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CHANGING DYNAMICS OF THE RELATIONSHIP BETWEEN IP LAW ANDCOMPETITION LAW: SPECIAL FOCUS ON COPYRIGHT LAW

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ABSTRACT

The birth of the possible conflict between Intellectual Property Rights (IPRs) and Competition Law is from the ultimate objectives they want to achieve. IP owner is compensated in the form of incentives by according limited period monopoly rights and Competition Law on the other hand works in the opposite direction by restricting monopolies which abuse their dominant position and augments fair play in the market. Since these two branches do converge or diverge at some point, leads to immediate inference of their overlap and the need for IP Law to be interpreted in the light of doctrine of freedom of competition in the market and envisage their probable conflict and complimentary role. Since, the dichotomy and similarity between IP and competition invariably exists in the application of these laws, this paper will analyze the various grounds where this interface exists so as to address the contemporary issues in the trade sector. The author thus, proposes to explore this relationship between IPRs particularly Copyright Law and Competition Law with the key task to appreciate the existence of IPRs minimizing its anticompetitive effects and the societal objectives it is intended to endorse.

Keywords: IPRs, Competition Law, Monopolies, Conflict, Complimentary, Copyright Law etc.

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INTRODUCTION

Intellectual Property (IP) Rights are the legal rights granted exclusively for possessing moral and commercial worth awarded to works of literation, art, trade names, symbols, inventions and designs in commercial usage and are creations of minds IP rights not only work advantageously for the consumers but benefit the society at large as it enables better investment in products and services for advancement and progress in society and better sustenance to creative fields. Advancement in technology has greatly affected the creation and dissemination of creative content be it writing, animation, photography, architectural design, moviemaking etc. at an extraordinary rate[2] and hence transformed the intellectual property regime leading to the social, political and economic advancements.[3]

Various industries irrespective of their scale of business, owe their existence to the dynamic Intellectual Property (IP) regime as it has allowed them to develop innovative business frameworks augmenting their growth and also simultaneously benefiting the consumers and the society at large.[4]

The most important and powerful industry of an economy at any stage of development is a creative industry and a situation of fair competition is a guarantee that this position is maintained. A broad definition of Competition according to World Bank Report (1999) is *"a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share*". Competition gives a boost to the industries to innovate, primarily for the benefit of society and preserving competition law against anti-competitive practices is taken care of by the competition policy.[5] Competition Law thus ensures that businesses are fairly competing and are protected from the unfair acts of others.

[2]Intellectual Property Rights in the Global Creative Economy (2013), http://www3.weforum.org/docs/GAC/2013/WEF_GAC_IntellectualPropertyRights_GlobalCreativeEconomy_Report_2013.pdf (last visited Nov 01, 2020).

[3] A. Mitchell. Polinsky & Steven Shavell, 2 Handbook of Law And Economics (2007).

[4] Sumanjeet Singh, *Intellectual Property Rights and Their Interface with Competition Policy: In Balance or in Conflict?* COMMUNICATION POLICY RESEARCH SOUTH CONFERENCE (CPRSOUTH5), XI'AN, CHINA (2010).

[5] SHAHID ALIKHAN & RAGHUNATH MASHLEKAR, INTELLECTUAL PROPERTY AND COMPETITIVE STRATEGIES IN THE 21ST CENTURY (2009).

Relationship between IP and Competition Law

The goal of this section is to precisely stipulate the basic concepts of IPR and Competition Law and further scrutinize their conflicting role if any or whether in essence, they execute complimentary roles of maximizing consumer welfare. Also, whether it is correct to infer that instead of being in contradiction with each other, they choose diverse paths to reachthe same objective of augmenting the welfare of consumers? And if this is affirmative, can wepresume that there exists a fair balance between competition and IPRs?

The intersection between IP and Competition Law is not new and has been a priority for dialogue at various international platforms. The 1948 Havana Charter for the International Trade Organization 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."[6]

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) also comprises of certain provisions that suggests widespread discretion to Members states in their application of Competition Law in respect of the acquiring and exercising of IP rights. Article 8.2 of the Agreement relates to *requirement of appropriate measures for preventing the abuse of intellectual property rights by right holders*. Article 31 gives detailed conditions for the *granting of compulsory licenses aimed at protecting the legitimate interests of rights holders* and specifically Article 31(k) validate the *right of Members to use such licenses as anti-competitive remedies with the condition that such anti- competitive practice needs to have been determined through a judicial or administrative process*.

Further, Article 40 of the TRIPS Agreement recognize *"licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology"* and also allows Members to specify anti-competitive practices constituting abuses of IPRs and to adopt

[6] Havana Charter for an International Trade Organization 1948, art. 46

measures to prevent or control such practices (Article 40.2). Such practices may include coercive package licensing, exclusive grant backs and clauses preventing validity challenges. Thus, Member-states have significant decision making power under the TRIPS Agreement in the advancement and application of Competition Law to the operation of IP Law.

Tracing the historical evolution of the relationship between Competition Law and IPR Law, they have seemed to emerge as different and unique practices of law but there is a significant concurrence in the goals and objectives of the two as they both focus on furtheringinnovation which ultimately leads to economic growth. IP rights are exclusive legal rights accorded to the creator to enjoy their fruits of creation whereas competition law affords anoutline of restricting anti- competitive practices with the ultimate objective of consumer welfare. IP protects individual interest and creates monopolies to some extent while the competition protects the market and battles monopolies. Numerous domains addressing the interface between IP and Competition also exist which may arise while granting the IPR protection or at the time of use in the form of misuse of licensing provisions, tying in arrangements etc. or also on the enforcement front by way of facing anti-competitive litigation.[7] The Raghavan Committee Report on Competition Law in India observes as:

"All forms of Intellectual Property have the potential to raise Competition Policy/Law problems. Intellectual Property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. Undoubtedly, it is desirable that in the interest of human creativity, which needs to be encouraged and rewarded, Intellectual Property Right needs to be provided. This right enables the holder (creator) to prevent others from using his/her inventions, designs or other creations. But at the same time, there is a need to curb and prevent anti-competition behavior that may surface in the exercise of the Intellectual Property Rights".[8]

"There is, in some cases, a dichotomy between Intellectual Property Rights and Competition Policy/Law. The former endangers competition while the latter engenders competition. There is a need to appreciate the distinction between the existence of a right andits exercise. During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the

[7] Maximiliano Santa Cruz Scantlebury & Pilar Trivelli, INTERACTION BETWEEN INTELLECTUAL PROPERTY AND COMPETITION LAWS E15 INITIATIVE (2016), https://e15initiative.org/publications/interaction-between-intellectual-property-and-competition-laws/ (last visited Jul 15, 2020).

[8] Report of the High Level Committee on Competition Policy and Law (2000), Para 5.1.7.

detriment of consumer interest or public interest, it ought to be assailed under the Competition Policy/Law."[9]

In essence, since both IP Law and Competition Law do converge or diverge at some point, leading to an instantaneous inference of their overlap and the need for IP Law to be interpreted in the light of doctrine of freedom of competition in the market and envision their probable conflict and complimentary role. The contradiction and similarity between IP and competition invariably occurs in the application of these laws, requiring their thorough analysis on various grounds where this interface exists so as to effectively address the current challenges faced by the trade system.

IP Law and Competition Law: The Conflict

The basic idea of conflict between IP and Competition Law is validated by the historical explanation of the role of IP Law of excluding the third parties from exploiting the subject matter of the creator without their permission and finally incentivizing the creator. The basic goal of this reward is to make the creator's work available to public at large which would otherwise have remained a secret. Traditionally, granting IP protection was regarded as a price paid by the society at large to the creator for public access of his work with a key focus on the individual right of the inventor.[10] This legal monopoly created by IP Laws, taking into account the unavailability of substitutes on either the demand or supply side in the relevant market results into creation of market power and barriers to entry leading to monopoly situation envisaged under Competition Law. In situations where alternative substitutes do not exist, IP holders have monopolistic positions in their relevant markets. However, being in this position does not automatically justify creation of a competition violation. It is only when this advantage or dominant position is abused, a situation of conflict is formed between the application of IP and Competition Law. To illuminate, the justification behind this conflict is that the IPRs by identifying the boundaries within which different competitors operate and exercise monopolies over their inventions, seemingly appears to be against the principles of constant market access and fair play envisaged under the competition rules and policies particularly, on horizontal and vertical restrains and abuse of dominant position in the relevant market.

[9] Report of the High Level Committee on Competition Policy and Law (2000), Para 5.1.8.

[10] Gitanjali Shankar & Nitika Gupta, *Intellectual Property and Competition Law: Divergence, Convergence, andIndependence*, 4 NUJS LAW REVIEW (2011).

Competition Law strives to create a division between allowable practices adopted by businesses and abuse of IPRs which is somehow distorted by various practices like tie-in arrangements, restrictive agreements, licensing restrictions etc. that are not expressly authorized by the IP statutes but that appears to have anticompetitive effects. *The prime question therefore is to ascertain as to when the legitimate operations of IP cease and becomes anticompetitive*.[11] Thus, inherent tension between the two will prevail as long as competition law emphasizes on static market access and IPR focuses on incentivizing the creator.

As soon as an asset is produced, the property rights are allocated to it whereas the invasion of competition policy occurs at a later stage when the asset has gained some market power. It therefore leads to a situation of difference in timing of the information present at the time of granting of property rights and when cases of competition law emerge.[12]

Drawing inference from the above discussions, both IP Laws and Competition law areactually moving parallel rather than being in conflict with each other and reaching a complimentary position dependent on each other for the attainment of optimal welfare. As IPRsare crucial in advancing competition a priori and competition law checks unwarranted behavior a posterior, therefore, at a common junction, Competition policy and Intellectual Property Lawcross paths to increase efficiency, encourage innovation leading to consumer welfare and economic growth.

IP Law and Competition Law: Complimentary Role

In the previous section, it has been discussed that the role of is IPRs to award monopolyrights and it is the competition law that battles monopolies in the market. However, monopolyper se is not anti-competitive but it is the abuse of monopoly which is considered anti- competitive. As the stipulated goal of IP Law is to augment innovation by offering conduciveenvironment for development of diverse products. These products are then available to the consumers at better prices and quality, which is same as the prime objective of competition law of promoting consumer welfare, thus both IP Law and Competition Law complementing eachother.

[11] Vishakha Sharma, *Intellectual Property Rights and Competition Policy: An Overview of Approaches Adopted by the US, EU and India to Harmonize the Two.* INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES (2014).

[12] SINGH, *supra* note 10, at 20.

Both IPR and Competition Law coexist at various level. Since, IPR and Competition policies intends to foster technological growth to promote innovation but will deter if pursued too stringently or too gently. Firms will be eager to innovate if some protection is afforded to them at some level from free riding or face strong competition in the market which further encourages them to create new products and maintain their position in the market. From the viewpoint of IP law, if it is not very difficult to acquire intellectual property protection, firms will be discouraged to innovate as their will be a number of IP holders who will be tough to locate for obtaining licenses. From the viewpoint of Competition Law, if a very stringent perusal of law enforcement is undertaken where the competitors are permitted to make unrestrained use of a company's innovation, then there will be very less or no incentive to innovate in the first place. Also, under any IP Law, it is expressly recognized that the protection granted is for a definite period which after the period of protection is over goes in the public domain. Even within the period of protection, the creation can be used with/without some restrictions for the purpose of research, teaching, granting compulsory licenses in the interest of public health or national emergencies and also when the patentees indulge in anti-competitive practices.[13] Once the said objective of IP is achieved, the protection is only meant for a limited time and when furtherance of such protection beyond specified time is not prevented, competition law in such cases can exercise limiting role. Therefore, in such situations, where the inherent purpose of the rights i.e. exceeding the crucial function for which the right is granted is lost, application of competition law the defends the ultimate aim of IP law, when IP Law is not in a position to safeguard the same.[14]

Considering the short term scenario, and in the reasonable exercise of the exclusivity granted under the IP Law, IPR holder is in a position to sue any potential competitors for infringement and can also deny access to technological innovations crucial for the development of next generation products. This leads to a situation of barring the entry to compete. At this juncture, the role of competition law becomes pertinent to scrutinize the fairness of IPR protection in attaining the ultimate goal of consumer welfare. Therefore, in the long run, the role of both competition law and IPR law is to attain enhanced efficiency and welfare and not only on competition and protecting the IP.[15]

[13] SINGH, *supra* note 10, at 20.
[14] SHANKAR, *supra* note 16, at 22.
[15] Alice Pham, COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: CONTROLLING ABUSE OR ABUSINGCONTROL? (2008), http://www.cuts-international.org/pdf/CompetitionLaw_IPR.pdf (last visited Jan 17, 2021).

In 1990, the Court of Justice of the European Union handed down a few landmark decisions,[16] which in essence held that there can be violation of competition law in certain exceptional cases involving the *exercise* of IP rights. This led to the birth of new modern view on the relationship between IP and competition law i.e. complementarity theory, where the two regimes are considered to complement each other as opposed to the historical view of them being in conflict with each other. In accordance with this theory, these two systems of law require each other to function and the ends they strive to achieve are not considered to be too divergent. This theory strives to pursue the long-term goals of innovation which IP Law furthers through the concept of long-term incentives and competition law practices by promoting dynamic competition in the market. Complementarity theory thus rests on the beliefthat IP operates in a competitive environment. The function of IP law is to restrain competitionby restricting the rivals from contending by imitation. This is done basically for increasing dynamic competition by substitution. From the perspective of competition law, intellectual property creates a bargain in which it is anticipated that pro-competitive vital impacts will counterbalance the anti-competitive consequences. The theory of complementarity emphasizesthat resolving the aforementioned tension between the concepts of intellectual property and competition calls for a case-by-case evaluation of the pro and anticompetitive impacts.[17]

General exemptions of IP from Competition Law

Various jurisdictions around the world reserve the application of Competition Law on the exclusive rights granted under the IP Law protection either expressly or impliedly. Some jurisdictions have no mention of IP Laws in their Competition legislation, while other contains statutory provisions exempting IP from competition law application. For jurisdictions which are relatively younger, this has resulted in certain issues primarily being under erroneous faith that there should be no application of competition law to IP related cases as opposed to the experienced jurisdiction that uses much matured theories to map the precise scope of application. These exemption clauses should guarantee that there is enough room for competition authorities to attentively implement a 'rule of reason' approach on individual case basis so that the goal of IPR to foster innovation does not lead to anti-competitive practices.

[16] Radio Telefis Eireann v. Comm'n of the Eur. Cmtys, Joined Cases C-241 & C-242/91and Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. 1-7791, Case C-7/97.

[17] COPYRIGHT, COMPETITION AND DEVELOPMENT (2013), https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/02_copyright_competition/report_copyright-competition-development_december-2013.pdf (last visited Sep 10, 2020).

Therefore, in situations where there is abuse of IP by the IPR holder in terms of unreasonable restrictive practices, the affected parties can claim relief under the Competition Act.[18]
In India, Section 3(5) of the Competition Act on restrictive agreements exempts conductrelating to the protection of IPRs. Section 3(5) reads as follows:

"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)"

In one of the landmark cases of *Shamsher Kataria v Honda Siel Cars Ltd and others (*Automobile Spare Parts case),[19] the Competition Commission of India dealt with the claim of IPR exemption under section 3(5)(i) of the Act. The CCI noted: *"The Commission is of the opinion under section 3(5)(i) allows an IPR holder to impose reasonable restrictions to protect his rights 'which have been or may be conferred upon him under' the specified IPR statutes mentioned therein. The statute is clear in its requirement that an IPR must have been conferred (or may be conferred) upon the IPR holder prior to the exception under section 3(5)*
(i) being available"

"The Commission is not the competent authority to decide, for example if a patent/trademark that is validly registered under the applicable laws of another country fulfills the legal and technical requirement or is capable of being registered under the Indian IPR statutes, specified under section 3(5) of the Competition Act. Such a mandate would lies with the IPR enforcement agencies of India. For the Commission to appreciate a party's validly foreign registered IPR, in the context of section 3(5) of the Act, satisfactory documentary evidence needs to be adduced to establish that, the appropriate Indian agency administering the IPR statutes, mentioned under section 3(5)(i) have: (a) validly recognized such foreign registered IPRs under the applicable Indian statues, especially where such IPR statutes prescribe a

[18] *Id.* at 6.

[19] [2015] CCI 133.

registration process, or (b) where such process has been commended under the provisions of the applicable Indian IPR statutes and the grant/recognition from the Indian IPR agency is imminent."

Also, the first case in India dealing with the conflict between IPR and the Competition Law was *Aamir Khan Production v Union of India*.[20] In this case the Bombay High Court held that Competition Commission of India has the jurisdiction to deal with matters relating to IPR when it is directly in contravention of the provisions of the Competition Act. Court also stated that *"every tribunal has the jurisdiction to determine the existence or otherwise of the jurisdictional fact, unless the statue establishing the tribunal provides otherwise. On a bare reading of the provisions of the competition act it is clear that CCI has the jurisdiction to determine whether the preliminary state of facts exists."*

In *Kingfisher* v. *Competition Commission of India*,[21] the Court echoed the competency of CCI to deal with all the issues that come before the Copyright Board. These judgments reflect an effort by various Indian Courts in addressing the emerging case laws of competition law involving IPR.

Taking into consideration the above points and also focussing on the applicability of Section 3(5), it has to be observed that the nature of non obstante clause in section 3(5) of the Act is not unconditional in nature which can be inferred from the terminology employed exempting the right holder from the strict application of competition law only for the purpose of safeguarding his rights from infringement and enabling the right's holder to impose reasonable restrictions as may be required to safeguard those rights.[22] It therefore follows that the clash between intellectual property and policies governing Competition and their long-term impact on economic growth cannot be understated.

According to World Intellectual Property Organization (2016) : *"There is a close link between patent rights and competition, which, in simple terms, can be characterized by two factors: on the one hand, patent laws aim to prevent the copying or imitation of patented goods and thus complement competition policies in that they contribute to a fair market behavior. On the other hand, competition laws may limit patent rights in that patent holders may be barred*

[20] [2011] 1 Bom CR 802.
[21] [2010]SCC OnLine Bom 2186.
[22] *FICCI - Multiplex Association of India v. United Producers/Distributors Forum* [2011] CCI 32.

from abusing their rights. In sum, experience shows that too high or too low protection of both patents and competition may lead to trade distortions. A balance has thus to be found between competition policy and patent rights, and this balance must achieve the goal of preventing abuses of patent rights, without annulling the reward provided for by the patent system when appropriately used."[23]

It is also stressed by William J. Baer, Former Director, Bureau of Competition, and Federal Trade Commission, *"Enforcement of competition laws no longer begins with the assumption that restrictive use of IP is necessarily anti-competitive. Current enforcement instead starts with three basic assumptions about intellectual property: First, intellectual property is comparable to other forms of property, so that ownership provides the same rights and responsibilities; second the existence of intellectual property does not automatically mean that the owner has market power; and third, the licensing of IP may often be necessary in order for the owner efficiently to combine complementary factors of production, and thus may be pro-competitive."*[24]

The vital task is to appreciate the existence of IPRs while minimizing its anticompetitive effects and focus on the societal objectives it is intended to endorse. An appropriate balance is therefore achieved when applying Competition Law and policy to IPRs. Since these two branches do converge at some point, the entire constitution of IP Law requires being interpreted taking into consideration the principle of freedom of competition, which is critical to competition policy. Therefore, it can be clearly inferred from the above discussions that both IP Law and Competition Law are complimentary approaches of facilitating technological advancement, innovation and ultimately economic growth taking into account the consumer welfare at large.

INTERFACE BETWEEN COPYRIGHT AND COMPETITION LAW

Works in which copyright subsists varies from country to country but the motive for awarding the copyright owner is the same which is incentivizing them for their investments. In the US Supreme Court judgment of *Twentieth Century Music Corp. v. Aiken*,[25] it was declared that

[23] EXAMINING THE INTERFACE BETWEEN THE OBJECTIVES OF COMPETITION POLICY AND INTELLECTUAL PROPERTY (2016), https://unctad.org/system/files/official-document/ciclpd36_en.pdf (last visited Nov 7, 2020).

[24] William J. Baer, ANTITRUST ENFORCEMENT AND HIGH TECHNOLOGY MARKETS FEDERAL TRADE COMMISSION (2013), https://www.ftc.gov/es/public-statements/1998/11/antitrust-enforcement-and-high- technology-markets (last visited Apr 15, 2021).

[25] 422 US 151 [1975].

"the immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Therefore, copyright law grants a bundle of exclusive rights to the author for his creative work in right of reproduction, distribution, derivative work, public performance etc. Various in- built safeguards are inserted in the copyright legislatures around the world in the order to strike a balance between access of work to the public as well as rights of the copyright owner. These safeguards include fair use/ fair dealing, idea expression dichotomy, originality requirement, first sale doctrine etc. These safeguards are believed to accommodate the societal interest. Therefore, the pertinent question which arises is whether the inbuilt safeguards under copyright law are adequate or is there any necessity for the courts to intervene by using legal doctrines outside the copyright system.[26]

The evolution and advancement of creative and cultural industries in *'independent individual countries or the high level of concentration in rather isolated small national market's*, various agencies have stressed on the relevancy of competition law enforcement in the copyright area.[27]

Relationship between copyright and competition law also have to be understood in identical sense as furthering complimentary goals same as that of the interface between the IPR and Competition being complimentary to each other with the ultimate goal of promoting market efficiency and consumer welfare. However, the conflict may arise at the application stage, between these two areas when excessive reliance is placed on the competition law to seal the copyright exclusivity. Therefore, in defining the boundaries of the application of competition law in the copyright based industries, the question is "how" it should be applied but not "whether" competition law should be applied. This calls for further harmonizing, taking into account the copyright's pro and anticompetitive effects on market competitiveness.[28]

Fundamentally, the role of copyright law is pro- competitive in the larger market of ideas and not in any specific markets of books or a cinematograph film etc. The author is awarded an exclusive right in the expression of his idea for supply of a *'commodity'* to be sold in the larger market. This will particularly lead to competition in the market of underlying idea which

[26] [26]John T. Cross & Peter K. Yu, COMPETITION LAW AND COPYRIGHT MISUSE SSRN (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=986891 (last visited Sep 15, 2019).
[27] [27]*Supra* note 17, at 23.
[28] *Id.* at 5.

is the larger market and between authors' expression and the expression generated by others suggesting a likely role of competition law in the outcome of copyright suit. A situation where an owner of copyright abuses his dominant position or carries out certain acts to protect its rights, competition can be restricted in the market of ideas. Therefore, under appropriate circumstances, competition law may intervene to preserve some degree of fair competition in these other markets.[29]

Copyright abuse can also ascend in cases where the copyright owner because of his exclusive right behaves in an improper way and perform certain acts to his advantage and which are detriment to others. Copyright abuse can be assumed in the cases where *the licensee's ability to deal with competitors is restricted*. For the economic benefit of the copyright owner, the owner will make sure that the licensee can only buy from him/her. Owners undertake various agreements in order to limit the ability of the licensee to negotiate on reasonable terms with the competitors. Peculiar example is of a 'tying arrangement' where the right of the licensee to acquire the license of a copyrighted work is based on his agreement to procure the second product in the same transaction leading to linking a competitor's ability to compete in the market for that other product, leading to unfair advantage to the competitors.

A situation of copyright abuse can also arise where another's ability to compete is also restrained. In situations where the competitor is a probable licensee, the copyright owner may not be willing to deal with the competitor. This situation is known as 'refusal to deal' where the copyright owner for competing in the market for the sale of that work or even in some other market may refuse to sell or license copies of the work to a competitor. Other situations may involve circumstances where the competitor enters into an agreement of pooling their assets or dividing the market among themselves generating serious anti-competitive concerns. This can lead to increased market concentration which will eventually come under the glances of competition authorities.

Also, when concessions are demanded from the licensee can also lead to situations of copyright abuse. The copyright owner usually enjoys a beneficial bargaining power during the grant of the license in its dealing with prospective licensees. In cases where the demand for copyright work is high, the copyright owner will be in an advantageous position to extract both

[29] Cross, *supra* note 32.

price and non- price concessions concerning the use of copyrighted work from the licensee. These can be in the form of charging high price for the use of copyrighted work, license for only non-commercial use, preventing reverse engineering, and concessions not directly related to the copyrighted work but beneficial to the owner. All of these concessions come with present peculiar competition policy concerns.

Copyright owners are entitled to certain procedural benefits and therefore are also in a position to extract considerable damages from the defendants in a copyright law suit. It is usually alleged by the defendants that the basic objective in instituting such suits is not to protect the legitimate interest but to safeguard conduct that is unrelated or only incidentally related to the copyright even though the defendant's conduct may technically infringe the copyright. Infringement suits in these types of cases are also directed against a probable licensees or competitors to limit competition in some other market or increase sales of the copyrighted product. This leads to *anticompetitive use of the judicial system* and can be considered a case of copyright abuse.

CONCLUSION

The probable clash between IP and Competition Law escalates from the aims they seek to augment. The IP owner is incentivized by giving monopoly rights for a limited period and but Competition Law goes against this rule by curbing abusive monopolies and enhancing market conditions leading a market with fair competition. Through the lens of competition law, IP like any other form of property is not inherently detrimental to competition and a well-defined IP regime is meant to advance innovation and promote dynamic competition in the market. Therefore, the relationship between both IP Law and Competition Law is not inherently conflicting but is rather compatible in nature. As long as both focus on promoting consumer welfare the conflict will not arise but intervention of competition law may be required in the cases of abuse at the hands of the IP right holder.

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