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ANALYSIS OF RELATION BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

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ABSTRACT

This paper will try to draw relation between Intellectual Property Law and Competition Law. The main objective or motive behind granting intellectual property is to give exclusive right to inventor or the maker, so that they can be benefited from their invention which creates monopoly in the market as common public has no right to use that intellectual property without the permission of the inventor. On the other hand the main objective of Competition law is to ensure a competitive and fair market and eradicate monopoly from the market. It seems that Intellectual Property Law and Competition are completely in conflict or opposite to each other and they cannot reconcile. Leaving this negative approach behind, in recent days positive perspectives are taken to harmonize or balance the relation between this two law. Though Intellectual Property Law and Competition Law are divergent from each other but they meet at certain point like the ultimate purpose of both this law is to ensure consumer welfare by encouraging innovation, so that consumers are able to get the utmost benefit. Intellectual Property right does not ensure automatic income or gain, income can be generated only when it is able to create a position in the market by maintaining its quality, in this way the objective of both the laws are preserved. It can be also said that Intellectual Property Law are complementary to each other in dealing with parallel imports, compulsory licensing and in Anti-competitive agreements. Help of judicial precedents are also taken to understand the matter wisely.

Key Words: - Intellectual Property, Competition, relation, conflict, harmonize, complementary.

RESEARCH OBJECTIVE

- To analyze the ultimate purpose and goal of Intellectual Property Law and Competition Law.
- To know up to what extent Intellectual Property Law and Competition Law contradicts each other
- To find out the specific areas in which Intellectual Property Law and Competition Law harmonizes with each other.
- To find out how the Intellectual Property Law and Competition Law are complementary to each other.

RESEARCH QUESTION

- How Intellectual Property Law and Competition Law are contradictory to each other?
- Up to what extent does Competition Law and Intellectual Property Law harmonizes with each other?
- How Intellectual Property Law and Competition Law are considered as complementary to each other in-spite of being contradictory with each other?

RESEARCH METHODOLOGY

To complete the study author have used doctrinal method of research, where the help of primary and secondary sources (like books, journals, articles) are taken to complete the research.

HYPOTHESIS

The relation between Intellectual Property Law and Competition Law are such that they cannot be reconciled.

INTRODUCTION

After Liberalisation, Globalisation and Privatisation, the world has changed rapidly and Intellectual Property and Competition Law are the two emerging law of this period. As the world is developing through innovation and technologies, so there is a tough competition in the market and to regulate this invention and competition, Intellectual Property Law and Competition Law, respectively, plays a major role. Though both these laws serve the purpose of consumer benefits

but they generally they conflict with each other, so their relation can be termed as “friends with disagreement”. In the case of *NDC Health V. IMS Health*¹ European Court of Justice stated that “Competition Law and Intellectual Property have never been easy bedfellows”². The main reason behind this conflict or sayings is Competition law ensures that there is fair competition in the market amongst the competitors and to prevent monopoly in the market whereas the main idea behind Intellectual Property Law is to grant exclusive rights to the inventor and it tends to create monopoly in the market. So, it creates a tassel between this two.

Though both these law are contradictory to each other, but in recent trends scholars came with a opinion that Competition law and Intellectual Property law also harmonizes with each other. Intellectual Property Law encourages people to come up with new invention which can be useful for the society or for the common people and Competition law prevents monopoly to ensure that customer can enjoy the benefits of all goods by investing the minimal amount, so it can be said both these law is for consumer welfare but their way of doing is different. Even Competition Law and Intellectual Property Law acts as complementary to each other because when intellectual property right is granted competition law ensures that right is not used in adverse way.

HISTORICAL BACKGROUND OF INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

Intellectual Property is intangible property which is “creation of mind”. It is the bundle of rights which is conferred to intellectual property holder to use that for commercial exploitation. Intellectual Property is of two types which are:-Industrial Property and Copyrights. Patent, Semi Conductor, Industrial Design, Trade Marks comes within the ambit of industrial property.

With the advent of technology, new innovations are emerging in the market, so the need to protect the innovation and innovator is of utmost importance. The term “Intellectual Property” was first used in 19th century but it is mostly used from 20th century.

The first convention on intellectual property was made in Paris Convention in 1883 and was followed by Berne Convention in 1886. World Intellectual Property Right Organisation(WIPO),

¹ [2004] All E.R. (E.C.) 813

² Roitch Caroline Jerobn, The Interface Between Competition Law and Intellectual Property Law in Kenya(2014) (unpublished LLM Dissertation, University of Nairobi)

Trade Related Aspect of Intellectual Property(TRIPS) further paved the way for protection of invention.

The object behind granting intellectual property right is encourage new invention and to use that commercially which will also help in the economic development of the country as well as it will benefit the common people.

The Competition emerge in the market when people started selling same product and competition arose regarding which product is better and can be availed in affordable price. In India the competition was first governed through The Monopolies and Restrictive Trade Practices Act, 1969(MRTP), but which was inefficient because this act focuses more on controlling monopoly rather than ensuring competition. To regulate competition , MRTP Act was abolished and Competition Act, 2002 was enforced. The main is that every player can get chances to flourish in the market, and control abusive position in the market and to ensure consumer are benefited from it.

So, intellectual property is to give exclusive right to the intangible property holder and he only have right to exploit that where as Competition law encourages competition in the market.

THE OBJECTIVE BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

As mentioned, the objective of Intellectual Property law is to encourage new invention and to grant exclusive right to the inventor, and without his prior permission common people can not use it, and it creates monopoly, where as main purpose of competition law is to prevent monopoly

The term “competition” is not used in same sense in Intellectual Property Law and Competition Law

The word “Competition” used in Intellectual Property Law and Competition Law are not used in same sense. In case of Intellectual Property Law competition is encouraged for doing new inventions and for that exclusive right is granted, and this restricts competition in the market in several ways. Intellectual Property law is only for individual good and not for the society as a whole. But Competition law does not restrict the market in the hand of one player, it ensures that

every player in the market, who is competent gets fair chance to carry on their activities and also to ensure customer can get the best quality product in affordable price.

It can be concluded that intellectual property law is for individual purpose which will help the inventor to exploit his invention for his own economic gain whereas competition law serves the purpose of community or of society at large where all the people can be benefited.

THE RELATION BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

Prima facie through the object of Intellectual Property law and Competition Law it is clear that they act against each other and their relation cannot be reconciled.

It is said by the scholars that Intellectual Property Law results in “the very same market condition” that the competition law seeks to eradicate.³ But this statement is not completely true. Intellectual Property law does not create monopoly in strict sense, rather it can be called as exclusionary because it gives exclusive rights to the owners. The exclusive right which is granted to the innovators for a specific time period and the right is granted over a particular product and not over the whole market place.

Merely granting exclusive right does not create monopoly in the market or generate automatic profit. It is needed that the product on which right is granted should meet the standard of the market and must be satisfactory to its consumer, so it is needed to maintain quality in order to sustain in market and take profit by using intellectual property right. So, intellectual property right only confers the exclusive right and not the monopolistic right.

Only restricting the big market players, is not the competition law. Mere agreements between the market players is not illegal in nature. Competition law only restricts those agreements and consider it to be illegal when it tries to create a dominant position in market and does not allow other market players.

In case of granting intellectual property and the holder of intellectual property uses his right in

³ *Id. at 4.*

order to abuse the market, or charging high price which common people can not access then competition law comes into play to control or regulate such thing.

It can be said that they are not totally different from each other, and they try to attempt same objective that is consumer welfare by taking different approach. A positive approach is taken and they are considered to be complementary to each other.

CONFLICT BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

Relation between Intellectual Property Law and Competition Law have been described as unhappy marriage.⁴

The conflict between Intellectual Property Law and Competition Law arises when there is abuse of market by the intellectual property holders. Intellectual property holders can manipulate the market in different ways: -

Abuse of Dominant Position:- The intellectual property holder can use their exclusive right to create monopolistic market by not allowing other players into the market. If intellectual property right is granted then no other person can use that without the permission of intellectual property holder and by this way dominant position can be created in the market and competition law is against it.

Section 3(5) (i) of the Competition Act states that: -

(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 (47 of 1999);

⁴ Atul Patel, Aurobinda Panda, Akshay Deo, Siddhartha Khettry and Sujit Philip Mathew, "Intellectual Property Law and Competition Law" 6 Journal of International Law and Competition Law 122 (2011)

(d) *the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);*

(e) *the Designs Act, 2000 (16 of 2000);*

(f) *the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000)*

This section prioritize intellectual property right and does not restrict trade practices. This is because intellectual property protection is, in fact, necessary as it is prerequisite for innovation, which is why most laws including Competition Law, give priority to IPR protection.⁵

Patent Thickets:- It means the patent with which there are multiple claims are associated. So, while using such patents one need to take permission or license from different patent holders before using that. So, it becomes difficult for market players or competitor to use that technology, as a result it automatically reduces the competition in the market and can create monopoly in the market.

Refusal to deal or license:- The patent holders may refuse to grant license to any other party or competitor in the market to deal with its patented right. The patent holder generally has no duty or obligation under anti-trust or patent law to license its intellectual property to other. Because of this it becomes easy for them to have control over the market and to commercially exploit the right without any intervention of any competitors.

Excessive Pricing:- In this case the dominant firm charges even more price than the usual rate. This trend is mostly prevalent in pharmaceutical industry. And the consumers are forced to buy such pharmaceutical product as consumer are forced to do so as there are no alternatives available in the market. So, through it a dominant position is created in the market which is against the competition law.

The goal of Intellectual Property Law is to protect intellectual property right holder's right and to protect them from infringement but this has become the ultimate cause of contradiction between Intellectual Property Law and Competition Law. Reward theory of Intellectual Property law encourages to grant intellectual property right and reward also encourage innovation but

⁵ Minakshi Bindhani, What is the Conflict Between IPR and Competition Law, available at:

<https://enterslice.com/learning/what-is-the-conflict-between-ipr-and-competition-law/#:~:text=This%20is%20because%20intellectual%20property,harm%20consumers%20or%20restrict%20competition>. (last visited on 4th October 2023)

constraining the right on a single hand may go against public or consumer benefit.

COMPLEMENTARY NATURE OF INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

Historically there is negative approach regarding the relation between Intellectual Property Law and Competition Law because they evolved with distinct and separate objective. But in presents positive approach is taken regarding their relation. They are considered to be the opposite side of the same coin. They have same objective that is consumer welfare by taking different perspective. Intellectual property encourages new invention from which the public at large will be benefited and along with it, intellectual property right also protects the interest of the inventors as well where as Competition law also protects the interest of the consumer so that they can enjoy that innovation within a reasonable and affordable price and also ensure a healthy competition among the market players.

It may be stated that Competition Law and Intellectual Property Law share the same economic objectives.⁶ Intellectual Property Right were introduced because they were thought to be essential for further industrial and economic development.⁷ If rights are not protected then the urge of innovation will reduce and the problem of “free rider” will arise. Competition can only play its role as market regulators if the products of human labour are protected by property rights.⁸ If this law is analyzed by considering the same objective, then it will be possible to overlook their contradiction. Competition law also recognises the role of Intellectual Property Right to encourage innovation, which will be beneficial to public and therefore Competition law also values Intellectual Property Law.

Competition law also plays important role in controlling the exclusive right of commercialization, which is granted through intellectual property right. If there is no control in market players then the intellectual property right holders can manipulate the market on their own way, which can act as hindrance for healthy competition. Granting intellectual property right does not create monopoly by itself, or having dominant position itself is not an offence, Competition law will

⁶ K.D Raju, The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India, 18 Journal of Intellectual Property Rights 112(2013)

⁷ Atul Patel, Aurobinda Panda, Akshay Deo, Siddhartha Khettry and Sujit Philip Mathew, “Intellectual Property Law and Competition Law” 6 Journal of International Law and Competition Law 128 (2011)

⁸ *Ibid.*

come into play when the market player uses their position to abuse the market. Competition Commission has also prohibited some of the intellectual property law, which is in contravention with the competition law.

HARMONIZATION BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW

The relation between intellectual property law and Competition Law is governed by Trade Related Aspects of Intellectual Property Rights (TRIPS). It can be said that TRIPS provision tries to bring harmonization between Intellectual Property Law and Competition Law. TRIPS introduced the concepts like compulsory licensing, parallel imports and Anti-competitive practices to create balance between these laws.

Compulsory Licensing

Pursuant to the general consideration in paragraph 1 of the TRIPS preamble, read with Article 8(2) of the TRIPS Agreement, Members are allowed to take appropriate measures consistent with the TRIPs to prevent abuse of intellectual property rights by right holders.⁹ Article 31 of the TRIPS Agreement gives right to govt. for compulsory licensing. Compulsory Licensing is a concept in which govt. has right to transfer the patent to the third party without taking permission of the patentee. It is used in the case where patentee takes undue advantage of his right and which is detrimental for consumer. Generally compulsory license is granted when patentee sells his patented product on a high price, or does not make or use his patented product sufficiently. Compulsory license is granted so that innovation can be used for public good and not for preserving the rights without any use. Section 84 of The Patents Act, 1970 also mentions about compulsory licensing.

Parallel Imports

Parallel imports basically refer to the genuine and legitimately acquired goods from the respective rights holders and thereafter sold at lower prices through trade channels which are legally

⁹ Lakshmikumaran and Sridharan attorneys, Interface between Competition Law and Intellectual Property Laws Indian Perspective, available at:

<https://www.lakshmisri.com/Media/Uploads/Documents/Interface%20between%20Competition%20Law%20and%20Intellectual%20Property%20Laws%20-%20INDIAN%20PERSPECTIVE.pdf>. (last visited on October 4, 2023).

unauthorized.¹⁰ It can be called as exhaustion of rights, because in this case the intellectual property holder totally gives his right to the third party. Since parallel imports are part of trade it is governed by both Competition Law and intellectual property law, i.e. under The Trade Marks Act, 1999. Section 29 and Section 30 of the Trade Marks Act allows parallel imports or international exhaustion of rights.

Parallel imports also promotes competition in the market because through it the trade marked goods becomes easily available in the market at lower prices and consumers gets benefited out of it. In this case the rights are transferred to other party, so they acquired right to sold that in the market, and due to it monopoly is prevented in the market and ensures competition for producing best quality goods.

Anti-Competitive Agreements

Article 40 of the TRIPs Agreement deals with Anti-competitive agreements in contractual licensing and it prevents to do such licensing which will create adverse effect on the market. The countries which adopted TRIPs have right to control or take measure against the licensing which is anti-competitive and abusive in nature. Appropriate measures such as exclusive grant-back conditions, condition preventing challenges to the validity and coercive package licensing in order to prevent or control restrictive licenses which have adverse effect on competition.¹¹

JUDICIAL PRECEDENTS

In the case of *Entertainment Network (India) Pvt. Ltd. V. Supper Cassette Industries Ltd.*¹², it was held that compulsory can be granted to any applicant(eligible), which is taken for public interest. It was also held that Copyright owner has right over his creation and can charge royalty for it, but it should not be unreasonable and the right is not absolute in nature.

In the case *Amir Khan Productions Pvt. Ltd. V. Union of India*¹³, the main issue was whether Competition Commission of India(CCI) has power to deal with intellectual property rights. The court in this case held that CCI has power to deal with intellectual property rights if it effects the

¹⁰ Aabir Shoaib, Lexlife India, available at: <https://lexlife.in/2021/02/15/legality-of-parallel-imports-in-india/>. (last visited on October 4, 2023)

¹¹ *Supra* note 9 at 9

¹² Civil Appeal No. 5183/2005

¹³ Writ Petition No.358 of 2010

competitive aspects of the market and abuses it.

In the case of *Atari Games Corp V. Nintendo America Inc*¹⁴, it was opined that though on first instance it may seem that competition law and intellectual property law contravenes each other but they are complementary in nature by encouraging innovation and competition through which consumer will be benefited.

CONCLUSION

In conclusion it can be stated that generally Competition Law and Intellectual Property Law are contradictory in nature. In taking consideration the incentive theory of the Intellectual Property Rights, the reward should be granted to the inventor. The inventor will only have the right to do commercial exploitation, which tends to give rise to monopoly. And Competition Law is against monopoly, which is abusive in nature. So, one grants the right and the other one tries to curb it. If a close view is taken, it is found that though Intellectual Property Law and Competition Law are in contradiction, still the relation between them can be reconciled. And they act as complementary to each other as both aim for consumer good. Even TRIPs also provide certain provision where this two law goes parallel, like as in anti-competitive practices in case of licensing can be dealt or control by competition law when it goes against the competition law. It can be said though the intellectual property right is granted which preserves the right of the innovator but it is limited in nature. Even with the judicial precedents it is clear that CCI also has power to deal with IPR matters. Thus it can be said they go hand in hand, and no one is superior than the other.

¹⁴ (Fed. Cir. 1992)