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## ***ABOUT US***



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you



# **THE INTERFACE BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: BALANCING INNOVATION AND COMPETITION WITHIN THE INDIAN CONTEXT**

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## **I. Introduction**

Free markets help in inventing new products as well as determining their price. When an excessive restriction is imposed on the economy, it prejudices the economy by making it rigid, as there will be no or minimum flexibility in operation. Where there will be less flexibility, there will be less invention or innovation. It is this contradictory stance that separates the fields of Intellectual Property Rights (“IPR”) and Competition Law. These fields of law have been viewed as diametric opposites due to their seemingly conflicting objectives. The purpose of IPR is to protect an individual’s creativity by safeguarding it from unauthorised usage. This incentivises invention, with the attachment of royalties and other benefits that allow creators to benefit while retaining the right to assign or license. Distinctiveness in the trademarks and designs of the products helps the consumers differentiate one product from the other. This uniqueness is guaranteed by these laws as it prevents other individuals from copying the mark of a particular brand, or a patent of a process, as all the exclusive rights are given to the trademark holder. The grant of these exclusive rights can be seen as contradictory to the objectives of Competition Law. Competition Law discourages any abusive market practices which eliminate competition and may be at the detriment of consumers.

It is imperative that the fields of IPR and Competition Law work harmoniously without compromising the core objectives of either field. Achieving such a goal would allow customers to benefit from choice due to product distinctiveness achieved with trademarks and copyrights while ensuring no anti-competitive practices.

## **II. Relevant Law**

There are three main provisions in the Competition Act, of 2002 (“Act”) that are relevant to understanding the relationship between IPR and Competition Law. Section 3(5) provides that the prohibition of anti-competitive effects as described in the Act, will not restrict any protection of statutorily imposed intellectual property rights.<sup>1</sup> It is important to understand the scope of this exemption. The mere applicability or presence of intellectual property does not override the jurisdiction of the Competition Commission of India (“CCI”), nor does it justify the imposition of exclusivity restrictions<sup>2</sup>. Any restriction imposed through intellectual property must be reasonable and necessary to protect the owner of the invention or good<sup>3</sup>.

Secondly, section 4 of the Act clarifies that the possession of rights conferred to the patent holder would not in itself amount to antitrust infringement; nevertheless, the misuse of such rights will constitute a breach of the provisions of the Act<sup>4</sup>. Section 4(2) treats enterprise action as abuse and applies equally to IPR holders. Thirdly, section 3(4) outlines what amounts to an unreasonable condition which has been understood to include patent pooling which has elements of the coordinated theory of harm, tie-in arrangements, price fixing, and receiving royalties post-patent expiration<sup>5</sup>. The prohibition of tie-in agreements encourages innovation while promoting competition within the market economy as it does not force products onto the consumer and provides a fair chance to all competing firms who may provide complimentary products. It is also important to note a recent development in the jurisprudence that clarifies that the Patent Act, being a special legislation, takes precedence over the Competition Act<sup>6</sup>.

## **III. Key Areas of Concern**

The duration of a patent is a key determinant of the existence of a competition concern. Patent rights are granted for a certain period, which is 20 years from the date of filing.<sup>7</sup> If such rights are given for an unlimited period, it could result in an Appreciable Adverse Effect on Competition (“AAEC”) as it stifles innovation which would negatively impact market

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<sup>1</sup> Section 3(5), The Competition Act, 2002; Shri Shamsher Kataria vs Honda Siel Cars India Ltd. & Ors., Case No. 03/2011.

<sup>2</sup> M/s K.C. Marketing Vs. OPPO Mobiles MU Private Limited, Case No. 34 of 2018.

<sup>3</sup> FICCI-Multiplex Association of India vs United Producers/ Distributors Forum & Ors., Case No. 01/2009; M/s K.C. Marketing Vs. OPPO Mobiles MU Private Limited, Case No. 34 of 2018.

<sup>4</sup> Section 4, The Competition Act, 2002.

<sup>5</sup> Section 3(4), The Competition Act, 2002.

<sup>6</sup> Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India, Case No. 8370/2015.

<sup>7</sup> Section 53, The Patents Act, 1970.

competition by being an excessive use of monopolistic power. In that case, it provides the enterprise with the power to set prices, possess exclusive information, and ultimately discourage entry, especially in industries with low entry barriers resulting in an unfair competitive advantage and the potential formation of a monopoly. An example of the same could be the formation of exclusive supply agreements over time, and discriminatory sub-licensing agreements eventually resulting in price fixing which could potentially limit the technological and scientific development within the industry<sup>8</sup>. Predatory pricing is considered by the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) as a restrictive trade practice. Overpricing of any patented product is, however, non-violative of any competitive provisions. It is necessary to strike the right balance between IP protection and competition-related policy in any market as a playing field for any upcoming industry.

The refusal to sub-license an IP can result in creating an inherently dominant position within the same market or even downstream or upstream dominance. This can severely impair technological and scientific development and control industry research and development (“R&D”) which would be a cause of concern for the CCI<sup>9</sup>.

The exception to Section 3 includes pre-existing statutory intellectual property but not trade secrets which makes it a grey area within the current jurisprudence<sup>10</sup>. From an IPR perspective, the first owner of a trade secret would intend to minimise the extent to which the same is known to the public. However, in Competition Law, the same should be available to all firms to avoid any unfair competitive advantage thus creating an impasse in objectives. Despite not having a conclusive stance on the same, trade secrets remain a viable factor to consider when assessing the presence of an AAEC<sup>11</sup>.

Horizontal licenses may still be an area of concern due to the possibility of collusion which creates the presumption that such an arrangement is anti-competitive. Licensing can be seen to impair and restrict R&D which may have anti-competitive effects which cannot be done away with completely. Thus, the type of licensing and the agreed-upon terms are vital.

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<sup>8</sup> Mahyco Monsanto Biotech (India) Limited (MABL) & Ors., Case No. 02/2015.

<sup>9</sup> *Ibid.*

<sup>10</sup> Shri Shamsher Kataria vs Honda Sael Cars India Ltd. & Ors., Case No. 03/2011.

<sup>11</sup> Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd. AIR 1967 SC 1098.

It is also important to note that Section 3(5) of the Act does not protect unregistered intellectual property. The Copyright Act does not mandate registration for its applicability which poses a contradictory position by both legislations. This also proves to be an issue with trade secrets, as previously mentioned, and trademarks. Additionally, the registration does not guarantee protection as even if it is registered, it must be accompanied by reasonable conditions as seen in the cases mentioned above. If certain legislation, such as the Patents Act, deems certain licensing arrangements as void and not within the scope of patent rights, the protection under Section 3(5) will not be of use to the parties. Furthermore, different IPR rights may span across different markets. The exclusive rights that a copyright owner has, i.e., the right to perform and communicate his/her work to the public, to make adaptations, etc. may constitute different markets individually<sup>12</sup>.

#### **IV. Possible Solutions**

The encouragement of non-exclusive or co-exclusive licensing can act as an incentive for innovation while retaining ownership on agreeable terms and minimising competition concerns. In such a case, the right to use the copyright does not lie with a single entity but can be given to multiple entities without compromising on the benefits of being an author. If the parties insist on some form of exclusivity, the same can be done with territorial exclusivity as it will only apply to production and not distribution within the confines of the specified territory. If there is any other form of exclusivity agreement, it must be with some limitation on the duration.

Compulsory licenses have been envisioned in Article 31 of the TRIPS Agreement in the event of any refusal to deal<sup>13</sup>. This allows enterprises to use intellectual property without the consent of the original owner when the owner refuses or is unknown. When the enterprise refuses to license intellectual property, it can be viewed as anti-competitive even though legislation encourages the freedom of the IP holder<sup>14</sup>. Understanding whether something amounts to anti-competitive refusal can be identified by examining whether the refused input is indispensable for an entity to compete in the downstream market, whether it could eliminate competition in the downstream or upstream market, and whether it could cause any damage to consumer

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<sup>12</sup> M/s HT Media Limited & M/s Super Cassettes Industries Limited. Case No. 40/2011.

<sup>13</sup> Article 31, Agreement on Trade-Related Aspects of Intellectual Property Rights: Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>14</sup> Entertainment Network (India) Limited v. Super Cassette Industries Ltd [2008] 37 PTC 353 SC 78-91.

choice<sup>15</sup>. The CCI has taken the opinion that any goods which are essential in nature must not be foreclosed with IPR protection and such an act will not protect the company from a CCI investigation. This may however conflict with the idea of imposing IPR protection on all innovations and transferred ownerships.

The CCI has taken the general stance that any goods of an essential nature must not be foreclosed with IPR protection and that such an act will not be immune from the CCI's investigation. This gives rise to Standard Essential Patents ("SEP") licenses which can only be granted if they are provided to all licensees within the same market segment at a standardised price<sup>16</sup>.

Agreements could include best endeavour clauses, which state that the owner of the IP must take any and all steps which a reasonable and prudent person would take to protect the use of that IP. This can be accompanied by a non-competition clause which restricts the ability to prepare or produce similar property without the consent of the owner and creator. To ensure that there is no effect on the rate of innovation, there should be adequate incentives in the form of protection and royalties to be given to the inventors and creators.

Lastly, the IP and Competition Law regulators must work in tandem with one another to safeguard the rights of the IP holders, support them in making new innovations, and increase the competitive spirit. There must be a sense of clarity in the law governing the same to rid of the current ambiguity.

## **V. Conclusion**

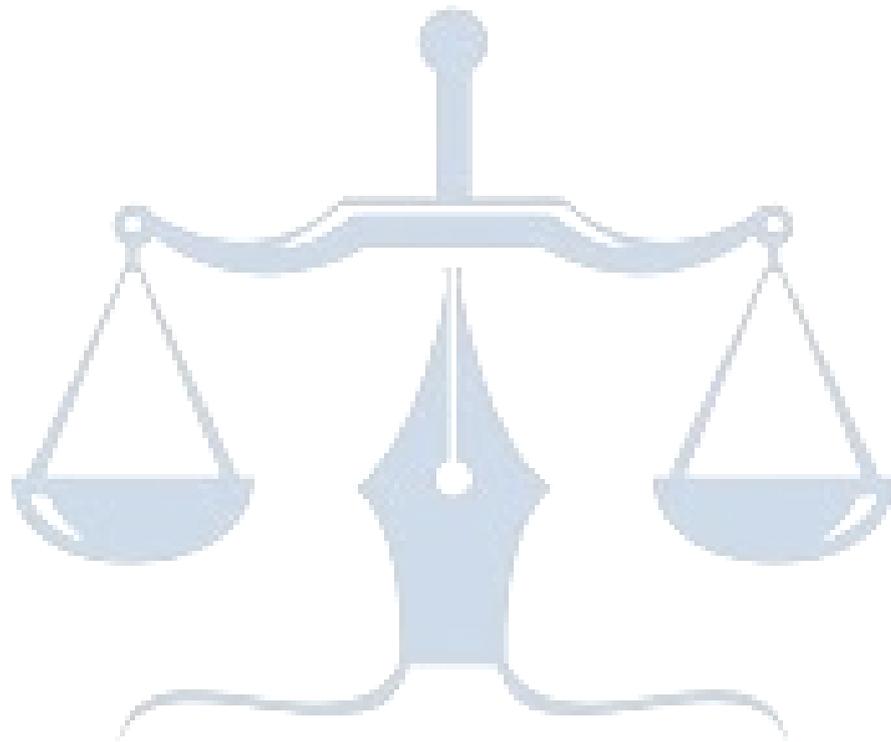
A synergetic relationship can exist to resolve the conflict in objectives within the fields of IPR and Competition Law despite the seemingly contradictory principles. Based on the language of the law in Sections 3 and 4 of the Act, it is clear that the CCI acknowledges the interplay and potential conflict of IPR with Competition Law. However, as previously mentioned, the enterprises possess several means through which they may use intellectual property in furtherance of innovation and development without compromising on competitiveness. The two fields of law must work together to formulate some clarity on the ambiguous areas while

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<sup>15</sup> Air Works India (Engineering) Private Limited vs GMR Hyderabad International Airport Limited & Ors, Case No. 30/2019.

<sup>16</sup> Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson, Case No. 50/2013.

keeping in mind the dynamicity, novelty and intersectionality of the fields. The CCI and the Controller General of Patents, Designs and Trademarks (CGPDTM) must work to understand the ramifications of the precedents set forth in their orders by ensuring that there are no inherently contradictory stances.



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