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EXAMINING THE RELATIONSHIP BETWEEN COPYRIGHT AND COMPETITION LAW VIS-À-VIS THE COPYRIGHT BASED ENTERTAINMENT INDUSTRY

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I. INTRODUCTION: CREATIVE INDUSTRIES

In the 21st Century, the actual wealth of nations is determined by human creativity and innovation.[2] This period has been a period of exceptional transformation in the way people communicate and work with each other to create creative content generating a dire need to endorse creativity by an ecosystem that motivates and fosters artistic works. Creativity needs to be sustained by an environment that encourages artistic works. Creative industries have become prime elements of the innovation system of the economy as their fundamental essence emerges not only from the economic contribution of these industries, but also from their ability to prompt the creation of new ideas and technologies. The term „creative industries" includes *—besides the copyright and cultural industries, all cultural or artistic production, whether live or produced as an individual unit*‖. It has to benoted that the terms „*Copyright*", „*Creative*", and „*Cultural*" industries are frequently used synonymously and indicates those activities or industries where copyright plays a specific and identifiable role. For the advancement of these creative industries in both developed and developing countries, the role of IP is indispensible, which is a major policy instrument and an essential component of the regulatory frameworksurrounding the creative industries. For attaining perennial

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[2] 'Guide on Surveying the Economic Contribution of the Copyright Industries' (*https://www.wipo.int/*2015)<https://www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf > accessed 7 April 2024.

economic growth at global level, the role that creative content plays in expressing the thoughts, stories and desires of people should be encouraged as well as protected.

II. INTELLECTUAL PROPERTY RIGHTS (IPRs)

Intellectual Property Rights are the exclusive legal rights possessing moral and commercial worth awarded to the creations of minds: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. Technological advancement over a period of time has impacted the creation and dissemination of creative content be it writing, animation, photography, architectural design, moviemaking etc. at an extraordinary rate and hence revolutionalised the IP regime leading to the social, political and economic vanguard. Many industries irrespective of their scale of business, owe their existence to the dynamic IP regime as it has allowed them to develop innovative business models furthering their growth and advancement and at the same time benefitting the consumers and the society at large.[3]

Therefore, it can be safely assumed that the IP rights not only work advantageously for the consumers but benefit [4]the society at large as it enables better investment in products and services for advancement and progress in the society. If the IP regime is encouraged to lead economic and social progress,[5] society will ultimately benefit from widespread knowledge, more investment in research and development, better sustenance for creative fields and resulting enhanced protection to consumers.

Therefore, in the international market arena, IP rights have become and will remain crucial building blocks of property interests and business arrangements.

Primarily, the core aim of IP regime is to stimulate and regulate creativity and further support and encourage creative endeavours of artists and businesses which can foster creation, production, marketing, broadcast or distribution of creative works.[11] A great deal of effort and individual will is put into the production of creative works and as

[3]WEF (n 5) 7.
[4]Sumanjeet, Singh, Intellectual Property Rights and Their Interface with Competition Policy: In Balance or in Conflict? (December 12, 2010). Communication Policy Research South Conference (CPRsouth5), Xi'an, China, Available at SSRN <https://ssrn.com/abstract=1724463> or< http://dx.doi.org/10.2139/ssrn.1724463> accessed 10 April 2024.
[5]Hans Henrik Lidgard and Jeffery Atik, *The Intersection of IPR and Competition Law* (Intellectadocysus 2008).

creativity leads to innovation, the role of IP law should thereof be to augment and not impede the creativity.

In global businesses, there is a constant creation of new ideas leading to innovation and safeguarding these innovations requires protection of the assets including the intangible assets i.e. IP. These IPRs are valuable assets for the business as they set apart from the competitor business thus providing an independent identity and form an essential part of your marketing or branding, provides diversity in choices to the consumers, generates revenue from licensing, assignment etc. of their IP .However, there are various factors which can influence the decision of whether to proceed with the protection of IP or not like the degree of protection which[6] can be obtained, the type of protection , incorporating the „view of the market" into the decision making process.

Senior OECD economist Giuseppe Nicoletti says that ―*the innovative effort of firms in a competitive environment is best exploited when intellectual property right protection guarantees that innovators receive sufficient rewards, and when scope for the strategic use of innovations to limit competition is restricted.*‖

Having said that, there is an immense need to protect IP rights of the creator and respect the creation as huge investments are incurred by the creative professionals in the form of real capital, education, knowledge etc. Also, safeguarding of IPRs is crucial in preserving economic growth. They encourage fair trading which would contribute to economic and social development. Effective enforcement of IPRs is critical to sustaining economic growth across all industries and globally.[7]

The pertinent debate prevailing globally is whether the right of creator is servile to interest of society or is superior to interest of the society. The quintessential degree of IP protection is dependent upon the level of development which a country has attained. From the public interest viewpoint, the best possible level of protection is the one which leads to maximum level of innovation depicting most advantageous balance between protection of the creator's interest and public access and preserving this balance is the basis of all IP laws.

[6]WEF (n 5) 4.

[7]Rodney D Ryder, *Intellectual Property Law* (Macmillan India 2005).

Intellectual Property derives its justification not from a single theory but incorporates the components of various theories substantiating its protection. Labour Theory acknowledges the right of the person to the fruits of his intellectual labour i.e. his efforts spent inventing and constructing his work and it is the duty of the state to enforce this natural right arising out of the labour. Personality theory is based on the rationale of self actualization which comes from the creators assertion of owning his personal expression ultimately giving the creator inherent moral rights in his creations. One of the most important theory on which the premise of IP is based is the Bargain Theory which mandates the IP Laws to strike a balance between the rights of the IP holders over their creations and that of the society at large in the form of access to new creations and a constant flow of improved products at the lowest prices.

Thus, the ultimate goal of any theory while justifying the protection of IP is to maximize innovation leading to augmenting the innate economic value of creativity while disseminating the work to public. Therefore, it is highly desirable to award IP protection to creative industries as these industries give boost to novelty in creations furthering sustainable and competitive economies.

III. COMPETITION LAW

The creative industries are immensely vital to any economy irrespective of the stage of development, and healthy competition ensures it stays that way.[8] A broad definition of Competition is ―*a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particularbusiness objective for example, profits, sales or market share* ‖ .Competition promotes industries and businesses to innovate and further improvise for the benefit of society at large and Competition Policy aims to preserve and promote Competition Law against restrictive business and trade practices. Competition Law ensures that businesses are fairly competing and are protected from the unfair acts of others. The Supreme Court of India in *Competition Commission Of India v Steel Authority OfIndia &An*observed :

[8]Lisa P Lukose, 'Protection of Traditional Knowledge as Intellectual Property: With Special Reference to India' (School of Indian Legal Thought, Mahatma Gandhi University, India 2009).

—The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three- fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.‖

The primary aim of competition law is to remedy the collapses in state of affairs of the free market– an idealized economic system in which the allocation of resources is determined by unhindered forces of demand and supply. Many countries have enacted competition laws to safeguard their free market economies resulting in maximizing of self interest of each participant and also favorable result to the society[9] at the same time. When a market is competitive, it will be upon the businesses to innovate for a better product which can be differentiated from the creations of others. Therefore, a competitive free market will ultimately benefit the consumers in the form of lower prices and efficient services, society while preserving personal freedoms.

The history of modern competition legislation can be traced back to the United States of America where the Sherman Anti-Trust Act 1890 was the first Federal Act that outlawed monopolistic business practices and was intended to protect the public from such predatory practices contemplated to eliminate and limit competition in market. Gradually, competition law came to be perceived as one of the basic premise for functioning of any economy. This steady recognition led to increase in the enactment of competition law in various countries including the developing countries. According to the paper of OECD on *International Co-operation in Competition Law Enforcement* (2014), "*At the end of the 1970s only nine jurisdictions had a competition law, and only six of them had a competition authority in place. By 1990, there were 23 jurisdictions with a competition law and 16 with a competition authority. The number of jurisdictions with competition authorities increased more than 500% between 1990 and 2013. As of October 2013, about 127 jurisdictions had a competition law, 29 of which120 had a*

[9]Shahid Alikhan and R. A Mashelkar, *Intellectual Property and Competitive Strategies in the 21St Century* (Wolters Kluwer Law & Business 2009).

functioning competition authority‖. Thisrapid expansion can be attributedto the wide spread recognition awarded to competition policy for promoting economic growth leading to a dynamic marketeconomy.

Every country, irrespective of its stage of development should tailor its competition legislation suiting its country specific requirements which should be pragmatic and implementable and based on local needs, aspirations and socio-economic, cultural and legal conditions. Traditionally, competition law and the competition authorities tackle the issues relating to control of monopoly or abuse of dominance; restrictive trade practices and other anti-competitive agreements; and regulation of combinations such as mergers, acquisitions and takeovers.

In accordance with emerging international trends and in wake of globalization, India opened up its economy in 1991 and resorted to liberalization which led the Indian markets to face competition not only domestically but also internationally. Gradually, it was found that *Monopolies and Restrictive Trade Practices Act, 1969*(the MRTP Act) was not suitable to deal with new and emerging challenges arisingin the Indian economy due to increasing integration with the world economy while honouring its obligations under the WTO driven trade regime[10] . In 2002, the Parliament of India thus enacted the Competition Act, replacing the archaic MRTP Act. The primary goal of the Act, as elucidated in the preamble, is *—keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote*[11] *and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto*‖..

The significance of competition is very lucid in an ever increasing globalised and innovative economy and has greatly affected the creative industry in general and specifically the entertainment industry. The media and entertainment industry is now at fore front of facing antitrust issues resulting from advances in technology , greater

[10]An Act to provide that operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto

[11]Divakar Babu, 'The Competition Act 2002 A Critical Study' (Department of Law, Sri Venkateswara University 2010).

awareness among industry stakeholders in terms of developing new business strategies, entering into various distribution arrangements, mergers, joint ventures drawing more attention of regulators as well as private players.

It has to be noted that with the surfacing of massive consumer markets for media and entertainment and growth of domestic, culture specific productions and global distribution of media subject matter, the practice of competition law with respect to IP related market and specifically copyright related market has significantly expanded. And competition law is acting not only as an instrument of restricting the exclusivity of the IPRs but also a means for effectively furthering the interest of both creative authors and consumers in terms of distribution of works and also by advancing the access of consumers to works at lower costs.

IV. RELATIONSHIP BETWEEN IP AND COMPETITION LAW

The interaction between IP and Competition[12] Law is not new and has been on the agenda for discussion at various global platforms. The *1948 Havana Charter forthe International Trade Organisation* contained provisions relating to General Policy towards Restrictive Business practices:

―Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives act forth in Article 1.‖

Also, the United Nations General Assembly, at its thirty-fifth session in its resolution 35/63 of 5 December 1980, adopted the "*Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*‖ approved by the United Nations Conference on Restrictive Business Practices. Since the adoption of the Set in 1980, four United Nations Conferences to Review All Aspects of the Set have taken place under the auspices of UNCTAD in 1985,1990, 1995 and 2000 respectively. A report on ―*Competition Policy And The Exercise Of Intellectual*

[12]The Competition Act, 2002 (12 OF 2003).

Property Rights‖ was also prepared by the UNCTAD Secretariat on therequest of Group of Experts[13] for consideration by the Fourth Review Conference in the year 2000. The report dealt with the role of competition policy in the exercise of IPRs and presented a comparative analysis of jurisdictions with extensive enforcement practice in relation to competition policy principles and rules relating to IP Rights contained in the legislation, case law or enforcement guidelines

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) also contains certain provisions that offer a wide discretion to Members states in their application of competition law in respect of the acquisition and exercise of IP rights. *Article 8.2* of the Agreement relates to requirement of appropriate measures for preventing the abuse of IPRs by right holders. Article 31 gives detailed conditions for the granting of compulsory licences aimed at protecting the legitimate interests of rights holders. Article 31(k) specifically validates the right of Members to use such licences as anti-competitive remedies with the condition that such anti-competitive practice needs to have been determined through a judicial or administrative process.

V. CONCLUSION

The possible conflict between IP and Competition Law arises from the goals they seek to promote where the IP owner is incentivised by giving monopoly rights for a limited period and Competition Law goes against this principle by curtailing abusive monopolies and enhancing market conditions by increasing choices and fair competition in the market. From the viewpoint of Competition Law, IP like any other form of property is not inherently detrimental to competition and a well structured IP regime is meant to advance innovation and promote dynamic competition in the market. Therefore, the interface between both IP Law and Competition Law are not inherently conflicting but are compatible with each other. Conflicts can arise only in situations where promoting the underlying objective of both IP and Competition Law[14] which is the protection of supreme interest of consumers and fair competition in the market that the

[13]'Competition Policy and the Exercise of Intellectual Property Rights' (UNCTAD Secretariat 2000)
[14]John T. Cross and Peter(n 60).

intervention of competition law may be required which can be abused at the hands of the IP right holder.

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