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COMPETITION LAW AND TRIPS ISSUES FACED IN INDIA

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ABSTRACT

Abstract Intellectual Property Rights grant the right holder the exclusive right to explore his innovation for a specific time period while barring others. Competition law, on the other hand, promotes free commerce and industry in the market economy by encouraging traders to compete fairly. It prohibits monopoly and anti-competitive conduct. So, whereas IPR and Competition Law appear to be at odds, they are really additional and complimentary to one another. Monopoly is not propagated by intellectual property rights. Only the absence of comparable IP-protected goods and services results in monopoly, which is followed by anti-competitive activities. In reality, anticompetitive actions harm intellectual property rights. Hence, by prohibiting anti-competitive acts, competition legislation promotes the establishment of IPR. If these two regimes are applied correctly, the apparent contradiction between IPR and competition law can be resolved. TRIPS has provided some flexibility to its member nations under Article 8.2, Article 40, and Article 31K, which can be used to ensure that these two regimes run correctly. After the MRTP Act, India implemented Sections 3, 4, 5, 6, 18, and 27 of the Competition Act, 2002, as its own competition legislation. As a growing country, India should put more emphasis on R&D to increase the variety of IP-protected goods and services available to consumers, giving them more alternatives and facilitating actual consumer welfare.

Key words: Intellectual Property Rights, Competition Law, TRIPS, Anti-competitive practices, monopoly.

I - INTRODUCTION

The aim of competition policy in the economy of a country is to ensure fair competition in the market by way of regulatory mechanisms. It is not intended to create restrictions or constrictions that may be detrimental to the growth of society. Its focus is the avoidance of market domination by a handful through different modes such as price fixing or market sharing cartels and undue concentration. 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[68]. Companies can monopolise their technology for a certain time, but they cannot monopolise the market. Intellectual property protection in and of itself is not abusive, but if it dominates the market, it is only serving a valid function, namely to generate an incentive for further innovation. Companies, on the other hand, undercut the fundamental concepts of competition law as well as the spirit of intellectual property protection when they refuse to licence their intellectual property to rivals.

At first glance, it appears that both notions are at odds in their respective fields of action. However, antitrust laws and patent laws coexist, as correctly stated by a 1948 US Supreme Court decision that defined the limitations of immunity in this manner. 'The existence of a valid patent or patents confers no exemption from the requirements of the Sherman Act beyond the limitations of the patent monopoly on the patentee.'[69] As a result, by banning anti-competitive agreements and boosting economic efficiency and consumer welfare, a

[68] UNCTAD Secretariat, Objectives of Competition Law and policy: Towards a Coherent Strategy for Promoting Competition and Development

[69] United States v. Line Material Co., 333 U.S. 287, 308, 76 U.S.P.Q. (BNA) 399, 408 (1948) (patent pool struck down on price fixing grounds apparently without examination of pro-competitive effects of pool on innovation and consumer welfare)

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robust competition law can provide a remedy. It may be stated that the dual goal of competition legislation is to preserve both consumer welfare and market participants' economic freedom. A study of competition policy demonstrates the need for several types of state actions affecting the acquisition and usage of IPRs. When a patent holder engages in anti-competitive behaviour, governments can take steps such as compulsory licencing of such inventions under the requirements of the World Trade Organization's Trade-Related Aspects of Intellectual Property Law (TRIPs) Agreement[70].Unilateral refusal to licence a patent (refusal to deal) might be used to justify coercive licencing. Under the notion of 'essential facilities,' failure to share a technology can be grounds for compulsory licencing to a third party, particularly if the facility is not available to the applicant at fair prices in order for the applicant to participate in the market. 'Patent thickets' are also mentioned as being detrimental to competition, particularly because they stretch the duration of the patent claims to an endless length. Important competition law issues, such as the Microsoft case, also include copyright law. Some of the examples show a conflict between trademarks and competition law. The fundamental dilemma in antitrust and intellectual property protection is whether the purpose of antitrust laws, which is to preserve competition in high-tech markets, encourages or retards long-term economic innovation.

The landmark Microsoft case dominates the discussion over antitrust law and intellectual property protection. Intellectual property rights (IPR) protection and competition law have traditionally emerged as two separate legal systems. The traditional role of competition legislation has been to enhance market efficiency and thereby avoid market distortions. Under the TRIPs Agreement, the goal of intellectual property law is to safeguard breakthrough ideas in the form of inventions that generate private monopoly rights for a limited length of time (20 years). The widespread assumption is that there are inherent contradictions between IPRs and competition because IPR protection confers monopoly rights while competition law combats market monopolies. Rather, a monopoly in and of itself is not anti-competitive in nature; however, misuse of a monopoly is. Technological advancements and patent protection laws result in increased incidents of monopoly rights abuse, particularly in high technology domains where a more basic study on the connection between intellectual property and competition law is required. The number of competition disputes using Intellectual Property Rights (IPRs) has increased in recent years, particularly in nations such as the United States and the European Union.

To comprehend the ground reality of the challenges in implementing competition and intellectual property law, it is necessary to examine the systems of other nations, as well as their practises and regulations concerning competition and intellectual property. While wealthy nations such as the United States enacted competition legislation far earlier and have been pursuing a new agenda, newly opened economies such as India are experimenting with the new legislation.

The relationship between competition law and IPR policy used to be mistakenly depicted as a pure juxtaposition or sheer contradiction for quite some time. Basically, IPRs designate boundaries within which competitors may exercise legal exclusivity (monopolies) over their innovation; therefore, in principle, create market power by limiting static competition in order to promote investments in dynamic competition. IPRs are, therefore, at first sight, seen at variance with the principles of static market access and level playing fields sought by competition rules, in particular, the restrictions on horizontal and vertical restraints or on the abuse of dominant positions.8 This is, however, not necessarily the case. Empirically, it

[70] Article 31(b) of the TRIPs Agreement

has been observed that rights over IP, while ensuring the exclusion of rival firms from the exploitation of protected technologies and derived products and processes, do not necessarily bestow their holders with market power. In fact, there often exist various technologies which can be considered potential substitutes to confer effective constraints to the potential monopoly-type conduct of IPR holders. For example, Microsoft Corporation holds the copyright for Windows, a very popular operating system used for Intel-compatible personal computers. However, possession of the IP for Windows and legal exclusivity over its use/exploitation alone do not give Microsoft market power since there are many other substitutes, such as Mac OS or Linux. What gave Microsoft the monopoly power in the market was the application of barriers to entry, which tilts the competitive balance in favour of the software giant. Only when alternative technologies are not available, IPRs can be said to grant their holders monopolistic positions in the defined relevant markets. And even then, that alone does not create an antitrust violation.

Antitrust/ competition law recognises that an IPRs creation of monopoly power can be necessary to achieve a greater gain for consumers. Moreover, antitrust/ competition law does not outlaw monopoly in all circumstances. For example, a monopoly achieved solely with superior skill, foresight, and industry 12 does not violate the antitrust/competition law. It is only when a monopoly is acquired or maintained or extended through unlawfully anti-competitive means that it can be ruled unlawful. From a theoretical perspective, IP is a quid pro quo for competition. Competition, whether static or dynamic, is not a natural phenomenon occurring all by itself with respect to all kinds of goods complex evolutionary system. The present competitive market is the result of an evolution from the manufacture of and trade in homogeneous natural goods to markets for highly diversified and artificially tangible or intangible goods. Similarly, competition has changed from rivalry by production and natural imitation to an evolutionary process of systematic creation and innovation. The ever-increasing forms and numbers of IP titles, the elevation of standards of protection and the territorial broadening of the scope of protection only mirror in law the diversity of the goods actually offered in competition and reveal the normality of such competition. To put it simply, IPRs policy protects the IP-based products and processes that firms use as inputs in the dynamically competitive process in the marketplace and thus is nowhere near being in contradiction or conflicting with the ultimate goal of competition law.

II - ARTICLE 40 TRIPS AGREEMENT

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may, in particular cases, constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include, for example, exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.
3. Each Member shall enter, upon request, into consultations with any other Member who has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is

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undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliary are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3.

III - ARTICLE 40.2

Article 40.2 affirms Members' sovereign power to establish and define rules of competition law regarding licensing practices and conditions (first sentence), and then goes on to recognize Members' authority to take appropriate measures to prevent or control such practices consistent with other provisions of the Agreement (second sentence). Both sentences must be read as mutually complementary, and they must be read in the light of Article 40.1 because Article 40.2 describes the action that Article 40.1 invites Members to take if they so wish. (i) The concept of anti-competitive practices (Article 40.2, first sentence) Article 40.2 (first sentence) is more narrowly worded than Article 40.1. It affirms each Member's sovereign power of "specifying in their national legislation licensing practices or conditions" only in view of "particular cases" in which they "constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market". Distinguished from Article 40.1, the negative effects seem to have to relate to competition rather than to trade, and impediments to the transfer or dissemination of technology are not mentioned at all.

However, in view of the interrelationship between Article 40.1 and Article 40.2, and considering the link, that Article 40.1 establishes between the restrictive nature of licensing practices or conditions and its impact on trade or technology transfer, the difference seems to be one of wording rather than of substance. In particular, Article 40.2 confirms a competition law approach to the control of technology transfer and does not elevate competition as such to the exclusion of promoting technology transfer, particularly in light of Article 7 and Article 8.2, which put particular stress on technology transfer as one of the TRIPS' objectives. The real difficulties of interpretation, which the first sentence of Article 40.2 raises, result from the fact that, on the one hand, Article 40.2 fully confirms Members' sovereign power to specify in their national legislation which licensing practices or conditions they consider to be abusive and anti-competitive; and on the other, it seems to limit that discretion by stating that such practices or conditions "may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market". The difficulties of interpreting this limitation stem from the fact that the wording is both tautological and contradictory. Abuses always exist only in particular cases. Licensing practices that constitute an abuse of IPRs having an adverse effect on competition are always unacceptable. In all the cases where these two requirements are met, the licensing practice must be unlawful. Therefore, the provision seeks to ensure by its qualifying language that Members do not specify anticompetitive practices or conditions of licensing in general and in the abstract but in reasonably detailed circumstantial form and by reference to their actual impact on the conditions of competition existing in the markets concerned.54 This particular understanding of Article 40.2 (first sentence) is confirmed by both the history of the provision[71] and by the literature[72]. It does not mean that Members may not, by their sovereign judgment, define what constitutes abuse. Article 40.2 expressly refers to their national legislation. But they must do so on the competition merits of practice as they see them. Nor does the provision exclude the establishment or the development of well-defined per se prohibitions of licensing practices or conditions that have no redeeming virtues, i.e., which, as such, are a priori and under all foreseeable circumstances anti-competitive.[73] Members have traditionally had such rules, and they have qualified the same licensing agreements differently. The limits of such qualification may not be found in a preconceived notion of abuse or in its combination with adverse effects on competition, but only by reference to the purpose and the provisions of TRIPS, i.e., by reliance on a requirement of consistency. (ii) The consistency and proportionality requirements (Article 40.2, second sentence) Indeed, the first sentence of Article 40.2 must be read in conjunction with its second sentence, which specifies the measures Members may take to prevent or to control the practices mentioned in the first sentence. As in the case of Article 8.2, the requirement of consistency of such measures with the provisions of TRIPS concerns not only the nature of the remedy, but also the substance of the relevant rules on competition. In this regard the considerations and comments made with respect to Article 8.2 apply mutatis mutandis in the context of Article 40.2. In particular, the examples given by the second sentence of Article 40.2, namely exclusive grant-back conditions, no-challenge clauses and coercive package licensing, refer only to practices which might be held to be abusive "in the light of the relevant laws and regulations of that Member". Thus, they may be qualified differently, just as other practices that are not mentioned may be deemed to be abusive. In fact, the few practices listed are expressly referred to as mere examples, and they are in no way representative of the large number and variety of restrictive licensing practices and conditions, which may or may not be, depending on both their definition and their context, either pro- or anti-competitive. Finally, Article 40.2 (second sentence) requires Members to limit the measures to prevent anticompetitive practices to what is "appropriate". This requirement of proportionality must be understood similarly as the same requirement in Article 8.2. In particular, the appropriateness of the measure may only be assessed "in the light of the relevant laws and regulations of that Member". Therefore, TRIPS in no way precludes Members from establishing the forms of antitrust control they consider fit in view of their legal traditions and their socio-economic conditions. For example, they may establish an ex-ante control or an ex-post control by specific administrative agencies or by courts, and they may do so on the basis of administrative or of criminal law. The proportionality requirement means only that the measure must be suited to effectively address and deal with the risk and the harm for competition which a given licensing practice may entail.

IV - Exemptions of Intellectual Property Rights under Indian Competition Law

Intellectual Property Rights ("IPR") encompass rights to copyright, trademarks, geographical indications, industrial designs, patents, and layout designs, among other things

[71] For the territoriality principle underlying the TRIPS Agreement, see Ullrich, Technology Protection According to TRIPS: Principles and Problems, in Beier, Schricker, at 357, 361 et seq.,
372 et seq
[72] Heinemann, at 245 et seq.; Fox, at 492 et seq. (1996).
[73] See Fox, 486 et seq., 492 et seq. A good example are the no-challenge clauses, which at least in principle are unlawful under U.S. law (see Lear v. Adkins, 395 U.S. 653 (1969)

(topographies of integrated circuits). India has ratified the Agreement on Trade-Related Intellectual Property Rights ("TRIPS"). As part of TRIPS compliance, exemptions for exercising IPR under the Competition Act of 2002 have been given, subject to "reasonable restrictions." This is only applicable to anti-competitive agreements (Section 3) and not to misuse of dominant position (Section 4)[74]. However, Section 4 of the Competition (Amendment) Bill, 2023, has also been requested to be placed in the exclusions category.

The term "reasonable conditions" is not defined under the Competition Act. However, by implication, unreasonable requirements linked to the exercise of IPR will be subject to the Act's restrictions. Because IPR is mostly based on licencing agreements/arrangements that typically have a negative impact on pricing, quantities, quality, or types of products and services, they may violate competition rules if they are not fair. Licensing agreements must thus be judged on their rationality, particularly provisions such as patent pooling, tie-in arrangements, royalty problems, R&D bans, price fixing, and so on. The exercise of IPR exemptions is heavily reliant on the terms of the licence agreement.

A) Telefonaktiebolaget LM Ericsson v. Competition Commission of India and Ors. [75]

Micromax and Intex, the informants, were mobile-handset makers and suppliers in India. Ericsson, the opposing party, had various patents, including a large number of Standard Essentials Patents ("SEP") in the telecommunications industry, which was deemed the GSM standard by the European Telecommunications Standard Institute ("ETSI"). It was claimed, among other things, that Ericsson requested high royalties in violation of Fair, Reasonable, and Non-Discriminatory ("FRAND") agreements. The royalties claimed were based on the Net Selling Price of the final product (the mobile device), which is arbitrary and unfair. There were further charges of patent infringement. After establishing a prima facie case, the CCI directed the DG to investigate Ericsson for suspected anti-competitive behaviour stemming from its patent. Ericsson had appealed this ruling in the High Court of Delhi (since this order is not appealable under the Competition Act), stating, among other things, that CCI lacks the power to initiate any proceedings in connection to a patentee's royalty claim. It was stated that any problem concerning such a claim would come outside the purview of the Patents Act of 1970 and could not be investigated under the Competition Act. The CCI maintained that the Patents Act of 1970 and the Competition Act operate independently and without conflict. The CCI's authority to investigate conduct in contravention of Sections 3 and 4 of the Competition Act is distinct from any other authority the Controller may have under the Patents Act, 1970. The High Court of Delhi rejected the writ petition affirming the CCI's prima facie decision regarding the DG's inquiry. This order is still being contested in an LPA before the High Court of Delhi. Thus, it appears that the IPR holder is still fighting a legal struggle for non-exemption under the Competition Act, which began in 2013 and is still ongoing.

B) Monsanto Holdings Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.[76]

The informant (Nuzuveedu Seeds, a seed distributor) filed a complaint with the CCI stating that MMBL and its other group firms violated Sections 3(1), 3(4), and 4(2) of the Competition Act. The CCI had ordered an inquiry under Section 26(1) after being prima facie convinced of the petitioner's alleged anti-competitive practises. The petitioners contended that the abovementioned order violated the Act. The petitioners contended that Section 3(5)(i) of the Competition Act has two

[74] (1) No enterprise or group shall abuse its dominant position.

[75] W.P. (Civil) 464/2014 disposed of vide Order Dated 30th March, 2016 by the Delhi High Court. Appealed in L.P.A. No. 246/2016, 247/2016, 550/2016 which is pending for adjudication and listed for hearing on 27th August, 2020.

[76] W.P. (Civil) 1776/2016 and W.P. (Civil) 3556/2017) disposed of vide Order Dated 20th May, 2020 by the Delhi High Court. Appealed in L.P.A. No. 150/2020 which is pending for adjudication.

limbs. The first one provides a blanket exclusion in respect of rights to restrain infringement of IPR and the second, which relates to other reasonable conditions that may be necessary for protecting the IPR. It was claimed that the Parliament only used the term "reasonable" in relation to other restrictions and not in relation to agreements to restrain infringement of IPR. The High Court of Delhi rejected the petitioner's arguments, ruling that the CCI has the authority to investigate conduct relevant to intellectual property rights under the criterion of "reasonable conditions." This order has also been challenged in an LPA before the Delhi High Court. It is still under consideration. Litigation against Monsanto, which began in 2015, has not stopped. The IPR holder continues to fight one legal battle after another to exercise his rights, with litigation beginning even in the early stages.

V - Asserting IPR during inquiry/investigation before the CCI/DG

Discussing the case known as the Car Manufacturer's lawsuit under this heading. This lawsuit arose from a complaint filed against Original Equipment Manufacturers ("OEM") for failing to make open-market space and tools available to independent workshop/repairers. The OEM's rates for repair maintenance services and replacement parts were higher than in other markets, resulting in a large rise in maintenance expenditures for automobile owners. The CCI determined that the distribution and sales agreements violated Sections 3(4) and 4 of the Competition Act. Toyota, Ford, and Nissan filed an appeal with the Competition Appellate Tribunal (COMPAT) against the CCI's ruling.

The Appellants asserted that their intellectual property rights in the form of patents, trademarks, copyrights, and designs were imbedded in the production of different spare components, and that the restrictions imposed by them were necessary and reasonable under Section 3(5)(i) of the Competition Act. Concurring with CCI's views and conclusions, the COMPAT concluded and held that the Competition Act recognises intellectual property rules as a saving provision, namely that if limitations are imposed owing to intellectual property rights, such restraints must be reasonable. OEMs must provide stringent proof of ownership of genuine IPRs for each item in order to be eligible for exemption under Section 3(5)(i) of the Act.

In determining whether the agreements entered into between the OEMs and the OESs are subject to the provisions of Section 3(5)(i) of the Act, it is necessary to consider, among other things, whether the right asserted is correctly characterised as protecting intellectual property and whether the requirements of the law granting the IPRs are met. The COMPAT also determined that the majority of the OEMs lacked IPR registration in India, putting them outside the exemption of Section 3(5)(i) and subject to antitrust legislation. The order was challenged at the Supreme Court[77]. The order of the COMPAT has now been stayed. As a result, it appears that granting exemption from antitrust rules is fraught with difficulty.

VI – CONCLUSION

The increasing importance of innovation is undeniable. IP aims support technological innovation, creativity, and dissemination. Completion law's basic duty and function is to prevent anti-competitive acts that damage economic efficiency and raise transaction costs. In both circumstances, dynamic efficiency, economic efficiency, and customer welfare should take precedence. Market competition must take into account the intellectual property rights of inventors, who always strengthen the market. After examining the legislation and cases, it is clear that competition law lacks the analytical tools required to determine the implications of IPR protection. However, both sets of laws (competition and IPR protection) share the same fundamental goals: the promotion of

[77] Civil Appeal No. 1222 of 2017, 1054 of 2017 and 951 of 2017.

innovation and the welfare of society. In all jurisdictions, a complete IPR competition strategy is essential in the areas of licence agreements, market dominance control, and mergers. Long-term efficiency should be supported rather than justified in the short term. The goals of intellectual property and competition law are coherent and compatible. Only when there is a misuse of monopoly rights can competition law intervene. Many IP licencing techniques, such as tying, grant backs, and pooling, are not inherently restricted. Intellectual property rights are effectively protected by competition policy. The TRIPs Agreement establishes a fundamental foundation for intellectual property protection as well as the enforcement of anti-competitive intellectual property licencing practises.

Article 8(2) of the Agreement states that necessary measures may be required to prevent intellectual property rights holders from abusing their rights. Article 40(1) acknowledges technology transfer. Article 40(2) empowers members to identify anti-competitive actions that constitute an infringement of IPRs and to take steps to prevent or regulate such infringements. Such methods may include exclusive grant backs, contractual terms limiting validity challenges, and coercive package licencing techniques that hinder competition and significantly affect commerce.

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