

INTELLECTUAL PROPERTY RIGHT (IPR) THE KOREAN SETTING



The efforts to protect intellectual property rights and provide a framework for handling infringements have increased in Korea over the past decades. Korea has acknowledged the importance of protecting technologies and copyrights, not only to protect its own development of technologies, but also to become a trustworthy partner to global companies and research institutions. Extensive patenting due to the Government's incentive policies has been the general picture the last decades in Korea but this is slowly beginning to change for a more qualitative assessment of patent proposals. Although Korea in many aspects follows international regulations on IPR, some challenges still remain, especially within copyright, design and counterfeit goods. This report will describe the IPR landscape and trends in Korea, as well as providing Danish companies with initial guidelines on how to handle collaboration agreements involving protected technology with Korean companies, research institutions and universities.

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1. Executive Summary

In the last 40 years, Korean society has developed immensely due to economic prioritization of science and technology, placing Korea as the 15th biggest economy in the world today. Within South Korea's key sectors such as ship building, consumer electronics, automotive & heavy industry and construction, these industries present outstanding competences on a global scale. Especially within ICT, Korea is home to some of the strongest and biggest companies in the world with Samsung and LG as the most prominent examples.

Since the 1990s the Korean economy has faced some limitation on quantitative growth. In response, Korea has strengthened its effort to stimulate technology development to transform itself into an innovative economic system which goes beyond mere productivity enhancement.

Therefore, during the past decades the Korean government has encouraged technology research and development and generation of IP. This effort has led to an extensive number of patents being filed, mainly from companies but also from universities and research institutions. Along this line, Korea has improved and enlarged IP protection by implementing regulations, joining international organizations, and signing international agreements.

However, it still appears that implementation of IPR enforcement mechanisms needs further strengthening. Weaknesses have been reported in the length, costs and uncertainty of the outcome of proceedings. Large number of locally produced counterfeit goods that can be found easily in retail shops and markets remain a source of serious concern. Some observers consider Korea as a transit area for counterfeit goods. It also appears that tourists from neighbouring countries tend to knowingly buy counterfeit goods in Korean markets. Piracy, and in particular online piracy, also remains as a concern in Korea. Active participation of authorities in IPR enforcement policy, improvement in the implementation of civil procedures and remedies, and customs procedures to prevent export or transit of IPR infringing goods, should remain a priority for Korea. (IPR Enforcement Report, 2009)

As mentioned, the Korean government has done a lot to tackle the problems including streamlining administrative procedures concerning

intellectual property rights and improving the relevant systems at the Korean Intellectual Property Office to deal with changes in the global trade environment. (The national government organisation act on KIPO, 2013) Further, Korea has developed close cooperative relationships with a number of international organizations in the domain of intellectual property rights and has strengthened global cooperation through an increasing number of FTAs with other countries, and recently with the European Union.

The Korean patent system works according to international conventions. Korea is a member of WTO and therefore has national laws on IPR. Moreover, Korea is a member of the WIPO (World Intellectual Property Organization) and became a signatory of the 1970 Patent Corporation Treaty (PCT) in 1978. The PCT, operated by WIPO, is a streamlined procedure allowing an application for a patent in a single language to apply simultaneously in the more than 130 PCT contracting countries. The process involves an 'international phase' application followed by a search to assess whether an invention is capable of being patented in the designated territories. Once this has been decided, applications may be made in individual countries, in the 'national phase', according to local rules and procedures. The main advantages of making a PCT application are buying extra time and cutting costs by reducing duplication, which helps avoid territories where chances of obtaining a patent are low (UK Investment, Intellectual Property Rights Primer for Korea, 2008).

The IPR trend in Korea clearly shows the immense efforts of the big electronics companies such as Samsung and LG. Additionally, R&D institutions and universities also put a substantial effort in performing R&D that lead to protectable results mainly as a result of the government's strong emphasis on measurable results such as publications and patents. Incentives were established to make Korean universities and R&D institutions internationally reputed and climb international ranking lists. As a good example, Korea Advanced Institute of Science and Technology (KAIST) received a prize as one of the Top 100 Global Innovators from Thompson Reuter in 2012. Today, Korean universities are commonly found among the top 50 higher education institutions in the international ranking lists (Shanghai ranking, Leiden ranking, QS and THE).

It seems that public institutional strategies are changing, however, and eventually this will affect government policies as well. KAIST and other heavy patent owners realize that to keep the patents is a huge cost that does not correspond to the impact generated by the IPR activated through licensing, spin-outs, acquisition or selling. Therefore, a stronger emphasis is now put on assessment and evaluation of possible impact before IP is protected. Also, if patent applications depend too much on existing technologies, complications may arise when evaluating future applications. Currently, it is difficult to conclude how far this strategy has spread among Korean companies and R&D institutions, but it is definitely present among the big important players. KAIST is inspired by the MIT model of impact assessment of patent application and thus is leading in implementing this new strategy. As a consequence, a decrease in the total number of (public) patents and other IP in Korea may be seen, and a corresponding increase in innovativeness and quality of the generated IP.

2. Background

2-1. Definition and Types of Korea's Intellectual Property Rights (IPR)

Definition of Intellectual Property Rights

Intellectual Property Rights are defined as the legal rights bestowed upon knowledge, information, technology, expression of thoughts or feelings, indication of business or goods, varieties of organism or genetic resources and other intangibles which are created or discovered by a person's creative activities or experience, and the proprietary value of which can be realized (Article 3(1) of Intellectual Property Framework Act). Owners of IPR can give permission to others to work on a patented invention based on license agreements, either exclusively or non-exclusively. Intellectual property rights include industrial property rights and copyrights. With the advancement of high technologies and culture, new forms of intellectual property rights are emerging such as trade secret rights and topography rights.

WIPO, a Geneva-based United Nations agency with 184 member nations, defines intellectual property as follows:

'Intellectual property refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. 'Intellectual property is divided into two categories: Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs.'

Types of Intellectual Property Rights

In Korea, IPR is divided into three major groups: Industrial Property rights, Copyright and New Knowledge Property right. Industrial Property rights are considered to be most relevant to Danish applicants. Within the Industrial Property Rights, South Korea distinguishes between patents (sometimes called 'invention patents') and utility models (also known as 'minor patents').

Rules for utility models are similar to those for invention patents but the test of what constitutes an invention patent depends on the definition of an invention as a 'highly advanced creation of a technical idea using the rules of nature', whereas for a utility model, applicable to 'devices', the barrier is lower whereby a device is defined as 'the creation of technical ideas using the rules of nature'. (Both definitions are quoted from the respective Acts). In each case the invention must show 'novelty, industrial applicability and inventive step' (See table 1) A further difference is that invention patents give protection for a maximum of twenty years, while utility models are valid for ten (UK Investment, Intellectual Property Rights Primer for Korea, 2008)

2-2. Korea's IPR system and Main players

Industrial property rights (IP) are governed by the Korean Intellectual Property Office (KIPO) and Copyrights by the Ministry of Culture, Sports and Tourism (MCT). Korea Intellectual Property Protection Association (KIPRA) protects IPR and takes measures against infringements in Korea (See Figure 1).

KIPO collaborates with Supreme Prosecutors' Office, District Prosecutors' Office, National Police Agency and Korea Trade Commission and KIPO is in charge of the laws regarding the four industrial property rights including patent, utility model, trademarks and design as well as unfair competition prevention and Trade Secret Protection Act.

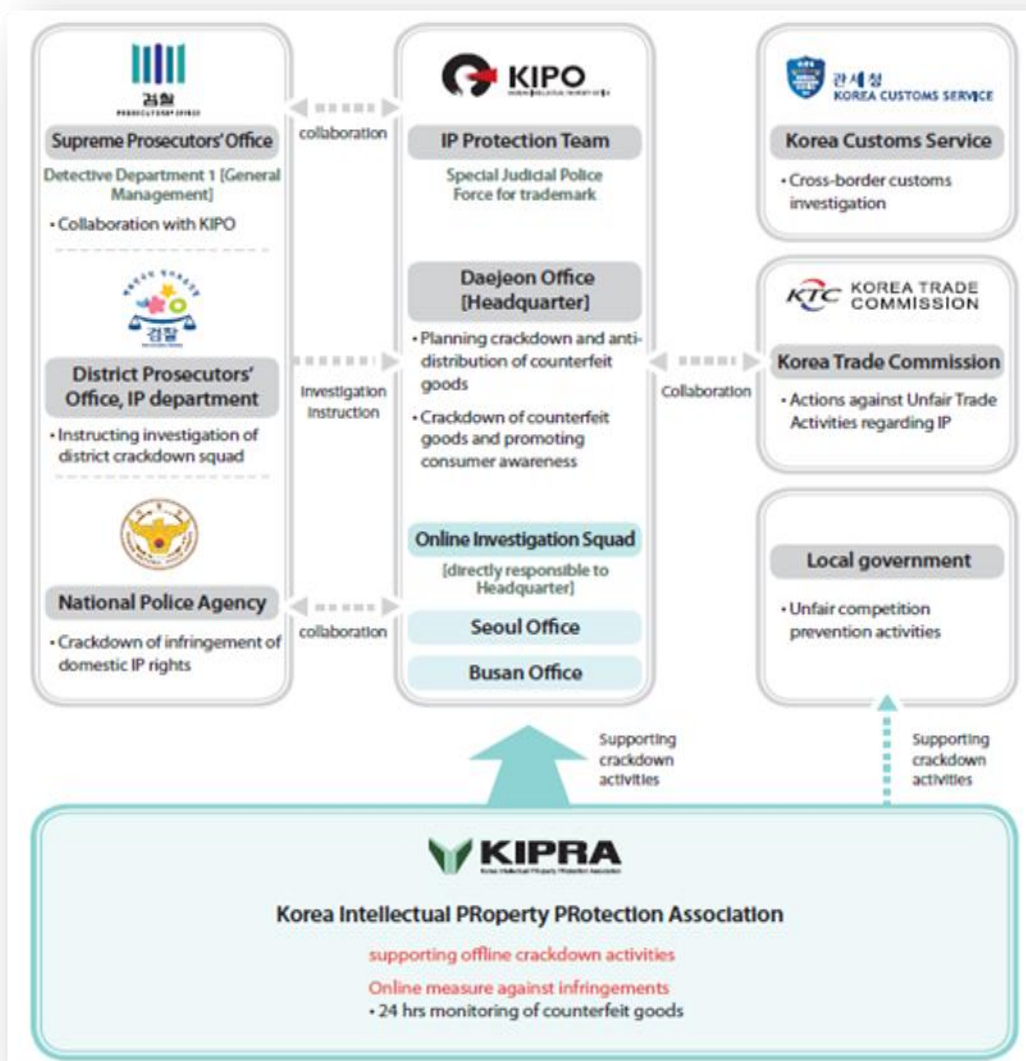


Figure 1: System of Korean IPR (Source: KIPO Web site, Modified by ICDK)

2-3. Overview of the Korean IPR Laws and Acts

Korea first enacted a Patent Act in 1961. Korea's specific legislation to protect various types of IPR has been through substantial amendments and new legislation over the years to bring greater coherence to the international standard of intellectual property protection. (See table 1) Korea is currently a signatory to various major international IP treaties including the Patent Cooperation Treaty, the Madrid Agreement on International registration marks, etc.

Law & Act	Presidential Degree	Authority
The Patent Law	Regulations for patent law Registration statute of patent law, Regulations of implementation of patent law	Korean Intellectual Property Office (KIPO)
Utility Model Act	Regulations for utility model act, Registration statute of utility model act	
Design Protection Act	Regulations for design protection act, Registration statute of design protection act	
Trademark Law	Regulation for trademark law, Registration statute of design protection act	
Invention Promotion Act	Regulation for invention promotion act, Enforcement decree of management, disposal and compensation of invention	
Unfair Competition Prevention and Trade Secret Protection Act	Enforcement decree of unfair competition prevention and trade secret protection act	
Semiconductor Layout Design Rights Act	Regulations for semiconductor layout design rights act, Enforcement decree of semiconductor layout design rights act	
Copy right	Enforcement ordinance of copyright	Ministry of Culture, Sports and Tourism (MCT)
Online Digital contents Industry Development Law	Enforcement ordinance of copyright, Computer program Protection Act	

Table 1: Major Laws and Acts on IP and Copyright (Source: KIPO Web site, Modified by ICDK)

2-4. Some statistics of Korea IPR

As a result of increased focus on patents and IPR from the government, Korea increased its number of patent applications since 2000. In 2011, numbers were almost doubled compared to 2000. Especially from 2003 to 2005, numbers were increased dramatically due to increased R&D funds from the government. However, the trend for applications continuously decreased from 2008 due to the global economic crisis (See figure 2&5).

Additionally, Korea increased its number of PCT (Patent Cooperation Treaty) applications and is now the 5th largest by country of origin (See figure 3). International applications filed under the PCT by Korean applicants have steadily increased on an annual basis primarily due to a clearer understanding of the advantages of the PCT system, rising awareness of the importance of IPRs, and continued efforts to consolidate patent rights abroad. Nevertheless, the large majority of Korean patent applications are still general, meaning filed and issued within Korea.

In 2012, the total number of applications for industrial property rights (i.e., Patents, Utility models, Trademarks, Design) increased and reached 396,996. The total number of registrations for industrial property rights (i.e., issued patents) in 2012 reached 243,869. The registration trend for IPRs showed an increase for three consecutive years since 2010.

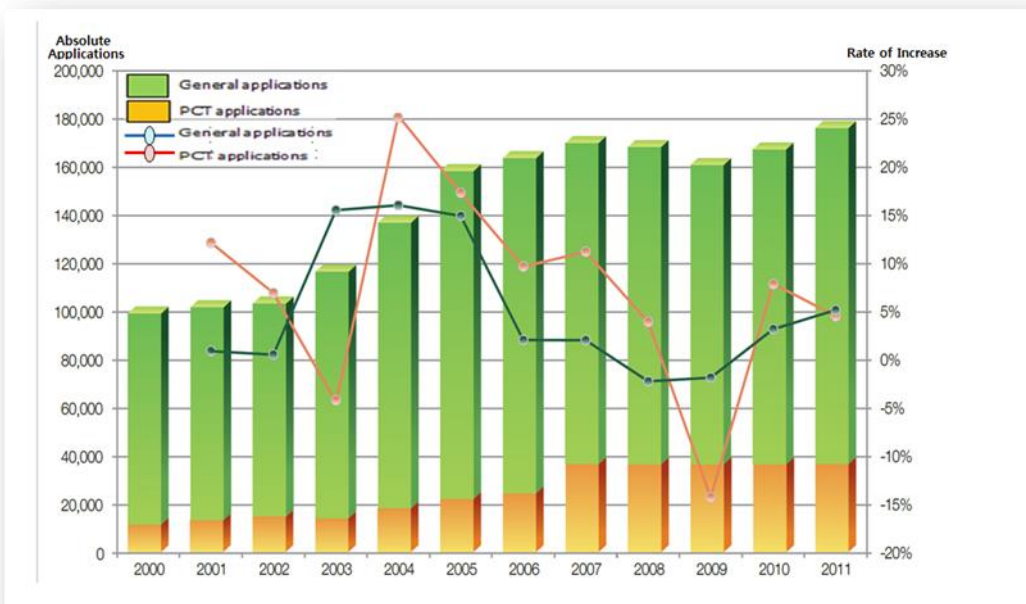


Figure 2. KOREA IPR Application trends (Source: The Patent Trend in Korea 2000-2011, KIPO)

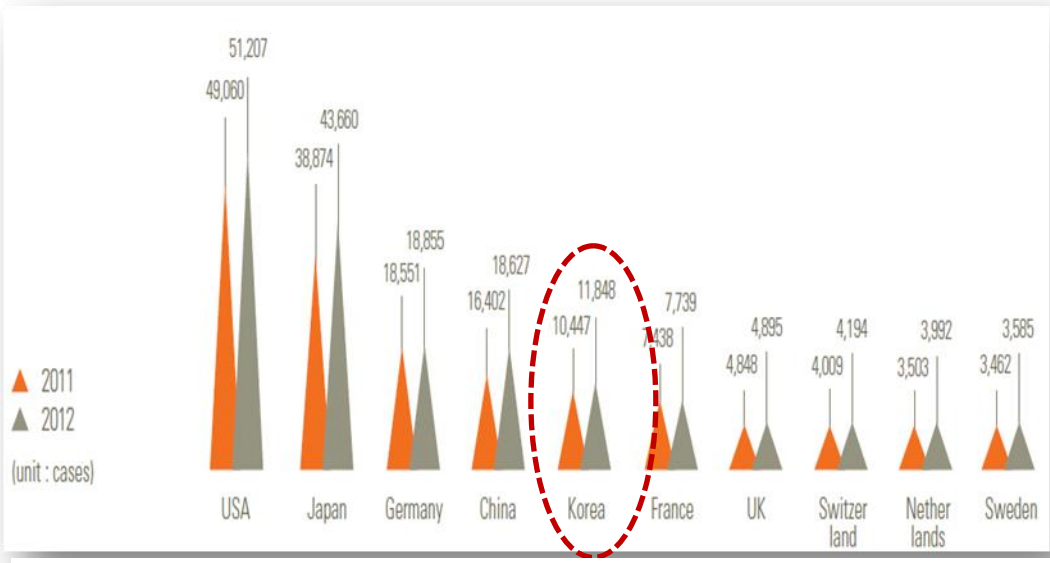


Figure 3. PCT Application trends in top 30 countries (Source: Annual Report 2012, KIPO)

In terms of technologies, there is a clear trend with the ICT and electronics being the dominant technology field. In 2011, among 5 major technologies (5 technologies are classified by WIPO technical classification), the applications and shares were divided as follows: Electronic (51.76%), Machines (20.82%), tools (11.85%), chemistry (10.24%), etc (5.32%) (See figure 4).

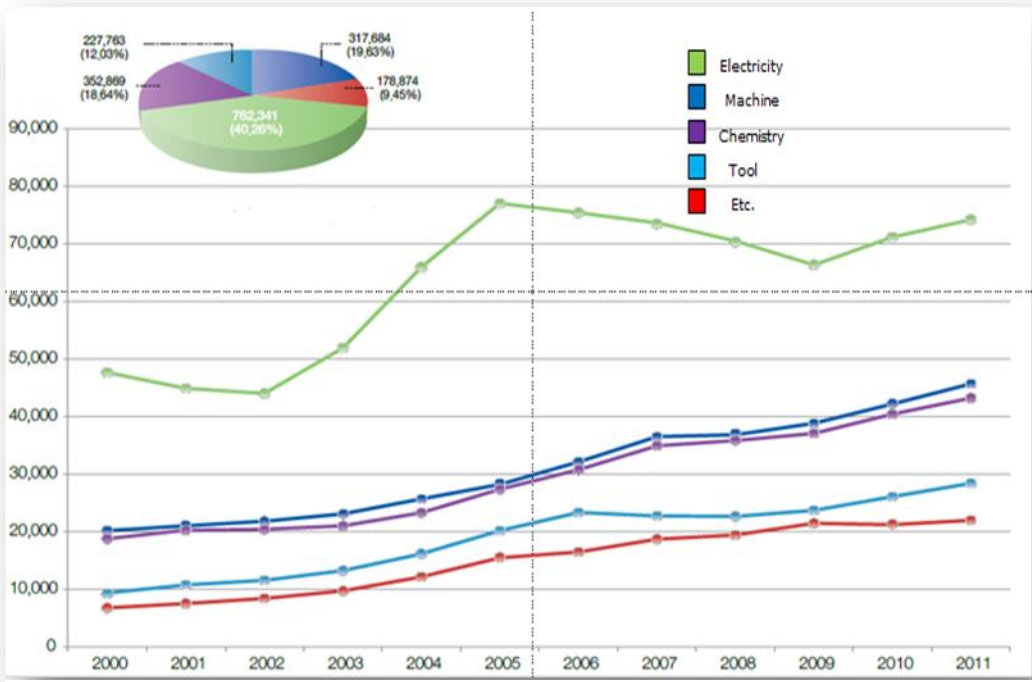


Figure 4. KOREA Patent Application and Share of 5 Major Technologies (Source: The Patent Trend in Korea 2000-2011, KIPO Annual Report 2012, KIPO)

Distinctively, companies share percentage is decreased from 94.38% in 2000 to 79.25% in 2011. However, there was an increase in percentage for Research institutions (4.47% → 10.12%) and Universities (1.15% → 10.63%), showing the increased focus on Korean universities as being key players in IPR and generation of new technologies to be utilized in the private sector (See figure 5).

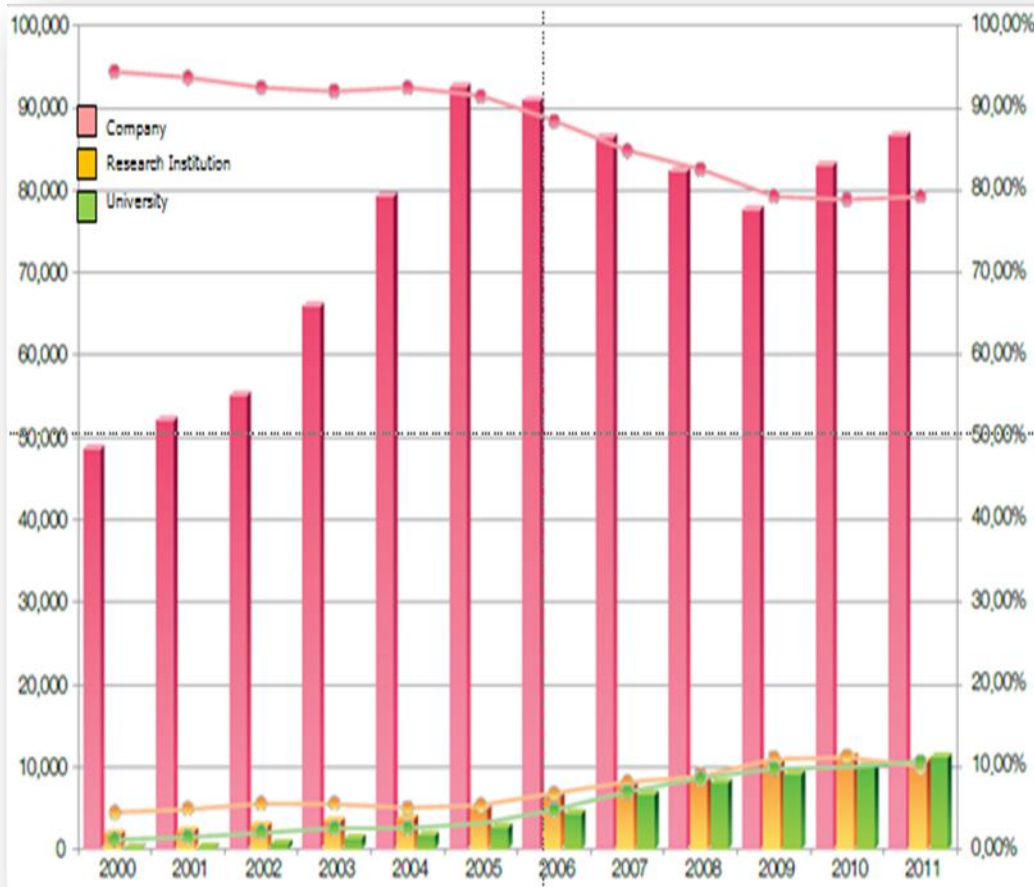


Figure 5. KOREA Patent Application and Share Trends by Principal Players
(Source: The Patent Trend in Korea 2000-2011, KIPO Annual Report 2012, KIPO)

It is estimated that decrease in applications in the company sector was affected by two main reasons, (i) big companies' (Samsung electronics, LG electronics) emphasis on quality patents over quantity patents and (ii) changes in the international economic market in the wake of the 2008 financial crisis. Meanwhile, the Promotion of Industrial Education and Industry-Academic Cooperation Act and increase in research and development costs led to drastic growth in the education sector (See figure 6).

Among big companies, Samsung electronics and LG electronics are frontrunners in patent application activities. Samsung SDI and LG Innotek are reported to have the highest growing applications. In case of Samsung SDI, the abrupt shift from CRT to LCD caused huge fluctuations in its numbers. In reality, Samsung SDI shot down the production line of Braun tube due to lack of competitive advantage. The company's market share also dropped by 59% in the third quarter of 2007, as its Braun tube, accounting for 90.4% of share in the 2014 global TV market, was shifted to flat screen TVs. (Source: Yonhap News Agency, 2007) In comparison, LG Innotek producing LCD backlight-related items, which are main LCD products, has recorded continuous growth.

A general conclusion from the overview above is that Korea's IPR culture is greatly affected by the large companies that work in the global market for high-tech manufactured goods (consumer electronics & devices). This has set the standard for Korea and has stressed the importance of having IPR in place. The overall picture also shows that Korea is less strong in other technology fields, especially the medical fields (although some medical/pharmaceutical patents could be contained in the 'Chemistry' category).

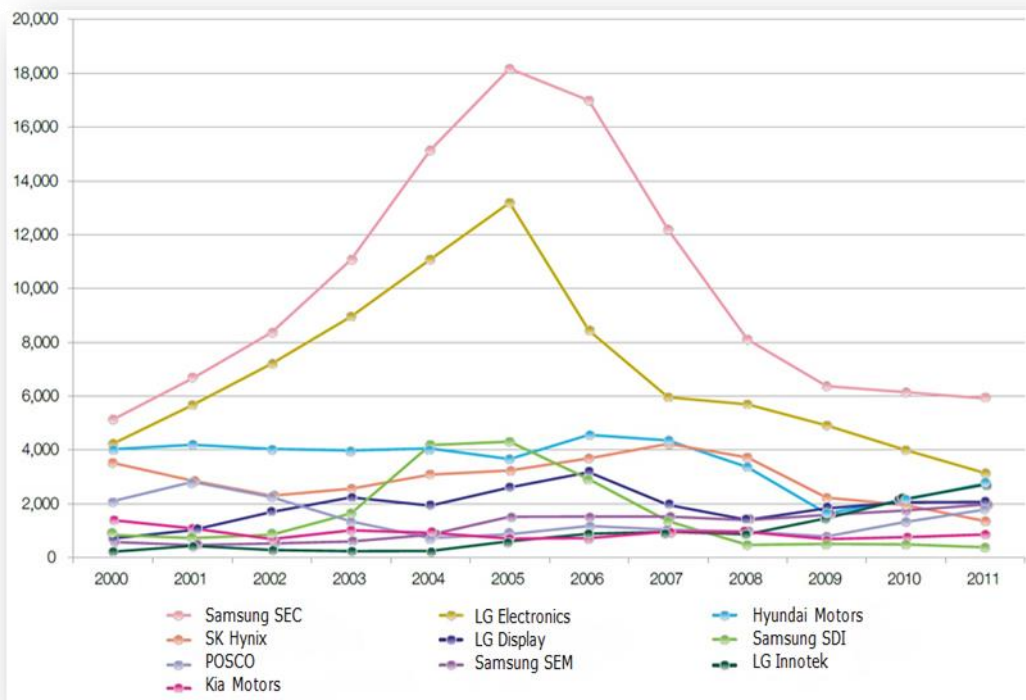


Figure 6. Top 10 Patent Application Trends by application numbers
(Source: The Patent Trend in Korea 2000-2011, KIPO Annual Report 2012, KIPO)

2-5. EU-KOREA FTA impact on IPR in Korea

Free Trade Agreement (FTA) between Korea and the EU has been effective as of 1st of July, 2011. What is remarkable in the FTA is that intellectual property right (IPR), among others, was addressed as an issue. On the EU side, high level of protection and enforcement of IPR is crucial to European competitiveness on the basis of its long-accumulated economical and industrial assets. Korea has also firmly established itself in the top tier of industrialized nations. In high-tech manufacturing industries, Korean companies currently account for large shares of global markets. For both parties with manufacturing expertise in high-tech companies, encouraging knowledge economy is a core future strategy and IPR is the kernel of the negotiation. (Source: EU Chamber of Commerce in Korea, Becoming an IP Powerhouse)

The FTA gives a legal framework to basic rules in the EU and in Korea for the protection of IPR and enforcement of such protection. Basically, the content covers 5 areas, copy rights, trademarks & designs, geographical indications, patents and enforcement.

Provision	Contents
Copyrights	Duration of Author's Rights Artists' Resale Rights Protection of Technological Measures
Trademarks & Designs	Exceptions to the Rights Conferred by a Trademark Protection Conferred to Unregistered Appearance
Geographical Indications	Scope of Protection Relationship with Trademarks
Patents	Extension of the Duration of Rights Conferred by Patent Protection for Pharmaceutical Products and Other Inventions Subject to Approval Protection of Data Submitted to Obtain Marketing Authorization for Pharmaceutical Products Protection of Data Submitted to Obtain Marketing Authorization for Plant Protection Products
Enforcement	Liability of Online Service Providers Border Measures

Table 2: The EU-Korea FTA IPR

The FTA sets standards of protection for intellectual property rights such as the protection of authors' work for duration of 70 years after the death of the author and the right to a single equitable remuneration for performers and producers of phonograms. Also, the FTA en-

asures that procedures for registering trademarks in the EU and Korea follow certain rules, such as the possibility of opposition by interested parties and the availability of a public electronic database of applications and registrations. Along with that, the FTA gives guarantees for the protection of data submitted to obtain marketing authorisation for pharmaceutical and for plant protection products and provides protection for a number of European and Korean geographical indications.

The FTA explains enforcement measures to be applied in Korea and in the EU to ensure effective action against infringement of the protection granted to IPR. This includes minimum rules on civil and administrative proceedings, criminal procedures and penalties in certain cases. The FTA provides that online service providers are not liable, under certain conditions, where services of intermediaries are used by third parties for infringing activities. Furthermore, the FTA expects that measures can be taken at the border, upon request or by the authorities, where it is suspected that goods infringing IPR may be imported, exported or placed under other customs procedures mentioned in the FTA.

(Source: European Commission, the EU-Korea FTA in Practice, 2011)

A variety of industries on the European side, including the pharmaceutical industry, agro-food producers, luxury products manufacturers and audio-visual industries, have made substantive progress in protecting IPR in both the EU and Korea. Reflecting the status of development of Korea and the positive role that IPR can play in improving the investment climate and enhancing innovation and diffusion of technologies, notably with environmental technologies, EU and Korea have still many things to collaborate, especially in clarifying substantive IPR and in creating specific standards for enforcement of intellectual rights.

(Source: Trade Sustainability Impact Assessment of the EU-Korea FTA: Final Report, 2008)

From the EU perspective, it is essential to deliver to Korean partners more clearly the division of responsibility between the European Commission and member state IP policies. It is also necessary to persuade Korean partners that there will not be unforeseen barriers to the fair transfer of technology. From the Korean side, it is crucial to demonstrate to potential European partners that previous IP leakage and “reverse engineering” suspicions are consigned to industrial history, and that there is a clear regulatory framework allowing fair access to jointly developed technology.

3. IPR advices for Danish Partners

Based on existing research and input from Korea Intellectual Property Office (KIPO), ICDK Seoul offers some general strategic advice on IPR protection to Danish companies and universities who wish to work with Korean partners and protect their IP in Korea.

	Company	University/GRI*
Company	Section 3.1	Section 3.2
University/GRI*		Section 3.2

*GRI: Government Research Institutions

Table 3: Category of Suggested Strategies

3-1. Companies

The suggested advice for companies can be divided into two kinds of relations, trade relations (strategy 1 to 4) and co-development relations (strategy 5).

Strategy 1 | Keep current with a related-IP trend in Korea

According to the territorial principle, IP acquired in Denmark (except for copyrights)¹ is valid only in Denmark and it cannot be protected in Korea. In other words, Danish companies looking for business opportunities in Korea should hold IP which is exclusively valid in Korea. Especially when a Danish company is considering an investment in Korean capital equipment as preparation of product launching, IP acquisition is a pre-requisite.

The simple but sound advice is to protect IP before entering Korea, and in case collaboration agreements are made between companies bringing in their own IPR, a thorough negotiation and agreement phase should be finalised, before starting the collaboration. The experience from Danish companies' collaboration with companies in Korea is that it is just as important to firmly show and state that technology not included in the agreement is not to be brought into the collaboration. In

¹ Copyrights acquired in Denmark can be protected in Korea under the Berne Convention as there is no registration process for copyrights

other words, Danish companies must be able to stand their ground during the project period and still keep the good collaboration running.

Strategy 2 | IP application should be made prior to product launching

A patent system is an institution that assigns exclusive right to a holder in return for disclosure of an invention. Also, a patent cannot be granted to a product that has been open to the public. In case a new invention is showcased by a product launching, pamphlet or advertisement before patent acquisition, the application should be filed within the 12 month grace period for novelty.² Further, a rival company can take advantage of promotional materials which gives a source of business.

Thus, the basic advice is that a prerequisite task for Danish companies trying to expand business in Korea is to apply for patent before product disclosure or launching. If it is impossible to get IP before product launching, purchasing patent on peripheral technology to avoid patent dispute can be an alternative.

Strategy 3 | Clarify where the responsibility lies

Original equipment manufacturing (OEM) is one way of business that either exports finished goods or manufactures product by importing necessary components. In this kind of business, actions for infringement of patent have an effect not only on the direct trespasser who manufactures infringed products but also on all people concerned in the manufacturing such as suppliers and distributors.

A company whose business is based on OEM should make clear the matter of responsibility by specifying in the contract as a way of hedging against unexpected patent conflict or financial losses.

Strategy 4 | Protect core technology personnel actively

Confidential information of a technology can be leaked by rival companies which try to entice core technology manpower offering stock option or high salary to knowledge holders. To avoid the outflow of hu-

² An application can be filed within the 12 month novelty grace period (Article 30 of the Patent Act)

man resources, which can be a risk to your business, set up an adequate compensation system, improve labour conditions and enter into a confidentiality agreement and non-competition agreement on reasonable terms. This is especially relevant when the Danish companies have Korean employees.

Strategy 5 | Collaboration agreements and foreground/background

There are two different scenarios in co-development projects between high-tech companies: (1) IP is brought into collaboration or (2) IP is generated during the collaboration or combinations of the two. So far, no collaboration between Danish and Korean companies exists where IP is generated through co-development. With the increasing links between Denmark and Korea, especially on the R&D side, this will eventually happen. As shown below in section 2-2, the process of doing an agreement on distributive research is just as relevant for companies as it is for research institutions and universities.

For the Danish company it is essential to specify what is brought into the collaboration and what is not (define foreground and background IP). In addition, prior to the start of the cooperation, it must not be forgotten to define which rights the parties have to Foreground IP that may be generated inside the cooperation. This can be done by specifying a Field-Of-Use for each Party.

As a general advice, a good indication for the FOU definition is the scope of supply of the Danish company. The Danish company should ensure to have full rights on the Foreground IP for its present (and maybe future) scope of supply including the right to sub-license (also relevant for Chapter 4-3). Danish companies should include a non-analysis clause for products/technology in the agreement, so a situation is avoided where the Korean partner perform an analysis of the product before, during or after the use of the product.

Concerning disputes, Danish companies should consider other options than Danish or Korean law which are always difficult to accept for one of the Parties. To propose neutral places like UK, CH or Singapore (which Koreans prefer) is an appropriate alternative.

The Danish company should prepare itself for the scope and size of the project to be a constant topic of negotiation and re-negotiation. Korean companies tend to present plans for the initial project that are very large. In the same manner, proposals to increase the scope and size of the project can be put on the table at any time. This is not necessarily negative, but, in the discussions with the Korean partner, it is important to understand the driver for these plans and make a reality check to end up with a realistic project. As an outsider to the Korean company, the employees of the Danish company are in a position to say no to certain proposals (in a polite way and with good reasons) which may be harder or even impossible to do for employees of a Korean company. In general, this means that a Danish company can help its Korean partners to keep the project on a meaningful track.

During the collaboration, a Danish company should be prepared for questions and efforts from Korean counterparts to bring in the protected background knowledge as well. Negotiation even after a written agreement specifying the contents is a common business practice. A Danish company needs to be prepared to state its position a number of times at different occasions before it is accepted. A Danish partner must therefore be ready to stand their ground (as stated under Strategy 1) and not make this perceived attempt of breaking the agreement influence an otherwise well-working project.

The general conclusion of Danish companies that have been active in Korea is that the process of negotiating the agreement is important, but equally important is the continued awareness of keeping the collaboration within the boundaries and scope of the agreement.

Another general observation is that perpetual change seems to be the only constant in Korean companies. This is not only true for the scope, size and aim of projects but even for the people themselves. Korean companies tend to have an annual re-organization where employees, especially on a higher management level are moved to different positions and disappear from the project while new persons are brought in. So be prepared to constantly monitor and re-establish your important business relations.

See also chapter 4 with specific advice from the Danish law firm Kro-mann Reumert.

3-2. Universities and Research Institutions

After the Korean government amended the Promotion of Industrial Education and Industry-Academy Cooperation Act in 2004 (See following quotation below), each university began forming Industry-Academy Groups (or Centres). As such, it is recommended to contact the group of each university when conducting technology cooperation. Additionally, from 2011, universities and companies have been advised to follow the Industry-Academy Guideline and the information below explains a regular procedure and new procedures of the guideline.

The purpose of this Act is to contribute to the development of communities and the State by training creative industrial human resources meeting the needs of the industrial world and by developing, spreading and diffusing new knowledge and technologies necessary for the growth of industry through the promotion of industrial education and the acceleration of industry-academic cooperation
 [This Article Wholly Amended by Act No. 8708, Dec. 21, 2007]

Between Industry and University/GRI

In general, the process of agreement on distributive research between Industrial and educational sectors (Inc. University and Research institutions) sector is as below.

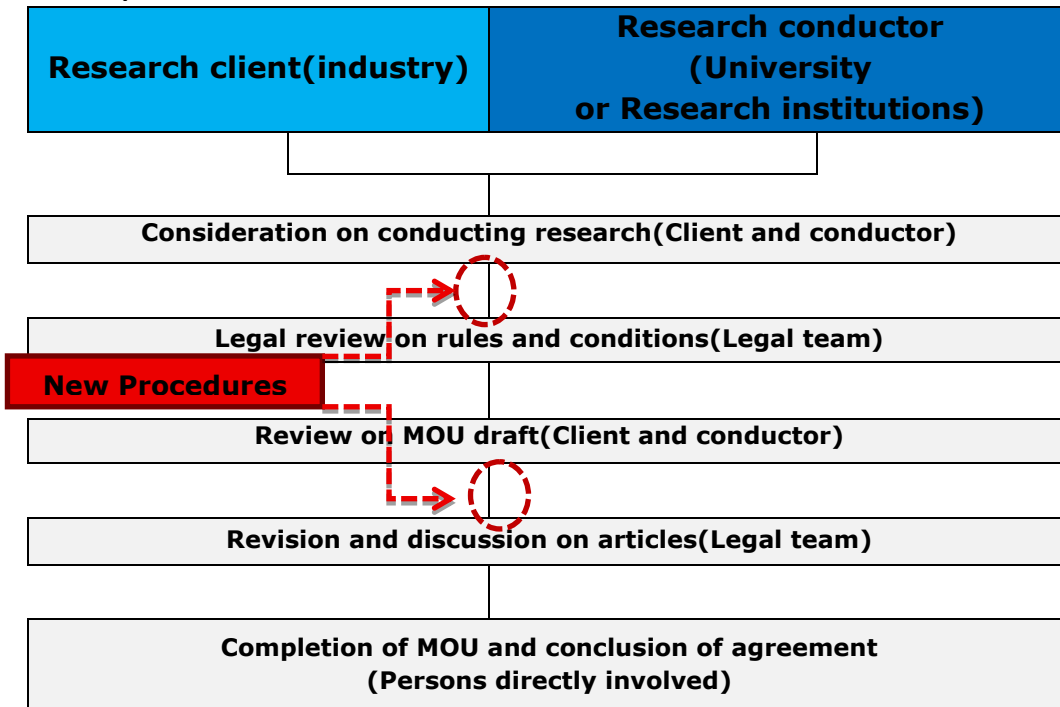


Figure 7. Present General process and new procedures of agreement on distributive research between Industrial sector and educational sector (Source: the Presidential Council on Intellectual Property Web site, 2011)

To ease the controversy on the ownership between client and conductor, the Presidential Council on IP has introduced a guideline in Dec 2012. As a result, two procedures have been added in the general process of agreement on distributive research: (1) A general review on rules and conditions, and (2) A MOU draft session by the legal team. The objective of the guideline is to secure the full exercise of IP for the industrial sectors, and to compensate properly to research institutions for better IP creation. According to the nature of the University-Industry Collaboration, there are 6 types of ownership according to the title of ownership as well as the distribution of right of implementation and profit.

Title	Distribution of right of implementation and profit
University-exclusive	Approval on implementation by industry free of charge
	Approval on implementation by industry with the agreed amount of cost
Joint ownership	Profit distribution according to self-implementation, third-party implementation
	Profit distribution only to third-party implementation
Industry-exclusive	Profit distribution according to self-implementation, third-party implementation (cross-licensing inclusive)
	Profit distribution only to third-party implementation (cross-licensing inclusive)

Table 4: Distribution of right of implementation and profit

Since the guideline was announced, University-Industry Collaboration in developed countries has been conducted closely on a higher level. Korea Advanced Institute of Science and Technology (KAIST) and Seoul National University (SNU) are taking the lead in University-Industry Collaboration following the guideline.

Between University/GRI and University/GRI

As this is a fairly unexplored area, not many cases or specific guidelines exist. General understanding on distributive research entails preparation and settlement of an agreement prior to the collaboration. Often, partners in university/university collaboration will expect the IPR developed in the collaboration to depend on the funding of the project. Having discussions on IPR brought into collaboration as well as IPR generated during the project prior to finalizing agreements is highly recommended.

4. CHALLENGES UNDER CO-DEVELOPMENT PROJECTS

The purpose of this chapter is to give a short summary of some of the main IP challenges that Danish companies and universities may encounter when participating in co-development projects with Korean partners including guidance on how to approach such IP challenges. The chapter is written by the Danish law firm Kromann & Reumert (with advice from Yulchon LLC) as an exclusive contribution to this report. Although there are overlapping information between this chapter and the rest of the report, the substantial input provided by Kromann & Reumert is presented here in its entirety.

Companies and universities participating in transnational co-development projects face major IP challenges, though not always the same, particularly as the Danish party will face an unfamiliar foreign legal regime. Often, a foreign legal regime entails hidden legal pitfalls resulting in a different legal position and potential loss of presumed rights and/or contractually agreed rights.

4-1. Protect Your Own IP and Confidential Information

Any party to a transnational co-development project has to consider the possibilities to and needs for having its own Background Information; technical information and know-how, including patents, models, designs, copyrights etc. (owned or controlled) protected, if possible and within reasonable limits, in the co-developers home jurisdiction. This also applies, if the co-developer is a Korean company or university. In nearly every development project, the Danish party will provide and disclose confidential information to the Korean co-developer. For a development project in Korea, like in most other jurisdictions, the Danish party should enter into a confidentiality agreement. However, a confidentiality agreement will not be sufficient, as the Danish party must also be in a position to identify and document the confidential information that it has disclosed to the Korean co-developer. In real life, lifting the burden of proof in relation to documenting what has been disclosed is often a challenge and should be considered before disclosing confidential information.

The Korean Unfair Competition Prevention and Trade Secrets Protection Act (UPVA) protect trade secrets (both technical and business in-

formation). However, it is important to note that in order for information to be protected as a trade secret in Korea the Danish company should expect that it will be necessary to prove among others, that the information disclosed is in fact information that the Danish company has used considerable efforts to maintain as a secret. Thus, the Korean public law protecting trade secrets should be supplemented by a contractual protection of confidential information under a confidentiality agreement.

Another issue and risk that the Danish party should address, is how trade secrets disclosed by the Korean co-developer should be handled. In Korea, a trade secret misappropriation might be (i) using confidential information received from the co-developer outside the scope of the co-development project; (ii) receiving confidential information from an employee of the co-developer, who is not authorized to disclose such information; or (iii) obtaining confidential information unrelated to the co-development project. In addition, if an ex-employee of the Danish party makes an unauthorized disclosure of trade secrets belonging to the Korean co-developer, the Danish party may also be found liable for trade secret misappropriation according to Korean law. Therefore, it is recommended that the Danish party implements a strict internal policy to manage confidential information received under such co-development projects and obtains confirmation from the Korean co-developer that the employees disclosing confidential information to the Danish party are in fact permitted to make such disclosure.

4-2. Identify the Parties' Background Information

A frequent dispute arising under a co-development project is that the parties are unable to agree whether certain information constitutes Background Information owned or controlled by one of the participating co-developers or whether such information constitutes Foreground Information (technical information and know-how, including patents, models, designs, copyrights etc. generated during the execution of the co-development agreement). Consequently, it is recommended to identify and describe each party's Background Information explicitly.

4-3. Foreground Information

As in every other co-development project it should be considered by the Danish party to keep a log book identifying and documenting any contributions to Foreground Information.

It should be agreed between the co-developers, how rights to Foreground Information are distributed. Should the rights be vested in the party who created the Foreground Information or should the rights be co-owned or belong to only one of the parties (or a third party)? Further, should any licenses (including grant-back licenses) be granted? To the extent that the Foreground Information initially belongs to the Korean party, the Danish party should consider securing an ownership assignment or a license to the Foreground Information in question. A right for the licensee to sub-license should also be considered as part of the agreed contract.

Every time a license is granted, a potential withholding tax on royalties (and the relevant double taxation agreement) has to be considered and checked.

If the parties have agreed on joint ownership to Foreground Information (or joint ownership to Foreground Information is likely to occur under the co-development project), the parties should enter into a joint ownership agreement (which may form part of the co-development agreement), regardless of whether the governing law is Danish law or Korean law. This is important, as for example a joint ownership to a patent is under a legal regime of consent, and the rights of joint-owners under Korean law and Danish law are not the same. For example, a joint patent owner must obtain consent by the other joint patent owner(s) before any license can be granted. The parties can therefore not rely on obtaining the necessary and relevant rights of exploitation without a joint-ownership agreement.

It is not unusual that a co-developer runs (more or less) identical projects within the same technology and sometimes even as an external project and an internal project(s) at the same time. There is always a risk that your project might inspire other projects of the co-developer. Consequently, there is a risk that conflicting rights of the co-developer (or of an entity coming from the same group of companies) will suddenly stop your project some time down the road or your project will

be de facto stopped by the co-developer due to lack of funding or just insufficient commitment. Or perhaps the co-developer may not support commercialization of the Foreground Information under your project, even if the project has been finalized, or even worse, perhaps a commercialization takes place by the co-developer under another setup and another project. Due care together with a carefully drafted co-development agreement with sufficient due diligence addressing such potential situations might reduce the risks but would not eliminate them.

4-4. Can the Korean Co-developer Provide the Agreed Rights to its Foreground Information to the Danish Party?

There may always be potential conflicting third party rights for a commercialization, especially if the Foreground Information depends on another party's technology or when we are dealing with employee's inventions. Regarding the latter, at least a part of the Foreground Rights will often be created and developed by employees of the Korean co-developer. Accordingly, it should be checked if the Korean co-developer has obtained (or may obtain) assignment of the co-developer's own employee's IP rights of relevance to the co-development project in order to secure that such rights can be granted (ownership/license) to the Danish party. The Korean co-developer may not always have such rights. It is important that such assignments from employees are eligible for lawful enforcement in accordance with the Korean Invention Promotion Act. It is recommended that the Korean co-developer should make representations and warranties as to the same in the co-development agreement.

For all co-development projects, the parties should always consider the potential pitfalls that differences in the financial strengths might in fact have influence on the conditions on how the Foreground Information actually is exploited and the possibilities of staying in the development project. The potential burden of an agreed mutual minimum performance (or a contractual right for a party to continue to expand and scale the development project alone if the other party does not or cannot keep-up) might have the result that the financially weaker party finds it difficult from a financial point of view to maintain its position in the project. Consequently, the financially weaker party might give up some of its rights to participate in further developments and commer-

cialization due to the financial burden of keeping on track with the project and thus see itself being diluted or perhaps even needs to withdraw from the project.

4-5. Does the Danish Party have Sufficient Rights to grant Rights to the Korean Co-developer?

If there are third-party rights, the Danish party will be restricted in assigning (or licensing) its Foreground Information (and/or Background Information) to the Korean co-developer. This has to be checked, including that the necessary employee's rights have been (or can be) transferred to the Danish party.

In some cases, the Danish party will have foreign employees participating in the co-development project who will not be subject to the Danish employee's invention acts. Previously, employers in Korea automatically obtained a royalty-free, non-exclusive license to use employee inventions without the need for any contractual arrangements or internal company policies to that effect. However, as of 31 January 2014, most large Korean companies are no longer entitled to an automatic grant of a royalty-free non-exclusive license to use employee inventions. If the Danish party has Korean employees, the Danish party has to secure the necessary rights to Foreground Information from such employees, including a right to assign/license such rights. Korean employees are entitled to "reasonable compensation" for employee's inventions, which is a very different approach compared to what applies for employees' inventions in Denmark.

The Danish party, as the employer, should also establish a procedure for the Korean employee to make a notification to the Danish party of any employee invention made. This is not only to secure the possibility of granting a license (or assignment) for the Danish party, but also to reduce the risk that technical information related to employee invention may be provided to an external third party (competitor) by the Korean employee.

4-6. Competition Law

The Korean Monopoly Regulation and Fair Trade Act (KMRFTA) prohibit agreements containing unfair collaborative acts and unfair trade practice. The Korean anti-trust authority applies the provisions of the KMRFTA whenever one or more of the parties is a Korean company notwithstanding any choice of law provisions in the contract.

Korean anti-trust regulations are strictly enforced. Thus, if a co-development agreement entered into between two competitors unfairly restricts competition, or if the co-development agreement is unreasonably one-sided, the Korean Fair Trade Commission may cancel or amend the co-development agreement or take other necessary corrective measures (such as imposing administrative fines or initiating criminal actions).

The parties should not only take into consideration the Korean competition laws but also the anti-trust regulations of other jurisdictions where the co-development agreement may have an effect, including EU competition law.

5. PRACTICAL INFORMATION

5-1. KIPRIS (Korea Intellectual Property Rights Information Service)

KIPRIS is an internet-based patent document search service made available to the public for free of charge. It covers publications of Korean IPR applications, legal status information, trial information, etc. Korea Institute of Patent Information has been providing KIPRIS since 1996 on behalf of KIPO.

KIPRIS is designed to promote the use of patent information for R&D activities, patent disputes, corporate mergers & acquisitions and so on. KIPRIS consists of a basic search function for entry-level users and an advanced search function for experienced users and for user's convenience.

KIPRIS also provides online download function. Users can easily access to the KIPRIS through Naver and Empas, major Korean portal sites, and acquire the data from KIPI.

How to use KIPRIS

1. Access to KIPRIS website at <http://eng.kipris.or.kr>
2. Click SEARCH >> PATENT
3. Click SMART SEARCH button to input and edit your search queries
4. Use the Sort feature to filter your results.
5. Refer to HELP for difficult patent terms.
6. Following services are restricted to KIPRIS members only:
Save Search Formula, My Folder and Online Download.
7. Sign up to get access to full features offered by KIPRIS.

5-2. Advising Law Firms

	Introduction	Main Service	Contact Detail
YOON & YANG	Established in 2003, with over 330 professionals (lawyers, patent attorneys, CPAs, customs advisors, tax attorneys, etc.) and more than 200 supporting staffs. More than 20 Specialty practice teams provide full range of services to clients from all around the world.	IP Practice Group Application and registration in trademark, patent, design, copyrights. Valuation of IPRs. Technology transfer and Licensing. Trade secret protection, National core technology transfer approval and notification. Online game and software laws, information and data protection laws, Cyber and cloud computing laws. Chemical management laws	Email: kkim@yoonyang.com Tel: +82-2-6003-7000
Kromann Reumert	Leading law firm in Denmark with offices in Copenhagen, Aarhus and London. 500 employees, including 325 fee earners who cover a long list of practice areas and who work together to provide quality services	IP Group Copyright, License agreements, R&D agreements, Open Innovation, Contract Manufacturing, Distribution law, IP contracts, IP due diligence and risk management, Patents and utility models, Processing of personal data, Product Imitations, Trademarks and domain name	Jens Blomgren-Hansen, (Asia responsible) Email: jbh@kromannreumert.com Michael Pitzner-Bruun, (IP responsible) Email: mpb@kromannreumert.com Jørn Vestergaard-Jensen Email: jvj@kromannreumert.com
Yulchon LLC	Leading full-service law firm in Korea with offices in Seoul, Beijing, Ho Chi Minh City and Hanoi. Over 358 professionals including 228 Korea-licensed, lawyers, covering a long list of practice areas. recognized by ALB, Legal 500, Asia Law and Chambers.	IP Practice Group Headed by five partners (all former judges) and two senior foreign counsels (all former in-house counsel). Experienced in all aspects of IP related contentious issues.	Young-Hill Liew, Email: yhliw@yulchon.com Jeong Yeol Choe, Email: jychoe@yulchon.com Samuel Lee, Email: samuellee@yulchon.com

Table 5: Advising Law Firms list

APPENDICES 1. PROCESS AND MAIN FEATURES OF KOREA'S IPR

Intellectual Property rights	Industrial Property rights	Patent	Source, Core technology (major invention)
		Utility model	Peripheral, Remedial technology (minor invention)
		Design	Design of product
		Trademark	Distinguishable symbol, Character, Figure
	Copy-rights	Copyright	Creative work in literature and art field
		Neighbouring right	Right of performers, phonogram producers, broadcasting organizations
		Database	Producers of databases
	New Knowledge Property rights		Traditional knowledge, New plant species, the names of internet domains and trademarks for tastes, sounds and smells, etc.

Table 6: IPR in Korea (Source: KIPO Web site, Modified by ICDK)

Industrial Property rights

Patent Right

Subject of protection

The highly advanced creation of technical ideas utilizing the rules of nature

Requirements of Patent Right

The applied invention should be able to be used for industry (availability in the concerned industry)

The applied invention should not be a technology (existing technology) known before patent application (novelty)

The applied invention, although this is different from the existing technology, should not be an easily thinkable one from the existing technology (Evolution)

Upon filing an application, the KIPO classifies the subject invention in accordance with the International Patent Classification, and after a pe-

riod of 18 months, the patent application is disclosed to the public. The approximate length of time generally taken from the filing of an application to the registration of a patent is 2 years.

Examination process

- Formality Examination

The formality examination consists of reviewing the process, subject of application, and legality of the methods used. If defects are found in the process by examination, the applicant is asked to amend the process. If the amendment is insufficient to correct the defect, the application is invalidated.

- Disclosure of Application³

The Korean Intellectual Property Office discloses the patent application 18 months after the application date (priority date when priority is claimed), or earlier at the request of the applicant (when earlier publication is requested).

- Request for an Examination

An application for a patent is examined when any person requests an examination. If a request for an examination is not filed within five years of the application, the application is deemed invalid. (Three years in the case of utility models)

- Substantial Examination

The applicant is notified of the decision to award a patent or to refuse registration after a substantial examination. In the case of a rejection, a notice of rejection (initial and final notice of rejection) is sent to the applicant, who may then submit his/her opinion and/or amendment on specification within a given period.

- Decision of Patent

The applicant is notified of the decision to grant a patent when the examination result shows no reason for a refusal.

- Registration and Publication of Registration

The applicant pays a registration fee to register the patent immediately upon receiving notification of the decision to award a patent. The patent right enters into effect upon establishment of registration. The registered application for a patent is published and disclosed to the public.

³ Disclosure of application will happen prior to filing of a request for an examination

- Decision to Refuse Registration

A patent is not granted when the reason for refusal remains unchanged after the applicant's submittal of a written opinion and complementary statement.

- Appeal against Examiner's Decision to Refuse Registration

An applicant who has received a rejection decision files a claim to assert that the decision is wrong and to request that the decision be reversed.

- Invalidation Trial

An examiner or an interested party (anyone from the date when the establishment of patent right is registered to the date on which three months have passed since public notification of the registration) requests to invalidate a patent right, citing the grounds for invalidation (requirements for patentability, improper description, misappropriated application, etc.).

Utility Model Right

Subject of Protection

The shape or structure of an article, or a combination of articles that is industrially feasible

Quick registration system of Utility Model

(Applicable to applications filed from July 1, 1999 to September 30, 2006)

The quick registration system was introduced to protect utility model technologies whose lifecycle is comparatively short and which are easily imitated, and to encourage small and mid-sized venture companies to develop and commercialize their technologies

Since rights are granted without any substantial examination of the registration conditions, it is possible that the rights are defective. Thus, the technology evaluation system was introduced to prevent any victims of defective rights arising from quick registration

Current system

(Registration after examination, applicable to applications filed on or after October 1, 2006)

The advantages of the quick registration system have been weakened by significant reduction of the examination process period. Also, certain drawbacks with the quick registration system, such as the abuse

of rights registered without examination, the burden on applicants stemming from the complicated nature of the examination process, and the low efficiency of examination, have surfaced. Against such background, the registration system has changed to incorporate registration after examination. The examination processes for utility models and patents is same, improving the convenience of civil petitioners

Trademark Right

Concept of Trademark

Trademark under the Trademark Act: The scope of trademark was limited to a sign, letter, figure, three-dimensional shape, colour or combination thereof. On July 1, 2007, the definition of trademark was expanded to include all kinds of marks that can be visually recognized such as a combination of colours, a hologram, and motion marks. In a broader sense, trademark may include a service mark, collective mark, or business emblem, and serves to distinguish the goods related to a person's business from those of other entities

Service Mark: "Service mark" refers to a mark (trade name of advertisement, finance, and restaurant businesses) which is used by a person who conducts a service business for the purpose of distinguishing his/her service business from those of others.

Collective Mark: "Collective mark" refers to a mark which is intended to be used directly by a corporation established by joint goods producers/sellers, or by the corporation's members for their goods in business or service business

Business Emblem: "Business emblem" refers to a mark which is used by a person who conducts a non-profit business for the purpose of indicating his business. (Organization Committee for the Olympics, Korean Red Cross, etc.)

Examination Process

- Publication of Application

The trademark application is published before the establishment of the right is registered in order to collect opinions and allow requests for opposition, making the examination fair. An applicant may request compensation when other persons use the trademark for which he/she has filed an application without obtaining due authorization and subsequently cause losses to his/her business.

- Opposition

Anyone can raise opposition to a trademark for which an application has been published within two months (an extension is not allowed) of the publication date. Applications for opposition should be written in the specified form and include the reasons for opposition and the necessary evidence.

Design Right

Application and examination process

Application for examined design registration and unexamined design registration. Designs for items whose lifecycle is short, such as foods (A1), clothes (B1), bedding (C1), papers and printouts (F3), containers (F4), fabrics (M1), miscellaneous goods (B2), shoes (B5), teaching materials (F1), and office supplies (F2) are registered without examination⁴, while designs for other items are registered after examination

Unique systems under the Design Protection Act

Similar Design: All owners of a design right or applicants for design registration can register designs similar to their registered designer design for which an application for registration has been filed (basic design) by making changes in shape, pattern, or colour of an article in order to prevent imitations or appropriations of the design by other

Design of One Set of Articles: Where two or more items are used together as a single set of articles, and where the design of the set of articles shows unity as a whole, an application for registration of the articles as one single design may be filed (tea set, smoking set, etc.)

Secret Design: If an applicant requests confidentiality, the Korean Intellectual Property Office does not announce the registration of the design for 3 years from the registration date

⁴ Items which can be registered without examination have been expanded into 18 categories including the categories listed here

Copyrights

Copyrights are composed of three rights: copyright, neighbouring right of copyrights, and right of database producers. As of April 2009, computer program protection law and copyright law were integrated, and the most recent material explaining the revision of the copyright law was released in December 2010.

Copyright

Definition

Copyright is divided into moral right and economic right.

Moral right exists to protect the honour of the author, and economic right aims to protect the economic benefit of the author.

Types

Moral right: publication right, name-indicating right, integrity right

Economic right : reproduction right, performing right, air transmission right, display right, distribution right, rental right, derivative work right

Legal characteristics of copyright

Generation of copyright: Copyright is generated with the creation of a work. It differs from industrial property right in that copyright works without registration, whereas industrial property right does not work without registration.

Legal characteristics of copyright: Copyright is an exclusive right.

Therefore, a person using a creative work must obtain permission from a copyright holder before using it. Economic right can be transferred to another person, whereas moral right cannot be transferred or inherited

Limitation of copyright

Copyright property right is the right to use a work exclusively. Considering that a work is created with direct or indirect support from society, recognizing the monopoly of a work's creator without limit is not beneficial to the public good and also hinders cultural development. Therefore, limitations are imposed on copyrights.

Protection period of copyright

Principle: during the lifetime of copyright holders and 50 years from the death of copyright holders

Work of an unknown author, work for business objectives, video works, program works: 50 years from the date of declaration

Joint works: 50 years from the death of the last copyright holder

Calculation of protection period: calculated from the next year from the year of the author's death and the declaration of works.

* The copyright law was revised on June 30, 2011 after the signing of the Korea-EU FTA. The protection of intellectual property rights was extended from 50 to 70 years. However, the revision will take effect on June 1, 2013. (Grace period of two years)

* The moral rights of an author expire at the death of the author, but are protected under article 14-2.

Registration of copyright

Copyright can be legally protected without registration, but the registration generates legal benefits.

Estimation: Estimate by registered author, copyright holders, the date of creation, and declaration. When the right of registered works is infringed, it is estimated to have been infringed by error.

Resistance: In the case of transfer of the copyright property right, those to whom the right is transferred have the right to resist a third party

Neighbouring right of copyright

Definition

Neighbouring right of copyright is bestowed on persons who contribute to distributing copyright works to the public through financial support or creative means.

Neighbouring right holders

Performers: actors, actresses, singers, conductors, musicians, etc.

Record producers / Broadcasters

Right of neighbouring right holders

Some of the right is limited for the benefit of the public. When broadcasting and performing a creative work, permission must be obtained

not only from the neighbouring right holders but also from the copy-right holders.

Protection period of neighbouring right holders

Performance: 50 years from the performance

Record: 50 years from the release of records

Broadcasting: 50 years from broadcasting

Right of database producers

Copyright law protects the right of database producers. Databases without creativity are also protected under the current copyright law.

Definition of Database

An edited work that arranges and composes subject matter in a systematic manner. (Article 2-19)

Right of database producers

Those who invest considerably in the establishment of a database have the right to reproduce, distribute, and broadcast the work. (Article 93-1)

Protection period

The right of database producers takes effect after the creation of a database. The right exists for 5 years. (Article 95-1) If a database is renewed or reviewed with a large investment, the right of the database producers takes effect and exists for five years. (Article 95-2)

Infringement Remedy

Principle

Copyright holders can apply for remedy against the infringement of their rights.

Civil Charge

Victims can sue a pirate in court and file a claim for damages.

The right to claim damages should be filed within 10 years from the infringement, if not, the right to such expires.

Criminal Charge

Legal action by copyright holders against pirates.

Infringement of copyrights is a crime indictable upon complaint, and the victim should file a lawsuit within six months of becoming aware of the infringement. Therefore, a third party may report of an infringement to the copyright holder, but may not directly sue the infringer.

A fine of less than 50 million won or imprisonment of less than 5 years may be imposed on those who infringe copyright law.

New Intellectual Property Right

The development of science and technology has increased the need to protect new intellectual properties. International discussion on the protection of intellectual properties that cannot be protected under the existing system is ongoing. The new intellectual property right includes traditional knowledge, new plant species, the names of internet domains, and traditional cultural expressions and intangible cultural heritage⁵. The government established the National Intellectual Property Commission in May 2011 to strengthen the support for intellectual property rights.

*Source: KIPO Web site, Modified by ICDK)

⁵ "trademarks for tastes, sounds and smell" is protected under the amended Trademark Act (Article 2(1) of the Trademark Act)

APPENDICES 2. 'SAMSUNG' CASE

First Apple victory in South Korea

Since 2011, Apple and Samsung have battled several lawsuits over copyrights and patents in both American and South Korean courts. In the beginning, the courts in each country deciding the case in favour of its national company were commonly seen. However, in December 2013 Apple got their first victory over Samsung in a Korean court when Samsung lost its claim in a long-running global patent battle against its American rival. Samsung had sued Apple for violating three patents on their messaging technology in smartphones and tablets and the Korean conglomerate had launched the lawsuit in a bid to stop the sale of some of Apple's iPhone and iPad models in South Korea. But the court rejected all of Samsung's claims against Apple, including a request to pay for damages to the company. (Source: Yonhap News Agency, 2013)

Samsung extended its lead over Apple in the global smartphone market in the third quarter, according to the IDC survey. Samsung had 31.4 percent of the market.



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KIPO Web site

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The Presidential Council on Intellectual Property website

KIPRIS website

Kromann Reumert, Danish Law Firm: Jens Blomgren-Hansen Asia responsible contact person; Partner Michael Pitzner-Bruun and partner Jørn Vestergaard-Jensen, IP responsible contact persons.

Yoon & Yang, Korean Law Firm: partner Kwon Hoe Kim

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