NLUA Journal of Intellectual Property Rights Volume 1 Issue 1

July 2022, pp. 153-165

REDEFINING THE COMPLEXITIES BETWEEN COPYRIGHT AND COMPETITION LAW – AN ANALYSIS

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Abstract

In some countries, including India, the intersection between intellectual property rights and competition law has remained a contentious issue. There have been differing views on the competition commission's authority to exercise jurisdiction over an IP owner's right to prevent rivals from exploiting his or her intellectual property. Because there are no precise rules for dealing with the intersection of competition and intellectual property law, the issues are decided by the courts on a case-by-case basis. The authors of this study investigate how other jurisdictions, such as the United States and the European Union, deal with the intersection of competition and intellectual property (in particular, copyright) laws. This study also looks at how Indian courts have dealt with similar situations, as well as how international judgements have impacted them. The author of this article explores not only the current law on this topic, but also potential future concerns that may arise, and how they might be addressed in order to enable and preserve the delicate balance between copyright law and competition law.

Keywords: Competition, License, Anti-Competitive Agreements, Market, Complementarity.

1. Introduction

There is increasing interest in the relationship between intellectual property (IP) and competition law, particularly as IP protection has grown in scope globally. Preliminary considerations need to be made before moving on to a more in-depth discussion of IP and competition law. When it comes to IP, many countries around the world appear to be influenced by the question of whether or not they are in conflict with each other. In contrast, we believe in the modern understanding according to which IP and competition law are not inherently in conflict with each other. IP and competition laws are intended to promote a system that encourages dynamic competition for better

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and more diverse processes and products by preventing imitation and enhancing substitution for it. Consequently, the theory of "complementarity" states that copyright law and competition law should be viewed as promoting complementary goals. When competition law is used to limit copyright exclusivity, there may be conflicts on the level of application. This modern view of competition law shows that the question is not "whether", but "how" competition law should be applied. For the latter question, a careful consideration of both the positive and negative effects of copyright on market competition is necessary.[1]

As a result, in the broader debate on copyright law and competition law, this conflict between exclusive rights and free competition is the primary focus. Competition law has a "restrictive" role in this regard because it could possibly restrict the right of the Copyright owner to use their own Copyrighted Assets.

Due to its "proactive" nature, the relationship between competition and copyright law has gotten short shrift in recent discussions. The purpose of copyright law is to ensure that the creators of works receive a fair reward for their labours of art. However, the willingness of customers to pay, not the exclusive right, is what generates this kind of revenue.

Customers may even be enticed to switch from lawful copies to unlawful ones if these markets for authorised use aren't functioning properly. Creating and maintaining an efficient and competitive distribution market depends on competition law. The Report is the best example of this feature in action. Distribution-related competition law cases are plentiful. Most of this is due to the fact that copyright-related markets often have to rely on the bundling of works into appealing repertoires and the use of centralised platforms for licencing and distribution, even though works are usually increasingly variable and have the ability to compete most effectively for consumers. As a result, the intermediaries who control these repertoires and platforms have a tendency to gain market power. According to this proactive role, competition law should not be viewed as an "enemy" of copyright law but rather as a key component of a more holistic copyright policy at the national and international levels.

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[1] P. S. Mehta, U. Kumar, *et. al.*, "Interface between Competition Policy and Intellectual Property Rights" 21(2) *Journal of Sustainable Development Policy Institute* 136-162 (2020).

2. Legislative Framework

In the vast majority of cases, copyright is not addressed in specific terms. Certain aspects of copyright have been dealt with under competition law in a significant number of jurisdictions. According to these sub-rules, trademark licencing agreements in the context of vertical distribution agreements like franchising agreements,[2] or technology transfer[3] and research and development (R&D)[4] agreements tend to be the most common. Such restrictions may encompass copyright concerns to the extent that technology transfer rules also extend to software licences.[5] As an example, consider the European Union's (EU) technology transfer restrictions. EU technology transfer guidelines specifically say that the European Commission will not apply European technology transfer standards to other copyright licences, such as those that govern the performance or reproduction and sale of works.[6] In contrast, the US antitrust agencies' IP Licensing Guidelines also apply to the licencing of copyrights in general.[7] Although EU law does not distinguish between the refusal to licence patents and copyrights[8] in its Guidance Paper on the Abuse of Market Domination, it is clear that the most serious refusal to licence instances under EU law relate to copyright.[9]

There is a broad rule of thumb that copyright-related cases be handled under competition law. To allow for a specific evaluation of a case's pro and anti-competitive impacts, generic exemption provisions tend to be read in a restricted manner. As a result of these general exemption rules, several younger jurisdictions, particularly in the United States, have not had such copyright-related litigation. Sub-rules, regulations and

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2 European Vertical Agreements Block Exemption Regulation and the Vertical Agreements Guidelines: Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ No. L 102/1; Commission notice – Guidelines on vertical restraints, [2010] OJ No. C 130/1.

3 Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, [2004] OJ No. C 101/2.

4 European R&D Block Exemption Regulation: Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, [2010] OJ No. L 335/36.

5 G. L. Bustin, P. Werdmuller, *et. al*., "2003 Annual Review of European Union Legal Developments", 38(3) *The International Lawyer* 639–664 (2004).

6 *Ibid.*

7 US Department of Justice and US Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, 1.0 (1995), *available at*: http://www.justice.gov/atr/public/guidelines/0558.htm#t1 (last visited on July 14, 2022).

8 Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ No. C 45/7.

9 *Supra* note 5.

guidelines can provide more particular guidance on IP-related cases. As with patent law, there is a propensity to treat copyright in the same manner. When it comes to the applicability of competition law to copyright-related matters, it appears that the approach of patent and innovation can serve as a useful guide.

3. Practice

It is common in most jurisdictions to stress on administrative enforcement of competition law and private regulation of IP through the courts when it comes to copyright and competition law. Some notable exceptions exist, such as in Latin America and Asia, where IP offices may also have administrative enforcement ability. In Peru (INDECOPI), for example, the competition agency and the IP agency are both parts of the same government entity.

The particularities of each jurisdiction have a significant impact on both the volume of activity and the types of matters handled. They explained this by citing institutional restrictions, such as a lack of people knowledge about IP or a desire to focus on more urgent matters. Some developing and emerging economies provided a significant argument, namely that copyright-related issues will not be brought before agencies as long as copyright enforcement is weak. This appears to be logical and enticing. Many countries are likely to see an increase in copyright respect and enforcement in the not-too-distant future. As a result, these countries could see a rise in these lawsuits in the near future as well. Other comparable jurisdictions have shown that minimal enforcement does not always mean that copyright-related industries, such as the music and film sectors and the media, are not growing. This might lead to competition law challenges. However, the premise that competition agencies will not be required to control Collective Management Organisations (CMOs) as long as CMOs need to be built up as efficient organisations for copyright enforcement and licencing is valid. This explains why EU law and European jurisdictions continue to provide the majority of CMO cases.

Resource individuals cited broad exemption clauses that preclude enforcers from applying competition law to IP-related disputes as a very concerning factor for a lack of practice in several jurisdictions. According to the experience of other countries, these laws are rarely used as absolute exemptions. Most of the time the agencies and courts prefer a very restrictive view of these laws or even appear to ignore them when big IP-

related matters arise. Exemption provisions like this might therefore be harmful in younger jurisdictions by providing enforcers with incorrect information or an easily available rationale for avoiding complex IP issues for which they do not have sufficient knowledge.[10]

4. Practice in the Copyright Market

Individual copyright-related industries, aside from software, are not dependent on economic development levels but often depend on cultural specificities of the given jurisdiction in terms of their relative prominence and relevance relative to other sectors.

As an example, in nations like India and Egypt, the film business is becoming important to the national economy, although this may not be the case in Europe or Canada or Australia. However, even countries in the same region may have established their own unique strengths in some areas of creative expression. While Columbia is famed for its music, Chile may be better known for its fiction. Sweden has recently become a major exporter of crime stories and related television programmes in recent years, whereas the music industry has mostly left the nation for tax reasons. If an industry's significance is high enough, the amount of practise a jurisdiction creates in that area may change. The amount of focus, though, may be even more critical. Copyright-related disputes frequently come from the media sector, which in most countries has a significant degree of concentration in this area. It does not matter if the country in question is also a major location for the production of audio-visual works. Competition enforcers should keep a watch out for the dissemination of cultural and creative content, in particular, according to a study. When it comes to foreign educational publications, for example, the Hellenic Competition Commission found a high level of concentration on the wholesale level. The two largest companies in this industry have a combined market share of 55.8 percent to 61.7 percent.[11] Likewise, only two businesses dominate the distribution of newspapers in Greece.[12] Generally speaking, the Bulgarian competition agency has shown a high level of awareness of competition issues in markets related to copyrights.

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10 N. Wyzycka and R. Hasmath, "The impact of the European Union's policy towards China's intellectual property regime" 38(5) *International Political Science Review* 549–562 (2017).

11 Max Planck Institute for Intellectual Property and Competition Law, "Copyright, Competition and Development", 31-32 (December, 2013).

12 Hellenic Competition Commission, Judgments in Cases 252/III/2003 and 519/VI/2011, Argos SA and Europi SA (reported by the Commission).

A great number of authorities have stated that they are obligated to uphold the law against any and all impediments on free competition. As a result, many organisations use an essentially reactive strategy to investigating cases, rather than proactively searching for new ones. There is no way to know for sure whether or not these complaints will lead to a string of significant judgements involving remarkably similar situations. Many of these practises may have occurred in India, where the Competition Commission recently handed down a series of decisions on regional film business associations' practises restricting access to local cinemas and placing unreasonable restrictions on the exploitation of films, such as unreasonable holdback periods for the exploitation of films on DVDs.[13]

5. Provision of Competition Act and Interface with IPR

Anti-competitive agreements that have a significant negative impact on the market are addressed under section 3 of the Competition Act. Contrary to this, clause 5 of the same section states that any agreement formed with the goal to preserve the right holder's Intellectual Property Right (IPR) is an exception to section 3.[14] "Reasonable limitations as may be required for preserving IPRs," according to section 3(5) of the Act, will not be subject to section 3. This implies that, although some of the right holder's acts may be monopolistic in character, they will not be considered anti-competitive agreements since they are fair. It should be emphasised, however, that the term "reasonable conditions" is not defined elsewhere in the Competition Act. The same may be applied so as to differentiate and infer whether the agreements have an unfavourable impact or not, and furthermore a rigorous case-by-case examination may also be required. The Competition Committee of India (CCI) is a specialised Court/Tribunal established in India to administer and enforce competition law. The CCI is a key player in the fight against anticompetitive behaviour and in competition advocacy. This quasi-judicial authority has ruled on a number of precedent setting matters involving the intersection of competition law and copyrights.

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13 *Reliance Big Entertainment Ltd*. v. *Karnataka Film Chamber of Commerce* (2015) 5 SCC 1.

14 P. Berwal, "Section 3(5)(i) of The Competition Act – An Analysis", 27(2) *National Law School of India Review* 168–184 (2015).

5.1. *United Producer/Distributors Forum v. Multiplex Owners*[15]

A conflict erupted in 2009 between multiplex owners and numerous Bollywood film producers/distributors. The conflict arose because the film producers/distributors requested a larger portion of the income collected by multiplexes. The multiplex owners claimed that manufacturers and distributors were colluding unfairly and causing anti-competitive difficulties. After producers/distributors placed pressure on multiplex owners to boost their revenue share, the multiplex owners' share grew by 2% in the first week and then increased further in the following weeks. The owners claimed, among other things, that the producers/distributors had created a cartel in order to induce them to compromise. They banded together to decrease the supply of movies to multiplex owners, resulting in lower income for the multiplex owners. The producers/distributors were acting in a cartel-like manner. Some of the producers'/distributors' arguments focused on copyright, claiming that cinematographs/feature films are protected by copyright, and that section 14 of the Indian Copyright Act, 1957 permits the right holder to exploit his works in whatever way he sees proper.[16] They also argued that it is up to the producers to determine how their films are transmitted to the public, and that it is not up to the owners to decide when the films are released and on what conditions they are sold. They further argued that the CCI lacked jurisdiction to hear the matter since the Copyright Act allows for alternative compulsory licencing.

Since section 3(5) of the Indian Competition Act is a non obstante provision that states that nothing shall impede people from placing reasonable limits in order to defend their rights given by the Copyright Act, 1957, the producers/distributors' activities are fully legitimate. After a thorough hearing of all parties, the CCI came up with their own interpretation of how copyright rules should be applied in the situation at hand. First, the CCI determined that copyrights are just statutory rights, not absolute rights. Furthermore, if any action is taken to assist multiplex owners, such as granting the producers the right to exclusively show the films via them, it would amount to forced licencing, over which the CCI has no authority to decide. The CCI found indications of cartel-like behaviour by

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15 J. Handoll, "Establishing Breach of Section 3 of the Competition Act, 2002 - The Indian Bid Rigging Cases", 27(2) *National Law School of India Review* 147–156 (2015).

16 B.T. Kaul, "Copyright Protection: Some Hassles and Hurdles", 46(2) *Journal of The Indian Law Institute* 236–268 (2004).

the producers/distributors and concluded that section 3 of the Competition Act had been violated. Section 3(5) of the Copyright Act was likewise found to be inapplicable since there was no actual violation of copyright.[17] The ruling that the Copyright Act has no overriding influence over competition rules was one of the most important components of the CCI's judgement. This implies that in the event of a conflict between competition and copyright laws, the competition laws will always win, however as per section 62 of the Competition Act, the application of other laws is not barred.

6. Copyright & Anti-Competitive Agreements

In this section, we shall discuss the two recent orders from CCI which deal with anti-competitive practices in film market. First one is the case of *K. Sera Sera Digital Cinema Ltd.* v. *Pen India Ltd.*[18] (hereinafter "the K. Sera case"), which dealt with the allegation of formation of cartels by opposite parties to monopolize and dominate the digital market for cinema in India by entering into an agreement that was anti-competitive in nature. The second case was the case of The Confederation of *Real Estate Brokers' Association of India* v. *Magicbricks.com*[19] (hereinafter "the Real Estate Brokers case"). In this case, the opposing parties were accused of, "abusing their dominant position by advertising a 'No Brokerage Policy' (NBP) on their websites, mobile applications, newspapers, and other media, as well as imposing unfair and discriminatory conditions" on traditional real estate brokers who work on a commission basis.

6.1. *The K. Sera case*

The decision in this instance clarifies when the exemption under section 3(5) of the Act may be used. The conflict erupted between a digital cinema exhibition service and the makers and distributors of the film "Kahaani 2". The informant said that the film's producers and rivals had engaged into anti-competitive arrangements such as tie-in agreements, exclusive supply agreements, and reluctant to interact with the informant in order to restrict the film's distribution. It was also claimed that the producers had advised against screening the films at any theatres associated with the informant. The distributors were also accused of stealing the informant's theatres for the installation of

[17] M. M. Sharma, "Economics of Exemptions from Competition Law", 24(2) *National Law School of India Review* 62–74 (2013).
[18] 2018 SCC Online Bom. 9789.
[19] [2016] CCI 19.

their technology/equipment, claiming to be the sole provider of the film "Kahaani 2". The opposing parties countered the informant's assertions by claiming that there was no proof of an anti-competitive agreement. The distributors maintained that it is up to the producers to decide whether or not to display the film solely on their platform. They also noted that quality and security are important considerations when selecting whether or not to distribute a film, and that the informant has previously caused copyright infringement. Investigations into a prior instance involving the informant revealed that they had engaged in internet piracy which was also claimed. There had been no counter arguments to contradict or contest any of the claims made by the opposing party, according to the Commission. The simple fact that they remained silent strengthened the legitimacy of the opposing parties' arguments. It was also noted that since the film's producers had put in significant effort to make their picture, they had every right to choose the economic plan for its distribution. Applying section 3(5)(i)(a) of the Competition Act, it is clear that as the proprietors of the picture, they have the right to impose "reasonable conditions" in order to safeguard their product from being used improperly.[20] Given that the informant has previously been accused of internet piracy, the producers' decision to limit the distribution of their film to the informant seems reasonable. The substance of section 3(5), as well as the confluence of Copyright and Competition Law were highlighted in this case. The Commission was effective in protecting the rights of the film's owners while also increasing competition in the market.

6.2. *The Real Estate Brokers case*

The CCI rejected claims of monopolisation of the real estate brokerage sector in India by Magicbricks.com and four other real estate websites. The Confederation of Real Estate Brokers' Associations of India has submitted an information with CCI. In addition to the above charges, it was claimed that opposition websites were using "No Brokerage Policy" tactics such as property auctions or "buy directly from owners" ads to remove competitors and real estate agents from the market. According to the report, conventional real estate brokers are being displaced from the market as a result of online real estate listing portals offering NBP or charging significantly less than the usual brokerage charge

[20] R. Sethi & S. Dhir, "Anti-Competitive Agreements Under the Competition Act, 2002", 24(2) *National Law School of India Review* 32–49 (2013).

of 2% of the sale/purchase value of a property. As no licence or registration is required in India to conduct real estate brokerage business, the large number of listing sites and traditional brokers in the relevant market pose competitive restraints on each other, and thus no specific player can act independently of market forces and affect consumers or other players in its favour. The Commission also reviewed the Association's website ranking data from Alexa.com and noticed that the rating only included websites/portals and did not include off-line brokers. The CCI further said that none of the five real estate websites can be found in violation of section 4 of the Competition Act since none of the five real estate websites had market dominance.[21]

7. Blanket Licenses – Violation of Competition?

The music business has traditionally been one of the most vocal in claiming copyright. It is often subject to copyright protection, resulting in a complicated legal relationship. A blanket licence is one that is granted to a music user, such as a radio station or television station, that permits them to use the music in any manner throughout the duration of the licence.[22] This is a more logical alternative since obtaining separate licences takes time. Blanket licences, which are issued by performing rights organisations, allow the use of any work in the granting society's repertoire for the life of the licence. Although this strategy is increasingly often adopted, its legality is believed to be in conflict with competition rules. The crux of the problem is a conflict between the encouragement of creative endeavours and the prohibition of unfair commercial practises.

7.1. *Broadcast Music, Inc.* v. *CBS, Inc*.[23]

Broadcast Music Inc. (BMI) was formed as a market middleman for musical works. Previously, thousands of owners of musical composition copyrights struggled to negotiate licencing with individual users and to find and prosecute infringers. BMI and American Society of Composers, Authors and Publishers (ASCAP) helped alleviate these concerns by enabling copyright owners to licence their works collectively under a blanket licence. Any work covered in the licence might be performed under the blanket licence. With BMI and ASCAP's blanket licencing, practically any copyright protected work in

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21 *Supra* note 14 at 10.

22 I. L. Pitt, "Superstar effects on royalty income in a performing rights organization", 34(3) *Journal of Cultural Economics*, 219–236 (2010).

23 441 US 1 (1979).

the United States (US) may be used. Columbia Broadcasting System (CBS), i.e. the "plaintiff", bought blanket licences for its TV and radio content. CBS sued BMI and ASCAP for antitrust breaches, claiming that the blanket licences constituted to price fixing and that BMI and ASCAP monopolised the composition market. The District Court ruled that blanket licences were not *per se* infractions, but the court of appeals ruled that they were and thereafter BMI appealed.

The Supreme Court overturned the ruling and remanded the case for a rational licence evaluation. A blanket licencing scheme for copyrighted musical works does not constitute price fixing in violation of the Sherman Act.

The criterion of analysis used to determine whether the blanket licencing system violated the Sherman Act was the "rule of reason", which the Court of Appeals might have used on remand if the question of blanket licencing in the television industry had been retained.[24] Courts only categorise some commercial interactions as per se breaches of the Sherman Act after extensive experience. Despite the intense antitrust examination of ASCAP and BMI's blanket licencing, the Court should not ban them as a per se trade constraint. The "Copyright Act, 1976" opted to use blanket licences and similar tactics. Thus, the assumption that blanket licences constitute a kind of price fixing susceptible to automatic condemnation under the Sherman Act is not nearly widespread.[25]

8. Future of Copyright & Competition in Digital Era: How Data-Driven Distribution may allow anti-Competitive Practices

The creation of content is merely one facet of the equation. Content distribution is another important commercial operation in the film and television industries. This sector of the company strives to find the best answers to the problems of when, where, and how to deliver information. When it comes to determining when material gets delivered, the film industry has already adopted a data-driven approach. The author has first-hand experience developing models that take into account aspects that vie for audience attention in certain jurisdictions, as well as employing algorithms to recommend the most financially advantageous release date. However, the where and how questions are more difficult to answer. To comprehend this, we must first examine the process of

[24] E. D. Cavanagh, "The Rule of Reason Re-Examined", 67(2) *The Business Lawyer* 435–469 (2012).
[25] *Ibid.*

film distribution. The Hollywood Antitrust Case of 1948,[26] which separated the operation of theatres from film studios, created the framework of movie distribution in the United States. As a result, US film makers have only had a tangential connection with their viewers, and distribution choices have mostly been based on gut instinct (for dates) or personal contacts (cinema pricing). With the noteworthy exceptions of France and South Korea, where studios and distributors are vertically integrated, this model is widely adopted across the globe.[27] As a result, theatres and film distributors typically have a fractious relationship. Distribution corporations (big studios) must persuade theatres to show their films by offering them rental payments, which is normally negotiated weekly per piece of material. As a result, film distributors are fighting for screen space and bidding against one other on the rental price. The exhibitors, not the audience, are the consumers and deciding where a picture will be released becomes a choice about how much to bid at a certain cinema. Distributors and exhibitors would need data on local demographics (including personal data, as described above, possibly acquired via loyalty programmes with the cinema, which we already see today), as well as data on other local factors competing for audience attention, in order to implement a data-driven distribution strategy. Both exhibitors and distributors would need to use the same information in order to reserve the best screens for the best movies. This data would have to be fed into an algorithm, which would then propose the best time to book. At first look, this seems to reduce anti-competitive activity, particularly pricing collusion. However, databases may be skewed by nature or on design, and algorithms are dark boxes that might hide unethical purposes. Even before the advent of big data, in the 1990s, it was clear that authorities would have a tough time detecting pricing collusion in digital systems.[28]

Data-driven, machine-learning systems may be skewed by their input data, allowing organisations to participate in automatic pricing collusion without having to communicate directly with one another. In this approach, using machine learning algorithms for critical business activities without regulating or inspecting the underlying data might generate (or obscure) significant competition concerns under current laws.

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26 *U.S.* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

27 D. W. Davis, "Marketization, Hollywood, Global China", 26(1) *Modern Chinese Literature and Culture* 191–241 (2014).

28 S. Borenstein, "Rapid Price Communications and Coordination: The Airline Tariff Publishing Case", 236 *The Antitrust Revolution: Economics, Competition and Policy* 562-572 (1994).

There has already been academic research towards detection measures for Artificial Intelligence (AI) enabled collusion.[29]

9. Conclusion

It is undeniable that innovation is an indispensable part of human history. With each passing day, the importance of human ingenuity grows more and more. The existence of both competitive policies and copyright laws in the contemporary world is necessary to preserve the welfare of consumers while also enhancing market competitiveness. Both branches of law, which have arisen independently of one another, serve an important role in preserving the interests of artists by giving exclusivity and also by ensuring a healthy level of competition. Because copyright works to the artist's favour, the artist is able to proceed with his or her creative process without fear of infringement or harm to either his or her professional reputation or financial well-being. The copyright laws are only intended to safeguard the rights of the creator and are not intended to clash with the competition legislation. But it is necessary to distinguish between exclusivity and monopoly throughout the application of the laws by using the rule of reason approach to each individual instance in order to identify the thin line between them. The current legislative framework of our country provides a plethora of opportunities for those who are curious.

[29] A. Ezrachi & M. E. Stucke, "Artificial Intelligence & Collusion: When Computers Inhibit Competition", 5 U. *ILL. L. REV*. 1775 (2017).