P: ISSN No. 0976-8602 RNI No.UPENG/2012/42622 VOL.-7, ISSUE-2, (Supplementary Issue)- April-2018

E: ISSN No. 2349-9443 Asian Resonance

Relations v/s Conflicts between Intellectual Property Rights and Competition Law

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Abstract

The aim of the present paper is to discuss about intellectual property rights and competition law. This formation is understood from the perspective of the concepts of democracy and active citizenship that allow completion law and intellectual property rights to comprehend both its own society's historical process and the importance to develop projects that seeks to convert a reality. The relationship between competition law and intellectual property rights, policy is erroneously regarded as pure juxtaposition and contradiction. The policy designates boundaries with which the competitors may exercise legal exclusively (monopolies) over their innovations. Therefore, it creates power of market by limiting static completion and promoting the flexible completion. It is seen prima-fascias as defeating the objectives of the static market access and level playing field promoted by restraints, or on the abuse of dominant positions.

The relationship between completion law and intellectual property rights, policy is erroneously regarded as pure juxtaposition and contradiction. However, competition is not the end goal of competition law, similarly as intellectual property (IP) protection is not the end goal of IPRs policy, but a means to achieve improved efficiency and better welfare in the long run. Competition may also motivate a drive for innovation, as firms compete to exploit first-mover advantages, learning-curve advantages, as well as to gain IPRs protection. Both regimes can thus function to promote consumer welfare in the same manner, while showing similarities and differences in their respective consideration of short and long term effects.

Keywords: IPR, Competition Law, Society, Democracy, Innovations, Policy.

Introduction

Competition may also motivate a drive for innovation, as firms compete to exploit first-mover advantages, learning-curve advantages, as well as to gain IPRs protection. Both regimes can thus function to promote consumer welfare in the same manner, while showing similarities and differences in their respective consideration of short and long term effects. The relationship between completion law and intellectual property rights, policy is erroneously regarded as pure juxtaposition and contradiction. The policy designates boundaries with which the competitors may exercise legal exclusively (monopolies) over their innovations. Therefore, it creates power of market by limiting static completion and promoting the flexible completion. It is seen prima-fascias as defeating the objectives of the static market access and level playing field promoted by restraints, or on the abuse of dominant positions. However, competition is not the end goal of competition law, similarly as intellectual property (IP) protection is not the end goal of IPRs policy, but a means to achieve improved efficiency and better welfare in the long run.

Competition laws of most countries often expressly or implicitly reserves its application on owners of exclusive rights (recipients of intellectual property protection granted by the State). IPRs and competition laws have substantial interface in their regulation of various issues of the business world. Briefly, their interface can be seen from two main perspectives: (i) the impact of IPRs in shaping the disciplines of competition law; and (ii) the application of competition law on the post-grant use of IPRs. IPRs policy can exert some restrictions on a pure prohibition of horizontal and vertical restraints by competition law, usually as an exemption.

On the other hand, IPRs are fully subject to general antitrust principles because what is conferred upon its owner is precisely that autonomy of decision in competition and freedom of contracting according to individual preferences those results from any private property, no matter tangible or intangible, and that is the object of and connecting factor for restraints of competition. Competition law, thus, while having no impact on the very existence of IPRs, operates to contain the exercise of the property rights within the proper bounds and limits which are inherent in the exclusivity acquired by the ownership of intellectual assets. Broadly, IPRs-related competition issues include:

1. Exclusionary terms in the licensing of IPRs, specifically the inclusion in licensing contracts of restrictive clauses such as territorial restraints, exclusive dealing arrangements, tying or grant-back requirements;
2. Use of IPRs to reinforce or extend the abuse of dominant position on the market, unlawfully;
3. IPRs as an element of mergers and cooperative arrangements; and
4. Refusal to deal.

This is a common practice in both the developed and the developing worlds. Besides, competition concerns may also be raised when the holders of IPRs resort to prevent parallel imports (i.e., goods brought into a country without the authorisation of the patent, trademark or copyright holders after those goods were placed legitimately into the circulation elsewhere). The incidence of IPRs-related anticompetitive practices can be treated as a ground for granting a compulsory licence – the licence awarded by the State over a specific IP without the willingness of the IP holder. Many competition authorities might be concerned to the extent that restrictions on parallel imports increase the rents flowing to right owners; not to say other potential anti-competitive effects of their market power. Compulsory license and parallel imports, however, remain debatable issues which lie on the delicate interface between IPRs policy and competition rules. The development of proper frameworks to address the IPRs/competition interface has been given considerable importance in many national jurisdictions, especially developed countries. The situations in developing countries, however, are rather less optimistic, due to their level of economic development, the scope and implementation of the laws as well as other specific local factors.

Currently, over 100 countries worldwide have competition laws, with more than half of them in the category of developing countries. With respect to IP laws, history suggests that implementation of a system to protect IP is a costly affair for developing countries, and they have often fine-tuned their IP regimes (if any) in consonance with their development requirements, rather than applying strict rules as developed countries had done. Developing countries normally tailor competition policies, if any, including specific regulations on the interface between IPRs and competition to their own conditions and goals, unrestricted by international rules and free from demands or coercion by developed countries. In doing so they need not mechanically adopt the models of competition policies applied in industrialised countries. Such policies should be simpler in developing countries than in developed countries in order to be capable of being enforced by much weaker States. The policies should essentially aim at the promotion of long-term growth of productivity, that is, of dynamic rather than static efficiency.

Beyond the national borders and the purview of domestic legislation, the desirability and necessity of a binding competition agreement within the framework of World Trade Organisation (WTO), on the background of the close relevance between competition policy and IPRs and from the perspective of the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement as yet, also needs to be handled with great prudence. This monograph examines the interface between competition law issues and the protection of IPRs – both complementarities and conflicts. It discusses the IPRs-related competition issues, highlighting abuse of a dominance position due to IPRs. In addition, the paper provides an overview of the competition law and IPRs in developing countries. Written in an easy to understand language, this monograph aims to serve the purpose of reaching out to relevant stakeholders as well as general readers.

Meaning and Concept of Competition Law

Competition policy can be defined as those government measures which influence the behaviour of enterprises and the structure of industrial sector. The objective of competition policy is to promote efficiency and maximise welfare Competition policy i.e. putting in place a set of policies that promotes competition in local and national markets, which includes a liberalized trade policy, openness to foreign investments and economic deregulation; and on other hand comprises legislation, judicial decisions and regulations specifically aimed at preventing anti-competitive business practices and unnecessary government interventions, avoiding concentration and abuse of market power and thus preserving the competitive structure of markets. The above elements refer to competition law. An effective competition law is to promote the creation of an enabling business environment, which improves static and dynamic efficiency, and leads to efficient resource allocation in which the abuse of market power is prevented by stimulating competition. In addition, competition law prevents artificial entry barriers, facilitates market access and compliments other competition-promoting activities.

Review of Literature

Herbert J, (2016) concerted refusals to license intellectual property rights. Unilateral refusals to license intellectual property rights are almost never antitrust violations, as is true of most unilateral refusals to deal. Concerted refusals to deal are treated more harshly under the antitrust laws because they can facilitate collusion or, in the case of

technology, keep superior products or processes off the market.

Beckerman-Rodau A., (2015-2016 Fall Issue) The relation with intellectual property rights: Subject matter expansion, This article examines the expansion of the subject matter that can be protected under intellectual property law. Intellectual property law has developed legal rules that carefully balance competing interests. The goal has long been to provide enough legal protection to maximize incentives to engage in creative and innovative activities while also providing rules and doctrines that minimize the effect on the commercial marketplace and minimize interference with the free flow of ideas generally.

Kaur Supreet, (2014) Interface between intellectual property and competition law. Intellectual property rights and competition law are two separate legal regimes having distinct objectives and purposes. Intellectual property rights are the exclusive rights conferred upon the creator or the inventor of the property to use and enjoy his creation or invention exclusively. Competition law on the other hand preserves competition in the market. Its main purpose is to prevent monopolization of the production process and allowing entry to the competitors in the market. Although there is a common area where both intellectual property and competition law intersect with each other yet their objectives are always conflicting with each other.

Pereira Alexandre L D, (2011)Software interoperability, intellectual property and competition law-Compulsory licenses for abuse of market dominance. Innovation is a shared purpose of both intellectual property (IP) and competition law. However, sometimes competition law conflicts with the interests of IP holders. This paper searches for an adequate criterion of practical concordance, which consists of evaluating, in the concrete situation, which of those regulations best performs the purpose of promoting innovation. It is considered that requirements of competition law shape IP regulations, but the internal limits of protection therein identified are not enough to safeguard concerns of competition law.

Aim of the Study

Intellectual Property Rights and competition policy are necessary to promote innovation and ensure a competitive exploitation thereof. Thus, the main function of law is to ensure their co-existence by striking a balance and removing any tension that subsists between intellectual property rights and competition policy. However, it is important to remember that the purpose of competition law is to protect competition not competitors and in the majority cases the blind application of the doctrine will only serve to undermine the incentives for dynamic efficiency that underpin the competitive process. Competition policy is an effective counterbalance to protecting intellectual property rights. The IPRs Agreement provides a basic framework of intellectual property protection as well as enforcement of anti-competitive licensing practices in intellectual property. Article 8(2) of the Agreement gives a general direction that appropriate measures may be needed to prevent the abuse of intellectual property rights by its holders. Article 40(1) recognizes that the licensing practices that restrain competition may have adverse effect on trade or impede technology transfer. Article 40(2) permits the members to specify anticompetitive practices constituting abuse of IPRs and to adopt measures to prevent or control such practices.

Significance of the Act

The competition law and Intellectual Property Rights (IPRs) policies are bound together by the economics of innovation and an intricate web of legal rules that seek to balance the scope and effect of each policy. IPRs protection is a policy tool meant to foster innovation, which benefits consumers through the development of new and improved goods and services, and spurs economic growth. It bestows on innovators the rights to legitimately exclude, for a limited period of time, other parties from the benefits arising from new knowledge, and more specifically from the commercial use of innovative products and processes based on that new knowledge.

In other words, innovators or IPRs holders are rewarded with a temporary monopoly by the law to recoup the costs incurred in the research and innovation process. As a result, IPRs holders earn rightful and reasonable profits, so that they have incentives to engage in further innovation. Competition law, on the other hand, has always been regarded by most as essential mechanism in curbing market distortions, disciplining anti-competitive practices, preventing monopoly and abuse of monopoly, inducing optimum allocation of resources and benefiting consumers with fair prices, wider choices and better qualities. It, therefore, ensures that the monopolistic power associated with IPRs is not excessively compounded or leveraged and extended to the detriment of competition.

Besides, while seeking to protect competition and the competitive process, which, in turn, prods innovators to be the first in the market with a new product or service at a price and quality that consumers want, competition law underscores the importance of stimulating innovation as a competitive input, and thus also works to enhance consumer welfare. Indeed, the relationship between IPRs and competition law has been a complex and widely debated one. It is not just one of balances between conflicting or complementary systems/principles, but also one of different levels of market regulation[1] as well. Errors or systematic biases in the interpretation or application of one policy's rules can harm the other policy's effectiveness. A challenge for both policies is to find the proper balance of competition and innovation protection.

IPRs and IPRs Policy

A definition of IPRs says: "they are a composite of ideas, inventions and creative expressions" plus the "public willingness to bestow the status of property" on them[4]. As in the case of tangible property, IPRs give their owners the right to exclude others from access to or use of protected subject matter for a limited period of time, and subsequently the right to license others to exploit the innovations when they themselves are not well situated to engage in large-scale commercial exploitation. The main legal instruments for protecting IPRs are patents, copyright (and neighboring rights), industrial designs, geographical indications (GIs), trade secrets and trademarks. Special sui generis forms of protection have also emerged, which

addresses the specific needs of knowledge-producers, for example, utility models, plant breeder's rights, and integrated circuits rights. Moreover, many countries enforce trade secret laws to protect undisclosed information that gives a competitive advantage to its owner. These legal instruments are just one of the pieces that form a national system of intellectual property (IP) protection. The institutions in charge of administering the IPRs system, as well as the mechanism available for enforcing these rights, are other crucial elements of the system's overall effectiveness.

The conventional economic rationale for IPRs protection is that they promote innovation, including its dissemination and commercialization by establishing enforceable property rights for creators of new and useful products; ensuring more efficient processes and original work of expression; and preventing rapid imitation from reducing the commercial value of innovation and eroding incentives to invest to the detriment of consumers. This rationale is typically used to explain the economics of patents and copyright laws. With respect to trademarks and industrial designs, the basis for protection is frequently framed in terms of incentives for investments in reputation (quality) rather than innovation per se. Trade secrets, in turn, are rationalised as a necessary supplement to the patent system, with the main positive role being to foster "sub-patentable" or incremental innovations.

The Conflicting Relations

The relationship between IPRs and competition law policy used to be mistakenly depicted as a pure juxtaposition or sheer contradiction for quite sometime. Basically, IPRs designate boundaries within which competitors may exercise legal exclusivity (monopolies) over their innovation; therefore, in principle, create market power by limiting static competition in order to promote investments in dynamic competition. IPRs are, therefore, at first sight, seen at variance with the principles of static market access and level playing fields sought by competition rules, in particular the restrictions on horizontal and vertical restraints, or on the abuse of dominant positions. Empirically, it has been observed that rights over IP, while ensuring the exclusion of rival firms from the exploitation of protected technologies and derived products and processes, do not necessarily bestow their holders with market power. In fact, there often exist various technologies, which can be considered potential substitutes to confer effective constraints to the potential monopoly-type conduct of IPRs holders. For example, Microsoft Corporation holds the copyright for Windows, a very popular operating system used for Intel-compatible personal computer. However, possession of the IP for

Windows and legal exclusivity over its use/exploitation alone do not give Microsoft market power, since there are many other substitutes, such as Mac OS, or Linux. What gave Microsoft the monopoly power in the market was the application of barriers to entry, which tilts the competitive balance in favour of the software giant. Only when alternative technologies are not available, IPRs can be said to grant their holders monopolistic positions in the defined relevant markets. And even then that alone does not create an antitrust violation. Antitrust/ competition law recognises that an IPR's creation of monopoly power can be necessary to achieve a greater gain for consumers. Moreover, antitrust/ competition law does not outlaw monopoly in all circumstances. For example, monopoly achieved solely with "superior skill, foresight, and industry does not violate the antitrust/competition law. It is only when monopoly is acquired or maintained, or extended through unlawfully anti-competitive means that it can be ruled unlawful.

Similarly, competition has changed from rivalry by production and natural imitation to an evolutionary process of systematic creation and innovation. "The ever increasing forms and numbers of IP titles, the elevation of standards of protection and the territorial broadening of the scope of protection only mirror in law the diversity of the goods actually offered in competition, and reveal the normality of such competition." To put it simply, IPRs policy protects the IP based products and processes that firms use as inputs in the dynamically competitive process in the marketplace, and thus is nowhere near being in contradiction or conflicting with the ultimate goal of competition law.

Complementing Each Other

It follows from the above discussion that when we think of the relationship between these two regulatory systems at a high level of abstraction, rather than being simply antithetical to each other, they complement each other in "promoting an efficient marketplace and long-run dynamic competition through innovation". As discussed above, IPRs policy creates and protects the right of innovators to exclude others from using their ideas or forms of expression. This will create more inputs for competition on the future market, as well as promote dynamic efficiency, which is characterized by increasing quality and diversity of goods and growth generated through increased productive efficiency. However, in the short run, and in some circumstances when patents, copyrights or other IPRs confer market power (through exclusivity), they may lead to restriction of production, a supra-competitive price, and what economists call a deadweight loss. This is where competition law comes in to help IPRs protection to be fair and on the right track of its virtue towards the welfare goal.

Thus, competition is not the end goal of competition law just as IP protection is not the end goal of IPRs policy but only a means to achieve improved efficiency and better welfare in the long run. In some circumstances, the society would be better off by allowing for limited market restrictions, monopolistic profits and short-term allocative inefficiency when these can be proven to promote dynamic efficiency and long-term economic growth. This has even been explicitly included among those factors to be taken into account by competition authorities in some competition statutes. For

example, it has been asserted that allowing price to rise above the marginal cost through a succession of temporary monopolies can spur dynamic competition. Analysts also argue that rapid innovation, increased importance of declining average costs, and network externalities have created conditions ideal for "dynamic" competition for monopoly, in which temporary monopolies rise and fall in the rhythm of rapid entry and exit. Moreover, competition may drive a race for innovation, as firms compete to exploit first-mover advantages, learning-curve advantages, as well as to gain IPRs protection.

These types of guidelines need to be re-examined and appropriately adjusted in the context of the "New Economy", which is characterised by an increased dependence on products and services that are the embodiment of ideas. A major challenge is, thus, to identify policies that will ensure an efficient operation of the competitive process that underlies this IP revolution. More narrowly, questions abound concerning the relationship between competition and IPRs laws, or the right way to bring out the benefits of as well as reinforce the complementarities between these two regulatory systems for the sake of dynamic efficiency and consumer welfare in the new era.

Conclusion

The current paper is an attempts to understand the core relationship between the competition law and IPRs protection laws as well as some of the significant relevant issusses on the said subject matter. To the extent that the interface is reflected hereby, it is complex and multifaceted. There are many complementary elements: the IPR system promotes innovation, which is a key form of competition; on the other hand, competition policy, by keeping market open and effective, preserves the primary source of pressure to innovate and diffuse innovation. But there are also conflicts – such as when an IPR serves to entrench market power. A regulatory balance, therefore, should be maintained and simplistic approaches should be avoided at all costs. As emphasised by William Baer, Director of the US FTC: "Enforcement of competition laws no longer begins with the assumption that restrictive use of IP is necessarily anti-competitive.

Current enforcement instead starts with three basic assumptions about intellectual property: First, intellectual property is comparable to other forms of property, so that ownership provides the same rights and responsibilities; second the existence of intellectual property does not automatically mean that the owner has market power; and third, the licensing of IP may often be necessary in order for the owner efficiently to combine complementary factors of production, and thus may be pro-competitive". Beyond the national borders and the purview of domestic legislation, the desirability and necessity of a binding competition agreement within the framework of WTO, on the background of the close relevance of competition policy and IPRs and from the perspective of the TRIPs Agreement also needs to be handled with great prudence. Any negotiators, especially from less developed countries, need to think twice before starting the process towards such an agreement as it is a matter of their own interests and rights. Otherwise, a catch-22 situation as with the TRIPs Agreement will once again arise to the detriment of their own countries and people, not anyone else.

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