COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: AN INTERFACE

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The judiciary has always struggled in the interpretation of different laws holding authority over a concurrent issue. A conflict arises when one law seeks to protect the rights of an individual and the same is questioned and inhibited by a different law, the general rule is that a special law will always prevail over the general law but what if the conflict is between two special legislations, this lacuna in the society may cause major issues and difference of opinions amongst the society. It is the duty of judiciary body to ensure clarity in the interpretation of laws. The question to be discussed in this article is not determining the superiority of either Competition Law or Intellectual Property (IP) Laws, but to discuss a unique case of whether IP can be validly defended against anti-monopolistic laws and how the judiciary has played a major role in clarifying the contest between these two laws. One can understand the exact nature of relationship of IP Law and Competition Law by reading this research article.

Competition law and IP law are enacted with different objectives. Competition Law regulates anti-competitive activities for the better functioning of the market whereas IP laws provide monopolistic rights to the holder of intellectual property.[2] This inconsistent working of both the laws create a stalemate, which this article seeks to address.

Intellectual property rights (IPR) are derived from the concept of reward theory, meaning the law seeks to reward the inventor for disclosing his invention to the public at large. IPR is a tool that grants monopolistic rights to the holder, thereby deterring others from offering competing products and hence, reducing the spirit of competition in the market.[3]

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[2] K.D Raju, *The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India*, 18, Journal of Intellectual Property Rights, 111, 112, (2013), available at http://nopr.niscair.res.in/bitstream/123456789/16395/1/JIPR%2018%282%29%20111-122.pdf, accessed on 03/04/2020

[3] N. Maheshwari, *India: Conflict Between Intellectual Property Law And Competition Law: Critical and Comparative Analysis*, Mondaq (25/03/2019), available at https://www.mondaq.com/india/cartels-

This creates a conflict on the applicability of the two laws. However, the Competition Act, 2002 (hereinafter referred to as 'the Act') has endeavoured for achieving harmony among the two laws by not eliminating the dominance achieved by a person due to his IPR, but by prohibiting the abuse of such dominance.[4]

The objectives of competition law are different from that of IPR as the former strives for economic growth and consumer welfare. Competition law, for achieving its objectives, lays down constraints on the rights that arise out of private property.[5]

J.M. Clark, in 1940, emphasised on the three key features of a workable competition:

- There must exist a rivalry amongst sellers.
- The buyers should have a free option for making purchases from alternate vendors.
- The sellers should make efforts to exceed the attractiveness of their products to gain a competitive advantage.[6]

Hence, this clearly enlightens the fact that IPR protects rights on inventions whereas the competition law strives to protect the healthy competition thriving in a market.

For a long period of time, both the laws have operated harmoniously with regard to each other. A crucial point to be kept in mind is that the concern of competition law is not with that of the existence of IPR, but its exercise.[7]

However, the two areas of law are also seen to be locking horns. IPR may grant a monopoly status with respect to pricing, which poses a great challenge in developing countries which may lack alternatives to IPR protected products.[8]

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monopolies/807504/conflict-between-intellectual-property-law-and-competition-law-critical-and-comparative-analysis, accessed on 03/04/2020

[4] *Ibid*

[5] N.Singh, *Competition Law & Intellectual Property Rights Interface*, KSLR Commercial & Financial Blog, available at https://blogs.kcl.ac.uk/kslrcommerciallawblog/2018/07/09/competition-law-intellectual-property-rights-ipr-interface/, accessed on 03/04/2020

[6] J.M. Clark, *Toward a Concept of Workable Competition*,30, The American Economic Review, 241, 244 (1940), https://www.jstor.org/stable/1807048?seq=1, accessed on 03/04/2020m

[7] *Competition Law and IPR- Friends or Foes?*, Khurana & Khurana, https://www.khuranaandkhurana.com/2013/02/16/competition-law-and-ipr-friends-or-foes/, accessed on 04/04/2020

Section 3 of the Act, 2002, deals with anti-competitive agreements. These include horizontal trade agreements such as agreement to limit production or supply, price fixing, rigging of bids, allocation of market area and vertical agreements such as tie-in arrangements, exclusive supply/distribution arrangement, resale price maintenance and refusal to deal. Moreover, cartels between persons, association of persons, enterprises and government are also included in the realm of anti-competitive agreements.[9]

However, section 4 of the Act is read with section 3, which lays down emphasis on abuse of dominant position. Section 4 does not bar the dominant position of a person but rather the abuse of such a position. Hence, the holders of monopolistic power due to exclusive access of IP are not barred by the competition law although the abuse of such power is strictly prohibited.[10]

To understand abuse, one needs to understand the term 'dominance'. A person can be said to hold a dominant position if he has the power to operate independent from the prevailing forces of the market or the person holding a dominant position can affect the competitors, consumers or the relevant market in their favour.

The abuse of such a position includes imposition of unfair or discriminatory conditions or price in the sale and purchase of goods or services, creating barriers to the entry into market, gaining advantage in another market by using the dominant position enjoyed in present market and predatory pricing.[11]

In India, IP laws are given overriding powers over the competition act, that is to say where the exercise of IPR produces an anti-competitive effect, IPR provides for licensing to curtail the anti-competitive effect and one must note that the role of Competition Commission of India (CCI) is nought in such a case.

However, the CCI watchdog overrides all acts while handling market abuse at a later stage. Moreover, the Act also keeps a keen watch on mergers and amalgamations, which have the

[8] *Ibid*
[9] *Ibid*
[10] *Supra 1*
[11] *Provisions Relating to Abuse of Dominance*, Competition Commission of India, https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf, accessed on 07/04/2020

effect of creating a dominant position in the market. The idea is not to prohibit but to regulate such synergies for a better and healthier competitive market.

The Act incorporated its provisions in compliance with the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), 1995. Section 3(5) of the Act, on one hand, grants the blanket exception to IPR for promoting innovation in the market and on the other hand, by the powers vested in section 4, regulates the practices which cause an appreciable adverse effect on the market by abuse of dominant position, thereby creating a perfect synchrony between the two independent laws.[12]

The judiciary has endeavoured to interpret the laws harmoniously by way of various pronouncements. In the case of *Aamir Khan Productions Pvt. Ltd.* v. *Union of India, it was held that the CCI shall have the power to deal with IP cases and the Act shall have a superior power in cases dealing with IP.* [13]

Moreover, FICCI Multiplex Association of India filed against United Producers/Distributors Forum (UPDF) and others for forming cartels in order to raise the revenue. UPDF refused to deal with multiplex owners, whose business entirely dependent on films. [14]

Hence, this deal became anti-competitive in nature. The UPDF had indulged in limiting and controlling the supply of films in the market, constituting a violation of section 3(3) of the Act. CCI directed the Director-General (DG) to inquire into the matter. After DG reported it to be a cartel, CCI issued a show-cause notice to UPDF towards which no reply was given.[15]

Au contraire, UPDF approached the Bombay High Court, contesting the jurisdiction of CCI and claimed that films are subject to copyright protection and therefore, they come under the jurisdiction of the Copyright Board. However, the court dissented with this argument and conferred CCI the jurisdiction.[16]

[12] Ss. 10(b), 12A, 12B, The Monopolies and Restrictive Trade Practices Act, 1969
[13] Aamir Khan Productions Pvt. Ltd, Mumbai & Anr. V. Union of India, AIR 2011 (NOC) 143 (BOM) ; 2010 (6) AIR BOM R 80
[14] FICCI Multiplex Association of India v. United Producers/Distributors Forum, Case No. 1 of 2009 (Competition Commission of India, 25/05/2011)
[15] *Ibid*
[16] T. Sanyal, Conflict of Intellectual Property Rights in Competition Law, Libertatem (15/02/2015), http://libertatem.in/articles/conflict-of-intellectual-property-rights-in-competition-law/, accessed on 07/04/2020

In an earlier case of Kingfisher v. Competition Commission of India, the court held that section 3(5) of the Act, does not restrict the right of any person to sue for infringement of IPR. Although, all defences capable of being raised before the Copyright Board can also be raised before CCI.[17]

In the case of Vallal Peruman and Ors.v. Godfrey Phillips India Ltd., the court held that the trademark owner has the right to use the mark in reasonable manner. In case a trademark is abused, it would amount to unfair trade practices of trademark. CCI has stated, "All forms of intellectual property have the potential to violate the competition."[18]*According to competition law, IP is considered a tangible property. So, CCI has the power to adjudicate on IP related matters.*

The judiciary has taken efforts to harmoniously construct a common path between the two laws. It can be rightly said that the objectives of both the laws cannot be achieved in isolation of each other.

A detailed analysis of both laws displayed that despite being two parallel legislations, they converge on grounds of consumer welfare and innovation. Although, CCI has been granted power to adjudicate upon the matter of IPR, IP can be rightly protected unless it constitutes an abuse, thereby ensuring encouragement to innovators and protection to the consumers.

[17] Kingfisher Airlines Limited & Another v Competition Commission of India & Others, Writ Petition No. 1785 of 2009, (Bombay High Court, 31/03/2010)
[18] Dr. Vallal Peruman v. Godfrey Phillips (India) Ltd., (1995) 16 CLA 201