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भारतीय प्रतिस्पर्धा आयोग
COMPETITION COMMISSION OF INDIA

ADVOCACY BOOKLET

INTELLECTUAL PROPERTY RIGHTS

UNDER THE COMPETITION ACT, 2002

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This quick guide, based on the work of an expert, is published as part of the advocacy programme of the Competition Commission of India (the Commission). Its contents should, in no way, be treated as official views of the Commission or of its officials. Readers are advised to carefully study the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, and seek legal advice, wherever necessary.

INTELLECTUAL PROPERTY RIGHTS
UNDER THE COMPETITION ACT, 2002

INTRODUCTION

This advocacy booklet addresses the applicability of section 3 relating to prohibition of anti-competitive agreements involving Intellectual Property Rights.

INTELLECTUAL PROPERTY

Intellectual Property can be regarded as a single generic term that protects applications of novel ideas and information that are of commercial value. As per the Competition Act, Intellectual Property includes:

1. Copyright and Related Rights
2. Trade Marks
3. Geographical Indications
4. Industrial Designs
5. Patents
6. Semiconductor Layout-designs of the Integrated Circuits

INTELLECTUAL PROPERTY RIGHTS AND MARKET POWER/DOMINANT POSITION

Intellectual Property Rights (IPRs)) provide exclusive rights to the holders to perform a productive or commercial activity. But this does not automatically include the right to exert restrictive or monopoly power in a market. An Intellectual Property Right generates market power. The potential pejorative character of the power may be unjustifiably great because of public policies like the encouragement of inventions. On the other hand, if investment of resources to produce ideas or to convey information is left unprotected, the competitors may take advantage and benefit by not being obliged to pay anything for what they utilize. This may result in lack of incentives to invest in ideas or information and the consumer may be correspondingly poorer. What is called for is a balance between abuse of market power and protection of the property holders' rights.

Intellectual Property Right lessens competition while competition law engenders competition. A workable solution can be predicated on the distinction between the existence of a right and its exercise. In other words, during the exercise of a right, if a prohibited trade practice is visible to the detriment of competition in the market or consumer interest, it ought to be assailed under the competition law.

INTELLECTUAL PROPERTY RIGHTS IN COMPETITION ACT

The Indian competition law, namely, the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, (the Act) deals with the applicability of section 3 prohibition relating to anti-competitive agreements to IPRs. An express provision [section 3 sub section(5)] is incorporated in the Act that reasonable conditions as may be necessary for protecting IPRs during their exercise would not constitute anti-competitive agreements. In other words, by implication, unreasonable conditions in an IPR agreement that will not fall within the bundle of rights that normally form a part of IPRs would be covered under section 3 of the Act. The Box below reproduces the operative portion of the relevant provision in the Act.

APPLICABILITY OF COMPETITION LAW ON INTELLECTUAL PROPERTY RIGHTS STATUTES

In the Competition Act, 2002, as amended by the Competition Amendment Act, 2007, section 3, sub section 5, clause (i) in chapter II relating to *Prohibition of certain agreements*, states that: -

"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).'

An enterprise, which enjoys dominant position by virtue of the IPR, if it engages in conduct considered abuse in terms of section 4, shall not enjoy any immunity. These abuses are in terms of section 4:

(i) directly or indirectly, imposes unfair or discriminatory condition or price;
(ii) limiting or restricting production of goods or provision of services or market;
(iii) limiting or restricting technical or scientific development to the prejudice of consumers;
(iv) denies market access in any manner;
(v) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
(vi) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

REASONABLE CONDITIONS

Section 3 sub section (5) of the Act declares that "reasonable conditions as may be necessary for protecting" any IPR will not attract section 3. The expression "reasonable conditions" has not been defined or explained in the Act. However, by implication, unreasonable conditions that attach to an IPR will attract section 3. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not reasonable with reference to the bundle of rights that go with IPRs.

For example, a licensing arrangement may include restraints that adversely affect competition in markets by dividing the markets among firms that would have competed using different technologies. Similarly, an arrangement that effectively merges the Research and Development activities of two or only a few entities that could plausibly engage in R&D in the relevant field might harm competition for development of new goods and services. Exclusive licensing is another category of possible unreasonable condition. Examples of arrangements involving exclusive licensing that may give rise to competition concerns include cross licensing by parties collectively possessing market power and grant backs. A few such practices are described below.

1) Patent pooling is a restrictive practice. This happens when the firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing quotas and prices. They may earn supra-normal profits and keep new entrants out of the market. In particular, if all the technology is locked in a few hands by a pooling agreement, it will be difficult for outsiders to compete.

2) Tie-in arrangement is yet another such restrictive practice. A licensee may be required to acquire particular goods (unpatented materials e.g. raw materials) solely from the patentee, thus foreclosing the opportunities of other producers. There could be an arrangement forbidding a licensee to compete, or to handle goods which compete with those of the patentee.

3) An agreement may provide that royalty should continue to be paid even after the patent has expired or that royalties shall be payable in respect of unpatented know-how as well as the subject matter of the patent.

4) There could be a clause, which restricts competition in R & D or prohibits a licensee to use rival technology.

5) A licensee may be subjected to a condition not to challenge the validity of IPR in question.

6) A licensee may require to grant back to the licensor any know-how or IPR acquired and not to grant licenses to anyone else. This is likely to augment the market power of the licensor in an unjustified and anti-competitive manner.

7) A licensor may fix the prices at which the licensee should sell.

8) The licensee may be restricted territorially or according to categories of customers.

9) A licensee may be coerced by the licensor to take several licenses in intellectual property even though the former may not need all of them. This is known as package licensing which may be regarded as anti-competitive.

10) A condition imposing quality control on the licensed patented product beyond those necessary for guaranteeing the effectiveness of the licensed patent may be an anti-competitive practice.

11) Restricting the right of the licensee to sell the product of the licensed know-how to persons other than those designated by the licensor may be violative of competition.

12) Imposing a trade mark use requirement on the licensee may be prejudicial to competition, as it could restrict a licensee's freedom to select a trade mark.

13) Indemnification of the licensor to meet expenses and action in infringement proceedings is likely to be regarded as anti-competitive.

14) Undue restriction on licensee's business could be anti-competitive. For instance, the field of use of a drug could be a restriction on the licensee, if it is stipulated that it should be used as medicine only for humans and not animals, even though it could be used for both.

15) Limiting the maximum amount of use the licensee may make of the patented invention may affect competition.

16) A condition imposed on the licensee to employ or use staff designated by the licensor is likely to be regarded as anti-competitive.

The above list is not exhaustive but illustrative.

PENALTY PROVISIONS

The Commission is empowered to inquire into any unreasonable conditions attached to the IPR agreements and can impose penalty upon each of such right holder or enterprises which are parties to such agreements or abuse, which shall be not more than ten percent of the average turnover for the last three preceding financial years. In case an enterprise is a 'company' its directors/officials who are guilty are liable to be proceeded against and punished.

In addition, the Commission has the power to pass inter alia any or all of the following orders (Section 27):

(i) direct the parties to discontinue and not to re-enter such agreement;
(ii) direct the enterprise concerned to modify the agreements;
(iii) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
(iv) pass such other order or issue such directions as it may deem fit.

In case of abuse of dominant position under section 4 by virtue of an IPR by an enterprise, in addition to the above penalties, the Commission has the power to order division of enterprise under section 28.

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