Book Review: Can Competition Law and Policy Regulate Copyright Markets and Collective Management Organizations?

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Introduction

Competition law, generally, is a policy tool that seeks to regulate business conduct. Its key objective is to ensure that market participants do not engage in anti-competitive practices to the detriment of consumers in particular, and economic development in general. Anti-competitive practices include market allocation, exclusionary conduct, price-fixing, and abuse of dominance. Unfortunately, when firms engage in anti-competitive practices they hinder innovation, investments, and competition. As a result, an increasing number of countries including developing countries have adopted competition laws and established competition agencies to enforce the competition law.

Equally important, the relationship between competition law and intellectual property has received considerable scholarly attention (see Josef Drexl, Copyright, Competition, and Development 2013). However, in the context of developing countries, scholarly work is still limited. Thus, Oriakhogba's book in general, and in particular its chapter seven, titled 'Application of Competition Law to Copyright and Collective Management Organizations' focusing on South Africa, Kenya, and Nigeria makes an immense scholarly contribution to this important topic. However, there is a need to go beyond these African big economies and explore other African countries.

This book review, therefore, focuses on chapter seven of Oriakhogba's book which seeks to answer the question, can competition law principles be applied in the realm of copyright law and collective management organizations (CMOS)? The chapter also seeks to broaden our understanding of how competition law interacts with copyright law and the regulation of CMOs.

Copyright Markets and Collective Management Organizations (CMOs).

Generally, copyright law confers exclusive rights on right owners, subject to limitations and exceptions. Even so, copyright owners are not in a position to individually negotiate licences, monitor unauthorized use of their works, or even follow up on royalties. Furthermore, as a result of the nature of copyright works and characteristics of the copyright market, it is difficult for a copyright owner to monitor the unauthorized use of their copyright works. As Oriakhogba notes:

> Copyright works are capable of multiple uses without dissipation in their value. They are capable of being used at the same time and at different places by different users…In such situations, widespread unauthorised use of copyright works is inevitable…copyright owners will not be able to prevent or authorise all uses of their works. They cannot be in all places at the same time' (pp. 17).

The inability of copyright owners to enforce their rights on their own due to the characteristics of the copyright markets has justified the creation of CMOs. In addition to performing social, economic and cultural functions that seek to protect copyright owner's work, CMOs also bridge the gap between the

copyright owner and users. According to Oriakhogba, through issuance of blanket licences, CMOs have been able to address the challenge of fragmentation of exclusive rights and transactions costs associated with individual copyright owner monitoring the use of their works.

Should CMOs be subject to competition law regulation?

Despite CMO's important work, the question that follows and which the author gives a deserved attention is ***whether CMOs should be regulated using competition law and policy***.

Nonetheless, there are a number of fundamental questions that the author has raised that require considerable attention: (a) Is CMO's natural monopoly justified, especially in the era of technology? It seems the courts will support CMO's monopoly as it reduces transaction costs, albeit debatable; (b) How has digitisation affected competition regulation of CMOs; (c) should CMOs anti-competitive conduct such as price-fixing collusion be regarded as per se illegal? (d) should copyright issues be regulated as a sector-specific rather than a competition law related issue? Answering these questions broadens our understanding of the intersection between competition law and copyright laws in general and CMOs in particular. The author through a great analysis of case laws (see pp. 195-209) provides the lens through which courts have addressed and interpreted these questions.

In chapter two of the book, the author argues that most CMO's are generally *de jure* natural monopolies (also see pp. 209-221). This natural monopoly position provides CMOs with a conducive environment to engage in anti-competitive practices such as abuse of dominant position, excessive pricing (royalties), market entry barriers in the form of membership discrimination and licensing exclusivity, discrimination between copyright owners and users or price fixing in the form of blanket licensing (pp. 31-33, 209). Thus as Oriakhogba notes, 'the concern of competition law is to ensure that such CMO does not abuse its dominant position within the relevant collective management and licensing market bounded and defined by the CMO's repertoire' (pp.16).Consequently, the focus on competition law with regard to CMOs has been on blanket licences, reciprocal agreement and membership contracts: the fixing of excessive royalty rates, the refusal of CMOs to license or accept owners as members, and the

limitation on copyright owners' economic freedom by CMOs. The author further scrutinizes how competition law can be applied in respect to CMOs merger control.

In addition to the question of justified monopoly of CMOs, Oriakhogba notes that the application of competition law to IP related issues is in most cases hindered by the *sector-specific defence*. Indeed, in all the three countries under study, as the author finds through in-depth analysis, competition law and copyright law complement each other, and competition agencies are granted concurrent jurisdiction with sector-specific regulators. For instance, the Nigerian Competition Act seeks to enjoy primacy over competition related cases, but still confers the competition regulatory agency concurrent jurisdiction with other sector-specific regulators over competition related cases. However, in order to reduce conflicts and enhance harmony, in all the three countries, the competition agencies and sector-specific regulators are required to enter into agreements. The author argues that this approach has 'in no doubt created a basis for the sector-specific regulation defence to competition law intervention' (pp. 189). This calls for the need for competition and IP agencies to work together to ensure that CMOs do not abuse their dominant position.

Whether the conduct of CMOs should be regarded as per se illegal, the author warns that what amounts to price fixing in the context of competition law, may not amount to price fixing in the context of CMOs. Referring to the celebrated case BMI vs CBS, the US Supreme Court declared that blanket licensing by a CMO is not per se illegal. Thus, it is important that the interpretation of what amounts to anti-competitive conduct must consider the special characteristics of IP regulation.

Copyright and its interface with competition law

One more contribution the author makes is how he examines the limitation of competition law application in copyright markets. For instance, copyright law infringements do not require intensive rule of reason analysis in specific markets as applied in competition law in regard to market definition. For instance, and according to the US case law in the case of *BMI v CBS*, 441 US 1 (1979), CMO's blanket licensing cannot be considered per se illegal unless it limits competition within the specific market. Furthermore, 'blanket licenses

crafted by CMOs are distinct products of the CMOs and they do not prevent the issuing of per-programme or per-work licences' (pp.32). However, this does not mean that the work of CMO's and blanket licensing would not be considered. The liability of proof is high. For instance, in the US, the rule of reason approach is applied. In this case, clear evidence based on a case by case basis, must exist showing that the CMOs are conducting themselves in a way that restrains competition.

Additionally, on the question of how copyright and competition law interface, the author argues that the monopoly right granted to copyright owners against third parties should not be understood in the context of competition law definition of monopoly. This is because it is an intangible property right and granting copyright owners exclusive rights, albeit subject to substantive limitations and exceptions, in itself incentivizes innovation. More so, copyright law does not confer exclusive rights over ideas per se. It protects the ways ideas are expressed as original works. In this sense, copyright law promotes dynamic competition and consumer welfare by ensuring that copyright owners work is not merely imitated, and neither do copyright owners unjustifiably restrict reproduction of their works. Thus competition law application in copyright markets 'helps copyright law to promote the public interest by ensuring that the exclusive right which copyright law confers on copyright owners is not exercised to prevent dynamic competition in a given market' (pp. 192).

This leads to a fundamental question well addressed by Oriakhogba, ***should copyright and competition law then be considered as complementary?*** Considering that CMOs have continued to rely on the sector-specific defence, the author notes that, nevertheless, 'the extent to which, and the conditions upon which, the sector-specific regulation defence can be relied upon by a CMO would depend on whether the copyright sector-specific regulation sanctioned the impugned conduct and/or addressed the relevant competition-related issues' (pp. 34). Hence, competition law is likely to be applied when the IP related regulation sanctions the anti-competitive conduct engaged by CMOs.

Oriakhogba also brings to our attention how ***digitisation*** has changed the regulatory systems of CMOs by enhancing competition. Digitization has reduced transactions costs through individual rights management and management by

internet rights aggregators. It has also made monitoring of users easy. Will digitization replace CMOs? Put differently, what is the impact of digitization on CMO's monopoly? Is CMO's monopoly justifiable in the age of technology? He argues that digitisation provides a platform for increased competitive behaviour among CMOs. However, he warns against establishing more CMOs or licensing other platforms such as the digital platforms. Oriakhogba, notes that such an approach is not feasible as it does not consider the 'dynamics of competition in the context of collective management, given the special nature of the goods (copyright licences) and services offered by CMOs for a number of reasons'(pp.29). These market dynamics include, the fact that each CMO's repertoire in the market forms a distinct, but complementary product for users. Moreover, having more CMOs does not lead to reduced prices and attract users, as CMOs are not moved by market forces.

Furthermore, Oriakhogba contends that CMO's play a socio-cultural role that is not influenced by market forces. Thus, if more CMOs are established as a bid to enhance competition, or CMOs be allowed to reject copyright owners, this will be to the detriment of small copyright owners. Moreover, even if few large copyright owners benefit, they will still have less bargaining power against large corporate firms (pp. 30).

It seems, Oriakhogba supports the establishment of few CMOs. This is because the existence of many CMOs, even when they specialize in a specific copyright issue, only leads to fragmentation of the copyright licensing problem. This applies to both the analogue and digital systems. Nevertheless, the author argues that CMOs increase competition from a copyright owner's side of the market. The author also brings to attention how to change the CMO regime to enhance competition and the entrants of new CMOS, bringing about a competitive licensing system.

Another major contribution that Oriakhogba makes is the empirical analysis. In the preceding chapters, 4, 5 and 6, he explores how Kenya, South Africa and Nigeria have addressed competition cases in the context of the CMOs. In all the three case studies, he provides a historical perspective of the emergency of CMOS. In particular, he explores issues concerning royalty distribution, membership, licensing and fixing of royalties. In the case of Nigeria, the Competition Act was enacted in 2018. Thus, at the time of writing the book, it

had not addressed competition cases. In South Africa, the Competition Act has not been applied to CMOs. However, in the context of copyright law, CMOs are restricted from fixing royalties unilaterally and arbitral in accordance with Section 9A of the SA Copyright Act.

Conclusion

This book makes immense contribution to the understanding of the application of competition law to IP related issues, especially in the context of developing countries. However, further research is needed to answer the questions raised in the book within the context of other African countries beyond Kenya, Nigeria and South Africa. Such research would also pay close attention to how digitization in itself will change the markets, and in particular how technological innovation pose as a threat to the monopoly of CMOs.

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