

A Study on the Fair Trade of Content Rights: Protecting Small & Medium Sized Content Creators and Publishers in the Nested Publishing Industry

by Gyoung-Gyu Choi* and Young-Dae Lee**

Online and wireless communications have dramatically changed the contents industry marketplace. Content transactions are now instantaneous as distribution channels move from the 'mart' to smart platforms, creating opportunities for content creators large and small. Yet with opportunity comes the threat of imbalance in the industry ecosystem. In order to ensure the health and diversity of an industry that relies so heavily on the welfare of small creative enterprises, it is essential to establish rules for the fair transaction of content rights. Several structural forces may work against such rules: first, the industry consists of a large number of small distributor intermediary businesses (e.g. major publishers); second, end distributors (e. g. platforms) maintain a superior, monopsony position; and third, economic valuation of content is difficult.

In terms of acquisition business model, rights transactions can be classified into three general models: (1) license model, (2) original acquisition model, and (3) monopsony model. This study explores the publishing industry in detail, considering key statutes and their operation across the models. From analysis of Korea and the US statutes and case law, and decisions of the Fair Trade Commission (FTC) of Korea, we offer evaluation criteria for discerning between fair and unfair content rights transactions. We further recommend industry practice that may enhance the likelihood for fair content rights transactions, and thus a thriving publishing ecosystem.

Keywords : Content Rights, Fair Trade, Publishing, Regulation Convergence, Valuation

* Corresponding Author, Professor, Dongguk Business School, Dongguk University-Seoul (e-mail: gchoi@dongguk.edu)

** Attorney, Suho Legal Group (e-mail: pydl@unitel.co.kr)

I. Introduction

The development of information & communications technology (ICT) has dramatically transformed the contents industry, yet the legal framework for content rights transactions has not kept pace. Conflicts among interested parties in the industry persist throughout the entire process of contracting rights, from pre-contracting to closing and implementation. This study identifies the key areas of content rights concern for small-medium businesses in the modern publishing industry by examining key statutes and their enforcement in recent case law. We further suggest changes to industry practice as well as improved administrative and legal guidelines in order that contents industry participants such as small businesses may receive a “fair share of the spoils” in a highly competitive and dynamic marketplace.

The content industry can be classified according to the manner and nature of rights that intermediaries acquire from content creators. We identify three main models: (1) the License model, (2) the Original Acquisition model; and (3) the Monopsony model. Yet because legal statutes tend to be far-reaching when established, key legislation has application across these models in the publishing industry. Clarifying the aspects of legislation pertinent to each model may help content originators and publishers understand their legal standing in a variety of business situations. And by describing the legal statutes, intent, case precedents, and fair trade tribunal judgments from Korea and the US, this study further offers evaluation criteria for discerning fair and unfair trade practices within the publishing industry. These criteria should aid small businesses in making effective judgments about content rights agreements in every stage of the rights transfer process. Furthermore, we define administrative and legal guidelines that might provide greater market stability to the conflict-ridden business of rights transfer.

Chapter 2 explains the unfair trade structure within the contents industry in general,

while Chapter 3 includes analysis of relevant case law and precedents in the publishing industry from which the authors derive a “fair/unfair” trade practice evaluation criteria. Chapter 4 identifies standards for protecting contents’ property value and for regulating unfair trade practices, packaging them as a set of guidelines for use industry-wide. We conclude with a discussion of implications for small-medium business owners as the publishing industry continues to evolve.

II. The Characteristics of the Contents Industry

2.1 Content Rights and Trade Structure

The objective economic potential of contents is transformed into a subjective aspect of content rights via market instruments (Lutzker, 2003). That is, the contents creator retains the economic value of contents via “property possession” and by “obtaining rights” thereof; the creator also retains the aspect of rights. This is termed the “content right.” Content rights include not only the traditional intellectual property rights of copyright, patent, and trademark, but also the rights to databases, trade secrets, know-how and other rights protected by legal policy. The newly created rights of information contract and information right derived from information technology (IT), are also conceptually closely related to content rights. Compared to personal property and real estate property rights that are strictly protected via the traditional *numerus clausus principle* the broad range of content rights are based on fluid legal grounds and regulatory tools, and accordingly, the scope of protection is limited.

The interested parties holding content rights can be categorized as the content creator (rights holder), content producer, and distributor. This picture is somewhat complicated by the activities and intermediation of editors and publishers negotiating with creator’s agents in the publishing industry.

But by and large, the conflicts among these parties include unfair trade in the contracting process, unilateral changes in contracts, and other issues in the distribution, performance, and profit sharing stages (FTC, 2010). As the authors have analyzed cases of unfair trade in the broader contents industry, we concur with previous findings that no matter the form of content, the core of unfair trade results from payments and/or price fixing (Lee, 2013).¹⁾ Therefore, determining the appropriate value of contents becomes a key criteria for evaluating whether a contract is fair or unfair.

The content industry can be classified according to the manner and nature of rights distributors acquire from content creators. We identify three main models: (1) License model, (2) Original acquisition model; and (3) Monopsony model.

(1) The license model is where a content creator retains the original content's copyright and thereafter permits the use of the content to a licensee or delegate via contract. Examples of licensors include writers, animators, comic book artists, webtoon creators, game developers, etc. Licensees are typically publishing houses, online platforms, merchandise companies, film and TV studios, broadcasters, and video game makers, to name a few. These fields offer strong protection of content creators' rights and fair trade through intellectual property rights laws and licensing or technology protection contracts (Na, 2007). Many content creators avail themselves of the services of agents to negotiate such contracts, to avoid allowing loopholes, expansive permission, or undervaluation to creep in to agreements. Often creators leverage agents to license original material to multiple licensees for different markets and/or purposes. It should be noted that while agents are a fixture in the US and European publishing industries, they are rare in Korean publishing.

1) Problems of unfair contracts unrelated to price can be fixed by a compensating payment for the problem.

(2) The original acquisition model involves a subcontractor structure where the content right is acquired and retained by the content producer from the creator in the course of contracting the contents. The producer typically creates a market opportunity for the creative product and shepherds its development to meet the market demand. Examples of this model include script development for screen, contracted animation production, contracted software development, online education development, and advertising.

(3) The monopsony model is where the content distributor takes on the status of a market-dominant business, and exercises the rights of the content creator or producer on behalf of the content creator or producer. The distributor in the monopsony model exhibits traits of an intermediary service provider (Kazuhiro, 2013). Examples of such monopsonistic distributors include online bookstores, music portals, news aggregators, platform-based "shops," concert venues, and exhibition halls (Kim, 2009).

In terms of content valuation, generally the contents industry relies on three methods: market-based, cost-based, and profit-based.²⁾ The market-based pricing method derives the proper price of content by comparing it to the price of similar market goods. The cost-based method relies on determining a minimum required cost for content production, plus some fixed amount to arrive at the price. The profit-based method assumes the profit that will be earned from the content in the market, then allocates a proportion of profit to each contributor to the content creation and its distribution, arriving at the content price accordingly (Fuyuro, 2005). Each of these methods poses potential hazards for the small and medium sized content

2) In the US, the OMB (Office of Management and Budget) determines the value of intellectual property, such as resources owned by the federal government and public information, via methods including "absolute value evaluation" and "relative value evaluation."

Table 1
Content Rights Models in Contents Industry

Model	License	Original Acquisition	Monopsony
Subject Industry	Publishing , Cartoons, Characters, Scenarios, Video game development	Software, Animation, Electronic education, Broadcasting, Advertisement	Music, Portals, Exhibition theaters, Communication, Concert venues, Exhibition halls
Contract types	Licensing contracts, Technology protection contracts	Outsourcing contracts, Subcontractor contracts	Contracts by agent, Fiduciary obligations
Interested Parties	Original creator (Copyright holder), Distributor	Contents producer, Commissioning contractor	Content producer, Distribution channels, Consumer
Legal Content Right(s)	Copyright, Trademark	Copyright	Copyright
Applicable Statutes and Protections	Intellectual Property Laws: Fair Trade Law, Licensing Contracts, Technology Protection Contracts	Subcontractor Protection Laws: Fair Trade Law, Contracts Law, Subcontractor Law, Franchise Law	Fair Trade Laws: Fair Trade Law, Large-Scale Distributor FTL, Contract Regulation Law (consumer)
Fair Trade Evaluation Criteria	Market-based	Cost-based	Profit-based
Common Unfair Trade Characteristics	Price discrimination	Predatory pricing	Price overcharge

Source: The authors.

creator or intermediary business, including undervaluation, inappropriate valuation, and contribution minimization.

Table 1 summarizes the three models of contents rights in the contents industry.

2.2 Rights Transfer of Published Works in Korea

In Korea, the rights of content creators are protected under “Monopoly Regulation and Fair Trade Laws” (hereinafter, Fair Trade Law), and unfair trade practices are regulated under the legal policies of intellectual property laws. Korean publishing is dominated by large-scale distributors such as large bookstores and online portals (KISA, 2009), and trade with these companies is subject to “Laws on Fair Trade in Large-Scale Distribution Industries” (hereinafter, Large-Scale Distribution Fair Trade Law).

The publishing industry functions primarily under the license model of rights transfer, with creators licensing to small publishers directly or via agents, and those small publishers then negotiating agreements with the bookstores and portals to achieve sales. The industry relies heavily on market-based pricing,

which from the perspective of small-medium businesses gives some assurance of fair valuation. The risk is in cases where similar products do not exist, or when market-based pricing cannot capture the potential value of high-demand or high-quality content. Most cases of unfair trade involving market-based pricing are related to price discrimination, where the stronger market players (such as portals or big bookstores) exploit the smaller players (such as small and medium sized publishers or micro sized content creators/individuals) by enforcing unfairly lower prices on the smaller player than charged by comparable products in the market, (2013).

2.3 Unfair Trade Practices in the Publishing Industry

The unfair practices applicable to contents creation in publishing industry fall into two general categories: unjust enrichment by the bigger party via unreasonably reducing the portion of responsibility of the bigger party, and unjustly incurring losses of the smaller party due to the smaller party’s bearing an unreasonably large portion of

responsibility.³⁾

The two major categories can be further subdivided. “Unjust enrichment” can include (1) unjust price/cost fixing, (2) controlling the payment and timing of costs, (3) unfair returning of items, (4) unfair trade practices in possession of copyright, and (5) unfair trade practices in contracting and performance. Unjust enrichment can be exercised by the bigger party on the smaller party, whether that bigger party is a distributor such as a portal or large bookstore unfairly trading with a small publisher, or even a small publisher unfairly dealing with a content creator. “Unjust losses” may include (6) unjustly requesting additional costs, (7) unfair trade practices under the pretense of early settlement, (8) unfair trade practices in the quality of the content, (9) unfair trade practices in the treatment of businesses, and (10) unfair trade practices related to obstruction and abuse. Unjust losses are incurred upon the small party and imposed by the bigger party, again whether that bigger party is the small publisher dealing with a content creator, or a distributor dealing with a publisher.

III. Publishing Industry and Contents Rights

3.1 Trends in the Publishing Industry

The rise of digital communications has caused a major shift in the common modes

3) While this study divides unfair trade practices into loss types and unjust enrichment types, unfair trade practices can also be divided according to the stages of contracting: (1) pre-contracting stage where planning and design costs are not known, (2) contracting stage that includes unilateral demands in contract terms, (3) content production stage that includes unilateral demands of changes to the content, (4) distribution stage that includes shifting the burden of promoting the content and refusing to provide offline distribution networks, (5) closing stage that includes refusal to provide sales records and unfair profit sharing, and (6) all other stages of contracting.

of publishing, which are now moving toward small quantity batch production targeted at a greater number of niche audiences. With new online means to connect with audiences at a lower entry cost, and more affordable access to rich source material, more people can exercise their imaginative powers (Lee, 2007; Lim, 1998). In this process there are less traditional but significant activities performed by editors and publishers that can add value to content creators. For example, interpreting and tracking feedback via social media, translating trends into promotional opportunities, increasing audience interest in follow-on publications; all expand the role of editors and publisher beyond that of mere licensee (Lee, 2013). Even some entrepreneurial self-publishers go straight to digital platforms to disintermediate publishing houses, relying on their own self-promotional skill to enhance their content’s opportunities.

The era of digital publishing means that as long as there is good content planning and the means of production, it is possible to take a chance in the new world of digitized publishing, even without much capital (Lee and Jung, 2004). The creative collaboration between the content makers with a basis in paperback books and the technological innovators with a basis in digital books allows both a new market perspective and a way to break free of the formerly big business oriented market structure (Jang, 2013). Another phenomenon worth noting is the ubiquitous introduction of digital libraries of public data. This trend reflects the fact that public services are also following the diversification of media and these changes will stimulate the expansion of new businesses to exploit such readily-available content (Lim, 1998).

3.2 Publishing Industry in Korea

In general, the channel to market in publishing starts with the licensing of contents from a creator to a value-adding intermediary such as a publishing house under a publishing agreement. Often a literary agent working

on behalf of the creator negotiates this agreement. Publishing agreements include a description of the work licensed, the rights transferred in terms of media (i.e. soft and hardcover, e-books, audiobooks, etc.), sales region, and term (length of time) for the transfer (Kim, Shin and Jung, 2016). A creator can expect royalty payments for each type of media included in the agreement. Publishing agreements also include named subsidiary rights such as large print and book-club rights. In negotiating such rights, the interest of the publisher is to expand the scope of rights while minimizing costs under the agreement; whereas the agent of the creator may be better placed to seek and negotiate profitable market opportunities, for example negotiating different subsidiary rights separately with specialized intermediaries to get the most out of the work. Agents may take a fee or percentage of the deal struck, and typically have detailed legal and market knowledge of the sector targeted by the work. As mentioned previously, the Korean publishing industry is characterized by a large number of small publishers per capita, but without the prevalence of literary agent activity as seen in the US or the EU.

From the publishing house the channel diverges between book distributors and/or digital distributors, and sales agencies, although the role of sales agents is decreasing.⁴⁾ These intermediaries then contract with the bookstore and online retailers. Occasionally publishers may contract directly with retailers (KIITPA, 2006).

Large offline bookstores in Korea such as Kyobo Book Centre, Young Poong Bookstore, and Bandi & Luni's, and online bookstores such as Yes24, Aladdin, Interpark, and Libro dominate the distribution market. Five bookstores including Kyobo, Yes24,

Interpark, and Aladdin represent 47.8% of total Korean book sales. In this context, often these large bookstores have a dominant position over small publishers, such that unfair trade practices are commonplace in the negotiating process and in fact make up a majority of unfair trade practice in the production-distribution process of publishing contents. Yet unfair practice between publishers and content creators is not uncommon. The nested structure of publishing industry contracts—whereby the distributor contracts with the publisher, who contracts with the creator—exacerbates the problem of unfair trade practices upstream as well as down, as unfair or complex deals down the line become more and more obscure to the original creator, thus potentially pushing down content valuation for the originator. As publishing evolves to take advantage of innovative forms of distribution, challenging our notions of coherent, single-format creative products, the publishing industry must embrace fair trade standards to protect creators, the initiators of transactions in the publishing value chain. In the next section we will examine a sampling of the variety of unfair trade practices that occur currently in the publishing industry, highlighting the nature of the claims, applicable statutes, and their impact.

3.3 Case Law on Unfair Trade Practices related to Publishing Contents Rights

The following examples in Table 2 show the types of unfair trade practices typical in the publishing industry. As previously mentioned, cases between content creators and their publishers are often clear-cut (1a, b), invoking the strong protections provided by copyright law. Even so, content valuation is critical to fair trade, and the limited ability of creators to assess disparities in publisher's market figures is a sticking point. Yet as publishers then go on to exercise these rights with third parties (the “nested structure” problem), Contract Regulation Law offers some protections (2).

4) Library service providers are also a player in the channel, but not the primary source of rights transfer concern for small-medium businesses. In rare cases, too, the publisher will sell direct to consumers; again this is not the primary concern for content creators.

Table 2
Sample Cases of Unfair Trade in Publishing Industry

No	Relevant Decision/ Case Law	Violated Law	Section	Plaintiff	Defendant	Grounds for Determining Unfair Trade	Resulting Decision or Settlement	Region	Entire
1a	Seoul High Court 2007. 2. 7. Sentence 2005 Na20837 Judgment (Greek and Roman Mythology-Olympus Guardian case)	Copyright Law		Hong, Eun-Young (Author)	Gana Publisher	Gana Publisher defrauded an author by creating a false sales status table that stated approximately 3.67 million copies, which was 1/3 of the actual number of copies sold, and paid only KRW 2,185,683,090 as publishing damages for delay.	The court ordered the defendant, Gana Publisher, to pay unpaid royalties and royalties for delay.	KOR	Court
1b	Greek and Roman Mythology-Olympus Guardian case	Copyright Law		Hong, Eun-Young (Author)	Gana Media	Defendant paid royalties for only 3.7 million copies out of 10 million copies	The court ordered the publisher to pay unpaid royalties of KRW 355,700,000 to original author.	KOR	Court
2	2013. 5. 6 FTC press release	Contract Regulation Law		Original Author	Hanbit Media, Inc	According to Hanbit media's right of publishing and exclusive printing including forced to work for revisions against the author and without the consent of author to transfer the author's property rights to third party, which determined that unfair terms and conditions limiting the rights of customers without good reason		KOR	FTC
3a	2010. 11. 24. FTC judgment 2010 GaYu 0609	Fair Trade Law	Art. 23 Art.111	446 publishers	Aladdin Communications, Inc.	Absence of a written agreement with vendors about the entire costs of sales promotion, expected profit, share percentage of promotion expense before promotion date and shifting the burden of promotional costs on vendors	Corrective instruction (stop violations) and the notice of corrective instruction	KOR	FTC
3b	2010. 11. 24. FTC judgment 2010 GaYu 0609	Distribution Services Law	Art. 11:2	5,682 publishers	Aladdin Communications, Inc.	Did not issue a written contract	Corrective instruction (stop violations) and the notice of corrective instruction	KOR	FTC
4a	2010. 11. 24. FTC judgment 2010 GaYu 0611	Fair Trade Law	Art. 23:1	Gilbut and 1,320 vendors	YES24, Corp.	Absence of a written agreement with vendors about the entire costs of sales promotion, expected profit, share percentage of promotion expense before promotion date and shifting the burden of promotional costs on vendors	Corrective instruction (stop violations) and the notice of corrective instruction	KOR	FTC
4b	2010. 11. 24. FTC judgment 2010 GaYu 0611	Distribution Services Law	Art.8:1	289 publishers	YoungPoong Bookstore, Inc	Absence of a written agreement with vendors about the entire costs of sales promotion, expected profit, share percentage of promotion expense before promotion date and shifting the burden of promotional costs on vendors	Corrective instruction (stop violations) and the notice of corrective instruction	KOR	FTC
4c	2010. 11. 24. FTC judgment 2010 GaYu 0611	Distribution Services Law	Art. 11:2	Book's representative and 527 publishers	YoungPoong Bookstore, Inc	While dealing with vendors, the content of a written agreement relating to the transaction, the delivery terms, and the notice of corrective instruction return conditions, etc. was not included	Corrective instruction (stop violations) and the notice of corrective instruction	KOR	FTC
5	2011. 1. 3. FTC judgment 2010 GaYu 1740	Distribution Services Law		51 publishers	YES24, Corp.	While dealing with vendors, the content of a written agreement relating to supply conditions, date of contracts and etc. was not included	Corrective instruction (stop violations) and the notice of corrective instruction	US	Court
6	U.S v Apple, Inc., et al., 12 Civ. 2826 (July 10, 2013)	Antitrust law		US	Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers, Macmillan, Penguin Group, Inc., and Simon & Schuster, Inc.	The publishers and Apple made an "agency pricing model" contract (whereby publishers set and fixed their own selling prices) including most favored partner low price (guaranteed clauses, effectively raising the minimum price of 90% of the NYT bestseller list, furthermore defendants fixed a minimum price for ebooks among the live large publishing houses, thus limiting competition and innovation in the digital bookselling sector	Plaintiff wins and settlements are as follows: Five defendants agreed with the judgment. Penguin: \$75m; Hachette, HarperCollins, Simon & Schuster: \$69m; Macmillan: \$26m; Apple challenged the judgment on appeal. Apple was declared by the US Supreme Court, and Apple is to pay \$450m.	US	Court

In the case of disputes between publishers and large distributors and/or retailers in Korea, the judgments often invoke multiple overlapping statutes such as Fair Trade Law and Distribution Services Law (3a, b; 4a, b, c; 5). It is characteristic of this industry that the big business distributor, such as a book distribution company or online bookstore, holds far superior negotiating power than the content creator, author or publisher. The Fair Trade Law applies in order to regulate abuse of market status and unfair trade practices; in the case of publishing content distributors, the Law on Fair Trade in Large-Scale Distribution Industry (i.e. Distribution Services Law) may apply if the distributor meets the requirements of 'Large-Scale Distribution.' Problems between the retail distributors and publishers often surface in the form of conflict over the price and purposeful obfuscation through missing contract terms like costs of sales promotion, expected profit, delivery terms, and return conditions. Without such essential elements in the written contract, small and medium sized publishers are likely to be exploited by big distributors, who may shift to them the burden of promotional costs. Yet in most of these cases the courts have issued only lenient judgments requiring merely corrective action rather than awarding damages. So the burden of maintaining fair practice rests significantly on the shoulders of publishers and their willingness to continually make claims to reassert fair practice.

This dangerous precedent may incentivize publishers instead to collude with distributors rather than fight them, to the detriment of the content creators and/or consumers. The case of collusion in the US between 5 publishers and Apple (6) demonstrates that even consumers can bear the burden of unfair trade in the industry, despite arguments from the publishers that their collusion was necessary for the health of the industry as a whole given the market dominance of Amazon.

3.4 Evaluation Criteria for Identifying Unfair Trade Practices

In the publishing industry, the nested trade structure with sequential deals in the supply chain from content creators to readers complicates the valuation of contents and identification of unfair trade practices. But we can generalize the types of unfair trade cases according to the major stakeholders involved: (1) author/creator-publisher, (2) publisher-distributor/vendor, and (3) distributor-consumer/reader. Referring to our earlier categorization of evaluation criteria for unfair trade in Table 1, we will look specifically at evaluation criteria for market-based, cost-based, and profit-based models. For the first two categories, evaluation using a market-based and cost-based methods can help protect small business's content rights. For the third type, Apple's agency pricing model provides guidelines to protect consumers in the contents trade.

3.4.1 Valuation Determination of Copyrights between Author/Creator-Publisher

Determining a copyright's economic value usually follows a traditional method using tax or financial statements against exchange values such as licensing fees or sale prices (Gorman and Ginsburg, 2002). Here, we set aside value determinations used by accounting firms or investment consulting firms, and use a market-approach to determine copyright value by looking at general exchange values from comparable products, which may employ multi-variate regression analysis.

In the case of intellectual property rights, we consider licensing fees, sales prices, internal profit from use of intellectual property rights, and the expected future value from use of intellectual property rights. The most important aspect of the market-approach method is that it is possible to estimate the fair market value that the potential seller and potential purchaser will agree upon (Weston, 2010). As the table below shows, it is possible to determine intellectual property value

Table 3
Factors for Determining Copyright Value

	Technology	Rights	Marketability	Exchangeability	Financial Stability
Copyright Value	Creativity	Possession of Copyright; Possession of Publishing Right	Size of Target Market	Copyrighted Material's Citation Frequency; Payment of Copyright Royalty	Quick Ratio
	Innovativeness	Frequency of Copying	Illegal Market Share	Number of Holders of Copyright or Publishing Right	Current Ratio
	Accuracy	Security	Economic Conditions	Production Capacity	Debt Ratio
	Expandability	Remaining Period of Copyright Protection	Past 3-Year Growth Rate in Relevant Copyright Market	Scope of Reach	Equity Capital Ratio
	Utility	Volume of Copyrighted Material	Market Stability	Degree of Completion	Interest Coverage Ratio

by applying AHP analysis to select factors and by evaluating technology levels within each category (KOCCA, 2012).

3.4.2 Valuation Protection of Copyrights between Publisher-Distributor/Retailer using MSRP

The Publishing Culture Industry Promotion Act (“Act”) in Korea has put in place a “books MSRP (Manufacturer’s Suggested Retail Prices) system” that prohibits discounting book prices beyond a certain percentage. Article 22 of the Act states, “(1) When a publisher prints materials for the purpose of sale of such materials, the publisher must set a sale price and mark such price on the material according to presidential decree. The same procedure applies for changing the set price. (2) Despite (1), in the case of digital publishing, the publisher must list the set price in a bibliographic information database and the vendor of digital publishing must clearly show the price the publisher has listed in the bibliographic information database on its online market website. (3) A vendor of published materials must sell the materials at the set price if the materials are subject to repurchase price maintenance per Article 29:2 of the ‘Monopoly Regulation and Fair Trade Law.’ However, a vendor of published materials may discount the materials within a 10% range according to its own established discounting method if

for the purpose of promoting reading and consumer protection.” Also, Article 9:2 of the Enforcement Regulations of the Act states, “(1) Article 23, Section 1, Clause 3 of the Act states that ‘acts in violation of the decree by the Minister of Culture, Sports and Tourism refers to acts of a vendor conferring an economic benefit to consumers beyond 10% of the list price of published materials, per Clause 3 and Clause 4 of Article 22 of the Act.’”

The legislative intent of the above law including its enforcement regulations is to prevent distribution of books at a far lower price than is reasonable or sustainable for publishers and creators. Prohibiting discounts beyond 10% of the list price is meant to guarantee recovering the minimum cost of publishing books. This is relevant for the cost-approach method of determining the value of contents, which is based on the expenditures required for producing the content.

3.4.3 Protecting Valuation among Author-Publisher-Distributors by Avoiding Unfair Low Pricing

In many cases, the main problem is purchasing contents at an unreasonably low price between authors and publishers and/or between publishers and distributors. There are many case precedents from real estate and other industries where civil/criminal laws and contract laws were employed, which

offer evaluation guidelines on this particular matter. According to Korean legal precedent, if parties agree to pursue no more civil or criminal legal action and settle for an amount less than 1/8 of what the plaintiff party could receive in damages there are grounds to find unfair trade practices. In the case of unreasonably low sale price, precedent is less consistent. Transactions with prices amounting to 2.7%, 12.5%, and 50% of the actual market value have been voided, while a transaction with a price amounting to 53% of the actual market value has not been voided. Taking these decisions all together, it can be concluded that in order for a transaction to be unfair it must be found that the transaction involved a price set at less than 50% of the property's market value.

3.4.4 Evaluation Criteria for Unfair Price Fixing between Distributor-Consumers Based on the Apple Agency Pricing Model Judgment

The famous case brought by the US Department of Justice against Apple and five large publishing houses⁵⁾ targeted the defendant's activity in cooperating to fix e-book prices and sales commissions, monopolize distribution through Apple, and thus challenge Amazon's growing hegemony in the sector. Despite the defendants arguing that this authorized dealership model was good for the health of the industry, the court judged that it was not enough to warrant illegal price fixing, elimination of publishing houses' retail price competition, and anti-competitive/anti-innovative behavior in the digital book-seller sphere, all which would ultimately prejudice consumers.

The lawsuit resulted in termination of a) the digital book sales contract with Apple, b) all agreements to fix digital book retail prices, and c) all "most favored partner low price guarantee" treatment clauses. In addition,

5) The five publishing houses involved were Hachette, Macmillan, HarperCollins, Simon & Schuster, and Penguin.

tion, consent orders were issued that a) prohibited the defendants from discounting sale prices for 2 years, b) prohibited agreements involving "most favored" treatment of digital book sales, c) prohibited agreements among digital publishing houses to increase the wholesale or retail price of books, d) prohibited and the sharing of sensitive information with other digital publishing houses regarding business plans, past-present-future wholesale plans, retail prices, and contract terms with retailers.⁶⁾

A similar result was reached in Europe in 2011 after the European Commission's investigations into Apple and the publishing houses' activities forced the parties⁷⁾ to submit affirmations to the European Commission effectively terminating their prior agreements and practices as in the US case. Satisfied by these affirmations, the European Commission closed their investigation in December, 2012.

As Forbes contributor Micheal Bobelian pointed out in his analysis in 2012, the busting of Apple's agency pricing model activity with publishers has an ironic ring to it, given that throwing their lot in with "the enemy" might have staved off further consolidation in the publishing sector and given flagging publishers a means to shore up their market power together with a new innovative partner against an effective e-book monopolist, Amazon (CPRC Secretariat, 2013). Yet the Department of Justice has yet to bring a case against Amazon for predatory pricing, a point which Bobelian attributes to "the evisceration" of large portions of anti-trust law in recent Supreme Court decisions. If Korean small businesses are to take a lesson from this global case, they may feel their options are further limited.

6) While the five publishing houses settled Apple contested the ruling, but in 2016 the US Supreme Court declined to hear their appeal, meaning the appellate court's final judgment stood (Chen, 2015; The Guardian, 2016).

7) Initially Penguin did not issue an assurance in line with the other parties; however it complied in March, 2013.

IV. Suggested Guidelines and Improvements for Ensuring Fair Trade

The current status of the publishing industry includes innovation, opportunity, and unfortunately commonplace unfair trade practice. With the limited market power of small publishers and content creators, nested nature of agreements, and lenient precedents set by FTC judgments against the big distributor/retailers, it behooves the Korean publishing industry itself to assert common guidelines to ensure fair trade among industry participants. Such cooperation may effectively enhance competition and transparency, while avoiding the futile resorting-to-collusion agreements seen in the US. After all, as distribution technologies rapidly change the role of publishers evolves, and creators find new and more direct ways to engage with their audiences. Establishing a forum and framework for guidelines could in itself reduce risk and volatility for smaller industry participants. With artificial intelligence and machine learning on the horizon, the publishing business does not look to settle down any time soon (Kim, 2014).

4.1 From Unfair Practice to Fair Trade Guidelines

The Seoul Metropolitan Government conducted a survey on the unfair practices in the culture and art industry, surveying a total of 834 people including illustrators, cartoonists and webtoon writers. According to the survey results Table 4, 79.0% of illustrators

were forced into unfair contracts. In the related publishing fields including cartoons and webtoons, many creators report being forced to transfer all intellectual property from secondary products as well as unfair profit distribution. Contracts prepared by publishers disadvantage authors and artists in terms of the secondary use rights in their works. The government therefore proposed to the National Assembly an amendment to the Welfare Act for the Arts in order to protect the legal status and rights of such artists (Seoul Metropolitan Government, 2017).

The Korean FTC has banned such unfair practices in the publishing industry, where until recently publishers routinely took away all the secondary rights of the authors' works through unfair contracts. A notorious case illustrating this practice is the example of the creative picture book 'Cloud Bread' (2004) by Heena Baek, who earned just 18.5 million won (US\$16,500) due to an unfair publishing and copyright transfer contract, where the publisher earned more than 440 billion won (US\$390m) through the book and subsequent commercialization not approved by the author (Jung, 2014).

In order to prevent this practice from recurring, the FTC required the top 20 publishers to correct their practice of unfair copyright property transfer, and to rectify contract clauses that required the forced copyright transfer of reproduction rights, performance rights, exhibition rights, rental rights, and other residual rights. Instead, the authors would choose whether to transfer those rights to the publisher or not. And if the author assigns the copyright to a third party, the

Table 4
Survey of Unfair practices in Cultural Art Market

	Artists' Experience of Unfair Practices	
	Cartoon & Webtoon creators	Illustrators
Pressuring Unfair Contract	36.5%	79.0%
Name indicating Right	16.0%	34.5%
Unreasonable Profit Sharing	33.0%	78.2%
Avg. cost of damage	7.66 million won	3.40 million won
Avg. number of abuses	2.4	2.4
Interfering in Art Works	20.3%	22.7%
Unfair Use of Art Work Info	9.5%	29.3%
Unfair Contract Closing	35.9%	54.9%

Source: Seoul Metropolitan Government (2017).

provision requiring prior consent of the publisher has been amended to be by the author's notice to the publisher. Furthermore, automatic 5-year renewals extending publishers' rights to works has been replaced by 1-year renewals, unless terminated by the author (Kim, 2014).

The legal cases in Table 2 serve to illustrate the various types of unfair trade practices typical in the publishing industry. Based on the analysis of unfair trading practices

and cases, we have drawn on applicable legal frameworks as well as other publishing industry practice to propose guidelines to address the major issues involved in unfair trade in the book publishing industry in Korea. These are summarized in Table 5. Where applicable, we recommend that the key industry associations agree and publish such guidelines along with contract and agreement templates and checklists for participants to work from.

Table 5
Fair Trade Guidelines for Publishing Contents

Major Issues	Obligations	Guidelines	Relevant Laws
1. Price and Cost Estimation	Prohibition of estimating undue production costs	Book distributors (including Internet Book distributors), when deciding on the price of books delivered by publishers, shall not set a significantly low price by abusing their superior position in the deal.	Fair Trade Law, Article 3:2, Clause 1
2. Holding of Copyright	Holding of Rights	When the publisher or manufacturer desires to transfer all or part of the publishing rights and transfer rights to third parties, or wants to set up pledges, prior written consent from the copyright holder is required. Book distributors (including the Internet book distributor) entering into an agreement with publishers for book distribution must immediately deliver a written document that specifies the contract terms. (While the general guideline applies to contract content, the examples of publishing content-related information in #3 should also be applied).	Copyright Law Article 46, Article 47
	Duty to Deliver Written Contract	- Examples for Publishing Content-related information: 1. The type of transaction, transaction items and quantity 2. Delivery terms 3. Bearer of the burden of a book promotion costs 4. Inventory Return Conditions 5. Bearer of sales incentive pay and pay conditions	Large-scale distribution law Article 6: 1, 3, 4
3. Acts Concerning Contracting and Performance	Duty of Keep Records/ Documents	Books distributors (including Internet book distributors) must preserve the contract document, among other documents, for five years from the date the contract is completed.	Large-scale distribution law Article 6: 4
	Prohibition of unjustified reduction	Book distributors (including Internet Book distributors) shall not reduce the price of delivered books. However, if there is a legitimate reason for reduction and if it is for a reasonable period of time in the field of publishing content, such reduction is permitted exceptionally.	Large-scale distribution law Article 7: 1
	Prohibition of Unfairly Shifting the Burden of Promotional Costs	Book distributors (including Internet book distributors), without consultation with the publisher, shall not force the publisher to bear the cost of promotional events. The percentage of sales promotion cost that is shared by the publisher shall not exceed 50%.	Large-scale distribution law Article 11: 1, 2, 3, 4
5. Content Quality	Prohibition of Unfair Demands to Re-do the Work	The Publisher or manufacturer should not demand modification without justifiable reason. The Publisher or manufacturer should not be required to publish a revision of the ranges not specified in the published contract without justifiable cause.	
	Prohibition Forcing Excessive Discount Sales	Book distributors (including Internet book distributors) shall not impose an excessive sales discount on publishers.	
6. Other	Prohibition of Conduct that Disadvantages Others	Book distributors (including Internet book distributors) shall not adversely change the terms and conditions, limit the delivery or transactions, or enter contracts or engage in conduct that disadvantages the publisher based on the fact that the publisher reported a violation of the laws to the authorities.	Large-scale distribution law Article 18
	Corrective Instructions	Book distributors (including Internet book distributors) who violate these rules may be ordered to cease violations, to prevent relapse, to pay the book sales price, to delete/modify terms of the contract, to publish a corrective instruction, to notify the counterparty publisher of their correction order, to report correction plans or actions, and other measures as necessary.	Large-scale distribution law Article 32

4.2 Improving Rules and Regulations in Publishing Industry

4.2.1 Put Fair Trade Practice Obligations in Writing

The Korean government's current "Publishing Culture Industry Promotion Act" does not contain rules regarding the establishment or enforcement of fair trade practices in the publishing industry specifically. Given the rapid growth of the publishing market as well as the frequent occurrence of unfair trade practices within the publishing industry, it is necessary to put the government's fair trade practice establishment and enforcement obligations in writing. The following recommendations are intended to improve outcomes for all participants in the industry.

4.2.2 Set Industry-Wide Rules for Prohibiting Unfair Trade

Because publishing contents must go through distribution in order to reach consumers, the distributor takes on a superior negotiating status over the content creator, and content creators tend to rely on well-capitalized distributors. Furthermore, if the content creator's equipment and platform tend to be exclusively made for the structure of the distributor, it becomes difficult to switch to a different distributor. The verticality, reliance, and exclusivity of such business relations have become the defining transactional qualities of this industry. Therefore, it is highly possible that trade conditions unilaterally unfair to the content creator will arise from the imbalances in economic and negotiating abilities between the content creator and the distributor. This is why it is necessary to establish industry-led rules specifically prohibiting unfair trade practices that use a distributor's superior negotiating position. An analysis of the MSRP's impact on publishers may provide impetus to get industry-wide discussions rolling.

4.2.3 Establish Entry and Exit Regulations

According to Article 9 of the current

"Publishing Industry Promotion Act", a person intending to operate a publishing house must notify the governor, mayor, county executive, or borough chief of the relevant jurisdiction of such intent beforehand, there by allowing the governor, mayor, county executive, or borough chief that has been delegated responsibility by the Minister of Culture, Sports and Tourism to regulate industry entry. Giving this civil figure the authority to void such person's certificate of notification and prevent future notifications of re-entry into the industry for person (s) operating a publishing house that a) repeatedly violates competition law provisions established to prohibit unfair trade practices, or b) refuses to take corrective measures despite receiving corrective orders after violating the "Contents Industry Promotion Act," would ensure some participant quality with the courts.

Should the corporate and administrative law regulatory entity be given the authority to regulate the disqualification of persons repeatedly engaging in unfair trade practices, it would be possible to create more creator-friendly regulation through the incorporation of individual business laws. This would increase the motivation of the publishing house operator to abide by legal rules while also clarifying the authority of corporate and administrative law regulators, thus completing the framework of fair trade rules (Jang, 2005).

4.2.4 Establishing Rules for Correction Recommendation

In order to establish fair trade rules in the publishing industry, it is necessary to clarify the regulatory powers of corporate regulators by putting in place unfair trade prohibition rules within the "Publishing Culture Industry Promotion Act." The regulatory authority should be able to issue correction recommendations to fix problems of unfair trade practice, which can be enforced using the corporate legal regulatory framework.

V. Conclusion

The Korean publishing industry's prospects for ensuring fair trade in the industry are hampered by the current lack of industry-wide rules and regulations, the power dynamic between players, and the complexity in the overlap of applicable laws and statutes. There are two regulatory layers to consider with contents business practice in general: fair trade practices and individual business regulation. From the business operator's perspective, this results in regulation by multiple supervisors and is referred to as double surveillance or dual regulation (Lee and Choi, 2013).

In order to establish legal policies that can regulate unfair trade practices in the contents industry market, this study has offered guidelines for distinguishing unfair trade practices and guidelines for more effective regulation. This is because providing evaluation standards for "unfairness" is a necessary step for guaranteeing predictability and legal stability in the contents industry.

Previous discourse on contents fair trade has focused on the concepts of or enforcement related to fair trade laws, but it is imperative to find a more comprehensive and multi-dimensional alternative. The legislative direction that this study proposes is "regulatory convergence." In other words, we suggest directly borrowing competition law provisions and applying them to the Contents Industry Promotion Act, which is a part of corporate law. By suggesting improvements to the Contents Industry Promotion Act (the general regulatory law) as well as individual business laws (which regulate each area of the contents industry), this study tries to build the legislative foundation for regulating unfair trade practices.

For example, business operation entry barriers that require permits licensing, registrations, and declarations are a typical corporate law regulation. If the entry barrier requirements are not satisfied, the business's permit may be rejected or cancelled, and because permit renewals are not possible,

these requirements are related to exit regulations as well. For permit requirements, the specific requirements demanded of the publishing industry standard would apply (Lee, 2011). If fair trade laws can be expanded to apply to competition protection and furthermore to consumer protection, it would be possible to shift policy in individual business laws to be more creator-friendly.

Normally, the regulatory measures of corporate law would cover only basic regulation, but when strict measures such as criminal penalties (including fines or imprisonment) are needed, competition law-related regulatory measures should also be used. In other words, corporate law and competition law regulations will have separate administrative channels but also complement each other and co-exist in a systematic administrative regulation system so as to better regulate unfair trade practices in the rapidly developing publishing market.

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콘텐츠 권리의 공정거래에 관한 연구: 출판산업 가치사슬에서 중소 콘텐츠 창작자와 출판업자의 권리 보호

최경규* · 이영대**

온라인 및 무선 통신은 콘텐츠 산업 시장을 획기적으로 변화시켰다. 유통 채널이 서점에서 스마트 플랫폼으로 이동함에 따라 거래가 즉각적으로 이루어져 제작자에게 새로운 크고 작은 기회가 제공되었다. 그러나 그러한 기회는 산업 생태계의 불균형을 초래한다. 창의적 중소기업의 성장이 중요한 콘텐츠 산업 특성상, 산업의 건전성과 다양성을 보장하기 위해서는 콘텐츠 저작권에 관한 공정거래 규칙이 필요하다. 하지만 산업의 몇몇 구조적 특성이 이러한 규칙의 시행을 어렵게 한다. 첫째, 콘텐츠 업계는 주요 출판사들처럼 다수의 중소 판매업자들로 이루어져 있다. 둘째, 구글과 같은 플랫폼 회사 등 최종 판매자들은 독점적 지위를 보유하고 있다. 셋째, 콘텐츠에 대한 경제적 가치 평가도 어렵다.

기업 인수의 측면에서 보면, 저작권 거래는 (1) 라이선스(권리위임) 모델, (2) 원시취득 모델, (3) 수요독점 모델로 분류가 가능하다. 이 연구는 출판업계에서의 주요 법령과 각 모델 별 적용 방식에 대해 알아본다. 한국과 미국의 법령, 판례분석, 공정거래위원회(FTC)의 심결들을 분석하여 저작권 거래의 공정성/불공정성 평가 기준을 제시한다. 나아가 이 연구는 콘텐츠 저작권의 공정한 거래를 제고하기 위하여 콘텐츠 산업의 일반적 관행을 개선하기 위한 가이드라인을 제시함으로써 출판산업 생태계가 발전하기를 기대하는 바이다.

주제어 : 가치평가, 공정거래, 규제 컨버전스(통합), 출판산업, 콘텐츠저작권

* 교신저자, 동국대학교-서울 경영학과 교수(e-mail: gchoi@dongguk.edu)

** 법무법인 수호 변호사(e-mail: pydl@unitel.co.kr)