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The Study on India Patent Pooling and Competition Laws Interface

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Abstract

The purpose of this essay is to evaluate the anti-competitive and pro-competitive implicationsof patent pooling in light of India's competition laws. This essay also aims to examine the relationship between patent pooling and its legal validity in light of the provisions of the Competition Act of 2002. Because patent pooling is a new idea in Indian law, a rigorous examination of how patent pooling agreements would operate within the Indian antitrust legal framework is required. Patent pooling may provide diverse economic benefits to consumers in terms of easier access to essential goods and enhanced market competition; however, in the lack of suitable regulations, it may also lead to collusive and anti-competitive behaviour among horizontal firms competing in the market. Patent pools can also be a situation of horizontal players cross-licensing patents through an arrangement that is anti-competitive under Indian competition laws. Given the foregoing, implementation of the per se rule will be found improper due to the economically advantageous and pro-competitive consequences of patent pools. This article evaluates the implications of patent pooling on market competitiveness. The article concludes by arguing that, while patent pooling is not inherently anti-competitive, it can be consequentially anti-competitive, and adequate guidelines regarding patent pools are

required to ensure that the financial advantages are well received, and market competition is not diminished to the prejudice of any person.

Keywords *- Intellectual Property Rights (IPR), Competition Commission of India (CCI), European Union(EU)*

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Introduction

The current market's competitiveness is heavily impacted by two types of regulations: competition laws and patent laws. In principle, both sections of law are contradictory to one other, as competition regulation is primarily focused on promoting market competition while patent legislation grants the patent holder significant monopoly in trade pertaining to the patented goods. Monopoly is produced and defended by one body of legislation, while its prohibition is sought by the other. There is a need to maintain equilibrium between patent rightsand competition laws so that there is adequate deterrence for misuse of patent rights' dominantposition while the advantages are preserved when used in a pro-competitive manner.

Except in cases of misuse of a dominating position, competition laws have never found that a dominant position is necessarily prohibited. Patent law grants the patent holder a dominating position, which in and of itself does not violate competition laws; nevertheless, patent holders abusing such a position does violate competition policies. 'A patent pool is an arrangement in which two or more patent holders pool their patents in exchange for a license to utilize them[2].'

Patent pooling raises anti-trust issues since it involves the emergence of anti-competitive market behaviour by firms participating in the patent pool. Patent pooling, although encouraging competition and innovation, may also stimulate anti-competitive behaviour because any collaboration among rivals carries the danger of collusive behaviour and may alsocarry the

[2] Floyd. L. Vaughan, The United States Patent System: Legal and Economic Conflicts in American PatentHistory, Norman, Oklahoma 1st ed., 1956, p. 39-40.

potential of cartelization[3]. Patent pooling may also result in rivals in the same relevantmarket sharing markets through territorial exclusivity or price fixing. Although patent poolingimproves market supply by removing the complementary patents problem, it also facilitates cooperation among rivals in the form of anti-competitive confidential information sharing andprice fixing. There is also the issue of the inflated cost of patent pooling negotiations, which can lead to the exclusion of firms with a limited number of patents, while the big enterprises can create a cartel to hinder market access to new rivals. The intersection between patent lawswith competition rules is a new occurrence in Indian law.

Patent Types in a Patent Pool

The word "pool" has frequently been used to denote a variety of various arrangements or agreements is which patents have been merged in some way by the patent owners. The United States Patent and Trademark Office defines patent pooling as an arrangement between two or more patent holders to permit or license one or more of their patents to one another or other parties[4]. Fundamentally, a firm that needs resources for manufacturing may obtain a license jointly rather than separately from two other companies that own several patents. Patent Pooling may involve several sorts of patents, such as competing patents, complementary patents, and essential or non-essential patents.

[3] Shama Mahajan, Patent Pooling and Anti-Competitive Agreements: A Nascent dichotomy of IPR and Competition Regime, 6(2) NLUJ Law Review 35 (2020) p. 39.
[4] Manas Bhulchandani, Akshay Khanna, Patent Pooling in Indian Scenario, 4(2) International Journal of Law15, 15 2018.

Substitute Patents

If two patents cover different technologies and do not impede each other, they are said to be replacements. When a patent depends on a separate subject matter not covered by the first patent, it is said to be non-blocking if it does not impede the use of another patent in the samefield. Such patents' protected technologies can be employed concurrently without violating oneanother[5].

Additional Patents

Legally speaking, two patents that mutually prohibit each other are complimentary. These patents are typically referred to as those that violate one another. Cumulative innovation leadsto mutually blocking patent rights since no technical component may be commercialised independently without the technological complements covered by the patent rights of various firms. This makes patent licencing necessary in order to get desired results without violating patent claims. Patents may be one-way blocking, which means that one patent may violate another but the second may not necessarily violate the first[6].

Certain patents that may be utilized in a unique way, or that can be substituted to achieve the same result, fall under the category of competing patents. An individual company's acquisitionof

[5] Secretariat WIPO, Patent Pools and Antitrust-A Comparative Analysis, WIPO, (Feb 2, 2020), https://www.wipo.int/export/sites/www/ip-competition/en/studies/patent_pools_report.pdf [hereinafter "Secretariat WIPO"].

[6] Justus Baron & Henry Delcamp, Patent Quality and Value in Discrete and Cumulative Innovation, WORKING PAPER 2010-07, CERNA WORKING PAPER SERIES, 3, (Feb. 5, 2020), https://hal-mines-paristech.archives-ouvertes.fr/docs/00/53/66/50/PDF/Quality_ind icators_16-11-10_VF.pdf

a license to a competing patent would dramatically reduce that particular company's desire for other competing patents[7]. As a result, a patent pool including conflicting patents is detrimental to overall competitiveness in the relevant market. Complementary patents are those that are fundamentally required to be used jointly in the manufacture of particular items, whether technological, pharmacological, or otherwise. Such patents justify the necessity that they be employed together in the manufacturing process, which validates their participation ina patent pool. Patent pooling of related patents aims to increase manufacturing efficiency, which in turn fosters market competitiveness. In terms of standardization, important patents must meet a standard established by the competent body. A Standard Essential Patent is given for an extraordinary improvement in technology that is acknowledged by a standard establishing authority to be a standard in a certain sector. A pool of Standard Essential Patents may eventually result in more competitiveness in the relevant market since it simplifies the creation of goods while adhering to industrial standards.

Patent Pooling's Economic Impact

Patent pooling is a new concept in India, with the primary goal of providing cheap health care. One of the primary goals of patent pooling has been the production of compilations for many patents owned by several nations in order to accelerate the rate of development and ease of access to medications for individuals in developing countries' lower economic strata[8].

[7] Roger B. Andewelt, Analysis of Patent Polls under the Antitrust Laws, 53(3) Antitrust Law Journal 611, 611 (1984).
[8] Manas Bhulchandani, Akshay Khanna, supra note 4, at 18.

A patent pool may provide economic benefits by providing protection from patent infringement litigation, resulting in better production efficiency and cheaper pricing for customers. A patent pool can also be considered as a very efficient solution to legal disputes with patent interference.

The first patent pool was formed as a result of a continuing legal dispute in 1856 between Baker, Grover, Singer, and Wheeler & Wilson for patent infringement in relation to patents involved in the creation of the sewing machine. In 1856, nine complimentary patents owned by various proprietors were pooled together to create a functioning sewing machine[9]. An advocate by the name of Orlando B. Potter proposed to all of the above-mentioned parties to settle the disagreement by allowing authorization to utilize technology held by each by poolingrather than turning to legal fights that resulted in reduced earnings.

Patent owners may also be able to gain efficiency in licensing their inventions by forming a single business capable of licensing all of their patents. Patent owners can efficiently fulfil a demand from a vast number of licensees for safe access to numerous patents by pooling. In the absence of a pool, such a demand would need a slew of costly talks between patent owners and various licensees. A pool effectively reduces transactions and their costs by allowing agreements to be conducted via a single body capable of giving access to the necessary collection of patents. Pooling may also allow patent owners to secure the full value of their patent contribution and stimulate investment in R&D. If a producer is aware that they may usea mix of patents and their

[9] Indrani Barpujari, Facilitating Access, or Monopoly: Patent Pools at the Interface of Patent and Competition Regimes, 14 Journal of Intellectual Property Rights 347, 345 (2010).

complements through pooling, it serves as an incentive to invest in patent production.

As previously stated, protection achieved by patent pooling is more likely to be economically beneficial; nevertheless, this is not always the case. The licensee's immunity from patent infringement may lead to collusive behaviour in the marketplace. Patent pools that require patent owners to offer legal protection to licensees for future inventions may have a negative influence on the level of innovation in the field of impact in technical research and development.

There are no economic incentives for enterprises to invest in research and development for future patents in the context of such a patent pool since the discovery of patentable ideas doesnot provide them with a competitive advantage over fellow rivals who are pool participants.

Unreasonable constraints in a patent pool may have anticompetitive impacts unrelated to the patents in the pool. In the case of competing technologies, participants in the patent pool of such innovations are understood as horizontal actors since the patented technologies are used to achieve identical results. The likelihood of reduced market rivalry between such horizontal enterprises with conflicting technologies will be raised to the degree of the pool's licensing limitations on such competing technologies.

Patent Pools' Anti-Competitive Effects

Patent pools containing conflicting patents may have an anticompetitive effect on the market.

When patents that are substitutable or compete with each other in terms of licensees are pooled together, the licensees' negotiation powers are decreased, and the licensees are obliged to acceptto the conditions established by the pool for the licensing of such competing technologies. In the absence of the pool, the licensees would be able to undertake separate talks with the patentowners and secure a license for one of the patents on advantageous terms, which is consistent with the competitive spirit of the marketplace. Depending on the current rivalry in the relevantindustry, such removal of competition by patent pooling might have tremendous economic consequences. Patent pools have the potential to facilitate collusive behaviour among horizontal rivals. A poolcan achieve a virtual horizontal merger of patent owners, and they can collectively decide on licensing prices for the patents. Such behaviour is contrary to competitive behaviour and results in the restoration of monopoly pricing in a competitive market[10].

Patent pools also help patent holders build de facto standards by dominating a technological sector in the absence of a benchmark agency. Patent holders may combine their patents through legal settlement and establish a single private standard of technology. The anticompetitive consequence of this is that the patent pool would reduce competition between rival patent holders who would have been competing for recognition by a standard establishing organization in the absence of the pooling arrangement.

Patent Pooling in India's Legal System

[10] Steven C. Carlson, Patent Pools, and the Antitrust Dilemma, 16 Yale Journal on Regulation 359, 388 (1999).

Patent owners that participate in a patent pool enter into horizontal or vertical arrangements, which are prohibited under Sections 3(3)[11] and 3(4)[12] of the Competition Act, 2002, respectively. The Patents Act of 1970 contains no clear provision pertaining to patent pooling agreements. However, Section 68 allows for patent transfer[13] and Section 84 allows for compulsory licensing of patents, resulting in the creation of a patent pool[14], which causes a contradiction between the two laws. The Competition Commission of India has classified patent pooling as a restricted trade activity because it may harm market competition, despite the fact that Section 102 of the Patents Act, 1970 allows the government to establish a patent pool[15]. In terms of anti-competitive implications, there is a gap in the current rules pertaining to patent pooling agreements under the Competition Act, 2002 and the Patents Act, 1970.

Patent pooling arrangements may result in a dominating position in the market. Patent pooling arrangements are likely to be regarded an abuse of dominant position since Section 4 of the Competition Act, 2002 lacks any particular restrictions relating to intellectual property. Even though Section 3(5) provides an exception for intellectual property agreements, patent pooling arrangements may be regarded in violation of Section 4, which forbids unilateral activity by a dominant entity that leads to abuse of its supremacy.

Section 140 of the Indian Patent Act[16] makes it illegal to include any of the following

[11] The Competition Act, 2002, § 3(3), No. 12, Acts of Parliament, 1949 (India)
[12] The Competition Act, 2002, § 3(4), No. 12, Acts of Parliament, 1949 (India).
[13] The Patents Act, 1970, § 68, No. 39, Acts of Parliament, 1949 (India).
[14] The Patents Act, 1970, § 84, No. 39, Acts of Parliament, 1949 (India).
[15] The Patents Act, 1970, § 102, No. 39, Acts of Parliament, 1949 (India).
[16] The Patents Act, 1970, § 140, No. 39, Acts of Parliament, 1949 (India).

restrictions in a license to manufacture or use a patented article:

a) to require the purchaser, lessee, or licensee to acquire from the vendor, lessor, or licensor or his nominees, or to prohibit him from acquiring or to restrict in any manner or to any extent his right to acquire from any person, or to prohibit him from acquiring any article other than the patented article or an article made by the patented process except from the vendor, lessor, or licensor or his nominees;

b) or to prohibit the purchaser, lessee, or licensee from using or to restrict the purchaser, lessee, or licensee's right to use an article other than the patented article or an article other than that made by the patented process that is not supplied by the vendor, lessor, or licensor or his nominee; or

c) to prohibit the purchaser, lessee, or licensee from utilizing or to restrict the purchaser, lessee, or licensee's right to use any method other than the patented process; or

d) to give exclusive grant back, prohibition of challenges to patent validity, and coercive package licensing. As a result, there are existing restrictions against anti-competitive acts under the Indian Patent Act, which precludes resort to the Competition Act, 2002.

The new Competition Act, 2002 intends to foster market competition by restricting anti-competitive agreements that may have a significant negative impact on Indian markets. This can be interpreted to mean that practices like patent pooling, which can increase efficiency in product production and distribution, may be granted a more liberal view by the CCI as long as anti-competitive practices like price-fixing, tying agreements, and

package licensing are avoided in the pool[17].

As previously noted, patent pools have the potential to provide substantial economic benefits; consequently, anti-competitive analysis of patent pools is not warranted. This is not to say that purposeful anti-competitive behaviour by parties masquerading as a patent pool, such as price fixing of items unrelated to the patents being pooled and market allocation agreements, should not be considered illegal. Restriction on the area of use for a license, which results in market allocation for patent licensees, is not anticompetitive in and of itself[18]. The argument behind the preceding remark is that such restrictions would not reduce any competition that would have occurred otherwise since licensees would not have been in a competitive situation in the absence of such patent license.

Conclusion

The school of thinking that believes that the exception provided under Section 3(5) of the Competition Act, 2002 is absolute in respect of agreements relating to intellectual propertymay prove to be erroneous. There must be a meaningful connection between the constraintsplaced on a third party by an IP owner, such as a patentee, and the goal of avoiding IP infringement. As a result, patent holders who participate in a pool and engage in anti- competitive practices should be subject to the provisions of the Competition Act, 2002, andpatent pools should be subject to

[17] Indrani Barpujari, Facilitating Access, or Monopoly: Patent Pools at the Interface of Patent and Competition Regimes, 14 Journal of Intellectual Property Rights 347, 345 (2010).

[18] Roger B. Andewelt, Analysis of Patent Polls under the Antitrust Laws, 53(3) Antitrust Law Journal 611, 611(1984).

the legal jurisdiction of the Competition Commission of India in addition to the Controller of Patents.

Another thing to think about is "jurisdiction." As noted, IPRs issued under Indian law are subject to the authority of Section 3(5) of the Competition Act. The problem occurs in a patent pool if the patents are issued in accordance with foreign law. According to the experts, Sections 3(1) and 3(4) of the Competition Act, 2002 should be applied in this situation to measure the AAEC. Nevertheless, the practise of patent pooling is regarded tobe promoted and restrictive regulations are meant to be freely applied in India given the Competition Act, 2002's goal to foster healthy competition and limit only anti-competitiveacts.

However, when it comes to legal concerns involving intellectual property, there is a distinct absence of guiding lines for the implementation and execution of the Competition Act 2002. The European Commission (EC), the Federal Trade Commission (FTC), and the Department of Justice (DOJ) in the United States issue guidelines, studies, and reports on a regular basis that portray their interpretation of relevant statute and their likely methodology to several types of agreements and forms of conduct, such as the aforementioned EU Guidelines on Technology Transfer Agreements and the FTC–DOJ Guidelines on IP Licensing. The Competition Commission of India is committed to doingmarket research and studies on various areas of the market, however there is a dearth of official guidelines on their strategy. The absence of adequate patent pooling regulations in India may have a significant negative impact on market competition, with horizontal players engaging in anti-competitive practices under the guise of

patent pooling agreements, or it may impair the economic benefits that result from patent pooling arrangements. As a result, effective rules for patent pooling must be provided in order to address the uncertainty in the interaction with competition law. Patent pooling must be liberally treated since it is critical for the effective manufacture and distribution of pharmaceutical goods so that they may be easily accessed by the country's lowersocioeconomic groups.