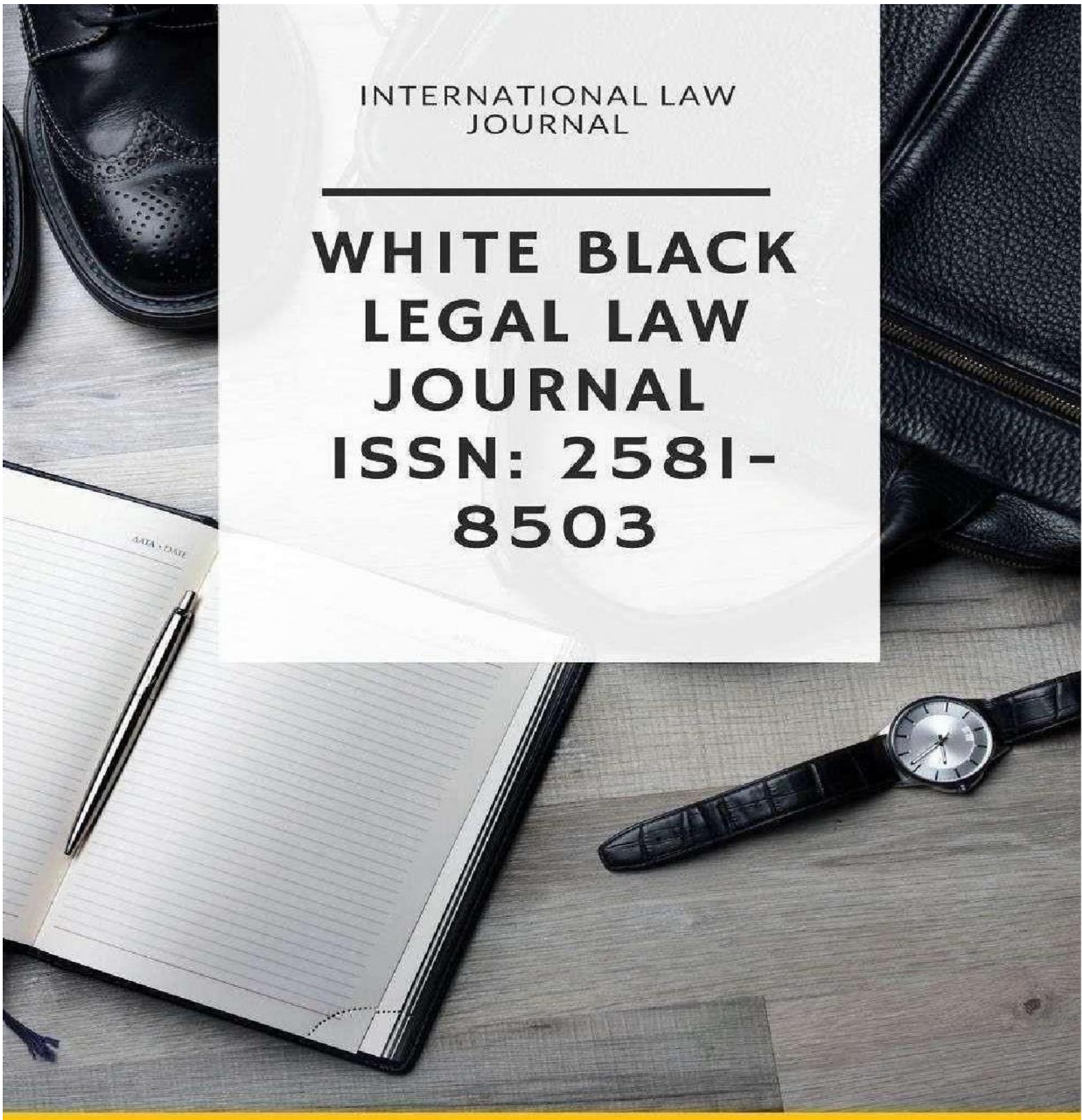

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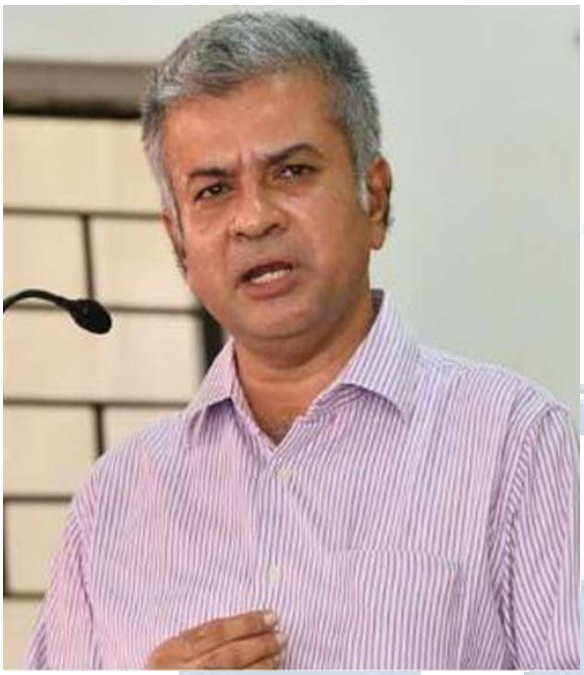

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

DETERMINATION OF RELEVANT MARKET AND RELEVANT PRODUCT MARKET: INDIAN PERSPECTIVE

AUTHORED BY - ADV.GAYATHRI S.B.

INTRODUCTION

It is a major misconception that there is an inherent tension between competition law and IPR.In actuality, however, the IPR itself encourages competition because of a few built-in processes.The fact is that IPR provides an incentive to the IP holder to promote the progress of science and technology through giving exclusive rights over their product.Meanwhile it already have checks and balances to prevent the IP holders from misusing their rights.IF the inherent checks and balances proves to be inefficient,then the Competition law can interfere within the IP regime.[1] So both the laws are not contradictory to each other, they are complementary to each other.Like in the competition cases,defining relevant markets is very important in the IP cases also as it is important for calculating the value of the IP lost sales.[2] If the defendant in an IPR infringement suit is found to have infringed the same,then the IPR owner's loss due it can be calculated only if we know how much market and consumers had been catered by the defendant with that infringing product and how many consumers are choosing the infringed product as an alternative or substitute over the IPR owner's product.[3]Therefore it is important to define relevant markets in the Intellectual Property Rights to find out the loss caused to the IPR owner.For instance In *Goenka Institute of Education and Research vs. Anjani Kumar Goenka and Anr.*[4],a trademark case, it is held that both the parties were based in different cities.Therefore there was only a little chance of public confusion.[5]Even though the court doesn't explicitly mentioned about the relevant market,it's implication is that they

[1]Indian Competition Act 2002,s.3(5)

[2]Alyssa A.Lutz and Lauren J.Stiroh, "The Relevant Market in IP and Antitrust Litigation"(2003) 9 (4) IP Litigator,<https://www.nera.com/content/dam/nera/publications/archive1/6302.pdf>

[3]Alyssa A.Lutz and Lauren J.Stiroh, "The Relevant Market in IP and Antitrust Litigation"(2003) 9 (4) IP Litigator,<https://www.nera.com/content/dam/nera/publications/archive1/6302.pdf>

[4] *Goenka Institute of Education and Research v Anjani Kumar Goenka and Anr.*,2009 (39) PTC 720 (Del.)

[5] *Goenka Institute of Education and Research v Anjani Kumar Goenka and Anr.*,2009 (39) PTC 720 (Del.):In this case "Goenka" was a prominent component of the trademarks of both the applicant and the respondent; the rival marks were "Goenka Public School" and "G.D. Goenka Public School."One institution was in Delhi and the other was in Rajasthan.

are not substitutable to each other since consumers do not prefer one over the other and they are not within the same relevant geographic market and hence doesn't constitute infringement.So it can be interpreted that belonging to different relevant markets and the substitutability factor can be factor that influence the infringement of IPR. So the question in case of market definition in IPR is whether the infringing product is substitutable to the original genuine product as per the consumer preferences and whether the consumers would turn to the genuine product if the original product has been eliminated from the market.[6] If the infringing product and the genuine product are substitutable then each sale of the infringing product is sales that the IPR owner will get if there is no such infringement.

In competition context a little rise in the price of a product will sometimes make the consumer to substitute that product with other one,product differentiation.But in IP context the price will not determine the substitutability of the product ie,product differentiation is not applicable in case of IP.For example if a person wants Harry Potter's book, that preference will not be replaced with another book due to the fact it the price of the book has increased by 5 percentage.Therefore the SSNIP test for market delineation will fail in IP context.So the question here is whether the market definition in the competition law is sufficient to encompass the market in IP context also.The competition law is addressing a traditional market where undifferentiated products are sold and competition only based on price and quality of the products.But IP context is different,where the products are differentiated and where the IP owners need to prevent the imitation of their products.[7]The market delineation factors with each types of IPs.The criteria that is applicable for determining the market of patent will not be the same for that of copyright and that too will not be same for Trademark.Indian Courts had engaged in the delineation of market in the IP context only in a very few case laws.This paper tries to analyze how the Indian Courts delineated market definition in IP context and how it is different from the market definition delineation of non-IP cases.

RELEVANT MARKET

The dominance of an enterprise is always analyzed with respect to its relevant market.Simply, relevant market can be defined as a market in which the competition takes place Relevant market has been defined under Section 2(r) of the Indian Competition Act.It states that the relevant market can be determined with reference to relevant product market or relevant geographic market or with

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[6] Indian Competition Act 2002,s.3(5)

[7] Alyssa A.Lutz and Lauren J.Stiroh, "The Relevant Market in IP and Antitrust Litigation"(2003) 9 (4) IP Litigator,<https://www.nera.com/content/dam/nera/publications/archive1/6302.pdf>

reference to both.[8]This section implies that the delineation of relevant market is completely up to the CCI.The Act had completely left the job of determining relevant market to CCI. From this definition it is clear that defining relevant product market and relevant geographic market is crucial while determining a relevant market.The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behavior and of preventing them from behaving independently of any effective competitive pressure.[9]In 2019 the Competition Law Review Committee analyzed whether there is a need to amend Section 2(r) to make it expressly a mandate to take into account of both relevant product market and relevant geographic market and not just either of the two.[10]The Committee concluded that there is no need to change the concept of "relevant market" under Section 2(r) because there hasn't been any enforcement gap from the current formulation of the section.[11]Section 19(5) of the Act states that the CCI shall have due regard on the relevant product market and relevant geographic market while determining the relevant market.[12]While we analyze the definition of relevant market it is evident that a uniform definition has not been adopted for it by the competition regulators and it will change according to the facts,circumstances,sectors etc. in question. Therefore we can say that in India 'rule of reason' approach is being adopted regarding this.Adopting a broad definition for the market would increase the ambit and include more products and competitors into it and in a narrow definition products and competitors will be excluded from the market.

RELEVANT PRODUCT MARKET

Section 2(t) of the Indian Competition Act 2002 gives us the definition for relevant product market.Relevant product market refers to the market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.[13]From the definition it is clear that substitutability is one of the factors that determine the relevant product market.[14]Analyzing the

[8]Indian Competition Act 2002,s.2(r): It states that "relevant market" means the market which may be determined by the commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets"

[9]Nguyen, Thanh, Defining Relevant Market Under the European Union Competition Law - Regulations and Practice - Experience for Vietnam (2012). <https://ssrn.com/abstract=2069995 >Accessed on 23/07/2023

[10]*Report Of Competition Law Review Committee*,Ministry of Corporate Affairs Government of India,2019 July,p.50,available at https://ies.gov.in/pdfs/Report-Competition-CLRC.pdf ,Accessed 30 July 2023

[11] *Report Of Competition Law Review Committee*,Ministry of Corporate Affairs Government of India,2019 July,p.50,available at https://ies.gov.in/pdfs/Report-Competition-CLRC.pdf ,Accessed 30 July 2023

[12] Indian Competition Act,s.19(5):It states that ") For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market'' and "relevant product market"

[13] Indian Competition Act 2002,s.2(t)

[14]Shubhalakshmi Bhattacharya & Ganesh BhaskarLata, "A comparative perspective of Competition Law cases in the

product based on its features and intended use is the first stage in determining the product market. This allows the Commission to restrict the scope of its examination into potential alternatives.[15]To determine whether two factors are substitutes the Commission takes into account many factors including including price discrimination, and the costs and difficulties involved in replacing a product's demand etc. More of these factors have been given in Section 19(7) of the Act.[16]Market definition for the product take into consideration both the factors of supply and demand.On the demand side it depends on substitutability and interchangeability from buyer's point of view.Here consumer's point of view of substitutability and interchangeability of goods is taken into consideration.It is called demand substitutability.On supply side, it depends on whether the sellers can switch the production to the close substitutes.This is called supply substitutability.In the definition of relevant product market in India much stress is given to the demand substitutability rather than supply substitutability.Supply substitutability has also been taken into consideration based on the facts and circumstances.

The primary question here is not regarding the availability of the substitutes but regarding the readiness of the consumer to substitute between these products.Does the consumer prefer to substitute between these products is the main concern here.While delineating the relevant market even the quality difference of the products will not be a concern, if the consumer prefers to substitute between them.It differs based on the purposes,facts,circumstances etc.i.e.,even the relevant product market of the same product will change on a case to case basis.

In *Goenka Institute of Education and Research vs. Anjani Kumar Goenka and Anr.*[17], it is held that both the parties were based in different cities.Therefore there was only a little chance of public confusion.[18]So from the court's judgment it is evident here that they are not substitutable to each other since consumers do not prefer one over the other and they are not within the same relevant product and geographic market.Here, even though there is this much similarity the court ruled that

ride-sharing industry: reflections from Singapore, EU, and India" (2022) 36(3) International Review of Law , Computers & Technology <https://www.tandfonline.com/doi/abs/10.1080/13600869.2022.2030026> Accessed 30 July 2023

[15]Shubhalakshmi Bhattacharya & Ganesh BhaskarLata, "A comparative perspective of Competition Law cases in the ride-sharing industry: reflections from Singapore, EU, and India" (2022) 36(3) International Review of Law , Computers & Technology <https://www.tandfonline.com/doi/abs/10.1080/13600869.2022.2030026> Accessed 30 July 2023

[16]Indian Competition Act 2002,s.19 (7) provides that "The Commission shall, while determining the relevant product market, have due regard to all or any of the following factors, namely:- (a) physical characteristics or end-use of goods; (b) price of goods or service (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialized producers; (f) classification of industrial products."

[17]*Goenka Institute of Education and Research v Anjani Kumar Goenka and Anr.*,2009 (39) PTC 720 (Del.)

[18]*Goenka Institute of Education and Research v Anjani Kumar Goenka and Anr.*,2009 (39) PTC 720 (Del.): In this case "Goenka" was a prominent component of the trademarks of both the applicant and the respondent; the rival marks were "Goenka Public School" and "G.D. Goenka Public School."One institution was in Delhi and the other was in Rajasthan.

there is no infringement. This proves the way how the courts approach the Competition law.

As it had been already stated ,Section 19(7) of the Competition Act, 2002 explicitly lays down certain factors which the Commission shall take into account while ascertaining the relevant product market.The factors provided under Section 19(7) are reproduced below: (a) Physical characteristics or end-use of goods; (b) Price of goods or service; (c) Consumer preferences; (d) Exclusion of in-house production; (e) Existence of specialized producers; (f) Classification of industrial products.This is not an exhaustive list of factors i.e. the Act is leaving it to the CCI , the job of finding the factors and delineating relevant market based on it with regard to the facts and circumstances.When identifying the product market, only the criteria that are pertinent to the particular facts need to be taken into account. All other aspects do not need to be taken into account.Customer preference won't matter in the context of intellectual property because they don't have any other options.Other than the trademark, this consumer preference does not become a factor of any other IP law.In Trademark Law the ground is consumer confusion that means there the preference of consumers will be a mark which will not create confusion to them, which is almost equivalent to the consumer preference ground under Competition Law.Like this these factors will change in each and every regime depending on the facts and circumstances.The consumer preference in the patent philosophy is not that in the copyright philosophy, both of them will not be equivalent to that in Trademark etc.Analysis of the price of products basis reveals that it is completely distinct from the competition act grounds in the context of intellectual property.The inventors have invested a great deal of money in research and development, and they have 20 years to recover that investment through patents. The IP itself has procedures like compulsory licencing to stop anti-competitive practises, therefore the CCI does not need to get involved in these matters.Because the grounds in the IP context are completely different, one may argue that CCI shouldn't meddle in IP because it is a whole separate system.So, there is an argument that IP laws cannot be evaluated using Competition Law which was currently endorsed by *Monsanto Holdings Private Limited & Ors v. CCI & Ors*[19]. On the other side it can be argued that if these factors are hindered CCI can interfere without looking into whether it is an IP regime or not.

RELEVANT GEOGRAPHIC MARKET

Section 2(s) of the Indian Competition Act, 2002 defines relevant geographic market.It is defined as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be

[19] *Monsanto Holdings Private Limited & Ors v. CCI & Ors*,LPA 247/2016

distinguished from the conditions prevailing in the neighboring areas.[20]It should be noted that a geographic market is only that portion of the territory where the conditions of competition for the supply or demand of goods or services are noticeably homogenous and distinct from the conditions existing in the neighboring area. It is not the physical territory in which the competing enterprises operate.It is the job of the CCI to determine what constitutes a relevant geographic market.Here the competing factors will determine the relevant geographic market ie, in a relevant geographic market the competing factors among the players within it should be homogeneous.The factors that should be taken into account while determining it had been given under section 19(6) of the Competition Act. It explicitly lays down certain factors which the Commission shall take into account while ascertaining the relevant geographic market. The factors are reproduced below: (a) Regulatory trade barriers; (b) Local specification requirements; (c) National procurement policies; (d) Adequate distribution facilities; (e) Transport costs; (f) Language; (g) Consumer preferences; (h) Need for secure or regular supplies or rapid after-sales services.This list is also not exhaustive.In the Trademark context when the case.

Despite being two distinct concepts, the relevant product market and the relevant geographic market are interconnected, and although the factors influencing each are distinct, there may also be overlap in the factors.The Act maintained it differently, but in practice the elements will overlap . Everywhere , every product will have its own geographic market as well as product market which might overlap with each other. The product market is dependent upon the geographic market since the factors determining the product market changes with the geographic market. So it can be said that the product market is determined by the geographic market.

DETERMINATION OF RELEVANT MARKET AND RELEVANT PRODUCT MARKET

In *Belaire Owners' Association v.Dlf Limited, Huda & Ors*[21]CCI delineated relevant market inorder to determine whether Dlf is dominant or not.[22]The dominance of an enterprise can be found out only with respect to its relevant market.The flat owners discovered they had a market and demand there, so they lowered the initially stated amenities and delayed the completion of the construction ,

[20] Indian Competition Act 2002,s.2(t)

[21]*Belaire Owners' Association v.Dlf Limited, Huda & Ors,*2011 CompLR 0239

[22]*Belaire Owners' Association v.Dlf Limited, Huda & Ors,*2011 CompLR 0239:In this case,the informants booked the units and paid a significant amount in advance when DLF announced the opening of Group Housing Complexes, known as The Belaire, in Gurgaon. They hardly had any choice but to follow DLF's instructions.The original plan was unilaterally changed by the DLF without notifying the informants.The DLF added 53 percent more flats.The Informants filed a complaint under the Act against DLF, the Haryana Urban Development Authority, and the Department of Town and Country Planning, State of Haryana, citing the construction's unusual delay and significant compression of the common areas and facilities originally designated for each flat. In the lawsuit, the informant claimed that DLF had imposed severe restrictions by abusing its dominating position.

indicating that they had extended their market. Their sole motivation is profit there.So CCI analyzed that there is prima facie abuse of dominance and ordered DG investigation.DG analyzed the facts and observed that the flats in that area normally costs 2-3 crores i.e.here the price factor and geographic factor has been taken into consideration.Here the relevant product market is delineated using the SSNIP test[23]. It is held that "if the prices of apartments which value between Rs. 2 -3 crore are increased,10% around Rs. 20 lakh, the customers will not settle for a house of Rs. 20 Lakh or even Rs. 50 Lakh."[24] In this case, it indicates that even in the event of a price increase, the preferences of the consumer will remain unchanged; that is, they will not choose a flat with less amenities, meaning that it cannot be replaced by any other lower-priced flats or apartments.So the court observed that residential buildings of value 2-3 crore will constitute a distinct class, and concluded relevant product "market as services provided by the developers for providing high end apartments to the customers."In the case of relevant geographic market it was observed that "a person who wants to reside in Gurgaon for various reasons like offices, work place, schools, colleges and will like to settle in Gurgaon will ask a builder to develop and build a house for himself in Gurgaon only."[25] The buildings cannot be transported from one area/ region to another.Here also the court took consumer preference into consideration and concluded Gurgaon as the relevant geographic market.CCI further clarified the terms 'high end' and 'residential' used by DG.Commission finds the differentiation between the 'residential' and 'non-residential' services and observed that they are different classes as their physical characteristics and end-use are different.[26]The residential properties will be substitutable or interchangeable among themselves despite some elements of consumer preferences within a certain price range.The most important determinant while delineating relevant market is the price of the dwelling unit within a specific geographical area.The commission here brought the distinction between 'high end' ,'economy' and 'low-end' residential units.The court also opined that such distinction has to be made depending upon the facts.The high end dwelling apartment is a mix of factors such as size, reputation of the location, characteristics of neighbors, quality of construction etc. and not a function of size

[23] Small but Significant, non-transitory Increase in Price test (popularly known as the "SSNIP test") which examines whether a sustained increase of approximately 5% in the price of a product would cause consumers to shift their demand to a substitute for that product.The logic behind the SSNIP test is that if the small but significant, non transitory increase in price is not profitable for the hypothetical monopolist, then there exists at least one substitute to the product whose prices were raised as part of the exercise.

[24] *Belaire Owners' Association v.Dlf Limited, Huda & Ors,*2011 CompLR 0239

[25] *Belaire Owners' Association v.Dlf Limited, Huda & Ors,*2011 CompLR 0239

[26]The Court states that "Non-residential" properties may include a wide array of properties such as office space, retail shops, commercial space, hotels, storage space, industrial space, infrastructure, sports or amusement spaces etc.Residential properties are buildings where people live, such as stand-alone houses, builder-floors, apartments, row-houses, condominiums or studio-apartments.

only.Here also the court used the SSNIP test and states that A five percent price increase for a villa wouldn't persuade the prospective buyer to go with a multi-story apartment.A person who has decided in the end that they prefer a villa due to factors like family size, need for privacy, demonstration effect, etc. would not switch to an apartment for a slight price increase. The purchase may be temporarily postponed or the choice may shift to a slightly less comfortable villa.Without comparable features, residential units won't be accepted as replacements since customers want "luxury" and not just a place to live. They will pay a premium price because of this.The "geographic region of Gurgaon" has become more significant because of its special circumstances and closeness to Delhi, airports, golf courses, and upscale shopping centers. Over time, it has developed a unique brand identity as a destination for upwardly mobile families.Therefore, it was shown that, in the vast majority of cases, a tiny 5% rise in the cost of a flat in Gurgaon would not cause a person to change his preference to Ghaziabad, Bahadurgarh, or Faridabad, or even to the outskirts of Delhi.Therefore the CCI has also agreed with the definition of relevant market definition given by DG.Here we can see that court analyzed various factors such as price,consumer preferences,substitutability,physical characteristics, end use,quality,reputation,facilities,privacy etc. for the delineation of market.The court even considered many factors which are not given under the Act and had not analyzed some of the factors that are given in the Act.So these factors changes on a case to case basis and on the basis of facts.

Analysis of the commission's decision on the e-commerce platform reveals that the majority of the previously listed elements are ineffective, and alternative factors are to be taken into account. Sometimes CCI fails to handle such situations.One of the first cases the Competition Commission of India handled involving an e-commerce platform was *Ashish Ahuja v. Snapdeal and others*[27]. Here CCI determined that the online and offline markets were not two distinct relevant markets, but rather two distinct routes of distribution for the same commodity, According to the CCI, consumers evaluate their alternatives and make decisions based on how discounts and shopping experiences vary between offline and online marketplaces.Customers are likely to switch to the offline market if prices in the online market rise noticeably, and vice versa.Based on the fact that consumers switched between offline and online markets for a variety of reasons, including price variations,CCI came to the conclusion that demand-side substitutability was the most crucial consideration.When we take into account both online and offline platforms, we can observe that the market is the same and that the same individual makes money from both online and offline platforms. Therefore, we must take into account both platforms in order to determine their relevance to the market.Thus, they

[27] *Ashish Ahuja v. Snapdeal and others,*Case No. 17 of 2014

might be seen as belonging to the same relevant market.However, everything will be different on an online platform in terms of customer preferences, the market's operation, and the consumer group catered to.Thus, they can both be regarded as distinct relevant markets.In *Mohit Manglani v Flipkart*[28],the CCI did not fully address the issue of relevant market vis-à-vis e-commerce and left the question of whether online portals may be considered a "separate relevant product market" or a "sub segment of the market for distribution" open for future discussion.CCI observed that "Irrespective of whether we consider e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the OPs seems to be individually dominant".[29]Here CCI is not giving any clarity regarding the relevant market.But the concern of CCI is not to find out the dominant position, the duty of CCI is to find out abuse of dominance.To find out the dominant position the only thing that needs to be analyzed is the market share, but for abuse of dominance many factors is to be considered.In this case the CCI failed to give a clarity regarding this point.Here CCI failed to clarify two points (a)what the CCI is looking at dominance or abuse of dominance (b) What constitutes a relevant market either e-market and offline market separate or both of them combined.In the case of *Matrimony.Com Limited v. Google LLC & Others*[30] According to the Director General Investigations,there were two relevant markets: the market for online general web search service in India and the market for online search advertising in India.[31]As regards the market for general web search service in India, the Director General was of the view that there was no substitution between general search service and vertical search/site-specific search service and Direct search Option by typing URL as there were variations in terms of their characteristics, intended use, price etc.Director General differentiated online advertising from offline advertising on the basis that advertisers had a range of reasons for opting for different forms of advertising and that one did not substitute the other .There are wide variations in mechanism for generation, display of results and clicking behavior,Both of them serve different goals and they are perceived differently by Publishers and internet users.The Director General went on to say that because online search advertising represents people' unique interests, it serves as a useful tool for identifying future clients. Therefore, the Director General concluded that, in contrast to display advertising, social media advertising, email-based, mobile, and display advertising, online search

[28] *Mohit Manglani v Flipkart,*Case No 80 of 2014

[29] *Mohit Manglani v Flipkart,*Case No 80 of 2014

[30] *Matrimony.Com Limited v. Google LLC & Others,*Case Nos. 07 and 30 of 2012

[31] The Consumer Unity and Trust Society ("CUTS") and Matrimony.com had each filed two separate complaints with the CCI. In both of these complaints, Google was accused of abusing its dominant position in the "online search" and "online search advertising" markets by conducting promotional advertisements, biasing search results in favor of its own shopping and travel websites, and creating a search bias. Both concerns were resolved by the CCI with a single order.

advertising can be customized and targeted for a particular audience, whereas the latter are more generic in nature.So they are not substitutable to each other. CCI agreed with the Director General that there were two relevant markets, namely the market for online general web search services in India and the market for online advertising search services.It further stated that online advertising is not substitutable with other forms of advertising such as in newspapers and on the radio etc.Different marketing functions are fulfilled by search and non-search advertising.There are differences in the pricing mechanisms used for the two types of advertisements.It was discovered that search and non-search advertising differed in terms of features, intended uses, and cost.Although complementary in nature, the two markets are not interchangeable.Online advertising allows advertisers to accurately monitor the effectiveness of the advertisement on the basis of actual number of users that it reaches whereas for offline advertisements, advertisers rely on estimated number of views and not the actual views which will not be there in the offline markets.Despite the fact that the court's examination of the pertinent markets in the e-commerce platform case is covered in the three judgements described above, the criteria applied in each of these cases varies.

Since IP is regarded as a completely distinct framework, the factors that the court considers in IP disputes will be completely different from what we have previously addressed.In *Biocon Limited & Ors. v. F. Hoffmann-La Roche Ag & Ors.*[32]Due to the revocation of their patent and the possibility of compulsory licensing due to the drug's high cost, Roche manufactured the less expensive versions of their antibody. Due to the revocation of their patent and the possibility of compulsory licensing due to the drug's high cost, Roche manufactured the less expensive versions of their antibody.[33]Instead of going behind patents, they attempted to expand the product's market reach by releasing the less expensive model.Even though it is inexpensive, this does not imply that their R&D expenses have not been met.When determining unfair pricing and price competition, CCI looked at two factors from the perspective of competition law: whether there is less expensive product on the

[32] *Biocon Limited & Ors. v. F. Hoffmann-La Roche Ag & Ors.*,Case No. 68 of 2016

[33] Rouche created an antibody called trastuzumab, which was commercialized in India as the medication Herceptin. ,used to attack cancer cells. The company removed Herceptin off the Indian market and replaced it with a less expensive drug called Trastuzumab in an effort to stop rivals from creating biosimilar versions of the drug and to circumvent the need for a compulsory license. Meanwhile, the informants worked to create a less expensive biosimilar version of it. Following the biosimilar version's release, the sources said that the Roche Group (opposite parties) began pursuing pointless legal battles against other companies in an effort to keep them from entering the "Trastuzumab" market.Furthermore, it was argued that the opposing parties had frivolous conversations with different authorities with the goal of obstructing the entry of its rivals.Furthermore, it was argued that the opposing parties had frivolous conversations with different authorities with the goal of obstructing the entry of its rivals and informant filed a complaint alleging abuse of dominance and anti competitive practises.

market and whether the defendant has made any reasonable efforts to bring down the price and make it more accessible and affordable.So in order to dispel accusations of unfair pricing, Roche has introduced a low-cost version of the antibody as a reasonable first step towards making it available and affordable. Furthermore, Roche claimed that the biosimilars did not share the same properties as their product when they were introduced to the market.In order to determine if biosimilars and the original medication fall within the same market and, if so, whether Roche has engaged in anti-competitive behavior and abuse of dominance, the relevant market must be examined.Here the court states that the Act's definition is essential for helping to define the relevant market, but it is impossible to do so without also taking the industry's unique characteristics into account.The structure of the pharmaceutical industry is such that the patient—who is ultimately the consumer—does not make the decisions.The treatment is determined by the doctor and the demand for the medicine of the drug is made by the doctor and not the patients.The intended use of the drug should be the most important one and the substitutability of medicine is based on 'quality', 'safety' and 'efficacy'. Here it can be seen that in the context of medicines they used factors which are very different from those we had already discussed.The court further stated that similar items with similar intended uses can be included in the relevant product market under section 2(t) and that products with identical attributes are not required to be present. CCI concluded that biosimilars as they serve the same intended use of the biological drug both of them became the same relevant market.In this instance, the court highlights factors that are critical in the context of pharmaceuticals, such as safety, efficacy, and intended usage.Since the conditions of competition are homogenous across India for pharmaceutical products,the relevant geographic market here would be 'India'.

In *Prints India vs Springer India Private Limited* [34] to find out the dominance of Springer India Pvt. Ltd. the relevant market is to be ascertained and the DG observed 'Journals published in India in English language in the field of Science, Technology and Medicine[35]'.Scientific Technical Medical journals are a different and independent product category that consists of a limited selection of solely academic journals with extremely high and sophisticated standards intended for academics and

[34]*Prints India vs Springer India Private Limited,*Case No:16 of 2010

[35]*Prints India vs Springer India Private Limited,*Case No:16 of 2010:Springer India is a division of the global publishing company Springer Science, and India Prints distributes Indian publications.India Prints was subject to multiple additional contractual requirements from Springer India. These requirements included lowering the journal discounts and requiring India Prints to give Springer India the end-user information. Should the information not be submitted, Springer India reserves the right to stop supplying India Prints with more publications. Prints India agreed to these conditions.But it stopped the practise when it began to notice a decline of clientele, for which it gave Springer India the information. Following that, Springer India made the decision to stop providing India Prints with periodicals.

scientific researchers.Market is limited to English language only on the grounds that advanced level academic work and research in the field of Science, Technology and Medicine is carried out in India almost exclusively in English.

The Commission also examined how journal publishing differs from book publishing and other forms of publications.Journals are a whole different category because of their special traits, intended audience, contributing writers, and content curation.In general, the journal publication industry serves academics as well as working professionals.The court also distinguished between the academic journals which only aim the researchers and other journals.Categorises them as a distinct class and observed them as non substitutable to other journals.It is not substitutable for the simple reason that the knowledge contained in that particular article cannot be found in any article of any other journal and agrees with the relevant market concept delineated by DG.Here when we analyze even though court had considered substitutability and other factors,the main factors considered were language, genre of publication,content in the publication,knowledge dissemination,category of consumers etc.which we had not used anywhere before.As the market here is with regard to academics , so the factors used should be relevant for that.

In *PepsiCo. Inc. And Ors. vs Hindustan Coca Cola Ltd. And Anr.*[36], Despite the fact that it must be examined using competition principles, the court did not apply them.[37]The competition principles has to be used here because the defendants had hampered the competition by hindering the plaintiff's market and causing the appreciable adverse effect on the market.By comparative advertising the defendants are leading the consumers to believe that Thumps Up is better than Pepsi. The Trademark law itself states that it is to be viewed from the standpoint of a man with average intelligence and imperfect recollection.So through this advertisement the thumbs up is creating a confusion among these consumers and is indulging in an anti competitive behavior.The term "Pappi," which is deceptively similar to "pepsi," is used in the commercial instead of the word "pepsi."Here the advertisement showed that "pappi" is sweet in taste and good for kids while Thumbs Up makes the adults stronger.[38]The market of Thumbs Up or Pepsi is not kids and when such a statement is used in the advertisement it will adversely affect the market of Pepsi. Here there are no vertical

[36]*PepsiCo. Inc. And Ors. vs Hindustan Coca Cola Ltd. And Anr.*,2003 (27) PTC 305 Del

[37]In this case, Pepsi sued Coca-Cola for improperly exploiting its trademark and defaming its goods in a commercial. When the actor in this commercial asks various people about their preferred beverage, they all name one that has packaging that is strikingly similar to Pepsi. The actor continues, saying they prefer this version since it's overly cutesy and aimed at younger audiences.After being forced to sample both beverages, the children eventually confess that the one they preferred was actually Coca-Cola. The other bottle's packaging was remarkably similar to Pepsi's, and the wording "Pappi" was inscribed in a similar style on the bottle cap.

[38]*PepsiCo. Inc. And Ors. vs Hindustan Coca Cola Ltd. And Anr.*,2003 (27) PTC 305 Del

agreements or horizontal agreements as stated in the Competition Act to make it an anti-competitive agreement.However, the question is whether anti-competitive activity requires a vertical or horizontal agreement.Although there is no explicit agreement about this, the defendants are disparaging the plaintiff's trademark, and it might be argued that this is anti-competitive because it is hampering their market. This will definitely have an appreciable adverse effect on the competition.Unfortunately, the court did not look into it since it might have believed that the Trademark Law provided sufficient clarity in this regard.How the market is seen in these situations is the question that arose when we attempted to identify the relevant market in this particular scenario.Trademark law didn't answer this question but there is a need for this.The primary question is in the Trademark context when we find out the relevant product market what is the market that the court should consider.In this case, the question is whether soft drinks in general may be considered the relevant product market or if it needs to be divided into several categories.The response will vary depending on the market and its customers.Both the Trademark Act and the Competition Act fail to address these issues, which must be remedied.

In *M/S Matrimony.Com Limited vs Kalyan Jewellers India Limited*[39] also although it is closely related to the competition principles, the court did not employ them.In this instance, the problem is not one of the market being hampered, but rather one of the market being boosted by the use of another's market i.e, unjust enrichment.That too is an anti competitive behavior or abuse of dominance.If we take marriage as such as the relevant market and disregard the Kalayan jewelers and matrimony as two distinct markets, then the aforementioned point becomes important.The Act had not directly given this as a factor for anti competitive behavior but it can also be considered as one since the word used is 'anti competitive behavior',it is not exhaustive and cannot be codified.This means that the anti competitive behavior encompasses parameters beyond those mentioned in the Act.The nature of anti competitive behavior changes with change in markets.Therefore an exhaustive list for anti competitive behavior will not work.We can find out how the European Court of Justice has extended anti-competitive behavior to encompass intellectual property when we examine its rulings.Our courts have an obligation to operate in this manner and to interpret anti competitive behavior that occurs outside of the Act.

In *Monsanto Holdings Private Limited & Ors v. CCI & Ors* The recent judgment regarding IP and competition makes it clear that Chapter XVI of the Patents Act (Working of Patents,

[39]*M/S Matrimony.Com Limited vs Kalyan Jewellers India Limited*,(MAD) 2020-3-226:The appellant holds trademark registrations for a number of additional names that have been developed by combining the language, location, or religion with the term "marriage," such as "Tamil Matrimony," "Kerala Matrimony," and so on. The appellant is also the registered owner of the mark "Bharat Matrimony." A few of the defendants submitted bids for the "AdWords," which are identical to the appellant's trademarks save for the space between the words.The appellant used "infringement" and "passing off" as grounds for filing a lawsuit seeking a permanent injunction.

Compulsory Licenses and Revocation) is a "complete code" with regard to patents and anti-competitive practices.[40]As per the decision the Patent law itself is sufficient to solve any disputes regarding it and the Competition Law, which is a general law need not to interfere in patent cases..This judgment does not discuss anything regarding the market and it's delineation as the issue in this case was that of jurisdiction and not of abuse of dominance or of anti competition.But this is a judgment that disposed of four appeals . Those case laws in its first stages had discussed the issue of relevant market.One among them is *M/s Nuziveedu Seeds Limited & Others. Vs. Mahyco Monsanto Biotech (India) Limited (MMBL) & Others*[41]in which the relevant market is determined as the Bt cotton technology which is used for manufacturing Bt cotton seeds, which have the inherent ability of fighting the cotton pest, Bollworm.The Commission observes that the said technology is different from traditional methods of pest control used in cultivation of cotton such as the use of chemical sprays.Chemical sprays is relatively less effective method to control pests in comparison to Bt cotton technology.The traditional method also contributes to pollution.The Commission is of the view that the Bt cotton technology, by virtue of its effectiveness and characteristics, appears to be a distinct product. So here they analyzed the factors such as effectiveness,characteristics,pollution control etc. to determine relevant market.Substitutability is also considered by the commission by stating that all Bt technologies irrespective of gene constituents are considered as same relevant market.The upstream market was concluded as 'provision for Bt technology in India'. While determining the downstream market the commission analyzed the factors such as performance of Bt cotton, size duration, resistance power etc. and concluded that the downstream market is market for manufacture and sale of Bt cotton seeds in India.*Micromax Informatics Limited vs Telefonaktiebolaget LM Ericsson*[42] The relevant market has been delineated as the SEP(s) in GSM compliant mobile communication devices in India.

[40]*M/S Matrimony.Com Limited vs Kalyan Jewellers India Limited,*(MAD) 2020-3-226*:*

[41] *M/s Nuziveedu Seeds Limited & Others. Vs. Mahyco Monsanto Biotech (India) Limited (MMBL) & Others,*Case No. 107/ 2015

[42] *M/s Nuziveedu Seeds Limited & Others. Vs. Mahyco Monsanto Biotech (India) Limited (MMBL) & Others,*Case no 50/2013

CONCLUSION

When we look into most of the IP cases, competition principle has not been looked into even though there are anti competitive behaviors.There is a strong argument that IP is totally a different mechanism and IP laws itself has inherent mechanisms to prohibit anti competitive behavior, so the Competition need not to interfere within the IP regime.But if something go beyond the purview of the IP laws , the Competition Law should interfere within the Ip regime also.

When it comes to the case of relevant market, the question is whether the court is analyzing the relevant factors that are suited for each market.In some cases even without determining the relevant market the court is deciding that there is no abuse of dominance.[43]In most of the IP cases the court will not delineate relevant market while looking into anti competitive behaviours.From the above discussion it is clear that the parameters of the relevant market will differ with the products and market in question.Therefore the court should take the 'rule of reason' approach and expand the relevant market concept to encompass the change with case to case basis. Indian IP laws had not given any provisions regarding the delineation of relevant markets in the cases of anti competition.How do we find out the relevant market in the case of patent, Trademark, Copyright etc is an unanswered question that needs to be answered.Neither of the Competition Act or IP Laws had an answer to this question.From the above discussion it is very clear that the grounds for the delineation of market in non-IP and IP cases are entirely different.Additionally even while competition is a factor in IP proceedings, the courts only consider IP principles and will not consider it seriously.

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[43]*Matrimony.Com Limited v. Google LLC & Others,*Case Nos. 07 and 30 of 2012

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