Competition Law an Interventionist Instrument of Intellectual Property Rights?

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"It is a long-standing topic of debate in economic and legal circles: how to marry the innovation bride and the competition groom"[1]

ABSTRACT

What is regarded as new today becomes old tomorrow. In this competitive world, every organisation tries to attract customers by introducing additional features to existing products in the market, or by innovating new range of goods, so as to maximize economic benefits. Intellectual Property Law confers exclusive or monopolistic rights when such inventions or additions exhibit some novelty, originality or inventive step, for a particular period of time, paradoxical to the principles of the Competition Law which seeks to prohibit monopoly for promoting free and fair competition in the market. Thereby, the two branches of law are generally categorised as rear bed fellows. The present era particularly focuses on the areas of interlace between them. The contemporaneousness of both branches of law is essential for the purpose of promoting market efficiency and protecting the interests of consumers, as one seeks to foster innovation and their commercialization, while the other corrects the malfunctions in the market.

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

INTRODUCTION

The market is governed by different regulatory principles.[2] India adopts the principle of a regulated market, to ensure the customer's basic needs are met appropriately and to balance the conflicting interests of various competitors. The legislations play a pivotal role in this type of economy which balances the monopoly rights and the interests of society. Intellectual Property Rights (IPR) and the Competition Law are two such cardinal branches of law.

The relationship between IPR and Competition Law is paramount in the present era of globalisation and liberalisation. In the back drop of the 'reward theory', Intellectual Property Law aims to reward the inventor for disclosing his work to the public, by granting exclusive rights over it for limited period, which would otherwise remain in dark. To make it simple, protection under IPR is given as a cost for disclosing his work to the public thereby granting access to the community at large. Thus, IPR is always concerned about individual rights whereas Competition Law is concerned with the interest of the customers i.e. the rights of the public at large, resulting in creation of antithesis legislations. Hence, there exists certain interlaces and tensions between this relationship.

At first blush, the objects of IPR and Competition Law seem to be at loggerheads with each other in their areas of operation. However, it is fallacious to say so, as there also exist a few arenas of convergence, the primary object of the same being two-fold; i) to provide economic benefit to the intellectual thinking of oneself and ii) to make it beneficial by making the intellectual work known to the civic. The secondary object is to promote inventions which in turn create choices of products in the market. Therefore, while the primary object is to ensure fair competition in the market by way of regulatory mechanisms, the secondary object is to stimulate product and process innovation fundamental to competitiveness and economic growth.[3] Thus, there exists a certain consensus on the object of both Laws, intending towards promotion of consumer welfare and innovation.[4] The *U.S. Department of Justice & the Federal Trade Commission*[5] has similarly observed that:

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[2]Shubhodip Chakraborty, *Interplay between Competition Law and IPR in Its Regulation of Market*, ACADEMIKE (Dec.24, 2018, 10:20 AM), https://www.lawctopus.com/academike/interplay-competition-law-ipr-regulation-market.

[3] Ruchi Verma & Shanya, *Clash between Intellectual Property Law and Competition Law: A critical analysis,* Vol. 1 Issue 1 RGNUL Student Law Review, 148 (2014).

[4] Atari Games Corp *v.* Nintendo of Am Inc., 897 F.2d 1572, 1576 (Fed Cir 1990).

[5] US Department of Justice and Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting innovation and competition, 2007, (Dec. 24, 2018, 12:30 PM),

> *"... [Competition] laws aim towards protection of robust competition in the market, whereas IP laws work to protect the necessary ability to earn a return on the investments that is necessary to innovate. Both lead to enter the market with production of desired technology, service or product..."*

Hence, there exist certain inherent tensions and interlaces between IPR and Competition Law. However, the end-point of these two laws is akin i.e. maximising consumer welfare.

This article seeks to spell out the correlation of the IPR-Competition law duo in the first part. In the second part, it goes on to elaborate the provisions of TRIPS agreement and provides comparative jurisprudence of the relationship between IPR and Competition Law in other countries. It then describes the facets of confluence of both the laws in the third part. Finally, the article concludes by explaining the inevitability of the cordial relationship between the two and suggests a few measures for better, harmonious relationship.

Denotation of the Term 'Competition'

The denotations of 'Competition' in IPR and Competition Law are contradictory. 'Competition' in IPR stimulates intense competition among the innovators and also simultaneously restricts the competition in innumerable ways, whereas, the term 'Competition' in the Antitrust Law intends to prevent abusive practices in the market for promoting and sustaining competition in market. More precisely, Antitrust Law prohibits anti – competitive agreements, abuse of dominant position and various combination, having appreciable adverse effect on the competition in the relevant market.[6] From the veneer, it seems that both laws have seemingly different objectives, but as previously stated, they ultimately aim at promoting & fostering innovation and consumer welfare in common.[7]

Dynamic Efficiency versus Static Efficiency

From the perspective of economic efficiency, the inter-relation between IPR and Competition Law is echoed by the relationship between 'dynamic efficiency' and 'static efficiency'. Both measure the efficiency of the market over years or for a shorter period of time respectively.[8]

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http://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcementand-intellectual-property-rights-promoting-innovation-and-competition-report.s. department-justice-and-federal-trade-commission/p040101pro

[6] *Supra note* 2 at 1.

[7] Anthony, S.F, *Antitrust and Intellectual Property Law: From Adversaries to Partners*, 28 AIPLAQ.J.1 (2000).

[8] Anderman, et al., *Technology Transfer and the New EU Competition Rules: Intellectual Property Licensing after Modernization*, OXFORD: OUP, 70–72 (2006).

Dynamic efficiency and Static efficiency are discordant with each other. 'Static efficiency' aims at reducing the costs of the products and improves quality and quantity of the products at existing level of prices. On the contrary, 'Dynamic efficiency' encourages novelty and innovation of new products or processes.[9]

IPR promotes dynamic efficiency by conferring exclusive monopolistic rights on the creator of the products and processes if they involve a novel, original and inventive step. Contrastingly, Competition Law promotes static efficiency by eliminating monopolistic and unfair competition in the market in order to maximise the usage of the given amount of the resources. Considerable momentum to the growth and welfare comes from the dynamic efficiency as it aspires to reduce the prices of the existing products and also to create substitutes. This can be observed from the statement of Josef Schumpeter, who opined that: "*The radical momentum that sets and keeps the capitalist engine running is gained from the new consumers, new products and novel methods of production and transportation. The competition from dynamic products or services or the new source of supply, mandates new costs and quality advantage, which questions the very existence of such firms and not merely their profit margins. This kind of competition is a more efficient lever in the long run for creating an arena for better innovations thereby lowering the prices".*[10]

Congruently, Robert Solow, in his Nobel Prize acceptance speech in 1987 expressed that, in the broader sense, "*the enduring rate of growth is dependent on the technological progress of the country*".[11] However, the 'monopoly' conferred on an IPR holder is only to exclude others from exercising such rights for a limited period of time. It is merely a legal monopoly. IPR in no way confers the economic monopoly as required by Competition Law, which gives the power to determine the prices in the market and to sustain them over a period of time.[12] Almost all scholars, academicians, practitioners concur that IPR and Competition Law are complementary to each other and their cordial relationships is eminent for the efficient functioning of the economy[13]. The US Antitrust Guidelines for Licensing of Intellectual Property, 1995 presented a similar view that, "*the Intellectual Property Laws and the antitrust*

[9]TU THANH NGUYEN, COMPETITION LAW, TECHNOLOGY TRANSFER AND THE TRIPS AGREEMENT IMPLICATIONS FOR DEVELOPING COUNTRIES, (Edward Elgar Publishing Limited, USA, 2010).
[10] Joseph Schumpeter, *Capitalism, Socialism and Democracy*, 83–85 (Harper & Row, New York, 1976).
[11] Solow & Robert M, *'Growth Theory'*, THE NOBLE PRIZE (Dec. 28, 2018, 02:08 PM) http://nobelprize.org/nobel_prizes/economics/laureates/1987/presentation-speech.html.
[12] *Supra note* 9 at 3.
[13] *Supra note* 9 at 3.

laws share the unvaried objective of boosting innovation and furthering the consumer welfare."[14] The EU Laws also stand on the same footing by elaborating that, *"Both bodies of law share the fundamental purpose of enhancing consumer welfare and an efficient distribution of resources."*[15] In other words, both the enactments intend to provide innovative goods and services at lower prices for furthering the interest of the consumers and the competitors at a balanced level.[16]

TRIPS– An Antidote to Abuse

Negotiating TRIPS in domestic law is of prime importance for safeguarding the interest of the innovators. TRIPS, the *grundnorm* of IPR, provides certain measures to be adopted by its members, to drive an adequate and subjective balance in the tussle prevailing between IPR & Competition Law, as the former invites unwarranted exploitation of market power. The agreement contains diverse provisions in relation to the use of IPRs in accordance with the principles of Competition Law.

Article 1 of the Agreement allows the member nations to formulate appropriate measures to implement the provisions of the agreement. Further, TRIPS mandates that the 'appropriate measures' so formulated by the members for preventing the IPR holders from abusing their rights or resorting to unfair trade practises should be in line with the agreement.[17]

Article 30 of the TRIPS Agreement authorises its members to provide limited exceptions to the exclusive rights granted to the innovators. Exceptions so framed should not unreasonably prejudice the legitimate interest of the IPR holders. Thus, it enables many members in practice to allow limited usage of IP for research and experimental purpose under the roof of fair use.

Article 31 enables a member nation to grant compulsory licences to the patented inventions on the grounds of public health, national emergencies, unsatisfied public usage, and unfair practises by the patentees. It also allows the members to specify other grounds in addition to

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[14] US Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property,1995*, Section 1.0, (Dec. 31, 2018, 05:15 PM), http://www.usdoj.gov/atr/public/guidelines/0558.pdf, See also Atari Games Corp. v. Nintendo of Am., 897 F. 2d 1572, 1576 (Fed. Cir. 1990).

[15] European Commission Guidelines on the application of Article 81 EC to technology transfer agreements.

[16] US DOJ and FTC (2007), *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, (Dec. 29, 2018, 03:14 PM), www.justice.gov/atr/ public/hearings/ip/222655.pdf.

[17] TRIPS Agreement, Article. 8.

the aforementioned ones with regard to the overall interest of their country. Apart from this, *Article 40* also allows the members to specify appropriate licensing practises or measures to restrict the abuse of intellectual property rights.

Thus, TRIPS, rather than multi – lateralising the specific principles against anti – competitive practises, leaves the door open to the members to frame their own domestic policies, as the member nations of WTO are asymmetrical in their positions due to varying levels of economic development. Therefore, the scope of TRIPS in curbing unfair competition heavily depends upon the Competition laws and IP laws adopted by each member country.

COMPARATIVE JURISPRUDENCE

To understand the enforcement difficulties of the two branches of law, it is indeed necessary to analyse the jurisprudence and practice on the same, prevailing globally. The author hereby compares the position prevailing in the developed regions of USA and the EU with the developing country India.

United States of America

The US Congress enacted the Sherman Act in 1890 in order to suppress the despotic use of economic power of business trust. Section 1 of the Sherman Act prohibits every contract facilitating the formation of trust which restraints trade and commerce both within the nations and outside. Meanwhile, Section 2 of the Act prohibits monopoly in all forms. In addition, Clayton Act and Federal Trade Commission Act were enacted to guard the market from anti – competitive practices. These legislations where amended over years with the view to ensure economic freedom in the market.[18]

Antitrust laws of US faced many possible conflicts with US Patent Act of 1790, which grants monopoly against its principle. In the beginning, US Courts refused to call down IPR – related issues with antitrust laws by favouring IP law over antitrust legislations. In the case of *National Harrow*[19], US Supreme Court held that, terms of the contracts which keep up monopoly or fixes price does not render the contract illegal. This paved way for a broad interpretation of IP

[18] S*upra note* 9 at 3.
[19] E. Bement & Sons *v.* National Harrow Co., 186 U.S. 70, 72–73 (1902).

rights over antitrust laws, which legalised the right holders to enter into price – fixing cartel agreements.[20] Thus, the very object of Sherman Act to regulate fair and free trade had failed.[21]

Later, in 1917, importance of antitrust laws in the economy gained a momentum over IP laws and thereby US law enforcement authorities changed their view and held that *IPRs could not go beyond the general law and might be subject to antitrust laws*.[22] Further, in the case, *Motion Picture Patents Co. v. Universal Film Manufacturing Co.,* US Supreme Court adopted a Doctrine of Patent misuse, which is considered as an equity principle emphasizing the patent holder to use the patent legitimately by not restraining the trade or acting against public interest.[23]

Antitrust – IP Guidelines, 1995

From the beginning of 1930s to early 1980s, US Supreme Court favoured antitrust laws over IPR. However, in 1980, US authorities recognised the need for strengthening of IP regime towards economic development. Thus, pendulum regulating the relationship between antitrust law and IPR had swung back towards IP laws again. In 1980, US Supreme Court observed that, *"the policy of competition runs deep in our law', but the policy of stimulating invention that underlines the entire patent system runs no less deep".*[24] The presumption that Intellectual Property Rights always confers the right holders the market power, was defeated.[25] In 1995, with the emerging jurisprudence in field of IPR, the Antitrust-IP Guidelines[26] were framed, as a product of serious deliberations and discussions by various authorities. The Guidelines embodies three general principles, namely:

a) Intellectual Property Rights stand in par with any other property right.
b) Intellectual Property Rights does not in itself create any market power.
c) Technology transfer is generally pro-competitive.[27]

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[20] US *v.* Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); see also, US *v.* Trenton Potteries Co., 273 U.S. 392, 338 (1927).
[21] S*upra note* 9 at 3.
[22] Motion Picture Patents Co. *v.* Universal Film Manufacturing Co., 243 U.S. 502 (1917).
[23] *Patent-Misuse Doctrine Law and Legal Definition,* US LEGAL (Dec. 31, 2018, 11:50 AM), https://definitions.uslegal.com/p/patent-misuse-doctrine/.
[24] Dawson Chemical Co. *v.* Rohm and Hass Co., 448 U.S. 176, 221 (1980).
[25] Illinois Tool Works Inc. *v.* Independent Ink, Inc., 547 U.S. 28 (2006).
[26] US Department of Justice and the Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, 1995, Section. 2.2, 2.3, (Dec. 31, 2018, 05:15 PM), *http*://www.usdoj.gov/atr/public/guidelines/0558.pdf.
[27] *Ibid.* Section 2.

The Antitrust-IP guidelines further provides for 'safety zone' which enumerates that, other than the following situations, any form of restraints in technology transfer agreements shall be curtailed on the ground of violation of anti -trust laws.

1) If the arrangements and restraint are not *per se* anti -competitive; and
2) If the arrangements or restraints imposed by the licensor and its licensee accounts for not more than 20 per cent of each relevant market affected; and/or
3) If, in addition to the parties of the licensing agreements, engaged in research and developmental activities, there are four other independent entities who pose as close substitutes engaged in similar research and developmental activities.[28].

Thus, in US, the Antitrust-IP guidelines governs the relationship between IPR and Competition Laws effectively and thereby maintains free and fair trade in the market.

European Union

For ensuring smooth and free 'competition in the internal market', principles governing competition, were incorporated into the Treaty Establishing the European Community i.e., Treaty of Rome in 1957.[29] Later, pursuant to the Lisbon Treaty[30], the EC treaty (Treaty of Rome) was amended and replaced by the Treaty on the Functioning of the European Union (TFEU). However, the objective of establishing Treaty of Rome is still addressed in the protocol annexed to TFEU. Articles 101 and 102 of the TFEU resembles Articles 81 and 82 of Treaty of Rome.[31]

Article 81 of Treaty of Rome, restricts agreements or concerted practices between undertakings, affecting trade between member states and inhibiting competition, while Article 82 of EC regulates the conduct of undertakings by restricting the abuse of dominant position.

Article 295 of Treaty of Rome, [32] regards IPR as State granted property rights, which should be exercised in line with EU Competition Law. European Court of Justice (ECJ) in the case, *Consten & Grundig v. Commission*[33], made a distinction between granting of IPR (existence) and exercising of IPR (exploitation). Nevertheless, Community Courts have also observed that

[28] *Ibid.* Section 4.3.
[29] Treaty of European Community (EC), Article 3.1(g).
[30] Ratified on 13 Dec. 2007, OJ 2007 C 306/1.
[31] S*upra note* 9 at 3.
[32] Presently Article. 345 TFEU.
[33] Joined Cases 56/64 and 58/64, Consten & Grundig *v*. Commission, [1966] ECR 299.

existence of IP rights *per se* do not constitute an infringement of EU Competition Law and also the exercise of IP rights in the absence of any anti-competitive agreement, concerted practice or abuse of dominant position cannot by itself violate Article 81 (1) and Article 82 of EC respectively.

Initially, when the Commission adopted the notice of Patent Licensing Agreements, 1962[34], it qualified the restrictions in technology transfer agreements as legal. Further, the aforementioned notice posted five groups of restrictions in licensing agreements which is regarded as not violative of Article 81(1) of EC, they are restrictions in the field of usage, technical applications, quantity of products to be manufactured, time and territory. However, the attitude of the Commission changed, following the case of *Consten & Grundig v. Commission,*[35] where, ECJ held that, *"the attempt to use IPRs by a licensor and a licensee to separate a national market within the community was an attempt to distort competition in the common market".* Consequently, the Commission in 1984 and 1988 enacted the Patent Licensing Block Exemption Regulation[36] and the Know-How Licensing Block Exemption Regulation[37] respectively. Predominantly, these two regulations act as guidelines to regulate the intertwined relation between IPR and Competition Law.[38]

Technology Transfer Block Exemption Regulation

In response to the US Antitrust-IP Guidelines (1995), the Commission formulated Technology Transfer Block Exemption Regulation (TTBER), 1996[39] by merging the two earlier block exemptions regulation, which provides 'safe harbour' to the technology transfer licenses from the challenges of Competition Law. TTBER, 1996 has been criticized for various reasons: *firstly*, for dividing standard clauses in licensing into four categories namely, (i) exempted clauses, (ii) White clauses [non – violative of Article 81 (1) of EC], (iii) Black Clauses [violative of Article 81 (1) of EC], (iv) Grey clauses [neither compatible nor violative, rather to be analysed on a case – by – case basis]. *Secondly*, it treated clauses having similar effects differently. *Thirdly*, the regulation is both too restrictive and too liberal, thereby, the

[34] The so-called 'Christmas Message', OJ 1962 139/2922.
[35] *Supra note* 33 at 8.
[36] Commission Regulation (EEC) No. 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of Patent Licensing Agreements.
[37] Commission Regulation (EEC) No 556/89 of 30 November 1988 on the application of Article 85 (3) of the Treaty to certain categories of know-how licensing agreements.
[38] S*upra note* 9 at 3.
[39] Commission Regulation (EC) No. 240/96 of 31 Jan. 1996 on the application of Article 85(3) EC to certain categories of technology transfer agreements, OJ 1996 L 31/2.

Commission revised TTBER, 1996 and enacted TTBER, 2004[40] with better clarity and for facilitating effective competition in the market.

The scope of TTBER, 2004 has been extended to cover software copyright licensing agreements, in addition to the existing patent and know-how ones. It specifies (i) limited list of 'hard – core restrictions' (Black clauses)[41], and (ii) limited list of 'excluded restrictions' (White clauses).[42] It also specifies that the clauses in technology transfer agreements would be exempted on the following grounds.

i) If, combined market share of the competing parties in the relevant market shall not exceed 20 per cent, where horizontal licences are at issue.

ii) If, combined market share of each non-competing party in the relevant market shall not exceed 30 per cent, where vertical licences are at issue.

However, TTBER, 2004 has been expired on 30th April 2014[43], and it has been replaced by the new regulation, TTBER, 2014.[44] It was adopted by the Commission on 21st March 2014 and it came to force from 1st May 2014. In TTBER, 2014, the scope of IPR is further more expanded to cover designs right. The concept of 'hard-core restrictions' and 'excluded restrictions' were retained, yet their scope has been further expanded to cover present issues. TTBER, 2014 regulation remain in force until 30th April 2026.[45] Thus, in the EU community, along with the development in technology, the legislations governing them are also amended periodically for enabling free and fair trade in the market.

India

After independence, the policy makers insisted upon immediate industrialization and equitable distribution of wealth. In 1964, the Government of India appointed the Monopolies Inquiry Commission to examine and investigate the extent of concentration of economic power in the private sector and its consequence on the society, and make recommendation based on their findings, necessary for enacting a legislation. In 1966, the *Hazari* Committee was appointed to evaluate the performance of the existing Industries (Development and Regulation) Act, 1951. Both the Committees concluded on their findings that, there exists concentration of economic

[40] Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.
[41] TTBER, 2004, Article 4.
[42] *Ibid.* Article 5.
[43] *Ibid.* Article 11.
[44] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.
[45] TTBER, 2014, Article 11.

power and the operations of industrial licensing system were inappropriate. The Government again in 1967 appointed a Committee known as *Dutt* Committee which also concluded that existing licensing system was fruitless to control concentration of power and called for a comprehensive legislation. Based on the recommendation of the *Dutt* Committee, Monopolies Restrictive Trade Practises (MRTP) was enacted in 1969.[46]

Due to the significant shifts of the Indian economic policies towards LPG, many of the provision in MRTP Act became obsolete. Further, MRTP Act had failed to address issues relating to mergers and acquisition. Thus, the Government of India appointed a high-level Committee under the chairmanship of Mr. S.V.S. Raghavan, to examine the relevance of MRTP Act and suggest an extensive legislation to regulate market. Based on the Committee's recommendations the Government of India scrapped the MRTP Act and enacted the Competition Law in 2002.[47]

Meanwhile, IP laws in India were amended from time to time in order to comply with TRIPS Agreement, 1995. Like any other country, the IP laws in India also guarantee the exclusive monopoly rights over the property invented. On the contrary, the Competition Act, 2002 prohibits abuse of monopoly[48] and the agreements which are deemed to be anti-competitive[49] in nature. In order to address this interventionist area, Section 3(5) of the Competition Act, qualifies the IP holder to impose reasonable restrictions for protecting and preventing the infringement of the exclusive rights conferred upon on him, without bothering the competition prevailing in the market. Thus, the non-obstante clause does not apply, if the parties, while exercising IPR, commit prohibited trade practices detrimental to the market or consumer welfare. In *FICCI Multiplex Association of India v. United Producers Distribution Forum (UPDF),* [50] CCI observed that "*Intellectual Property laws do not have any absolute overriding effect on the competition law. The extent of the non obstante clause in section 3(5) of the act is not absolute."* In this regard, Patent Act, 1970 also lists down certain restrictive conditions which should be avoided by the patent holder in licencing their patented article.[51] A glimpse of both the legislation shows that they aim for a common objective i.e. consumer welfare. In

[46] Raju KD, *Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India,* Volume 2, Issue 3, 1000115, INTEL PROPERTY RIGHTS, 2: 115 (2014).
[47] *Id.*
[48] The Competition Act, 2002, Section 4.
[49] *Id.* Section 3.
[50] FICCI Multiplex Association of India *v.* United producers Distribution Forum (UPDF), 011 Comp LR 0079 (CCI).
[51] Patents Act, 1970, Section 140.

India IP related Competition issue is still in the infant stage. In India, like any other developed country, there is no guideline to address the IPR-Competition Law related issues.

Briefly, in the developed countries the pendulum of favouritism swung between both the legislations and finally the oscillation came to a halt on the enactment of special guidelines regulating the relationship between the two. But, in India the laws governing competition were enacted a way later and until now there is no such guidelines regulating the relationship between the two. Rather, Competition law by permitting the reasonable exercise of IP rights excludes the IP holders from the scope of Competition Law.

IPR AND ANTITRUST LAWS: POINTS OF CONFLUENCE

IPRs and Competition Law have significant concourse in their regulation of various issues in the regime of commerce. In general, the essence of such concourse is spread out in the licensing arrangements, anti-competitive agreements, abuse of dominance, various combinations, etc.

Licensing Arrangements

The concept of 'compulsory licencing' in IPR, plays a vital role in forestalling the abuse of exclusive monopoly rights, in coalition with the antitrust laws which seeks to maintain free and fair competition in the market.

The 'compulsory licence' is an involuntary agreement imposed by the state on a loath vendor and an eager buyer to licence the innovation or improvement against the return of economic benefits.[52] In common, such licence is granted when the invention remains futile, undisclosed or it's related to food or medicine and as a counteraction in antitrust or misuse situations. In addition, the licence is granted in cases of national importance and where the licensee is the sovereign.[53]

This concept also finds a place in Article 31 of the TRIPS agreement, requiring the member nations to respect the requirements prescribed therein. Further, Article 40, respecting the territorial sovereignty of the member nations permits them to prescribe their own compulsory licensing standards. In India, Section 84 of Patent Act of 1970, grants Compulsory Licence,

[52] ALICE PHAM, COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: CONTROLLING ABUSE OR ABUSING CONTROL? (CUTS International, Jaipur Printers P. Ltd) (2008).
[53] Arnold G.J, *International Compulsory Licensing: The Rationales and The Reality*, IDEA: The Journal of Law and Technology, 349 (1993).

when the patent holder abuses his right by refusing to licence his innovation on FRAND terms, after the expiry of 3 years from the date of sealing of such patent, in line with Competition Act rescuing the market when there is abuse of monopoly power. Thus the static efficiency and the innovative efficiency converge at this point aiming at fostering competition and promoting the welfare of the people.

Anti-Competitive Agreements

When an inventor licences or otherwise transfers his invention to someone, he may impose certain conditions presupposing such transfer. These conditions are not *per se* anti – competitive in nature rather depending upon the nature of such conditions and the availability of the substitutes in the market they constitute anti-competitive agreements or combinations opposed by the competition law. A few of such occasion are detailed below.

Allocation of Geographical Territory:

The allocation of the geographical territory by the licensor i.e. reserving an exclusive territory for the licensee, may result in price fixing or abuse of dominance as prohibited by competition law.

In *Palmer v. BRG of Georgia*[54], the licensor granted permission to the licensee to market his copyrighted material exclusively, based on the condition that neither of them would compete with the other outside the state. This, was held by the U.S Supreme Court as an illegal allocation of market.

i) *Exclusive Dealing*

Apart from allocation of geographical territory, the agreements may require the licensee to exclusively deal with the licensor. They require the licensee to shun himself from procuring, distributing, selling or even licencing the products of the licensor's competitors. These agreements may be invoked as a safeguard against free riders. But, when such agreements foreclose the market for the competitors at a significant level or the duration of such exclusivity is for a lengthened period of time, the Competition Act may counteract such agreements.[55]

[54] Palmer *v.* BRG of Georgia, 498 U.S. 46 (1990).
[55] *Supra note* 52 at 12.

In *Tampa Electric Co. v. Nashville Coal Co*[56], the US Supreme Court held that, exclusive dealing clauses in technology transfer agreements violates Competition Law, only when the competition in relevant market has been foreclosed in a substantial level.

ii) *Tying Arrangements:*

The inventor may on the transfer of the invention mandate the transferee to take up a product or service in addition to the invention transferred, thereby tying such product or service with the invention, this is known as tying arrangement. This may create a scope for the tied product. Yet, if it forecloses the competition for the tied product, it's subject to the scrutiny of Competition Law.

A common example of tying agreement is found in the *Microsoft case*[57], Microsoft was alleged of abusing its monopoly power by tying its Operating System and Web Browser and selling it. This restricted the market for other web-browser competitors since Windows operating system users already had a copy of Internet Explorer (the browser, Windows tied with its Operating System). It was held that, Microsoft had abused its dominant position, committed monopolization and tying in violation of section 1 and 2 of the Sherman Anti-Trust Act. On appeal, Microsoft was ordered to be broken into two components one for the browser and other for operating system.[58]

Another noteworthy case is the *Eastman Kodak*[59] wherein, a tying arrangement by which, one party offered to sell its product on a condition that the buyer should purchase his other product too or at least agree that he would exclusively deal with the licensor for that other product, was held violative of Section 1 of the Sherman Act, if the seller has sufficient power to enforce the tie- in agreement.

The standard for proving illegal violation was also set forth:

- That the seller mandated the sale of one product or service on the purchase of a second product or service
- That the two products or services are in fact separate & do not constitute parts of a single product or service

[56] Tampa Electric Co. *v.* Nashville Coal Co, 365 U.S. 320, 327 (1961).
[57] US *v.* Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001).
[58] *Supra note* 2 at 1.
[59] Eastman Kodak *v.* Image Technical Services Inc., (90-1029), 504 U.S. 451 (1992).

- That the seller has sufficient market power for the tying product, to enforce the tie-in; and
- That the tie-in arrangement affected a substantial amount of commerce.[60]

iii) *Grant-Back*

An agreement by which licensor imposes a condition precedent, that the licensee should grant him the right to use any improvement made to the licenced technology. Though it restricts the choice of the licensee, it promotes further innovation and subsequent licencing. It serves as a means of sharing the rewards and risks. Generally, Grant-Back is anti-competitive in nature:

i) When it involves the use of the improved technology which goes beyond the originally licenced one;
ii) When it is in the form territorial restraint or exclusive dealing agreement;
iii) affects the incentive of licensee of the improvement;
iv) When it forecloses the competition in the market.

The above said arrangements are not exhaustive, even after the grant of exclusivity by IPR, agreements of like nature are deemed to be anti – competitive and prohibited by Competition Law.[61]

Abuse of Dominant Position

It is the position of economic strength which enables the person or enterprise to subvert the competition in the market and behave independent of various factors in the relevant market such as customers, competitions, availability of substitutes, etc.[62]

The general proposition as stated in the case of *Renault* [63] and *Volvo Veng*[64], 'dominant position in the market is not *per se* anti-competitive in nature rather the abuse of such position forms the subject matter of Anti-trust Laws.[65]As aforementioned, IPR by their very nature create legitimate monopoly rights which do not necessarily confer the power to control the market

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[60] *Supra note* 46 at 11.
[61] *Supra note* 52 at 12.
[62] *The Interface between Intellectual Property Rights and Competition Law: Issues,* SHODHGANGA http://shodhganga.inflibnet.ac.in/bitstream/10603/136685/10/10_chapter%202.pdf.
[63] CICRA and Anr. *v.* RENAULT 53/87, ECR 1988, 6039.
[64] Volvo *v.* Veng, 238/87, ECR 198, 6211,
[65] *Competition Policy and the exercise of Intellectual Property Rights,* UNCTAD (JAN. 6, 2019, 12:32 PM), https://unctad.org/en/Docs/c2clp22r1.en.pdf

and manipulate it, only when the power acquired is abused and the market is fine-tuned according to the whims and fancies of big market players, Competition Law intervenes to control the abuse.

The ECJ in the case of *Magil*,[66] held that the refusal to grant licence constituted an abuse in exceptional cases such as, absence of potential substitutes in the market and absence of legal justification for prevention of innovation

In general, imposition of discriminatory practices or trading conditions, predatory prices, limiting the supply of goods or services, denial of market access, using a dominant position in one relevant market to enter into or protect other relevant market are considered to be abuse of dominant position.[67]

In *Hawkins Cookers Limited v. Murugan Enterprises*,[68] the Delhi High Court held that a well-known mark on the pretext of being prominent and well-known cannot be left unchecked when it indulges in the practices of controlling the market and monopolising it. The same is termed 'abuse of dominant position' under antitrust laws and is prohibited.

Combination

When licensees involve themselves in acquisitions or mergers or when a joint venture is created, there is a probability of including in instruments of transfer, conditions for use, disposal or licencing of the product or services of the respective parties. When these conditions imposed by the licensor in technology transfer agreement are restrictive in nature, Competition Law comes into play and prohibits such agreements. The test of whether such condition are acceptable or not, lies in the substratum of technology transfer agreement, if the conditions are ancillary to the main contract they are valid, if not ancillary, they are said to infringe the rules of competition.[69]

In short, when the IP holder imposes restrictions not only to the licensee but also to the end users (downstream purchasers) it should be reasonable, otherwise the Competition Law

[66] Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP) *v.* Commission of the European Communities, Joined Cases C-241/91 P and C-242/91 P.
[67] The Competition Act, 2002, Section 4.
[68] Hawkins Cookers Limited *v.* Murugan Enterprises, 2008 (36) PTC 290(Del).
[69] *Supra note* 52 at 12.

prohibits such restrictions.[70] Further, the restrictions imposed on downstream purchasers are elaborated in the case *Quanta Computer, Inc. v. LG Electronics, Inc.*[71]

In *Boeing/McDonnell Douglas case,*[72] the merger was allowed subject to the condition that the aeroplane manufactures obtain a licence, free of exclusive dealing and the know-how underlying the aeroplane Boeing is made available. Further in the case of *Ciba- Geigy /Sandoz*[73], the merger relating to the parties enjoying dominant position in the market for Methoprene was allowed, conditioning the grant of non-exclusive licence on fair and reasonable terms.

6.5 <u>Cross Licensing:</u>

Cross licencing denotes an agreement in which two or more parties interchange their IPRs between them. Akin to dominant position, cross licensing is not *per se* anti-competitive in nature. It tends to be anti-competitive only when the subject matter of the agreement is a substitute but not complementary in nature. Anti-competitive cross licensing agreements reduce innovation, escalate the prices and retard the production. This happens mostly in cases where the competing entities enter into such agreements, causing the existence of substitutes and competitors coming to a strategic end. Thereby the parties to such agreement tend to form a trust that controls the market and fall within the purview of competition law.

6.5.1 <u>Patent Pools:</u>

The Patent Pool is a subject matter of cross-licencing. A patent pool is essentially a licencing agreement between two or more IP holders, who consent to cross licence their patents relating to the particular aspect.[74] Generally, Patent pooling are pro-competitive in nature which helps in integrating equivalent technologies, reducing the transaction costs and helps in avoiding costly infringement litigation. They tend to be anti- competitive in nature when they shield invalid patents or include patents that are competitive in nature.[75] According to author *Resnik*, patent pooling helps in gaining more profit, recovery of capital and reduces risk of further

[70] *Supra note* 9 at 3.
[71] Quanta Computer, Inc. *v*. LG Electronics, Inc., 553 U.S. 617 (2008).
[72] Boeing/McDonnell Douglas, Council Regulation (EEC) No 4064/89, 1989.
[73] Ciba – Geigy /Sandoz, Case No. IV/M. 737, 1996.
[74] *Patent pools and Antitrust – A Comparative Analysis*, WIPO (Jan. 07, 2019, 08:20 PM), https://www.wipo.int/export/sites/www/ip-competition/en/studies/patent_pools_report.pdf.
[75] KUMAR JAYANT & ABIR ROY, COMPETITION LAWS IN INDIA (1st ed, Eastern Law House), 2008.

innovation and research.[76] On the other side, *Krattiger and Kowalski*[77] hold a patent pool to be a double-edged legal sword, cutting through the blockages of patent thickets, simultaneously posing a number of risks.

Standard Essential Patents

The recent wars of smartphone giants have turned our focus towards the concept of Standard Essential Patents (SEPs). SEPs are those patents which have become the essential standard for further innovation and creation, they are essential for the implementation of a specific standard.[78] Patents are qualified as SEPs by the Standard Setting Organization (SSO).

From the perspective of Competition Law, an SEP holder enjoys substantial monopolizing market power due to lack of substitutes in the market. The holder is prone to abuse such monopoly power by refusing to licence the technology to other manufacturers or when exorbitant loyalties are levied, at this point the competition law comes to remedy such abuse.

The concepts of SEP had emerged in our country in the famous case of *Telefonaktiebolaget LM Ericsson*[79]. In this case, CCI observed that Ericsson holds a dominant position in the relevant market for *SEPs in GSM and CDMA, compliant mobile communication devices in India*, due to the absence of substitutes in the relevant market for the same and the royalties demanded by Ericsson bore no reasonable nexus with the patented technology and amounted to discriminatory pricing given that different royalty would be charged from different licensees for the same technology due to the difference in prices of the mobile handset in which the technology was used. As such, this discriminatory pricing was held to be *prima facie* in contravention of FRAND terms and Section 4 of the Competition Act.

In the landmark judgment, *Aamir Khan Productions Pvt. Ltd. v. UOI*[80] the Bombay High Court had the extended the jurisdiction of CCI to deal with IPR related issues. It held that CCI

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[76] Resnik DB, *'A biotechnology patent pool: An idea whose time has come'* (Jan. 05, 2019, 04:41 PM), http://www6.miami.edu/ethics/jpsl/archives/papers/biotechPatent.html

[77] Krattiger A & Kowalski S P*, 'Facilitating assembly of and access to intellectual property: Focus on patent pools and a review of other mechanisms'* Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices, (OXFORD PUBLICATION) (2007).

[78] Dipak Rao & Nishi Shabana, *India: Standard Essential Patents*, MONDAQ, (Jan. 05, 2019, 07:50 PM), http://www.mondaq.com/india/x/484412/Patent/Standard+Essential+Patents

[79] Telefonaktiebolaget Lm Ericsson *v.* Competition Commission of India, W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014

[80] Aamir Khan Productions *v.* Union of India, 2010 (112) Bom L R 3778. 60

possesses the jurisdiction to determine cases pertaining to Competition Law and IPR. The Court reiterated the same in *Kingfisher v. CCI*[81] that CCI is qualified to decide cases that come before the Copyright Board. This enumerate the fact that the Indian courts are ready for determining emerging cases of Competition Law involving IPR.

CONCLUSION

Historically, Intellectual property Law and Competition Law have evolved as two distinct system of laws. At present, World countries have admitted that the object of these legislations are similar in nature. These legislations aim at maintaining free and fair competition for the purpose of maximizing the consumer welfare in common. Competition Law guards the market by preventing unfair competition. While, The Intellectual property rights incentivize innovation by granting exclusivity over the invention for limited period of time, in order to, promote innovation and create choices thereby limiting the monopolistic activity. Only, when these exclusive rights agitate the free and fair competition, Competition Law comes to rescue the market by preventing the gross activity of the innovators in the market. Thus, the milestones of both the legislations seem to be akin, but the roads they tread on are different.

Further, it is evident from the economic theories, that the total profit gained in an industrial sector by the combined efforts of all the firms operating therein, is lesser than the profit gained by a monopolistic firm. But, at the same time the welfare of the consumer is highly impaired due to the higher prices fixed by the firms occupying the monopolistic position in the industrial sector. The Competition Law seeks to curb such iniquitous pricing for upholding the consumer welfare.[82] Hence it can be deduced that the over dosage of IPR is anti- competitive whereas the poor dosage deteriorates the genuine rights of IP holder, therefore, administration of appropriate dosage alone confers favourable pro-competitive effects and keeps the machine of consumer welfare, free and fair competition functional at all times. Thus, neither of the legislations act as an interventionist instrument against each other, rather they act in their own orbits with the common object of free and fair trade at their centre.

Due to technological developments and needful innovations, the author suggests that, it's high time for the legislators in India for a new enactment, which lubricates these two legislations to

[81] Kingfisher *v.* Competition Commission of India, W. P. 1785 of 2009.
[82] Viswanath Pingali, *Competition Law in India: Perspectives,SAGE JOURNALS, The Journal for Decision Makers* (Jun. 04, 2019, 07:50 PM), https://journals.sagepub.com/doi/pdf/10.1177/0256090916647222.

function simultaneously in their own style to achieve the common object of consumer welfare at its best. Such new legislations have to be amended from time to time as the markets calls for and to keep pace with the developed countries.

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