Intellectual Property Rights and Competition Policy: An Overview of Approaches Adopted by the US, EU and India to Harmonize the Two.

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Abstract

Intellectual Property Rights grant legal monopoly to creators over works that are results of human intellectual creativity. This legal monopoly may, depending on the unavailability of substitutes in the relevant market,lead to market power and even monopoly as restricted under competition law. Hence, the two areas of law are perceived to be at loggerheads with each other. However, an emerging viewpoint is that rather than conflicting, there are areas where IPRs and competition complement each other and serve the common purpose of innovation, market efficiency and consumer welfare. A lot depends upon how the countries formulate and implement their policies.

The aim of this article is to answer that one crucial question – Can IPRs and Competition policies co-exist peacefully? While doing so, the article highlights the manner and extent to which the TRIPs Agreement has dealt with competition issues. It primarily examines the practices and policies applied by various Jurisdictions, particularly those of the US, EU and India, to resolve this apparent clash between their IPRs and competition policies, by studying their laws and judicial pronouncements on the same. The article underlines the loopholes in the Indian Competition regime and, in conclusion, makes suitable recommendations for the same.

Introduction

The interaction between Intellectual Property Rights (IPRs) and Competition Law is predominantly created by the non-rivalrous and non-excludable nature of intellectual property, which causes the problem of “appropriability”.[2] The creation of this prima facie “inherent tension”[3] is due to IPR holders being granted statutory rights to essentially control access to the intellectual property and charging monopoly rents for the use of the IPRs –

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[2]K. Maskus, Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement, *Available at*: http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/maskus.pdf (June 7, 2014).

[3]*Ibid*.

something apparently in conflict with competition law, which attempts to curtail such market power.[4]

There are two main concerns that dominate this IPR/Competition law interface. The first of these is the potential abuse of monopoly pricing, especially in developing countries where effective substitutes to IPR-protected products may not be readily available.[5] Second, competition law seeks to draw a line between permissible business strategies and abuse of IPRs –line which is often blurred by horizontal agreements, exclusionary licensing restrictions, tie-in agreements, excessive exploitation of IPRs and other selling practises.[6] An inevitable chasm exists in the sphere of “monopoly rights” which is the essence of IPRSs. Concomitantly, the abusive exercise of these very monopoly rights is antilogous with the immutable tenets of competition policy. In these cases, the key question is to establish when the exercise of an intellectual property right ceases to be legitimate and becomes anti-competitive.

There is a seemingly inherent conflict between the two, yet, there is increasing opinion that the two realms can not only co-exist but also complement each other. Therefore, a common thread runs through Competition policy and Intellectual Property Law as they intersect at the point of fostering innovation, efficiency, consumer welfare and economic growth.

An indisputable function of law is to strike an efficacious balance between the conflicting interests and to reconcile the evident anomalies in the socio-economic system and this is precisely what Competition Law and Policy in various jurisdictions strives for.

This paper begins by throwing light upon the manner and the extent to which the TRIPs Agreement has dealt with competition issues. It primarily aims to examine the practises and policies applied by various Jurisdictions, particularly those of the US, EU and India, to resolve this interaction between their IPRs and competition policies, by studying their laws and judicial pronouncements on the same. The paper underlines the loopholes in the Indian Competition regime and, in conclusion, makes suitable recommendations for the same.

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[4] A. Ng, D. Liang and P. Waters, ‘Intersect between Intellectual Property Law and Competition Law’, *Available at:*http://www.chinalawinsight.com/2008/10/articles/corporate/antitrust-competition/intersectbetweenintellectual-property-law-and-competition-law/ (June 7, 2014).

[5] L. Peeperkorn, IP Licenses and Competition Rules: Striking the Right Balance, 26, 14-15,(World Competition 2003).

[6] *Supra note* 1.

Competition Rules and the TRIPS Agreement

The TRIPS Agreement does not introduce its own rules of competition law but instead authorizes Members to establish or maintain such rules. This reservation in favour of Members' sovereign competition policy represents a concession that the industrialized countries made in response to an earlier effort by developing countries to enact a Code of Conduct for the Transfer of Technology.[7]

Article 8.2 of the TRIPS Agreement states, as a 'Basic Principle', that 'Appropriate measures, provided that they are consistent with the provision of this Agreement, may be needed to prevent abuse of intellectual property rights by right holders or the resort to practises which unreasonably restrain or adversely affect the international transfer of technology."[8] This principle is given greater specificity in Part II of the Agreement, entitled "Standards Concerning the Availability, Scope and Use of Intellectual Property Rights", in which Section 8 deals with "Control of Anti-Competitive Practises in Contractual Licenses." This section consists of a single article – Article 40 – which covers both matters of substance[9] and of procedure.[10] There are no other rules pertaining to competition law in the TRIPS Agreement except for a provision allowing Members to impose compulsory licenses on intellectual property owners in order to remedy anticompetitive practises.[11]

Taken together, Articles 8.2, 40.1 and 40.2 may be viewed as both broad and narrow in scope. The provisions seem broadly applicable to restrictive practises relating to all the different intellectual property rights that the TRIPS Agreement covers, although both the legislative history and the examples given in Article 40.3 focus primarily on the licensing and transfer of patented technology rather than on trademark or copyright licensing.[12]

At the same time, these provisions are only concerned with the abusive exercise of intellectual property rights and with certain licensing practises and conditions. In this sense, both unilateral and bilateral IPR-related conduct of an anticompetitive nature is covered. A further distinction is then made between restrictive practises affecting licensing in general and those bearing on technology transfer in particular. However, other potentially anticompetitive arrangements, including mergers and acquisitions, which are more generally innovation-related, are left outside the reach of the TRIPS Agreement.

Therefore, we see that three guiding principles emerge from the competition rules set out in the TRIPS Agreement: (1) the reservation of IPR-related competition policy to sovereign national determination; (2) a requirement of consistency between national IPR-related

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[7] Hanna Ullrich, 'Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective', EUI Working Paper LAW No. 2004/3, Dept of Law, European University Institute, Florence, *Available at*: http://ideas.repec.org/a/oup/jieclw/v7y2004i2p401-430.html (June 13 2014)

[8] Agreement on Trade Related-Aspects of Intellectual Property Rights, art. 8.2

[9] ***Ibid***, art. 40.1, 40.2

[10] ***Ibid***, art. 40.3, 40.4

[11] ***Ibid***, art. 31(c), (k).

[12] ***Supra note*** 6 at 5.

competition policy and the TRIPS Agreement's principles of IP protection; and (3) there is a concern to primarily target practises restricting the dissemination of protected technologies.[13]

[13] UNCTAD & ICTSD, TRIPs and Development- Resources, Part Three: Intellectual Property Rights and Competition (2003), *Available at:*www.iprsonline.org/unctadictsd/docs/RB_3_Competition/pdf (June 4 2014)

USand the Interplay between IPR and Competition Policy

The Law

The US constitutional mandate of promoting the progress of Science and Useful Arts"[14] forms the bedrock of copyright and patent laws. On the other hand there is an equal emphasis on anti-trust law which aims to create an environment of free and fair trade, whilst improving economic efficiency and consumer welfare.

The Anti-trust law in the US is primarily rooted in the Sherman Act of 1890 and the Clayton Act of 1914. Section 1 of the Sherman Act prohibits 'every contract, combination… or conspiracy, in restraint of trade or commerce'.[15] Under this provision some agreements in restraint of trade, such as price fixing cartels and market allocation agreements are treated illegal per se. Most agreements, however, are judged under the rule of reason,[16] which calls for evaluation of purpose, power and competitive effects.[17]

Section 2 of the same Act prohibits conduct that 'monopolizes, or attempts to monopolize ay part of trade or commerce'. However, under this provision, claims of monopolization and attempts to monopolize are always judged under a full blown rule of reason. Purpose is inferred from a limited set of conduct identified as predatory, including certain pricing below cost and unjustified refusals to deal.[18]

The Clayton Act of 1914 declares that tying, exclusive dealing and stock mergers are illegal 'where the effect… may be to substantially lessen competition or tend to create a monopoly in any line of commerce'. The Act offences (including price discrimination, mergers and exclusionary conduct) call for proof that the conduct under scrutiny may substantially lessen competition.[19]

Section 5 of the Federal Trade Commission Act gives the FTC broad latitude to attack "unfair methods of competition" and "unfair or deceptive acts or practises".

Against the backdrop of anti-trust laws, there seems to be a constant tussle between individual's inalienable right to property (including IPRs which confer the right to monopoly and exclusivity) and the general freedom of trade and commerce. The apparent tension between IPRs and anti-trust laws is subsumed under the modern approach of treating IPRs

[14] Under Article I, section 8, clause 8 the Congress is granted power 'to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries'.

[15] Section 1, Sherman Act – "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[16] The rule of reason, first enunciated in Standard Oil case (1911) implies that a fact based approach should be adopted for the purpose of evaluating the reasonableness of the alleged anti-competitive conduct. It is in the form of weighing the pros and cons of the purpose and eventual consequence of the conduct and if the pro-competitive effects outweigh the anti-competitive harm, then the conduct is deemed reasonable

[17] Rudolf Peritz, The Interface between Intellectual Property Rights and Competition Policy, edited by Steven Anderman, 190 (Cambridge University Press 2007)

[18] *Ibid.*

[19] *Ibid.*

and competition policy as complementary to each other and the underlying theme is to strike an appropriate balance between the two.

With the same objective in mind and with a view to highlight the congruence between competition policy and intellectual property rights rather than the potential tensions between the two, the Dept. of Justice and the Federal trade Commission jointly issued the 1995 Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property.[20]

The Guidelines highlighted the nexus between IPRs and Competition policy and emphasised that Intellectual Property and other forms of property should be placed on an equal pedestal, without being oblivious of the inherent differences between IPRs and other property as far as the "ease of misappropriation is concerned.[21] It should not be presumed that the existence of IPRs confer market power upon the owner.[22] Competition policy and IP laws are intertwined with the common objective of promoting innovation and consumer welfare, and the licenses that blend the complementary factors of production produce pro-competitive results.[23]

Among other things, not only were the areas of convergence between competition policy and IP laws highlighted, but also certain novel features introduced, such as – innovation markets, horizontal and vertical relationships, steps to be followed in conducting 'rule of reason' analysis and anti-trust 'safety-zone' with respect to licensing transactions. Further, the guidelines make it clear that the anti-trust analysis of any particular licensing arrangements will be based upon the kind of relationship the parties share, whether vertical or horizontal.[24]

Judicial Precedents

In order to understand the interplay between IPRs and anti-trust law in the US, it is essential to delve into the anti-trust cases involving intellectual property. In the significant case of *Eastman Kodak Co. v. Image Tech Inc.*[25] the Supreme Court emphasised that power gained through some natural or legal advantage such as patent, copyright or business acumen can give rise to liability if "a seller exploits his dominant position in one market to expand his empire into the next". In this case, the plaintiff won its monopolization claim that Kodak's practise of refusing to sell patented parts to independent service providers was an unreasonable restraint to trade that violated Section 2 of the Sherman Act.[26]

The US Supreme Court declared in *Twentieth Century Music Corp v. Aiken*[27], that 'the immediate effect of our copyright law is to secure a fair return for an author's creative labour. But the ultimate ain is, by this incentive, to stimulate artistic creativity for the general public good.' The objective of IPR is innovation in all areas and furtherance of commercial interest

[20]IP Guidelines, 1995,*Available a:t*http://www.usdoj.gov/atr/public/guidelines/0558.pdf (June 2 2014).
[21] § 2.1 "The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property."
[22] § 2.0 (b) "The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner". IP Guidelines, 1995
[23]*Ibid.*
[24]*Supra note* 19, § 3.3, IP Guidelines, 1995.
[25] 504 US 451, 482-3 (1992)
[26]*Ibid.*
[27] 422 US 151, 156 (1975)

is secondary. The goal of IPR and competition law is to insure the freedom of trade and competition in market.[28]

Refusal to license was discussed by the US Court of the Ninth Circuit in *Kodak II*[29] and Federal Circuit in In Re Independent Service Organisations.[30] In the latter case it was held that intellectual property rights do not confer a privilege to violate anti-trust laws. In the case of *United States v. Microsoft*,[31] the District Court held that 'copyright does not give its holder the immunity from laws of general applicability, including antitrust laws.'

Hence, after the examination of the above cases, it is clear that the rights granted under the IP laws are subject to competition laws according to the US courts.

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[28]*Ibid*
[29] Image Technical Serve v. Eastman Kodak Co, 125 F. 3d 1195, 1218 (9th Circuit 1997)
[30]CSU LLC v. Xerox Corp, 203 F. 3d 1322, 1326 (Fed Cir 2000).
[31] 38 1998 WL 614485 (DDC, 14 September 1998)

European Union Position

<u>The Law</u>

The European Community Competition policy is deeply entwined with the objective of attaining market integration and the approach of EU competition authorities has tilted in favour of free and fair play of market forces. Intellectual property rights on the other hand have not been as freely granted as in the United States. At the same time, the exercise of IPRs has also been subject to the scrutiny of competition authorities. The competition rules of the EU have been influenced by two fundamental doctrines:[32] (1) competition rules apply not to the existence but to the exercise of IPRs; and (2) restraints upon competition are justified when they are reasonably necessary to safeguard the 'specific subject matter' of an IPR.

In practise, however, the European Court of Justice (ECJ) has not consistently based its reasoning upon the existence/exercise and specific subject matter doctrines, relying instead upon a standard economic analysis of the type used in non-IPR cases.[33]

It is important to note that at the same time the EC commission has acknowledged that an important part of its policy for encouraging innovation in the EU is a harmonized system of IPRs that can be used effectively to protect new products and technology.[34] The quest for evolving a coherent approach towards IPRs and competition policy is expedient and is well recognized by the EU competition authorities by formulating the R&D and IPR licensing block exemptions.

The broad objectives of achieving a single European market for goods and services whilst maintaining free and fair competition are bolstered by the provisions of the EC treaty. The treaty strikes at unilateral and joint anticompetitive conduct and articles 81 and 82 list out the various activities which are deemed to have a pernicious impact on competition.[35]

While Article 81 regulates joint conduct, primarily cartels; Article 82 concerns itself with unilateral conduct of large firms with substantial market shares. It prohibits dominant undertakings from conducting themselves in a manner that constitutes an abuse of their market power and attenuates competition. The abuse of dominance could be in the form of coercive tying arrangements, price manipulations, refusal to deal or refusal to license, etc. in any conduct involving abuse of dominance, it is pertinent for the EC to define the relevant market[36] before analysing the position of the undertaking in that market. If the undertaking is dominant in the market (which is usually determined on the basis of market share enjoyed by

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[32] Revised report by UNCTAD secretariat on Competition policy and the exercise of Intellectual property rights,*Available at:* www.unctad.org/en/docs//c2clp22r1.en.pdf (June 5, 2014).
[33] Ibid.
[34] Duncan Curley,Innovation, Intellectual Property and Competition – a legal and policy perspective,available at: http://www.stockholm-network.org/downloads/publications/d41d8cd9-Experts%20series%20-%20curley-formatted%20with%20cover.pdf (June 7, 2008)
[35] The Interface between Competition Law and Intellectual Property Rights, 49, *Available at:*http://cci.gov.in/images/media/ResearchReports/req1_20081103135559.pdf (11 June 2014)
[36] The relevant market is defined as a market constituting products – goods or services which are regarded as substitutable by the consumers on the basis of their price, use and characteristics.

that particular enterprise), and concurrently abuses its position in the market to leverage the commercial advantages in its favour, then the conduct of such undertaking falls foul of the provisions under Article 82 of the Treaty. The text of these two articles lists out the types of conduct which fall to tatters on the touchstone of competitiveness.[37]

These two provisions of the EC treaty which combat anticompetitive behaviour list out almost similar activities which are deemed to obliterate competition in the market. Under Article 81(2), it has been made amply clear that any conduct which falls foul of Article 81(1) shall be automatically void. However, innocuous agreements which promote technical and economic progress, foster consumer welfare and efficiency as mentioned in Article 81(3), preclude the application of Art 81(1) and 81(2). This is an important exception in favour of technical co-operation among enterprises.[38]

On the other hand, Article 82 gives sufficient leeway to the Commission to scrutinize the conduct of a dominant enterprise with regard to its impact on competition in the relevant market. Conduct which imposes unfair purchasing or selling conditions, or limits the production in any way or involves coercive tying or bundling by putting obligations on the parties to accept supplementary conditions which are not linked to the contracts as such, is violative of this provision. Although, keeping in view the unquestionable need for research and development, the European Commission has issued block exemptions in favour of R&D and IPR licensing. If the contract complies with the terms set out in a block exemption, it is legal and enforceable and the detailed competition rules often do not need to be considered further. The block exemptions are therefore said to provide a "safe harbour" or a "safety zone" for certain contracts.[39]

<u>Judicial Precedents</u>

The competition policy under Article 82 of the EU Treaty has been used to restrict the abusive commercial conduct of individual owners of IPRs, particularly where the IPR protects a market standard or a de facto monopoly. This provision of EU Treaty has used for implementing "compulsory licensing", which can be understood by perforating through a series of important cases, the first one being *AB Volvo v. Erik Veng*.[40] Volvo held the design right in the UK over front wings for cars. Veng imported panels into UK from Italy and Denmark where they had been manufactured without Volvo's consent. Veng's defence was that Volvo's refusal to grant license was an abuse of dominant position when Veng was willing to pay a reasonable royalty for license. The ECJ laid down a guiding principle in this case stating that "the significance of this case lies in determining the boundaries of compulsory licensing. It is pertinent that merely a refusal to grant license may not be anticompetitive in nature. Such refusal should be arbitrary, so as to compel involuntary compulsory licensing, in order to mitigate the rigours of abusive conduct." It was held in this case that 'the refusal by the proprietor of a registered design in respect of body panels of an

[37]*Supra note* 34 at 23.
[38]*Ibid* at 51.
[39]*Supra note* 33.
[40] Case C-238/87 [1988] ECR 6211, [1989] 4 CMLR 122

automobile to grant to third parties, even in return for reasonable royalties, a license for the supply of parts incorporating the design cannot in itself be regarded as an abuse of a dominant position. However, the exercise of such an exclusive right by the proprietor of a registered design in respect of a car body panels may be prohibited by Article 86 if it involves certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level.[41]

In the significant judgment of *Magill*[42], broader and more flexible approach was adopted. Magill, a Dublin company, was the compiler of a comprehensive weekly television guide combining the listings of three television companies broadcasting in the UK and Ireland. Since these listings were protected by copyright, Magill inevitably required a license, the grant of which was refused by these companies. The ECJ affirmed the grant of compulsory license by the Commission, on grounds of Article 82, and held that copyright in itself did not justify a refusal license in the 'exceptional circumstances'.

IMS Health v. NDC Health[43] however put three conditions to be satisfied for declaring such a refusal as an abuse of dominant position. They are: (1) That refusal to license is 'preventing the emergence of a new product for which there is a potential consumer demand'; (2) That it is 'unjustified'; and (3) That such refusal 'excludes competition in the secondary market'. It means that the freedom of the right holder is limited to balancing the competition in the market. Thus, the objective of IP rights should be to enhance innovation in the market and promote dynamic competition in the market.

It is pertinent to note that Microsoft continues to face many cases of abuse of dominant position, tying arrangements and other anticompetitive charges in the US as well as EU.[44] In the *Microsoft Case*[45] the Commission found that Microsoft was overwhelmingly dominant on the market for operating systems for client personal computers. The Commission, among other things, alleged that Microsoft had extended its dominant position (quasi monopoly) over operating system for client PCs for many years, to the adjacent markets in operating systems for servers and decided that withholding the information necessary to design competing programmes for work group servers compatible with the Windows was an abuse and risked eliminating competition from the server market, stifling innovation and reducing consumers' choice by locking them in.

It can be safely concluded that the EC competition laws accept that the achievement of an economic monopoly by means of investment, R&D and intellectual property rights is a legitimate course of conduct for a firm, a form of "competition on the merits". The EC Competition law also in most cases gives recognition to the right of IPR owners to prevent copying even if the exercise of this right denies access to markets to competitors. Further, EC

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[41] *Ibid.*
[42] C-241/91P and C-242/91P RTE; see also ITP v. Commission (1995) ECR I-743.
[43] Case C-418/01, IMS Health GmbH & Co. v. NDC Health GmbH & Co. KG (2002).
[44] K D Raju, The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India, Journal of Intellectual Property Rights, 18, 111-122 (2013)
[45] [2004] 4 CMLR 1231; Valentine KorahThe interface between intellectual property rights and competition in developed countries, *Available at:*http://www.law.ed.ac.uk/ahrc/SCRIPT-ed/vol2-4/korah.asp(June 2, 2014).

Commission law acknowledges that the pricing of IPRs, even by dominant firms, must include a return which adequately reflects the reward/incentice function on IPRs.[46]

[46] Seven Anderman, The Interface Between Intellectual Property Rights and Competition Policy, 38 (Cambridge University Press 2007).

Intellectual Property Rights under Competition Law in India

The Law

India is emerging as a fertile ground for discussions on the topic of Intellectual Property Rights versus Competition Law. The roots of Indian Law on competition can be traced back to Articles 38 and 39 of the Constitution which lay down the duty of the State to promote the welfare of the people by securing and protecting a social order in which social, political and economic justice is prevalent and its further duty to distribute the ownership and control of material resources of the community in a way so as to best sub-serve the common good, in addition to ensuring that the economic system does not result in the concentration of wealth. It is from these duties that the MRTP Act, 1969, also influenced by US, UK and Canadian legislations,[47] came about.[48]

India passed the Competition Act, 2002 in line with the economic liberalization of the country that had created an open market policy that was being followed in India since 1991. The Act seeks to: (1) Prohibit anti-competitive agreements; (2) Prohibit the abuse of dominant position by enterprises; and (3) Regulate combinations exceeding threshold limits in terms of prescribed turnover or assets.[49]

India had enacted its Patents Act as far back as 1970, and the same has been amended many times, the last being in 2005, so as to fully comply with the commitments made to the WTO in 1995. Section 3 of the Competition Act, 2002 states that 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. Section 3(5) of the Indian Competition Act, 2002 bestowed a blanket exemption on IPR, displaying the country’s strong commitment to protect IP rights vis-à-vis competition. However, Section 4 which deals with the clause of abuse of dominant position provides ample room for interfering in intellectual property matters. However, an enterprise which enjoys dominant position by virtue of the IPR, if it engages in conduct considered abuse in terms of Section 4 shall not enjoy any immunity.

Abuse of dominant position is a common form of anti-competitive practise prevalent in all countries. It may be in the form of refusal to deal, tying arrangements, exclusive licenses, etc. Dominant position is a position of economic strength that enables a firm to prevent effective competition in the relevant market. If a dominant firm in the market uses such practises, it is considered anti-competitive. Section 4 of the Indian Competition Act, 2002 specifically states that no enterprise shall abuse its dominant position and it makes no exemptions whatsoever with regards to dominant position granted under the IPRs. ‘Dominant position’ has been defined in the Act itself as a position of strength enjoyed by an enterprise in a relevant market, which enables it to operate independent of the established competitive forces and

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[47] A. Jones and B. Suffrin, EC Competition Law: Text, Cases and Materials, 790 (2008)
[48] *Ibid* at 791.
[49] Section 3, 4 and 5, Competition Act, 2002.

adversely affect its competitors or the consumers in the relevant market. It means that the dominant position of enterprises is per se not prohibited, but their abuse which adversely affects the competitive forces and consumers in the relevant market, is prohibited under the Act.

Section 3(5) declares that "reasonable conditions as may be necessary for protecting" any IPR will not attract Section 3. The expression "reasonable conditions" has not been defined or explained in the Act. However, by implication, unreasonable conditions that attach to an IPR will attract Section 3. In other words, licensing agreements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not reasonable with reference to the bundle of rights that go with IPRs.

For example, a licensing arrangement may include restraints that adversely affect competition in markets by dividing the markets among firms that would have competed using different technologies. Similarly, an arrangement that effectively merges the R&D activities of two or only a few entities that could possibly engage in R&D in the relevant field might harm competition for development of new goods and services. Exclusive licensing is another category of possible unreasonable condition. Examples of arrangements involving exclusive licensing that may give rise to competition concerns include cross licensing by parties collectively possessing market power and grant backs. Patent pooling and tie-in arrangements are restrictive practises. The list is non-exhaustive.[50]

Multiple agencies dealing with intellectual property and competition are also a concern in India. While the IPRs have their decisional agencies as well as their Appellate Authority, the CCI and the COMPAT decide on matters covering competition concerns. In Aamir Khan Productions Pvt Ltd. v. Union of India,[51] the Bombay High Court held that the CCI has the jurisdiction to deal with competition cases involving IPR. In Kingfisher v. Competition Commission of India[52] also it was made clear that all the issues that rose before the Copyright Board could also be considered before the CCI. All these cases give leading evidence that Indian Courts are prepared to deal with cases involving competition and intellectual property issues.

Under Section 27 of Competition Act, 2002, the CCI has the authority to penalize IPR holders who abuse their dominant position. Further, under Section 4 of the Act the Commission is also authorized to penalize the parties to an anti-competitive agreement, which is in contravention of Section 3 of the Act.

Thus, in principle, IPR licensing arrangements which interfere with competitive pricing, quantities or qualities of products would fall foul of competition law in India.[53]That apart, it

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[50]*Supra note* 43.
[51]2010 (112) Bom LR 3778.
[52]Writ Petition No. 1785 of 2009.
[53] The Institute of Chartered Accountants of India, COMPETITION LAWS AND POLICIES (2004), at 134, *Available at*: http://www.competition-commission-india.nic.in/advocacy/Presentation_by_ICAI.pdf. (June 5, 2014)

has no mention of exhaustion, parallel importation or compulsory licensing.[54] Owing to the blanket exemption under Section 3(5), the square peg of any anticompetitive practise tethered to the use of IPRs must now be brought through the round hole of "abuse of dominant position"[55] under section 4.

Also, Section 3 includes the almost exclusive focus of protecting the IPR holder with no adequate consideration of public interest.[56] While the Act does create categories of per se illegality such as price fixing, geographical divisions and market divisions, the standardized treatment extended to these categories as well as to tying arrangements, refusals to deal, re-sale price maintenance and exclusivity agreements suggest that the standard to if 'they cause adverse effect on competition'[57] would have to be very sound indeed.

Judicial Approach

The film industry is an area where there are always copyright issues coupled with anti-competitive practises ruling the industry. The leading judicial pronouncement on this is the case of *FCCI Multiplex Association of India v. United Producers/Distributors Forum (UPDF)*[58] where the FCCI filed information against UPDF and others stating that they were creating market cartels in films against multiplexes.

The facts of the case disclose that in order to raise revenue, the UPDF had refused to deal with multiplex owners. This amounted to a refusal to deal which was inherently anti-competitive under the Competition Act. Another clear fact was that the UPDF and others held almost 100 per cent share in the Bollywood film industry and the UPDF was indulging in unprofessional tactics by limiting/ controlling the supply of films in the market. This was in gross violation of Section 3(3) of the Act. The CCI prima facie found that there was an anti-competitive agreement and an abuse of dominant position, too. Consequently, the CCI directed the Director General to inquire into the matter. The DG inquired into the same and submitted a report that confirmed the presence of a cartel. The CCI held that every person and association has the right of collective bargaining but they shall not form cartels or control the market in such a way that there is an adverse effect on the market causing an anti-competitive effect.[59] The CCI issued a show cause notice to the relevant parties. The UPDF, instead of answering the show-cause notice, approached the Bombay High Court and contended that films were subject to copyright protection (under Sections 13(1)(b) and 14(d)(ii) of the Copyright Act).[60]

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[54] S. Ghosh, New Act Could Hamper Efforts to Contain Anti-Competitive Trends in Economy: Financial Express, JUNE 9, 2003,*Available at*: http://www.financialexpress.com/printer/news/81508/ (June 7, 2014).
[55] M. Kochiapalli, COMPETITION BILL IN INDIA: THE NEXUS WITH IP: SEPTEMBER 22, 2007, http://spicyipindia.blogspot.com/search/label/competion%20law (March 7, 2010).
[56]P.S. Mehta and U. Kumar, Tackling IPR Excuses through the New Competition Law: The Financial Express, June 12, 2001,*Available at*: http://www.cuts-international.org/article%20comp.htm (June 7, 2014).
[57] S. Ghosh, Presentation on IP and Competition in India,*Available at*: http://www.business.uiuc.edu/stip/documents/ShubhaGhosh.pdf (June 7, 2014)
[58] Case no 1 of 2009, CCI order dated 25 May 2011.
[59] CCI Order, para 23.48, *Available at:*http://www.cci.gov.in/May2011/OrderOfCommission/FCCIOrder260511.pdf (June 8 2014)
[60]*Supra note* 57.

The UPDF advanced the argument that it was the Copyright Board that had the jurisdiction to deal with the matter and not the CCI.Furthermore, it was contended that for an exclusive license, the only remedy is compulsory license as available under the Copyright Act, 1957. In other words the petitioner challenged the action taken by the CCI on the ground of lack of jurisdiction.[61]

Despite the fact that the issue was deliberated upon in the earlier matter of *Kingfisher v. Competition Commission of India*,[62] considering the importance of the matter, the Bombay High Court discussed it at length. The Court ruled that Section 3(5) of the Competition Act provides that Section 3(1) shall not take away the right to sue for infringement of patent, copyright, trademark, etc., and that the defences which could be raised before the Copyright Board could also be raised before the CCI.[63]

The UPDF next argued that a film is a subject matter of copyright protected under Section 14 of the Copyright Act, 1957 and that the right holder can exclude anybody from releasing a film in a particular multiplex and has the unhindered right to exploit the copyright without any restriction or limitation. They relied on an earlier Supreme Court decision in Indian Performing Right Society Ltd v. Eastern India Motion Pictures Association[64] in which it was argued that a feature film is nothing but a bundle of copyrights. However, the question was whether a copyright holder can enjoy his right when it affects the competition in the market. The UPDF further argued that once a legally binding agreement had been entered into between the parties, they could challenge the decision under the competition law. It was also pointed out that the Constitution of India under Article 19(1)(g) confers the right to trade and profession and there cannot be fetter on this right under competition law. However, it was ruled that the concerted activity of the UPDF in not releasing films through the informant in this was clearly in contravention of Section 3(3) of the Competition Act, 2002.[65]

The CCI held that a copyright is a statutory right under the Copyright Act and not an absolute right. The CCI relied on the Delhi High Court judgment on this point in *Gramophone Company of India Ltd v. Super Cassette Industries Ltd*[66] and on *MicrofibresInc v. Girdhar& Co.*[67] and observed that 'the legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc. and lesser protection to design activity that is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure Article.[68]

It is, therefore, amply clear that greater protection ought to be accorded to original artistic works related to cinema rather than its commercial interests.

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[61]*Ibid*
[62]*Supra note* 51.
[63]*Supra note* 57
[64](1977) 2 SCC 820.
[65]*Supra note* 57.
[66] 2010 (44) PTC 541 (Del)
[67] RFA (OS) no 25/2006 (DB), decided on 28 May 2009.
[68]*Supra note* 57.

The CCI's decision in the FCCI Multiplex case was a benchmark as it tried to end the abuse of dominance of association in the film industry. This was further cemented with the Commission fining 27 film producers a nominal amount of Rs 1 lakh.

The CCI rightly observed that intellectual property laws do not have any absolute overriding effect on competition law. The extent of the 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 rigours 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.

The Delhi High Court in the case of *Hawkins Cookers Limited v MuruganEnterprises*, held that a well-known mark cannot be permitted to create a monopoly in the market on the basis of being a well-known mark by controlling the ancillary and incidental market. This is to be considered as an abuse of dominant position and is prohibited.[69] In this case the plaintiff had alleged that the defendants had used the plaintiff's trademark 'Hawkins' on the defendant's product which was a pressure cooker gasket. The claim of the plaintiff was disputed by the defendant on the ground that the gaskets were being sold under their own trademark and the use of the word 'Hawkins' by the defendant on their products/gaskets was to inform the purchasers that the gaskets being manufactured by the defendant were suitable for Hawkins pressure cookers.

The defendant argued that the plaintiff wanted to monopolize the sale of gaskets which are used in pressure cookers in the market. The defendant manufactured gaskets which could be used for different types of pressure cookers including the pressure cookers manufactured by the plaintiff. The defendant claimed that it was common knowledge that there was always a second line of manufactures of spare parts, accessories and replacement items of machines, articles of everyday use, domestic appliances and even for automobiles of every description, and that this is known as an ancillary industry. The matter was decided against the plaintiff in this case.

The Apex court in the case of *Entertainment Network (India) Limited v. Super Cassette Industries Ltd*,[70] elaborately discussed the relationship between intellectual property protection and effects on competition in the market. The court observed that when the owner of a copyright exercises monopoly over it, any transaction with unreasonable terms would amount to refusal. It is true that the copyright owner has complete freedom to enjoy the fruits of his labour by charging royalty through the issue of licenses. However, this right is not absolute.

Excessive pricing and predatory pricing have close links to refusal to license. Overpricing of any patented product per se is, however, not violative of any competition provisions. In *Union of India v. Cynamide India Ltd and another*,[71] it was held that lifesaving drugs do not

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[69] 2008 (36) PTC 290(Del)
[70] MANU/SC/2179/2008, 2008 (5) OK, 719.
[71] AIR 1987 SC 1802.

fall outside the purview of price control. Keeping the pricing of patented and branded generics outside the scope of price control is a major concern. There is always the danger of the potential abuse of monopoly pricing especially when there are no substitutes available. This is a major concern particularly, in developing countries in the area of lifesaving drugs. Competition law seeks to draw a line between fair business practises and market abuses like restrictions on licensing, tie-in arrangements, predatory pricing, etc.

In *Singhania&Parteners LLP v. Microsoft Corporation (I) Pvt Ltd & Others*,[72] the CCI considered the question of anti-competitive behaviour and abuse of dominant position in the selling of Windows and Office 2007 software. In this case, the petitioner (informant) ordered the software, Windows Operating Systems and Office 2007 from a Microsoft distributor. The petitioners ordered the software for their LLP business and pain in advance as required by the purchase order. After paying the advance amount, Microsoft informed the petitioner that they could purchase only volume licenses and not the original equipment manufacturer (OEM) licenses which were available to a person who purchases a new machine. The cost of the volume licenses was double the amount of OEM licenses. The petitioner alleged that different dealers of Microsoft were charging different prices for the same product and thus the opposite party was artificially controlling the market. Indeed Microsoft with markets shares pegged at 90 per cent held dominant position in the market and therefore coercing the petitioner to purchase volume licenses at double the price of OEM licenses did amount to discriminatory pricing under Section 4(2)(a)(ii) of the Competition Act, 2002.

Microsoft argued that there was no competition issue in this case and that they did their business through three distribution channels, namely, volume licenses, OEM and retail chains. This was mainly to protect their IPR. They also pointed out that the relationship between Microsoft and its distributors was independent and not that of a principal and agent. The process mainly entailed selling its products to distributors and resellers on a principal to principal basis. Microsoft also informed that the three channels of distribution were different from each other and that the OEM channel was the one with the highest volume distribution which they could give at the lowest rates. Retail rates were more than volume rates and OEM rates due to the additional packaging and other costs. The petitioner alleged that different royalties charged for different licenses was a strategy adopted by Microsoft to maintain its monopoly in the market under the garb of its licensing policy and IPR protection. Moreover, the petitioner alleged that the licensing policy of Microsoft was nothing but an artificial device for maintaining the market and a strict control over its distribution system, which was responsible for unfair prices in the market and this thus violated Section 3(4)(e) of the Act.

However, the CCI could not find any violation of competition provisions. It observed that charging different prices for the same product under different kinds of licenses are justified and common in the market. According to the Commission, there was no clear evidence to suggest that due to Microsoft's dominant position, any competitor was driven out of the market. Hence, there was no violation of any competition provision.

[72] Case no 36/2010, decided by the Commission on 22 June 2011.

Conclusion

Intellectual Property Rights and Competition Policy: Strange Bedfellows?

Quite simply put, intellectual property protects individual interest,[73] while competition protects the market.[74] This leads to the immediate inference that there is a conflict between the two sets of regulatory mechanisms. Irrespective of this view, we have seen so far that not only do these two tenets of law coexist but they also complement each other where needed. In the modern society, the concept of absolute right is inapt and competition policy ensures that the rights granted under the IPs do not take an absolute form. Competition policies, where needed, keep checks and bounds over these rights. On the other hand, Anti-trust has never questioned or interfered with the most primary function of IP rights: preventing free riding of creative achievements and/or the firm's identity and reputation, acting as an incentive to innovate.[75] In fact, the former acknowledges the role of IP in promoting competition because by preventing free-riding, firms are encouraged to produce their own goods, which necessarily leads to competition.[76]

From the competition point of view, IPR may be viewed as a means to reduce competition since the IPR gives the holder of the right an exclusive monopoly while hindering others from offering the produce in the market. Also, IPR may be viewed as a weapon to restrict competition between licensees of a particular product. Furthermore, it may be stated that competition law and IP law share the same objectives. If the two laws can be interpreted in the background of a common objective, forcible conflicts can be avoided. There is broad agreement that the two systems of law are complementary in their effort to promote innovation and consumer welfare.[77] Both disciplines promote dynamic efficiency: that is, a system of property rights and market rules that create appropriate incentives for invention, innovation and the risks involved in R&D.[78] Competition law recognises the critical role that IPR plays in driving innovation and so values there rights.

Over time, the purpose of granting Intellectual Property Rights has seen a change. It is no longer the act of making the invention public that is being sought to be rewarded, but the necessity to promote innovation and creativity through the creating of incentives.[79] Reconciling intellectual property and competition policy requires recognizing that IP law is a

[73]W.R. Cornish, Intellectual Property 3 (2003).
[74]Richard Whish, Competition Law2 (2005).
[75] Gustavo Ghidini, Intellectual Property and Competition Law: The Innovation Nexus, 6 (2006).
[76]*Ibid.*
[77] Atari Games Corp v. Nintendo of Am Inc, 897 F2d 1572, 1576 (Fed Cir 1990); Consumer Protection and Competition Policy, Planning Commission of India, *Available at*: http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf (3 June, 2014)
[78]Varnet Christine A, Promoting Innovation through Patent and Anti-trust Law and Policy, US Department of Justice, 2010, *Available at*: http://ww/justice.gov/atr/public/speeches/260101.htm#3 (12 June 2014)
[79]IlkkaRahnasto, Intellectual Property Rights: External Effects and Anti-Trust Law, 19 (2003).

form of a competition policy[80] as the aim of innovation is ultimately more competition. IPR and competition law can be viewed as two sides of the same coin. They share common objectives that are achieved through different means.

Due to increasingly important role played by intellectual property in the world economy, measures against the misuse of IPR have become particularly relevant in the economic policy of most countries. As MarticKhor puts it, a trade-off may exist between achieving static efficiency through competition and achieving long-term efficiency through growth and innovation.[81]

A workable solution can be predicated on the distinction between the existence of a right and its exercise. In other words, during the exercise of a right, if a prohibited trade practise is visible to the detriment of competition in the market or consumer interest, it ought to be assailed under the competition law.

Recommendations for India

The Law with regards to IPRs and competition have developed and matured over the years in major jurisdictions such as US and EU while it's still at a nascent stage in India. India has a lot to borrow from the former keeping in mind its socio-economic environment.

As has been encouraged in EU and under the TRIPs, the Competition Commission of India may use the potent tool of compulsory licensing to countervail the harmful effects of the IPRs on competition. Further, the doctrine of 'essential facilities' can be made use in India to combat abusive conduct of dominant enterprises. The exemption in favour of "agreements in research and development", on the lines of EU may go a long way in encouraging innovation whilst maintaining healthy competition in the market.

K D Raju[82] has made some noteworthy recommendations some of which are worth a mention. The concept of the abuse of IPR must be defined by the Indian legislature. An exhaustive definition is not possible however, guidelines may be laid out. Acquisitions and mergers of IPRs must be monitored in order to avoid concentration of undertakings in IPR rich companies. Fair prices based on consumer capacity to pay and accessibility of IPR protected must be ensured through competition policies. Refusal to license on unreasonable and unjustifiable grounds and tying arrangements must be dealt with strongly by the CCI. Finally, Section 4 of the Competition Act may be amended to include high prices as an abuse of dominant position.[83]

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[80]ShubhaGhosh, Competitive Baselines forIntellectual Property Systems, International Publicgoods and TransferofTechnology undera Globalized Intellectual Property 793, 795-802 (Keith E. Maskus& Jerome Reichman eds., 2004).

[81]Khor Martin, Intellectual Property, Competition and Development, *Available at*: www.twnside.org.sg/title2/par/mk002.doc (13 June, 2014)

[82]*Supra note* 43.

[83]*Ibid.*

In conclusion, we must take cognizance that both Intellectual Property Rights and Competition Law are imperative in a country's legal regime and are here to stay. The role of either in a booming economy cannot, under any circumstances, be dispensed with. In such a scenario, countries must take lessons from each other's experiences in order to harmonize the two and avoid any possible clashes between these two complex branches of law.The countries must premise their regime on the presumption that Intellectual Property Rights and Competition are not at loggerheads with each other. They are meant to complement each other and serve a common purpose of innovation, consumer welfare and market efficiency.