

NEWSLETTER

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Intellectual Property Group

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Korea's Draft Amendment to the Civil Act May Mean Statutory Protection for 'Right of Publicity'

As the use of content platforms continues to grow around the world, Korea is revisiting the debate on who should be allowed to benefit from a person's name, likeness, or other indicia of personal identity. In a global environment where almost anyone can obtain public notoriety, Korea is seeking to foster a balanced approach to unfair competition and IP enforcement by bolstering statutory protections during a time when avenues to profit from individual rights of publicity have expanded.

In light of the dynamic recent changes to the range of celebrity and fame, on December 26, 2022, the Korean government previewed legislation regarding a draft amendment to the Civil Act establishing the "right to use for profit personal identity marks which characterize oneself such as portrait, name, voice, etc." (a.k.a., **the right of publicity**) as a universal right for all individuals. Like many other leading jurisdictions around the world, Korea recognizes that the right of publicity is an evolving and developing area of the law that has similarities to trademark law and may also impact brand owners. The Lee & Ko IP Team will continue to monitor and analyze these important statutory changes, as summarized below, for our clients, colleagues, and friends.

1. Key Provisions of Korea's Draft Amendment to the Civil Act

As an initial matter, the draft amendment acknowledges the individual right to use one's name, portrait, voice, and other personal identity marks for profit as a 'right of publicity' and enacts that this right may be held by any natural person.

Draft Amendment to Article 3-3 (**Right of Publicity**)

- (1) A person has the right to use his or her name, portrait, voice or other personal identity marks in a rational way.
- (2) The right of publicity under paragraph (1) shall not be transferred.
- (3) The right holder of a right of publicity may permit other persons to use their right of publicity. However, such permission may be withdrawn for serious causes, such as contradictory principles.

- (4) A person who has a legitimate interest in the use of another person's personal identity marks may use the personal identity marks within a reasonable scope without permission from the holder of the right of publicity.
- (5) The right under paragraph (1) shall be inherited after the death of the right holder and shall remain in existence for a period of 30 years.
- (6) The provisions of Article 3-2(2) and Article 3 shall apply mutatis mutandis to the right of publicity.¹

With regard to the key issues of assignability and inheritance, although the draft amendment does not allow for transfer of the right of publicity before death, the draft amendment leaves room to allow another person to use one's right of publicity for profit under a 'reasonableness' standard. Additionally, after the death of the rights holder, inheritance is made possible, as with many other property rights, for a period limited to 30 years.

Most importantly, the holder of a right of publicity may possess more powerful tools under Korea's heightened statutory framework to:

- (1) request the removal of a name, image, or likeness from unauthorized use campaigns;
- (2) take appropriate measures against misappropriation;
- (3) seek judicial protection for prevention of misappropriation; and
- (4) obtain compensation for damages when there is misappropriation.

Further, Article 2(1)(i) of the Unfair Competition Prevention and Trade Secret Protection Act (hereinafter, the **Unfair Competition Prevention Act**) provides remedies for "an act that infringes upon another person's economic interests by using without permission a mark that can identify the other person, such as the name, portrait, voice, signature, etc. of another person, which is widely known in the Republic of Korea and has economic value, for its own business in a manner contrary to fair commercial practices or competition order." This unfair competition framework allows for another line of statutory enforcement under Korea's long line of unfair competition cases.

In contrast to some of the unfair competition law limitations on enforcement, however, the draft amendment to the Civil Act provides that the right to use a personal identity mark is an independent right that all individuals can enjoy regardless of whether a personal identity marker, such as a name or portrait, is widely known in the Republic of Korea. Accordingly, the proposed draft amendment can be characterized as progressive legislation that attempts to lead the way toward greater individual flexibility while many jurisdictions around the world attempt to harmonize right of publicity laws and enact over-arching protections.

¹ Draft Amendment Article 3-2 (Personal Rights) (2) A person may request that another person who misappropriates the interest in personal rights under Paragraph 1 (hereinafter, **Personal Rights**) take appropriate measures to eliminate such misappropriation and restore the misappropriated interest in Personal Rights. (3) A person may request protection for prevention or compensation for damages against acts that hold a risk of misappropriation on Personal Rights.

2. Practical Implications for Future Enforcement

Like many leading jurisdictions around the world, Korea's thought leaders in law, industry, and academia have debated the necessity of legislation regarding the right of publicity for quite some time. While various opinions have been presented on how to treat this individual right, the Korean High Court, after acknowledging some of the key challenges, ruled that "[t]he right to use and control one's name for commercial purposes is naturally included in the right to pursue happiness under the Constitution and the name that forms a part of personal rights, thus there is no need to acknowledge the concept of the right of publicity as a separate independent property right." (Seoul High Court Decision No. 2014Na2006129, rendered January 30, 2015). This proposed draft amendment to the Civil Act is meaningful for confirming through Korea's foundational civil statute that the right of publicity, which the courts have already acknowledged, should be afforded heightened attention in our fast-moving and highly-connected modern world.

Further, this greater focus on 'name, image, and likeness' enforcement in Korea builds on the debate triggered following the Supreme Court's recent decision acknowledging unfair competition claims on behalf of Lee & Ko's client, Big Hit Entertainment. Fresh off the heels of Lee & Ko IP's successful representation of BTS's agency regarding unauthorized publication of a photo book similar to a magazine that used photos of the famous artists, Korea's National Assembly enacted Subparagraph (I) of the Unfair Competition Prevention Act. This latest draft amendment was discussed at the Korean legislature in a similar context to the BTS engagement while taking the further step of expanding the economic value of personal identity marks to universal rights that all individuals may be able to enjoy.

Because this draft amendment is currently in the pre-announcement stage, it will be necessary to follow the process of review through the Office of Legislation and the National Assembly's deliberations and resolutions. Like many of the key issues impacting global businesses in Korea, we recommend added vigilance and close attention until the actual enactment of the amended legislation in the future. Notwithstanding this caveat on legislative uncertainties, the momentum to establish a new right under Korea's Civil Act to protect the economic value of personal identity marks illustrates that social interest and public awareness of the urgent need to protect personal identity marks have continued to build.

If this draft amendment is enacted, anyone (irrespective of their celebrity status) will be able to seek compensation for the quantifiable economic damage that they suffered from the unauthorized use of their personal identity mark by a third party. The possible violation of the Civil Act must be kept in mind along with the Unfair Competition Prevention Act when companies or individuals use the personal identity marks of a third party for profit. Given that there are many abstract concepts in this amendment, such as 'principles,' 'serious causes,' 'justifiable interests,' and 'reasonable scope,' it will be necessary to observe Korea's judicial stance in the future regarding the establishment requirements and criteria for determining the boundaries of enforcement. In the end, as with any new statutory framework, pragmatic experience and real-world expertise in navigating the intricacies of Korea's litigation system will be critical.

In addition to the protection of patents, trademarks, and copyrights, Lee & Ko's Intellectual Property Practice Group provides leading-edge legal counseling based on a wealth of real-world experience. Grounded in decades of foundational expertise with protecting brand owners, as well as litigating unfair competition matters, we work with our clients to address their most challenging legal needs in Korea. If you need our team's assistance with 'right of publicity' strategies, please contact any of the key members of Lee & Ko's Intellectual Practice Group.

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