INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: AN EU AND INDIA ANAYLSIS

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Abstract

Intellectual Property Rights (IPR) and Competition Law are two regimes of law that are bound together by the economics of innovation and market by intricate legal rules that seek to provide balance between protecting and fostering innovation and preventing distortions in the market structure. Historically, these two regimes have developed as two separate fields of law, however, recently in India, the conflict between the two has overplayed. It is argued that these two regimes are not at loggerheads as their goals are to craft consumer welfare and encourage innovation through variant means. Further, it is argued that the interference of competition laws is not with the existence of patents, trademark or copyright but the exercise of it.

The present paper addresses the nexus between IPR and competition law in the innovation industry focusing on the Indian legal structure. This article argues that India is at a nascent stage towards the administration of Competition Laws. There is no sufficient jurisprudence to guide the Indian authorities to deal with the interface of IPR and competition in matters relating to abuse

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of dominant position, refusal to deal, tying agreements, exclusive licensing, patent pooling and mergers, predatory pricing and compulsory licensing. It is necessary to analyse and inculcate the jurisprudence developed in the EU, regarding the inherent tension between IPR and competition.

In conclusion,it is stated that the aims and objectives of IPR and competition laws may seem, at first instant wholly at odds with each other; however, it is argued that these two regimes are complementary to each other, since both are aimed towards encouraging innovation and a fair competitive market structure.

I. INTRODUCTION

The application of competition laws to intellectual property rights ("**IPR**") has been an area of complication and topic for debates for a long time, both at the USA and the European Union. Competition laws intend to prevent market distortions and anti-competitive behaviour, whereas, IPR at instances allows the creation of monopoly status or monopolistic behaviour among IP holders. However, this article argues that though both these legal regimes have developed as separate regimes, their goals are intrinsically intertwined towards consumer welfare, protect and foster innovation and prevent market distortion.

First, the article provides a detailed analysis of the inherent tension between Competition laws and IPR. Further, it argues that the functioning of each of the two legal regimes might be separate, however, at the backdrop of each of their respective objectives, the main aim of both such regimes is to create consumer welfare and foster innovation. Second, the article focuses at the TRIPS Agreement, and provides a detailed analysis of the extent at which the Agreement has provided guidance in order to address the friction between these two regimes. Third, the paper focuses on a few judgements provided by the European Union (EU), and extract various principles and judicial language used to smoothen the tension between the two regimes. Fourth, the paper addresses the lack of jurisprudence with regard to the application Competition laws to IPR in Indian Courts. In addition, it analyses the scanty number of cases present before the Indian Courts and the lack of judicial language with regard to clear demarcation between IP rights and Competition law intervention. Lastly, it is argued that due to the lack of precedent set before the Indian Courts, it is necessary that Indian Courts inculcate the jurisprudence laid down in the EU, in order to judge cases that require a segregation between IP holder's rights and interference of Competition laws.

II. INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAWS

Intellectual Property Rights are a set of statutory rights protected under the Indian Copyrights Act,[1] Patents Act,[2] and Trademarks Act.[3] These rights are provided to the inventor or creator of the property in order to protect their work and create a sense of exclusivity. In common parlance, IPR's designate boundaries which create a monopolistic or quasi-monopolistic rights over their innovation;[4] thus, limiting the scope of the market and the influx of new competitors.[5] Whereas Competition laws are a set of principles and rules that promote efficient functioning of the

[1]Indian Copyright Act, 1957.
[2]Patents Act, 1970.
[3]Trade Marks Act, 1999.
[4]THE INTELLECTUAL PROPERTY DEBATE-PERSPECTIVES FROM LAW, ECONOMICS, AND POLITICAL ECONOMY (Meir Perez Pugatch ed., Edward Elgar, 2007).
[5]Thomas Cottier & Ingo Meitinger, *The TRIPs Agreement without a Competition Agreement*, FONDAZIONE ENI ENRICO MATTEI WORKING PAPER NO., 65-99, http://www.feem.it/userfiles/attach/Publication/NDL1999/NDL1999-065.pdf.

market.[6] Their objective is to stop participants in a particular market to engage in anti-competitive practices that have a detrimental effect on the market.[7]

As Sir Meir Perez Pugatch, a renowned author, described in his book, "*The Intellectual Property Debate-Perspectives from Law, Economics, and Political Economy*", that if a Martian (any kind of extra-terrestrial body) were to visit Earth for the first time, and it were exposed to the knowledge of IPR and Competition law, it would undoubtedly think that there exist a certain sense of friction between these two systems.[8] However, it is argued that they are merely complementary to each other, which promote innovation and consumer welfare.[9]

It is noticed that in the short-run it may appear that IPR protection creates a monopoly, however, in the long run it promotes innovators and artists an incentive a new form of innovation or artistic expression, respectively.[10] It allows the participants in a market to create better quality and diverse products which allow growth and efficiency in the market.[11] Competition laws, on the other side, does not specifically estop participants in a particular market to possess market dominance or a monopoly. All the Indian Competition Act prohibits is the abuse of such

[6]K. Maskus, *Competition Policy and Intellectual Property Rights in Developing Countries: Interest in Unilateral Initiatives and a WTO Agreement*, WORLD BANK CONFERENCE ON DEVELOPING COUNTRIES AND THE MILLENNIUM ROUND, GENEVA 1999, http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/maskus.pdf.
[7]Eshan Ghosh, *Competition Law and Intellectual Property Rights with Special Reference to the TRIPS Agreement*, RESEARCH PAPER FOR THE COMPETITION COMMISSION OF INDIA,http://cci.gov.in/images/media/ResearchReports/EshanGhosh.pdf.
[8]The tension between competition laws and IPR is not a new phenomenon, it has been a bone of contention since a long time. See *supra* note 4.
[9]*Consumer Protection and Competition Policy*, PLANNING COMMISSION OF INDIA,http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf.
[10]Alice Pham, *Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?* CUTS INTERNATIONAL, INDIA (2008), http://www.cuts-international.org/pdf/CompetitionLaw_IPR.pdf ("**Pham**").
[11]S.F. Anthony, *Antitrust and Intellectual Property Law: Adversaries to Partners*, 20 AIPLA Q.J. 1 (2000) ("**Anthony**").

dominant position[12] which would create an adverse effect on the specific market.

In the light of the objectives of each system, i.e. IPR and Competition law, it is seen that competition is not the end goal of Competition laws; and protection of expression of ideas is not the end goal of IPR.[13] They are the mere means of achieving the goals set out in each of these systems. Though the two systems have emerged as widely different and distinct systems, their goals are complementary to each other, in order to pursue dynamic innovation and consumer welfare.[14] Where Competition laws provide a static efficiency in the market of the IP holder, IPR itself promotes a long-term system that allows incentive for innovation and growth.[15]

III. TRIPS AGREEMENT: PERMITTING CONTROL OF IPR

Trade-Related Aspects of Intellectual Property Rights ("**TRIPS**") Agreement is an international arrangement that sets down minimum standards for various forms of IP regulations that should be adopted by the nation states which are members of WTO.[16] TRIPS recognizes the application of Competition laws on IP holders and the market power it creates. It allows members to maintain laws that are necessary for prohibiting anti-competitive arrangements and practices.[17]

[12]Competition Act, 2002, §4.
[13]Pham, *supra* note 10.
[14]Atari Games Corp. v. Nintendo of Am Inc., (1990) 897 F.2d 1572, 1576.
[15]MARTIN KHOR, INTELLECTUAL PROPERTY, COMPETITION AND DEVELOPMENT (TWN, 2005).
[16]*Overview: The TRIPS Agreement*, WORLD TRADE ORGANISATION, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.
[17]Final Act embodying the Results of Uruguay Round of the Multilateral Negotiations, Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, Arts 8(2), 30, 31, 40. ("**TRIPS**").

The TRIPS agreement provides a regulatory measure on the use of IPRs, and Competition policy is a supplementary set of rules that are mentioned in the TRIPS Agreement.[18] Article 7 of the Agreement states that the enforcement of IPR should be construed to balance the rights and obligation and in pursuance of social and economic goals.[19] This does not specifically narrate the use of Competition laws where IP holders have abused their position, but it acts as an interpretative section that permits the members to control the use of IPR where it acts inconsistent with its objectives.[20]

The TRIPS agreement foresees and acknowledges that there may be a friction between the use of IPR and Competition laws.[21] Article 8(2) of the agreement clearly permits nation states to adopt any appropriate measures that prevent the abuse of IPR.[22] The text of the said article does not directly state that Competition policy should be adopted to control the abuse of IP holders, however, it provides enough room for nation states to adopt any such measures or policies that restrict such practices.

Article 40 of the TRIPS agreement is the "epicentre"[23] of the debate regarding IPR and Competition laws. Article 40(2) clearly states that nation could adopt or use competition laws to prevent the IP holders from abuse their dominant position or create an adverse effect on the market.[24] It acts as a conclusive manifestation of restriction mentioned in Article 8(2) of the Agreement. Further, the issuance of compulsory licensing is validated under Article 31 of the Agreement, it acts as a strong counterbalance between the patent holder and creation of an adverse effect in the market.[25]The article lays down eleven conditions which

[18]JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES (3rd ed, Oxford University Press, 2001) ("**Watal**").
[19]TRIPS Agreement, Art. 7.
[20]D. Shankar, *The Vienna Convention of Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPS Agreement*, 36 JOURNAL OF WORLD TRADE 721 (2002).
[21]Eleanor M. Fox, *Trade, Competition and Intellectual Property- TRIPS and its Antitrust Counterparts*, 29 VAND. J. TRANSNATIONAL L. 481, 486 (1996).
[22]TRIPS Agreement, Art. 8.2.
[23]*Supra* note 16.
[24]TRIPS Agreement, Art. 40.
[25]Watal, *supra* note 18, at 380-381.

requires to be observed before granting a compulsory license, it is an exhaustive list containing strict safeguards.

The TRIPS Agreement is largely focused on the functioning of IPR and creating an international standard of regulating the use of IPR. It has strictly mentioned the manner in which IPR can be obtained and used, however, it has to be in pursuance with the objective of granting and protection IP. The use of Competition policy in the TRIPS agreement is supplementary, however, it acts as a regulatory rule in order to control the conduct of the IP holder.

IV. ANALYSIS OF EU CASE LAWS DEALING WITH COMPETITION LAW

The Rome Treaty, which was responsible for the creation of European Union, was formulated in 1957. The treaty has been renamed in 2009 by the Lisbon Treaty as Treaty on the Functioning of European Union ("**TFEU**").[26] The primary objective of the European Union has to provide a market for goods and services and maintain the free and fair arrangement of the market. This policy has been re-affirmed when it is entwined with the Competition laws of EU. The rules of competition have been essentially based on two doctrines: firstly, competition rules apply to the exercise of the intellectual property rights rather than the mere existence of them; secondly, restraints over competition is justified when it is 'reasonably necessary' for protecting the intellectual property right in a certain subject matter.[27]

The Rome Treaty of 1957 has enumerated various kinds of anti-competitive practices through specific treaty provisions, which have

[26]JEAN-CLAUDE PIRIS, THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS (Cambridge University Press, 2010).
[27]*Revised report by UNCTAD secretariat on Competition policy and the exercise of Intellectual property rights*, UNCTAD, www.unctad.org/en/docs//c2clp22r1.en.pdf.

further been developed by judicial precedents. The interface between IPR and each such division is analysed below.

A. European Union Laws On Competition Law

The reinforcement of free and fair market for the purposes of market integration is well-supported by the competition rules stated in the Rome Treaty of 1957. Article 81 and 82 of the Treaty have substantially discussed which list out various actions that could be deemed to have a destructive impact on the competition. The European Court of Justice ("**ECJ**") however has made a prominent remark that such a list contained in Article 82 does not provide an entire "exhaustive enumeration"[28]of the possible kinds of abuse by a dominant position. Article 81 (presently Article 102 of the Treaty on the Functioning of the European Union: TFEU)[29] prohibits and bars agreements that may fix purchases or selling price, limit production, restrict the source of supply, or basically cause a competitive disadvantage, and thus automatically declares such an agreement void under Article 81(2).[30]

Article 82 (presently Article 102 of the TFEU)[31] on the other hand, regulates the undertakings and prohibits the abuse in relation to those who already possess a dominant position,[32] or even near that position within a common market, which has the potential to affect the trade between its Member States. Thus, in addition to exorbitant pricing and limitation of output, the Article considers driving out existing market and

[28]Europemballage Corp. and Continental Can Co. Inc. v. Commission, (1973) E.C.R. 215.
[29]*Consolidated Reader-Friendly Edition of the Treaty on Functioning of European Union*, EU DEMOCRATS, http://www.eudemocrats.org/fileadmin/user_upload/Documents/D-Reader_friendly_latest%20version.pdf
[30]However, the agreement is not void where the agreements are innocuous and promote technical or economic progress or foster consumer welfare and enable consumers to reap a fair share of benefit under Article 81(3).
[31]*Supra* note 29.
[32]A firm holds a dominant position if it possesses enough market power to behave to an appreciable extent independently of the competitors, customers and ultimately consumers. SeeUnited Brands Co. v. Commission, (1978) E.C.R. at 207, ¶65.

"placing ... [others at a] competitive disadvantage"[33] a form of abuse. The Article is substantially responsible for issuing licenses of intellectual property rights. The European Commission has clearly stated on several occasions that "an important part of its policy for encouraging innovation in the EU is a harmonized system of IPRs that can be used effectively to protect new products and technology".[34] Thus, mere dominance does not equate to abuse of such dominance. Therefore, the Commission must scrutinize the conduct and behaviour of such a company concerning the impact the actions have on the relevant market in question.

a) Abuse of Dominant Position

Intellectual Property Rights or exclusive rights[35] are granted to an inventor or a creator with the rationale of rewarding them for their invention and encouraging for further new research and development or innovations. Owing to the nature of IPRs, they create a "degree of economic exclusivity".[36] Therefore, an established dominant position in the market does not by default violate Competition Laws,[37] if such a case was however a violation, the concept of granting exclusive rights would be redundant. It also does not obligate exclusive right holders' to license such a property to others in all cases. Thus, it is safe to state that such an abuse of dominant position is largely dependent upon facts involved in a particular case.[38]

Dominance has been defined as a situation where in a certain market the

[33]The Rome Treaty 1957, Art. 82.
[34]DUNCAN CURLEY, INNOVATION, INTELLECTUAL PROPERTY AND COMPETITION – A LEGAL AND POLICY PERSPECTIVE,(Stockholm Network, 2006).
[35]Abhishek Adlakha, I*ntellectual Property and Competition Law: The Innovation Nexus*, 4 CIRC (2013).
[36]Pham, *supra* note 10.
[37]Emanuela Arezzo, *Intellectual property rights at the crossroad between monopolization and abuse of dominant position: American and European approaches compared*, 24JOHN MARSHALL JOURNAL OF COMPUTER & INFORMATION LAW (2007) [hereinafter Arezzo].
[38]Pham, *supra* note 10.

normal competitive forces are weakened in a sensible manner.[39] Therefore, the European authorities and courts have emphasized that existence of dominance in such a market does not simply exclude a certain degree of competition, unlike in cases of monopoly.[40] In Hoffmann-La Roche[41]case the ECJ, held that the "abuse is an objective concept relating to the behaviour of an undertaking in a dominant position… has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." In other words, the "abuse further"[42] destroys the market, which was already weakened by the presence of the dominance.

The ECJ in two cases[43] has held that enforcement of design rights or a refusal in granting the license did not amount to an abuse within the meaning of Article 82 of the Rome Treaty.[44] For instance in *AB Volvo v. Erik Veng*,[45] Veng was importing the manufactured parts without authorization, and had made serious attempts of obtaining a license. However, Veng opposed this importation. The ECJ on this ruled that a Veng's refusal to grant the license to Veng did not amount to abuse. The rationale given by the court was the right to excluding third parties from the sphere of "manufacturing and selling or importing products… constituted the very subject of [the Company's] exclusive right."[46]

The jurisprudence and approach of the ECJ has however developed in the more recent cases. The court has established a general criterion[47] as compared to Veng or CIRCA. In the Magill Case,[48] it involved refusal to license the copyright on the TV listings to a relatively small broadcasting company. This company was inclined in providing a comprehensive

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[39]Hoffmann-La Roche v. Commission, (1979) ECR I-461 at 39 [hereinafter Hoffmann-La Roche].
[40]BritishAirways v. Commission, Case C-95/04P (2007).
[41]Hoffmann-La Roche, *supra* note 39.
[42]Arezzo, *supra* note 37.
[43]Volvo v. Erik Veng, (1988) E.C.R. 6211; CIRCA v. Renault, (1988) E.C.R. 6039.
[44]RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION, (Joseph Drexl (ed.), Edward Elgam Publishing, 2008) (hereinafter "**Drexl**").
[45]AB Volvo v. Erik Veng, (1988) E.C.R. 6211 ("***AB Volvo***").
[46]*Id.*
[47]Drexl, *supra* note 44.
[48]RTE and ITP v. Commission (Magill), (1995) E.C.R. 1153 ("***RTE and ITP***").

weekly TV guide comprising of the three broadcasters' programming details,[49] which were the copyright holders. The ECJ based on these facts, issued a test, commonly known as the Magill test,[50] for actions that are abusive under Article 82. Namely, a) exclusive holder of input or raw material for running a business, where such product is not duplicable; b) when potential consumer demand exists for a product, but there is a limitation on the entry in the market itself c) there exists no legitimate business justification for such refusal to license d) where the goal is for reserving a downstream market by barring competition.[51] Thus, the ECJ held that the three television companies had abused their own individual dominant position in the market; as a result they were obligated to disclose the information for the TV weekly guide to be published by Magill.

In the landmark case of Microsoft,[52]intellectual property rights and competitions laws were faced at loggerhead. The case was initiated by Sun Microsystems, which claimed that Microsoft's refusal to supply the interoperability information that is essential, was illegal. The allegation stemmed from the fact that the licenses were being granted by Microsoft to Sun Microsystems' competitors, which they were claiming as an abuse of dominant position. After a process of investigation, the EC ruled that it was an abuse under Article 82 of the Treaty. For detecting abuse, the Commission first established that Microsoft possessed monopoly. On the basis of this, it re-iterated earlier decisions of the ECJ stating that a firm in possession of dominant position carries "*a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market*."[53]

Further, applying the above principle the Commission held cumulatively that firstly, information of interoperability was indispensable for other

[49]Anthony, *supra* note 11.
[50]Arezzo, *supra* note 37.
[51]RTE and ITP, *supra* note 48.
[52]Microsoft v. Comm'n, (2007) ECR II-1491.
[53]Michelin v. Commission, (1983) E.C.R. 3461.

work groups of operating systems. Secondly, there was a risk of eradication of all possibilities of competition with respect to the server operating system market. Lastly, there was a restriction on development of new products due to the rejection of licensing. Hence, such a refusal contributed to developing anti-competitive practices, amounting an abuse being a dominant position.

b) Excessive Pricing and Competition Law

An overall view of the European Commission(EC) practice has been inclined towards curtailing the abuse of dominance in terms of excessive pricing, where exorbitant prices are prevailing in market. It has taken several approaches and tests to determine the issue of excessive pricing peculiarly in most cases. The EC has not only constructed its decisions on economic arguments, but also inculcated arguments of "fairness", as the language of the law suggests by itself "unfair practices".[54] The primary objective for curbing the practice is that the monopolists use their position to "reap trading benefits that [probably] would not have reaped if there had been normal and sufficiently effective competition."[55] In addition, it is presumed that there exists a "fair" price that could be derived from the Commission/Courts, which is derived externally in that specific trade. [56]

The difficulty is in demarcating the line between what is unfair and what is not in a monopoly pricing system. As there is no definitive law on the standards of determining the fairness, the decision is largely dependent upon judicial interpretation.[57] In General Motors v. Commission,[58] the ECJ gauged whether a price is reasonable to its economic value, if not the price is known to be abusive in nature. General Motors (GM), possessed the power to inspect and issue certificates of conformity to all the vehicles for their respective trademarks that entered the country. The

[54]Michal S. Gal, *Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?* 49 ANTITRUST BULLETIN 384 (2004) ("**Gal**").
[55]United Brands Co. v. Commission, (1978) 1 C.M.L.R. 429.
[56]Gal, *supra* note 54.
[57]*Id.*
[58] General Motors v. Commission, (1976) 1 C.M.L.R. 95.

Belgian authorities conferred this power. However, GM charged a high fee for such a service. The Commission found that GM was in a dominant position. The Court extending the ambit of abuse held, "the imposition of a price which is excessive in relation to the economic value of the service provided" would amount to abuse.

Similarly, in *United Brands Co. v. Commission*,[59] the Court applying the General Motors principle further stated that "*the question to be further determined is whether the difference between the costs actually incurred and the price actually charged is excessive*".[60] Therefore, the Court restating the principle of General Motors held that charging a price that is exorbitant, which has no "reasonable relation" to the economic value of the product that is being supplied, would be an abuse. In other words, this decision initiated a test that necessitated the Commission to conduct a cost analysis in terms of comparing the selling price of a product and the cost of its production, for the determination of excessive pricing.[61]

Another approach adapted by the courts is the "comparative market test".[62] The test was initially applied in the Societe des Auteurs, Compositeurs at Editeurs de Musique ("SACEM") decisions.[63] The issue in this case was whether the rate was higher than the rates in other Member States and thus was it subject to unfair trading conditions. The court held that the on the comparison of the fee levels, it can be determined whether the difference is inclined towards abuse of a dominant position. Therefore, the suggestive method posed to be an alternate to the cost-analysis, where it required instead to objectively weighing the price levels among comparable markets while detecting

[59]United Brands Co. v. Commission, (1978) 1 C.M.L.R. 429.
[60]*Id.*
[61]Production costs are especially difficult to determine when long-term investments are made, when risk- factors should be assessed, when production costs of complex corporate structures with a wide product range or multinational production facilities must be apportioned, or when intellectual property is involved. See CICCE v. Commission, (1986) 1 C.M.L.R. 486.
[62]Gal, *supra* note 54.
[63]Ministere Public v. Tournier, (1991) 4 C.M.L.R. 248 ("**SACEM II**"); Lucazeau v. SACEM, (1989) E.C.R. 281 ("**SACEM III**").

excessive pricing.

The ECJ as a common practice has intervened in cases where the margins are beyond or about one hundred percent.[64] It has permitted a significant line of margin that can be rightfully be exercised by a monopolist.[65] However, the ECJ in a number of cases, observed excessive pricing as an "abuse of market power" that leads to distribution of inequitable benefits or even accepting distribution of wealth[66] which prevail in a market regulated by monopolists.

c) Refusal to Deal/License

The general principle that is followed in European Union Laws is that the parties, even including dominant firms, are free to contract.[67] It is thus pertinent to note that the refusal to deal doctrine has been termed as a series of "exceptional circumstances", where the refusal by the monopolists or even near monopolist is detrimental or harmful[68] to a competition-based market. The provision flows from Article 102 of the Treaty, which states that "…since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market".[69]Thus, balancing the prevalence of Intellectual Property Rights and Competition Law, the courts have developed the jurisprudence through several case laws while dealing with exceptional circumstances.

In *AB Volvo v. Erik Veng*,[70] the ECJ held that Article 82 of the Treaty could be attracted and as a result constitute "abuse of dominance", if a dominant position engages in abusive conduct for example "arbitrary

[64]Gal, *supra* note 54.
[65]*Id.*
[66]Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV., 561 (1983).
[67]Maggiolino M., *Monopolists' Refusal to Deal in IP: US Courts and EU Institutions line up along some Cultural and Jurisdictional Cleavages*,3RD ANNUAL CONFERENCE OF THE EPIP (EUROPEAN POLICY FOR INTELLECTUAL PROPERTY) ASSOCIATION (2011).
[68]*Id.*
[69]The Rome Treaty, 1957.
[70]AB Volvo, *supra* note 45.

refusal to supply spare parts to the independent repairers."[71] Therefore, it is important to note a clear difference that merely refusal to grant license may not per se be anti-competitive, however, such a refusal must be arbitrary for constituting as an abusive conduct. In the *Magill Case*,[72] the ECJ, in addition to the other violations, it held that refusal was also abusive in nature because "*it prevented the appearance of a new product [that the dominant firm] did not offer and for where there was a potential consumer demand*". Therefore, it held that refusal to such licenses of copyright resulted in abusive conduct on the part of dominant firms.

In *Oscar Bronner*,[73] a landmark case on refusal to deal, the ECJ laid down a definitive test for resolving the issue of when refusal to deal is "illegal". It stated three instances for the same: a) it may be likely to eliminate competition in secondary market; b) that cannot be objectively justified; and c) when the claimed input of the same is indispensable for the rivals to even carry on their own business, where basically there are no actual or substantial substitutes in existence for that input. Therefore, even though the undertaking of such a dominant position may not amount to abuse, however, "the exercise of an exclusive right by the proprietor may, in exceptional circumstances may involve abusive character.

In a more recent case, *IMS Health v. NDC Health*,[74] the ECJ validated identical stance as Magill. It stated that the refusal to grant access to, in this case copyrighted input, was abusive as: a) it was such as to exclude any competition in the secondary market; b) it was unjustified; and c) it concerned an indispensable input. Further, it said that such a refusal resulted in blocking the beginning of a new product, which possessed a potential consumer demand, which in effect affected the overall development of a new market.

[71]*Id.*
[72]ITP v. Commission, (1995) E.C.R. I-743.
[73]Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, (1998) ECR I-7791.
[74]IMS Health v. NDC Health, (2004) E.C.R. 1-5039 ("**IMS Health**")].

V. ANALYSIS OF INDIAN CASE LAWS DEALING WITH COMPETITION LAW

The Indian Competition Act was enacted in the year 2002, which traces back to the Monopolies and Restrictive Trade Practices Act, 1969. Due to the liberalization of the Indian economy, many of the sections in the previous Act became redundant. The Competition Act is a fairly new piece of legislation that intends to prevent trade practices that create an adverse effect to the market and protect the welfare of consumers.[75]

It is argued that the recent Competition Act is not directly resolve the conflict between Competition Laws and IPR. Further, it is argued Section 3(5) of the Act does not restrict or prohibit aggrieved parties to bring a matter relating to anti-competitive practices of IP holder to the Competition Commission. A close perusal of Manupatra regarding the interface between Competition Law and IPR would show the lack of Indian jurisprudence that is available regarding the conflict. However, the few that are available, lack enough judicial thought and language that could clearly dissect the conflict.

The Competition Act is divided into various kinds of anti-competitive practices, the interface between IPR and each such division is analysed below.

A. The non-obstante clause of Section 3(5)

Section 3(5) of the Competition Act states that any reasonable conditions imposed by the IP holder during the exercise of his IPR, would not amount to an anti-competitive practice under the Act.[76] However, any unreasonable conditions on an agreement imposed by an IP holder will not fall within the protection laid down in Section 3(5) of the Act. In other words, while exercising an IPR, if the party performs a prohibited

[75]Competition Act 2002, Preamble.
[76]Competition Act 2002, § 3(5).

trade practice,[77] in detriment of the market or consumer welfare,[78] the non-obstante clause under Section 3(5) would not be applicable.[79]

B. Where should such matters be heard- Issue on Jurisdiction

The dispute between IPR and Competition Act is one of the most complex and disputed areas of law.[80] Thus, the issue regarding where such matters shall be instituted is of importance. The provisions of neither Competition Law nor IPR, does not provide any remedy to such situations. However, in *Aamir Khan Production v Union of India*[81], the Court held that Competition Commission of India (CCI) has the jurisdiction here matters relating to IPR when it is directly in contravention of the provisions of the Competition Act. In cases of providing licenses, it would be the duty of the Copyright Board to hear such matter, since the Act specifically provides it to do so.[82] This principle of law has been further reiterated in subsequent judgements where such dispute was an issue.[83]

C. Abuse of Dominant Position

Dominant position is a position of economic strength, where it can operate independently with respect to the other competitive market

[77]Manju Bharadwaj v. Zee Telefilms Ltd., (1996) 20 CLA 229. See also Dr Valla Peruman v. Godfrey Phillips (India) Ltd., (1995) 16 C.L.A. 201.
[78]Jefferson Parish Hospital District No. 2 v. Hyde, (1984) 466 US 2.
[79]ABIT ROY &JAYANT KUMAR, COMPETITION LAW IN INDIA202-203 (Eastern Law House, 2008).
[80]Drexl, *supra* note 44. See also Regibeau & Rockett Katharine, *The relationship between intellectual property law and competition law*, UNIVERSITY OF ESSEX, DEPARTMENT OF ECONOMICS, ECONOMICS DISCUSSION PAPERS 581,https://www.essex.ac.uk/economics/discussion-papers/papers-text/dp581.pdf.
[81]Aamir Khan Productions Pvt. Ltd. and Aamir Hussain Khan v. Union of India through Ministry of Affairs, The Competition Commission of India through its Secretary Mr. S.L. Bunker and the Director General Competition Commission of India, (2010) 102 SCL 457 (Bom).
[82]*Id.*
[83]Kingfisher v. Competition Commission of India, Writ Petition No. 1785 of 2012.

participants.[84]A position of dominance itself does not conclude that it is anti-competitive,[85] it is only in contravention with the Act when it abuses this position.[86] It enables dominant market participants to prevent operative competition in the relative or a geographical market.[87]

The rigidity among IPR and Competition Law is mainly due to the understanding that where the former creates and protects monopoly, the latter seeks to prevent or restrict it.[88] However, such an understanding of IPR is far too simplistic. Indian Courts have not effectively facilitated to resolve this issue. It is argued that IPR itself does not grant monopoly rights. They provide an opportunity to IP holders to regulate prices of their products.[89] However, that should not be considered as granting an economic stronghold in a particular market as understood in competition laws.[90]

[84]It has been established that dominant position in a market can be abused when the market participant intends to control the prices of the commodities sold in the market and sell them at discriminatory prices and when such participants prevent other firms from entering the market; Belaire Owner's Association v. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana, (2011) 104 CLA 398 (CCI);United States v. E.L. du Pont de Nemours & Co., (1956)351 U.S. 377.

[85]Hoffmann-la Roche & Co. AG v. Commission of the European Communities, (1979) 3 C.M.L.R. 211.

[86]Competition Act 2002, § 4.

[87]M/s. Maharashtra State Power Generation Company Ltd. v. M/s. Mahanadi Coalfields Ltd. and M/s. Coal India Ltd., Case No. 11 of 2012; M/s. Gujarat State Electricity Corporation Limited v. M/s. South Eastern Coalfields Ltd. and M/s. Coal India Ltd., (2013) CompLR 910.

[88]US v. Westinghouse, (1981) 648 F.2d 642.

[89]GUSTAVO GHIDINI, INNOVATION, COMPETITION AND CONSUMER WELFARE IN INTELLECTUAL PROPERTY LAW, (Edward Elgar Publishing Ltd., 2010).

[90]Mark D. Janis, Herbert J. Hovenkamp, Mark A. Lemley, *Virtually all mystery novels are copyrighted, yet no one could seriously claim that any one mystery novel held a monopoly in a relevant economic market,* ANTICOMPETITIVE SETTLEMENT OF INTELLECTUAL PROPERTY DISPUTES, MAURER SCHOOL OF LAW: INDIANA UNIVERSITY DIGITAL REPOSITORY (2003),http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1407&context=facpub.

FICCI Multiplex Association of India[91] Case is a leading authority that dissevers the dispute between IPR and competition law. In the present case UPDF formed cartels and refused to deal with multiplex owners in order to raise their revenue. In order the defend themselves, UPDF raised an argument that under section 14 of the Indian Copyright Act, they have the authority to sell or communicate their film to the public.[92] The Court held that such a right is recognized by the Court, however, it would not permit producers to form cartels and act in contravention to section 3(3) of the Competition Act.[93] The rights guaranteed under section 14 of the Copyright Act does not take allow IP holders to act arbitrarily and inconsistent with the provisions of the competition laws.

The Delhi High Court in *Hawkins Case*[94]observed the case regarding an allegation by the plaintiff that the defendant company was using the plaintiff's trademark "Hawkins" on their products, which were pressure cooker gaskets. The Court held that a well-known mark cannot create a market monopoly due to its reputation. If it does create a monopoly it cannot use this economic strength in order to control the ancillary markets, then, it would be considered as an abuse of dominant position.[95]

Indian Courts lack thorough jurisprudence in the field of abuse of dominant position with regard to IP holders. The above two judgements are the only clear judicial decisions which have been able to clarify the position of IPR and competition law. Courts have not specifically stated that the main aim or objective of IPR is to promote innovation and economic interest is only secondary.[96] Therefore, any act that is done in pursuance of economic interests which would disrupt the market, would be in contravention to the provisions of competition law. In the light of

[91]FICCI Multiplex Association of India v. United Producers Distribution Forum(UPDF), (2011) CompLR 79 (CCI).
[92]*Id.*
[93]*Id*
[94]Hawkins Coolers Ltd. v. Murugan Enterprises, (2008) 36 PTC 290(Del).
[95]*Id.*
[96]Twentieth Century Music Corp. v. Aiken, (1976) 422 US 151.

the above argument it could be stated both IPR and competition laws have similar interests, to create freedom of trade and consumer welfare.[97]

D. Refusal to License

A widely accepted notion of IPR is that the holder is not under any obligation to license its products. It is consistent even when an IP holder has monopoly over the market of a particular material.[98] However, at instances where an IP holder refuses to licence its product it may constitute an abuse under competition laws.[99] Refusal to licence at instances may be misused by dominant IP holders to take unjustified anti-competitive advantages,[100] at such instances the refusal acts in contravention to competition laws.

In order to cope with such practices foreign courts have developed the "essential facility doctrine".[101] It requires a firm possessing monopolistic character to grant access it has protection over in order to facilitate effective competition.[102] In India there is a lack of jurisprudence regarding refusal to license and its impacts on market competition.

E. Excessive Pricing or Price Discrimination

Excessive pricing of a commodity is not exactly a violation of Indian Competition Laws.[103] There has been an ambiguity with this regard, as to what extent could an IP holder use its exclusive rights to charge a

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[97]United Brands Co. & United Brands Cont'l BV v. Comm'n, Case, (1978) ECR 207, 63-66;Hoffmann-la Roche & Co. AG v. Commission of the European Communities, (1979) 3 C.M.L.R. 211.
[98]Anthony, *supra* note 11.
[99]Radio Telefis Eireann v. Commission, (1995) 1 CEC 400.
[100]K.D. Raju, *The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India,* 18 J. INTELL PROP RIGHTS, 117 (2013) [hereinafter Raju].
[101]Rita Coco, *Antitrust Liability For Refusal To License Intellectual Property: A Comparative Analysis and the International Setting,* 12(1) MARQ. INTELL. PROP. L. REV., 4-15 (2008) [hereinafter Coco].
[102]Jaiveer Singh, *Is there a Case for Essential Facilities Doctrine in India?*, CIRC WORKING PAPER NO. 04, CUTS: INSTITUTION FOR REGULATION AND COMPETITION(2013),http://circ.in/pdf/Essential_Facilities_Doctrine_India.pdf.
[103]Union of India v. Cyanamide India Ltd. and Anr., (1987) AIR 1802 (SC).

particular price for its commodity. Predatory Pricing is prohibited under the Indian Competition Act,[104] however, there is no strict jurisprudence in India that prohibits an IP holder to charge an excessive amount for its product.

A recent case before the Competition Appellate Tribunal, the CCI considered the nature of anti-competitive behaviour and abuse of dominant position with regard to Microsoft's charges for various licences.[105] In the *Microsoft Case*,[106] it was alleged that the respondents were abusing their dominant position in pricing similar products, differently, and compelling the consumer to purchase the costly products, and refusing to sell the same product at a lower price. The Court held that the ultimate product which was to be sold were not a software of Microsoft Office or Microsoft Word, but three distinct and separate licenses.[107] The Court held that since the products were different, IP bearers had the right to charge differential prices for its products. Since, the appellants could not produce any evidence to show that the three products were similar in nature or that Microsoft was abusing its dominant position, the matter was dismissed.

The Tribunal failed to consider that there were no competitors in the market, apart from Microsoft, with respect to Windows Operating System.[108] It is argued that they failed to obtain further evidence regarding the matter, and dismissed the matter prematurely. Microsoft owned 90% of the market share[109] and it coerced consumers to buy volume licenses for a higher price, where the product was being sold at a lower price with respect to personal computers. The judgement by the Tribunal lacked analysis of the manner in which Microsoft was pricing its commodity and the manner in which it effected the market.

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[104]Indian Competition Act 2002, §4.
[105]Singhania & Partners LLP v. Microsoft Corporation (I) Pvt Ltd and Anr., (2012) CompLR 1107 [hereinafter Singhania & Partners LLP].
[106]*Id.*
[107]*Id.*
[108]Raju, *supra* note 100.
[109]Singhania & Partners LLP, *supra* note 105.

VI. LESSONS FOR INDIA

A. Incorporation of Essential Facilities Doctrine

Essential facilities doctrine, as mentioned before, requires a dominant firm to allow access to an essential facility that it provides in order to create effective competition in the market.[110] Under this principle, a dominant IP holder is required to grant access to competitors with regard to its commodity, in order to permit competitors to reasonable provide goods and services to its consumers.[111] It is essential to note that this doctrine is required to be used cautiously and not to arbitrarily intrude an IP holder's right to its innovation. In order to incorporate the set standard in Indian Competition Law it is required to consider the precedent set by the European Court of Justice.

In establishing dominance, it is required to show that the firm has economic stronghold in the market, as opposed to monopoly power.[112] It is necessary to establish that the firm has a "special responsibility" no to refuse its license in order to prevent a distortion or create an adverse effect on Competition.[113] Further, there has been to strict term defined to explain the nature and width of "essential facilities".[114] However, it is necessary for Indian Courts to establish the extent at which certain commodities should be included under the said doctrine.

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[110]Chiripa, Anca Daniela, *Access to Essential Facilities- A Comparative Competition Law Perspective of Share Use and Recent Margin Squeeze Cases,* 1 COMPETITION SURVEY: STUDIES, RESEARCH AND ANALYSIS,32-41 (2011).

[111]Daniel Glasl, *Essential Facilities* Doctrine *in EC Anti-Trust Law: A Contribution to the Current Debate*, 4 ECLR, 305-312 (1994).

[112]It is not required to show that the firm has a certain percentage of market share to inculcate a dominant position in the relevant market. In accordance with Indian Competition Laws, it is required to prove that conditions are met under Section 19, other factors are required to take into concern while establishing a dominant position in the market. See Brain A. Facet and Dany H. Assaf, *Monopolization and abuse of Dominance in Canada, The United States and The European Union: A Survey*, 70 ANTITRUST L. J. 513 (2003).

[113]Nederlandsche Baden-Industrie Michelin v. Commission (Michelin 1), (1983) E.C.R. 3461.

[114]Cyril Ritter, *Refuse to Deal and "Essential Facilities": Does intellectual property require special deference compared to tangible property?*, 28(3), MARQ. L. REV.,1117-1118 (2005).

The test that should allow Courts to use this doctrine, has been firmly been established in the IMS Health Case.[115] The three conditions that require to be followed to order to apply "essential facilities doctrine" are:

i. The refusal to license is preventing the emergence of a new product for which there is a potential demand by the consumers;

ii. The refusal is arbitrary and not justified by an objective standard;

iii. The refusal will exclude any or all competition or will eliminate any or all competition in the secondary market.[116]

Indian Courts could read the doctrine with Section 4 of the Competition Act, which deals with abuse of dominant position. Indian Competition Law defines dominance with respect to "economic strength" as opposed to market monopoly, which is similar to European Union's understanding of dominant position.[117] It could read in the principle within Section 4, Explanation (a), which states that the abuse of dominance that effects its competitors or consumers or the relevant market in its favour, is prohibited.[118] However, the close has to keep a close scrutiny while determining the essential facility that is required to be licensed and the extent to which it could restrict or harm the IP holder's rights. It has to provide a strict balance between the rights of the IP holder and a proper functioning competition in the market.[119]

B. Integration of European Union Experience

The Competition Commission of India, being a recently formed body, could rely on the European Authority standards of regulating the tension between IPR and Competition laws. The laws in such major jurisdictions has developed over the years through judicial precedents which has

[115]IMS Health, *supra* note 74.
[116]*Id.*
[117]United Brands Company and United Brands Continental v. Commission, (1978) E.C.R. 207.
[118]Competition Act 2002, § 4 Explanation (a),
[119]Coco, *supra* note 101.

accommodated and protected both innovation and competition rights of small companies. The CCI could take guidance from the arguments that are framed by the European Commission while gauging the abuse of IPRs that have been granted to inventors/creators.

The language of the Competition Act of 2002, specifically Section 3, is broadly shaped on Article 82 of the Rome Treaty (presently Article 102 of the TFEU).[120] Even the definition of dominant position in the Competition Act has been imbibed as stated in the case *United Brand v. Commission* by the European Commission. Therefore, there is no substantial scope of development possible as far as legislation is concerned in relation to abuse of dominance.

The dominant position of an enterprise can be determined under Section 19(4) of the Competition Act in India. Once such a position is determined as per the criterion laid down, the CCI is required to determine the abuse in the exercise of IPRs. A few reports and analysis have indicated that CCI has been inconsistent while applying the economic principles for determining the abuse and analysing the market for such practice. It has been suggested that if a consistent approach is practiced by the CCI during their economic analysis, it will promote and encourage industries and companies for adapting a "pro-competitive business strategy"[121] that falls within the ambit of the Competition Laws of India.

Excessive pricing has been in conflict inherently since the development of IPR and Competition Law. Where a market faces a downfall in competition, there is a direct effect on the consumers as the price paid by them is not based upon the true economic value of the service/product. However, it has been difficult for assessing the practice irrespective of jurisdiction, thus India's competition authorities will therefore face a similar difficulty. Thus, the Competition bodies could apply the tests, discussed in the paper, that have been used in excessive pricing under the

[120]Shalaka Patil et al., *Competition Law in India – Jurisprudential Trends and the Way Forward*, NISHITH DESAI ASSOCIATES (Apr. 2013), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition%20Law%20in%20India.pdf.
[121]*Id.*

jurisdiction of European Commission. However, it is important to avoid a disparity where a very low margin is maintained always, as this would only dissuade investment. Thus, a "sustainable"[122] level of margin would serve the purpose.

VII. CONCLUSION

The growing importance of nexus between IPR and Competition laws are indisputable. The dispute between both the regimes has to be resolved in backdrop of furtherance and promotion of innovation and market stability. The protection provided by IPR is necessary to foster innovation among market player, however, it has to be within the boundaries provided by Competition policy. Neither of the two regimes should undermine the prominence of the other. The applicability of Competition laws towards exclusive right holders should be used cautiously in order to prevent erroneous precedent and proper competition in the market.

Indian Courts are at a nascent stage towards resolving issues regarding IPR and Competition law disputes. The Courts lack strict judicial precedents and appropriate judicial language in order settle disputes between both such regimes. In light of the normative stage in India, it is opined that it should adhere to the TRIPS Agreement in order to create an edifice to resolve disputes regarding both such regimes. Further, the Agreement is not comprehensive to create a strict set of tools to provide a resolute guidance towards each case of anti-competitive practice with respect to IPR. However, it should allow Courts to create a structure of balancing IPR and Competition laws in the backdrop of achieving social and economic goals.

In order to create an opposite balance between both such regimes, it opined that Indian Courts should inculcate the precedent laid down in EU. Further, the judicial decisions should provide a definite applicability

[122]Amitabh Kumar, *Excessive Pricing – An abuse of Dominance*, 88 COMPETITION LAW REPORTS (2011).

of Competition laws with respect to IP holders. The judicial texts should suggest that the intervention of Competition laws with respect to IP holder's rights are with respect to the exercise of such rights and not its existence. Lastly, the Courts should provide a clear demarcation between the two regimes and provide decisions in the framework of achieving consumer welfare, promotion of innovation and economic growth.