CONVERGENCE OF INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: EMERGING NEED FOR THE RIGHT BALANCE IN INDIAN PERSPECTIVE

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ABSTRACT

Competition Law and Intellectual Property Rights are two sides of the same coin. Competition Law is enacted to ensure healthy competition in the market by regulating and restricting the agreements between competitors. Intellectual Property Rights grant exclusivity to exploit the patented property and restrict others to access the same. If Competition Commission of India is satisfied that IPR brings any appreciable adverse effect on market, then Competition Act provides stances to bring action. *Prima Facie* there appears to be conflict between the applications of the two realms. Yet, it has been observed in numerous cases that these two sets of law share a common goal of consumer welfare and economic efficiency. This article seeks to explain a simple proposition that Intellectual Property Rights and Competition Law are complementary policies rather than constraining laws in Indian market. Therefore, it aims to show that Intellectual Property is subject to Competition law in relation to jurisdictional point of view and can be tried by the Commission which has set out a plethora of cases. Also, the right dosage of IP in the market is inherently pro – competitive and can help in achieving allocative efficiency. In Indian perspective, the right balance needs to be sought for the application of both the laws which can help in increasing market efficiency and thus attain the common objective.

Keywords: Intellectual Property Rights, Competition Law, Jurisdiction, India

INTRODUCTION

As soon as Privatization and Globalization lifted the restrictions on the trade policy, the legal system of IPR and competition law have evolved greatly. Since the enactment of the Indian Competition Act in 2002, there has been a question of debate over the interference of Intellectual Property Rights [hereinafter IPR(s)] and Competition policy.

At the onset, there appears to be tension between these two sets of law as IPRs promote monopoly in the market and on the contrary, competition law battles the strengths of monopoly. In general, monopoly is not against competitiveness in nature, but the abuse of such monopoly is always considered as anti-competitive.[iii] This principle has been followed by Competition Commission of India (hereinafter referred to as CCI) in numerous of cases before it – setting out the scope of the two laws which may overlap and their objective come into collision.

COMPETITION LAW & INTELLECTUAL PROPERTY RIGHTS

The aim of IPR is to provide certain incentives to the creators, inventors, artists to hearten the innovation in the economy. This objective is ascertained by allowing certain rights to the intellects for their inventions which create monopoly rights for a specific period of time (20 years in case of patent) to overcome the research and development costs they have incurred and for a positive return on their investments overtime.[iii] It provides a wide area of choice for consumers among competitors in the relevant market between the range of products and services they offer.

In the absence of protection provided by IPR, the efforts and innovations of efficient enterprises will be replicated by less efficient enterprises which consequently cause market distortion by counterfeiting products and services. This will disorientate new innovators, creators and artists of any incentive behind the innovations and thus decrease motivation amongst them.[iv]

The *competition policy* is the backbone of the economy which ensures fair competition between business ventures by implementing whimsical regulation mechanisms. It may occur to the

minds of the readers that competition law may at times be detrimental to societal growth by implementing restrictions or constrictions on entrepreneurs.[v] But, competition law is an instrument enforced by the Central Government to ensure healthy competition in the market and further achieving the state of allocative efficiency which can only be achieved in a perfect competition in the market.

The main focus of competition policy is to prevent the domination of market by enterprises or associations of enterprises or persons or associations of persons through agreement including but not limited to price fixation or through abuse of dominance.[vi]

In an economic standpoint, law of the land allows the use of patents without authorization of the patent holder, including use by the government or third parties only in cases when there is national emergency or other critical circumstances to protect consumer welfare or market freedom. Further, if the patent holder embraces any type of anti-competitive practices, the state can adopt mandatory manoeuvres like compulsory licensing under the provisions of TRIPS Agreement.[vii]

Refusal to deal for a patent is the sole reason for granting compulsory licenses by the government. In the 'essential facilities doctrine',[viii] withholding to grant the use of patent of such technology can be used as a ground by government to levy compulsory licensing to a third party only if such patent facility is not made available at a fair, non – discriminatory and reasonable price at the disposal of third parties to maintain the competition equilibrium in the relevant market. The patent holder is impotent to impede development and use of technology. Somehow this makes it evident that IP also adds to the promotion of healthy competition in the relevant market. Where there is refusal of technology (patented) which hinders the emergence of new products in the market, it shall be considered anti-competitive. Such a refusal will be considered as abuse of dominance according to ***IMS Health Case***.[ix]

Therefore, whilst competition law is focused on saving the interest of the market over some private set of rights, IPR safeguards an individual's rights by ensuring private rights of an innovator. However, to comprehend the reality of struggle in administering competition law

and intellectual property law, it is crucial to entail upon the deepest system, practices, and provisions of both the law and the ever developing decisions of CCI on the concerned matter.

CRITICAL ANALYSIS

The report of ***Raghavan Committee*** stated that, *"all forms of Intellectual Property have the potential to raise Competition Policy/Law problems. Intellectual Property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society."* The report states that there is a need to protect the right of the innovator to reward and promote motivation for further innovation. But, at times, there is also need to restrict and prevent anti-competitive behavior that may make an appearance in the employment of IPRs.[x]

In case of any interference by IP in competition and where CCI is satisfied of *adverse appreciable effect on competition* (in short AAEC) in the relevant market, the competition act of 2002 provides for an action to be set in motion to eradicate such interference.[xi]

Section 3(5) of the competition act provides for the reasonable use of such private rights involving innovations. The wordings of section 3(5) make it clear by using *'reasonable use'* over such rights allowing the right holder to impose only reasonable conditions on licensing to third parties in the market of a similar product.[xii] This was addressed by CCI in the case of ***FICCI – Multiplex Association of India v. United Producers/Distributors Forum***[xiii], where the respondent circulated the notice ordering not to release films to the members of FICCI. It was contented by respondent that the notice was issued keeping in mind the exception provisions of section 3(5) of the act and asserted that the respondents were within their rights to impose reasonable conditions. CCI decided the matter in favor of FICCI stating

"23.30 It may be mentioned that the intellectual property laws do not have any absolute overriding effect on the competition law. The extent of non-obstante clause in section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigors of competition law only to protect his rights from infringement. It further

enables the right holder to impose reasonable conditions, as may be necessary for protecting such rights."

Notwithstanding, the exception provision of Section 3(5) of the Indian Competition Act 2002 discovers its curb in section 4(2), which expresses that there will be an abuse of dominant position if the enterprise forces unfair and discriminatory conditions or agreements or prices in relation to the purchase or distribution or sale of goods.[xiv]

Therefore, a person or association of person or an enterprise can hold the dominant position[xv] in the market but cannot abuse the said position *per se*. The idea of competition policy was introduced in the era of post liberalization and privatization. The market mechanism is now shifted from one being of controlled and constrained to that of open market which is controlled by free forces of market, therefore monopoly is not restrictive but abuse of monopoly surely is.[xvi] The private rights of the holder are restricted against the detriment of consumers which means that in case of licensing of invention, the IPR holder cannot impose unreasonable conditions. As such, there is no determined list of unreasonable conditions and shall be carried out on a case-to-case basis. For instance, the Patent Act states that the right holder cannot resort to exercises which adversely affect the transfer of technology in the International market and that such innovation shall be made available at reasonable prices.[xvii]

CONFLICT OF JURISDICTION

To be specific, the cases pertaining to involvement of IPR are heard by the Court of Law (i.e. High Court/Supreme Court). But in the *Raghavan Committee* report it was stated that 'a Committee shall be established which recognizes the need to restrict the anti-competitive behavior in the market that may arise because of use of IP protection.' Jurisprudence for Indian Courts together with Competition Act does not provide for any exemption to cases involving IPR issues which can be tried by CCI.

CCI was established by Central Government under section 7 of the act after the Supreme Court pronounced its judgment in ***Brahma Dutta***[xviii], where it was held that CCI shall be established to adjudicate matters relating to anti-competitive practices, and Competition Appellate Tribunal shall be established for advisory and regulatory functions.

CCI advocated for itself in jurisdictional issues while dealing with cases involving IPR. The most important and recent case is that of ***Telefonaktiebolaget LM Ericsson v. Competition Commission of India***[xix], where a petition was filed by Ericsson before Delhi High Court challenging the decision of CCI directing an investigation into the matter of abuse of dominance against Telefonaktiebolaget LM Ericsson. In the hearing before CCI, the informant Micromax Informatics Ltd. alleged Ericsson of abusing its dominant position in GSM technology market by: (1) Stipulating extravagant royalty on the sales of entire phone instead of just patented technology, and (2) Reporting SEBI about Micromax's failure to pay royalty before its listing. Several US cases like ***Rambus, Inc. v. Infineon Techs. AG***[xx] and EU cases like ***Motorola Mobility v. Apple Inc.***[xxi] and ***Huawei Technologies Co Ltd v. ZTE Corp.***[xxii] were relied upon to resolve the second issue in question. Ericsson contented that CCI lacks jurisdiction as the remedy is sought under the Patents Act.

In an appeal before the Delhi High Court challenging the order of CCI contending that the remedy provided in Patents Act is that of compulsory licensing which overrides the Competition Act. However, the Court could not find any irreconcilable differences between the Patent Act and the Competition Act since the remedies under the two acts were materially different. Further, the Court said that the grant of remedy under one enactment cannot bar the grant of remedy under the other statute. This could not be inconsistent for CCI to pass an order under the Competition Act.

In another case of ***Aamir Khan Productions (Pvt.) Ltd. v. Union of India***[xxiii] before the Bombay High Court, a writ petition was filed challenging the show cause notice issued by respondent on the ground that CCI does not exercise jurisdiction to commence proceedings in respect of films for which the Copyright Act, 1957 contains exhaustive provisions. It was held

that the CCI having jurisdiction to commence the proceedings is a mixed question of law and fact which the CCI is competent to decide on its own.

Again in ***Kingfisher Airlines v Competition Commission of India***[xxiv], the issue of jurisdiction arose before Bombay High Court. The facts of the case are that Jet Airways and Kingfisher Airlines entered into an alliance agreement in somewhat October, 2008. On information furnished by respondent number 3 which established a case under section 3 of the Competition Act, 2002, the Commission (then established under M.R.T.P Act) issued a notice to the petitioner for investigation. It was contented by the petitioner that their alliance is saved as the particular section came into force on 20th May, 2009 and has no retrospective effect. Therefore, the cognizance taken by Commission was one without jurisdiction. On the contrary, the Court set aside the jurisdictional objections raised by the petitioner on the ground of 'continuing effect'.

Thus, the Competition Act is applicable to the cases involving IPRs even before the act came into force and there is nothing in the statutes[xxv] listed under the exception provision of section 3(5) which could oust the jurisdiction of CCI and thus, IPRs are subject to Competition Law. CCI is competent enough to adjudicate matters relating to IPR which have adverse appreciable effect on competition in the relevant market.

ADEQUACY ISSUES

The emerging need to apply competition law may be kept away if the models of IPR are developed and enacted in such a delicate way that balances the objectives of the competition policy and also accommodates innovators. To prevent anti-competitive practices in the market, developing technologies now require strict scrutiny by competition policy in a way of exercising private rights.[xxvi] The legislation must be adequate in identifying and defining the control over IPR.

Competition law will be required exactly when the property rights are not portrayed sufficiently, provoking non-fulfilment of the very goals of IPR. Therefore, vaguely defined, IPR provides for strong protection of innovator's right, without just cause and thus fails to promote innovation and only increases money centric behavior in the market, defeating the purpose of including the IPR[xxvii] as an exception to competition law. IPR should be provided in such a manner that it fulfils its functions adequately.

From an economic perspective, IP is essential for achieving efficiency, but too much of IPR will lead from market equilibrium to monopoly market and then that monopoly will be abused in the market leading to anti – competitive practices, and thus, defeating the goals of competition law.

If private rights of an individual are not guarded by IP law, it diminishes the motivation for more innovation in the market instead of boosting it. Economic efficiency cannot be achieved with such limitations in the market as there are no adequate means to protect the genuinely differentiated features in the market.

In simple terms, the right amount of IP in the market is when there is neither too much nor too little interference of IPR in the competition. It is naturally pro–competitive. The patented IP becomes the industrial standards. In such a case, the competitors cannot develop differentiated technology. It also increases the cost of market research tests and thus causes unnecessary harm to the market and themselves.

Both the laws have a particular objective which cannot be blended completely with that of the other.[xxviii] Critical Analysis of this crossover of competition and IP law would be deceptive if it is assigned to the latter, the direct role of promoting competition, or to the former, and the direct role of promoting innovations. The main objective is to develop both the disciplines in such a manner that promotes a dynamic competitive market.[xxix]

CONCLUSION

The growing importance of differentiated innovations for economic development is indisputable. The basic objective of competition law is to promote economic efficiency and its functions are to prevent anti-competitive practices which could harm the economy. The goal of IPR is to protect and promote innovation and creation. Consumer welfare and allocative efficiency is a common goal derived out of both the legislations. Both the policies share a compatible and consistent goal that furthers long – term efficiency in the market.

IPR and Competition Law cannot be considered in isolation but are complementary to each other. The nature of all forms of IP is such that they may raise competition law problems. That is why, exception has been laid down in section 3(5) of the competition act which permits the reasonable use of intellectual property rights to protect it from the rigors of competition law, but it does not mean that they can be abused by imposing unreasonable, discriminatory and unfair limitations against competitors in the market.

To adjudicate upon the matters dealing with anti-competitive practices, the Central Government established Competition Commission of India under section 7 of The Competition Act of 2002. CCI also functions as a watchdog to monitor the market regarding the fair play and domination of monopoly in the market. Through decisions in cases before CCI and various High Courts, it is now clear that CCI is competent enough to entertain matters revolving around IPR which interfere with the competition in the relevant market.

Competition law is required when models of IPR laws are not applied properly, thus, not fulfilling the objectives of IP law. Therefore, a balance shall be maintained between the application of IP law and competition law that fulfils the functions of both the laws without diminishing the efficiency of the market. IP shall be there in the right dosage, which is inherently pro – competitive and can sometimes make it difficult for the competitors to seek alternate ways to attract customers as the patented property which is now an industrial standard and has become consumer's priority.

Unlike the US and the EU, there is no clarity in Indian legislation regarding the competition matters in respect of their sectors. Competition law should not go too far in its application and regulation standards. In this incipient phase of Indian competition law, the authorities have adequate practice to depend on. Simultaneously, a comprehension of the rationale for the points of reference would be of great value so as to guarantee that the same can be altered keeping in mind the particular needs of the *Indian Market* and the competition situation therein.

ENDNOTES

[i] Telefonaktiebolaget LM Ericsson v. Competition Commission of India 2016 SCC OnLine Del 1951
[ii] United States v. Topco Assocs., Inc. 405 US 596 (1972)
[iii] UNCTAD, 15th Sess., TD/B/C.I/CLP/36 (Aug. 17, 2016), available from https://unctad.org/meetings/en/SessionalDocuments/ciclpd36_en.pdf
[iv] MEIR PEREZ PUGATCH, *THE INTELLECTUAL PROPERTY DEBATE*, 6 THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW, ECONOMICS AND POLITICAL ECONOMY , 4 (2006)
[v] J. M. CLARK, 30 IN *TOWARD A CONCEPT OF WORKABLE COMPETITION* (1942), 241–256.
[vi] The Competition Act, 2002
[vii] Article 31(b) of TRIPS Agreement, 1995
[viii] United States v. Terminal Railroad Co., 224 U.S. 383 (1912)
[ix] IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG., Case C- 418/01 [2004] ECR I-5039
[x] RAGHAVAN COMMITTEE, RAGHAVAN COMMITTEE, REPORT OF HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW (2000), https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf (last visited May 27, 2020).
[xi] Section 19(3) of The Competition Act, 2002
[xii] Section 3(5) of The Competition Act, 2002
[xiii] Multiplex Association of India v. Untied Producers/Distributors Forum 2011 SCC OnLine CCI 33:[2011] CCI 32
[xiv] Section 4(2) of The Competition Act, 2002
[xv] Explanation of Section 4 of The Competition Act, 2002 defines the term *'dominant position'*
[xvi] VIJAY KUMAR SINGH, *COMPETITION LAW DOMINANT POSITION AND ITS ABUSE: MEANING OF DOMINANT POSITION*, SSRN ELECTRONIC JOURNAL (2014)
[xvii] Section 83(f) and (g) of Indian Patent Act, 1970
[xviii] Brahma Dutta v. Union of India, AIR 2005 SC 730
[xix] Telefonaktiebolaget LM Ericsson v. Competition Commission of India, 2016 SCC OnLine Del 1951
[xx] Rambus, Inc. v. Infineon Techs. AG, 330 F. Supp. 2d 679 (E.D. Va. 2004)
[xxi] Motorola Mobility, Inc. v. Apple Inc. ITC Inv. No. 337-TA-745, 2010-10-6
[xxii] Huawei Technologies Co. Ltd. v. ZTE Corp. C – 170/13
[xxiii] Aamir Khan Productions (Pvt.) Ltd. v. Union of India, [2010] 4 CompLJ 580 (Bom.)
[xxiv] Kingfisher Airlines v. Competition Commission of India, (2010) 4 Comp. LJ 557 (Bom.)
[xxv] The statutes are: Copyright Act, 1957 (14 of 1957); Patents Act, 1970 (39 of 1970); Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); Designs

Act, 2000 (16 of 2000); Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000)

[xxvi] GUSTAVO GHIDINI & J. H. REICHMAN, INTELLECTUAL PROPERTY AND COMPETITION LAW: THE INNOVATION NEXUS (2006).

[xxvii] GIREESH CHANDRA PRASAD, *MNCS MARRYING INTO INDIA INC. FACE PATENT TEST* , , https://economictimes.indiatimes.com/industry/banking/finance/mncs-marrying-into-india-inc-face-patent-test/articleshow/2243228.cms?from=mdr (last visited May 29, 2020)

[xxviii] GUSTAVO GHIDINI & J. H. REICHMAN , supra note 26 at 111.

[xxix] SHUBHA GHOSH, IN *INTELLECTUAL PROPERTY RIGHTS: THE VIEW FROM COMPETITION POLICY* (2009), 344–346.