

Question 3: Question for National Reporters

Can the exercise of copyrights or related rights, especially by copyright collection societies constitute an abuse of a dominant position?

If this is the case, up to what extent and under which circumstances?

Explanation given by LIDC Committee

Several court decisions (e.g. *Magill*) have pointed out the correlation between the two bodies of rules. The analysis may differ depending on whether the exercise of these rights is individual or collective and in the later situation by virtue of a membership or a legal obligation to join a collective system.

It could be useful to list all the arguments that have been put forward to set up the balance if this is possible.

Suggestion of sub matters to look into:

- are there in your country specific legal measures on this matter as well as on the specific issues of societies specialised in the collection of copyright or neighbouring rights?
- what are the existing or advisable criteria for establishing a balance of interest between conflicting rights?

Scope of Question

1. The above question effectively breaks down into three questions as follows:
 - 1.1 Can the *exercise* of copyright or related rights constitute an abuse of a dominant market position and if so in what circumstances?
 - 1.2 Can the *exercise* of copyright or related rights by bodies administering such rights collectively (including copyright collecting societies) constitute an abuse of a dominant market position and if so in what circumstances?
 - 1.3 Can membership or a legal obligation to join a collective system constitute an abuse of a dominant market position?
2. In order to ascertain the position in each LIDC jurisdiction which is covering this question, each of these three questions break down into the following sub-questions.

Sub-questions

3. Can the exercise of copyright or related rights constitute an abuse of a dominant market position and if so in what circumstances?

3.1 Please state which works are generally covered by copyright and related rights in your jurisdiction.

For this purpose, the expression "works" includes the following:

- Musical works
- Literary works
- Dramatic works
- Artistic works
- Cinematographic works (including film and television)
- Performances
- Sound recordings
- Designs
- Databases

The expression "related rights" means all rights related to copyright such as performers rights, moral rights, design rights, sound recording rights, database rights.

These lists are not exhaustive and the terminology will differ from jurisdiction to jurisdiction.

3.2 What specific rights are accorded to the owners of copyrights and related rights in your jurisdiction?

For example, in the UK a copyright holder has the exclusive right to:

- copy the work;
- issue copies of the work to the public;
- rent or lend the work to the public;
- perform, show or play to the public;
- broadcast the work or include it in a cable programme service; and
- make an adaptation.

For example, in the UK, a holder of a performer's right (a related right) has a right to equitable remuneration for the exploitation of the performance and to require that exploitation of his performance is only with his consent. Exploitation includes copying, issuing copies to the public, recording, renting or lending copies to the public.

These lists are not exhaustive and the terminology will differ from jurisdiction to jurisdiction.

3.3 Have there been any national decisions of courts, tribunals or competition authorities in which the exercise of copyright or any of the related rights mentioned above (or any others which you have identified which fall within that category in your jurisdiction) by an *individual* has either:

3.3.1 been found to amount to an abuse of a dominant market position?

3.3.2 been found not to amount to an abuse of a dominant market position after the rightholder in question has successfully defended itself against such a claim?

3.4 If so, please provide details of the factual circumstances, economic analysis and legal decision made, with particular regard to the following questions:

3.4.1 what right or rights were involved?

3.4.2 what form(s) of utilisation of that right(s) was involved?

3.4.3 if there was a finding that the rightholder had a dominant position in the market in question, was the existence of dominance:

- (a) based entirely upon the ownership of the right concerned;
- (b) based in part upon the ownership of the right concerned;
- (c) based on factors independent from the ownership of the right concerned?

(d) what forms of exercise of the right(s) were found to be abusive and in what circumstances?

(e) what forms of exercise of the right(s) were found not to be abusive and in what circumstances?

3.5 What criteria were used by the court/tribunal/competition authority to determine the appropriate balance to be struck between the need to ensure that the rightholder was not deprived of the substance of its right and the need to ensure that the rightholder did not exercise the right unfairly? In particular please state whether any of the following points were considered in cases where the abuse concerned either a refusal to supply or excessive pricing and if so, what conclusions were drawn?

Refusal to supply

- (a) the material which was the subject of the right was indispensable for the production of a new and independent product or service;
- (b) the new product or service did not exist at the time of requesting a licence of the right and there was demonstrable demand for the product or service in question;
- (c) there was no objective justification for the refusal to supply;
- (d) the refusal would eliminate all competition in the market in question.

Unfair/excessive/discriminatory pricing

- (a) what costs or other charges did the court/tribunal/competition authority use as a basis for measuring whether the royalties charged for using the licensed work was unfair/excessive?

3.6 Do you agree with the balance struck and if not, what criteria would you have used and why?

3.7 Have there been any circumstances in which a court/tribunal or competition authority has determined that the mere exercise of a right could amount to an abuse, and if so in what circumstances?

4. Can the exercise of copyright or related rights by bodies administering such rights collectively (including copyright collecting societies) constitute an abuse of a dominant position?

4.1 For this purpose, a collecting society is considered to be an undertaking or association whose primary purpose is to administer rights on behalf of its members in such a way that the society is empowered by each of its members to negotiate and act in respect of his works. There is no need for individual consultation with members as to the terms on which licences authorising the use of their works are to be granted and licences are granted in respect of the works of more than one rightholder.

4.2 What copyright collecting societies exist in your jurisdiction and describe:

4.2.1 the rightholders they represent;

4.2.2 the function they perform including the scope of the exercise of the rights transferred or assigned to them;

4.2.3 their objective and rationale for carrying out this task on a collective basis;

4.2.4 the legal basis for collective administration, including eg.

(a) *Voluntary collective licensing*: where a society or governing body is mandated by its members to collect and distribute royalties on their behalf:

e.g. in response to a collective need where the rights administered by a collecting society comprise one or more

exclusive rights conferred by statute on the rightholder and the rightholder finds it impractical or impossible to individually license and monitor use or in fact the use is tied up with or integrally involved with the exercise of rights of other rightholders and income from exploitation is generated jointly;

(b) *Hybrid of legislation and voluntary licensing*: Rights are conferred by statute and mandated to a collecting society (e.g. collecting societies for cable retransmission right under EC Directive 93/83/EEC);

(c) *Special juridical status or other statutory basis*

4.3 Do any specific remedies exist, other than under competition law, to regulate the activities of collecting societies?

4.4 Are there other substantial forms of collective administration of such rights by bodies other than "collecting societies" (as defined above) e.g. where a company undertakes as one of its activities, the management and licensing of collective rights where such licences are granted in respect of the works of more than one rightholder (e.g. Media company, sports body) and rightholders voluntarily assign rights under the terms of a contract.

4.4.1 If so, please state what they are and answer the questions referred to in 4.2.1 – 4.2.4 above in relation to these bodies.

4.5 Have there been any national decisions of courts, tribunals or competition authorities in which the collective *exercise* of copyrights or related rights by any of the organisations identified in 4.2 or 4.4 above have either:

4.5.1 been found to amount to an abuse of a dominant market position?

4.5.2 been found not to amount to an abuse of a dominant market position after the organisation in question has successfully defended itself against such a claim?

4.6 If so, please provide details of the factual circumstances, economic analysis and legal decision made, with particular regard to the following questions:

4.6.1 what rights were involved?

4.6.2 what form of organisation as identified in 4.2 or 4.3 above was involved and on what basis was it found that the organisation held a dominant position in the market in question?

4.6.3 what form(s) of exercise of rights were found to be abusive and in what circumstances?

4.6.4 what form(s) of exercise of rights were found not to be abusive and in what circumstances?

4.6.5 please consider, in particular, the following issues in relation to any decision dealing with either excessive, unfair or discriminatory pricing or bundling or rights:

Excessive or unfair pricing

(a) what costs basis was used to determine a benchmark for a "fair price" or for determining whether a price was discriminatory?

(b) were any arguments raised to justify prices which exceeded a "fair" comparator on the basis that there were objective reasons for such differences?

Bundling of rights

- (a) what forms of bundling of rights resulted in users being required to pay for the use of rights which they did not wish to use in order to access rights which they did want to use?
- (b) on what basis did the collecting society justify such bundling?
- 4.6.6 what criteria was used to strike a balance between conflicting interests involved?
- 4.6.7 do you agree with the balance struck and if not, what criteria would you have used and why?
- 4.7 Have there been any decisions of national courts, tribunals or competition authorities in which it has been found that one of the organisations referred to in 4.2 or 4.4 above have: (i) made conditions of membership of a collective group; or have (ii) stipulated conditions on which it would: exercise; administer; manage; or distribute the proceeds resulting from the exploitation of collective rights; that either:
- 4.7.1 amount to an abuse of a dominant position on the market?; or
- 4.7.2 do not amount to an abuse of a dominant market position after the organisation in question has successfully defended itself against such a claim?
- 4.7.3 If so, please provide details of the factual circumstances, economic analysis and legal decision made, with particular regard to the following questions:
- (a) what rights were involved?
- (b) what form of organisation as identified in 4.2 or 4.4 was involved and on what basis was it found that the organisation held a dominant position in the market in question?
- (c) what form(s) of exercise of rights were found to be abusive and in what circumstances?
- (d) what form(s) of exercise of rights were found not to be abusive and in what circumstances?
- 4.7.4 In answering the question concerning abuse please state whether, in particular, the decision dealt with the following matters:
- (a) the criteria used to determine whether the obligations imposed upon members were no more onerous or restrictive than those which were absolutely necessary for the attainment of the collecting societies' objective? (restraints may include the length of assignment of rights, the type and scope of the rights which must be assigned, bundling of rights, the territorial reach of any assignment).
- (b) the mechanism for calculating the payment to rightholders and whether this included any "social" or "cultural" cross-subsidisation of less popular rightholders by popular rightholders.
- (c) what justifications were given by collecting societies (and which of these were accepted by the Court/Tribunal or competition authorities) for requiring rightholders to assign bundles of rights to them as conditions of access to the society/undertaking.
- 4.7.5 If not already dealt with in answer to question 4.7.4 what criteria was used by the court/tribunal/competition authority to strike a balance between the conflicting interests involved?
- 4.7.6 Do you agree with the balance struck and if not, what criteria would you have used and why?

**Susannah Sheppard
International Reporter**

