



**ASSESSING THE COMPLEMENTARY
NATURE OF INTELLECTUAL
PROPERTY RIGHTS AND
ANTITRUST LAWS IN A RAPIDLY
ADVANCING WORLD**

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Abstract: *In a semi developed world, rapidly advancing technology requires a systemic equilibrium of laws which can facilitate judicial regulation. Universally harmonized laws could pave way to malpractices such as patent picketing¹ where the IPR holder of a new technology occupies a rent hoarding position and exercises their patent in protest, selectively working and depriving some countries of their innovation. To combat such scenarios and enhance the industry wide goal of dynamic competition, competition authorities like CCI(Competition Commission of India) and the judiciary need to work in consonance with worldwide judicial developments to keep up with evolving technology and find a robust footing in seas which can otherwise be considered alien.*

Keywords: Intellectual Property Rights , Copyright, Antitrust laws, Competition Commission of India(CCI and DG), the Copyright Act 1957, the Competition Act 2002, TRIPS, unfair trade practices, trademark, semi-developed world, patent picketing, trade secrets.

Introduction

Courtesy of the nature of the circumstance humans thrive in, much of the phenomenon, natural or otherwise that we experience is derivative of democratized stimuli. On the base level every describable human interaction can be abstracted into building blocks of human ingenuity², but those that integrate these building blocks and extrapolate them through their thought and labor into the domain of creative expression are certainly deserving of recognition. Therefore, a copyright is earned by an author through his original work by not only investing his/her “sweat and brow”³ but also by proving their creativity through expression.

Copyright offers limited protection (so as to not allow monopolistic stagnation) for a myriad of novelties that tilt towards the aesthetic side of the expression spectrum and aims to strike a delicate balance between creative incentive and public good. Copyright is an incorporeal right⁴ through which restrictions can be imposed on those who seek to violate the copyright holder’s copyrighted property for their own gain without securing the copyright holder’s assent and consent. As an incorporeal right, a copyright can only protect tangible things much like property. Therefore, abstract ideas cannot be copyrighted⁵.

The Indian Intellectual Property Rights position is overseen by the Copyright Act, 1957, successor of the Indian Copyright Act of 1914, which is in accordance with

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² *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014)

³ *Blackwood And Sons Ltd. And Ors. vs A.N. Parasuraman*, AIR 1959 Mad 410

⁴ Dr JN Barowalia: Commentary on the Right to Information Act, 4th Ed, The Right to Information Act, 2005.

⁵ *Baker v. Selden*, 101 U.S. 99 (1879)



“Trade Related Intellectual Property Rights”. The former is further complemented by the Competition Act, 2002 which finds its basis in a *prima facie* contradictory economic philosophy of antitrust⁶. Alleviating concerns of contradiction, the grundnorm of both these Acts aim to facilitate dynamic industrial competition, which is a necessary component of a free market economy, thereby maximizing consumer welfare.

1. Calculus of Interests in a Technologically Advanced Matrix

In *Sony Corp. v. Universal City Studios*⁷ the perplexing issue of “calculus of interests” arose, where a suit against Sony Corp. was instituted basing the cause of action on the manufacture of VTRs (Video Tape Recorder) by Sony which were used to record copyrighted media of Universal City Studios. The court held that there is no contributory negligence by Sony as there is no constructive knowledge of any such activity, further there are a number of legal uses of VTR which involve no infringement of Universal City Studios copyright, the court also pointed out that contributory infringement can only be justified when a direct infringement is induced or intentionally encouraged. In *Consim info Pvt. Ltd. v. Google India Pvt. And Ors.*⁸ the plaintiff brought a suit against the defendant for wrongfully using the plaintiff’s trademark as registered under Trade Marks Act, 1999 through the Google’s AdWords program (Keyword Triggered Advertisements), the plaintiff also accused matrimonial sites that would come up when the plaintiff’s site was

being displayed through the search engine on the basis of issues like dilution of the trademark, free riding on the coattails (passing off) and likelihood of confusion.

The similarity of the two aforementioned cases lies in the issues regarding justification of liability that is being incurred by the defendants, where Sony’s liability is *prima facie* more non maintainable due to the control factor, the complexity that shrouds Google’s case in the form of technical advancement leaves much to be analyzed. In *Google vs. Guangdong Ganyi Electrical Appliances Co. Limited* a Chinese case, saw Google evading joint-liability on the basis that Google did not possess the ability to check or control the data submitted by the competitor nor did it have an obligation to examine the legality of that information. Operating on the order passed by Madras High Court in the case of *Consim info Pvt. Ltd. v. Google India Pvt. And Ors* confirming Google USA to be a proper defendant, the CCI and its DG in *Consim info Pvt. Limited and another v Google Inc., USA and another*⁹ with respect to their power to review abuse of dominance and the assertion of their jurisdiction over the conduct of firms based abroad having anti-competitive effects in India found Google to not be in contravention of Section 4 of the Competition Act, 2002 due to the lack of necessary analysis brought on record through their investigation. This can be chalked up as a lacunae in the Competition Act, 2002 for it leaves much to the discretion and analysis of the CCI on anti-competitive agreements, a

⁶ BHATTACHARJEA, A. (2010). Of Omissions and Commissions: India’s Competition Laws. *Economic and Political Weekly*, 45(35), 31-37. Retrieved April 9, 2020, from www.jstor.org/stable/25742019

⁷ 464 U.S. 417 (1984)

⁸ 2010 (7) MLJ 497 [LNIND 2010 MAD 4297]

⁹ 2014 Indlaw CCI 34



luxury even countries with far greater experience cannot afford¹⁰.

It is to be noted that CCI's analysis also went against *Rescuecom Corp. v. Google, Inc.*¹¹ a factually similar case where it was held "regardless of whether Google's use of Rescuecom's mark in its internal search algorithm could constitute an actionable trademark use, Google's recommendation and sale of Rescuecom's mark to its advertising customers, are not internal uses" the court went a step further and established that the insulation the rejected logic(internal use) provides the defendants, may in the future present a possibility of corruption where every search engine may design trademark components in a way that would inflict much confusion upon the consumers. The courts due to the infinitely varying circumstances have come up with different tests like the 9th circuit's eighth factor test¹² set forth in *AMF Inc. v. Sleekcraft Boats*¹³.

The European position as represented by *Interflora Inc v. Marks and Spencer*¹⁴ holds the view that keyword advertisement does not lead to copyright infringement on the other hand it can encourage healthy competition as the competitor's product can gain a unique identity as an alternative. Infringement arises when a "well-reasoned and observant" internet user fails to

distinguish between the source of the product and the origins of the product alleging infringement.

2. Abuse of Dominance through Innovation

The decision to favor exclusivity or limiting competition depends on the function (as in a graph) of what the nature of the information being protected is, the duration of its protection, who could be the infringer along with the nature of possible infringement¹⁵. Similar rationale was seen in the controversial inclusion of "relative advantage, by way of the contribution to economic development" clause in the Competition Act, 2002 as a power bestowed upon the CCI which could be manipulated in the favor of large firms to justify blatantly anti-competitive practices in the name of development. The aforementioned clause also seems to draw inspiration from the view of Scandinavian scholars that is, to let right holders benefit from reasonable, rational use of their rights and any intervention should be warranted only after veritable legal scrutiny¹⁶.

A welcome addition to the fairly new Competition act, 2002 is its deviation from "unfair trade practices" which distracted the

¹⁰ The parliamentary committee that reviewed the 2006 amendment bill was well aware of this problem, and directed the government to make suitable amendments to the Consumer Protection Act(Lok Sabha Secretariat, 2006: 54-56) the government's assurances to this effect were not fulfilled.

¹¹ 562 F.3d 123 (2d Cir. 2009)

¹² (1) strength of the mark (2) proximity of the goods (3) similarity of the marks (4) evidence of actual confusion (5) marketing channels used (6) type of goods and the degree of care likely to be exercised by the purchaser (7) defendant's intent in selecting the

mark and (8) likelihood of expansion of the product lines

¹³ 599 F.2d 341 (9th Cir. 1979)

¹⁴ C-323/09

¹⁵ Czapracka, K. A. (2007). Antitrust and Trade Secrets: The US and the EU Approach. *Santa Clara Computer & High Tech. LJ*, 24, 207.

¹⁶ Rahnasto, I. (2003). *Intellectual Property Rights, External Effects, and Antitrust Law: Leveraging IPRs in the Communications Industry*. Oxford University Press.



MRTP commission¹⁷. As seen in *Walker v. Time of Life Films*¹⁸, unfair competition claims based solely in copyright claims can be preempted, but unfair competition claims based on breach of confidentiality, breach of fiduciary duty or trade secrets cannot be preempted¹⁹, and was upheld in *Computer Associates International, Inc. v. Altai, Inc*²⁰ a landmark judgment which enforced the three step method of abstraction, filtration and comparison to distinguish idea from expression in a computer software, which was considered a literary work despite its utilitarian effect, the decision made sure that necessity should render protection to any innovation docile. A similarly deceptive position plagued the CCI commission when they dealt with “unfair trade practices” in *Toyota Kirloskar Motor Private Limited and others v Competition Commission of India and Ors.*²¹ where the DG through investigations found the appellants to be in a dominant position regarding spare parts, COMPAT²² had previously established ancillarisation, network and vendor development to be a natural consequence of setting up an Automobile firm. The findings

of the court led them to believe that the appellants through their conduct had an appreciable adverse effect on competition.

Democracy and market competition both aim to maximize public welfare. In the case of *United Brands v. Commission*²³ The European position on “abuse of dominant position” was clarified, the commission held that a position that is enjoyed by a firm asserting dominance *pro tanto* it behaves in a way that is self-sufficient, independent of the competition and ultimately the consumer itself. The European commission upheld their stance when adjudicating the fairness of the Mc Dornell Douglas and Boeing merger where the merger was rejected in lieu of the facts that it posed certain anti-competitive effects contrary to the commission’s U.S counterpart²⁴. After intense restructuring however the same was approved. The Commission’s Decision of 24.03.2004 relating to a Proceeding under Article 82 of the EC Treaty²⁵ found Microsoft in violation of Article 82 of the EC treaty where the tech giant was “refusing to supply the Interoperability Information and allow its use for the purpose of developing and

¹⁷ Monopolies and Restrictive Trade Practices Commission was established under MRTP act, 1969. The Monopolies and Restrictive Trade Practices Act, 1969 (“the MRTP Act”) stands repealed and was replaced by the Competition Act, 2002, with effect from September 1, 2009.

¹⁸ 615 F. Supp. 430 (S.D.N.Y. 1985)

¹⁹ 17 U.S.C. § 301

²⁰ 982 F.2d 693 (2d Cir. 1992)

²¹ On 09 December 2016, reported in 2014 Indlaw COMPAT 24

²² the Competition Appellate Tribunal's (COMPAT)

²³ [1978] ECR 207, 215

²⁴ Chauhan, B. (2012). INDIAN COMPETITION LAW: GLOBAL CONTEXT. *Journal of the Indian Law Institute*, 54(3), 315-323. Retrieved April 11, 2020, from www.jstor.org/stable/44782475

²⁵ Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.



distributing work group server operating system products” thereby having an adverse effect on competition.

3. Combatting Public Health Concerns by using Externalities to Regulate IPR

“The IP system cannot operate in isolation for broader public policy questions such as how to meet human needs: basic health, food and clean environment”²⁶

Long before the modification of copyright to entertain IPR requests concerning technical advancements, firms big or small used to rely on the trade secret doctrine to protect the edge that their recipes granted them over the competitors²⁷. The nature of trade secrets has since accrued much deliberation, some legal scholars even comparing them to private property rights, in India the nature of trade secrets is prospectively enclosed in a legislation that has not yet been fleshed out “the National Innovation Act, 2008”. Secrets that would no longer remain so due to employee malfunction could then be protected through the doctrine of “Law of Confidence” as seen in *Computer Associates International, Inc. v. Altai, Inc.*, but the need of the hour suggests that externalities should guide certain IPR affairs which directly affect competition

(“adverse effect on competition”) or a domain of subjectively far greater relevance, public health.

Regulatory data protection seeks to provide firms of those pharmaceuticals which are required by law to undergo meticulous clinical and on field trials to ensure the efficacy and safety of their product²⁸, which can be considered an incentive to encourage further research. The same firms after gaining market exclusivity aim to remunerate themselves through extravagant pricing, which the common man who is also in need of their product can rarely afford. On the other hand the lack of this exclusivity period could de-incentivize research and stifle innovation. The proposed solution could be government funding of clinical trials²⁹, as even relatively advanced countries have agreed to their being no fixed general rule to be applied to all IPR matters³⁰, tampering with current TRIPS qualified law could call for unprecedented problems in many sectors. The solution lies in externalities like competition law³¹.

Para 6 of the DOHA declaration of 2001 which includes in its discourse a humanitarian policy which states that public health shall always supersede private interests guarded by patent protection when it comes to life threatening diseases, was met with the declaration of the TRIPS council in August of 2003 which resulted in the

²⁶ By Pascal Lamy(Director General WTO)

²⁷ Carroll, A. (2014). For God, Country & Coca-Cola: The Definitive History of the Great American Soft Drink and the Company That Makes It. The Company departed from India rather than hand the sacred formula to the insistent government.

²⁸Fellmeth, A. X. (2004). Secrecy, monopoly, and access to pharmaceuticals in international trade law: protection of marketing approval data under the TRIPS Agreement. *Harv. Int'l LJ*, 45, 443.

²⁹ Press Release, HIV/AIDS infected children can now benefit from a European and Developing Countries Clinical Trials Partnership-funded trial, European and Developing Countries Clinical Trials Partnerships, IP/07/1336 (Sept. 14, 2007)

³⁰ Czapracka, K. A. (2006). Where antitrust ends and IP begins-On the roots of the Transatlantic clashes. *Yale JL & Tech.*, 9, 44.

³¹ Gopalakrishananet, N.S (2005). Study on Test-data Protection in India, CUSAT(This study was later published as a book by the Eastern Book Company).



formation of a policy aimed to provide effective patent protected medicine to developing countries at affordable costs, but the lack of adequate technology required to effectively manufacture these patented medicines by the importing countries made this policy extremely cumbersome to implement, which indirectly resulted in a more docile form of patent picketing³². The TRIPS council meeting in 2009 saw member nation India making cogent arguments regarding the need of a practical, legal and operational policy to effectively implement provisions enclosed in para 6 of the DOHA declaration, due to India's insufficient technical faculty to fully utilize the compulsory licensing system. A similar problem was faced by member nation Canada³³.

Non-working patents, or patents that are registered in a specific region which are not being worked locally; are a source of significant nuisance and stifle local development in particular and global development in general. These types of patents cloud a developing country in a non-permeable membrane which blocks dissemination of essential knowledge which in turn leads to a lack of advancement of the product being protected by the non-workable patent. Non-working patents have been historically considered an IP abuse, however in a global setting favoring free trade

regulations the final word regarding abuse is heard by the agent of harmonization in a semi developed world, TRIPS, which is silent regarding the issue. This is where antitrust laws come in, when patents picket countries can make the products they are protecting a subject of compulsory license³⁴. Compulsory license regulations therefore could level the playing field as seen in the case of *Bayer Corporation v. Union of India through The Secretary and Others*³⁵. Nexavar, Bayer's patented drug was not being worked locally and hence became a subject of India's first compulsory license. Compulsory licensing is however an exception and should be used rarely or in a situation that warrants such reaction³⁶.

In a recent turn of events a slightly erroneous interpretation of 'trade secrets' in Prof. *Dr. Claudio De Simone & Anr. Vs Actial Farmaceutica*³⁷ has hurt the fabric of patent law, it is common knowledge that when a patent expires the innovation being protected by the patent belongs in public domain, and no trade secret protection can be afforded. The court observed that 'know how' agreements and trade secrets cannot be equated to property in India. Different procedures of innovation are protected differently and many scholars consider trade secrets and patents to be complementary, as patents require a patent to fully disclose its innovation including the best mode, certain

³² The confusion on the issue of importation is justifiable. Article 5(A)(1) of the Paris Convention provided the importation of patented articles by the patentee shall not entail forfeiture of the patent. This was done to move on-working patents from the greater threat of revocation to the lesser threat of non-voluntary licence. Reichman, J., & Hasenzahl, C. (2003). Non-voluntary licensing of patented inventions. *City: Geneva, ICTSD and UNCTAD*. The TRIPS Agreement is however silent over this issue.

³³ Nair, M. D. (2009). TRIPS, WTO and IPR-DOHA Round & Public Health.

³⁴ Ali, F. (2016). PICKET PATENTS: NON - WORKING AS AN IP ABUSE. *NLSIU Bangalore - Indian Journal of Law and Technology*.

³⁵ LNINDORD 2013 IPAB 93

³⁶ Merges, R. P. (1994). Of property rules, coase, and intellectual property. *Columbia Law Review*, 94(8), 2655-2673.

³⁷ 17 March, 2020 IN THE HIGH COURT OF DELHI AT NEW DELHI



ways are therefore protected through trade secrets as seen in *Wyleth v. Natural Biologics Inc*³⁸, even after expiration of the patent of the patented drug, the manufacturing process of the drug was protected through trade secrets. The failure of disclosing the best mode of an innovation in its patent cannot render the trade secret (best mode) to be in public domain on expiration of the patent. This instance is testimony to the existence of a multifaceted system of rights, the *sine qua non* of which lies in balance.

4. Conclusion and Recommendations.

India as it currently stands is a developing country in a semi developed world, and has enacted laws in accordance with harmonizing treaties like TRIPS. Bottlenecks are a common phenomenon, when some components of a working system are relatively underdeveloped (IPR) and hold it down hindering it from achieving its maximum potential; to alleviate this problem surrounding components (Competition laws, Antitrust laws) and the machinery itself (judiciary) is upgraded rather than concentrating all efforts on the defaulting component as the aphorism "*a rising tide lifts all boats*" aptly suggests. In the field of IPR our judiciary often finds itself chasing new grounds, authorities like the CCI and foreign precedents level the playing field by lending their expertise to help strike a delicate balance between private incentive and public good and help achieve industry wide dynamic competition in a technologically advancing world. Interpreting IPR laws in isolation could lead to the formation of "*a*

discredited intellectual property system which risks collapsing under its own weight"³⁹.

Recommendations include:

- An efficient framework which includes in its discourse outsourcing to more techno savvy firms for research, or the formation of an advisory board which can advise the DG on ongoing investigations.
- A comprehensive legislation regarding definitions of "trade secrets" which leaves relatively less on the discretion of a wide variety of courts.
- Government funding of clinical trials to help come midway with private firms for the sake of public good.
- Careful examination of alleged patent abuse cases, to prevent anti-competitive practices like over-protectionism and protect the competition in the market more than the competitors.
- To shed light on the complementary nature of trade secrets and patents, and the importance of their coexistence for big firms with the help of foreign precedents.
- Working on an international reference point for conventions and authorities to render their behavior amenable to the needs of the semi developed world keeping in mind their shortcomings.
- Compulsory licensing to be used as a rarity which warrants the existence of exceptional circumstance, and to not let the legal device become an instrument of overuse and eventually malpractice.

³⁸ 2003 U.S. Dist. WL 22282371

³⁹ Ghidini, G. (2006). *Intellectual property and competition law: the innovation nexus*. Edward Elgar Publishing.