

different judgements to judge fair dealing, why not incorporate them into the statute and simultaneously introduce a “such as” clause in the provision. Fair use is based on utilitarian principles and fair dealing is based on the natural law theory where author takes centre stage. The view of the authors is in favour of adapting the fair dealing doctrine with certain features of the ‘fair use’ system. It is now up to the legislators, in the present day circumstances, to approach & analyse this issue so as to best serve our interests.

CLASH BETWEEN INTELLECTUAL PROPERTY LAW AND COMPETITION LAW A CRITICAL ANALYSIS

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Abstract

Competition Law and Intellectual Property Law prima facie appear to have conflicting objectives and goals. These conflicts have in turn brought the emergence of a long debated topic, which has to be resolved for better understanding of the subjects. Thus, with evolving of jurisprudence in this area and the emergence of a plethora of cases, the author intends to understand the interface between two streams of law i.e. Intellectual Property Rights (IPR) and Competition law. Competition law operates towards facilitating the market growth by curbing anti-competitive practices in the market. On the other hand, IPRs confer exclusive monopoly to the proprietor. However, there have been wide changes in the recent times that have changed the course of debate. The latest trend and dispute has shifted from conflict between the domain of IPRs and completion law to the exercise of rights in IPR affecting competition law. This flows from the fact that the both are intended towards furthering innovation and consumer welfare.

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Therefore, in the light of the above intricacies and problems the author seeks to discuss the general principles and laws pertaining to Intellectual Property Right and Competition law. Thereafter the author has tried to analyze the application and operation of both the laws in different jurisdiction followed by a deep study of Case laws. Lastly, the author seeks to critically examine all the factors to reach to an amicable solution for the same.

1. INTRODUCTION

Competition Law and Intellectual property rights (IPRs) seem to operate in different domains having distinct objectives and applications. Thus, understanding the smooth operation of IPR law to competition law is the most challenging task, which needs immediate attention.¹⁹⁵ With evolution of jurisprudence on competition law and emergence of plethora of cases, it has become utmost important to understand the interface between two mainstreams of law i.e. IPR and competition law. Apart from India, this topic is widely debated throughout the world also, and thus the author would also like to discuss and critically analyze the situation in different jurisdictions. This would help in drawing contrast with Indian Jurisprudence and further highlighting ways to reconcile the same.

Competition law operates towards protection of practices, which help in furtherance of the smooth functioning of the markets.¹⁹⁶ On the other hand, IPRs operate to give exclusive rights over a property.¹⁹⁷ Thus, broadly it can be inferred that intellectual property seeks to protect individual interest and competition protects the market. The interface and connection between IPRs and competition law is essentially created by the non-excludable character of intellectual property that causes the deadlock between the two.¹⁹⁸ Thus, this tussle boils down to the conflict between the IPR law and the competition law, which needs to be amicably resolved.

¹⁹⁵ K.D. Raju, “The Inevitable Connection between Intellectual Property and Competition Laws”, *Journal of Intellectual Property Rights*, Vol 18, March 2013, p.111.

¹⁹⁶ K. Maskus, ‘Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives And A WTO Agreement’ (1999), *at* <http://siteresources.worldbank.org/DEC/Resources/847971251813753820/6415739-1251814020192/maskus.pdf> (last accessed 1March 2014).(Not found)

¹⁹⁷ W.R. Cornish, *Intellectual Property*, Sweet and Maxwell, 2003.

¹⁹⁸ *Supra* note 1, at p. 10.

However, there have been wide changes in both laws in the recent times. On one hand, competition law is emerging as a law designed for regulation of economic power¹⁹⁹ and on the other hand expansion of IPR coverage to wide range of markets and products along with emergence of IPR driven markets in various jurisdictions is taking place.²⁰⁰ Thus, the latest trend and dispute has shifted from conflict between the domain of IPRs and completion law to the exercise of rights in intellectual property affecting competition law. This flows from the fact that the both are intended towards furthering innovation and consumer welfare.²⁰¹

Therefore, in order to deal with the intricacies and problems, the author has divided the paper broadly under three major heads. Firstly, the author seeks to discuss the general jurisprudence pertaining to IPR and Competition law. Thereafter the author has tried to cull out the operation of both the laws in different jurisdiction followed by a deep study of Indian Jurisprudence. Lastly, the author seeks to critically examine all the factors followed by conclusively determining the solution of the same.

1.1. OBJECTIVES OF IPR AND COMPETITION LAW

It is a common fallacy that competition law and IPRs have conflicting goals. It has emerged from the traditional notions behind the subject matter of the two domains without deep scrutiny of its background. IPR is usually taken as a tool to confer exclusive monopoly thereby preventing others from participating and offering products in the market. This can be directly equated with adverse impact on

¹⁹⁹ Richard Whish, *Competition Law*, Oxford University Press, 2005.

²⁰⁰ D.Evans and R Schmalensee, 'Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries' (2001), at <http://www.nber.org/books/innovation2/evans5-1-01.pdf> (last accessed 2 March 2014).[Not *per se* available on the site mentioned; Author has accessed it from a CCI ARTICLE]

²⁰¹ Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, Oxford Publications, Online resource centre 789 (2006), available at books.google.co.in/books?isbn=0199572739, (last accessed 5 March 2014).

competition in the market. It can also be understood simply in the light of formation of monopoly by licensees of different products in the market. IPR seems to narrow down the free and competitive market while competition law revolves on the pivot of promoting efficiency and preventing distortions in the market.

Analyzing IPR in the background of reward theory also clarifies the situation of the endless conflict between competition law and intellectual property law which derives its color from the policy of reward theory i.e. reward to the inventor.²⁰² The law was inclined to reward the creator for disclosure of his work to public and thereby granting access to everyone else to something that would otherwise remain in abyss. Protection of such nature was impliedly the cost for the disclosure to the society at large. Thus, IPR was always focused on individual rights and thereby led to the initiation of conflict with the confinement of individual rights with the advent of competition law.

However, a close observation reveals that both IPR and Competition Law work towards a common objective. There is a unanimous consensus on the fact that both aim towards promotion of innovation and consumer welfare.²⁰³ This can be witnessed from other jurisdictions as well. According to the U.S. Department of Justice & the Federal Trade Commission-

*“... [Competition] laws aims towards protection of robust competition in the market, while IP laws work to protect the necessary ability to earn a return on the investments that is necessary to innovate. Both lead to enter the market with production of desired technology, service or product.”*²⁰⁴

²⁰² Holyoak & Torremans, *Intellectual Property Law*, Oxford university Press, 2008.

²⁰³ *Atari Games Corp v. Nintendo of Am Inc*, 897 F.2d 1572, 1576 (Fed Cir 1990).

²⁰⁴ US Department of Justice and Federal Trade Commission, ‘Antitrust Enforcement and Intellectual Property Rights: Promoting innovation and competition’ (2007), at <http://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation->

Competition law is essential for the liberalization and economical growth. It can be traced out from the fact that hundreds of countries have enacted competition law. These include the U.S., European Union, Japan, Canada, and Singapore etc. This was followed by series of amendments in legislations across the world and enactment of new legislations to stay at par with the rapid growth and economical liberalization which subsequently gave rise to analyze the role of intellectual property in great depth as cases of misuse of IPR were rising at a sharp pace. Thus, India enacted its competition law in 2002.

The harmonization of the same is evident from the fact that the *Competition Act*, 2002 has accommodated the objectives of IPR aptly while framing laws and provisions. Competition law enumerates that there is no harm in dominance of market power as long as it is not abusive. It may be considered against competition law if the proprietor holder abuses its dominant position thereby tampering competitive market.²⁰⁵ The IPR owner is generally viewed in a dominant position but this can be reconciled with the above fact of abuse of dominant position. In the recent times, gradual changes have been introduced in both competition and intellectual property law. It includes prohibition of activities and provisions that explicitly and directly contravene competition in the market. Thus, a balanced approach is required for careful construction of the same.

2. STATE OF AFFAIRS IN VARIOUS OTHER JURISDICTIONS

2.1. UNITED STATES

The role of IPR in competition law is not widely dealt under the United States antitrust legislation. However, with advancements in both competition law and Intellectual property law, there has been long debates regarding the immunity to be granted to IPR in the ambit

[and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf](http://www.competitionreport.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf), (last accessed 11 March 2014).

²⁰⁵ The *Competition Act*, 2002 [No.12of 2003], s. 4. available at <http://www.cci.gov.in/images/media/competitionact/act2002.pdf> (last accessed 2 March 2014).(Not found)

of antitrust laws. The traditional view pertaining to IPR saw IP law's as key to monopolies, which were contrary to the Anti-trust practices.²⁰⁶

However, with emerging jurisprudence in the field of IPR, there has been an inclination towards the view that IPRs allow consumers exercise the freedom to substitute products and technologies with other products and technologies available in the market. The Department of Justice and other authorities have analyzed the contentious issue very closely and have inferred that presence of IPR does not necessarily amounts to abuse of dominant position or creation of monopolies.²⁰⁷

In the furtherance of the same, a framework was established upon deliberations and discussions by various agencies and authorities and consequently resulted in formulation of an antitrust "safety zone".²⁰⁸ It pertains to regulation of licensing agreements under IP laws for providing certainty and boost up competition in the market. The framework and guidelines related to safety zone enumerates that no restrictions will be imposed on IP licensing agreement in case the following situation arises²⁰⁹:

²⁰⁶ US Department of Justice and the Federal Trade Commission, 'Antitrust enforcement and intellectual property rights: Promoting innovation and competition' (2007), at <http://www.ftc.gov/reports/innovation/P04010.PromotingInnovationandCompetitionrpt0704.pdf>. (Last accessed 1 March 2014). [NOT AVAILABLE]

²⁰⁷ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006). This case established that there should not be a presumption of market power under the Sherman Act when the sale of a patented product is conditioned on the sale of a second product in a tying arrangement.

²⁰⁸ US Department of Justice and the Federal Trade Commission, 'Antitrust Guidelines for the Licensing of Intellectual Property', April 1995, pp. 22-23, ¶ 3.4, available at <http://www.usdoj.gov/atr/public/guidelines/0558.pdf> (last accessed 2 March 2014).

²⁰⁹ *ibid.*

- (i) If the arrangements and restraints under IP laws are not prima facie anti-competitive i.e. leading to predatory pricing, tying-in arrangements, reduction of output, controlling the market or increasing prices; and
- (ii) If the total account of each relevant market affected by the restraint imposed by the licensor and licensees together is not more than 20 percent; and/or
- (iii) If, apart from the parties relating to the licensing agreement, there are 4 more specialized entities that are independently controlled and pose incentive to research and development which proves to be a close substitute to the R&D activities of the parties to the licensing agreement.

Further the Department of Justice and Federal trade Commission have narrowed down the licensing agreements under IP and assignments that would be subject to liability under antitrust law:²¹⁰

- (i) Conditional refusals to license which cause competitive harm;
- (ii) Tying arrangements (if the seller has market power in the tying product; the arrangement has an adverse effect on competition in the relevant market for the tied product; and the efficiency justifications for the arrangement do not outweigh the anticompetitive effects); and
- (iii) Cross licensing and patent pooling agreements where the arrangements result in price fixing, coordinated output restrictions among competitors or foreclosure of innovation.

2.2. EUROPE

The interface between IPR and competition law is dealt in Article 81 of the Treaty of European Commission.²¹¹ The relationship between

²¹⁰ *Supra* note 13.

²¹¹ Article 81, European Union, Treaty Establishing The European Community, available at

licensing in IPR and competition law is enumerated by EC in detail. The journey can be traced as a shift from liberal approach to more intervening approach. EC has adopted a more economical and market-centric view, which is reflected in the TIBER of 2004, coupled with guidelines of technology transfer.²¹² Article 82 of the EC also plays a crucial role in case of abuse of dominant position concerning agreements under IPRs.²¹³

EC has broadly issued 2 block exemptions that explicitly provide immunity to IPRs from the conduct rule concerning anti-competitive agreements. However, this does not mean that the immunity extends to conduct rule concerning abuse of dominant position too.²¹⁴

The 1st block exemption is the “specialization agreement” that addresses the IPR was issued in year-2000.²¹⁵ It deals with the exemption of provisions of use and assignment of IPR that are expressly mentioned in the specialization agreement subject to compliance of various condition mentioned therein. Some of them are:

- (i) Necessity of use of Intellectual Property rights and assignment for the implementation of the specialization agreement²¹⁶;

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E081:EN:HTML> (last accessed 7 March 2014).

²¹² A. Jones & B. Suffrin, *EC Competition Law: Text, Cases And Materials*, 2008, p. 777.

²¹³ *id.* at p. 773.

²¹⁴ Article 82 of the EC Treaty prohibits an abuse by one or more undertakings of a dominant position within the common market or a substantial part of it pertaining to the extent to which it may affect trade within Member States.

²¹⁵ Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.

²¹⁶ Article 1(2), Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.

- (ii) The combined market share of the participating undertakings should be less than 20% of the relevant market²¹⁷; and
- (iii) The specialization agreement must not directly or indirectly have the object of: (a) fixing prices when selling the product to third parties; (b) limiting output or sales; or (c) allocating markets or customers²¹⁸.

The second block exemption, which addresses IPRs expressly, is the “technology transfers” block exemption that was issued in 2004.²¹⁹ It pertains and regulates the exemption of patents, know-how and copyright assignments and licensing agreements from perspective of the conduct rule of anti-competitive agreements, subject to conditions and limitations underlined therein. Some of these are:

- (i) In case of agreement between the competitors, the combined share of the relevant market accounted for the parties must not exceed more than 20%²²⁰
- (ii) The share of the relevant markets individually accounted for by each of the parties must not exceed 30% in case of agreement between the non-competitors²²¹

²¹⁷ Article 4, Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.

²¹⁸ Article 5, Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.

²¹⁹ Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

²²⁰ Article 3(1), Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

²²¹ Article 3(2), Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

- (iii) It bars inclusion of agreements containing severely anti-competitive restraints.²²²

3. THE TRIPS AGREEMENT

The TRIPS Agreement also enumerates guidelines and safeguards in this regard. The essence of the same can be narrowed down to three guiding principles which are:

- (i) It is up to the determination of each nation to reserve its own IPR-related competition policy.
- (ii) It is required to have consistency between the TRIPS Agreement's principles of IP protection and national IPR-related competition policy.
- (iii) The focus is majorly centered towards targeting those practices that are restricting the dissemination of protected technologies.²²³

The TRIPS agreement enumerates elaborately in its text the role of IPRs and supporting character of competition policy to avoid the deadlock between the two domains.²²⁴ However, TRIPS agreement is merely facilitating than being mandatory. Thus, the objectives and principles of TRIPS guide in attaining the competitive balance required for facilitating innovation along with economic growth.²²⁵

²²² Article 4, Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

²²³ A. Roy & J. Kumar, 'Competition Law in India' 2008, p. 183.

²²⁴ S.D. Anderman, *The Interface Between Intellectual Property Rights And Competition Policy*, Cambridge University Press, 2007, p. 7.

²²⁵ Article 8.2, WTO, Agreement On The Trade-Related Aspects Of Intellectual Property Rights, available at

Article 6 of the TRIPS deals with an important aspect of exhaustion, which plays, a vital role under competition law. It deals with exhaustion of rights. It facilitates the balancing of rights, duties and liabilities under the two domains.²²⁶

Article 8.2 deals with other aspects of objectives and principles enumerated under the TRIPS Agreement.²²⁷ This article is of much importance from the perspective of developing nations as it facilitates developing nations in justifying its' provision and stand in competition law for dealing in areas that are silent under TRIPS agreement like abuse of dominant position in the relevant market and IPR.²²⁸

Article 40 of TRIPS²²⁹ is the cornerstone of the interface between IPR and competition law and helps in providing flexibilities to the developing nations. It has provisions like code of conduct for transfer of technology²³⁰ for the developing nations and equitable principles for

http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (last accessed 9 March 2014).

²²⁶ A.K. Koul, "The General Agreement On Tariffs And Trade (GATT)/World Trade Organization (WTO): Law, Economics And Politics", 2005, p. 460.

²²⁷ *Supra* note 31; 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."

²²⁸ J. Watal, *Intellectual Property Rights In The WTO And Developing Countries*, Oxford University Press, 2001, at p. 293.

²²⁹ Article 40, WTO, "Overview: The TRIPS Agreement", available at http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last accessed 10 March 2010).

²³⁰ C.M. Correa, "Innovation and Technology Transfer in Latin America: A Review of Recent Trends and Policies", published in S. Lall (ed.), *The Economics Of Technology Transfer*, 2002, at pp. 339-342.

regulating anti-competitive and restrictive practices that were adopted by the UN General Assembly in 1980.²³¹

Further, Article 7 acts as a guiding principle for interpreting the provisions pertaining to IPR and competition law under TRIPS.²³² Article 31(k) also acts as a strong provision to counterbalance the adverse effect of IPR on competition law.²³³

4. EMERGING JURISPRUDENCE IN DEVELOPING COUNTRIES

As discussed above, TRIPS agreement provides a wide ambit for inclusion of provisions pertaining to IPR and competition law. Further, it also grants flexibility to all the nations including developing nations to formulate provisions as per the needs and requirements of their market. However, in the absence of mandatory provision, there are ample chances of subjection of this contentious issue to more negotiations at World Trade Organization.²³⁴ Thus, in the light of above possibility, it is of utmost necessity for the developing nations to clarify its stand and scope on the subject of interface between

²³¹ UNGA Adopted This By Resolution 35/63 Of December 1980; The United Nations, A Set Of Multilaterally Equitable Agreed Principles And Rules For The Control Of Restrictive Business Practices, at <http://www.un.org/documents/ga/res/35/a35r63e.pdf> (last accessed 12 March 2014).

²³² D. Shanker, "The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPs Agreement", 36 *Journal Of World Trade*, 2002, p.721.

²³³ Article 31(k), TRIPS Agreement reads: "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 anticompetitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions, which led to such authorization, are likely to recur, *Supra* note 31.

²³⁴ *Supra* note 34 at p. 304.

competition law and IPR to be able to exercise the flexibility accorded to it in future.

There are also chances of development of mandatory provisions under TRIPS pertaining to the present jurisprudence in developed countries.²³⁵ This would directly hamper the development, growth and flexibilities in developing nations. Thus, developing nations should concentrate and analyze the aspects related to their economies to build a framework for reconciling both IPR and competition law.

There is not much jurisprudence and provisions available under TRIPS for regulation from the perspective of competition policy except for few elaborations. TRIPS pose lots of difficulties to the developing nations as it mostly addresses and facilitates the developed nations' policy framework. Most of its substantive content draws its roots from EPC and thus it had negligible impact on EU²³⁶ and created many changes as far as developing nations are concerned.

Thus, the developing nations should create a framework for analyzing the grounds, principles, objectives and situations under which IPR would override the competition law and regulatory measures for facilitating economic growth and development. As far as technological transfers are concerned, the developing nations are pushed to a disadvantaged position as compared to the developed nations and hence, there is a need for concrete steps by the developing nations to avoid further exploitation.²³⁷

There is a need to regulate licensing, assignments and agreements issue in cases of conflict between IPR and competition law.²³⁸ Additionally,

²³⁵ *id.* at p. 301.

²³⁶ C. Colston & K. Middleton, *Modern Intellectual Property Law*, Routledge-Cavendish, 2005, at p. 60.

²³⁷ WTO Working Group on the Interaction of Trade and Competition Policy at its fifth session (WT/WGTTT/5), ¶15, www.wto.org.tw/SmartKMS/fileviewer?id=2008 (last accessed 23 March 2014).

²³⁸ D.V. Eugui, 'What Agenda For The Review Of Trips? : A Sustainable Development Perspective' (2002) available at

competition laws in developing countries should be framed in a way to deal directly with all anti-competitive practices, predatory pricing, collusive practices, tying-arrangements, etc which can cause adverse impact on the welfare of customers and economic development.²³⁹

5. THE STUDY OF THE INTERFACE IN INDIA

With the emergence of plethora of cases and regulations pertaining to prevention of the overriding effect of IPR over competition law, it has become necessary to critically analyze the subject in great details with respect to both statutory provisions and judicial precedents. However, a mixed view is prevalent in the present scenario pertaining to the much debated issue of IPR and competition law.

Critically examining, one can easily reach to the reasonable inference that every subject under IPR does not need regulation by the competition law.²⁴⁰ IPR merely confers the dominant position or facilitation of monopolies but this does not necessarily imply the abuse of dominant position by the proprietor of the subjects specified under IP laws.²⁴¹

In India, Competition Act, 2002 provides for the prohibition of anti-competitive practices and not monopolies per se. Completion law effectively operates to regulate the unjustified practices under IPR subject to conditions and provisions enumerated therein.

6. STATUTORY ANALYSIS

http://www.ciel.org/Publications/AgendaTrips_Summer02.pdf (last accessed 12 March, 2014).

²³⁹ *Supra* note 30 at p. 8.

²⁴⁰ M. Naniwadekar, 'Intellectual Property Rights and Competition Law: Friends or Foes?' (2009), *at* <http://spicyipindia.blogspot.com/2009/09/intellectual-property-rights-and.html> (last accessed 24 March 2014). (Page not found)

²⁴¹ Shubha Ghosh, "Intellectual Property Rights: the View from Competition Policy", 103 Nw. U. L. Rev. Colloquy, pp. 344-346 (2009).

The Competition Act, 2002 passed by the Indian legislature is in synchronization with the principles of economic efficiency and liberalization. With the opening of trade barriers and rapid flow from international markets, a need was felt for robust regulation of the same. Thus initially an open market policy was formulated in India. Later on keeping in mind the new challenges, Competition Act was enacted which seeks to fulfill its objectives vide prohibition of the following:²⁴²

- (i) Anti-competitive agreements;
- (ii) Abuse of dominant position by the enterprises in the market; and
- (iii) Regulation of combinations that exceed the threshold limits against the prescribed assets or turnover.

The competition law policy and practice find reference in the Indian law vide Articles 38 and 39 of the Constitution. It lays down the principles for promoting and securing social, economic and political justice for the people and maintaining social order.²⁴³ The duty is on the State to ensure the same. Additionally, the State is burdened with the duty to regulate the ownership of material resources and direct the control in the best way to address the common good with fulfillment of maximum objectives. This is to ensure and check the concentration of power in the hands of few, which leads to anti-competitive practices, and accumulation of wealth in the hands of few.

In order to fulfill the gaps in the MRTP act and counterbalance the challenges, Government in October 1999, appointed a High Level Committee to draft a new competition law.²⁴⁴ Consequently

²⁴² D.P. Mittal, *Competition Law & Practice*, Taxmann Publications Pvt. Ltd., 2008 at p.3.

²⁴³ T Ramappa, *Competition Law in India: Policy, Issues and Developments*, The University Press, New Delhi, 2011.

²⁴⁴ The Institute of Chartered Accountants of India, 'Competition Laws And Policies' (2004), at p. 129.

Competition Act, 2002,²⁴⁵ was enacted with robust provision and inclusion of TRIPS complying provisions too.

S. 3 of the Competition Act, 2002 dealt with the anti-competitive agreements. The interface between competition law and IPR can be easily traced by incorporation of S. 3(5) of the Act. It is essentially a blanket provision which acts as an exception for IPRs under S. 3(5) of the Act. This is done to accommodate innovations and thereby promote technologically advanced goods and products.²⁴⁶ However, it also regulates efficiently, the practice in order to check unreasonable practices of IPR under this provision.²⁴⁷

Thus, there are provisions for regulating such foul agreements and licenses under IPR that go against the spirit of the Competition Act, 2002.²⁴⁸ Provisions have been made to address any anti-competitive practice pertaining to IPR to be proved through the channel of abuse of dominant position as mentioned under S.4 of the Competition Act, 2002.²⁴⁹ Additionally, the Act also includes explicit categories like price fixing, geographical divisions etc. that extends up to predatory pricing, tying-in arrangements and other allied subjects, if they lead to causing appreciable adverse impact on competition.²⁵⁰

²⁴⁵ R. Dutta, 'Critical Analysis: Reflection of IP in Competition Law of India', at <http://www.inclawnews.com/display.aspx?4674> (last accessed 21 March 2014).

²⁴⁶ *id.*, at p. 133.

²⁴⁷ S. Jain and S. Tripathy, "Intellectual Property and Competition Laws: Jural Correlatives", *Journal of Intellectual Property Rights* (2007), at pp. 236-243.

²⁴⁸ *Supra* note 50, at p.134.

²⁴⁹ *Supra* note 47 at p. 24, S. 4 define abuse of dominant position broadly to include: (a) unfair or discriminatory prices, (b) restrictions on production or technical and scientific development, (c) practices that result in denial of market access, and (d) tying and market leverage.

²⁵⁰ S. Ghosh, 'Presentation on IP and Competition In India', at <http://www.business.uiuc.edu/stip/documents/ShubhaGhosh.pdf> (last accessed 24 March 2014).

7. CRITICAL ANALYSIS IN THE LIGHT OF JUDICIAL PRECEDENTS

Since the emergence of MRTP Act and Competition Act, 2002, plethora of cases have emerged, laying down principles related to the subject matter of competition law and IPR. Anti-competitive agreements²⁵¹ and abuse of dominant position²⁵² along with other sub heads form the framework of Competition Act that determines the regulation of IPR pertaining to competition law.

There have been various landmark judgments pertaining to the conflict between IPR and the competition law. Various authorities and agencies are continuously deliberating and debating over this contentious issue. *Aamir Khan Productions Pvt. Ltd. v. Union of India*²⁵³ is a landmark judgment delivered by the Bombay High Court wherein the Court while dealing with a matter pertaining to the issue of IPR held that CCI has the jurisdiction to deal with all cases concerning competition law and IPR. In *Kingfisher v. Competition Commission of India*²⁵⁴ also, the Court reiterated that the CCI is competent to deal with all the issues that come before the Copyright Board. Such cases enumerate the fact that the Indian Courts are ready for dealing with emerging cases of competition law involving IPR.

Competition law has provided S. 3(5) as a provision that highlights interface between competition and IPR issues. It is a blanket provision incorporated in the competition law. However, there is no provision under S. 4 on the ground of IPR abuse or public policy for interference in such cases. It specifically enumerates that action can be taken only in cases where there is abuse of dominant position leading to appreciable adverse effect on the competition.

²⁵¹ The *Competition Act*, 2002, s. 3.

²⁵² The *Competition Act*, 2002, s. 4.

²⁵³ *Aamir Khan Productions v. Union of India*, 2010 (112) Bom L R 3778.

²⁵⁴ *Kingfisher v. Competition Commission of India*, Writ petitions no. 1785 of 2009.

Cartel is yet another issue that is dealt elaborately under the competition law. Formation of cartels is a prevalent practice among industries and firms. Recently the proprietors owning IPRs have indulged in formation of cartels and thereby causing distortion of competition in the market. An evident example of the same can be traced from the film industry as it involves both IPR issues i.e. copyright along with competition law provision affecting the industry. In the case of *FICCI Multiplex Association of India v. United Producers/Distributors Forum (UPDF)*,²⁵⁵ the petitioner (FICCI) filed complaint against the UPDF alleging the formation of market cartels in the film industry. This was deliberately done by UPDF to boost their revenue and thus it had refused to strike deal with the multiplex owners. This has direct and drastic effect on the multiplexes as their business is wholly dependent on the film industry.

Consequently, this resulted in anti-competitive practice of refusal to deal leading to distortion of competition adversely for gaining profits. Further, defendants held 100 per cent share in the industry and thus indulging in limitation of supply of films in the market qualifies as an anti-competitive practice. It qualified as a violation of S. 3(3) the Competition Act too. The parties on delivery of the show cause notice filed a petition in Bombay High Court on the pretext of lack of jurisdiction of CCI to decide a matter pertaining to IPR. The Court citing S. 3(5) of the Competition Act 2002 read with S. 3(1) held that the latter section cannot curtail the right to sue for infringement under IPR, and further CCI has jurisdiction to entertain all matters that can be presented before the Copyright Board.

Recently, CCI also held that copyright is not an absolute right but is merely a statutory right under the Copyright Act, 1957.²⁵⁶ Further, in *Microfibres Inc v Girdhar & Co.*, the Court observed that:

“The legislative intent was to grant a higher protection to pure original artistic works and lesser protection to the activities that are commercial

²⁵⁵ *FICCI Multiplex Association of India v. United Producers Distribution Forum (UPDF)*, Case No. 1 of 2009, CCI order dated 25 May 2011.

²⁵⁶ *Gramophone Company of India Ltd. v. Super Cassette Industries Ltd.*, 2010 (44) PTC 541 (Del).

in nature. Thus, the intent of the legislature is explicitly clear that the protection provided to a work that is commercial in nature is at lower pedestal than and not to be equated with the protection granted to a work of pure Article.²⁵⁷

It can therefore be safely concluded that the precedents enumerate greater protection to original artistic works as compared to the furtherance of commercial interest. CCI has come out with a landmark decision as it undoubtedly moved towards checking the abuse of dominance by forming cartels in the market of film industry.

In *Hawkins Cookers Limited v. Murugan Enterprises*²⁵⁸, Delhi High Court held that a well known mark on the pretext of being prominent and well-known cannot be left unchecked to create monopoly in the market by indulging in practices of controlling the incidental market. The same would fall under the category of abuse of dominant position in the market and is prohibited.

The status of law in U.S. is no different. In *Twentieth Century Music Corp v. Aiken*²⁵⁹, the Court reiterated that the immediate aim of the copyright law is to make sure that the author gets a fair return, however the ultimate aim is to stimulate artistic work for public good. Thus, the aim and objective of both IPR and Competition law is to promote innovation and interest of the public along with furtherance of competition in the market for common good. A similar approach is adopted by the ECJ which can be inferred from the case of *Hoffmann-La Roche*²⁶⁰ and *United Brands*.²⁶¹

²⁵⁷ *Microfibres Inc v. Girdhar & Co.*, RFA (OS) no. 25/2006 (DB), decided on 28 May 2009.

²⁵⁸ *Hawkins Cookers Limited v. Murugan Enterprises*, 2008 (36) PTC 290(Del).

²⁵⁹ *Twentieth Century Music Corp v. Aiken*, 422 US 151(1975).

²⁶⁰ *Hoffmann-La Roche & Co AG v. Comm'n*, Case C-85/76, 1979 ECR 461.

²⁶¹ *United Brands Co & United Brands Cont'l BV v. Comm'n*, Case C-27/67, 1978 ECR 207, 63-66.

In *Entertainment Network (India) Limited v. Super Cassette Industries Ltd.*,²⁶² Hon'ble Supreme Court in length stated the interface between competition law and effect of IPR on competition in the market. Refusal to deal is one such limb of anti-competitive practices that is covered under the competition law. The Court observing the same held that, though the proprietor of a copyright exercises absolute monopoly over it, but the same is limited in the sense that any transaction with unreasonably tainting or limiting competition would amount to refusal. Undoubtedly, IPR owners can enjoy the fruits of their labour via royalty by issuing licences but the same is not absolute.

The jurisdiction of other countries also highlights the fact that exercise of rights under IP laws is subject to the competition law/anti-trust law. Dealing a case pertaining to refusal of license, a U.S. Court in *Kodak II*²⁶³ and in *In re Independent Service Organizations*,²⁶⁴ held that IPR does not grant an unfettered right to violate the anti-trust law. Further, in *United States v. Microsoft*²⁶⁵, the Court held that the IP laws are not immune from anti-trust laws and all the general laws are equally applicable on IP laws and exclusive right holders.

Excessive pricing and predatory pricing is yet another problem that competition law is grappling with. It is also closely associated to refusal of license. In *Union of India v. Cyanamide India Ltd. and another*,²⁶⁶ the Hon'ble Court held that overpricing of lifesaving drugs is also prohibited and the same does not fall beyond the ambit of price control. Competition law is currently facing a lot of trouble in keeping the branded agencies and patented products under the ambit of price control. In case of lack of substitutes, there's always a potential danger hovering in the form of monopolies. The domain of life saving drugs in relation to high pricing is a major concern in developing nations.

²⁶² *Entertainment Network (India) Limited v. Super Cassette Industries Ltd.*, MANU/SC/2179/2008, 2008(5) OK, 719.

²⁶³ *Image Technical Serve v. Eastman Kodak Co.*, 125 F. 3d 1195 (1218) (9th Cir 1997).

²⁶⁴ *CSU LLC v. Xerox Corp.*, 203 F. 3d 1322 (1326) (Fed Cir. 2000).

²⁶⁵ *United States v. Microsoft*, 38 1998 WL 614485 (DDC, 14 September 1998).

²⁶⁶ *Union of India v. Cyanamide India Ltd and another*, AIR 1987 SC 1802.

Competition law is enacted to promote fair practices prevent abuse of dominant position and completion in the market that is prevalent in the form of tie-in arrangements, excessive pricing, exclusive licensing etc.

In the case of tying arrangements, a highly usable product or service is tied with a less marketable product or service and the seller agrees to sell both together irrespective of the choice of the buyer. Practicing illegal, tying arrangements is against the competition law or anti-trust law. In *Tele – Direct* case²⁶⁷, it was observed that the selective refusal to license a trademark constitutes an abuse of the dominant position. Recently, the *Microsoft* case is yet another example that dealt with the issues of abuse of dominant position and refusal to deal with third parties and inclusion of tying arrangements.²⁶⁸

8. CONCLUSION

It can undoubtedly be inferred now that both IP and competition law have complementary goals. Both are working towards achieving the ultimate objective of promoting innovation and protection of consumer & economic welfare. IP furthers innovation which consequently results in promotion of competition in the market. Over the time, direct goals of these two domains of law have been sufficiently reconciled for attaining the optimum middle path.

IP confers rights to the property holder to enjoy the returns of the disclosure, while competition law is required to deal with IPR in a manner of not absolutely curtailing it rather reconciling it with the goals of competition law. Competition law should impose regulation on IPR only to the extent of interference by holder of IPR in the domain of competition law. There is a need to strike an optimum balance between the policies of IPR and competition law. This will facilitate the long term relationship between the two along with fulfilling the goal of innovation and economic welfare.

²⁶⁷ *Canada (Director of Investigation and Research) v. Teledirect (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.).

²⁶⁸ *Microsoft v. Comm'n*, Case T-201/04, 2007 ECR II-1491.

However, there are certain inferences that need to be taken into consideration while reconciling the IP law and competition law. IPR confers exclusive rights on the proprietor and hence, it must be regulated with regard to the following points. Firstly, since the jurisprudence pertaining to effect of IPR on competition law is restricted only to the jurisprudence from U.S., ECJ and sparsely from other jurisdictions; hence, its activities relating to acquisition of ownership under IPR for strengthening monopolies should be seriously discouraged. Secondly, IPR law must be regulated only in the sphere where it causes adverse effect on the competition to prevent unnecessary interference in the IP laws. Thirdly, IPR companies must be regulated efficiently to prevent concentration of market power in the hand of few to prevent the potential threat of cartels and abuse of dominant position. CCI must be given ample power and jurisdiction to scrutinize distortion of competition and refusal to deal by the industries and firms in the market. Fifthly, excessive pricing and refusal to deal unnecessary on frivolous grounds should be made subject to CCI scrutiny to facilitate smooth functioning of the market.

The detailed analysis of both the streams- IPRs and competition law direct us to the conclusion that both have overlapping issues which can't be dealt in isolation. Despite both are in essence poles apart, however, their goals and objectives are converging than conflicting as understood in general parlance. Despite the fact that there are intricacies and sensitive issues, both the streams have managed to reconcile and strike a middle path in order to ensure the fulfillment of the ultimate objective of common good and protection of consumer welfare.

Thus, at this initial stage of competition law in India, the emerging jurisprudence in India and abroad allay down sufficient framework for development of competition law and regulatory scheme for IPR. The emerging jurisprudence had effectuated the inclusion of gradual changes in both the laws thereby getting prepared to tackle new challenges and plethora of new cases & disputes.

Also, it is equally important from the perspective of a developing nation like India to understand the sensitive and crucial aspects of the contentious issue of tussle between IPR and its effect on competition

law. The framework is set in appropriately to handle any interference with economic growth. However, a true understanding and application of laws and reasons behind the precedents would help in ensuring the smooth function of both the domains and specific needs of the Indian market.

**THE SUPREME COURT ON THERAPEUTICAL EFFICACY
AND SECTION 3(d) OF THE INDIAN PATENTS ACT**