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THE CONTOURS OF THE INTERPLAY BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY

AUTHORED BY - DHANYA K

Abstract

Intellectual Property Rights and its interplay with Competition Policy or Anti-trust Law has an ever-growing importance in today's times, especially due to the way the economy is evolving. This paper will examine the multifaceted relationship between Intellectual Property Law and Competition Policy and also attempts to interpret the complex relationships that dominate the global market. Intellectual Property Rights are the basis for promoting Innovation, stimulating creativity and protecting the results of a persons intellectual work. However, its management within the framework of competition policy requires a balance so that it does not harm the consumers in any way.

This paper first provides a Historical Context of Intellectual Property Rights as well as Competition Policy to gain understanding of their relevance in the current market economy.

This paper delves deep into the interplay between Intellectual Property Rights and Competition Policy and analyses the similarities as well as the conflicts existing within their frameworks. It provides an overview of the evolving landscape of these laws.

This paper will largely deal with anti-competitive practices and challenges faced by Big Tech Companies controlling large Intellectual Property portfolios. It also examines the role of competition authorities as well as its effectiveness in protecting the market from monopolies while promoting innovation.

This paper aims to provide a comprehensive understanding of how Intellectual Property Rights and Competition Policy exist side-by-side, while opening the door for innovation and economic growth and simultaneously preserving competition and consumer interests in the global marketplace.

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Background

IP Rights and Competition Policy have are two wings of the law which are said to have been at loggerheads since an extremely long period of time. One of the major reasons for this can be attributed to the basic functionality of these two laws. While IP rights tries to protect inventions and creations of the human mind. Without these IP Rights, the chances of manufactures and service providers copying their competitors product and selling it as their own is very high. This can lead to a lot of confusion in the market. This can also lead to people losing their motivation to innovate new products, which can cause issues for the economy. Competition Policy tries to increase and regulate competition in the market, and ensures that there is no monopoly in the hands of just one business in the market.

Scope

This paper deals with Intellectual Property Rights and Competition Law and their interactions under the law. It deals with the similarities as well as the differences that these laws have between each other and how it helps the market. It also delves into the use of IP Rights by Big-Tech Companies and how competition law holds together the world of Big-Tech to ensure that these companies do not indulge in more anti-competitive practices which can negatively impact the market.

Literature Review

1. Innovation, Intellectual Property Rights and Competition Policy by Sumanjeet Singh, Innovation and Development Journal, January 2015
2. Intellectual Property and Competition Law:Understanding the Interplay, by Hanna
3. Stakheyeva

Analyzing the literature available, it can be concluded that:

1. The papers, even though they delve into the interplay between the two laws, tend to deal less with the evolution of such an interplay
2. The papers also focus less on major players in the market like Big-tech companies and the Impact IP Rights and Competiiton policy have in their day-to day functions.

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Research Problem

Does IPR impact Competition Policy in any way? Or vice-versa, does competition policy affect IPR? IF yes, how? Is there any possibility that these two laws can go hand-in-hand?

Research Methodology

Doctrinal Research has been undertaken. A qualitative study has been conducted using secondary sources to understand IP Rights and Competition Policy in depth and analyze their advantages as well as shortcomings within the market. It has also been undertaken to understand the effect these two laws have on each other, both positive as well as negative

Research Question

1. Whether there has been an interplay of IPR and Competition Policy since the coming into force of these laws.
2. Whether use of IP Rights by Big-Tech Companies leads to any sort of misuse of the Competiton Policy by these companies
3. Whether SEPs confer powers on their owners which can be misused by them

Introduction

Intellectual Property Rights and the Competition Policy of the Market at any given point have been a topic of discussion for decades now. Their interplay has a huge significance in the effective functioning of the market system as well as the economy. Both these laws govern the market and try to protect consumer welfare in one way or another. Globalization is another reason for the unending interplay of these two dimensions of the Law.

History of Intellectual Property Law and Competition Law

Intellectual Property Law refers to a law created for the purpose of protection of inventions made by the human mind. This means that this law covers every creation by the human mind, which is unique. The law gives the creator an exclusive right over their creation. There are majorly three important types of Intellectual Property Rights. These include Copyright, Patent and Trademark. The development of Intellectual Property Rights can be traced back to 500 BCe, where, in Sybaris, exclusive rights were granted to chefs for their inventions in cooking.

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The Paris Convention for the Protection of Industrial Property, 1883 was held the first step towards protection of creators as well as their inventions on an international scale. Then in the year 1886, the Berne Convention for the Protection of Literary and Artistic Works came about. The result of this convention was the Protection of literary and artistic works, while providing a framework for international copyright protection. Another such agreement is the TRIPS Agreement, also called the Trade Related Aspects of Intellectual Property Rights. It is a multilateral agreement on international Intellectual Property Rights, which came into force in 1995[1]. The idea behind is to use this agreement as an instrument to put into action a set of rules on a global platform, covering IP protection across all member nations. This will help in the promotion of innovation and technology. It will also lead to a growth in the economy of the nations involved.

The World Intellectual Property Organization (WIPO),an agency of the UN, now works as a global forum for the protection of Intellectual Property Rights, with its headquarters in Geneva, Switzerland[2].

An IPR holder, as per the law, can also license or even assign his product to another person.

On the other hand, Competition Law was borne in India as a part of The Monopolies and Restrictive Trade Practices Act, 1969. The intention behind the passing of this act was to curb monopolies from taking over the market as well as to prevent unfair trade practices in the market. This act tries to bring about equilibrium in the market in India. But, when the Liberalization of the market was undertaken by then Prime Minister P M Narasimha Rao, in 1991, it was felt that there was a need for a more comprehensive set of laws concerning the marketplace. To this effect, the Competition Act, 2002 was enacted. Through this Act, the Competition Commission Of India (CCI) was established as the regulatory body to ensure that the market was functioning smoothly. The Act focused on Anti-Competitive Agreements, Abuse of Dominant Positions, and any another element of the marker that could restrict Competition. The objective of the Act was to promote innovation, bring about equilibrium in the marketplace and protect the consumers.

Since IPR tries to provide monopoly to the owner or creator of a particular product, and

[1] https://www.wto.org/english/tratop_e/trips_e/trips_e.htm
[2] https://www.wipo.int/portal/en/index.html

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Competition Law tries to make sure there is no monopoly in the market, there is an inherent conflict in the interplay of these two laws. But, the commonality between them lies in the fact that both these laws work towards fuelling innovation and protecting competitive markets for the purpose of generating economic efficiency and welfare of the markets.

Interplay Between IPR and Competition Law

IPR tends to protect the innovation of a person. The law provides for protecting any kind of product which is the brain-child of the human mind. IP Rights usually resolve market failures which tend to arise due to information-based transactions. Another way IP Rights works, is by acting as a legal barrier to the entry of new technologies, products etc. Into the market. This, in common parlance within the competitive markets, is also called as the right to exclude. This makes it very clear that IP Rights is about ensuring Competition in the market place, but this has to be done in such a way that the IP Rights do not coincide with the Competition Policy.

The Tech-Industry is one such industry where the use of IPR and Competition law merges. BigTech companies indulge in a lot of practices which can fall under the category of Anti-Competitive practices. Anti-Competitive practices refers to those methods undertaken by companies to prevent their competitor from entering the market and taking away their position. Along with this, anti-competitive markets also include the manipulation of market prices, controlling innovation, providing poor services etc. Big-Tech Companies are those companies which form a part of the group of globally significant technology companies like Google, Amazon etc.

The existence of IPR is a boon for these companies. It helps them strategize and gain competitive advantage over other companies in the market. Trademark and Patent have a huge role to play in these. Companies use these to capture power within the market and then use this power to their own advantage. It Is majorly IP Rights protecting all these companies. Without these rights, their innovations are at a very huge risk of being exploited by their competitors. Also, such companies which enjoy a powerful position in the market have to cautious that they do not engage in any sort of conduct which could distort competition. This is because these companies are always under the supervision of the Competition Authorities. One mistake in their part is enough for them to lose their position in the market.

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IPR is also important to small firms as it protects the products of these firms and helps them in adapting to the changing market circumstances with a little bit more ease than in a situation where they do not have these rights.

IP protection is awarded to products not just to protect the innovators from exploitation of their product by competitors, but it is also to protect the consumers. IP protection is usually only to those products which are beneficial to the general consumer and does not harm them in any way. Also IP Rights like Geographical Indication helps a consumer to identify the place where the product originated. IP Rights also aim to protect consumers from fraud.

Competition law, as opposed to IPR, involves itself with restricting monopolies from taking over the market. It keeps a check on Anti-Competitive practices in the market such as establishing a monopoly, abuse of dominant position etc.

How does a company with IP Rights abuse it dominant position?

It many do so by using its IP Rights to lock competitors products from entering the market. This means that by doing this, they tend to establish a monopoly. They do this based on their Standard Essential Patent (SEP), and thereby, they indulge in a breach of Competition Law.An SEP sets a standard of technology for a product, without which that product would be of no use in the market. SEPs provide their holders with significant market power. It also gives them an opportunity to abuse their dominant position in the market by means of Cross-Lincensing, Pushing Competitors out of the market arena or even by extracting excessive royalty from their customers. SEP owners also tend to control innovation by holding them up by giving unreasonable demands. Competition authorities have their focus now on controlling the power that these SEPs provide to companies. Now, SEP owners are required to commit their SEPs to Fair, Reasonable and Non-Discriminatory terms (FRAND). This helps to bring about equilibrium within the market.

In the Motorola Case, Motorola had entered into an agreement with Apple in Germany for licensing its mobile telecom SEP.This agreement broke down and led to Motorola filing a Patent infringement case against Apple in the German Court. It further applied for an interim injunction for its SEP. This created doubts in the minds of the European Commission (EC), thus forcing them to start a formal investigation against Motorola. The aim of this investigation was to make sure that Motorola was not violation Competition Law I.e to ensure that It was not abusing its

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dominant position in the market. The EC here found that Motorola had violated the Competition Law of the European Union. It further found it anticompetitive on the part of Motorola to require Apple to give up its right to challenge the validity of Motorola's SEP. Finally, while delivering a judgement, the EC did not impose a fine on Motorola, thus exercising its discretion.

Another issue is Excessive Pricing. Some businesses which have a dominant position in the market, and have IP Rights attached to their products may price their products in such a way that it is not affordable to consumers. This is another violation of Competition law by such businesses. But, the problem with this is that Competition Authorities have faced a lot of difficulties in defining the term Excessive. In the case of *Flynn Pharma Ltd v Competition and Markets Authority*[3], the practical difficulties in depicting the term "Excessive Pricing" was identified by the commission.

There are researches which suggest that IP Rights have a negative impact on the economy as well as on innovation. It is said that IPs are one of the reasons for increasing monopolistic powers in the market as well as exploitation of consumers by businesses. It is also pointed out that IP Rights is the reason for inefficient allocation of resources in the market place, to a great extent. It must also be ni=otes that while IP Rights focuses on long term growth of the economy as well as welfare, Competition Policy focuses on short-term growth.

This interplay between IP Law and Competition Policy gained ground with the case of *United states v Aluminium Company Of America* [4].

Now, the view has changed. The view currently predominant in the market is that both these policies share common goals. it is stated that these policies tend to complement each other in many scenarios. One of these views suggests that since IP rights promotes innovation, invention etc. among its owners, as a direct consequence, it also promotes dynamic competition. This further promotes consumer welfare.On the other hand, enforcement of these policies too strongly or too weakly is also a problem. For eg: Enforcing IP rights too weakly I.e neglecting most of the IP laws would lead to businesses copying inventions in the name of taking inspiration from a particular innovation. This would lead to lack of interest among innovators to create new

[3] https://www.supremecourt.uk/cases/uksc-2020-0113.html
[4] https://casetext.com/case/united-states-v-aluminum-co-of-america-2

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products. It will also make it difficult for them to analyze as to which license is needed and to pay for it. On the Competition side of things, if it is too strongly enforced, it will lead to rival firms being easily able to make use of a particular firms innovation. This, again, will make innovators question the need for an innovation.

Let us now look at a few sections of these laws which show the interplay between these two laws:

1. Section 3(5) of the Indian Competition Act, 2002 states that nothing as mentioned under Section 3 of the act (Anti-competitive agreements) shall prevent a person from bringing in a petition for infringement or the imposition of any reasonable conditions to prevent the infringement of his/her invention[5].
2. Section 4 of the Indian Competition act deals with the concept of Abuse of Dominant Position[6]. Abuse of dominant position occurs when a firm or a business holds a position that has a huge economic position in the market, and the activities of another firm or business cannot affect this firm. In such a situation, if the firm engages in any activity that can Impede or harm the development of competition in the market, then that is said to be an abuse of dominant position. But, under section 4 of the Indian Competition Act, 2002, nowhere do we see the mention of IPRs. This is probably due the the fact that IPRs do not provide a firm with a dominant position in the market.

Limitation

1. IP Rights is a vast concept and has to be dealt with accordingly. It cannot be analyzed and concluded upon .
2. Intellectual property licences have the potential to stifle competition, especially if they include territorial or exclusive provisions. To make sure that licencing agreements don't unnecessarily limit competition in the market, competition authorities may step in.
3. Competition law and intellectual property rights are frequently administered by separate agencies and are governed by distinct legal frameworks. This may make it difficult to coordinate efforts and settle disputes between the two legal specialities.

[5] https://indiankanoon.org/doc/229714/
[6] https://indiankanoon.org/doc/1780194/#:~:text=(1)%20No%20enterprise%20shall%20abuse%20its%20dominant%20position.

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4. Different laws and regulations apply to competition law and intellectual property rights in various jurisdictions. It can be difficult to coordinate a consistent response to global issues.

In order to ensure that the advantages of encouraging innovation through IP rights are balanced with the requirement to maintain a competitive market environment, addressing these limitations calls for a cautious and nuanced approach. Rules that strike the correct balance are developed and enforced in large part by regulatory bodies and policy-makers.

Solutions

1. Provide detailed antitrust guidelines that specify how competition authorities should evaluate cases where intellectual property rights and competition policy collide. This can lessen uncertainty and help businesses become more clear.
2. Encourage cooperation and exchange of information between competition authorities and intellectual property offices. This can help avoid inconsistent rulings by ensuring a coordinated approach to cases involving both competition law and intellectual property.
3. Examine and update intellectual property and competition laws on a regular basis. The legal environment changes, and new issues and technological advancements may call for modifications.
4. When assessing how intellectual property rights affect competition, take public interest considerations into account. This could entail evaluating the ramifications for overall welfare, taking into account elements like innovation, consumer welfare, and technology accessibility.
5. Inform all relevant parties—businesses, solicitors, and the general public—about the significance of striking a balance between intellectual property rights and competition laws. This can encourage adherence to legal requirements and a better understanding of the complexities involved.
6. Encourage global coordination and cooperation on matters of IP and competition law. A uniform global framework can be promoted and conflicting decisions can be avoided by harmonising laws and procedures across jurisdictions.
7. Examine and revise merger guidelines to take the competition into account when considering mergers involving sizable IP portfolios. This involves evaluating the impact on innovation and the possibility of market dominance.

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8. To find possible issues with competition that may arise from the exercise of intellectual property rights, conduct regular market research. By taking a proactive stance, issues can be resolved before they get worse.

These solutions seek to achieve a balance between providing robust intellectual property protection to encourage innovation and maintaining a competitive market that benefits customers and fosters more innovation. Together, policymakers, regulators, and other interested parties should improve and put these strategies into practise in light of how