Market Economy vs. Invention- Paradigm of Competition Law and Intellectual Property Rights

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Research Article

Abstract

The contentions between competition laws and intellectual property rights is still contemporary and evolving. The aim of both these legal regulation regimes are independent and exclusive, however, they can't be viewed in isolation. The technological advancement, research and development, competitive market structure, etc. the need for rewarding, promoting and preserving innovation and creativity has accelerated. However, this aspect of promoting innovation and creativity shouldn't conflict the basic ethos of market competition. Otherwise, the ultimate objective of consumer welfare will be defeated.

Keywords: Competition Law, Antitrust Law, Intellectual Property, Invention, Creativity, Market competition, Anti-competitive

1. Introduction

Competition law and IPR law have diverse objectives but their relation is a complementary relationship. This conflict or collision between the two statutes is in the nascent phase. India has cogent laws to regulate the market competition and anti-competitive activities through the Competition Act, 2002 and the umbrella laws of the intellectual property statutes i.e. trademark, patent, copyright, etc.

India has entered into the agreement relating to aspect of Intellectual Property Right, consequently India amended its IP laws according to the international IP standards. The underline purpose of IPRs is to reward the inventions and creation of the human mind. In so far as IP goes, the reward that an IP holder gains acts as a stimulus to promote further inventions and creativity. This ultimately involves the invention of new and better product and services, through research and development. Entrusting exclusive rights, in so far as patents go may be justified on the ground that without exclusive rights many firms wouldn't invest resources and capital in research and development. The inventor will face competition

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from those who haven't invested in research and innovation, likewise, priced at a cheaper rate. The incentive to originality, research & development would be missing if other players ride on it. In the case of trademarks, it encourages the trademark holder to invest in reputation and distinguishing the product. The consumers can identify the product by the trademark, this saves the consumer from confusion. The trademark endows reputation and concomitantly guarantee quality to a great extent.

Patents and other intellectual property rights are mostly limited by domestic law. For example, an invention of an Indian patent holder can be exploited in Hong Kong. The Indian patent holder cannot restrain exploitation of the patented invention in Hong Kong unless the patent is granted in Hong Kong also.

The new and better product and service face tough competition due to a plethora of options, alternatives, dupes, copied and counterfeit products flooding the market. These dupes or counterfeit products are made without making any investment. It is, therefore, necessary that innovation and creative work is protected. Striving to achieve the aim of Intellectual property law that is to promote and encourage R&D and innovation by deploying human skills, expertise, knowledge, etc.

The Competition Act, 2002 which sets out certain objectives keeping in view the economic development of the country. The Competition law intervenes with IPR law at several levels although their functions and concept significantly differ. The epicenter of the Competition Act, 2002, is to prohibit certain agreements, which are anti-competitive and prohibit the abuse of a dominant position. Section 3 of the Competition Act, 2002 regulates the horizontal and vertical agreements that are anti-competitive in nature. An exception for intellectual property has been made in the Competition Act, 2002 under Section 3(5). The roots of this exception relate to the type and nature of property and requirements that the intellectual property pose. In so far as Section 3(5) of the Competition Act, 2002 goes its provision to restrict infringement of the rights of the IP holder is laudatorily. This sub-section further allows imposition of the reasonable condition through agreements to protect the intellectual property. Perhaps, the unreasonable conditions on the use of IPR are not permitted, by virtue of regulation under Section 3(5) of the Competition Act, 2002 i.e. anti-competitive agreements. Thus, the interpretation of 'reasonable conditions' looks to best oblique as the Act does not define reasonable conditions. The task of interpreting and elucidating the reasonable

conditions ardently rests upon the judicial precedents. However, the booklet on intellectual property by the Competition Commission provides a list of unreasonable conditions.

The issue between IPR law and Competition law can be discern perhaps by focusing on few pertinent sections of the Indian Competition Act, namely the Ss. 3(5) conjoining with S. 60[3] & 62[4]. The Act specifically mentions that the provisions of the Competition Act should be in consonance with other laws at the same it the Competition Act will have overriding effect if provisions of other law are inconsistent.

Moreover, it is reverting to observe that the relevant markets will be required to be evaluated along with the degree of market power of the holder of intellectual property for assessment under the competition law.

Further, the "*abuse of dominant power*" is provided with in Section 4 of the Competition Act. The provision is drafted akin to EC Treaty's Article 82.[5] Section cogently mentions that the abuse of a dominant position is statutory prohibition. It does not prohibit or restrict the dominant position. Prohibition is on abusive use and misuse of dominant position by the law. It does not enumerate any exception to IP as per that given in Sub clause (5) of Section 3 of the Competition Act, 2002. It is noteworthy to consider that IPR may not confer the holder a dominant position in the market. The monopoly or the exclusive rights conferred by IPR are time-specific and perhaps may not result in an economic monopoly. The competition law is concerned to regulate the latter i.e. economic monopoly. Subsequently, the mere presence of the dominant position granted to the IP holder under the IPR law is not prohibited under competition law. The quintessential requirement is that the dominant position is being abused by the IP holders. Moreover, Competition law intervenes in situations when the dominant position granted to the IP holder is abused, else it is inconsequential. The competition law will necessarily intervene when the dominant position is granted by the IPR law and it itself is abused by the IP holder. Ultimately, such abuse impacts the economic monopoly adversely.

[3] Section 60 of the Competition Act, 2002 states that the Act to have overriding effect. The provisions of the Competition Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

[4] Section 62 of the Competition Act, 2002 provides application of other laws not barred. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

[5] The Indian competition regime is young, this similarity in law to the EC law would allow the Competition Commission of India to draw on the EC competition jurisprudence, which is considered one of the most developed in the world. *See*, Shamnad Basheer, Competition Bill in India: The Nexus with IP, September 22, 2007, *available at:* http://spicyipindi a.blogspot.com/2007/09/competition-billin-india-nexus-with-ip.html. (December 16, 2020).

Apparently, the underline purpose and objective of competition law and IPR are same but their perspective and manner differ. The IPRs grant monopoly and exclusive rights to the innovator or creator for a specific tenure, excluding others from using the product and services that are protected by IP law. Per contra, the competition law strives to reduce market barriers, unhealthy competition and keep market open for players to innovate and grow.

Ex-post intervention is cast upon the antitrust laws or the competition law and for the ex-ante competition promulgate the IP law are designed.
It is undeniable that there is cogent convergence among the two laws regulating market competition and the IP, however, it has come into light recently. The importance and problems associated with this convergence have drawn the eye of stakeholders, scholars and thinktanks. The competition law and IP are independent statutes granting protection and promoting individual aims respectively. Competition law promotes and protects healthy competition in the market and correct market failures. It regulates anti-competitive agreements, abuse of dominant position and combinations. Whereas the IP laws are governed by distinct statutory laws for each IP. The fundamental aim of the IP is to provide the exclusionary right or exclusive rights offered as a bundle of rights over creations of the human mind.

The difference in the manner, perspective and approach of the competition law and IP law germinate the conflict and overlap between the two statutes. Considering the conflicting convergence, a new provision S.4A was proposed in "*The Competition (Amendment) Bill, 2020*." Per se this Section of "*The Competition (Amendment) Bill, 2020*" sought to be an endeavour for exclusively protecting the intellectual property rights holders.[6]

This article is an attempt to deliberate the significance and convergence of the IPR and the Indian law in India on anti-trust. It establishes the differences and interactions between intellectual property and competition law.

[6] The Competition (Amendment) Bill 2020, S. 4A. reads, nothing contained in section 3 or section 4 shall restrict 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 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 and Integrated Circuits Layout-Design Act, 2000 (37 of 2000). *See*, http://feedapp.mca.go v.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf.

2. Literature Review

Does a tussle between laws pertaining to innovation and market regulation really exist has been studied by Raghavendra Pratap Singh and Vishwanath Singh Pratap in the article "Are IPR and Competition Law in Tussle?: An interface between IPR and Competition Law."[7] According to the author, prima facie observation of IPR and Competition law perhaps seems to be odd. The never-ending legal debate has originated from the presumption of their opposing and conflicting nature. The article concludes that a middle path is being developed through perusal of statutes and interpretation of statutes via the judgments of the Courts rather than studying both the laws in isolation. So that the incentives to the IP holder are secure without compromising the consumer welfare. Pro-competitive interpretation and approach of IPR law must be inferred in consonance with competition law. In exercise of the exclusive rights of an IP holder, the focus of competition law should be to concentrate on the effect on the relevant market.

The research laid in respect of interplay between IPR and competition law can deduce certain guiding principles. The key principles are, firstly, the umbrella shall not be imposed on IPR. It shall have interfered with only in cases where it causes appreciable adverse effect on market competition. Secondly, enterprises dealing with IPR shall be properly regulated to avoid any concentration of market strength that may lead to abuse of market dominance. Thirdly, sufficient jurisdiction must be given to the market competition watchdog i.e. Competition Commission of India to decide matters pertaining to both IPR and competition law.

The coordination between IPR and competition law must be maintained with the dissimilarity of the two laws, particularly legal monopoly & economic monopoly. As, legal monopoly falls in the ambit of Intellectual Property Rights & the latter can be categorized in the preview of law relating to competition.

In the article Abuse of Dominance & IPRS in India: Emerging Jurisprudence in the Era of Digital Economy, the author Avinash Sharma.[8] It has been viewed that IPR are acting as an entry barrier for novel competitors to enter the market. However, some innovations like patent may be immensely valuable perhaps raises the contention that whether competition

[7] CNLU LJ (7) [2017-18] 215.
[8] Manoj Kumar Sinha, Susmitha P Mallaya. (Ed.), *Emerging Competition Law* (Wolter Kluwer, India, 1st edn., 2017).

law should intervene or leave it alone. For economic and consumer welfare balance between both, the laws must be struck. This balance can be struck by right policies which will enable that IPR is given appropriate for correct reasons and to correct parties. Moreover, IPR is given for an appropriate period, exemptions, exclusions with the flexibility to provide and safeguard the vital public interest. Although, the balance will highly rely and vary depending not on one factor, however on the nature and innovative process, market structure, the factors of particular sector, demand variations, the cost of research and development and of course the product. Hence, standards of Intellectual Property should have sufficient restrictions if the IPR encounters abuse or anticompetitive agreements, per contra the standards should adequately reward the IP holder.

"The Interface between Competition Law and Intellectual Property Rights: Balancing the Pros and Anti-Competitive Strains authored by Abhay Lunia and Itishri Upadhyay."[9] In the article the authors have impressed that Innovation will be encouraged by maintaining a balance between the personal interest of the holder of rights and that of the society. Therefore, competition policy or intellectual property policy must not be pursued either too strongly or weakly. If competition policy bends to allow companies to make use of the innovation of other companies, it will reduce the incentive of the creator or inventor to innovate. Consequently, the interest of the IP holder must be taken into account.

The common goal of consumer welfare is to be kept in sight to iron out the strains between the competition law and IPR. The judicial trend in different jurisdiction attempt to keep the anti-competitive rule in line with their policy objectives. Like, the US jurisdiction aims at enhancing consumer welfare by promoting dynamic efficiency and the UK emphasizes on enhancing the short-term gains to the consumer at the expense of more radical innovation and long-run gains offered by dynamic efficiency. India draws a contextual inference from both the jurisdiction, has followed a similar approach to that of the EU in promoting consumer welfare and static efficiency. The view of the authors that the interrelationship between Competition Law and Intellectual Property Rights is complex and is still evolving is affirmed by the writer in this article.

In Exemptions, Exceptions and Differential Applications under Competition (Antitrust) Law R. Shyam Khemani has accorded the position of more complex area to antitrust law and

[9] Abhay Lunia, Itishri Upadhyay, "The Interface Between Competition Law and Intellectual Property Rights: Balancing the Pro and Anti-Competitive Strains" 3(2) *NLUJ Law Review* 75 (2016).

policy and intellectual property right. According to the author, a balance should be struck carefully. To limit or withdraw exemptions, provisions need to be in place. Guidelines and legal provisions delineating the prohibitions and permissible practice under the antitrust laws have been published by some jurisdictions.[10]

In The Antitrust Assault on Intellectual Property, author David J. Kappos writes that there is expansive deference, recognizing similar goals of the antitrust and intellectual property law. The writer mentions that the common ground of both the laws can obscure due to the perspective and time scale of the two laws.[11]

"Section 3(5) (i) of the Competition Act- an Analysis" authored by Paramjeet Berwal. The article pertains to the involvement between Intellectual Property and competition law. According to the writer, it is crucial for all the stakeholders to analyze aspects of Sub-Clause (5) of Section 3 of the Competition Act, 2002,[12] that affect competition, innovation & welfare of the consumer, in view of the decision of the Competition Commission's given in Kataria[13] judgment.

The authors reckon that there are substantial uncertain contours through which the competition law has been framed due to which there is inability to regulate the anti-competitive exercise of IPR.

IPRs should not be used as a means to circumvent and ultimately violate competition law. Even the provisions of the TRIPS aim at preserving competition in the market. More so the public interest has to be accounted by Intellectual property rights. Therefore, the responsibility to analyze the new dimensions of the law and to interpret law made by the law makers lays on the judiciary. This article in a potential way accedes to the views of the author of the article Section 3(5) (i) of the Competition Act- An Analysis.

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[10] Dhall. (ed.), *Competition Law Today Concepts, Issues and the Law in Practice* (Oxford, India, 2nd edn, 2019).
[11] David Kappos, "The Antitrust Assault on Intellectual Property" 31(2) *Harvard Journal of Law & Technology*, (Spring 2018).
[12] Clause (5) of Section 3 of the Competition Act dealing with Anti-competitive agreements states-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).
[13] *Shamsher Kataria*, In re, 2014 SCC OnLine CCI 95.

3. Methods and Results

The method involved in preparing this article script includes primary and secondary sources of information. Relevant statutes, books, articles, judicial precedents, legal database, online resources like websites pertaining to competition law and IP have been referred to in this article. The doctrinal or the armchair research methodology was adopted to research and study the problem and convergence that of antitrust law and IP. This study is partly explanatory, analytical and comparative in nature.

The cogent research questions pertaining to this article are as follows:

Is there a convergence of law relating to market competition & IP?

Whether the interface of competition law and IP need sui generis policy?

Does the law relating to market competition and IP have diverse objectives?

These research questions have been discussed in the following part of the article. Moreover, to understanding with the contour of the interface of competition law and IP being in the nascent. Instead of sui generis law to solve the problem arising between the two laws, intelligible interpretation should be given to matters arising in this area. There should be a harmonious interpretation of the competition law and IP so that there is no inconsistency between them.

IP grants exclusive rights whereas competition law attacks unfair monopoly. However, the underline objective of both the legislatures is to promote healthy competition and consumer welfare.

4. Competition Law v. IPR: Legislative and Judicial Approach

In the recent age of vast growing economy, the pivotal role played by competition law is complementary in keeping close scrutiny on the market regulation. Likewise, the advent of the age of innovation and technology paved the way for a strong legal platform to protect intellectual property rights (IPRs) in society. Henceforth, it is needless to say that the concepts of law relating to competition and that of Intellectual Property Rights are not contrasting set of groups, but are a mutually exclusive study, that seems to have conflicting interests in certain scenarios. While competition law is an attempt of legislation to curb any

abuse or dominance in the market, on the other hand, IPR law promotes monopolistic power in the name of innovation.

4.1 Competition Law and Policy

This law is a tool for curbing elements in the trade market which are not in competition, forbidding abuse of dominant position, and regulation of combinations and mergers. The legislature has thus assigned a key role to competition law of ensuring a productive, efficient and reasonably competitive markets. India sanctioned The Competition Act 2002 after the review of Act of Monopolies 1960 and Restrictive Trade Practices Act and then entrenched the competition commission of India.

The law of competition and the policy of competition are two different concepts, wherein former being the subset of the latter. Competition policy entails that the anti-competitive conduct by businesses is prohibited by competition law and in case the market breakdown, sectoral regulatory laws are in position to look upon the situation.

To intensify competition in local and national market certain government policies such as relaxed foreign investment, regulatory reform and liberalized trade policy are also practiced.[14] The aim of policy on competition is to alleviate the efficiencies of the market that ultimately benefits the consumers, by actually increasing rivalry between competing businesses.

4.2 Intellectual Property Rights

Intellectual Property Rights aim to give an exclusive right to owner, prohibiting unauthorized use of innovation, and promotion of creativity and innovation by rewarding the owner of the same. Apart from real tangible property, the intellectual property covers patents, trademarks, copyrights, geographical indication, industrial design protection, plant variety protection, layout design protection, etc. The justification of IP protection to products and processes is owed to various factors like uniqueness, innovation and novelty, branding etc., which brings value addition to the society in any welfare economy. It is, however, this justification that has led to putting barriers for the new and small competitors to enter into the market, who lack

[14] Competition Law and Policy in India, Law Teacher, *available at*: https://www.lawteacher.net/free-law-essays/international-law/the-foundation-of-the-competition-policy-in-india-international-law-essay.php (Last visited on Dec 13, 2020).

that financial support to come up with the innovation of their own in a competitive framework.

4.3 The intersection between Competition law and IPRs

Economical surge in the present times has led to wide discussions regarding the concept of competition law and IPRs. The two concepts pose in a direction towards securing rights of owners, consumer and the society. Yet, they somehow strike a contrast when it comes to the monopolistic exercise of powers by the owner.

It is imperative to understand how the two laws are related before we analyze the reason that there arises a scrimmage among the two. In the longer run, the monopolistic or the exclusive status is given by virtue of IPR laws to the holder of right promotes competition. "*In so far as a good deal of innovation on part of competitors is promoted, it will lead to new, innovating, competing and sustainable products in the market*."[15] Nevertheless, higher efficiency and consumer welfare are the primary objectives of the both the laws. While the IPR law creates a monopoly for only a limited period of time, in favor of the holder of the right, the competition law is invoked only when there is a misuse of such a monopoly. It is within the authorised boundaries of IPRs that competition law can exercise a check on the use or misuse of the rights conferred under IPR laws.

Further, it imperative to state that IPR laws have an overriding effect on the Competition Act, in regard to the abuse of IPR. If in the exercise of his rights a patent holder gives rise to anti-competitive activity, the Patent Amendment Act (2005) can be invoked that provides the issue of "*licenses to stop such anti-competitive activity*."[16] Henceforth, to an extent, it can be rightly be inferred that though Competition law and IPR law be in conflict. However, it cannot be ignored that they seem to be overlapping areas that have to be understood in conjunction with the globalized economy of the present times. Notwithstanding, IPR and Competition law are in sync with each other when it comes to the protection of 'idea' or 'expression'. The market carves a niche for intellectual property by the introduction of innovative, diverse products and services, due to which competition is enhanced.[17]

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[15] Govaere, I., *The Use and Abuse of Intellectual Property Rights in E.C. Law* (Sweet & Maxwell, London, 3rd edn, 1999).
[16] Ms. Madhuri Iyer, Competition Law and IPR- Friends or Foes?, Khurana & Khurana, *available at:* https://www.khuranaandkhurana.com/2013/02/16/competition-law-and-ipr-friends-or-foes/ (Last visited on Dec 18, 2020).
[17] *Ibid*.

The various provisions of the Indian Competition Act 2002, carving out the link between the IPR laws and Competition law are summarized below:

a. Section 3: This Section prohibits anti-competitive practices, irrespective of the fact that "the very prohibition does not restrict 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 conferred under IPR laws like Copyright Act, 1957, Patents Act, 1970, the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999), the Designs Act, 2000 and the Semi-Conductor Integrated Circuits Layout-Design Act, 2000."
b. Section 3(5): The reasonable use such inventions are exempted from the span of the law dealing with market competition.
c. Section 4(2): Here, the action by enterprises are to be treated as equally applicable to IPR holders.

4.4 The tussle of Competition law and IPRs

In a leading article published by UNCTAD (United Nations Conference on Trade and Development), it has been held that "while there is an interface between the defense of free competition and intellectual property protection, this does not mean that there is a collision between the two but there are some areas where disputes can occur. These disputes should be regarded as exceptional situations because, in fact, exclusive rights encourage innovation and technology generation to benefit society."[18] The surge in market unpredictability, owing to rising innovation and curiosity towards better options has given a boost to competition law.

In the larger sense, IPRs lessen the competition while competition law endangers competition. The challenges that evolve between the two facets can be understood hereunder:

4.5 The Anti-Competitive Agreement Provisions under Section 3 of The Competition Act, 2002

Section 3 of the Competition Act deals with agreements that are anti-competitive and affect the market by causing or "likely to cause an appreciable adverse effect on the competition (AAEC) within India." S.3(5) of the Competition Act explains an exemption to IPRs, wherein

[18] *Convergence between Competition Law and Intellectual Property*, UNCTAD, *available at*: https://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Intellectual-Property-and-Competition-Law.aspx. (Last visited on Dec, 22, 2020).

'reasonable condition' can be imposed for the protection of IPR, without attracting S.3 of the Competition Act. However, it is pertinent to mention here that the term 'reasonable' has not to be explained under the Act. Also, the enforcement of 'unreasonable condition' to guide IPR will definitely violate provisions of S.3.[19] Activities falling in such ambit, i.e., IPR activities not enjoying above mentioned exemptions are explained hereunder:

4.6 Tie-in Agreements

"*The agreement of tying occurs when, through a contractual or technological requirement, a seller conditions the sale or lease of one product or service on the customer's agreement to take a second product or service*."[20] It believes that bundling and tying are considered as anti-competitive and pro-competitive in general.[21]A joint agreement between few organisation is hence, a way of close trade practices which create an imbalance in the market and thus hamper competition. In such a scenario patentee handling goods or services are barred from licences for competing in the market.

4.7 Patent Pooling

Patent pools basically are the accumulation of IPRs that are the subject of cross-licensing. The patent pool is administered as per the understanding of the contract amongst the parties. The patentee directly transfers the IPR(s) or licensees or as joint venture or in other ways.[22] And therefore, it can be considered that patent pooling is trade-restrictive practice, as technology related to intellectual property will be confined with few people by the process of agreement pooling.[23] It is in this regards that patent pools can be termed anti-competitive when they harness patents which pose an adverse effect on the market. Krattiger A. Kowalski[24] has held that patent pools will restrict patents which are invalid which will ultimately prevent such technology to fill in the domain of public. It is due to this reason that

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[19] *Anti-Competitive Agreements under the Competition Act,* Vakilno.1, *available at:* https://www.vakilno1.com/bareacts/laws/anti-competitive-agreements-competition-act.html. (Last visited on Dec. 19, 2020).

[20] Dennis W. Carlton & Jeffery M. Perloff, *Modern Industrial Organisation* 319 (Pearson, US, 4th ed. 2005).

[21] *See*, e.g., David Evans & Michael Salinger, *Why Do Firms Bundle and tie? Evidence from Competitive markets and Implications for Tying Law,* 22 Yale J. on Reg. 37 (2005).

[22] John Klein, '*Cross-Licensing and Antitrust Law*', United States Department of Justice, *available at*: http://www.usdoj.gov/atr/public speeches/1123.htm (Last visited on Dec. 19, 2020).

[23] Sehaj Sunderlal, *Competition Law vis-à-vis IPR Rights,* Legal Service India, *available at:* http://www.usdoj.gov/atr/public speeches/1123.htm. (Last visited on Dec. 19, 2020).

[24] Krattiger A Kowalski S P, 'Facilitating assembly of and access to intellectual property: Focus on patent pools and a review of other mechanisms' in A. Krattiger, RT Mahoney, L Nelsen (eds), *Intellectual Management in Health and Agricultural Innovation: A Handbook of Best Practices* (Oxford 2007).

patent pools have been rested on the enter mark of permitted monopolies and anti- confident violations

a. Royalty payment after the expiration of patent period: Agreement which includes a clause with regards to royalty payment by the licensee will come in light of exemption under Section 3(5) after the expiry of period of patent fall under the restrictive trade practice.
b. Restricting clauses in R&D: Agreement having a clause that restricts competition in Research and Development or use of rival technology would infringe exemption granted under Section 3(5) of the Act, as being held to be anti-competitive.
c. A deal in which licensor settled the range of the product at which licensee should sell out their product in the prevent market place, or imposition of territorial restriction, are termed to being anti-competitive and thus will lose immunity of Section 3(5).

4.8 Comparative Analysis among different nations

To study and analyze the given subject, a wholesome approach is inevitable. Hereunder, there is a crisp discussion of a comparative analysis on the subject among the US, EU and India, in light of some judicial pronouncements.

a. *The United States:* Nation like the United State has free market or open market system, allowing easy regulation since it is minimal or almost no abuse of monopolistic behavior. It was as early as in 1995 that "*the Antitrust Guidelines for the Licensing of Intellectual Property have been adopted by the US, after taking a systematic economic effects-based approach to evaluating IP licensing agreements*."[25] It is widely acclaimed that the approach of the United States on refusal to license is laxer. Even in the case of a monopolistic patent holder in a relevant market, its refusal to license a patent to others will not generally provide the basis for holding that the patentee has been abusive.[26] In Trinko case,[27] the Court upheld that monopolistic power can be acquired by firmed by making unique and customized infrastructure for their customers. Additionally, the incentive for monopoly would reduce of such firms if the firms are compelled to disclose the source of their advantage and rivals also invest in those facilities that are

[25] Commission Regulations (EC) No. 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements, 1996 O.J. (L 31) 2.
[26] *SCM Corp.* v. *Xerox Corp*., 645 F. 2d 1195 (2nd Cir. 1981).
[27] *Verizon Communications* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408(2004).

economically beneficial. Tying cases have been covered under section one of "*the Sherman Act*," similarly, the tying arrangements and the exclusive dealing are regulated by section three of "*the Clayton Act*". It can be observed that numerous cases of the US of IPRs have been booked under violation of Section one (as tying cases) & Section two (attempt to monopolize) of "*the Sherman Act.*"

The *Microsoft case* is a landmark case that relates to competition law and IPRs law issues during the TRIPS regime.[28] The case is of 1998, in which it was alleged that Microsoft was abusing its monopoly power as Microsoft was tying its operating system, holds much importance because Microsoft was convicted when US Congress passed the Sherman Act. Not only by charging prices that are monopolistic, but it was also alleged that Microsoft harmed consumers by "depriving them of software innovation that very well may have found valuable, had ten innovations been allowed to reach the marketplace."[29] Hence, it can be deduced that even if the ownership of Windows is held by Microsoft, it still cannot exercise an exclusive right in the downstream market to the benefit of its own.

It can thus be inferred that the decisions of courts & similar tribunal have been pivotal in developing the law and corresponding the legal system in the US.[30]

b. *The European Union (EU):* In 1996, the European Commission adopted its present Technology Transfer Block Exemption (TTBE),[31] which had a more or less structured approach to examine the technology licensing agreements. However, the said approach also shifted to economic effects-based approach through a newly drafted document, i.e., the Technology Licensing Guidelines.[32] Article 81 of the EC Treaty, clearly states the divergence between both the laws[33] while Article 82 explains the abuse of dominant position

[28] *US* v. *Grinnell*, 384 U.S. 563, 570-71 (1996); see also Aspen Skiing Co., 472 U.S. at 595-96.
[29] Rubinfeld, Daniel L., (1998). *Antitrust enforcement in dynamic network industries,* The Antitrust Bulletin/ Fall-Winter 1998.
[30] K.D. Raju, *the Intellectual Property Rights and Competition Law-A comparative analysis* (1st edn, Eastern Law House 2014) 167.
[31] Commission Regulations (EC) No…/2004 of [...] on application of Article 81 (3) of the Treaty to categories of technology transfer agreements, *available at:* http://europa.eu.int/comm/competition/anitrust/legislation/licensing_arrangements/en.pdf., (Last visited on Dec. 19, 2020).
[32] Commission Notice, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, *available at:* http://europa.eu.int/comm/competition/antitrust/legislation/licensing_arrangements/guidelines_en.pdf (Last visited on Dec. 19, 2020).
[33] Article 81, European Union, Treaty Establishing The European Community, *available at:* http://eurlex.europa.eu/LexUriSe rv/LexUriServ.do?uri=CELEX:12002 E081:EN:HTML (Last visited on Dec. 19, 2020).

created through IPR licensing agreement.[34] However, it is to be noted that under Article 82, only the abuse of a dominant position can trigger liability and not the conduct which is aimed at obtaining a dominant position. Likewise, Article 102 of the EC Treaty holds the power to pardon conduct of abuse, if it can be proved that "*such abuse was done for the welfare of the consumers at large*." It can be deduced that a balance between abuse of competition and the welfare of the consumer is sought by the authorities of the European Competition. It is therefore said that the EU takes a more vigilant approach towards license refusal, which is evident in the IMS health judgement[35] regarding the refusal of licensing data collection on pharmaceutical sales and prescriptions, copyrighted '1860-brick structure'. It was held that mere refusal on the part of authorities to grant license cannot be considered as an abuse of dominant position. Access to an product or service protected under IP protected can indispensable only after satisfaction of following conditions must be there to carry on business:

a. "*The refusal must prevent the emergence of a new product for which there is potential consumer demand,*
b. *It must be unjustified, and*
c. *It must exclude a competition on a secondary market."*[36]

"*The law of the EU is a unique legal system which operates alongside the laws of the member states of the EU*." The tying practices are governed under the EC Treaty's Article 102, where contracts to acceptance by other parties, having no connection with the subject of such contract, can be punished under Article 82(d) of the EC Treaty as abusive conduct.

Thence, to conclude that competition authorities of both the EU and the US are following competition policies, which are oriented towards innovation[37] & almost same approach is taken for licensing of Intellectual Property.

[34] A. Jones & B. Suffrin, *EC Competition Law: Text, Cases and Materials* 773 (Oxford, US, 2008).
[35] *IMS Health Care GmbH & Co. K.G.* v. *NDC Health GmbH & Co. K.G.* Case 2-418/01; (2004) ECR I-5039.
[36] *Ibid*, Para 38.
[37] Tu Thang Nguyen, *Competition Law, Technology Transfer and the TRIPS Agreement*, (1st edn, Edward Elgar Publishing Ltd 2010) 160.

4.9. Judicial Pronouncements dealing with the interplay of Competition law and IPRs:

While dealing with the issue of the conflict of two laws, alongside maintaining harmony among the rights of the owner and that of society, Indian courts have tried to deal the interplay among the two through numerous judgements, which are discussed below:

a. *FICCI-Multiplex Association* v. *United Producers Distributors Forum*:[38] In the present case the issue of collective abusive decision was dealt with. A cartel was formed under the forum United Producers and Distributors Forum (UPDF) by the opposite parties. The opposite parties forming this forum included producers and distributors of the film. The collective abusive decision of the UPDF was to not to release films to the multiplexes in order to create pressure onto them for accepting the terms of revenue sharing ratio. The formation of cartel i.e. UPDF by the consortium producers and distributors was upheld by the Competition Commission of India. This cartel had the ability to control the release of the films, because of its market share being at 100%, and also held the unreasonableness under Section 3(5)(i). Additionally, it was rightly held that the supply of films to multiplexes restricted by the United Producers and Distributors Forum (UPDF) was an anti-competitive act falling under the Competition Act 2002, Section 3(3).
b. *Aamir Khan Productions Private Limited* v. *The Director-General*:[39] The consequence of this case was that a plethora of cases relating to issues of IPR and Competition in the economy were unfolded. It was held that CCI has the jurisdiction to deal with cases relating to IPR and competition issues by the High Court of Bombay. It was found that there was anti-competitive agreement at the hands of UPDF who held almost 100% share in the Bollywood film industry, and thus there was a dominant position also. Further, Bombay HC also held that right to sue for infringement of patent, copyright, trademark etc., cannot be taken away by Section 3(1) and defences can be equally orchestrated before both CCI and the Board of Copyright.
c. *Micromax Informatics Ltd*. v. *Telefonakiebolaget LM Ericsson (Publ.)*:[40] Under the Competition Act 2002, Section 19(1)(a) an informant filed an information against the opposite party on the premise of them demanding an unfair royalty from the informant about standard-essential patents on GSM technology and thereby accusing of an abuse of

[38] Case no 01 of 2009, decided on 25th May 2011.
[39] 2010 (112) Bom LR 3778.
[40] Case no 50/2013 of Competition Commission of India.

dominant position with its large portfolio of Standard Essential Patents (SEPs). Ericsson, on the other hand, claimed that its patents have been infringed by Micromax and Intex. It can thus be alleged that plaintiff and defendant have taken two different stands, wherein informant before CCI holds that defendant is bound to obtain license from the plaintiff because the alleged patent not only valid but also essential. However, the defendant (Micromax) had contested the validity of Ericsson's five Standard Essential Patents (SEPs) in the Intellectual Property Appellate Board (IPAB). It was concluded by the hon'ble High Court of Delhi (herein with referred as DHC) that while it accepts that at the order passing stage, a prima facie view had to be formed by the CCI. Additionally, the it would include a view as to its jurisdiction to entertain the informant/complainant, which had not been done. The hon'ble High Court of Delhi was unable to gives its judgement regarding the authority concerned in recent case filed under Article 226 of the Constitution of India.

Further, it has also held DHC that CCI deal in clean constitutional laws, and stated that "nothing stated herein should be construed as an expression of opinion prima-facie or otherwise on the merits of the allegations and all observations are in the context of jurisdiction of CCI to pass the impugned orders".

5. Conclusion

Hence represents a cogent relationship that interweaves competition law and IPR law which has been mainly dealt at the national level by various jurisdictions. This interface and relationship arising out of IPR and competition law have been noticed in the global scenario also.[41]

The conflicting areas of competition law and IP should be dealt on a case to case basis in reference to the facts of the case. Prima facie conflict can apparently be observed between laws of competition and IPR. However, both legislatures have sui generis aim but their fundamental objective is not in conflict.

The Indian competition law has taken inspiration and widely acknowledged the European competition law because the latter is developed regime. It is a source of building the

[41] As early as the 1948 Havana Charter for the International Trade Organisation, imposed an obligation that Members prevent restraint on competition and cooperate with the Organisation on such restraints. *See*, http://docs.manupatra.in/newsline/article s/Upload/502431F8-79FB-483F-BAED-0F4EBDF56339.pdf (Last visited on Dec. 19, 2020).

instrumental understanding of the competition law for India, as Indian competition law is in the nascent stage. Indian competition law and policy perhaps influence ubiquitous but adoption, in particular, the interpretation is based on its national law and objective. Coherent reliance should be made on the precedents to develop the law further. Adjudicators can perhaps maintain the fundamental objective of these collateral laws. Simultaneously, balance and struck accord of these laws to attain the common and ultimate objective of consumer welfare.

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