

# NEWSLETTER

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Intellectual Property Group

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## Amendments to Korea's

### *Unfair Competition Prevention and Trade Secret Protection Act* Provide More Protection for Data and Famous People

Korea's recent amendments to the *Unfair Competition Prevention and Trade Secret Protection Act* (the **UCPA**) strengthened the statutory framework for:

- expanding the scope of protection to unstructured data in light of the significance the data assumes in today's digital era; and
- expanding the defined scope of unfair competition, including the unfair use of name, image, and likeness, for brand protection and enforcement against unauthorized use of name, image, and likeness.

#### 1. UCPA Amendments Expand Scope of Unfair Uses Defined as Unfair Competition

##### ■ Background

Korea's UCPA amendments prohibiting unfair use of data and unauthorized use of the name, image and likeness readily identifying a famous person were adopted by the Korean National Assembly as of November 11, 2011. Under Korea's legislative process and procedures, the revised statute will come into effect on April 20, 2022.

Under the current Korean legal framework, 'undisclosed data' may be protected as a trade secret based on the UCPA. Among the range of disclosed data, 'structured data' - data whose material is systematically arranged and composed - is protectable through copyright law as compilation works or databases. There has been a lack of legal foundation, however, for protecting 'unstructured data', which accounts for the majority of data in the Korean market.

When it comes to unstructured data protection, when a person collects data of another person disclosed for a business purpose and subsequently sells such data to third parties or uses it for the individual's personal commercial purposes without permission, courts have interpreted such acts to fall within the meaning

of ‘acts of unfair competition’ under Article 2(1)(k) of the UCPA, which operates as a supplementary general or ‘catch-all’ provision.

To properly control the unauthorized collection, use, and distribution of various forms of data, however, legislative discussions have been underway for introducing independent stand-alone provisions. Specifically, the Korean National Assembly enacted the *Framework Act on Data Industry and Use Promotion* (the **Data Framework Act**). The Data Framework Act specified the general principles for data protection (*Data Framework Act*, Article 12(1) and (2)) and outlined specific acts that constitute unfair uses of data, including remedies available under the UCPA (*Data Framework Act*, Article 12(3)).

## ■ UCPA Amendments Expand Civil and Criminal Remedies for Data Protection

The UCPA Amendments expand the scope of data protected as “among those data defined under . . . the Data Framework Act” to include data that is: (1) provided to the specified individual or the specified majority as part of business; (2) substantially accumulated and managed through electronic means; and (3) technical or operational information not maintained as secrets. The UCPA Amendments also list several broad types of acts that constitute unfair uses of data and specify them as acts of unfair competition.

More specifically, the Amendment defines the following acts as unfair competition:

- a person who does not have access to the data acquiring such data through theft, deception, illegal access, and other unlawful means and subsequently using and disclosing such data (**illegal acquisition by the person not granted with access**);
- a person who has access to the data through contractual relationships with the data owner using or disclosing such data or providing such data to third parties for the purpose of gaining unfair profits or causing damage to the data owner (**breach of good faith on the part of the person with granted access**);
- knowingly acquiring the data pertaining to (1) and (2) above and knowingly using and disclosing such data (**malicious subsequent acquisition**); and
- providing, importing, exporting, manufacturing, transferring, leasing or transmitting, without authorization, the technology, service, device or the components of such devices whose main purpose is to avoid, eliminate or change technological protective measures implemented for the protection of the data or displaying it for the purpose of transferring and leasing (**neutralization of technological protection measures**).

A person who suffered damage from another person’s unfair use of such data may initiate civil actions (*Amended UCPA*, Articles 4 and 5), including the request for an injunction prohibiting use and compensation through monetary damages. A criminal action may be brought by Korean Prosecutors, however, only when another person’s unfair use of such data involves ‘neutralization or disabling technical protective measures’ (*Amended UCPA*, Article 18(3)).

## 2. UCPA Amendments Expand Protection Against Unauthorized Use of Name, Image, and Likeness

### ■ Background

Recently, there has been increasing global interest in cases involving the range of permissible use for marks readily identifying a person ('Name, Image, and Likeness'). Key enforcement cases in Korea have focused on portraits and names of famous people, including the manufacture and sale of illegal goods attempting to free-ride on the goodwill achieved through significant investment and efforts.

Historically, Korean courts have often applied supplementary general provisions or the 'catch-all provision' of the UCPA to find that using the Name, Image, and Likeness of a famous person constituted an act of unfair competition. In Lee & Ko IP's recent Name, Image, and Likeness enforcement actions on behalf of BTS, the Korean Supreme Court held that manufacturing and selling photo albums and photo cards containing several photos of BTS members infringed on the outcomes achieved by BTS's management company through substantial investment and effort (*i.e.*, BTS' reputation, credibility and ability to attract fans and consumers). Accordingly, the Korean Supreme Court concluded that such behavior violated Article 2(1) (k) of the UCPA that defined unauthorized use of the outcomes achieved.

The new UCPA Amendments attempt to clarify the scope of protection and to foster uniformity in the application of the law in Korea. By codifying the scope of protection in Name, Image, and Likeness enforcement cases, the UCPA Amendments attempt to improve the stability and predictability of the Korean IP legal system.

#### ■ UCPA Amendments Specify Civil Claims to Protect Name, Image, and Likeness

The UCPA Amendments add a new provision to protect the Personally Identifiable Mark of a famous person (*Amended UCPA*, Article 2(1)(l)). The new provision defines a Personally Identifiable Mark protected under law as "a mark that can identify a person, such as person's name, portrait, voice or signature, is widely known in the country, and possesses economic values." The UCPA Amendment also defines 'the act of using a Personally Identifiable Mark without authorization in ways that violate fair commercial/transaction practices or competition market order for one's own business' as an act of unfair competition.

In cases where the Personally Identifiable Mark of a famous person is used without permission, remedies for successful civil claims, including requests for injunctive relief and compensatory damages, are available. (*Amended UCPA*, Articles 4 and 5.) This line of enforcement scenarios, however, is not yet subject to criminal punishment (*Amended UCPA*, Article 18(3)).

### 3. Practical Implications and Future Prospects

The overarching goal of these UCPA Amendments is to codify expanded protections for unstructured data and marks identifying famous people. In the past, many of Korea's IP enforcement campaigns relied on the supplementary general or 'catch-all' provisions of the UPCA in light of the lack of express governing laws. While many businesses or famous people who suffered injury in the past relied on an outdated statutory framework, this UCPA amendment is meant to allow for more active protections from harm and famous brand owners should expect stronger enforcement remedies.

Further, businesses that operate in privacy-implicating operations will need to

evaluate the increased risk that should arise under the UCPA Amendments where (1) data collection and the use of the data of another person occur by bulk means, such as crawling, or (2) the unauthorized use of the Name, Image, and Likeness of another person is a part of the business. Accordingly, we recommend that clients conduct their compliance audit work well in advance and seek expert advice early to ensure that management can assess the new risk profile presented by the Amended UCPA.

Finally, we recommend that our clients continue to keep watchful eyes on how Korean courts interpret the newly-added provisions in the UCPA to track the specific real-world interpretations of each element, including the key factors cited by Korean judges and jurists attempting to apply the new standards for rendering final judgments in Korea.

*Lee & Ko's IP Practice Group has significant experience and expertise in IP cases and disputes, as well as representing and defending corporate IP rights, seeking remedies against infringement, and responding to infringement claims. Lee & Ko is uniquely positioned to provide client-centered services for IP legal issues and disputes. If you would like to learn more about our practice or the latest UCPA Amendments, please feel free to contact us.*

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