

# China-Korea IP & Competition Law Annual Report 2015

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The first edition of this report was accepted with highest hospitality by experts all over the world for its rich information delivered by the best experts in respective fields of study in China and Korea. In fact, this is the first work of its kind to introduce annual developments of IP and competition laws with a full scope. We believe that great synergy was created by combining the two jurisdiction's resources bringing legal and institutional progress in the Asian region.

The China-Korea Market and Regulation Law Center (the "MRLC") has been working hard to lead the developments of IP laws and competition laws with comparative and integrative perspectives. This annual report is one of its major achievements and we hope the next edition in 2017 will be made with significant improvements and even richer contents.

This second report was made possible by many experts' contributions, as was the case of the first edition. First and foremost, we want to thank Professor Liu Chun Tian not only because this report was born from his preeminent idea, but also because he wrote an extensive preamble and IP policy chapter despite his very busy time arrangement. We would also like to thank Professors Shi Ji Chun and Kim Yeon Tae, Representative Commissioners of the MRLC, who provided essential leadership and support to bring this book to life.

We are grateful for each of the scholars and practitioners who came forward to take care of the research, writing and translation for the report. We are honored to have such leading authorities from top institutions and law firms volunteer to contribute knowledgeable articles. Thanks very much to Adrian Emch and the team at Hogan Lovells LLP who volunteered efforts for excellent translation of the entire part on Chinese laws.

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Editors-in-Chief  
*Meng Yanbei and Lee Hwang*

# PREAMBLE

From a technical and economic point of view, human society is a whole and a unified system. How a country – especially a big country with global influence – strategically looks into the future from the perspectives of history and development, makes decisions and choices on major issues such as the overall path of human society and whether such decisions are sensible or not, define the fate of the country and the nation. Those choices determine not only a country's direction, route, basic strategy and national policy, but also its overall development level of politics, economy and society.

What path would World War II lead humanity to – peace and development, or war and revolution? World history of the past 70 years tells us that the key decisions and strategic choices of the large countries on major issues have determined the fate of their own people and also the basic pattern of the world. The impact of those decisions has lasted until now. Every country has gone through it and has learnt the lessons.

After more than 30 years of reform and opening up, China has accumulated enormous wealth through dividends released from manpower, land etc., and has changed from a backward agricultural country to a complex economic regime where agricultural, industrial and post-industrial societies coexist. China has become one of the world's super economies. However, at present, China is also suffering from the international economic downturn, coupled with overcapacity and weak economic growth back home. The country is again facing a major strategic decision about the path of its economic development. Among all options, the Chinese government's innovation-driven development strategy is the most sensible one. Once it is successfully implemented, it will be sure to benefit both China and the rest of the world.

This report suggests that rational, scientific and innovative ideas, innovation and effective resources integration – taking into account the reality on the ground – will guarantee the sustainable development of China's economy. In this regard, this report highlights two points as follows.

**First, what is innovation and how does one innovate?** The reason for the Chinese government to put forward the innovation-driven development strategy and to build an "innovative country" within a short period of time is that "innovation" is interpreted in the right way and the right pattern is chosen. Generally, many people presume that innovation is only for high-tech and for elites. Therefore, only the most developed countries, for instance the United States, would be "innovative countries." However, innovation is a human activity, and can be achieved in various ways. Innovation not only raises the level of human thinking to new horizons, but also leads to the detection of new paths, new space, new territory for science and productive activities. This in itself is innovation.

This report argues that "innovation" is the activity of developing a new production and life style through the allocation of resources, based on humans' material and spiritual needs. Innovation includes science, technology and also the system. Human beings living in various regions of the world, and in different periods in history, have diversified and very complex production and life styles due to their geographical and historical reasons.

The resources on this planet are limited, while innovation can be endless. For human beings, there is always room for innovation. Whether in the most advanced or a backward civilization, whatever the stage of development, it is always possible to improve production and life quality, making room for innovation. We can therefore say that innovation is everywhere and every time. Regardless of production or life cycles, irrespective of basic necessities, material and spiritual areas, or manpower, material, anything in the world – any country, economy, organization and individual can carry out new allocation of resources and innovate on the basis of existing things.

They can choose to design innovative ideas in line with their own conditions. As a result, any economy that can generate new benefits and can achieve innovation as a means of producing wealth is an "innovation-oriented economy." In this sense, after laying out the basis of an economy, society, education, technology and rule of law – and while searching for new development means and driving force – China found its path of innovation-driven development. China's "innovative economy" is an integral part of globalization. It follows an independent division of labor, but also fosters complementary cooperation to build a human society of common destiny with other countries.

**Second, it is crucial to rationally allocate national resources to protect innovation and development.** Resources are the basic elements of producing wealth. An innovative economy is an extremely complex and subtle regime involving technology, markets, systems, mechanisms, individuals, society, country etc. In this light, we can roughly divide them into macro, meso, micro-resources. But resources themselves – even high-quality resources – are neither equal to wealth, nor strength. Only the effective allocation of diverse resources can be aggregated into wealth and transferred into economic strength. The United States is generally regarded as a referential model. On the one hand, it has natural advantages in resources, and formed a strong ability to integrate resources due to its advanced science and technology, mature market, rule of law and democratic system. It becomes a model for developed countries. But this is just one form of development, which is only suitable for the United States and may not necessarily work in another country. For instance, one neighboring country of China is resource-rich, has a young labor force with English spoken by hundreds of millions of people as native or working language. This facilitates communication with the Western world, market economy all along, mature tradition of the rule of law and mainstream's democratic values. All these are definitely "5A" quality resources. In contrast, the above elements of China are not as good as that country, at best "B" goods by level. However, despite the above, China has achieved so much more.

The reason behind it is that China has a stronger ability to integrate resources. "5A" high-quality resources without integration are just like a scattered "BMW" car spare parts, with which one cannot hit the road. In contrast, an efficiently assembled "5B" "Non-BMW" can race down the highway. Taking high-speed railway as an example, in China, the network of high-speed train has spread out all over the country and is becoming a common choice for people in China to travel. At the same time, the high-speed rail of the "5A" country is still on the drawing map.

We believe that an innovation-driven development strategy must be a systematic project. Whoever has the stronger ability to integrate resources has the stronger ability to innovate matters. Among others, the national resources play a decisive role in the integration of various resources. This is where China's advantages, characteristics and self-confidence lie. It should be treasured by the Chinese and could work as a reference for other countries. Nonetheless, there are still many problems to be resolved when it comes to the use of China's national resources, such as how to use and allocate national resources more scientifically and efficiently, as well as how to achieve the full innovation potential.

This is the second year that we jointly publish the MRLC Annual Report about the most important development in intellectual property and antitrust laws in China and Korea. In the coming year, China, South Korea and the rest of the world will all continue to make progress. With the help of the Internet, this progress continues to enrich and expand the world's knowledge systems and fully benefits people around the world. We aim to make our work to be part of that knowledge collection effort.

*LIU Chuntian*

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President of China Intellectual Property Law Research Association

## 致谢

本报告的第一版由中国与韩国各领域最出色的专家撰写，因其丰富的内容而受到世界各国专家的好评。本书以全面的视角和丰富的内容来介绍两国在知识产权法以及竞争法领域每一年的发展，可谓是一次全新的尝试。本报告通过结合两个司法辖区的丰富资源，对推动亚洲地区法律和体制进步会发挥重要的协同作用。

中韩市场暨规制法研究中心（MRLC）一直致力于用比较和综合的视角引领知识产权法和竞争法的发展，本年度报告正是MRLC的主要成果之一。我们也期待2017年下一版的年度报告会因为更加丰富的内容而愈发完善。

第二版年度报告的顺利出版与第一版一样，离不开许多专家为此做出的贡献。首先，我们要感谢刘春田教授，不仅仅因为这份报告源自于他富有建设性的提议，还因为他在非常繁忙的时间安排中还亲自撰写了本报告的卷首语和知识产权政策的章节。我们也要特别感谢MRLC的主任委员史际春教授和KIM Yeon Tae教授，没有他们的领导和支持，本报告不可能顺利地出版。

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主编：孟雁北、李煌

# 卷首语

从技术和经济角度看，人类社会是一个整体，是一个统一的体系。一个国家，尤其是一个具有全球影响的大国，在战略上，如何以历史和发展的眼光看待未来，如何对人类社会整体走势等重大问题做出判断和选择，其决策是否得当，关乎国家、民族的命运。既决定一个国家的方向、路线、基本战略和国策，也决定了一个国家政治、经济、社会的整体发展水平。第二次世界大战结束以后，人类社会的未来趋势如何，主旋律是什么，是和平与发展，还是战争与革命。七十年的世界历史告诉我们，当年各主要国家对重大问题的基本判断和战略选择，既决定本国人民的命运，也决定世界的基本格局。其影响之久，于今罔替，对此，各国都有经验和教训。

中国经过30多年的开放改革，依靠体制、人力、土地等释放的红利积累了巨大的财富，神话般地从落后的农业大国迅速转向农业文明、工业文明、后工业文明等多种生产方式并存的复合经济形态，形成了世界少有的超大型经济体。当下，遭遇了国际经济衰退、国内产能过剩、经济增长乏力的调整期。中国经济发展的出路何在，又面临一个重大的战略选择。在诸种选择中，中国政府决策的创新驱动发展战略是最恰当的选择。如若成功，必将造福中国，惠及世界。理性、科学的创新观念的确立和创新模式的设计，以及因应创新模式，从中国的实际出发有效地整合资源，将成为中国经济持续发展的有效保证。对此，本报告强调两点认识：

## 一、何谓创新，如何创新？

中国政府为什么提出创新驱动发展战略，为什么敢于在有限的时间段内建成“创新型国家”，关键在于对创新的定义、解读以及对创新模式的选择。很多人想当然认为，创新限于高新科技领域，创新是少数引领人类前进道路的精英的事，因此，只有美国为代表的发达国家属于“创新型国家”。事实上，创新是一个内涵清晰，外延极为广泛的人类活动，是一个具有多元实践模式的概念。科学的理解和解读创新概念，既可以为抬升人类的思维水平打开新的眼界，也可以为人类的科学、生产活动开拓无限的新路径、新空间、新境界，这本身就是一个创新。所谓创新，就是基于人的物质和精神需求，通过对资源进行配置，以提供新的生产和生活方式的活动。创新，既包括科学技术，也包括制度。地球上各个地区，各个时期生活着的人类，由于地理、历史的原因，呈现出多元化、多层次、

多阶段的极其复杂的生产和生活方式。就地球而言，资源是有限的。但是创新是无可穷尽的。人类永远有创新的空间，无论是身处最先进的文明，还是最后进的文明，无论当下处于何种层次，何种发展阶段，其生产和生活都有改善的可能，都为创新留下空间，因此可以说，创新无处不在，无时不在，无阶段不在。任何国家，任何经济体，任何组织、任何个人、事无巨细，无论生产、生活，无论衣食住行，物质精神领域，还是人力、物力，世间万事万物，在现有基础上，进行新的资源配置，皆可创新，都可以选择设计符合自身条件的创新模式。因此，凡是能够产生新的利益，能够实现靠创新作为生产财富手段的经济体，就属于“创新型经济体”。中国正是在这样的意义上，在奠定了一定的经济、社会、教育、科技、法治的基础上，在寻求新的发展手段和动力的过程中，确立创新驱动发展的道路的。中国形成的“创新型经济体”，是全球化运动的组成部分，与其他国家既有独立分工，又有互补合作，共同致力于构建人类命运共同体。

## 二、合理配置国家资源，保障创新发展

资源是创造财富的基础要素，创新型经济体则是一个包括但不限于技术、经济、制度、机制、个体、社会、国家等资源在内的极其复杂而精微的经济运作系统。按照要素的作用大小，我们大体分为宏观、中观、微观资源。但是资源本身，即使是优质资源，既不等于财富，也不就是实力。唯有对各种资源进行有效的配置，才能聚合为财富，升华为能力。通常认为，美国是可资借鉴的样本。一方面她具有先天的资源优势，并且凭借发达的科学技术、成熟的市场、法治和民主体制形成了强势的资源整合能力，成为当今发达国家的典范。但这仅仅是发展模式的一种，是只适合美国的模式。换一个地方就不一定成功。比如，众所周知，我们的近邻某国，占据诸多的资源优势，其劳动力之年轻，令人羡慕得咋舌；数亿人口的生活、工作语言是英语，与西方世界的交流畅通无阻；一向实行市场经济；有成熟的法治传统；奉行世界潮流认同的民主价值观，这些无疑是“5A”级别的优质资源。反观中国，上述几项要素都不如该国，按级别，充其量不过属于“B”货，但是，实践上却又是如此大的反差。究其原因，中国在资源的整合能力上更胜一筹。未整合的优质的“5A”，形同散落一地的“宝马”汽车备件，无法上路。而高效组装为完整的“5B”“非宝马”汽车，可以从容、快速的在高速路上奔驰。拿高速铁路为例，“5B”的中国，高铁已遍布全国，高铁出行已经成为中国人的基本生活方式，而“5A”国的高铁还在图纸上。我们认为，创新驱动发展战略是一个系统工程，谁的资源整合能力强，谁就具备优势的创新能力。其中，国家资源在各类资源的整合中具有举足轻重的作用，这也正是中国的优势所在，特色所在，自信所在。既值得中国人认真总结，也可为他国提供借鉴。当然，在国家资源的运用上，中国还存在这样或那样的问题。如何更科学的运用国家资源，达至各项资源配置的优质高效，还有创新的潜力。



中韩知识产权与竞争法年度发展报告已经是合作的第二年了，在新的一年里，无论中国、韩国，还是世界，都在进步。借助于互联网，这种进步不断地推进世界知识体系的丰富与扩展，并全面的惠及全人类。令人高兴的是，我们的工作将成为其中的一部分。

刘春田

中国人民大学教授

中国人民大学知识产权学院院长

中国知识产权法学研究会会长

## 감사의 말씀

지난해 창간된 MRLC 연차보고서는 중국과 한국의 지적재산권 및 경쟁법 분야 최고 전문가들이 다양한 이슈에 대한 최신정보를 담았으며, 그 결과 전세계 많은 전문가들로부터 매우 좋은 평가를 받았습니다. 실제 MRLC 연차보고서는 중국과 한국의 지적재산권 및 경쟁법 전반에 대한 연간 동향을 소개하는 첫 시도라고 할 수 있습니다. 저희는 아시아지역의 법과 제도의 발전에 있어 이러한 두 국가의 협력이 큰 시너지효과를 발휘할 수 있을 것이라고 생각합니다.

한-중 시장규제법 센터는 비교법적 그리고 통섭적 연구를 통해 지적재산권법 및 경쟁법의 발전을 이끌고자 다양한 노력을 하고 있으며, MRLC 연차보고서는 이러한 노력들의 큰 성과 중 하나라고 할 수 있습니다. 그리고 다음 2017년 호에서는 더욱 풍부하고 보다 발전된 내용을 담기 위해 준비하고 있습니다.

2016년 연차보고서의 발간은 2015년 창간호와 마찬가지로 많은 전문가들의 기여가 있었기에 가능했습니다. 가장 먼저 Liu Chun Tian 교수님께 감사 드립니다. 연차보고서의 발간은 Liu Chun Tian 교수의 아이디어로부터 시작했으며, 매우 바쁜 일정에도 불구하고 서문과 지적재산권 정책에 대한 장을 집필해주셨습니다. 또한 MRLC 대표위원이신 Shi Ji Chun 교수님과 김연태 교수님께도 두 분의 리더십과 연차보고서 발간에 있어 아낌없는 지원에 감사 드립니다.

그리고 연차보고서 발간을 위해 연구와 집필 그리고 번역에 참여하여 큰 수고를 마다하지 않으신 여러 학자 분들과 실무가 분들께 감사 드립니다. 중국 편 전부를 맡아 훌륭한 영문번역을 해주신 Hogan Lovells LLP의 Adrian Emch 변호사님과 팀에게도 특별히 감사 인사를 드립니다.

MRLC 연차보고서 발간이 있기까지 MRLC 및 자매연구소인 ICR센터와 ELR센터의 여러 구성원들은 다양한 분야의 최고 집필진들을 구성하고 기타 여러 사안을 결정함에 있어서 귀중한 조언과 도움을 주었습니다. 우선 연차보고서 발간과 관련하여 전반적인 책임을 맡아 진행해주신 김선형교수님께 감사 드립니다. 김교수님의 노력이 없었다면, 연차보고서는 빛을 보기 어려웠을 것입니다. 다음으로 연차보고서의 초안을 검토하고 발간 절차에 도움을 준 김용중 박사, 박윤석 박사, 최지필 연구원에게도 감사의 인사를 전합니다. 또한 중국 편 초안 검토와 많은 일들을 담당해준 Li Shu, Sun Yang, Yuan Shuai 그리고 Wu Chenfei에게도 감사 인사를 전합니다. 마지막으로 힘든 일을 마다하지 않고 프로젝트 지원 업무를 담당해주신 홍지선 선생님의 노고에 감사 인사를 전합니다.

편집장

*Meng Yanbei and Lee Hwang*

## 서문

기술적 경제적 관점에서 인간사회는 전체적이고 통일된 체계라고 할 수 있습니다. 국가 특히 전체적으로 영향력을 갖는 큰 국가는 전략적으로 역사와 성장의 관점에서 미래를 전망하고 인간사회의 전체적 추세와 같은 중요한 사안들을 결정 선택하며, 그러한 결정여하에 따라 국가와 민족의 운명이 좌우될 수 있습니다. 이러한 선택들은 국가의 방향과 노선, 기본 전략과 국내정책뿐만 아니라 정치, 경제 그리고 사회의 전반적인 발전 수준을 결정하게 됩니다.

제2차 세계대전 후 인류를 이끈 방향은 무엇이었는가 - 평화와 성장 또는 전쟁과 혁명? 과거 70년의 세계역사는 중요한 사안들에 대한 주요 국가들의 결정과 전략적 선택들이 자국 국민들의 운명과 전 세계의 흐름을 결정해왔다는 것을 우리에게 보여주고 있습니다. 이러한 결정들에 따른 영향은 지금까지도 지속되고 있습니다. 모든 국가들은 이를 경험했고 또한 교훈을 얻었습니다.

중국은 개혁과 개방 이후 30년 이상 동안 노동력과 토지에 대한 통제를 해제함으로써 막대한 부를 형성하였으며, 후진적 농업국가에서 농업과 산업 그리고 후기 산업화 사회가 공존하는 복잡한 경제체제로 변화하였습니다. 이러한 변화로 중국은 세계 경제대국 중 하나가 되었습니다. 그러나 현재 중국은 세계 경기침체와 더불어 과잉설비 및 낮은 경제성장으로 인해 어려운 상황에 처해있습니다. 때문에 중국은 다시 한번 경제성장을 위한 중요한 결정을 해야 할 상황을 맞이 하였습니다. 이러한 상황에서 중국정부의 여러 정책들 가운데 혁신주도 성장전략이 가장 적절합니다. 만약 이러한 전략이 성공적으로 이행된다면, 중국뿐만 아니라 세계 다른 나라들에도 이익이 될 것이 분명합니다.

이 보고서는 합리적이며 과학적이고 혁신적인 아이디어 그리고 현장의 현실을 반영한 혁신과 효율적인 자원 통합이 중국 경제의 지속가능한 성장을 가능케 할 것이라 보고 있습니다. 이와 관련해 보고서에는 다음 두 가지를 강조하고 있습니다.

첫째, 혁신은 무엇이며 어떻게 혁신하는가? 중국 정부가 혁신주도 성장 전략을 앞당겨 추진하고 짧은 기간 내에 “혁신적인 국가”로 거듭나려는 이유는 “혁신”이 적절한 수단이며 방향이기 때문입니다. 일반적으로 많은 사람들은 혁신이 단지 고도의 기술과 유능한 인재를 위한 것이라고 생각합니다. 더구나 미국과 같은 선진국만이 “혁신적인 국가”일 것이라고 생각합니다. 그러나 혁신은 인간의 활동이며 다양한 방법을 통해 이루어질 수 있습니다. 혁신은 인류의 사고 수준을 새로운 지평으로 높일 뿐만 아니라 과학과 생산적 활동에 대한 새로운 경로, 공간, 영역을 탐색할 수 있도록 합니다. 이러한 것 자체가 혁신입니다.

이 보고서에서는 “혁신”을 인간의 물질적 그리고 정신적 필요를 바탕으로 자원배분을 통해 새로운 생산이나 삶의 방식을 개발하는 활동으로 설명하고 있습니다. 혁신은 과학과 기술 그리고 체계를 포함합니다. 전세계 다양한 지역에 거주하며 역사적으로 다른 배경을 가진 인류는 그러한 지역적 그리고 역사적 차이로 인해 다양하고 복잡한 생산과 삶의 방식을 갖고 있습니다.

지구의 자원은 유한하지만 혁신은 끊임없이 이루어질 수 있습니다. 인간에게 혁신을 위한 영역은 항상 존재합니다. 선진적이든 후진적인 문명이든, 발전 수준이 어떻든 생산과 삶의 질의 개선하고 혁신의 길을 여는 것은 항상 가능합니다. 우리는 혁신이란 언제든 어디서든 이루어질 수 있는 것이라고 말할 수 있습니다. 생산 또는 생활, 의식주, 물질적이거나 정신적인 영역 또는 인력, 물자 등과 같은 세상 어떤 것이든 국가, 경제, 조직 또는 개인들은 자원을 새로이 배분하고 기존의 것들을 바탕으로 혁신할 수 있습니다.

이들은 자신들의 상황에 맞추어 혁신적인 아이디어를 만들어 낼 수 있습니다. 그리고 그 결과 새로운 편익을 만들어내고 부를 창출할 수 있는 수단으로서 혁신을 이룰 수 있는 경제가 “혁신지향형 경제”인 것입니다. 이러한 의미에서 중국은 새로운 성장 수단과 동력을 찾는 과정에서 경제, 사회, 교육, 기술과 법에 기초하여 검토한 후 혁신에 기반한 성장을 선택한 것입니다. 중국의 “혁신적 경제”는 세계화에 있어 필수적인 부분입니다. 이는 다른 국가들과 함께 독립적 분업뿐만 아니라 공동운명체로서 인류사회로 나아가기 위한 상호협력을 촉진하는 결과가 될 수 있습니다.

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# BOOK ONE

**MRLC IP & COMPETITION LAW**

**2015 ANNUAL REPORT OF CHINA**



## **PART I.**

# **OVERVIEW OF INTELLECTUAL PROPERTY POLICY AND COMPETITION POLICY OF CHINA**

### **CHAPTER 1.**

OVERVIEW OF INTELLECTUAL PROPERTY POLICY

### **CHAPTER 2.**

OVERVIEW OF COMPETITION POLICY



## CHAPTER 1.

# OVERVIEW OF INTELLECTUAL PROPERTY POLICY

*LIU Chuntian\**

In 2015, the Chinese government – including the central government and its local counterparts – has been actively promoting IP strategies and gradually improving the IP system. Its goal is to make institutional and mechanical preparations for the implementation of an innovation-driven development strategy. At a high level, the following measures have been taken.

### ***1. The State Council Issued the Several Opinions of the State Council on Accelerating the Construction of Great Power in Intellectual Property under the New Situation***

On 22 December 2015, the State Council issued the *Several Opinions of the State Council on Accelerating the Construction of Great Power in Intellectual Property under the New Situation* (No. 71 [2015], State Council). These opinions contain five tasks.

The first task is to promote the reform of the IP management system, improve the management of the IP service industry and social organizations, explore the "one industry, multiple industrial associations" pilot project among IP service industrial associations etc. It also includes authorizing local governments to carry out IP reform experiments and encouraging local governments with relevant capabilities to launch IP-integrated management reform pilot projects. The task further includes the establishment of an IP evaluation system, as well as an innovation-driven development evaluation system, in which the importance of IP is stressed.

The second task is to implement strict IP protection by raising the upper limit of compensation for damages in case of infringement, sanctioning appropriately for serious malicious infringing conduct, severely cracking down on IP crimes, promoting IP protection and precautionary mechanisms, incorporating IP infringement into credit records of corporations and individuals, strengthening the innovation protection in new formats and new areas, and regulating IP abuses.

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The third task is to promote the IP implementation creatively. This includes perfecting the examination and registration mechanisms, achieving online registration, electronic application and paperless approval. It also includes the promotion of making information publicly available, constructing IP operating and information service platform, and enhancing free or low-cost access to patents and other information.

The fourth task is to strengthen IP's overseas layout and risk control in key industries, enhance the right protection, expand overseas IP layout channels and enhance overseas risk prevention ability.

The fifth task is to elevate the level of foreign cooperation in the IP space, promote the construction of a foreign cooperation system and expand IP public relation channels.

## ***2. The State Intellectual Property Office Issued the Promotion Plan for the Implementation of the National Intellectual Property Strategy in 2015***

On 1 April 2015, the State Intellectual Property Office published *the Promotion Plan for the Implementation of the National Intellectual Property Strategy in 2015* (hereinafter referred to as "*Promotion Plan*"). In terms of IP protection and encouragement on innovation and invention, according to this Promotion Plan, the major focus is the acceleration of disclosure of IP related administrative law enforcement information and the set-up of relevant credit standards. Other focuses will be on strengthening the convergence of IP administrative law enforcement and criminal justice, cracking down on patent infringements and counterfeits, cyber-based IP infringement, manufacture and sale of fake big-brand products and other criminal conduct, particularly investigating a number of patent infringement and counterfeit cases with gross violation and adverse social impact.

Efforts shall also be put in expanding the IP legal enforcement in the field of e-commerce and large-scale exhibitions, strengthening IP regulation in the process of the manufacture of goods, processing and transporting, and also regulating IP dispute resolution. With regard to promoting the creation of IP rights and industrial upgrading, the *Promotion Plan* puts forward tasks including enhancing the IP layout and operating service in key industries, accelerating the construction of IP public service platform, expanding the implementation of patent pilot projects among central government-owned enterprises, and increasing the intensity of patent navigation. It also includes supporting the development of IP services and IP financial services, promoting the development of IP pledge financing and insurance businesses, improving licensing payment mechanisms for online publishing, promoting and protecting national cartoon brands and strengthening the protection of geographical indications.

Beyond that, the *Promotion Plan* also involves the pilot work of reforming the use, disposal and income management of scientific and technological achievements of central level institutions.

It further encompasses the tasks of promoting the standardization of IP management, traditional knowledge protection and management and organizational knowledge management, improving basic patent data resource systems, making it more convenient for the public to access basic patent data resources at a lower cost, promoting the fourth amendment of the Patent Law, organizing policy studies on IP's contribution, and putting forward the goal, tasks and measures for building a stronger nation.

### ***3. The General Office of the State Council Issued the 2015 Major Tasks for the Nationwide Crackdown on IPR Infringements and on the Production and Sale of Counterfeit and Shoddy Products***

On 9 April 2015, the General Office of the State Council issued *the 2015 Major Tasks for the Nationwide Crackdown on IPR Infringements and on the Production and Sale of Counterfeit and Shoddy Products* (No. 17 [2015], the General Office of the State Council) (hereinafter referred to as "*Major Tasks Outline*").

The *Major Tasks Outline* aims to create an environment of fair competition and a safe consumption by strengthening market supervision and centralizing market regulation. In order to achieve this goal, the Major Tasks Outline first requires laying solid legal grounds for law enforcement and judicial practice, bringing forward timely legislation proposals, supporting the promulgation of e-commerce laws and promoting the amendment of copyright laws and regulations on patent agents.

Second, the *Major Tasks Outline* focuses on setting up a regulatory enforcement layout around hot social topics and key areas, for example the extension of the Internet industry's special action time, the carrying-out of special regulatory action in rural and urban fringe areas, the special investigation into motor gasoline and diesel, and the "breeze action" which promotes the image of Chinese products overseas.

Third, for the purpose of improving the efficiency of law enforcement, the *Major Tasks Outline* stipulates that we should widely use cloud computing, the Internet of Things, mobile Internet and other new-generation information technology. We should make innovations in marketing supervision and perfecting cross-region and cross-department law enforcement cooperating mechanisms.

Fourth, the *Major Tasks Outline* supports the enhancement of the judicial protection function at the same time as promoting seamless convergence of administrative law enforcement and criminal judicial practice and intensifying the crack-down of criminal investigative powers. Moreover, the Major Tasks Outline proposes to strengthen international communication and cooperation in the field of fighting against IP infringement, intensify cooperation through the sharing of learnings on leading cases, assisting in forensic investigation, providing judicial assistance, as well as carrying out

cross-border joint law enforcement in major foreign-related cases.

#### ***4. The Legislative Affairs Office of the State Council Issued the Draft of Patent Law Amendments***

On 2 December 2015, the Legislative Affairs Office of the State Council issued *the Draft of Patent Law Amendments* (Public Consultation Draft) (hereinafter referred to as "*Draft*") along with its explanation, seeking public comments. The *Draft* discusses five main issues.

The first issue is to expand patent protection and safeguard the legitimate rights and interests of patent holders, for instance by way of adopting measures such as improving evidence rules, clarifying the effect of administrative mediation agreements, requiring the announcement of an invalidation request to be made public in a timely manner, increasing the system for compensating for damages resulting from malicious infringement, intensifying the punishment for counterfeit patents. The *Draft* also proposes some new concepts like "group infringement" and "repeat infringement".

The second issue is to promote patent exploitation and usage so as to reap the values of patents. The *Draft* proposes a principle that for an invention-creation that is accomplished by using the material and technical conditions of an employer, the agreement between the employer and the inventor prevails to regulate the allocation of the rights. It also proposes a policy that inventors or designers should be allowed to exploit their invention-creations and gain relevant economic benefits, under the circumstances where their employer is disinclined to exploit such inventions and where there is an agreement between the employees and the employer.

The *Draft* also introduces the patent open-license system and the principle of implied licensing of certain standard essential patents. It clarifies the rules on the registration of patent pledges and the rights and interests of pledgee. It also adds the principles on preventing the abuse of patent rights.

The third issue is to clarify the governmental functions under the rule by law, establishing a service-oriented government. The *Draft* clarifies the functions and divisions of the administrative patent departments at the central and local levels, promoting the functional reforms of governmental departments, clarifying the relevant departments' powers and responsibilities for administrative patent examination, approval and enforcement. Furthermore, it also proposed that administrative patent departments should also be responsible for building a patent information public service system and promote the utilization of patents.

The fourth issue is to improve the patent examination system and improve the quality of patents. The *Draft* makes clear the need for protection of design patents, and proposes to undo the restrictions on patent protection for the diagnosis and treatment of cultured animals' diseases. It also

aims to optimize the processes of patent application, examination, review and invalidation, introduce a new nationwide priority system for design patents, improve the regulations of priority claims, clarify the principles of patent review and invalidation procedures and extend the protection term for design patents.

The fifth issue is to improve the patent agency system, thereby promoting the IP service industry's healthy development.

### ***5. The State Intellectual Property Office Issued the Opinion on the Further Strengthening of Intellectual Property Use and Protection of Boosting Innovation and Entrepreneurship***

On 7 September 2015, the State Intellectual Property Office, the Ministry of Finance, the Ministry of Human Resources and Social Security, the All-China Federation of Trade Unions and the Central Committee of the Communist Youth League jointly issued *the Opinion on the Further Strengthening of Intellectual Property Use and Protection of Boosting Innovation and Entrepreneurship* (No.56 [2015], the State Intellectual Property Office) ("*Opinion*").

In order to further enhance the implementation and protection of IP rights, fueling innovation and industry inventions, the *Opinion* first provides that we should refine the measures of reducing IP application and maintenance fees for medium and small size enterprises, expand the IP value accomplishment channels, improve the valuation, pledge and circulate systems for IP rights, lower the entry barriers for innovation and entrepreneurship.

Second, the *Opinion* aims to leave more space for innovation and entrepreneurship by providing more incentives from a policy perspective, for instance by promoting the legal system for service and non-service inventions, improving the IP assistance systems for entrepreneurs in order to build IP incubators.

Furthermore, in order to promote IP implementation and lead the direction of innovation and entrepreneurship, the *Opinion* suggests a few measures including launching a number of micro or macro patent navigation projects, promoting the establishment of IP industry collaboration, making full use of social networks, big data and cloud compute to build nationwide IP public service platforms.

Lastly, the *Opinion* emphasizes the importance of improving IP service systems, supporting innovation and entrepreneurship (such as establishing an IP liaison officer regime at newer entrepreneurship service platforms). It also urges the improvement of experimental system of patent-based data services and encouraging IP service institutions to adopt market-based mechanisms,

specialized services, and capitalization approaches. In addition, the *Opinion* proposes that measures be taken aiming to intensifying IP training, promoting innovation and entrepreneurship, enhancing IP law enforcement, and protecting entrepreneurship achievements.

***6. The State Intellectual Property Office, the Ministry of Science and Other Ministries and Commissions Issued The Guiding Opinions on the Implementation of the National Standards Prescribed under the Rules of Enterprise Intellectual Property Management***

On 30 June 2015, the State Intellectual Property Office, the Ministry of Science and other ministries and commissions issued the *Guiding Opinions on the Implementation of the National Standards Prescribed under the Rules of Enterprise Intellectual Property Management* (No. 44 [2015], the State Intellectual Property Office) ("*Guiding Opinions*"). The *Guiding Opinions* aim to make full use of the government's power of integrating and incorporating social resources, as well as planning overall scheme, when implementing the standards.

More specifically, in terms of improving enterprise IP management, the *Guiding Opinions* propose to establish an IP management system which coordinates with business operators, and make the IP management a key element throughout the whole process of economic operations. In order to enhance enterprises' ability to comply with the standards, the *Guiding Opinions* encourage all types of IP service organizations to participate in the process and establish consulting service systems, and encourage and support patent agencies' assistance to enterprises.

At the same time, the *Guiding Opinions* require the establishment of a recognition regime for enterprises' IP management systems. IP training institutions should establish relevant training programs. To further encourage enterprises to implement the standards, the *Guiding Opinions* point out that finance, tax and economy related policies will be adopted.

In addition, the government shall communicate with enterprises regularly, and a communication platform should be established. With the help of IP training and assistance service institutions for medium or small enterprises, the government may reinforce training, assistance and services for those types of enterprises at the expense of the government, so as to create an enterprise-friendly public service environment.

Furthermore, the *Guiding Opinions* require the scientific assessment of the effect of the standards' implementation, and based on the demands of the various enterprises, the need for further regulation and refinement of IP management systems.

### ***7. The State Administration for Industry and Commerce Issued The Provisions on the Regulation on the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition***

On 7 April 2015, the State Administration for Industry and Commerce issued the *Regulation on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition* (No. 74, the State Administration for Industry and Commerce) ("*SAIC Regulation*"). The *SAIC Regulation* aims to improve the operability of antitrust law enforcement and assist companies to assess whether their IP related conduct complies with antitrust rules.

First, the *SAIC Regulation* defines concepts such as non-price IP abuse to eliminate or restrict competition, as well as the definition of the relevant market.

And then, the *SAIC Regulation* prohibits the conducts eliminating or restricting completion by use of IP rights, it then specifies the prohibitions as follows: First, the monopoly agreement made by companies exercising IP rights was prohibited, and there also defines the safe harbor rules. Second, the *SAIC Regulation* clarifies that dominant companies are prohibited from abusing their dominance when exercising IP rights. The regulation further specifies the rules on the determination and presumption of a dominant position and explicitly prohibits specific types of conduct such as a refusal to license IP, exclusive dealing, tying, unfair conditions and discriminatory treatment. Third, the *SAIC Regulation* aims to provide guidance on specific situations including patent pools, and the setting and implementation of standards incorporating IP rights.

In addition, the *SAIC Regulation* also provides guidance on the framework of analysis for enforcing antitrust rules in the IP sector and the steps for analyzing and deciding an abuse of IP rights, and enumerates the factors which affect the competition.

Last but not least, according to the *Anti-Monopoly Law*, the *SAIC Regulation* sets out the legal consequences for abuse of IP rights which eliminate or restrict competition.

### ***8. The State Forestry Administration Issued the 2015 Implementation Plan for Promoting of Forestry Intellectual Property Strategy***

On 6 May 2015, the State Forestry Administration issued the *2015 Implementation Plan for Promoting of Forestry Intellectual Property Strategy* (No. 69 [2015] the State Forestry Administration) ("*Forestry Plan*"). The primary goal of the plan is to promote the quality of forestry IP.

To achieve the goal, the *Forestry Plan* requires China's forestry departments to undertake a comprehensive assessment and set up an evaluation system for forestry IP, incorporate patents and

new plant species' quality index into the support and rewarding policy, and promote the review of new plant species. In particular, the *Forestry Plan* emphasized the reinforcement of IP transformation effects, and the convergence of forestry IP policy together with forestry industrial and regional policies, promoting the materialization, commercialization and industrialization of IP rights, as well as supporting the establishment of forestry biological genetic resources exploration and benefits sharing system.

In order to protect forestry IP, the *Forestry Plan* requires forestry departments to reinforce the protection of plants' genetic resources and traditional knowledge, improve the forestry IP management and service capabilities, establish an IP registration system for major forestry technology projects, and enhance the information analysis and warning system in key areas. The plan also proposes to improve forestry IP basic capabilities, enhance the capabilities for new species testing, reinforce national forestry genetic resources' categorization and the establishment of a basic database and a forestry IP basic database and sharing platforms.

### ***9. The Government of Guangdong Province Issued The Guangdong Province Action Plan on In-Depth Implementation of Intellectual Property Strategy to Promote Innovation-Driven Development***

On 24 September 2015, the Government of Guangdong Province issued the *Guangdong Province Action Plan on in-depth implementation of intellectual property strategy to promote innovation-driven development* (No. 266 [2015] People's government of Guangdong) ("*Guangdong Action Plan*"). The plan aims to enhance the core competitive ability of the enterprises and to promote Guangdong's industrial upgrade. The goal is to make Guangdong Province known as an international center for creation, use and protection of IP as well as a leading province in China in respect of implementing the IP-driven stronger nation strategy.

To achieve the goal, first, the *Guangdong Action Plan* starts with strengthening the strict protection of IP rights by ways of using the venue of the recently set-up Guangzhou Intellectual Property Court, increasing compensation for IP infringement and ensuring the judicial protection more generally.

Second, the *Guangdong Action Plan* suggests taking core measures as promoting inventions, and increasing their volume and quality. More specifically, the plan proposes to encourage inventions by providing subsidies, rewards and financial supports, and encourages companies to establish their own competitive IP portfolio and increase their ability to have their own key patents.

Third, another core measure of the *Guangdong Action Plan* is proposed to implement patent navigation plans in key sectors, reinforce technology research and integrated innovation in key areas and reserve patents with strategic value.



Fourth, the *Guangdong Action Plan* recognizes the need to promote the transformation of patent technology as the essential step in the realization of IP values, requiring the standard conversion rate of patents to be an important indicator for project approval and evaluation.

In addition, the *Guangdong Action Plan* suggests establishing a market-driven IP operation and trading mechanism, supporting the establishment of IP pledge financing support and risk compensation mechanisms, and proposes the establishment of a China (Guangdong) IP investment and financing service platform. The plan further recognizes the importance of building the ability to provide IP related services by urging the deployment of "desks" for rapid IP protection in specific towns in Guangdong as well the establishment of IP big data implementation platforms, in order to provide basic data resources to the public at no charge.

#### ***10. Guangdong Province's Intellectual Property Office and Free Trade Office Jointly Issued The Guiding Opinions on Strengthening the Intellectual Property Rights in China (Guangdong) Free Trade Pilot Zone***

On 30 September 2015, Guangdong Province's Intellectual Property Office and Free Trade Office jointly issued the *Guiding Opinions on Strengthening the Intellectual Property Rights in China (Guangdong) Free Trade Pilot Zone* (No.154 [2015] Guangdong Province Intellectual Property Office) ("*Guangdong Guiding Opinions*"). As an important element for the blueprint of establishing the Guangzhou Free Trade Zone, the *Guangdong Guiding Opinions* aims to establish IP related regimes.

In particular, the *Guangdong Guiding Opinions* aim to integrate the features of different sections in the free trade zone, establishing a unified IP administrative management regime and constructing high-standard IP management and protection system which conforms to the international practice.

At the same time, the *Guangdong Guiding Opinions* propose to establish a diversified IP dispute resolution regime and rights-protection assistance system, in which international arbitration system will be invited. In addition, a new Guangzhou Free Trade Zone IP synthesized dispute resolution center and IP related disputes rapid resolution system will be established.

To realize the full market value of IP, the *Guangdong Guiding Opinions* point out that innovation and IP rights are meant to support the "One Belt and One Road" strategy, with pilot platforms for nationwide IP operation public services in Hengqin and an IP rights operation center in the Shekou section of Qianhai. Furthermore, in order to achieve the goal of industrial upgrade for Guangzhou Free Trade Zone, the *Guangdong Guiding Opinions* suggest exploring patent information service mode in the zone, carrying out pilot projects in some sections for concentration of IP service providers in those sections within the zone, upgrading the patent application services and improving the efficiency and quality of patent application.

## CHAPTER 2.

# OVERVIEW OF COMPETITION POLICY

DONG Dudu & MENG Yanbei\*

In 2015, Chinese competition policies achieved a more fundamental status in the whole economic policy system. Since China's reform and opening-up began, competition policies have gone through a development process. In the constantly emerging antitrust cases and promulgation of a series of antitrust guidelines, competition policies were carried out effectively and grew to a gradually elevated, then fundamental, status.

The enactment of the 1980 *Interim Provisions of the State Council for Developing and Protecting Socialist Competition* marked the creation of competition policies. The entry into force of the Anti-Unfair Competition Law in 1993 and the *Anti-Monopoly Law* in 2008 marked the set-up of the fundamental framework for competition policies. The 2014 *Decision of the Central Committee of the Communist Party of China on Several Major Issues on Comprehensively Deepening Reforms* emphasized the significance of competition policies, which dramatically raised their status and importance. On October 12, 2015, the *Several Opinions of the CPC Central Committee and the State Council on Promoting the Reform of the Price Mechanism* was put forward to enhance market price supervision and antitrust enforcement, and to establish the fundamental role of competition policies step-by-step.

### ***1. Consistency of China's Competition Policies with Other Economic Policies***

China has gradually established the fundamental status of competition policies. However, the country does not deny the significance of other economic policies such as industry and investment policies. Instead, it coordinates the various types of economic policies based on the principle of market competition. For example, the *Several Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening System and Mechanism Reform and Accelerating the Implementation of the Innovation-driven Development Strategy* state that, for certain aspects of industrial technology policies, it is imperative to reform the industrial regulation system by shifting the emphasis from ex ante examination and approval to interim and ex post regulation; strengthening the guiding and supervisory roles of industrial and technology policies; specifying and

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gradually increasing the indexes and relevant standards for production and market access in terms of environment, conservation of energy, land, water and materials, and quality and safety; and overall forming a unified, authoritative, open and transparent market access standard system.

With regard to innovation policies, it is necessary to expand the right of enterprise and address the innovative decision-making of the State. The State's science and technology plans should focus on strategic demand. The plans should not only put emphasis on the research in key fields where the market cannot effectively allocate resources, but should also allow enterprises to independently decide according to market demand for research, direction of development, technology routes, and factor allocation of the competitive industry and technology innovation. As to financial and tax policies, it is imperative to keep the structural tax reduction direction and gradually transform the method of the input by the State in enterprise technological innovation so that inclusive financial and tax policies will be the main method of input. Considering that both competition policies and other economic policies have their reasons and value to exist, and both have restrictions and cannot be substituted by the other, China should build competition-friendly economic policies such as industrial policies.

## ***2. Fair Competition Review System as Major Action for Enforcement of Competition Policies at the Present Stage in China***

The building of a fair competition review system is essential for ensuring that the fundamental status of Chinese competition policies is maintained, and for promoting the reform of economic policies.

The fair competition review system refers to a system where competition authorities or other authorities put forward alternative schemes which do not obstruct the realization of policy goals and cause minimum damage to market competition. The system works through analyzing and evaluating the potential or existing competition influence of the proposed or current public policies. *The Several Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening System and Mechanism Reform and Accelerating the Implementation of the Innovation-driven Development Strategy* require to break up local protectionism, clean up and repeal those provisions and practices that hinder a national unified market, correct the behavior of local governments in providing improper subsidies or making use of administrative powers to restrict or exclude competition, and explore the implementation of the fair competition review system.

*The Notice of the State Council on Approving and Forwarding the Opinions on the Priority Tasks for Deepening the Reform of the Economic System in 2015 Promulgated by the National Development and Reform Commission* (Guo Fa [2015] No.26) put forward that China shall establish and regulate the review system for industrial policies in terms of their fairness and competitiveness. *The Opinions of the State Council on Certain Policies and Measures for Vigorously Promoting Public Entrepreneurship and*

*Innovation*, promulgated on June 11, 2015, emphasized that the fair competition review system is to be released in an accelerated manner to establish a unified, transparent, orderly and regulated market environment.

On July 31, 2015, the Price Supervision and Anti-Monopoly Bureau at the National Development and Reform Commission ("NDRC") held a symposium, inviting related departments to raise opinions for the fair competition review system to be established. The building of a fair competition review system means that China has started to provide institutional guarantees for the realization of the fundamental status of the competition policies. *The Opinions of the Central Committee of the Communist Party of China and the State Council on Promoting the Reform of Price Mechanism* confirmed that the building of the fair competition review system will go ahead. Additionally, it emphasized that it is necessary to establish a coordination mechanism between competition policies and other policies, such as industry and investment policies, in order to implement the fair competition review system and to promote the building of a unified, open, orderly and competitive market system.

The goals of implementing the fair competition review system for China are to build an effective communication and coordination mechanism between competition policies and other economic policies, to urge the government to consider their policies' influence on market competition while formulating policies and measures, to sort out relations between government and the market at the source, and to put in practice the fundamental status of competition policies.

### ***3. China's Effective Regulation for Administrative Monopolies to Promote Enforcement of Competition Policies***

In 2015, the significance of China's goal for market integration, and creating a unified market, was highlighted on an ongoing basis. There were numerous policy announcements, much system building, and many judgments relating to forbidding administrative monopoly, breaking up local protectionism and industrial monopolies, and cleaning up and abolishing regulations and conduct which impede the national unified market.

*The Opinions of the State Council on Vigorous Development of E-commerce to Speed up the Cultivation of New Economic Driving Force, the Opinions of the State Council on Promoting the Modernization of Domestic Trade Circulation and Establishing Business Environment under the Rule of Law, and the Guiding Opinions of the State Council on Playing the Leading Role of New Consumption and Speeding up the Formation of New Supply* all emphasize how important it is to eliminate market segmentation and clean up and abolish regulations and conduct which impede the integration into a unified market nationwide. The antitrust authorities successfully investigated and published various cases against administrative monopolies, which had a great impact nationwide. In addition,

the *Interpretations of the Supreme People's Court on Several Issues concerning the Application of the Administrative Litigation Law*, promulgated on April 20, 2015, stated that citizens, legal persons, or organizations of other types can bring administrative lawsuits before the court if they believe the administrative authorities abused their administrative power to exclude or restrict competition. In particular, a Chinese court also made a first-instance judgment condemning an administrative monopoly for the first time.

#### ***4. Legislation, Enforcement and Jurisdiction as Important Tools in Promoting the Implementation of Competition Policies***

The development and implementation of China's competition policies is largely in the form of formulation of various antitrust guidelines, antitrust enforcement action, and jurisdiction. This includes listing the factors for identifying illegal conduct, refining legal liabilities, allocating enforcement powers, and regulating the enforcement procedure.

To further clarify the factors for identifying anti-competitive conduct, the Anti-Monopoly Commission under the State Council is drafting guidelines on exemption for monopoly agreements, guidelines on prohibiting the abuse of intellectual property rights to eliminate or restrict competition, and guidelines on antitrust enforcement in the automotive sector. The State Administration for Industry and Commerce ("SAIC") also released a draft of its *Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition*. To refine and regulate legal liabilities, the Anti-Monopoly Commission under the State Council is drafting leniency guidelines, guidelines for calculating the amount of illegal gains and fines. To regulate the enforcement procedure, the Anti-Monopoly Commission is drafting guidelines on the commitments procedure for companies. In turn, MOFCOM issued the *Guiding Opinions on Regulating the Declaration Names for the Cases of Concentration between Business Operators*, and SAIC issued both the *Law Enforcement and Supervision Provisions of the Administrative Authority for Industry and Commerce* and *Dealing with the Petition and Complaint Lists in the Field of Industrial and Commercial Administration through Legal Way and Classification*.

Regarding the connection between administrative antitrust enforcement and private litigation, although there are some follow-on litigation suits, it is something that obviously needs to be further explored.

In the resolution of disputes, although involved interests and value conflicts are more complex, parties' awareness of antitrust issues is improving and court judgments are more open, persuasive, and professional. With such professional improvement in antitrust cases, the real value of conflicts and the choices behind the disputes must be viewed in relation to constitutive elements and enforcement procedures such as the relevant market, market power, the calculation for the damage compensation

amount, identification of the amount of the fine, possible application of leniency policies, etc. However, we should be concerned that the integration of competition policies which maintain market competition may be replaced by probably trivial details. Competition policies' function of realizing the national economic function may be downplayed and blurred. In addition, the choice of whether to bring a private antitrust lawsuit depends on the related parties' decision, while the choice of administrative antitrust enforcement depends on public opinion and complaints.

The administrative antitrust agencies did not launch targeted investigations based on the overall evaluation of market competition in specific industries and sectors, which is a deficiency in the Chinese antitrust implementation strategy at the policy-implementation level. It is a challenge for competition policy-making in China on how to process the reality of China's market competition and make integrated planning and implementation arrangements.

Generally speaking, because Chinese competition policies were confirmed as fundamental economic policies in 2015, they certainly deserved the attention they have received. The content of competition policies is not limited to the announcement of ideas and principles. Instead, the policies have become more specific, professional and operative. The legislation, enforcement and judiciary of China's Anti-monopoly not only promote the effective implementation of competition policies, but also successfully promote the creation of a competition culture. All along, the basic tasks and core problems of competition policies have been to combine and handle timely the reality of market competition, and to explore, confirm, coordinate and maintain the various value goals related to market competition.

## **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

Following the strategy of "innovation-driven development," which was introduced by China's top leadership at the general meeting of the 18<sup>th</sup> CPC National Congress, five new development concepts were introduced at the fifth session of the 18th CPC National Congress: innovation; coordination; going green; opening up; and sharing. Among these concepts, innovation was ranked first.

Against that background, China's State Council, its ministries and commissions, and other government agencies have been giving full attention to technological innovation. At the end of 2015, the State Council issued the *Several Opinions of the State Council on Accelerating the Construction of Great Power in Intellectual Property under the New Situation*.<sup>1</sup> Before this, the State Council adopted at the end of 2014, and published on January 4, 2015, a document entitled *the Action Plan for Deep Implementation of National Intellectual Property Rights Strategy (2014-2020)*.<sup>2</sup> Premier Li Keqiang also proposed a slogan asking "people to start their own businesses and to make innovations," when he delivered a government work report at the plenary meeting of the National People's Congress in 2015. In addition, in order to narrow the gap in information technology vis-à-vis more advanced countries, the Ministry of Industry and Information Technology actively promoted the establishment of a number of industrial alliances that related with intellectual property rights ("IPRs") in certain industries, such as the establishment of Integrated Circuit Intellectual Property Alliance. Some local governments promulgated a series of policies and regulations to encourage innovation in their jurisdictions, for instance the Beijing government published its *Action Plan (2015-2020) for the In-depth Implementation of the Capital Intellectual Property*<sup>3</sup>, and Qingdao (in Shandong Province)

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1. *Several Opinions on Speeding up the Construction of a Powerful Country with Intellectual Property Rights under the New Situation*, see [http://www.gov.cn/zhengce/content/2015-12/22/content\\_10468.htm](http://www.gov.cn/zhengce/content/2015-12/22/content_10468.htm), published on December 22, 2015, accessed on March 4, 2016.

2. *Action Plan of In-depth Implementation of the National Intellectual Property Strategy(2014-2020)*, see [http://news.xinhuanet.com/fortune/2015-01/04/c\\_1113870665.htm](http://news.xinhuanet.com/fortune/2015-01/04/c_1113870665.htm), published on January 4, 2015, accessed on March 4, 2016.

3. *Action Plan of In-depth Implementation of the Capital Intellectual Property (2015-2020)*, see [http://www.sipo.gov.cn/zlssbgs/bwdt/201507/t20150714\\_1144231.html](http://www.sipo.gov.cn/zlssbgs/bwdt/201507/t20150714_1144231.html), published on July 14, 2015, accessed on March 4, 2016.



government published the Action Plan (2015-2020) of *Qingdao for the In-depth Implementation of the Intellectual Property Strategy*<sup>1</sup> at the end of 2015. Overall, in 2015 China's governments at all levels paid considerable attention to innovation. Despite these efforts, however, it is obvious that there is still a long way to go before the establishment of a new environment for innovation.

At the same time, national legislative bodies in relation to IPRs revised or drafted laws or regulations concerning patents, in order to create a legislative environment that encourages innovation and protects IPRs. The decision on revising the Law of the People's Republic of China on Promoting the Transformation of Scientific and Technological Achievements was reviewed and adopted by the Standing Committee of the National People's Congress on August 29, 2015. This is the first revision of the law since its promulgation on May 15, 1996, and the revision involves many measures of promoting the transformation of scientific and technological achievements. In addition, the decisions on revising the Patent Law, the Regulations on Patent Commissioning, the Regulations on Service Inventions and other laws or regulations were all been submitted to the Legislative Affairs Office of the State Council for further review.

In terms of judicial adjudication, China has set up three intellectual property courts in Beijing, Shanghai and Guangzhou at the end of 2014. Tao Kaiyuan, vice president of the Supreme People's Court ("SPC"), suggested at the meeting of the CPPCC National Committee in 2015 that intellectual property high courts should be established at the national level as appeal courts for patent cases to keep judicial criteria unified.<sup>2</sup> Apart from that, the SPC also established the Intellectual Property Case Guidance and Research (Beijing) Base, Intellectual Property International Exchange and Cooperation Base and Judicial Protection and Market Value Research (Guangdong) Base for Intellectual Property Rights separately in Beijing, Shanghai and Guangzhou in 2015 for the next step of the judicial reform. However, due to the imbalance in the economies of Eastern and Western China and the different performances in technological innovation around the country, a severe imbalance also exists in the building and implementation of the intellectual property system, which is also a specific condition of China's development level.

## II. LEGISLATION AND POLICY DEVELOPMENT

In recent years, the Chinese government has been aware of the impact of IPR protection on China's future economic development, and this conceptual change is obviously directly related to the transformation of China's economic development pattern. The reform and opening-up policy has been in place for over 30 years. During these 30 years, China's economic development mainly depended on the expansion of volume to maintain rapid growth in a long period of time. This

1. *Qingdao's Action Plan of In-depth Implementation of the Intellectual Property Strategy(2015-2020)*, see <http://www.qingdao.gov.cn/n172/n25685095/n25685320/n25685956/n25688318/151202105622412268.html>, published on December 2, 2015, accessed on March 5, 2016.

2. *Tao Kaiyuan: A High Court of Intellectual Property at the National Level should be Established*, see <http://ip.people.com.cn/n/2015/0310/c136655-26666441.html>, published on March 10, 2015, accessed on March 4, 2016.

pattern of economic development drove the economy mainly through the consumption of resources. Today, as China has become the world's largest energy consuming country, this pattern of resource-driven development is clearly no longer sustainable, and therefore must be transformed into an innovation-driven pattern. The system of intellectual property is no doubt the most basic system to encourage and protect innovation, and it is impossible for China to realize the transformation of economic development patterns without effective IPR protection. Therefore, attaching importance to the construction of a functioning intellectual property system has become a key demand of China's economic development in general. This is different from the situation in China 30 years ago. This might be one of the key underlying reasons why China has been revising its intellectual property laws and strengthening IPR protection in recent years.

### ***A. The Revision of the Patent Law***

In 2015, the revision of China's Patent Law was the most important topic in the process of strengthening the IPR system. After the Patent Law was last revised in 2008, the State Intellectual Property Office ("SIPO") submitted fresh draft revisions to the Patent Law to the Legislative Affairs Office of the State Council in 2013. After China's top leaders took the strategic view to promote "innovation," the SIPO re-submitted a new draft for revision of the Patent Law to the Legislative Affairs Office in the second half of 2015. In this draft, a chapter of "Implementation and Application of Patent" was newly added, 18 existing articles were revised and 14 articles were newly added.

There have been various disputes in the revision of the Patent Law over the years. But when it came to the general direction of strengthening the protection of the patent right, cracking down on infringers and increasing tort costs, the views of different parties have been basically consistent. There have not been major disputes on the principle of emphasizing the implementation and application of patented technology in patent legislation, but there are different views on the technical aspects of the legislation. For instance, views differ on whether the implementation and application of patented technology should be included in a special chapter in the Patent Law. In the current Chinese legal system, there is a special law called the *Law of the People's Republic of China on Promoting the Transformation of Scientific and Technological Achievements*, which was also revised in 2015. When formulating regulations on promoting the transformation of scientific and technological achievements that include patented technologies, is it necessary to regulate the same subject through two laws? This situation of overlap is obviously not ideal, and the internal coordination problem of the legislature is admittedly one of the reasons for this situation. However, the more important reason lies in the current departmental legislative system, as almost every government department has the tendency to expand its authority through legislation. Under the current legislative system, the SIPO is in charge of the revision of the Patent Law, while the revision of the Law on Promoting the Transformation of Scientific and Technological Achievements falls within the purview of the Ministry of Science and Technology. In short, all departments try to expand their authority through revising

laws, which has led to the phenomenon of the expansion of administrative powers in recent years.

For a long time, the authority of the administrative departments in relation to IPRs has been a controversial topic in the IPR legislative process in China. Back in the early 1980's, the Trademark Law stipulated that the administrative departments for industry and commerce can impose administrative penalties for trademark infringements, and can also directly order the infringers to compensate for losses. Compensation for losses is one of the relief measures for infringements of civil rights, so there is clearly little legal basis for administrative departments to get themselves involved in the settlement of civil disputes. As a result, the provisions relating to the compensation for losses were all removed from the Trademark Law in 1993, but the terms of the administrative penalties were still remained.

In contrast, since the promulgation of the Patent Law in 1984, the scope of the law enforcement authority of the administrative patent department has been relatively narrow. Although the scope of law enforcement authority was discussed during the previous three revisions to the Patent Law, administrative law enforcement has remained in an auxiliary position in the area of protection of patent rights. This situation led the SIPO to try to expand its power when it submitted its draft revisions to the Patent Law to the State Council in 2013. Under this draft, the administrative patent departments would not only be empowered to impose penalties for patent infringements, but they would also be able to order infringers to compensate for the losses they have caused. However, after its publication, the draft drew so much criticism that the SIPO had to make some amendments when it re-submitted a new draft on revising the Patent Law to the State Council in 2015: the originally proposed article of ordering infringers to compensate for losses was removed, but many provisions aiming to expand the authority of the administrative patent department still remained in the draft. However, there will be heated debate over patent administrative law enforcement during the review process of the Patent Law in the future. What is certain, however, is that the SIPO still has a very strong desire to expand its authority over administrative law enforcement. It even promulgated the revised *Measures for Patent-related Administrative Law Enforcement* in 2015.

### ***B. The Revision of the Regulations on Patent Commissioning and the Drafting of the Regulations on Service Inventions***

In addition to the Patent Law, the State Council also handled the revision of the *Regulations on Patent Commissioning* and the drafting of the *Regulations on Service Inventions* in 2015. The main goal of the *Regulations on Patent Commissioning* is to adjust patent agents' problems arising at work. Over the past 30 years, China's patent agency industry has undergone significant changes, and now it is imperative to revise those articles of the *Regulations on Patent Commissioning* that no longer fit today's market practice. 30 years of reform have initially established the market economy system in China, and patent agencies and their management must adapt to the requirements of market

economy. Therefore, the revision process of the *Regulations on Patent Commissioning* has been quite smooth and steady. During this period, there were surely disputes over issues such as the reserve or abolishment of the *Regulations on Patent Commissioning* and the legal nature of patent agents' qualifications, but compared with the formulation of the *Regulations on Service Inventions*, the revision of the *Regulations on Patent Commissioning* has been quite successful. In turn, the drafting of the *Regulations on Service Inventions*, pursued in the goal of respecting knowledge and talents, is to implement the requirements of the *National Outline for Medium and Long-term Talents Development Plan*. However, after the drafting of this bill started, it led to a considerable debate among the business community, academia or even government departments. The most controversial question in this debate is whether a service inventor can get monetary awards (besides his/her regular wages) when the service invention leads to the grant of a patent, or share in a certain proportion the reward of the profits (if any) obtained from the implementation of the invention. Although both Europe and the United States recognize the theoretical basis of such rights of service inventors and also recognize that this is a legally protected interest, they have completely different approaches over the reward sharing forms for service inventors. China's draft *Regulations on Service Inventions* is closer to the approach of Europe.

### ***C. The Publication of the Action Plan for Deep Implementation of the National Intellectual Property Rights Strategy (2014-2020)***

In the *Action Plan for Deep Implementation of the National Intellectual Property Rights Strategy (2014-2020)*, which was released in early 2015, the State Council emphasizes once again the need to transform achievements, including the transformation of patent technologies. Obviously, the patent authorities have realized that China has a high number of IPRs as it is the biggest IPR application country in the world, but that the quality of these IPRs is generally low. One standard to evaluate the quality of an IPR is the possibility to transform it into productivity. From the market perspective, IPRs that cannot be transformed into productivity are valueless. As China already had the largest amount of patent applications and PCT patent applications in the world several years ago, bubbles will definitely appear in China's patent market which may finally destroy Chinese technology market if we do not improve the quality of our patents. In order to enhance China's ability to make use of the IP legal system and to create an environment of encouraging and protecting innovation, *the Several Opinions of the State Council on Accelerating the Construction of Great Power in Intellectual Property under the New Situation*, which were published at the end of 2015, put forward five important measures including promoting the reform of the IP administration system and mechanism, implementing strict IP protection, facilitating IP creation and application, strengthening IP supervision and risk control in key sectors, and improving the level of foreign cooperation in relation to IP.

Although the title of the above-mentioned policy document contains references to IP in general,

its content (especially the substantial content) is more patent focused. It reflects the fact that different authorities within the Chinese government participate in IP policy making. To be specific, the policies promulgated by SIPO mostly cover practical aspects of IP issues, while the documents made by SAIC or SAPPRFT provide more substantial regulations concerning trademark or copyright issues, respectively. However, generally, the Chinese government's tendency to put increasing emphasis on patent protection is rather clear.

On the other hand, these policy documents also show that the Chinese patent policies are not mature enough, which is due to the low development level of China's market economy, low growth level of China's technology market and the limited technology capacity at the R&D level. For example, the *Action Plan for Deep Implementation of the National Intellectual Property Rights Strategy (2014-2020)* states that the quantity of invention patents per ten thousand people must reach 14 by 2020 compared to four in 2013. This type of number target will definitely lead local governments to take more administrative measures over the next several years to stimulate the application of invention patents. Logically, this will worsen the situation where our patents are of high quantity but of low quality. If China cannot quadruple its innovation ability by 2020, the unit value of Chinese patents will certainly drop in general just like the inflation in the technology market. With a country's innovation ability remaining steady, the more patent certificates the authority issues, the lower value every single certificate will carry.

### III. MAJOR CASES

In 2015, Chinese courts decided several influential or noteworthy cases. For example, Apple sued the Patent Reexamination Board to claim that the Board's declaration of the invention patent of Zhizhen Corporation's chatting robot to be valid was flawed.<sup>1</sup> The judgment in this administrative litigation provides a detailed analysis of the need for sufficient openness in patent law by taking information systems and processes as examples. Although people hold different views towards the judgment, it has great reference value for the writing of patent specifications and patent claims when patenting information systems and processes. Similarly, there was the case in which Shijiazhuang Shuanghuan Automobile Co., Ltd. sued Honda Motor Co., Ltd.<sup>2</sup> claiming it did not infringe the defendant's design patent and requesting compensation for losses suffered. The case was initiated by Honda to claim that Shuanghuan had infringed its design patent, but then Shuanghuan made the counterclaim against Honda as carrying out hostile warnings. Finally, the court held that Honda lost the case, which gave rise to heated discussion.

Besides the above-mentioned two cases, there were many other classic patent cases in 2015.

1. Administrative Judgment No. 2935 [2014], Beijing High People's Court (second-instance); Administrative Judgment No. 184 [2014], Beijing First Intermediate People's Court (first-instance).

2. Civil Judgment No. 7 [2014], Supreme People's Court (second-instance); Civil Judgment No. 1 [2013], Hebei High People's Court (first-instance).

Due to limited space of this report, we will only describe the invention patent infringement litigation between Weihai Jiayikao Life Appliance Co., Ltd. ("Jiayikao Company") and Zhejiang Tmall Network Co., Ltd.<sup>1</sup>

The facts were as follows. Plaintiff Jiayikao Company found out that Yongkang Jinshide Engineering & Trading Co., Ltd. ("Jinshide Company"), one of the defendants, sold infra-red cooking appliances, for which the plaintiff holds patents, on the Tmall e-commerce platform. Jiayikao Company bought the product from Jinshide Company through Tmall, and had the purchase notarized. After having compared its own patented product and the product sold by Jinshide Company, Jiayikao Company uploaded complaint materials including the link of the product against which the complaint was filed, the analysis report of the patent infringement and the comparison table of technical features to Taobao IP Protection Platform. The product and the person against which the complaint was filed could be ascertained via these complaint materials. But Tmall rejected the materials and required Jiayikao Company to provide the comparison of the technical points listed in the patent claims with the alleged infringing product. Tmall also suggested that Jiayikao Company do a comparison with graphics and text, and required it to provide the number of the purchase order and the names of both parties.

In both the first and second instance, all parties agreed that the product sold by Jinshide Company is within the patent protection scope, but they disagreed on whether the patentee's complaint to Tmall was valid and whether Tmall's behavior was at fault, etc.

At first instance, the court decided that Jinshide Company should immediately stop the sale of the products infringing the plaintiff's patents and compensate Jiayikao Company RMB 150,000 for its economic loss, and Tmall should assume joint liability for RMB 50,000 of the compensation. Tmall appealed against the judgment.

The appeal court ruled that the complaint materials provided by the patentee only need to include the identity of the patentee, the name of the patent, the patent number, and information concerning the product and the person against which the complaint was filed. This makes it sufficiently convenient for the recipient of the complaint to forward it to the relevant person. In this case, the court found the complaint materials submitted by Jiayikao Company to contain all the above elements and therefore to be valid. As for the infringement comparison analysis, Jiayikao had included a 5-page comparison table of technical features with graphics and text in the submitted complaint materials, but Tmall unreasonably rejected the complaint with preformatted words alleging the comparison table was not effective as it was not done with graphics and text. In addition, Tmall contradicted itself by requiring Jiayikao Company to provide a comparison table of the technical features on the one hand, and claiming it faced challenges in judging whether the products sold by the online stores infringe the invention patents on the other hand. Therefore, the appeal court did

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1. Civil Judgment No. 186 [2015], Zhejiang High People's Court (second-instance).

not support Tmall's defense and upheld the first instance decision.

This case can be regarded as a parallel to the copyright infringement cases by Internet service providers in the patent sphere. The key issue is what degree of attention the e-commerce platform needs to pay in order to be exempted from liabilities in patent infringement cases. The verdict transplants the "information/deletion" rule in copyright law which applies to infringements in the Internet environment into patent infringement cases, and provides specific explanations to questions such as what conditions it takes for the Internet service providers to be informed and which measures it needs to take after being informed. The principles reflected by the explanations are quite valuable for e-commerce platforms' daily operations, although these explanations are strictly speaking only effective in the particular case.

## CHAPTER 2.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADEMARK LAW

ZHANG Guangliang\*

## I. OVERVIEW

There has been a recent revision of Chinese trademark legislation in the past two years: first the revision of the *Trademark Law* in 2013, and then the revision of the *Implementing Regulations of the Trademark Law* in 2014. In 2015, however, there were no particularly important legislative developments in the trademark law area. The State Administration for Industry and Commerce ("SAIC") took a series of measures in updating trademark policies, which include reviewing decisions on trademark registration applications by trademark agencies, lowering the fee for trademark registration, implementing operations to protect the exclusive rights of trademarks with geographical indications, and implementing a new-version of *Table for Distinction of Similar Goods and Services*.

For trademark judicial protection, cases concluded by courts touched upon the procedure of trademark registration, the scope of pre-existing right(s), the recognition of infringement under the background of "Internet+", the recognition of trademark infringement for OEMs (who process products with designated brand-name), the right of first use defense, and the civil liability of trademark infringements, which will have a great impact on China's trademark law from the judicial perspective.

## II. LEGISLATION AND POLICY DEVELOPMENT

There were no particularly important legislative developments in the trademark law area during the course of 2015. However, from a policy perspective, SAIC launched multiple measures to implement the new trademark law.

First, on January 4, 2015, SAIC's Trademark Office published its *Explanations for the Review Decisions on Trademark Registration Applications by Trademark Agencies*. These explanations provide

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that, where the registration application of a trademark not covered by its agency services were filed by a trademark agency in its own name before May 1, 2014 and no acceptance decision is made, the Trademark Office will decide not to accept such an application according to Article 87 of the amended *Implementing Regulations of the Trademark Law*; if a notice of acceptance has been issued according to the *Trademark Law* before the amendment, the Trademark Office will decide to dismiss the application pursuant to subparagraph 8 of Article 10(1) and Article 19(4) of the revised *Trademark Law* at the trademark examination stage.

Second, the *Table for Distinction of Similar Goods and Services*, which was modified based on the NCL (10-2015) by the Trademark Office, took effect on January 1, 2015. Since October 15, 2015, the fee for trademark registration with the Trademark Office has been lowered from RMB 800 to RMB 600.<sup>1</sup>

Third, SAIC also published policies relating to trademark protection. On April 7, 2015, SAIC published the Notice of *Implementing Operations to Protect the Exclusive Rights of Trademark with Geographical Indications*, which covered a period from April 1, 2015 to September 30, 2015.<sup>2</sup> On November 12, 2015, SAIC published its *Opinions on Strengthening and Regulating Selective Quality Testing of Products Traded Online*, which provide that if consumers cannot find the online seller to claim damages, the e-commerce platform shall compensate for consumers' damages.

### III. MAJOR CASES

#### *A. Anhui Huayuan Pharmaceutical Co., Ltd. v. the Trademark Office of the State Administration for Industry and Commerce*<sup>3</sup>

On December 14, 2012, the SAIC Trademark Office published its *Notice on Issues Related to the Applications for Registration of Trademarks for Newly-Added Retail or Wholesale Services* in order to implement the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*. Article 4 of the notice set a transitional period for registration applications between January 1 and January 31, 2013. Registration applications under the same or similar newly-added service items submitted during this period would be deemed to have been filed on the same day.

On January 4, 2013, Anhui Huayuan Pharmaceutical Co., Ltd. ("Huayuan Pharmaceutical") applied for registration to the Trademark Office, for a trademark that consisted of the Chinese

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1. Notice of the National Development and Reform Commission and the Ministry of Finance on Lowering the Rates of Property Transfer Processing Fees, Trademark Registration Application Acceptance Fees and Some Other Administrative and Institutional Fees (NDRC Price [2015] No. 2136), see [http://www.sdpc.gov.cn/zcfb/zcfbtz/201509/t20150924\\_752139.html](http://www.sdpc.gov.cn/zcfb/zcfbtz/201509/t20150924_752139.html), accessed on April 5, 2016.

2. From January to November 2015, China approved the registration of 351 geographical indications. As of the end of November, China has approved a total of 2945 registered geographical indications, of which 83 foreign geographical indications.

3. Administrative Judgment No. 177 [2015], Intellectual Property Court of Beijing (first-instance).

Characters for "Huayuan Pharmaceutical" and graphics. The trademark was approved as a Class 35 commodity. Subsequently, another two companies submitted applications for the "Huayuan" trademark.

On October 23, 2014, the Trademark Office delivered the *Consultation Notice on Trademark Registration Applications* on the same day to the three companies, which demanded the three parties to coordinate amongst themselves and retain only one party's application. If they could not reach an agreement, the Trademark Office would draw lots to determine the applicant.

In response, Huayuan Pharmaceutical immediately filed an administrative lawsuit with the Beijing Intellectual Property Court, asking the court to revoke the consultation notice made by the Trademark Office and order it to remake the decision. The Beijing Intellectual Property Court determined through trial that the transitional period as regulated in Article 4 of the *Notice on Issues Related to the Applications for Registration of Trademarks for Newly-Added Retail or Wholesale Services* was virtually a redefinition for "the same day" as regulated in Article 31 of the Trademark Law, which went beyond the Trademark Office's statutory authority. The court ruled to revoke the consultation notice and made a decision to review the trademark application submitted by Huayuan Pharmaceutical.

The significance of this case was that it was the first case related to "legitimacy review" of the normative documents formulated by national ministries after the implementation of the revised *Administrative Litigation Law* in 2014.

### ***B. DreamWorks Animation SKG, Inc. Administrative Dispute over Review of Trademark Objection<sup>1</sup>***

On December 22, 2008, Hu Xiaozhong submitted a registration application for the trademark "KUNG FU PANDA" on steering wheel covers and other commodities. DreamWorks Animation SKG, Inc. raised an objection and asserted the prior "merchandising rights" derived from its animation movie of the same name "KUNG FU PANDA."

Both the SAIC Trademark Evaluation Committee and the first-instance court considered that a "commercialization right" is not a statutory right in current law and not a civil right protected by law. The content and boundary of such a right is not clear, and it is difficult to determine whether DreamWorks Animation SKG, Inc. has the absolute and exclusive rights to the name "KUNG FU PANDA" in the trademark field.

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1. Administrative Judgment No. 4257 [2014], Beijing First Intermediate People's Court (first-instance); Administrative Judgment No. 1969 [2015], Beijing High People's Court (second-instance).

However, the second-instance court determined that when the name of a movie or the movie characters and their names have certain recognition beyond the movie itself as promoted by commercial actors, the public may attach their awareness and emotions for the movie to its name and its characters' names. Additionally, the public may have empathy towards commercial goods or services which are related to the movie. Based on these interpretations, right holders are thus able to obtain commercial value and trading opportunities beyond film distribution. Therefore, the name of the film, and the image and name of the film characters, can constitute a "merchandising right" and "prior right" in the trademark registration.

The significance of this case was that the second-instance court identified the "commercialization rights" directly, while also identifying that the "prior right" included civil rights. It clearly identified the factors to be considered for the protection of "commercialization rights": (1) the degree of popularity and impact; and (2) the possibility of confusion and misidentification.

### ***C. Guangzhou Riicy Technology Co., Ltd. v. Beijing Xiaoju Technology Co., Ltd.<sup>1</sup>***

Guangzhou Riicy Technology Co., Ltd. ("Riicy Technology") is the owner of trademarks No. 11122098, No. 11122065 "滴滴(Didi)" and No. 11282313 "滴滴(Didi)". The trademarks were authorized to be used in Class 38: "information delivery and telecommunication information", and Class 35: "commercial management and organization consultation."

Riicy Technology brought a lawsuit before the Haidian District People's Court alleging that Beijing Xiaoju Technology Co., Ltd. had infringed its trademark right by providing "DiDi" taxi service to the public through a software information platform. The court considered that the "DiDi" taxi service could not be classified into the services of classes mentioned above simply because it used application of the Internet and mobile communication services. If the services are taken as a whole and comprehensively, then users and providers of Internet and telecommunication services could not be confused. "DiDi" taxi services did not provide commercial management and telecommunication technology support services directly, and the patterns, clients and content of services were obviously distinct from the plaintiff's approved services. The court dismissed Riicy Technology's claim.

The significance of this case is that the judgment shows the analytical approach when classifying products/services and the same or similar trademarks in the Internet environment—such classification should be considered comprehensively, to examine whether users and the providers of Internet and telecommunication services are confused. This case was included in the 10 typical intellectual property cases of the Beijing High People's Court for judicial protection of intellectual property rights during 2015, and in 50 typical intellectual property cases of Chinese courts during 2015.

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1. Civil Judgment No. 21033 [2014], Haidian People's Court of Beijing (first-instance).

***D. Pujiang Yahuan Locks Co., Ltd. v. Focker Security Products International Limited<sup>1</sup>***

Focker Security Products International Limited ("Focker") had the trademark right of "PRETUL and an oval" through transfer. The trademark was approved to be used in Class 6 goods such as metal accessories for furniture and hardware metal locks.

Focker alleged that Pujiang Yahuan Locks Co., Ltd. ("Yahuan") produced padlocks which were exported to Mexico for its overseas client Truper SA, and that all the padlocks bore the "PRETUL and an oval" trademark, which infringed upon Focker's trademark right.

The first-instance court considered that Yahuan's acts of labeling "PRETUL" trademark on the processed padlocks, keys and the accompanying product descriptions, and labeling "PRETUL and an oval" trademark on the padlock package indeed infringed upon Focker's right, because the trademarks it bore were the same as Focker's registered trademark. Similarly, the second-instance court determined that Yahuan's acts of labeling "PRETUL" trademark on padlocks, keys and the accompanying product descriptions were acts using a similar trademark with the registered trademark, constituting trademark infringement.

However, the Supreme People's Court ("SPC") considered that, as a mark that distinguishes the origin of goods and services, the basic function of a trademark is identification. The marks Yahuan put on its processed products had neither the meaning nor the function of identifying the goods' origin. Thus, the marks in this case were not considered as trademarks, and labeling such marks on the goods should not be regarded as a usage in the trademark sense. Therefore, SPC revoked the decisions of the first-instance and second-instance courts.

The importance of this case lies in the circumstance that the SPC's retrial decision made clear the approach to determine trademark use. The SPC judgment emphasized the basic function of the protection of the Trademark Law over a trademark – identifying, which sets the basis for judging trademark infringement. The case is also significant in providing guidance on trademark cases involving OEMs under the same circumstances. It is included in the 50 typical intellectual property cases of Chinese courts during 2015.

***E. Guangzhou Star River Industrial Development Co. Ltd., Guangzhou Hongfu Real Estate Co. Ltd., v. Jiangsu Weifu Group Construction and Development Co., Ltd.<sup>2</sup>***

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1. Civil Judgment No.56 [2011], Ningbo Intermediate People's Court of Zhejiang (first-instance); Civil Judgment No. 285 [2012], Zhejiang High People's Court (second-instance); Civil Judgment No. 38 [2014], Supreme People's Court (retrial).

2. Civil Judgment No. 8 [2011], Nantong Intermediate People's Court of Jiangsu (first-instance); Civil Judgment No. 0171 [2011], Jiangsu High People's Court (second-instance); Civil Judgment No. 102 [2013], Supreme People's Court (retrial).

Guangzhou Star River Industrial Development Co., Ltd. ("Star River") and Guangzhou Hongfu Real Estate Co., Ltd. ("Hongfu") were the rights holders of No.1946396 and No. 1948763 registered trademarks "Star River," which were approved to be used for the services of Classes 36 real estate management and Classes 37 architecture services.

Jiangsu Weifu Group Construction and Development Co., Ltd. ("Weifu") named the project of residential buildings it developed as "Star River Garden." Star River and Hongfu sued for trademark infringement and unfair competition. The first- and second-instance courts considered that, according to the popularity of the involved registered trademark, the characteristics of commercial real estate sales and the fact that Weifu used "Star River Garden" as the name of buildings it developed, Weifu's acts did not mislead the public and did not amount to trademark infringement or unfair competition by counterfeiting the specific name of a well-known product or using another company's name without authorization.

However, at re-trial, the SPC considered that commercial real estate and real estate construction constitute a similarity between goods and services. According to the SPC, the name "Star River Garden" of the buildings developed by Weifu is actually a commercial mark. The distinct part of the name "Star River" is exactly the same as the distinct part of the two registered trademarks of Star River and Hongfu. Also, considering that information flows fast in modern society and that real estate developers sometimes develop a series of real estate projects nationwide, the SPC found that the public can be easily confused by Weifu's real estate project name. Accordingly, the court held Weifu's acts to constitute infringement of Star River and Hongfu's trademark.

There are two points of significance in this case. First, the case involved the protection of registered trademarks of services such as real estate sales and the determination of liabilities for such infringement. The SPC's retrial judgment made it clear that when intellectual property rights such as trademark rights conflict with property rights, the court should follow the principle of good faith and public interest to decide whether the parties should bear the liability to stop using the trademark. Considering that the name of the residential buildings containing the wording of "Star River" was approved by the civil affairs department and that the residents have lived there for years without knowing anything about the trademark infringement, the court's order to stop using the name would result in an imbalance of interests between the trademark right owners, the public and the residents. Thus the court did not order the defendant to stop using the name on that particular residential building project, but it ruled that the name "Star River" cannot be used for real estate projects which have not been sold yet or are to be developed in the future. The case not only protects the legal interests of trademark right owners, but also avoids negative consequences on social order and public interests. This is a sound display of the value-guiding function of judicial decisions.

Second, regional courts usually consider that real estates have regional characteristics, and that the popularity of related trademarks does not extend from one region to another, so that cases of this

type would not result in consumer confusion. However, in this case, the SPC challenged this view, which is a meaningful guidance for trademark infringement cases related to real estate and real estate construction. The case is also included in the 10 typical intellectual property cases of Chinese courts during 2015.

## CHAPTER 3.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COPYRIGHT LAW

*LI Chen\**

## I. OVERVIEW

In 2015, China did not promulgate any important pieces of legislation in the copyright law field. The main developments relating to copyright law took place through law enforcement, which focused on containing infringements in the Internet environment. Notices issued by the National Copyright Administration of China ("NCAC") were aimed at regulating the use of works in the Internet environment. Court also dealt with all kinds of new cases, such as how to determine digital TV box manufacturers' copyright infringement liability, and how to prevent copyright abuse.

## II. LEGISLATION AND POLICY DEVELOPMENT

### *A. NCAC Notice on Regulating the Copyright Order for Reproduction through Internet*

On April 17, 2015, the NCAC issued *the Notice on Regulating the Copyright Order for Reproduction through Internet*. The Notice indicated that, "when reproducing the works of other persons, the Internet media shall comply with relevant provisions of copyright laws and regulations, obtain the approval from and pay remuneration to the copyright owners and indicate the names of the authors, names of the works and the sources of the works, unless otherwise provided by laws and regulations." The notice also indicated that statutory licenses shall not apply when newspapers and periodical publication organizations or the Internet media reproduce each other's published works. The notice further provided other copyright legal relations between Internet media and newspapers and periodical publication organizations. It encourages newspapers and periodical publication organizations or the Internet media to establish a form of cooperation regarding the copyright to reproduction via the Internet through executing copyright license agreements, and required copyright administrations at all levels to intensify copyright regulation over Internet media.

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### ***B. Notice of Launching "Sword Net 2015" Special Crackdown on Internet Infringement and Piracy***

On June 11, 2015, the NCAC, the State Internet Information Office, the Ministry of Industry and Information Technology and the Ministry of Public Security jointly issued *the Notice of Launching "Sword Net 2015" Special Crackdown on Internet Infringement and Piracy*.

The Notice clearly stipulated the work objectives, key tasks, work measures, action steps and work requirements of the "Sword Net 2015". These key tasks included:

1. intensifying the regulation of copyright law enforcement over music websites, taking a strong stance against infringement of rights and piracy activities such as dissemination of music works without approval in order to encourage copyright self-discipline and cross-licensing amongst music websites;
2. launching special regulations over the copyrights of network cloud storage, encouraging key network cloud storage enterprises to carry out self-inspection and self-correction over their copyright issues, and resolutely investigating and punishing any illegal infringement of rights and piracy activities through network cloud storage;
3. launching special crackdowns on infringement of rights and piracy activities of third party apps on smart mobile terminals, and regulating the copyright order of app developers and app stores;
4. launching special regulations on network advertisement alliances, investigating and punishing those network advertisement alliances who intentionally support infringement of rights and pirating activities, and guiding large network advertisement alliances to establish a mechanism for copyright protection;
5. further regulating the copyright order for reproduction through internet, strengthening the copyright protection for digital publishing content, intensifying the supervision over Internet media, taking a strong stance against infringement of rights and piracy activities such as illegal reproduction without approval or dissemination of the works of other persons, and protecting and promoting the integrated development of traditional publication and new media.

### ***C. NCAC Notice on Requiring Online Music Service Providers to Stop Unauthorized Dissemination of Music Works***

On July 8, 2015, the NCAC issued *the Notice on Requiring Online Music Service Providers to Stop Unauthorized Dissemination of Music Works*. The notice indicated that, since July 2015, the



NCAC would launch a special online music copyright campaign, reinforce copyright regulations of online music service providers, and promote the establishment of a good copyright order and ecosystem for online music. Online music service providers were ordered to stop unauthorized dissemination of music works, and to remove all unauthorized music content by July 31, 2015. Online music service providers that continue to disseminate unauthorized musical works after July 31, 2015 will face severe punishment by the NCAC according to law.

#### ***D. NCAC Measures for the Implementation of Copyright Administrative Penalties (Revised Draft for Comments)***

On September 8, 2015, the NCAC issued *the Measures for the Implementation of Copyright Administrative Penalties (Revised Draft for Comments)*. The draft for comments provides the illegal conduct to be subject to administrative penalty, including:

1. acts of infringement listed in Article 48 of the *Copyright Law*, which concurrently constitute harm to the public interest;
2. acts of infringement listed in Article 24 of the *Computer Software Protection Regulations*, which concurrently constitute harm to the public interest;
3. acts of infringement listed in Article 18 of the *Regulations on the Protection of Right of Dissemination via Information Network*, which concurrently constitute harm to the public interest, and acts of infringement listed in Articles 19 and 25;
4. acts which shall be subject to administrative penalty in accordance with the provisions of Articles 41 and 44 of the *Regulations on Collective Copyright Management*;
5. other illegal conduct concerning copyright, which shall be subject to administrative penalty pursuant to any other relevant laws, regulations or rules.

The draft explains that penalty measures include: warning; imposing fines; confiscating the illegal income; confiscating the infringing products; confiscating equipment used for installing and storing the infringing products; confiscating the materials, tools, equipment, etc. mainly used for producing the infringing products; and imposing any other type of administrative penalty specified by laws, regulations, and rules.

The draft for comments also provides the jurisdiction, time limitation, penalty procedures and enforcement procedures of copyright administrative penalties.

### ***E. NCAC Notice on Regulating the Copyright Order in Network Disk Service***

On October 14, 2015, the NCAC issued the *Notice on Regulating the Copyright Order in Network Disk Service*. The notice requires that

1. those network disk service providers that provide users with network information storage space services shall respect copyrights;
2. network disk service providers shall establish necessary management mechanisms, apply effective technical measures, voluntarily shield and remove infringing works and prevent users from uploading, storing or sharing others' works illegally;
3. network service providers shall make prompts for users to comply with copyright laws in a prominent place on the first page of their network disks;
4. network disk service providers shall indicate in a prominent place of the first page of their network disks the methods for the notification and complaints by rights owners, for the accepting of notification and complaints from rights owners, and for removing relevant infringing works and deleting or disconnecting the links to relevant infringing works within 24 hours after receiving the notification or complaint from any rights owner.

They shall at the same time comply with the provisions on "notification" under the *Regulations on the Protection of the Right to Dissemination via Information Network*. It also sets the requirement that no network disk service provider may, at its own discretion, upload or organize the uploading of others' works without authorization, nor can they edit, recommend, rank or otherwise process the works uploaded or stored by users.

Network disk service providers may not guide, induce or encourage users to share others' works illegally in any way, nor will they provide a convenient platform for users to make use of other network service forms to share others' works illegally. Network disk service providers shall strengthen user management, require users to make reasonable explanations timely of any abnormal account logins, abnormal changes in network traffic and other situations that may be suspected of infringement and may suspend or terminate the use of the accounts by the users that refuse to give an explanation or fail to give reasonable explanations.

Network disk service providers shall keep the complete registration information such as names, account numbers, web addresses and contact information of users and provide the necessary information such as the infringing works uploaded, stored or shared by users, web addresses or domain names as required by the copyright administrative departments. Network disk service providers shall establish infringing user disposal mechanisms and dispose of the infringing users

by listing them in blacklist or suspending or terminating the services to them in light of the circumstances of their infringement. The notice also clearly enumerates several types of works that are stopped from being stored or uploaded by users.

### III. MAJOR CASES

#### *A. Hunan Happy Sunshine Interactive Entertainment Media Co., Ltd. v. Tongfang Co., Ltd.<sup>1</sup>*

Plaintiff Hunan Happy Sunshine Interactive Entertainment Media Co., Ltd. ("Happy Sunshine Company") was granted the exclusive right for network dissemination of information of an entertainment TV show called "Tian Tian Xiang Shang". Defendant Tongfang Company is the manufacturer of a set-top box "Tsinghua TongfangLingyue 3 Intelligent TV Tuner" with VOD systems, which enables users to demand the TV show involved in the case through the "Rabbit Video Software". The plaintiff requested the defendant to stop providing the on-demand service of the TV show involved and pay compensation for its losses. However, the defendant believed that the set-top box itself had not engaged in any infringing actions and, as the "Rabbit Video Software" was provided by a third party, Tongfang would assume no tort liability.

At first instance, the court held that, without any permission, Tongfang Company pre-installed the "Rabbit Video Software" in the product involved and placed it in the boot desktop to recommend to its users. As a result, users would see the TV show involved through the "Rabbit Video Software" when they first turned on the set-top box. The company also put the "Rabbit Video Software" and its function of displaying film and television works in advertisements for the product involved. Therefore, the court found that it had failed to fulfill its duty of reasonable review, which constituted an infringement, so it should bear tort liability. Tongfang's arguments that it is only a hardware manufacturer and the product involved was not made for the purposes of substantial infringement were deemed as inadmissible. As a result, the court ordered the defendant to stop infringement and to compensate the loss of RMB 15,000.

The defendant refused to accept the first-instance judgment and appealed. The grounds of its appeal were: 1. "Rabbit Video" did not come preinstalled by Tongfang, but was downloaded by users themselves; 2. the set-top box itself was not for the purposes of substantial infringement, as it had many other functions other than demanding the TV show involved; 3. the TV show involved was not stored on the server of "Rabbit Video", as the software only provides a linking service which should not be considered as network dissemination of information.

1. Civil Judgment No. 19960 [2014], People's Court of Haidian District, Beijing Municipality (first-instance); Civil Judgment No. 559 [2015], Intellectual Property Court of Beijing (second-instance).

**The second-instance court held that:**

- The question of whether the video software is preinstalled by the company or is downloaded by users following a prompt page does not change the fact of software binding of the set-top box, and does not affect the determination of the nature of the defendant's conduct.
- The conduct that Happy Sunshine Company objects to is "the act of binding Rabbit Video to the set-top box by the appellant which enables users to obtain the content involved," rather than the act of providing the set-top box. Therefore, whether the set-top box in itself is only a tool and whether it is not made for infringement purposes does not have an impact on the determination of the nature of the conduct involved.
- The identification of network dissemination of information should be based on server standards, rather than the standards of user perception. As the work involved is not stored on the server of "Rabbit Video", the service provided by this software does not constitute network dissemination of information, but a linking service.
- As Happy Sunshine Company has never licensed others to disseminate the work involved in the Internet, the linked content was infringing content, and the linked site infringes the right to network dissemination of information. The providers of "Rabbit Video" had edited the linked content, made a list of programs and provided program descriptions, and it is reasonable that they should have known that the work involved was included in the linked content. The providers of "Rabbit Video" had not only edited the linked content but had the links linked to a limited number of sites. Therefore, what they provided is an active directional link service, rather than passive entire network link service. In view of this, the providers of "Rabbit Video" should bear a higher cognitive obligation for determining whether the linked content is legitimate dissemination. As the linked content is a TV show, which belongs to film work, in the case of providing an active directional link service, the providers of "Rabbit Video" failed to fulfill their due cognitive obligation. This therefore constitutes a joint infringement upon the right to network dissemination of information.
- The available evidence is insufficient to prove that the developer of "Rabbit Video" is not the appellant. Even if it is not, it has a close cooperative relationship with the appellant and shall bear joint tort liability. Therefore, the second-instance court rejected the appeal and affirmed the decision of the first-instance court.

**Noteworthy points in this case are:**

- It clearly indicates that even if the hardware itself has no substantial infringing purposes, if binding software to hardware can enable users to get illegal content, hardware manufacturers still have to

bear tort liability.

- The decision has considered the evaluation of the "server standards" and the "standards of user perception" of identifying the right to network dissemination of information in the juridical practice of China, and puts forward clearly that the "server standards" is to be adopted.
- The decision brings forward the identification standards of a joint infringement committed by the providers of link services.
- The decision clearly points out that when the providers of link services commit infringement, hardware manufacturers that have a close cooperative relationship with them shall also bear joint tort liability

***B. Jinan Huaxing Architectural Design Co., Ltd. v. Shandong Huasheng Architectural Design and Research Institute<sup>1</sup>***

Plaintiff Huaxing signed a Construction Design Contract with Jintian Company ("Jintian"), where Huaxing was the designer. Later Jintian issued a notice to Huaxing to terminate the contract, on the grounds that Huaxing had broken the contract and that this resulted in a major loss for Jintian.

Subsequently, Jintian signed another Construction Design Contract with the Huasheng Architectural Design Institute ("Huasheng Design"), the contract agreed that Huasheng Design was to followed the original design drawings, perfect the construction drawings based on the actual characteristics of the construction site. Huasheng Design modified the drawings on the basis of the original drawings of Huaxing, and submitted them to the Construction Engineering Drawing Design Review Center ("Drawing Review Center") with its own name signed on the drawings.

The first-instance court held that Huasheng Design had copied and modified the plaintiff's graphic works and signed on them, which infringed the plaintiff's copyright. As a result, the court ordered Huasheng Design to immediately stop the infringement, compensate for the losses and issue an apology. As for Huaxing's claims for "destroying the duplications of the construction drawing design documents and the signed construction materials", the first-instance court held that the infringing drawings involved were the basis for the Drawing Review Center to review on the structure safety, mandatory standards, and standard execution of the construction drawings. Destroying them would bring risks to public safety, as the drawings involve construction quality as well as fire safety. Therefore, the court did not support Huasheng Design's request to have the documents and materials

1. Civil Judgment No. 926 [2014], Jinan Intermediate People's Court, Shandong Province (first-instance); Civil Judgment No. 159 [2015], Shandong High People's Court (second-instance).

destroyed.

The second-instance court held that Huasheng Design had infringed Huaxing's copyright. According to Article 4 of the *Copyright Law*, "in the exercise of copyrights, copyright owners shall not violate the Constitution or any other laws and shall not harm the public interest," copyright owners shall not abuse their rights and must respect the public interest and others' legitimate interests in the exercise of copyrights.

If Huasheng Design was ordered to stop using the alleged infringing drawings, it would lead to the construction project not being accepted and not putting into use for a long period of time, which would result in a waste of social resources. Therefore, there should be no order to stop Huasheng Design from using the alleged infringing drawings. Construction design drawings are different from other works and they are to be used for specific purpose, that is, for a particular construction project. Therefore, uses that are consistent with its intended use should be allowed.

According to Article 12 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Civil Cases Involving Copyright Disputes*, "where the copyright to a commissioned work is vested in a commissioned party, the commissioned party shall be entitled to the right to use the work within an agreed scope of use; where the parties fail to agree upon the scope of use for that work, the commissioned party may use the work free of charge to the extent that the use is specifically for creating a work on a commissioned basis."

In this case, Jintian, as the commissioned party, is entitled to use the design drawings of Huaxing on the construction project involved. However, given the mandatory provisions of national laws and regulations on the construction industry, Jintian cannot directly use the design drawings for acceptance, and it cannot complete the acceptance of a construction project without the aid of a construction unit that has design qualification. As Huasheng Design participated in the acceptance of the construction project under Jintian's commission, even though it is inappropriate for Huasheng Design to redesign drawings for a completed construction project without the permission of Huaxing, Huasheng Design did not exceed the scope of use for Huaxing's original design drawings. If the court ordered Huasheng Design to stop infringement, withdraw and destroy the alleged infringing drawings and the construction materials signed by Huasheng stored by the Drawing Review Center, this would lead to the predicament that the construction project cannot be accepted and put into use. When compared with the copyright of the design drawings claimed by Huaxing, this would result in a serious imbalance of relevant interests and would cause irreparable damage to the construction unit, the owners and other relevant interested parties. In summary, the court did not order Huasheng Design to stop using the alleged infringing drawings for the involved construction project, but Huasheng Design was prohibited from using the alleged infringing drawings for other construction projects. As a result, the second-instance court revoked the stop of use part of the first-instance judgment, but it retained the apology remedy and increased the amount of damage

compensation.

**Noteworthy points in this case are:**

- The directly cites a principle term Article 4 of the *Copyright Law*, and points out that copyright owners shall not abuse their rights.
- It makes clear the limitation of application of the remedy of cessation of use, that is, when an order of stopping the usage would lead to a serious imbalance for the interests of the parties, the court does not support such a remedy.

## CHAPTER 4.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADE SECRETS

JIN Haijun\*

## I. OVERVIEW

Since the 18<sup>th</sup> CPC Central Committee put forward the innovation-driven development strategy, the reform of the intellectual property ("IP") regulations and system has become an increasingly important topic. Certainly, the discussion also involves the relevant legislation and practice related to trade secrets.

On March 13, 2015, the CPC Central Committee and the State Council issued the *Several Opinions on Deepening the Reform of Institutional Mechanisms to Accelerate the Implementation of the Innovation-driven Development Strategy*, which had a special section, requiring implementation of strict IP protection regulations. In addition to the general requirements of perfecting the IP legislation, IP litigation and infringement investigation mechanisms, etc., these opinions specified some requirements for trade secret protection: "Improve the regulations for trade secrets protection, identify the meanings of trade secrets and infringements, research and formulate the corresponding protection measures, explore and establish the pre-trial protection system. Study intellectual property protection methods to new forms of innovations, such as business models."

## II. LEGISLATION AND POLICY DEVELOPMENT

The basic law for trade secrets is the *Anti-Unfair Competition Law*. And the legislative developments in 2015 was the revision of the *Anti-Unfair Competition Law*, which was listed in the 12th National People's Congress Standing Committee's legislative plan. Revised draft has been submitted by the relevant departments to the Legislative Affairs Office of the State Council. This was the first time that the *Anti-Unfair Competition Law* was subject to legislative amendments since it was enacted in 1993.

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In 2015, the State Administration for Industry and Commerce completed the revised draft of the *Anti-Unfair Competition Law*, and submitted it to the Legislative Affairs Office of the State Council. The main modified content of Articles 10 and 25, which involve trade secrets protection and legal liability, focus on the following aspects: (1) make a more accurate definition of trade secrets, especially requiring that the protected information should be of "commercial value" and should "take appropriate protective measures"; (2) make a more detailed definition towards the infringement of trade secrets, and add a new method "fraud" in the list of obtaining others' trade secrets by unfair methods, apart from the originally listed methods "theft, inducement and coercion"; (3) intensify the law enforcement towards infringing trade secrets, and increase the fine level (in the current Anti-Unfair Competition Law, the fine level is between RMB 10,000 and 100,000).

### III. MAJOR CASES

#### ***A. Shenzhen Vwintech Science and Technology Ltd. v. Shenzhen Laitelisen Science and Technology Co. Ltd., WangXili, MaYun***

Wang Xili and Ma Yun were sales engineers at Shenzhen Vwintech Science and Technology Ltd. ("Shenzhen Vwintech") and engaged in marketing. Both of them signed labor contracts with the company. The contract period of Wang Xili's contracts was from November 23, 2009 to November 22, 2012. According to the agreed confidential terms in the labor contract, Wang Xili was to keep confidential the technical secrets and trade secrets of the company. The technical secrets at issue included, but were not limited to: customer demand reports, scheme design, technical reports, inspection reports, technical documentations and related correspondences, etc. The trade secrets at issue included, but were not limited to: price information, cooperation agreements, customer information, financial information, marketing plans, etc. The contract period of Ma Yun was from July 6, 2010 to July 5, 2013 and the remaining labor contract terms were the same as Wang Xili's.

On November 29, 2012, Wang Xili applied to resign and, on November 27, 2012, Ma Yun received all the customer documents from Wang Xili. On December 12, 2012, Wang Xili was approved to leave the company. On April 26, 2012, Shenzhen Laitelisen Science and Technology Co. Ltd. ("Laitelisen") was established, appointing Long Jianping as executive director and Wang Xili as supervisor. On September 25, 2012, Long Jianping and Chen Qiong became 51% and 49% shareholders of Laitelisen, respectively. The company's business scope included technical development and sales of network communication equipments, computer system integration, etc. Wang Xili is Long Jianping's daughter, and Ma Yun and Chen Qiong are spouses.

On May 15, 2012, Shenzhen Vwintech signed the so-called Clean Room Environment Monitoring System Sales Contract with Zhejiang Xianju Pharmaceutical Co., Ltd ("Xianjun Pharmaceutical"), selling clean room environment monitoring system for RMB 1.1 million. Ma Yun

was the contact person of Shenzhen Vwintech.

On December 5, 2012, Laitelisen signed a contract with Xianjun Pharmaceutical, selling two portable particle counters, priced at RMB 204,000. Wang Xili signed the contract representing Laitelisen.

On March 11, 2013, Shenzhen Vwintech and Xianjun Pharmaceutical signed another contract, entitled Environmental Online Monitoring System Engineering Services Contract. The contract price was RMB 107,000.

During the second instance court's investigation, Shenzhen Vwintech said that it did not have a specific client register but requested to protect Xianju Pharmaceutical as its customer; on May 15, 2012, it signed the Clean Room Environment Monitoring System Sales Contract with Zhejiang Xianju Pharmaceutical Company, which carried its trade secrets and was the content evidence; but it did not take security measures upon this contract.

According to the civil judgment (2013) Shenzhen Bao'an People's Court Zhi Min Chu Zi No.911 by the Bao'an District People's Court in Shenzhen, this dispute was about infringement of trade secrets, and customer information obtained by Shenzhen Vwintech and Xianju Pharmaceutical during the transaction is not only included name, address, and contact information, but also trading habits, intention and content. Having this information, Ma Yun could timely notice the clients' intention and price, and obtained the possibility to sign the contracts based on the usage of trade. Since the customer information reflected the commercial value and Shenzhen Vwintech took security measures towards the information, the information constituted trade secrets. Within the labor contracts signed by Wang Xili and Ma Yun with Shenzhen Vwintech, Shenzhen Vwintech had already required them to keep confidential the operating information they obtained, such as customer documents. Wang Xili and Ma Yun breached their contracts by disclosing, using and allowing Laitelisen to use the information of Shenzhen Vwintech's client, Xianju Pharmaceutical, which harmed the economic interests of the Shenzhen Vwintech. Laitelisen knowingly used the information to reap economic benefits. Therefore, Wang Xili, Ma Yun and Laitelisen were found to infringe Shenzhen Vwintech's trade secrets together. Accordingly, the first instance court ordered Laitelisen, Wang Xili and Ma Yun to compensate Shenzhen Vwintech RMB 200,000 within ten days after the verdict entered into force.

The Intermediate People's Court in Shenzhen accepted the application for appeal, and issued its judgment in (2015) Shenzhen Intermediate People's Court Zhi Min ZhongZi No.769. The final decision revoked the civil judgment of the first instance, and rejected all the requests of appellee, Shenzhen Vwintech.

In this case, under the circumstances that the basic facts did not change, the first and second

instance courts' verdicts were quite different, which indicates that there must be a legal problem in need to be clarified. Article 13 of the *Interpretation of Several issues concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition*, issued by the Supreme People's Court in 2007, provided that customer lists, which contain trade secrets, generally refer to the special customer information consisting of customer's name, address, contact information and trading habits, intention and content, including pooled numerous customer rosters and long-term stable specific customer, which is different from public information.

Therefore, the controversy of this case was, first, whether the information of the contact person, telephone number, email, fax number in the Clean Room Environment Monitoring System Sales Contract constitutes special customer information which is different from public information, and second, whether Xianju Pharmaceutical is the long-term stable specific customer of the appellee.

For the first problem, second instance court held that Shenzhen Vwintech only submitted the Clean Room Environment Monitoring System Sales Contract as the evidence of the carrier and the content of trade secrets, which was only proved common information between contacts of two parties, such as telephone number, fax and email. But it did not reflect the special information of Xianju Pharmaceutical, such as trading habits, intention and content. For the second problem, second instance court considered that before Shenzhen Vwintech and Xianju Pharmaceutical signed the contract on December 5th, 2012, they had only one transaction, which was not conformed with long-term stable trade relationship. The evidence submitted by Shenzhen Vwintech also did not prove that Xianju Pharmaceutical was the long-term stable specific customer of Shenzhen Vwintech.

### ***B. Zhu XX Trade Secret Infringement Case***

Dynea Adhesive (Guangdong) Co., Ltd ("Dynea") is a wholly foreign-owned enterprise, possessing a number of the world's leading technologies and patents. From November 2003, when it was set up and put into operation, through the end of 2013, its output value exceeded RMB 1.6 billion. Zhu XX was the director of the technical department of the company, and one of the two chemical engineers, leading and engaging in a number of researches and development of important products. He was also responsible for the product after-sale maintenance guidance and tracking services. He had extensive contact with customers. Zhu XX signed the Confidential Non-Competition Agreement with Dynea. By the end of 2011, Zhu XX resigned from the company within the contract period, and left without the approval of the company. At the beginning of 2012, Zhu XX engaged in adhesive technology research and development in Chang'an (Guangdong) Adhesive manufacturing Co., Ltd ("Chang'an") upon recommendation of a headhunter.

A year Later, Dynea reported the case to the public security organizations and requested to protect the technical secrets of its formula. The public security organizations investigated the case,

extracted the suspected infringing products and searched the residence of Zhu XX according to law. In one CD seized at the scene, there were 223 folders and 1,908 documents, including 1,885 documents involving trade secrets of Dynea. A considerable part of the above-mentioned information was beyond the authority of Zhu XX based on his position and responsibilities.

According to VAT invoice issued by Chang'an, from 2012 to the end of 2013, the company sold a total of more than 1,812 tons of infringing products, which were worth more than RMB 11.26 million. According to the appraisal report issued by a professional appraisal company, the crime of Zhu XX caused a direct loss over RMB 6.63 million because of the damage caused to Dynea's formula. The banking account of Zhu XX received monthly remittance (salary) of RMB 11,745 from the personal accounts of Xyuan Zhang, X Huang, XboGu, Xping Zeng and Xyinglin and so on since February 28, 2012.

The prosecutor accused Zhu XX of breaching the confidentiality agreement signed with Dynea during his research and development work at the company, using the formula and technology of adhesive products he had access to while working at Dynea, and utilizing the technology to manufacture and sell the same or similar products. The prosecutor argued that this was a seriously violation of Dynea's trade secrets. However, the defendant, Zhu XX, pleaded not guilty.

After the hearing, the Gaoyao People's Court in Guangdong considered the suspected infringing products were Dynea's trade secrets, and found that Zhu XX had breached the confidentiality agreement signed with Dynea and indicated that the suspected infringing products were the same or highly similar to those of Dynea. The court found Zhu XX breached the obligations of keeping trade secrets, disclosing or using the trade secrets and causing serious consequences towards the owner of trade secrets. In short, the court found a violation of Dynea's trade secrets, holding the facts alleged by the prosecutor to true and the evidence sufficient. The court rendered the first instance judgment in June 2015, sentencing Zhu XX to three years and six months' imprisonment and a fine of RMB 50,000.

This case involves the criminal responsibility for trade secret infringements. According to Article 219 of the Criminal Law, persons who infringe of trade secrets and cause serious losses to the owner of trade secrets are to be sentenced less than three years imprisonment or criminal detention in addition to a fine or be sentenced to a fine only. Persons who cause particularly serious consequences are to be sentenced to imprisonment between three and seven years, and a fine.

The controversy of this case was, first, except for Zhu XX, whether Chang'an and its responsible persons were accomplices in the infringement of trade secrets and, second, whether the sentence on Zhu XX was appropriate.

According to the elements of crime of violating infringement of trade secrets, the prosecutor

must prove that the defendant's illegal access to trade secrets is made on purpose. This provides the possibility to avoid criminal liability if it is a third party who obtains or uses the trade secrets (often competitors of the owner of the trade secrets). Taking this case as an example, Chang'an did not receive Zhu XX as formal employee (or may take a pseudonym), and all payments towards Zhu XX's bank account were through personal accounts instead of company accounts. All these methods may allow the third party, Chang'an, to avoid criminal liability.

Conviction and sentencing standards for trade secret infringement crimes are detailed in *the Interpretation of Several Issues concerning the Application of Law in the Criminal Cases of Infringement of Intellectual Property Rights*, issued by the Supreme People's Court and the Supreme People's Procuratorate in 2004. According to Article 7 of this interpretation, infringing business secrets and causing losses to the owner of trade secrets amount over RMB 500,000 are deemed to "cause serious consequences". Causing losses to the owner of trade secrets in the amount over RMB 2.5 million is deemed to "cause particularly serious consequences". According to the appraisal report of the case, Zhu XX caused economic loss of RMB 6.63 million on Dynea, which is viewed as causing "particularly serious consequences to the owner of trade secrets" and the penalties foreseen are imprisonment between three and seven years, plus fine. The court sentenced Zhu XX to three years and six months' imprisonment, still within the range of sentencing provided by law.

## **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 OF PROHIBITION OF ABUSE OF  
DOMINANT MARKET POSITION

### **CHAPTER 3.**

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF CONTROL ON  
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### **CHAPTER 4.**

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION OF  
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### **CHAPTER 5.**

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF UNFAIR COMPETITION  
CONDUCT

## CHAPTER 1.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION OF MONOPOLY AGREEMENTS

TAN Yuan\*

## I. OVERVIEW

Articles 13 and 14 of the *Anti-Monopoly Law* ("AML") separately regulate horizontal monopoly agreements and vertical monopoly agreements. Article 15 regulates the exceptions to the prohibition of monopoly agreements. Article 16 prohibits the conduct of industry associations implementing monopoly agreements. In turn, Article 46 of the AML provides specifically the liabilities of business operators and industry associations for engaging in monopoly agreement. It also provides rules on leniency policy – that is, if one company, on its own initiative, reports the monopoly agreements to the antitrust authority and provides important evidence, the authority, at its discretion, can mitigate or exempt the reporting company from punishment. In general, although the provisions relating to monopoly agreements in the AML are characterized by their "broad-brush" nature, they are complete in terms of content. The AML implementing rules on monopoly agreements are mostly done in the form of regulations and guidelines of the antitrust authorities.

In 2015, the State Administration for Industry and Commerce ("SAIC"), the National Development and Reform Commission ("NDRC") and the antitrust enforcement authorities at the provincial level have performed productive enforcement actions targeting monopoly agreement conduct in the market. SAIC published four monopoly agreement cases on its website,<sup>1</sup> and NDRC mainly investigated and punished eight international shipping companies for concluding and implementing price monopoly agreements, defending the legitimate rights and interests of Chinese exporters and importers.

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1. See *Announcement of Competition Enforcement*, <http://www.saic.gov.cn/zwgk/gggs/jzzf/>, accessed on March 9, 2016.

## II. LEGISLATION AND POLICY DEVELOPMENT

Given the "broad-brush" nature of the provisions relating to monopoly agreements in the AML, antitrust enforcement authorities need to promulgate more detailed regulations and guidelines to regulate monopoly agreements in specific industries and fields. In 2015, SAIC and NDRC have made breakthroughs in terms of preparing related regulations and guidelines.

### ***A. SAIC Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate and Restrict Competition***

On April 7, 2015, SAIC promulgated the *draft Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate and Restrict Competition*.<sup>1</sup> Monopoly agreements are mostly regulated by Articles 4 and 5 of the provisions: Article 4 is a general provision on prohibiting the abuse of intellectual property rights ("IPRs") to reach monopoly agreements. It provides that "business operators shall not enter into a monopoly agreement between them as prohibited by Article 13 or Article 14 of the AML by exercising IPRs, unless they are able to prove that the agreement complies with the provisions of Article 15 of the AML." Article 5 provides a safe harbor, and the application conditions thereof. It provides that the exercise of IPRs by a business operator under any of the following circumstances may not be found as constituting a monopoly agreement prohibited by Article 13(1)(6) and Article 14(3) of the AML, unless there is evidence to the contrary that the agreement serves to eliminate or restrict competition:

1. where the business operator and other business operators with whom it has a relationship of competition hold a combined market share of not more than 20% on the relevant market that is affected by the exercise of IPRs, or there exist at least four alternative technologies on the relevant market that are accessible at reasonable costs and are under independent control; or
2. where the business operator and its transaction counterparty each hold a market share of not more than 30% on the relevant market, or there exist at least two alternative technologies on the relevant market that are accessible at reasonable costs and are under independent control.

This provision contains clear expectation that companies themselves identify whether their conductrun against the provisions of the AML.

### ***B. Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council for the Abuse of Intellectual Property Rights (Draft for Comments)***

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1. *Provisions on Prohibiting the Abuse of Intellectual Property Rights to Eliminate and Restrict Competition*, see [http://www.saic.gov.cn/fldyfbzdzj/zcfg/zcfg/201507/t20150724\\_159428.html](http://www.saic.gov.cn/fldyfbzdzj/zcfg/zcfg/201507/t20150724_159428.html), published on July 24, 2015, accessed on March 10, 2016.



On December 31, 2015, NDRC solicited public opinions on the *Anti-Monopoly Guidelines for the Abuse of Intellectual Property Rights (Draft for Comments)* ("Guidelines"). The second part of the guidelines provides specifically that the following IP agreements between competitors may eliminate or restrict competition:

**Joint R&D.** The following factors shall be taken into consideration during specific analysis: (a) whether the agreement imposes restrictions on the participating business operators to independently conduct R&D activities on new technologies or products outside the scope of joint R&D; (b) whether it imposes restrictions on the participating business operators to collaboratively conduct R&D activities on new technologies or products with third parties outside the scope of joint R&D; and (c) whether it imposes restrictions on the ownership and exercise of IP related to the new technologies or products researched and developed by business operators outside the scope of joint R&D.

**Patent pools.** The following factors shall be taken into consideration during specific analysis: (a) whether the patents included in a patent pool are fully or mainly composed of alternative technologies; (b) whether the patent pool restricts members to license their pooling patents separately; (c) whether the patent pool is used to exclude alternative technologies, or block market access of other business operators into relevant market; (d) whether the members through patent pools exchange information relating to competition such as price, output, market segmentation which is not necessary for patent pools; and (e) whether the patent pool restricts members to conduct R&D activities on new technologies.

**Cross-licensing.** The following factors shall be taken into consideration during specific analysis: (a) whether cross-licensing is exclusive; (b) whether it constitutes a barrier to the access of third parties into relevant market; and (c) whether it hinders competition in downstream relevant product market.

**Formulation of standards.** The following factors shall be taken into consideration during specific analysis: (a) whether the agreement excludes other specific business operators; (b) whether it excludes specific business operators' relevant solutions; (c) whether it leads companies not to implement other competitive standards; and (d) whether there are necessary and reasonable restraint mechanisms when exercising the IP incorporated in the standards.

Not only the IP agreements reached between competitors are likely to restrain competition, but also IP agreements between non-competitors may have the same effect. In order to improve the efficiency of antitrust enforcement and provide clear guidance for businesses, the guidelines also provide that IP agreements can be exempted from the monopoly agreements prohibition under certain circumstances.

### III. MAJOR CASES

#### *A. Guangzhou Panyu Animation and Gaming Association Case<sup>1</sup>*

On May 25, 2012, the secretariat of the Guangzhou Panyu Commercial Animation & Game Expo drafted an exhibition alliance agreement, which was signed by 52 member companies. Under the alliance agreement, members of the Guangzhou Panyu Animation and Gaming Association ("GAGA") and signatories of this agreement undertake to only participate in the exhibitions sponsored or organized by GAGA in Guangzhou, such as the Panyu Commercial Animation & Game Expo and the GTI Guangzhou Expo.

In contrast, if they want to participate in any other exhibitions in Guangzhou not sponsored or organized by GAGA, they would have to submit a written application to GAGA for approval 30 days before participation. Through the agreement, the members and signatories also agreed not to attend illegal exhibitions, any exhibition that is unrelated to the industry of animation and gaming or any exhibition that GAGA decides not to participate. With the authorization of SAIC, the Guangdong Administration for Industry and Commerce ("Guangdong AIC") initiated an investigation against the suspected monopoly conduct of GAGA.

The Guangdong AIC determined that the 52 member companies which signed the exhibition alliance agreement were independent operators managing the same or similar business, and hence were competitors in Guangzhou. In addition, the authority held that the agreement actually or potentially restricted their freedom to operate. Under the agreement, all signatories of the agreement should promise to only participate in the exhibitions sponsored or organized by GAGA in Guangzhou, such as the Panyu Commercial Animation & Game Expo and the GTI Guangzhou Expo. As noted, they need to obtain a written permit from GAGA for participating in any exhibition in Guangzhou which is not sponsored or organized by GAGA. The agreement limits the signatory companies' right of choice for participating in exhibitions, which requires the signatories to boycott all other animation and gaming exhibitions (such as the Guangzhou Hongwei exhibition and other animation exhibitions organized by Guangzhou Hongwei Exhibition Service Co., Ltd.). Due to the actual or potential restriction to choose exhibitions brought about by the agreement, the member companies would boycott exhibitions which are not sponsored or organized by GAGA. This would likely have the effect of excluding or restraining competition in the animation and gaming exhibition industry in Guangzhou, and impair the interests of other animation and gaming exhibition companies of Guangzhou. Based on the above-mentioned consideration, the Guangdong AIC concluded that the agreement involved was a monopoly agreement amounting to a collective boycott. Accordingly, it ordered GAGA to cease the violations and imposed a fine of RMB 100,000 on GAGA pursuant to the *AML*.

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<sup>1</sup> *Decision on Administrative Penalty by the Guangdong Administration for Industry and Commerce (Yue Gong Shang Jing Chu Zi [2015], No. 2)*, see [http://www.saic.gov.cn/zwgk/gggs/jzzf/cfd/201512/t20151208\\_164678.html](http://www.saic.gov.cn/zwgk/gggs/jzzf/cfd/201512/t20151208_164678.html), published on July 9, 2015, accessed on March 11, 2016.

### ***B. The Roll-on/Roll-off Cargo Shipping Bid Rigging Cartel*<sup>1</sup>**

Japan's Nippon Yusen Kabushiki Kaisha ("NYK Line") and seven other shipping companies were found to have engaged in international ro-ro cargo shipping services in the routes between China and other countries and regions in recent years. Ro-ro cargos include cars, machinery and other non-containerized shipping which can be unloaded from, and loaded onto, a ship through the way of rolling.

From 2008 to September of 2012, eight shipping companies including NYK Line were found to have conducted frequent bilateral or multilateral communications on the shippers' invitation for bids and/or price inquiries via phone, meetings, dinners, e-mails, visiting, etc. They also exchanged sensitive information, conducted price negotiations, allocated customers and shipping routes, reached and implemented many agreements regarding the quotation of specific ro-ro cargo manufactures' shipping business relating to China shipping line business.

Eight companies agreed not to interfere with each other's existing shipping business when doing business: on the one hand, competitors should respect a certain company's existing business undertaken in certain lines from certain manufactures, and assist the company to get shipping orders, to maintain or even raise the freight rate through non-bidding or high price bids; on the other hand, companies should respect competitors' existing business undertaken in certain lines from certain manufactures, and assist the competitors to get shipping orders, to maintain or even raise the freight rate through non-bidding or high price bids.

NDRC concluded that the eight competing ro-ro cargo shipping companies agreed not to interfere with each other's existing shipping business, exchanged sensitive information, conducted price negotiations, distributed customers and shipping routes, reached and implemented agreements regarding the quotation of specific ro-ro cargo shipping business. The above-mentioned conduct constituted the act of reaching and implementing monopoly agreements on fixing or changing prices and dividing sales markets excluded and restricted competition in the relevant market and damaged the interests of importers and exporters of related cargo and customers.

Based on the variety in duration, scope, role and illegal nature of their anti-competitive conduct, NDRC made different penalty decisions to these eight shipping companies separately:

- (1) For the long duration, wide scope and the serious nature of NYK Line's antitrust violations, NYK Line was fined 10% of its 2014 annual sales of international ro-ro cargo shipping service related to the Chinese market. Considering NYK Line was the first one which reported to NDRC about the monopoly agreements and provided significant evidence, ceased the illicit behavior, cooperated

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1. See *Decision on Administrative Penalty by the National Development and Reform Commission* ([2015], No. 1-8), <http://jjs.ndrc.gov.cn/fjgld/>, accessed on March 17, 2016.

well during the investigation and took rectification measures, NDRC exempted NYK from fines.

- (2) For the long duration, wide scope and the severity of K-Line's antitrust violations, NDRC imposed a fine of 10% of its 2014 annual sales of international ro-ro cargo shipping service relevant to the Chinese market. As K-Line was the second company to voluntarily report about the monopoly agreements and to provided important evidence, and as it ceases the illegal conduct, cooperated during the investigation and took rectification measures, NDRC determined to reduce the fine on K-Line by 60%. The fine amount represented 4% of K-Line's 2014 annual sales of international ro-ro cargo shipping services in the Chinese market, around RMB 23,980,869.
- (3) For the long duration, wide scope and the severity of Mitsui O.S.K. Lines' antitrust violations, NDRC determined to impose a fine on Mitsui O.S.K. Lines in the amount of 10% of the company's 2014 annual sales revenues derived from international ro-ro cargo shipping services in China. As Mitsui O.S.K. Lines was the third one which voluntarily reported and provided important evidence, ceased its anti-competitive conduct, cooperated with NDRC and took appropriate measures, NDRC reduced the fine by 30% and to reach an amount of 7% of the company's 2014 annual sales revenues in the affected market, RMB 38,121,126.
- (4) Considering the specific situations of the remaining five companies and whether provided the illegal fact and important evidence unknown by NDRC NDRC ordered them to cease their illegal behavior as soon as possible, and imposed fines on EUKOR Car Carriers, Wallenius Wilhelmsen Logistics, CSAV, Eastern Car Liner and CCNI in the amount of 9%, 8%, 6%, 5%, and 4% of their affected 2014 annual revenues in the Chinese market, respectively.

## CHAPTER 2.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION OF ABUSE OF DOMINANT MARKET POSITION

DONG Dudu\*

## I. OVERVIEW

In 2015, the main developments in the area of prohibition of abuse of dominant market position are mainly administrative decisions and court judgments in individual cases. During the course of the year, the State Administration for Industry and Commerce ("SAIC") and the National Development and Reform Commission ("NDRC") publicized 10 administrative penalty decisions, while the official court judgments disclosure website ([wenshu.court.gov.cn](http://wenshu.court.gov.cn)) publicized 19 judgments of private antitrust litigation and two judgments of administrative litigation. These cases involve abuse of dominance conduct such as tying, imposing unreasonable conditions, excessive pricing, refusal to deal etc., and also touch upon several complex issues such as the definition of product markets and the determination of a collective dominant market position, etc.

## II. LEGISLATION AND POLICY DEVELOPMENT

### *A. Opinions of the Supreme People's Court on Equally Protecting Non-Public Economy and Promoting the Healthy Development of Non-Public Economy*

On March 4, 2015, the *Opinions of the Supreme People's Court on Equally Protecting Non-Public Economy and Promoting the Healthy Development of Non-Public Economy* underlined that the court system should be improved in relation to the trial of antitrust cases, and to prevent companies with a dominant market position from abusing their position, and strictly pursue legal liabilities for their anti-competitive conduct, thereby promoting a competitive, efficient and fair market environment for market players of various kinds of economic ownership.

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### ***B. List of Classifying the Complaints by Letters and Visits in the Industrial and Commercial Administration Field according to Legal Approaches***

On December 25, 2015, the *List of Classifying the Compliant Requests by Letters and Visits in the Industrial and Commercial Administration Field* according to Legal Approaches provided that, according to the *Anti-Monopoly Law* ("AML") and other related laws, regulations, rules and regulatory documents, the complaints of any alleged abuse of dominance conduct should be verified by SAIC or the administration for industry and commerce ("AIC") or market regulator at the provincial level. If SAIC decides to accept a case, the case should be handled according to the *AML* and other relevant laws, regulations, rules and regulatory documents, and should be completed by an administrative penalty decision or a termination of investigation decision.

## **III. MAJOR CASES**

### ***A. XianyangLianhe Passenger Service Co., Ltd. v. XianyangQindu Taxi Service Department et al. over the Dispute of Abuse of Dominant Market Position<sup>1</sup>***

This case involves the definition of the relevant product market and the determination of a collective dominant market position. There are a total 1,305 taxies in the urban areas of Xianyang, a city in Shanxi Province, 151 of which are operated by taxi companies, and the remaining 1,154 are run by individual taxi operators. According to the *Notice of the General Office of the People's Government of Xianyang on Further Strengthening the Administration of Taxi Industry in Urban Areas*, all individual taxi operators were requested to join (or in other words, affiliate themselves with) a taxi company so that the operations can be subject to corporatized and intensive management. Also, the individual operators were asked to sign standard management service contracts with the taxi companies, while the nature of their business operation was to remain that of individual operators (the so-called "affiliating services"). However, taxi companies that offer affiliating services to individual operators need to obtain so-called "road transport business licenses".

The plaintiff, XianyangLianhe Passenger Service Co., Ltd. ("Lianhe"), did not obtain the road transport business license, so it was not allowed to offer affiliating services to individual taxi operators, but was entitled to offer other taxi-related services such as withholding and remitting taxes and helping with insurance claims. The defendants Qindu, Weicheng and Huaguang all obtained the road transport business licenses. Accordingly, they were able to have individual taxi operators join them as well as provide other taxi-related services. The 1,154 taxies operated by individual operators in Xianyang were affiliated with seven taxi companies, among which, 328 were affiliated with Qindu, 300 with Weicheng and 322 with Huaguang. These three taxi companies accounted for 28.4%,

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1. Civil Judgment No. 35 [2014], Shanxi High People's Court(second-instance); Civil Division No. 1042 [2015], Supreme People's Court (retrial).

26.0% and 27.9% in the affiliating service market for individual taxi operators, respectively. Their collective market share was 82.3%. Also, the three defendants share the same legal representative, have the same business scope stated in their business licenses, and uniformly sign the "rights and obligations agreements" and "operating agreements" with the individual taxi operators, issue taxi operation certificates, charge a monthly service fee of 100 RMB to individual taxi operators, and distribute taxi invoices with the same stamp.

The plaintiff claimed that the three defendants carried out exclusive dealing, which deprived the individual taxi operators of independently choosing taxi companies providing services to them and also excluded the plaintiff from the fair competition of offering taxi agency service to the individual taxi operators, and therefore constituted an abuse of a dominant market position.

The first-instance court held that the relevant service market, in which the alleged monopolistic conduct occurred, was the "taxi service market". The collective market shares of the three defendants account for 3/4 of the taxi service market in the urban areas of Xianyang, and each of the defendants has a market share of more than 1/10. However, the court found that the defendants had the ability neither to control the price of taxi services and the quantity of taxis nor to block or affect the entry of other business operators into the taxi service market. Therefore, the claims of the plaintiff were rejected as the three defendants were not considered to have a collective dominant position in the taxi service market in Xianyang.

On appeal, the second-instance court held that the appellant (the plaintiff at first instance) defined the relevant market in the complaint as the individual taxi operator service market in the urban areas of Xianyang, whereas the court defined the relevant market in the trial as the taxi service market in Xianyang. The appellant believed that the competing services in the relevant market were: (a) annual verification and passenger invoicing; (b) tax remits; (c) traffic accident disposing and insurance claims. However, it is obvious that the taxi service market is not limited to those three services. They are just parts of the taxi service market, and the appeal court rules that the appellant had failed to prove that those three services would constitute an independent market. A taxi service market may also cover other services—even if being narrowly defined as individual taxi operator service market, it is still possible to cover other taxi-related services. The arguments of the relevant market alleged by the appellant were found to be unclear. The definition of the relevant market and the determination of a dominant market position may need more support by economic analyses, as they are not simply a matter of law. Given that the appellant failed to provide more convincing arguments or evidence to prove that the appellee's conduct amounted to exclusive dealing, the second-instance court rejected the appeal and affirmed the first-instance judgment.

Lianhe further applied for retrial to the Supreme People's Court which held that, at second instance, Lianhe had argued that the competing services against the defendants in the taxi service market in Xianyang were: (a) annual verification and passenger invoicing; (b) tax remits; (c) traffic

accident disposing and insurance claims and that the territorial scope of the relevant market was the urban areas of Xianyang in Shanxi Province. In turn, during the examination of the retrial, Lianhe clarified that the relevant market it argued for was that for the services prescribed by the Article 25 of the *Regulations of Shanxi Province on Taxi Passenger Transportation* – that is, the agency services (insurance, claims etc.) offered by the taxi service companies to individual taxi operators. The Supreme People's Court found there inconsistency between the definitions of the relevant market Lianhe provided during the proceedings. At the same time, the second-instance court determined that Lianhe had failed to provide more convincing statements or evidence to prove the three taxi passenger service departments' conducts had constituted restriction, and thus determined that there were not sufficient grounds for Lianhe's claim that the three taxi passenger service departments committed an abuse of a dominant position in the relevant market. The Supreme People's Court found these determinations to be appropriate, and therefore affirmed the second-instance judgment, dismissing Lianhe's application for retrial.

***B. Jixian Branch of Heilongjiang Broadcast & Television Network Co., Ltd. v. Shuangyashan Administration for Industry and Commerce*<sup>1</sup>**

This case involves the relationship between *the Anti-Unfair Competition Law* (“AUCL”) and *the Anti-Monopoly Law* (“AML”) – especially the issue of whether the articles of the AUCL that regulate restrictions of competition are still applicable after the implementation of the AML. The plaintiff, the only network television service provider in Jixian County, took advantage of its monopolistic market position to compel users to pay an annual paid-program-fee of RMB 260 when the users applied for the HD service. The defendant, the Shuangyashan Administration for Industry and Commerce (“AIC”) determined that, the aforesaid conduct fell under the circumstance prescribed in the AUCL of forced consumption, harming consumer interests by taking advantage of the company's monopolistic market position, and imposed an administrative penalty on the company. The legal basis for the specific administrative act by the defendant was: Article 23 of the AUCL and Articles 4(1)(6) and 5(1) of *the Certain Regulations on Prohibiting Conducting Restricting Competition by Public Service Enterprises*.

The plaintiff claimed that the AIC did not have standing in imposing the administrative penalty. According to Article 7 of the AML, the plaintiff argued that it is a natural monopoly, whose conduct is exempted from the AML. At the same time, according to Articles 9 and 10 of the AML and Article 3 of the *Provisions on the Procedures for the Administration for Industry and Commerce to Investigate and Handle Cases of Monopoly Agreements and Abuse of a Dominant Market Position*, the authorities empowered to investigate and handle the case are SAIC and the provincial administrations for industry and commerce authorized by laws and regulations, not including the Shuangyashan AIC. The defendant claimed that it was appropriate to apply the specific problems in this case to the

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1. Administrative Judgment No. 2 [2015], Jianshan District People's Court of Shuangyashan City, Heilongjiang Province (first-instance).



AUCL.

The trial court held that the *Reply of the State Administration for Industry and Commerce on Issues concerning the Qualitative Treatments of Forced Transactions by Cable Service Providers*, which was provided by the defendant AIC, expressly stated that Article 6 of the AUCL and Article 4 of the *Certain Regulations on Prohibiting Conducting Restricting Competition by Public Enterprises* apply to forced transactions by cable service providers, and should be punished by reference to Article 23 of the AUCL. Therefore, the trial court held that the application of the administrative penalty decision by the defendant was appropriate, and rejected the plaintiff's claims.

***C. Decision of the Liaoning Administration for Industry and Commerce on the Abuse of a Dominant Market Position by Fushun Branch of Liaoning Tobacco Company*<sup>1</sup>**

This case was about the determination of illegality of tie-in sales. In order to achieve the sales targets and increase cigarette sales, the Fushun branch of Liaoning Tobacco Company made its sales plan on a weekly basis in accordance with the sales targets, the sales of tobacco retailers in the previous period and the current inventory. It then made a current “delivery strategy” for cigarettes in high demand for tobacco retailers in light of the sales plan. In other words, the Fushun branch bundled the quota limit of cigarettes of brands in high demand (called “resource smoke”) with the order quantity of cigarettes of certain brands (called “task smoke”). This is a kind of tie-in sales by bundling the quota limit of “resource smoke” with the order quantity of “task smoke” according to a certain proportion, forcing tobacco retailers intending to order “resource smoke” to order a corresponding quantity of “task smoke” in compliance with the “delivery strategy”. This means the tobacco retailers had to order more “tasks smoke” if they want more “resource smoke”.

The investigating antitrust authority held that the relevant market in this case should be defined as that for cigarettes. According to the *Law on the Tobacco Monopoly*, only companies that have obtained a license for tobacco wholesale are allowed to operate within a corresponding territorial scope, and companies or individuals that have obtained a tobacco retail license can only purchase from those local tobacco wholesale companies.

In this case, the party under investigation was the only operator with a license for tobacco wholesale in Fushun, its franchise in tobacco wholesaling was to Fushun, and non-local cigarette wholesalers were not allowed to enter the same territory. This means that the tobacco retailers in this area can only lawfully purchase from the party under investigation. As a result, the relevant market in

1. *Decision of the Liaoning Administration for Industry and Commerce on the Abuse of a Dominant Market Position by Fushun Branch of Liaoning Tobacco Company*, Liaoning Administration for Industry and Commerce No. 2 [2015], Competition Law Enforcement Announcement No. 7 [2015], see [http://www.saic.gov.cn/fldyfbzdzjz/dxal/201509/t20150925\\_161988.html](http://www.saic.gov.cn/fldyfbzdzjz/dxal/201509/t20150925_161988.html), published on September 25, 2015, accessed on April 2, 2016.

this case was defined as that administrative region of Fushun.

Due to the restrictions by the tobacco monopoly laws and regulations, the Fushun branch enjoyed a monopolistic position in the relevant market, and had a dominant market position. Its practice of bundling the quota limit of “resource smoke” with “task smoke” according to a certain proportion restricted tobacco retailers from freely deciding their purchase quantity or choosing brands of cigarettes. The practice also increased retailers' capital burden and put them under inventory pressure, which led to a substantial overstocking for part of the downstream tobacco retailers.

From the perspective of promoting competition, this practice of tie-in sales was detrimental to competition among downstream tobacco retailers and to the survival of the fittest among the tobacco production companies upstream. The above-mentioned practice of the Fushun branch was held to be anti-competitive, and to have undermined the fair market competition order in the cigarette sales market. Therefore, the antitrust authority adopted an administrative penalty decision ordering the Fushun branch of Liaoning Tobacco Company to stop the violation and imposing a fine of 1% of the total tie-in cigarette sales volume made in the previous year (2013).

## 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 China in charge of merger control. From the enactment of the Anti-Monopoly Law ("AML") until the end of 2015, MOFCOM has received over 1450 notifications. Among these cases, 26 transactions were approved subject to conditions and two transactions were prohibited,<sup>1</sup> MOFCOM also enacted implementing rules on the review of concentration between business operators to improve the merger review regime.

In 2015, according to its statistics, MOFCOM cleared 312 cases in 2015, which represents an increase of around 35% relative to 2014.<sup>2</sup> Among these cases, two were conditional approval decisions: Nokia's acquisition of Alcatel-Lucent, and NXP's acquisition of Freescale.<sup>3</sup> No transaction was blocked in 2015, though the parties in Tokyo Electron/Applied Materials abandoned the deal, partially due to MOFCOM's antitrust concerns.<sup>4</sup> In 2015, MOFCOM also worked on streamlining and speeding up its merger review process, and enforcing its authority by punishing non-filings and incompliance with commitments.

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1. *Coca-Cola/Huiyuan*, MOFCOM Public Announcement No.22 [2009], see <http://fdj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml>, published on March 18, 2009, accessed on March 16, 2016; and *Maersk/MSK/CMA CGM*, MOFCOM Public Announcement No. 46 [2014], see: <http://fdj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml>, published on June 17, 2014, accessed on March 18, 2016.
2. *MOFCOM year-end working summary No. 9: actively promote antitrust enforcements and safeguard fair market competition*, MOFCOM Press Release, see <http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml>, published on January 15, 2016, accessed on March 18, 2016.
3. *Nokia/Alcatel-Lucent*, MOFCOM Public Announcement No. 44 [2015], see <http://fdj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml>, published on October 19, 2015, accessed on March 18, 2016; and *NXP/Freescale*, MOFCOM Public Announcement No.64 [2015], see <http://fdj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml>, published on November 5, 2015, accessed on March 20, 2016.
4. *U.S. Applied Materials and Tokyo Electron Limited announce giving up the merging plan after failing to solve the competitive concerns in the anti-monopoly investigation of China's Ministry of Commerce*, MOFCOM Press Release, April 30, 2015, see <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201505/20150500963825.shtml>, published on April 30, 2015, accessed on March 20, 2016.

## II. LEGISLATION AND POLICY DEVELOPMENT

### *A. Developments in Relation to Legislation and Policy*

In 2015, MOFCOM's continued to improve the merger control regime through the adoption and amendment of *AML* implementation rules, though perhaps not as intensely as the previous years. In 2015, MOFCOM enacted the *Guiding Opinions on Regulating the Notification Names for the Cases of Concentration between Business Operators*,<sup>1</sup> and released a template for the Entrustment Agreement of the Supervisory Trustee,<sup>2</sup> and MOFCOM also worked on the amendment of the Measures on the *Notification of Concentrations between Business Operators* and the *Measures on the Review of Concentrations between Business Operators*, and participated in the initial research effort for the amendment of the *AML*.<sup>3</sup>

Apart from that, in October 2015, MOFCOM and the European Commission signed a practical guidance document creating a framework to strengthen the cooperation between the competition authorities in their merger reviews. The guidance is expected to facilitate communication throughout the entire merger review procedure on issues of procedure and substance, including the definition of relevant markets, theories of harm, competitive impact assessments and remedies.<sup>4</sup>

### *B. Procedural Streamlining*

In 2015, 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 in response to the general criticism for its often lengthy review process. Under the simple case procedure, cases that have no obvious antitrust concerns can usually be cleared in phase 1 (within 30 calendar days after case acceptance). In 2015, the number of simple cases was around 250, which represented around 80% of all cases approved by MOFCOM in 2015.

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1. *Guiding Opinions on Regulating the Notification Names for the Cases of Concentration between Business Operators*, [2015] MOFCOM Anti-Monopoly Bureau, see <http://fldj.mofcom.gov.cn/article/i/201502/20150200891361.shtml>, published on February 6, 2015, accessed on March 20, 2016.

2. *Entrustment Agreement of the Supervisory Trustee (Template)*, MOFCOM Anti-Monopoly Bureau, see <http://fldj.mofcom.gov.cn/article/c/201511/20151101196166.shtml>, published on November 27, 2015, accessed on March 20, 2016.

3. *MOFCOM year-end working summary No. 9: actively promote antitrust enforcements and safeguard fair market competition*, MOFCOM Press Release, see <http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml>, published on January 15, 2016, accessed on March 18, 2016.

4. *Mergers: Commission signs best practices cooperation framework with China*, European Commission press release, see [http://europa.eu/rapid/press-release\\_IP-15-5843\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5843_en.htm), published on October 15, 2015, accessed on March 21, 2016; and *The 10th China-EU Competition Dialogue took place in Beijing*, MOFCOM press release, see <http://fldj.mofcom.gov.cn/article/xxfb/201510/20151001134527.shtml>, published on October 15, 2015, accessed on March 21, 2016.

Another important change to streamline the merger review process was the internal restructuring of MOFCOM's Anti-Monopoly Bureau. Previously, any filed case had to go through the pre-acceptance review conducted by the Bureau's Consultation Division before it reached the final case handlers for the substantive review. In September 2015, MOFCOM decided to convert the Consultation Division into an additional case team division, together with the Legal Division and Economic Division. Today, all cases are allocated to one of the three divisions, and a single case team from one of the divisions is responsible for reviewing a case from submission to clearance. Overall, this reorganization has helped MOFCOM improve the efficiency of its review procedure. According to MOFCOM's statistics, the re-acceptance review phase has now shortened by 13% compared to last year.<sup>1</sup>

### III. MAJOR CASES

#### *A. Nokia/Alcatel-Lucent*

MOFCOM conditionally approved Nokia's acquisition of Alcatel-Lucent on October 19, 2015. According to MOFCOM's assessment, while the acquisition would unlikely have an anti-competitive effect in the markets of wireless communication network equipment, core network systems and network infrastructure services, it may restrict competition in the communication technology standard essential patent ("SEP") licensing markets in China.

After several rounds of remedy proposals from Nokia, MOFCOM eventually granted conditional approval, subject to the following conditions:

- Nokia confirms that, subject to reciprocity, it will not seek injunctions to prevent the use of SEPs granted on FRAND terms except where the SEP holder has offered FRAND compliant license terms but the potential licensee has not entered into the license nor complied with its terms in good faith;
- Where Nokia transfers any SEP to a third party in the future, Nokia will promptly inform its existing licensees in China and Chinese businesses with whom it is in active negotiations of such transfer. If such transfer significantly affects the value of any Chinese licensee's Nokia SEP portfolio, any existing licensee has the right to renegotiate fees upon expiry of the existing (licensing) agreement and Nokia will reconsider the royalty rate for potential licensees. Nokia will also consider new SEPs that may be included in its patent portfolio when renegotiating the royalty rate;
- The transfer shall be subject to the condition that the transferee will be bound by Nokia's FRAND

1. *MOFCOM year-end working summary No. 9: actively promote antitrust enforcements and safeguard fair market competition*, MOFCOM Press Release, see <http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml>, published on January 15, 2016, accessed on March 18, 2016.

commitments owed to standard setting organisations.

- Nokia is required to annually report on its compliance with the commitments for a five-year term.

### ***B. NXP/Freescale***

On November 25, 2015, MOFCOM approved NXP's acquisition of Freescale, subject to conditions. According to MOFCOM, the relevant markets in this case were the global markets of general micro-controllers, special analogue integrated circuits (applied in the field of automobiles) for power supply and radio frequency ("RF") power transistors. With a combined market share of 54%, MOFCOM considered the transaction might eliminate or restrict competition in the global market of RF power transistors. This case was re-filed after the withdrawal of the first merger notification filing.

MOFCOM eventually granted approval subject to the condition that NXP should fully divest its RF power transistor business. At the same time, MOFCOM imposed numerous conditions to make sure NXP will fully fulfil its other obligations during the transition period, such as:

- To strictly fulfil Article 20 of the *Measures on Additional Restrictive Conditions for the Concentration of Business Operators (Trial)* during the transition period to ensure the existence, competitiveness and marketability of the business to be divested;
- To provide relevant services to buyers in strict accordance with the relevant agreements and commitments during the transition period; and
- The NXP/Freescale deal shall not be implemented until the divestment deal has been concluded.

### ***C. Cases on Monitoring Remedies***

In 2015, MOFCOM also started to publish its decisions on revoking or revising the remedies in previous conditional approvals.

On January 6, 2015, MOFCOM revoked remedies from Google's acquisition of Motorola Mobility conditionally approved in May 2012.<sup>1</sup> The revocation was accepted after Google sold the Motorola Mobility business to Lenovo upon MOFCOM's approval.<sup>2</sup>

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1. *Google/Motorola Mobility*, MOFCOM Public Announcement No. 25 [2012], see <http://fldj.mofcom.gov.cn/article/ztzx/201205/20120508134324.shtml>, published on May 19, 2012, accessed on March 21, 2016.

2. *Notice on revoking part of the remedies in Google/Motorola Mobility*, MOFCOM Public Announcement No. 2 [2015], see <http://fldj.mofcom.gov.cn/article/ztzx/201501/20150100862331.shtml>, published on January 9, 2015, accessed on March 21, 2016.

On August 20, 2015, MOFCOM approved Anheuser-Busch InBev's acquisition of non-public shares in Zhujiang Brewery. After this acquisition, Anheuser-Busch InBev's interest in Zhujiang Brewery increased from 25.62% to 29.99%, without changing control rights in Zhujiang Brewery.<sup>1</sup> MOFCOM's approval of this acquisition was required because one of the conditions of MOFCOM's approval of InBev's 2008 acquisition of Anheuser-Busch was that prior consent shall be obtained before InBev increases its stake in Zhujiang Brewery.<sup>2</sup>

In October 2015, MOFCOM partially revoked the remedies imposed on Seagate's acquisition of Samsung's hard disk drive business on December 21, 2011,<sup>3</sup> and the remedies imposed on Western Digital's acquisition of Hitachi's hard disk business on March 2, 2012.<sup>4</sup> These revocations were based on MOFCOM's new assessment of the competition situation of the state in the hard disk drive market.

#### ***D. Cases on Sanctions for Non-filing***

In September 2015, MOFCOM posted four decisions on its website in which it announced the sanctions on companies for failing to file transactions that should have been notified, i.e. *BesTV New Media/Microsoft*, *CSR Puzhen/Bombardier Transportation*, *Fosun Pharmaceutical/Suzhou ErYE Pharmaceuticals* and *Fujian Electronics and Information Group/Chino-E Communications*.

Two of the decisions were based on the unreported establishment of joint ventures (*BesTV New Media/Microsoft* with 51/49%, and *CSR Puzhen/Bombardier Transportation* with 50/50%).<sup>5</sup> The fines imposed in these two decisions were RMB 150,000 and RMB 200,000 respectively.

In the *Fujian Electronics and Information Group/Chino-E Communications* case, the acquirer had parcelled the acquisition of the target's shares into two tranches – the acquisition of 35% of the shares by the parent company, followed by the acquisition of the entirety of the shares by a subsidiary – with separate sales and purchase agreements (signed within the course of about two weeks). The acquirer notified the 100% acquisition to MOFCOM under the *AML*. However, MOFCOM found that the first tranche already constituted an acquisition of a "controlling right" – one of the filing

1. *Notice on agreeing to Anheuser-Busch InBev's acquisition of non-public shares in Zhujiang Brewery*, MOFCOM Public Announcement No. 35 [2015], see <http://fldj.mofcom.gov.cn/article/ztxx/201508/20150801090985.shtml>, published on August 20, 2015, accessed on March 21, 2016.
2. *InBev/Anheuser-Busch*, MOFCOM Public Announcement No. 95 [2008], see <http://fldj.mofcom.gov.cn/article/ztxx/200811/20081105899216.shtml>, published on November 18, 2008, accessed on March 22, 2016.
3. *Notice on revising the restrictive conditions in Seagate's acquisition of Samsung's hard disk drive business*, MOFCOM Public Announcement No. 43 [2015], see <http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001144105.shtml>, published on October 19, 2015, accessed on March 22, 2016.
4. *Notice on revising the restrictive conditions in Western Digital's acquisition of Hitachi Storage*, MOFCOM Public Notice No. 41 [2015], see <http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139040.shtml>, published on October 19, 2015, accessed on March 22, 2016.
5. *BesTV New Media/Microsoft*, MOFCOM Administrative Penalty Decision No. 671 [2015], see <http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124903.shtml>, published on September 29, 2015, accessed on March 22, 2016; and *CSR Puzhen/Bombardier Transportation*, MOFCOM Administrative Penalty Decision No. 670 [2015], see <http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124899.shtml>, published on September 29, 2015, accessed on March 22, 2016.

criteria – which therefore constituted a reportable transaction. MOFCOM imposed a fine of RMB 150,000 to Fujian Electronics and Information Group.<sup>1</sup>

In the fourth transaction – Fosun Pharmaceutical's acquisition of 65% of the shares in Suzhou ErYE Pharmaceuticals – the situation was similar: the acquirer bought two sets of stakes (35% and 30% shares, respectively) from two different affiliates within the target group, and transferred the 35% stake during the course of its pre-notification talks with MOFCOM.<sup>2</sup>

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1. *Fujian Electronics and Information Group/Chino-E Communications*, MOFCOM Administrative Penalty Decision No. 668 [2015], see <http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124887.shtml>, published on September 29, 2015, accessed on March 22, 2016.

2. *Fosun Pharmaceutical Development/ Suzhou Erye Pharmaceuticals*, MOFCOM Administrative Penalty Decision No. 668 [2015], see <http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124896.shtml>, published on September 29, 2015, accessed on March 22, 2016.



## CHAPTER 4.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION OF ADMINISTRATIVE MONOPOLISTIC CONDUCT

*MENG Yanbei* \*

## I. OVERVIEW

China's socialist market economy is still not fully mature. In some areas, conducts such as using administrative measures to improperly favor local companies exists. Frequently, administrative authorities abuse their administrative power to eliminate or restrict competition. Against this background, it is necessary for China to strengthen the enforcement against administrative monopolies, to clean up and abolish various rules and practices that impede the formation of a unified national market and fair competition, and to regulate the government's administrative conduct.

In 2015, the Chinese antitrust enforcement authorities investigated several administrative monopoly cases and imposed sanctions, evoking a significant impact nationwide. Also, a court issued a first-instance judgment for the first time in administrative monopoly litigation. These developments make the regulation of administrative monopolistic conduct in China the highlight of antitrust implementation in 2015. The rapidly growing amount of administrative monopoly cases investigated and punished by Chinese authorities in 2015 reflects the government's firm determination to streamline administration and delegate powers to lower levels, and to promote fair market competition. It also illustrates the government's efforts to "keep the administrative power in cages".

## II. LEGISLATION AND POLICY DEVELOPMENT

In 2015, China did not issue any administrative laws, regulations and enforcement guidelines specifically about administrative monopoly, but the Chinese government issued a series of policy

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documents and judicial interpretations that can, to some extent, be deemed as legislative and policy developments related to regulation of administrative monopolies in China.

***A. Several Opinions on Deepening Institutional Reform and Accelerating the Implementation of the Innovation-driven Development Strategy Promulgated by the CPC Central Committee and the State Council<sup>1</sup>***

On March 13, 2015, the Central Committee of the Communist Party of China ("CPC") and the State Council issued their *Several Opinions on Deepening Institutional Reform on Accelerating the Implementation of the Innovation-driven Development Strategy*, which emphasize the need to crack down on industrial monopolies and market portioning that restrict innovation.

The opinions aim to break up local protectionism, to clean up and abolish those rules and practices that impede the formation of a national unified market, to correct the behavior of local governments such as providing improper subsidies and using administrative powers to eliminate or restrict competition, and to explore the implementation of a fair competition review system.

***B. State Council's Opinions on the Further Development of E-commerce and Nurturing of a New Economic Driving Force, Opinions on Promoting the Modernization of the Domestic Trade Circulation and Building a Business Environment Based on the Rule of Law, Guiding Opinions on Playing the Leading Role of New Consumption and Nurturing a New Driving Force of New Supply<sup>2</sup>***

On May 4, 2015, the State Council issued its *Opinions on the Further Development of E-commerce and Nurturing of a New Economic Driving Force* to regulate competition conduct in the e-commerce field. The document specifically points out that the government agencies at various levels should not designate any supplier to provide public services in the e-commerce field by issuing an administrative order, and should not abuse administrative powers to exclude or restrict competition in the e-commerce field.

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1. *Several Opinions on Deepening Institutional Reform and Accelerating the Implementation of the Innovation-driven Development Strategy promulgated by the CPC Central Committee and the State Council*, CPC Central Committee Release No.8 [2015], see [http://www.gov.cn/xinwen/2015-03/23/content\\_2837629.htm](http://www.gov.cn/xinwen/2015-03/23/content_2837629.htm), published on March 23, 2015, accessed on February 18, 2016.

2. *Opinions on the Further Development of E-commerce and Nurturing of a New Economic Driving Force*, State Council Release No.24 [2015], see [http://www.gov.cn/zhengce/content/2015-05/07/content\\_9707.htm](http://www.gov.cn/zhengce/content/2015-05/07/content_9707.htm), published on May 7, 2015, accessed on February 28, 2016; *Opinions on Promoting the Modernization of the Domestic Trade Circulation and Building a Business Environment Based on the Rule of Law*, State Council Release No.49 [2015], see [http://www.gov.cn/zhengce/content/2015-08/28/content\\_10124.htm](http://www.gov.cn/zhengce/content/2015-08/28/content_10124.htm), published on August 28, 2015, accessed on February 18, 2016; *Guiding Opinions on Playing the Leading Role of New Consumption and Nurturing a New Driving Force of New Supply*, State Council Release No.66 [2015], see [http://www.gov.cn/zhengce/content/2015-11/23/content\\_10340.htm](http://www.gov.cn/zhengce/content/2015-11/23/content_10340.htm), published on November 23, 2015, accessed on February 18, 2016.

On August 26, 2015, the State Council issued the *Opinions on Promoting the Modernization of the Domestic Trade Circulation and Building a Business Environment Based on the Rule of Law*, which call for the removal of market portioning. Further, the opinions contain provisions regarding the cleaning up and abolishing of rules and practices preventing the establishment of a unified market and fair competition nationwide. They also prohibit regional blockades in market economic activities, and target administrative agencies' abuse of powers which restricts competition.

On November 19, 2015, the State Council published the *Guiding Opinions on Playing the Leading Role of New Consumption and Nurturing a New Driving Force of New Supply*. The guiding opinions aim to improve fair, open and transparent market rules, to form a fair competition review system, to build an environment where products and production elements move freely, and various kinds of market players compete fairly and orderly. The guiding opinions also stress the need to systematically clean up with protectionist policies by local governments and ministries, to remove institutional obstacles to the sales of products, provision of services or development of industries across different areas regulated by different ministries, and across different industries and regions.

The guiding opinions also prohibit setting discriminatory entry conditions for companies, products and services from other places. Their goal is to eliminate various explicit or implicit administrative monopolies, to reinforce antitrust enforcement, to formulate specific measures which guarantee that various market players can equally enter into natural monopoly and franchised industries according to law, and to regulate products and services in the field of network-based natural monopolies.

### ***C. Work Plan for Integrating and Building Unified Public Resources Trading Platforms Promulgated by the Administrative Office of State Council<sup>1</sup>***

On August 10, 2015, the General Office of the State Council issued the *Work Plan for Integrating and Building Unified Public Resource Trading Platforms*. The document requires that public resources trading platforms of all levels should not illegally carry out, or mandatorily designate, intermediary services for biddings and auctions, etc., and should not force non-public resources trading projects to trade on the platforms.

Furthermore, the public resources trading platforms should not obstruct market players from other regions from entering into the local public resources trading market by setting restrictive conditions in relation to company registration place, presence of local branches, qualification verification, bidding (auction) license, compulsory guarantee, etc.

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1. *Work Plan for Integrating and Building Unified Public Resources Trading Platforms*, Administrative Office of State Council Release No.63 [2015], see [http://www.gov.cn/zhengce/content/2015-08/14/content\\_10085.htm](http://www.gov.cn/zhengce/content/2015-08/14/content_10085.htm), published on August 14, 2015, accessed on February 18, 2016.

***D. Opinions on the Establishment of a Long-term Mechanism to Clean Up and Standardize the Relevant Provisions on Tenders and Bids Promulgated by Seven Relevant Ministries*<sup>1</sup>**

On April 15, 2015, the *Opinions on the Establishment of a Long-term Mechanism to Clean Up and Standardize the Relevant Provisions on Tenders and Bids* were circulated by the National Development and Reform Commission ("NDRC"), together with the Ministry of Industry and Information Technology, the Ministry of Housing and Urban-Rural Development, the Ministry of Transport, the Ministry of Water Resources, the Ministry of Commerce and the Legislative Affairs Office of the State Council, upon consent of the State Council.

This document strictly prohibits local governments and agencies from setting administrative licenses in the form of official government rules (i.e., the so-called "red-header documents") to restrict market competition or to illegally impose sectorial protectionism or regional blockades, interfering with market activities.

***E. Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Administrative Litigation Law*<sup>2</sup>**

On April 20, 2015, the *Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Administrative Litigation Law* were approved by the Supreme People's Court ("SPC") and became effective since May 1, 2015.

Article 12 (1) of the *Administrative Litigation Law*, newly amended in 2014, added several new types of administrative cases which allow citizens, legal persons or other organizations to bring a lawsuit before court. Among these cases, the eighth item in that clause refers to cases where an administrative agency is considered to have abused its administrative powers to eliminate or restrict competition. In this way, this clause combines the relevant provisions in the *Anti-Monopoly Law* ("AML") and the *Administrative Litigation Law*.

In this regard, the promulgation of the SPC's judicial interpretations facilitates the implementation of reforms of the *Administrative Litigation Law* on aspects such as the case registration system, the scope of case acceptance, the mechanism of sending government officials in charge to appear before court and respond to claims, and the jurisdiction of administrative cases across several administrative regions. Also, the interpretations fulfill the institutional condition that

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1. *Opinions on the Establishment of a Long-term Mechanism to Clean Up and Standardize the Relevant Provisions on Tenders and Bids*, NDRC Release No.787 [2015], see [http://fgs.ndrc.gov.cn/xtjl/201504/t20150421\\_703122.html](http://fgs.ndrc.gov.cn/xtjl/201504/t20150421_703122.html), published on April 21, 2015, accessed on February 18, 2016.

2. *Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Administrative Litigation Law*, Supreme People's Court Release No. 9 [2015], see <http://www.court.gov.cn/zixun-xiangqing-14294.html>, published on April 27, 2015, accessed on January 16, 2016.

allows the courts to accept administrative monopoly cases.

### III. MAJOR CASES

In 2015, the Guangzhou Intermediate People's Court rendered the first-instance judgment in the administrative monopoly case *Shenzhen Tsinghua Sware Hi-Tech Co., Ltd. v. the Education Department of Guangdong Province*. Also, NDRC investigated and corrected several administrative monopoly cases involving the Transportation Department of Hebei Province, the Transportation Department of Shandong Province,<sup>1</sup> the Road Transportation Bureau of Gansu Province,<sup>2</sup> the Communications Administration of Yunnan Province,<sup>3</sup> the Health and Family Planning Commission of Sichuan Province and the Health and Family Planning Commission of Zhejiang Province.<sup>4</sup>

These cases involved local protectionism, designated transactions, exclusive dealing, the enactment of rules eliminating or restricting competition, and other conduct in violation of the relevant provisions of the *AML*. Besides the above-mentioned cases, in another case, the Development and Reform Commission of Hunan Province ("Hunan DRC") corrected the Jiangyong County government's conduct of abusing administrative power to restrict competition.<sup>5</sup>

#### *A. Shenzhen Tsinghua Sware Hi-Tech Co., Ltd. v. the Education Department of Guangdong Province*<sup>6</sup>

On February 2, 2015, the Guangzhou Intermediate People's Court held that the Education Department of Guangdong Province ("Education Department") had violated the *AML* by designating the software provided by Goldon Software Company Limited as the exclusive provider of software used in the competition of "Basic Skills of Construction Cost."

In its first-instance judgment, the Guangzhou court concluded that, according to Article 32 of the *AML*, "administrative authorities and other organizations authorized by laws or regulations to

1. NDRC Suggestion Letter to Correct Shandong Transportation Department's Conduct of Abusing Administrative Power to eliminate or restrict competition Shandong DRC No. 501 [2015], see [http://jjs.ndrc.gov.cn/fjgld/201503/t20150327\\_668911.html](http://jjs.ndrc.gov.cn/fjgld/201503/t20150327_668911.html), published on March 27, 2015, accessed on February 17, 2016.

2. Gansu NRC Suggestion Letter to Correct Wuwei Road Transportation Bureau's Conduct of Abusing Administrative Power to Eliminate or Restrict Competition Gansu DRC No. 5 [2015], see <http://www.gsdrcc.gov.cn/content/2015-11-24/33514.html>, published on November 24, 2015, accessed on February 18, 2016.

3. Yunnan Communications Administration was Corrected for Abusing Administrative Power to Eliminate or Restrict Competition, see [http://www.ndrc.gov.cn/gzdt/201506/t20150602\\_694807.html](http://www.ndrc.gov.cn/gzdt/201506/t20150602_694807.html), published on June 2, 2015, accessed on February 18, 2016.

4. The Health and Family Planning Commissions of Sichuan Province and of Zhejiang Province Correct Their Anti-Competitive Conduct in Violation of the *AML* in Centralized Medicine Procurement, see [http://www.sdpc.gov.cn/gzdt/201511/t20151102\\_757334.html](http://www.sdpc.gov.cn/gzdt/201511/t20151102_757334.html), published on November 2, 2015, accessed on February 18, 2016.

5. The Provincial-Level DRC correct Jiangyong People's Government's conduct of Abusing Administrative Power to Eliminate or Restrict Competition, see [http://www.hnfgw.gov.cn/ztl/jjgyfddz/201601/t20160118\\_2908350.html](http://www.hnfgw.gov.cn/ztl/jjgyfddz/201601/t20160118_2908350.html), published on January 18, 2016, accessed on February 18, 2016.

6. Wan Jing, Two Unprecedented Antitrust Enforcement Cases Reflect the Rule of Law, see [http://www.legaldaily.com.cn/index\\_article/content/2015-12/24/content\\_6413752.htm?node=5955](http://www.legaldaily.com.cn/index_article/content/2015-12/24/content_6413752.htm?node=5955), published on December 24, 2015, accessed on February 20, 2016.

perform public functions shall not abuse their administrative powers to require business operators or individuals, directly or in disguised form, to deal with, to purchase from, or to use the products of a business operator designated by them." The court further held that the Education Department's conduct of designating exclusive software for the competition constituted administrative monopoly conduct.

From the perspective of the "subject" (of such conduct), the Education Department is an "administrative authorities and other organizations authorized by laws or regulations to perform public functions." From the perspective of the "conduct", the conduct of designating an exclusive provider of software for the competition amounted to "requiring business operators or individuals, directly or in disguised form, to deal with, to purchase from, or to use the products of a business operator designated by them."

At the same time, according to the *Administrative Litigation Law*, administrative authorities shall bear the burden to prove their concrete administrative acts. Therefore, the court concluded that the Education Department had abused its administrative power, as it was not able to provide evidence to prove the legitimacy of designating an exclusive competition software provider. This case is very significant, as it is the first successful judgment in an administrative monopoly case in the past seven years since the *AML* came into force. So far, since the defendant appealed, the case is pending before the second-instance court, and the final judgment has not been rendered yet.

***B. NDRC's Suggestion to Correct the Health and Family Planning Commission of Bengbu's Conduct of Abusing Administrative Power to Eliminate or Restrict Competition*<sup>1</sup>**

In March 2015, six government authorities including the Health and Family Planning Commission of Bengbu ("Bengbu Health Commission")—a government entity in the city of Bengbu, Anhui province—issued the *Tentative Implementing Measures on the Centralized Procurement of Medicines, Supplies and Equipment for Public Medical Institutions* in Bengbu. Following the issuance of the measures, Bengbu established a centralized procurement office of medicine, supplies and equipment for public medical institutions in Bengbu ("Procurement Office") and also established a procurement consortium of public medical institutions in the whole city ("Procurement Consortium"). Furthermore, on April 10, 2015, the Bengbu Health Commission issued a "request for quotation for Bengbu Public Medical Institutions' procurement of clinical drugs of single varieties with target quantities" (Doc No. Anhui C-2015-CG-X-111). The request for quotation not only identified the varieties, specifications and dosage forms of 30 varieties of drugs, but also directly specified the manufacturers of these drugs, excluding competition among different manufacturers

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1. NDRC Suggestion Letter to Correct the Health and Family Planning Commission of Bengbu's Conduct of Abusing Administrative Power to Eliminate or Restrict Competition NDRC No.21[2015], see [http://jjs.ndrc.gov.cn/fjgld/201508/t20150826\\_748682.html](http://jjs.ndrc.gov.cn/fjgld/201508/t20150826_748682.html), published on August 26, 2015, accessed on February 17, 2016.

producing the same variety of medicines. This arrangement was considered detrimental to the formation of reasonable prices through market competition.

In addition, the *Competitive Consultation Notice* (Doc No. Anhui C-2015-CG-C-112), issued on 10th April 2015, and the *Competitive Consultation Notice* (Doc No. Anhui C-2015-CG-C-168, issued on 22nd May 2015, set different qualification requirements for local and non-local operators, excluding the potential bidders from other regions. Such arrangement was considered detrimental to promoting full competition in the relevant market. The General Office of NDRC issued a letter to the General Office of the People's Government of Anhui Province, suggesting to correct the Bengbu Health Commission's conduct of abusing administrative power to eliminate or restrict competition, and to generally clear up and regulate other anti-competitive acts violating the *AML* in the centralized procurement of drugs in the province.

***C. Gansu DRC's Suggestion to Correct Wuwei Road Transportation Bureau's Conduct of Abusing Administrative Power to Eliminate or Restrict Competition<sup>1</sup>***

From December 10, 2014 to February 5, 2015, the Gansu Provincial Development and Reform Commission ("Gansu DRC") investigated price monopoly agreement case of the automobile maintenance companies in Wuwei, a city in Gansu Province, in accordance with the law. During the investigation, Gansu DRC founded that the Wuwei Road Transportation Bureau and its affiliated Road Transportation Association, when supervising and administrating the second-level maintenance of road transportation automobiles, abused their administrative powers to force business operators to engage in anti-competitive acts.

The case has two highlights: (1) the Gansu antitrust enforcement authority issued two suggestion letters. The first one addressed the administrative monopoly of the Wuwei Road Transportation Bureau. The second addressed to abolishing the *Notice of Circulating the Man-hour Quota and Price Standard for Automobile Maintenance Services in Gansu Province* ("Notice") promulgated by Transportation Department of Gansu and the Price Bureau of Gansu, which aims at solving the administrative monopoly fundamentally. In the second suggestion letter, the Gansu DRC considered that some regions in Gansu are still implementing the Notice ([2000] Doc Gansu No. 11). Since the price for automobile maintenance services is not included in the Government Pricing Catalogs of the central government and of Gansu Province, such price is subject to market-adjusted pricing and should be determined by the companies themselves. Gansu DRC considered that continuing to implement this document would harm market competition of the automobile

1. *Gansu DRC Suggestion Letter to Correct Wuwei Road Transportation Bureau's Conduct of Abusing Administrative Power to Eliminate or Restrict Competition* Gansu DRC No. 5[2015], see <http://www.gsdlc.gov.cn/content/2015-11-24/33514.html>, published on November 24, 2015, accessed on February 18, 2016.

maintenance industry, and suggested the Transport Department of Gansu Province to abolish the document.<sup>1</sup> (2) the Gansu antitrust enforcement authority started a mechanism where the third parties in an administrative monopoly case can be subject to sanctions—it fined 22 companies who participated in the administrative monopoly and implemented the price-fixing a total of RMB 89685.54, which is 2% of the turnover of each company in 2013.<sup>2</sup> It is the first case in the antitrust enforcement against administrative monopoly in China where third parties were also punished, leading to extensive discussions and some doubts to a certain extent.

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1. *Gansu DRC Suggestion Letter to Abolish the Notice of Circulating the Man-hour Quota and Price Standard for Automobile Maintenance Services in Gansu Province*, see <http://gansu.gansudaily.com.cn/system/2015/11/26/015777235.shtml>, published on November 26, 2015, accessed on February 18, 2016.

2. Administrative Penalty Decision of Gansu DRC ((2015) No.25—(2015) No.46), see <http://www.gsdr.gov.cn/category/sjgjdjcj-fld> published on November 14, 2015, accessed on February 18, 2016.



## CHAPTER 5.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF UNFAIR COMPETITION CONDUCT

*JIN Shanming* \*

## I. OVERVIEW

The Anti-Unfair Competition Law ("AUCL") has become a hot topic in relation to the discussion on the rule of law in China recently. Especially the legislative amendments of the AUCL, initiated in 2013, have become the focus of social concerns. However, there were no new moves in the field of enacted legislation in the year 2015, as law enforcement remained the focus of the AUCL practice.

In 2015, the National Administration for Industry and Commerce and other market regulators investigated and dealt with 68,170 unfair competition cases of all kinds.<sup>1</sup> There was a significant increase in the number of unfair competition cases handled by courts: the number of civil cases at first instance reached 2181 (156 of them monopoly cases), an increase of 53.38% year-on-year. The number of unfair competition cases in the Internet space continued to grow.<sup>2</sup> Nonetheless, the amendment and implementation of the AUCL is bringing new challenges. The need to respond actively to the real problems and institutional demands in the economic life, giving the market the decisive role, will be the focus to guide the amendment and implementation of the AUCL in the future.

## II. LEGISLATION AND POLICY DEVELOPMENT

The regulation of unfair competition conduct is an indispensable and important part of market supervision, which is based on an improved normative system. In 2015, there have been

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1. Wang Jiangping, Creating a New Situation of Competition Law Enforcement under the New Economic Situation, see [http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201604/t20160427\\_168212.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201604/t20160427_168212.html), published on April 27, 2016, accessed on March 16, 2016.

2. Unfair Competition Cases Increased by 53.38% Compared with Last Year, see [http://www.legaldaily.com.cn/zt/content/2016-04/25/content\\_6599995.htm?node=81559](http://www.legaldaily.com.cn/zt/content/2016-04/25/content_6599995.htm?node=81559), published on April 25, 2016, accessed on March 16, 2016.

policy developments in the AUCL space, while little in the field of enacted legislation. The Chinese government stressed the importance of competition policies generally, which created the basis for the implementation of the competition policies. In March 2015, the Central Committee of the Communist Party of China ("CPC Central Committee") and the State Council stressed in their *Certain Opinions on Deepening System and Mechanism Reform and Accelerating the Implementation of the Innovation-driven Development Strategy*, that "it is imperative to bring into play the fundamental role of market competition in stimulating innovation, create the fair, open and transparent market environment, strengthen the guidance of innovation by competition policies and industrial policies, improve survival of the fittest and increase the innovation motivation of market subjects." In October 2015, the CPC Central Committee further confirmed its intention, in its *Recommendations for the 13th Five-Year Plan for Economic and Social Development*, "to accelerate the formation of a unified, open, competitive and orderly market system, establish the mechanism of protecting fair competition, and break geographical segmentation and industrial monopolies."

Against this background, the establishment of a framework and implementation mechanism for competition policies and a fair competition review system to screen industrial and operational policies has become an essential mission for China in strengthening the reform of its economic system. Strengthening the enforcement of competition laws and safeguarding fair competition in the marketplace can effectively guarantee the realization of the CPC Central Committee's policies such as that to have "the market play a decisive role in the allocation of resources and the government better play the role" and "promote the reform of supply-side and increase effective supply."

### III. MAJOR CASES

#### *A. Ji'an Branch of Jiangxi Salt Group Ltd. v. Ji'an Administration for Industry and Commerce*<sup>1</sup>

The Ji'an Salt Bureau of Jiangxi Province is the administrative institute in charge of salt industry, authorized by the State Council. The Ji'an Branch of Jiangxi Salt Group Ltd. ("Ji'an Salt Company") is an enterprise (its business scope includes salt, site rental, daily necessities, etc.) and is registered with the related administration for industry and commerce. The Ji'an Salt Bureau and the Ji'an Salt Company basically share their staff.

Ji'an Salt Company does not only specialize in the salt wholesale business, but also sells daily necessities. In order to improve its revenue stream, some sales people of Ji'an Salt Company forcibly tied non-salt products (such as cooking oil, liquor, etc.) during their wholesale and distribution of salt, or tied low sodium salt or deep-well salt during distribution. Where the customers resist to

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1. Administrative Judgment No. 22 [2014], People's Court of Jizhou District (first-instance); Administrative Judgment No. 35 [2015], Ji'an Intermediate People's Court (second-instance).

the tying proposal, the company would stop supplying salt arguing that it has no high sodium salt (mesohaline) or even no salt of any kind.

Certain edible salt retailers were dissatisfied with this practice, and complained to Ji'an Administration for Industry and Commerce ("Ji'an AIC"). The Ji'an AIC issued two notices of correction to Ji'an Salt Company in 2012 and 2013, respectively. The Ji'an AIC investigated the company, informed it of the hearing rights and analysed its statements. The authority made an administrative penalty decision on July 2014. The Ji'an AIC ordered Ji'an Salt Company to stop its illegal conduct and imposed a fine of RMB 160,000.

Ji'an Salt Company refused to accept the AIC decision and applied for administrative reconsideration, yet the penalty decision was maintained. The company then brought a lawsuit before court in the hope of revoking the administrative decision of the Ji'an AIC.

The Jizhou District People's Court in Ji'an held that Ji'an Salt Company, as a national salt monopoly enterprise, had a statutory right of exclusivity and a dominant position over salt retailers compared with other ordinary salt operators. Yet the court found that the company's position as a market player should be equal to that of other operators. By using its dominant position in salt wholeselling and distribution in its diversified businesses, the plaintiff was found to compel salt retailers to buy low sodium salt or non-salt products such as edible oil, washing products or liquor together with edible salt. The company was found to have violated Article 6 of the AUCL, and to have imposed a restriction for the others to purchase products from designated suppliers. The court therefore concluded to uphold the administrative penalty decision made by the Ji'an AIC. The company's further appeal to the Ji'an Intermediate People's Court was also rejected.

This case is a typical case of an administrative body investigating unfair competition conduct. One distinct manifestation of unfair competition conduct is where public utilities or other enterprises with a statutory monopoly in certain sectors force customers to purchase products from designated suppliers, to attach unreasonable condition or to bundle products against consumers' will.

The above-mentioned types of conduct severely damage other operators' right to fair competition, restrict or eliminate fair play for others. A fair, free, competitive and orderly market cannot be established without the adequate protection of the right to fair competition for the majority of operators. The right to fair competition is a fundamental right for all kinds of market operators to do business, and it is the basis to stabilize the market order and stimulate innovation.

The court decision below highlights the benefits of administrative enforcement to protect the right to fair competition, to support the law enforcement of administrative authorities and to promote the healthy development of the market economy. However, the decision also raises the question about the relationship between the AUCL and the Anti-Monopoly Law.

***B. Beijing Qihoo Technology Co., Ltd. v. Beijing Sougou Information Service Co., Ltd.<sup>1</sup>***

Plaintiffs Sougou Information Company and Sougou Technology Company ("Sougou") jointly alleged that, since 2011, Qihoo Technology Company and Qihoo 360 Company ("Qihoo") had been restricting users from installing and using Sougou Browser, and from setting Sougou Browser as their default browser at their own. Sougou's goal was to promote its products 360 Safe and 360 Browser and increase their reputation. Sougou achieved this by abusing its "supervisory" status as the provider of security software and services, inducing, deceiving users or even by directing users to resorting with destructive techniques. In addition, Qihoo was found to maliciously fabricate and spread false facts that "Sougou Input bundles browser and Sougou Browser cannot be removed without 360 Safe," which led to business credit and reputation damage and significant financial loss for Sougou.

Qihoo argued that it had never intervened or guided users to make certain choices, and that loyal users of Sougou Browser were still able to access Sougou's services via pop-up reminders provided by 360Safe. Qihoo also argued that the reminder facility of 360Safe represented technical innovation rather than unfair competition. Accordingly, it argued, its conduct was both legal and reasonable, while Sougou's claims lacked factual and legal basis and should therefore be rejected. The first-instance and second-instance courts held that, the pop-up windows of Qihoo 360Safe had exceeded the reasonable functional scope of security software, and had affected fair competition among browser software providers. They held that Qihoo's conduct harmed the legitimate rights of Sougou, and constituted unfair competition. The relevant conduct of Qihoo through 360Safe violated the principle of equal treatment required by the AUCL, amounting to unfair competition. In addition, Qihoo's above conduct was also found to have engaged to engage in commercial diffamation through its official micro-blog account on Sina Weibo.

This is a typical unfair competition case in the Internet economy. While regulating unfair competition, the AUCL encourages and protects operators to gain competitive advantages in a fair and reasonable way by constantly improving their own technology.

In the Internet space, when operators improving their relevant technical measures, they should not only focus on improving user experience to enhance their competitive advantage, but also take the legitimate rights of competitors into account. Actions in relation to competitors can be justifiable according to the actual situation of relevant market. Followed by the actual development of market, relevant attitude shall be dynamically taken.

With the continuous development of network and computer technology, security software

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1. Civil Judgment No. 15709 [2013], Beijing No.2 Intermediate People's Court (first-instance); Civil Judgment No. 1071 [2015], Beijing High People's Court (second-instance).

has developed from its traditional basic network security protection function – which only monitors, screens, protects and cleans program codes that are hazardous to the computer, such as viruses and Trojans – to its current software assistant management function - which assists users in managing computer software to enhance user experience. Therefore, even if there is no fundamental impact on the safe use of computers, like the cases of affecting the default settings and other important matters, reasonable pop-up reminders and necessary intervention by security software are justifiable from the perspective of protecting users' right to know and right to choose. These reminders are in line with the nature of security software and should be classified with the function scope of security software.

However, the functions of security software should be implemented through necessary and reasonable means, and should be in compliance with the basic requirements of the principle of good faith and business ethics recognized by the Internet industry. Acts of security software that intervening the operation of other software, which are beyond reasonable limits and cause harm to other software operators, should be deemed unfair competition and be tackled according to the law.

## **PART IV.**

# **DEVELOPMENTS IN LEGISLATION AND PRACTICE OF ANTI-MONOPOLY LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS OF CHINA**

### **CHAPTER 1.**

DEVELOPMENTS IN LEGISLATION OF ANTI-MONOPOLY LAW RELATING TO  
INTELLECTUAL PROPERTY

### **CHAPTER 2.**

PRACTICE OF ANTI-MONOPOLY LAW RELATING TO INTELLECTUAL PROPERTY  
RIGHTS

## CHAPTER 1.

# DEVELOPMENTS IN LEGISLATION OF ANTI-MONOPOLY LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS

*DONG DUDU\**

## I. OVERVIEW

In 2015, the State Administration for Industry and Commerce ("SAIC") promulgated the *Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights* ("SAIC IPR Regulation"), while the National Development and Reform Commission ("NDRC") drafted and published the *Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Abuse of Intellectual Property Rights (Draft for Comments)* ("NDRC Draft IPR Guideline"). These rules specify the high-level provision and authorization in Article 55 of the *Anti-Monopoly Law* ("AML"), and clarify the general principles, the standards to determine illegality and the corresponding legal liabilities of antitrust regulation in the field of intellectual property rights ("IPRs").

Separately, SAIC, the Ministry of Commerce ("MOFCOM") and State Intellectual Property Office ("SIPO") are also drafting different versions of the *Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights*.

## II. SAIC IPR REGULATION

The SAIC IPR Regulation was enacted on April 7, 2015 and entered into effect on August 1, 2015.

### *A. General Principles of Antitrust Regulation in the IP Field*

For the purpose of the *SAIC IPR Regulation*, conduct eliminating or restricting competition

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by abusing IPRs means monopolistic conduct of a business operator exercising IPRs to implement a monopoly agreement, abuse a dominant market position etc. in violation of the stipulations in the *AML* (except for price monopolistic conduct). Accordingly, when determining the illegality of any conduct in the IPR field, the basic analytical framework in the *AML* should be followed.

For the analysis and determination of a suspected abuse of IPRs by a business operator to eliminate or restrict competition, the following steps can be taken: (1) ascertain the characteristics and forms of a business operator's exercise of IPRs; (2) ascertain the characteristics of the relationship between the business operators exercising IPRs; (3) define the relevant market involved in the exercise of IPRs; (4) determine the market positions of the business operators exercising IPRs; (5) analyze the impact on competition in the relevant market caused by the exercise of IPRs by a business operator.

For the analysis and determination of the characteristics of the relationship between business operators, the specificities of the conduct exercising IPRs itself need to be taken into consideration. Where the licensing of IPRs is involved, there may be a transactional relationship in a licensing contract between business operators originally in a relationship of competition. It is also possible that there is a relationship of competition in the market where both the licensor and the licensee use such IPRs to manufacture products. However, if there is no relationship of competition between the parties at the time of entering into the licensing agreement and the relationship of competition is only established after the entering into the agreement, then it is still not deemed an agreement between competitors, except where there is a substantial change to the original agreement.

The following factors should be taken into consideration for analyzing and determining the impact on competition of a business operator's conduct exercising IPRs: (1) the market position of the business operator and the trading partners; (2) the degree of concentration in the relevant market; (3) the degree of difficulty to enter the relevant market; (4) industry customs and the stage of industry development; (5) the duration and scope of effectiveness of the restraints from the perspectives of output, territory, consumer, etc.; (6) the impact upon the encouragement of innovation and the dissemination of technology; (7) the innovative capacity of the business operator and the speed of technological change; and (8) other factors related to the determination of the impact on competition of the conduct of exercising IPRs.

### ***B. Definition of the Relevant Market in the IPR Field***

In the *SAIC IPR Regulation*, the relevant market including the relevant product market and the relevant geographic market is defined in accordance with the *AML* and the *Guidelines on the Definition of the Relevant Market*, issued by the Anti-Monopoly Commission under the State Council, and the impact of factors such as IPRs and innovation etc. is considered.



During the course of antitrust enforcement work involving the licensing of IPRs etc., the relevant product market can be a technology market or a product market containing specific IPRs. The relevant technology market means the market where the technology involving the exercise of IPRs competes with the technologies of the same type that are interchangeable.

### ***C. Monopoly Agreements and Exemptions in the IPR Field***

Where the conduct of exercising IPRs by business operators falls within any of the following circumstances, it may not be deemed a monopoly agreement prohibited by Article 13(1)(6) and Article 14(3) of the *AML*, except where there is evidence to the contrary proving that such agreement has the effect of eliminating or restricting competition:

(1) The aggregate market share of the business operators in a relationship of competition does not exceed 20% in the relevant market that is impacted by their conduct, or there exist at least four other substitutable, independently controlled technologies which can be obtained at reasonable cost in the relevant market;

(2) The market share of neither the business operators nor their trading partners exceeds 30% in the relevant market, or there exist at least two other substitutable, independently controlled technologies which can be obtained at reasonable cost in the relevant market.

### ***D. Abuse of Dominance in the IPR Field***

The determination and presumption of a dominant market position is conducted in accordance with the stipulations of Article 18 and Article 19 of the *AML*. A business operator's ownership of an IPR may constitute one of the factors to determine its dominant market position. However, a business operator should not be presumed to have a dominant market position in the relevant market solely according to its ownership of an IPR.

Where its IPR constitutes a facility essential for production and business operations, a business operator in a dominant market position cannot refuse to license other business operators to use such IPR under reasonable conditions, without legitimate reasons, to eliminate or restrict competition.

When determining whether the above-mentioned conduct is present, the following factors need to be considered in parallel: (1) the IPR cannot be reasonably substituted in the relevant market and is necessary for other business operators to compete in the relevant market; (2) the refusal to license the IPR has a negative impact on competition or innovation in the relevant market, to the

detriment of consumer welfare or public interests; (3) licensing the IPR does not cause unreasonable harm to such business operator.

During the course of exercising IPRs, a business operator in a dominant market position shall not implement the following conduct to restrict transactions, without legitimate reasons, to eliminate or restrict competition: (1) restrict trading partners to exclusively deal with itself; (2) restrict trading partners to exclusively deal with the business operators designated by it.

In addition, when exercising IPRs, a dominant operator cannot implement tying conduct which concurrently fulfills the following conditions, without legitimate reasons, eliminating or restricting competition: (1) force bundled sales or package sales of different products against transaction customs, consumer habits or ignoring product functionalities; (2) the implementation of the tying conduct causes the business operator to extend its dominant position in the tying product market into the tied product market, eliminating or restricting competition in the tying product or tied product market.

Furthermore, a dominant business operator cannot eliminate or restrict competition by implementing the following conduct, amounting to the attachment of unreasonable restrictive conditions, without legitimate reasons, when exercising IPRs: (1) requiring trading partners to grant exclusive grant-back for technology improved by them; (2) prohibiting trading partners from challenging the effectiveness of its IPR; (3) restricting trading partners from utilizing competing products or technologies after the expiry of the term of the licensing agreement, where IPRs are not infringed; (4) continuing exercising rights of an IPR whose protection term has already expired or has been determined to be ineffective; (5) prohibiting trading partners from dealing with third parties; (6) attaching other unreasonable restrictive conditions to trading partners.

During IPR exercises, a business operator in a dominant market position shall not apply discriminatory treatment to trading partners in equivalent conditions, without legitimate reasons, to eliminate or restrict competition.

### ***E. Special Provisions on Patent Pools and Standard-Setting***

During the course of exercising IPRs, a business operator shall not eliminate or restrict competition by using the patent pool. Members of a patent pool shall not enter into any monopoly agreement prohibited by the Article 13 and 14 of the *AML*, except where there is evidence proving that the agreement made by those business operators conforms to the stipulation in the Article 15 of the *AML*.

An organization managing a patent pool in a dominant market position cannot use the

patent pool to implement the following conduct, without legitimate reasons, to eliminate or restrict competition: (1) restricting members of the patent pool from becoming independent licensors to license patents outside the pool; (2) restricting members of the patent pool or licensees from independently, or in cooperation with a third party, developing technology that competes with the pooled patents; (3) forcing licensees to grant exclusive grant-back of technology improved or developed by them to the organization managing the patent pool or the members; (4) prohibiting licensees from challenging the effectiveness of the pooled patents; (5) applying differential treatment concerning trading conditions to members of the pool or licensees in the same relevant market which are in equivalent conditions; (6) other abuses of a dominant market position as determined by SAIC.

During the course of exercising IPRs, business operators shall not use the setting and implementation of standards (including compulsory requirements in national technical regulations) to engage in conduct eliminating or restricting competition.

Without legitimate reasons, a dominant company cannot implement the following conduct eliminating or restricting competition during the course of the setting and implementation of a standard: (1) when participating in the standard setting process, deliberately failing to disclose information on its right to the standard setting organization or clearly giving up its right, but asserting its patent right against implementers of such standard after its patent is involved in a certain standard; or (2) after its patent has become a standard essential patent, implementing conduct eliminating or restricting competition such as refusing to license, tying products or attaching other unreasonable trading conditions when transacting, in violation of the fair, reasonable and non-discriminatory principle.

### III. NDRC DRAFT IPR GUIDELINE

According to the working schedule of the Anti-Monopoly Commission of the State Council, NDRC drafted the *NDRC Draft IPR Guideline*, which was released for public comments on December 3, 2015. The draft guideline provides more specific explanations and stipulations concerning the general principles and analytical methodology in IPR-related antitrust regulation, and such issues as the definition of relevant markets, the types of potentially anti-competitive IPR agreements and abuse of dominance in the IPR field.

Notably, the draft guideline points out that, in antitrust enforcement involving the IPR area, the antitrust authorities are to observe four sets of principles:

- (1) antitrust regulation of IPR-related conduct should adopt the same regulating standard as other property rights, follow the basic analytical framework of the *AML*, yet at the same time consider the special characteristics of IPRs;

- (2) a company should not be directly presumed to hold a dominant market position in the relevant market solely because of the ownership of IPRs;
- (3) to analyze conduct exercising IPRs which may eliminate or restrict competition, according to the specific needs of each case, the positive effects on competition and innovation of conduct exercising IPRs are to be given adequate consideration;
- (4) the principles of fairness and transparency are to be adhered to, and the facts, evidence and reasons put forward by business operators as to whether the exercise of IPRs is legitimate are to be given adequate consideration.

The analytical methodology for antitrust enforcement is as follows: when analyzing and determining whether a business operator violates the *AML* by eliminating or restricting competition by abusing IPRs, the antitrust authority needs to specifically analyze the category of the monopoly conduct that the conduct exercising the relevant IPRs may constitute, by comprehensively using the analytical methods of disciplines such as law, economics, etc. In the analysis, it can be considered what the competition conditions in the relevant market are, whether the relevant conduct exercising IPRs eliminates or restricts competition, and whether the relevant conduct exercising IPRs promotes innovation and enhances efficiency.

*The NDRC Draft IPR Guideline* has not addressed such issues as concentration of business operators and legal liabilities in the IPR field. Overall, the *NDRC Draft IPR Guideline* is still in the process of getting finalized.

## CHAPTER 2.

# PRACTICE OF ANTI-MONOPOLY LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS

WANG Chunyan\*

## I. OVERVIEW

In China, IP-related antitrust cases were done through administrative law enforcement and through the courts. Since the *Anti-Monopoly Law* ("AML") came into effect in 2008, a significant amount of cases have emerged. Comparatively, the number of IP-related antitrust cases is quite small. But not only the civil antitrust cases going through trial (i.e., Huawei v. Inter Digital in 2013), but also the cases which were dealt by the antitrust agencies (i.e., the Qualcomm decision in 2015) have had a profound effect. The related fact-finding and legal analyses have drawn broad attention internationally.

In 2015, the IP-related cases are mainly dealt by the administrative antitrust agencies, in particular the National Department and Reform Commission ("NDRC") – its investigation against for abuse of dominance – and the IP related merger cases investigated by the Ministry of Commerce ("MOFCOM").

## II. MAJOR CASES

### *A. Qualcomm's Abuse of Market Dominant Case*<sup>1</sup>

NDRC accepted the complaint against Qualcomm Technologies, Inc. ("Qualcomm") according to the *AML* and other regulations, and investigated to find out whether Qualcomm had a dominant position in the market for licensing CDMA, WCDMA and LTE wireless communication standard essential patents ("wireless standard essential patents") and the market for baseband chips for CDMA, WCDMA and LTE wireless communication terminal devices ("baseband chips"), and

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1. Administrative Penalty Decision No.1 [2015], Price supervision and inspection Bureau of NDRC, see [http://jjs.ndrc.gov.cn/fjgld/201503/t20150302\\_666170.html](http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html), published on February 9, 2015, accessed on March 20, 2016.

whether Qualcomm had abused its dominant position.

In this case, considering that Qualcomm used its wireless standard essential patents in several jurisdictions to offer a package license, NDRC investigated Qualcomm's wireless standard essential patents licenses and the sale of baseband chips, which are involved during the manufacture and sale of the wireless communication terminals in China and are closely related to domestic market competition and consumer interests.

After investigating and collecting evidence for more than a year, NDRC found that Qualcomm had a dominant position in the CDMA, WCDMA and LTE wireless standard essential patents licensing market and the baseband chip market, and had engaged in the following types of conduct amounting to an abuse of dominance:

**1. Abuse of the dominant position in wireless standard essential patents license market by charging an unfairly high price for the patent license.**

The specific manifestations of this abuse were, first, that the company charged for expired wireless standard essential patents, granted long-term and non-fixed-term licenses and did not provide a patent list. Qualcomm's argument that newly added patents can make up the value of the expired licenses were not proven. Second, Qualcomm was found to require licensees to grant free cross-licenses. When licensing its wireless standard essential patents, Qualcomm was found to force some licensees to cross-license related non-wireless standard essential patents and grant free cross-licenses. The company was also found to have prohibited some licensees from launching lawsuits against it and its clients on related patents. Third, Qualcomm was found to have put the wireless standard essential patents and non-wireless standard essential patents in a package license. At the same time, Qualcomm used the net wholesale price of a wireless communication terminal as the basis for calculating royalties.

NDRC held that Qualcomm's conducts stated above eliminated and restricted competition in the wireless communication technology market, violating the subparagraph (1) of Article 17 of the *AML*, which prohibits dominant companies from selling products at unfairly high price.

**2. Abuse of the dominant position in the wireless standard essential patents license market, by engaging in tying arrangement of the non-essential wireless patents without any justifiable cause during the course of its licensing of wireless standard essential patents.**

During the course of wireless standard essential patents licensing, Qualcomm did not distinguish the wireless standard essential patents from the non-essential wireless patents, and did not provide a patent list to its licensees. Instead, it charged at a fixed royalty and granted a package

license. Qualcomm also bundled other licenses with its wireless standard essential patents license.

The above-mentioned conduct made it difficult for technologies competing with the company's non-essential wireless patents to compete in the market, thereby eliminating and restricting competition in the related non-essential wireless patents licensing market. The conduct was further found to hinder and suppress technology innovation, and ultimately harm the interests of consumers. NDRC held that Qualcomm, without any justifiable cause, bundled the licensing of non-wireless standard essential patent with that of its wireless standard essential patents, in breach of the subparagraph(5) of Article 17 (1) of the *AML*, which prohibits dominant companies from tying without any valid reasons.

### **3. Abuse of the dominant position in the baseband chip market by imposing unreasonable trading conditions during the sale of baseband chips.**

Qualcomm was found to set the signing and no-challenge of a patent license agreement as a pre-condition for companies to be able to buy Qualcomm baseband chips. NDRC held this to amount to forcing potential or present licensees, who are not willing to accept these unreasonable patent license conditions, out of the market thereby eliminating and restricting market competition. NDRC held that Qualcomm had, without any justifiable cause, imposed unreasonable trading conditions during the sale of baseband chips. The requirements upon licensees to sign a patent license agreement with unreasonable conditions and not to challenge the agreements were found to violate the subparagraph (5) of Article 17 of the *AML*, which prohibits dominant companies from imposing unreasonable trading conditions.

Pursuant to Articles 47 and 49 of the *AML*, NDRC ordered the following penalties for the above-mentioned conduct:

#### **a. Qualcomm was ordered to stop the violations**

When granting wireless standard essential patent licenses to Chinese manufacturers, Qualcomm shall provide a list of patents and shall not charge a license fee on an expired patent. Qualcomm was ordered not to require licensees who enjoy non-essential wireless patents to grant cross-licenses against their own will. Besides, Qualcomm cannot force the licensees to grant any related cross-licenses at an unreasonable cost; Regarding the sales of wireless communication terminals in China, Qualcomm shall not insist on using the net wholesale price of a wireless communication terminal as the basis for calculating the wireless standard essential patent royalties while the rate of the royalty has already been high. Qualcomm was ordered not to implement tie-in sales of non-wireless standard essential patents without justifiable cause.

Regarding wireless communication terminal manufacturers purchasing baseband chips in

China, Qualcomm shall not put unreasonable conditions on potential licensees, such as requiring royalties on expired patents, free cross-licenses, tying non-wireless standard essential patents without valid reasons, etc. Qualcomm shall not put clauses prohibiting the challenge of patent license agreements as a pre-condition for the supply of baseband chips.

The prohibitions stated above should be also applied to the subsidiaries of Qualcomm and other companies Qualcomm has actual control over. When the Qualcomm assigns the wireless standard essential patents to others, it shall require the assignee to accept the restrictions listed above.

b. A fine of 8% of its total sales volume made in 2013 was imposed on Qualcomm

Considering the seriousness, profound extent and long duration of Qualcomm's abusive conduct, NDRC imposed a fine of 8% of the total sales volume made in 2013, which amounted to RMB 6,088 million.

This case is the Chinese antitrust case with the highest fine, and has drawn the broadest attention since the *AML* came into effect in 2008. It is one of the top 10 antitrust developments in 2015<sup>1</sup>. The NDRC decision stops the anti-competitive conduct in the wireless communications industry which Qualcomm was found to have engaged for some time, and is meant to encourage free competition in this industry and protect consumers' interests. The way used to identify the Qualcomm's dominant position and abusive conduct, and the remedies imposed on the company's conduct have a great impact on the antitrust/IP field.

### ***B. IP-Related Merger Cases Investigated by MOFCOM***<sup>2</sup>

On April 21, 2015, MOFCOM accepted the merger filing for Nokia's acquisition of Alcatel-Lucent. Its antitrust assessment began with a survey of the communication technology standard essential patent licensing market to then analyze the merger's impact on the Chinese market. MOFCOM analyzed the parties' overlaps in the wireless network access equipment, core network equipment, network infrastructure services markets, and studied the competition issues that may raise in relation to communications standard essential patents held by Nokia post-merger.

MOFCOM held that Nokia's acquisition of Alcatel-Lucent may have the effect of eliminating and restricting competition in the wireless communications standard essential patents licensing market.

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1. Jiang Liyong: THE TOP 10 ANTITRUST DEVELOPMENT IN 2015, see [http://www.huxiu.com/article/140503/1.html?f=index\\_feed\\_article](http://www.huxiu.com/article/140503/1.html?f=index_feed_article), published on March 2, 2016, accessed on March 20, 2016.

2. *Announcement on the Anti-Monopoly Review Decision on Conditional Approval for the Concentration of Undertakings in the Acquisition of Alcatel-Lucent by Nokia*, Announcement of the Ministry of Commerce No.44 [2015], see <http://fdj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml>, published on October 19, 2015, accessed on March 20, 2016.



Based on the commitments made by Nokia to MOFCOM, the authority decided to conditionally approve the transaction. On October 19, 2015, MOFCOM published its decision conditionally approving the transactions. The restrictive conditions include the following:

First, subject to reciprocity, Nokia should not seek injunctions based on standard essential patents ("SEPs") to block the implementation with a fair, reasonable and non-discriminatory ("FRAND") standard, unless it has already provided license conditions in compliance with the FRAND principle, but the potential licensee has not entered into FRAND license or followed license conditions in good faith.

Second, if some SEPs are assigned to a third party, which would have a great impact on the value of the SEP packages to be licensed to Chinese licensees, the pre-assignment licensees have the right to re-negotiate the royalty rate before expiry of the existing license agreement.

Third, if Nokia assigns its SEPs to new owners in the future, Nokia can only assign them on the condition that the new owners accept the fact that Nokia is bound to comply with the FRAND obligations on these SEPs as committed to the standard-setting organization. As a result, the FRAND obligations will also be assigned to the new owners.

Nokia should also follow the obligations under the *AML* and related regulations. If Nokia does not follow the obligations mentioned above properly, MOFCOM shall take certain measures according to the related regulations in the *AML*.

# APPENDIX

## **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 CHINA

ZHANG Guangliang\*

## I. PATENTS

### *A. Number of Applications*

In 2015, the number of the applications for invention, utility model and design patents in China was 2,799,000. Among the number of the applications for invention patents was 1,102,000, up 19% year-on-year. The number of utility model patents was 1,128,000, up 30% year-on-year. The number of design patents was 569,000, up 1% year-on-year.

2,639,000 Chinese domestic applications for invention, utility model and design patents were made, among which the number of the applications for domestic invention patents was 968,000, up 20.9% year-on-year.<sup>1</sup>

### *B. Number of Grants*

During the course of 2015, the number of grants of invention, utility model and design patents in China was 1,718,000, up 32% year-on-year. Among these, there were 359,000 invention patent grants, up 54% year-on-year. The number of utility model patent grants was 876,000, up 24% year-on-year. The design patents granted amounted to 483,000, up 33% year-on-year.

The number of the Chinese domestic grants for invention, utility model and design patents was 1,597,000, up 32% year-on-year. Among these, the number of the domestic grants for invention patents reached 263,000, up 61.9% year-on-year. Among the domestic grants of invention patents, the number of service inventions was 239,000, accounting for 90.9% of all domestic granted invention patents, while the number of non-service patent grants was 24,000, accounting for 9.1%.<sup>2</sup>

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1. *SIPO's Monthly Statistics Bulletin of Patent Affairs and Integrated Management*, see <http://www.sipo.gov.cn/tjxx/tjyb/2015/201601/P020160114531916715830.pdf>, accessed on April 26, 2016.

2. *SIPO's Monthly Statistics Bulletin of Patent Affairs and Integrated Management*, see <http://www.sipo.gov.cn/tjxx/tjyb/2015/201601/P020160114531916715830.pdf>, accessed on April 26, 2016.

### ***C. Number of PCT Applications and Grants***

The number of the applications under the Patent Cooperation Treaty ("PCT"), which the State Intellectual Property Office received in 2015, was 30,548, up 16.7% year-on-year. Among these, 28,399 were domestic applications, accounting for 93%, representing an increase of 18.3% year-on-year. 2,149 of them were foreign applications, a decrease of 0.6% year-on-year.

The number of the Chinese domestic stage PCT applications for invention patents was 82,000, increasing by 2.8% compared with the year before. The number of the Chinese domestic stage PCT applications for international utility model patents was 1,098, reflecting an increase of 11%.<sup>1</sup>

### ***D. Number of Ownership***

By the end of 2015, the number of the domestic ownership of invention patents amounted to 872,000 (Hong Kong, Macao and Taiwan excluded), up 31.4% year-on-year. The patent density was 633.7 pieces per millions of people, increased by 30% year-on-year.<sup>2</sup>

### ***E. Other***

In 2015, 138 patent agencies were newly approved and established, and 4,777 individuals in total passed the "patent agent qualification examination." The number of national patent agencies surpassed 1,200 and that of practicing patent agents exceeded 12,000.<sup>3</sup>

During 2015, the amount of patent pledges increased by RMB 56 billion in total in China, an increase of 14.5% compared with the previous year.<sup>4</sup>

## **II. TRADEMARKS**

In 2015, the received number of the applications for trademark registration amounted to 2,876,000, representing an increase of 25.85% compared with the year before and an all-time high. Online applications for trademark registration reached 1,988,200 throughout the entire year,

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1. SIPO's Monthly Statistics Bulletin of Patent Affairs and Integrated Management, see <http://www.sipo.gov.cn/tjxx/tjyb/2015/201601/P020160114531916715830.pdf>, accessed on April 26, 2016.

2. SIPO's Monthly Statistics Bulletin of Patent Affairs and Integrated Management, see <http://www.sipo.gov.cn/tjxx/tjyb/2015/201601/P020160114531916715830.pdf>, accessed on April 26, 2016.

3. SIPO's Monthly Statistics Bulletin of Patent Affairs and Integrated Management, see <http://www.sipo.gov.cn/tjxx/tjyb/2015/201601/P020160114531916715830.pdf>, accessed on April 26, 2016.

4. Patent Pledge Financing Exceeded 56 Billion in 2015, see [http://www.sipo.gov.cn/zscqgz/2016/201601/t20160128\\_1234421.html](http://www.sipo.gov.cn/zscqgz/2016/201601/t20160128_1234421.html), published on January 28, 2016, accessed on April 26, 2016.

accounting for 69.13% of the total applications in the same period, 2.2 times more than paper applications.

The average effective registered trademarks owned per 10,000 Chinese market entities increased from 1,074 in 2011 to 1,335 in 2015, an increase of 24.3%. By the end of 2015, the applications for trademark registration in China have totaled 18,402,700 pieces, registered 12,253,900 pieces in total, and effectively registered 10,343,900 pieces. In China every 7.5 market players have an effective registered trademark.<sup>1</sup>

### III. COPYRIGHTS

In 2015, China continued to maintain a substantial growth in copyright registrations: 1,348,200 pieces of work registration, 292,360 pieces of computer software copyright registration, and 606 pieces of copyright pledge registration. The total amount of copyright registration reached 1,641,166 pieces, an increase of 35.49% compared to 1,211,313 pieces in 2014.

From the types of registered works, photography works represented the largest category, with 510,120 pieces, 38.74% of the total, registered. Literary works followed with 489,672, accounting for 37.19%; art works 274,431, accounting for 20.84%; film and television works 15,527, accounting for 1.18%; video products 8,627, accounting for 0.66%; graphic works 5,315, accounting for 0.40%; phonograms 3,998, accounting for 0.30%; musical pieces 2,834, accounting for 0.22%; model, drama and dance totaling 6,319, accounting for 0.48% in total.

In 2015, the number of the registrations for Chinese computer software copyright hit a new record high: a total of 292,360 pieces of software were registered throughout the entire year, increasing 33.63% compared with the previous year.

During the course of 2015, 606 pieces of copyright pledges were registered by the Copyright Protection Center of China, reflecting an increase of 22.18% as compared with the previous year. Among these, 409 pieces were registrations of work copyright pledges, increasing by 34% year-on-year. The remaining 197 pieces were registrations of computer software copyright pledges, representing a decrease by 3.14% year-on-year.<sup>2</sup>

1. China's Applications for Trademark Registration Over 10 Million, see [http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201604/t20160420\\_168049.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201604/t20160420_168049.html), published on April 20, 2016, accessed on April 26, 2016.

2. Notification for the National Registration of Copyrights in 2015, see <http://www.ncac.gov.cn/chinacopyright/contents/483/274781.html>, published on February 14, 2016, accessed on April 26, 2016.

## IV. OTHER

The amount of the applications for integrated circuit layout design registration in 2015 amounted to 2,058, an increase of 12% year-on-year. The number of certifications issued was 1,800, an increase of 15.9% year-on-year.<sup>1</sup>

The amount of the applications for new variety rights of agricultural plants in 2015 was 2,069, increasing by 17% year-on-year. The amount of the applications for new variety rights of forest plants was 1,788 in total.<sup>2</sup>

## V. ADMINISTRATIVE PROTECTION

The Chinese government strengthened its efforts to combat patent infringements in the year of 2015, and 35,844 administrative law enforcement cases on patents were handled, up 46.4%. In 2015, the national intellectual property (“IP”) rights system handled 14,607 patent disputes and 21,237 patent counterfeit cases, up 77.7% and 30.6%, respectively. Among these, 14,202 cases are related to patent infringements.<sup>3</sup>

The Administrations for Industry and Commerce at all levels and market regulators handled 51,000 cases of patent infringement and counterfeit and closed 47,000 cases (representing a monetary amount of RMB 740 million). The authorities destroyed 522 dens making and selling fakes, transferred 238 suspected criminal cases to the judiciary according to law, involving an amount of RMB 120 million in total.<sup>4</sup>

## VI. JUDICIAL PROTECTION

In 2015, the number of first-instance, second-instance and re-tried cases in the IP field which were accepted and disposed by courts grew by 11.49% and 11.76% to 149,238 and 142,077 respectively compared with the year 2014. The courts accepted 130,200 new civil, administrative and criminal IP cases at first instance, 11.73% more than 2014. Among these, the courts at the district level disclosed 123,059 IP cases, up 11.68% year-on-year.<sup>5</sup>

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1. *Press Conference of Applications for the Authorization of Invention Patent and other Relevant Circumstances in 2015*, see <http://www.sipo.gov.cn/twzb/2015ndzygztjsj/>, published on January 14, 2016, accessed on April 26, 2016.

2. *Press Conference of Chinese Intellectual Property Development in 2015*, see <http://www.sipo.gov.cn/twzb/2015zscqfzkkfbh/>, published on April 19, 2016, accessed on April 28, 2016.

3. *Analysis on the Data of the Law Enforcement in the Intellectual Property System in 2015*, see [http://www.sipo.gov.cn/zscqgz/2016/201601/t20160118\\_1230431.html](http://www.sipo.gov.cn/zscqgz/2016/201601/t20160118_1230431.html), published on January 18, 2016, accessed on April 28, 2016.

4. *Press Conference of Chinese Intellectual Property Development in 2015*, see <http://www.sipo.gov.cn/twzb/2015zscqfzkkfbh/>, published on April 19, 2016, accessed on April 28, 2016.

5. *Intellectual Property Protection by Chinese Courts in 2015*, see <http://mt.sohu.com/20160421/n445409528.shtml>, published on April 21, 2016, accessed on April 28, 2016.

### ***A. Civil Cases***

In 2015, the number of civil IP cases accepted and disposed by local courts at first instance grew by 14.51% and 7.22% to 109,386 and 101,324 respectively. The closing rate of civil IP cases at first instance was 82.66%. Among the cases accepted in 2015, 11,607 were patent cases, up 20.3% year-on-year; 24,168 were trademark cases, up 13.14% year-on-year; 66,690 were copyright cases, up 12.1% year-on-year; 1,480 were technology contract cases, up 38.19% year-on-year; 2,181 were competition cases (156 were antitrust-related), up 53.38% year-on-year; and 3,093 were "other" IP cases, up 22.45% year-on-year.

Among the cases disposed in 2015, 1,327 involved foreign parties, down 22.67% year-on-year, while 387 cases involved parties from Hong Kong, Macau or Taiwan, down 9.15% year-on-year.

The number of civil IP cases at second instance which were accepted and concluded in 2015 rose 9.84% and 9.61% to 15,114 and 15,025. New and concluded cases at the re-trial level increased by 43.75% and 21.28% respectively, to 115 and 114.

In 2015, the number civil IP cases accepted and handled by the Supreme People's Court ("SPC") grew to 381 and 377, an increase of 13.39% and 11.2% respectively. Among these, there were eight and seven, respectively, were new and concluded case examined as second instance cases. The numbers of new and concluded cases examined as re-trial cases were 329 and 321 respectively. New and concluded cases examined by "referral" (tishen) were 18 and 23 respectively (including cases carried over from previous years).<sup>2</sup>

### ***B. Administrative Cases***

During the course of 2015, local courts accepted 9,839 IP-related administrative cases at first instance, a number which remains basically unchanged compared to the previous year. Those courts closed 10,926 such cases (including cases carried over from previous years), 123.57% more than previous year. The closing rate of administrative IP cases at first instance was 70.5%.

Of those accepted, 1,721 were patent cases, up 219.29% year-on-year; 7,477 were trademark cases, down 19.65% year-on-year; 10 were copyright cases, down 16.67% year-on-year; 631 were other IP cases, up 917.74% year-on-year.

The number of first-instance cases involving foreign parties or Hong Kong, Macao or Taiwan

1. *Intellectual Property Protection by Chinese Courts in 2015*, see <http://mt.sohu.com/20160421/n445409528.shtml>, published on April 21, 2016, accessed on April 28, 2016.

parties was 4,928, representing 45.1% of the concluded IP-related administrative cases at first instance, unchanged from the previous year. 4,348 of these cases involved foreign parties, 295 Hong Kong parties, 8 Macao parties and 277 Taiwan parties.

In 2015, the SPC accepted 378 IP-related administrative cases and concluded 377, up 161% and 150% year-on-year respectively. Among these cases, 367 were re-trial cases and 361 were closed.<sup>1</sup>

### ***C. Criminal Cases***

In 2015, the local courts accepted 10,975 IP-related criminal cases at first instance. This number basically remains unchanged from the previous year. New lawsuits included 4,913 IP infringement cases (4,358 involved registered trademarks, such as use of counterfeit marks, and 504 involved copyrights), down 6.28% year-on-year; 3,925 were IP infringement cases involving the crime of production and sale of sub-standard products, down 1.03% year-on-year; 1,923 were IP infringement cases involving the crime of illegal business operations, up 13.32% year-on-year; 214 were cases of other nature, up 16.94% year-on-year.

### ***D. Other***

Significant progress was achieved through the establishment of IP courts in the year 2015. The creation of IP Courts in Beijing, Shanghai and Guangzhou witnessed a good start. As of December 31, 2015, the above-mentioned three IP Courts have handled 15,772 IP-related civil and administrative cases. As of November 2015, six High People's Courts, 95 Intermediate People's Courts and 104 Basic People's Courts have launched the "Three-in-One" reform (i.e., joint trial of IP-related civil, administrative and criminal cases).<sup>2</sup>

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1. *Intellectual Property Protection by Chinese Courts in 2015*, see <http://mt.sohu.com/20160421/n445409528.shtml>, published on April 21, 2016, accessed on April 28, 2016.

2. *Intellectual Property Protection by Chinese Courts in 2015*, see <http://mt.sohu.com/20160421/n445409528.shtml>, published on April 21, 2016, accessed on April 28, 2016.



## APPENDIX 2.

# RELEVANT DATA IN THE FIELD OF COMPETITION LAW OF CHINA

LV Qing\*

In China, three administrative 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 to hear and decide civil lawsuits based on the AML between private parties and administrative appeals against decisions by the administrative authorities.

## I. MINISTRY OF COMMERCE

The MOFCOM is in charge of the merger review process. From August 1, 2008 (the entry into force of the AML) through to the end of 2015, according to MOFCOM unconditional case lists<sup>1</sup> and MOFCOM press conferences,<sup>2</sup> the MOFCOM reviewed a total of 1,298 cases. Among these cases, 1,270 were unconditionally approved (about 97% of the total); 26 were conditionally approved; and two were prohibited (about 2% of the total).

In 2015, the MOFCOM approved 310 cases without conditions. Among these 310 cases, 231 cases satisfied the simple case standards and were cleared under the simple case procedure. The remaining cases were approved in the standard review procedure.<sup>3</sup>

In 2015, the MOFCOM also approved two cases subject to conditions.<sup>4</sup>

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1. See <http://fldj.mofcom.gov.cn/article/zcfbl/>, accessed on April 20, 2016.

2. *MOFCOM 2015 annual work overview IX: actively promoting antitrust enforcement and maintaining fair market competition*, see <http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml>, published on January 15, 2016, accessed on April 20, 2016.

3. See <http://fldj.mofcom.gov.cn/>, accessed on April 20, 2016.

4. *Announcement on the Anti-monopoly Review Decision on Conditional Approval for the Concentration of Undertakings in the Acquisition of Alcatel-Lucent by Nokia*, Announcement of the Ministry of Commerce No. 44 [2015], see <http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml>, published on October 19, 2015, accessed on April 21, 2016; *Announcement on the Anti-monopoly Review Decision on Conditional Approval for the Concentration of Undertakings in the Acquisition of Freescale by NXP*, Announcement of the Ministry of Commerce No. 64 [2015], see <http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml>, published on November 27, 2015, accessed on April 21, 2016.

## II. NATIONAL DEVELOPMENT AND REFORM COMMISSION

The 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 2015, 45 penalty decisions were published on NDRC's website, nine of which were adopted in 2015.<sup>1</sup>

## III. STATE ADMINISTRATION FOR INDUSTRY FOR INDUSTRY AND COMMERCE

The 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.

By the end of 2015 there were 33 penalty decisions published on SAIC's website, including six cases where the SAIC granted suspension of investigation.<sup>2</sup> According to the official statistics, the SAIC and its local offices authorised and investigated 58 antitrust cases since the *AML* became effective until the end of 2015, 24 of which have been concluded.

In 2015, the SAIC launched 12 antitrust investigations.<sup>3</sup> The market supervision department of the SAIC investigated and decided 68,170 cases of all kinds of anti-competitive conduct and the penalty amounted to 1.157 billion.<sup>4</sup>

## IV. COURTS

The *AML* gives the courts the jurisdiction over private litigation as well as administrative law litigation. And the courts also accepted unfair competitive cases.

For private litigation, since the *AML* came into force in 2008 until the end of 2015, courts in China reportedly accepted a total of 415 private antitrust lawsuits.<sup>5</sup> In 2015, courts in China

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1. See <http://www.sdpc.gov.cn/fzgggz/jgjdylfd/fjgld/index.html>, accessed on April 22, 2016.

2. See <http://www.saic.gov.cn/zwgk/gggs/jzzf/>, accessed on April 22, 2016.

3. *Classic Anti-Monopoly Case Workshop of SAIC held in Chong Qing*, see [http://www.cq.xinhuanet.com/2015-12/02/c\\_1117327188.htm](http://www.cq.xinhuanet.com/2015-12/02/c_1117327188.htm), published on December 2, 2015, accessed on April 22, 2016.

4. *The SAIC Investigated and Decided 68170 Pieces of Anti-Competitive Cases in 2015*, see <http://finance.people.com.cn/n1/2016/0426/c1004-28306661.html>, published on April 26, 2016, accessed on April 30, 2016.

5. *Strengthen the Proficiency and Enhance Law Enforcement*, see [http://www.saic.gov.cn/jgzf/fldyfbzljz/201507/t20150701\\_158420.html](http://www.saic.gov.cn/jgzf/fldyfbzljz/201507/t20150701_158420.html), published on July 1, 2015, accessed on April 23, 2016; *China Will Promote the Normalization and Refinement of Anti-trust Enforcement*, see <http://tech.xinmin.cn/2016/01/20/29351826.html>, published on January 20, 2016, accessed on April 23, 2016.

reportedly accepted 141 private antitrust lawsuits.<sup>1</sup>

For administrative litigation, there hasn't been any court challenge of authority decisions in the first five years of *AML* enforcement history. In 2014, there was reportedly at least 2 administrative cases brought to court, the case of Jiangsu Concrete Company<sup>2</sup> and the case of Hubei Power Supply Company<sup>3</sup>. However, in 2015, there was no public court judgment in administrative appeals against decisions by the antitrust authorities. Local courts of china accepted 2,181 pieces of unfair competitive cases, among which 156 cases belong to private anti-trust lawsuits, up 53.38%year-on-year.<sup>3</sup>

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1. *Strengthen the Proficiency and Enhance Law Enforcement*, see [http://www.saic.gov.cn/jgzf/fdyfbzljz/201507/t20150701\\_158420.html](http://www.saic.gov.cn/jgzf/fdyfbzljz/201507/t20150701_158420.html), published on July 1, 2015, accessed on April 23, 2016; *China Will Promote the Normalization and Refinement of Anti-Trust Enforcement*, see <http://tech.xinmin.cn/2016/01/20/29351826.html>, published on January 20, 2016, accessed on April 23, 2016.
  2. Administrative Judgment No.70[2014], Nanjing Intermediate People's Court (first-instance); Administrative Judgment No.71[2014], Nanjing Intermediate People's Court (first-instance); Administrative Judgment No.72[2014], Nanjing Intermediate People's Court (first-instance).
  3. Administrative Judgment No.00004[2014], Hubei Province Yi Chang City Xi Ling District People's Court (first-instance).
  4. *Intellectual Property Protection by Chinese Courts in 2015*, see <http://mt.sohu.com/20160421/n445409528.shtml>, published on April 21, 2016, accessed on April 30, 2016.

# BOOK TWO

**MRLC IP & COMPETITION LAW**

**2015 ANNUAL REPORT OF KOREA**



## **PART I.**

# **OVERVIEW OF INTELLECTUAL PROPERTY POLICY AND COMPETITION POLICY OF KOREA**

### **CHAPTER 1.**

OVERVIEW OF INTELLECTUAL PROPERTY POLICY

### **CHAPTER 2.**

OVERVIEW OF COMPETITION POLICY

**CHAPTER 1.****OVERVIEW OF INTELLECTUAL PROPERTY  
POLICY***AHN Hyo Jil\****I. OVERVIEW**

Korea does not have a single code for protection of intellectual property rights but has enacted separate laws in each area that is deemed to need protection. First, there is the Patent Act to protect inventions and the Utility Model Act to protect utility models. An invention is considered a highly advanced creation of technical ideas that utilizes laws of nature, while a less advanced creation is considered a utility model. The Utility Model Act does not protect materials and methods. Semiconductor designing technology is protected by a separate Semiconductor Design Act. There is also the Design Protection Act to protect industrial designs and the Trademark Act to protect registered trademarks and service marks. In addition, the Unfair Competition Prevention and Trade Secret Protection Act (the “Unfair Competition Prevention Act”) prohibits acts of unfair competition and infringements on trade secrets. While the Unfair Competition Prevention Act prohibits unfair registration and usage of domain names, the Internet Address Resource Act (the “Internet Address Act”) regulates unlawful registration and usage of domain names. The Act on Prevention of Divergence and Protection of Industrial Technology (the “Industrial Technology Protection Act”) intends to prevent and protect illegal divergence of industrial technology deemed a national core technology or advanced technology that materially affects the security and development of the country, beyond the scope of trade secrets under the Unfair Competition Prevention Act. The Plant Variety Protection Act protects new plant varieties. The Copyright Act protects copyright holders, performers and record producers while the Content Industry Promotion Act protects any content created with significant efforts for five years after production. In addition, the Framework Act on Intellectual Property was established in 2011, aimed at establishing basic government policies and building a system for promotion of creation, protection and utilization of intellectual property.

The subjects of application for each law is not significantly different from other countries. But business marks (such as trademarks, business names, etc.) are protected on two levels. The Trademark Act protects only registered trademarks without regard to whether the registered

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trademark is well-known or famous, and the protectional scope is limited to misleading or confusing the origin of product. On the other hand, the Unfair Competition Prevention Act protects well-known trademarks, business names, names and other business marks without regard to whether they are registered and protects against dilution in addition to misleading or confusion of origin. In the meantime, the Design Protection Act included letter fonts in its protectional scope since 2004.

Works related to the Patent Act, Utility Model Act, Semiconductor Design Act, Design Protection Act, Trademark Act and Unfair Competition Prevention Act are all governed by the Korean Intellectual Property Office (the “KIPO”), while works related to the Copyright Act and Content Industry Promotion Act by the Ministry of Culture, Sports and Tourism. Matters that fall under the Industrial Technology Protection Act are handled by the Ministry of Trade, Industry and Energy while the Ministry of Agriculture, Food and Rural Affairs and the Ministry of Oceans and Fisheries oversee the Plant Variety Protection Act. Matters under the Internet Address Act are governed by the Ministry of Science, ICT and Future Planning.

The Intellectual Property Tribunal under KIPO acts as a court of first instance for matters concerning the invalidation of registration and trials to confirm the scope of a patent right. The Patent Court (established in 1988) has jurisdiction over appeals against a judgment of the Intellectual Property Tribunal, and final judgment is made at the Supreme Court. From 2016, lawsuits concerning infringement on patent rights, utility model rights, design rights, trademark rights or species protection rights will first be litigated at one of the five regional courts, and may be appealed at the Patent Court. In other words, appeals of infringements on patents (and other rights as above) will be under the exclusive jurisdiction of the Patent Court like appeals to Intellectual Property Tribunal decisions.

## **II. Developments in 2015**

There were not many law revisions in the field of Intellectual Law in 2015. Significant law revisions in 2015 included revisions in the Patent Act, Utility Model Act and Unfair Competition Prevention Act. Significant revisions of enforcement decrees were made in relation to the Patent Act, Utility Model Act, Trademark Act and Copyright Act.

The most important change was the change of jurisdiction for infringement lawsuits of industrial property rights (including patents). In the past, the court system of Korea operated as a dual system in which patent courts had jurisdiction over patent infringement lawsuits while general courts had jurisdiction over cancellation of decision lawsuits. But through revision of the Court Organization Law and Civil Procedure Code, jurisdiction of infringement lawsuits has been concentrated. First, district courts (located in the area where the relevant high court sits) were granted exclusive jurisdiction over actions against infringement of ‘intellectual property rights including



patents' (patent rights, utility model rights, design rights, trademark rights, and plant variety protection rights) by revising the Civil Procedure Code. The Seoul Central District Court, however, has exclusive jurisdiction for cases falling under the jurisdiction of the Seoul High Court (Article 24.2). In effect, suits may only be filed at the Seoul Central District Court, Daejeon District Court, Daegu District Court, Busan District Court or Gwangju District Court. Also, Article 24.3 allows concurrent jurisdiction so that parties have the option to bring suit at the Seoul Central District Court notwithstanding exclusive jurisdiction. This allows the Seoul District Court to utilize the expertise it has built up through adjudicating intellectual property lawsuits. Through revision of the Court Organization Law, the Patent Court has exclusive jurisdiction over appeals of such intellectual property right infringement lawsuits (Article 28, Article 28.4, Article 32.2). This has improved the expertise, consistency and efficiency of judgments. Suits concerning 'intellectual property rights other than patents' can be brought according to the Civil Procedure Code (Article 2 or Article 23) as usual. In addition, bringing suit at District Courts (located in the area where the relevant high court sits) is an option (Article 24.1 of the Civil Procedure Code). Such lawsuits include suits concerning copyright and its neighboring rights according to the Copyright Act; suits concerning unfair competition and trade secret infringement according to Unfair Competition Prevention Act; suits concerning circuit layout rights according to Semiconductor Design Act; and suit concerning geographic representation rights according to the Agricultural and Marine Products Quality Control Act.

(1) Next, the revised Patent Act allows exception of public disclosure after applying for a patent (Article 30.3) and divisional application after registration of a patent (Article 52.1). The previous law only allowed exception of public disclosure when applying for a patent. But the revised law allows exception of public disclosure during the period granted for correcting specifications or plans, or within three months or receipt of a certified copy of a decision to grant/deny a patent. The same provisions apply to the case of utility model registrations (revised Article 11 of the Utility Model Act). Also, the previous law only allowed divisional application during the period granted for correcting specifications or plans, but the revised law extends the period to within three months or receipt of a certified copy of a decision to grant/deny a patent. These provisions are meant to raise the possibility that a patent will be granted. Further, priority review is allowed for people aged 65 + and persons who are unable to complete the process of patent application without priority review due to major health issues (Article 9.12) through revision of Enforcement Decrees of the Patent Act. The Enforcement Decree of the Utility Model Act has similar provisions regarding priority review (Article 5.13).

There are two meaningful en banc Supreme Court judgments in the field of patent law in the last year. First, with regards to deciding whether a product-by-process met the requisite elements for a patent, earlier Supreme Court holdings first looked into whether special circumstances existed (in which the product could only be specified by production method itself), and would only judge upon creativity (compared to prior technology) for inventions that were specific to the product

according to the scope applied for without consideration to production methods only if no special circumstances existed (Supreme Court Judgment in Case No. 2004Hu3416 delivered on June 29, 2006). In contrast, the Supreme Court recently held in an en banc ruling that if a product-by process, even if production methods are described, the object of invention is the final product itself and not the production method. Hence, when determining whether the invention meets patent requirements, review of technological composition should not be limited to production method, but extend to description of production method and the product that has the structure and characteristics that are specified in the scope of patent application. Based on such understanding, the Supreme Court changed its previous position by holding that whether novelty or creativity exists must be determined compared to prior technology notified before the application (Supreme Court Judgment in Case No. 2011Hu927 delivered on January 22, 2015). In short, it held that whether an application meets the requirements for a patent need to be determined on the 'product itself' without regard to whether 'special circumstances' exist. Further, the Supreme Court held that such interpretation regarding scope of application applies identically when determining whether infringement exists in patent infringement suits (Supreme Court Judgment in Case No. 2013Hu1726). Second, previous Supreme Court judgments held that medical drug intake methods and dosage are not patentable subject matter, and do not concern the product itself, and hence, cannot be an element of invention (Supreme Court Judgment in Case No. 2007Hu2926 delivered on May 28, 2009). However, it changed its stance in an en banc judgment by acknowledging that when drug intake methods and dosage are described in addition to the relevant illness and medical effects in relation to a drug invention, such drug intake methods and dosage can add value to the product by expressing the property that best sets forth the product's effects. Hence, new patents can be granted for medical drugs which fulfil the requirements of novelty and creativity by adding drug intake methods and dosage (Supreme Court Judgment in Case No. 2014Hu768 delivered on May 21, 2015).

On the other hand, there was a judgment regarding employee inventions made in Korea that have been registered as a patent abroad. It was held that in such cases, elements like the acquisition and succession of the patentable right of the employee invention, acquisition of non-exclusive license by user, and employee's claim for compensation need to be based on the rights and duties of the employment between employer and employee. Hence, territorial principles or international laws protecting intellectual property rights do not apply and the Invention Promotion Act of Korea should apply as the relevant legal authority to labor contracts (Supreme Court Judgment in Case No. 2012Da4763 delivered on January 15, 2015). If a patent is related to a product invention, producing or selling items only used to manufacture that product are indirect infringements according to Article 127 of the Patent Act. But when the finished product is manufactured abroad, even if partially-finished goods are produced domestically, indirect infringement does not apply as a principle (Supreme Court Judgment in Case No. 2014Da42110 delivered on July 23, 2015). In addition, if an invention uses another party's invention or identical inventions, a use relationship is deemed to be established and falls within the scope of the other party's patented invention (Supreme Court Judgment in Case No. 2014Hu2788 delivered on May 14, 2015). In a case related to the invention of use requiring a

description of medical effect, unless there are special circumstances (like when the pharmaceutical mechanism that represents the medical effects is clearly identified before patent application), the medical effects of the specific matter must be specifically described to satisfy the description requirements (by listing experiments showing pharmacological data or other comparable substitutes) (Supreme Court Judgment in Case No. 2013Hu730 and 2015Hu727).

(2) There was a revision to expand subjects of priority review in the field of trademark law. In the case that a trademark registration applicant receives a written warning for using a similar or identical trademarks for a similar or identical designated good (in relation to another trademark registration), the trademark subject to the warning can be reviewed on as a priority (Article 2.5). This intends to quickly resolves disputes related to trademarks.

There were meaningful judgements about three-dimensional trademarks in the field of trade mark law. In one case, the registered trademark, the designated good was cardiovascular or sexual dysfunction drugs ('Viagra') with a three-dimensional rhombus shape and blue color combination. In a trademark infringement suit between such trademark holder and another party who produced and sold a sexual dysfunction drug with a similar form, the Court held that since the three-dimensional shape and color are not essential to product function, the latter's trademark registration is valid. But since there are differences in shape and the drug is taken on order by doctor and prescription by a pharmacist, and could be distinguished by the packaging and the letters and business names put on the product, the likelihood of confusion is eliminated, and thus not an infringement on trademark nor a violation of unfair competition (Supreme Court Judgment in Case No. in case No. 2013Da84568 delivered on October 15, 2015). In another case on the issue of cancellation of registration refusal of a three-dimensional trademark related to 'hip joint balls' (the designated good), the court held that although the three-dimensional shape itself did not have distinctiveness, distinctive letters on the surface of the balls could generate distinctiveness for the whole mark (Supreme Court Judgment in Case No. 2014Hu2306 delivered on February 26, 2015).

Another case involved invalidation of the 'Girls Generation' trademark. 'Girls Generation' is the name of a singing group with 'cotton coats' and 'makeup services' registered as the designated good or service. The court held that since 'Girls Generation' was well known as the name of a girl group by the public at the time of registration, it had acquired fame (deemed to have acquired fame through mass media one year and a half after its debut), there is a possibility of confusion even when it is used for designated goods or services different from the previous trademark, making the latter trademark registration invalid (Supreme Court Judgment in Case No. 2013Hu1207 delivered on October 15, 2015). In other cases, the court ruled that a trademark only composed of the words 'MONTESSORI' did not have distinctiveness in relation to a designated good of toys since it is more closely related to child education. Hence, a third party using the same trademark does not constitute a trademark infringement or violation of unfair competition (Supreme Court Judgment in Case No. 2013Da15029 delivered on June 11, 2015). Finally, in a case involving registration of the trademark

‘Seoul National University’ with a designated good of baby food, the court ruled that the name ‘Seoul National University’ represents the specific national university, (and not merely a university located in Seoul) since the geographical designation of ‘Seoul’ and common noun ‘University’ are not separable when combined, and thus has distinctiveness (Supreme Court Judgment in Case No. 2014Hu2283 delivered on January 29, 2015).

(3) In the field of copyright law, there was a revision of the Enforcement Decree related to the Copyright Act to relax requirements in using orphan works. This revision abolished the requirement that required users to publicly search for copyright holders on the internet homepage of the Ministry of Culture, Sports and Tourism, and allowed them to search information networks using search tools for the proper copyright holder instead (Article 18.1). Also, previously, the Minister of Culture, Sports and Tourism was required to announce the search for a copyright holder for 15 days to provide legal approval, but this announcement period was shortened to 10 days (Article 20.1).

There were many significant cases in the field of copyright law. First, it was held that an internet link merely indicated the web location information or route to the work stored on a webpage or website. Hence, even if a copyright holder’s work is shown or transmitted to a user (without authorization) because the link directly connects to a webpage infringing on the copyright holder’s replication or transmission rights when clicked, this does not constitute a violation of replication or transmission rights under the Copyright Act, nor a crime of accessory since it does not facilitate infringement (Supreme Court Judgment in Case No. 2012Do13748 delivered on March 12, 2015). In another case involving removal and destruction of wall murals in a train station without proper procedures followed, the court held that when such action violates one’s sense of honor, social credit or fame, it can be an infringement of the copyright holder’s general personal rights, separate from rights to maintain uniformity. In a case where a copyright trust was terminated, and the copyright was returned to the original copyright holder (trustor), a user cannot counter an original copyright holder after such termination based on trustee’s authorization of use (Supreme Court Judgment in Case No. 2011Da101148 delivered on April 9, 2015). Also, since advance playing of a part of a musical work is an act of providing a sample, it cannot misrepresent the contents or form of a work by distorting the idea or feeling of the work and do not constitute an infringement of rights to maintain uniformity (Supreme Court Judgement in Case No. 2012Da109798 delivered on April 9, 2015). Further, the court held under Article 76.2 and Article 83.2 of the Copyright Act, a person who ‘uses’ a record ‘for sale’ must pay considerable compensation to the performer or record maker, ‘a record for sale’ includes not only records made for sale to unspecified persons but also records offered in a transaction in any form (such as digital records) and the meaning of ‘use’ includes indirect use by providing streaming service of a record for sale (Supreme Court Judgement in Case No. 2013Da219616 delivered on December 10, 2015). In another meaningful ruling, the court held that even if a work includes immoral and illegal contents, it is still protected by copyright laws so that the act of uploading obscene video files on the internet may be considered an infringement of the Copyright Act (Supreme Court Judgement in Case No. 2011Do10872 delivered on June 11, 2015).

In a case involving determination of whether creativity exists in a musical work, the court held that one must focus on the melody (the most specific and uniquely expressed element of a musical work) along with rhythm and harmony (Supreme Court Judgement in Case No. 2013Da14828 delivered on August 13, 2015). The Korea Music Copyright Association applied technological protection measures to karaoke equipment that did not allow karaoke equipment to play new songs without going through a certification procedure. The court held that if one manufactures and sells a device which disables the protection measure, it would constitute a violation of laws prohibiting such disablement, and an indirect violation of the Copyright Act based on infringement of right to perform (Supreme Court Judgement in Case No. 2015Do3352 delivered on July 9, 2015). In the case of sale and import of an imitation of a rabbit doll whose original character was created in a foreign country, according to Berne Convention's national treatment principle, foreign-made characters were held to be protected by Korean copyright laws as an infringement on the replication and secondary product rights, in addition to being a violation of the Unfair Competition Prevention Act (Supreme Court Judgement in Case No. 2015Do11550 delivered on December 10, 2015). The court also ruled that a song composed of lyrics and music can be divided into the lyric part and music part, making it a combination work and not collaborative work (Supreme Court Judgement in Case No. 2013Da58460 delivered on June 24, 2015). Lastly, abstract types of character, or incidents or backgrounds that typically appear in relation to a topic in fiction were held to fall under the domain of ideas and are not protected by copyright laws (Supreme Court Judgement in Case No. 2013Da14378 delivered on March 12, 2015).

(4) In the field of trade secrets, there was a revision of the Unfair Competition Prevention Act to relax requirements for trade secret protection. Previously, 'considerable efforts' were necessary to maintain confidentiality in order to be protected as a trade secret. But, small-to-medium enterprises lacked capabilities to build a sufficient system for trade secret protection, and were often left unprotected. To solve this problem, the revised law relaxed requirements for trade secret protection from a standard of 'considerable effort' to 'reasonable effort' (Article 2.2). Also, in accordance with the original proof system (introduced in 2013 through the revised Unfair Competition Prevention Act), a person who is issued a certificate of authenticity is presumed to possess the information as written in electronic document at the time he registered his electronic fingerprints. (Article 9.2.3). This intended to resolve difficulty of proof for trade secret holders.

There were not many meaningful Supreme Court judgments in the field of trade secrets, but only some significant lower court rulings as follows. Even when a part of information at issue is disclosed to the public through a patent, if the unregistered part of information is maintained as trade secret and has economic value, it can be recognized as a trade secret (Seoul Central District Court Judgement in Case No. 2014No5270 delivered on June 23, 2015). The court held that a non-competition agreement that prohibited employment at a competitor's business for 2 years for low level and low salary employees without any consideration and with a KRW one hundred million penalty was void under Article 103 of the Civil Code as it is against social practices by excessively

limiting the freedom of occupation and work and free competition (Suwon Regional Court Judgment in Case No. 2012GaHab16110, 2012GaHab20317 delivered on May 12, 2015). In another case, the court held that as trade secrets are only protected during the period it reduces production and development (in this case, three years), it would not be an infringement of trade secrets to disclose or use that trade secret after expiration of such period (Busan High Court Judgment in Case No. 2014No1033 delivered on January 15, 2015). In one case, the court held that the period of trade secret protection needs to be limited to a reasonable range (for this case, three years) considering the time and cost the trade secret holder spends to acquire relevant technical information, and the time it would take a competitor to acquire that information (through reverse engineering or independent development). Hence, since the protection period had already passed when the trial had ended, a request for injunction against infringement could not be granted, but a claim for damages was acknowledged (Seoul Central District Court Judgment in Case No. 2011GaHab34076 delivered on February 12, 2015). The court changed the change of employment prohibition period to two years after resignation (from five years) considering the employee's position, work, amount of compensation provided for trade secret protection, and concerns of infringement on freedom of occupation (Seoul Eastern District Court Judgment in Case No. 2013GaHab108097 delivered on January 22, 2015). Finally, a court found that even when information cannot be considered a trade secret under the Unfair Competition Prevention Act (because it does not fulfill requirements of maintenance of confidentiality although fulfilling requirements of non-publicity and economic value), if that information is an important asset to the business, taking and using this information constitutes a violation of a duty of loyalty under the criminal law, and creates tort liability to compensate for damages (Daegu High Court Judgement in Case No. 2015Na473 delivered on August 20, 2015; Busan Regional Court Judgment 2013GaHab48800 delivered on April 23, 2015).

(5) There were no revisions of law related to the Unfair Competition Prevention Act. Some judgments in this field are discussed as follows. First, the Supreme Court held that although a title of a musical cannot be seen to have the function of representing the origin of good or business as a principle, the title 'CATS' suggests a specific musical performance (since it has been performed for a long time in Korea), and hence, a third party performing the musical named 'CHILDREN CATS' constitutes unfair competition (Supreme Court Judgement in Case No. 2012Da13507 delivered on January 29, 2015). In a lower court ruling, the court held that one cannot arbitrarily use another's business mark without consent just because he contributed to the creativity and recognition elements of the business mark (Seoul Central District Court 2015KaHab702 delivered on August 28, 2015). In another case, the court ruled that even if technological or business information does not constitute a trade secret, when the information is 'an important business asset', it is considered a result of 'one's considerable investment and efforts'. Hence, if one uses the information for his own business against fair trade practices, it may be a violation of Unfair Competition Prevention Act (Seoul Central District Court 2014GaHab514641 delivered on December 23, 2015). Finally, where an internet portal business provided an internet keyword search advertisement service which registered and used a keyword set as a combination of the name of an entertainer and a good, the court ruled that only

the issue of infringement of personal right could be reviewed (since publicity right as a property right is not recognized under Korean law). Since the social value or fame of the plaintiffs had not declined and no other damages had occurred due to the keyword advertisements, the personal rights of the defendants were considered not violated. Further, since this sort of keyword search advertisement is a commonly used method and not against fair trade practices, it was not considered a violation of unfair competition (Seoul High Court Judgment 2014Na2006129 delivered on January 30, 2015). This judgment denied recognition of publicity rights, but there are other lower court rulings that have recognized publicity rights as a separate property right. There has not been a Supreme Court judgement on this issue yet generating controversy in academic circles.

**CHAPTER 2.****OVERVIEW OF COMPETITION POLICY***LEE Hwang\****I. OVERVIEW**

The Monopoly Regulation and Fair Trade Act (the “MRFTA”) was established in 1980 in Korea. The MRFTA is unique in that it was introduced spontaneously without direct influence from other countries or on the recommendation of international organizations but rather in response to a public demand to counter the negative effects of conglomerates (the “chaebols”) and establish a free and fair market economy during political and economic turmoil.

The Korean competition law system is based on the so-called economic clause in Clause 2 of Article 119 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. These special laws collectively aim to protect economically-inferior parties such as small and medium-sized enterprises (the “SMEs”).

The MRFTA can be divided into three (3) main types of regulations. The first type concerns traditional domains of competition policies and regulates abuse of market dominating positions, anti-competitive mergers and unjust concerted practices (cartels) to protect and promote free competition in the market. The second type concerns prohibitions of unfair trade practices which aim to maintain fair trade between the market and market participants. 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 last type concerns measures limiting concentration of economic power. These measures regulate or moderate excessive economic power that has resulted from government-led economic development since the 1960s. But regulations under this category have been significantly relaxed since the mid-2000s.

Generally, prohibitions on abuse of market-dominating positions apply when there is a

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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. 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.

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.

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 with the KFTC having limited capacity to investigate charges as an administrative agency.

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 acts is perceived as one of the main functions of the KFTC. But, recently, cases which in nature private and 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. 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 (based on the method employed or details of transaction). Thus, there has been criticism because the illegality standards of unfair trade practices are vague and extensive, and seen to excessively expand its regulatory scope. 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.

With the regulatory categories described above serving as the 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 other 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.

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. Accordingly, some meaningful cases of success have emerged. A symbolic example is the 2013 Military Oil Bid-Rigging case in which the Defense Acquisition Program Administration was awarded KRW 135.5 billion in damages from five (5) refiners. Yet, it is too early to be overly optimistic 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). But in any case, private litigation is expected to increase significantly in the future.

## **II. 2015 TRENDS I: THE SUBSTANTIVE CHARACTERISTICS OF COMPETITION LAW CASES**

The KFTC has continued to be successful in promoting market competition in difficult times when continuous economic growth has stagnated. But recently, the KFTC seemed to shift its priority to the protection of economically inferior parties from promoting market competition, and has been criticized for deviating from traditional goals of competition enforcement. This sort of criticism has continued in 2015.

In 2015, there has been some special aspects to cases in different categories. Most significantly,

the courts have been strengthening their judicial review of illegality and demanding more rigorous standards in cartel cases, the category of cases that the KFTC has been most concentrated on since the 2000s. As a representative case, in the late 2015 ramen cartel judgment concerning information exchange, the court required a high standard of proof for proving agreement that is in effect equivalent to a criminal case. This can be attributed to the court's perception that cartel cases can be distinguished from general administrative cases, since they involve large monetary fines by the KFTC. Thus, the KFTC needs to put in more efforts into collecting evidence to prove the illegality of cartels, including proof of agreement, in the future. In these circumstances, the aforementioned limited investigative powers of the KFTC are likely to add on to its difficulties.

On the other hand, the courts are understood to have relaxed standards concerning methods of proof in proving the anti-competitiveness of cartels compared to earlier cases. In recent years, the Supreme Court had established precedents by which the KFTC would always need to define the market and anti-competitive effects (even in cases of hardcore cartels), resulting in the KFTC losing many cases due to lack of proof of anti-competitive effect. Hence, there were many voices concerned with the dampening effect this would have on regulation of hardcore cartels. But in 2015, through a series of judgments, the Supreme Court has established a new position that the KFTC does not always have to perform rigorous economic analyses for market definition to prove the anti-competitive effect of a hardcore cartel, but may employ intuitive methods for market definition. At the same time, the courts have held that hardcore cartels are highly likely to have anti-competitive effects by nature. This is considered to have relatively lowered the standard of proof required of the KFTC in hardcore cartel cases.

As opposed to cartel cases, there have not been any special developments in the enforcement or cases in the category of market dominant positions. This can be explained in that the KFTC, already over-burdened, chose to focus on the cartels and protection of economically-inferior parties in response to urgent political and social demand, rather than engage in the more complex and resource-intensive tasks of regulating market dominant positions after the 2007 POSCO judgment which required anti-competitive effects to be proven.

In the field of regulation of anti-competitive mergers, there were 3 significant cases of merger regulation concerning global corporations. Since the element of domestic sales has been introduced, there has been an increase of reporting to the KFTC regarding mergers between purely foreign corporations. Against this background, the KFTC's extraterritorial application has been attracting unprecedentedly high interest. Most significantly, the KFTC implemented corrective measures involving a consent decree for the first time in a merger case in the Microsoft-Nokia merger case. This case was considered highly significant because it showed that foreign corporations could utilize consent decree procedures in mergers. The KFTC also actively cooperated with US and Chinese competition authorities to bring about a withdrawal of merger application in the merger case between Applied Material Inc. (AMAT) and Tokyo Electron Ltd. (TEL). This was the second-ever case in

which the KFTC released a statement of objection that led to withdrawal in a case of a global merger.

An important case developed in the regulation of intellectual property rights according to competition laws due to the enactment of Drug Approval-Patent Linkage System (as part of the revision of the Pharmacy Act in March 2015). Although the illegality of agreement to delay the release of generic drugs had already been confirmed through the 2014 Supreme Court judgement in the GSK-Donga Pharmaceutical case, the new system strengthened KFTC monitoring of related cases. Another important case emerged as the KFTC ordered corrective measures in an abuse of patent case in relation to a global merger. In August 2015, the KFTC approved the merger between Microsoft and Nokia on the condition of a consent decree, imposing various corrective measures to prevent Microsoft from abusing the non-standard patents of Nokia. This attracted significant attention since the US and EU authorities had authorized such merger without any conditions and was more in line with the Chinese authorities' conditional authorization. In the meantime, the KFTC's imposition of corrective measures employing the concept of abuse of superior bargaining position in the Dolby standard patent license contract is also considered meaningful. This case was a rare in that it fell slightly out of line of earlier positions taken by the KFTC. While the KFTC had held that it would focus on anti-competitive effects in abuse of standard patents cases (resulting in enforcement of such cases in the category of abuse of market dominant position), this case was regulated as an abuse of superior bargaining position case (falling under the regime of unfair transactions).

### **III. 2015 TRENDS II: SOCIAL PERCEPTIONS AND IMPROVEMENT EFFORTS RELATED TO MRFTA ENFORCEMENT PROCEDURES**

In 2015, there was much criticism concerning the KFTC's enforcement procedures. These issues arose as the KFTC strengthened its enforcement and the demand for stronger rights to defense by defendants and expectations by the courts and law firms for due process grew. The main issue involved the fact that the KFTC is primarily an administrative agency (although its quasi-judicial powers are recognized) and should strengthen its judicial review and improve due process in its investigation and deliberation procedures accordingly.

The demand for procedural improvements are expected to show most prominently in the investigation of cartels, the KFTC's most concentrated category of enforcement. Due to the KFTC's active enforcement, instances of hardcore cartels have decreased and it has become difficult to collect direct evidence of agreement. Accordingly, the KFTC has expanded into investigating "non-hardcore" cartels, transitioning into consolidating extensive indirect evidence to prove agreement. A representative example that called attention was the regulation of a cartel based on information exchange. But in this late 2015 ramen cartel judgment, the Supreme Court demanded a high

standard of proof of agreement with regards to such information exchange. To satisfy this standard, the KFTC needs to secure a variety of evidence through strong investigation. But recently, the KFTC is known to be experiencing difficulty as it is criticized for the mandatory nature of its investigations, while it is pointed out that the law only provides for investigative powers of voluntary nature. Hence, in the future, a large issue remains unresolved as there is a need to reconcile effective enforcement and demands for procedural guarantees.

Primary issues regarding procedures concerns the improvement of enforcement procedures, the repeal of the exclusive prosecution system, and the introduction of third-round appeals.

Firstly, with regards to the improvement of enforcement procedures, the KFTC announced improvement measures bringing about important changes in investigative methods. In the past, the KFTC relied on voluntary cooperation and evidence submission by corporations when investigating due to its administrative nature. But there were some cases in which corporations would not cooperate due to risk of exposure if any illegality was found. The KFTC's resulting investigative methods generated complaints of coercion. There were also complaints that internal case processing within the KFTC (including deliberation and decisions) did not sufficiently guarantee defendants' rights. Hence, the KFTC announced the so-called "Case Handling 3.0" improvement measure to solve such procedural issues. According to this measure, the KFTC will proactively ask for consent and cooperation when investigating corporations, and guarantee rights to make statements in the context of rights to defense. This was to realize due process principles through the establishment of transparent and open procedures. The KFTC hopes to eliminate issues regarding enforcement through these measures, but there is concern that it may reduce its regulatory powers and ultimately interfere with enforcing against serious illegal acts such as cartels.

Secondly, most of the acts regulated by the MRFTA can also be criminally prosecuted. But there has been concern that the scope of criminal prosecution is too extensive as it encompasses anti-competitive mergers as well as lighter cases of unfair trade practices. In addition, there has been concern that direct enforcement by police and prosecutors may weaken the economy, as they lack requisite expertise in competition laws. As a result, since the enactment of the MRFTA, the "exclusive prosecution" system has been in place, requiring prior KFTC referral for the prosecutor's office to be able to bring criminal charges. But there was much criticism because the KFTC did not refer cases to the prosecutor's offices even in important cases. Hence, in 2013, mandatory prosecution was introduced in response to demands for "economic democratization" measures called for during the 2012 presidential elections. According to this measure, 5 agencies (including the prosecutor's office and the Board of Audit and Inspection of Korea) can request criminal referral to the KFTC and the KFTC is then mandated to refer the case to the prosecutor's office. But, even so, such requests for referral has been rare, generating concerns of effectiveness and leading to arguments for the eventual repeal of such exclusive prosecution system. The KFTC is proactively opposed against such repeal and future developments are of great interest.

Thirdly, currently, appeals against KFTC decisions can be brought to the Seoul High Court, leading to a 2-round appeal system in contrast to other administrative actions. But recent strengthening of expertise in the judiciary with regards to competition cases has led to demands for a transition into a 3-round appeal system. Future developments regarding this issue are also of great interest.

## IV. CONCLUSION

The MRFTA has played an essential role in establishing a new developmental paradigm with a focus on market competition, overcoming the limits of conglomerate-driven economic development. This need is expected to increase as Korea survived the 1998 Currency Crisis and 2008 Global Economic Crisis and currently experiences economic polarization issues.

2015 was not a year of great change in competition law enforcement. This means that the enforcement was relatively stable as the current administration reached its third year. In overall, enforcement remained faithful to traditional areas of competition law: there was a continuous expansion of enforcement against cartels, and decisive corrective measures were implemented in cases of domestic and international mergers based on their anti-competitive effects (proved by sophisticated economic analyses). Most importantly, enforcement's leading role in bringing cases against abuse of intellectual property rights was impressive.

But there were setbacks in that enforcement was devalued by concentrating on protecting economically-inferior parties (against principal goals of improving economic efficiencies) while enforcement procedures did not satisfy due process principles. These issues can be understood to reflect the high expectations for competition law that hope a market competition-based competition law regime will help the Korean economy rise beyond the limits of quantitative growth and transition into qualitative development. It is worth noting that there is rising call for more independent enforcement and realization of constitutional due process guarantees.

In 2016, one hopes for improvement regarding such issues, leading to evaluation that competition laws significantly contributed to economic growth, consumer welfare, and current issues of economic polarization.

## **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

**CHAPTER 1.****DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PATENT LAW**

*LEE Eunwoo (Vera) / CHUN Hayoun\**

**I. OVERVIEW**

In 2015, in regards to the Korean patent system and law, there were not only amendments that affected the daily working of a patent, e.g., revision of the public disclosure exception rule and introduction of draft amendment review system, but more importantly, exclusive jurisdiction over appeals of patent infringement lawsuits has been assigned to the Patent Court. Therefore, from January 1, 2016, appeals of trial courts' rulings on patent invalidation and patent infringement lawsuits will be heard exclusively by the Patent Court. Further, in 2015, there were important Supreme Court's *en banc* decisions regarding interpretation of product-by-process claims and patentability of drug administration and dosage regimes.

**II. LEGISLATION AND POLICY DEVELOPMENT*****A. Concentration of Jurisdiction***

In the past, invalidation trial of a patent was tried by the Korean Intellectual Property Trial and Appeal Board ("KIPT"), and appeals from the KIPT were tried by the Patent Court. Meanwhile, patent infringement lawsuits were heard by the District Courts like other civil lawsuits, and appeals thereof were tried by the High Courts. Such difference in jurisdictions for appeal of a patent invalidation suit and appeal of a patent infringement suit made the appellate trials delayed or even led to mutually conflicting decisions.

In December 2015, the Court Organization Act has been amended to the effect that jurisdiction over appeals of patent infringement lawsuits have been assigned to the Patent Court. Further, pursuant to an amendment of the Civil Procedure Act, IP cases should be submitted to the jurisdiction of one of five district courts including Seoul, Daejeon, Daegu, Busan, and Gwangju

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District Court, while the Seoul Central District Court, where a court exclusively for IP cases exists, always has concurrent jurisdiction over patent infringement lawsuits.

As a result of such amendments, the Patent Court now has jurisdiction over appeals of both patent invalidation suits and patent infringement suits, and further, most of the patent infringement suits are now likely to be instituted or referred to the Seoul Central District Court. Such changes will lead to concentration of jurisdiction over patent cases. As a result, we can expect the expertise and experience of the Patent Court to be accumulated and improved, and legal reasoning of the courts to be more consistent and unified. The amended laws have taken effect from January 1, 2016.

### ***B. Amendment of the Public Disclosure Exception Rule***

In case a patent applicant disclosed his/her invention prior to the patent application, in order to prevent the application being rejected based on lack of novelty due to his/her own disclosure, grace period has been allowed worldwide, and similarly, the so called “public disclosure exception rule” has been in place in Korea. However, prior to the recent amendment to the rule, it required the applicant to declare and invoke the public disclosure exception in his/her patent application, and thus, in case the applicant found out about pre-disclosures after the submission of the application or mistakenly omitted to declare such pre-disclosures, then it cannot take advantage of the grace period that would otherwise have been granted. Compared to the equivalent grace period system in the U.S., this was viewed as too harsh on the applicants.

Under the amended Patent Act effective from January 28, 2015, even if the applicant does not declare and invoke the public disclosure exception rule, if the examiner points out such fact during the patent examination, then the application may be amended at a certain fee to invoke the rule.

### ***C. Review of Draft Amendment***

In January 2015, the Korean Intellectual Property Office (“KIPO”) introduced a system of reviewing draft amendments. Under this system, in response to the patent examiner’s notice of rejection, the applicant may submit draft amendment for the examiner’s review prior to submitting the amendment, and consult with the examiner on acceptability of the draft amendment and whether it can overcome the grounds of rejection. Therefore, the applicant can more readily overcome the rejection by submitting an amendment, of which draft has already been reviewed by the examiner. In order to use the draft amendment review system, the draft amendment must be submitted and

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1. *Qingdao's Action Plan of In-depth Implementation of the Intellectual Property Strategy(2015-2020)*, see <http://www.qingdao.gov.cn/n172/n25685095/n25685320/n25685956/n25688318/151202105622412268.html>, published on December 2, 2015, accessed on March 5, 2016.
  2. *Tao Kaiyuan: A High Court of Intellectual Property at the National Level should be Established*, see <http://ip.people.com.cn/n/2015/0310/c136655-26666441.html>, published on March 10, 2015, accessed on March 4, 2016.

appointment with the examiner must be made at least one (1) month prior to the amendment due date. During the consultation with the examiner, examiner may give guidance on how to amend the claims/specification to overcome the rejection, and the examiner's opinion and conversation between the examiner and the applicant will be transcribed into a consultation record. However, the applicant is not bound by the draft amendment as submitted, and is allowed to file an amendment that is different from that of which the applicant consulted with the examiner.

### III. MAJOR CASES

#### ***A. Interpretation of Product-By-Process Claims (Korean Supreme Court Judgment in Case No. 2011Hu927 delivered on January 22, 2015 En Banc Decision & Korean Supreme Court Judgment in Case No. 2013Hu1726 delivered on February 12, 2015)***

When a claim is directed to a product while including a limitation related to the process for making such product (*i.e.*, product-by-process claim), it has been unclear whether such process should be considered in determining the scope of the claim.

Prior to the present Supreme Court decisions, the Korean Supreme Court precedent held that in determining the patentability, process of a claimed product should not be considered, unless the claimed product can only be defined by the process steps by which the product is made (*see* Korean Supreme Court Judgment in Case No. 2004Hu3416 delivered on June 29, 2006). In other words, if the product can be specified only by the process, then it is considered in determining the patentability; however, if not, then it is not considered when deciding the patentability. On the other hand, there was no Korean Supreme Court precedent regarding the determination of the product-by-process claim scope in a patent infringement case.

In the present *en banc* decision (Korean Supreme Court Judgment in Case No. 2011Hu927 delivered on January 22, 2015), the Korean Supreme Court held explicitly that “the novelty and inventiveness of product-by-process claims shall be determined not based on the claimed product limited by the process for making the product, but based upon the claimed product having the structure or characteristics as specified by all the limitations in the claim, including the process to make the product.” By overruling previous contradictory precedent, the Korean Supreme Court clarified that the construction of product-by-process claims does not depend on whether the product can be specified only by the process, but the patentability should be determined on the “product” of which the structural features or the characteristics are specified by the claim language including limitation of the process.

In addition, in another *en banc* decision (Korean Supreme Court Judgment in Case No.

2013Hu1726 delivered on February 12, 2015), the Supreme Court held that product-by-process claims must be construed the same way as that for determining patentability and infringement, and thus, the Court has hereby established a rule of interpreting product-by-process claim in determining patent infringement. However, the Court still left a room for different interpretation by stating that product-by process claims may be construed to be limited by process recited in the patent claims, if otherwise the scope of claims construed is clearly overly broad and unreasonable in view of the invention disclosed in the specification.

To elaborate on the case above, the claim-at-issue in this case, which included the process steps, was about a stomach treatment medicine, Jaceosidin. The Supreme Court held that the said process did not affect the structure or characteristics/property of Jaceosidin, and thus, the process was not considered in interpreting the scope of the claims. Further, given the scope of claims is not construed clearly overbroad even without considering the process, the scope of claims was not limited by the process.

In these recent cases, the Supreme Court applied the same principle in determining patentability and infringement of product-by-process claim, and made it clear that the process is considered in construing the scope of claims only when it affects the structural features or characteristics/property of the product.

***B. Law to Apply to Relation Between the Inventor and the Employer Regarding an Employee's Invention Registered as a Patent Overseas (Korean Supreme Court Judgment in Case No. 2013Hu1726 delivered on February 12, 2015)***

Pursuant to the Invention Promotion Act of Korea, in relation to an invention that an employee of a company invents in connection with his/her duties, where it falls within the scope of business of the employer, and the activities that have led to the invention fall within the present or past duties of the employee ("employee's invention"), the employer is granted a royalty-free, non-exclusive license to the employee's invention, the employee's invention may be pre-assigned to the employer through employment contract or the like, and rightful compensation thereof must be paid to the employee inventor. However, in case the employee's invention is registered as a patent not in Korea but overseas, the law was not so clear whether the employer had a non-exclusive license or may be pre-assigned of the invention. Moreover, given territorial principle is applied with regards to patent rights, it was unclear whether the Korean law could be applied to the patents registered overseas.

In this decision, however, the Supreme Court held that, given the rights between the employer and employee inventor are not dependent upon the patentability or validity of the patent, territorial principle does not apply. Indeed, given such relationship is governed by the employment contract between the employer and the employee, the rights of the employer and the employee in relation

to the employee's invention are also governed by the governing law of the contract, and thus, if that governing law is the laws of Korea, then the employer may obtain non-exclusive license free of charge over the patent registered overseas.

***C. Application of Territorial Principle in Establishing Indirect infringement  
(Korean Supreme Court Judgment in Case No. 2014Da42110 delivered on July 23, 2015)***

Under the Article 127 of the Patent Act, producing a good to be used exclusively for producing the invention is deemed as an indirect infringement. Such provision on indirect infringement is to protect the patent holder by considering preliminary actions toward patent infringement as an infringement.

However, in this case, the Defendant exported half-finished goods for mobile phones, while the actual assembly and completion of the half-finished good into an infringing finished product was carried out overseas. The issue here was, whether such act should be deemed as an indirect infringement under Article 27 of the Patent Act, particularly in light of the territorial principle. Moreover, the scope of indirect infringement was controversial in Korea which does not have a provision similar to 35 U.S.C. §271(f).

In this context, the Supreme Court held that “indirect infringement is to maintain effectiveness of a patent right to the extent that such right is not unjustly broadened. However, considering that patent holder's exclusive right to manufacture, use, assign, rent, import, etc., in connection with working of his/her product invention is effective only within the country where the patent is registered due to territorial principle of patent right, the word “production” under Article 127(1) of the Patent Act should be regarded as production within Korea. Therefore, in case such production occurs overseas, even if pre-production steps were done in Korea, indirect infringement is not established.” In other words, to find indirect infringement, production of infringing good must be carried out in Korea.

Meanwhile, there are views that since the Supreme Court required domestic production of an infringing good to establish indirect infringement, indirect infringement can be established only when direct infringement (*i.e.*, production), is found. However, the Supreme Court has not directly addressed this issue, and thus, it is yet unclear.

***D. Patentability of Drug Administration Methods and Dosage Regimes (Korean Supreme Court Judgment in Case No. 2014Hu768 delivered on May 21, 2015, En Banc Decision)***

Patentability of drug administration methods and dosage regimes has been controversial worldwide. In its earlier decisions, the Supreme Court denied patentability based on the reasoning that (i) such methods and regimes were un-patentable acts of medical treatment and (ii) did not relate to features of the pharmaceutical product itself, and thus, could not be used to determine novelty or inventiveness of the product. (*See Case No. 2007Hu2926 delivered on May 28, 2009; Case No. 2007Hu2933 delivered on May 28, 2009*)

However, on February 19, 2010, the European Patent Office's Enlarged Board of Appeal held in the G02/08 case that, since drug administration methods and dosage regimes are regarded as a specific use, which is patentable under the European Patent Convention, when considering the novelty and inventiveness of a substance, drug administration methods and dosage regimes thereof must also be considered (*see* EBA Case No. G 0002/08). Also, the Japan Patent Office revised its examination guideline in October 2009 to include drug administration methods and dosage regimes when determining novelty and inventiveness of a patent (Patent and Utility Model Examination Handbook Appendix B Chapter 3, 3-2-2).

Given such worldwide trends, the Korean Supreme Court reversed its earlier position, and held that drug administration methods and dosage regimes can be considered when determining patentability. Specifically, the Supreme Court held that "when drug administration methods and dosage regimes are specified in a pharmaceutical product invention in addition to its target disease or medical effectiveness, then administration methods and dosage regimes should be considered not as medical activities but as inventive features of the pharmaceutical product, which is to fully realize the effectiveness of the pharmaceutical product, and thus, pharmaceutical products that are found novel and non-obvious in light of the administration methods and dosage regimes can be patented."

In practice, the present decision is significant in that it now allows pharmaceutical companies to secure an improvement patent which relieves side effects of their patented pharmaceutical product by improving its drug administration methods and dosage regimes. Also, for multinational pharmaceutical companies, they can attempt to lengthen the patent protection period by registering separate patents with respect to administration methods and dosage regimes, even if the patent for original drug has expired.

**CHAPTER 2.****DEVELOPMENTS IN LEGISLATION AND PRACTICE OF TRADEMARK LAW***KIM Wonoh\****I. OVERVIEW*****A. Legislative Revisions and Policy Improvements***

In 2015, the Samsung-Apple case drove a policy change towards strengthening review of the functionality of three-dimensional trademarks. There were also some achievements in eradicating trademark brokers and counterfeit trademarks. In addition, following the enactment of the revised Trademark Act (enacted June 11, 2014 as Law No. 12751), subordinate laws and specific standards of review were revised. In late 2015, revisions related to trademark standards of review continued including the addition of subjects of review and change of standards in judging distinctiveness for three-dimensional trademarks. Also, a proposal for a full-scale revision of the Trademark Act (Proposal No. 13183, whose main body included provisions that were left out of Law No. 12751) was brought to discussion at the House of Representatives in December 24, 2014, laid silent in 2015, but then passed as law February 4, 2016 and to be enacted as of September 1, 2016. The revision of the Trademark Act includes (1) full-scale revision of the system of the Trademark Act to reflect its status as an independent law, (2) reorganization of the concept of novelty and provisions related to the requisite elements of trademark registration, (3) improvement of the cancellation of trademark registration due to non-use system, and (4) other improvements of procedural rules. Further, in late 2015, according to revisions of the civil procedure laws and court organization laws, the patent courts gained exclusive jurisdiction over the first round of appeals in relation to infringement of industrial property rights (including trademarks).

***B. Major Cases***

The most prominent Supreme Court case in trademark law was the Pfizer v. Hanmi Pharmaceutical judgment on the functionality and elements of confusion in relation to the Viagra

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formula (Case No. 2013Da84568). The third-party trademark invalidation judgment related to the popular girl group “Girls Generation” (Case No. 2013Hu1207) was also an influential case. In addition, the judgment regarding the distinctiveness of three-dimensional trademarks (Case No. 2014Hu306), the ‘Seoul National University judgment’ that sparked controversy regarding acknowledging the intrinsic distinctiveness of notable geographic names (Case No. 2014Hu2283), the “Montessori” judgment which stipulated the standards of review for trademarks when other traits of distinctiveness according to Article 6.1.7 of the Trademark Act do not exist (Case No. 2013Da15029), and the judgment regarding whether a title of a musical can be considered an business identifier (Case No. 2012Da3507; although this case fell under the Unfair Competition Prevention Act) were each a significant case.

## II. LEGISLATION AND POLICY DEVELOPMENT

### *A. June 11, 2014 Revision of Subordinate Laws according to the Revised Trademark Act*

#### **1. Revision of the Trademark Act Enforcement Decree and Enforcement Rules**

According to the revised Enforcement Decree of the Trademark Act (Presidential Decree No. 26216), if a party receives a warning to terminate use of the trademark from a trademark applicant, the trademark at issue would be prioritized for accelerated examination. Enforcement Rules were also revised as follows (Order no. 156 of the Ministry of Trade, Industry and Energy): i) submission deadlines for written opinions were changed to a designated term so that the term could be shortened if necessary (Article 30-2), ii) revision of required documentation when applying for motion trademarks including mandating submission of electronic recording media, iii) consumer survey results were included in documents of proof for acquired distinctiveness (newly installed Article 36.4)

#### **2. Full-scale Revision of the Standard of Review for Trademarks according to Rule No. 79 of the KIPO Regulation (Enacted January 1, 2015)**

First, the organization of the standards of review was changed to a part-chapter system from the precious article-provision system (related content are now grouped together).

Second, reflecting revisions and additions to the 2014 revised Trademark Act: provisions regarding trademarks imitating celebrity names or titles of media broadcast programs were specified (Part 4 Chapter 7), standards of review for trademarks that dilute famous trademarks were newly installed (part 5 Chapter 10), new standards of review for trademarks with illegal purposes (Part 5 Chapter 12) and standards of review for trademarks applications against good faith were also newly

installed (Part 5 Chapter 18).

Thirdly, standards of review related to non-traditional trademarks (special marks) were collected and reorganized (Part 8) ▷ requisite elements to apply property indications were specified (Part 4 Chapter 3) ▷ standards of review in determining the distinctiveness of marks (without distinctiveness) within a combined trademark were improved (Part 4 Chapter 8) ▷ regulation of trademarks considered against public order and morality was relaxed (Part 5 Chapter 4) ▷ regulation of trademarks that include the signature of celebrities was relaxed (Part 5 Chapter 6) ▷ standards of review in judging the similarity of trademarks were improved (Part 5 Chapter 7).

### **3. Revised Standards of Review enacted as of February 1, 2016 (Rule No. 88 of KIPO Regulation)**

Foremost, reflecting the revisions of the Enforcement Decree and Enforcement Rules i) subjects for priority review were added, ii) written opinion submission deadlines were changed from a statutory period to a designated period, iii) submission of electronic media was mandated when applying for motion trademarks, and iv) instances of usage for determination of acquired distinctiveness were revised.

Secondly, as review of the functionality element of non-traditional trademarks has become stricter, guidelines that had specified functionality reviews were incorporated into the trademark standards of review (Chapter 13) as described below.

Thirdly, standards of review regarding the distinctiveness of three-dimensional trademarks were revised so that they would not conflict with the Supreme Court precedent (described below), standards of review regarding amendment of designated good were revised and standards of review regarding the collective mark for geographical marks were specified.

#### ***B. Guidelines for stricter review of the functionality element of non-traditional trademarks***

KIPO changed its policy towards stricter reviews of three-dimensional trademarks after the Samsung-Apple case. Specific guidelines discussed below have been applied to trademark applications since September 2015.

##### **1. Change of perspectives in review of three-dimensional trademarks**

KIPO will review both distinctiveness and functionality so that functional goods or packaging cannot register as trademarks. This would improve the previous practice of reviews being focused on



distinctiveness and lacking of review on functionality.

## **2. Stricter application of functionality for three-dimensional trademarks**

Previously, Article 7.1.13 of the Trademark Act could only be applied when the whole mark had functionality, and could not be applied to other substitute shapes. KIPO improved this provision by stipulating that if functionality can be found on the whole mark, even if some non-functional elements are included, the relevant provisions can be applied.

## **3. Search and use of various resources to determine functionality**

Up to now, to determine distinctiveness or similarity, KIPO mainly relied on reviewing previously applied-for or registered trademarks, but changed to actively investigate and consider patent registration or usage in functionality determinations.

### ***C. Major Point of the Full-Scale Revision of the Trademark Act (Proposal No. 13183) to be enacted as of July 1, 2016***

#### **1. Legislative Intent**

To raise public comprehension of trademarks, the new law concisely reorganizes the definition of trademarks around the main meaning and common expressions, installs a new system of priority registration based on prior use to protect the rights of trademark applicants who had already been using the trademark and improves the trademark cancellation trials system to strengthen follow-up action on trademark non-use. In the meantime, provisions of the law were written in Korean, difficult terminology was changed, and complicated sentences were shortened to make the law easier to understand.

#### **2. Major Points**

##### **a. Full-scale revision of the system of Trademark Act as an independent regulation**

The law was reorganized to reflect its independent status by reorganizing numeral indicators and references to patent law to solve issues of confusion caused by frequent revisions.

##### **b. Reform of the definition of trademarks (Article 2.1.1 & Article 2.1.2)**

The law defined trademark as a mark that distinguishes one's good or service from another's

good or service, and mark as a sign, shape, sound, smell, three-dimensional shape, color or any other mark that is used to express the source of the good (regardless of the form of the expression). This concisely summarized the definition to focus on the main meaning and common expressive forms (including the distinctiveness and indication of source).

c. Reform of the concept of novelty and requirements for trademark registration

i ) the provision that limited trademark registration within 1 year of its expiration date (Article 7.1.8 of the current law) was removed (Article 34.1) so that an applicant may register an identical or similar trademark even if 1 year has not elapsed from the date of expiration ii ) the law made clear that the point of assessing whether a trademark can be registered is not the time the trademark is applied for but when the review of registration is performed. But for cases where the trademark is used for illegal purposes (to cause loss to specific persons, etc.), the point of judgment would remain to be at the time of trademark application as hitherto (Article 34.2) iii) the law newly installed a priority registration provision based on prior use (Article 35.2) that grants trademark registration to an applicant who had used the trademark earlier if 2 or more applications compete on the same date iv) the law introduced a Consent for Trademark Coexistence system (Article 36), allowing trademark registration if consent is obtained from the earlier trademark rightholder unless there is a concern of source confusion.

d. Improvement of cancellation trial system based on non-use

The revised law supplements the shortfalls of the registration system, and introduced the following measures to improve the cancellation trial system based on non-use: i ) expand the scope of persons entitled to file for a cancellation trial for unused registered trademarks to “anyone” (previously limited to parties of interest), while limiting the scope to parties of interest for collective marks (as hitherto) (Article 119.6), ii ) presume that any use of a trademark within 3 months of filing for a cancellation trial a ‘nominal use’ intended to avoid such cancellation (Article 119.4), iii) stipulate that if a judgment cancelling a registration for an unused trademark is finalized, the related rights are terminated retrospectively at the filing date of such trial (Article 119.7). Previously, the cancellation was effective as of the date of the judgment. Hence, this provision makes it easier for plaintiffs of cancellation trials to register trademarks identical or similar to cancelled trademarks.

e. Other improvements to procedural rules

i ) the law provides for the extension of the correction period if an objection is filed against an announcement of trademark registration (Article 17.1). Hence, the Head of KIPO or the Chief Judge of the Patent Court may grant a one-time 30-day extension for the correction period or for the filing period in relation to an appeal against a decision to decline amendment on a party’s request or on his own authority ii ) the law provides for a return of fees if a trademark registration trial is withdrew (Article 79.1.3). The provision expanded the scope of fee returns, stipulating that if such trial is withdrawn within 1 month of filing, a party may file for and receive a return of fees.

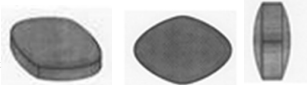


### III. MAJOR CASES

The most prominent Supreme Court case in trademark law was the Pfizer v. Hanmi Pharmaceutical judgment on the functionality and elements of confusion in relation to the Viagra formula (Case No. 2013Da84568). The third-party trademark invalidation judgment related to the popular girl group “Girls Generation” (Case No. 2013Hu1207) was also an influential case. In addition, the judgment regarding the distinctiveness of three-dimensional trademarks (Case No. 2014Hu306), the ‘Seoul National University judgment’ that sparked controversy regarding acknowledging the intrinsic distinctiveness of notable geographic names (Case No. 2014Hu2283), the “Montessori” judgment which stipulated the standards of review for trademarks when other traits of distinctiveness according to Article 6.1.7 of the Trademark Act do not exist (Case No. 2013Da15029), and the judgment regarding whether a title of a musical can be considered an business identifier (Case No. 2012Da3507; although this case fell under the Unfair Competition Prevention Act) were each a significant case.

#### *A. Standard of review regarding the functionality of the Viagra formula three-dimensional trademark (Supreme Court Judgment in Case No. 2013Da84568 delivered on October 15, 2015)*

##### 1. Facts and Main Issues

Pfizer is a foreign corporation and manufacturer of Viagra, a heart valve and sexual function disorder medication with a mark defined as a three-dimensional rhombus shape combined with blue

color “” registered as trademark. Pfizer filed a trademark infringement suit against Hanmi Pharmaceutical who manufactured, sold and advertised a medication to treat impotence “”, “”.

The issues were 1) the legislative intent of Article 7.1.13 of the Trademark Act and whether a three-dimensional trademark could be considered to consist of a designated good and its wrappings under such Article, 2) as a prerequisite to determining trademark infringement, what standards should be used to determine the similarity of three-dimensional trademarks and whether the marks at issue could cause confusion as stipulated under the Unfair Competition Prevention Act.

##### 2. Main Points of the Opinion

① The revised Trademark Act (enacted on August 22, 1997) allowed three-dimensional shapes to be a form of trademark. In order to harmonize its provisions with patent laws and protect

free and effective competition, Article 7.1.13 was installed to disallow trademark registration if the trademark consists only of essential three-dimensional shapes that would be necessary for the function of the good even if the trademark fulfills Article 6 distinctiveness requirements. From this perspective, the following elements need to be determined on a collective basis for three-dimensional trademarks i) whether the good is distributed in the market or whether a substitute shape exists, ii) even if a substitute shape exists, whether it can be produced at similar or lower level of cost, iii) whether a technological advance derives from the three-dimensional shape (that surpasses the original function), etc.

The lower court determined that internal medication can be of various size, shapes and colors and a variety of substitute shapes may be utilized. The court considered the fact that different manufacturers are producing different colors and shapes (not rhombus or blue) for the designated good (heart valve and sexual function medication), and determined that the shape and color did not provide any technological advancements beyond the natural functions of internal medication. But the court also ruled that the trademark registration cannot be clearly voided based on the essential functionality of the three-dimensional shape.

② Regarding the similarity between the two marks (a prerequisite determination for trademark infringement and violation of the Unfair Competition Prevention Act), the Supreme Court held that “while the registered trademark and the defendant’s products do have similarities, the shapes are different. As these medications are taken on a doctor’s prescription and distributed by a pharmacist in most hospitals, one must determine that the products may be distinguished by their names (written on the product and box) and the defendant’s letter trademark and business name. Hence, it is difficult to reach the conclusion that the registered trademark and the shape of the defendant’s products would mislead consumers, and identical or similar.” The court also ruled that there were no concerns of confusion under the Unfair Competition Prevention Act considering the usage of the marks at issues.

### **3. Analysis of the Opinion**

In this case, the defendant argued that the plaintiff’s registered trademark had a clear cause to be determined void and that the suit constituted an abuse of right. Thus, the court first reviewed the issue of registration invalidation focusing on the question of functionality and the similarity of the marks to determine the issue of infringement. The Supreme Court ruled that although the shape and color of the medication could only be perceived as a decoration or wrapping constituting an ingredient-indicating trademark under Article 6.1.3 of the Trademark Act, it would acknowledge the ‘acquisition of distinctiveness based on usage’. This recognized the effectiveness of its three-dimensional trademark although on a strict basis. But the issue remained whether functionality exists, since even if a three-dimensional trademark is granted on distinctiveness based on usage, it can still

not be registered if ‘the trademark consists only of essential three-dimensional shapes that would be necessary for the function of the good’ (Article 7.1.13)

In this case, the Supreme Court held that so-called ‘de jure functionality’ may disallow registration from a public interest perspective of harmonization with the patent law system (functionality can be sufficiently protected by patents for a short term) and protecting free use among other competitors. The case is significant because although the three-dimensional trademark system has been enacted for almost 20 years, there were no standards to determine the functionality element stated in a judgment. This standard was specified to global standards and falls in line with the KIPO’s movement towards strengthening the application of functionality on non-traditional trademarks.

### ***B. The Girls Generation Judgment (Supreme Court Judgment in Case No. 2013Hu1207 delivered on October 15, 2015 (invalidation of registration))***

#### **1. Facts and Main Issues**

The entertainment company that the girl group “Girls Generation” belongs to filed suit against an individual who registered a mark with identical aspects for goods and services in 2007. Plaintiffs filed an invalidation suit arguing that the registration constitutes user deception under Article 7.1.11 of the Trademark Act. The first court of instance, the Intellectual Property Tribunal affirmed the decision, while the Patent Court cancelled the decision on appeal. The Supreme Court sent the case back to the Patent Court on remand to finalize invalidation of the registration. The issue focused on whether Article 7.1.11 could be applied to determine that a registered trademark could be considered deceptive even in cases where a previously-used trademark has become famous after the trademark at issue was registered.

#### **2. Main Points of the Opinion**

① The Patent Court held that at the date of registration of the “소녀시대” trademark (February 9, 2009), although the trademark was perceived as a distinctive mark indicating the plaintiff’s goods and services (goods consisting of albums and music and services consisting of concerts, media appearances and commercial modeling), it could not be considered to be a famous mark surpassing the identification of a specific person’s mark. Hence, goods and services that are similar or secondary goods or services that are not of close affiliation could not be considered to cause source confusion.

② In contrast, the Supreme Court held that “if a previously-used trademark becomes widely known to the general public (other than related parties dealing with the goods) and gains fame, goods

that indicate the trademark or similar goods, or even different kinds of goods (depending on the use or circumstances of the sales transaction), can be perceived as being produced and sold by the owner of the famous mark or by parties of special affiliation. In that case, there is possibility of confusion regarding the source of goods to the user even if the trademark is being used on goods different from the goods of the previously-registered trademark.”

### **3. Analysis of the Opinion**

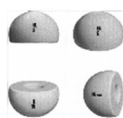
This judgment ruled on the issue of whether the defendant’s trademark registration could be considered to be a trademark that could defraud consumers due to confusion of source according to Article 7.1.11 of the Trademark Act assuming that the name of the girl group had obtained fame. Up to this point, the provision had only been applied to trademarks that were recognized as a mark of a specific person (and not reached a level of fame). When close economic affiliation or other special circumstances were found, the provision could be applied to secondary products. The point of judgment for this provision was the time when a decision on trademark registration was being made. But the Patent Court found that the previously-used trademark had not reached fame, and that the designated good and the designated good of the registered trademark was not identical or similar, and no economic affiliation existed. Hence, the registered trademark did not constitute a trademark that could defraud consumers due to source confusion. But the Supreme Court found that the plaintiff’s previously-used trademark had obtained fame, with the public perceiving the name as the girl group Girl’s Generation. Accordingly, even non-related secondary products constituted a mark that could defraud consumers and were ruled void.

According to the court, the point of judgment for Article 7.1.10 (related to business of fame and confusion) is at the time of trademark application. In the meantime, this case had occurred before the latter part of Article 7.1.10 (the prohibition of famed trademark dilution) had been installed. Hence, the court resorted to expanding the scope of the latter part of Article 7.1.11 to solve this real problem but was criticized for perhaps excessively expanding its interpretation. But it could be seen to be an inevitable choice as it was related to the name of a representative girl group leading the Hanryu (Korean pop) wave. As the law has since been revised to better protect such famed trademarks, it is unlikely to be adopted as a preferential precedent and likely to remain a one-time incident.

### ***C. Judging distinctiveness when a three-dimensional trademark incorporates letter (Supreme Court Judgment in Case No. 2014Hu2306 delivered on February 26, 2015)***

#### **1. Facts and Main Issues**

The trademark at issue was of combined form incorporating the small English letters ‘BIOLOX



delta’ in a three-dimensional trademark “ ” with ‘hip joint balls’ as the designated good. KIPO and Intellectual Property Tribunal ruled that the three-dimensional form consisting of a half-sphere with a round groove could not constitute a trademark according to Article 6.1.3 of the Trademark Act (technical mark because it was a general form of the designated good). But the Patent Court and Supreme Court acknowledged the distinctiveness and reversed.

The issue was whether trademark registration could be refused if distinctiveness existed on the whole mark (with a combination of signs, letters and shapes; but when no distinctiveness can be found in the three-dimensional shape itself) according to Article 6.1.3 of the Trademark Act.

## 2. Main Points of the Opinion

The Supreme Court upheld the Patent Court’s judgment (which cancelled the Intellectual Property Tribunal’s decision) holding that “although the three-dimensional form consisting of a half-sphere with a round groove is a general form of the designated good lacking distinctiveness, and the pink parts are of a general color lacking distinctiveness, the combination with the English letter ‘BIOLOX delta’ does not have technical meaning, and combined together constitutes distinctiveness. Hence, Article 6.1.3 of the Trademark Act does not apply”.

## 3. Analysis of the Opinion

When determining the distinctiveness of three-dimensional trademarks combined with letters (determining applicability of Article 6.1.3 of the Trademark Act), KIPO’s Revised Review Guidelines of March 15, 2012 (Part 8 Chapter 1 3.4 11) stipulated that “when distinctive letters or shapes are added to a three-dimensional shape, in order to distinguish from two-dimensional trademarks, the distinctiveness of the combined letter or shape will not be considered, and distinctiveness will be determined on the three-dimensional shape itself”.

A different standard was to be applied to three-dimensional trademarks because distinctiveness of the three-dimensional shape itself was considered necessary. Also, because the introduction of a disclaimer system had failed, this position dealt with concerns of how one could register a trademark combining a three-dimensional shape and letter and then exercise rights on the shape.

Based on such review guidelines, KIPO and the Intellectual Property Tribunal ruled that in this case i) parties in transaction and users of the designated good could intuitively perceive the

designated good ‘hip joint balls’ from the three-dimensional shape, and thus the trademark consisted of a generally used shape, ii) the color added to the three-dimensional shape was merely for to give the good a sophisticated effect, and iii) even if the letter part had distinctiveness, it could not be considered in determining the distinctiveness of a three-dimensional shape.

The courts considered the fact that review guidelines do not have legal effect and i) there was no provision under the Trademark Act that mandated that distinctiveness only be determined on the three-dimensional shape (and in disregard of combined signs, letters and shapes) and ii) if distinctiveness is acknowledged on a trademark that includes a indistinctive three-dimensional shape, the effect of the trademark does not apply to the three-dimensional part (according to Article 51.1 of the Trademark Act). Hence, even if trademark registration is allowed in such cases, the effect of the trademark would not expand to the three-dimensional part causing unreasonable limitation of other people’s use. These were the grounds for the court’s departure from KIPO’s position. After this judgment, KIPO revised its guidelines (February 2016) to eliminate such application standards, reconciling the conflict with the judgment.



## CHAPTER 3.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COPYRIGHT LAW

*CHO Yong Sig\**

## I. OVERVIEW

The enforcement decree of the Copyright Act was amended on July 13, 2015. This established new articles to reduce the period for legal approval by the Minister of Culture, Sports and Tourism, and improve procedures to provide convenience to applicants, when utilizing works of unknown copyright holders. Also, although copyrights are protected under the Copyright Act, the Ministry of Culture, Sports and Tourism provided a standardized contract for the fields of culture and art, to correct unfair practices between copyright holder and investor (or assignee) and protect and strengthen the rights of copyright holders. In addition, in 2015, the Korea Copyright Commission took efforts to establish an international cooperation network to protect copyrights and expand the copyright technology market as Korean digital content is exported to overseas markets. While law revisions corresponding to drastic changes of the digital environment have been continuing in Korea, the Supreme Court introduced a judgment on copyright issues related to internet links (an issue that has recently re-emerged).

Discussion on whether a software invention (SW Patent) is within the protectional scope of the Patent Act is in progression through proposals for revision of the Patent Act. Regarding copyrights, the issue of protecting algorithm ideas as patent inventions is a difficult and continuing issue. If algorithm ideas are protected as patent inventions, exclusive rights on the program is granted to a certain person, and as a result, even if the expression is different, a program consisting of identical algorithms may only be implemented by the patent holder. Since this actually binds the copyright to the patent right, controversy is expected to continue.

## II. LEGISLATION AND POLICY DEVELOPMENT

### *A. Amendments of the enforcement decree of the Copyright Act*

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Amendments for the enforcement decree of the Copyright Act were revised as of July 13, 2015, to reduce the period for legal approval by the Minister of Culture, Sports and Tourism, and improve procedures to provide convenience to applicants, when utilizing works of unknown copyright holders.

Article 50 of the Copyright Act<sup>1</sup> regulates the use of the works of unknown copyright holders. The revised enforcement decree improves application procedures for legal approval in such cases (Article 18(1) (iii), (iv), Article 18(2)(iv), Article 20(1)(i) and Article 21(1) as follows: ① introduced the concept of ‘considerable efforts’ for search of the copyright holder or his/her place of residence by using an information search tool as a requirement for legal approval; ② application procedures and the place for announcement following approvals have been unified into the ‘rightholder search information system’ to enhance the effectiveness of approval procedures; and ③ announcement periods required for approval have been reduced to improve the speed of legal approval procedures and provide applicants with convenience.

### ***B. Preparation of a standard contract form<sup>2</sup>***

The Ministry of Culture, Sports and Tourism presented standardized contracts for grant of whole or partial copyrights, and exclusive or non-exclusive use of copyrights. In reality, these issues need reasonable balance between protecting the rights of creators and guaranteeing free use by users.

The Ministry of Culture, Sports and Tourism also announced a standardized contract for scenarios in the film industry to correct past practices of failing to designate writing periods, failing to make proper payments for writing, or infringing on copyrights, etc. These standardized contracts improved the guarantee of rights for scenario writers (as a creator) in relation to the Copyright Act.

In addition, standardized contracts for various fields were introduced in relation to grant of copyrights in publications, reasonable distribution of rights and profits in the broadcasting, and movie showings. These efforts intended to improve unfair contract practices and strengthen the rights of creators.

## **II. MAJOR CASES**

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1. Article 50 (Exploitation of Works Whose Holder of Copyright holder's Property Right is Unknown) ① Where any person fails, despite his/her considerable efforts which meet the standards prescribed by Presidential Decree, to identify the holder of copyright holder's property right to a work (excluding foreigners' works) made public, or his/her place of residence, and therefore is unable to obtain any authorization for its exploitation, he/she may exploit the work with approval of the Minister of Culture, Sports and Tourism as prescribed by Presidential Decree, and by depositing a compensation money as determined by the Minister of Culture, Sports and Tourism. [Amended by Act No. 8852, Feb. 29, 2008]

2. <http://www.mcst.go.kr/>

***A. Whether the act of adding internet link amounts to reproduction and transmission under the Copyright Act<sup>3</sup>***

On an internet site managed by the defendant, members of website posted digital contents without approval from copyright holders through links which could be opened or downloaded by a user. In this case, the court held that the act of link by users does not amount to the replication and transmission prescribed by the Copyright Act, even if the defendant did not delete the link contents and left it alone, and thus not an infringement of copyrights.

An internet link was perceived to merely indicate the web location information or route to webpage or work stored on the server (website), even if it directly connects to the linked webpage or work when clicked by an internet user. Thus, it was held that the act of providing a like link does not amount to replication and transmission prescribed by the Copyright Act. While this means that the act of providing a link does not constitute a crime, the specific method of linking may decide whether the elements are met. When considering the comprehensive circumstances, this case was determined not to constitute a crime of replication and transmission crime under the Copyright Act. Also, the act of accessory under the Criminal Act refers to all direct and indirect acts that facilitate the principal's infringement. As the act of linking itself merely indicates web location information or route to a webpage or work stored on the server (website), even if it directly connects to a webpage violating the replication rights or public transmission rights of a copyright holder by posting works without approval from the copyright holder or sending copyrighted work to an internet user, it was held that this does not facilitate execution of the infringement and does not constitute a crime of accessory for copyright infringement.

On the other hand, there is a Supreme Court judgment in relation to determining accessories for display of obscene materials on an internet site, that held "while the neglect of the information providing entity (or staff of the portal site managing the information providing entity) to manage the distribution or sale of obscene materials in compliance with legal duties cannot make them a principal of infringement under the Telecommunications Basic Act (since neglect is not identical to distribution and sale), there is a separate determination to be made on the issue of whether such parties can be viewed as accessories."<sup>4</sup> In other words, this position could be interpreted to mean that even if infringement occurs of the internet site managed by a party, the party's negligence may constitute a crime of accessory by such neglect.

While this decision directly applies the Supreme Court's previous position of rejecting civil tort liability by reason that the act of providing an internet link does not amount to replication or transmission under the Copyright Act, it is significant in that it is the first criminal holding that an act of providing an internet link does not amount to becoming an accessory to such infringement.

3. Supreme Court Judgment in Case No. 2012DO13748 delivered on March 12, 2015

4. Supreme Court Judgment in Case No. 2003DO80 delivered on April 28, 2006.

Further, although the description of facts was not detailed, it could be viewed that it intended to secure maximum freedom of information exchange on the internet by minimizing legal restrictions on linking to strictly prevent a chilling effect.

***B. Whether ‘commercial music records’ under the Copyright Act includes music which is replicated by streaming<sup>5</sup>***

In a case involving plaintiffs in the business of trust management of music playing rights and record producers against defendant who played transmitted digital music at a shop in a department store, the Supreme Court held that streaming commercial music records is covered as an indirect use of commercial music records under the Copyright Act.

Article 76(2)(i), 83(2)(i) of the Copyright Act prescribes that a person who carries out a public performance by using commercial music records shall pay reasonable compensation to the relevant music player or record producer. This provision acknowledges a right of compensation to a music player and record producer when there are public performances of commercial music records and the record is used for the public performance exceeding a generally expected scope of use. This is based on the concern that opportunities to play music or sell a record may be unfairly lost and opts to provide relief in such cases. Based on the contents and purpose of such provision, the Supreme Court held that ‘commercial music records’ refers to not only the record produced for sale to unspecified individuals but a record provided in any form as part of a sale transaction, reflecting the reality in which digital music sources are in general use. This expanded the concept of ‘music records’ to the method of streaming from previous concepts limited to LPs or CDs, etc.

Further, the Supreme Court held that ‘use’ includes not only direct use (directly playing commercial music records) but also indirect use by way of streaming commercial records. In relation to ‘public performance’, as Article 2(iii) of the Copyright Act defines the term ‘public performance’ as publicly-open works, stage performances, music records or stage broadcasts, playing, singing, orally narrating, reciting, screening, reproducing or other methods, the act of the defendant playing a streaming digital music source in his store was considered to constitute an act of ‘public performance’ by the ‘use’ of commercial records.

***C. A standard for infringement on musical works<sup>6</sup>***

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5. Supreme Court Judgment in Case No. 2013DA219616 delivered on December 10, 2015.

6. Supreme Court Judgment in Case No. 2013DA14828 delivered on August 13, 2015.

In a case involving whether a song written by famous songwriter Jin Young Park infringed upon another party's musical copyrights, the Supreme Court held that even when the work as a whole is considered creative work falling under the Copyright Act, effects related to replication of original work do not apply to parts which are not creative expressions. Hence, if the dispute in the copyright infringement suit alleges that a part of copyrighted musical work has been replicated (not the copyrighted work as a whole), it must first be determined whether such part is a creative expression. This confirmed the existing position of the Supreme Court in relation to the standards of copyright infringement.

Further, the court provided a standard for determining creativity for musical works by stipulating that "in deciding whether creativity exists in musical work, one must consider the elements of rhythm, harmony, and etc., as a whole with a focus on the tune (the most detailed and distinctive form of musical expression)".

In accordance with such legal principle, it was held that the musical work of the plaintiff was practically similar to the disputed copyrighted work, and the correction, increase, changes made did not amount to the addition of novel creativity. The part in comparison with plaintiff could not be viewed as a creative expression, and the replication rights of plaintiff could not apply to such part. Therefore, the Supreme Court viewed that the work of plaintiff did not have creativity and remanded the original decision which acknowledged the infringement of copyright by the defendant. This case has the significance in determining creativity in a copyright infringement case.

#### ***D. The relationship between the copyright holder and user when the trust agreement of the musical work is terminated***<sup>7</sup>

In a case involving the issue of use right of copyrighted work of a defendant where the Music Copyright Association granted the use approval of musical work to the defendant but the trust agreement between the plaintiff (the original copyright holder) and the Music Copyright Association terminated prior to the expiration of the use approval agreement, the Supreme Court held that the use right (which the copyright user obtains by the use approval agreement with the copyright holder) merely amounts to a feature of a claim justifying its use of copyright work against the copyright holder. In a case when the trust agreement of copyright expired and the copyright is transferred to a trustor who is the original copyright holder, it was held that, unless there are special circumstances (like the existence of agreement that the original copyright holder succeeded the use approval carried out by the trustee between the original copyright holder and trustee), the copyright user cannot counter the original copyright holder based on the use approval of trustee to the extent of use after

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7. Supreme Court Judgment in Case No. 2011DA101148 delivered on April 9, 2015.

the copyright transfer following trust expiration.

The Supreme Court in the past only held that the transfer registration of a copyright holder's property right is a counter element against a third party. Such third party was limited to those with a justifiable right claiming a defect of registration in relation to the transfer of copyright holder's property right. Hence, a person who infringes upon a copyright holder's property right was determined to not constitute such third party as defined in Article 54 of the Copyright Act<sup>8</sup>. But it did not make determination whether a person who obtained use approval constitutes a third party for cases where a trust agreement of copyright has expired. This Supreme Court judgment decided that when a musical work is transferred to an original copyright holder due to expiration of trust agreement of property right, a third party cannot counter the original copyright holder based on the fact that a third party obtained the use approval from the trustee prior to the expiration of a trust agreement. In the future, when obtaining a use approval of copyright, when the copyright subject to use approval has a change of copyright holder due to the expiration of trust agreement of copyright or transfer of copyright, there is a high chance that the courts will acknowledge that it is not possible to counter a new copyright holder based on the use approval agreement. Therefore, countermeasures need to be prepared.

Further, this case also dealt with the issue of whether an in advance listening service of musical work infringed on a copyright holder's right to the integrity. Even if a partial use of literary work, musical work, or copyright to the image, as such partial use is only different in terms of amount of use (in comparison to the use of entire copyrighted work), it cannot be viewed as infringement of a right to the integrity of the copyright holder unless the partial use involved selecting a part of copyright work and directly using it with no change to the used parts; the way of use is in line with the ordinary way of using the copyrighted work; the use could cause misunderstanding that the used part is the whole copyrighted work if a general consumer or the consumer of the copyrighted work would recognize the use of such part as use of a part of the entire copyrighted work; or the idea or emotion of the copyright holder expressed in the copyrighted work or the content or form of the copyrighted work may be misunderstood due to the partial use.

### *E. The meaning of 'technical protection measures' under the Copyright Act'*

This case involved karaoke machine manufacturer A Co., Ltd. implementing protection measures to prevent the playing of new files from a karaoke machine unless certain certification procedures were taken while supplying karaoke studios with monthly new songs. Plaintiff alleged

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8. Supreme Court Judgment in Case No. 2004DA10756 delivered on July 4, 2006, and etc.

9. Supreme Court Judgment in Case No. 2015DO3352 delivered on July 9, 2015.

that the defendant manufactured and sold a device incapacitating the protection measures which infringed upon the copyrights of the Music Copyright Association. It was held that the above protection measures fell under Article 2.28 (a) of the Copyright Act in relation to replication and distribution rights, and under Article 2.28 (b) of the Copyright Act in relation to public performance rights.

In Article 2.28 (a), the term “technical protection measures” is separately defined as (a) Technical measures taken (in order to effectively prevent or control the access to works, etc.) by a right holder or a person who has obtained a right holder’s consent, protected under this Act in relation to the exercise of copyright or other rights protected pursuant to this Act and (b) technical measures taken by a right holder or a person who has obtained a right holder’s consent in order to effectively prevent or control the act of infringing on copyright or other rights protected pursuant to this Act.

It was held that the protection measures of (a) do not directly prevent or restrict the infringement of each individual right of replication, distribution, public performance, etc., which constitutes the copyright but it means the protection measures of copyright by preventing or restricting the access to a medium where the work is stored or access to the contents of works by the regenerating, playing such medium and the protection measures of (b) directly prevents or restricts the infringing action of each individual right which constitutes the copyright. In deciding whether the protection measures in question belongs to which of above two, it was held that as the copyright is not a single unity of right but it is a bundle of various rights like replication rights, distribution rights, public performance rights, etc., these are each individual rights and each individual right should be decided based on individual standards.


The Copyright Act considers technical measures which a copyright holder takes in order to restrict the access to the work or prevent the replication as ‘technical protection measures’, prevents the incapacitation action by the way of removing, changing or detouring the technical protection measures and prescribes to allow civil, criminal sanctions on parties who violate it. Thorough this case, the Supreme Court clarified the concept of technical protection measures prescribed by the Copyright Act and acknowledged the act of manufacture and sale of a device which intends to incapacitate technical protection measures to a person (who is not aware of such) as a principal who has committed a copyright infringement through an act of an innocent human agent.

### ***F. Protection of applied arts which are not protected as literary works in foreign country<sup>10</sup>***

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10. Supreme Court 2015. 12. 10. announcement 2015DO11550 decision

In a case in which the defendant was prosecuted for importing and selling a doll “”

with identical, similar to trademark “” registered by a trademark owner, Japanese B Co., Ltd, for infringing upon the property right of B, violating the Copyright Act on grounds that it caused confusion with a doll sold in Korea by C under a commercial agreement with B, violating the Unfair Competition Prevention and Trade Secret Protection Act (the “Unfair Competition Prevention Act”) and violating the Trademark Act, the Supreme Court decided that applied art which is not protected as a copyrighted work in Japan could still be protected as artistic work under the Copyright Act of Korea.

The defendant argued that the character or rabbit doll of the current case is a applied art which is not protected as copyrighted work in its own country, Japan, and based on Article 2.7 of the ‘Berne Convention for the Protection of Literary and Artistic Work’ (the “Berne Convention”)<sup>11</sup> or Article 3.3 of the Copyright Act<sup>12</sup>, it is also not protected as a copyrighted work in Korea. However, the character of this case is of a unique form which can be distinguished from the image of an actual rabbit (generally seen), as a result of the mental efforts of the creator, and also distinguishable from existing works of other copyright holders. Therefore, it was deemed to establish creativity which is an element of copyrighted work protected by the Copyright Act. Among the countries that abide by the Berne Convention, the principle of national treatment is applied based on the convention and Article 3.3 of the Copyright Act which prescribes that reciprocity is not interpreted as excluding the principle of national treatment under the Berne Convention. It was held that Japan being a country of Berne Convention, as long as national treatment is applied to works in Korea (which is also a country abiding by the Berne Convention), the character in this case (for which Japan is the country of origin) could be protected as artistic copyrighted work in accordance with Copyright Act of Korea. Further, the defendant’s acts were held to constitute violation of the Copyright Act, Unfair Competition Prevention Act and Trademark Act. The violation of the Copyright Act and violation of the Unfair Competition Prevention Act were considered single actions constituting several violations falling under compound crimes of Article 40 of the Criminal Act. The violation of the Trademark Act had different elements and form of action, and was considered practically within a concurrent crime relationship under Article 37 of the Criminal Act.

11. Article 2(7) subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.

12. Article 3 (Foreigners’ Works) (3) Even when foreigners’ (excluding foreigners residing in the Republic of Korea at ordinary times and Stateless persons; hereafter the same shall apply in this Article) works are to be protected under paragraphs (1) and (2), but if the relevant foreign country does not protect the works of the nationals of the Republic of Korea, their protection under treaties and this Act may be correspondingly restricted.



## CHAPTER 4.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF KNOW-HOW AND TRADE SECRETS

*KIM Byung-Il\**

## I. OVERVIEW

The 「Unfair Competition Prevention and Trade Secret Protection Act」 has been partially revised in relation to the trade secret protection system. Revisions mainly concerned relaxing requirements to be acknowledged as a trade secret and introducing presumptive effects with the issuance of certificates of authenticity. 2015 trends in the trade field are as follows.

## II. LEGISLATION AND POLICY DEVELOPMENT

### *A. Relaxing Requirements for Trade Secrets*

The Unfair Competition Prevention and Trade Secret Protection Act (the “Unfair Competition Prevention Act”) defines a “trade secret” protected by the law as production methods, sales methods, and other technical or business information that is used for business that is kept confidential through reasonable efforts. A trade secret must not be publicly known and possess independent economic value (Article 2.3 of the Unfair Competition Prevention Act). But there has been a criticism that some business or technical secrets of small-to-medium enterprises (that have value) are not protected because the requirements to be subject to secret protection under the Unfair Competition Prevention Act are too strict.

To be protected as a trade secret, the secret holder must use “considerable effort” to maintain the secrecy even if the technical or business information has economical value and is not common knowledge. In other words, the secret holder must consciously seek to maintain secrecy and represent and manage it in a way that puts third parties and employees on objective notice. ‘Considerable effort’ in this context means (i) there is a mark or notice that enables the information to be

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perceived a secret, (ii) there is duty of confidentiality for parties that either can access, can limit access or have accessed the information, indicating the degree of effort to objectively enable a perception that the information is a secret that is being maintained and managed. However, in the case of small businesses with limited resources, it is difficult to establish sufficient systems for trade secret protection (like limiting access to information), leading to issues of trade secrets with value not being protected for not meeting the standards of considerable effort. Hence, the law has been revised to relax the standard of “considerable effort” to a standard of “reasonable effort” in consideration of the reality where small businesses have difficulty in establishing trade secret protection systems.

By this revision, trade secrets can be recognized even if measures to limit access to information are not perfectly taken. Still, there are no definitive court holdings on what degree of efforts “reasonable efforts” requires, so businesses need to follow normally practiced levels of trade secret management.

### ***B. Introduction of presumptive effects for original proof certificates***

The trade secret original proof certificate system was introduced in November 2010 and is operated by the Korea Institute of Patent Information. This allows businesses to register electronic documents that include trade secrets (including technical secrets, research ideas and business information, etc.) to relax the difficulty of proof for trade secret holders in trade secret infringement disputes. The Unfair Competition Prevention Act has been implemented since January 31, 2014, and specifies legal provisions (including standards for designating original certificate-providing institutions) to provide legal grounds and enhance trust in the system. But since it did not provide for a presumptive effect that a trade secret holder possessed the registered information even when an original proof certificate had been issued, it had limitations in relaxing difficulty of proof. Hence, there was a need to introduce provisions establishing presumptive effect of information possession when original proof certificates were issued to enhance the effectiveness of the system based on its legislative intent (of facilitating proof for trade secret holders). The revised law introduced provisions that presumed the holder possessed the registered information at the time the electronic document was registered when original proof certificates have been issued by an original proof-providing institution. This has enhanced the effective of this system and relaxed difficulties of proof in trade secret infringement disputes.

## **III. MAJOR CASES**

In 2015, there has been a significant judgement about maintenance of confidentiality

orders in the field of trade secrets as discussed below.

***A. Judgement that did not accept an application for a maintenance of confidentiality order (in relation to a trade secret) in a trade secret infringement suit. In this case, a party argued that the other party had wrongly obtained and used its trade secrets (Supreme Court Judgement in Case No. 2014Ma1688 delivered on January 2015).***

Article 14.1.1 of the Unfair Competition Prevention Act states that a judge can order maintenance of confidentiality regarding a trade secret (a party holds) to the other party (or if a corporation, the representative of the corporation), legal representatives thereof, or persons who gain knowledge during litigation in a business interest infringement suit due to trade secret infringement, except when the other party, litigation representatives thereof or persons who gain knowledge of the trade secret during litigation had already obtained the trade secret (by means other than reviewing trial or discovery documents).

The Supreme Court held that the maintenance of confidentiality order intended to protect trade secrets from being disclosed in the process of litigation. Hence, it held that trade secrets already obtained (unrelated to the litigation process) by the other party, do not fall under the protectional scope of the law. Therefore, the Supreme Court denied the application for maintenance of confidentiality order in a trade secret infringement suit where a party contended that the other party had illegally obtained and used its trade secret.

#### **IV. CONCLUSION AND EXPECTED TRENDS IN TRADE SECRET PROTECTION**

The Korean Intellectual Property Office (KIPO) has put in significant legislative efforts to protect trade secrets by responding to trade realities. KIPO has reorganized the requisite elements of trade secret infringement (subject to criminal charges) from the legislative main body to specific narrations, newly installed regulation when parties refuse to delete or return trade secrets after expiration of use or possession, and announced legislative notice of fixed maximum limits to fines. Such legislative efforts in relaxing requirements to acknowledge trade secret and specifying elements to find criminal charges of trade secret infringement are expected to contribute to building healthy business practices.

**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”. “Unfair competition” means acts that mislead or cause likelihood of confusion by using trade indica, which include causing likelihood of confusion of the source of a product by using a well-known mark; false indication of origin; and misleading consumers about product quality. In 1998, the title of the act was amended to the ‘Unfair Competition Prevention and Trade Secret Protection Act (hereinafter ‘Unfair Competition Prevention Act’). The legislative process may have faults in that although, the nature of “trade secret infringements” falls under “unfair competition,” it gives the impression of trade secret infringements not being under unfair competition. It would have been better if trade secret infringement were listed as part of unfair competition. But this article will discuss legislation development and cases limited to “unfair competition using trade indica.” (Trade secret infringements will be discussed separately 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 were once mainly driven by manufacturing and off-line services, they have now shifted to cultural products/services and on-line services, giving rise to new types of unfair competition and disputes, with legislations and court decisions following in response.

**II. LEGISLATION AND POLICY DEVELOPMENT**

Provisions on trade secret protection were set forth in 1991, and provisions regarding prohibition of dilution of famous marks (2001) and protection of domain names and product design (2004) followed. The most recent revision was in 2013 to insert a “general provision defining acts of unfair competition” to “Item (j)” in Article 2.1 of the Unfair Competition Prevention Act. This has been the most significant change since the enactment in 1961. Thus, acts that are not listed as (a) to

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(i) in Article 2.1 of the Unfair Competition Prevention Act can now be held as unfair competition under Item (j), so that the range of unfair competition has largely expanded.

Item (j) provides that: any act of infringing another's economic interests by appropriating, for one's own business, trade values resulted from the other's significant investment or efforts, to the contrary of fair competition practices. The conditions for infringement of Item (j) are (i) a trade value resulted from the plaintiff's substantial investment or efforts (subject of protection), (ii) use of the trade value for the defendant's business (act by the defendant), (iii) loss of the plaintiff's economic interests (economic loss), (iv) the defendant's act is contrary to fair competition practices (illegality), and (v) causation. Item (j) was introduced as a general provision, which encompasses all acts of unfair competition, making its intentions clear by starting the provision with "any act". Item (j) meets the need to regulate new types of unfair competition in changing industrial and technological environments. Now illegal use of avatars, game items or sports statistics, internet framing advertisements that cause source confusion, and use of celebrities' identity could all be unfair competition. Further, 'business use of competitors' photos (without copyrightable creativity)' can now be held as unfair competition under Item (j) rather than under Article 750 of the Civil Law (under 'interests that are worth protection by law').

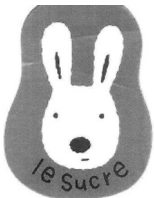


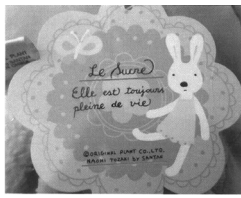
### III. MAJOR CASES

The following sections will discuss major cases decided by the Supreme Court subsequent to the cases discussed in the last edition of the MRLC Annual Report (China-Korea IP & Competition Law Annual Report 2014). Most of the cases concern appropriation of famous marks causing likelihood of confusion. Famousness, distinctiveness, likelihood of confusion are the major issues involved in these cases, along with copy of the design of a product. The discussion will focus on the facts, holding, reasoning and implication of each case.

#### *A. The Le Sucre case*

***(Supreme Court Judgment in Case No. 2015Do11550 delivered on December 10, 2015)***

In this case, the plaintiff obtained license from Original Plant Ltd. (a Japanese company and holder of the 'le sucre' copyright), registered the trademark in Korea with dolls as the designated good, and imported and sold rabbit dolls (as below). The defendants imported and sold KRW 3.6 billion worth of 83,950 similar rabbit dolls from November 2010 to April 2013. The dolls imported and sold by the defendants had a tag (pictured below), making buyers believe that they were purchasing a genuine product.

Plaintiff's Registered Trademark	Plaintiff's Doll	Defendant's Doll	Tag on the Defendant's Dolls
			

The Supreme Court held that the defendants both infringed the plaintiff's registered trademark right and violated the Unfair Competition Prevention Act. The defendants were sentenced to 2 years of prison. Specifically, the court held that 'the plaintiff's character and three-dimensional rabbit doll design constituted a well-known mark indicating the source of another's product under Article 2.1(A) of the Unfair Competition Prevention Act. The provision prohibits the use of a mark similar to another's well known product mark, causing likelihood of confusion as to source'.

In this case, the Supreme Court acknowledged that the product design(the rabbit doll), as well as the character, is a product mark under Article 2.1(A). The Supreme Court does not acknowledge inherent distinctiveness as a source when trade indicia, such as containers or wrappings, have other functions than indicating sources. However, distinctiveness is recognized when the distinguishing feature of a product's design acquires source indicating function as the result of a long and exclusive use. Some courts admitted that distinctiveness could be acquired only after short term exclusive use based on recent developments of commercial media. The le sucre rabbit doll is a character created by Japanese artist Naomi Tozaki, and has gained great popularity among parents of young children or women since it appeared in a fabric freshener commercial in Korea.

### ***B. The Viagra case***

***(Supreme Court Judgment in Case No. 2013Da84568 delivered on October 15, 2015)***

In this case, the plaintiffs Pfizer and Pfizer Korea registered a three dimensional blue rhombus shape designated as sexual disfunction medication. The defendant pharmaceutical company produced and sold a blue rhombus shape sexual disfunction medication. The external box of the plaintiff's product had dark and light blue stripes on the lefthand side against a white background. The inside of the box was silver, the backside noted 'Pfizer Korea, Viagra, Pfizer' and the 'Pfizer' was carved on the pills.

Plaintiff's registered three-dimensional trademark	Plaintiff's Product	Defendant's trademark in use
		

The Supreme Court denied the ‘likelihood of confusion’ under Article 2.1(a) of the Unfair Competition Prevention Act based on the facts that ① the medications were specialized products taken on a doctor’s prescription and distributed by a pharmacist in most hospitals, and ② source of the two products can be distinguished by the names, letter trademarks and business names on both products and boxes.

In many cases, defenses for the defendants against the ‘likelihood of confusion’ are ① that the consumers of the defendant’s products are different from those of the plaintiff, and ② that the consumers have expert knowledge. The latter defense can be argued ① when the price of the product is high (like cars or other luxury items) prompting sufficient investigation by the consumer, or ② when the consumers are experts (which applies to the this case). In this case, the likelihood of confusion was denied due to the expertness of the consumers (doctors and pharmacists) who select the product.

### ***C. The Montessori case***

***(Supreme Court Judgment in Case No. 2013Da15029 delivered on June 11, 2015)***

In this case, the plaintiff Montessori Korea had been established in 1988 and developed and sold products based on Montessori educational theory. The plaintiff registered ‘Montessori (in Korean)’ and ‘MONTESSORI’ with toys as the designated goods. The defendant sold educational toys marked as ‘Montessori’. The Supreme Court ruled that ‘Montessori’ is ‘widely perceived and used for the specific educational theory or educational materials and tools that apply specific child education theory’ between general consumers and transacting parties. Thus, the case did not satisfy Article 2.1 (a) ~ (c) of the Unfair Competition Prevention Act which requires ‘well- knownness in the domestic market’ and ‘distinctiveness (of a source indication for a product)’.

To be a product mark or business mark protected by the Unfair Competition Prevention Act, there must be a ‘function of source indication’. This judgment ruled that ‘Montessori’ had a ‘function of showing a specific educational theory’ rather than indicating a specific source. ‘Montessori’ is an educational theory developed by Maria Montessori (an Italian doctor), and the Association Montessori Internationale (established in 1929) trains and certifies educators based on the Montessori

theory.

***D. The Musical Cats case***  
***(Supreme Court Judgment in Case No. 2012Da13507 delivered on January 29, 2015)***

In this case, The Really Useful Group Ltd. (RUG) of UK produced and did business related to the Musical Cats. The Defendant entered into a licensing contract regarding Cats, and jointly developed numerous shows in major cities in Korea: 191 shows in 2003, 58 shows in 2004, 140 shows in 2007 and 172 shows in 2008, in English; and 146 shows in 2008, 59 shows in 2009, multiple shows in 2011, in Korean. The Defendant also produced and played numerous shows from 2003 to 2011 in major cities titled ‘Kids Cats’, ‘Musical Kids Cats’ and ‘Live Musical Kids Cats’. In the meantime, in 2011, the plaintiff changed the terms of its contract with RUB while this case was being adjudicated in the district court (Seoul Central District Court Judgment in Case No. 2010GaHab99946 delivered on April 22, 2011) which stipulated the plaintiff’s exclusive rights to use the Korean and English mark of ‘CATS’ for advertisement and promotion of the show.

The main issue of this case was whether ‘Cats’ would be considered a distinctive mark for the musical show of Cats or simply a name of a character who appears in the musical Cats. The Supreme Court ruled that the ‘Musical Cats’ “has been distinguished enough to indicate a source of the specified musical to consumers and transacting parties. It is highly individualized source of indication which enables consumers to associate the musical with a specific source, even though they do not know the exact name of the source.” Hence, it was considered a business mark under Article 2.1 (b) of the Unfair Competition Prevention Act.

The judgment is significant in the following aspects: first, the Supreme Court has consistently held that distinctiveness can only be recognized when ‘high individualization (as a source indication)’ has been proved if the ‘source indication is not an inherent function of trade indicia such as characters, product designs, containers or wrappings.’ Thus, the fact that the Supreme Court recognized the distinctiveness of the ‘Musical Cats’ based on ‘high individualization’ implies that the court will not recognize ‘inherent distinctiveness of a musical title.’ In fact, the Supreme Court has ruled that ‘a musical is a copyrightable work where the script, music, lyrics, dance and stage art come together while music and dance are set precisely to match the structure and flow of the story. The title is simply a shortened description of the name or content of the musical. Generally, the title does not have an inherent function of indicating the source of a product or a business.’

Second, under Article 2.1 (a) ~ (b), the ‘likelihood of confusion’ must also be proved. But the Supreme Court judgment lacked ruling on whether the defendant’s use of ‘Kids Musical Cats’ could ‘mislead’ parents or educators who make decision on whether to see the show. It is doubtful that the same decision would have been reached if ‘likelihood of confusion’ had been a main issue.



***E. The Cosmetic Container Imitation case***  
***(Supreme Court Judgment in Case No. 2013Da212066 delivered on March 27, 2014)***

In this case, the plaintiffs company imported and sold expensive brand cosmetics. The defendant produced and sold low-to-midrange cosmetics. The defendant held an promotion, in which customers received a free, new product of the defendant in exchange for an empty bottle of the plaintiff's cosmetics. The plaintiff argued that the defendant imitated its container which constituted an 'imitation of a product design' under the Unfair Competition Prevention Act.



Article 2.1 (i) of the Unfair Competition Prevention Act stipulates the following as an unfair competitive act: “selling, lending, or exhibiting or importing/exporting for the purpose of selling or lending, a product that imitates a product design (including the shape, color, shine or any combination of a product, a test product, or a product in a catalogue someone else has made”. The Supreme Court held that the ‘imitation’ means “copying another’s product design to make a product design substantially identical”, and that the defendant’s product was not an imitation based on the following reasons: ① it is hard to recognize the defendant’s intention to free-ride on the plaintiff’s product, ② the ingredients of the two products are different, and ③ the defendant had previously used identical designs for different cosmetics.

The conclusion of this judgment is appropriate, but the followings need to be pointed out. First, the subject of protection of the Article 2.1(i) of the Unfair Competition Prevention Act is not the ‘ingredient of the product’ but the ‘product design’. Hence, the subject of judgment in this judgment should be the container and not the cosmetics. Second, the ‘intention of free-riding’ is not a consideration to determine ‘imitation’. Third, item (i) excludes “product designs that imitate common shapes of identical products (or products similar in function or utility)” from protection. But ‘cylinder-shape containers’ are a common shape for cosmetics and other products, eliminating the need to determine ‘imitation’ in this case.

## **PART III.**

# **DEVELOPMENTS IN LEGISLATION AND PRACTICE OF COMPETITION LAW OF KOREA**

### **CHAPTER 1.**

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF THE PROHIBITION  
AGAINST MONOPOLY AGREEMENT

### **CHAPTER 2.**

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION AGAINST  
ABUSE OF MARKET DOMINANT POSITION

### **CHAPTER 3.**

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF BUSINESS COMBINATION

### **CHAPTER 4.**

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION AGAINST  
UNFAIR COMPETITION CONDUCT

### **CHAPTER 5.**

DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PRIVATE LITIGATION

## CHAPTER 1.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF THE PROHIBITION AGAINST MONOPOLY AGREEMENT

*KUM Changho / RYU Song\**

## I. OVERVIEW

The Korea Fair Trade Commission (“KFTC”) has traditionally been engaged in active law enforcement of cartels, and such enforcement trends have continued into 2015. In 2015 alone, the KFTC sanctioned companies in 88 cases involving cartels and imposed administrative surcharges amounting to approximately KRW 500 billion (about USD 420 million).<sup>1</sup> In the recent few years, the KFTC actively exercised its regulatory authority against cartels in regard to the so-called information exchange. However, in 2015, several major court decisions were rendered which served to put the brakes on such regulatory stance of the KFTC.

With respect to the KFTC’s prohibition against cartels, 2015 marked an important transformation in the investigation procedures. Even though the KFTC’s investigations of cartels and other violations of the Monopoly Regulation and Fair Trade Act (“MRFTA”) are voluntary investigations conducted without judicial warrants, such investigations had actually been conducted as compulsory investigations and were subject to criticisms for not sufficiently guaranteeing the procedural rights of the investigated companies. To address this concern, on October 21, 2015, the KFTC announced the Reform Policy on Investigation Procedure (i.e., the so-called “Case Handling 3.0”) centered on the protection of rights and interests of companies and the enhancement of transparency in the investigation procedure. As a means for specific implementation of the above policy, the KFTC implemented the “Rules on Investigation Procedure of the KFTC” (“Investigation Procedure Rules”) from February 4, 2016. Additionally, as part of “Case Handling 3.0,” the KFTC announced that it would amend the “Notification on Implementation of the Leniency Program for Corrective Measures, Etc. Against Confessors” (“Leniency Program Notification”) to require the attendance of the employees and officers who participated in the cartel at the review and decisional

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1. KFTC, 2016 Work Plan to the President (January 2016)

hearings of the KFTC in order to correct the harms which were inflicted by false or exaggerated leniency applications.

## II. LEGISLATION AND POLICY DEVELOPMENTS

Within the Korean judicial system, the KFTC is deemed to possess the characteristics of a quasi-judicial body, which, as a practical matter, means that it functions as a court with original jurisdiction. However, the KFTC recently suffered several losses in cases where large administrative surcharges were imposed. In addition, calls for improvements in the overall case handling procedure, such as the period required for handling a case and the legal procedure in the on-site investigation process have been raised. In such circumstance, there have been academic discussions on whether to change the current two-tiered judicial review for administrative appeal against the KFTC's dispositions into the three-tiered judicial review applied in other administrative litigations.

Heeding to the above public opinions, the KFTC announced the so-called "Case Handling 3.0" on October 21, 2015 after holding internal discussions regarding the matter. Case Handling 3.0 included action plans to protect the rights and interests of the investigated enterprisers and to enhance the transparency in the investigation procedure. Accordingly, the Investigation Procedure Rules of the KFTC have been newly enacted and the existing case handling procedure was amended, both effective as of February 4, 2016.

Most of the cases imposed with large amounts of administrative surcharges involve cartels.<sup>2</sup> Many on-site investigations are also conducted while investigating cartels. Therefore, the above changes in the system are likely to have important effects on the KFTC's future law enforcement regarding cartel cases. The key details of "Case Handling 3.0" are as follows:

(1) Improvement of on-site investigations and other investigation practices: (i) explicitly including the specific suspected violations in the notice of investigation and specifying the investigated subject matters in order to prevent excess investigations in advance; (ii) guaranteeing, in principle, the presence of counsel during the entire investigation process, such as during on-site investigations and witness interviews; (iii) drafting and issuing to the investigated company a "written confirmation of investigation process" and a "list of collected and submitted materials" that include the time of arrival to the investigated location and commencement and end time of the investigation; and (iv) causing the head of the investigating division to heed to the investigated company's complaints on the process of the on-site investigation after the conclusion of the such investigation and requiring the investigators to include the details and the process of the investigation in the on-site investigation daily report.

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2. In 2014, the KFTC imposed a total of KRW 804.3 billion (USD 675 million) in administrative surcharges, out of which 95% or approximately KRW 769 billion (USD 645 million) was imposed on cartels.

- (2) Enhancement of internal control and improvement of case handling procedures: (i) registering the case in the KFTC's computer system to obtain a case number, subsequently conducting an on-site investigation and notifying the investigated company of all case handling results regardless of the existence of a violation; (ii) handling the case within, in principle, 6 months (for cartels 13 months) from the commencement date of the investigation, but obtaining approval from the secretary general by setting an extension period, if extension is necessary for unavoidable reasons; and (iii) introducing the exclusion, evasion and avoidance system for the public officials of the decisional department (i.e. the General Counsel Office).
- (3) Prevention of misuse of the leniency program: requiring the mandatory attendance of officers and employees involved in the cartel at the review and decisional hearings so that the veracity of the leniency application can be closely examined to prevent false and/or exaggerated leniency application regarding cartels.<sup>3</sup>

### III. MAJOR CASES

#### ***A. Substantially Restricting Competition by Interfering or Restricting the Business Activities of Other Enterprisers – Case Concerning a Cartel among Multiple-System Operators (“MSO”)***<sup>4</sup>

Article 19(1)(i) through 19(1)(viii) of the MRFTA enumerates the specific types of cartels, such as price-fixing, agreements on production volume, agreements on market division, agreements on restricting access to facilities, and bid-rigging. Meanwhile, Article 19(1) also includes subparagraph (ix) as a catch-all provision that prohibits joint conducts by multiple enterprisers which substantially restrict competition in a particular business area by interfering with or restricting the business activities of other enterprisers in addition to the conducts enumerated in subparagraphs (i) through (viii) above. While cartel cases that applied subparagraph (ix) above have been relatively rare, the MSO case is likely to become a leading case for the application of subparagraph (ix) in the future. The collaborative act at issue in this case was the agreement among five MSOs to sanction program providers (“PPs”) that executed broadcasting program supply contracts with internet protocol television enterprisers (“IPTVs”) by reducing the broadcasting channels. With respect to the above, the Supreme Court affirmed the KFTC's conclusion in holding that, by causing a substantial number of PPs to abandon the plan to supply IPTVs with broadcasting programs, the agreement among the MSOs indirectly interfered with the pay-per-view service business of the IPTVs and caused the concern of reducing the range of consumer options regarding pay-per-view services. Hence, the Supreme Court further concluded that the aforementioned agreement among the MSOs constitutes a cartel prescribed under Article 19(1)(ix) of the MRFTA as an act that created a state in which competition is restricted or is likely to be restricted in the pay-per-view service market. In light of the

3. The amended Leniency Program Notification which stipulates the cartel participants' obligation to attend the hearings has been enforced since April 15, 2016.

4. Supreme Court Judgment in Case No. 2012Du24177 delivered on April 23, 2015.

reality that the types of cartels are performed in increasingly more complex forms, matters where the application of subparagraph (ix) is considered are likely to increase in the future.<sup>5</sup>

***B. Definition of Relevant Geographic Market in Price-Fixing Cases – Case Concerning Cup Coffee Price-Fixing<sup>6</sup> and Case Concerning Driving School Tuition Price-Fixing<sup>7</sup>***

Under the MRFTA and relevant procedure acts of Korea, the legal doctrine of per se illegality, which does not permit a defense against anti-competitiveness when certain act requirements are satisfied, is not recognized. Accordingly, the Supreme Court opined that the relevant market should be specifically defined to review the anti-competitiveness even in cartel cases.<sup>8</sup> Simultaneously, however, the Supreme Court has also held that the KFTC's burden of proof regarding the definition of the relevant market can be mitigated to a certain extent. In other words, when considering the diversity of cartels and the efficacy and reasonableness of regulation thereof, empirical economic analysis is not a requirement when the KFTC defines the relevant market, but, rather, the reasonableness of the market definition can be determined based on the type of the cartel at issue, the specific details thereof, and the economic effect, the general trade reality of the product subject to the cartel and other factors that can be inferred from the details of the conduct.<sup>9</sup>

In the case concerning cup coffee price-fixing, the Supreme Court reaffirmed the above position. In other words, in the foregoing case, the Supreme Court held that, in light of the existing legal doctrine above, the KFTC's definition of the relevant market for cup coffee as a separate and distinguishable market to the markets for canned coffee or bottled coffee was lawful. However, the Supreme Court further added that, even if the relevant market was expanded to the product market for the entire coffee products, the anti-competitiveness can still be found since the enterprisers involved in the cartel jointly hold approximately 30% of such market.

The Supreme Court further specified the foregoing legal doctrine in the case concerning driving school tuition price-fixing. The conduct at issue in this case was the agreement among seven driving schools located in different areas within Seoul to fix tuitions, and the Supreme Court reviewed whether the KFTC's definition of the relevant geographic market as the market for driving schools in Seoul was reasonable. In other words, since the students from the areas near Seoul also procured driving lessons from the suspected driving schools by using public transportation, such

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5. Supreme Court Judgement in Case No. 2013Du1683 delivered on August 19, 2015, was another cartel case where Article 19(1)(ix) of the MRFTA was applied. In this case, a group of pharmaceutical wholesalers participating in a pharmaceutical procurement tender held by a specific hospital agreed to acknowledge each wholesaler's vested rights to the previously handled products and to purchase each of the products from such vested wholesalers when supplying the hospital, regardless of the successful bidder. Such agreement was recognized to constitute a cartel.

6. Supreme Court Judgement in Case No. 2014Du762 delivered on April 9, 2015.

7. Supreme Court Judgement in Case No. 2012Du28827 delivered on October 29, 2015.

8. Supreme Court Judgment in Case No. 2012Du11829 delivered on April 11, 2013.

9. Supreme Court Judgment in Case No. 2013Du24471 delivered on November 27, 2014.

driving schools contended that market shares should be calculated in the markets for driving schools both in Seoul and its surrounding areas.

In response to such contention, the Supreme Court held that, in price-fixing, “unless special circumstances exist to indicate otherwise, the details of the agreement alone can easily expose the anticompetitive effect of such agreement.” Hence, the Supreme Court opined that illegality can still be found even if the KFTC failed to accurately measure the market shares of the cartel participants in the appropriately defined relevant geographic market. In other words, when the KFTC errs by defining the market more narrowly than the lawful scope of the relevant market, and the market share based on such market definition is not calculated accurately as a result, unless the reasonably inferred anticipated market share is so negligible that such market share does not restrict or is unlikely to restrict competition (or other special circumstances exist), anti-competitiveness may be found by comprehensively taking into account the specific factors for determining anti-competitiveness.

Pursuant to the holding above, the Supreme Court admitted that it is possible to view the relevant geographic market of the driving schools located in Seoul as “the entire area of Seoul and some areas in Gyeonggi-do adjacent to Seoul” even in the aforementioned case concerning driving school tuition price-fixing. Nevertheless, the Supreme Court pointed out that the market share would not be significantly changed even if the relevant geographic market is somewhat expanded, and that the agreement among the driving schools is likely to only affect the market in Seoul. In light of the foregoing facts, the Supreme Court affirmed the decision by the KFTC, which limited the relevant geographic market only to Seoul, as a reasonable definition of the relevant geographic market.

### ***C. Requirements for a Cartel Based on Information Exchange – Case Concerning Ramen Price-Fixing***<sup>10</sup>

In 2012, the KFTC determined that four Korean ramen manufacturers and sellers exchanged information on price increases and that the lower-rank enterprisers sequentially followed the market-leading enterpriser in increasing prices. The KFTC decided that such information exchange and the resulting price increase constituted a cartel. In particular, the KFTC determined that a cartel existed based on the details of the exchanged information, the number of instances of information exchange, the means for implementing the price increase, the similar price increase rate and other circumstantial evidence. Among the above list of evidence, the witness statement offered by B was the definitive evidence. Such statement stated that he/she had heard A talk about his/her attendance at a meeting where a discussion on increasing the price of ramen was held.

However, the Supreme Court noted that, while information exchange can be key evidence in

10. Supreme Court Judgement in Case No. 2013Du25924 delivered on December 24, 2015. Meanwhile, the conclusion from Supreme Court Judgment in Case No. 2013Du26309 delivered on January 14, 2016, which reviewed the KFTC's sanctions on other enterpriser suspected of participating in the above ramen noodle price-fixing case, was the same.

establishing reciprocity of communication of intent between enterprisers, it cannot alone establish the existence of a cartel. Based on the foregoing premise, the Supreme Court held that the KFTC failed to present sufficient evidence to establish the existence of a cartel. As its reasoning the Supreme Court offered the following arguments: (i) B's statement lacked accuracy in regards to the matters discussed at the meeting as an expert witness testimony and (ii) the reality showed some conducts by the enterprisers that cannot coexist with the alleged agreement, such as the ramen companies delaying the timing of the price increase or providing separate financial support to its distribution network, and (iii) with the existence of external conformity being unclear due to the diversity in ramen products, (iv) the evidence offered by KFTC alone is insufficient to establish the reciprocity of communication among the enterprisers.

#### ***D. Criminal Punishment of Foreign Enterpriser for a Cartel Activity in a Foreign Jurisdiction – Case Concerning Bearing Price-Fixing***

The MRFTA prescribes imposition of up to three years imprisonment or up to KRW 200 million in criminal fines upon any person participating in a cartel (Article 66 of the MRFTA). Recently, the KFTC has actively referred cartels to the Prosecutor's Office for criminal punishment. With regards to the price-fixing among Japanese bearing manufacturers and sellers, by which the price of bearings supplied to Korea were fixed in Japan and implemented by agreement through their Korean branch offices,<sup>11</sup> the court imposed a criminal punishment (i.e., criminal fine) on foreign enterprisers for the first time. While the KFTC issued corrective orders and imposed administrative surcharges in prior cases through the extraterritorial application of the MRFTA, this case marked the first instance of criminally punishing a foreign enterpriser through criminal referral by the KFTC.

#### ***E. Termination Period for a Cartel – Case Concerning Price-Fixing Among Oil Refineries<sup>12</sup>***

The statute of limitations for imposing criminal punishment of a cartel begins to run from the termination date of the cartel.<sup>13</sup> The Supreme Court previously established the following standards: (i) to establish the fact that implementation by some of the enterprisers participating in the cartel was terminated, such enterprisers must express their intent to withdraw from the agreement, either explicitly or implicitly, to the other enterprisers and perform an act adverse to the purpose of the agreement, such as setting prices at a level that would have existed if no agreement had been executed, based on their independent determinations, and (ii) to find termination of the cartel for all enterprisers involved, the relevant enterprisers must explicitly breach the agreement and perform

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11. See KFTC Decision in Case No. 2015-003 delivered on January 14, 2015 ("Case concerning monopoly agreement among four manufacturers and sellers of mini bearings").

12. Supreme Court Judgment in Case No. 2014Do471 delivered on August 19, 2015.

13. Supreme Court Judgment in Case No. 2010Do16001 delivered on September 13, 2012.



an act adverse to the purpose of the agreement, such as setting prices at a level that would have existed if no agreement was executed, based on their independent determinations, or there must be a circumstance sufficient to show that the agreement had been actually breached, such as the maintenance of an act sufficient to deem the agreement breached through repeated price competition among the enterprisers for a certain period.<sup>14</sup>

In this case, the issue was whether the fact that some of the oil refineries had temporarily discounted the prices at significant margins relative to other oil refineries in four different instances constituted termination of the cartel. With respect to such issue, the Supreme Court offered the standard that the measures of temporarily decreasing prices within several agreements executed among enterprisers in a price-fixing scheme cannot be viewed as a revocation of the agreement based on breach or termination thereof, unless a clear expression of revocation of a cartel is present. Simultaneously, the Supreme Court held that a temporary interruption alone cannot be deemed an actual revocation of the agreement in this case. The Supreme Court provided the following grounds for not finding the occurrence of an interruption by some of the oil refineries due to the significant margin of price discounts in four occasions as termination of a cartel: (i) in an oligopolistic market, an attempt to temporarily interruption from the cartel can occur to maximize profits; (ii) the temporary breakaway was cured and the participants thereto had immediately returned to status quo; and (iii) the oil refineries attempted to maintain the performance of the agreement by checking compliance and protesting any noncompliance during the cartel period.

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14. See Supreme Court Judgment in Case No. 2007Du2586 delivered on October 23, 2008.

**CHAPTER 2.****DEVELOPMENTS IN LEGISLATION AND  
PRACTICE OF PROHIBITION AGAINST  
ABUSE OF MARKET DOMINANT  
POSITION***LEE Changhun\****I. OVERVIEW**

In 2015, there was no significant change in laws or policies related to the regulation of abuse of market dominant position. In addition, the KFTC case of corporate messaging services seems to be in effect the only case dealing with such issues, as nearly all of the Korea Fair Trade Commission ("KFTC") decisions or court judgments did not directly deal with issues related to abuse of market dominant position. Particularly, as the corporate messaging services case dealt with the issue of margin squeeze for the first time in Korea, it received high level of attention. In the case, by applying the provisions of the Monopoly Regulation and Fair Trade Act ("MRFTA") that regulate below-cost sales, the KFTC found an abuse of market dominant position. However, in determining whether below-cost sales occurred in the case, it is difficult to understand why the KFTC applied normal trading price, instead of cost, as a basis for determination. In this respect, there is a keen interest in how the court will ultimately rule in the ongoing litigation.

**II. LEGISLATION AND POLICY DEVELOPMENT**

In 2015, there was no particular change in laws or policies related to regulation of abuse of market dominant position.

**III. MAJOR CASES**

It appears that the only 2015 case in which the KFTC or the Korean court rendered a

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\* Partner, Shin & Kim

significant decision or judgment regarding abuse of market dominant position is the case of corporate messaging services of Korea Telecom ("KT") and LG U+ (collectively "KT, Etc.", the respondents) (KFTC Decision in Cases No. 2015-049 and 050).<sup>1</sup> A summary of the case is as follows (in accordance with the facts acknowledged by the KFTC<sup>2</sup>).

### ***A. Overview***

The enterprises (the "Messaging Providers") that provide corporate messaging services (the "Messaging Services") enable their corporate clients such as banks and credit card companies to send text messages (e.g., notification of deposits and withdrawals, card transaction approvals, etc.) to the mobile devices of their users via wireless networks that are provided by network operators. In return, the Messaging Providers receive a certain amount of flat fee per service from the corporate clients. Upon entering agreements with the Messaging Providers, network operators provide transmission services (the "Transmission Services") by which they send text messages via wireless networks to the above-mentioned users who are registered to use their telecommunication networks. In return, network operators receive a certain amount of flat fee per service from the Messaging Providers. In short, such business is structured as follows: network operators sell the Transmission Services to the Messaging Providers, which then use such services as an essential resource in selling the Messaging Services to their corporate clients. In the meantime, network operators like KT, Etc. independently sell Messaging Services to corporate clients (as vertically-integrated enterprises) while selling the Transmission Services to the Messaging Providers.<sup>3</sup> In this context, Messaging Providers can be categorized into those who have their own wireless networks, such as KT, Etc., and those who do not (the "General Messaging Providers"). As only each network operator can send text messages to its own registered users, without exceptional circumstances, it is imperative that the Messaging Providers enter a transmission service agreement with each and every network operator (even the Messaging Providers with wireless networks such as KT, Etc. purchase the Transmission Services from other network operators for the purpose of sending text messages to the registered users of such other network operators).

KT, Etc. sold their Messaging Services at a price lower than both the price of Transmission Services they sell to other Messaging Providers and the price of the Transmission Services they purchase from other network operators. That is, while the price of the Transmission Services was on average KRW 9.2 per service, KT, Etc. sold their Messaging Services at a lower price, about KRW 8 per service. Since KT, Etc. did not have to separately pay for the Transmission Services provided to the registered users of their own network service (as a vertically-integrated enterprise), it could set a low price.

1. In some civil lawsuits, the court handled the issue of abuse of market dominant position (Seoul Western District Court Judgment in Case No. 2015Gadan17244 delivered on December 17, 2015, etc.), but no decision with significance regarding such issue has been made.

2. As I was not personally involved in this case, I was prompted to rely on the facts specified in the official decision by the KFTC.

3. Korea has three key network operators, SKT, KT and LG U+. Among the three, SKT is not in the business of selling the messaging services.

### ***B. KFTC's Decision***

The KFTC viewed that the sale of the Messaging Services by KT, Etc. constitutes an unreasonable exclusion of competing enterprises ("[practice of] unreasonably excluding competitive enterprises") under Article 3-2(1)5 of the MRFTA, and particularly constitutes below-cost sale ("[practice of] supplying goods or services at lower prices than normal trading prices") under Article 5(5)1 of the Enforcement Decree of the MRFTA. Based on such view, the KFTC decided that the sales activity of KT, Etc. constitutes abuse of market dominant position. First, the KFTC defined the market for corporate messaging services via wireless networks as the relevant product market, and the Korean market as the relevant geographic market. Then, the KFTC designated KT, Etc. a market dominant enterprise based on its market shares in the relevant markets and the fact they have their own wireless networks, which are an essential resource in providing the Messaging Services. Furthermore, with respect to the below-cost sale conduct element for the above provision of the Enforcement Decree ("supplying [...] at lower prices than normal trading prices"), the KFTC assumed that the "normal trading prices" are the "prices applicable to normally-executed transactions[.]" and determined that the above conduct element was satisfied by the act of KT, Etc. selling the Messaging Services below the price of the Transmission Services. In support of finding unreasonableness—or anticompetitive concern/intent—in such conducts, the KFTC presented as evidence that (i) the General Messaging Providers' market shares sharply declined, (ii) if KT, Etc. continue to sell the Messaging Services below the price of the Transmission Services, price competition in the messaging service market would become structurally impossible without KT, Etc. making loss, and (iii) it is difficult to find any good reason for such a low price other than an intent to exclude competitors (i.e., General Messaging Providers) from the market.

Based on such conclusions, the KFTC ordered the following remedial measures to KT, Etc.: (i) prohibition from setting the price of the Messaging Services below the sum of (a) the lowest price of the Transmission Services that is reported by KT, Etc. to the relevant government ministry, and (b) other costs of producing the Messaging Services, excluding costs of the Transmission Services; (ii) submission on a regular basis to the KFTC of a statement of production cost after separating the accounting for the messaging service business (provided, when KT, Etc. use their own the Transmission Services, the production cost must be calculated based on the price of the Transmission Services reported to the above government ministry); and (iii) submission on a regular basis to the KFTC of the transaction history of the Messaging Services.

### ***C. Assessment of the KFTC Decision***

The MRFTA, in regulating abuse of market dominant position, restrictively lists the elements of each individual type of conduct, which constitute the grounds for regulation. As the MRFTA does not include any provision directly regulating margin squeeze, the first issue raised was what

specific type of abuse should be applied to this case. For instance, as Article 3-2(1)3 of the MRFTA and Article 5(3)3 of the Enforcement Decree thereof prohibit restricting access to an essential element, such provisions may be applied to the act of KT, Etc. selling the Transmission Services to the General Messaging Providers at a high price (in which case, it should also be assessed whether KT, Etc. transferred their market dominance in the transmission service market to the messaging service market). However, while focusing on the issue of low-price selling of the Messaging Services, as discussed above, the KFTC applied the provisions on below-cost sale. This seems to be because the price of the Transmission Services set by another network operator without the Messaging Services (SKT) is almost the same as the price set by KT, Etc.

What is more notable in this decision is the KFTC's determination basis for below-cost sale, which states that any price lower than the normal trading price constitutes below-cost sale. However, such determination is considerably questionable. The Supreme Court has made it clear through its decision in the POSCO case<sup>4</sup> that the purpose of the MRFTA is to protect competition, not competitors. An efficient enterprise's entry to the market and provision of goods or services at a lower price than the existing normal transaction price should not be simply deemed to constitute a conduct of below-cost sale, and such interpretation appears to be contrary to the purpose of the POSCO decision. In other words, even if a low-price policy of an efficient enterprise eventually causes damages to relatively inefficient competitors, such would only be an outcome of market transformation occurring around efficient enterprises, and should not be seen as contradictory to the purpose of competition law. In this regard, the below-cost sale provisions have been generally understood to regulate predatory pricing below cost, i.e., price below the production cost. In the present case, KT, Etc. are vertically-integrated companies in the business of directly providing the Messaging Services while also operating their own wireless networks. If they could eliminate double margin and increase efficiency due to vertical integration, which subsequently allowed them to sell the Messaging Services at a lower price than the normal trading prices (the KFTC seems to acknowledge such facts), such business should not be prohibited. It does not seem appropriate to determine below-cost sales by using normal trading price, as the issue of whether the low-pricing policy of KT, etc. resulted from increased efficiency should be determined based on whether such low price exceeds their cost. KT, Etc. appealed the KFTC decision, and the present case is currently under review by the Seoul High Court. There is a need to closely watch the pending court decision on this case. hearings of the KFTC in order to correct the harms which were inflicted by false or exaggerated leniency applications.

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4. Supreme Court Judgment in Case No. 2002Du8626 delivered on November 2, 2007.

## CHAPTER 3.

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF BUSINESS COMBINATION

*KIM Kyoung Yeon*\*

## I. OVERVIEW

Under the Monopoly Regulation and Fair Trade Act of Korea (the “MRFTA”), a company shall report to the Korea Fair Trade Commission (the “KFTC”) on a concerned business combination if its total assets amount to 20 billion won or more or if its total amount of sales amounts to 200 billion won or more as of the end of the business year immediately prior to the year in which the business combination takes place. In such case, if a company’s total assets or sales amount to 1 trillion won, it shall make a pre-combination report (pre-merger filing) to the KFTC and such business combination cannot be completed without obtaining the KFTC’s approval. In cases of business combination between foreign companies, the parties are only obliged to file a report on a combination if each of the parties’ sales exceed 20 billion won in the Korean market as of the end of the business year immediately prior to the year in which the business combination takes place. Matters regarding the business combination report and review by the KFTC are regulated by the MRFTA, its enforcement decree, and KFTC notifications (especially for the detailed matters).<sup>1</sup>

Per the 2015 M&A Trend announced by the KFTC, the number of business combination reports filed in 2015 was 669 in total. Among these reports, 534 were filed by domestic companies (amounting to 56.3 trillion won), and 135 were filed by foreign companies (amounting to 325.6 trillion won). The size and number of M&As for which business combination reports were filed have both increased from the previous year. On a closer look, there is an increasing number of acquisitions of domestic companies by Chinese companies.<sup>2</sup>

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1. Guidelines for Business Combination Report (KFTC Notification No. 2012-59), Business Combination Review Guidelines (KFTC Notification No. 2015-3), Standards for Imposition of Administrative Fine on Violation of Standards of Business Combination Report (KFTC Notification No. 2012-22), Standards for Imposition of Corrective Measures Relating to Business Combination (KFTC Notification No. 2011-3), Standards for Imposition of Enforcement Fine on the Non-performance of Corrective Measures Relating to Business Combination (KFTC Notification No. 2012-23)

2. It was estimated as 2 cases in 2013 (0.04 trillion won) → 4 cases in 2014 (0.6 trillion won)→10 cases in 2015 (1.6 trillion won)

## II. LEGISLATION AND POLICY DEVELOPMENT

### *A. Major Trends of Legislation*

#### **1. MRFTA Amendment was Passed by the Cabinet Council<sup>3</sup>**

Under the amendment of the MRFTA that was passed by the Cabinet Council on December 23, 2014, filing obligations became exempt in the following cases: (i) Interlocking directorates less than 1/3 of the total number of directors, (ii) Mergers and business transfer between affiliates of a company that is not a ‘large company’ under the MRFTA, or (iii) Share acquisition, establishment and interlocking directorate of a company such as special purpose company, ship investment company, etc. which engages in the portfolio investment or investment in the specific area for its main business. Also under the Amendment, a company (such as private equity fund whose business purpose is to acquire another company) is obliged to file a report at the stage of acquiring a company but exempted from such obligation at the stage of establishment of the company itself. The proposed Amendment is a result of policy to develop an efficient system by considering actual anti-competitive effects from the stage of imposing obligations to file reports.

#### **2. Amendment of the Business Combination Review Guidelines Came into Effect (June 30, 2015)<sup>4</sup>**

The KFTC made amendments to the Business Combination Review Guidelines. Under the Amendment, when a M&A case is determined to be not anti-competitive at the voluntary preliminary review, the maximum review period will be 15 days (shortened from 30 days at present) when it is formally reported to the KFTC. This will facilitate faster review of M&A cases when the voluntary preliminary review acknowledges that it has no anti-competitive effects.

## III. MAJOR CASES

### *A. Imposition of Remedies*

#### **1. NXP Semiconductors N.V.’s Acquisition of Freescale Semiconductors Ltd. (KFTC Decision in Case No. 2015 Gigeol 3595 delivered on November 25, 2015)**

NXP Semiconductors N.V. (“NXP”), a semiconductor company manufacturing non-memory semiconductors signed an agreement to acquire 100% of shares of the Freescale Semiconductors Ltd.

3. [http://www.ftc.go.kr/news/policy/competView.jsp?news\\_no=2418&news\\_div\\_cd=1](http://www.ftc.go.kr/news/policy/competView.jsp?news_no=2418&news_div_cd=1) However, as of October 19, 2016, the Amendment has not come into effect yet.

4. [http://www.ftc.go.kr/policy/compet/competView4.jsp?report\\_data\\_no=6295&tribu\\_type\\_cd=020&report\\_data\\_div\\_cd=&currpage=1&searchKey=&searchVal=&startdate=&enddate=](http://www.ftc.go.kr/policy/compet/competView4.jsp?report_data_no=6295&tribu_type_cd=020&report_data_div_cd=&currpage=1&searchKey=&searchVal=&startdate=&enddate=)

(“Freescale”). Based on the products for which NXP and Freescale compete, the KFTC defined six semiconductor product markets as the relevant product markets: markets for the general-purpose Micro Controller Unit, general-purpose Digital Signal Processor, automotive Micro Controller Unit, automotive Digital Signal Processor, automotive Analog Power IC and Radio Frequency Power Transistor. Among those markets, the KFTC determined that after the proposed merger, the merging companies would account for 61.7% of the entire RF power transistor market, becoming the largest business entity, so they are presumed to restrict competition in the market. In this regard, the KFTC imposed corrective orders on NXP as follows: (i) NXP should sell its entire RF power transistor business to a third party within six months (it was considered that the RF power transistor business is scheduled to be sold according to the EU’s commitment decision); (ii) The purchaser of the divested business, when it requests, should be allowed to use the assets which will not be sold, under fair and reasonable conditions and (iii) Reports on remedy implementation results should be submitted to the KFTC within 60 days from the last day of each business year for five years.

## **2. Lotte Department Store’s Acquisition of Daewoo Department Store (KFTC Decision in Case No. 2015 Gigyeol 1493 delivered on June 25, 2015)**

Lotte Shopping signed a contract with Daewoo International Co., Ltd. to take over businesses of Daewoo Department Store’s Masan branch and Busan branch (Central Square). Among those transactions, after the acquisition of Daewoo Department Store’s Masan branch, Lotte Department Store’s aggregate market share in the department store in Changwon (greater area of Masan) would be 64.2%, the largest share. The KFTC, after reviewing the acquisition of Daewoo Department Store Masan by Lotte Department Store deemed that the acquisition would increase market concentration in the department store market in Changwon, practically restricting competition against the acquired department store’s shops and suppliers conducting most of their business in Changwon and accordingly imposed corrective orders; The KFTC banned Lotte Department Store from increasing commission rates and renting rates for 3 years charged to Daewoo Department Store Masan’s shops and suppliers doing most of their business in Changwon. This case is significant in that this is the first case in the business combination between department store businesses that the KFTC imposed corrective orders banning increase of commission rates charged to their shops and suppliers.

## **3. Bayer Korea’s Taking Over of MSD Korea’s Over the Counter Drug (KFTC Decision in Case No. 2015 Gigyeol 0588 delivered on May 4, 2015)**

The KFTC determined that Bayer Korea’s taking over of MSD Korea’s over the counter drug business (four over the counter drugs) would restrict competition in the domestic oral contraceptive pill market. Therefore, the KFTC ordered Bayer Korea to dispose of its assets and rights related to the oral contraceptive pill (Mercilon) acquired from MSD Korea to a third party and to have a prior



consultation with the KFTC when Bayer Korea designates a buyer. In addition, the KFTC banned on selling Bayer Korea's over the counter oral contraceptive pill through the designated buyer or distributor of Mercilon, oral contraceptive pill acquired from MSD Korea.

#### **4. SeAH Besteel's Taking Over of Posco Specialty Steel (KFTC Decision in Case No. 2015 Gigeol 0464 delivered on May 18, 2015)**

SeAH Besteel's acquisition of 52.16% of Posco Specialty Steel from Posco was viewed to be a horizontal merger in the markets of seven products such as carbon steel bar, billet, round billet, tool steel, plastic die steel, carbon wire rod, and free forging because SeAH Besteel and Posco Specialty Steel were competitors for such seven products as well as a vertical in the stainless wire-stainless CdBar market and stainless wire rod-stainless wire market ranging from the supply of raw material and the production of products. The KFTC (i) limited the price increase for the next three years in the carbon steel bar, billet and round billet markets where SeAH Besteel and Posco Specialty Steel directly compete each other and (ii) banned price discrimination and supply volume or supply ratio control for the markets where competitors might face supply disruption of raw material such as billet and stainless wire rod markets.

#### **5. Hanwha's Acquisition of Samsung General Chemicals' Stock (KFTC Decision in Case No. 2015 Gigeol 0450 delivered on March 30, 2015)**

The KFTC decided to impose corrective orders against a proposed deal in which Hanwha Chemical, along with its affiliate Hanwha Energy, acquired stocks of Samsung General Chemicals. The KFTC determined that the deal would restrict competition in the domestic Ethylene Vinyl Acetate (EVA) market. The KFTC (i) limited the rate of EVA domestic price increase to be lower than the rate of export price increase for the next three years, (ii) limited the rate of EVA domestic price decrease to be higher than the rate of export price decrease, and (iii) ordered submission of a report on progress of remedy implementation to the KFTC semiannually.

### ***B. Cancellation of Business Combination Report and Consent Order***

#### **1. Cancellation of the Proposed Merger between AMAT-TEL (Reported by the KFTC on April 29, 2015)**

Applied Materials Inc. ("AMAT") and Tokyo Electron Ltd. ("TEL") (the "Parties"), which are the first and third largest suppliers of semiconductor manufacturing equipment respectively, signed a merger agreement and notified the transaction to the KFTC (The merger was also filed to major

jurisdictions related to the semiconductor industry including the U.S., China, Japan and Taiwan around the same time). The parties proposed remedies including divestiture of overlapping business assets mostly at product level to the KFTC and other competition authorities.

After the KFTC collected opinions from the related parties domestically and internationally, consulted experts and made an in-depth analysis on whether the merger would be anti-competitive in cooperation with foreign competition authorities, it concluded that the merger could substantially impede competition in the semiconductor manufacturing equipment market (global market). Furthermore, finding that the proposed remedies by the parties were not sufficient, the KFTC delivered an examination report which imposed corrective orders including the divestiture of the overlapping business unit. In this course, the KFTC cooperated and discussed review status with the U.S. Department of Justice Antitrust Division (DOJ), the Ministry of Commerce of the People's Republic of China (MOFCOM), the Japan Fair Trade Commission, and the Taiwan Fair Trade Commission. After the KFTC delivered the examination report, the parties abandoned the proposed merger transaction. This is the second international merger case that the parties cancelled the proposed merger transaction after the KFTC delivered an examination report following the BHP Billiton – Rio Tinto case.

## **2. Proposed Merger between MS-Nokia (Reported by the KFTC on August 24, 2015)**

This is the first case in Korea that a consent decree has been applied to the merger case. In this case, the KFTC delivered an examination report concluding that the MS proposed merger would limit competition. On August 27, 2014, MS offered a consent decree, voluntarily proposing a remedy plan to address the anti-competitiveness of the proposed merger.

In September 2013, MS announced its acquisition of Nokia's mobile devices and service business and notified the deal to competition authorities in the U.S., EU, China, Japan and Taiwan. In November 2013, MS also notified the acquisition to the KFTC. At the end of 2013 and the beginning of 2014, the U.S. and EU competition authorities approved the acquisition concluding that the proposed acquisition would not have anti-competitive effects. However, in Korea, it raised some competition concerns that the proposed acquisition would limit the competition in the domestic mobile device market.

MS proposed its remedy plan promising that (i) it will comply with FRAND commitments, (ii) it will not bring lawsuits for injunctions, (iii) it will maintain royalties at or below the current level for the next seven years, and (iv) it will eliminate provisions on exchanging information in the business collaboration agreements. On February 4, 2015, the KFTC decided to initiate the consent decree proceeding and expanded the scope of remedy's application by revising and supplementing the remedy plan. After that, the KFTC made MS promise the following remedy plans and based on that, approved the proposed acquisition on a conditional basis: (i) MS will comply with FRAND

commitments when licensing SEPs and it will not seek injunctions or import ban against Korean domiciled manufacturers for SEPs, (ii) with regard to non-SEPs, it will maintain royalties at or below the current level, will not transfer any non-SEPs for a period of five years and will not seek injunctions or import ban against Korean domiciled manufacturers and (iii) it will delete provisions on exchanging business information and will not exchange sensitive business information.

**CHAPTER 4.****DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PROHIBITION AGAINST UNFAIR COMPETITION CONDUCT**

*SHIN Sang Hoon /KANG Il\**

**I. OVERVIEW**

The Korea Fair Trade Commission (“KFTC”) amended the Review Guidelines on Undue Exercise of Intellectual Property Rights (KFTC’s Established Rules No. 205) on December 17, 2014 and implemented the guidelines from December 24, 2014.

Meanwhile, the Fair Trade in Authorized Dealer Act was passed by the National Assembly on December 3, 2015 to strengthen regulations of unfair trade practices in transactions among suppliers and dealers.

In 2015, the KFTC concretized the standards of judgment regarding some types of unfair trade practices, which are required to restrict competition in the relevant market, by amending the Review Guidelines on Unfair Trade Practices. In this guideline, the KFTC confirmed that the illegality of tying should be judged based on anticompetitive effect in the market. However, it eased the requirements of illegality for unfair use of technologies of or taking employees from other undertakings.

The KFTC expanded its investigation by including local public entities as well as national public entities exercising significant influence over the private sector. It resulted in correcting unfair trade practices of public entities. The KFTC also imposed corrective orders on a global standard-essential patent holder which owns the SEP-related audio codecs technology, with respect to its conduct of establishing unfair contract terms and conditions when entering license agreements with licensees.

Regarding resale price maintenance of contact lenses, the Supreme Court ruled, on November 12, 2015, against the global contact lens manufacturer in the lawsuit where the manufacturer had argued cancellation of corrective order and imposition of penalty surcharge of the KFTC.

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\* Attorneys, Bae, Kim & Lee LLC

## II. LEGISLATION AND POLICY DEVELOPMENT

The KFTC amended the Review Guidelines on Undue Exercise of Intellectual Property Rights (KFTC's Established Rules No. 205) on December 17, 2014 and implemented the guidelines from December 24, 2014.

The KFTC also set forth specific standards for abuse of patents by non-practicing entities ("NPEs") and standard essential patent holders (a prominent issue in the field of intellectual property rights), reformed the general review principles and the structure for types of abuses with respect to the exercise of intellectual property rights, and supplemented a substantial portion of the guidelines by defining relevant markets.

As monetization through intellectual property has become active, various types of NPEs have emerged and are carrying out business domestically and internationally. In the past, monetization was achieved through direct exercise by patent holders of their rights, but recently, cases where rights are exercised through NPEs by means of transfer or grant of exclusive licenses are becoming more common. In this regard, the amended review guidelines specifically set forth abuse of patents by NPEs.

In connection with standard essential patents, the amended review guidelines include an act of unduly avoiding or circumventing the grant of licenses under FRAND terms and conditions or unduly disturbing the exercise of any relevant patent held by licensees when granting licenses related to any standard essential patent as an act of abuse.

On December 3, 2015, the Fair Trade in Authorized Dealer Act ("FTADA") was passed at the National Assembly plenary session. In addition the Korea Fair Trade Commission released the Enforcement Decree of the FTADA on July 26, 2016, which consists of 21 provisions and two annexed tables.

The FTADA provides an exhaustive list of the types of abusive conduct by suppliers with superior bargaining power (compared to authorized dealers): (i) compulsory purchase of supplier's goods or services; (ii) compulsory provision of any economic benefits for suppliers; (iii) setting up a sales target; (iv) provision of disadvantages; (v) interference with authorized dealer's business; (vi) declining or avoiding purchase order confirmation; (vii) revenge activities. The Enforcement Decree of the FTADA provides a guidance specifying each type of conduct proscribed by the FTADA.

The FTADA stipulates that the Dispute Resolution Committee ("DRC") be set up in the Korea Fair Trade Mediation Agency and grants the effect of a judicial settlement to resolution of disputes by the DRC to facilitate prompt resolution of disputes. An Enforcement Decree specifies related operation and procedures of the DRC.

The FTADA delegates to the Enforcement Decree, a setup of the specifics of administrative

finer to be imposed on a supplier who is found to have committed abuse of superior bargaining power as well the specifics of fines for negligence in case of violation of the statutory duties (e.g., obligation to memorialize a supply agreement in writing). The Enforcement Decree also provides the specific criteria for the administrative fines to be imposed for commission of abusive conduct by a supplier with superior bargaining power and for the fines for negligence to be imposed for other types of violations stipulated by the FTADA.

The FTADA requires some contractual terms to be included in the agreement to be handed over to authorized dealers (wholesaler or retailers) (e.g., types of trade, method of delivery, conditions of return, causes for termination). The Enforcement Decree of the FTADA requires additional terms to be included if the trade type is a consignment sale. The extra terms to be contained in consignment sales agreements are (i) the scope of work to be performed by authorized dealers and the method of her or his performance; (ii) any consideration to be paid by suppliers to dealers including, without limitation, commission.

Meanwhile, in amending the Review Guidelines on Unfair Trade Practices (hereinafter, the "Review Guidelines"), the KFTC (i) concretized the standards for judgment on types of unfair trades (refusal to deal, discrimination, exclusion of competitor, binding and conditional trade), which are examined mainly based on anticompetitive effect; (ii) supplemented the standards so that the illegality of a tie-in sale will be judged mainly based on anticompetitive effect; (iii) supplemented the standards for judgment on a superior trading position in trade in a way to judge such position based on the continuance of, and level of dependence on trade; and (iv) eased the requirements for illegality of unfair use of technologies of or taking employees from other undertakings.

Previously, the Review Guidelines only briefly specified the meaning of 'anticompetitive effect' but there was no specific standard for judgment or criteria, which made it difficult to make a judgment on whether an actual individual behavior has anticompetitive effect. In this regard, the amended Review Guidelines set forth detailed standards by presenting that such anticompetitive effect includes market price increase and production decrease. For unfair trade practices (which are assessed mainly based on their anticompetitive effect), the proposed amendment requires that whether an undertaking in question has market power should be determined first, and then the anticompetitive effect should be proven.

The proposed amendment clarifies specific market share standards which are used to determine whether an undertaking has market power. In case where an undertaking has more than 30% market shares in the relevant market, it is deemed to have market power. In case of 20% to 30%, the undertaking is deemed to have market power depending on its market concentration, competition condition, and product characteristics. In case of 10% to 20% market shares, the undertaking is deemed to have market power if other market participants are conducting the same trade practice that it engages in and the effect of such practice accumulates, causing accumulative

containment effect.

In addition, while the previous Review Guidelines prescribed that in making a judgment on the illegality of tie-in sales, hindering consumers' options would be considered (in addition to anticompetitive effect), the amended Review Guidelines basically limited the standard of review to anticompetitive effect in such cases, adopting recent theories of competition laws and law enforcement practices in other countries. Per the amended Review Guidelines, the four illegality requirements for the control of tie-in sales are as follows: ① whether two different products exist; ② whether tie-in sales occur; ③ whether an undertaking executing a tie-in sale has a significant position in the market for the major product; and ④ whether an undertaking executing a tie-in sale excludes competitors in the market for the supplementary product.

While the previous Review Guidelines specified that in making a judgment on the existence of a superior position in trades, the availability of alternative customers should be considered, the amended Review Guidelines supplemented the standards in a way to make a judgment based on the continuance of, and level of dependence on trades. In other words, the guidelines specify that (i) if trades continue, in general, investments are made in specialized capital equipment, human resources and technologies, etc., which leads to lock-in, and the counterparty holds a superior position; and (ii) if the dependence on trades is judged as substantial in consideration of the proportion of either party's revenue that comes from the other party to its total revenue, a superior position in trades shall be recognized.

Furthermore, the amended Review Guidelines held that a judgment on the illegality of abuse of position in trades against consumers shall be made mainly based on the relevance to the trade order, including cases where such abuse threatens to damage unspecified consumers or any act similar thereto occurs continuously and repeatedly. This reflected a recent precedent (Supreme Court Judgment 2012du18325 delivered on September 10, 2015).

Lastly, previously there was criticism that under the Review Guidelines acts of unfair use of technologies or taking employees from other undertakings were not effectively regulated because the requirements for such charges were so strict (leading to companies using this loophole instead of promoting M&As). In response, the amended Review Guidelines eased the standards for judgment on illegality. As a result, related to the requirement that an 'undertaking's current and future business plans need be seriously affected', 'seriously' has been toned down to 'considerably'.

### III. MAJOR CASES

#### *A. Abuse by Dolby of its position in trades under licensing agreements (KFTC Decision in Case No. 2015-125 delivered on August 3, 2015)*

On August 3, 2015, the KFTC imposed a corrective order against Dolby Laboratories Licensing Corporation (US corporation) and Dolby International AB (Swedish corporation), which own the license to the international standard sound technology and patents, etc., for their act of establishing unfair contract terms and conditions for domestic undertakings at the time of execution of license agreements.

As Dolby owns the license to AC-3, the standard digital audio coding technique, it is necessary for undertakings to obtain its permission to produce relevant digital audio products. The technique has been adopted as the audio coding standard by standardization organizations for media such as digital broadcasting all over the world and DVD, etc., and if the technique is not adopted in any product relevant to such media (e.g., digital television, DVD player, etc.), no sound is played. Dolby set forth its terms and conditions under which the licensee may not dispute the validity, or ownership of the patent concerned in the licensing agreement, and it may terminate the licensing agreement if the licensee disputes the validity of the patent concerned. In addition, Dolby made it possible to terminate an agreement even for any threatened infringement or abuse by the licensee of any of its intellectual property rights other than actual infringement or abuse. It also set forth terms and conditions under which the licensee shall be liable for damages and overall audit costs even if there is only a minor discrepancy between the quantities previously reported by the licensee and those confirmed by an audit and the licensee shall confer Dolby an exclusive right to receive the right to subservient inventions that the licensee acquires and be prohibited from granting a license to a third party.

The KFTC determined that Dolby put its counterparties at a disadvantage in the manner of establishing and maintaining unfair contract terms and conditions in a licensing agreement as stated above.

***B. Forced sale and restriction of sales districts by EBS  
(KFTC Decision in Case No. 2016-024 delivered on January 26, 2016)***

The KFTC imposed a corrective order and a penalty surcharge of 350 million won against Korea Educational Broadcasting System (EBS) for its forced sale and restriction of sales districts.

According to the KFTC's judgment, EBS obtained monopolistic power in the market for reference books for senior high school students under the government's policy connecting textbooks with the College Scholastic Ability Test (the "Test") and forced sole distributors (non-exclusive agencies) to sell its textbooks that are not affiliated with the Test (reference books for first to eleventh graders) by using such power. In particular, EBS set up an index for evaluation of sole distributors, allocated a high grade of up to five times to the sales of textbooks not affiliated with the Test in comparison with those affiliated with the Test, and gave sole distributors who get poor grades



disadvantages such as termination of the distribution agreement. Furthermore, the KFTC determined that EBS established a sales district for each sole distributor and strictly restricted sales districts by using coercive measures such as giving a warning to distributors who supplied textbooks for any other district or requiring such distributors to provide a report.

***C. Maintenance of resale prices of contact lenses by Johnson & Johnson Korea, Ltd. (Supreme Court Judgment in Case No. 2014Du44066 delivered on November 12, 2015)***

Regarding the conduct of maintaining resale prices with respect to Acuvue contact lenses, the Supreme Court ruled, on November 12, 2015, against the plaintiff, Johnson & Johnson Korea, Ltd. (“Johnson & Johnson”), in the lawsuit where it had argued cancellation of corrective order and imposition of penalty surcharge.

On May 26, 2014, the KFTC imposed corrective orders and penalty surcharge of 1,806 million won against Johnson & Johnson based on the assessment that Johnson & Johnson fixed the minimum resale prices for Acuvue contact lenses supplied to optical shops in advance, forced them not to sell the contact lenses at any prices lower than the pre-fixed prices and imposed conditions to the effect of not selling the products to any optical shop with which it does not transact business, which constitutes resale price maintenance under Article 29(1) of the Monopoly Regulation and Fair Trade Act and unfair binding conditions under Article 23(1) of the same act.

In the lawsuit for cancellation of the actions taken by the KFTC filed by Johnson & Johnson, the Supreme Court maintained the original decision of the Seoul High Court to the effect that (i) Johnson & Johnson fixed and notified a minimum sales price for consumers to optical shops and suspended the supply of the products if any violation was detected through a compliance inspection conducted by its employees, which constituted resale price maintenance; and that (ii) it made optical shops agree not to sell Acuvue contact lenses to any optical shop it did not deal with and suspended the supply of the products temporarily upon violation of such agreement, which constituted an act for the purpose of maintaining resale price, possibly obstructing fair trade.

**CHAPTER 5.****DEVELOPMENTS IN LEGISLATION AND PRACTICE OF PRIVATE LITIGATION***HONG Daesik* \***I. OVERVIEW**

Korean competition laws have been primarily enforced by the KFTC. But recently, private litigation has been on a rapid rise, stimulating legislative change in laws that promote the role of private litigants in preventing anti-competitive acts.

One of the most important developments in this respect has been the repeal of the MRFTA provision that required a preceding KFTC corrective measure to be established for a private damage action related to anti-monopoly case to proceed. Before 2004 amendment, plaintiffs were required to wait until the KFTC measure had been established before they could bring a private litigation. If there was an appeal to the KFTC decision, plaintiffs needed to wait until such appeal and decision was finalized. But with the repeal of such provision, plaintiffs are now free to bring damage actions based on the MRFTA, including when the KFTC is still investigating the case.

**II. LEGISLATION AND POLICY DEVELOPMENT*****A. General Procedures***

Despite systematic improvements, private litigations in competition law cases are generally not brought without KFTC prior action on illegality. Since class action lawsuits and extensive discovery 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. Once a KFTC decision procedure is finalized, the courts may use KFTC's fact-finding as a presumption of fact (although it will not serve as definite proof). Based on such presumption, plaintiffs have a greater incentive to bring a damage action alongside administrative litigation. The

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KFTC is mandated to send all information regarding a case if the court requests it. Hence, if there has been a KFTC investigation in the matter regardless of whether any decision has been reached, the same evidence that the KFTC had reviewed will be utilized in the private litigation against the defendants.

This has become a concern for leniency applicants. Although evidence submitted to the KFTC is considered a trade secret, if the KFTC receives a request from the court in latter litigation, there are no grounds to refuse such request. Thus, there is argument that a provision exempting leniency applicant documents from such requirements needs to be introduced, but without any resolution yet.

### ***B. Calculation of Damages***

The MRFTA allows the courts to determine a large amount of damages based on the 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 allowing the court to decide on an amount of damages rather than require the plaintiff to prove the exact amount of damages that were incurred by the defendant. The court utilized this provision in the Uniform Cartel case in which the amount of damages for each purchaser was relatively small.

But the courts are cautious in relaxing proof of causation in the context of damages calculations. For example, in the Microsoft abuse of market dominant position damages action, the court ruled that the plaintiff had failed to prove causation between Microsoft's illegal acts and damages since most of the alleged amount of damages were based on unrealized profits.

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 analyses 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). The Korean courts have generally taken a 'but for' approach in calculating damages in private litigation. In other words, the Supreme Court has held that the proper amount of damages in the 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 assets with the illegal acts committed'. But the appropriate economic method to determine that difference remains controversial. In the Military Oil Bid-Rigging case, the Seoul Central District Court of Korea calculated damages based on a but-for competition price estimated by the econometric method using the multiple regression model. On the other hand, the Seoul High Court adopted the 'modified' standard market comparative method (yardstick method) in calculating damages while holding that courts need to use the most reasonable method to bring about appropriate real-world outcome, acknowledging the limits of econometric analytical methods. In response, the Supreme Court held that the price that would have formed without the illegal act can be determined by excluding the

increase of price caused by the act while keeping other price-forming factors of the relevant market stable. Based on this holding, the Supreme Court reversed the Seoul High Court ruling citing that the calculation of competition price did not exclude the effects of price-changing factors although there were changes in economic factors.

### ***C. 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 hand, any person that has incurred 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, reduced damages to the practically equivalent effect to recognizing a pass-on defense holding that 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.

## **III. MAJOR CASES**

There were not any cases with new holdings at the Supreme Court in 2015 but there was a significant judgment regarding calculation of damages in a lower court. In the follow-on lawsuit in the National Health Insurance Service v. Dong-A ST case (the first-ever follow-on lawsuit to a KFTC reverse payment case), the Seoul Western District Court adopted the market share based theory in calculating damages, which estimates assets without the illegal act based on the predicted change in market share. The case-specific justification for such premise is that the price of pharmaceuticals is not influenced by other elements due to the distinct nature of drug price setting. Accordingly, the court presumed that the plaintiff would have market power at least similar to the market leading generic producer when the agreement was reached, and calculated damages based on the predicted market share but for the illegal agreement.

**PART IV.**

**DEVELOPMENTS IN LEGISLATION  
AND PRACTICE OF  
ANTI-MONOPOLY LAW RELATING  
TO INTELLECTUAL PROPERTY  
RIGHTS IN KOREA**

# DEVELOPMENTS IN LEGISLATION AND PRACTICE OF ANTI-MONOPOLY LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS IN KOREA

*KOO Dave B. \* / KIM Gene-Oh (Gene) \* / CHOI Gina Jeehyun \*\**

## I. OVERVIEW

Article 59 of the Monopoly Regulation and Fair Trade Law (“FTL”) provides that the FTL shall not prohibit any conduct that is deemed as a fair exercise of intellectual property rights (“IPR”). On that basis, the Guidelines on Unfair Exercise of Intellectual Property Rights (“IPR Guidelines”) – which were issued by the Korea Fair Trade Commission (“KFTC”) to articulate general principles and specific criteria for applying the FTL to the exercise of IPR – provide that even an act that may appear as a fair exercise of IPR may be an unfair exercise and regulated under the FTL if it in substance deviates from the fundamental purpose of the intellectual property system.

Since the mid-2000s, the KFTC has recognized IPR abuse as a major area of FTL enforcement and has been aligning the applicable regulations and standards with changing market practices to regulate anti-competitively 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 provide a legal basis for the KFTC to regulate the activities of foreign enterprisers. In 2012, the KFTC enacted new guidelines for standard essential patents and patent license agreements. Moreover, since 2010, the KFTC has been surveying patent licensing and enforcement activities in the information technology, pharmaceuticals, machinery, and chemicals sectors and has investigated and found that certain IPR-related practices of both domestic and foreign companies violated the FTL.

In 2014, the KFTC continued its efforts for regulating IPR abuse and released further amendments to the IPR Guidelines, including provisions to better regulate non-practicing entities (“NPE”) and to modify certain provisions relating to standard-essential patents (“SEP”). In addition, to regulate SEPs more rationally, the KFTC collected opinions from various sectors and has

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announced additional amendments to the IPR Guidelines in March 2016. Furthermore, the KFTC closely reviewed the MS-Nokia business combination and Dolby's abuse of transactional position in 2015 and is continuing its efforts in 2016 to investigate other potential patent abuse activities. On the litigation front, the Korean Supreme Court's decision in 2014 on an alleged pay-for-delay settlement is significant as the first decision by the highest court of Korea on the standards for applying Article 59 of the FTL.

## II. LEGISLATION AND POLICY DEVELOPMENT

### *A. Application of competition laws to Intellectual Property Rights ("IPR")*

The Monopoly Regulation and Fair Trade Law ("FTL"), which is the competition law of Korea, provides that the FTL shall not prohibit any conduct that is deemed as a fair exercise of IPR. Article 59 of the FTL restricts and limits the application of the FTL to IPR by providing that "[t]his Act shall not apply to any act which is deemed as a justifiable exercise of the right under the Copyright Act, the Patent Act, the Utility Model Act, the Design Protection Act or the Trademark Act." Conversely, this provision provides that the FTL may be applied to an exercise of IPR if it is deemed unfair.

With respect to the scope of fair exercises of patent rights under the FTL, the Korean Supreme Court stated that "any act that is not deemed to be a justifiable exercise of patent right refers to any act, even if such act appears to be an exercise of patent rights, whose substance is beyond the intent 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 justifiable shall be made taking into account the overall circumstances, including the purpose and intent of the Patent Act, the contents of the patent rights concerned, and the influence of the act on fair and free competition" (Supreme Court Judgment in Case No. 2012Du24498 delivered on February 27, 2014). This decision, rendered in a case involving collusion between a patentee and a licensee, is significant because it is the first decision in which the highest court in Korea reviewed and opined on the meaning of Article 59 of the FTL and the limitations of the application thereof and provides guidance on the applicability of competition laws to IPR.

The KFTC, which is the competition law enforcement authority in Korea, issued the IPR Guidelines in 2000 to articulate general principles and specific criteria for applying the FTL to the exercise of IPR. The IPR Guidelines affirm the limitations in applying the FTL by providing that "the legitimate exercise of IPR 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 FTL in accordance with Article 59 of the FTL." 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 the IPR, and the effect of the exercise on competition in the relevant market.”

### ***B. 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 FTL and also reference the guidelines of foreign competition authorities. In December 2014, the KFTC made substantial amendments to the IPR Guidelines by applying the principles provided in major case decisions from foreign jurisdictions such as the U.S. and the EU and gathering opinions from relevant government agencies such as the Korean Intellectual Property Office (“KIPO”), industry experts, and IPR experts. The 2014 amendments strengthened the legal basis for enforcing the FTL against the abuse of patent rights by NPEs and SEP holders and incorporated modified general examination principles and categories of abuse behaviors. In its previous annual work plans, the KFTC had already identified its plans to regulate patent abuse, noting its particular concern with activities of NPEs and SEP holders – including excessive royalties, unfair discrimination in charging royalties, and unilateral filing of patent infringement actions – that may undermine innovative competition and cause undue harm to domestic companies, and the 2014 amendments to the IPR Guidelines are in response to those plans. The main modifications of the 2014 amendments can be summarized as below:

#### **1. Provisions regarding NPEs**

The 2014 amendments define NPE as a “business entity engaging in business activities to make profits by exercising a patent over patent licensees, etc., rather than manufacturing or selling products or providing services by applying the patented technology.” The 2014 amended IPR Guidelines classify patent abuse by NPEs into the following five categories: (1) imposition of excessive royalty; (2) failure to apply terms that are fair, reasonable and non-discriminatory (“FRAND”); (3) imposition of unfair terms and conditions for license agreements; (4) filing or threatening to file frivolous patent infringement lawsuits; and (5) patent privateering (i.e., transferring patent rights to an NPE and causing that NPE to engage in any of the foregoing acts).

While active research and discussions are ongoing in the U.S. and the EU regarding the scope of NPEs and whether special regulation under competition laws is necessary, the competition agencies in those jurisdictions have yet to issue specific guidelines or detailed plans in relation to NPEs. Under these circumstances, the KFTC’s preemptive amendments to the IPR Guidelines indicate the agency’s keen interest in regulating NPEs.



## **2. Provisions regarding SEPs**

The 2014 amendments newly define SEP as “a patent for materializing a standard technology, for which a license is necessary to manufacture a product or provide a service that requires the standard technology.” Also, the KFTC supplemented the existing section on the exercise of patent rights related to standard technologies to add a provision 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 potential licensee, such act may constitute abuse of patent rights. The provision also states that filing an injunction claim without negotiating with a willing licensee in good faith is highly likely to be found as unfair conduct. These provisions are consistent with the KFTC’s position in a case further described below wherein Apple filed a complaint against Samsung Electronics and with foreign competition authorities’ and courts’ recent permissions of injunction claims raised against an unwilling licensee by an SEP holder who had participated in license negotiations in good faith, upon satisfaction of certain requirements. In addition, the IPR Guidelines supplemented the list of IPR abuse acts committed by SEP holders, adding unfair evasion of a license under FRAND terms and unfair restriction of a licensee’s exercise of the licensed patent.

## **3. Amendments to general examination principles and categories of abuse**

The focus of the IPR Guidelines was shifted from regulating unfair trade practices to regulating abuse of a market-dominant position by adding a provision that in the case where an enterpriser is exercising IPR by itself, the IPR Guidelines shall be applied to the extent that the enterpriser possesses a market-dominant position. In addition, efforts were made to enhance the IPR Guidelines’ completeness by describing the categories of abuse in order of phases from the acquisition of a patent to the exercise thereof (litigation, licensing, etc.). The KFTC also presented standards for making determinations on issues unique to IPR and increased predictability by adding criteria for determining illegality of grantbacks or package licensing.

### ***C. 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. With a purpose to achieve balanced enforcement of the FTL against the exercise of IPR, the amendments appear to be the result of collecting various opinions on the definitions of standard technology and SEPs as well as on the subject and scope of regulations. The 2016 amended IPR Guidelines limit the definition of “standard technology” to technology selected as a standard by standard setting organizations etc. and delete the reference to “technology that is used widely in the relevant technology field as a de facto standard.” 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 thought 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 to 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.

### ***D. Introduction of patent linkage system for drugs***

In March 2015, under the Korea-US FTA, amendments were made to the Korean Pharmaceutical Affairs Act to introduce a system similar to the U.S. Hatch-Waxman Act. These amendments are referred to as the “patent linkage system for drugs,” and they address, among others, improvements to the registration of patents for drugs and the patentee notice process, sales injunctions following patent disputes, and a reporting requirement upon settling a patent dispute. In its annual work plan for 2016, the KFTC noted that the patent linkage system increased the possibility of unfair exercise of patent rights and stated that it would reinforce its monitoring of any delay or interruption in the market entry of competing products caused by patentees pursuant to an agreement with competitor licensees in the medical or pharmaceutical area. In particular, the KFTC is now able to more actively intervene in the exercise of IPR in the pharmaceutical industry based on a newly adopted system requiring drug companies to report to the KFTC the settlement of a patent dispute within 15 days for the purpose of monitoring reverse payments. However, since the KFTC has yet to issue detailed reporting procedures and specific standards for reviewing the reports, much attention is being focused towards how the KFTC will enforce the FTL in this regard going forward.

## **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 in connection with these important issues in recent years. In this part, we review some of the recent cases and consider the Korean courts’ and the KFTC’s positions on these issues and their significance.

***A. 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 made a request to KIPO to seek a negative declaratory judgment on the scope of the patent. Subsequently, Companies A and B executed: (i) a settlement agreement pursuant to which Company B shall discontinue manufacturing and selling Product Y and voluntarily withdraw the action filed on the patent; (ii) an agreement pursuant to which Company A shall grant to Company B a domestic co-distribution right for Product X and Company B shall refrain from developing, manufacturing, registering, or selling any drug containing the same or a similar active ingredient as Product X or that is likely to compete with Product X; and (iii) a supply agreement pursuant to which Company A shall grant to Company B the exclusive distribution right in Korea for a new drug (not released yet) named Z (“Product Z”) and shall pay to Company B a fixed annual incentive equivalent to KRW 100 million for a period of 5 years, irrespective of the actual sales volume. Thereafter, agreements (ii) and (iii) took effect, Company supplied Products Y and Z in Korea. Later, these two agreements were renewed in writing to extend the expiry dates to December 2008 and January 2010, respectively, but the parties continued to carry out both agreements even after such agreed expiration date. The patent for the manufacturing method of the active ingredient of Product X expired on January 25, 2005.

The KFTC found such three agreements made by Companies A and B above a single act of collusion, issued a correction order, and imposed an administrative fine on the ground that they constitute a collusion that unfairly restricts competition in the relevant market. Companies A and B asserted that the order was illegal and filed a lawsuit seeking the court’s cancellation thereof.

**<Judgment>**

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 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 supply agreement (ii) regarding Product X were anti-competitive 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.” On the supply agreement, (iii) regarding Product Z, the KFTC and the Seoul High Court also acknowledged that execution thereof constituted an 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 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 FTL and the limitations of the application thereof. The court stated that “any act that is not deemed to be a justifiable exercise of patent right refers to any act, even if such act appears to be an exercise of patent rights, whose substance is beyond the intent of the patent system and therefore runs counter to the fundamental purpose of the patent system.” The court also 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 contents of the patent rights concerned, and the influence of the act on fair and free competition.” For determining whether an agreement to end a patent dispute is an unfair collusion, the court provided a standard requiring consideration of the relevant market definition and the anti-competitive nature of the act in issue. The 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.

***B. Finding of no FTL violation in seeking injunction based on SEPs  
(KFTC decision delivered 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 other things, an injunction against and seeking damages for alleged infringement of four SEPs and one non-SEP related to third-generation mobile telecommunication technology. In response to this, in April 2012, Apple filed a complaint with the KFTC asserting that Samsung – a market-dominant company – interfered with its business using a patent infringement action unfairly by raising an injunction claim based on SEPs. Apple asserted that Samsung abused a market-dominant position and unfairly interfered with business activities because Samsung refused access to essential elements and breached its obligation to disclose patent information during the process of standardizing technology.

**<Judgment>**

In February 2014, after an examination that lasted almost two years, the KFTC announced its conclusion that there was no suspicion that Samsung violated the FTL. If the KFTC concludes that there is no suspicion of violation, a written resolution is not published, and therefore it is difficult to confirm specific grounds for and the reasoning behind the decision. However, in this case, the KFTC exceptionally 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 fall under 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 market. However, the KFTC did not present an opinion regarding the relationship between the technology markets and the mobile telecommunication devices market, expansion of monopolistic power, and the two-sided market nature.

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, given that royalty rates are determined based on various elements, Samsung's offered rate was not found to be overly excessive in violation of FRAND terms. The KFTC also stated that in order for an injunction request by an SEP holder to constitute interference with business activities, the request needs to make it difficult for another enterpriser to carry out manufacturing or sales through an unfair use of a patent infringement action but in this case, Samsung rightfully exercised its rights as a patentee and did not unfairly interfere with business activities. However, regarding the same disputes between Samsung and Apple, the authorities of foreign countries have reached different conclusions; among others, it was reported that the EU competition authority issued an examination report to the effect that Samsung's exercise of SEPs was unlawful.

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 FTL 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.

***C. Approval conditioned upon consent decree in MS – Nokia business combination (KFTC Decision delivered 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 of 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 could transfer its manufacturing business while maintaining its patent rights.

**<Judgment>**

The KFTC granted 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 owned even after the business combination would not be subject to examination.

The KFTC showed concern that MS may abuse its patent rights against its competitors upon becoming a competitor of the Korean smartphone manufacturers and that a business partnership agreement that MS executed with a particular smartphone manufacturer may restrict competition as it provides a basis for the sharing of business information between competitors. Subsequently, MS submitted a corrective plan containing proposals to voluntarily remove concerns of anti-competitiveness and filed a consent decree. 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 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;

(2) With respect to non-SEPs, a commitment to set the royalty rate at a level below the current prevailing rate, not to assign any of them for five years, and not to 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 the business partnership agreement executed by MS and a Korean smartphone manufacturer, a commitment to delete provisions for sharing sensitive business information from a competition standpoint and not to share such business information in the future.

This KFTC decision is significant as (i) it includes not only SEPs but also non-SEPs in the scope of the order; (ii) it classifies the relevant markets as the mobile device, OS system, and patented technology markets, and as a result, not only smartphone patents but also tablet patents and patents owned by the affiliates of MS are included 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.

In particular, it is noteworthy that the KFTC imposed certain conditions through a consent decree unlike other competition authorities dealing with the MS-Nokia business combination that granted approval without any conditions, and this is similar to the Chinese competition authority's decision granting 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 can be subject to restrictions. However, this decision regulating non-SEPs at a degree equivalent to SEPs, as discussed above, has raised significant controversy inside and outside Korea, and therefore, the 2016 amended IPR Guidelines distinguish between SEPs for which a voluntary FRAND commitment was made to a standard setting organization and the other patents. The KFTC's regulation of non-SEPs should be carefully monitored going forward.

However, the KFTC found that the transferee Nokia, which continued owning its patents, is not subject to the business combination examination under the FTL. This decision is different from the Chinese competition authority's decision to impose an obligation on Nokia to comply with FRAND terms. The Chinese competition authority deemed the sale of Nokia's mobile phone business as generating concerns over patent abuse and anti-competitiveness.

***D. Corrective order for Dolby's license agreement  
(KFTC Decision delivered in August 2015)***

**<Factual Background>**

Dolby is the owner of a standard technology relating to digital audio coding and has licensing rights for AC-3, which was adopted as an audio coding standard technology by standard setting organizations around the world for media including digital broadcasting and DVD. Therefore, Dolby's permission is essential to produce any relevant digital audio product. In the license agreements executed with Korean manufacturers, Dolby included the following terms: (i) the licensee shall not dispute the validity or ownership of patents owned by Dolby, and if the validity is disputed, 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) unfair standards for damage compensation and sharing of audit costs; 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, and if the licensee does not comply, then Dolby may terminate the agreement.

**<Judgment>**

The KFTC ordered Dolby to modify the above conditions contained in the license agreement executed with the Korean companies wishing to use the technology because they are unfair transaction conditions. The KFTC found that Dolby's acts of (i) imposing a covenant not to contest validity, (ii) entitling itself to terminate the agreement solely for the reason of 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 improved inventions were illegal as an abuse of market-dominant position. Accordingly, the KFTC ordered Dolby to refrain from imposing such unfair transaction conditions and execute amended agreements on existing licensees. However, no administrative fine was ordered because none of the conditions above had actually been enforced yet.

The KFTC's above decision is significant as it applied the FTL to an owner of standard technology. The KFTC has already stated in a press release that it would reinforce monitoring activities against unfair acts by owners of standard technology and apply strict sanctions to violations, and its active regulation is expected to continue.

However, the publicly disclosed written resolution of the KFTC failed to contain a clear decision regarding Dolby's ownership of standard technology and its market share and position. Rather, the KFTC immediately found Dolby to be in a "transactional position" that is sufficient to constitute unfair transaction practices against licensees – i.e., "a relatively dominant position or at least a position that can significantly affect the counterparty's transaction activities." Therefore, the KFTC's standards for determining a market-dominant position of a standard patent will have to be identified in another decision in the future. In addition, it is noteworthy that even though the IPR Guidelines limit their own scope of applicability to abuse of a market-dominant position, the KFTC explains that it referred to the IPR Guidelines as a basis for determining unfair transaction 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 transactional position (which constitutes an unfair transaction practice) and abuse by a market-dominant company are similar in terms of the reasoning behind finding a violation of the law."



# 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<sup>1</sup>***CHOI Jipil\**

Classification	2011	2012	2013	2014	2015	YoY[%]
Patent	178,924	188,915	204,589	210,292	213,694	1.6
Utility Model	11,854	12,424	10,968	9,184	8,711	△5.2
Design	56,524	63,135	66,940	64,413	67,954	5.5
Copyright	134,234	142,176	159,217	160,663	185,443	15.4
<b>Total</b>	<b>381,536</b>	<b>406,650</b>	<b>441,714</b>	<b>444,552</b>	<b>475,802</b>	<b>7.0</b>

Table applications by the right type in recent years

**I. PATENT*****A. Amount of application***

The total number of IPR applications – including patents, utility models, designs, and trademarks in 2015 amounted to 475,802, increased by 7% from last year. Patent applications totaled 210,292, showing a 1.6% increase from last year. However, the increase rate slowed down following global downturn of patent applications. Korea ranked the fourth in the number of patent application. The total number of final decision for patent examination in 2015 reached 149,620(15.6% decrease from last year) and rate of refusal decision was 35.4%.

***B. Amount of registration***

The total number of registrations for intellectual property rights in 2015 reached 274,446, a 4.9% decrease from last year. The total number of registration for patent reached 101,837, a 21.5% decrease from last year.

\* CHOI Jipil, Research Fellow, ICR Law Center.

1. See Korea Intellectual Property Office, Annual Report 2015 (2016), [http://www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=60114&catmenu=ek07\\_01\\_01\\_15](http://www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=60114&catmenu=ek07_01_01_15).

### ***C. Amount of PCT applications and registrations***

According to WIPO statistics of December 2015, the number of international applications filed globally under the PCT amounted to 218,000, representing a 1.7% increase compared to 2014. The number of international PCT application designating Korea as a country of origin amounted to 14,549, an 11.1% increase compared to 2014. Korea remains its rank at 5th followed by U.S., Japan, China, and Germany. The amount of international applications filed under the PCT by Korean applicants has a tendency of increase (from 6.1% in 2014 to 6.7% in 2015) and the share of Korea, China and Japan continuously increases from 37.9% in 2014 to 40.7% in 2015. The world's top 10 PCT applicants includes two Korean companies (Samsung Electronics, LG Electronics).

## **II. Trademark**

Trade mark applications for 2015 totaled 185,443, a 15.4% increase compared to last year. Design applications totaled 67,954, a 5.5% increase compared to last year.

The total number of international trademark applications filed under the Madrid System in 2015 reached 49,273 and the amount of international trade mark application to Korea totaled 835, a 24.4% increase compared to last year. Also, the amount of registered international trademark reached 51,938 and the amount of registered international trademark totaled 924.

Korea (1,282) took 4th place following Germany (3,453), Swiss (3,316), and France (1,317) in the international design applications filed under Hague System in 2015. Samsung Electronics, Korean company applied 1,132 trade mark and experienced 1st place in the company rank of international design applications filed under Hague System in 2015.

## **III. Copyright**

In 2015, there were 37,495 works were voluntarily registered. It shows small moderation of growth making over 30,000 works during four years.

## **IV. Amount of cases on intellectual property rights in Korea**

In 2015, 878 cases were filed to the Patent Court. Of these cases, 446 patent cases. Amount of cases filed to patent court has continuously decreased since 2011. 822 cases were handled, 223 of them were on appeal (37.2%). In 2015, 240 cases were filed to the Supreme Court, and 257 of them were handled. Average duration of patent case is 225.5 days in the Patent Court, and 159.2 days in the Supreme Court.

13,968 cases were filed to Intellectual Property Tribunal (a 16.7% increase compared to last year). Of them, patent and utility model cases totaled 9,364, a 23.4 % increase compared to last year. It should be noted that after the introduction of the drug approval-patent linkage system, amount of cases referred for trial increased to 1957 in 2015 from 216 in 2014 and 49 in 2013. Approval rate of patent invalidation trial has a tendency of decrease; however, it shows 45% which is as twice high as that of Japan. Rate of appeal to patent court reached 13.8% and rate of annulment of the trial decision reached 24.2%.

## APPENDIX 2.

# RELEVANT DATA IN THE FIELD OF COMPETITION LAW OF KOREA

*CHOI Jipil\**

## I. KOREA FAIR TRADE COMMISSION<sup>1</sup>

In 2015, the KFTC showed outstanding performance and received five-star rating (5/5) by the Global Competition Review magazine for the first time, which indicate the global recognition of the KFTC as a top-notch competition agency.

In 2015, the KFTC handled 4,367 cases and imposed measures higher than warning in 2,661 cases, which was a 9.2% increase compared to 2014.

	Classification	2013	2014	2015	YoY[%]
MRFTA	Abuse of market dominance	0	0	5	
	M&A	21	39	24	Δ38.5
	Economic power concentration	45	63	97	54.0
	Cartel	45	76	88	15.8
	Prohibited act of enterprisers organization	63	57	63	10.5
	Unfair business practice	180	122	103	Δ15.6
	Subtotal	349	357	380	6.4
	Consumer Protection Related Laws	658	1090	783	Δ28.1
	Fair Subcontract Transactions Act	1085	911	1358	49.1
	Fair Franchise Transactions Act	74	70	121	72.9
	Fair Transaction Act in a Large-scale Retail Sector	1	6	15	150
	Etc. (failing to submit data, denial of investigation, etc.)	0	1	4	300
	<b>Total</b>	<b>2167</b>	<b>2435</b>	<b>2661</b>	<b>9.2</b>

Table Record of case handling by the KFTC (tougher than warning)

\* CHOI Jipil, Research Fellow, ICR Law Center.

1. See KFTC, Statistical Yearbook of 2015 (2016) (in Korean, English edition not available at the time of writing).

The KFTC imposed surcharges in 202 cases, a 78.6% increase from 2014 and it totaled KRW 588.9 billion, a 26.7% decrease from 2014. 64 of them were related to cartel totaling KRW 504.9 billion, which is 85.7% of the total. 19 of them were related to unfair business practice totaling KRW 24.2 billion. 4 of them were related to abuse of market dominance totaling KRW 12.5 billion. The major reason for decrease in surcharges is the record-breaking amount imposed in bid-rigging on the nationwide high-speed rail project in 2014.

KFTC filed 56 criminal accusations to the Prosecutor's Office, of which 9 were cartel cases. Actual prison term was not sentenced in any case but there were 2 probations in the district court and the high court level.

In 2015, among 511 KFTC enforcement actions that can be appealed, 76 cases (16.8%) were appealed to the court. 122 cases reached final judgement in 2015, of which the KFTC won in 90 cases and partially won in 17 cases, lost in 15 cases. 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.<sup>2</sup>

Classification	2013	2014	2015	YoY(%)
Accusation to the Prosecutor's Office	63	62	56	Δ9.6
Corrective Order	312	267	450	68.5
Surcharge (Amount)*	89[4,184]	113[8,043]	202[5,889]	78.7[Δ26,7]
Voluntary Correction, Recommendation, Warning, etc.	1,792	1,993	1,953	Δ2.0
<b>Total</b>	<b>2,167</b>	<b>2,435</b>	<b>2,661</b>	<b>9.2</b>

Table Recent performance in correction by the KFTC (\*KRW Billion)

The total number of M&A notifications in 2015 stood at 669 cases (a 17.2% increase from last year) with a collective worth of approximately KRW 381.9 trillion (a 81.6% increase from last year). KFTC intensively evaluate 32 cases and issued remedies in 6 of them. The number of the case related to failing to report M&A amounted to 16.

## II. COMPETITION ADVOCACY<sup>3</sup>

In 2015, the KFTC received prior legislative consultation on 1,337 proposed legislations initiated by government, and gave opinion on 13 cases, 9 of which reflected the KFTC opinion (consisting of 69% acceptance rate).<sup>4</sup>

2. National Assembly Budget Office. Fiscal Year 2015 Fiscal Program Performance Evaluation (National Policy Committee) (2016).

3. This part covers updates and new developments in 2015, based on the chapter on competition advocacy written by Prof. Daesik Hong in the previous version of this report. See Daesik Hong, 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.

4. KFTC, Statistical Yearbook of 2015 (2016), p. 119.

The KFTC involved in competitive impact assessments on 571 proposed legislative enactments or amendments, 16 of which, in the KFTC's opinion, had possible anticompetitive effect.<sup>5</sup> The opinions of the KFTC were reflected in the regulatory review process in 11 cases. (consisting of 69% acceptance rate).

In 2015, the KFTC continued its competition advocacy mission and pursued 18 anticompetitive regulations in the agriculture, distribution, game, and touring sectors which closely affect daily life of consumers.<sup>6</sup> In April 2015, the KFTC recommended that the local governments should improve 134 municipal ordinances in three topics which unreasonably restrict entries and activities by out-of-territory firms in the name of protecting local firms.<sup>7</sup> The KFTC successfully dissuade a local legislative council from revising the "capped rate" regulation on the commission of licensed real estate agents to "fixed rate" which might rule out price competition and adversely affect consumer welfare.

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5. Regulatory Reform Committee, Regulatory Reform White Book of 2015 (2016), p. 707(in Korean).

6. KFTC Press Release on November, 30, 2015, "Conclusion on the reforming 18 anticompetitive regulation in 2015".

7. KFTC Press Release on April. 30, 2015, "Recommendation on improving anticompetitive municipal ordinances by local governments".