INTELLECTUAL PROPERTY LAW AND COMPETITION LAW: AN ANALYSIS

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1. INTRODUCTION

The relationship between IPRs and Competition Law has attracted growing attention over time. Competition law and IPRs policies are bound together by the economics of innovation and an intricate web of legal rules that seeks to balance the scope and effect of each policy.

Competition Law is the essential mechanism specifically aimed at preventing anti-competitive business practices, market distortions and unnecessary government interventions, avoiding abuse of market power and thus preserving the competitive structure of markets. It, therefore, ensures that the monopolistic power associated with IPRs is not extended to the detriment of competition, and thus also works to enhance consumer welfare. Competition Policy essentially comprises a set of policies that promotes competition in the market, which includes a liberalized trade policy and openness to foreign investments. Competition policy can succinctly be defined as those government measures that directly affect the behavior of enterprises and the structure of industry. The objective of competition policy is to promote efficiency and maximize welfare.

IPRs protection is a tool meant to foster innovation, which benefits consumers through the development of new and improved goods and services, and spurs economic growth. It bestows on innovation the right to legitimately exclude for a limited period of time, other parties from the benefits arising from new knowledge and more specifically from the commercial use of innovative products and processes based on that new knowledge. In other words, innovators or IPR holders are rewarded with a temporary monopoly by the law to recoup the costs incurred in the research and innovation process. As a result, IPR holders earn rightful and reasonable profits so that they have incentives to engage in further innovation.

Indeed, the relationship between IPRs and competition law has been a complex and widely debated one. An IPR generates market power. The potential pejorative character of the power may be unjustifiably great because of public policies like the encouragement of inventions. On the other hand, if investment of resources to produce ideas or to convey information is left unprotected, the competitors may take advantage and benefit by not being obliged to pay

anything for what they take. This may result in lack of incentives to invest in ideas or information and the consumer may be correspondingly poorer. What is called for is a balance between abuse of monopoly and protection of the property holders' rights. Competition law, thus, while having no impact on the very existence of the IPRs, operates to contain the exercise of the property rights within the proper bounds and limits which are inherent in the exclusivity conferred by the ownership of intellectual assets.

2. CONFLICTING OR COMPLEMENTING EACH OTHER?

The aims and objectives of IPRs and competition laws are complementary, as both aims to encourage (i) innovation, by investment in research and development; (ii) competition, by use of innovation in the economy and (iii) enhance consumer welfare, by protecting consumers from exploitation. They complement each other in promoting an efficient marketplace and long-run dynamic competition through innovation. It has been observed[1] that rights over IP do not necessarily bestow their holders with market power. In fact, there often exist various technologies, which can be considered potential substitutes to confer effective constraints to the potential monopoly-type conduct of IPRs holders.

Only when alternative technologies are not available[2], IPRs can be said to grant their holders monopolistic positions in the defined relevant markets. And even then that alone does not create an antitrust violation. IPRs policy protects the IP based products and processes, and thus is nowhere near being in contradiction or conflicting with the ultimate goal of competition law.

We can sum up the above discussion with the words of the US Department of Justice (DOJ) and the Federal Trade Commission (FTC), which, in their Antitrust Guidelines for the Licensing of Intellectual Property, 1995 have been stated as:

"*The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more*

[1] OECD (1989),competition policy and intellectual property rights ,P.14-17

[2] In a survey conducted in 1981 by the OECD, licensors reported that they face no alternate supplier only in 27 percent of the cases. In 34 percent, the number of alternate suppliers is low, ranging from 2 to 5. In around 30 percent of the cases, more than 10 alternate suppliers are available. (For more details, see supra note 1 - p.15)

efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. The antitrust laws promote innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers".

However, in certain circumstances when patents, copyrights or other IPRs confer market power (through exclusivity), they may lead to restriction on production, a competitive price, and what economists call a deadweight loss[3]. Moreover, in the rational exercise of its self-interest, an IPR holder may sue would-be rivals for infringement, deterring entry to compete, or prolong its market power by precluding access to technology necessary for the next generation of products to emerge. This is where competition law comes in to help IPRs protection to be fair and on the right track of its virtue towards the welfare goal. Thus, by creating and protecting the right of innovators, IPRs provide economic agents with the incentives for technological innovation and/or new forms of artistic expression. This will create more inputs for competition on the future market, as well as promote dynamic efficiency, which is characterized by increasing quality and diversity of goods, which is also the objective of competition policy. Moreover, IPRs may create a race for innovation, as firms compete to exploit first mover advantages so as to gain IPR protection. Therefore, both IPRs and competition policy are necessary to promote innovation and ensure a competitive exploitation thereof.

3. INTERFACE BETWEEN COMPETITION LAW AND IPR

The objective of the competition law involves two faces firstly to protect the consumer welfare and secondly the economic freedom of market players. When a patent holder adopts any kind of anti-competitive practices, government can adopt measures like the compulsory licensing of such technologies which has been stated in the 31(b) of the WTO Trade Related Aspects of Intellectual Property Law (TRIPs) Agreement.

[3] It is the loss of economic efficiency in terms of utility for consumers/producers such that the optimal or allocative efficiency is not achieved as defined in Economic Times, "Definition of Deadweight loss", available at http://economictimes.indiatimes.com/definition/deadweight-loss.

There are two opposing views on the interface between a Competition Law and Intellectual Property Law. The first view is that there is a tension between competition and intellectual property as the competition law seeks to eliminate monopolies and encourage competition, while IPR laws bestows its inventors with a temporary monopoly. According to the proponents of this view, the main function of IPR laws is to properly assign and defend property rights on assets that have economic value. On the other hand, the main goal of competition law should be to minimize the adverse consequences of monopoly power arising from IPRs. However this approach has become outdated and not followed in modern times.

The second view is that competition law continues to be an essential tool of ensuring continued innovation and economic growth. The aims and objectives of IPRs and competition laws are complementary, as both aims to encourage innovation, competition and enhance consumer welfare. It is vitally important to preserve competition in innovation because competition ensures the best outcome for consumers.

The Raghavan Committee in its report mentioned about the conflict of IPR with Competition Law. Clause 5.1.7 of the report stated that "*All forms of Intellectual Property have the potential to raise Competition Policy/Law problems. Intellectual Property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. Undoubtedly, it is desirable that in the interest of human creativity, which needs to be encouraged and rewarded, Intellectual Property Right needs to be provided. This right enables the holder (creator) to prevent others from using his/her inventions, designs or other creations. But at the same time, there is a need to curb and prevent anti-competition behavior that may surface in the exercise of the Intellectual Property Rights*."

To deal such kind of problems provision has been laid down in Section 3 and 4 of the Competition Act, 2002.

Section 3

The Competition Act, 2002 (the Act) deals with the applicability of section 3, Prohibition relating to anti-competitive agreements to IPRs. Under section 3, Competition Commission of India looks into agreement which is anti-competitive in nature and those found to be anti-competitive are declared to be void. An express provision [section 3(5)] is incorporated in the Act, that reasonable conditions as may be necessary for protecting IPRs during their exercise

would not constitute anti-competitive agreements.[4] Section 3 of the Indian Competition Act prohibits anti-competitive practices, but this prohibition does not restrict "the right of any person to restrain any infringement of or to impose reasonable conditions, as may be necessary for protecting any of his rights" which has been conferred under various IPR laws. However, this protection is not absolute. If the restrictions imposed are unreasonable, the same can be tried under Competition law. Section 3(5) reads as:

(5) Nothing contained in this section shall restrict-

(i) The right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi- conductor Integrated Circuits Layout- Design Act, 2000 (37 of 2000);

(ii) The right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Thus, the wording of the section suggests that the exception is only allowed for the purpose of protection of the rights to the extent granted by the Intellectual Property law; the requirement of reasonableness. The same has been held in various cases.

[4]Advocacy Booklet on Intellectual Property Rights under Competition Act, 2002. Available at: http://www.competition-commission-India.nic.in/advocacy/Intellectual_property_rights.PDF.

In *FICCI Multiplex Association of India v. United Producers/Distributors Forum*[5], the CCI rightly observed that intellectual property laws do not have any absolute overriding effect on competition law. The extent of the non-obstante clause in Section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of competition law only to protect his rights from infringement.

In *Aamir Khan Productions v. The Director General*[6], the Bombay High Court held that the CCI has the jurisdiction to deal with competition cases involving IPR.

Further, in *Kingfisher v Competition Commission of India*[7], it was again made clear that all the issues that rose before the Copyright Board could also be considered before the CCI.

Section 4

Section 4 of the Indian Competition Act, 2002 deals with abuse of dominant position. The section prohibits the abuse of dominant position and not its mere existence. It further explains what is meant by abuse of dominant position and enumerates the practices which are to be considered abusive. No exception has been created for IPRs under Section 4 for various reasons.

Firstly, IPRs may not confer a dominant position in the market; the legal monopoly conferred by IPRs may not necessarily lead to an economic monopoly and it is the latter that the competition law is concerned with.

Secondly, even if IPRs do grant a dominant position, mere existence of market power is not prohibited under Section 4. To be prohibited, the dominant position needs to amount to abusive.

The same view was concluded by Competition Commission in *Singhania & Partners LLP v. Microsoft Corporation (I) Pvt. Ltd & Other*[8], the CCI considered the question of anti-competitive behaviour and abuse of dominant position in the selling of Windows and Office 2007 software by Microsoft which had control over 80 per cent of the market. Still, the CCI could not find any violation of competition provisions. The Commission observed that charging different prices for the same product under different kinds of licenses are justified and common in the market. According to the Commission, there was no clear evidence to

[5] Case No 1 of 2009, CCI order dated 25th May, 2011.
[6] 2010 (112) Bom LR 3778
[7] Writ petition no 1785 of 2009
[8] Case no 36/2010, decided by the Competition Commission of India on 22nd June, 2011.

suggest that due to Microsoft's dominant position, any competitor was driven out of the market. Hence, it was held that there was no violation of any competition provisions by Microsoft.

Thus, the Competition policy accepts the dominance, even if resulting from IPR holders, as long as it does not amount to an abuse of market power. In the event of abuse, the fact that the source of market dominance is IPRs, makes no relevance. The section does not make any exception for the IPR holders.

4. COMPETITION LAW AND IPRs IN DIFFERENT JURISDICTIONS

Competition Law and IPR operate together to foster innovation and to enhance dynamic efficiency in economic growth and development. Therefore, the development of interface between Competition Law and IPR has been given considerable importance in many jurisdictions. Time and over, developing countries have shown hesitancy in implementing strong protection of IP. Developing countries normally tailor competition policies, including specific regulations on the interface between IPRs and competition, to their own conditions and goals, unrestricted by international rules and coercion by developed countries. Such policies need to be simpler in developing countries than in developed countries to be enforceable by much weaker states, and to promote long term growth of productivity, that is, of dynamic rather than static efficiency.[9]

Europe

The interface between IPR and competition law is dealt in Article 81 of the Treaty of European Commission which discusses the compatibility of IPR licensing agreements with competition policy. The policy of the EC has changed from liberal approach to more economic approach which is reflected in the block exemption for technology transfer agreements (TTBER) of 2004, accompanied by the relevant Technology Transfer Guidelines, which specifically cover patents. Article 82 of the EC also plays a crucial role in case of abuse of dominant position concerning agreements under IPRs. EC has broadly issued two block exemptions that explicitly provide immunity to IPRs from the anti-competitive agreements. However, this does not mean that the immunity extends to abuse of dominant position too.

[9] Singh and Dhumale, (1999, p. 12), as cited by Correa (2000).

The 1st block exemption is the "*specialization agreement*" which was issued in the year 2000, addresses the IPR.[10] It deals with the exemption of provisions of use and assignment of IPR that are expressly mentioned in the specialization agreement subject to compliance of various condition mentioned therein. Some of them are:

a) Necessity of use of Intellectual Property rights and assignment for the implementation of the specialization agreement[11];
b) The combined market share of the participating undertakings should be less than 20% of the relevant market[12]; and
c) The specialization agreement must not directly or indirectly have the object of: (a) fixing prices when selling the product to third parties; (b) limiting output or sales; or (c) allocating markets or customers.[13]

The second block exemption, which addresses IPRs expressly, is the "*technology transfers*" block exemption that was issued in 2004.[14] It regulates the exemption of patents, copyright assignments and licensing agreements from the perspective of anti-competitive agreements, subject to conditions and limitations underlined therein. Some of these are:

a) In case of agreement between the competitors, the combined share of the relevant market accounted for the parties must not exceed more than 20% on the affected relevant technology and product market.[15]
b) The share of the relevant markets individually accounted for by each of the parties must not exceed 30% in case of agreement between the non-competitors. [16]
c) It bars inclusion of agreements containing severely anti-competitive restraints. [17]

[10] Commission Regulation (EC) No 2658/2000 of 29th November, 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.
[11] Article 1(2), Commission Regulation (EC) No 2658/2000 of 29th November, 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.
[12] Article 4, Commission Regulation (EC) No 2658/2000 of 29th November, 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.
[13] Article 5, Commission Regulation (EC) No 2658/2000 of 29th November, 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.
[14] Commission Regulation (EC) No 772/2004 of 27th April, 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.
[15] Article 3(1), Commission Regulation (EC) No 772/2004 of 27th April, 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements
[16] Article 3(2), Commission Regulation (EC) No 772/2004 of 27th April, 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.
[17] Article 4, Commission Regulation (EC) No 772/2004 of 27th April, 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

United States of America

The distinction between the competition law and IPR is not widely recognized under the United States antitrust regulation. However, the traditional view that enforcement of IPRs is a key to monopolization was widely recognized in the United States. But, due to advancement of IPR and competition law, there have been long debates on giving immunity to IPR in respect of antitrust laws. However, with the emerging jurisprudence in the field of IPR, there is an inclination towards the view that IPRs allow its consumers the freedom to substitute the products and technologies with other products and technologies available in the market.[18]

The Department of Justice has analyzed the issue very carefully, and has drawn an inference that presence of IPR does not necessarily lead to an abuse of dominant position and creation of monopolies. In furtherance of the same, a framework was established and consequently resulted in formulation of anti-trust "safety zone". It relates to regulation of licensing agreement under IP laws to provide certainty and to increase competition in the market. The framework of the safety zone enumerates that no restrictions will be imposed on the IP licensing agreements in case the following situations arise[19]:

a) If the arrangements and restraints under IP laws are not prima facie anti-competitive i.e., leading to predatory pricing, tying-in arrangements, reduction of output, controlling the market or increasing prices; and
b) If the total account of each relevant market affected by the restraint imposed by the licensor and licensees together is not more than 20 percent; and/or
c) If, apart from the parties relating to the licensing agreement, there are four more specialized entities that are independently controlled and pose incentive to research and development which proves to be a close substitute to the R&D activities of the parties to the licensing agreement.

[18] *Illinois Tool Works Inc*. v. *Independent Ink, Inc.*
[19] US Department of Justice and the Federal Trade Commission, "Antitrust Guidelines for the Licensing of Intellectual Property", April 1995, 4.3, p. 22-23.

5. THE INTERNATIONAL DIMENSION: TRIPs AGREEMENT

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is an international agreement administered by World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property regulation as applied to nationals of other WTO members. India is a signatory for the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The aim and objective of introducing TRIPS was to bring about uniformity in the standards of IPRs among the WTO members irrespective of their economic, social and political conditions. The TRIPS Agreement states that monopoly over certain forms of IP should not create barriers to trade. All member countries are granted the discretion to determine the appropriate method of implementing the provisions of TRIPS within their own legal systems. The objectives and principles of TRIPS guide in attaining the competitive balance, required for facilitating innovation along with economic growth.

Article 6 of the TRIPS deals with an important aspect of exhaustion, which plays, a vital role under competition law. It deals with exhaustion of rights. It facilitates the balancing of rights, duties and liabilities under the two domains.

Article 8.2 of TRIPS states that appropriate measures are required to be taken to prevent abuse of IPRs by right holders and/or thwart practices which unreasonably restrain trade or adversely affect technology transfer.

Article 40, specifies the types of licensing practices which restrain competition and impede the transfer and dissemination of technology including exclusive grant-back conditions, coercive package licensing and clauses preventing challenges to the validity of the IPR.

The scope of TRIPS is wide enough to include all practices, which are not just anti-competitive but restrict or have an adverse effect on trade. The measures adopted by several countries to prevent such practices are required to be in consonance with the provisions of TRIPS.

6. CONCLUSION

It can undoubtedly be inferred that both IPR and competition law have complementary goals. Both are working towards achieving the ultimate objective of fostering innovation and promoting economic and consumer welfare. The IPR system promotes innovation, which is a key form of competition; on the other hand, competition policy, by keeping market open and effective, preserves the primary source of pressure to innovate and diffuse innovation. Despite the fact that there are intricacies, both the streams have managed to strike a middle path in order to achieve the ultimate objective of common good and protection of consumer welfare.