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# **INTERFACE BETWEEN COMPETITION LAW AND PATENTS LAW: A PANDORA BOX**

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## **ABSTRACT**

*The interface between Intellectual Property Rights and Competition Law has remained a moot point in several jurisdictions including India. There have been conflicting views regarding powers of the Competition Commission to exercise its jurisdiction over Patentee's right to exclude his/her competitors from using its patented technology. This question again came up before the Hon'ble High Court of Delhi in a recent case of Monsanto v Competition Commission of India. Though the court in the instant case tried to clarify the issue with regard to the conflict of powers between the Competition Commission of India and Power of the Controllers of the Indian Patent Office, there were various issues which were overlooked by the Court. Due to the lack of specific guidelines regarding how to deal with the interface between Competition Law and Patents Law, the issues are settled by the courts on case to case basis. Through this paper, the authors look into the issue of how this interface is dealt with in other jurisdictions such as US and EU. Unlike India, in US and EU guidelines are issued by respective governments regularly in order to solve any possible conflict between Competition Laws and Patent Laws. Through this paper the author suggests for providing such guidelines so as to allow and maintain the delicate balance between Patent Law and Competition Law.*

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## **I. THE JURISDICTIONAL TUSSLE**

There has been persistent litigation between Competition Commission of India (CCI) and Patentees over the manner of exercise of their rights. The first case wherein the conflict between IP and Competition Law was witnessed was in the case of *Super Cassettes Industries Ltd. v. UOI & Ors.*<sup>1</sup> In the aforesaid case the issue of conflict between section 4 of the Competition Act, 2002 and the Copyright Act, 1957 was looked into by the Court. The Court while dismissing the writ petition, opined that the powers of the Competition Commission and Copyright Board govern different aspects of law. The second major challenge against the jurisdiction of CCI was raised in the case of *Telefonaktiabolaget LM Ericsson (Ericsson) v. CCI and Anr.*<sup>2</sup> (*Ericsson*) wherein the primary issue was with regard to the jurisdiction of CCI to examine the allegation of anti-competitive conduct and abuse of dominance by the patentee. It was contended on behalf of Ericsson that matters pertaining to the abuse of dominance/dominant position by a patentee in respect of patent licensing should be addressed under the Patents Act and not under the Competition Act as the Patents Act provides for efficacious remedies in the nature of grant of compulsory licenses. The High Court observed that the jurisdiction of CCI under the Act to inquire allegations of anti-competitive practices and abuse of dominance arising out of the monopoly granted by patent rights cannot be taken away even if the Patents Act, 1970 provides for efficacious remedies *inter alia* in the nature of grant of compulsory licenses. Again, in the case of *Monsanto holding Pvt. Ltd. v Competition Commission of India*<sup>3</sup> (*Monsanto*) the hon'ble Delhi High Court dealt with the issue of conflict of powers between Competition Commission and Controller of Patents. In the matter herein, Monsanto (petitioners) had patented Bt. Cotton Technology (Bollgard) under the Patents Act, 1970. The patented technology was then sub-licensed to several seed manufacturers in India on payment of royalty/fee for the use of technology. The information was filed against Monsanto under S. 19 (1)(a)<sup>4</sup> and 19 (1) (b) <sup>5</sup>of the Competition Act, 2002 alleging contravention of S. 3 and S. 4

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<sup>1</sup> *Super Cassettes Industries Ltd. v. UOI & Ors* ,W.P.(C) 1119/2012 decided on 04.10.2012.

<sup>2</sup> *Telefonaktiabolaget LM Ericsson (Ericsson) v. CCI and Anr* W.P.(C) 464/2014 decided on 30.03.2016.

<sup>3</sup> W.P.(C) Nos. 1776/2016 & 3556/2017 decided on 20 May, 2020.

<sup>4</sup> S. 19(1) (a) The Commission may inquire into any alleged contravention of the provisions contained.... from any person, consumer or their association or trade association; or

<sup>5</sup> S.19(1) (b) The Commission may inquire into any alleged contravention of the provisions contained.... a reference made to it by the Central Government or a State Government or a statutory authority.

of the Act. Orders<sup>6</sup> passed by the CCI were challenged and the primary issue before the court was whether the Competition Commission had the jurisdiction to entertain a complaint relating to the manner of exercise of his/her rights by a patentee under the Patents Act, 1970. Thus, the Indian courts have been bothered time and again over the issue of powers of the Competition Commission of India in restricting Intellectual property rights holder in exercising his/her rights granted under various intellectual property laws. The issue which ought to be settled is the scope and ambit of the powers of the Competition Commission while encroaching into the rights of an Intellectual property rights holder.

The objective behind the intellectual property law is to promote innovation and provide incentives to innovators. The objective of competition law is ensure economic growth and consumer welfare. It is pertinent to note that the Indian Courts have followed a case to case approach, however, concrete steps should be taken and guidelines/rules should be framed which can serve as guiding principles for the authorities in dealing with such cases

A grant of Intellectual property right to a business entity confers exclusive right to produce a patented article or exercise the right of ownership over the protected process for a fixed period of time (20 years). Evidently, the business entity gets some degree of superiority from other competitors in the market. Owing to this superiority in the market, if any business entity engages in an allegedly abusive business practices by restricting competition, preventing rivalry or market entry, it invites competition concerns. The holder of intellectual property rights may exercise different degrees and models of exclusivity. These exclusive arrangements may lead to market foreclosure and potential competition related concerns. Thus, *prime facie* it appears that exercise of intellectual property rights in an allegedly abusive way is diametrically opposite to the goal of competition law and policy of free market access, open use and open market. On the other hand, exercise of Intellectual property rights lead to creation of innovative product and process which opens new market.

Thus, there exists a delicate link between Intellectual property rights (specifically patents) and competition. Too high or too low implementation of either laws i.e Patent Law or Competition Law may lead to trade distortion. Hence, a balance has to be found between competition policy and Patent rights and balance must ensure fulfillment of objective under both laws. A fine tuning in the legislative frameworks and enforcement of relevant laws is the key to

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<sup>6</sup> Orders dated 10.02.2016 passed by the CCI u/s 26(1) and an order dated 18.02.2016 passed by the CCI u/s 33 of the Act

resolve the jurisdictional tussle between Intellectual Property authorities and Competition authorities.

It is pertinent to note that this jurisdiction tussle has not only been observed between Competition Commission and Intellectual property office about also between Competition Commission and other Sectoral regulators. One such example is that between Competition Commission and Electricity Boards. Under the Electricity Act, 2003 the legislators conferred power upon the regulator to deal with anti-competitive agreements, abuse of dominant position and mergers related to impediment to competition in electricity.<sup>7</sup> This is similar to the language used in section 3 and 4 of the Competition Act, 2002 which pertains to anti-competitive agreements, abuse of dominant position and regulation of combinations. In the case of *Shri Neeraj Malhotra, Advocate v. North Delhi Power Ltd. & Ors.*<sup>8</sup> the anti-competitive behaviour of the electricity distribution companies was alleged and issue with regard to the jurisdiction was raised. The court asserted that where ever the question with regard to abuse of dominant position are raised the matter would fall within the jurisdiction of the Competition commission.

Not only this the conflict between Competition Commission and Telecom sector was recently under spotlight. The Telecom sector is regulated by Telecom Regulatory Authority of India (TRAI) under the Telecom Regulatory Authority of India Act, 1997. The objective of the aforesaid Act is *to nurture conditions essential for the growth of telecom industry*. Section 11 of the TRAI Act delegates power to the Telecom Regulatory Authority of India (“TRAI”) to *“facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services”*. On comparing with the objective of the Competition Act, 2002 one could say that objectives of both legislations, when read together, intend to create an environment that may facilitate fair competition. In fulfilling the concerned objective, it appears that the jurisdiction of TRAI and the CCI overlap while dealing with dealing with competition related issues in telecom industry related matters. The issue of overlap in jurisdiction was addressed by the Supreme Court in the case of *Competition Commission of India v. Bharti Airtel Limited and Others.*<sup>9</sup> The court observed

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<sup>7</sup> Section 60 of the Electricity Act, 2003 states: “The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is *likely to cause or causes an adverse effect on competition* in electricity industry”

<sup>8</sup> Case no. 06/2009

<sup>9</sup> (2019) 2 SCC 521.

that TRAI must be allowed to deal with the jurisdictional aspect. Once ascertained by TRAI that there is an anti-competitive practice, the jurisdiction of CCI can be activated. The court further said that in this way a balance could be maintained between powers of TRAI and the CCI.

In view of the aforesaid discussion, it may be asserted that jurisdictional tussle between competition commission and other sectoral regulators exists. Through the series of cases it can be observed that a clear overlap is present between the objectives of Competition Act and other acts.

## **II. ANALYSIS OF THE PROVISIONS OF THE PATENTS ACT, 1970 AND THE COMPETITION ACT, 2002**

A patent is granted to the patentee in respect of novel and inventive product/process. It is important to bear in mind that a patentee is granted a patent for an invention after a long and tedious process involving both formal and substantive examination by an administrative authority, i.e.- Indian Patent Office. The patentee enjoys the monopoly over the Patent for a specified period of 20 years. Even after the grant of a patent, the said patent is open for Post-grant opposition and revocation.

Grant of a Patent and commercialization of a Patent are two different aspects. The grant of a Patent does not *prima facie* mean that the patent holder enjoys a dominant position in the market in respect of the product/process. Accordingly, a patent right does not necessarily confer a market power. There is no guarantee that the market will recognize the value of the invention or that the inventor will be able to capture that value during the patent term.<sup>10</sup> In simple terms, mere grant of a patent does not necessarily mean commercial success. There are many other aspects which are involved in making any product a commercially successful product. Consequently, without commercial success, there is no market dominance.

It is pertinent to note here that there are a large number of limitations to which a patent right is subjected to. The sphere of rights of the patentee are limited by the already existing prior arts, overlapping patent rights, limitation of market etc. Exercising lawful right by a patentee

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<sup>10</sup> feldman-robin.pdf, , <https://web.stanford.edu/dept/law/ipsc/pdf/feldman-robin.pdf> (last visited Dec 17, 2020).

in the market is often interpreted as abuse of dominant position by the patentee. It is pertinent to mention that the Indian Courts in plethora of judgements arguably (mis)interpreted, that exercise of Patent rights would lead to abuse of dominant position in the market and therefore without getting into the complex license arrangement, courts assumed jurisdiction of Competition Commission. Lack of technical expertise to understand technology (involved in patents) and economics (involved in competition) leads to a one-dimensional interpretation ignoring many other facets. Further, automatic assumption by court that a patent holder is in dominant position in the market is required to be re-considered, as eventually, interference with the innovation would discourage competition. Firstly, it is to be bore in mind that grant of patent and commercial success comes under different spheres. A granted patent would not automatically guarantee commercial success and commercially successful innovation are not always patentable. These nuances are required to be understood by the Courts. Thus, there is a need for clear guidelines with regard to the scope of rights which a holder of patent could exercise without inviting the attention of Competition Commission.

In the next part the authors would look into the various provisions of the Patents Act and try to understand whether the Indian Patents Act, 1970 provides for sufficient remedies in dealing with Anti-Competitive practices adapted by a patentee.

#### **A. DOES THE PATENTS ACT, 1970 PROVIDE SUFFICIENT REMEDIES WHILE DEALING WITH ANTI-COMPETITIVE PRACTICES?**

In the Monsanto and the Ericsson cases it was argued that the Patents Act, 1970 is a self-sufficient Act. Where an Act is a complete code, then the legislative intent is to govern all aspects under the code itself.<sup>11</sup> The fact that the Patents Act provides for the remedies such as compulsory license and revocation on non-working, any abuse of rights by the Patentee could be addressed under the Patents Act, 1970 and the jurisdiction of the Competition Commission is ousted.

To remedy the evils of abuse of dominance, exercise of monopoly wider in scope and exercise of monopoly for a longer duration, there are specific provisions under the Patents Act, 1970. For instance, Section 140 of the Patents Act, 1970 remedy the evil of abuse of

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<sup>11</sup> *Patel Brothers v. State of Assam and Ors.* [2017], AIR2017SC383

dominance as it elaborates upon the conditions which are unlawful to be inserted in an agreement for sale/purchase of a patented article. S. 140(1) illustrates that

*(1) It shall not be lawful to insert-*

*(i) in any contract for or in relation to the sale or lease of a patented article or an article made by a patented process; or*

*(ii) in licence to manufacture or use a patented article; or*

*(iii) in a licence to work any process protected by a patent, a condition the effect of which may be-*

*(a) to require the purchaser, lessee, or licensee to acquire from the vendor, lessor, or licensor or his nominees, or to prohibit him from acquiring or to restrict in any manner or to any extent his right to acquire from any person or to prohibit him from acquiring except from the vendor, lessor, or licensor or his nominees any article other than the patented article or an article other than that made by the patented process; or*

*(b) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee, to use an article other than the patented article or an article other than that made by the patented process, which is not supplied by the vendor, lessor or licensor or his nominee; or*

*(c) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee to use any process other than the patented process,*

*(d) to provide exclusive grant back, prevention to challenges to validity of Patent & Coercive package licensing, and any such condition shall be void.*"

Provisions similar to S. 140 and S. 141<sup>12</sup> of the Patents Act, 1970 were also available in the Patents Act, 1977 enacted by the British parliament i.e. S. 44<sup>13</sup> and S. 45<sup>14</sup>. Interestingly, it

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<sup>12</sup> 141. **Determination of certain contracts-**

(1) Any contract for the sale or lease of a patented article or for licence to manufacture, use or work a patented article or process, or relating to any such sale, lease or licence, may at any time after the patent or all the patents by which the article or process was protected at the time of the making of the contract has or have ceased to be in force, and notwithstanding anything to the contrary in the contract or in any other contract, be determined by



was only after the enactment of the Competition Act, 1998 these two sections were repealed to avoid the unnecessary overlap and ambiguity. The Competition Act in India was enacted in 2002. However, even after the enactment of the Competition Act, the two provisions (S. 140 and S. 141<sup>15</sup> of the Patents Act, 1970) were not repealed. The legislative intent appears to give powers to the Controllers instead of the Competition Commission.

Arguably, by the virtue of S. 140 of the Patents Act any restrictive or unfair conditions of a license agreement could be challenged by filing a civil suit for declaring the agreement null and void. However, the competitor companies instead chose to file complaints against the patentee before the Competition Commission thereby, eliminating the dominant player (patentee) from the market. Which in turn discourages the Patentee to invest into research and development and also reduces investment on behalf of other competitors. The above notion would be thereby against the basic objective of the Competition Act and Patents Act.

Further, Chapter XVI of the Patents Act, 1970 is titled as Working of Patents, Compulsory License and revocation. S 83<sup>16</sup> under this chapter is titled as general principles to working of patented invention and clearly provides that in exercising powers under this chapter, due regard should be given to the general considerations as laid down under S. 83. The plain reading of S. 83 along with other provisions under this chapter gives an impression that the legislature while enacting the Patents Act, 1970 clearly intended to give powers to the Controller to decide, *inter alia*, whether any practice adapted by the patentee is anti-competitive in nature or not. Clause (f) of S 83 further states that “that the patent right is not abused by the patentee or person deriving title or interest on patent from the patentee, and

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the purchaser, lessee, or licensee, as the case may be, of the patent on giving three months notice in writing to the other party.

(2) The provisions of this section shall be without prejudice to any right of determining a contract exercisable apart from this section.

<sup>13</sup> Section 44- Avoidance of certain restrictive conditions

<sup>14</sup> Section 45- Determination of parts of certain contracts.

<sup>15</sup> 141. **Determination of certain contracts-**

(1) Any contract for the sale or lease of a patented article or for licence to manufacture, use or work a patented article or process, or relating to any such sale, lease or licence, may at any time after the patent or all the patents by which the article or process was protected at the time of the making of the contract has or have ceased to be in force, and notwithstanding anything to the contrary in the contract or in any other contract, be determined by the purchaser, lessee, or licensee, as the case may be, of the patent on giving three months notice in writing to the other party.

(2) The provisions of this section shall be without prejudice to any right of determining a contract exercisable apart from this section.

<sup>16</sup> **General principles applicable to working of patented inventions.**—Without prejudice to the other provisions contained in this Act, in exercising the powers conferred by this Chapter, regard shall be had to the following general considerations, namely..... that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.

*the patentee or a person deriving title or interest on patent from the **patentee does not resort to practices which unreasonably restrain trade** or adversely affect the international transfer of technology;*”. S. 83 (f) makes use of a term “**Unreasonably restrain trade**”, however the Patents Act, 1970 is silent with regard to what would constitute an unreasonable restraint of trade. Upon careful review, we may find that S. 4 of the Competition Act, 2002 which deals with abuse of dominant position wherein, it defines “***limit or restrict***” under clause (b) of Section 4. However, it does not provide any definition for “restrain”. The terms restrict/limit/restrain, cannot be used interchangeably and all three terms have their different inherent scope and meaning. It is to bear in mind that a patentee has a negative right which includes the right to exclude its competitors. Another issue with the Section 83 is that it is silent regarding the appropriate forum which would have the jurisdiction to decide which activity of the patentee would constitute an unreasonable restraint of trade.

The provision of Compulsory licensing under S. 84 embodies the basic objective of granting a patent, and thus, where reasonable requirements of public with regard to a patent invention have not been satisfied or where the patented invention is not available to the public at the reasonable affordable price or if the patented invention is not worked in the territory of India, the Controller may grant a Compulsory License. Other sections under this chapter provide various powers of the Controller which the Controller can exercise while adjudicating an application for a compulsory license. Further, section 90<sup>17</sup> of the Patents Act provides guiding principles which the Controller shall keep in mind while deciding terms and conditions of compulsory license and S 90 (1) (ix) provides “*that in case the licence is granted to remedy a **practice determined after judicial or administrative process to be anti-competitive**, the licensee shall be permitted to export the patented product, if need be*”. Section 90(ix), deals with the anti-competitive practice determined by a Judicial or Administrative process, however the section does not stipulate which specific administrative body would decide the practice as anti-competitive. Even though by virtue of S. 77<sup>18</sup> of the Patents Act, 1970 the Controller has powers of the civil court and empowered to decide whether the practice is anti-competitive or not, there has been no precedent in this regard.

Thus, a Controller under the Patents Act is well positioned to determine whether an act would constitute anti-competitive practice or not. However, the Patents Act does not clarify appropriate body which must exercise this power thereby, leading to conflict.

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<sup>17</sup> S. 90 - Terms and conditions of compulsory licences.

<sup>18</sup> S. 77- Controller to have certain powers of a civil court.

## **B. IS THERE ANY IRRECONCILABLE CONFLICT BETWEEN THE COMPETITION ACT AND PATENTS ACT ?**

The provision of the Competition Act, 2002 which deals with Intellectual property rights is S. 3(5) <sup>19</sup> which excludes the applicability of the Competition Act in respect of any agreement, which relates to restraining infringement of any patent rights. The Court in the Monsanto case remarked “*that the rights under S. 3(5) are not unqualified*”. It was also observed that only agreements that are “*necessary for protecting any of his rights which have been or may be conferred upon him under*” the specified statutes provide for the safe harbour under Sub-section (5) of Section 3 of the Competition Act. Thus, a patentee has a right to impose only reasonable conditions. The Courts in India are doing a blanket application of the provision and without any satisfactory explanation regarding what would constitute reasonable or unreasonable.

Further, S. 60 <sup>20</sup> of the Competition Act, clarifies the position of the Competition Act vis-a-vis the other statutes and it states that the Competition Act would have an overriding effect over the other laws. Thus, setting the stage for the exercise of jurisdiction by the Competition Commission. The Courts discussed about the relevance of S. 60 of the Competition Act, 2002 in *Competition Commission of India v. M/s Fast Way Transmission Pvt. Ltd. and Others*<sup>21</sup> and remarked that “*Section 60 then gives the Act overriding effect over other statutes in case of a clash between the Act and such statutes to effectuate the policy of the Act, keeping in view the economic development of the country as a whole*” Also, Section 62 <sup>22</sup> of the Competition Act expressly provides that the Competition Act would “*be in addition to and not in derogation of the provisions of any other law for the time being in force*”, clearly expresses the legislative intent that the Competition Act is in addition to other laws.

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<sup>19</sup> (5) Nothing contained in this section shall restrict— (i) 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-

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

<sup>20</sup>S. 60 of the Competition Act, 2002- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

<sup>21</sup> *Competition Commission of India v. M/s Fast Way Transmission Pvt. Ltd. and Others*, [2018 4 SCC 316]

<sup>22</sup> Section 62 of the Competition Act, 2002- Application of other laws not barred.—The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

After analysing the provisions of the Completion Act *vis-a-via* the Patents Act it appears that the conflict between Patents Act and Competition Act does not exist.

### **III. POSITION IN US AND EU**

The US courts have observed that the Competition Law and the Intellectual property Law are aimed at encouraging innovation, industry and competition.<sup>23</sup> Further, the European commission also observed that “inherent conflict between intellectual property rights and the Community competition rules”<sup>24</sup>

However, conflict in the interface of these two laws has been a point of discussions and deliberations under both the jurisdictions. Adopting a balanced approach whereby, the monopoly under Intellectual property law could be appropriately enjoyed with minimum anti-competitive behaviour has been the primary goal under both jurisdictions.

Under the US Laws, DOJ (Department of Justice) and FTC (Federal Trade Commission) have the responsibility to enforce the antitrust laws (Competition Laws). The three primary U.S. federal antitrust laws are the Sherman Act, the Clayton Act, and the FTC Act. IP rights promote innovation and technology transfer as the companies are encouraged to invest in research and development for the creation of new products and improving the quality. On the other hand, the Anti-trust law also promotes innovation, with introduction of new and improved products or services. It is relevant to point here that the mutual aim of both these laws have also been recognized by the US courts stating that aims and objectives of patent and antitrust laws . . . are actually complementary, as both are aimed at encouraging innovation, industry and competition.”<sup>25</sup> Under the US law, the concept/understanding with regard to licensing freedom is well crystalized. Thus, the anti-trust laws do not impose liability upon a firm for a unilateral refusal to assist its competitors. The justification behind the same is that the innovators would be less likely to fund the research if the government

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<sup>23</sup> *Atari Games v Nintendo*, 897 F.2d at 1576

<sup>24</sup> Notice providing guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ 2004 C101/02) (Guidelines on Technology Transfer Agreements)

<sup>25</sup> *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990)

later decides that this technology would be shared with others. Therefore, the US court rejected the notion that IP owners have the duty to deal with competitors.<sup>26</sup>

The Directorate for Financial and Enterprise Affairs Competition Committee in its paper issued on June 6, 2019 discussed about various anti-competitive practice and flexible framework available to IP holders. With regards to Exclusive dealing arrangements<sup>27</sup> it was observed that such arrangements can have procompetitive benefits including encouraging licensees to invest in the commercialization, distribution, and improvement of licensed technology.

This approach of balancing the IP vis-a-vis the Anti-trust laws could be clearly observed in the judicial decisions delivered by the US courts. For instance, in the case of *Monsanto Co v McFarling*<sup>28</sup>, the dispute arose after unilateral refusal to license IP rights by Monsanto. Monsanto sued for patent infringement after McFarling, a farmer, breached a biotechnology licence by replanting seeds from a crop grown from Monsanto's patented soybeans. On the other hand, McFarling alleged that Monsanto tied a patented product (the original seed) to an unpatented second-generation soybean seed. The Federal courts observed that Monsanto's raw exercise of its right to exclude from the patented invention by itself is a "tying" arrangement that exceeds the scope of the patent grant.

In the case of *FTC v Actavis*<sup>29</sup>, the Supreme Court held that reverse payment patent settlements are subject to antitrust scrutiny under a rule of reason standard. Further, the court observed that pay-for-delay agreements between brand and generic drug companies are subject to antitrust scrutiny.

Thus, the Federal Antitrust agencies and Courts treat antitrust and Intellectual property as complementary areas of law and look into areas of competition, innovation and consumer welfare. Antitrust claims based on the acquisition, assertion or transfer of intellectual property rights are evaluated primarily under sections 1 and 2 of the Sherman Act, section 7 of the Clayton Act or section 5 of the FTC Act. A wide body of federal case law provides guidance on the application of the antitrust laws to particular fact patterns.

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<sup>26</sup> *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004)

<sup>27</sup> An exclusive dealing arrangement prevents or restrains the licensee from licensing, selling, distributing, or using competing IP, technology, or products.

<sup>28</sup> *Monsanto Co v. McFarling* (363 F. 3d 1336, 1342 Fed. Cir. 2004)

<sup>29</sup> 570 U.S. 136 (2013)

The European Commission, deliberates that both bodies of law (IP laws and Competition Laws) share the same basic objective of promoting consumer welfare and an efficient allocation of resources. The European Court of Justice while explaining the harmony between the IP rights and Competition Law observed that there exists a difference between existence of IP rights and their exercise. Accordingly, the EC competition law never interferes with the existence of IP rights but it may exercise its powers to influence the manner in which the IP rights are exercised. The exercise of IP rights is subject to Articles 81(1)<sup>30</sup> and 82<sup>31</sup> of the EC Treaty. The European Commission considers that the IP right holders are not entitled to refuse license in all circumstances and there is no complete immunity for exclusive exploitation of their rights.

Though, the refusals to license deemed lawful in most circumstances. However, a refusal to license may be found to constitute an abuse of a dominant position under Article 102 TFEU (Treaty on the Function of European Union) in certain ‘exceptional’ circumstances that is without an objective justification. Thus, in a case Microsoft it was observed by the commission, that refusal by a dominant undertaking to provide such information to its competitors “may, under exceptional circumstances, be contrary to the general public good by constituting an abuse of a dominant position with harmful effects on innovation and on consumers”.<sup>32</sup>

Thus, where IP-Competition Law interface in US and EU jurisdiction are based upon common objective and both aim at promoting innovation, there exists certain level of differences. Under the US laws unilateral refusal to deal are not prima-facie considered as Anti-competitive in nature. On the other hand, EP in its series of cases has clearly analysed that refusals to license IP rights as abuses of dominance.

#### **IV. SUGGESTIONS**

There is a need of additional provisions in the Competition legislation expressly providing for manner of the exercise of powers of the competition commissions. They may form a part of the competition law or a subsidiary regulation. An exhaustive list of conditions should be

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<sup>30</sup> Article 81(1) prohibits agreements which have as their object or effect the restriction of competition.

<sup>31</sup> Article 82 prohibits abuses of dominance.

<sup>32</sup> Microsoft/W2000

provided to access whether an intra-technology restriction has gone beyond the limits of legal protection. Also, the legislation may clearly lay down the conditions under which it can be opined by the Competition Authorities that a licensing arrangement is likely to adversely affect the market. Through the developing jurisprudence in India and other countries, guidelines can be laid detailing the circumstances under which intra-technology restrictions would be anti-competitive. The guidelines must also provide for when intra-technology restrictions could be considered pro-competitive. Through these guidelines it is required to be recognized that a patent owner is to be rewarded for their investments and encourage further research and development. These guidelines must detail about grant-back, patent-pooling, cross licensing or royalty-free exchange licensing arrangements, pay for delay etc. Hence, a balanced approach to competition law enforcement and intellectual property protection is required to be adopted. If the exercise of intellectual property rights by a patentee leads to a monopoly, there may still be a possibility for the creation of new markets or products or for innovation.

## **V. CONCLUSION**

The basic objective behind the enactment of the Competition Act and Patents Act are supplementary and complementary to each other. However, the issue of conflict of powers between the two Acts (Patents Act and Competition Act) has been a moot point. Thus, in the light of the same there is a need of specific guidelines in matters involving Competition law and Patents Law. Unlike other jurisdiction (US and EU), India has not issued any guidelines (explanation) with regard to the matters involving Competition Act and Patents Act, due to which matters are being settled on case to case basis. On the other hand, in US and EU various guidelines are being issued clarifying the position of Competition Commission when dealing with a Patentee. Harmonizing the applicability of two laws is important. At present, the courts in India apply same/identical understanding to the Patentee as applied to any other enterprise (dealt under Competition law). Therefore, the sphere of exercise of rights by the Competition Commission is required to be well-defined especially while dealing with Intellectual property rights holders.

The Indian Patents Act, 1970 has various lacunas and the position of the Controller *vis-a-vis* the Competition Commission is still unclear. It is required that S. 140 of the Patents Act is

amended to clearly identify the adjudicatory authority which should decide what would constitute anti-competitive practice. Similarly, the provisions of the Competition Act, 2002 such as S.3(5) is required to be amended, as there exists an inherent defect in understanding what would be labelled as reasonable and what would be labelled as unreasonable.

Thus, a balanced approach which would allow a balance between the contracts concerning patents and their impact on Competition. It has been well identified that the Patent rights and Competition policies complement each other. Therefore, a balance in implementation of Competition Policies and patent rights is required to be made. This balance would prevent the abuse of patent rights without annulling the reward provided by the Patent system.