

Exclusionary Effects of Blanket Copyright License Agreement Offered by a Dominant Firm  
— A Case Study on Abuse of Dominance in Japan and Its Justifications

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## 1. Case Summary

This paper presents a case study related to a series of administrative and judicial decisions related to music blanket license agreements offered by Japanese Society for Rights of Authors, Composers and Publishers (hereinafter “JASRAC”), a dominant music copyright collecting society in Japan.<sup>1</sup>

Pursuant to the Law on Intermediary Business Concerning Copyrights,<sup>2</sup> which was repealed on October 1st, 2001, a copyright collecting society shall obtain a permission of the Commissioner of the Agency for Cultural Affairs before conducting its business activities.<sup>3</sup> At that time, JASRAC was the only copyright collecting society that engaged in the business of music copyright management. However, with the repeal of the Law on Intermediary Business Concerning Copyrights, the Law on Management Business of Copyright and Neighboring Rights came into effect on the same day.<sup>4</sup> According to the Law on Management Business of Copyright and Neighboring Rights, a copyright collecting society may conduct its management business activities after fulfilling the requirement of registration with the Commissioner of the Agency for Cultural Affairs and submitting its management trust contracts as well as royalty rules to the same Commissioner. In the wake of the new registration system, various copyright collecting societies gradually emerge in Japan. Still, only one society named “e-License Inc. (hereinafter “e-License”)", which is the plaintiff in a lawsuit described later in this paper, went into the copyright management business associated with the use by broadcasting organizations in Japan.

### 1.1. Overview of the facts of the case

JASRAC has been entrusted with the management of copyright of a majority of musical works used for broadcast purposes. It has signed blanket license agreements on musical works with almost all of the broadcasting organizations in Japan, and has been collecting royalties based on the

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<sup>1</sup> A music copyright collecting society is a body which carries on the business of managing music copyright entrusted to it by copyright holders, including songwriters, composers and music publishers. It licenses its members’ musical works to users, collects royalties from them, and distributes collected royalties to copyright holders after deducting management fees from such royalties.

<sup>2</sup> Law No. 67, of 1939.

<sup>3</sup> *Id.*, Art. 2.

<sup>4</sup> Law No.131, of 2000.

agreements accordingly (hereinafter referred to as “the conduct at issue”).

The blanket license agreements offered by JASRAC adopt a comprehensive method for licensing and collecting royalties. Under these agreements, broadcasting organizations are allowed to use all of the musical works in the JASRAC repertory with no quantity restrictions by paying a flat fee of a fixed percentage (1.5%) of their annual broadcast revenue as copyright royalties, irrespective of whether or how many times they actually use the musical works managed by JASRAC. In other words, JASRAC provides broadcasting organizations with all-you-can-use music licensing services at a fixed rate, which means that the broadcasting organizations signing the blanket license agreement may not pay less even if they use less.

Under such a system of performance royalties, the broadcasting organizations will have to pay additional fees on top of the royalties paid to JASRAC if using musical works managed by other music copyright collecting societies, the fact of which, from the viewpoint of broadcasting organizations, leads to an increase in the overall expenses of royalties and imposes an increased financial burden on them. As a consequence, many broadcasting organizations had reservations about performing musical works managed by other music copyright collecting societies. A problem has thus emerged where the broadcasting organizations intentionally avoided using musical works managed by a new entrant, i.e., e-License.

As a new entrant to the business of music copyright management market, e-License endeavored to expand its business by signing management trust contracts with influential copyright holders in Japan, including major music publisher companies. However, regardless of the fact that its entrusted musical works contained popular songs, e-License’s licensing business did not progress as expected, partly because of the broadcasting organizations’ tendency to avoid using e-License’s entrusted musical works. In view of this tendency, Avex Group, a major music publisher in Japan concluding a management trust contract with e-License with respect to a pop song titled “Renai Shasin [a photo of love],” decided to set this song’s performance royalty fee free of charge after negotiating with e-License. The main purpose of this strategy is to encourage broadcasting organizations to use “Renai Shasin”. However, the Avex Group decided to terminate the management trust contract with e-License later.

## **1.2. Cease and desist order and its subsequent hearing decision**

After investigating the conduct at issue, Japan Fair Trade Commission (hereinafter “the JFTC”) found that the blanket license agreements signed between JASRAC and the broadcasting organizations did not correspondingly reflect the proportion of the JASRAC-managed musical works used for broadcasting when licensing royalties were being calculated. The broadcasting organizations had no inclination to use musical works managed by other music copyright collecting societies, because they would have to bear the additional expense of royalty fees if they used any. The conduct at issue thus caused difficulties for other music copyright collecting societies to carry on business. By signing and honoring such agreements, JASRAC excluded the business activities of other music copyright collecting societies, which was contrary to public interest and

substantially restraining competition in the field of licensing of managed musical works associated with broadcast use for broadcasting organizations in Japan. The JFTC thus ruled that the conduct at issue falls within the definition of private monopolization provided in Article 2, Paragraph (5) of the AMA and constitutes a violation of Article 3 of the AMA, and accordingly issued a cease and desist order (hereinafter “the order”) to JASRAC pursuant to Article 7, Paragraph (1) of the AMA on February 27, 2009.<sup>5</sup>

JASRAC disagreed with the order and requested the JFTC to hold a hearing for rescission of the order, contending that the conduct at issue did not violate Article 3 of the AMA. After the hearing proceedings, the JFTC decided to rescind the order on June 12, 2012 (hereinafter “the hearing decision”),<sup>6</sup> mainly on the grounds that, based on the submitted evidence, the conduct at issue is considered to have no exclusionary effects on other music copyright collecting societies in the field of licensing of managed musical works associated with broadcast use in Japan. The hearing decision specifically held that, although the conduct at issue had a restraining effect on the broadcasting organizations with respect to the use of musical works managed by other music copyright collecting societies and acted as a negative factor in market entry decisions, it is still necessary to take into account comprehensively all other relevant factors in order to judge whether or not the conduct at issue had exclusionary effects on other music copyright collecting societies. The relevant factors indicated by the JFTC include the following:

- I. With respect to the use of the song “Renai Shasin”, no difference was found in the status of the use before and after the performance of the song became free of charge.
- II. Based on the fact finding, the conduct at issue could not be found to have caused the broadcasting organizations to avoid using e-License’s entrusted musical works. The broadcasting organizations did nothing more than adopt a cautious attitude towards the use of e-License’s entrusted musical works. Also, the conduct at issue could not be deemed to have caused copyright holders to avoid entrusting their copyrights to e-License. Thus, it would be inappropriate to judge that the conduct at issue had exclusionary effects on other music copyright collecting societies.
- III. The main reason why the broadcasting organizations were circumspect about the use of e-License’s entrusted musical works is because of e-License’s incompetent management system.
- IV. The reason why the Avex Group decided to terminate the management trust contract is because the Avex Group did not correctly recognize the status of the use of “Renai Shasin” and mistakenly believed that the broadcasting organizations avoided using the songs managed by e-License due to an additional burden of royalty fees. The decision to terminate the contract is actually not based on the conduct at issue.
- V. The number of musical works managed by e-License was in fact on the increase.

However, although not a recipient of the hearing decision, e-License subsequently filed an action for rescission of the hearing decision in the Tokyo High Court. The court, after affirming

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<sup>5</sup> Cease and Desist Order No. 2 of 2009 (JFTC Feb. 27, 2009).

<sup>6</sup> Hearing Decision No. 17 of 2009 (JFTC June 12, 2012).

that e-License has the standing to sue in the action, reversed the hearing decision and ruled that the conduct at issue had anticompetitive effects of excluding other music copyright collecting societies from the field of licensing of managed musical works associated with broadcast use in Japan, and rendered a decision to rescind the hearing decision accordingly (hereinafter “the Decision”).<sup>7</sup> The decision is summarized as follows.

### **1.3. Summary of the Decision**

#### **A. Errors in the findings of fact**

The Tokyo High Court found that, in view of substantial evidence, the JFTC had committed some errors in the findings of the fact related to the relevant factors indicated by I. to V. enumerated in the hearing decision.

After reviewing the evidence, the court affirmed the finding shown in the factor I by stating that the finding made by the JFTC, which held that the song “Renai Shasin” was frequently used by broadcasting organizations actually after as well as before the announcement of zero royalty fees, cannot be regarded as an unreasonable one. However, with respect to the factor II, in light of the evidence presented by the broadcasting organizations, the court found that many broadcasting organizations distributed internal notification documents requesting their employees to refrain from using the musical works managed by e-License, which should be reasonably deemed to have discouraged the use of musical works managed by e-License. The court thus held that the finding shown in the factor II was not based on substantial evidence.

As to the factor III, the court stated that, based on the evidence presented, the broadcasting organizations avoided or attempted to avoid the use of musical works managed by e-License, not because of e-License’s insufficient preparation for its management system and the ensuing bewilderment, but by reason of additional royalty fees that had to be paid to e-License if they used musical works managed by it. And the main cause of this situation, according to the Decision, is that the royalty fees paid to JASRAC by broadcasting organizations did not accurately reflect whether or how many times the musical works managed by JASRAC were used. Consequently, the finding in the factor III was not based on substantial evidence.

Concerning the factor IV, judging from the fact that quite a few broadcasting organizations avoided or attempted to avoid the use of musical works managed by e-License due to additional royalty fees, the court found that the conduct at issue constitutes one of the causes of such fact and should be deemed as one the reasons that the Avex Group decided to terminate the management trust contract. Therefore, the finding in the factor IV was not based on substantial evidence as well.

As regards the last factor V, the royalty fees that were actually paid to e-License only amounted to 200~300 thousand Japanese yens a year, which were a drop in a bucket compared to the broadcasting organizations’ annual revenue. Moreover, most of the musical works managed by e-License were indie songs that were unexpected to be performed for broadcast purposes. In view

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<sup>7</sup> Tokyo High Court Nov. 1, 2013 (Case No. 2012 (Gyo-Ke) 8) .

of these facts, the court thereby held that the finding in the factor V, where the JFTC stated that e-License did not necessarily have difficulty carrying on business, was not based on substantial evidence.

#### B. Errors in judgment about whether the conduct at issue constitutes exclusionary private monopolization

The Tokyo High Court made an in-depth analysis of whether the conduct at issue constitutes exclusionary private monopolization, reasoning that, from the perspective of cost reduction, it is a natural and reasonable business judgment for broadcasting organizations to refrain from paying royalty fees incurred from performing musical works managed by music copyright collecting societies except JASRAC. Even though broadcasting organizations usually choose what songs to perform based on various factors, in most cases it is economically rational for them to choose ones with no additional expenses among multiple alternatives. On top of that, on October 2006, JASRAC negotiated with the broadcasting organizations and decided to raise royalty fees on licensing its entrusted musical works. All of these circumstances urged the broadcasting organizations to avoid an additional burden of business expenses. Besides, in view of the status quo that JASRAC has been managing a majority of musical works associated with broadcast use in Japan, it is most unlikely, if not impossible, for broadcasting organizations not to sign blanket license agreements on musical works with JASRAC. Also, given that the broadcasting organizations need to perform a considerable number of musical works, it is nearly unrealistic for them to sign separate royalty agreements with JASRAC. On the other hand, as the sole copyright collecting society that newly entered the copyright management business associated with the use by broadcasting organizations in Japan, e-License has been entrusted with an extremely limited number of musical works compared to JASRAC. The court accordingly stated that it is highly probable that the conduct at issue caused broadcasting organizations to avoid using the songs managed by other music copyright collecting societies due to an additional burden of royalty fees, and that the conduct at issue should be deemed to have a restraining effect on the broadcasting organizations with respect to the use of musical works managed by other music copyright collecting societies.

Judging from all the relevant facts of the case, the Tokyo High Court held that the conduct at issue posed particular difficulties for other music copyright collecting societies to carry on business as well as to conduct market entry, and thus had exclusionary effects on other music copyright collecting societies in the field of licensing of managed musical works associated with broadcast use for broadcasting organizations in Japan. Therefore, the findings in the hearing decision were not based on substantial evidence, and the JFTC committed errors in judgment about whether the conduct at issue constitutes exclusionary private monopolization.

#### C. Judgment

Based on the preceding analysis, the Tokyo High Court held that the conduct at issue had anticompetitive effects of excluding other music copyright collecting societies from the field of licensing of managed musical works associated with broadcast use in Japan, and the JFTC committed errors in the findings of fact as well as the judgment in the hearing decision. Accordingly, the court rendered the Decision to rescind the hearing decision, ruling that the defendant, namely the JFTC, should examine and make judgments on whether the conduct at issue satisfied other requirements of exclusionary private monopolization under Article 2, Paragraph (5) of the AMA, including whether or not the conduct at issue “has unnatural characteristics that deviate from the scope of normal competitive practices, from the perspective of forming, maintaining or strengthening market power.”<sup>8</sup>

## **2. Opinion about of the case**

### **2.1. Problems with the hearing decision**

Considering the fact that the Decision rendered by the Tokyo High Court reversed the JFTC’s hearing decision and held the conduct at issue violated the AMA, a quick review of the hearing decision will serve as a the basis for the following analysis. The logical structure of the reasoning involved in the hearing decision is outlined as follows:

To begin with, ① the conduct at issue exerted a restraining effect on the broadcasting organizations with respect to the use of musical works managed by other music copyright collecting societies. Besides, JASRAC had consistently been the sole entrepreneur engaging in the relevant market. In view of these two facts, the conduct at issue undeniably acted as a negative factor in other entrepreneurs’ decisions on market entry. Nevertheless, ② the song “Renai Shasin” was actually performed extensively. The status of the performance showed no sign of change before and after the use of the song became free of charge. ③ Among 15 broadcasting organizations inquired by the court, 14 broadcasting organizations denied that they had deliberately avoided using e-License’s musical works. According to the JFTC’s investigation, it remains unclear to what extent the musical works managed by e-License were avoided to be used. What is more, ④ with respect to factual causation, the primary cause why the broadcasting organizations chose not to use e-License’s entrusted musical works is due to e-License’s ill-prepared management system, which led to the bewilderment of broadcasting organizations. To sum up, ⑤ the JFTC thus held that the conduct at issue did not cause the Avex Group to terminate the contract with e-License, and that the conduct at issue was not the primary reason why no competitor entered the market entry.

This paper argues, however, that the exclusionary effects should be deemed to exist inasmuch as the use is actually restrained. It is unnecessary for the JFTC to identify specific conduct of

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<sup>8</sup> A requirement specified by the Supreme Court with respect to Article 2, Paragraph (5) of the AMA. See, Supreme Court Dec. 17, 2010 (Case No. 2009 (Gyo-Hi) 348) .

avoidance of use. Although the JFTC has found that the conduct at issue was not the main cause, this should not necessarily lead to a denial of causation.<sup>9</sup> Even granted that e-License's poor preparation for conducting business did cause the broadcasting organizations not to use e-License's entrusted musical works, the causation between the conduct at issue and the result of exclusion should not be denied, because e-License's poor preparation was also attributable to the conduct at issue and thus a chain of causation was established.

Based on the basic reasoning described above, this paper carries out an analysis of the Decision as follows by concentrating on the appropriateness of the hearing decision.

In a landmark decision regarding NTT-East's exclusionary private monopolization, the Japan Supreme Court held that: "[translated by the author]...*whether the conduct in question constitutes the conduct that 'excludes the business activities of other enterprises' prohibited under Article 2 paragraph(5) of the AMA, should be determined by whether or not the conduct in question has unnatural characteristics that, from the perspective of forming, maintaining or strengthening market power, deviate from the scope of normal competitive practices, and poses significant difficulties in its competitor's market entry.*" According to this case law, courts should determine whether exclusionary effects, unnatural characteristics and substantial restraint of competition exist in a case before reaching a comprehensive conclusion that a violation of Article 2 Paragraph(5) of the AMA occurs. In the JASRAC case, the same approach should be applied. The JFTC should render its decision based on a comprehensive analysis of the effect of the conduct at issue on competition.

Given the case law in the NTT-East case, the case should be judged by whether the conduct at issue posed difficulties in market entry, rather than whether specific conduct of avoidance of use existed or not. By contrast, the JFTC in its hearing decision analyzed whether specific conduct of avoidance of use existed, holding that the exclusionary effects could not be established because the broadcasting organizations merely took a cautious attitude toward e-License and thus could not be deemed to avoid using e-License's entrusted works. Even granted that it was necessary for the JFTC to establish that specific conduct of avoidance of use existed, as the JFTC's stance taken in the hearing decision, it would be sufficient for the JFTC to prove the cautious attitude taken by the broadcasting organizations in order to establish that the avoidance of use actually existed.

The hearing decision held that the primary cause why e-License failed to enter the market is its inadequate management system that caused the bewilderment of broadcasting organizations. Such a decision seems to be based on the legal premise that a cause-effect relationship was not proven if the main cause was found not to be the conduct at issue. The legal reasoning here is, however, not appropriate, as explained above.

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<sup>9</sup> See, Akira Negishi, "JASRAC Haijogata Shiteki Dokusen Higi Jiken Shinketsu –Shinpan Shinketsu Heisei 24・6・12" [The JFTC's hearing decision on the JASRAC's alleged exclusionary private monopolization – Hearing Decision June 12, 2012], NBL (Tokyo) 991 (Dec. 2012): 61. "[translated by the author] However, until now, neither the JFTC nor the case laws had interpreted or applied the law in a way requiring the JFTC to prove that the conduct 'in effect' caused difficulties in other competitors' business, or that other entrepreneurs' market entry was 'specifically' excluded, in order to rule that the conduct constituted an exclusion within the meaning of exclusionary private monopolization."

Apart from this, the market in which the exclusionary effects occurred was not the downstream market (the licensing market for the use of managed musical works), but the upstream market (the market for the entrusted management of copyright of musical works). The hearing decision committed errors in the application of the law with respect to the exclusionary effects occurring in the upstream market.

## **2.2. Exclusionary effects and efficiencies of the blanket copyright license agreements**

### **2.2.1 · Exclusionary effects**

As regards whether the blanket copyright license agreements had exclusion effects or not, the hearing decision denied it with the reasoning mentioned above, while the Tokyo High Court affirmed it with a different reasoning. More specifically, the court denied the framework for judgment adopted in the hearing decision, which limited the factors for comprehensive consideration. The court held that, “[translated by the author] *When judging whether the conduct at issue had (exclusionary) effects that posed particular difficulties for other competitors’ market entry, one should comprehensively take into account the following circumstances: the market structure in the field of licensing of managed musical works associated with broadcast use, the position of the intervener (JASRAC) and the plaintiff (e-License) in the relevant market, characteristics of musical works, the relationship between the conduct at issue and the field of entrusted management where entrepreneurs compete for music copyright management trust contracts with copyright holders, etc.*”

Besides, the Decision also affirmed the exclusionary effects brought by the blanket copyright license agreements. The Decision held that: “*Owing to the blanket copyright license agreements signed between JASRAC and the broadcasting organizations, when the broadcasting organizations perform the musical works managed by the intervener (JASRAC), they do not have to pay additional royalty fees beyond a fixed royalty fee calculated based on the method explained before, regardless of how many songs they perform. By contrast, when they perform musical works managed by other music copyright collecting societies, they have no choice but to pay royalty fees separately according to the copyright license agreements signed with the said societies.*”

### **2.2.2. Two-sided market**

A music copyright collecting society is a platform acting as an intermediary between two markets: an upstream market where it carries on business of managing music copyright entrusted by copyright holders, and a downstream market where it carries on business of licensing managed musical works associated with broadcast use. It thus constitutes a two-sided market, where indirect network effects arise. Briefly speaking, indirect network effects mean that, when the number of users on the one side increases, the value for the users on the other side also increases. In the case of copyright collecting society, such cross-side effects can be observed as well. Namely, the more broadcasting organizations a collecting society signs license agreements with, the more benefits

copyright holders will enjoy to entrust their musical works to such a society. In the meantime, the more musical works a collecting society is entrusted with, the stronger incentives broadcasting organizations will have to choose such a society to sign license agreements with.

Once a collecting society signs license agreements with most of the broadcasting organizations in the downstream market, competitors' market entry in the upstream market will be hindered because of indirect network effects. Subsequently, in the upstream market, incentives for copyright holders to entrust their works to other collecting societies will be reduced or even eliminated. In consequence, a music copyright collecting society with a monopolistic position in the upstream market is able to maintain or strengthen the market power, and is likely to abuse it. From the view of competition, JASRAC attains a dominant market position in comparison to new entrants due to the characteristic of a two-sided market. Such a characteristic accordingly falls under the scope of "market structure", which is a factor indicated by the Decision as one of the factors that should be taken into account comprehensively.

Before and still after the enactment of the Law on Management Business of Copyright and Neighboring Rights, JASRAC had been the only copyright collecting society engaging in the field of licensing of managed musical works associated with broadcast use in Japan, until e-License entered the market. It has signed blanket license agreements on musical works with almost all of the broadcasting organizations in Japan, and has established its monopolistic position so as to benefit from first-mover advantage. In other words, with respect to the "market structure" in this case, JASRAC's dominant market power stems from its long-lasting de jure monopolistic position. Additionally, the characteristic of a two-sided market has even raised the market entry barrier higher.

Although the JFTC held in its hearing decision that the number of musical works managed by e-License was on the increase after reviewing e-License's position in the upstream copyright management market, it would be, however, impossible to evaluate the anticompetitive effects—namely whether the conduct at issue posed particular difficulties to competitor's business activities—in the upstream market without an analysis on whether and how much e-License received a remuneration for management based on the actual performance in the licensing of musical works.

### **2.2.3. Justifications for blanket copyright license agreements**

Some plausible justifications for blanket copyright license agreements are worth noted here. Specifically, from the viewpoint of efficiency, important justifications that need to be further discussed in this case may include: ① reduction of monitoring costs; and ② the fact that the broadcasting organizations can perform the songs without paying additional royalty fees (the marginal cost is zero).<sup>10</sup>

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<sup>10</sup> In Japan, it is an issue whether the justification of efficiency should be examined in the context of "unnatural characteristics" or "substantial restraint of competition", both of which are the requirements of private monopolization. No prevailing consensus has so far been established on this issue. In the legal

### **2.2.3.1 Reduction of monitoring costs**

The blanket copyright license agreements have pro-competitive effects of improving efficiencies in the downstream market. With the blanket copyright license agreements, the broadcasting organizations may cut down on the burdensome costs (the monitoring costs) which would have incurred in recording music usage information every time. Such blanket license agreements thus facilitate the use of musical works managed by JASRAC. However, when the JFTC evaluates whether the conduct at issue fulfills the requirement of “unnatural characteristics”, it is crucial to check whether the alleged violator employed any measures simultaneously for mitigating the exclusionary effects brought by the conduct at issue, regardless of to what extent efficiencies have been improved.

In this case, it is inappropriate, however, to deny that the conduct at issue fulfills the requirement of “unnatural characteristics” only on the basis of reduction of the monitoring costs, because JASRAC did not take any measures at all for mitigating the anticompetitive effects that result from JASRAC’s conduct of signing agreements with almost all of the broadcasting organizations. As the plaintiff e-License argues in this case, there are still other methods of keeping a record of music usage information apart from that of precisely recording song titles and play times every time. For example, a proposed solution would be to categorize broadcasting organizations into several groups and charge differential royalty fees according to their expected level of music usage. Accordingly, reduction of the monitoring costs alone is not enough to justify the conduct at issue, irrespective of a huge saving in the monitoring costs that would have incurred in tracking music usage information.

### **2.2.3.2 Curve-out measure**

A curve-out measure means a calculation method for determining royalties that allows licensees to deduct certain amounts from fixed royalties provided by a blanket copyright license agreement if licensees (in this case, the broadcasting organizations) use musical works managed by other music copyright collecting societies. As noted above, the conduct at issue allows the broadcasting organizations to perform songs without additional costs, which means the marginal cost is zero. Broadcasting organizations thus have no incentives to use fewer musical works in order to cut down on the costs, and are likely to use musical works inefficiently. On this point, the conduct at issue prevents the efficient use of musical works in the JASRAC’s repertory, and is likely to create inefficiency.

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practice, however, the JFTC’s opinion stated in the Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act, as well as the Japan Supreme Court’s decision in the NTT-East case, seems to consider examining the justification of efficiency in the context of “unnatural characteristics”. A plausible reason for this may be that the unnatural characteristics requirement aims to identify an exclusion that does not result from efficiency. The unnatural characteristics requirement within the meaning of exclusion is intended to exclude an exclusion stemming from normal competitive practices from the application of the AMA. This means that an exclusion does not constitute a violation of the AMA if it is caused by conduct essential for efficiency.

It is vital to see whether economically viable alternatives are available when exclusionary effects are being assessed. If the actual amount of use of musical works could be reflected in the royalty fees charged by JASRAC, the broadcasting organizations might be willing to reduce the use of songs managed by JASRAC with a view to confronting the dominant music copyright collecting society. With a copyright license agreement in which the degree of music usage is somehow reflected in the royalties, the broadcasting organizations would have incentives to save royalty costs by using fewer musical works. Accordingly, if the broadcasting organizations were provided with a viable option to choose individual licenses, the exclusionary effects of the conduct at issue would be mitigated to some extent. The conduct at issue, which did not include a curve-out measure, is thus problematic from the view of competition.

To conclude, the reasons why the conduct at issue brought about unparalleled market foreclosure effects can be found in two main aspects: ① the conduct at issue did not provide the broadcasting organizations with available opportunities to choose an economically viable individual license other than the blanket copyright license agreement; ② the conduct at issue have decreased the incentives of the broadcasting organizations to perform musical works managed by other music copyright collecting societies, because the fixed royalties paid to JASRAC would not drop even if they choose to play songs managed by others.

As possible approaches to mitigate the exclusionary effects, either the curve-out measure that ensures a licensee's alternatives, or methods which provide incentives for broadcasting organizations to save royalty fees calculated based on their level of music usage, should be adopted in a blanket copyright license agreement. In United States and European Union, local music copyright collecting societies employ either approach in their blanket copyright license agreements. Especially in U.S, the exclusionary effects brought by blanket copyright license agreements are not so severe when compared to that in Japan because of competition among music copyright collecting societies. Besides, individual licenses and curve-out measures are available options for broadcasting organizations.

### **2.2.3.3 Justifications offered in the Decision**

With respect to the plausible justifications mentioned above, the Tokyo High Court ruled as follows.

*“The plaintiff (e-License) is the sole copyright collecting society that newly entered the field of licensing of managed musical works associated with broadcast use and has been collecting royalty fees since its entry. However, compared to the intervener (JASRAC), the plaintiff has been entrusted with the management of an extremely limited number of musical works associated with broadcast use, as compared to JASRAC.... (The conduct at issue) is highly probable to cause broadcasting organizations to avoid using the songs managed by other music copyright collecting societies because of an additional burden of royalty fees. Accordingly, it should be deemed to have a restraining effect on the broadcasting organizations with respect to the use of musical works managed by other music copyright collecting societies.”*

*“The broadcasting organizations avoided using the songs managed by other music copyright collecting societies in order to cut down on the additional burden of royalty fees when selecting what song to perform in daily programs, except special exceptional ones.”*

*“In view of the foregoing facts and considerations, the court hereby reached the conclusion that the intervener’s conduct at issue posed particular difficulties for the plaintiff to continue carrying on business as well as to conduct market entry in the field of licensing of managed musical works associated with broadcast use, and had exclusionary effects on the business activities of other music copyright collecting societies in the same field. Accordingly, the findings in the hearing decision...were not based on substantial evidence, and the judgment in the hearing decision contained some errors, too.”*

### **3. The Japan Supreme Court Decision**

The JFTC disagreed with the Tokyo High Court Decision, and appealed the case to the Japan Supreme Court. On April 28, 2015, the Japan Supreme Court dismissed the JFTC’s appeal, holding as follows:

*“Even after the law governing music copyright collecting societies was shifted from the license system to the registration system, the intervener (JASRAC) is still entrusted with the management of copyright of a majority of musical works in the relevant market. It would be thus beyond imagination for the broadcasting organizations not to sign blanket license agreements with the intervener. Under these circumstances, the intervener adopted a method for collecting licensing royalties, which did not reflect the proportion of its musical works used for broadcasting when the amount of royalties was being calculated. With such a method, the total amount of licensing royalties that the broadcasting organizations would have to pay would increase when they paid licensing royalties to other collecting societies. Given that musical works are basically substitute goods for the purposes of broadcasting, the conduct at issue should be deemed to have a restraining effect on the broadcasting organizations with respect to the use of musical works managed by other music copyright collecting societies. Besides, the scope of restraint covers almost all of the broadcasting organizations in Japan, and the conduct at issue has been lasting for a relatively sustained period of time. In view of the foregoing facts, the court concludes that the conduct at issue caused particular difficulties for other music copyright collecting societies to enter the relevant market.”*