Lakshmikumaran
& Sridharan
attorneys

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Interface between Competition Law and Intellectual Property Laws

INDIAN PERSPECTIVE

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4 Introduction

7 1. Horizontal and Vertical agreements involving IPRs

9 2. License Agreements

2.1 Potential Competition related Issues in Licensing

2.2 Scope of the IPR exemption under Section 3(5)

2.3 Indian Jurisprudence on Licensing of Standard Essential Patents

2.4 Refusal to grant IP License

17 3. IPRs as a defence against abuse of dominance

18 4. Excessive pricing

18 5. Implications of Merger Control

INTRODUCTION

The legal regimes of competition law and Intellectual Property Rights (IPR) are often termed as '*friends in disagreement*'. Although they envisage different ideals in theory, in practice, they work in tandem to ensure static and dynamic efficiency in the market, and contribute towards consumer welfare.

From a commercial perspective, one may try to imagine that competition law seeks to draw a line between permissible business strategies and abuse of IPRs. When and how is line is crossed is often an issue. On the one hand, IPRs may be considered as government-sanctioned monopolies created to foster innovation/consumer protection and therefore, too early interference from competition law disciplines would undo the very purpose behind granting IPRs. On the other hand, too late interference from competition law, certain IPR related conduct may cause more harm to competitive conditions than it in the market than it fosters innovation/consumer protection.

Internationally, the interface between IPR and competition is governed under the Trade related aspects of intellectual property rights (TRIPS) Agreement. Pursuant to the general considerations in paragraph 1 of the TRIPS preamble, read with Article 8(2) of the TRIPS Agreement, Members are allowed to take appropriate measures consistent with the TRIPs to prevent the abuse of intellectual property rights by rights holders. Article 31 of TRIPs provides for the grant of compulsory licenses, under a variety of situations, which include:

- The interest of public health;
- National emergencies;
- Nil or inadequate exploitation of the patent in another country (under the famous 'Doha' declaration);
- Anti-competitive practices by the patentees or their assignees; and
- Overall national interest.

Article 40 of the TRIPS Agreement deals with anti-competitive practices in contractual licenses and allows Members to adopt, consistently with the other provisions of the Agreement, appropriate measures such as exclusive grant-back conditions, conditions preventing challenges to validity and coercive package licensing in-order to prevent or control restrictive licenses which have adverse effect on competition. In addition, Article 30 of the TRIPs also permits Members to create limited exceptions to patent rights and given the specific reference to 'abuse' in Article 8 of the TRIPs, One can also consider Article 30 to be relevant provision enabling Members to address abusive practices in acquiring and exploiting IPRs.

Indian law recognises that limited monopolies granted by IPRs are not per se anticompetitive or excessively exploitative; however they may take anticompetitive flavours when the IPR holder looks to extend those rights beyond their intended and proper scope or when such monopolies artificially divide markets among enterprises and possibly impedes the development of new goods and services.

Overview of Legal Provisions

The legal interface between the competition regime and IPR is set out under section 3(5) of the Competition Act, 2002 ("Act"). The provision states as follows:

3. Anti-competitive agreements

(5) 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);***

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

(Emphasis Supplied)

A bare reading of the aforesaid section indicates that the competition regime in India provides ensures that the Act does not intend to interfere with the regular exercise of the rights conferred and protected under different IPR statutes. The modern position differs from the previous competition regime under the Monopolistic and Restrictive Trade Practice under MRTP Act, 1969.

It is an established position of law that Section 3(5) does not simply remove the CCI's jurisdiction over IPR related cases[1]. While Competition law does not bar application of other laws[2], the Act also has an overriding effect over other legislations for the time being in force.[3]

The jurisprudence on the substantive issues of interface between IPR and competition law in India is relatively nascent. Beginning with the later part of 2013, there have been determinative rulings of the CCI which elaborate upon the relationship between competition and IPR and set out the conditions in which provisions of Competition Act, 2002 may stand violated. In this note, the key rulings of CCI have been discussed under the following heads:

1. Horizontal and Vertical agreements involving IPRs
2. IPRs as a defence against abuse of dominance
3. Terms of license agreements and fixing royalty rates

[1] *Amir Khan Private Limited v. Union of India, 2010(112)* Bom LR3778

[2] Section 62, Competition Act, 2002

[3] Section 60, Competition Act, 2002

HORIZONTAL AND VERTICAL AGREEMENTS INVOLVING IPRs

1

In *M/s HT Media Limited v. M/s Super Cassettes Industries Limited*,[4] the CCI was seized with the price and conditions of license upon FM radio stations, for them to play the copyrighted music owned by music producers. The CCI held in that case that requiring private FM radio stations to contractually pay a minimum guarantee (Minimum commitment charges), is anti-competitive as it forecloses other competitors from a substantial share of the market. CCI's reasoning was premised on the ground that since the private radio station is contractually bound to pay the music creators/producers a minimum guarantee, they are more likely to broadcast the amount of music for which they have paid a pre-fixed price. This would inevitably result in other competitors in the music industry not being able to compete for and being foreclosed from broadcasting their music on this prefixed play-out of which 30-50% was reserved already.[5]

The CCI had another occasion to elaborate upon the interpretation and application of Section 3(5) in the recent *Automobiles* case.[6] The case pertained to anti-competitive practices of car manufacturers with respect to the sale of their spare parts, besides, rendering after-sale automobile maintenance services. The CCI order rebuked these practices of the car manufacturers. Although this order is under appeal and review, the CCI's decision did clarify the following:

Scope of Section 3(5)

i. The CCI also clarified that the IPR must have been conferred on the holder prior to the exception being availed. CCI stated that protection ought to have been granted or a process ought to have been initiated for grant of such protection under the relevant IPR statutes in India.[7]

ii. The CCI's order does not address the issue of 'trade secret' and their treatment under the Competition Act, 2002. The Director General's Report pointed out that since 'trade secret' does not find a mention in Section 3(5), it ought not to be protected; the car manufacturers, on the other hand, contented that trade secrets should be conferred protection under established principles of common law.[8] This remains a grey area of law in India, especially when Section 3(5) of the Act protects rights 'conferred' upon by specific statutes. Since, trade secrets protection in India is not governed by any specific statute it prima facie is excluded from protection

[4] Case No. 40 of 2011, decided on October 1, 2014

[5] Ibid, Paragraph 206

[6] *Shri Shamsher Kataria v. Ors.*, Case No. 03/2011, 25 August 2014 (Automobiles Decision)

[7] Paragraph 20.6.16, Automobiles Decision

[8] Paragraphs 3.9.30 & 18.27, Automobiles Decision

under Section 3(5) of the Act as well. Nonetheless, an argument can be made that even outside the scope of Section 3(5), the existence of 'trade secrets' and their protection could be a relevant factor in assessing 'appreciable adverse effect on competition, especially since the Supreme Court has recognised reasonable protection against exploitation of trade secret.[9]

iii. The CCI emphasised upon the need to produced sufficient documentary evidence in-order to successfully establish the grant of applicable IPR in India.[10] E.g. in this case, car manufacturers were obligated to provide documents to establish their claim, i.e. registration/application details of their designs, patents and how they correspond to specific spare parts, in order to enjoy protection under section 3(5).

'Necessary for protecting'

i. The CCI has created a very strict standard for what is 'necessary' to protect IPRs. The CCI opined that merely selling spare parts which are manufactured end products, does not necessarily compromise the IPR held by car manufacturers in such products. In the CCI's words, car manufacturers could contractually protect their IPR as against these dealers and could still permit them to sell their products.[11]

'Public good element'

i. As per the CCI order, access to spare parts and diagnostic tools cannot be restricted due to greater public good.[12] The CCI took account of the fact that once a vehicle was purchased, there is a clear anticipated need for spare parts and servicing. One may perceive this to be akin to the essential facilities doctrine applied in the EU. Under EU law, refusal to give third parties access to essential facilities could constitute an abuse of dominant position, contrary to Article 82 (now 102 of the EC Treaty). Such 'essential facility' may be in the nature of products such as raw material, am IPR, a service, information, infrastructure or access to a physical place; telecommunication network or software interface.[13]

Therefore, companies must be cautious to foreclose access to certain goods which are essential in nature, as even an IPR protection may not cloak them in case a CCI investigation is initiated.

[9] *Niranjan Shanker v. Century Spinning & Manufacturing Co.,* (1967) 2 SCR 378

[10] Paragraph 20.6.16, Automobiles Decision

[11] Paragraph 20.6.21, Automobiles Decision

[12] Paragraph 26.6.28, Automobiles Decision

[13] Lang, J. (2005) "The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law" in Antitrust, Patents and Copyrights, EU and US Perspectives, Leveque, F. and Shelanski, H (eds.), p. 62

LICENSE AGREEMENTS

2

Licensing is usually considered to be pro-competitive as it enables the licensee to combine complimentary factors of production, reduce transaction and production costs and reduces the risk of free riding by others. Horizontal licenses, however, may raise certain competitive concerns as parties may use these to conceal collusive behaviour such as market division.

Without getting into too many technicalities at this stage, the Licensing guidelines issued in the US[14] suggest that restrains on use of licensed technology in a licensing agreement (which is not in the course of a merger) is considered to be within the antitrust "safety zone" if:

i. The combined market share of license and licensee is not more than 20%, they are; and

ii. The restraint in question is not '*per se*' anticompetitive.

The above "safety zone" is not a conclusive rule; rather, it provides a degree of certainty to market players that in such situations, absent extraordinary circumstances, restraints placed on the use of licensed technology would not be challenged. This also means that license agreements that are outside this "safety zone" may nonetheless be considered pro-competitive on facts. The European Union has achieved similar results with its Technology Transfer Block Exemption.

Under the Indian law, no specific guidelines have been set out by the CCI dealing with the issue of technology licensing and there are no explicit "safety zones" prescribed. However, the structure and tenor of Section 3 of the Act also suggests a dual-approach, though the duality lies in the manner in which burden of proof is allocated. In some instances, the law presumes that the arrangement is anticompetitive, placing the burden on the parties to prove otherwise. In other instances, the burden lies on the authorities, i.e. the Director-General ("**DG**") and the CCI to prove that the arrangement is anticompetitive. In addition, under Section 3(5) Act, 'reasonable conditions... necessary for protecting' any intellectual property right or conditions placed to prevent infringement, will not attract Section 3. This explicit exception in Section 3 differentiates the Indian position.

[14] Antitrust Guidelines for the Licensing of Intellectual Property, Issued by the Department of Commerce and the Federal Trade Commission, April 6, 1995, available at http://www.justice.gov/atr/public/guidelines/0558.htm

2.1 Potential Competition related Issues in Licensing

The following licensing practices below indicate an illustrative list of the conditions that are likely to raise concerns under competition law:

- Patent pooling whereby firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties and at the same time, fix quotas or prices.
- A tie-in agreement whereby a licensee may be required to acquire particular goods solely from the patentee, thus foreclosing the opportunities of other producers.
- Agreement providing that royalty should continue to be paid even after the patent has expired or royalties shall be payable in respect of unpatented know-how as well as the subject matter of the patent.
- Clause restricting competition in R&D or prohibiting a licensee to use rival technology.
- Subjecting a licensee to a condition not to challenge the validity of IPR in question
- Requiring the licensee to grant back to the licensor any know-how or IPR acquired and not to grant licenses to anyone else.
- Fixing the price at which licensee should sell.
- Licenses requiring payment based on total sales (regardless of the use of the licensed IPR)
- Restricting the licensee territorially or according to categories
- Coercing the licensee to take several licenses in intellectual property even though the former may not need all of them.
- Imposing condition of quality control on the licensed patented product beyond those necessary for guaranteeing the effectiveness of the licensed patent.
- Restricting the right of the licensee to sell the product of the licensed know-how to persons other than those designated by the licensor.
- Imposing a trade mark use requirement on the licensee
- Indemnification of the licensor to meet expenses and action in infringement proceedings

- Putting undue restriction on licensee's business. For example, 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.
- Limiting the maximum amount of use the licensee may make of the patented invention
- Imposing a condition of the licensee to employ or use staff designated by the licensor
- Cross licensing (i.e. inter-change of IPR between two or more people) if the technologies licensed are substitutes rather than being complementary in nature.

Depending on the nature of the restraints in question, the CCI will either presume them to be anti-competitive or investigate whether such restraints are causing appreciable adverse effect on competition in India.

2.2 Scope of the IPR exemption under Section 3(5)

Section 3(5) does not give protection to unregistered intellectual property rights such as unregistered trademarks or trade secrets. With respect to registered intellectual property rights, the language of Section 3(5) suggests that it contains two different exceptions - *first*, right to restrain infringement of the relevant IPRs; and second, the right to impose reasonable conditions to protect the rights conferred by the relevant IPR legislations mentioned in Section 3(5) of the Act.[15] The expression "reasonable conditions" has not been defined or explained in the Act and it has to be decided by the CCI, on a case to case basis. In *Multiplex Association case*[16], for instance, the movie producers argued that the decision to not release any movies was reasonable to protect their copyright in the movies and thus valid under Section 3(5). The CCI held that intellectual property laws do not have any absolute overriding effect on competition law. It was held that the Act exempts the provision with respect to anti-competitive agreement in only limited circumstances i.e. to protect the rights conferred by the relevant IPR statutes.

The above decision suggests that what is reasonable or unreasonable would depend on the facts and circumstances of each case. Logic and common sense command a similar factual analysis. The provision appears

[15] CCI emphasised upon the need to produced sufficient documentary evidence in-order to successfully establish the grant of applicable IPR in India

[16] FICCI – *Multiplex Association of India v United Producers Distributors Forum and others*, Case No. 1 of 2009 decided on 25.05.2011

to be intended as a balancing act between the exercise of exclusivities guaranteed by various intellectual property legislations and the maintaining a fair/competitive market. Such a 'balancing' act necessarily implies that the standard/test to be applied cannot render either of the legislations ineffective or inutile. While this does provide very clear ex ante guidance, the CCI in their advocacy measures[17] has provided an illustrative/indicative list of practices (similar to the one mentioned above) that may be unreasonable under Section 3(5):

- Exclusive licensing arrangements, such as exclusive cross-licensing (with grant backs) by parties collectively possessing market power.
- Patent pooling, where enterprises decide to pool their patents and agree not to grant licenses to third parties, and at the same time, fixing quotas and prices.
- Forcing licensees to acquire particular goods (unpatented materials e.g. raw materials) solely from the patentee, thus foreclosing the opportunities of other producers. This implicates a tie-in arrangement.
- Payment of royalty beyond patent expiry.
- Clause restricting competition in R&D/prohibiting use of rival technology.
- Subjecting a licensee to the condition that the validity of IPR in question cannot be challenged.
- Exclusive grant-back arrangements, where a licensee may be required to exclusively grant back to the licensor, any derivative know-how or IPR.
- A licensor may fix the prices at which the licensee should sell.
- The licensee may be restricted territorially or according to categories of customers.
- 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 coercive package licensing.
- A condition imposing quality control on the licensed patented product beyond those necessary for guaranteeing the effectiveness of the licensed patent.
- 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 in violation of competition.
- 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.

[17] See Advocacy Booklet – Intellectual Property Rights under the Competition Act, 2002 available at http://competitioncommission.gov.in/advocacy/PP-CCI_IPR_7_12.pdf

- Indemnification of the licensor to meet expenses in infringement proceedings is likely to be regarded as anticompetitive.
- Undue restriction on licensee's business, such as by way of field of use restrictions.
- Limiting the maximum amount of use the licensee may make of the patented invention.
- A condition imposed on the licensee to employ or use staff designated by the licensor.

Interestingly, the Patents Act, 1970 explicitly prohibits certain licensing arrangements under Section 140. These may be summarized as below:

- Requiring the licensee to acquire from the licensor or his nominees, or to prohibit from acquiring or to restrict in any manner or to any extent his right to acquire from any person or to prohibit him from acquiring except from the licensor or his nominees, any article other than the patented article or an article other than that made by the patented process;
- Prohibiting the licensee from using or to restrict in any manner or to any extent the right of the licensee, to use an article other than the patented article or an article other than that made by the patented process, which is not supplied by licensor or his nominee;
- Prohibiting the licensee from using or restricting in any manner or to any extent the right of the licensee to use any process other than the patented process;
- Mandating exclusive grant back;
- Preventing challenges to validity of Patent; and
- Coercive package licensing

The Patent Act, 1970 declares these conditions void and in principle, therefore, not within the scope of patent rights. In such cases, the exemption under Section 3(5) of the Competition Act, 2002 will not come to the rescue of the licensing parties.

2.3 Indian Jurisprudence on Licensing of Standard Essential Patents

The validity of the terms under a license agreement on Standard Essential Patents (SEPs) and fixing of royalty rates for such SEPs came under CCI's scanner in 2013. It must be pointed out herein that while SEP has immense benefits, it is vulnerable to abuse of market power that it confers upon the SEP holder. In two cases instituted against the same licensor, CCI determined that *prima facie*, the proposed license terms were unfair & discriminatory.[18] The key implications of these cases include:

i. In a license agreement covering SEPs, the licensor cannot charge different royalty rates or offer different commercial terms to licensees belonging to the same category. In this light, CCI condemned the Non-disclosure agreement which the licensor imposed upon the licensee based on which the licensee could not investigate into the unfairness of the terms of the license vis. other potential licenses.[19]

ii. The royalty rates charged by Ericsson had no linkage to patented product since the technology resided only within the chipset but the Ericsson calculated its royalty on the retail price of the entire phone. Therefore, while the technology remained the same, the royalty may vary for two manufacturers based on the pricing of their phones. Thus increase in the royalty for patent holder was without any contribution to the product of the licensee. Charging of two different license fees per unit phone for use of the same technology prima facie was held to be discriminatory and also reflected excessive pricing vis-à-vis high cost phones.[20]

iii. Furthermore, licensor may not impose upon the licensee clauses, such as a jurisdiction clause, debarring licensee from having disputes adjudicated in India (where both parties carry on business) and vesting jurisdiction in a foreign land prima facie. Such clauses represent abuse of dominance on part of the licensor.[21]

Finding the actions to be prima facie anticompetitive, the CCI directed the DG to initiate an investigation. Quite interestingly, the orders in this case were passed under Section 4 of the Act, i.e. provision with respect to abuse of dominant position which does not have an exemption of IPRs similar to Section 3(5).[22] However, this does highlight that royalty rates in actual license agreement covering SEPs, will be judged on similar standards.

[18] Case No. 50/2013, *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson* (Publ), 12 November 2013 & (Micromax-Ericsson); Case No. 76/2013, *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson* (Publ), 16 Jan 2014 (Intex-Ericsson)

[19] Micromax-Ericsson, Paragraph 17

[20] Micromax-Ericsson, Paragraph 17

[21] Intex-Ericsson, Paragraph 17

2.4 Refusal to grant IP License

Discussions on competition issues in licensing cannot be complete without discussing the competition issues in not licensing. After all, it is possible that market players could refuse to license their technology, thereby causing appreciable adverse impact on competition in India. An appropriate relief in this case would be to force the holder of the technology to license the same, which would be something akin to compulsory license ("**CL**"). Such refusals, when limited to decisions of a single entity would have to be examined under Section 4, though where the refusals involve multiple entities, i.e. 'group boycott', the examination may proceed under both Sections 3 and 4 of the Act.

Complications abound in this area not only because of lack of any guidelines from the CCI, but also because this is a subject matter addressed in certain intellectual property legislations. For instance, under Section 84, Indian Patents Act, 1970, the Controller of Patents has the power to grant compulsory license, after expiry of three years from grant of patent, in case the patented invention does not meet the 'reasonable requirements of the public', or is 'not available to the public at a reasonably affordable price' or 'is not worked in the territory of India'. Very recently in 2012, in an order that was upheld on appeal, the Controller of Patents granted a compulsory license to Bayer's patent covering a cancer drug to a generic Indian drug manufacturer on all three grounds.[23]

The Copyright Act, 1957 contains similar provisions, though of a narrower scope. Compulsory license may be issued pursuant to Section 31(1)(b) of the Copyrights Act, 1957. It may be issued when the Copyright Board is satisfied that the copyright owners have refused to allow communication to the public and such refusal is not reasonable. This provision extends only to certain type of copyrighted works and not all. Recently, in *Music Broadcast Pvt Ltd v. Phonographic Performance Limited* (2010 decision), the Copyright Board, in a much controversial decision, issued compulsory license to musical works in favour of the FM radio industry on a revenue sharing model, i.e. 2% of the net advertisement earnings of each FM radio station would be set aside to pay the music providers.[24]

Other intellectual property legislations do not carry such explicit provisions. Given these explicit legislative mechanisms under specialized intellectual property regimes, there are potential issues arising from such legislative overlaps. Whether the existence of such specialized compulsory license

[22] The CCI has observed that that unlike Section 3(5), there is no exception to section 4(2) of the Act. Therefore, if an enterprise is found to be dominant pursuant to Explanation (a) to Section 4(2) and indulged in practices amounting to denial of market access; it is no defense to suggest that such exclusionary conduct is within the scope of their intellectual property rights

[23] *Natco Pharma v. Bayer Corporation,* Controller of Patents Mumbai, March, 2012 available at: http://www.ipindia.nic.in/iponew/compulsory_license_12032012.pdf; *Bayer Corporation v. Union of India & Ors.,* IPAB, Chennai, 4 March 2013, available at: http://www.ipab.tn.nic.in/045-2013.htm

[24] *Music Choice India Pvt Ltd v. Phonographic Performance Limited,* Copyright Board (Second Order), 2010

regimes would impliedly restrict the powers of the CCI is an unanswered question. One must note that competition authorities in foreign jurisdictions have granted CL under the competition provisions of their respective statutes, notwithstanding similar provisions in IP laws.[25] Thus, one may arguably make a case for the grant of CL under the provisions of Act. Though the jurisprudence in this regard is still evolving, in the coming days, the CCI would inevitably grapple with these questions. It would be a test of time to see whether the CCI would attempt to adopt the factors considered by the relevant IP authorities and fit them within the scope of the Act, or whether the CCI would distance itself from such factors and instead assess the issue under other factors. Of course, the CCI also has the option to refer such matters to relevant IP authorities under Section 21A of the Competition Act, 2002. Only time will provide clear answers to such questions.

On the other hand, under the EU law, while IP holders do not have a general obligation to license their intellectual property rights to competitors, the European Court of Justice (ECJ) has opined that in 'exceptional circumstances', such refusal could result in an abuse of dominance. Such exceptional circumstances include- refusal relating to a product/service that is indispensable to the exercise of a particular activity on a neighbouring market; refusal of a kind so as to exclude any effective competition on that neighbouring market; and refusal preventing the appearance of a new product for which there is potential consumer demand.[26] In such circumstances, unless otherwise objectively justified, such refusal amounts to an abuse of dominance. These conditions were further reiterated in *IMS Health*, where a refusal to license IP rights was held to amount to an abuse when a competitor wishes to produce new goods or provide new services on a neighbouring market using such IP for which potential consumer demand existed.[27] This is more popularly known as the "essential facilities" doctrine and where these conditions are satisfied, the refusal to license such an essential facility would constitute an abuse of dominant position. Such 'essential facility' may be in the nature of products such as raw material, an IPR, a service, information, infrastructure or access to a physical place; telecommunication network or software interface.[28]

There has been some traction to this doctrine in the CCI so far. In a few of its decisions, the CCI appears to have endorsed the applicability of the "essential facilities doctrine" under Section 4 of the Act. However, these decisions do not have seem to have discussed in detail, the scope of application of this doctrine. One cannot state with legal certainty that the "essential facilities" doctrine is the only basis on which an entity's refusal to license its intellectual property would amount to an abuse of dominance.

[25] Survey on Compulsory Licenses granted by WIPO Member States to Address Anti-Competitive uses of IPR, CDIP/4/4 Rev/STUDY/INF/5

[26] Radio Telefis Eireann v. Commission, 1991 ECR II-485, Paragraphs 52-56

[27] Case 418/01, IMS Health GmbH & Co OHG v. NDS Health GmbH & Co KG, [2004] ECR I-5039, Paragraph 49

[28] Lang, J. (2005) "The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law" in Antitrust, Patents and Copyrights, EU and US Perspectives, Leveque, F. and Shelanski, H (eds.), p. 62

IPRs AS A DEFENCE AGAINST ABUSE OF DOMINANCE

3

It is clear from the face of the legislation that the 'safe harbour' contained in Section 3(5) of the Act applies only to the prohibition under Section 3 and practices covered under Section 4. This has been confirmed by the CCI's most recent order in the *Automobiles* decision rendered on 25 August 2014, mentioned earlier.[29] The CCI noted that unlike Section 3(5), there is no exception to section 4(2) of the Act. Therefore, if an enterprise is found to be dominant pursuant to Explanation (a) to Section 4(2) and indulged in practices amounting to denial of market access; it is no defence to suggest that such exclusionary conduct is within the scope of their intellectual property rights.[30]

The language used by the CCI's decision, which is currently under appeal and review, suggests that the existence of IPR is completely irrelevant to the analysis under Section 4. Nonetheless, the approach taken by the CCI is questionable. If the very grant and exercise of rights ordinarily associated with IPRs is considered an 'abuse', this would render the very grant of such rights redundant. This takes away any meaning from Section 62 in the Act, which states that the Act is intended to apply in conjunction with other legislations. At the same time, the presence of an intellectual property right cannot also be considered as granting immunity from the rigours of Section 4 of the Act. This takes away the meaning ascribed to Section 60 of the Act, which states that the Act will apply notwithstanding any inconsistency with other legislations. The presence of both provisions only suggests that an attempt must be made to *balance* the exercise of IPR exclusivities on the one hand and competitive behaviour on the other an ensure that the market participants are acting in a manner which does not cause an appreciable adverse effect on competition in India .

[29] *Shri Shamsher Kataria v. Ors.*, Case No. 03/2011, 25 August 2014 (Automobiles Decision)
[30] Paragraph 20.5.85, Automobiles Decision(Automobiles Decision)

4 EXCESSIVE PRICING

In *M/s HT Media Limited v. M/s Super Cassettes Industries Limited*, discussed earlier, the CCI also dealt with the question of ascertaining whether a licensing price amounts to 'excessive pricing' on account of the licensor. The CCI mentioned in that decision that an analysis of cost data is required. The cost data analysis would include cost of a sound recording which is reflected in the acquisition price paid as 'royalty' to the owners or 'recording expenses' if music is developed in-house. Furthermore, certain sound recording may be extensive to acquire but the music may turn out to be flop, and vice-versa. Such factors must also be accounted for, while determining the licensee fee. Therefore, a case of excessive pricing ought to take these indices into account, and a mere claim that a higher price is being charged by a licensor vis. its competitors may not suffice a claim.[31]

5 IMPLICATIONS OF MERGER CONTROL

Technology transfer agreements and other acquisition of IPRs may require the approval of CCI. This must be done pursuant to Sections 5 and 6 of the Act. The regulation may apply even in cases of purely overseas transaction which is characterised by some Indian assets for one of the parties.[32]
In January 2013, CCI investigated and approved the acqusition by SAAB, a Swedish technology investor of shares of Pipavav, an Indian shipbuilding construction company.[33] CCI noted that there was a strategic technical partnership agreement in place, which ensured that the parties jointly bid for projects and prevent misuse of intellectual property with respect to the projects. Further, SAAB had the right to appoint one nominee director on the board of Pipapav. The CCI held that this investment (although the investment was only of 3.329%) was a strategic investment and hence, the trasnaction was to be notified to the CCI, for approval. It is vital to note that non-notification in cases of such mergers may lead to imposition of penalty of 1% on the annual tunrover of the parties or assets, whichever is higher.[34]
Similarly, one has to get requsiite guidance to ensure that Therefore, gun-jumping without due notification and furnishinhg of requisite information to CCI is prohibited under Section 43A of the Act.

Therefore, when the companies wish to enter into technology transfer agreements, such transaction must be reviewed from a competition law perspective to check whether such transaction will require the approval of the CCI, from a merger control perspective under Section 5 and 6 of the Act.

[31] Case No. 40 of 2011, decided on 1 October 2014, Paragraphs 198, 199

[32] Acquisition of Pfizer Nutrition (a company incorporated under the laws of Delaware, USA, Combination Registration No. C-2012/05/57, decided on 1 August 2012, Paragraphs 9 & 10

[33] Combination Registration No. C-2012/11/95, decided on 1 January 2013, Paragraph 9

[34] Please see Section 43A of the Act.

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Lakshmikumaran & Sridharan attorneys

An ISO 9001:2008 and ISO 27001:2005 certified law firm

NEW DELHI
5 Link Road, Jangpura Extension,
New Delhi 110014

B-6/10, Safdarjung Enclave
New Delhi - 110 029
Phone : +91-11-4129 9811
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd Floor, CNERGY IT Park,
Old Standard Mill,
Appa Saheb Marathe Marg,
Prabhadevi,
Mumbai - 400 025
Phone : +91-22-2439 2500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
World Trade Center,
No. 404-406, 4th Floor, South Wing,
Brigade Gateway Campus,
No. 26/1 Dr. Rajkumar Road,
Malleswaram West,
Bengaluru - 560 055
Phone : +91-80-49331800
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church, Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

EUROPE
Lakshmikumaran & Sridharan SARL
Avenue Giuseppe-Motta 35-37
1202 Geneva
Phone: +41 22 919 04 30
Fax: +41 22 919 04 31
E-mail: lsgeneva@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus
1 Church Road, Camp
Pune - 411 001
Phone : +91-20-66801900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road
Kolkata - 700071
Phone: +91-33-40055570
E-mail :lskolkata@lakshmisri.com

CHANDIGARH
SCO No. 59, 1st Floor,
Sector 26, Madhya Marg,
Chandigarh – 160 026.
Phone: +91-172-4921700
E-mail: lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor,
Corporate Office Tower,
AMBIENCE Island, Sector 25-A,
Gurgaon - 122001
Phone : +91-124–477 1300
E-mail : lsgurgaon@lakshmisri.com

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