 DOI: *https://doij.org/10.10000/IJLSI.111406*

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 4 | Issue 2

2022

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Enigma of IPR and Competition Law

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ABSTRACT

Intellectual Property Rights and Competition law are two faces of the same coin. One compliments another and at times One overpowers another. After Liberalisation, Privatisation and Globalisation the market economy changed drastically. Even statutes were amended and new concepts were introduced. The economy of not just India but other nations' economies too depends majorly on these two subjects. Whether we talk about the Currency Basket or about the exploitation of the biocarbon resources, all can be determined by IPR and Competition Law.

Keywords: *Liberalisation; Privatisation; Globalisation; Economy; currency Basket; exploitation about the biocarbon resources*

I. INTRODUCTION

The two subjects, Intellectual Property Rights and Competition Law are currently the most talked about topics. Competition Law is considered as the most effective and efficient way to tackle market problems such as anti-Competitive agreements, mergers and combinations, and a profusion of such topics. Intellectual Property Rights, on the other hand, tries to strike a balance between owners' rights and social interest. The rights owned by the owner and exclusive and IPR encourages the owner to exploit his intellectual creation creating a monopolistic environment. Competition law stands completely against such monopolistic tendencies.

II. COMPETITION LAW AND IPR

Before the Competition Law came into existence there was Monopoly and Restrictive Trade Practices Act (MRTP Act). The so-called Act was amended several times and later replaced by the Competition Law. After the introduction of Liberalisation, Privatisation, and Globalisation it came to the notice of the officials that concepts such as bid-rigging, abuse of dominance, cartelization were not inclusive of the MRTP Act due to which the Competition Bill was passed and the Competition Act came into existence. IPR consists of various subjects such as the Trademarks Act, Patent Law, Copyright Law etc. the main aim of IPR is to ensure that the rightful owner of the intangible property exploits its intellectual right. Whereas for Competition Law the main objective is to ensure that there are no anti-trust practices being preached.

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With the differences, there exists a similarity between the two Acts. Competition Act 2002 sought to provide a harmonious construction between IPR and Competition Law. Section 3 of the Competition Act,2002 states that no association or enterprise has the right to enter into an anti-competitive agreement. Section 3(5) talks about the owners of the IPR, it states that all IPR holders are protected even if they enter into an anti-competitive agreement provided that they act within the boundaries of the IPR.

III. INTERPRETATION OF "COMPETITION" IN IPR AND COMPETITION LAW

The term "competition" means different in the context of IPR and in Competition Law. When we talk about the term Competition with regards to IPR we can say that IPR promotes fierce competition among its inventors who use their rights to the fullest and simultaneously bars the competition in many ways. The intellectual property rights to an intangible good are granted for a specified duration, which once lapses goes to the public domain ending the competition among the inventors. Whereas, when we talk about competition in accordance with competition law, it is the duty of the competition law to ensure that there aren't any abusive practices and that the market is functioning smoothly. It is the duty of the Competition law to ensure that the consumers are getting products at a reasonable price at a reasonable quantity.

Talking about anti-competitive practices, the market tends to have an appreciable adverse effect on markets through agreements. If the agreement may cause this by force of limiting or controlling the product or the services. This leads to abusive practices such as cartelization and/or abuse of dominance. Dominance over a specific area of a market can be earned by any enterprise through monopoly power, this is not per se violation of antitrust law but abuse of this position is illegal and has a detrimental effect on the market. An enterprise tends to become dominant if the relevant market is narrowly defined and it ceases to be so if it is defined widely[2].

(A) Abuse of Dominance

Dominant position refers to the position of strength an enterprise has gained. When the enterprise abuses its strength by trying to manipulate the market in accordance to satisfy their requirements, we can say they have abused their dominant position. Initially, abuse of dominance is defined in Article 82 of the European Community Treaty.[3] Whereas, abuse of dominance according to the Indian jurisdiction is defined under Section 4 of the Competition Act of 2002. Abuse of dominance is one of the most

[2] Atari Games Corp. v. Nitendo of Am. , 897 F.2d 1572, 1576 (Fed. Cir.1990)

[3] 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 insofar as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

challenging areas with context to the Competition Law as an enterprise can at any moment acquire a dominant position legitimately in the market through innovation or superior production. Three questions typically arise in context to Abuse of Dominance:

(a) What is the relevant market in which dominance or abuse has been alleged?

(b) Does the enterprise have dominance in the relevant market?

(c) What are the specific indicted practices and whether they amount to abuse?

Firstly, a relevant market consists of 'relevant product market' and 'relevant geographical market'. Relevant product market means goods that can be substituted or interchanged by the consumer. The relevant geographical market comprises the conditions of the competition that can be homogenous.

Secondly, the Act lists out the determination of whether an enterprise is dominant or not. We can see the process of determining the same in the case of Ajay Devgan vs. YRF[4]. Here we can make a note of how the Competition Commission of India bifurcated and determined whether YRF was in a dominant position or not.

Thirdly, the Competition Act recognises a few practices abusive such as unfair or discriminatory prices or conditions, denying market access or making it difficult for new and small businesses to access the market completely and smoothly, imposing supplementary contractual obligations unconnected to the subject or to the contract and most importantly, using dominance in one market to either enter or protect another market.

It is to be noted with regard to Abuse of Dominance that what the Act under Section 4 contemplates is the abuse of dominant position by an enterprise or a group rather than abuse of a dominant position of collective dominance by more than one entity. abuse on account of collective dominance is a concept not recognised by the Indian Competition regime so far. When the market is dynamic and is characterised by the presence of multiple players, no single player can be said to be in a position to affect the competitors or consumers or the market in its favour[5]. We can clearly state that in the absence of dominance, the question of abuse of dominant position does not arise[6]. We can also state that in certain exceptional circumstances, the intellectual property rights holders may use their rights in such a manner that it leads to an abuse of the dominant position[7].

IV. WTO AND ISSUES OF MARKET ACCESS

All countries signatory to the World Trade Organization are eligible for free Market Access. Free Market Access denotes access to another country's market for the sale of one country's goods freely i.e when one country can freely sell its products in another country's market. The WTO plays a major role in this area. WTO provides the member governments with a

[4] 4292 appeal No. 130/2012 with IA No. 264/2012
[5] Ashok Kumar Vallabhaneni v. Geetha SP Entertainment LLP
[6] BPHC vs. Amazon
[7] Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission of the European Communities

platform to resolve trade relating disputes and negotiate with other members.

A major problem with Market Access is the ending of competition in the country where the goods are being exported to. When one country has access to another country's market, they tend to either buy the small businesses or make the market so competitive that other businesses withdraw themselves. One such instance is of China and India. China has free access to India's market, therefore, sells its products. Chinese products in no time became so popular that the same products when manufactured and produced by India no one bought them. China sold items from toys to deities' sculptures in India. Even though deity sculptures were made by Indians and sold at a much cheaper price, the consumers preferred Chinese products. This caused small businesses to shut and China as a nation obtained dominance which they abuse in certain situations.

TRIPS (Trade-Related Aspects of Intellectual Property Rights) is an international agreement formed by the WTO (World Trade Organization) that sets down minimum standards for many forms of IP regulation as applied to nationals of other WTO members[8]. Many countries during the negotiation expressed their concerns on how the Intellectual Property Rights holder exploits his rights by creating unfair competition by abusing his power.

Liberalisation and Globalisation played a major role in the establishment of Market Access. It is after this that member governments could bring an increase in their economy and work more efficiently. With access to the market, there is also a probability of Cartalization in the market among two enterprises.

(A) Cartels on an international level

Cartalization is a common anti-trust practice followed by many enterprises. We can find cartelization not just among enterprises nowadays but also on an international level among countries. There are many areas where these countries form cartels and do not allow other countries to participate mainly to gain dominance and boost the economy of their country. There are three main areas where countries have formed cartels.

Firstly, in supplying Nuclear Fuel where countries such as the US, UK, Canada, China, France, Japan, Russia and Germany have always been at the forefront. They have formed a cartel among themselves which is well known by all the other countries. This, therefore, puts them in a dominant position. No other country other than them is invested in this field of supply. India, even though can be a part isn't due to many factors that are listed out by these dominant countries.

The second major area where cartelization is prominent is in the field of Hydrocarbon. Persian countries, Kuwait, Venezuela and Saudi Arabia are known as the founding countries of OPEC which is a major oil-producing country. Other member countries of OPEC are Qatar, Indonesia, Libya, UAE, Algeria, Nigeria, Ecuador and a few

[8] Kingfisher vs Competition Commission of India Writ petition no 1785 of 2009.

African Countries. These countries are known as the major oil-producing countries and have been successful in ensuring that other than them, no other country should and can excel in this field. The oil barrels owned by Russia and UK are discussed further in the paper.

The third is where we can make a note of the formation of cartelization is between USA and China. During the recent times of the Covid 19 pandemic when all the countries were worried about the manufacturing and distribution of vaccinations, there were countries that came up with the solution to this problem. Two such countries were USA and China. India like other countries talked to the USA for exporting the raw materials for the vaccine. China and USA at this crucial moment cartelised and Bidden decided to stop selling raw materials to India for the vaccine. This is not just a case of cartelization but also the case of abuse of dominance as both these countries are powerful and have a dominant position and abusing it by not supplying a raw material creates a monopolistic environment.

V. COMPETITION AND PATENT

Patent laws mainly aim to prevent bootlegging, making and selling patented products and thus it can be said that Patent right also complements with competition policy in that it contributes to fair market behaviour, which is the prime purpose of competition policy. A patent also fosters the innovation of the product, which is also one of the goals of competition law. Competition concerns only arise if patent owners use patents in ways that subvert the objectives of patent rights and are inconsistent with their essential function[9]. Violation of any Patent right amounts to a violation of anti-trust policies. A patent is a subject under the heading of IPR and like IPR even a Patent license expires after a certain duration.

Inventors once get their patent rights, refuse to allow anyone to make good use of it lawfully and such behaviour creates a monopolistic market. Therefore patents are usually granted to inventions that benefit the public. There have been situations where inventors gained a patent for products that are required for reasons but also refuse anyone else who try to buy or use those rights. One such situation is when in the past salt was granted a Patent. Kargil, an American enterprise acquired an American patent over salt. They had acquired patents over iodised and non-iodised salts. As America is one of the signatory members of the WTO they had Market Access to India. When Kargil entered Indias Market, no other enterprise could produce or manufacture salt as Kargil had the Patent to it. Enterprises such as ITC and TATA used to indulge in the business but once Kargil entered the market they had to put a stop to their production. Neither was this objected to nor criticised by the incumbent Government. Once the government changed, Kargil was asked to withdraw either themselves or their Patent rights as it created a monopolistic environment and also was against the National Interest. It was after this that the government came to a conclusion with regards to patent rights that patent will be granted to only those

[9] Bainbridge: Intellectual Property

inventions that will not harm the competition and to those who demand it with a bonafide intention.

Abusing their power once acquiring patents for their inventions is a common practice. We can take note of it in recent times as well. During the pandemic when all the nations were busy working on the cure (vaccine) USA was the first nation to have produced it. It got the vaccine patented and after that refused to supply the raw materials to India. Another example in the field of medicine is when pharmaceutical companies acquire patents over their invention, sell it at higher prices and when another such company tries to sell medicine curing the same illness, is asked to withdraw itself as a salt which was used was patented.

It is important to understand that such practices do not benefit the public and increase monopolistic practices. Patent holders tend to forget that the patent to their invention goes against humanism at times. The best example of life-saving drugs is the medicine used to cure cancer. The treatment of cancer is expensive as the medicine used has to be imported even though the same can be produced in India it is not permitted due to the patent rights.

India when had to launch its rocket, the USA refused to supply cryogenic engines stating that India did not envisage the Provisions of TRIPS. They also forced other countries and asked them too to not supply raw materials which India lacked back for 10 years. India could produce those parts as they did not own the patent to it. After a time, Indian scientists produced the required part () and launched the rocket. These are only some instances where a nation has abused its patent rights and violated our National interests.

Section 4(a) of Competition Law

Ministry of Corporate Affairs came up with the Draft Competition (Amendment) Bill 2020. It was based on the recommendations made by the Reports of the Competition Law Review Committee. The said bill recommends widening the scope of Section 3(5) of the Competition Act,2002 and an extension of IPR safe Harbour to dominant position cases. The proposed section 4A is merely an extension of Section 4. The key aspect lies in the wordings of " reasonable condition". The section states that IP holders can make use of their rights under certain restrictions. The CLRC while drafting the provision has stated that the provision should be interpreted in a narrow sense so as to bring it in line with international jurisprudence.

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between the Member States[10]. The grant of a patent to an inventor is not an unjust competitive practice, the use of the patent rights in an inappropriate manner can lead to exploitation of the smooth functioning of the markets as a whole[11].

[10] Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**")

[11] Parke, Davis & Co. vs. Problem

VI. CONCLUSION

When we talk about both these theories, we can say that IPR is a right that is granted to the creators or the inventors by the government whereas, Competition Law is legislation that plays the role of an artificial handover for the market operation. In my opinion, both these laws are conflicting in nature but simultaneously complement each other. When one is abused, the other law makes it a point to back it up.

Competition Law tries to offer the consumers as many options as possible to choose from and tries to create a balance among the manufacturers and consumers. IPR on the other hand tries to provide such manufacturers with rewards by being the sole creator of that product. IPR offers a dominant position that does not violate the competition policies but abuse of that position is. To conclude we can say that, both these laws have a common objective but they differ from each other in the modes they adopt to achieve it.

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