

Legal Regulation of Abuse of Copyright Exclusive License by Digital Music Platforms

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Abstract: Digital music copyright exclusive licence is now the most applicable form of agreement in the digital music market. Although the National Copyright Administration interviewed in 2017, which had a short-term good effect, the digital exclusive licensing model dominated by "exclusive license" gradually evolved into the exclusive copyright agency model allowing "non-exclusive license+ sub-licensing", the digital exclusive copyright authorization model still raises great monopoly risks, such as abuse of market dominance, vertical monopoly agreements, and concentration of operators. However, the specific behaviors involved in the exclusive digital copyright licensing model still give rise to great monopoly risks, such as abuse of dominant market position, vertical monopoly agreements, operator concentration and other behaviors that bring about the exclusion and restriction of competition still exist. In view of this, based on clarifying the hidden worries of the abuse of exclusive copyright licensing of digital music platforms, this article compiles the types of abuse of exclusive copyright licensing of digital content platforms and puts forward an effective path of legal regulation.

Keywords: Digital Music Copyright; Exclusive Licensing Model; Abuse of Dominant Market Position; Antitrust Law

1. Formulation of the Problem

As we step into the era of digital economy, the consumption of digital content products has become another new consumption growth point in the Internet platform. The term "digital content products" was first used in China's official documents in 2011, the National Development and Reform Commission issued the "Guidance Catalogue for the Adjustment of Industrial Structure (2011 this year)", which "encourages the category of" Article 28

"information industry" item 43 for "digital music, mobile media, animation and games and other digital content". Article 28 of the "Encouraged Categories" of the "Information Industry", item 43 reads "Development systems for digital content products such as digital music, mobile media, animation and games". Although this guidance catalogue was revised in 2013, the content of item 43 has not changed, i.e. the expression of digital content products remains unchanged^[1]. Among other things, the strong profitability of the digital music market has attracted many digital music platforms to enter the market, and the copyright market has shown the effect of concentration of publishing rights, and the digital music copyright market was in chaos for a while.

With the issuance of the "strictest copyright order" of the national copyright in 2015, digital music platforms led by Tencent, Ali and NetEase Cloud started the "copyright war", and the digital music market spontaneously formed the exclusive authorisation mode of digital music copyrights and gradually settled into the "exclusive authorisation + sub-licensing" mode with the change of user demand. The digital music market has spontaneously formed an exclusive digital music copyright licensing model, and with the changes in user demand, it has gradually settled into an "exclusive licensing + sub-licensing" model. Exclusive licensing of digital music copyright refers to the exclusive licensing of the copyright of a musical work to a digital music service provider, who, after obtaining the exclusive licence, is still able to sub-license the copyright to other people for use and thus gain revenue.

However, in recent years, head digital music platforms have continued to experience copyright friction, with Tencent Music's copyright disputes with NetEase Cloud Music being the most frequent. 2021 The State Administration for Market Supervision and Administration (SAMSA) fined Tencent for the

unlawful implementation of operator concentration in relation to the acquisition of an equity stake in the China Music Group and ordered it not to enter into, or disguise, an exclusive copyright agreement with the upstream copyright holders and not to raise competitors' costs by means of high upfront payments and other means to raise competitors' costs in disguise. Antitrust regulation has come down hard, but the long-criticised exclusive copyright licensing model still accounts for the vast majority of the digital music market.

Some scholars regard exclusive music rights as a "good medicine" that promotes rather than hinders the healthy development of the domestic digital music industry^[2]; however, others are opposed to the idea, arguing that exclusive music licensing is not a benign form of licensing^[3]. The more common perception is that exclusive rights trading has the dual effect of protecting copyrights and threatening competition, and even if the exclusive rights trading model itself should not be stopped, we should be alert to its possible negative anti-competitive consequences and take the necessary legal measures to prevent it^[4].

2. The Dilemma of Digital Music Platforms' Abuse of Copyright Exclusivity Licences

2.1 Uneven Market Landscape

With the entry of headline internet companies, China's digital music industry has gradually formed a competitive pattern of "Tencent One Super Multi-Strong". 2016, Tencent's QQ Music and China Music Group (CMC) integrated to form Tencent Music Entertainment Group (TME), with a total market share of more than 80%, and a share of more than 80% of its exclusive music library resources, forming a de facto dominant market position. share also exceeded 80 per cent, creating a de facto dominant market position^[5]. With the market already strongly dominated by head operators, the exclusive copyright licensing model has undoubtedly exacerbated the imbalance in the market. Even though there is often a sub-licensing agreement in the exclusive digital music copyright licensing agreement, for the sake of long-term interests and market share, the exclusive licensed digital music service providers and their music platforms will often give up the short-term benefits of sub-

licensing.

In 2018, Jay Chou's songs were taken off the shelves of NetEase Cloud Music due to the expiry of the copyright of Jay Chou's music licensed by Tencent to NetEase Cloud Music, resulting in a short-term loss of about 15% of NetEase Cloud Music's user base^[6]. Kugou Music and Xiami Music used to be the leading music platforms with the most users, but were forced to opt for a merger with Tencent because the cost of competing for music rights was too high. Shrimp Music, which is backed by Alibaba Group, was not immune to the rising price of copyrights and eventually decided to cease operations in 2021.

According to public information on the Internet, "Tencent Music Entertainment Group's copyright library accounts for 90 per cent of China's total music library after it has successively acquired the exclusive music rights of Warner, Sony and Universal. This means that Tencent Music has partially replaced the social functions of the Music Copyright Association of China (China Music Copyright Association), and has become China's music copyright management organisation in the actual sense". This shows that the exclusive licensing model plays an extremely important role in the formation of Tencent Music Group's monopoly.

2.2 Severe Closure of Relevant Markets

With relatively limited exclusive copyright resources, the number of competing operators will continue to diminish with the excessive accumulation of exclusive copyright resources. Tencent Music Group, as a music platform with a dominant market position, will likely choose to sign express or implied collusive agreements with other dominant competitors, such as NetEase Cloud Music, in order to maintain their respective currently occupied market shares, prevent potential competitors from entering the relevant market, and ultimately form a horizontal cartel^[7].

Although platforms have decided not to participate directly in horizontal cartels for fear of antitrust penalties, platforms that hold a large number of exclusive music copyright resources can still use simple gaming tactics to covertly prevent potential competitors from entering the market and competing in the marketplace, eliminating the need for

platforms to openly participate in horizontal cartels at the risk of antitrust investigations^[8].

2.3 Greater Difficulty in Applying the Antimonopoly Act

The Antimonopoly Law intervenes more to rectify the illegal and improper aspects of copyright transactions and to ensure that the exclusive licensing of digital music copyrights takes place in a fair and orderly environment that is inclusive of innovation, rather than unduly interfering with the freedom of copyright transactions^[9]. For IPR abuse, although the Antimonopoly Law and supporting regulations have relatively complete rules, it is more difficult to define the relevant market, market status and prove abusive behaviour in cases involving the platform economy. Article 68 of China's Anti-Monopoly Law makes it clear that the Anti-Monopoly Law applies to the abuse of intellectual property rights by operators to exclude or restrict competition, and the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition further refine the types of behaviour and the criteria for determining the abuse of intellectual property rights by operators with dominant market positions. In fact, the current Antimonopoly Law was first enacted in 2008 and although it was amended in 2022, it still generally follows the traditional three-step process of defining the relevant market, determining the market position, and analysing the competitive impact of the action being taken^[10]. There is even a large gap in the definition of the exclusive licence model.

In terms of the nature of the exclusive licence agreement, it does not violate the provisions of the Copyright Law and belongs to the category of autonomy of meaning and freedom of contract in the civil law. Therefore, purely in terms of signing the exclusive licence agreement of digital music copyright, it is difficult to take corresponding measures against digital music platforms occupying a dominant position in the market from the perspective of ex post regulation of the Antimonopoly Law. In addition, some scholars have clearly pointed out that a harsh enforcement attitude is not appropriate in the Internet industry, and that a more rational enforcement strategy in the Internet industry should be moderation^[11]. The implementation of the concept of moderation in antitrust enforcement in the Internet industry has, to a

certain extent, increased the competitive risk of exclusive licensing in the digital music market.

3. Types of Abuse of Copyright Exclusivity Licences by Digital Music Platforms

The so-called exclusive licensing model is simply a business transaction model between the music industry and copyright owners, which is created as a result of the free competitive market for capital and does not additionally create corresponding market barriers and restrictions^[12]. Market-dominant digital music platforms usually enter into licensing contracts with upstream copyright owners under an exclusive licensing model, and then sub-license the exclusive rights to other digital music service providers^[13]. However, under the combination of the exclusive licensing model and the sub-licensing model, the downstream copyright owners are often in a passive position, thus creating an exclusionary effect of the "sub-licensing model" which is favourable to competitors in general.

3.1 Imposing Unreasonable Trading Conditions on Downstream Copyright Holders

On the one hand, digital music platforms occupying a dominant market position may impose a series of unfair trading conditions on counterparties during the sub-licensing process, such as discriminatory licensing (differential treatment), demanding unfairly high licence fees, restricting the duration of sub-licensing, mandatory cross-licensing (copyright-sharing), limiting the terms of licences, and so on.

3.2 Attach Substantial Use Restrictions on Downstream Copyright Holders

On the other hand, digital music platforms with a dominant market position can selectively sub-license, limiting the quantity and quality of copyrights available to competing platforms or downstream secondary creators of copyrighted content.

4. Path of Legal Regulation on Abuse of Copyright Exclusive Licence by Digital Music Platforms

4.1 Improvement of the Antimonopoly Act and Related Guidelines and Regulations

Firstly, the Anti-Monopoly Law may add a typology of vertical non-price monopoly

agreements to its provisions. Article 14 of the current Anti-Monopoly Law only summarises exclusive dealing agreements such as exclusive digital music copyright licensing agreements as "other monopoly agreements determined by the State Council's anti-monopoly law enforcement agency", which is ambiguous and may increase the difficulty and uncertainty of anti-monopoly enforcement. In fact, compared with vertical price monopoly agreements, vertical non-price monopoly agreements, represented by exclusive dealing agreements, may have a greater exclusionary and restrictive effect on the market. Therefore, a typology of typical vertical non-price monopoly agreements can be considered, and exclusive dealing agreements can be explicitly included in the scope of vertical monopoly agreement regulation^[14].

4.2 Reshaping the Market Management Function of the Audiovisual Industry Association (AIA)

Although the Copyright Law of the People's Republic of China and the Regulations on the Administration of Copyright Collectives (hereinafter referred to as the "Administration Regulations") have confirmed the status of the identity of music collective organisations from a legislative perspective, their characterisation is not sufficiently clear to enable them to carry out their monitoring duties in the position of an administrative organ. The world's three largest music companies Universal, Sony and Warner have exclusively licensed the lyrical copyrights they hold to Tencent. However, observing the licensing models of these three major companies in EU countries, the US and Japan, they are usually directly handed over to local music collective organisations for management. In contrast, in China, music platforms have essentially replaced the authority of the Association for the Performing Arts (APA), and a music market environment dominated by a single company inevitably constitutes a monopoly^[15].

China should pay more attention to the Association, position its nature in the legislation, and stipulate its management authority and management mode in a more systematic manner; due to the stability of the legal regulation and the severity of its sanction, it should formulate judicial interpretations matching the law on

some detailed issues. While the State Administration of Market Supervision is actively rectifying the monopoly problem caused by exclusive authorisation, the Supreme People's Court should also promptly issue a judicial interpretation of the anti-monopoly issue in the field of music in conjunction with the change of the law, for example, clarifying the specific types of monopoly agreements and infringement modes under Article 14 of the Anti-Monopoly Law of the People's Republic of China and the use of the standards for the music industry, etc., to improve the regulation of the music industry from the aspect of the interpretation of the law. Secondly, the Music Industry Association (MIA) has the right to regulate the music industry in terms of legal interpretation. Secondly, while enjoying the authority and status of management, the Association should abide by certain principles and fulfil the obligations stipulated in the law.

4.3 Ex Ante Interventions with Antitrust Measures Appropriately Strengthened in Conjunction with the Copyright Act

Unlike the Anti-Monopoly Law, which adopts a regulatory approach based on ex post facto prevention and control, the Copyright Law achieves its regulatory effect more through power restrictions, favouring ex ante prevention. Ex ante prevention and control is more conducive to preventing problems before they occur, and ex post facto review measures have a disproportionate impact on the platforms involved, and once a finding of illegality has been made against a digital music platform, the cost of ordering it to restore the status quo ante would be too high and costly. Therefore, the Copyright Law may adopt different term limits for exclusive licences of different weights of music, and set shorter statutory limits for core music. In addition, the duration of the exclusive licence can be determined by combining the number of exclusively licensed music owned by the platform, with the more music the shorter the duration of the exclusive licence^[16].

5. Conclusion

The exclusive digital music copyright licensing model is the most applicable form of agreement in the digital music market today, so it should be standardised to reduce the potential risks of competition. Although the copyright competition is still an important weight for online music

service providers to compete effectively and profoundly affects the competition pattern of the domestic digital music market, in the long run, the transformation of the single competition from copyright competition to multi-dimensional competition such as product experience, brand interaction and user service is the key to promote the core competitiveness of China's digital music market in the globalised market, and at the same time, it is also the key to encourage innovation, protect competition and maximise consumer welfare. At the same time, it is also the way to find the best balance between encouraging innovation, protecting competition and maximising consumer welfare.

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