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**Critical Analysis of Interface between Competition Law and Intellectual
Property Rights with Special Reference to Copyrights in India**

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The research paper focuses on the interface between Copyright (Intellectual Property Rights) and Competition Law in India. Both these aspects of law have occupied distinct positions in law and generally contradict each other. Competition Law regulates practices which have anti-competitive effect on the market and also which affect negatively on the fair functioning of the market; whereas IPR promotes exclusive rights of the author (creator) over the content and also promotes monopoly over the content; in this sense the two concepts of law contradict each other fundamentally.

The foundation of case laws and jurisprudence regarding the interface of Competition Law and IPR are still developing and need to be concrete, thus there is a need to refer and analyse the jurisprudence in the US and the European Union.

The first part of the paper shall deal with definitions, interpretation and overview of competition law and IPR in India. The following chapters shall compare the provisions of the EU Regulations, laws in USA and laws in India. The paper shall conclude with suggestions and guidelines which can be adopted from other jurisdictions.

Key Words: Intellectual Property Rights, Competition Law, European Union Regulations

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CHAPTER 1

Introduction

There are two sets of law which have recently expanded and developed in 21st century, which are Competition Law & Intellectual Property Rights [hereinafter referred to as IPR]. These fields of law work dynamically in their own spheres. But when they intersect, they have its own principles which at some instances create conflict between the interest of the concerned parties.

Competition Law is a set of rules seeking to maintain the market competition by synchronizing anti-competitive conduct of companies in the market. The competition law approaches matters relating to anti-competitive conduct of the enterprises' by a combination of punitive, remedial and preventive measures.²⁶⁶ Competition law plays a vital role in conduction of a fair market. It has assumed great importance in regulating markets both national and internationally. It is a law which protects consumers' interests and ensures freedom of trade and practices worldwide. Internationally new forums have been constituted which governs competition law apart from United Nations Conference on Trade and Development (UNCTAD). The principle objective of the law is to protect and maintain fair market competition.

The Competition Commission of India (herein referred to as CCI) was constituted under the Competition Act, 2002. The main aim of the commission is to prohibit malpractices adversely affecting market competition. Moreover, it was inactive with the purpose to sustain a fair market competition as well as to protect consumers' interests. The Hon'ble Supreme Court in the writ petition case of *Brahm Dutt V. Union of India*²⁶⁷, stated the qualification of the members and the chairman of the Commission. It comprises of a Chairperson and minimum two and not more than six other members to be appointed by the Central Government²⁶⁸. It is established under Section 7(1) of Competition Act, 2002.

Intellectual properties are the properties created out of human mind. Rules and regulations governing such properties are called Intellectual Property Rights. It is a right provided to the owner of the property in respect of it's ownership, protection and security. The term intellectual property connotes a specific legal meaning itself but nowadays it's abbreviations such as IP or

²⁶⁶ Competition Commission of India, Annual Report 2015/16.

²⁶⁷ AIR 2005 SC 730; (2005)2 HC 431.

²⁶⁸ The Competition Act, 2002 No. 12, Act of Parliament, 2003 (section 8)

IPR has become modern names for the same. Random House Webster's Unabridged Dictionary defines the term "intellectual property", thus: Property that results from original creative thought, as patents, copyright material and trademarks.²⁶⁹ IP is divided into two branches: 1] Industrial Property, and 2] Copyrights and neighbouring rights.

Industrial properties includes Industrial designs, Patents, Layout designs, Trademarks, geographical indications etc. Whereas Writings, Dramatic works, Musical Works, Painting and Drawings, Audio – Visual Works, Architectural works, Photographic works, Sound Recording, Sculptures, Actors and Singers, performance of musicians, broadcasts etc are included under Copyrights and neighbouring rights.

In simple terms, copyright means a right acquired by an individual over his work as a result of a person's intellectual labour. The main objective of this law is to provide protection to individual's skills, labour over a work. "According to Oxford dictionary the word copyright was derived from the expression 'copier of words.'" The word copyright has been explained in Oxford English dictionary as an exclusive right given by law for a certain term of years to an author, composer etc. (or his assignee) to print, publish or sell copies of his original work. According to Black's Law Dictionary copyright is the right in literary property as recognised by positive law. An intangible incorporeal right granted to the author or originator of certain literary or artistic production whereby he is invested for a specific period with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

The copyright law in India has been revised several times to suit the needs of the creators over several decades, often based on changes in the international conventions. The important question which has been at dispute for several years is regarding the subject matter of protection under the scope of copyright law. The extent of safeguarding shall extend to the following amongst many others such as, literary works (either original or translation), dramatic works, musical works, artistic work, films, sound recording, computer programs (including software), compilation of books. The fundamental principal behind the section 14²⁷⁰ of the present Act was to promote creation of original and authentic content either in the context of texts, translations, audio-visual creation, art work or even digital like software codes etc. The

²⁶⁹ Random House Webster's Unabridged Dictionary.

²⁷⁰ The Copyright Act, section 14, 1957

provision promotes originality and protects the creator. In a way this provision also promotes and protects the creator's economic rights.

In India, copyright comes into existence automatically that means as soon as the work is created, the right comes into existence. According to Section 45 of Copyright Act, 1957 registration is optional and not mandatory. Works published before the inception of the present Act can also be registered provided the work still enjoys copyright. Copyright is negative in nature as it imposes duty on others to prohibit exploitation of others work for their benefit. The general principle on which the copyright law works is that “protected works cannot be availed without the consent of the owner of the rights”²⁷¹. The Berne Convention is an international agreement that governs copyright. It was enacted in 1886 in Berne, Switzerland. India became it's member in 1928.

CHAPTER 2

Overview of Laws

The decade of 80's and 90's has been a crucial one for India, especially due to enactment of new economic policies and opening of Indian market to the world. It was a period of transaction, where the government has to promote Indian industries in the world. The new economic policies of 1991 which brought about Liberalisation, Privatisation and Globalisation which is abbreviated as LPG. It was observed that as the competitiveness of the market has increased a competition law was the need of the hour. In 1959, the first competition law was enacted and is known as Monopolies and Restrictive Trade Practices Act (herein referred to as MRTP). The Act enforced on 1st June, 1970. But with the changes in the market structure, nature of business, economy etc., there was a need to replace the existing Act and hence the Competition Act of 2002 was enacted. Consequentially the Government of India formed a committee under the chairpersonship of Mr. SVS Raghavan (known as “Raghavan Committee”) to draft a competition law in accordance with international conventions. In keeping with the report, a draft of Competition Law was formulated and introduced to the Government in the year 2000 and the Bill was presented in the Parliament which was passed

²⁷¹ Alka Chawla, Law of Copyright: Comparative Perspective (1st Edition, Lexis Nexis, 2013).

in 2002 and the act was called as Competition Act of 2002 and was enforced from September 1, 2009 and thus repealed MRTP Act.

As per Section 7(1) of Competition Act, 2002, a commission was established which is to be known as Competition Commission of India. The constitutional validity of the commission was questioned in *Brahm Dutt V. U.O.*²⁷², and wherein Section 8 of the aforementioned act was put under the scanner. The Apex Court refrained from delivering any judgement on the issue and further observed that one should look at the amendments and then question the issue of constitutionality. Under Competition (Amendment) Bill, Competition Appellate Tribunal was established which is a three member quasi-judicial body and it was enacted in the light of the *Brahm Dutt*²⁷³ case.

Section 3 of the Act deals with the anti-competitive agreement. Section states that “agreement between enterprise or associations or enterprises or person or association or persons in relation to production, supply, storage, distribution, acquisition or provision of services or control of goods which causes or is likely to cause an appreciable adverse effect of competition are known as anticompetitive agreement.”²⁷⁴ Such agreements are prohibited by law. This agreement is of two types: vertical agreement and horizontal agreement.

“*The abuse of Dominant Position*” is contrary to the objectives of the Competition Act and thus prohibited by section 4 of the act and it is defined under section 4²⁷⁵ of the Act. As per the definition in the act, any enterprise holding a position of power in any relevant market, which allows it to function as independent of the factors in the market such as competition and consumer interests, and which affect the competition is known to hold “*Dominant Position*” in the said relevant market. For instance, if an enterprise by the name XYZ holds a dominant position in a relevant market, it has the power to control the dynamics of the market and thus cause imbalance to competition in the said relevant market.

The concept of IPR is borrowed from West. The very first law passes in relation to IPR was the Indian Trade and Merchandise Marks Act which was enacted in 1884. It was followed by Indian Patent law in 1856. It was some of the first Indian laws to be enacted and was followed by a series of related to IPR. These include Indian patents and Designs Act, 1911, Indian

²⁷² AIR 2005 SC 730; (2005)2 HC 431.

²⁷³ *Brahm Dutt v. Union of India*, AIR 2005 SC 730; (2005)2 HC 431 (India)

²⁷⁴ The Competition Act, section 3, 2002.

²⁷⁵ The Competition Act, section 4, 2002.

Copyright Act, 1914. The Trade and Merchandise Marks Act of 1958 and the Indian Copyright Act of 1957 replaced the Indian Merchandise Marks Act and Indian Copyright Act respectively. The then government formed a committee under the chairpersonship of Justice Rajagopala Ayyangar. The committee was called as Justice Rajagopala Ayyangar Committee (RAC). The committee was constituted to revise the existing patents and designs laws. In 1959 a report was submitted by the committee which stated fine balance between the ideals of the constitution. It also provided for patenting of drugs. It mainly outlined the policy behind the Indian patent System. India has ratified both World Intellectual Property Organization (WIPO) and World Trade Organisation (WTO).

The law governing copyright in India is the Copyright Act, 1957. The said Act was amended in 2012. Section 16 of the Act specifies that any person shall not be entitled to copyright or any right similar to the latter in the areas of any artistic work, literary, dramatic, musical, irrespective of the status of the publication , otherwise than under and in accordance with the provision of this statute.²⁷⁶

CHAPTER 3

Inter-Relation between Copyright and Competition

The most common concern in the area of competition law is the possible violation of the law due to the existence of intellectual rights such as copyright, trademarks, patents, geographical indications (GI). IPR provides an owner with the right to protect and sell his property which in turn provides monopoly to the owner whereas competition law aims to establish a fair competition and restricts monopoly of any particular enterprise in the market. Such right holders mere rely on this law as it encourages more innovation and competition in the market.

The Competition Act 2002 has broadly taken into consideration the principles of IPR at the time of formulation of the provisions of the act and it does not exclude the dominance achieved by a person due to such IP rights.²⁷⁷

²⁷⁶ Gramophone Company of India Ltd. V. D.B. Pandey (1984) 2 SCC 534 (India)

²⁷⁷ Best IT World India Private Limited V. M/s Telefonaktiebolaget L M Ericsson (Publ) (CCI)(India), (2016) 124 CC 0519

Some of the notable judgements of Indian courts on interface between IPR and Competition Laws are following:

*Aamir Khan Productions Private Limited V. Union of India*²⁷⁸, the High Court of Bombay has held that all the matters pertaining to Competition Law and IPR falls within the jurisdiction of CCI ²⁷⁹. In another case, the Commission has held that IPR is a statutory right guaranteed by the law and does not have a sovereign status.²⁸⁰ In *Union of India V. Cyanamide India Limited & Anr.*²⁸¹, the Supreme Court has held that charging huge amount on life saving drugs falls within the scope of price control and the Competition Commission exercises jurisdiction over such matters.²⁸² In the landmark case, the Apex Court reiterated its previous judgements and observed that though the copyright holder enjoys full monopoly but it is not absolute in the sense that if such monopoly hampers the functioning or competition of the market it will be regarded as in violation of the competition law and a reason for cancellation of the license. ²⁸³

Section 3(5) of the Competition Act

Act, 2002 provides the reasonable conditions that are necessary to protect the IPR conferred by the following statutes, would not constitute anti-competitive agreements. It states that:

“5. *Nothing contained in this section shall restrict—*

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

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

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

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

²⁷⁸(2010) 112 Bom L R 3778

²⁷⁹ Ibid

²⁸⁰ Kingfisher V. Competition Commission of India, Writ petitions no. 1785 of 2009(India)

²⁸¹ AIR 1987 SC 1802

²⁸² Ibid

²⁸³ Entertainment Network (India) Limited v. Super Cassette Industries Ltd., 2008 (5) OK 719

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

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

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

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.”²⁸⁴

The term ‘reasonable conditions’ in clause (i) of Section 3(5) has not been defined or explained in the present Act. In simple terms it means that if any unreasonable conditions are attached to IPR then the Section 3 will be applicable that means if the licensing arrangements affect the prices, varieties and quantities of any commodities and services then it will fall under Competition Law. As per the reports published by the commission, the CCI is authorized to question and investigate into the conditions which obstructive in the IPR agreements.²⁸⁵ The Commission is empowered to impose penalty upon parties to such agreements under Section 27 and 28 of Competition Act, 2002.

In the case of *FICCI Multiplex Association of India V. United Producers/Distributors Forum*²⁸⁶, it was contended in this case that the alleged anti competitive agreement was for the purpose of protecting the rights of producers/distributors and is covered under Section 3(5) of the Competition Act, 2002. It was observed by the commission that right guaranteed under the Copyright Act, 1957 is not an absolute right. It further observed that Section 14 of Copyright Act, 1957 has to be read in line with provisions of Competition Act. It is commonly understood that copyright in works such as cinematography, film and sound recordings are limited in nature as compared to rights in primary works like literary, dramatic or musicals.²⁸⁷ For the purpose of the present case the Competition Commission has relied on the observation made by the Delhi High Court in the case of *Gramophone Co of India Ltd V. Super Cassette Industries Ltd*²⁸⁸, where the commission held the copyright as a statutory right.

²⁸⁴ The Competition Act, section 3(5), 2002

²⁸⁵ Intellectual Property Rights under the Competition Act, 2002, A Quick Guide published by Competition Commission of India, New Delhi, pp. 3-8.

²⁸⁶ 2011 Comp LR 79 (CCI).

²⁸⁷ Ibid

²⁸⁸ ILR (2010) Supp (5) Delhi 656.

The Delhi High Court in the case of *Microfibres Inc. V. Girdhar & Co*²⁸⁹, has held that the legislative intent was to grant a higher protection to pure original artistic work such as paintings, sculptures etc., and lesser protections to design activity which is commercial in nature.²⁹⁰

In the landmark case of *Shamsher Kataria V. Honda Siel Cars India Ltd*²⁹¹, observed that though the registration of IPR is compulsory, same registration does not automatically empowers a company to seek exemption provided u/s 3(5) of the Act, 2002. The Commission further stated that an important criteria for the determination of availability of the exemption u/s 3(5)(i) is to examine if the conditions were enforced by the holder of such rights can be termed as an “*imposition of a reasonable condition*, as maybe required for safeguarding any of his rights.”²⁹²

CHAPTER 4

Other Jurisdictions

EUROPEAN UNION

The interface between IPR and Competition Law in the European Union (herein referred as EU) is outlined in the preamble of the Technology Transfer Guidelines issued by the European Commission (herein referred as EC). Notably the Article 101 of the Treaty on the Functioning of European Union(herein referred as TFEU) provides for the applicability of the EU Competition Law to agreements aimed at restricting market competition. Article 102 of the same treaty sanctions violation of a dominant position and also the merger regulation.²⁹³ There

²⁸⁹ 128 (2006) DLT 238

²⁹⁰ Ibid, Nandu Ahuja vs. Competition Commission of India & Anr. (17.01.2014 - COMPAT) : MANU/TA/0003/2014 (India)

²⁹¹ 2014 Comp LR 1 (CCI).

²⁹² Ibid.

²⁹³ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (The “Merger Regulation Act”), OJL 24, 29.01.2004, p.1-22.

is a move to the intervening approach from a liberal approach in the area of IP law in relation to licensing agreements in the European Courts.²⁹⁴

UNITED STATES

The development of competition in the states started before any other jurisdictions. In nineteenth century, America enacted anti-trust laws in response to unfair business practices by the corporate enterprises, to control such market competition and inflation. Since then the laws have been evolved to prohibit engaging in huge range of anti-competitive conduct of corporate including anticompetitive mergers and joint ventures. The Sherman Act regulated the market competition as it is applicable to both US companies and Non-US companies operating business outside. With the change in market circumstances and increasing competition the Department of Justice has created zones known as safety zones which provides no imposition of the restrictions on Licensing agreements unless and until it adversely affects the market.

In America, copyright law primarily falls in the domain of federal law; however, the states (individual) have their own state laws concerning copyright. The State Copyright legislations are limited in nature as it exists within a confined space, i.e., within the state constrained by other factors such as the federal law, international law, the pre-emption doctrine and etc. Though the state laws are not that important in state policy, but do form an important component of such policies.

CHAPTER 5

Conclusion and Suggestions

To confer upon exclusive rights of the owner to behave in a particular way is an exclusive characteristic of IPR. On the contrary, the aim of the Competition Law is to keep the market open

²⁹⁴ A.Jonas and B.Suffrin, EC Competition Law: Text, cases and materials, 2008, p.777.

and fair. However, it is generally believed that it is simply incorrect to suppose that there is a tension inherently between the area of law and policy. The European Commission Guidelines on the application of Article 101 of the TFEU to technology transfer agreements says:-

*“Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive, market economy”.*²⁹⁵

The US Department of Justice and Federal Trade Commission have similarly recognised that *“Intellectual property and Anti- trust Laws work in tandem to bring new and better technologies, products, and services to consumers at low prices.”*²⁹⁶

The jurisprudence of interface between copyright and competition law is similar to the provisions under the European Union because of socialist economy followed in both the countries. For instance, under Indian law the provision of dominant position is not expressly defined whereas under European Law fix percentage is provided for the determination of dominant position of an enterprise in the market.

The interface between IPR and Competition law in India meets with several loopholes. The jurisdiction to decide cases involving copyright and competition is still undiscovered and is considered by several scholars, jurists as one of the main loopholes. Another loophole in this area is the lack of fair representation as the members do not have expertise in Copyright Law. The jurisprudential aspect of this area is also lacking.

²⁹⁵ OJ [2014] C 89/3

²⁹⁶ Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition