DOS COMMERCIAL EXPLOITATION OF INTELLECTUAL PROPERTY RIGHTS INHERENTLY RESULT IN ANTI-COMPETITIVE PRACTICES?

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New Delhi                                               Salil Arora
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1. INTRODUCTION

1.1 Background

In olden days, intellectual property and competition law were often considered as like poles of a magnet that repel each other. As a result of this apparent antagonism between the two, intellectual property rights regime was considered to be creating monopolies to spur innovation, while the competition law eliminated monopolies. Intellectual property rights affords inventors, creators and authors in the case of copyright and designs - protection from imitation and also gave right holders substantial discretion over how to use or license their intellectual property. Competition law prohibits arrangements that restrain competition. Thus, while one law promotes higher prices by excluding at least some competition, the other body of law promotes lower prices by prohibiting conduct that limits competition. Intellectual property (IP) law subjects intellectual assets to the owner’s exclusive control whereby promoting monopolistic tendencies. Competition law on the other hand, seeks to avoid market barriers and benefit consumers by ensuring that a multiplicity of suppliers of goods, services and technologies may effectively compete against each other thus promoting perfect competition in the market. While former has inventor’s and author’s interest at its core, the latter seeks to guard the interest of the consumer.

1.2 Monopolistic tendencies and free competition

Monopoly and perfect competition represent two extremes along a continuum of market structures. At the one extreme is perfect competition, representing the ultimate of efficiency achieved by an industry that has extensive competition and no market control. Monopoly, at the other extreme, represents the ultimate of inefficiency brought about by the total lack of competition and extensive market control. The reality however lies in between as there exist in markets neither a monopoly nor the perfect competition. What is found to be existing is mostly a market tending towards monopolistic competition or moving towards imperfect competition. The feature of monopolistic competition is differentiation of products and services. The IP holders because of their rights tend to differentiate one product from another. Therefore, essentially when we deal with the issue of interface between antitrust laws and IP laws, in effect we are dealing with monopolistic markets.
1.3 **Relationship between Competition Law and IPRs**
The relationship between Competition law and IPRs poses uniquely difficult challenges to policymakers, particularly in developing countries, the majority of which have little or no tradition in the application of competition law and policies.¹ At the time of introduction of protection for intellectual property, the law was designed to reward the inventor for making his work public and thereby allowing the society to access something that would otherwise have remained secret.² Protection in the form of intellectual property rights ("IPRs") was the price paid by society to the inventor so that the latter would make his work public. As a result, there was greater focus on the individual right of the inventor. It was not envisaged that protection of intellectual property ("IP") benefitted the society as well.³ With time, however, the idea of what must be rewarded has changed. It is not the act of making the invention public that is being sought to be rewarded, but the necessity to promote innovation and creativity through the creation of incentives⁴. Reconciling intellectual property and competition policy requires recognizing that IP law is a form of competition policy.⁵ With this change in approach, IP law becomes less individual-centric. The result is a balance between individual interests of the right-holders and the general interest of society in encouraging further innovation.⁶ Since the aim of such innovation is ultimately more competition, competition law and IP become less divergent. These two branches of law, being multifaceted and dialectic, allow for the interaction of seemingly conflicting objectives and are capable of converging on the ultimate goal of enhancing the competitive dynamics of innovation.⁷

Going much deeper into the areas of operation of both legal regimes, one can notice that competition law and intellectual property rights deal with grant of rights by the State whereas competition law deals with use of those rights. It has now been realized that both work in tandem

and have a complementary roles in driving innovation in today’s technologically dynamic markets.

The reasons for grant of intellectual property rights are:

1. Incentive to invent;
2. To encourage disclosure;
3. Commercialization of technology through licensing; and
4. To increase dynamic efficiency.\(^8\)

Whereas, the primary goals of competition law are:

1. Enhancement of efficiency in the market;
2. Promoting consumer welfare;
3. Avoidance of conglomeration of economic power; and
4. Protection of smaller firms from anti-competitive agreements.

Competition law does not encroach on the essential functions of IPRs. It does not question the exercise of excluding power as such against third parties, who seek to access the IPR protected innovation/creation, but only the enactment of further anti-competitive behaviour aimed at exploiting the position of strength in the market in their dealings with third parties and the consequent generation of further anti-competitive effects. It is only such further exercise whereby IPRs are used to leverage and expand market power beyond the essentially granted anti-free riding function which can be restricted by antitrust law.

Competition is not necessarily incompatible with IPRs and, on the contrary, can effectively lead to dynamic efficiency through increased innovation. Competition can be a powerful incentive to introduce product, process or organizational innovations, as noted by the U.S. Federal Trade Commission (FTC):

"Competition can stimulate innovation. Competition among firms can spur the invention of new or better products or more efficient processes. Firms may race to be the first to market an

\(^8\) Competition Law in India: Abir Roy and Jayant Kumar, Eastern Law House, 2008, p.170.
innovative technology. Companies may invent lower cost manufacturing processes, thereby increasing their profits and enhancing their ability to compete. Competition can prompt firms to identify consumers’ unmet needs and develop new products or services to satisfy them.”

2. Intellectual Property Rights

2.1 What are IPRs?

Intellectual property rights are legal and institutional devices to protect creations of the mind such as inventions, works of art and literature, and designs. They also include marks on products to indicate their difference from similar ones sold by competitors. Over the years, the rather

elastic IPR concept has been stretched to include not only patents, copyright, industrial designs and trademarks, but also trade secrets, plant breeders’ rights, geographical indications, and rights to layout-designs of integrated circuits. The Convention Establishing the World Intellectual Property Organization (1967) does not seek to define intellectual property, but gives the following list of the subject matter protected by intellectual property rights:

1. literary, artistic and scientific works;
2. performances of performing artists, phonograms, and broadcasts;
3. inventions in all fields of human endeavor;
4. scientific discoveries;
5. industrial designs;
6. trademarks, service marks, and commercial names and designations;
7. protection against unfair competition; and
8. all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

The philosophy behind grant of IPRs finds origin in the Locke’s ‘Theory of Property’ according to which labour should be rewarded.¹⁰

### 2.2 What are intellectual property rights for?

Traditionally, IPRs – especially patents and copyright – have been justified on both consequentialist and rights-based grounds. These are not mutually exclusive since some arguments contain elements of both.

The consequentialist justification is that when inventors, authors or artists have an exclusive right to reproduce and sell their works, society benefits in consequence. This proposition is based on two assumptions. First, it assumes that such a right encourages inventors to invent, authors to write and artists to paint. Second, it presupposes that the greater the quantity of inventions and

creative works eventually released into the public domain, the more the public benefits through economic or cultural enrichment, or enhanced quality of life. Thus, advocates of this justification tend to argue that IPRs are incentives that encourage creative endeavor.

According to rights-based justifications for IPRs, property in intellectual works is primarily a matter of justice rather than of public policy. IPR laws exist to define and enforce the property rights but are not the source of these rights; since to enjoy a property right over one’s creative work is a human right.

According to such a view unauthorized use of somebody’s invention or creative work is an unfair – and therefore illegal – intrusion on the creator-proprietor’s freedom to benefit from its use without interference. This justification does not of course apply so easily to those many cases where IPRs are owned by companies and not individuals.

Consequentialist justifications have inspired national IPR laws and policy making far more than rights-based ones. For example, the original role of the United States patent and copyright systems were to implement Article 1 Section 8 of the U.S. Constitution, which empowers Congress ‘to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.’ U.S. IPR law, then, was not founded on a natural rights justification of intellectual property ownership. Rather, the granting of exclusive rights for limited times was regarded as being beneficial for the country in terms of scientific and cultural progress.

IPRs, then, exist primarily to benefit society. But this does not tell us much about the ends that IPRs are meant to serve nor how these ends ought to be achieved. In general terms, IP rights – especially patents – are tools for economic advancement that should contribute to the enrichment of society through (i) the widest possible availability of new and useful goods, services and technical information that derive from inventive activity, and (ii) the highest possible level of economic activity based on the production, circulation and further development of such goods, services and information.

In pursuit of these aims, inventors are able to protect their inventions through a system of property rights – the patent system. Once acquired, the owners then seek to exploit their legal rights in the marketplace. The possibility of attaining commercial benefits, it is believed, encourages invention and innovation. But after a certain period of time, these legal rights are
extinguished and the now unprotected inventions are freely available for others to use and improve upon. Enhancing the society’s capacity to generate such useful goods, services and information by itself is one means for achieving such ends (and may, it could be argued, be a sufficient end in itself). But it is not the only means. After all, these could also be imported, and legal incentives could be created for such importation, as they were in the past.11

2.3 Concept of Innovation

2.3.1 Schumpeter and innovation

Schumpeter identified innovation as the critical dimension of economic change. He argued that economic change revolves around innovation, entrepreneurial activities, and market power. He sought to prove that innovation-originated market power could provide better results than the invisible hand and price competition. He argues that technological innovation often creates temporary monopolies, allowing abnormal profits that would soon be competed away by rivals and imitators. He said that these temporary monopolies were necessary to provide the incentive necessary for firms to develop new products and processes.12

Since in an economic analysis, we value competition because it promotes efficiency i.e., as a means rather than as an end, it would seem that whenever monopoly would increase efficiency it should be tolerated, indeed encouraged.13

Joseph Schumpeter in his theory of ‘Monopolies Leading to invention’ argued that main motors for technological innovation were companies with monopolistic or quasi-monopolistic powers. According to him, “Competition that counts is competition from the new commodity, from the new sources of supply, which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their lives.” He also noticed that monopolies that did not innovate well were likely to be replaced by new monopolies that were more effective innovators.14

2.3.2 Baxter’s Comparability test
Baxter’s Comparability test provides that ‘a patentee is entitled to extract monopoly income by restricting utilization of his invention’ as long as the restriction is confined ‘as narrowly and specifically as the technology of his situation and the practicalities of administration permit’.15 The test emphasizes on competition law, in particular, the minimization of monopoly loss-while downplaying concepts of patentee reward and inventive activity.

2.3.3 Bowman’s “Competitive superiority” test
This test allows a patentee to utilize a restrictive practice if the reward to the patentee measures ‘the patented product’s competitive superiority over substitutes’.16 The cost of the patent system in the form of monopoly loss that accompanies patentee’s elimination of competition is not considered.

2.3.4 Louis Kaplow’s “ratio” test
This test examines the ratio between ‘the reward to patentee receives when permitted to use a particular restrictive practice’ and ‘the monopoly loss that results from such exploitation of the patent’.17 This test offers the most nuanced and rigorously developed approach to the patent-competition intersection
Kaplow represented his ratio test as:

\[
\text{Patentee Reward/Monopoly Loss}
\]

In general, higher the ratio, more desirable is the practice.
Schumpeter explains that “economic development is driven by the discontinuous emergence of new combinations (innovations) that are economically more viable than the old way of doing things”18. There are three important elements to note from this quote. First, innovation occurs when prior routine behaviour is challenged by the entrepreneur’s new practices. Second, the change must be discontinuous in the sense that it is not just incremental adaptations to the

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existing system caused by neoclassical shifts in external factors. And third, the innovation must be economically more viable than the previous practices.

2.4. Characteristics distinct to IPRs are:

1. IPR are largely territorial rights except copyright, which is global in nature in the sense that it is immediately available to all the members of the Berne Convention.

2. These rights are protected through relevant IP legislations (except trade secrets which are protected through Common Law) and are monopoly rights implying that no one can use these rights without the consent of the right holder.

3. IPRs need to be renewed from time to time for keeping them in force except in case of copyright and trade secrets.

4. IPR have fixed term except trademark and geographical indications, which can have indefinite life provided these are renewed after a stipulated time specified in the law by paying official fees. Trade secrets also have an infinite life provided it is suitably protected from disclosure.

5. IPR can be assigned, gifted, sold and licensed like any other property.

6. Unlike other moveable and immoveable properties, these rights can be simultaneously held in many countries at the same time.

7. IPR can be held only by legal entities i.e., who have the right to sell and purchase property. In other words an institution, which is not autonomous may not in a position to own an intellectual property.

8. These rights especially, patents, copyrights, industrial designs, IC layout design and trade secrets are associated with something new or original and therefore, what is known in public domain cannot be protected through the rights mentioned above. Improvements and modifications made over known things can be protected.

9. Intellectual property relates to items of information or knowledge, which can be incorporated in tangible objects at the same time in an unlimited number of copies at different
locations anywhere in the world. The property is not in those copies but in the information or knowledge reflected in them.

2.5 **TRIPS Agreement: International endeavor to harmonize IPR regime:**

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which was concluded in 1994 as a part of the Uruguay Round of multilateral trade negotiations is the most wide-ranging and far-reaching international treaty on the subject of intellectual property to date and marks the most important milestone in the development of international law in this area. Apart from being the first international intellectual property agreement to dramatically increase the level of minimum standards of IP law, TRIP is also the first international intellectual property law agreement:

1. that obliges, in a single undertaking, new standards on as many as seven types of IPRs (namely, copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout of integrated circuits, and undisclosed information) for as many as 138 countries/territories;
2. to be included as a part of the rules governing the multilateral trading system, thus marrying trade law and jurisprudence with intellectual property law, particularly making the swift and effective dispute settlement process of the WTO, which can impose trade penalties on members violating the agreement;
3. that includes fairly detailed standards for domestic enforcement of IPRs, both internally and at the border;
4. that obliges protection of new types of IPRs even in developed countries, of which at least one, undisclosed information has never been the subject of any multilateral agreement before, and another, protection for integrated circuit designs, had no effective international treaty, while others, like plant variety protection or performers’ rights, were geographically limited;
5. that covers new subject matter under existing types of intellectual property, at least for some developing countries, such as product patents for food, pharmaceuticals, chemicals, Microorganisms;
6. that creates higher level of protection for geographical indications; and
7. that incorporates a text on the control of anti-competitive practices in the licensing of IPRs in a binding treaty.

2.6 **Safeguards under the TRIPs Agreement to address issues of Competition**

Three guiding principles emerge from the competition rules set out in the TRIPs Agreement:
Firstly, reservation of IPR-related Competition Policy to sovereign administration. Secondly, a requirement of consistency between national IPR-related competition policy and the TRIPs Agreement’s principle of IP Protection. Thirdly, there is a concern to primarily target practices restricting the dissemination of protected technologies.

TRIPs addressed the issue of competition though three provisions:

**Article 8.2** - *Appropriate measures, provided that they are consistent with the provision of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.*

**Article 31(k)** - *Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anticompetitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.*

**Article 40** - (1). *Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.*
(2). Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.¹⁹

2.7 Protection of Traditional Knowledge

“Traditional knowledge" means knowledge, innovations and practices of indigenous and local communities embodying traditional life-styles; the wisdom developed over many generations of holistic traditional scientific utilization of the lands, natural resources, and environment. It is generally passed down by word of mouth, from generation to generation and is, for the most part, undocumented.

The informal knowledge available with people presents following difficulties in being recognized for purposes of intellectual property protection:

1. Knowledge is quite often in parallel held by individual organizations, groups of people, communities.
2. Community is not a legal entity.
3. Communities lack adequate education, awareness and resources to take advantage of IPRs.
4. Traditional knowledge is developed over a period of time and is intergenerational and, therefore, may not meet the criteria of novelty or originality or inventive step required by IPRs.

Misappropriation of traditional knowledge often involves the acquisition of such knowledge in one country and the seeking of patents in other countries. Two areas of concern in relation to protecting Traditional Knowledge are:

1. The granting of patents or other IPRs covering traditional knowledge to persons other than those indigenous peoples or communities who have originated and legitimately control the traditional knowledge. This occurs mainly because of two reasons:

   a) One is in connection with the definition of prior art used to determine whether a claimed invention meets the novelty standard for patentability. Many IPR regimes, especially in the West (but not in India) define novelty in a manner that does not recognize information available to the public through use or oral traditions outside their domestic jurisdictions and therefore such knowledge is in danger of being patented.

   b) Second concerns the adequacy of the information on prior art available to patent examiners. It has been said that the instances of patents wrongly granted show that the prior art in the case of traditional knowledge originating in one country is not widely known or documented and available to patent offices all over the world. The instances which have very prominently come to light in the recent past of the patents being secured in USA on brinjal, bitter-gourd, Jamun, turmeric and Neem pertain to patents being granted on use of biological material which is already known in India and therefore there is nothing new/innovative in the grant of patent.

2. The traditional knowledge is being used without the authorization of the indigenous peoples or communities who have originated and legitimately control it and without proper sharing of the benefits that accrue from such use. Patenting of such traditional knowledge in a different country can cause anti-competitive concerns because of following reasons:

   a. Original holders get no share in profits/no recognition for nurturing resources/knowledge.

   b. Once IPR acquired, original holders cannot make commercial use of IPR protected resources/knowledge.

   c. Violation of rights of original holders over resources/knowledge.

   The patenting of Neem seed extract serves as a good example. The Neem tree is an indigenous plant of India and its oil has been used medicinally for hundreds of years to cure a number of ailments. In addition, the residue left behind after the oil has been extracted from Neem seeds are used as a highly effective insecticide. In 1971, aware of the many uses of the Neem tree, United
States national Robert Larson used *Neem* seed extract to produce and patent a pesticide known as Margosan-O. In 1988, Larson sold his patent to W Soon thereafter; W.R. Grace began processing twenty tons of *Neem* seed per day. As a result, *Neem* seed prices in India skyrocketed from 300 rupees per ton to an average of 3500 rupees per ton. In effect, patenting and large-scale production of the *Neem* seed has made this resource too expensive for the average local farmer in India to purchase. This has forced the population to change the crops they farm and abandon the traditional cures that they have relied upon for countless generations.  

An enabling provision for protection of traditional knowledge has been made under the Biological Diversity Act, 2002. This is an Act to provide for conservation of biological diversity, sustainable use of its components and equitable sharing of the benefits arising out of the use of biological resources and for matters connected therewith or incidental thereto. The modalities for protecting indigenous knowledge are still emerging and evolving and therefore the measures for doing so have been left open and flexible under this provision. It provides for *interalia* registration of knowledge, and for developing sui generis system for protecting traditional knowledge. Even the Patents (Second Amendment) Bill, 2002 provides that the patent applicant should disclose the source and geographical origin of the biological material when used in an invention. Further, non-disclosure or wrongful disclosure of source of biological material and any associated knowledge will result in opposition to the grant of patent or revocation of the patent.

### 3. Competition/Anti-Trust Law

#### 3.1 Background

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21 Section 36(5): The Central Government shall endeavor to respect and protect the knowledge of local people relating to biological diversity, as recommended by the National Biodiversity Authority through such measures, which may include registration of such knowledge at the local, State or national levels, and other measures for protection, including sui generis system.
22 Clause 28 of the Bill proposes to delete certain provisions while it incorporates two new grounds for revocation of patents – i) “that the complete specification does not disclose or wrongly mention the source of geographical origin of biological material used for invention”.
ii) “that the invention so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in any country.
The main aim of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

Taking into account the fact that competition is essential for governance, in his address to the Central Hall of Parliament, dated 03.07.2007, the then President, Dr. Abdul Kalam observed:

“The challenges in realizing the developed India vision 2020 provide also opportunities for innovation in every aspect of governance and legislative actions. As we review the governance system and legislative processes for the 21st century, full advantages and implications of technological revolutions, national and global connectivity, globalization and international cooperation and competition have to be taken into account.”

### 3.2 Schools of Antitrust

#### A. The Harvard School

In the middle of the twentieth century, Harvard economists argued that an industry’s structure, that is, the number of firms in the market and their relative sizes, determines how effectively firms will perform in that market. Beginning in the 1960s, Harvard professors applied the structural approach of the Harvard economists to antitrust theory. These scholars argued that, when markets are concentrated, firms are more likely to engage in anticompetitive conduct.

Harvard School academics pointed out that, when Congress enacted the Sherman and Clayton Acts, it was concerned with the growing economic and political power of trusts such as the Standard Oil Company and United States Steel Corporation. In construing the broad language of the Sherman and Clayton Acts, the courts should be guided by Congress’s desire to protect individual competitors from the market power wielded by large firms.

Harvard scholars opposed market concentration, even when it might lower costs and prices, thereby benefiting consumers. Harvard scholarship convinced many judges to presume the illegality of any conduct by firms with market power, regardless of its effect on consumers. For
example, in 1945, in United States v. Aluminum Co. of America\textsuperscript{23}, Judge Learned Hand found Alcoa liable for monopolizing the aluminum manufacturing market. Taking advantage of economies of scale by expanding its manufacturing capacity to meet increasing demand, Alcoa was able to deliver quality products to customers at low prices. Judge Hand’s decision penalized Alcoa simply for engaging in aggressive competition that benefited consumers.

The Harvard School approach had many advantages. If antitrust analysis under the Harvard School was not perfect, at least it was certain. The courts were able to indulge in a presumption of illegality for many types of conduct without engaging in a complicated analysis of the economic circumstances in the relevant market. Since the outcomes of trials were so predictable, business executives understood the type of conduct they should avoid. Firms in concentrated industries were effectively deterred from transactions that increased concentration levels in the relevant market. The Harvard School approach, however, also had serious disadvantages. Harvard School jurists were too quick to find fault with aggressive competition. The courts and agencies prevented large firms from engaging in competitive conduct that could have benefited consumers and would have been perfectly permissible for firms with lower market shares.

\textbf{B. The Chicago School}

By the late 1960s, a group of scholars at the University of Chicago had set forth an opposing theory of antitrust analysis in a series of articles and treatises. These scholars found no evidence that Congress’s intent under the antitrust laws was to protect individual competitors against large firms’ exercise of market power. They argued that the antitrust laws were designed simply to increase the efficiency of the American economy.

Bork defined economic efficiency in terms of conditions that maximized wealth, and he equated wealth enhancement with “consumer welfare,” meaning lower costs, reduced prices, and increased output of products and services desired by customers.

Bork believed that “[t]he only legitimate goal of American antitrust is the maximization of consumer welfare.”\textsuperscript{24}

All other possible goals of the antitrust laws, including the protection of small business from the power of large firms, were irrelevant.

\textsuperscript{23} 148 F.2d 416 (2d Cir. 1945).
Chicago School academics argued that the Harvard School misjudged the ways in which firms continue to compete, even when they have relatively few rivals. Chicago School scholars believed that markets were likely to correct against any competitive imbalances on their own, without intervention by antitrust regulators.

Indeed, the courts and government agencies usually made poor decisions in attempting to regulate economic conduct; they were simply not capable of devising regulatory solutions that were more effective than the natural workings of the marketplace. Since markets are self-correcting in any event, the courts and enforcement agencies should only intervene in the competitive process when it was clear, after thorough study, that anticompetitive conduct was threatening consumer welfare. The Chicago School began to impact antitrust case law in the late 1970s, when several Chicago School scholars, including Robert Bork, Frank Easterbrook, and Richard Posner, were appointed to the federal bench.

By the early 1990s, the Chicago School had completed a revolution in antitrust analysis. No longer willing to indulge a presumption of illegality for many types of competitive conduct, the courts and agencies insisted on proof of specific anticompetitive effects before finding defendants’ conduct illegal. It was insufficient for a plaintiff to prove that an individual firm or a group of competitors possessed significant market power. In addition, plaintiffs would have to demonstrate, through empirical evidence, that the conduct at issue harmed consumers by increasing prices or decreasing output. This approach led the courts and agencies to become more lenient in allowing firms to acquire and exercise market power.

By the late 1980s, the Chicago School had destroyed the old antitrust verities. No longer could business executives be sure of the types of transactions that might lead to antitrust liability. Faced with the impossibility of making the empirical economic decisions required by the Chicago School, fact finders rendered a series of conflicting decisions in antitrust cases. These decisions confused antitrust practitioners and business executives as to the applicable standards of conduct under the antitrust laws.

Neither approach has proven to be effective in regulating competitive conduct. The Harvard School prohibited innovative forms of competition that could have enhanced economic efficiency, while the Chicago School allowed competitors to engage in certain conduct that harmed consumers in many domestic markets.
The law, however, moving in tandem with economic realities and also with the collective social and economic will of incentivizing research, innovation, special intellectual efforts has on one hand provided in a span of six to seven centuries various *sui generis* legislations to provide protection to various kinds of IPRs, it has also simultaneously sought to protect the fair play and competition and resulting benefit to consumers, through legislations that aim at protecting such competition and defeat attempts of cartelization and creation of monopolies.

### 3.3 Application of Competition Law to IPRs

Competition law may be applied when particular intellectual property rights have not been obtained in the proper manner or are not deserved, for instance, when patents have been obtained by deceiving the patent office. In addition, low standards of patentability and shortcomings in patent examination may lead to the granting of “poor quality” patents that can hamper competition. Acquiring patent rights for frivolous developments or with overbroad claims can provide grounds for anti-competitive intervention even in jurisdictions where IP is essentially seen as compatible with competition law.

Undue enforcement of IPRs can also amount to anti-competitive conduct. In particular, preliminary injunctions may be effectively used to prevent legitimate competition. This is why courts in the United States and Europe have generally taken a very cautious approach towards the granting of injunctions in patent cases. Border measures can also be used with an anti-competitive intent. Enforcement measures should allow the protection of the IPR holder’s legitimate interests, but equally protect against abuses that may unjustifiably distort competition. In the US the concept of “sham” litigation may be applied in cases of abuses of legal procedures, notably when a legal action is based on fraudulently acquired IPRs or on an obviously incorrect legal theory, on valid rights that are known to be unenforceable or where the plaintiff knew that there was no infringement.

“Patent pools” represent another situation that may be subject to analysis from a competition policy perspective. Such pools may be used for pro-competitive purposes. However, they may facilitate tacit collusion in a multiplicity of markets and allow the pool members to impose abusive terms on nonmembers wishing to get access to technologies.
The accumulation of patents in the form of “package patents” may have anti-competitive effects if used, for instance, to inappropriately extend market power from legitimate patent claims to illegitimate patents, or to coerce a party into licensing patents that it might not have otherwise done. “Patent thickets” may also raise competition law concerns, as co-operation among competitors in different forms (including cross-licensing) may be necessary to navigate the patent thicket, ultimately limiting competition. “Sham petitioning” may equally form the basis for a claim under competition laws. The US Federal Trade Commission, for instance, has intervened in some cases of fraudulently-obtained patents such as Turmeric and Neem patent.

3.4 Position in India

Until 2002, India did not have a competition law regime. The earlier regime consisted of the Monopolies and Restrictive Trade Practices Act (“MRTP”) enacted in 1969. MRTP was, however, sought to be replaced by the Competition Act, enacted in 2002 and amended in 2007 (the “Act”). After the enactment of this Act, the nexus between IP and competition has been a subject of constant debate among experts. In light of global developments, including the obligations under the TRIPS and the resultant amendments to the IP regime in India, the ability of the competition regime in India to be able to deal with market power created by IP became very relevant. The Act deals with it in more than one provision.

3.4.1 Anti-competitive Agreements (Section-3).

Section 3 of the Act dealing with anti-competitive agreements, has made an exception for IPRs. It preserves the rights of the IPR holder to prevent infringement and protect these rights, as long as the restrictions imposed by the agreement are reasonable, ensuring that competition policy does not interfere with the reasonable use of IPRs.

Section 3: Anti-competitive agreements.-

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of
goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-
   (a) directly or indirectly determines purchase or sale prices;
   (b) limits or controls production, supply, markets, technical development, investment or provision of services;
   (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
   (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-
   (a) tie-in arrangement;
   (b) exclusive supply agreement;
   (c) exclusive distribution agreement;
   (d) refusal to deal;
   (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.- For the purposes of this sub-section,-
(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
(b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
(d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
(e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.
(5) Nothing contained in this section shall restrict-
(i) 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 under-
(a) the Copyright Act, 1957 (14 of 1957);
(b) the Patents Act, 1970 (39 of 1970);
(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
(e) the Designs Act, 2000 (16 of 2000);
(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.
Although the jurisprudence on this point is still to evolve in India, however, there are number of judgments of U.S courts and of ECJ (European Court of Justice) wherein the issue of anti-competitive agreements and IPRs has been discussed:
(a) *Illinois Tool Works Inc. v. Independent Ink, Inc.*\(^{25}\), was a case decided by the Supreme Court of the United States involving the application of U.S. antitrust law to "tying" arrangements

of patented products. The Court ruled unanimously that there is not a presumption of market power under the Sherman Antitrust Act when the sale of a patented product is conditioned on the sale of a second product in a tying arrangement. A plaintiff alleging an antitrust violation must instead establish the defendant's market power in the patented product through evidence.

(b) *Windsurfing International v Commission*\(^{26}\) concerned the company Windsurfing International that had granted patent licences to several German partners for its ‘windsurfing’ invention where these licensing agreements contained several restrictions inter alia obliging the licensees to use and sell the rig and sailboard together. Windsurfing International argued that the limitations or field of use restrictions in the licensing arrangement were not to restrict competition but merely to ensure that the sailboards were not of lower quality, that such quality controls were justified on the ground of product liability under Californian law and to prevent ‘slavish imitations’ of the boards.

ECJ was not impressed by the arguments put forward and held that the fact that Windsurfing had sufficient product differentiation between its licensed sailboards was merely to satisfy their own interest of having covered the widest possible field of market demand, hindering competition. The Court therefore held that the ‘field of use’ restrictions imposed by the company upon its licensees hindered competition going beyond the scope of the licensed technology as the restrictions made it possible for the company to amplify the utility and sales of the invention.

(c) The case *Consten and Grundig*\(^{27}\) concerned Consten, which was exclusive distributor in France of Grundig products and agreed not to deliver products directly or indirectly outside France. Grundig also obliged all its distributors in Europe not to deliver products outside their respective territories. The object and effect was to protect its dealers from parallel imports. Grundig therefore conferred an absolute territorial protection on Consten so that customers in France could not obtain products from anyone other than Consten. ECJ held that the exclusive agreement as such was not prohibited under Article 81 EC Treaty although the arrangement to eliminate parallel imports.


(d) In *Ansul Co v Uniroyal*\(^\text{28}\), it was held that a patent holder was not allowed to impose customer restrictions upon the purchasers of the patented product holding that such vertical restrictions were illegal per se.

### 3.4.2 Abuse of dominant position

Section 4 of the Act deals with abuse of dominant position; its wording is similar to Art. 82 of the EC Treaty.\(^\text{29}\) It is clear that it is the *abuse* and not the existence of a dominant position, which is prohibited by law. It explains what is meant by abuse of dominant position enumerates the practices which are to be considered abusive. What is noteworthy and relevant is that no exception has been created for IPRs.

This embodies the principles viz., competition policy makes room for IPRs and frames its policy accordingly. The exception allows for reasonable conditions to be imposed by the IPR holder to protect the rights granted by the relevant IP law; this ensures that the IPRs are not frustrated. At the same time, the exception is only allowed for the purpose of protection of the rights to the extent granted by the IP law; hence the requirement of reasonableness.

On the other hand, such an exception has not been carved in Section 4 for a number of reasons. Firstly, IPRs may not confer a dominant position in the market; the legal monopoly conferred by IPRs may not necessarily lead to an economic monopoly and it is the latter that the competition law is concerned with. Secondly, even if IPRs do grant a dominant position, mere existence of market power is not prohibited under Section 4; it needs to amount to an abuse of dominant position. Competition policy is willing to accept the dominance, if any, that may result from the exercise of IPRs by the holder; only when this amounts to abuse does competition law interfere.

In the event of such abuse, the fact that the source of market dominance is IPRs is of no relevance. Therefore Section 4 makes no exception for IPR-sourced market power.

\(^{28}\) *Ansul Co v Uniroyal Inc* 404 U.S. 1018 (1972).

\(^{29}\) **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 insofar 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 contracts.
Competition Commission has stated that there is need to balance the protection of rights of the holders of intellectual property with the prevention of abuse of market power. It further explains that this balance may be struck by differentiating between the existence of a right and its exercise. During the exercise of a right, if an abusive practice is in evidence, which is detrimental to competition, it must be assailed under competition law. Therefore, under Section 3, IPRs have been protected to the extent that they are reasonable. Unreasonable conditions contained in an agreement will not be thus protected. On the other hand, when an enterprise enjoys a dominant position and is thus covered by Section 4, it enjoys no immunity for its IPRs. 

**Dominant position-Interpretation by ECJ:-**

(a) In *Deutsche Grammophon* \(^{31}\), it was held that the mere possession of intellectual property rights does not automatically amount to a dominant position. It instead examined the position of the firm in the relevant market and the ability of the IP holder to ‘impede the maintenance of effective competition over a considerable part of the relevant market, having regard in particular to the existence and position of any producers or distributors who may be marketing similar goods or goods which may be substituted for them’.

(b) In *Magill* \(^{32}\), the ECJ confirmed that ‘so far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position’. Although there is no presumption that IP rights confer market power, they may however reinforce the inference of a dominant position if the undertaking has also a high market share.

(c) In *AB Volvo v Erik Veng* \(^{33}\), Volvo held the design right in the UK over front wings for cars. Veng imported panels into UK from Italy and Denmark where they had been manufactured without Volvo’s consent. Volvo alleged infringement of its UK registered designs. Veng’s defense was that Volvo’s refusal to grant license was an abuse of dominant position when Veng was willing to pay a reasonable royalty for license. The question before ECJ was whether refusal to grant license by Volvo was an “abuse of dominant position”? The ECJ said:

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“An obligation imposed upon the proprietor of protected design to grant to third parties, even in return for a reasonable royalty, a license for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a license cannot itself constitute an abuse of a dominant position.”

Outlining the circumstances, under which refusal to license may be deemed to constitute “abuse of dominance”, the court said that Article 82 may be attracted if an undertaking holding a dominant position involves in abusive conduct such as – “arbitrary refusal to supply spare parts to the independent repairers, the fixing of prices for spare parts at an unfair level, or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation…”

Therefore, the significance of this case lies in determining the boundaries of “compulsory licensing”. It is pertinent that merely a refusal to grant license may not be anti-competitive in nature. Such refusal should be “arbitrary”, so as to compel involuntary compulsory licensing, in order to mitigate the rigours of abusive conduct.

(d) IMS Health v. NDC Health

IMS was the largest supplier of sales data and other information on pharmaceutical services to pharmacies in Germany using a ‘brick like’ structure, which divided Germany into 1860 areas or ‘bricks’, corresponding to a particular geographical area. This structure became the ‘market standard’ for delivery of such pharmaceutical information and was protected by copyright. NDC developed a similar structure, deriving from IMS and the German court prohibited NDC from using any structure derived from IMS. On a referral from the German court, the ECJ emphatically reiterated that all the criteria of the “exceptional circumstances,” as stated in Magill, must be fulfilled in order for a compulsory license to be granted. In the absence of such exceptional circumstances, the IP owner has the exclusive right of reproduction, and a refusal to grant license even by a dominant undertaking, cannot, of itself, constitute an abuse of Article 82.

The court reasserted that the three cumulative criteria must be met for a refusal to be regarded as abusive:

- The undertaking which requested the license must intend to offer new products or services not offered by the owner of copyright and for which there is a potential consumer demand.

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34 Case C-418/01, IMS Health GmbH & Co. v. NDC Health GmbH & Co. KG (2002).
The refusal cannot be objectively justified.
The refusal must be such as to exclude competition on a secondary market.

3.5 Position in United States of America

The US federal antitrust legislation does not expressly address how IPRs will be treated for competition purposes. However, there has been much debate in the US over the extent to which IPRs should be immune from the application of antitrust laws. Previously, the predominant view was that IP law’s grant of exclusivity was seen as creating monopolies that were in direct conflict with the antitrust law’s attack on monopoly power.\(^3\)

In *SCM Corp. Versus Xerox Corp.*\(^4\), it was held:

“...The conflict between the antitrust and patent laws arises in the methods they embrace that were designed to achieve reciprocal goals. While the antitrust law prescribes unreasonable restraints of competition, the patent laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his patented art.”

However, the guidelines promulgated by the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) - Antitrust Guidelines for the Licensing of Intellectual Property (1995), apply a general rule that market or monopoly power will not be presumed as arising from Intellectual Property and the same has become the rule in the courts by virtue of the Judgment in the matter of *Tool Works Versus Independent Ink Inc.*\(^5\).

**DOJ/FTC Guidelines**

The IP Guidelines apply three fundamental principles to IP licensing:

1. For the purpose of anti-trust analysis, the agencies regard intellectual property as being essentially comparable to any other form of property.
2. The agencies do not presume that IP creates market power in the anti-trust content.

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\(^4\) 645 F.2d 1195, 1203 (2d Cir.1981).

The agencies recognize that IP licensing allows firms to combine complementary factors of production and is generally pro-competitive. Further, guidelines issued by both agencies have established an antitrust "safety zone" in relation to certain types of IP licensing arrangements to provide some degree of certainty and to encourage such activity. Broadly, the safety zone establishes that the agencies will not challenge a restraint in an IP licensing arrangement if:

1. the restraint is not *per se* anti-competitive (that is, it does not consist of arrangements which are *prima facie* anti-competitive such as price fixing, market sharing or other restraints of a kind which would always or almost always tend to reduce output or increase prices);
2. the licensor and its licensees collectively account for no more than 20% of each relevant market significantly affected by the restraint; and/or
3. there are four or more independently controlled entities in addition to the parties to the licensing arrangement which possess the required specialized assets or characteristics and the incentive to engage in research and development that is a close substitute of the research and development activities of the parties to the licensing agreement.

The DoJ and FTC also consider that the following IP licensing and assignment arrangements would be subject to antitrust liability:

1. Conditional refusals to license which cause competitive harm;
2. tying arrangements (if the seller has market power in the tying product; the arrangement has an adverse effect on competition in the relevant market for the tied product; and the efficiency justifications for the arrangement do not outweigh the anticompetitive effects); and
3. cross-licensing and patent pooling agreements where the arrangements result in price fixing, coordinated output restrictions among competitors or foreclosure of innovation.

### 3.6 Position in European Union

The European Commission has issued two block exemptions which expressly immunise IPRs from the anti-competitive agreement conduct rule. It is important to note, however, that block

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exemptions do not immunise agreements from the abuse of dominant market position conduct rule\textsuperscript{40}. The first block exemption which addresses IPRs expressly is the "specialisation agreement" block exemption (issued in 2000)\textsuperscript{41}. Specialisation agreements refer to agreements:

- where one participant gives up the manufacture of certain products or the provision of certain services in favour of another participant ("unilateral specialisation");
- where each participant gives up the manufacture of certain products or the provision of certain services in favour of another participant ("reciprocal specialisation"); or
- where the participants undertake jointly to manufacture certain products or provide certain services ("joint production agreements").

This "specialisation agreement" block exemption ensures that provisions within specialisation agreements concerning the assignment or use of IPRs are immune from the anti-competitive conduct rule, provided a number of conditions are met. Some of these conditions are:

- the assignment or use of IP rights must be necessary for the implementation of the specialisation agreement\textsuperscript{42};
- the combined market share of the participating undertakings is less than 20\% of the relevant market\textsuperscript{43}; and
- the specialisation agreement must not directly or indirectly have the object of: (a) fixing prices when selling the product to third parties; (b) limiting output or sales; or (c) allocating markets or customers\textsuperscript{44}.

The second block exemption which addresses IPRs expressly is the "technology transfers" block exemption (issued in 2004). Broadly, this block exemption exempts patent, know-how and

\textsuperscript{40} Article 82 of the EC Treaty prohibits an abuse by one or more undertakings of a dominant position within the common market or a substantial part of it in so far as it may affect trade within Member States.

\textsuperscript{41} Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements.


\textsuperscript{43} Article 4, Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements.

\textsuperscript{44} Article 5, Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements.
software copyright licensing and assignment agreements from the anti-competitive agreement conduct rule, subject to many limitations. Some of these limitations include: 45

1. (in the case of agreements between competitors) the combined share of the relevant markets accounted for by the parties must not exceed 20% 46; 
2. (in the case of agreements between non-competitors) the individual share of the relevant markets accounted for by each of the parties must not exceed 30% 47; and
3. the agreements must not contain severely anti-competitive restraints (such as the restriction of a party’s ability to determine its prices when selling products to third parties and the limitation of output).

4. Striking the balance between Competition Law and IPRs

The goal of competition law is not to prohibit monopoly; but to prohibit anti-competitive conduct. It accepts the achievement of an economic monopoly by means of research and development and consequent IPRs as valid and legitimate conduct, which amounts to competition on merits. It recognizes the right to prevent copying even if it results in the denial of access to others. Pricing of IPRs even by dominant firms is allowed to ensure adequate return on

investments. The uses that are regulated by competition law are those which are not considered to be legitimate, i.e. unjustifiable behaviour.

A proper discourse of basic nature of intellectual property rights and competition law reveals that both aims at producing efficiency in the market. In the long run, both aim at consumer welfare and they complement each other. In the case of intellectual property goods, the marginal cost of production is very less. The cost incurred is cost of research and development and the cost of inventing new technologies along with ancillary expenditure incurred in bringing up that product in the market. Absence of any monopoly right will disallow the inventor to recover the cost of research and development. This might result in discouraging investors to invest in bringing up newer technologies, which create dynamic efficiency in the market. At the same time the disclosure requirements of intellectual property provides a pathway for further innovations. Thus intellectual property regime is definitely dynamically pro competitive even if it is statistically non-co operative. In the long run, technological progress contributes far more to consumer’s welfare than does the elimination of static deficiencies caused by non competitive pricing. From an economist perspective, intellectual property law is primarily concerned with the provision of appropriate ex-ante incentives (and increasing competition in innovation markets), while competition law is primarily concerned with ex poste incentives (and increasing competition in product markets).\(^4\) But as Valentine described, both are divergent paths to the same goal.\(^5\)

The issue of what the contours of intellectual property law should be in the first instance has come up in the form of testimony by competition officials before the US Congress\(^6\) and in comments to the US Patent and Trademark Office.\(^7\) These interventions have been justified on the ground that:

Intellectual property law and antitrust law share the common goal of “encouraging innovation, industry and competition.” Thus, when properly applied, the two bodies of law complement and reinforce each other’s purposes. Conversely, inappropriate application of either can undermine the purpose of both. If antitrust enforcement unnecessarily prevents intellectual property owners from profiting from invention, this interference also may compromise the goals of antitrust laws.

\(^4\) David A. Balto: Intellectual property and Antitrust: general principles, 867 PLI/Pat 9, 64.
\(^7\) Comment of the Staff of the Federal Trade Commission, Dkt. No. 9505 31 44-5144-01.
And inappropriate or overbroad grants of intellectual property rights may interfere with the competition that often drives innovation. Rather than conflicting, there are areas where IPRs and competition complement each other. By creating and protecting the right of innovators to exclude others from using their ideas or forms of expression, IPRs provide economic agents with the incentives for technological innovation and/or new forms of artistic expression. This will create more inputs for competition on the future market, as well as promote dynamic efficiency, which is characterised by increasing quality and diversity of goods, which is also the objective of competition policy. Moreover, IPRs may create a race for innovation, as firms compete to exploit first-mover advantages so as to gain IPR protection. Therefore, both IPRs and competition policy are necessary to promote innovation and ensure a competitive exploitation thereof. It is necessary therefore to ensure their co-existence.

A balance between the two different instruments, only apparently in conflict, has to be found in order to ensure that both policies can play their complementary role in providing sufficient incentives for innovation and economic growth.

For the purpose of competition analysis, two preliminary should be considered: first, intellectual property should be regarded as comparable to any other property; second; the possession of an intellectual property does not necessarily confer market power upon its owner.

Regarding to the first aspect, intellectual property is a particular form of property because of the intangible nature of the object protected by the law. In particular, the owner of a tangible good can benefit from the disposal of the good and getting the advantages from its direct use or from its sale to third parties. On the other hand, due to the extreme ease of misappropriation that characterizes any intangible good, the owner of an intellectual property right could not take advantage, in the absence of a specific law protecting his rights, of all the benefits deriving from his creative efforts. If innovators were not granted the exclusive legal right to the economic exploitation of their work, imitation could be expected to occur, reducing the returns to the innovator and the incentive to innovate.
5. **Recommendations**

Some of the recommendations to ensure co-existence of Competition Law and Intellectual Property Rights are:

1. To establish or strengthen competition laws in order to control, *inter alia*, possible abuses emerging from the acquisition and exercise of IPRs.

Taking the example of Neem patent case wherein patent was allowed to exist for so many years before getting revoked due to prior knowledge shown by Indian Ayurvedic texts and India had to spend so much on litigation, but no compensation or penalty on company enjoying patent for considerable time before revocation. Thus, the Competition Commission must be empowered of imposing penalties and awarding compensation in cases where the patents have been obtained frivolously.
2. To ensure an adequate coordination among the competition law agency and other agencies whose decisions may influence market structure and operation, with the aim of maintaining a competitive environment.

Any increase in the period of commercial exploitation of IPRs must be done after consultation with Competition Commission, in order to avoid any arbitrary increase in the period.

3. To fully use the flexibilities allowed by the TRIPS Agreement to determine the grounds for granting compulsory licenses to remedy anti-competitive practices relating to IPRs. There should be a Joint committee of IPR and Competition Commission which should be given an overriding power over IPR legislations to decide when an IPR is revocable on the ground of existence of public interest.

4. To develop policies, including guidelines, for use at the patent offices to prevent the granting of frivolous or low quality patents, as well as patents containing overly broad claims, which may be used to unduly restrain legitimate competition and block innovation; to prevent and correct abuses in the acquisition and enforcement of IPRs viz. patent pooling, patent thickets etc; and also to seek compensation from those who exploit traditional knowledge through the deprivation of Communities holding such knowledge.

5. Competition Commission to act as guardian of Public domain

The Competition Commission must be bestowed with the responsibility of not allowing unnecessary shrinkage of public domain because vested corporate and other interests have a tendency of getting the periodicity extended and should also ensure that periodicity is not so little that IPRs fly to other countries.
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