COMPULSORY LICENSING OF IPR:

INTERFACE WITH COMPETITION AUTHORITY

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INTRODUCTION

The Competition act 2002 governs the conduct of compulsory license and acts on its abuse. Like the competition authority in EU, the competition authority in India grants the access to transfer the license to competitive owners. Thereby the researchers shall be conclusive on answering whether CCI holds the supreme authority on conferring compulsory license in distinct happenings on the basis of essential facilities doctrine prevailing in the US and EU. The concept of compulsory license evolves when the parties comprise of willing buyer and an unwilling seller, then the compulsory license is involved forcibly by the states.

The International agreements comprising of –

- WIPO,
- convention for the protection of the IP
- WTO agreements,
- TRIPS

The situations under which compulsory licensing get granted are, Public interest for maintaining the anti-competitive manner. Unreasonable prices were the IP is not well furnished in any country or in national emergency concerning the public health. It is of the utmost importance that each and every country is in the quest to bring a harmony between the interface of competition laws and the IP laws. The debatable issue here is to determine the extent competition reforms could be utilised for the purpose of granting compulsory licensing of the IPs. It is observed that the onus is on

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national authorities should examine the transfer agreement and also examine anti-competitive effects arising from the licensing agreements. It depends on the regulatory reforms of a country to choose more than one authority which can grant compulsory license without the overlapping of the powers between other authorities. To govern this inherent conflict, the competition authority gives the access of facility to the competitive competition who can survive in this potential competitive market. The practice of compulsory market has been applauded world life with the view to achieve global human welfare common to the country's laws. In India the IP authority and the competition commission are the two authorities vested with the right to grant compulsory license.

The paper exhibits the analysis with respect to the grant of compulsory by respective provisions in UK, US and EU pertaining to IP and the competitive laws. Innovation and the efficiency are the key factors which are aimed to get the competition authorities and IP laws. To attain this objective, the hurdles floating in the competitive market are removed. The reason of the conflict arises during the decision making by the two different authorities over the same issue. On one hand the Competition laws focus to perish the inappropriate exercise of practices and allocation prevailing in the market with regard to the products and services, whereas, on the other hand, the aim of IP lanes in India to promote a dynamic and efficient gains by the virtue of incentives and the process including the M&A or the protection of IPs. On the other hand the factor that inculcate the competition and keep the competition alive in the exclusive grant of the IPRs.

INTERNATIONAL FRAME OF REFERENCE

The mechanism of arbitrarily operating their protected IPs gives rise to unlawful monopoly by the IPR holder gains the dominancy, on the other hand, the upcoming competitions that rely on the protected IP eventually become of the prevailing de facto monopoly created by potential competitors. Therefore compulsory license become a levy factor to curb the anti-competitive behaviour of the dominant IP holders. Going by the suggestion of jurisprudence in the US and EU it can be understood that compulsory license results as an appropriate remedy in the case of anti-trust. Keeping this fact in mind and amalgamating it with socio-economic conditions prevailing in the Indian market, the tool of compulsory license has become the need of the hour leading to the growth in Indian industry. Having look at the International perspective, there are various countries

which have adopted more than one authoritative for purpose of issuing compulsory licensing within the ambit of respective statute. The paper below shall discuss the scenario in our EU, US and India.

EUROPEAN UNION

In EU, the government of EU and the 27 member states work together with regard to the grant of compulsory license. These two authorities work on different footings. The EU government undertakes the process of competition law and he member states govern the reforms pertaining to IP. Therefore, the member states, with their concerning laws governs the allotment of compulsory license. Whereas, the European Commission and the European court of justice makes SURE that there is a level playing field, ensuring free and fair competition by promote free movement of IPs which could be compulsorily licensed, and thus the ECJ acts as anti-competitive cure in the competitive market. The provisions under the EC treaty empower all the member states to work towards anti-competitive practices. To be precise, Article 101 of the EC sets the scope and limitations associating to the rights and remedies by envisaging IP rights. Article 102 prohibits the commercial entities to interrupt with the operations of a reasonable and common market that aims a free flow of capital along with its ancillaries and labours. The activities prohibited under Article 102 comprise of the dominance exhibited by the commercial entities that involves direct and indirect abuse in unfair purchase and selling prices or trading, as it amounts to limit the market by suppressing its technical and economic conditions along with prejudice to the consumers, since the consumers are placed at competitive disadvantage and contracts are subjected as per the commercial entity. As per the competition law of EU, any unilateral defiance of IP rights titleholder to the competitors, would not amount to the violation of the competitive law.

In addition to this, there are situations, where the denial amounts to the abusive conduct as per EU. The right to access the IP can be granted in case of any abuse by the dominant position holder under competition law. This practice of granting the compulsory license should be inconsistent under ECJ by the virtue of doctrine of essential facility.

The doctrine of Essential facility stems from the anti-trust law prevailing in the US and very well followed in countries like European Union. Under this doctrine, the owner provides the access of facilities by the virtue of undertaking that could avail the facility at the cost of certain price. The

progress of this doctrine could be fetched from Article 102 of the EC treaty, under which, abuse by the dominant position holder is prohibited which takes place with respect to the refusal of deals in the common market and hinders the fair and free competition. In the case of Volvo v. Eric, the models were denied the access to design rights to be done on car body panels, which in turn deprived the repairers who work independently from granting the surplus parts. Further, it was held that, abuse of prevalent position is not confirmed on the ground of mere refusal, with the proviso that here is no supplementary abusive control stringed with the refusal. The ECJ also clarified the attributes that shall amount to the abuse of dominant position if here is any refusal, such refusal shall comprise of:

- Refusal to supply spare parts to independent repairers,
- Unfair means of fixing prices and giving any adverse effects to the models in circulation.

With the help of more cases, ECJ evolved a set of criteria's that could aid in defining the essential facility. Though, there are not any straight driven formulae to categorize the criteria, but the credentials observed by ECJ include:

- Presence of a controlling enterprise that has dominancy over the facilities.
- Such facility could not get reproduced by the competitors, because of lack of ability,
- Securing the access of such facilities should be a mandate,

The situation under which the anti-competitive remedy of compulsory licensing is granted arises when the refusal to grant the license affects the market access with respect to other competitors. To validate this theory, the doctrine of essential facility was applied by the EC concerning the IPR issues. In the case of Magill's, EC held that Article 102 gets violated by such refusal of license. Further, ECJ also held that the dominancy of position does not get conferred by mere holding of the IPR ownership. In the Magill's case, the TV broadcasters held their copyright protection on respective television programs, in furtherance, every broadcaster had their distinct guide for the purpose of Informing the viewer's regarding the programs that could happened the coming week. Magill wished to consolidate all the three different broadcasters into one television guide. Whereas, Magill was kept deprived with the license by all the three broadcasters. Post the Magill

judgment, the exclusive circumstances were laid, where the refusal of such license should be declared as an abusive conduct. Such exclusive circumstances comprise of Lack of potential substitute with respect to the new products whose access is denied in the market. Whereas, the consumer raises the demand for such products in the market.

In the recent case of IMS Health v. NDC Health, the former had copyrights over certain pharmaceutical data's, and refused the grant of the license top other competitors. EC held that, IMS health should grant the license of the pharmaceutical data to MDC health. The reason laid by the EC was observed by the application of doctrine of essential facility, as per which it was dominant industry principle. Moreover, the other customers also needed the pharmaceutical database to provide the service value to the customers, and thus, the exceptional circumstance was created which was earlier held in Magill's case.

It is the competition laws of a nation that could strive balance between the competitiveness and the innovation which in addition seek the protection of IP Laws.

U.S

Compulsory license has not been covered under the US patent lanes. Nevertheless under the provision of the copyright laws, the intention could get furnished by the notice if one sees it. Such notice shall be sent to the copyright office of the state. US have two national authorities that govern the protection of the IP, The US patent and the Trademark office. Therefore in US, compulsory license is not used as a tool to address the anti-competitive issue pertaining to the IP protection. There are two federal agencies that govern the anti-trust system. These companies comprises of Federal trade commerce , Department of justice Anti - trust divisions Both the authorities have different working to govern the cases related to anti-trusts. The functions of these anti-trusts agencies includes:

- Maintain the fair play competition in the common market that is the reason of merger gets lessened.
- To cure the competitive loss
- To use anti-competitive actions over the use of IPR

The role of dominancy by IP rights holders gets curbed by involving section 2 of Sherman Act under the US anti-trust law like the provision under EU; mere refusal grant the license doesn't amount to violate the anti-trust law. Only when such refusal amounts to an anti-competitive conduct then under certain circumstances section 2 is involved.

In the case of Eastman Kodak v. Image Technical Service, the former company was into the business of manufacturing and selling of phonographing materials. In addition to this, Kodak was also involved in selling the success and replacing its equipment pack. The service organisation started granting requests to Kodak and eventually, limited the availability which made it difficult for the ISO to compete with Kodak.

Therefore the ISOs took action under section 1 and section 2 of the Sherman because of the refusal in drafting in its already painted parts. District court gave the judgement in favour of ISOs asking Kodak to sell the respective parts to the ISOs. The appellate court held that and anti-trust liability dealing with refusal to deal in IP can arise that there is a presumptions of valid cause that leads not to license which can be counterpart by the support of anti-competition intention, including the respective situation when IP gets the status of "essential facility." Compulsory access to the protected IPs could also get levy in those cases where any refusal to license indicates the intention of anti-competitive mechanism. The foreign trade mechanism in a very recent matter of Rambus Inc. held that the company's improper opinions and statements regarding its patents applications which were attributed to RAM from the organisations who started the monopoly in the market set by the company called JEDEC. FTC invoked Section 2 and section 5 of Sherman Act and directed Rambus to grant license of SDRAM available at royalty rates or at the rates set by the commission. The US court contradicted the decision of FTC, on the following grounds accounting the powers of FTC:

- Ancillary authority given to FTC to IMPOSE Compulsory License.
- FTC can IMPOSE actions like royalty free license, e.t.c to remedy anti-competitive conduct
- FTC has also the power to grant compulsory license to next generation.

U.K

The scenario in UK is different from that of EU and US. UK has got more than one authorities with the power to grant compulsory license.

1. Intellectual Property office
2. Secretary of the State
3. Office of fair trading
4. Competition Authority

For the grant of compulsory license, application could be sent to the IPO, post the filing of application; IPO checks the product's consistency with the UK Patent Act, 1977. The abuse of dominant position holder in the competition market gets highlighted with the profiteering of IPR and eventually affecting the competition laws. To curb this, the competition commission and the state's secretary can furnish request to the IPO for the purpose of calling for its action in the cases of mergers that does not get covered under the Enterprise Act, 2002. Therefore, in UK, the abuse of dominant position is taken care by the OFT that holds the power to govern and issue compulsory license when required in certain special circumstances. Therefore, having seen the conceptual background, we can say that apart from EU, US, there are various other jurisdictions where national authority equally distributes the obligation of granting license. Though, the working nature f the two agencies are very different. Both the agencies do not require marking down their operations, they work independently to attain statutory goals and objectives.

INDIAN PERSPECTIVE

The scenario in India is way approaching towards being reasonable. There has neither been any case till now that has seen CCI to decide the matter in case of refusal of license nor any use of the doctrine of essential facility. The competition commission of India is empowered to grant the compulsory license. The preamble of the CCI lays the objective of the act in safeguarding the people from dominant position and any anti-competitive practices. Supreme Court, with its various decisions has held that the promotion of economic efficiency by the tool of fair competition that should run parallel to consumer preferences. This binds the competition commission with its prime purpose to execute its power in achieving this objective by the virtue of critical analysis in issuing

the compulsory license under competition act. In India, the IP Laws and other authorities have the provisions where such authorities are empowered to issue a license.

Section 84(1) of the patent act describes that:

At any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory licence on patent on any of the following grounds, namely:—

(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied,or

(b) that the patented invention is not available to the public at a reasonably affordable price, or

(c) that the patented invention is not worked in the territory of India.

There are three circumstances under which the Central Government, by the way of notification, can provide the grant of compulsory license:

- National Emergency
- Extreme Urgency
- Non commercial use by public

Section 31 of the copyright Act empowers the copyright bard to grant the Compulsory license on following grounds:

- Refusal to grant the performance in public work.
- Refusal in allowing communication by broadcasts.

Therefore, getting the essence of the provisions mentioned under the IP Laws, these provision do not get govern the abuse of dominant IPR holder, who affects the anti-competitive practice by refusing the access to essential facility. There are differences in the functioning of IP authorities

and competition authorities because they are limited by this own set of statutory goals, which permits them from crossing into each other's domain. Moreover, the competition authorities are considered as expertise in dealing cases related to anti-competitive trends which goes lacking in the IP authorities when such matters pertain to protection of IPR. Therefore, it is the CCI that had to act as the competent authority. Examining the CCI's authority and power to grant exclusive license acting under the ambit of competition act of India, 2002.

Section 4 of the Competition Act: Sec-4 [(1) No enterprise or group shall abuse its dominant position.] (2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].—- (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service.

According to this, the dominant holder's refusal to grant license shall hinder the constructive supply as per the provision. Further, such refusals shall also limit the productions and services giving prejudice to the consumers. Such hindrances can occur by any of the above three ways mentions, which also amount as an abusive conduct under Section 4(2) (b) of the Competition Act. The intention of the legislature seems to have given the validity to the doctrine of essential facilities under the competition act. CCI, therefore intervenes when there are circumstances were dominant enterprise controls certain facility which are needed for the free and fair access of market trading, then such enterprise cannot refuse the sharing so such facilities with the competitors and reasonable competitive cost. CCI can invoke Section 4(2) (c) if such practices of refuel is taken by the enterprise, as per such dominant enterprise shall be bound to share the essential facility. This kind of order can be placed in equal footing as that of grant of compulsory license. Moreover, in continuation to this, CCI under section 27 (g) can also by the way of penalty or compensation pass 'any order' if the enterprises acts in contravention to section 4. Going by the Mischief rule of interpretation, it should be kept clear that 'any order' passed shall aim to CURB the MISCHEF, hence acts as a remedial mechanism to continue the demand. Statutory provisions in India go overlapping with the other laws. Similarly, the Indian IP Laws and other laws have received over riding effect from the CCI, by the virtue of section 60 of the act.

As per section 60 of the act, The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Thereby, once the ball has entered the court of CCI, the other statutory authorities stand no chance to take the merit of the case. In the recent case of HT Media which was dealt by CCI, wherein, the company alleged T-series, super cassettes that it abused its dominant position. As per the market value, T-series had the market shares of 80%, and T-series was alleged for charging 2 % extra royalty rate, as the price charged from HT Media was Rs. 660/ need hour. As held in the case of Phonographic Ltd v. Music Broadcast Pvt. Ltd, CCI held that any music company could not charge more than 2% of the revenue as the royalty rate. In HT Media case, the forum chosen was CCI because of the slow evolving progress of copyright board with regard to complaints. On the other hand, the jurisdiction was challenged by T-series stating the reason that, it is the copyright board where the application of compulsory license was filed. Further, CCI dismissed the application by T-Series, and the matter went to Delhi High Court, where the petition got disposed, and the CCI was ordered to hear the jurisdiction issue which was raised by T-Series. The Rationale put forth by CCI was that the abuse of dominant position under the competition law is broadly different from that of the grant of compulsory license. Whereas, the complaint rose by HT Media deals with unjust and unreasonable license fees, and hence, it is exclusive jurisdiction of the CCI. Till date, the case has not been heard on the merits and issue, and T-Series already has all the odds against it. This case is one of its kinds, where the doctrine of essential facility's conditions could be explained under Indian scenario with the following observations:

- There should be a dominant enterprise heading and regulating the facilities. In HT Media case, 80% shares were acquired by T-Series.

- If the facility is not granted to the competition then, the competitor would lack the ability to reproduce such facility. In the HT Media case, the company was not able to produce music.

- To meet the growing market, the potential competitors should have an access to facility. In the Ht Media case, company had to gain rights from T-Series for making a place to compete the market of radio broadcasting.

- The feasibility for growing the facility should be fulfilled. Taking the reference of the Phonographic case, where they were charged more than 2 % royalty rate. In the HT Media case,

company was charged Rs.660/needle hour which was apparently four times more than current rate and hence T-Series quoted an arbitrary price.

The competition commission of India has got lethal powers and well structured as compared to the other IP Laws in India. Under the given circumstances that T-series has abused its dominant position, then the CCI may impose the compulsory license on T-Series by the virtue of Section 27(g) continuing n the public and consumer welfare, to maintain a free and fair competition under the doctrine of essential facility.

FINDINGS AND CONCLUSIONS

The Federation of Indian Chambers of Commerce and Industry has laid down the observation that the remedy to cure anti-competitive practices is not explicitly granted to the Competition Act. It is Section 27(g) of the act that has empowered the CCI to pass 'any order' that can curb the mischief involved pertaining to compulsory license. Talking about the Indian Patent Act, 1970, FICCI observed that, under section 30, it has also recognized the validity of compulsory license as a concurrent remedy.

With the above researched concepts, I would like to explain the findings brought under this head. When a potential competitor has to file complain for the abuse of domain position without furnishing any obligations of desired person which is mandatory under the Indian Patent Act, then, it is always advantageous to lodge a complaint against such abuse with respect to Intellectual Property. Adding to this advantage, the complainant also does not require the expiry of 3 years from the date of complaint filed in order to carry forward the complaint to CCI. Indian IP authorities, failing the skills when the case relates to anti-competitive abuse, or market trend, relating to the protection of Intellectual Property Rights.

The competition Act, 2002 gives a better approach under the hands of CCI for granting the compulsory license , wherein, the CCI can refer the matters relating to compulsory license to the appropriate IP authority by the virtue of section 21A of the act. Hence, compulsory licensing should be recommended as an anti-competitive remedial cure utilized in cases where the exclusive management is contestable and any other remedy cannot get resorted to.

CONCLUSION

From the above given concepts, it could be said that there is a similar goal shared by the both IP authorities and competition laws which makes them run parallel, the difference lies in achieving the goal through different set of statutory mechanisms and rights. The doctrine of essential facility shall be looked into in cases where it shall be declared that such refusal of license comes within the doctrine's acumen. The obligation of compulsory license can sometimes lead to decrease in the incentives to innovate, but like applied in U.S and EU; it can later be inscribed by the application of exceptional circumstances test. Therefore, there happens very limited situations where compulsory license amount to be taken as a remedy. Further, these limited circumstances leads to include the desire to access the essential facility of the protected intellectual property rights by the dominant positions to compete in the free and fair market.

At different levels, there might be several authorities concerning over the same thing through different mechanisms, pertaining to the grant of compulsory license. The difference happens in the mechanism involved with respect to the grant of the license by the virtue of their respective statutory limits, as witnessed in the Indian scenario where CCI and other IP authorities have the power to grant compulsory license, but such power over the same thing could not overlap the CCI's power. Since, CCI can intervene only at exceptional circumstances dealing with competition in order to remedy such anti- competitive practices that don't not happen under the ambit of IP authorities.

Hence, the doctrine of essential facility shall restrict such power to CCI.