A RESEARCH PROJECT

ON

COMPULSORY LICENSING OF IPRs AND ITS EFFECT ON COMPETITION

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BY

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ABSTRACT

Compulsory licenses are involuntary contracts between willing buyer and unwilling seller imposed or enforced by the state. A compulsory license is a legal instrument designed to force intellectual property owners to license out their statutorily granted right to interested third parties capable of manufacturing the patented product at cheaper prices.

The expansion of Intellectual property regime and aggressive filing of patents by companies has lead to a situation today wherein important and vital products of human use are monopolized by the corporations. Although the grant of IPRs have engendered and facilitated innovation but in some cases the grant of monopoly rights has proved counter-productive and it has impeded the growth of competition. India’s first compulsory licensing order in favour of Natco Pharma has garnered a lot of attention all over the globe, and compulsory licensing has been viewed as a remedy to curb abuse of exclusivity protected by IPRs. This project will endeavour to look in to the effect of Compulsory licensing on competition globally and its possible outcomes in India with a view of Indian Competition Policy and IPR regime.

RESEARCH QUESTIONS

1. Can exclusive rights in form of IPRs be abused to stifle competition?
2. Does compulsory licensing engender competition?
3. Is compulsory licensing permissible under Competition Act, 2002 to curb anti-competitive practices of IP holder?

OBJECTIVES

This research project aims to study the effect of compulsory licensing on competition with special regard to Indian legal framework of IPRs and Competition Law. This research project further seeks to check the viability of Compulsory licensing order under Competition Act 2002.
HYPOTHESIS

The exclusive rights in the form of IPRs have potential to stifle competition and the abuse of IPRs by their holders can be remedied by compulsory licensing order by Competition Commission of India under its power to pass orders as it deems fit in Section 27 (g) of Competition Act 2002.

SCOPE

This research project endeavours to review cases of compulsory licensing and their effect on competition of various jurisdictions like EU, US, South Africa and India. Special emphasis will be laid upon Indian laws dealing with IPRs and Competition.

RESEARCH METHODOLOGY

Research Methodology in this project is doctrinal and secondary sources of information are relied upon. Articles, case laws and books by various writers are referred to.
1. Introduction

A compulsory license is an involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the state. All across the world the compulsory license on IPRs is granted on almost similar grounds like unreasonably exorbitant prices of a essential facility or commodity; or patent being not worked in the country; or where substantial public interest is affected by the way IPR holder is exercising its right. Antitrust violations have also been reprimanded by awarding compulsory licenses in some jurisdictions where there has been abuse of IPR leading to exclusion of competitors in an industry.

The compulsory licensing has been mandated by several international agreements like WIPO (World Intellectual Property Organization), Paris Convention for the protection of industrial property1 and WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). These international agreements have given several grounds to their contracting states to like promotion of public health and nutrition or to promote the public sectors of vital importance to their socio economic and technological importance.2

In anti-trust violations also the compulsory licensing may be resorted to as a remedy where patent has been abused or where the protected product is vital to national interest or the licensee getting the compulsory license is the government. Therefore, there are situations where the interest of society at large should be given more importance than the personal rights in the form of IPRs.

A lot of countries have issued compulsory licenses for anti-competitive misuse of IPRs by companies. According to a survey around 53 countries in the world have given compulsory licenses after the comeuppance of TRIPS agreement. Brazil, Thailand, Malaysia, South Africa, Kenya, Ecuador etc. have issued compulsory licenses over the patent rights of AIDS drugs and recently India has joined the bandwagon of compulsory licensing when the Patent Controller awarded compulsory license on a cancer drug Nexavar patented by Bayer to generic drug maker Natco Pharma. Indian Patent Act has provisioned for compulsory licensing since its enactment in 1961.

Compulsory licensing of IPRs in India has raised a lot of eye brows as the Indian pharmaceutical industry is third largest pharmaceutical industry in the world second only to

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1 Article 5 (a).
2 See TRIPS Articles 8, 31 and 40.
United States and Japan.\(^3\) There is great a number of pharmaceutical companies in India and most of them are producing generic drugs. The compulsory licensing order has been passed recently this year so the effect of compulsory licensing of IPRs has yet to be felt practically in India. This project while dealing with compulsory licensing and its various facets will try to predict the effect of compulsory licensing on competition in India. In furtherance to it, this research project studies the feasibility of Compulsory licensing order by Competition Commission of India under Competition Act 2002. The question of what amounts to be abuse of IPR with relation to competition law has also been tried to be answered.

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2. **Socio-Economic Justification of Compulsory Licensing**

"Between our trade and our health, we have chosen to look after our health."

: Luiz Inacio Lula da Silva (President of Brazil) on compulsory licensing of AIDS drugs

The interface between IPRs and Competition law is a very delicate and complicated. The IPRs prohibit imitation and copying of products, product characteristics, industrial designs etc and in a way they also contribute to fair competition in market. On the other hand the competition law may restrict the exclusivity provided by IPR if the exclusivity has been exploited to exclude others from business by anti-competitive means. Therefore, a too high or too low protection of both the IPRs and competition may prove bad for market as it will unnecessarily create distortions in the trade. An optimum level of protection to both IPR and competition law is thus, desirable for promotion of competition in markets.

Many countries like Ecuador, South Africa, Kenya, Tanzania, Malaysia and Thailand have resorted to compulsory licensing of HIV drugs and the effect of compulsory licensing has been incredible.

The above shown graph shows how the branded anti retro-viral drug available at $10439/month for a person in May 2000 was selling for just $712 in August 2001. The competition from generic drug manufacturers has caused bottoming of prices of HIV drugs. This illustrates the effect of competition on enhanced public welfare. Similarly, when essential facilities and products which are exclusively restricted in favour of a person by virtue of Intellectual property rights are licensed by government to others the competition will get enhanced and the same facility or product may be available in varieties at a more reasonable price.

A more suitable example of compulsory licensing enhancing public welfare is *Bayer v. Natco*\(^5\) where Mr. P.H. Kurien while awarding the license observed, “a right cannot be absolute. Whenever conferred upon a patentee, the right also carries accompanying obligations towards the public at large. These rights and obligations, if religiously enjoyed and discharged, will balance out each other. A slight imbalance may fetch highly undesirable results. It is this fine balance of rights and obligations that is in question in this case.” The cancer drug Nexavar is now available at Rs.8800 instead of Rs.2.8 Lakh. It means that the same drug after compulsory licensing is available at just 3% of its earlier price.\(^6\)

Compulsory licensing of IPRs should be resorted to rectify the unfair trade practice by an IPR holder only as a last option. Compulsory licensing may deter foreign direct investment in industrial sectors. Apprehensions of compulsory licensing of IPRs may cause companies to not to venture in to Indian jurisdiction as their right of patent or any other IPR may be licensed to others bringing down the profitability. Extraordinary cases involving IPRs over life saving drugs, essential services may be licensed if the pre-requisites of compulsory licensing under patent laws or abuse of dominant position under competition laws are proved against an IPR holder.

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Compulsory licensing has triggered positive outcomes for India. India is the largest producers of Anti-Retro Viral drugs for middle and low income countries.\(^7\) A lot of Indian companies cater to Sub-Saharan and African countries where HIV spread is creating havoc. This has enabled differentiated products and cheaper prices. In compulsory licensing the IP holder whose right has been licensed to others gets royalty as sanctioned by the court. In *Bayer v. Natco* the Bayer is sanctioned 6% of profits from sale of sofranib by Natco-pharma. This indicates that though profitability of an IP is diluted to a great extent by compulsory licensing but a still the incentive for innovation does not vanish completely. Competition may get increased as a result of compulsory licensing as it has in some cases of drugs manufacturing as showed above, but a feeling of mistrust may arise in companies that innovate and spend a lot of money, personnel and other resources in making a new product. But, as the popular saying goes desperate times calls drastic measures. Therefore, the drastic measure of compulsory licensing must be used only in desperate times as the Patent controller did in *Bayer v. Natco*\(^8\) where only two percent of total patients of liver and kidney cancer had access to the drug made by Bayer. This attracted provisions of section 84\(^9\) of Indian Patent Act 1961 and hence the compulsory licensing order was passed.

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\(^7\) [http://www.avert.org/generic.htm?ei=BSCzUl7SI4rtrQe184HoAQ&usg=AFQjCNG7TCDQ4psf6bVAJg4ZVjNzBtgf3Q](http://www.avert.org/generic.htm?ei=BSCzUl7SI4rtrQe184HoAQ&usg=AFQjCNG7TCDQ4psf6bVAJg4ZVjNzBtgf3Q), Accessed on 26 November 2012.

\(^8\) C.L.A. No. 1 of 2011, Order pronounced on March 9, 2012.

\(^9\) 84. Compulsory licences.

(1) At any time after the expiration of three years from the date of the sealing of a patent, any person interested may make an application to the Controller alleging that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price and praying for the grant of a compulsory licence to work the patented invention.

(2) An application under this section may be made by any person notwithstanding that he is already the holder of a licence under the patent and no person shall be estopped from alleging that the reasonable requirements of the public with respect to the patented invention are not satisfied or that the patented invention is not available to the public at a reasonable price by reason of any admission made by him, whether in such licence or otherwise or by reason of his having accepted such a licence.

(3) Every application under sub- section (1) shall contain a statement setting out the nature of the applicant’s interest together with such particulars as may be prescribed and the facts upon which the application is based.
3. **IP and Unfair Competition**

“... intellectual property rights do not ipso facto confer monopoly power. While they do permit product differentiation, and sometimes give the owner power over price, there is a vast difference between an exclusive right and the sort of economic monopoly that is the concern of anti-trust law...” : *Herbert Hovenkamp & Mark D. Janis*

The ideal situation in which consumer welfare is maximized is perfect competition. The concept of perfect competition calls for a situation wherein all the producers are manufacturing undifferentiated product and the price they charge for their product is the same. In perfect competition there is no incentive for innovation as advantage acquired by the means of innovation evaporates in the absence of intellectual property rights. Thus, the argument that competition abhors protection holds its ground at least theoretically.

In practical world the interface of IPR and competition has been uncertain to a great extent, where results have differed drastically in different products. Patents in technological innovations have resulted in to a more competitive market in car manufacturing, satellite communication and telecom markets. Whereas in drugs, seeds and software markets the IPRs have given rise to fewer competitors and less competitive markets.

There are few examples wherein innovation has lead to windfall of revenue to companies without them being patented or patented in a very weak patent regime. If we look at the technologies that are at the heart of Information and communication technology we come to know that even compulsory licensing of transistor could not stop Bells Labs to harvest a

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[4] In considering the application filed under this section the Controller shall take into account the matters set out in section 85.

[5] The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price, may order the patentee to grant a licence upon such terms as he may deem fit.

[6] Where the Controller directs the patentee to grant a licence he may as incidental thereto exercise the powers set out in section 93.
handsome revenue that laid foundation of semiconductor industry. \(^{10}\) Semi conductor industry as well as software industry emerged under a weak IP regime. The telecom industry was also controlled by national monopolies until 1990s across the globe and it developed to the great extent without being protected under IPRs. Therefore, the argument that exclusive rights in the form of IPRs are the only way to promote innovation is not true every time. Exclusive rights protected in the form of IPRs do create a situation wherein other parties who are capable and willing to produce the product are stopped from doing so. There is a fair number of instances wherein IPR protected monopoly has been abused to curb competition. Following instances may be called as abusive use of Intellectual property rights.

1. Patent Pooling wherein two or more companies come together and cross license the technology relating to a particular technology to each other so as to restrict others to acquire it.

2. Tie in arrangements to tie a product with other product which is patented so that the acquirer has to get the other product also from the patentee.

3. Royalty Payment after expiry of patent.

4. Prohibiting licensee to use technology from rival company.

5. Prohibiting licensee from challenging validity of IPR.

6. Price-fixation for the licensee to sell the licensed product.

Generally the older cases involving antitrust and intellectual property were related to patent misuse whereas the newer ones relate to copyright misuse. Patent misuse is a judge made doctrine wherein the patent stands forfeited if the patent holder uses that patent in an improper way.\(^{11}\) Tying arrangements, in which a party agrees "to sell one product but only on the condition that the buyer also purchases a different product, or at least agrees that he will not purchase that product from any other supplier, have also been held as anticompetitive and in violation of antitrust laws in various jurisdictions. The most famous case


on this issue has been the recent case of *United States v. Microsoft*\textsuperscript{12}. In this case the case was brought by 20 states and United States Department of Justice against the Microsoft Company under Section 1\textsuperscript{13} and Section 2\textsuperscript{14} of the Sherman Act of 1890. The Federal Circuit Court of Appeals of District Columbia in this case held that the Microsoft’s dominance in the field of Intel based Operating Systems constituted a monopoly. Further the court reasoned that there was abuse of monopoly by Microsoft because of bundling of Internet Explorer web browser and windows operating System. It gave unfair leverage to Microsoft against other competitors in web browsing industry. Netscape Navigator and Opera were restricted by the abuse of monopoly based on IP by Microsoft in this case. Microsoft had altered and manipulated and altered its application programming interfaces to allow only Internet Explorer to run on Windows Operating System. Windows operating systems was a product that was Intellectual Property of Microsoft\textsuperscript{15} and protected under Patent Act but the way in which it tied up Internet Explorer to it was held as anti-competitive and Microsoft was held guilty of illegal restraint of trade and monopolization of trade. This is a classic example of how a company holding an exclusive right under IPRs can abuse its exclusivity to get unethical and illegal leverage. In Indian Competition Act 2002 also such tie in agreements are held as anti-competitive under Section 3 (4) a. Such tie in agreements are very much prone in the products wherein the main product is protected by patent and has considerable market capitalization and the tying product has its substitutes in market but the illegal extension of patent protected monopoly restricts the consumers to use the substitutes

\textsuperscript{12} CA No. 98-1232 (CKK)  
\textsuperscript{13} Section 1. Trusts, etc., in restraint of trade illegal; penalty  
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.  
\textsuperscript{14} Section 2. Monopolizing trade a felony; penalty  
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.  
\textsuperscript{15} US6275983
of the tying product, this was exactly the case in *Microsoft* case and it was held as illegal and Microsoft was compelled to come to a settlement with other rivals in web browser industry. This is a seminal case of abuse of IPR by bundling the other product in a way to lead the market share in monopolistic way by resorting to unfair trade practices.

**Competition Law and IPR interface in European Union**

The competition law and IPR interface in Europe is regulated by European Community (EC) Competition Rules governed by EC Treaty. Articles 81 and 82\(^\text{16}\) of the said rules have been the beacon of light for Section 3 and 4 of Competition Act 2002. At the heart of any application of EC competition rules to intellectual property, whether by way of Article 81 and 82 the European Commission and EC Courts have been compelled to develop a conceptual means of overcoming the national property interests protected by Article 225 of

\(^{16}\)EC Treaty, Article 81(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

EC Treaty, Article 82: Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract
the EC treaty. This article states that the state rules governing property ownership shall remain unaffected by the provisions of this treaty.

A lot of jurisprudence has been developed in Europe over the issue by the various courts in some of the landmark judgments that have laid down the foundation of law in European Union.

1) *Consten and Grundig v Commission*\(^{17}\) In this case The ECJ drew a distinction between the existence of intellectual property rights, which could not be challenged, and their improper exercise.

2) *Parke Davis v Probel & Centrafarm*\(^{18}\) The ECJ held that the existence of intellectual property rights did not in itself mean that a firm was dominant, although it was relevant to any assessment of dominance; the ECJ also held that a dominant firm with intellectual property rights might be guilty of abusing its dominant position, for example by charging excessive prices.

3) *SCM Corp. v. Xerox Corp.*\(^{19}\) The court held that the conflict between the antitrust and IPR laws arises in the methods they embrace that were designed to achieve reciprocal goals. While the antitrust laws prescribe unreasonably restraints of competition, the IPR laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his/her protected art.

**Indian Perspective on IP and Unfair Protection**

The Competition Act 2002 does not permit any unreasonable condition forming a part of protection or exploitation of intellectual property rights. According to the section 3(5) nothing in the Section 3 shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him by IP laws. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in

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\(^{17}\) [1966] CMLR 418.

\(^{18}\) [1968] CMLR, 47.

\(^{19}\) *SCM Corp. v. Xerox Corp.*, 645 F. 2d 1159.1203.
reasonable juxtaposition with the bundle of rights that go with IPRs. Therefore the reasonability of the conditions in agreements involving IPRs has to be there to avail the exception under Section 3(5) of Indian Competition Act or otherwise CCI may be called upon to take note of anti-competitive agreement under Section 19 of the Act and it may pass order of divestiture of intellectual property or compulsory licensing under the provisions of the Act.

The disagreement between the IPRs and competition law was encountered in a few cases before MRTP Commission. Section 15 of MRTP Act excluded the application of provisions of the Act to patented products similar to that of Section 3(5) of the Competition Act. In *Vallal Peruman v. Godfrey Philips (India) Limited*\(^{20}\) the Commission observed that the provisions of the Monopolies and Restrictive Trade Practices Act would be attracted only when there is an abuse in exercise of the right protected. This principle was again reiterated in *Manju Bhardwaj case*\(^{21}\) where the matter was related to manipulation, distortion, contrivances and embellishments etc by way of misuse of trademarks. Thus, it can be safely deduced that even before the enactment of Competition Act 2002 the unfair trade practices emanating from misuse of IPRs were coming under the ambit of MRTP Act\(^{22}\) and similarly similar issues can be undertaken by CCI under the mandate of Competition Act 2002. In another case Mahyco-Monsanto Biotech India Limited was also indicted by MRTP Commission of unfair trade practices as it was abusing its dominant position by charging high royalty fee which made the seed exorbitantly costly to the farmers.\(^ {23}\) These cases consolidate the arguments that the monopoly acquired by IPRs is prone to abuse by IPR holder and in many cases the dominant position protected by IPRs has been used to curb competition by many companies.

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\(^{21}\) *Manju Bhardwaj Vs. Zee Telefilms Ltd. And Others*- Utpe 148/95, Mrtp Commission, New Delhi Dated January 2, 1996; or 20 CLA 229


Is Refusal to license an unfair trade practice?

There is a general rule that monopoly acquired by IPRs is not bad. In *SCM v. Xerox*24, the Second Circuit refused to impose antitrust liability upon Xerox based on a refusal to license its patents to competing manufacturers of plain paper copiers even though the patents had been licensed to companies that made coated paper copiers.

However, there are certain exceptions to this rule *Eastman Kodak Co. v. Image Technical Services, Inc.*,25 in which the Court stated that “power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next.” But the fact remains that there is no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright. This cannot be termed as exclusionary conduct as the patent holder is acting within the framework of patent laws. All other doubts were cleared in US by 1988 amendment to Patent Act which provides that the No patent owner otherwise entitled to relief for infringement of contributory infringement shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of having done or more of the following: … (4) Refused to license or use any rights to…

Whereas, in Europe the European antitrust authorities have implemented the Essential Facilities Doctrine within the framework of litigations relative to intangible assets. According to this doctrine, a dominant firm could be compelled to grant access to one of its inputs to competitors if it seems necessary to ensure an effective competition.26 Indian patent law permits cross licensing but this can lead to anti-competitive practice in licensing of patents. Therefore, there is a need to forge a balance between IPRs and competition law by utilizing the wide mandate given to Competition Commission of India under Competition Act 2002.

24 645 F.2d 1195 (2d Cir. 1981).
4. Compulsory Licensing as a Remedy to Abuse of IPR

There is a popular belief that the Competition Law and Intellectual Property Rights are complementary to each other and in long run both of them promote competition and innovation. Despite this belief there is a growing discontent among a section of jurists that there exists inconsonance between the competition law and IPRs. The number of people having belief in idea is on rise because of exclusionary effect of Intellectual Property Rights in industry. The protection and exclusivity that the IPRs provide has been exempted from application of anti-trust laws of most of the jurisdictions with some glaring exceptions. Brazil is one of the exceptional cases where Article 21 clause XVI of Anti-trust law provides that to take possession of or bar the use of industrial or intellectual property rights or technology would be considered as breach of economic order.

A lot of companies do acquire a lot of other companies just to acquire the IPRs but such accumulation of IPR is not bad per se unless and until it violates anti-trust provisions. In India application of Section 3 has been exempted to IPRs but the abuse of dominant position under Section 4 can always be pleaded against an enterprise that is engaged in anti-competitive practice. According to this section there will be abuse of dominant position:

- if an enterprise or a group, directly or indirectly imposes unfair or discriminatory-
  - Condition in purchase or sale of goods and services; or
  - Price in purchase or sale (including predatory price) of goods and service

- Limits or restricts-
  - production of goods or provision of services or market therefore; or
  - technical or scientific development relating to goods or services to the prejudice of consumers; or
  - indulges in practice or practices resulting in denial of market access; or

- Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
➢ Uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Therefore, this section has a wide scope and application as a lot of anti-competitive activities come to its fold. Any IP holder could be indicted under this section for charging excessive prices, unfair and discriminating conditions. An extension of exlusivity to a product that is unsupported by IPR and non-use of an IPR to the consumers can be grounds for proceeding against an enterprise under Section 4. The recent case of Bayer v. Natco wherein the compulsory license was provided to Natco over Nexavar could also have been successfully pursued under competition act as the Bayer was limiting and restricting production this cancer drug as it was available to only 2% of the potential consumers. Excessive charge that was imposed by it (Rs. 2.8 Lakh/Month) was also in violation of Section 4 (2) a (ii) of Competition Act.

Compulsory licensing ensures that a good number of producers or manufacturers are there to cater to the needs of society; it spurs competition and consumer welfare. Those who argue against it saying that it leads to erosion in incentive for innovation forget that a right is always accompanied by a corresponding duty, and failure to perform that duty might have its implications in law. Provisions of Competition Act 2002 are wide enough to check abuse of IPRs and compulsory licensing is the most appropriate remedy to check this although in exceptional circumstances only.

In other jurisdictions like Canada also the Competition laws have authorized the transfer and confiscation of Intellectual Property Rights.27 Patents, trademarks, copyrights and all other kind of IPRs come under this provision in Canada. Andean group of countries including Columbia, Venezuela, Ecuador, Bolivia and Peru also have provisions sanctioning compulsory licensing as a remedy for anti-competitive practices.28 Argentina and29 Chile30

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27 Section 32 of The Canadian Competition Act, RSC 1985.
29 Law No. 24.481 of 1995 on Patents and Utility Models (as amended by Law No. 24.572) of Argentina.
30 Law No. 19.039 Establishing the Rules Applicable to Industrial Titles and the Protection of Industrial Property Rights (of 24 January 1991) of Chile.
also have similar provisions in their anti-trust laws. South African Patent Act also has a provision for compulsory licensing of patent if the patent is not worked in their territory and the requirement of public are met by import.\textsuperscript{31} In US the US Federal Trade Commission required Dow to license various patents and other intellectual property to BP Amoco and Exxon, relating to the market for polyethylenes.\textsuperscript{32} The Supreme Court in \textit{Besser}\textsuperscript{33} described compulsory patent licensing as, “a well-recognized remedy where patent abuses are proved in anti-trust actions and is required for effective relief” and similarly it was preferred by court in \textit{United States v. Microsoft Corporation}.\textsuperscript{34}

International covenants also seem to support the compulsory licensing as a measure for promotion and development in developing and under-developed countries. Paragraph 6 of Doha Declaration on TRIPS agreement and Public health also declares, “We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.”\textsuperscript{35} Thus, there is sufficient ground to believe that compulsory licensing as a remedy for rectifying abuse of IPRs and anti-competitive practices emanating from them is getting popular day by day in countries where the innovation is not taking place and foreign companies are abusing their exclusive rights under IPRs to charge excessive price and limit the production of protected good over which they have monopoly.

\begin{footnotesize}
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\item Section 56(2) of South Africa Patent Act 1978: The rights in a patent shall be deemed to be abused if - the patented invention is not being worked in the Republic on a commercial scale or to an adequate extent, after the expiry of a period of four years subsequent to the date of the application for the patent or three years subsequent to the date on which that patent was sealed, whichever period last expires, and there is in the opinion of the commissioner no satisfactory reason for such non-working.
\item \textit{United States v. Besser Mfg. Co.}, 343 U.S. at 447.
\item Available at http://www.usdoj.gov/atr/cases/f200400/200457.pdf.
\item http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm#public_health, Accessed on 27 November 2012.
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5. **Indian Scenario**

In India as of now there is no settled position as to when CCI would grant a compulsory license, although the provisions of Competition Act 2002 seem to confer a lot of powers to CCI under Section 27\(^\text{36}\) and Section 28\(^\text{37}\) of the Act in open couch terms. The preamble of Competition Act 2002 reflects the objective of the act as follows, "it is an act to provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition to promote and sustain competition in markets to protect the interest of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith and incidental thereto.” This preamble implies that one of the goals of this act is to protect the common man from anti-competitive trade practices.

Earlier in the years prior to the enactment of 2002 Act MRTP Act (Monopolies and Restrictive Trade Practices) was in force the monopoly itself was bad in law but after Competition Act 2002 only abuse of monopoly attracts penalty from CCI. This reflects a policy shift by Indian Government keeping in mind the global trends in business and economy. The CCI in its decisions has placed a great emphasis on interest of common man, than on competitors or the competitive process.\(^\text{38}\) In furthurance to it the Hon’ble Supreme Court of India has held, “the main objective of the competition law is to promote economic

\(^{36}\) Section 27. Orders by Commission after inquiry into agreements or abuse of dominant position.- Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section or section 4, as the case may be, it may pass all or any of the following orders, namely:-

(g) pass such other order as it may deem fit.

\(^{37}\) Section 28. Division of enterprise enjoying dominant position.-

(1) The Central Government, on recommendation under clause (f) of section 27, may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

(2) In particular, and without prejudice to the generality of the foregoing powers, the order referred to in subsection (1) may provide for all or any of the following matters, namely:-

(a) the transfer or vesting of property, rights, liabilities or obligations;

\(^{38}\) Naval Sataravala Chopra, Dinoo Muthappa, The Curious Case of Compulsory Licensing in India, Vol. 8 No. 2, August 2012, Competition Law International, p.37
efficiencies using competition as one of the means of assisting the creation of market responsive to consumer preferences.”

Thus, the consumer welfare is one of the most important objective of the Competition Act of 2002, and all the powers of CCI given under the act have to be exercised keeping in mind the realization of this objective.

Section 27 of the Act provides for the orders by the commission after inquiry into agreements or abuse of dominant position, it says “Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section or section 4, as the case may be, it may pass all or any of the following orders, namely: - pass such other order as it may deem fit.” This provision can be given wide interpretation and CCI may exercise powers of wide amplitude under this blanket provision. A compulsory licensing order can be contemplated by Competition Commission under this Section to rectify the situation where exclusivity conferred by IP has been exploited to get unfair leverage. Under section 28 also the commission may provide for divesture or transfer of property rights including IPRs. Such an approach especially after *Bayer v. Natco* could be considered if there is blatant abuse of dominance by a company in related matter. Following situations may attract compulsory licensing where IP holder:

- Charges unfair and discriminatory prices; or
- Limits production of goods and services; or
- Restricts technical or scientific development of goods and services; or
- Desecrates consumer welfare.

Section 21 A of the Act contemplates reference to other statutory bodies like Controller of Patents and other IPRs before making an order of compulsory licensing but the language of section suggests that there is no obligation before commission to make a reference and it “may” make a reference to such statutory authority. The commission shall consider the opinion of statutory authority, but another provision which provides overriding effect to Competition Act over all other statutes gives an impression that the nature of Section 21 A to make reference is suggestive in nature.

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39 Judgment by SC in Civil Appeal No. 7999 of 2010.
40 Section 60 of Competition ct 2002.
Therefore, given the circumstances the CCI may pass an order of compulsory licensing if that is the need of hour. We have seen how CCI has gone ahead by imposing a grand penalty to DLF in *Belaire Owners Association v. DLF Limited and HUDA* to the tune of Rs. 630 Crore for abusing its dominant position, just to ensure that consumer interest is not overlooked by such big companies. Similarly, CCI may be called upon to pass Compulsory licensing order if necessary to rectify the anti-competitive practice; or to ensure consumer welfare and to promote and sustain competition.

Indian Patent Act has an explicit provision for compulsory licensing since its inception. It has following grounds for grant of compulsory license on patents after expiry of three years of its grant:  

- The reasonable requirements of the public with respect to the patented invention have not been satisfied.
- The patented invention is not available to public at affordable price.
- The patented invention is not worked in the territory of India.

Section 90 of the Act also empowers the Controller to settle the terms and conditions for compulsory licenses. Sections 92 (1) and 92 (3) enable the Central Government and the Controller, respectively, to deal with circumstances of national emergency or circumstance of extreme urgency related to public health crises by granting relevant compulsory licenses. Section 92A provides for compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems. This an "enabling provision" for export of pharmaceutical products to any country having insufficient or no manufacturing capacity in the pharmaceutical sector in certain exceptional circumstances, to address public health problems. Such country has either to grant compulsory license for importation or issue a notification for importation into that country.

India is home to big Pharmaceutical Industry which breathes on patents. The Indian pharmaceutical industry currently ranks third in terms of volume of production. Patent on products are new to Indian legal system, thus most of the Indian pharmaceutical industry is

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41 Case No. 19 of 2010  
42 Section 84 of Patents Act of 1961.  
engaged in manufacturing generic drugs. Research and development budget of Indian
government, Indian universities and companies is abysmally low compared to other
countries which lead the way in R&D.\(^{44}\) Indian IT industry too is also dealing with
outsourcing and thus there is a situation wherein Indians are lagging behind in producing
cutting edge technologies and brands which has fostered growth of foreign companies in
India.\(^{45}\) They hold the knowledge and they rule the terms. Therefore, there exists a chance
that these companies can abuse their positions and resort to anticompetitive practices.
Compulsory licensing of IPRs in cases of such abuses would be an apt remedy that will
deter these companies from abusing their dominant positions. Keeping in mind Indian
conditions compulsory licensing will spur growth and development in Indian industrial
sectors. Keeping in mind the size of Indian market the incentive for innovation will not
erode to the extent that might deter companies from entering in to innovative endeavours as
courts have granted reasonable royalties in cases where compulsory licensing has been
awarded. Compulsory licensing will make the products more accessible to public and it will
be beneficial for public welfare.

\(^{44}\) Indian Government’s budget for research and development in Science and Technology has grown by mere

\(^{45}\) Jaya Prakash Pradhan, Global Competitiveness of Indian Pharmaceutical Industry: Trends and Strategies,
6. CONCLUSION

It can be safely concluded from above discussion that abuse of IPR is a very reasonable likelihood where an enterprise has its rights protected under Intellectual Property (IP) laws. The monopoly protected by IPRs is though permissible under laws but the fact remains that it is very much prone to abuse. The enterprises are often tempted to indulge in to anti-competitive and exclusionary practices and they try to extend their monopoly into areas where they do not have rights protected by IPRs. Software giants like Microsoft, Seed companies like Mahyco Monsanto Biotech[^46] and drug manufacturers have their products under IPR protection and most of the times enterprises like these are sole manufacturer of their kind products. This kind of monopoly catapults these enterprises in to a position where they can dictate their terms over whole of the industry and sometimes which can be violative of free competition rules. Compulsory licensing can be seen as an effective remedy in such cases where the public interest is involved to a large extent and anti-competitive practices of companies have damaged the interest of consumers as well as competitors in legal sense. Issues critical to nation like public health, public order and national security have been sufficient ground for compulsory licensing all over the globe but many countries have treated it as a remedy against anti-competitive practices.

The argument that compulsory licensing engenders competition is true to some extent especially for countries where innovation is not taking place. Such developing and under developed countries might do so to improve competition in some sectors of markets where a single player is abusing its dominant position but in long run it might hurt the incentive for innovation and thus, may prove anti-competitive.

There are reasonable apprehensions that the Foreign Direct Investment (FDI) may dry up if a country goes on to grant compulsory license as a regular measure for abuse of IPRs and anti-competitive practices. Therefore, as reiterated in this project the compulsory licensing must be resorted only in exceptional cases. European courts in this regard have developed a essential facilities doctrine which decides in which case compulsory licenses should be

resorted to. In my opinion this doctrine sets balance between protection of IPRs and protection competition and it is worth emulating.

In India also Competition Act 2002 has given a wide mandate to CCI to impose penalties on enterprises violating free competition rules as provisioned by the Act. The powers of CCI in Section 27 (g) and 28 (2) are wide enough to incorporate compulsory licensing in to their ambit. In absence of any precedent it can be conclusively said that compulsory licensing does fits in to the framework of Competition Act 2002. Keeping in mind the global trend it would not be anomalous if CCI passes an order of compulsory license to protect consumer welfare and fair competition.
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