The Competition-IP Dichotomy: Emerging Challenges in Technology Transfer Licenses

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Technology transfer agreements are necessary to fulfill technological needs that are impossible to meet with local technical capabilities. Traditional devices of licence transfer often fall within the purview of antitrust scrutiny and are deemed anti-competitive practices in general trade, as in the case of territorial restrictions in licensing. Antitrust laws, although fit to evaluate general trade agreements, often fail to address intricate problems involving IPR and therefore, lack the tools to adequately solve them. The blanket protection approach to IP as provided by Section 3(5) of the Indian Competition Act is equally ineffective due to lack of a mechanism to deal with IP-related unfair trade practices. The TRIPS under Article 40, permits member states to prevent abuse of IP through anti-trust legislations. India has permitted cross licensing under its patent laws but has failed to prevent its anti-competitive fallout in technology licensing. This article draws from the EU TTBE 2004 Regulations as well as the US antitrust guidelines to highlight the need for a balance between the two conflicting interests of competition policy and the protection of technological know-how. It further purports to set forth an adaptation of guidelines for India, keeping in mind the anti-trust laws of other jurisdictions.

Keywords: IPR, commercialization, anticompetitive practices, FDI, joint ventures, technology transfer licences

Knowledge and technology lie at the very foundation of a successful economy, thus technology transfers are of great significance in the world today. The acquisition of new technology is absolutely vital for all companies that want to procure or retain a competitive edge in the market. Additionally, movement of knowledge between the developed and the developing nations brings into sharp contrast the tension between the claims of private property ownership, perceived public need and national trade policies.1

The now abandoned UNCTAD draft International Code on the Transfer of Technology in its definition of technology transfer describes technology as ‘systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service which does not extend to the transactions involving mere sale or mere lease of goods.’2

Technology transfer agreements occasionally possess certain restraint clauses which may affect the competitive conditions in the market. It is therefore necessary for antitrust law to evaluate the competitive impact of the manner in which patent rights are employed or transferred.3 The competition implications of technological transfers are particularly important for producers in developing nations such as India who license in technology or procure it through foreign direct investment (FDI) to stimulate domestic production.

This article deals with the intellectual property (IP) and competition law dichotomy which prevails in legal systems all over the world. It analyses specific issues related to technology transfer licences and antitrust law, deliberates upon the distinct stances taken by the EU and the US antitrust guidelines regarding technology transfer and further seeks to elaborate upon the ambiguities in the Indian competition law. Finally, it purports to evolve a set of guidelines for India to ensure a balance between the competition law policies of the State and the intellectual property rights of an individual.

Modes and Types of Technology Transfer

The transfer of technology occurs in several modes. Several arrangements exist to facilitate the flow of technology, across national boundaries, the vast majority of which revolve around a contractual agreement. These include agreements for assignment of IP rights, licensing agreements, know-how contracts, franchise, consultancy agreements, joint-
venture agreements (transfer of technology necessary for a joint project) and turn-key contracts (involving building of an industrial plant and the transfer of know-how or the ‘key’ to local personnel). Only in licensing and assignment arrangements can one plausibly state that access to technology has been transferred in its entirety. The distinctions in the form of these varied arrangements range from the duration of the right, to the nature of obligations incurred by the contracting parties.

The most commonly used instrument for transferring technology is the licence contract. By such a contract, the owner of special technology creates a relationship whereby someone else is permitted and equipped to make use of this property. In developing nations, a major source of international transfer of technology is FDI. It can be defined as the act of establishing or acquiring a foreign subsidiary over which the investing firm has substantial management control.4

A technology transfer licence generally needs to have the name of the grantor or licensor who professes ownership or control over the subject matter; a description subject matter to be licensed; the name of the grantee or licensee (including or excluding subsidiaries and other affiliates) to whom the licence is granted.

A technology transfer agreement generally has several provisions which help decide the permissible uses of the right by the licensee. For instance, there needs to be a clause dealing with the exclusive or non-exclusive nature of the licence which determines whether the licence is to be a granted only and exclusively to the licensee, or whether it can be licensed to other persons as well. There may be a geographic territory clause that establishes whether the licence to exercise this right is limited to a particular geographical territory and the extent of that territory. It also has a clause providing the price of the licence as well as the duration for which the licence is effective.5

It may however possess certain ‘restraint clauses’ which could detrimentally affect the competitive environment of the market. For example, there may be a field of use or specific application clause which is a means by which the licensor limits the field of business for the licensed technology. If this clause is framed in a particular manner it could act as a restraint clause and limit the ways in which the licensed technology is used so as to ensure that the licensor is benefited.

Thus, it is apparent that though technology transfer agreements can benefit the market by ensuring that newer technologies are developed and made available, these may also affect the competition in the market.

The Interface between IPR and Competition Policies

It is often said that intellectual property rights and antitrust law are diametrically opposed concepts: the former create monopolies, whereas the latter strives to prevent them. Nevertheless, these seemingly conflicting concepts actually strive towards the same objectives - innovation and consumer welfare. It is necessary to analyse both IP laws and competition laws to understand this apparent dichotomy.

Intellectual property law allows for the establishment of enforceable and exclusive rights for the inventors of new and useful products, more efficient processes, and original works of expression. The most frequently noted economic rationale for IP protection is that it encourages private investment in R&D and spurs innovation.6 Assigning exclusive rights to the outcomes of creative and intellectual efforts increases incentives to develop new products. Through technology transfer agreements, inventors can commercialize their inventions and benefit from them. IPR also play a role in the dissemination of innovation and facilitate commercial development of ideas.7

Competition laws, in turn, attempt to make sure that new technology, products, and services are traded or licensed in a competitive atmosphere. In the current evolving market, new technologies are constantly replacing the old as competitors try to increase efficiency, improve their products or create new products in order to maintain their share of the market. Antitrust laws promote competition by prohibiting anticompetitive mergers, collusion, and exclusionary uses of monopoly.

As the US Supreme Court explains, the goal of antitrust or competition law is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.8 Market mechanisms are not always sufficient to ensure that dominant companies do not pre-empt the competitive process. It is for this reason that competition laws in nations all over the world prevent companies from monopolizing or attempting to monopolize any part of trade and commerce. For social reasons, the free market system requires that a failing market be repaired, reinstituted, and redeveloped. Hence, a free market needs protection
against distortion. Where there are agreements with the intent or the effect of preventing or restraining competition, such agreements must be prohibited and their effects repaired.\textsuperscript{9}

The existence of IP rights promotes market momentum and rivalry, as companies vie to be the first to, for example, patent a particular product.\textsuperscript{1} Competition laws, on the other hand, are used by the State to restrict players who are using anti-competitive agreements or practices to foreclose markets, to save them from having to innovate or price products reasonably.

Despite being closely related and having a common aim, the interface between intellectual property practices and anti-competition law remains rocky. This is because, antitrust laws are primarily aimed at keeping markets open and dynamic, whereas some IPR effectively grant exclusive rights to make or sell particular products/services, potentially causing markets to be monopolized. In a world without IP protection, any new product or technology can be adopted by direct competitors and an inventor will not be able to benefit from his/her own labour. Conversely where technology is protected by IP rights, the owner is afforded a greater degree of market power over the product and can restrict or foreclose business activities in the market.\textsuperscript{10}

In the world today, modern inventions and technology are central to developing the global economy and as such transfer of technology and IP is of great importance in the market.\textsuperscript{11} It is thus essential to devise an effective mechanism for walking the tightrope between IP and antitrust laws. Doing so may be complicated but as both regimes are indispensable, a clear pathway must be found.

**Technology Transfer and its Conflicts with Competition Law**

From the competition law perspective, many clauses in patent and know-how licensing contracts- or means of technology transfer, resemble agreements in the restraint of trade. Therefore, most of the literature on clauses in licensing contracts, relates to possible conflicts with antitrust policy and law.

History is replete with examples of licences that include terms essentially unrelated to the transfer of full monopoly rights contained in the IP being licensed. For example, there have been clauses requiring the licensee to refrain from competing in other unrelated markets, clauses containing illegal tying arrangements masquerading as a licence, and blatant pooling of competing technology in order to form a cartel.\textsuperscript{12}

Contractual promises within the licence agreement (i) not to challenge the validity of the licensed IPR, (ii) requiring exclusive dealing; (iii) involving restrictions on research; (iv) having grant back provisions and (v) imposing restrictions on the use of personnel are examples of provisions under a technology transfer licence which appear to be antitrust law violations.\textsuperscript{13}

Technology transfer may impose vertical restraints or horizontal restraints. Vertical restraints refer to limitations imposed between different levels of the market, for example, those imposed by a manufacturer on a dealer. A horizontal restraint, on the other hand, refers to a restraint by one competitor to another at the same level of the market. For example, those imposed by one producer of product A on another producer of product A. Horizontal restraints appear to be more restrictive a trade practice.\textsuperscript{14}

**Patent Pooling and Competitive Concerns**

A ‘patent pool’ refers to licensing arrangements wherein two or more patent holders license their patents to each other or co-license their patents to a third party.\textsuperscript{15} It is usually established based on standardized products, such as the 3C DVD patent pool, 3G patent platform, etc. Patent pooling has several pro-competitive benefits such as integrating complementary IP, reducing transaction costs, disseminating technology, and avoiding litigation. Further, by licensing their pooled patents on a group basis, patent pool members can offer ‘one-stop shopping’ to firms seeking to manufacture products using those patents. However, it is to be noted that these pools amount to horizontal agreements and, therefore, create the risk of unlawful allocation of markets that might raise competitive concerns. Pooling may also result in control of the price or output of downstream products, which will hinder efficiency and destroy fair competition. If patent pool members jointly monopolize the market, and by exclusive licence or refusal to license prevent other competitors from effective competition in the relevant market, it might be against the law.

After scrutinizing the plausible outcome of patent pooling on competition, the Antitrust Division of the US Department of Justice and the US Federal Trade Commission (FTC) cited two main concerns of a potential or actual patent pool. Firstly, horizontal
coordination among the pool’s licensors could lead to a reduction in price competition among downstream products. In particular, a pool that includes patents for substitute technologies could lead to increased prices in the final goods market due to the absence of competition among those substitute technologies. Additionally, participants in the pool might be able to use it to collude, for example, by exchanging competitively sensitive information, such as pricing, marketing, or R&D information through the mechanism of the pool. Secondly, combining patent rights could discourage R&D and consequently harm the interests of licensors. Such arrangements usually require members to grant each other licences at minimal costs because they are required to share their successful R&D. Licensees could be discouraged from innovating if the licensors do not retain the right to license their patents independently or if licensees are not adequately rewarded for innovations that they grant back to the pool. The FTC has often concluded (e.g. VISX case\(^{16}\)), that a pool containing substitutable patents, i.e., patents covering technologies that compete with each other and those which licensee producers could choose between, may have the anticompetitive effect of increasing the total royalty rate to licensees. Thus, an important part of the analysis of a patent pool would be- whether, and to what extent, licensees use the patents in the pool as complements or as substitutes.\(^{17}\) Even if it is concluded that such arrangements drastically reduce transaction costs for licensees, it cannot be denied that pooling agreements will always warrant greater anti-trust scrutiny due to the collective pricing of pooled patents, greater possibilities for collusion, and generally a larger number of market participants.

### IP and Tying Arrangements

Tie-in arrangements involving IP, is another practice that may invite anti-trust scrutiny. According to this, the licensee may be required to procure particular goods solely from the patentee, thus foreclosing opportunities for other producers. Generally, linking IP with products or other forms of IP takes many forms, such as offering licenses that cover multiple patents or copyrighted materials or tying the sale of two patented goods or one unpatented and one patented good. A classic case of tying occurs where a patented good is attached with an input used for the patented good. Thus, the sale of the patented product is subject to the sale of the unpatented product. In some cases, there could also be a technological tie up, where the tying and the tied product are bundled together physically or produced in such a way that they are compatible only with each other.\(^{18}\) While dealing with licences, ‘mandatory package licensing’ may occur where a patent owner refuses to license a particular patent unless a licensee accepts an entire package.\(^{19}\)

### Some Other Licensing Practices

In practice, licence agreements may also require that a licensee pay royalties beyond a patent’s expiration, thus unreasonably extending the market power conferred by the patent. Such practices traditionally have been challenged under the doctrine of patent misuse. Antitrust challenges to these practices have been few owing to the agency’s established rule that they would cause competitive concern only if the patent in question has conferred market power, i.e., the patent holder can profitably ‘maintain prices above, or output below, competitive levels for a significant period of time.’\(^{20}\) Alternatively, an agreement may provide that royalty should continue to be paid even after the patent has expired or that royalties shall be payable in respect of unpatented know-how as well as the subject matter of the patent. Moreover, there could also be a clause, which restricts competition in R & D or prohibits a licensee to use rival technology. Or in other situations a licensee may be subjected to a condition not to challenge the validity of IPR in question. The provision may also be invoked when a licensee may require to grant back to the licensor any knowhow or IPR acquired and not to grant licenses to anyone else. This is likely to augment the market power of the licensor in an unjustified and anti-competitive manner. A licensor may also fix the prices at which the licensee should sell.\(^{19}\)

Territorial restrictions may also be imposed wherein the licensee may be restricted territorially or according to categories of customers. In some instances the licensee may be coerced by the licensor to take several licenses even though the former may not need all of them. This is known as package licensing which may be regarded as anti-competitive.

A condition imposing quality control on the licensed patented product beyond those necessary for guaranteeing the effectiveness of the licensed patent may be an anticompetitive practice.\(^{19}\) The restricting of the right of the licensee to sell the product of the licensed know-how to persons other than those designated by the licensor is also anti-competitive.\(^{19}\)
In some cases, imposing a trademark use requirement on the licensee would be prejudicial to competition, as it could restrict a licensee's freedom to select a trademark.20

Thus it is apparent that on imposition of certain requirements or clauses, technology transfer licenses may result in severe restraints on the competition prevalent in a market. These licenses therefore ought to be governed by competition laws to ensure that no such eventuality takes place.

Stance of the EU and the US: Legislative and Judicial Analysis

US: The Intellectual Property Guidelines Approach and Court Fashioned Exemptions

The enforcement approach taken by the United States is embodied in the 1995 Department of Justice and Federal Trade Commission’s Antitrust Guidelines for the Licensing of Intellectual Property (IPG).21 There are three basic principles underlying the IPG: First, IP is viewed in the same way as any other form of property (§§ 2.0(a), 2.1). Thus, the same antitrust principles govern IP and other forms of property. Second, contrary to traditional thinking, it is not assumed that a patent creates market power (§§ 2.0(b), 2.2). Third, IPR licensing is usually efficient and pro-competitive because it typically integrates complementary IP, speeds up innovations to market, and encourages further innovation (§§ 2.0(c), 2.3).

The IPG further elucidate the application of the rule of reason standard to specific categories of IPR licensing, including cross-licensing, pooling, and grant-backs. The IPG also provide for an antitrust ‘safety zone,’ explaining that, absent extraordinary circumstances, federal antitrust enforcers will not challenge a restraint in an IPR licensing arrangement if: (1) the restraint is not prima facie anti-competitive, and (2) the licensor and licensees collectively account for no more than twenty percent of each relevant market significantly affected by the restraint (§ 4.3).

The enforcers are required to use the antitrust rule of reason to ask whether an IP licensing restraint is likely to have an adverse effect on competition, and if so, whether the restraint achieves pro-competitive benefits or whether its efficiencies outweigh the adverse effects.22 Thus, an accommodative, economic efficiency-oriented standard is maintained. For example, a licensing restraint may harm competition among actual or potential horizontal competitors in the same relevant market by facilitating market division or price fixing. However, licences provide a licensee with an incentive to invest in the commercialization and distribution of products embodying the licensed IP and to develop additional applications for the licensed IP (IPG, § 2.3).

The US courts have stated that IPR holders must show ‘objective business justification’ for exclusionary conduct in re Independent Service Organizations Antitrust Litigation, which has left very little room for rebuttal.22 The issue has been analysed in the Data General Corp wherein the company which manufactured and repaired personal computers refused to license to third parties a copyrighted software program designed to diagnose dysfunctional personal computers. Independent repairers claimed that the software was essential for them to repair Data General’s computers properly. The central issue involved was whether Data General’s (attempt to protect its) exclusive rights on the diagnostic program could amount to a legitimate business justification for the refusal to license and for the consequent harm suffered by consumers.23 The court was prepared to enforce copyright protection declaring an author’s desire to exclude others from use of copyrighted work is a ‘presumptively valid business justification’.

EU: Technology Transfer Block Exemption Regulations Approach

The EU stance on technology transfer is reflected in the national IPR grants historically made by individual EU nations and the EU-wide antitrust principles embodied in Articles 101 and 102 (formerly Articles 81 and 82 of the EC) of the Treaty Establishing the European Economic Community.24

The Technology Transfer Block Exemption Regulations (TTBER) approach has been previously applied to licences of either patents, or know-how,25 or a combination of both. In 2004, the European Commission published a legislation governing technology licensing, namely, a new TTBER, Regulation 772/2004,26 together with supporting guidelines.27-28

The TTBER ensures that patent and know-how licensing agreements remain exempt from Article 101(1) and extends the benefits of the block exemption to software copyright licence agreements. The guidelines to the TTBER suggest that the rules may be also applied to other types of copyright agreements. Besides extending the scope of exemptions offered by Regulation 240/96, the TTBER also extends the period of exclusivity for as long as
the licensed IP right remains valid or the know-how remains secret. Under this regulation, exclusivity provisions in know-how licences were exempted for up to 10 years from the date when the licensed product was first put on the EU common market by a licensor.\textsuperscript{29}

Certain flaws exist in the new ‘do-it-yourself’ environment expected the new TTBER to be user friendly, instead of which the ‘safe harbour’ that determines TTBER applicability, in case of particular licences is dependent upon decrypting a number of elusive criteria which could easily lead to different conclusions.\textsuperscript{29} Moreover, under the new TTBER, licensors will have a continuing obligation to monitor the relevant criteria to ensure that they remain covered by the block exemption. A number of complications still exist in the present EU law relating to technology transfer.

Article 82 of the EC Treaty expressly establishes that ‘any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.’\textsuperscript{31}

The EC Courts upheld compulsory licensing in the Magill case\textsuperscript{30}, wherein three major broadcasting companies refused to license their copyrighted TV listings for a comprehensive TV guide by another company. This was determined to be a clear abuse of dominance by the IP holders, because the holder of an essential raw material to a product with consumer demand denied licensing with no business justification merely to reserve a downstream market.

It must be noted at this point that EU competition law is applied to remedy the consequences of imperfect IP laws. In contrast, the US antitrust agencies and courts note flaws in the IP system, but are much more reserved when it comes to remedying their negative effects; instead they defer such problems to the authorities responsible for IP policy.\textsuperscript{10} Application of antitrust rules to address imperfections in IP laws might offer significant advantages, especially since IP policy makers often do not take due account of competition values. Yet, it also has dangerous implications. As the EU experience shows, the reasoning that leads to desirable outcomes in a particular case may create a danger of over-enforcement and negatively affect incentives to innovate if applied to valid IPR.\textsuperscript{31} The challenge lies in the coining of clear limiting principles for application of antitrust laws to IPR.

The Indian Scenario

Potential benefits are often thwarted by market-distortionary practices. In view of this, proper institutional arrangements were placed to check such behaviour of market players. While different countries had initiated market-oriented economic reforms, India enacted the Competition Act 2002 to replace the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. This law in general, consists of provisions with respect to behaviour and structure of firms in the market: institutional and enforcement design; and competition advocacy.\textsuperscript{32} The legislation exempts IP holders from certain requirements, acknowledging a need to focus on a national economic development strategy that covers IPR issues in a holistic framework.

The Specific Exceptions for IP under the Indian Competition Act, 2002

The provision carving an exception for IP holders is Section 3(5) of the Competition Act, 2002. It is pertinent to note that Chapter II of the Act proscribes anti-competitive agreements including tie-in arrangements, exclusive supply agreements. Section 3(5) however provides (\textit{inter alia}) the section shall not be read to restrict the ‘right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary to protect any of his rights which have been or may be conferred upon him under’ the Copyrights Act, the Patents Act, the Trademarks Act, the Geographical Indications Act, the Designs Act or the Semi-conductor and Integrated Circuits Layout Design Act. It is believed that if IP is not protected, then it would disturb innovation and this would subsequently be reflected in bad quality services and goods. The competition law does permit restrictions on IP, except when unreasonable conditions are imposed by the IP holder.\textsuperscript{33} Transfer licenses may violate competition laws when they overstep fixed competitive pricing. The ‘abuse of dominant position’ provision contained in Section 4 of the Competition Act is the only recourse against anticompetitive technology transfers.\textsuperscript{34} A criticism of this exception is the failure to consider public interest and an absence of reasonable restrictions on licensees for the protection of such IPRs. Section 3(5) of the Act declares that ‘reasonable conditions as may be necessary for protecting’ any IPR will not attract Section 3.
The expression ‘reasonable conditions’ has not been defined or explained in the Act. However, by implication, unreasonable conditions that attach to an IPR will attract Section 3. In other words, licensing arrangements likely to affect adversely prices, quantities, quality or varieties of goods and services will fall within the ambit of competition law as long as they are not reasonable with reference to the bundle of rights that go with IPR. For example, a licensing arrangement may include restraints that adversely affect competition in markets by dividing the markets among firms that would have competed using different technologies. Similarly, an arrangement that effectively merges the R&D activities of two or only a few entities that could engage in R&D in the relevant field might harm competition for development of new goods and services. Exclusive licensing is another potentially unreasonable condition. Examples of arrangements involving exclusive licensing that may give rise to competition concerns include cross-licensing by parties collectively possessing market power and grant backs.\(^35\)

Technology transfer licences that impose unreasonable conditions are not protected under Section 3(5). Penalty can be imposed for the Section 27 of the Act for such violations. Under the broad umbrella of such a provision however, only a limited illustrative list can be prepared. Clearly, the Indian legislature needs to evolve a slab system which would determine the exact meaning of reasonable conditions under technology licences or otherwise.

**Conclusion**

The mainstream view is that IP and competition laws should work in harmony to maximize wealth by promoting innovation and economic progress.\(^36\) It has already been seen that though IPR is not immune to competition intervention, its special features must be considered. Where the scope of IP rights is ambiguous, competition law may be used as a tool to circumscribe its scope. However, careful balancing is necessary, as over-enforcement of antitrust laws may undermine the objectives of IP.\(^6\)

The overlap between competition and IP law has been interpreted differently by courts in different countries. The United States courts, have rationalized that antitrust and intellectual property laws are complementary legislations and in the long run, pursue the very same goal; namely, protection of consumer welfare. In practice, however, such ‘complementarity’ of goals allowed IP rights to gain immunity from antitrust intervention.

Owing to the market share threshold, there is concern about the practical utility of the TTBER. There are also concerns on the reliability of TTBER and its guidelines in the modern context. The general impression is that application of TTBER will require specific information which is either unavailable to parties or only available at high cost. On a cost-benefit analysis, it is altogether possible that licensors and licensees will not be prepared to make the detailed investigations and complex analyses necessary to benefit from the TTBER.\(^37\)

Thus, striking a balance between antitrust and IP requires taking into account static and dynamic efficiency considerations.\(^38\) Static efficiency focuses on present market terms and its main concern is the level of prices. It entails that property rights in knowledge assets should be minimal and owners of such assets should be forced to share them with competing companies as a means to lower prices. Dynamic efficiency, on the other hand, is concerned with long-term effects, such as the level of innovation, the development of new products and services, and the pace of technological progress. Innovation brings better products, more choice for consumers, and lower prices. Therefore, even if it can be established that IP involves static inefficiency, it is socially desirable, if the ex ante incentives to innovate due to the additional reward are sufficiently great.\(^39\)

India requires to be careful while implementing laws that are TRIPS compliant. For instance, there is a need to harmonize the standards for granting compulsory licenses in Article 31 with the current Act,\(^30\) since due regard to technical advantages dilutes the stronghold created on the abuse of dominant position under Section 4 (ref. 41). IPR licensing arrangements which interfere with competitive pricing, quantities or qualities would be restricted by competition law, and yet the role of exhaustion, parallel importation or compulsory licensing, are not explicit.\(^41\) The legislation, however, clearly mentions penalty provisions in case of anti-competitive practices. It creates categories per se of illegality, geographical divisions and market divisions, the standardized treatment extended to these categories as well as to tying arrangements, refusals to deal, re-sale price maintenance and exclusivity agreements. However, standards need to be set to understand, when there is an adverse affect on competition. The
US and EU have set certain precedents wherein a ‘valid business justification’ would suffice to circumvent the competition law.\(^2\) A check and balance with a certain set standard requires to be legislated. Taking a middle path with a new technology transfer regulation would be one step forward in harmonizing this area of conflict within exclusive licensing agreements.

An analysis of the other two major jurisdictions’ applicable guidelines as well as case laws suggests that the issues identified are better dealt with by agencies and courts specialized in dealing with IPR.\(^4\) IP licensing occurs in quickly changing technological environments.\(^4\) To understand the technologies, a constant update in knowledge is necessary. The economic considerations driving antitrust/anti-competition policies in comparison are static. IP agencies (e.g., the PTOs), by their everyday work, are exposed to the latest changes in the industries and therefore, ‘automatically’ kept up to date. It is due to these dynamics (static economic policy developments vs fast-changing technologies) that the institutions dealing with IPR—the PTOs, national agencies in Europe, and the courts—seem to be better suited to administer the licensing of IPR.\(^4\)

The concerns underlying and driving competition policy can be accounted for under regular IP analysis. In order to tackle the problem of cost-efficiency, the evaluation of IPR licensing agreements should be transferred to a different forum, namely, specialized agencies IP and courts. The Indian courts are yet to encounter cases wherein such conflicts concerning licensing agreements exist. Keeping in mind the global experience, specialized IP courts in India must equip themselves to deal with such issues and the Indian legislature should endeavour to harmonize both interests effectively.

References
22 In re Independent Service Organizations Antitrust Litigation, 203 F.3d 1322 (Fed Cir 2000).
23 Data General Corporation v Gramman System Support Corporation, 36 F.3d, 1147 (1st Cir, 1994); 35 US C.S. § 271(d) (1988): ‘no patent owner otherwise entitled to relief for infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of the patent owner’s refusal to license or use any rights to the patent.’ The Court inferred from such
proposition that no antitrust claim could be raised against a refusal to license and that Congress had intended to create sort of an implied limited exception for patents from antitrust scrutiny.


25 ‘Know-how’ is defined as ‘a body of technical information that is secret, substantial and identified in any appropriate form’, Commission Regulation 240/96, January 1996 on the application of Article 85(3) [now Article 81(3)] of the Treaty to Certain Categories of Technology Transfer Agreements, 1996 OJ (L 31) Article 10.


28 The TTBE and the modernization reforms referred to in this article are now in effect throughout 25 Member States, including the 10 accession countries.


34 Section 4 defines abuse of dominant position broadly to include: (a) unfair or discriminatory prices, (b) restrictions on production or technical and scientific development, (c) practices that result in denial of market access, and (d) tying and market leverage.


