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Anti-Competitive Practices arising out of Intellectual Property Rights

MANIT SHARMA¹ AND HRITHIK SHARMA²

ABSTRACT

This article throws light upon the anti competitive practices which are exercised by the holders of intellectual property rights, it highlights the apparent antagonism between the IPR laws and Competition law. The essential aspect of IPR is the grant of exclusive use whereas competition law aims at maximum allocation of resources without prejudice to achieve allocative efficiency. Both IPR and Competition law work in tandem performing their roles of encouraging innovation and consumer welfare respectively. The competition law strikes a balance by rewarding the IP holders but also safeguarding the market from unfair competition and anti competitive measures. But in recent times the competition commission of India has through various cases highlighted certain practices which involve abuse of IP rights, contrary to the provisions of competition act. The IPR holders use foul practices such as pricing abuse in form of excessive or differential pricing, or onerous provisions in the license agreement which may potentially cause market distortions.

Keywords: Intellectual property rights, Competition law, consumer welfare, anti-competitive practices, market power.

I. INTRODUCTION

Competition law advocates the necessity for free markets, removes monopolies, and aspires to create a competitive environment that benefits consumer choice. It aims to create an ecosystem driven towards consumer rights, balance of market power, free trade, and efficient resource allocation. Section 3 of the competition act, 2002 deals with anti competitive agreements. It states that 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.³ It includes agreements such as Price fixing agreements, exclusive supply agreement, exclusive distribution agreement, refusal to deal, tie-in arrangement etc.

¹ Author is a student at Institute of law, Nirma university, India.

² Author is a student at University of Petroleum and Energy Studies (UPES), India.

³ The Competition Act, 2002, § 3[1], No. 12, Acts of Parliament, (Jan. 13, 2003)

Anti competitive practices basically disrupt the market.

It can have a significant impact on the market and could lead to various consequences like:

- 1. Higher prices** - When there is less competition in the market it drives prices down, due to which companies charge inflated and unreasonable prices and enjoy larger profit margins.
- 2. Lack of alternatives** - When companies engage in practices that harms competition, they can effectively control a larger share of the market and can restrict the entry of new competitors. This lack of competition leads to less availability of a variety of products and services which leads to lack of alternatives for the consumers
- 3. Misuse of market power** - When a company engages in any anti competitive practice it can use its dominant position to misuse its market power by entering into unfair and onerous agreements or by driving a competitor out of the market.
- 4. Barriers to entry** - When a company uses anti competitive practices such as using barriers like predatory pricing, exclusive supply/distribution agreements, refusal to deal with a company etc could prevent new firms from entering the market.
- 5. Reduced incentive for efficiency** - Companies strive to operate efficiently to maintain their competitiveness. However anti-competitive practices can reduce the incentive for companies to improve efficiency or reduce costs. Without the pressure of competition, dominant companies may become complacent and less driven towards optimizing their goods and services potentially resulting in inefficiencies

Section 3(5) of the competition act, 2002 states that nothing contained in section 3 shall restrict any person's right to prevent infringement or to impose reasonable conditions, such as copyright, trademarks, patents, designs and geographical indications, that is appropriate to protect the Intellectual property rights of that person. In the light of these exemptions the IPR holders at times engage in anti competitive practices such as pricing abuse in form of excessive or differential pricing, or onerous provisions in the license agreement which may potentially cause market distortions. These Intellectual property rights are often used by the right holders as a tool to prejudice the interest of other players in the market leading to reduced competitions and dominance of few stakeholders.

II. ANTI-COMPETITIVE PRACTICES THAT ARISE OUT OF INTELLECTUAL PROPERTY RIGHTS

[A] Pricing Abuse

Pricing abuse refers to the unfair or anti-competitive practices employed by a company or person to influence or exploit pricing mechanisms in a market. It involves the use of market power by a dominant firm to influence prices in a way that harms competition, restricts entry of new firms, or exploits consumers at the behest of limited choices. Pricing abuse through intellectual property rights can take various forms,

- a. **Excessive Pricing** - Excessive pricing refers to a situation where the dominant firm through exercise of its market power charges unreasonably high prices for its products or services. This practice can harm consumers by denying them access to affordable options and restricting consumer choice. In the case of *Micromax Informatics Limited VS Telefonaktiebolaget LM Ericsson*⁴ One of the findings during the investigation revealed excessive pricing by Ericsson. The CCI observed that Ericsson holds a large number of GSM and CDMA patents. It was observed that Ericsson had a total of 33,000 patents, with 400 of these patents granted in India. Ericsson is the largest holder of SEPs (standard essential patents) which are used for mobile communications like 2G, 3G and 4G patents. Since Ericsson has a large share of SEPs and there was no other alternate technology, it had 'complete dominance' over its IPR licensees in the market. On this basis CCI concluded Ericsson to be a dominant enterprise in the relevant market. It was stated in the information filed by Micromax and Intex that Ericsson was demanding unfair and exorbitant royalty for its SEPs and that is contrary to the FRAND (Fair, Reasonable, and Non- Discriminatory) terms. The CCI observed that the royalties charged by Ericsson had no link with the product, because the technology patented resided in the chipset and remained the same but Ericsson calculated the royalty charged based on the retail price of the phone. This charging of different license fee for the same technology was held to be unfair and discriminatory and reflected excessive pricing for the companies whose phones had a high retail price.

In the case of *Ms HT Media v. M/s Super Cassettes Industries Limited*⁵ there were allegations filed against super cassettes, the largest private producer of Indian music, of abusing its dominant position. One such allegation involved charging excessive amounts as license fees for granting the right to broadcast its music content from the radio operators. It was also alleged

⁴ Micromax Informatics Limited vs. Telefonaktiebolaget LM Ericsson Case No. 50 of 2013

⁵ Ms HT Media v. M/s Super Cassettes Industries Limited Case No. 40 of 2011

that such exorbitant license fees/royalty and minimum commitment charge by Super Cassettes was an unfair and discriminatory condition imposed by it for granting license to broadcast its music content on radio which lead to denial of market access to the other music companies and they were left with less market share and less market power. It was observed that super cassettes in the light of exemption granted under section 3(5) of the competition act tried to impose excessive royalty and licensing fees for broadcasting its music content and tried to justify in the context of protecting its copyright. This case shows how Intellectual property rights at times gives birth to anti competitive practices.

b. Differential Pricing - It involves charging different prices to different customers for the same or similar products or services without any reasonable justification. It leads to price discrimination and can harm competition by creating unfair advantages for certain customers. In the *Ericsson case* apart from the issue of excessive pricing, it was also alleged that the royalty charged by Ericsson was excessive when compared to royalties charged by other patentees for patents similar to the patents of Ericsson. CCI noted that Ericsson had subjected all licensees to Non-Disclosure Agreements (NDA) which prohibits the licensees to disclose commercial terms between similar patent seekers. In the issue of differential pricing CCI observed that charging two different license fees on the basis of retail price of a phone for use of the same technology is unfair and discriminatory and also reflects excessive pricing for companies selling high cost phones. CCI also noted that NDA thrust upon the licensees by Ericsson strengthens this point of differential pricing as after NDA, each of the users of SEPs are unable to know the terms of royalty for each other. And that this type of NDAs can be used by dominant firms to charge different prices for similar goods and services.

c. Minimum Commitment Charge - Minimum Commitment Charges (MCC) refers to fees or charges imposed by service providers when a customer fails to meet a specified commitment or usage level. These charges are commonly found in various industries, such as telecommunications, software licensing, or subscription-based services. In the *super cassette case* CCI also dealt with the issue of minimum commitment charge. The radio operators had stated that Super Cassettes were imposing a minimum commitment charges to be paid per month by the radio operators notwithstanding actual needle hour of broadcast of the music content. CCI on investigation found out that Super Cassettes requires a minimum commitment charge to be paid by the radio operators irrespective of the actual number of needle hours of the music of Super Cassettes that is broadcast. It was further noticed that, except Super Cassettes, no other music company in the market was imposing

a minimum commitment charge. Considering the dominance of Super Cassettes, the radio operators had no choice but to accept the onerous conditions imposed by super cassettes. The CCI noted that the imposition of minimum commitment charges has an anti-competitive effect on the other music companies in the market as it forecloses other competitors from a substantial share of the market. Going by the interpretation of CCI in case of Super Cassettes and prima facie order of Ericsson, it is apparent that CCI is more in favor of license fee that has a nexus with the use or value of the licensed product.

[B] Non-Pricing Abuse

Non-pricing abuse refers to anti-competitive practices employed by firms which do not directly involve manipulating or exploiting pricing mechanisms. Through other indirect ways like Refusal to Deal, Exclusive Dealing, Tying and Bundling etc. these practices can harm competition, restrict entry, or exploit consumers. Non-pricing abuses can have similar detrimental effects on market competition, consumer welfare, and market structure as pricing abuses.

Onerous Terms in the License Agreement - Onerous terms in a license agreement refer to contractual provisions that place significant burden or obligations on one party. These terms are unfair or oppressive, and they may create an imbalance of power between the parties involved. Onerous terms in a license agreement can be problematic for the other party and may indicate a lack of fair bargaining power or an imbalance of power in the contractual relationship between the parties. Eg. The license agreement may impose overly restrictive terms on the licensee, such as limiting the territories in which they can operate or the license agreement may contain Unfavorable Dispute Resolution Mechanisms etc. In the case of *Shamsher Kataria v. Honda Siel Cars India Limited & Ors*⁶ The agreements which were analyzed by the CCI where there was alleged that the OEMs (original equipment manufacturers) had entered into a selective distribution channel and they had prohibited their dealers not to source any spare parts from any third party apart from OEMs. Further, the dealers were also prohibited to sell the spare parts to the independent repairers over the counter. The CCI noted that the agreements between the OEMs and their dealers restricted the sale of spare parts in the open market which under section 3(4)(c) of the Competition Act amounts to an exclusive distribution agreement. Further CCI observed that such practices also amounted to refusal to deal under the terms of section 3(4)(d) of the Competition Act. The OEMs and the authorized dealers also had clauses in their agreements requiring the authorized dealers to source spare parts only from the

⁶ Shri Shamsher Kataria vs Honda Siel Cars India Ltd. & Ors Case no. 03 of 2011

OEMs or from their authorized vendors, which the CCI found to be in the nature of exclusive supply agreements in terms of section 3(4)(b) of the Competition Act. The dealer agreements between the OEMs and their authorized dealers also had restrictions on dealing in competing brands of cars without seeking their consent in writing. The CCI noted that by entering into this agreement the OEMs restricted the customers of spare parts to a particular dealer and had limited choice of accessing any other dealer who could repair service at a lower cost than these OEMs. Further the OEMs by restricting access lead to the rise in the usage of spurious spare parts as genuine spare parts could only be available at few authorized dealers, which could jeopardize consumer safety. The CCI concluded that such agreement is void as it is an anti competitive agreement which causes appreciable adverse effect on competition in the market .

III. CONCLUSION

It is well observed that intellectual property rights at times can give rise to certain anti competitive practices. These practices could disrupt the competition in the market. It could lead to various consequences like stagnation of industry, higher prices/inflation, creation of barriers to enter the market, misuse of market power, lack of alternatives, Reduced incentive for efficiency etc. Practices such as pricing abuse (excessive pricing, differential pricing, minimum commitment charges) could disrupt market balance and can prejudice the interest of the consumers or other competitors. It helps the companies to influence or exploit pricing mechanisms in a market. Non pricing abuse (Onerous Terms in the License Agreement) in ways like Refusal to Deal, Exclusive Dealing, Tying and Bundling etc. can harm competition, restrict entry, or exploit consumers. The CCI over years has taken many advocacy initiatives stating practices which are anti competitive which indicates that while CCI gives due importance to IPR holders but it would regard all practices as anti- competitive where the IPR holder misuses the rights conferred upon him by the IPR statutes in India. The competition commission has tried to strike a balance between rights of IPR holders and Competition law by rewarding the IP holders but also safeguarding the market from unfair competition and anti competitive measures.
