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INTERFACE OF INTELLECTUAL PROPERTY AND COMPETITION LAW IN INDIA: THE EVOLVING TRENDS

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***Abstract*--Competition and innovation are two central processes in market economies. They play a particularly important role in protecting and stimulating competition and innovation in decentralized market economies. The main objective of competition law is to regulate firm behavior which might harm the competitive process. On the other hand, the purpose of Intellectual Property is to promote innovation and knowledge creation. Competition Policy and Intellectual Property Rights interact in many important dimensions but at a general level, the objectives of both systems are to promote economic efficiency and enhance consumer welfare. For the smooth functioning of the market, it is essential to understand the multiple linkages between Intellectual Property Rights and Competition policies. It is particularly important for developing nations, many of which are currently devising competition laws to complement the stronger intellectual property regimes. In this light, the aim of present paper is to analyze the complex relationship between Intellectual property and Competition law. The paper first introduces the concept of Intellectual Property Rights and Competition Law after that it highlights the common areas where both intersect and contradict each other. The paper justifies that both have distinct operational areas and their functions are independent. This argument would be examined by the study of established practice of western countries, there reconciliation process and what India should follow to maintain a balance between Intellectual Property Rights and Competition Law. Lastly, an attempt has been made to study the role of the judiciary by analyzing judgments of last 10 years from the judicial bodies like courts and the quasi-judicial bodies' consumer forums and the Competition Commission. The analysis of case laws leads to a trend that in India the interface between two has been practically balanced.**

From last two decade, the relationship between intellectual property rights and competition law has been topical, despite the historically separate development of each area.[1] The nature of intellectual property rights and competition has been known primarily for their rocky relationship with volcanic tensions.[2] As the jurisprudence on intellectual property rights and competition law mushroomed, the policy makers faced the major issue of promoting rivalry in innovation without harming competition.[3] The relationship between intellectual property (IP) and disciplines regulating competition has attracted growing attention, particularly as a result of the expansion and strengthening of IP protection at the global scale. While IP law deliberately subjects intellectual assets to the exclusive control of right owners, competition law seeks to avoid market barriers and benefit consumers by encouraging competition among a multiplicity of suppliers of goods, services, and technologies. Dealing with such a relationship poses unique analytical challenges to policy-makers.[4]

INTELLECTUAL PROPERTY RIGHTS

The intellectual property deals with the creation and innovation of intellectual work and its protection in favor of the creator against everyone. A definition of IPRs says: "They are a composite of ideas, inventions, and creative expressions" plus the "public willingness to bestow the status of property" on them.[5] As in the case of tangible property, IPRs give their owners the right to exclude others from access to or use of protected subject matter for a limited period of time, and subsequently the right to license others to exploit the innovations when

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[1] Hiroshi Iyori & Akinori Uesugi, *The Antimonopoly Laws And Policies of Japan*, (1994) at p. 387, available at http://www.jftc.go.jp.

[2] Christina Bohannan & Herbert Hovenkamp, "*Creation Without Restraint: Promoting Liberty and Rivalry in Innovation*", E.I.P.R. 2012, 34(9),pp. 645-647

[3] Ibid.

[4] Correa, C. (2007). *Intellectual Property and Competition Law: Exploration of Some Issues of Relevance to Developing Countries*, ICTSD IPRs and Sustainable Development Programme Issue Paper No. 21, International Centre for Trade and Sustainable Development, Geneva, Switzerland.

[5] United States vs. Aluminium Co. of America, 148 F.2d 416, 430 (2d Cir, 1945).

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they themselves are not well situated to engage in large-scale commercial exploitation.[6] The Intellectual Property Laws recognize and reward the innovators and creators of intellectual work. This, in turn, paves way for industrial and technical progress as it promotes invention and innovation. In the globalized era, nothing flows more easily, than ideas and information, and the laws of intellectual property protection have been the subject of progressive globalization since the early 19th century. In the first phase, intellectual property rights were sometimes included in bilateral commercial treaties, such as early treaties of friendship, commerce, and navigation.[7] A second phase was characterized by bilateral treaties dealing with intellectual property specifically, but this phase was superseded in the late 19th century by the adoption of the first of two (prospectively) global intellectual property conventions, in the form of the Paris Convention of 1883[8]. This governed patents, trade marks, designs and other so-called 'industrial property rights' and was complimented from 1886 by the Berne Convention[9], dealing with copyright. The Paris and Berne conventions attracted new members and were revised at more or less regular intervals during the 20th century, until the process broke down in about the 1980s, principally as a result of the increasing polarization between capitalist and socialist economies on the one hand, and the developed and developing worlds on the other. From this deadlock there emerged the most recent milestone in the globalization of intellectual property laws, namely the WTO TRIPs Agreement of 1994.[10] The umbrella term of intellectual property is a compendious one and embraces patents, copyright, trademarks, industrial designs, layout-designs of integrated circuits and geographical indications. Under these IPRs the ingenuity and intellectual works of creator/ author/ innovator are protected against unwarranted encroachments by conferring exclusive rights.[11]

COMPETITION LAW

On the other hand, the objective of the competition law is to enhance the welfare of consumers through the promotion of competition and fair trading and provision for consumer protection.[12] The competition law deals with the promotion and maintains market competition by regulating anti-competitive conduct by companies. The purpose of competition law is to promote fair competition and prevent the abuse of dominance in the market by the companies. Therefore, it basically protects the interest of enterprises against such abusive dominance by other enterprises as well as the interest of the consumers. It aims at creating an environment of free and fair play of the market forces. It creates a path for entry of the new market players by limiting the anticompetitive behavior. The competition law also plays a crucial role in the liberalized economy of the globalized world. At present more than 100 countries have enacted competition law and in some countries, it dates back more than a century,[13] few examples are Sherman Act, 1890 of US, European Countries enacted most of the laws in the 1950s after the adoption of Rome Treaty in 1957. In the same line Japan in the year 1947 enacted its Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade. Newly emerging economies seem to have either amended their existing laws or enacted modern competition laws in the wake of economic liberalization that began with the conclusion of the WTO agreements in 1995. India also

[6] Pham, Alice (2008), 'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?', CUTS International, Jaipur, India, p. 12.

[7] Christopher Wadlow, Intellectual Property as an 'Investment' in International Law: A Case of Access to Medicines versus Access to Justice?, 4 J. Comp. L. 79 2009, p. 85.

[8] The Paris Convention for the protection of industrial property was agreed in 1883 and complemented by the Madrid Protocol of 1891. It was revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967), and amended in 1979. As of 15th May 2004, the Paris Convention had 164 signatory states, see on http://www.wipo.org, 'Treaties', Intellectual Property Protection Treaties, Paris Convention.

[9] The Berne Convention for the protection of copyright was adopted in the year …. available at http://www.wipo.org, 'Treaties', Intellectual Property Protection Treaties, Berne Convention.

[10] Yu, P (2009) 'The Global Intellectual Property Order and its Undetermined Future' *WIPO Journal* ***1.***

[11] World Intellectual Property Organisation, available at: http://www.wipo.int/about-ip/en (last accessed on 10th Jan.2015.)

[12] Charles Lawson, *Rethinking The Exemption of Some Patent License and Assignment Conditions from the Trade Practices Act 1974 (Cth) Competition Laws,* 2 Macquarie J. Bus. L. 47 2005, p.56.

[13] K.D.Raju, *The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India, Journal of Intellectual Property Rights, vol.18 (2013), pp. 111-122.*

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enacted its new competition law in 2002 to cope with its new economic policies and widespread economic reforms.[14] The new Competition Act replaced the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). The Indian Competition Act, 2002 is quite similar to that of the US and UK's competition laws.[15]

INTERFACE BETWEEN IPR AND COMPETITION LAW

The interface of intellectual property rights and competition law has grown massively, owing to the expansion and strengthening of intellectual property at a large scale. One prevalent view now a day is that competition law by protecting competition, and intellectual law by rewarding innovation, create incentives to introduce new products.[16] However, at the highest level of analysis, it is apparent that both IPR and competitive policies are complementary to each other because they share a common concern to promote technical progress to the ultimate benefit of consumers.[17] However, in the short run, and in a certain situation when trademarks, copyright, patents or other IPRs confer exclusive rights of exploitation, they may lead to restriction of production, premium price and sometimes deadweight loss. Moreover, in the rational exercise of its self-interest, an IPR holder may sue would-be rivals for infringement, deterring entry to compete, or prolong its market power by precluding access to technology necessary for the next generation of products to emerge. This is where competition law comes in to help IPRs protection to be fair and on the right track of its virtue towards the welfare goal.[18] The primary concerns that dominate IPR and competition law interface are the potential abuse of monopoly pricing, especially in developing countries where effective substitutes to IPR protected products may not be readily available. Second, competition law seeks to draw a line between permissible business strategies and abuse of IPRs-a line which is often blurred by horizontal agreements, exclusionary licensing restrictions, tie-in agreement, excessive exploitation of IPRs and other selling practices. However, at a conceptual level, the lines are clear. The monopoly rights granted by IPR are not anticompetitive but become so, when exercised beyond their intended scope of the exercise. Efficiency is also one of the aims of the competition law which comprises three distinct concepts of efficiency viz productive, static and dynamic efficiencies.[19] Intellectual property also shares the same objective in terms of fostering efficiency, they can well be in conflict.[20]

Three theoretical bases have been suggested for this reconciliation between IPRs and competition law regimes:[21]

- The competition law should interfere with Intellectual property issues only when social welfare is at risk;
- The view that concentration and monopoly markets have the edge over competitive markets in terms of innovation owing to greater capital and resources and
- The view that competition law only concerns itself with consumer welfare when the effects of a proposed action on production and innovation efficiency are neutral or indeterminate. A standard of reasonability has to be applied depending on the individual facts and circumstance of the case.[22]

[14] Ibid.
[15] Ramkishen S. Rajan, Rahul sen, "*Trade Reforms in India Ten Years on: How has it Fared Compared to its East Asian Neighbours?*", CIES Adelaide University Dec. 2000.
[16] Haris Apostolopoulos, *Refusal-to-Deal Cases of IP Rights in the Aftermarket of US and EU Law: Convergence of Both Law Systems through Speaking the same Language of Law and Economics*, 5 DePaul Bus. & Comm. L.J. 237 2006-2007.
[17] Howard Morse, *Standard Setting and Antitrust: The Intersection between IP Rights and the Antitrust Laws*, IP LITIGATOR, May/June 2003, p. 17.
[18] Pham, Alice (2008), 'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?', CUTS International, Jaipur, India, p. 18.
[19] Mark-Oliver Mackenrodt, Academic Researcher at the Max Planck Institute for Intellectual Property, Competition, and Tax Law, Munich, Germany.IIC 2005, 36(1), 113-126.
[20] Ibid.
[21] Thomas Eilmansberger et al., Materielles Europarecht [Substantive European Law] 246 (2008).
[22] Ibid.

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In addressing intellectual property specifically, the Commission considered that 'innovativeness will be a key requirement in sustaining and enhancing living standards'.[23] However, in setting the appropriate standards it is also required to consider that intellectual property laws continue to be scrutinized to ensure that they are not unduly restrictive through legislation.[24] In addressing a balance between certainty with clear rules prohibiting certain conduct and a flexible response recognizing that some apparently prohibited conduct may be pro-competitive.

The competition policy in India as discussed above is still in infantry stage, but even then the scenario in India is promising, as there has been a rise in substantial case law, which deals with the interaction of IPR and competition law. There were instances of interactions in MRTP Act and even in competition Act, 2002 there have been several instances of such interactions.
According to Raghwan Committee Report[25], India's competition policy provides that, all forms of intellectual property have the potential to violate the competition laws. The 'temporary monopolies' given to protect intellectual property as a regulatory barrier to market entry, as part of its broader concerns about legislation that restricted competition, that a mechanism to promote reform of regulation that unjustifiably restricts competition from a central plank of a national competition policy.[26]

The Indian Competition Act, 2002 (the Act) deals with the applicability of section 3 prohibition relating to anti-competitive agreements to IPRs. Under section 3(5) a blanket exception for intellectual property is incorporated in the Act, that reasonable conditions as may be necessary for protecting IPRs during their exercise would not constitute anti-competitive agreements. In other words, by implication, unreasonable conditions in an IPR agreement that will not fall within the bundle of rights that normally form a part of IPRs would be covered under section 3 of the Act.[27] The 'temporary monopolies' given to protect intellectual property as a regulatory barrier to market entry, as part of its broader concerns about legislation that restricted competition, is a mechanism to promote reform of regulation that unjustifiably restricts competition from a central plank of a national competition policy.[28]

JUDICIAL PRONOUNCEMENTS

Throughout the history of the interface of intellectual property and completion law, it has been a judge-made law that has effectively steered the direction of the discipline or lessened the volcanic tension that exists between them.[29] In *Vallal Peruman & Others v. Godfrey Philips India Ltd.*[30], it was by the commission, that, 'the independent right of the trademark user to use it reasonably and hence it cannot be used unreasonably or in contradiction with the terms & conditions imposed at the time of grant. If the trademark owner misuses the trademark owner misuses the trademark by way of manipulation or distortion than that will definitely be covered by competition policy'. In *Amir Khan Productions Private Ltd. v. The Union of India*[31], a complaint

[23] Productivity Commission, *Review of National Competition Policy Reforms*, Inquiry Report 33(2005) iv.
[24] Charles Lawson, *Rethinking The Exemption of Some Patent License and Assignment Conditions from the Trade Practices Act 1974 (Cth) Competition Laws*, 2 Macquarie J. Bus. L. 47 2005, p.78.
[25] High Level Committee report on Competition Law 2002.
[26] Charles Lawson, *Rethinking The Exemption of Some Patent License and Assignment Conditions from the Trade Practices Act 1974 (Cth) Competition Laws*, 2 Macquarie J. Bus. L. 47 2005, p.65.
[27] *Intellectual Property* Rights under the Competition Act, 2002, Competition Commission of India, available at http://www.cci.gov.in
[28] Charles Lawson, *Rethinking The Exemption of Some Patent License and Assignment Conditions from the Trade Practices Act 1974 (Cth) Competition Laws*, 2 Macquarie J. Bus. L. 47 2005, p.65.
[29] Christina Bohannan & Herbert Hovenkamp, "*Creation Without Restraint: Promoting Liberty and Rivalry in Innovation*", E.I.P.R. 2012, 34(9),pp. 645-647.
[30] (1995) 16 CLA 201.
[31] 2010(112) Bom LR 3778

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was filed against United Producers/ Distributors of Films against the formation of market cartels in films, against multiplexes. In the present case, the jurisdiction of competition commission was also challenged with regard to intellectual property matters[32]. However, it was held by the court that CCI is competent to deal with intellectual property matters and also CCI has overriding effect over other legislations for the time being in force[33]. CCI prima facie found that there was a violation of sec 3(3) of Competition Act, 2002. Director General was ordered to conduct an inquiry and submit the report. It was also observed by the CCI that intellectual property laws do not have any absolute overriding effect on competition law. The nonobstante 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.[34] In the case of *Entertainment Network (India) Limited v. Super Cassette Industries Ltd*[35], it was held by the Supreme Court of India that there is a relationship between IPR and competition and their interplay is crucial for markets. The honorable court stated that, when a copyright owner tries to monopolize his intellectual property and puts unreasonable terms in the agreement, it will be considered as a refusal to license/deal. Even though it is a known fact that Copyright owner can utilize his intellectual property in any manner he likes, but this right is not absolute.[36] In Microsoft case[37] 'windows and office 2007' was the contentious issue and it was held by the CCI that there was no kind of violation of competition provisions, as the pricing policy followed by Microsoft was common in the market and was not in any way anti-competitive. CCI also stated that there was neither any evidence that this practice was driving out the competitors from the market nor there was the absence of any alternative available to petitioner. The imperatives of "unfettered competition" and "innovation" are indispensable for attaining sustained economic growth. As we have already seen, the balancing of competition with innovation is an extremely difficult task since there is an apparent tension between the tenets of IP law and competition policy.

The holders of intellectual property are said to have monopolistic positions in the market when there are no alternative technologies are available. To avoid conflicts between intellectual property and competition policy, it is advisable to account for competition policy concerns already when designing the optimal scope of intellectual property rights. For example, competition law thinking could be incorporated in the Patent Act by introducing compulsory licensing obligation if there is a predatory use of intellectual property rights. Then the role of competition law can be limited to fine tuning.[38] Thus, it can be said that both IPR and Competition laws go hand in hand. As certain privileges are being given under the IPRs it is restricted by the enforcement of competition laws.[39] In India, we can definitely utilize the provisions of 'compulsory licensing' in the case of excessive pricing policy being abused by dominant enterprises. There is also a need for specific guidelines which will deal with the case involving the application of both IPR and Competition. There is no authority other than CCI to take this task. While whatever changes are to be introduced or if changes in the implementation of present rules are required, one important thing is to be kept in mind that IPR & Competition Laws are not in conflict, their interplay is not one of substitute nor it is corrosive. Rather both these laws supplement and complement each other in various essential aspects. Apart from compulsory licensing the doctrine of 'essential facilities' can also be extremely applied in India, especially in cases involving abuse of dominant position via 'refusal to deal' or 'refusal to license'. This concept has been aptly applying in developed nations and India can

[32] It was argued by the UPDF that the matter related to copyrights on films can be dealt only by the Copyright Board.
[33] Section 60, The Competition Act, 2002
[34] Raju K. D, "Interface between competition law and intellectual property Rights: A comparative Study of the US, EU and India", JIPR Vol 18 (2013).
[35] 2008(9) SCR 165.
[36] (*Singhania & Partners LLP v. Microsoft Corporation Pvt. Ltd & others) 2010*
[37] Ibid.
[38] Mark-Oliver Mackenrodt, Academic Researcher at the Max Planck Institute for Intellectual Property, Competition, and Tax Law, Munich, Germany.IIC 2005, 36(1), 113-126.
[39] Patel Atul, *Intellectual Property Law & Competition Law*, Journal of International Commercial Law and Techology, vol. 6, Issue 2(2011), p.130.

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take lessons from there to utilize this concept to equip itself to handle such cases efficiently. The best part about these concepts is that they are flexible and the developing nations can amend them in accordance with their own requirements. We need the kinds of community policy towards the competition law and IPR interface seeks to encourage innovation because if competition law is not applied with the utmost caution, there is a real possibility that competition and innovation in the industries where strong are a key competitive element will be negatively affected.[40]In addition, India can also adopt a similar approach adopted by EU, wherein the Dominant Undertakings have a general duty to supply the essential facilities to competitors. It is also expected from the policy makers that they should play an active role in the promotion of effective competition in areas, such as pharmaceuticals, where IPRs and other regulations are significant determinants of competitive behavior.[41]

[40] Thomas Heide, *Trademarks and competition law after Davidoff*, EIPR, 2003, 25(4), 163-168.
[41] Correa, C. (2007). *Intellectual Property and Competition Law: Exploration of Some Issues of Relevance to Developing Countries*, ICTSD IPRs and Sustainable Development Programme Issue Paper No. 21, International Centre for Trade and Sustainable Development, Geneva, Switzerland.