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Harmonizing Nature of IPRs and Antagonism Rule

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Abstract

This paper studies the degree to which country differences in intellectual property rights protection affect the choice of companies for a particular mode of international inter firm R& D partnering. It focuses on the preference of companies for either an equity joint venture or a contractual partnership. The changes have been triggered by the interrelationship of phenomena of distinct nature. Social, Political & technological changes have been shaping a new social contract in the area of research and innovation. The degree of appropriability conveyed through dominancy of relevant market and IPRs & the nature of the complementary assets required to commercialize the innovation.

Keywords: R&D partnering, equity joint venture, contractual partnership, IPR.

Introduction

The domain view today is that competition law is a tool for promoting social welfare by deterring practices and transactions that tend to increase market power. 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 market. This might result in discouraging investors to invest in bringing up newer technologies, which creates dynamic inefficiency in the market. In long run, technological progress contributes far more consumers welfare then does the eliminating of static inefficiencies caused by non-competitive pricing. From an economic perspective, intellectual property law is primarily concerned with the provision of appropriate ex ante incentive, while competition law is primarily concerned with ex post incentives and increasing competition in product markets.

A proper discourse of basic nature of intellectual property rights and competition law reveals that both aims at producing efficiency in the market. In long run, both aims at consumer welfare and they complement each other. In case of intellectual property goods, the marginal cost of production is very less. According to Landes and Ponser, for copyright law to promote economic efficiency, it must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the cost of administering intellectual property protection. Economic Competition Policy and Intellectual Property Rights (IPRs) are widely recognized to be complementary components of a modern industrial policy

However, it should be well understood that the intellectual property regime and competition law complements each other only at the equilibrium. State can comfortably reward innovation through patents and copyrights so long as the compensation is not significantly in excess of that necessary to encourage investment in innovation, and the market power that results is not used to distort competition in product or service areas. Modern competition policy attempts to keep markets innovative by maintaining effective competition on markets by preventing foreclosure of markets and maintaining access to markets. Economic competition law gives explicit recognition to the positive contribution that IPRs make to competition as well as innovation and has made a number of significant adjustments within its doctrines to accommodate the exercise of IPRs.

EC Competition law is not to be governed by the philosophy of IPRs. Competition law maximizes social welfare by condemning monopolies while intellectual property does the same by granting temporary monopolies. Federal Trade Commission, USA observes that tension between intellectual property and competition policy, necessarily arises on the grant of invalid intellectual property or abuse or misuse of granted monopoly. EC competition law accept that the achievements of an economic monopoly by means of investment R&D and intellectual property

rights is a legitimate course of conduct for a firm, a form of 'competition on merits'.

The complementary nature of the agents has a strong influence on an institution's efficiency, for, in order to carry out innovation, it is necessary to develop many diverse assets, such as marketing, dedicated equipment, distribution and services, and after-sales service, among others. The access to property of the complementary assets, particularly those which are specialized or "co-specialized", aids in defining who will win and who will lose in an innovative process. Imitators may supersede first comers if they have access to vital complementary assets. In this specific case, the development of contractual mechanisms – especially those of 3 property rights – is of the utmost importance. From this perspective, the rights to intellectual property may also be perceived as an element of reference for the interaction among the (public and private) economic agents which take part in the innovative process.

Today, in fact, there are four main spheres in which EC competition policy may be said to act as a 'second tier' of regulation of intellectual property rights and intervene in extreme cases. First competition policy under Article 82 of the EU Treaty has, in extreme cases, been used to restrict the abusive commercial conduct of individual owners of IPRs, particularly where the IPR protects a market standard or de facto monopoly. Secondly, competition policy regulates certain terms of bilateral IPR licensing agreements, i.e. technology transfer agreements under Article 81 of the EU Treaty, and a block exemption regulation. Thirdly, competition policy regulates cooperative relationships between competitors in joint ventures and multilateral agreements including patent pools, multilateral cross-licensing agreements and standardization agreements. Finally competition policy intervened on occasion to limit IPR owners from acquiring competing technologies as well as requiring compulsory licenses as a condition of merger approval.

If a court thinks an invention for which a patent is being sought would have been made as soon or almost as soon as it was made even if there were no patent laws, it must pronounce the invention obvious and the patent invalid. In the case of Roberts vs. Sears Reobuck & Co. Ponser J, observed that the validity of patent from the perspective of legislation and patent office is different from competition law perspective. From the perspective of competition law, a patent is invalid. In case of Vallal Peruman vs. Godfrey Philips (India) Ltd., it was stated that certification of registration held by an individual or an undertaking invest in him/it, an undoubted right to use trade mark/name etc, so long as the certification of registration is in operation and more importantly, so long as the trade mark is used strictly in conformity with the terms and conditions subject to which it was granted.

The concept of Monopoly, Dominancy and IPRs Market under Article 82

The European Commission's Notice on the definition of the relevant market states that it uses an economic approach to define the relevant market. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumers, by reason of the products' characteristics, their prices and their intended use'. The Commission's practice of defining markets narrowly is not directed solely at IPR owning giants. It is part of wider tendency to regulate essential infrastructures which create dependency relationships or 'lock ins' in 'after markets' such as maintenance markets, spare parts markets, consumable markets and complementary markets. In Hilti vs. Commission, Hilti produced nail guns, cartridges and nails and sold them in a commercial package which it called a Power Activated Fastening System (PAFS). Hilti held a patent for the gun and one for the cartridges strips, but none for the nails. The Commission decided that the relevant market was not the wall construction market in which the PAFS was one product. Instead, it chose to define each part of the package as a separate product and found that there were three separate markets.

Paragraph 8 of the Commission notice defines the relevant geographic market in the following manner:

The relevant geographic market comprises the area in which the undertaking concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

While presenting the goods, and merchandise for sale in the market or for promotion thereof, the holder of the certificate misuse the same by manipulation, distortion, contrivances and embellishment etc, so as to mislead or confuse the consumers, he would be exposing himself to an action of indulging in unfair trade practices. It will, thus be seen that the provisions of the Monopolies and Restrictive Trade Practices Act would be attracted only when there is an abuse in exercise of the rights protected therein. Policies which are subject to shared competences are listed first: internal market, economic and monetary policy, and policies relating to other specific areas (employment, social policy, economic, social and territorial cohesion, agriculture, fishing, environment, consumer protection, transport, Trans-European networks, research and development, energy and space) and to the area of freedom, security and justice. Article 82 of the EU Treaty regulates the conduct of undertakings which have already achieved market dominance. The analysis of abuse under Article 82 involves three stages. First the 'market' in which the alleged abuse occurred must be defined. Secondly, there must be a determination of whether or not the firm allegedly committing the abuse was 'dominant' in a market, whether or not it is in the market in which the abuse occurred. Thirdly, the conduct must be analyzed to determine whether or not an 'abuse' was committed. The judicial interpretation of Article 82 has accepted the principle that monopoly power is not unlawful if it is lawfully acquired. Finally Article 82 confers upon dominant firms, whether IP protected or not, a position of 'special responsibility' not to use their dominant market power ant competitively to further weaken the

already weakened state of competition on markets caused by their dominance. Dominance under Article 82 can take two forms: single firm dominance and joint or collective dominance. The Commission's assessment of single firm dominance starts with an estimation of the markets share of the product in its market, but market shares by themselves are merely the starting point.

For the purpose of understanding the Article 82/IPR interface, it is important to distinguish between two types of single firm dominance: dominance of a market with real competitors existing in that market and dominance in the form of few if any real competitors, i.e. a near monopoly. A firm can, in the first category, be dominant with a market share as low as the 50 percent level and in very unusual cases as low as 40 percent. In extreme case, in the second category, dominance can take the form of a de facto monopoly in which there are no actual competitors in the 'market'. If a firm has a de facto monopoly in a particular market consisting of a near 90-100 percent market share, it is still necessary to see whether there are 'barriers to entry' for potential competitors. One such barrier can be intellectual property protection reinforcing exclusive use of the product by the incumbent firm. The mere existence of an IPR is not presumed to be a barrier to entry. Since a market consists of goods that are substitutes for each other, it is only where the market is a single good market i.e. a market standard, that the IPR constitutes an absolute barrier to entry.

Competition Law in India was the result of the constitutional goal of socio-economic justice & distributive justice and was against the economic concentration. Intellectual Property Rights are conferred by the national laws which clothe them with territorial character. Prior to establishment of WIPO, no coordinating effort was made to harmonize the different approaches of national laws in granting or protecting the intellectual rights. Trade related Intellectual Property Agreement made an influence on the harmonization of intellectual property laws by imposing mandatory obligations on the member states of the WTO to enact national laws in compliance with the standards of protection of the rights by each member at international level on the basis of national treatment, requiring that the same rights should be equally available to nationals as well as foreigners. When the economy and markets were not open for the foreign player the object was to restrict the monopoly & economic concentration but as the situation changed from time to time, law was also changed and the focus has been given to promoting the competition & that to without curbing the monopoly. In neo-liberal order where India is following the concepts of socio-economic justice & distributive justice monopoly in all cases cannot be treated as bad practice. In the era of the globalization the Indian industries has to compete with the foreign players in the market who are well equipped with the economic resources.

The particular monopoly & competition practice is good or bad can be tested on the touch stone of consumers' interest & development of the economy of the country and to draw a balance between monopoly & competition all depends on the better enforcement of such law.

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