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Dichotomy of Intellectual Property & Competition Laws: A Note on Persisting Challenges in Prevention of Ip Based Abusive Practices

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Abstract

Although the law relating to protection of intellectual properties and competition laws appear to be divergent in their objectives, an indepth analysis of their interface is important to put the legislations in their proper place. The present article is focused on analyzing the persisting interface between the two and also outlays the differences in interpretation of such interface in the developing and developed countries. Additionally, this article is an attempt to reconcile the arguments putting the laws in repulsive directions and argues that conceptual foundations of the two are in-fact, ideologically different and distinct from each other. This article would also be helpful in ascertaining the level and points of complementarity between the two laws and proves that the projected objectives of both the laws are actually similar and converging. The article also presents an overview of the permissible scope of regulation of anti-competitive / IP based abusive practices through TRIPs framework. In the light of divergent interpretations to the dichotomy in developed and developing countries of the world, the article also explores opportunities of 'universalization' or harmonization of any incidental conflict between the two laws and presents available opportunities for such harmonization. The article concludes with the fact that dichotomy between the two laws is still a complex legal issue for the developing and emerging economies to handle. However, the interface is extremely important for such countries in light of the fact that such economies are heavily dependent on import of improvised versions of technology from developed countries which have a mature competition law regime to handle IP based abusive practices.

A Critical Insight to IP – Competition Law Dichotomy

The present discussion would not be the first on interface and relations between IPR and competition laws but has remained in debates and discussion for a considerably long period of time.[1] The alleged conflict between IP laws and competition jurisprudence revolves around the monopolistic

1 WTO (1998), 'Communication from the European Community and Its Member States: On the Relationship between the Trade-Related Aspects of Intellectual Property Rights and Competition Policy, and between Investment and Competition Policy', WT/WGTCP/W/99, para. 1

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powers and market control which arise from the IP rights.[2] It is however important to locate all possible instances in which direct interface of both the laws could be noticed. Additionally, there is also a need to clarify the '*objectives*' behind both the laws in both philosophical and practical sense. When viewed from the literary perspective, it could be said that IP laws grant monopoly rights to IP holders and therefore limits competition. Similarly, competition laws focus more on 'welfare' and 'equal opportunities in market systems' and hence are against the basic principles of IP law protection. If this view is taken in abstract, it would appear as if both the laws are contradictory in nature. Whether they are or they are not, is to be answered through research and proper application of logics.

The relationship between IP and Competition law is more appropriately analyzed on the basis of relationship between '*static*' and '*dynamic*' efficiency, in the context of *economic efficiency*.[3] '*Static efficiency*' here means optimal utilization and distribution of resources at disposal for example through tendency of reducing cost through refining products and capacities.[4] When analyzed in great details, it would resemble broadly the objectives of competition law. Competition law attempts to achieve 'static efficiency' by prohibiting collusion, abuse of dominance and concentration of absolute market power. However, for high standards of growth and development, static efficiency would not be enough. It simply means that allocation of resources could not be done till creation of such resources has been undertaken.

It is for this reason that more importance is given to '*dynamic efficiency*' which refers to gains that are achieved from new ways of doing business and new methods of making products. It is said that dynamic efficiency helps in offering more choices and alternatives to existing products to the consumers, with a welfare perspective attached to it.[5] It is also acclaimed that permanent rate of growth largely depends upon the rate of technological progress in the widest sense possible.[6]

One important point to be noted here is that '*monopoly*' granted under both IP laws and competition laws '*is not the same*'. Under IP laws, the monopoly granted to IP holder is just '*legal monopoly*' and not the '*economic monopoly*' which is regulated by the competition laws.[7] There is therefore, a need of competitive supervision today so that aspects of dynamic efficiency could be promoted for the times to come.[8] It is now largely accepted that both the laws attempt to promote innovation and creativity, because the subject matter of focus is not what is perceived. But it should not be presumed here that IP laws and the rights granted thereunder are immune from competition supervision. It is well settled now that IP does not give 'entitlement' to by-pass or violate the competition norms.[9]

The proposition that '*subject-matter*' of both the laws is different could also be supported through a categorical view of laws in some select developed countries. For example in US Antitrust Guidelines for the Licensing of Intellectual Property, it is stated that '*both laws share the common purpose of promoting innovation and enhancing consumer welfare*'.[10] Additionally in EU, it is well settled that

2 Peeperkorn, Luc (2003), 'IP Licences and Competition Rules: Striking the Right Balance', World Comp., 26(4), 539–564.

3 Brodley, Joseph F. (1987), 'The Economic Goals of Antitrust: Efficiency, Customer Welfare, and Technology Progress', N.Y.U. L. Rev., 62, 1025

4 Masoudi, Gerald F. (2006), 'Intellectual Property and Competition: Four Principles for Encouraging Innovation', available at www.usdoj.gov/atr/public/speeches/215645.pdf

5 Schumpeter, Josef (1976), Capitalism, Socialism and Democracy, New York: Harper & Row, pp. 83–85

6 Solow, Robert M. (1987), 'Growth Theory and After', available at http://nobelprize.org/nobel_prizes/economics/laureates/1987/presentation-speech.html

7 See, Sullivan, Lawrence A. and W.S. Grimes (2006), The Law of Antitrust: an Integrated Handbook, St. Paul, MN: Thomson West, p. 98

8 Gallini, Nancy T. and M. Trebilcock (1998), 'Intellectual Property Rights and Competition Policy: A Framework for Analysis of Economic and Legal Issues', in OECD, 'Competition Policy and Intellectual Property Rights', DAFFE/CLP(98)18, pp. 325–326

9 In US v. Microsoft Corp., 253 F.3d 34, 63 (DC Cir. 2001), the Federal Circuit confirmed that the proposition that the exercise of IPRs lawfully acquired cannot give rise to antitrust liability 'is no more correct than the [one] that use of one's personal property, such as a baseball bat, cannot give rise to tort liability'.

10 See also Atari Games Corp. v. Nintendo of Am., 897 F. 2d 1572, 1576 (Fed. Cir. 1990)

'*both bodies of law share the common objective of promoting innovation and consumer welfare*'.[11] Similarly, in Japan it is mandated that '*it is important for the competition policy to insulate competition in technologies and products from any negative effect caused by any restrictions deviating from the purposes of the intellectual property systems, with fully activating the effect of promoting competition*'.[12] The competition commission of Singapore also clarified that '*both IP and competition laws share the same basic objective of promoting economic efficiency and innovation*'.[13]

It could therefore be safely concluded that where the IP laws establish the market in which intellectual property is created, valued and exchanged; competition laws ensures that the market assigns a fair and efficient value to this property.[14] But there has to be caution; as IPR and Competition laws have never been good bed- fellows.[15]

Arguments on Complementarity of IP & Competition Law

Although both promote innovation and transfer of technology, it is important to maintain an intelligent '*balance of projection*' between the two. It means that none of them should be pursued more strongly than what is actually required. If in case, IP is pursued more actively, getting access to monopoly of IP would become easy, this will ultimately undervalue the incentives and rewards attached to the IP. Consequently, if competition laws would be pursued actively, firms will get easy access to their competitors' trade secrets and other IPs which will eventually discourage IP commercialization.[16] It is in the light of such 'balance of projection' that in addition to TRIPs limitations of IP, an extra protection to consumer interests is assured by competition laws.[17] It is however important to remember that IP laws should not be used as a tool to misuse the rights granted thereunder and affect the overall health and wellbeing of competitive environment in an economy. Similarly, competition law should not be blamed for many reasons behind which IP law is itself the reason. All economies should strive to create a proper balance of projection so that the merits of both the laws could be utilized to achieve higher scales of growth.

A presumption that IP laws themselves are *pro-competitive* would not be improper and economies should adopt suitable mechanisms to ensure that *exclusivity* granted by the IP laws is protected and is not misused.[18] Both IP and competition laws share a *basic equation of complementarity* and therefore the relationship should be prevented from intentional overlaps and unjust benefit from such complementarity should not be allowed. A debate on dichotomy of both the laws would persist for a long time to come as divergent approaches are adopted in implementation of both the laws but the debate should not be directed towards identifying relational weaknesses between the two. An economy which gains success in proper balancing of projection would be able to derive the maximum benefit out of both the laws.

Summarily, the *interface between IP and competition laws is not repulsive in nature* and both the laws (though with different objectives) tend to promote innovation and transfer of technology amongst the nations. There may be extreme

11 See, The European Commission Guidelines on Application of Article 81 to Technology Transfer Agreements, 2004

12 Section 1.1, Japan's Fair Trade Commission, Guidelines for the Use of Intellectual Property under the Anti-monopoly Act, 28 Sept. 2007

13 Competition Commission of Singapore, 'Guidelines on the Treatment of Intellectual Property Rights', June 2007, para. 2.1.

14 WTO, 'Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council', WT/WGTCP/2, 1998, para 113–122

15 NDC Health v. IMS Health [2004] All E.R. (E.C.) 813 (European Court of Justice)

16 OECD (2005), 'Intellectual Property Rights', DAD/COMP(2004)24, pp. 17–18

17 Under the TRIPS Agreement, an invention is patentable if it is new, nonobvious and useful (Article 27.1). Further, there are conditions concerning sufficiently clear and complete disclosure of invention on patent applicants (Article 29). Even if the invention meets those criteria, it may be excluded from patentability if it is contrary to public order, or morality, or other specific circumstances (Article 27.2 and 27.3). The monopoly rights of the patent holder are limited to a specific period of time, but at least twenty years counted from the filing date (Article 33), with some exceptions and other use not needing authorization of the patent holder (Articles 30 and 31).

18 WIPO (2008), 'Draft Report of the Second Session of the CDIP', CDIP/2/4 Prov., para 342 and 348

legal perspectives being followed some selected nations but the rigidity should not violate the broad objectives behind both the laws. It is in no country that IP laws have granted an absolute immunity from the regulatory ambits of competition law. There may still be some contradictions between the prescriptive statements of both laws but their complementarity would surely be beneficial for economic development.

Regulation of Competition under and through TRIPs

Appropriate regulation of competition has not been a concern of only the developed economies but has been a concern of international importance since early years of liberalization. It was in a response to this 'unification of laws relating to restrictive trade practices' was proposed at the international level.[19] In lieu of the support given to this proposal in the aftermath of 2nd World War, Havana Charter for International Trade Organization (ITO) provided for a detailed comprehension relating to restrictive trade/ business practices.[20] The negotiating members were given power to file complaints and ITO was proposed to be the investigating agency. Disputes were to be settled through the dispute settlement procedures of ITO. Although serious deliberations were conducted on identifying various IP related anti-competitive practices, it all went in vain as Havana Charter was never ratified. Later, UN adopted voluntary guidelines with the objective to ensure that restrictive business practices do not impede or negate the realization of benefits.[21]

In relation to transfer of technology amongst the nations and to prevent anti-competitive practices related thereto, negotiations under UNCTAD were conducted to adopt the Transfer of Technology (ToT) code which listed *inter alia* 14 restrictive trade practices.[22] Due to the divergent approaches of developed and developing countries, ToT Code never gained legal character.[23]Those discussions still hold persuasive and guiding value in the contemporary whenever policy making related to technology transfer oriented issues gain highlight.[24]

In order to give international character to competition rules, daft of International Anti-trust Code was tabled before the comity of nations by a group of scholars in 1993.[25] The code recognized that IP provisions though granting exclusive rights in favor of its holder are not *per se* anti-competitive, and would remain so if utilized within the permitted dimensions. In addition to such international efforts in laying down clear provisions relating to regulation of IP oriented anti-competitive practices, there were recognizable regional efforts also.[26] Hence, there were many considerable and serious efforts in laying down comprehensive norms relating to regulation of IP oriented anti-competitive practices.

The developed nations had well established rules relating to regulation of competition and therefore they never intended to provide for such rules in TRIPs.[27] In pursuance of mutual negotiations conducted between both parts of the world, certain provisions such as Article 8.2, 31(k) and 40 were introduced in TRIPs with the intention to regulate IP based anti-competitive practices.[28] A careful perusal of these provisions is therefore important. Article 8.2 states that '*appropriate measures,*

19 See Furnish, Dale B. (1970), 'A Transnational Approach to Restrictive Business Practices', Int'l L., 4, 318–319

20 Final Act of the UN Conference on Trade and Employment: Havana Charter for an International Trade Organization, available at www.worldtradelaw.net/misc/havana.pdf

21 See Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 1980

22 Chapter 4 of the 1985 version of the ToT Code, in UNCTAD (2001), Compendium of International Arrangements on Technology Transfer: Selected Instruments, Geneva: UNCTAD, pp. 266–269

23 Patel, Surendra et al. (eds) (2001), International Technology Transfer: The Origins and Aftermath of the United Nations Negotiations on a Draft Code of Conduct, The Hague: Kluwer Law International

24 Ibid.

25 International Antitrust Code Working Group (1993), 'Draft International Antitrust Code' (Munich Code)', Antitrust & Trade Regulation Report, Special Supplement, Issue No. 1628

26 See Article 1704 of the NAFTA Agreement, Chapter 15 of North American Free Trade Agreement (NAFTA)

27 UNCTAD-ICTSD (2005), Resource Book on TRIPS and Development, Cambridge: Cambridge University Press, pp. 61–91; Gervais, Daniel (1998), The TRIPS Agreement: Drafting History and Analysis, London: Sweet & Maxwell, pp. 46–59

28 Articles 6, 31(c), and 37.2 of the TRIPS Agreement, to some extent, may be also regarded as competition rules.

provided that they are consistent with TRIPs, may be needed to prevent the abuse of intellectual property rights by right holders or resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology'. The provision provides delegated legislative power to the WTO member states to provide for legislations in broader conformity with TRIPs. The restrictive trade practices under this clause cover both unilateral anti-competitive practices by the individuals / firms and also contractual obligations which adversely affect the trade balance. It is important to note here that Article 8.2 does not addresses all forms of anti-competitive such as mergers, acquisitions or joint ventures etc. Therefore, the corresponding domestic legislation in this perspective is extremely important while adjudging appropriate measures for regulation of competition under TRIPs.

Similarly, Article 40 substantially provides for regulation of anti-competitive contractual licenses[29] and lays down procedural rules relating to concerted or cooperative efforts of WTO member states in enforcement of their anti-competitive rules relating to contractual licensing of IP.[30]

Additionally, in order to respond to the abuse of dominant positions by any IP holder(s), TRIPs under Article 31(k) provides use of 'compulsory licensing' as a tool. Certain specific conditions imposed on the member states before resorting to compulsory licensing are also waived off if the action is being taken in response to anti-competitive practices used by the IP holder.[31] The methodology to be used and quantum of punishment to be imposed is purely a subject relevant to the domestic laws of member states and due to their national interests, any uniform law in this context could not be deemed feasible. Though there are some countries which have exceedingly subjected the abuse of IP rights to competition scrutiny, there are others such as Thailand, Pakistan, and Afghanistan etc. which have laid down any specific legal machinery in this perspective. The divergence in approach still survives even after a long standing history of the TRIPs.

The Proposed Universalization

A considerable debate however has been on creating an international legal instrument parallel to TRIPs in order to universalize the regulation of anti-competitive practices arising out of abuse of IP rights.[32] The central idea behind such arguments is the adoption of different perspectives by different nations while addressing critical interfaces of competition law and TRIPs even amongst the developed countries.[33] It could not be answered as to whether such internalization is really required even when pre-violation remedies are already contained in TRIPs, e.g. compulsory licensing. Although such internationalization would establish a common perspective to strategies and methodologies used for curtailing and preventing IP abuses, it may take away the 'flexibilities' provided to developing and least developed countries which were reserved for them after a series of discussions. It should also be remembered that market orientation, structure and patterns of operation differ from country to country as they may have apparent and hidden interests in overall wellbeing of their market systems. One should not forget the interests of developed nations which they have pursued through careful articulation of TRIPs.

However, the prevention of patent abuses was incorporated into the Paris Convention only at the Revision Conference in The Hague in 1925. It initially aimed to give each contracting party the right to grant compulsory licences, instead of patent

29 See Article 40.1 and 40.2 of TRIPs

30 See Article 40.3 and 40.4 of TRIPs

31 Section 31 (k): Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.

32 Diane P. Wood. The Internationalization of Antitrust Law, 44 DEPAUL L. REV. 1289 (1995); Eleanor M. Fox, Market Access, Antitrust and the World Trading System: En Route to TRAMS-Trade-Related Antitrust Measures (Nov. 20, 1995) (presented at Congress on Competition Policy in the Process of International Integration, Italian Antitrust Authority, Rome)

33 Eleanor M. Fox, Trade, Competition, and Intellectual Property--TRIPS and its Antitrust Counterparts, 29 Vanderbilt Law Review 481 (2021)

forfeiture, in a case of failure to work. The patent abuses in the Paris Convention are most probably to be interpreted narrowly; they involve only a local working requirement, rather than anti-competitive practices relating to patents in general. On the other hand, they may perhaps be interpreted broadly, the failure to work merely providing a specific example of patent abuses.

To be then read together with other provisions of Article 5.A, such abuses may include refusal to license on reasonable terms and conditions that impedes industrial development, insufficient supply or excessive pricing of patented products.[34] On the basis of this interpretation, it could be said that the incorporation of such patent abuses '*could be seen as a timid early step in the internationalization of the law of the intellectual property/antitrust interface*'.[35] However, Article 5.A (2) merely provides contracting parties with '*the right to take legislative measures*', rather than the obligation to do so. Such an obligation was not seriously considered at the international level until the adoption of the WIPO Development Agenda in 2007. Even then, there are some nations which have not bothered to address this issue and have largely remained silent which further necessitates internationalization.

Concluding Remarks

There are some apparent complexities of interpretation of the competition rules provided through and under TRIPs due to obvious reasons of ambiguity. It is because of this principle reason that the critical issue of regulating abusive practices based on IP rights could not be addressed uniformly by the comity of nations. Many objections from the concurring sides have been received on interpretation of 'rights' and 'obligations' contained in TRIPs which require comprehensive elaboration and analysis. Though the broader prescriptions under TRIPs are based on mutual consensus of the nation states, the competition rules appear to be open-ended in nature.[36] Participating member states were provided with discretionary powers to legislate their own domestic laws which further complicated the issue.[37] For instance, Article 40.1 recognizes that there are some anti-competitive licensing practices but it does not list them. Similarly, listing of anti-competitive practices in contractual licenses is also not exhaustive and TRIPs thereby supplements that the activities enlisted in Article 40.2 are merely suggestive.

Although significant efforts have been undertaken by developing member states such as India, the dichotomy of intellectual property rights and competition law is, and will remain a complex legal issue to be handled by legislators and policy makers. There are several internal and external hindrances faced by the developing member states of the world and overcoming such hindrances is not a very easy task to perform.

34 Bodenhausen, G.H.C. (1968), Guide to the Application of the Paris Convention for the Protection of Industrial Property, Geneva: BIRPI, p. 67-73

35 Hovenkamp, Herbert et al. (2007), IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law, New York: Aspen, supp., pp. 40(2)–40(41)

36 UNCTAD-ICTSD (2005), Resource Book on TRIPS and Development, Cambridge: Cambridge University Press, pp. 61–91; Gervais, Daniel (1998), The TRIPS Agreement: Drafting History and Analysis, London: Sweet & Maxwell, pp. 46–59

37 See Article 8.2, TRIPs Agreement