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# REGULATION OF COMPETITION AND INNOVATION IN INDIA: EXPLORING THE JURISDICTIONAL ISSUES

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Prof Dr R Haritha Devi, Director, Research, Publications & Academic Affairs, The Tamil  
Nadu Dr Ambedkar Law University, Chennai

## ABSTRACT

The regulation of Competition and Innovation in India presents a complex interplay between various legal issues involving Competition Law and Intellectual Property Rights. A strong intellectual property regime encourages innovations and brings a sense of protection to the innovators. But as more innovations come to the market there must exist a fair market. Fairness in the market alone leads to better prices and availability of the products and services to the consumer. Competition Law maintains fairness in the market whereas intellectual property law gives exclusive protection to the innovators. The intersection of Competition Law and Intellectual Property Rights poses great challenges. Determining the boundary between the legitimate use of Intellectual property rights by the holders when they enter the market is the real challenge for the authorities. There is always a debatable discussion between these two regimes. Hence this paper tries to analyze the relationship between IP and Competition Law with special reference to the jurisdictional issues with the help of decided cases.

**Keywords:** Intellectual Property – Innovation – Competition Law – Jurisdiction – Fair Market – Consumer Rights.

## **INTRODUCTION**

Innovation means a new idea or method or the use of new ideas or methods. In today's world, consumers prefer only innovations as they get better products and updated technology. It is an innovation that helps in bringing better versions of the products and services to the market. The term 'innovation' is often confused with 'invention'. Many times, these two overlap each other. But a thin line of difference exists between the two. Invention is the creation of a new idea or ideas whereas innovation is the adding or turning of new ideas into reality. Innovation adds more value to the product which already exists. A strong intellectual property regime encourages innovations and brings a sense of protection to the innovators. But as more innovations come to the market there must exist a fair market. Fairness in the market alone leads to better prices and availability of the products and services to the consumer. Competition Law maintains fairness in the market whereas intellectual property law gives exclusive protection to the innovators. Hence the relationship between these two laws is a debatable issue in the current scenario. Hence an attempt has been made in this paper to study the relationship between competition law and innovation from a consumer welfare perspective and the jurisdictional issues between the Competition Commission and the authorities regulating intellectual property rights.

## **INTELLECTUAL PROPERTY RIGHTS(IPR)**

IPR protects the innovative and creative capacity of the competitors and thereby grants better products and services to the consumer. Innovation is the key to any successful firm. It is adaptability and constant innovation that makes a company survive in the competitive market. Intellectual property rights allow an individual or a company to have exclusive rights over his ideas without the fear of competition from others for at least a specific period. The ultimate aim of granting such rights is to encourage innovation which will eventually lead to more and better products for the consumer. In other words, innovators or IPR holders are rewarded with a temporary monopoly by the law to recoup the costs incurred in the research and innovation process. As a result, IPR holders earn rightful and reasonable profits, so that they have incentives to engage in further innovation.<sup>1</sup> The main legal instruments that protect Intellectual Property Rights in India

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<sup>1</sup> Pham, Alice (2008), 'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?', CUTS International, Jaipur, India

are Patent, Copyright, Industrial Designs, Geographical Indications, and Trademarks. Some of the special protections are granted in the form of plant breeders' rights, and integrated designs. Traditionally the rationale behind granting IP rights is that they promote innovation by granting an assured economic benefit out of the new products or services. It also encourages new innovators in the market without the fear of their products being imitated by others without their permission. So, IP rights grant exclusive rights to the holder which can be enforced by him for his gains by him or by assigning the rights to others.

## **COMPETITION LAW**

The market generally means the place where buyers and sellers meet for the exchange of goods. The market implies that there is freedom for the buyers and sellers to exchange their goods and services without any interruptions. As Pyle G.F. puts it, "Market includes both place and region in which buyers and sellers are in free competition with one another." A fair market is the basis for better protection for the consumers. In a market where there is free and open competition, consumer has more and better choices at a better price. This is the main objective of competition Law.

Businesses exist to satisfy the customer; the latter becomes the focal point in marketing. That's why it is said marketing ends where the goods and services supplied by the marketer satisfy customer wants.<sup>2</sup> The main aim of competition law is to enhance economic improvement using competition as one of the means to create a market that will respond to the needs of the consumers.<sup>3</sup>

## **CONSUMER PROTECTION AND COMPETITION LAW**

Consumer protection has been the subject matter of concern from the very early times. The early common law has tried to protect the consumers by fixing tort liability. In India, we can see a plethora of legislation protecting the consumers. A breakthrough was the enactment of the Consumer Protection Act of 1986 with the sole objective of giving an effective remedy to consumers. After the new economic policy of 1991 when India was marching towards globalization consumer protection is even more a difficult task. In today's globalized world, Indian

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<sup>2</sup> Dr. L. Natarajan, 'Marketing', Margham Publications, Chennai, 2016, p. 1.9

<sup>3</sup> Dr. H.K. Saharay, Textbook on competition Law, Universal Law Publishing, Delhi, 2016, p.87

consumers have a variety of choices not only from Indian companies but also from multinational corporations. Today consumer protection needs to be thought of holistically. It is essential that there is a need for legislation that will protect all the stakeholders in the market and thereby consumer is also protected.

Competition Law which came into force in 2002 has expanded the definition of ‘consumer’ beyond what is stated in the Consumer Protection Act 1986.<sup>4</sup> Sustaining competition is the best means to achieve the goal of providing the common man with the widest range of goods and services at a reasonable price. Wide choice at a reduced cost is the most important need for a consumer. Fair competition in the market is essential to achieve this objective. The Competition Act intends to provide a level playing field to the producers and make the market work for the welfare of the consumers.

The definition of ‘consumer’ under the Competition Act<sup>5</sup> has expanded to include all the market players. It encompasses the manufacturer or the producer within itself. The definition implies in itself that if the entire market is monitored for fairness, then the consumer is automatically protected. Assuming the market to be a pyramid the consumer stands on the top where all the other market players are step by step from downwards. Hence if all the market players are regulated the consumer is benefitted thereby. The definition in the Competition Act

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<sup>4</sup> Section 2 (d) Consumer Protection Act 1986 - “consumer” means any person who,—(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or(ii) [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person [but does not include a person who avails of such services for any commercial purpose]

<sup>5</sup> Section 2 (f) Competition Act 2002 - “consumer” means any person who—(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;

encompasses this point by expanding the definition of consumer including all market players. Another definition that implies the same point can be seen in the scope of the term ‘agreement’, as defined in the Competition Act. It is wide and extends to a mere ‘arrangement’, ‘understanding’ or ‘action in concert’, none of which need be in writing or enforceable by law. This broad definition of the term ‘agreement’ is no accident and was intentionally done to cover any form of understanding that cartel participants could have among themselves. The policy justification for such a broad definition also ties into the fact that cartels rarely exist in explicit contractual form, and it is difficult to find direct evidence in investigations of this kind. As a result, the CCI has tended to rely on various forms of circumstantial evidence, which is by nature more attainable (though not exact) to prosecute cartels and thereby protect consumer welfare.

## **ROLE OF CCI IN PROTECTING CONSUMER WELFARE**

Competition Commission of India while dealing with cases of anticompetitive agreement, abuse of dominance and combinations has expanded the scope of consumer protection within the competition law regime. The decisions of CCI in recent years explain this trend of consumer welfare as its goal. For example, In the *Cement Cartel* case,<sup>6</sup> the CCI found an agreement among various cement manufacturers on the ground that they were members of the Cement Manufacturers Association (CMA) and their participation at the CMA facilitated collusion among them. Specifically, the CMA provided cement manufacturers an opportunity to exchange sensitive price and production information with each other. The CCI was not persuaded by evidence showing that the government directed the collection of price and production data, as well as market share volatility, which generally counters a narrative of cartelization.

In the *Container Manufacturers' case*,<sup>7</sup> the CCI concluded on the balance of probabilities that an agreement existed, by relying on two pieces of circumstantial evidence: similar bids were submitted despite a variance in cost structures among container suppliers, and the fact that at least 10 of the container suppliers had common board members. Despite the lack of any direct evidence of an express agreement, the CCI found that the circumstances facilitated the possibility of information exchange. As a result, the CCI concluded that there was an agreement between the

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<sup>6</sup> *Builders Association of India v Cement Manufacturers Association & Ors*, Case No. 29 of 2010 (CCI).

<sup>7</sup> *In Re: M/s Sheth & Co and Ors*, Suo Moto Case No. 04 of 2013.

container suppliers. The CCI's practice marks a departure from the settled principle that evidence adduced, even if circumstantial, needs to be considered in light of the 'totality of circumstances' applicable to the particular case, and not piecemeal.

In the *Airline Fuel Surcharge* case,<sup>8</sup> the CCI found an agreement merely on the basis of the parties' inability to disprove that they were party to a cartel. Specifically, the CCI concluded that an agreement existed on the basis that the cartel participants were unable to provide any plausible explanation for parallel incremental increases in fuel surcharge rates to negate the existence of a cartel. In particular, the parties were unable to provide any evidence to support their contention that they determined their respective fuel surcharge independently. This led the CCI to conclude that a clandestine 'understanding' among various airline operators existed. The nature of evidence used by the CCI to find the existence of an agreement, seems to suggest that the burden to prove an agreement, which is for the CCI to meet, shifted onto the parties (ie, airlines) to prove that there was no agreement between them.

The decision of the above cases by CCI shows that it is deciding cartel cases even without direct evidence keeping in mind the welfare of the consumer in such cases. If direct evidence is sought then the decision would have been otherwise. It is a worldwide accepted notion that cartels have negative effects on consumers. If we take the example of any of the international or national cartels, we can find that the effect of such cartels is an extraordinary price high of the respected goods or services. There are at least 30% to 40% price high that occurs due to the formation of any cartel. The people have to pay that high amount to avail of that respected good or service, though actually, those goods cost less than what the consumers have to pay. So, it is considered as a great detriment to the consumer welfare. Hence the CCI's approach to such cases keeping in consumer welfare is highly commendable.

The CCI's approach though is being contested before the Competition Appellate Tribunal (COMPAT), which has far more exacting standards on the nature of the evidence used to find the existence of a cartel agreement. In October 2015, in the *Andhra Pradesh Films* case,<sup>9</sup> COMPAT

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<sup>8</sup> *In Re: Express Industry Council of India*, Case No. 30 of 2013.

<sup>9</sup> *Andhra Pradesh File Chamber of Commerce v M/s Cinergy Independent Film Service Pvt Ltd & Ors*, Appeal No. 15 of 2013.

took exception to the evidence relied on by the CCI to come to a finding of a violation of section 3(3) of the Competition Act. COMPAT expressly observed that the lack of evidence collated by the DG and the CCI led the CCI to arrive at a 'perverse' finding of contravention. This contravention was arrived at without requiring the complainant in the particular case to show that there was, in fact, any anticompetitive conduct by the alleged members of the cartel. This demonstrates that COMPAT is inclined to apply a more robust approach to analyzing evidence before it, even while the CCI on the other end has made it increasingly difficult for companies to defend cartel charges.

### **IPR AND COMPETITION LAW – INTERFACE**

Competition law and IP regime interfaces in many circumstances. At first sight, it appears that competition law exempts IP holders from its regime. Section 3(5) of the Competition Act<sup>10</sup> provides that section 3 which deals with anticompetitive agreements does not apply to IPR holders. But it is not so. It is seen that whenever the IP holder enters the market and there is a misuse of rights granted to him then competition law will apply. In other words, exceeding rights granted to IPR holders will entertain competition law. So, section 3(5) cannot be treated as a complete exception to IPR holders.

The interface between IPR and Competition Law is seen in various situations. The primary among them is when there is an abuse of IP rights by the holders. Companies having IP rights may misuse it by pooling their rights which is generally called patent pooling to block the competition of their competitors. Another major area of abuse of IP rights is patent holders refusing to license their Standard Essential Patents (SEPs) in fair, reasonable, and non-discriminatory (FRAND) terms. Issues can also arise when patent holders charge excessive royalties or refuse licenses which

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<sup>10</sup> Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:

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

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

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

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

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

impairs innovation and restricts competition. Cross-licensing between competitors holding IP rights also can reduce competition which is harmful to the consumers.

The CCI while dealing with cases under this section has taken the above stand in almost all the cases. There can be no right that is absolute and without restrictions. The rights granted under IP laws would be meaningful and lasting only when an IP holder can take legal action for the protection of his rights. That is precisely what is provided under section 3(5) of the Competition Act as, “the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him.”

In its decision passed on 30 March 2016, the High Court of Delhi<sup>11</sup> upheld the order passed by the CCI directing an investigation into the allegations of abuse of dominance against Ericsson concerning its action as a standard essential patent holder. The court concluded in this case that there is no inconsistency between both regimes and CCI has jurisdiction even if it dealt with an IP issue. The same can be seen in the case of *Amir Khan Productions Private Limited v. Union of India*<sup>12</sup>. The petitioner in this case challenged the jurisdiction of CCI on the grounds of lack of jurisdiction. But the court held that section 3(5) provides that section 3(1) shall not take away the right to sue for infringement of patent, copyright, trademark, etc. all the defenses that can be raised before the respective authorities of IPR can also be raised before the CCI. Competition Law does not bar the application of other laws. In *Hawkins Cookers Limited v. Murugan Enterprises*,<sup>13</sup> the High Court of Delhi held that a well-known mark on the pretext of being prominent and well-known cannot be left unchecked to create a monopoly in the market by indulging in practices of controlling the market. The same would fall under the category of abuse of dominance and therefore prohibited.

In the case of *Monsanto Holdings Pvt. Ltd, & Others*<sup>14</sup> the issue before the Delhi High Court concerning the overlapping of the jurisdiction between the regulatory authorities under the

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<sup>11</sup> <http://competitionlawblog.kluwercompetitionlaw.com/2016/07/13/ericsson-v-micromax-a-kick-start-to-the-sep-frand-antitrust-jurisprudence-in-india/> the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000) accessed on 1.09.2019

<sup>12</sup> 2010 (112) Bom LR 3778.

<sup>13</sup> 2008 (36) PTC 290 (Del).

<sup>14</sup> Reported in <https://indiakanoon.org/doc/158839264/>



Patent Act and the Competition Act. The petitioners, in this case, have alleged that the orders passed by the CCI against MMBL are not maintainable on the ground that the CCI does not have jurisdiction to examine the issues raised before it as they relate to the exercise of rights granted under the Patents Act. It was submitted by the petitioners that the issues relating to abuse of dominance are required to be determined by the authorities under the Patent Act namely the Controller of Patents and without effective findings from the controller the CCI had no jurisdiction to proceed further. After elaborate discussion, the Court concluded that there was no conflict between the Patent Act and the Competition Act, and therefore the jurisdiction of the CCI to entertain complaints regarding abuse of dominance concerning patent rights could not be excluded.

## **CONCLUSION**

An analysis of cases dealt with by CCI reveals that the relationship between IP and competition law is complimentary and not conflicting. Both regimes are aiming at consumer welfare as their goal. A true understanding of both the legislation and the interpretations given by the respective authorities would help in the smooth functioning of the ultimate benefit of the consumer. A lack of clarity in section 3(5) of the Competition Act has led to the misunderstanding that competition law excludes intellectual property rights. That is precisely the reason why in many of the cases involving IP rights before the CCI the jurisdiction of the CCI was questioned. If there is an issue of anti-competitive agreements, abuse of dominance, or Combinations the authority to decide upon it may be granted exclusively to the CCI so that the delay that is caused in deciding who has the jurisdiction to decide the case may be avoided. Presently it is seen in some of the cases that the companies who were alleged violations under the Competition Act have taken up jurisdiction as an issue and the High Courts had to decide jurisdiction leaving out the main issue of violations under the Competition Act. This can be avoided by amending section 3(5) giving a complete jurisdiction to decide on competition issues exclusively to CCI even if it had Intellectual Property Rights involved in it. This will bring in more confidence among the consumers and that creates more innovations in the market.