JICLT
Journal of International Commercial Law and Technology
Vol. 6, Issue 2 (2011)

Intellectual Property Law & Competition Law

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Abstract. Competition law and intellectual property rights (IPRs) have evolved historically as two separate systems of law. There is a considerable overlap in the goals of the two systems of law because both are aimed at promoting innovation and economic growth. Yet there are also potential conflicts owing to the means used by each system to promote those goals. IP laws generally offer a right of exclusive use and exploitation to provide a reward to the innovator, to provide an incentive to other innovators and to bring into the public domain innovative information that might otherwise remain trade secrets. Competition authorities regulate near monopolies, mergers and commercial agreements with the aim of maintaining effective competition in markets. This article introduces the concept of IPRs and Competition law. It highlights important areas of conflict between the two laws and also deals with the Indian antitrust law. It concludes by trying to harmonize the conflicts.

1. Introduction

Intellectual Property Rights (IPR) and Competition Law are both founded with the purpose of achieving economic development, technological advancement and consumer welfare. IPR are legal rights governing the use of such creations. This term covers a bundle of rights, such as patents, trademarks or copyrights, each different in scope and duration with a different purpose and effect.[1] Competition law seeks to prevent certain behaviour that may restrict competition to detriment consumer welfare. In short run, IPR encourages innovation and new products in the market, whereas in long run- Competition Law promotes consumer welfare by introducing new products to the market and maintaining the qualities of the goods in the market. Thus both are complementary means of promoting innovation, technical progress and economic growth to the benefit of consumers and the whole economy.

IPRs and competition are normally regarded as areas with conflicting objectives. The reason is that IPRs, by designating boundaries within which competitors may exercise monopolies over their innovation, appear to be against the principles of competitive market and level playing fields sought by competition rules, in particular the restrictions on horizontal and vertical restraints, or on the abuse of dominant positions.

IP Laws are monopolistic in nature. They guarantee an exclusive right to the creators and owners of work which are a result of human intellectual creativity. Also they prevent commercial exploitation of the innovation by others. This legal monopoly may, depending on the unavailability of substitutes in the relevant market, lead to market power and even monopoly as defined under competition law. It is an advantage granted to the owner over the rest of the industry or sector. When this advantage or dominant position is abused, it creates a conflict between IPR and competition law.[2]

[1] Jayashree Watal, Intellectual Property Rights in WTO and Developing Countries, 2001 (Oxford University Press) , at 1-5
[2] Adv. Vishnu S, Conflict Between Competition Law And Intellectual Property Rights (August 13, 2010) http://www.articlesbase.com/intellectual-property-articles/conflict-between-competition-law-and-intellectual-property-rights-3106578.html#ixzz0yxtT0wdR

1.1 History and Evolution of IPR

Historically, the interest of exporters of products or technologies incorporating IP conflicted with those of importers or imitators of such products or technologies. The increasing pace of globalization engendered by faster and cheaper methods or transportation and communication, combined with the growing ease of imitation, produced a strong and continuing demand for improving the international legal frame work for the protection and enforcement of IPRs. IPRs have thus moved rapidly from being an esoteric subject confined to specialist's circles to become a major policy issue in international economic relations and a term recognized by the general public the world over.[3]

During the late 19th century, the demand for Intellectual property rights increased due to high-tech development and expansion of international trade. Meanwhile Intellectual Property transactions in the international market increased which gave rise to contradictions regarding IPRs and regional restrictions. In order to resolve these contradictions, various international conventions were enacted. The convention of "Paris convention for protection of Industrial Property" was the first convention came up in 1883 established by Germany, France, Belgium and 10 other countries for the protection of Industrial Property, followed by "Berne Convention for the protection of Literary and arts" first of its kind for the protection of Copyright. It was in 1993 when WTO adapted these international conventions. WIPO (World Intellectual Property Rights Organization) was established in 1970 and it was in charge of 20 international conventions relating to protection of intellectual property rights. TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement in 1994 achieved the goal to link international trade with people's intellectual property rights. It succeeded in providing a more unified higher platform.[4]

1.2 History and evolution of Competition law

History of competition law can be traced back to Roman Empire: the modern day competition law has its genesis in the American antitrust statutes like Sherman Act of 1890 and Clayton Act of 1914. But it was only after the Second World War that the American concept of Competition law became widely accepted. European Community incorporated the provisions of Competition law in Articles 81 and 82 of Treaty of Rome, signed in 1957. Subsequently most of the major countries, like China, Brazil, Russia, Singapore, South Korea and Japan established their own competition regimes. Today, over hundred jurisdictions have their competition regimes in place and any enterprise having aspirations to go multinational cannot afford to ignore this law.

The Indian Parliament passed the Competition Act in 2002 and it received the President's assent in January, 2003. To fulfill the objectives of the Act, government established CCI with effect from October 14, 2003. Certain provisions of the Act were challenged in the Hon'ble Supreme Court and Hon'ble Chennai High Court. In response, the Government promised to carry out certain amendments to the Act. This amendment bill was introduced in Parliament in 2006 and was adopted in 2007.[5]

In pursuit of globalization, India has responded positively by opening up its economy, removing controls and resorting to liberalization. In quest of increasing the efficiency of the nation's economy, the Government of India acknowledged the Liberalization Privatization Globalization era. As a result, the Indian market faces competition from within and outside the country. This led to the need of a strong legislation to dispense justice in commercial matters and the Competition Act, 2002 was passed. Healthy and fair competition has proven to be an effective mechanism which enhances economic efficiency. Therefore the purpose of implementing the competition law was to curb monopolies and encourage competition in Indian market. Competition laws involves in formulating a set of policies which promote competition in the market. These are aimed at preventing

[3] The Review and Forecast on development History of IPR in the World, Xeumei an, School of Law, Gaundong University of Financial, Gangdoung, China, (August 11, 2010) www.ccsenet.org/journal/html.
[4] Supra note 1,at 12-13
[5] Supra note 2

unfair trade practices. It is also framed with the intention of curbing abuse of monopoly in the market by the dominant company. Consumer welfare and a healthy competition in the market are the main objectives of the Competition Law.[6]

2. Conflict between Intellectual Property Rights and Competition Law

Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. An Intellectual Property Right (IPR) is, an intangible right "protecting commercially valuable products of the human intellect"; it may comprise patents, copyrights, trademarks and other similar rights. An IPR includes the right to exclude others from exploiting the non-corporeal asset.[7]

IP is divided into two categories: Industrial property, which includes inventions patents, trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.[8]

Competition law involves formulating a set of policies which promote competition in the market. These are aimed at preventing unfair trade practices. It is also framed with the intention of curbing abuse of monopoly in the market by the dominant company. Consumer welfare and a healthy competition in the market are the main objectives of the Competition Law.

The provisions of the Competition Act, 2002 prohibits the exercise of anti-competitive agreements by the IPR holders since they are in conflict with the competition policies. Further, the Act authorizes the Competition Commission of India to penalise the IPR holders who misuse their dominant position. Furthermore, Section 45 of the Act the Commission is also authorized to penalise the parties to an anti-competitive agreement, which is in contravention of Section 3 of the Act.[9]

The major concerns of competition law in regard to intellectual property rights are the market power that may result from granting such rights, and the detrimental effects caused by the anti-competitive exercise of IP rights. At its simplest, market power can harm consumers by setting prices higher than those needed to secure cost effective production. Moreover, the harm caused by market power may extend beyond this, when the protection granted to firms allow them to slow or distort innovation. Under these circumstances, market power will limit the growth of productivity over time, and reduce the scope for sustainable increases in living standards.[10]

Intellectual Property Rights and Competition Law have been described as an unhappy marriage. The former may be seen to promote monopolies whilst the latter is designed is oppose them. In other words, on one hand, IP

[6] See. http://www.competitionlawindia.com/scope-of-competition-law/ (August 20, 2010).
[7] Supra note 2
[8] *Max Planck Institute for Intellectual Property, Competition and Tax Law (August 18, 2010) http://www.ip.mpg.de/ww/en/pub/research/researchprofile/int_prop.cfm*
[9] See. A Public Lecture on "Interface between the Indian Competition Act 2002 and the IPR Laws in India" by Allan Asher, Board Member of the United Kingdom Office of Fair Trading Friday, 29 May 2009, 3PM to 5PM, Federation House, FICCI, New Delhi (August 18, 2010)
http://www.circ.in/pdf/Backgrounder-Public_Lecture_By_Allan_Asher_29May2009.pdf
[10] Sachin Kumar Bhimrajka, Study on relationship of competition policy and law and Intellectual property rights, (August 18, 2010) http://www.cci.gov.in/images/media/ResearchReports/sachin_report_20080730103728.pdf

laws work towards creating monopolistic rights whereas competition law battles it. In view of this there seems to be a conflict between the objectives of both laws.[11]

In order to combat, IPR monopolies anti-competition laws often include two major measures like parallel imports and compulsory licensing. A compulsory license is where an IPR holder is authorized by the state to surrender his exclusive right over the intellectual property, under the provisions of TRIPS. A parallel import includes goods which are brought into the country without the authorization of the appropriate IP holder and are placed legitimately into a market.

Innovation has always been a cause in a growing economy resulting in more innovation. The advent of fresh innovations gives rise to healthy competition at macro as well as micro economic levels. IP laws help protect these innovations from being exploited unlawfully. In view of this, IP and Competition laws have to be applied in tandem to ensure that the rights of all stake holders including the innovator and the consumer or public in general are protected.[12]

The common objective of both policies is to promote innovation which would eventually lead to the economic development of a country however this should not be to the detriment of the common public. For this the competition authorities need to ensure the co-existence of competition policy and IP laws since a balance between both laws would result in an economic as well as consumer welfare.

3. Interface between IPR and Competition Law in India

3.1 Through Domestic Legislation

The roots of Indian law on competition can be traced back to Articles 38 and 39 of the Constitution which lay down the duty of the State to promote the welfare of the people by securing and protecting a social order in which social, political and economic justice is prevalent and its further duty to distribute the ownership and control of material resources of the community in a way so as to best sub-serve the common good, in addition to ensuring that the economic system does not result in the concentration of wealth. It is from these duties that the MRTP Act, 1969, also influenced by US, UK and Canadian legislations, came about.[13]

The process of initiating a new competition law in India was started by an Expert Group set up to study trade and competition policy, following the Singapore Ministerial Declaration of the WTO in 1996. Noting that competition policy is a prerequisite to economic liberalization, the Expert Group, in its report submitted to the Ministry of Commerce in January 1999 recommended that a fresh competition law be drawn up. In October 1999, the government appointed a High Level Committee on Competition Policy and Competition Law to draft the new competition law, which was submitted in November 2000. [14]The resultant Competition Act, 2002, coming into force mere months before the expiry of the TRIPS compliance period for India can therefore be seen as India's fulfilments of its TRIPS obligations.[15] Under Section 3, the Competition Commission is required to look into agreements which are anticompetitive in nature and those found to be anticompetitive are declared void.

The Competition Act incorporates a blanket exception for IPRs under Section 3(5) based on the rationale that IPRs deserve to be cocooned since a failure to do so would disturb the all-important incentive for innovation,

[11]Supra note 2
[12] Paul Edward Galler , International Intellectual Property Conflicts Of Law And Internet Remedies (August 19, 2010) http://nopr.niscair.res.in/bitstream/123456789/3620/1/JIPR%2010%282%29%20133-140.pdf
[13] The Institute of Chartered Accountants of India, Competition Laws and Policies (2004), at 117-118
[14] *Id*, at 128-129.
[15] R. Dutta, Critical Analysis: Reflection of IP in Competition Law of India (August 11, 2010), http://www.indlawnews.com/display.aspx?4674

which, itself, would have knock-on effects in terms of a lack of technological innovation and reflect a lack of quality in goods and services produced. However, equally, it does draw the line inasmuch as it does not permit unreasonable conditions to be passed off under the guise of protecting IPRs.[16] Thus, in principle, IPR licensing arrangements which interfere with competitive pricing, quantities or qualities of products would fall foul of competition law in India.

However, this manifestation of Section 3(5) is far removed from the original recognition given by the High Level Committee to the fact that all forms of IPRs have the potential to raise competition policy problems, in effect recognizing the existence/exercise distinction.[17] That apart, it has no mention of exhaustion, parallel importation or compulsory licensing. Owing to the blanket exemption under Section 3(5), the square peg of any anticompetitive practice tethered to the use of IPRs must now be brought through the round hole of "abuse of dominant position" [18]under Section 4.

Section 3 also remains puzzling, in as much as it goes against MRTP Commission precedent under the old Act which held that the Commission (and, by extension, the Competition Commission of today) had complete and unfettered jurisdiction to entertain a complaint regarding IPRs. Indeed, *Manju Bhardwaj v. Zee Telefilms Ltd*[19] and *Dr Vallal Peruman v. Godfrey Phillips (India) Ltd*[20] stand as authority for the view that unfair trade practices [as understood under Section 36-A(1) of the old Act] could be triggered by the misuse, manipulation, distortion, contrivance or embellishment of ideas generated by the complainant. Other grounds for critique of Section 3 in particular include the almost exclusive focus on protecting the IPR holder, no adequate consideration of public interest and the absence of any power to restrict an IPR holder from imposing reasonable conditions on licensees for protecting such IPRs.[21]

While the Act does create categories of per se illegality such as price fixing, geographical divisions and market divisions, the standardized treatment extended to these categories as well as to tying arrangements, refusals to deal, re-sale price maintenance and exclusivity agreements suggests that the standard of if "they cause an appreciable adverse effect on competition"[22] would have to be very sound indeed.

3.2 At International FORA

Relevant to IPR and competition law, India made three proposals at the WTO Ministerial Conference in 1999.[23] The first was with regard to transfer of technology and called on developed countries to provide incentives to enterprises to promote technology transfer to developing countries as they were enjoined to do under Article 66(2). India used the example of environmentally friendly technology that could serve as a useful starting point for facilitating such fair and favourable transfer and also supported a further study of the TRIPS provisions including Article 40 to better evaluate where implementation of technology transfer could be improved.[24]

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[16] S. Jain and S. Tripathy, Intellectual Property and Competition Laws: Jural Correlatives, 12 Journal of Intellectual Property Rights (2007), at 236-243.
[17] The Committee noted that IPRs provide exclusive rights to their holders to undertake commercial activities but this does not include the right to exert restrictive or monopoly power in a market/society. See S.M. Dugar, Commentary on the MRTP LAW, Competition Law & Consumer Protection Law- Law, Practices and Procedures: Volume 1 (2006), at 757.
[18] M. Kochiapalli, Competition Bill in India: The Nexus with IP September 22, 2007 (August 17, 2010), http://spicyipindia.blogspot.com/search/label/competion%20law
[19] (1996) 20 CLA 229.
[20] (1995) 16 CLA 201.
[21] P.S. Mehta & U. Kumar, Tackling IPR Excuses through the New Competition Law: Financial Express, June 12, 2001 (August 17, 2010), http://www.cuts-international.org/article%20comp.htm
[22] S. Ghosh, Presentation on IP and Competition in India (August 18, 2010), http://www.business.uiuc.edu/stip/documents/ShubhaGhosh.pdf.
[23] Ministry of Commerce, Government of India, India's Proposals on IPR Issues: Preparations for the 1999 Ministerial Conference 1(3) INDIA & THE WTO (March 1999), (August 15, 2010), http://commerce.nic.in/wtomar.htm
[24] *Id*, at para 3.

The second proposal was a call for harmonizing the approaches to utilizing living resources as under the TRIPS Agreement and the UN Convention on Biological Diversity—primarily a clash between the hand-me-down provision under Article 27(3) of the former and the affirmation of Members' sovereignty in such issues under the Preamble of the latter. India suggested the via media of including further conditions on patent applications under Article 29 of TRIPS and subsequent harmonization of national laws in line with this.

Lastly, the Indian delegation put on record its view that a higher level of protection for GIs was necessary, noting the anomaly under Article 23 of TRIPS which extended the "kind", "type" and "imitation" protections only to wines and spirits. India called on Members to respond to the need to expedite and spread the benefits of work already initiated by the TRIPS Council in this regard under Article 24.

While the first two initiatives are of an international character and require India to remain persistent at the international level, the third suggestion, *i.e*. better protection for GIs, is something that Indian competition law also currently lacks. Thus, it may be recommended that India, which has adopted the relevant, TRIPS standards under

Section 22 of its GI Act, 1999, should look to bring unfair competition in dealing with GIs under its competition law since, currently; there is no agency to ensure enforcement of Section 22.[25] If competition law improvements are sought to be made to the TRIPS itself, India would do well to buy more implementation time, restrict progress only to measures actually stymieing free trade and lobby for more exemptions.[26]

India also needs to be extremely careful about how to exercise discretion under Article 31 in granting compulsory licenses since the potential negative effects on R&D and new innovation are immense. Following due administrative/judicial process is an absolute must, as provided by the Article 31 procedure.[27] The need for harmonizing the current Act (which, in status quo, merely provides that an evaluation of whether an enterprise enjoys a dominant position take into account technical advantages including IPRs held by it) with the standards for granting compulsory licenses in Article 31 is thus apparent, since the due regard to technical advantages dilutes the stronghold created on the abuse of dominant position under Section 4.[28] It would be most advisable, therefore, to specify concrete circumstances in which compulsory licenses should be granted or, at the very least, which of the conditions in Article 31 of TRIPS are supported by India.

3.3 Enforcement Laws in India

The general laws in relation to Intellectual Property Enforced in India are Civil Procedure Code provides for the civil remedies and enforcement through civil courts, the Indian Penal Code provides for penal remedies. The rules of practice of the trail courts, High Courts and the Supreme Court of India set the finalities of the enforcement procedure. India follows common law tradition and judicial precedents do have binding force. Hence the decision of the Supreme Court binds the Lower judiciary of the country. [29]

The IP laws do provide for statutory enforcement mechanisms. The most important Indian Intellectual Property Laws.[30] These legislations are supported by the relevant Rules there under and these rules[31], along with the main post WTO Intellectual Property Legislations.[32]

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[25] Dr. S. Chakravarthy, Competition Policy and Intellectual Property Rights (August 14, 2010), http://www.cci.gov.in/images/media/forum/34f_IPRs_chakravarthy_22July2005.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00

[26] A. Bhattacharjea, India's Competition Policy: An Assessment POLICY: AN ASSESSMENT (August 12, 2010), http://www.competitionlaw.cn/upload/temp_08033019381892.pdf, at 36

[27] *Id*

[28] P.S. Mehta and U. Kumar, Need for Clearer Norms on IPR in New Completion Bill: The Financial Express , June 13, 2001 (August 18, 2010), http://www.cuts-international.org/article%20comp.htm

[29] Mainly -Code of Civil Procedure; Indian Penal Code; The Civil and Criminal Rules of Practice.

[30] The Patent Act, 1970, The Trade Mark Act, 1999, The Copyright Act, 1957, The Design Act, 2000.

The geographical indications rules provide for the administrative mechanism for registration and enforcement of geographical Indications. The Semi Conductor Integrated Circuits Lay out Design Act, 2000 the under the Act were notified in the official gazette on 11th of December 2001, to support the administrative mechanism there under. The Information Technology Act, 2000 also plays an important role in relations to areas of inter phase between information Technology and IPR.

4. Indian Scenario of Antitrust Law

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), the 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. [33]

There are two opposing views on the interface between a competition law and IPR (Intellectual Property Rights) laws. The first contends that there is a tension between competition and intellectual property, arguing that competition law seeks to eliminate monopolies and encourage competition, while IPR laws reward creators and inventors with a limited monopoly. According to the proponents of this view, the main function of IPR laws is to properly assign and defend property rights on assets that have economic value. On the other hand, the main goal of competition law should be to minimize the adverse consequences of monopoly power arising from IPRs.

The second view contends that competition law continues to be a vital means of ensuring continued innovation and economic growth. The aims and objectives of IPRs and competition laws are complementary, as both aims to encourage innovation, competition and enhance consumer welfare. It is vitally important to preserve competition in innovation because competition ensures the best outcome for consumers.

Competition authorities are normally concerned with anti-competitive practices such as abuse of dominant position whatever be the source of such practices, rather than with the abuse of IPRs. The Indian Competition Act 2002 (CA 02) specifically refers to IPR laws. Section 3(5) of the Act states that agreements entered into for imposing reasonable conditions or restraining infringements of IPRs conferred under respective IPRs laws would not be actionable under the CA 02. The CA 02 applies to IPRs in relation to abuse of dominant position and combinations. Therefore, abuse of dominance due to an IPR is liable for action under the Indian Competition Act just as IPR-related dealings in combinations leading to an anti-competitive effect.

Thus, the issues involved are technical and multifarious and need to be dealt with in diverse ways. There have been cases such as *Mahyco-Monsanto* which prove that this subject deserves more attention than it has received in the past. In that case, Mahyco-Monsanto was found guilty of price gouging (pricing above the market price when no alternative retailer is available) in a Bt cotton case filed by the Andhra Pradesh Government and some civil society organisations before the Monopolies and Restrictive Trade Practices Commission of India. Mahyco–Monsanto was charging an excessively high royalty fee for its BT gene, which made the seed too expensive for the farmers. As there was no competition due to their IPR on BT cottonseeds, Mahyco-Monsanto had a monopoly and had acted arbitrarily.

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[31] The Patent Rules, 1972 as amended by Patents (Amendment) Act of 1999, The Trade Mark Rules,2001, The Copyright rules, 1958 & The Design rules,2001

[32] The Geographical Indication Act, 1999; The Semi Conductor Integrated Circuit Lay Out-Design Act, 2000.

[33] Shashank Jain & Sunita Tripathy, Intellectual Properrty and Competion Laws: Jural Correlatives, JIPR Vol.12 (2) [March 2007] (August 21, 2010), http://nopr.niscair.res.in/bitstream/123456789/239/1/JIPR%2012%282%29%20%282007%29%20224-235.pdf, at 227.

4.1 Competition Act, 2002 & IPRs

The Indian competition law, namely, the Competition Act, 2002 (the Act) deals with the applicability of section 3 prohibition relating to anti-competitive agreements to IPRs. An express provision [section 3(5)] is incorporated in the Act, that reasonable conditions as may be necessary for protecting IPRs during their exercise would not constitute anti-competitive agreements. In other words, by implication, unreasonable conditions in an IPR agreement that will not fall within the bundle of rights that normally form a part of IPRs would be covered under section 3 of the Act.

5. IP Issues in Mergers & Acquisitions

Intellectual Property (IP) is the latest form of wealth in today's largely information based economy where tremendous value is placed on inventions, discoveries and knowledge of the same, as production and growth depends on them. As a result, IP assets which range from well-known assets like patents, copyright, trademarks, know-how and trade secrets to newer ones like mask-works and internet domain names form a substantial part of company assets.[34] For quite some time now, they have played a key role in mergers and acquisitions both at the national and global level, many of which take place with the sole aim of acquiring IP assets belonging to the transferor/target company and all rights therein.[35] One reason for this is the fact that given the rapid pace at which technology is developing, most companies find it more economical to purchase newly developed intellectual property. Also, developing one's own technology may be too expensive or uncertain which means acquisition is the only way of staying competitive. Further, doing so helps to expand and improve business performance depending on factors like the value of the IP assets and rights in them, potential benefits etc.

Moreover, the target company may not have rights over all aspects of intellectual property used by it, such as when it has obtained a license to make use of intellectual property belonging to a third party. In such cases, if the licensee desires to assign its rights to an acquiring company, it may have to obtain the licensor's consent to such transfer. Even when such consent is not required, it has to give notice to the licensor of the proposed transfer.

Post the merger/acquisition, the relevant IP assets have to be recorded as belonging to the transferee/takeover company in all jurisdictions where they exist for the company to be conferred with valid rights of ownership and use under law. Otherwise there may be confusion regarding ownership and the company may lose its newly acquired rights to the asset(s). This is especially possible with regard to well-known marks that are extensively used so that they no longer act as an indicator of origin. In such a situation, the company may not be able to avail of certain reliefs like enforcement of IP protection, prosecution of infringements and damages thereon, injunction orders etc. A failure to record the change in ownership can also lead to loss of royalties and affect the acquiring company's rights to engage in further transactions.[36]

One last issue to be noted in this regard is that the status and extent of protection given to IP often varies from one country to another depending on their level of economic and technological development. Difference may be with regard to the ease with which property rights may be established by the transferor company, the duration of time for which these rights exist and extent to which they are enforceable, remedies available in case of infringement etc. These have to be taken into account in case of international mergers and acquisitions.

[34] Patrick A. Gaughan, Mergers and Acquisitions: An Overview, (August 14, 2010), http://media.wiley.com/product_data/excerpt/79/04714143/0471414379.pdf.
[35] G. Bryer & Scott J. Lebson, *Intellectial Property Assets in Mergers and Acquisitions* August 17, 2010), http://www.wipo.int/sme/en/documents/pdf/mergers.pdf.
[36] Supra note 34.

6. Economic justification of IPRs and Competition

Intellectual Property Rights play an important role in economic life in this age of technological innovation. IPR were introduced because they were thought to be essential for further industrial and economic development. Economist argues that, if everyone were to be allowed to use the results of innovative and creative activity freely, the problem of "free rider" would arise. No one would invest in innovation or creation, except in a few cases in which no other solution were available, because to do so would put them at a competitive disadvantage. Competition can only play its role as market regulator if the products of human labour are protected by property rights. In the respect, exclusive monopolistic character of the intellectual property rights is coupled with the fact that these rights are transferable and marketable as they can be sold as individual items. IPRs grants monopoly to the IPR holder but it is no way absolute and it is limited in time; it is also subject to competition with similar products, similar trademarks, etc. Inventions compete with substitute technologies, so that the profits based on the exclusive use of the invention are rarely monopolistic rents. The latter situation arises in those rare situations in which an invention is such a radical step forward that there is a (temporary) absolute lack of substitutability. Intellectual property rights do not give their owners an automatic profit: they are directly oriented towards demand. The reward that they provide for innovative activity depends upon the competitive structure of the market concerned. Only when the market appreciates the innovation on its merits will the owner be rewarded and make a profit. '*The ownership of intangibles in the sense of abstract property rights… is therefore limited to a temporary, ephemeral competitive restriction'*. Intellectual property rights confer exclusive rights, but they hardly ever confer a real monopoly, in the sense that the monopolist can act arbitrary way without being influenced by his or her competitors.

Moreover if the IPRs are not given short term monopoly then the competitors will wait for someone else to invest in the innovation creation of products. Competitors will without taking the risk of uncertainty of the investment will enjoy the process. The cost of the distribution of knowledge is insignificant.

As a result, it is argued that the economy would not function adequately, because innovation and creation are essential elements in a competitive free market economy. From this perspective, innovation and creation are required for economic growth and prosperity. IPRs should be created if goods and services are to be produced and used as efficiently as possible in such an economy. The knowledge that they will have a property right in the results of their investment will stimulate individuals and enterprises to invest in the research and development, and these property rights should be granted to those who will economically maximize profits. It is assumed that the creator and inventor will have been motivated by the desire to maximize profits-either by exploiting the invention or creation him or herself, or by having it exploited by a third party-so the creator inventor is granted the rights.[37]

7. Next Steps toward International Harmonization and Convergence

It is apparent that the intersection of antitrust and intellectual property is driven by a number of competing considerations that include, but are not limited to, antitrust and intellectual property principles. Failure to separately consider the enforcement of intellectual property rights from antitrust principles complicates the prospects for harmonization and threatens to harm the development of antitrust principles, with application beyond intellectual property.

Fundamentally, intellectual property law and antitrust law present no major conflicts with each other, as both areas of law center on the innovation process and the expansion of economic activity. Nonetheless, different countries have distinct antitrust approaches that derive from valuing the protection of local businesses versus

[37] S. Holyyoak & Torremans, Intellectual Property Law, , 2008 (Oxford University Press) at 231.

providing broad access to critical products, such as pharmaceuticals. Additionally, countries have different substantive standards and different enforcement regimes. For example, in the United States, the same court can adjudicate intellectual property and antitrust issues. In the RU, national authorities determine intellectual property issues, such as patent validity, while the EG deals with antitrust issues.[38] The Japanese system, like that of several others, does not provide clear standards because the predominant enforcement tool is through an opaque administrative guidance process. Nevertheless, while the differences in national approaches, standards, and regimes pose major obstacles to harmonization and convergence, many of these obstacles may be surmounted in ongoing and current efforts to bring harmonization and convergence more generally to competition policy.

For the present, the best solution may be to intensify the dialogue at the bilateral and multilateral levels. There are promising opportunities for enhanced understanding and transparency through undertakings such as the recent FTC/DOJ hearings, the U.S. /EC intellectual property/antitrust working group, and the OECD. Officials of both the United States and the EU have endorsed this approach.

The International Competition Network (ICN) also promises to be an important forum for isolating the pure antitrust issues posed by intellectual property enforcement and licensing. Since the membership of the ICN represents competition authorities from both mature and newly created competition agencies and its focus is "all competition, all the time," the ICN may be the best forum for an exchange of views. Additionally, since its inception, the private sector has participated in the work programs of the ICN, many times as primary drafters of the groups' work product. Given that intellectual property issues are of growing interest in the antitrust arena, the private sector has advised that the ICN should establish a working group on intellectual property and antitrust.[39] As it has before, the private sector could provide information, support, expertise, viewpoints, and assistance with drafting reports on both the legal and technical aspects of the intellectual property/antitrust interface.

Resolution of these issues on a principled basis offers the best route to improving understanding and reaching some level of convergence. It is critically important to the efficacy of these undertakings, whether they are bilateral, as in the case of the U.S. /EC intellectual property/antitrust working group, or multilateral, as in the case of the OECD, UNCTAD, and ICN, that the private sector in both developed and developing economies participates. Substantial contributions have been made in the past by the private sector, most notably in the ICN, and international bodies and individual governments should welcome and encourage future participation by the private sector in efforts at harmonization of the intellectual property and antitrust interface.

8. Case Study

In *United States v. Pilkington plc & Pilkington Holdings Inc*[40], the complaint charged the British firm Pilkington plc and its U.S. subsidiary with violation of Section 1 of the Sherman Act by agreeing to unreasonably restrain trade in the construction and operation of float glass plants and in technology for producing glass through the float process. The Complaint also alleged that the defendants monopolized the world market for the design and construction of float glass plants. According to the Complaint, markets around the world had been allocated pursuant to restrictions in licenses for patents and other intellectual property relating to the float glass process, even though the underlying patent rights had since expired, removing any protection for the restraints. The case was settled by a consent decree, which among other things prohibits the defendants from restricting U.S. and

[38] Kara M. Boniialibus, Thr Commimily Paient Syriern Proposai and Patent Infringement Proceedings: An Eye Towards Greater Harmonization in European Intellectual Properly Law, 22 PACK L. RKV. 201, 203 (2001)
[39] James F. Rill, International Competition Network: The Perspective of Nongovernmental Advisors, Address before the International Competition Network 1st Annual Conference (Sept. 29, 2002), (August 22, 2010), http://www.intcrnationalcompetitionnetwork.org/rill_icn_ naples_speech.pdf.
[40] Civil Action number CV 94-345-TUC-WDB, filed in United States District Court for the District of Arizona.

foreign firms from bidding on plant construction projects in the United States and from restricting the ability of U.S. firms to bid on projects.

In ***United States v. Microsoft Corp***[41]., the Division charged that Microsoft, in violation of Section 2 of the Sherman Act, illegally maintained its monopoly in operating systems for personal computers through restrictive licensing agreements with PC makers (called original equipment manufacturers, or "OEMs") and restrictive non-disclosure agreements with independent software vendors. The Complaint also alleged that these agreements were unreasonable restraints of trade in violation of Section 1 of the Sherman Act. One of the provisions in the defendant's agreements with OEMs required payment to Microsoft for each PC the OEM shipped, whether or not the machine contained any Microsoft software. This provision acted as a tax on OEMs' use of competing PC operating systems. The case was settled by consent decree, which in part prohibits Microsoft from including certain unreasonably restrictive provisions in its contracts with OEMs and independent software vendors.

9. Conclusion

IP and Competition laws share the same economic rationale. They are both crucial for the establishment of competitive and innovative market conditions. The common objective of both policies is to promote innovation which would eventually lead to the economic development of a country however this should not be to the detriment of the common public. The competition authorities need to ensure the co-existence of competition policy and IP laws since a balance between both laws would result in an economic as well as consumer welfare.

Competition laws are always directed towards diluting monopolies, unfair trade practices and dominance of abuse of market power in the hands of few individual e.g.-cartels and charters. Tough IPRs promotes monopoly and abuse of dominance of market power in the hands of the innovator, it helps in promoting innovation and economic growth as it encourages more and more investors to invest money in the R&D and also to utilize its application in efficient manner.

It should be kept in mind that the only conflict arising between IPRs and competition laws as stated in the above discussions arises due to the monopolistic effect of the IPRs. We should not forget that IPRs provide short term monopolies (Patent-20years, Copyrights- life+60years), which implies that it provides incentives for the innovator and also allows them to apply its industrial application. After the allotted time span, the monopoly on the hand of innovator expires and it comes to public domain. The intellectual property laws provide motivation for innovation and its dissemination and commercialisation by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. In the absence of intellectual property rights, imitators could more rapidly exploit the efforts of innovators and investors without compensation.

It can be concluded that both IPRs and Competition law goes hand in hand. As certain privileges are being given under the IPRs it is restricted by the enforcement of Competition laws. As rightly said in Indian laws, nothing (right) is absolute, every right comes with restriction, limitations and liabilities.

Acknowledgement:

The authors express their gratitude to Prof. Dr. Nirmal Kanti Chakraborty, Director, KIIT Law School, Bhubaneswar for providing logistical support and Dr.Tabrez Ahmad, Associate Professor of Law, KIIT Law School, Bhubaneswar for reviewing the work and providing valuable knowledge.

[41] Civil Action Number 98-1232 (CKK), filed in the United States District Court for the District of Columbia.