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## **Conflict between IPR and competition law**

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### **Abstract**

To what extent should competition law be permitted to intrude into the hallowed halls of IP?

IP purists argue that IP regimes are good enough to internally sort out the negative fallouts of excessive monopoly power typically engendered by avaricious IP owners. Intellectual Property Rights (IPR) consists of a bundle of legal rights conferred upon the owner of intangible property to acquire the monopoly to utilize commercially his intellectual creations. Competition Law regulates competition so that there is no adverse effect on the market. IPR grants durational limited monopoly preventing creation of unlimited dominant position in the market. The objectives of competition law is to prohibit abuse of dominant position, formation of anti-competitive agreements and regulating combinations and mergers. IPR also plays a positive role in encouraging innovation, technology creation, promotion of new business etc. therefore the role of IPR is also necessary.

Markets are generally governed by different mechanism or system. For simplicity this paper concentrates on two mechanisms, they are free market operation and regulated market operation. In a country with a free market operation, the prices of goods are set freely by consent between buyers and sellers and are free from any intervention from the government or any other regulatory measures. In a regulated market economy, as from the name, it can be deduced that it is controlled by different regulatory bodies. The legislations are one of the chief components of regulatory mechanism which in its concerned areas tries to balance between the free play of monopoly rights and interests of the society.

**Keywords:** geographical indication, invention, trademarks, trade secrets

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### **Introduction**

#### **What are intellectual property rights?**

Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work or investment in a creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions. The importance of intellectual property was first recognized in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties are administered by the World Intellectual Property Organization (WIPO).

The types of intellectual property include:

- Trade Secrets,
- Trademarks,
- Copyrights,
- Patents,
- Invention,
- Geographical indication.

#### **Nature of Intellectual Property**

IP has its very own extraordinary highlights to separate itself from different sorts of rights. These highlights include:

- **Regional:** Unlike unflinching property, IP property is normally utilized in different nations. In this way, IP-related

issues will in general be settled by the national laws of the nations included.

- **Selective ideal to proprietors:** This implies parties other than the proprietors don't reserve the privilege to utilize the IP without authorization.
- **Assignable:** Since an IP is a type of rights, it tends to be doled out. It tends to be sold, bought, authorized, enlisted, or connected.
- **Autonomy:** In many cases, IP rights are typified in items, with various sorts of IP rights subsisting in a similar kind of article.
- **Subject to Public Policy:** IP rights need to consent to open arrangement. While proprietors of IP try to accomplish sufficient compensation, they likewise need to ensure that shoppers can utilize their manifestations with insignificant bother.
- **Unified:** Multiple gatherings can have interests in a unique creation without affecting the interests of other right holders on a similar thing. Because of its unbreakable nature, IP is an asset that can't be depleted.

#### **Targets of IP Law**

In the web age, IP rights are imperative to the accomplishment of a business or brand. There are laws that secure proprietors of IP, generally as licenses, copyrights, and trademarks. Be that as it may, infringement of the terms of these insurances can prompt misappropriation and out of line rivalry. It can endanger

monetary accomplishment by backing off the generation of new thoughts and substance. By and large, the destinations of IP law include:

Monetary motivating force – IP rights give makers of IP a budgetary motivator. Financial development – IP law can encourage monetary development by giving statutory articulation to the makers' monetary rights and advancing financial and social improvement through the cultivating of reasonable exchange.

The government has already approved the proposal to establish a National Institute of Intellectual Property Rights Management at Nagpur<sup>[1]</sup>. The primary functions of the institute include training, education and research, in addition to acting as a tank on key IP policy matters. The government has already put forward plans to expand and modernise further the IP offices in order to make them world class<sup>[2]</sup>.

IP laws are not enforced internationally they are for the nation's own interest that is the fundamental principles in Berne and TRIPS and thus government has the freedom to choose their IP regime. The Government of India has taken several measures to streamline and strengthen the intellectual property administration system in the country these remedies include civil, criminal and provisional remedies. When a party proposed to take a civil action against any infringer, it has to file a Suit for infringement or passing off in a High Court or a District Court. Upon a successful suit for patent infringement, the court will order an injunction restraining the infringer from working the patented invention for the entire term of the patent.

Government of India has created a group of technical experts i.e. known as *Mashelkar Committee* to examine the issues in patent law.

### **Competition Law**

Competition law is a law that elevates or tries to keep up market rivalry by directing enemy of aggressive lead by companies. Competition law is actualized through open and private enforcement. Competition law is known as "antitrust law" in the United States for authentic reasons, and as "hostile to imposing business model law" in China and Russia. In earlier years it has been known as exchange provides legal counsel in the United Kingdom and Australia. In the European Union, it is alluded to as both antitrust and competition law.

The historical backdrop of competition law comes to back to the Roman Empire. The business practices of market merchants, societies and governments have dependably been liable to examination, and at times extreme sanctions. The two largest and most influential systems of competition regulation are United States antitrust law and European Union competition law. Countries may allow for extraterritorial jurisdiction in competition cases based on so-called effects doctrine. The protection of international competition is governed by international competition agreements. In 1945, during the negotiations preceding the adoption of the General Agreement on Tariffs and Trade (GATT) in 1947, limited international competition obligations were proposed within the Charter for an International Trade Organisation. These obligations were not included in GATT, but in 1994, with the conclusion of the Uruguay Round of GATT Multilateral Negotiations, the World Trade Organization (WTO) was created. The Agreement Establishing the WTO included a range of limited provisions on

various cross-border competition issues on a sector specific basis<sup>[3]</sup>.

The competition commission of India became fully operational only from may, 2009, nine years after the competition act was passed and two years after it was amended. Very clearly the competition act with its focus on economic objectives defines the role of commission as an economic instrument where the dispensation of justice is primarily to promote and sustain competition in market while protecting the interests of consumers. The foundation of the competition policy in India is laid on the Articles 38<sup>[4]</sup> & 39<sup>[5]</sup> of the constitution of India.

Well the nine principles of competition policy are:

- Foster competitive neutrality between public and private sector enterprises
- Ensure access to essential facilities
- Facilitate easy movement of goods, services and capital
- Separate policy-making, regulation and operation functions
- Ensure free and fair market process
- Balance competition and intellectual property rights(IPR)
- Ensure transparent, predictable and participatory regulatory environment
- Notify and publicly justify deviation from competition principles
- Respect for international obligations

Competition law is a means to implement competition policy and prevent anti-competitive practices by firms and unnecessary government interventions.

The three major Federal antitrust laws are:

- The Sherman Antitrust Act
- The Clayton Act
- The Federal Trade Commission Act.

Intellectual Property Laws are monopolistic in nature. They guarantee an absolute right to the creators and owners of work which are a result of human artistry. Also they prevent commercial exploitation of the innovation by others. This legal monopoly sometimes lead to market power and even monopoly as defined under Competition Law. When this advantage or dominant position is abused, it creates a conflict between IPR and Competition Law.

### **Differentiation through exclusivity- underlying philosophy of IP**

Differentiation is the underlying economic justification for offering IP protection to products or processes. Such differentiation is owing to several aspects of the product, including unique technical process, new industrial design, branding etc... Differentiation had positive benefits for consumers since it provides new products and processes. Hence, in the Schumpeterian sense differentiation allows creative destruction. IP is an incentive to engage in such differentiation.

To take an example of a lemonade drink- If a vendor X is selling the drink at Rs 20/-, but for any cartelization the competitor in his area will start selling the same at a lower price to compete with the original vendor to an extent where prices are brought down to the marginal cost plus some acceptable profits. Beyond such price-based competition, it would not be profitable for firms to compete. Hence, one of them draws up a strategy to differentiate

his lemonade by adding some spices or other features that can differentiate his product. By doing some he competes through product differentiation and innovation. If the other vendor has to keep up in attracting new customers, he must innovate. The important point here is that price-based competition is distinct from competition in innovation.

### **Dynamic efficiency- underlying philosophy of Competition policy**

The aim of competition policy is to efficiencies in the market to benefit the consumers. Here, static efficiency is achieved through competitive price-based competition. However, with price-based competition, only static efficiency can be created. In the long run, static efficiency does not lead to the growth of markets. Innovation is needed to produce and sustain dynamic efficiency. Although Competition law and policy may defer to dynamic efficiency, it does not lead to a necessary conclusion that IP is the only way to achieve this. There may be other alternative tools to create dynamic efficiencies in the market.

efficiency v. public good The efficiency goals of competition policy are highly contested suggesting that the Chicago school of economics has gone too far in justifying efficiency at the cost of consumer benefits and competition. 5 While efficiency is one of the goals of competition law, IP is distinguishable from other property rights that create efficiency in the markets. This is owing to the unique nature of knowledge, which is both non-rival and non-excludable. Hence a balance has to be maintained.

The concept of public goods in relation to IP is important for understanding the kind of regulatory interface regime that must be developed. The public good concept of knowledge/information, to which IP law extends protection can be explained by an example. If I have an apple, I can only give so much to you from whatever is left after eating because apples (all chattels and land also) are rival in their consumption. No two people can consume the same apple at the same time in a full measure due to such rivalry. However, if I decide to give a lecture, it can be consumed by several people together without depleting the possibility of each one (include me) to consume the lecture. This non-rivalry is inherent in knowledge/information due to its public good character. Similarly, if I have give out the apple to you, I can always take it back and exclude you in the sense that land and chattels are excludable in character. However, a piece of information or knowledge once disclosed with any inhibiting factor (like IP) cannot be disposed of those who now possess it.

Indian competition policy within patent law: Ex-ante and Ex-post While competition law is designed to intervene ex-post (ie. After the abuse has occurred), IP laws are designed to promulgate competition ex-ante. This may surprise many that since the main objective of any IP is to convey limited monopoly through a right to exclude, how is it reasonably possible to create competition within the IP based framework. Taking the example of patent law, we can see the certain provisions in patent law in India to create a kind of dynamic efficiency that balances competition.

Ex-ante and ex-post competition within patent law- policy thresholds

Ex-ante competition in the patent law context is created by virtue of identifying the level of nonobviousness that enable the patent office to assess the qualitative features of an invention. Thus screening for inventive step leads to efficiencies since a higher

level of inventive step can leave certain aspects of the invention in public domain for lack of compliance with such a qualifying threshold. This is called the patentability criterion. Similarly, Section 3(d) of the Patents Act, 1970 also creates a higher threshold for secondary patents in the area of chemicals by requiring an enhanced efficacy criterion for qualifying as subject-matter that can be patented.

However, a close observation reveals that both IPR and Competition Law work towards a common objective. There is a unanimous consensus on the fact that both aim towards promotion of innovation and consumer welfare <sup>[6]</sup>. This can be witnessed from other jurisdictions as well. According to the U.S. Department of Justice & the Federal Trade Commission- "... [Competition] laws aims towards protection of robust competition in the market, while IP laws work to protect the necessary ability to earn a return on the investments that is necessary to innovate. Both lead to enter the market with production of desired technology, service or product."

The harmonization of the same is evident from the fact that the Competition Act, 2002 has accommodated the objectives of IPR aptly while framing laws and provisions. Competition law enumerates that there is no harm in dominance of market power as long as it is not abusive. It may be considered against competition law if the proprietor holder abuses its dominant position thereby tampering competitive market. The IPR owner is generally viewed in a dominant position but this can be reconciled with the above fact of abuse of dominant position.

### **The TRIPS Agreement**

The TRIPS Agreement also enumerates guidelines and safeguards in this regard. The essence of the same can be narrowed down to three guiding principles which are:

- a) It is up to the determination of each nation to reserve its own IPR-related competition policy.
- b) It is required to have consistency between the TRIPs Agreement's principles of IP protection and national IPR-related competition policy.
- c) The focus is majorly centred towards targeting those practices that are restricting the dissemination of protected technologies.

The TRIPS agreement enumerates elaborately in its text the role of IPRs and supporting character of competition policy to avoid the deadlock between the two domains. However, TRIPS agreement is merely facilitating than being mandatory. Thus, the objectives and principles of TRIPS guide in attaining the competitive balance required for facilitating innovation along with economic growth. Article 6 of the TRIPS deals with an important aspect of exhaustion, which plays, a vital role under competition law. It deals with exhaustion of rights. It facilitates the balancing of rights, duties and liabilities under the two domains. Article 8.2 deals with other aspects of objectives and principles enumerated under the TRIPS Agreement. This article is of much importance from the perspective of developing nations as it facilitates developing nations in justifying its" provision and stand in competition law for dealing in areas that are silent under TRIPS agreement like abuse of dominant position in the relevant market and IPR <sup>[7]</sup>. Article 40 <sup>[8]</sup> of TRIPS is the cornerstone of the interface between IPR and competition law and helps in providing flexibilities to the developing nations. It has provisions like code of conduct for transfer of technology <sup>[9]</sup> for the

developing nations and equitable principles for regulating anti-competitive and restrictive practices that were adopted by the UN General Assembly in 1980.

### **The study of the interface in India**

a mixed view is prevalent in the present scenario pertaining to the much debated issue of IPR and competition law. Critically examining, one can easily reach to the reasonable inference that every subject under IPR does not need regulation by the competition law<sup>[10]</sup>. In India, Competition Act, 2002 provides for the prohibition of anticompetitive practices and not monopolies per se. Competition law effectively operates to regulate the unjustified practices under IPR subject to conditions and provisions enumerated therein.

The competition law policy and practice find reference in the Indian law vide Articles 38 and 39 of the Constitution. It lays down the principles for promoting and securing social, economic and political justice for the people and maintaining social order. 49 The duty is on the State to ensure the same. Additionally, the State is burdened with the duty to regulate the ownership of material resources and direct the control in the best way to address the common good with fulfillment of maximum objectives. This is to ensure and check the concentration of power in the hands of few, which leads to anti-competitive practices and accumulation of wealth in the hands of few. S. 3 of the Competition Act, 2002 dealt with the anti-competitive agreements. The interface between competition law and IPR can be easily traced by incorporation of S. 3(5) of the Act. It is essentially a blanket provision which acts as an exception for IPRs under S. 3(5) of the Act. This is done to accommodate innovations and thereby promote technologically advanced goods and products. 52 However, it also regulates efficiently, the practice in order to check unreasonable practices of IPR under this provision<sup>[11]</sup>.

There have been various landmark judgments pertaining to the conflict between IPR and the competition law. Various authorities and agencies are continuously deliberating and debating over this contentious issue. *Aamir Khan Productions Pvt. Ltd. v. Union of India* is a landmark judgment delivered by the Bombay High Court wherein the Court while dealing with a matter pertaining to the issue of IPR held that CCI has the jurisdiction to deal with all cases concerning competition law and IPR. In *Kingfisher v. Competition Commission of India*<sup>[12]</sup> also, the Court reiterated that the CCI is competent to deal with all the issues that come before the Copyright Board. Such cases enumerate the fact that the Indian Courts are ready for dealing with emerging cases of competition law involving IPR. Recently, CCI also held that copyright is not an absolute right but is merely a statutory right under the Copyright Act, 1957. Further, in *Microfibres Inc v. Girdhar & Co.*, the Court observed that: "The legislative intent was to grant a higher protection to pure original artistic works and lesser protection to the activities that are commercial in nature. Thus, the intent of the legislature is explicitly clear that the protection provided to a work that is commercial in nature is at lower pedestal than and not to be equated with the protection granted to a work of a pure Article." It can, therefore, be safely concluded that the precedents enumerate greater protection to original artistic works as compared to the furtherance of commercial interest. CCI has

come out with a landmark decision as it undoubtedly moved towards checking the abuse of dominance by forming cartels in the market of the film industry.

Recently an issue was raised in the Delhi High Court in the case of *Hawkins Cookers Limited v M/s Murugan Enterprises. Hawkins Cookers Limited* is the owner of the trademark "Hawkins" and uses it on several products including pressure cooker gaskets. Murugan Enterprises, manufacturers, among other things gaskets for pressure cookers and uses the Hawkins trademark in respect of parts of pressure cookers to establish compatibility. Murugan Enterprises in its arguments before the court opined that it had its own well-established trademark "Mayur" with a prominent peacock displayed on its product packaging. The Delhi High Court in this case held that no reasonable person or purchaser could assume a trade connection between the "Mayur" brand of gaskets and the "Hawkins" brand of pressure cookers. Further, the court opined that in this case the Murugan Enterprises neither sought to benefit from Hawkins' trademark nor did it try to show a connection between the two. Additionally the court opined that the defendants' use of the "Hawkins" mark was only to show the suitability of the product to be used as an ancillary product in a Hawkins pressure cooker and that such use would evidently fall within the exception carved out under Section 30 of the Trademarks Act, 1999.

Further, the use of the trademark in relation to the product is reasonably necessary to indicate the fitness of the gaskets for the "Hawkins" brand of pressure cookers. In the Hawkins case, Justice Kaul also pointed out that "The object of filing of the suit thus appears to be to create a monopoly over such (gaskets) ancillary items so that no third party is able to sell the same in the market." The judge also goes on to point out that the use of the "Hawkins" trademark on the gaskets packaging would have been infringing if it had been used as a trademark. Since Murugan Enterprise's use of the "Hawkins" mark was only indicative and is not being used as a trademark there would be no question of infringement. The Delhi High Court judgment in the Hawkins case reflects on the fact that dominant firms cannot be encouraged by courts if they are found to abuse their dominance by creating a monopoly in the market thereby affecting the market share of smaller and/or firms who are in direct competition with such dominant firms.

Excessive pricing and predatory pricing is yet another problem that competition law is grappling with. It is also closely associated to refusal of license. In *Union of India v. Cyanamide India Ltd. and another*<sup>[13]</sup>, the Hon'ble Court held that overpricing of lifesaving drugs is also prohibited, and the same does not fall beyond the ambit of price control. Competition law is currently facing a lot of trouble in keeping the branded agencies and patented products under the ambit of price control. In case of lack of substitutes, there's always a potential danger hovering in the form of monopolies. The domain of life saving drugs in relation to high pricing is a major concern in developing nations. Competition law is enacted to promote fair practices prevent abuse of dominant position and completion in the market that is prevalent in the form of tie-in arrangements, excessive pricing, exclusive licensing etc.

### **Conclusion**

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 well 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. Firstly, IPR law must be regulated only in the sphere where it causes adverse effect on the competition to prevent unnecessary interference in the IP laws. Secondly, IPR companies must be regulated efficiently to prevent concentration of market power in the hand of few to prevent the potential threat of cartels and abuse of dominant position. CCI must be given ample power and jurisdiction to scrutinize distortion of competition and refusal to deal by the industries and firms in the market. Fifthly, excessive pricing and refusal to deal unnecessary on frivolous grounds should be made subject to CCI scrutiny to facilitate smooth functioning of the market.

Also, it is equally important from the perspective of a developing nation like India to understand the sensitive and crucial aspects of the contentious issue of tussle between IPR and its effect on competition law. The framework is set inappropriately to handle any interference with economic growth. However, a true understanding and application of laws and reasons behind the precedents would help in ensuring the smooth function of both the domains and specific needs of the Indian market.

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3. [https://en.wikipedia.org/wiki/Competition\\_law](https://en.wikipedia.org/wiki/Competition_law)
4. State to secure a social order for the promotion of welfare of the people The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations
5. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means to livelihood; that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; that there is equal pay for equal work for both men and women; that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
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