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음악 라이선싱 분야 저작권법과 공정거래법의
교차 영역에 관한 비교법적연구

*A comparative analysis of the intersection between copyright law
and antitrust issues in music licensing in South Korea and the
United States: focusing on the law, cases and developments*

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ABSTRACT

Ever since the advent of digital music, there have been varying viewpoints as to the usefulness of current music licensing landscape. Across the globe, streaming has drastically changed the way consumers listen and access music and we are consistently exposed to news headlines that reveal negative impacts on songwriters and their future livelihoods stemming from outdated licensing laws. In midst of this complex web of music licensing practice, is the roles of intermediaries, such as music related rights management societies. Calls for proper and efficient management in music copyright have centered around establishing a mechanism to raise the existing level of transparency (or lack thereof) and to enable distribution of royalties that is as real as possible to the creators. In this respect, antitrust law has played an important role to some extent in curbing the inherently monopolistic rights of the intermediaries to ensure that they are held accountable. However, the difficulties in accurately identifying and anticipating the kind of activities that would run counter to the goals of copyright law and antitrust law have posed a significant challenge in effectively protecting the rights of both the creators and to the users in public. In this thesis, a comparative analysis of the kinds of anticompetitive activities undertaken by the music intermediaries have been explored between South Korea and in the United States where the two systems reveal differing music ecosystem but nonetheless continue to face the problem of finding the most equitable balance between the rights-holders and users under the rubric of current copyright and antitrust laws and principles.

keywords : copyright, antitrust, licensing, music, intermediaries, South Korea, United States

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“With digital technology, we have to reinvent and to reimagine our future as artists, but also as consumers of arts. And this is the challenge for the future generations”

- Jean-Michel Jarre, artist, composer, and president of CISAC

CHAPTER 1

INTRODUCTION

1.1 *The Research Context*

The advent of digitalization ushered in a seismic change in the way music is consumed and the concomitant challenge to the very foundation of the traditional legal framework for licensing music. It is no great claim to assert that the initial shock of digital evolution is a thing of the past with consumers increasingly becoming comfortable with the ever-advancing technology.¹ So much so that the speed of technological evolution is now driven by, and intricately connected with, the rise in consumer expectations.² Consumers access music through multiple and varied platforms and devices enabling such access only continues to grow.³ Naturally, more participants and entrants, that is, the stakeholders, have stepped into the music market with varying degree of interests and values. Since then, complications have arisen in the process of finding a solution to strike a fair balance among competing interests under the current music licensing system and the reconciliation of the interests involved has not been an easy task.⁴ Debates have emerged over adjusting and amending the music licensing system. These have been well rehearsed and a number of amendments have been made; bills have been proposed to address such complications.⁵ However, despite the frenzy, publicity, studies and reforms,

¹ David Poole, *Digital Transitions and the Impact of New Technology on the Art*, CPAF Digital Technologies and the Cultural Sector (21 November 2012).

² *Innovation drives consumer expectations*, Warc (16 June 2015), http://www.warc.com/LatestNews/News/Innovation_drives_consumer_expectations.news?ID=34930.

³ United States Copyright Office, *Copyright and the Music Marketplace*, A Report of the Register of Copyrights (February 2015) 12.

⁴ *Id.*

⁵ *Id.*, 134.

it is clear that key players in the music marketplace - from songwriters to music streaming services - continue to decry the lack of unity in every nook and cranny of the music licensing landscape.⁶

As the growth of streaming has now definitely transitioned us from an analog to a digital environment, it is with no great surprise that there is an urgent or even overdue need for an upheaval of out of tune interpretations of laws and policies affecting music licensing.⁷ Despite the explosive consumption of music and the industry's endeavors to keep pace with the changes in which consumers enjoy music through digital distribution platforms that seek to meet consumer expectations, time and again we observe a lack of fair remuneration going back to the artists and record labels. This is ironic because revenues increased by 45.2% reaching US\$2.9 billion over the five-year period up until 2015, growing more than four-fold. No one really knows whether the money is in fact being fairly distributed to the rights-holders.⁸ Therefore, copyright laws and regulations around the collecting societies have been one of the key focuses of studies thus far undertaken to pave the way towards providing fair returns to music creators in the digital age.⁹ In this

⁶ Seung Mo Nam, *International Sensation Psy, Copyright Royalties from the hit Gangnam Style are only..?*, SBS NEWS (Oct. 4, 2012)

http://news.sbs.co.kr/news/endPage.do?news_id=N1001411696; Sujin Kim, *Poor musicians who are getting 1 KRW per music recording played on streaming*, BUSINESS POST (March 3, 2015),

<http://www.businesspost.co.kr/news/articleView.html?idxno=10021>; Maya Kosoff, *Pharell Made Only \$2,700 In Songwriter Royalties From 43 Million Plays of 'Happy' On Pandora*, BUSINESS INSIDER (Dec. 23, 2014), <http://www.businessinsider.com/pharrellmade-only-2700-in-songwriter-royalties-from-43-million-plays-of-happy-on-pandora-2014-12>; David Lowery, *My Song Got Played On Pandora 1 Million Times and All I Got Was \$16.89, Less Than What I Make From a Single T-Shirt Sale!*, TRICHORDIST (June 24, 2013), <http://thetrichordist.com/2013/06/24>.

⁷ IFPI Global Music Report 2016, IFPI Chief Executive Frances Moore said: "After two decades of almost uninterrupted decline, 2015 witnessed key milestones for recorded music: measurable revenue growth globally; consumption of music exploding everywhere; and digital revenues overtaking income from physical formats for the first time. They reflect an industry that has adapted to the digital age and emerged stronger and smarter". <http://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2016>.

⁸ Lohan Presencer CEO, Ministry of Sound, *A different beat: music changes its tune*, Barclays (June 2016), <https://www.barclayscorporate.com/content/dam/corppublic/corporate/Documents/Industry-expertise/the-future-of-media.pdf>.

⁹ There is an abundance of literature on the problems and potentials of collective licensing and copyright societies. See, Copyright Licensing in Music Distribution Reproduction and Public Performance (Brian T. Yeh, Congressional Research Services 7-5700, 2015); Collective Management of Music Copyrights in the Digital Age (Brian R. Day, 18 Tex. Intell. Prop. L.J. 195, 2010); Collective Management of Copyright and Related Rights (Daniel Gervais editor, 2d edition, 2010 Kluwer); Uber-Middleman: Reshaping the Broken Landscape of Music Copyright (Jonathan W. Cardi, 92 Iowa L. Rev. 835-90, 2007); Pavel Tuma, Pitfalls and

respect, the need to reign in the anticompetitive practices of collecting societies and other intermediary entities or government bodies that influence the regulation of such collecting societies has been identified as one of the integral areas of research.¹⁰

Naturally, new modes of music consumption means more opportunities for different and novel ways to conduct businesses. In the music industry context, collecting societies and their collective licensing practices play a particularly crucial role that directly affects the rights of copyright holders and the welfare of the public as listeners.¹¹ To this end, the overriding principles that need to stay at the forefront of our minds are ensuring transparency and competition, both of which preserve the efficiencies of the collecting societies and ultimately help to prevent a stagnant, anticompetitive market that would benefit neither songwriters nor listeners. As in many other countries, the majority of copyright subject matter works, the collective management of music and licensing is undertaken by the collecting societies. The roles played by these collecting societies brings into focus the need for effective management of music licensing and considerations of copyright as well as any potential antitrust issues that may arise as a result of a collecting society's centralized character.¹² While on one hand, the rationale for the monopolistic position of such societies could be justified on the basis of the need to protect, enforce and license rights effectively, there is the inevitable 'tendency of collective administration to evolve into self-serving bureaucracies'¹³ restricting competition as regards to the conditions for the management and licensing of rights for musical works.

Challenges of the EC Directive on the Collective Management of Copyright and Related Rights, 28 European Intellectual Property Review 220 (2006); Ariel Katz, The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights, 1 Journal of Competition Law & Economics 541 (2005).

¹⁰ Paul Goldstein, P. Bernt Hugenholtz, *International Copyright: Principles Law, and Practice*, (Oxford University Press 281 (3rd ed. 2013); Matthew Rimmer, *Intellectual Property and Climate Change: Inventing Clean Technologies*, Edward Elgar Publishing 104 (2011).

¹¹ *Supra* n 3, 150.

¹² Daniel J. Gervais, *Collective Management of Copyright and Related Rights*, 2ed Wolters Kluwer 370 (2010).

¹³ Martin Kretschmer, *The Aims of European Competition Policy towards Copyright Collecting Societies*, Paper for Society for Economic Research on Copyright Issues SERCIAC 2005 Montreal (7-8 July 2005) pp

Subsequently, a debate concerning the tensions between antitrust and copyright licensing in music has surfaced. The traditional tension between antitrust and intellectual property law has been grappled with by many courts, businesses and scholars over the years owing to the seemingly conflicting aims and objectives of the two bodies of law. Whilst the goal of intellectual property law is aimed at rewarding creators and inventors through granting them a limited monopoly, antitrust laws seek to eliminate exclusionary conduct that produces or preserves a monopoly. However, the modern view is that there is a complementary relationship between intellectual property and antitrust law since they both ultimately seek to encourage innovation, competition and consumer welfare.¹⁴ To this end, the licensing of intellectual property has been one of the most significant topics at the intersection of antitrust and intellectual property and the modern view seems to align with the understanding that such a licensing practice will “usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentive for initial research, spur incremental innovation, facilitate diffusion and generate product market competition”.¹⁵ Antitrust law in this respect plays an important role in delineating the contours of monopolies and remedying the effects of anticompetitive motives.¹⁶

The resulting tension between the two bodies of law is even more acute in music copyright licensing, and has been a popular subject matter for debate since the advent of digital technology. However, unlike in other areas of intellectual property rights, a specific focus on the intersection of music copyright law and antitrust law has been

¹⁴ *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576, 14 U.S.P.Q.2d (BNA) 1034 1037 (Fed. Cir. 1990); See also, the United States Department of Justice in 2007 on *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, Federal Trade Commission (2003) 2: “Antitrust and intellectual property are properly perceived as complementary bodies of law that work together to bring innovation to consumers: antitrust laws protect robust competition in the marketplace, while intellectual property laws protect the ability to earn a return on the investments necessary to innovate.”

¹⁵ Recital 5, Technology Transfer Block Exemption Regulation (TTBER) Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

¹⁶ Thomas G. Krattenmaker, Robert H. Lande, Steven C. Salop, *MONOPOLY POWER AND MARKET POWER IN ANTITRUST LAW*, Airlie House Conference on the Antitrust Alternative, Copyright 1987 by the Georgetown Law Journal Association.

lacking.¹⁷ As the value of the digital contents increase in parallel with equally diversifying use of music, more dialogue in this space is critical. By examining the procompetitive effects against the anticompetitive effects of the music licensing practice, a more consistent, transparent and fair copyright law can be established. We know that a well-designed music licensing system that is capable of withstanding a robust marketplace serves to benefit artists, intermediaries and public at large and fulfills one of the fundamental principles of the constitutional system.¹⁸

1.2 *The Research Questions and Methodology*

A comparative method will be adopted in this research to help better understand the national laws of South Korea and the United States including the resistance of traditions and the improvements made to renovate the fossilized approach of the domestic laws, the legal doctrines and interpretations by the courts thus far. This research examines the topic of the intersection of copyright law and antitrust law as it relates to music licensing, approaching them from a comparative perspective. It looks at the way controversial issues of music copyright law and policy are being handled in Korea and in the U.S. through an anticompetitive lens to identify similarities and differences and to analyze their causes and their implications in the respective domestic market. As the ability to consume music arises exponentially from a series of technological developments, the current legal framework in both countries is being highly criticized for failing to meet this demand. The research takes a particular interest in the actors involved in music copyright law, critically, the intermediaries and antitrust practices by such actors. The aim is to provide an insight into how the dynamic of intermediary participation influences substantive outcomes and pave the way for the potential design of more rational decision-making processes in which music copyright law and policy are shaped and enforced.

¹⁷ Herbert Hovenkamp, Mark Janis, Mark Lemley, and Christopher R. Leslie, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law*, Aspen Publishers Online, (2013 Supplement) 24-102; Richard A. Posner, "Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property," 4 *John Marshall Review of Intellectual Property Law* 325 (2004).

¹⁸ *Supra* n 3.

Following are the key research questions to be explored in this thesis:

- What are the differences and similarities between the Korean and the United States legal framework as it relates to the music licensing system?
- What kinds of anticompetitive practices in the music industry can be identified that appear to run counter to the spirit of copyright and antitrust law in Korea and the United States?
- How has each country addressed the issues of anticompetitive practices in music licensing and how have the scope and limitations of the current legal framework influence in shaping such responses in the two countries?
- How can legislators and courts in Korea make use of the United States law in the field of music licensing and their antitrust law analysis to actively monitor and police anticompetitive practices of key domestic music licensing actors?

In answering the above questions firstly in Chapter 2, this research examines the historical developments in music licensing that led to the current copyright law governing music licensing in South Korea. Among the themes to be covered in this chapter includes the protection of musical works under the Copyright Act and a brief overview of the exceptions and limitations of such legal protection; the relevant institutions' responsibility for copyright enforcement; the roles of intermediaries such as collecting societies and how they have changed over the years to adapt to the digital age; and the position of consumers. Chapter 3 examines the legal framework which sets forth the intersection of unfair competition law and copyright law in South Korea and their effects on music licensing practice. Additionally, it discusses the types of anticompetitive practices within the area of music licensing in Korea through past and current case studies. Chapter 4 examines the U.S. counterpart to music licensing and discusses the decisions that touch on the matter of antitrust and copyright intersection and such decisions' potential future effects on the music licensing landscape through various calls for reform. Chapter 5 sets forth the key findings and specifically sets forth answers and reflections on the research questions mentioned above. Chapter 6 concludes by recommending further study into the various reforms and proposals currently put forward

as benchmarks by the legislature, the industry and academics. It explains that in an era where there is a continuous emergence of diversified music distribution channels, more authoritative guidelines and analysis are needed, but also an availability of corresponding diversified licensing models for the artists and users and an accurate data of musical works remain central for both countries, coupled with a combined effort by the government, the courts and the industry as a vehicle in any reformative actions in the future.

CHAPTER 2

DEVELOPMENT OF COPYRIGHT PROTECTION FOR MUSIC AND THE LICENSING REGIME UNDER KOREAN COPYRIGHT LAW

2.1 *The Scope of Protection of Music and its Rationale*

In any discussion relating to music licensing, an understanding of the legal foundation of copyright protection of music and the subsequent regulations that took place over the years to cater for music copyright in a changing landscape is imperative. In Korea, like most countries, rights of authors of musical works are constitutionally recognized.¹⁹ Article 22 of the Constitution as amended in 1987 states that all citizens shall enjoy freedom of learning and the arts. The rights of authors, inventors, scientists, engineers and artists shall be protected by Act.²⁰ While the Korea Copyright Act (No. 9625, April 22, 2009) does not clarify the definition of copyright in general, it states the purpose of the law in Article 1: to protect the rights of authors and the neighboring rights and to promote fair use of works in order to contribute to the improvement and development of the culture and related industries.²¹ Copyright registration is not mandatory in Korea, although it provides certain procedural benefits in case of a dispute or infringement.²²

¹⁹ Constitution of the Republic of South Korea (promulgated on July 17, 1948, and last revised on October 29, 1987).

²⁰ *Id.* Article 2.

²¹ Korea Copyright Act [Enforced on July 23, 2009] [Law No. 9625, April 22, 2009, amendment], Article 1.

²² Korea Copyright Commission, <http://www.copyright.or.kr/eng/service/registration.do>.

The protection duration is of a period of fifty years after the death of an author unless otherwise provided in the subsection of Article 39 of the Copyright Act.²³ Moreover, among the wide range of subject matters it protects, the Korean Copyright Act specifically protects ‘musical works’.²⁴

‘Musical works’ are protected under Article 4(1)(2) of the Copyright Act.²⁵ The concept of a dichotomy between expression and idea is echoed throughout the definition section of the Act.²⁶ As such, only the original expression of an idea can be copyrighted rather than the idea itself. Creative sound that is an expression of human thoughts and emotions is copyrightable, irrespective of whether the expression of such is derived from a human or an instrument. In this respect, the Act has no fixation or formality requirements for an author to attain copyright protection.²⁷ In saying that however, a fixation requirement is essential in determining whether or not a reproduction of ‘phonogram’ is made and when the protection period of neighboring rights commences as stipulated in Article 86(2) of the Act.²⁸ Nonetheless, there is no other requirement within the Act that mandates fixation of music works such as in scripts or in phonograms. Because of this however, there may be difficulties for an author to prove ownership of his or her work under the Act.²⁹

In terms of rights related to musical works, there are two types. One is the economic or sometimes referred to as the ‘property’ right of authors, and the other is the ‘moral’

²³ above n 21. Article 39.

²⁴ *Id.* Article 4(1)(2).

²⁵ *Id.*

²⁶ John Shepherd, Kyle Devine (eds.) *The Routledge Reader on the Sociology of Music*, Routledge (2015) Chapter 27 by Lee Marshall: “Copyright protects expressions of ideas, not the ideas themselves. That someone had the idea to write a song about, say, surfing does not mean that someone else cannot write a song on the same topic; what it does mean is that they cannot use the same words, or the same chords or melody to express that idea. In theories of copyright, this is known as the idea/expression dichotomy. The idea/expression dichotomy exists to ensure that the flow of ideas in society is not restricted by copyright.”

²⁷ Park, Kwang Dong, *Laws on the Use of Musical Works: A Comprehensive Analysis and Proposal for a New Scheme*, Korea Legislation Research Institute, 2011.

²⁸ *Supra* n 21. Article 86(2).

²⁹ *Supra* n 22.

rights of authors, which are the ancillary rights related to copyright.³⁰ Authors in the music context would normally mean the lyricists, composers and arrangers. Economic rights of such authors as recognized by the Act consist of the following: (i) rights of reproduction³¹ (e.g. making any copy of an author's work such as using it in a movie, as a sample, or publishing it as sheet music or posting copyrighted music or videos on YouTube, or making a copy of a newly purchased CD or downloaded content for someone else, all fall within the ambit of reproduction right); (ii) public performance³² (e.g. performance of an author's song on the radio, in clubs or restaurants, on television, or any other venues where the performance would be deemed 'public'); (iii) transmission³³ (e.g. via the internet such as internet radio stations, a satellite or cable TV); (iv) exhibition (this is not particularly applicable to music); (v) distribution³⁴ (e.g. the right that allows an author to decide who may sell copies of his or her work); (vi) rental³⁵ (e.g. lending copies or phonorecords of the work); (vii) production of derivative work³⁶ (e.g. creation of a parody song or adaptations of the original work); and (viii) publication. Moral rights, on the other hand, include the right to (i) disclose his/her work publicly, (ii) indicate his/her real name or second name on the original or reproduction of his/her work, or on the medium of publication by which his/her work is made public, and (iii) maintain the integrity of the content, form and title of his/her work.³⁷ Under the Copyright Act, moral rights cannot be waived or assigned. The aforementioned acts can be restricted by the rights holder.

The other type of ancillary rights to copyright are the neighboring rights and in the music context they protect the rights of performers (e.g. singers), music record producers and broadcasting service providers. The neighboring rights of performers are the (i) right to indicate name, (ii) right to maintain identity, (iii) right of reproduction (i.e. right to

³⁰ 2013 Annual Report on Copyright in Korea, 24.

³¹ *Supra* n 21, article 22.

³² *Id.* Article 3.

³³ *Id.* Article 7 ("Public transmission"), Article 10 ("Interactive transmission"), Article 11 ("Digital sound transmission").

³⁴ *Id.* Article 23.

³⁵ *Id.* Article 21.

³⁶ *Id.* Article 22.

³⁷ *Id.* Articles 10, 16 to 22.

reproduce their performances), (iv) right of distribution, (v) right of lease, (vi) right to perform, (vii) right to broadcast (i.e. here the broadcasting means the transmission of sound and visual images by wire or wireless communication intended for direct reception by the public, and does not include mere amplification of sound within the same uninterrupted area, and broadcasting may either be live or recorded), and (viii) right to transmit. For the music record producers, the neighboring rights they hold are the (i) right of reproduction, (ii) right of distribution, (iii) right of lease, and (iv) right to transmit.³⁸ With respect to broadcasting service providers, they have the neighboring rights of (i) reproduction, (ii) simultaneous relay and (iii) performance. In Articles 23 and 36 and under Article 101 of the Act, the limitations and exceptions to the rights granted to the copyright holders such as fair use are set out.³⁹ With respect to the limitation of a copyright, which is an exclusive right, some rights are restricted for the purpose of cultural advancement or public interest in accordance with applicable laws.⁴⁰ In Korea, to provide the legal basis for the limitations on copyright regarding general copyrighted works, there are 14 provisions pertaining to the reproduction for judicial proceedings, use for the purpose of school education, reproduction for private use, etc.⁴¹ The following table is a summary of the rights of music copyright holders:

Table 1: Summary of rights of copyright owners in music

Category	Author	Performer	Sound Record Producer	Broadcasters	Explanation
Copyright holder	Lyricist, Composer, Arranger	Singer, Performer	Producer, Agency	Broadcasting station	
Rights	Reproduction	Reproduction	Reproduction	Reproduction	Right to reproduce (CD, karaoke etc)
	Distribution	Distribution	Distribution		Assignment

³⁸ *Id.* Chapter 3.

³⁹ *Id.* Articles 23, 26 and 101.

⁴⁰ *Id.*. SUBSECTION 2. LIMITATIONS ON AUTHOR'S PROPERTY RIGHTS, Articles 23 – 38.

⁴¹ *Id.*

					or leasing right
	Lease	Lease	Lease		Leasing right
	Transmission	Transmission	Transmission		Streaming and downloading
	Public performance	Public performance		Public performance	Performance, recording, broadcasting play, screening, acting
	Broadcasting	Broadcasting		Right of simultaneous broadcasting	Right to broadcast
	-	Broadcasting right to compensation	Broadcasting right to compensation		Compensation as per the broadcast
	Digital transmission	Digital transmission	Digital transmission		Compensation as per the digital transmission
	Display				
	Derivative Right				Remake, right to arrangement
	-	Commercial purpose performance compensation right	Commercial purpose performance compensation right		Compensation as per performance
	Right of publication				Right to disclose
	The right to indicate author's name				Must identify the author
	The right to preserve the integrity				Adaptation, parody etc.

From an institutional point of view, the Ministry of Culture, Sports and Tourism (“MCST”) is the primary institution in charge of copyright-related issues in Korea. There

are four divisions that are dedicated to enforcing copyright-related issues: Copyright Policy Division, Copyright Industry, Copyright Protection and Culture and Trade Team. There are other institutions such as the Korean Copyright Commission, the Presidential Council on IP and the Copyright Protection Center.

2.2 *Music Licensing System*

2.2.1 *Characteristics of Music*

It is worth first noting here the special characteristics of music subject matter and how it warrants separate attention when examining the structure of the music licensing system from a copyright law perspective. According to the work conducted by the Korea Legislation Research Institute entitled '*Laws on the use of Musical Works: a Comprehensive Analysis and Proposal for New Scheme*',⁴² there are four features of music that need to be borne in mind when analyzing music copyright. The first is that music is an intangible form of expression which affects the listener through hearing and it has an inconsistent cause and effect relationship to things. In other words, the musical sound component computes and structures elements and qualities of sound to generate intangible but affective-effective energy that affects us as human beings.⁴³ Secondly, that an instant availability of any kind of music immediately has an impact on human productivity, social mentality and understanding of one's self. It is a medium made up of sound and silence that can be perceived as an artistic form and/or cultural activity. Needless to say, music plays a vital part of people's way of life.⁴⁴ Thirdly, the lack of means to prevent unauthorized use of music other than through legal mechanisms.⁴⁵ Fourthly, where an unauthorized use is detected, because there is a lack of recordation, it

⁴² *Supra* n 27.

⁴³ *Id.*

⁴⁴ See L.C. Edwards, K.M. Bayless, M.E. Ramsey, *Four Important Reasons for Including Music in the Classroom*, Pearson Allyn Bacon Prentice Hall (2010).

⁴⁵ *Supra* n 27.

is difficult or even impossible, to seek remedy after the fact.⁴⁶ Additionally, when it comes to the types of use of music the following characteristics can be identified:

- 1) The ability to use a large volume of works continuously at once;
- 2) There are various means of use such as performance, screening, recording, broadcasting, publishing and so forth;
- 3) The use is available worldwide;
- 4) The users (i.e. listeners) wield substantial power and influence and therefore virtually anyone can become a user;
- 5) The granting of permission to use musical works to each and every listener is impractical and by the same token, to search and track down every author of musical works by the users is difficult and extremely time-consuming; and
- 6) The ways in which users access and use music constantly varies as the digitalization of musical works and the advancement of networks change the ways in which music can be consumed.⁴⁷

With these factors in mind, it is now appropriate to discuss the driving force behind the licensing of such musical works. It has been emphasized that the licensing of copyrighted works is the most important contractual and legal tool for copyright holders' economic interests.⁴⁸ Copyright is about the private authority of copyrighted works, and exclusive rights are thereby granted to the copyright owners. Consequently the copyright owner herself must exercise her exclusive right and the user must directly seek permission to use such copyrighted work from the copyright owner and pay any due consideration for that use.⁴⁹ However, in the modern age, the use of copyright works is becoming more

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Seung-Kyoon, Kye, "The Changing of Creation Environment and Some Issues of Authorization to Exploit Works of Korean Copyright Act." *Korea Association for Informedia Law*, Vol. 13 No. 2 (2009) p. 41; see also, Bernard Marr, *Perspectives on Intellectual Capital*, Routledge (2005) pg 131: "By permitting the intellectual capital holder to set out the terms and conditions under which the user is to use and deal with the intellectual capital, licenses provide a flexible means through which to disseminate intellectual capital, while protecting the economic interests of the holder"; *Copyright Policy, Creativity, And Innovation In The Digital Economy*, The Department of Commerce Internet Policy Task (July 2013) 4,

⁴⁹ Jeong, Seong-hee & Kim, Kyungsuk, "A study on improvement of copyright license system for users.," *The Journal of Cultural Policy*, Vol.29 No.1 (2015).

diverse with various music distribution channels coming into the market making it impractical for the individual copyright owner to grant permission to each and every user around the world as well as monitoring and enforcing her right. As we have seen before, this rings especially true for musical works.⁵⁰

2.2.2 *The Scope of Copyright Management Services*

In many countries, copyright collective management is employed to collectively manage, that is, to collect and distribute royalties on behalf of copyright owners from the use of copyrighted works.⁵¹ For this reason, it is vital that the copyright collective management organizations (hereinafter referred to as ‘CMO’) operate fairly and efficiently so that the interests of copyright holders as well as users are considered equally.⁵² In Korea, the 1986 Copyright Act has been amended by the 78th (permission to entrust copyright), 79th (supervision) and 80th amendments. Provisions relating to the ‘permission to entrust’ and ‘copyright cancellation of permission’ have respectively been inserted which formally enshrine the collective management system in the current Copyright Act.⁵³

Chapter 7 sets forth provisions with respect to ‘copyright management services’ covering the copyright trust services as well as the copyright agency (or brokerage) services.⁵⁴ Pursuant to Article 2(26) of the Act, the definition of “copyright trust services” means a line of business in which one holds in trust and continuously manages the rights on behalf of the persons who hold the rights of owners of author’s property rights, publication rights, neighboring rights, or rights of database producers, and shall include a general agent concerning exploitation of works.⁵⁵ “Copyright agency or brokerage

⁵⁰ Ivan Pitt, *Direct Licensing and the Music Industry*, Springer International Publishing 119 (2015); see *The Importance of Collective Management*, International Confederation of Societies of Authors and Composers, 2.

⁵¹ Darren QxBean, Yuna Lee, Royalties? Not Joseon Dynasty Kings - A Comparative Analysis of Copyright and Music Licensing Groups in the United States and Korea, *Journal of Korean Law*, Vol. 13 No. 1 (2014) 69-137.

⁵² *Korea Copyright Committee Special Topic*, Asia Patent Attorneys Association (APAA), 2014.

⁵³ *Supra* n 21.

⁵⁴ *Id.* Chapter 7.

⁵⁵ *Id.* Article 2(26).

services” shall mean a line of business in which one acts as an agent or a broker on behalf of the persons who hold the rights of owners of author’s property rights, publication rights, neighboring rights, or rights of database producers with regard to the exploitation of the rights.⁵⁶ In other words, there is no transfer of rights. The difference between the two services is worth noting here as it has important repercussions. The following tables depict the differences between the two services and the current copyright management organizations operating in Korea:

Table 2: The Difference between the two Copyright Management Services⁵⁷

Copyright Trust Management Services	Copyright Brokerage Services
Right to undertake continued management of copyrighted works and managing in a blanket manner the use of the copyrighted works of those copyright-holders who hold IP rights, exclusive publishing rights, publishing rights, neighboring rights or database producing rights. By being entrusted with the copyright of the copyright holders, grant use of the copyright works and collect royalties and after taking off administrative fees, distribute the rest to the copyright holders.	On behalf of the right holder of IP, exclusive publishing, owner of publication rights and neighboring rights, or database publishing rights, undertake mediation or agency conduct of the rights and the use of such rights. Agency or brokerage functions as an intermediary in the use of the copyrighted works and other contractual performance manages the relationship between the copyright holder and the user. Tasks of working as an agent to the copyright holder; allows the use of the works and receives the consideration and passes it on to the copyright holder.
Approval required from the MCST	Declaration/Notification to the MCST

As explained by Phillip Louis Landolt, ‘a copyright trust service is the equivalent to the majority of copyright management organizations, that is, it is about the exercise of

⁵⁶ *Id.* Article 27.

⁵⁷ *Supra* n 49.

copyright or neighboring rights by the rightsholders themselves organized into a society'.⁵⁸ Accordingly, stricter regulations apply to trust services. In Korea, a permit-based system with an *ex ante* regulatory process is adopted, which means that a CMO (for the purpose of this thesis CMO shall have the meaning of an organization undertaking copyright trust services) must receive government approval for its operations.⁵⁹ However, copyright management agencies have only to report their activities to the Ministry of Culture, Sports and Tourism.⁶⁰ This is reflected in Article 105 of the Act ("Permit, Etc. for Copyright Management Services") which stipulates that, "(1) Any person who intends to engage in copyright trust services shall obtain a permit from the Minister of Culture, Sports and Tourism as prescribed by Presidential Decree, and any person who intends to engage in copyright agency or brokerage services shall report to the Minister of Culture, Sports and Tourism as prescribed by Presidential Decree."⁶¹ Moreover, the government's control over CMOs and copyright agencies extends to requiring reports on their activities and failure to provide such reports can lead to suspension of their activities or, in an extreme case, the government approval could be revoked.⁶² The Copyright Act designates the Korea Copyright Commission ("KCC") as a mediation agency.⁶³ However, the results of mediation are enforceable only with both parties' consent as to such results.

The rationale behind the strict regulations for CMOs is self-explanatory. As the significant rights are effectively all assigned to a CMO, more pedantic rules attach to the granting of trust management services. Under the trust relationship, the copyright holder merely retains an ownership of legal title, effectively assigning all of his or her rights to the CMO, and is deprived of freely exercising rights under its copyrighted work.⁶⁴ From both the copyright holder and user perspectives, it provides a degree of assurance by

⁵⁸ Phillip Louis Landolt, *Collective Management of Copyright and Related Rights*, Kluwer Law International 407 (2006).

⁵⁹ *Id.*

⁶⁰ *Supra* n 21, Article 105.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* Article 105(6).

⁶⁴ *Supra* n 51.

enabling an environment that allows the copyright holders to entrust their rights and for the users to license in the belief that the copyrighted works are set at a reasonable price.⁶⁵ Additionally, copyright owners, as they are free from managing his or her copyrighted works, can focus on generating more creative works and avoid complicated legal issues that arise from the management of use of copyrighted works.⁶⁶ This in turn leads to an increase in the use of such copyrighted works and, because a collective organization is doing this on the copyright owners' behalf, there is a higher chance of confirming a favorable position when executing the terms of use agreement.⁶⁷ In other words, the copyright holders do not have to individually exercise their copyrighted works and can entrust their rights to a CRO for management thereby reducing the risk of compromising their exclusive rights and respective benefits more efficiently.

Due to much stricter requirements for engaging in copyright trust services, there are only thirteen copyright management organizations (only seven of the CMOs solely undertake trust services management) that undertake copyright trust services in Korea compared to 748 agency or brokerage services.⁶⁸ The policy implemented by the Korean government was to allow only one CMO for copyright holders per field, thereby effectively naturally rendering each CMO with a substantial, monopolistic position. The table below depicts the three music-related CMOs in Korea and their major areas of business.

Table 3: The List of Current Music Copyright Management Organizations in Korea

Name of the body	Operation Date	Types of Copyright Trust Services Management	
KOMCA (music)	February 23, 1988	Trust	Performance
		Services	Reproduction
			Broadcasting including webcasting

⁶⁵ *Korean Music Industry White Paper 2014*, Ministry of Culture, Sports and Tourism and the Korea Creative Content Agency, 132.

⁶⁶ *Supra* n 49.

⁶⁷ *Id.*

⁶⁸ *2015 Yearbook Copyright Statistics*, Korea Copyright Commission, Vol. 4 No. 5 (2015).

			Transmission
			Foreign deposit usage fee and CMO deposit usage fee
Federation of Korean Music Performers (music performers' neighboring rights collective management)	November 14, 2000	Trust Services	Reproduction/distribution
			Performance
			Broadcasting
			Transmission
			Other usage
Recording Industry Association of Korea	March 17, 2003	Trust Services	Reproduction/Distribution
			Transmission
The Korean Society of Composers, Authors and Publishers	September 2014	Trust Services	Performance
			Reproduction
			Broadcasting including webcasting
			Transmission

According to the Korea Copyright Commission's report of 2015, the music royalty collection took up 75% of the entire copyright collection reaching approximately 1.3 billion Korean won in total.⁶⁹

2.2.3 Other Legislation Affecting Copyright Management Organizations

As seen above, the Copyright Act provides assistance in analyzing the question of whether a particular use of the copyrighted works by a user requires permission from the copyright holders. When a CMO manages the copyright works entrusted by the copyright

⁶⁹ *Id.*

holders, the CMO must ensure that it is acting in compliance with the relevant Trust Act.⁷⁰ Furthermore, the relationship governing the copyright holders and a CMO is based on a Trust Management Agreement and the relationship between users and CMO on a Terms of Use Agreement. Principles of civil law must come into play to ensure there is no breach of the contractual terms.⁷¹ Moreover, owing to the monopolistic position of the CMOs and for the benefit of the majority at large, the terms and conditions of such agreements must be fair and reasonable in accordance with the Regulations of Standardized Contracts Act.⁷² For all these reasons, the CMO system of trust management services mandates approval by the MCST regarding the procedures for setting the collection and distribution of copyright works, the royalty and administrative fees prior to the operation of a CMO's trust services. Brief explanations of other relevant legislation affecting the operation of CMOs are provided as follows:

a) Trust Act

The Korean Trust Act⁷³ defines the trust management as that the organization managing a copyrighted work entrusted by the copyright holder, on his or her behalf by virtue of a trust management agreement to achieve efficient management of copyrighted works and to protect and enhance the vested rights of the copyright holders.

b) Civil Act

Pursuant to Article 32 (Incorporation of Non-profit-making Juristic Person and Permission thereof) of the Civil Act of Korea, a CMO is an association or foundation relating to science, religion, charity, art, social intercourse, or otherwise relating to enterprises not engaged for profit or gain, which may be formed as a juristic person subject to the permission of the competent authorities.⁷⁴ Hence as a juristic person, it is eligible to become a party in the civil proceedings and can claim for infringement of the

⁷⁰ Trust Act of 2011 (Act No. 10924 promulgated on July 25, 2011).

⁷¹ Sang Hee Lee, The Study of Copyright Collective Management Organizations -With a Focus on the Korean System, *SNU LAW & TECHNOLOGY*, Vol. 6 No. 2 (2010) 52-71.

⁷² *Supra* n 49. *Regulations of Standardized Contracts Act* (Act No. 8863 of February 29, 2008, as amended by another Act February 29, 2008).

⁷³ *Supra* n 70.

⁷⁴ *Civil Act of Korea of 1958* (Act No. 471 of February 22, 1958).

copyright on behalf of the copyright owner.

c) Regulations of Standardized Contracts Act

The primary purpose of the Regulations of Standardized Contracts Act in Korea is to prevent businesses from engaging in fraud or unfair practices by taking advantage of their superior information resources and bargaining position.⁷⁵ This Act regulates standard form contracts and aims to ensure fairness of the contract in order to protect consumers. As the trust agreement is drafted with a view to entering into an agreement with multiple individuals or entities and is almost always readily available, the terms and conditions must be in compliance with the core principles of the Regulations of Standardized Contracts Act.⁷⁶

2.2.4 *Rate-Setting Process*

a) Process

With respect to the royalty rate-setting, Article 105(5) states that the rate and the amount as prescribed under paragraph (4) and the rate and amount of royalties that copyright management service providers may collect from users shall be determined by the copyright management service providers, subject to the approval of the MCST, provided that this shall not apply to a person who has reported as a copyright agent or broker.⁷⁷ Fees and royalties charged by a CMO for copyrighted works must be put before MCST for deliberation and approval.⁷⁸ CMOs can internally prepare an amendment to their music levy rates and have such amendment approved by the MCST.⁷⁹

The approval process is not an easy task. In order to make a request for changes in a CMO's music levy regulations, such a request must be in a written form and submitted to

⁷⁵ *Regulations of Standardized Contracts Act* (Act No. 8863 of February 29, 2008, as amended by another Act February 29, 2008).

⁷⁶ *Supra* n 49, 253.

⁷⁷ *Supra* n 21, Article 105(5).

⁷⁸ *Id.*

⁷⁹ Choi, Jinwon, "Development of Music Industry and looking back on the approval-based music levy regulations." *Korea Association for Informedia Law*, Vol. 16, No.3 (2013) 36.

the MCST.⁸⁰ The MCST then publishes such proposed changes on its website for fourteen days to gather stakeholders' opinions.⁸¹ Under subsection (6) of Article 105, in the case of the approval as provided under paragraph (5), the MCST shall ask for deliberation by the Korea Copyright Commission as prescribed under Article 112, and it may set the period for the approval procedure or may approve the application after correcting the contents thereof, if necessary. If a request by the MCST is made to the KCC for deliberation, then the Commission must deliberate for two months and then notify their decision to the MCST.⁸² The MCST will then again examine the amendment(s) in light of the KCC's decision to determine whether to proceed with approval or not. This process can take years. Accordingly, the provisions governing the collective administration establishment as well as the rate-setting process shows that there is a strong *ex ante* impact assessment policy and regulations embedded in the Act.⁸³ Thus, when a new music platform is introduced or other changes occur in the copyright ecosystem a new adjustment would accordingly be required.⁸⁴

2.2.5 *Collective Management Organizations for Musical Works: KOMCA and KOSCAP*

a) Breaking free from the monopolistic structure of CMO

In 2014, the government introduced a second non-profit copyright collective for musical works, the Korean Society of Composers, Authors and Publishers (“KOSCAP”), to sit alongside the existing Korea Music Copyright Association (“KOMCA”).⁸⁵ In the early days of the collective management system, copyright related activities were low in Korea and therefore the one-field-one-organization policy seemed to be an appropriate

⁸⁰ *Id.*

⁸¹ *Enforcement Decree of the Copyright Act* (Enforced on February 1, 2010), Article 49..

⁸² *Id.*

⁸³ Tae-Hee Hwang, “Applying competition law against the abusive blanket licensing practices of the management association of copyright.” *Ajou University Law Institute, Vol. 9 No. 4* (2016) p.190

⁸⁴ *Id.*

⁸⁵ “음악 저작권 시장 독점 깨는데 9년 걸렸어요”. Oct 15, 2014, <http://www.pdjournal.com/news/articleView.html?idxno=53459>

judgment call.⁸⁶ However, as seen above, the strict regulations surrounding the copyright trust services brought about severe monopolistic power from KOMCA which stimulated much debate on the serious decline of transparency in management and degradation of service quality over the years.⁸⁷

b) KOMCA

By way of background, KOMCA, established in 1964, is one of the earliest CMOs of musical works created in Asia for the purpose of protecting the rights and interests of music copyright holders.⁸⁸ KOMCA officially commenced operations of copyright trust services on 23 February 1988 after the enactment of the amended Copyright Act of 1987.⁸⁹ Since then, KOMCA has managed various rights of musical works such as the right of public performance the right of broadcasting, the right of interactive transmission and the right of reproduction. At the time, the music copyright royalties were insignificant and KOMCA was thought of more as a music creators' fraternal society.⁹⁰ It was not until the 1980s, after it received permission to undertake trust management services, that disputes relating to music copyright royalties started to surface.

Prior to KOSCAP, as the sole CMO for music copyright collecting, the court recognized that KOMCA holds a 97% market share and thus holds a monopoly.⁹¹ The method which the KOMCA collective management of copyrighted works adopts is a blanket licensing scheme whereby licensees generally may make unlimited uses of all rights granted in all the works in a collective catalogue for a one-off fee.⁹² Hence, irrespective of the actual usage of the copyrighted works, copyright royalty fees are usually based on

⁸⁶ above n 79.

⁸⁷ 라디오로 음악 듣는데 이용자에게 돈을 내라고? October 30, 2014, <http://opennet.or.kr/7720>; “영화 제작시 ‘특약’ 없었다면 음악 공연권료 책임 없어” June 3, 2013,

<http://www.etnews.com/201306030550>; 삼성 ‘밀크’ 파동...시민단체 ‘음저협 제소 검토” 공정위에 “음저협 음원계약 해지는 저작권 남용” 주장 October 30, 2014;

http://news.inews24.com/php/news_view.php?g_menu=023110&g_serial=859882

⁸⁸ above n 58, p. 401

⁸⁹ Id..

⁹⁰ above n 65, p. 132

⁹¹ High Court Decision No. 2011nu23025 held on July 5, 2012

⁹² above n 83.

a fixed percentage of total revenues received during the period covered by the relevant license. In other words, blanket licensing gives the user access to the entire catalogue of the rights society in a single transaction.⁹³ As a result, transactional costs are reduced, rendering high efficiency. It is also a convenient method for the copyright owners as the costs of getting his or her compositions to the users are reduced and the problem of policing for infringement is also reduced.⁹⁴ However, as KOMCA does not provide options of licensing to its members other than the blanket-based license, the en bloc pricing and the lack of flexibility have caused much criticism and drawn complaints for lack of transparency and fairness.

The ongoing criticism KOMCA attracted from 2006 to 2012 frequently made KOMCA subject to a national audit for its unfair practices regarding royalty distribution and fairness.⁹⁵ Arguments have been raised by experts demonstrating the harmful effects of sustaining a monopolistic CMO scheme.⁹⁶ Moreover, the lack of choice in the licensing scheme did not satisfactorily meet the quantitative growth of the music industry due to ever-advancing technologies which continue to introduce different models for music consumption.⁹⁷ Even though there is continuous change in the way that music is perceived, valued and used, the seemingly stagnant practices adopted by KOMCA prompted the government to introduce a second CMO for musical works.⁹⁸ Nonetheless, the number of KOMCA's members broke the 20,000 mark in 2016 with 2,090,000 songs

⁹³ Collecting Societies Handbook, *KOMCA – Korean Music Copyright Association, Type of Licenses*, WIPO (2014)

⁹⁴ above n 83, p. 191

⁹⁵ above n 65, p. 144

⁹⁶ Id.. See also, John McLellan, "Development of Licensing Practice in Asia", *The Legal Update for Entertainment & Technology - IAEL* (February 15, 2016): "KOMCA created much controversy when a tension between a powerful group of aggregators and the industry which resulted the aggregators artificially depressing the value of music by price-fixing – all you can eat models for ridiculously low prices. The situation went so far as to prompt government investigate and forming a task force to hear submissions which resulted in a move to mandate by law minimum prices for the consumption of music which has pleased neither side."

⁹⁷ *Korean Music Industry White Paper 2015*, Ministry of Culture, Sports and Tourism and the Korea Creative Content Agency (2015)

⁹⁸ See, Hae Wan Lee, "The Problems of Trust based Collective Copyright Management System and Legislative Alternative", *Lawyers Association Journal*, Vol.59. No.4 (2010); Hae Wan Lee, "The Current System of Collective Administration of Copyright and Its Ideal Path to the Future." *Korea Association for Informedia Law*, Vol. 8 No. 1 (2004);.

under KOMCA's management. Despite the entrance of KOSCAP, the second CMO in this field that was established in 2014, KOMCA still maintains its strong position, collecting a total of 143 billion Korean won ("KRW") in 2015 in licensing fees and distributing 137 billion KRW of royalties back to the copyright holders.⁹⁹ As of 2013, KOMCA has signed mutual management contracts with forty-five organizations from forty-three different countries with respect to performance and broadcasting rights and forty organizations from forty-three countries for the right of reproduction.¹⁰⁰ KOMCA membership is composed of composers, authors, arrangers, music publishers, successors and so forth.

c) KOSCAP

As briefly mentioned above, in October 2014 the MCST approved the establishment of a new copyright association, the KOSCAP, in an attempt to "create competition and extend the rights of [music] creators".¹⁰¹ Before this, KOMCA had enjoyed a copyright management monopoly in music for fifty years. As of November 2014, approximately thirty copyright owners had withdrawn from KOMCA and registered with KOSCAP.¹⁰² There are presently around 200 members (mainly comprised of independent artists) and about 400 songs under management.¹⁰³ Actual operation (i.e. collecting of license fees), however, commenced in January 2015 because even though members withdrew from KOMCA, such withdrawal does not instantly extinguish the trust rights bestowed on KOMCA. KOMCA holds its rights under the trust management agreement until the end of the remaining duration of the collecting and distribution period (currently set at three months).¹⁰⁴

⁹⁹ 음저협 설립 50년 음악저작권자 2만명 돌파 April 9, 2015
http://www.dt.co.kr/contents.html?article_no=2015040902100931746002.

¹⁰⁰ *Supra* n 30.

¹⁰¹ New copyright body causes conflict for music creators, Korea JoongAng Daily, Oct 06, 2014
<http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2995697>.

¹⁰² 음저협, 환골탈퇴 없이 회원신뢰 추락 막지 못해 July 20, 2015
<http://www.newscani.com/news/articleView.html?idxno=117451>

¹⁰³ KOSCAP NEWS LETTER Vol 1. January 29, 2016.

¹⁰⁴ KOSCAP website notice page September 12, 2014
http://www.koscap.or.kr/community/notice_view/?f_seq=568.

The main difference between the two associations is KOSCAP's "selection system", which allows music creators to choose which rights the association will be entrusted with, such as transmission, broadcasting and reproduction rights.¹⁰⁵ By giving the copyright holder an option to select which rights are to be entrusted and which rights are to be excluded from the scope of the trust agreement, this has been said to correspond with the ways in which the copyrighted works are used in the digital era as technologies have developed to allow copyright owners to self-administer their works on other music platforms.¹⁰⁶ Furthermore, in certain instances, the use of copyright works can even be monitored accurately by the copyright holders themselves. For this reason, it has come to the attention that sometimes copyright holders may want to hold a specific share of his or her copyright works for their own administration and management.¹⁰⁷ This system is a reflection of some of the voices raised prior to the establishment of KOSCAP that the music licensing system was in dire need of providing a selective method within the realm of existing trust management services.¹⁰⁸ In addition to that, it was seen that such reflection bodes with the 'trust' based agreement with CMO in the first place.¹⁰⁹ That is, a true trust management agreement should respect and incorporate copyright owners' opinions to the fullest extent possible. As previously mentioned, KOMCA members must still entrust all their rights to KOMCA including future works by the copyright holders. Moreover, another element of difference between KOMCA and KOSCAP is that KOSCAP has employed an expert-oriented business in order to ameliorate the distrust expressed about KOMCA by some of its members.¹¹⁰

In April 2015, the MCST approved KOSCAP's music levy rates which treat general music and background music equally in terms of royalty calculations. KOSCAP's royalty distribution depends on the level of contribution made to broadcasting rather than on the

¹⁰⁵ *Supra* n 83, 193.

¹⁰⁶ 신규 음악저작권 신탁 단체 "신탁범위선택제 도입" April 8, 2014

<http://www.yonhapnews.co.kr/culture/2014/04/08/0901000000AKR20140408162200005.HTML>.

¹⁰⁷ *Id.*.

¹⁰⁸ *Supra* n 49.

¹⁰⁹ *Id.*

¹¹⁰ *Supra* n 106.

type of music.¹¹¹ Hence, KOSCAP charges royalties based on the length of the music clip used by the broadcasting stations. In short, this new system does not regard the two types of music as different. KOMCA and a number of musicians expressed enagement at such an approved rate-setting system by KOSCAP, claiming that this method of payment unreasonably tilts the balance towards for-profit music businesses and to overseas copyright holders rather than to the actual artists and musicians.¹¹² In around July 2015, about fifty singers and composers who are members of KOMCA held a press conference to publicly complain about the MCST's decision arguing that MCST 'secretly' approved KOSCAP's music levy rates without sufficient consultation and without reflecting stakeholders' views and opinions.¹¹³ KOMCA is of the view that background music cannot hold the same standard as that of general music given that the purpose of background music is secondary and it plays more of a supportive function.¹¹⁴ In addition, a substantial portion of background music in Korea (46%) is from overseas, thereby creating special treatment to the music importation businesses.¹¹⁵ This is evident from the subsequent withdrawal by a music importation business from KOMCA and moving to KOSCAP.¹¹⁶

¹¹¹ Yim Seung-hye, "Divided royalties enrage musicians". *Korea JoongAng Daily*. (July 28, 2015) <http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=3007112>.

¹¹² See, 저작권단체, '일반 음악 우대 vs 사용 시간별 차등화' 공방 October 5, 2015, <http://www.ipnomics.co.kr/?p=28026>; '배경음악 저작권료' 분배율 싸고 힘겨루기 July 23, 2015, <http://www.hani.co.kr/arti/culture/music/701558.html>; "내 몸값은 10분의 1" 연주음악 작곡가들이 화났다 January 4, 2016; <http://weekly.chosun.com/client/news/viw.asp?nNewsNumb=002389100014&ctcd=C02>.

¹¹³ *Id.*

¹¹⁴ Eun Soon, Hwang, '주배시라는 단어 들어 보셨나요? 저작권료 분배를 둘러싼 끊이지 않는 논란', *Chosun Media No.2385* (January 15, 2016) <http://pub.chosun.com/client/news/viw.asp?cate=C01&mcate=M1004&nNewsNumb=20160119147&nidx=19148>.

¹¹⁵ See, Se Hee, Park, '작곡가들은 무엇을 위해 싸우는가?' *HuffingtonPostKorea News*, (July 22, 2015); Hwe Kwon Kim, Sang Hee Park, "아름다운 음악에 돈이 끼어드니 시끄럽다, 뮤지션들 간 갈등 밑바닥에 깔린 열악한 저작권 구조", *Sisa Press* (August 19, 2015) <http://m.sisapress.com/journal/article/142338>; Jae Hoon Lee, "신중현·윤종신·김형석 "'배경음악 사용료 배분 개정안' 규탄" *Newsis* (July 20, 2015) http://www.newsis.com/ar_detail/view.html?ar_id=NISX20150720_0013802808&cID=10601&pID=10600.

¹¹⁶ *Id.*

On the other side of the spectrum, KOSCAP takes the view that royalties for broadcasting need to be based on the actual use of the music in broadcasting.¹¹⁷ In KOSCAP's opinion, merely because background music is a minor genre does not warrant differential treatment, as KOMCA has been doing for more than fifty years.¹¹⁸ So far, under the monopoly system of KOMCA, the fees paid by broadcasting stations for using music in their programs had to follow a "differential payment rate system" in which the payment fee differed depending on the type of music.¹¹⁹ Background music royalties are only about a tenth of those paid for "general music," songs with lyrics like K-pop. KOSCAP views this as an unfair and unjustified practice especially with respect to minor genres such as background music.¹²⁰ KOSCAP has explained that there should not be a differential treatment of the types of music when it comes to the copyright royalty distribution system but rather the differentiation should be based on whether the performers actually sing or whether the music is simply played.¹²¹ Depending on the purposes for which the background music is utilized, the amount of royalty calculated and distributed will be different to ensure such payment is commensurate with the purpose for which the music was utilized.¹²² KOSCAP is currently treating national traditional music, children's song classics and other minor genres equally.

Now equipped with approval from the MCST, an official turf war has begun between the two CMOs, each trying to protect their sources of income – that is, their members – from switching to the other association. The frustration expressed by KOMCA is understandable, considering that it previously wielded significant power as the only music copyright association in Korea for decades and thus all royalties collected went to KOMCA. However, with KOSCAP on the scene, the cash flow that broadcasting stations pay to the music copyright associations which are based on a fixed fee that entitle them

¹¹⁷ Chang Wook, Park, "방송 배경음악 '주먹구구'식 저작권료 분배." *News1* (October 7, 2015), <http://news1.kr/articles/?2451320>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Hyun Sik, Kim "한음저협-함저협, 배경음악 사용료 두고 팽팽한 갈등." *CBS NoCutNews* (July 20, 2015) <http://www.nocutnews.co.kr/news/4446690>.

¹²¹ *Supra* n 104.

¹²² *Id.*

the freedom to use the association's music in their programs, will be proportioned between the two associations. By way of example, broadcasting stations paid approximately 33 billion KRW in royalties and one association is ten times larger than the other, the larger association will receive and distribute around 30 billion of the 33 billion KRW in fees.¹²³ Therefore, if members of KOMCA pull out and switch to KOSCAP, then KOMCA's portion of the pie will consequently get smaller.¹²⁴

It is expected that KOSCAP's active business practice will lure many background music writers away from KOMCA to strengthen its numbers and consequently expand its share of the royalty pie. The furious members of KOMCA have said that the focus of this debate is not about expressing discontent at the new competition but rather on KOSCAP's royalty distribution system as it devastates general music writers in Korea.¹²⁵ They argue that the amount of effort, time and personnel (e.g. lyricist, composers, rearrangements etc.) involved in creating general music cannot be compared to the process of creating background music.¹²⁶ It was also pointed out that the role of MCST is central in settling disputes of this nature considering the complexity of music licensing processes.¹²⁷ Members of KOMCA have criticized the MCST for not involving KOMCA in the discussion of KOSCAP's new royalty distribution system so as to amicably work out any differences, even though MCST was not obligated to do so.¹²⁸ The bottom line is that such tension between the two CMOs is just the beginning, making it all the more essential to have in place a well thought-out guideline on licensing practice. The next chapter will look at the types of antitrust behavior by intermediaries that highlights such need.

Table 5: Key Issues Relating to KOMCA and KOSCAP Rate-Setting Systems

¹²³ Heavy investment in South Korea, *IFPI Digital Music Report 2013* (February 18, 2013).

¹²⁴ *Id.*

¹²⁵ *Supra* n 114.

¹²⁶ *Id.*

¹²⁷ *Supra* n 112.

¹²⁸ *Id.*

KOMCA	ISSUE	KOSCAP
Types of music fixed rate (general 1, BGM 0.1)	Distribution principle	Amount of contribution in the broadcasting
TV (performers 1, recording 0.5) Radio (performance 0.5, recording 0.25) different distribution according to the media and method of use	Distribution regulations	Types of use (performance 4, recording 1) and time of play (1 point: 1~30 seconds, 2 points, 31 – 90 seconds, 3 points 91 – 150 seconds, 4 points: 151 and over)
TV and Radio combination	Media differentiation	TV and radio separately calculated

CHAPTER 3

INTERSECTION OF ANTITRUST LAW AND COPYRIGHT LAW AS IT RELATES TO MUSIC LICENSING IN KOREA

3.1 *General Background to the Intersection of Antitrust Law and Copyright Law*

As previously mentioned, prior research on the application of antitrust law in the context of copyright enforcement has been comparatively slight. The following two reasons have been said to warrant such scarcity in research.

Firstly, it is attributed to the existence of the restriction of ‘resale price maintenance’ incorporated in Article 29(1) of the Korean MRFTA which states that ‘No enterpriser shall engage in resale price maintenance’.¹²⁹ Note, however, that this provision shall not apply to cases wherein there are ‘justifiable’ reasons in terms of the maximum price maintenance preventing the transactions of goods or services at above specified prices.¹³⁰ The term ‘resale price maintenance’ is defined to refer to an act of trading goods or services wherein an enterpriser fixes a price in advance in order to force a counterpart enterpriser or another enterpriser involved in the subsequent phases of the transaction to buy from or provide to the enterpriser only at that price or executes transactions under any agreement or binding condition for such purpose.¹³¹ Article 29(2) stipulates that ‘*the provisions of Paragraph (1) shall not apply to literary works prescribed by the Presidential Decree or to goods meeting the following conditions that have received designation in advance from the Fair Trade Commission as being eligible for resale price maintenance*’.¹³² Further, pursuant to Article 43 of MRFTA on Restrictions on resale price maintenance, it states that ‘Publications specified in the Presidential Decree’ as per Paragraph (2), Article 29 (Restrictions on Resale Price Maintenance) of the Act

¹²⁹ *Monopoly Regulations and Fair Trade Act* (Act No. 3320 of December 31, 1980, as amended up to Act No. 11937 of July 16, 2013), Article 29(1).

¹³⁰ *Id.*

¹³¹ *Id.* Article 29(1).

¹³² *Id.* Article 29(2).

refers to those publications defined in Article 2 (Definitions) of the Copyright Act and designated by the Fair Trade Commission following consultations with the head of the relevant central administrative agency (including electronic publications).¹³³ Additionally, the Fair Trade Committee has excluded publication works which are subject to the Publishing Industry Promotion Act¹³⁴ (e.g. textbooks etc) that have not exceeded eighteen months since the first publication and the Registration of Periodicals Act¹³⁵ (e.g. newspapers etc). A practice that falls within the ambit of these exceptions is deemed to guarantee a fixed profit to the publishers or distribution businesses who manage such literary works and contribute to the universal dissemination of the relevant works promoting the publishing industry at large.¹³⁶

Prior to a recent Supreme Court decision, maintaining a minimum resale price was treated as an outright illegal conduct.¹³⁷ However, in the latest decision, it was held that where there is a ‘justifiable’ cause, then setting a floor price for resale may be permitted.¹³⁸ Such a decision is yet to be reflected in the legislation. In the Review Guidelines on Unfair Exercise of Intellectual Property Rights, section 2(c) states: “...*any exercise constituting minimum price maintenance falling under one of the acts of resale price maintenance under Article 29 of the Act is deemed to be a violation of the Act without the need to conduct an analysis of its efficiency improving effect and impediment to fair trade effect*”.¹³⁹ Nonetheless, the Guidelines to the Resale Price Maintenance have been amended by the Fair Trade Committee to make it explicit that even though setting a minimum resale price is in principle, an antitrust violation, if there is evidence that shows that the benefit of consumer welfare outweighs the effect of restriction of competition, then the court may consider such action to fall within the exception provided by Article

¹³³ *Id.* Articles 2, 29 and 43.

¹³⁴ *Publishing Industry Promotion Act* (Act No. 8533, Jul. 19, 2007).

¹³⁵ *Registration, etc. of Periodicals Act*.

¹³⁶ Do-yool, Han, “The relation of copyrights and Fair Trade Law”, *Law Institute of Korea Business Leaders Alliance Vol 29, No. 2* (June 2015) 276.

¹³⁷ *ISSUE & FOCUS on IP*, Korea Institute of Intellectual Property, April, May 2012; Supreme Court Decision No.2012do24498 accessed on February 27, 2014.

¹³⁸ *Id.*

¹³⁹ *Review Guidelines on Unfair Exercise of Intellectual Property Rights, Fair Trade Commission Republic of Korea (March 31, 2010), Article 2(c)*.

29(2) of the MRFTA.¹⁴⁰ This is in line with the idea that because intellectual property rights impose costs on the public, the intellectual property laws can be justified by the public goods argument only to the extent that the laws, on balance, encourage enough creation and dissemination of new works to offset those costs.

The second reason for the scarcity of research on antitrust law in the context of copyright enforcement is the lack of growth in the relevant copyright market.¹⁴¹ The purpose of the antitrust law is to promote free and open competition in a market, therefore, if there is no market in existence then there obviously would not be any antitrust issue. However, times have changed. The value of the Korean recorded music market has increased with much speed and it was at one point ranked the eleventh largest recorded music market in the world.¹⁴² Before the so-called ‘Korean wave’ made a phenomenal hit around the world, the copyright-related market was not very well-developed either quantitatively or qualitatively.¹⁴³ Furthermore, at the time the law was passed, the subject matters that were sufficient enough to constitute a market for the purpose of antitrust law were mostly novels, photography, magazines, books, newspapers, records and CDs (physical formats) that contained musical works.¹⁴⁴ But now, music consumption continues to experience diversification, especially in relation to digital contents; various kinds of music distribution channels have been created in the relevant market and thus an increased risk in copyright infringement has transpired. Considering that copyright laws were enacted in an environment with no streaming, MP3 downloads and other online music platforms, confusion as to the interpretation of the relevant legislation arose and the legitimacy of the existing licensing practices has been questioned. In contrast with patents, copyright subject matter such as music through digital platforms and the internet are prone to easier reproduction and imitation. Therefore, the urgency and necessity of copyright protection transpired quite vigorously over recent years. This has occurred in tandem with aggressive enforcement actions by KOMCA in seeking royalties that invoke

¹⁴⁰ *Supra* n 129, Article 29(2).

¹⁴¹ *Supra* n 136.

¹⁴² *Supra* n 123.

¹⁴³ *Supra* n 30.

¹⁴⁴ *Supra* n 136.

anticompetitive issues owing to KOMCA's series of non-transparent, unreasonable practices of royalty collection and distribution as well as charging excessively high fees from users.¹⁴⁵

3.2 *The Legal Framework of the Intersection under the Monopoly Regulations and Fair Trade Act*

Chapter 7 of the MRFTA sets out the exceptions relating to intellectual property rights. Article 58 stipulates that MRFTA shall not apply to acts of an enterprise or enterprisers organization as committed in accordance with any of its decrees.¹⁴⁶ The term "enterprisers organization" refers to a juristic combination or federation organized by two or more enterprisers for the purpose of promoting their common interests regardless of the form of organization.¹⁴⁷ To this end, copyright owners license their works to others and obtain fees corresponding to the use in a repetitive fashion, that is, in consideration for the use of the copyrighted works, the copyright holders receive economic benefits.¹⁴⁸ Such activity is regarded as an enterprise for the purpose of the definition under the MRFT Act.

Article 59 of the MRFTA, which covers the exception to the exercise of a right to intangible property, reads: "The provisions of this Act shall not apply to any act deemed to be a justifiable exercise of rights under the Copyright Act, Patent Act, Utility Models Act, Design Act, or Trademark Act".¹⁴⁹ At the time of the Amendment Bills, the explanatory note stated that there was a valid reason "to clarify the scope of the antitrust exemption on the exercise of IP rights".¹⁵⁰ The term 'justifiable' was added in Article 59 to reduce uncertainty as to the somewhat ambiguous wording of the original provision. Previously, there were controversies surrounding the legal interpretation of the exercise of an intellectual property right which appeared to deem any exercise of any act of

¹⁴⁵ *Supra* n 87.

¹⁴⁶ above 129. Article 58.

¹⁴⁷ *Id.* Article 2(4).

¹⁴⁸ above n 83. P. 193.

¹⁴⁹ *Id.* Article 59.

¹⁵⁰ above n 137.

intellectual property rights to be wholly excluded from antitrust law.¹⁵¹ The immediate task soon thereafter was to set up a standard which differentiates the kinds of acts that may be considered as a ‘justifiable act of intellectual property rights’. It is important to note that the answers to the questions of which acts would classify as a ‘justifiable exercise’ and how to define such scope in terms of standards, will enable us to know how expansively or restrictively the antitrust exemption should be applied.

There are various theories that have been put forward as guidance in delineating the scope of Article 59. There is the ‘inherent’ IP rights theory.¹⁵² Only those rights that fulfil the original purpose of intellectual property would be exempt from antitrust scrutiny. There is also a theory termed as an ‘amended license misuse’ theory; acts that extend beyond the original purpose of intellectual property rights protection, that is, purposes that are unreasonable and unfair, are outside the context of the relevant intellectual property rights and thus should be held subject to antitrust law.¹⁵³ Another theory is the ‘amended theory of deviance from the intent of the law’ which states that in case intellectual property rights are exercised in a way that diverge from the legally recognized scope of such right and used for an unreasonable purpose then monopoly regulations and fair trade law will apply to cover such an act.¹⁵⁴ There is also a so-called mere ‘confirmation of a regulation’ theory, which contends that Article 59 is not a special provision, but rather it merely explains that any unreasonable application of intellectual property rights shall be unlawful for the purpose of antitrust law.¹⁵⁵

¹⁵¹ *Id.*

¹⁵² Son Chan Joo, *Competition Law*, Seoul: Law and Economics Publishing (1993) p. 369; See also Hyung Ki, Baek, “The Conflict and Congruity between IP Law and Antitrust Law.” National Information Society Agency Policy Vol 13 No. 4 (2006) p. 51; Sang Jung, Lee, “The Advisable Framework of Copyright Collective Management System”, *Dongguk University Law Review* Vol. 9 No.1 7-36 (2008)

¹⁵³ Park Gil Joon, *Korean Monopoly Regulations and Fair Trade law*, Seoul: Samyoung Publishing (1983) p. 55; see also, Chung Wan, “International Trends about the Regulation of Intellectual Property Right under Competition Law.”, *Kyung Hee University Law Review* Vol. 46. No. 2 (2011) p. 193

¹⁵⁴ Kwon Oh Seung, *Patent Rights and Monopoly Regulations and Fair Trade law*, Hong Moon Publishing (2001) p. 153

¹⁵⁵ Jung Ho Yeol, *Competition Law*, 3rd ed PYBOOK Publishing (March 2010) p. 96

Then there is the examination of illegality of the antitrust law theory. Many of the antitrust related law enforcement bodies, the United States being the primary case, assess the illegality of a given conduct in question through either a ‘rule of reasons analysis’ or a per se rule. The principles of a ‘rule of reasons analysis’ involves deciding the sentence based on the costs and convenience which is assessed as a whole regarding a specific conduct in question to determine whether there is or is not an effect of restriction of competition. The relevant law enforcement body expands the market to which the product or service under scrutiny is related and then takes a series of steps to evaluate how the conduct in question has an effect on such market. After determining the relevant market, usually the small but significant and non-transitory increase in price-test is applied. An increase in price of a hypothetical monopoly business that is small but meaningful and non-temporary (typically applies a 5-10% of price increase) is factored in. While there is a risk of wrongfully deciding the case due to the seemingly simple determination process, a definite application of the rule of reason principle can be applied if the analysis of legality versus illegality is taken into consideration well in advance of the dispute. Moreover, for there to be a clear case of per se rule application, there needs to be a substantial experience accumulated to decide on this and to select action that seldom has exceptional instances.

As mentioned briefly above, a few years ago, the Supreme Court of Korea in a judgment handed down on 27 February 2014 (2012 do 24498),¹⁵⁶ rendered an analysis of the criteria for deciding a ‘justifiable exercise of intellectual property right’. The Court stated that an agreement between two competitor companies to not manufacture products in consideration for the granting of exclusive sales right, is an antitrust violation. In the same year in December, a document called the *Review Guidelines on Unfair Exercise of Intellectual Property* was released and enforced by the Fair Trade Commission, which seems to reflect the decision by the Supreme Court:

“Section (2)(B). Whether an exercise of intellectual property rights is *just* is determined by

¹⁵⁶ Supreme Court Decision No.2012do24498 held on February 27, 2014.

- (i) whether it satisfies the original purpose of the intellectual property rights which is to facilitate industrial development by protecting and encouraging invention and promoting the use of related technology and
- (ii) how it affects competition and fair trade order in the relevant market. However, whether the exercise of intellectual property rights breaches the Act shall be determined after separately reviewing the conditions of illegality prescribed in the provisions of the relevant provisions.¹⁵⁷ (emphasis added)

However, these Guidelines which apply to all intellectual property rights, place their main focus on patents. For this reason, the exact scope of ‘justifiable exercise of IP right’ in the context of music licensing, which has as its roots a different system, can only be discerned through inferring from previous cases that involved antitrust and music copyright law. Therefore, whether the standards would differ depending on the different types of music platforms remains an issue. The running theme or the overriding questions that need to be kept at the back of our minds when looking at the domestic cases below will be ‘what kind of acts would be a justifiable exercise of right for the purpose of an antitrust exemption’ and ‘what factors are taken into consideration’.

3.3 *Types of Anticompetitive Practices by the Music Licensing Actors*

The below judicial cases highlight practices by not just the CMO but also other music industry actors (e.g. online music providers and publishers) that have sparked academic and media attention. These practices will be examined to determine whether there was either an actual breach or bordering a breach of antitrust law. The point here is to accumulate knowledge, and where possible, compartmentalize the kinds of conduct against the regulations of the existing prohibited practices under the MRFTA.

3.3.1 *Misuse of Market Dominance*

¹⁵⁷ *Supra* n 139, Article 2(b).

While the dominant position of the CMO is justified to the extent that its core function serves economic efficiency and brings benefits to both the copyright holders and the users, where the conduct overreaches to the purview of the ‘abusive acts’ as defined in Article 3(2) of the MRFTA, then such conduct must be prohibited.¹⁵⁸ Article 3(2) (Prohibition on the Abuse of Market Dominance) states that:

“No market-dominating enterpriser shall commit any of the following acts (hereinafter referred to as “abusive acts”):

1. Acts of unreasonably determining, maintaining, or changing the price of goods or services (hereinafter referred to as “price”);
2. Acts of unreasonably controlling the sale of goods or provision of services;
3. Acts of unreasonably interfering with the business activities of other enterprisers;
4. Acts of unreasonably impeding the participation of new competitors;
5. Acts to unfairly exclude competing enterprisers or acts that may significantly harm the interest of consumers.”¹⁵⁹

As such, in order for a conduct to fall within this provision, there needs to be a clear exclusionary act by the CMO of a copyright owner or another third party from the market. Market dominance must be proved first (i.e. “market-dominating enterpriser”).¹⁶⁰ To this end, if there are only a handful of CMOs and one of the CMOs is entrusted with the copyright holder’s majority of rights and the vast majority of the users will experience difficulty in accessing and enjoying such copyrighted works without an agreement between the users and the CMO, then it is possible to contend that the said CMO holds market dominance. We have seen that even with KOSCAP in the music licensing scene, KOMCA still holds substantial power in the market.¹⁶¹ In saying this, however, not only

¹⁵⁸ *Supra* n 129, Article 3(2).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* Article 4 (Presumption of Market-Dominating Enterpriser) states that:

“An enterpriser with any of the following market shares in a particular business area (excluding an enterpriser whose annual sales turnover or purchases in a particular business area amount to less than KRW 4 billion) shall be presumed to be a market dominating enterpriser as referred to in Subparagraph (7), Article 2 (Definitions): Amended on August 3, 2007, 1. The market share of one enterpriser is 50/100 or more.”

must KOMCA hold market dominance, it must internally have a business model that contains features of an enterpriser, for instance, sharing profits with the copyright owner. Though it may satisfy the definition of an ‘enterprise organization’ for the purpose of the MRFTA, it is difficult to deem a CMO as a market-dominating enterprise from a practical point of view.¹⁶² Nonetheless, a CMO when acting ‘without a justifiable reason’ and/or extends beyond the ‘limited levels normal for the same or similar businesses’ in such a way as to significantly harm the interest of consumers, will be considered as an abusive act for the purpose of the MRFTA and the respective Enforcement Decree.¹⁶³ Two types of conduct in which a CMO has engaged in or is continuing to engage in, that fall below the standard of ‘justifiable reason’ are discussed next. In summary, they are a ‘refusal to grant a license’ and an ‘unreasonable demand of royalty collection’ under the Terms of Use Agreement. Each will be discussed in turn below.

a) Refusal to Grant License by CMO

i. *KOMCA v Korean Broadcasting Station (‘The KBS case’)*¹⁶⁴

The KBS case reveals one type of anticompetitive practice of misuse of power by a CMO. While the case was brought on the basis of a misuse of a right under the contract in question and the dominating position of KOMCA, the case is not about the application of the MRFTA. However, it would nonetheless help to shed light on the nature of anticompetitive practices in the music licensing context that may fall foul of either Article 58 or 59 of the MRFTA.

In this case, the background facts demonstrate that in July 2009, a new musical work right Terms of Use Contract (‘the Contract’)¹⁶⁵ was signed between the applicant, a

¹⁶² *Supra* n 83, 200.

¹⁶³ *Id. Enforcement Decree of Monopoly Regulations and Fair Trade Act* (Enforced on January 1, 2012).

¹⁶⁴ Seoul Central District Court Decision No. 2012gahap508727 held on February 5, 2013.

¹⁶⁵ *Id.* at 5.

CMO, and the respondent broadcasting company ('KBS')¹⁶⁶ which covers the rights and payment for using a musical works catalogue held by the respondent. According to article 4 of the Contract, if a delay were to occur in the future in the execution of a subsequent extension contract due to a failure to determine a mutually agreeable royalty rate for the musical works, then the rate on which the payment would be based for the preceding year would be paid in advance and an adjustment would be made once the new royalty rate was agreed upon by the parties. Furthermore, according to article 12 of the Contract, the expiration date was 31 December 2011 and the subsequent Contract was to be signed one month prior to the expiration. If it were not signed, then the parties were to follow the procedure stipulated in the relevant regulations in the Copyright Act. In essence, KOMCA sought to prevent the use of musical works by KBS due to the delays in signing a new, subsequent contract including damages.¹⁶⁷

Arguments by the Parties

KOMCA brought the proceedings on the basis of an alleged breach of contract and sought damages. Based on the aforementioned facts, the Contract of 31 December 2011 had ended and there was at the time no effective agreement in place.¹⁶⁸ For this reason, KOMCA claimed that KBS did not have the right to the use of musical works and therefore if KBS used the musical works under the management of KOMCA without consent, then this would be an infringement of reproduction, public performance, transmission and distribution rights of KOMCA.¹⁶⁹ In its defense, the respondent, KBS, claimed that prior to the expiration of the Contract, it had made advanced payments based on the terms of the Contract. As there was a delay in agreeing to the terms of the subsequent agreement, pursuant to the terms of the Contract KBS used the musical works legitimately by paying in advance the royalties based on the preceding rate. KBS asserted that, as provided by the Contract, once the new subsequent agreement was executed then

¹⁶⁶ The respondent is a public corporation which operates radio television and online services and is one of the biggest South Korean television networks. Funded by the government and license fees, but independently managed, its source revenues comes from television license fee which includes commercial advertisement sales.

¹⁶⁷ *Supra* n 164.

¹⁶⁸ *Id.* at 6.

¹⁶⁹ *Id.* at 7

the difference in payment would be adjusted accordingly. KBS claimed that the use of musical works by the respondent could not be deemed a copyright infringement in light of such provision in the Contract. KBS then brought a cross-claim on the basis that bringing a lawsuit against KBS by KOMCA was an abuse of market power.¹⁷⁰ In this respect, KBS argued that KOMCA in fact intended to use its market-dominating power to leverage its position in the negotiation by bringing this lawsuit and use it as a tool to demand an excessive royalty rate which KBS could not agree to accept.¹⁷¹ As such, KBS argued that the claims brought before the court by KOMCA should be rejected.

KOMCA's counterargument

KOMCA countered KBS's argument and cross-claim stating that article 4 of the Contract merely specified the process by which the parties managed the usage fee in the event that the execution of a new agreement was delayed.¹⁷² KOMCA argued that no provision in the Contract allowed KBS to legitimately use KOMCA's entrusted musical works post-expiration. In KOMCA's view, the Contract only dealt with the prepayment and the adjustment method in case there was a delay in reaching a new subsequent agreement between the parties. According to subparagraph 2 of Article 12 of the Contract, if the new agreement was not executed one month prior to the expiration date of the existing Contract then the parties were to follow the procedures as stated in the copyright regulation.¹⁷³ If it was recognized that the respondent still retained the right to the use of the musical works owing to article 4 of the Contract even though there was a lack of execution of the new contract, then such argument would go against the principles of private autonomy.¹⁷⁴ Moreover, KOMCA argued that if the court was to agree to KBS's argument, then it would ignore KOMCA's intention and effectively grant unlimited usage rights to KBS without a legitimate basis.¹⁷⁵ This would in turn bestow a forced obligation on KOMCA to supply, which would go against the principles of private

¹⁷⁰ *Id.* at 8

¹⁷¹ *Id.*

¹⁷² 2015 Korean Copyright Law Reports, Korean Copyright Committee (2015) 20.

¹⁷³ *Supra* n 164.

¹⁷⁴ *Id.*

¹⁷⁵ *Supra* n 172, 33.

autonomy rendering unfairness.¹⁷⁶

The Decision

Two main issues were considered by the court. Firstly, the question as to KBS's right to the use of musical works under the Contract and secondly, whether the lawsuit instigated by KOMCA was an abuse of market power.

1. Question as to KBS's right to the use of musical works under the Contract

It was not disputed that for many decades, KOMCA had granted the broadcast, public performance and public transmission rights to the respondent and had executed license agreements to pay fixed licensee fees in consideration. According to the Contract signed in December 2003, Article 7 related to license provision, prepayment and adjustment of music license fee was set out in Article 8, and Article 15 set out the contract's duration. Even though the duration of the former license agreement of 31 December 2005 had expired, both parties had not executed the new license agreement and thus continued the negotiation of the royalty rate. To this end, KBS had made advanced payments to the applicant of up to three-quarters of the year 2006 and used the musical works of the respondent to this date.¹⁷⁷ In the meantime, the applicant, on 14 December 2006, received from three broadcasters the 2006 third quarter licensee fee and the 2006 fourth quarter in advance. For the license fee applicable for 2007 onwards, KOMCA set up a taskforce to calculate a reasonable fee for the new agreement and until the new license fee was calculated it was agreed between the parties to apply the 2006 licensee rate. Even though the parties had negotiated for the 2012 rate prior to the expiration of the existing agreement, mutual agreement had still not been reached, due to differences in opinions. KBS had paid for the first and second quarter of 2012 based on the rate stipulated in 2012 and for the same for both third and fourth quarters. The Court after looking at the abovementioned facts, stated that it could be inferred from the provisions of the

¹⁷⁶ *Id.*

¹⁷⁷ *Supra* n 164.

agreement that the parties anticipated that the subsequent agreement would be entered into upon expiration of the existing Contract.¹⁷⁸

On the point of principles of private autonomy raised by KOMCA, the court held that this was not so relevant in this case due to Article 105(5), (6) and (8) of the Copyright Act as well as the fact that the Minister can always prohibit the functions of KOMCA as per Articles 109(1) and (2) in cases where the applicant receives licensee fees beyond those granted.¹⁷⁹ Therefore, the monopolistic and public nature of the applicant's position needed to be carefully and prudently dealt with and for this reason, the regulations around the functions of the applicant were closely scrutinized. The question of principles of private autonomy had little relevance in this case.

Of particular importance, owing to the struggles by the parties in reaching an agreement regarding the music license fees, public interest was also negatively affected. The court took seriously the detrimental impact on today's broadcasting function and the music industry whenever disputes arise as to the license fees between KOMCA and KBS.¹⁸⁰ For these reasons, the court held that the license agreement must be entered into for the betterment of the public welfare and social demands. What's more, the licensee fee which the respondent pays to the applicant, that is, the standard of the licensee fee, takes into consideration, firstly, the nation's economic scale, the condition of the society's state and the music industry's development standard and the citizens understanding and appreciation of the musical works and the relevant government department's permission. Also, foreign-equivalent agreements are to be used as benchmark examples and thus the appropriate rate cannot be determined in a single uniform fashion which goes to demonstrate the strong public nature of the dealing.¹⁸¹

Further, because a mutual agreement could not be reached between the parties regarding

¹⁷⁸ *Supra* n 172, 34.

¹⁷⁹ *Supra* n 164, 8.

¹⁸⁰ Sung-Hoon, Kim, 공익성에 밀린 음악저작권... 음저협, KBS 상대 저작권 소송 패소, *Herald Business*, February 15, 2013, <http://nbiz.heraldcorp.com/view.php?ud=20130215000117>.

¹⁸¹ *Supra* n 164, 10.

the music licensee fee, a request was made to the Minister of CPT in January 2012 for the determination of the rate, and such rate was determined for all three broadcasters on 27 December 2012. The applicant was obliged to enter into an agreement based on this rate and as per article 2(1), the applicant could not reject a request for the usage of the musical works unless there was a 'justifiable or reasonable reason'.¹⁸² As the rate was determined based on the collection and distribution regulations and as this had been approved by the MCST, an obligation was upon the applicant to comply with such an approved rate fee and enter into a subsequent contract with the respondent.¹⁸³ If, however, the applicant did not wish to enter into a new contract due to the Minister's abuse of its discretion or defect in the approval of music levy rates, the applicant would have initiated an administrative lawsuit case against the Minister of CST questioning the lawful effect of the music levy rate.¹⁸⁴ The applicant had brought no such action. Rather, the reason why the new agreement had not been entered into arose from the fact that the applicant, despite having an obligation to enter into the agreement based on the approved rate, was refusing respondent's request. Despite the current surrounding circumstances, the applicant's refusal to enter into subsequent agreement went against the principles of justice and therefore its lawsuit could not succeed.

2. Whether the lawsuit instigated by the CMO was an abuse of market power.

From an economic perspective, both KOMCA and KBS hold a monopolistic position in their respective fields. From a social point of view, both parties go beyond being a pure private company and exercise important public functions that directly affect the welfare of the public. Further, as mentioned above, once the collection and distribution payment is approved by the MCST in accordance with Article 2(2) of the Copyright Act, KOMCA cannot, without a justifiable or reasonable reason, reject a request for use of musical works. In addition, KOMCA is also contractually obliged to follow the payment regime contained in the Copyright Act and as determined by the MCST and duly execute the

¹⁸² *Supra* n 172, 25.

¹⁸³ *Supra* n 164, 11.

¹⁸⁴ *Id.*

subsequent agreement with KBS. The facts have shown in this case that it was KOMCA who had not been fulfilling its obligation to follow the amended and approved music levy rates and it continued to reject the request of KBS who sought to execute the new agreement. As such, for KOMCA to file a lawsuit against KBS in light of these facts, was held by the court to constitute a misuse of power and was therefore prohibited.¹⁸⁵

The court agreed that when the terms of use agreement expire as a result of the delay in reaching an agreement on the terms of the new subsequent contract, the user no longer holds legitimate rights to the use of the musical works in question.¹⁸⁶ There is no doubt that the use of the musical works after the expiration of the terms of use agreement is copyright infringement. However, in this case, a CMO, who without reasonable cause, continuously rejected the request for use of musical works and refused to fulfil its obligations by entering into an anticipated subsequent agreement, and instead claimed a copyright infringement against the user, was found by the court to have committed an abusive act by a market-dominating organization.¹⁸⁷

Accordingly, it appears that there are two key factors relevant to the misuse of power in the music licensing context that drove the court towards finding in favor of KBS. First is the public nature of the agreement in question between KOMCA and KBS and secondly, KOMCA's continuous rejection of proposals by KBS by unreasonably terminating the agreement unilaterally without a reasonable basis, leaving KBS with no choice but to become exposed to copyright infringement.

ii. *Individual Content Provider*

User generated content phenomenon show that in the future:

¹⁸⁵ *Supra* n 172, 35.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*, 36.

“...everyone will not only be a content user or consumer; everyone will become (or could easily become) a content provider or supplier. Not just traditional suppliers and distributors of entertainment programming, such as record companies and television networks, but anyone and everyone. The playing field has been leveled. Anyone on the network can become a content provider, and we believe just about everyone will become a provider of content of some sort.”¹⁸⁸

In this respect, two points of view have been expressed as identified by Kohn & Kohn.¹⁸⁹ At one end of the spectrum, it was suggested that such a phenomenon meant increased opportunities not only to engage in music licensing to potentially millions of individuals who desire to receive musical works, but to republish them to others inexpensively.¹⁹⁰ On the other end of the spectrum, more skeptical views assert that increased loss of opportunities for the copyright owners to account for their returns due to possibly countless individuals accessing musical works via interactive digital transmissions of musical works and sound recordings.¹⁹¹

However, it has become apparent that if you are not a large music contents provider in Korea, then this may operate as a barrier in entering into the Terms of Use Agreement with KOMCA. KOMCA’s position is that it only executes agreements with large content providers such as YouTube or ‘Podbbang’ that engage in a platform business and it does not enter into agreements with individual content providers.¹⁹² The reason for KOMCA’s refusal is based on the copyright royalty calculation. In order to calculate copyright royalties, there needs to be detailed information and a record of the use of musical works used such as a podcast. Individual content providers cannot furnish such information due to a lack of resources, personnel, and so forth.¹⁹³ Currently

¹⁸⁸ Al Kohn & Bob Kohn, *Kohn on Music Licensing*, Wolters Kluwer Aspen Publishers, 47 (4th Ed., 2010).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*, 46.

¹⁹¹ *Id.*

¹⁹² 마을미디어에서 음악이 사라진다고? March 7, 2016

<http://www.mediaus.co.kr/news/articleView.html?idxno=53432>.

¹⁹³ *Id.*

‘Podbbang’¹⁹⁴ is in the process of entering into an agreement with KOMCA, however, it is only limited to real time broadcasts – the podcast would not be easy to include. KOMCA claims that through YouTube, Daum tvPot¹⁹⁵ or Naver tvcast¹⁹⁶ there are full agreements currently in place with KOMCA, thus, podcasts can be used on these three large music platforms. However, such platforms focus on clips of videos, whereas the majority of individual contents providers like Maeul Media’s¹⁹⁷ provide content that is more oriented towards radio programs. Therefore, without a license agreement with KOMCA, Maeul Media will face difficulty reaching its listeners.¹⁹⁸ The purpose of establishing Maeul Media was to introduce music to the public, however, due to the potential copyright infringement risk created by the lack of any license agreement, it is unable to broadcast music. This problem has been raised to the Copyright Committee, however, it has only been dealt with in a matter of fact, formalistic way with no purposive progress.¹⁹⁹

Rather than finding a practical licensing model to accommodate this type of medium, the continued refusal to enter into license agreements with small content providers like Maeul Media due to Maeul Media’s supposed lack of ability to furnish royalty payment reports does not seem to be within the ‘justifiable’ exercise of KOMCA’s rights under the Copyright Act.

b) Unreasonable Demand of Royalties by CMO

Excessively asserting rights to copyright royalties on a service that should not be collected upon pursuant to the music levy rates approved by the MCST, is another category of practice by CMOs that potentially raises an anticompetitive red flag.

¹⁹⁴ Podbbang is a Korean podcast platform that hosts free podcasts from a variety of networks.

¹⁹⁵ Daum tvPot is a freeware TV cast service launched by a web portal company called Daum in Korea.

¹⁹⁶ Naver TVcast is a TV cast service launched by Korea’s largest online portal Naver.

¹⁹⁷ Maeul Media is a community media in Korea. It involves a network for promoting communication and solidarity in a community medium that focuses on sharing life stories and social issues experienced by ordinary people in the community.

¹⁹⁸ *Supra* n 192.

¹⁹⁹ *Id.*

i. *Music in Movie Theatres (KOMCA v CGV)*²⁰⁰

KOMCA has asserted strong protection for public performance rights royalties. KOMCA's basis for its strenuous effort in going after major film companies is to expand the scope of performance protection rights because such rights represent a substantial revenue stream for the copyright holders. While the focus of this case was on Article 99(1) of the Copyright Act, it nonetheless shed light on another aspect of licensing practices by KOMCA.²⁰¹

Between 2012 and 2016, the Korean movie industry and KOMCA were involved in a legal dispute. KOMCA brought a large scale lawsuit against CJ CGV and other multiplex film companies by notifying such multiplex film companies to pay for foreign movies' public performance royalties.²⁰² The film companies came together to set up a Film Music Copyright Conciliation to defend their position against KOMCA.²⁰³ KOMCA asserted that the film companies must execute copyright license agreements with KOMCA including situations where contracts are entered into by the film companies directly with film music directors and producers.²⁰⁴ At the same time, KOMCA argued that in addition to music usage royalties, when such music is used in films that are shown at theatres, this is a separate right of public performance, thus a corresponding payment for public performance is required.²⁰⁵ Hence, KOMCA demanded a retrospective payment for all the music used in the films from October 2010.²⁰⁶ KOMCA's line of argument effectively conveyed that film companies who had paid for the use of the

²⁰⁰ Supreme Court Decision No. 2014da202110 handed down on January 14, 2016.

²⁰¹ *Supra* n 21. Article 99(1): "(Cinematization of Works) (1) If the owner of author's property rights authorizes a person to cinematize his work, it shall be presumed that such authorization includes each of the following rights, unless otherwise stipulated: 1. To dramatize a work for the production of a cinematographic work".

²⁰² *Supra* n 200.

²⁰³ Film Music Copyright Conciliation, 영화음악 사용허락에 Q&A (3)- 음저협과 CJ CGV 민사 1 심판결 이후, Korean Film Producers Association (June, 2013).

²⁰⁴ *Supra* n 200.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

musical works for the very purpose of screening at the music theatres, would have to pay KOMCA again for the same purpose but under a different head of ‘right of public performance’.²⁰⁷ The film industry was enraged, arguing that it had paid all the royalties needed to allow them to produce and screen the movies at the theatre.²⁰⁸ Negotiations between the film companies and KOMCA broke down, and KOMCA soon after went to the MCST requesting approval of the music levy rates that reflect KOMCA’s position on the public performance rights royalties.²⁰⁹ This position is especially unfair for independent films, which often play self-produced music in their films.²¹⁰

However, after four years of legal battle, the court found in favor of the film industry. In January 2016, the Supreme Court held that the music used in the films and shown at the theatres cannot be perceived as public performance for the purpose of the Copyright Act.²¹¹ CGV won in both the first court of appeal and before the Supreme Court who upheld the court of appeal’s verdict. It was held that in the event that copyright owners enter into a direct license agreement with either film producers or music directors, then the rights of reproduction, distribution as well as public performance of the works at the theatres for both creative musical works and existing music works should be deemed permitted under the agreement with KOMCA.²¹² In other words, the users do not have to go through KOMCA or other CMOs in order to directly enter into a license agreement for the use of musical works with the copyright owners. Moreover, the Supreme Court made it clear that in the agreement between KOMCA and the film producers, there were no provisions that indicated public performance of the musical works at the theatres were excluded. For this reason, the court held that without any special provision suggesting

²⁰⁷ *Supra* n 192.

²⁰⁸ Han, Ji-young, “Limitations on rights of public performance” *Ajou University Law Institute, Vol. 9 No.4, pp.153-182* (2016) 158.

²⁰⁹ “영화 제작시 ‘특약’ 없었다면 음악 공연권료 책임 없어” June 3, 2013, <http://www.etnews.com/201306030550>.

²¹⁰ *Supra* n 203, 5.

²¹¹ *Supra* n 200.

²¹² *Id.*

otherwise, the public performance right granted under the license agreement in question extends to the use at movie theatres as well.²¹³

Of relevance, the Supreme Court noted that KOMCA's demands of royalty rates and assertion of such rights was excessive.²¹⁴ A restraint exercised by the court can be seen in the judgment so that the rights of copyright holders are not expanded without boundaries and against the intent of the Copyright Act.²¹⁵ From an anticompetitive practice point of view, it appears that the demand for copyright royalties - while in principle a justified exercise of copyright - cannot be used as a weapon to restrict fair media communication and to halt cultural advancements and distribution channels.²¹⁶ To this end, it is difficult to perceive the actions of KOMCA in this case as acting substantially in the interest of the creators. While it was a positive decision for the film industry, it was most likely only possible because the party opposing KOMCA was CGV, a large company with sufficient resources to be able to pursue a legal battle, unlike smaller, powerless businesses facing potential copyright infringement.²¹⁷

ii. *Creative Commons License ("CCL") and Wantreez Music*

A few years ago there was a dispute between KOMCA and a venue music business called Wantreez Music on the issue of CCL.²¹⁸ KOMCA requested Wantreez Music to withhold using CCL music and use only the songs in KOMCA's category at the venues

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Shin & Kim, *Legal Update* (January 28, 2016).

http://www.shinkim.com/upload_files/newsletter/SHIN&KIM_IP_Legal_Update_201601_kor.pdf.

²¹⁶ *Supra* n 192 which also criticizes excessive copyright assertion by KOMCA.

²¹⁷ *Id.* See also, 저작권 강화, 이제 주민센터 노래교실까지 거덜낸다 January 15, 2013

<http://ipleft.or.kr/?p=4248>:

"On 15 January 2013, it was reported that KOMCA has demanded royalty payment from a local community singing class. Sharp criticism was drawn against KOMCA's yet again aggressive assertion of copyright which appeared to prevent low income residents from enjoying cultural activities. While the local center singing class received fixed fees for the attendance, however, it is different from a private academy as it was held at a no-profit center that used the budget of the local community service center targeting senior members of the community."

²¹⁸ 매장음악 놓고 음저협·원트리즈뮤직 '벼랑끝 대치' August 7, 2013

<http://www.etnews.com/201308070306>.

and KOMCA notified Wantreez Music that if such a request was not accepted, then it would go ahead in terminating the existing Terms of Use Agreement.²¹⁹ In response, Wantreez Music made a complaint to the Fair Trade Committee and sought arbitration. From an individual business perspective, this is the first case that has been raised before the Fair Trade Committee against KOMCA. Wantreez Music argued that KOMCA misused its dominant power by demanding acceptance of an unreasonable request, that is, ceasing the use of CCL music, followed by a unilateral notification of termination of the Terms of Use Agreement.²²⁰

To provide some background to the business arrangement between Wantreez Music and the use of CCL works, firstly, Wantreez Music had entered into an exclusive supply agreement with Europe's biggest open copyright company called Jamendo and therefore held 100 CCL songs for the purpose of its venue music business.²²¹ Wantreez granted uses of the CCL music only when a store requested such a catalogue.²²² Wantreez also used pop songs licensed from KOMCA's catalogue as well. KOMCA, however, argued that Wantreez Music's exclusive commercial arrangement with a foreign business adversely hampered fair business practice regarding music played at stores and this consequently lead to adverse effects on the rights of copyright holders.²²³ KOMCA asserted that some music businesses had complained about the business model adopted by Wantreez Music on the basis that an exclusive use of CCL prevents fair return of copyright royalties to the copyright holders and ultimately detrimentally affects the interests of the creators.²²⁴ Nonetheless, KOMCA claims that it only notified termination of the agreement and has not actually terminated the relationship. If the arbitration does not result in an amicable resolution, the case will be transferred to the Fair Trade Committee. Then KOMCA's practice will be examined by the Fair Trade Committee to see if it has engaged in unfair business practices.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Do Shin Lee, *Report on Royalties on the Digital Audio Transmission*, Ministry of Culture, Sports and Tourism (April, 2016) p. 23

²²² *Id.*

²²³ *Supra* n 218.

²²⁴ *Id.*

Early last year, another battle between a CMO and Wantreez Music arose, this time in respect of dissemination of false information and facts in the way Wantreez Music is conducting its business.²²⁵ The tension first reached the media when the Recording Industry Association of Korea (“RIAK”), a CMO for sound recordings, published an article without the knowledge of Wantreez Music claiming that Wantreez Music is conducting an illegal venue music service.²²⁶ Wantreez Music argued that musical works that are not subject to CCL are used in accordance with the Terms of Use agreement with the Korean Copyright Committee. Wantreez Music claimed that it has duly been paying copyright fees and, through its own developed digital transmission system, legitimately distributing venue music to others.²²⁷ In saying this, however, Wantreez Music admitted that thousands of venues in which Wantreez Music provides services through the method of digital transmission, there are a few (3% or fewer) venues where there has been an insecure internet connection and thus they could not utilize the streaming service. As a way to temporarily fix the problem, Wantreez Music offered a download play service.²²⁸ This has been rectified and all of the venues in which Wantreez Music has licenses are now enjoying the upgraded version of streaming services and are therefore free of any copyright infringement issues.²²⁹

According to the report announced by RIAK, Wantreez Music has only entered into an agreement with one CMO with respect to the digital transmission (webcasting service) and it has not entered into agreements with the other music-related CMOs.²³⁰ More importantly, it was reported that Wantreez Music has not entered into any agreements

²²⁵ Seok Jung, Kwon 원트리즈뮤직, 저작권법 위반으로 약식기소, *10 Asia* (January 22, 2015) <http://tenasia.hankyung.com/archives/423589>.

²²⁶ Hyun Taek, Park, 서비스업체 원트리즈뮤직, 저작권법 위반 형사처벌, *JTBC News* (January 22, 2015) http://news.jtbc.joins.com/article/ArticlePrint.aspx?news_id=NB10736020.

²²⁷ *Id.*

²²⁸ Seok Jung, Kwon, 원트리즈뮤직, CCL 논란에 대해 “음산협, 허위사실 유포로 고소할 것”, *Hankyung* (January 22, 2015) <http://stock.hankyung.com/news/app/newsview.php?aid=2015012259264>.

²²⁹ *Supra* n 225.

²³⁰ Recording Industry Association of Korea webpage (January 22, 2015) http://www.riak.or.kr/customer/news_view_new.asp?pkey=11703&page=1.

that deal with rights pertaining to ‘transmission’ with any of the three music CMOs or copyright holders.²³¹ In their defence, Wantreez Music clarified that for digital transmission rights, an agreement with KOMCA is required, however, for the other two music CMOs (FKMP and RIAK) there is a regulation that allows for post compensation of royalties. Thus, Wantreez Music is not obliged to execute an agreement with these latter two CMOs in advance.²³² Another aspect of the report regarding which Wantreez Music claims falsehood is that it has never at any point supplied music other than CCL music to venues which have only executed an agreement for CCL music.²³³ Moreover, Wantreez Music has maintained that it promptly agreed on a mutual resolution to avoid copyright infringement on the pre-listening service a few years ago.²³⁴ Wantreez Music has expressed disappointment that RIAK is bringing up this incident, which have been resolved, as a way to intentionally detect any defects in the Wantreez Music business.²³⁵ Additionally, for such an aggressive act by RIAK, Wantreez Music claims that it cannot help but feel that RIAK is trying to put undue pressure on the CCL recording market. The upshot of this apparently aggressive enforcement by RIAK is, according to Wantreez Music, de-incentivizing businesses like Wantreez from enhancing music services through constant upgrades to the existing system for the purpose of resolving ongoing copyright issues.²³⁶ It appears that a CMO singularly targeting Wantreez Music - by virtue of its position in the field - constitutes an unfair treatment causing detrimental effect to the business.

iii. SKT’s Additional Service Charge Case

This case is about a dispute between KOMCA (the applicant) and SK Telecom

²³¹ *Id.*

²³² *Supra* n 225.

²³³ *Supra* n 226.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Hyun Ju, Cho, 가게에서 노래 들었더니 저작권료 내라 하네요, 음악단체들 ‘매장 음악’

저작권 단속 나서면서 마찰 빚어 *Sisa Press*, April 9, 2013

<http://www.sisapress.com/journal/articlePrint/137140>.

(“SKT”)²³⁷ (the defendant) as to the payment for transmission fees by SKT.²³⁸ The dispute centered on how to assess the revenue which is used to base the royalty fee for the transmission fee. The question was whether the monthly additional charge of 900 KRW (obtained by the defendant by its members) is also included in the royalty payment. To resolve this issue, the applicant requested arbitration to the Copyright Commission and the parties agreed to such method of resolution.

In the course of the proceedings the defendant argued that the applicant was in a ‘market dominant position’²³⁹ for the purpose of antitrust law and the applicant is only in pursuit of increasing its profits in the usage fees by demanding royalties on the additional service charge. The additional service charge is something which the defendant requests from its members in consideration for the communication network and technology investment. The applicant wanted to obtain a slice of the royalties on such additional charges by virtue of placing a condition reflecting such additional charge in the contract. KOMCA instituted this proceeding based on such a contractual provision and in light of such practice, the defendant claimed that KOMCA has abused its market dominating position and, as a result, misused its copyright.

On this point the court stated that, (1) in accordance with Copyright Act Article 105(5) the music levy regulation must be approved by the MCST and therefore KOMCA was not in a position to arbitrarily decide on the royalties, and (2) when looking at the surrounding circumstances of this case, both parties after realizing that there was a potential dispute as to the additional service charge, agreed to resolve the issue through arbitration and then before the court. The court note that pursuant to the agreement, KOMCA initiated this proceeding and (3) that SKT receives information on the usage fee from its members, the copyright holders, the copyright neighboring right holders and other content related stakeholders. SKT distributes a total of 66.5% of the share for the information usage fee and the remaining 33.5% is treated as an additional service usage

²³⁷ SK Telecom is South Korea's South Korean wireless telecommunications operator, it is part of the SK Group and is the largest wireless carrier in the country.

²³⁸ Seoul High Court Decision No.2011Na24663 held on October 26, 2011.

²³⁹ *Supra* n 129, Article 2(7).

fee which goes to SKT. As claimed by SKT, the consideration for the mobile communication network system and other usage returns are not treated differently and they are not divided or separately processed from the additional service usage and the information usage fee. Thus, SKT claimed that there is no room for KOMCA to intervene on such a payment process. If the revenue is limited to the information usage only, then the possibility of different royalties being paid to KOMCA due to arbitrary classification of payment by SKT would be high. Therefore, the court held that, taking into account the surrounding circumstances and the very purpose of the establishment of KOMCA, SKT's business size and its position in the mobile communication industry, as well as the mutual agreement to pursue this case, viewed in its entirety makes it difficult to conclude that the applicant has misused copyright owing to its market dominant position. The court as a result, dismissed the defense of copyright misuse. It appears that the parties' intention and the mutual arrangement to pursue this case steered the court away from finding a misuse of market dominant power.²⁴⁰

The striking factor about this case is that the antitrust law's market dominance argument was used as a premise to the copyright misuse theory rather than under the auspices of MRFTA and the intervention of the Fair Trade Commission. Additionally, the court found KOMCA not to have abused its monopoly position primarily due to two reasons. First is the fact that KOMCA has to obtain prior approval from the government when setting royalty rates and secondly the fact that the proceeding in question was instituted with the mutual consent of the parties. Nonetheless, the absorption of the analysis of competition law and copyright defence is seen by some academics to be improper and problematic.

It was explained that there are several disadvantages in tying the two issues together when analyzing a case.²⁴¹ Not only is there an issue regarding copyright misuse and

²⁴⁰ 대법 "통화연결음 부가서비스 저작권료 인취도 돼", *JTBC* (July 11, 2013)
http://news.jtbc.joins.com/article/article.aspx?news_id=NB10307669.

²⁴¹ Byung gyu Lee, A Study on Copyright Misuse Defense Developed by US Case Law, *Kyung Hee University Law Review*, Vol. 49, No. 3 (2014).

antitrust violation, which contain different elements for establishment,²⁴² but they also differ in terms of remedies and implications as well. Further, it has been pointed out that there is a risk of examining copyright misuse cases as a type of antitrust violation and such an application method could narrow the scope of copyright misuse.²⁴³ Copyright misuse cases include and handle facts that are irrelevant to antitrust law. For instance, one of the key reasons why the copyright misuse discussion needs to be dealt with separately from the antitrust law discussion, is the lack of market power which the copyright holder wields. The most often cited problem in the antitrust law cases is the abuse of a market dominant enterpriser and thus the business or the product in question must hold some market dominance. However, in comparison to patent and trade mark, copyright is perceived to hold a weaker market dominating effect. Therefore, using the antitrust regulation of market dominance on the copyright holder effectively incapacitates the misuse of the copyright principle. This would be no different than giving up on controlling and regulating the copyright misuse acts outright. Therefore, to decide the case by stating that because there is no market dominance and therefore both antitrust and copyright misuse arguments will fail is a dangerous approach and one that needs to be clarified and structured by the courts sooner rather than later.²⁴⁴ In addition, this author is of the view that a greater focus on the nature of activities adopted by KOMCA was needed and the intentions behind its demand for royalties should have been addressed to assess whether KOMCA's practice was a 'justifiable exercise of an intellectual property right'.²⁴⁵

c) Non-Transparent Conduct

²⁴² To explain, there are two elements to the copyright misuse (misuse of power) as per the Civil Act, namely, the subjective and objective elements. However, for antitrust violation, the Fair Trade Commission intervenes and the remedies are granted from an administrative law point of view, and the remedy must pass the Fair Trade Commission's investigation, consent decree or a corrective or mandatory performance and penalty. Copyright misuse, on the other hand, is often used as a defence in a case of copyright infringement and hence from a litigation point of view it is used as a type of defence.

²⁴³ *Id.*, 218.

²⁴⁴ *Id.*

²⁴⁵ *Supra* n 129, Articles 58 and 58.

The problem is that for both public and non-commercial purpose uses, the CMOs have been actively seeking to obtain copyright fees for such uses. However, whether such money obtained actually goes to the authors remains questionable. It appears that even though the copyright royalties have been demanded forcefully it doesn't appear that the creators are fairly receiving their dues in return.²⁴⁶ In October 2015, KOMCA was accused of misappropriate handling and distribution of royalties.²⁴⁷ It receives millions of KRW in music royalties but in the distribution phase, it has not appropriately analyzed and distributed the royalties and it has done so without any plans or systematic methods.

This is not just a matter of concern for KOMCA, but also applies to other music intermediaries. At around the same time, Roy Entertainment and Koong Entertainment have entered into agreements with broadcasting companies for background music in dramas etc. and have raised high profits, but it was reported that the actual employee song writers were not paid regularly and promptly for their works. It turned out that the copyright holder's name was also registered as the company's representative's name.²⁴⁸ This shows that the copyright payment is not being properly and fairly returned to the creator. The lack of transparency and fairness in the distribution is not the only problem. Sometimes, due to the copyright issues the creators are overwhelmed by the complexity and this has been used inappropriately as a means to threaten and strangle someone's rights. It is fair to say that creators who have put in so much effort into creating musical works should not be used freely by Maeul Media and/or podcasts. However, as seen above, the CMOs who are responsible for managing such copyrighted works are not entirely without fault.²⁴⁹ They too have a major problem in that the lack of recordation of the exact use of copyrighted works damages music creators and their income.

²⁴⁶ 음저협, 저작권료 정산 방식 변경.. '개리 논란' 해결점 찾나, *Josun*, April 10, 2015
http://news.chosun.com/site/data/html_dir/2015/04/10/2015041001576.html; Yujin Jun, 음저협 “35 억 지급 완료 개리에 직접 사과할 것”, *The Huffington Post Korea*, July 21, 2015,
http://www.huffingtonpost.kr/2015/07/21/story_n_7839964.html.

²⁴⁷ *Id.*

²⁴⁸ NamEunju, 마저 '열정페이'의 결과물이었나 Augus, *Hani News* August, 19 2015,
<http://www.hani.co.kr/arti/PRINT/705125.html>.

²⁴⁹ *Supra* n 192.

3.3.2 *Restrictions on Improper Concerted Practices*

Pursuant to Article 19 of the MRFTA which sets forth a prohibition on improper concerted practices, no enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means to engage jointly in any of the following acts or let others engage in such kinds of activities that unfairly restrict competition (hereinafter referred to as “improper concerted practice”).²⁵⁰ Subsections 1 and 2 of this Article specifically mention the act of fixing, maintaining, or changing prices as one of the prohibited improper concerted practices and an act of determining the terms of trade or conditions of payment of goods or services. As the music industry gains momentum in the current digital era, it is not just the conduct of CMOs who have been criticized for reaching beyond their permitted scope of rights. Large music online service providers have also introduced various types of business models involving price-fixing schemes and other anticompetitive features in an attempt to draw in consumers to acquire a competitive edge.

The SKT price collusion case illustrates this point. This case was about abuse of a market dominating position, unfair collusive practice, and collusive refusal to trade, regulations of business associations and their misuse of position in transactions ultimately tried to exclude newcomers from entering into the market.²⁵¹ For the online music service provider (‘OSP’) to conduct its online music business, permission from all of the music owners must be obtained. However, as we have seen, pursuant to the Copyright Act, MCST’s approval allows a CMO to manage the copyrighted works on behalf of the copyright owners and thus OSPs simply require permission from the CMOs. Lyricists, composers, performers and music producers receive royalties in consideration for the use of their copyrighted musical works on the basis of MCST-approved music levy rates. Each CMO holds its own approved music levy rates. Once the music levy rate is enforced then the three CMOs each enter into Terms of Use Agreements with the OSP. The three music CMOs’ music levy rates were approved on 28 February 2008 and

²⁵⁰ *Supra* n 129, Article 19.

²⁵¹ Fair Trade Committee Decision No. 2010kajo3119.

enforced on 1 May 2008. Previously, only the downloading of DRM music was allowed, however, when the download service for Non-DRM transpired, the music OSPs came together to agree on the Non-DRM music and the related product scope. In the amended rates, the Non-DRM music download service was allowed fully but for the fixed download products case, a limit of 120 songs or unlimited Non-DRM products could be supplied. To this end, the questions of the unlimited Non-DRM fixed service released by the OSPs, the number of songs for the Non-DRM Products and their corresponding price, were determined. The difference between DRM and Non-DRM is that the former contains a technical tool equipped in the copyrighted works that protects the contents of online or digital music, while the latter lacks such mechanism and thus does not contain any restrictions of use.

SKT and Loen in conjunction, decided with KTF, KT music, CJ E&M and Neowizinternet, that: (1) for the Non-DRM fixed rate download product case, an unlimited song product package was allowed to be supplied. However, for the limited product or package, this was only permitted provided that when forty songs are purchased such will be priced to 5000 won and for 150 songs, 9000 won; (2) in case of a combined product, the streaming component of the Non-DRM will be set to 1000 won and the existing 5000 won for the MR product is to be maintained; (3) for the case of limited song product, when DRM is applied, then it will be 20% of the price of the Non DRM product; (4) for the single download product, the price will be the difference between the Non-DRM music and DMR music and such difference will be 100 won; and (5) for those anomaly products other than the 5000 won per forty songs and the 9000 won per 150 songs, will not be released (e.g. seventy songs for 7000 won). In sum, such music OSPs agreed not to release unlimited Non-DRM fixed-rate products but only the products that conditions 5000 won for forty songs and 9000 won for 150 songs, ultimately coalescing each OSP's sale products. In late 2008, it was also revealed that there was another collusive pricing practice to increase the price of combined Non-DRM product by 1000 won. Such practice was deemed by the Fair Trade Committee as an unfair collusive practice and accordingly ordered corrective measures and a penalty.

The Fair Trade Committee stated that the conduct by the said OSPs in collectively fixing the price and the supply terms prevents medium sized businesses from releasing more competitive products thereby detrimentally impairing the rights of consumers and the medium sized businesses in the relevant market.²⁵² In addition, by limiting the types of product and fixation of price, there is the effect of adhesion to the music market and blocked chances of introducing various types of products and corresponding pricing options. In the view of the Fair Trade Committee, such activity effectively violates consumers' rights to make choice in products and it is also a breach of Article 19(1)(1) of the MRFTA, which prohibits collective agreement on a price. In this case, the agreement is not simply one that decides on the new Non-DRM fixed download product's price, but rather a price collusion prohibited under the Article 19(1)(1). The agreement is based on the fact that the product to be supplied will be limited to a certain number of songs and thereby ultimately setting the price for one song for which the consumers will be using it to base their transaction in the market. In other words, an activity that goes beyond mere determination of standard price of a new product (e.g. for the non-DRM fixed download product) will be a price collusive practice and thus a violation of antitrust law under the MRFTA.²⁵³

In April 2016, it was reported that Loen Entertainment and KT Music have been subject to an audit from the Fair Trade Committee on the issue of online music service collusion.²⁵⁴ The basis of the instigation arises from the alleged collusive activity between the two largest online music service providers, Melon (Loen) and Genie (KT Music) to hinder market entrance of the newcomers to the online music service market, namely, Milk Music, Beat and Dinga Radio who are in a competitive relationship with Melon and Genie. Further activities of KOMCA, Universal Music and other music publishing companies have also been subject to investigation of the Fair Trade Committee in an attempt to unearth any unfair collusive activities. Loen and KT Music

²⁵² *Id.*

²⁵³ *Supra* n 136, 295.

²⁵⁴ Hyuna Kim, 음원시장 갑질 논란 끝날까..공정위, 로엔-KT 뮤직 담합 조사, 이데일리 (May 10, 2016)

<http://www.edaily.co.kr/news/NewsRead.edy?newsid=01541606612647608&SCD=JE41&DCD=A00504>.

are also being accused of abusing a market dominating position. Examining the past conduct of Loen, KT Music and KOMCA, reveals Loen's suspension of 26,000 songs from being supplied by Milk Music in February 2015; Loen and KOMCA opposing MCST's enactment of Beat's music levy rates in December 2015; Loen and KT Music, KOMCA and Universal etc. rejecting the streaming radio DingaRadio's license request and jointly submitting a warning against DingaRadio in February 2016. Analysis showed that such an array of incidents indicates that the new entrants (Milk and Beat) are experiencing difficulties due to large music distribution companies such as Loen and KT Music controlling the mammoth existing music platforms such as Melon and Genie and harboring ill-feeling towards competitive businesses. This case was brought before the Supreme Court and on 9 October 2016 it was held that Loen Entertainment and KT Music's online music recording service was in violation of MRFTA for price collusion and accordingly the court penalized the two companies with 1 million KRW.²⁵⁵ While this case did not centrally address the issue of the intersection of copyright law and anticompetitive practices under MRFTA, it nonetheless illustrates the scenario where multiple copyright holders are abusing market dominant positions by engaging in a collusive practice and collusive refusal to trade by excluding newcomers in a specific market.

3.3.3 *Unfair Business Conduct*

Even if the court does not recognize the market dominance, there is a room in the scope of the antitrust analysis of the MRFT Act to capture anticompetitive conduct of CMOs, namely, the grounds of unfair business practice. Chapter 5 of the MRFT Act prohibits unfair trade practices. Article 23(3) of the MRFT Act states that, 'no enterpriser shall commit any of the following acts that are likely to impede fair trade (referred to as "unfair trade practices" hereinafter) or make an affiliated company or other enterprisers perform such act of unfairly inducing or coercing customers of competitors to deal with

²⁵⁵ Jimin Shin, '온라인 음원 담합' KT 뮤직·로엔엔터, 유죄 확정... 각 벌금 1 억원, *LegalinSight* (October 10, 2016) <https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=103680>.

the enterpriser in question'.²⁵⁶

a) The case of 'tying' (Milk Music)

The dispute between KOMCA and Milk Music, a streaming radio service application introduced by Samsung Electronics, first officially commenced on 11 October 2014. KOMCA announced that it would terminate the Terms of Use Agreement (the Agreement) with Soribada, which had supplied copyrighted works to Milk Music, for breach of the said Agreement.²⁵⁷ Milk Music together with Soribada, is an internet radio service provider in Korea. Internet radio service is a type of service where the user can choose in advance the music he or she wants to listen to – it is distinguished from an on-demand streaming service. For example, KBS classic FM (93.1MHz) can be downloaded on smartphones to listen to classic music. One can only listen to classic music on KBS classic FM, but for Milk Music, the user can select any genre of channels and listen to it like a radio. Users can also customize his or her dial by adding preferred stations, or create one's own station around one's favorite artists or songs. On 9 March 2015, Samsung brought its free Milk Music streaming radio service to more users via the web, as promised in January last year. Previously, Milk Music had been available as an application only for Samsung smartphones, tablets, TVs and smartwatches, but from March 2015, it was now made available to anyone with a browser.²⁵⁸

Though Milk Music has exited the world's largest market, the United States in September 2016, Samsung is not ready to abandon Milk Music altogether. A Samsung representative said that Milk Music continues to operate in China, Malaysia and South Korea. Internet Radio Service is something that has already become universal overseas

²⁵⁶ *Supra* n 129, Article 23(3).

²⁵⁷ Ryu Sena, 삼성 밀크 파동, 시민단체 '음저협 제소 검토' *inews24* (October 30, 2014) http://news.inews24.com/php/news_view.php?g_menu=023110&g_serial=859882; '밀크파동'에도 소리바다는 방긋...왜? September 27, 2014 <http://news.joins.com/article/15939683>; 삼성전자 "내일 22일 미국서 '밀크' 서비스 중단 August 22, 2016

<http://www.yonhapnews.co.kr/bulletin/2016/08/22/0200000000AKR20160822039500017.HTML>.

²⁵⁸ 무료 음악 스트리밍 서비스가 음악산업에 미치는 영향에 대한 연구, 공정거래 측면에서 접근: 끼워팔기를 중심으로, Korea Creative Content Agency, 2015.

and is also being solidly forming its presence in the domestic market. In the United States, 47% of the music market goes to radio streaming. From the domestic music market perspective, the introduction of the Milk Music service, which emphasizes the ‘free’ element quite profoundly, has brought about issues of antitrust raised by both parties - KOMCA and Milk Music.²⁵⁹ Understanding these issues will aid in pinpointing area of conduct where music licensing practice draws in sharp antitrust scrutiny.

Firstly, arguments by KOMCA will be considered. KOMCA’s basis for termination is that in accordance with the Terms of Use Agreement between KOMCA and Soribada, the terms of the Agreement explicitly state that Soribada must provide a ‘paid’ service and, therefore, Milk Music pays respective royalties to Soribada and Soribada pays royalties to KOMCA for the use of the music.²⁶⁰ At the end of the day, KOMCA’s view is that Milk Music is nonetheless supplying such copyrighted music for free to its users. KOMCA’s line of reasoning is that the specific term ‘paid’ in the agreement is not about who is paying the copyright royalties.²⁶¹ According to KOMCA, this is not the standard in which the said term should be measured against but rather, the term ‘paid’ must be read to implicate that Milk Music’s use of the copyrighted works be based on a ‘paid-system’. Only in such instance would Soribada be regarded as having fulfilled its obligation under the agreement with KOMCA. Moreover, KOMCA also expressed the danger of permanently inscribing a mindset in the consumers that accessing music for free is justified.²⁶² Additionally, the emphasis on the ‘free’ element of the music service by Milk Music unveils Samsung Electronics’ aggressive marketing. That is, by virtue of owning the Milk Music streaming radio service, it can become a collecting point for services used as a free music listening platform.²⁶³ To this end, it could negatively affect business models that have been developed progressively over the years and eventually block or prevent opportunities for such business models to flourish in a competing market. As a result, a creation of a large monopoly platform dominating the market could

²⁵⁹ *Supra* n 258.

²⁶⁰ *Supra* n 259, 94.

²⁶¹ *Id.*

²⁶² *Supra* n 258.

²⁶³ Samsung Milk Music in Setback in Conflict over Music Copyright Korea Bizwire (October 15, 2014) <http://koreabizwire.com/samsung-milk-music-in-setback-in-conflict-over-music-copyright/21792>.

unfold with a decrease in value by the consumers in relation to music consumption.²⁶⁴

Secondly, Milk Music argues that KOMCA's demand for the cease of the Milk Music service is evidence of an abuse of KOMCA's dominant position in the market.²⁶⁵ OpenNet and Consumer Korea likewise have submitted applications to the Committee against KOMCA for violating its dominant position for aggressively demanding the cease of use of music.²⁶⁶ Milk Music noted that using KBS Classic FM's application listeners do not have to pay. That is the key to the radio service. Milk Music pointed out that no one criticizes KBS for providing music for free and no one calls this a copyright infringement because KBS pays for the copyright on behalf of the listeners. Milk Music argues that its service is no different to this; Soribada or Samsung Electronics pays the royalties on behalf of the music service. But KOMCA has unilaterally terminated the agreement between Soribada and KOMCA for not receiving money from the listeners by Milk Music. Furthermore, Milk Music is claiming that KOMCA misused its dominant position and exceeded its authority by extending beyond the scope of its music levy rates approved by the MCST. To this end, Milk Music argued that as there was no internet radio service related music levy regulation at the relevant time, KOMCA in principle could not demand such a payment on a service that cannot be collected. In any case, because the model used by Soribada (which is paying usage fees to KOMCA) is close to an on-demand streaming radio concept, it is accordingly subject to the highest rate for copyright royalties, hence more returns to the copyright owners. As such, it has been argued by Milk Music that for KOMCA to terminate an agreement that is benefiting the creators goes against the interest of the creators. According to the Terms of Use Agreement between KOMCA and Soribada, KOMCA can unilaterally terminate only in exceptional cases, such as where there is an intentional or repetitive infringement of copyright or where, without the knowledge of KOMCA, the creator enters into an overlapping agreement with a third party or defaults on payment and other such exceptional cases. Other than such extenuating circumstances, KOMCA cannot refuse

²⁶⁴ *Id.*

²⁶⁵ *Supra* n 259.

²⁶⁶ Kyungmin, Lee, 오픈넷 "밀크뮤직 계약해지 관련 음저협 공정위에 제소" 뜻 밝혀, *etnews* (October 30, 2014) <http://www.etnews.com/20141030000210>.

the use of the copyrighted works.

As such, Milk Music has claimed that unlike other internet radio service companies, if KOMCA has been continuously terminating Milk Music in particular, then such an act should be deemed as specifically refusing a certain business and stopping the transaction by a specific company. This conduct is, therefore, a breach of sub paragraph 1 of Article 23(1) of the MRFTA which prohibits unfair trade practices, namely, an act of unfairly refusing any transaction, or discriminating against a certain transacting partner. In addition, Milk Music argued that in the music industry, KOMCA operates influential business activities for music creators, intermediaries and listeners but, without any special reason, it has refused a partner's business activity.²⁶⁷ The fact that KOMCA holds a market dominant position means that there are effectively no other alternatives for the business to enter into a music copyright use transaction. In Milk Music's opinion, this further highlights KOMCA's practice as unreasonable.²⁶⁸

Soon after the notification of termination by KOMCA that it would invoke its right of termination should Soribada fail to change, the Milk Music service was changed into a paid service for use of musical works. In this respect, it was reported by one of the media outlets that the final compromise likely to be made would be around 1000 KRW per month, however, there have been some views expressed that such an agreement on the final consumer price by KOMCA and Soribada is a serious antitrust violation, namely, a violation of Article 29(1) on Restrictions on Resale Price Maintenance. A question was raised as to how the copyright holder, here the CMO, can decide on the final consumer price? This was seen as surpassing the rights of valid copyright and falling within the scope of antitrust law.²⁶⁹ As we have seen in the Non-DRM case above, the Fair Trade Committee has already explicitly noted that as long as the three music CMOs receive copyright royalties, CMOs do not have the right to intervene or meddle with the sale price of the products or the pricing structure of such products sold by the online service

²⁶⁷ *Supra* n 259.

²⁶⁸ *Id*

²⁶⁹ *Id*.

providers. Nonetheless, in April 2015, nine months since the termination of the agreement by KOMCA, a new agreement was entered into that changed some of the services into ‘paid services’ and increased options for the users to choose which service (premium or general) it wishes to subscribe to in order to access the music.²⁷⁰ If the rights and obligations of music actors and activities are not clarified by means of legislative reform or authoritative guidelines, more disputes will arise and will likely be resolved on a case by case basis, driving up costs and time.

b) Blanket Licensing

It has been mentioned above that blanket licensing has been justified on the basis that it allows facilitation of mass-scale use of copyrighted works, which has essentially been the keystone in the flourishing of CMOs.²⁷¹ Blanket licensing allows users to predict the costs associated with the use of copyrighted works, offers legal certainty and provides them with a wide choice of works for performance and/or reproduction. Thanks to the reciprocal representation by the CMOs, they also grant users access to a worldwide repertoire from all participating international societies. As such, a reduction in transaction costs that enables users to be able to cover all rights under a single license worldwide definitely makes it intuitively appealing.²⁷²

However, prior to the establishment of KOSCAP which has introduced a ‘selection system’, blanket licensing meant that copyright holders had to basically assign all of their rights to the CMO including any future works. For this reason, blanket licensing created considerable difficulties for users from entering into an agreement that allows the use of only the selected works the user wishes to access and exploit. Due to blanketing licensing, the user has no choice but to enter into a Terms of Use Agreement which contains unnecessary works. As a result, users’ freedom became restricted and the forced

²⁷⁰ Kim Boyoung, 삼성 밀크뮤직, 저작권 분쟁 해결 Hankyung (July 1, 2015)

<http://www.hankyung.com/news/app/newsview.php?aid=2015063033861>.

²⁷¹ *Supra* n 83, 190.

²⁷² *Id.*

transaction leads to exclusion of competitors and interference with fair transaction. Such practice could possibly be in violation of Article 23(1)(3) of the MRFT Act and Enforcement Decree of Article 1(2)(5) regarding ‘tying’, that is, for buyers wanting to purchase one (‘tying’) product by forcing them to also buy another product or products.²⁷³ Nonetheless, if the user has had the option of paying only for the individual works he or she has selected then such structure of licensing would not be considered as a practice of tying. For this reason, it has been argued that there is a need to assess whether, prior to the approval of the music levy rates which reflects the blanket licensing regime, the practice of the relevant blanket licensing is found to be in breach of antitrust law or rather considered as a bundled discount which, owing to the reduction in price, ultimately increases the benefits of the users.²⁷⁴ It remains to be seen whether the new scheme introduced by KOSCAP will prompt other CMOs to implement a more discerning system suited to the current digital age.

CHAPTER 4

A COMPARATIVE LOOK AT THE U.S. MUSIC LICENSING SYSTEM

In light of the proposals presented by the U.S. Copyright Office in early 2015 which, if adopted, would bring in the most radical changes to how music is licensed in nearly a half century, the time is ripe to delve deeper into the U.S. counterpart in music copyright law and its intersection with antitrust law.²⁷⁵ Hence, this chapter will comparatively examine the standards and mechanisms used to curb the rights of CMOs and other music industry actors’ anticompetitive practices in the U.S.

4.1 *Protection of Music under the U.S. Copyright Act*

²⁷³ *Id.*, 198.

²⁷⁴ *Id.*

²⁷⁵ United States Copyright Office, *Copyright and the Music Marketplace*. A Report of the Register of Copyrights, February 2015.

The U.S. Constitution has given to Congress the power ‘to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’.²⁷⁶ While Congress in the early days, granted songwriters limited statutory control over their creations, it was not until 1909 that this power included the exclusive right to public performances for profit. It was not until 1917 that the composers were able to enforce this right. The current United States Copyright Act²⁷⁷ confers upon the owner of a copyright “a bundle of discrete exclusive rights,” each of which may be transferred or retained separately by the copyright owner.²⁷⁸ The importance of intellectual property has become even more apparent in the United States with the prevalence of digital technology and the Internet. In the context of music, like that of South Korea, copyright is vital to the existence of the music industry since the industry places its foundation on ownership of certain original and creative works, mainly songs and recordings.²⁷⁹ Thus, it is essential to have a solid understanding as to what rights are provided by copyright law to protect creators and owners of works of authorship and how they are exercised and enforced.

Firstly, similar to that of the Korean Copyright Act, originality and expression are required for a work to be capable of copyright protection. However, unlike that of Korean Copyright Act, the United States Copyright Act makes explicit the requirement of fixation in addition to originality.²⁸⁰ Section 102(a) of the U.S. Copyright Act lists eight specific categories of copyrightable works to demonstrate the types of works that may be copyrightable. Of relevance, among them are ‘Musical Works’ and ‘Sound Recordings’, which are the two categories most important to the music industry.

Section 102(a)(2) of the Copyright Act stipulates that ‘musical works, including any accompanying words’ are subject matter suitable for protection. The Act does not define

²⁷⁶ U.S. Const. art. I, §8.

²⁷⁷ *Copyright Act of 1976* (17 U.S.C. §§ 101 – 810).

²⁷⁸ *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 495-96 (2001).

²⁷⁹ Peter J. Strand, Robert Kouchoukas and William Rattner, *Legal Issues Involved in the Music Industry, Lawyers for the Creative Arts* (2005) https://law-arts.org/pdf/Legal_Issues_in_the_Music_Industry.pdf.

²⁸⁰ Moser, David J. & Stay, Cheryl L., *Music Copyright Law*, Course Technology, Cengage Learning 2012, 34.

‘musical compositions’, but the meaning of the term has been ‘fairly settled’.²⁸¹ A ‘musical work’ is the actual underlying musical composition (the song itself), which is the product of songwriters who write the music and/or lyrics of the composition.²⁸² Generally speaking, a musical work involves a grouping of melody, harmony and rhythm and must satisfy the three requirements mentioned above, that is, originality, expression and fixed in tangible form. For the purpose of the Copyright Act, music, lyrics or single instrumental compositions, each on its own or in combination, all fall under the term ‘musical works’.²⁸³ The relationship of music and lyrics has been described in these terms: ‘*the popularity of a song turns upon both the words and the music; the share of each in its success cannot be appraised; they interpenetrate each other as much as the notes of the melody, or separate words of the “lyrics”*’.²⁸⁴ Accordingly, in terms of assessing infringement, if a person copies only the music or the lyrics from a song, then the infringement liability reaches to the same extent as though that person had copied both the music and the lyrics together.²⁸⁵

Under the U.S. Copyright Act, the distinction between musical works and sound recordings is crucial in understanding the basis of music licensing. Sound recording as one of the categories of copyrightable subject matter is defined as follows: “*Works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects such as disks, tapes, or other phonorecords in which they are embodied*”.²⁸⁶ The underlying musical, literary or dramatic works whose performance may be contained on the recording is distinguished from a recording of song which is separately copyrightable from the song recorded. For instance, where a song (music composition and lyrics, if applicable) is copyright protected, the recording artist or record label company must obtain a license from the copyright owner of the song to reproduce the song in phonorecords. If a recording artist records the said song without

²⁸¹ H.R. REP. No. 94-1476, at 53 (1976)

²⁸² 17 U.S.C. §102(a)(2).

²⁸³ *Id.*

²⁸⁴ *Edward B. Marks Music Corp. V. Jerry Vogel Music Co*, 140 F.2d 266 at 267 (2d Cir. 1944).

²⁸⁵ *Id.*

²⁸⁶ *Supra* n 283, Article 101.

the permission from the copyright owner of that song, then the resultant sound recording produced will not be protected by copyright because that sound recording is a derivative work and under section 103(a), a derivative work which employs ‘*preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully*’.²⁸⁷

The important difference is that the copyright in the sound recording covers the rendition or performance of the musical composition rather than the composition of the song itself.²⁸⁸ In more simplified terms, compositions may consist of a combination of lyrics, melody, harmony and rhythm; a sound recording on the other hand may consist of synthesized sounds, mechanical sounds, or sounds that occur in nature and are not limited to recordings of musical compositions. Legal recognition of a sound recording occurred as a result of the changes in the way people consumed music over time as new technologies entered the music scene.²⁸⁹ It was not until 1971 that Congress recognized artists’ sound recordings as a category of copyrighted works deserving federal copyright protection. Therefore, sound recordings fixed before February 15, 1972, are not protected under the federal copyright law, however, they may be protected under state statutory and common law.²⁹⁰ The federal protection for recordings fixed on or after February 15, 1972 apply only to the exclusive rights of reproduction, distribution, and preparation of derivative works and no exclusive right of public performance was granted.²⁹¹

Then in 1995, Congress granted sound recording owners a limited public performance right for digital audio transmission.²⁹² Things got quite complicated from hereon with Congress passing a law in 1995 in an endeavor to account for digital distribution of music. Congress decided that the compulsory license for public performances of

²⁸⁷ *Id.*, Article 103(a).

²⁸⁸ *Supra* n 281.

²⁸⁹ Bielas, Ilan, “The Rise and Fall of Record Labels” (2013).*CMC Senior Theses.Paper 703* at 6.

²⁹⁰ Steve Gordon and Anjana Uri, “The Current State of Pre-1972 Sound Recordings: Recent Federal Court Decisions in California and New York Against Sirius XM have broader implications than just whether satellite and internet radio stations must pay for pre-1972 Sound Recordings”, *Journal of Intellectual Property and Entertainment Law, NYU, Vol. 4 No. 2* (Spring 2015) 340.

²⁹¹ *Id.*

²⁹² *Digital Performance Right in Sound Recordings Act of 1995* (“DPRSRA”).

songwriters' compositions should apply to streaming services.²⁹³ At the same time Congress chose to grant sound recording copyright owners and performers a public performance right for digitally streamed music, and to make this right subject to a compulsory license as well. The sound recording compulsory license covers only 'non-interactive' internet radio and 'non-interactive' streaming services like Pandora.²⁹⁴ The digital public performance right and accompanying compulsory license carry the consequence that sound recording copyright owners are now also paid for the streaming of their performances, while composition copyright owners are paid for the underlying composition, that is, digital downloads are considered sales rather than public performance and are thus paid separately.²⁹⁵

To track the relevant numbers and provide payments to performers and sound recording copyright owners, an entity called SoundExchange was created, which will be discussed in more detail below.²⁹⁶ Because Congress seemed to envision streaming services as closer to a substitute for terrestrial radio, it fashioned the related compulsory license fee scheme in a way that results in very low payments, such that artists are paid in the range of thousandths of a cent per stream.²⁹⁷ Some commentators have criticized the Congress 'for failing to account for the fact that, for many listeners, streaming services [which] would do more than simply replace terrestrial radio - these services would supplant the purchase of music'.²⁹⁸ The discussion below will provide a more in depth analysis regarding the way in which this right is subject to compulsory licensing under sections 112 and 114 of the Copyright Act but holds different royalty rates standards. Below is a simplified chart of artist revenue streams in the United States:

²⁹³ *Id.*

²⁹⁴ Blacc, A., Manta, Irina D., and Olson, David S. "A Sustainable Music Industry for the 21st Century." *Cornell Law Review Online* (2015) 44: "The sound recording compulsory license covers only "noninteractive" Internet radio and "noninteractive" streaming services like Pandora. It does not cover interactive services such as Spotify. This is why Taylor Swift was able to pull her music from Spotify but not Pandora."

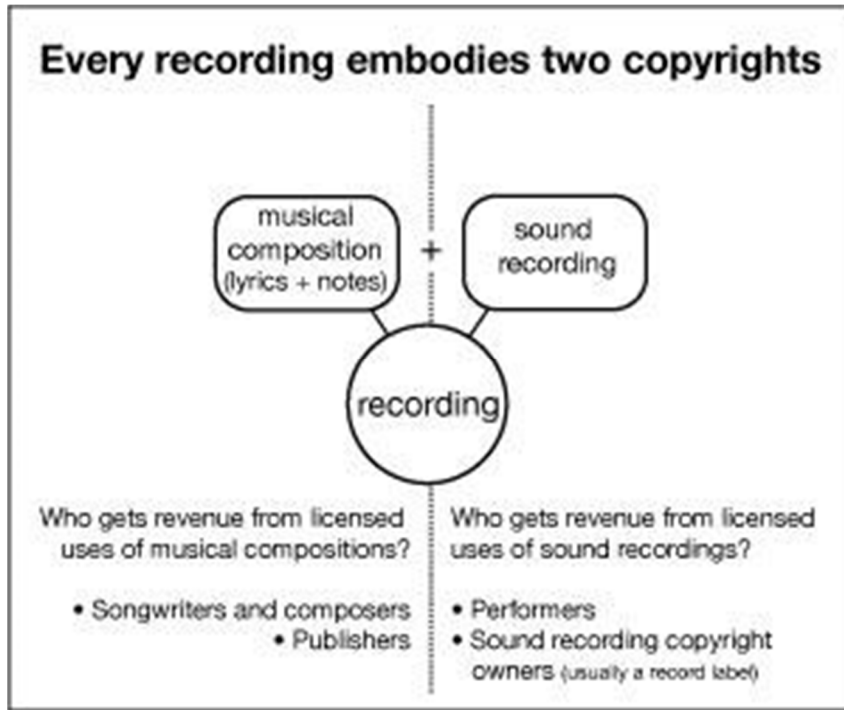
²⁹⁵ *Id.*

²⁹⁶ *Supra* n 283. Copyright Act, 17 U.S.C. §§ 112 and 114.

²⁹⁷ *Id.*

²⁹⁸ *Supra* n 295, 107: "Had Congress thought of streaming services as the way that listeners would "buy" the music they want to hear, including by creating "channels" or even playlists, it presumably would have made the compulsory license rates higher to compensate musicians adequately".

Figure 1: Artist Revenue Streams in the United States²⁹⁹



Exclusive use and control of one's intellectual property is the very underpinning of copyright protection. Section 106 of the Copyright Act sets forth six exclusive rights that copyright holders may have depending on the type of work involved.³⁰⁰ These exclusive rights (i.e. 'bundle of rights') can be enforced and owned separately and the copyright holder can exercise any of these rights by him or herself or grant permission to others to do so. In the context of music, there are licenses for different uses of music. The three core licenses in music are the reproduction right, the distribution right and the public performance right. Each will be discussed in conjunction with an overview of the music licensing system in the United States below.

4.2 Music Licensing System in the U.S.

²⁹⁹ 42 Revenue Streams, Future of Music Coalition, <http://money.futureofmusic.org/40-revenue-streams/>.

³⁰⁰ *Supra* n 283. Copyright Act, 17 U.S.C. §106.

4.2.1 Mechanical License (reproduction and distribution rights)

a) Reproduction of Musical Works

Firstly, there is the mechanical license which permits the licensee, usually the record company or recording artist, to reproduce and distribute a copyrighted musical work in recordings such as compact discs and cassettes in return for a royalty (a percentage of the sale price) on recordings sold. Section 106 of the Copyright Act sets forth these various rights, including the right “to reproduce the copyrighted work in copies” and the right “to perform the copyrighted work publicly”.³⁰¹ In the case of music copyrights, reproduction involves authorizing the copying of musical works, that is, duplicating sheet music or sound recordings. With respect to the right of distribution, such right permits the sale of copies (sheet music) or sound recordings to the public.

The compulsory mechanical license presents the most crucial limitation on the reproduction right for musical works. Section 115 of the Copyright Act of 1976, as amended, provides that once a musical composition has been distributed to the public in sound recordings in the United States with the copyright owner’s consent, the composition may be reproduced by anyone.³⁰² What this means is that the copyright holder has the authority to decide whether and more importantly *how* the work is first reproduced and distributed given that the initial recording of a musical work or ‘first use’ does not fall under the compulsory license.³⁰³ Such license arose from the monopolization by a large manufacturer of piano rolls as a result of a 1908 Supreme Court case. The judgment limited the mechanical reproduction right to a compulsory license, enabling any manufacturer of piano rolls to mechanically reproduce a musical work in exchange for a payment of a royalty fee, without negotiating with the copyright holder for permission.³⁰⁴ The current rate, which is set by the Copyright Royalty Board

³⁰¹ *Supra* n 283. Copyright Act, 17 U.S.C. § 106(1), (4).

³⁰² Copyright Act, 17 U.S.C. § 115.

³⁰³ Circular 73, United States Copyright Office, Revised October 2015, <http://www.copyright.gov/circs/circ73.pdf>.

³⁰⁴ *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1908).

(the administrative body responsible for establishing statutory rates and terms under the section 115 license) for the mechanical license is 9.1 cents for songs five minutes or less, or 1.75 cents per minute or fraction thereof for songs over five minutes, whichever is greater.³⁰⁵ Additionally, the compulsory license only applies to non-dramatic musical works, that is, musical compositions or songs. While section 115 compensates the musical work copyright holder for reproduction and distribution rights, it does not allow for the duplication of a sound recording. Permission to duplicate a sound recording must be obtained from whoever holds ownership to the said sound recording copyright (i.e. the recording artist or record studio).³⁰⁶

A mechanical license can be acquired irrespective of whether the copyright holder grants consent, although this does not occur generally in practice.³⁰⁷ In practice many of the terms of the compulsory license provision are used in negotiation and in practice, mechanical licensing is generally a simple process in which very little negotiation actually takes place and the royalty paid under a negotiated mechanical license will either be the statutory rate or a reduced rate agreed upon by the publishers and record company.³⁰⁸ In saying that, many publishers and copyright holders choose not to issue mechanical licenses themselves but rather engage a mechanical licensing agent to do so on their behalf.³⁰⁹

The National Music Publishers Company, which is the trade association representing American music publishers, established the Harry Fox Agency (“HFA”) in 1927 to issue and administer mechanical licenses.³¹⁰ Needless to say, using the HFA provides the

³⁰⁵ *Supra* n 304.

³⁰⁶ *Id.* 17. U.S.C. Sec. 115(a)(2): “A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner”.

³⁰⁷ *Supra* n 188, 92.

³⁰⁸ Brian T. Yeh, “Copyright Licensing in Music Distribution Reproduction and Public Performance.” *Congressional Research Services* 7-5700 (2015) 5.

³⁰⁹ *Id.*, 6.

³¹⁰ Peter K. Yu, *Intellectual Property and Information Wealth*, London, Praeger Perspectives (Vol. 1 2007) p.163; HARRY FOX AGENCY, <http://www.harryfox.com> (last visited October 9, 2016).

publishers with a cost effective alternative and the periodic audits of major record companies by HFA and distribution of any recovered monies among publishers in proportion to their earnings are certainly appealing.³¹¹ Nonetheless, the HFA has been facing declining revenue from mechanical licensing for years. It was announced on July 7, 2015 that SESAC (one of the Performing Rights Organizations or “PROs”) had agreed to purchase the agency for the reported sum of \$20 million.³¹² Under the rubric of SESAC, the acquisition has enabled SESAC to allow for the bundling of performance and mechanical licensing in a single agency streamlining music service, especially on digital platforms where the licensing framework was criticized for its highly fragmented model.³¹³ Moreover, SESAC equipped with an agreement now in place with the online radio service, Rumblefish and HFA’s digital service, offers an even more streamlined digitally imported licensing and royalty processing scheme.³¹⁴ This is important to note here and it will be discussed further later, as will the operations of the other two PROs, namely ASCAP and BMI, non-profits which are governed by consent decrees imposed by the federal government which restrict the ways in which licensing of performing rights can be conducted.

Turning to licensing of digital reproduction and distribution, the language of section 115 of the Act post Digital Performance Right in Sound Recordings Act (“DPRSRA”) states that the compulsory mechanical license is applicable to the distribution of phonorecords of musical works ‘by means of a digital transmission which constitutes a digital phonorecord delivery’. The Copyright Act defines a ‘digital phonorecord delivery as’: *‘each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital*

³¹¹ *Supra* n 276, 21.

³¹² *Supra* n 50.

³¹³ *Id.*

³¹⁴ Rumblefish, <http://rumblefish.com/rumblefish-streamlines-rights-management-for-digitally-imported/> <last visited 8 September 2016>.

*transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.*³¹⁵

According to this definition, when you purchase music online from services such as iTunes or eMusic and download the music, a digital phonorecord delivery is said to be received for the purpose of DPRSRA. There is an exclusion of real-time transmission which means that streamed transmission is not considered a digital phonorecord delivery. However, in May 2008, musicians, publishers, record labels and relevant tech companies came to an agreement that established royalty rates and terms and conditions applying to limited downloads, interactive streaming, and all known incidental digital phonorecord deliveries.³¹⁶ Thereafter, this settlement agreement was implemented by the Copyright Royalty Judges (CRJs) and the rates and terms contained therein were adopted as the final regulations pursuant to the statutory authority of the CRJs under section 801(b)(7) of the Copyright Act.³¹⁷ This section requires the CRB to weigh and take into consideration several policy-oriented objectives in setting the rates for the license.³¹⁸

b) Reproduction of Sound Recordings

As mentioned above, federal copyright law of the United States did not recognize sound recording copyright protection until 1972. Hence, except in the limited case of non-interactive streaming services that qualify for compulsory licensing under sections 112 and 114, licenses to reproduce and distribute sound recordings – such as those necessary to make and distribute CDs, DPDs transmission and ringtones or an interactive music

³¹⁵ Digital Performance Right in Sound Recordings Act (“DPRSRA”): “*A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.*”

³¹⁶ *Supra* n 83, 10; Agreement Published in the Federal Register, Copyright Royalty Board, Library of Congress, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 73 Fed. Reg. 57,033 (Oct. 1, 2008).

³¹⁷ *Id.* See also, Copyright Royalty Board, Library of Congress, In the Matter of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding: Final Determination of Rates and Terms, available on Jan. 22, 2010, at <http://www.loc.gov/crb/proceedings/2006-3/dpra-public-final-rate-terms.pdf>.

³¹⁸ 17. U.S.C. Sec. 801(b)(7).

service – are acquired by means of direct negotiation between a licensee and the sound recording owner (record label) in the open market.³¹⁹

4.2.2 Performance License (Public Performance Right)

a) Performing Rights Organizations in Musical Works

In the United States, the recognition of a right to publicly perform musical composition was expressly made in 1897 even though the musical compositions were given copyright protection in 1831. Today, the copyright holder's exclusive right to perform is reflected in section 106(4) of the Copyright Act. It is no overstatement to observe that the performance right, out of the six exclusive rights of copyright, is undeniably the most imperative right for the musicians and businesses involved in music creation.³²⁰ One commentator provided explanation for such importance as follows:

“The problem is that musical works are performed so extensively and in such widely diverse settings, that individual copyright owners are unable to enforce their performance right on their own. Unauthorized performances frequently occur because it is too costly for the copyright owners to police their rights and too costly for the users to obtain a license.”³²¹

The problem was addressed through the establishment and operation of the performing rights organization (“PRO”). In contrast to their Korean counterpart which implements a copyright management organization that administers substantial rights of the copyright based on a trust principle, in the United States, history shows that these PROs have come to the scene to address the problems stated above. Collecting and distributing royalties, licensing and policing violation of performance rights of their members' copyrighted musical works, PROs are effectively a middleman that allows the members and the users to reduce the relevant transaction costs.³²² As Kobayashi suggests, “PROs are arguably

³¹⁹ U.S. Copyright Office, <http://copyright.gov/title17/92chap1.html> <last visited 7 August 2016>.

³²⁰ Marshall A. Leaffer, *Understanding Copyright Law*, LexisNexis (5th ed 2010), at s 8.23.

³²¹ *Id.*

³²² *Supra* n 188.

the quintessential example of Coasian organization – i.e. An organization whose existence is based on the mitigation of transactions cost that would be generated by the use of market transactions to license, price, collect and distribute performance right royalties”.³²³

Today in the United States, every domestic musical composition is in the repertory of ASCAP³²⁴ or BMI,³²⁵ the two largest PROs. ASCAP was founded first in 1914 followed by SESAC which is a for-profit organization and then BMI, the second largest. A relatively new for-profit PRO, GMR, like that of SESAC can license performance rights outside of direct government oversight.

For the purpose of understanding the system of PROs, the ASCAP system provides a prime example. We will briefly look at the main terms of the agreement between ASCAP and music writers and publishers.³²⁶ Firstly, the nature of the agreement is that of a grant of nonexclusive right.³²⁷ ASCAP members grant ASCAP a nonexclusive right to license their public performance right of musical works. ‘Nonexclusive’ means that, compared to its Korean counterpart, each member of ASCAP can negotiate and license his or her music outside of the ASCAP system separately to perform their music. The second main term of the agreement, similar to the Korean counterpart, relates to the right to bring suit on behalf of or in the name of a member and the right to not only license but to monitor the use of the works.³²⁸ Thirdly, the members of ASCAP assent to the royalty distribution system and such system is widely known as the ‘blanket’ scheme whereby members’ performance rights are licensed out on the basis of a one-off fee by the users

³²³ Bruce H. Kobayashi, Opening Pandora’s black box: A Coasian 1937 View of Performance Rights Organizations in 2014, *George Mason Law Review Vol 22, No. 4*, pp 925-942 (2015).

³²⁴ The American Society of Composers, Authors and Publishers (ASCAP) is an American not-for-profit performance-rights organization (PRO), <https://www.ascap.com/> <last visited 24 September 2016>.

³²⁵ Broadcast Music, Inc. is another American not-for-profit performance-rights organization (PRO), <http://www.bmi.com/> <last visited 10 September 2016>.

³²⁶ ASCAP Terms of Use, <https://www.ascap.com/about/legal-terms/terms-of-use>.

³²⁷ *Id.* Article 8 Rules for Use of the Services.

³²⁸ *Id.*

that allows access to the entire repertory of ASCAP.³²⁹ It's important to note that such a single fee varies depending on the size and nature of industry groups and individual users.³³⁰ Blanket licensing or direct licensing (outside of the ASCAP system) are not the only available forms of license. There are other licenses such as per-program or per-segment licenses offered by PROs but they are less commonly used. Due to their nature, such licenses require more detailed and pedantic reporting information.³³¹

ASCAP apportions and pays out the collected royalties which are subject to administration expenses with the final distribution payment reflecting the extent of, and to whom the musical work was performed. In terms of rate-setting, unlike the mechanical right, the public performance of musical works is not subject to compulsory licensing under the Copyright Act. However, if the users and ASCAP fail to reach an agreement as to the appropriate licensee fee then pursuant to the consent decrees, potential licensees can petition the court and a federal judge in the Southern District Court of New York ("SDCN") adjudicates disputes and sets rates for a set term.³³²

b) Performing Rights Organizations in Sound Recordings

1. *Impact of DPRSRA of 1995*

Unlike the Korean counterpart, the United States copyright law under sections 106(4) and 114(a) specifically excludes a performance right in sound recordings. Specifically, section 114(a) of the Copyright Act provides that the 'exclusive rights of the owner of copyright in a sound recording do not include any right of performance under Section 106(4)'.³³³ As mentioned previously, by virtue of the DPRSRA of 1995, the United States copyright law has recognized a performance in sound recordings involving certain

³²⁹ *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-1395(WCC), 2001 WL 1589999, at *1 (S.D.N.Y. June 11, 2001).

³³⁰ *Supra* n 321.

³³¹ *Supra* n 281. Whether such licenses are a realistic alternative has been tested before the courts. Per-program or per-segment license basically refers to license that enables users to use the musical works for specific programs or portions of programs in consideration for a fixed set fee or a percentage of said program's advertisement revenue.

³³² *Id.*

³³³ *Supra* n 316, s 114(a).

‘digital audio transmissions’. Except in this limited circumstance, however, most performances of sound recordings are still excluded from protection. Exemptions include traditional over-the-air broadcasts and ephemeral copies for over the air broadcasts from the sound recording performance right. Thus, when a radio station plays a popular song, only the copyright owner of the musical work and not the copyright owner of the sound recording of that work, may claim royalties for the performance of the music composition. Therefore, under the current law, the exclusive public performance right is limited to digital audio transmissions, and thus sections 112 and 114 statutory licenses cover satellite radio and non-interactive subscription providers engaged in digital performances. The rationale for Congress drawing this legal distinction is the promotional effect that traditional airplay is said to have on the sale of sound recordings.³³⁴

2. *The role of SoundExchange and the Copyright Royalty Board*

‘SoundExchange’ is the collection and distribution organization designated by the Copyright Royalty Judges for the section 112 and 114 license payments and reporting of royalties.³³⁵ It is a single non-profit agent and was established by the RIAA in 2000. In 2003 it was spun off as an independent entity. While the Copyright Act states how royalties collected under section 114 are to be distributed, section 112 royalties are paid by SoundExchange directly to the sound recording owner. Hence, in order to comply with federal statute, digital broadcasters must obtain blanket public performance licenses from sound recording copyright owners via SoundExchange, a digital-only PRO that exclusively collects and distributes digital performing rights royalties to sound recording copyright owners and performers.³³⁶ The section 114 statutory license considers different types of non-interactive digital music services – free and paid internet radio services, preexisting satellite radio services and preexisting music subscription services – to perform sound recordings upon compliance with the statutory license requirements, including the payment of royalties as determined by the CRB.³³⁷ Section 112 sets forth a

³³⁴ *Supra* n 276.

³³⁵ SoundExchange, <http://www.soundexchange.com/> <last visited October 22, 2016>.

³³⁶ *Supra* n 309, 12.

³³⁷ Copyright Act, 17 U.S.C. § 114.

related statutory license that authorizes the creation of ‘ephemeral copies’ or server reproductions of sound recordings that facilitate digital transmissions. The CRB establishes the rates and terms for the section 112 and 114 licenses.³³⁸

In terms of rate-setting, this is where the fragmented licensing framework is at its peak. Firstly, as a backdrop, the line between interactive and non-interactive services has not been clearly drawn and is subject to some debate. As seen above, sections 112 and 114 apply to non-interactive (i.e. radio style) services, which means interactive or on-demand services are not covered. There is a statutory definition of an interactive service and a Second Circuit decision that sheds some light on what would constitute non-interactive services, by contemplating on the meaning of the term ‘interactive’.³³⁹ A personalized music streaming service such as Pandora³⁴⁰ and Rdio³⁴¹ have been classified as non-interactive services and thus require the obtaining of statutory licenses for their public performance of sound recordings. With that in mind, it must be remembered that section 114 was first created with the enactment of the DPRSRA and at the time the ‘pre-existing’ satellite radio and music subscription services (those that existed as of July 31, 1998) were the only services to which section 114 applied. The four-factor policy-oriented standard in section 801(b)(1) of the Act is therefore used to determine the royalty rates and terms of the 1995 license, which is the same standard that had long applied to the section 115 compulsory license for musical works. Due to the preservation of the old royalty rate-setting standard (section 801(b)(1))³⁴² for the preexisting services, Sirius

³³⁸ Copyright Act, 17 U.S.C. § 112.

³³⁹ *Arista Records, Inc. v. Launch Media, Inc.* (Docket No. 07-2576 (2nd Cir. Aug. 21, 2009)): “a webcasting service is “interactive” under the Digital Millennium Copyright Act if a user can either (1) request, and have played, a particular sound recording, or (2) receive a transmission of a program “specially created” for the user”.

³⁴⁰ Pandora is free, personalized radio that has been seen to liken to a radio that enables users to choose a genre of music but not particular songs. The model which Pandora adopts relies on a compulsory license under 17 U.S.C. 115 to legitimately gain access to music.

³⁴¹ Fortune, <http://fortune.com/2016/08/20/pandora-on-demand-streaming/> <last visited August 29, 2016>. Following the announcement to expand its business into the realm of on-demand music through its planned \$75 million acquisition of Rdio (streamer), an update has been made that such service can start as soon as September 2016.

³⁴² Copyright Act, 17 U.S.C. § 801(b)(1): To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated to achieve the following objectives:

XM satellite service, Music Choice and Muzak subscription services are governed by the four factor standard in section 801(b) of the Act.

That is one royalty standard. Second is the ‘willing buyer/willing seller’ rate-setting standard which applies to the section 112 ephemeral recordings with the enactment of the DMCA in 1998. In this respect, for all internet radio and other newer digital music services and for all ephemeral recordings regardless of the service other than those captured under section 801(b), the CRB is to establish rates and terms *‘that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller’*.³⁴³ Hence, the two-tiered system existing in U.S. copyright law that subdivides non-interactive digital audio services into two categories for the purpose of determining royalty rates for statutory performance. Not surprisingly, much debate has ensued as to the pros and cons of each standard, that is, the ‘willing buyer/willing seller standard’ (i.e. internet radio) which generates high rates as compared with the ‘section 801(b) standard’ which is limited to certain services that were ‘preexisting’ in 1998 (such as Sirius XM satellite radio) which enjoy much lower rates and produce a more equitable return to the creators.³⁴⁴

This is not the end. To make matters more complex, for an interactive streaming service like Spotify, which does not fall under either the section 112 and 114 licenses, a privately

-
- (A) To maximize the availability of creative works to the public.
 - (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
 - (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
 - (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

³⁴³ U.S. Congress, Congressional Record, V. 148, PT. 16, November 12, 2002 to November 14, 2002, 22315.

³⁴⁴ The Copyright Act should be amended to employ a single standard in all rate setting proceedings for digital radio: the Section 801(b)(1) standard. To effectuate this change, the second sentence of 17 U.S.C. s 801(b)(1) should be amended by replacing ‘Sections 114(f)(1)(B), 115 and 116’ with Sections 112, 114, 115, and 116. The argument being that the copyright policy should be technology neutral and should apply a consistent royalty-rate setting standard across technologies (Internet Radio: the case for a technology neutral royalty standard).

negotiated direct licensing approach is adopted. Since direct licenses are agreed upon at the discretion of the copyright holder and the potential licensee, the license terms can be vastly different from those that apply under the statutory regime.

In summary, various rates apply for sound recording performance rights under the auspices of DPRA and DMCA. At least four varying rate standards can be extracted to apply to the different types of music distributions:

- 801(b) standard Sirius XM – CRB applies
- CRB applies (willing seller willing Buyer Pandora)
- Licenses directly (Spotify)
- Not required to see such licenses and thus pay a rate of zero (terrestrial radio broadcasters).³⁴⁵

4.3 *Historical Development of the Intersection of Antitrust and Music Licensing Law*

Even a brief overview of the copyright law and the music licensing system in the United States reveals flaws and areas of gaps and uncertainties. While antitrust laws have played an important role in remedying areas of anticompetitive outcomes such as compulsory licensing and consent decrees, the intersection of copyright and antitrust law is still currently in the field of dissonance yet to be harmonized by statute or by the Supreme Court. Thus, Congress in the United States has not seen fit to include any immunity in the United States intellectual property statutes similar to Articles 58 and 59 of the Korean MRFTA. We know that intellectual property rights by their very nature bestow their owners the authority to exclude. But modern antitrust law and policy in the United States, like that of its Korean counterpart, acknowledges that the existence of an intellectual property right does not necessarily give market power for the purpose of antitrust law.³⁴⁶

³⁴⁵ *Supra* n 276.

³⁴⁶ See, e.g. *Independent Ink, Inc. v. Illinois Tool Works, anc.*, 396 F.3d 1342 (2005).

4.3.1 *Sherman Act Sections 1 and 2*

The aim of antitrust law has been said to ‘protect markets from monopolization and other anticompetitive restraints of trade which may cause market stagnation and inhibit economic growth’.³⁴⁷ Perhaps similar to that of the Korean counterpart, the U.S. antitrust legislation is a model of brevity which stems from two provisions that are extraordinary in both the possible range of legal construction and vagueness. These two provisions are the Sherman Act³⁴⁸ Sections 1 and 2:

15 U.S. Code § 1 - Trusts, etc., in restraint of trade illegal; penalty *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*

15 U.S. Code § 2 - Monopolizing trade a felony; penalty *Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*

As has been seen in the Korean counterpart, antitrust violations oftentimes rest on the concept of finding the requisite market power and the monopoly which thereby arises

³⁴⁷ Whitney Broussard, The Promise and Perils of Collective Licensing, *J. INTELL. PROP. L.* Vol. 17 No. 19 (2010) 20.

³⁴⁸ *Sherman Antitrust Act of 1890* (15 U.S.C. §§ 1-7).

when a product yields a dominant market share in that particular field of the market. Thus, determining whether there is that prerequisite market power monopoly needs to be first established before a violation of section 2 of the Sherman Act can be ascertained; the same applies to unlawful tying under section 1 of the Sherman Act. There are no specific statutory provisions that exempt a ‘justifiable’ exercise of intellectual property right in the United States, rather as the DOJ/FTC report notes, ‘*the Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property*’. The *Antitrust Guidelines for The Licensing of Intellectual Property* Section 4.2 states:

“If the Agencies conclude, upon an evaluation of the market factors described in section 4.1, that a restraint in a licensing arrangement is unlikely to have an anticompetitive effect, they will not challenge the restraint. If the Agencies conclude that the restraint has, or is likely to have, an anticompetitive effect, they will consider whether the restraint is reasonably necessary to achieve procompetitive efficiencies. If the restraint is reasonably necessary, the Agencies will balance the procompetitive efficiencies and the anticompetitive effects to determine the probable net effect on competition in each relevant market.”

Moreover, the courts in the United States have developed over the years a multifaceted and nuanced approach to antitrust claims in the intellectual property context.

Referring to Section 1 of the Sherman Act,³⁴⁹ the Supreme Court has stated that “Congress could not have intended a literal interpretation of the word ‘every’”, and consequently, courts “analyze most restraints under the so-called ‘rule of reason’”.³⁵⁰ This ‘rule of reason’³⁵¹ approach, which most antitrust claims involving copyright abuse fall under, are dealt with by section 2 of the Sherman Act.³⁵² This provision requires a

³⁴⁹ 15 U.S.C. § 1.

³⁵⁰ *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 342-43 (1982).

³⁵¹ See *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

³⁵² 15. U.S.C. § 2.

court to find a restraint of trade and then conduct a balancing exercise between the anticompetitive effects of the practice under dispute against any pro-competitive effects. According to the Antitrust Guidelines for the Licensing of Intellectual Property issued by the Department of Justice in 1995:

*“in the vast majority of cases, restraints in intellectual property licensing arrangements are evaluated under the rule of reason. The Agencies’ general approach in analyzing a licensing restraint under the rule of reason is to inquire whether the restraint is likely to have anticompetitive effects and if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects.”*³⁵³

The court is further required to take into consideration any economic reasons validating the disputed practice and assess whether the restraint in question is unreasonable. The challenged practice will not be in violation of antitrust law if the anticompetitive effects do not outweigh the procompetitive effects.³⁵⁴

The other basic approach are the per se violations. Per se violations would be those certain practices such as explicit price fixing, limits on output, group boycotts and agreements to divide a market.³⁵⁵ This approach requires:

*“...no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice. Conduct characterized as per se unlawful is that which has been found to have a 'pernicious effect on competition' or 'lack[s] . . . any redeeming virtue’”*³⁵⁶

³⁵³ *Antitrust Guidelines For The Licensing Of Intellectual Property*, Issued by the U.S. Department of Justice and the Federal Trade Commission, April 6, 1995.

³⁵⁴ *Antitrust and Intellectual Property* Address by R. Hewitt Pate Acting Assistant Attorney General Antitrust Division U.S. Department of Justice, before the American Intellectual Property Law Association 2003.

³⁵⁵ Richard, G. & Shapiro, C., “Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No’s Meet the Nineties.” *Brookings Papers on Economic Activity: Microeconomics* 28 (1997): 283-349.

³⁵⁶ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

In other words, they are practices that are by nature plainly anticompetitive and thus do not warrant a substantial examination of the activity's likely competitive effect, and are treated as being outright illegal. The Supreme Court said that 'once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable'.³⁵⁷ Therefore, armed with accumulated experience over the years, certain arrangements including price-fixing agreements are deemed per se violations of Section 1 by the courts.

4.3.2 *Consent Decrees*

A copyright is intended to be a complete individual monopoly but ASCAP and similar associations, by combining individual monopolies, holds substantial aggregate market power. This comes as a result of pooling together their public performance rights so that those rights can be collectively licensed. Over the years, ASCAP has bolstered its strength in bargaining position through increasing its royalties which has prompted users to tenaciously insist that the federal antitrust laws be invoked against the Society. In 1934 the DOJ brought proceedings against ASCAP. The petition complained of monopolistic conduct and of several practices restraining trade, two of which were illegal combination and conspiracy and destroying of the incentive of broadcasting stations to use the musical composition of composers. Additionally, the complaint was made that ASCAP as a 'a self-perpetuating body dominating the music industry and radio' unlawfully and unreasonably maintained prices and provided licensed music to users on terms and conditions arbitrarily fixed by the Society. Hence it was claimed that the very rationale for having a system like ASCAP, namely to reduce transaction costs, was greatly compromised due to ASCAP's significant anticompetitive practices, which did not seem reasonably necessary to achieve the goals of efficiency.³⁵⁸ Around 1941, these anticompetitive practices led to the DOJ bringing separate antitrust lawsuits against the

³⁵⁷ *Supra* n 351 at 343-344.

³⁵⁸ A system in which this is done collectively, through PROs and blanket licenses, can be an efficient way of reducing transactions cost. (page 12).

two largest US PROs, BMI and ASCAP, for unlawfully monopolizing the licensing of performing rights. They allegedly did this by acquiring exclusive rights to negotiate their members' public performance rights and by prohibiting their members from entering into direct licensing arrangements. Both lawsuits were settled by the consent decrees, which imposed significant conditions on ASCAP and BMI licensing practices. Since then, ASCAP and BMI's activities have been overseen by the Antitrust Division of the DOJ and enforced by the federal district courts, namely the SDNY.

The two consent decrees have both identical and differing aspects. Both ASCAP and BMI were no longer to be the exclusive agents for their members, if any member preferred to negotiate and license individually and directly with a music user.³⁵⁹ Further the two PROs, by reason of the consent decrees, are forbidden from entering into agreements with licensees that display price discrimination between 'similarly situated' licensees and their membership must be so that any request for membership is accepted, provided that the music creator or publisher satisfies minimum standards.³⁶⁰ Additionally, alternative forms of licenses to the blanket license must be available such as per-program license on an economically meaningful basis.³⁶¹ In the event that there is a disagreement over the licensee fee, ASCAP or BMI may seek a reasonable royalty rate from one of two federal district court judges in the Southern District of New York ("SDNY"), also known as the 'rate court'.³⁶² In such rate proceedings, the burden of proof that the royalty sought is reasonable is on the PROs and the court determines whether the rate is reasonable by assessing the fair market value of the license. In this respect, the antitrust concerns play a significant role in that the rate court is expressly

³⁵⁹ United States v. ASCAP, No. 41-cv-1395, 2001-2 Trade Cas. (CCH) ¶ 73,474, 2001 WL 1589999 (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree"); United States v. BMI, No. 64-cv-3787, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), as amended, 1996-1 Trade Cas. (CCH) ¶ 71,378, (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree"), available at <http://www.justice.gov/atr/case-document/file/489866/download>.

³⁶⁰ *Supra* n 325; see also The United States, Department of Justice, <https://www.justice.gov/atr/ascap-bmi-decree-review> <last visited September 10, 2016>

³⁶¹ RI Goodman, Music Copyright Association and the Antitrust Laws, 25 *Indiana Law Journal* 168 (1950) p. 177, 178.

³⁶² *Supra* n 361.

obligated to consider ‘*the fact that the PRO, as a monopolist exercises disproportionate power over the market for music rights*’.³⁶³

The major difference is that there is an explicit prohibition for ASCAP in licensing any rights other than performance rights. Although BMI does not have a similar prohibition, BMI also does not in practice license any rights other than public performance rights. Specifically, under Section IV(A) of its Consent Decree,³⁶⁴ the only music right ASCAP is permitted to license is the public performing right.³⁶⁵ BMI, under Section IV(B) of its Consent Decree is only specifically precluded from being a record label or a record or sheet music distributor.³⁶⁶ BMI traditionally refrained from engaging in other aspects of the music business, such as mechanical (songs used in audio-only recordings) and synchronization (songs used in audio-visual use in film, TV, video, etc.) out of concern that the DOJ would seek to impose more stringent restrictions.³⁶⁷ Since the first imposition of the consent decrees, there have been a number of modifications made to the decrees for both ASCAP and BMI and court decisions. Despite the fervent requests for easing of restrictions in the consent decrees, such requests have recently been struck down by the DOJ and they continue to run in their current form today.³⁶⁸

4.4 *Types of Anticompetitive Practices by the Music Licensing Actors in the U.S.*

Almost from the outset, the performing rights societies have been under attack through the antitrust laws by both the federal government and various industry groups. The

³⁶³ *United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005).

³⁶⁴ *Supra* n 361; see ASCAP Consent Decree AFJ2 § IV(A) (prohibiting ASCAP from holding rights in compositions other than the right of public performance both inside and outside of the United States).

³⁶⁵ *Id.* Although ASCAP can also function as an agent to collect royalties from the sale of blank digital audio tape.

³⁶⁶ *Supra* n 361, BMI Consent Decree § IV(B).

³⁶⁷ BMI, http://www.bmi.com/licensing/entry/business_using_music_bmi_and_performing_rights <last visited 10 October 2016>.

³⁶⁸ American Songwriter, <http://americansongwriter.com/2016/06/songwriter-u-department-of-justice-strikes-down-consent-decree-agreement/>, <last visited 30 June 2016>.

following are some of the major focuses of the antitrust attack that have occurred over the years.

4.4.1 *Blanket Licensing*

a. *BMI, ASCAP v CBS*³⁶⁹

The major focus of the attack has been the blanket license, by which a single fee is charged for use of the entire repertoire, based on a flat sum or on the users' revenues. The fee is unrelated to the frequency of use of the musical works. Actions under section 1 of the Sherman Act brought by national and local broadcasters alleging price fixing and restraint of trade have largely failed.³⁷⁰

In the 1970s, CBS sued ASCAP and BMI alleging that these blanket licenses constitute anticompetitive price fixing, but the Supreme Court held, under the rule of reason analysis, that they were not anticompetitive because the non-exclusive licenses granted by the PROs did not prevent direct negotiations with the copyright owner. Further, the transaction cost rationale meant that PROs enhanced great efficiency as they reduce bargaining costs for music users. Accordingly, the court held that rather than looking at blanket licensing through a per se analysis, the rule of reason test must be used as a blanket license is primarily used to address the problems of negotiating potentially thousands of individual licenses.³⁷¹ Hence the court was of the view that it did not unreasonably restrain competition because CBS could feasibly obtain direct licenses from copyright owners.³⁷²

³⁶⁹ *BMI v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23-24 (1979) (finding that blanket licenses are not per se violations of the Sherman Act because direct licenses were viable alternatives for potential licensees); *Columbia Broad. Sys., Inc. v. ASCAP*, 620 F.2d 930, 938-39 (2d Cir. 1980) (finding that blanket licenses did not unreasonably restrain competition because licensees such as CBS had a real choice in obtaining direct licenses from copyright owners as an alternative).

³⁷⁰ *Supra* n 321, 377.

³⁷¹ *Supra* n 3, 38.

³⁷² *Supra* n 371.

b. *Buffalo Broadcasting v ASCAP*³⁷³

After the *ASCAP, BMI v CBS* litigation, other courts also observed the blanket license and sustained it against antitrust challenges under rule-of-reason analysis. In *Buffalo Broadcasting v ASCAP*, the United States Court of Appeals for the Second Circuit found that it was not an unreasonable restraint on trade for ASCAP to offer blanket licenses to local TV stations, where ‘source licensing’³⁷⁴ was also available. The court thus concluded that the blanket license offered by ASCAP, although likely the least expensive of the available options, was not the only option available and therefore the plaintiffs failed to prove that the ASCAP blanket license unfairly restrained trade in violation of the Sherman Antitrust Act.³⁷⁵

In the above two cases, ASCAP and BMI in their monopolistic position had substantial means to increase costs by using the blanket licensing scheme and the DOJ’s concern in this respect is completely reasonable. As explained by one commentator:

*“The blanket licenses inherently fix song prices because when an entity buys a blanket license for a set fee per month it can use any song in the collecting organizations’ catalogs. Even if a songwriter decided not to allow ASCAP and BMI to license her compositions and instead negotiated performance rights directly, once a radio station, TV station or dance club has paid for a blanket license, this purchaser is unlikely to be willing to negotiate directly for higher-priced songs that are not part of the license. And once an entity has a blanket license, it has very little incentive to license additional songs individually, even if the composition copyright holder offers a very low price.”*³⁷⁶

³⁷³ *Buffalo Broad. Co., Inc. v. ASCAP*, 744 F.2d 917, 926-32 (2d Cir. 1984) (coming to the same conclusion as BMI, ASCAP decisions because direct licenses, as well as per-program and source licenses, offered realistic alternatives to the blanket license).

³⁷⁴ *Id.* Single-program licenses for the use of individual pieces of music or source licenses from the copyright owners, which allow the producers of syndicated programming to obtain necessary performing rights licenses from the source – that is, the composers – and pass those rights to the local television station.

³⁷⁵ *Id.*

³⁷⁶ *Supra* n 295 at 105-106.

Nevertheless, a sea change has since taken place as music publishers begin to experiment with direct licensing, bypassing PRO licensing schemes, as we will see in the case immediately below.

c. ASCAP, BMI v DMX³⁷⁷

In this case, the market rates were established by the rate court only after lengthy and costly rate court proceedings. In 2012, the Second Circuit addressed the rate dispute involving ASCAP and BMI on the one hand, and DMX, a background music service which pipes music into 70,000 restaurants, stores and other public places on the other regarding the rate to be paid for an adjustable-fee blanket license. DMX contended for lower rates basing its claim on the direct licenses it had entered into with a number of copyright owners (mostly smaller publishers) on relatively favorable terms for DMX. Another direct license rate on which DMX relied was with Sony/ATV, the world's largest music publisher. In 2007, Sony/ATV decided to license its songs directly to DMX on the basis that it be given a pro rata share of the same annual rate as other small publishers. Furthermore, DMX paid Sony/ATV the sum of \$2.7 million in advance and a \$300,000 administrative fee. BMI subsequently sued DMX. In that instance, DMX argued that it was overcharged for its BMI license and presented its lower rate with Sony/ATV as evidence that the market had changed. The U.S. District Judge Louis Stanton agreed after a 10-day trial in Manhattan and required BMI to cut DMX's rate in half. BMI appealed soon thereafter and the appellate court still ruled in favor of DMX. The court found that this and the other direct deals entered into by DMX to be persuasive benchmarks and that the rate courts reasonably considered DMX's direct license in their rate determinations. Although the PROs argued that the substantial advancement paid to Sony/ATV by DMX rendered that license an inadequate basis upon which to set rates for the remainder of the publishers covered by the PRO's blanket licenses, the court of appeals nonetheless affirmed the rates adopted by the rates courts.³⁷⁸

³⁷⁷ *BMI v DMX*, 683 F.3d.

³⁷⁸ *BMI v DMX* at 47 – 49.

The ruling paves the way for other major publisher to bypass BMI and license their music directly. Indeed, Sony/ATV said starting this month it will begin licensing its catalog directly to digital music providers such as Spotify, Pandora and the streaming service that Apple is reportedly developing.³⁷⁹ In a statement, Sony/ATV said it *'has a responsibility to constantly identify better ways of serving its songwriters'* and its decision to license music directly to DMX *'was an example of insuring its songwriters to be paid in a fair and timely fashion'*.³⁸⁰ As a result, large publishers complained that the amount of money that the PROs received from digital platforms were significantly lower than the industry counterparts such as the recording companies. As an example, Pandora pays around half of its revenue to record companies and music artists in comparison to PRO's licenses that only distribute a mere 4% to the music songwriters and publishers.³⁸¹ At the other end of spectrum, PROs view such activity by Sony in this case as a way to obtain a 'quick infusion of cash'³⁸² through advance payments from DMX in place of discounted royalty rates. This decision has prompted ASCAP and BMI to request an easing of its government imposed consent decrees which they argue limit their bargaining power in the digital platform, further heightened by SESAC which is not subject to such government restrictions.

d) RMLC v SESAC³⁸³

SESAC, as mentioned above, is not subject to a consent decree and is a for-profit organization. Television and radio licensees recently sued SESAC in 2012 in two separate actions for alleged anticompetitive licensing practices. The Radio Music License Committee ("RMLC") accused SESAC of being *'a cartel that has illegally monopolized an essential repertory of copyrighted music'*³⁸⁴ and that it has taken unfair advantage of

³⁷⁹ *Supra* n 50.

³⁸⁰ Crain's New York Business, <http://www.crainsnewyork.com/article/20121216/ENTERTAINMENT/312169998/bmi-faces-the-music> <last visited December 16, 2015>.

³⁸¹ The Future of The Music Business (May 2008) <http://www.futureofthemusicbusiness.biz/2014/05/direct-licensing-controversy-will.html> <last visited September 9, 2016>.

³⁸² *Supra* n 381.

³⁸³ *Radio Music License Committee, Inc. v. SESAC, Inc., et al.*, No.2:12-cv-05807-CDJ (E.D. Pa.) (the "RMLC Proceeding").

³⁸⁴ *Id.* at 1.

the discrepancy it enjoys as compared to ASCAP and BMI's consent decrees.³⁸⁵ RMLC contended that SESAC's licensing model effectively only allows the users such as local televisions and RMLC to choose a blanket license without other realistic options and driving up costs of the other alternative forms of license such as per-program licensing and having in place conditions that punitively punishes licensees that enters into direct licensing.³⁸⁶ All these practices are prohibited under ASCAP and BMI's consent decrees. While the local television stations also criticized SESAC's unwillingness or inability to be transparent in their operations by declining to provide licensees with repertory.³⁸⁷

In October 2014 SESAC agreed to pay \$58.5 million to television stations as part of a settlement in a separate antitrust case filed by the Television Music License Committee ("TMLC").³⁸⁸ That agreement also subjects SESAC and the TV stations to arbitration if they cannot agree on royalty terms. As per the settlement, if SESAC cannot come to an agreement with the committee its royalty fees will be set by a third party arbitration panel. SESAC must also pay the radio group 3.6 million in legal costs. The agreement covers 22 years starting in 2016. Settlement effectively bars SESAC from arbitrarily seeking unreasonably high rates from a radio operator at the risk of copyright infringement exposure.³⁸⁹ The Office observed that this case and the cases involving Pandora (to be discussed below) illustrate the importance and corrective potential of private enforcement actions outside of the consent decree environment.

4.4.2 *Windowing and Ad-revenue Bans*³⁹⁰

³⁸⁵ *Id.* at 18.

³⁸⁶ RMLC First Notice Comments at 2.

³⁸⁷ TMLC First Notice Comments at 14; Sirius XM First Notice Comments at 6.

³⁸⁸ Billboard, <http://www.billboard.com/articles/business/6281846/sesac-settles-television-class-action-for-58-million> <last visited March 6, 2016>.

³⁸⁹ RMLC, the copy of Settlement Agreement can be found here:

<http://imgsrv.radiomlc.org/image/rmlc/UserFiles/File/Final%20SESAC%20RMLC%20Settlement%20Agreement.pdf>.

³⁹⁰ Alexa Klebanow, Tim Wu, Is Music the Next eBooks? An Antitrust Analysis of Apple's Conduct in the Music Industry, 39 *Colum. J.L. & Arts* 119 (2015).

It is worth noting the practice of windowing and ad-revenue bans that have recently stirred up debate around anticompetitive practices by the giant tech company Apple as Korea moves towards the final stages in executing agreements to introduce Apple Music domestically.³⁹¹ Over the years, Apple's conduct has attracted attention due to its pressure on labels to enter into exclusive license agreements, (i.e. windowing) and pressuring labels and the market to refuse to enter into deals with streaming companies like Spotify who adopt an advertising-based revenue model, commonly known as 'freemium'. The later activity of banning 'free' streaming seems to raise much more serious antitrust concerns over windowing as it potentially removes 'any low cost option for consumers'.³⁹²

One article "*Music the Next eBooks? An Antitrust Analysis of Apple's Conduct in the Music Industry*" explores the antitrust impact of Apple under the headings of joint refusal to deal/parallel exclusion, price manipulation/maintenance and monopoly maintenance. The results seem to show that the challenge for a claim based either on a Section 1 or Section 2 of Sherman Act would be the determination of anticompetitive effects, particularly in light of the procompetitive justification that Apple is likely to develop and present. The study looks at both the anticompetitive and procompetitive justifications of Apple's conduct and finds that while one-off exclusives or windowed songs are difficult to be considered as anticompetitive, which is what Apple currently endorses, for the music context, the 'theory of harm must be made on the basis that a widespread windowing of short durations can create harm to competition at the retailer level'.³⁹³ To this end, the article states that 'if multiple labels adopted windowing for entire catalogs of music or Apple facilitated coordination among record companies, these might be signs that the restraint is no longer reasonable under Section 1 or 2'.³⁹⁴ Additionally, the study shows that the high barriers to entry given the concentrated

³⁹¹ 애플뮤직, 한국 정식 서비스...K 팝 콘텐츠 부족 탓에 '반쪽?', yonhapnews (August 5, 2016) <http://www.yonhapnews.co.kr/bulletin/2016/08/05/0200000000AKR20160805066951017.HTML>.

³⁹² *Supra* n 392 at 22.

³⁹³ *Id.* at 31.

³⁹⁴ *Id.* at 40.

nature of the music market also raise the risk of anticompetitive coordination.³⁹⁵ It appears that this is an area where a line must be drawn as to what types of windowing and banning activities specifically in the music industry would violate antitrust law.

4.4.3 Collusion and Unilateral Refusals to Deal

Now in an age of full digital transition, the growing anticompetitive threat is most likely to be posed not by ASCAP and BMI, but by the individual music publishers acting in loose coordination to demand more money, or, failing that, to deny access to their content altogether. Vice President of business affairs at Pandora, in criticizing the current fragmented U.S. music licensing regime and agreeing to the DOJ's decision not to change the consent decrees, said that 'while copyright ownership is split among an uncountable number of players, the music publishing industry is highly concentrated, allowing major record labels to try to use their market power to decide which services win and lose'.³⁹⁶ He noted that the experience of users that deal with a smaller PRO, named simply SESAC, illustrates the power the PROs have to act in an anticompetitive way if they are free of the consent decree framework.³⁹⁷ The discussion below will examine the recent antitrust lawsuits brought against ASCAP and BMI by Pandora involving partial withdrawals and refusal to license by ASCAP and BMI in cooperation with the major music publishers against Pandora.

a) In re Pandora

*i. Pandora v ASCAP*³⁹⁸

³⁹⁵ *Id.* at 17.

³⁹⁶ Theblaze, <http://www.theblaze.com/stories/2016/07/11/online-music-service-pandora-faces-backlash-after-supporting-black-lives-matter-and-racial-justice/> <last visited July 11, 2016>.

³⁹⁷ RainNews, <http://rainnews.com/doj-announces-consent-decree-decision-no-change-plus-a-new-rule/> <last visited 30 June 2016>.

³⁹⁸ *Pandora Media, Inc. v. American Society of Composers, Authors and Publishers et al*, Nos. 14-1158, 14-1161, 14-1246 (2nd Cir. May 6, 2015) *Pandora Media, Inc. related to United States of America, v. American Society of Composers, Authors, and Publishers*, 12 Civ. 8035 (S.D.N.Y. 2013), *Pandora Media, Inc. related to United States of America, v. American Society of Composers, Authors, and Publishers*, No. 41 Civ. 1395 (S.D.N.Y. 2013); *BMI v. Pandora Media, Inc.*, No. 13 Civ. 4037 (LLS) (S.D.N.Y. 2013).

Partial Withdrawal

The *Pandora Media, Inc. v. ASCAP* case specifically dealt with some of the major record labels withdrawing their content from the ASCAP joint licensing venture. It involved whether, and to what extent, owners of copyrighted digital content are permitted to refuse to deal with competing distribution channels on dramatically different commercial terms. Pandora sued ASCAP and BMI and some of the major record labels for abusing their market power for ‘withdrawing’ their digital music licensing rights from ASCAP and BMI, thus forcing individualized negotiations. The background to this case can be traced back to the DMX case discussed above. In about 2011, Sony Music and UPMG decided to partially withdraw from ASCAP so they could independently negotiate licenses with Pandora, rather than using ASCAP. EMI, in particular, threatened to withdraw from ASCAP completely if ASCAP did not change its practices, that is, to allow publishers to withdraw from ASCAP and the right to license new media music users while continuing to license ASCAP to license other media. In response, ASCAP modified its internal compendium of rules to permit this practice. Negotiations didn’t go well so the case ended up in front of Judge Cote, one of the two rate court judges.

In this case, the presiding District Judge Denise Cote entered summary judgment for Pandora. She reasoned that the consent decree gave Pandora the legal right to a blanket license. In the judgment she stated that:

*“even though certain music publishers beginning in January 2013 have purported to withdraw from ASCAP the right to license their compositions to ‘New Media’ services such as Pandora. Because the language of the consent decree unambiguously requires ASCAP to provide Pandora with a license to perform all of the works in its repertory, and because ASCAP retains the works of ‘withdrawing’ publishers in its repertory even if it purports to lack the right to license them to a subclass of New Media entities, [Pandora must prevail].”*³⁹⁹

³⁹⁹ In re Pandora Media, Inc., 6 F. Supp. 3d 317 (S.D.N.Y. 2014).

The court's reasoning looked into the terms of the consent decree to conclude that "it is clear that the 'ASCAP repertory' is defined in term of 'works' and not 'individual rights' in works with respect to classes of potential licensees".⁴⁰⁰ For that reason, the court held that the partial withdrawal was not allowed. Publishers had to be either 'all in' or 'all out'. The court thus held that "ASCAP did not have the right to permit the partial withdrawals of rights at issue and thereby acquiesce to a regime in which some music users could not obtain full public performance rights to works in the ASCAP repertory".⁴⁰¹

Judge Cote also found the evidence before the court revealed suspicious collusion on the part of the publishers and ASCAP which she described as, "troubling coordination between Sony, Universal and ASCAP, which implicates a core antitrust concern underlying the ASCAP consent decree and casts doubt on whether the licenses were the product of a competitive market because ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora". She noted that the fact "they coordinated their activities with respect to Pandora" meant that "the very considerable market power that each of them holds individually was magnified".⁴⁰² The court went on to find that they used such power in the market to extract 'supra-competitive prices',⁴⁰³ breaching confidentiality agreements and refusing to provide Pandora with a rundown of the repertoire purportedly being withdrawn. The major publishers also interfered with Pandora's negotiations with ASCAP and in one statement Pandora argued that, "ASCAP and BMI were supposedly operating in the free market, [but] when given the chance to compete, the major publishers and ASCAP choose not to but rather quickly reverted back to the type of anticompetitive behavior the consent decrees are meant to mitigate".⁴⁰⁴

⁴⁰⁰ *Id.* at 13. Section II(C) provides that "'ASCAP repertory' means those works the right of public performance of which ASCAP has or hereafter shall have the right to license at the relevant point in time." AFJ2 § II(C).

⁴⁰¹ *Id.* at 18.

⁴⁰² *Id.* at 357-58.

⁴⁰³ *Id.* at 357.

⁴⁰⁴ Pandora, Executive Summary of Testimony of Chris Harrison Vice President, Business Affairs, Pandora Media Inc. Before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet June 25, 2014, <https://judiciary.house.gov/wp-content/uploads/2016/02/062514-Music-License-Pt-2-Testimony-Pandora.pdf> at 11.

Rate-setting

After the withdrawal rulings, Judge Cote went a step further, refusing to consider the direct deals as benchmarks when deciding how much Pandora should pay. The internet company had been pressured into signing the deals by fear of mass infringement, she said at the time, meaning they were not a good indicator of free market rates.⁴⁰⁵ Again, Judge Cote noted the ‘troubling coordination’ between the competing publishers in their talks with Pandora in reaching her decision. The current consent decree requires that ‘similarly situated’⁴⁰⁶ licensees be treated by the PRO in a nondiscriminatory fashion. ASCAP’s current consent decree defines a similarly situated licensee as licensees in the same industry that perform ASCAP music and that operate similar businesses and use music in similar ways and with similar frequency. One of the factors is the nature and frequency of musical performances and ASCAP’s cost of administering licenses, whether the music users or licensees compete with one another, and the amount and source of the music users’ revenue.⁴⁰⁷ It is this provision that led Judge Cote to determine that Pandora (a customizable but non-interactive internet-based radio station) should pay a higher rate than traditional radio stations.

*ii. Pandora v BMI*⁴⁰⁸

This is another similar case, this time involving Pandora’s rights relative to BMI prohibiting music publishing companies from withdrawing selected rights from BMI representation. The opinion given by Judge Stanton was another blow to publishing companies that wanted to negotiate individually with service providers to use content in BMI’s catalogs digitally or in movies while retaining the remaining uses within BMI’s administration.

⁴⁰⁵ *Supra* n 401 at 347.

⁴⁰⁶ *Supra* n 361, ASCAP Consent Decree AFJ2.

⁴⁰⁷ *Id.*

⁴⁰⁸ *BMI v. Pandora Media, Inc.*, No. 13 Civ. 4037 (LLS) (S.D.N.Y. 2013).

As we have seen, in recent years many major music publishers have expressed discontent with the PRO fee system and in particular they assert that the performing rights fees that Pandora paid to BMI and ASCAP did not reflect the fair-market value of their copyrights. That perception has been reinforced by the disparity between the high fees digital performing services pay to record companies for sound recording rights, and the significantly lower fees they pay to the PROs (and hence to the copyright owner, authors and composers) for public performance rights.

Like ASCAP, BMI acquiesced in its affiliate publisher copyright-holders' withdrawals of the rights to digital performance of their musical compositions effective as of January 1, 2013 and modifications of their affiliation agreements to exclude BMI's right to license those rights to new media services under the pressure of four large music publishers which sought to withdraw from ASCAP and BMI the right to license their compositions to so-called 'New Media Services'. As the predominant internet digital performer of their compositions, Pandora was the primary target of those withdrawals. With respect to BMI licenses, Pandora could no longer enjoy the right to perform those publishers' compositions at the 1.75% rate afforded by its license with BMI. To retain the right to perform them, it had to negotiate directly with the publishers. Consequently, between March 2012 and July 2014, Pandora entered into seven direct licenses with publishers for the internet digital performance of musical compositions they had withdrawn from the ASCAP and BMI repertoires.

In a December 18, 2013 Opinion and Order, the judge in *Pandora v. BMI* reached a similar conclusion, holding that:

“When music publisher copyright holders exercise their right to withdraw their digital rights and revoke BMI’s authority to license those compositions to Pandora and other new media services, those compositions no longer qualify for inclusion in BMI’s

*repertory and BMI can no longer license them to Pandora or any other applicant. Thus, the publisher loses the whole list of BMI licensees for that composition.”*⁴⁰⁹

In the discussion section of this Opinion and Order, Judge Stanton explained that BMI’s repertory consists of compositions whose performance “BMI has the right to license or sublicense” and it “shall upon the request of any unlicensed broadcaster, license the rights publicly to perform its repertory”.⁴¹⁰ As such, when portions of that right are withdrawn, then withdrawn works can no longer be included in a blanket license for BMI’s repertory. In rejecting BMI’s argument, Judge Stanton held that:

*“BMI and the interveners argue that nothing in the BMI Consent Decree prevents BMI from agreeing not to serve particular customers. That puts matters backwards. Nothing in the Consent Decree settling this antitrust case can be read to allow one with BMI’s market power to refuse to deal with certain of its applicants. The copyright law necessarily gives that privilege to the interveners, but BMI cannot combine with them by holding in its repertory compositions that come with an invitation to a boycott attached.”*⁴¹¹ (emphasis added)

We have seen that in the later rate-setting proceeding in *Pandora v ASCAP*, Judge Cote ruled that the disallowed private deals were not good benchmarks for picking a rate, saying Pandora had been pressured into the higher rates by fear of infringement. She awarded ASCAP a 1.85% rate which was affirmed by the Second Circuit in May. Judge Stanton, though, said just the opposite: finding that the post-withdrawal deals are the ‘best benchmarks’ and the ‘most recent indices of competitive market rates’ he awarded BMI the 2.5% rate prompting the radio giant to appeal.

The opinion included pages of email conversations between Pandora executives, materials of which in Judge Stanton’s opinion demonstrated that the internet radio firm

⁴⁰⁹ *Id.* at 26.

⁴¹⁰ BMI Consent Decree Arts. II(c); VII(B).

⁴¹¹ *Supra* n 410.

was not pressured by legal fear as Judge Cote found in her case. Judge Stanton opined that the email correspondence indicates a mere conducting of a normal negotiation in pursuit of a business goal.⁴¹² For this reason, the rates that came out of those negotiations were considered to be fair game for figuring out fair market value. Judge Stanton stated that ‘the reality is that the direct licensing deals were driven by business considerations rather than the collateral prospect of copyright infringement’.⁴¹³

c) Aftermath of *In re Pandora*

It appears that the inconsistent judgments from the two rate court decisions may be inevitable in relation to the blanket licensing in music copyright given the peculiar dynamics of the music industry and the competing public policy between antitrust and copyright laws.⁴¹⁴ Although the initial existence of the PROs and their ability to provide blanket licenses in an exclusive base was a matter of antitrust concern in the past, the case of *In re Pandora* shows the opposite scenario where the withdrawing of rights from a PRO was attempted as a form of collective boycott to block the access of a new type of service to the traditional licensing practices.⁴¹⁵

In recent years, publishers have been combined into just a handful of actors that control the whole catalogue of contemporary music.⁴¹⁶ The power amalgamated by these actors has exposed, as demonstrated in the Pandora case, the ability to seek increased base rates by compelling Pandora to enter into direct license agreements with each of the publishing companies. Such compulsion would lead to an imposition of higher transactional costs to licensees like Pandora. Furthermore it has been pointed out that the anticompetitive, collusive behavior shown in the above Pandora proceedings occurred against the

⁴¹² *Id.* 22.

⁴¹³ *Id.* n 49.

⁴¹⁴ *Supra* n 400.

⁴¹⁵ *Supra* n 3.

⁴¹⁶ Garcia, Kristelia A., “Facilitating Competition by Remedial Regulation.” *31 Berkeley Tech. L.J* 183 (2016) at 229: Notwithstanding the efforts of Congress, the DOJ, and the relevant courts, consolidation in the music industries has only intensified. Currently, a mere three record labels constitute 65% of the music found on Pandora, 180 while the three largest music publishers control roughly 65% of the market for musical composition.

backdrop of a highly regulated industry and despite the existence of a ‘a consent decree and under the auspices of a rate court and two different regulatory agencies: the DOJ and the FTC’.⁴¹⁷ As such, one academic has described such situation as ‘an extensive breakdown in structural competition’⁴¹⁸ and ‘without a workably competitive market, the forces of supply and demand are not able to correct a supra-competitive price, nor check such anticompetitive practices as refusal to deal’.⁴¹⁹ It appears that no one has ever tested the effectiveness of the judicial relief provisions in the decades old consent decrees as a machinery to administer blanket license pricing by the courts to set a reasonable price for musical performing rights in the event the negotiating parties fail to reach an agreement.

Added to this anticompetitive effect is the possibility of Pandora facing a massive copyright infringement liability if in the event Pandora has no other choice but it directly engages in license negotiation with the publishers. In this respect, one representative from Pandora said before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights:

*“There is no authoritative database of copyright ownership information to which a service such as Pandora could turn if it had to license directly these millions of copyrights owned by tens of thousands of copyright owners. Those databases that are available (e.g., ASCAP, BMI and some music publishers maintain online databases) can only be searched on a song-by-song basis and often contain conflicting information.”*⁴²⁰

Since the Pandora proceedings, doubts have been cast on whether antitrust law effectively and adequately protects and balances the interests of the music stakeholders. It must be remembered that even when antitrust is applicable, it is an *ex post* review and thus review is conducted only when the alleged harm is already evident. In other words, it ‘does not provide a remedy for breaking up monopolist firms unless and until they

⁴¹⁷ *Id.* at 230

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 222

⁴²⁰ U.S. Senate Judiciary Committee, Statement of Christopher S. Harrison on Behalf of Pandora Media, Inc. Before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights How Much for a Song?: The Antitrust Decrees that Govern the Market for Music March 10, 2015.

engage in predatory conduct’.⁴²¹ To this end, it has been said that the ‘consent decree acts only on ASCAP and not on ASCAP’s individual members, thus limiting its ability to thwart anticompetitive behavior on the part of individual entities’.⁴²² Further, the courts have changed their attitude from treating ‘group boycott’ or ‘concerted refusal to deal’ as per se illegal by members who hold market power. Modern courts have shown that unilateral refusals to deal by monopolists are rarely considered as anticompetitive:

*“ASCAP is better known in competition circles for the concept that some cooperative joint ventures among competitors necessarily require collective action to realize distribution efficiencies and minimize transaction costs. Yet that permissive “rule of reason” approach to what might otherwise be considered horizontal collusion is tempered by the realization of the courts that when they include nearly everyone in a market, content organizations can become competitively essential.”*⁴²³

As mentioned in one statement, the ‘Pandora proceedings revealed for the first time in more than 100 year history of performance rights in the United States an attempt by a music publisher to unilaterally interfere with a music creator’s relationship with the PRO of their choice’.⁴²⁴ Hence calls for reform have been raised to ameliorate these newly found issues faced in the current music licensing practice.

CHAPTER 5

FINDINGS

Despite the great differences in their historical development, conceptual structure and style of operation, the two legal systems both face the challenges brought by the digital

⁴²¹ *Supra* n 418, at 235.

⁴²² *Id.* at 234.

⁴²³ Glenn Manishin, Opening Pandora’s Box: Copyright and Antitrust, Disruptive Competition Project (October 17, 2013) <http://www.project-disco.org/competition/101713-opening-pandoras-box-copyright-and-antitrust/#.WARwjo9OKy0>.

⁴²⁴ Statement by the SGA president Rick Carnes, Billboard <http://www.billboard.com/articles/business/7318702/umpg-ole-pull-film-production-music-ascap-sesac> <last visited April 1, 2016>.

advancements and the resultant anticompetitive behaviors demonstrated by the relevant actors in the music licensing context. For the purpose of comparative studies, the following summarizes the similarities and differences recognized in the music licensing landscape and the application of antitrust law to the types of anticompetitive practices by the music intermediaries. Each research question will be analyzed and discussed in turn as below:

- **What are the differences and similarities between the Korean and the United States legal framework as it relates to the music licensing system?**

Protection of Musical Works

Both countries constitutionally recognize the importance of protecting rights of authors. ‘Musical Works’ are statutorily protected in Korea and in the United States under the auspices of the respective copyright acts. While the Korean Copyright Act protects musical works on the basis of copyright and neighboring rights, in the United States musical works are protected by looking at copyright relating to musical composition and sound recording. Fixation is not a requirement in Korea, however, it nonetheless helps in the context of enforcement. A key difference is the fact that sound recording is not conferred with complete protection in the United States. This is different from the Korean counterpart. As a result of the enactment of the DMCA and the subsequent the DPRSRA, performance right protection is granted to sound recordings for digital uses.

Music Licensing System

Korea adopts the trust management principles to facilitate the collective management of copyrights for musical works. Prior to the establishment of its second music CMO, KOSCAP, Korea had implemented a one-field one-CMO policy for different fields of music subject matters. A CMO is established only upon permission from the MCST and the Copyright Act governs the royalty rate-setting. Thus, any fees charged by a CMO for copyrighted works must be put before the MCST for deliberation and approval. This stands in stark contrast to the United States approach where there are multiple performing rights collecting agencies, two of which are governed by consent decrees

while the other two which are for-profit organizations do not have any government imposed restrictions over their practice. The consent decrees have long governed the way in which ASCAP and BMI conducted their business. Furthermore, pursuant to the consent decree, ASCAP can only grant performing licenses and under both the ASCAP and BMI consent decrees, the SDNY can judicially oversee the case and set reasonable rates on behalf of the parties in case disputes arise as to the amount. Both CMOs and PROs have as their rationale the efficiency of transaction costs.

Intersection of Antitrust law and Music Copyright

In Korea, the Monopoly Regulations and Fair Trade Act Chapter 12, Articles 58 and 59, set out the relevant exemptions. Article 59 states that any act which is deemed to be a justifiable exercise of rights under the Copyright Act (and other intellectual property related legislation) shall not be bound by this Act. In addition to Enforcement Decrees, Korea has the *Review Guidelines on Unfair Exercise of Intellectual Property Rights* as guidance as to what would constitute an antitrust violation. In the event that there is an alleged anticompetitive practice that warrants judicial oversight, this is investigated by the Fair Trade Committee and brought before the court. In the United States counterpart, there is no legislative endorsement of IP exemption. However, anticompetitive practices relating to the practices of PROs generally invoke analysis under the Sherman Act sections 1 and 2 through either a per se analysis or a rule of reason. The *Antitrust Guidelines for The Licensing of Intellectual Property* is also available. Although similar to the Korean guidelines, it is mostly centered on patent issues. Nonetheless in both countries, the balancing of the anticompetitive and procompetitive effects of the copyright collecting organizations or agencies is crucial in determining the legitimacy of the conduct for the purpose of antitrust analysis. Interestingly, motives and public policy arguments also seemed to play an important role in assessing whether the practice by a CMO or PRO is capable of withstanding antitrust scrutiny.

- **What kinds of anticompetitive practices in the music industry can be identified that appear to run counter to the spirit of copyright and antitrust law in Korea and the United States?**

Types of Anticompetitive Practices

The above findings show that the enormous power wielded by the copyright collecting societies in both countries means that negotiation leverage is greatly tilted towards the CMOs and PROs. In both Korea and the United States, the refusal to license has been particularly problematic in conjunction with the effects of blanket licensing that seemingly confine the rights of the users to musical works. However, in the United States the restrictive reading of the consent decrees that disallow partial withdrawal of digital rights have been met with much criticism with the Copyright Office proposing an opt-in opt-out system to address this issue. Moreover, the unreasonable demand of royalties by KOMCA and its excessively broad reading of the previous legal provisions relating to public performance have also led to a series of lawsuits. Additionally, the national perception, treatment and clauses of fair use exceptions are narrow which also intensifies the influence of the CMO in seeking out royalties. In respect of the royalties, the concerted practice in the SKT price collusion and the coordinated acts of the PROs and the large music publishing companies in the Pandora case demonstrate somewhat similar points in that the influential power of the intermediaries and the effect on competition cannot be overlooked. As in the SKT price collusion case, an investigation by the Fair Trade Committee played the central role; in the United States the judicial role is integral in striking a fair balance and benchmark for the music royalties.

Another instance where antitrust issues have surfaced in the context of music licensing is the unfair business conduct by the music-related companies in their adopted business models. We have seen this in the Korean company Samsung's aggressive marketing versus KOMCA's equally aggressive response to account for music royalties. The tension in such instances provoked debates as to whether this is a matter of business practice or an anticompetitive practice forbidden by law. Likewise, Apple's conduct in the music industry has invoked debates as to whether the practice of windowing and ad-revenue bans would fall foul of the Sherman Act's sections 1 and 2 or be deemed legitimate business practice. More attention needs to be drawn to such practices by the Korean counterpart and this would be beneficial as it awaits an imminent finalization of Apple Music into its nation.

- **How has each country addressed the issues of anticompetitive practices in music licensing and how have the scope and limitations of the current legal framework influence in shaping such responses in the two countries?**

As seen in Chapter 3, under Korean law, Articles 58 and 59 of the MRFTA, *the Review Guidelines on Unfair Exercise of Intellectual Property* together with various theories proposed by academics provide nuanced mechanisms in assessing whether there exists an antitrust violation in an intellectual property cases. However, when assessing music licensing related cases that involves anticompetitive practices, the relevant provisions of the MRFTA and the guidelines do not seem to offer as a viable means for the parties to raise in court proceedings. Even when such misuse of power is noted by the courts, in depth discussions of the scope of the relevant provisions of MRFTA, the review guidelines or the various theories available are not adequately deliberated by the parties.

In the KBS case, on the issue of whether the lawsuit instigated by the CMO was an abuse of power, the court focused on the wording and the nature of the Terms of the Use Agreement between the parties and the important public functions of KOMCA and KBS in finding abusive act by KOMCA with its market-dominating position. While the court did not specifically state that such repetitive rejections by KOMCA, who is entrusted with relevant music copyrights, fall outside the ‘justifiable exercise of intellectual property right’ for the purposes of the MRFTA, this can arguably be deduced from the judgment. Rather than using the various antitrust theories in intellectual property cases that are often used in the context of patents, what drove the court in this case seems to be the underlying public interest in the works by the parties in question. If public interest approach is utilized in assessing the anticompetitive behavior of KOMCA, then such analysis by the court against the MRFTA and other competition guidelines in the context of music licensing would assist in gaining better understanding the scope of the term ‘justifiable exercise of intellectual property right’. Moreover, as seen above in the case of individual contents provider, given the significance attached to the content provider or suppliers in digital music era, KOMCA’s consistent refusals to license with individual content providers would also run counter to public interest at large. Again the limitations

of the current legal framework under the copyright law and the MRFTA present as hurdles for music users to request for antitrust examination of KOMCA's anticompetitive actions. More active part of the Fair Trade Committee seems critical in this respect under the current legal scheme.

Other anticompetitive practice concerning KOMCA was with respect excessive demand of royalties. CGV case involved the scope of public performance right under the Copyright Act. However, one cannot ignore the fact that all throughout the case, the aggressive actions of KOMCA and the court's effort in restraining the rights of copyright holders from expanding beyond the boundaries afforded by the Copyright Act. Again while court did not specifically delved into the issue of antitrust violations, it nonetheless highlighted a type of action by KOMCA that calls upon questions of misuse of power. Another case which involved an aggressive action by a CMO in the sound recording arena, the RIAK, further testifies the enormous power held by these CMOs in the music industry. So much so that, as was seen in the example of Wantreez instance, businesses are getting hurt by such actions of CMOs in terms of its legitimate business models and incentives to deliver more accessible contents to users. Whether such actions by a CMO can withstand antitrust scrutiny under the current legal framework under the Copyright Act and MRFTA remains unclear without a more tailor made review guidelines that concentrates on the anticompetitive issues faced by the music industry. Moreover, while in the KBS case, a public interest line of reasoning influenced the court's decision, in the SKT Additional Service Charge case, a defense of copyright misuse was raised to which the court amorphized the issues of copyright misuse and antitrust violation. In other words, even though the grounds of copyright misuse as a defense to infringement and antitrust violation hold different elements for establishment, the court in that case seemed to have tied the two grounds together which have the effect of diminishing the role of copyright misuse as a defense in the infringement cases. By finding that because there is no market dominance and hence no antitrust violation AND copyright misuse is an incorrect approach and only further complicates the analysis of the two different grounds of law. It is of the author's view that the lack of clarity and structure in the current legal

framework by the courts in the music licensing context continues to bring about such inconsistent judgments whenever issues relating to the actions of KOMCA arises.

The non-transparent conduct of KOMCA in their day to day business has stirred much controversies over the years. Given the vast amount of power held by KOMCA, the users and the music creators alike have not been able to match up to such dominating position leading to lack of fair returns to the creators and lack of opportunities for fair dealing with the distributors and/or users. The lack of accurate recordation of the exact use of copyrighted works and the ownership databases have been raised as causes to such opaque licensing transactions. Without a more authoritative and binding regulations that oversees the businesses of KOMCA, the continued decay from the creators and users alike is expected to endure.

Moving to restrictions on improper concerted practices under the MRFTA, we have seen that Article 19 of the MRFTA provides prohibition on any improper concerted practices such as price fixing, maintain or changing prices. We have seen through the SKT price collusion case that it is not just the actions of CMOs that invokes anticompetitive practices in the music industry. Major online music service providers too pose significant risk in upsetting fair competition and running against the spirit and intent of copyright law. In this case, the Fair Trade Committee successfully brought breach of Article 19 of the MRFTA against the major companies. While the Supreme Court did not deal with the tensions of copyright and antitrust law violation in that case, it nonetheless presented another type of potential anticompetitive practice which KOMCA has been caught up with, prompting yet again for stricter oversight of KOMCA's day to day business.

Lastly, we looked at two types of cases that would likely to fall under the heading of unfair business conduct under the MRFTA. The practice of 'tying' by Milk Music, a streaming radio service application introduced by Samsung Electronics was placed under the spotlight. The main issue was whether Milk's business model in ultimately providing free music to its users violated the Terms of Agreement between KOMCA and Soribada. Milk Music argued that KOMCA's is misusing its market dominant position in

demanding ceasing of Milk Music's service, continuously terminating Milk Music singularly, and therefore in violation of Article 23(1) of the MRFTA. After a lengthy and prolonged discussions that went back and forth between the Milk Music and Soribada on one side and KOMCA on the other, it was reported that the final negotiated price for the music was 1000 KRW per month. However this has brought about another antitrust issue that such agreement on the final consumer price by KOMCA was a breach of Article 29(1) on Restrictions on Resale Price Maintenance. Ultimately, a new agreement was entered into between the parties that changed some of the services into paid services as well as providing increased options for the users to choose from. Nonetheless, the current legal framework does not seem to help either parties exactly to what extent a CMO or a music providers can exercise or cannot exercise nor do past court judgments give a clear guidelines.

In the United States, the Sherman Act provides the basic antitrust law framework and the courts have used the rule of reason and per se analysis in assessing the anticompetitive practices of the music intermediaries. Additionally the consent decrees that have been in existence for decades have played a crucial role in restraining the conducts of the ASCAP and BMI, the two largest PROs in the United States. However, such government enforced decrees are not applicable to the other two for-profit organizations. The consent decrees and the compulsory licensing mechanisms embedded in the Copyright Act are some of the examples of antitrust remedies used to reduce the effects of anticompetitive practices by these music intermediaries and to protect the creators and users. What once was employed as an effective means to curb the powers by ASCAP and BMI of their notorious anticompetitive practices in entering into exclusive blanket license agreements, the consent decrees today are causing much controversy as to its applicability in today's digital era. Therefore, the limitations of consent decrees and compulsory licensing against antitrust practices have been increasingly put forward by the users, the PROs, and the creators alike who are now challenging the original rationales for such mechanisms. As seen in the *ASCAP, BMI v DMX* case, the disparate royalty standards provided under the current Copyright Act and under the consent decrees by the rate court judges have raised inconsistent protections and royalty rates for different music copyright subjects.

Much of the anticompetitive practices by ASCAP and BMI involves questions of how far or how narrow the consent decrees should be interpreted and what factors should be taken into consideration by the rate court judges in determining ‘a reasonable royalty rate’. With large music publishers begins to experiment with direct licensing, which have, in the instance of DMX case, yielded lower rates than ASCAP and BMI, such decision has prompted ASCAP and BMI to more assertively request for an easing of the consent decrees to hold stronger bargaining power against these large music publishers in the digital platform. However, at the other end of spectrum, SESAC which is a not restrained by a consent decree has recently been caught up in antitrust lawsuits for taking unfair advantage of its unrestricted licensing practice by only offering a blanket license without offering any other realistic options for its member to choose from as well as incorporating punitive provisions in its license agreement that punishes licensees who enter into direct licensing. Such practices are currently prohibited under the consent decrees of ASCAP and BMI.

Additionally, a recent research into the windowing and ad-revenue bans by Apple is another form of anticompetitive practice that have been raised some alarm bells of antitrust law in the music context. As seen above, whether the current analysis under sections 1 and 2 of Sherman Act would be able to catch Apple’s windowing and ad-revenue ban practices as being in violation of antitrust law remains to be seen. However, based on the past cases and research involving analysis under Sherman Act, the roles of judges would seem critical in delineating the boundaries of what should or should not be classified as antitrust violation.

Furthermore, we have seen in the Pandora’s collusion and unilateral refusals to deal cases, the factors judges take into consideration in determining a reasonable royalty rate for any given case and how the practices of the parties can influence such rate determination process. This is primarily due to the two consent decrees which specifically ban PROS from entering into agreements with licensees that show price discrimination amongst similarly situated licensees, the setting of minimum membership standards, satisfaction of which mandates PROs to accept any request for membership. In addition, we have

seen that the consent decrees must make available alternative economically viable forms of licenses other than the blanket licenses. In re Pandora, in assessing the fair market value of the license, we could see that the antitrust concerns played a critical part in the judges' decision-making process. Given that judges are compelled under the consent decrees to consider the fact that PROs hold a market-dominating position, PROs predisposition in inserting disproportionate power over the market for music rights is always at the forefront in the determination process. As such, the parties surrounding circumstances of the rate negotiations prior to the proceedings and their motives and intent all come into consideration by the rate judges. For this reason, what is clear is that the consent decrees of ASCAP and BMI do curtail the powers of the PROs with a guaranteed rate-court to hear both sides of the arguments to come up with the most reasonable royalty rate for the parties. However, whether such rate determination does in fact reflect the reality of the market has been doubted by many industries in the music marketplace. Limitations posed by the current legal framework is exacerbated by the lack of readily available copyright ownership information to users and distributors which has the effect of tilting negotiation powers towards PROs and large music publishers.

- **How can legislators and courts in Korea make use of the United States law in the field of music licensing and their antitrust law analysis in providing checks and balances on anticompetitive practices of key domestic music licensing actors?**

Based on the analysis of the two systems of law as it relates to music licensing and antitrust examination, it appears the United States have increased scrutiny on the present music licensing regime by Congress and executive branch entities. Of particular relevance the scope of the rights granted by PROs that license musical works under the federal consent decrees has raised many questions and opportunities for the stakeholders and lawmakers and regulators to consider how the property interests of musical composition owners can be protected in today's state of music market. We have seen that the United States music licensing landscape currently is subject to heavy governmental regulation including federal antitrust consent decrees and the current structure of US's copyright laws. Cases that arose from the interpretation of the consent decrees

demonstrated the difficult issues of legal and policy concerns regarding the outcome that PROs are only permitted to engage in 100-percent licensing practice (that is, no partial withdrawals allowed as seen in re Pandora). Such decision gave rise to criticisms concerning principles of copyright law, interference with creative cooperation among music creators and effectively undermining of the very concept of blanket licensing granted by ASCAP and BMI for the majority of its performances of musical works. However, in saying that, the benefits of consent decrees cannot be ignored considering the fact that there have also been multiple antitrust lawsuits against SESAC which is not constrained by the consent decrees and have been targeted for engaging in anticompetitive practices in recent years. Therefore a more balanced approach between a less restrictive interpretation of consent decrees married with an adequate antitrust scrutiny over the practices by the PROs need to be made available in the United States. With this in mind, there appears to be at least three areas in the United States that may assist the Korean counterpart in developing its case laws and legislations around its own music licensing scheme. The lessons learned from the United States music licensing-related antitrust cases could present as helpful guidance in formulating a more effective mechanism to monitor and police the actions by the CMOs in Korea.

The Roles of the Rate courts

Firstly, the adoption of expert panel such as rate court and rate court judges in mediating the disputes surrounding the royalty rates would be beneficial given that such court judges are compelled to consider the monopolistic position held by the collecting societies and their business practices in negotiation transactions in discerning the reasonable royalty rate. Currently under the Korean counterpart, there is an arbitration mechanism available for the parties should there be a dispute regarding the royalty rates, however there are no binding set of rules that compel consideration of antitrust issues on the board. It should be noted that in the United States, the Copyright Office has proposed that it would be even more efficient to move all ratesetting to the Copyright Royalty Board and it is the view of the Copyright Office that any issues of anticompetitive practices should be evaluated separately apart from the determination of equitable rates for songwriter's works. While there may be merits in the Copyright Royalty Board in

assessing the rate-related issues given their specific expertise in copyright law and economics, it is of the author's view that in case of detachment of ratesetting and enforcement of antitrust laws, there is a danger of reading into the issues in isolation rather than as a whole. Currently the rate court judges are permitted to examine the surrounding circumstances of the parties, their motives and their actions in the prior negotiations in ratesetting in coming to their decision. It remains doubtful whether the consideration of anticompetitive conduct in the music licensing disputes can be assessed without also determining the reasonableness of the royalty rates set by the parties. Separation of the determination of fair rates for musical works and allegations of anticompetitive conduct away from the rate courts could also increase the amount of workload in preparing and bringing two separate cases for the parties. Nonetheless, with the increase in growth in Korean music industry in conjunction with the upcoming introduction of Apple music domestically, Korea could benefit highly from availability of a more expert-based panel that is accessible for the parties in rate-setting and addressing of anticompetitive practices of major CMOs and music intermediaries. For instance in the case of *In re Pandora*, Judge Cote was in particular noted and took into account the anticompetitive practices by the parties which had an effect in the ratesetting determination. On the other hand in the SKT price collusion case, because the courts only concerned themselves with respect to the violation of the relevant competition statute, subsequent problem of parties' agreed upon usage fee still remained hovering over the case.

Multiple Collecting Societies

Moreover, we have seen that the Korean counterpart has introduced its second CMO, KOSCAP in recognition of the importance of preserving choice and competition among the CMOs, by generating more efficient methods for tracking music-related copyrights, distributing relevant royalties and of course, reduced commission rates. Such introduction of competition seems to align with the importance of the existence of multiple PROS in the United States music marketplace which allows the songwriters and publishers to carefully select the PRO with which they affiliate based on their understanding of which collecting society will bring about the most value. This is a

welcome approach with assurance from KOSCAP that a more expert-driven approach will be implemented. In the United States, we have seen that PROs compete for memberships on the basis of a number of criteria such as membership training, educational opportunities, and benefits such as guarantees, advances and networking. While the licensing rates and commission structures are roughly equivalent across the current PROs, there is always a room for larger differentiation in the future as new organizations is always capable of entering the market. However, in Korea the restrictive approval-based establishment of CMO seems to make it difficult for great differentiation in licensing rates and commission. Despite so, there have been criticisms arising from purported unequal treatment of copyrights in songs by KOSCAP (between background songs and full-scale songs), royalty calculation (i.e. music levy) of which MCST has approved without adequate consultation from all stakeholders.

Ratesetting Process and Industry Input

As seen above, the United States Copyright Act, it mandates copyright holders to license their musical works at a government-set rates – that is, in the area of mechanical and performance licensing, they are subject to compulsory licensing and ratesetting. While such justification for government’s role in music licensing stems from the antitrust concerns, the disparate ratesetting standards have prompted the Copyright Office to recommend for a single, market-oriented ratesetting standard applicable to all uses of music under the statutory licenses. Moreover, the United States is calling for government licensing (e.g. compulsory licensing under the Copyright Act) processes to treat like uses of music equally as well as embracing government supervision that advances voluntary transactions such as direct licensing while preserving collective solutions. In this respect, recommendations and industry opinions are being collected and gathered to find the most effective means to streamline the ratesetting standards. Currently there is a tension between the willing buyer/willing seller approach and the s 801(1)(b) standard which prompts CRB to weigh and take into consideration several policy-oriented objectives in setting the rates for the license. Such active industry contributions are something that should benefit the Korean part in determining the most fair remuneration for the music creators and license fees for the users. Having a uniform standard such as s 801(1)(b) that

seeks to balance various policy objectives could also provide guidance for the relevant authorities in approving music levies in the music marketplace. The willing seller and willing buyer method is more akin to the free market approach, and while some have argued (as discussed in more depth below) that free market does not in actuality exist in the properties of music, the increasing engagement of direct licensing in the United States could also offer some alternatives for a more sustainable music market in Korea as well.

CHAPTER 6

CONCLUSION

Owing to an awful lot of moving parts with respect to copyrights especially in music and how they are transferred to users, the current regime cannot be fixed by looking purely at either the antitrust side or the copyright side. Both sides need to be looked at it together with a holistic effort on the part of each government, the judiciary and the industry as a whole. When viewed broadly, both legal systems have in place a patchwork of amendments and regulations in an effort to accommodate the changes brought about by the digital movement. Nonetheless, despite such effort, anticompetitive practices by the music intermediaries are still evident irrespective of whether one adopts an approach of CMOs as in Korea or a multifaceted framework of PROs as in the United States. Accordingly, much academic work has been sparked in the United States in the wake of the legal defeats by ASCAP, PROs and the music publishers. A further study into the various models proposed by the Copyright Office in the United States coupled with academic proposals would certainly furnish useful benchmarks for the Korean counterpart as well as understanding the direction in which its largest music industry partner is moving towards.

Currently, as mentioned above, the United States Copyright Office is reconsidering decades old antitrust decrees for ASCAP and BMI and also wishes to give music rights owners, such as publishers, the ability to withdraw streaming rights from services. The

Office has made an unprecedented call proposing to turn performance rights organizations into ‘music rights organizations’ with the ability to bundle reproduction, distribution and performance rights together.⁴²⁵ In short, the solution proposed is to bring about via legislation the merger of the various music licensing rights into one set of entities whose power over music licensing would be closely monitored by Congress, the Copyright Office and the courts.⁴²⁶ The United States Copyright Office is favoring the open free market approach. In agreement with much of the music publishers’ concerns, the Copyright Office also concedes that there does not appear to be any sound ‘reason why sound recording owners are permitted to negotiate interactive streaming rates directly while musical work owners are not’. Allowing a limited partial withdrawal (only to interactive streaming rights for new services) in the manner of an ‘opt out’ mechanism has been proposed by the Copyright Office.⁴²⁷

In the academic field, there are proponents of free market theory which was the common theme running through the most recent Copyright Office report.⁴²⁸ Such theory argues for ‘market solutions based on free negotiations between the parties who determine prices with supply and demand without the restrictions of intervention of government boards and lawyers’.⁴²⁹ One commentator stated that music is a form of information goods and therefore ‘a more nuanced system of differential pricing of different pieces of music – recorded by different artists, composed by different song writers may well emerge’.⁴³⁰ Some have cast doubts on the free market theory arguing that ‘while such free market economics assumes a competitive marketplace for rival and excludable goods, this is actually not the state of affairs for the music industry, which instead touts a

⁴²⁵ *Supra* n 3, 160.

⁴²⁶ Jonathan W. Cardi, *Uber-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 *Iowa L. Rev.* 835-90,(2007) p. 880

⁴²⁷ *Supra* n 3, 159.

⁴²⁸ Lenard, Thomas, M. & White, L., “Moving Music Licensing into the Digital Era: More Competition and Less Regulation.” *Technology Policy Institute* (2015).

⁴²⁹ Blacc, A., Manta, Irina D., and Olson, David S. “A Sustainable Music Industry for the 21st Century.” *Cornell Law Review Online* (2015) 7.

⁴³⁰ *Supra* n 430, 29.

single public good – songs – in a marketplace that is not workably competitive’.⁴³¹ Thus a more compromised approach may be warranted, such as a ‘remedial regulation approach’ or a ‘clearing house approach’ that proposes the least drastic changes to the existing licensing structure whilst reaching maximum value and efficiency.

Yet whatever approaches or theories one proposes, no approach will bring about maximum efficiency without a reliable centralized authentication database of musical works.⁴³² This is something that both Korea and the United States have expressed a need for. Improving the function of the marketplace in music properties requires the full identification of those works and their authors. Both Korea and the US need to develop a standardized system of unique identifiers for each musical composition and the specific sound recording version, so that users and distributors can identify from whom they need to license rights in order to avoid infringement.⁴³³

⁴³¹ *Supra* n 418 at 240: Garcia explains that music is a differentiated product and thus “unlike standard goods—including those traditionally protected by property rights, like a house—songs, once released, are not excludable, nor is their worth diminished through their use by others.” Stating hence, therefore music is prone to anticompetitive issues as a noncompetitive market.

⁴³² Casey, Rae-Hunter, “Better Mousetraps: Licensing, Access, and Innovation in the New Music Marketplace.” 7 *J. Bus. & Tech. L.* 35 (2012) 50 – 52.

⁴³³ *Supra* n 430, 21; see also *supra* n 3: The Copyright Office has recognized that the most critical and widely used identifiers for the millions of musical works and sound recording in the marketplace, the ISWC and in the case of sound recording, the ISRC. These two identifiers should in the Office’s belief, over a period of time (e.g. five years) become required elements within the proposed GMRO-managed database. It has been reported that ASCAP and BMI have already begun implementing use of ISNI.

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국문초록

디지털 기술이 급속도로 발전하면서 음악 소비 방식 및 형태 또한 크게 변하고 있음은 분명하다. 지난해 세계 녹음 음악 매출은 실물 음반과 디지털 음악 매출이 같은 비율을 기록하며 물리적 환경에서 디지털 환경으로, 다운로드에서 스트리밍으로 옮겨가는 추세다. 이러한 환경 속에 아날로그 시대에 만들어진 음악 저작권법은 현 시대를 반영하고 있는지에 대해 미국법상의 음악 라이선스 시스템에 대한 분석을 공정거래법 측면에서 우리나라 법과 비교법 연구를 수행하고자 한다. 두 나라의 법 체계를 비교 분석함으로써 저작권법과 공정거래법이 교차하는 영역에서의 주요쟁점들을 사례와 시사점을 통해 검토하여 음악 시장에서의 공정성을 확보할 수 있는 방법들을 살펴 볼 수가 있다. 비교 분석을 통해 잦은 개정에 의한 해결방안에는 한계가 있음을 인식할 수 있으며 보다 더 의미 있는 변화는 공정거래법 역할을 적극 활용하여 음악 라이선스의 효율성 증대와 저작권 단체의 저작권 관리·신탁 기능을 경쟁과 혁신 중심으로 보완하는 점에 본 논문은 초점을 두고 있다.

주요어 : 저작권법, 공정거래법, 음악 라이선싱, 신탁관리단체, 음악 저작권, 집중관리단체, 비교법

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