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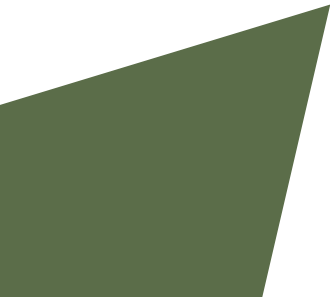
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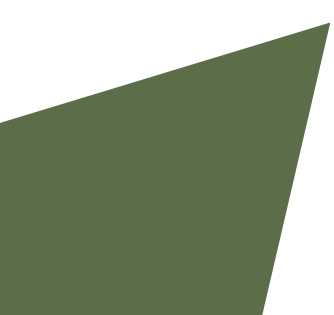
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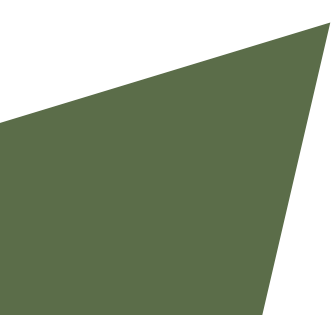
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Competition Law and IPR - An interplay or a friction?

Riya Jariwala

ABSTRACT

The Competition Act, 2002 accords protection to intellectual property rights and excludes arrangements between entities from the gauge of anti-competitiveness, if necessitated by the need to protect such rights. The main aim of Intellectual property rights (IPR) laws is to incentivise the intellectual effort and investment made therein, by the owner with exclusivity to deal with or exploit the subject matter. This protection accorded to a person is in complete contrast to the objectives of Competition law, as it aims at regulating and enhancing competitiveness in the market. Therefore, there exists a conflict between IPR laws as well as Competition law, on account of its contradicting aims and objectives. On one hand, Competition law restrains exclusivity while on the other hand, the Intellectual Property Rights laws confers the same. This research paper aims to throw light upon the various issues involved in a case comprising of competition concerns arising out of the protection awarded under the major IPR laws, namely The Patents Act, 1970 , The Copyright Act, 1957 and The Trade Marks Act, 1999 and examines the judiciary's stance in the event of a friction between the IPR laws vis-à-vis The Competition Act, 2002.

INTRODUCTION

*“It is a longstanding topic of debate in economic and legal circles:
how to marry the innovation bride and the competition groom”.¹*

The interface of Intellectual Property Rights (IPR) and Competition Law is a complex question that engages a never-ending dialogue between the devil and the deep sea as it encompasses two opposing views. While on one hand, ‘Intellectual Property Rights’ laws promote exclusivity and protects the individualistic and private rights of a person, Competition law is an enabling and a more community-oriented legislation to curb monopolies and discourage abuse of dominance. Therefore, their inter-relationship in any jurisdiction may become a matter of great prominence and controversy due to its long-standing over-lapping nature. Although the relevant statute may define the rights conferred upon a particular species of intellectual property as an exclusive right to use the patent, apply the design, use the trademarks or commercially exploit the work in certain forms (as in copyright), in practice what the statute confers is the right to prevent competitors from commercially exploiting the respective rights to the detriment of the owner of the property², thereby conferring exclusivity upon the owner with respect to dealing with that property.

INCIDENCE OF IPR IN COMPETITION LAW

The Competition Act, 2002 aims at prohibition of certain agreements, abuse of dominant position and regulation of combinations promoting exclusivity.³ It also aims at promoting competition as a means of market response and consumer preference so as to ensure effective and efficient allocation of resources and to create an incentive for the economy for innovation.⁴

Despite its principle of prohibiting anti-competitive agreements, the Competition Act, 2002 specifically makes an exception and recognises the rights of a person to restrain any infringement of, or to impose reasonable conditions, as may be necessary to protect any of his intellectual property rights.⁵ Although Intellectual Property Rights’ laws and Competition Law may seem at

¹ Mario Monti European Commissioner for Competition Policy, *The New EU Policy on Technology Transfer Agreements*, Ecole des Mines, Paris, (Jan. 16th, 2004). http://europa.eu/rapid/press-release_SPEECH-04-19_en.htm?locale=en.

² P. NARAYAN, INTELLECTUAL PROPERTY LAW, 4 (3rd ed. Eastern Law House, 2001).

³ The Competition Act, 2002. [hereinafter “The Act”].

⁴ UNCTAD Secretariat, *Objectives of Competition Law and policy: Towards a Coherent Strategy for Promoting Competition and Development*.

⁵ The Act, *supra* note 3 at § 3 (5).

loggerheads with each other at the outset, they can co-exist, as aptly observed by the U.S Supreme Court.⁶

Therefore, the question remains *quo vadis* with respect to striking a balance between protection of Intellectual Property Rights and preservation of competition in the fast-paced times in emerging economies like that of India.

DEVELOPMENT OF COMPETITION LAWS IN INDIA

India's expedition into free-market liberalization and its transition from a "command and control" economy led to annulling the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 which steered an era of inclusive industrial development by enactment of The Competition Act, 2002. There was a plethora of difference between the two aforementioned legislations such their nature, aims and objectives as well as their enforcement. While the MRTP Act was a criminal legislation prohibiting dominance and monopoly at the very outset, the erstwhile Competition Act is a civil legislation which permits dominance as well as monopoly unless it is abused to cause an appreciable detriment on competition in the relevant market.⁷

In regard to the protection of Intellectual Property Rights, the MRTP Act did not expressly mention any situation contemplating the necessity of protecting Intellectual Property or its dealings. Furthermore, it merely specified that the Act was in addition to and not in derogation of any other law in force, thereby suggesting an implication that it recognised arrangements pertaining to the statutes protecting intellectual property rights.⁸ In contrast to the same, the erstwhile Competition Act, 2002 specifically recognises the arrangements entered into so as to protect intellectual property rights and grants an exemption with regard to imposing reasonable conditions so as to protect intellectual property rights, further specifying each of the IPR protection statutes specifically and categorically.⁹

Another grey area in the MRTP Act was with reference to the jurisdiction or selection of an appropriate forum in the event of a conflict between intellectual property rights and competition concerns *vis-à-vis* the provisions of the MRTP Act. However, with the introduction of the competition regime under The Competition Act, 2002 it has now been clarified that the Competition Commission of India (CCI) shall not be deprived of its jurisdiction in case of a

⁶ United States v. Line Material Co., [1948] 333 U.S. 287, 308: 76 U.S.P.Q. (BNA) 399, 408.

⁷ PD Sudhakar & K. K. Sharma, Seoul, *Competition law and policy in India, Competition Commission of India*, (Nov. 14th 2008).

⁸ Monopolies and Restrictive Trade Practices Act, 1969, §4.

⁹ The Act, *supra* note 3 at § 3(5).

dispute involving intellectual property rights causing an impact on Competition.¹⁰ Furthermore, the Competition Act bars the jurisdiction of any civil court with respect to issues involving the question of impact on competition while also prohibiting the grant of any injunction with respect to the same.¹¹ However, all the defences which can be raised before a copyright board or the Intellectual Property Rights Appellate Board (IPAB) may be raised before the Competition Commission of India (CCI).¹² Therefore, it is settled that the CCI can decide constitutional, legal and even jurisdictional issues except the validity of statute under which tribunal is established.¹³ In furtherance to the same, in a case where the Opposite Party had instituted a civil suit for infringement of its IPR, it was observed that, “*Pendency of a civil suit in High Court does not take away the jurisdiction of the Commission to proceed under the Competition Act.*”¹⁴ Hence, it must be reiterated that the Competition Act, 2002 is in addition to and not in derogation of any other laws.¹⁵ Owing to the aforesaid principles, it may be concluded that the CCI shall adjudicate upon disputes involving conflict between intellectual property rights and competition law in addition to other remedies.

INDIAN JUDICIARY ON THE CONVERGENCE OF IPR WITH COMPETITION LAW

Indian judiciary is yet to build substantive jurisprudence on the inter-relationship and the struggle between intellectual property rights and competition law. Slowly but steadily, the judiciary has begun its journey of demarcating the lines of reasonableness while determining the issue of protecting IPR while at the same time maintaining competitiveness in the relevant market. In order to strike the right balance and to overcome the competition concerns, the concept of ‘compulsory licensing’ and ‘statutory licensing’ in case of patents and copyrights have also been introduced.

COMPETITION LAW VIS-À-VIS THE PATENT ACT, 1970:

Encouragement of innovation and R&D necessitates that the inventor is given an opportunity to recuperate his investments. Hence, the inventor is awarded protection for his intellectual as well as financial outlay by way of a patent, thereby, granting him exclusivity in regard to the patented subject matter. However, this patent protection is a form of exclusionary right awarded to the

¹⁰ Amir Khan Productions Private Limited v. Union of India; 2010 Bom LR 3778, 112.

¹¹ The Act, *supra* note 3 at § 60.

¹² The Act, *supra* note 3 at § 62.

¹³ Amir Khan, *supra* note 9.

¹⁴ Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ), Case no. 50/2013.

¹⁵ The Act, *supra* note 3 at § 62.

patentee, which leads to competition constraints such as barriers to entry and foreclosure of the market.¹⁶

However, the Competition Act also envisages that the CCI may while determining on issues of anti-competitive agreements and abuse of dominance, shall have due regard to factors like accrual of benefits to consumers, improvements in production or distribution of goods or provision of services and promotion of technical, scientific and economic development.¹⁷

The celebrated case involving major automobile manufacturers of India like Volkswagen, Honda, Toyota, Skoda, Fiat, BMW, Ford and others, wherein, these 14 automobile manufacturers entered into such arrangements that its spare parts were unavailable in the local market for repairs for their automobiles.¹⁸ Besides, the technological information, diagnostic tools and other tools necessary for repairs, maintenance and service of the Opposite Party's advanced automobiles were not freely available or accessible in the market. The Opposite Parties were charged with indulging in 'refusal to deal' and 'denial of market access' practices in this case apart from 'resale price maintenance'. However, they invoked their exemption under Section 3(5) stating that these arrangements amounted to necessary restrictions reasonable for protecting their rights under The Patent Act, 1970 due to the usage of sophisticated and advanced technology. It was the argument of the Informant that the practices of the Opposite Parties deprived the buyers from accessing spare parts at a cheaper cost and led to monopoly in that respect. Upholding the same, the CCI ordered the Opposite Parties to cease and desist from such practices forthwith and held that the arrangements amounted to anti-competitive vertical restraints in the nature of 'exclusive supply' and 'refusal to deal'. The CCI made a noteworthy decision holding that the automobile manufacturers were required to effectively alter their repairs and maintenance practices so as to enable independent contractors to conduct repair and maintenance of automobiles and make spare parts and know-how freely accessible. Furthermore, the CCI may also exercise its powers of procuring undertakings from the Opposite Party, so as to prevent it from indulging in future anti-competitive practices as it did in the case of Shamsheer Kataria.¹⁹

Therefore, it may be observed that in a contract for sale or lease of a patented article or a licence to manufacture or use, a patented article or a licence to work any process protected by a patent, the Patents Act 1970 considers tie-in conditions and exclusive supply arrangements as unlawful. Further, in consonance with the obligations cast under TRIPs, provisions providing exclusive

¹⁶ UNCTAD Secretariat, *Examining the interface between the objectives of competition policy and intellectual property* (Aug. 17th, 2016).

¹⁷ The Act, *supra* note 3 at § 19.

¹⁸ Case no. 03/ 2011; Shamsheer Kataria v. Honda Sael Cars Limited & Ors.

¹⁹ *Ibid.*

grant-backs, preventing challenges to validity of a patent and coercive package licensing are also deemed to be restrictive and unlawful.

In the Boeing/McDonnell Douglas case, the merger was sanctioned as it permitted other aircraft manufacturers to obtain non-exclusive licences to patents and underlying know-how held by Boeing.²⁰ Similar approach has also been adopted by the Indian judiciary. Therefore, based on numerous observations, it can be said that the obligation to licence out IPRs constitutes one of the remedies to prevent anti-competitive aspects of a merger, i.e. divestitures of IPRs involved as a means to preserve competition.

It is a wise conclusion, therefore, that the Indian patent regime prohibits the exercise of patent rights in a manner likely to have an adverse effect on competition but also preserves public interest by way of compulsory licensing in certain cases such as where the patented invention is not workable in the territory of India or where the patented invention is not available at affordable prices or in reasonable quantity to the general public.²¹

Another important issue revolving around IPR and anti-trust laws is the trend of ‘Patent Pools’, also popularly known as ‘Patent thickets’. A ‘Patent Pool’ can be defined as an agreement between two or more patent owners to license one or more of their patents to one another or to third parties.²² In a patent pool, patent rights are aggregated amongst multiple patent holders. Then, the pooled patents are made available to member and non-member licensees and typically the pool allocates a portion of the licensing fees it collects to each member in proportion to each patent's value.²³ Such patent pools may lead to an oligopolistic market and also alarm competition authorities due to its cartelising effect.

Another anti-competitive concern may be that such patent pools may provide a platform for market players to engage in ‘price fixing’ practices or potential collusion for controlling market conditions. However, one must not ignore the pro-competitive effects of a patent pool such as enhanced efficiencies by integrating complementary patents, promoting dissemination of technology, reduced litigation and transaction costs.²⁴ For superior analysis into the phenomenon of ‘Patent Pooling’, one must also delve into the more intricate distinction between ‘essential’ and

²⁰ Boeing/McDonnell Douglas, Case No IV/M.877 : C(97) 2598 final.

²¹ The Patent Act, 1970, § 84.

²² World Intellectual Property Organization (WIPO), *“Patent Pools And Antitrust” – A Comparative Analysis, Prepared by the Secretariat*, 1(March 2014). [hereinafter “Patent Pools and Antitrust”].

²³ ROBERT P. MERGES, INSTITUTIONS FOR INTELLECTUAL PROPERTY TRANSACTIONS: THE CASE OF PATENT POOLS, IN EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY, INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY, 123, 129 (Rochelle Cooper Dreyfuss et al. eds., 2001).

²⁴ Patent Pools And Antitrust, *supra* note 20 at 12.

‘non-essential’ patents and the rationale behind F/RAND (fair, reasonable and non-discriminatory) terms of granting licenses.²⁵

With respect to valuation of IPR, which is another significant issue involving convergence of IPR with competition law, a clear stand has been taken by the CCI that it shall steer away from venturing into any kind of price analysis involved as far as products involving IPRs are concerned. This stand precludes the CCI from making any price analysis at all, for all products as every product involves some or the other IPR.²⁶

COMPETITION LAW VIS-À-VIS THE TRADEMARK ACT, 1999:

- With reference to ‘Anti-Competitive Agreements’ and ‘Abuse of Dominance’ under Sec. 3 and 4 of the Competition Act, 2002.

The Delhi High Court has enunciated upon the interpretation of Section 3(5) of the Competition Act, 2002 with regard to the ‘reasonable conditions’, as may be necessary to protect the rights of a person conferred upon him under the Trademark Act, 1999 in the case of *Hawkins Cooker Limited v. M/s. Muruggan Enterprises*²⁷ wherein the Division Bench overturned the decision of the Single judge which had ruled in favour of the defendant. The grievance related to a defendant manufacturing pressure cooker gasket under the trademark of ‘Mayur’, however displaying on the packaging material: “Suitable for: Hawkins Pressure Cookers” which was the trademark of the appellant. It was a pertinent observation of the division bench that while the words “suitable for” were printed in black colour, the word “Hawkins” was in red colour, thereby attracting the attention of the buyers and confusing them. While the single judge refuted the plea of the plaintiff and considered as a means to distorting competition in the market by imposition of unreasonable vertical restraints while considering the defendant’s use as merely suggestive of the purpose of the goods, thereby not amounting to infringement. In contrast to the same, the division bench refused to accept the ruling of the single bench and stated that the defendant was precluded from the use of the trademark of the plaintiff and such restraint shall be a reasonable condition necessary for protection of trademark of the plaintiff, hence not anti-competitive.²⁸

Therefore, whether a condition may be termed as anti-competitive vertical or horizontal restraint or shall fall within the purview of a reasonable condition necessary to protect the trademark of a

²⁵ J. Gregory Sidak, : The Delhi High Court’s emerging jurisprudence on royalties for standard-essential patents, Vol. 10, No. 8, JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE, (2015).

²⁶ <https://globalcompetitionreview.com/jurisdiction/1000467/india>.

²⁷ RFA(OS) 09/2008.

²⁸ *Ibid*.

person, is purely a question solely dependent on the facts and circumstances of that case and therefore, shall vary on a case to case basis.

However, it has been observed that the exclusivity granted by a trademark and its use by the proprietor is rarely a matter of competition concern and has little or no effect upon its control on the market forces. Such is a manifestation of the fact that a trademark is a mark protecting the identity of the proprietor and does not essentially impose conditions on the production/distribution of goods or provision of services but merely serves as a device for identification of the proprietor of such goods or services, thereby resulting into differentiation and not exclusivity in the sense of anti-trust laws.

- With Reference to Regulation of ‘Combination’ under Sec. 5 of the Competition Act, 2002.

The real considerations under anti-trust laws with regard to ‘trademarks’ is from the ‘Combination’ perspective. It has been an accepted proposition that acquisition of trademarks also amounts to combination if it satisfies the prescribed threshold. The CCI has in a recently released order²⁹ recognised ‘trademarks’ as assets for the purposes of the Competition Act, 2002 and imposed a penalty of Rs. 5 Lakhs on ITC Limited for its failure to notify a combination, wherein, it acquired two trademarks ‘Savlon’ and ‘Shower to Shower’ from Johnson & Johnson by way of two separate asset purchase agreements entered into on 12th February 2015. Further, the order also re-emphasises the position that the Indian merger control regime relates to not only *an acquisition of one or more enterprises* but also *‘acquisition of control, shares, voting rights or assets of another enterprise.’*³⁰ In the event the thresholds prescribed under Section 5 of the Act are met, such an acquisition requires prior notification to, and approval from, the CCI.³¹

Therefore, consequent to the recent order of CCI, it may be concluded that acquisition of ‘trademark’ by an entity shall also result into an obligation of notification³² to the CCI under the Competition Act, 2002 if it satisfies the threshold prescribed under Section 5 of the Competition Act, 2002.

COMPETITION LAW VIS-À-VIS THE COPYRIGHT ACT, 1957:

The most complex and intricate relationship exists between the rights protected under the Copyright law with respect to their reasonability in relation to competition aspects involved. Major issues also encompass around the neighbouring rights, especially broadcasters’ rights and

²⁹Combination Registration No.C-2017/02/485

³⁰ The Act, *supra* note 3 at § 5.

³¹ The Act, *supra* note 3, § 6.

³² *Ibid.*

broadcasters' reproduction rights. In the landmark judgement of *Cricket Association of West Bengal*³³, the issues relating to the rights of broadcasters to telecast live cricket matches was dealt with. This case comprehensively deliberated upon the principle of whether a monopoly shall be permissible in broadcasting, its interpretation with the reasonable restrictions under Article 19 of the Constitution of India, 1950 and the monopolistic tendencies of the Cricket Association of Bengal. The Apex Court further shed light on the global practices and understanding of broadcasters' rights and denied the Cricket Association monopoly, although it did not touch upon the provisions of competition law expressly.

Other issues which are generally referred to the Competition Commission are with regard to the excessive licensing fee and arbitrary conditions amounting to anti-competitive restraints and abuse of dominant position in the relevant market. In the case of *M/s. HT India Limited v. M/s. Super Cassettes Industries Limited*³⁴, wherein, the Informant alleged that the Opposite Party, known under the brand name 'T-Series', engaged in the production and publication of music in India which also occupied a dominant position on account of control over 70% of Bollywood Music imposed excessive licensing fee and minimum commitment charges as well as made the conclusion of its arrangements subject to acceptance of all its stipulations *in toto*. The CCI imposed a penalty of approx. *Rupees Three Crores* on the Opposite Party for misusing its copyrights and refuted the unreasonable restrictions imposed by the Opposite Party on the Informant and other market players, thereby abusing its dominant position in the relevant market.

It may therefore, be concluded that the CCI has undertaken a thoughtful exercise of gauging the pro-competitive and the anti-competitive effects in order to determine whether the conditions imposed by the parties are reasonable in view of the exemption granted under the Competition Act, necessitating the same on account of protection of their copyright.

ANALYSIS

After carefully analysing the judicial developments under major Intellectual Property Rights' laws and their inter-play with Competition law, I have come to the supposition that the Indian Judiciary is still at a normative stage and follows the rules evolved in the developed jurisdictions of the European Union and the United States.

It also follows that India as a country is still to lay clarity on a firm stand as to what shall prevail in case of a direct conflict between the competition law and the Intellectual Property laws and enables

³³ 1995 SCC (2) 161.

³⁴ Case no. 40 of 2011.

a more precise exercise based upon the facts and circumstances of each case and its impact. Furthermore, another observation that may be made is with regard to the fact that Competition authorities extend greater attention in cases regarding, conditions protecting patent and copyright while the conditions for protection of rights of trademark holders necessitates little or no judicial intervention in case of its raising competition concerns in the market.

CONCLUSION

In pursuance to the elaborate discussion ensued above, it can be appropriately deduced that there is a clear distinction between the philosophy of intellectual property rights laws which thrive on deriving exclusivity through those laws and the jurisprudence behind enacting anti-trust laws which entail fair and effective competition in the market and curbing out exclusivity.

Although, *prima facie* it may seem that the objectives of Competition Law and Intellectual Property Rights Law are at conflict with each other, ultimately their ends meet at the common ground of consumer welfare and promotion of innovation and technology.

As observed by the Federal Trade Commission,

*“Competition can stimulate innovation. Competition among firms can spur the invention of new or better products or more efficient processes. Competition can prompt firms to identify consumers’ unmet needs and develop new products or services to satisfy them”*³⁵

In consonance with the same, competition is not incompatible with innovation or laws encouraging innovation i.e. intellectual property laws, but may in turn be a catalyst in the form of bettering productive by way of constant struggle to become pre-eminent.

³⁵ Federal Trade Commission, 2003, P.1-2