CHAPTER- VII

Conclusion and Suggestions

The existence of Intellectual Property Rights stimulates both investments and development of new ideas, which in turn promotes economic growth which is vital for our society today. By providing a number of protective forms for various industrial property rights the incentive to invest in research and development naturally will increase, as these investments become more secure and the right owner will reap the rewards for his creative effort and innovation. Intellectual property rights, by their very nature, give a monopolistic status to the holder of the right, and so put some short-term restraints on competition in the market. However, in the long run they promote increased competition since a good deal of innovation on the part of competitors is promoted, which will lead to new, competing and substitutable products on the market.\(^1\) On the other hand the objective of Competition Law is increased efficiency in the market and consumer welfare.

Intellectual property Law and Competition Law are the two major areas of law governing the market and promoting economic efficiency, consumer welfare, competition, innovation and technology transfer. Although they share the same objectives, the anti-competitive exercise of IPRs through unilateral or collusive conduct may adversely affect competition and innovation and in fact hinder technology transfer.

The tension between IPRs and competition policy is sought to be resolved by the competition authorities in major jurisdictions such as US and EU. The law in these countries developed and matured over the years to accommodate the interests of both innovation and competition. However, competition law and policy is in its nascent stage in India in most of the developing countries and the interface between IP law and competition policy poses a challenge to these nations especially in US, EU and India as discussed. There is also a realization among these countries that innovation is the key for flourishing of the economy. Therefore the primary concern is the precompetitive treatment and exercise of IPRs.2

As suggested by Hovenkamp3, much of the confusion regarding the patent-antitrust interface stems from the lack of consensus about the optimal amount of patent protection. Antitrust restrictions on patent exploitation affect the scope and the exercise of patent rights, which in turn alters the size of patentee reward. As such, the patent-antitrust rules are an integral part in the determination of the optimal patent protection (i.e., how many incentives to offer to induce innovation). At the same time, it is impossible to delineate the optimal scope of the patent-antitrust rules without placing these rules in the context of the overall determination of optimal patent protection. The patent-antitrust rules are but one of the many pieces of the puzzle.

Reconciling intellectual property and competition policy requires recognizing that intellectual property law is a form of competition policy4.

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The researcher shows that the interplay between Intellectual Property and Competition policy is not conflicting since Intellectual property creates monopoly for a limited period of time and competition law shall only interfere when the monopoly is missued. Intellectual property is about competition policy. Innovation occurs through competition, and intellectual property rights ensure effective, dynamic competition. This is why intellectual property rights must be defined in a way that is consistent with dynamic market competition. If constructed too strongly, intellectual property rights can interfere with competition. If constructed too weakly, intellectual property rights may not adequately resolve the market failures that bedevil markets for information. The challenge is to design rules both within intellectual property law (the substantive law of patents, copyrights, trademarks, and trade secrets) and outside intellectual property law (substantive competition law) that promote dynamic competitive markets. In the United States, the Sherman Act 1890 is a matured legislation to handle anti-competitive practices. The Clayton Act 1914 prohibits mergers and price discrimination. The areas of clash between Intellectual Property Rights and Competition law like the refusal to deal, tying arrangements, patent pooling, exclusive licences being monitored by the courts to prevent such practices to protect efficiency in the market.

The European Union through Articles 101 and 102 respectively have tried to curb abuse of dominant position, imposing unfair purchase of selling prices, actions against cartels is strictly being implemented by the European Commission. The Court’s attitude is that the exercise of an intellectual property right that causes or maintains the partitioning of markets will only be upheld to such an extent that the specific subject matter of the right is protected. This means that intellectual property rights have a core, the

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specific subject matter that the right holder can rely on even if this hinders cross-border trade. Within the specific subject matter, which is different for all intellectual property rights and which is developed through the jurisprudence of the Court, the Community principle of free movement of goods is subordinated to the national rules⁶.

India being at the growing stage after its economic liberalization is having difficulty accepting the conflict between both the laws. With liberalization, globalization and privatization it was made easier to concentrate on the aspects of competition and innovation equally. After 1991, law also kept pace with the shifting economic paradigms as was reflected by the amendments brought about in the MRTP Act. To face the newer challenges posed by a vibrant economy like India, it was important to evolve new strategies of growth while cherishing the ideals of economic democratization manifested under Articles 38 and 39(b) and (c) of the Constitution of India. Article 38 states that the State shall secure a social order for the promotion of the welfare of people. Article 39 (b) and (c) states that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. The Competition Commission of India was established with the aim of fostering competition, preventing practices having an adverse effect on competition, protecting consumers’ interests and ensuring freedom of trade by various participants in the economy. India also developed and accustomed its IP laws to be in conformity with the TRIPS agreement. However, the tussle between IPRs and competition cannot be resolved unless a clear cut policy approach is laid down by way of guidelines

as was done by the United States Department of Justice and the Federal Trade Commission in the year 1995.

In India, it is the duty of the Competition Commission to eradicate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.

The researcher agrees with the author Debra A. Valentine in her article, “Intellectual Property and Antitrust: Divergent Paths to the Same Goal” “that the relationship between the two systems is characterised more by its accommodation than by its conflict. Both pose a divergent path to the same goal”. The researcher concludes that Intellectual property is an exception to free competition. Competition law will try to interfere only when somebody tries to extend the allowed term of protection by different means or misuse of such monopoly. The behaviour of competition law is not in conflict with intellectual property rights. Competition law is equipped to deal with the abuse of intellectual property rights. Thus, the hypothesis is disproved that Intellectual Property Rights and Competition Law as separate branches of law are necessary for a vigorous competition in the market.

The United States and the European Union have strong competition policies. In the United States both the Sherman Act 1890 and the Clayton Act 1914 prohibits anti-competitive and abusive actions and prohibits mergers and price discrimination targeted to market distortions. There are issues involving unilateral refusal to license, tying arrangements, exclusive licences, patent pooling which might lead to distortion in the competition. On the other hand in the European Union, Article 101 and 102 of the European Union treaty prohibits trade between states that restrict competition. Cartelisation and abuse of dominant position are strictly prohibited.
Looking at India, Competition Act 2002 came after repealing the Monopolies and Restrictive Trade Practices Act. The underlying objective behind creation of the Competition Act was to curb the practices which eliminate competition in the market. Section 3 of the Act deals with anti-competitive practices which exempts IPR from its application. Section 4 deals with abuse of dominant position. India is at a growing stage to comprehend the interplay between intellectual property and competition law.

The researcher after looking into the United States scenario comes to the conclusion that US courts are more favourable to intellectual property protection when compared in promoting competition in the market, the major issues being the abuse of dominant position, refusal to license, tying arrangements etc.

### 7.1 The European Union scenario

In the European Union framework, the accommodation between competition law and IPRs tend to occur within the general doctrines of competition law. There are limited examples of IPRs being treated as a special form of property. The example is the ‘exceptional circumstances’ test embedded in Article 102. This doctrine includes that normal exercise of IPRs will not abuse a dominant position. In extreme cases when IPRs are used unjustifiably by their highly dominant owners to exclude competitors from market is when the Competition law of EU starts intervening.

Article 102 also provides a more typical form of accommodation to the exercise of IPRs in the logic of its concept of dominance. The researcher has pointed out earlier that attainment of dominance is not unlawful. The competition law in the European Union accepts that achievement by market
dominance by organic growth including investment in R&D and intellectual property rights protection is a legitimate course of conduct for a firm.

The accommodation with IPRs in the new TTBER Guidelines occurs almost entirely with the logic of competition law. The 2004 IP Guidelines do not state explicitly that IP protected products are treated as any other form of property rights, as did the US Guideline in 1995. An analysis of the same makes it clear that there is little special treatment for IPRs under Article 101. The Guidelines have accepted that great majority of licensing agreements are pro-competitive and compatible with Article 101\(^7\). Finally, the Commission also acknowledges that technology licensing may require the licensee to make considerable sunk investments in the licensed technology and production assets necessary to exploit it.\(^8\)

Looking into the judicial pronouncements, the ECJ has pointed out that existence of monopoly power under IP rights is not a breach of EU Competition Law.

As early as in 1968, Art 82 (presently Article 102), could be applied to the use of IP rights as long as the relevant conditions relating to the operation of the article were in place- the fact that an undertaking holds an IP right does not necessarily mean that it is dominant. The Court in Parke Davis & Co. v Probel, Reese, Beintema-Interpharm and Centrapharm\(^9\), the ECJ held that to charge a price for a patented item than a non-patented item was not an abuse of dominant position but in confirming that Art. 82 could be applied to the exploitation of IP rights.

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\(^7\) TTBER Guidelines, para 9
\(^8\) Id, para 8
\(^9\) 24/67[1968] CMLR 47
Looking into Tetra Pak I\(^\text{10}\), the EC Commission condemned the acquisition of a license to intellectual property in an area where the undertaking in question was already dominant. On the other hand in Sirena v Eda\(^\text{11}\), the Court held that holding of intellectual property does not necessarily confer dominant position as it may be the case that the relevant market encompasses products, services, or processes other than the one for which the right is held.

The Magill\(^\text{12}\) judgment was criticized by a number of competition and intellectual property lawyers, and it is generally considered to be ‘exceptional’, although it is not doubted that it remains a good law. Despite this the Commission took an interim measures decision in relation to the use of intellectual property in German law. The CFI in this case was very clear that would be appropriate to compulsorily license intellectual property in response to an alleged breach of Art 82:

> It is important to recall that the public interest in respect for property rights in general and for intellectual property rights in particular is expressly reflected in Articles 30 and 295 EC. The mere fact that the applicant has invoked and sought to enforce its copyright in the 1860 brick structure for economic reasons does not lessen its entitlement to rely upon the exclusive right granted by national law for the very purpose of rewarding innovation. In the present case, where there is, on the face of it, a clear public interest underlying the applicant’s effort to enforce and profit from the specific subject matter of its copyright in the 1860 brick structure, the inherently exceptional nature of the power to adopt interim measures would normally require that conduct whose termination or amendment is targeted by such measures fall clearly within the scope of the Treaty competition rules.

\(^{11}\) 40/70 [1971] ECR 69, Para 16  
\(^{12}\) C 241 and 242/91P [1995] 4CMLR 418
Conclusion and Suggestions

However, the characterization of the refusal to license at issue in the present proceedings as abusive turns, prima facie, on the correctness of the Commission's interpretation of the case law concerning the scope of 'exceptional circumstances'. It is this case law which explains the clearly special situations in which the objective pursued by Art. 82 EC may prevail over that underlying the grant of intellectual property rights. In this context, where the abusive nature of the appellant’s conduct is not unambiguous having regard to the relevant case law and where there is a tangible risk that it will suffer serious and irreparable harm if forced, in the meantime, to license its competitors, the balance of interests favours the unimpaired preservation of its copyright until the judgment of the main action13.

Further in NDC Health Corporation v IMS Health Inc and Commission14 case, regarding refusal to license, the ECJ had justified that: (1) the refusal prevented the emergence of a new product for which there was demand; (2) the refusal was unjustified; and (3) refusal would exclude competition on a secondary market.

The ECJ while dealing with the issue of compulsory licensing in Microsoft15 case, noted in para 204 that it was not the Commissions ‘intention to order Microsoft to disclose its source code to its competitors’. The Microsoft judgment was a landmark judgment in terms of intellectual property versus competition law in the US. Microsoft violated the competition laws by not disclosing its interoperability information to competitors which is necessary to operate with Microsoft’s dominant PC operating systems.

13 Para 143-4
14 C-481/01 P ® [2002]5CMLR 1
The cases discussed above relate to the extreme position in which the compulsory licensing has been raised, the situation more normally encountered continues to be that in which it is the exercise of IP rights that is curtailed by the application of competition law, although there are few cases relating to the process of applying for IP rights and the management of the IP systems. Thus the use of patents and related IP rights to partition the market was condemned by the EC Commission in Astra Zeneca plc\textsuperscript{16} with the Astra Zeneca group being fined 60 million pounds in respect of various infringements related to the marketing of an anti-ulcer medicine, Losec.

The essential facilities doctrine was discussed by the ECJ in Bronner\textsuperscript{17}, Volvo\textsuperscript{18}, Renault\textsuperscript{19}, Magill\textsuperscript{20}, Microleader\textsuperscript{21} and IMS Health\textsuperscript{22} cases. The Magill and IMS Health cases has specifically put conditions for refusal to license an IPR that covers indispensable input for competitors.

The provisions in the European Commission treaty relating to the free movement of goods or intellectual property are Art 28 which provides that quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States. However, Art 30 provides some exceptions to this general principle. It states that the provisions of Art 28…..shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of…industrial and commercial property. Such prohibition or

\textsuperscript{16} 2005/1757/EC, decision of 15 June 2005 \\
\textsuperscript{17} Oscar Bronner v Mediaprint [1998] ECR 1 7791 \\
\textsuperscript{18} Volvo v Veng [1988] ECR 6211 \\
\textsuperscript{19} ConsorzioItaliano Della Comomenetistica Di RicambioPer-Autiveicoli and Mexicar v RegieNationale Des Usiness Renault (case 53/87) [1990] FSR 544; [1988] ECR 6039. \\
\textsuperscript{20} Micro Leader Business v Commission Case T-198/98 [2000]4 CMLR886 \\
\textsuperscript{21} Comp D3/38.044- NDC Health/IMS Health: Interim Measures, Commission Decision of 3\textsuperscript{rd} July 2001 \\
restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Art 30 expressly allows restrictions based on the assertion of IP rights, as long as such restrictions do not amount to ‘arbitrary discrimination or a disguised restriction on trade between member States’. The ECJ has thus developed a line of cases which significantly restricts the ability of the holders of IP rights to exercise those rights in a way which divides the internal market. The ECJ has drawn a distinction between ‘existence’ of IP right and the ‘exercise’ of that right which the researcher finds to be an uncomfortable distinction. The ECJ in Consten and Grundig v Commission\(^23\), the Court held that:

Article 30….cannot limit the field of application of Article 81(presently Article 101). Article 295 confines itself to stating that the “Treaty shall in no way prejudice the rules in Member States governing the system of property ownership”. The injunction contained in……..the contested decision to refrain from using rights under national trademark law in order to set an obstacle in the way of parallel imports does not affect the grant of those grants of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 81(1)\(^24\).

In Deutsche Grammophon v Metro\(^25\), the distinction between the existence and the exercise of an IP right was discussed. The interface of Intellectual Property rights and Competition Law has grown enormously because of the expansion and strengthening of intellectual property at a large scale. Two main concerns dominate this IPR competition law interface which is the potential abuse of monopoly pricing, especially in developing countries

\(^23\) Case 56 and 58/64 [1966] 1 CMLR 418
\(^24\) Para 50
\(^25\) [1971] CMLR 631
where effective substitutes to IPR-protected products may not be readily available.\textsuperscript{26} As Mario Monti\textsuperscript{27} has rightly pointed out: “It is a long standing topic of debate in economic and legal circle: how to marry the innovation bride and the competition groom”.

### 7.2 The United States scenario

The United States Antitrust Law had enacted the Sherman Antitrust Act, 1890. Later the enactment of the Clayton Act 1914, Federal Trade Commission Act 1914 and the Robinson Patman Act 1936, the competition law has attained new dimensions.

At the federal level, it has long been recognized that antitrust and intellectual property rights encourage innovation but by different means which can conflict. Intellectual property rights grants monopoly whereas antitrust promotes competition. Moreover, intellectual property is mainly concerned with longer term a benefit than antitrust which is mainly concerned with price and output, its policy focuses on short term effects of strategic conduct.

Antitrust and IP laws have historically been in and out of relative prominence. In the earlier years of the interplay between both the laws, the IP laws arguably won out as the courts excused conduct extending the scope of patent rights beyond its appropriate bounds. Later, antitrust bounced back with revenge, condemning per se unlawful what would now be considered relatively innocuous product.

\textsuperscript{26} L. Peeperkorn, “IP Licences and Competition Rules: Striking the Right Balance”, World Competition Policy, Vol. 26, (2003), 527
\textsuperscript{27} European Commissioner for Competition Policy, January 2004
Conclusion and Suggestions

Modern US antitrust law dates back to the last years of the nineteenth century and cases reconciling IP with antitrust date back only to the first decade or two of the twentieth. The United States jurisprudence reveals that US Courts are more favourable to intellectual property protection when compared in promoting competition. The researcher has shall look into the US Courts antitrust scrutiny in the intellectual property rights.

In the 1910s, the SC had initially approved the practice of tying a patent license to the purchase of an unpatented product in a case where the producer of a rotary mimeograph included a license restriction that the licensee purchase pencils, paper, ink, and other products only from the manufacturer. But five years later in Motion Picture Patents Co v Universal Film Manufacturing Co., the Court had rebuked a licensing provision requiring operators of motion picture projection to screen film only produced by the manufacturer.

With regard to patents, in Simpson v Union Oil Co., the SC declared that ‘the patent laws ….are in pari materia with the antitrust laws and modify them pro tanto. The SCM decision held that ‘where a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the anti-trust laws’. In cases like U.S v E.I. Du Pont de Nemours & Co. and U.S v Microsoft Corporation, the monopoly power was discussed by the court. In Image Technical Services v Eastman Kodak Co., the court held that exploiting dominant position in one market to expand the empire into another is violative of section 2 of the Sherman Act. The Court aptly held that neither the aims of intellectual property nor antitrust law justify

28 Henry v Dick 224 US (1912)
29 243 US 502, 37 Cr 416 (1917)
30 377 U.S. 13, 24 (1964)
31 351 US 377
32 253 F 3d 34, 51 (D.C. Cir 2001)
33 125 F 3d 1195, 1218 (9th Cir 1997)
allowing a monopolist to rely on a business justification to mask anti-competitive practice.

The law on the antitrust treatment of IP licensing practices generally breaks down into two areas: allegedly anticompetitive conduct arising from the unilateral or concerted refusal to issue a license, or allegedly anti-competitive conduct arising from a particular licensing arrangement. In the former category, it deals with the refusal to deal outside the IP context. Claims from the latter usually stem from some restriction in the license on conduct outside use of protected IP.

Unilateral refusal to license IP suggests the limited areas where IP holders should be circumspect when denying a license to a rival. In Data General Corp v Grumman Systems\(^{34}\), the first circuit had created a rebuttal presumption that unilateral refusal to license are lawful. In Image Technical Services v Eastman Kodak Co\(^{35}\), the Ninth circuit created a similar assumption but modified it slightly to emphasize that the presumption would not rest on ‘formalistic distinctions’ but would be based on actual market reality and would focus the fact finder on… the primary interest of both intellectual property and antitrust laws: public interest’. In Re Independent Service Organization Antitrust Litigation\(^{36}\), the Federal Circuit rejecting the First and Ninth Circuit’s middle road approach held that in the absence of any illegal tying, fraud in the Patent and Trademark office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws.

\(^{34}\) 36F3d 1147, 1187 (US Ct of Apps (1st Cir), 1994
\(^{35}\) 125 F3d 1195, 1218 (US Ct of Apps (9th Cir), 1997)
\(^{36}\) 203 F3d 1322, 1327 (US Ct of Apps (Fed Cir) 2000
The US Supreme Court went on to say that Licensing restrictions cannot be put in such a way that it substantially reduces the market and creates a monopoly. In Atari Games Corp. Case\textsuperscript{37}, the Court made it clear that both IP rights and antitrust law provide incentives for scientific advances and commercializations of inventions and creative works, both promote consumer welfare. However, when licensing fails, some intellectual property rights owner have collaborated to enforce their rights in a confrontational manner. In Originators Guild of America v FTC\textsuperscript{38}, the Supreme Court held that “even if copying were an acknowledged tort under the law of the state, the situation would not justify petitioners in combining together to regulate and restrain interstate commerce”.

Tying closely resembles the patent misuse cases where the sale of a license is conditioned on purchase of some good or service that is not covered by the relevant IP. The Courts in US require plaintiffs to meet four elements to succeed on a per se tying claim: (1) the existence of two separate products; (2) sale conditioned on purchase of something else; (3) market power sufficient to restrain the tied market; and (4) an effect on a ‘not substantial amount’ of interstate commerce. In United States v Loew’s\textsuperscript{39}, the court had claimed that a related claim is bundled licensing which is generally permissible as long as there is no conditioned sale. However in US Philips Corp v ITC\textsuperscript{40}, simply bundling related patents together without any restriction or requirements regarding use will likely not warrant per se treatment.

Patent pooling involves whether pooled patents involve ‘blocking patents’ or competing patents. A patent pool with a set of royalty is akin to price fixing. However, with blocking patents, the courts have realized since the early days of

\textsuperscript{37} Atari Games Corp. v Nintendo of America, Inc 897 F 2d 1572; 1576 (Fed Cir 2006)
\textsuperscript{38} 312 U.S. 457 (1941)
\textsuperscript{39} 371 US 38, 83 S Ct 97 (1962)
\textsuperscript{40} 424 F3d 1179 (US Ct of Apps (Fed Cir), 2005)
the IP licensing antitrust law that such arrangements are pro-competitive and essential to clear up the patent thickets. The Princo case mentioned earlier, involves several issues relevant to the antitrust treatment of patent pools. The Federal circuit found that, while such conduct could conceivably represent an antitrust violation, it does not represent a viable patent misuse defence in an infringement action. In another case \(^{41}\) patent pools that serve to retard innovation can be challenged.

In cases of copyright, the exclusive right to copy includes more than protection from making of identical duplicates such as photo or digital copies. It also prohibits others from making ‘substantially similar’ reproductions, whether ‘by imitation or simulation’. The well known Sega Enterprises Ltd. v Accolade Inc.\(^{42}\) involved reverse engineering and with it, copying in order to identify application program interfaces (APIs) which the defendants needed to write game programs that would run on the SEGA system. The Court determined that Accolade’s copying did not infringe SEGA’s copyright in the operating system, noting that Accolade’s games competed directly with those of SEGA and its licensees.

### 7.3 Indian scenario

India also developed and accustomed its IP laws to be in conformity with the TRIPS agreement. One can easily infer that equal drive on innovation and competition is a matter economic expediency for India. However, the tussle between IPRs and competition cannot be resolved unless a clear cut policy approach is laid down.

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\(^{41}\) United States v Automobile Mfg Association 307 F Supp 617 (US Dist Ct (CD Cal), 1969

\(^{42}\) 977 F.2d 1510
Conclusion and Suggestions

The Competition Act 2002 explicitly points out exceptions in favour of the exercise of intellectual property rights in Section 3(5) of the Act\(^43\). Looking into Section 3 of the Indian Competition Act which prohibits anti-competitive agreements between enterprises and lists out the conduct which is deemed to have a harmful impact on competition which includes – determining purchase or sale prices, limiting production or supply, allocating geographic markets or product market, bid rigging or collusive bidding etc. However, the exception as created by clause (5) of the section reflects the policy of striking a balance between the legitimate interests of IPR holders and competition in the market.

The advanced countries and major trading nations like US and EU have taken recourse to tools such as compulsory licensing in order to mitigate the impending perils of abusive conduct of dominant enterprises. The applicability of such a provision in India cannot be precluded since the Indian Patent Act makes an explicit provision for compulsory licensing. This would be more relevant in the field of pharmaceuticals where competition in the generic drugs may be foreclosed by dominant undertakings. The researcher concludes that compulsory licences can be used, both in the context of IPRs and of competition laws, to remedy anti-competitive practices. Article 31(k) of the TRIPS Agreement, explicitly provides for the granting of such licences

\(^{43}\) 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
b) the Patents Act, 1970
c) the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999
d) the Geographic Indications of Goods (Registration and Protection) Act, 1999
e) the Designs Act, 2000
f) the Semi-conductor Integrated Circuits Layout-Design Act, 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.
in the case of patents.\textsuperscript{44} It is pertinent to mention that the power to enact laws on compulsory patent licensing arises from several international agreements such as the World Intellectual Property Organization (WIPO) Paris Convention for the Protection of Industrial Property,\textsuperscript{45} the relevant provisions of which were incorporated into the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

TRIPS provide flexibility to the Member States to solve the difficulties resulting in potential conflict between competition policy and IP law. Articles 8, 31 and 40\textsuperscript{46} deserve a special mention. Members may “adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development.”\textsuperscript{47}

Further, TRIPS handles compulsory licenses as an exception to the agreement's minimum requirement that all Member States afford a patentee a right of exclusivity during the complete patent term. TRIPS lay down a set of


\textsuperscript{45} Paris Convention, Article 5, states that “[e]ach country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.”

\textsuperscript{46} The following part of Article 40 is relevant for our purpose -
1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member. Available at http://www.wto.org/english/tratop_e/trips_e/t_agm3d_e.htm#8 accessed on March 10, 2010.

\textsuperscript{47} Article 8 of TRIPS
circumstances that establish a floor at which any Member State is allowed to issue compulsory license. The compulsory licenses that are allowed fall into two categories—where there is an overriding public interest or where the patent rights are being used in an anti-competitive manner. In the realm of national laws, following are the examples that specify when compulsory licenses can be issued:

- Refusal to enter into a voluntary licensing agreement on reasonable commercial terms;
- Public interest;
- Public health and nutrition;
- National emergency or situation of extreme urgency;
- Anti-competitive practices on the part of patent holders;
- Dependent patents;
- No or insufficient working of the invention in the national territory.

Thus, it is evident that compulsory licensing can potentially combat some of the most insidious circumstances including anti-competitive practices. India can undoubtedly enact and develop its laws to suit the peculiar requirements. The Competition Commission of India may use the potent tool of compulsory licensing to countervail the harmful effect of IPRs on competition. This approach must be subject to the TRIPS provisions which entail that the compulsory license should be issued on the basis of individual merits and the IPR holder must be appropriately remunerated etc. Therefore India can fully use the flexibilities allowed by the TRIPS Agreement to determine the grounds for granting compulsory licences to remedy anti-competitive practices relating to IPRs.

Further, the doctrine of “essential facilities” can be made to apply in India to combat abusive conduct of dominant enterprises. Developing
countries like India may draw interesting lessons from the application of the concept of refusal to deal, essential facilities, block booking and royalty stacking doctrine in developed countries.

However, there are no rigid models and developing countries can elaborate their own approaches on the matter in order to respond to their public interests. In countries like US and EU the essential facilities doctrine has been used as a potent tool for granting of compulsory licences so as to allow third parties to have access to IP protected products and technologies. The vast array of case laws that has developed in this area throws light on some of the conditions and circumstances under which the doctrine of essential facilities is applied to IPRs. The most frequently enunciated pre-requisites are refusal to deal without any objective justification; exclusion of competition in secondary market by denying access to essential facilities which are deemed to be industry standards and are indispensable for producing new goods for which there is consumer demand; extending and perpetuating monopoly in other markets in ways different from normal development of monopoly power (example – unlawful tying).

Under the India law, these could fall within the ambit of Section 4. The Competition Act, 2002 (Section 4) prohibits the abuse of dominance by enterprises. Section 4(2) (c) articulates that abuse of dominant position consists in indulging in practice(s) resulting in denial of market access. Further, section 4(2) (e) expatiates that such abuse could also be in the form of using the dominant position in one relevant market to enter into, or protect, other relevant market. These provisions are very much in line with the principles adopted by EU and US courts in cases involving refusal to deal and essential facilities. However, India can evolve its own principles with regard to application of essential facilities doctrine without dampening the

48 Supra note 2
growth of innovation and enterprise. India could also adopt the EU approach wherein the law casts a general duty upon dominant firms to supply the essential facilities to competitors (unlike US)\textsuperscript{49}.

In some cases, even if the facilities are not “essential” the denial of access by a dominant firm is nonetheless scrutinized from the perspective of abusive conduct, considering its impact on competitors in secondary market. The essence lies in adopting the “rule of reason” approach with regard to cases involving “refusal to deal”, which would lend flexibility to the application of essential doctrine. Pertinently, in India, S.4 (2) (e) of the Competition Act is the vanguard for preventing abusive conduct by IP owners and ushering competition in secondary markets.

The analysis of the scope of competition law and IP laws reveals certain factors that can be used for determination of unreasonable use of IPRs. The researcher proposes that the primary determinants of abuse of IPRs could be excessive pricing and accessibility of goods and services. The secondary determinants of abuse of IPRs could be market sharing, unfair contract terms and dominance leverage. There are certain IP management practices which have more pro-competitive effects than anti-competitive effects. Nevertheless, such practices may also come under the purview of competition law. These are patent pools, cross-licensing, field of use licences and the standard setting process. Jurisdictions such as the United States, European Union, Japan and Singapore have adopted guidelines relating to these practices. Development of guidelines related to antitrust treatment of IP licensing under the Indian Competition Act would help clarify these areas\textsuperscript{50}.

\textsuperscript{49} Ibid
\textsuperscript{50} Ravikant Bharadwaj, KD Raju and M. Padmavati, ‘Determining unreasonable use of intellectual property rights in anti-competitive agreements in India’ (2013) I.C.C.L.R. 2013, 24(6), 231-238
Conclusion and Suggestions

In India, it is the duty of the Competition Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. The obligation to grant compulsory licence and to adjudge the status of an invention vis-à-vis s.3 (d) of the Indian Patent Act 1970 has been entrusted to the Controller of Patents, Design and Trademarks. The Controller, under the Indian Patent Act 1970, is the creature of the statute. As every enquiry brings forth a new riddle to the fore, a possible conundrum which further needs to be addressed is the enquiry into the jurisdiction of the appropriate forum in India for redressal of the abuse of patent rights in an anti-competitive way.\(^{51}\)

In a country like India, both IPR and antitrust regimes are in a state of infancy, thus jurisprudence in respect of the relationship between them has not really been thought of. The SVS Raghavan Committee in the light of the TRIPS Agreement recommended that apart from private companies in India, the State monopolies, government procurement and foreign companies should be subject to competition law. It prohibits collusive anticompetitive agreements, abuse of dominance, and mergers among enterprises. The same has been incorporated in the Act.

The winds of change shall fetch a new set of challenges with regard to clashes in overlapping zones of IPR and competition law and it is relevant for developing nations like India who are at the verge of cutting edge technology to protect their innovations and also be deal with the upcoming economic strategies in the garb of protective competition.

7.4 Suggestions

In the light of the above deliberations, the researcher would like to extend her suggestions to the Competition Commission of India which are as following:

- First of all, the conditions of abuse of IPR and violation of competition law like abuse of dominant position, exclusive licensing agreements, tie-ins, duty to supply where access was essential, block booking, royalty stacking and patent pooling should be clearly defined Intellectual Property Laws in order to punish the competition law violators. The US approach is that of treating IPRs at par with other property rights. This seems to be a practical option for India as well since it lends simplicity to the application of competition laws.

- The competition law and intellectual property rights are for the welfare of the consumers. Both the laws share the same economic rationale. They are both important for the establishment of competitive and innovative markets. This concept should be included in the respective Acts.

- Since the Indian Courts have been relying on the judgments of the EU and US in absence of a clear definition of the term “abuse of Intellectual property rights” in the Competition Act the researcher proposes the definition of “abuse of Intellectual property rights” as “abuse of dominant position, exclusive licensing agreements, tie-ins, duty to supply where access was essential, block booking, royalty stacking and patent pooling”.
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- Licensing should not be used as a means to abuse the market and thereby affect healthy competition. It should never be used as a method to restrict competition for undue benefits and must be considered as ‘abuse of IPRs’.

- Competition Act does not include high prices as abuse of dominant position. In this regard, Section 4(2) (a) (ii) of the Competition Act, 2002 should be amended so as also to include high prices. High prices not related to any objective criteria is the essence of exploitation and fair price should be ensured through in IPR protected products through competition policies. Excessive prices may be a means of unhealthy competition and should be strictly dealt by the CCI.

- Tying arrangements are restrictive practices and should be strictly dealt under the competition provisions. Tying practices involves several factors such as the objective behind selling the product, the inter-relation between tying and tied product, the amount at which the transaction is made and its probable effects on the market. These factors should be taken into consideration by the CCI.

- Patent pooling may go against competition law and will allow the process to be locked making it difficult for new entrants to enter into the market. The patent pooling is likely to attract anti-trust litigation if the licensing arrangements and agreements under it have an appreciable adverse effect on competition.

- The CCI should deal with unreasonable and unjustifiable grounds of refusal to license very strictly and this should be considered as anti-competitive. The three conditions must be taken into consideration by the CCI such as the refusal to license must prevent the competitor
offering a new product on the secondary market for which there is a potential demand, further, the refusal must not have an objectionable justification and finally the refusal must reserve to the owner of the IPR of the market for the supply of a secondary product in the member State concerned by eliminating all competition on that market.

- The guidelines could list out the anti-competitive conduct of IP owners under a “per se” category. This would enable the holders of IPRs to exercise their rights in a manner which is harmonious with competition policy. If the conduct which is per se illegal and anti-competitive is listed out by the Commission in its guidelines, it may lead to reduction in the number of cases falling foul of the competition laws.

- The exemption in favour of ‘agreements in research and development’, on the lines of EU exemption may go a long way in encouraging innovation whilst maintaining healthy competition in the market. India can adopt the block exemption for research and development in the lines of EU by adopting certain guidelines.

- In technology areas, exhaustion principle may be seriously applied so that the seller cannot put unreasonable conditions on the purchaser after selling the product. Further, technology transfer guidelines should be adopted in India to watch that acquiring of IPR is not to strengthen the exclusive monopoly power in the market.

- The definition of market could be bifurcated into markets for goods, services and technology or innovation. This would reduce the complexity and enable the Commission to address situations in which
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IP is used to charge excessive prices for or prevent access to protected technologies.

- The impact of IPRs on the market substantially varies depending upon the legal and socio-economic contexts in which they apply. Thus, the static-dynamic efficiency rationale applicable to a developed country does not necessarily hold in low income countries. High levels of IPR protection may have significant negative distributive consequences in the latter without contributing or even impeding their technological development. Thus, the Competition Commission can legitimately give static efficiency precedence over dynamic efficiency considerations and challenge, for instance, situations of excessive pricing emerging from the exercise of IPRs.

- Compulsory licensing should be meticulously used as a tool by the Controller of Patent for any patented product on public interest invoking Section 84 of the Patents Act, 1970. The patentee must make the patented invention available to the public at a reasonable price under Section 84(1)(b) 84(2) of the Patents Act, 1970. Section 84(7)(a)(ii) of the Patents Act, 1970 states that in the case of grant of license, it should be in ‘reasonable’ terms and price which will maintain healthy competition in the market.

- The remedy also lies in the Patent Act, 1970 since if the patent right is abused by the patentee in order to increasingly restrain the trade and transfer of technology, the Controller of patents can take actions under Section 83 of the Patents Act, 1970. The Controller should also consider taking into account the anti-competitive practices by the patentee while dealing with the restraint of trade.
Conclusion and Suggestions

- Section 140 of the Patents Act, 1970 states that licensing agreement contains conditions restricting the freedom of purchasing non-patented article from any other source as illegal has to be considered as anti-competitive and should also be categorically incorporated into the Competition Act, 2002.

- The provisions for prohibiting practices such as “royalty stacking” should be included in the Competition Act, 2002 by taking lessons from the Micromax Case.52

The recently announced National IPR Policy by the Department of Industrial Promotion and Policy, Government of India53 has pointed out that it is the need of the hour to defend India's interest to hold a robust ground in the world of competition. The policy seeks to strengthen the existing laws and offers for an effective legal system for the protection, promotion and interface between IPRs and Competition laws. These broad objectives of the National IP Policy are in alignment with the researcher’s concluding remarks in the thesis.

The above suggested measures given by the researcher if taken into consideration by the policy makers and adopted by the Regulatory body would lead to a healthy market and it is important, particularly for developing nations like India who are at the threshold of cutting age technology to protect their innovations and be able to handle the onslaught of economic policies in the name of healthy competition.

52 Case no 50/2013 of Competition Commission of India