

# *Administrative Remedies for Unfair Competition in South Korea*

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# Protection Against Unfair Competition – Changes & Issues

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- In South Korea, comprehensive protection against **unfair competition** and **trade secret infringement** is provided by a statutory law, *i.e.*, the Unfair Competition Prevention and Trade Secret Protection Act (**UCPA**).
- In order to respond to the diversifying aspects of unfair competition, the UCPA has been **revised** to:
  - *add* – types of acts of unfair competition, such as damaging another party’s trade dress, imitation of product shape, idea theft, *etc.*
  - *award* – punitive damages (treble damages) for an act of idea theft, which is a type of unfair competition (as of April 2021) and trade secret infringement (as of July 2019)
  - *expand*
    - the subjects of administrative investigation, as an administrative remedy, to include imitation of product shape, and idea theft
    - KIPO’s authority to publicly announce the administrative investigation results.
- We have addressed **administrative remedies** in this slide, which have been strengthened under the revised UCPA, but are still relatively unknown.

# Remedies for Unfair Competition in Korea

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- Under the UCPA, **civil**, **criminal**, and **administrative remedies** are available in Korea, which may grant
  - injunctive relief – interim injunction or permanent injunction
  - damages – lost profit, reasonable royalty, up to treble damages for willful infringement
  - criminal penalties – imprisonment and/or fines
    - up to **3 years** / up to KRW 30 million (approximately **USD 26,000**)
  - administrative relief – administrative investigation and recommendation of corrective action
- **Civil / criminal remedies** can provide an ultimate solution; however, substantial costs and time may be required for these remedies. **Administrative remedies** may provide easy access and prompt resolution without official fees, but they do not have compulsory force.
- By understanding the administrative remedies, business entities may utilize them more often, or better respond thereto.

# Administrative Remedies for Unfair Competition

Administrative remedies mainly consist of **investigation** and **recommendation of corrective action**.

- The following table summarizes the administrative remedies in Korea.

	Criteria	Summary
1	Investigative authority	The Commissioner of KIPO and relevant administrative authorities (city mayor, governor of specific administrative province, <i>etc.</i> )
2-i	Report for administrative investigation	<b>Report reception</b> – Unfair Competition Reporting Center operated by KIPO (Korean Intellectual Property Office) and KOIPA (Committee at the Korea Intellectual Property Protection Agency)
2-ii		<b>Reporting entity (petitioners)</b> – Any body without restriction
2-iii		<b>Subject to be reported</b> – Specific acts of unfair competition as defined under the UCPA
3	Investigation process	Investigation may commence <b><i>ex officio</i></b> or by <b>report</b> (no official fee)
		Preliminary investigation, Full investigation (expert advice), Decision
		Approximately <b>4 months</b> from report to decision
4	Decision	<b>Recommendation of corrective action</b>

# Subject to be Reported for Investigation – Previously

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- When KIPO receives a report for investigation, it will consult the reporter (petitioner) and determine whether the reported matter is a **subject to be reported** under the UCPA.
- Previously, among the acts of unfair competition exemplified under the UCPA\*, only a part of specific acts of unfair competition listed in the UCPA could be reported to KIPO.
  - Acts of **causing confusion** about the origin of a product or source of business
  - Acts of **misleading** or **false allegation** about the place of origin, manufacturing process, characteristics, quality, amount, *etc.* of goods
  - Acts of **damaging the distinctiveness or reputation** of another party's mark (dilution of famous mark)
  - Acts of using national flags, national emblems, certification symbols of the government of any countries or treaties, including the Paris Convention, *etc.*, as a trademark, *etc.*

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\* The UCPA exemplifies several **acts of unfair competition**, which are similar to the *prohibited acts of unfair competition* as stipulated in Article 10 *bis* of the Paris Convention. (Articles 2(1)(a) to 2(1)(k), 3, and 3 *bis* of UCPA).

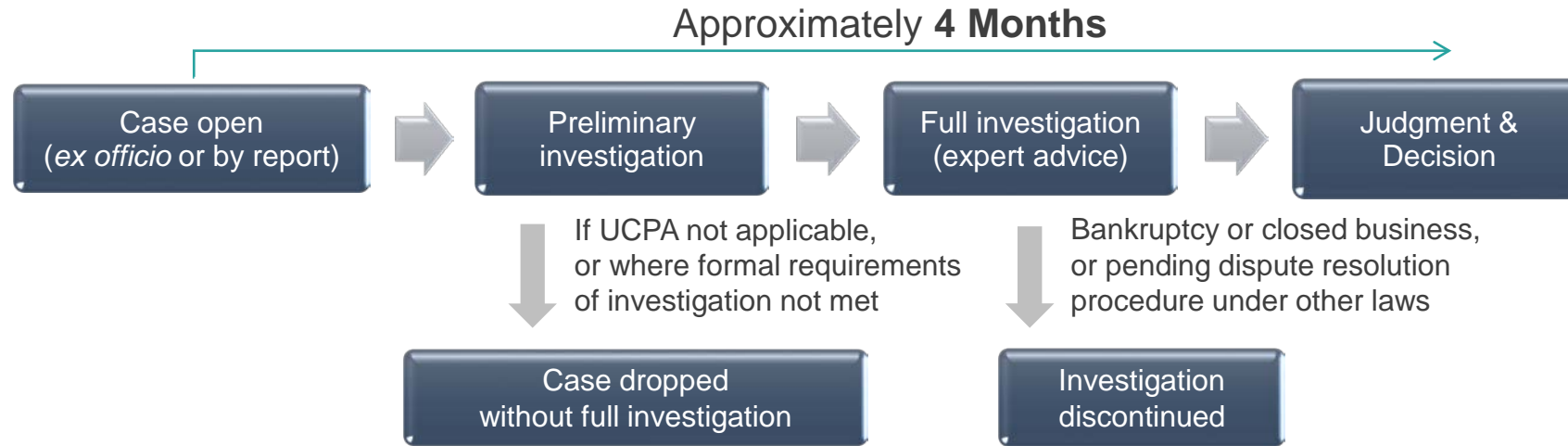
# Subject to be Reported for Investigation – Currently

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Under the revised UCPA, the following acts have been **added** to the list of subjects to be reported:

- Acts of **copying or imitation of a product shape** (Article 2(1)(i) of the UCPA):
  - within *three years* from the date that the development of the product shape was completed
  - currently actively used against copying of food packaging and cosmetic packaging, stationeries, and personal miscellaneous items, such as handbags, eyeglasses, *etc.*
- Acts of **unfairly using information or idea theft** (Article 2(1)(j) of the UCPA):
  - using another person's technical or business ideas or providing the same to others for use without consent
  - acquired in the course of negotiation or transaction, such as business proposals, bidding, public competition, *etc.*
  - currently actively used in the field of IT-related technologies, or construction industries with many subcontracting relationships
- Currently, with the above additions to the list, more business entities may use administrative remedies as an option for unfair competition.

# Procedures of Administrative Investigation (1)



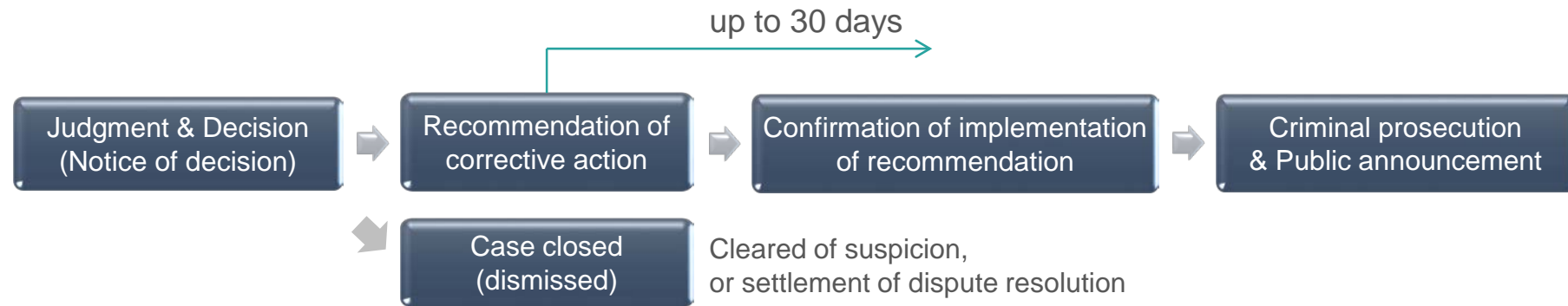
- Administrative investigation, which is the first stage of administrative remedies, commences either ***ex officio*** or **by report**.
- During the investigation, KIPO may have relevant public officials **inspect** or **collect** the suspected entity's documents, account books, product samples, *etc.*
- KIPO may have the suspected entity **submit information** or **attend** the investigation.

# Procedures of Administrative Investigation (2)

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- If the business entity under investigation for unfair competition **refuses or obstructs** the investigation:
  - a **fine** of up to KRW 20 million (approximately USD 18,000) may be imposed.
- **Suspension or closing** of the investigation of unfair competition:
  - When a **mediation of dispute** over the identical matter under the Invention Promotion Act is proceeding or has been established, the investigation of unfair competition may be suspended or closed.
- KIPO's decision upon the investigation of unfair competition will be rendered approximately **4 months** from the date of receipt of the report.
  - shorter than those of civil or criminal actions – over **1 year** on average to decision for the first instance.
- There is **no official fee / no consulting fee** for the entire processes of KIPO's investigation.

# Recommendation of Corrective Action (1)



- If the investigation reveals violations of the UCPA, KIPO issues a **Recommendation of Corrective Action**.
  - KIPO may set a period of up to **30 days** for the business entity having committed an act of unfair competition to make a corrective action including:
    - **stopping** manufacturing or using the products produced via the unfair competition act
    - **disposing of** the products produced via the unfair competition act
    - **compensating** for damages caused by the unfair competition act

# Recommendation of Corrective Action (2)

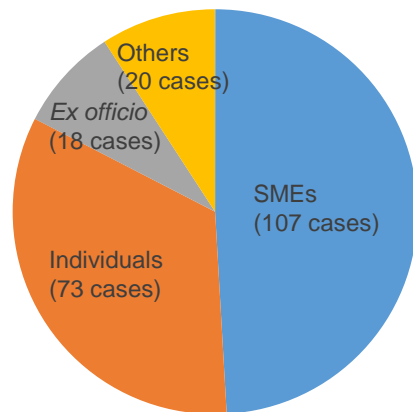
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- **Public announcement**
  - If the business entity having committed an act of unfair competition does not comply with the recommendation of corrective action, KIPO may publicly announce:
    - the details of the act of unfair competition committed by the business entity
    - the fact that KIPO has issued a recommendation of corrective action to the business entity
  
- **In cases of failure to comply** with the recommendation of corrective action:
  - KIPO will transfer the case to the Prosecutors' Office under the Criminal Act.
    - The information and documents that were collected in the course of investigation *can be utilized* in criminal prosecution and civil litigation.
  
- KIPO may **hear opinions** of relevant parties, interested persons, or witnesses, *etc.*
  - Prior to 1) issuance of a recommendation of corrective action, 2) public announcement, or 3) transfer of the case to the Prosecutors' Office by *ex officio* or by request.
  - The relevant parties, *etc.*, may submit evidence and documents at that time.

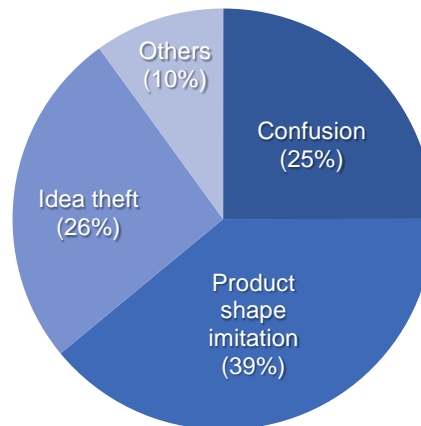
# Statistics Show Continued Increase

- Statistics show that the number of cases of administrative investigation on unfair competition, particularly challenged by small & medium business entities (SMEs) and individuals, has continued to increase.
- By type of unfair competition, reports were submitted most in the order of **product shape imitation** (39%), **idea theft** (26%), and **confusion** as to origin of products or business (25%).

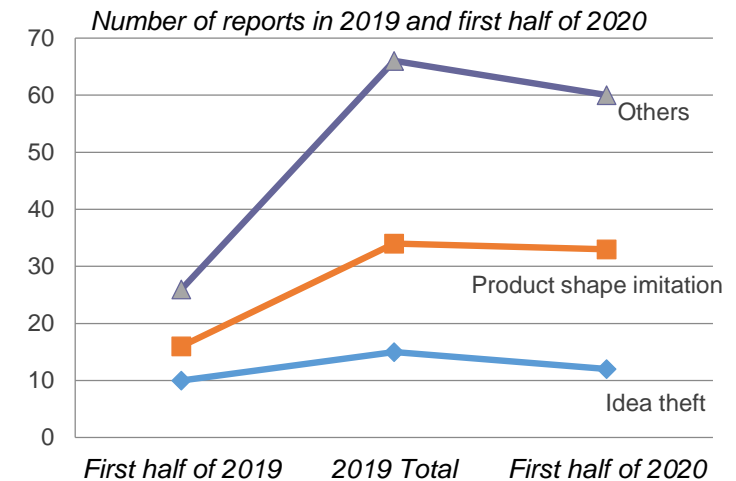
- Statistics of Administrative Investigation Cases**



Number of reports by type of reporting entity



Ratio of reports by type of unfair competition act



# Advantages of Administrative Remedies

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- **Easier** – Ease of accessibility and usefulness for the petitioners
  - KIPO supports or provides consulting for the petitioners to report unfair competition *without* consulting fees.
  - KIPO will conduct administrative investigation *without* official fees.
  - The **information** and **documents** that were collected in the course of administrative investigation of unfair competition *can be utilized* in criminal prosecution and civil litigation.
- **Effective** – High rate of resolution; about **70%** of business entities under investigation
  - admitted that they had committed unfair competition acts,
  - voluntarily corrected such unfair competition acts, or
  - accepted KIPO's recommendation of corrective action.
- **Faster** – Prompt remedy is available
  - It usually takes about **4 months** to receive a final judgment.  
*cf.* civil / criminal actions against unfair competition will take over 1 year on average

# Possible Pitfalls of Administrative Remedies

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- **No compulsory force**

- Currently, a “**corrective order**” having legitimate compulsory force has **not** yet been adopted.
- If the business entity having received a “**recommendation of corrective action**” does not voluntarily comply, the recommendation does not have legitimate compulsory force.
  - In such case, additional actions, *i.e.*, civil and/or criminal action, will be required.

- ***Ex officio* investigation only (not adversarial system)**

- The investigation is conducted by the administrative authority without the participation of the reporters (petitioners).
  - The points of investigation may not be in consistent with those of the petitioners’ interest.
  - The administrative authorities may issue **different decisions** than civil or criminal courts.

# Our Comments for Petitioners

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- In the intellectual property litigation, oftentimes it is not easy to collect evidences for legal action. Administrative action may be used **as a means to collect evidences** through the power of administrative authorities (KIPO) to use them for potential civil / criminal lawsuits.
  - In **civil** lawsuits, the courts may order KIPO to submit all evidences that were collected in the administrative investigation. The petitioner may request the courts to issue such order.
  - In **criminal** actions, KIPO will submit all evidences when they transfer the case to the Prosecutors' Office.
- Administrative action may be available **without prior IP rights** and even in cases where the copied product shape was disclosed.
- When the business entities (developers, start-ups, or sub-contracting parties, *etc.*) are providing an idea to a counterparty, we recommend the following:
  - Collect and keep all records during the transaction negotiation.
  - When providing information, make it clear that it is the property of the provider.
  - Sign a non-disclosure agreement.

# Our Comments for Potential Respondents

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- For respondents, we recommend the following:
  - Identify the petitioners' main purpose in the administrative action - whether the purpose is *collecting evidences* or obtaining *recommendation of corrective action*.
  - **Actively respond** to the investigation proceedings and **submit a defense opinion**.
    - the respondent may proactively request KIPO to hear their defense opinion.
    - the respondent may submit defense evidences in the course of investigation, prior to KIPO's decision.
  - Obtain a **copy of the investigation records** for perusal.
- The concept of a '**protectable idea**' under the UCPA has not yet been clearly defined in Korea, and as such, nor have the remedies against its misappropriation. Thus, we recommend potential respondents take sufficient precautionary steps including the following:
  - **Documenting** all data as specifically as possible.
  - **Listing and notifying of** existing technology or ideas similar to the idea to be acquired.
  - **Securing IP rights** which one already has that are related to the idea that will be acquired.

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We would be happy to answer your questions.