

COMPETITION LAW AND IPR: IMPLICATIONS FOR INDIA¹

Priyanka Bhowmik*

Abstract

In Intellectual Property Rights and Competition Law there is tension but no fundamental contradiction. Dealing with such a relationship poses unique analytical challenges to policy-makers. But most of the developing countries don't have legislation relating competition or even if there is any law, implementation of such legislations are little. In India the Competition Act 2002 was enacted by replacing Monopolies and Restrictive Trade Practices Act 1969. In Competition Act 2002, there are three main elements anti- competitive agreements, abuse of dominant position and regulation of combinations which are likely to have an appreciable adverse effect on competition. In a nutshell, the proposed research seeks to examine the ways for governments of developing countries like India to ensure that the interest of the individual who seeks IPR protection is balanced with that of competitive trade, economic growth and ultimately public welfare.

Keywords: Anti competitive practices, Dominant position, Consumer welfare, IPR, Competition Act, 2002, TRIPS Agreement

* **Research Scholar, BHU.**

INTRODUCTION

As an International legal frame work TRIPS Agreement still is of a general nature and doesn't provide for any specific guidance for competitive trade which can be useful for the trade interest of developing countries. In spite of that there are some flexibilities which can be used by developing countries for upliftment of their economic interest. Such are Article 8, Article 40, Article 31K. By resorting to these flexibilities, developing countries domestically can counterbalance the strong IPR system. For that purpose developing countries have to enact domestic legislations. But most of the developing countries don't have such kind of legislation or even if there is any law, implementation of such legislations are little. As the law implementation mechanism is very weak in some developing countries, they are totally unable to get the fruit of TRIPS flexibilities. There are also some developing countries where such legislations are totally absent because of their unawareness. In 2002 India enacted competition law which is Competition Act, 2002. In this Act there are provisions which are useful to combat with the anti-competitive practices in the Indian market but in India the situation is same like first mentioned developing countries. Implementation mechanism for competition law is very weak in India. Even people are not aware of this law. Even people are not aware of this law. So first of all India much resorts to strong implementation mechanism policy and then there must be competition law awareness programme by NGO's, Law students, lawyers. As the competition law is quite new to the people of India, it will take time but I can say 'better late than never'.

Competition law in India

In India first competition law was MRTP Act, 1969 (Monopolies and Restrictive Trade Practices Act, 1969). It was enacted on the basis of economic condition prevailing in India at that point of time. It was for prohibiting monopoly in trade. As because India started focusing on competition in trade and commerce, Government of India in 1999 decided to enact law for promoting competition in trade and commerce of nation. On the basis of report of Raghavan committee Competition Act, 2002 was enacted by Parliament of India. Competition Commission of India was established playing pivotal role for keeping competition in economy of country. Competition Act, 2002 encourage competition in the market for upliftment of trade and

commerce and prohibition of anti competitive practices which is the ultimate welfare of consumers.²

Section 3 provides the meaning of Anti competitive agreements. Under Competition Act 2002, anti competitive agreement means an agreement regarding the production, supply, distribution, storage, acquisition or control of goods or the provision of services, which causes or likely to cause an appreciable adverse effect on competition within India.³ Such kind of agreements can be 'horizontal' or 'vertical' both. Horizontal anti-competitive agreement means an agreement between direct competitors for example An agreement between two or more companies manufacturing or giving same goods and services, which adversely effect free and competitive market economy, thus ultimately resulting into curtailment of consumer rights and interest. Vertical agreements means an agreement between a manufacturer and a distributor or a distributor and a retailer which hampers free flow of the goods and services in the market and thus again adversely affect consumer welfare.⁴

Section 4 of the Act describes the meaning of abuse of dominant position. By using the power of dominance the right holder (IPR holder) abuse that position. Such kinds of abuse nullify the very concept of the free trade. In Indian market free and competitive trade is the need of the hour. The consumers in Indian market don't have high purchasing capacity. So they can't afford highly priced goods and services. As there is little, even one can say no competition in the Indian market the IPR holders prices their goods and services at a high rate which is beyond the purchasing capacity of the Indian consumers. But it is also true that IPR itself doesn't provide monopoly. Only because there is no competition, the right holders get dominance over the market. In this situation the right holders get a chance to abuse their dominant position in the market by resorting to anti-competitive agreements which penetrate into the growth of trade and economy in India.⁵

² http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCI%20Basic%20Introduction_0.pdf

³ Section 3 of the Competition Act, 2002.

⁴ ANESTIS S. PAPADOPOULOS, *THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY*, 14 (Cambridge University Press 1ST ed. 2010).

Implications for India

Under the Section 27 (g) and 28 (2) of The Competition Act, 2002, CCI has been given power to give orders appropriate to restrain anti-competitive practices in Indian Market. Here, taking the powers given by these provision CCI can take resort to Compulsory licensing policies. It's also true that compulsory licensing can hamper competition in higher market. But in a developing country like India where innovation is little in rate and purchasing power of consumers is low, compulsory licensing is one option CCI can use to prevent anti-competitive practices in market. But if we see deeply compulsory licensing provision under the Patent Act, should not be one and only way to combat with the problem. As India is developing nation the policies are changing so change in present law is required. At present by using this provision Government is making IP holder compelled to give out his innovation in meager amount which is discouraging the progress of innovation of the country. But it's also true that patented products are going beyond the economic reach of consumers of India. If in one nation people are walking back financially than that nation's future economic progress will get tougher. Here is the main challenge before India to trick balance between the tow i.e using TRIPS flexibilities in such a way to keep the nation's economic growth in the way to progress at the same time not to discourage the concept of innovation by compelling innovators to wash out their hard work. Compulsory licensing can be used to counter balance the present situation. But it's also true that in long run it hampers competition as it put FDI at par. Foreign companies will not be interested in Indian market as compulsory licensing policy will destroy their monetary benefits. But it is also true that India has not been flourished in innovation. IPR protected products are few in number and by taking this advantage IP right holder get involved into monopoly business. They price their product high which is beyond the purchasing capacity of common people of India. This situation gets grievous nature in cases of essential health care product like medicines of cancer, AIDS etc. This is also an acute problem in African countries where AIDS is a big concern. As an emerging economy India can take resort to compulsory licensing policies. This study suggests that in case of compulsory license, licensee should be provided with proper remuneration so that he doesn't get discouraged. Otherwise innovation will get discouraged. Innovation should not be discouraged. Where innovation is more there will be competition among the inventors to innovate quality

⁵ Analyzing Section 4 of the Competition Act, 2002.

product. Where innovation is more consumer will get more options. In that case innovators will try to give quality product but in cheap rate. And that time only country will get felicitated trade, flourished economy and ultimate consumer welfare with fair competition.⁶

Concluding remark

Innovation results into new goods and services which create better facility to consumers. But if consumers can not avail those innovative goods and services because of high price asked by traders or monopoly of traders of those innovative goods and services than such kind of innovation are of no use for any country. In such situation country should have strong legislation to prohibit monopoly of innovators and also to prohibit trade practices which adversely affect on innovation. After MRTP Act India got Competition Act, 2002 competition law in this regard. But due to lack of awareness, lack of enforcement of this Act and also for other reasons anti-competitive practices, abuse of IP right, India's trade and commerce is adversely getting affected. As a developing country India's economy is growing where adverse practices on trade and commerce is not acceptable. India is taking upper place among the growing economy of the world. India's economy is growing day by day. But India should not be placed among those countries where intellectual property right holders are not protected. IP right holders should get protection under Indian Law. Innovation should be encouraged by spending more on R and D (Research and Development) so that more innovations come out as the strength of nation. Only concern is, India should take proper step to prohibit monopoly of IPR holders and on the other hand to prohibit practices by traders which are adversely affecting IPR.

⁶ Raju KD Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India. *Intel Prop Rights* 2: 115 (2014). doi:10.4172/2375-4516.1000115