
COMPETITION LAW & INTELLECTUAL PROPERTY LAW: AN INTERFACE

Dr Siddharth Deoras, ICFAI University Raipur

Introduction

Competition law acknowledges the investment of intellectual property rights in promoting competition in the market economy. The common objective behind framing of both the laws can be ascertained as promoting innovation, creativity and a better market for consumers. A monopoly right is given to the creator of IPR for a particular period in appreciation and justification of his efforts, whereas competition law also recognizes the IPR by providing exclusive exemptions for the same. Competition laws generally protect the IPR from its purview. When the holder of the IPR abuses his dominating position in the market, there is no exception from the application of the competition law. The doctrine of essential facilities provides access to the essential facilities to the competitors in view of the public interest and public welfare. Market efficiency and consumer welfare are the ultimate objectives of both intellectual property rights and the competition law. From the legal perspective, the latter encourages enterprises to be more efficient and reduce the costs of products and services which will in turn lead to reduced prices and improved quality. IPR on the other hand provides legal means to recover the investment by extending a monopoly in relation to its subject matter for fixed duration. Thus, it serves as a twin tool of monopoly and competition. However, the philosophy of IPR is not applicable to competition law. As competition law is considered to be the most appropriate form of legislation to curb the abuse of IPR. In this regard they compliment each other. This shows that both are separate rights having equal value as far as legal principles are concerned. Though an exclusive right to perform commercial activity is provided to the holder of IPR it does not include automatically the right to practice monopoly in a market. Even if the monopoly is practiced in any case, it will not violate the provisions under competition law because it does not restrain monopoly per se.¹

¹ Susmitha P Mallaya, Abuse of Dominance and Doctrine of Essential Facilities: An Interface, 1 Emerging Competition Law 161, pg. 161-162, Wolters Kluwer (2017)

The government increases public welfare by fostering community innovation by giving special rights to IP property holders. Competition legislation, on the other hand, creates profit chances that motivate market entities with efficient and inventive production practises. The provision of abuse of dominant position under section 4 of the Competition Conduct of 2002 does not exclude an act done in advancement of an IPR. That does not, however, imply that the two laws are incompatible. In the United States and the European Union, the number of competition lawsuits involving IPR is on the rise. In India IPR related litigation is at an infant stage and therefore proper analysis of its provision is required. These legal aspects relating to the abuse of dominant position ought to be examined in this light. This is because the purpose of competition law is to observe that the IP right holder does not abuse his dominant position by virtue of his exclusive rights vested by intellectual property.²

The IP holder is granted an exclusive monopoly, which restricts others from delivering items in the market due to IPR, which may be compared to having a significant negative impact on the market. Competition legislation, on the other hand, encourages market efficiency by limiting market monopoly abuse. Dominance isn't always anti-competitive under competition law. Various characteristics such as market share, structure, and market size are taken into account when determining the competitiveness of a market.³

A significant position of a firm in the relevant market to exercise its exclusiveness over other competitive forces can be termed as dominant position. The concept of dominance has been defined differently in various countries as dominant position, monopoly or substantial degree of market power. The most common form of anti-competitive practice prevalent in many of the countries is the abuse of dominance. It may be in the form of refusal to deal tying arrangements, exclusive licenses etc. In *United Brands v. Commission*⁴ dominant position has been defined by the court as one of the economic strengths enjoyed by an undertaking. This will enable it to restrain effective competition in the relevant market. However, the Organization for Economic Co-operation and Development (OECD) points out that the concept of dominance is broader

² Ibid

³ Susmitha P Mallaya, Abuse of Dominance and Doctrine of Essential Facilities: An Interface, 1 Emerging Competition Law 161, pg. 161-162, Wolters Kluwer (2017)

⁴ (1978) ECR 207

than economic monopoly, although a monopoly would clearly be dominant.⁵

Monopoly and economic monopoly

Monopoly is the genus of which economic monopoly is the specie. Both these terms are used interchangeably in common parlance. However, the difference between these two similar terms is simply based upon the semantics of the language. Monopoly which is derived from the Greek term in general connotation implies the exclusive possession, control or exercise of something. Economic monopoly as evident from the term pertains to certain economic pattern in a market wherein a specific enterprise will control the entire market giving no alternatives to the consumers to choose from. As a result, often monopolists reduce output to increase prices and earn more profit. Monopoly is a broader concept than economic market power over price and is not the same as economic monopoly, although a monopoly would clearly be dominant. However, this distinction seems irrelevant when dominant position of an enterprise is examined under competition law for proving abuse.

In the Indian context, abuse of dominance refers to an enterprise's power in a relevant market, regardless of the competitive pressures that adversely impact its competitors or customers in that market. This competition law term is comparable to those found in other nations' competition laws, such as the United Kingdom and the European Union. Similarly, the Raghavan Committee stated that abuse of dominance is central to Indian competition law, and that it includes restrictions on quality products in markets and technical developments, predatory pricing and practises that are exclusionary in nature, and conduct that is prejudicial to consumer interest in general as abuse of dominant position. Generally, the prohibitions of abuse of dominant positions relates to charging higher prices, restricting quantities, using position to extract rents by an incumbent firm in a dominant position to protect its position of dominance by making it difficult for potential entrants and competitors to enter the market. Therefore, although dominance is a necessary condition for establishing violation of this provision it is by no means a sufficient condition for doing the same. Hence, dominance per se is not prohibited but only their abuse which will have an adverse effect on the competition and consumers in the relevant market is prohibited under the Act. As rightly observed, the competition law does not prohibit enterprises to attain dominant position, instead what the law

⁵ Prakash Sharma, *The Problem of Choice: Understanding Demand Side Credibility and Economics Through Effective Consumer Policies and Competitive Practices*, 1 *Emerging Competition Law* 283, 283, Wolters Kluwer (2017)

prohibits is subsequent use of that dominant position. In other words, when an enterprise uses its dominant position for preventing entry of new enterprises or conducts its affairs in a manner which amounts to anti-competitive practice, then it is prohibited. The concept of predatory pricing is also a mode of abuse of dominant position where the sale of goods and provision of services is made at a price which is below the cost of production with a view to reduce or eliminate competition.

One of the ways to abuse the dominance is to enter into another market. For instance in *Microsoft Corporation v. Commission*,⁶ the European Commission held Microsoft Company liable for infringement of article 82 of the EC treaty by committing abuses of its dominant position. The commission discovered that it engaged in two types of abusive behaviour: first, it refused to provide and authorise its competitors with interoperability information for the purpose of developing and distributing products that compete with Microsoft's own products in the workgroup server operating systems market. Second, they made the Windows client PC operating system available only if the Windows Media Player software was purchased at the same time. As a result, competition in the multimedia player industry has been restricted. The Commission levied a monetary penalty on Microsoft. They also directed for a corrective action to be taken by the Microsoft within a certain period of time, subject to a complex verification mechanism. Similarly in *IMS Health v. NDC Health*,⁷ the European court of Justice examined the question whether the refusal to license the IP for the data format constituted an abuse of a dominant position within the meaning of article 82 and also what are the relevant factors to be determined for analyzing IP is 'indispensable' to market entry.

The court held that a refusal to license IP is an antitrust violation only under exceptional circumstances. When access to the IP is required for the conduct of a certain business and the additional requirements are satisfied, the situation is considered extraordinary. One is that the IP owner's unwillingness to licence prevents the introduction of a new product that the IP owner does not sell and for which there is potential market demand. Second, the rejection has no objective validity, and third, it removes all competition in the relevant market. *IMS Health GmbH* filed a copyright infringement lawsuit in German National Court against *Pharma*

⁶ T-201/04

⁷ C-418/01

Intranet Information for providing data services in a format for which IMS Health owned the copyright.

Essential facilities doctrine

The Important Facilities Doctrine (EFD) refers to situations in which a company is required to give access to facilities that are essential to people under its control. It necessitates allowing other rivals access to a facility that a company dominates and controls in order to compete effectively. Under this philosophy, it is required to share the vital capability. More often than not, situations involving the EFD emerge when a vertically integrated corporation that is a natural monopolist in one market refuses to provide a rival in another market access to the monopolised input. The simple idea for this doctrine is that essential facilities such as harbors and ports for shipping lines, a computer reservation system for airlines, and high voltage electricity transmission lines and gas transmission pipelines for energy companies, must be made available for use by competitors where those competitors cannot or can only by incurring very high costs build their own version of such facilities. The ECJ ruled in Bronner case that before this doctrine could be applied it must first be shown that there is no real or potential alternative that would allow competition on that 'secondary market'. Providing the claimant with access to facility must be seen as the last resort. It is not sufficient that it would be expensive or difficult for the claimant to provide itself with similar facilities. It must also be considered whether there were alternatives open to the claimant even if they were less advantageous than securing access to facility in question. In the IMS health case the ECJ emphasized that there can only be an abuse due to refusal to access where the undertaking that sought a license to use the facility in this case copyright intended to offer a new product or service that was not offered by the facility's owner and for which there was potential customer demand.

Generally, EDF in India can be ascertained from the essential facilities controlled by the State earlier, For instance infrastructure goods, in particular in the Telecom Regulatory Authority of India (TRAI), Act 1997, the Electricity Act, 2003 and the Petroleum and Natural Gas Regulatory Board (PNGRB), Act 2006. Though not directly in the context of anti-monopoly law, Supreme Court had an occasion in VST Industries Limited v. VST Industries Worker's Union,⁸ to consider whether the private bodies possessing dominant position and engaging in

⁸ (2001) 1 SCC 298

infrastructure facility was performing a public function and expected to act in public interest or not. It was held that private bodies that possessed dominant position in the market were under an implied duty to act in the public interest. Hence, if the company performing a public function refuse to deal with any competitor, it would be under judicial scrutiny for performing an arbitrary action. In order to open up the market to competition, both the competition authority and the courts must balance the economic and competitive interests of the parties concerned in the public interest.

Apart from that, the idea of necessary facilities in India may also be deduced as obligatory licencing from the regulatory requirements of the Indian Patent Act, 1970. Accordingly, any person interested may apply to the controller for a compulsory licence on a patent on any of the subsequent grounds mentioned therein, which include reasonable public requirements with respect to the patented invention and reasons for the patentee's refusal to grant licence or licences on reasonable terms, at any time after the expiration of three years from the date of the grant of a patent. It also allows for compulsory licence to be granted for the growth of a current trade or industry, as well as the foundation of any new trade in India. Despite this, the philosophy is not explicitly stated but may be inferred from the regulation's provision. In other words, it mentions that if there is a refusal to deal by the patent holder it will create a trade barrier with respect to goods not protected by the patent, and then it can be ground for compulsory license which in turn meets the requirements of EFD.

In a nation like India, where both the IPR and competition law regimes are in their infancy, the link that exists has not been fully considered. Abuse of dominance under competition law is critical in preventing IP rights holders from abusing their rights. By establishing exclusive rights to owners and protecting user interests, IP laws aim to find a balance between research and development, expenditure, and incentives for innovation. When it comes to the reaction of competition law to IP protection, there is a type of paradox. The cost structure within the technological markets, would naturally lead to concentration of market power and any attempt by regulators to artificially fragment the market is likely to damage the efficiency of the industry to the ultimate detriment of consumers.

The basis of application of the doctrine of essential facilities lies in certain principles that are fundamental to the European jurisprudence, which are alien to Indian jurisprudence. Even while the courts in India have handled some concerns, it was not because of popular outrage,

but because of international duties. There has not been a case where enterprises have been mandated to share access to IPR in India. However, there is little consistency in the rulings of European courts as to what constitutes necessary facilities in the context of IPR. The United States Supreme Court has never addressed this issue, although having dealt with the duty of refusal to trade under IPR on several instances. These concerns have been handled by Indian courts in the context of forced licencing and refusal to trade under the Indian Patent Act, 1970. The necessary facilities concept, on the other hand, cannot be used to compel compulsory licencing simply because IPR produces market power in the goods. It is to be noted that defining essential will pose obvious problems. Firstly, a definition requiring that users have absolutely no alternative but to use a facility would undermine the doctrine because even extremely important facilities such as railways could conceivably be duplicated. Secondly, every monopolist possesses some advantage. However, requiring only users to suffer an economic inconvenience will reverse the general policy which every monopolist normally possesses in the market situations. A balanced definition is required to solve this problem. It needs to examine whether or not competition law upholds the doctrine of essential facilities. In this situation, it is to be noted that the needs of competitor, the preferences of the consumer and the analysis of the market are all irrelevant in determining what facilities are so essential that must be shared. So far, there is no case which provides a consistent rationale for essential facilities doctrine. It also ignores the social costs and advantages of a creator sharing with a competitor. However, there will be a need to apply this doctrine to preserve the public welfare when there are difficulties of public health. As a result, it is clear that the necessary facilities doctrine's logic is hazy and does not completely comprehend the intricacies of the situation, and that a straight jacket formula for essential facilities cannot be constructed and implemented.

Legally speaking, most of the competition legislations have not defined abuse of dominant position. An attempt to monopolize or misuse of market power is prohibited in the laws of most of the countries including India. This creates problem in the market economy. The approach in determining dominance is clear in India and the act also provides scope of compensation to the affected parties by abuse of dominant position. However, it is very difficult to determine abuse of dominant position based on market share and the judicial approach is also different in a case-to-case basis. European Union relies more heavily on the essential facility doctrine in comparison to the United States as a justification for controlling anti-competitive actions by a dominant firm. The doctrine of essential facility though not much has been developed in the

Indian context, need to be applied carefully as the boundaries of legitimate competition normally encompasses gaining and keeping exclusive access to assets that confer a competitive advantage. A dominant owner who acquired rights legitimately cannot be denied of advantages arising from the ownership on the basis of this doctrine. However, there is a legitimate duty on the owner to provide access to the essential facilities and not to make entry of other players into the market impossible and uneconomical. They can be compensated adequately by the new entrants for the advantage they are acquiring from the dominant firms.

Another concern is that since under IPR, individual initiatives are transformed into proprietary right which give the individual holder the right to exclude others who are in need to use their rights but not able to pay their demand, it is pertinent to find a solution especially in a developing country like India where both IPR and CL are in a developing state, therefore, both should work together for the public welfare. The refusal to access an essential facility has significant anti-competitive effects in a market. There is a duty imposed on the dominant owner to provide access on a non-discrimination basis to the customers who are also its competitors on the basis of sufficient compensation paid to the dominant owners. The courts should impose a duty on the monopolists to deal with essential facility only on a limited basis which is exceptional.

It is suggested that specific guidelines for cases dealing both with the IPR and CL need to be brought by CCI. Both the streams of law should complement to each other. In order to enhance monopolistic power in the market for the acquisition of IPR, India needs to regulate with adequate technology transfer standards. Because market dominance does not in and of itself violate competition laws, the techniques and methods employed to achieve such dominance should be investigated. Different licencing approaches should be examined in order to prevent abuse of dominance through the exploitation of IPR rights. Furthermore, because the necessary facilities philosophy has yet to be established in India, it may be made adaptable to meet the needs of the country. As a result, it can be concluded that both notions should be complementary for a better comprehension of the relevant legislation and the general welfare of the people.⁹

⁹ Avinash Sharma, *Abuse of Dominance & IPRs in India: The Emerging Jurisprudence in the Era of Digital Economy*, 1 *Emerging Competition Law*, 176, 176, Wolters Kluwer (2017)

Intellectual Property Rights, in general, are the rights to prevent others from exploiting a non-corporeal asset. Intellectual property rights (IPRs) are rights that can be asserted in relation to the output of human intelligence. Patents, design rights, copyright, trademarks, and other assets are all included in this category. When there are no replacements on either the demand or supply side of the market, it may frequently rise to substantial market dominance. In other words, IPRs may amount to entry barriers and make it difficult for new firms/competitors to enter the market. Nevertheless, this is not quite frequent. Patents, for instance, cover only the inventions and applications claimed and unless these are important patents are of little value. It has been stated that patent holders seldom extend their protection to other nations under the Paris agreement during the first year of application since the expense of filing further applications, including translations, may outweigh the patent's estimated value for more countries. Some patents and other IPRs, on the other hand, may be, and indeed are, extremely valuable, and the question arises as to whether the Competition Law should intervene to limit their scope, or whether this should be left to the concerned intellectual property legislations and the authorities established therein to deal with the scope of such IPR.¹⁰

At present, the prevailing view is that the IP law and competition law are not contradictory but must be seen as complementary components of a modern industrial policy aiming at promoting consumer welfare. It is viewed that the healthy and fair competition is generally important and indeed essential because it curb market distortions, induce efficiency in the use of resources, prevent monopoly or oligopoly, maintains prices at fair levels, prevent excessive or monopoly profits and promote consumer interests and welfare. In contrast the IP laws aim at protecting for a limited period of time the research and development inventions carried out by the inventor firms from being used by the firms producing similar products and subsequently making a profit on the same. That is, it grants the owners the right to prohibit others from commercially exploiting the innovation or invented subject matter for a short time. In this view, IPRs are monopolistic legal rights granted to the creators and owners of works, and they provide the owner or IP holder with a competitive advantage over the rest of the people, industry, or sector. In general, the function of Competition Law begins when a monopolistic legal rights advantage or dominating position is exploited by the owner or holder. Both IPRs and Competition Laws are increasingly recognised as being formed with the goal of attaining economic progress, technical innovation, and consumer welfare. While IPRs foster innovation and new products

¹⁰ Avinash Sharma, Abuse of Dominance & IPRs in India: The Emerging Jurisprudence in the Era of Digital Economy, 1 Emerging Competition Law, 176, 176, Wolters Kluwer (2017)

in the short run, the Competition Law promotes consumer welfare in the long run by bringing new items to the market and preserving the quality of the commodities on the market. As a result, these are complimentary strategies of encouraging innovation, technological advancement, and economic growth for the benefit of customers and the entire economy.

Competition Policy and Law

Competition is process of rivalry between firms, each seeking to win customers business. This rivalry may occur in a number of ways some firms compete on price, some focus on developing the quality of existing products or services, while still others use entrepreneurial or research skills to develop new products or services. Competition policy includes all those policy instruments that impinge on the promotion of competition in the markets. There are two elements of competition policy – i) first, a set of competition enhancing policies such as liberalized trade policy, relaxed foreign direct investment policy, deregulation, privatization etc. and ii) second, a law to prevent anti-competitive practices. Competition policy while promoting a healthy competition culture endeavors to uphold the principles of free and fair market process, removal of distortions and barriers, justifications and notification, balancing competition and intellectual property rights, ensuring public monopoly does not turns private monopoly, competitive rules and regulations, competitive neutrality, competition audit, involvement of stakeholders etc.¹⁹⁴ Arguably, there is considerable dispute about the aim of the competition policy and law. Whether we require it in order to protect competitors from being kept out of the markets they wish to enter or to increase efficiency and consumer welfare, or to increase efficiency and total welfare including that of the firm with market power. At first in the EU competition was perceived by many as protecting competitors, especially small and medium sized firms. However, in the last 15 years it is becoming increasing clear that the enforcement agency see it as protecting consumer welfare. The US went through similar stages at earlier periods and the enforcement agencies there state that they intend to protect consumers. Most economists, however, would prefer to protect total welfare like Canada wherein the efficiencies are relevant even if the cost savings and other benefits they generate are not passed on to the consumers. However, in most jurisdictions including the USA and EU, the anti-competitive conduct is not permissible unless part of the benefit is passed on to consumers.

In India, the purpose of passing of the Competition Act,2002 is to curb abuse of dominance,

anticompetitive agreements and encouragement of fair competition. The right to compete can be deduced from India's Constitution's article 19(1)(g), which provides the basic right "to practise any profession, or to carry on any employment, trade, or business." Indian competition policy aims to protect and promote competition by enforcing competition law against restrictive business and trade practises such as anticompetitive agreements and abuse of dominance, as well as influencing the formulation and implementation of government policies that affect competition.

The Supreme Court of India in *Competition Commission of India v. Steel Authority of India Limited & Another*,¹¹ observed:

“In terms of competition law goals, they differ from nation to country, and even within a country, they appear to develop and evolve with time. However, it will be good to review some of the common competition law objectives. The primary goal of competition law is to increase economic efficiency by utilising competition as one of the tools for aiding in the formation of markets that are responsive to customer preferences. Perfect competition has three advantages: allocative efficiency, which assures effective resource allocation, productive efficiency, which ensures that production costs are maintained to a minimum, and dynamic efficiency, which encourages creative practises. These elements have mostly been acknowledged as the guiding principles around the world.”

Protection of IPR

Patents, plant varieties, layout designs of integrated circuits, industrial designs, registered and unregistered trademarks, undisclosed information (sometimes known as trade secrets), geographical indications, copyrights and related rights are all examples of intellectual property rights. IPRs can be granted for a variety of reasons. It has the potential to attract many types of investment. Patent rights, for example, may be justified on the grounds that few companies would invest significant resources in R&D without the promise of an exclusive right. The inventor would meet competition from those who have not made a similar investment and are able to sell more cheaply. As a result, there would be little motivation to do the original R&D if others could benefit from it for free. It's also worth noting that national patent offices publish patent applications and claims, and that even before the patent expires, the protected invention

¹¹ (2010) 10 SCC 744

can be legally used for research and development by others, though not for commercial manufacture or sale, allowing for more research on previous work. In addition, IPRs make licencing negotiations easier. The licensee is unlikely to agree to pay a licencing fee or accept any limits on its conduct unless it has had the opportunity to test the technology, which would be difficult to arrange if the licensee could then utilise the innovation without breaking the law.

In general, there are two main reasons for granting IPRs in India and elsewhere: first, to give statutory recognition to the creators' moral and economic rights in their creations, as well as the public's rights to access those creations; and second, to promote creativity and the dissemination and applications of its results, as well as to encourage fair trade that would contribute to economic and social development. Having said that, it is quite difficult to ascertain as to how to reward those investing in huge R&D those which were indeed expensive to create but can be exploited at virtually no cost once they have been created. It takes resources to build a bridge or gas pipeline but once built it costs very little to permit people use it. This is often true for most of the technologies which is expensive to develop but can be used most efficiently if access was granted at average variable cost, often almost nil, but then there would be no incentive to make the original investment. It has been stated that the option of leaving it to the government to fund R&D is not satisfactory, as civil servants have been good at spotting winners, therefore, there is broad consensus in most developed countries to let the market decide the worth of the investment. This is normally done by giving an exclusive right to the person whose application first reaches the patent office. It can be then obtain the value of the invention by using it itself or assigning or licensing its IPRs at a price to others.

Clearly there is a tradeoff between providing the incentive to invest in innovation and the liberty of others to exploit the protected product. However, the tradeoff seems more theoretical rather than practical as neither side of the balance can be quantified. Competition in innovation however is widely thought to be more important than competition from someone providing the same product in the same way. Joseph Schumpeter said that:

“Competition that counts is competition from the new commodity, the new competition the new sources of supply, the new type of organization competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives”

This clearly demonstrates why dynamic competition in innovation is considered by many to be

more important than static competition between suppliers of similar products. Further, it is to be noted that most IPRs are limited in various ways by the legislation granting them to encourage them to encourage competition. However, it is also to be remembered that they do not last forever. Even trademarks last only so long as they are used. Similarly, there are exceptions to copyright protection for fair use, or to patent protection for research purposes. Likewise, compulsory licenses may be granted by the patent office. The question arises whether such limitations should be provided for ex ante, before the commitment to invest is undertaken, by legislation, or whether they should be imposed ex post by competition law or both.

Competition law enforces IPR:

IPRs are seen as an exception to the general rule promoting free competition. Clearly, the protection is not meant to continue even after the objectives of IP have been achieved. In cases where IP is unable to prevent the extension of such power beyond the realm of the intended protection, competition is capable of playing this limiting role. Hence the attitude of anti-trust to IPR is not hostile. It acts to ensure that the inherent purpose of the rights is not defeated, if and when the IP owner exceeds the essential function for which the right is granted, such as protection of innovators achievements against free-riders and protection of the firm's reputation and identity. Such an occasion may arise when contractual exercise of IPRs, results in competitive restraints, far in excess of the need to protect the owner against free-riding. One can argue that in order to prevent abuse, IP laws, eg, compulsory license itself been provided but that should not and must not restrict the competition authorities to invoke antitrust enforcement. It may also happen when IPR grants such a degree of market dominance that compulsory license of the right to a third party is justified.

In such a situation, IP law may not be able to control the exercise of the right when the consequence of such exercise exceeds the purpose for which it was granted. It is at this point that competition law becomes relevant, because it is equipped to deal with the consequences of the exercise of property rights. Therefore, in such circumstances the functioning of competition law protects the ultimate goal of IP law when the latter may be incapable of ensuring the same.

Like most other jurisdictions the EC also had a period of misunderstanding of the economic effects of IP leading to very strict overruns on the exercise of such rights. Gradually, this gave way to a more realistic understanding of IP. It recognizes the distinction between legal and

economic monopolies and therefore no longer assumes that the existence of IP automatically grants market power to the firm in question. More importantly it extends to the exercise of IP the general caveat in Article 102 of EC Treaty that the mere existence of dominance is not sufficient in order for action to be taken under anti-trust policy. It has made significant changes to its competition doctrines in order to make sufficient room for IPRs not just to innovation but also to competition. That the incentives to innovation created by IPRs produce new competitors and products which lead entirely new markets has been acknowledged. Further it presumes pro-competitive and pro-innovative effects and aims to ensure better diffusion of IPRs through the common mark.

To reconcile IP and competition, the Court of Justice of the European Union has distinguished the existence of the right granted by national law, which must be respected by EC law, from its exercise, to which EC prohibitions could apply. One consequence of this separation is that it allows the CJEU to respect the decision of a member state to grant special protection to certain forms of IP, resisting the temptation to interfere with the national IPRs of any member state.

It should be highlighted that there are still instances where an IP owner's exercise of a right that is legal under the IP system may be illegal under the competition regime. In such circumstances, EC competition law provides no exemption just because it is consistent with IP legislation. In such cases, competition rules reserve the power to interfere. It is erroneous to believe that IP has higher value merely because it is afforded particular legal protection by most legal systems; such protection can be ascribed to its fragility, which results from a lack of adequate protection in civil and criminal laws, rather than its superior worth.

The possibility of unlawful situations arising under competition laws, when the same is still lawful under the IP regime, however, shows that the competition authority is required to act as per the policy laid down and not revisit the trade-off between the efficiencies of the two spheres in each individual case before it. In addition, this aspect also demonstrates why the enforcement of the two legal regulatory mechanisms need to be kept distinct and independent of each other what is lawful under one might not be so under the other and independent consideration needs to be given to ensure that the objectives of the latter are protected and promoted.

Competition law and IPR convergence in India

India has always been accused of insufficient protection to intellectual property rights. This is

despite the fact that there have been phenomenal changes in India's IPR laws, IPR policy and the attitude towards protection of IPR by the judiciary since the heyday of economic liberalization, privatization and globalization, the latest example is when a delegation of US lawmakers visited India and "while India took up its \$110 billion IT sector's concerns on the proposed restrictions on the U.S. non-immigrant visas for foreign skilled workers, the American lawmakers led by Bob Goodlatte, chairman, Judiciary committee, House of Representatives raised concerns on IPR issues, including the need to strengthen copyright norms and provisions to encourage and protect innovation." Putting it simply, the disagreements between India and the western world regarding IPR protection in an era of globalization are twofold- one concerning the ideological understanding towards globalization and the other regarding the relationship of investment and innovation.¹²

The stories of India's troubles with globalized IPR regime and the criticism it has faced is quite long, but there have been certain highpoints along judicial scrutiny of IPR in India in the past almost half a decade which reflect the narrative of the overall journey during this period in a succinct manner. For example, the end to a long-drawn court battle fought by Swiss multinational pharmaceutical manufacturer claiming a patent, or the only compulsory license issued by the Controller General of Patents and Trademarks against patent of a German company, or the decision of the High Court of Delhi in the copyright infringement suit filed by a group of publishers in the United Kingdom. All these are highpoints in the turbulent travel of the Indian IPR regime. Also, the Competition Commission of India, a creation of the Competition Act, 2002 has also been party to a dispute concerning the infringement of patents fought by a Swedish multinational which holds huge number of patents pertaining to the telecommunication sector.

It would be difficult to consider all these abovementioned cases wherein many courts, forums, suits and applications were involved but an essential question that holds importance in all these cases is- what is the standard of protection that any private intellectual property law must yield when it comes at loggerheads with interests of the public at large? In view of the fact that while intellectual property law and competition law both work towards maximization of efficiency in the markets to serve economic interests of the nation and public, a collective reading of both

¹² Anku Sharma, Increasing Access to Knowledge using Competition law-IPR Convergence in India, 1 Emerging Competition Law 215, pg. 215-216, 2017

these laws can facilitate to ascertain how they can complement each other in protecting these interests.

One of the ways of collective reading of the two laws is to zero down to one of the interests that both laws have considered under the ambit of public interest in many situations the interest pertaining to access to knowledge. Being one of the most important wheels for India's drive towards a knowledge-based economy, access to knowledge is one of the important interests which comes under the ambit of public interest.¹³

Competition & IPR convergence

Scholars share the view that Competition law and Intellectual Property Rights law work towards the same goals of enhancing efficiency and welfare. However, this conclusion seems to be derived out of the success of simultaneous application of IPR and Competition law in United States and the European Union, as has been proved by an evolving jurisprudence across the overlapping areas of these laws. Another justification for the shared objectives of these laws stems out from their respective roles in a market-based economy. Lastly, the engagement of a large number of countries with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and many countries implementing competition law and policy bears evidence to the acceptability of common standards as regards both the laws across the globe.

To begin with a question can be asked that is it possible for the competition law and IPR laws to actually converge or not. The answer could go in multiple directions. One reply could be that both these laws are independent of each other due to their very nature, where one grants monopolies and the other controls them, and at times they overlap each other. Other view could be that when the limited monopolies granted in the form of IPR are abused competition law comes into operation. Also both these legal regimes can be considered to be products of the market based economy which try to serve as justifications for some of the inherent flaws in it. The common area of operation of these laws being related to dynamic efficiency in an economy, they aim at neutralizing the imbalances in the market through regulation.

Schumpeter argued in his theory of creative destruction that monopolies may be beneficial for the market as they not only incentivize innovation but also drive away the incompetent out of

¹³ Ibid

the market. His discourse and the concept of dynamic efficiencies seems to be a justification for existence of a subject like the interface of competition law and intellectual property rights law at first place. In this process he rejects the viewpoint of the classical economists and their mode of analysis which included only demand-supply and price-based analysis as the determinants for measuring growth. But he himself argues that it is very difficult to quantify the gains or losses that may be caused by new products or new technologies in the market.

The point is that when it has not been possible to quantify the economic gains or losses of new products or technologies when the branch of economics related with dynamic efficiency has been consistently working in this domain for more than a century now, is it possible to ascertain their effects on the society. And if not then are there any ways of determining what kind of technologies will be appropriate for a society, at least economically, if both these questions are answered in the negative, it is indeed well acceptable to consider that if any of these new products or technologies are made available to the minds at work to create more robust products or technologies, it might cater to the needs of the society. That is where increasing access to knowledge regarding these new products or technologies or the technical and educational know how involved are usually something which make more sense.

Applying both the laws together

Though legislations pertaining to competition law have mushroomed in developing as well as least developed countries but the dearth in application of these laws with respect to IPR related matters is quite evident.

Much of the existing body of literature on the interface in India also either compares it with its mature counterparts in the European Union and US or draws inspiration from the same. Primary reasons that can be attributed for an extensive reliance on comparative literature can include the development of the subject being at a nascent stage in India and TRIPS calling for minimum standards of IPR in member states. These reasons seem appropriate because Indian laws related to intellectual property and competition have been undergoing remodeling since 1995 in line with India's commitments in the World Trade Organization (WTO).

Compulsory licensing of IPR

One of the four factors while considering an application for grant of a compulsory license to a

patent requires that the applicant should have made efforts to obtain license. Proviso to this factor applies on establishment of a ground of anti-competitive practices, adopted by the patentee. TRIPS members might include licencing methods or conditions in their laws that may constitute an infringement of intellectual property rights and have a harmful effect on competition in the relevant market. Conditions of the sort of grant back conditions, conditions prohibiting validity challenges, and forced package licencing, among other things, may be legislated against in order to better defend IP rights. Copyright law in India also contains provisions for the grant of compulsory licenses in cases where the work has been withheld from public. Aforementioned are some of the effects and remedies suggested by IPR laws of a much broader discussion front the interface.

Anti-Competitive Agreements: At the outset a pre-contractual obligation is set out in section 3 of the competition Act, 2002. This obligation prohibits enterprises from agreeing on those terms which cause or are likely to cause adverse effect on competition. Any agreement which does not adhere to this obligation is void. Explanatory classification can be made amongst these obligations where on one side there are agreements are presumed to be having AAEC and the other ones characterizing less pernicious agreements where the AAEC needs to be established. Nonetheless the presumptive ones have a saving room for agreements entered into by way of joint ventures if they increase efficiency.

Presumptions can be rebutted and determining AAEC itself requires regard for various factors. The factors in toto for reaching at the stage of AAEC range from limiting or controlling markets, technical development etc. to promotion of technical, scientific and economic development at all. Anti-competitive agreements are seen from the point of view of its likely effects on the market.

These likely effects may then be characterized to be determined through various efficiencies especially when the claims are made to use a modern economic approach.

There are three types of efficiencies essentially attributed to the modern more economic approach which are allocative, productive and dynamic. Wherever there is a question of developing markets through introduction of new products or processes, dynamic efficiency is taken into account. For example, if an enterprise charges somewhat higher price than desired out of it for necessitating competition to use the marginal profit above desired level to introduce

a new product in the market by using excess within that marginal profit, it is seen as adding to dynamic efficiency of the market and can mitigate such high pricing effects.

Dynamic efficiency is seen as an important imperative in the favor of IPR which are made to incentivize owners so that they can contribute in developing markets through innovation which is the third aspect of dynamic efficiency. Thus IPR agreements which essentially are supposed to be aimed at furthering innovation, therefore, require a treatment at first place while determining AAEC where the positive effects in present and future may outweigh negative effects. A balance is required to be created. Empirical economic analysis to measure its effects is essential in each case where the subject is IPR.

Another anti-competitive filtering method for IP agreements states that any person's right to prevent any violation of his exclusive right is immune from anti-competitive examination. The installation of reasonable conditions required for the protection of any of an IPR owner's rights is also immune from such scrutiny. The first type of exemption seems to be revolving about the existence of an IPR, while the latter seems to be closer to the exercise of IPR. The former can be further classified into protection which the owner seeks to set out his claim of copyright that is existence as such, and the protection by owner by way of oppositions, infringement suits etc. which although came only after grant of IP but still very much relate to the existence and exercise of IPR as such in the statute. But this has been constructed from the intent of the legislature while drafting section 3(5).

Interface in Competition Act regime

The Indian scenario after the Competition Act came into effect in 2002 is that there is a blanket exception for IPR under Competition Act. The real issue is the exercise of IPR rights under competition law regime. Striking a balance between implementing competition laws and the innovators right in enjoying his rights granted under IPR regime is the goal to be achieved. Intersection of IP and Competition Law is observed when there is an imbalance between the exclusivity rights accorded by IP law and anti-competitive practices that the Competition law tries to protect. Section 2 (5) gives an impression that the protection granted under the IPR regime is a complete exception to the application of competition law. This is not true. Section 3 requires the Competition Commission to investigate anticompetitive agreements, and those that are determined to be anticompetitive are declared void. Competition legislation is still an important tool for guaranteeing innovation and economic prosperity. There can be no ultimate

right, because every right comes with limits, obligations, and restrictions. But the rights granted under IP laws would be meaningful and lasting only if it provides that an IPR holder may at any time be able to take legal action for protection of his IP rights. This is what section 3(5) of the Competition Act says about restraining any infringement of, or imposing reasonable conditions, despite the fact that the term "reasonable conditions" isn't defined or explained in the Act. Section 3(5) of the Competition Act acknowledges the viewpoint that IPR protection is required to achieve greater consumer benefit. It is IP protection that leads to new innovation and it is new innovations brought to the market that gives free choice to the consumers. It is this free choice to the consumers that leads to prevention of monopoly and also promotes and sustains competition which is exactly the aim of any competition law.¹⁴ IP and Competition law conflict can be better understood by the following circumstances:

(i) Standard Essential Patent holders:

Many a times technology that is required to implement a standard is protected by patents. Those patents without which a standard cannot be implemented are termed as "Standard Essential Patents". In such cases, the patent holders, who already enjoy regular exclusionary rights over the patented technologies, have an added advantage by virtue of their technologies being essential to standards. This is because a large number of industry players want to sell standard compliant products and will therefore license SEPs giving the SEP holders a competitive advantage over others. Thus, Standard Setting Organization is seen implementing IPR policies.

(ii) Copyright holders

In the case of Copyright holders, CCI's jurisdiction has also been a point of contention. This issue was addressed in depth in the case of Amir Khan Productions Private Limited v. Union of India. In this matter, the FICCI (Federation of Indian Chambers of Commerce and Industry) filed a complaint against the United Producers/ Distributors Forum (UPDF) and others for allegedly engaging in a market cartel in film distribution against multiplexes. UPDF refused to negotiate with multiplex owners in order to increase their earnings. Films are the exclusive

¹⁴ Harita Devi, Intellectual Property Rights and Competition Law- Friendly Foes, 1 Emerging Competition law, 236, pg. 240-241, Wolters Kluwer (2017)

source of revenue for multiplexes. As a result, this reluctance to negotiate is anti-competitive. The UPDF and others own nearly a hundred percent of the Bollywood film business. By refusing to negotiate with multiplexes, UPDF was limiting/controlling the availability of films on the market. Hence the contention against UPDF was they were violating section 3(3) of the Competition Act, 2002. CCI has determined that there is an anticompetitive agreement and that a dominant position has been abused. As a result, the CCI instructed the Director General (DG) to investigate the situation. The DG investigated the subject and concluded that there was a cartel. A show cause notice was issued by CCI. Instead of responding to the show-cause notice, the UPDF went to the Bombay High Court. UPDF argued that because films are protected by copyright, only the Copyright Board has jurisdiction to deal with the issue. Furthermore, it was argued that the sole remedy for exclusive licencing is a compulsory licence provided under the Copyright Act, thus the petitioner opposed the CCI's decision on the grounds of lack of jurisdiction. Given the gravity of the situation, the Bombay High Court held a lengthy hearing on the subject. The court decided that section 3(5) does not exclude a person from suing for violation of a patent, copyright, trademark, or other intellectual property right. All of the defences that can be raised in front of the copyright board can also be used in front of the CCI. The implementation of other legislation is not prohibited by competition law. But it is seen that even in this case the issue of clash of jurisdiction of copyright board and that of the CCI has not been decided with clarity. Instead the Court has only said that CCI is also having jurisdiction. Hence there is an overlapping of jurisdiction among the authorities regarding IP issues.

The same position has been observed by the European Court of Justice (ECJ) in the Magill²²⁶ case involving the issue of whether the owner of copyright-protected TV programmes listings could exclude competitors from the derivative market for weekly TV guides. Because of the lack of actual or possible replacements and the obstruction of product innovation, as well as the unfair leveraging in a secondary market and the lack of legal explanation, the court determined that the refusal to licence constituted abuse in extraordinary circumstances. The appellants' contention that an entity in a dominant position's behaviour comprises of the exercise of a right designated as copyright under national law can never be evaluated under Article 86 of the treaty was rejected by the court. As a result, rather than focusing on whether

the activity was inside or beyond the scope of the IPRs granted, the court focused on whether it was anti-competitive.

The status of the law in U.S is no different. In *Twentieth Century Music Corp. v. Aiken*, the court reiterated that the immediate aim of the copyright law is to make sure that the author gets a fair return, however, the ultimate aim is to stimulate artistic work for public good. Thus, the aim and objective of both IPR and Competition Law is to promote innovation and interest of the public along with furtherance of competition in the market for common good.

"The legislative objective was to offer a higher level of protection to pure original creative works and a lower level of protection to commercial operations," the court stated in *Microfibres Inc v. Girdhar & Co.* As a result, the legislature's meaning is very clear: "The protection afforded to commercial works is on a lesser level than and should not be compared with the protection afforded to pure Article works.

(iii) Licensing of Patents

Another area where there is a conflict between IP and competition law is licensing of patents. While exercising their intellectual property rights, the owners of these rights, especially the patentees and copyright holders, impose certain conditions that can have a conflict with competition law. The patentees while licensing their patents may impose reasonable conditions on his licensees or buyers that are an exercise of his rights granted under patent issued to him. But in this purported exercise of those rights the patentee cannot directly or indirectly interfere with the competition process. This creates conflict between intellectual property rights and competition law. Whenever there was an exceeding of limits by the patentee in the form of price fixing, resale price maintenance, allocation of territory etc.

(iv) Cartels

Cartel is yet another issue that is dealt elaborately under the competition law. Formation of cartels is a prevalent practice among industries and firms. Recently the proprietors owning IPRs have indulged in formation of cartels and thereby causing distortion of competition in the market. An evident example of the same

can be traced from the film industry as it involves both IP issues i.e., copyright along with competition law provision affecting the industry.²³⁰ Undoubtedly, IPR owners can enjoy the fruits of their intellectual thinking by way of royalty. But this right is not absolute without restrictions. The jurisdiction of other countries also highlights the fact that exercise of rights under IP laws is subject to the competition law.

Conclusion

The roles of intellectual property laws and competition law are complementary since both have the same goal of safeguarding consumers. It is critical to maintain competition in the creative arts because competition guarantees that customers get the greatest results. Intellectual property rights provide the owner exclusive rights, but not monopoly rights, which would decrease or eliminate competition in the market. They are charged with separate sectors of regulation, namely economic protection for inventors and fostering and maintaining competition in the market when innovators enter the market, therefore there is no fundamental contradiction between them. It is to be noted that the coexistence of IP and competition alone would increase economic and consumer welfare. IPRs and Competition law goes hand in hand.

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