THE INTERFACE BETWEEN IP AND COMPETITION POLICY: SAFEGUARDS AGAINST ANTI-COMPETITIVE ACTIVITIES OF IP OWNERS

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INTRODUCTION

Intellectual Property is the oil of the 21st century.

- "Mark Getty"

Intellectual property specifies creations of the mind. It includes new inventions, ideas, artistic work, designs, etc. Intellectual property is protected by Intellectual Property Rights under the Intellectual Property Rights Act, of 2005. Intellectual Property Rights help people to protect their activities by getting them registered under the act as a patent, trademark, etc. On the other side Competition law promotes competition in the market to prevent monopoly and anti-competitive activities. Intellectual Property Rights and Competition Policy are contrary to each other. On one hand, Intellectual Property Rights give protection to new inventions and ideas while on the other hand competition policy promotes competition between companies in the market for a smooth mechanism to counter anti-competitive agreements, regulate mergers and acquisitions, restrict dominant position (monopoly), etc. The competition law helps people/ consumers to choose one among many at their wish. Competition law increases competition between the companies in the market and restricts monopoly in the market. Whereas on the other hand, IPR (Intellectual Property Rights) promotes new ideas which result in a monopoly in the market. Often Consumer Welfare becomes the major issue between IPR (Intellectual Property Rights) and Competition Law. Intellectual Property Rights assert a balance between the rights of the owner and social interest. IPR (Intellectual Property Rights) gives the right of the product/design to the owner only and restricts people from copying the same. With the increasing number of startups and innovations in India the demand for Intellectual Property Rights (IPR) increases. Many schemes like Startup India, Venture Capital Assistance scheme, etc promote startups to come up with innovative ideas. These ideas, designs, etc are protected by IPR (Intellectual Property Rights) and restricts other startup or business to do the same as the right is vested with the owner. IPR (Intellectual property Rights) gives owners numerous rights to protect their idea, invention, designs, etc from others accessing their product, design, etc.

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IPR (INTELLECTUAL PROPERTY RIGHTS)

Intellectual Property Rights are given in many forms like patents, trademarks, copyrights, and trade secrets.

PATENTS

Section 48(a) of the Indian Patent Act, 1970, a patentee whose patent's subject matter is a product can enjoy the exclusive right to prevent third parties from making, using, offering for sale, selling, or importing such products in India without his consent. In other words, concerning a product patent, the rights envisaged under the aforementioned Section 48(a) are available to the patentee. Patents are granted for an invention. Patents are granted by the government giving the right for the inventor to protect his invention. Patents are mainly divided into 4 types [1]

Product Patents: When an inventor finds a new product/ new method and provides a technical solution for the problem and if that solution satisfies the terms and conditions of the Patent an application should be filed before the concerned Patent's office to claim the patent. A person can file only one application at a time. If a person files for 2 patents he/ she should file 2 applications before the patent office.

Design Patent: Design Patents are protected under the Designs Act, of 2000. Unique and distinct designs will get protected under the Designs Act, of 2000. It is important to note that only ascetic aspects are protected but not the functioning of the design.

Utility Patent: Utility Patents are granted in the United States of America and are not granted in India. Utility Patents are broadly divided into two types:

- Provisional Patents: Provisional Patents are granted for temporary protection of the idea. The status of the patent is known as "Patent Pending"
- Non-Provisional Patents: The Non-Provisional Patent is the final patent and no further changes will be approved.

Plant Patents: Plant patents are also not granted in India but granted in the United States of America. In India, there is the Protection of Plant Varieties and Farmers Rights Act, 2001[2], with equivalent purposes and adjusted to serve India.

[1] Satyaki Deb, 'Types of patents' (blog I pleaders, 2nd January 2023) < https://blog.ipleaders.in/types-of-patents/#Product_patents>accessed 26th June 2023
[2] The Protection of Plant Varieties and Farmers Rights Act, 2001

COPYRIGHTS

Copy Rights are granted to the creators of the original work in literary works, dramatic, musical, artistic, cinematographic, and sound recordings. Copyrights are granted under the Copy Rights Act, of 1957. Copy Rights are protected in two forms

Economic Rights: A creator enjoys economic rights under section 14 of the Copyrights Act, 1957. Economic rights are granted for reproducing and publishing the work to the public. It also allows the creator to translate or adapt the work/ content created.

Moral Rights: Under section 27 of the Copy Rights Act, of 1957 there are two basic moral rights for the creator:

(i) Right to paternity: It gives rights to the creator/ author to claim their authorship of the work and prevents others from claiming the authorship.

(ii) Right of integrity: The right of integrity prevents others from altering the work of the creator/ artist which would cause a threat to the reputation/honour of the creator/ author.[3]

Online Copyrights

Are online copyrights safe? Under what enactments are online copyrights protected? What is the difference between online copyrights and normal/ offline copyrights?

Online Copyrights are protected under two enactments:

Copyrights Act 1957

The Information Technology Act, 2000: If a person IS LOCATED IN India and violates/ infringes copyright then he/ she is liable under this act. The provisions of this Act shall have an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Trade Marks: A name, sign, or word that differentiates one good/ product/ enterprise from another good/ product/ enterprise is called a trademark. It prevents others from using the owner's trademarks and protects the owner. It is often used as a marketing tool to increase their brand value. A brand is always a trade mark but a trademark isn't always a brand. A trademark can be a logo, picture, or slogan. The protection of trademark is given under the Trademark and Merchandise Act, of 1958. Later it is protected under the Trademark Act, of 1999.

[3] Mahendra Kumar Sunkar 'Copyright Law in India'(legal services) <https://www.legalserviceindia.com/article/l195-Copyright-Law-in-India.html> accessed 26th June,2023

TYPES OF TRADEMARKS

Service Mark: A service mark is a name, logo, or slogan given to an enterprise that provides services to differentiate from other enterprises which provide the same services. Services include transportation, entertainment services, sponsorship, and housing development services.

Collective Mark: A collective mark is given to professionals like CA, CS, Lawyers, etc. CA is a collective trademark that is used by the ICAI (Institute of Chartered Accountants of India).

Certification Mark: A certification trademark means a mark competent of identifying the goods or services in connection with which it is used in the manner of trade, which is certified by the owner of the mark in respect of source, body, mode of manufacturer of goods or performances of assistance, quality, accuracy or other characteristics.

Trade Dress: Trade Dress is a term that refers to the visual appearance of the product or design. It prevents consumers from packaging products that are framed to imitate other products.

DESIGNATION OF TRADEMARK

A trademark is designated by

- TM (TM is used for unregistered Trade Mark which promotes products);
- SM (SM is used for unregistered service mark which promotes services);
- ® (® is used for registered trademark)

If the owner has registered the Trademark then he is entitled to rights under section 28 of the Trademark Act, 1999. Under Section 27 of the Act, no action will be taken for infringement if the trademark is unregistered.

The concept of usage of non-physical trademarks evolved in the case of Hardie Trading Ltd. and Anr vs Addison's Paint and Chemicals Ltd[4] where the Supreme Court gave a wider interpretation of the usage of non-physical trademarks. [5]

Trademarks help enterprises to market themselves easily and help consumers to differentiate between enterprises and their services. Nowadays as many startups are booming trademarks

[4] Hardie Trading Ltd. and Anr vs Addison's Paint and Chemicals Ltd Appeal (civil) 5307-11 of 1993
[5] Anushka 'Ojha Trademark Law in India' (blogipleaders, 8th June 2019) <https://blog.ipleaders.in/trademark-law-in-india/> accessed 26th June

and other Intellectual Property Rights (IPR) plays an important role. The importance of trademarks increases as enterprises increase in the market.

Trademarks protect brands from infringement of their trademarks which further helps the enterprise to protect their product/ service. Trademarks play a crucial role when it comes to marketing their products. People/ consumers need to be aware of these trademarks to make sure that they are purchasing the right product/ service.

Trade Secrets

Trade secrets are confidential information of an enterprise that can be sold or licensed. Leaking of such information may cause a huge loss to the enterprise. The three essentials of Trade Secrets are:

- Information;
- Economic Value;
- Reasonable efforts have been taken to protect trade secrets.

Trade Secrets helps business to crack the market and grab customers. Leaking of such information could cause an incredible loss to the enterprise. Big brands have many trade secrets licensed so that no one can copy the secret and gain from their idea/ strategy. If the information is known beyond the organization then it does not cover under trade secrets. Trade secrets are known only to a few people within the organization.

COMPETITION LAW

Competition Act, 2002 covers the competition law. Competition law protects enterprises from anti-competitive activities which further protects consumers by maintaining stability in the market. According to Section 3 of the Competition Act, 2002 "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India."[6] It prohibits organizations that hurt the competition in India.

IPR (INTELLECTUAL PROPERTY RIGHTS). VS COMPETITION LAW

IPR promotes new ideas, inventions, etc whereas competition law promotes competition and prohibits monopoly. IPR doesn't allow others to copy ideas, inventions, etc without the

[6] Competition Act, 2002 Section 3

owner's consent whereas, on the other hand, the competition law is not much concerned about copying the content, idea, etc as it promotes competition in the market.

However, section 3(5) of the Competition Act, 2002 shows how the act doesn't interfere with IPR (Intellectual Property Rights) Policies.

According to Section 3(5) of the Competition Act,2000; 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)[7]

Section 4 of the Competition Act, 2000 says that the dominant position given to the enterprise in the market shouldn't be misused. Section 27 of the Competition Act, 2000 says the Competition Commission of India can punish IPR (Intellectual Property Rights) holders if the dominant position is abused by the enterprise. By considering both the above-mentioned section it can be said that the Competition law is not against IPR (Intellectual Property Rights) but it prohibits the misuse of the dominant position in the market. The main objective of the competition law is to protect consumers'/customers' interests and make sure that the consumers/ customers are not misled by the enterprises. Competition law aims to maintain proper competition in the market so that the dominant players do not misuse their position in the market and mislead the customers/consumers.

[7] The Competition Act, 2000 Section 3(5)

In the case of Amir Khan Productions Private vs Union of India,[8] the Bombay High Court held that the Competition Commission of India has the jurisdiction to deal with the cases relating to IPR (Intellectual Property Rights) and Competition law.

In the case of Kingfisher vs Competition Commission of India,[9] The court held that Section 3(5) does not constrain the right of the holder of IP rights to sue for encroachment or infringement of copyright, trademark, patent, and so forth. The Competition Commission of India has conferred the power to manage all the cases that come before the Copyright Board. Thus, the competition law does put limitations on the application of other laws.

COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS (IPR)

Competition law and IPR (Intellectual Property Rights) are closely interrelated to each other. According to the United Nations Conference on Trade and Development (UNCTAD) document on 'Examining the interface between the objectives of competition policy and intellectual property'[10]. The main objective of IPR (Intellectual Property Rights) is to protect new ideas, inventions, etc from infringement. IPRs (Intellectual Property Rights) are granted to the owner to protect his ideas, inventions, designs, products, etc from others using them unauthorisedly. If one wants to use a registered IPR (Intellectual Property Rights) then he/ she should take permission from the owner and then use it. The objectives of Competition law are Instead, boosting efficiency and enhancing economic growth and consumer welfare are the goals of competition legislation. Some rights emanating from private property are restricted by competition law to attain them for the good of society. It is regarded as advantageous for the economy since it encourages innovation, progress, and increased competitiveness. While competition law protects the interests of the market and the larger society by restricting those private rights that may undermine the community's general well-being and prosperity, IPR is about individual rights affording security and protection to private rights on innovations.

[8] Aamir Khan Productions Private vs Union of India 2010 (112) Bom L R 3778
[9] Kingfisher vs Competition Commission of India, Writ petition no 1785 of 2009
[10] United Nations Conference on Trade and Development, 'Examining the interface between the objectives competition policy and intellectual property, Intergovernmental Group of Experts on Competition Law and Policy, 15th Session, October 2016, available at <https://unctad.org/system/files/official-document/ciclpd36_en.pdf> (Visited on 26.06.23)

The interplay between Competition Policy and IPR can be laid out in the following cases:

1. Licensing Contracts: One of the key roles of Competition Policy is to review the anti-competitive effects of licensing contracts (regulating the transfer or exchange of rights to the use of intellectual property) Examining the anti-competitive implications of licensing agreements (which control the transfer or exchange of rights to the use of intellectual property) that result in the exploitation of market dominance is one of the main responsibilities of competition policy. In general, the property has positive impacts. It makes it easier for companies with stronger comparative advantages to use technological innovation and know-how and to disseminate it. When technologies are integrated in a complementary way, production might become steadily more efficient and product quality could improve. However, some circumstances may emerge when an exclusive license completely prevents other businesses from joining the market. To prevent such undesirable scenarios, competition legislation must be put into action. The goal is to analyze whether IP licensing practices have anti- or pro-competitive effects.

2. Technology Transfer: Depending on the specific contractual clauses and market circumstances, the transfer of copyrighted technology may imply unjustified limitations on competition. The purpose of the legislation is to forbid anti-competitive behavior, not monopoly. Technology transfer agreements would be deemed anti-competitive if they result in the abuse of a market position by putting onerous restrictions on such intellectual property rights.

Technology transfer agreements may be deemed anti-competitive in the following circumstances, for example, Patent pooling, in which two or more businesses band together and exchange cross-licensing rights to a certain technology to prevent others from acquiring it. Tie-in agreements to connect a product with another trademarked product so that the acquirer has to get the other product also from the patentee.

3. Abuse of Dominant Position: A dominant position is a position of financial and economic power possessed by businesses and entrepreneurs that enables them to thwart the maintenance of effective competition in an appropriate market. An organization gains a dominating position over time, and factors like the level of technology, entrance obstacles, the size of activities, etc., have an impact on this achievement.

The following are some ways that a business can make use of its dominating position:

- Imposition of unfair trade conditions, exploitative prices, or discriminatory practices;
- Reduction in the availability of goods or services;
- Refusal to enter a market;
- Using its hegemony in one pertinent sector to penetrate another pertinent area

The Competition Law forbids businesses from abusing their dominating positions. An organization can establish market dominance by using its monopolistic power, although the monopoly itself is not illegal under anti-trust laws; only the misuse of this position is that the market is negatively impacted by the law.

In the landmark case of United States v. Microsoft Corporation,[11]

Facts- were that Microsoft was alleged of abusing its monopoly power by tying its operating system and web browser and selling. This restricted the entry of other web-browser competitors in the market since Windows operating system users already had a copy of Internet Explorer (the browser Windows tied with its browser). Microsoft stated that Internet Explorer was a different and separate entity altogether since a separate version is found for other Operating Systems.

Held- that Microsoft had altered its dominant position and by this, it wanted to crush other operating systems and it said that Microsoft had committed monopolization, and tying in violation of sections 1 and 2 of the Sherman Anti-Trust Act.

Later, Microsoft appealed this decision, and judgment was given that Microsoft would have to be broken into two different components, one for the browser and the other for the operating system.

Refusal to Provide Licence: The purposes of the legal framework for intellectual property and the laws governing competition are the foundation of licensing legislation. The legislation grants the intellectual property rights (IPR) bearer sole authority for a set period limit. Therefore, the owner of an IPR can prevent others from using it, but he cannot stop the development and application of better technology. This is clear from the fact that intellectual property promotes market competitiveness.

The Court has cautiously established three requirements to be completed for classifying such a denial as an abuse of dominant position in the well-known case of IMS Health GmbH &

[11] United States v. Microsoft Corporation 253 F.3d 34(D.C. Cir. 2001)

Co. OHG v. NDC Health GmbH & Co. KG (IMS Health Case).[12] The arguments are as follows: The refusal to grant a license "is delaying the introduction of a new product for which there is a potential market demand." It is 'unjustified' and 'excludes competition in the secondary market', according to this argument.

Cross-Licensing: Cross-licensing is the practice of exchanging intellectual property rights between at least two parties.

If the licensed technology is a replacement in nature rather than complementary, it could act as a barrier to competition. Rising pricing, decreased innovation, scaled-back advances, and production cuts are the anti-competitive impacts of cross-licensing, which are likely to occur when it occurs between competing entities, in which case the competing companies.

The goal of competition regulation is to limit and control attempts to exploit an intellectual asset beyond the restrictions imposed by IPRs. As a result, IPRs and competition law are inherently at odds. Today, there is less conflict and more compromise in the relationship between the two systems. Both take unique routes to the same destination.

Patent Pooling: Whether they are transmitted directly from the patent holder to the licensee or via another channel, such as joint ventures, a patent pool is a collection of intellectual property rights (IPRs) that are the subject of cross-licensing. Both pro- and anti-competitive effects can be attributed to patent pools. Making patented technology open to licensees often has pro-competitive advantages. When utilized to protect invalid patents or when they contain patents that would compete with one another and are not complimentary, patent pools can have a significant anti-competitive effect on the market. The per se rule applies to patent pools in the majority of nations, including the United States, Canada, Japan, Germany, etc.

PROTECTIONS GIVEN FROM ANTI-COMPETITIVE PRACTICES BY IP HOLDERS

IPR and competition law have often been found to have competing objectives. Both free market and regulated market systems are used to run a nation's economic activity. The two distinct processes were used to improve the efficiency of the national market. The pricing of products and services is freely determined by agreement between buyers and sellers in a country with a free market economy, free from interference by the government or other regulatory measures. As implied by the name, a regulated market system would likely find that it is constrained by various regulatory organizations.

[12] IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG ECLI:EU:C:2004:257

The laws are one of the main components of the regulatory system that, in the relevant sectors, attempts to strike a balance between the free exercise of monopoly rights and societal interests. By examining both mechanisms, it is possible to conclude that the countries need both a regulated market and a free market since each has benefits and drawbacks. While adhering to IP laws and competition regulations is essential, prices must remain steady for both the supplier and the customer to be able to meet their demands. The economy should not be stagnant but rather dynamic, with regulatory authorities in place to keep it in check.

The following 2 preventative protections or procedures, however, help to stop the infringement of intellectual property rights:

- **Mandatory Licencing**: According to Article 31 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS),[13] a compulsory license is one in which the state permits or compels an IPR owner to give up his exclusive right over intellectual property. Compulsory licenses are only given in extreme situations, such as those involving public health, national emergencies, little or no patent exploitation in the nation, and general national interests.
- **Parallel Imports**: On the other side, a parallel import consists of products that are legally sold in a market but are imported into the nation without the consent of the relevant IP owner.

CONCLUSION

Innovation's increasing significance cannot be disputed. IPR (Intellectual Property Rights) seeks to advance technological advancement, creativity, and innovation. The primary objective of competition law is to eliminate unfair business practices that reduce economic efficiency and cost of transactions. In conclusion, the fields of intellectual property rights and competition law are complementary. As a result, it cannot be seen in isolation given that their areas of focus appear to mostly overlap and, in some instances, conflict. To satisfy the goals of widespread competition and consumer welfare, it is crucial to strike a balance between IPR (Intellectual Property Rights) and Competition law. At the same time, innovation must be secured by giving inventors exclusive rights and enough protection to enable them to recoup their R&D investments. Even though Section 3(5) provides all IPR (Intellectual Property Rights) holders with blanket protection, Section 4 of the Competition Law of India has a

[13] World Trade Organisation (WTO) on TRIPS (The Agreement on Trade-Related Aspects of Intellectual Property Rights) Section 31 available at <https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm> (Visited on 26.06.23)

significant impact on preventing anti-competitive behavior on the part of IP holders who abuse their dominant position. To have a flexible market environment and a regulatory body that will make sure the pricing and supply of goods and services in the market are under control, there also has to be a balance between a free trade market and a limited market. Competition legislation should, however, be kept under check. The threshold of its control from the perspective of competition law shouldn't exceed instances where IPR (Intellectual Property Rights) results incalculable adverse. From the perspective of competition law, the bar for its control shouldn't exceed situations in which IPR (Intellectual Property Rights) has a calculable negative impact on competition. Additionally, protections are in place in cases when IP (Intellectual Property) holders engage in anti-competitive behavior. Subject to its terms, practices like Compulsory licensing and Parallel Importation should be allowed. India, a developing country, has achieved some degree of balance between IPR (Intellectual Property Rights) and competition policy, but there is still more work to be done since the first instance of forced licensing was only granted in 2012.

Therefore, competition law and IPR (Intellectual Property Rights) go hand in hand. India should work more toward achieving the balance between competition policy/ law and IPR (Intellectual Property Rights). The interface between intellectual property (IP) and competition policy plays a crucial role in ensuring a balanced and fair marketplace. While IP rights grant exclusive control over inventions, creations, and designs, there is a need to implement safeguards against anti-competitive activities by IP owners. These safeguards are essential to prevent the abuse of IP rights that could hinder competition, stifle innovation, and harm consumer welfare.

One key safeguard is the application of competition policy to address potential anti-competitive behavior arising from the exercise of IP rights. Competition authorities play a vital role in assessing and addressing anti-competitive practices, such as the misuse of IP rights to create barriers to entry or to exclude competitors from the market. By scrutinizing agreements, licensing arrangements, and patent abuses, competition authorities can ensure that IP owners do not engage in practices that unduly restrict competition.

Moreover, the concept of "essential facilities" provides another safeguard against anti-competitive activities in the context of IP. When certain IP rights are deemed essential for market access and competitors cannot reasonably duplicate them, competition authorities may require IP owners to license their essential IP on fair, reasonable, and non-discriminatory

(FRAND) terms. This promotes competition by preventing IP owners from using their rights to exclude competitors or to extract excessive licensing fees.

Collaborative approaches such as patent pools and standard-setting organizations also contribute to balancing IP rights with competition policy. These mechanisms encourage the sharing and licensing of essential technologies, promoting interoperability and competition in industries that rely on standards. By establishing fair and transparent processes for IP licensing, these organizations can prevent the creation of monopolies or undue market power by individual IP owners.

Overall, the interface between IP and competition policy aims to strike a delicate balance between incentivizing innovation through IP protection and ensuring a competitive marketplace that benefits consumers and fosters further innovation. Safeguards against anti-competitive activities by IP owners, including the application of competition policy, the concept of essential facilities, and collaborative mechanisms, are crucial for maintaining this balance and promoting fair competition, innovation, and consumer welfare in today's dynamic and evolving economy.