

Competition Law Issues Related to Tie-in Arrangements Involving Copyrighted Items

Abstract

From the perspective of the Copyright Act, tie-in arrangements stem from the advantageous legal or economic position enjoyed by the copyright holder as a result of exclusive rights granted under the Copyright Act, for there is a temptation to use that advantageous position to take the products that trading counterparts want and bundle them together with other products. From the regulatory perspective of competition law, tie-ins are a way of restricting competition, adopted with the purpose of leveraging one's market power to eliminate competition in the tied-product market and erect barriers to market entry. Some have refuted these views, however, on the basis of marketing practice and economic theory, arguing that the bundling of products is a commonly seen marketing method and that tie-ins actually spur competition in some ways. This report draws together domestic and foreign academic papers and law implementation case studies as well as international and domestic industry information regarding copyrighted items to identify issues touched upon therein, and goes on from there to carry out in-depth research and analysis of these issues and examine Taiwan's prior implementation of the law in this area to clarify whether there should be different evaluation principles or judgment standards in implementing competition law where copyrighted goods are bundled for sale together with ordinary non-copyrighted goods; under what conditions and within what scope competition law should restrict tie-in arrangements; which types of copyright tie-in arrangements do not violate the Fair Trade Act; what terms and conditions in a tie-in arrangement would go beyond the legal exercise of copyrights; and the role that competition law and the competition authority should play with regard to tie-in practices involving copyrighted goods.

The unique, unsubstitutable nature of copyrighted goods gives the copyright holder a relatively advantageous negotiating position, creating strong temptation to engage in tie-ins when selling copyrighted goods. Competition law case precedents involving tie-in practices in various different countries show that a very high percentage of those cases have involved tie-ins involving copyrighted goods. In Taiwan, as well, tie-ins involving copyrighted goods constitute an absolute majority of cases, thus clearly indicating a strong temptation to make use of tie-in arrangements with copyrighted goods. This report takes the position that although a copyright holder exercising his copyrights in accordance with the Copyright Act is not subject to the provisions of the Fair Trade Act, nevertheless, where a copyright is licensed subject to the terms of a tie-in arrangement, and this arrangement affects free competition or market order, [the licensor] may not claim exemption from the provisions of the Fair Trade Act on the grounds that he is engaging in the legitimate exercise of his rights.

Copyrights are no different in nature from ordinary property rights inasmuch as they are exclusive and absolute under the law. They do differ, however, in the manner in which they are obtained, in their duration, and in the manner of their assignment. This

report takes the position that tie-in arrangements involving copyrighted products should be subject to the same regulatory provisions that govern tie-in arrangements involving ordinary products. However, due to the special features of copyrighted goods (e.g., they are provided exclusively by a single party, are unsubstitutable, and consumer preferences play a role), and due also to the fact that rights holders enjoy an exclusionary market position when entering into contracts, there is thus a relatively high degree of reliance in the relationship between the parties on the demand and supply sides in the market for copyrighted goods. For this reason, in determining the market power of a copyright holder, one should use a different set of standards than when determining the market power of [a supplier of] ordinary goods.

This research report found that tie-in arrangements involving copyrighted products have traditionally been used mostly with audio/video works and musical works, but with the recent rapid development of information technology, information technology goods—such as computer software, hardware, and maintenance services—have come to account for the bulk of tie-in cases. In particular, computer software users are less likely to be concerned with conceptual expression than they are with the software's compatibility with other related software. For this reason, although computer software receives copyright protection, unsubstitutability of computer software still arises. Software standardization is an established trend in the industry, meaning that computer software copyrights are more likely to spawn monopolistic market power than are copyrights for other goods. The market for computer software platforms, moreover, is an emerging technology market and, consequently, competition cases of this type are different in nature from cases involving traditional copyrighted goods. This is an area deserving the Fair Trade Commission's scrutiny.

The Fair Trade Act has been in force in Taiwan for more than 10 years and the Fair Trade Commission has accumulated considerable experience with tie-in cases. This report recommends that these past cases be thoroughly analyzed to establish the following: procedures for making determinations; the requisite elements of a tie-in arrangement; and methods for arriving at findings of fact and related conclusions of law. The report further recommends the formulation of principles and standards for handling tie-in cases, taking into account the special product features of intellectual property rights at the time of their publication. These principles and standards should have characteristics specific to our own country, and should be clear and concrete. This would give enterprises something to go by, and would also provide the competition authority with a clear means of handling such cases.

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