INDIAN JOURNAL OF LEGAL REVIEW

VOLUME 3 AND ISSUE 1 OF 2023

INSTITUTE OF LEGAL EDUCATION

Indian Journal of Legal Review [ISSN - 2583-2344]

(Free and Open Access Journal)

Journal's Home Page – https://ijlr.iledu.in/

Journal's Editorial Page - https://ijlr.iledu.in/editorial-board/

Volume 3 and Issue 1 of 2022 (Access Full Issue on - https://ijlr.iledu.in/volume-3-and-issue-1-of-2023/)

Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

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INDIAN JOURNAL OF LEGAL REVIEW [IJLR]

Volume 3 and Issue 1 of 2023

ISSN - 2583-2344 *(and)* ISBN - 978-81-961120-2-8

Published by

Institute of Legal Education

https://iledu.in

CONFLICT BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE STUDY BETWEEN INDIA AND THE USA

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Best Citation - SURIYA ADILA, CONFLICT BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE STUDY BETWEEN INDIA AND THE USA, Indian Journal of Legal Review (IJLR), 3 (1) of 2023, Pg. 314-320, ISSN - 2583-2344.

ABSTRACT

The hallmark of contemporary modern world is technological advancement and rigorous economic activity. Technological advancements and economic activities have reached unimaginable heights and continue to grow even further. The end goal of this technological advancement and economic activity is to serve the people, primarily by increasing the standard of living of the people, or to put it in other words welfare of people is the end goal. The two most important laws, which the states use to oversee or regulate the sphere of technological and economic activity are Competition Law and Intellectual Property Rights laws.

Both the legal regimes, Competition Law and Intellectual Property Rights law, seek to serve the same purpose of economic development, enhancing innovation and technology, and welfare of the consumer. Thus, arises the interesting discourse of how two legal regimes, intending to serve the same purpose come into apparent conflict with each other. The simplistic answer to that question can be that it perhaps is the inclusionary approach of one and exclusionary approach taken by another that brings these two legal regimes into an apparent conflict with each other.

The IPR law regime, though cannot be faulted for granting exclusionary rights to the inventor for her invention as it is just and fair that an inventor is rewarded for his creation, however again the emphasis must be welfare of people. Thus, the moot question that ultimately comes forth is, how are the rights of inventor balanced to ensure that the welfare of people is maintained, and the purposes of Competition Law is not defeated.

I. INTRODUCTION

Competition law and Intellectual Property Rights two very different legislations that came into being to deal with things in different playing fields have time and again over the years conflicted with each other. They have been perceived to share an uncomfortable relationship, however care must be taken while making such comments as it is easy to pit one against the other without issuing addendum and required qualifications, comprehensive evaluations must be made to look into these allegations. A delicate link i.e. the market surely exists between the two areas of law. The ultimate aim of both these legislations is to undoubtedly promote innovation and further consumer welfare. The nature of Intellectual Property Rights is with promoting competition by way of granting exclusive rights for a limited period of time, the idea is to foster innovation thus elevating competition from static to dynamic, hence this goes against the general belief that a dispute exists between the two and on the other hand as it is very clear the role of competition law is to look into anti-competitive practices. That being said, the mechanisms deployed by both these legislations to achieve this seemingly similar goal may lead to altercation and conflicts. Though Intellectual Property Rights have enough sections to deal with the situations to prevent the abuse of these rights yet a person having that right in the form of exclusivity can be motivated to misuse it by finding loopholes and thus his actions be averse to goal of dynamic market and competition, for this very purpose a safety valve in the form of

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competition law exists. A lot has been already said about the conflict that exist between the two areas of law and enough literature already exist discussing the same question, despite this the conundrum is not settled and a uniform answer does not exist dealing with this conflict.

In India the question concerning the conflict between the Competition law and Intellectual Property Rights has persistently come before the court but one size fits all reasoning has never been provided by the court they are mostly dealt from case to case basis, and also no concrete guidelines exist for the same which is not the case with other jurisdictions like USA where FTC–DOJ Guidelines on Licensing of IP is there and which keeps getting updated from time to time encompassing all the recent phenomenon leaving no scope for loopholes, also these guidelines has provided a safety zone to IP owners which shall be discussed in detail later. Thus, in this paper a comparative study is made between two different jurisdictions i.e. India and the USA wherein the author tries to navigate through the contours of these conflict by way of different case laws, guidelines and law reports.

II. RATIONALE OF COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS

The word competition means firms that facilitate rivalry and the circumstances that facilitate such rivalry.[713] Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal and encourages firms to innovate by reducing slack. For this purpose, competition law came into picture to provide the framework within which these competition activities can take place, to protect this process of rivalry in the market and ultimately regulate anti- competitive activities. The history of competition law can be traced back to 50th century roman period with the enactment of *Lex Julia de Annona,* which prohibited profiteering and joint action to influence of corn trade. Common law is one of the main basis of emergence and crystallization of competition law. Earlier, courts used common law to protect competition in the market. In the USA who is the torch bearer and touchstone in dealing with cases of competition all over the world, the development started with the Sherman Antitrust act, 1890 followed by the Clayton Antitrust act, 1914 and also Federal Trade Commission act, 1914, these body of legislations were the first body of modern legislations in the world. In India the first body of act to regulate competition in the market was in the form of Monopoly and Restrictive Trade Practices Act, 1969, this law with the change in time and global dynamics became obsolete and was unable to keep up with the changing market. Moreover, with the introduction of new economic policy and opening of the market via liberalisation, a need for new Competition legislation was felt. For this reason, Raghavan committee was constituted and the present Competition Act, 2002 came into effect.

Coming to Intellectual Property Right, it is that right that is given to the individual for the creation of property that has come into existence because of the use of his intellect. It consists of the protection offered by the legal regimes of various patent, copyright, trademark, designs etc.[714] Intellectual Property Right is granted to the individual for the purpose of providing incentive, through this statutory expression is given to the inventor's invention and access of the invention to the public and also it helps to promote creativity. There is a whole ecosystem and web of treaties and authorities that exist at an international level for the protection of these rights like TRIPS, WIPO etc. and also at national level different acts deals with different areas of intellectual property. In India it is the Patents Act, 1970, Copyright Act, 1957 etc, USA also provides for

[713] S. Chakravarthy, *New Indian Competition Law on the Anvil* 2 RGICS Working Paper Series No. 22 (2001).

[714] William Cornish, David Llewelyn & Tanya Aplin , INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS (Sweet and Maxwell 2013.

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laws both at state and central level to deal with cases of Intellectual Property Rights.

III. THE TUSSLE BETWEEN THE TWO AREAS OF LAW

A. INDIA

In India the law dealing with the tussle between Competition law and IPR is still at primary stage where not much has been said and ruled and mostly the question that has come before the court is related to the Competition Commission of India's jurisdiction in dealing with the cases of IP infringement which entails anti-competitive practices also. For this purpose, an analysis of the case laws, the law reports and a comparison with USA jurisdiction is looked into.

In India, *Amir Khan Production case*[715] opened way for many other cases dealing with Competition law and IPR which further questioned the need for having clear guidelines as to the extent of IPR protection and when and where does the role of Competition Commission of India comes into picture. Thus, in light of developments happening globally where IPR has a strong hold it becomes imperative to study the legal relevance of competition law while dealing with IPR related cases.

Competition commission of India is under an obligation to promote and maintain fair competition, prevent anti-competitive activities and also unfair trade practices.[716] It is section 3 of the act which provides that

"forbids any enterprise or association of enterprises or person or association of persons from entering into any agreement 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."[717]

This very section in its sub- clause (5) carves out an exception for Intellectual Property owners,

"the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under the Copyright Act, 1957 (14 of 1957); the Patents Act, 1970 (39 of 1970); the Trade Marks Act, 1999; the Geographical Indications of Goods (Registration and Protection) Act, 1999; the Designs Act, 2000 (16 of 2000); the Semi-conductor Integrated Circuits Layout-Design Act, 2000"[718]

From the bare reading of this sub-clause one can say that this provision provides a blanket ban on CCI to look into IP infringement cases but what is overlooked most of the times is the word 'reasonable conditions' that is incorporated in it, through which a window though a very small one is provided by which a reasonable nexus must exist between the condition that is placed on the third party and object for preventing infringement of IP rights. Thus, if this reasonable nexus cannot be created them CCI can come into picture. To substantiate this argument, we can look into Raghavan committee report wherein there was recommendation in the report "there is a need to appreciate the difference between the existence of a right and the exercise of it. During the exercise of this right if any anti-competitive behaviour is visible that is detriment to the consumer welfare and against public interest the Competition law need to step on"[719]

This recommendation is seen to be embodied in section 3(5)[720] of the Competition Act. The 2007 Planning Commission Report on Competition policy[721] has also reiterated this position. This interpretation of both these

[715] Aamir Khan Productions v Union of India (2010) 102 SCL 457 (Bom).
[716] Competition Act, 2002 (India).
[717] Competition Act, 2002, S. 3 (India).
[718] Competition Act, 2002 S. 3(5) (India).
[719] Government of India, 'Report of the High Level Committee on Competition Policy and Law' (2000, India).
[720] Competition Act, 2002 s. 3(5) (India).
[721] Planning Commission, 'Report of The Working Group on Competition Policy' (2007, India).

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reports indicates that how Competition Act retains the power to look into the legality of patentee's action. In addition to this section 4 of the Competition act provides enough room to deal with situations covering abuse of dominant position to interfere with Intellectual Property Rights matters. Mostly all the cases come before the court concerning IPR when it relates to violation of section 4 of the act. Section 4 of the Competition act specifically states that no enterprise shall abuse its dominant position.[722] This form of abuse is a common form of anti-competitive activity that is prevalent across the globe. It can be in any form ranging from refusal to deal, tie in arrangement, prohibiting licensee to use rival technology or from challenging validity of IPR etc. Dominant position per se is not a negative trait, it simply means a position of economic strength in the market, it is only its abuse that the provisions of Competition Act.

In *Amir Khan Production case*[723] the Bombay High court ruled that Competition Commission of India (CCI) had the jurisdiction to deal with cases with competition cases that also involve question of IPR in it. Next in the case of *Kingfisher v. CCI*[724] the question before the court was that whether the issue that arose before the copyright board can be tried by the CCI, the answer to which was in affirmative. All these cases lead to the conclusion that courts in India were ready to deal with disputes concerning IPR and Competition act. Prior to Competition act, 2002 the MRTP commission constituted under MRTP act 1969 also decided many cases on these lines where cases like *Manju Bharadwaj v. Zee Telefilms Ltd*[725] and *Dr Vallal Peruman v. Godfrey Phillips (India) Ltd*[726] also held that when a person misuses a trademark by way of distortion and manipulation misleading the customers also calls for action. In recent time a landmark judgement of *FICCI Multiplex association*[727] tried to end the abuse of dominance of association in film industry, this case was decided by CCI to be a prima facie case of abuse of market regulatory positon and anti-competitive agreement, it was observed by the court that

"intellectual property right do not have an absolute overriding effect on the competition act. The extent of non-obstante clause in section 3(5) is not absolute as is clear from its wordings."[728]

Also in Hawkins cooker case[729] the Delhi High court ruled that a well-known mark cannot be permitted to create monopoly in the market and it falls under the heading of abuse of dominant position and the company can be penalised for it under the sec 27 of the Competition act.

In Entertainment Network (India) ltd v. Super Cassette Industries ltd., the Supreme Court of India, elaborately discussed the relationship between IPR protection and competition in the competition. The right of copyright owner is not absolute, ofcourse the copyright owner to enjoy the fruit of his labour can charge a fee by issuing licences but should not create monopoly in the market by abusing his position.[730]

Apart from refusal to license cases, abuse of dominance, the major tussle has always been with respect to the jurisdiction of CCI or not, in the case of Telefonaktiebolaget LM Ericsson v. Competition Commission of India.[731], in this case a petition was filed by Ericson challenging the jurisdiction of CCI on a matter that was covered by Patents Act,1970, to which CCI said that the power to act on violation of sec 3 and 4 Competition Act, 2002nremain independent of

[722] Competition Act, 2002 s. 4 (India).
[723] Aamir Khan Productions v Union of India (2010) 102 SCL 457 (Bom)
[724] Kingfisher v. CCI (2012) Writ Petition No. 1785.
[725] Manju Bharadwaj v. Zee Telefilms Ltd (1996) 20 CLA 229.
[726] Dr Vallal Peruman v. Godfrey Phillips (India) Ltd (1995) 16 CLA 201.
[727] FICCI Multiplex Association of India v United Producers Distribution Forum (UPDF), Case No 1 of 2009, CCI order dated 25 May 2011
[728] *Id.*
[729] Hawkins Cookers Limited v Murugan Enterprises (2008) (36) PTC 290(Del)
[730] Entertainment Network v. Super Cassettes Industries (2008) (37) PTC 353.
[731] Telefonaktiebolaget LM Ericsson v. Competition Commission of India (2016) (66) PTC 58 (Del).

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controller's power under Patents Act, 1970. The Hon'ble court gave a very simplistic answer to this complex question and stated that there exists no irreconcilable consistency between both the acts and CCI could exercise its jurisdiction. However, court left opened many loose ends and queries that still need to be answered.

In Toyota Kirloskar Motor Private Limited and Ors. Vs CCI[732] in the case COMPAT upheld CCI order of violation of section 3 and 4 of Competition Act and it was held that the restrictions that were imposed for the purpose of protecting IPR's were not reasonable.

With this continued conundrum and cases discussed above it can be easily said that the development with respect to conflict between IPR and Competition Act is still at developing stage as the court has decided each matter on case to case basis and not settled position exist as of now, for this reason it becomes imperative that we look into other countries' jurisdiction where such similar matters have been decided, in the present paper we look at USA.

B. THE UNITED STATES OF AMERICA

In USA as also mentioned above exist three major legislations that talk about antitrust laws, the Sherman Act[733] this acts specifically deals with looking into contracts that restraint trade, The Federal Trade Commission Act[734], that deals with unfair and deceptive practise of disrupting competition and Clayton Act[735] that covers those areas which are not dealt in Sherman Act. The institutions that deal with the complaints arising out legislations are US Department of Justice and Federal Trade Commission.

In USA the position initially with respect to these two legislations was that IPR and antitrust laws were viewed to be completely contradictory to each other. It was with the decision on Atari game corps where it was decided that both these areas of law want to achieve common objective of innovation and competition,[736] this decision created a drastic shift on how these two legislations were initially perceived it in the USA. To create a balance position wherein IPR owner enjoys right over their intellectual property but without abusing it has been a point of concern in the USA as well. Licensing freedom in the USA has taken a very concrete shape, under which there is no restriction under antitrust laws to unilaterally refuse to assist the competitors. In Verizon case[737] the justification for this understanding was given that if the technology be made to share necessarily with the competitors then the chance of funding in innovation would become less and thus the purpose of IP would be defeated. This balanced approach is consistently seen through different case law decisions; in the case of Monsanto it was seen that a conflict arose when Monsanto refused to license IP rights and sued farmer McFarling for patent infringement as he replanted the seed from the crop that were grown from Monsanto patented seeds, this argument was rejected by the federal courts and was termed as tie in arrangement for the reason that an unpatented seed was tied to a patented product and thus the refusal exceeded the scope of the license granted.[738]

In another case it was ruled by the Supreme Court if there is a case of reverse payment patent settlement then that case will be eligible to be scrutinised by antitrust laws by rule of reason principle.[739]

Thus, the agencies and the courts have treated competition law and Intellectual Property Rights as complementary area of law and thus dealt with it accordingly, there is availability of enough case laws that provide answers on application of antitrust to different facts.

[732] Toyota Kirloskar Motor Private Limited and Ors. vs. Competition Commission of India (2016) MANU TA 0062.
[733] The Sherman Antitrust Act, 1890 (USA).
[734] The Federal Trade Commission Act of 1914 (USA).
[735] The Clayton Antitrust Act of 1914 (USA).
[736] Atari Games Corp. v. Nintendo of Am., Inc. (1990) 897 F.2d 1572.
[737] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP (2004) 540 U.S. 398, 407-08.
[738] Monsanto Co v. McFarling (2004) 363 F. 3d 1336.
[739] FTC v Actavis (2013) 570 U.S. 136 (2013).

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This relationship between competition law and Intellectual Property Rights led to a very unique development in the form of guidelines which even today forms important part of this area of law.

Antitrust guidelines for licensing of intellectual property provides for three principles that are used to govern antitrust concerns concerning intellectual property. The first principle states that intellectual property ride will also have to pass the test of antitrust rules and be within the limit of its rules, this point was substantiated in a case where it was argued that IP right owners have absolute rights over their IP without any restrictions, to which the court said that Intellectual Property will be treated as other property and no special treatment shall be bestowed on it when it comes to passing of the antitrust rules.[740] However, the guidelines did not give complete open hand on application of antitrust rules as certain limitations were placed since intellectual property is very different from other tangible properties. It is more susceptible to taken advantage of, it creation involves high cost, valuation is very difficult, thus the antitrust analysis should keep these things in mind.[741]

The second principle that is incorporated in the guidelines is that it is not necessary that intellectual property rights creates market power, this point is substantiated in the case United States steel corps[742] where determination of market power was significantly dependent on the substitutes that are available in the market. Thus, the guidelines states that the agencies are to look into these factors as well.

The third principle that is incorporated in the guidelines states that how intellectual property are pro-competitive, under which licensing provides for creating incentives and which in return provide ease of transferring that technology and efficient use of intellectual property.[743]

All these principles incorporated in the form of guidelines are to be thoroughly looked into by the agencies, these guidelines will help in identifying anti-competitive behaviour but not compromising the innovation offered by intellectual property.

These elaborate guidelines that are updated from time to time, help the agencies to form an opinion on whether a situation that is present before them transgress the antitrust laws.

These specific clarifications in the form of precedents set and comprehensive guidelines is lacking in the developing nation like that of India where this conflict is still at nascent stage.

IV. CONCLUSION

From the above discussion it can be clearly stated that the development with respect to Competition law and Intellectual Property is still developing, how far the ideas from the USA can be brought in India is to be seen, one aspect that cannot be overlooked when trying this approach is in the difference of status in both the countries i.e. one is a developed nation and other a developing nation. No doubt the USA has adopted a balanced approach but how far India can learn from it is to be seen as it definitely cannot afford to go stringent and thus break the bone of innovation.

The major takeaway from the USA jurisprudence on these lines is that the guidelines that it has incorporated to deal with the IP- competition cases, this has played an active role in making the base of these seemingly contradictory legislations strong. Thus, India too can publish specific guidelines that deal with the interaction between Competition law and IPR, these guidelines will not only help in moulding the jurisprudence of the interaction but also identify the gaps that exist that can be further

[740] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
[741] Antitrust-Intellectual Property Guidelines (2017).
[742] United States Steel Corp. v. Fortner Enterprises, Inc. (1977) 429 U.S. 610.
[743] Antitrust-Intellectual Property Guidelines (2017).

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incorporated by updating the guidelines. The central government and the authorities must act with alacrity in this field.

These two area of laws cannot be kept in water tight compartments and it is bound to flow, the government and the authorities should thus be better armed to deal with these situations and for which enough authority should be given to the authorities concerned as developing country like India cannot also afford to lose its innovation and technologies all the time in the name of anti-competitiveness.

Competition commission of India needs to deal in an informed and nuanced way to the IP-antitrust matters, the mandate of CCI should be allowed to fulfilled unhindered.

The recent National IPR Policy, 2016 should act as guide in formation of whatever changes that are required to deal with IP-antirust relationship. This policy has suggested that there is a need to look into this complicate relationship by conducting studies on the subject for more clarity and certainty on the subject at hand.

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