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KOREA FAIR TRADE COMMISSION ISSUES ITS FIRST-EVER SANCTIONS ON THE COPYRIGHT INDUSTRY FOR ABUSE OF MARKET DOMINANCE

The Korea Fair Trade Commission (the “**KFTC**”) ordered corrective action and imposed an administrative fine of KRW 340 million¹ (tentative amount) against the Korea Music Copyright Association (“**KOMCA**”) for abuse of the latter’s dominant position in the music copyright management market. According to the KFTC’s press release dated July 26, 2023, KOMCA was found to have engaged in the practice of charging excessive royalties to broadcasters, thereby interfering with its competitor’s ability to collect broadcast royalties. The KFTC also decided to lodge a separate criminal complaint against KOMCA with the Prosecutors’ Office.

A. Relevant Facts

At issue was KOMCA’s practice of applying, as part of the formula it uses to calculate music broadcast royalties charged to broadcasters, the so-called “music management ratios” at nearly 100%, which the KFTC found as being excessive and arbitrary—especially, in view of the existence of a competitor in the relevant market. Music management ratio refers to the ratio representing the KOMCA-managed musical works vis-à-vis the entire musical works used by the particular licensee or the broadcaster in the present context.

For nearly three decades after its establishment in 1988, as Korea’s sole music performance rights organization (“**PRO**”) licensed by the Ministry of Culture, Sports and Tourism, KOMCA enjoyed a de facto monopoly over the PRO market. However, following the opening of the music copyright management services market in September 2014 which resulted in the introduction of KOSCAP, a competing PRO,² KOMCA became obligated (starting from the third quarter of 2015) to collect broadcast royalties that reflect the percentage of the musical works actually entrusted to or administered by KOMCA. Despite such obligation, KOMCA continued to charge broadcast royalties that was based on its management ratio from when it held a monopoly in the market (at 100%, or 97% at times), or some other arbitrarily determined management ratios (i.e., 97.28%, 96%, or 92%).

¹ KRW 340 million is the amount of fine calculated for the period from July 1, 2015, to December 31, 2021, with fines for the period from January 1, 2022, to July 19, 2023, to be later confirmed.

² In September 2014, the Ministry of Culture, Sports and Tourism ordered the opening of the music copyright management services market to other competitors, as a result of which the Korea Society of Composers, Authors, and Publishers (“**KOSCAP**”), entered the market. Despite having been in business for over 9 years now, as of 2021, KOSCAP represented only about 9.8% of Korean music authors, whereas KOMCA’s representation was at about 90.2%. (See KFTC’s press release citing a statistical study prepared by the Korea Copyright Commission.)

KOMCA also exerted pressure on the broadcasters to pay excessive royalties through various means, such as by way of filing or threatening civil and/or criminal lawsuits against them. Although KOMCA was aware that the total broadcast royalties needed to be allocated between KOMCA and KOSCAP in proportion to their respective management ratios, KOMCA nonetheless brought a civil action against two major national broadcasting companies in March 2016 to collect royalties that are calculated based on an unreasonably high management ratio of 97%. Subsequently, KOMCA notified the broadcasting companies that they would be suspended from using the copyrighted musical works and that legal action would be taken unless they agreed to enter into a license with KOMCA that applied the excessive management ratio. Further, in response to the broadcasters' objection to the management ratio of 100% as being excessive, KOMCA notified them that the base royalty amount would be increased. Through such actions, KOMCA exerted pressure on the broadcasting companies to agree to its excessive management ratio.

B. KFTC's Decision

The KFTC found that KOMCA imposed terms that were unreasonable in light of the ordinary trade practices,³ and KOMCA's actions taken against the broadcasting companies thereby interfered with the business activities of its competitor, KOSCAP. This constituted a violation of Korea's Monopoly Regulation and Fair Trade Act (the "**MRFTA**"), which prohibits a market-dominant player from interfering with others' business activities by abusing its dominance, such as pressuring the counterparty to enter into a transaction on the terms that are unreasonable in light of the ordinary trade practices. Of some 130 broadcasters who had entered into a license with KOMCA as of the end of 2021, KOMCA's conduct at issue affected 59 broadcasting companies comprised of both linear and satellite broadcasters and broadcasting system operators.

The KFTC also determined that KOMCA's practice of charging excessive royalties to broadcasting companies by applying arbitrarily-determined management ratios constitutes an unfair trade practice in violation of the MRFTA, as it involves an entity with a superior bargaining position forcing its counterparty to provide undue economic benefits.

³ Any broadcast royalty is required to be (i) charged and collected in accordance with the Collection Regulation approved by MCST, (ii) by applying the management ratio that is reasonably and objectively determined to the extent possible based on all available information.

C. Implications for Music Copyright Industry

The KFTC's decision clearly emphasizes that KOMCA's conduct – charging and collecting excessive broadcast royalties by abusing its dominance against numerous broadcasting companies, interfering with competitor's collection of royalties and establishment in the market – constitutes a violation of the MRFTA. The decision also sets a precedent, as this is the first time the KFTC has sanctioned abuse of market dominance in the copyright industry. At a more immediately practical level, it remains to be seen whether this latest decision from the KFTC will have any material impact on the presently deadlocked negotiation between KOMCA and many of the major OTT/SVOD service providers (both domestic and global), the negotiation for which has proven to be challenging due to the similar conduct by KOMCA that was at issue in the KFTC decision.

It should also be noted that the KFTC, in rendering this decision, has expressed its intent to enhance its monitoring of unfair trade practices in the content industry, including areas related to copyright, and to strictly impose sanctions.

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