ISSN: 2582-6433

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

 ISSN: 2582-6433

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions ofthe authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

ISSN: 2582-6433

EDITORIAL TEAM

EDITORS

Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board

ISSN: 2582-6433

Dr. Namita Jain

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC - NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce. Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.

Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ISSN: 2582-6433

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

ISSN: 2582-6433

THE FUNCTIONALITY BETWEEN IPR AND COMPETITION LAW: ISSUES AND CHALLENGES

AUTHORED BY - DISHA MOITRA

ABSTRACT

Intellectual property (IP) and competition policy are two critical areas of law that intersect in numerous ways. While IP provides exclusive rights to creators and owners of innovations and creative works, competition policy aims to promote and preserve market competition and prevent monopolistic practices. However, there is a risk that IP rights may be used by their owners to stifle competition, which can be detrimental to consumer welfare and innovation. Anti-competitive activities of IP owners can take many forms, including monopolization, abuse of dominance, collusion, and anti-competitive licensing practices. To balance the interests of IP owners and promote market competition, a careful approach is needed. This paper discusses the interface between IP and competition policy. It explores the different types of anti-competitive practices that IP owners may engage. The paper also discusses the challenges of applying competition law to IP rights and the need for a balanced approach that recognizes the legitimate interests of IP owners while promoting market competition. Overall, the paper argues that a well-designed competition policy framework that appropriately balances the interests of IP owners and market competition is crucial to fostering innovation, consumer welfare, and economic growth.

KEYWORDS: Intellectual Property, Competition Law, Globalization, Interface

INTRODUCTION

"*It is a long-standing topic of debate in economic and legal circle: how to marry the innovation bride and the competition groom*"

- Mario Monti

The tussle between IP policy and Competition law gained prominence after globalization. Due to globalization, there has been an integration of economies as well as technology transfer which gave rise to new technologies. Innovation and competitiveness in market increased, which on one

ISSN: 2582-6433
hand provided an impetus to economic growth however on the other hand, it raised many issues and challenges.

From the perspective of IP policy, competition law restricts competition because competition policies in many nations are designed in such a way that it believes that concentration of power is harmful for healthy competition. In simple words, competition policy opposes monopolization of power. However, it is believed that creating a situation of perfect competition is difficult and just concentrating on elimination of monopolization of powers may lower the interest of big corporations to invest in R&D[1]. If one analyses from the perspective of competition law, then IP regime restricts competition and promotes monopolization by granting exclusive rights, which restricts other players in the market to compete on the same level. This ongoing debate has created a lot of difficulties in harmonizing between the two regimes.

In short, Intellectual property rights and competition law are bound together by the financial matters of developing and a complex snare of legitimate standards that tries to adjust the degree and impact of every strategy. The previous gives restrictive freedoms inside an assigned market to deliver and sell an item, administration or innovation that outcome from some type of scholarly creation qualifying explicit necessities, it encourages advancement which benefits shoppers through the improvement of new and better-quality labour and products. These innovations and manifestations are safeguarded by licenses, copyrights, brand names, proprietary advantages, or sui generis types of assurance. Contrarily, competition law mechanises the market, promotes fair competition by avoiding monopolisation and abuse of dominant position. It further aims at equal distribution of resources and social welfare of the consumers.

AREAS OF INTERPLAY BETWEEN IPR AND COMPETITION LAW

- Licensing Contracts

As per the IP laws, certain exclusive rights are granted to the IP holders, to exploit and reap profits for their skill, hard work, creativity for a stipulated period of time. However, there is a provision of licensing of these aforementioned rights in almost all the IP statutes to ensure that the rights of IP holder are balanced with the rights of the public at large. These licenses can either be voluntary

[1] OECD," Competition policy and intellectual property rights", (1989)

ISSN: 2582-6433

licenses or compulsory licenses.

Voluntary licenses are those that are granted by the IP holder himself in return of which they receive monetary benefits. Basically, licensing of IP rights is a way for commercialization of rights and also transfers the economic rights to the person to whom the license is granted. Compulsory licenses are given by the government. The concept of compulsory licensing is incorporated under Article 31[2] of TRIPS and in compliance with the TRIPS agreement the member nations has also incorporated the provisions of compulsory licensing in their respective IP regime. The provision of compulsory licensing is applied in special circumstances so that is does not unreasonably prejudice the rights of IP owner. Article 31 of TRIPS elucidates that compulsory license can be granted in case of national emergency, extreme urgency, for any non-commercial use or to prohibit any anti-competitive practice.

These grants of licenses are considered to be pro-active from the point of view of competition law because competition law oppose the concentration of power or grant of exclusive rights. As per U.S licensing regime, there is concept of safety zone, which provides that restrain can be levied on use of technology even when the same has been licensed if the same is not considered within the purview of safety zone. The said restrain is not considered as anti-competitive and is imposed when the combined share of the licensor and the licensee is more than 20% in the market. The EU has also incorporated similar provisions but in a modified version as per the requirements of their nation. If we talk about the Indian context, then the competition regulatory body i.e., CCI has not prescribed any such concept of safety nets because of which many issues relating to licenses have arisen over the period of time.

There are various IP as well as competition law concerns that are raised in case of licensing regime:

- The major issue which arose is the refusal to grant license outside a cartel that is formed or patent pooling can be a best illustration to this situation wherein certain firms engaged in similar industry decide to pool their invention and technology and thereafter, they refuse to grant license outside the cartel.
- The practice of payment of royalties even after the expiration of patent or to pay royalties in order to gain knowledge about the unpatented know-how also pose a challenge.

[2] Article 31 TRIPS- “Other use without authorization of the right holder”

ISSN: 2582-6433

- Fixing exorbitant license prices is also a common anti-competitive practice.
- Imposing unfair restrictions on use of license such as- imposing higher standards of quality control on patented product more than the reasonable standards or coercing the licensee to obtain different type of licenses in order to attain the rights in a particular IP or putting a restriction that after licensing, the licensee will only engage the staff that is provided by the licensor.

As mentioned above, that CCI has not created any safety nets so depending on the aforementioned situation or any other situation, the CCI would either consider it per se anti-competitive or would conduct an inquiry to know whether such conditions imposed while granting the license are having an adverse effect on the competition in the market[3].

Although there is no prescribed safety net by CCI but certain IP legislation such as- Indian Patent act under Section 140[4] have mentioned certain conditions that would be considered as void, if imposed while granting the license. The conditions are that the licensor should not impose any unreasonable condition while granting the license that would severely restrict the licensee's right for instance. The licensee should not be restricted to only use the patented process, licensee should not be bound to only purchase items from the licensor, the licensing should not be coercive etc.

- <u>Tie-in arrangements</u>

In common parlance, a tie-in arrangement can refer to an agreement between enterprises whereby they jointly agree to do something for instance- Any retailer joining hands with any e-commerce system to deliver its products only through that specific delivery partner. However, from the perspective of competition law, tie-in arrangement has a specific and narrow meaning which is provided under sub section 4 of section 3. This section defines, tie-in-arrangement as an agreement whereby the consumer purchasing a product is also required to purchase some other good. In such an agreement, there are two kinds i.e., ‘tying good’ and the ‘tied good’. Tying good is the one which the purchaser wants to purchase whereas tied good is the one which the purchaser is bound to purchase due to the prevailing tie-in-arrangement. As per competition law, tie-in-arrangements are considered as anti-competitive.

[3] Lakshmikumaran & Sridharan Attorneys,” Interface between competition law and intellectual property laws- Indian perspective”9-10, Accessed at: https://www.lakshmisri.com/Media/Uploads/Documents/Interface%20between%20Competition%20Law%20and%20Intellectual%20Property%20Laws%20-%20INDIAN%20PERSPECTIVE.pdf
[4] Section 140 Patent Act,1970- “Avoidance of certain restrictive conditions”.

ISSN: 2582-6433

Anti-Competitive Agreements- Anti-competitive agreements are those agreements which adversely affect the competition in the market. World bank glossary define anti-competitive practices as the practices that are undertaken by enterprises with a motive to eliminate competition, to maintain their dominant position in the market without providing any cost or quality benefits to the consumer. Section 3 of the Competition act prohibits such kind of agreements.

Clause 1 of Section 3 is a general clause and is broad in its scope. It prohibits any kind of arrangement entered between enterprises in which supply, manufacture, distribution, storage etc. is done in such a way that it causes adverse effect on the competition within India. This section does not lay down any straight jacket formula to determine anti-competitiveness. The same will be determined as per the facts and circumstances of each case. Such agreements entered between the enterprise would be considered as void as per clause 2 of section 3.
Tie-in arrangement may not be per se anti-competitive. It can also be advantageous, for instance- it may provide the consumer with a product or service that they might actually need while purchasing the other product. For an example; a bike seller might be selling helmet locker with the bike which can be of use for the customer. However, forcing the customer to purchase the same can be anti-competitive. It is for this reason that a case relating to anti-competitive agreement is determined according to its own circumstances.

The U.S Supreme Court in Northern Pacific Railway Co. vs United States[5], opined that tie-in-arrangements restrict the competition in respect of the product that is tied and also the consumers are forced to purchase the tied product because of which such an agreement have adverse effect on competition.

There are certain pre-requisites that are looked into before ascertaining that a particular arrangement is a tie-in-arrangement and is anti-competitive.

1. Two separate products- As discussed above, in order to constitute tie-in-arrangement, there should be two products one is the tying product and one is the tied product. These should be two independent product that are sold together as a consequence of an agreement entered between enterprises. In such a situation, sometimes it become difficult to ascertain that whether a particular arrangement is a tie-in-arrangement or not for instance- a soap company selling a pack of 4 soaps together would not constitute tie-in-arrangement.

[5] 356 US 1 (1958)

ISSN: 2582-6433

2. Coercion- The next element to be kept in mind in order to ascertain that the tie-in-arrangement is anti-competitive is coercion. If a consumer purchasing a product is bound to purchase another product without his wish, then we can say that such tie-in-arrangement is anti-competitive. Merely offering a product with another product is not anti-competitive for instance- bike seller offering helmet lock with the bike, not making it compulsory for the consumer to purchase the same, then the same cannot be considered as anti-competitive. Thus, whether coercion exists or not is again a matter of facts and circumstances.
3. Market Power- One of the peculiar features of competition act is that as per this act, an agreement is anti-competitive only when it has an adverse effect on the competition in the market. so, in order to ascertain the anti-competitiveness of tie-in-arrangement, it becomes important to assess the market power. The share of the market of the tying product and the tied product, the restrictions imposed, the rate at which the tied product is sold etc, all these factors have to be assessed[6].

- Abuse of dominant position

Dominant Position signifies a position of strength that an enterprise might have over others. From the competition point of view, dominant position can be considered in economic terms wherein one market player is in a position to maintain its supremacy. Dominant position is not per se anti-competitive under competition act however, abuse of such position is considered as anti-competitive.

Abuse of dominant position impedes fair play in the market, it eliminates the competition and also reduce the choices available to customers. An enterprise can abuse its dominant position in many ways such as- predatory pricing, imposing unfair conditions, denying other competitors to have access to market share, using its dominant position in one market to enter another market etc. Section 4 of the competition act deals with abuse of dominant position. This section defines dominant position as a position of strength than an enterprise hold in a relevant market in such a manner that it operates independently and also effect the competition in its favour[7].

[6] Alan Prince, "Analysis of tie-in-agreements under competition law", 4 International Journal of legal developments and allied issues 30-34 (September 2018)
[7] Kajal Dhiman, "Abuse of dominant position under competition act,2002", Manupatra (20th June 2022), Accessed at: https://articles.manupatra.com/article-details/ABUSE-OF-DOMINANT-POSITION-UNDER-

Clause 2 of Section 4 enumerates certain activities that are considered as abuse of dominant position.

- Imposition of discriminatory prices in order to maintain monopoly and eliminate the competition is considered as an abuse.
- Controlling the production of goods and services.
- Denying market access to other competitors.
- Using dominant position to enter other relevant market or
- Entering into contracts that obligates the other party with certain supplementary obligations is also considered as an abuse.

Considering the aforementioned list, the activities that constitute abuse of dominant position can be categorized under two heads: Exploitative practices and Exclusionary practices. An example of exploitative practice could be predatory pricing. In predatory pricing, an enterprise keeps the price of the good below the cost in order to attract customers, eliminate competition and maintain monopoly in the market. An example of exclusionary practice could be denial to market access wherein the enterprise holding the dominant position controls the infrastructure of the market or other facilities that are necessary to enter the relevant market[8].

Section 19[9] of Competition Act, 2002, vest CCI with the power to investigate into the anti-competitive practices. Clause 4 of Section 19 lays down certain factors that should be considered in order to establish abuse of dominant position. These factors are: The market share that the enterprise holds and its size, the barriers for entry of any other competitor, dependency of consumers, price of the product etc. In situations, where CCI has established a prima facie case considering the aforementioned factors, then it can direct the director general to conduct an investigation and file a report thereon on the basis of which CCI can adjudicate.

- <u>Patent Pools</u>

The IP rights creates monopolization whereas the competition law to some extent oppose such monopolization in case if it is adversely affecting the competition in the market. however, both these laws are not contrary or always in conflict with each other. The broader objective of both

---

[8] Provision relating to abuse of dominance, CCI, Accessed at: https://www.cci.gov.in/public/images/publications_booklet/en/provisions-relating-to-abuse-of-dominance1652177254.pdf

[9] Section 19 of Competition act- "Inquiry into certain agreements and dominant position of enterprise".

ISSN: 2582-6433

these laws is to ensure economic growth and consumer welfare. The primary aim of competition law is to promote free and fair competition, to ensure that powers are not concentrated in one hand and to encourage competitiveness in the market. The U.S Supreme Court, in the case of *Atari Games Corp. vs Nintendo of America Inc*[10], opined that competition law and IPR can peacefully co-exist with the help of proper legislative regime. If monopoly is created by IP rights that is adversely affecting the competition, then the Sherman Act,1890, dealing with the provisions of free and fair competition can regulate such a situation.

However, in order to maintain monopoly and commercialize the IP rights, the IP holders sometimes adopt anti-competitive practices. One of such anti-competitive practice is Patent Pools. Pool in general sense can be referred to accumulate something so, patent pooling can be referred as an arrangement wherein two or more enterprise agree to pool their patent and then license it to third parties so that, they can escape the clutches of high level of competition, can maintain monopoly and avoid duplicity and overlap of technology. In India, the patent regime is regulated by Indian Patent Act,1970. Although, it does not have any explicit provision regarding patent pool[11]. However, under Section 102 of Patent act, the government can make and regulate such pools for public interest. Patent pools per se are not bad but they can be anti-competitive when the members of the pool refuse to grant license to third parties without any reasonable cause of fix high prices for the grant of license. Recently, An Indian generic drug manufacturing company, Aurobindo Pharma Limited and Med Chem joined a patent pool for manufacture of anti-retroviral medicines[12].

The concept of patent pooling is not new to the world, rather it has been a prevalent practice since years. During the first world war, the U.S government intervened to solve the tussle between Wright Company and the Curtis Company, who were engaged in manufacturing airplanes but were fighting over their patent technologies which brought the manufacturing of airplane at halt thus, the U.S government looking at the ongoing condition of war, asked the two companies to form a patent pool so that airplanes can be manufactured and use during wartime. Another example of patent pool can be traced back to 1998, when Sony, Philips and Pioneer formed a

---

[10] 975 F.2d 832 (Fed Cir. 1992)
[11] Shaurya Shukla, "Patent Pooling vis-à-vis competition act: Antagonism of IPR and Competition regime", IRALR (17th May, 2021), Accessed at: PATENT POOLING VIS-A-VIS COMPETITION ACT, 2002: ANTAGONISM OF IPR AND COMPETITION REGIME. (iralr.in)
[12] Priyanka Rastogi, "India: Patent Pool", Mondaq (7th July 2014), Accessed at: https://www.mondaq.com/india/patent/325602/patent-pool

patent pool to comply with standards that were necessary for DVD-Video and DVD-ROM. Time and again enterprises have entered into patent pools but if such patent pool affect the competition in the market, then the Competition act comes into play.

Patent pools can be generally of two types: Open Pool, wherein a professional management company is hired to manage the pool and to take various decisions regarding the same such as: who are eligible to enter the pool, at what rate the license would be provided to third parties etc. The other type is a closed patent pool, wherein within the members of patent pool any one member is selected to take the decisions regarding the pool. In closed patent pool, there is no outsourcing of decision-making rights to third party[13].

- <u>Technology Transfer</u>

In the growing age of competition, the creation and adoption on new technology by companies has become necessary. Technological innovation is playing a crucial role to gain a competitive edge in the market. whether it be new and efficient ways of production of goods or adopting new technologies for management of enterprise or to increase the sales by new ways of communication, technology plays an important role at every step of production and sale of goods and services. Investing in development of new technologies can be risky and costly but it helps an enterprise to gain a competitive edge in the market, it also helps to develop any technology suiting to the needs and requirements of the enterprise and reduce the dependency on other enterprises.

Due to high cost and risk involved in development of new technology, there has been a growing usage of the concept of technology transfer. Basically, technology transfer can be referred to a process whereby any technology, know how developed by an individual, group of individuals, an enterprise, is exchanged with other organizations. Technology transfer can be among countries, industries, enterprises etc. Technology Transfer can take place through various ways such as: licensing, assignment, sale etc. The person transferring the technology is referred as ‘Transferor’ and the person acquiring the technology is referred as ‘Transferee’. There is a contractual legal relationship between the transferor and the transferee and the transfer of the technological know-how is governed by the terms in the contract[14].

[13] Ibid.

[14] Prashant Kumar, “India: Technology transfer agreement: Intellectual property rights and Competition law”, Mondaq (20th March 2015), Accessed at: https://www.mondaq.com/india/contracts-and-commercial-law/382680/technology-transfer-agreement-intellectual-property-rights-and-competition-law

ISSN: 2582-6433

An agreement for technology transfer which includes such provision that are not reasonable to protect the IPR but are incorporated to abuse the position in the market, are considered to be anti-competitive. Technology transfer is a broad term, which can be anti-competitive when; the transfer includes unreasonable restrictions such as high price, patent pooling, if done for a motive to abuse the dominant position, can also fall under this category.

INDIAN SCENARIO

In Indian context, the interplay between Intellectual Property Rights and Competition Law is at very nascent stage. IPR and Competition law emerged and developed independently and individually however, they can be said to be the sides of the same coin because the broader objective of both of these laws is to accelerate economic growth and cater to the needs of the consumer.

Various theories of IPR provides a justification for grant of exclusive rights to the IP holder. These rights create a situation of monopoly for a limited period of time, which is often opposed by the competition law. The main objective of competition law is to enhance the market for the consumers so that, they are given more choices. IPR in such a situation seems to go against the objectives laid by competition law, which results in the conflict between the two. Applying competition law to cases involving IPR is one of the most peculiar and complicated issue in the field of competition law. Due to the technological advancements, there has been an increase in the number of cases pertaining to abuse of IPR. At the inception, these two laws were considered to be contradictory to each other due to the fact that one promotes monopolization and the other prevents it. however, in the present time, the harmonization between IPR and Competition law is considered imperative for the progress of a nation[15].

The Interplay between competition law with Patent, Trademark and Copyrights is discussed below:

1. Patent and Competition law

The Patent holders can abuse their position in the market through various ways such as: By abuse of Standard essential patent, by adopting predatory pricing mechanism, by entering into anti-competitive agreements, by delaying or restricting the entry of players in the market through

[15] K.D. Raju, “The inevitable connection between IPR and Competition law: Emerging jurisprudence and lessons for India”, 18 Journal of Intellectual Property Rights (March 2013).

supplementary protection certificates.

- Abuse of dominant position via using the SEP

Standard essential patent sets a common standard for any product or process that the other players in the market has to comply with. Standard can be in form of a document that is approved by a regulating authority by consensus and such a document mentions the essential requirements that have to be complied with. Standards can be of two types: De jure standard and De facto standard. De jure standard are set by standard setting organization whereas de facto standard gains recognition due to its wide acceptance among the market players and the public. Standard play an essential role in improvement of the quality of the good or service provided. The importance of setting a standard has been recognized internationally in the 13th WIPO session on law on patent in which it was opined that increasing interconnectedness among nations, necessitates the establishment of international standards[16]. The growing importance of SEP has made it a lucrative source for IP holders to abuse their position in the market.

The one holding a SEP, have a significant power in the market and they can abuse the same via restricting the competitors to enter the market or by charging excess free for grant to license. Due to the abuse of SEP by imposing discriminatory and unfair conditions, the standard setting organization (SSO), now require the SEP holder to abide by the FRAND (Fair, reasonable and non-discriminatory) terms while grant of license[17].

- Abuse of dominance via excessive pricing

Charging exorbitant price for a good or a service is considered as anti-competitive mainly when such an enterprise occupies a dominant position in the relevant market. In case of IP holders, they are already enjoying the monopoly rights so they have to extra cautious to ensure that they are not indulging in any anti-competitive practices.

- Restricting the entry of competitors by entering into any kind of anti-competitive agreement

Patent holders in order to protect their patent from any new invention or competition, often resort

[16] Ishan Sambhar, "India: concept of standard essential patent", Mondaq (30th June 2020), Accessed at: https://www.mondq.com/india/patent/954588/concept-of-standard-essential-patent
[17] Ashish Bharadwaj and Vishwas H. Devaiah, "Multi-dimensional approaches towards new technology: Insights of innovation, patent and competition", 1-18(Springer, 2018)

ISSN: 2582-6433

to anti-competitive practices by entering into agreements that curtail the competition in the market and restrict the entry of competitors. This practice is common in case of pharmaceutical industry. In pharma sector, there is a risk that entry of new innovative and cheap generic version of the medicine that might change the competition pattern in the market. To avoid such a situation patent holder often enter into Patent settlement agreements (PSA's) which also comes under the scrutiny of competition law. When the expiry date of protection of patent approaches, the patent holder are confronted with a risk that generic medicines having a cheaper rate will enter the market to tackle with this situation, the patent holder sometimes engage in patent related dispute or litigation to delay the entry of generics in the market. In order to resolve the ongoing dispute, PSA's agreement are considered as a best resort wherein the parties enter into an agreement to avoid the high litigating cost. Such agreements entered between the patent holder and the manufacturer of the generic medicine, often charge high amount from the manufacturer of generic medicines which is considered as unreasonable and anti-competitive.

2. Trademark and Competition law

Anticompetitive restrictive agreements (clauses in commercial contracts, such as prohibitions on online sales, qualitative selective distribution, vertical restrictive agreements, etc.) are the most frequent competition law issues pertaining to trademarks.

Trademark owners frequently try to impose contractual restrictions that forbid shops from advertising their items on online portals. Such legal provisions are typically found in agreements for the selective distribution of high-end or highly technical goods. Due to their restricted nature, such contracts with online sales limits (often in selective distribution contracts) may be deemed anticompetitive. On the other side, trademark owners may rely on the argument that such restriction is justified in order to safeguard the goodwill and reputation of their brands.

3. Copyright and Competition law

Copyrightable subject matter includes the protection over the computer programme and software. In this era of digitalization, the importance of computer programme and software has increased. Due to the growing importance, the copyright holders are abusing their position in the market through various methods such as by refusing to provide license, charging excessive royalties etc[18].

[18] Ashish Bharadwaj and Vishwas H. Devaiah, "Multi-dimensional approaches towards new technology: Insights of innovation, patent and competition", 15(Springer, 2018)

ISSN: 2582-6433

To maintain a harmony between IPR and Competition law, there were various provisions that were incorporated in the competition act, 2002. Section 3 of the act prohibits any kind of anti-competitive agreement and consider such agreement as void per se however, Section 3(5) of the competition act, reflects the nations commitment for providing strong protection to IPR. This section states that the IPR holder should not be restricted to impose conditions in order to protect their IP rights. This section provides a blanket exemption to IPR but to maintain a balance, Section 4[19] has been incorporated that prevents the abuse of dominant position and in case such an abuse is undertaken by an IP holder then, CCI will have a jurisdiction to intervene in such matters.

CASES OF INTERPLAY BETWEEN IPR AND COMPETITION LAW

- *FICCI- Multiplex Association vs United Producers Distributors Forum*[20]

The producers and distributors of films have the option to collectively refuse to distribute their films to multiplexes in order to pressure them to agree to the parameters of income sharing proportion. Extraction of a higher income share was the driving force for the creation of the United Producers and Distributors Forum (UPDF). All producers and wholesalers, even those who were UPDF employees, were sent warning by UPDF not to deliver any new films with the intention of showing them at multiplexes. The Competition Commission of India determined that UPDF engaged in cartel-like behaviour in this case since it had complete control over the arrival of films due to its 100 percent market share.

It was decided that as a component film is considered to be a collection of copyrights, the question arises as to whether the choice to sell, give on hire, or transmit the film in broad daylight also includes the right not to sell or send out a recruit. It should be noted that copyright does not grant the holder a market ability because there is a difference between the negotiating power between individual copyright owners and collective allowing through copyright social rules. According to Section 3(3) of the Competition Act, the UPDF's decision to limit its movie stockpile to multiplexes was an accurate conclusion reached by the CCI. The case's investigation reveals that members of the UPDF were imprisoned at various stages of the business-like production and dispersion. Because manufacturers and retailers are not competing at the same level of business,

[19] Section 4 of Competition Act- "Abuse of dominant position".
[20] Case no 01 0f 2009, decided on 25th May 2011

ISSN: 2582-6433
it will fall under a vertical arrangement.

- *Amir Khan Productions Private Limited vs Union of India*[21]

In the present case, the petitioners challenged the show cause notice issued by CCI on the ground that CCI has no jurisdiction to intervene with any matter regarding the film because copyright has already been obtained for the same. The reason CCI issued a show cause notice was because of the information that was filed by FICCI Multiplex Association. In the information, it was stated that the Film & Television Producers Guild of India are engaged in forming a cartel that is anti-competitive as per Section3(3) of Competition act. CCI took cognizance of the matter and directed the Director General to investigate the matter. DG in its report concluded that petitioner is contravening the provisions of competition act, by forming a cartel with a motive to charge high revenue from the multiplexes. The petitioners challenged the said decision of CCI before the H.C, on the ground that as the film has copyright protection so it would be exempted under Section 3(5) of the Competition act therefore, the decision of CCI is without any jurisdiction. The Bombay H.C in the present case, dismissed the appeal filed by the petitioners. The court opined that there no explicit provision in the act which bar the jurisdiction of CCI in IPR matters. Moreover, the matter of jurisdiction of CCI cannot be ascertained at such an initial stage where only a show cause notice has been issued and the matter is still at the inquiry stage. This case was an important case because for the first time it addressed various issues pertaining to the interplay between IPR and Competition law.

- *Hawkins Cookers Limited vs Murugan Enterprises*[22]

The Delhi High Court ruled that a well-known brand could not be allowed to engage in practises of controlling the incidental market under the guise of being prominent and well-known in order to establish a monopoly in the market. The same would be considered an abuse of a market's dominating position and is prohibited.

- *Singhania and Partners LLP vs Microsoft Corporation Pvt. Ltd.*[23]

In this case, the petitioner purchased for its business, a window operating system from one of the distributors of Microsoft and also made an advance payment for the same. however, later on

[21] 2010 (112) Bom LR 3778
[22] 2008 (3)PTC 90 (Del)
[23] Case no 36 0f 2010, decided on 22nd July 2011

ISSN: 2582-6433

Microsoft informed the petitioner that they can only purchase the volume licenses and not OEM (Original equipment manufacturer) license because OEM license is only available to those who are purchasing a new machine.

The price of OEM licenses was double than that of Volume licenses to which the petitioner alleged that different distributors of Microsoft are charging different prices for the same product and as Microsoft occupy 90% of the market share so, they are abusing their dominant position. The petitioner was forced to purchase volume licenses so they, contented that this amounts to discriminatory pricing under Section 4(2)(a)(ii) of the Competition Act 2002.

CCI in this case did not find that there was a prima facie case in favour of the petitioner. CCI opined that charging different price for different license is a justified practice. Further, CCI opined that there was no evidence against Microsoft to prove that they have undertaken anti-competitive practices to keep the competitors out of the market.

CONCLUSION

In the mission of globalization, India has answered emphatically by opening up its economy, eliminating controls and restabilising progression. In quest for expanding the proficiency of the country's economy, the public authority of India perceived the advancement, Privatization and Globalization period. Subsequently, Indian market faces rivalry from the inside and outside the country. This lead to need of an extreme regulation to apportion equity in the business matters and thus the Competition Act, 2002 was passed to manage something similar. Solid and fair rivalry has maintained to be a powerful instrument, which upgrades financial productivity. Thus, the reason for starting the opposition regulation was to control restraining infrastructures and energize rivalry in Indian market. An Intellectual Property Right (IPR) is a tricky right "safeguarding economically significant results of the human mind", it includes patent, trademark, copyrights, brand names and other comparable freedoms. An IPR incorporates the option to dispose of others from taking advantage of the non-human resource. In Indian context, the Competition act, 2002 and various IP legislations has been playing an important role to harmonize between IPR and competition law by incorporating provisions of; compulsory licensing, parallel import etc.