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Monopoly or No Monopoly - The Conflict between Competition Law and IP Law

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Abstract

Innovation and Competitiveness have a symbiotic relationship that provides the basis for interaction between these two branches of law, that is IP law and Competition law. These two legal regimes are not just important for legal enthusiasts but also attract economists worldwide. These two fields have gained much importance in the last few years as competition creates a level playing field for all the firms participating and IPR has become part of a strategic plan to ensure the growth of the enterprise. In short, the main aim of these legal regimes is to foster the growth of a firm and the economy but the path chosen by both regimes is different. IPR provides an exclusive right over a certain intangible property in the market that a firm creates, competition law, on the other hand, keeps a check on the abuse of market power caused by the anti-competitive exercise of IP rights which leads to a tussle between the two laws and thus creating a conflict of monopoly or no monopoly. The article throws light on understanding the interaction between both branches of the law in society.

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Introduction

The last few decades have seen immense restructuring and reforming of economies where competition has been one of the central organizing principles. Every economy today strives to achieve efficiency. While efficiency might mean different things to different people or economies, Competition law and Intellectual Property Rights (IPR) are two legal regimes that are essential in achieving this efficiency. Competition law, on one hand, focuses on keeping a check on anticompetitive conduct in the economy while IP law, on the other hand, focuses on rewarding inventors for their inventions. The idea behind it is simple: competition law induces the producers to do better in the market, and providing legal protection to the inventors through IPR encourages other people, paving the way for more intellectual creation and innovation. But these two legal regimes are often considered "Friends in disagreement" as one discourages monopoly and the other encourages monopoly leading to a conflict in the market and creating a dilemma on which law prevails over whom. This dilemma attracts many economists and legal enthusiasts; therefore, the need to understand the basic interface between competition law and IPR law becomes important.

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Looking into the Law of Competition

Competition in a market in its most basic sense would mean rivalry between different firms or sellers to secure the patronage of buyers for achieving a particular business objective such as profits, sales, or market share. Competition law refers to the framework of rules and regulations designed to check anti-competitive conduct in the economy, it aims at encouraging the process of competition while discouraging the monopoly for the benefit of the consumers. Thus, competition law tends to create a level playing field for sellers, meanwhile protecting the consumers. A dynamic competitive environment in the market along with competition policy and the law ensures a successful market economy that includes lower prices, better products, and wider choices.

Before we dig deeper into the important provisions of competition law it is important to understand the background and evolution of competition law. The history of competition law can be traced back to the Sherman Act of 1890 in the USA and The Canadian Combines Act of 1889 which were directed against the formation of monopolies in the market economy for consumer welfare. This led to the enactment of competition laws in different countries across the world which also saw India as a follower of the same.

History and Evolution of Competition law in India

The roots of the law on competition in India can be discovered in **Articles 38 and 39** of the Indian Constitution which lay down the duty of the State to promote the welfare of the people by securing and protecting a social order in which social, political, and economic justice is prevalent and its further duty to distribute the ownership and control of material resources of the community in a way to best sub-serve the common good, in addition to ensuring that the economic system does not result in the concentration of wealth.[2] This led to the enactment of the **Monopolistic and Restrictive Trade Practices (MRTP) Act** in 1969 for the prevention of concentration of economic power, prohibition of restrictive trade practices, prohibition of unfair trade practices, etc.

As the new paradigm of economic reforms namely Liberalisation, Privatisation, and Globalisation (LPG) was introduced into the Indian Economy in 1991, the ineffectiveness of the MRTP Act became quite clear as it was inadequate to regulate the market and ensure the promotion of competition therein. The Central Government, therefore, enacted a new law **Competition Act, 2002** after a report submitted by Raghavan Committee in 2000. The MRTP Act was eliminated by the Competition Act of 2002.

[2] Rishika Sugandh & Siddhartha Srivastava, *INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: INDIAN JURISPRUDENCE*, International Journal of Law and Legal Jurisprudence Studies, available at http://ijlljs.in/interface-between-intellectual-property-rights-and-competition-law-indian-jurisprudence/, last seen on 03/10/2022

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Important provisions of the Competition Act, 2002

One can agree that there are three basic functions of the Competition Act, 2002 which are given below[3]

1. Prohibition of certain anti-competitive agreements. (Section 3)[4]
2. Prevention of abuse of dominant market position, and (Section 4)[5]
3. Regulation of combinations. (Sections 5 &6)[6]

Section 3 of the Competition Act, 2002 deals with anti-competitive agreements and terms them as void. The competition act prohibits any agreements which cause or is likely to hurt the competition in markets in India and declares such agreements as void. This section also explains the concept of horizontal agreements and vertical agreements in Sections 3(3) and 3(4) respectively while the legislature did not use the words Horizontal or vertical agreements, however, the use of some words indicates that the section covers such types of agreements.

Section 4 of the Competition act deals with the provision related to the abuse of a dominant position. A dominant position under Section 4 is defined as "a position of strength enjoyed by

[3] Teacher, Law. (November 2013). *Introduction to Competition Act*, available at https://www.lawteacher.net/free-law-essays/international-law/introduction-to-competition-act-international-law-essay.php?vref=1, last seen on 03/10/2022
[4] Section 3, The Competition Act, 2002
[5] Section 4, The Competition Act, 2002
[6] Section 5 & 6, The Competition Act, 2002

an enterprise in the relevant market in India. The abuse of the dominant position impedes fair competition between the firms, exploits consumers, and makes it difficult for other players to compete with the dominant enterprise on merit.[7] Dominance per se is not considered bad by the competition act but it's the abuse of such dominance that is prohibited under the act.

In simple words, a combination can be defined as a merger, acquisition, or amalgamation between two or more enterprises or businesses.[8] But the Competition act defines combination under Section 5 as "The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises." The act, therefore, prohibits any anti-competitive combinations entered into by the MNCs, as MNCs with their huge power and resources tend to dominate the Indian small-scale industries.[9]

The Intellectual Property Law

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; symbols, names, and images used in commerce.[10] It is a form of intangible property that can be incorporated for the creation of new goods or services or in adding value to already existing products. IP is traditionally divided into two branches, namely Industrial

[7] Kajal Dhiman, *ABUSE OF DOMINANT POSITION UNDER COMPETITION ACT*, available at https://articles.manupatra.com/article-details/ABUSE-OF-DOMINANT-POSITION-UNDER-, last seen on 03/10/2022

[8] Sparsh Agrawal, *Comprehending combination under Competition Law*, available at https://blog.ipleaders.in/comprehending-combination-competition-law/#Introduction, last seen on 03/10/2022

[9] Ibid

[10] *What is Intellectual Property*, World Intellectual Property Organization, available at https://www.wipo.int/about-ip/en/, last seen on 03/10/2022

Property and Copyright, the industrial property branch includes trademarks, patents, designs, etc. Intellectual Property has become part of the sophisticated legal strategies adopted by companies around the country for achieving growth and stability. The emergence of IP around the world has led to the expansion of IP rights which gives an edge to the IPR holders to utilize their product in the way they want and the absence of such rights on IP would lead to a situation wherein other firms in the market would be in a position to free ride on the successful results of research and development of another firm.

In the judgment of ***R.C. Cooper V Union of India***[11], Supreme Court aptly stated "property" means the "highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which do not depend on another's courtesy: it includes ownership, estates and interests in corporeal things, and also rights such as trademarks, copyrights, patents, and even rights in personam capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially concerning transfer or succession, and to their capacity of being injured".

Labour Theory

Different theories try to explain the foundation of Intellectual Property Rights, one of the most popular ones is the labour Theory. The labour theory was propounded by John Locke who stated that a person's productive work gives him the right of property claim. According to the

[11] Rustom Cavasjee Cooper v. Union of India, 1970 AIR 564, 1970 SCR (3) 530

Labor Theory, a person who labors upon his resources has a right to bear the fruits of his effort, when work is done by a person using his intellect and his labor it is the duty of the state to make sure that the person has an exclusive right over that property. The theory provides incentives to individuals by offering them recognition for their creativity, this encourages the creators and inspires others to produce more and make their work available to the public.

History and Evolution of IPR

The origin of IPR goes back to 1883 with the adoption of The Paris Convention for the protection of Industrial Property. This convention was a landmark event in the history of intellectual property. Since the Paris Convention dealt with industrial property and not Copyright, The Berne Convention solved this issue in 1886 by protecting the literary work and the rights of authors. Then many different conventions were ratified for IPR which led to the development of IPR in the world. In recent times, the ambit of IPR has expanded and has reached new dimensions, for example- traditional knowledge, biological diversity, protection of new plant varieties, etc.

The intellectual property laws in India were developed during the British period. The British enacted different statutes for the protection of different forms of IPR in India but after independence, changes were sought in the existing laws which led to the enactment of different statutes which are existing in the country now such as The Copyright Act of 1957, The

Trademarks Act of 1999, The Patents Act of 1970, The Geographical Indication of Goods (Registration and Protection) Act of 1999, etc.

Hence as a post-industrial revolution phenomenon, the expansion of industrial property has taken new dimensions. The evolution of Intellectual Property Rights is closely associated with the expansion of knowledge, industrial progress, commercial viability, and access to technology. The process of development is continuing in new areas such as Traditional knowledge, Trade secrets, Protection of new plant varieties, etc.

Conjunction between Competition Law and Intellectual Property Law

As discussed earlier, Competition Act regulates three basic types of conduct i.e., anti-competitive agreements, abuse of dominant position, and anti-competitive combinations which makes it possible that IPR holders would engage in conducts falling under these categories to earn super normal profits which makes it important to discuss the interface of these three areas with IPRs

1. **Anti-competitive agreements and IPRs:**

There is no reference to the word "Competition" in any of the IP statutes but the Competition act provides certain exemptions to protect the IPRs in Section 3(5) of the act which is read as follows:

(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999;

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999;

(e) the Designs Act, 2000;

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000;[12]

Section 3(5) of the act exempts the agreements made by certain persons from falling within the purview of the Anti-Competitive agreements but under some reasonable conditions. Thus, to be eligible under the provision, conditions in the agreement must be reasonable and necessary

[12] Section 3(5)(i), The Competition Act, 2002

to protect the rights that find their basis in the IP law statutes specified in Section 3(5)(i) of the Act.[13] But the application of this section is ambiguous as the legislation does not specify the reasonable conditions and leaves it to the court to determine it on a case-to-case basis. But does this section implies that the objectives that are sought to be served by the application of IPR laws are given priority over the objectives sought to be served by the application of Competition law?[14]

In ***FICCI – Multiplex Association of India v. United Producers/ Distributors Forum***[15], The Competition Commission of India (CCI) stated that "the intellectual property laws do not have any absolute overriding effect on the competition law. The extent of the non-obstante 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." However, CCI in this case did not mention the parameters that made the agreements unreasonable.

2. Abuse of dominant position and IPRs

[13] Chandrika Bothra & Mehak Kumar, *DETERMINING THE REASONABILITY OF CONDITIONS UNDER §3(5) OF THE COMPETITION ACT: ANALYSING THE INTELLECTUAL PROPERTY LAW EXEMPTION*, 13 NUJS Law Review 4 (2020), available at http://nujslawreview.org/wp-content/uploads/2021/03/13-4-Bothra-Kumar.pdf, last seen on 03/10/2022

[14] Paramjeet Berwal, *Section 3(5)(i) OF THE COMPETITION ACT- AN ANALYSIS*, National Law School of India Review Vol. 27, No. 2 (2015), pp. 168-184, 175 available at https://www.jstor.org/stable/44283656, last seen on 03/10/2022

[15] Ficci - Multiplex Association of India v. United Producers/ Distributors Forum, Case No. 1 of 2009 (Competition Commission of India, 25/05/2012)

The monopoly conferred by an IPR holder is legal and cannot be equated with an economic monopoly held by firms in the market through their dominant position. IP-induced monopoly can be seen in cases where there are no substitutes for the products and the IPR holder ends up charging excessive pricing, which will be covered under the Abuse of dominant position. Different factors are to be considered while considering whether ownership of a certain IP puts the holder in a dominant position or not. Establishing the fact of dominance in the case of IPR cases also varies from case-to-case basis.

One of the landmark cases is ***Microsoft Corp. V Commission of the European Communities***[16], The European Commission in this case stated that Microsoft had abused its dominant position in the PC/OS market by refusing to supply the necessary information to the competitors for their products to interoperate with Windows, and hence to compete viably in the market. The commission decided that withholding the necessary information to design competing programs compatible with Windows was abuse and was done to eliminate the competition, stifling innovation, and reducing consumers' choices by locking them in. The commission, therefore, decided the case against Microsoft and asked it to make available necessary information to its competitors.

[16] Microsoft Corp. v. Commission of the European Communities, Case T-201/04. European Court Reports 2007 II-03601

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Another case pertaining to the abuse of dominant position is ***Anuj Kumar Bhati v Sony Entertainment Television***[17], the complainant, in this case, alleged that the respondent has been using its dominant position and therefore discriminating in the selection of contestants on a popular game show "Kaun Banega Crorepati" which is in violation of Section 4 of the competition act. CCI in this case observed that the viewers had substitutes at other channels during prime time and were watching those shows also, leading to which, the respondents were not in any dominant position and therefore there was no violation of relevant sections.

3. Anti-Competitive Combinations and IPRs

The world is now technology and information-driven, and tremendous value is given to inventions, discoveries, and knowledge as the growth of any competitive firm depends on these factors. But developing technology has become too expensive and that is the reason why companies today find it easier to purchase newly developed technologies than to put their money into research and development for the same. This not only leads to the expansion but the improvement of businesses as well. The process of acquisition is not an easy one and requires due diligence by the acquirer, the company also has to make sure that the acquisition does not stifle innovation or negate the entry of new products into the market.

One of the landmark mergers that attracted a lot of attention was that of ***The Boeing Company and The McDonnell Douglas Corporation*****.** The two were arch rivals in the aviation

[17] Shri Anuj Kumar Bhati v. Sony Entertainment Television (SET), Case No. 63 of 2010 (Competition Commission of India, 29/03/2011)

industry in the USA but this combination, however, was accepted by The United States Federal Trade Commission (FTC) only on the condition that other airplane manufacturers obtained non-exclusive licenses to patents and underlying know-how held by Boeing so as to protect the market from monopoly.[18] India has also seen a trend of mergers and acquisitions regarding the Indian pharmaceutical companies which led to the constitution of the Arun Maira committee and the recommendations of the committee included that Associations of companies must be perceived to not only lobby for the interest of their own members but more convincingly advocate and work towards the larger public good.[19]

A Coordination between Competition Law and Intellectual Property Law

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has made an effort to achieve a degree of balance between IPR and Competition law. TRIPS is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for different forms of intellectual property regulations as applied to nationals of other WTO members.[20] TRIPS was negotiated during the Uruguay Round of the

[18] Sumit Singh, *The Merger Of McDonnell Douglas And Boeing - A History*, Simple Flying, available at https://simpleflying.com/mcdonnel-douglas-boeing-merger/, last seen on 03/10/2022

[19] Planning Commission, Government of India, *Hight Level Committee Report on FDI in existing Indian Pharma Companies*, available at https://pharmaceuticals.gov.in/sites/default/files/ArunMiaraCommitteeReport.pdf, last seen on 03/10/2022

[20] *Competition Law, and Intellectual Property Rights: Confronting Paradigms,* Legal Services India, available at http://www.legalservicesindia.com/article/1453/Competition-Law-and-Intellectual-Property-Rights:-Confronting-Paradigms.html, last seen on 03/10/2022

General Agreement on Tariffs and Trade (GATT)[21] and came into being in 1994. It is one of the most comprehensive international agreements on IPR to date and covers 9 categories of IPRs. TRIPS covers different types of ways to attain a degree of balance between IPR and Competition Law which are given below:

1. **Parallel Imports (Section 6)[22]**

   A parallel import is an item that's imported and sold outside of the brand's authorized distribution channels.[23] In its basic sense, Parallel Imports are nothing but the resale of a branded product without the authorization of the IPR holder. For example, if USA sells a product but charges two different prices for the same product in China and India and the price of that product charged is higher in China as compared to India then China can import those products from India at a lower price than from USA, such products will be called as Parallel Imports. Another term used for parallel imports is the gray market for imports.

   Parallel imports work on the Principle of Exhaustion, once a brand sells a product, it exhausts its monopoly right over that product and thus the purchaser can now sell the product to the third party without authorizing the owner. Section 6 of the TRIPS agreement allows its members to have wider discretion in order to adopt

[21] Wikipedia, *TRIPS AGREEMENT, available at* https://en.wikipedia.org/wiki/TRIPS_Agreement, last seen on 03/10/2022
[22] World Trade Organization, *Agreement on Trade related aspects of Intellectual Property Rights,* Section 6
[23] *Parallel Imports explained,* Red Points, available at https://www.redpoints.com/blog/parallel-imports-explained/, last seen on 03/10/2022

regional, national or international exhaustion principles for serving their domestic policy goals.[24] Allowing parallel importation facilitates developing and least developed countries as they can have access to products at lower prices. Parallel imports put a cap on the rights provided by IPRs and change the market regime from monopoly as the countries have the option of buying products through parallel imports if they are charged higher prices, but one cannot deny the fact that it encourages a free-riding effect which in turn reduces the inducement to invest by the IPR holders and thus this remains a controversial issue in the world.

Despite the commitment of countries to TRIPS, developing countries still subject themselves to the exploitation of developed countries as some of the countries demand "TRIPS-plus" protection which is a higher level of protection norms demanded by the developed countries that are not prescribed by the WTO's TRIPs regime. India has objected to this TRIPS-plus protection which can be seen in its Free Trade Negotiations (FTA) with EU and Japan. [25]

In ***Kapil Wadhva v Samsung Electronics (2013)[26],*** The Delhi High Court strengthened the legality of parallel imports in India. The Court stated that the

[24] Chang-fa Lo, *Potential Conflict Between TRIPS and GATT Concerning Parallel Importation of Drugs and Possible Solution to Prevent Undesirable Market Segmentation*, Food and Drug Law Journal Vol. 66, No. 1, 2011, available at https://www.jstor.org/stable/26660925, last seen on 03/10/2022

[25] *What is TRIPs Plus?* Indian Economy.net, available at, https://www.indianeconomy.net/splclassroom/what-is-trips-plus- what-is-data exclusivity/#: ~:text=TRIPs%20Plus%20are%20higher%20level, not%20formally%20related%20to%20TRIPs.

[26] Kapil Wadhwa & others v. Samsung Electronics Co. Ltd, 2012

Trademark Act of 1999 follows the principle of International Exhaustion implying that the exclusive right of a trademark owner gets exhausted once the goods have been sold by the owner.[27]

2. Compulsory Licensing (Section 31)[28]

When the government allows third parties to make available a certain patented product without the consent of the patent owner, it is called Compulsory licensing. It is one of the flexibilities included in the TRIPS agreement under Section 31. When a patent holder registers his invention in patents, he gets an exclusive right to use the patented product, the way he wants, this right also excludes the rest of the world from using the patented product without his permission but exceptions to this exclusivity are spelled out in TRIPS, the one form of which is Compulsory licensing.[29] But granting compulsory licensing is not easy and it is to be met with certain conditions before using this exception.

The rationale behind granting compulsory licensing is limiting the exclusive rights granted to the patent holder and providing a mechanism to bypass a patent

[27] Ibid, at 32

[28] World Trade Organization, *Agreement on Trade related aspects of Intellectual Property Rights,* Section 31

[29] Arvind Subramanian, *Compulsory Licensing in Patent Legislation: Superfluous and Misleading,* Economic and Political Weekly Vol. 25, No. 34 (Aug. 25, 1990), pp. 1880-1881, available at https://www.jstor.org/stable/4396673, last seen on 03/10/2022

owner's legal monopoly.[30] One of the grounds for granting a compulsory license is non-working or insufficient working of an invention patented.[31] But what constitutes non-working or insufficient working can be different for different countries. Compulsory licensing can be termed as a blessing in disguise for developing and least developed countries as patent owners of medicines charge high prices for their medicines making them inaccessible for these countries.

The concept of Compulsory licensing can be linked with the principle of the "Essentials Facilities Doctrine" whereby the IP holder is required to grant access to a facility that he/she holds for effective competition in the market. One of the landmark judgments related to Compulsory Licensing is the judgment of ***Bayer Corporation v Union of India and others (Bayer v Natco)***[32],this was the first case where the compulsory license was granted in India as the Controller and Intellectual property Appellate Board (IPAB) found Natco as a deserving candidate for compulsory licensing as Bayer was charging a very high price for cancer medicine. The IPAB stated that compulsory licenses should be granted on a case-to-case basis and one must keep in mind the factor of public health while hearing the cases related to Compulsory Licensing.

[30] *Compulsory Licensing: A Cure for Distributing the Cure?* Centre for Strategic and International Studies, available at https://www.csis.org/analysis/compulsory-licensing-cure-distributing-cure, last seen on 03/10/2022
[31] Supra 22.
[32] Bayer Corporation v. Union of India and others, Case no. 35 of 2012 (Intellectual Property Appellate Board, Chennai, 04/03/2012)

Conclusion

In conclusion, it can be said that IP law cannot be applied in isolation from Competition law and vice versa. Undoubtedly the tussle between IP law and Competition law will always be there as IP Law is producer-friendly while Competition law is producer friendly but what one needs to remember is that both laws are market friendly in one or the other way. Therefore, the need to achieve a balance between IP law and Competition law in the market becomes important as both these regulations are equally necessary for the development of an economy. Achieving a balance between these legal regimes can be different for different countries as countries that are already developed may have different markets since such countries will be innovation-friendly and will focus more on inventions and thus giving IPR a better hold on the economy. On the other hand, developed or developing countries will focus more on providing goods at a lower cost thus making such countries competition-friendly and giving Competition laws an edge in such countries. But it is equally important for countries to understand that strengthening IP laws and Competition laws must go on the socio-economic background of the country and in a country like ours that has a complex socio-economic setup, one has to take examples of the best practices from around the world which will take time to develop.