the anti-competitive effects.

2. Acquittal of Oracle Korea's Abuse of Market Dominant Position Case (KFTC Case No. 2014SeoGam4422)

Oracle is a market-dominant operator that sells database management systems (DBMSs) with a domestic market share of about 58.5%. Oracle offered customers who joined its premier maintenance service the option to use the next version of its software at no additional cost, calling it the Complete Service Offering (CSO). The KFTC believed such CSO policy to be an anti-competitive tie-in scheme to sell the 'repair maintenance service' and the 'next version of DBMS software' to a counterparty (client company). However, on April 6, 2016, an en banc commission acquitted the case.

The key argument in this case was establishment of the tie-in, requiring the proof that the maintenance service market and major upgrade market were separate markets and recognized as separate products. On this point, the KFTC's economic analysis claimed that they could be considered separate products. But Oracle's economic analysis claimed that the proper market definition would be an integrated DBMS system market including licensing, maintenance service and upgraded versions of software considering the demand/supply characteristics and general market practices in the DBMS market. Hence, in an integrated DBMS system market, competition is carried out between systems rather than individual components, and as such, a tie-in could not be proved. The en-banc commission ruled that the maintenance service and major upgrades related to the CSO policy should be regarded as components of the DBMS system market and not as separate independent products and did not accept the claim of transfer of dominance through a tie-in. In addition, it also ruled that it was not proven that these policies had any anti-competitive effects of increasing prices, inhibiting competition or excluding competitors. This is a good example that show how KFTC decisions are based on appropriate economic theories and empirical evidence related to a case.

3. Court Judgments on the Market Definition of Cartels

Since the High Court and subsequent Supreme Court rulings in the 2010 cartel case of upscale imported car dealers ⁹, illegality of cartels ¹⁰ must be determined on analysis of the anti-competitive effects based on definition of the relevant market. In other words, to determine a collusive act illegal, the relevant market must be defined. In addition, the courts recommended the definition of relevant market to be based on the SSNIP standard (Small but Significant and Non-Transitory Increase in Price), as in the Lexus case, consistent with relevant market definition in abuse of market dominant position cases. The Supreme Court had maintained this position in the 2013 series of beverage cartel cases ¹¹. However, the courts have considerably relaxed such demands on strict market definition in recent judgments, including the 2014 bid-rigging case among producers and sellers of fertilizers. including Namhae Chemical ¹². In this case, the Supreme Court concluded that "when defining the relevant product market for collusive acts, empirical economic analysis cannot be required, and even if the defendant defines the relevant market without such analysis, the

Seoul High Court Judgment in Case No. 2009Nu1930 delivered on May 19, 2010 (Lexus); Seoul High Court Judgment in Case No. 2009Nu9873 delivered on July 22, 2010 (BMW).

Supreme Court Judgment in Case No. 2010Du11757 delivered on April 26, 2012 (Lexus). Supreme Court Judgment in Case No. 2010Du18703 delivered on April 26, 2012 (BMW).

^{11.} Supreme Court Judgment in Case No. 2013Du11829 delivered on April 11, 2013 (Lotte Chilsung Beverage), Supreme Court Judgment in Case No. 2011Du204 delivered on February 14, 2013 (Haitai Beverage), Supreme Court Judgment in Case No. 2010Du28939 delivered on February 14, 2013 (Woongjin Foods).

^{12.} Supreme Court Judgment in Case No. 2013Du24471 delivered on November 27, 2014.

validity of the market definition can be verified based on the type and the specific terms of the alleged collusive act, the deduced economic effect, and the general transactional reality of the goods or services that are the object of the collusive acts". This hard core cartel case can be regarded as a case that conforms to the economic theory that illegality can be found by minimum market definition. This trend was confirmed once again by the 2016 High Court judgment in the case of a cartel among six paper cup manufacturers (Seoul High Court 2015Nu30076 delivered on November 25, 2016). In this case, the court explained that empirical analysis for relevant market definition in relation to collusive acts cannot be demanded in every case when considering the diversity of collusive acts and the efficiency and coherence of regulations. These cases can be regarded to lead to the conclusion that anti-competitive effects can be proven by intuitive minimum market definition in the case of hardcore cartels that clearly limit competition.

PART II.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF INTELLECTUAL PROPERTY LAW OF KOREA

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PATENT LAW

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADEMARK LAW

CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COPYRIGHT LAW

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF KNOW-HOW AND TRADE SECRETS

CHAPTER5.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF UNFAIR COMPETITION

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PATENT LAW

CHUN Hayoun*

I. OVERVIEW

Regarding the Korean patent system, some critics has pointed out that patent rights are not fully protected since the rate of invalidating granted patents is high, and it is difficult to prove patent infringement and damages. In light of such criticism, the new Korean Patent Act effective as of June 30, 2016 introduced a court's order to submit materials, whereby the court may order the alleged infringer to submit materials necessary for proving infringement or damages.

The Korean Supreme Court ruled regarding the standard for determining inventiveness, that the technology which the applicant described as prior art in the specification or in a filing during the prosecution might not be recognized as prior art in case such description conflicted with other evidence, and ruled to provide a strict test for determining the scope of disclosure in the prior art. Korean Supreme Court appeared leaning toward not readily invalidating patents.

II. LEGISLATION AND POLICY DEVELOPMENTS

1. Material Submission Order

Article 132 of the new Korean Patent Act effective as of June 30, 2016 provides that,

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^{*} Attorney, Lee & Ko.

in a patent or exclusive license infringement action, the court may, upon request from one party, order the other party to submit materials necessary for proving the infringement or calculating the amount of losses caused by the infringement.

Before the revision pf the Korean Patent Act, the patentee in a patent infringement action could request that the court order the other party to submit documents relevant to patent infringement or damage according to a document submission order under the Korean Civil Procedure Act. Also, the former Korean Patent Act provided that the court may order upon request from the patentee that the alleged infringer submit documents necessary for calculating the amount of damages incurred by the patent infringement.

The above provisions in the Civil Procedure Act and Patent Act, however, apply only to documents, and thus, the court cannot order submission of materials other than documents. Further, in cases the alleged infringer does not comply with the order to submit documents on the grounds, for example, the documents contain trade secrets of the alleged infringer, the court cannot deem the infringement or damage amount to be proved, but can only deem that the patentee's arguments regarding the document is true.³

Article 132 of the new Patent Act provides that the court can order submission of material, rather than document. Thus, it is now possible that the court orders submission of non-document type material such as the infringing product or digital file.⁴ The alleged infringer may object to the order based on justifiable grounds, but, the fact that the material contain trade secrets cannot be a justifiable ground.⁵

The new law also enhanced penalties for non-compliance of such order. In case the alleged infringer does not comply with court's order to submit material without any justifiable grounds, the court may deem that patentee's argument regarding the content of the material is true. Further, in case it is difficult for the patentee to specifically state the content of the material and infringement or amount of damage cannot be proved without the ordered material, if the alleged infringer does not comply with the order, the court may deem that patentee's arguments regarding infringement or amount of damage is true.⁶

^{1.} Article 344 of the Korean Civil Procedure Act.

^{2.} Article 132 of the Korean Patent Act before revision.

^{3.} Article 349 of the Korean Civil Procedure Act.

^{4.} Article 132.1 of the Korean Patent Act.

^{5.} Article 132.2 of the Korean Patent Act.

^{6.} Article 132.5 of the Korean Patent Act.

This new law is opening a way for a patentee to enforce his right even in cases where it is difficult for a patentee to prove infringement or damages. However, it is at the court's discretion whether the court deems the patentee's arguments to be true in case the alleged infringer does not comply with court's order. Accordingly, the effectiveness of the new provision will depend on how the court handles and applies the provision.

2. Revision to Patent Act to become Effective in March 2017

The Korean Patent Act was further revised on February 29, 2016, and the revised act will become effective on March 1, 2017. Although this new law falls outside the scope of this article, major changes are briefly reviewed here as some of the changes are quite notable. First, the period for requesting examination of a patent application is shortened from 5 years to 3 years from the application date. Without requesting examination within the above period, the application is deemed to be withdrawn. Second, a request for patent transfer is introduced. Previously, in case an application is filed by a person who is not an inventor or its assignee, the application was rejected or invalidated if issued. Under this system, the legitimate inventor or its successor should file a new application to recover its right. According to the new law, the legitimate inventor (or its assignee) can file a lawsuit to request the transfer of the application or patent filed by unauthorized person to the legitimate inventor, without invalidating the patent. Lastly, patent cancellation proceeding will be available. Unlike an invalidation trial that can only be filed by an interested party, a cancellation proceeding can be brought by anyone. Further the proceeding is ex parte, unlike the invalidation trial which proceeds inter parte. The details will be covered in the next edition of this Annual Report after the revised act becomes effective.

III. MAJOR CASES

1. Determination of Scope of Disclosure in Prior Arts (Korean Supreme Court Judgment in Case No. 2013Hu2873, 2013Hu2880 (Consolidated) delivered on January 14, 2016)

In determining inventiveness, the claimed invention and the teaching of the prior art are compared. Thus, it is a prerequisite to determine what is taught or disclosed in the prior art. In this case, the issue was whether the inventiveness of a claimed invention could be negated based on one prior art reference when another reference provides inconsistent or conflicting

disclosure.

The invention at issue was a use invention relating to anesthetic effect of pregabalin. It was recognized by the court that the prior art reference submitted by the plaintiff disclosed that racemate⁷ of Pregabalin increases GABA (gamma-aminobutyric acid)⁸ level in brain, and it was known that increase in GABA level leads to anesthetic effect. Accordingly, the plaintiff argued that the claimed invention was readily derivable by those skilled in the art based on the teaching of the prior art reference and known relationship between GABA level and anesthetic effect.

On the other hand, the prior art reference explained that the relationship between pregabalin and increase in GABA level was not clearly proved by experiments. Specifically, according to the reference, in vitro experiment and in vivo experiment for mouse were conducted under the presumption that activating GAD enzyme leads to increase in GABA level, causing anticonvulsant effect. However, the correlation between GAD enzyme and increase in GABA level was not confirmed by the experiments, and rather, in vitro experiment and in vivo experiment exhibited conflicting results. Further, another prior art reference submitted described that activation of GAD enzyme has no or uncertain correlation with increase in GABA level or anticonvulsant effect, to cast doubt on the effect of activating GAD enzyme, which is the presumption of the main prior art reference.

The Korean Supreme court ruled that "in determining whether inventiveness should be denied based on a prior art reference, all matters reasonably recognizable by a person of ordinary skill in the technical fields to which the invention belongs (hereinafter, "a person of ordinary skill in the art") from the reference as a whole should be considered, not disclosures in a portion thereof; and if other prior art references contain disclosures that are inconsistent with, or renders unclear, the disclosures provided in a portion of the initially considered prior art reference, such additional disclosures should be comprehensively considered to determine whether a person of ordinary skill in the art could have easily derived the invention from prior art".

The Korean Supreme Court ruled that, when considering the main prior art reference and other references comprehensively, those skilled in the art would not admit the teaching

Material that has equal amounts of left- and right-handed enantiomers of a chiral molecule to have nullified enantiomer haracteristics.

^{8.} Inhibitory neurotransmitter in the mammalian central nervous system.

that pregabalin increases GABA level without any doubt, but would understand that the main prior art reference falsely concluded that GABA level was increased only based on the anticonvulsant effect found from in vivo experiment. Because the correlation between GABA level and anticonvulsant effect was doubted (in view of the teaching of the main reference and other references), the Korean Supreme Court found that, those skilled in art could not readily admit the uncertain statement of the main reference, and further considered the relationship between GABA level and anesthetic effect to derive the claimed invention.

According to the above ruling, even if a prior art reference has disclosure sufficient to negate inventiveness of a claimed invention, if there is another reference teaching conflicting or inconsistent facts, the inventiveness of the claimed invention may be recognized. Thus, a party challenging inventiveness may be additionally burdened to prove that the disclosure of a prior art reference is correct.

2. Interest of Right Protection in a Passive Scope Confirmation Trial (Korean Supreme Court Judgment in Case No. 2014Hu2849 delivered on September 30, 2016)

Scope confirmation trials are a procedure unique to Korean patent system. In a scope confirmation trial before by the Korean IP Trial and Appeal Board ("KIPTAB"), a patentee can seek a decision declaring that a product or method by an alleged infringer falls within the scope of his/her patent (in which case the trial is called "active (or positive) scope confirmation trial"), and an alleged infringer can seek a decision declaring that his/her product or method falls outside the scope of a patent (in which case the trial is called "passive (or negative) scope confirmation trial"). The scope confirmation trial is advantageous in that the proceeding is relatively simple since the validity of the patent at issue is not reviewed. A decision made by KIPTAB in a scope confirmation trial, however, does not bind the court that reviews a concurrent or following infringement action, and thus, it is not impossible that the court renders a decision that does not conform with KIPTAB's decision. This has casted a doubt on the effectiveness of scope confirmation trial. Nonetheless, scope confirmation is being widely used in practice for several reasons, including relatively simple and fast procedure, and technical expertise of trial examiners in KIPTAB.

A petitioner in a passive scope confirmation trial should specify the product or method to be compared with the patent at issue ("Invention for Confirmation"). In this regard, the Korean Supreme Court ruled that a product or method that the petitioner is practicing or will potentially practice can be the Invention for Confirmation. See Korean Supreme Court Judgment in Case No. 97Hu3241 delivered on November 14, 2000.

In the present case, the defendant (petitioner) brought a passive scope confirmation trial, and identified a product that the defendant planned to practice as the Invention for Confirmation, seeking a decision that the Invention for Confirmation does not fall within the scope of the patent at issue. However, the parties did not dispute the fact that the Invention for Confirmation fell outside the scope of the patent at issue. Specifically, the plaintiff (patentee) sent a warning letter and filed a criminal complaint in relation to a product that the defendant was practicing, but the plaintiff did not allege infringement against the Invention for Confirmation which the defendant planned to practice, and stated that the plaintiff would not do so in the future.

The Korean Supreme Court held that "a product that the petitioner is not practicing but plans to practice can be subject of a passive scope confirmation trial. However, in case the dispute between the parties is only related to the infringement by the product that the petitioner is currently practicing, and the parties do not dispute over the fact that the Invention for Confirmation, which the petitioner plans to practice, does not fall within the scope of the patent at issue, the passive scope confirmation trial for such Invention for Confirmation is not allowed because the interest of right protection in the petition cannot be recognized". The court ruled that the in case there is no dispute over whether the Invention for Confirmation fall within the scope of the patent at issue, the petitioner shall be dismissed for lack of interest of right protection.

It was settled law that a scope confirmation trial is allowed only when the interest of right protection is recognized. However, the past rulings of the Korean Supreme Court regarding interest of right protection were mostly focused on the issue of practice of the Invention for Confirmation, that is, whether or not the alleged infringer practices or plans to practice the Invention for Confirmation. In this case, the Korean Supreme Court did not recognize the interest of right protection when the Invention for Confirmation was practiced by the alleged infringer, because there was no dispute over the infringement between the parties. Previously, a petitioner often filed a passive scope confirmation trial to minimize the risk of potential patent infringement allegation even when the patentee did not enforce its patent. However, this judgment indicates that this type of trial will not be allowed, and thus, the usage of passive scope confirmation will be likely reduced.

3. Applicability of Defense of Free-to-Work Technology (Patent Court Judgment in Case No. 2015Heo4019 delivered on January 15, 2016)

Under the Korean patent law, the defense of free-to-work technology is one of the possible defenses available for an alleged infringer in a patent infringement action. The defense of free-to-work technology is a defense claiming that the technology practiced by the alleged infringer is identical to or readily derivable by those skilled in the art from the prior art. If the defense is accepted, the court determines non-infringement without comparing the accused technology with the patent at issue.

Previously, the Korean Supreme Court took the position that the court in a patent infringement action could not review the validity of the patent at issue because the validity of a patent should be determined in an invalidation trial before KIPTAB. Under this law, the defense of free-to-work was used for arguing non-infringement against a patent lacking novelty or inventiveness without directly reviewing the validity of the patent.

The above position, however, was changed in 2012 by an *en banc* decision by the Korean Supreme Court. The Korean Supreme Court ruled that the court can review the validity of a patent in a patent infringement action, and if the court considers the patent invalid, then the court shall dismiss the infringement action because the action is misuse of a patent right. Since the court can review the validity of a patent, the defense of free-to-work technology, which was used as an alternative to the defense of invalidity, lost its significance. However, without a clear decision by the Korean Supreme Court, the applicability of the defense of free-to-use technology was not clear.

In this case, the Patent Court ruled that "the purpose of the defense of free-to-work technology (if the technology practiced by the alleged infringer is identical to or readily derivable by those skilled in the art from the prior art, then the technology does not fall within the scope of the paten at issue) is to limit a patent right from expanding to cover technology that could not be patented at the time of application. Thus, the defense cannot be applied when the alleged product includes all of the elements of the claimed invention as listed in the scope of application, and thus, literal infringement is found".

Under the ruling, the Patent Court rejected the defense of free-to-work technology raised by the defendant without reviewing if the alleged product is identical to or readily derivable from the prior art. The Patent Court clarified that the defense of free-to-work technology cannot be raised as a general defense in a patent infringement action, but is applicable only as a defense for limiting the doctrine of equivalence. The Korean Supreme Court has adopted the defense as one of factors for limiting the application of doctrine of equivalence. See Korean Supreme Court Judgment in Case No. 99Hu522 delivered on August 21, 2001. Accordingly, if this decision is upheld by the Korean Supreme Court, the defense of free-to-work technology will lose its significance. An appeal is pending before the Korean Supreme Court, and developments are being observed.

4. Whether an Element Recited in a Preamble of a Claim is Deemed to be a Prior Art (Korean Supreme Court en banc Judgment in Case No. 2013Hu37 delivered on January 19, 2017)

Typically, a specification of a patent includes description of the prior art. Also, it is one way of claim drafting to recite the prior art in a preamble, followed by the characteristic features using the expression "characterized in that". Regarding this type of description, the Korean Supreme Court previously ruled that the technology described in the specification as the prior art is deemed to be the prior art, and can be used as a basis for determining patentability of the claimed invention. See Korean Supreme Court Judgment in Case No. 2004Hu2031 delivered on December 23, 2005.

In this case, in response to the rejection by an examiner during the prosecution, the patentee amended the claims by way of adding certain elements to the preamble of a claim. In the remarks submitted together with the amendment, the patentee explained that certain well-known elements were recited in the preamble in the amended claims. Based on the above prosecution history, the plaintiff argued that the elements recited in the preamble is the prior art, and challenge the inventiveness of the claimed invention.

The Patent Court, however, did not accept the plaintiff's argument and determined that the elements could not be deemed as the prior art only based on the remarks submitted during the prosecution. Rather, based on the evidence submitted by the parties, the Patent Court found that the patentee mistakenly considered the elements were well-known because the elements were described in an application which was filed but not published before the application date of the patent at issue, and the inventiveness of the claimed invention was recognized by Patent Court.

The Korean Supreme Court held "whether an element recited in a claim falls within the scope of prior art is a matter of fact, and the burden of proving the above is borne by the party who challenges the novelty or inventiveness of the claimed invention. Hence, principally, the above fact should be determined based on evidence unless it is admitted by the patentee or clear to the court". Accordingly, "the elements recited in the preamble may be presumed to fall within the scope of the prior art without evidence if and only if the applicant recited the element in the preamble for indicating that the elements were not only background or conventional technology, but also the well-known prior art in view of the entire content of the specification and the prosecution history. This presumption, however, is not conclusive, and may be overturned under certain circumstances, for example, in cases where it is found that that the technology was proprietary technology or described in a patent application yet to be published at the time of application but mistakenly described as disclosed technology".

Under the such law, the Korean Supreme Court upheld the Patent Court's finding based on evidence that the applicant mistakenly described the elements as disclosed technology, and the elements recited in the preamble does not fall within the scope of the prior art.

In this case, the Korean Supreme Court clearly ruled that the issue of whether an element falls within the scope of the prior art is matter of fact, and presented a standard for determining the issue according to general principle of burden of proof under the civil procedure law. Since the issue of whether an element falls within the scope of the prior art is matter of fact, it should be proved by evidence. It is possible to presume that the element is prior art in view of indirect facts such as remarks submitted during the prosecution and description in the specification. However, the presumption is not legal presumption, but a de facto presumption, according to the Korean Supreme Court.

Under the Korean law, there are two types of presumption, namely, legal presumption which is made according to the statute of the law, and de facto presumption, which is made according to logic and experience. The former can be overturned when the conflicting fact is proved by evidence, while the latter can be overturned by evidence that render the presumption doubted. Accordingly, the presumption that an element falls within the scope of the prior art can be overturned without proving the conflicting fact – the element was not known at the time of application – if any fact rendering the presumption doubted is submitted. In this case, the Korean Supreme Court first presumed that the elements recited in the preamble fall within the scope of the prior art based on the remarks submitted during the

prosecution. However, other evidence (i.e., an application that was filed but not published at the time of application of the patent at issue) showed that the applicant mistook that the elements, which were described in the unpublished application were published. The presumption was overturned by a fact that casts doubts on the presumption, and thus, the issue remained unproved. Accordingly, the Korean Supreme Court ruled against the party who bore the burden of proving the issue (i.e., the party challenging the validity of the patent), and recognized the inventiveness of the claimed invention.

This decision clarified that an element cannot be deemed to fall within the scope of the prior art based on the fact that the element is recited in the preamble per se, and that this issue needed proof by evidence. This case is meaningful in that Korean Supreme Court reached this decision based on general principle regarding legal presumption and de facto presumption. Now, it is strictly required that a party who challenges the validity of a claimed invention needs to prove that the elements of claimed invention were indicated by the prior art with evidence.

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADEMARK LAW

KIM Won-oh*

I. OVERVIEW

1. Legislative Amendments

A full-scale revision of the revised Trademark Act has taken effect since September 1, 2016 (Act No. 14033, announced on February 29, 2016). While the main provisions of the revised Trademark Act have been introduced in the last edition of this Annual Report, there are significant revisions that were not adopted or amended in the final stages of review. In addition, prior to the enforcement of the revised Act, supplementary regulations and guidelines such as the Presidential Enforcement Decree No. 27331 (revised on July 12, 2016), the Ministry of Industry and Commerce Enforcement Ordinance No. 213 and the KIPO Rule No. 90 Trademark Review Guidelines were established. Since it is necessary to pay attention to the transitional provisions that apply to the new law, this section will discuss the revised Trademark Act with a focus on fifteen main provisions.

2. Major Cases

There were no groundbreaking rulings in the Supreme Court in the field of trademark law in 2016, but some significant cases are the following: 1) a case focused on whether the words 'Alba' (meaning "part-time job") and 'Heaven' combined could constitute a descriptive mark signifying an 'ideal working environment' (Case No. 2015Hu1911); 2) a case implementing "reasonable reasons" in the context of regulation of unfair registration

^{*} Professor, Inha University Law School.

of similar trademarks by a domestic representative of a trademark holder of a treaty country (2016Hu717); 3) a case concerning application of statutory damages under the Trademark Act (2014Da59712); and 4) a case concerning cancellation of a registered trademark due to unauthorized use of an unregistered trademark (2016Hu663). In addition, there were several Supreme Court judgments that ruled on the similarity of trademarks and the point of judgment (timewise) concerning cases of prior registration of a trademark.

II. LEGISLATION AND POLICY DEVELOPMENT

1. Revised Points of Trademark Act Enacted in September 1, 2016

(1) Integration of Service Mark into Trademark

The Revised Act simplified the definition of trademark from the former Trademark Act Article 2 to "a mark that distinguishes one's good from another's good". 'Good' here includes services except for geographical indication goods, which means service marks have been integrated into trademarks. Also, 'mark' was separated and defined as "a sign, shape, sound, smell, three-dimensional shape or any other mark that is used to express the source of the good, regardless of the form of the expression". In Article 2 of the Enforcement Decree (Classification of Marks), three types of marks are specified. The existing service mark and trademark combined application check box is deleted from the trademark registration application section of the Enforcement Regulation No. 3. In addition, the conversion of an application between the two is not available anymore. However, in the transitional provision, conversion of application before September 1, 2016 is permitted. Meanwhile, in the case of application for additional registration of a class of good, it is now possible to add class of good or service industry from September 1, 2016, because restriction on an addition of a product due to the division of rights has been eliminated.

(2) Prohibition of Duplicate Registrations of Trademark of Certification Mark: Article 3.4 and 3.5 (Who is Qualified to Obtain a Registered Trademark)

① Traditionally, 'a person who has applied for or registered a trademark, collective

^{1.} Article 2 of the Trademark Act (Classification of Marks)

Marks under Article 2.1.2 of the Trademark Act (hereinafter referred to as the "Act") shall be classified as follows:

A sign, word, numeral, figure, design, three-dimensional form, combination of these elements, or each of these elements with color added;

^{2.} Visually perceivable marks, such as a single color, combination of colors, hologram or continuous movement, etc.;

^{3.} Visually imperceivable marks, such as sound or smell.

mark or a business mark (hereinafter, the "trademark") could not be registered as a "certification mark" only for identical or similar class of goods. However, the revised act strengthened duplicate registration regulations so that identical or similar marks could not be registered as 'certification marks' regardless of class of good (Clause 4).

② In the same context, 'a person who has applied for or registered a certification mark' shall not be allowed to register the trademark regardless of the class of good (Clause 5). This regulation applies to application of trademarks from September 1, 2016.

(3) The Extension of Correction Period and Request for Patent Trial for Opposition: Article 17.1 (Extension of Period, etc.)

In the past, only people who resided in places that are remote or difficult of access were provided an opportunity for extension within 30 days. However, the revised law allows anyone to apply for a 30-day extension. For people who reside in places with difficult access, an additional extension is allowed if it is within 30 days. This regulation applies to application of trademarks from September 1, 2016.

(4) Extension of Revocation Period for Invalidation: Article 18.2 (Invalidation of Procedure)

Previously, in cases where a procedure was proved to be null and void, and if the case was deemed to be caused by a cause for which the defendant could not be held liable, an invalidation could be cancelled within 14 days from the date the cause had extinguished. Now, the period has been extended to within 2 months of such extinguishment. This new law applies for cases in which the cause has not extinguished for more than 2 months starting September 1, 2016

(5) Removal of the Provision that any Trademark for which One Year has not yet Elapsed after the Date the Trademark Rights Have Extinguished shall not be Registered

In accordance with of Article 7.1.8 and Article 7.1.8.2 of the former Trademark Act, if the application of an identical or similar trademark is filed by another person within one year after the termination of the trademark right, the registration was denied in principle. However, such regulation has been removed. Accordingly, the choices for latter users of a trademark have been expanded. The application of this provision is beneficial to the applicant. Therefore, even if it is an application for the registration of trademark prior to the enforcement of the Act in September 1, 2016, the new law shall be applied even if a trademark registration decision is made after enforcement in September 1, 2016.

(6) Revision to the Prohibition of Trademark Application Registration without the Consent of the Trademark Owner of a Treaty Country: Article 34.1.21²

This provision, which is based on Article 6.7 of the Paris Convention, rejected applications only when there was an objection filed or information provided in cases of a "domestic illegal application by an agent or representative of a person who has a right to a trademark registered in a treaty country". If there was an error in registration, a trial for cancellation of trademark registration could be requested within five years. The revised law extends the applicant to those who may violate fiduciary duties, such as those in a contractual or business relationships with the plaintiff (partnerships or employment, etc.) and clearly excludes the registration of a domestic trademark application in such cases categorizing such grounds as a ground to deny trademark registration. In cases of registration by error, trademark is invalidated rather than cancelled as previously (Article 117 of the Law). This regulation applies to application of trademarks from September 1, 2016.

(7) Change of the Time of Judgment of a Trademark that cannot be Registered: Article 34.1.7

In the past, the time of judgment as to if the trademark was in conflict with the registered trademark was based on the time of application. Therefore, if a similar cited trademark registration trademark existed at the time of application of a subsequent trademark application, the trademark was rejected even if the cited trademark had expired at the time of registration. However, in the revised law, the time for judging if a trademark conflicts with the registered trademark has been changed from the time of application to registration. Accordingly, if the registered cited trademark had existed at the time of application but was extinguished at the time of registration, it becomes possible to register the conflicting subsequent application. It shall be noted that this regulation applies to the application of trademarks from September 1, 2016.

(8) Addition of a Category that does not Constitute a Change of Subject Matter: (Amendments before the Decision of Publication of an Application): Article 40.2.5

In the past, when an amendment had been made before a decision on publication of

^{2.} Article 34 of the Trademark Act (Trademarks Ineligible for Trademark Registration)
Any trademark for the registration of which any person who has or had a contractual relationship, such as partnership or employment, business contractual relationship, or any other relationship with a person who holds the right to the trademark registered, which is identical or similar to the trademark registered in a State party to the treaty, applies on goods by designating goods identical or similar to the goods on which the trademark is designated as the designated goods without the consent of the person who holds the right to the trademark.

application, the following categories of amendments were not considered a change of subject matter: ① reduction of the scope of the class of good ② correction of errors ③ clarification of ambiguous expression ④ deletion of the appending portion of the trademark. The revised law added the description of a mark under Article 36.2 and other categories to be prescribed by the Ordinance of the Ministry of Trade to such category (Article 33 of the Enforcement Regulation³). As the scope of objects subject to change of subject matter has been reduced, amendments can be made more easily, making it more convenient for applicants. This regulation applies to application of trademarks from September 1, 2016.

(9) Obligation to Submit an Amendment of Articles of Association for Collective Marks and Certification Marks: Article 43 (Submission of Amended Articles of Association, etc.)

In the past, when an applicant changed the articles of association, the obligation to submit such amendments was voluntary. The revised law requires a compulsory submission of amendments for collective marks and certification marks. This regulation applies to any amendments made after September 1, 2016.

(10) Expansion of Scope of Amendment Ex Officio: Article 59 (Amendment Ex Officio, etc.)

In the past, when an examiner made a decision of publication of application, an ex officio amendment was possible only for designations of class or good. However, under the revised law, the scope of ex officio amendments has been expanded to include 'general matters' if an item on the application for registration of trademark is obviously wrong. Such amendments made ex officio are notified to the applicant, and if the applicant does not accept it, he may submit a written statement to the commissioner of KIPO. The revised law specifies that the effect of such submission of written statement is to nullify the ex officio amendment and revoke the decision of publication of application. If a decision of publication of application is cancelled, the applicant is notified. If it remains cancelled after a filing of appeal, the appeal is dismissed and the filing fees for the appeal are refunded. This regulation

^{3.} Article 33 of the Enforcement Rules of the Trademark Act (Not Considered a Change of Subject Matter), In Article 40.2.5, the Trademark Act lists the following as those categories that satisfy "description of a mark under Article 36.2 or other categories prescribed by Ordinance of the Ministry of Trade, Industry and Energy";

 $^{1. \} modifying \ the \ description \ of \ the \ mark \ under \ Article \ 36.2$

^{2.} correction when more than one drawing or photograph does not match, or when modifying or replacing e a drawing or photograph that is not sharp

^{3.} Modifying or replacing smell samples or sound files that do not match the visual representation for visual presentation

^{4.} When subdividing a comprehensive name into specific names that are included in the name (This includes the case of subdividing while leaving the comprehensive name as is).

applies to the application of trademarks effective September 1, 2016.

(11) Extension of Grace Period for Application and Registration: Article 77 (Restoration of Trademark Registration Application by Paying or Preserving Trademark Registration Fees)

The grace periods (and additional payment period) for failure to comply with trademark procedures was 14 days and failure to make payment by registration fee payment deadlines was 6 months. The revised law extends the grace period for failure to comply to two months, and extends the deadline for additional payment to one year, minimizing unreasonable loss of trademark rights against a trademark owner's intention. This regulation applies if less than two months has elapsed when there is a failure to comply, or one year when an additional payment has elapsed prior to September 1, 2016 (Article 6 of the Supplementary Rules).

(12) Registration Notice in a Trademark Notice: Establishment of Article 82.3

In the past, only a notice of filing was filed but the new law requires a registration notice including the name of the trademark owner (recommendations by Article 14 of the Enforcement Decree) to be published in the Trademark Public Report to announce a trademark registration when registered. The registration notice posted in the Trademark Public Report includes the mark, designated product, trademark registration number, trademark registration date, and priority claim under the treaty, etc. This regulation applies to registrations of trademark after the enforcement of such provision, from September 1, 2016.

(13) Improvement of the Reasons for Limitation of Validity of Trademark Rights: Article 90.1 (Scope of Effectiveness)

In the past, it was necessary to indicate the name or trade name, etc., in a 'normally used manner' so that other similar pre-registered trademarks would not affect one's own use and such use would not constitute a trademark infringement. But interpretation of a 'normally used method' was unclear. Accordingly, the revised Trademark Act amended the terms and expressions of this provision to clarify that trademark rights are not effective if their names, trade names, etc., are used in accordance with commercial practices. This regulation applies to trademarks applied for after September 1, 2016 as grounds to limit its effectiveness.

(14) Revision of the Non-Use Cancellation Decision System: Article 119.5 and Article 119.6 (Cancellation of Trademark Registration)

The revised law makes it possible for the non-use cancellation system (which supplements blind spots of the registration system) to fulfill its function: (i) Article 119.5

allows anyone to apply for non-use cancellation in contrast to the previous system in which only interested parties could apply, and (ii) under Article 119.6 of the revised law, if judgment of a cancellation order is confirmed, the trademark is deemed to have expired as of the date such cancellation was applied for rather than the date the cancellation order was confirmed so that the applicant for cancellation can register a trademark identical or similar to the expired trademark more easily. However, an amendment to presume that use of a trademark within 3 months of a non-use cancellation application a nominal use to avoid cancellation and not acknowledge it as legitimate was deleted in the final review process. This regulation applies to cases in which non-use cancellation has been applied for after September 1, 2016.

(15) Establishment of Application for Confirmation of Scope of Rights for Designated Products: Article 121 (Confirmation of Scope of Rights)

Under the previous law, when a registered trademark consisted of various products, there was an unreasonable requirement to pay a total fee for the whole category even if an application was filed for certain designated products in a confirmation of scope of rights proceeding. Under the revised law, when applying only for confirmation concerning certain designated products, provisions to calculate the application fee for each designated product has been provided. This regulation applies to cases in which an application of confirmation of the scope of rights has been filed for after September 1, 2016.

III. MAJOR CASES

1. Criteria for Identifying Characteristics for a Trademark (the Alba Paradise case: Supreme Court Judgment in Case No.2015Hu1911 delivered on January 14, 2016)

(1) Issue and Ruling

This case concerned whether the words 'Alba' (meaning "part-time job") and 'Heaven' combined could constitute a characteristic-identifying mark of 'Alba Heaven' (implying an 'ideal working environment') to provide designated services in employment introduction, placement and information.

The Supreme Court upheld the judgment of the Patent Court (which cancelled the holding of the Patent Tribunal that regarded 'Alba Paradise' to constitute a characteristic-

identifying mark) by ruling that "under Article 6.1.3 of the former Trademark Act (prior to the whole revision by Law No. 14033) whether a trademark constitutes a technical trademark is determined objectively in consideration of the concept of the trademark, relationship with the designated product and reality of transactions. If a general consumer cannot recognize the indication of the basic quality, function and use of the designated product when taking the mark as a whole, it cannot be seen to satisfy such criteria in cases where the quality, function and use of the designated product is implied or emphasized. When considering this principle in the context of the designated service, the combination of two words to signify an 'ideal working environment' cannot be found a direct indication of its designated services to a general consumer giving an implication that it provides placement services and related information".

(2) Analysis

This case is a judgment reaffirming criteria to determine whether a trademark can be considered a property-indicating mark under Article 6.1.3 of the Trademark Act. Traditionally, one must consider the 'trademark's concept, relationship with the designated product and transactional realities, etc.', in an objective manner⁴ but a consumer must be able to intuitively identify it as a property-identifying mark based on the designated product for it to be considered a technical trademark⁵. However, the boundaries between technical and implicit trademarks are blurry in specific application and determinations are not easy to make. In this case, the Patent Office and the Patent Tribunal viewed the term 'Alba Paradise' as a technical term intuitively referring to a place where part-time work is introduced and related information is provided. But the Patent Court and the Supreme Court considered the term to give an inference of but not a direct indication of the characteristics of the designated service by indicating to general consumers that it provides 'part-time work introduction, placement, and related information'.

2. Interpretation of the Requirements for Prohibition of Trademark Application Registration without the Consent of the Trademark Owner of a Treaty Country (Supreme Court Judgment in Case No. 2016Hu717 (consolidated cases) delivered on July 27, 2016)

See Supreme Court Judgment in Case No. 99Hu2440 delivered on February 22, 2000; 2002Hu1140 delivered on August 16, 2004 etc.

^{5.} See Supreme Court Judgment in Case No. 2007Hu555 delivered on June 1, 2007, etc.

(1) Issue

In this case, the plaintiff filed for cancellation of trademark registration based on Article 73.1.7 of the Former Trademark Act, concerning a trademark registered by the plaintiff while he was serving as the representative director of the defendant's Korean branch. Article 23.1.3 states that for a trademark registered in a Treaty Country or a trademark similar to such trademark, "when a representative, an agent of the trademark holder, or a representative or agent of a trademark holder within 1 year of applying for trademark registration (hereinafter, referred to as the "Agent") does not obtain the consent of such trademark holder or without justifiable reason applies for trademark registration of a designated product that is identical or similar to the designated product of such trademark, the trademark registration may be cancelled".

The Supreme Court held that 'in the light of the legislative intent of this regulation to establish fair international trade order by strengthening the protection for trademark holders of a treaty country' justifiable reason 'does not only exist in cases where a trademark holder expressly agrees to a trademark application by an Agent, but also when there is implied consent or when such application could be considered to not harm fair international trade order (when a trademark holder has abandoned the trademark or when made others believe that he had no intention of acquiring rights in Korea) even when a trademark or similar trademark application is filed'.

(2) Analysis

In the case of trademarks with global reach, trademark rights arise only when individually registered in each country in accordance with territorial principles, but sometimes registration is preempted by agents and representatives (such as sales agents) in a country. In such cases, disputes arise over who possesses the trademark if there is no clear contractual relationship between the parties. In these cases, if territorial principles are respected, it would be difficult to protect the rights of a trademark holder but exemptions have been allowed to protect persons from unfair registration by agents. Such exemption is provided by Article 6.7 of the 'Paris Convention for the Protection of Industrial Property Rights' and Korean law has incorporated this by listing it as a ground to object to a registration under Article 23.1.3 and a ground to cancel a registration (even if already registered) under Article 73.1 of the Former Trademark Act.⁶

This has been amended as Article 34.1.21 (Trademarks Ineligible for Trademark Registration) and Article 117.1.1 (Trial to Invalidate Trademark Registration) under the current Trademark Act. See footnote 22.

This ruling held that 'justifiable reason' under Article 23.1.3 of the Former Trademark Act could encompass express and implicit consent of a trademark holder, and[even?] when a trademark holder gave up his rights or showed to the agent that he had no intention of acquiring a trademark in the country. The court found it difficult to find that the defendant expressly or implicitly consented to the trademark application at the time of application nor that there was a justifiable reason for the trademark application. Hence, the court affirmed the judgment of the lower court and rejected the appeal.

3. Cancellation of Registered Trademark due to Illegal Use of Unregistered Trademark (Supreme Court Judgment in Case No. 2016Hu663 delivered on August 18, 2016)

(1) Facts and Main Issue

Discovery A foreign company using trademarks Siscovery filed a cancellation of registration lawsuit against the owner of the registered trademark **DICOVERY**, stating that the defendant's use falls under Article 73.1.2 of the former Trademark Act. The Plaintiff Company had been using its trademark since July 2012 on clothing items. The defendant company had been using the registered trademark along DICOVERY since January 2013 on with other trademarks **NCOVERY**, **NET** clothing items. Among them, the defendant then applied for a trademark relatively less similar to the plaintiff's trademark on March 27, 2013 and registered such trademark as of October 15, 2014. The plaintiff's trademark was widely recognized in Korea at the time of the defendant's registration, and the defendant continued to use the used trademarks even after registration of its trademarks. The court ruled that the combined use of trademark with the defendant's used trademarks led to a greater likelihood that a consumer would confuse or be misled about the origin of products in comparison to using only its registered trademark. This would constitute use of a similar trademark under Article 73.1.2 of the former Trademark Act which would be a cause to cancel the registration of the defendant's registered trademark. The court affirmed the judgment of the lower court.

(2) Analysis

Article 73.1.2 of the former Trademark Act stipulates terms of registration cancellation due to the unauthorized use.⁷ It prohibits a trademark owner from intentionally altering his trademark to expand it beyond its legal use to protect the interests of parties in transaction

^{7.} Article 119.1 of the Trademark Act.

and consumers as well as protecting the credit and interests of the owner of the branded trademark. Considering such legislative intent, if a trademark owner uses a plurality of similar trademarks in combination, only registers a portion of the trademarks, and then continues to use the unregistered trademarks so that a consumer is more likely to confuse or be misled about the origin of products in comparison to using only its registered trademark (as in this case), this use is deemed to meet the cancellation requirements. Such interpretation of the Supreme Court is read to affirm that the criteria to determine use within a similar scope for a registered trademark depends on whether the use of the used trademark causes source confusion with the registered trademark.

4. Interpretation of Application of Criteria for Statutory Damages under the Trademark Act (Supreme Court Judgment in Case No. 2014Da59712, 59729 (Consolidated) delivered on September 30, 2016)

(1) Facts and Main Issue

This ruling concerns the interpretation of regulations for damage claims caused by infringement of trademark rights. The following are the main criteria in determining whether damages may be claimed under Article 67.2.1 of the former Trademark Act: [1] whether the trademark owner is required to assert and prove the occurrence of infringement and specific damages other than ordinary fees, [2] whether the infringer can avoid damage liability by asserting and proving that no damages occurred to the trademark owner, and [3] whether an infringer can prove that no damages occurred because the trademark owner had registered the trademark but did not actually use it. Concerning Issue [3], the Supreme Court ruled that one may claim estimated damages up to KRW 50 million instead of claiming for damages under Article 67. In these cases, the court held that estimated damages can be acknowledged based on arguments and evidence, because in some cases (such as use of counterfeit trademarks) proving the amount of damages is difficult. Hence, statutory damages up to a fixed limit should be available to provide relief to victims but are an exception which should be interpreted strictly as stipulated in law. Therefore, the court held that for a trademark owner to claim damages under this provision, the trademark owner must have actually used the registered trademark at the time of infringement, the trademark used by the infringer must be identical or have identical elements to the registered trademark of the trademark owner, and if there are no identical elements, damages must be claimed and proved by normal methods and not as statutory damages as discussed above.

(2) Analysis

This ruling dealt with several issues regarding the filing and calculation of damages in a trademark infringement case. The discussion in this chapter focused on the holding regarding statutory damages as it was the first Supreme Court Judgment on the interpretation of criteria for statutory damages to apply. Provisions regarding statutory damages were enacted as a revision of the Trademark Act and introduced through the implementation of the KORUS FTA in 2007. Regarding statutory damages, Article 67.2.1 of the former Trademark Act⁸ stipulated that it applies to ".... use of a trademark identical to a registered trademark on an identical product", distinguishing it from application of trademark infringement in general trademark cases. In these cases, first, the trademark owner can make claims only based on a trademark that the trademark owner is currently using, and second, application is limited to counterfeiting cases where trademarks that are identical to a registered trademark are used. This is because our statutory damages system was introduced by accepting US demands in KORUS FTA negotiations, and was modeled on the statutory damages system of US federal trademark laws. Understanding the legislative background and intent of such provisions, the Supreme Court made clear that statutory damages could not apply to general cases of trademark infringement, including cases involving scope of similarity.

^{8.} Article 111.1 of the Trademark Act.

The statutory damages system of US applies to counterfeit marks that a spurious designation is identical with, or substantially indistinguishable from infringed trademarks.

CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COPYRIGHT LAW

CHO Yong Sig*

I. OVERVIEW

The Copyright Act revised as of September 23, 2016 provided the grounds and operative provisions for the establishment of the Korea Copyright Protection Agency. The Korea Copyright Protection Agency has established a copyright protection review committee to deal with orders to disclose the identity of a copyright infringer and reviews of corrective orders and recommendations efficiently by a consolidated agency, independent of the Korea Copyright Commission. In addition, the revised law stipulates that digital music is included in the definition of 'records' and clarified the definition of 'records for sale' as 'records publicly released for commercial purposes (commercial records)', dealing with the confusion regarding digital sound sources transmitted by streaming methods with legislative measures.

As systems to protect the rights of the copyright holders have recently been strengthened, cases planned and brought in anticipation of "settlement funds" have increased. But there was a ruling that such devised lawsuits are illegal as they are contrary to the nature and legislative intent of the Civil Procedure Act. In addition, a court ruled that a UCC website (in which the users of the website create and modify its contents directly), falls under the definition of "database" protected by the Copyright Act.

II. LEGISLATION AND POLICY DEVELOPMENTS

^{*} Managing Partner, Darae Law.

1. The Amended Copyright Act [enforced on September 23, 2016]. [Law No. 14083, Partially Amended March 2016]

(1) The Korea Copyright Protection Agency

The Korea Copyright Protection Agency (the "Copyright Protection Agency") was established to protect copyrights according the amended Copyright Act [enforced on September 23, 2016]. The government supports expenses necessary for the establishment, facilities and operation of the Copyright Protection Agency. The Copyright Protection Agency has established a copyright protection review committee to review orders to disclose the identity of copyright infringers (Article 103.3 of the Copyright Act), corrective orders (Article 133.2 of the Copyright Act) and correction recommendations (Article 133.3 of the Copyright Act).

A corrective order is issued by the Minister of Culture and Tourism to online service providers to ① give warnings to copyright infringers, ② the deletion or suspension of transmission of illegal copies, ③ suspend the accounts of repeat infringers, and ④ stop all or part of bulletin board services (Article 133.2 of the Copyright Act). The Minister of Culture, Sports and Tourism needs to conduct a review by the review committee to issue such orders. A corrective recommendation is issued by the review committee to online service providers to take the measures ①, ② and ③ above (Article 133.3 of the Copyright Act). An account suspension order is issued for infringers who have received three or more warnings, and a bulletin board service suspension order is issued for a bulletin board that receives three or more illegal copy deletion/suspension orders.

The step-by-step countermeasures system that is included in the corrective order/recommendation system ultimately seeks to stop the infringement of an infringer who has been warned. If the infringement continues despite the warning, certain measures will be taken within the system, and if the infringement continues, remedies by the Copyright Act should be actively applied.

(2) Revision of the Definition of 'Record'

The former "Copyright Act" stipulated that a "record for sale" could be played without paying royalties, except when played in certain large stores. However, there has been controversy about what is a 'record for sale' because the distribution and usage of music has changed due to technological change (e.g., CD, tape purchases → digital streaming service). This is because if the act of playing music in a store is considered playing a 'record for sale',

it can be freely used without paying any royalties (unless it falls under an exception). But if it is not considered a 'record for sale', the user of record must obtain the copyright holder's permission and pay royalties.

The revised Copyright Act [enforced on September 23, 2016] [Law No. 14083, Partially Amended March 22, 2016], stipulates that "digital music" is included in the definition of a "record" and clearly defined a "record for sale" as a "record publicly released for commercial purposes (commercial record)". A commercial record means a record which has been publicly released to sell a record to the public or to obtain indirect benefits related to the sale of the record.

[Supreme Court Cases]

① Supreme Court Judgment in Case No. 2010Da87474 delivered on May 10, 2012 (the "Starbucks" case)

In relation to Article 29.2 of the Copyright Act, while considering a 'record' to be a tangible CD, the Supreme Court limited the meaning of 'record for sale' to records that are produced for sale to the public.

② Supreme Court Judgment in Case No. 2013Da219616 delivered on December 10, 2015 (the "Hyundai Department Store" case)

In relation to Article 76.2 of the Copyright Act, the Supreme Court ruled that a 'record for sale' includes not only records produced for sale to an unspecified public but also any form of record that is provided for a transaction through sales.

③ Supreme Court Case No. 2016Da204653 delivered on August 24, 2016 (the "Himart" case) In relation to Article 29.2 of the Copyright Act, the Supreme Court limited the meaning of the term 'record for sale' to records made for sale to the public.

2. The Next-Generation Intellectual Property Special Expert Committee

The most prominent issue in 2016 was the Chinese chess match between Google's artificial intelligence (AI) and professional Chinese chess player Lee Sedol. Much interest was drawn on the issue of whether artificial intelligence had developed beyond the scope of 'statistics' to a level of 'creativity' based on big data (previously believed to uniquely human trait). In this regard, academia has started to discuss who can be considered the copyright holder of creations of artificial intelligence and whether such creations can be considered

copyrighted work.1

The Ministry of Science, ICT and Future Planning has set up a 'Next-Generation Intellectual Property Special Expert Committee' at the National Intellectual Property Committee to analyze issues and develop and execute strategies to respond to future disputes over intellectual property from legal and technological perspectives.

III. MAJOR CASES

1. Regarding a Planned Lawsuit (the so-called "Settlement Money Lawsuits") (Incheon District Court Judgment in Case No. 2016GaHab51899 delivered on April 1, 2016)

(1) Facts

The plaintiffs, copyright holders of fictional work, filed suit against 116 defendants who copied and transmitted their work by torrent without permission. After the plaintiffs filed and served the 116 defendants, the petitioner individually contacted the defendants and agreed to drop the case against 60 defendants.

(2) Main Points of the Ruling

The court ruled that this case was a planned lawsuit (a so-called "settlement money lawsuit") as it targeted dozens of unspecified minors. The court found that the plaintiffs' filing of a joint lawsuit against defendants who have no relation to each other would be considered a so-called settlement money lawsuit and unlawful according to the essence and intent of Article 65 of the Civil Procedure Act. The court proceeded to dismiss the case citing that it would be reasonable for a case asking for KRW 5 million from each defendant to be dealt with in a simple and prompt procedure in accordance with the Small Claims Judgment Act.

(3) Analysis

Incheon District Court Judgment in Case No. 4. 1. 2014GaHab51967 (finalized) and Incheon District Court Judgment in Case No. 2013GaHab20850 (finalized) provided

LEE Sang Mi, "Who is the copyright owner of Artificial Intelligence-generated works?", Hannam Journal of Law & Technology 2016, Vol. 22, No. 3, pp. 241-294.

the same reasoning in their cases. In these cases, the courts recognized the right to claim damages from plaintiffs who are copyright agents. The court ruled that although the right of the copyright owner should be protected according to provisions of the Copyright Act and the Civil Procedure Act, lawsuits filed exclusively for "settlement money" are against the essence and purpose of the Civil Procedure Act.

2. Criteria to Determine the Copyright Holder of a Record under the Former Copyright Act (Supreme Court Judgment in Case No. 2013Da56167 delivered on April 28, 2016)

(1) Issue

The plaintiff had been involved in producing music by writing the lyrics, composing and arranging music, and personally singing or playing music in the recording process for approximately 45 records (hereinafter, the "records"). The plaintiff filed suit to confirm that all neighboring rights to a copyright such as reproduction rights, distribution rights, lending rights and transmission rights are not held by the defendant. The defendant claimed that he had procured all rights to the record from seller A who had provided the funds necessary for the record production and sold the completed record.

All 45 records (master records) in question in this case were produced from around 1968 and prior to July 1, 1987 (the effective date of the wholly-revised Copyright Act (Law No. 3916)). Hence, as the former Copyright Act (Law No. 432) applied, the main issue was how to determine the proper copyright holder for a record (treated as copyrighted work) according the former Copyright Act.

(2) Main Points of the Ruling

The Supreme Court reasoned that a copyright holder under the former Copyright Act should be the legal entity that planned and took responsibility for the process of recording the original work on the record. Under the premise that one cannot be regarded a copyright holder just by making factual and functional contributions to a record production (by performing music or singing, or producing or conducting), the Supreme Court ruled that the plaintiff was not the sole or joint copyright holder for these records considering A's role and the extent of involvement in the production of the records and A's relationship with the plaintiff. Since A bore all expenses incurred in the production of these records, and sold the records under his charge, A would be considered the legal entity that planned and took responsibility for the entire production with the intent of becoming the copyright holder.

Although the plaintiff had contributed to the production by writing the lyrics, composing and arranging the music, and personally singing and playing the music in the records, this would be considered only a factual and functional contribution to the recording process of the records produced by A's planning and under his responsibility. Considering the plaintiff's contributions not satisfying the criteria for acts of a proper legal entity, the Supreme Court ruled for the defendant.

(3) Analysis

Under the former Copyright Act, records were protected as works along with music, singing and performances. In 1987, the wholly-revised Copyright Act introduced a neighboring rights system in addition to copyrights, by which records (as well as performances and broadcasts) were protected as neighboring rights. While the 1987 Copyright Act had a clear definition of who was the producer of the record by including a definition of "record producer", the former Copyright Act did not have a provision defining "copyright holder", causing frequent disputes. In addition, at the time the former Copyright Act was enforced, awareness of copyrights was weak in general (not only regarding records), and contracts were often unclear or even non-existent, making it difficult to interpret the parties' intents and resolve a dispute

Against this background, this ruling provides a relatively clear standard that it is necessary to uniformly apply criteria with regards to record producers in accordance with current copyright laws when determining the copyright holder of a record under the former Copyright Act which can serve as a useful guide for future cases.

3. Criteria for Judging whether Permission to Use the Original Work is included in an Intention to Transfer, if a Person Possesses the Copyrights on Both the Original Work and Derivative Works and Transfers his Copyrights for Derivative Works (Supreme Court Judgment in Case No. 2014Da5333 delivered on August 17, 2016)

(1) Issue

The plaintiff entered a contract for program development with the defendant in 2004, and the defendant modified program A (its signature warehouse management program) to create program B and sold it to the plaintiff. After the defendant sold program C (a modification of program B) to another company, the plaintiff filed for damages claiming that the defendant infringed upon the copyrights of program A.

This issue involved whether permission to use the original work is included in an intention to transfer, if a person possesses the copyrights on both the original work and derivative works and transfers his copyrights for derivative works.

(2) Main Points of the Ruling

The court ruled since derivative work is considered separate from original work, if the copyrights of a derivative work (based on an original work) are transferred and there is no separate indication of intent to transfer the copyrights of the original work the copyrights of the original work are not necessarily transferred along with the copyrights of the derivative work just because the original work is included in the derivative work. In this case, even if the copyrights of derivative work (program B) were transferred to the defendant according to the program development contract, it is difficult to find that the copyrights of program A were included in such transfer and difficult to find any intention to transfer the copyrights of the original program A to the defendant through the program development contract.

If a person who possesses the copyrights on both the original work and derivative work transfers the copyrights of the derivative work, whether permission for use of the original work is included in the intention to transfer concerns interpretation of the representation of intent which entails an analysis of factors (including the contents of the contract, the motive and factual background of the contract, the purpose that the party intended to accomplish through the contract and transactional practices) considered in a comprehensive manner and reasonably interpreted according to the law of logic and experience. In this case, the Supreme Court ruled that the consent of the plaintiff could be found with respect to the use of the original work of program A in developing program B, taking into account the fact that the program development contract transfers all rights to program B to the defendant (Article 7), but does not stipulate that one must obtain separate permission from the plaintiff to modify program B or limit the right to modify to a certain scope; the purpose for which the defendant entered into a contract with the plaintiff; the fact that the defendant needed to obtain rights to make modifications to program B and the plaintiff knew of such necessity; the fact that the plaintiff provided defendants with not only the source code of the B program, but also the corresponding "Oracle"-based source code; and the fact that the plaintiff knew and did not object when the defendant reverted the operating system of program B to the original work when there were problems with warehouse management services when using program B.

(3) Analysis

This case concerned whether the copyrights of an original work (program A) were transferred to the defendant if the copyright of the derivative work (program B) was transferred to the defendant by a program development contract, whether the rights to produce derivative works on the derivate work (program B) were also transferred if such transfer was recognized, and when a person possessing copyrights to both the original and derivative work transfers the copyrights of the derivative work, whether permission to use the original work is included in the intent of transfer.

Since Article 5 of the Copyright Act provides for protection of derivative work as independent work and stipulates that the protection of derivative work does not affect the copyrights of the original work, unless there was a separate representation of intent concerning the original work, the court ruled that copyrights of the original work are not included in the transfer of the copyrights of the derivative work solely because the original work is included in the derivative work.

In addition, regarding rights to produce work, under Article 45.2 of the Copyright Act, while it is presumed that the right to produce and use derivative works is not included without any special agreement when a copyright is transferred wholly or partially, in the case of programs, it is presumed that the right to produce derivative work has been included in the transfer. Hence, according to this rule, the defendant held the right to produce derivative work of program B.

Regarding the main issue of whether the defendant's development of program C infringed on the plaintiff's copyright of program A, the Supreme Court focused on whether the plaintiff (who had transferred program B to the defendant) had also gave permission to use the original work. If it were found that the plaintiff had given the defendant permission to use the original work, the defendant's adaptation of program B or development of program C would not be an infringement on the original work, but on the contrary, if it were found that the plaintiff had not given the defendant permission to use the original work, the defendant's adaptation of program B or development of program C would be an infringement of the original work. The Supreme Court saw the issue of whether permission to use original work is included when transferring copyrights of derivative work as a matter of agreement or interpretation of intentions of the transferor and transferee. Hence, the contents of the contract, the motive and factual background of the contract, the purpose that the party intended to accomplish through the contract and transactional practices should be

considered comprehensively.

As a result, the Supreme Court determined that the plaintiff gave permission for the defendant to use the original work, program A, when transferring the copyrights of program B. Hence, the defendant's development of program C by modifying program B would not be considered an infringement of program A's copyright. This ruling provided a standard to determine whether infringement had occurred for SW development disputes that frequently occur in practice.

4. Whether Pornography is Copyrighted Work under the Copyright Act (Seoul High Court Judgment in Case No 2015La1490 delivered on November 29, 2016)

(1) Issue

The creditors are domestic companies that have entered into exclusive release rights contracts for video productions made by Japanese video producers and other producers. A copyright infringement lawsuit was filed against the debtor who ran a website where such videos could be downloaded. The issue of this case concerned whether the video of the creditors which consisted of obscene material could be considered copyrighted work under the Copyright Act.

(2) Main Points of the Ruling

The court held that copyrighted work means work not included in the unprotected work listed in Article 7 of the Copyright Act, that are specific external expressions of human thoughts and emotions obtained through mental efforts by words, sounds and colors. It would be sufficient to contain a 'creative form of expression' and does not concern its moralistic characteristics. Hence, this case followed in a line of Supreme Court cases that ruled that even if immoral or illegal aspects are included in its content, work is protected under the Copyright Act (refer to Supreme Court Judgment in Case No. 90DaKa8854 delivered on October 23, 1990 and Supreme Court Judgment in Case No 2011Do10872 delivered on June 11, 2015). The Supreme Court ruled that even if the videos contained sexual scenes, as long as they were not simple or secret recordings of actual sexual acts with no creative expression, the creativity of the work could not be denied. In addition, if the videos were considered pornographic, its distribution, sales, and exhibition may be limited through punishment of such distribution, sale or exhibition under Criminal laws, the Promotion of Information Network Usage Act or laws concerning Information Protection. But such limitation would not extend to pleadings to stop copyright infringement when copyright holders ask the courts

to stop the distribution of video works against their will.

(3) Analysis

The Supreme Court acknowledged that even if the work is pornography mostly composed of scenes of sexual acts or genitalia of men and women, a copyright holder who has participated in the 'planning process' based on scenario realized creative expression through selection of the locations and actors, selection of performances and background that would be shown in the video, photographic lighting and art work, and the 'editing process' by which scenes were deleted to and connected to complete a video. Hence, the video was protected under the Copyright Act as copyrighted work.

In the Supreme Court Judgment in Case No 90DaKa8845 delivered on October 23, 1990, the court ruled that "copyrighted works that are protected by the Copyright Act are those expressions of ideas or feelings that are in the scope of literature, art, or the arts without consideration of morality. Even if the contents contained immoral or illegal parts, they would be protected as works under the Copyright Act". Subsequently, a lower level court's judgment followed that pornographic work is protected under the Copyright Act (Seoul District Court Judgment in Case No. 2011No2664 delivered on November 23, 2011 (finalized)) as the issue of copyrights for pornography has been constantly discussed in academia. The Supreme Court case cited by this court (Case No. 2011Do10872 delivered on June 11, 2015) was the first judgment in which pornography was recognized as a copyrighted work under the Copyright Act. Consequently, Japanese producers of pornographic material began to file copyright infringement lawsuits against file-sharing sites in Korea (Busan District Court Judgment delivered on August 29, 2015 and the Seoul District Court Judgment delivered on October 18, 2015, etc.).

The Constitutional Court had ruled in Case No. 95HunGa16 delivered on April 30, 1998, that 'obscenity' is an explicit and naked expression of sexuality that distorts human dignity and humanity. It is a medium that appeals only to sexual interest without any literary, artistic, scientific or political value and could not be guaranteed freedom of press and publication. But in Case No. 2006HunBa109, the Constitutional Court changed its previous position that obscene expression is not protected under the scope of freedom of press and publication. Hence, the Constitutional Court also recognized that the expression of 'obscenity' is within the scope of protection for freedom of press and publication as stipulated in Article 21 of the Constitution.

The key issue of disputes over pornography was the question of whether pornography could be protected by copyright. Unless the Copyright Act stipulates morality as a requirement of a work, one cannot use 'obscenity' as a standard to determine whether a work is copyrighted. There is a voice of concern that pornography will become more prevalent due to the recognition of pornography as copyrighted material. However, as stated in this judgment, laws need to be specially devised to regulate the distribution of or clawback of profits obtained through illegal distribution, etc. This case re-confirmed the position of Korean courts that copyrighted work should be content-neutral.

5. Whether the Operator of a User Interface Contents (UCC) Website is Considered a "Database Creator" under Article 2.20 of the Copyright Act (Seoul High Court Judgment in Case No. 2015Na2074198 delivered on December 15, 2016)

(1) Issue

The plaintiff has been operating an online encyclopedia called 'Enha Wiki' since 2007 where users can publish contents they have created themselves (UCC). The defendant also operated a website called 'Enka Wiki Mirror' which duplicated the plaintiff's website in a mirroring manner. The plaintiff's asked for termination of the defendant's website and damages for violation of the Copyright Act and the Unfair Competition Prevention Act.

The issue in this case concerned whether the UCC site could be considered a "database" under Article 2.19 of the Copyright Act and whether the operator of the UCC site could be considered a "database creator" under Article 2.20.

(2) Main Points of the Ruling

The lower court² presupposed that to be protected as a "database" under the Copyright Act, a "database creator" should have made considerable efforts to protect the collection, arrangement and composition of the data. That court found that the plaintiff had not made considerable efforts for the collection, arrangement and composition of the data to be legally protected when comprehensively considering the facts that most of the postings on the plaintiff's website were created or modified by each user; the postings were not controlled by the management of the defendant's website; and even if users reported certain postings to management, the corrections were made by the users themselves.

^{2.} Seoul District Court Judgment in Case No. 2014Gahap44450 delivered on November 27, 2015.

However, the appellate court found that the plaintiff's website constituted a "database" based on the fact that it systematically organized information on various topics (such as current affairs, culture, arts, sports, entertainment, etc.) so that its users could search various information according to certain criteria. In addition, the court found the plaintiff to be a "database creator" based on the facts that the plaintiff had proposed to install the wiki system on its website, designed the order, categories and items of the website, introduced individual and systematic search functions, selectively displayed high-quality content, satisfied users' preferences by displaying information on subculture and general knowledge side-by-side, and paid expenses to maintain and manage the server for operation of the website.

(3) Analysis

Under the Copyright Act, "database" is a systematic arrangement or composition of materials, which allows them to individually approach or retrieve the material (Article 2.19 of the Copyright Act). The key element distinguishing a database from edited work is found in its creative elements. While the creative element of traditional edited works is found in the selection and arrangement of raw materials, the value of the database is in the 'amount of information' (the large amount of information that it collects and accumulates) and the 'ease of search' (the system that enables users to easily access and search the information). Thus, how large an amount of data is accumulated in a more important issue than how much creativity lies in the selection and arrangement. If creativity was required to be established for databases in the selection, arrangement and composition of data at the same level of edited works to meet the criteria for copyright protection, database protection may become null. Hence, the Copyright Act protects databases that have no element of creativity.

The lower court ruled that database protection does not require creativity in the collection, arrangement and composition of data to protect the efforts of "database creators" and first reviewed the issue of whether the plaintiff made a "considerable effort" as a "database creator". The Copyright Act defines "database creator" as a person who has invested heavily in human or material resources in the creation of a database or in the verification or supplementation of its data (Article 2.20 of the Copyright Act). Hence, "considerable efforts" becomes the standard to determine whether one can be considered a "database creator". In other words, for the website of the plaintiff to constitute a "database", the plaintiff must first satisfy the criteria to be considered a "database creator". But since "database" and the "database creator" are separately defined in Article 2.19 and 2.20 of the Copyright Act with separate criteria, the plaintiff (operator of the plaintiff's website) need not be a "database creator" for the website to constitute a database. Whether or not the

website is a "database" may be judged separately from whether the plaintiff is a "database creator".

The lower court and the appeal court made different judgments about the "database" and "database creator". The lower court focused on the fact that the website's postings were mostly UCCs, while the appellate court saw the website as a collection of UCCs, and focused on the arrangement and composition of the postings in the plaintiff's website. In addition, since the plaintiff was not considered to be a "database creator", the lower court concluded that the plaintiff's website did not constitute a "database". Hence, it can be understood that such different conclusions were reached because the courts differed on the issue of whether it would be reasonable to protect a "database creator" under the Copyright Act when the creator is operator who arranges and manages UCCs that are produced and modified by users. If the emphasis is on the production and input of data, if the operator has not produced or input data and users of the website have produced the data, the database creator who has input and updated the data can be considered more a user rather than an operator. On the other hand, if the emphasis is placed on the arrangement and composition of the data, an operator who creates and manages the system with considerable effort and investment by accumulating data, facilitating the search and continuously updating the arrangement and configuration should be protected as a database creator.

The literal meaning of database is "an accumulation of data that organically combines and saves the data necessary for various joint tasks". A database is constructed by selecting materials, analyzing the nature and scope of the services, and designing and implementing a system that the users can easily access. Considering that a database is a collection of data that is continuously evolving with real-time accessibility, operation and maintenance of the database also plays a very important role in building the database. In addition, since the Copyright Act defines "database" as "a compilation that systematically arranges and organizes material" (Article 2.19 of the Copyright Act) and that the rights of the database creator do not extend to the material constituting the database (Article 93.4 of the Copyright Act), it is reasonable to place emphasis on the arrangement and composition of the material rather than the characteristics of the material itself constituting a database.

Therefore, in judging whether a website constitutes a "database" under the Copyright Act or not, the courts should look at the design and implementation of the website (the accumulation of postings) rather than the characteristics of individual postings. Also, in determining whether criteria for "database creator" has been met, it is reasonable to judge

based on whether "investments in human or material resources have been made" by looking at the management and composition of a website (such as selection, design, implementation, operation and maintenance of postings). From this perspective, the ruling in this case was based mainly on the arrangement and composition of the postings rather than on the characteristics of the postings themselves, and on the 'considerable effort' of the plaintiff with regards to the operation and management of the collection of postings.

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF KNOW-HOW AND TRADE SECRETS

KIM Byungil *

I. OVERVIEW

In 2016, a legislative notice to amend the "Unfair Competition Prevention and Trade Secret Protection Act" (hereinafter, referred to as the "Unfair Competition Prevention Act") in relation to the trade secret protection system was proclaimed, and such proposal was submitted to the National Assembly as of January 18, 2017. The main amendments relate to further relaxation of requirements for trade secrets, introduction of a punitive damages system, and measures to strengthen penalties. This chapter will discuss these amendments and major cases related to trade secrets.

II. LEGISLATION AND POLICY DEVELOPMENT

The proposed amendment of the Unfair Competition Prevention Act, which was promulgated on August 17, 2016, and submitted by the government in January 2017, has been amended to include: (i) relaxation of trade secret requirements; (ii) introduction of punitive damages; and (iii) strengthening penalties for trade secret infringements.

These amendments intended to alleviate the requirements for protected trade secrets, introduce a punitive damages system for infringement of trade secrets, and expand the types of trade secret infringement, and through these measures, improve and complement some of

^{*} Professor, Hanyang University Law School.

the weak spots in the operation of the current system. The main provisions are as follows.

1. Relaxation of the Criteria for Trade Secrets (Article 2.2)

Criteria for trade secrets have been relaxed to include secrets whose secrecy have been maintained without requiring reasonable efforts in such maintenance. Previously, technical or business information that is useful for production methods, sales methods and sales activities that meet certain requirements need be kept confidential by reasonable efforts to be recognized as a trade secret.

Information that constitutes a trade secret is required to be 'kept secret by reasonable efforts', which is called secret management. The previous law used the term 'considerable efforts' instead of 'reasonable efforts' and the term was revised to its current form as of January 28, 2015. The amendment relaxed the requirement to provide relief for underfunded SMEs which do not have sufficient systems to protect their trade secrets in place. However, regarding the degree of 'considerable efforts' required under the previous law, the courts have interpreted it as a 'reasonable degree of efforts' that corresponds to the size of the company. With the revised law, even if there is 'no reasonable efforts, as long as secrecy has been maintained', trade secrets can be recognized. Hence, criteria for satisfying secret management for SMEs are expected to be set lower than before.

2. Introduction of a Punitive Damages System (Article 14.2.6 and 14.2.7)

If the trade secret infringement is recognized as malicious, compensation up to three times the amount of damages acknowledged can be awarded. In determining whether the infringement is malicious, factors such as whether the infringer has superior status, degree of intention, period and frequency of infringement and degree of economic gain gained by the infringer are considered to strengthen the relief provided for victims of trade secret infringement.

3. Reinforcement of Penalties for Trade Secret Infringements (Article 18.1 and 18.2)

To prevent gaining unauthorized profits or inflicting damage on trade secret holders, unauthorized leaks of trade secrets, deletion, and refusal to return trade secrets and possession are penalized as trade secret infringement. The amount of fines for trade secret infringement was limited in principle to KRW 100 million or less if the infringer used or

knew that the trade secret would be used in foreign countries, and less than KRW 50 million in other cases. The amendment raised such thresholds to KRW 1 billion and KRW 500 million, respectively.

III. MAJOR CASES

In 2016, lower court judgments regarding criteria for secret management and whether transfer of important company documents constitute malpractice were worthy of notice in the field of trade secrets.

1. Cases regarding Criteria of Secret Management

(1) Seoul Central District Court Judgment in Case No. 2014GaHab563704 delivered on January 15, 2016

In the case of trade secret infringement related to a security software plug-in installation program used for internet banking (Seoul Central District Court Judgment in Case No. 2014GaHab563704 delivered on January 15, 2016), the court recognized the non-publication, economic usefulness and secret management of each material involved in the case, holding that each constituted a trade secret under Article 2.2 of the Unfair Competition Prevention Act. Whether confidentiality was maintained by considerable efforts is usually the main issue in trade secret disputes for SMEs. In this case, secret management of X company software was acknowledged for the following reasons:

- 1) Since the beginning of its establishment, the company registered and managed the modifications related to the development program on internal information and source management systems (such as wiki or jira) and the project server storing the program development data was installed in a separate space with a lock so that only a few authorized persons could physically access it.
- 2) To prevent leakage of trade secrets, employees were required to enter a confidentiality agreement at the initiation and termination of employment.
- 3) The company also required a confidentiality clause to be incorporated into the business cooperation contract it executed with Y company, imposing a confidentiality

obligation on other companies in business relationships with them.

4) When sending emails to which the materials were attached, the company included a clause stating that the 'attached data contains a main part of the development and should be kept undisclosed' or marked the email as 'Confidential'.

(2) Degree of 'Reasonable Efforts'

If the level of 'reasonable efforts' required increases, the level of objective measures to be taken by the holder of the information also increases. For example, a holder may be required to take further measures to maintain the secret such as: arranging for a dedicated staff to carry out the secret management and limit the number of personnel who can access the information to a minimum, collecting and storing the information in a specific place to control access to it, or locking the information with a password and changing the password periodically. SMEs that are smaller than large companies may not be protected by the law due to the difficulty in maintaining this level of a management system. Therefore, the level of reasonable efforts required should be enough to objectively disclose the intention of the holder to manage the confidentiality of the information, i.e., it should show that 'the information is being managed by the holder as a secret'. However, the efforts should not be overly restrictive in its internal use or reach a level by which the holder must incur excessive costs. Therefore, the level of considerable efforts should be determined in a comprehensive manner in each case, depending on a variety of circumstances such as the type and size of the company, number of employees, type and nature of the technical field the trade secrets falls under, means and method of infringement, characteristics of the business in which the trade secret is used, and relationship between the infringer and holder company.

(3) Analysis of Supreme Court Judgments on Secret Management

1) Positive Examples

① Supreme Court Judgment in Case No. 2012Do7874 delivered on October 25, 2012

The court acknowledged secret management when the company (holder of the trade secret) had required a confidentiality agreement that prohibited disclosure of trade secrets and incorporated a non-competition clause. In addition, the company restricted access to the natural source compounding room and the powder sauce compounding room when making the fish soup and installed and managed closed-circuit monitors around the entrances.

② Supreme Court Judgment in Case No. 7.9. Supreme Court Judgment in Case No. 2006Do7916 delivered on July 9, 2009

The court acknowledged secret management when a company took internal measures to restrict access to the CAD file and the technical data at issue. The company also imposed confidentiality obligations on the Korea Railroad corporation when entering into a resource purchase contract and explicit and implied confidential obligations on the company (pertaining to the files above) that commissioned the creation of an electronic manual for the CAD file at issue.

3 Supreme Court Judgment in Case No. 7.24. 2007Do11409 delivered on July 24,2008

The court acknowledged secret management when the IP address, ID and password were necessary to access the server of the company (holder of the source files constituting the program on the internet)

4 Supreme Court Judgment in Case No. 9. 15. 2004Do6576 delivered on September 15, 2005

The court acknowledged secret management when the plaintiffs received confidentiality pledges from the defendants and enforced a transfer security system and industrial security management regulations on them.

(5) Supreme Court Judgment in Case No. 96Da16605 12. 23. delivered on December 23, 1996

The court acknowledged secret management when the plaintiff company set up a separate laboratory in the factory so that no unauthorized personnel could enter, imposed a confidentiality obligation on all the employees, and strictly controlled the technical information under the management of the director of research.

2) Negative Examples

① Supreme Court Judgment in Case No. 2008Do3436 delivered on September 10, 2009

The court did not acknowledge secret management when the defendant entered a confidentiality agreement with the company the day before his retirement, but the computer where the material of this case was kept had no password and no separate lock so that anyone could easily access and read the material. Also, anyone could access, read and copy

the material through any computer in the company, and the drawer which contained the backup CD for the material was always open.

② Supreme Court Judgment in Case No. 2006Do8498 delivered on January 30, 2009

The court did not acknowledge secret management when the company did not provide separate security education or classify the experiment results of this case as secure data. Also, the computer in which the experiment results were stored was placed on the desk where the defendant was working without any security devices, the office where the defendant worked was not separated from other people, and there was no one to stop the defendant when he took the computer out. Thus, although the defendant executed a general security agreement when he joined the company, secret management was denied.

③ Supreme Court Judgment in Case No. 2008Do3435 delivered on July 10, 2008

Although some of the defendants had executed a general trade secret confidentiality agreement when joining the company, there was no security manager assigned for the files created at work, and no security devices or security controls. There was no classification according to importance or any special marks to indicate that the material was confidential or secret for the files. Information stored on the file server could be accessed, read and copied freely by even production staff and individual computers on the internal network. Secret management was not acknowledged.

3) Summary of Supreme Court Cases

The cases show the court considers the following elements as important to satisfy secret management: ① a mark or notice that shows that specific information is a trade secret through designation of a person in charge of security, security education, or the installment of security devices or security management regulations, ② measures to limit the persons or the methods of access to the information. The fact that a confidentiality agreement was executed at the time of joining or leaving the company without such elements does not satisfy the requirements for secret management.

(4) Conclusion

A trade secret must not be publicly known (confidentiality) and have independent economic value. It must pertain to information on production methods, sales methods, and other technical or business information useful for business activities (Article 2.2 of the Unfair Competition Prevention Act). In other words, trade secrets require the following

elements: (1) not publicly known (not known or confidential), (2) have independent economic value as technical or business information useful for production methods, sales methods or other business activities (economic usefulness), and (3) managed as a secret through reasonable efforts (secret management). The current Unfair Competition Prevention Act provides for the relaxation of confidentiality requirements from 'considerable effort' to 'reasonable effort' in relation to the requirements for the establishment of a trade secret under Article 2.2.

Under the former Unfair Competition Prevention Act, the standard for secret management required considerable effort. 'Considerable effort' consisted of the following: intention to maintain confidentiality, storing the trade secret in a limited place (for example, at a physical location or in a server or folder in the case of electronic information), limiting access to such storage, specifying the method of storing or destroying the confidential data, assigning specific staff to handle the secret, or imposing confidentiality obligations. However, the courts found it difficult to acknowledge secret management when any employee could access the information without special restrictions, or when the information was of a type that a long-time employee would know of it. Therefore, if you do not specify the business secret and simply execute a general business confidentiality agreement, and then take no separate action, it would be difficult to recognize confidentiality. However, it may be possible to manage the trade secret by appropriate methods that are not strict depending on the size of the company or the value of the secret when excessive costs are incurred to maintain confidentiality; Therefore, it is necessary to consider whether the matter involves a large company or a small company, and the value of information when determining issues of secret management.

However, there has been criticism that the requirements for secret management are too strict under the Unfair Competition Prevention Act, making it difficult for business or technical secrets with protection value to be sufficiently protected for SMEs. Therefore, the standard for secret management under the Unfair Competition Prevention Act requires the secret management by 'reasonable effort'. The standard of reasonable effort for secret management is identical to the standards under the Uniform Trade Secret Act (model act) and the federal Economic Espionage Act. The revision of the Unfair Competition Prevention Act intended to relax secret management requirements from 'considerable effort' to 'reasonable effort' in order to protect trade secrets of SMEs that were not protected because they could not satisfy the requirements of secret management even when core technology had been leaked. However, despite the relaxation of these requirements, the issue remains that 'secret

management through reasonable efforts' is an indeterminate concept, so that the specifics will need to be determined by cases in the courts.

2. Whether Unauthorized Transfer of Important Company Data Constitutes Malpractice even when the Data does not Concern a Trade Secret

When a person who handles the affairs of another person in a job gains economic profit himself or through a third party and causes damages by violating a duty of such job, such violation constitutes malpractice. Whether malpractice can be found can depend on what the person who handled the affairs of another person did. Supreme Court Judgment in Case No. 2015Do17628 delivered on July 7, 2016 ruled on standards to constitute malpractice when a company employee transferred unauthorized company data to provide it to competitors or for their own benefit. The facts of this case are as follows: Defendant K asked C to save the company's data including various design plans on a shared notebook and give it to him just before leaving the company in June 2012. In July 2012, after leaving the company, he received the shared notebook and saved and kept the data (listed in Table 1 which shows where each piece of material was stored) on a personal external hard drive. Defendant S did not return or dispose of the personal external hard drive which stored the data of items 2, 3, 5 to 12 (of Table 1) and kept it after leaving the company. Also, defendant J did not return or dispose of the personal USB which stored the data of items 1, 4, 13 to 16 (listed in Table 2), and kept it after leaving the company. Each defendant executed a letter of resignation and confidentiality agreement that stipulated that they would not disclose any technical or business information of the company acquired during employment and would not use any such information at a competing company. The defendants used some of the data listed in Table 1 and 2 during their employment.

The Supreme Court held that "if an employee leaks or transfers company data without authorization to competitors or for their own benefit, even if the data does not constitute a trade secret, as long as the data is not disclosed to an unspecified majority so that the data could not be acquired without going through the holder, the holder of the data has spent a considerable amount of time, effort, and money in the acquisition or development of the data, and the data consists of the principal assets of the business so that the use of the data will give a competitive advantage to the competitor, then such acts are a breach of duty that constitutes malpractice". Even when an employee legally transfers business secrets or materials that are the principal assets of the business and such conduct does not constitute malpractice, if he does not return or discard the trade secrets to the company at the time of

leaving and provides it to a competing company or retain it for the purpose of using it for the benefit of his own interest, such conduct will constitute malpractice" (Supreme Court Judgment in Case No. 2015Do17628 delivered on July 7, 2016).

In short, even if the data is not a business secret, it is illegal to transfer data that has not been disclosed to an unspecified majority (so that the data could not be acquired without going through the company) to a competing company or use it for one's own interest. The court made clear that it would constitute malpractice if one legitimately holds important company data but then fails to return or discard the data when leaving the company to transfer it to a competitor or use it for one's own benefit.

IV. CONCLUSION AND EXPECTED TRENDS IN TRADE SECRET PROTECTION

The revisions to the Unfair Competition Prevention Act introduced in this chapter intended to strengthen the protection of trade secrets of companies by, first, relaxing the standards for trade secrets and the strict interpretation of trade secrets by the courts, second, introducing a punitive damages system, and third, strengthening criminal penalties for violation of trade secrets, such as adding more types of trade secret infringement and increasing fines. Legislative amendments that stipulate the relaxation of standards for trade secrets and specify the elements to constitute trade secret infringement are expected to contribute to the maintenance of a healthy trade order in the industry.

This is because the trade secret of a company is acquired through considerable R&D investments over a long period of time, and if the trade secret (a principal resource that affects the competitiveness of the company) is leaked, the company may incur irrecoverable economic loss. Hence, these legislative amendments are expected to contribute to the maintenance of a healthy trade order in the industry as measures to relax the standards for trade secrets and strengthen civil and criminal liability for trade secret infringement. However, while profits for companies that are trade secret holders may be more heavily protected, if the protection of trade secrets is strengthened, it will be necessary to carefully review the related issues and appropriateness of measures, such as the expansion of parties subject to violation due to the relaxation of the trade secret standards, the necessity of introducing punitive damage system from a policy standpoint, and the appropriateness of setting a maximum threshold for the amount of surcharges, etc., from a legislative perspective.

CHAPTER 5.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF UNFAIR COMPETITION

PARK Junu*

I. OVERVIEW

Korea enacted the "Unfair Competition Prevention Act" in 1961. Later, the "protection of trade secrets" was added (1991), and the act was divided into provisions regulating "unfair competition" and "trade secret infringement". As an "act of unfair competition", the law listed acts that cause confusion or misleading by using trade dress, which includes: an act of causing confusion with another person's business activity by using a well-known mark; an act of indicating a false place of origin; and an act of leading the public to misunderstand the quality. In 1998, the title of the act was amended to the 'Unfair Competition Prevention and Trade Secret Protection Act (hereinafter, the "Unfair Competition Prevention Act"). However, it is doubtful whether such legislation is appropriate since the nature of 'trade secret infringement' incorporates elements of 'unfair competition', while such division gives the implication that trade secret infringement is not an act of unfair competition. Hence, it would have been better if trade secret infringement was listed as part of unfair competition. But this article will discuss legislative development and cases limited to "unfair competition using trade indicia" according to the current legislative structure (trade secret infringements are discussed separately in Chapter 4 along with protection of know-how).

Recently, the most notable trend related to the Unfair Competition Prevention Act is the diversification of the types of disputes. While industries that were once driven by manufacturing and off-line services have now shifted to cultural products/services and online services, new types of unfair competition and disputes have surfaced with legislations and court decisions following in response.

^{*} Professor, Sogang Law School.

II. LEGISLATION AND POLICY DEVELOPMENTS

Since provisions on trade secret protection were established in 1991, prohibition of dilution of a famous mark (2001) and protection of a domain name and product shape (2004) have been added. The most recent revision was in 2013 to insert a "general provision of unfair competition acts" to "Item (j)" of Article 2.1 of the Unfair Competition Prevention Act which defines "unfair competition acts". This was the most significant revision of the Act since its first enactment in 1961. As a result, the unfair competition acts that were listed under Item (a) to (i) of Article 2.1 have all become exemplary enumerations, and the function and role of the Unfair Competition Prevention Act has greatly increased. Item (j) stipulates as follows: any act infringing upon another's economic interests by using achievements derived from another's significant investment or efforts for one's own business without permission contrary to trade practices and fair competition.

Elements to constitute an act of unfair competition under Item (j) include ① (subject matter of protection) the achievement must be a result of the plaintiff's significant investment or efforts, ② (act by defendant) use for one's own business without permission, ③ (economic loss) infringement on other person's economic interests, ④ (illegality) violation of fair trade practices or competition, and ⑤ causation, etc. Item (j) is a provision that encompasses all acts of unfair competition by stipulating general requirements to constitute an act of unfair competition (and not a specific type of unfair competition) and makes such intention clear by heading the provision with "such other acts".

Item (j) was introduced in response to the need for a general provision to regulate new types of unfair competition practices arising from changes in industry and technology. It makes it possible to make claims under Unfair Competition Prevention Act for unauthorized use cases involving avatars, game items and athletic statistics, etc., internet framing advertising cases that cause confusion, and use of publicity cases. Accordingly, while 'commercial use of photos (without copyrightable creativity) published on a competitor's homepage' was previously regulated under Article 750 of the Civil Law (under 'interests that are worth protection by law'), it can now be regulated as an act of unfair competition under Item (j).

However, there is a criticism that Item (j) undermines the 'free use' intentionally guaranteed by other categories of 'intellectual property rights law' like patent law, copyright

law, design protection law and trademark law. This is an issue that the courts need to address going forward.

III. MAJOR CASES

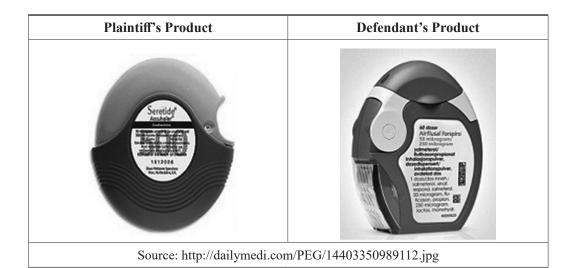
The following sections discuss major cases decided in the Supreme Court and the Seoul High Court in 2016. In 2016, the Seoul High Court stipulated more detailed standards for interpretation of Article 2.1 of the Unfair Competition Prevention Act, and provided for the possibility of trade dress protection. The courts also dealt with various issues of famousness, distinctiveness, and possibility of confusion or dilution. In addition, there was a case involving imitation of the shape of a product. Possibilities of trade dress protection were also opened. The discussion below will focus on the facts, holding, reasoning and implication of each case.

1. Protection of Product Mark

(1) Medical Product Container Case (Seoul High Court Judgment in Case No. 2015Da2049390 delivered on March 31, 2016)¹

Plaintiff Glaxo Group Limited is a multinational pharmaceutical company and Plaintiff Glaxo Smith Kline is its Korean distribution company. Defendant Korea Sandos is a Korean corporation of the multinational pharmaceutical company Sandoz Group and defendant Ahn Kook Pharmaceutical is a Korean pharmaceutical production and sales company. When the patent term for Seretide, an asthma treatment owned by the plaintiffs, expired, the defendants began to sell 'Airflusal', a generic drug. Accordingly, the plaintiffs argued that the defendants' products violated Items (a), (c) and (j) of Article 2.1 of the Unfair Competition Prevention Act.

Seoul District Court Judgment in Case No. 2014Gahap552216 delivered on August 21, 2015, subsequently dismissed by Supreme Court Judgment in Case No. 2016Da219594 delivered on August 24, 2016.



Protection of Source Indication

Items (a) and (c) of Article 2.1 of the Unfair Competition Prevention Act protect "widely recognized product marks in the domestic market". Item (a) prohibits acts that cause confusion with products 'that are widely known to general consumers' and Item (c) prohibits dilution of products that are 'widely known to the general public'. As for the product's container or packaging, the inherent function of which is not source-indicating, the court has recognized it as a 'product mark' only when 'unique features' could be derived from the form, shape or color of the product's container or packaging, and such 'unique features' had been used exclusively for a long period of time, enough to distinguish one source of a product from the other.

In this case, the court acknowledged that the form, shape and color combined in the container of the plaintiff's product could constitute a 'product mark widely recognized in Korea' but not solely based on the color purple. However, since the plaintiffs and defendants' products can be purchased only by a doctor's prescription, the court denied the possibility of confusion, an element to establish Item (a), since the primary consumers were experts such as doctors and pharmacists. In addition, the court did not allow relief under Item (c) since the plaintiffs' product containers were not widely known as a product mark to the general public.

The Issue of whether Item (j) Applies

The court acknowledged that the product mark constituted 'a trade value resulted from significant investments and efforts' under Item (j) of Article 2.1 of the Unfair Competition Prevention Act since considerable credibility and goodwill from consumers had been

established in the 'shape of the plaintiffs' products' widely recognized in Korea as a product mark. However, the court found that the defendants' product and the plaintiffs' product were not similar in shape and there could be no possibility of confusion regarding source. Hence, the defendant could not be found to be using the form of the plaintiffs' product.

Issues of Causing Confusion, Similarities, Functionality of Color and Survey Results

This case can be seen to have developed the jurisprudence of the Unfair Competition Prevention Act in the following respects.

First, a registered trademark widely recognized in Korea can be protected under both the Unfair Competition Prevention Act and the Trademark Act. But regardless of registration, while Item (a) of Article 2.1 of the Unfair Competition Prevention Act (which protects product marks widely recognized in Korea) sets forth 'confusion' and 'similarity' as separate requirements, Article 108 of the Trademark Act does not specify 'confusion' as element to establish infringement. In the past, the courts interpreted that "similarity could be acknowledged if there is a possibility of confusion" when applying Article 108 of the Trademark Act, but stipulated 'confusion' as an element separate from 'similarity' when applying Item (a) of the Unfair Competition Prevention Act. However, in cases where the trademark law and the unfair competition prevention law were both at issue, the court ruled that 'similarity' under the Trademark Act should be interpreted as previously, but criteria to determine 'similarity' under Item (a) of the Unfair Competition Prevention Act was not specified or ruled to be "identical to the interpretation of similarity under the Trademark Act". However, in this case which only involved the Unfair Competition Prevention Act, the Seoul High Court clarified that the same standard of establishing similarity 'if there is possibility of confusion' under Article 108 of the Trademark Act applies to determine 'similarity' under Item (a). But there was no discussion of how the 'similarity' requirement could be distinguished from the 'confusion' requirement.

Second, regarding the plaintiffs' claim in this case that 'the color of the product (purple) alone fulfills the requirements to establish a product mark', defendants argued that the color 'purple' represents the 'functionality' of a 'combination medication' which could not be protected under Item (a) In the past, there were periods when asthma medications consisted of 'persistent functional beta agonists' used blue containers and 'inhaled steroids' used red containers. The plaintiffs' product was the world's first combination drug to combine the two treatments above, and the defendant argued that the purple container had the function of representing such characteristics. The Copyright Act, Design Protection Act, Trademark Act and Unfair Competition Prevention Act all clarify that 'function' is not protected by the provisions of law and interpretations of the court. While the court denied the functionality of purple because "it could not recognize the competitive

need to use purple in the combination medication", it is notable that the court did not deny the 'functionality of color' itself.

Third, the plaintiffs submitted survey results showing that more than 95% of domestic doctors or pharmacists thought of the plaintiff's inhaler when hearing 'purple' or 'purple inhaler' to argue that 'purple' constituted a product mark under Item (a). However, the court found that such survey results were caused by the fact that ① 'purple containers had been used only by the plaintiffs' products' and ② 'coordinate convenience of language use', and did not recognize the color 'purple' as a product mark. This clearly showed that although survey results can be considered important, the standard to determine whether a product mark exists lies in the secondary meaning or acquired distinctiveness of its unique features.

2. Protection of Business Marks

(1) Separation of Corporate Groups (Supreme Court Judgment in Case No. 2014Da24440 delivered on Dec. 28, 2016)²

Daesung Group was divided into three corporate groups including plaintiff Daesung Industrial and defendant Daesung Holdings after the death of its founder. The plaintiff filed suit against the defendant because the defendant's use of the business name 'Daesung' caused confusion with its business mark. Item (b) of Article 2.1 of the Unfair Competition Prevention Act prohibits as an act of unfair competition "the act of causing confusion with another's business facilities or activities by using a business mark similar to a business mark widely known in a domestic market and owned by another". The Supreme Court ruled that "when a business group connected by economic and organizational ties is separated, unless it is acknowledged that a specific affiliate plays a central role in adopting and using the mark of the business group, and general consumers perceive such affiliate as the main source of the business so that it can be recognized as the successor of the business group mark, another affiliate that uses a business mark including in the business group mark cannot be seen to be committing an act of unfair competition by using the credit or reputation and illegally retaining profits". Hence, the defendant's acts were not considered to fall under Item (b).

Seoul District Court Judgment in Case No. 2012Gahap98305 delivered on June 21, 2013; Seoul High Court Judgment in Case No. 2013Na44845 delivered on February 20, 2014.

Exclusive Use of Business Name under Commercial Act

On October 1, 2009, the defendant registered Daesung Holdings as its business name, and on June 30, 2010, the plaintiff registered Daesung Group Holdings as its business name. Both companies included 'holding companies' as part of their business purposes. Article 23.1 of the Commercial Act stipulates that "One cannot use a business name that could create confusion with a business owned by another for unfair purposes". Article 23.4 of the Commercial Act stipulates that 'if an identical business name is used in the same administrative district and business category, one who uses a business mark registered by another can be presumed to be using it for an unfair purpose'. Article 23 of the Commercial Act protects business marks similar to Item (b) of Unfair Competition Prevention Law, but differs in that it does not require 'famousness' of the plaintiff's business name, and in that it presumes an 'unfair purpose' exists if the business name is registered. The defendant in this case filed a lawsuit on grounds that the plaintiff violated Article 23 of the Commercial Act and won the Supreme Court. Supreme Court Judgment in Case No. 2013Da76635 delivered on January 28, 2016.

(2) The English Name and Business Mark of an Association (Seoul High Court Judgment in Case No. 2015Na2037144 delivered on March 24, 2016)³

In this case, the plaintiff was the Korean Doctor Association and the defendant was the Korean Oriental Medicine Doctor Association, but both associations used the English name "The Association of Korean Medicine". The plaintiff alleged that the defendant's use of the same English name constitutes a violation under Item (b) of Article 2.1 of the Unfair Competition Prevention Act. But the Seoul High Court did not consider the English name of the plaintiff to be 'widely known in Korea' and perceived that western medicine and oriental medicine practices are clearly distinguishable causing no possibility of confusion with the plaintiff's business facilities or activities. Thus, the court ruled that such use did not fall under Item (b).

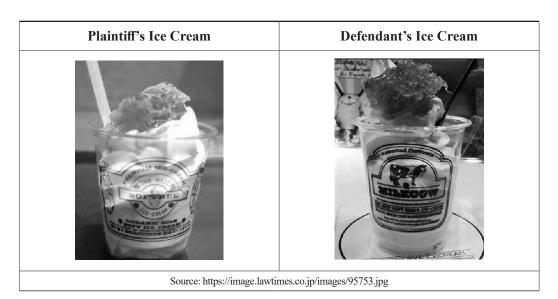
Meanwhile, the English name of the defendant association was originally 'The Association of Korean Oriental Medicine', which was changed to its current name. For this reason, the plaintiff alleged that the defendant's change of name was a violation of Article 23.1 of the Commercial Act (infringement of exclusive rights to a business name), but the Seoul High Court did not find an 'unfair purpose', a requirement for application of such provision.

Seoul District Court Judgment in Case No. 2013Gahap102542 delivered on June 12, 2015, subsequently dismissed by Supreme Court Judgment in Case No. 2016Da217925 delivered on July 14, 2016.

3. Imitation of the Shape of a Product

(1) Softree Ice Cream Case (Supreme Court Judgment in Case No. 2015Da240454 delivered on October 27, 2016)⁴

In this case, the plaintiffs had been running ice cream stores since June 2013 and the defendants had been running ice cream stores since February 2014. The plaintiffs and defendants sold ice cream in plastic cups or cones and then topped them off with pieces of honeycombs. The plaintiff alleged that the defendants' acts constituted an 'imitation of the shape of a product' under Item (i) of Article 2.1 of the Unfair Competition Prevention Act.



The Supreme Court has defined the 'shape of a product' (a requirement to constitute an 'imitation of the form of a product') as the 'overall appearance of a product consisting of its form, shape, color, gloss or the combination of these elements'. The court held that "in terms of general social perceptions, if there is no fixed pattern among the products, a 'product shape' cannot be found, even if there is uniformity in the idea, particular form or functions that makes up the shape". This suggested that a 'consistent uniformity of shape' is a requirement in finding a 'shape of a product'. However, the court found that the plaintiff's product did not constitute a 'shape of a product' under Item (i) because the shape of the ice cream differs for each product and does not maintain a consistent shape as a store employee makes and sells the ice cream immediately upon order.

Seoul District Court Judgment in Case No. 2014Gahap524716 delivered on November 27, 2014; Seoul High Court Judgment in Case No. 2014Na2052436 delivered on September 10, 2015.

4. Acts against Fair Commercial Practices

(1) The Hermes Print Bag Case (Seoul High Court Judgment in Case No. 2015Na2012671 delivered on January 28, 2016)⁵

The plaintiff Hermes is a French company that manufactures handbags, and the defendant is a Korean company that produces and sells bags and clothing. The plaintiff's Birkin Bag, Kelly Bag and Kelly Lakis Bag are all made of leather and sell for more than KRW 10 million in Korea. The defendant printed a design similar to the design of the plaintiff's bags on polyester material and sold it for approximately KRW 200,000. The defendant's bags were printed on a flat surface to give the illusion of three dimensions. Among consumers the defendant's bags were called print bags, fake bags or parody bags.



Source

Plaintiff's Birkin Bags: http://www.ipnomics.co.kr/wp-content/uploads/2015/11/%EB%B2%84%ED%82%A8%EB%B0%B1.jpg Plaintiff's Kelly bag: http://cfile217.uf.daum.net/image/16101C474EFC9B0D0F1491

 $\label{lem:example} Example of a print bag: http://mblogthumb3.phinf.naver.net/20130704_234/halftime007_1372910138393Xkn9X_JPEG/11. jpg?type=w2$

The plaintiff filed a lawsuit against the plaintiff for unfair competition and damages for using a design similar to the defendant's handbag under Item (c) and (j) of the Unfair Competition Prevention Act. Item (c) and (j) of Article 2.1 of the Unfair Competition Prevention Act all protect 'product marks widely recognized in Korea'. Item (a) prohibits causing confusion with product marks 'widely known to general consumers' and Item (c) prohibits dilution of product marks 'widely known to the general public'. On the other hand,

^{5.} Seoul District Court Judgment 2014Gahap552520 delivered on January 29, 2015.

if the source indication is not an original function, distinctive features are derived from the form, shape or color of the product's container or packaging, and such 'distinctive features' have been used exclusively for a long period of time, the Supreme Court has recognized it as a 'product mark' if the source indication is clearly individualized.

The court in this case found that although the distinctive features of the plaintiff handbags were widely known to 'general consumers', there were not clearly individualized to the extent that the general public would recognize a specific product.

Regarding the application of Item (j), the court found that the defendants violated Item (j) based on the facts that ① the design of the plaintiff handbags was an achievement resulting from significant investment or effort, ② the design in this case was an 'economic interest worthy of legal protection' since it was a key element of the property value of the product, and ③ if the design in this case was not protected by intellectual property rights laws, it would be a 'gap of legal protection' and not a 'denial of legal protection for public domain'.

Role of Item (j): Impairing Public Domain v. Filling Legal Gaps

The judgment in this case can be evaluated to have developed legal theories regarding the application of Item (j) of the Unfair Competition Prevention Act in aspects discussed below.

The court in this case ruled that whether an act 'contravenes fair trade practices' or 'infringes upon an economic interest' rests on whether the economic interest is 'worthy of legal protection' or 'belongs to the public domain (in which case anyone would be able to use it freely)'. There has been criticism of Item (j) since it impairs guarantees of public domain established by other intellectual property rights. However, this judgment is meaningful in that it ruled that the court should proactively determine whether the application of Item (j) would 'fill the legal gap of other intellectual property laws' or 'disable guarantees of the public domain'. However, the court did not make clear in determining the question of whether a plaintiff's achievements are 'worthy of legal protection' or 'belong to the public domain' is the question of 'economic interests' or 'contrary to fair trade practices'.

In addition, the court in this case stated that Article 750 of the Civil Act would apply if the defendant's acts occurred before the introduction of Item (j), but Item (j) would apply if the defendant's acts occurred after such introduction.

(2) The Lamborghini Cell Phone Case (Seoul High Court Judgment in Case No. 2015Na2045381 delivered on March 17, 2016)⁶

The plaintiff Tonino Lamborghini is an Italian corporation that manufactures and sells watches, clothing and accessories. The defendant sold a 'leather mobile phone case' with a mark similar to that of the plaintiff.



Mark of the Plaintiff

The court found that the defendant's actions did not fall within the scope of Item (a) and (c) of Article 2.1 of the Unfair Competition

Prevention Act because the plaintiff's product mark was not widely recognized in Korea. The product mark of the well-known automobile company Lamborghini in Korea is owned by Automobili Lamborghini, a company different from the plaintiff.

In addition, the Court noted that in the application of Item (j), 'to prohibit the use of an identification mark, the mark must be registered as a trademark or widely recognized in Korea. If not so, the mark belongs to the public domain and is not worthy of legal protection, and use of such identification mark is not contrary to fair trade practices or competitive order'.

Guarantee of Public Domain

The judgment in this case is meaningful in that it shows what it means to be 'not worthy of legal protection because it belongs to the public domain' in application of Item (j). As stated by the court, Item (j) is a new regulation enacted to regulate 'new and various types of unfair competition that occur due to changes in society, etc.' Therefore, unless it is a new type of 'economic value or use' (such as 'use as an identification mark or source indication'), the application of Item (j) would 'harm intentional guarantees of public domain' rather than 'fill legal gaps'. Hence, the court's ruling and rationale seem to be appropriate.

(3) The Red Bean Bread Store Interior Case (Seoul High Court Judgment in Case No. 2015Na2044777 delivered on May 12, 2016)⁷

The plaintiffs and defendants in this case mainly operated a store selling red bean bread made of organic wheat and natural yeast in subway stations. Starting around May 2, 2013,

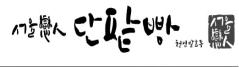
Seoul District Court Judgment in Case No. 2013Gahap542076 delivered on July 16, 2015, subsequently dismissed by Supreme Court Judgment in Case No. 2016Da219587 delivered on July 22, 2016.

Seoul District Court Judgment in Case No. 2014Gahap529490 delivered on July 10, 2015, subsequently dismissed by Supreme Court Judgment in Case No. 2016Da229058 delivered on September 21, 2016.

the plaintiffs operated a red bean bread shop called 'Seoul Lovers' at Seoul Railway Station, and 5 months later (around October 25, 2013) they sold about 7000 products a day on average and became widely known to consumers as they were introduced in various internet newspapers and blogs. On the other hand, Defendant 1 worked at the plaintiff's store as a baker starting May 1 to August 2013. On December 5, 2013 Defendant 1 and Defendant 2 opened a red bean bread store at the Seoul City Hall subway station called "Nu-e-ae". Subsequently, Defendant 2 ended his partnership with Defendant 1 and changed the store's name to 'Nu-e' on July 29, 2014.

Plaintiff Defendants

Mark, External Signage / Store Interior









Source

Top: http://cfile25.uf.tistory.com/image/22259E3453C1F8603BF2C5

Bottom: http://postfiles16.naver.net/20140812_47/ hankhoon2_1407801166698iPeVN_JPEG/SAM_2797. JPG?type=w1 Top: http://cfile214.uf.daum.net/image/2461EB335303507F15CB31

Middle: http://img.ezmember.co.kr/cache/board/2014/08/17/1893dc510e0915e1d15a6c770ad3f6ff.jpg

Bottom: http://mblogthumb1.phinf.naver. net/20151109_188/ino111_1447058938814rqotb_JPEG/ DSC08772.JPG?type=w2

Grounds for Recognition of 'Achievements Made with Considerable Investment or Effort by Others'

First, the court ruled that 'achievements made through substantial investments or efforts under Item (j)' includes technical achievements as well as the comprehensive image of the business such as the form and appearance of the store, interior design, decoration, signs, etc., unless there are "special circumstances".

The following are the grounds for the Court to recognize the "achievements made by substantial investment or effort". The plaintiffs ① visited Japan multiple times to investigate the various items, store interiors and design of promotional materials for product planning before the opening of the store, ② commissioned several design companies to develop the mark and store design of its stores, ③ proposed the opening of a stand-alone store to Seoul Railway Station for publicity and sales and launched detailed business plans by proposing joint marketing to a marketing company regarding gift products, and ④ commissioned a design company to create basic brand images, packaging containers and shopping bags, advertisements and promotional materials, and opened the store.

Grounds for Recognition of 'Use in a Manner Contrary to Fair Trade Practice or Competitive Order'

The court found that the defendants had used a method contrary to fair trade practice and competitive order by creating stores that used similar structural elements to the plaintiff's stores (such as the mark) so that consumers had identical or very similar perceptions. ① Defendant 1 started work at the plaintiff's company as a baker on May 1, 2013, left in August of the same year, and opened and operated the defendants' store on December 5, 2013, four months later. ② In November 2013, just before the opening of the Defendant's store, there is circumstantial evidence that the employees of the interior design company the defendants commissioned took photographs of the structure and interior of the plaintiff's store, and various promotional materials. ③ The whole concept of the store is quite similar to the plaintiff's store as the mark, color of signs, layout and structure of the store are very similar, the sales products are identical, and location conditions are the same. ④ General consumers confused the defendant's store as the plaintiff's store.

Grounds for Recognition of 'Infringement of Economic Interests'

The court found that the actions of the defendants violated the plaintiff's economic interests on the following grounds. ① The signs and interior of the plaintiff's store distinguishes it from other stores. ② The plaintiff already sold more than 7,000 products

a day on average about 5 months after opening the store. ③ The plaintiffs sales or stores had been widely reported on various internet newspapers or internet blogs and had become widely known to consumers. ④ General consumers had mistaken defendants' store as the plaintiff's store.

Defendants' Argument

The defendants made the following two arguments regarding the plaintiff's arguments and the Court's ruling.

First, the defendant made arguments under Article 15 of the Unfair Competition Prevention Act. Article 15 stipulates that if there are any provisions in conflict with the Unfair Competition Prevention Act under the Patent Act, Utility Model Act, Design Protection Act, Trademark Act, or Copyright Act, the other provision will trump over the provision in the Unfair Competition Prevention Act. The defendants argued that since the interior of the plaintiff's store could have been protected under the Design Protection Act, but the plaintiff did not register their designs (including the interior), it would not be protected by the Design Protection Act. The defendant further argued that even if the interior of the plaintiff's store can be protected under the Unfair Competition Prevention Act, since the Design Protection Act has priority over the Unfair Competition Prevention Act, the design could not be covered by the Unfair Competition Prevention Act. On this point, the Court held that 'the provisions of the Unfair Competition Prevention Law may be applied to the extent that they are not in conflict with the provisions of the Design Protection Act, and Item (j) of the Unfair Competition Prevention Act protects theft of achievements against fair commercial practices regardless of whether the design is registered'.

Second, the defendant alleged that the arrangement of marks in the plaintiff's store was already widely used in other stores in Korea and Japan. The court did not acknowledge this based on the difference in the interior of the plaintiff's store and the evidence presented by defendants.

Protection of Trade Dress

The Seoul High Court ruled that the defendants' acts constituted a violation under Item (j) based on ① the interior of the plaintiff's store was differentiated from that of other stores, ② they were widely known to consumers, and ③ the defendant's store was mistaken as the plaintiff's store. 'Differentiation' and 'fame' of the interior of the plaintiff's store means that they had acquired 'secondary meaning' or 'distinctiveness by use', which is a requirement for protection as 'trade dress'. In fact, the District Court stated that the interior of the plaintiff's store was protected as a 'trade dress' (Seoul Central District Court Judgment in Case No 2014GaHab52940 delivered on Oct. 5, 2015). Although the Seoul High Court used the term 'comprehensive image of business' instead of 'trade dress' in its ruling, it could be considered to have protected 'trade dress' by using Item (j).

(4) The Cloud Web Case (Supreme Court Judgment in Case No. 2013Da42953 delivered on April 29, 2016)⁸

The defendant in this case was an internet portal site operator who also operated an advertisement business (banner ads and keyword search ads) through the portal site. The plaintiff was a development, production and sales company of a program called "Cloud Web". Internet users downloaded and installed the plaintiff's program (hereinafter referred to as the "Program"). By using the Program's 'add', 'delete' or 'move' buttons, users could ① delete all or part of the color advertisement of the defendant's portal site, or ② insert a search advertisement of another portal site into the defendant portal site for display, or ③ change the order of the search ad so that the search ad of the other portal site would be displayed above the search ad of the defendant's portal site. User could also change the design of the portal by utilizing the background, font, color, etc., provided by the Program. However, if a user clicked on the 'Default' button of the Program, all changes made by the user would return to their original state. The defendant wrote a letter to the plaintiff stating that 'since the plaintiff was using the credit and customer intake power of the defendant's portal site, if the defendant continued to use the Program to infringe on the defendant's business and the rights of its advertisers, the defendant would take all civil and criminal legal actions necessary'. Hence, the plaintiff filed a lawsuit against the defendant to confirm the absence any obligations.

^{8.} Seoul District Court Judgment in Case No. 2010Gahap111327 delivered on August 11, 2011; Seoul High Court Judgment in Case No. 2011Na66544 delivered on May 3, 2013.

Installation screen of Cloud Web

Selection process of a User's Background Screen





Result of Selection of Background Screen

Menu Settings according to a User's Frequency of Use





Note: Example of another portal site where one can change the settings in ways similar to the defendant's site.

The Supreme Court ruled that even if the defendant's advertising revenue decreased due to the Program, it was only a de facto effect of the individual set-up of the program users, and therefore the plaintiff's conduct was not illegal. The more detailed reasons for the ruling can be read in the Supreme Court's ruling that quotes the High Court. The Seoul High Court first stated that 'the profit of the advertising business of the defendant's portal site' constituted a 'profit worthy of legal protection'. However, the court also pointed to the fact that ① "individual internet users have the freedom to view and change the information and images provided by the portal site according to their preferences on their computers", and ② the plaintiff's act was limited to providing the Program. In addition, even if individual internet users used the Program and as a result the defendant's advertising revenue was reduced, the court did not find any illegality since there was no causation between the plaintiff's acts and the defendant's decline in advertising revenue.

The Seoul High Court recognized the profit of the advertising business of the defendant's portal site as 'profit worthy of legal protection' based on Article 750 of the Civil Act, which is a general tort provision. The Supreme Court also recognized the advertising business profit of a portal site as a 'profit worthy of legal protection' in 2010. If the cloud web program in this case was produced and distributed after the Supreme Court Judgment above was codified in the form of Item (j) of the Unfair Competition Prevention Act, the 'achievements made by significant investment or efforts' argument under Item (j) would have been acknowledged. However, it should be noted that when seeing that the court did not acknowledge the plaintiff's liability for Torts in this case, this case would not have met the 'use' requirement even if Item (j) was applied.

PART III.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COMPETITION LAW OF KOREA

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION OF MONOPOLY AGREEMENTS

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION AGAINST ABUSE OF MARKET DOMINANT POSITION

CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF CONTROL ON CONCENTRATION OF UNDERTAKINGS

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION AGAINST UNFAIR COMPETITION CONDUCT

CHAPTER 5.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PRIVATE LITIGATION

CHAPTER 6.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF IPR-RELATED ANTITRUST

CHAPTER 1.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION OF MONOPOLY AGREEMENTS

KUM Changho & RYU Song*

I. OVERVIEW

Active law enforcement against improper collaborative acts ("cartels") by the Korea Fair Trade Commission (the "KFTC") continued in 2016. The KFTC uncovered 269 cartel cases and imposed a total of KRW 2.4 trillion (approximately USD 2.145 billion) in penalty surcharges in four years from 2013 to 2016. This illustrates the strengthened regulations compared to the four-year period spanning from 2008 to 2011 when the KFTC uncovered 157 cartel cases and imposed a total of KRW 1.2 trillion (approximately USD 1.072 billion) in penalty surcharges. In 2016 alone, the KFTC uncovered 60 cartel cases and imposed a total of KRW 751.8 billion (approximately USD 670 million) in penalty surcharges. The KFTC announced a plan to focus its supervisory authority over cartels in 2017 since cartels undermine the standard of living and fiscal soundness.¹

With respect to legislations and policies concerning cartels in 2016, institutional changes were adopted to operate the leniency program more strictly. Meanwhile, interesting decisions were rendered by courts in 2016 regarding restriction of competition by bid-rigging, scope of the sales which serve as the base of calculation of penalty surcharge, standard for recognizing cartels by means of information exchange and the standard for applying the Monopoly Regulation and Fair Trade Act (the "MRFTA") on collective acts of enterprisers' organizations, etc.

^{*} Attorneys, Yoon & Yang LLC.

^{1.} KFTC, 2017 Work Plan to the President (January 2017).

II. LEGISLATION AND POLICY DEVELOPMENT

In relation to cartels, the MRFTA was amended and the Notification on Operation of Leniency Program for Corrective Measures Imposed on a Voluntary Reporter, etc., of Improper Collaborative Acts (the "Leniency Notification") was amended twice in 2016. The purpose of such amendment was to strictly operate the benefits granted to leniency applicants of cartels.

1. Amendment of Provisions of the Leniency Program in the MRFTA

Article 22.2.2 was newly inserted in the MRFTA, which was amended on March 29, 2016 and implemented on September 30, 2016. The gist of the new provision is that where a person who voluntarily reported cartel engages in another cartel within five years from the date when corrective measure or penalty surcharge is mitigated or exempted, such person should not be granted mitigation or exemption of any of the corrective measures or the penalty surcharge for such act. The purpose of the amendment is to deal with an enterpriser who is repeatedly involved in cartels after being granted benefits from the leniency program.

2. Amendment of the Leniency Notification

(1) Amended Leniency Notification No. 2016-3 (Amended and Implemented on April 15, 2016)

Establishment of a new regulation on the attendance to a tribunal by the relevant employees of the voluntary reporter: In determining the establishment of cartel, related sanctions and grant of leniency for a leniency applicant, etc., the KFTC investigates evidence and collects opinions from the examiner (i.e., investigative official of the KFTC) and the enterprisers alleged to be involved in the cartel by holding a hearing at the tribunal. Meanwhile, for an enterpriser involved in cartel to benefit from the leniency program, an enterpriser must have cooperated in the investigation and deliberation by the KFTC in good faith. The amended Notification stipulates that attendance to tribunal by the relevant employees of the leniency applicant should be considered in determining whether the applicant has cooperated in the investigation and deliberation in good faith. Accordingly, the KFTC is now capable of confirming the factual background directly with the employees involved in the cartel and of reviewing the cartel itself and the contents of the leniency application more concretely.

Strengthened prohibition on third-party disclosures: In case a leniency applicant discloses information on the leniency application and the cartel before completion of the deliberation of the KFTC without the consent of the KFTC, such disclosure is deemed to be a violation of the leniency application's obligation to cooperate in good faith and the disclosing leniency applicant cannot benefit from the leniency program. Previously, the Notification simply provided that if an enterpriser discloses information on leniency application and on the cartel to a third party before the examiner's report (to be submitted by the examiner to the KFTC in relation to an alleged cartel) is delivered to the applicant, the KFTC may under its discretion consider the enterpriser to be uncooperative in the investigation. However, the amended Leniency Notification extends the period of confidentiality obligation and clarifies that the benefits from the leniency program will not be granted to an enterpriser that breaches such obligation.

(2) Amended Leniency Notification No. 2016-11 (Amended and Implemented on September 30, 2016)

Strengthened requirements for the succession of leniency applicant rank: If a preceding leniency applicant withdraws its application or is denied leniency status, a subsequent applicant succeeds to the status of the preceding applicant. However, given that the first-rank leniency applicant is fully exempted from the penalty surcharge and criminal referral to the Prosecutor's Office, excessive benefits should not be granted to the subsequent leniency applicant that has not made additional contribution to the identification of the cartel. The amended Leniency Notification expressly states that for a second-rank leniency applicant to succeed to the status of the first-rank leniency applicant, it should satisfy the requirement of "voluntarily reporting the cartel when the KFTC had yet to obtain information or failed to secure a full array of evidence necessary to substantiate the cartel". Therefore, if the KFTC has secured sufficient evidence from the first-rank leniency applicant, the second-rank leniency applicant cannot succeed the status as the first-rank leniency applicant, even if the status of the first-rank leniency applicant is revoked.

Improvement of Procedures for Leniency Applicant: The status of the leniency applicant under the leniency program is determined basically by the order of application. Therefore, the timing of the KFTC's acceptance of an application is a very important issue. To clarify the timing of acceptance, the amended Leniency Notification limited the method of leniency application to (i) a visit to the Cartel Policy Division of the KFTC or (ii) submission of the application to the KFTC via its facsimile or email dedicated to leniency application. In

addition, the amended Leniency Notification provides that the application should be deemed accepted by the KFTC when the application "arrives" before the investigative official of the Cartel Policy Division of the KFTC or at the dedicated facsimile or email address. However, in case of an oral application, the time when the recording "begins" should be viewed as the time of application, given that the recording may take a while.

Improvement of Amnesty Plus: If an enterpriser who fails to voluntarily report a cartel under investigation by the KFTC ("existing cartel") voluntarily reports another cartel ("additional cartel") as the first-rank leniency applicant, leniency should be granted to such enterpriser in relation to the existing cartel as well. In such cases, the level of leniency for the existing cartel should be determined by comparing the monetary size of the products or services subject to the additional cartel with those of the existing cartel. For example, if the size of the additional cartel is smaller than that of the existing cartel, the penalty surcharge for the existing cartel may be reduced by up to 20% and if the size of the additional cartel is larger than that of the existing cartel, the penalty charge for the existing cartel may be reduced by up to 100%. The amended Leniency Notification expressly states that if there are multiple existing or additional cartels, the combined size thereof should be considered in calculating the size of cartel.

III. MAJOR CASES

1. Restriction on Competition by Bid Rigging – Case Concerning Bid Rigging of the Tender for Navy's Submarine Combat System

Regarding the tenders for Korea's navy submarine combat system and sonar system, the KFTC labeled the agreement between Company A and Company B, both defense contractors, that (i) only Company A would participate in the tender for the combat system and (ii) only Company B would participate in the tender for the sonar system in four areas as an act of bid rigging and imposed sanctions thereon. However, the Seoul High Court ruled that the agreement does not restrict competition and cancelled the KFTC's disposition on the ground that (a) Company B did not have technical skills necessary for the tender for the combat system in which Company A participated alone, and (b) Company A did not have technical skills necessary for the tender for the sonar system in which Company B participated alone.²

^{2.} See Seoul High Court Judgment in Case No. 2012Nu14462 delivered on August 21, 2013.

This decision attracted attention as it was understood to decide to the effect that restriction on competition should be strictly deliberated in bid rigging cases as well.

However, the Supreme Court reversed and remanded the above decision of the Seoul High Court³ on the ground that the agreement should be deemed to have an effect of restricting competition since (x) it is difficult to conclude that Company A and Company B had decided not to participate in the tenders for the combat system or the sonar system which were subject to their bid rigging before the agreement, (y) the lack of technical skills in certain areas does not automatically mean that they are not in competition, and (z) an enterpriser with a low possibility to win may prepare itself for future tenders by participating in the current tender and such participation may serve as a factor for an enterpriser most likely win to lower its bidding price. The decision is meaningful in that the Supreme Court clarified its stance that if bid rigging has a potential to affect the successful bidding price, its effect of restricting competition should not be denied easily.⁴

2. Calculation of Relevant Revenue for Cartel – Cases Concerning Price-Fixing regarding Auto Teller Machines ("ATMs") and Zinc Coated Steel Sheets

The penalty surcharge imposed on cartel by the KFTC is determined up to 10% of the revenue from the products or services affected by the cartel ("Relevant Revenue"). In 2016, the Supreme Court provided detailed standards for the scope of the Relevant Revenue in some of its decisions, including the following two cases.

First, in the case concerning price-fixing regarding ATMs, the Supreme Court ruled that the revenue generated from contracts that had been executed before agreements to engage in price-fixing should be excluded from the calculation of the Relevant Revenue.⁵ In this case, four manufacturers and sellers of ATMs agreed on July 23, 2003 to restrict price competition among them and the agreement remained effective until the end of March 2009. The KFTC included all the sales from ATMs during the same period in the Relevant Revenue and calculated penalty surcharge accordingly. The Supreme Court ruled that the revenue from the contracts executed before July 23, 2003, when the agreement for price fixing was reached,

^{3.} See Supreme Court Judgment in Case No. 2013Du19004 delivered on February 18, 2016.

^{4.} Similarly, Supreme Court Judgment in Case No. 50061 regarding the bid rigging in the tender for automatic metering system for water supply delivered on April 12, 2016 also reversed and remanded a Seoul High Court decision that denied the restriction on competition by bid rigging.

^{5.} See Supreme Court Judgment in Case No. 2013Du1126 delivered on May 27, 2016.

should be excluded from the Relevant Revenue, since such sales were not affected by the price fixing although they were generated during the period subject to the agreement.

Second, in the case concerning the price-fixing regarding zinc coated steel sheets, the closing date for price-fixing agreements was one of the major issues in relation to the calculation of the Relevant Revenue. If an enterpriser withdraws from cartel, the revenue generated after the date of withdrawal should be excluded from the Relevant Revenue because such sales are not affected by the cartel. Meanwhile, in this case, Company A agreed with other enterprisers around April 2006 to adopt extra charge for price increase of zinc coated steel sheets (1st agreement), but did not participate in the follow-up agreements reached by the other enterprisers around July and November 2006 to increase the amount of extra charge (2nd and 3rd agreements) and maintained the previous level of the extra charge. Regarding this, the Supreme Court ruled that the 2nd and 3rd agreements only changed the method of calculating the extra charge based on the 1st agreement, and therefore, Company A should not be deemed to have withdrawn from the cartel simply because it did not participate in the 2nd and 3rd agreements. In conclusion, the Relevant Revenue that serves as the basis for calculation of penalty surcharge to be imposed on Company A should include the revenue generated after the 2nd and 3rd agreements.

3. Requirements for Establishing a Cartel based on Information Exchange – Price-Fixing of Commercial Trucks

Under the MRFTA, information exchange may serve as a convincing circumstantial evidence to prove the existence of an agreement, but the information exchange itself is not deemed a cartel. For the past few years, the Supreme Court has taken a stance that information exchange itself is not sufficient to prove a cartel.⁷ The case concerning price-fixing for commercial trucks is in the same vein with such recent decisions of the Supreme Court.

In this case, there was no dispute over the fact that the seven enterprisers that manufactured and sold commercial trucks exchanged information on their sales price and

See Supreme Court Judgment in Case No. 2015Du49832 delivered on October 27, 2016; see also, Supreme Court Judgment in Case No. 2015Du53794 delivered on November 10, 2016.

See the case concerning cartel for interest rate of personal life insurance at pp. 237-38 of the China-Korea IP & Competition Law Annual Report 2014 and the case concerning cartel for instant noodles on p. 350 of the China-Korea IP & Competition Law Annual Report 2015.

sales performance for eight years and accordingly, the KFTC imposed sanctions thereon as it considered such exchange of information to be an act of cartel. However, the Seoul High Court and the Supreme Court did not recognize the establishment of cartel⁸ on the ground that it is difficult to conclude that the enterprisers used the information exchange as a means of cartel, since (i) information on sales performance accounted for a larger part of the information exchanged among the enterprisers than information on sales prices, (ii) the enterprisers purposefully provided false information in some instances, (iii) the enterprisers established a new pricing policy based on the information they obtained from each other and competed with each other to induce customers and (iv) despite the information exchange, the time and rate of price increase by each enterpriser are not consistent with those of the other enterprisers.

4. Prohibited Activities of Enterprisers' Organization – Collective Strike by the Korean Medical Association

The MRFTA considers cartel to be one of the prohibited activities of enterprisers' organizations. Therefore, if members of an enterprisers' organization form a cartel at the behest of the organization, such organization shall become subject to sanctions. The main issue in this case was whether the act of members of the Korean Medical Association, which had voted to collectively suspend their business as a form of protest against the government's amendment of the Medical Service Act, constituted a cartel that falls under the category of prohibited activities of enterprisers' organization prohibited by the MRFTA. The KFTC considered the collective suspension of businesses constituted a cartel, which is a prohibited activity of enterprisers' organizations, and, accordingly, imposed corrective orders and penalty surcharges. However, the Seoul High Court revoked the disposition of the KFTC on the ground that the resolution for collective suspension of business does not restrict competition.⁹

In this case, the Seoul High Court did not recognize the restriction on competition on the ground that (i) the purpose of the collective suspension of business by the Korean Medical Association was to oppose the government's amendment of the Medical Services Act, rather than affecting prices, quantity, quality and other conditions of medical services,

See Seoul High Court Judgment in Case No. 2014Nu41246 delivered on December 10, 2015; see also, Supreme Court Judgment in Case No. 2016Du31098 delivered on December 29, 2016.

See Seoul High Court Judgment in Case No. 2014Nu58824 delivered on March 17, 2016 (this decision is pending at the Supreme Court as the KFTC filed an appeal).

(ii) given the nature of the country's national health insurance program, the collective suspension would not cause increase in the price of medical services, (iii) there is insufficient evidence to deem that the quality of medical services had deteriorated during the period of collective suspension and (iv) while it is known that the collective suspension had caused inconvenience to consumers but such inconvenience is insufficient to recognize the restriction on competition since it is not a transaction term, such as a price, quantity and quality of medical services but one of the many factors that affect such terms.

Meanwhile, the Supreme Court rendered an *en banc* decision in 2003 that the resolution to collectively suspend business and implementation by the Korean Medical Association in protest of the government's pursuit of the separation of prescription and sale of drugs and the proposed medical insurance premium constitute a prohibited activity of enterprisers' organizations. However, five of the thirteen justices presented dissenting opinions that the collective suspension of business by the Korean Medical Association did not constitute a prohibited activity of enterprisers' organizations since the purpose of such act was to protest against the government's medical policies rather than expanding profits by restricting competition among doctors within the Korean Medical Association. The decision above by the Seoul High Court is consistent with these dissenting views.

A variety of discussions concerning the Seoul High Court decision are underway, e.g., (i) what is the standard to determine restriction on competition for cartels, and (ii) whether the Noerr-Pennington doctrine¹¹ established by the U.S. case law, which held that antitrust laws are not applied to an act of interest groups intended to affect the government or the Congress, or any similar legal principles, are applicable to the MRFTA. Therefore, it is noteworthy how the Supreme Court will rule in this case.

^{10.} See Supreme Court Judgment in Case No. 2001Du5347 delivered on February 20, 2003.

^{11.} See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 US 127 (1961); see also, United Mine Workers v. Pennington, 381 US 657 (1965), etc.

CHAPTER 2.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION AGAINST ABUSE OF MARKET DOMINANT POSITION

LEE Changhun & LEE Jae Hwan*

I. OVERVIEW

In year 2016, there were no special changes in law or policy related to regulation of abuse of market dominant position. However, it is notable that the Knowledge Industry Anti-Monopoly Division was newly established within the Korea Fair Trade Commission (the "KFTC") because it is likely that the Knowledge Industry Anti-Monopoly Division will mainly regulate IT companies' abuse of market dominant position. Therefore, regulation of abuse of market dominant position is expected to be strengthened in the future.

Meanwhile, among the cases handled by the KFTC and the courts in year 2016, the Oracle case is a representative case where a determination was made about abuse of market dominant position. In this case, the main issue was whether Oracle's provision of maintenance service constituted a tying arrangement. The KFTC is known to have made its decision to acquit Oracle from the tying charges on grounds that the requirement that there must be separate products for a tying arrangement was not met and that Oracle's conduct did not cause an increase in price or the exclusion of competitors, etc. The KFTC's acquittal decision is meaningful basically because it faithfully applied the legal principle regarding tying. However, since the KFTC did not provide any official materials related to its acquittal decision above, it seems it will be difficult for this case to serve as a specific and clear

^{*} Attorneys, Shin & Kim.

precedent in the future.

II. LEGISLATION AND POLICY DEVELOPMENT

In year 2016, there were no special changes in law or policy related to regulation of abuse of market dominant position. However, on December 6, 2016, to strengthen enforcement of the Monopoly Regulation and Fair Trade Act (the "MRFTA") in the knowledge industry field, the Knowledge Industry Anti-Monopoly Division was newly established in the Anti-Monopoly Bureau of the KFTC, which is notable from a regulation of abuse of market dominant position aspect. That is, by expanding and reorganizing the team responsible for information and communication technology ("ICT"), which had been operated through a task force team, into the Knowledge Industry Anti-Monopoly Division, the KFTC is planning to strengthen enforcement of competition law in fields such as ICT and pharmaceutical and biotechnology, and it is likely that IT companies' abuse of market dominant position will be the main subject of regulation. With the structural reorganization, the KFTC's regulation of abuse of market dominant position is expected to become more active overall in the future.

III. MAJOR CASES

Among the cases handled by the KFTC and the courts in year 2016, the Oracle case is a representative case where a determination was made about abuse of market dominant position. This case is examined further below. ²

^{1.} In addition to the Oracle case, in year 2016, there was an acquittal from charges of abuse of market dominant position for three multiplex companies (CGV, Lotte Cinema, and Megabox). Originally, the civic organization that reported the three multiplex companies to the KFTC argued that the three companies each increased the movie ticket price by KRW 1,000 for the seat and time most preferred by the audience and argued that such conduct constitutes an abuse of market dominant position (conduct of unreasonably deciding or changing prices). Regarding this, it seems the KFTC official in charge made an acquittal determination on grounds that significant costs must have gone into improvement of the multiplex theater, introduction of new materials, maintenance service, and investment of human resources for internal management, and that therefore it is difficult to view the situation as having involved a substantial price increase (admission fee), compared to the costs. Basically, price regulation should be very limited or avoided from the aspect of feasibility of execution and fairness (Changhun Lee, Study of Economic Law Cases, Volume 9, pages 15–18 (Bobmunsa, 2015)), and the KFTC's prudent position in this case is understandable. However, there is a need to be aware that this case was decided arbitrarily by the official in charge at the KFTC's Seoul office and was not decided by small- or full-session KFTC hearings.

Since the KFTC did not provide a written KFTC decision or other official materials related to this case, the following has been organized based on information from news articles, etc.

1. Summary of the Case

Oracle, which has its headquarters in the United States, sells database management system ("DBMS") that can save, search, and process data in the computer mainly to companies, who are its customers. When selling the DBMS, Oracle has also been entering into maintenance service agreements for resolving software problems and providing updates. In this case, the issue was whether this conduct of Oracle was a tying arrangement that is an abuse of market dominant position.

To properly understand the context in which this conduct became problematic, it is necessary to first consider the content of the maintenance service. The KFTC Examiner divided the maintenance service into "general maintenance service" and "product support". According to this division of the maintenance service, "product support" includes correcting and supplementing existing products (resolving bugs that are found in the existing product and providing patch for stronger security) and function upgrades (adding new functions). The "general maintenance service" includes general maintenance service, including management and processing of issues and education of users, etc.

In the Oracle case, the Examiner argued that the function upgrade in "product support" constituted a separate product and that Oracle unlawfully tied the maintenance service to the DBMS. Oracle responded that the sale of the DBMS naturally includes the function upgrade above and that the requirement of separate products for a tying arrangement was not met. Accordingly, over the course of two full-session KFTC hearings, there was fierce argument about whether the requirement that there must be separate products had been met.

Ultimately, the KFTC made an acquittal decision regarding Oracle's conduct, and the main basis for that acquittal decision is known to have been the fact that the requirement of separate products had not been met. That is, the KFTC viewed the Examiner's reasoning that determined the function upgrades as a separate product artificial. In particular, it looks like the KFTC focused on how unrealistic it was for clients to use Oracle's DBMS while receiving maintenance service from another competing business because of the differences in source code, etc. Also, it looks like the KFTC considered as important the fact that most of Oracle's customers who purchased the DBMS and maintenance service together were companies, which have sufficient analytical ability about transaction structure, rather than individuals. In addition, the KFTC is known to have also considered the fact that prices did not increase in the DBMS market and that competitors were not excluded due to Oracle's conduct.

2. Evaluation of the KFTC Decision

Tying is conduct where a seller requires the customer to purchase separate products or services that are tied to each other from the seller or a business specified by the seller. In determining whether there are "separate products or services" that are the subjects of a tying arrangement, factors that should be collectively considered include whether the products or services are generally transacted separately, the commercial use or functional characteristics, and the perception and behavior of consumers, etc. In particular, in the rapidly developing IT field, often the combination of products and services and the trend in technological innovation must be considered together to arrive at an appropriate conclusion. The KFTC's acquittal decision in the Oracle case is meaningful in that it reflected the reality of transactions in the IT field and appropriately applied the standard for determining whether products are separate. The KFTC's close analysis of the detailed circumstances about why the DBMS sale and provision of the maintenance service must occur together in actual transactions when making its decision deserves a positive evaluation. However, since the KFTC did not provide any official materials regarding its acquittal decision above, such as a written KFTC decision, regrettably, it seems that it will be difficult for this case to serve as a specific and clear precedent in the future.

Meanwhile, related to the requirements for tying that is an abuse of market dominant position, we think the current system of the MRFTA needs to be improved. Currently, Article 3.2.1 of the MRFTA, which serves as the basis for regulating abuse of market dominant position, Article 5 of the Enforcement Decree of the MRFTA, and the more specific Guidelines for Examination of Abuse of Market Dominant Position do not have a rule specifically mentioning tying as an abuse of market dominant position. Under such a legal system, it looks like the KFTC is regulating tying arrangements of market dominant businesses by relying on somewhat vague provisions, such as Article 3.2.1.3 of the MRFTA (conduct of unreasonably interfering with the business activity of other businesses) or the latter part of Article 3.2.1.5 of the MRFTA (conduct raising concern about causing substantial harm to the interest of consumers). However, as long as our legal system is based on the written law, it is desirable to have clear rules related to the requirements for tying that is an abuse of market dominant position. Regarding this, even if it is not an amendment of the law itself, we believe it is possible to sufficiently make such improvements through an amendment of the Guidelines for Examination of Abuse of Market Dominant Position.

CHAPTER 3.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF CONTROL ON CONCENTRATION OF UNDERTAKINGS

KIM Kyoung Yeon*

I. OVERVIEW

According to business combination trends of 2016 published by KFTC, the number and the size of business combinations between domestic enterprises both declined, exhibiting a bit of passivity, whereas the business combinations between foreign enterprises noticeably increased both in number and size. Among total of 646 cases of business combination filed to KFTC, the numbers of business combinations of domestic and foreign enterprises were 490, and 156, respectively, each recording KRW 26.3 trillion and KRW 567.3 trillion.¹

The marked decline in the number of internal restructuring particularly characterizes the trends of 2016 which affected the total number and size of business combinations, considering the fact that Korean regulations of business combination require a filing of internal restructuring (albeit a simplified filing) as well, which is not required in other countries, as long as the size of the relevant transaction forms, excluding stock subscriptions, satisfies the requirement. Furthermore, due to uncertainty in the economy, aggressive business combinations for entrance into new industries were stalled. There were only two cases of a large-sized business combinations between domestic enterprises (transaction size of KRW 1 trillion or more).

^{*} Partner, Yulchon LLC.

KFTC Press Release dated February 28, 2017, "Foreign enterprises aggressively engage in M&As, while domestic enterprises stay passive" (KFTC, Announcement of Result of Analysis on Business Combination Trends in 2016).

^{2.} The number of inter-affiliate business combination, a type of internal restructuring, decreased from 190 to 167, exhibiting a 12.1% decline, while the size plummeted from KRW 28 trillion to only KRW 4.4 trillion, a staggering 84.3% decline. KFTC surmised such decline was due to the phasing out of once aggressive large-sized restructurings.

As shown below, with the exception of SKT's acquisition of CJ HelloVision, the cases, in which KFTC mainly focused on their restrain of competition, were mostly large-sized business combinations between foreign enterprises from pharmaceutical and medical areas, which were in the limelight globally. The reason for two-year consecutive decline in foreign enterprises' acquisitions of domestic enterprises is due to a lack of corporations in Korea which are ripe for M&As, in the areas where global restructurings are taking place, of which the size of local market is still relatively small. Meanwhile, 25% of the acquisition price (approximately KRW 850 billion) in foreign enterprises' acquisition transactions of domestic enterprises, is attributable to Chinese enterprises' acquisitions of businesses in information and communications and broadcasting areas. Chinese companies were particularly aggressive in the acquisitions of Korean information and communications and broadcasting businesses in 2016. On the other hand, business combinations in manufacturing industry were significantly passive, equally in ex-post investments through M&As, let alone in the new investments. Such phenomenon accompanies some concern with respect to recovery of the economy in Korea.

II. LEGISLATION AND POLICY DEVELOPMENTS

1. Amended 'Business Combination Application Guideline' Notice (Effective June 20, 2016)

(1) Relaxed Submission Requirements for Business Combinations with Low Risk of Restricted Competition

With respect to business combinations of enterprises with low risk of restricted competition qualified to make a simplified filing, such as inter-affiliate business combinations, establishment of private equity fund, and holding of additional posts by a small number of officers (less than 1/3), and mixed business combinations (business combinations other than a horizontal or vertical business combination), which are not business combinations between competitors, KFTC decided to relax the requirements by waiving the submission of market status documents (revenues of the top three products concerned, competitor information, market share status, etc.). Regardless of the existing type of business combination, KFTC decided to waive the requirement to submit the market status documents regarding the top three products of the filing company and its counterparty for filing companies qualified to make a simplified filing, and to simplify the requirements for mixed business combinations by requiring the submission of documents on only the top product.

(2) Relaxed Some of the Submission Requirements for Listed Domestic Enterprises

KFTC used to require the filing company to submit the status documents detailing its affiliates and shareholders as well as those of the counterparty. However, under the amended notice, a domestic listed enterprise is exempted from submitting the documents on its affiliates and shareholders since the same is included in the published business report*, and is only required to indicate the relevant information in the event of any change in the published business report. As such, domestic listed enterprises now face lesser burden with respect to submission of the documents on affiliates and shareholders status.

III. MAJOR CASES

1. SKT's Acquisition of CJ HelloVision: Disapproved

(1) Outline of the Business Combination and KFTC's Disposition

In this business combination (the "Business Combination"), SK Telecom ("SKT") sought to acquire 30% of CJ O Shopping shares which owns 53.92% of CJ HelloVision shares, and to subsequently merge SK Broadband (the extinguished corporation), in which SKT owns 100% of its shares, with CJ HelloVision (the surviving corporation). The parties filed for business combination on December 1, 2015, about a month after the execution of the stock purchase agreement and M&A agreement dated November 2, 2015. However, on July 15, 2016, KFTC disapproved the Business Combination entirely after conducting a review for approximately seven months. The Business Combination has a complex nature whereby mutually horizontal and vertical combinations of various broadcasting and communications businesses carried on by the parties of the Business Combination would transpire simultaneously. Due to the wide scope of the Business Combination, encompassing the paid broadcasting with a dual platform consisting of the cable broadcasting and IPTV, wholesale and retail (markets of) mobile communications, high-speed internet, wire telephone, and international telephone services, KFTC decided that it could not ultimately eliminate the harmful effect of restricted competition in the relevant markets through behavioral corrective measures or partial sales on some of the targeted Business Combination alone. Based on the foregoing, KFTC disapproved the Business Combination in its entirety.

(2) Major Issues of the Business Combination

Starting from the reviewing stage of the Business Combination, various issues, including definition or demarcation of the relevant markets (especially product markets

and geographical markets for the paid broadcasting), calculation of the market share of mobile communications' wholesale market, method of measuring the probability of price increase of paid broadcasting programs, the potential enhancement effect of consumer benefits via combined products, and whether the disapproval of the Business Combination would violate the principle of proportionality, were sharply contended. KFTC notes that it sufficiently utilized the materials submitted by the parties of the Business Combination and the competitors, reports published by reputable institutions such as Korea Communications Commission and Korea Information Society Development Institute, and referenced the business combination cases of US and Europe in relation to broadcasting and communications areas. The major issues contended by the parties of the Business Combination are briefly summarized as follows:

Issues	Argument of the Parties	KFTC Decision
Geographical Markets of Paid Broadcasting ³	National Market: it is a de facto combination of an MSO, which operates in a number of broadcasting service areas nationwide and an IPTV enterprise, which provides services nationwide, and a chain of substitution among the cable TV operators by broadcasting service area exists due to the common pricing constraint. As a result, the pricing and its implication would be felt nationwide.	Market by Broadcasting Service Area: taking into consideration of both the demand substitutionability linked to consumers' residential areas and the actual supply substitutionability via suppliers' transmitting of broadcasting, demarcations are made based on the broadcasting zone market (region-local), not nationally, in both Korean and foreign cases.
Product Markets of Paid Broadcasting	Separation of Analogue and Digital Product Markets: the two products differ in terms of service quality, price, characteristics of the broadcasting (bidirectional broadcast service, VOD, etc.), and of the users	Combination of Analogue and Digital Product Markets: consumers already recognize the two products as similar services. In view of the result of KISDI's critical loss analysis, there is no need to define them into separate markets since the actual revenue loss rate is greater than the critical revenue loss rate when combining the two products

^{3.} With respect to the products in relation to the Business Combination other than the paid broadcasting, KFTC demarcated the geographical market as a national market on the grounds that the suppliers are providing homogeneous services nationwide mostly without differentiating the regions, suppliers' pricing and managements' decision making are being carried out nationwide, and there is no differentiation by region in terms of consumers' purchasing behavior.

Probability of Price Increase of Paid Broadcasting Programs

No: there is fierce competition pressure with IPTV, satellite broadcasting, etc., and the result value of GUPPI (Gross Upward Pricing Pressure) of the price increasing elements of the combined company is at or less than 5% in most of the broadcasting zones, and less than 10% in all broadcasting zones. Since the value of UPP reflecting the effectiveness effect of 10% was in the negative, there is no probability of price increase.

Yes: when combining the market shares of CJ HelloVision and SKB's IPTV, the combined company would comfortably be in the top position in the relevant geographical markets. In fact, in the areas where CJ HelloVision secured a high market share, relatively higher prices were being charged (analysis on the correlation between CJ HelloVision's ARPU (Average Revenue Per User) and the gap between the second largest enterprise). In particular, the analysis of UPP (Upward Pricing Pressure) showed that the UPP index were in the positive for both. As such, the pressure of price increase exists. In addition, the UPP value analysis of the parties of the Business Combination contained some defects.

Restricted Competition in Wholesale and Retail Markets of Mobile Communications

No: the market shares of the parties of the Business Combination are low, and CJ HelloVision's market share is too low to be seen as a maverick in the relevant markets. The regulatory authority is already strictly regulating the prices, and there exists strong competition pressure due to the presence of existing enterprises, such as KT and LGU+. As such, no restrain of competition is expected in the wholesale market of mobile communications.

Yes: the pressure for CJ HelloVision, as a maverick, to keep a check on the existing mobile communications enterprises dissipates through the acquisition of CJ HelloVision, the top enterprise of altteul phone of the top mobile communications enterprise. Furthermore, strengthening of dominance in the mobile communications market based on the cable TV subscriber group is of concern. In particular, the combined market share of SK Telink, the existing affiliate of SKT, and CJ HelloVision in the altteul phone market is large, resulting in potential restrain of competition in the wholesale market of mobile communications through the vertical combination.

2. BI/SANOFI's Transfer of Animal Health Product Division: Corrective Measures (Sale of Assets, Price Limits)

(1) Outline of the Business Combination and KFTC's Disposition

In this business combination (the "Business Combination"), Boehringer Ingelheim International GmbH ("BI") sought to acquire shares issued by three affiliates of Sanofi (Merial SAS, Merial Participations SAS, Merial, Inc.) and the animal health product division owned by other affiliates of Sanofi. While the Business Combination was a mixture of stock purchase and business transfer, KFTC determined the Business Combination as a form of business transfer since BI would purchase the entire Sanofi's animal health product division under the "sale and purchase agreement of Sanofi's animal health product division". BI engaged in an exchange of business by undertaking the acquisition of the animal health product division and transfer of its healthcare division to Sanofi simultaneously. Sanofi's acquisition of BI's healthcare division was approved on the ground that there is no concern of restricted competition in the domestic markets. The parties entered into the sale and purchase agreement of animal health product division on June 26, 2016, and reported on the said agreement to KFTC on July 5, 2016. On December 6, 2016, KFTC imposed corrective measures, involving a combination of structural and behavioral measures, as follows: of the business sectors subject to the sale and purchase, (i) to sell all assets⁴ in relation to domestic "sales" of swine circovirus vaccines and oral NSAIDs (non-steroidal anti-inflammatory drugs) for pet dogs within six months, and (ii) to allow the counter party (acquirer) of the sale and purchase agreement to use the intellectual property rights and technical data with respect to development and production of the relevant products in order to completely relieve concern of restricted competition, and to supply the finished products and raw materials at or below certain price for two years upon request of the counter party of the sale and purchase agreement.

(2) Major Issues of the Business Combination

KFTC defined the relevant product markets in this case by utilizing (i) the product approval of Animal and Plant Quarantine Agency (APQA),⁵ which indicates the animal

^{4.} Since all manufacturing facilities of the parties of the Business Combination are located overseas, and the concern of restricted competition may not be present in foreign markets, the assets subject to sale were limited to the facilities related to domestic sales.

^{5.} In a similar context, KFTC had considered classification system levels 3 and 4 of ATC (Anatomical Therapeutic Chemical) at the time of defining the relevant markets in the case regarding a reverse payment settlement concerning ATC markets (KFTC Decision rendered on December 23, 2011 Case No. 2011-300, a case regarding unfair collusive conduct of Glaxo Group Limited and Dong-A Pharmaceutical).

species, method of administration, efficacy, and (ii) CEESA's classification system, which codified animal health products based on use of treatment, animal species, indications, rather than the general considerations in the usual product markets in view of the fact that the target products are medical supplies. KFTC defined the relevant geographical markets as domestic markets by taking into consideration that it is difficult for domestic consumers to purchase the medical supplies directly from overseas due to the related regulations on importation of medical supplies.

In fact, the aggregate market share of the parties of the Business Combination in the product markets on which the corrective measures are imposed satisfied the presumptive requirements for restricted competition.⁶ In case of the swine circovirus vaccines, BI's market share is consistently on the rise in the relevant markets, and KFTC was especially concerned with the fact that while Sanofi's market share is at 4.4%, it may present competition pressure in substance. In case of the oral NSAIDs for pet dogs, a structural change was taken into consideration where the combination of the top two enterprises would reduce the number of enterprises in the market from three to two, intensifying concentration in the market.

In general, unless a special circumstance is present, a business combination adding a meager market share of 4.4% would hardly qualify as presumptive requirements for restricted competition due to such business combination. KFTC's decision in this case does not provide any explanation on how the 4.4% market share brought about the actual competition pressure. Nevertheless, one may easily expect that there will be no merit for the parties to contend over this point since the same order to sell was also imposed in EU. KFTC seems to have had in mind to provide freedom in the future business of the unidentified counter party when it was considering imposing an order to sell, in view of that fact that KFTC ordered to provide permission to use the intellectual property rights necessary for 'manufacturing' upon request of the counter party, despite the fact that only sales activities were being carried out in Korea at the time of the Business Combination.

3. ABBOTT/St. Jude Medical: Corrective Measures (Sale of Assets)

(1) Outline of the Business Combination and KFTC's Disposition

^{6.} After the Business Combination, the aggregate market share of the combined company would be at or over 50%, and the combined company will be ranked at the top in the market with at or over 25% gap in market share with the enterprise coming in second in rank.

In this business combination (the "Business Combination"), Abbott Laboratories ("Abbott") sought to acquire 100% of St. Jude Medical, Inc. ("SJM") shares through a reverse triangular merger (a business combination in which the acquiring company establishes a subsidiary which will be subsequently merged into the acquired company)⁷, but there arose the issue of restricted competition in the "vessel closure device market" for a cardiovascular related medical device following the Business Combination as the said business sector was responsible for 25% of Abbott's total revenue from medical device businesses. The parties of the Business Combination entered into the agreement on April 27, 2016, and reported on the said agreement to KFTC on August 8, 2016. On December 22, 2016, KFTC imposed corrective measures, mainly centering on the sale of assets related to the Business Combination.

(2) Major Issues of the Business Combination

After the Business Combination, the combined company became a de facto monopolist with a market share of 98.92% in the Korean vessel closure device market, and the market share of the parties of Business Combination skyrocketed by 41.06%p as the two enterprises used to compete at the similar level and scale. Furthermore, Cardinal Health, a competitor in the remaining markets, only had approximately 1% of the market share, which in substance meant the Business Combination would dissipate the competition pressure and create monopoly. Taking into consideration that the potential increase of efficiency of enterprise claimed by the parties (aiding the recovery of patients' health, reducing the production costs, improving competitiveness, etc.) is unlikely, and that such increase of efficiency of enterprise does not outweigh the concern of restricted competition, KFTC imposed the order to transfer and sell all assets and the related agreements with respect to the vessel closure device division of one of the parties of the Business Combination to a third party within six months of the completion of the Business Combination.

The case is meaningful as a reference in terms of what particulars the KFTC supplemented while imposing the order to sell the assets. In other words, with respect to the advance preparation procedure regarding the sale, KFTC pointed out that the respondents shall (1) consult with KFTC in advance regarding the details and scope of the sale of target assets, including the information of counter party and the target assets, (2) faithfully

^{7.} SJM would issue new shares (SJM shares) to Abbott in exchange for the merger of Vault Merger Sub, Inc., a wholly owned subsidiary of Abbott. The SJM shares so issued would then be converted into rights to receive 0.8708 of Abbott's new shares and the cash corresponding to USD 46.75 per share, and would be retired thereafter. As such, the structure enables Abbott to acquire 100% of SJM shares.

cooperate with a view to smoothly carry out the procedure if approval of administrative authority or consent from a third party is required for the sale of the target assets, and (3) respectively and independently operate the division related to the target assets, by separating the said division from other divisions owned by the respondents, after the Business Combination until the completion of the sale. Meanwhile, with respect to the sale plan and separate operation, KFTC indicated the submission deadline by establishing a detailed plan for performance within 30 days from the date of the corrective measures, and ordered to make a report to KFTC on the progress of performance, including the sale, within 30 days from the due date (if the sale of the target assets was completed before the due date, such date of completion). In addition, KFTC indicated that in the event of a cause which clearly renders performance of the sell order impossible, the performance period may be extended only once up to six months with an advance approval of KFTC. In such case, the request for extension shall be made to KFTC 30 days prior to the due date of performance period.

Such detailed corrective measures of KFTC appear to be based on appropriate application of the existing "Imposition Standard of Corrective Measures for Business Combination" of KFTC (KFTC Notification No. 2014-17), "Operation Guidelines of KFTC Corrective Measures" (KFTC Established Rule No. 226), and Article 64 of Rules on KFTC Meeting and Case Handling Procedures (KFTC Notification No. 2016-2). KFTC's such provision of clear guidelines is meaningful for the party on whom corrective measures, such as sale of assets, are actually imposed, in terms of expecting what procedures KFTC would take and in what order it would proceed; provided, however, that there may be some potential disputes regarding the hands-on procedures as to whether the "consultation" with KFTC prior to the sale is a simple consultation, affording some degree of leadership to the parties, or whether such procedure is premised on the engagement equivalent to the approval of KFTC. Determination and meaning of the aforementioned matters should be further refined through various enforcement cases in the future.

CHAPTER 4.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION AGAINST UNFAIR COMPETITION CONDUCT

KANG Il & SHIN Sang Hoon*

I. OVERVIEW

The Enforcement Decree of the Fair Agency Transactions Act (the "FATA") as a subsidiary regulation to specify the FATA was enacted and officially announced on December 22, 2016.

The Korea Fair Trade Commission (the "KFTC") ordered Airbnb Ireland to revise or delete its refund policy provisions specifying (i) only 50% refund until 1 week prior to arrival; and (ii) non-refundable service fees of the Airbnb (6 to 12% of the accommodation fees).

The KFTC also decided to impose a corrective order and a penalty surcharge in the total amount of KRW 1.216 billion on Diageo Korea Co., Ltd. ("Diageo Korea") with regard to its unfair inducement of customers by providing cash or redeeming taxes for purchasers. Meanwhile, on February 15, 2017, the Seoul High Court decided entirely in favor of the plaintiffs in a lawsuit filed by Lotte Cinema and CGV, Korean cinema chains, against the KFTC for cancellation of the imposition of corrective orders and penalty surcharges with respect to unfair discriminatory treatment, etc.

^{*} Attorneys, Bae, Kim & Lee LLC.

II. LEGISLATION AND POLICY DEVELOPMENT

The Enforcement Decree of the FATA ("the Enforcement Decree") as a subsidiary regulation to concretize the FATA, which was passed by the National Assembly on December 3, 2015 and enforced from December 23, 2016, was enacted and officially announced on December 22, 2016. The Enforcement Decree consists of a total of 21 provisions and 2 exhibits including the matters delegated by the FATA and other procedural provisions required for the execution of the Act.

The FATA requires the supplier (the headquarters of an agency) to prepare an agency transaction agreement specifying terms and conditions, such as the type of the transaction, the method of delivery, condition for return of goods and grounds for termination of the agreement, etc. and deliver the written agreement to the agency (Article 5.1). The related Enforcement Decree specifies that in case of consignment sale, the following matters shall be described additionally in such agency transaction agreement: (i) the scope of the business entrusted to the agency by the supplier and the matters regarding the performance thereof; and (ii) the matters regarding the fees and any other payment for consignment sale to be payable to the agency by the supplier irrespective of the title thereof (Article 2).

In addition, as the FATA delegates to the Enforcement Decree the types of the violations a supplier can commit by means of unduly taking advantage of his/her position in a transaction as follows: (i) any act of compelling an agency to purchase, against the intention of the agency, any goods (including products whose expiry date is coming closer, new products, slow selling products and products in stock) or any sample, equipment or promotional materials (Article 3); (ii) any act of compelling an agency to provide economic benefits, such as costs for any sales promotional events as requested by the supplier, salaries for any persons hired or managed by the supplier, or contributions or monetary support irrelevant to the agency transaction (Article 4); (iii) any act of compelling an agency to achieve a sale/purchase target by presenting a goal concerning transactions, and taking actions, such as termination of the agency agreement prior to the expiration thereof, suspension of supply of the goods or services or failure to pay any amount payable to the agency, or expressing the intent to take such actions upon the agency's failure to achieve such goal (Article 5); (iv) any act of establishing or altering any terms and conditions of transactions to give any disadvantage to an agency, such as adding any terms and conditions during the term of the agency agreement against the intention of the agency or prohibiting the agency to claim damages upon termination of such agreement,

or imposing any disadvantage to the agency in the course of implementing the transaction by refusing to accept any goods returned by the agency for any reason attributable to the supplier or requiring the agency to pay costs incurred for such return (Article 6); (v) any act of interfering in management activities of an agency by requiring the agency to obtain the instruction or approval of the supplier in making a decision on appointment, dismissal and terms and conditions for employment of any officer or employee or provide any trade secret without any justifiable reason such as current condition of the customers and details on sales, etc. [provided, however, that in case where the supplier has obtained the consent of the agency in a transaction for consignment sale or there is any justifiable reason, such act does not constitute interference in management activities of the agency (Article 7)].

Furthermore, the FATA prescribes that the Agency Dispute Mediation Council shall be established within the Korea Fair Trade Mediation Agency in order to mediate disputes on agency transactions in a prompt manner (Article 13) and in case where mediation of matters for dispute mediation is completed, such mediation between disputing parties shall be have the same effect as a court settlement (Article 21.1). The related Enforcement Decree clarifies the detailed matters required by the administration of the procedures for dispute mediation set forth by the FATA by prescribing the matters regarding the Agency Dispute Mediation Council including convocation of meetings and procedures for application for, and completion of dispute mediation (Articles 8 through 19).

In addition, the Enforcement Decree (i) specifies the meaning of the "amount involved in the violation of the FATA" set forth therein as the upper limit for a penalty surcharge for each type of abuse of a position in a transaction (Article 20) and the standards for determination on imposition of a penalty surcharge and the calculation thereof (Exhibit 1), and (ii) provides for the base amount of a fine for each violation and the standards for increase or decrease thereof (Exhibit 2).

III. MAJOR CASES

1. Corrective Measures Imposed by the KFTC on Airbnb for its Unfair Terms and Conditions

The KFTC recommended Airbnb Ireland to revise its refund policy provisions

specifying (i) 50% refund up until 1 week prior to arrival; and (ii) non-refundable service fees of the Airbnb (6 to 12% of the accommodation fees), but Airbnb failed to comply with the recommendation without any justifiable grounds, and on November 3, 2016, the KFTC decided to issue a corrective order to Airbnb.

Airbnb is a business operator that provides various services including search for accommodation, accommodation brokering, handling the settlement and refund of accommodation fees on behalf of the host, intervention in a dispute with the host, etc. in return for service fees in an amount equivalent to 6 to 12% of the accommodation fees.

The KFTC judged that in case where the cancellation of reservation is made in advance, the performance of Airbnb is relatively reduced compared to when the guest actually checks in, but making the service fees already paid non-refundable irrespective of whether the guest cancels his/her reservation or actually checks in unreasonably is unfair. The KFTC also judged that making all service fees non-refundable irrespective of whether the cancellation is made due to intentional or gross negligence of Airbnb is unreasonably disadvantageous to consumers and falls into the clause which obligates consumers to pay compensation for damage in an excessive amount as set forth in Article 8 of the Act on the Regulation of Terms and Conditions. Accordingly, Airbnb decided to revise its terms and conditions, which are applicable to all countries in the world, according to the purport of the corrective measure issued by the KFTC.

The action taken by the KFTC in this case is significant in that a corrective order was issued for the first time in the world with respect to Airbnb's refund policy, which is causing discontent among many consumers at home and abroad.

2. Corrective Measures Imposed by the KFTC on Diageo Korea for its Unfair Inducement of Customers

The KFTC decided to impose a corrective order and a penalty surcharge in the total amount of KRW 1.216 billion on Diageo Korea Co., Ltd. ("Diageo Korea") with respect to its unfair practice of inducing customers by providing cash or redeeming taxes for purchasers such as bars and restaurants.

Diageo Korea is selling 89% of its whiskey products through retailers such as Korean

bars and restaurants from around 2011. This whiskey supplier paid in cash a total of KRW 14.8532 billion, in instalments of KRW 50 million on average and as much as KRW 300 million to the so-called "keymen" of 197 retailers (employees of retailers who exercise their influence over the venues and their customers in the selection and purchase of alcoholic beverages) on the condition of retailers not purchasing rivals' products and purchasing its products in certain quantities. Diageo Korea also paid to the keymen of 69 retailers who had to pay aggregate income tax additionally in 2013 a total of KRW 364.54 million (the amount equivalent to the sum of the aggregate income tax) by making payments in cash, supporting travel expenses or repaying debts owed to wholesale dealers with an aim to increase the sale of its products.

According to the KFTC's decision, Diageo Korea unfairly induced customers by providing improper payments in excessive amounts for its intermediate customers who can recommend products for final customers so that it would distort final customers' choice with unfair profits. The KFTC considered that such practice constitutes unfair inducement of customers set forth in Article 23.1.3 of the MRFTA and inducement of customers by providing unfair profits set forth in Subparagraph 4(a) of [Exhibit 1-2] with respect to Article 36.1 the Enforcement Decree of the Act.

3. Decision Rendered by a High Court Concerning Discriminatory Treatment by Lotte Shopping Lotte Cinema and CGV (Seoul High Court Judgment in Case No. 2015Nu39165 and 2015Nu44280 delivered on February 15, 2017)

On February 15, 2017, the Seoul High Court decided entirely in favor of the plaintiffs in a lawsuit filed by Lotte Cinema and CGV, the nation's two biggest cinema chains, against the KFTC for cancellation of the imposition of a corrective order and penalty surcharges.

On March 6, 2015, the KFTC ordered surcharges in the amount of KRW 5.5 billion on the grounds that (i) the two movie theater operators differentiated the terms and conditions for transactions by allocating the movies distributed by non-affiliated distributors to small-sized theaters or a small number of screening times, or placing promotional materials in a bad position. In addition (ii) the two movie theater operators gave distributors unfair disadvantages by issuing discount coupons which reduce the premium payable to distributors (revenue based on ticket prices) without prior consultation with distributors.

The Seoul High Court admitted that it is highly difficult for movie theater operators to accurately forecast box-office records of certain movies before the movies come out to the public. Court also found that it is also difficult for the movie theater operators actually treated some movies distributed by non-affiliate distributors in a significantly disadvantageous manner. The court also held that the cinema chains are not deemed to have given disadvantages to distributors in an unfair manner by issuing discount coupons. On top of it, the court held that Lotte Entertainment, which is not a separate entity but one business division of Lotte Cinema, cannot be an object of unfair differentiation under the MRFTA.

The above case has created a large ripple effect on the entire movie industry as an important precedent concerning the vertically integrated structure of the current movie industry. Currently, the above two cases are pending at the Supreme Court.

Case Concerning Discriminatory Treatment, Etc. by Lotte Shopping Lotte Cinema (Seoul High Court Judgment in Case No. 2015Nu39165 delivered on February 15, 2017)

1. KFTC's Decision

A. Discrimination in Terms and Conditions for Transactions

The KFTC imposed a corrective order and an surcharges on the Plaintiff on the grounds that (i) the Plaintiff allocated 79 movies distributed by distributors other than Lotte Entertainment ("Lotte Enter"), one of its business divisions, to small-sized theaters or a small number of screening times in comparison with movies distributed by Lotte Enter regardless of their expected box-office ranks or the number of audiences during weekends for the period from January of 2011 to April of 2014 and (ii) placed leaflets or other promotional materials for all the movies distributed by non-affiliated distributors in a bad position in comparison with movies distributed by Lotte Enter for the period from August of 2013 to February of 2014, which constitutes an act of discrimination regarding the terms and conditions for transactions.

B. Act of providing unfair disadvantages

The KFTC issued a corrective order, stating that the Plaintiff gave distributors unfair disadvantages by issu-ing discount coupons which reduced the premium payable to distributors without prior consultation with distributors for the period from January of 2010 to March of 2014.

2. Court's Holding (Cancellation of Corrective Order and Order for Payment of Penalty Surcharges in Entirety)

A. Decision on Discrimination in Terms and Conditions for Transactions (Discrimination in Allocation of Screening Times and Theaters, Etc.)

1) Existence of discrimination and prominence thereof

It is difficult to conclude that the Plaintiff significantly discriminated in favor of Lotte Enter, one of its busi-ness divisions, against other distributors in determining the terms and conditions for transactions, and it is also difficult to consider that the Plaintiff engaged in unfair trade practices which threaten to obstruct fair trade.

- A movie, as typical experience goods, has a property of low repeatability of consumption, com-pared to other goods. Due to the uncertainty in the demand for movies, the movie industry is an industry with high risks. For this reason, movie theater operators attempt to make an accurate demand estimation in consid-eration of various factors affecting box-office records before determining the number of screening times and the size of theaters, etc. for newly-released movies in order to maximize their profits, and if such estimation differs from the demand actually realized, they promptly adjust the number of screening times and the size of theaters, etc. in response thereto. It is natural that the demand estimation made by movie theaters differs from each other.
- Even though estimated box office rankings are deduced, there still is a limitation that external vari-ables, which are changing from time to time, cannot be fully reflected therein. It is also doubtful whether movie theater operators have the obligation to allocate screening times only based on estimated box office rankings. Accordingly, it is difficult to conclude that the Plaintiff significantly discriminated against the five movies above simply on the grounds that the Plaintiff allocated a relatively small number of screening times to the five movies distributed by other distributors, which ranked higher than those distributed by Lotte En-ter, a business division of the Plaintiff. In addition, there seem to have been justifiable grounds for the allocation of a relatively small number of screening times for the five movies above.
- It is unreasonable to judge that the Plaintiff significantly discriminated against other
 distributors in terms of screening times simply based on the difference with the screening times
 allocated by Megabox, an-other cinema chain, without considering the fact that every movie
 theater operator has different internal standards concerning estimation of box-office records or
 allocation of screening times.
- It is unreasonable for the KFTC to judge that the Plaintiff significantly discriminated against

other distributors simply based on the fact that the Plaintiff allocated a relatively small number of screening times to the movies which attract a larger audience on weekends than weekdays without considering whether the Plaintiff had any reasonable grounds for such act.

- During the investigation conducted by the KFTC, the employees of distributors, including
 Warner Bros, Sidus and Sony Pictures, made a statement to the effect that they had never
 suffered from damages while distributing movies to Lotte Cinema, a business division of the
 Plaintiff, and the allocation of screen-ing times for the movies distributed by their companies
 was appropriate.
- It is difficult to consider that with respect to the 24 movies which were allocated to a relatively small number of theaters in view of their estimated box office rankings or the number of audiences on week-ends, there existed significant discrimination by the Plaintiff or that its discriminatory intent was clearly re-vealed only based on the circumstances mentioned by the KFTC (it was confirmed that 15 movies out of the 24 movies above were allocated to theaters with a small number of seats, but the number of screening times and seats on weekends allocated to the movies was rather larger).
- It is difficult to conclude that the Plaintiff's instruction that three or four leaflets for the
 movies distributed by Lotte Enter be placed on the top tier of the leaflet rack makes any great
 significant difference in promotion effects.
- It can be said that the number of the movies that were asserted by the KFTC to have been
 discrimi-nated against is insignificant in comparison with that of the entire movies shown by
 the Plaintiff.

2) Obstruction to fair trade

The act at issue is only deemed to have been conducted to maximize the Plaintiff's economic profits based on its analysis on the specific box-office record for each movie, and it cannot be affirmed that such act was conducted with an intention to give disadvantages to other distributors. Further, it is also difficult to consider that the act at issue constitutes an act which threatens to obstruct fair trade in view of the trends of the movie industry, general situation regarding competition and the details of the sales strategies adopted by movie theaters, etc.

3) Discrimination in terms and conditions for transactions based on the Plaintiff itself

For an act to constitute discrimination in terms and conditions of a transaction, there should be a premise that the terms and conditions for, or the details of a transaction are in favor of, or against a particular enterpriser in comparison with those for other enterprisers (See the Supreme Court Judgment in Case No. 2004Du3014). As Lotte Cinema and Lotte Enter are basically business

divisions or internal organizations that belong to the Plaintiff, it is difficult to consider that Lotte Enter is an independent counterparty against the Plaintiff. Ac-cordingly, it is difficult to say that the reason for the distribution satisfies the requirement for discrimination in terms and conditions for transactions set forth in Article 23.1. of the MRFTA. Even in this regard, the rea-son for the distribution in respect of such act is not established.

B. Decision on Provision of Unfair Disadvantages (Issuance of Discount Coupons)

1) Existence of superior position in transactions

The Plaintiff's superior position in transactions is acknowledged.

2) Providing disadvantages

It is difficult to consider that the Plaintiff gave disadvantages the counterparty by abusing its superior posi-tion in transactions.

- The Plaintiff has the right to set the entrance fee and the issuance of discount coupons for
 movie tickets can be viewed as an act conducted within the scope of its authority to set the
 entrance fee unless there are any special circumstances.
- The act of issuing such discount coupons can be considered to have increased the sales, which serves the interests of distributors as well, and therefore, the Plaintiff's act cannot be considered unilaterally disadvantageous to distributors.
- In view of the method for issuing discount coupons at issue and the business practices in the
 indus-try, consumers can see movies at lower prices by using coupons, and therefore, in some
 aspects, such act con-tributes to the increase of consumers' welfare. It is difficult to consider
 that the issuance of such coupons con-stitutes an act which threatens to obstruct fair trade as an
 act conducted beyond normal trade practice based on the submitted materials.

CHAPTER 5.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PRIVATE LITIGATION

HONG Daesik *

I. OVERVIEW

The Monopoly Regulation and Fair Trade Act (the "MRFTA"), the main body of Korean competition law, has been primarily enforced by the Korea Fair Trade Commission (the "KFTC"). Although private damage actions have been an available legal remedy, there were few cases until 2003. Private litigations began to increase starting in 2004, mostly in the form of follow-on suits filed by the victims after the KFTC found violations in cartel cases. The Systematic development that contributed to the increase in private litigation was the amendment of the MRFTA in 2004.

First, the plaintiffs (or victims) were now free to bring damage actions based on the MRFTA before the KFTC's decision on a violation was finalized. Before the 2004 amendment, plaintiffs were required to wait until the KFTC measure had been finalized before they could bring a private litigation suit. But with the repeal of such provision, plaintiffs were now free to bring damage actions based on the MRFTA.

Second, the provision relaxed the plaintiff's burden of proof by establishing a system to deal with the court's high standard in proving the specific amount of damages. The new provision allowed the court to make an estimation of reasonable amount of damages at its discretion. However, the provision was not used much due to the uncertainty regarding the applicable standard. The Supreme Court set forth the applicable standards in 2016.

^{*} Professor, Sogang University Law School; Director, The ICT Law & Economy Institute.

^{1.} OECD, Korea Progress in Implementing Regulatory Reform, OECD Reviews of Regulatory Reform (2007), p. 85.

The representative case that triggered the increase in private litigations brought by cartel victims was the Military Oil Bid-Rigging case and the Flour Price Cartel case, in which the plaintiffs were the government and baking companies, respectively. The Supreme Court ruling on these cases raised the incentives for more private lawsuits by clarifying the position of the court on important legal issues such as the method for quantifying damages and the standing to sue for indirect purchasers.

Unlike claims for damages compensation, the MRFTA does not explicitly provide a right to seek the injunctive relief for a private party. However, considering that the Supreme Court has opened a way by a judge-made law to grant injunctive relief on unfair trade practices based on laws other than the MRFTA², the request for injunctive relief is available at least in theory.

II. LEGISLATION AND POLICY DEVELOPMENT

1. General Procedures

Despite institutional improvements, private litigations in competition law cases are generally not brought without KFTC's prior action finding an illegal conduct. Since class action systems and discovery procedures are not available, it is very difficult for a private litigant to pursue a stand-alone case without KFTC decision finding illegality.

If there is a KFTC action on illegality, follow-on private litigations can avoid such hurdles. Although the KFTC's decision does not have a binding effect as to its fact-finding,³ the courts may use KFTC's fact-finding as a de facto presumption. Based on such presumption, plaintiffs have a greater incentive to bring a damage action alongside a pending administrative litigation. The KFTC is mandated to send all information regarding a case if the court requests it. Hence, if there has been a prior KFTC investigation in the matter, substantially the same material that the KFTC had reviewed can be utilized in the private litigation against the defendants. The data includes anything that could be admissible as judicial evidence, which means that it is not limited to materials that were formally deliberated on by the KFTC, such as the examiner's report and its attachments.

Supreme Court Judgment in Case No. 2008Ma1541 delivered on August 25, 2010 (Interfering with an internet portal's advertisement business).

^{3.} Supreme Court Judgment in Case No. 89Daka29075 delivered on April 10, 1990, etc.

This may cause a concern for leniency applicants. Although data submitted to the KFTC is considered a trade secret, if the KFTC receives a request from the court for submission in latter litigation, there are no grounds to refuse such request if the data has evidential value at trial. Thus, there is an argument that it is necessary to introduce a provision exempting leniency applicant documents from such extensive record submission requirements, but no resolutions are in force yet.

2. Causation

There must be causation between the violation of the MRFTA and the victim's damages, which means a logical connection that there would have been no harm to the victim if there had been no violation. The plaintiff bears the burden of proof. This corresponds to U.S. court precedents⁴ which stipulates that alleged damages should constitute antitrust injuries to be recognized as recoverable damages, which means that the damages need to be a type of damages antitrust law aims to prevent, and that such damages need to be caused by the defendant's illegal act.

The court takes a principled position regarding proof of the existence of a causal link. For example, in the private damages case related to the Microsoft's abuse of market dominant position, although the court acknowledged that the defendant engaged in illegal bundling and that the plaintiff went out of business, it declined to acknowledge causation between the two facts. The court ruled that the plaintiff had failed to sufficiently prove causation between its exit of the messenger business and damages since most of the alleged amount of damages were based on unrealized profits.⁵

3. Calculation of Damages

The burden of proof for the amount of damages by an illegal act covered by the MRFTA lies on the plaintiff. However, the standard of proof and the degree of conviction necessary for judicial estimation of the amount of damages are relatively low compared to those required for proving the factual occurrence of damages. The Supreme Court has held that the proper amount of damages in private litigation is 'the difference between the amount of assets the plaintiff would have had but for the defendant's illegal acts and the amount of

^{4.} Brunswick Corp. v Pueblo Bowl-C-Mat, Inc, 429 US 477, 97 S Ct 690 (1977).

Supreme Court Judgment in Case No. 2012Da79446 delivered on February 15, 2013.

assets with the illegal acts committed'⁶. In other words, the court has generally taken a 'but for' approach in calculating damages in private litigation. For cartels, the difference can be calculated by multiplying the amount of purchase with the difference between the price that victim actually paid and the but-for competitive price.⁷

In order to prove the amount of damages caused by a cartel, the amount of purchase and the actual price paid by the victim must also be proved, but the more difficult part lies in the proof of the but-for competitive price. The but-for competitive price should be calculated by excluding the increase of price caused by a cartel while keeping other price-forming factors of the relevant market stable. If the economic factors affecting price formation before and after cartel remain the same, the proof may not be difficult because it is reasonable to calculate but-for competitive price using before and after comparison methods, based on the transaction price assessed after the termination of a cartel. However, in a case where there is a significant change in economic factors, even if there is comparable price available in the market, it cannot be used as such. This is because the influence caused by variable factors should be excluded. In these cases, a party must depend heavily on economic reasoning such as empirical economic analysis.

In the Military Oil Bid-Rigging case,⁸ which economic approach is more appropriate if one relies on economic reasoning was at issue. The court of first instance, the Seoul Central District Court of Korea, calculated damages⁹ based on a but-for competitive price estimated by the econometric method using the multiple regression model. On the other hand, the appeal court, the Seoul High Court adopted a 'modified' standard market comparative method (yardstick method, making certain adjustments to the Singapore spot market price, the so-called MOPS price, as the standard market price) in calculating damages¹⁰ while holding that courts need to use the most reasonable method to bring about appropriate real-world outcome in a specific case, acknowledging the limits of econometric analytical methods. In response, the Supreme Court reversed the Seoul High Court ruling, which chose the approach that normatively transforms standard market comparison method, citing that the calculation of but-for competitive price did not exclude the effects of price-changing factors although there were noticeable changes in economic factors. As the Seoul High

^{6.} Supreme Court Judgment in Case No. 91Da33070 delivered on June 23, 1992 (per curiam).

^{7.} Supreme Court Judgment in Case No. 2010Da18850 delivered on July 28, 2011.

^{8.} Supreme Court Judgment in Case No. 2010Da18850 delivered on July 28, 2011.

^{9.} Seoul Central District Court Judgment in Case No. 2001Gahap10682 delivered on January 23, 2007.

^{10.} Seoul High Court Judgment in Case No. 2007Na25157 delivered on December 30, 2009.

Court reviewed the case on remand from the Supreme Court, the issue was which economic approach it would adopt, but the actual case was concluded with the parties' settlement in accordance with the court's ruling for recommendation of settlement¹¹.

As discussed above, the calculation of the amount of damages results in an extremely tricky situation derived from the nature of the matter, and proving necessary facts is difficult. In light of these difficulties, the MRFTA allows the courts to determine an adequate amount of damages based on overall arguments and the outcome of investigating evidence. If multiple plaintiffs have respective amounts of small damages, this provision relaxes a plaintiff's burden by letting the court decide on an amount of damages rather than requiring a plaintiff to prove the exact amount of damages that were incurred by the defendant. The court acknowledged the amount of damages for each purchaser in the School Uniform Cartel case¹² in which the amount of damages for each purchaser was relatively small. It recognized but-for competitive price as the plaintiff's actual purchased price appropriately reduced in consideration of various circumstances.

While the court's discretionary power to determine the amount of damages has eased the burden of private litigation for individual plaintiffs, the use of economic approach in damages calculation has become a hot issue in cases like the Military Oil Bid-Rigging case (in which huge amounts of damages were claimed). Examples of cases where the courts found an economic approach reasonable include the Flour Price Cartel¹³ case using the econometrics using the dummy variable after cartel, the hepatitis vaccine price fixing case¹⁴ of the drug wholesaler using the yardstick method, and reverse payment settlement cases¹⁵ of pharmaceutical companies using market share theory.

4. Other Issues

Treble damages or other forms of punitive damages have not been introduced into the MRFTA yet. Under the MRFTA, only the enterprise or the enterprise organization may be liable for illegal acts. Hence, if an enterprise's individual employee commits an illegal act, a private action cannot be brought under the MRFTA against that individual. On the other

^{11.} Seoul High Court Judgment in Case No. 2011Na62825 delivered on July 10, 2013.

^{12.} Seoul High Court Judgment in Case No.2005Na109365 delivered on June 27, 2007.

^{13.} Supreme Court Judgment in Case No.2010Da93790 delivered on November 29, 2012.

^{14.} Seoul High Court Judgment in Case No.97Na4465 delivered on May 20, 1997.

^{15.} Seoul Western District Court Judgment in Case No.2014Gahap38388 delivered on August 12, 2015.

hand, any person that has suffered from damages caused by an illegal act covered by the MRFTA may sue regardless of whether he is a direct purchaser or not.

The pass-on defense is not clearly established under the MRFTA. In the Flour Cartel case, the Supreme Court rejected the pass-on defense citing insufficient proof of causation between the plaintiff's loss due to the increase in flour price and the increased amount in sales due to the increase in price. This was based on the assessment that whether a plaintiff would pass-on increased costs caused by increased price (despite the risk of decreased demand), unless proven otherwise, would be a matter of judgment for the plaintiff. But the court did acknowledge that some amount of damages was passed-on to consumers, and reduced damages to create a practical equivalent effect in recognizing a pass-on defense since it would not be equitable for the plaintiff to gain undue profit. In the meantime, the Supreme Court stipulated that so-called indirect purchasers may bring damage actions against enterprises when they can prove causation between their loss and the illegal act. 17

5. Major Trends in 2016

In 2016, there was no particular change in laws or policies related to private litigation.¹⁸ Currently, the National Assembly has submitted bills regarding treble damages, the KFTC's authority to issue corrective order to compensate, and the introduction of injunction system, some of which might be reflected in actual legislation after the establishment of the new government in May 2017.

III. MAJOR CASES

In 2016, a noteworthy Supreme Court decision has been announced regarding the compensation for damages in the Diesel Price cartel case. This case began with a filing of a suit by cargo vehicle drivers who bought diesel supplied to gas stations by three refineries after the KFTC's decision on violation that the refiner had kept the selling price of diesel products high. Since the class action system has not yet been introduced in Korea, the form of the lawsuit was a collective action brought by 580 consumers as individual plaintiffs.

^{16.} Supreme Court Judgment in Case No.2010Da93790 delivered on November 29, 2012.

^{17.} Supreme Court Judgment in Case No.2013Da21062 delivered on September 4, 2014.

Supreme Court Judgment in Case No. 2014Da81511 delivered on November 24, 2016.

The plaintiff's amount of damages could be calculated by multiplying 'the amount of diesel purchased per plaintiff and the overcharge price per liter of the diesel (actual purchase price - but-for competitive price)'. In this case, there were difficulties in setting the amount of purchase and the actual purchased price because for some plaintiffs, while it was confirmed that the diesel had been purchased during the fixing period of this case, the price and the amount of purchase and the identity of the business from which the purchases were made were all unclear. Needless to say, there were a lot of difficulties in calculating the but-for competitive price. The court of the first and second instance rejected the plaintiffs' claims since the plaintiffs were unable to specify the amount of the purchase from the defendants during the cartel period and therefore the overcharge price could not be calculated.

On appeal, the Supreme Court ruled on the issues in the following sequence.

First, the court found that from the submitted evidence the plaintiffs can be divided into two groups. The first group of plaintiffs' purchases of diesel from the defendants during the cartel period cannot be recognized while the second group's purchase of diesel can be reasonably recognized from the submitted evidence.

Second, in the case of second group of plaintiffs, the court held that it was appropriate to exert its discretion to acknowledge a substantial amount of damages, since proving the purchase amount and the but-for competitive price or excessive price is extremely difficult due to the nature of the specific violation.

Third, even if the court could determine a large amount of damages at discretion, the methodology on which it is based should be reasonable and objective. According to this standard, the plaintiffs' methodology is reasonable and objective with regard to the amount of purchase, but with regard to the but-for competitive price or excessive price, the plaintiffs' claim of a 'modified' standard market comparison method (making adjustments in the MOPS price set as the standard market price) was not reasonable and objective.

Fourth, even if the plaintiffs' methodology is not valid, the trial court should have conducted a vigorous review and determination to estimate a considerable but-for competitive price or excessive price. In addition, the court illustrated methodologies for calculating considerable but-for competitive price or excessive price. The Supreme Court concluded that appropriate methodologies admissible are not limited to ① econometric methodology, and may include ② methodology relying on the statistical data on excessive

price by the cartel, the amount of damages awarded in similar cases, and the amount of profit the business acquired due to the violation, ③ method of comparing supply price of refiners who did not join cartel with supply price of cartel defendants, and ④ some adjustments can be made in the calculation of the plaintiff's report if the domestic diesel retail price is linked to the MOPS price. In cases where compensation for a huge amount of damages is expected, methodology ①, although costly, can be attempted, but in this case where an individual consumer is the plaintiff, it is not cost-effective. In that sense, this case has significance in explicitly accepting the methodologies with relatively high cost-efficient alternative.

CHAPTER 6.

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF IPR-RELATED ANTITRUST

CHUN Keehong & LEE Kyungyul *

I. OVERVIEW

Article 59 of the Monopoly Regulation and Fair Trade Law (the "MRFTA") provides that the MRFTA shall not prohibit any conduct that is deemed a legitimate exercise of intellectual property rights (the "IPR"). However, the Guidelines on Unfair Exercise of Intellectual Property Rights ("IPR Guidelines") – which were issued by the Korea Fair Trade Commission (the "KFTC") to articulate general principles and specific criteria for applying the MRFTA to the exercise of IPR – provide that even an act that may outwardly appear as a legitimate exercise of IPR may be an unfair exercise and regulated under the MRFTA if it deviates in substance from the fundamental purpose of the intellectual property system.

Since the mid-2000s, the KFTC has recognized IPR abuse as a major area of MRFTA enforcement and has been aligning the applicable regulations and standards with changing market practices to regulate anti-competitive and/or abusive behaviors. In particular, the KFTC amended and reinforced the IPR Guidelines in April 2010, which up until then primarily regulated unfair licensing terms, to address newly arising IPR issues – including abuse of patent pools and technical standards, frivolous patent lawsuits, and unfair settlement of patent disputes – and to clarify the legal basis for the KFTC to regulate the activities of foreign enterprisers. In 2012, the KFTC issued new separate guidance for patent license agreements and model standards for the operation of standard-setting organizations.

 ^{*} Attorneys, Kim & Chang.

In December 2014, the KFTC released further amendments to the IPR Guidelines, including new provisions relating to the regulation of non-practicing entities ("NPE") and standard-essential patents ("SEP"). Controversially, however, the definition of SEPs introduced in the 2014 amendment included so-called de facto SEPs, but the KFTC announced additional amendments to the IPR Guidelines in March 2016, excluding de facto SEPs from the definition of SEPs so that de facto SEPs will be regulated under the same standards as any other IPR that is not an SEP. This reflected concern that the existing IPR Guidelines imposed excessive restrictions on de facto SEPs by applying the same standards as for SEPs when assessing whether there had been an IPR abuse.

Meanwhile, in December 2016, the KFTC newly established the Knowledge Industry Anti-Monopoly Division to strengthen enforcement of the MRFTA within "knowledge industries" such as IT, pharmaceuticals and biotechnology. In its 2017 Enforcement Plan, the KFTC stated that it would extensively monitor for exclusionary conduct in the semiconductor and broadcasting/telecommunications sectors, restriction of R&D-based competition and anticompetitive conduct in the pharmaceutical and medical device industries. Improper petitions for injunctive relief in violation of FRAND commitments and tying with services and products unrelated to the standard technology will be special areas of focus.

In 2015, the KFTC actively enforced the MRFTA with respect to IPR abuse, closely reviewing the MS-Nokia business combination and Dolby's abuse of superior transactional position. This trend continued in 2016, with the KFTC imposing the highest ever administrative fine of KRW 1.03 trillion against Qualcomm for abuse of its market dominant position.

II. LEGISLATION AND POLICY DEVELOPMENT

1. Application of Competition Laws to Intellectual Property Rights ("IPR")

The MRFTA, which is the competition law of Korea, provides that the MRFTA shall not prohibit any conduct that is deemed a legitimate exercise of intellectual property rights ("IPR"). Article 59 of the MRFTA restricts and limits the application of the MRFTA to IPR by providing that "[t]his Act shall not apply to any act which is deemed as a legitimate exercise of a right under the Copyright Act, the Patent Act, the Utility Model Act, the Design Protection Act or the Trademark Act". Conversely, this provision can be interpreted

to provide that the MRFTA may be applied to an exercise of IPR if it is deemed not to be legitimate.

With respect to the scope of legitimate exercise of patent rights under the MRFTA, the Korean Supreme Court stated that "conduct that is not deemed to be a legitimate exercise of patent rights' refers to conduct which may outwardly appear to be an exercise of patent rights, but whose substance deviates from the object of the patent system and therefore runs counter to the fundamental purpose of the patent system". The Supreme Court also stated that the determination of whether an exercise of patent rights is legitimate "shall be made taking into account the overall circumstances, including the purpose and object of the Patent Act, the details of the patent rights concerned, and the effect of the conduct on fair and free competition" (Supreme Court Judgment in Case No. 2012Du24498 delivered on February 27, 2014).

The KFTC, the competition law enforcement authority in Korea, issued the Review Guidelines on Unfair Exercise of Intellectual Property Rights ("IPR Guidelines") in 2000 to articulate general principles and specific criteria for applying the MRFTA to the exercise of IPR. The IPR Guidelines affirm the limitations in applying the MRFTA by providing that "[t]he legitimate exercise of IPR under Article 59 of the MRFTA means an exercise of IPR within the scope of the IPR's exclusive right of usage as defined by the relevant laws and in such case, shall not be subject to the MRFTA, in accordance with Article 59 of the MRFTA". The IPR Guidelines further present criteria similar to those of the Supreme Court by providing that "whether the exercise of IPR is legitimate requires consideration of various circumstances as a whole, including the purpose and aim of the relevant IP laws such as the Patent Act, the content of such IPR, and the effect of such act on competition in the relevant market".

2. Amendments to IPR Guidelines in December 2014

Since issuing the IPR Guidelines in 2000, the KFTC has released five amendments to the guidelines. These amendments reflect the investigations conducted and decisions rendered by the KFTC to regulate the exercise of IPR under the MRFTA and also appear to take into account the guidelines of foreign competition authorities. Specifically, the 2014 amendments strengthened the legal basis for enforcing the MRFTA against the abuse of patent rights by non-practicing entities ("NPEs") and standard-essential patent ("SEP") holders, in light of concern that the activities of NPEs and SEP holders – including imposition of excessive

royalties, unfair discrimination in charging royalties and filing of patent injunction actions against willing licensees – may undermine innovation and competition and cause undue harm to domestic companies. Based on these concerns, the 2014 amendments also incorporated modifications to general examination principles and categories of abuse behaviors. The main modifications introduced by the 2014 amendments can be summarized as below:

(1) Provisions regarding NPEs

The 2014 amendments define NPE as "an enterpriser who engages in the business activities of generating profits through an exercise of patent rights against patent implementers, etc., without itself being engaged in manufacturing or selling of goods or offering of services using the patented technology". The 2014 amended IPR Guidelines classify patent abuse by NPEs into the following five categories: (1) imposition of excessive royalty; (2) refusing to apply fair, reasonable and non-discriminatory ("FRAND") terms for patents obtained from a third party that was subject to FRAND; (3) in the case of NPEs formed through a consortium, unfairly refusing to license or licensing on discriminatory terms enterprisers that are not members of the consortium; (4) filing or threatening to file frivolous patent infringement lawsuits through deceptive means (such as concealment or omission of important information necessary to respond to the NPE's exercise of patent rights); and (5) patent privateering (i.e., transferring patent rights to an NPE and causing that NPE to engage in any of the foregoing acts).

(2) Provisions regarding SEPs

The 2014 amendments newly define SEP as "a patent that is needed to implement a standard technology, for which anyone wishing to manufacture goods or supply services that require such standard technology must obtain a license". Also, the KFTC supplemented the existing section on the exercise of patent rights related to standard technologies by adding a sub-section concerning injunction actions by SEP holders. In particular, the provision states that if an SEP holder who has committed to license its SEP on FRAND terms files an injunction action against a willing licensee without negotiating in good faith, such act may constitute abuse of patent rights. In addition, the IPR Guidelines added to the list of potential abusive acts committed by SEP holders, including unfairly avoiding providing a license under FRAND terms in order to strengthen monopoly power in relevant market or exclude competitors, and unfair restriction of a licensee's exercise of its own patents or unfair cross-license of its non-SEPs.

(3) Amendments to General Examination Principles and Categories of Abuse

Regarding unilateral conduct, the 2014 amendments to the IPR Guidelines shifted the focus away from regulating unfair trade practices to regulating abuse of market-dominant position. The IPR Guidelines state that regarding unilateral exercise of IPR, the IPR Guidelines shall apply to the extent that the enterpriser possesses a market-dominant position, and "unfairness" (applicable to unfair trade practices) was no longer included as a criterion for the determination of illegality. In addition, efforts were made to enhance the completeness of the IPR Guidelines by categorizing the types of abuse according to the life-cycle of the patent, from the acquisition of a patent to the exercise thereof (litigation, licensing, etc.). The KFTC also added criteria for determining the illegality of grantbacks or package licensing in order to address issues unique to IPR and to increase predictability regarding the KFTC's enforcement.

3. Amendments to IPR Guidelines in March 2016

Following the amendments in December 2014, the KFTC released further amendments to the IPR Guidelines in March 2016. The 2016 amended IPR Guidelines limit the definition of "standard technology" to technology selected as a standard by standard setting organizations etc., by deleting reference to "technology that is used widely as the practical standard in the relevant technology area" from the definition. Additionally, the definition of SEPs was also amended to refer only to those patents for which a voluntary commitment to license on FRAND terms is required from the patent holders. In line with the amended definition of SEPs, the amended IPR Guidelines removed references to de facto SEPs, and it is expected that the KFTC will now review the legality of the exercise of "de facto SEPs" based on the standards for reviewing the exercise of non-SEPs (or general patents). This amendment reflects the view that reviewing the legality of the exercise of de-facto SEPs based on the standards for reviewing the exercise of SEPs is likely to be construed as an excessive limitation on patent rights.

Also, the KFTC amended the purpose of the IPR Guidelines as the "promotion of free and fair competition" and clarified when a refusal to license patents could be viewed as unfair. As such, the amended IPR Guidelines are regarded as having been amended in a manner more favorable to the exercise of patents by patentees.

4. Introduction of Patent Linkage System for Drugs

In March 2012 and March 2015, amendments to the Korean Pharmaceutical Affairs Act came into effect to introduce a system similar to the U.S. Hatch-Waxman Act pursuant to the Korea-US FTA. These amendments are referred to as the "patent linkage system for drugs", and they address, among others, registration of drug-related patents on a "green list" and the patentee notice process, sales injunctions following patent disputes, and a reporting requirement upon settling a patent dispute.

In particular, the KFTC is now able to more actively monitor the exercise of IPR in the pharmaceutical industry such as reverse payments based on the newly adopted system that requires drug companies to report to the KFTC the settlement of a patent dispute within 15 days.

5. Establishment of Knowledge Industry Anti-Monopoly Division

In December 2016, the KFTC established the Knowledge Industry Anti-Monopoly Division to strengthen enforcement of the MRFTA within "knowledge industries" such as IT, pharmaceuticals and biotechnology. The KFTC explained that the establishment was motivated by the need for systematic monitoring and timely intervention in light of sector characteristics such as high risk of monopolization of the relevant technology by first movers and dynamic shifts in the market environment, as well as the high level of expertise and know-how required in regulating these industries.

The Knowledge Industry Anti-Monopoly Division will be mainly responsible for investigating abuse of monopolistic/oligopolistic positions and unfair trade practices in these knowledge industries, such as reverse payments in the pharmaceutical industry and abuse of IPR to exclude competitors. Consequently, the KFTC announced in its 2017 Enforcement Plan that it would strengthen monitoring exclusionary conduct in the semiconductor and broadcasting/telecommunications sectors, restriction of R&D-based competition, anticompetitive conduct in the pharmaceutical and medical device industries, improper claims for injunctive relief in violation of FRAND commitments and tying with services and products unrelated to standard technology.

III. MAJOR CASES

Much attention has been paid to the enforcement of competition laws against the exercise of IPR, and various cases in relation thereto have arisen in several countries. In Korea, the courts and the KFTC also have issued several decisions relating to these important issues in recent years. In this section, we review some of these recent cases and consider the Korean courts' and the KFTC's positions on these issues and their significance.

1. Finding of Unfair Collusion in an Agreement to End a Drug Patent Dispute (Supreme Court Judgment in Case No. 2012Du24498 delivered on February 27, 2014)

<Factual Background>

- A global pharmaceutical company A ("Company A") was selling an antiemetic drug named X ("Product X"). A Korean pharmaceutical company B ("Company B") released an antiemetic drug named Y ("Product Y") containing the active ingredient of Product X.
- Company A asserted that Company B's Product Y infringed the patents of Product X and filed a lawsuit seeking an injunction for patent infringement. Company B then sought a negative declaratory judgment on the scope of the patent from the Korean Intellectual Property Office ("KIPO").
- Subsequently, Companies A and B executed: (i) a settlement agreement pursuant to which Company B discontinued the manufacturing and sale of Product Y and voluntarily withdrew the action filed on the patent; (ii) an agreement pursuant to which Company A granted to Company B a domestic co-distribution right for Product X and Company B refrained from developing, manufacturing, registering, or selling any drug containing the same or a similar active ingredient as Product X or that was likely to compete with Product X; and (iii) a supply agreement pursuant to which Company A granted to Company B the exclusive distribution right in Korea for a new drug (not released yet) named Z ("Product Z") and paid to Company B a fixed annual incentive equivalent to KRW 100 million for a period of 5 years, irrespective of the actual sales volume.

<Holding>

The KFTC found the three agreements entered into by Companies A and B above as a single act of collusion, issued a corrective order, and imposed an administrative fine on grounds that they constituted collusion that unfairly restricted competition in the relevant market.

Regarding the relevant market and market share, the Seoul High Court and the Supreme Court recognized the following facts: (i) Company A possesses a market-dominant position because Company A has a market share of 47% and a combined market share with the second-ranking product that exceeds 90% and (ii) Company A held a monopoly in the market of antiemetic drugs containing the active ingredient of Product X until Company B released Product Y. The Supreme Court stated that for an act to be recognized as an unfair collusion, it needs to have anti-competitive effects on the relevant market. The Supreme Court found that the settlement agreement and co-distribution agreement regarding Product X were anticompetitive and constituted an unfair collusion because "under these agreements, the original drug manufacturer provides to the competitor economic benefits far beyond the patent litigation cost in return for the withdrawal of the competing product and imposes restrictions on market entry of the competing product for a longer term than the patent duration, and the patentee provided part of its proprietary profits to the infringer to maintain its monopolistic power in return; thus, the agreement restricted fair and free competition". For the supply agreement regarding Product Z, the KFTC and the Seoul High Court held that it constituted unfair collusion, but the Supreme Court reversed the lower court's decision, ruling that the KFTC had failed to define the relevant market for Product Z and present evidence showing that the agreement was anti-competitive.

The Supreme Court's decision above is significant because it is the first decision in which the highest court in Korea examined and opined on the meaning of Article 59 of the MRFTA and the limitations on its scope of application. The Supreme Court stated that "the determination of whether an exercise of patent rights is justifiable shall be made taking into account the overall circumstances, including the purpose and intent of the Patent Act, the details of the patent rights concerned, and the influence of the act on fair and free competition". To determine whether an agreement to end a patent dispute constitutes unfair collusion, the court provided a standard requiring consideration of the relevant market and the anti-competitive nature of the act in issue. The Supreme Court appears to have taken a stance closer to the rule of reason than the per se rule in terms of the standard for determining illegality.

2. Finding of No MRFTA Violation in Seeking Injunction based on SEPs (KFTC Decision announced on February 26, 2014; No Suspicion of Violation)

<Factual Background>

- While negotiations were ongoing to resolve patent disputes between the parties, Apple filed an action on April 15, 2011 in the U.S. against Samsung Electronics seeking an injunction against alleged infringement of design rights and non-SEPs, and claiming damages. Subsequently, in the same month, Samsung filed an action with the Seoul Central District Court against Apple seeking, among others, an injunction against and damages for alleged infringement of four SEPs and one non-SEP related to third-generation mobile telecommunication technology.
- In response, in April 2012, Apple filed a complaint with the KFTC asserting that
 Samsung was a market-dominant company and unfairly interfered with its business
 by seeking an injunction for patent infringement based on SEPs. Apple asserted that
 Samsung abused its market-dominant position and unfairly interfered with Apple's
 business activities.

<Holding>

In February 2014, after an investigation that lasted almost two years, the KFTC announced its conclusion that Samsung had not violated the MRFTA. Generally, if the KFTC concludes that there is no violation, a written resolution is not published, and therefore it is difficult to confirm the specific grounds for and the reasoning behind the decision.

However, in this case, the KFTC circulated a detailed press release, allowing verification of the key grounds for the decision. First, in terms of the relevant market, the KFTC found that the four SEPs based on which Samsung filed an action against Apple each constitute an individual technology market and that Samsung possesses a market-dominant position in each of the technology markets. In addition, the KFTC recognized that Samsung is a market-dominant company exercising control in the Korean mobile telecommunication device market. However, the KFTC did not present an opinion regarding the relationship between the technology markets and the mobile telecommunication devices market.

After considering the history of dealings between the parties, the KFTC found that (i) Apple, a potential licensee, failed to negotiate in good faith and (ii) Samsung, the SEP holder, negotiated in good faith because Samsung offered various license terms to Apple before and

after the filing of the injunction request and participated in substantial negotiations to narrow down the gap with the royalty rate offered by Apple. Also, the KFTC held that Samsung's offered rate was not overly excessive in violation of FRAND terms, and therefore Samsung rightfully exercised its rights as a patentee and did not unfairly interfere with business activities.

This decision is noteworthy as the first case in which the KFTC considered the question of whether an SEP holder's filing of an injunction claim violated the MRFTA as an abuse of IPR, and it appears that the decision served as a basis for the KFTC's 2014 amendments to the IPR Guidelines, as discussed above.

3. Approval Conditioned upon Consent Decree in MS – Nokia Business Combination (KFTC Decision announced in August 2015)

<Factual Background>

- In September 2013, Microsoft ("MS") executed with Nokia an agreement to acquire Nokia's mobile phone business and submitted in November 2013 a business combination report requesting approval from the KFTC.
- MS already held many mobile-related patents and through the acquisition agreement was now able to directly manufacture devices in competition with other Korean smartphone manufacturers. Nokia was able to transfer its manufacturing business while maintaining its patent rights.

<Consent Decree>

The KFTC granted a final approval for the business combination conditioned upon a consent decree precluding the possibility of patent abuse by MS and elected not to examine Nokia by holding that the patents that Nokia would continue to own after the consummation of the business combination did not fall within the scope of the KFTC's merger review process.

The KFTC appears to have been concerned that MS might abuse its patent rights against its competitors upon becoming a competitor to Korean smartphone manufacturers and that a business partnership agreement that MS executed with a particular smartphone manufacturer might restrict competition as it provided a basis for the sharing of business information between competitors. Subsequently, MS applied for a consent decree, submitting a corrective plan including proposals to voluntarily address the KFTC's concerns regarding possible

abuse of patent rights. The KFTC approved the business combination on the below terms:

- (1) With respect to SEPs, a commitment to comply with FRAND terms at all times, to not file an action seeking an injunction on sale or import, both inside and outside Korea, against any Korean smartphone/tablet manufacturers, to not condition its SEP license on the other party providing a license to its patents (other than for SEPs covering the same standard), and to not assign SEPs to a third party unless the third party agreed to abide by the same commitments;
- (2) With respect to non-SEPs, a commitment to continue providing licenses to Korean smartphone/tablet manufacturers, to not increase the royalty rate beyond the current prevailing rate, to not assign any non-SEPs for five years, and to not file an action seeking an injunction of sale or import, both inside and outside Korea, against any of the Korean smartphone/tablet manufacturers; and
- (3) In terms of a Business Collaboration Agreement ("BCA") entered into by MS and a certain smartphone manufacturer, a commitment to delete provisions regarding the sharing of competitively sensitive business information and not to share such business information in the future.

This KFTC consent decree is significant as (i) it includes not only SEPs but also non-SEPs in the scope of the order; (ii) it includes not only smartphone patents but also tablet patents and patents owned by the affiliates of MS in the scope of the order; (iii) it restricts injunction actions on sales not only in Korea but also in foreign jurisdictions; and (iv) it is the first case applying a consent decree to a business combination.

It is noteworthy that the KFTC imposed certain conditions through a consent decree unlike most other competition authorities reviewing the MS-Nokia business combination that granted approval without any conditions, with the exception of the Chinese competition authority's decision, which granted approval for the business combination on certain conditions. It appears that both Korea and China believed that not only SEPs but also non-SEPs deemed technically or commercially essential could be subject to restrictions.

4. Corrective Order for Dolby's License Agreement (KFTC Decision announced in August 2015)

<Findings of Fact by the KFTC>

- Dolby is the owner of a licensing rights relating to AC-3, which is a standard technology
 relating to digital audio coding which was adopted by standard setting organizations
 around the world for media including digital broadcasting and DVD. Therefore, Dolby's
 permission is essential to produce digital audio product relating to AC-3.
- In its license agreements executed with Korean manufacturers, Dolby included terms such as the following: (i) the licensee shall not challenge the validity or ownership of patents owned by Dolby, and if the validity is challenged, Dolby may terminate the agreement; (ii) Dolby may terminate the agreement even if there is only "a concern" over infringement or abuse of Dolby's IPR; (iii) standards for damage compensation and sharing of audit costs that were excessively favorable to Dolby; and (iv) the licensee shall grant to Dolby the exclusive right to acquire rights developed by the licensee based on Dolby's patented technology and may not license such rights to a third party.

<Holding>

The KFTC ordered Dolby to modify the above conditions contained in the license agreements executed with the Korean companies wishing to use its technology. The KFTC found that Dolby's acts of (i) imposing a covenant not to challenge patent validity, (ii) reserving the right to terminate the agreement solely since there was a concern over infringement of IPR, (iii) requiring unfair damage compensation and sharing of audit costs, and (iv) restricting the licensee from disposing of or exercising rights in the licensee's improvements were illegal as an abuse of superior trading position. Accordingly, the KFTC ordered Dolby to refrain from imposing such unfair transaction conditions and to execute amended agreements with existing licensees. However, no administrative fine was imposed because none of the conditions had actually been enforced.

The KFTC's above decision is significant as it applied the MRFTA to an owner of standard technology.

However, the publicly disclosed written resolution of the KFTC did not explicitly address the competitive significance of Dolby's ownership of patents in standard technology and whether it gives rise to a market dominant position. Rather, the KFTC found Dolby to be in a "superior trading position" that was sufficient to give rise to unfair trade practices against licensees – i.e., "a relatively dominant position or at least a position that can significantly affect the counterparty's transaction activities". In addition, it is noteworthy that even though the IPR Guidelines limit their own scope of application to abuse of market-

dominant position, the KFTC explains that it referred to the IPR Guidelines as a basis for determining unfair trade practices given that "[(i)] the IPR Guidelines were prepared to articulate general principles for applying the law to and specific examination criteria for the exercise of IPR and [(ii)] abuse of a superior trading position (which constitutes an unfair trade practice) and abuse by a market-dominant company have similarities in terms of the reasoning behind finding a violation of the law".

5. Corrective Order and Administrative Fines for Qualcomm's Abuse of Market Dominant Position (KFTC Press Release announced in December 2016 and Public Version of Written Decision Released in February 2017)

<Findings of Fact by the KFTC>

In the KFTC's recent investigation of and decision against Qualcomm, it defined the relevant market as (i) the worldwide licensing market for all standard essential patents ("SEPs") owned by Qualcomm with regard to each mobile telecommunication standard such as CDMA, WCDMA and LTE, and (ii) the worldwide modem chipset market for each mobile telecommunications standard such as CDMA, WCDMA and LTE. The KFTC then held that Qualcomm has a market dominant position with regard to each relevant market.

According to the KFTC, Qualcomm engaged in three types of problematic conduct. First, Qualcomm allegedly refused to provide a license to its mobile telecommunications SEPs to competing chipset manufacturers or provided or offered only a restricted license (e.g., exclusion of 'use' rights, restriction of customers to whom modem chipsets could be sold, requirement to provide detailed business information to Qualcomm, provision of royalty-free cross-grants to Qualcomm) or other restrictive agreements (such as covenants not to sue, 'exhaust remedies' agreements or 'standstill' agreements), requiring mobile phone manufacturers to obtain a separate license from Qualcomm in order to purchase and use modem chips.

Second, Qualcomm allegedly conditioned the supply of its modem chipsets to mobile phone manufacturers on the execution of a patent licensing agreement with Qualcomm. Furthermore, the modem chipset supply agreements that were entered into with mobile phone manufacturers allegedly stipulated that (1) the sale of modem chips did not include the right to use Qualcomm's patents, (2) the purchased modem chips could be used only for the development and manufacture of mobile phones, and the sale and use of mobile phones needed to comply with the terms of the license agreement, and (3) the modem chip supply

agreement could be terminated or the supply of chipsets could be refused or suspended if the purchaser breached the terms of its modem chipset supply agreement or its license agreement with Qualcomm. According to the KFTC, Qualcomm used threats to discontinue its supply of modem chipsets as negotiating leverage during actual negotiations with mobile phone manufacturers.

Third, Qualcomm allegedly engaged in certain licensing practices such as (1) licensing all of its patents on a 'package license' basis without distinguishing between cellular SEPs, non-cellular SEPs, and non-SEPs or between mobile technology standards such as CDMA, WCDMA, and LTE, (2) on the basis of such package license, unilaterally determining the royalty rate to be applied with the entire handset as the base, without undergoing good faith negotiation procedures to assess the value of its patents, and (3) in return for a license to its patents, demanding royalty-free cross-licenses to patents owned by mobile phone manufacturers for Qualcomm and its modem chip customers, thereby constructing a 'patent umbrella' favoring its modem chip business.

<Holding>

The KFTC held that the first type of conduct (refusal to license to modem chipset manufacturers) constituted abuse of market dominance due to unreasonable interference with the business activities of another enterpriser by (i) offering unreasonable terms in light of normal trade practice, and (ii) denying or restricting, without legitimate reason, use of or access to essential elements for the production and sale of products by another enterpriser.

With regard to whether such conduct was unreasonable in light of normal trade practice, the KFTC held that (i) the practice of providing SEP licenses at the modem chipset or component level did exist, (ii) there was a need for SEP licenses to be provided at the modem chipset level in light of the concept and nature of SEPs and the fact that Qualcomm itself recognized that a license to its patents was necessary in order to operate a modem chipset business, (iii) in light of the general understanding of FRAND commitments and Qualcomm's own stated positions regarding FRAND, there was a legitimate expectation that FRAND-compliant SEP licenses would be provided to willing modem chipset licensees, and (iv) it was not unreasonably difficult or impossible to provide licenses at the modem chipset level, and therefore the normal trade practice was to provide unrestricted SEP licenses under FRAND terms to modem chipset manufacturers who were willing licensees.

The KFTC also stated that as a vertically integrated enterpriser with a dominant position

in both the SEP license market and the modem chipset market, Qualcomm was under an especially strict obligation to comply with its FRAND commitments.

Meanwhile, the KFTC rejected arguments by Qualcomm that (i) device-level licensing was a normal trade practice that had been in existence since Qualcomm's initial entry into mobile telecommunications, (ii) modem chipset manufacturers were free to manufacture and sell modem chipsets without risk of patent disputes even without any license from Qualcomm, (iii) ETSI's IPR policy allowed for device-level licensing, (iv) device-level licensing allows for proper compensation for Qualcomm's patents, as its patents are implemented not only at the component or modem chipset level, but also at the device level, (v) being forced to license at both the modem chipset level and device level would only lead to patent disputes and inefficiencies.

The KFTC further held that Qualcomm had anti-competitive intent to restrict competition in the modem chipset market by refusing to license to competing modem chipset manufacturers in order to obtain, maintain and strengthen its dominant position in modem chipsets and thereby implement and enforce its device-level licensing policy. According to the KFTC, (i) Qualcomm had an incentive to restrict competition as a vertically integrated dominant enterprise, (ii) Qualcomm knowingly breached its FRAND commitment, (iii) Qualcomm refused to provide SEP licenses to competitors despite recognizing that obtaining full licenses was important in the modem chipset market, (iv) Qualcomm enacted a double standard by requiring its competitors to provide royalty-free cross-licenses to their patents while not providing licenses to its own patents to competing modem chipset manufacturers, and (v) the more powerful the competitor, the more unfavorable were the terms provided by Qualcomm.

The KFTC held that there was anti-competitive effect or the concern of anti-competitive effect due to the above conduct as (i) competing modem chipset manufacturers were exposed to the risk that they would be prohibited from selling modem chipsets, (ii) it raised the costs of competing modem chipset manufacturers, (iii) it functioned as an entry barrier to potential competitors, (iv) it interfered with the business activities of competitors and provided Qualcomm with an advantage vis-à-vis its competitors, (v) numerous competitors were driven from the market or went out of business while Qualcomm's overall share of the modem chipset market increased and its position became more entrenched, (vi) Qualcomm's violation of its FRAND commitment as a market dominant enterprise and vertically integrated firm made it even more difficult to control its abuse of market dominance, (vii)

market power was leveraged to adjacent markets (such as application processors), (viii) innovation in the modem chipset market was restricted, and (ix) it was used as a means of forcing mobile phone manufacturers to enter into license agreements.

Regarding refusal to provide access to essential elements, the KFTC held that the SEPs held by Qualcomm were essential to the manufacture, sale and use of modem chipsets, and Qualcomm refused or restricted the use of such essential elements, thereby unfairly harming the business activities of competing modem chipset manufacturers.

The KFTC held that the second type of conduct (conditioning the supply of modem chips on the execution of a patent license agreement) constituted abuse of market dominance due to unreasonable interference with the business activities of another enterprise by unreasonably forcing a detrimental transaction or conduct on the transaction counterparty.

Specifically, the KFTC held that by linking the modem chipset supply agreement and license agreement, (i) Qualcomm deprived its customers of the opportunity to fairly negotiate a SEP license, (ii) customers were exposed to the risk of stoppage of their mobile phone business, and (iii) various customers were forced to enter into patent license agreements with Oualcomm.

The KFTC held that Qualcomm had anti-competitive intent as (i) it had the incentive to restrict competition in the license market as a dominant vertically integrated enterprise, (ii) it avoided its obligation to engage in good-faith negotiations under FRAND, (iii) it prevented device manufacturers from circumventing Qualcomm's business model by using competing modem chipsets, (iv) it actually utilized the threat of halting modem chipset supply in the course of licensing negotiations, and (v) its business model was atypical compared to other modem chipset manufacturers.

The KFTC held that there was anti-competitive effect as (i) Qualcomm avoided engaging in good-faith license negotiations in breach of its FRAND commitment, (ii) Qualcomm transferred its dominance in the modem chipset market to the SEP license market, and (iii) Qualcomm's coupling of modem chipset supply and patent license agreements functioned as a means of patent hold-up to force various licensing practices on handset manufacturers.

The KFTC rejected arguments by Qualcomm that (i) its licensing practice was established since it was a small company, its license terms were well known to the industry prior to the standardization of WCDMA and LTE, it had never actually stopped supply of

modem chipsets even when there was a dispute in the process of negotiating patent license agreements, and that it had never employed modem chip supply to obtain an advantage in the negotiation of license agreements, (ii) Qualcomm was merely protecting its patent rights and not facilitating infringement of its own patents, as the use of its modem chips without a license agreement would inevitably infringe Qualcomm's patents, (iii) handset manufacturers were not prevented from manufacturing devices as they were able to obtain modem chipsets from other suppliers, and (iv) there was no exclusionary anti-competitive effect.

The KFTC held that the third type of conduct (forcing various licensing terms on handset manufacturers, such as package licensing, unilateral royalty terms, and royalty-free cross licenses) also constituted abuse of market dominance due to unreasonable interference with the business activities of another enterprise by unreasonably forcing a detrimental transaction or conduct on the transaction counterparty.

Specifically, the KFTC held that (i) Qualcomm imposed contractual terms that were favorable to Qualcomm by denying licensees the opportunity to engage in FRAND negotiations and the option of reasonable license terms and (ii) imposed royalty-free cross grant terms without providing just compensation.

The KFTC also held that there was anti-competitive intent to (i) strengthen dominance in the telecommunications SEP license market and (ii) exclude competitors in the modem chipset market, and there was anti-competitive effect as (i) Qualcomm strengthened its monopoly power in the telecommunications SEP license market, (ii) Qualcomm engaged in patent hold-up, (iii) competitors were excluded from the modem chipset market, (iv) technical innovation was hampered as the R&D incentives of other patentees were restricted, and (v) end-consumer welfare was harmed.

The KFTC rejected arguments by Qualcomm that (i) the cross-licenses it obtained from handset manufacturers were not royalty-free but were reflected in the overall license fees it received from handset manufacturers and (ii) package licensing, unilateral royalty terms and royalty-free cross-licenses are separate conduct but the KFTC failed to satisfy its burden of proof by regarding them as illegal as a whole instead of assessing the legality of each type of conduct.

The KFTC further held that while the first, second and third types of conduct were each anti-competitive and a violation of the MRFTA, the combination of the three types of conduct further increased their overall anti-competitive effect.

The KFTC also held that the second and third types of conduct also constituted unfair trade practice (abuse of superior trading position).

Based on the above findings and analysis, the KFTC issued a corrective order and imposed an administrative fine of KRW 1.03 trillion (approximately USD 900 million). The KRW 1.03 trillion fine imposed in this case is the largest ever imposed in any single case by the KFTC.

The KFTC's corrective order required Qualcomm to: (i) not force modem chip manufacturers to accept unfair license terms, (ii) engage in good faith negotiations for a patent license agreement, if requested by a modem chip manufacturer; (iii) not force handset manufacturers to execute a patent license agreement by conditioning the supply of modem chipsets on the execution of a licensing agreement, and modify or delete related contractual provisions in existing chipset supply agreements; (iv) not force handset manufacturers to accept unfair contractual terms in their license agreements with Qualcomm, and renegotiate existing patent license agreements if requested by handset manufacturers; and (v) notify modem chip manufacturers and handset manufacturers of the KFTC's corrective order and report details of new or amended agreements to the KFTC.

The scope of handset manufacturers to which the corrective order applies includes (a) handset manufacturers headquartered in Korea (and their affiliates), (b) handset manufacturers selling handset in or to Korea (and their affiliates), and (c) handset manufacturers supplying handsets to handset manufacturers falling within (b) above (and their affiliates).

The scope of modem chip manufacturers to which the corrective order applies includes (x) modem chip manufacturers headquartered in Korea (and their affiliates), and (y) modem chip manufacturers supplying modem chips to the handset manufacturers (a) through (c) listed above.

According to media reports, Qualcomm has appealed the KFTC's decision to the Seoul High Court and has also applied for a stay of the corrective order.

<Implications of the KFTC Decision>

The KFTC Decision covers a broad range of controversial issues which are expected to be litigated in court, of which a few are mentioned below.

First, the KFTC held that Qualcomm has an obligation to license to modem chip manufacturers. Given that there are SEP licensors other than Qualcomm that engage in device-level licensing, it is unclear whether the KFTC regards such obligation as unique to Qualcomm (due to its nature as an allegedly dominant vertically integrated enterprise) or applicable to all FRAND-encumbered SEPs.

Second, the KFTC relies heavily on Qualcomm's FRAND commitments and its alleged breach of such commitments as a basis for a finding of anti-competitive intent and effect. However, it is still unclear whether FRAND commitments, which are civil contracts in nature, may directly be relied upon by competition authorities as giving rise to anti-competitive intent and effect.

Third, the corrective orders imposed by the KFTC are extremely broad, as the handset manufacturers and modem chipset manufacturers covered by the corrective orders could conceivably include almost all manufacturers worldwide, and there is no limitation on the territorial scope of the patents that are subject to the corrective orders regarding licensing practices. Given this extremely broad scope, it is unclear whether the requirement that there be a "direct, substantial, and reasonably foreseeable effect" on the Korean market for extraterritorial application of the MRFTA is satisfied for the corrective orders discretion. However, the provision was not used much due to the uncertainty regarding the applicable standard. The Supreme Court set forth the applicable standards in 2016.

APPENDIX.

APPENDIX 1.

RELEVANT DATA IN THE FIELD OF INTELLECTUAL PROPERTY OF KOREA

APPENDIX 2.

RELEVANT DATA IN THE FIELD OF COMPETITION LAW OF KOREA

APPENDIX 1.

RELEVANT DATA IN THE FIELD OF INTELLECTUAL PROPERTY OF KOREA

CHOI Jipil*

I. PATENT¹

1. Amount of applications

The total number of IPR applications – including patents, utility models, designs, and trademarks declined by 2.5% from 475,802 in 2015 to 463,862 in 2016. IPR applications, which had been increasing since 2010, showed a downturn for the first time in 6 years.

Classification	2012	2013	2014	2015	2016	YoY(%)
Patent	188.915	204,589	210,292	213,694	208,830	[△2.3]
Utility Model	2,424	10,968	9,184	8,711	7.767	(△10.8)
Design	63,135	66,940	64,413	67,754	65,659	[△13.4]
Trademark	142,176	159,217	160,663	185,443	181,606	[△2.1]
Total	406,650	441,714	444,552	475,802	463,862	(△2.5)

Table 1) applications by the right type in recent 5 years

Patent applications totaled 208,830, showing a 2.3% decrease year-over-year ("YoY"). However, Korea maintained the fourth in the number of global patent application.

^{*} Research Fellow, ICR Law Center.

Statistics regarding Intellectual Property in Korea are based on the Korean Intellectual Property Office, 2016 Annual Report (2017), unless otherwise indicated. See http://www.kipo.go.kr/kpo/user.tdf?a=user.html.HtmlApp&c=3072&catmenu =m02_03_04. (in Korean). For the English summary, see http://www.kipo.go.kr/upload/en/download/annualreport_2016.pdf.

The first office action for patent application in 2016 amounted to 174,792, a 6.1% increase YoY. The average pendency period between patent application filings and first office actions was 10.6 months, on par with major jurisdictions. The total number of final decision for patent examination in 2016 reached 172,503, a 15% increase YoY. The rate of decision of refusal was 38.4%.

2. Number of Registrations

The total number of new IPR registrations in 2016 amounted to 286,589, a 4.4% increase YoY. The total number of registration for patent reached 108,876, a 6.9% increase YoY.

Classification	2012	2013	2014	2015	2016	YoY (%)
Patent	113,467	127,330	127,786	101,783	108,786	(6.9)
Utility Model	6,353	5,959	4,955	3,253	2,854	[12.3]
Design	46,146	47,308	54,010	54,551	55,603	(1.9)
Trademark	77,903	100,094	99,791	114,747	119,256	(3.9)
Total	243,869	280,691	288,542	274,424	286,589	(4.4)

Table 2) registration by the right type in recent 5 years

3. Number of PCT Applications and Registrations

According to WIPO statistics of December 2016, the number of international applications filed globally under the PCT amounted to 233,000, representing a 7.3% increase compared to 2015. The number of international PCT application designating Korea as a country of origin amounted to 11,560, an 6.4% increase compared to 2015. Korea remains its rank at 5th followed by U.S., Japan, China, and Germany.²

It is notable that the share of Korea, China and Japan increases continuously and fast, from 43.5% to 47.4% in 2016. The world's top 10 PCT applicants includes two Korean companies (Samsung Electronics and LG Electronics).

WIPO, Patent Cooperation Treaty Yearly Review - 2017 http://www.wipo.int/edocs/pubdocs/en/wipo_pub_901_2017.pdf, p.

II. TRADEMARK

Trademark applications for 2016 totaled 181,606, a 21% decrease YoY. Design applications totaled 65,659, a 3.4% decrease YoY.

The total number of international trademark applications filed under the Madrid System in 2016 reached 52,884 and the amount of international trademark application designating Korea as a country of origin totaled 1,012, a 21.2% increase YoY. Also, the total amount of registered international trademark under the Madrid System was 44,726 and among which the amount of registered international trademark designating Korea as a country of origin totaled 811.

Regarding the international design applications filed under Hague System, Korea got the first place (1,290) on the number of applications, and got the third place (1,882) based on the number of designs, following Germany (3,917), Swiss (2,555).

III. COPYRIGHT

In 2016, there were 39,400 works were voluntarily registered, which represented a 5% increase YoY.³

IV. NUMBER OF CASES ON INTELLECTUAL PROPERTY RIGHTS IN KOREA

11,960 cases were filed to Intellectual Property Tribunal (a 14.5% decrease YoY). Of them, patent and utility model cases totaled 9,364, a 24.2 % decrease YoY. It is mainly due to the number of the pharmaceutical cases returned to stable in 2016 at approximately 300 cases. After the introduction of the drug approval-patent linkage system, the number of pharmaceutical cases referred to trial had surged to about 1900 cases in 2015.

Approval rate of patent invalidation trials increased slightly at 49.1%. This is 2.7 times

Korea Copyright Commission, Copyright Statistics - Copyright Registration, https://www.copyright.or.kr/information-materials/statistics/registration/index.do (last visited Aug. 31, 2017) (in Korean).

higher than Japan and calls for the improvement in patent quality. Rate of appeals to the patent court reached 15.4% and rate of annulment of a tribunal decision reached 25.3%.

In 2016, 986 cases were filed to the Patent Court, of which 643 were patent and utility model cases.⁴ Patent Court handled 889 cases (500 patent and utility model cases).

In 2016, filing for appeal to the Supreme Court against the Patent Court decisions amounted to 319 cases, and the rate of appeal was 42.3%, a 5.1% increase YoY. The reversal rate in patent cases by the Supreme court was 4.3%, a 2.3% decrease YoY.

The fight against internet piracy "Sword Net 2016" special action investigated 514 administrative cases and fined RMB 4,670,000. "Fall Wind 2016" special action confiscated more than 4,600,000 infringing piracy publications and dealt with 1,500 infringing piracy cases.

F. JUDICIAL PROTECTION

1. Civil lawsuits

In 2016, courts nationwide newly accepted 136,534 civil IP cases of first instance and concluded 131,813, increased respectively 24.82% and 30.09%, case conclusion rate of first instance is 83.18%. Among them, newly accepted patent cases 12,357, increased by 6.46%; trademark cases 27,185, increased by 12.48%; copyright cases 86,989, increased by 30.44%; technology contract cases 2,401, increased by 62.23%; unfair competition cases 2,286 (among which 156 pieces were monopoly cases), increased by 4.81%; other IP civil disputes cases 5,316, increased by 71.87%. 1,667 foreign-related IP civil cases of first instance were concluded throughout the year, increased by 25.62%; 1,130 HK/Macao/Taiwan-related IP civil cases of first instance were concluded, increased by 291.99%.

Courts nationwide newly accepted 20,793 pieces of IP civil cases of second instance and concluded 20,334, increased respectively by 37.57% and 35.33%. Courts nationwide newly accepted 79 retrial IP civil cases and concluded 85, decreased respectively by 31.30% and 25.44%. The Supreme People's Court newly accepted 369 IP civil cases, decreased by 3.15%; concluded 383 pieces (including existed), increased by 1.59%. Among them, newly

Patent Court of Korea, Annual Case Statistics, patent.scourt.go.kr/patent/news/news_07/index.html (last visited Aug. 31, 2017) (in Korean).

accepted 7 cases of second instance and concluded 11; newly accepted 319 applications for retrial and concluded 331; newly accepted 32 retrial cases and concluded 32.

2. Administrative lawsuits

In 2016, courts nationwide newly accepted 7,186 IP administrative cases of first instance and concluded 6,250, decreased respectively by 26.96% and 42.80%; the case conclusion rate was 53.16%. Among them, newly accepted patent cases 1,123, decreased by 34.75%; trademark cases 5,990, decreased by 19.89%; copyright cases 37, increased by 270%; other administrative cases 36, decreased by 94.45%. Among the concluded administrative cases of first instance, 4,241 were judged to maintain concrete administrative act, 1,263 were judged to revoke. Local people's courts nationwide newly accepted 3,233 IP administrative cases of second instance and concluded 3,069, increased respectively by 44% and 31.77%. The Supreme People's Court newly accepted 355 IP administrative cases and concluded 352, decreased respectively by 6.08% and 6.63%. Among them, newly accepted 282 applications for retrial and concluded 283.

3. Criminal lawsuits

In 2016, courts nationwide newly accepted 8,352 IP cases of first instance involving criminal and concluded 8,601, decreased respectively by 23.9% and 20.43%; the case conclusion rate was 89.06%. The effective judgments involved 10,431 persons, among which 10,334 were given penalties. Newly accepted criminal cases of second instance involving IP were 787 pieces, broadly flat on a year; 812 pieces were concluded, increased by 3.83%.

4. Other

In 2016, procuratorial authorities nationwide approved 2,251 cases and 3,797 persons relating to infringement of IP right throughout the year, prosecuted 3,863 cases and 7,059 persons; suggested administrative law enforcement authorities to transfer 145 criminal cases and 180 persons suspected of infringing IP rights; supervised on public security authorities to docket 135 cases and 159 persons.

In 2016, public security authorities nationwide detected kinds of infringement and counterfeiting criminal cases of 17,000 pieces, involving a total value of RMB 4,626,000,000.

APPENDIX 2.

RELEVANT DATA IN THE FIELD OF COMPETITION LAW OF KOREA

CHOI Jipil*

I. KOREA FAIR TRADE COMMISSION¹

In 2017, the KFTC continued to maintain its outstanding performance and once again won five-star rating (5/5) by the Global Competition Review magazine, which indicates global recognition of the KFTC as a top-notch competition agency.²

In 2016, the KFTC received 3,802 cases (a 5.8 % decrease year-over-year, "YoY"), handled 3,885 cases (an 11% decrease YoY), and imposed measures tougher than warning in 2,279 cases.

	Classification	2014	2015	2016	YoY (%)
MRFTA	Abuse of market dominance	0	5	0	△100
	M&A	39	24	22	△8.3
	Economic Power Concentration	63	97	120	19.1
	Cartel	76	88	64	△27
	Prohibited Act of Enterprisers Organization	57	63	35	△44
	Unfair Business Practice	122	103	60	△41
	Subtotal	357	380	301	△20.7

^{*} Research Fellow, ICR Law Center.

For the official statistics for the Korea Fair Trade Commission, see KFTC, Statistical Yearbook of 2016 (2017) (in Korean), http://ftc.go.kr/policy/case/caseStaticView.jsp?open_info_lt_no=26.

Global Competition Review, Rating Enforcement 2017, Star Rating (Jul. 25, 2017), http://globalcompetitionrview.com/benchmarking/rating-enforcement-2017/1144939/star-ratings.

Consumer Protection Related Laws	1090	783	737	△5.8
Fair Subcontract Transactions Act	911	1358	1035	△23
Fair Franchise Transactions Act	70	121	190	57
Fair Transaction Act in a Large-scale Retail Sector	6	15	9	△40
Etc. (failing to submit data, denial of investigation, etc.)	1	4	7	75
Total	2435	2661	2279	△14.3

Table 1 Record of case handling by the KFTC (tougher than warning)

Classification	2014	2015	2016	YoY (%)
Accusation to the Prosecutor's Office	62	56	57	1.7
Corrective Order	267	450	252	44
C	113	202	111(0,000)	^ /E(2/)
Surcharge (Amount)*	(8,043)	(5,889)	111(8,038)	△45(36)
Voluntary Correction	1,161	1,220	739	△39
Recommendation, Warning, etc.	945	953	1,231	31.6
Total	2,435	2,661	2,279	△14.3

Table 2 Recent performance in correction by the KFTC (*KRW Billion)

In 2016, there were 111 cases on which surcharges were imposed. The number of cases decreased by a 45% YoY, but the total surcharges KRW reached 803.8, a 36.5% increase YoY. Large amounts of surcharges were imposed in the LNG tank construction bid rigging case against 13 operators (KRW 350.5 billion) and in the cement cartel case against 7 operators (KRW 199.2 billion). These cases were respectively the fourth and fifth largest fines among the amount of fines imposed on cartels internationally in 2016. Surcharges on the cartel conduct accounted for 94% (KRW 756 billion in 45 cases), followed by the Act on Fair Transactions in Large-scale Distribution (KRW 23.8 billion in 5 cases), unfair business practices (KRW 17.2 billion in 12 cases) and Fair Subcontract Transactions Act (KRW 4.3 billion in 27 cases).

KFTC filed 57 criminal accusations to the Prosecutor's Office, of which 22 were cartel

cases. This does not include 3requests to prosecute by the Small and Medium Business Administration.

In 2016, among 325 KFTC enforcement actions that were appealed, 51 cases (15.7%) were appealed to the court. 198 cases reached final Judgment in 2016, of which the KFTC won in 153 cases and partially won in 22 cases, and lost in 1 case. However, it is important issue that returned surcharges as an outcome of lost suits amounted to KRW 251.8 billion in 2014, KRW 357.2 billion in 2015, and KRW 330.3 billion.³

The total number of M&A notifications in 2016 slowed down at 646 cases (a 3.4% decrease YoY), but the collective worth M&A amounted to approximately KRW 593.6 trillion (a 55.4% increase YoY).⁴ This is mainly due to the large growth in the worth of M&A between foreign businesses that affect the domestic market, which reached KRW 564.1 trillion (a 74.2% increase YoY). KFTC intensively evaluated 27 cases and issued remedies in 3 of them. The number of the case related to failing to report M&A amounted to 19, upon which the KFTC imposed fine of KRW 385.5 million.

A significant increase in the legislative activity by the National Assembly in the field of competition law is also notable. The number of proposed legislations concerning the KFTC was 37 in 2011, 57 in 2012, 82 in 2013, 54 in 2014, 65 in 2015, but surged to 110 in 2016.

In 2016, the KFTC provided KRW 835 million reward to 54 individual informants who reported violations. In the air duct construction cartel case in which heavy surcharges amounting KRW 14.6 billion were imposed against 23 firms, the KFTC paid record breaking KRW 485 million to the individual informant.

II. COMPETITION ADVOCACY⁵

In 2016, the KFTC received prior legislative consultation on 2,017 proposed legislations

National Assembly Budget Office. Fiscal Year 2016 Fiscal Program Performance Evaluation (National Policy Committee) (2017), p. 87.

KFTC Press Release on February 28, 2017, "Trends and Features in the M&A in 2016", https://www.ftc.go.kr/policy/compet/ competView4.jsp?report_data_no=7199.

^{5.} This part covers updates and new developments in 2016, based on the chapter on competition advocacy written by Professor. HONG Daesik in the previous version of this report. See HONG Daesik, Developments in Legislation and Practice of Competition Advocacy, in MRLC, China-Korea IP & Competition Law Annual Report 2014 (MENG Yanbei & LEE Hwang eds. 2015), pp. 130-133.

initiated by government, and gave opinion on 12 cases, 12 of which reflected the KFTC opinion (consisting a 100% acceptance rate). The KFTC involved in competitive impact assessments on 197 proposed legislative enactments or amendments, 6 of which, in the KFTC's opinion, had possible anticompetitive effect. The opinions of the KFTC were reflected in the regulatory review process in 3 cases. (consisting of 50% acceptance rate).

In the first half of 2016, the KFTC continued its competition advocacy mission and pursued 9 anticompetitive regulations to introduce competition in the public sector and to remove the impediment to developing new materials. In the second half of 2016, the KFTC challenged 6 anticompetitive regulations to open up the public sector and improve un reasonable restriction in business activity, such as the approval system for fees for paid broadcasting and the designation of the commission payable to judicial scrivener. 9

^{6.} KFTC, Statistical Yearbook of 2016 (2017), p. 119.

^{7.} Regulatory Reform Committee, Regulatory Reform White Book of 2016 (2017), p. 844(in Korean).

KFTC Press Release on Jul. 15, 2016, "Conclusion on the reforming 9 anticompetitive regulation in the first half of 2016". http://www.ftc.go.kr/news/ftc/reportRelationView.jsp?report_data_no=6841 (in Korean).

KFTC Press Release on December 27, 2016, "Conclusion on the reforming 6 anticompetitive regulation in the second half of 2016". http://ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=7121 (in Korean).

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