INTERNATIONAL JOURNAL FOR CORPORATE AND COMPETITION LAW [IJCCL]

2024 || ISSN. 3049-3560 (Online) || Volume 1 Issue 4

LICENSING OF INTELLECTUALPROPERTY RIGHTS

Tejasi Kulkarni[1]

INTRODUCTION

Often referred to as '*friends in disagreement*,' the legal squabble of competition law and Intellectual Property Rights (IPR) can be traced back to the 20th Century. In the olden days, these two streams of law were thought of to be the two similar poles of magnet, with repelling tendencies.[2]Due to this apparent opposition, it was thought that the competition law's initial goal was the abolition of monopolies, but the intellectual property rights regime's goal was the creation of monopolies in order to promote innovation. In today's technologically diverse market environment, it was discovered that both operate in collaboration and play supplementary roles in fostering innovation.[3]

Intellectual Property Rights pertain to a particular form of ownership and a property right in an abstract, intangible idea, which has the capacity of being expressed in the tangible form. The fundamental feature of the grant of intellectual property rights is the 'right of exclusion', which denotes that the owner of that right, is free to exercise such right to the exclusion of others.[4] Competition law, on the other hand, aspires to attain the maximum production of resources as possible, and tries to govern the allocation of the same.[5]This has; throughout time; been considered as the best approach at viewing the aims and objectives of these two bodies of law, which otherwise have, independent and diverse domains of operation. In theory they envisage totally divergent ideologies, but they work in synchrony to uphold market efficiency for the ultimate objective of consumer welfare.

---

[1] The author is a graduate of Symbiosis Law School, Hyderabad.
[2]Aghion, *Competition and Innovation: An Inverted-U Relationship*,2 (120) THE QUARTERLY JOURNAL OF ECONOMICS, 701-728 (2005), https://www.ucl.ac.uk/~uctp39a/ABBGH_QJE_2005.pdf. (Accessed on 3 September 2022).
[3]Abir Roy, Jayant Kumar, COMPETITION LAW, 2 EASTERN LAW HOUSE, (2016).
[4]Anderson, R., and W. Kovacic, *the application of competition policy vis-à-vis intellectual property rights: the evolution of thought underlying policy change*, WTO STAFF WORKING PAPER, No. ERSD-2017-13, WTO, (2017).
[5]Brodley, J, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, N.Y.U. L. REV., 62,(1987)http://thejournalofregulation.com/en/article/brodney-j/.

Incentives to develop new technology may be impacted by competition policy in three ways.First, through merger control, many Member nations' competition policies prevent the development of excessive concentration and market dominance. The application of competition laws to joint ventures engaged in research and development is a second significant area where competition policy and innovation intersect. The final key component; and the subject of the present piece of research; is the link between competition law and the licensing of Intellectual Property Rights.[6]

In the context of specific competition cases, when deciding enforcement priorities, and in advocacy activities supporting IP regimes, it would be beneficial to understand the competitive effects of various IP rights and their unique significance for economic sectors. However, decisions about the significance of IP rights in competition analyses are frequently made on a case-by-case basis. This point is further emphasized by the Scoping Note on Competition and Intellectual Property Rights, which describes this as a potential area of study and states that it *"concerns the competitive implications of various IP rights and how their influence may vary across the different economic sectors."*[7]

CONCEPT OF LICENSING

What is licensing?

Licensing, which is seen as a key tool for the spread of innovation, enables innovators to be compensated for their work and fosters collaboration and follow-on innovation throughout the IP's "period of exclusivity.".'[8]License agreements could also be anti-competitive, contributing to cartelization or other anticompetitive foreclosure, for example. Whether an agreement is likely to have a detrimental effect on competition is the main issue for those who enforce the free market. There is consensus in the international community that IP licensing has the potential to have pro-competitive impacts.[9]

[6]Delrahim, M, The *Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property*, GEO. MASON L. REV., 13,259, http://europa.eu.int/comm/competition/speeches/text/sp2003_038_en.pdf. (2005).
[7]*Scoping Note on Competition and Intellectual Property Rights 2019-20,* para. 20, OECD, (2018).
[8] Department of Trade and Industry, *Intellectual Property and Innovation*, 9712, (1986).
[9]*Walker Process Equipment v. Food Machinery and Chemical Corp*., 382 US 172 (1965).

An IP license is a contract in which the holder of a particular IP right (licensor) grants the holder of a different IP right (licensee) the right to use (part of) that other party's IP rights for a predetermined period of time in connection with a particular range of goods, frequently within a predetermined geographical area..The "leasing" of intellectual property for a price is another way to think of intellectual property licensing. Licenses allow for only limited use, allowing licensees to profit from IP while safeguarding the licensor's ownership rights, in contrast to IP assignments, which give full ownership. For as long as they live and for 70 years after they pass away, IP owners can get royalties for their licensed IP.

There are three main types of license agreements, and each one offers a unique set of rights, benefits, and drawbacks:

1. Exclusive license: give the sole authority for the use of the intellectual property to a third party. The owner of the IP is not permitted to use the IP or authorize any other third parties to do so.
2. Sole license: gives a third party the exclusive right to utilize intellectual property while forbidding the owner from granting additional licenses to other parties. However, the owner of the IP may still make personal use of it.
3. Non-exclusive Licenses: Allow the use of intellectual property by others without preventing the owner from using it themselves or granting other parties licenses.

More than often, the patent holders exploit their rights by licensing. Over time, it has been established that licensing is pro-competitive because it enables a licensee to conglomerate complimentary factors of production, decrease transaction and production cost, and any sort of free riding by the others. The DOJ and FTC issued anti-trust guidelines aboutIntellectual Property Licensing. The three key principals laid down are as follows:

a. An intellectual property shall be comparable to any other form of property for the purposes of anti-trust analysis.
b. There shall be no presumption so as to, intellectual property creating market powers, for the purposes of anti-trust analysis.

c. Since IP Licensing allows firms to combine the complimentary factors of production, it is considered pro-competitive.

Competition law always remains conscious as to the horizontal or vertical nature of the license. A horizontal license occurs when the licensor and the licensee are potential or actual competitors in the relevant market. This raises the concern regarding competition since this setup may be used by the parties as a shield for their collusive behavior, for instance, division of markets. A license is considered vertical in nature when it has an impact on the activities which are of a complementary nature. They are agreements between enterprises which operate at different levels of the production chain, and as a result, in different markets.[10]

To date, there exist no guidelines set out by the CCI regarding compulsory licensing. But an enquiry was initiated by the CCI against Ericson in the case of Ericsson *v. Micromax*,[11] as to whether excessive rates were being charged by Ericson and as result, if an abuse of dominance case could be made out.

The functional aspect of intellectual property × Competition Law

Diving deep into the arena of operation of these two sects of law, it is not difficult to infer that competition law and Intellectual Property Rights are complimentary to each other. The later pertains to the granting of the rights while, the later deals with the usage of the rights. In the meanwhile, the rationale between each of them finally meets at the same point. To establish this more strongly, the reason for granting of Intellectual Property Rights are as follows:

1. The incentive to invest – when granting the rights with regard to Intellectual Property, it provides a major incentive to the inventor. It in a way also motivates the individual to dwell more into inventions, which in turn boosts the economy overall.[12]
2. For encouraging disclosures – if temporary monopoly rights are not served as an incentive to the inventor, by the state, the inventor will find no reason to make disclosure with regard to his invention. Therefore, encouraging disclosures has multi fold

[10]Abir Roy and Jayant Kumar (2008) COMPETITION LAW IN INDIA p.525.
[11] Ericsson *v. Micromax,* Case no. 50/2013.
[12]Robert Stoner, *Intellectual Property Rights, Competition Policy, and Innovations: Where does the problem lie,* FTC. GOV. (2003).

advantages. Firstly, it increases the knowledge pool. Secondly, it pushes forward the ulterior motive of economic development

3. Technology commercialization –The granting of intellectual property rights aids in the inventions' greater commercialization. It helps in granting licences to organisations who are in a better position to utilise the rights in a way that is generally economically sound.[13]
4. Increasing the dynamic efficiency – this pertains to the development of new products and processes which result in more socially desirable innovations. [14] In this regard, the temporary monopoly granted by the state incentivizes the creators to invest more into innovations and claim rewards.

Requirements of a valid license

In general parlance, an IP licensing agreement is said to be valid on account of two grounds:

1. Existence in the safety zone

- In the United States, the licensing agreements lay down that if a licensor is licensing his Intellectual Property, the combined market share of license and licensee should not exceed 20%. If it does not, they are considered to be in the safety zone.

2. Misuse of patents

- This is a doctrine developed by the judiciary to limit the extension of monopoly by the patentee, beyond the legal boundaries set by the statute.[15] In other words, this doctrine stops the patentee from using his innovation, contrary to public policy. Numerous instances of patent misuse are observed in the situations given under:
  a. The walker process, as substantiated by the case of *Walker Process Equipment Inc. v. Food Machinery and Chemical Corp.*[16] wherein, a patent obtained by staging a fraud against the patent office is not enforceable in court.
  b. The Handgards Type Claims.

[13]Lemley, M., *Intellectual Property Rights and Standard-Setting Organizations*, CALIFORNIA LAW REVIEW, 90 (6),https://doi.org/10.15779/Z384D9P. (2002).
[14]Rai, A, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, Northwestern University Law REVIEW, Vol. 94, https://scholarship.law.duke.edu/faculty_scholarship/451. (1999).
[15]*Supra* note at 9.
[16]*Walker Process Equipment Inc. v. Food Machinery and Chemical Corp,* 382 US 172.

c. Instances of patent ambush.
d. Sham litigation, which was first observed by the courts in the US case of *Professional Real Estate Investors v. Columbia Pictures Industry*[17].

Competition law gets involved when the licensing agreements poses itself as a potential threat to entities which would have been or are actually competitors in the market. any restraints with regard to IP licensing agreements get razed under the "per se" rule, if not, they are generally evaluated as per the "rule of reason." These are used to determine whether the said restraint has a potential of providing anti-competitive effects, and if yes, it ought to be evaluated if the restraint is absolutelynecessary for achieving the pro-competitive benefits which can outweigh the anti-competitive effects.

EVOLUTION OF THE APPLICATION OF COMPETITION LAW TO IP LICENSING

A focus on the consequences of IP-related actions has replaced the traditional application of formalistic norms in contemporary approaches to the link between competition and intellectual property laws. Even with these advancements, there are still ongoing issues with how IP and competition laws interact as the economy changes, new commercial strategies emerge, and businesses engage in new kinds of anticompetitive behavior.[18]

Since the first competition rules in North America were adopted, there has been a clear conflict between antitrust and intellectual property laws. Early US cases attempted to distinguish between the two areas and concluded that patents and agreements relating to patents were exempt from antitrust legislation.[19] Due to this complete exemption from antitrust regulations for IP-related business actions, competitors could agree to cross-licenses in order to fix prices. Due to this, US courts gradually limited the application of the patent immunity theory and ruled that when patent holders go outside the bounds of the patent grant, antitrust law may still be in effect.[20]

[17] *Professional Real Estate Investors v. Columbia Pictures Industry,* 508 US 49 (1993).
[18] *Niranjan Shanker v. Century Spinning & Manufacturing Co*., (1967) 2 SCR 378.
[19] Survey on *Compulsory Licenses granted by WIPO Member States to Address Anti-Competitive uses of IPR*, 4, (2004).
[20] *Ibid.*

The initial approaches to licensing under competition law were formalistic in nature. The US Department of Justice Antitrust Division's "Nine No- No's" ban, which amounted to a collective condemnation of vertical patent licensing schemes as unlawful per se, was just a summary of a strategy that took shape early in the 1970s.The 1970s saw the application of a stricter licensing policy in Europe, where conduct was classified as "white-listed," "grey-listed," and "black-listed."

In recent decades, several governments throughout the world have been requiring effects-based analyses before declaring licensing activities to be anticompetitive because they have recognized the potential procompetitive impacts of formerly illegal per se licensing procedures. The Antitrust Division of the US Department of Justice officially changed its position on licensing techniques in 1988, moving from outright rejection (per se) to a "rule of reason" strategy that balanced licensing's pro- and anticompetitive impacts. An effects-based licensing strategy was also implemented in Europe. Similar strategies are evident in the advice given by competition authorities worldwide, including those in Canada, Korea, and Japan.

The evolution of the OECD's recommendations on IP law and competition shows these trends.

1. *"Recommendation of the Council concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licenses."*
2. *"Recommendation of the Council concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements."*

As will become obvious from the review of licensing techniques pursued below, the concepts established in the OECD IP Licensing Recommendation are still applicable to the evaluation of many licensing contracts. That conversation will highlight the need to update this proposal to reflect changes since it was initially made thirty years ago, though.[21]

The growing value of IPR

Over the past 20 years, patent awards have skyrocketed, and patent rights have usually been stronger and broader. More categories of thoughts and works are now eligible for protection as a

[21] *Intellectual Property Rights under the Competition Act, 2002* available at http://competitioncommission.gov.in/advocacy/PP-CCI_IPR_7_12.pdf.

result of new rights and laws aimed at increasing IP protection. The copyright protection period has also been extended. Some of these changes are the result of obligations included in international agreements like TRIPS, the WIPO Performances and Phonogram Treaty, and the WIPO Copyright Treaty.[22]

The expansion of the Internet and the digitalization of the economy are factors in the strengthening of IP rights. In OECD economies, knowledge-based capital is now more common. It has not only spanned a wide range of industries, but it has also developed through time into the most common type of business investment in an expanding number of nations. It is hardly unexpected that capital that is protected by IP has grown to play an increasingly significant and pervasive role in economic activity given that IP rights protect knowledge-based capital. As a result, IP has evolved into a common component that significantly affects economic performance in practically every area.

Globalization, which compelled IP systems to adapt to increasingly globally diverse corporate processes for product development, manufacturing, and distribution, is another factor contributing to increased IP rights protection.Additionally, due to globalisation, more companies that operate globally are requesting copyright protection in the several places where a creative work may need to be protected or filing for IP protection in those jurisdictions.[23]

For instance, the long-term trend indicates that since 2003, the number of patent applications globally has increased each year, with the exception of 2009, when the financial crisis caused a 3.8% decline. The majority of patent applications—roughly half—are fresh submissions in one jurisdiction and the other half are renewals in another.

In summary, as the digital economy has grown and spread beyond information goods and services to other sectors of the economy, the interface between IP rights and competition has come to the fore. As a result, the importance of competition issues originating in the digital economy to competition authorities has increased, many of which raise considerations about licencing.

---

[22]*Antitrust Guidelines for the Licensing of Intellectual Property*, DEPARTMENTOF COMMERCE AND THE FEDERAL TRADE COMMISSION, April 6, 1995, available at http://www.justice.gov/atr/public/guidelines/0558.html.
[23]Patrick Rey, *Hearing on Competition and Intellectual Property Law and Policy in the Knowledge based Economy,* (2002).

In any case, there is general agreement that licencing policies should be judged in light of their outcomes. This necessitates conducting economic analysis, which is the topic of the following section.

THE ECONOMICS OF IP LICENSING

The idea that the creation of an IP right communicates an economic monopoly along with its package of exclusive rights is the root of a significant portion of the conflict between competition law and intellectual property rights. The antitrust notion that a patent granted a monopoly was long maintained in the US. Courts made determinations regarding whether there was a legitimate patent or enough copyright to demonstrate market dominance in antitrust cases, and they notably mentioned "the patent monopoly" in their rulings.[24] But it is now universally acknowledged that having an IP property does not always translate into having commercial power.[25]This conclusion is supported by a straightforward but powerful argument: even though an intellectual property right grants the ability to exclude with respect to a particular good, process, or work, there are frequently enough nearby alternatives that are either actual or potentially available to limit the use of market power...[26]Additionally, the possession of market dominance by the licensor does not necessarily cause anticompetitive issues; restrictions that serve only to aid the licensor in capturing the surplus associated with the innovation are consistent with the IP regime's incentive structure. Instead, the real question is whether, when considering incentives for innovation, business activities involving IP rights are universally pro- or anticompetitive. This necessitates weighing the various licensing agreements' potential implications.[27]

Pro -Competitive effects of IP Licensing

Once an IP right has been established, it is best for society for the innovation to be shared and disclosed. Dissemination or disclosure, however, may not be generated if they are required to be protected by an IP claim. Therefore, even while an IP right may prevent an innovation from

[24]Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Anti-Trust and Intellectual Property,* (2000).
[25]*To Promote Innovation: The proper balance of patent law and policy,* 4 (12), 55-57 (2003).
[26]*Ibid.*
[27]Rai, A, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, NORTHWESTERN UNIVERSITY LAW REVIEW, Vol. 94, https://scholarship.law.duke.edu/faculty_scholarship/45. (1999).

being used to its full potential in the short term, it is necessary to pay this price to ensure enhanced long-term dynamic resource efficiency through increased levels of research and innovation.

At the same time, licencing may be utilised to restrict the short-term misallocation brought on by IP rights. Even though the applicable IP rights are still in existence, licencing promotes competition for the distribution of protected ideas and creations and aids in their dissemination and utilisation. An IP right holder will only decide to licence when licencing revenues exceed the profits the IP owner could receive by excluding competitors, which increases potential IP right holders' incentives to invest ex ante..[28]As a result, IP licencing agreements will typically be procompetitive, encouraging both ex post competition and ex ante innovation. It has been suggested that licence agreements have a number of pro-competitive effects:

These include i)assisting in the control of risk and lowering transaction costs while commercialising an innovation; (ii) facilitating the promotion of one's intellectual property while preventing free riders from engaging in intellectual property infringement; (iii) facilitating the maximisation of profits in proportion to the improvement in consumer welfare resulting from one's innovation; and (iv) fostering and maintaining goodwill. [29]

These pro-competitive effects are a result of the fact that most licencing arrangements are vertical contracts between a company engaged in an upstream technology market (the licensor) and a company active in a downstream market (the licensee)A common example of an input that gains value via the addition of complementary elements is an IP right. In many cases, the owner of the IP right finds it more cost-effective to hire others to provide these complimentary factors rather than providing them themselves.[30]The majority of vertical agreements, according to economists, are either beneficial or pro-competitive. Numerous licencing arrangements can be justified using the same logic.By integrating the intellectual property with additional production

[28]M. Firoz S., *the changing trends in IP Licensing: India v. US,* 63-79 (2009).
[29]*Interplay of Competition Law and the Intellectual Property Rights,* 6, (2011).
[30]Rina Ghosh, *Anti-trust v. Intellectual Property: Do they compliment or contrast,* (2006).

elements through licencing, IP can be exploited more effectively, benefiting consumers through lower prices and the introduction of new products.[31]

Anti-competitive effects of IP Licensing

Nevertheless, licencing agreements may provide threats to the competition. The possibility of cartelization is the most significant of these and can appear whenever an agreement is reached between real or future rivals in a particular market. There may be collusion on the markets for goods made with the licenced technology as well as the market for the licenced technology itself.[32]By convincing the licensor to impose resale price maintenance and thereby setting pricing at the licensee level, licensees can implement cartel agreements in the market for goods made with the licenced technology. Vertical price fixing may enhance the durability of a cartel arrangement at the licensor level by boosting the transparency and consistency of the licensors' retail prices.[33]

A licence agreement could result in anticompetitive foreclosure, for instance through vertical restrictions that significantly raise entry barriers by necessitating entrance at more than one level. This is a second worry for the competition. Vertical restrictions, however, are likely to have an anticompetitive impact on consumers only in a few specific market scenarios.[34] First,At the licensor level, there is a significant amount of market concentration, and the bigger licensors use the same or similar restrictions. Second, a considerable portion of the licensee market must be covered by the restriction. And last, it must be difficult to penetrate the limited market.[35]

Balancing the Pro- and Anticompetition effects

The sections that came before this one outlined some significant pro- and anticompetitive features of IP licencing agreements. The existence of both sorts of impacts in licencing circumstances explains why formalistic criteria alone cannot be used to determine whether a licencing agreement is compliant with antitrust laws. When viewed separately, licencing

[31]Haman Shah, *why is licensing Necessary: Deeper dive into the IP regime,*16 J. Int. Law, 45-49 (2013).
[32]Galetovic, A., S. Haber and R. Levine, *An Empirical Examination of Patent Holdup", Journal of Competition Law and Economics*, 11, 549, http://dx.doi.org/10.1093/joclec/nhv024. (2015).
[33]Ratna Mohan, *Aspect of price fixing and cartelization,* 14 Oxford Univ. Press, 176-78 (2012)
[34] Nordhaus, W., *An Economic Theory of Technological Change*, AMERICAN ECONOMIC REVIEW, 59/2,18-28, https://econpapers.repec.org/article/aeaaecrev/v_3a59_3ay_3a1969_3ai_3a2_3ap_3a18-28.html. (1969).
[35]*ibid*

agreements are neither "good" nor "bad" in terms of the competition policy.[36] A certain kind of licencing clause can be applied in a variety of ways and affect competition in a variety of ways. This emphasises how crucial it is to look at the rationale behind and potential outcomes of licence terms in the context of the economy.

Over the years, competition enforcement has mostly concentrated on differentiating between procompetitive and anticompetitive licencing activities. This experience makes it unsurprising that some licencing procedures have been approached with principles. Using these methods instead of conducting a thorough consequences research for each situation gives competition analysis more direction and moves along faster.

COMPULSORY LICENSING: A REMEDY FOR REFUSAL TO LICENSE

Many of the concerns about unfair competition are related to strategic licencing strategies, like exorbitant pricing and (constructive) refusals to provide licences, that may violate competition laws. Furthermore, compulsory licencing on FRAND conditions may be the best course of action in cases of patent holdup or holdout.[37] All of these areas of competition law enforcement are contentious. Particularly at the intersection of competition law and intellectual property licencing, refusal to licence and coercive licencing have long been some of the most difficult and contentious issues.

A lot of the possible procompetitive effects of IP and its licencing are also influenced by the licensor's ability to restrict the number of companies permitted to trade in the new technology. A duty to licence could reduce the value of actual IP rights, restrict the advantages of innovation, compromise IP systems, and ultimately deter innovation. It is widely accepted that the licensor should generally be permitted to decline to provide licences to other businesses and to confine

[36] Hemphill, C.*Intellectual Property and Competition Law*, The Oxford Handbook of Intellectual Property Law, OXFORD UNIVERSITY PRESS, http://dx.doi.org/10.1093/oxfordhb/9780198758457.013.32. (2013).
[37]Epstein, R. and K. Noroozi, *Why Incentives for 'Patent Holdout' Threaten to Dismantle FRAND, and Why It Matters*, BERKELEY TECHNOLOGY LAW JOURNAL,32,1381, http://dx.doi.org/10.15779/Z38WD3Q19B. (2017).

the exploitation of the innovation to either itself or to its chosen licensee as far as competition policy is concerned..[38]

A refusal to issue a licence occasionally has anticompetitive effects. If a refusal to provide a licence limits the creation of goods for which there may be a market and prevents competition from growing in downstream markets, there may be possible anticompetitive repercussions. Additionally, there are IP methods to deal with circumstances where licences are refused, typically for reasons linked to public health, reliance, or lack of exploitation.

Whether unilateral refusals to grant IP licences are ever anti-competitive and, if so, what should be done about them are topics of debate. In some jurisdictions, the denial of a licence is not regarded as an actionable injury to competition..[39] However, in some other nations, a unilateral refusal to licence intellectual property may, under certain conditions, violate competition laws.In the case of *M/s HT Media Limited v. M/s Super Cassettes Industries Limited*, the CCI also addressed the issue of determining whether a licencing fee constitutes "excessive pricing" on the part of the licensor. In that ruling, the CCI made reference to the need for a cost data study.[40]

Compuslory Licensing

Without addressing the competition difficulties in non-licensing, discussions on licencing competition issues are incomplete. After all, market participants may choose not to licence their technology, which would have a significant negative impact on India's competitive environment.Compulsory licencing is a common solution in cases of licence denials.Forcing the owner of the technology to grant licences would be a suitable remedy in this situation; this is known as compulsory licencing (CL). When such refusals only involve a single entity, they must be investigated under Section 4, but when they involve many entities, such as a "collective boycott," they may be examined under both Sections 3 and 4 of the Act.

[38] Shelanski, H, *Information, Innovation, and Competition Policy for the Internet*, UNIVERSITY OF PENNSYLVANIA LAW REV, 161, 1663, http://www.ftc.gov/opa/2012/09/emi.shtm. (2013).
[39] Gilbert, R*, looking for Mr. Schumpeter: Where Are We in the Competition--Innovation Debate?*INNOVATION POLICY AND THE ECONOMY, 6, 159-215, http://dx.doi.org/10.1086/ipe.6.25056183. (2006).
[40]*M/s HT Media Limited v. M/s Super Cassettes Industries Limited,* Case no. 40 of 2011.

Licensing can be imposed as a remedy in two situations: mergers and antitrust cases. Due to the merging parties' approval or voluntary entry into them, licencing promises made as part of merger control are often not problematic. The antitrust remedy of mandatory licencing is more contentious.

Not only are there no CCI standards in this subject, but there are also significant problems because this is a topic that is covered by several intellectual property laws. If the patented invention does not meet "reasonable requirements of the public," is "not available to the public at a reasonably affordable price," or "is not worked in the territory of India," for example, Section 84 of the Indian Patents Act, 1970 grants the Controller of Patents the authority to issue a compulsory licence after the passage of three years following the grant of the patent. The Controller of Patents awarded a compuslory licence to Bayer's cancer medicine patent in 2012 in a decision that was upheld on appeal..[41]

Similar rules, albeit with a more limited reach, are found in the Copyright Act of 1957. In accordance with Section 31(1)(b) of the Copyrights Act of 1957, a compulsory licence may be granted. It may be given out if the Copyright Board determines that the copyright owners' refusal to permit public communication is unreasonable. Only some types of copyrighted works are covered by this provision; not all.In a highly contentious ruling in *Phonographic Performance Limited v. Music Broadcast Pvt Ltd.*[42], the Copyright Board ordered mandatory revenue-sharing licence for musical works in the interest of the FM radio business. 2% of each FM radio's net advertisement revenue is the proposed sharing model. That money from the radio station would be set aside to pay the musicians.[43]

These stated prohibitions are absent from other intellectual property laws.These legislative overlaps could lead to problems given the explicit legislative mechanisms under specialised intellectual property systems. It is unclear whether the existence of such specialised compulsory licence regimes would imply a limitation on the CCI's authority. It should be noted that, despite

[41]*Natco Pharma v. Bayer Corporation, Controller of Patents Mumbai*, 2014 (60) PTC 277 (Bom).
[42]*Music Choice India Pvt Ltd v. Phonographic Performance Limited*, 2010.
[43]William M. Landes, *An Economic Analysis of Copyright Law,* 18 J LEG STUDIES 325.

identical prohibitions in IP legislation, competition authorities in other jurisdictions have granted CL in accordance with their own competition statutes.[44]

While IP owners are not required by EU law to generally grant licences to rivals, the European Court of Justice (ECJ) has ruled that in "extraordinary circumstances," a failure to do so could amount to an abuse of dominance. These exceptional circumstances include refusals related to goods or services that are necessary for the conduct of a specific activity on a neighbouring market, refusals of a nature to preclude any real competition on that market, and refusals that prevent the introduction of new goods for which there may be a market.[45]Such a refusal amounts to an abuse of dominance under such circumstances, unless objectively warranted. These terms were further reaffirmed in IMS Health, where it was determined that it is an abuse to refuse to licence IP rights when a competitor wants to make new goods or offer new services on a neighbouring market using that IP.[46]The refusal to licence such a necessary facility would constitute an abuse of dominant position where these elements are met, and this doctrine is more commonly referred to as the "essential facilities" doctrine. Such a "essential facility" may take the shape of a service, information, infrastructure, or access to a physical location, as well as a telecommunication network or software interface.[47]This philosophy has thus far gained some momentum in the CCI. The "essential facilities theory" as it applies to Section 4 of the Act appears to have received support from the CCI in a couple of its rulings. The breadth of application of this doctrine, however, does not appear to have been thoroughly covered in these rulings. It is not possible to say with legal certainty that the "essential facilities" theory is the only justification for an organization's refusal to grant a licence for its intellectual property.

CONCLUSION

New technological advancement may be significantly impacted by how competition policy is implemented in the licensing of intellectual property. First, the profitability of innovation may be significantly affected by competition policy.Second, by altering the makeup of the market –, the

[44]*Compulsory Licenses granted by WIPO Member States to Address Anti-Competitive uses of IPR*, (2012).
[45]*Radio Telefis Eireann v. Commission*, 1991 ECR II-485.
[46]*IMS Health GmbH & Co OHG v. NDS Health GmbH & Co KG*, [2004] ECR I-5039.
[47] Lang, J, *The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law in Antitrust, Patents and Copyrights, EU, and US Perspective*s, 62 (2005).

control of technology licensing through competition law and policy may have an unintended negative impact on the incentives for innovation.

Evidence of anticompetitive harm will likely be required before it can be determined that an IP licensing arrangement violates competition following an effects-based evaluation. Depending on the circumstance, practically every type of restrictive licensing restriction can either promote or inhibit competition. In order to prevent cartelization, licensing agreements are normally assessed on a case-by-case basis. There is a fundamental understanding of how IP and competition law interact, as well as the necessity of balancing the pro- and anticompetitive effects of licensing activities, even while there isn't total agreement on every facet of every IP licensing arrangement or practice.

Given the significance of innovation to growth, effort should be taken to ensure that the implementation of competition laws does not impede the development and adoption of innovations. However, patent and know-how licensing agreements can result in major cartel issues, such as price fixing, output constraints, and market and customer divisions, therefore competition regulators cannot simply adopt a lenient approach.