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A Review of the Improvement of the Expert Evidence System under the Criminal Procedure Act

- Focused on the Case of Intellectual Property Litigation -

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Abstract

As the number of professional lawsuits increases, many discussions are being made on improving the appraisal system to assist a judge. In particular, the importance of expert evidence in a trial for intellectual property rights is more emphasized because of its unique characteristics. Although the relevance of expert evidence is emphasized in a criminal trial, active discussions on system improvement have yet to occur. Therefore, the problems of the expert evidence system by order of a judge in the expert evidence systems of the Criminal Procedure Act(Articles 169 - 179-2) and the ways to improve the problems are examined. To that purpose, solutions to challenges, such as the specification of an expert witness, the method of an expert witness examination, the method of a report on expert evidence, and the anonymity of an expert witness, were sought.

keywords : Expert Evidence System, Criminal Procedure Act, Appraisal, Request for Expert Evidence, Copyright Litigation

1. Introduction

As the number of cases in which professional lawsuits are conducted increases, ongoing discussions on the need to improve the expert evidence system to assist a judge is being made. In particular, the importance of expert evidence in a trial for intellectual property rights is more emphasized because of its unique characteristics. However, expert evidence during a trial has revealed many problems regarding fairness and effectiveness. Although the importance of expert evidence is stressed in criminal trials, active discussions on the improvement of the system have not been made yet. The following chapters will look into ways to improve the problems of the expert evidence system (Articles 169 - 179-2 of the Criminal Procedure Act) under the order of a judge among the expert evidence systems of the Criminal Procedure Act and, in particular, examine the problems of expert evidence in the lawsuits related to intellectual property rights.

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2. Expert Evidence System under the Criminal Procedure Act and Characteristics of the System in Intellectual Property Litigation

2.1 Expert Evidence System under the Criminal Procedure Act

2.1.1 Overview

Suppose the method of evidence in criminal litigation is classified according to the method of evidence examination. In that case, it can be divided into five categories: evidence supplied by expert witnesses, documentary evidence, evidential materials, written evidence, and computer discs and other materials made for information storage. Among them, expert witnesses provide expert evidence, and the court or an investigation agency requires a third party to investigate, report the rule of thumb or specific factual judgment obtained by applying the rule, and supplement the lack of expertise and experience necessary for trial or investigation. In principle, a court may order a person of learning or experience to give expert evidence (Article 169 of the Criminal Procedure Act). However, exceptions were mentioned under Articles 177, 147, and 149 of the Criminal Procedure Act, including limited witnesses' qualifications and the right to refuse to testify. Similar to civil litigation, the objects of expert evidence are psychiatric evaluation, physical examination, handwriting, documents, seals, letters, fingerprint examination, and market appraisal or survey appraisal. In addition, drug analysis, hair drug testing, lie detector tests, and DNA profiling are conducted in criminal litigation, unlike civil litigation. In particular, utilizing expert evidence in intellectual property - related lawsuits, including patents, has been increasing recently. Many discussions about expert evidence related to intellectual property rights have begun because of its unique characteristics compared to other fields[1].

2.1.2 Procedures of Expert Evidence

Deciding whether to order expert evidence in the adoption stage of expert evidence conduct is at the court's discretion. Suppose there is a suspicion that a person has mental and physical disabilities concerning the judgment of criminal responsibility, and the person has not had a psychiatric evaluation by an expert. In that case, the lack of evaluation based on a judicial decision is illegal[2]. In addition, if a judge does not conduct a psychiatric evaluation even though it is needed to fulfill the obligation to explain facts, it may be considered as a reason for appeal due to failure to exhaust all necessary deliberation leading to the lack of evaluation[3].

Next, the designation of an expert witness should be made. There is a conflict of opinion on whether to allow an expert witness to be specified when a party requests expert evidence. The majority theory and practice do not prevent a party from specifying an expert witness when they request expert evidence, but even if specified, it is regarded as merely an expression of a request to the court. The specification and the selection of an expert

witness belong to the full authority of the court. Comparable to a civil case, in a criminal case, an expert witness is appointed following the rules of the Supreme Court, and the head of a related organization or government office is sometimes requested, in writing, to recommend and notify an appropriate person.

When an expert witness is designated, they are summoned for the first time, and the court conducts an identification interrogation about them or warns them of the punishment for false expert testimony, requires them to take an oath, explains the right to refuse expert evidence, inform matters subject to expert evidence, and orders expert evidence. A prosecutor, defendant, and counsel have the right to participate in an expert witness examination, and the court must determine and notify the date of the expert witness examination unless the parties express their intention in advance not to participate.

Moreover, an expert witness should write a progress report and results. The court may if deemed necessary, have the expert witness explain, in written form, the progress and results, which shall be conducted in the form of an expert witness examination. The provisions of the witness examination shall apply mutatis mutandis.

Lastly, an appraisal fee must be paid. An expert witness may request compensation for an appraisal and a substitute payment in addition to travel expenses, daily allowances, and accommodation fees, as prescribed by law. The provisions on witnesses shall apply mutatis mutandis to the payment of travel expenses, daily allowances, and accommodation fees. In criminal proceedings, the National Treasury ultimately bears a fee for expert evidence and is not included in the litigation cost. It cannot be paid out of a defendant even though the defendant provides other litigation fees.

2.1.3 Examination Record of the Expert Witness and Admissibility of Evidence of Written Appraisal

Even though a written appraisal is submitted, a court may have an expert witness explain matters subject to appraisal. In this case, an examination record of the expert witness must be written following the expert witness examination procedure. Because the examination report of the expert witness is a protocol stating the result of the expert witness examination in the presence of a court or judge, the admissibility of evidence is recognized under Article 311 of the Criminal Procedure Act.

Similar to any other evidence, a written appraisal is evaluated according to a judge's free evaluation of evidence; thus, a judge has the discretion to adopt the result of the expert evidence through the examination of evidence, even in case multiple appraisal results are varied. However, there is a limit to the free evaluation of evidence. In this regard, the court held that "where a method of scientific evidence, such as genetic testing and blood type tests, is proved to be true, and the method of reasoning is deemed to be so severe that it would have no possibility of a mistake

or disregarding the possibility of a scientific error, a judge has a substantial binding force in fact-finding. Thus, even if the fact-finding authority has the exclusive authority of fact-finding, rejection of the fact-finding without any reasonable ground is impermissible as it goes beyond the bounds of the principle of free evaluation of evidence"[4] and "the scientific evidence method supporting the facts charged should be proved to be true, and where it is recognized that the method of prosecution is so extreme that the scientifically legitimate that there is no possibility of mistake or disregarding the possibility of mistake, the judge in need to have a substantial binding force in finding facts. To this end, the method of evidence should be submitted to the court through analysis with the standard inspection method approved by the appraiser with professional knowledge, technology, and experience. In addition, it should be guaranteed that the identity of data is recognized in all processes, such as collection, storage, analysis, etc., and that there was no artificial manipulation, damage, or addition."

2.1.4 Request for Expert Evidence

The court may request expert evidence of public offices, schools, hospitals, or other associations or agencies equipped with appropriate facilities if deemed necessary. In the case of adopting a request for expert evidence, proceeding directly to the process is acceptable, and there is no need for an expert witness to be summoned or examined. In addition, the provisions concerning taking an oath shall not apply. In the case of a request for expert evidence, the court may request a person designated by such public offices, schools, hospitals, associations, or agencies to explain the document of expert evidence.

2.1.5 Expert Evidence by the Commission of Expert Evidence of Investigation Agency

An investigation agency may commission an expert opinion if necessary for investigation (Article 221 (2) of the Criminal Procedure Act), but the court is not involved in that stage. The person an investigation agency has commissioned is called an expert witness in practice. However, they are not obligated to take an oath and do not fall under the crime of fraudulent expert opinion (Article 154 of the Criminal Act) even if they give a false expert opinion. In the procedure of expert evidence, there is a big difference from the expert witness ordered by the court (Articles 169 - 171 of the Criminal Procedure Act) in that an opportunity for cross-examination by a party is not given. In this regard, unlike expert evidence by the court's order, there has been a discussion on whether it is appropriate to recognize admissible evidence of a written appraisal by the commission of an investigation agency that does not have strict legal regulations under the same requirements as a written appraisal by the court[5].

2.2 Issues of the Utilization of Expert Evidence in Intellectual Property-Related Litigation

2.2.1 Characteristics of Expert Evidence in Intellectual Property-Related Litigation

First, it is not easy to confirm the presupposition of a judge because technical factors and legal value judgment are combined. In the case of copyright infringement, a specific technical expression should be analyzed and interpreted to determine whether an object has legally protected interests. In the process, whether it is a protectable object should be considered according to the concept of the Copyright Act. When subjective or objective requirements are judged, expert evidence is conducted by considering whether a comparative object is an object that has legally protected interests; that is to say that whether it corresponds to an expression protected by Copyright Act. A similar pattern appears in a case of infringement of patent rights or trade secrets. In other words, unlike ordinary expert evidence, which analyzes and reports specific technical matters, intellectual property - related lawsuits require complex capabilities because the analysis of technical matters, and the consideration of legal values should be conducted simultaneously or sequentially.

Second, there is a characteristic that the final judgment is not made, only following the logical flow. In the case of determining whether there is a substantial similarity which is an essential matter and for which expert evidence is most actively used because of the difficulty of judgment in the matter of copyright infringement, the criterion of substantial similarity is considered a policy judgment rather than legal judgment[6]. In judicial practice, there is no explicit standard of substantial similarity, but it is judged to determine whether a specific degree of similarity is substantial or not. In this process, making a judgment according to the logical flow is complex, and it appears the same when the court deals with intellectual property - related litigation, including patent lawsuits.

2.2.2 Issues of Expert Evidence in Intellectual Property-Related Litigation

The first problem is the difficulty in securing fairness, showing a phenomenon in which the importance of the stage of expert evidence is connected to private interests in the trial process. A representative case was the construction appraisal fraud in 2015. In March 2015, a contractor and a building owner filed a lawsuit over the cost of the new motel construction in Geoje, Gyeongsangnam-do. In this lawsuit, the court-appointed appraiser A secretly proposed to both the contractor and the building owner saying, “I will conduct an appraisal in your favor.” Both parties, who knew that an appraisal had an essential influence on the trial’s outcome, handed A KRW 10.8 million and KRW 8.5 million, respectively. In addition, B, the representative of the company to which A belonged, “subcontracted” the appraisal to other engineers and submitted a written appraisal to the court in A’s name. In the case, it was also stated that there was a practice in which B usually received about 10% of the appraisal fees as commission, and in particular, when a retired employee was designated as an expert witness

for a lawsuit, B secretly conducted an appraisal and submitted a written appraisal to the court by stealing the retired employee's name[7]. This type of case was the leading cause of revising the appraisal regulations when the Civil Procedure Act was revised in 2016[8]. Similar to this case, an expert who conducts an appraisal undermines the fairness and expertise of appraisal for their benefit often occurs[9].

The second problem is the maldistribution of evidence which can be compared to a tilted playground. The utilization of an appraisal in a trial usually takes place in the process of securing evidence. However, maldistribution of evidence, a problem that has been dealt with in litigation procedures for a long time, is the biggest obstacle to practically implementing the principle of equality of arms, suggesting that differences in economic status and other factors can eventually affect the outcome of the trial in conducting the appraisal. The government and the judiciary have also seriously considered this issue, a subject of lengthy discussion. Sheila Jasanoff pointed out that "Law, in theory, shares with science the 'effort to be wholly rational, to organize and institutionalize the search for truthful data. However, inequality of resources in any lawsuit can easily tilt the balance in favor of the wealthier party."[10].

The third problem is that the phenomenon of actual binding is growing. As mentioned earlier, in a complicated and professional lawsuit, a judge is bound to an appraisal result because they cannot have various professional knowledge corresponding to facts. In this regard, the Supreme Court held that "where a method of scientific evidence, such as genetic testing and blood type tests, is proved to be true, and the method of reasoning is deemed to be so severe that it would have no possibility of a mistake or disregarding the possibility of a scientific error, a judge has a substantial binding force in fact-finding. Thus, even if the fact-finding authority has the exclusive authority of fact-finding, rejection of the fact-finding without any reasonable ground is impermissible as it goes beyond the bounds of the principle of free evaluation of evidence,"[11] and it prohibits a judge from rejecting an appraisal result without clear grounds. In other words, it is acknowledged that a judge is bound to be a certain extent to an appraisal result. If a judge is bound to be a certain level in an appraisal result, the appraisal system is not simply composed of assisting a judge but needs to be reorganized to form a more advanced institutional system[12].

The fourth problem is the characteristic of the application of appraisal procedures in the process of intellectual property trials. Appraisal procedures are widely used in trials related to various specialized fields. The biggest difference in applying appraisal procedures in intellectual property trials and other trials is that the individuality of each case is considered in the case of intellectual property trials. In general, when appraisal procedures are applied in the trial process, an expert witness can be selected by certain rules, and replacing the expert witness with another expert can also be

done without a big problem. Due to the expertise needed in each case and the complexity of the fields, intellectual property trials differ from other trials in that each issue must be addressed individually by examining and selecting a qualified expert witness. Because of its characteristics, in practice, the court has difficulty in and feels pressured by finding a proper expert witness and selecting them as an expert witness for conducting an appraisal during the process of the individual case in trial.

The fifth problem is the closeness between an appraisal result and the court's decision. If the result of an appraisal is presented in an intellectual property trial, the appraisal result inevitably has a significant influence on the final judgment of the trial. Therefore, the court deals with conducting an appraisal carefully in the process of an intellectual property trial. Unlike other fields, when an appraisal is conducted in an intellectual property trial, the content of the appraisal is basically linked to the matter of rights because the reliability of the subject who conducts an appraisal is distinguished as a judgment on rights is inevitably involved in the appraisal process. In addition, patent litigation cases have a stronger public nature than other cases because patent rights affect the general situation. Because of their public nature, it is pointed out that when an expert is used for appraisal, an expert who can favor the court, both parties, and the public, should be used[13]. Originally, judgment on facts and norms should be clearly divided into the duty of an expert witness and a judge, but in an intellectual property trial, distinctions of their duties are ambiguous and somewhat mixed. Therefore, the demand for reliability for an expert witness is higher than in other fields. Moreover, an appraisal by an expert witness with secured reliability (public confidence) is vital for the efficiency of the trial process because the court can avoid unnecessary disputes during the trial.

The last problem is the high appraisal fee, which is a problem because, unlike in civil litigation, in which one or both parties pay an appraisal fee for a case, the subject of paying a fee is the state, even though it is an appraisal lawsuit in criminal litigation. In the process of criminal litigation, the state should pay an appraisal fee. However, a hefty appraisal fee burdens the state because of considerable limitations in using financial resources, which are a part of the national budget. That is, there is a high possibility that each court will not be able to go through a necessary and appropriate appraisal because financial resources are not entirely distributed. Meanwhile, a high appraisal fee is a factor that lowers appraisal utilization, even in civil litigation. Therefore, the necessary development of a series of standards through the calculation of an appraisal fee by a publicly trusted expert witness has been raised because a standard of an appropriate appraisal fee does not exist.

2.3 Response of the Civil Procedure Act to Improve the Expert Testimony System

2.3.1 Amendment Process and Background

The expert testimony of the specialized field, a type of evidence supplied by expert witnesses, is subject to practical limitations in applying the principle of free evaluation of evidence if the contents are more professional and complicated than they look. In some cases, it has led to problems hindering the procedural processes, such as high expert testimony fees, poor and insincere expert testimony, delays in reporting the results of expert testimony, and moral hazard, as well as preventing quickness and economic efficiency. Therefore, there has been an ongoing debate on the need to improve the procedures at the level of judicial reform. In particular, the expert testimony of construction was more controversial than in any other field. Problems such as the selection of expert witnesses and the level of expertise had often occurred as a large part of expert testimony was commissioned to expert witnesses without conditions in the reality of trials.

The regulations of expert testimony under the Civil Procedure Act, which was revised on March 29, 2016, were proposed as an alternative for the Legislation and Judiciary Committee by integrating and adjusting the amendments to the Civil Procedure Act, as initiated by Representative Jeon Haecheol (Proposal No. 16056), reflected by the suggestion of the Committee on Trial Reform, and the initiative of Representative Kim Hoe-sun (Proposal No. 1917826), based on the amendment to the mitigation of proof of damages. However, the matters related to the procedures of expert testimony were only included in the amendment to the Civil Procedure Act initiated by Representative Jeon Haecheol, and the relevant provisions of the current Civil Procedure Act were also revised with almost the same contents.

2.3.2 Major Amendments

First, Article 335-2 (Duty of Expert Witness) was newly established to require expert witnesses to fulfill the obligation to notifying the self-competence of expert witnesses and the obligation to the prohibition of the entrustment of expert testimony. Where an expert witness deems that a matter for expert testimony is not in his or her field of specialization or needs to be dealt with jointly with another expert witness, he or she shall promptly request the court to revoke his or her designation as expert witness or to designate an additional expert witness (paragraph 1), and no expert witness shall commission another person to give expert testimony in his or her place (paragraph 2).

Second, Article 339 (Method of Stating Expert Testimony), paragraph 3 was newly established that the court shall give the parties an opportunity to state their opinions either in writing or orally. In addition, Article 339-2 (Method of Examining Expert Witness) was newly established that an expert witness shall be examined by the presiding judge (paragraph 1), but a judge of the collegiate panel may examine an expert witness after informing the presiding judge thereof (paragraph 2). Moreover, each party may examine an expert

witness after informing the presiding judge thereof: Provided, That the presiding judge may restrict examinations by a party when such examinations are overlapped or irrelevant to the issue or when other necessary situations exist (paragraph 3).

Third, Article 339-3 (Examination of Expert Witness through Video or Other Transmission System) was newly established that if an expert witness has difficulty in appearing before the court because of any difficult and special circumstances or an expert witness resides abroad, the court may examine him or her through a video or other transmission system or Internet-based video conferencing after hearing opinions of the party (paragraph 1). With respect to the examination of expert witnesses under paragraph (1), the regulation of witness examination through video or other transmission system (Article 327-2 (2) and (3)) shall apply mutatis mutandis. Meanwhile, the regulation applies mutatis mutandis to the examination of expert witness (the proviso to Article 340).

Fourth, Article 341 (Entrustment for Expert Testimony), paragraph 3 was newly established that a court may, if deemed necessary, have the person designated by a public agency, school, other organization or a foreign public agency make an explanation (paragraph 2) through video or other transmission system.

2.4 Review

The user of appraisal litigation can be primarily a judge. In practice, designating an expert witness requires the consent of both parties in a matter for a specific object, and both parties (representatives) in a case can also be the secondary users of litigation. In addition, expert evidence made in an intellectual property trial is sometimes required for complex expertise because expert evidence is not only required for technical expertise but also for analysis and judgment that considers intellectual property rights behind technical judgment. In an intellectual property trial, in which a judge has a reasonably high level of dependency on the result of expert evidence, such a demand imposes a high burden on the court.

As mentioned earlier, various problems with the expert evidence system have been pointed out. For the Civil Procedure Act, efforts have been made to solve many problems with the appraisal system through the 2016 revision, although there are still several problems with intellectual property rights. However, the rational operation of the appraisal system is of greater importance in a criminal trial, which requires strict evidence admissibility, than in a civil trial[14]. Nevertheless, the current Criminal Procedure Act does not show any active efforts for improvement to solve many problems with the expert evidence system. Except for expert evidence by an investigation agency, expert evidence by the court's order has a system and purpose which are not significantly different from the expert evidence systems and purposes of criminal and civil trials. Because of this characteristic, the revision of the Civil Procedure Act can be an excellent precedent to improve the expert

evidence system of the Criminal Procedure Act.

However, it is difficult to reflect on unique problems in the field of intellectual property rights in the system improvement of the Criminal Procedure Act, which does not review a specific individual system, because the Criminal Procedure Act should act as a universal norm encompassing expert evidence in various fields. Therefore, if the problem of expert evidence in intellectual property rights can be solved by improving the Criminal Procedure Act, improvement measures considering intellectual property rights can be reviewed.

3. Problems and Improvement Measures

3.1 Issue on the Specifications of an Expert Witness of a Party

The issue in this section is whether both parties (a prosecutor, a defendant, and others) in a case can nominate a specific expert and apply as an expert for expert evidence when the court designates an expert witness[15]. In dubitably, the parties' applications do not constrain the court[16]; however, there is an academic conflict about this issue. The positive theory standpoint is based on the following facts: (1) a party's defense activity should be guaranteed as much as possible in a criminal trial based on the adversarial system; (2) Article 169 of the Criminal Procedure Act only stipulates the qualification of an expert witness and does not mean the court has exclusive authority to designate an expert witness; (3) if an inappropriate expert witness is requested, the court may dismiss it[17]; (4) unlike the Civil Procedure Act, which stipulates only the designation of an expert witness by authority, Article 294 (1) of the Criminal Procedure Act stipulates that an expert witness examination can be requested; and (5) it is necessary to strengthen the principle of court-oriented trials and the principle of oral pleading[18]. The standpoint of positive theory corresponds to the standpoint of the majority theory[19]. In contrast, the negative theory standpoint is based on the facts: (1) Article 169 of the Criminal Procedure Act gives the court the authority to designate an expert witness, and (2) an expert witness is the role of the court's assistant[20]. However, contrary to the opposing theory, it is believed that the positive theory is more reasonable because it can guarantee the defendant's right to defend and prevent arbitrary appraisal conducted by the court[21]. Moreover, if necessary, the court can dismiss the application of an inappropriate expert witness and designate an expert witness by the authority because the court is not bound to a party's application. However, it is not efficient in relying on the interpretation of the theory in practice, and therefore, legislative improvements are needed.

3.2 Issues of the Challenge of an Expert Witness

Unlike the Civil Procedure Act (Article 336), which explicitly recognizes the challenge of an expert witness, the Criminal Procedure Act

does not provide such provisions. Even with an interpretation theory, it is impossible to interpret that the Criminal Procedure Act recognizes the challenge of an expert witness[22]. However, the Criminal Procedure Act stipulates the challenge of court officials and interpreters (Article 25 (1) of the Criminal Procedure Act). In contrast, Article 74 of the Criminal Procedure Act in Germany recognizes the challenge system for an expert witness. In practice, in selecting an expert witness by the court, there is a limit to judging whether an expert is appropriate as an expert witness for a case only by external factors (qualification and others). It is also pointed out that the court's continuous effort and fee burden for the judgment process based on external factors is not relatively reasonable[23]. Therefore, the appointment of an appropriate expert witness has been treated as an important issue in the procedures of Korean civil lawsuits, and it is now mandatory for an expert witness to determine whether they are appropriate as an expert witness for a case by the revision in 2016 (Article 335-2 of the Civil Procedure Act). In the United States, as all links to an expert selected by the court could not be known, selecting an inappropriate expert became a problem and Gates Rubber Company v. Bando American, Inc.[24] was one of the representative cases[25]. Considering this factor, it seems that there is no significant reason not to acknowledge the challenge of an expert witness in the procedures of criminal lawsuits[26] and a procedure to exclude a selected expert witness when a party judges them inappropriately. However, it is necessary to recognize a disagreement with an appraisal method of a designated expert witness as a cause for the challenge of an expert witness rather than limiting the cause of challenge to qualification and conflicts of interest. If so, it is reasonable to determine the time of challenge considering the decision to designate an expert witness and the date of expert evidence.

3.3 Issue of the Method of Expert Witness Examination

When an expert witness designated by the court presents evidence in a trial, the boundary between the court and a party becomes blurred[27]. As such, a party has no choice but to actively participate in an appraisal procedure, which significantly impacts the outcome of a trial. In particular, a court-appointed expert witness has a considerable advantage in terms of fairness. However, paradoxically, there is a concern that a judge can accept an expert's opinion without providing sufficient opportunities for a counterargument by a party because neutrality is secured and credible[28]. Therefore, expert evidence participation of a party is meaningful, and the participation is not intervention in conducting expert evidence. It means participating in the determination of the method and scope of expert evidence, which is a previous stage of conducting expert evidence, through the date of expert evidence in practice and, after an appraisal result is submitted, questioning (examining) an expert witness about the result are procedurally guaranteed.

In the case of the Civil Procedure Act, regulations had been revised to guarantee the statement of a party's opinion on an appraisal result. Concerning examining an expert witness, the method of a witness examination by cross-examination does not apply mutatis mutandis to ease the burden on a party. It follows the ex officio examination in principle, but a party's right to supplementary examination is guaranteed. In the Criminal Procedure Act, the examination of an expert witness is divided into two cases: (1) the case that an expert witness shall be required to explain his or her opinion under Article 171 (4) of the same Act; and (2) the case where a person is examined regarding facts in the past which they come to know under special knowledge, it shall be governed by the provisions of the examination of a witness under Article 179 of the same Act. The latter refers to a witness who states specific facts they learned in the past because he has knowledge and experience. In other words, a witness who states the facts learned through knowledge and experience in the appraisal process they are in the position of a witness, not an expert witness. The Criminal Procedure Act applies different grounds for these two types of expert witness examination. In the former, Article 90 of the Regulation on Criminal Procedure requires expert evidence to apply the provisions of the witness examination to make it possible to examine an expert witness. In the latter case, the provisions of witness examination apply mutatis mutandis under Article 179 of the Criminal Procedure Act. The regulations on witness examination (Criminal Procedure Act, Regulation on Criminal Procedure) allow a party to examine a witness. However, unlike the latter, which has the method of expert witness examination based on the law giving a party the right to examine a witness, the former may not adequately secure the guarantee of a party's right to defend because the provisions of witness examination apply mutatis mutandis under the ground of the Regulation on Criminal Procedure. Therefore, legislative improvements are needed.

3.4 Issue of the Method of Report on Expert Evidence

Article 171 of the Criminal Procedure Act stipulates that an expert witness shall submit the progress or result of expert evidence in writing. Meanwhile, in the Civil Procedure Act, an expert witness states his or her opinion either in writing or orally. Considering that expert evidence corresponds to evidence supplied by expert witnesses, it is questionable whether it is necessary not to allow reporting on an expert evidence result orally, even in the procedures of criminal lawsuits. In the case of expert evidence made by an investigation agency (Article 221 (2) of the Criminal Procedure Act), expert evidence is reported orally, not in writing, and an investigation agency prepares a progress report and result of expert evidence[29]. Unlike a written report, it is challenging to specify specific details in the case of an oral report. However, an oral report may sufficiently achieve the purpose of expert

evidence depending on the case. Therefore, there is room for improvement on the limit of the report method on expert evidence, which is confined to a written report. In addition, like an oral statement of an appraisal result at an investigation agency, a result of expert evidence in the court is also reported orally. However, it does not seem that there is a lack of clarity because the content is clearly recorded, and a judge confirms the content of a statement. If reporting on the result of expert evidence made orally is allowed, it is believed that it is necessary to request an expert witness to submit specific evidence, if necessary, to guarantee the party's right to defend.

3.5 Others

First, it is necessary to balance the system between the similar regulations of the Criminal Procedure Act and the Civil Procedure Act. The Criminal Procedure Act regulates many contents of expert evidence by Regulation on Criminal Procedure. However, in particular, some of the contents of witness examination are prescribed by the laws in the case of civil litigation procedures. Therefore, it is not reasonable to consider similar contents as different ones based on the laws or the regulations depending on the litigation procedures, and it is believed that it is necessary to reorganize the system for this issue.

Second, the Criminal Procedure Act stipulates that a party may be present to examine expert evidence in Article 176, but the content of the provision is not specific. Therefore, to what extent they should participate in the process of expert evidence based on the provision is unclear. In the provision, it is believed necessary to specify the specific contents, including the meaning of participation.

Third, the Criminal Procedure Act stipulates the subject of examination of an expert witness on the premise of "a person based on his or her expertise," but the Civil Procedure Act stipulates the subject as "a person who has knowledge and experience." As the concept of expertise is interpreted as encompassing knowledge and experience, the issue in interpretation between the two has not been found. However, it is necessary to reorganize the fact that the same contents are differently expressed.

Fourth, it is necessary to establish a legal basis for the anonymity of an expert witness. Like the recent case of the Korean Medical Practice Review Authority (KMPRA), the anonymity of an expert who conducts expert evidence is used when an institution conducts expert evidence for fair and effective appraisal conduct. However, this method is not institutionally clearly organized and is treated differently depending on the trial. In the case of the KMPRA, public confidence in the institution was not legally guaranteed, and the institution did not correspond to a public institution which had been a problem. Nevertheless, it is believed necessary to make clear regulations because the anonymity of an expert witness is a matter of conflict between

the value of fair appraisal and the litigant's right to defend.

4. Conclusion

The expert evidence of intellectual property becomes a critical issue of who conducts expert evidence and how expert evidence is conducted because a judge cannot fully perform their duty in the expert evidence of intellectual property compared to expert evidence of other fields. In addition, considering the dual procedure of an investigation and a trial, and the adversarial system, which is challenging to balance between the state and the individual, a criminal trial requires stricter demand on the appraisal system than the demand on the appraisal system in a civil trial. With these factors, practical discussions should be actively made, based on the analyses discussed, to maximize the practical effect of the system improvement.

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