

Korea's IP guidelines may be lost in translation

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L-R: Sai Ree Yun, Cholsoo Han, Harry First, Koren Wong-Ervin, Huang Yong (Credit: GCR Live)

Criticism of intellectual property guidelines issued by Korea's Fair Trade Commission may partly stem from an erroneous translation into English, a former senior official said today. *Pallavi Guniganti at GCR Live in Seoul*

Cholsoo Han, secretary general of the KFTC from 2011 to 2014, said the guidelines published in December 2015 do not necessarily assume that a patent holder has market power, and instead call for market power to be



Cholsoo Han (Credit: GCR Live)

assessed based on various factors, including the economic influence of the technology at issue.

Concerns to the contrary stem from poor translation of the guidelines into English, Han said: “In fact, the term unfairness should be replaced with anti-competitiveness.”

Among the critics is Koren Wong-Ervin, who spoke alongside Han on a panel at GCR Live IP & Antitrust Asia-Pacific today. As director of the Global Antitrust Institute, she co-authored a comment on the KFTC’s amendment to its guidelines on the unfair exercise of intellectual property rights.

Today, Wong-Ervin reiterated the comment’s criticism that the guidelines seem to create presumptions that certain conduct – such as “unfairly” refusing to license a standard-essential patent, or licensing such patents on “discriminatory terms” – is anticompetitive, which she contrasted with the effects test articulated in the 1995 US guidelines on IP and antitrust.

Han acknowledged problems with the guidelines that go beyond translation, such as terms that are used too broadly. But he insisted that the guidelines do not treat discriminatory licensing as *per se* illegal.

The KFTC is “very aware” that such discrimination can serve legitimate, precompetitive ends under some circumstances, Han said, and therefore

determines the illegality of conduct by analysing the effects.

The panel's moderator, Sai Ree Yun at Yulchon, kicked off this line of discussion by noting that the author of the guidelines has said that the English translation of is not accurate.

In the context of the IP guidelines, unfair means anticompetitive and the KFTC seeks to protect the competitive process, not a competitor, Yun said. However, he said in the context of contracting practices, the law uses the same word to mean something broader than anticompetitive.

“Korean antitrust law uses same terminology ‘unfair’ in different contexts to mean different things,” Yun said. “To foreigners who are not native speakers, it means the same thing. It may worry foreigners – why should the regulation covering abuse of dominance use the terminology of the concept of unfairness, which should be limited to regulating unfair trade practices?”

Yun said the guidelines singling out certain practices as potentially illegal, rather than simply leaving it to the general application of an effects-based approach, raises a red flag.

Han recently joined Yoon & Yang as a senior advisor. Harry First, co-director of the competition and innovation programme at New York University's law school, and Huang Yong, a law professor at the University of International Business and Economics in Beijing, also participated in the panel.

The second annual GCR Live IP & Antitrust Asia-Pacific conference ended today.

