



Upcoming Publication of MRLC Annual Report About the Development of IP and Competition Laws in China and Korea

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Introduction

The primary difficulty experts encounter when analyzing cases of IP or competition laws in China or Korea is the problem of insufficient information regarding relevant legislation and enforcement. Although an abundance of cases and information is under construction in each jurisdiction, they are mostly only available in the local language. Hence, there is a general lack of knowledge on current issues available to foreign experts. Especially in China, where IP and competition laws are rapidly being established and revised, this creates a problem for international practitioners.

In the meantime, IP and competition laws have been a driving force of legal and commercial globalization. Thus, as it is widely accepted that lack of information is a market imperfection that distorts market process², this risk is magnified when the influence can stretch over the globe.

In many cases of information shortage, the government attempts to cure the problem by generating the necessary information with public cost to achieve efficiency in the market. This is not, however, always the case when it comes to information crossing over different jurisdictions. In such cases, the cost is borne by the local community while the beneficiaries are usually foreign, creating limited incentive for the government to get involved. For example, in Korea and China, most competition case decisions are delivered only in the local language and translation is the responsibility of the defendant. In addition, most other legal sources, including legal provisions, case laws, and other institutional matters are not fully available in a translation.

It seems evident that such issues of externality harm legal development as well as globalization. Foreign actors who struggle with insufficient information may experience negative outcomes and shy away from further business in countries with such lack of information.

The China-Korea Market & Regulation Law Center (the “MRLC”), founded in 2013, takes such problems seriously. We believe that the MRLC may contribute to the international community by providing necessary and trustworthy information regarding developments in IP and competition laws of China and Korea in a timely manner. In fact, the MRLC is perfectly situated for such a mission as it is an interdisciplinary research center established between the prestigious law schools of China and Korea for academic, educational and practical cooperation in the fields of IP and competition laws. Hence, the MRLC aims to provide a platform for the international legal community to share ideas, expertise and comparative experiences. We believe that, by introducing annual development of IP and competition laws in China and Korea together in a comprehensive format, we can create a large synergistic effect in addition to delivering necessary information. This is all the more significant as China and Korea are quickly becoming home to the most cutting-edge legal developments and enforcement in the topic areas with close interactions among themselves.

The Annual Report will offer expert, practical and in-depth introduction of yearly developments and will be made available in three languages; English, Chinese and Korean.

Structure of the Annual Report and Authors

The MRLC is going to publish its first issue of “Annual Report on Antitrust & IP Issues in China and Korea (the “Report”) in the late summer of 2015. It will include all major developments of 2014 and include a discussion on all major aspects of IP and competition law development in the two jurisdictions. Future issues are expected to be published in every spring.

For a full understanding, the Report starts with Part I, a general overview of IP and competition law regimes in each jurisdiction. It will provide not only simple knowledge and information but also helpful analysis and forecasts of future development by local experts.

In Part II, the Report discuss the development of IP laws in China and Korea. Each chapter covers patent, trademark, copyright, and know-how & trade secret, respectively, and is composed of an overview, legislation and policy development, and major cases section.

Part III deals with the development of competition laws in China and Korea. In correspondence to Part II, it includes a chapter on the major issues of competition law including monopoly agreement (cartels), abuse of market dominance, concentration of undertakings (merger), and unfair competition conducts. To reflect the particularities in each jurisdiction, the Chinese chapter further discusses the issue of administrative monopolistic conduct while the Korean chapter deals with competition advocacy.

Part IV discusses the implementation of competition law in the field of IP. The issues related to this field have attracted keen interest in the global legal community in recent years and sorting out the legislative and judicial issues involved into a coherent legal framework have proved to be a difficult task that no jurisdiction can claim success for. This Part is a unique element of this Report and is significant in that: first, such inter-sectionary disputes frequently occur in these jurisdictions due to their strong IT industrial backgrounds; second, while Korea is currently a popular venue for such challenging international disputes, it is fairly expected that China will attract many such proceedings in the near future, making Chinese legal development and enforcement significant; third, China and Korea are developing cutting-edge legal principles in this area with a common culture and industrial background. Hence, a collaborative report analyzing the developments in the intersections of competition and IP laws in China and Korea may create synergy that benefit international community.

To ensure the quality of this Report, the MRLC invited more than 25 top experts from both academia and legal practice in China and Korea. Chinese authors include distinguished professors and practicing attorneys from international law firms, including Liu Chuntian (Renmin University of China), Guo He (Renmin University of China) and Emch Adrian (Hogan

Lovells). Korean authors include leading professors and practicing attorneys from the five largest law/patent firms in Korea, including Ahn Hyojil (Korea University), Kim Byeongil (Hanyang University), and Gene-Oh (Gene) Kim and Gina Jeehyun Choi (Kim & Chang).

Major Content: IP Law

China

This part starts with a general overview of Chinese IP legislation: Patent Law, Trademark Law, Copyright Law, and Know-how & Trade Secret Protection Act. Following an introduction regarding the history of IP legislation, it continues on to discuss the policy direction of the Chinese IP law and policy.

The subsequent chapters introduce the annual developments for the four main areas of IP laws in 2014. For example, the chapter of patent laws provides an overview of the historical development as follows:

Eight years have passed from the Patent Law's enactment in 1984 to the first amendment of the Patent Law in 1992; another eight years passed from the first amendment of the Patent Law in 1992 to the second amendment in 2000; and another eight years passed before the third amendment was completed in 2008. The eight-year circle is a mere coincidence. However, the three eight year periods together respectively witnessed the whole process of China's economy from the start, to develop, and to start off. Today, China has embarked on the fourth amendment of the Patent Law, which is driven by the sustainable economic development in China, the direct demand for building an innovation-oriented country, and the rule of law has not been adequate enough.

Each chapter deals with major legislation and policy development in patent law in detail, including: the drafting of the fourth amendment of the *Patent Law*, the *On-duty Invention Regulation*, the *Patent Administrative Enforcement Regulation*, and major judicial interpretations on patent infringements. Although legislation is yet to be completed, drafts for public review have been publicly released and are discussed in the Report.

Each chapter also discusses major patent cases in 2014. For example, it introduces the Beijing Municipal Higher People's Court case about "portable display devices (with graphical user interface)" of U.S. Apple Inc., and the Supreme People's Court case regarding an "essential technical features dispute."

In "portable display device (with graphical user interface)" case, the court held whether the graphical user interface could be protected as a design patent or not shall be examined according to Article 2(4) of the Patent Law, although the Guidelines for Patent Examination stipulate that "a displayed image when powered on falls outside the scope of protection for the grant of design patent right". To accurately define the content of a design, applicants should indicate which parts belong to a displayed image when powered in an appropriate manner through pictures, photos or brief descriptions when applying for a design patent for a graphical user interface. And, the case made it clear that the Guidelines for Patent Examination was only a reference document in determining the validity of a patent, and courts may diverge from certain rules prescribed in Guidelines for Patent Examination in accordance with the law for good cause.

In "essential technical features dispute" case, the Supreme People's Court held that the stipulation that "claims shall be in accordance with the specification" had a wider range of application compared to independent claims that shall "record the essential technical features necessary for solving technical problem". The latter requirement could apply to the independent claims and dependent claims; also to the situations where the scope of technical features recorded in claims was too broad to be supported by the specification, and where the claims couldn't be supported by the specification as a whole because of lacking essential technical features.

Korea

In correspondence to the Chinese chapter, the Korean Part starts with a general overview of Korean IP legislation, including the *Patent Act*, *Utility Model Act*, *Trademark Act*, and *Unfair Competition Prevention and Trade Secret Protection Act*. Following an introduction regarding the history of IP legislation, it continues on to discuss the policy direction of the Korean Intellectual Property Office.

The subsequent chapters introduce the annual developments in 2014 for the four main areas of IP laws. For example, the chapter of patent laws gives an overview of the development in

2014 as follows:

In 2014, KIPO amended its Patent Examination Guidelines for Computer Software Inventions, and introduced several new procedures, including filing a patent application in a foreign language, relaxing requirements for the restoration of patent rights that have been expired due to non-payment of annuities, and filing of divisional application after notice of allowance is issued. Moreover, the Supreme Court ruled on several notable cases addressing refunds of royalties upon invalidation of a patent, doctrine of equivalents and the possibility of reviewing inventiveness in trials related to scope determinations.

Each chapter deals with major legislation and policy development in patent law in detail, including: revisions to *Patent Examination Guidelines for Computer Software Inventions*, and *Amendment to the Korean Patent Act* (to allow filing a Korean patent application in a foreign language). Major patent cases in 2014 are also discussed, including a Supreme Court judgment that rejected a claim for a refund of royalties where a licensed patent was found invalid.

The Supreme Court held that a licensee cannot claim for a refund of royalties (paid to a licensor) when the licensed patent is found invalid after the execution of a license agreement. The Supreme Court ruled that the license agreement cannot be found ineffective at the time of execution and that it had only become ineffective when the patent became invalidated. This reasoning was based on grounds that once a license agreement is executed, the patentee cannot seek injunctions or monetary damages against a licensee based on the infringement of the patent, and that third parties are prohibited from utilizing the patent due to the exclusive rights granted to the patentee before the patent was found invalid.

Prior to this decision, the issue of whether licensees may claim for a refund of royalties already paid to the patentee when a licensed patent is later found invalid was not clear. The Supreme Court has answered in the negative, and further hinted that the licensee cannot claim for the refund even in case where a licensee has entered into the license agreement mistakenly assuming that the patent was valid.

Major Content: Competition Law

China

Part III deals with the development and practice of Chinese competition law. For example, after a brief introduction regarding legislation and enforcement systems, the chapter concerning “Controlling over Concentrations between Business Operators” states the development in 2014 as follows:

In 2014, the normative work and actual case work grew considerably. Compared with past years, the number of transactions where MOFCOM imposed conditions increased slightly. Among the total of 245 transactions cleared by MOFCOM until in 2014, four were conditionally approved and one was prohibited. As for the normative work, MOFCOM issued a regulation on the simplification of the merger control procedure for certain cases, a streamlined guidance document on the notification requirements and process, and a new regulation on remedies.

Following the overview, the Report introduces *Provisional Regulation on Standards Applicable to Simple Cases of Concentrations between Business Operators* ("Simple Case Regulation")³, the *Guiding Opinions on the Notification of Simple Cases of Concentrations between Business Operators* (Trial) ("Simple Case Guiding Opinions")⁴, *Guiding Opinions on the Notification of Concentrations between Business Operators* (Trial)⁵, and *Regulation on the Attachment of Restrictive Conditions for Concentrations between Business Operators* (Trial)⁶. Among many concentration cases in 2014, the Report includes some important cases to explain details as follows:

On 17 June 2014, MOFCOM published the announcement of its prohibition of the establishment of network centre by A.P. Moller - Maersk A/S of Denmark (“Maersk”), MSC Mediterranean Shipping Company S.A. (“MSC”), and CMA CGM S.A. (“CMA CGM”).⁷ The MOFCOM decision was its second prohibition, next to Coca Cola's acquisition of Huiyuan, since the effectiveness of the AML in 2008. The decision has drawn widespread attention, in particular since the transaction was a foreign-to-foreign-foreign deal and the US and EU regulators

cleared the deal or decided not to object to it. In its decision, MOFCOM found that the transaction would significantly strengthen the parties' market power, with a combined market share of 46.7% on the Asia-Europe route. MOFCOM found the parties' remedies proposals to be insufficient to address its competition concerns, and hence prohibited the transaction.

Korea

This chapter deals with the Korean competition law development. For example, following a brief introduction regarding the legislation and enforcement system, the chapter regarding monopoly agreements explains developments as follows:

... According to KFTC statistics, cartel cases accounted for 369 cases, or 19.7% of all cases between 1988 and 2013 in which administrative fines were imposed by the KFTC for violations of the MRFTA. Further, the monetary amount of administrative fines imposed upon cartel cases amounted to KRW 3.3514 trillion (approximately USD \$31 billion), constituting approximately 74.3% of the total amount of all administrative fines.⁸ Such active enforcement against cartels by the KFTC continued in 2014. According to one survey, administrative fines imposed against cartels by the KFTC accounted for USD \$1.01 billion in 2014. This amounts to 19% of the total amount of administrative fines imposed by major competition authorities around the world in 2014 (USD \$5.3 billion), putting the KFTC at ranking number three worldwide, following the European Union (approximately USD \$2.3 billion) and Brazil (approximately USD \$1.7 billion).⁹

In 2014, in addition to the above, (i) the Supreme Court ruled on significant issues in relation to cartels, including extraterritorial application in international cartels cases, standards for determining anti-competitiveness of cartels and the requisite elements to determine that a cartel has been formed through information exchange; (ii) the KFTC amended regulations regarding notices related to its leniency program in order to address various issues; and (iii) cartel victims have actively filed lawsuits for compensation of damages.

Following the overview, the Report introduces legislative and policy development. It includes the *Amendment of the KFTC Operational Guidelines for Corrective Measures of Leniency*

Applicants of Unjust Concerted Act (the “Leniency Guidelines”), and among many cartel cases in 2014, it selects five important cases, including the following discussion:

*Extraterritorial Application of the MRFTA to Cartels – Cartel Case Regarding Fuel Surcharges by Air Cargo Carriers*¹⁰

Article 2-2 of the MRFTA stipulates that “in cases where conduct affects the domestic market, even if the conduct occurs abroad, the MRFTA shall apply to such conduct.” However, the specific meaning of “affecting the domestic market” has been unclear. This case involved a cartel by air cargo carriers in Japan with respect to fuel surcharges on flight routes “from Japan to Korea.” In this case, the Supreme Court limited the application of the MRFTA to overseas cartel activities that “have a direct, substantial and reasonably foreseeable effect on the Korean market.” Hence, it held that the MRFTA is applicable to this case since the Korean market was subject to this cartel. Another key issue in this case involved the question of whether regulation based on the MRFTA was possible when Japan’s Civil Aeronautics Act prohibited the application of the Antimonopoly Act of Japan on agreements of transportation costs approved by Japan’s Ministry of Land, Infrastructure, Transport and Tourism. The Supreme Court ruled that the MRFTA could not apply in exceptional cases where conduct that is permitted under foreign law conflicts with Korean law to the point that the party cannot act in a lawful manner. It further held that there is no conflict of law between the applicable Japanese law and Korean law in this case, since Japan’s Civil Aeronautics Act provides an exception for conduct that de facto limits competition.

Major Content: Implementation of Competition Law in IP

China

Issues at the intersection of IP and competition laws have become a focal point for legal discussion by experts and industries worldwide. The overview section states that:

Monopolistic conduct in the field of intellectual property rights results from abusing intellectual property rights to eliminate and restrict competition, and specifically by taking advantage of monopoly agreements and abusing

dominant market position, etc. In China, many laws and regulations are formulated to regulate this type of conduct together.

This part discusses the regulatory and policy developments in this field. In China, relevant authorities published two drafts for comments in relation to the regulation of anti-monopoly in the field of IP in 2014: the *SAIC Draft Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights* (Draft for Comments) issued by the State Administration for Industry and Commerce ("SAIC") and the *Interpretations on Several Issues Concerning the Application of Law in the Trial of Patent Infringement Cases (II)* (Draft for Comments) issued by the Supreme People's Court.

In relation to major cases, this Part introduces Qualcomm's abuse of dominant market position case, and the Huawei Technologies Co., Ltd. (Huawei for short) v. Inter Digital Inc. (IDC) case on standard essential patent royalty fees. For example, on the Huawei disputes over abuse of dominant market position, the report includes the following content:

Huawei v. IDC on disputes over abuse of dominant market position case is regarded as the first monopoly dispute over standard essential patents in China, and was selected as one of "China Court 2013 Top 50 Intellectual Property Cases" by the Supreme People's Court. The definition of basic issues in the case such as "scope of relevant market", "dominant market position", "abuse of dominant market position" and "undertaking civil liability of monopolistic conduct" provide guide to the future trial of similar cases.

Korea

Issues at the intersection of IP and competition laws have become a focal point for legal discussion worldwide. This chapter incorporates up-to-date knowledge into this important chapter. The overview states as follows:

... the KFTC amended and reinforced the IPR Guidelines in April 2010 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 operation of standard setting organizations and patent license agreements. Moreover,

since 2010, the KFTC has been conducting surveys on the status of patent enforcement activities in the information technology, pharmaceuticals, machinery, and chemicals sectors, and has rendered decisions finding that certain IPR-related business activities of both domestic and foreign companies violated the MRFTA. Most recently, in December 2014, the KFTC released further amendments to the IPR Guidelines which include those intended to better regulate “non-practicing entities” (“NPEs”).

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 MRFTA.

This part then continues to discuss the regulatory and policy developments in this field with an emphasis on the 2014 amendment of KFTC Guidelines on IPR licensing regarding NPEs and SEPs. For major cases, it introduces the KFTC decision about seeking injunctions based on SEPs that involved Samsung and Apple. It states:

In April 2011, Samsung Electronics filed an action with the Seoul Central District Court against Apple seeking, among other things, an injunction against alleged infringement of four (4) of Samsung’s SEPs related to the third-generation mobile telecommunication technology. Subsequently, Apple filed a complaint with the KFTC on the basis that Samsung’s injunction claim based on SEPs violates the MRFTA as an abuse of market-dominant position based on an unfair use of a patent infringement action.

In February 2014, the KFTC announced its conclusion that there was no suspicion of violation of the MRFTA by Samsung, stating that after considering the history of dealings between the parties, it was difficult to view that Samsung, the SEP holder, failed to negotiate in good faith, while it was also difficult to view that Apple negotiated in good faith. This decision is noteworthy as the first case in which the KFTC considered the question of whether an SEP holder’s filing of an injunction claim violated the MRFTA as an abuse of IPR, and it appears that the decision served as a basis for the KFTC’s subsequent amendments to the IPR Guidelines, as discussed above.

Conclusion

The objective of MRLC Annual Report is to surmount obstacles of local language and provide a material introduction and analysis regarding the legislation and enforcement of IP and Competition laws in China and Korea to the international community. It addresses some comparative analysis of the legal systems, market competition, levels of economic development and economic systems in the Report with a focus on China and Korea, thus further enhancing understanding among China, Korea and the international legal community.

It is foreseeable that important cases and regulations will continue to emerge in China and South Korea. For instance, SAIC published *Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights* on April 7, 2015; and the State Intellectual Property Office (SIPO) posted on its website a new draft of proposed amendments to the Patent Law for public comment in April, 2015; and the Supreme People's Court is reviewing the case of Huawei Technologies Co., Ltd. v. Inter Digital, Inc. on disputes over standard essential patent royalty fees. Hence, we believe the MRLC Annual Report will continue to be a valuable resource supplying important information and new developments in China and Korea to the international legal community.

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² John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, Columbia Law Review Vol. 91, No. 2 (Mar., 1991), p. 261.

³ *Provisional Regulation on Standards Applicable to Simple Cases of Concentrations between Business Operators*, [2014] MOFCOM Announcement No. 12, 11 Feb. 2014.

⁴ *Guiding Opinions on the Notification of Simple Cases of Concentrations between Business Operators (Trial)*, [2014] MOFCOM Anti-Monopoly Bureau, 18 Apr. 2014.

⁵ *Guiding Opinions on the Notification of Concentration between Business Operators (Trial)*, [2014] MOFCOM Anti-Monopoly Bureau, 6 Jun. 2014.

⁶ *Regulation on the Attachment of Restrictive Conditions for Concentrations between Business Operators (Trial)*, [2014] MOFCOM Order No. 6, 4 Dec. 2014.

⁷ *Maersk/MSC/CMA CGM*, [2014] MOFCOM Public Announcement No. 46, Jun. 17, 2014.

⁸ The Korea Fair Trade Commission, 2013 Statistical Yearbook (April 2014).

⁹ See GCR Global Competition review, "Brazil, Korea imposes half of world's \$5.3billion in cartel fines" (January 7, 2015), available at: <http://globalcompetitionreview.com/news/article/37717/brazil%ADkorea%ADimpose%ADhalf%ADworlds%AD53%ADbillion%ADcartel%ADfines/3/3>; Allen & Overly, "Global cartel enforcement 2014 year in review" (January 6, 2015), <http://www.allenoverly.com/publications/en-gb/Pages/Global-cartel-enforcement-2014-year-in-review.aspx>

¹⁰ Supreme Court, Case No. 2012Du13665, rendered May 16, 2014.