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NAVIGATING THE NEXUS: A COMPREHENSIVE EXAMINATION OF THE SYNERGY AND TENSIONS BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW

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ABSTRACT

Navigating the nexus between intellectual property rights (IPRs) and competition law presents a multifaceted terrain fraught with both synergy and tension. This abstract aims to encapsulate the intricate interplay between these two legal domains, offering a comprehensive examination of their dynamics. On one hand, IPRs serve as vital incentives for innovation and creativity, fostering economic growth and societal progress. However, their assertion can sometimes encroach upon the principles of competition, potentially stifling market competition and hindering consumer welfare. Through an in-depth analysis, this study elucidates the delicate balance required to harness the synergies while mitigating the tensions between IPRs and competition law. It explores various legal frameworks, judicial decisions, and policy considerations that shape this intersection, shedding light on key challenges and emerging trends. Ultimately, the elucidation of this complex relationship is crucial for policymakers, legal practitioners, and scholars alike in ensuring a fair and dynamic marketplace conducive to innovation and competition.

INTRODUCTION

Intellectual property rights and competition regulation are closely related. The former provides exclusive rights within a designated market to produce and sell[3] a product, service or technology that result from some form of intellectual creation qualifying specific requirements.

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[3] Keith E. Maskus and Mohammad Lahouel, '*Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement*' (1999 <http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/maskus.pdf>accessed 3 March, 2024

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These inventions and creations are protected by patents, copyrights, trademarks, trade secrets, or sui generis forms of protection. Thus, IPRs designate boundaries, within which competitors may exercise their rights.

Philip L Williams[4]in his paper "Intellectual Property Rights: a Grant of Monopoly or an Aid to Competition?" stated that intellectual property rights is an important instrument of public policy, designed with the objectiveof promoting efficient production of creative work so as to serve social rather than individual welfare goals. In principle, IPRs create market power by limiting static competition in order to promote investments in dynamic competition. In competitive product and innovation markets the awarding of IPRs rarely results in sufficient market power to generate significant monopoly behaviour. However, in some circumstances a set of patents could generate considerable market power through patent-pooling agreements among horizontal competitors. In countries that do not have a strong tradition of competition and innovation, strengthening IPRs could markedly raise market power thereby encouraging its exercise. At the outset, licensing activities and patent protection were carried out under strict surveillance of competition law and it was considered that patents are monopolies. R. Posner in his paper, Antitrust Law: An Economic Perspectiveanalyses that not all IPRs are monopolies but acknowledges that some may be in certain circumstances.

The interplay between the Intellectual Property Lawsand Competition Law can be traced in the following areas:

LICENSING CONTRACTS

The role that competition policy plays in monitoring[5] abusive exploitation of market power in connection with the exercise of IPRs is particularly important in the review of the anticompetitive effects of licensing contracts (regulating the transfer or exchange of rights to the use of intellectual property), containing exclusivity or restrictive clauses.[6] It is commonly agreed that the licensing of intellectual property generally[7] has favourable effects. It facilitates the diffusion of technological innovation and know-how and their exploitation by firms which

[4]European Commissioner for Competition Policy, January 2004

[5]Eugene Buttigieg, *Competition Law: Safeguarding the Consumer Interest*, (Wolter Kluwers, 2009)

[6]Ibid

[7]Govaere, I., *The Use and Abuse of Intellectual Property Rights in E.C. Law*, (3rd edn, Sweet & Maxwell London 1999)

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may have a greater comparative advantage. Production can be made more efficient and product quality can be enhanced when technologies are used in a complementary manner.

Also, licensing patented technology may increase the return to IPRs holders, increasing therefore firms' incentives to pursue investment in Research & Development. In fact, welfare would be reduced if innovators and IPRs holders were forced to enter into direct production and commercialization and hence not allowed to license their know-how to third parties, facilitated to manufacture and market licensed goods and services.[8]

TECHNOLOGY TRANSFER

Nevertheless, the transfer of patented technology may involve excessive and unnecessary restrictions to competition, depending on the specific contractual arrangements and market conditions. An overview of the pro-competitive and anticompetitive effects of four frequently used types of contractual restrictions is listed as follows:

- territorial exclusivities,
- exclusive dealing,
- tying requirements, and
- grant-back requirements.

They are often used as tools to facilitate the transfer of technology. However, under some circumstances, they may also lead to an undue restriction of competition.[8]

PATENT POOLS

Patent pools are the aggregation of intellectual property rights which are the subject of cross-licensing; whether they are transferred directly by patentee to licensee or through some medium, such as a joint venture, set up specifically to administer the patent pool Patent pools have pro-competitive and anti-competitive effects. Pro-competitive benefits generally flow from a licensor's making patented technology available to licensees. Patent pools can have anti-competitive effects when they are used to shield invalid patents or when they include patents that are not complementary and would compete against each other. According to a

[8]Ibid

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noted author Resnik,pooling helps companies earn a steady income, recover their investments[9] and reduce risk, which could spur them to further research and innovation.

On the other hand, Krattiger and Kowalski[10], points at patent pools to a 'potential double-edged legal sword', while while being able to cut through patent thicket blockages, pose a number of risks, mainly from the perspective of competition. Patent pools are subjected to the per se rule in most jurisdictions, including the United States, Canada, Japan, Germany etc.

TYING AGREEMENTS

A 'tie-in' is a commercial arrangement in which the seller of one-product i.e. the tying product conditions its sale on the buyer's purchasing a second product i.e the tied product from a seller or a designated third party. A tying clause should be tested against following factors to determine its validity with competition laws: First of all, the tied item is a separate product or service from the tying item, further, the actual tie exists and not an insubstantial amount of commerce effected.

Tying arrangements are considered as one of the usual practice adopted by the licensing companies. Tying is deemed to be per se illegal or may be analysed under the 'rule of reason' approach.

GRANT-BACKS

Many firms require their licensee to grant back any improvement made on the subject- matter to them. The result is that effect of grant-back clauses is that they tend to decrease the licensee's incentive to invest. The licensee has to grant back its improvement [11]to the licensor for free. Thus the licensee chooses not to invest his resources for improvement which discourages innovation as it decreases the licensee's own incentive to improve the technology.

Thus grant back clauses tends to limit the licensee's role in any type of improvement in the technology since he shall have to give back any kind of improvement in the product. This leads

[9]Massimiliano Gangi, "*Competition policy and exercise of Intellectual Property Rights*", <http://www.archivioceradi.luiss.it/documenti/archivioceradi/osservatori/intellettuale/Gangi1 .pdf > accessed 2 March, 2024 .

[10]John Klein, 'Cross- Licensing and Antitrust Law', (United States Department of Justice, 2nd May 1997) <http://www.usdoj.gov/atr/public speeches/1123.htm>accessed 29 December, 2024

[11]Jefferson Parish Hosp. Dist. No. 2 v Hyde (1984) 466 US 2

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to discouragement and thereby restraining innovation and advancement of technological practices.

CROSS-LICENSING

Interchange of intellectual property rights between two or more persons is cross licensing. It might be a bar to competition if the technology licensed is substitute rather than complementary in nature. The anti-competitive effects of [12]cross licensing are reduced innovation, increased prices and cut backs in production which is likely to happen when cross-licensing is between competing entities and in that case the competing entities would not exist and they together may create a market power.

Competition regulation aims at restricting attempts to extend exploitation of an intellectual asset beyond the boundaries provided by IPRs. Thus, there is an inherent tension between competition laws and IPRs, particularly if competition laws give emphasis to static market access and IPRs emphasize incentives for dynamic competition. Structured properly, however, the two regulatory systems complement each other in striking an appropriate balance between needs for innovation, technology transfer, and information dissemination. [13]Today, the relationship between the two systems is characterized more[14] by its accommodation than by its conflict. Both pose a divergent path to the same goal.

ABUSE OF DOMINANT POSITION

Dominant position is a position of economic strength enjoyed by the enterprise which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. Some of them are: imposition of discriminatory practices or trading conditions or predatory prices, limiting supply of goods or services, denial of market access, using a dominant position in one relevant market to enter into, or protect, other relevant market. A dominant position in substance means the capacity of an enterprise to act independently of

[12]Debra A. Valentine, 'Intellectual Property and Antitrust: Divergent Paths to the Same Goal' (Federal Trade Commission, 5 March 1996),
[13]Ibid.
[14]<http://www.ftc.gov/speeches/other/speech35.htm > accessed 24/02/24

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competitive forces prevailing in the market or to affect the relevant market in its favour. A dominant position is acquired by an enterprise over a period of time and factors such as state of technology, barriers to entry, scale of operations, etc., influence the achievement of a dominant position.

REFUSAL TO SUPPLY LICENSE

The law of licensing is based on the complementary goals of the intellectual property system and competition law. The Intellectual property rights holder has the exclusive right granted under the law for a limited period of time. Thus the right holder is able to prevent others from exploiting it but he cannot restrain the development and use of a superior technology. This is evident from the fact that intellectual property promotes competition in the market. The issue arises where the refusal of a patented technology prohibits the entrance of a new product into the market and is considered anti-competitive.

The IMS Health case has cautiously inserted three conditions to be satisfied for declaring such a refusal as an abuse of dominant position. They are:

(1) That the refusal to license 'is preventing the emergence of a new product for which there is a potential consumer demand'

(2) That it is 'unjustified'[15] and

(3) That such refusal 'excludes competition in the secondary market'

CONDITION IN LICENSE AGREEMENT FIXING PRICES

The issue in a license agreement fixing prices is that whether the owner of the patents could entirely control the manufacture, use and sale of its patented product, the right to impose the condition that its sales should be at prices fixed by the licensor and subject to change according to its discretion. In the view of the judiciary, a term would be valid provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. It is to be noted that one of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. Finally, when the patentee licensees another to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods.

[15]Case C- 418/01, IMS Health [2004] ECR I-5039

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BLOCK BOOKING

Block booking is the practice of renting one motion picture to an exhibitor on condition that it is also rent other features from the same company. The issue arises when each copyrighted film block booked was itself a unique product and that each feature films varied in theme, in artisticperformance, in stars, in audience appeal, etc., and that the other party by reason of its copyright had a 'monopolistic' position as to each tying product and thereby trying to impose an appreciable restraint on free competition in the tied product. Further, there were problems when television stations were forced to accept unwanted films which denied access to the other distributors who, in turn, were foreclosed from selling to the stations.

CONCLUDING REMARK

To conclude, the objective of this chapter is to locate the conflicting issues of intellectual property protection and competition law in various jurisdictions like the United States, European Union and India. The various issues like licensing contracts, abuse of dominant position, block booking, technology transfer, condition in license agreement fixing prices, tying agreements, grant back conditions and refusal to supply license are the conflicting areas where both the laws appear in interface with one another. Through this chapter, the researcher shall study the areas through judicial pronouncements of the jurisdictions of United States, European Union and India. The researcher shall also find out the means of bridging the gap between the two divergent areas of law and also point out some suggestions which the developed countries like United States and European Union have taken up.

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