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Comparative study on Intellectual Property and Competition Law Its Divergence and Convergence

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ABSTRACT

The increasing interaction between property (IP) and competition is an issue with great relevance today. If we consider them with our traditional ideology, then IP and competition laws may seem to follow divergent objectives since one grant temporary monopoly and the other seeks to protect the market from monopolistic behaviors. However, a modern and deeper observation leads to the finding that they share a common aim, which in many instances makes them interact in a complementary manner to each other. Both reasonable IP protection and effective antitrust enforcement are a part of the worldwide innovation system. The similarities and tensions between IP and competition are constantly present within the application of those bodies of law. Therefore, to adequately face the new challenges that this phenomenon has brought to the trade system, each jurisdiction should analyze and considers the interaction that IP and competition may have on different grounds.

This paper touches on some initiatives that seek to deal with these interactions in broad terms, proposing different paths to be followed to form IP and competition enhance each other's virtues and work together towards the development of social welfare. Further, it cites some samples of tensions which will arise when IP interacts with competition law and the way they could be resolved in several ways consistent with the particularities of each jurisdiction. There is a group of practices which will be recommended for promoting the approach in each country within the future, supporting different observed practices. The first course of action is to reinforce the relation between competition and IP agencies. This may be done at different levels—from bringing IP and competition promotion functions into one office, to promoting an off-the-cuff more fluent relation among offices.

I. INTRODUCTION

The acceleration of innovation in today's globalized economy is making international trade grow each day, constantly raising new topics and challenges to achieve sustainable development. An issue with great relevance to this is the increasing interaction between

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intellectual property (IP) and competition. At first sight, IP and competition laws could seem to follow divergent objectives since one grant temporary monopoly and therefore the other seeks to guard the market from monopolistic behaviors. However, a deeper observation leads to the finding that they share common rationales, which makes them interact in a complementary manner to each other in many cases.1 Both reasonable IP protection and effective antitrust enforcement are a part of the worldwide innovation system. Intellectual property rights (IPRs) intend to provide incentives to innovators restricting the use of the knowledge they produce by allowing the imposition of charges on the use of that knowledge, thereby obtaining a return on their investment. IPRs promote investments in innovation by granting substantial, but time-limited, market power. Also, IP reduces transaction costs of customers by identifying products with their origin, ultimately promoting, through this recognition, the development of better products at lower costs. Antitrust laws promote a favorable environment for the growth of innovation. They also prevent dominant firms from harming or delaying innovation.2 These similarities and tensions between IP and competition are constantly present in the application of these bodies of law. This interaction is growing in importance, to the advanced industrial countries in particular, as the fund of exploitable ideas becomes more sophisticated and as their hopes for a successful economic future depend increasingly upon their superior corpus of new knowledge and fashionable conceits.3 Therefore, the interaction that IP and competition may have on different grounds should be analyzed and taken into account by each jurisdiction to adequately face the new challenges that this phenomena has brought to the trade system. This document will touch on some initiatives that seek to address these interactions in broad terms, proposing different paths to be followed to make IP and competition enhance each other's virtues and work together towards the development of societies' welfare. Further, we will see some examples of tensions that may arise when IP interacts with competition law and how they might be resolved in different ways according to the particularities of each jurisdiction.

IPR

Intellectual Property Rights tries to strike a balance between the rights of the owner and social interest. It Grants a degree of exclusivity to the owners of intangible property, necessarily restricting access of others to the same and gets exclusive right and commercial value for his intellectual creation. The period of exclusivity permits the IPR holder to exploit the value that is assigned to the IPR and is seen as a reward/incentive for the effort invested by the inventor in creating the IPR. Intellectual Property Rights (IPRs) create a temporary right in favor of the IPR holder to exclude others from using that IPR. Thus, making it monopolistic in nature for a

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particular time period. The IPR and it policy framework is directly responsible for development of any society. Absence of IPR awareness will result in the bereavement of inventions, high chance of infringement, economic harm and waning of an intellectual era in the country. Thus, there is a dire need for dissemination of IPR information so as to boost indigenous inventions and developments in the field of research and technology.

Based on type of invention, creation and their applications the intellectual property rights are classified as follows:

i) **Patents:** Patent is an intellectual property right granted to the inventor by the concerned government office for his novel technical invention.

ii) **Trademarks:** A trademark is a distinctive sign or logo that denotes that the particular item is produced or provided by a specific person or industry or enterprise.

iii) **Industrial Designs:** An industrial design encourages creativity and skill development amongst the individual and manufacturing sector by promoting more aesthetically pleasing products for the society.

iv) **Layout design of semiconductor integrated circuit:** Layout-design means three-dimensional disposition of the elements in which at least one element is active, and or some of all having interconnections as a microcircuit, or such a three-dimensional disposition prepared for an microcircuit planned for industrial manufacturing.

v) **Geographic indications of source:** The term Geographical Indication (GI) has been chosen by WIPO includes all existing means of protection of such names and symbols, regardless of whether they indicate that qualities of a given product are due to its geographical origin, or they merely indicate place of origin of a product.

vi) **Copyright and related rights:** Copyrights protect expression of idea of author, artist and other creators which is concerned with mass communication. The following literary and artistic works are covered under copyrights: (literary and artistic works, musical, artistic, photographic and motion pictures, computer programmes etc.).

Competition Law

On the other hand, competition law deals with an efficient mechanism to counter anti-competitive agreements, regulating mergers and acquisitions, restricting the use of dominant position etc. Competition policy is a set of tools used by the state in order to protect and promote the process of competition, with the aim of achieving allocative efficiency andante-trust law helps in doing so, whether effectuated as a result of coordinated or by unilateral action.

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Competition is also considered as a primary source of productive efficiency, which transpire when firms produce the maximum output possible from a given amount of inputs, and dynamic efficiency, which occurs when society exploits innovations that are economically feasible.

Competition law also plays a vital role in a liberalized economy. Its importance can be inferred from the fact that as of 2010, more than 100 countries have enacted competition laws. There are two main ways in relation to competition law in which economics can be involved. First, because competition law is aimed partially at remedying market failure a general macro-economic argument is often made on the existence of such market failure and therefore the costs imposed by it. Secondly, micro-economic arguments are likely to be relied upon in each individual case to justify intervention or to defend a company's position. The principal purpose of competition law is to resolve some of the situations in which the free market system breaks down. The significance of competition in progressively innovative and globalised economies is clear.

Robust competition between firms is the life force of a strong and effective market. Competition also helps the consumers in getting a good deal. The firms are inspired by competition law to innovate by cutting slack, reducing costs and providing incentives for the efficient organisation of production. To oversee the business operations of companies and individuals in the country following fair practices of competition and economic growth of the country, the competition act of 2002 was passed by the parliament of India to form a commission which regulated these concerns. The act is also applying for agreement, acquisition or any cartel concerning business transactions that can impact the economy of the country.

II. INTERFACE BETWEEN IPR AND COMPETITION LAW

Notwithstanding that both IP and competition serve similar rationales, historically they have had an independent development. As a result, these fields have grown apart in their institutions, legislation, and study. This trend has started to change over recent years since global trade is increasingly developing in ways that bring new challenges to a harmonized interaction of these fields. One way to illustrate these differences is through looking at their legal development. At a regulatory level, the IP system is characterized by a balance among its standardized evolution through international agreements and the local regulatory differences established in using those agreement's flexibilities. By contrast, the regulation of competition has had a rather local approach, with no major international regulatory standardization. The first IP international agreement was the Paris Convention for the Protection of Industrial Property, signed in Paris in 1883, which today has 176 contracting members. Also, since 1995, the Agreement on Trade-

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Related Aspects of Intellectual Property Rights (TRIPS) is in force, with 162 World Trade Organization (WTO) members applying it. This is to date the most comprehensive IP agreement. It introduced IP into international trade by regulating global minimum standards for protecting and enforcing nearly all forms of IPRs. Furthermore, after TRIPS several bilateral and plurilateral IP negotiations have taken place, especially through free trade agreements (FTAs), increasing TRIPS standards, which, due to the application of the most favored nation (MFN) clause, are conferred to all WTO members.

This resulted in national legislations that have a common basic standard regarding the scope and extension of IP rights. However, national legislations differ on the extension of IP regulation above that minimum. In opposition, notwithstanding that the WTO agreements, including TRIPS, do contain some provisions dealing with competition, and major efforts were deployed in the WTO Doha Round to agree on minimum international competition standards, ultimately the WTO decided in 2004 that this matter would not be part of the Doha work program. Also, aside from assuring the existence of minimum institutions and enforcement efforts, FTAs have not established large substantive competition obligations. The international character of IP and the effects it may have in trade must be analyzed taking into account the local characteristics of competition law. The latter allow countries to address related trade challenges in a more flexible manner, according to their own perspectives and policies. In this regard, some attempts at designing the best set of practices on IP and competition policy have progressed through national and plurilateral efforts.

III. COMMON OBJECTIVES BUT DIVERGING PERSPECTIVE

If we perceive from the competition point of view, IPR may be viewed as a means to reduce competition since the IPR gives the holder of the right, an exclusive monopoly while hindering others from offering the product in the market. Furthermore, it may be stated that competition law and IP law contribute to the same economic objectives. The forcible conflicts between these two laws can be avoided, if the two laws can be construed in the contextual of a common objective. There is a comprehensive arrangement that the two systems of law are complementary in their effort to promote innovation and consumer welfare. Both teach to promote dynamic productivity, meaning a system of both property rights and market rules that create suitable encouragement for invention, innovation and the risks tangled in R&D. Competition law recognizes the critical role that IPR plays in driving innovation and so values these rights.

One of the most complex and perilous fields of competition policy can be said to be the

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application of competition law to intellectual property cases. Competition and intellectual property were mostly considered contradictory in the past. The general perception was that there are inherent tensions between IPR and competition. The reason behind this is that competition policy and IPR have traditionally grown as two separate systems of law, distinct and diverse. The conventional part of competition law has been to encourage proficiency in the market and thus to avert market distortions. However, both IP Law and Competition law are aimed at promoting active competition in the market, this notion is widely accepted.

However, it is still controversial whether competition law intervenes and in fact restrains the use of IPR. A good example that displays the above-mentioned controversy since it was essentially a matter of intellectual property protection versus competition law is the Microsoft case. In this case an India law firm, Singhania & Partners LLP, filed a complaint with the Competition Commission of India (CCI) against Microsoft India, alleging anti-competitive practices and the abuse of dominance in the Indian market with regard to their software, Windows Operating System and Windows Office. The Competition Appellate Tribunal (COMPAT) upheld the CCI ruling that Microsoft did not abuse its dominant position regarding its software license in an order dated 9 October 2012. Pertinent to note is that the said case was decided in favor of Microsoft despite the fact that Microsoft was facing a number of cases and adverse rulings in other jurisdictions like in the US and EU. It is a well-accepted norm that healthy competition in the market cannot be compromised at the cost of consumer interests, constant innovation and discouragement of competition.

IV. COMPLEMENTARITIES BETWEEN IPR AND COMPETITION LAW

It follows from the above discussion that when we think of the relationship between these two regulatory systems at a high level of abstraction, rather than being simply antithetical to each other. As discussed above, IPRs policy creates and protects the right of innovators to exclude (excluded) others from using their ideas or sorts of expression. This provides economic agents with the incentives to interact in efforts that produce technological innovation and/or new sorts of artistic expression.

Moreover, within the rational exercise of itself interest, an IPR holder may sue would-be rivals for infringement, deterring entry to compete, or prolong its market power by precluding access to technology necessary for subsequent generation of products to emerge. This is where competition law comes in to assist IPRs protection to be fair and on the proper track of its virtue towards the welfare goal.

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1. Both as a way to realize improved efficiency and better welfare

Thus, competition isn't the top goal of competition law even as IP protection isn't the top goal of IPRs policy but only a way to realize improved efficiency and better welfare in the long run. In some circumstances, the society would be happier by allowing limited market restrictions, monopolistic profits and short-term allocative inefficiency when these are often proven to market dynamic efficiency and long-term economic growth. This has even been explicitly included among those factors to be taken under consideration by competition authorities in some competition statutes. For example, it's been asserted that allowing price to rise above the incremental cost through a succession of temporary monopolies can spur dynamic competition. Analysts also claim that hasty innovation, network which are exterior have shaped circumstances perfect for ―active competition for monopoly, throughout which temporary monopolies rise and fall within the rhythm of rapid entry and exit.

2. Both as a driving force for innovation

Moreover, competition may drive a race for innovation, as firms compete to take advantage of first- mover advantages, learning-curve advantages, also on gain IPRs protection. It is also one among the tasks of competition law to guard this sort of competition: competition within the innovation race or competition for the market as distinguished from competition in the product market. Nevertheless, it should be noted also that competition cannot function the only driver of innovation. Inventors sometimes cannot appropriate value from the invention without the grant of IPRs, making IPRs protection a crucial incentive for innovation in such settings.

3. Both promoting consumer welfare

Both regimes can thus function to market consumer welfare within the same manner, while showing similarities and differences in their consideration of short and end of the day effects on consumer welfare. Patent law and therefore the incipiency elements of antitrust legislation are similar therein they both are ultimately supported inherently uncertain predictions of what's getting to happen within the future. The difference is that within the antitrust regime we sometimes are concerned about conduct that within the short-term could also be benign or maybe helpful to consumers, but which will be harmful within the end of the day , whereas within the patent regime, we are willing to tolerate immediate consumer harm, e.g. monopoly pricing within the expectation that within the end of the day it'll benefit consumers by encouraging innovation.

We can sum up the above discussion with the words of the US Department of Justice and the Federal Trade Commission (FTC), which in their 1995 ―Antitrust Guidelines for the

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Licensing of Intellectual Property‖, have stated:

"The property laws and therefore the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. In the absence of property rights, imitators could sooner exploit the efforts of innovators and investors without compensation. Rapid imitation would scale back the commercial value of innovation and erode incentives to take a position, ultimately to the detriment of consumers. Innovation and consumer welfare is promoted by antitrust laws by prohibiting certain actions which might damage competition."

These types of guidelines need to be re-examined and appropriately adjusted in the context of the New Economy, which is characterized by an increased dependence on products and services that are the embodiment of ideas. A major challenge is, thus, to spot policies which will ensure an efficient operation of the competitive process that underlies this IP revolution. More narrowly, questions abound concerning the relationship between competition and IPRs laws, or the right way to bring out the benefits of as well as reinforce the complementarities between these two regulatory systems for the sake of dynamic efficiency and consumer welfare within the new era.

Moreover, IPRs may create a race for innovation, as firms compete to take advantage of first-mover advantages so on gain IPR protection. Therefore, both IPRs and competition policy are necessary to market innovation and ensure a competitive exploitation thereof. It is necessary therefore to ensure their co-existence.

Further, they pursue the goals of consumer welfare and encourage innovation through different means. Premised on the thought that enterprises during a competitive market are going to be less complacent and have greater incentive to innovate to realize market share, competition law can indeed act as a spur for intellectual property.

In the previous acknowledges the role of IP in promoting competition because by preventing free-riding, firms are encouraged to supply their own innovative products, which necessarily results in competition. Innovation and consumer welfare are promoted by competition law by barring certain actions which will harm competition.

Primarily, competition laws involve s. the formulation of a group of policies which promote competition within the local markets and are aimed toward preventing anti-competitive business practices and unwonted government interference. Competition laws also are framed with the intention of curbing abuse of market power by a dominant company. Further, competition law aims at eliminating monopolization of the assembly process thereby encouraging new firms to enter into the market. The maximization of consumer welfare and a

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rise in production value are a number of the most objectives of competition law. On the other hand IP Laws are monopolistic legal rights granted to the creators and owners of labor which are a result of human intellectual creativity.

These are often in varied fields like industrial, scientific, literary and art. Intellectual Property Rights (IPR) gives the owners the proper to exclude others from using their invented subjected matter for a limited period of your time. Further, IPR laws concerning copyrights, patents, trademarks, industrial designs and trade secrets prevent commercial exploitation of the innovation by others. IP rights grant the owner a plus over the remainder of the industry or sector. Conflict is created between IPR and competition law when this advantage or dominant position is abused.

Recently a problem was raised within the Delhi supreme court within the case of Hawkins Cookers Limited v M/s Murugan Enterprises. Hawkins Cookers Limited is the owner of the trademark “Hawkins” and uses it on several products including autoclave gaskets. Murugan Enterprises, manufacturers, among other things gaskets for pressure cookers and uses the Hawkins trademark in respect of parts of pressure cookers to work out compatibility. Murugan Enterprises in its arguments before the court opinionated that it had its own well-established trademark “Mayur” with a prominent peacock displayed on its product packaging. The Delhi supreme court during this case held that no reasonable person or purchaser could assume a trade connection between the “Mayur" brand of gaskets and therefore the “Hawkins” brand of pressure cookers. Further, the court opined that during this case the Murugan Enterprises neither sought to profit from Hawkins’ trademark nor did it attempt to show a connection between the two. The court discoursed the defendants’ use of the “Hawkins" mark.

Additionally, under Competition law, the unavailability of substitutes within the market may establish dominance within the market. Likewise, a comparison of market shares between dominant firm and their competitors is beneficial in determining dominance also as a monopoly. Even then, there seems to be an issue in determining the minimum percentage of the market share that would establish dominance and/or monopoly of a specific firm within the market. Various judgments vis-à-vis dominance has also not been ready to establish a minimum percentage that indicates dominance of a firm.

Anti-competition laws so as to combat the IPR monopolies often include two important measures namely compulsory licensing and parallel imports. A compulsory license is where an IPR holder is permitted by the state to surrender his prerogative over the property, under article 31 of the Trade-Related aspects of Intellectual Property Rights (TRIP). Compulsory licenses

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are granted under certain circumstances like within the interest of public health, national emergencies, nil or inadequate exploitation of a patent within the country, and for an overall national interest. A parallel import on the opposite hand includes goods which are brought into the country without the authorization of the acceptable IP holder and are placed legitimately into a market.

In addition, provisions like Section 3 of the new Competition Act, 2002 (the Act) deals with anti- competitive agreements which can't be employed by IPR holders since they're in conflict with the competition policies. Firstly, patent pooling may be a restrictive practice wherein firms of a specific manufacturing industry plan to pool their patents and agree to not grant licenses to 3rd parties, simultaneously fixing quotas and prices. Secondly, prohibiting a licensee to use rival technology is considered as anti-competitive under the law by a clause that restricts competition with reference to research and development. Thirdly, a licensor under the law is prohibited from fixing the worth at which the licensee should sell his goods. The above-mentioned examples aren't by any means exhaustive but are a couple of illustrations demonstrating anti-competitive provisions applicable to IPR under the Act. Further, under Section 4 of the Act the Commission is additionally authorized to penalize the parties to an anti-competitive agreement, which is in contravention of Section 3 of the Act.

V. CONCLUSION

Competition and intellectual property are in many ways aligned since they share the common ultimate goal of promoting consumer welfare. Nonetheless, in achieving this purpose there are new areas of tension constantly arising between them, especially since innovation plays an increasingly relevant role in world trade. To properly confront the challenges that this evolution presents, it is very important to analyze the matter actively and in depth. This exercise includes understanding the factors of discussion in both a general and a local manner. To do so, it is relevant to consider that both IP and competition have common grounds of analysis in general, but also local peculiarities in each jurisdiction and region, making their interaction different in each country. Though in general this area of interaction has not been so vastly explored, this is changing now with different local and regional efforts, such as those pointed out in Section 3. These initiatives constitute an opportunity to develop a discussion that can lead each national system to confront new challenges in this field in a stronger manner. In this, there is a set of practices that can be recommended for promoting the approach in each country within the future, based on different observed practices, including those mentioned above.

A first course of action is to enhance the relation between competition and IP agencies. This

may be done at different levels—from bringing IP and competition promotion functions into one office, to promoting an off-the-cuff more fluent relation among offices.

Some examples of initiatives that may be developed are regular workshops and other diffusion exercises among IP and competition public servants, academics, attorneys and other relevant stakeholders; the establishment of consultation channels between agencies; and the setting up of a regular calendar of authorities meetings to discuss joint agendas and concerns, among others. The World Intellectual Property Organization (WIPO) has promoted and organized such activities.52 Another initiative to consider is the publication of joint opinions where applicable, for instance, in high-profile cases where IP and competition topics arise and there is a consensus on how to address them. These kinds of actions may show in a specific manner how IP and competition agencies may join hands and how their topics can in many cases be aligned.

Further, a fundamental initiative in this regard is the development of joint studies among agencies. This initiative is vastly recommended to enhance IP and competition interaction to address considering all relevant angles in a determined matter. A third recommended line of action within the relation between agencies, in the long term, could also be the publication of various sorts of soft law instruments that address these topics. Finally, it's going to even be desirable that the relation between IP and competition be taken to subsequent level by formally considering the impact that IP norm setting may have on competition. This effort is highly relevant for the purpose of raising a strong and deep ex-ante position of the IP and competition national system that would allow stakeholders to address future challenges in a coherent manner. To sum up, the recommendation is to develop a strong and permanent relation and joint instruments among IP and competition authorities in each country, and to strengthen the understanding of each national reality to face future challenges in a more comprehensive and, if possible, aligned manner. To enhance the analysis of competition and IP interaction in each nation, it is important to understand the uniqueness of their systems and, as a consequence, address interaction challenges in the best mode that protects and promotes their development.

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