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COMPARATIVE ANALYSIS OF CONFLICT BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

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ABSTRACT

This paper investigates into the common issues and conflicts which happened in both Intellectual property and competition law. In the globalized business marketplace, intellectual property rights of Patents, and copyrights etc., which creates monopolistic rights in economically and socially healthy way. This article describes about companies refrain from licensing their intellectual property to competitors, they undermine the basic tenets of competition law as well as the spirit of intellectual property protection. This paper also mentions Trade Related Intellectual Property Rights (TRIPS) compliance of compulsory licensing related to Pharmaceutical industry stating Novartis case, Standard Essential Patents in Micromax and Ericcson Case. This paper also provides an overview on IP and Competition in Information and Communication Sector and IP and competition in entertainment industry.

Keywords: ***Intellectual Property Rights, Patent, Copyrights, Standard Essential Patent, Novartis, Compulsory Licensing, monopolistic rights***

INTRODUCTION

In the contemporary era, Intellectual property rights and competition law are emerged as most significant branches of Business law. The interplay between intellectual property rights and competition law is very important for the maintenance of competitive and dynamic economic climate. Normally, Intellectual property rights and competition law are regarded as areas at odds with each other. Intellectual Property laws work towards creating monopolistic rights whereas, Competition law eliminates it.

Over the past two decades, intellectual property rights have grown to a statue from where it plays a major role in the development of global economy. In 1990's many countries unilaterally strengthened their laws and regulations in this area and many others were poised to do likewise. At the multilateral level, successful conclusion of the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) in the World Trade Organization enhanced the protection and enforcement of IPR to the level of solemn international commitment. The new global IPR system comes with both benefits and costs. The domain of intellectual

property is vast. Copyrights, Patents, Trademarks and Designs are known to have recognised for a long time. Newer forms of the protection are also emerging particularly stimulated by the exciting developments in scientific and technological activities[1].

Whereas, Competition /Antitrust laws involve the formulation of set of policies which promote competition in the local markets and are aimed at prevent anti- competitive business practices and unwanted government interference. Competition law is applicable not only to traditional activities but also to those once regarded as natural monopolies or preserve of the state, such as telecommunications, energy, transport, broadcasting and postal services. Even the liberal professions, sports, entertainment, and media have also become the subject of competition law scrutiny[2]

1.) INTERSECTION OF INTELECTUAL PROPERTY LAW AND COMPETITION LAW

Competition law and IP laws shares similar goals of ensuring consumer welfare and promoting innovation. The TRIPS Agreement administered by the WTO which sets down some standards for many forms of intellectual property regulation as applied to Nations of other WTO Members. Therefore, competition law comes into play when the protected rights are used and exploited during the years of protection. Competition law purports to ensure that ex - post IPRs are enjoyed/exploited in reasonable manner or do not extend beyond the protection granted [3]. Intersection of IP and Competition law is observed when there is an imbalance between the exclusivity rights accorded by IP law and anti – competitive practices that the competition law tries to protect, and therefore cases such as Ericson vs Micromax. Where on one hand, Ericsson attempted to enforce its Standard Essential Patents (SEPs), and Micromax on the other hand contended anti – competitive practice by Ericsson based on the nature of royalty practices that Ericsson tried to impose on the Defendant is just one among the growing number of examples where the interface between the two laws is strengthening. [4]

2.) COMPETITION CONCERNS IN LICENSING OF INTELLECTUAL PROPERTY RIGHTS

The qualification attached to this is that intellectual property law should provide economically meaningful monopolies. Otherwise, competition law which by itself doesn't condemn the mere possession of monopoly power, but rather certain exercises of or efforts to obtain it, might be allowed to interfere with the monopoly. Federal Trade Commission, USA observes that tension between intellectual property and competition policy, necessarily arises on the grant of invalid intellectual property and abuse or misuse of granted monopoly[5].Competition Laws in order to combat the IPR monopolies often include two important measures namely compulsory licensing and parallel imports. A compulsory licence is where an IPR holder is authorized by the state to surrender his exclusive right over the intellectual property, under Article 31 of the Trade Related aspects of Intellectual Property Rights (TRIPs). Compulsory licenses are granted under certain circumstance such as in the interest of public health, national emergencies, nil or inadequate exploitation of a patent in the country, and for an overall National interest. A parallel import on the other hand includes goods which are brought into the country without the authorization of the appropriate IP holder and are placed legitimately into a market. [6]. In addition, provisions like Section 3 of the new Competition Act, 2002. The Act deals with anti-

competitive agreements which cannot be used by IPR holders since they are in conflict with the competition policies. Firstly, patent pooling is a restrictive practice wherein firms of a particular manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, simultaneously fixing quotas and prices. Secondly, a clause that restricts competition with respect to research and development or which prohibits a licensee to use rival technology is considered anti - competitive under the law. Thirdly, a licensor under the law is prohibited from fixing the price at which the licensee should sell his goods. The above mentioned examples are not by any means exhaustive, but are a few illustrations demonstrating anti - competitive provisions applicable to IPR under the Act. Furthermore, under Section 27 of the Act, the Competition Commission of India has the authority to penalize IPR holders who abuse their dominant position. Further, under Section 4 of the Act the Competition Commission is also authorized to penalize the parties to an anti-competitive agreement, which is in contravention of Section 3 of the Act. Innovation has always been a catalyst in a growing economy resulting in more innovation. The advent of fresh innovations gives rise to healthy competition at macro as micro economic levels. IP laws help protect these innovations from being exploited unlawfully. In view of this IP and competition laws have to be applied in tandem to ensure that the rights of all stake holders including the innovator and the consumer or public in general are protected. The common objective of both policies is to promote innovation which would eventually lead to the economic development of a country however this should not be to the detriment of the common public. For this the competition authorities need to ensure the co-existence of competition policy and IP laws since a balance between both laws would result in an economic as well as consumer welfare.

3.) INTELLECTUAL PROPERTY AND COMPETITION LAW IN PHARMACEUTICAL SECTOR

The Doha declaration on the TRIPs agreement and Public Health in August 2003 finally led to the amendment to the TRIPs agreement in 2005.IN

The honourable Supreme court in Union of Indiav Cyanimide India ltd. And ANR.Which favoured the interests of manufacturersand discouraged price controls; the Hon'ble SC in its Order dated, 10th March 2003 directed the government to ensure that "essential and life – saving drugs do not fall out of price control". "Pricing of patented and branded generics outside the scope of price control is a major concern. Price negotiations on patented drugs may not ensure affordability and could determine other best available alternative public health safeguards." Price control of patented drugs is the need of the hour especially in the Indian Context where affordability of patented drugs is expected to be less than common. [7]

The Novartis dispute is a landmark judgment highlighting the fact that the IPR regime must safeguard the economic interests of the country and accordingly dismissed the application seeking patent on Gleevec, under the amended Patents Act. Novartis claimed that India's Patent Act did not meet the rules set down by the WTO and was in violation of the Constitution. The Main issue for consideration was whether the Indian Patents Law complies with TRIPS provisions? The Chennai High Court was of the opinion that Section 3(d) of the Patent Act should be construed as a refinement to the enhanced patentability criteria wherein only new forms that demonstrate substantially different utility than what existed before are patentable and held that Section 3(d) of

the Patent Act was in compliance with TRIPS provisions. Novartis has submitted Special Leave Petition before the Supreme Court of India and the final verdict is awaited though the patent has been already granted. [8]

4.) INTELLECTUAL PROPERTY AND COMPETITION IN INFORMATION AND COMMUNICATIONS TECHNOLOGY (ICT) SECTOR

The Info-Tech industry is currently into a lot of litigation involving violation of competition law across the world. The Problem is acute in cases of Standards – Essential Patents (SEPs). Standards are set by Standard Setting Organizations (SSOs) across the globe. These technical standards are encumbered by patents. Hence SSOs seek a Fair, Reasonable and Non – Discriminatory (FRAND) licensing commitment from patent holders. However, they do not determine the FRAND terms and leaves it to individual Parties. I.e. the patent holders and the licensee manufactures to negotiate. Hence, while standards are meant for collective public use, Patents are meant private exclusive rights. Implementation of Standards have an interest in getting the FRAND licence at a reasonable so as to avoid royalty staking. However, patent holders may end up suing manufacturers for patent infringement of SEPs. A pertinent question is whether or not injunctive relief must be granted for cases involving SEPs. Most jurisdiction have denied injunctive relief by emphasizing that when monetary damages are sufficient , there is no irreparable harm that is caused to the patent holder. However, in India, Ericsson has been able to obtain a consent order in which the court has determined interim royalties until the conclusion of the trail. Non-compliance of such an order could lead the invocation of injunctive relief. Since validity can be an issue in cases involving SEPs, it is important to maintain restraint in granting injunctive relief. In fact, the European Union Competition Commission has held that:

"Seeking injunctions before courts is generally a legitimate remedy for patent holders in case of patent infringements. However, the seeking of an injunction based on SEPs may constitute an abuse of a dominant position if a SEP holder has given a voluntary commitment to license its SEPs on FRAND terms and where the company against which an injunction is sought is willing to enter into a license agreement on such FRAND terms. Since injunctions generally involve a prohibition of the product infringing the patent being sold, seeking SEP – based injunctions against a willing licensee could risk excluding products from the market. Such a threat can therefore distort licensing negotiations and lead to anti-competitive licensing terms that the licensing terms that the licensing terms that the licensee of the SEP would not have accepted absent the seeking of the injunction. Such an anticompetitive outcome would be detrimental to innovation and could harm consumers.

In India, Micromax and Intex have approached the CCI complaining that Ericson's conduct in discriminating manufacturers in terms of differential royalties amounted to abuse of dominance since the royalty rates were not based on actuals but on final price of the end product. The CCI has initiated investigations against Erickson after finding a prima facie case. However, the question of seeking injunctive relief and its relationship with abuse of dominance has not been tested.[9]

5.) INTELLECTUAL PROPERTY AND COMPETITION LAW IN ENTERTAINMENT INDUSTRY

India is the largest producer of movies in the world with over 1,300 films released each year. With respect to theatre density, however, India ranks poorly with 12 screens per million opposed to 117per million in the US. As a result of this huge infrastructural deficit, an industry survey estimates a poor volume of 4 billion ticket sales each year across 12,000 odd theatres. For a country with a population totalling 1.2 billion, the volume of ticket sales Vis – a – Vis movies produced is abysmal. There are plethora of cases of IPR and Competition law with respect to Media Industry. Intellectual Property is not differentiated from other tangible properties for the purpose of competition law. So CCI can adjudicate matters relating to IPRs. The Competition commission can decide constitutional, legal, and jurisdictional issues except the validity of statute under which tribunal is established. In the case of Aamir Khan Productions Private Limited [10]. The court ruled that competition has the power to deal with intellectual property cases. The court laid down, "competition commission has the power to deal with intellectual property cases. What can be contested before Competition Commission under Competition Act, 2002 has overriding effect over other legislations for the time being in force." In The same case, FICCI filed information against United Producers/ Distributors Forum (UPDF) and others for market cartel in films against the Multiplexes. In order to raise their revenue, UPDF had refused to deal with multiplex owners. The Fact that multiplex business is 100 percent dependent upon films hence, making this deal to come into the category of refusal to deal and anti – competitive. The UPDF and others hold almost 100 percent share in Bollywood film industry. UPDF had been indulged in limiting and controlling supply of films in the market by refusal to deal with multiplexes which is the violation of Section 3 (3) of Competition Act 2002. CCI prima facie found there is anticompetitive agreement and there is abuse of dominant position also. So CCI directed Director General (DG) to inquire into the matter. DG inquired into the matter and reported it to be cartel. CCI issued a show cause notice. UPDF contented that films are subject to copyright board has the jurisdiction to deal with matter. Furthermore, contented that for exclusive license, only remedy is compulsory license available under Copyright Act. So petitioner challenges the action taken by the CCI on the ground of lack of jurisdiction.

CONCLUSION

Thus the TRIPs Agreement provides a basic framework of intellectual property protection as well as enforcement of anti- competitive licensing practices in intellectual property. The IPRs and competition law objectives are consistent and compatible where the competition law intervention is required only when there is an abuse of monopoly rights. Both IPR and Competition laws promotes innovation and consumer welfare. Domains of two laws have been harmoniously construct to accomplish middle path. A detail discussion leads to conclusion that the conflict between two laws can't be accomplished in isolation. Even though they are parallel to each other.

REFERENCES/ENDNOTES

1. Intellectual property rights – law and practice, the institute of Company secretaries of India.

2. Richard Whish, Competition Law 1, 5th edition (New York: Oxford University Press 2005).
3. Competition Law in India, Abir Roy,Jayant Kumar, Second Edition, Eastern law House.
4. ***Telefonaktiebolaget lm Ericsson v Competition Commission of India*** **W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014.**
5. Roberts v Sears, Roebuck & Co. 723F 2d 1324,1346 (7th Cir 1983).
6. **www.legalserviceindia.com/article/1307 - competition-law-and-intellectual-property- laws.html**
7. Union Of India & Anr V. Cyanimide India Ltd. & Anr [1987] SC 1802
8. Novartis AG v Union of India and Others
9. Competition law and Intellectual Property Rights, e- paathsaala.
10. Aamir khan Productions Private Limited .v. Union of India on 18 August, 2010.