ANTI-COMPETITIVE PRACTICES THROUGH IPR IN CYBERSPACE

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ABSTRACT

IPR'S are the intangible assets and legal right given to the person for the creation of his/ her mind. These rights are usually granted for a specific amount of time wherein they grant the creator with an exclusive right to exploit his/her creation. In India, we have variety of Intellectual property rights like: copyrights, patents, trademarks, geographical indications, designs etc.

But, a lot of tech companies under the garb of IPR are indulging in a lot of Anticompetitive and monopolistic practices in the name of cybersecurity and are disrupting the emergence of technological and scientific advancements in the world and we know that all of these software, systems, network, computers, mobile phones are a part of cyberspace.

Keywords: IPR, Anti-competitive, technology, intellect, software, cybersecurity, internet, cyberspace.

Introduction

The internet has made todays human culture unduly reliant. Electronic gadgets like computers, mobile phones, tablets etc. may now function and talk for people. All thanks to the use of AI and the internet of things (IOT). This means that, these machines and internet have 'hegemonize' humans completely. Even 4-year kids are now going gaga over internet. There is a famous quote by **Gulrej Khan** that says ***"Internet addiction is a slow poison to Intellect"***. Internet takes away the thinking ability of humans. They in fact works in accordance to the devices, internet etc. But, in reality Human intellect does, in fact, operate the machines. Humans are the ones who are making these machines, the software, the hardware, the infrastructure to connect to internet. Thus, when humans use their intellect to create something new, they want that their intellect and invention to get rewarded and this is done by way of IPR'S.

But as humans have started getting rewards for the use of their intellect by way of Intellectual property rights, they have also started abusing their dominant position against other humans which is obstructing the economy and technology development. Thus, it becomes essential to strike a balance between intellectual rewards and use of the rewards in the market.

The interplay between IP Law and Competition Law

The two principal areas of law that manage the industry and encourage consumer well-being and technological transfer are competition law and intellectual property law. In order to maintain a competitive and dynamic economic market, the interface between IP laws and competition law is tremendously vital. Both of these laws are related to consumer well-being. Competition law main intention is to prohibit any actions that stifle commerce and to supress monopolistic practices. Whereas, IP law, provides a benefit to Intellect of the owner of intellectual property by providing them right to freely use their rights and right to uphold exclusivity. Both of these laws aim to ensure technological advancement and maximum benefit to society as whole.

To succeed in this competitive world today, many tech companies are in dire need to build brand image and attract majority of customers and hence, they are constantly involving themselves in technology development by way of new software, devices and internet related services while also protecting their IPs. But, while developing their own market share, these companies are often caught in a situation of anti-competitive practices. While these companies

take a defence of cybersecurity, the competitors are not given appropriate opportunity to provide the advancements to the society which is against the provisions of Competition law.\

Conflicts

1. **Don't shroud technology-related information under a veil of secrecy:**

A patent is a sort of exclusive intellectual property right that grants its owner the legal right to prevent others from creating, using, or selling an invention for a specific period of time (20 years in India). After the expiration of 20 years the right will exhaust and the information will come in public domain. But the issue comes when the big Tech companies starts using patent as a way to monopolise their right and not for society welfare.

1.1 One of the examples in the above-mentioned context is the **mobile patent controversy** since 2009. There is a belligerent competition in the smartphone market with respect to the multitouch capabilities feature. Multitouch is a vital feature to a smartphone now a days. The unlocking of a phone, texting, clicking a picture, playing games, browsing and other things happens in a split second with the help of multitouch gesture. As claimed by Apple it was Apple's iPhone that started this multitouch feature and as expected Apple has patented its multitouch technology which has seen many litigations and finally come out on top as it is Valid.

Apple on the basis of its patented Multitouch feature has sued many big tech companies for infringing its patent and using its multitouch feature in their mobile devices. In the year 2011 Apple has accused Samsung of infringing on its patents for "multi-touch gestures" and "tap to zoom" features.in the following year, the Court stated that Samsung had infringed the multitouch gesture patent. Apple requested $2.5 billion in damages, but the judge decided that Samsung should pay $1,049,343,540[1]. HTC (tech company) created its own multitouch user interface layer for Android and Windows Mobile, but Apple eventually sued, alleging patent infringement.[2] Many other companies were ready to take the risk of getting sued by using this multitouch feature deployed by Apple. This is because big tech companies **"won't be able to compete against iPhone"** if their devices don't support multitouch.

[1]Samsung agrees to pay $548 million to Apple for patent infringement, https://www.androidauthority.com/samsung-agrees-to-pay-548-million-to-apple-for-patent-infringement-659895/(Last visited May 3, 2022).

[2] What the mobile patent fight is all about, Krill, P., 2010. https://www.infoworld.com/article/2626882/what-the-mobile-patent-fight-is-all-about.html (Last visited April 30, 2022).

Now the question arises that if Apple had already patented the multitouch gesture then how can other companies produce touch screen mobiles? The answer to this question is very simple: The multitouch/multifunction interface used on Apple's mobile devices and the newest Mac with a "touchbar" is covered by Apple's patent. Other companies are either licencing to their technology or they are using alternative touchscreen technology. For example: google holds a patent on Capacitive touch screen. But originally apple was not the inventor of touchscreen. In 1970, the first commercially effective resistive touch screen was produced, and the PLATO IV was released in 1971. It was 1983 which marks the day when first multitouch touchscreen was formed. Initially Apple was denied patent over Multitouch screen gestures but after a long battle in the year 2017 its patent was upheld.

1.2 Also, since several years Apple has been releasing newer versions of iPhone but we look closely there are not much changes to the basic layout of the iPhones. After a point of time Apple does not provide software updates on the older version of the iPhone. All of these practices are anti-competitive and are withholding the technology which can be used for public good. This is kind of evergreening practice.

2. Decrypting the legal issue of intellectual property vs. the right to repair:

Apple's anti-repair policies were augmented when they launched their latest iPhone 13. This makes it nearly impossible to fix ones iPhone outside the purview of their own stores. Even in case a customer gets their iPhone fixed via third party and the parts used are genuine and original apple part still the software will stop the customer from using iPhone completely unless the reparation is verified by Apple stores only. They will block various functions and apps for the customer, thereby forcing the customer to get it repaired via authenticated Apple stores.

Under the guise of IP rights, the company and the manufacturers are exploiting their dominating position. This contravenes the provisions of. This violates section 4 of the act. Section 4 of the competition act states that 'No enterprise shall abuse its dominant position'.[3]

This compels users to replace rather than fix their devices, thereby inducing a "throw-away culture" rather than a "repair culture." As getting the mobile repaired by the authenticated stores very costly and thereby opting to buy a new phone all together. To promote replacements, repair fees are maintained high.

[3] The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).

Therefore, it becomes very necessary to introduce 'right to repair' legislation. Currently, many states of U.S.A have adopted this legislation. Many other countries have already recognised this legislation. EU has adopted this legislation in 2019. In UK, this legislation was enforced on July 1, 2021. But India right now doesn't not have such a legislation. The right to repair is a freedom right which allows technology users and consumer the ability to repair, modify, or seek third-party servicing of their electronic devices[4]

3. Is cybersecurity really a threat?

Now the debate is between these authenticated manufacturers and the third-party repair. Big tech companies like Apple, Verizon and others wants the legislation to be quashed as they have fear that such a legislation would bring their cybersecurity in question.

According to them, if such a legislation gets recognition, then these manufacturers would be required to divulge critical technical details about the products, they are selling so that the third-party repair can easily obtain the spare parts without any difficulty and this would make it easy for cybercriminals to do things that would attack the cybersecurity and would also breach their privacy. The third-party repair would get sensitive information about the product once they open up the device to repair it. This is just like open your door to a stranger where you don't know what is the next step they are going to take. This could lead to hacks, data and information theft and cyberattacks.

But the third-party repair and the consumers are arguing that such a legislation should become effective. Manufacturers who are currently backing up this legislation are actually strengthening the security rather than harming it by providing credentials and authentic, high-quality auxiliary parts. When the customer is purchasing the mobile devices, he/she gets the unconditional right over their devices. They have a right to get their devices repaired where ever they want. They cannot be stopped from getting their devices repaired.

So, cybersecurity is really not a threat but just a fear these tech companies are spreading to maintain competition and dominant position in the industry.

[4] Challenging cybersecurity as the reason to oppose the consumer Right to Repair, http://cyberlaw.stanford.edu/blog/2021/01/challenging-cybersecurity-reason-oppose-consumer-right-repair (Last visited May 4, 2022).

Suggestions to overcome these conflicts

1. The Purpose of Patents Is to Disseminate Information to the General Public. Patents are one of the most well protected and well enforced IPRs but its main goal is to do technology transfer so that the public interest is upheld. Apple by withholding technology is disrupting with the healthy flow of technology in the world and thus, this is against the very purpose of patents. In case some technology is benefitting the whole society as a whole and is helping in technology transfer then Apple being a trillion-dollar company is under obligation to share the technology and information with the society as a part of corporate social responsibility.
2. The legislation: Right to repair is very essential. As the gadget ages, there are cases when a device needs to get repaired or needs some spare parts to replace original parts but they are not available in the market. In such a case, the customer is left with no option but to visit to the authenticates Mobile company stores which is a costly event due to the expense of fixing or replacing spare components. Consumers are left with the choice of purchasing a new device rather than incurring significant repair costs. In India, we do not have this specific legislation up till now.

But the case of **Shamsher Kataria v Honda Siel Cars India Ltd,** [5]changed the scenario completely. In this case, 14 automobile manufacturing companies were found liable their anti-competitive practises and for abusing their dominant position. They were engaged in selling the spare parts of various automobiles to authorised dealers and not to independent markets. With respect to the above-mentioned practice CCI stated by issuing a directive against these automobiles companies that the Consumers have freedom to choose between independent mechanics and authorised dealers.

Therefore, it is imperative that like other countries we should have Right to Repair as a proper legislation. Thus, upholding public and society interest at large.

Conclusion

It may be argued that, while there are numerous disputes between IPR and Competition law, there are extant acts and legislations that assist bridge the gap between both of the laws. It also becomes the duty of the companies operating in a particular market to maintain healthy competition and refrain themselves form all the anti-competitive practices that may harm the

[5] Shri Shamsher Kataria vs Honda Siel Cars India Ltd. & Ors, 03/2011

pubic at large and technological development of the world. On one hand, Competition law aims to provide consumers with a broad range of options and to strike a balance between the manufacturer's and customers' rights by maximising profit while providing a high-quality product at a low price. IPR also enables the producer to get compensation for the product's sole creation, which benefits the general public. The IPR's monopolistic position appears to be legal, but misuse of the position may be illegal.