

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 3

2022

© 2022 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at the **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Competition Law - Intellectual Property Interface: A Comparative Analysis between United States and India

AASTHA JAIN¹

ABSTRACT

Competition agencies' guidelines, policy statements, as well as associated advocacy efforts are important vehicles for expressing policy across the full range of anti-competitive practices, and for companies' aid in determining their market behaviour. They also provide an empirical foundation for documenting the trends and evolution of policy thought across jurisdictions and time by providing a window into the brains of administration officials and specialists on the issues they're dealing with. Protection of Intellectual Property Rights within the competition law involves various complexities due to their technical nature. As such, the relevant law is in constant need of upgradation especially in the field of patents. With this perspective, this paper provides a comparative analysis between the jurisdictions of the United States (also called the "cradle of anti-trust laws") and India (a developing country with fairly less experience with competition laws) examining the competition laws, guidelines and policy initiatives in the context of Intellectual Property in order to track the trends and developments affecting the competition law – IP interface. The measures used for comparison in the paper are: licensing practices, patent settlements, competition advocacy in respect of Intellectual Property. The main focus is on competition agency rules, policy statements, and advocacy actions relating to IP, implementation and case developments are mentioned when they are useful in showing relevant methods and trends. The data reveals that unlike three decades ago, focus on the effective application of competition law to IP is not limited to some limited traditional industrialized jurisdictions. It is found that there are notable cross-jurisdictional learnings and implementations in policies and guidelines.

I. INTRODUCTION

Guidelines, policy statements, and related advocacy actions issued by competition agencies are critical vehicles for policy expression throughout the entire spectrum of anti-competitive practices, as well as for companies' assistance in determining their market conduct. They're also a window into the minds of agency officials and professional staff on the issues they're

¹ Author is a LLM Student at Amity Law School, Amity University Noida, India.

dealing with, offering an empirical foundation for charting the patterns and evolution of policy thinking across jurisdictions and across time.

In the context of competition policy protection of intellectual property rights, the function of competition agency guidelines and policy recommendations has arguably been particularly essential. This is due to at least three factors. For starters, there has been little juridical or enforcement experience in this area in many countries. Despite the fact that the agencies regard the topic to be essential, they believe it is beneficial and informative to share their perspectives. Second, we believe that the subject's complexity necessitates explanation, and that guidelines or some policy declarations that lay out broad organizational principles (though, of course, distinguishing unique instances and contexts) are a useful tool. Third, while international instruments such as the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO TRIPS Agreement) recognize the importance of the competition policy-intellectual property (IP) nexus, they provide little guidance on specific enforcement issues.²

A comparative analysis is presented in this paper. The jurisdictions examined are the developed economy of United States that has considerable experience in this area and is also called the “*cradle of antitrust laws*”, and the developing economy of India that has fairly less experience with the relevant field of study.

II. THE UNITED STATES

Guidelines and other policy statements produced by the US federal competition ('antitrust') authorities have been an important tool for the creation of enforcement measures and policy with respect to the application of IPRs, as Anderson and Kovacic explain in greater detail. They've had a big influence on not just US court decisions and Supreme Court theories in this field, but also on analytical and regulatory strategies in other countries. The applicable standards have a lengthy and fascinating history that reflects both substantial enforcement experience and a broad evolution of economic ideas on the underlying issues.³

To give a brief of the relevant history, in the 1970s, the US Department of Justice's Antitrust Division formulated the "nine no-nos." which were a collection of allegedly anti-competitive

²Robert D. Anderson and Anna C. Müller, 'Competition policy and the WTO TRIPS Agreement: an essential platform for policy application, and questions unresolved', to be published in Robert D. Anderson, Nuno Pires De Carvalho and Antony Taubman (eds.), *Competition Policy and Intellectual Property in the Global Economy* (Cambridge, Cambridge University Press, World Intellectual Property Organization and World Trade Organization, forthcoming).

³ Ibid.

IP licensing activities that, at the very least, would draw systematic analysis of Division⁴ and were described as acts that "would almost always lead to antitrust difficulties because of their unfavorable effect on competition."⁵ In the 1980s, the Department's enforcement policy in this area underwent a major shift. The 'nine no-nos' were specifically denounced in a sequence of speeches and similar efforts aimed at persuading the courts of the pro-competitive advantages of licensing methods and the negative consequences of an overly stringent strategy to competition law enforcement in this field.⁶

While the Department of Justice and the Federal Trade Commission (FTC) continued to emphasize the majority of 'restrictive' licensing practices' pro-competitive impacts, they also exhibited a greater awareness of, and willingness to interfere in, apparent incidents of anti-competitive exploitation in the 1990s. The Justice Department and the Federal Trade Commission ('the US Agencies') issued a set of 'Antitrust Guidelines for the Licensing of Intellectual Property' in 1995, which formalised this method.⁷ In the United States, the Guidelines provided a new strategy for the exploration of IPRs under competition law. The 1990s and 2000s saw a substantial rise in the number of US enforcement cases involving the exercise of IPRs in some fashion, coinciding with the development and dissemination of the US Guidelines.

The US Agencies issued a new variation of the US Guidelines⁸ in January 2017, which carried over the core parts and analytical methodologies of the '1995 Guidelines' while expanding on their applicability in specific areas.⁹ The revised US Guidelines have been praised by Makan Delrahim, the new US Assistant Attorney-General for the Antitrust Division, who appears to be sympathetic to their overall approach while possibly wanting to place even more emphasis on the promotion of innovation and the dynamic aspects of competition in the work of the US enforcement authorities.¹⁰

Current Scenario – The new 'Antitrust Guidelines for the Licensing of Intellectual Property,' as indicated above, keep the US Guidelines' previous focus on licensing procedures. They don't

⁴ Ibid.

⁵ Bruce Wilson, Deputy Assistant Attorney General, Department of Justice, 'Myth or Reality? Or Straight Talk from "Alice in Wonderland"' (Remarks before the American Patent Law Association, 21 January 1975).

⁶ Richard Gilbert and Carl Shapiro, 'Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties' (1997) Brookings Papers: Microeconomics 283-336.

⁷ The 1995 US DOJ-FTC Guidelines. <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf>.

⁸ The 2017 US DOJ-FTC Guidelines. Available at <https://www.justice.gov/atr/IPguidelines/download>.

⁹ Anderson and Kovacic, see above note 1.

¹⁰ Makan Delrahim (2017), Assistant Attorney General, Antitrust Division, US Department of Justice, Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law, Remarks to the USC Gould School of Law - Application of Competition Policy to Technology and IP Licensing, Los Angeles, California, available at <https://www.justice.gov/opa/speech/file/1010746/download>.

include SEPs or anti-competitive patent litigation settlements, for example, which are crucial problems at the confluence of IP and competition policy.¹¹ As mentioned later, this is in stark contrast to, say, Canadian practices. These issues have, of course, been addressed in relevant Policy Statements and enforcement initiatives in the United States, which are included below.

Doctrinal content of the US Guidelines

i. **Overall Framework** - The US Guidelines have strongly been rooted in a 'rule of reason' framework since 1995, under which the use of IPRs is considered neither as innately antithetical to competitive principles nor as invariably in accord with such principles. The 2017 edition of the Guidelines, which define and depend on three connected concepts, maintains and expands on this approach. These, in turn, are derived directly from Anderson and Kovacic's description of the development in economic theory, and are increasingly acknowledged by competition authorities around the world:

- The US government considers intellectual property to be substantially equivalent to other types of property. Under US antitrust laws, this property is neither free from scrutiny nor particularly questionable.
- It is not assumed by the Agencies that IPRs automatically convey market power in any given situation. Rather, this is a situation that must be assessed on a case-by-case basis.¹²
- The Agencies believe that IP licensing agreements are generally pro-competitive since they allow enterprises to efficiently integrate complementary sources of production.

ii. **The treatment of licensing practices** - The impact of licensing arrangements on competition would be analyzed using three types of markets, according to the 1995 US Guidelines: (i) markets for intermediate or final items containing Intellectual Property; (ii) markets for certain existing technologies; and (iii) 'innovation markets'.¹³ It was stressed the difference between vertical and horizontal interactions. Concerns about the consequences of licensing arrangements for market structure, coordination, and foreclosure were recognized in the Guidelines, and the importance of exclusivity terms as a factor presenting potential concerns was emphasized. They also established 'safety zones' in the structure ('market situations in which licensing arrangements are unlikely to be challenged, absent compelling

¹¹ Joseph Farrell, Richard Gilbert and Carl Shapiro, Proposed Update of DOJ/FTC IP Licensing Guidelines, 7 September 2016. Available at <https://www.justice.gov/atr/file/890491/download>.

¹² *Illinois Tool Works, Inc. v. Independent Ink, Inc.* 126 S. Ct. 1281 (2006).

¹³ See note 25.

circumstances, due to the presence of sufficient competition in a market to pre-empt the possibility of market power being exploited").¹⁴

While the basic aspects and approaches mentioned above were carried over in the 2017 edition of the US Guidelines, they were revised and expanded on in several ways.¹⁵ The updated Guidelines, in particular, (i) include references to Supreme Court decisions that have acknowledged and affirmed the enforcement agencies' opinion that patents do not essentially assign market power on the patentee; (ii) assert that a unilateral rejection to assist competitors will not generally prompt antitrust obligation; and (iii) make it clear that resale price maintenance agreements are not as such illegal and are assessed utilizing the rule of reason.¹⁶ The 2017 Guidelines also replace previous references to the notion of innovation markets with the more concrete notion of research and development markets, indicating widespread suspicion for the contribution of the former concept.¹⁷

iii. **Refusals to License** - The 'right to exclude' has historically been viewed as one of the most essential rights held by IP owners in the United States.¹⁸ The 2017 US Guidelines indicate this position, stating:

'Owners of intellectual property have specific rights to exclude others under intellectual property law. These rights enable property owners to benefit from their assets. The rights of IP owner to 'exclude' are similar to those of other types of private property owners. Antitrust laws normally do not hold a company liable if it refuses to aid its competitors unilaterally, in part as doing so could stifle investment and innovation.'¹⁹

This sentence appears to rule out the prospect of US authorities launching enforcement actions purely based on a refusal to license, as the European Commission has done.²⁰

¹⁴ 1995 US Guidelines, above note 25, pp. 22 et seq. The principal indication that firms are operating within a safety zone is that four or more independently controlled technologies, in addition to the technology controlled by the parties to the arrangement under examination, are present in the market.

¹⁵ See note 8.

¹⁶ Ibid.

¹⁷ Hartmut Schneider, James W. Lowe, Leon B. Greenfield, Mi Hyun (Angela) Yoon, Facelift for Two Millennials: DOJ and FTC Update Guidelines for IP Licensing and International Enforcement, 24 January 2017. Available at <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179883656>.

¹⁸ Assistant Attorney General Makan Delrahim, Competition, Intellectual Property, and Economic Prosperity, Remarks at the U.S. Embassy in Beijing, Beijing, China, 1 February 2018, available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usembassy-beijing>.

¹⁹ See note 8.

²⁰ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 407-08 (2004), Opinion of the Supreme Court of the United States. Available at <https://supreme.justia.com/cases/federal/us/540/02-682/opinion.html>; and Willard K. Tom and J. Clayton Everett, Jr., 'Competition policy, intellectual property and network industries: post-1995 enforcement experience in the US and EU', forthcoming in Anderson et al, above note 1.

Other enforcement issues

i. **Anti-competitive Patent Settlements** - The anti-competitive impacts of 'pay for delay' agreements, in which brand-name drug firms seek to delay entry into specified key markets by possible generic competitors, are one of the initial areas of focus. For more than a decade, the US Federal Trade Commission has focused its efforts on this issue.²¹ As the Commission has pointed out:

In recent years, one of the FTC's primary priorities has been to resist a costly legal strategy that branded drug producers have been using to restrict competition from lower-cost generic drugs. By proposing patent settlements that pay generic businesses not to introduce lower-cost alternatives to market, these pharma companies have been able to avoid competition. For a rising number of branded pharmaceuticals, these 'pay-for-delay' patent agreements effectively prevent all other generic drug competition. According to a research conducted by the Federal Trade Commission, anti-competitive agreements cost consumers and taxpayers \$3.5 billion in increased medicine costs each year. The FTC has pursued a number of actions to block similar deals since 2001, and it favors legislation that would prohibit such 'pay-for-delay' agreements.²² The Commission's views were reflected in the majority ruling of the US Supreme Court in the significant case of *FTC v. Actavis, Inc.*, in most but not all respects.²³

ii. **Standard Essential Patents (SEPs)** - The Department of Justice, with the help of the Federal Trade Commission, has been focusing on disputes concerning standard essential patents (SEPs) that a patent owner (or past owner) has agreed to license on FRAND terms.²⁴ The level of interest and concern is such that the Department and the US Patent and Trademark Office produced a joint policy statement on the subject in 2013. (joint DOJ-PTO policy statement).²⁵ According to the Department:

Our innovation-driven economy is based on principles that are commonplace in daily life [...]. While standards help our economy run more efficiently and provide consumers and businesses

²¹ Federal Trade Commission, Pay-for-Delay: When Drug Companies Agree Not to Compete. Available at <https://www.ftc.gov/news-events/media-resources/mergers-competition/pay-delay> (last accessed on 31 January 2018).

²² Ibid.

²³ *FTC v. Actavis, Inc.*, Supreme Court of the United States, Syllabus, October 2012; Anna C. Müller and Antonella Salgueiro, 'Reverse patent settlement agreements in the pharmaceutical sector from a competition policy perspective: enforcement and regulatory issues', forthcoming in Anderson et al, see above note 1.

²⁴ Renata Hesse (2014), A Year in the Life of the Joint DOJ-PTO Policy Statement on Remedies for F/RAND Encumbered Standards-Essential Patents (Remarks to the Global Competition Review GCR Live IP & Antitrust USA Conference)

²⁵ US Department of Justice and US Patent and Trademark Office, Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments. See also note 24.

with new, advanced products, they also pose a threat to competition [...]. There is a risk of future patent hold-up when industry sets a norm that includes patented technology held by participants in the standard-setting process. Firms implementing a standard might realize that switching away is more difficult and expensive once the standard has been established. The owners of the included patents gain market power as a result of this lock-in.²⁶

To address this concern, the 2013 joint DOJ-PTO policy statement underscores the risk that a FRAND-encumbered patent holder will try to reclaim some of the market power it would have had if it had not entered into the FRAND commitment by seeking an exclusion order to force an implementer to acknowledge more difficult terms than those consistent with the FRAND commitment by seeking an exclusion order to force an implementer to acknowledge more burdensome terms than those consistent with the FRAND commitment.²⁷ An order prohibiting the importing of relevant products is an instance of such an exclusion. When the US Trade Representative disapproved an exclusion order issued by the US International Trade Commission against some Apple Inc. goods in August 2013, he cited the DOJ-PTO policy statement, underlining the issue's importance as a matter of international trade policy.²⁸

Recently, there were rumblings of a possible future adjustment in the US enforcement attitude on this subject. In November 2017, Assistant US Attorney General for the Antitrust Division, Makan Delrahim, made the following statements before a panel about the treatment of standard-setting organizations:

I'm concerned that we, as enforcers, have gone too far in appeasing the issues of technology implementers that engage in standard-setting bodies, and that we may be jeopardizing benefits for IP creators who are entitled to a fair compensation for producing game-changing technologies.²⁹

Still, it's unclear what particular modifications in enforcement methods will emerge.

iii. **Patent Assertion Entities (PAEs)** - The function and behavior of PAEs, sometimes known as 'trolls,' has been a third major area of attention for US competition enforcement agencies.³⁰ These are companies whose main business is obtaining patents in order to enforce

²⁶ Renata Hesse (2013), IP, Antitrust and Looking Back on the Last Four Years (remarks presented at the Global Competition Review, 2nd Annual Antitrust Law Leaders Forum, Miami, Florida).

²⁷ Ibid.

²⁸ Ibid.

²⁹ Delrahim (2017), above note 10. See also Crowell & Moring LLP, Antitrust, Standard Development, and Essential Patent Licensing: The Antitrust Division Returns to Sound Enforcement Principles, available at <https://www.lexology.com/library/detail.aspx?g=1abc710f-0d87-4840-a94a-31b2dcc1c4b6>.

³⁰ FTC, Patent Assertion Entity Activity: An FTC Study, October 2016. Available at https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftcstudy/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.

them against current products or services, rather than practicing, facilitating, or inventing technology for customer advantage. The Federal Trade Commission (FTC) published a research paper on PAEs in 2016. While the FTC recognizes the value of infringement action in preserving patent rights, it also recognizes that nuisance infringement litigation can drain judicial resources and deflect attention away from more productive corporate practices.³¹ As a result, in order to maintain balance, the FTC recommended adjustments to:

- (1) address discovery burden and cost inequity in PAE litigation;
- (2) provide the courts and defendants with more details about the plaintiffs who have filed infringement lawsuits;
- (3) streamline multiple cases introduced against defendants on the same infringement theories; and
- (4) offer adequate notice of these infringement concepts as courts continue to evolve increased pleading necessities for patent cases.³²

Competition advocacy regarding the IP system

Apart from their enforcement activities in relation to the aforementioned and other issues, the US competition agencies, particularly the FTC, have involved in substantial advocacy pursuits relating to the competition-IP interface, as well as the scope and application of IPRs in general, as Anderson and Kovacic discuss.³³ One of the main goals of these actions is to avoid the recognition of ill-founded rights which might stifle competition or stifle follow-on innovation without serving any legitimate counter-purposes.³⁴ The FTC's 2003 study on 'The Proper Balance of Competition and Patent Law and Policy' was an important example of such effort that had an impact outside of the United States.³⁵ The International Competition Network (ICN) and the World Bank Group (WBG) recognized the FTC "for increasing awareness of the competitive dynamics of markets characterized by disruptive innovation through a series of advocacy instruments (workshops, blogs, opinions, and letters) targeted to both legislators and regulators in The 2015-2016 Competition Advocacy Contest."³⁶

Overall, the United States is definitely a leading and significant jurisdiction when it comes to

³¹ Ibid.

³² Ibid.

³³ See above note 9.

³⁴ Ibid.

³⁵ FTC, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, 2003. Available at <https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balancecompetition-and-patent-law-and-policy/innovationrpt.pdf>.

³⁶ World Bank Group (WBG), The 2015 – 2016 Competition Advocacy Contest: How to Build a Culture of Competition for Private Sector Development and Economic Growth.

concerns with the competition-IP interface, as well as the originator of analytical methodologies that are now employed, with slight changes, in a variety of other jurisdictions (see below). In the United States, an economics-based 'rule of reason' approach to the consideration of licensing procedures and other relevant activity is now well-entrenched, with a focus on the preservation of incentives for innovation. The present US Guidelines, which are primarily concerned with licensing difficulties, mirror this approach and are supplemented by policy announcements and other informal guidance on emerging topics such as anticompetitive patent settlements, SEPs, and PAEs. Without a doubt, the United States' experience has been a valuable source of information for the rest of the globe on crucial topics. Nonetheless, as will be addressed further below, other jurisdictions have now 'caught up' to the US in crucial ways and have become policy pioneers in their own way.

III. INDIA

In 1969, India passed its first antitrust law, the "Monopolies and Restrictive Trade Practices Act" (MRTP Act). Rather than fostering competition more widely, the Act's principal goal was to prevent economic power concentration and restrict monopolistic practices. Following "multilateral trade liberalization" in the 1990s, India's government acknowledged the importance of competition policy in its post-liberalization market economy. As a result, the government established a "High Level Committee on Competition Policy and Law" in 1999 to provide guidance on modern competition law. According to India's Finance Minister at the time:

In view of international economic developments relating to competition rules, the MRTP Act has become obsolete in certain areas. We must refocus our focus away from monopolies and toward increasing competition. The government has decided to form a committee to look into these concerns and draft a new competition statute that is appropriate for our circumstances.³⁷

Parliament established the Competition Act in 2002 based on the presented proposals, which was then revised in 2007, 2009, and most recently in 2017. The Competition Commission of India (CCI) was founded in 2003 under the same Act to "remove practices that have a harmful impact on competition, encourage and sustain competition, safeguard consumers' interests, and assure freedom of trade carried on by other players in Indian markets."³⁸

In India, the Competition Act was enacted as a significant step toward increasing competition. Anti-competitive agreements, misuse of dominant position, and mergers and acquisitions are

³⁷ Pradeep S. Mehta, *A functional competition policy for India* (Academic Foundation, 2006).

³⁸ The Competition Act, 2002.

all prohibited under the Act. However, there is no clear provision in the Competition Act forbidding anti-competitive IP-related commercial actions. The prohibition of anti-competitive agreements is limited by an amnesty exception for IPR holders, notwithstanding the fact that the general restriction on abuse of dominant position extends equally to non-IP and IP related acts.

Beyond that, India has long been concerned about the general impact of intellectual property on competition and the market economy. As a result, India played a key role in winning agreement on the inclusion of anti-competitive as well as other apparent IP abuse clauses in the TRIPS Agreement.³⁹

The volume of competition enforcement proceedings involving the exercise of IP increased dramatically at the turn of the twenty-first century. Despite the fact that the CCI has not issued any official guidelines or regulations on the IP-competition policy interface, such problems were addressed in relevant enforcement proposals, as well as in a non-binding instrument published by the CCI in 2002, the "Advocacy Booklet on Intellectual Property Rights" under the Competition Act (Advocacy Booklet).⁴⁰

Scope of relevant statutory provisions

Anti-competitive agreements "in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition inside India" are prohibited under Section 3 of the Competition Act. Nonetheless, there are some IP exceptions in this provision:

Nothing in this section limits a person's right to prevent infringement of, or to impose reasonable conditions on, any of his rights that have been or may be conferred upon him under: (i) the Copyright Act, 1957; (ii) the Patents Act, 1970; (iii) the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999; (iv) the Geographical Indications of Goods (Registration and Protection) Act, 1999; (v) Designs Act, 2000; (vi) Semi-conductor Integrated Circuits Layout-Design Act, 2000.⁴¹

While the legitimate utilisation IPRs is hence excluded from Section 3's anti-competitive agreements provisions, there is no equivalent exemption applicable in circumstances of IPR misuse. Instead, Section 4 of the 2002 Competition Act imposes a prohibition on abuses of

³⁹ Nuno Pires de Carvalho, *The TRIPS*

Regime of Antitrust and Undisclosed Information (Kluwer Law International, 2008); A.V. Ganesan, 'Negotiating for India', in Watal and Taubman, above note 13; and Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Oxford University Press, 2001).

⁴⁰ The Competition Commission of India, *Advocacy Booklet, Intellectual Property Rights of 2002*.

⁴¹ See note 31.

dominant position by offering an exhaustive list of forbidden actions, but does not contain an equivalent "defence clause" for IPR holders.⁴² In addition, the Patent Act of 1970 includes mechanisms for compulsory licensing based on wider public interest considerations.⁴³

Doctrinal content

i. Overall Framework - Although the importance of a 'rule of reason' approach has been recognized in some recent competition cases, India still generally follows a 'per se' approach, as evidenced in the limited jurisprudence on the competition policy-IP interface.⁴⁴

The exception regarding the applicability of Section 3 of the Competition Act makes reference to 'reasonable conditions as may be necessary for protecting IPRs' as the main requisite to fall under the immunity set out therein. As those conditions are not further defined or explained in the Act, by implication, unreasonable conditions attached to IPRs will fall under the scope of Section 3.⁴⁵ As mentioned before, practices considered as abuses in terms of Section 4 are not exempted from competition scrutiny.

ii. Licensing Practices - The Advocacy Booklet gives a non-exhaustive indicative record of licensing arrangements that are limiting or likely to be anti-competitive on the issue of licensing agreements. For example, a deal that effectively combines the R&D efforts of two or a few businesses that could reasonably participate in R&D in the related industry could stifle competition for new product and service development. Exclusive licensing agreements, such as cross-licensing, tie-ins, and patent pools, are another source of potential competition.

iii. Refusals to License - Case law has mostly dealt with refusals to license. In an analysis of a related case involving whether a 'refusal to deal' led to a violation of the Competition Act, the CCI concluded that, because section 4(2) of the Act contains no 'IP defense' clause against an alleged abuse of dominance, such a conduct of the organization cannot be acknowledged based on the fact that the exclusionary act is within the purview of their IPRs.⁴⁶ A refusal to deal might be viewed as a vertical restraint that is anticompetitive. In this sense, refusing to

⁴² Ibid.

⁴³ Bayer Corporation v. Natco Pharma Ltd., Order No. 45/2013 (Intellectual Property Appellate Board, Chennai).

⁴⁴ "The decision of Competition Appellate Tribunal (COMPAT) in Schott Glass India Pvt. Ltd., v Competition Commission of India (Appeal No. 91 of 2012, 2 April 2014) gave a fillip for the place of economic evidence. A later ruling of COMPAT in National Stock Exchange of India Limited v Competition Commission of India and Another (Appeal No. 15 of 2011, August 2014) suggests that new frontiers of market economics is still to be fully appreciated and it falls on economics to communicate with lawyers and others." For additional analysis see Geeta Gouri, 'Economic Evidence in Competition Law Enforcement in India' in Jenny and Katsoulacos (eds.).

⁴⁵ Advocacy Booklet, above note 33.

⁴⁶ Shamsher Kataria v. Honda Siel Car India Limited, Case No. 03/2011, Competition Commission of India, 25 August 2014 and 27 July 2015.

award a license or imposing unduly restrictive restrictions on a license can be viewed as potentially anti-competitive.⁴⁷

Furthermore, the CCI's approach to analyzing claims of refusal to deal prioritized short-term consequences above the longer-term consequences of IPRs, which are critical for competition and innovation. The CCI's approach has been criticized for constraining IP holders' rights by allowing for compulsory licensing of IP technologies to third parties.⁴⁸

iv. Anti-competitive patent settlements - Patent settlements may be investigated as anti-competitive agreements under Section 3 of the Competition Act when irrational standards are attached to the IPRs, or as an abuse of dominant position under Section 4 of the Act when a dominant firm enters such agreements to foreclose effective competition in the market. However, if the agreement is made during the term of patent, the patentee may invoke a limited right of defence under Section 3(5) of the Act, as long as the restriction is needed to preserve the patentee's IPRs.⁴⁹

Furthermore, a report commissioned by the CCI on challenges of competition in the Indian pharmaceutical market is noteworthy.⁵⁰ Despite the fact that it made remarks about patent settlements, it was unable to provide clear guidelines on the subject.⁵¹ In keeping with its efforts on the matter, the CCI is said to have launched inquiries into two medicine patent settlements as recently as 2017.⁵²

v. Standard Essential Patents (SEPs) - The jurisprudence on FRAND licensing for SEPs, which has been growing and has been adopted by various decisions of the CCI and the Delhi High Court, is relevant to the issue on competition-IP interface – that are not covered per se under the Competition Act.⁵³ The disagreements stemmed from 'exorbitant' SEP royalty

⁴⁷ Samir R Gandhi, Gaurav Bansal and Krithika Ramesh, 'India (Chapter 8)', in Vinje, above note 178, p. 93. Available at https://thelawreviews.co.uk/digital_assets/d8692bd5-442a-4470-ad8e1aeac28d304d/TIPAR2-full-book-PDF.pdf.

⁴⁸ Divyanshu Agrawal, India's First Spare Parts Case: The Intellectual Property Defence in Anti-Trust Law, 14 November 2014. Available at <http://jiplp.blogspot.ch/2014/11/indias-first-spare-parts-case.html>.

⁴⁹ Legal News & Analysis – Asia Pacific - India - Competition & Antitrust, India – Pay For Delay Agreements on The CCI Radar, 12 September, 2014. Available at <http://www.conventuslaw.com/archive/indiapay-for-delay-agreements-on-the-cci-radar/>.

⁵⁰ Centre for Trade and Development (Centad), New Delhi, Competition Law and Indian Pharmaceutical Industry, 2010, para. 5.4.21. Available at http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf.

⁵¹ *Ibid.*

⁵² Michael A. Carrier, 'Drug Patent Settlements', in Blair and Sokol (eds.), above note 223, p. 336.

⁵³ *Micromax Informatics Ltd v. Telefonaktiebolaget LM Ericsson*, Case No. 50 of 2013, Competition Commission of India, 12 November 2013; *Intex Techs (India) Ltd v. Telefonaktiebolaget LM Ericsson*, Case No. 76 of 2013, Competition Commission of India, 16 January 2014; *Best IT World (India) Private Ltd. V. Telefonaktiebolaget LM Ericsson*, Case No. 4 of 2015, Competition Commission of India, 12 May 2015.

rates and non-disclosure of license terms, both of which were determined to be an abuse of dominant position in the telecommunication sector.

In regards to the suspected abuse of dominance, the CCI determined that using the sale prices of downstream products as a royalty base is exorbitant and has no relationship to the value of the SEP being licensed out. As a result, the royalties was discriminatory and in violation of FRAND requirements, resulting in abuse of dominance. Furthermore, the Delhi High Court confirmed the CCI's jurisdictional right to examine an alleged abuse of dominance in *Telefonaktiebolaget LM Ericsson v. Competition Commission of India*, citing the absence of an "irreconcilable conflict" between the Competition Act and the Patent Act.⁵⁴

Non-SEPs have recently received increased attention from the CCI. It looked on the potential anti-competitive impact of voluntary non-SEPs standards. The Competition Appellate Tribunal (COMPAT) considered the practice of private and voluntary standardisation as potentially generating entry obstacles, which could result in an abuse of dominance in a related case.⁵⁵

vi. Patent Assertion Entities (PAEs) - The CCI has yet to issue official guidance or a position on patent assertion entities. Nonetheless, it is worth noting that the Indian Patent Act stipulates that patents are not given just to allow patentees to have a monopoly,⁵⁶ and that patents are not subject to 'hoarding.' In this way, India's current legislation, combined with the practice of compulsory licenses, may function as a deterrent to patent trolls.

Competition advocacy / ongoing discussion on the competition-IP interface

The Competition Act states that "the Commission shall take appropriate steps for the strengthening of competition advocacy, developing awareness, and providing training about competition issues."⁵⁷ In this spirit, the CCI has made a considerable effort in creating advocacy booklets as component of its advocacy program, which provide advise on various anti-competitive behaviors.⁵⁸ Although the content should not be construed as representing the CCI's official position, it does serve as an example.

As previously stated, the CCI released a brochure in 2002 mentioning the application of Section

⁵⁴ *Telefonaktiebolaget LM Ericsson v. Competition Commission of India*, W.P.(C) No. 464/2014 and 1006/2014

⁵⁵ *In re K Sera Sera Digital Cinema Pvt. Ltd. v Digital Cinema Initiatives, LLC & Ors.* (Case No. 30 of 2015), where six Hollywood movie production houses, by way of a joint venture, required cinema owners and digital cinema service providers in India to comply with a certain type of technology, so as to protect their proprietary content from piracy.

⁵⁶ The Indian Patent Act of 1970.

⁵⁷ The Competition Act, 2002, s. 49 (3).

⁵⁸ Advocacy Booklet, above note 33.

3 of the Competition Act to anticompetitive agreements including IPRs.⁵⁹ It shows specific instances of licensing agreements which come under the umbrella of competition law, despite the presence of IPRs.

Furthermore, on March 1, 2016, the Indian Ministry of Commerce and Industry's Department of Industrial Policy and Promotion released a discussion paper titled "Standard Essential Patents and their FRAND Availability."⁶⁰ The purpose of the paper was to engage interested stakeholders and citizens in a conversation about the policy framework that was required. SEPs, patent hold-ups, FRAND licensing, cross-licensing, and patent pooling are all discussed in detail in this article. It also gives an outline of the licensing situation in the United States, Germany, the Netherlands, France, the United Kingdom, China, and Japan.

As a result, India's position on the competition–IP interface might be characterised as less well-defined than that of other countries. Because of the void due to a lack of formal Guidelines, a more cautious approach to individual concerns has arisen through case law. Furthermore, while competition laws apply to IPRs, the exception under Section 3 of the Competition Act allows for considerable flexibility in their evaluation.

IV. CONCLUSION

Both jurisdictions under consideration have at least rudimentary procedures governing potential anti-competitive IPR misuse, including licensing agreements. While licensing techniques are often excluded from or in compliance with competition laws in many cases, ancillary clauses such as resale price maintenance, distributing, grant-backs, and other similar acts are at least susceptible to prospective investigation under national competition laws.

A shift toward a consequences or case-by-case ('rule of reason') method is visible in the jurisdictions. Furthermore, the competition agency's advocacy activities are increasingly supplementing holes in or outright lack of essential norms. This is especially true for 'new' issues that aren't addressed in existing rules.

The handling of refusals to license, which in some jurisdictions can constitute an abuse of power and in others (notably in the US) is deemed to be usually well within rights of the IPR holder, shows clear disparities in approach.

Anti-competitive patent settlements are a problem that is gaining traction amongst competition authorities around the globe. Both jurisdictions deal with it in some way, whether through

⁵⁹ Ibid.

⁶⁰ Available at http://www.ipindia.nic.in/Whats_New/standardEssentialPaper_01March2016.pdf.

advocacy, enforcement, or related jurisprudence. In the same way, SEPs are constantly being addressed in some way.

These advances are beneficial in many ways: they show a growing knowledge of the roles of intellectual property and competition policy in stimulating innovation and technological dissemination, and hence of the relevance of these policy tools for economic growth, development, and prosperity. Indeed, the importance placed on the relationship between competition policy and intellectual property as a component of the regulatory structure for innovation and the dissemination of new technologies in both the jurisdictions studied is a key finding of this study that deserves to be discussed at the national, multilateral, and international levels.

The necessity for a more cross-jurisdictional learning experience and eventually, a considerable level of coordination (whether voluntarily or not) concerning the policy concerns, applications, and initiatives covered in this study is a key question that arises from this analysis. There is a minimum need for more discussion of connected concerns in key fora, involving both competition and IP authorities. For the transmission of policy reforms in this area, transnational conversations and instructional practices are critical. Without such debate, there's a good chance that appropriate enforcement policies may develop in inefficient ways, resulting in unnecessary interjurisdictional conflicts. It is also an anomaly that the role of IPRs in the global economy is currently protected and, to some extent, entrenched by the WTO TRIPS Agreement, while no same formal treaty arrangement appears to serve the function of competition policy in the world market, and to guarantee that such policy is implemented in a transparent and impartial manner.
