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INTERACTION BETWEEN INTELLECTUAL PROPERTY AND COMPETITION LAWS

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ABSTRACT

The increasing interaction between Intellectual Property (IP) and Competition is a topic of great relevance today. IP and competition laws that appear to follow divergent goals at first glance, since one allow temporary monopolies and the other aims to protect the consumer from monopoly behaviors. A deeper study, however, leads to the fact that they share a similar rationalethat in many situations helps them interact with each other in a complementary way. The global innovation system comprises both reasonable IP protection and effective antitrust compliance. The parallels and contradictions between IP and competition in the application of these law enforcement agencies are persistent. Therefore, each jurisdiction should analyze and take into account the interaction that IP and competition may have on different grounds in order to adequately face the new challenges that this phenomenon has brought to the trading system. This article seeks to trace the shift from divergence between the two areas to convergence between them. This article touches on some initiatives that seek to address these interactions in broad terms, proposing different paths to be followed to enhance the virtues of each other and work together towards social welfare development.

There is a set of practices that can be recommended, based on different observed practices, to promote the approach in each country over the long term.It may also be beneficial to take the relationship between IP and competition to the next level by formally examining the possible effect of the IP standard-setting on the competition.

KEYWORDS: *Intellectual property right, competition law,Anticompetitive Nature, Antitrust law*

INTRODUCTION

Intellectual Property Rights grant owners a degree of exclusivity, restricting other people's access to the same.[1] On the other hand, competition law aims to preserve efficient market access.[2]Law on intellectual property subjects intellectual assets to the owner's exclusive control. On the other hand, competition law aims to eliminate market barriers and benefit customers by ensuring that a multiplicity of suppliers of products, services, and technologies can compete efficiently against each other. The relationship between these two areas of law presents unique challenges for policy-makers, particularly in developing countries, the majority of which have little to no history in the application of competition law and policies.[3]This article seeks to trace the shift from divergence between the two areas to convergence between them.

Although much of the literature on IPRs, anticompetitive behavior is possible in respect of exercise of other intellectual property rights also. Copyrights are also involved in significant disputes over competition law.Copyright is also capable of creating monopoly control, and the radical concentration exists at both national and international levels in most information goods markets.In certain cases, profound conflict has also been noted between the purposes of trademark and competition law.In addition, unreasonable enforcement of IPRs can amount to anticompetitive behaviour. In particular, the use of preliminary injunctions may be effective in preventing legitimate competition.This is also possible to use border controls with an anti-competitive intent. Enforcement measures should allow the protection of the legitimate interests of the right-holder, but should also protect against abuses which may unjustifiably distort competition.

THE INTERSECTION BETWEEN COMPETITION AND IP REGIMES

[1] W.R. Cornish and D.Llewelyn, Intellectual Property, Patents, Copyrights, Trade Marks and Allied Rights, 5th edn, (London: Sweet & Maxwell, 2003) p.4.
[2] Richard Whish, Competition Law, 5th edn, (Oxford University Press, 2005),p.54
[3] Carlos M. Correa, Intellectual Property and Competition Law, Exploring Some Issues of Relevance to Developing Countries, available at http://ictsd.net/downloads/2008/06/corea_oct07.pdf, accessed on 28 June 2020

Historically, the integration between the intellectual property rights and competition law has been noted.[4]IP and competition interact in many spheres. These interactions may arise either when IPRs are granted; when they are used; or when enforcing them. Several IPRs are common to some interaction issues while others will be specific to one or only some IP rights.[5]

NATURE OF INTERSECTION BETWEEN THE TWO REGIMES

Since the very beginning of competition law in the European Communities (EC) the relationship between competition law and intellectual property law has been a controversial topic.Intellectual property and competition law both pursue the goal of enhancing economic welfare and innovation, but their direct objectives appear to conflict. Although intellectual property focuses on the reward of inventive effort and the inventor's incentives to innovate by the conferral of an exclusive right on the use of the invention, competition law emphasizes the dissemination of innovation by ensuring distribution and access.

The interpretation of the definition of the word 'efficiency' is an important part of the study of the relationship between intellectual property and competition policy.Both IP and competition laws are aimed at promoting economic efficiency but effectiveness as understood, is different from efficiency as perceived in IP policy. The economic theory discusses three types of 'efficiencies': productive, allocative, and dynamic efficiencies. The economists refer to the first two notions of efficiency as static efficiency for convenience. The competition policy aimed at encouraging competitive pricing and prevent market power abuse is about static efficiency. The policy is based on the contention that monopoly or any other form of imperfect market structure leads to static inefficiency as product pricing is above the marginal cost resulting in behavior seeking monopoly profits and rent. IP ensures dynamic efficiency, as new products and new utilities for existing products are involved.

COMPLEMENTARITY BETWEEN THE TWO REGIMES

Lord Keynes pointed out that practitioners still conform to the theories of a defunct economist,

[4] DhruvChadha, The Intersection Between Competition Law And Intellectual Property, https://competitionlawobserver.wordpress.com/2016/08/20/the-intersection-between-competition-law-and-intellectual-property/ accessed on 28 June 2020

[5]Maximiliano Santa Cruz Scantlebury and PilarTrivelli, Interaction between Intellectual Property and Competition Laws, https://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Scantlebury-and-Trivelli-Final.pdf accessed on 28 June 2020

which leads contemporary economists to write papers on the insufficient or obsolete application of antitrust law to economics.[6]

Competition law aims at more competition which, at least in the short term, may lead to price reductions and increased production. The basic goal of competition law is to regulate anticompetitive trade practices.[7]It can also boost innovation and thus encourage enterprises to create new products and services in order to gain new markets.In this manner, competition law embraces the basic IPR proposition, where the exclusivity provides the opportunity required to invest in knowledge/information. In this way, IPR and competition law form part of the same superstructure that aims to promote innovation and improve consumer welfare.

Although there is an apparent conflict between the objectives of protection of intellectual property and competition law, a more in-depth analysis of the issue shows that the two policies and they intend to coherent intend to complement one another.

Intellectual Property Rights offer an opportunity to invest in research and development.The opportunities must be adequate not only to encourage creativity but also to promote marketing.When IP protection is not related to marketing it limits the possibility of selling information to customers for little benefit. Good IP protection thus results in long-term benefits for consumers.

Patents serve to enhance the technical knowledge of public domain thus providing incentives for further innovative activity. Patents include a disclosure obligation as a form of compensation in exchange for market exclusivity, in which the technological details are made clear and others are free to integrate the information into new invention that does not infringe the claim.Patents and other forms of IP are in this sense dynamically pro-competitive even though they are statically non-competitive. They create significant competition with benefits for customers in the long run. Antitrust legislation does not contravene IPRs in this way.Yet it does not allow the

[6] Patrick Van Cayseele and Roger Van den Bergh, Antitrust Law, available@ http://encyclo.findlaw.com/5300book.pdf, accessed on 28 June 2020.
[7] "Anti-competitive practices" has not been defined and even the WTO Reference Paper on Basic Telecommunications, in Section 1.2 merely lists three anti-competitive practices See WTO, Reference Paper on Basic Telecommunications.

free riding of creative accomplishments. This has little to do with the identity and reputation of businesses, thereby serving as an impetus for creativity and a guarantee of accurate information of the market.On the contrary, antitrust law encourages firms to develop new products and processes in order to acquire future competitive advantages from their inventions by hindering entrepreneurs from becoming rent-seekers and consolidating their positions.[8]Therefore the two regimes compliment one another in fostering economic development and consumer welfare.

The antitrust law is complementary to IP policy except in cases of transfer of IPRs and possible restrictive deals. For almost any legal structure, the relationship between antitrust laws and intellectual property rights is complicated, primarily due to the apparent opposite goals of the two sets of law.On the one hand, IPRs grant the right holder the right to use and exploit the invention exclusively, enabling him to impose conditions and limits on firms that may be his actual or potential competitors.Antitrust law, on the other hand, limits monopolistic behavior with a view to maintaining effective market competition.In the recent past, the belief that IP and competition regimes clash with each other has dramatically shifted.Today, both in the US and in the EU, the common understanding is that IP law and antitrust law seek the same aim, with different but complementary instruments, of improving consumer welfare and promoting innovation.[9]

For the purposes of competition law, intellectual property is not distinct from other tangible properties.Thus CCI can adjudicate issues related to IPRs. Except for the validity of the statute under which tribunal is created, the competition commission may determine constitutional, legal, and jurisdictional issues. In the case of *Amir Khan Productions Private Limited v. Union of India*[10], the court ruled that the competition commission had the authority to deal cases relating to intellectual property. The court stipulated that the competition commission has the power to adjudicate cases of intellectual property.What can be contested before the copyright board can also be contested before the Competition Commission Competition Act , 2002 has for the time being overriding influence over other legislation. In *Kingfisher vs Competition*

[8]Gustavo Ghidini, Intellectual Property and Competition Law-The Innovation Nexus, Edward Elgar (2006), p.57.
[9] Riccardo Sciaudone "IPRs and antitrust law: the not so odd couple", (2011) 6 Journal of Intellectual Property Law & Practice, pp.837-838, (published online August 11, 2011) accessed on 28 June 2020
[10](2014) 10 SCC 1.

Commission of India[11], It was also held that the CCI has the power and jurisdiction to deal with cases brought before the Copyright Board. These leading cases demonstrated the road to competition and IPR policies related to this issue.But having said that, India is still in its infancy and needs a much deeper perspective on this issue.

That is not to suggest there are no conflicts. Nevertheless, the relationship between IP law and antitrust law may give rise to some tensions particularly when the IP holder is dominant. Any regulations on intellectual property can not be formulated and enforced in isolation from other legal fields, in particular competition law. The 'competition policy' theory indicates that the role of competition law or antitrust regulators is not just to establish but to maintain the conditions for competition and market contestability in the field of IPRs. An objective to be achieved through a diversity of policies and regimes is to define the right balance between competition and IPRs.

Conflicting Areas

The conflict between Competition law and IPRs came before Monopolistic and Restrictive Trade Practices Commission (MRTP Commission, predecessor to the Competition Commission) in the case of *VallalPeruman and Others versus Godfrey Phillips India Limited*.[12] The case established that the trademark owner has the right to use the trademark in a fair and reasonable manner i.e. this right is subject to the terms and conditions imposed at the time the trademark was granted. But it does not allow using the mark in any unreasonable way. In the case where trademark owner violates the trademark by exploiting, distorting, contriving, etc., it may attract the enforcement of trademark unfair trade practices. On India's competition policy, court says "all forms of intellectual property have the potential to violate competition."

The interaction between IPRs and competition law is largely created by the non-rivalrousand non-exclusive nature of intellectual property, which causes the "appropriability" problem.[13]The existence of this prima facie "inherent friction" is due to the fact that IPR holders are given statutory rights to regulate access to intellectual property in essence and charge monopoly rents

[11] WRIT PETITION NO.1785 OF 2009
[12] 1995 16 CLA 201
[13] K. Maskus, Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement available at,http://siteresources.worldbank.org/DEC/Resources/84797125181375382O/6415739-1251814020192/maskus.pdf accessed on 28 June 2020

for the use of IPRs — something that is evidently in conflict with competition law, which seeks to curb this market power.[14]

In the case of*Entertainment Network (India) Ltd .v Super Cassette Industries Ltd.*[15], the relationship between the protection of intellectual property and the impact on market competition was discussed in depth. The court observed that any transaction with unreasonable terms would lead to denial if the owner of a copyright exercises monopoly over it.It is true that by charging royalty through the issue of licenses, the copyright owner has full freedom to enjoy the fruits of his labour. But this right is not absolute. In the case of *United States v Microsoft*[16], the court ruled that copyright does not grant its holder the immunity from general applicability rules, including antitrust laws.

This interface between IPRs and competition law has evolved into several kinds of competitive restraints. Although no one has tried to argue that licensing agreements are per se anti-competitive, the target of these restrictions is typically a licensing agreement that could adversely affect competition by deliberately splitting markets between companies and thus impeding the production of new products and services.[17]More specifically, the concept of exclusive licensing, expressed by companies by many unilateral business strategies such as tie-in arrangements, exclusive dealing, licensing restrictions (covering grant back clauses, extensions of IPR terms and restrictions on use) as well as horizontal agreements (such as pooling and cross-licensing through jointly market-powered parties) drew the attention of competition regulators worldwide.While the interaction between competition law research and IP exercise will create some problems for policy-makers.

Suggestions

The following suggestions can be madeas regards the regulation of anticompetitive trade practices associated with IP in India.

[14] A. Ng, D. Liang and P. Waters, Intersect between Intellectual Property Law and Competition Law, available at http://www.chinalawinsight.com/2008/10/articles/corporate/antitrust-competition/ intersect between -intellectual-property-law-and-competition-law/ accessed on 28 June 2020
[15] AIR 2004 Delhi 326
[16] 38 1998 WL 614485
[17]The Institute of Chartered Accountants of India, Competition Laws and Policies (2004), at p.134.

A. IP grant must be strictly in accordance with national and international standards.

   Wrong IP granting extends monopoly rights unfairly or to the wrong parties, widening the scope of anti-competitive behavior and abuses of the market.The nature of the grant's appropriateness should be consistent with the need to strike the right balance between the need for incentives for the right holder and the need for society to access and use the inventions.[18]

B. Exceptions, restrictions and limitations focused on policies in favour of developing countries such as India.

   Policy space should be given, in particular for developing countries to have appropriate arrangements for exceptions, IP exemptions and restrictions in accordance with development needs and requirements, and access rights for essential goods and services.Where these exceptions and restrictions exist or are permitted in international laws such as TRIPS, these should be used by developing countries. It will reach the degree of monopoly and increase the scope and extent of the economy's competition, as well as providing for protection of rights and access to essential goods and services.

C. The proper flexibilities for developing countries.

   In addition to exceptions, international frameworks should also include sufficient flexibilities, especially for (but not limited to) developing countries, to allow or even encourage them to take steps that may be appropriate to offset IPRs granted.Such measures are intended to uphold competition principles and satisfy the need to access essential goods and services.

D. Principles of competition to be incorporated into national IP regime

   Principles and measures relating to competition that exist in IP-related international treaties should be fully recognized and accepted, and technical assistance should be given to developing countries to allow them to be aware of these and incorporate them into national legislation, policies and practices where possible.

Conclusion

[18] Martin Khor, Intellectual Property Competition and Development, paper submitted at International Seminar on "Intellectual Property and Development", held on 2 – 3 May 2005 at the World Intellectual Property Organization (WIPO), Geneva, available at www.twnside.org.sg/title2/par/mk002.doc, accessed on 28 June 2020.

There are compelling reasons to give greater importance to the standards of competition in relation to intellectual property for developed and developing countries alike.Some of them are below.TRIPS 'general principles state that appropriate measures may be needed to prevent right-holders from abusing IPRs or resorting to practices which unreasonably restrain trade or adversely affect technology transfer.[19] Licensing is seen as an IPR holders' legitimate and competitive activity that legitimizes third-party access to technology. Yet they may become "anti-competitive" if they are a mere sham for a monopoly arrangement, if they restrict competition between technologies that are economic alternatives to each other, or where new technologies are excluded from the market.Developing nations such as India therefore need to adopt such measures in domestic legislation.

The anti-competitive conditions in IPR licenses should be set by developing nations to be null and void per se.Countries have the leeway to decide which licensing conditions can be considered to have anti-competitive effects per se and this flexibility should be retained.In many cases, it is not the restrictive nature of IPR licenses that causes concern, but the unambiguous refusal to transfer technology without other cross-licensing arrangements that developing country companies may not have access to.[20] In addition, the question of whether the right holder's refusal to grant or license a patent can be considered a patent misuse must be clarified with specific international standard guidelines.

In some cases, if a practice is deemed anti-competitive, compulsory licensing may be granted, even without efforts to obtain a voluntary license, and even if it is not primarily for domestic market supply.[21] In addition, "the need to correct anti-competitive practices can be taken into account in determining the amount of remuneration in such cases" and authorities may refuse to terminate the authorisation if and when conditions that led to such authorisation are likely to recur.Developing countries such as India should adopt this pro-competitive protection and measure into their national legislation and policies.

[19] Article 8.2 of TRIPS
[20] This view finds support from JayashreeWatal, Intellectual Property Rights in the WTO and Developing Countries,(Oxford University Press, New Delhi, 2002): p307.
[21] Article 31, sub-paragraph (k) of TRIPS.

In general, it would be necessary for developed countries to adopt the principles and elements of pro-competition into their national IP legislation and regulations.In addition, they should accommodate provisions under national competition law and regulations banning anti-competitive practices in IP licenses.

The current IP system, at international and national level, should be evaluated in the light of the crucial need for "balances" in the IP system to allow for both innovation and meeting the needs of the public interest and development.In recent years,this balance has changed too far internationally towards the IP regime, in both international IP systems and in many countries ' national laws or policies.This is very dangerous for developing countries because due to their peculiar conditions they are susceptible to adverse effects.Global harmonization of IP laws has contributed to the imbalances and the spread of conditions that make it harder to compete with developing countries and their businesses and institutions.Therefore, a review of the international IP frameworks is necessary to identify the causes of the imbalances, although a review of the national frameworks is also needed in order to allow effective use of the current flexibilities.It has already been observed that both IP and Competition regimes are too complex to let them operate independently.Modern invention and technology are central to the global economy, and as such technology transfer and IP are of great market importance.[22]Only with successful compliance will the benefits made by competition law be achieved. Weak enforcement of competition law is even worse than lack of competition law.Poor compliance also reflects a variety of factors such as insufficient enforcement authority funding.

[22] Lind Musyart, "The European Commission's Draft Technology Transfer Block Exemption Regulation and Guidelines: A significant departure from accepted Competition Policy Principles", (2004) Vol.25 (4) European Competition Law Review, pp.181-189