



Collective Management from a Competition Law Perspective

Yee Wah Chin

Evolution and Equilibrium: Copyright this Century

15-16 November 2012

The NZ Centre of International Economic Law

Wellington, New Zealand

Collective Management from a Competition Law Perspective

- Competition law context
- Competition law v. collective management
- CMOs this century?

Competition Law

- Coordinated conduct – cartels
 - Price fixing
 - Allocation of markets
- Unilateral conduct – abuse of dominance
 - Monopoly power
 - Monopsony power
- Mergers/concentrations

Competition Law v. Collective Management

- Collective management
- BMI/ASCAP

Collective Management

- Input - assignments of rights to CMO
- Output - licenses to users
- Distribution - fees to members
- Arrangements w/ other CMOs
- “Almost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theatres, involve a violation of the anti-trust laws.” *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 893 (S.D.N.Y. 1948).

BMI/ASCAP

- Competition law standard
- Legal history

BMI v. CBS, 441 U.S. 1 (1979)

- Despite facial attributes of cartel that would be per se violation, is subject to rule of reason
- Agreement among competitors on fees for blanket license may be permissible if necessary to enable license & if license is new desirable product
- Ancillary restraints in arrangements no more than needed to effectuate purpose
- Individual licenses available

History

■ Consent decrees

- 1941 – ASCAP, BMI
- 1950, 1960, 2001 – ASCAP
- 1966, 1994 – BMI
- Rate court
- 70 years of monitoring

■ Digital Performance Right in Sound Recordings Act of 1995

- Statutory/compulsory license for sound recordings digital public performances – Copyright Office to designate CMO & set rates
- Copyright Royalty Board
- Direct negotiations despite CRB rulings

This Century

- CMOs as necessary evil
- How necessary now?

Necessary Evil

- Balancing of BMI v. CBS
- Ease of access for users v. control by rightholders
- Alternative to compulsory/statutory license

Necessary Now?

- Least competitively restrictive means – which aspects still needed?
 - Global repertoire database
- Technology enable direct licensing/monitoring
 - Spotify
 - iTunes
 - Copyright Clearance Center
- State of economic development



Collective Management from a Competition Law Perspective

Yee Wah Chin
yeewah.chin@vuw.ac.nz
ywchin@alum.mit.edu