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MONEY, MONEY, MONEY: MONOPOLY ISSUES IN COLLECTING SOCIETY

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ABSTRACT

Competition law and intellectual property law has been evolving separately and has been conflicting with each other in various aspects Nevertheless, both laws have the same aim that is to spur economic growth and also encouraging innovation. Copyright law is a subset of intellectual property law, and the central conflict between copyright and competition law is in the case of collecting societies. Collecting society works as the mediator between the copyright holders and the copyright users which include authors, artists and others who benefit from collective management of their works, recordings, and performances. Collecting societies are said to be by nature monopolistic in the relevant market, and the question here is whether that market is being exploited or abused in a manner contrary to public interest. The struggling relationship between the collecting societies and the user of the works who becomes a rightsholder/member of the society, to safeguard the copyright, may result in the collecting societies to set excessive fees or to impose restrictive terms and conditions in the licensing agreement. Hence, this paper will discuss the position of collecting societies on monopoly in light of competition law and copyright law from a few perspectives from various jurisdictions. This paper employs a doctrinal analysis using secondary data. The findings will respond to the monopoly position of collecting societies and will also provide a basis for the policy makers in Malaysia to consider whether it is necessary to adopt a new framework to monitor the governance of the collecting societies in competition issues.

Keywords: Collecting society; Monopoly; Licensing; Copyright law; Competition law

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1. INTRODUCTION

1.1. Copyright Law (Intellectual Property Law) Versus Competition Law

Intellectual property laws provide incentives for innovation and creation in the form of exclusive rights such as private monopolies, either limited in time (patents, copyright, or related rights), or for a potentially unlimited duration (indefinitely renewable trademark registrations, or trade names (Cottier & Germann, 2008). Whereas, the main objectives of competition law are to encourage consumer welfare and healthy competition among players (Kats, 2005). Competition law involves in formulating a set of rules near monopolies, mergers and commercial agreements (Patel, Panda, Deo, Khettry, & Matthew, 2011) which promote competition in the market. It also encourages the best quality of goods and services at the lowest costs for end users, as well as making sure that the suppliers have freedom of access to the market and the demands associated with freedom of choice by preserving a useful competitive framework (Cottier & Germann, 2008). Copyright law is a subset of intellectual property law, and the central conflict between copyright and competition law is highlighted in the case of collecting societies. Collecting society works as the mediator between the copyright holders and the copyright users which include the authors, artists and others who benefit from collective management of their works, recordings, and performances (Luise Schild, 2012). Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs. In copyright law, when the rights involve the economic rights from the work that has been produced, the right owner has the option to exercise the right individually or with the assistance of collective management (Olatunji, Adam, & Aboyeji, 2017). It is unreasonable for the author to keep track of the use of their works on their capacity, since exploitation occurs everywhere, almost regularly. Hence, when the user violates the copyrighted works, it is impossible for them to manage their rights and uphold it legally all at once (Handke, 2013).

Both areas of laws have contradictory aims. When there is a boundary for the competitors to have their exclusive rights to their innovation or works within the intellectual property rights, the monopoly is actually against the underlying competitive market sought by competition rules. Intellectual property is a natural monopoly as the law guarantees an exclusive right to the creators and owners of work which is a result of human intellectual creativity.(Patel et al., 2011) Under competition law, if there are no substitutes in the similar market, it may lead to market power and monopoly and hence, gives an advantage to the right holder of the intellectual property against the rest of other players in the industry (Kretschmer, 2005). The conflict between both intellectual property law and competition law creates the outcome of the advantage or the abuse of a dominant position (Patel et al., 2011)

1.2. Issues

The operational management of a collecting society works like this; typically one collecting society supplies licenses to the user of copyright works in one particular domain of rights, for example, public performances (Kretschmer, 2005). One license grants through reciprocal agreements with other societies in other countries in order to have access to the world repertoire. Hence, for the individual owners of copyright works, they have no choice but to be part of a collecting society in order to gain access and be appropriately remunerated. As such, the monopolistic structure gives the control to the collecting society and exploit its position versus rights holders/members

concerning access and also royalty distribution. The collecting society could abuse its market power to raise prices for its administration services over marginal costs or to run its operations inefficiently. This will adversely affect users whose access will be restricted by monopoly pricing. Monopolistic collective administration promotes social welfare only if the benefits from fully exploiting economies of scale are more significant than the adverse effects of monopoly pricing (Handke, 2013).

1.3. Aim and Purpose

In view of the above, this paper aims at examining the interface of the conflict between competition law and intellectual property law in highlighting the current legal position governing the monopolistic nature of the collecting society in various jurisdictions and intends to fill in gaps in the literature. For this paper, the discussion is divided into five parts:

i) the overview of the conflicts between intellectual property and competition law;
ii) the background and characteristics of collecting societies within the context of copyright law and also reviews on monopoly;
iii) the methodology of this paper;
iv) on the other jurisdictions in relating to the issues of monopoly in collecting societies including Malaysia; and
v) conclusion.

2. LITERATURE REVIEW

2.1. Historical Background of Collecting Societies

The system of collective management of rights historically has existed for more than 100 years in other countries and as copyright law gradually developed, the traditional principles of the system of collective rights management remain unchanged. The aims mainly are to protect authors' rights, to secure a way by which they are rewarded, and at the same time to provide the means by which music finds its way legally and smoothly to users, hence to the public.

It was said that the collective administration started with an argument which resulted in a fight relating to drinks that a French composer, Ernest Bourget did not want to pay – since his work was played without his authorisation in one of the cafés in Paris. He debated, "you consume my music, I consume your wares"(Rodger & Ungureanu, 2010) and he won the argument before the Tribunal de Commerce de la Seine which for the first time, recognised a right to public performance (Chin, 2014). He then realised and understood that he has his right to the originality of his masterpiece that he composed, and therefore it is entirely absurd for him to dedicate his life in chasing unauthorised performances of his music. Besides, he also needed a considerable cost to track and negotiate with other various holders and end users. So Ernest Bourget, his colleagues Victor Parizot and Paul Henrion as well as the publisher Jules Colombier founded an Agence Centrale, which was the direct predecessor of the first modern collecting society, Societe des Auteurs et Compositeurs et Editeurs de Musique (SACEM). SACEM, established in 1851, became the European model, collecting at times even in Switzerland, Belgium, and the UK. With the establishment of SACEM, it had solved the issues on individual contracting and also offered other facilities for the benefits of the right-holders (Gervais, 2011).

In terms of the development of music copyright, it can be organised into three different periods, each one associated with a different international agreement. First, was through the Berne Convention for the Protection of Literary and Artistic Works, to which 172 countries have become signatories. Next, the World Trade Organisation (WTO) that administers the Agreement on Trade-Related Aspects of Intellectual Property Rights ("the TRIPs Agreement"), with the aim to have a robust focus on the commercial significance of cultural industries. In between the two was an era of increasing emphasis on the rights of "performers, producers of phonograms, and broadcasting organisations," which reached an apex with the signing of the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations ("the Rome Convention") in 1961 where Malaysia is not a party. Nevertheless, there are two international treaties that Malaysia has deposited its instrument of accession in 2012, that is the WIPO Copyright Treaty (WCT) and WIPO Performances & Phonograms Treaty (WPPT) which lead to the protection of copyright and related rights in the digital age. Malaysia adapts to the treaties in facilitating the dissemination of protected material over the internet and also amends the law accordingly about legal remedies against the circumvention of technological measures used by authors(Tseneva - Sapoundjieva, 2008). Hence, it is a necessary task for management of the work that has been published to avoid any alteration of information of such data and at the same time brings benefits to the original author in exercising their rights in exploiting their work(Tseneva - Sapoundjieva, 2008).

2.2. Characteristic of Collecting Society

Collecting societies are organisations usually set up by right holders to manage their rights mainly for economic rights or also used to refer to all types of collective rights management organisations or in short CMOs, irrespective of the precise rights or bundle of rights they manage according to Luise Schild (2012). It is a common practice that copyright holders' assignment other organisations to jointly administer some of their copyrights which are referred to as 'collective administration' of copyrights, or 'collective rights management.' The organisations that conduct collective administration are known as 'collecting societies,' 'copyright collectives,' or 'copyright management organisations' (CMO) according to Handke (2013). Today collecting societies operate in more than one hundred countries, and there are dozens of these organisations in some highly developed economies (Gervais, 2010).

Luise Schild (2012) discussed the role of collecting societies in which there is more than one category of right holders within the collecting societies; because of this, more rights will be aggregated for licensing purposes. As they also provide services such as auditing and monitoring of the use of rights and collecting and distribution of royalties, it is crucial for the collecting societies to make sure that the right holders are reasonably and appropriately remunerated regardless of whether they are individuals or from other related companies (Luise Schild, 2012). Riis et al (2016) highlight the mode of CMOs whereby the expectation of benefits is an essential element for right holders when they decide on the mode of rights management. The underlying factors that determine whether the expectations of users are best met by collective rights administration or by the individual administration are not constant. Growing opportunities to contract individually may be turning the tide against the collective models (Riis, Rognstad, & Schovsbo, 2016).

Collective management of rights is an essential mechanism carried out by Collective Management Organisations (CMOs). It enables creators and rights owners to exercise their rights efficiently in their country and abroad, in their interests and those of commercial users, consumers, and the general public. These aims, functions and the operational manner of collecting societies remained, despite all the technological changes and the advancement of the cyberspace. Collective management organisations or copyright societies work as private, not-for-profit, legal entities that are established under governmental supervisions. They work as the mediator between the copyright holders and the copyright users. Any individual entity having copyrighted works is eligible to be a member of the societies. The collection of royalties and the overall right management has become a complicated issue in the absence of a CMO. Authors are clueless as to how they can best exploit their music rights and also with regard to their likely action when their rights are violated or infringed.

However, it needs to be stated that one of the prime duties of the CMO members is to update the society on their available copyrighted works and the deals or agreements they have signed or the license they have issued to the users of their work. The societies obtain exclusive authorised rights to the copyrighted works from the members by way issuing license (Faiz, 2015). Collecting societies, as a result, hold the ultimate right to grant a license of the copyrighted works for different purposes and in return collect royalties from the same entities or individuals. In addition, collecting societies has the mandate (Colangelo & Lincesso, 2012) to track and identify infringements or right violations and initiate appropriate legal action.

Faiz (2015) further explains the type of copyright society that involves and responsible in the management of authors that has one or more than one unique genre. For exploitation, it is the copyright collectives as an association that the authors transfer copyrights with. Generally, collectives have these roles in granting licenses for the use of works in their repertory, besides that they also negotiate and collect royalties, and distribute them to their members, and lastly they will take legal action against those who infringe the copyrights to which they hold the title (Fox, 2000).

2.3. Monopoly

The monopoly power of copyright collectives can be restricted in several ways. First, on the side of rights holders, collecting societies are usually run as non-profit collectives. Members have voting rights similar to shareholders, which gives them some control over the operations of the collecting society. Second, collecting societies are subject to statutory regulation. In most territories, there are specific regulations regarding, for instance, the pricing of licenses, collectives' membership policy and investments in culture (Faiz, 2015). Third, collecting societies often trade with commercial users who enjoy some market power themselves. Collective bargaining may protect rights holders from market power on the user side. Before the liberalisation of broadcasting in the UK, for instance, the constellation between public broadcasters and collecting societies was akin to a bilateral monopoly. Today, many markets for Internet-based services seem prone to dominant, multinational firms such as Amazon, Google or Apple with its iTunes store. What is more, users tend to form trade organisations that bargain on their behalf. Several economists see negotiations in bilateral monopolies as the primary process to approximate socially efficient licensing arrangements (Handke, 2013; Watt, 2010). Lastly, price discrimination by collecting societies could approximate a socially efficient outcome according to standard welfare economics, even if collectives were to enjoy almost unrestricted market power on the user side (Handke, 2013).

Under exceptional circumstances, the refusal of IP licenses may be considered an abuse of dominant position, as competition law intervenes as a last resource to control the potential monopolistic power of IP holders(Pereira, 2011). There are the three pillars of modern competition law are prohibitions against in the United States which are first, the coordinated anti-competitive conduct, secondly, the unilateral conduct that abuses a dominant market position and lastly mergers and other transactions aggregating assets that may create a monopoly (Hollander, 1984).

3. METHODOLOGY

This study adopts a qualitative methodology using library-based research method to critically review the literature on the conflicts between intellectual property law and competition law, in particular, the collecting society under copyright law. The primary and secondary sources of data will be examined through the content analysis method. The former relates to Competition Act 2010 and also other jurisdiction law from United States, European Union, Australia and Canada. The latter refers to the content analysis of textbooks, journal articles, government reports, working papers, commentaries on case laws and online databases such as Emerald, Hein Online and Sage Publication which is done to support the primary sources of data.

4. DISCUSSIONS

This part of this paper will discuss the position of collecting societies on monopoly in the light of competition law and copyright law from a few perspectives from various jurisdictions.

4.1. United States

U.S. antitrust law stems (Cross & Yu, 2008). These provisions state in relevant part:

> ....§ 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.
>
> § 2. Monopolising 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 .... (Sherman Act, 15 U.S.C. §§ 1-2 (Supp. 2007))

However, there are no special provisions dealing with rights granted by intellectual property law under U.S. antitrust law. Hence, courts have had to balance the competing policies in the two legal regimes to arrive at a proper weigh(Cross & Yu, 2008).

Amongst all the significant creative rights producing and exporting nations, the United States is unique in that its law of copyright is virtually silent as to issues relating to collective administration (Sinacore-guinn, 1993). In the United States, authors' societies have been in existence since the 19th Century, and their development is marked by the societies in the field of music(Riccio & Codiglione, 2013). The US record companies have never had any experience in licensing radio or other performance of their sound recordings. Under the copyright laws of the United States, there is no recognition of a broadcasting or public performance right in sound recordings(Band & Butler, 2013). U.S. Government has given little or no support to their development of collecting societies such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI) and Society of European Stage Authors and Composers (SESAC).

American CMOs ASCAP and BMI have been operating pursuant to an antitrust consent decree with the U.S. Department of Justice since 1941 and 1966 respectively(Hillman, 1998). The decrees reflect concerns about possible abuses of both monopoly and monopsony power. In the case of monopsony, the concern was the possible abuse of members even though both ASCAP and BMI are membership organisations.

The Department of Justice brought the actions in response to ASCAP and BMI requiring broadcasters and other licensees to obtain a blanket license covering all performances of their entire catalogue. Under the consent decrees, the broadcaster can obtain a blanket license on a per program basis as opposed to a blanket license for all programs (Kretschmer, 2005). Due to allegedly monopolistic conduct, both CMOs have been sued multiple times in the aftermath of the consent decrees, but courts have been unwilling to restrain them. The US broadcasting company CBS brought an action against the two major collecting societies ASCAP and BMI, alleging that their blanket licenses and the composition of the fees were indeed to be regarded as a violation of the per se prohibition of price-fixing agreements(Drexl, Antony, Kim, & Muchiri, 2013). The Court explained that the practice is per se illegal under the antitrust laws only if it is so anticompetitive and without redeeming virtue that it warrants a presumption of illegality. In Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (1979), the Court found that the blanket license policy did not meet that definition. Noel Hillman, an Assistant U.S. Attorney in the Fraud and Public Protection Division of the Department of Justice, recounts several instances of ASCAP or BMI abusing their market power and even violating the consent decrees under which they both still operate (Hillman, 1998). Despite the consent decrees' goal of encouraging fair pricing and choice, the two CMOs still drive the vast majority of licensees into purchasing expensive blanket licenses (Hillman, 1998). The US decision in BMI v. CBS, however, does not exempt CMOs from competition law. It only established the rule that the grant of blanket licenses would not be per se illegal as a price-fixing agreement. Collecting societies and their contractual relationships are controlled under the rule of reason of US antitrust law (Drexl et al., 2013).

Professor Ivan Reidel (2011) discussed that if the licensing market is not subject to monopoly, the pricing for broadcasters would be lowered and therefore having aired more entertainment content for the viewers. Hence, due to the high pricing of blanket licensing fees, the U.S consumers are forced to watch all the excessive advertising on broadcast media. Under the current system, Reidel (2011) argues, "Audiences and broadcasters are necessarily worse off: Audiences are served more annoying ads than a competitive market would provide and broadcasters pay artificially inflated prices for songs."

In contrast, (Fox, 1997, 1998, 2000) had commented on the issues on the case of CMOs in the U.S mainly ASCAP and BMI. She explains that the case was appealed to the Supreme Court and the court in principle examine the market before deciding whether the case is anticompetitive or not. The court observed that there are thousands of composers and more than 20,000 in ASCAP and also BMI. Therefore, it showed a fragmented market, and with the need to police infringements, pooling of compositions was necessary to make the market work. Hence, it was decided by the Supreme Court that defendants' methods of licensing could not be a per se violation of the antitrust laws because they were not explicitly anti-competitive, and they had healthy pro-efficiency aspects. Eleanor further explains that basically, the rule of law in the United States enforced it as per se illegal only on a plainly anti-competitive practice (Kretschmer, 2005). She suggested having a framework agreement, (Cross & Yu, 2008) such as in TRIP as per Section 8, Article 40 on control of anti-competitive practices in contractual licences, with requirements on nations for transparency, non-parochialism, obligations to have and apply competition law, rules for choice of national law, and dispute resolution to solve remaining conflicts (Fox, 1997, 1998).

The ASCAP and BMI decrees are about the transaction between the applicant and CMOs involving the tariff or rate of each agreement, and if the user (applicant) fails to agree on a fee, the applicant may ask the District Court in the Federal Southern District of New York to set a 'reasonable' rate(Watt, 2010). The decrees are said to be the only permanent antitrust decrees issued that remain in effect(Greaves, 2004). This persistence may indicate that the collecting societies remain natural monopolies in some areas. A new CMO was established under the Digital Performance Right in Sound Recordings Act of 1995, a regulatory system was established outside of antitrust scrutiny in order to manage the rights in digital uses of sound recordings, and it has been regulated like a utility rather than within the antitrust standards since collecting society is said to be a natural monopoly. However, DiLorenzo (1996) discussed that a natural monopoly can still turn on to other circumstances, for example, the landline telephone systems. Hence it is crucial to re-look from time to time any claim of natural monopoly (Kon, 2000). A natural monopoly forms when a single entity can supply a good or service to an entire market at a lower cost (Mankiw, 2009) than could two or more entities (DiLorenzo, 1996).

Zhang (2016) suggests a way to deal with the problem of monopoly is by regulating the behaviour of monopolistic collecting societies (Tomain, 2002). This solution is particularly prevalent in the case of a natural monopoly. Therefore, the regulatory control of natural monopoly can be acknowledged by limiting the entry; setting prices; controlling profits; and imposing a service obligation (Chin, 2014). In United States antitrust law, it focuses on the whole market rather an individual actor within the market hence, it is said to be a drastic decision to penalize the copyright abuse for violating competition act. Therefore, the United States court is exploring other ways in combatting copyright abuse (Cross & Yu, 2008).

4.2. Canada

In Canada, the government has observed collective administration to be a necessary practice for a range of copyrights and a series of revisions to Canada's Copyright Act (Zhang, 2016) has led to the establishment of a world record 36 collective organisations representing a diversity of copyright holders and administering a variety of rights (Gervais & Maurushat, 2003). The proliferation of collecting societies in Canada has created a system of taxing the public for private benefit, a system

that answers directly to neither market competition nor democratic processes(Band & Butler, 2013).

In Canada, its competition law is detailed and complexed with a few different types of anticompetitive acts. However, the Act unearths a subtle balance between society's need for free competition and a seller's need for flexibility in the ways it markets its services and goods(Cross & Yu, 2008). As intellectual property is concerned; however, the balance clearly favours sellers of intellectual property at the expense of the public interest in competition and free trade. Two provisions explicitly govern how the Competition Act 1985 applies to patents, copyrights and other forms of intellectual property. The rule is under section 79(5). Although section 79, taken as a whole, deals with situations in which a party abuses its dominant position in a market, subsection 5 creates a broad exception for the enforcement of intellectual property rights. This subsection provides:

> ...(F)or the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

This provision recognises the fundamental conflict between the law of monopolies and copyright law. A certain degree of market power has been given to the copyright owners by the Parliament. Any act taken solely to protect that privileged position cannot run afoul of the Competition Act 1985, even if it results in higher prices or limits the ability of other firms to compete. However, the section 79(5) exception does not apply if the act involves something more than the exercise of an intellectual property right, and the act may be challenged as an abuse of the intellectual property owner's dominant position(Cross & Yu, 2008).

4.3. Australia

In Australia, with reference to the review of intellectual property legislation under the Competition Principles Agreement and the committee suggests ministerial revocation (s. 135ZZC of the Australian Copyright Act 1968) be broadened to cover all collecting society arrangements, both input, and output, including the disclosure of information to members and the public. It is also suggested that guidelines be issued to each collecting society, in the spirit of a contract between the society and the community, that specify the Government's expectations regarding the society's conduct, including in terms of the information required to be disclosed and the process for disclosure. The Arts Law Centre of Australia submitted that:

> ...Without these collective agencies, there would be very little return for artists and creators, given their lack of finances to police and enforce copyright, and the cost of pursuing copyright infringements. (p.8)

One commentator has stated that ‘the interaction of copyright law and markets in the arts and cultural industries, propelled by technological developments that have both reduced the cost of copying and vastly extended markets, have led to the growth and formation of collecting societies

(Ergas, McKeough, & Stonier, 2000). They are natural monopolies, and their operations have added to existing concerns regarding the statutory monopoly created by copyright law(Towse, 1999).

4.4. European Union

Collecting societies in all EU Member States has the responsibility to make sure that they cannot neglect to license their repertoire, they have to disclose to their members on specific threshold rules, and they will have to be transparent in their finances. It is an interesting attribute of collective administration in the event of music performing right and mechanical reproduction societies, whereby as a representative for both authors (composers and lyricists) and publishers, changes to membership and distribution rules can only be executed if there is consent by both groups.(Kats, 2005).

In BRT v. SABAM (1974), the first collecting society case before the European Courts, the ECJ characterised the Belgian performing right society as "an undertaking to which the state has not assigned any task, and which manages private interest, including intellectual property rights protected by law". This was confirmed in 1979 and 1983 in the Greenwich and GVL Cases. BRT v. SABAM is among the first case encounters collecting societies on competition issues which both United Kingdom (U.K) and European competition authorities take into account the need to ensure balance between the requirement of a maximum freedom of right owners to dispose of their own works and that of the effective management of those rights by an undertaking that in practice, and failing which it will lead to a monopoly position(Chin, 2014).

The EC competition rules support the principle of the internal market by preventing private parties from erecting barriers to trade by entering restrictive agreements (Art.81 EC Treaty) or abusing their dominant position on the market (Art.82 EC Treaty). Article 82 EC was also interpreted as meaning that by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies (Kon, 2000) concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified"(Watt, 2010).

There are a few cases in EU that involve abusive conduct towards members, and abusive conduct towards users within Article 82. In GEMA I, the Commission recognised seven categories of rights members might assign separately: (1) broadcasting, (2) public performance, (3) mechanical reproduction, (4) film performance, (5) video reproduction and performance, (6) film synchronization, (7) new categories of right. This is due to the act by GEMA in making a compulsory for the members to assign all their categories of rights in an agreement. Collecting societies who give no choice to the copyright owners as to where to place the management of their rights abuse their dominant position and are in breach of Art.82 EC Treaty(Watt, 2010). In GEMA II, the minimum membership allowed by the commission is for a term of three years. Retaining right for five years after a member's withdrawn is likely to be unjust. In GEMA III the Commission

decided that a clause in GEMA's statutes which was designed to prevent GEMA members from making payments to broadcasters and others to play particular recordings was not abused and the Commission authorised the societies statutes imposing uniform effective rates of remuneration (thus stopping members from making payments to users).

The first step taken by the European Commission to reform the way the collecting societies in handling their business is by adopting a Communication on the Management of Copyright and Related Rights in the Internal Market ("the 2004 Communication"). A Recommendation on the cross-border management of copyright in respect of online music services ("the 2005 Recommendation") was adopted a year later. The favorable option in the recommendation states that the right-holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder (Luise Schild, 2012). Their primary concerns are on good internal governance and licensing of rights on behalf of copyright owners (Hollander, 1984).

4.5. Malaysia

Copyright collecting societies came into existence in Malaysia in the late 1980s after the Malaysian Copyright Act came into force on 1 December 1987. In the beginning, the public did not realise and was not aware of the fact that royalties within the licensing agreement need to be paid for the commercial use of copyright material, and therefore the collections are very minimal, and the societies were actually operating at a loss. However, with the assistance of the stakeholders, the current scenario has changed as there is a higher awareness of copyright and more enforcement actions supported by the government for using the copyrighted music and sound recordings.

With reference to Section 3 of Copyright Act 1987, an author is defined as the writer or the maker of the work for the literary work, the composer for musical work, the artist for the artistic works other than photographs and all persons who are involve with the arrangement of the film or recording, the broadcasting and in relation to any case, by whom the work was done. The authors have exclusives rights to do specific acts in particular with regard to their work. Exclusive here means as a general rule they have the right to forbid others to exploit the work without their express consent. They also can decide on the mechanism of work that can be used and also be giving permission for the use of work in return for remuneration. Other than that, the rights granted to authors include the economic rights of reproduction, translation, broadcasting, public performance, adaptation, rental, distribution and making the work available over the Internet. The moral rights for the authors commonly include the right to claim authorship of the work and to object to any distortion, mutilation or other modification of the right owner's work that might be prejudicial to his honour or reputation (CISAC, 2015).

The law which relates to collecting society in Malaysia, are found under Part IVA of the Copyright Act 1987 and the Regulations, which explain the establishments of licensing bodies to protect the work of the right holders. It also explains the declaration of the establishment and MYIPO as the Controller under the law has the discretion to notify the licensing bodies that is in compliance with the law. The Controller also may revoke a declaration given to a licensing body if he is satisfied that the licensing body act within Section 27A (6), i.e. (a) is not functioning adequately as a

licensing body; (b) no longer has the authority to act on behalf of all its members; (c) is not acting in accordance with its rules or in the best interests of its members, or their agents; (d) has altered its rules so that it no longer complies with any provision of this Act; (e) has refused, or failed, without reasonable excuse, to comply with the provisions of this Act; or (f) has been dissolved.

The first collecting society in Malaysia was the Public Performance Malaysia Sdn Bhd (PPM), founded in 1988 which was then followed by Music Authors' Copyright Protection Bhd (MACP) in 1989. For many years PPM and MACP were the only two collecting societies in Malaysia, but this changed in 2001 when a third and fourth agency, called Performers' and Artists' Rights (M) Sdn Bhd (PRISM) and Recording Performers Malaysia Berhad (RPM) was incorporated. With effect from 1 June 2012, the Copyright (Licensing Body) Regulations 2012 came into force in Malaysia whereby all new and existing Collective Management Organisations(CMOs) need to apply for declarations to commence or continue with collective licensing operations for and on behalf of their authorised members. Officially by 2013, all four collecting societies have been legitimately recognised by MyIPO.

Music Authors' Copyright Protection (MACP) Bhd represent 2 million international composers, lyricists, and publishers from all over the world. It collects royalties for the songwriters and publishers when their works are used. On the other hand, the Public Performance (Malaysia) or PPM works for the protection of the rights of recording companies (Faiz, 2015). Besides that, there is Performer's Rights and Interest Society Malaysia Bhd (PRISM) and Record Performance Malaysia Bhd (RPM) which both works for the singers and musician of sound recordings. Interestingly, both CMOs protect the same type of works, and therefore it is up to the singer or musician to be a member of either one of the collecting societies. Collecting societies in Malaysia are very much self-regulated. With reference to the guideline by World Intellectual Property Organization (WIPO) and also international collecting society like International Confederation of Societies of Authors and Composers (CISAC) and International Federation of the Phonographic Industry (IFPI) regarding collecting societies, the collecting societies in Malaysia set their own rules. In the event of dispute for example over unreasonable terms or a license being unfairly declined, the parties have recourse to the Copyright Tribunal that was established under the new Part IVA of the Act which deals with copyright licensing.

In 2016, PRISM has about 1,600 members and RPM about 700 members. It was reported that in 2016, there are complaints with regard to the distribution of royalties which led to about 40 PRISM members were left disappointed when, after waiting for three years for royalties, they were only given token sums of between RM400 and RM600 (Kon, 2000). These members were very disappointed that over RM1.4 million operating costs were deducted from PRISM's royalty collection of RM1.5 million. The musicians have become victims of circumstances since two licenses have been granted to two bodies to collect royalties(Kon, 2000). The end result of this was that consumers who play music in public places have chosen not to pay royalties(Band, Jonathan; Butler, 2013). Thus, far no cases involving the collective administration of copyright have been determined by the Copyright Tribunal. That does not mean there are no complaints from the end users or the rightsholders from the facilities offered within the collecting societies, but instead, these complaints have been settled internally without going through the Copyright Tribunal.

In 2017, Music Rights Malaysia Berhad (MRM) a non-profit organisation and the sole licensing body designated by the Intellectual Property Corporation of Malaysia (MyIPO), an agency under

the Ministry of Domestic Trade, Co-operative and Consumerism (MTDCC) is established to carry out collective music license issuance and fee collection activities in Malaysia effective 1 January 2017 on behalf of and in place of the following music licensing bodies which include MACP, PRISM, RPM and PPM. It is an excellent move in order to harmonise the collection of licensing payments from the public.

In Malaysia, the Competition Act 2010 which came into force on 1 January 2012 provides a regulatory framework in matters relating to competition in commercial activities. The preamble of the Competition Act 2010 sets several aims of the Competition Act 2010 which are, among others, to promote economic development by promoting and protecting the process of competition. Under the Malaysian Competition Act 2010, section 10 prohibits the abuse of a dominant position. With reference to Section 3, dominant position means a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without useful constraint from competitors or potential competitors. Chapter 2 of the Act prohibits an enterprise from engaging (whether independently or collectively with other enterprises) in any conduct which amounts to an abuse of a dominant position in any market for goods or services in Malaysia.

On that note, the question is, would the collecting societies in Malaysia have the natural monopoly within the context of the Malaysian Competition Law Act 2010, and would it fall under such power in a market and leads to abuse of dominant position? Knowing the nature of intellectual property, mainly copyright, most of the dealings may involve exclusivity to the rights which will lead to a private monopoly. Hence, under Guidelines of Abuse of Dominant Position issued under Malaysia Competition Commission (MyCC), there will be two stages of assessment by MyCC on whether there has been breach of Chapter 2 ie firstly whether the collecting society reported is dominant in a relevant market in Malaysia and secondly, if the collecting society is dominant, whether the collecting society is abusing that dominant position. With the establishment of MRM, the agency is the sole licensing body for collective music royalty collection activities in Malaysia. The said agency is formed by the four other main licensing bodies in Malaysia, i.e. MACP, RPM, PPM and PRISM and since copyright is a private property right, the Government cannot fix the rates, and the copyright owner will determine their own rates with the assistance of all the collecting societies.

The establishment of MRM solves the confusion for the end users in payment of fees collection for copyrighted work. Prior, they will have to refer to 4 different agencies in terms of payment. Since the establishment of MRM is relatively new, there is still a long way to discuss the issues of fairness further mainly the dominant position of MRM and whether there are competition issues among the collecting societies. One example of abuse that can occur in collecting society situation is with regard to its excessive fees its service. As for now, there is no reported complain to MyCC with regard to the abusive conduct. In adopting the recommendation by the EU Commission, the collecting societies need to oblige to grant a license with reasonable conditions, i.e. transparent with the activities in the society in order to remedy the abusive conduct. There is also a possibility that collecting society in Malaysia is under the purview of Second Schedule ie the exclusion for Chapter 2 of Competition Act. It may fit the characteristic of collecting society as the only body that entrusted with the operation of services of general economic that is collecting payments of licences for the benefit of copyright owners. Therefore, as mention above, it possesses the monopolistic in nature. However, since there is no decided case on collecting society, the issue is open for debate. Competition Act 2010 is a statute which is general in application, applies all

matters excluding sectoral matters for example telecommunication and energy. Since copyright law is an intellectual property matter, it has not been regulated separately as compared to the above mentioned sectoral matters. Therefore, The Competition Act 2010 is the only law applicable relating to competition issues. Currently, MyCC is in progress of endorsing the guideline between intellectual property law and competition law. It is hoped that the guideline will assist in striking a balance of both laws mainly in copyright law.

5. CONCLUSION AND POLICY RECOMMENDATIONS

In the last two decades, the awareness of copyright protection has become more widespread than ever before. That includes the payment of royalty fees to the copyright owners via the collecting societies. Collecting societies have the monopolistic nature in assisting the flow of commercial exploitation values to the right owners. However, there are circumstances where the collecting societies' conduct can be abusive and affects the economics of the industry, and therefore safeguards are needed particularly in such contexts to protect members and absent right-holders against abuse by the CMO and that relates to the case in Germany. In the United States, although there is no specific provision in regulating their antitrust law and intellectual property, the judge concurs in monitoring the behavioural of the natural monopolistic of the collecting societies in order to avoid any abuse. Both Canadian and Australian law acknowledge the conflicts of competition law and copyright law, give a certain market power for the copyright owners, and recognize the natural monopoly. However, in Canada, if the abuse act is done other than for the exercising intellectual property rights, then the court will take action under an abuse of dominant position. Meanwhile in Malaysia, due to the unreported complains about the distribution of royalties from the public and also abusive act from the collecting societies, it shows the lack of transparency within the management of collecting societies. Malaysia acknowledges the natural monopoly behavior of collecting society but however will still closely monitor the dealings among the collecting societies in Malaysia in order to avoid abuse of dominant positions. Hence there is a need for strict supervision by the government especially when it involves the nature of the agreement signed between the collecting societies and copyright holders and the distribution of royalty rates among the members.

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