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THE MONOPOLY DILEMMA: THE TUG OF WAR IN PHARMACEUTICAL SECTOR

AUTHORED BY - AHMAD FAROOQUI

ABSTRACT

The purpose of this paper is to identify and understand the core issue associated with the Patent and Competition law. This Paper further explores a method to create a balance between law relating to intellectual property and competition through innovation. The interplay between competition law and intellectual property law has historically been contentious, often viewed as opposing forces where intellectual property laws tend to support monopolistic practices, while competition laws aim to limit them. This research further shed the light on this tradition dichotomy by analyzing the problem associated in Pharmaceutical Industries and try to resolve this problem through the lens of Dynamic competition. This paper undertakes a conceptual research in order to finds out real cause of the conflict. It further takes intellectual approach to answer the question: "To what extent do patent monopolies encourage or stifle innovation in pharmaceutical industries?" Finally, the paper suggests amendments in the existing law which reconciles both the fields in order to promote effective innovation which is crucial for economic development and growth in India.

Keywords: Patent law, Competition law, Their Relationship, Pharmaceutical Sector, Dynamic Competition

INTRODUCTION

"Patent laws reward innovation; antitrust laws prevent monopolization. The tension between them is inevitable." — Herbert Hovenkamp¹

Intellectual Property (IP) and Competition Law are the two side of the same coin that shape the legal landscape of innovation and market dynamic. One side provide the right to the creators and inventors to encourage innovation, while the other side aims to maintain fair market conditions by curbing monopolistic practices and anti-competitive behavior. The interplay

¹ HERBET HOVENKAMP, ET A`,IP AND ANTITRUST:AN ANALYSIS OF ANTITRUST PRINCIPLE APPLIED TO IP LAW (New York, Aspen Law & Business, 2002).

between these two areas is complex and frequently disputable, as one favour exclusivity and the other advocating for market accessibility.

This article delves into the inter-connection that exist between IP and Competition Law by addressing significant issue such as monopolistic behavior, patent pools, as well as challenges of patent misuse and inflated pricing. Furthermore, this article helps us to understand this complex relationship in the field of Pharmaceutical sector. The concept of dynamic competition is emerged as a viable approach to balance the dual goals of fostering innovation and enhancing market access. Dynamic competition emerged as important tool that resolve the problem associated in the field of pharmaceutical sector.

By analyzing the diverse viewpoints, this article aims to provide the encyclopedic understanding to what extent do patent monopolies encourage or stifle innovation in pharmaceutical industries and highlighting the need for balance approach in order to promote innovation and consumer welfare.

UNDERSTANDING INTELLECTUAL PROPERTY AND COMPETITION LAW

In the dynamic realm of innovation and market regulation, the IP law and Anti-Trust law emerged as an important tool which influence and control the market. The Inevitable Tension as discussed by the *Herbert Hovenkamp* between the IP law and Competition law make these two law un-ignorable in today landscape. These laws are like the two side of the same coin as the goal of the both the law are same but have diverse and conflicting approach. Prof. John F. Duffy argues that competition law plays a crucial role in shaping intellectual property rights². In contrast, the Competition Commission of India (CCI) asserts that these rights act as an obstacle and hinder competition³.The crossed road of both the field is viewed as a highly complex and face significant challenge in the realm of competition law⁴.

² John F. Duffy's comments at *National Lawyers Convention organized by The Intellectual Property Practice Group of the Federalist Society for Law and Public Policy Studies*, November 14, 2013, YOUTUBE (Mar. 23, 2025) <https://www.youtube.com/watch?v=TmBJknoGKSM>; see also Shubha Ghosh, *Intellectual Property Law and Competition*, *International Scholars Conference on Intellectual Property Law*, University of Wisconsin Law School, 16-17th September, 2014.

³ *Competition Commission of India, Advocacy Booklet*, Intellectual Property Rights Under the Competition Act, 2002

⁴ Joseph Drex1, *Research Handbook on Intellectual Property and Competition Law* (Edward Elgar Publishing Limited, 2008)

Intellectual Property law provides creators with exclusive rights to foster innovation. The World Intellectual Property Organization (WIPO) define IP as the products of human creativity, including inventions, artistic works, designs, and commercial symbols⁵. This principle is enshrined in Article 27 of the Universal Declaration of Human Rights, which affirms the right to benefit from the protection of moral and material interests arising from creative works⁶. The Organization for Economic Co-operation and Development (OECD) assert that these rights give holders a temporary monopoly right on their creations⁷.

On the other hand, Competition Law plays a crucial role in maintaining fair market conditions by preventing monopolies. In *Competition Commission of India v. Steel Authority of India & Anr*,⁸ the apex court held that the primary objective of the Competition Act is to find remedy to situations which may destroy the free market system and promote economic efficiency. It protects the process of competition.⁹ This concept is considered to be valuable and, therefore, worthy of being protected.¹⁰ It ensures that only the most efficient firms thrive in markets¹¹. Ultimately, the primary objective of competition law is to protect the competitive process, fostering an atmosphere where consumer interests¹² are prioritized and price competition is encouraged.¹³

INTELLECTUAL PROPERTY RIGHT IN COMPETITION ACT 2002

In India, the Competition law govern by the competition Act, 2002¹⁴. *Section 3 of this Act*¹⁵, prohibits any business conduct that could significantly harm competition in India. While

⁵ WIPO, <http://www.wipo.int/about-ip/en/>. (Mar. 23, 2025)

⁶ *What is Intellectual Property?*, WIPO, available at http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf. (Mar. 23, 2025)

⁷ R.S. Khemani & D.M. Shapiro, *Glossary of Industrial Organisation Economics and Competition Law 'commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD* (1993).

⁸ *Commission of India v Steel Authority of India & Anr* [2010] INSC 720

⁹ H L Deb, *Competition Bill (H.L.)*, Volume 582 Column 1156, October 30, 1997

¹⁰ SANDRA MARCO COLINO, *INTRODUCTION TO COMPETITION LAW*, (Oxford University Press, 7th ed. 2011).

¹¹ Klaus Schwab, *The Global Competitiveness Report 2014-15* (World Economic Forum 2014).

¹² Bork, R.H., *The Antitrust Paradox: A policy at War with Itself*, Basic Books, (1978); Posner, R.A. *Antitrust Law*, University of Chicago Press, 2nd edition, (2001); Dr. S. Sothi Rachagan, *Competition Policy and Law in the Consumer and Development Interest, United nations Conference on Trade and Development 2-4 July 2003* p. 4 <http://www.cid.harvard.edu/cidtrade/Papers/sothi.pdf> ;

¹³ RICHARD WHISH, *COMPETITION LAW*, (London, LexisNexis UK, 5th edition 2003) 734; THOMAS DREIER, *BALANCING THE PROPRIETARY AND PUBLIC DOMAIN INTEREST: Inside or Outside of Proprietary Rights?*, *EXPANDING THE BOUANDARIES OF INTELLECTUAL PROPERTY: Innovation Policy for the Knowledge Society* (Rochelle, Cooper, Dreyfuss, et al eds. 2001) 312; HERBET HOVENKAMP, *ET A`IP AND ANTITRUST:AN ANALYSIS OF ANTITRUST PRINCIPLE APPLIED TO IP LAW* (New York, Aspen Law & Business, 2002).

¹⁴ The Competition Act, 2002, No.12 of 2003, Act of Parliament, 2002(India)

¹⁵ The Competition Act, 2002, § 3, No.12 of 2003, Act of Parliament, 2002(India)

Section 3(5) this subsequent act¹⁶ offers an exemption for intellectual property (IP), but this exemption is not absolute. Section 4¹⁷ addresses the abuse of dominant market positions, allowing for intervention in IP-related issues as well¹⁸. The act offers only a limited provisions related to intellectual property.

PATENT-COMPETITION PARADOX: THE ULTIMATE AIM AND CONFLICT

The Patent-Competition Paradox is a legal and economic tug-of-war of the two opposing field that is patent law and competition law which struggle to shape innovation and market fairness. Patents grant inventors a temporary monopoly while competition law maintain fair market conditions by curbing monopolistic practices.

The interplay between intellectual property rights and competition law is complex and often contradictory. When, these contradictory and diverse field are effectively balanced, then they encourage innovation. The competition law done this by safeguarding the market dynamics, while on the other hand, patent law done this by encouraging diverse forms of innovation¹⁹. Failure to achieve this balance would adversely affect the innovation.²⁰

To understand this paradox more effectively, we have to understand the diverse viewpoint of the two law. The diverse perspective of the two field are:

1. Monopolistic Practices:

From the IPR standpoint, these rights are designed to prioritize the innovation by enabling companies to allow some form of monopolies. On the other hand, competition law aims to curb monopolistic behavior.

2. Patent Pools and Licensing:

In the realm of IPR, companies frequently join forces through patent pools or licensing

¹⁶ The Competition Act, 2002, § 3(5), No.12 of 2003, Act of Parliament, 2002(India)

¹⁷ The Competition Act, 2002, § 4, No.12 of 2003, Act of Parliament, 2002(India)

¹⁸ K. D. Raju, *The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India*, 18 J. INTELL.PROP. L. 111, 114 (2013).

¹⁹ Professor Greg Dolin, *Resolving the Patent-Antitrust Paradox: Promoting Consumer Welfare Through Innovation*, CENTRE FOR PROTECTION OF INTELLECTUAL PROPERTY-GEORGE MASON UNIVERSITY SCHOOL OF LAW (May, 2013), <http://cpip.gmu.edu/wp-content/uploads/2013/08/Dolin-Patent-Antitrust-Paradox.pdf>.

²⁰ Susan S. DeSantet. al., *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, FEDERAL TRADE COMMISSION (Oct., 2003), <http://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf>.

agreements to share technologies and collaboratively to create new products. However, from a competition law perspective, while such collaborations can enhance innovation, they also risk consolidating market power if not properly regulated. Authorities must ensure that these arrangements do not lead to anti-competitive outcomes.

3. Abuse of IPR:

The primary goal of IPR is to shield creators from unauthorized exploitation of their inventions. Nonetheless, some entities may exploit patents by aggressively enforcing them against others, a practice known as "patent trolling." From the competition law viewpoint, these abusive tactics can hinder competition by building legal legislation.

4. Compulsory Licensing:

Patents provide inventors with a temporary monopoly as a reward for their innovations. However, in exceptional circumstances, such as public health crises, the need for compulsory licensing may arise, allowing others to use the patented technology without the consent of the patent holder. But in competition law Compulsory licensing is a measure taken to balance the interests of IPR holders with public interests, particularly in sectors like pharmaceuticals, where access to life-saving drugs is essential.

The primary objectives of Intellectual Property Rights (IPR) and Competition Law are closely aligned. First and foremost, *both frameworks prioritize consumer interests*. Competition law is designed to ensure a fair marketplace, preventing monopolistic behaviors, similarly IPR safeguards inventors by protecting their creations from unauthorized use. Furthermore, *both areas encourage innovation*. Patent law incentivizes inventors by granting them exclusive rights for a limited duration, which favours investment in research and development. Likewise, a competitive market environment spurs businesses to innovate as they seek to outperform their rivals. Finally, *both IPR and Competition Law strive for market fairness*. Competition law works to maintain an open market by banning anti-competitive practices, while patent law aims to balance rewarding inventors which promote market fairness.

THE REAL PROBLEM: AN INTERACTION WITH PHARMACEUTICAL SECTOR

The Pharmaceutical Industry stands at the crossroad of innovation and accessibility facing a constant battle between the two opposing force that is Patent and Competition law. On one side, Patent Law act as fuel for medical advancement, as they provide innovator with exclusive

right that ensure profitability and further promote research and development. On the other side, Competition laws advocate for a fair marketplace which aim to prevent monopolies and enhance affordability through the availability of generic drugs. This tension creates a dilemma as patent protections can hinder competition and restrict access to vital medications.

The real problem arises when the patent right holder tries to abuse market power via various malpractices, such are refusal to license, excessive pricing, abuse of dominance etc. These problems can be understand in following key point:

1. Abuse of Market Power via Refusal to License:

The abuse of market power in the pharmaceutical sector through the refusal to license, poses serious threat. Dominant companies frequently exploit their patent rights to limit access to vital medications, which not only suppresses competition but also maintains inflated prices. When a pharmaceutical firm declines to license its patents, it effectively blocks generic manufacturers from entering the market. This restriction significantly reduces consumer access to affordable drugs. 'SEP owners may have been exploiting market power, and holding up innovation, through unreasonable or discriminatory licensing demands.'²¹In *Natco Pharma Ltd. v. Bayer Corporation*²²the court illustrates the consequences of refusal to license. Bayer's denial of a voluntary licensing request for its cancer drug Sorafenib led to Natco applying for a compulsory license. The court found that Bayer's pricing made the drug inaccessible to most patients, thus justifying the grant of a compulsory license to Natco, enabling it to produce the drug at a lower price. In the case of *Re: Distribution of Essential Supplies and Services during Pandemic*²³, the Supreme Court recognized the insufficient availability and supply of vaccines and elucidated the legal framework of issuing compulsory licensing to meet the demand of the vaccines.

2. Abuse of Dominance via Misuse of Regulatory Procedures:

Another aspect of interplay between patents and competition law is via the abuse of the regulatory procedures that have adversely affect the pharmaceutical sector. The SPC right that is granted a person an exclusive right for the duration of marketing authorization. Often this right is abused by the patent holders to prevent the entry of generic products in the market. This abuse can be understand in the *AstraZeneca-Losec*

²¹ 'IP and Antitrust: Implications of Recent Cases and Likely Policy Developments in 2017' (Freshfields, 2018) <<http://antitrust.freshfields.com/ip-and-antitrust>> accessed 8 January 2018.

²² Natco Pharma Limited v. Bayer Corporation Compulsory License Application No. 1/2011.

²³In Re: Distribution of Essential Supplies and Services During Pandemic SMW(C) No.- 000003/2021.

case²⁴. The EC fined the Anglo-Swedish group AstraZeneca €60 million for misusing regulatory and patent strategies for one of its medicinal products, Losec. In particular, AstraZeneca was found guilty of delaying entry of generic products in the market.

3. Abuse of Dominance via Excessive Pricing:

The abuse of dominance in this sector is one of the pressing issue as it have adverse effects on competition. Some of the common examples of such abuse include the Charging of excessive prices. When a dominant pharmaceutical company charges excessively high prices for its products especially when no reasonable substitutes are available, it can harm consumers and stifle competition²⁵. For instance, the European Commission has imposed fines on multiple pharmaceutical firms for engaging in anti-competitive activities, including abuse of dominance. *In the Aspen Pharma case*, The EC is investigating whether Aspen Pharma abused its dominant position within Article 102 TFEU by imposing significant price increases for the drugs in question. The EC also inquired allegations that the company threatened to withdraw the drugs in some EU Member States.²⁶

4. Anti-competitive Agreements

Rai (2019)²⁷ discussed the prevalence of anti-competitive agreements in the pharmaceutical industry in India. These agreements occur between originator companies and generic manufacturers resulting in higher drug prices and reduced access to medicines for consumers. To address this issue, competition authorities in India have scrutinized the pharmaceutical sector, particularly agreements. Such agreements can delay the entry of generics to the market and lead to higher drug prices, negatively affecting consumers and limiting competition²⁸

Pharmaceutical companies often engage in strategic patenting, a practice that involves filing numerous patents for minor changes or alternative uses of existing drugs. Such tactics can stifle true innovation by diminishing competitive pressures and restricting the availability of generic options. Moreover, *patent monopolies can hinder innovation from generic manufacturers*, who

²⁴ AstraZeneca v. Commission (2005) COMP/A.37.507/F3 OJ L 332/24.

²⁵ Competition Act. (2002b). *Abuse of dominant position*, Indian Kanoon, Acts of Parliament, India, sec 4 <https://indiankanoon.org/search/?formInput=section%204%20of%20competition%20act+doctype:judgments>

²⁶ 'Antitrust: Commission Opens Formal Investigation into Aspen Pharma's Pricing Practices for Cancer Medicines' (Europa, 2017) <http://europa.eu/rapid/press-release_IP-17-1323_en.htm>accessed 8 December 2017.

²⁷ *Anti-competitive agreements in the Indian pharmaceutical industry: A competition law analysis*. *Journal of Intellectual Property Rights*, 24(2), 85-94.

²⁸Rai, R, *Anti-competitive agreements*, Indian Kanoon, Acts of Parliament, India, Sec.3.<<https://indiankanoon.org/doc/1153878/>>

are essential for providing cost-effective medications. It curtails competition and slows the overall innovation rate within the industry. Finally, *patent protections tend to favor large pharmaceutical companies* in developed countries, while impeding technological progress in developing nations like India. This disparity fosters a north-south divide in medicine access, where poorer countries grapple with inflated drug prices due to monopolistic practices.

DYNAMIC COMPETITION: AN AID TO PHARMACEUTICAL SECTOR

In the rapidly evolving pharmaceutical world, innovation is essential and often feels like a race against time. Dynamic competition fuels the companies to seek advanced treatments and help in research and discoveries while intellectual property plays a crucial role in developing a life-saving medications.

Dynamic analysts often adopt a broader perspective on competition, prioritizing processes over mere outcomes.²⁹ In reality, dynamic competition aligns more closely with traditional views of competition than the simplified concept of static competition³⁰. When formulating a concept of dynamic competition, it is essential to consider the economic justification for intellectual property rights should recognized and align with the fundamental economic principles of IP and competition law.³¹ Joseph Schumpeter was a prominent proponent of this dynamic competition theory, aim to establish a framework that replace the static model³². An antitrust analysis framework that prioritizes dynamic competition would focus on innovation and the capabilities of individual enterprises.³³ Dynamic competition emerges as a tool which provide aid to the pharmaceutical sector by tackling several vital challenges. Some of the way are:

- *Lowering Prices through Generic Competition:* On the expiry of the patent period, generic manufacturers can enter into the marketplace, resulting in substantial price drops for consumers.
- *Fostering Innovation:* Dynamic competition motivates pharmaceutical companies to pursue ongoing innovation. Due to this firms cannot depend solely on existing drugs.

²⁹ J GREGORY SIDAK AND DAVID TEECE, INTELLECTUAL PROPERTY, COMPETITION LAW AND ECONOMICS IN ASIA 70 (R. Ian McEwin, 2011).

³⁰ Ibid

³¹ OLAV KOLSTSTAD, COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS – OUTLINE OF ECONOMICS – BASED APPROACH, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW 10 (Josef Drexl, Edward Elgar Publishing Limited, 2008).

³² JOHN A. MATHEWS, REFLECTIONS ON SCHUMPETER’S LOST SEVENTH CHAPTER TO THE THEORY OF ECONOMIC DEVELOPMENT, ELGAR COMPANION TO NEO-SCHUMPETERIAN ECONOMICS 81 (Horst Hanusch and Andreas Pyka, Edward Elgar Publishing Limited, 2007)

³³ SIDAK, GREGORY AND TEECE DAVID, REWRITING THE HORIZONTAL MERGER: GUIDELINE IN THE NAME OF DYNAMIC COMPETITION, 16 Geo. Mason L. Rev. 885,885 (2009).

- *Establishing Market Discipline:* Dynamics competition in the pharmaceutical industry foster market discipline, where drug prices align with their value. Companies are driven to develop high-quality, effective treatments to justify premium pricing.
- *Removing Barriers to Entry:* Dynamic Competition play a crucial role in dismantling obstacles that may prevent new players from entering the pharmaceutical market.

SUGGESTION

Some suggestion and recommendation relating to the above mention problem are:

1. Indian laws relating to innovation and competition in the field of pharmaceutical sector should integrate elements of dynamic competition as it adopts a broader perspective on competition, prioritizing processes over mere outcomes.³⁴
2. The retailers should actively participate in healthy competition in order to reduced high rate margin. The CCI recommended a strategy for regulating trade margins that involves setting price caps by relevant stakeholders. This approach seeks to prevent negative outcomes, such as a rise in drug.³⁵
3. For reasons of promoting dynamic competition in pharmaceutical sector, the companies should require rapid publication of patent applications with full disclosure of the technical processes and reduce them to commercial practice³⁶.
4. The term "abuse of patents" should be defined as the improper utilization of IPR that harms consumer interests and societal welfare.³⁷
5. It is essential to effectively implement merger guidelines to prevent the concentration of intellectual property within companies.³⁸
6. The acquisition of IP must be properly regulated, with explicit technology transfer guidelines included in the legislation³⁹.

³⁴ J GREGORY SIDAK AND DAVID TEECE, *INTELLECTUAL PROPERTY, COMPETITION LAW AND ECONOMICS IN ASIA 70* (R. Ian McEwin, 2011).

³⁵ *Centre for Trade and Development Competition law and Indian pharmaceutical industry.* (Centad) (2010). New Delhi. Available at http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf

³⁶ *Intellectual Property: Balancing Incentives with Competitive Access*, GLOBAL ECONOMIC PROSPECTS, (Apr. 22, 2015), <http://siteresources.worldbank.org/INTGEP/Resources/335315-1257200370513/05--Ch5--128-151.pdf>.

³⁷ K. D. Raju, *The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India*, 18 J. INTELL.PROP. L. 111, 114 (2013).

³⁸ Rosabeth Moss Kanter, *The Experts: Does the Patent System Encourage Innovation?*, THE WALL STREET JOURNAL, (May 16, 2013), <http://online.wsj.com/news/articles/SB10001424127887323582904578487200821421958>.

³⁹K. D. Raju, *The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India*, 18 J. INTELL.PROP. L. 111, 114 (2013).

CONCLUSION

The intricate dance between IP and Competition Law shapes the very fabric of innovation and market accessibility. These two fields are in constant tension and conflict as one aims to reward creativity through exclusiveness while the other tries to maintain fairness in the market. This conflict particularly plays a vital role in the pharmaceutical industry, where the need for life-saving treatments must be weighed against the demands for profitability and public accessibility.

On the one side the patent law prioritizes pharmaceutical advancements while on the other side unchecked monopolistic practices can hinder market access and limit competition. Dynamic competition emerges as a powerful tool in bridging the gap between these two fields and developing an environment where pharmaceutical companies are encouraged to innovate continuously. The integration of the principle of dynamic competition into policy frameworks becomes a necessary requirement in order to sustain both technological progress and healthcare access.

At the end, the ultimate goal or aim is not only to protect an innovator or consumer in isolation but the primary focus is to make or establish a system where both can coexist harmoniously. As it was well said that *“Just as a bird needs both wings to fly, a thriving economy needs both innovator and consumer for development”*.

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