CHAPTER – VI

Interplay between Intellectual Property Rights and Competition Law: Position in India

6.0 Introduction
The interplay between intellectual property rights and competition law is in its nascent stage. This chapter shows the journey of the intellectual property, competition law and the interplay between the two laws through judicial pronouncements.

6.1. Intellectual Property Regime in India

India has always been a frontrunner when it comes to the protection of intellectual property rights. It has enacted various laws either in compliance to various international treaties/conventions or of its own for the protection and development of intellectual property rights. An attempt has been made to discuss some key initiatives taken by India for the protection of intellectual property rights.

6.1.1 Patents

The first Indian patent statute was the Act VI of 1856 which was passed in to encourage inventions of new and useful manufactures and to induce inventors to disclose secret of their inventions. The Act was subsequently repealed by Act IX of 1857 since it had been enacted without the approval of the British Crown. The Act granted special privileges to the
Inventor’s of new inventions for a period of 14 years. The Act was modified and re-enacted in 1859. The 1859 Act conferred on the inventor the exclusive privileges to make, use and sell the invention for a period of 14 years. This Act was repealed by the Inventions and Designs Act, 1888 which was in turn repealed by the Indian Patents and Designs Act in 1911.

Inspite of the major amendments, which were brought in 1930 into the 1911 Act, a Patents Enquiry Committee was appointed by the Government of India under Dr. Tek Chand in 1948 to review the working of the patent laws in India. This was made in response to the felt need for the effective protection of the rights of the patentee in tune with the trade-related and industrial needs of India. In 1953 the Committee submitted its final report. The report noted that the Indian patent system has failed to stimulate invention among Indians and to encourage the development and exploitations of new inventions for industrial purposes in India. It demonstrated that the patent position in India to be favourable to the Britishers and not to Indians, thus failing to secure benefits of the patent system to the largest section of the people. Based on the report of the committee, a Patents Bill based on the U.K. Patents Act, 1949 was introduced in Lok Sabha in 1953. But the bill lapsed due to the dissolution of the Lok Sabha.

In 1957, the Government of India then appointed a Committee under the chairmanship of Justice Rajagopala Ayyangar to suggest necessary changes and revise the patent law in India taking into consideration the social needs of the people of India. The Indian drug industry was dominated by the foreign multinationals who imported drugs into the Indian market making the prices of the life saving drugs to be costly. The Ayyangar Committee being guided by the Constitutional guarantee of economic and social justice enshrined in the Preamble of the Constitution and Article 21 of the
Constitution\textsuperscript{1}, recommended for the process of patenting drugs as against the product patenting to ensure that the medical needs of the poorer sections of the society is met with.

The Ayyangar Committee submitted its report comprehensive report in September 1959. In pursuance to the Committee report, the Patents Bill with some additional changes in the field of food, medicine and drugs was introduced in the Lok Sabha in 1965. The Joint Committee of the Parliament was entrusted to study this Bill. The report of the Joint Committee was presented in the Lok Sabha in 1966 but lapsed due to the dissolution of the Lok Sabha in 1970. Thus it came into force in 1972.

India being a party to the TRIPs Agreement is under an obligation to keep its patent law in conformity with TRIPs provisions. The TRIPs Agreement mandates India to provide product patents and to provide Exclusive Marketing Rights during the transition period. The Act was then amended by the Patents (Amendment) Act, 1999 and then subsequently in Patents (Amendment) Act 2002. The Patents (Amendment) Act 2005 has been adopted thereby meeting the TRIPs deadline.

\textbf{6.1.1.1 Criteria for patentability}

The criteria for patentability in Indian law are:

(a) Novelty: Section 2(1) (j) as amended by the Patents (Amendment) Act 2002 defines invention as including any new product or process involving an inventive step and capable of industrial application. A new invention may consist of a new combination

\textsuperscript{1} The Indian Constitution 1950, Art. 21: No person shall be deprived of right to life and personal property except according to the procedure established by law.
of all integers so as to produce a new or important result or may consist of altogether new integers.²

(b) Utility: Section 2 (1) (j) of the Indian Patents Act states that an invention means a new product or process involving an inventive step and capable of industrial application. The phrase “capable of industrial application” clearly indicates that for an invention to be patented in India, it should satisfy the criterion of utility.

(c) Inventive step/Non-obviousness: Section 2(1) (j) of the Patents Act, 1970 as amended in 2002 defines invention as a new product or process involving inventive step and capable of industrial application. Inventive step is defined as a feature that makes the invention not obvious to a person skilled in the art. In M/s Bishwanath Prasad Radhey Shyam v M/s Hindustan Metal Industries³, it was held that, for an improvement or a combination of something known before, to be patentable, it must involve an inventive step and should be more than a mere workshop improvement. The ingenuity, independent thought and skill of the inventor must be judged to assess the degree of inventive step. There must be the exercise of some inventive faculty over the collection of more than one integers for it to qualify for the grant of patent.

6.1.1.2 Infringement of patents

In India the law neither defines infringement nor does lay down any yardsticks to determine as to what constitutes infringement. In India the

² Raj Prakash v Maungat Ram Chowdhury AIR 1978 Del. 1
³ (1979) 2 S.C.C. 511
patentee has the exclusive right to make or use the patented article or use the patented process and prevent the third parties from resorting the same.⁴ Thus the patentee has the right to exploit the patent, to sue for infringement and to assign and license the patent rights. The extent of the monopoly rights are taken into consideration since no solid guidelines are laid down. The interpretation of the claims in the patent specification determines whether there is a patent infringement or not. The next step is to see whether the acts of the defendant amount to making, using, selling or manufacturing a patented product.

The infringement can be either direct or indirect. In the case of direct infringement, there is direct taking of the elements of the patented invention. But in indirect infringement, the elements of the patented invention are not taken as such. The elements of the patented invention will be hidden by some significant alteration so as to make it appear as a new one. An infringement is deemed to occur only when the infringer without authority makes, uses or sells any patented invention, essential features of the invention or any equivalent invention.⁵ In case of infringement of the patent, the onus of proving the infringement lies upon the plaintiff. He has to prove that the patent is his favour and the infringement was caused by using the process patented by the plaintiff.⁶ But in Sec 104 A of the Patent Act 1970, it is stated that in the case of infringement of patent, where the subject matter of the patent is a process for obtaining a product, the onus of the burden of proof is with the defendant. He has to prove that the process used by him to obtain the product identical to the product of the patent process is different from the patented process. A patentee, exclusive licensee, assignee, co-owner or a person authorized by the patentee can file a suit for infringement. An action

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⁴ The Patents Act, 1970, s 48
⁵ Laxmi Dutt v Nanku AIR 1964 All. 27
⁶ Bombay Agarwal Co. v Ram Chand Diwan AIR 1953 Nag. 154.
for infringement of patent must be instituted in any District Court having jurisdiction to try the suit.⁷

### 6.1.1.3 Defences

Certain provisions of defences in The Indian Patent Act 1970 are discussed below:

(a) Section 47: Grant of patents to be subject to certain conditions: The grant of a patent under this Act shall be subject to the condition that:

1. any machine, apparatus or other article in respect of which the patent is granted or any article made by using a process in respect of which the patent is granted, may be imported or made by or on behalf of the Government for the purpose merely of its own use;
2. any process in respect of which the patent is granted may be used by or on behalf of the Government for the purpose merely of its own use;
3. any machine, apparatus or other article in respect of which the patent is granted or any article made by the use of the process in respect of which the patent is granted, may be made or used, and any process in respect of which the patent is granted may be used, by any person, for the purpose merely of experiment or research including the imparting of instructions to pupils; and
4. in the case of a patent in respect of any medicine or drug, the medicine or drug may be imported by the Government for the purpose merely of its own use or for distribution in any dispensary, hospital or other medical institution maintained by or on behalf of the Government or any other dispensary, hospital or other medical institution which the Central Government may, having regard to the

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⁷ Supra note 4, s 104
public service that such dispensary, hospital or medical institution renders, specify in this behalf by notification in the Official Gazette.

(b) Section 107: Defences, etc., in suits for infringement:- (1) In any suit for infringement of a patent every ground on which it may be revoked under section 64 shall be available as a ground for defence. (2) In any suit for infringement of a patent by the making, using or importation of any machine, apparatus of other article or by the using of any process or by the importation, use or distribution or any medicine or drug, it shall be a ground for defence that such making, using, importation or distribution is in accordance with any one or more of the conditions specified in section 47.

In Fabcon v Industrial Engineering Corporation, the Allahabad High Court observed as follows:

According to section 107(1) in any suit for infringement of patent, every ground on which it may be revoked under section 64 shall be available as a ground of defence. Section 64 emanates the grounds for revocation of patent. Under the scheme of the Act itself, therefore, there is a distinction maintained as between the defence raised to a suit for infringement of patent (vide Section 107) on one hand and the revocation sought of a patent on the other (vide Section 64). The grounds may be the same, but still there is no inconsistency on account of the suit being defended as liable to dismissal in a particular case and a case where the defendant seeks also that the patent asserted by the plaintiff is revoked.

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8 AIR 1987 All 338
(c) Section 107A\textsuperscript{9}: Certain acts not to be considered as infringement.—
For the purposes of this Act:- (a) any act of making, constructing, using, selling or importing a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being in force, in India, or in a country other than India, that regulates the manufacture, construction, use, sale or import of any product; (b) importation of patented products by any person from a person who is duly authorised under the law to produce and sell or distribute the product, shall not be considered as a infringement of patent rights.

(d) Section 111: Restriction on power of court to grant damages or account of profits for infringement: (1) In a suit for infringement of patent, damages or an account of profits shall not be granted against the defendant who proves that at the date of the infringement he was not aware and had no reasonable grounds for believing that the patent existed.

Explanation:- A person shall not be deemed to have been aware or to have had reasonable grounds for believing that a patent exists by reason only of the application to an article of the word "patent", "patented" or any word or words expressing or implying that a patent has been obtained for the article, unless the number of the patent accompanies the word or words in question.

(2) In any suit for infringement of a patent the court may, if it thinks fit, refuse to grant any damages or an account of profits in respect of any infringement committed after a failure to pay any renewal fee with the prescribed period and before any extension of that period.

\textsuperscript{9} The Patents (Amendment) Act 2002
(3) Where an amendment of a specification by way of disclaimer, correction or explanation has been allowed under this Act after the publication of the specification, no damages or account of profits shall be granted in any proceeding in respect of the use of the invention before the date of the decision allowing the amendment, unless the court is satisfied that the specification as originally published was framed in good faith and with reasonable skill and knowledge.

(4) Nothing in this section shall affect the power of the court to grant an injunction in any suit for infringement of a patent.

6.1.2 Trademarks

The use of trademarks was well-known in Roman times. The guild system of medieval England produced the first widespread use of trademarks. Distinctive production marks were required on goods manufactured by the local guilds. The geographical expansion of markets and development of more complex distribution systems eventually resulted in a new function of production marks. The marks served to identify the source of the goods to the prospective purchaser who could then make their selections based upon the reputation, not merely of the immediate vendor but also of the manufacturer. The medieval production mark thus evolved into a trademark used by manufacturers, distributors and other sellers to identify their goods and services in the market place.

6.1.2.1 Rights of a trademark owner

The protection of the trademark is based on the principle of the protection of the reputation and goodwill of the trademark owner which the
trademark owner acquires through constant and exclusive use. The law seeks to protect the established trademark of a person from being violated by another by not permitting any others to use the trademark. Besides through use, rights in a trademark can be obtained by registration, by permission or by license or by assignment. Section 28 of the Trademarks Act, 1999 deals with the rights conferred by registration. According to this section, on the valid registration of a trademark, the trademark owner gets the exclusive right to use the trademark in connection with the goods and services in respect of which it is registered and he can also obtain relief in respect of infringement, if one invades his right by using a mark which is the same or deceptively similar to his trademark.

6.1.2.2 Infringement of Trademark

Any person who trespasses the rights conferred by registration of a trademark infringes the registered trademark for example by adopting identical or deceptively similar trademark. In case a trademark is not registered then the trademark can be protected under passing off. The idea used for infringement is the same used for passing off but the two differ in two fundamental aspects; passing off is concerned with only one method of passing off, namely use of a trademark; once a mark is shown to offend, the user of it cannot escape by showing that he has adopted the name outside the area where the proprietor of the actual mark has attained distinction.

To determine infringement the following factors are taken into consideration:
(1) If the mark nearly resembles the plaintiff’s registered trademark so as to cause confusion or deceive the general public.\(^{10}\)

(2) Once it is found that the defendant has used the trademark, nothing said or done by the defendant can make available the trademark to the defendant since the infringement consists in using the trademark, as the trademark is indicative of the origin.\(^{11}\)

(3) Even if the trademark is descriptive and not registrable and the defendant too uses a name that is descriptive but confusingly similar to the previous trademark, the defendant cannot use it as a defence to a claim for infringement action. The plaintiff’s are not deprived of statutory provision of the fact that the defendants may be using a descriptive work “as a trademark”.\(^{12}\)

(4) The proprietor does not necessarily have to establish instances of actual confusion or deception arising from the defendant’s use of the mark.\(^{13}\)

(5) Whether certain trademark causes confusion is a question of fact and degree in each case. The court has to take into account all the relevant circumstances in the comparison of the marks. The risk of the deception must be real and not fanciful.

### 6.1.2.3 Defences of Trademark Infringement

When an infringement is initiated against a defendant, he may set up any of the defences provided by the Act, depending upon the applicability of the relevant defence to his case. He can either claim that the plaintiff is not entitled to use as has no title or proprietorship or that the use of the mark by the defendant is not infringement or it is protected by the provisions of

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10 Saville Perfumary v June Perfect (1941) 58 RPC 147 at 161
11 Saville Perfumary case at pp. 161, 174
12 Picot v J.P. Co Goya (1967) RPC 573
13 Lever Bros. v Sunniwite (1949) 66 RPC 573
Section 30 of the 1999 Act which lists out the acts that do not constitute infringement.

He can claim that he has been using the trademark in accordance with honest practices in industrial or commercial matters, and is not as such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trademark. Subsection (2) of Section 30 states that a registered trademark is not infringed where the use in relation to goods or services indicates the kind, quality, quantity, intended purposes, value, geographical origin, the time of production of goods or of rendering of services or other characteristic of goods or services:

a. A trademark is registered subject to any conditions or limitations, the use of the trademark in any manner in relation to goods to be sold or otherwise traded in, in any place, or in relation to goods to be exported to any market or in relation to services for use or available or acceptance in any place or country outside India or in any circumstances, to which, having regard to those conditions or limitations, the registration does not extend;

b. The use by a person of a trademark-
   i) In relation to goods connected in the course of trade with the proprietor or a registered user of a bulk or which they form part, the registered proprietor or the registered user confirming to the permitted use has applied the trademark and has not subsequently removed or obliterated it or has at any time expressly or impliedly consented to the use of the trademark;
   ii) In relation to services to which the proprietor of such mark or of a registered user conforming to the permitted use has applied the mark, where the purpose and effect of the use of the mark is to indicate, in
accordance with the fact, that those services have been performed by the proprietor or a registered user of the mark.;

c. The use of a trademark by a person in relation to goods adapted to form part of, or to be necessary to, other goods or services in relation to which the trademark has been used without infringement of the right gives by registration under this Act or might for the time being so used, if the use of the trademark is reasonably necessary in order to indicate that the goods or services are adapted, and neither the purpose not the effect of the use of the trademark is to indicate, otherwise than in accordance with the fact, a connection in the course of trade between any person and the goods or services, as the case may be;

d. The use of a registered trademark, being one or two or more trademarks registered under this Act which are identical or nearly resemble each other, in exercise of the right to the use of that trademark given by registration under this Act\textsuperscript{14}.

Where the goods bearing the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringing on a trade by reason only if-

a) The registered trademark having been assigned by the registered proprietor to some other person, after the acquisition of those goods, or

b) The goods having been put on the market under the registered trademark by the proprietor or with his consent.

\textsuperscript{14} To claim protection under section 30(2)(e), both the registered trademark as well as the infringing mark should have been registered under the Act (Crompton Greaves Ltd. v Salzer Electronics Ltd., 2011 (46) PTC 450 (Mad) at p. 465)
Subsection (3) shall not apply when there exist legitimate reasons or the proprietor to oppose further dealings in the goods in particular, where the condition of the goods, has been changed or impaired after they have been put on the market.

a) The defendant is the prior user of the disputed mark;
b) The defendant has been a honest concurrent user;
c) The defendant has a right to use the contested mark in view of the concurrent registration;
d) The trademark of the plaintiff became a common word; public juris;
e) The registration of the plaintiff’s trademark was invalid;
f) The plaintiff is debarred from suing due to his own conduct like acquiescence, delay or laches.

6.1.3 Copyrights

The first Copyright enactment in India was the Copyright Act of 1847 which was enacted during the East India Company’s regime. The Act passed by the Governor-General of India affirmed the applicability of English Copyright law to India. The Copyright Act 1911 while repealing earlier statutes on the subject was also made applicable to all the British colonies including India. In 1914, the Indian Copyright Act was enacted which modified some of the provisions of the Copyright Act 1911, and added some new provisions to make it applicable in India. The Indian Copyright Act 1914 remained applicable in India until it was replaced by the Copyright Act, 1957.

6.1.3.1 Subject matter of Copyright

The subject-matter of copyright are original literary, dramatic, artistic, musical works, cinematograph film, sound recording, works of artistic craftsmanship, work of sculpture.

6.1.3.2 Infringement of Copyright

The rationale behind infringement is that no one should be allowed to appropriate the fruits of another’s labour whether it is tangible or intangible. Infringement means the interference with, or violation of the rights of the copyright of another; it takes place when the owner/author does something, which is the exclusive right of the owner/author. Infringing copy means reproduction without a license by the owner of a literary, dramatic, musical or artistic work, copy made of a cinematograph film, recording of sound recording, or a cinematograph of such films of such programs or performance in relation to which broadcasts, reproduction right or performers’ right subsists.

Where a person without the license granted by the owner of the copyright or by the registrar of copyright or in contravention of the grant by the copyright owner uses the exclusive right of the copyright owner causes primary infringement. Where the work is communicated to the public constitutes secondary infringement. This could be by sale or hire or lets for hire or distributes for the purpose of trade that affects the copyright owner prejudicially. Even if it is imported it constitutes secondary infringement.
6.1.3.3 Defences in Copyright Infringement

With the purpose of encouraging private study, research and promotion of education, the Copyright Act gives exceptions to what might not cause infringement. These form the defences in case of copyright infringement. The basic purpose of Section 52 is to give the freedom of expression given under Article 19(1) so that research, private study, criticism, review or reporting of current events is done. Section 52 gives a list of acts that do not constitute infringement of copyright. The exceptions listed in section 52(1)\(^{16}\) can be applied for any act in relation to the translation of a literary, dramatic or musical work or the adaptation of such work.

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\(^{16}\) Certain acts not to be infringement of copyright—

(1) The following acts shall not constitute an infringement of copyright, namely:—

(a) a fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of [(i) Private use including research;] (ii) criticism or review, whether of that work or of any other work; [(aa) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme from such copy— [(aa) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme from such copy “(i) in order to utilise the computer programme for the purpose for which it was supplied; or(ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied;] [(ab) the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available; [(ab) the doing of any act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available;”(ac) the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied;(ad) the making of copies or adaption of the computer programme from a personally legally obtained copy for non-commercial personal use;] (b) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events:-

(i) in a newspaper, magazine or similar periodical; or (ii) by [broadcast] or in a cinematograph film or by means of photographs. [broadcast] or in a cinematograph film or by means of photographs.” [Explanation.—The publication of a compilation of addresses or speeches delivered in public is not a fair dealing of such work within the meaning of this clause;]

(c) the reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding:
Interplay between Intellectual Property Rights and Competition Law: Position in India

(d) the reproduction or publication of a literary, dramatic, musical or artistic work in any work prepared by the Secretariat of a Legislature or, where the Legislature consists of two Houses, by the Secretariat of either House of the Legislature, exclusively for the use of the members of that Legislature;

(e) the reproduction of any literary, dramatic or musical work in a certified copy made or supplied in accordance with any law for the time being in force;

(f) the reading or recitation in public of any reasonable extract from a published literary or dramatic work;

(g) the publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for the use of educational institutions, in which copyright subsists: Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.

Explanation.—In the case of a work of joint authorship, references in this clause to passage from works shall include references to passages from works by any one or more of the authors of those passages or by any one or more of those authors in collaboration with any other person;

(h) the reproduction of a literary, dramatic, musical or artistic work—

(i) by a teacher or a pupil in the course of instruction; or

(ii) as part of the questions to be answered in an examination; or

(iii) in answers, to such questions;

(i) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and student of the institution, or of a cinematograph film or a [sound recording], if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution [or the communication to such an audience of a cinematograph film or sound recording]; [(j) the making of sound recordings in respect of any literary, dramatic or musical work, if—

(i) sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work;

(ii) the person making the sound recordings has given a notice of his intention to make the sound recordings, has provided copies of all covers or labels with which the sound recordings are to be sold, and has paid in the prescribed manner to the owner of rights in the work royalties in respect of all such sound recordings to be made by him, at the rate fixed by the Copyright Board in this behalf: Provided that—

(i) no alterations shall be made which have not been made previously by or with the consent of the owner of rights, or which are not reasonably necessary for the adaptation of the work for the purpose of making the sound recordings;

(ii) the sound recordings shall not be issued in any form of packaging or with any label which is likely to mislead or confuse the public as to their identity;

(iii) no such sound recording shall be made until the expiration of two calendar years after the end of the year in which the first recording of the work was made; and

(iv) the person making such sound recordings shall allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such sound recording: Provided further that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made in pursuance of this clause, the Copyright Board is, prima facie satisfied that the complaint is genuine, it may pass an order ex parte directing the person making the sound recording to cease from making further copies and, after holding such
inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty;

(k) the causing of a recording to be heard in public by utilising it,—

(i) in an enclosed room or hall meant for the common use of residents in any residential premises (not being a hotel or similar commercial establishment) as part of the amenities provided exclusively or mainly for residents therein; or

(ii) as part of the activities of a club or similar organisation which is not established or conducted for profit;

(l) the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution;

(m) the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction;

(n) the publication in a newspaper, magazine or other periodical of a report of a lecture delivered in public;

(o) the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such book is not available for sale in India;

(p) the reproduction, for the purpose of research or private study, or with a view to publication, of an unpublished literary, dramatic or musical works kept in a library, museum or other institution to which the public has access: Provided that where the identity of the author of any such work or, in the case of a work of joint authorship, of any of the authors is known to the library, museum or other institution, as the case may be, the provisions of this clause shall apply only if such reproduction is made at a time more than [sixty years] from the date of the death of the author or, in the case of a work of joint authorship, from the death of the author whose identity is known or, if the identity of more authors than one is known from the death of such of those authors who died last;

(q) the reproduction or publication of—

(i) any matter which has been published in any Official Gazette except an Act of a Legislature;

(ii) any Act of a Legislature subject to the condition that such Act is reproduced or published together with any commentary thereon or any other original matter;

(iii) the report of any committee, commission, council, board or other like body appointed by the Legislature, unless the reproduction or publication of such report is prohibited by the Government;

(iv) any judgment or order of a court, Tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court, the Tribunal or other judicial authority, as the case may be;

(r) the production or publication of a translation in any Indian language of an Act of a Legislature and of any rules or orders made there under—

(i) if no translation of such Act or rules or orders in that language has previously been produced or published by the Government; or

(ii) where a translation of such Act or rules or orders in that language has been produced or published by the Government, if the translation is not available for sale to the public: Provided that such translation contains a statement at a prominent place to the effect that the translation has not been authorised or accepted as authentic by the Government; [(s) the making or publishing of a painting, drawing, engraving or photograph of a work of architecture or the display of a work of architecture:]
6.1.4 Designs

Design means any design applied to any article, or to any substance artificial or natural or partly artificial or partly natural. It must have an appeal to the eye and should have individuality in appearance. The purpose of the design law is to protect novel and original designs made with the object of applying it to articles manufactured and commercialized with a view to encourage competitive progress and industrial development.

(i) the making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work falling under sub-clause (iii) of clause (c) of section 2, if such work is permanently situate in a public place or any premises to which the public has access;
(u) the inclusion in a cinematograph film of—
(i) any artistic work permanently situate in a public place or any premises to which the public has access; or
(ii) any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film;
(v) the use by the author of an artistic work, where the author of such work is not the owner of the copyright therein, of any would, cast, sketch, plan, model or study made by him for the purpose of the work: Provided that he does not thereby repeat or imitate the main design of the work;
(x) the reconstruction of a building or structure in accordance with the architectural drawings or plans by reference to which the building or structure was originally constructed: Provided that the original construction was made with the consent or licence of the owner of the copyright in such drawings and plans;
(y) in relation to a literary, dramatic or musical work recorded or reproduced in any cinematograph film, the exhibition of such film after the expiration of the term of copyright therein: Provided that the provisions of sub-clause (ii) of clause (a), sub-clause (i) of clause (b) and clauses (d), (f), (g), (m) and (p) shall not apply as respects any act unless that act is accompanied by an acknowledgement—
(i) identifying the work by its title or other description; and
(ii) unless the work is anonymous or the author of the work has previously agreed or required that no acknowledgement of his name should be made, also identifying the author; [(z) the making of an ephemeral recording, by a broadcasting organisation using its own facilities for its own broadcast by a broadcasting organisation of a work which it has the right to broadcast; and the retention of such recording for archival purposes on the ground of its exceptional documentary character;
(za) the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority. Explanation.—For the purpose of this clause, religious ceremony including a marriage procession and other social festivities associated with a marriage.] (2) The provisions of sub-section (1) shall apply to the doing of any act in relation to the translation of a literary, dramatic or musical work or the adaptation of a literary, dramatic, musical or artistic work as they apply in relation to the work itself.
6.1.4.1 Rights of a design owner

In India, the Designs Act does not expressly carve out anything on the rights of the design owner. The registered proprietor of a design has the copyright in the design. Copyright is the exclusive right to apply a design to any article in any class in which the design is registered. As in other intellectual property rights, he has the right to assign, transfer or license the rights to a second person for some consideration. The rights of the design owner had to be inferred from the provision on infringement of registered design. According to the provision on infringement of registered designs, commissions of certain acts are prohibited during the existence of the copyright in a design without the consent or license of registered proprietor or design. No one can publish it or have it published or expose for sale any article on which either the design or any fraudulent or obvious imitation has been applied, or can apply or cause to apply the registered design for any class of goods covered by the registration, the design or any imitation, or can import for the purpose of sale any article in which the design is registered or to which any fraudulent of obvious imitation had been applied.

From the above provision, it is clear that only the owner of the registered design can publish, apply, sell or import an article containing registered design and obviously he can proceed against the infringer in cases of infringement of his registered design.

17 Designs Act 2000, s 2(c)
18 Designs Act 2000, s 22
6.1.4.2 Infringement of Designs

Infringement is the violation of the rights of the owner thereby unlawfully trespassing on his right or privilege. Protection of designs is mainly to promote industries, thereby amounting to industrial progress. Registration of new and original design ensures that the inventor of the design is not deprived of his commercial profit by the application of the registered design by others to their goods.

On registration of a design, the registered proprietor shall attain a copyright in the registered design for a period of ten years from the date of registration.¹⁹ The owner of a registered design has the exclusive right to carry out certain specified acts in relation to articles for which the design is registered. The right in the registered design is infringement by a person who without the license of the registered proprietor does anything which is the exclusive right of the proprietor. The Act enumerates the circumstances in which the copyright in a design shall be infringed. Thus during the existence of copyright in any design, it shall be unlawful for any person:

- For the purpose of sale to apply or cause to be applied to any article in any class of articles in which the design is registered, the design or any fraudulent or any obvious imitation thereof, except with the license or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied or
- To import for the purposes of sale, without the consent of the registered proprietor, any article belonging to the class in which the design has been registered and having applied to it the design or any fraudulent or obvious imitation thereof, or

¹⁹ Ibid at s 11
Knowing that the design or any fraudulent or obvious imitation thereof has been applied to any article in any class of articles in which the design is registered without the consent of the registered proprietor, to publish or expose or cause to be published or exposed for sale that article.

To constitute infringement, it has to be proved that copyright in the design existed at the time of infringement and that the design or an imitation was applied to any article or class of articles which are registered and that such application was made without the license or written consent of the registered proprietor, or that the defendant has imported for the purpose of sale the article bearing the design or its imitation without the consent of the registered proprietor, or that the defendant has published or exposed or cause to be published or exposed for sale the pirated article with the knowledge that it is an infringing one.

6.1.4.3 Defences in Design Infringement

In case of infringement of designs, the defendant can raise certain defences in his favour. The defenses open to the defendant are that he can either deny infringement, or can deny the intention to infringe, or can question the validity of registration. These defenses are based on the grounds that the registered design is not a design within the meaning of the Act, or that it is neither new or original, or that the plaintiff is not the registered proprietor or he is not entitled to sue or that of the acquiescence or laches.
6.2. Evolution of Competition Law in India

India followed the approach of planned economic development even after it got its independence. The broad policy objectives were achieving self-reliance and promoting social justice. Self-reliance, over time came to include import substitution. The government had a role to play for the coming in and going out of the enterprises in the market. Plant and firm size were subject to statutory limitations, and imports and foreign investment were restricted. Government-owned businesses enjoyed protections and preferences and dominated the majority of the economy in various sectors20. These policies were reflected in many of the state’s economic policies, including its industrial, trade, labour, exchange controls, financial sector, and several other policies. In this system, there was little place for competition policy.

While the above economic strategy helped in many ways, including the growth of basic industries, in the 1980s it was realized that it was severely constraining entrepreneurial growth. Policy reform followed more particularly since 1991 with the liberalization of industrial and trade policies, foreign investment rules, exchange rates, capital controls, reducing the reservations for the public sector, and in many other areas.21

6.2.1 The Monopolies and Restrictive Practices Act

After the attainment of independence, India adopted and followed policies comprising of ‘Command-and-Control’ laws, rules, regulations and executive orders. The MRTP Act was one such case wherein such command

21 Ibid
and control economy was based. Widespread economic reforms were undertaken and consequently the march from Command-and-control economy to an economy based more on free market principles commenced its stride.\textsuperscript{22}

The Monopolies and Restrictive Trade Practices Act, 1969 (the MRTP Act) was the first legislation with regard to competition law in India. This legislation was primarily designed to meet requirements of the then prevailing economic, social, and policy situation.\textsuperscript{23} The MRTP Act, 1969 was enacted at in the era of licences, permits and controls. Monopoly in trade and industry was regarded as bad in law. Though public interest and consumer welfare were at the core of the objectives of the said Act, as yet the concept of ‘market economy’ was not fully conceived at that point of time. The Act empowered the Central Government to set up a Commission to oversee the implementation of the Act.

The State’s control should diminish in the case of business practices. There was a need for promoting competition in the market suppressing the monopoly. The MRTP Act had become redundant and thus there was a need for a competition law in the country. To suit international developments a high level committee was appointed to look into a modern competition law for the country.

\textbf{6.2.1.1 Objectives of the MRTP Act}

MRTP Act came into force in 1970 and the MRTP Commission was set in August, 1970. The Act deals with the concept of monopolistic and

\textsuperscript{22} Kumar Jayant and Abir Roy, \textit{Competition Law in India} (1st edn, Eastern Law House 2008), 35

restrictive trade practices and subsequently with the unfair trade practices. It owes its insight to Article 38 and 39 of the Constitution of India which says that the State should strive to promote public welfare by securing and protecting a social order in which socio-economic justice shall inform all institutions of national life, and ensure that the ownership and control of the material resources of the community are so distributed so as to subserve the common good and that the operation of the economic system is based in such a manner which does not result in the concentration of the wealth and means of production to the common detriment. The Act was based on four principles:

1. Social justice;
2. Welfare State;
3. Regulating concentration of economic power to the common detriment;
4. Controlling monopolistic, unfair and restrictive trade practices

The most important function of MRTP Act is to watch the operation of the economic system should not result in the concentration of wealth and means of production to the common detriment. The broad premises on which the MRTP Act rests are unrestrained interaction of competitive forces, maximum progress through rational allocation of economic resources, availability of good or services of quality at reasonable prices and finally a just and fair deal to the consumers.²⁴

The Competition Act and the body dealing with the competition law matters i.e. the Competition Commission of India shall come into operation after repealing the MRTP Act and the winding up of the MRTP Commission as recommended by the committee.

²⁴ Supra note 20
For this purpose, the Government of India constituted a High Level Committee under the chairmanship of SVS Raghavan, with the aim of examining the MRTP Act, and gauging its relevance, and to bring about a new regime, which would be consonant to and able to protect the domestic entities from international competition. It was due to the recommendations of this Committee that the MRTP Act was ultimately phased out, with the introduction of the new Indian Competition Act, 2002.25

6.2.1.2 Trade practices under the MRTP Act

MRTP Act regulates three types of trade practices, monopolistic trade practices, restrictive trade practices and unfair trade practices. A monopolistic trade practice means a trade practice which has or is likely to have the effect of maintaining the prices of goods or services at an unreasonable level, or limiting technical development or capital investment to the common detriment or allowing the quality of any goods or services in India to deteriorate. It includes unreasonably increasing the cost of production of goods or maintenance of services or the sale or resale prices of goods or the charges of the services; or the profits which are or which may be derived by the production, supply or distribution of any goods or in the provision of any services; preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by adoption of unfair methods or unfair or deceptive practices.

MRTP Act’s objective could not be achieved to a great extent. Thus in June 1977, the Government appointed the High-Powered Expert (Sachar)
Committee to consider and report the required changes. The Committee’s report recommended:

(1) Withdrawal of exemption to public enterprises, to be able to check monopolistic, restrictive and unfair trade practices in the sector;

(2) Widening the scope of MRTP Act to include unfair trade practices (UTPs) like hoarding, the supply of hazardous products, and misleading and deceptive advertising; and

(3) Enhancement of MRTP Commission’s powers and enlargement of its role

Restrictive Trade Practices: Restrictive Trade Practices means a trade practice which has, or may have the effect of preventing, distorting, or restricting competition in any manner and in particular which tends to obstruct the flow of capital or resources into the stream of production, or which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions. The MRTP Act lists out certain types of agreements, which are deemed to be agreements relating to restrictive trade practices and required to be registered with the Director General of Investigation and Registration (“DGIR”).

Restrictive Trade practices have the effect of preventing, distorting or restricting competition. Manipulation of prices, conditions of delivery or flow of supply in the market which may have the effect of imposing on the consumer unjustified costs or a restriction is known as Restrictive Trade Practices.

Certain common types of restrictive trade practices enumerated in the MRTP Act are:
(a) Refusal to deal
(b) Tie-up sales
(c) Full line forcing
(d) Exclusive dealings
(e) Price discrimination
(f) Re-sale price maintenance
(g) Area restriction

Unfair Trade Practice: An unfair practice means a trade practice, which, for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services, adopts unfair methods or unfair or deceptive practices. Before 1984, the MRTP Act contained no provisions for protection of consumers against false or misleading advertisements or other similar trade practices. The Sachar Committee therefore recommended that a separate chapter should be added to the MRTP Act defining various Unfair Trade Practices so that the consumer, the manufacturer, the supplier, the trader and other persons in the market can conveniently identify the practices, which are prohibited. Essentially unfair trade practices falling under the following categories were introduced in 1984 in the MRTP Act.

The Monopolistic Trade Practice (MTP) came into the statute by an amendment to MRTP Act in 1984. An MTP is a trade practice, which has or which is likely to have the effect of:

(1) Maintaining the prices of goods or charges for the services at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner;
(2) Unreasonably preventing or lessening competition in the supply or distribution of any goods or in the supply of any services
(3) Limiting technical development or capital investment to the detriment or allowing the quality of any goods produced, supplied or any services rendered, in India, to deteriorate;

(4) Increasing unreasonably:
(a) The cost of production of any goods; or
(b) Charges for the provision;
(c) Maintenance, of any services
(d) The prices at which the goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or
(e) The profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase of any goods) or in the provision or maintenance of any goods or the provision of any services;

(5) Preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices.

6.2.1.3 Failure of the MRTP Act

The failure of the MRTP Act was the absence or adequate definitions in the Act. Acts which were anti-competitive in nature like predatory pricing, cartel, collusion, bid-rigging etc. The MRTP Commission also did not have the adequate resources to check the anticompetitive practices. In 1991, due to the balance of payment crisis, the government of India market oriented reforms aimed at dismantling the industrial licensing system, giving business the freedom to make investment decisions and the gradual opening of key infrastructure sectors to private investors. Slowly the government begun to lift many import controls, reduce tariffs, and liberalization of economy. A committee was set up to suggest ways to advise for a modern competition
law in India since the government knew that the whole set up had become a relic. The Government came out with a new tax law styled the Trade Related Competition Bill.\textsuperscript{26}

\section*{6.2.2 Antitrust Laws in India}

India, like other developing countries, has adopted antitrust policies for its own domestic enterprises, so as to break public monopolies which are an outcome of socialist impact on economic policy. Owing to the opening of the market and stimulation of the private sector in the core areas of economy the adoption of antitrust policy by way of the enactment of the Competition Act, 2002, SVS Raghavan Committee has played a leading role in its conception. The said Act repeals the previous Monopolies and Restrictive Trade Practices Act (1969), and the creation of Competition Commission there under has become the new genre guiding the industry.

The goals of competition laws include economic efficiency, promotion of trade, facilitating economic liberalization and enhancing development of a market economy, along with consumer protection. The idea of competition is rooted in the freedom of firms to carry out their business in a manner best suited to further their personal interest. The balance is essentially between the bounds of public power and private power and the relationship between these two forces.

India as a signatory to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, under the World Trade Organization (WTO) Regime, has an obligation to comply with the requirements of Article 40. It obliges enactment of relevant competition legislation and brings IP

\textsuperscript{26} T.C.A Ramanujam, ‘Competition Law on the Anvil Business Line’, (India, 31\textsuperscript{st} July 2001), 1
statutes in conformity with the same, so as to avoid any hostility. The said provision of TRIPS cites exclusive grant back conditions, preventing challenges to validity and coercive package licensing. The Patents Act (1970) illustrates the practice in India to encourage division of territory, cross licensing of patents that would reduce competition and price fixing.\(^\text{27}\)

### 6.2.3 SVS Raghavan Committee

The committee recommends that apart from private companies in India, the State monopolies, government procurement and foreign companies should be subject to competition law. It prohibits collusive anti-competitive agreements, abuse of dominance, and mergers among enterprises. The committee has in this regard taken care to suggest incorporation of provisions in respect of the provisions of TRIPS Agreement. It has envisaged the interface between IP and antitrust to involve issues relating to agreements amounting to abuse of dominant position and issues arising out of mergers.

Abuse of dominance has been pointed out to be central to the competition law in India by the committee. In its view, it includes restriction of quantities, markets and technical developments. Predatory pricing and practices exclusionary in nature, in specific, and conduct considered in general prejudicial to consumer interest were viewed to be abusive in nature and advocated to be prima facie illegal.

6.2.4 Comparative analysis of MRTP Act, 1969 and Competition Act 2002

A brief comparative analysis of MRTP Act and the Competition Act: First of all, MRTP Act was premised in size whereas Competition Act is premised on conduct. Further, MRTP had a procedure, reformist and behavioral approach whereas Competition Act had a result oriented and punitive approach. Moreover, in MRTP competition offences implicit and not defined expressly whereas in the Competition Act competition offences are explicit and defined. Further more, MRTP Act frowns upon dominance, included unfair trade practices, rule of law approach, no extraterritorial application, no combination regulation and no penalties for offences whereas in the Competition Act, it excluded unfair trade practices, rule of reason approach, extraterritorial application of the Act, presence of combination regulations and penalties for offences. Finally, MRTP Commission had no advocacy role. On the other hand Competition Commission of India (CCI) had a competition advocacy role.28

6.2.5 The Competition Act, 2002

The Competition Act, 2002 came into existence in January 2003 and the Competition Commission of India was established in October 2003. The Act states that "it shall be the duty of the Commission to eliminate practices having adverse effect on competition, to promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India." The reading of this provisions shows that how much authorization and power the CCI possesses.

28 Supra note 22, 47
The Act prohibits anticompetitive agreements (Section 3), abuse of dominant position (Section 4) and regulates mergers, amalgamations and acquisitions (Sections 5 & 6). These provisions and several connected provisions of the Act have not yet been brought into force. This was due to a writ petition filed before the Supreme Court of India challenging certain provisions of the Act. After the discarding of the petition by the Supreme Court, the Government introduced certain amendments to the Act in the Competition (Amendment) Bill, 2006, which is currently under consideration in Parliament. Since India was nascent in the competition law arena so there was not sufficient judgments to interpret the laws. Thus there were the current provisions of the Competition Act, 2002 which came to its recue. It reads thus:

(i) Prohibit anti-competitive agreements;
(ii) Prohibit abuse of dominant position by enterprise; and
(iii) Regulate Combinations exceeding threshold limits in terms of prescribed turnover or assets.

As recognized by the Raghavan Committee Report, the three enforcement areas are not mutually exclusive, and there would be considerable overlap between them. The reason for delineating them as broad areas are in order to organize the approach in dealing with each situation. The Competition Act defines what kind of situations could arise under each of the categories, and provides the principles to be adopted while examining the same. The Act elaborates the factors that need to be considered for analyzing each of the concepts of abuse of dominance, analyzing combinations and assessing whether agreements between enterprises can be considered anti-competitive.29

The scheme laid down under the law places emphasis on case by case analysis or the ‘Rule of Reason’ for determining violation of the Act. The ‘Rule of Reason’ test means that only combinations and agreements that cause or are likely to cause appreciable adverse effect on competition in the relevant market are subject to action under the Act and that size and dominant position is not in itself bad. There are only a few, very specific circumstances which are ‘presumed’ to have appreciable adverse effect on competition in market.

While the Competition Act provides the fundamental framework for governing competition, the development of jurisprudence on application of the Competition Act will determine to a large extent how it is interpreted and applied. Countries with well-developed Competition law regimes, such as the United States of America and the European Union, have each had to develop several sector and issue-specific guidelines to enable better application of the Competition law. While the experience of other countries can be a guiding factor, given that competition law is specific to a particular socioeconomic background, Competition Commission of India would need to incrementally develop the law based on experience gained. The development of jurisprudence through case laws will help clarify the manner in which each of these concepts needs to be addressed.  

6.2.5.1 Anti-competitive agreements

Looking into one of the objectives of the Act as stated in the Preamble is to prevent practices having adverse effect on competition. The


30 Ibid.
main objective of suppliers of goods and services who are in a position to manipulate the market is to maintain the profits at pre-determined levels. They tend to achieve these goals by various means like restraining the supply of goods and services, price-fixing, dividing the market, etc. Section 3 of the Act prohibits any agreement with respect to production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India. Under Section 3, any such agreement is considered void. The term "agreement" is broadly defined and includes any arrangement, understanding or concerted action, whether or not it is formal, in writing or intended to be enforceable by legal proceedings. Sec 3 (1) is a general prohibition of an agreement in the supply of goods or services that causes or is likely to cause an appreciable adverse effect on competition in India. Sec 3 (2) shall declare such an agreement as void. Section 3(3) deals with certain specific anti-competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert or such action by cartels. Section 3 (4) deals with vertical restraints imposed through agreements among enterprises in different stages of production or supply.

Section 3(5) of the Act does not provide for absolute exemption to IPRs. It actually provides for an exemption to that extent where the Intellectual Property rights do not transgress what has been allowed, in a sense that is counter-productive to the common masses, the consumers and competitors in particular.

6.2.5.2 Abuse of dominant position

The Act does not condemn firms for achieving a dominant position, only the abuse of that position. Dominant position is defined as, “a position

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of strength, enjoyed by an enterprise in the relevant market in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or ii) affect its competitors or consumers or the relevant market in its favour”\(^{32}\). The definition is similar to those in the competition laws of several other jurisdictions, such as the European Union and the United Kingdom.

The Competition Act specifies that the Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely:-

- regulatory trade barriers,
- local specification requirements,
- national procurement policies,
- adequate distribution facilities,
- transport costs; language,
- consumer preferences; and
- the need for secure or regular supplies or rapid after-sales services\(^ {33}\).

The relevant product market is to be determined by considering: physical characteristics or end-use of goods; the price of goods or service; consumer preferences; exclusion of in-house production; the existence of specialized producers; and the classification of industrial products.\(^ {34}\) The possibility of exclusion of in-house (i.e. captive) production is also to be considered as a factor.\(^ {35}\)

\(^{32}\) Competition Act 2002, explanation (a) to s 4(c)
\(^{33}\) Competition Act 2002, s 19(4)
\(^{34}\) Id at, s 19(7)
\(^{35}\) Supra note 20
The Act identifies a wide variety of factors that should be considered in determining whether a firm is dominant or not under Section 4 having due regard to all or any of the following factors, namely:

i. market share of the enterprise;

ii. size and resources of the enterprise;

iii. size and importance of the competitors;

iv. economic power of the enterprise, including commercial advantages over competitors;

v. vertical integration of the enterprises or the sale or service network of such enterprises;

vi. dependence of consumers on the enterprise;

vii. monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

viii. entry barriers, including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

ix. countervailing buying power;

x. market structure, and size of market;

xi. social obligations and social costs;

xii. relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and

xiii. any other factor which the Commission may consider relevant.36

36 Competition Act 2002, s 19(4)
6.2.5.3 Regulation of combinations

A combination as defined under Section 5\textsuperscript{37} would result subject to the other prescriptions of the section, such as the monetary thresholds of assets or turnover of the enterprise specified therein, on: (a) acquisition of control, shares, voting rights, or assets of one or more enterprises by one or more persons; (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution, or trading of a similar or identical or substitutable service; (c) any merger or amalgamation. The provision of Sec 6(1)\textsuperscript{38} prohibits any combination that causes, or is likely to cause, an appreciable adverse effect on competition within the relevant market in India and thereby declaring that such combination would be void. Section 6(2) sets out the procedure for the regulation of combinations.

Once the relevant market has been defined, it would be necessary to determine whether the combination causes or is likely to cause an appreciable adverse effect in that relevant market. The factors to be considered are listed in considerable detail in the Act.\textsuperscript{39}

- actual and potential import competition;
- barriers to entry;

\textsuperscript{37} Amended in 2007
\textsuperscript{38} Sec 6 (2) Regulation of combination: Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, [shall] give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within 14 [thirty days] of—
(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be
(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.
\textsuperscript{39} Competition Act 2002, s 20(4)
the degree of market concentration;
- degree of countervailing power in the market; the likelihood that the combination would allow the parties to significantly and sustainably increase prices or profit margins;
- the extent of likely effective competition;
- the extent to which substitutes are available or likely to be available in the market;
- the market share, in the relevant market, of the persons or enterprises in a combination, individually and as a combination
- the likelihood that the combination would result in the removal of a vigorous and effective competitor in the market;
- the nature and extent of vertical integration in the market;

The analysis also includes consideration of whether one of the firms in the combination is a failing business and the nature and extent of innovation. In addition, the Commission must consider the possible benefits that might flow from the combination that would contribute to economic development and whether the benefits outweigh the adverse impact of the combination, if any. These factors are an indication of a rule of reason approach.

6.3. Cases of interplay between IPR and Competition Law

In FICCI-Multiplex Association v United Producers Distributors Forum\(^{40}\), there was a collective decision of the opposite parties producers and distributors of films not to release films to the multiplexes with a view to pressurize the multiplexes into accepting the terms of revenue sharing ratio.

\(^{40}\) Case no 01 of 2009, decided on 25\(^{th}\) May 2011
The purpose of forming United Producers and Distributors Forum (UPDF) was extracting better revenue sharing ratios from multiplexes. UPDF issued notices instructing all producers and distributors, including those who were the members of UPDF, not to release any new films for the purpose of exhibition at the multiplexes. In this case, Competition Commission of India held that UPDF entered into a cartel like activity since it had the ability to control the release of films since it had a 100 per cent market share. The CCI went further to analyze Sec 3(5)(i) to determine the unreasonableness.

Since a feature film is considered to be a bundle of copyrights to make copies, sell or give on hire or communicate a film in public, the question arises whether the right to sell or give on hire or communicate the film in public includes also the right not to sell or give on hire. It has to be noted that copyright does not grant a market power to the holder since there is a difference between the bargaining power between individual copyright owners vis-à-vis collective licensing through copyright societies.

The CCI had correctly decided that UPDF had restricted the supply of films to multiplexes was an anti-competitive act under Section 3(3) of the Competition Act 2002. Analysis of the case reveals that the members of the UPDF were engaged at different levels of the business such as production and distribution. Since producers and distributors are not at the same level of business, they are not competitors and hence it shall fall under vertical agreement\(^{41}\).

In Amir Khan Productions Private Limited v Union of India\(^{42}\), Federation of Indian Chamber of Commerce and Industry filed information

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\(^{41}\) Ravikant Bharadwaj, KD Raju and M. Padmavati, ‘Determining unreasonable use intellectual property rights in anti-competitive agreements in India’ (2013) I.C.C.L.R. 2013, 24(6), 231-238

\(^{42}\) 2010 (112) Bom LR 3778
against United Producers/Distributors Forum (UPDF) and others for market cartel in films against the multiplexes. Despite knowing that multiplex business is 100% dependant on films, UPDF refused to deal with multiplex owners. The UPDF and others hold almost 100 percent share in the Bollywood film industry. UPDF was indulged in limiting/controlling supply of films by refusing to deal with the multiplexes which are clearly violation of Section 3(3) of the Competition Act 2002.

The Competition Commission of India (hereinafter called as CCI) found that there is anti-competitive agreement and that there is a dominant position also. So the CCI directed the Director General (hereinafter called as DG) to inquire into the matter and submitted a report that there is cartel. UPDF instead of answering to showcause notice, approached the Bombay High Court contending that films are subject to copyright protection and the Copyright Board has the jurisdiction to deal with the matter. Moreover, it was contended that for exclusive licence, only remedy is compulsory license available under Copyright Act.

The Bombay High Court dismissed the petition stating that Section 3(5) of Competition Act, 2002 provides that Section 3(1) shall not take away the right to sue for infringement of patent, copyright, trademark etc.

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43 The Copyright Act 1957, s 13(1)(b) and Sec 14(1)(d)(ii)
44 (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.
The defences can also be raised before the Competition Commission of India which can be raised before the Copyright Board.

In another case Singhania and Partners LLP v Microsoft Corporation (I) Pvt. Ltd., the petitioner ordered with Microsoft for Windows Operating Systems and Office 2007 from a Microsoft distributor. According to the instruction of Microsoft, the petitioner ordered software for their LLP business and paid the advance required by the purchase order. After paying the advance amount, Microsoft informed the petitioner that they can purchase only volume licenses and not Original Equipment Manufacturer (OEM) licences which are only available to a person who purchases a new machine. The volume licenses were double the amount of OEM licences. Allegations of the petitioner were that different dealers of Microsoft charges different prices for the same product and thus the opposite party artificially controls the market. Microsoft having market shares of 90 percent hold a dominant position in the market. The petitioner being forced to purchase volume licences at double the price of OEM licences amounts to discriminatory pricing under Section 4(2)(a)(ii) of the Competition Act 2002.

Microsoft’s contention was that it licences its product through three main channels of distribution like OEM, Volume licences and Retail Chain. Further, it has to protect its Intellectual Property Rights and prevent piracy of its products. Moreover, its relationship with sellers and distributors is independent and does not create any principal agent relationship. It sells its products/licences to its distributors or sellers on a principal to principal basis. Further, it contended that OEM licences are different in nature than those purchased through other channels. Finally, Microsoft’s agreement with the OEMs does not require that OEMs can install Windows directly on the PC. OEMs are free to distribute PCs with non Microsoft software or without software at all.

45 Case no 36/2010, decided by the Commission on 22.06.2011
On the other hand, the petitioners argued that different royalty charged for different licences is a strategy adopted by Microsoft to maintain its monopoly in the market under the garb of licensing policy and intellectual property rights protection. They further contended that the licensing policy of Microsoft is nothing but an artificial device for maintaining the market and strict control over its distribution system responsible for unfair prices in the market and thus violates section 3(4)(e) of the Act.

The Competition Commission has not found any prima facie evidence showing that charging different prices for the same product under different kind of licences are justified and common to the market. The Commission did not find any material to show that due to Microsoft’s dominant position competitors were driven out of market. However, Mr. R. Prasad’s dissenting opinion is noteworthy. He says that the Commission should look into all factors which are anti-competitive in nature, even though they are not part of the information supplied by the petitioner. There is a possibility of Microsoft playing a dominant role since it holds 80% of the market share of the operating systems.

Further, the OEM license is available only through manufacturers, FPP for individual intending o buy for 5 or less PCs for Volume license and upgradation. It creates a baffling situation for a customer who intends to buy more than 5 PCs. The only option left is to go for OEM which creates buying of OEM and maintaining a monopoly of the Microsoft in Operating system. Finally, Microsoft charged a much lesser price in China and higher price in other countries which hinders competition in the market. Such cases were filed in the United States in the State of Iowa and California and Microsoft was ordered to refund the difference to volume licences for abusing of monopoly power.
In Shamsher Kataria and Honda Siel cars and others, Shamsher Kataria (Informant) filed the information under Section 19(1)(a) of the Act in January, 2011 against Honda Siel Cars India Ltd, Volkswagen India Pvt. Ltd. and Fiat India Automobiles Pvt. Ltd. alleging anti-competitive practices in respect of sale of spare parts of these companies. Relying on practices in European Union (EU) and the United States of America (United States), Informant contended that car manufacturers in India were charging higher prices for spare parts and upkeep services than their colleagues overseas. Further, there was complete restriction on availability of technological information, diagnostic tools and software programs required for servicing and repairing the automobiles to autonomous repair shops. The Informant has further alleged that the restriction on the availability of genuine spare parts and the technical information/know how required to effectively repair, maintain or service the automobiles manufactured by the respective Opposite Parties (OP) is not a localized phenomenon. The OPs and their respective dealers, as a matter of policy, refuse to supply genuine spare parts and technological equipment for providing maintenance and repair services in the open market and in the hands of the independent repairers.

The Commission passed detailed order in the following manner under section 27 of the Act which are discussed below:

i) The parties are hereby directed to immediately cease and desist from indulging in conduct which has been found to be in contravention of the provisions of the Act.

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46 Case no 03/2011 of Competition Commission of India
47 Ibid at para 1
48 Ibid at para 1.1
49 Ibid at para 1.2
50 Ibid at para 22.3
ii) OPs are directed to put in place an effective system to make the spare parts and diagnostic tools easily available through an efficient network.

iii) OPs are directed to allow OESs to sell spare parts in the open market without any restriction, including on prices. OESs will be allowed to sell the spare parts under their own brand name, if they so wish. Where the OPs hold intellectual property rights on some parts, they may charge royalty/fees through contracts carefully drafted to ensure that they are not in violation of the Competition Act, 2002.

iv) The OPs will place no restrictions or impediments on the operation of independent repairers/garages.

v) The OPs may develop and operate appropriate systems for training of independent repairer/garages, and also facilitate easy availability of diagnostic tools. Appropriate arrangements may also be considered for providing technical support and training certificates on payment basis.

vi) The OPs may also work for standardization of an increasing number of parts in such a manner that they can be used across different brands, like tyres, batteries etc. at present, which would result in reduction of prices and also give more choice to consumers as well as repairers/service providers.

vii) OPs are directed not to impose a blanket condition that warranties would be cancelled if the consumer avails of services of any independent repairer. While necessary safeguards may be put in place from safety and liability point of view, OPs may cancel the warranty only to the extent that damage has been caused because of faulty repair work outside their authorized network and circumstances clearly justify such action.
viii) OPs are directed to make available in public domain, and also host on their websites, information regarding the spare parts, their MRPs, arrangements for availability over the counter, and details of matching quality alternatives, maintenance costs, provisions regarding warranty including those mentioned above, and any such other information which may be relevant for full exercise of consumer choice and facilitate fair competition in the market.

The Commission further noted that the OPs have violated the provisions of both sections 3 & 4 of the Act. Anti-competitive conduct of the opposite parties impacts a very large number of consumers in the country estimated to be around 2 crore. Further, the anti-competitive conduct of the opposite parties has restricted the expansion of spare parts and independent repairers segment of the economy to its full potential, at the cost of the consumers, service providers and dealers. It was also noted that despite the fact that most attractive markets for the automobile manufacturers and some OPs have made consumer-friendly commitments in other jurisdictions like Europe, they have failed to adopt similar practices in India which would have gone a long way in significantly diluting their present anti-competitive conduct.51 The Commission imposes a penalty of 2% of total turnover in India of the opposite parties.52

In Micromax Informatics Ltd. v Telefonakiebolaget LM Ericsson (Publ)53, the Micromax Informatics Ltd. (hereinafter informant) filed a complaint under Section 19 (1) (a) of the Competition Act 2002 against Telefonakiebolaget LM Ericsson (Publ) (hereinafter opposite party) on the

51 Ibid at para 22.4
52 Ibid at para 22.6
53 Case no 50/2013 of Competition Commission of India
abuse of dominant position by demanding an unfair royalty from the informant with regard to standard essential patents on GSM technology.

Ericsson is a member of the Standard Setting Organization (SSO), European Telecommunications Standard Institute (ETSI). ETSI has formulated its own IPR policy called the ETSI Intellectual Property Rights Policy (“ETSI IPR Policy”) and the present information, opposite party demanded from informant to secure licences of patents used in its products on Fair, Reasonable and Non-Discriminatory Terms (FRAND Terms). FRAND licences were not provided despite the informant making a request for details. Despite that the informant entered into a Non-Disclosure Agreement with opposite party on 16\textsuperscript{th} January, 2012. After almost 16 months i.e. on 5\textsuperscript{th} November 2012 the terms of the FRAND licences were disclosed to the informant. The opposite party thereafter instituted a civil suit against the informant before the High Court of Delhi, alleging infringement of eight Standard Essential Patents (SEPs), used in 2G, 3G and 4G devices. The Single Judge passed an ad interim ex-parte order in favour of Ericsson.

In Telefonaktiebolaget Lm Ericsson vs Intex Technologies (India)\textsuperscript{54} in which the plaintiff, M/s Telefonaktiebolaget LM Ericsson a company incorporated under the laws of Sweden and claimed that the plaintiff is one of the largest telecommunications companies in the world.

The Ericsson group is active in more than 180 countries having annual sales of USD 35 Billion (approximately) for the year 2013. The Ericsson's main trade is to provide telecom operators with best-in-class equipment and services for telecommunications network. The Ericsson group has invested tons of billions of US dollars in the past decade on telecommunications research and development. The plaintiff's portfolio comprises of mobile and

\textsuperscript{54} Delhi High Court Judgment, 13\textsuperscript{th} March 2015 I.A. No. 6735/2014 in CS(OS) No.1045/2014
fixed network infrastructure, telecom services, software, broadband and multimedia solutions for operators, enterprises and the media industry.\textsuperscript{55}

The plaintiff has contended that the defendant in the plaint that the defendant continues to market and sell various infringing mobile phones/devices. As detailed above, the AMR Patents (AMR Speech Codecs) and 3G Patents correspond to mandatory portions of the 3G standard, to which 3G-enabled devices must adhere. The said patents are employed by the defendant in its various 3G-enabled devices. The AMR Patents, as well as the EDGE Patent, also correspond to optional, but widely implemented, portions of the 2G standard and the EDGE standard, to which 2G/EDGE-enabled devices must adhere. It is alleged that the plaintiff procured certain handsets being sold by the defendant (listed below) and performed in-house testing to gauge whether the Suit Patents are being infringed by the said handset devices or not. The test reports prove that those are infringed by the defendants.\textsuperscript{56}

The plaintiff has also filed an affidavit of Mr. Vijay Ghate, an expert who has examined the standards, the patent specifications and the test reports & has come to the conclusion that the Suit Patents are essential in relation to all the relevant ETSI standards and the same will be necessarily infringed by any device that is compliant with the said standards. The plaintiff has placed on record the testing reports, performed in relation to the four representative mobile devices of the defendant, along with an affidavit of Mr. Max Olofsson. The said reports establish that the defendant is indeed infringing the Suit Patents.\textsuperscript{57}

After receiving the information about the defendant who allegedly infringed the product being imported/ offered for sale/ sold in India, the

\textsuperscript{55} Ibid at para 3
\textsuperscript{56} Ibid at para 6
\textsuperscript{57} Ibid at para 20
plaintiff on 16th December, 2008 addressed a letter intimating the defendant about the fact that the telecommunication products being sold by it infringe various SEPs held by the plaintiff in respect of GSM 58 and GPRS 59 technologies, in order to give offer to negotiate & discuss a license agreement on FRAND 60 terms for all of plaintiff’s Standard Essential Patents. 61

In reply, the defendant, vide its e-mail dated 7th January, 2009, stated that it is not aware about any significant portfolio of plaintiff’s patents in India that are essential for compliance by the defendant, however, the defendant agreed to meet on this aspect. The plaintiff thereafter gave the defendant an example list of the standard essential patents owned by the plaintiff in India. The plaintiff asked the defendant to sign a Non-Disclosure Agreement ("NDA") so as to facilitate exchange of confidential information (claim chart mapping, infringement analysis etc.) in entering into a FRAND license with the plaintiff. 62 The defendant initially refused to enter into an NDA despite which the plaintiff held various meetings with the defendant to discuss its FRAND licensing program. But despite meeting, the defendant did not enter into the NDA.

The plaintiff, thereafter by its letter dated 16th December, 2011, again requested the defendant to enter into a licensing agreement with the plaintiff on FRAND terms for the SEPs portfolio of the plaintiff. The defendant in its reply letter dated 19th January, 2012, at the first instance, submitted before the plaintiff that the defendant was not a manufacturer of mobile phones as it is merely selling/ trading them under its brand name and thus cannot be held

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58 GSM (Global System for Mobile Communications) is a standard developed by European Telecommunications Standards Institute to describe the protocols for second generation (2G) Digital cellular networks used by mobile phones.
59 GPRS (General Packet Radio Service) is a packet oriented mobile data service on the 2G and 3G cellular communication system’s global system for mobile communication.
60 FRAND is a legal term that stands for “Fair, Reasonable, and Non-Discriminatory” and is typically used to describe patent licensing terms
61 Ibid at para 22
62 Ibid
liable for infringement of patents. The plaintiff in its reply letter dated 26th January, 2012 clarified that the defendant is legally liable to obtain a license from plaintiff despite the fact that it is not manufacturing the infringing products but was selling the same and the defendant was invited to negotiate a license agreement on FRAND terms with the plaintiff. The plaintiff negotiated with the defendant under the aegis of Indian Cellular Association. Even after the aforesaid efforts by the plaintiff, the defendant failed to show any serious intention of entering into a patent license agreement with the plaintiff.\(^63\)

After repeated attempts by the plaintiff, on 11th April, 2013, the defendant finally signed the NDA (after a lapse of over four years). The plaintiff allegedly provided more information to the defendant and its liability to take license in respect of the plaintiff's SEPs. The plaintiff thereafter supplied the term sheet to the defendant vide email dated 23rd April, 2013 prior to their meeting dated 29th April, 2013. During the course of another meeting which was held between both the parties on 23rd May, 2013, the plaintiff explained its SEP portfolio, the standardization process, etc. The defendant requested the plaintiff to provide a revised patent license arrangement. Thereafter, the Plaintiff drafted a written offer based on the discussion held on 23rd May, 2013, and provided the same to the defendant. In reply, the defendant, however, proposed a counter offer which was different, as per the plaintiff, from the in-principle agreement reached in the meeting between both the parties on 23rd May, 2013.\(^64\)

The plaintiff alleged that on one hand the defendant continued to engage in correspondence with the plaintiff and on the other hand multifarious proceedings were initiated by the defendant against the plaintiff before the Competition Commission of India and the Intellectual Property Appellate

\(^{63}\) Ibid at para 24  
\(^{64}\) Ibid
Board (IPAB) in the months of August-September, 2013, for revocation of the plaintiff's suit patent. The net result is that the defendant did not respond positively to any of the proposals offered by the plaintiff. The defendant has also filed a Complaint/Information before the Competition Commission of India alleging abuse of dominance by the plaintiff. The said complaint was filed by the defendant on 30th September, 2014. The said complaint is registered as Case No.76/2013. Both the aforesaid proceedings were initiated by the defendant during the period when the licensing negotiations were still on-going between the parties.

It is alleged by the plaintiff that the defendant has taken two different stands, i.e. as in the complaint/ information before the CCI is based that the plaintiff patents are valid and essential as a result of which the defendant is bound to seek a license from the plaintiff whereas before the IPAB the defendant has challenged the validity of five SEPs of the plaintiff. The defendant did not disclose before the CCI that it had already filed five revocation petitions before the IPAB. By its order dated 16th January, 2014 the CCI had ordered an investigation against the plaintiff on the basis of allegations made by the defendant in its complaint before the CCI. The said order dated 16th January, 2014 was challenged by the plaintiff by filing a writ petition, being W.P (C) No.1006/ 2014, before this Court on inter alia the ground that the order passed by the CCI was arbitrary in nature and without jurisdiction. That on 17th February, 2014 the Writ Court directed that whilst the Director General (D.G) of the Competition Commission of India ("CCI") may call for information from the plaintiff, no final report shall be submitted by the Director General and no final orders shall be passed by the CCI in Case No.76 of 2013. The Writ Court also directed that no officer of the plaintiff Company, stationed abroad, shall be called upon by the D.G for the purpose of investigation. The Writ Court also ordered that the

65 Ibid at para 25
66 Ibid at para 28
observations made by the CCI in its order dated 16th January, 2014 shall not come in the way of the plaintiff negotiating with the third parties or in the adjudication proceeding filed by either of the parties. The defendant contended five main issues in his written statement which are:

(i) Under the Act, the validity of a patent must be first established before the issue of infringement is considered by the Court.

(ii) Section 13(4) of the Act has been interpreted by the Supreme Court to mean that no patent which is granted in India enjoys presumptive validity owing to the mere factum of grant.

(iii) The caveat in Section 13(4) of the Act has been interpreted as an obligation on the part of a patentee to establish the validity of his patent in the Plaint before he proceeds to address the issue of infringement.

(iv) It is submitted that the defendant's prior-filed revocation petitions and three other revocation petitions represent a serious challenge to the validity of the plaintiff's Suit patents. Thus, no relief can be granted to the Plaintiff. Therefore, until the issue of validity is not conclusively adjudicated upon, the plaintiff is not entitled to the grant of any relief by this Court.

(v) The defendant has challenged five of the Suit patents, the so-called "AMR patents", and the other three Suit patents, the so called "EDGE/ 3G patents" are being challenged, on multiple substantive grounds under Section 64 of the Act including for lack of patentability, lack of novelty, lack of inventive step, non-compliance with Section 8 of the Act, fraud on the Indian Patent Office and insufficiency of disclosure. The violation of Section 8 is a substantive violation of the Act since it establishes breach of the duty of trust cast on the patent applicant by the Act. The violation of Section 8 is fatal to the existence of a patent. Section 8 of the Act has two sub-sections.

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67 Ibid at para 29
The first sub-section requires a patent applicant to submit a statement to the Controller of Patents within the prescribed period setting out detailed particulars of contemporaneous patent applications which were filed by the patent applicant or someone deriving title from the applicant in other jurisdictions with respect to the same or substantially the same invention. Under the same sub-section, it also requires him to give an undertaking to the Controller that he would keep the Controller informed in writing, from time to time, of detailed particulars in respect of such foreign applications, if any of them is filed subsequent to the filing of the Indian application. Under the second sub-section of Section 8, whenever the Controller seeks details of examination of foreign applications, the patent applicant shall furnish them within the prescribed time period. The object of both sub-sections of Section 8 is to enable the Controller of Patents/Indian Patent Office to have access to the material placed before foreign Patent Offices by the applicant. Every Suit patents have been obtained by suppression or non-disclosure of information under Section 8, thereby committing a fraud on the Indian Patent Office.68

Therefore, in this case, The Delhi High Court observed that the defendant has prima facie acted in bad faith during the negotiations with plaintiff, it has even approached various mediums and has made contrary statements in order to get monetary benefit such as:

a) In the Counter affidavit filed by defendant in the aforesaid Writ Petition, it has been stated that the reason it was not disclosed to CCI was that the disputes in personam are of no concern to CCI which has larger responsibility to decide anti-competitive practices in rem.

b) In the Written Statement filed by defendant in the present suit, it has been stated that "the institution of the revocation proceedings before the IPAB was not brought to the attention of CCI since an express clarification

68 Ibid at para 40
was sought from the Defendant from by the CCI as alleged by the plaintiff with regard to the validity of the Plaintiff's patents.

c) In the Counter Affidavit filed by defendant in the W.P(C) 1006/2014 (filed by plaintiff against the CCI's order dated 16th January, 2014) it has been admitted by defendant that it requires a license in respect of plaintiff's eight standard essential patents.\(^{69}\)

The Delhi High Court took the same view which is already taken in Suit No.442/2013 and the stay order passed in the two applications i.e. I.A. No.3825/2013 (for stay) and I.A. No.4694/2013 (for vacation of stay order). The aforesaid same royalty amount is fixed in the present matter also, but the same be paid in the following manner by disposing of this interim application:

i) That 50% amount of royalty in the same manner as per details mentioned in Suit No.442/2013 from the date of filing of suit till 1st March, 2015 shall be paid to the plaintiff directly by way of bank draft within four weeks from today. For the remaining 50% amount, the defendant shall furnish the bank guarantee within the same period with the Registrar General of this Court who would invest the said amount in FDR initially for a period of twelve months.

ii) For future period, every six months the same terms would apply till the disposal of the suit in the same manner. The proceedings of the suit are expedited.

iii) As regard the previous period i.e. prior to suit is concerned, the defendant shall furnish true accounts from the date of user till the date of suit within four weeks by filing of an undertaking that in case of decretal of suit, the defendant shall pay the amount for the said period as fixed by the Court

\(^{69}\) Ibid at para 148
while issuing direction at the final stage of the suit when the objection of defendant on limitation also would be considered as per law.

iv) Liberty is also granted to both the parties to seek further direction or modification order in case of change of circumstances and subsequent events.70

In M/s Best IT World (India) Private Limited (iBall) v M/s Best IT World (India) Private Limited (iBall) & M/s Ericsson India Private Limited71, the Informant is identified to be an Indian IT & Electronics company incorporated under the Companies Act, 1956 and engaged in the business of import and distribution of computer peripherals, mobile handsets, tablets etc. The Informant started business as a computer fixtures supplier in 2001 under the brand name “iBall” and entered into the mobile phone sector in November 2010. The Opposite Party No. 1 in this case was a company incorporated under the laws of Sweden and it offered services related to software and infrastructure in Information and Communication Technology for telecom operators and other industries including licensing of intellectual property as well as networking equipments, mobile and fixed broadband, operations and business support solutions, cable TV, internet protocol television, video systems etc.72

The facts of the case as per the Informant that the Opposite Party No. 1 is one of the world’s largest telecommunication companies with a global market share of 38% and also one of the largest holders of Standard Essential Patents (“SEPs”) in the mobile phone and wireless industries with approximately 33,000 granted patents as of 2012, out of which 400 were granted in India73.

70 Ibid at para 161
71 Case no 04/2015 of CCI
72 Ibid at Para 2
73 Ibid at para 3
Thereafter, in November 2011, Ericsson wrote a letter to the Informant, stating that they have appraised the Informant’s product portfolio and found that the patents of Ericsson have been infringed, which were directly relevant to the Informant’s past, present and future GSM and/or WCDMA compliant products and requested for a meeting to discuss the issue. However, Ericsson did not specify any patents which were directly relevant to the Informant’s products that were infringed. During the meeting, it was communicated to the Informant that some of its handset models were violating the patents of Ericsson and the Informant should come into a global patent licensing arrangement (GPLA) for all the patents of Ericsson. The Informant expressed its readiness to enter into such agreement if Ericsson could identify the patents which were alleged to have been infringed, such patents were valid and enforceable in India and the terms of such arrangement were reasonable and not burdensome. It was informed by Ericsson to the Informant that a non-disclosure agreement (NDA) would have to be entered into before proceeding further in the matter. The Informant has stated that Ericsson declined to share any data about the patent infringements until it executes the NDA.74

Thereafter, an email was sent by Ericsson to the Informant on 29.11.2011 along with a draft NDA for further dialogue. Ericsson, through NDA, levied very stringent terms such as ten years confidentiality in relation to disclosure of any information by either party, confidential information is to be shared only with an affiliated company and all disagreements are to be settled by way of arbitration in Stockholm, Sweden. The Informant had raised numerous apprehensions regarding the terms and conditions of the NDA and highlighted that it is keen to enter into a license agreement with Ericsson as per FRAND (fair, reasonable, and non-discriminatory) terms and within the jurisdiction of Courts in India. In July 2012, it was conversed to the Informant by Ericsson that the proposed license would cover not only its

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74 Ibid at para 4
future sales but also past sales. The Informant contended that despite repeated requests for adopting lenient terms and conditions in the NDA and to provide details about alleged patent violations on the part of the Informant, Ericsson did not address these issues.\(^{75}\)

The Informant highlighted that refusal by Ericsson to identify the standard essential patents so infringed by the Informant, threat of patent infringement proceedings, persuading the Informant to enter into one sided and arduous NDA, tying and bundling of patents irrelevant to the Informant’s products by way of GPLA demanding unreasonably high royalties by way of a certain percentage value of handset as opposed to the cost of actual patent technology used etc. are violative of the provisions of section 4 of the Competition Act, 2002 and requested the Commission to conduct necessary investigation on the abuse of dominant position by the Opposite Parties.\(^{76}\)

The Competition Commission of India in this order observed that Ericsson was a member of a Standard Setting Organisation namely, European Telecommunications Standards Institute (ETSI) which is officially recognized by the European Union as a European Standards Organization. ETSI produces globally applicable standards for Information and Communication Technologies i.e., fixed, mobile, radio, converged, broadcast and internet technologies, some of which are covered by patents held by ETSI or ETSI members like Ericsson. Standardisation is a voluntary process wherein a number of market players reach a consensus for setting common technology standards under the support of a Standard Setting Organisation, which in the present case is ETSI. In simple terms, standardisation is the process of developing and implementing technical standards. Such technological standards are termed as SEP. Once a patent is declared as SEP,

\(^{75}\) Ibid at para 5
\(^{76}\) Ibid at para 6
it faces no competition from other patents until that patent becomes obsolete due to new technology.\textsuperscript{77}

It was observed by the Commission in this case that as per clause 6 of ETSI IPR policy, an IPR proprietor is required to give irreversible written undertaking that it is prepared to grant irreversible licences on FRAND terms to be applied fairly and consistently to similarly placed players. The patent owner has to grant irrevocable license to manufacture, including the right to make or have made customized components and sub-systems to the licensee's own design for use in manufacture sell, lease, or otherwise dispose of equipment so manufactured repair, use, or operate equipment and use methods.\textsuperscript{78}

It was further observed by the Commission that FRAND license are primarily intended to prevent Patent hold-up and Royalty Stacking. The worth of complex products and services often depends on the interoperability of components and products of different firms. To improve the value of these complex products, competing manufacturers, customers and suppliers participate in standard setting practices to set technological standards for use in designing products or services. When such standard technologies are protected by patent rights, there is a possibility for hold-up by the patent owner which means a demand for higher royalties or more costly or onerous licensing terms than could have been obtained before the patent was declared as a SEP. Hold-up can undermine the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Ultimately, the high costs of such patents get transferred to the final consumers. Similarly, royalty-stacking occurs when a single product uses many patents of same or different licensors. As such, from the perspective of

\textsuperscript{77} Ibid at para 8
\textsuperscript{78} Ibid at para 9
a firm manufacturing the product, all the diverse claims for royalties need to be added or stacked together to determine the total burden of royalty to be borne by the manufacturer.\footnote{Ibid at para 10}

Ericsson had acknowledged to ETSI that it has patents over 2G, 3G and EDGE technology and these patents are SEPs. As per its undertakings, Ericsson is required to offer and conclude licenses with patent seekers on FRAND terms. Ericsson’s patents have also been accepted by Department of Telecommunication (DoT), Government of India and every telecom service provider in India is required to enter into a Unified Access Service License Agreement with DoT. DoT had directed that all GSM/CDMA network equipments imported into India should also meet the standards of international telecommunication technology as set by International Telecommunication Union, Telecommunication Engineering Center and International Standardization bodies such as 3GPP\footnote{The 3rd Generation Partnership Project (3GPP) is a collaboration between groups of telecommunications associations, known as the Organizational Partners.}, 3GPP-2\footnote{The 3rd Generation Partnership Project 2 (3GPP2) is a collaboration between groups of telecommunications associations to make a globally applicable third generation (3G) mobile phone system specification within the scope of the ITU’s IMT-2000 project.}, ETSI\footnote{The European Telecommunications Standards Institute (ETSI) is an independent, not-for-profit, standardization organization in the telecommunications industry in Europe.}, IETF\footnote{Internet Engineering Task Force (IETF) develops and promotes voluntary internet standards, in particular the standards that comprise the Internet protocol suite.}, ANSI\footnote{American National Standards Institute (ANSI) is a private non-profit organization that oversees the development of voluntary consensus standards for products, services, processes, systems, and personnel in the United States.}, EIA, TIA\footnote{The Telecommunications Industry Association (TIA) represents manufacturers and suppliers of global communications networks through standards development, policy and advocacy, business opportunities, market intelligence, and events and networking.}, IS.\footnote{Ibid at para 11}

The Commission was of the view that SEPs owned by Ericsson are in respect of the 2G, 3G and 4G patents used in smart phones, tablets etc., which fall under GSM technology therefore, prima facie, the relevant product
market to be considered in the instant case appears to be the market of “Standard Essential Patents for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices”. Considering the nature of the relevant product and pan India presence of Ericsson, the relevant geographic market in this case appears to be the territory of India. Accordingly, the relevant market to be considered in the instant case has to be the market of “Standard Essential Patents for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices in India”. 87 The Commission further held that Ericsson has 33,000 patents to its credit, with 400 of these patents granted in India. Ericsson is also the leading holder of SEPs used in mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc. Since there is no other alternate technology available in the market in India, Ericsson enjoys a complete dominance over its present and prospective licensees in the relevant market. Thus Ericsson, prima facie, appears to be dominant in the relevant market 88.

The allegations made in the information concerning royalty rates make it clear that the practices adopted by Ericsson appear to be inequitable as well as contrary to FRAND terms. The royalty rate being charged by Ericsson has no linkage to the functionality of the patented product rather it has linkage to the final price of the manufactured product in which the patent is being used. Ericsson seems to be acting contrary to the FRAND terms by imposing royalties linked with the cost of manufacturing product. Charging of two different license fees per phone for use of the same technology, prima facie, appears to be discriminatory. Further, the terms of the NDA are contrary to the spirit of applying FRAND terms fairly and uniformly to similarly placed players. The Commission observes that forcing a party to execute NDA and imposing excessive and unfair royalty rates, prima facie, amount to abuse of

87 Ibid at para 12
88 Ibid at para 13
dominance in violation of section 4 of the Act. Also, imposing a jurisdiction clause debarring the Informant from getting the disputes adjudicated in the country where both the parties are engaged in doing business and vesting the jurisdiction in a foreign land, prima facie, appears to be unfair.\textsuperscript{89}

The Competition Commission of India found in its analysis that a prima facie case of contravention of the provisions of section 4 of the Competition Act, 2002 was made out against the Opposite Parties and it is a fit case to be investigated by the Director General\textsuperscript{90}. Accordingly, the Commission directed the Director General to cause an investigation in this matter and submit the report within the prescribed timeframe.

6.4 Concluding remark

In the modern economy, IPR and Competition have complementary roles in the ultimate goal of protection of consumer welfare. On the one hand, IPR promotes innovation which in turn accelerates competition in the market. The fact that these two realms of law come in conflict with each other but some kind of reconciliation is required too.

The researcher has found that there exists a difference between ‘legal monopoly’ and ‘economic monopoly’ since the former falls within the domain of IPR authorities and the other falls within the arena of competition authorities. It is the duty of competition authorities to watch out that dominant position ipso facto does not grant monopoly but the abuse of such dominant position which shall attract the offences within the competition law.

\textsuperscript{89} Ibid at para 14
\textsuperscript{90} Ibid at para 16
To conclude and after analyzing the legislations and cases, the Competition law of India is not well equipped to deal with the cases involving Intellectual Property and Competition Law. The Competition Act in India has not fully developed and matured with regard to the interplay between Intellectual Property and Competition Law. The competition authorities are heavily relying on the European Union judgments since it is the most developed competition regimes worldwide. The Amir Khan Productions Pvt. Ltd case, the FICCI case, the Microsoft case, the Micromax case and the latest Ericsson cases are the onset in Indian jurisprudence of Intellectual Property Law and Competition Law.