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Anti-Competitive Tendencies of Patent Pools: Challenges and the Road Ahead

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Both Competition law and Intellectual Property Rights [IPR] aim to work towards creating an ideal framework to ensure the furtherance of the economy, by creating policies that seek to promote consumer well-being, innovation, and maximization of wealth. While the measures are different, the objectives of both these laws are very well in sync. The role of Competition law in regulating IPR comes to the fore when the owners of these rights use their advantageous position to engage in practices that tend to gravitate against the optimal level of competition in the market as envisaged by the regime of Competition law. One of the key areas that tend to cause friction between these two regimes is the area of patent pools. This note tries to delineate the anti-competitive tendencies of patent pools depending upon their types as well as the licensing practices and grant-back terms that they entail. Furthermore, the note attempts to locate how the Indian competition regime has tried to accommodate the role of IPR. Finally, the note goes on to trace the continuing development of the Competition regime in India and the possible implications of this development on patent pooling agreements along with the need to get a clarity of approach concerning the intersection of these laws to efficiently realize the goals that both these regimes envision.

Keywords: *patent pools, competition law, ipr, innovation.*

INTRODUCTION: UNDERSTANDING THE LINK BETWEEN IPR AND COMPETITION LAW

The core objective of the regime of IPR is to incentivize innovators by recognizing and rewarding the efforts and investment of resources that they have put into executing their ideas. To recognize and appreciate the efforts and resources that innovators put into executing their intellectual ideas, IPR aims to provide them with incentives for their work. This is done by equipping the innovators with restrictive monopolies in their favor. While it is true that a grant of IPR confers on the owner a degree of superiority over the rest of the competitors for at least some period, in no way does this mean that IPR contravenes the objectives of the Competition law. Competition law aims to benefit consumers by enforcing regulatory policies that seek to avoid market barriers and ensure fair competition in the market. It essentially seeks to discourage the concentration of power in the hands of a few and therefore regulates monopoly only when it tends to become anti-competitive.¹

Entities that already have a substantially monopolistic position in the market may not be very inclined to invest their resources toward innovation as they already have a sufficient enough profit margin. This is where the role of IPR becomes extremely relevant. While the innovators may be able to enter the market through their innovations, IPR gives them a better chance at success in the market by providing them with certain exclusive rights to exploit their innovations. However, there is no guarantee that the advantages that come along with these rights will necessarily translate into market power. Market power is co-related to a lot of variables and often there are '*sufficient actual or potential close substitutes*' for such products, processes, etc. to prevent anyone's domination in the market.² It is only when the owner of an IPR crosses the permissible limits demarcated for exercising his rights and engages in abusive business practices such as market foreclosure, and restricting competition in the market, that he

¹ Mahajan Shama, 'Patent Pooling and Anti-Competitive Agreements: A Nascent dichotomy of IPR and Competition Regime' 6(2) NLUJ Law Review 35 (2020) <<http://nlujlawreview.in/wp-content/uploads/2020/04/62-NLUJ-Law-Review-35-2020.pdf>> accessed 01 May 2023

² Robert D Anderson and William E Kovacic, 'The application of competition policy vis-à-vis intellectual property rights: the evolution of thought underlying policy change' (2017) WTO Staff Working Paper ERSD-2017-13 <https://www.wto.org/english/res_e/reser_e/ersd201713_e.pdf> accessed 01 May 2023

comes under the scrutiny of Competition law. Article 7 of the TRIPS Agreement³ stipulates that the ‘*protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*’ As this provision makes clear, giving incentives to the innovators is not only done for securing their interests but also to make sure that society is constantly moving towards technological progression and innovation and therefore to ensure the overall social and economic welfare of the general public.⁴ It is due to this very consideration that any intervention with the use of IPR so long as it is done to prevent their abuse and protect the public interest is justified under Article 8 of the TRIPS Agreement.⁵

CONCEPT OF PATENT POOLS: PROS AND CONS

A patent is granted in respect of a novel and inventive product/process, thereby granting the patentee monopoly over his work for a specified period of twenty years. However, it does not mean that the patent holder will per se enjoy a dominant position in the relevant market as the grant of a patent right, and the ability to be able to convert it into commercial success which is essential for establishing any sort of market dominance, are two completely different things. It is essential to remember that a patent right is subjected to a large number of limitations, for example, the already existing prior arts, the limitation of the market, etc.⁶ In addition to this, considering the pace of technological advancement, any sort of monopoly provided by a patent right can be useful only for a limited time as there is a constant influx of better innovations with superior technology into the market. However, none of these factors can take away from the fact that patents can be easily used in anti-competitive strategies aiming to exclude other competitors from the market.⁷ It is in this context that the concept of patent pools is increasingly relevant.

³ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, art 7

⁴ ‘Overview: the TRIPS Agreement’ (WTO) <https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed 01 May 2023

⁵ TRIPS Agreement, art 8

⁶ Mansee Teotia and Manish Sanwal, ‘Interface Between Competition Law and Patents Law: A Pandora Box’ (2021) SSRN <<http://dx.doi.org/10.2139/ssrn.3775567>> accessed 01 May 2023

⁷ Victor Rodriguez, ‘Patent Pools: Intellectual Property Rights and Competition’ (2010) 4 Open Aids Journal <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831195/>> accessed 01 May 2023

While the growth of intellectual property, especially patents, is a positive indicator of innovation, it also increases the risk of overlapping patents, thus creating the need for patent pools. Patent pools can be defined as ‘an agreement between two or more patent owners to license one or more of their patents to one another or to third parties’. Patent pools have a history of helping in navigating through patent thickets (overlapping patent rights controlled by rights holders that require innovators to reach licensing deals for multiple patents from multiple sources)⁸ and clear patent blockings. While patent pools do come with their set of advantages, at the same time they also carry the inherent risk of instigating anti-competitive concerns, as they can easily facilitate tactic collusion between pool members, allowing them to leverage their monopoly and impose abusive terms on non-members to get access to the technologies they require.

DIFFERENT TYPES OF PATENT POOLS AND THEIR EFFECT ON COMPETITION IN THE MARKET

To understand the effect of patent pools on competition one needs to understand the different types of patents that can be covered within the ambit of patent pools. Two patents are substitutes for one another if they cover alternative technologies. It essentially means that the subject matter covered by such patents can be used side by side without infringing on each other.⁹ One such example is the case of *Summit v VISX*¹⁰ which unfolded in the United States of America (USA) in 1998. Here, two companies that had obtained patents related to laser eye surgeries and had also been successful in getting marketing approval from the United States Food and Drug Administration formed a pool with each of them relinquishing their right to license their patents outside the pool. This pool was declared anti-competitive as the patents acted as substitutes for one another. On the other hand, complementary patents create a situation where no technological component can be marketed individually without the technological complements protected by patent rights of different companies thereby necessitating patent licensing from

⁸ Ian Hargreaves, ‘Digital Opportunity: A review of Intellectual Property and Growth’ (2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf> accessed 01 May 2023

⁹ *Ibid*

¹⁰ ‘Summit Technology, Inc and VISX, Inc; Analysis to Aid Public Comment’ (1998) 63(169) Federal Register <<https://www.govinfo.gov/content/pkg/FR-1998-09-01/pdf/98-23448.pdf>> accessed 01 May 2023

different sources for producing the desired output without infringing patent claims. In the case of complementary patents, pooling is mostly favorable.

Patent Pools can also raise competition-related concerns vis-à-vis the licensing practices that they entail. It is for this very reason that patent pools have often invited the attention of the judiciary in the USA and European Union. In an interesting development in 2002, Microsoft had to license intellectual property rights in various protocols required to create products that were interoperable with Microsoft Windows on non-discriminatory and reasonable terms on the orders of the DOJ¹¹.

Patent pools with grant-back terms also pose certain anti-competitive challenges. Under a grant-back arrangement, the potential licensee is required to agree to the stipulation that he would be willing to grant to the licensor the rights to any improvement that may be made in the original patent i.e., the technology being licensed. This condition for grant back could be without any remuneration or some low remuneration may be fixed. While they act as an incentive for the licensor and encourage them to license their technology, exclusive grant-back clauses in particular can work to reduce the incentives to a licensee to innovate and create something better, meanwhile also working to maintain or increase the market power of the licensor.¹²

UNDERSTANDING THE POSITION OF PATENT POOLS WITHIN THE INDIAN COMPETITION REGIME

It is in this context that the complexities associated with the actual and potential effect of patent pools on Competition law need to be understood within the Indian terrain. Sections 3(1)¹³ and 3(2) of the Competition Act, 2002,¹⁴ [the Act] lay down that any agreement which causes or is likely to cause an Appreciable Adverse Effect on Competition [AAEC] in India is void and Section 3(3) of the Act,¹⁵ lists down certain agreements where there is a presumption of AAEC. Recognizing the critical role played by the regime of IPR in furthering innovation in society, the

¹¹ Robert D Anderson and William E Kovacic (n 2)

¹² 'Licensing of IP rights and competition law - Note by India' (OECD, 10 May 2019) <[https://one.oecd.org/document/DAF/COMP/WD\(2019\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)4/en/pdf)> accessed 01 May 2023

¹³ Competition Act 2002, s 3(1)

¹⁴ Competition Act 2002, s 3(2)

¹⁵ Competition Act 2002, s 3(3)

provisions of the Competition Act,¹⁶ have been framed in such a way as to accommodate these rights. Therefore, acting as an exception to section 3(3) of the Act,¹⁷ section 3(5) of the Act,¹⁸ allows the owners of IPR to enter into any agreement without attracting the restrictions of Section 3(3),¹⁹ so long as only such '*reasonable restrictions*' are imposed as are necessary for the protection of rights granted under this regime. This exception of reasonable restrictions is in line with the '*rule of reason*' as laid down by the Supreme Court of the USA in the landmark case of *Standard Oil Company v United States*.²⁰ It was this case that clarified the scope of the Sherman Act, of 1890,²¹ and laid down that while all contracts necessarily restrain trade at some level, to subject any agreement to antitrust scrutiny under this act what needs to be analyzed is whether they were '*unreasonably in restraint of trade*'.

The Competition Act nowhere specifies what would qualify as a reasonable or for that matter an unreasonable restriction. But in 2011, the Competition Commission of India (CCI) released an advocacy booklet that offers some clarity concerning what qualifies as unreasonable restrictions. Some examples of unreasonable restrictions as laid down by the CCI are, '*licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and service, exclusive licensing arrangements, including cross-licensing by parties collectively possessing market power, grant backs, exclusive licensing and acquisition of IPR*'. An illustration that explains this further is the case of *K Sera Sera v Pen India*,²² where the CCI relied upon section 3(5) of the Act²³, to hold that exclusive agreement with distributors to prevent agreements with repeated IPR infringers constitute a reasonable restriction. To further rule out the vagueness associated with the provision, many commentators have pointed to the '*essential facilities doctrine*' as a way out to test the reasonability of the patent pooling agreements in the Indian context²⁴. The doctrine

¹⁶ Competition Act 2002

¹⁷ Competition Act 2002, s 3(3)

¹⁸ Competition Act 2002, s 3(5)

¹⁹ Competition Act 2002, s 3(3)

²⁰ *Standard Oil Co of New Jersey v United States* [1910] 221 US 1

²¹ Sherman Anti-Trust Act 1890

²² *K Sera Sera Digital Cinemas Limited v Pen India Ltd. and Others* (2016) Case No 97/2016

²³ Competition Act 2002, s 3(5)

²⁴ Meenakshi K K and Hardik Jain, 'IPR-Antitrust Crossroads: is Essential Facility Doctrine a Solution?' (2017) 11 NUALS Law Journal <<https://nualslawjournal.com/files.wordpress.com/2020/08/nuals-law-journal-vol-11-2017.pdf>> accessed 02 May 2023

as laid down in the case of the *Terminal Railroad Association*,²⁵ has been used previously in the USA as an exception to the application of IPR as well. The basic principle of this doctrine is that when reasonable access to a product or service is essential for the survival of competitors i.e., the independent existence of the patented assets devoid of the pool is essential for the survival of the progress of a fair market then such agreements shall be considered unreasonable and hence beyond the scope of exemption of section 3(5) of the Act²⁶.

On the other hand, section 4 of the Competition Act, of 2002,²⁷ prohibits a dominant entity from abusing its position of dominance to adversely affect the competition in the relevant market. An exception for IPR as seen under section 3(5) of the Act,²⁸ is not prevalent for this particular section. Therefore, an entity found abusing its dominant position under this section can't use the defense of having been protected by the regime of IPR.

THE EVOLVING INDIAN JURISPRUDENCE

In furtherance of the recommendations of the Competition Law Review Committee (CLRC), the draft Competition (Amendment) Bill (2020)²⁹, did contemplate the incorporation of a new section (section 4A) in the Competition Act, 2002³⁰. This section was designed to extend a provision similar to section 3(5) of the Act,³¹ as applicable to anti-competitive agreements to the cases of abuse of dominance as well. However, the Competition (Amendment) Act 2023,³² has decided to omit this proposed change, thereby maintaining the status quo in this regard. One of the reasons for discarding this potential change could be the apprehension that several stakeholders expressed about how this section carried along with it an inherent risk of becoming a standard defense that could be put up by entities abusing their dominant position under section 4 of the Act under the guise of protecting their IPR. As there is still no definite definition of what constitutes '*reasonable restrictions*' under section 3(5) of the Act,³³ the extension of the

²⁵ *United States v Terminal Railroad Association of St Louis* [1915] 236 US 194

²⁶ Competition Act 2002, Section 3(5)

²⁷ Competition Act 2002, Section 4

²⁸ Competition Act 2002, Section 3(5)

²⁹ The Draft Competition (Amendment) Bill 2020

³⁰ Competition Act 2002

³¹ Competition Act 2002, s 3(5)

³² Competition (Amendment) Act 2023

³³ Competition Act 2002, s 3(5)

same to abuse of dominance cases could create complications as the possibility of misuse is higher in this case.

As far as the effect of the amendment on patent pools is considered, an area where this potential change could have created an issue is the case of a Standard Essential Patent (SEP). A SEP can be defined as a common global standard that is agreed to by various market players under the rubric of a Standard Setting Organisation (SSO) to set a 'common technology standard'.³⁴ Given the market power of standards, and of holders of patents essential to such standards, the owner of a SEP is under an obligation to license its patented technology on FRAND terms (fair, reasonable, and non-discriminatory).³⁵ In *Micromax Informatics Ltd v Telefonaktiebolaget LM Ericsson*,³⁶ CCI opined that FRAND licenses are primarily intended to prevent patent hold-up and observed that patent hold-up undermines the competitive process of choosing among technologies and thus, threatens the integrity of standard-setting activities. In SEP licensing cases, a patentee using this potential provision may have been able to circumvent these conditions to arm-twist a willing licensee to accept unfavorable terms and thus abuse his dominance.³⁷

CONCLUSION

The COVID-19 pandemic has been instrumental in demonstrating the complications associated with creating a balance between IPR, ensuring fair competition in the market, and most importantly, consumer welfare. At the 73rd World Health Assembly held in 2020, while the World Health Organization (WHO) and the European Union strongly supported patent pooling for pharmaceutical drugs, the USA and the United Kingdom were against it.³⁸ As the note attempts to indicate, while patent pools come with their own set of advantages, they need to be

³⁴ Ishan Sambhar, 'Concept of Standard Essential Patent' (*Mondaq*, 30 June 2020) <<https://www.mondaq.com/india/patent/954588/concept-of-standard-essential-patent>> accessed 02 May 2023

³⁵ OECD Secretariat Background Note (n 15)

³⁶ *Micromax Informatics Ltd v Telefonaktiebolaget LM Ericsson* [2013] Case No 50/2013

³⁷ Vikas Kathuria, 'Draft Competition (Amendment) Bill Proposes Extension of Protection to IPR Holders in Abuse of Dominance Cases' (*SpicyIP*, 03 March 2020) <<https://spicyip.com/2020/03/draft-competition-act-amendment-bill-proposes-extension-of-protection-to-ipr-holders-in-abuse-of-dominance-cases.html>> accessed 02 May 2023

³⁸ 'US and UK lead push against global patent pool for Covid-19 drugs' (*The Guardian*, 17 May 2020) <<http://www.theguardian.com/world/2020/may/17/us-and-uk-lead-push-against-global-patent-pool-for-covid-19-drugs>> accessed 02 May 2023

monitored from a Competition perspective, to prevent this collaborative effort from turning into an overpowering exercise. There needs to be strict scrutiny concerning the types of patents involved in a pool, the licensing arrangement between the concerned parties, and the terms on which the pool is functioning. The Indian jurisprudence around this area is still evolving. The legislature, as well as the CCI, need to work together to get clarity of approach as to what are the '*reasonable restrictions*' that would exempt IPR from the scrutiny of Competition law. This clarity is an essential element to make sure that these two areas of the Indian legal system can work concertedly for furthering consumer welfare which is what both these laws essentially seek to protect.