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IPR AND COMPETITION LAW UNDER TRIPS: A WAY FORWARD TO INDIA*

Abstract

Intellectual Property Rights give exclusive right to its right holder to explore his invention for a particular time period excluding others. Competition Law, on the other hand, provides with free trade and business in the market economy by propagating free competition among traders. It restrains monopoly and anti-competitive practices. Thus apparently IPR and Competition Law confront each other, but in reality they are supplementary and complementary to each other. IPR don't propagate monopoly. Only non-availability of similar IP protected goods and services gives rise to monopoly which is followed by anti-competitive practices. In fact, anti-competitive practices have adverse affect on IPR. Thus by restraining anti-competitive practices competition law helps IPR for its growth. Apparent conflict between IPR and Competition law can be mitigated if these two regimes are used properly. TRIPS has given some flexibilities to its member countries in Article 8.2, Article 40, and Article 31K which can be used to make these two regimes operate in a right manner. After MRTP Act, India has enacted Section 3, Section 4, Section 5, Section 6, Section 18, and Section 27 under Competition Act, 2002 as its own competition law. As a developing nation, India is to give more focus on R and D to make IP protected goods and services various in number to give consumer options in their hand and to facilitate the term consumer welfare in true sense.

Key words: Intellectual Property Rights, Competition Law, TRIPS, Anti-competitive practices, monopoly.

Introduction

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IPRs provides with exclusive right to its holder to use, produce, trade on his invention excluding others from the market for a definite period of time. Competition law propagates free trade and commerce in the market. Thus apparently both regimes confronts with each other. But in reality they don't. Anti-competitive practices in the market have adverse effect on IPR. Competition law restricts anti-competitive practices in the market. Competition law propagates free competition and restrains monopoly in the market. IPR never propagate monopoly. Non-availability of similar goods and services generates monopoly in the market. Then monopoly followed by anti-competitive practices. Due to high price of IP protected goods and services, consumers opt for infringed goods and services either knowingly or sometimes with knowledge as they don't have purchasing capacity for IP protected goods and services. It encourages anti-competitive practices. And due to non-implementation of competition law anti-competitive practices prevails in the market and adversely affects on trade and commerce of nation. Though IPR and competition law confronts with each other apparently, but in reality they help each other for development of trade and commerce. Most of the developing countries are suffering from anti-competitive practices in their market economy as they don't have proper implementation of competition law and some even don't have competition law of their own. The law of unfair competition was dealt with in the Paris Convention for Protection of Industrial Property, 1883.[1] The Treaty of Rome (EC Treaty) was signed in March 1957.[2] With the negotiations between developing and developed countries, on the International Code of Conduct on the Transfer of Technology under the auspices of the United Nations Conference on Trade and Development (UNCTAD) from 1970 – 1985 restrictive trade practices got special importance in New International Economic Order (NIEO).[3] As a result the TRIPS Agreement contains a modicum of competition rules, namely Articles 8.2, 31(k), and 40, even though it is an international convention dealing mainly with IPRs.[4] TRIPS Agreement

[1] Paris Convention relative to protection of Industrial property, Art 5A, Mar 20, 1883, Article 5(A) states : (1) Importation by the patentee into the country where the patent has been granted of the articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent. (2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuse which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work. WTO Committee on Trade and Envrionment, Statement by India Apr 7,1998, WT/CTE/W/82.

[2] ANESTIS S. PAPADOPOULOS, THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY, 14 (Cambridge University Press 1ST ed. 2010).

[3] The NIEO was intended to eliminate the economic dependence of developing countries, promote their accelerated development based on the principle of self-reliance, and introduce appropriate institutional changes for the global management of the world resources, See Michael. Blakeney, *Transfer of Technology and Developing Nations*. 1. FIJ. 689 (1988).

recognizes power of WTO members over controlling IPR- related anti-competitive practices.[5] As a developing nation, India has enacted its own competition law in the year 2002. Competition Act, 2002 provides Section 3, Section 4, Section, 5, Section 6, Section 18, and Section 27, which are the provisions related to restraining anti-competitive practices. This paper explores how a developing nation with special reference to India can resort to consumer welfare through free competition without hampering IP laws.

OVER VIEW on IPR and Competition law

Competition law/policies

Competition policies are measures taken by the government to restrain anti-competitive practices in the market which is hampering trade and commerce of the nations. Competition policies are measures taken by the government for providing free market economy. Competition policies by the government propagate competition among the traders in the market to bring goods and services with high quality but with a reasonable price which causes ultimately consumer welfare. Anti-competitive practices in the market hampers competitive market economy for which consumers are not getting good quality products and services in the market and thus diluting the word consumer welfare. Competition policies controls on anti-competitive practices. Competition law on the other hand provides with legal provisions to restrict such anti-competitive practices in the market. Competition policies are measures taken by the government to bring competition law. On the basis of competition policies, competition laws come into force.

Intellectual Property Rights

IPRs provides with right to the innovators to exclude others from using his innovation for a particular time period. Like for patent 20 years under Indian Patent Act and Under Indian

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[4] MAX PLANCK, COMMENTARIES ON WORLD TRADE LAW. IN PETER-TOBIAS STOLL AND KATRIN AREND (Eds),WTO- TRADE RELATED ASPECT OF INTELLECTUAL PROPERTY LAW, 656-676 (Martinus Nijhoff Publishers 2009).

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[5] Tu Thanh. Nguyen, and Hans Henrik Lidgard,. *WTO Competition Law Revisited: From TRIPS Competition Flexibilities and Singapore Issues to the WTO Agenda of a Post-Doha Round.* Faculty of Law Lund University Legal Research Paper (Apr. 27, 2017, 2:10 p.m) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1455366

Copyright Act 60 years after death of the right holder. It gives right holder right to use and to do trade on his innovation by excluding others from doing the same. The right holder has right to use and to trade on his inventions. Right holder gets full monetary rights over his inventions. As innovators invest on their inventions so IPRs gives monetary rights to the innovators to make out their hard work and monetary investment.

INTERFACE BETWEEN IPR AND COMPETITION LAW

Confrontation with each other

IPRs giving right holder exclusive right over their inventions to use, produce, and trade his invention by excluding others in the market. When there is non-availability of similar IP protected goods and services, Right holder gets monopoly over the market economy. On the other hand competition law/policies restraining monopoly on the market, as monopoly is opposite to free market which competition policies/law provide with. Here comes the main difference between the two regimes. In fact though they confronts with each other but in reality IPRs never provides monopoly in the market. If there are various IP protected goods and services then consumers will get options to choose. As IP protected goods and services are fewer in number, so the concept of monopoly comes. There necessarily to get more IP protected goods and services for proper consumer welfare. Here comes the necessity to encourage IPR by boosting R and D. Competition among the IP right holders boosts IPR. Competition law helps in encouragement of IPR by confirming competition in the market. Thus apparently competition law/policies and IPRs are confronting with each other but in reality they are not, if they can be operated in the proper way.

Complementary with each other

In fact competition law/policies and IPRs are complementary to each other. Competition policies/law restricts anti-competitive practices in the market. IPRs are also get hampered by anti-competitive practices against IP protected goods and services. Most of the time anti-competitive practices in the market prevails against the IP protected goods and services which is called infringement in IPR. Infringed goods produced by anti-competitive practioners prevail over the market. Here by restraining anti-competitive practices on the market competition law/policies are genuinely helping IPR and IPR is not against competition. It also restrains anti-competitive practices in the market. Thus can say they are complementary to each other.

TRIPS Flexibilities

TRIPS Agreement has given some flexibilities under Article 8, Article 40, Article 31K as a way to its member nations to combat with the problem of anti-competitive practices adversely affecting trade and commerce and transfer of technology.

Article 8

Article 8.2 states: "Appropriate measures, provided they are consistent with the provisions of the Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology". This Article empowered WTO members to formulate or amend their domestic laws and adopt appropriate measures to combat with three kinds of anti competitive IPR related practices i) abuse of IPR by right holders. Ii) Anti-competitive practice that unreasonably restrain trade iii) practices that adversely affect international technology transfer.[6]

Article 40

Article 40 states: 1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. 2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.[7]

Grant-back conditions

The "grant-back" covenant is one of the basic tools of patent licensing by which the licensor of a patent can access to the invention made by the licensee. It is the clause in the agreement of

[6] Article 8.2 of TRIPS.

[7] Article 40 of TRIPS Agreement.

the patent where the patentee as a licensee of the patent reserves his right to the improvement made by the licensee after entering the agreement.[8]

Conditions preventing challenges to validity

It is not a right measure if opted by the member nations to TRIPS. It prevents to challenge the validity of the IP Rights which in real is null and void. It gives right to the owner to compel the licensee not to challenge the validity of the IP right owned by him. Thus gives rise to anti competitive exploitation to the IP right.[9]

Coercive package licensing

The patentee may grant to others the right to make, use and sell under his patent. Such grants are resulted into licensing agreements which provides remuneration for the rights transferred. The patentee who is the licensor include more than one patent in agreements and compelled the licensee to take all the patents in the agreement. This practice is known as package licensing. It involves the licensing of a group of patents for a specific period of time in consideration for payment of remuneration. This practice obviously is forcing a licensee to accept unwanted patents in order to get a desired patent or patents. The theory is harmful because it creates a new monopoly wholly outside that granted by the patent. Where, however, the licensee *voluntarily* accepts a package, no misuse occurs. [10]

Article 31K

Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the

[8] Paul G. Chevigny, *The Validity of Grant-Back Agreements Under the Antitrust Laws,* 34 Fordham L. Rev. 569 (1966). Available at: http://ir.lawnet.fordham.edu/flr/vol34/iss4/2

[9] MAX PLANCK, COMMENTARIES ON WORLD TRADE LAW. IN PETER-TOBIAS STOLL AND KATRIN AREND (Eds),WTO- TRADE RELATED ASPECT OF INTELLECTUAL PROPERTY LAW, 656-676 (Martinus Nijhoff Publishers 2009).

[10] Robert S. Bloom, *Package Licensing and Post-Expiration Royalties: The Risk of Misuse*, 10 B.C.L. Rev. 143 (1968), http://lawdigitalcommons.bc.edu/bclr/vol10/iss1/8

authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.[11]

These are the flexibilities given by TRIPS to its member nations to follow for counter balance IPRs and Competition law confrontation.

Indian competition law

Developing countries have option to get resort to TRIPS Flexibilities and make their own legislations. In India first competition law was MRTP Act, 1969 (Monopolies and Restrictive Trade Practices Act, 1969. It was enacted on the basis of economic condition prevailing in India at that point of time. It was for prohibiting monopoly in trade. As because India started focusing on competition in trade and commerce, Government of India in 1999 decided to enact law for promoting competition in trade and commerce of nation. On the basis of report of Raghavan committee Competition Act, 2000 was enacted by Parliament of India. Competition Commission of India was established playing pivotal role for keeping competition in economy of country. Competition Act, 2000 encourage competition in the market for upliftment of trade and commerce and prohibition of anti competitive practices which is the ultimate welfare of consumers.[12]

Section 3 of Competition Act, 2002 provides the meaning of Anti competitive agreements. Under Competition Act 2002, anti competitive agreement means an agreement regarding the production, supply, distribution, storage, acquisition or control of goods or the provision of services, which causes or likely to cause an appreciable adverse effect on competition within India.[13]

Section 4 of the Competition Act, 2002 describes the meaning of abuse of dominant position. By using the power of dominance the right holder (IPR holder) abuse that position. Such kinds of abuse nullify the very concept of the free trade.[14]

[11] Article 31K of TRIPS Agreement.
[12] http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf

[13] Section 3 of the Competition Act, 2002.
[14] Section 4 of the Competition Act, 2002.

Section 5 of the Competition Act, 2002 provides that any acquisition, merger or amalgamation falling within the ambit of the thresholds constitutes a combination.[15]

Section 6 of the competition Act, 2002 provides with the regulation of the combination.[16] Competition Amendment Act 200 provides with mandatory notification of the combination. Prior to the Amendment, it was optional.[17]

Section 27 of the Competition Act, ***2002*** states that the Competition Commission of India has the authority to penalize IPR holders who abuse their dominant position. Further, under Section 4 of the Act the Commission is also authorized to penalize the parties to an anti-competitive agreement, which is in contravention of Section 3 of the Act.[18]

Section 18 of the Competition Act, 2002 "Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other participants, in markets in India." Accordingly, under the Act, the Commission is to take action against anti-competitive agreements and abuse of dominant position.[19]

Concluding remark

In Indian market free and competitive trade is the need of the hour. The consumers in Indian market don't have high purchasing capacity. So they can't afford highly priced goods and services. When there is little, even one can say no competition in the market the IPR holders prices their goods and services at a high rate which is beyond the purchasing capacity of the consumers of developing country like India. But it is also true that IPR itself doesn't provide monopoly. Only because there is no competition, the right holders get dominance over the market. In this situation the right holders get a chance to abuse their dominant position in the market by resorting to anti-competitive agreements which penetrate into the growth of trade and economy in the nation. Intellectual property rights don't provide monopoly. It is only when there is no option at the hand of consumers regarding IP protected goods and services, IP right holders get monopoly over their invented goods and services. Competition law restrains monopoly in the market and provides with free competition among traders. Thus propagation

[15] Section 5 of the Competition Act, 2002.
[16] Section 6 of the Copetition Act, 2002.
[17] Competition Amendment Act, 2007.
[18] Raju KD (2014) Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India. Intel Prop Rights 2:115
[19] *Ibid.*

against monopoly by competition law is not against IPR. Rather free competition among the IP holders boosts market economy and individual economy both. If there are similar IP protected goods and services, then consumers get more options and competition among the IP holders generates quality goods with reasonable price. Here consumers get benefits and on the other hand IP right holders don't get hinder by conditions imposed by IP office like compulsory licensing on the ground of non working product, non marketability etc. Here we can say, Competition law and IPR complement each other if these two regimes are made to operate in the right manner. TRIPS Agreement has given some flexibilities for preventing anti-competitive practices which can be used by member countries. By using these provisions member countries of TRIPS Agreement can make their economy growing by counter balancing IPR and Competition law in the proper way. For developing nation like India it's very essential to keep its economy strong simultaneously not to discourage innovation and rights of innovators. After MRTP Act India got Competition Act, 2000 competition law in this regard. But due to lack of awareness, lack of enforcement of this Act and also for other reasons anti-competitive practices, abuse of IP right, India's trade and commerce is adversely getting affected. In India innovation should be encouraged by spending more on R and D (Research and Development) so that more innovations come out as the strength of nation. More innovated product in market reduce monopoly and give more options to the consumers to get better product in reasonable price and thus create consumer welfare in true sense.