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INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 2

2020

Interface between Intellectual Property Rights and Competition Policy Safeguards against Anti-Competitive Activities of I.P. Owners

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ABSTRACT

This research paper revolves around the Inter-relationship between the Competition Policy and Intellectual Property Rights. It explains how the Competition Policy could clash with the activities in relation to Intellectual Property Rights. It further mentions the kinds of anti-competitive activities indulged into by the IP holders and how the Competition Law of the country comes into play in order to regulate competition in the market, promote economic and consumer welfare. Apart from this, the research paper also covers various safeguards provided against anti-competitive activities of IP owners. Later, the paper has discussed about India's Position with regard to the interplay between the Competition Act, 2002 and the Intellectual Property Laws of India along with some landmark cases in relation to it.

I. INTRODUCTION

"He, who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." - Thomas Jefferson

Intellectual property (IP) alludes to manifestations of the mind like inventions; literary and artistic works; designs; and symbols, names and pictures utilized in commerce. IP is protected in law by, for instance, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create.[2]Competition Law in layman term means a law that promotes or seeks to maintain market competition by regulating anti-competitive conduct by companies. According to the Cambridge Dictionary, *the laws that are intended to make sure that there is afair competition between businesses, for example by making rules to control monopolies.*[3]

Intellectual Property Rights (IPR) and Competition Law are closely related and are part of the

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[2] What is Intellectual Property *available at* https://www.wipo.int/about-ip/en/ (Visited on 02.04.20)
[3] Cambridge University Press 2020

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same bowl. The former gives an exclusive right to the owner to sell a particular good or service or technology that result from some form of Intellectual creation. Intellectual property could be in the form of a Copyright, Patent, Trademarks or Trade Secrets.*Intellectual property (IP) allows consumers to make choices between competing entrepreneurs and the goods/products and services they sell. Therefore, IP is inherently pro-competitive because it ensures the protection of differentiated, intangible business assets.*[4]However, the aim of Competition Law in the country is to regulate the competition in the market and to restrict any unfair trade practice which is detrimental to other traders and economy in general. The most common problem that the Competition Law faces is when the Intellectual Property Right holder abuses his right in such way that detriments the consumer's welfare and innovation. Hence, competition law is germane to the area of intellectual property (IP) and may be invoked by the consumers or by any interested, intrigued or affected third party to ensure that the IPR holders are not abusing their dominant position. The relationship between Competition Law and Intellectual Property Rights (IPR) is one of the most debated topics in recent years. Competition Law has been regarded as the most efficient instrument by administering it's policies in countering and combating anti-competitive agreements, prohibiting abuse of dominant position, regulating mergers and combinations and provoking efficient allocation of resources to ultimately benefit the consumers, providing them with variety of choices, better quality products at a reasonable price. Intellectual Property Rights affirms for striking a balance between the exclusive right of the owner and the social interest. It ensures that the owner of the intangible property gets an exclusive right and protection, so as to exploit commercially his intellectual creation, gaining the monopoly rights thereof. IPR comprises of a heap of rights which gives the owner the right to bar others from accessing the product, subject to a limited timeframe.

II. LITERATURE REVIEW:

For this paper, I have referred to many books one of them being *"The Interface between Intellectual Property Rights and Competition Policy"* by *Steven D. Anderman* and research papers online. I have also gone through multiple agreements such as the TRIPS (The Agreement on Trade-Related Aspects of Intellectual Property Rights), Paris Agreement, etc. I have also gone through multiple enactments specifically the Competition Act, 2002 and the Intellectual Property Laws of India.

[4] IP and Competition Policy *available at* https://www.wipo.int/ip-competition/en/ (Visited on 02.04.20)

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III. COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS:

The Competition Policy and IPR are closely interrelated. According to the United Nations Conference on Trade and Development (UNCTAD) document on '*Examining the interface between the objectives of competition policy and intellectual property*'[5] the main objective of IPR is to encourage innovation by providing the relevant incentives and rights. This objective is achieved by granting to inventors some exclusive rights on their inventions to allow them to recover research and development investments and earn profits for a certain period of time. The objectives of Competition law are instead those of promoting efficiency and enhancing economic growth and consumer welfare. To achieve them, Competition law constrains some rights arising out of private property for the benefit of the community. Competition is considered desirable for the economy because it calls for innovation, advancement and enhances competitiveness. While IPR is about individual rights offering security and protection to private rights on inventions, Competition law shields the interests of the market and the broader community, by restraining those private rights that may harm the community's overall wellbeing and prosperity. The interplay between Competition Policy and IPR can be laid out in the following cases:

1. Licensing Contracts:

One of the key roles of Competition Policy is to review anti-competitive effects of licensing contracts (regulating the transfer or exchange of rights to the use of intellectual property) that causes exploitation of market power. It is commonly agreed that the licensing of intellectual property generally has favourable effects. It facilitates the dissemination of technological innovation and know-how and their exploitation by firms which may have a greater and better comparative advantage. Production could be made progressively efficient and product quality could be enhanced when technologies are used in a complementary manner. However there are some situations that may arise in which exclusive license totally excludes other firms from entering the market, this where competition law needs to come into force and prevent such undesired market behaviour. This is where Compulsory Licensing comes into the picture being a safeguard against such activity. According to the OECD (Organisation of Economic Co-operation and Development) document on 'Licensing of IP Rights and Competition Law'[6]the

[5]United Nations Conference on Trade and Development, 'Examining the interface between the objectives competition policy and intellectual property', Intergovernmental Group of Experts on Competition Law and Policy, 15th Session, October 2016, available at **http://unctad.org/meetings/en/SessionalDocuments/ciclpd36_en.pdf** (Visited on 03.04.20)

[6] OECD (Organisation of Economic Co-operation and Development) document on 'Licensing of IP Rights and Competition Law' Directorate For Financial And Enterprise Affairs Competition Committee available at https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf (Visited on 03.04.20)

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main objective of this roundtable discussion was to provide an overview of legal and economic developments with regards to the treatment of the licensing by competition law and policy, with a focus on areas where the role of competition law is controversial. The goal is to analyse whether IP licensing practices have anti- or pro-competitive effects.

2. Transfer of Technology:

The transfer of patented technology may involve unreasonable restrictions to competition, depending on the precise contractual provisions and market conditions. The goal of competition law is not to prohibit monopoly but to prohibit anti-competitive conduct. Any technology transfer agreements which lead to an abuse of a market position by imposing unreasonable conditions of such intellectual property rights would be considered as anticompetitive. Following situations of technology transfer agreements may be called anti-competitive such as:

- *Patent Pooling wherein two or more companies come together and cross license the technology relating to a particular technology to each other so as to restrict others to acquire it.*
- *Tie in arrangements to tie a product with other product which is patented so that the acquirer has to get the other product also from the patentee.*
- *Prohibiting licensee to use technology from rival company.*
- *Prohibiting licensee from challenging validity of intellectual property rights.*
- *Price-fixation for the licensee to sell the licensed product, etc. These types of clauses imposed in the technology transfer agreements by the intellectual property right holder or licensee are called anticompetitive for the market, hence shall be void.*[7]

3. Abuse of Dominant Position:

Dominant position is a position of economic and monetary strength enjoyed by the enterprises and entrepreneurs that empowers them to forestall effective competition being maintained on the relevant market. A dominant position is acquired by an enterprise over a period of time and factor such as state of technology, barriers to entry, scale of operations, etc., influence the achievement of a dominant position.

Ways in which an enterprise can exploit his dominant position are as follows:

[7] CCI (Competition Commission of India) document on '*Technology Transfer Agreements in High Tech Industries: A Competition Law Analysis' available at* http://cci.gov.in/images/media/ResearchReports/Technology%20Transfer%20Agreements%20in%20High-Tech%20Industries%20_A%20Competition%20Law%20Analysis.pdf , *(Visited on 03.04.2020)*

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- Imposition of discriminatory practices or trading conditions or predatory prices
- Limitation on supply of goods or services
- Denial of market access
- Using its dominant position in one relevant market to enter into another relevant market

The Competition Law also prohibits abuse of dominant position by an enterprise. Dominance over any specific area of a market can be earned by an enterprise through its monopoly power, however monopoly itself is not in violation of anti-trust law but abuse of this position is against the law and features a detrimental effect on the market.

In the landmark case of *United States v. Microsoft Corporation*[8],

Facts- were that Microsoft was alleged of abusing its monopoly power by tying its operating system and web browser and selling. This restricted theentryof other web-browser competitors in the market since Windows operating system users already had a copy of Internet Explorer (the browser Windows tied with its browser). Microsoft stated that Internet Explorer was a different and separate entity altogether, since a separate version is found for other Operating Systems.

Held- that Microsoft had altered its dominant position and by this, it wanted to crush other operating systems and it said that Microsoft had committed monopolization, and tying in violation of sections 1 and 2 of the Sherman Anti-Trust Act.

Later, Microsoft had appealed this decision and judgment was given that Microsoft would have to be broken into two different components, one for the browser and the other for the operating system.

4. Refusal to Supply License:

The law of licensing is based on the integral objectives of the intellectual property system and competition law. The IPR holder has the exclusive right granted under the law for a limited timeframe. Thus the IPR holder is able to restrict others from exploiting it but he cannot restrain the advancement and use of a superior technology. This is evident from the fact that intellectual property encourages competition in the market.

[8]United States v. Microsoft Corporation 253 F.3d 34(D.C. Cir. 2001)

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In the famous case of *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG (IMS Health Case)*[9], the Court has cautiously inserted three conditions to be satisfied for declaring such a refusal as an abuse of dominant position. They are:

- That the refusal to license 'is preventing the emergence of a new product for which there is a potential consumer demand'
- That it is 'unjustified' and
- That such refusal 'excludes competition in the secondary market'

5. Cross-Licensing:

Interchange of intellectual property rights between at least two people is called cross licensing. It might be a bar to competition if the technology licensed is substitute in nature rather than complementary. The anti-competitive effects of cross licensing are- *increased prices, reduced innovation, scaled down advancement and cut backs in production* which is likely to happen when cross licensing is between contending entities and in that case the contending entities would not exist and they together may create a market power. Competition regulation aims at restricting and regulating attempts to extend exploitation of an intellectual asset beyond the boundaries provided by IPRs. Thus, there is an inherent clash between Competition Law and IPRs. Today, the connection between the 2 systems is characterized more by its accommodation than by its conflict. Both takedifferent paths to the same goal.

6. Patent Pooling:

Patent pools are the collection of IPR's which are the subject of cross-licensing; whether they are transferred straight by patentee to licensee or through some medium, such asjoint ventures, set up specifically to administer the patent pool. Patent pools have pro-competitive and anti-competitive effects. Pro-competitive benefits generally flow from a licensor's making patented technology available to licensees. Patent pools can have serious anti-competitive impact on the market when they are used for the purpose of shielding invalid patents or when they include patents that are not complementary and would contend against each other. Patent pools are subjected to the per se rule in most countries like the United States, Canada, Japan, Germany etc.

IV. SAFEGUARDS PROVIDED AGAINST ANTI COMPETITIVE PRACTICES OF IP HOLDERS:

It is by and large observed that IPR and competition law have conflicting goals. Economic activities of a country are operated through two systems i.e. free market and regulated market

[9]IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG ECLI:EU:C:2004:257

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systems. The reason behind adopting the two different mechanisms is for better working of the country's market. In a nation with a free market system, the prices of goods and services are set freely by consent between buyers and sellers and are liberated from any intervention from the government or any other regulatory measures. In a regulated market system, as from the name, it very well may be found that it is restrained by different regulatory bodies. The legislations are one among the chief elements of regulatory mechanism which in its concerned areas tries to balance between the free play of monopoly rights and interests of the society.

It can be said by analysing both the mechanism that the countries require the regulated market as well as a free market since both of them have their advantages and disadvantages. While going with the operation of Competition law and IP invention is indispensable, price needs to be stable so that the supplier along with the buyer is able to fulfil their needs. The economy ought not to be a static one but open with the regulating bodies to keep it under control.

There are however 2 preventive safeguards or measures that prevent the abuse of Intellectual Property Rights and those are as follows:

1. ***Compulsory Licensing:***

A compulsory license is where an IPR owner is authorized/forced by the state to surrender his exclusive right over the intellectual property, under article 31 of the Trade-Related aspects of Intellectual Property Rights (TRIPS)[10]. Compulsory licenses are granted under exceptional circumstances such as: in the interest of public health, national emergencies, nil or inadequate exploitation of a patent in the country, and for an overall national interest.

2. ***Parallel Imports:***

A parallel import on the other hand includes goods which are brought into the country without the authorization of the appropriate IP owner and are placed legitimately into a market.

V. POSITION IN INDIA:

India being a developing nation also has undertaken the above mentioned measures to curb anti-competitive practices with its Competition law statute known by the name of the Competition Act, 2002.

Under Section 3 of the Competition Act, 2002,

[10] World Trade Organisation (WTO) on TRIPS (The Agreement on Trade-Related Aspects of Intellectual Property Rights) Section 31 available at https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm (Visited on 04.04.20)

"No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India."[11]

In layman language, the above section means that it restrains the enterprise or group of the enterprise to enter into any agreement relating to any activities which will hurt competition. It is limited to India.

However ***Section 3(5)*** of the Act offers a sweeping special case on IPR which shows how the competition law does not interfere with IPR policies.

(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)[12]

Section 4 of the said Act deals with abuse or maltreatment of dominant position which meddles with IPR rights, when violated. This shows how Competition Law complements with IPR instead of conflicting with it, though it is in contravention to Section 3 of the Act.Furthermore, under *Section 27* of the Competition Act, 2002, the Competition Commission of India has the authority to penalize IPR holders who abuse their dominant position.

Apart from above mentioned sections the Patents Act, 1970 also contains provisions with regard to compulsory licensing. In India the Controller General has the authority to grant

[11] Section 3, Indian Competition Act, 2002
[12] Section 3(5) of the Competition Act, 2002

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patents to enterprises and to review applications received from persons interested for grant of compulsory licensing subject to following conditions.

According to *Section 84* of the Patents Act, 1970, the controller general can grant compulsory license for patents only on the following grounds that are as follows:

a) *That the reasonable requirements of the public with respect to the patented invention have not been satisfied, or*

b) *That the patented invention is not available to the public at a reasonably affordable price, or*

c) *That the patented invention is not worked in the territory of India.*[13]

Further, compulsory license could also be granted suo-moto by the government under *Section 92* of the Patents Act, 1970 pursuant to a notification specified in the official gazette under the following grounds- national emergency or extreme urgency or in cases of public non-commercial use. Getting to another measure to curb anti-competitive practices, Parallel Imports have been mentioned itself in number of statutes and cases.

Section 2(m) of the Copyright Act, 1957, definition of infringing copy is mentioned which now clearly states that ***"Provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country shall not be deemed to be an infringing copy"***[14]

Parallel Imports under the Trademarks Act, 1999, is not permitted as it clearly states under *section 30(4)* that "*Sub-Section (3) shall not apply where there exist legitimate reasons for the proprietor to oppose further dealings in the goods in particular, where the condition of the goods, has been changed or impaired after they have been put on the market." This section allows the Trademark owner to control the circulation of goods."***[15]

VI. CASES:

1. ***Aamir Khan Productions Private vs Union Of India***[16],

Held- Bombay High Court held that Competition Commission India has the jurisdiction to deal with cases relating to IPR and competition issues.

2. ***Godfrey Phillips India Ltd. &Anr. vs State Of U.P.&Ors***.[17]

[13] Section 84 of the Patents Act, 1970
[14] Section 2(m), Copyright Act, 1957
[15] Section 30(4), Trademarks Act, 1999
[16] Aamir Khan Productions Private vs Union Of India 2010 (112) Bom L R 3778
[17] Godfrey Phillips India Ltd. &Anr. vs State Of U.P.&Ors [2005] 139 STC 537 (SC)

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Trademark owner misuses the trademark by manipulating, distorting. It will lead to unfair trade practices of trademarks. The court while observing the competition law of India expressed that "all kinds of intellectual property have the potential to infringe or encroach the competition." The court additionally observed that a trademark proprietor has the right to use his trademark in a sensible manner.

3. Kingfisher vs Competition Commission of India[18]

The court held that Section 3(5) does not constrain the right of the holder of IP rights to sue for encroachment or infringement of copyright, trademark, patent, and so forth. Competition Commission of India has conferred a power to manage all the cases that come before the Copyright Board. Thus competition law does put limitations on the application from other law.

4. Bayer Corporation vs Union Of India[19] (also known as Natco vs Bayer)

It was India's first ever compulsory license which was granted by the Patent Office on March 9, 2012 to Natco Pharma for the generic production of Bayer Corporation's Nexavar, a life saving drug used for treating Liver and Kidney Cancer. Bayers Corporation sold this drug at exorbitant rates, with one month's worth of dosage costing around Rs. 2.8 Lakh. Natco Pharma offered to sell it around for Rs 9000, making it reasonable and affordable for individuals belonging to every stratum of society. All the 3 conditions of Section 84 of Patents Act were fulfilled and the decision was taken for the benefit of general public.

5. Hindustan Lever Ltd. v. Briju Chhabra[20]

The Plaintiff (Hindustan Lever Ltd) is that Registered Proprietor of the Trademark 'LUX'. The Defendant used to import LUX soaps that were manufactured in Indonesia into India without the permission of the plaintiff(Hindustan Lever Ltd.)The imported LUX soap was for sale only in Indonesia (as indicated on the soap). It was argued by the plaintiff that such import of soap into India amounts to Infringement of its rights. The Hon'ble High Court of Delhi concurred with the submissions of the plaintiff and defendant was limited from enjoying any further acts of parallel import.

The above leading cases showed the path to this issue relating to Competition and IPR policies. However, India is still in its infant stage and requires a much deeper perspective on this issue.

[18]Kingfisher vs Competition Commission of India, Writ petition no 1785 of 2009
[19]Bayer Corporation vs Union Of India 2013 IndLaw IP AB 20
[20]Hindustan Lever Ltd. v. Briju Chhabra Suit No. 2345 of 2000, High Court of Delhi

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VII. CONCLUSION

The growing importance of innovation is indisputable. The goals of IPR are to promote innovation, creativity and diffusion of technology. The basic role and function of Competition Law is to prevent anti-competitive practices that harm economic efficiency and increase transaction cost. In summary, Intellectual Property Rights and Competition Law are complementary to each other. Thus it cannot be put in isolation, given that their scope seems to largely overlap and, in some cases, clash. It is thus essential to strike a balance between IPR and Competition law to satisfy the objectives of widespread competition and consumer's welfare, while simultaneously securing innovation by granting inventors exclusive rights and sufficient protection to allow them to recover research and development investments. The Competition Law of India plays a major role in deterring the anti-competitive practices of the IP holders regardless that under Section 3(5) it bestows blanket protection to IPR holders but under Section 4, if the IP holders abuse its dominant position then the Competition Law will come into play. Further, there has to be a balance between a free trade market and restricted market in order to provide a flexible market scenario and simultaneously a regulatory body that shall ensure the price and supply of good and services in the market is under control. However, Competition law should not go too far. The threshold of its regulation from a Competition law point of view ought not surpass the cases where IPR causes calculable antagonistic impact on competition. And where the IP holders do indulge in any anti-competitive activities, safeguards such as Compulsory Licensing and Parallel Importation should come into play subject to its conditions. India being a developing nation has to some extent struck a balance between Competition Policy and IPR, however it still has a long way to go as the very first compulsory licensing case was granted in the year 2012.

"It is a long standing topic of debate in economic and legal circle: how to marry the innovation bride and the competition groom"[21]

- *Mario Monti*

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[21] Mario Monti, European Commissioner for Competition Policy, January 2004

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