

INTELLECTUAL PROPERTY AND COMPETITION LAW: DIVERGENCE, CONVERGENCE, AND INDEPENDENCE

*Gitanjali Shankar and Nitika Gupta**

Intellectual property rights grant a degree of exclusivity to the owners, necessarily restricting access of others to the same. On the other hand, anti-trust law seeks to promote competition and increase access to the market. There is a seemingly inherent conflict between the two. Yet, there is increasing opinion that the two realms can, not only co-exist but also complement each other. This article seeks to trace the shift from divergence of the two areas to their convergence. Thereafter, it aims to show that they have distinct operational areas and their functions can and must be kept independent. The theoretical position adopted above is tested against EU law, where such principles have been applied. The separation of operational areas has ensured minimum conflict in a market economy, where both areas play key roles. The Indian position can be seen to be leaning towards such an understanding and it is likely that eventually cases before the Competition Commission will be decided according to these principles.

I. THE GRADUAL MOVE FROM DIVERGENCE TO CONVERGENCE

A. OBJECTIVES OF IP AND COMPETITION LAW

Intellectual property rights (“IPRs”) offer a period of exclusive rights to exploit the property in question.¹ Competition law, on the other hand, seeks to maintain effective access to the market.² Very simply, intellectual property (“IP”) protects individual interest, while competition protects the market. This leads to the immediate inference that there is a conflict between the two sets of regulatory mechanisms.

* 5th and 3rd Year students respectively, The W.B. National University of Juridical Sciences, Kolkata.

¹ W.R. CORNISH, INTELLECTUAL PROPERTY 3 (2003).

² RICHARD WHISH, COMPETITION LAW 2 (2005).

1. Reward Theory in IP and Consequent Conflict

The perception of such conflict is further bolstered by the historical emphasis of intellectual property law, which was based on the policy of reward to the creator/inventor.³ 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.⁴ Protection in the form of IPRs was the price paid by society to the inventor so that the latter would make his work public.⁵ As a result, there was greater focus on the individual right of the inventor.⁶ It was not envisaged that protection of IP benefitted the society as well.⁷

When IP law focused on such a traditional relationship between the inventor and the general public, the conflict between IP and competition is much easier to explain. Here IP has no commonality with competition policy and the two pursue divergent goals. IP seeks to protect and reward the innovator by granting exclusivity and competition law seeks to protect the market by enhancing access,⁸ which necessarily goes against the exclusivity granted by IP.⁹

2. Changes in the Objectives of IP and the Consequent Reconciliation

With time, however, the idea of what must be rewarded has changed.¹⁰ 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 incentives.¹¹ Reconciling intellectual property and competition policy requires recognizing that IP law is a form of competition policy.¹² With this

³ For instance, patents can be traced back to the Middle Ages where inventor privileges took the form of royal grants. See HOLYOAK & TORREMAN, *INTELLECTUAL PROPERTY LAW* 5 (Paul Torremans ed., 2008).

⁴ Meir Perez Pugatch, *Introduction: Debating IPRs*, in *THE INTELLECTUAL PROPERTY DEBATE: PERSPECTIVES FROM LAW, ECONOMICS AND POLITICAL ECONOMY*, 4 (Meir Perez Pugatch ed., 2006).

⁵ HOLYOAK AND TORREMAN, *supra* note 3.

⁶ *Id.*

⁷ *Id.*

⁸ MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* 19 (2004).

⁹ *SCM Corp v. Xerox Corp*, 645 F 2d 1195 (2003).

¹⁰ Although there can be no single moment marked as the point when the change came about, the Statute of Monopolies enacted in England in 1624 is considered to be influenced, *inter alia*, by the idea that in certain circumstances, a market monopoly would be necessary as an incentive to innovate (§ 6 of the Statute) (See Holyoak And Torremans, *supra* note 3).

¹¹ ILKKA RAHNASTO, *INTELLECTUAL PROPERTY RIGHTS: EXTERNAL EFFECTS AND ANTI-TRUST LAW* 19 (2003).

¹² SHUBHA GHOSH, *COMPETITIVE BASELINES FOR INTELLECTUAL PROPERTY SYSTEMS, INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY* 793, 795-802 (Keith E. Maskus & Jerome Reichman eds., 2004).

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.¹³ 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.¹⁴

It was during a period of misunderstanding of the economic effects of intellectual property rights that competition law placed overly strict limits on their exercise. Analysis over the decades has gradually increased support for the theory that protection of IP rights is not contradictory to the enhancement of free market competition.¹⁵

3. Promotion of Competition as an Objective of IP Law

Anti-trust laws¹⁶ were never intended to serve the interests of jealous competitors who merely seek to require a successful competitor to redistribute lawfully earned wealth. The legitimate goal of anti-trust law is the promotion of efficiency through the protection of the competitive process itself, rather than any particular competitor; thus, anti-trust law seeks to protect competition, not competitors.¹⁷

Anti-trust has never questioned or interfered with the most primary function of IP rights: preventing free riding of creative achievements and/or the firm's identity and reputation, acting as an incentive to innovate.¹⁸ In fact, the former acknowledges the role of IP in promoting competition because by preventing free-riding, firms are encouraged to produce their own goods, which necessarily leads to competition.¹⁹

B. CHANGES IN LIGHT OF THE NEW OBJECTIVES

Since the two branches do converge, the framework of IP law also needs to be interpreted in light of the same principle of freedom of competition, which is fundamental to anti-trust policy.

¹³ GUSTAVO GHIDINI, *INTELLECTUAL PROPERTY AND COMPETITION LAW: THE INNOVATION NEXUS* 6 (2006).

¹⁴ GIORGIO MONTI, *Article 82 EC and New Economy Markets*, *COMPETITION, REGULATION AND THE NEW ECONOMY* 48-49 (2004).

¹⁵ HOLYOAK & TORREMAN, *supra* note 3, 12-13.

¹⁶ The term anti-trust law and competition law are used synonymously with each other, in this article.

¹⁷ Allen Kazsboim and Alan Goldman, *No Short Cut to Antitrust Analysis: The Twisted Journey of the Essential Facilities Doctrine*, 1996 *COLUM. BUS. L. REV.* 1, 2 (1996).

¹⁸ GUSTAVO GHIDINI, *supra* note 13.

¹⁹ *Id.*

Though not conclusive, two primary guidelines emerge. First is the need for a strict definition of various IPRs, both in terms of number and kind. Since IPRs are essentially a restraint on competition, they are deemed as exceptions to the abovesaid objective. Extension of the nucleus of IPRs would be permissible by legislation and *legislation alone* and not by interpretation.²⁰ In line with this reasoning lies a further extension of this guideline: no functions of IP law are to be surreptitiously attributed to other branches of law, in specific competition law, even when such branches while pursuing their respective other functions, may cover IP-protectable subject matter. Therefore, even when competition law deals with subject matter protected by IP, it must not be allowed to either extend or curtail the rights or protection granted under the IP regime.

The other guideline is a pro-competitive interpretation of IP law, without challenging the integrity of such rights or the law protecting them.²¹ When more than one interpretation of IP law is possible, that interpretation must be chosen which promotes competition, defends the economic rights of third parties and protects the market's competitive forces, rather than an interpretation which does the contrary.²² IP will have to be defined in a manner that is consistent with competitive dynamism.²³

C. INTERFERENCE DUE TO INADEQUACY?

It has been opined that the need to invoke anti-trust might be avoided if the paradigms of IPRs are structured and applied with such balance that the interests of the first as well as later innovators are reconciled. The failure of the legislators in adequately identifying and defining the limits of property rights, especially with regard to newer technologies necessitates scrutiny by competition law of the exercise of these rights, to prevent anti-competitive foreclosure.²⁴

By inference, competition law will be needed only when the property rights are not defined sufficiently, leading to non-fulfillment of the very objectives of IP law.²⁵ IPRs create an exception to free competition, by granting exclusivity, to promote innovation. Therefore, loosely defined, IPRs increase the scope of protection, without due justification and hence do not

²⁰ On the other hand, limitations on such IPRs must also be by legislation and not interpretation. This has been discussed in more detail below.

²¹ This is a policy guide for authorities which are required to interpret the law.

²² GUSTAVO GHIDINI, *supra* note 13, 8.

²³ Shubha Ghosh, *Intellectual Property Rights: the View from Competition Policy*, 103 Nw. U. L. REV. COLLOQUY 344, 346 (2009).

²⁴ GUSTAVO GHIDINI, *supra* note 13, 111.

²⁵ See generally, Gireesh Chandra Prasad, *MNCs Marrying into India Inc. Face Patent Test*, 30 July 2007, available at <http://toostep.com/trends/mncs-marrying-into-india-inc-face-patent-test> (Last visited on February 14, 2011).

promote innovation; they merely result in rent-seeking behaviour. The purpose of making an exception to free competition is defeated. In such an event, competition law steps in – to compensate for the shortcoming of IP law in an attempt to ensure that competitive dynamics are not disturbed by the ill-defined IPRs.²⁶ Thus, what is required is for IPRs to be defined in a manner that sufficiently fulfils its assigned function.

D. MIDDLE PEATH-WHY?

Despite the above discussion, it cannot be denied that construction of the interaction between IP and competition either in terms of the clash between the excluding features of one and the principle of freedom of the other or in terms of the reassuring prospect of the substantial converging goals of each would be over-simplistic. Neither of the extremes is entirely true. Each has a specific goal which cannot be harmonized entirely with that of the other.²⁷ Analysis of these intersections of IP and competition rules would be misleading if it attributed to the latter, the direct role of promoting innovation or to the former, the direct role of promoting competition. The two disciplines aim at different but synergic objectives; each can indirectly serve the other by fulfilling its function.²⁸ The challenge is to design rules both within IP law, i.e. the substantive law of patents, copyrights, trademarks, and trade secrets as well as outside IP law, i.e. substantive competition law in a manner that promotes dynamic competitive markets.²⁹

II. THE ARGUMENT FOR INDEPENDENCE

Since each has a distinct function to perform, it is contended that IP and competition have different scopes and operate in different areas, even if there is some degree of overlap, which in turn leads to interaction. There is and must be independence between the two realms.

A. SCOPE: WHEN DOES EACH OPERATE?

It has been the contention of many that the fields of IP and competition must be strictly separated with the former dealing with properly *assigning* and *defending* property rights, while the latter is concerned with the *use* and *exercise* of such property rights in the market. By extension, this

²⁶ See generally, Gustavo Ghidini, *supra* note 13, 111.

²⁷ Mihir Naniwadekar, *Intellectual Property Rights and Competition Law: Friends or Foes?*, September 1, 2009, available at <http://spicyipindia.blogspot.com/2009/09/intellectual-property-rights-and.html> (Last visited on February 14, 2011) quoting HERBERT HOVENKAMP *et al.*, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW (2009).

²⁸ GUSTAVO GHIDINI, *supra* note 13, 111.

²⁹ Shubha Ghosh, *supra* note 23.

separation must also be maintained when enforcing the law. We support this view and present several reasons for the same.³⁰

Property rights are assigned as soon as the asset is created. Competition, on the other hand, regulates the use of property rights, including IPRs only when these rights are a source of market power.³¹ It is this reference to market power, which differentiates the former from the latter. Even IP law regulates to some extent, the use of the property rights that it assigns; but it does so *without* reference to market power. Competition, on the other hand, regulates the use of *all property rights*, which are a source of market power and does not single out IPR for such regulation.³² Therefore, there is difference between the two in terms of the time frame and the scope of enforcement.

B. WHAT COMPETITION LAW DOES NOT DO

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,³³ but only the enactment of further anti-competitive behaviour aimed at exploiting the position of strength on 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.³⁴

C. COMPETITION LAW BOLSTERS IP

IP is an exception to the general rule promoting free competition. The protection is not meant to continue even after the objectives of IP have been achieved. In cases where IP is unable to prevent the extension of such power beyond the realm of the intended protection, competition is capable of playing this limiting role. Hence the attitude of anti-trust to IPR is not hostile. It acts to ensure that the inherent purpose of the rights is not defeated, if and when the IP owner exceeds the essential function for which the right is granted, such as protection of innovators' achievements against free-riders and protection of

³⁰ We would like to substantiate the contentions using certain general prepositions, followed by the EC law, since the Indian law is modelled very closely on the competition law provisions of the EC Treaty.

³¹ Donna M. Gitter, *The Conflict in the European Community between Competition Law and Intellectual Property Rights: A Call for Legislative Clarification of the Essential Facilities Doctrine*, 40 AM. BUS. L.J. 217, 293 (2003).

³² Pierre Regibeau and Katharine Rockett, *The Relationship Between Intellectual Property Law and Competition Law: An Economic Approach*, in THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS & COMPETITION POLICY 522 (2007).

³³ Shubha Ghosh, *supra* note 23.

³⁴ GUSTAVO GHIDINI, *supra* note 13, 102.

the firm's reputation and identity.³⁵ Such an occasion may arise when contractual exercise of IPRs, results in competitive restraints, far in excess of the need to protect the owner against free-riding. It may also happen when IPR grants such a degree of market dominance that compulsory license of the right to a third party is justified.³⁶

In such a situation, IP law may not be able to control the exercise of the right, when the consequence of such exercise exceeds the purpose for which it was granted. It is at this point that competition law becomes relevant, because it is equipped to deal with the *consequences* of the exercise of property rights. Therefore, in such circumstances, the functioning of competition law protects the ultimate goal of IP law, when the latter may be incapable of ensuring the same.³⁷

This instance demonstrates the separation of IP and competition. The effectiveness of the system and the protection of the purposes are both ensured because their functions are kept independent of each other, both in terms of when they become operational and under what circumstances.

D. LEGAL MONOPLY VERSUS ECONOMIC MONOPLY

Not every use of intellectual property needs interference from competition authorities. A legal monopoly does not necessarily lead to an economic monopoly. The mere ownership of IP does not lead to a dominant position in the market.³⁸ By extension the mere use of IPR does not constitute an abuse of the dominant position.³⁹ Further, monopoly power which is legally acquired is not unlawful.⁴⁰

The goal of competition law is not to prohibit monopoly; but to prohibit anti-competitive conduct.⁴¹ 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.⁴² 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

³⁵ James B. Kobak Jr., *Intellectual Property, Competition Law and the Hidden Choices Between Original and Sequential Innovation*, 3 VA. J.L. & TECH. 6 (1998).

³⁶ GUSTAVO GHIDINI, *supra* note 13, 7.

³⁷ Shubha Ghosh, *supra* note 23, 344.

³⁸ Mihir Naniwadekar, *supra* note 27.

³⁹ Steve Anderman and Hedvig Schmidt, *EC Competition Policy and IPRs*, in THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS & COMPETITION POLICY 40 (2007).

⁴⁰ Mihir Naniwadekar, *supra* note 27.

⁴¹ *Id.*

⁴² MASSIMO MOTTA, *supra* note 8; Mihir Naniwadekar, *supra* note 27.

which are *not considered to be legitimate*, i.e. unjustifiable behaviour after taking account of the factors listed above.⁴³

E. COMPETITION LAW THRESHOLDS: IP VERSUS OTHERS

Competition law makes room for the rights granted by IP law before it begins its examination. Such a threshold is set by law in order to ensure that the territory of IP is not usurped by competition.⁴⁴ This may lead to some favourable treatment by competition policy, of the exercise of IP by the firm. Once these standards of examination have been fulfilled by competition, however, there is no need for any further differentiation of intellectual property from other types of property rights by competition law.⁴⁵

Competition authorities need not treat monopoly power from IP any differently on grounds of supposed importance of innovation or the public good nature of the information. These have already been taken account of when issuing the property rights applying to intellectual property.⁴⁶

F. COMPETITION LAW: POLICY VERSUS APPLICATION

Accordingly, the trade-off in the efficiencies of IP has already been contemplated and taken account of by the policy makers in the design of IP law and is embedded in it. Therefore in competition law, it is essential that such trade-off not be revisited by the competition authorities when making individual decisions.⁴⁷

The distinction sought to be made is between favourableness of treatment by competition policy (which is permissible) and favourableness of treatment by competition authorities or the court empowered to decide competition matters, (which must not be permitted in accordance with the doctrine of separation between the realms of competition and IP).⁴⁸ There needs to be equality of treatment of various sources of monopoly power.

It is only when market power and the existence of dominance have been established that competition law steps into the arena.⁴⁹ The function

⁴³ Steve Anderman and Hedvig Schmidt, *supra* note 39, 38.

⁴⁴ Donna M. Gitter, *supra* note 31, 293.

⁴⁵ *Id.*

⁴⁶ Pierre Regibeau and Katharine Rockett, *supra* note 32, 505.

⁴⁷ Pierre Regibeau and Katharine Rockett, *supra* note 32, 505.

⁴⁸ James B. Kobak Jr., *supra* note 35, 6.

⁴⁹ How market power and the existence of dominance are to be determined when IPRs are involved is a policy decision. However once such a policy has been laid down, the function of

of competition law is to prevent the abuse of dominance by dominant firms in the market. As stated earlier, there may be planned differences in the manner of determination of dominance and its abuse due to the exercise of IP rights in the case concerned. Once the determination is made, however, the interference of competition law, including the manner in which the abuse of dominance is dealt with, remains independent of the source, further reiterating its independence from the area of IP law.⁵⁰

G. AN EXAMPLE: EXAMINATION OF MERGERS BY COMPETITION IN THE PRESENCE OF IP

In appraising a merger, competitive authorities evaluate whether markets are likely to be affected by the decrease in competition after the new entity is formed. Since the determination relates to the likely effect of the merger on market shares, the considerations cannot involve merely the sales of the merging entities but also the productive capacity, since it indicates potential market shares.⁵¹

This principle manifests the examination of market power by competition.⁵² As stated earlier, the source of market power is an irrelevant consideration for competition. Therefore, when examining a merger, intellectual property of the merging entities are pertinent objects of enquiry.⁵³ While the actual sales of IP by the parties would be relatively easy to evaluate, scrutiny of the existing stock of intellectual assets of the merging parties (including those which are not licensed to other parties), would also be significant, though harder to measure.⁵⁴ Experience has shown that such thorough examination of the IP-related aspects of a merger is rare, although there have been instances limiting the acquisition of competing technologies as well as requiring compulsory licenses⁵⁵ as a condition of merger approval.⁵⁶ It has been opined that

the authority lies in using the conditions to determine the existence of the same and thereafter carry out the rest of its functions.

⁵⁰ Pierre Regibeau and Katharine Rockett, *supra* note 32, 522.

⁵¹ *Id.*, 527.

⁵² A criticism is often raised against the examination of mergers by competition authorities on the ground that at the time of the merger-transaction, the new entity is merely acquiring market power, at most. It is a clear policy of competition law, that mere market power or dominance is not unlawful; there needs to be abuse of such position, which cannot be proved or disproved at the time of the merger.

This objection, however, is applicable irrespective of the source of market power. It is a criticism against competition policy as such and has no exclusive application to IP. It reiterates the point that competition does not treat IP any differently, from other sources of market power, beyond the threshold previously decided on.

⁵³ Gireesh Chandra Prasad, *supra* note 25.

⁵⁴ Pierre Regibeau and Katharine Rockett, *supra* note 32, 527.

⁵⁵ *See e.g.* Tetra Pak Rausing SA v. Commission, (1990) ECR II-309.

⁵⁶ Steve Anderman and Hedvig Schmidt, *supra* note 39, 39.

merging entities may have to divest some of their IPRs if the combined IP wealth is likely to undermine the market.⁵⁷

III. 'CONVERGENCE, DIVERGENCE AND INDEPENDENCE': AN ANALYSIS OF EC LAW

In this section of the article, we seek to examine the jurisprudence of the European Community ("EC") law in analysis and support of the contentions raised in the previous section.

A. IP IN NEW LIGHT

Like most other jurisdictions, the EC also had a period of misunderstanding of the economic effects of IP leading to very strict overtures on the exercise of such rights.⁵⁸ Gradually, this gave way to a more realistic understanding of IP. It recognizes the distinction between legal and economic monopolies and, therefore, no longer assumes that the existence of IP automatically grants market power to the firm in question. More importantly, it extends to the exercise of IP, the general caveat in Art. 82 of the EC Treaty that the mere existence of dominance is not sufficient in order for action to be taken under anti-trust policy. It has made significant changes to its competition doctrines in order to make sufficient room for IPRs.⁵⁹

It has given explicit recognition to the positive contribution of IPRs not just to innovation but also to competition. That the incentives to innovation created by IPRs produce new competitors and products which lead to entirely new markets has been acknowledged. Further it presumes pro-competitive and pro-innovative effects and aims to ensure better diffusion of IPRs through the common market.⁶⁰

B. INDEPENDENCE OF SPHERES

To reconcile IP and competition, the European Court of Justice ("ECJ") has distinguished the existence of the right granted by national

⁵⁷ Vinod Dhall, as quoted in Shamnad Basheer, *Competition Bill in India: The Nexus with IP*, September 22, 2007, available at <http://spicyipindia.blogspot.com/2007/09/competition-bill-in-india-nexus-with-ip.html> (Last visited on February 14, 2011); It may be noted that the merger review provisions under the Competition Act, 2002 have been notified to come into effect from June 1, 2011. See Rahul Singh, *Notification of Merger Review Provisions under Competition Law*, March 8, 2011, available at [http://indiakorplaw.blogspot.com/2011/03/notification-of-merger-review.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed:+IndianCorporateLaw+\(Indian+Corporate+Law\)](http://indiakorplaw.blogspot.com/2011/03/notification-of-merger-review.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed:+IndianCorporateLaw+(Indian+Corporate+Law)) (Last visited on March 9, 2011).

⁵⁸ Donna M. Gitter, *supra* note 31, 293.

⁵⁹ Steve Anderman and Hedvig Schmidt, *supra* note 39, 37.

⁶⁰ *Id.*

law, which must be respected by EC law, from its exercise, to which EC prohibitions could apply.⁶¹ One consequence of this separation is that it allows the ECJ to respect the decision of a member-state to grant special protection to certain forms of IP, resisting the temptation to interfere with the national IPRs of any member-state.⁶²

While competition law does certainly seem to accord a more favoured position to IPRs than it used to because of its contribution to innovation and therefore to competition, there are still situations where the exercise of a certain right by an IP owner, lawful under the IP regime, may be unlawful under the competition regime. In such cases, no immunity is granted by EC competition law merely because of its consistency with IP laws. Competition law reserves the right to intervene in such circumstances.⁶³ It is erroneous to assume that IP has superior value, simply because of the special legal protection offered to it, by most legal systems; such protection can be attributed to its vulnerability arising from the lack of sufficient protection in civil and penal laws, rather than to its superior value.⁶⁴

Firstly, this demonstrates the earlier distinction made between competition policy and the functions of the competition authorities. The change in attitude and approach towards IP law is a favourable position assumed by competition policy. This decision was arrived at as a policy decision, due to the impact it was considered to have on the ultimate goals of competition and IP and the trade-off deemed to fit the conditions of the EC market best.⁶⁵

The possibility of unlawful situations arising under competition law, when the same is still lawful under the IP regime, however, shows that the competition authority is required to act as per the policy laid down and not revisit the trade-off between the efficiencies of the two spheres in each individual case before it.⁶⁶ In addition, this aspect also demonstrates why the enforcement of the two legal regulatory mechanisms need to be kept distinct and independent of each other; what is lawful under one, might not be so under

⁶¹ See Case 102/77, Hoffmann La Roche & Co. v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH, 1978 E.C.R. 1139; Case 24/67, Parke Davis and Co. v. Probel, 1968 E.C.R. 55; Joined Cases 56 & 58/64, Etablissements Consten S.A.R.L. v. Commn, 1966 E.C.R. 299.

⁶² Thomas Eilmansberger, *Antitrust and Intellectual Property in Global Context: A Symposium in Celebration of the Work of Lawrence A. Sullivan: IP and Antitrust in the European Union*, 13 SW. J.L. & TRADE AM. 261, 263 (2007).

⁶³ Steve Anderman and Hedvig Schmidt, *supra* note 39, 38.

⁶⁴ Josef Drexl, *Intellectual Property and Antitrust Law - IMS Health and Trinko - Antitrust Placebo for Consumers Instead of Sound Economics in Refusal-to-Deal Cases*, 35 INT'L REV. OF INTELL. PROP. & COMPETITION L. 788, 805 (2004).

⁶⁵ Donna M. Gitter, *supra* note 31, 293.

⁶⁶ Shubha Ghosh, *supra* note 23, 344.

the other and independent consideration needs to be given to ensure that the objectives of the latter are protected and promoted.⁶⁷

C. 'ARTICLE 82': ABUSE OF DOMINANCE IN THE CONTEXT OF IP

Since the central prerogative of an IPR-holder is to exclude others from using the information, the only suitable provision for challenging the exercise of exclusive rights and for imposing licensing obligations is Art. 82. While it is here that anti-trust enforcement could directly interfere with the substance of these rights, the courts have used Art. 82 with great caution in relation to IPRs, perhaps influenced by the commitment to respect member-states' decisions to grant statutory IP protection.⁶⁸

Under EC law, legal monopoly is not presumed to confer market power or dominance; also mere dominance is not unlawful under Art. 82.⁶⁹ There must be actual evidence that market share of a product, *whether protected by IPR or not*, reflects such significant power as to amount to dominance. Once such dominance is established, Art. 82 confers on all dominant firms, the special responsibility to not use its dominant power anti-competitively further weakening a market, which is already weakened by their dominance. These rules apply, whether or not the source of such market power of the dominant firm is IPRs.⁷⁰

It is, however, true that when IPR reinforces the market power of a firm, certain significant concessions are made, in pursuance of the policy of the EC as outlined above. The 'exceptional circumstances' test under Art. 82 operates to limit its application to the exercise of IPRs quite explicitly in the case of abuse of refusal to supply and implicitly in the case of abuse of excessive pricing.⁷¹

Therefore the EC competition authority continues to exercise its functions when there is dominance in the market, without as such making an exception for the presence of IP in such dominance-abusive practices.⁷² The competition policy only increases the threshold to be met before such dominance or its abuse can be proved. But once the conditions have been met, there is no further immunity granted by competition law, and certainly not the competition authorities, merely because IPRs are involved, thus reiterating the separation in scope of IP and competition.

⁶⁷ MASSIMO MOTTA, *supra* note 8.

⁶⁸ Thomas Eilmansberger, *supra* note 62, 261, 266.

⁶⁹ RICHARD WHISH, *supra* note 2.

⁷⁰ Steve Anderman and Hedvig Schmidt, *supra* note 39, 40-41.

⁷¹ *Id.*, 40.

⁷² Donna M. Gitter, *supra* note 31, 293.

D. 'ESSENTIAL FACILITIES' DOCTRINE: AN ILLUSTRATION

The essential facilities doctrine is a sub-set of Art. 82 and the abuse of dominance arising from the refusal to supply. Dominance as well as its abuse need to be established before the doctrine can be applied. When applying this doctrine, the courts have been very clear that mere ownership will not confer dominance and mere refusal will not constitute abuse.

It was established in the case of *Commercial Solvents v. Commission*⁷³ that a refusal to supply could in some circumstances, amount to an abuse of dominant position. The anti-competitive aspect of the Commercial Solvents' behaviour was particularly clear where the refusal would eliminate the only serious competitor that it would face in the downstream market.

In addition to the conditions laid down under the general application of the doctrine, mere refusal to license IP will not be sufficient to invoke the essential facilities doctrine. There must be additional *exceptional* circumstances.⁷⁴ The law is stricter in the case of refusal to license intellectual property rights making it more difficult to prove abuse.⁷⁵

The additional circumstances which make the refusal exceptional and cause it to amount to abuse of dominance are determined by three conditions.⁷⁶ Firstly, the refusal must relate to a product or service indispensable to the exercise of a particular activity in the neighbouring market; secondly the refusal is of such a kind as to exclude any effective competition in that neighbouring market and thirdly, the refusal prevents the appearance of a new product for which there is a potential consumer demand.⁷⁷ The Court has stated that the requirement that the refusal obstructs the introduction into the market, of such a product for which there is potential demand, is only found in the case law involving IP.⁷⁸ Thus, by recognizing the presence of such additional circumstances, competition policy, when formulating the essential facilities doctrine, has made room for a higher threshold for IP, after which competition authorities would be able to apply the doctrine.⁷⁹

⁷³ Cases 6/73 & 7/73 (1974) ECR 223.

⁷⁴ Shammad Basheer, *Block Me Not: How "Essential" Are Patented Genes?*, available at <http://ssrn.com/abstract=942681> (Last visited February 14, 2011).

⁷⁵ RICHARD WHISH, *supra* note 2, 699.

⁷⁶ *Microsoft v. Commission*, (2007) 5 CMLR 846, 332.

⁷⁷ *Id.*, 333.

⁷⁸ *Microsoft v. Commission*, (2007) 5 CMLR 846, 335.

⁷⁹ It needs to be noted here, that the essential facilities doctrine is one which is not found explicitly in the EC Treaty and has been applied by the Courts by inference from Article 82. Therefore an argument is possible that the Court is in essence, deciding on the threshold for IP and is not leaving it to the policymakers. However what needs to be taken account of is that the essential facilities doctrine, in its entirety has been a court-determined doctrine. Therefore,

IV. A GLOBAL PERSPECTIVE

The relationship between IP and competition has not gone unnoticed in the global scenario. As early as the 1948 Havana Charter for the International Trade Organisation, imposed an obligation that Members prevent restraint on competition and cooperate with the Organisation on such restraints.⁸⁰ While between the 1960s and 1980s, there was considerable discussion regarding the relationship between IPRs, transfer of technology and competition, in 1980, the United Nations General Assembly, adopted a resolution called the ‘Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices’ containing rules relating to abusive practices in the field of IPRs.⁸¹

The TRIPS Agreement also contains certain safeguards in this regard and the guiding principles are that firstly there is reservation of IPR-related competition policy to national determination. Secondly there is a requirement of consistency between national IPR-related competition policy and the TRIPS Agreement’s principles of IP protection. Thirdly there is a concern to primarily target practices restricting the dissemination of protected technologies.⁸²

Members have the right to act against the abuse of IPRs provided that such action is consistent with the provisions of the Agreement.⁸³ Further compulsory license is available as a remedy to correct the abuse of patents.⁸⁴ In addition, fines and injunctions may also be sought. There is also discretion available to the Members to specify abusive intellectual property practices in their respective state legislations.⁸⁵ Thus Member-states have substantial discretion under the TRIPS in the development and application of competition law to the arrangements and conduct in the field of IP.⁸⁶

The Anti-Competitive Guidelines for Licensing of Intellectual Property set forth three guiding principles which are taken together to affirm the legitimacy of a wide variety of intellectual property licensing terms and

the Court, in formulating the exception for IP, has not treated IP any differently from any other source of monopoly. Once it has found justification for a degree of policy making, creating the exception for IP was no different. It did not do so because of the interface between IP and competition. On the other hand, it did so, because it was not treating IP any differently.

⁸⁰ Article 46, Havana Charter for an International Trade Organisation, 1948, available at <http://www.worldtradelaw.net/misc/havana.pdf>, (Last visited February 14, 2011).

⁸¹ Frederick M. Abbott, *Are the Competition Rules in the WTO TRIPS Agreement Adequate?* 7 J. INTL. ECO. L. 687, 688 (2004).

⁸² ABIR ROY AND JAYANT KUMAR, *COMPETITION LAW IN INDIA* 183 (2008).

⁸³ Article 8.2, TRIPS Agreement.

⁸⁴ Article 31(k), TRIPS Agreement.

⁸⁵ Article 40, TRIPS Agreement.

⁸⁶ Hans Ullrich, *Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective*, 7 J. INTL. ECO. L. 401, 403 (2004).

arrangements.⁸⁷ Firstly, for the purpose of anti-trust analysis, intellectual property is essentially comparable to any other form of property; secondly, intellectual property rights are not presumed to create market power for the purposes of anti-trust analysis and thirdly, intellectual property licensing is generally pro-competitive as it allows firms to combine complementary factors of production.⁸⁸

These guidelines are in clear consonance with the theoretical analysis contained in the previous sections of this paper.⁸⁹ It summarises the stance of the authors and has been justified by practice.

V. COMPETITION LAW AND IP 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 2007.⁹⁰ 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 Competition Act deals with the same in more than one provision.

The Statement of Objects and Reasons states clearly that the Competition Act is being enacted *inter alia*, to prevent practices which have an adverse effect on competition and to promote and sustain competition in the markets.⁹¹

Firstly, §3 of the Competition 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

⁸⁷ US Department of Justice and Federal Trade Commission, Anti-trust Guidelines for the Licensing of Intellectual Property, April 6, 1995, available at <http://www.justice.gov/atr/public/guidelines/0558.htm> (Last visited on February 14, 2011).

⁸⁸ *Id.*

⁸⁹ In addition, it has been stated by Licensing Guidelines in the US that where the licensor licenses his property and the combined market share of licensor and licensee is not more than 20% then they are considered to be within the safety zone. This is clearly a threshold set by the policy makers for the regulation of competition, in relation to IP. Therefore once the threshold is met, the competition authorities will take action accordingly, without any exception arising out of the fact that IP rights are involved.

⁹⁰ The provisions of the Competition Act have been notified by the Government in a phased manner and the whole Act is expected to come into force in the near future. Services were also included under the new regime.

⁹¹ See Statement of Objects and Reasons, Competition Act, 2002.

restrictions imposed by the agreement are reasonable, ensuring that competition policy does not interfere with the reasonable use of IPRs.

§4 of the Competition Act deals with abuse of dominant position; its wording is similar to Art. 82 of the EC Treaty.⁹² 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 to the current discussion, is that no exception has been created for IPRs.

This embodies the principles explained earlier in the article. Firstly, 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 §4 for a number of reasons. Firstly, IPRs may not confer a dominant position in the market; as explained earlier, 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 §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 §4 makes no exception for IPR-sourced market power.⁹³

The position which has been taken by the authors throughout this paper, has been endorsed by the Competition Commission. It 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 §3, IPRs have been protected to the extent that they are reasonable. Unreasonable conditions contained in an agreement will not be

⁹² The Indian competition regime is young; this similarity in law to the EC law would allow the Competition Commission of India to draw on the EC competition jurisprudence, which is considered one of the most developed in the world. See Shamnad Basheer, *supra* note 57.

⁹³ See Rahul Dutta, *Critical Analysis: Reflection of IP in Competition Law of India*, available at <http://www.indlaw.com/display.aspx?4674>, (Last visited on February 14, 2011).

thus protected. On the other hand, when an enterprise enjoys a dominant position and is thus covered by §4, it enjoys no immunity for its IPRs.⁹⁴

VI. CONCLUSION

There is no doubt that in the modern economy, IP and competition have complementary roles in the ultimate goal of protection of consumer welfare. IP promotes innovation which in turn promotes competition in the market. It cannot, however, be ignored that the direct and immediate goals of these two realms of law do conflict sufficiently to need some mode of reconciliation – a middle path.

This middle path can only be achieved by separating the functioning of the two spheres from each other. Allowing interference into each other's domains will lead to a conflict, which will necessarily have to be resolved by placing one superior to the other. Such a policy decision can be largely avoided if their operations are kept independent of each other.

IP must deal with the grant and functioning of property rights, while competition law would need to deal with the manner of exercise of these rights, only with reference to their effect on the market. The difference between policy decisions and individual case decisions needs to be maintained. Such separation is essential in order for both areas to be able to efficiently fulfil their goals and in the long term complement and supplement each other.

There is a difference between economic and legal monopoly which must be maintained. The former falls within the domain of competition authorities, while the latter with IP authorities. It is not the existence of a dominant position that threatens competition in a market, but its abuse and competition law must be concerned only with the latter. When there is abuse of dominant position, it is irrelevant what property right allowed the enterprise to attain such a position.

We have relied heavily on European law because it is widely acknowledged to be one of the most developed competition regimes worldwide. In addition, the similarities in the provisions of law between the European law and Indian law are no coincidence; it is likely that the Indian law-makers have intended heavy reliance on the European position. This makes an understanding of the European position vital to the nascent Indian competition regime.

⁹⁴ Advocacy Booklet on Intellectual Property Rights under the Competition Act, 2002, Competition Commission of India, available at <http://www.cci.gov.in/images/media/Advocacy/Awareness/IPR.pdf>, (Last visited on February 14, 2011). *See also*, Advocacy Booklet on Abuse of Dominance, Competition Commission of India available at http://www.competition-commission-india.nic.in/advocacy/Booklet_AbuseOfDominance11032008.pdf (Last visited on February 14, 2011).

At this nascent stage of Indian competition law, the authorities have sufficient practice to rely on. At the same time, an understanding of the reasons behind the precedents would be most useful in order to ensure that the same can be tailored to suit the specific needs of the Indian market and the competition scenario prevailing herein.