The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India

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The laws on intellectual property rights (IPRs) and competition have evolved historically as two separate systems. The traditional role of competition law has been to promote efficiency in the market and thereby prevent market distortions whereas the role of IPR has been the promotion of innovations by granting protection and rights over inventions. The general perception is that there is an inherent tension between IPR and competition law. Proof for this is the rise in the number of intellectual property related competition cases in the recent past across jurisdictions. India too has had her share of litigations in the matter.

The present study addresses the nexus between IPR and competition law in general with a focus on India. It also proposes to deliberate upon and discuss judicial decisions and policy measures undertaken in different jurisdictions so as to understand the nature of real-time disputes in other countries and to help formulate concrete guidelines for the effective working of Indian competition authorities and the patent offices.

In conclusion, the study argues that the present Indian Competition Act, 2002 (as amended in 2009) is not equipped to deal with the interplay between competition provisions and intellectual property protection. It reflects on the lack of sufficient rules along with the deficit in sufficient case laws which makes the issue more complex and suggests that the Competition Commission of India (CCI) should come out with IPR and competition specific guidelines in order to deal with those cases.

Keywords: Competition law, intellectual property rights

The application of intellectual property right (IPR) law to competition issues is one of the most complicated disputes in the field of competition law. Great technological advances have seen a significant rise in the number of cases of abuse of monopoly rights which require more fundamental research to understand the critical interplay between intellectual property and competition law. The number of IPR related competition cases has been increasing in the recent past, especially in the US and EU.

India’s IPR related competition litigation is at an infant stage, but the Aamir Khan Productions v The Director General opened a plethora of cases dealing with IP and competition issues. It is important therefore, to draw a clear demarcation between the extent of intellectual property rights protection and competition intervention for innovation in high technology areas. The legal aspects of the abuse of dominant position, patent pooling, the refusal to license, and other anti-competitive practices by IPR holders also need to be examined. Recently the Indian law firm, Singhania & Partners LLP, filed a complaint with the Competition Commission of India (CCI) against Microsoft India, alleging anti-competitive practices and the abuse of dominance in the Indian market with regard to their software, Windows Operating System and Windows Office. The Competition Appellate Tribunal (COMPAT) upheld the CCI ruling that Microsoft did not abuse its dominant position regarding its software licence in an order dated 9 October 2012. Pertinent to note is that the said case was decided in favour of Microsoft despite the fact that Microsoft was facing a number of cases and adverse rulings in other jurisdictions like in the US and EU. In yet another recent case, the CCI took a rather diminutive stand on the direct to home (DTH) operators in India who were allegedly using anti-competitive practices including abuse of their dominant position and tying hardware with other technology products in the high technology emerging Indian market. The DTH operators were exonerated based on the CCI argument that there is no such concept as ‘collective dominance’ in the Competition Act of India. It is highly doubtful whether the CCI

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decision is at par with similar decisions in comparable jurisdictions. The petitioner, Consumer Online Foundation (COF) preferred an appeal before the COMPAT which admitted the appeal against the order of CCI.

In the *FICCI Multiplex Association of India v United Producers/Distributors Forum (UPDF)*, the CCI found cartel-like activity in the Indian film industry. In this case, the UPDF argued that the alleged agreement between the producers and the distributors of the film was necessary to protect the intellectual property rights of the producers. It is evident therefore that in the recent past, there have been more conflicts than cooperation between intellectual property protection and competition law in India. However, these conflicts or collaborations cannot vitiate the goals of either competition law or IPR protection.

This paper discusses the convergence of IPR protection and competition law by tracing the purpose of the two streams of law, the policy measures and their application in the present day context in complicated technology areas. The first part of this paper deals with the interface between intellectual property protection and competition policy and its consequences, in a theoretical framework. The second part deals with the emerging jurisprudence on intellectual property involving competition cases, in India and other jurisdictions. The study concludes with the argument that intellectual property rights are not inherently against competition laws, rather the abuse of such monopoly should be dealt with using competition law.

**Common Aim: Different Perspectives**

It is true that IPR protection has received a great deal of attention in the technologically advanced, contemporary world due to various reasons. Competition law too is gaining a strong foothold in the gamut of laws that affect this technology-driven world. In fact IPR and competition can be viewed as two sides of the same coin. They share common objectives that are achieved through different means. From the competition point of view, IPR may be viewed as a means to reduce competition since the IPR gives the holder of the right, an exclusive monopoly while hindering others from offering the product in the market. Also IPR may be used as a weapon to restrict competition between licensees of a particular product. Furthermore, it may be stated that competition law and IP law share the same economic objectives. If the two laws can be interpreted in the background of a common objective, forcible conflicts between these two laws can be avoided. There is broad agreement that the two systems of law are complementary in their effort to promote innovation and consumer welfare. Both disciplines promote dynamic efficiency: that is, a system of property rights and market rules that create appropriate incentives for invention, innovation and the risks involved in R&D. Competition law recognizes the critical role that IPR plays in driving innovation and so values these rights.

Competition law also plays a vital role in a liberalized economy. Its importance can be inferred from the fact that as of 2010, more than 100 countries have enacted competition laws. Some of these laws date back more than a century: the US, for example, enacted the Sherman Act as far back as 1890. The competition rules of the European Union were implemented through the adoption of the Treaty of Rome of 1957. Most of the European countries enacted laws in the 1950s while Japan enacted its Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade in 1947 (ref. 11). Newly emerging economies seem to have either amended their existing laws or enacted modern competition laws in the wake of economic liberalization that began with the conclusion of the WTO agreements in 1995. For example, India enacted a new competition law in 2002 to cope with its new economic policies.

Due to the increasingly important role played by intellectual property in the world economy, measures against the misuse of IPR have become particularly relevant in the economic policy of many countries. In fact as Martin Khor puts it, a trade-off may exist between achieving static efficiency through competition and achieving long-term efficiency through growth and innovation. The market dominance of the monopoly holder may seem to be anti-competitive, but it is a part of intellectual property protection. There is no harm in dominance of market power as long as it is not abusive. It may be considered as an abusive action when a dominant company refuses or refrains from licensing its IP to competitors at a reasonable price. Korah argues that a trade-off exists between innovation and the liberty of another to use a protected product. The author propounds that this trade-off is often theoretical in nature rather than practical as neither side of the balance can be quantified.
The application of competition law to intellectual property cases can be regarded as one of the most complicated and critical fields of competition policy. In the past, competition and intellectual property were mostly considered contradictory. The general perception was that there are inherent tensions between IPR and competition. This was mainly because competition policy and IPR have historically evolved as two systems of law, separate and distinct. The traditional role of competition law has been to promote efficiency in the market and thereby to prevent market distortions. However, it is widely admitted that both fields of law are aimed at promoting dynamic competition in the market. However, it is still controversial whether competition law intervenes and in fact restrains the use of IPR. The Microsoft case is a good example that displays the above mentioned controversy since it was essentially a matter of intellectual property protection versus competition law. It is a well-accepted norm that healthy competition in the market cannot be compromised at the cost of consumer interests, constant innovation and discouragement of competition. With the advent of new technologies in many areas, the abuse of IPR, such as blocking patents, patent pools, buyback agreements and interoperability issues now require greater and careful research on the interface between intellectual property and competition law.

In the recent past, competition authorities and courts have prohibited certain activities of intellectual property owners which are lawful under the intellectual property legislations, but contravened some of the provisions of competition law. This is similar to the judgements against Microsoft in the US and the EU. Intellectual property rights create monopolies, while competition law battles monopolies. This is the general perception and how these two streams balance each other is the moot question.

The Emerging Jurisprudence: IP versus Competition Law

The tension between competition policy and IPR is not new and has been a bone of contention ever since the Statute of Monopolies, 1624 was enacted in England. It prohibited monopolies, but permitted ‘patent monopolies.’ Intellectual property rights protect and incentivize innovation along with a monopoly right over the invention for a limited period of time. On the other hand, competition law protects and prevents unfair competition in the market. The aim of the competition policy in a country is to ensure fair competition in the market by way of regulatory mechanisms. It is not intended to create restrictions or constraints that may be detrimental to the growth of the society. Companies can monopolize their technologies for a limited period of time, but they cannot maintain a monopoly over the market. Intellectual property protection per se is not abusive and ironically is only serving its legitimate purpose, namely, to create incentive for further innovation, when it dominates the market. However, when companies refrain from licensing their intellectual property to competitors, they undermine the basic tenets of competition law as well as the spirit of intellectual property protection.

To understand the difficulties in applying competition law and intellectual property law, it is essential to look into the systems of various countries, their practices and provisions as they deal with competition and intellectual property. While developed countries like the US, adopted legislations on competition much earlier and have been pursuing a new agenda, newly-open economies like India are still experimenting with the new legislations. There are lessons to be learned and experiences to be shared.

Previously, patent protection and licensing activities were carried out under the strict surveillance of competition law and patents were considered monopolies. Later in the 1970s, a new series of antitrust laws emerged as a result of proper economic analysis of intellectual property protection by scholars like Posner. These laws recognized that not all IPRs are monopolies but acknowledged that some may be, in certain circumstances.

The increased protection along with increased incentives for R&D investments produced larger cumulative innovation in high technology intensive sectors like software. Some of the huge companies capitalized on this enhanced IPR protection scenario and utilized it for individual market leadership. The recent Microsoft case revealed that the market share of the Windows operating system was 94 per cent of all Intel chip personal computers worldwide. It also revealed that the market share of MS Word was 90 per cent as compared to Word Perfect and that Microsoft’s Internet Explorer had captured more than 80 per cent of the web browser market from its rival Sun Microsystems’s Netscape Navigator during 2003.
commitment to protect IP rights on IPR, displaying the country’s strong commitment to protect IP rights and wealth created through market monopoly.

India passed the Competition Act, 2002 in line with the economic liberalization of the country that had created an open market policy that was being followed in India since 1991. The Act seeks to:

1. Prohibit anti-competitive agreements;
2. Prohibit the abuse of dominant position by enterprises; and
3. Regulate combinations exceeding threshold limits in terms of prescribed turnover or assets.

India had enacted its Patents Act as far back as 1970, and the same has been amended many times, the last being in 2005, so as to fully comply with the commitments made to the WTO in 1995. Section 3 of the Competition Act, 2002 states that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(5) (ref. 22) of the Indian Competition Act, 2002 bestowed a blanket exemption on IPR, displaying the country’s strong commitment to protect IP rights vis-à-vis competition. However, Section 4 which deals with the abuse of dominant position, provides ample room for interfering in intellectual property matters as well.

Abuse of dominant position is a common form of anti-competitive practice prevalent in all countries. It may be in the form of refusal to deal, tying arrangements, exclusive licences, etc. The following part deals with such categories of transactions in detail.

Abuse of Dominant Position

Dominant position is a position of economic strength that enables a firm to prevent effective competition in the relevant market. If a dominant firm in the market uses such practices, it is considered anti-competitive. Section 4 of the Indian Competition Act, 2002 specifically states that no enterprise shall abuse its dominant position. ‘Dominant position’ has been defined as a position of strength enjoyed by an enterprise in a relevant market, which enables it to operate independent of the established competitive forces and adversely affect its competitors or the consumers in the relevant market. It means that the dominant position of enterprises is per se not prohibited, but their abuse which adversely affects the competitive forces and consumers in the relevant market, is prohibited under the Act.

India is also emerging as a fertile ground for discussions on this important topic of IPR versus competition. Multiple agencies dealing with intellectual property and competition are also a concern in India. In Aamir Khan Productions Pvt Ltd v Union of India, the Bombay High Court held that the CCI has the jurisdiction to deal with competition cases involving IPR, In Kingfisher v Competition Commission of India, also, it was made clear that all the issues that rose before the Copyright Board could also be considered before the CCI. All these cases give leading evidence that Indian courts are prepared to deal with cases involving competition and intellectual property issues.

The erstwhile MRTP Commission in Manju Bharadwaj v Zee Telefilms Ltd and Dr Vallal Peruman v Godfrey Phillips (India) Ltd categorically stated that where a person misuses a trademark by manipulation, distortion, contrivances and embellishments so as to mislead the consumers, he would be exposing himself to an action. There is no clause in Section 4 on the ground of public interest or IPR abuse as a ground for interference. Action can be taken only when there is ‘appreciable adverse effect on competition.’

Another feature of anti-competitive activity is the formation of cartels. Cartel activity is widely prevalent across many Indian industries. The example of the film industry is a unique one because there are always copyright issues coupled with anti-competitive practices ruling the industry. In FICCI Multiplex Association of India v United Producers/Distributors Forum (UPDF), the FICCI filed information against UPDF and others stating that they were creating market cartels in films, against multiplexes. In order to raise their revenue, the UPDF had refused to deal with multiplex owners and it is well known that the multiplex business is 100 per cent dependent upon films. Hence, this amounted to a refusal to deal, which was inherently anti-competitive. Another clear fact was that the UPDF and others held almost 100 per cent share in the Bollywood film industry and the UPDF was indulging in unprofessional tactics by
limiting/controlling the supply of films in the market and this thereby amounted to refusal to deal with multiplexes. This was in gross violation of Section 3(3) of the Competition Act, 2002. The CCI prima facie found there were an anti-competitive agreement and an abuse of dominant position too. Consequently, the CCI directed the Director General of CCI (hereinafter referred to as DG) to inquire into the matter. The DG inquired into the same and submitted a report that confirmed the presence of a cartel. The CCI issued a show cause notice to the relevant parties. The UPDF instead of answering the show-cause notice, approached the Bombay High Court and contended that films were subject to copyright protection [under Sections 13(1)(b) and 14(d) of the Copyright Act]; therefore, it was the Copyright Board that had the jurisdiction to deal with the matter. Furthermore, it was contended that for an exclusive licence, the only remedy is a compulsory licence as available under the Copyright Act 1957. In other words the petitioner challenged the action taken by the CCI on the ground of lack of jurisdiction. Despite the fact that the issue was deliberated upon in the earlier matter of Kingfisher v Competition Commission of India, considering the importance of the matter, the Bombay High Court discussed it at length. The Court ruled that Section 3(5) of the Competition Act 2002 provides that Section 3(1) shall not take away the right to sue for infringement of patent, copyright, trademark, etc., and that the defences which could be raised before the Copyright Board could also be raised before the CCI.

The CCI had held that every person and association has the right of collective bargaining but they cannot make cartels and control the market in such a way that there is an adverse effect on the market causing an anti-competitive effect. In this case, the UPDF controlled 100 per cent of the market and their activity was clearly violative of Section 3(3)(a) of the Competition Act, 2002. The UPDF argued that a film is a subject matter of copyright protected under Section 14 of the Copyright Act, 1957 and that the right holder can exclude anybody from releasing a film in a particular multiplex and has the unhindered right to exploit the copyright without any restriction or limitation. The CCI in an earlier decision in Reliance Big Entertainment Ltd v Karnataka Film Chamber of Commerce had prevented the KFCC from taking any action against exhibitors who were exhibiting the movie ‘Ravan’ as long as they were willing and desirous to exhibit. Hence, the UPDF contended that it was their exclusive right to release a movie in any multiplex that they wished. They relied on an earlier Supreme Court of India decision in Indian Performing Right Society Ltd v Eastern India Motion Pictures Association, in which it was argued that a feature film is nothing but a bundle of copyrights. However, the question was whether a copyright holder can enjoy his right when it affects the competition in the market. The UPDF further argued that once a legally binding agreement had been entered into between the parties, they could challenge the decision under the competition law. It was also pointed out that the Constitution of India under Article 19(1)(g) confers the right to practice any profession. Hence, there cannot be a fetter on this right under Competition law. However, the CCI ruled that the concerted activity of the UPDF in not releasing films through the informant in this case was clearly violative of Section 3(3) of the Competition Act, 2002.

More interestingly, the CCI held that a copyright is a statutory right under the Copyright Act of 1957 and not an absolute right. The CCI relied on a Delhi High Court judgment on this point in Gramophone Company of India Ltd v Super Cassette Industries Ltd in another judgment, in the matter of Microfibres Inc v Girdhar & Co, the Court observed that:

The legislative intent was to grant a higher protection to pure original artistic works such as paintings, sculptures etc. and lesser protection to design activity which is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure Article.

It is therefore amply clear that greater protection ought to be accorded to original artistic works related to cinema rather than its commercial interests. The CCI’s decision in the FICCI Multiplex case was a benchmark of sorts as it tried to end the abuse of dominance of association in the film industry. This was further cemented with the Commission fining 27 film producers, a nominal amount of Rs 1 lakh.

The CCI rightly observed that ‘intellectual property laws do not have any absolute overriding effect on competition law. The extent of the non obstante clause in Section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of competition law only to protect his rights from infringement. It further enables
the right holder to impose reasonable conditions, as may be necessary for protecting such rights.'

The US Supreme Court declared in *Twentieth Century Music Corp v Aiken*, that 'the immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.' The objective of IPR is innovation in all areas and furtherance of commercial interest is only secondary. The goal of IPR and competition law is to protect the interests of the public and to ensure the freedom of trade and competition in the market. The judicial practice of the European Court of Justice (ECJ) adopted a similar approach in cases like *United Brands* (1978), *Hoffmann-La Roche* (1979), and *Michelin* (1983).

Market dominance can take two basic forms. In one form, an undertaking actively violates fair competition in the relevant market. In the other, the current economic situation places the monitored company in a position in which it does not have to pay attention to the other market actors when forming its own behaviour in the relevant market. In its *United Brands* decision, the ECJ defined ‘dominant position’ as that which corresponds to the latter alternative and stresses upon the independent formation of business conduct. A similar position was taken by the Delhi High Court as well.

The Delhi High Court in the case of *Hawkins Cookers Limited v Murugan Enterprises*, held that a well-known mark cannot be permitted to create monopoly in the market on the basis of being a well-known mark by controlling the ancillary and incidental market. This is to be considered as an abuse of dominant position and is prohibited. In this case, the plaintiff had alleged that the defendants had used the plaintiff’s trademark ‘Hawkins’ on the defendant’s product which was a pressure cooker gasket. The claim of the plaintiff was disputed by the defendant on the ground that the gaskets were being sold under their own trademark and the use of the word ‘Hawkins’ by the defendant on their products/gaskets was to inform the purchasers that the gaskets being manufactured by the defendant were suitable for Hawkins pressure cookers.

The defendant argued that the plaintiff wanted to monopolize the sale of gaskets which are used in pressure cookers in the market. The defendant manufactured gaskets which could be used for different types of pressure cookers including the pressure cookers manufactured by the plaintiff. The defendant claimed that it was common knowledge that there was always a second line of manufacturers of spare parts, accessories and replacement items of machines, articles of everyday use, domestic appliances and even for automobiles of every description, and that this is known as an ancillary industry. The matter was decided against the plaintiff in this case.

Under Section 27 of the Competition Act, 2002, the CCI has the authority to penalize IPR holders who abuse their dominant position. Further, under Section 4 of the Act the Commission is also authorized to penalize the parties to an anti-competitive agreement, which is in contravention of Section 3 of the Act.

**Refusal to License**

The law on licensing in the US as well as in the EU is based on a concept of complementary goals of the intellectual property system and competition law. The intellectual property holder has the exclusive right granted under the law for a limited period of time. The right holder is able to prevent others from exploiting it but he cannot prohibit the development and use of a superior technology. Thus intellectual property protection promotes dynamic competition in the market. However, the refusal of a patented technology prohibits the entrance of a new product into the market and is considered anti-competitive.

The Supreme Court of India in the case of *Entertainment Network (India) Limited v Super Cassette Industries Ltd*, elaborately discussed the relationship between intellectual property protection and effects on competition in the market. The Court observed that when the owner of a copyright exercises monopoly over it, any transaction with unreasonable terms would amount to refusal. It is true that the copyright owner has complete freedom to enjoy the fruits of his labour by charging royalty through the issue of licences. However, this right is not absolute.

Refusal to license was discussed further by the US Court of the Ninth Circuit in *Kodak II* and Federal Circuit in *In re Independent Service Organizations*. In the latter case it was held that intellectual property rights do not confer a privilege to violate anti-trust laws. In the case of *United States v Microsoft*, the District Court held that ‘copyright does not give its holder the immunity from laws of general applicability, including antitrust laws.’ It is clear that the rights granted under the IP laws are subject to competition laws.
The European Court of Justice (ECJ) has also followed a similar view and was of the opinion that refusal to license is anti-competitive. In the Magill case\textsuperscript{43} it was held that individual property ownership and refusal to license may constitute an abuse and breach of competition laws. The case involved a broadcast company’s refusal to license program schedules to a publishing company interested in publishing a television guide. Such refusals constitute an abuse under the competition laws. Refusal to deal may be misused by dominant undertakings to pursue unjustified competitive advantages. On the other hand, in Volvo v Veng, it was held that “the refusal by the proprietor of a registered design in respect of body panels of an automobile to grant to third parties, even in return for reasonable royalties, a licence for the supply of parts incorporating the design cannot in itself be regarded as an abuse of a dominant position. However, the exercise of such an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 86 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation……”\textsuperscript{44} There have been cases where a dominant firm ceases to supply its competitors,\textsuperscript{45} refuses to allow access to production facilities (essential facilities),\textsuperscript{46} does not allow access to IP rights\textsuperscript{47} or refuses to cooperate in normal industry practices.\textsuperscript{48} The IMS Health case\textsuperscript{49} however put 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’ and
3. That such refusal ‘excludes competition in the secondary market.’

It means that the freedom of the right holder is limited to balancing the competition in the market. Thus the objective of IP rights should be to enhance innovation in the market and promote dynamic competition in the market.

**Excessive Pricing**

Excessive pricing and predatory pricing have close links to refusal to license.\textsuperscript{50} Predatory pricing was considered by the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) as a restrictive trade practice. According to Sections 2(o) and 33(j) of the said Act, an agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor, is a restrictive trade practice, prejudicial to public interest.

Overpricing of any patented product per se is however, not violative of any competition provisions. In Union of India v Cyanamide India Ltd and another,\textsuperscript{51} it was held that lifesaving drugs do not fall outside the purview of price control. Keeping the pricing of patented and branded generics outside the scope of price control is a major concern. There is always the danger of the potential abuse of monopoly pricing especially when there are no substitutes available. This is a major concern particularly, in developing countries in the area of lifesaving drugs. Competition law seeks to draw a line between fair business practices and market abuses like restrictions on licensing, tie-in arrangements, predatory pricing, etc.

In Singhania & Partners LLP v Microsoft Corporation (I) Pvt Ltd & others,\textsuperscript{52} the CCI considered the question of anti-competitive behaviour and abuse of dominant position in the selling of Windows and Office 2007 software. In this case, the petitioner (informant) ordered the software, Windows Operating Systems and Office 2007 from a Microsoft distributor. The petitioners ordered the software for their LLP business and paid in advance as required by the purchase order. After paying the advance amount, Microsoft informed the petitioner that they could purchase only volume licences and not the original equipment manufacturer (OEM) licences which were available only to a person who purchases a new machine. The cost of volume licences was double the amount of OEM licences. The petitioner alleged that different dealers of Microsoft were charging different prices for the same product and thus the opposite party was artificially controlling the market. Indeed Microsoft with market shares pegged at 90 per cent held a dominant position in the market and therefore coercing the petitioner to purchase volume licences at double the price of OEM licences did amount to discriminatory pricing under Section 4(2)(a)(ii) of the Competition Act, 2002.

Microsoft argued that there was no competition issue in this case and that they did their business through three distribution channels, namely, volume licences, OEM and retail chains. This was mainly to protect their IPR. They also pointed out that the
relationship between Microsoft and its distributors was independent and not that of a principal and agent. The process mainly entailed selling its products to distributors and resellers on a principal to principal basis. Microsoft also informed that the three channels of distribution were different from each other and that the OEM channel was the one with the highest volume distribution which they could give at the lowest rates. Retail rates were more than volume rates and OEM rates due to the additional packaging and other costs. The petitioner alleged that different royalties charged for different licences was a strategy adopted by Microsoft to maintain its monopoly in the market under the garb of its licensing policy and IPR protection. Moreover, the petitioner alleged that the licensing policy of Microsoft was nothing but an artificial device for maintaining the market and a strict control over its distribution system, which was responsible for unfair prices in the market and this thus violated Section 3(4) (e) of the Act.

However, the CCI could not find any violation of competition provisions. The Commission observed that charging different prices for the same product under different kinds of licences are justified and common in the market. According to the Commission, there was no clear evidence to suggest that due to Microsoft’s dominant position, any competitor was driven out of the market. Hence, there was no violation of any competition provisions by Microsoft. It is interesting to note that the Commission failed to see that there was no competitor in the market against Microsoft on its Windows Operating System. It was in fact the Commission’s duty to find more evidence against Microsoft through an investigation rather than rejecting the application on the ground of insufficient evidences given by the petitioner.

It is pertinent to note that Microsoft continues to face many cases of abuse of dominant position, tying arrangements and other anti-competitive charges in the US as well as EU. In both countries Microsoft was fined heavily for the violation of competition provisions. It seems strange therefore that the Indian competition authorities gave a clean chit to Microsoft for reasons unknown.

In a dissenting opinion, CCI Member, Mr R Prasad, rightly pointed out that the Commission should look into all factors which are anti-competitive, even if they are not part of the information supplied by the petitioner. There was clear evidence that Microsoft held 80 per cent of the market share of operating systems and that there was a possibility of Microsoft playing a dominant role in the market. The price levels charged for OEM, volume purchase and retail prices had no connection with any of the business practices and the OEM and retail prices were almost thrice that of PC software as observed by the Member. This was clearly an attempt by Microsoft to exploit the monopoly market. The practice can be seen only as unfair and discriminatory.

Another allegation raised was that the desktop software of Microsoft worked well only when paired with Microsoft’s own software and was incompatible with other operating systems. It was therefore alleged that this was a deliberate attempt by Microsoft to monopolize its operating system. The blocking of the interoperability of other operating systems can be considered as an abuse of dominant position. It was also found that the consumers using the old version of the Microsoft operating system were compelled to purchase the new version at a higher price which was also violative of the Competition Act. Furthermore, it was a known fact that Microsoft charged a much lesser price in China and a higher price in other countries which was also against the spirit of the competition law. The supply of Windows to OEMs was only to expand each other’s business and this hindered competition in the market. Such cases were filed in the United States in states like Iowa and California and Microsoft was ordered to refund the difference in volume licences for abuse of monopoly power in the market. The fact that the Indian competition authorities turned a blind eye towards Microsoft will lead to more exploitation of the Indian market in the future, by Microsoft, with over pricing.

To sum up, the European as well as the US jurisprudence, suffice it is to say that the US courts and EU judgments have adopted a balanced approach towards refusal of an IP protected technology for licensing. The interpretation of this can be that a competitor who wants a free ride on a patented technology is not protected under the competition law provision of abuse of dominant position. On the other hand, an IP holder who prevents the introduction of a higher technology in the market by refusing to license the existing technology which is required for the development of such technology is also not protected under the competition provisions.

Indian courts have also taken similar views, but the CCI has not shown any maturity and not taken into consideration the decisions in cases from other
jurisdictions. It is necessary to strike a healthy balance between IP protection and competition policy in the Indian market in order to have a level playing field for this emerging industry.

**Tying Arrangements**

Section 3(4) of the Competition Act, 2002 prohibits tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance. Any of these practices having adverse effect on competition in India are prohibited. In the *Director-General (Investigation and Registration) v Indian Drugs Manufacturers Association*, where an agreement was entered into between the manufacturers acting as sellers on one hand and chemists and druggists acting as purchasers on the other for fixing a uniform discount price over wholesalers and retailers, the Tribunal held that any agreements between the buyer and sellers would not amount to restrictive practice under the MRTP Act. However, it was actionable under competition law. In *Director-General (Investigation and Registration) v Parke Davis India Ltd and Ors*, it was alleged that a Loan Licence Agreement was entered by Parke Davis with a small scale industry unit for manufacturing the impugned formulations with the purpose of circumventing the need for obtaining prior approval of price fixation under the Drugs Price Control Order. The MRTP Commission held that Section 2(o) of the MRTP Act was not attracted as the alleged trade practice was not restrictive and did not have the effect of preventing, distorting or restricting competition. However, this is not so with competition law. The *Novartis case* was an eye opener for developing countries like India. The case raised the issue of extended patent application with the ever greening effect and excessive pricing of proprietary medicine.

In tying arrangements, a seller agrees to sell a highly usable product or service only on the condition that the buyer also purchases a less important or marketable product or service, irrespective of the fact whether the buyer wants the second product or not. Illegal tying of products is one of the most common anti-trust claims. The *Tele – Direct* case in Canada is the most discussed tie-in-selling case. In this case, it was alleged that selective refusals by the respondent to license its trademark constituted an abuse of its dominant position. The *Microsoft* case is another recent one that dwelt upon issues like abuse of dominant position and refusal to supply essential information to third parties and tying of products. Microsoft’s tying of the media player middleware to Windows operating system has been established as a violation of Section 1 of the US Sherman Act. There are cases filed against violation of both the Sections 1 and 2 of the Sherman Act indicating tying cases and attempts to monopolize. The current thinking on these matters is summarized well in the Federal Circuit’s 1990 opinion in *Atari Games Corp v Nintendo of America Inc*, stating that: ‘the aims and objectives of patent and anti-trust laws may seem, at first glance, wholly at odds. However, the two bodies of law are complementary, as both are aimed at encouraging innovation, industry and competition.’ Jurisprudence has made it clear that tying of products is in violation of competition provisions and IP rights are no justification of market dominance and anti-competitive practices.

**Conclusion**

The incentive theory for the protection of IPR rewards the inventor by giving him a monopoly right for a limited period of time. Competition law on the other hand acts against monopoly rights which are abusive in nature. Competition law seeks to enhance the market conditions by more choice and competition in the market. Intellectual property rights appear to go against this principle leading to possible conflicts between these two areas of law. Competition law can play a proactive role in arresting the abuse of monopoly rights granted by IPR. At the same time IPR monopolies are meant to facilitate further innovation and thereby boost further competition in the market. A dominant position in the market *per se* is not prohibited, but its abuse goes against competition provisions. One cannot operate like a cartel in the name of ‘collective bargaining’ which is what happened in the *FICCI Multiplex* case. India can use the compulsory licensing provision in case of excessive pricing of any products including copyrighted and patented software. Tying arrangements between the producers and dealers should be dealt with using the competition provisions. The CCI should come up with specific guidelines in dealing with cases involving both competition and intellectual property. The interaction between intellectual property and competition policy is neither conflicting nor is it aimed at replacing the other. Rather the two streams of law are complementary and supplementary to each other. The courts have now settled the principle that the ‘interest of the consumer and competition in the market’ is of supreme importance and cannot be sacrificed at the cost of the right holder.
Dealing with Intellectual Property and Competition Issues

1) The concept of the abuse of IPR is not defined in any legislation in India. Hence, the understanding of it must not be restricted to the narrow scope of case laws of other countries like the US and EU.

2) The definition of ‘abuse of IPRs’ ought to be ‘unjustifiable use of the IPRs causing damage to the interest of the consumers and the society at large.’

3) Using licensing as a strategy to expand IPR and to restrict or eliminate competition for improper benefits also must also be considered as ‘abuse of IPRs.’

4) The acquisition of IPR with the purpose of strengthening monopoly power in the market should be regulated properly with clear technology transfer guidelines in India.

5) Merger guidelines should be properly implemented to avoid concentration of undertakings in IPR rich companies.

6) Unilateral refusal of licences or refusal to deal by parties who have violated standards ought to be made subject to the scrutiny of the CCI. In the case of tying in relevant markets, due consideration should be given to factors such as purpose of selling, the interrelation between tying and the tied product, transaction practice and its effect on competition in the market.

7) Excessive pricing or high prices not related to any objective criteria is the essence of exploitation and fair price ought to be ensured in IPR protected products through competition policies.

8) Pricing in developing and developed countries should be based on consumer capacity to pay and not on discriminatory prices which are violative of competition law.

9) Different licence fees for different markets are per se not in violation of competition law. Hence, the pricing policy of a dominant firm should be based on the economic balance of consumers rather than being inherently exploitative in nature.

10) Refusal to license on unreasonable and unjustifiable grounds should be with dealt strongly by the CCI and ought to be held anti-competitive.

11) Super dominance of the market per se does not violate competition provisions. However, the means and methods used to reach such dominance should be examined and different licensing tactics to retain such dominance should be made anti-competitive and be considered the abuse of such dominant position.

12) The exhaustion principle should be strongly applied in technology areas, so that the IP holders may not be able to impose unreasonable conditions on the purchaser after selling the product.

13) Tying arrangements are restrictive practices in the market and should be strictly dealt with under competition provisions.

14) The Indian Competition Act, 2002 does not include high prices as an abuse of dominant position. Section 4 of the Competition Act therefore needs to be amended to include high prices as a criterion as well.

In conclusion, it can be observed that the relationship between competition and intellectual property rights with its intricacies and ironies is here to stay. It is amply clear that these two streams of law are bound to converge and cannot be expected to stay as water tight compartments exclusive of each other. With increased trade and stronger economic ties between nations, it is absolutely imperative that countries strengthen their legislative systems in order that they are well prepared to handle any impending crisis that may require them to choose between either streams of law without compromising on individual or public good as the case may be. It is important that laws be made foolproof in order to ensure greatest good for the largest number while at the same time assuring ample protection and encouragement to an individual’s creativity and innovation.

The winds of change are set to bring with them a new set of challenges with regard to conflicts in overlapping zones of competition law and IPR and it is important, particularly for developing nations like India who are at the threshold of cutting edge technology to protect their innovations and be able to handle the onslaught of economic policies in the name of healthy competition.

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5 Consumer Online Foundation v Tata Sky Ltd and Others, CCI order dated 23 March 2011.
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7 Atari Games Corp v Nintendo of Am Inc, 897 F.2d 1572, 1576 (Fed Cir 1990), ‘the aims and objectives of patent and antitrust laws . . . are actually complementary, as both are aimed at encouraging innovation, industry, and competition’; Consumer Protection and Competition Policy, Planning Commission of India, http://planningcommission.nic.in/plans/ planrel/fiveyr/11th/11_v1/11v1_ch11.pdf (30 June 2010).


19 Motion Picture Patents Company v Universal Film Company Manufacturing Company, 243 US 5502 (1917).


22 (5) 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);

23 Kingfisher v Competition Commission of India, Writ petition no 1785 of 2009.


26 Vodafone International Holdings BV v Union of India, 2009 (4) Bombay Cases Reporter 258 (DB).


28 Reliance Big Entertainment Ltd v Karnataka Film Chamber of Commerce, Case no 25 of 2010.

29 Indian Performing Right Society Ltd v Eastern India Motion Pictures Association (1977) 2 SCC 820.

30 Gramophone Company of India Ltd v Super Cassette Industries Ltd, 2010 (44) PTC 541 (del).


32 Twentieth Century Music Corp v Aiken, 422 US 151, 156 (1975).


34 Hoffmann-La Roche & Co AG v Comm’n, Case C-85/76, 1979 ECR 461.

35 N V Nederlandsche Banden Industrie Michelin v Comm’n, Case C-322/81, 1983 ECR 3461.

36 Eilmansberger Thomas et al., Materielles Europarecht (Substantive European Law) 246 (2008).

37 Hawkins Cookers Limited v Maruun Enterprises, 2008 (36) PTC 290(Del). The basis of decision in case was that the plaintiff tried to create monopoly in the market.


40 Image Technical Serve v Easternok Kodak Co, 125 F. 3d 1195, 1218 (9th Cir 1997).

41 CSU LLC v Xerox Corp, 203 F. 3d 1322, 1326 (Fed Cir 2000).


47 Magill, IMS Health and Microsoft cases.

48 Hanlen Edmond O’, Refusal to supply: Jurisprudence in European competition law since Oscar Bronner, Trinity College Law Review, 9 (2006), 156.


50 Predatory pricing is a strategy that entails a temporary price below the cost of production in order to injure competition and thereby reap higher profits in the long run.
51 Union of India v Cyanamid India Ltd and another, AIR 1987 SC 1802.
52 Singhania & Partners LLP v Microsoft Corporation (I) Pvt Ltd & others, Case no 36/2010, decided by the Commission on 22 June 2011.
53 Tie-in arrangement is defined as any agreement requiring a purchaser of goods, as a condition of such purchase, to also purchase some other goods.
54 Exclusive supply agreement includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.
55 Exclusive distribution agreement includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.
56 Refusal to deal includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.
57 Director-General (Investigation and Registration) v Indian Drugs Manufacturers Association, [1992] 73 Comp Cas 663 (NULL).
58 Novartis AG, Switzerland rep by its Power of Attorney Ranjna Mehta Dutt v Union of India (UOI) through the Secretary, Department of Industry, Ministry of Industry and Commerce and Ors, (2007) 4 MLJ 1153, decided on 6 August 2007. The Madras High Court rejected the patentability of the lifesaving drug ‘Glivec’ under Section 3(d) of the Indian Patent Act.
59 Canada (Director of Investigation and Research) v Tele-direct (Publications) Inc (1997), 73 CPR (3d) 1 (Comp Trib).
60 Microsoft v Comm’n, Case T-201/04, 2007 ECR II-1491.
61 Compare the European Microsoft case, COMP/C-3/37.792, with US v Microsoft Corporation, 253 F.3d 34 (DC Cir 2001).
63 Atari Games Corp v Nintendo of America Inc, 897 F. 2d 1572 (Fed Cir, 1990), citing Loctite Corp v Ultraseal Ltd, 781 F.2d 861, 876-77, 228 USPQ (BNA) 90, 100-01 (Fed Cir, 1985).