Compulsory License

A Remedy to Anti-trust?

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Compulsory license is the authorization given by the government (Patent Authority) to the third party to make, use or sell a particular product or use a particular process which has been patented. It is to be done without the need of the permission of the patent owner.

While thoroughly analyzing the surroundings of this research, it outlines a possible approach for the Competition Commission of India (CCI) to adopt if it should play a role in issuing compulsory licenses.

There are various international agreements pertaining to compulsory licensing. The origin of the concept of compulsory License at an international level can be traced through the Paris convention of 1967. Article 5(A) of the Paris Convention first recognized the concept of Compulsory License. Article 5(A) (4), in specific, provides that "A compulsory license may not be applied for, on the ground of failure to work or insufficient working, before the expiration of the period of four years from the date of filing of the patent application or three years from the date of the grant of patent, whichever period expire last; it shall be reduced if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferrable, even in the form of the grant of a sub-license, except with the part of the enterprise or goodwill which exploits such license."[1]

Agreement on trade-related aspects of Intellectual Property Rights (TRIPS) also deals with the aspects of compulsory licensing. Article 31 "Other use without the authorization of Right Holder" is concerned with the concept of compulsory licensing. In specific, Article 31(c) says "the scope and duration of such use shall be limited to the purpose of which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive"[2].

The Concept of Compulsory Licensing is also recognized in India. Chapter XVI of the Indian Patent Act, 1970 deals with the concept of compulsory licensing in India. There are some conditions which need to be fulfilled for the grant of compulsory license, which are covered under the Section 84 and 92 of the said Act.

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[1] *Provisions of Paris Convention for the protection of Industrial Property*, 1883, http://www.wipo.int/treaties/en/text.jsp?file_id=288514.
[2] *Agreement on Trade-Related aspects of Intellectual Property Rights*, http://www.cptech.org/ip/wto/trips-art31.html.

Section 84 (1)[3] of the Indian Patent Act provides that an application can be made to the controller for the grant of compulsory license, only after the expiration of 3 years from the date of grant of patent to the patent holder, in any of the following conditions –

1. When the reasonable requirement of the public with respect to the patented invention has not been satisfied, or
2. When the patented invention is not available to the public at a reasonably affordable price, or
3. When the patented invention is not worked in the territory of India.

Section 92 of the Indian Patent Act provides that controller can also issue the compulsory license suo motu pursuant to the notification made by Central Government in case of a national emergency or extreme urgency or public non-commercial use.

In the landmark case of *Natco Pharma Ltd. vs. Bayer Corporatio,* India's first ever compulsory license was issued. The brief facts of the case are that the Bayer Corp. had the patent right for the production of the drug "Nexavar" – used to cure liver and kidney cancer. It was established in this case that only 2% of the population had the access to the drug because it was sold at the price of Rs. 2.8 lacs for the dosage of a month which was certainly very high. All the grounds of section 84(1) were fulfilled in this case and the Indian Patent office issued a compulsory license to the Natco Pharma which promised to make available the drug at the price of Rs. 8,800 only for the dosage of the month.

In the case of BDR Pharma vs. Bristol Myers Squibb, the controller rejected the application for compulsory license made by BDR Pharma. The Reason behind the rejection of the application was that the BDR Pharma failed to make prima facie case for the making of an order under Sections 87 of the Act. The observations made by the controller are as under –

a) BDR Pharmaceuticals has not made any credible attempt to obtain a voluntary license from the Patent holder.
b) The application has also not acquired the ability to work the invention to the public advantage.

There are many jurisdictions which are dealing with the concept of compulsory licensing with their Competition Laws and Intellectual Property Law. In Austria, Patent Act, 1970 deals with the concept and purposes of compulsory licensing. Their IP Laws as well as Competition Laws both deals with the concept of

[3] Secion 84 (1) - At any time after the expiration of three years from the date of the [170] [grant] of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:-

(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.

compulsory licensing and both of them considers the anti-competitive conduct as an aspect of granting it. Cartel Court as well as Federal Competition Authority is entitled to grant compulsory license in Austria. The conditions of use of the invention, considering its nature and the circumstances of the case, shall be determined in the proceedings before the Austrian Patent Office.

In Belgium, the Patent Act of Belgium, 2004 and Law on the protection of Plant and Varieties, 1975 deals with the concept of compulsory licensing. The grounds for which compulsory license can be granted in Belgium are National or Public interest, Interests of Public Health and failure to work or insufficiency of working of the patented invention. The Competition Council as well as the Courts and Tribunals of are the bodies entitled to grant compulsory license. The legislative history of the Belgium IP Act indicates that a number of patent licensing practices could be found to be an abuse.[4]

In France, the France Intellectual Property Code is dealing with their IP laws. Compulsory license can be granted if the products and services available to the public through a patent holder are in insufficient quantity or quality or at abnormally high prices, or where the patent is exploited under conditions contrary to the public health or is judged as an anti-competitive practice by administrative or court decision. It is further provided that in case of anti-competitive practice no out of court settlement is allowed and it is subject to the issuance of compulsory license. The National Authorities entitled to grant compulsory license are the Minister of Public Health (in interest of national public health) and Administrative & Court authorities (for patented inventions in the field of semiconductor technology). In France, compulsory license are appropriate mechanism to enforce anti-trust law to address anti-competitive uses of IP rights, however, no situation arose.[5]

In Germany, their Patent Act provides that a compulsory license can be granted for a patented invention in the field of semiconductor technology only in the case where doing so is necessary to eliminate the anti-competitive practices pursued by the patent holder. Compulsory license can be issued in the cases to eliminate anti-competitive practice and in the public interest. The Federal Cartel Office and the Land Cartel Offices are the National Authorities entitled to grant compulsory licenses in Germany. There, the anti-trust law is considered as an appropriate ground for granting of compulsory license.

In UK, according to UK Patent Act, grounds for granting the compulsory license are anti-competitive uses of IP rights and national or public interests. In UK, the authorities entitled to grant compulsory license are the Intellectual Property Rights, the Secretary of State and the Competition Commission. Section 51(c) of UK Patent Act provides that the Competition and Market Authority can make a report to the Parliament on a competition reference, that the person was engaged in anti-competitive practice which operate or may be

[4] W.S. Bowman, Patent and Antitrust Law, 62, 65 (1973).
[5] Survey on compulsory licenses granted by WIPO member states to address anti-competitive uses of Intellectual Property Rights, http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4_rev_study_inf_5.pdf.

expected to be operated against the public interest and the appropriate Minister may apply to the Comptroller to take action under this section.

There is an overlap between the protection of IP rights and the granting of Compulsory license. The monopoly granted to the holder of IP rights can create barriers to entry and give rise to the market power the abuse of which is prohibited under Section 4 of Indian Competition Act, 2002. Therefore, there is a need of balance between competition and innovation protection. Compulsory license will increase the number of companies producing or selling a particular. Hence, the supply will go up and the cost will come down. There are some benefits as well as some risks also of compulsory licensing vis-a-vis market competition. The benefits of compulsory licensing to competition are maximizing of profits, intellectual property development and demand enhancement, managing risk and transaction cost, maintaining a reputation for quality and maintaining productive efficiency by the licensee. Whereas the risks of compulsory licensing to competition are that it is an instrument for cartelization, exclusionary affects i.e. it creates barriers to entry, acquiring market power and non-price predation.

On analysis it may be said that the compulsory license can be implemented as a remedy in antitrust or misuse situations. By discussing the position of various countries it's seen that in countries like France, UK, Germany and Austria anti-competitive conduct is a legal ground to grant compulsory license. In UK, along with the Intellectual Property Office the Competition authority is also entitled to grant compulsory license independently. The Competition authority is also entitled to make a report to the Patent Office that a person or Corporation is engaged in some anti-competitive practice, requesting the comptroller of Patent authority to take further action. In Belgium, in addition to the Courts and Tribunals of law, the Competition Council also has the power to grant compulsory license. In Austria, the Cartel Court, the Federal Cartel Prosecutor and the Federal Competition Authority is also entitled to grant compulsory license.

In *Microsoft Corp. Case*,[6] Microsoft was an American Company involved in the development and marketing of software products. The Commission found that Microsoft has a dominant position on the client PC operating systems and also on the work-group server operating systems. By refusal to supply the "inoperability information" it had prevented its competitors from developing competing products on the latter market. The enterprise was held to violate the Article 82 of European Commission Treaty. A close study of Microsoft Corp. Case clarifies that there are similar provisions in the Indian Competition Act. Section 4(2) (a) (ii), 4(2) (b) and 4(2) (c) of the Indian Competition Act are akin to the violated provisions of the Article 82 of EC treaty in the above discussed case.

[6] Microsoft Corp v Commission of the European Communities (T-201/04).

Competition authorities in foreign jurisdictions have granted compulsory licenses under the competition provisions of their respective statutes. Following the footprints of the other jurisdictions it may be considered that CCI may be empowered to make a recommendation or report to the Patent office, informing that some enterprise is indulged in some anti-competitive conduct and in view of CCI it would be proper to resolve it by granting compulsory license.

It may be considered that within the purview of prevalent provisions of the Competition Act,

2002, if the Commission deems fit, a reference under Section 21A may be made to the appropriate authority for the grant of compulsory license if need be. The concept of compulsory licensing can be recommended as an anti-competitive remedial cure utilized in cases where the exclusive management is contestable and any other remedy cannot get resorted to.