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BALANCING EXCLUSIVE COPYRIGHT RIGHTS AND MARKET COMPETITION: REFUSAL TO LICENSE VS. COMPULSORY LICENSING

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Abstract

On the one hand, the two domains of intellectual property law and competition law have different ideas that are incompatible (intellectual property law and competition law are conflicting ideas, as they are diametrically opposite to each other). The justifications for granting intellectual property rights sometimes show that these rights are negative rights, as exemplified by John Locke's labour theory of property or by Hegel's personality theory, the conflict thus arising between intellectual property law and antitrust law. These exclusive rights allow the holder to act out of his monopoly and market power and to abuse his dominant position in the market for the benefit of the economy. Copyright is a bundle of rights that include economic, moral, and neighbouring rights. It can be communicated, adapted, reproduced, etc. Each of these rights could be assigned for copyright licensing and would authorize the licensee to use the copyrighted work in the manner specified in the agreement. If a person refuses to grant a license to use the rights in a work, although the terms of the contract are favourable, then such a refusal by the owner of the dominant position in the market amounts to an abuse of that position. This would not only stifle the development of the copyrighted work but also that of the economy, thus antithetical to the very idea of intellectual property rights. One way to deal with the problem is the institution of compulsory licensing, which is recognized in statutes and cases all over the world. The article will be devoted to the discussion of these concepts as well as the issues concerning the licensing of copyright and the refusal to grant a license. It will also be discussing the implications of such conduct as abuse of dominant position, the concept of compulsory licensing, and the agency of copyright in the area as future possibilities, plus the above discussion will be based on regulations and cases in India and around the world.

Keywords: *Copyright Licensing, Dominant Position, Refusal to License, Compulsory Licensing.*

Introduction

The Underlying Clash: Exclusivity in IPR vs. Fair Market Access Under Competition Law

There are plenty of reasons to justify the granting of intellectual property rights, starting with John Locke's rejection of the labour theory, according to which an inventor who has invested his time and labour should be the one to benefit, because man's very nature is opposed to labour[768]. Another such reason might be Hegel's personality theory, where work is seen as the reflection of the creator's idea and personality and, therefore, the one being the creator's work should be the most protected. In fact, there are numerous other similar theories backing up such protection. The right given is a negative right, and therefore in essence, it is opposite to anticompetitive laws, which leads to such two legal areas sharing

[768] John Locke, *Second Treatise of Government* (1690) Ch V ("Of Property").

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several conflicting principles and cases. Intellectual property laws are basically aimed at supporting human ingenuity, innovation, and enterprise. This is to be done by awarding the innovator with the right of the exclusive use and exploitation of the invention, which, according to the theory, will eventually lead to technological and industrial progress.[769] Also, the public disclosure of inventions would contribute to the public knowledge base thus, creating even more room for innovation and development.[770] However, the exclusiveness granted by I.P. rights has been the main cause of the numerous occasions and times in which fair competition has been stifled.[771] These exclusive negative rights enable the right holder to have the freedom to manipulate monopoly and the market for their benefit and according to their whims, therefore, causing the unfair competition in the economy to be the dominant form of the market.

On the one hand, IP laws and on the other hand, competition laws are generally considered to be two diametrically opposing concepts, the former aimed at promoting monopolies and the latter prohibiting them.[772] One such contradiction is in the field of copyright. Copyright Licensing is a commonly used I.P. practice, which is not only common in our country but also worldwide.[773] It allows the copyright owner to transfer the rights he owns in the I.P. to a certain licensee in return for remuneration; this activity promotes fair competition in the market and at the same time, it enables the copyright owner to get the financial benefits that come from his work.

The Interplay Between Copyright Licensing and Competition Regulation

Copyright is not just one single right but rather a bundle of rights. It mainly comprises economic rights, moral rights, and related rights. Different international agreements recognise these rights.[774] They include numerous rights such as to communicate, adaptation, broadcast, reproduction, etc. Any one of these rights may be sub-divided by copyright licensing so as to grant the licensee the use of the copyrighted work in a manner stipulated in the contract. A copyright license is an assurance given by a copyright owner to a licensee that the latter may safely exploit the copyright without the risk of infringement. The copyrighted works are free to go global through different ways of exploitation, which are regulated by licensing agreements, thus, the copyright owner and the licensee both get the benefits. To give an illustration, the Harry Potter book series was written by a British author J.K Rowling. The translation rights were licensed and the books were published in various languages in various countries. Then, after its success, the film rights were licensed and the books were turned into movies. So, the above point about the reach of such copyrighted work through licensing and the income it generates can be very well understood by this example.[775]

As per the Indian Law, the subject matter of copyright which could be licensed or assigned are Original literary, dramatic, musical, and artistic works, Cinematograph films, and Sound recordings.[776]

At its most basic level, a copyrighted licensed is an authorization by the copyright owner to a third party to use any or all of the copyright owner's exclusive rights that are given to him under Sections 14, 37, and 38 of the Act.[777] These rights can be independently exploited.

The change of this beneficial practice of copyright licensing into a copyright abuse of dominant position occurs when copyright holders that already have a monopoly in their respective markets refuse to license their

[769] Edmund Kitch, 'The Nature and Function of the Patent System' (1977) 20 J Law & Econ 265.
[770] *Diamond v Chakrabarty*, 447 US 303 (1980)
[771] FTC, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (US FTC Report 2003).
[772] Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press 2005)
[773] WIPO, *Copyright Licensing Guide* (WIPO 2022)
[774] Berne Convention for the Protection of Literary and Artistic Works 1886, art 9–14
[775] WIPO Magazine, "Building a Global Brand: Harry Potter Licensing Model" (2018).
[776] Copyright Act 1957 (India) s 13(1).
[777] Copyright Act 1957 (India) ss 14, 37, 38.

products so as to maintain that monopoly and thus be able to continue enjoying their dominant position in the market. The practice of refusal to license is considered by various courts around the world as anti-competitive. The ECJ deemed it anti-competitive in the *Magill case*.[778] In the case of *United States vs. Microsoft*[779], the district Court held that "Copyright does not give its holder immunity from laws of general applicability, including antitrust laws".

One way to fix the problem is by introducing the principle of compulsory licensing.

The paper would aim at discussing the concepts and issues regarding the licensing of copyright and the refusal to license and the implications of that as an abuse of dominant position, the concept of compulsory licensing and its possible future developments. The above discussion would be based on the statutory provisions in India and other countries, especially the E.U.

Refusal to License as an Abuse of Dominance:

Assessing Dominance and Its Abuse in Indian and EU Antitrust Jurisprudence

The concepts of "Dominant Position" and "Abuse of Dominant Position" are often spoken of as pairs, the latter being a qualifier of the former, but they are separate concepts.[780] It is not that the former would always be associated with its abuse. Although dominance is a necessary condition for establishing a violation of the provision regarding the abuse of a dominant position, it is not a sufficient one by any means.

As for the Indian Competition Law, a dominance of one-fourth of the market is enough to determine a dominant position. Besides that, the Act also specifically mentions that no single enterprise shall abuse its dominant position. Indian Courts have held that the Competition Commission of India can deal with issues relating to IPR, where there is abuse of dominant position or any anti-competitive practices being followed. Also, the cases before the Copyright Board can be considered by the Competition Commission of India.[781] Its comparative definition by the Courts of Europe is that "dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.[782]"

The Courts of Europe have talked about the concept of from time to time, and have recognized that the two ideas are separate and at the same time they are linked. "Dominance is defined as a situation whereby normal competitive forces playing in a certain market are sensibly weakened." In the landmark *Hoffmann-La Roche & Co. AG* v *Commission* [1979] ECR 461, the ECJ elaborated that: "The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[783]"

Article 82 of the E.C Treaty discusses such abuse by dominant position, it states "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far

[778] *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd* v *Commission* (Magill) [1995] ECR I-743.
[779] *United States v Microsoft Corp*, 253 F.3d 34 (DC Cir 2001).
[780] Competition Act 2002 (India) s 4
[781] *FICCI Multiplex Association of India v United Producers/Distributors Forum* (2011) 108 CLB 433 (CCI)
[782] *United Brands Company and United Brands Continental* v *Commission* [1978] ECR 207
[783] *Hoffmann-La Roche & Co. AG* v *Commission* [1979] ECR 461.

as it may affect trade between Member States.[784]"

Doctrinal Parallels and Divergences in Abuse of Dominant Position: India and the EU

The person who holds the copyright is entitled to have exclusive control over the work. Moreover, the copyright owner is the one who is entitled to reap economic benefits from the work. It is the right holder's prerogative to prohibit others from infringing such rights; however, he cannot, on the other hand, stop the advancement of technology and ideas.[785]

Therefore, thinking about the growth of business and the resulting economic benefits, the concept of copyright licensing came into existence. It allows any person other than the copyright owner to derive economic benefits from the work upon the grant of authorization in the license agreement. In market situations where the copyright holder is enjoying a monopoly and thus refuses such a licensing agreement and consequently slows down competition and economic growth, it can be considered an abuse of dominant position.[786] When a copyrighted work is not licensed, the growth of ideas will be limited. For example, a very famous author whose works are not licensed can be neither converted into a cinematograph nor a dramatic work. Likewise, if the patent holder refuses, this will disallow the new entrants in the market, hence leading to the stagnation of technological progress.

Therefore, both Indian Copyright and Patents Act have provisions in place that regulate licensing and its refusal. In the case of *Entertainment Network (India) Ltd. Vs Super Cassette Industries Ltd*, the Court held that "a refusal occurs when the copyright owner, by exercising a monopoly over it, imposes unreasonably terms in any transaction. It is true that a copyright owner is entitled to have complete freedom in enjoying the fruits of his labour by charging royalties through the issuance of licenses. Nevertheless, this right is not absolute.[787]" In the *American Motion Picture case of United States vs Microsoft*, the District Court was unequivocal that antitrust laws are applicable to rights granted by I.P.[788] Thus, it is generally accepted that if a dominant firm's unilateral refusal to deal with a rival result in harm to the competitive process, then this refusal may constitute prima facie evidence of exclusionary conduct.

The European Union shares the same view on this matter, as the ECJ defined what constitutes misuse or an anticompetitive action in the case of refusal to deal. Moreover, the Court made it clear that not all refusals to deal are cases of misuse. The case revolved around Volvo Automobiles' refusal to deal with Mr. Veng, who was allegedly producing unauthorized spare parts. Additionally, it inferred that denial of access to licensing for third parties would not be considered abuse since "production and selling or importing products incorporating the design constitute the very subject matter of Volvo's exclusive right."[789] The Court went on to specify other instances which could be considered as abuse. ECJ stated that a refusal to grant a license for an IPR "may be prohibited by art.82 if it involves abusive conduct by a company in a dominant position, such as the arbitrary refusal to supply spare parts to independent repairers, setting a price for spare parts at an unfair level or a decision to discontinue production of spare parts for a particular model, even if a large number of cars of that model are still in circulation."

The issue was extensively discussed in the Magill case. It concerned the refusal of copyright licensing of TV listings by three television broadcasters to a small company that intended to create and distribute a comprehensive TV guide with information about the three broadcasters' programming. Since

[784] Article 82 EC Treaty (now Article 102 TFEU).
[785] Copyright Act 1957 (India) ss 14 & 51
[786] Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (FTC Report 2003).
[787] *Entertainment Network (India) Ltd v Super Cassette Industries Ltd* (2008) 13 SCC 30.
[788] *United States v Microsoft Corp* 253 F 3d 34 (DC Cir 2001).
[789] *Volvo AB v Erik Veng (UK) Ltd* [1988] ECR 6211.

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each TV company sold its own TV guide with only its programming, a comprehensive TV guide was lacking, and the Court found that copyright had been employed as a strategic tool to block the selling of a product for which there was a reasonable consumer demand.[790]

The so-called Magill test points out that "the legitimate owner of an IPR who is in a dominant market position is said to abuse such position if:

a) it is single-handedly the exclusive possessor of a raw material or an indispensable input for running a certain business in the market, and the input is not replicable;

b) his conduct obstructs the introduction of a product for which potential consumer demand exists;

c) there is no valid business reason for the refusal to license;

d) his actions were intentionally aimed at achieving the goal of keeping the downstream market for himself by closing it off to the competition of other potential rivals."

The decision in IMS further specified three conditions that must be met for any conduct to be considered an abuse of dominant position, those conditions being:

• That such refusal is preventing the emergence of a new product for which there is potential consumer demand.

• That such refusal is not justified.

• That such refusal excludes competition in the secondary market.

Consequently, the right holder's freedom is to be viewed in terms of a balance of competition in the market. Hence, the main goal of I.P rights should be to facilitate market innovation and the coexistence of dynamic competition.

Compulsory Licensing as a Corrective Tool Against Market Abuse

The above discussion referred to the conflict between the intellectual property right holders and competition laws. Nevertheless, the concept under intellectual property law that is regarded as an infringement of its rights is compulsory licensing. The main objective of the act is to revive competition in the market. By way of this legal tool, the State permits a competitor to use, sell or produce, in accordance with the terms of the agreement, another competitor's products.[791] Compulsory licensing may be granted concerning patents or copyrights. This results from numerous international agreements such as the World Intellectual Property Organization (WIPO), the Paris Convention for the Protection of Industrial Property, and TRIPS.[792]

The Indian Copyright Act aims to protect the writers, artists, etc. so that they get the fruits of their labour, but it is subject to compulsory licensing in some cases. Section 31 provides for the case of copyright compulsory licensing in the works that are withheld from the public. One of the most significant cases relating to the issue of compulsory licensing is *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.*[793] The facts of the case were that a radio channel, radio Mirchi, played a number of songs and music and the rights over the music belonged to Super Cassettes Industries. Therefore, they filed for permanent injunction against the channel. In the meantime, the channel moved under Section-31(1)(b) for the grant of compulsory licensing. The main question in the case was whether such a compulsory licensing grant was possible. Radio contentions were that AIR and Radio City were licensees and therefore, they should be given the same. The Court, however, ruled that a compulsory license can be granted only on the

[790] *Radio Telefis Éireann (RTE) and Independent Television Publications Ltd v Commission* (Magill) [1995] ECR I-743.

[791] Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (FTC Report 2003).

[792] Paris Convention for the Protection of Industrial Property 1883; TRIPS Agreement 1995; WIPO

[793] *Entertainment Network (India) Ltd v Super Cassette Industries Ltd* (2008) 13 SCC 30.

grounds set out in Section 31A, that is, when the work in question has been completely denied to the public. In this case, the licensee was already AIR and Radio City. Hence, it was not an absolute denial of public access. So, the argument of Radio Mirchi does not make any sense, and they were guilty of copyright infringement.

Article 82 of the E.U Treaty is a powerful means to combat anti-competitive practices, especially when the IPR confers a de facto monopoly on the holder. In short, this provision of the EU Treaty has been the main link for the enforcement of "compulsory licensing" which can be cleared by looking at the numerous precedents one by one. For example, the above-mentioned case of Volvo clarifies the extent to which compulsory licensing can be carried out. It argues that a simple refusal is not a refusal to license, therefore such a refusal should be arbitrary if one is to be compelled to involuntary compulsory licensing. Another case that elaborated the concept is *IMS Health Case*[794] that was referred to earlier in the paper.

Conclusion and Way Forward

Intellectual Property Laws and Competition Laws has always been a complicated couple with the two laws sharing a complex relationship, largely because the principles at the core of both laws are mutually exclusive. IPR on the one hand, through the promotion of a short-term monopoly over the exclusive rights granted to the author, in the best of cases, stagnates competition in the market. On the other hand, competition laws are geared towards the maintenance of healthy competition and by that virtue, the discouragement of monopoly in the economy.

Therefore, the proponents of the two systems often exchange criticisms. IPR advocates strongly reject the idea of any antitrust intervention in the field of IP by arguing that it would not be in accordance with the very nature of the right, and it would lower the author's incentive to come up with the same. Likewise, the opposite side condition is such that an antitrust intervention is supported by many, if the purpose is to maintain free competition in the market and thereby ensure economy growth, when it comes to the issue of exclusive IP rights. The remedy to this perennial conflict lies in the harmonious approach to such cases dealing with conflicts of both regimes. One cannot infringe the rights granted by the other regime and therefore a balance between the two is required. Every such case conflicted by the two regimes should be examined carefully to determine if there is any anti-competitive activity. This approach is very much in line with the practice of the European Court, which we have already discussed. The author of the work is entitled to the benefits that are conferred by the exclusive right, but these are only to be overridden when the author unreasonably or arbitrarily conflicts with competition in the market. The key to determining this delicate balance is sticking to the precedents dealing with the problem and the emergence of new concepts such as compulsory licensing which are gradually incorporated in different statutes all over the world.

[794] *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039.