Interface between Competition Law and Intellectual Property Law: A Study of United States, European Union and Indian Law

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Submitted By

SILKY MUKHERJEE

Under the guidance of

Prof. (Dr.) MAMATA BISWAL
Professor of Law
Gujarat National Law University
Gandhinagar, Gujarat, India

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INTRODUCTION

From the early years of the twentieth century, the conflict between the exercise of IPRs and competition policy tended to be exaggerated by judicial and administrative doctrines initially in the U.S.A and later in the European Union[1]. Intellectual Property Laws generally offer a right of exclusive use and exploitation to provide a reward to the innovator, to provide an incentive to other innovators and to bring into the public domain innovative information that might otherwise remain trade secrets. Competition authorities regulate near monopolies, competition in markets. This regulation occasionally results in limits being placed on the free exercise of the exclusive rights granted by Intellectual Property Laws.[2]

Intellectual property rights and competition regulation are closely related. The former provides exclusive rights within a designated market to produce and sell a product, service or technology that result from some form of intellectual creation qualifying specific requirements. These inventions and creations are protected by patents, copyrights, trademarks, trade secrets, or sui generis forms of protection[3]. Thus, IPRs designate boundaries, within which competitors may exercise their rights.

Competition law maximizes social welfare by condemning monopolies while intellectual property law does the same by granting temporary monopolies. The qualification attached to this that the intellectual property law should provide economically meaningful monopolies. Otherwise, competition law which by itself does not condemn the mere possession of monopoly power, but rather certain exercises of or efforts to obtain it, might be allowed to interfere with the monopoly.[4]

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[1] Steven D. Anderman and Hedvig Schmidt, *The Interface between Intellectual Property Rights & Competition Policy*, (3rd edn, Cambridge University Press, 2007) 7

[2] Ibid

[3] Keith E. Maskus and Mohammad Lahouel, '*Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement'* (1999) <http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739 1251814020192/maskus.pdf> accessed 30 March, 2011

[4] Kumar Jayant and Abir Roy, *Competition Law in India* (1st edn, Eastern Law House 2008), 176

In *United States v Microsoft*[5], it has been held that an owner of intellectual property does not have absolute right to use property in any manner without restrictions. It would violate the competition law if a company possesses monopoly power and there is wilful acquisition or maintenance of that power which an enterprise as distinguish from growth or development as a consequence of superior product, business acumen or historic accident[6].

The owner has all the rights to exploit the intellectual property rights and also the right to prevent others from so doing. There is no violation of competition law if the owner of the articles (patented or otherwise) seeks to dispose them directly to the consumer or fixes the price by which his agents transfer from him directly to such consumer[7].

Moreover, the essential facilities doctrine was enunciated by the United States Supreme Court in *United States v Terminal Railroad Association*[8], wherein they imposed a duty upon firms controlling an "essential facility" to make that facility available to their rivals. The essential facilities doctrine has profound consequences for intellectual property protection and for competition in markets where firms own important inputs that are protected by patent, copyright, or trade secrets[9]. Under the Indian Law these could fall within the ambit of Section 4 of the Competition Act 2002 which prohibits abuse of dominance by enterprises.

Further, the potential outcome of Trade Related Aspects of Intellectual Property Rights (TRIPS) that is of particular concern to developing countriesis that stronger IPR protection strengthens the market power of Foreign Transnational Corporations, which may lead to reduced sales and higher prices, and which can limit the extent of technology diffusion. In addition enhanced market power may restrict entry and can lower the rate of innovation. Enhanced market power through stronger IPR protection may facilitate other forms of anti-competitive behaviour, including selling practices and licensing restrictions. These include: (a) the cartelization of potential competitors through cross licensing agreements that fix prices, limit output or divide markets; (b) the use of IPR-based licensing agreements to exclude competitors in particular markets by raising entry barriers through tie-

[5] 253 F. 3d 34 (D.C. Cir 2001)
[6] U.S v Grinnel Corp. 384 US 563 (1966)
[7] United States v. General Electric Company 272 US 476
[8] [1912] 224 US 383.
[9] Supra note 4, 186

in sales or restrictions on the use of related technology; (c) the use of IPR protection to predate competitors by threatening or initiating bad faith litigation and opposition proceedings, which may raise market entry barriers particularly for new and small enterprises[10].

Raghavan Committee Report on Competition Law in India observes as follows in paragraphs 5.1-7 and 5.1-8:

"5.1-7 All forms of intellectual property have the potential to raise competition policy/law problems. Intellectual property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. Undoubtedly, it is desirable that in the interest of human creativity, which needs to be encouraged and rewarded, intellectual property right needs to be provided. This right enables the holder (creator) to prevent others from using his/her inventions, designs or other creations. But at the same time, there is need to curb and prevent anti-competition behaviour that may surface in the exercise of the intellectual property[11].

5.1-8 There is, in some cases, a dichotomy between intellectual property rights and competition policy/law. The former endangers competition while the latter engenders competition. There is a need to appreciate the distinction between the existence of a right and its exercise. During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the competition policy/law"[12].

Finally, competition regulation aims at restricting attempts to extend exploitation of an intellectual asset beyond the boundaries provided by IPRs. Thus, there is an inherent tension between competition laws and IPRs, particularly if competition laws give emphasis to static market access and IPRs emphasize incentives for dynamic competition. Structured properly, however, the two regulatory systems complement each other in striking an appropriate balance between needs for innovation, technology transfer, and information dissemination.[13]

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[10] Rod Falvey and Foster Neil, "*The Role of Intellectual Property and Technology Transfer and Economic Growth: Theory and Evidence*" ,<http://www.unido.org/fileadmin/import/60030_05_IPR_rights_in_technology_transfer.pdf> accessed 5 July, 2011

[11] D.P Mittal, *Taxmann's Competition Law and Practice* (2nd edn.,Taxman Allied Services (P.) Ltd 2008), 216.

[12] Ibid

[13] Massimiliano Gangi, "*Competition policy and exercise of Intellectual Property Rights*", <http://www.archivioceradi.luiss.it/documenti/archivioceradi/osservatori/intellettuale/Gangi1.pdf > accessed on 15 February, 2011

There is a clear conflict between competition law and intellectual property law. Intellectual Property creates monopolies whereas competition law battles monopolies. In the present research, the researcher will study the conflict between Intellectual Property law and the Competition Law and will also try to find out the situation by judicial pronouncements by studying the situation prevalent in European Union and United States and how India can develop and formulate its competition policy by learning a lesson from competition laws prevalent in European Union and United States.

LITERATURE REVIEW

Various authors/researchers have done their research work in the area of Interface between Intellectual Property Rights and Competition Law. As a result, a lot of literature in this field can be found in books, journal articles, proceedings, thesis and dissertations, reports and magazines.

Steven D. Anderman in his edited book, "*The Interface between Intellectual Property and Competition Law*"[14], observed that from the early years of the twentieth century, the conflict between the exercise of IPRs and competition policy tended to be exaggerated by judicial and administrative doctrines initially in the U.S.A and later in the European Union. Intellectual Property Laws generally offer a right of exclusive use and exploitation to provide a reward to the innovator, to provide an incentive to other innovators and to bring into the public domain innovative information that might otherwise remain trade secrets. Competition authorities regulate near monopolies, competition in markets. This regulation occasionally results in limits being placed on the free exercise of the exclusive rights granted by Intellectual Property Laws. Intellectual property rights and competition regulation are closely related. The former provides exclusive rights within a designated market to produce and sell a product, service or technology that result from some form of intellectual creation qualifying specific requirements. These inventions and creations are protected by patents, copyrights,

[14] Oxford University Press, New York, 2011

trademarks, trade secrets, or sui generis forms of protection. Thus, IPRs designate boundaries, within which competitors may exercise their rights.

Kumar Jayant and Abir Roy in their book, "*Competition Law in India*"[15] examined that Competition law maximizes social welfare by condemning monopolies while intellectual property law does the same by granting temporary monopolies. The qualification attached to this that the intellectual property law should provide economically meaningful monopolies. Otherwise, competition law which by itself does not condemn the mere possession of monopoly power, but rather certain exercises of or efforts to obtain it, might be allowed to interfere with the monopoly.

Rod Falvey and Foster Neil in their article, "*The Role of Intellectual Property and Technology Transfer and Economic Growth: Theory and Evidence*",[16] says that the potential outcome of Trade Related Aspects of Intellectual Property Rights (TRIPS) that is of particular concern to developing countries is that stronger IPR protection strengthens the market power of Foreign Transnational Corporations, which may lead to reduced sales and higher prices, and which can limit the extent of technology diffusion. In addition enhanced market power may restrict entry and can lower the rate of innovation. Enhanced market power through stronger IPR protection may facilitate other forms of anti-competitive behaviour, including selling practices and licensing restrictions. These include: (a) the cartelization of potential competitors through cross licensing agreements that fix prices, limit output or divide markets; (b) the use of IPR-based licensing agreements to exclude competitors in particular markets by raising entry barriers through tie-in sales or restrictions on the use of related technology; (c) the use of IPR protection to predate competitors by threatening or initiating bad faith litigation and opposition proceedings, which may raise market entry barriers particularly for new and small enterprises.

James Langenfied, "*Intellectual Property and Antitrust: Steps toward striking a Balance*"[17], was of the view that although intellectual property and anti-trust laws, may be both "aimed at encouraging innovation, industry and competition", a tension between intellectual property and antitrust policy has always existed. He suggests that there should be

[15] Competition Law in India (Kolkata: Eastern Law House, 2008)
[16] Review of Development Economics, Volume 10, Issue 4, 2006
[17] Intellectual Property and Antitrust: Steps towards striking a balance 52 Case W Res 91

more an explicit recognition and accounting of the unique aspects on intellectual property. There should be more economic and policy analysis of the full impact of intellectual property on competition and innovaton.

Valentine Korah in the book "*Intellectual Property Rights and the EC Competition Rules,*"[18] analyses the tension between competition law and IPRs. She looks into the functions of competition law and intellectual property law in the EC.

Steven Anderman and Ariel Ezrachi in their book, "*Intellectual Property Rights and Competition Law*"[19] has discussed the interplay between Intellectual Property Rights and Competition Law in the European Union with reference to Article 101 and Article 102. They have analysed the same through abuse of intellectual property rights, refusals to supply, tying, excessive pricing and exclusionary pricing policies.

Meg Buckley, in his article, "*Licensing Intellectual Property: Competition and Definitions of abuse of dominant position in the United States and the European Union*"[20] observed that whenever intellectual property rights are at odds with competition law, the European Commission favours maintaining access to European Union markets over protecting the intellectual property rights that may block market access.

Jonathan D.C. Turner in his book, "*Intellectual Property and EU Competition Law*"[21], has pointed the interface between both the laws through issues in technology, culture, media and sport and branding.

Shahid Ali Khan and Raghunath Mashelkar in their book, "*Intellectual Property and Competitive Strategies in the 21st century*"[22] has noted regarding the national economic development strategy and encouraging research and development while discussing the interface of both the laws.

[18] Hart Publishing, Oxford and Portland, Oregaon, 2006
[19] Oxford University Press, 2011
[20] 29 Brooklyn J Int'l L 2004
[21] Oxford University Press, 2010
[22] Intellectual Property and Competitive Strategies in the 21st century, Kluwer Law International, 2004

Sara M. Biggers, Richard A. Mann and Barry S. Roberts in their article, "*Intellectual Property and Antitrust: A comparison of evolution in the European Union and United States*"[23] analyses the enforcement of competition policy in the US and EU jurisdictions in the backdrop of cases against the Microsoft in both jurisdictions.

Daniel J. Gifford in his article "*Antitrust's Troubled Relations with Intellectual Property*"[24], he argues some key areas where intellectual property clashes with antitrust law and suggests to accord special treatment by the courts.

HYPOTHESIS

A conflict exists between IPRs and competition policy in major jurisdictions – European Union, United States and India.

RESEARCH FOCUS AND AIM

The research will focus on the Intellectual Property Regimes and Competition Law in European Union and United States. The study will further focus on the areas where Intellectual Property Law and Competition Law are in conflict with one another. Major reference will be made to the national and international legal considerations that this topic may raise.

The proposed study aims also to look into the areas where India can develop and formulate its competition policy and learn from the major countries like the European Union and United States of America.

[23] Intellectual Property and Antitrust: A Comparison of evolution in the European Union and United States, 22 Hamline J Pub L & Pol'y, 1999
[24] 87 Minn. L. Rev 1695 2002-2003

OBJECTIVES

The objectives of the research are to:

- Examine the Intellectual Property regimes and Competition Law in the European Union, USA and India
- Examine the convoluted relationship between Intellectual Property law and the Competition law in the major jurisdictions of U.S.A, EU and India.
- Analyze the conflict between Intellectual Property law and the Competition Law.
- Propose the best possible solution to resolve the conflict between Intellectual Property law and the Competition Law and how India as a developing nation can develop its competition law by taking a lesson from the major trading blocks – European Union and United States of America.

RESEARCH QUESTIONS

The main purpose of this research is to attempt to find a solution to the interface between Intellectual Property Rights and Competition Law. Following are the main research questions:

1. Is there a conflict between Intellectual Property Rights and Competition Law?
2. Whether an interface is necessary between Intellectual Property Rights and Competition Law?
3. Whether United States is more liberal while deliberating on the overlap of Intellectual Property Rights and Competition Law?
4. Whether EU is strict while dealing with the interface of IP Laws and Competition Law?
5. Whether Indian Intellectual Property Rights and Competition law is in consonance with major jurisdictions of United States and European Union?
6. Whether Competition Commission of India is able to deal with the issues of interface between Intellectual Property Rights and Competition laws?
7. Whether India as an emerging economy can draw lessons from the experiences of EU and US in the interface of Intellectual Property Rights and Competition Law?

RESEARCH METHODOLOGY

The current research involves the following categories of research:

- Doctrinal methodology
- Analytical methodology
- Descriptive methodology
- Historical methodology
- Case-analysis methodology

SCOPE AND LIMITATIONS OF RESEARCH

The present study deals with the issues and problems existing between Intellectual Property Law and Competition Law in European Union, United States and Indian law. The researcher undertakes to study only the areas of conflict between the Laws. The research relies on past decisions, concepts and legal structure to evaluate the present problem.

SIGNIFICANCE OF THE RESEARCH

The interplay between competition and intellectual property law has a vital effect on the market. The two laws operate in totally two directions. Intellectual Property Laws provide negative rights granted to the inventor for his exclusive monopoly rights. The negative right provides a stimulus to the inventor and reward him as an incentive for his creativity. The basic aim of intellectual property rights is to stimulate innovation and produce new products and processes. This Intellectual Property can enhance competition in the market. On the other hand, competition regulates and protects the interests of the inventor and of the technologies as a follow-up action to the invented technology by facilitating through licensing procedures.

Competition law maximizes social welfare by condemning monopolies while intellectual property does the same by granting temporary monopolies. The condition is that intellectual property law should provide economically meaningful monopolies. Otherwise, competition law which by itself does not condemn the mere possession of monopoly power,

but rather certain exercises of or efforts to obtain it, might be allowed to interfere with the monopoly.

Under the competition laws, monopoly rights per se are not prohibited but abuse of monopoly rights is prohibited. During this age of globalisation, both intellectual property and competition law are trying to work in tandem together acknowledging their roles and responsibilities in the process of innovation. The duty of the competition law is to see that licensing activities of intellectual property law of a company is not abusive and has a pro-competitive and a favourable effect on the market.

Since India is at its nascent stage to understand the interplay between both the laws, the researcher suggests to the CCI to include and amend some of the provisions of the Intellectual Property Law and Competition Laws.

DEFINITION OF KEY CONCEPTS

INTELLECTUAL PROPERTY: Intellectual property (IP) refers to the creations of min, such as inventions; literary and artistic work; designs; and symbols, names and images used in commerce. WIPO has classified intellectual property into two groups, i.e. Industrial property consisting of Patents, Trademarks, Designs, Geographical Indications etc and Copyrights and related rights.

TRADEMARK: "Trademark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.[25]

TRADEMARK LICENSING: A trademark license is an agreement between a trademark owner ("licensor") and another party ("licensee") in which the licensor permits the licensee to use its trademark in commerce.

[25] Section 2(zb), Trademarks Act, 1999

PATENT POOLING: Patent pooling is an agreement among patent owners to license a set of their patents to one another or to third parties

TYING AGREEMENTS: Tying arrangements are those where a seller agrees to sell a highly usable product or service only on the condition that the buyer also purchases a less important or marketable product or service, irrespective of the fact whether the buyer wants the product or not.

BLOCK BOOKING: Block booking is the practice of renting one motion picture to an exhibitor on condition that it is also rent other features from the same company.

EXCLUSIVE LICENSING AGREEMENTS: An exclusive license means that the licensor shall not practice under the patent and that the licensor shall not grant licenses to any other parties.

ABUSE OF DOMINANT POSITION: Dominant position is a position of economic strength enjoyed by the enterprise which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

TIE-INS: In tying arrangements, a seller agrees to sell a highly usable product or service on the condition that the buyer also purchases a less important or marketable product or service, irrespective of the fact whether the buyer wants the second product or not.

RELEVANT PRODUCT MARKET: The relevant product market is defined as "those commodities reasonably interchangeably by consumers for the same purposes and may be used as substitutes[26]

[26] Korkola v Allpro Imaging, Inc., 2009 U.S. Dist. LEXIS 70727

CHAPTERISATIONS

Introduction

Chapter 1: Intellectual Property Rights and Competition Law: An overview

Chapter 2: Interface between Intellectual Property Rights and Competition Law: Issues

Chapter 3: Interplay between Intellectual Property Rights and Competition Law: Position in the European Union

Chapter 4: Interplay between Intellectual Property Rights and Antitrust laws-Position in USA

Chapter 5: A Comparative Study of EU and US Intellectual Property Law and Competition Law through judicial pronouncements

Chapter 6: Interplay between Intellectual Property Rights and Competition Law: Position in India

Chapter 7: Conclusions and Suggestions

CHAPTER SUMMARY

The **introduction chapter** deals with the brief introduction to the topic of the thesis. It also includes the objective, scope, limitations, significance, utility, research questions and hypothesis of the study of research. It also deals with the methodology adopted to carry out the research.

The **first chapter** deals with the general overview of Intellectual Property Law and Competition Law. It deals with the nature of Intellectual Property Rights (IPR) and nature of competition policy and the TRIPS Agreement in relation to IPR and competition policy.

The **second chapter** deals with the study of interface between Intellectual Property Law and Competition Law. It mainly discusses the issues like licensing contracts, technology transfer, patent pooling, tying agreements, grant-backs, cross licensing where the two distinct disciplines come in conflict with each other.

The **third chapter** discusses the concept of IPR, competition and the interplay between Intellectual Property Law and Competition Law – the position in European Union. European competition law is intended to fulfill two key objectives: First, open, free and fair competition in the common market of Member States. Second, to cross national borders, insofar as they hamper free trade within the Community, with the goal of achieving a single European market for goods and services. These broad objectives are laid down in the European competition rules, specifically Articles 101 and 102. After a brief discussion on Articles 101 and 102, the researcher has tried to show the application of Article 102 to the Trademark law with the aid of decided cases. Later the researcher has dealt with the issue, i.e. the interface between IPR and Competition Law with the help of case laws decided by the European Courts of Justice.

The **fourth chapter** discusses the concept of IPR, competition and the interplay between Intellectual Property Law and Antitrust Laws – the position in the United States of America. It also lays down the guidelines which are issued by the U.S. Department of Justice and the Federal Trade Commission. These Guidelines embody three general principles:

(a) for the purpose of antitrust analysis, the Agencies regard intellectual property as being essentially comparable to any other form of property;

(b) the Agencies do not presume that intellectual property creates market power in the antitrust context; and

(c) the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally pro competitive.

In US the intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could rapidly exploit the efforts of innovators and investors without compensation. Rapid imitation would reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. The antitrust laws promote

innovation and consumer welfare by prohibiting certain actions that may harm competition with respect to either existing or new ways of serving consumers.

The conflict between IPR and antitrust laws is basically understood under three statutory laws, that is, The Sherman Act, 1890 (Sections 1 and 2), The Clayton Act, 1914 (Sections 2, 3, 4, 7, 7A, 8 and 12) and The Federal Trade Commission Act, 1914 (Section 5). The next section deals with the Lanham Act, 1946 and then discusses the concept of trademark disparagement or dilution with the aid of decided cases. Later the chapter tries to evaluate the actual conflict between IPRs and antitrust laws with the help of cases decided by the American courts.

The **fifth chapter** of the thesis then analyzes the similarities and differences between the US and EU competition law. A comparative study has been made between Article 102 of the EC Treaty and Section 2 of the Sherman Act, 1890 by the researcher.

The **sixth chapter** deals with India's approach to Competition Law. It first discusses the history of competition law in India, basically the Monopolies Restrictive Trade Practices Act, the SVS Raghavan Committee and then goes on to discuss the provisions of the Competition Act, 2002 mainly Section 3, 4 and 5 respectively. As the Competition Act, 2002 is still in its infancy there have been no such cases regarding competition. But in the case of Mahindra & Mahindra Ltd v. Union of India AIR 1959 SC 798, the Court while deciding the case laid down that it is pertinent to answer the following:-

- whether the facts of the case are peculiar to the business to which the restraint is applied;
- what was the condition applied before and after the imposition of restraint;
- determination of the nature of restraint and its actual or probable effects.

The **final chapter** of the thesis concludes how India can develop and formulate its competition policy by learning a lesson from competition laws prevalent in EU and US. The researcher has also tried to point out that a set of guidelines should be framed for the application of competition laws to intellectual property rights which is in turn an indispensable requirement for maintaining an efficacious balance between IPRs and

competition policy. These guidelines may be in the form of broad policy objectives or they may be intricately detailed. The most suitable approach would be to synthesize the best features available in various jurisdictions in order to cater to the Indian requirements.

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