



## **SOUTH KOREA: TRADE DRESS PROTECTION FOR SERVICE PROVIDERS AND NEW PROVISION REGARDING THE THEFT OF IDEAS**

An important amendment to the Unfair Competition Prevention and Trade Secret Protection Act (UCPA) will go into effect on July 18, 2018. This amendment specifies the protection to be given to trade dress belonging to service providers in Korea and introduces a new type of prohibited unfair competitive activities.

### **Trade Dress Protection for Service Providers**

The UCPA currently prohibits activities that may create confusion between one party's mark and a well-known source identifier of another party or may dilute another party's well-known source identifier, through commercial use of a mark that is identical or similar to the well-known source identifier.

Such well-known source identifiers include not only trademarks, but also names, product configurations, product packaging, and any other signs, which identify the source of the products or services. However, until the present amendment, it was not clear whether the overall appearance of the business of a service provider could also be protected under these specific provisions of the UCPA.

The amendment to the UCPA makes it clear that the trade dress of a service provider is also protected, by adding the following examples of the types of source identifiers covered: "the manner in which goods are offered for sale/ services are provided, the overall appearance of the place where the service is provided, such as signboards, external and interior design".

Such trade dress had only recently started to be protected by Korean courts under a different provision of the UCPA, the "catch-all provision," which prohibits a party from infringing another person's right to business profit through using commercially the output produced by that person through considerable effort and investment without authorization, through a method that contravenes fair trade practice or competition order. The first time the Supreme Court of Korea issued a ruling that the overall appearance of a store design was a protectable right was

under the catch-all provision (for more details on this decision, please see our Winter 2016/17 newsletter here).

Courts have established three requirements that must be met in order for a service provider to enjoy trade dress protection under the catch-all provision: the trade dress has to be distinctive, it cannot be simply functional, and there must exist a likelihood of consumer confusion.

The new amendment to the UCPA source identifier provisions, while intended to more clearly protect trade dress in Korea, may render protection for the trade dress of service providers more elusive, as plaintiffs will have to prove that the trade dress is well-known, a difficult element to establish in practice.

However, application of the catch-all provision has mostly been limited to cases where the trade dress was not clearly protected elsewhere under Korean IP or UCPA law (although the Supreme Court has yet to weigh in on this issue). Thus, it remains to be seen whether the amendment, by making it clear that trade dress can function as a source identifier, will actually provide service providers with stronger protection for their trade dress compared to under the catch-all provision.

### **New Provision Regarding the Theft of Ideas**

The amendment introduces a new type of unfair competitive activity, by prohibiting the unfair use of information with economic value (including technical or business ideas) that has been obtained through a business proposal, bidding, public contest, business negotiations or during the process of a transaction. The unfair uses covered by this provision include uses for one's own business or for a third party's business, as well as providing the information to a third party for their use. However, there is no violation if the person accused of obtaining the idea had previous knowledge of the idea, or if the idea was widely known in the concerned business field.

Violation of this provision may subject the offender to civil and administrative liability, but not criminal liability.

### **References**

***Kim & Chang Intellectual Property - local agent in South Korea***

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