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Competition Law and IPRs: Friends or Foes?

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ABSTRACT

Competition Law and Intellectual Property Rights (IPRs) have been a topic of heated discussions, especially in a regulated market economy like India. Both the areas are dynamic and often tend to come in conflict with each other. Though the means are different, both Competition Law and IPR strive towards one goal – attainment of efficiency in market. However, the differences in the methods and approach in achieving this goal leads to conflict between the two. Besides, while competition law strives to sustain and promote competition in the market, IPRs confer limited monopolies thereby restraining competition. The paper attempts to look into the interplay between competition law and IPRs to analyse whether competition law and IPRs are friends or foes. The same shall be carried out by analysing the provisions of both laws and the related judicial precedents.

I. INTRODUCTION

Intellectual Property (IP) refers to creations of the mind, such as inventions, literary and artistic works, design and symbols, names and images used in commerce[2]. IPRs are private rights. In the present era of information revolution, IPRs are a valuable asset. The purpose behind the grant of IPRs, as far as the inventor/author/IP holder is concerned, is an incentive to invent/produce original works. With respect to the public at large, the purpose behind IPRs is to promote original works (Copyright), prevent confusion amongst consumers (Trademark), publication of complete specification of an invention in the public domain (Patent) etc.

The term 'competition' is defined differently in different parts of the world. The Competition Act in India doesn't define the term competition. However, the Parliamentary Standing Committee in its ninety third report on Competition Bill, 2001 defined competition as an economic rivalry against economic enterprises to control great market power[3]. In the words

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[2] World Intellectual Property Organization (WIPO), (Dec. 8th 2020, 03 52 AM), http://www.wipo.int/about-ip/en/.

[3] Parliamentary Standing Committee on Home Affairs, Ninety Third Report on the Competition Bill, 2001, (Presented to the Rajya Sabha on 21st November, 2002) (Dec 9th 2020, 09 06 PM),

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of Fali S. Nariman, competition law is all about economics and economic behavior[4]. Competition law is that law which promotes or seeks to maintain market competition by regulating anti-competitive conduct[5]. The competition law seeks to protect and preserve competition in the market. The purpose of competition law has a consumer welfare angle attached to it. However, the IPRs reflect the financial significance to IPR holders and not to consumers.

Competition in the market helps in attaining static efficiency[6]. However, static efficiency might lead to stagnated markets in the long run. Therefore, in order to promote market growth, in the long run, dynamic efficiency is desirable. The same can be achieved with the help of IPRs[7]. The absence of IPRs results in the lack of incentives for innovators which may result in market failure. Therefore, the aim is to achieve a tradeoff by restricting only those monopolies that lead to inefficiency.

II. TRIPS AND ANTI-COMPETITIVE PRACTICES

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) vide Article 8.2 provides that "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade….."[8]

Though Article 8.2 addresses the issue of abuse of IPRs, the main provision in the Agreement that fights against anti-competitive practices is Article 40. The Members vide Article 40.1 agree that certain types of licensing agreements related to IPRs can have an unpleasant effect on trade and hamper the transfer and dissemination of technology. Consequently, the Members vide Article 40.2 may provide for legislation to curb licensing practices or conditions that may constitute an abuse of intellectual property rights adversely affecting competition in the relevant market.

It is interesting to note that the TRIPs Agreement is concerned about competition and anti-competitive practices, but the IPR laws in India fails to explicitly provide for a safeguard

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https://www.prsindia.org/uploads/media/1167471748/bill73_2007050873_Standing_Committee_Report_on_Competition_Bill__2001.pdf.

[4] Fali S. Nariman, *Law and Economics*, Vinod Dhall (edn.), Competition Law Today: Concepts, Issues and Law in Practice XV, New Delhi, Oxford University Press, 2007.

[5] Yi Lut et. al, *The Role of Competition Law (Act): An Asian Perspective*, Asian Social Science Vol. 9 No. 7, 47-53. (Dec. 8th 2020, 04 08 AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2281756.

[6] Competition also helps in achieving dynamic efficiency. For instance, if a seller is selling his goods at the marginal cost of production with no or very less profit, a new entrant cannot hit the market with the same good – this forces the new entrant to innovate, thereby contributing to dynamic efficiency.

[7] IPRs are not the only way to achieve dynamic efficiency, but it is the most preferred one.

[8] The Agreement on Trade Related Aspects of Intellectual Property Rights, 1994, art. 8.2.

against anti-competitive practices.

III. Competition Act, 2002 and Intellectual Property Rights

Though the IPR laws in India fails to mention about "competition", the Competition law in India explicitly excludes from its ambit the reasonable conditions imposed by an IPR holder in protecting his IPR. The legislative intent behind the Competition Act, 2002 is not to interfere in IPR protection, however, if the Competition Commission of India (CCI) is satisfied that such protection results in an Appreciable Adverse Effect on Competition (AAEC) in India, then the provisions of the Act will be attracted. The Act vide S. 3(5) excludes the right of IP holders to prevent infringement or to impose "reasonable conditions"[9] for the protection of his IPRs from the ambit of anti-competitive agreements[10]. A combined reading of Section 3(5) and Sections 60 and 62 of the Competition Act complicates the IP-Competition interface. Section 60 contains the non-obstante clause i.e. the provisions of the Act shall have effect notwithstanding anything contained in other law. On the other hand Section 62 reads that the provisions of the Act shall be in addition to and not in derogation of any provision in any other law. This conflict creates difficulties in assessing the real nature of the interventions that are possible under the Competition Act. However, the court has held that the CCI has jurisdiction to deal with IPR cases[11].

The lack of definition for "reasonable conditions" indicates that the competition law in India permits an IPR holder to hamper competition to protect his IPRs. This implies favouritism towards IPRs, at the cost of competition in the market. Hence there is nothing wrong in saying that the Indian legal system prioritizes the IPR laws and its objectives over that of the competition law. Nevertheless, the CCI has identified some practices that are unreasonable[12] viz. patent pooling, tie-in arrangements, restricting research and development etc.

It is to be noted that the exception of reasonable use of IPR from the purview of competition law is only restricted to the purposes mention in S. 3 (5). When it comes to abuse of dominance under Section 4 of the Act, IPRs are not exempted.

IV. Competition Law and IPRs – The Role of Judiciary

The courts in India had a handful of chances to discuss the competition law – IPR interface. The question whether CCI has the jurisdiction to deal with IPR cases was held as affirmative

[9] The Act fails to define reasonable conditions thereby leaving it to the courts/CCI to decide.
[10] The Competition Act, 2002 (Act 13 of 2003), s.3 (5) (i).
[11] Aamir Khan Productions Pvt. Ltd. v. Union of India (2010) 112 Bom L R 3778.
[12] Advocacy Booklet on Intellectual Property Rights, published as a part of the advocacy programme on CCI, 5, (Dec 8th 2020, 02 21 AM), https://www.cci.gov.in/advocacy-booklet/126.

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in the case Aamir Khan Productions Pvt. Ltd. v. Union of India[13]. A similar view was upheld by the Competition Appellate Tribunal (COMPAT) in the case of Kingfisher Airlines Ltd. v. Competition Commission of India[14] wherein it was held that the CCI has jurisdiction to deal with all cases that come before the Copyright Board.

In *Entertainment Network (India) Limited* v. *Super Cassette Industries Ltd*[15], the apex court observed that even though the copyright holder has monopoly, if such monopoly creates disturbance in smooth functioning of the market, it will be in violation of competition law. This implies that the right of IPR holder to protect his IPR is not absolute but subject to limitations. The judgment is a reminder that if private rights like IPRs are given importance over market competition, it will be detrimental to the economy of the nation.

In *Union of India* v. *Cyanamide India Limited & Another*[16], the court held that overpricing of life saving drugs is a matter within the ambit of CCI as far as the pricing factor is concerned. The court reasoned the same on the ground that the absence of alternatives leads to creation of monopolies which adversely affects the economic efficiency in the market. Also, in the light of the present COVID-19 pandemic, if the price of the COVID-19 vaccine is unregulated in the name of patent rights over it, the same will be unaffordable to a large section of the society and at the same time patent rights over the vaccine would prevent others to enter the market and provide the same at a cheap rate. Therefore, grant of jurisdiction to CCI in matters of overpricing of life saving drugs is a step in the right direction.

The judiciary, in this context, played the role of reducing the friction between the two laws by acting as a lubricant. By permitting CCI to look into whether the use of IPRs by IPR holders leads to AAEC, the courts have upheld the importance of societal interest over private interest. The same is appreciable.

V. CONCLUSION

It can be seen that even though it seems that IPRs laws have been given more importance than the competition laws, the imbalance is brought to equilibrium by the judiciary by letting the CCI have a look into the IPR cases. This equilibrium is essential to prevent the abuse of IPRs by IPR holders. The same also helps sustain healthy competition in the market. Both the laws supplement each other; one comes into picture when the other is misused, thereby

[13] (2010) 112 Bom L R 3778.
[14] Order of COMPAT in Appeal No. 15 of 2012.
[15] 2008 (37) PTC 353
[16] AIR 1987 SC 1802.

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supplementing each other. Though competition law strives to get consumers the best deal and IPRs are concerned primarily about the inventors/authors, an equilibrium is struck by ensuring that the IPRs do not unreasonably affect the competition in the market.

To sum up, it can be said that both competition law and IPR strive towards attaining efficiency in the market. While the former promotes competition to achieve static efficiency, the latter grants limited monopoly to inventors or innovators to achieve dynamic efficiency, thereby facilitating market growth in the long run. Thus, IPR promotes inventions and innovations by granting exclusive rights to inventors and innovations whereas competition law strives to keep the markets open for the entry of new players. In this way, both competition law and IPRs supplement each other and hence they can be said to 'friends in disagreement as to the modus operandi'.

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