



Hot Topics in IP and Competition Policy

Yee Wah Chin

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SNU School of Law & SNU Center for Law & Technology

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Hot Topics in IP & Competition Policy

- Competition law context
- Patents
- Copyrights

Competition Law

- Framework
- General principles
- Application to IP

Framework

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

General Principles

- Antitrust protects competition & consumers, not competitors
- Key factors are impact on
 - Markets
 - Consumers choice
 - Competitive process
- Not panacea for business disputes

Application to IP

- Historical: Inherent conflict between IPR laws granting “monopoly” & antitrust laws prohibiting monopoly
- Current: IPR & antitrust laws are complementary
 - Both encourage innovation, competition & consumer welfare
 - IPR laws do not necessarily confer monopoly, but only right to exclude

Patents

- Hot topics
- Competition policy perspective

Hot Topics

- Patent assertion entities/patent portfolio acquisitions/privateering
- F/RAND
- Hold-up/reverse hold-up
- SSO licensing commitments/SEPs
- Reverse payment settlements
- Exhaustion/first sale
 - Self-replicating technologies

Competition policy perspective

- Existence/source/exercise of market power
- Promoting innovation v. public access
- Long term v. short term
- Dynamic v. static

Copyright

- First sale
 - Software
 - E-books
- Collective management

Collective Management

- Competition law v. collective management
- CMOs in the 21st century

Competition Law v. Collective Management

- Collective management
- BMI/ASCAP

Collective Management

- Characteristics
- Competition law reactions

Characteristics

- Input - assignments of rights to CMO
- Output - licenses to users
- Distribution - fees to members
- Arrangements w/ other CMOs

Competition Law Reactions

- “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).
- “If I have enemies — and I assure you it is a long list — on that list are collecting societies. And I can’t care less. They are monopolists. That is not about protecting the artist, or creator, it is about protection of that system. Perhaps it made sense a long time ago, but it doesn’t make sense at this moment.”
European Commissioner for digital issues Neelie Kroes, September 23, 2012

BMI/ASCAP

- Consent decrees
- BMI v. CBS, 441 U.S. 1 (1979),
competition law standard
- Post-BMI v. CBS

History

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

BMI v. CBS

- 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

Post-BMI v. CBS

- Digital Performance Right in Sound Recordings Act of 1995
 - Statutory/compulsory license for sound recordings digital public performances
 - CMO designated by Copyright Office & rates set Copyright Royalty Board
- Direct negotiations despite CRB rulings

21st 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?

- Current landscape
- Analysis of necessity

Current Landscape

- Technology enables direct licensing/monitoring
 - Spotify
 - iTunes
 - Copyright Clearance Center
 - Pandora

Analysis

- Standards
- Debate

Standards

- Which aspects still needed?
 - Global repertoire database
 - Enforcement
- CMO least restrictive means?

Debate

- Creative competition
- Cultural advocacy
- Cultural diversity
- State of economic development



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Yee Wah Chin
ywchin@ingramllp.com