

Managing Intellectual Property

The Global IP Resource

A QUEST FOR CONVERGENCE WITH INDIAN COMPETITION LAW

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Cyril Abrol and Samridh Bhardwaj of Remfry & Sagar look at how India approaches the seemingly opposing forces of IP rights and competition law, in particular through the Competition Commission



"Competition is not only the basis of protection to the consumer, but is the incentive to progress" –

Herbert Hoover

Since time immemorial, a great emphasis has been placed on creations of the human intellect, and competition and innovation have always been entwined. It is believed that as early as 500 BC, in the Greek city of Sybaris, as encouragement to discover new refinement in luxury, profits arising from such discoveries were secured to the inventor by a patent for the space of a year.

Intellectual property rights protect individual interest, and reward inventors by granting an exclusive right of commercial exploitation. Competition laws fundamentally protect the market by opposing monopolies. The dichotomy between the two laws seems inherent; however, lately, there is a consensus that both present divergent paths for achieving the same goal. Jurists argue that the absence of an IP right regime would endanger the existence of competitors in the market and the lack of competition laws the very existence of competition. The question that we grapple with is not the very existence of IP rights, or their need in society, but the manner in which such rights are exercised to achieve a healthy competitive environment.

Competition law in India

From an Indian perspective, the Competition Act 2002 (the Act) is the governing legislation which, among other things, lays down the law on the prohibition of anti-competitive agreements and the abuse of a dominant position. Replacing the Monopolies and Restrictive Trade Practices Act 1969 (made obsolete by changing economic patterns), it was brought into effect on March 31 2003 and became fully enforceable by June 1 2011. The new statute seeks to promote and sustain competition, to protect the interests of consumers and ensure freedom of trade by discouraging horizontal and vertical arrangements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which are likely to cause an appreciable adverse effect on competition in India.

However, one exception exists, insofar as the Act preserves the right of a person to restrain infringement and allows the imposition of "reasonable conditions" which may be necessary for the enjoyment of rights conferred under Indian IP statutes.

Reasonable conditions

While the Act lays down broad guidelines on the interpretation of "appreciable adverse effect on competition" and "dominant position", unfortunately, it fails to define or explain as to which reasonable conditions may be necessary for protecting IP rights. While it is true that a fixed set of rules would not be applicable to all cases, the lack of guiding principles leaves room for ambiguity. Absent clear guidelines under the Act, we turn to Indian IP legislations in search of tests for reasonability.

Reliance on IP laws

In a contract for sale or lease of a patented article or a licence to manufacture or use a patented article or a licence to work any process protected by a patent, the Patents Act 1970 considers tie-in conditions and exclusive supply arrangements as unlawful. A prohibition on the right of the licensee to use any process other than the patented process is also barred. Further, in sync with the obligations cast under TRIPs, provisions providing exclusive grant-backs, preventing challenges to validity of a patent and coercive package licensing are also viewed as restrictive and unlawful. It can, therefore, be safely said that the Indian patent system prohibits the exercise of patent rights in a manner likely to have an adverse effect on competition. The Designs Act 2000 embodies similar provisions relating to tie-in arrangements and exclusive supply agreements.

The Semi-Conductor Integrated Circuits Layout-Design Act 2000 empowers administrative authorities to rectify a competition concern generated out of the registration, licence or use of a registered layout-design, but does not delve into detail. It merely envisions the conditional use of a registered layout-design by the government or a person nominated by the government to the extent deemed necessary to remedy the anti-competitive practice. Under the Copyright Act 1957, reasonable conditions may be imposed by the author of a work to protect his moral rights.

Jurisdictional overlap

In the wake of such diversity in legislative sources laying down what constitutes reasonable conditions necessary for protecting IP rights, a peculiar jurisdictional overlap comes to the fore involving the statutory authority set up under the Act, namely, the Competition Commission of India (CCI), and other IP legislations, with both having reasons to sit in judgment over a competition concern.

The Act provides that its provisions shall be in addition to, and not at the expense of, the provisions of any other law in force. This implies a harmonious construction of competition law with other legislations. However, the main concern is not of conflicting provisions but rather of multifarious remedies available for the same alleged wrong, and so permitting more than one statutory or judicial authority to have jurisdiction over the same subject matter.

This issue was first highlighted in the Aamir Khan Productions case decided by the High Court of Bombay in 2010. CCI had issued a notice to the petitioner alleging violation of the provisions of the Act pertaining to anti-competitive agreements on the ground that its actions, together with other film producers in India, were "cartel like", as they had collectively agreed to abstain from releasing any of their films in multiplexes unless their demand for higher profit sharing was met. The petitioner approached the Court alleging that the notice was without jurisdiction insofar as the subject matter, that is, films are solely governed by the provisions of the Copyright Act. The Court observed: "There is nothing in the Competition Act 2002 to indicate that the Competition Commission is not invested with the jurisdiction to determine such jurisdictional fact". The CCI exercised jurisdiction over the matter on the ground that "neither any question of infringement of rights" arose under the Copyright Act and "nor was the question of imposing reasonable conditions to protect such right" before the CCI. Therefore, "any plea based on copyright is wholly misplaced and has to be rejected". Upon investigation, the CCI observed that the film producers had "acted in concert", and their conduct of limiting and controlling the supply of films to multiplex owners was anti-competitive. In doing so, the CCI carved out a jurisdictional exception for itself insofar as cases concerning reasonable conditions. The order of the CCI did not, however, disclose the essential reason for carving out such an exception. Does this mean that the CCI is of the view that in cases involving intellectual property, reasonability of conditions or their necessity is to be determined by bodies established under the relevant IP legislations before the CCI evaluates a case for violation of the provisions of the Act? Only time shall tell how and who shall test the reasonability of a condition imposed towards the protection of an IP right.

Meanwhile, the CCI is relying on precedents from foreign jurisdictions to assist it in deciding whether or not an arrangement is anticompetitive. However, to its dismay, there is some ambiguity on the method of evaluation. To illustrate, let us trace the evolution of US jurisprudence on antitrust laws. A common approach of US courts has been to examine the restraints in the course of licensing under a rule of reason. Rule of reason mandates an inquiry as to whether a particular restraint or condition is likely to have an anti-competitive effect and, if so, whether the restraint or condition is

reasonably necessary to achieve a redeeming (pro-competitive) virtue. This would involve instances where the creation of efficiencies outweighs the anti-competitive effects. The NCAA case is a benchmark for the applicability of the rule of reason requiring a detailed analysis of the restraint in relation to its benefits. Conversely, other US courts have found the nature and effect of certain restraints ex facie anti-competitive and have treated them as unlawful. The NSPE case and the BMI case are amongst the first that applied the rule. Classic examples of applicability of the rule include naked price fixing, restraints on output and market access and group boycotts. This rule has often been considered harsh on defendants, as it requires the demonstration of some competitive justification even in the absence of a detailed analysis. Realising the need for a synthesis, a diluted approach for testing reasonability was developed in the case of Massachusetts Board of Registration in Optometry. It was observed that "the method of analysis we employ here is more useful than the traditional use of the per se rule or the rule of reason", and a series of questions were laid down for evaluation:

First, we ask whether the restraint is 'inherently suspect'. In other words, is the practice the kind that appears likely, absent an efficiency justification, to 'restrict competition and decrease output'?...If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition of power, must be employed. But if it is inherently suspect, we must pose a second question: Is there plausible efficiency justification for the practice?...Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry – a third inquiry – is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry – there are no likely benefits to offset the threat to competition.

Although this case attempted to find a median path, it mandated the judgment of "inherently suspect" restraints and a great deal of subjectivity came to be associated with the test. In fact, the term inherently suspect was so elastic that it was capable of covering innumerable cases. Later, this test was also criticised for being largely prejudicial to defendants who were required to demonstrate plausible efficiencies and proof of their validity long before the plaintiff proved any anti-competitive effect. Various truncated test methodologies have followed, and it has been realised that any means of evaluating restraints and conditions will have to be put through its paces before it can be guaranteed to provide predictability to administering competition.

If we look at China, after years of discussions and numerous revisions, its Anti-Monopoly Law came into effect in 2008. This law purports to cover entities which abuse intellectual property and eliminate or restrict market competition. However, some provisions of the law are not clear, and lead to uncertainty for foreign players. The law does not adequately provide for convergence of intellectual property and antitrust and is too general insofar as it fails to define the boundaries of IP abuse and the consequent effects.

The CCI holds the key

Similar to other jurisdictions, perhaps, the key to understanding the true legislative intent of including the terms reasonable conditions and necessary in the Act lies in their fluidity.

The Act is a recent legislation, and so is the CCI. Yet the CCI has successfully managed to play the role of a competition facilitator and adjudicator since its inception. The CCI has actively been investigating transactions which may be anti-competitive. and has passed stringent orders across

industries. Efforts of the CCI are well appreciated. Of course, future decisions and competition advocacy initiatives by the CCI hold the key for better convergence of competition and IP laws in India.

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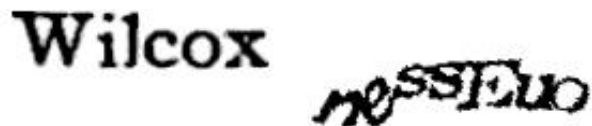
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