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A CRITICAL ANALYSIS OF THE INTERFACE BETWEEN COMPETITION LAW AND IPR:A CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO PATENT REGIME IN INDIA

AUTHORED BY: RITIK MALIK & DR. SHEEBA AHAD

Abstract

The relationship between competition law and intellectual property rights (IPRs), particularly within India's patent regime, is a subject of ongoing debate. While patents are intended to stimulate innovation and provide incentives to inventors, they also confer monopolistic power that can stifle competition and hinder access to essential goods and services. Balancing the interests of inventors, consumers, and society presents a significant challenge for policymakers and regulators, especially in the context of globalization and diverse international approaches to competition policies.

In India, this tension is especially pronounced. The country's patent regime has seen significant reforms to align with international standards while incorporating provisions to safeguard public health and prevent the abuse of IPRs. However, challenges such as patent thickets and ever greening persist, complicating the balance between innovation and affordability. This paper critically analyzes the legal frameworks, case studies, and empirical evidence to offer insights into the complex interface between competition law and IPRs, aiming to inform policy discussions and contribute to ongoing debates on achieving a balance that benefits society as a whole.

Introduction

The key purpose of all competition policies are to make sure that there is legal entry/ exit of firms and smooth functioning of companies without the exercise of any malpractices. Some prominent anti competitive practices are collusive bidding, abuse of dominant position, refusals to give goods, exacting excessive prices for products etc. which negatively influence the competition in specific markets. There is a very close connection among IPRs and the competition law or policies

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of a land. Where on one hand, IPRs execute the competition policies by protecting the privileges of the inventors in the marketplace from exploitation by other competitors; the competition policies stop any abuses of privileges of the IP owners.

IPRs create temporary rights to favor the IPR holder to exclude others from using that IPR. The period of exclusivity allows the IPR holders to exploit the values that is assigned to the IPRs and is seen as rewards for the attempt invested by the inventor in creating the IPRs. Therefore, the IPRs essentially grants monopoly rights to the holders of such IPRs for restricted periods of time.

Competition laws are considered with preventing anti-competitive conducts, whether effectuated as a result of coordinated or unilateral action. Inherent in this interface between IPRs and competition law is the need to ensure that not only is the IPR not subject to abuses but also to guarantee that the antitrust regimes are not overbearing and keeps the incentives for prospective inventor to innovate and make IP.

The association among competition laws and IPRs are often viewed as adversarial. Competition laws strive to maintain effectual competition as ways of achieving effective allocation of resource and thereby contributing to client happiness. IP rights, on the other hand, provide the IP holder with legal monopolies for restricted periods, which protect the IP holders from competition.

IPR and Competition Law Interface

The simple hallmark of competition law is the protection of those principles and practices which enable the efficient functioning of markets. A natural concomitant to this objective is making certain that incumbent enterprises do not engage in anticompetitive practices to the detriment of the market. However, the application of competition law standards-in terms of practices that should be banned outright, viewed as potentially anticompetitive or should be investigated further-varies widely across jurisdictions.

The interaction between intellectual property rights (IPR) and competition law is predominantly created by the non-rivalrous and non-excludable nature of intellectual property, which causes the problem of "appropriable". The creation of this prima facie "inherent tension" is due to IPR holders being granted statutory rights to essentially control access to the intellectual property and charging monopoly rents for the use of the IPRs-something apparently in conflict with

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competition law, which attempts to curtail such market power.

Historically, this conflict has been overplayed, right from the early days of the 20th century, when granting patents in particular brought about paranoia regarding monopolies and patent licensing was heavily regulated.

There has been a well-rounded concern of competition law with IPR owing to two major developments -the expansion in functional coverage of IPR protection and its vertical expansion to a new range of products, especially knowledge-based products and the appreciable trend, especially in IPR-driven markets such as the US, EU and Japan, of individual market leadership reinforced by IPR-protected industrial standards.

However, it is now usually accepted that the two regimes are not so much at loggerheads as they pursue the goals of consumer welfare and encouraging innovation through different means. It is thus implicitly understood that the real issue that competition law has is not with the existence but with the exercise of IPR. Striking this balance involves walking the tightrope between over- and under-protection of innovators' efforts.

Three theoretical bases have been suggested for this reconciliation between IPR and competition law regimes:

1. the view that competition law should only interfere with innovation/IPR when social welfare is at risk;
2. the view that concentration and monopoly markets have the edge over competitive markets in terms of innovation owing to greater capital and resources and
3. the view that competition law only concerns itself with consumer welfare when the effects of a proposed action on production and innovation efficiency are neutral or indeterminate.

These theoretical underpinnings would suggest that a reasonability standard be applied, taking into account the facts and circumstances of the case in question.

Two main concerns dominate this IPR/competition law interface. The first of these is the potential abuse of monopoly pricing, especially in developing countries where effective substitutes to IPR-protected products may not be readily available. Second, competition law seeks to draw a line between permissible business strategies and abuse of IPR, a line which is often blurred by horizontal agreements, exclusionary licensing restrictions, tie-in agreements, excessive

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exploitation of IPR and other selling practices

However, at a conceptual level, the lines are clear. The limited monopolies granted by IPR are not per se anticompetitive or excessively exploitative-they only become anticompetitive when the IPR holder looks to extend those rights beyond their intended and proper scope.

Types of Restraints

This interface between IPR and competition law has evolved several types of restraints on competition. While no one has sought to contend that licensing agreements are per *se* anticompetitive, the focus of these restraints is typically a licensing agreement which could adversely affect competition by artificially dividing markets among enterprises and possibly impeding the development of new goods and services.

More specifically, the phenomenon of exclusive licensing, manifested through several unilateral market tactics by enterprises such as tie-in arrangements, exclusive dealing, licensing restrictions as well horizontal agreements, have attracted the attention of competition regulation authorities across the world.

Domestic Scenario

The process of initiating a new competition law in India was started by an Expert Group set up to study trade and competition policy. Noting that competition policy is a prerequisite to economic liberalization, the Expert Group, in its report submitted to the Ministry of Commerce in January 1999 recommended that a fresh competition law be drawn up. In October 1999, the government appointed a High Level Committee on Competition Policy and Competition Law to draft the new competition law, which was submitted in November 2000. The resultant Competition Act, 2002 coming into force mere months before the expiry of the TRIPS compliance period for India can therefore be seen as India's fulfillment of its TRIPS obligations.

Under Section 3, the Competition Commission is required to look into agreements which are anti competitive in nature and those found to be anticompetitive are declared void.

The Competition Act incorporates a blanket exception for IPR under Section 3(5) based on the rationale that IPR deserve to be cocooned since a failure to do so would disturb the all-important

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incentive for innovation, which, itself, would have knock-on effects in terms of a lack of technological innovation and reflect a lack of quality in goods and services produced. However, equally, it does draw the line inasmuch as it does not permit unreasonable conditions to be passed off under the guise of protecting IPR. Thus, in principle, IPR licensing arrangements which interfere with competitive pricing, quantities or qualities of products would fall foul of competition law in India.

However, this manifestation of Section 3(5) is far removed from the original recognition given by the High Level Committee to the fact that all forms of IPR have the potential to raise competition policy problems, in effect recognizing the existence/exercise distinction.

Section 3 also remains puzzling, inasmuch as it goes against MRTP Commission precedent under the old Act which held that the Commission (and, by extension, the Competition Commission of today) had complete and unfettered jurisdiction to entertain a complaint regarding IPR. Indeed, *Manju Bhardwaj v. Zee Telefilms Ltd* and *Dr Vala Peruman v. Godfrey Phillips (India) Ltd* stand as authority for the view that unfair trade practices [as understood under Section 36-A(1) of the old Act] could be triggered by the misuse, manipulation, distortion, contrivance or embellishment of ideas generated by the complainant.

Other grounds for critique of Section 3 in particular include the almost exclusive focus on protecting the IPR holder, no adequate consideration of public interest and the absence of any power to restrict an IPR holder from imposing reasonable conditions on licensees for protecting such IPR.

While the Act does create categories of per se illegality such as price fixing, geographical divisions and market divisions, the standardized treatment extended to these categories as well as to tying arrangements, refusals to deal, resale price maintenance and exclusivity agreements suggests that the standard of if "they cause an appreciable adverse effect on competition" would have to be very sound indeed.

Critical analysis of the relationship between Patent and Competition Law

On the face of it, the two arms of law that are closely related to forces in the market, patents and competition laws, seem to be in conflict with each other. It appears that one arm of law creates

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and protects monopoly power, while the other seeks to proscribe it. However, this discernible conflict has been invalidated over the years as the sole purpose of both these systems of law is to promote innovation, industry and competition in a market for customer welfare.

Though Patents are necessary for furthering efficiency and development in a market, it also has great potential of having a negative effect on the competition and consumers in certain circumstances. A Patent holder who exercises significant power in a market can tend to misuse it's position and fortify it further in order to expand and conquer the entire market place, thus, affecting the free and fair competition in the market in an unpropitious way. Such a malevolent conduct can take the form of vexatious litigation, tie-in arrangements, restraints on challenging the validity of patent and vertical restrictions that adversely affect competition. As a result, a patent holder becomes like any other abusive firm in the market, engaging in anti-competitive practices, except that such a holder has an exclusive right over its invention which it can use to thwart competition in the market in contrast to the other companies which do not possess such a right. Several scholars have highlighted problems in the patent system itself, the primary problem being overprotection that may interfere with innovation rather than promoting it.

Patents and antitrust law are two bodies of law that closely relate to the working of competitive forces in the market. At first glance, they appear to be in apparent conflict: because antitrust law is concerned with promoting competition while patent law grants inventors a limited period of exclusivity in exchange for disclosing their invention. It may appear that one body of law creates and protects monopoly power, while the other seeks to proscribe it.

But this apparent conflict has been debunked over the years. Firms that engage in innovation compete against each other to develop new products and new processes to manufacture existing products to secure the reward of exclusivity that is the essence of a patent. Both systems are intended to act complementarily, as both are aimed at encouraging innovation, industry, and competition.

In the European Union, this understanding is adopted by the European Commission in its Guidelines of the application of Article 101 of the Treaty of the Functioning of the European Union to technology transfer agreements.

In the USA, the Department of Justice and the Federal Trade Commission share a similar outlook

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that is reflected in a document titled Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition.

Competition law may intervene when patent holders abuse their rights to stifle competition, such as through anti-competitive licensing practices or patent misuse.

Competition law considerations arise in cases involving patent pools and SEPs, particularly concerning FRAND licensing terms. Competition law evaluates the impact of mergers and acquisitions on market competition, including transactions involving companies with significant patent portfolios. Reverse Patent Settlements (Pay-for-Delay): Competition law scrutinizes agreements between patent holders and generic manufacturers that delay the entry of generic products into the market, potentially harming competition. Balancing patent rights with competition concerns is essential for fostering innovation while ensuring market competition remains robust and dynamic.

In India, the only comparable document is the Advocacy Booklet on IPRs published by the CCI. However, rather than elaborating the CCI's approach to different types of agreements and forms of conduct, the Booklet only illustrates different licensing terms that are restrictive or likely to be anticompetitive. The CCI also commissions market research and sectorial studies, but they do not provide authoritative guidance on the approach of the Commission.

For example, a study on IP laws and competition law policy was commissioned to IIT Kharagpur in 2015, and the objective of the study was to study jurisprudence in the field of IP and competition law in the pharmaceutical and chemical industries in India. But the stated summary results of this unpublished study are only that:
There is likely to be a trend to restrict production by exclusive license since the number of exclusive licenses granted by the patent holders has increased in the course of the last two years. This also has an adverse impact on the price and 'affordability'. It is suggested that a comprehensive policy on 'compulsory license' may be framed taking in view the gross abuse of dominant position by the 'patent holder' and 'the licensee'.

Furthermore, the lack of guidance is reflected in the CCI's tendency to intervene without any consistent basis or method, highlighting a number of key issues that need to be addressed in light of the teachings of innovation economics prevailing today. Any inconsistencies in the CCI's

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approach can have major ramifications on the Indian economy. The CCI must recognize the fact that firms making investment decisions seek clear, predictable rules as to how the intellectual property and competition regimes will operate in tandem. To minimize friction between competition law and patent rights, the contours of legitimate exercise of patent rights must be clear. This is necessary to ensure the promotion of progress, by enabling efficient investment in innovation.

The Antitrust authorities are not concerned with the existence of patent rights per se, but only when the exercise of patent rights causes harm to competition. The Competition Commission of India (CCI) was established in 2003 to 'eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India'. . It was in the case of Aamir Khan v. The Director General that the jurisdiction of the Competition Commission of India (CCI) to deal with cases pertaining to competition law and intellectual property rights was firmly established.

It is only when a patent protection results in more than what is required to safeguard the invention, does it oppose the competition policy. This phenomenon is most common in the software industry, especially the standard essential patents (SEPs) which have emerged as a war zone between protection granted by patents and the competition law. A landmark case in this regard was Micromax Informatics Limited v Telefonakteibolaget LM Ericsson (Publ) in which the relationship between the Patents Act and the Competition Act was discussed extensively. In this pertinent case, Ericsson claimed 1 billion from Micromax claiming infringement of SEPs due to the refusal of Micromax to accept the fair, reasonable and non-discriminatory (FRAND) terms of the former's technology usage. The parties entered into an interim arrangement, under which, Micromax paid royalties to the Applicant till the patent infringement suit was finally decided. In the mean time, Micromax filed a complaint with the CCI alleging that Ericsson is abusing its dominant position by charging exorbitant rates of royalties from the former and by failing to provide its industry essential patents to handset makers under the FRAND terms. On investigation, CCI found Ericsson guilty of violation of section 4 of the Act against which, the defendant filed a writ petition in the Delhi HC. On 30th March 2016, the High Court of Delhi8 concluded that in case of an irreconcilable conflict between the Competition Act and the Patents Act, the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of patent rights cannot be ousted. It further rejected the contention of the petitioner that the dispute being the subject matter of a civil suit cannot be tried by the CCI.

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The Patent Act itself contains provisions to ensure that the competition in the market is not disrupted. It has been drafted in a way to encourage innovations while simultaneously complying with the market rules for upholding competition. For instance, in order to ensure that the patentee does not misuse its right by refusing to grant licenses on reasonable terms, Section 84 of the Act, providing for "Compulsory licenses", was created.

The interplay of patent rights and competition policies differ from country to country. In the USA, the patent holder's right to exploit its patent to the fullest is recognized, constrained only by market demand. In contrast to this, the competition authorities in the EU have a mandate to intervene when a firm abuses its dominance by engaging in excessive pricing in relation to its patent right.

Need

There are several aspects pertaining to the connection between patents and competition that require clarity. The first and foremost in this regard is the jurisdictional issue. In matters involving issues pertaining to both the Patents Act and Competition Act and where there is an overlap for such a matter to be decided by a civil court and CCI, it has to be ascertained whether the CCI should hear the case first or the civil court, in order to avoid multiplicity of proceedings. Further, the extent to which the CCI can intrude in the matters concerning patent rights also has to be fixed. The intervention has to be based on the understanding of the intricacies of innovation, patents and competition and not merely on market effects and economic theory. This is necessary to avoid unreasonable restrictions on the rights of a patentee, defeating the entire purpose of granting an intellectual property right, in the first place. In addition to this, as in section 3(5) of the Competition Act, an exception for IPR in section 4 also needs to be formulated to deter courts from drawing baseless conclusions that any company in possession of a patent is bound to abuse its privileged position. Apart from these, need of the hour is to strike a proper balance between the contracts concerning patents and their impact on competition. The large number of patent holders might result in the tragedy of anti-commons, chronic under-use of patented resources and in the creation of a monopoly. It may also hinder innovation and the resultant benefits to consumers. Patent rights and Competition policies are not inherently in contradiction to each other instead they complement each other and all that is required is,the right amount of balance to be struck between the two.

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Conclusion

In sum, experience shows that too high or too low protection of both patents and competition may lead to trade distortions. A balance has thus to be found between competition policy and patent rights, and this balance must achieve the goal of preventing abuses of patent rights, without annulling the reward provided for by the patent system when appropriately used.

Competition law and IPR in India play crucial roles in fostering innovation, protecting consumer interests, and promoting fair competition in the marketplace. Both areas of law aim to strike a balance between incentivizing innovation and preventing monopolistic practices that stifle competition. While IPR grants exclusive rights to innovators, competition law ensures that these rights are not abused to create monopolies or hinder market competition. The CCI regulates mergers and acquisitions to prevent anti-competitive outcomes and maintains a fair playing field for all market participants.

Patents incentivize innovation by granting inventors exclusive rights to their inventions for a limited period. This encourages investment in research and development, leading to the creation of new technologies, products, and processes that benefit society.

While patents grant monopolistic rights to inventors, competition law ensures that these rights are not abused to create monopolies or stifle competition. The CCI monitors patent-related activities to prevent anti-competitive behavior, such as misuse of patents to create barriers to entry or engage in unfair trade practices.

Competition law in India aims to ensure that essential technologies remain accessible to all, even when protected by patents. Measures such as compulsory licensing and FRAND terms help balance the interests of patent holders with the need for widespread access to critical innovations, particularly in sectors like healthcare and telecommunications.

SEPs, which are patents covering technologies essential to industry standards, present unique challenges at the intersection of competition law and patents. India's competition authorities closely monitor SEP licensing to prevent abuse, such as patent hold-up or royalty stacking, which could harm competition and innovation. Competition law enforcement agencies in India, such as the CCI, conduct antitrust investigations into patent-related activities to ensure compliance with

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competition norms. Cases involving allegations of patent abuse, including anti-competitive agreements, abuse of dominance, and anti-competitive mergers and acquisitions, are carefully scrutinized to maintain a competitive market environment.

Indian courts play a significant role in shaping the relationship between competition law and patents through landmark judgments. Decisions interpreting the Competition Act and the Patents Act establish legal precedents that influence future cases and provide guidance on issues such as patent licensing, abuse of dominance, and anti-competitive practices. Ensuring coherence between competition law and patent policy is essential to strike the right balance between incentivizing innovation and promoting competition. Policy interventions, such as guidelines on intellectual property and competition law, help clarify legal standards and provide guidance to businesses, innovators, and policymakers.

To conclude, the relationship between competition law and patents in India is dynamic and multifaceted. By maintaining a balance between incentivizing innovation and preventing anti-competitive behavior, India can foster a competitive marketplace that promotes innovation, protects consumer interests, and contributes to economic growth and development.

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