The balance between the dynamic and static goals of IP law and competition law can be met with by means of a deeper analysis of the way their ‘courtship’ operates. Many believe that these two regimes are antagonistic to each other for various reasons, however the authors flout this proposition. In India, the competition regime is in the state of infancy, the Competition Act, 2002, in particular, has addressed to this issue as a primary concern. However, lack of judicial precedents, owing to a nascent IP regime, has disabled the development of jurisprudence in this regard. Indian law, especially after signing of the TRIPS Agreement, has come in consonance with the laws in EU and US. The authors juxtapose analysis of the courts in the above-mentioned foreign jurisdictions in the Indian context. The primary finding of this paper is that though IP and Competition Law are not antagonistic, there may be situations where IP may be used to extend monopoly beyond the scope of the IP protection. Patent thickets and mergers are examples of situations where monopoly granted by IP may be misused. Herein issues stemming out of anti-competitive agreements and mergers have been highlighted. It has been suggested that ‘Essential Facilities Doctrine’ may be used to solve issues arising out of the interplay between these two facets of law. Therefore, IP must reasonably be subject to competition laws to the extent of preventing misuse of the temporary monopoly.

Keywords: Competition law, IP regime, intellectual property rights, antitrust law, abuse of dominance, mergers, Essential Facilities Doctrine

The enactment of the Competition Act has given rise to a question in the minds of many as to how will it possibly react to intellectual property and the rights conferred thereto by IP statutes. There is doubt in this regard as it is a gray area, at least, in respect of the position in India. The uncertainty is apparent as intellectual property and competition laws are notionally different and appear to be opposed to each other; they have different objectives. Intellectual property grants monopoly for a period of time, whereas competition laws seek to undo monopolistic and restrictive trade practices. Prima facie they seem to be antagonistic. The aim of this study is to show that in reality there is no inherent conflict, though historically they spring from different motivating forces.

The fields of application of IP statutes and competition laws, together with the prevalent misunderstanding that these are opposed branches of a ‘common root’, can more easily be comprehended when approached by an analysis of the genesis of these different phases of law. Herein first, the object of intellectual property protection and that of the competition laws is explained.

Then comparison has been made between the objectives of the two. Further, the same has been discussed in light of the provisions of the Competition Act and the extent of its applicability to intellectual property.

Nature of Intellectual Property Rights

Roscoe Pound in ‘Outline of Jurisprudence’ has observed that, ‘in [a] civilized society men must be able to assume that they may control what they have discovered and appropriated to their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order’.

Intellectual property rights can generally be considered as specie of intangible property. Its protection has for several centuries formed the foundation of secure prosperity in most modern political systems, and is found at the base of most flourishing industries of today. It is meant to promote creativity and innovation by rewarding innovator with an exclusive, but temporary property right.

As society has grown and personal possessions increased, governments have found it desirable to provide for the regulated exchange of property between persons, to enable a larger enjoyment of the
additions to the wealth of the world by an interchange of property among the creators of this wealth, thus encouraging individual effort and talent to provide effective and efficient promotion of better ways of producing and utilizing the means at hand. This provides an incentive to progressive individuals by rewarding them with the depredations of less industrious persons. Government recognizes the rights of property ownership in the fruits of individual work, be it manual, intellectual, or combination of these. The protection of these rights becomes a measure of the practical usefulness of the government, as the authority for the preservation of the peace and welfare of the state.

The US Supreme Court in *Kewanee Oil v Bicron Corp* justifying protection of intellectual property; observed that, offering a right of exclusion for a limited period is an incentive to inventors to risk the often-enormous costs in terms of time, research and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives of our citizens. In other words, the right of exclusion granted to the creator of intellectual property promotes greater common good of citizens. It plays a vital role in the dissemination of innovation and facilitating commercial development of ideas.

Analogically speaking, had a farmer not planted, cultivated and reaped his crops not only would that particular individual been poorer in not possessing the results of his work, but the world as a whole would have been deprived, at least for the time, of the benefits of such labour. Thus, recognition of the exclusive property right in such individuals tends to assure a continued supply of desirable and better products for the consuming public by assuring protection to the worker in the results of his labour when he supplies them to public. Such a guarantee of the exclusive right to enjoyment of property promotes the general welfare of society only so long as it is limited to such use of enjoyment of the property if the property had never existed. IP spurs innovation.

The basis for the recognition of intellectual property by specific grant by government has always been that the innovation into the community enriches the public welfare, and the innovator to that extent is a public benefactor.

Nature of Competition Laws

Antitrust was neither invented by technicians of commercial law nor by economist themselves. It was instead desired by politicians and by scholars attentive to pillars of democratic systems, who saw it as an answer to a crucial problem for democracy. Competition laws are based on the premise that competition is always a stimulant and monopoly is narcotic. It is submitted that the above view may not be applied generically to all situations but on a whole does provide clarity to the confusion as it is to enhance consumer welfare. Its concern is ‘not to protect business from the working of the market; it is to protect the public from the failure of the market’.

The economic community is best served by free competition in trade and industry. Competition laws or antitrust statutes protect competition. They are concerned primarily with cartels and the acquisition or maintenance of monopoly power by ‘unacceptable’ means. Its primary purpose is to foster competition, which in turn is indeed to encourage lower prices, better products, and more efficient production methods. It brings opportunities of profit that stimulates businesses to find new, innovative and more efficient methods of production. It is in public interest that quality, price and service in an open, competitive market for goods and services be the determining factor in the business rivalry.

The common law has traditionally favoured competition and has held agreements and contracts in restraint of trade illegal and unenforceable. The justification for these laws is that monopoly practices are socially harmful because they decrease total surplus. Also, concentrated market power can impair individual and business freedom and can on occasion threaten democratic values that require dispersion of economic power.

These statutes do not make agreements granting monopoly illegal but existence or non-existence of prohibited trade practices is what determines the illegality of the contracts. The law recognizes that certain arrangements between firms may benefit consumers by allowing the firms that have reached the agreement to compete more effectively against other firms. The government therefore does not prosecute all agreements between companies, but only those that threaten to raise prices to consumers or to deprive them of new and better products.

They are for the control of the general conduct of business and their relatively simple application to
business transactions must be borne in mind in connection with any business engagement, and, while combinations of properties in various ways may produce advantages to the participants and the public as well, such combinations must not contravene the antitrust laws.27

Entities implementing IP laws have at various times tried to solve the problem of external effects caused by such rights. There has always been an issue whether a holder of an exclusive right may somehow use it to exclude others or cause others to pay additional costs. This is reflected in the most contemporary balancing theories that primarily deal with the problem of incentives and imitation.28

**Intellectual Property Rights versus Competition Laws**

Intellectual property and antitrust are complementary regimes, both designed to encourage innovation within appropriate limits.29 That is to say, rewards in the form of monopoly granted by intellectual property are acceptable, until it is not significantly in excess of what is necessary to encourage investment and the market power is not used to distort competition.30 Therefore, policy governing intellectual property and antitrust is required to satisfy a participation constraint that the creator must earn a sufficient return on his investment to induce the desired amount of innovative activity. Satisfying the participation constraint may necessitate some adjustments in antitrust treatment of intellectual property.

The better view is that both antitrust, by protecting competition, and intellectual property, by rewarding innovation, create incentives to introduce new products.31 Antitrust for the most part has no quarrel with IPR, the argument that market power is more acceptable is reasonably necessary to achieve efficiencies, including efficiencies connected with innovation.32 It is to ‘protect rivalry and competitive process’ and pro-competitive efficiency gains must give way to this goal.33 When modest anticompetitive effects of a transaction are significantly outweighed by the positive consumer welfare consequences of innovation, antitrust has struck in favour of innovation.34

Intellectual property laws grant monopoly; deprive public of nothing it possesses, but rather are an inducement to supply public with desirable works, which might not otherwise be available.35 It is wrong to assume that such grants are merely a restraint of trade granted legal sanction. A patent is not a restraint of trade for the reason that it is granted only to a person who invents and discloses a new and therefore unknown invention,36 as no person other than the patentee had the ability to carry on trade prior to the disclosure made by the patentee, and this disclosure forms the consideration of the grant. Thus, the incentives to create intellectual property may be diminished unless there are contractual provisions and restrictions on its use that preserve the value of property for the patent holder. Similarly, trade mark provides a grant to a person for the sums invested by him in building up the goodwill of his brand and to prevent confusion in the minds of people, the grant is in the interest of the public as it gives an implicit assurance of quality and prevents confusion, similar is the case of all other forms of intellectual property. It has been noted by commentators and the courts that the ultimate objectives of IP and competition laws are complementary because both serve the common purpose of maximizing consumer welfare, through innovation and industry.37

Unwarranted or overly broad IPRs not only harm competition in the short run, but also harm innovation in the long run,37 as in case of patents exclusion is allowed to the extent of the claims. In the view of enforcement agencies and commentators, the world over, IPRs combined with market power may give rise to competitive concerns;38 and may be used to oust-competitors. They may enhance market power and create barriers to entry.39 For instance, ‘firm A’ obtains a patent for a dust cleaning system that consists of a dust sensing device using nanotechnology and subsequently obtains a patent which ‘substitutes’ the ordinary sensors with bio-sensors. Such flag posting may oust-competition and may be anti-competitive, due to the reasons of non-obviousness and for being sufficiently inventive.

It however, may induce wasteful research, it may ‘not’ seek better technology and may produce only an equivalent or inferior alternative to overcome road block posed by the initial patent,40 creation of patent thickets is one such example. Such situations can affect interests of consumers adversely, dislodge development of small and medium-sized enterprises and put at bay recasting government-business relations. Competition law plays a role to correct improvidently defined IPRs, even if it entails adjusting competition principles. It is submitted that IP seems to have become a principal driver in the
In a market of differentiated products, a defendant’s product may enjoy a price-cost advantage that rivals cannot eliminate because patents, trademarks, or other factors prevent them from duplicating the defendant’s version of the product. Antitrust is not opposed to monopoly but to unfair monopolistic practices. In fact its leniency for patentable IP may lead to applications for patents that are intended only to circumvent antitrust enforcement. Poor patent quality, patent thickets, and defensive patenting are a reality in some industries. Questionable IPRs may give rise to significant competitive concerns, they may also obstruct innovation. Sham litigation can paralyze technological process for years, as in various countries, especially in India, the time period for disposal of suits is long. Any newly invented technology has a limited shelf life within which it can yield maximum economic benefits which as a result of such litigation can sufficiently fade away. It affects the acquisition and exploitation of intellectual property just as it affects the acquisition and use of other powers over property. It is submitted that: ‘the patent system would be seriously undermined ...were the threat of potential antitrust liability to attach upon the acquisition of a patent at a time prior to the existence of a relevant market and ...at a time prior to the commercialization of the prior art’. The premise however remains that a monopolist does not have an obligation to deal or assist in competition. Obtaining a patent though may create monopoly in respect of the technology contained therein for a limited period of time but the same provides goods that were never manufactured before. IP laws are designed to strike a balance between R&D expenditure and incentives for innovation on one hand by granting owners exclusive rights and protecting interests of users through a variety of exceptions. Incorporation of ‘compulsory licensing’ provisions in IP laws in various jurisdictions is an exception as enunciated above.

Intellectual property protection accords creators protection against certain competitors, to the end providing greater incentives for creative activity but at the cost of reducing dissemination of the results of such activity on account of the higher prices that will prevail, however, trade secrets are an exception to this general proposition. When modest anticompetitive effects of a transaction are significantly outweighed by the positive consumer welfare consequences of innovation, antitrust usually strikes the balance in favour of innovation. The concern of antitrust remains to ensure that firms do not harm, prevent, distort competition through collusion with their actual or potential competitors. It is not the duty of a firm to assist its competitors but only to deal in a fair manner.

In our view antitrust restrictions on current and future use affect these choices and affect the degree to which consumers will benefit from the innovation. The antitrust laws seek to prevent ‘the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident’. Antitrust Laws in India India, like other developing countries, has adopted antitrust policies for its own domestic enterprises, so as to break public monopolies which are an out-come of socialist impact on economic policy. It is seen as a response to an important problem of democracy. As, ‘in a democratic society... there are... bounds that should never be crossed: one beyond which legitimate public power becomes illegitimate’. Owing to the opening of the market and stimulation of the private sector in the core areas of economy the adoption of antitrust policy by way of the enactment of the Competition Act (2002), SVS Raghavan Committee has played a leading role in its conception. The said Act repeals the previous Monopolies and Restrictive Trade Practices Act (1969), and the creation of Competition Commission there under has become the new genre guiding the industry.

Competition laws belong to an order, where different disciplines, factors and interests are interwoven, and according to changes related to the relevant time period. The goals of competition laws include economic efficiency, promotion of trade, facilitating economic liberalization and enhancing development of a market economy, along with consumer protection. The idea of competition is rooted in the freedom of firms to carry out their business in a manner best suited to further their personal interest. The balance is essentially between
the bounds of public power and private power and the relationship between these two forces.

India as a signatory to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, under the World Trade Organization (WTO) Regime, has an obligation to comply with the requirements of Article 40. It obliges enactment of relevant competition legislation and brings IP statutes in conformity with the same, so as to avoid any hostility. The said provision of TRIPS cites exclusive grant back conditions, preventing challenges to validity and coercive package licensing. The Patents Act (1970) illustrates the practice in India to encourage division of territory, cross licensing of patents that would reduce competition and price fixing.

S V S Raghavan Committee

The committee recommends that apart from private companies in India, the State monopolies, government procurement and foreign companies should be subject to competition law. It prohibits collusive anticompetitive agreements, abuse of dominance, and mergers among enterprises. The committee has in this regard taken care to suggest incorporation of provisions in respect of the provisions of TRIPS Agreement. It has envisaged the interface in India to encourage division of territory, cross licensing of patents that would reduce competition and price fixing.

Abuse of dominance has been pointed out to be central to the competition law in India by the committee. In its view, it includes restriction of quantities, markets and technical developments. Predatory pricing and practices exclusionary in nature, in specific, and conduct considered in general prejudicial to consumer interest were viewed to be abusive in nature and advocated to be prima facie illegal.

We are of the opinion that like US, oligopoly can be maintained by way of IPRs however the same cannot be misused to exclude competitors unfairly. The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not unlawful but is an important element of the free-market system.

Anti-Competitive Agreements

§ 3(5) of the Competition Act (‘Act’) envisages a situation wherein 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 the various IP laws in India is not restricted. The primary question to be answered therefore is that whether § 3(5) prevents the Act from being applied to situations where intellectual property rights may create genuinely uncompetitive situations.

The distinction made by the committee that if the exercise of IP imposes costs on society that exceed the benefits of granting the right competition law intervention would be permissible. A critical analysis of the section leads one to believe that it grants only limited immunity of IPR from the Act’s purview. More specifically, the section exempts agreements relating to IPR under the laws as specified therein, from the applicability of § 3(1) and (2). Only reasonable and legal conditions under those laws are not within the prohibition. § 27 of Indian Contract Act, prohibits agreements which amount to restraint of trade. Such agreements are invalid unless it is reasonable as between the parties and not injurious to the public interest. In India it will be valid if it falls within any of the statutory, or judicially created, exceptions. The prevalent view is that an agreement for trade combination for the purpose of avoiding competition is not necessarily void.

‘Competition’ must be understood in the sense of ‘effective’ or ‘workable’. The legality should depend more on the market power of the defendant, the market context and the actual economic effects of the operations. Crucially, the section provides for immunity, and that too, only in a limited fashion for one form of anti-competitive conduct, viz. anti-competitive agreements, and does not encompass conduct, either exclusionary or exploitative, that is an abuse of dominance or predatory in nature.

This implies that the Act does not question the exercise of IPRs’ excluding power as such versus unauthorized third parties trying to access the protected innovation/creation. It denies the possible interference of competition law with the terms of grant of IPRs by the legislation, and to the subsequent approach, which rejected such interference in relation to the ‘normal exercise’ of IPRs themselves according to their ‘own’ (‘or specific’) power content, equated with their ‘essential’ anti-free riding function. According to Professor Steve Anderman, such an approach blurred the distinction between ‘existence’ and ‘permitted exercises’ of IPRs, antitrust does not question the exercise of excluding faculties as such against
unauthorized third parties seeking to access (share) the IPR-protected innovation/creation, but only the enactment of further anti-competitive behaviour by the IPRs holders aimed at exploiting their position of strength on the market in their dealings with third parties, and the consequent generation of further anti-competitive effects. Thus, only these further ‘exercises’ whereby IPRs are used as a ‘lever’ to expand market power beyond their ‘essential anti-free riding function could be restricted by antitrust law.

Some types of intellectual property do not require much protection because of the difficulty of imitation. Other types of IP are virtually impossible to protect because of the ease of imitation. This however does not mean that rents cannot be gained on these inventions. The flexibilities in India’s IPR regime by way of statutory provisions abridging rights of inventors, whose primary or intended use or commercial exploitation of their invention would be contrary to public order or morality, or causes serious prejudice to human, animal or plant life or health, or to the environment also have a visible impact on competition.

§ 3(5) of the Act does not provide for an absolute exemption to IPRs. In essence it provides for an exemption to the extent IPRs do not transgress what has been allowed, in a manner that is counter-productive to the public in general, and the consumers and competitors in particular.

Abuse of Dominance and IP

The high level committee report on Competition Law while deliberating upon the periphery describing the ‘Abuse of Dominance’ laid down a five prong tests, namely,

1. Whether the provisions of the law make it too easy for the competing firm to be classified as dominant.
2. Whether the law seeks to control the prices charged by dominant firm(s).
3. Whether the law does not seek to control the prices charged by dominant firms.
4. Whether there is a suitable test for predatory pricing.
5. Whether there is a scope for applying the rule of reason to the exclusionary vertical agreements.

The key issue is the extent to which these arrangements foreclose the market to manufacturers or retailers and the extent to which these raise rival’s cost and/or dampen existing competition. The costs of such arrangements need to be weighed against the benefits. Anti-competitive agreements are not per se void, but subject to rule of reason. These agreements are considered illegal only if they result in affecting competition adversely to an appreciable degree. The test applied is what is known as the ‘rule of reason’ analysis.

The term dominant position within the meaning of the Competition Act refers to the position of strength being enjoyed in a relevant market in India that gives the enterprise the power to ‘operate independently of competitive forces in the relevant market’. Thus in view of the above provision read in the light of the committee report, restraints may actually be beneficial in particular market structure circumstances.

The litmus in this regard was laid down in the landmark judgement of Mahindra & Mahindra Ltd v Union of India, the Court while deciding the case laid down that it is pertinent to answer that Whether the facts of a case are peculiar to the business to which the restraint is applied; What was the condition applied before and after the imposition of restraint; Determination of the nature of restraint and its actual or probable effects.

The rule of reason herein is in consonance with that expressed in the case of National Society of Professional Engineers v United States and National Collegiate Athletic Association v Board of Regents of the University of Oklahoma, and can be summed as ‘that the rule of reason does not support a defense based on the assumption that competition itself is unreasonable’.

Issues relating to abuse of dominance also encompass agreements that result in ‘tie in’ of a new or not so popular product along with a product that enjoys dominance; both being targeted to the same group of consumers. Explanation (a) to §3 (4) prohibits arrangements that are a forced purchase of a second distinct commodity with desired purchase of a dominant ‘tying product’, resulting in economic harm to the competition in the ‘tied’ market. It can allow a monopolist to acquire a monopoly position in a newly emerging market by ‘swinging’ or transferring its initial monopoly in the newly emerging market. Kodak, where Kodak’s policies designed to limit the availability of parts to competitors, it was held that the policy to sell parts to its buyers could be an illegal tie-in sale, as well as monopolization or an attempt to monopolize the service and parts market.
Transfer of IPRs under licensing agreements may also be used to restrict competition between the licensor and the licensee or between a number of licensees. IPRs may give the right holder a market dominant position, either by virtue of the exclusive right, without more, or because IPRs combined with other factors, such as, network externalities practices that satisfy to be essential facilities are deemed to be anticompetitive in nature. The indispensable requirement for invoking that doctrine is the unavailability of access to the ‘essential facilities.’ Indian legislators have inserted the said provision to bring within the purview of the Act agreements that ‘may’ circumvent its provisions, and permit the abuse of dominant position by companies to the detriment of smaller firms. As entry barriers could result from absolute advantages, herein intellectual property, and access to inputs. Exclusory practices could increase the strategic advantages of the first mover. It is clear that the provision is not opposed to a company occupying dominance in a market, but misusing the same to the detriment of others competing.

### Treatment of Mergers and Consequences on IP

§ 6 of the Act prohibits a combination, which causes an appreciable adverse effect on competition. It contains provisions requiring pre-notification of combination. Such concentration of economic powers may occur, inter alia, through mergers and takeovers. Such corporate acts may create a dominant enterprise, exerting its dominance in a wide array of aspects in a particular market. Both vertical and horizontal actions may be exercised in conjunction or exclusively, depending on the corporate action. For e.g. a particular kind of semi-conductor chip is manufactured by three companies, ‘A’, ‘B’ and ‘C’. Where A owns the pioneer patent and B owning an improvement patent, whereas C owns a trade secret in respect of the same technology, all being essential to trade. If C merges with B and acquires a dominant stake in A, making it its subsidiary, then it can use technological leverage to further its economic interests. Such an advantage, though not necessarily, but mostly, be used by C for the reason that according to the micro economic theory extra-ordinary profits can be earned only in a monopoly or in a monopolistic market.

With this end at hand the Committee opined that the reason for such a provision in most laws is to preempt the potential abuse of dominance where it is probable, as subsequent unbundling can be difficult and socially costly. Strictly speaking, mergers should be challenged only if they reduce or harm competition or adversely harm welfare. The Section envisages that a merger activity abroad affecting competitive concerns and consumer welfare in India must meet with the threshold requirements provided therein. For these purposes the test as laid down in §§ 6(1) and (2) provides the turn over size as a guider for the presumption about illegality of combination. It is submitted that such a presumption is rebuttable. For the purposes of same valuation of assets is an essential, and the brand value, value of copyright, patent, trademark (both registered and unregistered), geographical indications and designs and other commercial rights referred in § 3(5). As per the provisions, described herein, it is required that not only an appraisal of the immediate impact of the combination on competition but also a prediction of its effect on competitive conditions in future is essential to prevent the destruction of competition.

### Essential Facilities Doctrine in the Indian Context

There exists a sort of a dichotomy, in India, like in other parts of the world, especially, when the reaction of antitrust laws to IP protection is being analysed. The existence of a dichotomy, to an extent, has been disproved, and it is submitted that antitrust laws will intervene not when a monopoly exists but when (1) it is being misused or (2) in event of creating monopolies by unfair means. However the question, pertinent herein, more particularly in the Indian context is that; how a particular action be termed ‘fair’ or ‘justified’ in law? The problem is aggravated in light of the situation that in India the competition regime is in a nascent stage.

In our opinion the above issue must be dealt with in accordance with principles of economics. The approach adopted by the Chicago School is relevant in shedding light in this matter; the aim of antitrust is to create market efficiency, in accordance with the price theory. The point being that the degree and level of competition is not relevant to determine a conduct as anticompetitive, but the market efficiencies prevented by conduct is the determinative factor.

Traditional antitrust principles may not justify all of the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. When there
exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. In the original 1936 IBM case purchasers of IBM’s tabulating machines were also required to purchase their tabulating cards from IBM- a tie achieved through contracting. On the contrary in the later 1970’s case there was an allegation that IBM’s new central processing unit was interface incompatible with the plug-in components of rivals- a tie achieved derived through product design.

A firm can not usurp and assume an adverse position to its competitors, both present and future, it cannot use the advantage at hand to their detriment. Thus “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident,” can be a ground to maintain and succeed in an antitrust action.

If the advantage derived, herein being technological or goodwill based, if central to other competitors cannot be used to cast out competitors. For instance a company manufacturing detergent powders compatible with the washing machine of another manufacturer, in such a case the former must be permitted to use the trade name of the latter, non-permission of the same may amount to denial of an essential facility and may be violative of the provisions of the Act. The test being (1) whenever competitors have jointly created a useful facility, (2) that is essential to the competitive vitality of rivals, (3) and (perhaps) essential to the competitive vitality of the market, (4) and admission of rivals is consistent with the legitimate purposes of the venture, then (5) the collaborators must admit rivals on relatively equal terms.

However, it is submitted that there is no duty to predisclose one's inventions, because predisclosure would reduce the returns from and therefore the incentives for innovation. The duty to sell another's products and the duty to predisclose would chill desirable activity and therefore the courts determined, as a matter of law, there is no duty to share. What is required to be disclosed is what may be termed as being 'critical to the plaintiff's competitive vitality'. It means that the plaintiff cannot compete effectively without it and that duplication or practical alternatives are not available.

Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. When there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small. It will be less plausible that the antitrust laws contemplate such additional scrutiny, against the slight benefits of antitrust intervention.

Conclusion

IP and antitrust laws share the same economic rationale. They are both crucial for the establishment of competitive and innovative market conditions. These complementarities justify the application of competition law analysis with the object of defining the limits of IP protection. Competition law argues against the minimum protection approach of the TRIPS Agreement, whereas TRIPS protects IPRs worldwide, the relevant markets for products based on IPRs are not necessarily global. Limitations on, and exceptions to, IP rights in local markets will create only negligible income losses to the right holders and will not affect competition or prices in other markets.

Competition law plays a role to correct improvidently defined IPRs, even if it entails adjusting competition principles. IP laws are designed to strike a balance between R & D expenditure and incentives for innovation on one hand by granting owners exclusive rights and protecting interests of users through a variety of exceptions.

In a country like India wherein both IP and antitrust regimes are in a state of infancy, thus jurisprudence in respect of the relationship between them has not really been contemplated. The same has been brought in not because of issues arising out of public discontent but due to the reasons of international obligation. The SVS Committee has thus in view of TRIPS recommended that apart from private companies in India, the State monopolies, government procurement and foreign companies should be subject to competition law. It prohibits collusive anticompetitive agreements, abuse of dominance, and mergers among enterprises. The same has now been incorporated in the Act.

Since, IP laws transform individual initiatives into private property, which makes it possible to exclude users who are unwilling or unable to pay for their individual benefits. In line with the concept of global commons competition law promotes economic efficiency and distributive justice, it serves political-
freedom oriented ends. It is pertinent to find a solution, especially in a jurisdiction like India, to this ‘link’ that these two essential facets of commercial law requires, forms of private initiatives protected by IP laws that are essential to others in furtherance of their private initiatives must be brought within the purview of antitrust legislation.

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13. United States v Dubilier Condenser Corp, 289 U S 178 (1933) This decision is good in law and has been discussed in Banner Metals Inc v Lockwood, 125 U S P Q 29, 29 (Cal App 2 Dist Mar 07, 1960); Heinemann v U S, 230 U S P Q 430, 430 (Fed Cir 17 Jul 1986); Pittsburg State University/Kansas Nat Educ Ass'n v Kansas Bd of Regents/Pittsburg State University, 79 U S P Q 2d 1106, 1106 (Kan 10 Nov 2005).
15. United States v Aluminum Co of Am, 148 F 2d 416, 427 (2d Cir 1945), ‘Many people believe that possession of unchallenged economic power deadens initiative and depresses energy; that immunity from competition is unchallenged economic power deadens initiative and depresses energy; that immunity from competition is a necessary and stimulant to industrial progress; that the spurs of constant stress is necessary to counteract an inevitable disposition to let well enough alone’.

19 The Preamble to the Competition Act, 2002 states its objective as ‘...promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets’. http://www keepmedia com/pubs/Reason/2001/04/01/-268283?page1 (26 December 2005), Northern Pacific Ry Co v United States, 356 US 1, Justice Hugo Black observed that: It ‘...was designed to be comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade It rests on the premise that unrestrained interaction of competing forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions... [The] policy unequivocally laid down by the [Sherman] Act is competition ’ Distinguished on another point by US v Microsoft Corp, 253 F 3d 34, 86 (D C Cir 28 June 2001). Followed in Continental TV Inc v GTE Sylvania Inc, 433 US 36, 36 (US Cal 23 June 1977); In re Wireless Telephone Services Antitrust Litigation, 385 F Supp 2d 403, 417 (S D N Y 2 September 2005).


22 Mann et al, Smith and Roberson’s Business Law, 9th edn (West Publishing Co, St Paul), 1994, 1039.


26 Standard Oil Co of Ind v United States, 228 US 20 (1912); Boston Store v American Gramophone Co, 248 US 8 (1925); Ethyl Gasoline Corp v United States, 309 US 436 (1940) In Tata Engg and Locomotive Co Ltd v Registrar of Restrictive Trade Agreements, (1977) 47 Comp Cas 520 (SC), it was held that; ‘The decision whether a trade practice is restrictive or not is to be arrived at by applying the rule of reason and not on the doctrine that any restriction as to the price will be a restrictive trade practice ’.

27 In Standard Mfg v United States, 226 US 20 at 49, the US Supreme Court observed; ‘...The law is its own measure of right and wrong, of what it permits, or forbids, and the judgement of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties and it may be, of some good results ’ US v General Elec Co, 79 U S P Q 124, 124 (S D N Y 8 October 1948); In re Scrap Metal Antitrust Litigation, 2002 WL 31988168, (N D Ohio 7 November 2002).


29 Laik K, Role of intellectual property in economic growth, Journal of Intellectual Property Rights, 10 (6) (2005) 469. It is submitted that in the light of arguments advanced there seems to be no controversy between intellectual property and competition laws.

30 In United States v Gypsum Co, 333 US 100, 135 (1969), the Court stated that: ‘Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties or the patents drawn from patent-free industry products and through regulation of distribution ’ State v Nielsens, 19 Utah 2d 66, 68 (Utah 28 March 1967); State v Bowling, 5 Ariz App 436, 439 (Ariz App 16 May 1967) (NO 2 CA-CR 79).


34 United States v Dubler Condenser Corp, 289 US 178, 186 (1933).

35 Rev Stat § 4886, 35 USC §31 (1940).


43 SCM Corp v Xerox Corp, 645 F 2d 195 (2d Cir 1981).

Mahindra & Mahindra v Union of India AIR 1979 SC 798. 53

The IP statutes are also notable for opposition provisions, its requirement on the part of a potential inventor to disclose the source used in an invention, the prior consent principle and compulsory licensing.

Report of the High Level Committee on Competition Law (Raghuvaran Committee), pp 4-5.


89 The High Level Committee on Competition Law (Raghavan Committee), 4 4-8.


91 The High Level Committee on Competition Law (Raghavan Committee), 4,6-2.

92 In India the common law doctrine of ‘Passing Off’ is recognized, §§ 27 and 2(1zb) of the Trade Marks Act (1999); Apple Computers v Apple Leasing (1993) IPLR 63 (Del); Whirlpool Corporation v N R Dongu 56 DLT 304 (Del); Calvin Klein Inc v International Apparel Syndicate (1995) IPLR 148 (Del).


