Competition Law and Intellectual Property Rights
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#### Objectives

- to understand the nature of conflict of complementarities between IP and Competition law and policy
- To understand how comparative jurisdictions have resolved them
- To understand what space do WTO member countries have in terms of designing the interface between IP and competition law
- To specifically look into the provisions of the Indian Competition Act and find out mechanism to deal with the IP and competition policy interface.
- To look into two key sectors - pharmaceuticals and ICT and understand how the interface between IP and competition law is resolved in these sectors

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**Module Overview:**

The module briefs students about the interface between the competition Law and Intellectual Property Rights. It proceeds to discuss some fundamental concepts about the nature of monopoly and competition policy in order to examine whether or not their goals are contested. It will also provide an overview on TRIPS Agreement, Flexibilities for Developing Countries, Indian Competition Act, 2002, IP and Competition in Specific Sectors and Indian competition policy within patent law.

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**Introduction**

Property rights are critical in modern free-market capitalist oriented societies. Intellectual property rights (IP) protection aims to provide an exclusionary right i.e. a right to exclude others in doing acts that are offered as a bundle of rights over creations of human mind. IP is fashioned into
different forms of protection like patents, copyright, trademark, geographical indication, plant variety protection, industrial designs protection, layout design protection, trade secrets etc. These are a category of intangible rights which protect several aspects of innovation and forms of human creativity. However, there are important distinctions between treating real property (land and chattels) and IP owing to fundamentally different economic character of information/knowledge. Hence excluding others has a tremendous economic consequence which impacts both innovation and access.

At the same time, competition law and policy is an instrument to intervene in markets and correct market failures. Such laws primarily seek to encourage competitors to compete against each other and thereby create an economically efficient free market system. Adam Smith, father of economics once said: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

Thus competition benefits consumers since rivals compete to attract business by lowering prices, improving quality and services and are driven by consumer needs.

The intersection between IP and competition brings in some interesting debates since the tools used to regulate markets are very different. IP is property which allows the holder to exercise his market power. At the same time competition law and policy is meant to attack unfair monopoly. In an idealist market situation (pareto optimality), consumers would benefit without IP which conveys a kind of limited monopoly in the short run. However, this may lead to lack of incentives for innovators and hence there will be market failure. Hence a balance is struck by virtue of attacking only those monopolies which lead to inefficiency.

This module proceeds to discuss some fundamental concepts about the nature of monopoly (if it is to be called so) and competition policy in order to examine whether or not their goals are contested. While differentiation is the underlying philosophy for protecting IP rights, competition policy seeks to achieve the same set of goals by deferring to dynamic efficiency. Since WTO member countries have sufficient leeway to structure the regime governing the interface between IP and competition law, brief explanation of the nature of mandate under TRIPS is warranted. The Indian competition policy within patent law in terms of its ex-ante and Ex-post nature is examined to understand how liability rules in IP law may be useful in generating competition. In this context a discussion on the difference between the nature of market intervention between IP and competition law is conducted.

The Indian competition Act, 2002 in terms of its various provisions dealing with anticompetitive agreements, abuse of dominance and regulation of combinations is discussed in the light of the type of antitrust analysis as applied to IP. We shall see this from some cases decided by the commission, tribunal and the high court. Finally, some specific sectoral issues primarily in the pharmaceutical sector and Information technology sector are discussed. The module ends with a brief summary of key points discussed herein.

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2. Contested goals: Is there an essential conflict?

On the important reasons why IP and Competition law and policy are seemingly at loggerheads is due to the fundamentally different perspectives on the relationship between property, IP and Innovation vis-à-vis Competition and innovation. The underlying utilitarian principle behind granted IP rights is because of market failure in differentiation. Similarly, the cause of dynamic efficiency is the underlying economic policy basis for Competition policy.

2.1 Differentiation through exclusivity- underlying philosophy of IP

Differentiation is the underlying economic justification for offering IP protection to products or processes. Such differentiation is owing to several aspects of the product, including unique technical process, new industrial design, branding etc. Differentiation had positive benefits for consumers since it provides new products and processes. Hence, in the Schumpeterian sense differentiation allows creative destruction. IP is an incentive to engage in such differentiation. In the words of a popular commentator:

The absence of a reliable and coherent theory of intellectual property has given rise to conceptual misunderstandings and, in particular, has led policy makers to make poor choices as regards the formulation of decisions on its protection and enforcement. Contrary to the general view, there is a thread that unites all the components of intellectual property. That thread consists of the differentiating capacity and function of those components, in addition to their intangible nature and susceptibility of use in activities of an economic nature. It is therefore purported that intellectual property is about differentiation, whether it deals with invention and creation or not. Once it is accepted that intellectual property is not necessarily an incoherent bundle of rights in intangible assets of many sorts, its intrinsically pro-competitive nature becomes a matter of course. The crucially important notion that intellectual property is part of the social fabric of free and organized societies becomes also an almost self-evident matter.  

To take an example of a lemonade drink- If a vendor X is selling the drink at Rs 20/-, but for any cartelisation the competitor in his area will start selling the same at a lower price to compete with the original vendor to an extent where prices are brought down to the marginal cost plus some acceptable profits. Beyond such price based competition, it would not be profitable for firms to compete. Hence, one of them draws up a strategy to differentiate his lemonade by adding some spices or other features that can differentiate his product. By doing some he competes through product differentiation and innovation. If the other vendor has to keep up in attracting new customers, he must innovate. The important point here is that price based competition is distinct from competition in innovation.

2.2 Dynamic efficiency - underlying philosophy of Competition policy

The aim of competition policy is to efficiencies in the market to benefit the consumers. Here, static efficiency is achieved through competitive price based competition. However, with price based competition, only static efficiency can be created. In the long run, static efficiency does not lead to growth of markets. Innovation is needed to produce and sustain dynamic efficiency. Although Competition law and policy may defer to dynamic efficiency, it does not lead to a necessary conclusion that IP is the only way to achieve this. There may be other alternative tools to create dynamic efficiencies in the market. In the words of a commentator:\(^4\)

\[\text{In general, static efficiency is best achieved through competitive markets. In terms of consumer welfare, competition may lead to allocative efficiency when the price of a product is equal to the marginal cost of producing a unit of it. In this scenario there is maximum diffusion of existing products. When the products are essential for life as with food and pharmaceuticals, allocative efficiency becomes an important objective on both economic and equity grounds. But a competitive environment may deter investment in the production of knowledge. Intellectual property rights provide the opportunity for profits over and above marginal costs both to finance ongoing research and development and as an incentive for further research and development. Thus a basic policy question is how to reconcile providing short-term benefits to consumers (static efficiency) with the need to ensure that long-term benefits are obtained as a result of innovation (dynamic efficiency). The loss of static efficiency should be set against the growth and welfare benefits accruing from the future introduction of new products and processes. Exclusive rights can be imposed at the cost of sacrificing static efficiency, but they should be subject to strict limits because intellectual property rights lead to underutilization of information including for the generation of subsequent innovation.}\(^5\)

2.3 efficiency v. public good

The efficiency goals of competition policy are highly contested suggesting that the Chicago school of economics has gone too far in justifying efficiency at the cost of consumer benefits and competition.\(^5\) While efficiency is one of the goals of competition law, IP is distinguishable from other property rights that create efficiency in the markets. This is owing to the unique nature of knowledge, which is both non-rival and non-excludable. Hence a balance has to be maintained. In the words of a popular commentator:

\[\text{Because IP rights impose costs on the public, the IP laws can be justified by the public goods argument only to the extent that the laws on balance encourage enough creation and dissemination of new works to offset those costs. One of the reasons that IP rights are limited in scope, duration, and effect, is precisely in order to balance these costs and benefits. For example, the limited term of IP rights ensures that inventions will be freely}\]

available after a fixed term. The key to economic efficiency lies in balancing the social benefit of providing economic incentives for creation and the costs of limiting the diffusion of knowledge. This balancing approach sets the stage for IP law’s interaction with antitrust. A simplistic assessment of this interaction might proceed as follows: IP rights are monopolies, and antitrust is designed to prevent monopoly, so the two laws are in conflict. Indeed, on several occasions in U.S. history courts and scholars seem to have taken precisely this approach. In fact, however, both premises are wrong, or at least oversimplified. IP rights do not *ipso facto* confer monopoly power. While they do permit product differentiation, and sometimes give the owner power over price, there is a vast difference between an exclusive right and the sort of economic monopoly that is the concern of antitrust law. Indeed, the vast majority of patented products and processes are commercial failures. And even where a patented (or particularly a copyrighted or trademarked) product is successful in the marketplace, it normally competes for the attention of consumers with many other products, some themselves protected by IP rights. To choose just one example, virtually all mystery novels are copyrighted, yet no one could seriously claim that any one mystery novel held a monopoly in a relevant economic market. At the same time, it is too facile to say that antitrust law forbids monopoly. While it is certainly true that the goal of antitrust is to promote competition, the law has never made monopoly itself illegal. Rather, it has concerned itself with particular sorts of anticompetitive *conduct* designed to achieve market power. By contrast, a company that achieves and maintains a monopoly without engaging in such conduct will not run afoul of the antitrust law.\(^6\)

The concept of public goods in relation to IP is important for understanding the kind of regulatory interface regime that must be developed. The public good concept of knowledge/information, to which IP law extends protection can be explained by an example. If I have an apple, I can only give so much to you from whatever is left after eating because apples (all chattels and land also) are rival in their consumption. No two people can consumer the same apple at the same time in full measure due to such rivalry. However, if I decide to give a lecture, it can be consumed by several people together without depleting the possibility of each one (include me) to consume the lecture. This non-rivalry is inherent in knowledge/information due to its public good character. Similarly, if I have give out the apple to you, I can always take it back and exclude you in the sense that land and chattels are excludable in character. However, a piece of information or knowledge once disclosed with any inhibiting factor (like IP) cannot be disposed from those who now possess it.

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3. TRIPS Agreement and Flexibilities for Developing Countries

Article 8:2 of the TRIPS Agreement states:

Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

However, this provision has not been interpreted by any panel of the WTO dispute settlement. While certain conditions like what amounts to appropriate are flexible, such measures taken must be consistent with the provisions of the TRIPS Agreement. This provision primarily allows non-violation and measures that may be taken under Article 40 with reference to practices that IP right holders resort to in imposing unreasonably restrain trade or adversely affect the international transfer of technology. The concept of abuse of intellectual property rights by right holders is particularly not clear. Some have questioned the concept of abuse underlying IP in the sense that if IP do not provide a positive right to exclude but only a negative right, how it would have the capability of causing abuse? It is important to note that such a view is quite narrow looking to the possibility of IP holder choosing to harm competition by exercising his rights in several different ways.

In the context of Principles laid down in Article 8, a WTO panel has come to a conclusion that

These principles reflect the fact that the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.

Article 40 is largely based on comity, where a member whose feels that an IP holder that is national or domiciliary of another member is suspected of having violated competition law. However, nothing more than a consultation is required by the provisions of this section. In most cases, members are free to adopt measures consistent with TRIPS to remedy the abuses of IP. However, it is interesting to note that whether TRIPS allows members to have a structural presumption (per se rule) in cases of violation of competition law and policy is debtable in the light of Article 40:2 which states that Nothing in this Agreement shall prevent Members from specifying in their

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8 Lemley (2007)
9 In EC — Trademarks and Geographical Indications in explaining Article 8:1.
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. The concept of licensing practices or conditions that may in particular cases is more likely to be interpreted as a rule of reason requiring competition authorities to assess pro-competitive benefits versus anticompetitive ones, rather than a structural presumption for or against all practices. TRIPS does not provide an exhaustive list of practices, however, it is important to note that grantback conditions, conditions preventing challenges to validity and coercive package licensing are identified as the type of practices that may be abusive. In this context it is important to note that Article 40 gives a wide latitude to members to introduce take any measure consistent with TRIPS. Since there is a moratorium on non-violation complaints (Article 64:2), many practices may form part of the standard antitrust analysis as applied to IP. Moreover, Article 31 allows compulsory licence as a remedy for violations of IP.

4. Indian competition policy within patent law: Ex-ante and Ex-post

While competition law is designed to intervene ex-post (ie. After the abuse has occurred), IP laws are designed to promulgate competition ex-ante. This may surprise many that since the main objective of any IP is to convey limited monopoly through a right to exclude, how is it reasonably possible to create competition within the IP based framework. Taking example of patent law, we can see the certain provisions in patent law in India do create a kind of dynamic efficiency that balances competition.

4.1 Ex-ante and ex-post competition within patent law- policy thresholds

Ex-ante competition in the patent law context is created by virtue of identifying the level of non-obviousness that enable the patent office to assess the qualitative features of an invention. Thus a screening for inventive step leads to efficiencies since a higher level of inventive step can leave certain aspects of the invention in public domain for lack of compliance with such a qualifying threshold. This is called the patentability criterion. Similarly, Section 3(d) of the Patents Act, 1970 also creates a higher threshold for secondary patents in the area of chemicals by requiring an enhanced efficacy criterion for qualifying as subject-matter than can be patented. In this case, the Supreme Court’s decision in Novartis v. Union of India (2013) offers useful guidance since efficacy has been interpreted as therapeutic, thereby leaving a large chunk of non-therapeutic inventions (although otherwise patentable) outside the pale of patent law.

Post the grant of patents (ex-post), there are provision that allow use without authorization of the right holder. Section 47 refers to limited exceptions to the grant of patent rights by creating a robust research exemption for experimental use and other kind of acts that involve minor diminution or rights of the patent holder that may not usually conflict with the normal exploitation of patent rights.

Ex-post provisions like compulsory licence may also create price based competition. Section 84 allows compulsory licences to be granted if the reasonable requirements of the public with respect to the patented invention are not met or that the patented product is not available at affordable
prices or that the patented invention is not locally worked. A compulsory licence may be sought after the expiry of three years of grant. There are several important conditions attached to the grant of a compulsory licence. It is important to note that such a forced contract, although curtails the patent holder’s monopoly power, are considered as obligations on the part of the patentee. This is confirmed by a decision of the High Court in Bayer Corporation v. Union of India (2014), which repatriated the conclusions of the IPAB that since compulsory licences are grounds for imposing using without authorization (but with compensation), these are more like obligations on patent holders.

Compulsory licence under section 84 can be granted on the ground that “if, by reason of conditions imposed by the patentee upon the grant of licences under the patent or upon the purchase, hire or use of the patented article or process, the manufacture, use or sale of materials not protected by the patent, or the establishment or development of any trade or industry in India, is prejudiced; or if the patentee imposes a condition upon the grant of licences under the patent to provide exclusive grant back, prevention to challenges to the validity of patent or coercive package licensing.” Similarly section 91 allows grant of compulsory licences on relate patents which have a possibility of having blocking effects.

Similarly, section 140 of the Patents Act list out several conditions on licensing that are declared as void. The licences involve typing, bundling, coercive package licensing, exclusive grant back and licensing condition that impose a bar on challenge to validity of patents.

4.2 Difference in the nature of market intervention between IP and Competition law

Competition law intervenes at several levels in IP protected markets forremedying anticompetitive agreements, abuse of dominance and for regulating combinations. However, the nature of intervention is significantly different. The provisions in patent law are more aligned with public internet, which are based on structural conditions. The pro-competitive effects are not in question in an analysis under patent law. The controller is only required to comply with formal conditions and not to assess issues involving lawful exercise of market power. Hence provisions in patent law are more in public interest.

However, any assessment under competition law would require evaluation of relevant markets and an assessment of the degree of market power held by the IP holder. Here the pro-competitive benefits of certain conditions on licences may be held as valid. It will be interesting to see how this interface develops in India owing to elaborate provisions in the patents Act that deal with situations of abuse that may also fall fowl of competition law.

In HT Media v. Super Cassattes India Ltd. the High Court of Delhi has held that the CCI can look into violations of section 4 for abuse of dominance. However, once the CCI came to any finding which is adverse to T-Series, the CCI shall give a week’s time for T-Series to approach the appropriate forum under the copyright Act for grant of a relief. In this case, the CCI\(^\text{10}\) has come to finding that opposite party is in contravention of the provisions of section 4(2)(a)(i) of the Act by

imposing unfair condition of MCC on private FM radio stations. There was also a cease and desist order issued in favor of the complainant. The Commission further directed to suitably modify the unfair condition of MCC imposed on private FM stations in India in its existing agreements within 3 months of the date of receipt of this order. Penalties were also imposed. 

It may be interesting to note that since the time duration for applying for a compulsory licence under the patent law is three years, could the CCI intervene to prevent any immediate abuse on the part of the patent holder? This is not very clear from any current practice in the Indian jurisdiction.

5. Indian Competition Act, 2002

Even after few years since the Government notified provisions that may implicate IP practices, the CCI has not come up with any guidelines in this regard. The Competition Act, 2002 is not primarily intended to interfere in IP protection unduly, however, if the CCI finds AAEC in India, there is definitely an action possible under the Act. Section 3(5) when read with Section 60 and 62 of the Competition Act gives and impression that resolution of the IP Competition interface is fraught with difficulties. Section 60 states that the provisions of the Act shall have effect notwithstanding anything contained in other law (non-obstante clause). Section 62 at the same time states that the provisions of the Act shall be in addition to and not in derogation of any provision in any other law. This creates problems in assessing the real nature of the interventions that are possible under the Competition Act. For example: Under section 3(5) allows IP holders to impose “reasonable conditions” on their licences to secure IP protection. However, the test for reasonableness cannot completely undermine the rights of the IP holder. Similarly, would it be unreasonable to conclude that Section 3(5) can be invoked where conditions declared as unreasonable under Section 140 or 84 or 91 of the Patents Act, are to be prima-facie considered also unreasonable under the competition Act.

In Multiplex Association of India v. United Producers the CCI came to a conclusion that copyright is a statutory right and not absolute. It is restricted to the term granted under the statute. The extent of 3(5) which is in the nature of a non-obstante clause was held as clearly providing guidance. Hence collective bargaining agreement entered into by trade associations is anticompetitive in nature. Hence a violation of Section 3(3)(a) and (b) was made out and the defence under 3(5) was not upheld.

Under Section 4, refusal to licence IP can also amount to abuse of dominance. Section 4(2) (b) and (c) considers the question of abuse of dominance which involves limiting production of goods or provisions of services or market or restriction the technical or scientific development relating to goods or services to the prejudice of consumers or denial of market access. However, there are no cases of grant of compulsory licences in India. But a remedy in the form of a compulsory licence is definitely possible for violation of competition law. The HT media case discussed above will be the first one if the CCI determines that compulsory licence is an appropriate remedy.

In another case, Bull Machines Pvt. Ltd. v. JCB India Ltd., the Hon'ble high court came to a conclusion that once a interlocutory relief was granted by any court, CCI could not have jurisdiction, although the high court has allowed CCI to conduct the investigations.
6. IP and Competition in Specific Sectors:
There are unique sectoral challenges in resolving the interface between IP and competition. We will consider two important sectors.

6.1 Pharmaceutical Sector
Pharmaceutical sector is unique in many ways since it’s a heavily regulated industry. There are two major implications of the particular nature of working of the pharmaceutical industry. One, it is a heavily patent dependent industry and two, that markets are skewed due to doctor-industry tie ups where the doctor chooses a drug and the consumer pays, at times with less choice. Recently, the government has planned to introduce measure which will require doctors to prescribe generics names for the drugs. This is expected to bring in some competition.

While CCI has not adjudicated any issue on pharmaceuticals as such, it was recently noted through many press reports that CCI had started a probe into reverse payments/ settlements for patents made by the pharmaceutical industry. Such reverse payments or settlement by patent owner with generics raise contentious issues about potential violations of Section 4 since the virtue of exercise of market power, generic products are kept off the market, which ultimately hurts consumers. However, if there are valid reasons for such reverse payments, it may not fall fowl of competition law. The US Supreme Court has recently held in FTC v. Actavis (2013) that such reverse payment settlements shall be scrutinized under the rule of reason and that they are not per se anticompetitive.

6.2 Information and Communications Technology (ICT)
The Info-tech industry is currently into a lot of litigation involving violation of competition law across the world. The problem is acute in cases of standards-essential patents (SEPs). Standards are set by standard setting organizations (SSOs) across the globe. These technical standards are encumbered by patents. Hence SSOs seek a Fair, Reasonable and Non-discriminatory (FRAND) licensing commitment from patent holders. However, they do not determine the FRAND terms and leaves it to individual parties i.e. the patent holders and the licenceree manufactures to negotiate. Hence, while standards are meant for collective public use, patent are private exclusive rights.

Standards implementers have an interest in getting the FRAND licence at a reasonable price so as to avoid royalty staking. However, patent holders may end up suing manufacturers for patent infringement of SEPs. A pertinent question is whether or not injunctive relief must be granted for cases involving SEPs. Most jurisdiction have denied injunctive relief by emphasizing that when monetary damages are sufficient, there is no irreparable harm that is caused to the patent holder. However, in India, Ericsson has been able to obtain a consent order in which the court has determined interim royalties until the conclusion of the trail. Non-compliance of such an order could lead the invocation of injunctive relief. Since validity can be an issue in cases involving SEPs,

it is important to maintain restraint in granting injunctive relief. In fact, the European Union Competition Commission has held that:¹³

Seeking injunctions before courts is generally a legitimate remedy for patent holders in case of patent infringements. However, the seeking of an injunction based on SEPs may constitute an abuse of a dominant position if a SEP holder has given a voluntary commitment to license its SEPs on FRAND terms and where the company against which an injunction is sought is willing to enter into a licence agreement on such FRAND terms. Since injunctions generally involve a prohibition of the product infringing the patent being sold, seeking SEP-based injunctions against a willing licensee could risk excluding products from the market. Such a threat can therefore distort licensing negotiations and lead to anticompetitive licensing terms that the licensee of the SEP would not have accepted absent the seeking of the injunction. Such an anticompetitive outcome would be detrimental to innovation and could harm consumers.Ô

In India, Micromax¹⁴ and Intex¹⁵ have approached the CCI complaining that Ericsson’s conduct in discriminating manufacturers in terms of differential royalties amounted to abuse of dominance since the royalty rates were not based on actuals but on final price of the end product. The CCI has initiated investigations against Ericsson after finding a prima-facie case. However, the question of seeking injunctive relief and its relationship with abuse of dominance has not been tested.