How to Protect Foods and Foodways as Intangible Properties Effectively in the Republic of Korea

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-Visiting Scholar, Washington University School of Law (MO, USA)

<Research Area>
Intellectual Property Law, Cultural Property Law, Private International Law, Civil Procedure, Arbitration
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Introduction

- In 1983, a multi-national company applied for patents for a recipe making food similar to Kimchi in 15 countries including South Korea.
- Kimchi is ‘a traditional fermented Korean side dish made of vegetables (mainly cabbage or radish) with a variety of seasonings.
- Kimchi’s history in Korea dates back to the 7th century when pickling had been first used.
- Nestle’s patents drew attention from the Korean government.
Kimjang, Making and Sharing Kimchi in the Republic of Korea (2013):

The only foodway-related one of the 18 Korean Intangible Cultural Heritages of Humanity inscribed on the UNESCO list as of June 5th, 2016
Introduction

- IP law systems may sometimes conflict with the protection afforded based on the Korean Cultural Heritage Office and the UNESCO.
- This presentation will explore how to strike a balance between IP law and cultural law protection regimes in passive and active ways.
## Introduction

- **Active Ways of Protection of Foods and Foodways under both IP and non-IP laws**

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## Introduction

- **Passive Ways of Protection of Foods and Foodways under IP laws**

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<tr>
<th>Patents</th>
<th>Patentability of Foods and Foodways</th>
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<tr>
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<thead>
<tr>
<th>International Trademark Classification of Food</th>
<th>Nice Classification</th>
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</thead>
</table>
Active Ways of Protection of Foods and Foodways

1. Active Ways of Protection of Foods and Foodways under IP regime
   a. Patents
   - Export of the Korean agricultural food has amounted to 5.6 billion dollars as of 2016.
   - As the Korean cuisine ("hansik" in Korean) becomes popular globally, patent applications based on the Korean foods and recipes have been increasing.
### Active Ways of Protection of Foods and Foodways

- E.g.) About 50 Kimchi-related patent applications have been filed annually for recent 10 years.

<table>
<thead>
<tr>
<th>Technology increasing flavor and taste of Kimchi</th>
<th>39% out of total number of a decade-long Kimchi-related patent application (1&lt;sup&gt;st&lt;/sup&gt;)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Korean foods and recipes which strengthen functionality by adding specific substances or ingredients for the purpose of prevention or cure of diseases</td>
<td>30% (2&lt;sup&gt;nd&lt;/sup&gt;)</td>
</tr>
</tbody>
</table>
## Active Ways of Protection of Foods and Foodways

<table>
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<tr>
<th>Substantive Requirements for a Patent Registration</th>
<th>1. Invention</th>
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<tr>
<td></td>
<td>2. Industrial Applicability</td>
</tr>
<tr>
<td></td>
<td>3. Novelty</td>
</tr>
<tr>
<td></td>
<td>4. Non-obviousness</td>
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</tbody>
</table>
Active Ways of Protection of Foods and Foodways

- Article 2(1) of the Korean Patent Act defines "inventions" as "highly advanced creation of technical ideas utilizing the laws of nature."

- For a patent registration, an invention must satisfy the basic criteria of industrial applicability, novelty, and non-obviousness. Improvement of traditional foods and recipes can be protected under patent system if it meets requirements for patentability.
Active Ways of Protection of Foods and Foodways

- Since September 1990, the inventions of foods and table luxuries have become subject matters of patent.

- (the Korean Patent Act (Act No. 4207, revised on January 13th, 1990 and effective since September 1st, 1990)
Active Ways of Protection of Foods and Foodways

* Korean Cane Ice Cream case

In a trial to invalidate the patent registration of the "Method of manufacturing stick typed soft ice cream" (the Korean Patent No. 1269215)

The Ruling rendered by the Korean IP Trial and Appeal Board on September 30th, 2014 (Case No. 2013 Dang 1869)

In a trial to invalidate the patent registration of the method of producing cane ice cream before the Korean IP Trial and Appeal Board, the Board ruled that its patent was invalid because the cane ice cream was revealed via the Internet prior to the patent application of the method of producing cane ice cream.

The patent of the cane-shaped pop corns filled with ice cream was invalidated due to lack of novelty.
Active Ways of Protection of Foods and Foodways

Active Ways of Protection of Foods and Foodways

Source: http://kpat.kipris.or.kr/kpat/biblioa.do?method=biblioFrame from the KIPO home page (last visit on May 1st, 2016)
Active Ways of Protection of Foods and Foodways

- Video on Korean Cane Ice Cream
  [https://www.youtube.com/watch?v=OSIfb-8-oIE](https://www.youtube.com/watch?v=OSIfb-8-oIE)
b. Unfair Competition Law

A. Unfair Competition

The Korean Cane Ice Cream can be protected pursuant to the Unfair Competition Prevention and Trade Secret Protection Act in Korea. In December 4th, 2014, Seoul Central District Court temporarily enjoined the defendant from selling his goods because the defendant copied the shape of goods of the plaintiff's.
B. Trade Secrets

- Traditional foods and recipes owned by a specific family can be protected as a trade secret.

<table>
<thead>
<tr>
<th>Prior to the revision of the Unfair Competition Prevention and Trade Secret Protection Act (hereinafter &quot;Unfair Competition Prevention Act&quot;) in 2015</th>
<th>information, including a production method, sale method, or useful, and technical or business, information for business activity, that is not known publicly, is the subject of considerable effort to maintain its secrecy, and has independent economic value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfair Competition Prevention Act of 2015</td>
<td>information, including a production method, sale method, or useful, and technical or business, information for business activity, that is not known publicly, is the subject of reasonable effort to maintain its secrecy, and has independent economic value</td>
</tr>
</tbody>
</table>
Active Ways of Protection of Foods and Foodways

- 2015 revision:

The test to maintain secrecy of a trade secret is lowered so as to protect small and medium-sized businesses who do not have internal system and financial resources sufficient to protect their trade secrets.
Active Ways of Protection of Foods and Foodways

- However, traditional foods and foodways are not usually protectable as trade secrets b/c they do not meet the requirement as to whether their holder(s) has(have) made reasonable effort to maintain their secrecy.

- Nonetheless, new menus and recipes transformed from the original foods and recipes can be protectable as trade secrets. In this regard, certificate of the original documents of trade secret can be taken into account (i.e., the person to whom a certificate of the original document was issued is presumed to hold information on the contents of the electronic document as is at the time of registration of the electronic fingerprint).
c. GIs of Foods and Foodways

- GI rights do not aim at encouraging innovation and individual creativity through the grant of a monopoly for a certain period. Instead, they represent commonly used geographical names, set up permanent communal rights, and purport to protect "old knowledge."

- In this context, traditional knowledge and culture related to traditional foods and foodways can be indirectly protected under GI system.
Active Ways of Protection of Foods and Foodways

- GIs in Korea are primarily governed by: (i) the Trademark Act (Act No. 13848, amended on January 27, 2016 and effective since April 28th, 2016); (ii) the Act on Quality Control of Agricultural and Fishery Products (Act No. 13268, amended on March 27th, 2015 based on revision of another law, and effective since March 28th, 2016); and (iii) the Unfair Competition Prevention and Trade Secret Protection Act (Act No. 13844, amended on January 27th, 2016, effective since the same date) (hereinafter "Unfair Competition Prevention Act").
Active Ways of Protection of Foods and Foodways

- Article 2(1) 3-2 of the Korean Trademark Act,
- "geographical indication":
  - "an indication which identifies goods as being produced, manufactured, or processed in a region or locality where a given quality, reputation or any other characteristic of the goods is essentially attributable to their geographical origin."
In Anhung Steamed Bread case, the Korean Patent Court, the court of second instance, ruled that Anhung steamed bread (안흥찐빵 in Korean) for streamed bread constituted a GI collective mark and was valid.

Judgment rendered by the Korean Patent Court on November 23rd, 2011 (Case No. 2011 Heo 6628).
2. Active Ways of Protection of Foods and Foodways under Non-IP Regime

a. Cultural Heritage Protection Act

A. Overview

- Cultural Heritage Protection Act and the Act on Conservation and Use of Biological Diversity can contribute to conserving and using traditional food and foodways on basis of the Korean administrative laws.

- According to Article 2 (1) 2 (c) and (e) of Cultural Property Protection Act, intangible cultural properties cover traditional knowledge including oriental medicine, farming and fishing, and traditional customs inclusive of clothing, food, and housing.

- According to Article 2(1)2 of Cultural Heritage Protection Act, a term “intangible cultural heritage” is defined as “intangible cultural works of outstanding historic, artistic, or academic value, such as drama, music, dance, game, ritual, craft skill, etc.” The Administrator of the Cultural Heritage Administration may designate more valuable intangible cultural heritage as important intangible cultural heritage, following deliberation by the Cultural Heritage Committee.
B. Functions of the Cultural Heritage Committee

One of the functions of the Cultural Heritage Committee established under the Cultural Heritage is to investigate and deliberate matters concerning the recognition of holders, honorary holders, or holding organizations of any important intangible cultural heritage and the revocation of such recognition (Article 8 (1) 4 of Cultural Heritage Protection Act).
Active Ways of Protection of Foods and Foodways

C. Criteria to Designate an Important Intangible Cultural Heritage and to Recognize Its Holder

(a) Legal Sources

(aa) Cultural Heritage Protection Act (CHPA)

Paragraph 2, main sentence and paragraph 4 of Article 24 of Cultural Heritage Protection Act
Article 24 of CHPA (Designation of Important Intangible Cultural Heritage) (1) The Administrator of the Cultural Heritage Administration may designate more valuable intangible cultural heritage as important intangible cultural heritage, following deliberation by the Cultural Heritage Committee. (2) Where the Administrator of the Cultural Heritage Administration designates any intangible cultural heritage as important intangible cultural heritage pursuant to paragraph (1), he/she shall recognize a holder (including a holding organization; hereinafter the same shall apply) of the important intangible culture heritage. However, it is not applicable when the Administrator of the Cultural Heritage Administration designates any important intangible cultural heritages difficult to be recognized as the holder by the nature of important intangible cultural heritage pursuant to Presidential Decree.
(3) The Administrator of the Cultural Heritage Administration may additionally recognize another holder of the relevant important intangible cultural heritage, in addition to the holder recognized pursuant to paragraph (2).

(4) Where a holder of important intangible cultural heritage recognized pursuant to paragraph (2) main sentence or (3) has a difficulty in properly initiating into his/her skills or artistic talents under Article 41-2, the Administrator of the Cultural Heritage Administration may recognize him/her as an honorary holder, following deliberation by the Cultural Heritage Committee. In such cases, where a holder of important intangible cultural heritage is recognized as an honorary holder, the recognition as the holder of such important intangible cultural heritage shall be deemed revoked at that time.

(5) Necessary matters concerning standards, procedures, etc. for the designation of important intangible cultural heritage under paragraph (1), and matters concerning standards, procedures, etc. for the recognition of holders of important intangible cultural heritage and honorary holders under paragraph (2) to (4) shall be prescribed by Presidential Decree.
Active Ways of Protection of Foods and Foodways

(bb) Enforcement Decree of Cultural Heritage Protection Act

- Enforcement Decree of Cultural Heritage Protection Act

Article 12 (Standards and Procedures for Recognizing Holders, etc. of Important Intangible Cultural Heritage)
(1) The standards for recognition as holders, holding organizations and honorary holders of important intangible cultural heritage under Article 24 (2) main sentence and (4) of the Act are as follows: [Omitted]

(5) Detailed standards for recognition of holders, etc. under paragraph (1) shall be determined and publicly announced by the Administrator of the Cultural Heritage Administration, in consideration of the value of initiation, capabilities and environment for initiation, and contribution to initiation activities.
Active Ways of Protection of Foods and Foodways

(cc) Official Notice of Cultural Heritage Office No. 2015-14 (Feb. 2015)

- It set forth the criteria to designate important cultural heritages and to recognize their holders pursuant to Article 12 (5) of Enforcement Decree of Cultural Heritage Protection Act.
Active Ways of Protection of Foods and Foodways

(b) Criteria to Designate an Important Intangible Cultural Heritage

- Transmittable Value (70 pts) + Necessity for Transmission (30 pts) = 100 pts

A. Transmittable Value (total: 70 pts)
   a. Historical Characteristics (20 pts)
   b. Artistic Characteristics (20 pts)
   c. Academic Characteristics (15 pts)
   d. Local Characteristics (15 pts)

B. Necessity for Transmission (total: 30 pts)
   a. Urgency (15 pts)
   b. Sustainability (15 pts)
### A. Transmittable Value

<table>
<thead>
<tr>
<th>Classification</th>
<th>Criteria</th>
<th>Method to evaluate the criteria</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Historical Characteristics</td>
<td>Duration of transmission</td>
<td>Quantitative</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>The extent to which the form of current intangible cultural heritage sustains</td>
<td>Qualitative</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Credibility of its historical grounds such as relics, literatures and oral statements</td>
<td>Qualitative</td>
<td></td>
</tr>
<tr>
<td>Artistic Characteristics</td>
<td>Degree of its uniqueness</td>
<td>Qualitative</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>Degree of the beauty of its form and contents</td>
<td>Qualitative</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Degree of the beauty of its expression</td>
<td>Qualitative</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Degree of functionality</td>
<td>Qualitative</td>
<td></td>
</tr>
<tr>
<td>Academic Characteristics</td>
<td>Its value as a material necessary to understand the Korean culture</td>
<td>Qualitative</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>The probability to be used as a material for academic research</td>
<td>Qualitative</td>
<td></td>
</tr>
<tr>
<td>Local Characteristics</td>
<td>The extent to which it represents a local, traditional culture.</td>
<td>Qualitative</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>The extent to which it represents a Korean traditional culture.</td>
<td>Qualitative</td>
<td></td>
</tr>
</tbody>
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### Active Ways of Protection of Foods and Foodways

#### B. Necessity for Transmission

<table>
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<tr>
<th>Classification</th>
<th>Criteria</th>
<th>Method</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urgency</td>
<td>Frequency and scope of the applicable item</td>
<td>Qualitative</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>Urgency of the protection of the applicable item (degree of factors jeopardize the sustainability of the applicable item)</td>
<td>Qualitative</td>
<td></td>
</tr>
<tr>
<td>Sustainability</td>
<td>Number, age, and scale of the subject of transmission</td>
<td>Qualitative</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>Viability of internal and external activities for transmission carried out by the subject of transmission</td>
<td>Qualitative</td>
<td></td>
</tr>
</tbody>
</table>
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(c) Criteria to Recognize a Holder of Important Intangible Cultural Heritage (e.g., Group Item)

- Ability for Transmission (75 pts) + Environment for Transmission (20 pts) + Contribution to Transmitting Activities (5 pts)

A. Ability for Transmission (75 pts)
   a. Technical Ability for Transmission (40 pts)
   b. Capability for Transmission (15 pts)
   c. Transmitting Activities (20 pts)

B. Environment for Transmission (20 pts)
   a. Infrastructure for Transmission (10 pts)
   b. Willingness to Transmit (10 pts)

C. Contribution to Transmitting Activities (5 pts)
**A. Ability for Transmission (75 pts)**

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<thead>
<tr>
<th>Classification</th>
<th>Criteria</th>
<th>Method</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Technical Ability for Transmission</td>
<td>Technical ability for the applicable item</td>
<td>Qualitative</td>
<td>40</td>
</tr>
<tr>
<td>Capability for Transmission</td>
<td>Degree of understanding of the applicable item</td>
<td>Qualitative</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>Leadership and teaching ability</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transmitting Activities</td>
<td>Experience as a teaching assistant for transmission and experience to finish the required courses for transmission</td>
<td>Quantitative</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>Record of participation in public events for the last 10 years</td>
<td>Quantitative</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Awards in the field of the applicable item</td>
<td>Quantitative</td>
<td></td>
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</table>
## Active Ways of Protection of Foods and Foodways

### B. Environment for Transmission

<table>
<thead>
<tr>
<th>Classification</th>
<th>Criteria</th>
<th>Method</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Infrastructure for Transmission</td>
<td>Reputation of the holder</td>
<td>Qualitative</td>
<td>10 pts</td>
</tr>
<tr>
<td></td>
<td>Health of the holder</td>
<td>Qualitative</td>
<td></td>
</tr>
<tr>
<td>Willingness to Transmit</td>
<td>The holder’s willingness to transmit his/her skill</td>
<td>Qualitative</td>
<td>10 pts</td>
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</tbody>
</table>
## C. Contribution to Transmitting Activities

<table>
<thead>
<tr>
<th>Classification</th>
<th>Criteria</th>
<th>Method</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contribution</td>
<td>The extent to which the holder contributes to the transmitting activities of the organization which hold the skill</td>
<td>Qualitative</td>
<td>5 pts</td>
</tr>
</tbody>
</table>
D. Establishment of UNESCO International Information and Networking Center for Intangible Cultural Heritage in Asia-Pacific Region

Article 17-2 of CHPA (Establishment of UNESCO International Information and Networking Center for Intangible Cultural Heritage in Asia-Pacific Region) (1) An International Information and Networking Center for Intangible Cultural Heritage in the Asia-Pacific Region under the auspices of the United Nations Educational, Scientific and Cultural Organization (hereinafter referred to as "UNESCO") [hereinafter referred to as the "International Information and Networking Center for Intangible Cultural Heritage in the Asia-Pacific Region"] shall be established under the control of the Cultural Heritage Administration to promote the implementation of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and support activities, etc. to safeguard intangible cultural heritage in the Asia-Pacific Region.
(2) The International Information and Networking Center for Intangible Cultural Heritage in the Asia-Pacific Region shall be a legal entity.
(3) The International Information and Networking Center for Intangible Cultural Heritage in the Asia-Pacific Region shall have officers and other necessary staff as provided in its articles of incorporation.

(4) Except as provided in this Act, the provisions of the Civil Act concerning incorporated foundations shall apply *mutatis mutandis* with respect to the International Information and Networking Center for Intangible Cultural Heritage in the Asia-Pacific Region.

(5) Expenses required for the operation of the International Information and Networking Center for Intangible Cultural Heritage in the Asia-Pacific Region may be defrayed out of the National Treasury.

(6) The State or local governments may allow the International Information and Networking Center for Intangible Cultural Heritage in the Asia-Pacific Region to use or benefit from their national or public property without any consideration if necessary to perform its functions.
Active Ways of Protection of Foods and Foodways

E. Registration and Protection of Intangible Cultural Heritage of Humanity

- 1. Inscription Criteria
  (http://english.cha.go.kr/english/world_heritage_new/world_intangible_o1.jsp?mc=EN_04_02)
  (last visit on May 20, 2016)

- 2. Nomination Timetable
  (http://english.cha.go.kr/english/world_heritage_new/world_intangible_o2.jsp?mc=EN_04_02)
  (last visit on May 20, 2016)
Active Ways of Protection of Foods and Foodways

Article 19 of CHPA (Registration and Protection of World Heritage Site, etc.) (1) The Administrator of the Cultural Heritage Administration may file an application with UNESCO for the registration of Korea's important cultural heritage being as a World Heritage Site, Intangible Cultural Heritage of Humanity, or Memory of the World in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage, the Convention for the Safeguarding of the Intangible Cultural Heritage or UNESCO's programs. In such cases, the Administrator of the Cultural Heritage Administration shall determine procedures, etc. for selecting those to be applied for, in consideration of UNESCO's regulations.

(2) The Administrator of the Cultural Heritage Administration shall actively endeavor to preserve not only cultural heritage registered with UNESCO as a World Heritage Site, Intangible Cultural Heritage of Humanity, or Memory of the World (hereafter referred to as "World Heritage Site, etc." in this Article), but also cultural heritage of humanity, and to enhance the prestige of cultural heritage around the world.
(3) The State and a local government shall maintain, manage and support a World Heritage Site, etc. to the level equivalent to the State-designated cultural heritage from the date on which they are registered, and the Administrator of the Cultural Heritage Administration may order any person who engages in any activity that could affect a World Heritage Site, etc. or its historic and cultural environment to take necessary measures for the protection of a World Heritage Site, etc. and its historic and cultural environment, as prescribed by Presidential Decree.
Active Ways of Protection of Foods and Foodways

F. Protection and Development of Important Intangible Cultural Heritage

Article 41 of CHPA (Protection and Development of Important Intangible Cultural Heritage)(1) The State shall protect and develop important intangible cultural heritage for succession to and development of the traditional culture.
(2) The Administrator of the Cultural Heritage Administration shall require holders of important intangible cultural heritage to conduct education for transferal of skills or artistic talent they have (hereinafter referred to as "skills or artistic talent") in order to transfer and preserve important intangible cultural heritage: Provided, That this shall not apply in any extenuating circumstance prescribed by Presidential Decree.
Active Ways of Protection of Foods and Foodways

(3) The State or a local government may reimburse expenses incurred in initiation into skills or artistic talents under paragraph (2) within budgetary limits, and may permit the gratuitous use of State or public property established or acquired for initiation into skills or artistic talents.

(4) The Administrator of the Cultural Heritage Administration may award a scholarship to persons who receive initiation into skills or artistic talents.

(5) The Administrator of the Cultural Heritage Administration may grant special subsidies to honorary holders of important intangible cultural heritage.

(6) Necessary matters concerning initiation into skills or artistic talents, and the payment of scholarships and special subsidies under paragraphs (2), (4), and (5) shall be prescribed by Presidential Decree.
G. Public Announcement and Notice of Designation or Recognition

Article 28 (Public Announcement and Notice of Designation or Recognition)(1) Where the Administrator of the Cultural Heritage Administration designates any property as State-designated cultural heritage (including its protective facilities and protection zones), or recognizes any person as a holder or honorary holder of any important intangible cultural heritage pursuant to Articles 23 through 27, he/she shall publicly announce the purport thereof in the Official Gazette, and shall promptly notify the owner, holder, or honorary holder of the relevant cultural heritage of such designation or recognition.
Active Ways of Protection of Foods and Foodways

(2) In cases under paragraph (1), where no owner of cultural heritage exists, or it is unclearly who the owner of cultural heritage is, notice shall be given to the possessor or custodian of the relevant cultural heritage.
Active Ways of Protection of Foods and Foodways

H. Issuance of Letters of Designation or Recognition

Article 29 of CHPA (Issuance of Letters of Designation or Recognition)(1) Where the Administrator of the Cultural Heritage Administration designates cultural heritage as a national treasure, treasure, or important folklore resource pursuant to Article 23 or 26, he/she shall issue a letter of designation to the owner of the relevant cultural heritage.

(2) Where the Administrator of the Cultural Heritage Administration recognizes any person as a holder or an honorary holder of important intangible cultural heritage pursuant to Article 24 (2) through (4), he/she shall issue to the persona letter of recognition as a holder or honorary holder of important intangible cultural heritage.
I. Time Designation or Recognition Becomes Effective

Article 30 of CHPA (Time Designation or Recognition Becomes Effective)
The designation or recognition under Articles 23 through 27 shall become effective on the date the owner, holder, honorary holder, possessor, or custodian of cultural heritage is notified of the designation or recognition, while it shall become effective to any person, other than persons notified thereof, on the date public notice thereon is given in the Official Gazette.
J. Revocation of Recognition

Article 31 (Revocation of Designation or Recognition)(1) Where cultural heritage designated under Article 23, 25 or 26 loses its value as State-designated cultural heritage, or such designation needs to be revoked based on its valuation, the Administrator of the Cultural Heritage Administration may revoke the designation, following deliberation by the Cultural Heritage Committee.

(2) Where a holder of important intangible cultural heritage falls under any of the following subparagraphs, the Administrator of the Cultural Heritage Administration revoke the recognition as a holder of the important intangible cultural heritage, following deliberation by the Cultural Heritage Committee:
Active Ways of Protection of Foods and Foodways

1. Where he/she is inappropriate for a holder of the important intangible cultural heritage due to his/her physical or mental disability, etc.;
2. Where he/she is sentenced to a fine or heavier punishment in connection with public performance, exhibition, examination, etc. of traditional culture or to imprisonment without labor or heavier punishment for any other reason, and the sentence becomes final and conclusive;
3. Where he/she emigrates to a foreign country or acquires a foreign nationality;
4. Where any other grounds prescribed by Presidential Decree exist.
Active Ways of Protection of Foods and Foodways

(3) Where an individual holder or honorary individual holder of important intangible cultural heritage is deceased, his/her recognition as a holder or an honorary holder of the cultural heritage is revoked, while if all individual holders of important intangible cultural heritage are deceased, the designation of the important intangible cultural heritage may be revoked, following deliberation by the Cultural Heritage Committee.

(4) Where the results of examination under Article 27 (3) reveal that the designation of protective facilities or protection zones is inappropriate, or any other special ground exists, the Administrator of the Cultural Heritage Administration shall either revoke the designation of the protective facilities or protection zones or adjust the scope thereof. Where the designation of State-designated cultural heritage is revoked, the designation of the protective facilities or protection zones therefor shall also be revoked without delay.
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- Korea became the 11th signatory to this Convention on Feb. 9, 2005.
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- **Korean Intangible Cultural Heritages of Humanity inscribed on the UNESCO list**

- **18** (Royal Ancestral Rite and Ritual Music of Jongmyo Shrine | Pansori Epic Chant | Gangneung Danoje Festival | Ganggangsullae Circle Dance | Namsadang Vagabond Clowns' Play | Rites of Vulture Peak | Jeju Rites for Goddess of Wind | Dance of Cheoyong | Gagok, lyric song cycles accompanied by an orchestra | Daemokjang, traditional wooden architecture | Falconry | Jultagi, tightrope walking | Taekkyeon, a traditional Korean martial art | Weaving of Mosi (fine ramie) in the Hansan region | Arirang, lyrical folk song in the Republic of Korea | Kimjang, Making and Sharing Kimchi in the Republic of Korea | Nongak: Community Band Music, Dance, and Rituals in the Republic of Korea | Juldariki: Tugging Rituals and Games)
Active Ways of Protection of Foods and Foodways

- **Kimjang, Making and Sharing Kimchi in the Republic of Korea (2013)**

  “Kimjang, making large quantities of Kimchi to sustain Koreans through the long winter months, has been an essential part of preparing for the long harsh seasons. A variety of socio-cultural entities also practice Kimjang for diverse purposes; sharing with less privileged neighbours, promoting cooperation among members, or educating the time-honoured tradition to the young. All Koreans are thus part of the one large Kimjang community, which transcends regional and socio-economic boundaries within Korean society.”

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Kimjang, Making and Sharing Kimchi in the Republic of Korea (2013)
b. Act on Conservation and Use of Biological Diversity

- Article 2, subparagraph 6 of the Act on Conservation and Use of Biological Diversity defines "traditional knowledge" as "knowledge, technology and practices of individuals and local community who have maintained traditional lifestyle appropriate for conservation of biological diversity and sustainable use of biological resources."

- Article 20 of the Act prescribes that the Korean government is obliged to carry out the following national policies to promote conservation and use of traditional knowledge: (i) finding, research and protection of traditional knowledge of individuals and local community; (ii) gathering of traditional knowledge-related information and establishment of system for managing it; and (iii) establishment of foundation for using traditional knowledge.
c. Voluntary Escrow of Recipes or Information on Food under the Act on the Promotion of Collaborative Cooperation between Large and Small-Medium Enterprises

- The escrow system under the Act on the Promotion of Collaborative Cooperation between Large and Small-Medium Enterprises (hereinafter "Cooperation Promotion Act"), was introduced into the Cooperation Promotion Act in 2010 and the total number of escrow exceeded 10,000 as of March 2014.

- The Large and Small Business Cooperation Foundation, which was established under the supervision of Small and Medium Enterprise Administration, has been in charge of the escrow of technical data.
Technical data consists of information on intellectual property rights such as patents, utility model rights, design rights, copyrights or on useful technical or business information for business activity such as methods for manufacture, production and sale. Even though useful technical or business information for business activity is not the subject of considerable effort to maintain its secrecy, it can be voluntarily escrowed under the Cooperation Promotion Act.
Active Ways of Protection of Foods and Foodways

- Hence, the scope of information pursuant to Article 1 bis (2) of the Cooperation Promotion Act is broader than that of trade secrets, which requires that their holder(s) make *reasonable effort* to maintain its secrecy.

- A bailor enterprise may register its technical data: (i) the title, type, and production date of technical data; (ii) the outline of technical data, (iii) the name and address of the bailor enterprise; (iv) other matters prescribed by Presidential Decree.
Active Ways of Protection of Foods and Foodways

- If any dispute occurs between the parties concerned or the parties interested with regard to technology of a bailor enterprise registered in its real name, such technology shall be presumed to have been developed in accordance with the details of the deposited goods.

- In this context, recipes and information on foods which are believed to have independent economic values can be escrowed, and are legally presumed to be developed by its bailor at the date when they were produced in accordance with the details of the deposited recipes and information on foods as is. The Cooperation Promotion Act is applicable only to businesses, excluding individuals.
Passive Ways of Protections of Food and Foodways under IP Regime

1. Patents of Foods and Foodways
   a. Patentability of Foods and Foodways

   The national Internet portals related to foods and foodways play an important role in protecting individuals, legal entities, and foreign governments from patenting the Korean traditional foods and recipes. In other words, the lack of novelty will prohibit them from patenting the original form of the Korean traditional food and recipes.
b. Nestle’s Kimchi-Related case

- In 1983, Societe d'Assistance Technique pour Produits Nestle S. A. (hereinafter "Nestle") applied for a patent for a process for producing vegetable juice through fermentation, similar to a process used to make Kimchi, in 15 countries including South Korea.

- Its patent application was denied in Korea because the application is similar to Kimchi. However, except for its patent application in Korea, its patent applications for the same process were approved in other 14 countries.
Passive Ways of Protection of Foods and Foodways

- For example, in USA, "Preparation of a flavored solid vegetable and vegetable juice utilizing hydrolysed protein" was filed on October 4, 1983 and patented on December 25, 1984, before United States Patent and Trademark Office (hereinafter "USPTO").
Passive Ways of Protection of Foods and Foodways
Passive Ways of Protection of Foods and Foodways

- The reason why Nestle obtained patents for the process in other 14 nations is that, in 1983, no official references were available to prevent Nestle from patenting the process making vegetable juice through fermentation.

- Hence, it was imperative for the Korean government to establish the Internet homepage(s) which introduce information on the traditional Korean foods and foodways to the public.
Passive Ways of Protection of Foods and Foodways

- In this regard, **Korea Traditional Food portal** is very pivotal for the Korea Food Research Institute (hereinafter "KFRI") to meet international standards in its promotion of the Korean foods and foodways.

- **In 2009**, the website (www.tradifood.net (last visit on March 21st, 2016)) was introduced by the KFRI under a year-long collaboration with the Korea Agency of Digital Opportunity and Promotion and the Korea Institute of Science and Technology.

- Another significant web site (http://www.koreantk.com (last visit on February 27th, 2016)) is **Korean Traditional Knowledge portal**. This web site is operated by the Korean Intellectual Property Office since December 2007. It includes information on traditional as well as local food. The web site for traditional food in the Korean Traditional Knowledge Portal covers information on traditional food, its recipes and foodstuff.
Passive Ways of Protection of Foods and Foodways

2. International Trademark Classification of Food (Nice Classification)

- Since January 1, 2007, the English designation of Kimchi was listed on the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (hereinafter "the Nice Classification").

- Hence, the name "Kimchi" gained the international prestige of the side food and assured the global businesses and international legal community that the traditional Korean food made of pickled cabbages was originated from the Korea, not other countries. In this regard, the Japanese have referred to it as "Kimuchi." The Nice Classification can contribute to proving the origin of the traditional knowledge in some sense.
### Passive Ways of Protection of Foods and Foodways

[Table 1] Nice Classification [International Trademark Classification]

<table>
<thead>
<tr>
<th>Edition/Year</th>
<th>Class</th>
<th>Indication of Goods</th>
<th>Basic No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>9th/2007</td>
<td>29</td>
<td>fermented vegetable foods [kimchi] in English aliments à base de légumes fermentés [kimchi] in French</td>
<td>290162</td>
</tr>
<tr>
<td>10th/2016</td>
<td>29</td>
<td>kimchi [fermented vegetable dish] in English kimchi [plat à base de légumes fermentés] in French</td>
<td>290162</td>
</tr>
</tbody>
</table>
Passive Ways of Protection of Foods and Foodways

- The original and long-standing form of traditional staple foods can be listed on Nice Classification, preventing foreign governments, legal entities, and individuals from obtaining a trademark in foreign jurisdictions.

- In this context, the word "Kimchi," will be a generic term.

- However, from the cultural perspective, it will signify that the internationally well-known Korean food originally came from Korea.
Conclusion

- The original forms of traditional knowledge on foods and foodways can be protected by GI-related IP laws and non-IP laws from the cultural perspective in active ways and by patent law, and/or Nice Classification in some cases, in passive ways.

- The improved forms of traditional knowledge on foods and foodways can be protected by IP laws and non-IP laws from the perspective of both IP and cultural laws in active ways.
Conclusion

- How to protect traditional knowledge as IP is not clear.

- Traditional foods and foodways which do not fall within the definition of traditional knowledge can be protected by classic IP laws and/or intangible cultural property.

- Intangible property on traditional foods and foodways: intellectual property vs. intangible cultural property vs. intangible cultural heritage? (Who owns or holds the right on it? or Who can benefit from it? State, legal or natural person, or humanity as a whole)
Thank You

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