


## REFUSAL TO LICENSE IN DATABASE RIGHTS: A COMPARATIVE APPROACH BETWEEN THE EUROPEAN UNION AND MALAYSIA



 Nazura Abdul Manap<sup>1\*</sup>

<sup>1,2,3</sup>Faculty of Law, Universiti Kebangsaan Malaysia, 43650 Selangor, Malaysia

 Ahmad Azam Mohd Shariff<sup>2</sup>

 Haliza A.Shukor<sup>3</sup>



(+ Corresponding author)

### ABSTRACT

#### Article History

Received: 12 March 2018

Revised: 20 April 2018

Accepted: 8 May 2018

Published: 24 May 2018

#### Keywords

Abuse of dominant position

Refusal to license

Competition law

Database rights.

Under the competition law, refusal to license is a form of abuse of dominant position for which certain requirements must be met based on the existing legislations, guidelines and decided cases. As the Malaysian Competition Act 2010 is fairly nascent as compared to the European Union (EU) jurisdiction, it is pertinent to learn how the latter establishes the elements of refusal to license in declaring it as a form of abuse of dominant position. Hence, the objective of this paper is to identify provisions relating to refusal to license in Malaysia and provide a comparative analysis relating to the approaches adopted by the EU and Malaysia in this area with specific focus on database rights. This paper employs library based methods and analyses data by way of comparative approach. The findings indicate that while Malaysia Competition Act 2010 provides provisions relating to refusal to license, but such provisions are yet to be tested.

## 1. INTRODUCTION

Compulsory licensing involves owners being required to allow the reproduction of their copyright material in return for reasonable remuneration (Kevin, 2015). Such licensing of a database may be made for reasons such as securing public interest in ensuring access to and use of the database and to circumvent the high costs of transactions in licensing agreement (Mark, 2003). It seeks to balance the interests of owners with that of the public or users. In the United Kingdom, compulsory licensing of copyright occurs in two situations: the compulsory licenses of information on television programmes to be broadcast, and compulsory licensing of copyright to check monopoly control provided under Section 144 of the United Kingdom Copyright, Designs and Patents Act 1988 (UK CDPA, 1988).

### 1.1. Provisions Relating to Compulsory License

#### a) Broadcasting Act 1999

The compulsory licenses of information on television programmes which entitles publishers to provide information about them are covered under the Broadcasting Act 1999, Schedule 17, para 7(1) of which states:

“...This Schedule and the Copyright Design and Patent Act 1988 shall have effect as if the Schedule were included in Chapter III of Part I of the Act, and that Act shall have effect as if

proceedings under this schedule were listed in section 149 of that Act (jurisdiction of the Copyright Tribunal)...” (Broadcasting Act, 1999).

It should be noted that the provision only applies if the broadcasting information or the TV listing is considered as a “database” and complies with the test of originality. Television programmes would meet the first requirement as the definition covers programmes that are to be shown and arranged according to time and date.

However, the issue of originality may pose problems for the database producer since the test of originality as constituting the “sweat of the brow” no longer applies to the database. TV listings would not qualify for copyright protection as they do not meet the test of “intellectual creation” in databases since they merely involve the selection and arrangement of the contents of the database and are not intellectual creations (Kevin, 2015). As such, unless originality is achieved in this regard, the issue of compulsory licensing as envisaged by the above provision cannot be implemented.

The question then arises as to what happens to this non original database and whether compulsory licensing can be effected for it. The answer is in the negative since as long as the test of originality is not met, it does not fall within the jurisdiction of copyright law. The database owner could however seek protection under *sui generis* database rights. The problem of compulsory licensing being not applicable to rights other than copyright is substantiated by section 28(1) of the UK CDPA 1988 which states that:

“...The provisions of this chapter specify acts which may be done in relation to copyright works notwithstanding the subsistence of copyright, they relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts...” (UK CDPA, 1988).

However, it should be noted that under this provision compulsory licensing falling under the Broadcasting Act 1990 does not extend to *sui generis* database rights. Also, there is no provision in the Database Regulations which extends the applicability of the compulsory licensing to the database rights owner leading to the possibility that broadcasters (database producers) could apply this to obtain a monopoly by refusing to license their product. This is quite unlikely as refusing to license amounts to an anti-competitive practice under section 5 of the Competition Act 1980 and the Competition Commission (and in some cases the Secretary of State) has the power to invoke a compulsory license in a database right based on any adverse report from the Monopolies and Mergers Commission.

## **b) Copyright Act 1987**

The Copyright Act 1987 does not provide any specific provision on compulsory licenses which can only be granted without authorization through translation rights. This right is similar to the compulsory licensing specified in Article 11 *bis* (2) and Article 13 of the Berne Convention which incidentally seek to allow access to literary works, particularly educational materials, written in other languages (Khaw, 2001). Section 31 provides a license to produce and publish a translation of a literary work written in any other language, and is confined to a database that is produced in a foreign language and intended to be translated into the national language. It does not cover applications for obtaining and use of compulsory license for databases other than as mentioned.

A database owner who refuses to grant a license on reasonable terms is open to charges of monopoly practices (UK CDPA, 1988). (Section 144 of the UK CDPA 1988) and under European laws this is tantamount to abusive conduct.

### **i. Abusive Conduct: Refusal to License**

A situation of dominant position abuse can occur in a number of ways among which is the refusal to grant a license to a competitor by a database owner. This is addressed under heading (b) of the second paragraph of Article 102 of the TFEU (previously Article 82 EC Treaty) which states that “...Such abuse may in particular consist in: ...limiting production, markets or technical development to the prejudice of consumers...”

The case of *Instituto Chemioterapico Italiano and Commercial Solvent* (Instituto Chemioterapico Italiano and Commercial Solvent, 1974) illustrates the application of this provision. It was deemed that a dominant position party should not cease supplying raw materials to an existing customer which manufactured derivatives of the material on the grounds that it had begun manufacturing the derivative itself and wished to eliminate its former customer from the market. The same principle was applied in the case of *United Brands v. Commission* (United Brands, 1978) where it was held that a dominant position entity involved in marketing a product cannot discontinue supplying a long standing customer who abides by customary commercial practice and places regular orders.

In the case of *Telemarketing*, *Telemarketing* (1985) the unjustified refusal by a dominant undertaking to allow television space to independent telemarketing companies was held to breach Article 102 of the TFEU in the tele-diffusion market. The court affirmed the principle that an abuse within the meaning of the article occurred where, without any objective necessity, a dominant position entity monopolizes an ancillary activity which might be carried out by another undertaking as part of its activities on a neighboring but separate market, with the possibility of eliminating all competition.

Intellectual property cases are subject to the same principle. In *Volvo* (1955) the court considered whether refusal to supply constituted an abuse, holding that:

“...it was not an abuse of a dominant position for a car manufacturer holding the registered designs for body panels for its cars to refuse to license others to supply replacement panel necessary for the repair of the cars...”

It is apparent that refusal to license an intellectual property right per se does not amount to an abuse of dominant position. The court elaborated that for such abuse to have occurred there must be the element of arbitrariness on the part of the dominant party such as refusal to supply goods to independent repairers. Other examples of such abuse include unfair levels of price fixing for goods and services, and not producing spare parts for a model of a car which may still be in circulation.

## ii. The Requirements of Abusive Conduct in Refusal to License

The European Court of Justice in *Magill* (1995) *Magill* deemed that refusal to grant a license for a database does not by itself constitute an abuse by a dominant position entity although in exceptional circumstances the exercise of an exclusive right by a proprietor may involve abusive conduct.

The court first set forth the circumstances under which such abuse exists in the *Magill* case. These conditions were later added in a subsequent judgment of *Tierce Ladbroke v. Commission* (Tierce, 1997) where a doctrine of essential facilities was introduced. Later, in *Oscar Bronner GmbH & Co KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG*, *Oscar* (1998) the courts set three cumulative conditions by combining the two last conditions of *Magill* and an additional condition added in *Ladbroke*. The amalgamation of the above cases provides the basis for satisfactorily establishing abusive conduct in any refusal to license namely:

- i. The product protected by the intellectual property right must be indispensable to compete in the secondary market (essential facilities);
- ii. The undertaking requesting the license must intend to create a new product for which there is potential consumer demand (emergence of new product);
- iii. The refusal must not be objectively justified; and
- iv. The refusal is likely to eliminate all competition in the secondary market

The four cumulative conditions for establishing abuse by refusal to grant access to products and services are elaborated below.

### a. Indispensability of the Product /Essential Facilities

Like the test of essential facilities, that for indispensability was invoked in European cases. According to the doctrine, an abuse of dominant position occurs where an entity that enjoys dominant position in the provision of facilities essential for the supply of goods or services refuses without objective justification access to those facilities. In cases of intellectual property rights, this doctrine can be used by a competitor who needs a license of intellectual property rights but whose application was turned down by dominant undertaking. It has been established that not only must a dominant undertaking refrain from anti-competitive action, it must actively promote competition by allowing potential competitors access to the facilities which it has developed. This was in accordance with *Bronner*.

This principle was debated initially in two cases of *Ladbroke* and *Bronner*. The former relates to a refusal by French race course societies to license televised broadcasts of horse races to Ladbroke's betting outlets in Belgium. The Court of First Instance found that this refusal was not discriminatory as denoted by the cases of *Magill* and *Commercial Solvents*. The societies were not involved in the betting market (in which the product was offered), the televised broadcasting of races was not indispensable to the bookmaker's main activity (namely the taking of bets), and the refusal to license did not prevent the emergence of a new product. While the court seemed to affirm that the cases dealing with refusal to supply applied to intellectual property rights, it deemed that access to broadcasts of French horse races was not indispensable for the firm to compete in the Belgian betting markets. Also the refusal to supply did not mean that the societies had the advantage of reserving to themselves an ancillary activity which might be carried out by another entity in a neighbouring and separate market.

In *Bronner*, the court provided elements to establish when tangible or intangible products or services may be considered essential or indispensable for operating in a given market. For the test of indispensability it should at least be established that:

“...it is not economically viable to create a second home delivery scheme for the distribution of daily newspaper with a circulation comparable to that of the daily newspapers distributed by the existing scheme...”

In *Bronner* the circumstances were clearly not met and the court in taking a strict view of the circumstances where an owner is obliged to grant access to facilities, believed that the choice of trading partners is a right and that one should also be free to dispose of property in any way deemed fit. Dominant entities would be unwilling to invest and innovate if the benefits were to be made freely available to competitors whilst the latter in turn would have no incentive to develop competing facilities.

It was deemed that the test for whether a product, service or intellectual property right (input) is essential for operating in a given market is dependent on availability of substitute inputs which may be used to operate in the market in question, or there are technical, legislative or financial obstacles which may render it impossible or unreasonably difficult for any undertaking seeking to operate on that market to create other input possibly in conjunction with other operators.

In terms of financial obstacles to the development of alternative inputs, the court held that it must at least be shown that the product is not economically viable for production on a scale similar to that of the existing inputs.

Based on the database case of *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG (IMS v. NDC)*, (IMS, 2004) indispensability tests must confirm two conclusions. First, is that the level of participation of the pharmaceutical industry in the development of the undertaking's (IMS) brick structure was an element to be considered when examining the indispensability of the brick structure in competing in the relevant market. A high level of involvement of the pharmaceutical undertakings in the development of the IMS brick structure, though not a complete technical or legal impediment to a shift to an alternative structure, was a major cause of the dependency of pharmaceutical companies on the existing structure. As such, the competing entity should be allowed access to the copyrighted structure to enable them to compete fairly on the market.

Secondly, the element involving additional costs to be expended by the entity to acquire the research literature on a structure other than the one protected by copyright will also need assessment. Obviously if pharmaceutical industries had to make costly extra organizational and financial efforts to migrate to other structures, the creation of new structures would be likely made more burdensome and less profitable. The above test of establishing database indispensability thus involves two elements. One is the cost to switch to another structure and, second, the degree of participation of the companies in existing structures which could be obstacles in the way of creating alternative products.

#### **b. Emergence of New Product**

The “emergence of new product” involves a person requesting for a license to a right (licensee) to create a new innovation. As illustrated in *Magill*, the publication of a comprehensive weekly TV listing guide was considered a new product put on the market, and the refusal to license it was considered suppression where the licensing policy of RTE (the undertaking holding a dominant position) discriminated against its appearance as a multi-channel guide that would compete with the captive guides of each of the organizations in question. The arbitrary refusal to allow *Magill* and other potential entrants into the weekly television market to publish that information was considered an abuse as it was seen as aimed at preventing the emergence of any competing product.

This condition revolves around the idea that in balancing protection of intellectual property rights (copyright) and the economic freedom of owners against promoting protection of free competition, the latter can succeed only if the refusal to grant a license affects consumers negatively by being an obstacle to the development of another market that can serve them. Such a refusal to grant a license is deemed abusive only if the requesting entity is not going to merely duplicate an existing product or service but meets specific consumer needs not met by the existing offers even though they may be in competition with the owner of the right.

#### **c. Objectively Justified**

The issue of what constitutes objective justification remains hazy and difficult and has rightly received much scrutiny, with the European Court of Justice generally leaving it to be resolved by national courts. Intangible assets such as intellectual property rights revolve around the right of owners to gain a fair return on their investments (Derek, 2004).

There must be more to the claim that intellectual property rights seek to impute a right to exclude to encourage innovation and that applying them must be amenable to objective justification. This supposes that in concluding that an input is indispensable and also to justify imposing rigorous conditions and high royalties for attaining the license the grounds for application must be examined carefully.

As shown in *Magill*, the Commission was of the opinion that although there is a need to ensure comprehensive coverage of cultural and educational programmes that could justify a license term it could not validate an absolute refusal to license (Christopher, 2004). It is also obvious that it may be difficult to determine what other justifications could be considered as objective.

#### **d. Eliminating All Competition in the Secondary or Down Stream Market**

In separate upstream and downstream markets, the former comprises the input product or service. A database, for instance, relates to the market for intellectual property rights such as a copyright or a database right. The downstream or the secondary market consists of products or services that form the input for the production of another product or service. In *Bronner*, it was held that in determining whether abuse occurred in the refusal to grant access to a product or a service needed for conducting a particular business, it was pertinent to distinguish an upstream market, here for the home delivery of daily newspapers, and a downstream market for daily newspapers. As such, competition refers to both markets and eliminating it involves consideration of both sectors.

*Magill* illustrated that there was a market for television listings even when they were not marketed separately by the broadcasters and offered at no cost to newspapers. The same situation occurred in *Bronner* where it was acknowledged that there was a market for nationwide home delivery of daily newspapers even though the entity holding a monopoly for such a market did not offer such a service. The court concluded that the grounds for abuse are considered sufficient even if the identified market in upstream inputs is only a “potential” or “hypothetical” one. Abuse is apparent where a dominant undertaking does not market independently the inputs at issue but continues to assert exclusive right by restricting or eliminating competition of downstream market (IMS, 2004).

It was also submitted that for an unjustified refusal to grant a license of intellectual property right to be considered abusive, it is not sufficient that the related intangible asset be necessary for operating in a market and that owing to the refusal, the owner of the copyright may eliminate all competition on the secondary market. This situation calls for a balancing of the intellectual property rights and economic interests of the owner of those rights and protecting free competition. It may well be that the refusal to grant license may tip the equation in favour of the competitors’ interest if it prevents the development of the secondary market to the disadvantage of consumers.

It is important to note that this “add on” element developed by AG Tizzano in his opinion in *IMS* exceeds the “exceptional circumstances” in *Magill*. Here it was suggested that for any refusal to license to be deemed unlawful there should be more than just the element of impeding the creation of a new product or service for which there is demand. It is considered unlawful if it prevents a potential competitor from producing goods or services which are different from those supplied by the dominant undertaking holding the intellectual property right.

AG Tizzano opined:

“...in order for an unjustified refusal to be deemed abusive, it is not sufficient that the intangible asset forming the subject-matter of the intellectual property right be essential for operating on a market and that therefore, by virtue of that refusal, the owner of the copyright may eliminate all competition on the secondary market...”

Thus for a refusal to license an intellectual property right to be deemed abusive it must meet the condition of preventing the materialization of a new product. This is applicable to both types of products whether tangible or intangible.

This ruling was endorsed by the Court of Justice but it only confined itself to the tangible property at issue to copyright, making it clear that the requirements for a refusal to supply tangible and intangible goods (copyright or intellectual property) vary. The former as in *Bronner* have only three requirements while for the latter an additional element of emergence of new products has to be present to establish abuse by owners of intellectual property. In requiring different conditions for different types of property rights, the court has contributed to a good balance between the two laws by reconciling intellectual property rights with competition laws.

In his opinion piece, AG Tizzano in *IMS* refers to the “emergence of new products” as “goods or service of different nature” though he did not explain what constitutes a different nature such as whether it is the same as a ‘new’ product. Using “different nature” could be more useful as a new product could arguably include the same product but at a lower cost or in an improved state. On the contrary, a condition requiring the product to be of a different nature would not include the above definition of new.

Although neither the opinion of the AG nor the court’s decision has described what amounts to a “different nature”, it can be deduced that the former adopts the *Magill* description where “new” may include a dissimilar product (daily versus comprehensive weekly programme listings) which is what a consumer needs. Therefore, the term did not have a broad meaning but rather a narrow one. In *IMS* a *new* product would be a report on sales of medicines presented with some additional value-added information.

Thus, for refusal to license the copyright in a database to be deemed abusive all the above-mentioned four requirements must be satisfied. This creates a suitable balance between the rights of the database owner, the users of the database and competitors.



## 1.2. Developments on Abusive Conduct in Refusal to License in the European Union

The latest development with regards to abusive conduct in refusal to license can be seen in the case of *Microsoft v Commission*, [Microsoft \(2007\)](#) a developer and vendor of computer software that includes the Windows and work group server operating systems known as the Windows Server. However, Sun Microsystems lodged a complaint to the Commission on the company's refusal to supply them information which they claimed necessary to allow interoperability of its work group server operating systems with Windows. Investigations by the Commission established that among others Microsoft had infringed Article 102 of the TFEU by refusing to supply and allow the use of its interoperability information for the purpose of developing and distributing work group server operating system products. Microsoft's appeal was turned down by the Court of First Instance which agreed with the Commission that the company had abused its dominant position.

In this case, the Court of First Instance reiterated the principle held in *Bronner* and *Magill* stating that only in "exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such an abuse." The Court of First Instance adopted the tests as previously laid down in *Bronner* and *Magill* as noted and elaborated earlier.

In addition to the requirement of "emergence of new product" the Court of First Instance clarified that any limitations in terms of technical development will also constitute prejudice to consumers within the ambit of Article 102 of the TFEU. Its judgment also stated that the circumstances of *Magill* and *IMS* "cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 102 of the TFEU."

Further, in relation to the requirement of "eliminating competition in the secondary market", the Court explained that:

"It is not necessary to demonstrate that all competition on the market would be eliminated. What matters, for the purpose of establishing an infringement of Article 102 TFEU, is that the refusal at issue is liable to, or is likely to eliminate all effective competition on the market..."

From this case, it can be shown that although principles set in previous cases have been adopted, applicable tests on "new product" and "elimination of competition in the secondary market" have been clarified by the Court of First Instance.

## 1.3. Competition Laws in Malaysia

### i. Malaysian Communication and Multimedia Act 1998 (CMA, 1998)

Prior to the [Competition Act \(2010\)](#) the only specific provisions on competition in the area of database rights lay under Sections 133-144 of the CMA 1998. Protection of an online database can be considered as covered by the Act as its producers are required to apply for a class license for conducting any content application business as a Content Application Service Provider. On those grounds, the principle of competition as provided in the Act may be applicable to online database industries.

There are three express prohibitions in regulating competition under the CMA 1998, namely; [Safinaz \(1998\)](#).

- i. Engaging in any conduct which leads to "substantial lessening of competition" in a communication market;
- ii. Attempting to "tie" or link arrangements. This seeks to prevent the act of "tying" the acquirer of a communication product or service to another that is not of his interest; and
- iii. Entering into collusive agreements, including but not limited to rate fixing, market sharing, and boycott of a supplier of apparatus or another competitor.

In addition, "dominant-position" licensees or players in a communication market ([CMA, 1998](#)) must not be involved in any activities that may "substantially lessen competition" in the market ([CMA, 1998](#)). Although not

defined in the Act, the CMA Guidelines in section 7.1(a) describes “a dominant position” as a licensee who is actually dominant in a communication market and who has the ability to exercise the dominant position.

Although, these concepts have yet to be tested in Malaysian courts, it is believed that the provisions of the CMA 1998 may be applied in any competition issues relating to online database industries in Malaysia.

## ii. Competition Act 2010 (Competition Act, 2010)

The Competition Act 2010 which came into force on January 2012 provides comprehensive legislation in the field of competition law. Its preamble sets several aims which, among others, seek to contribute to economic development by promoting and protecting the process of competition. It comprises of 67 sections divided into 6 parts covering the preliminary, anticompetitive practices, investigation and enforcement, decisions by the commission, competition appeal tribunal, and a general section.

The Act applies to all types of commercial activities within and outside Malaysia although Section 3(3) states that it does not apply to communication and multimedia, and energy commercial activities as they are already fall under the ambit of the CMA 1998 and the Energy Commission Act 2001 (Energy, 2001). In addition, effective 1 January 2014, the Federal Government gazetted the Petroleum Development Act 1974 (Petroleum, 1974) and the Petroleum Regulations 1974 (PU (A) 432/1974) to be included in the list of the First Schedule of the Competition Act (2010). Thus, the petroleum sector is excluded from the application of Competition Act 2010.

Provisions relating to refusal to license in the field of database rights are yet to be tested in Malaysia. As such, the requirements to establish such refusal rely on the provisions contained in Section 10 of the Competition Act 2010 and the Malaysia Competition Commission (MyCC) Guidelines on Chapter 2 Prohibition on Abuse of Dominant Position. Section 10 also relates to abuse of dominant position which is defined by Section 2 of the Competition Act 2010 as follow:

“a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.” (Competition Act, 2010).

Generally, being in a dominant position is not prohibited under the Competition Act 2010 but such a person or entity which engages in any of the acts listed in Section 10(2) (a)-(g) (Competition Act, 2010) may be subject to Section 10 of the Act. According to Section 10(2) of the Competition Act 2010, it provides as follows;

Without prejudice to the generality of subsection (1), an abuse of a dominant position may include—

- (a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- (b) limiting or controlling—
  - (i) production;
  - (ii) market outlets or market access;
  - (iii) technical or technological development; or
  - (iv) investment,to the prejudice of consumers;
- (c) refusing to supply to a particular enterprise or group or category of enterprises;
- (d) applying different conditions to equivalent transactions with other trading parties to an extent that may—
  - (i) discourage new market entry or expansion or investment by an existing competitor;
  - (ii) force from the market or otherwise seriously damage an existing competitor which is no less efficient than the enterprise in a dominant position; or



- (iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;
- (e) making the conclusion of contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contract;
- (f) any predatory behaviour towards competitors; or
- (g) buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification for buying up the intermediate goods or resources to meet its own needs.

Without prejudice to the generality of subsection (1), an abuse of a dominant position as defined under Section 10(2) (c) of the Competition Act 2010 may include “refusing to supply to a particular enterprise or group or category of enterprises” (Competition Act, 2010). Refusal to supply under Article 3.26 of the Guidelines on Chapter 2 Prohibition on Abuse of Dominant Position covers:

- i. refusal to supply products to buyer;
- ii. refusal to license intellectual property rights; and
- iii. refusal to grant access to infrastructure that is necessary (an essential facility) to supply certain products (e.g., telecommunications services, which need access to a telecoms network that cannot be economically duplicated) (Guidelines on Chapter 2 Prohibition, 2012).

As shown by Article 3.26 of the Guidelines on Chapter 2 Prohibition on Abuse of Dominant Position, Malaysia somehow adopts the EU approach in the event of an enterprise refusing to provide access to essential facility, although actual implementation of the provision remains to be tested. As it stands, clearer implementation guidelines on this matter await the outcome of decisions by the competition authorities in Malaysia.

#### 1.4. Analytical Approach

The above discussion elaborates on the issue that abuse of dominant position occurs when certain conditions are present in a party’s refusal to license. In the EU, although provisions relating to refusal to license are covered by legislation, it is the case laws that have successfully shaped the application of the provisions in the area of database rights. In contrast, the application of such provisions in Malaysia is uncertain. This is due to the infancy of the Malaysia Competition Act 2010 and reliance on its provisions and the Guidelines on Chapter 2 Prohibitions issued by the Malaysian Competition Commission.

## 2. CONCLUSION

This paper concludes that provision relating to refusal to license is incorporated in the Competition Act 2010. Despite the fact that the provision remains to be tested especially in the area of database rights, it is hoped that Malaysia will be able to learn as much as possible from EU examples to enable decision makers to deliver unambiguous and applicable rulings in this area.

**Funding:** This study received no specific financial support.

**Competing Interests:** The authors declare that they have no competing interests.

**Contributors/Acknowledgement:** All authors contributed equally to the conception and design of the study.

## REFERENCES

- Broadcasting Act, 1999. Schedule 17, para the broadcasting act 1999, 7(1).
- Christopher, S., 2004. IMS helath and its implications for compulsory licensing in Europe. *European Intellectual Property Law Review*, 26(10): 467-472. [View at Google Scholar](#)
- CMA, 1998. Malaysian communication and multimedia Act 1998 (Act 588).

- CMA, 1998. Section 138(2), CMA 1998.
- CMA, 1998. Section 139(1), CMA 1998.
- Competition Act, 2010. Competition act 2010 (Act 712).
- Competition Act, 2010. First Schedule, the Competition Act 2010.
- Competition Act, 2010. Section 2, the Competition Act 2010.
- Competition Act, 2010. Section 10(2)(a)-(g), the Competition Act 2010.
- Competition Act, 2010. Section 10(2)(c), the Competition Act 2010.
- Derek, R., 2004. Compulsory access under competition law- a new doctrine of “convenient facilities” and the case of price regulation. *European Competition Law Review*, 25(11): 669-673. [View at Google Scholar](#)
- Energy, 2001. Energy commission act 2001 (Act 610).
- Guidelines on Chapter 2 Prohibition, 2012. Article 3.26 of Chapter 2 Prohibition on Abuse of Dominant Position.
- IMS, 2004. IMS health GmbH & Co OHG v. NDC health GmbH & Co KG (IMS v. NDC) [2004] All E.R. (EC) 813.
- Instituto Chemioterapico Italiano and Commercial Solvent, 1974. ECR 223.
- Kevin, G., 2015. Gwilym Harbottle: Copinger and Skone James on copyright. London: Sweet & Maxwell.
- Khaw, L.T., 2001. Copyright law in Malaysia. *Malayan Law Journal Sdn. Bhd.*
- Magill, 1995. Magill (joined cases of Case 241/91 P, Radio Telefis Eireann (RTE) and Case 242/91 P, Independent Television Publications Ltd (ITP) v. Commission, [1995] ECR I-07 43, [1995] 4 C.M.L.R 718.
- Mark, D., J., 2003. The legal protection of database. United Kingdom: Cambridge University Press.
- Microsoft, 2007. Microsoft v commission (Case T-201/04).
- Oscar, 1998. Oscar Bronner GmbH & C.KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG [1998] ECR 7791.
- Petroleum, 1974. Petroleum development act 1974 (Act 144).
- Safinaz, M.H., 1998. Competition regulations under the Malaysia communication and multimedia Act 1998. *Periodical Release No. 13/2000: 16-25.*
- Telemarketing, 1985. Telemarketing ECR 3261.
- Tierce, 1997. Tierce Ladbroke v. Commission, E.C.R II-923.
- UK CDPA, 1988. Section 144, the United Kingdom copyright, designs and patents act 1988.
- UK CDPA, 1988. Section 28(1), the United Kingdom copyright, designs and patents act 1988.
- United Brands, 1978. United Brands v. Commission, ECR 207.
- Volvo, 1955. A.B. and V. Eric, 1988. ECR 6211.

*Views and opinions expressed in this article are the views and opinions of the author(s), International Journal of Asian Social Science shall not be responsible or answerable for any loss, damage or liability etc. caused in relation to/arising out of the use of the content.*