ANALYZING THE JURISPRUDENCE OF CCI AND ITS IMPLICATION ON INNOVATIONS IN INDIA

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With the launch of programs such as Digital India and Start up India, the mentality of the government to foster and encourage innovation is evidently visible. Further, with the launch of the National IPR policy as well, it can clearly be concluded that the focus of the government is on promoting a strong intellectual property regime to incentivize innovation and investment in its territory. For example, India is an important market for the large companies which are into the telecom industry, due to it possessing the world second largest network. A stronger Intellectual property regime is essential to capitalize on this advantage and further the intentions of the government to encourage entrepreneurial innovation, specifically in the hi-tech sector. With the advent of the Competition commission of India i.e. a regulatory body to oversee the market situation and maintain a competitive atmosphere, a need and duty to balance the aim of a stronger IPR regime and a competitive accessible market is imperative. The role of a regulator dealing with the economic state of the country, in such a situation, ought to be more than a completely judicial one, where the impact of decisions can be overwhelming on the prevalent economic policies of the country. The factor of innovation is significantly imperative to be kept in mind for an efficient regulatory mechanism and to effectively foster the economic market and state of the country. The agenda of the regulator cannot merely be non-coherent judicial adjudication, keeping the contextual state and the economic policy of the government out of consideration. The Supreme Court of India has taken a similar view in the case of *Excel Corp Ltd. v. Competition Commission of India*[1] stating that the goals of competition law enforcement ought to include fostering innovation as a means to an end of curbing consumer harm. The highest court in this case recognized that incentives to innovate are affected by the degree and the type of competition in the market and further by the actions of regulators such as the CCI. Hence it is

[1] 2017 (8) SCC 47

imperative for the regulatory body (specifically duty bound to regulate the economic conduct in the market) to foster a pro-innovation economy. This paper argues that the CCI, while deciding cases, has not positively implemented this policy mandate and has rather given decisions which are regressive and not amenable to incentivize investment decisions. I will be tracing a few decisions of the CCI implying towards the inconsistency with the policy of an innovation incentivizing economy, taken up by the government. The paper will conclude as to how the strictly judicial role which has been assumed by the CCI is a wrong approach to take in the prevailing state of innovation economics. Such inconsistencies have major ramifications on the Indian economy and dis-incentivize large IP holding global companies from investing in India due to lack of protection and low return commitment.

1. *SAMSHER KATARIA v. HONDA SIEL CARS LTD. AND ORS.*[2]

In the aforesaid case at hand, popularly known as the Automobile spare parts case, the CCI was looking into agreements entered in by automobile manufacturers and the original equipment suppliers (OES). According to the factual situation at hand, the design, drawing, technical specification, technology, know how etc. of some of the parts were provided by the manufacturers to the suppliers. In accordance with the same, the OES were supposed to manufacture the original spare parts and supply the same only to the manufacturers. There was no permission to allow sale in the after- market without prior consent. The case was registered under section 3 and section 4 of the Indian Competition Act, which deal with Anti-Competitive Agreements and Abuse of Dominant position respectively. The CCI concluded that the restrictions placed would violate sections 3(4)(b), 3(4)(c) and 3(4)(d) because they adversely affect competition in the automobile sector. The CCI stated that (i) the choice amongst the original

[2] C-03/2011. This has been affirmed by the Competition Appellate Tribunal subsequently in an order dated December 9, 2016, except on the issue concerning quantum of penalty, an explanation of which is not relevant for the instant discussion.

dealer or independent retailer should be left to the consumer and (ii) a collaborative space amongst independent repairers, original suppliers and manufacturers needs to be created to provide the consumer with efficient and competitive repair alternatives. There are some serious issues with the conclusions drawn and the rationale adopted by the CCI.

Firstly establishing the law, Section 3(1) states that *"No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India."*[3] Further section 3(4)(c),(d) and (e) specify these agreements to be Exclusive supply agreements, Exclusive distribution agreements and Refusal to deal respectively, which have thereon been defined in the explanation clause. Interestingly, section 3(5) provides for an IPR exemption stating that, "Nothing in this section shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000)."

It was argued by the Automobile manufacturers in this case that the technologically advanced vehicles required specialised skills and regular training for an effective repair mechanism. With regard to the same, independent repairers do not possess the skill and expertise and any

[3] The Competition Act 2002, s. 3

mishandling of the cars manufactured by them may lead to a hazardous situation for the public and the environment. Further, there being no effective registration or licencing requirement for the spare parts manufacturers to operate increases the vulnerability to such danger. The CCI rejected these arguments stating that consumer choice cannot be restricted due to such implications. The Automobile manufacturers took to arguing the IP exemption under section 3(5) contending that the overseas parent corporations of the original manufacturers validly held IP rights which was later transferred to these manufacturers by a technology transfer agreement. This was rejected by the CCI citing the territoriality principle associated with IP rights in India. The CCI stated that the IP rights are territorial and unless it has been registered in India, in accordance with the Acts mentioned under section 3(5), the said rights cannot be granted merely by a technology transfer agreement.

Upon an analysis of the conclusions of the CCI, it seems that the CCI has overlooked the pro-competitive justifications provided for in section 19(3) of the Competition Act. The efficiency considerations of the restrictions provided in the agreement seem to overwhelm the claim of a desire to indulge in an exploitative conduct by the manufacturers. This reduces the desired efficiency in the product market and can substantially hamper the goodwill of the manufacturers product, due to vulnerability to non-efficient and non-specialised repair mechanisms. This decision shows the non-consideration of innovation requirements in the Automobile industry.[4] Here the costs of R&D and IP remain with the principal and allowing the sub- contractor to sell these directly in the market without consent or an exclusive agreement, would undermine the principle's incentive to innovate, due to the problem of recovering costs involved in the same.[5] The main factor, coming out of this case which contributes to disincentivising investment in the Indian market on the part of patent-holding companies abroad though, is the strict appliance of the territoriality doctrine for availing the IP exemption. This implies a requirement for a

[4] Avirup Bose, "Role of Indian regulators to foster innovation" (2018) JIRICO Brief 1:4
[5] Abir Roy, *Competition Law in India: A practical guide* (2016 Wolters Kluwer), 293

registration of the patent of each and every spare part again in India to be able to claim the IP exemption, which significantly dilutes the intention of the provision. Such a territorial application of IP in the competition sphere is mindless of the economic implications and results in pressurizing innovation-driven companies to register their patents before entering into an exclusive technology use and sale agreement. This contributes to the reluctance associated with investment in a particular territory due to harsh and expensive procedural requirements, curbing the application of the innovation and investment- driven government policy. An alternative mechanism involving verification of the patents conferred abroad by the Indian patent office on occasion of claims availing this exemption seems to be a more efficient solution rather than a strict territorial application of IPR's specifically for the purpose of Competition law. Further, such a strict territorial application disregards the relevance of IP-related international instruments which mandated the internationalisation of certain aspects dealing with IPR's. The extra territorial application of IP rights has been argued to serve the underlying purpose of the International IP conventions, which is ensuring greater protection for right holders. The TRIPS, agreement entered into by the members of the World Trade Organisation, is an international document playing a crucial role in regulatory globalisation of the norms of property and contract, although yet, it sticks to principles of territoriality to some extent. It is essential to recognise the importance of such extra-territorial application specially in the wake of globalisation and economic investment, specifically for competition enforcement and regulation. The growing significance of international trade and investment has increasingly led nations to devote regulatory attention to conduct abroad, and there is a pressing need for this specifically in the competition sphere, for an effective implementation of the principle of innovation economics or the goal of an innovation and investment driven market. To promote policy projects like "Make in India", it is imperative on the part of regulators, to recognise the contribution of foreign

investors in proprietary ideas, and protect them with utmost commitment in the competition sphere at least.[6]

FRAND LITIGATION AND DETERMINATION OF ROYALTY RATES

2. *ERICSSON v. MICROMAX* AND *ERICSSON v. INTEX*[7]

The CCI has given its decision on the question of determination of excessive royalty rates and the rules behind determination of a fair royalty base in these cases. Upon allegations of Abuse of Dominance under section 4 of the Competition act, the CCI went on to decide whether the royalty rates which were being charged upon licencing were to be charged on the patented product or the downstream end-product which was sold in the market. It was argued by Micromax and Intex that the patented product cannot be completely equated to the final product and the contribution of the patented product with the final product cannot be objectively determined. Further Ericson was not able to provide a considerable link of its patents with the final product. Hence, providing for royalties on the end product was argued to be an act of over-compensating the patentee. The CCI concurred with this argument, setting a subjective standard of Fairness and Equity, rather than focussing on an economic analysis of the market for setting royalty rates, that would promote innovation and incentivise more investment on the part of the Patentee and other potential patentees. India's current economic state demands an innovative model to boost the economic prowess of the market. The investors right to exclude others from using the patent, ought to include the right to set as high a royalty as long as the market permits. Any strict dependence on fairness and equity in such pricing is counter-productive and

[6] Avirup Bose, "Unfair or abusive? IPR rhetoric must be echoed by CCI" *Financial Times* (Delhi, 2 July 2017) available at https://www.financialexpress.com/opinion/unfair-or-abusive-ipr-rhetoric-in-india-must-be-echoed-by-cci/770630/

[7] *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson* (Publ), Case No. 50/2013; *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson* (Publ), Case No. 76/2013 (CCI).

undermines the aim of the effective provision of economic rights to IPR's.[8] A chilling effect on the market and the will to invest on innovation and in the market is a direct consequence of such a reasoning.[9] The consideration of the economic state of the jurisdiction, the market demand price of the product and thereafter the contribution of the essential SEP to the final product is imperative to determine FRAND royalty and adequate compensation. The requirement of FRAND standards cannot depend on subjective factors of fairness and equity to the public, rather upon fairness as per the market consideration, providing for an appropriate return to the innovator. An argument put in by Micromax and Intex stating that the paying capacity of these companies is far-lesser than premium telecommunication companies like Apple, Samsung etc. due to the budget nature of their products is also a mind-less one. Due to them being budget companies, the price of the downstream product is anyway lesser than the price of high-end companies, which automatically lowers the royalty amount.

Such a direct reliance on the principle adopted by the United States, by the CCI is a total blind-sided approach towards the context and state of the economy. India is a developing model where innovation and incentive to invest is essential for the growth of the economy and consequently consumer welfare. Such a short-sighted approach on the part of a regulatory body is un-called for and undermines the individuality of contextual policy making. The intent of the law is to be ascertained keeping the mind the context of the jurisdiction, rather than blindly interpreting on the basis of the prevalent application in another particular jurisdiction. The Delhi High Court as well has condemned this approach undertaken by the CCI. It has cited the direction given by the Chinese Competition Authority with respect to Qualcomm's SEP for 3G and 4G technologies., which holds in favour of fixing the royalty rates as a percentage of the net-selling price of the downstream product. This is a real-world economic approach rather than a short-sighted one.

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[8] *Supra* at n. 6

[9] Avirup Bose, "To ensure success of Start-up India, Digital India, regulators must encourage innovation" *Financial Express* (Delhi, 17 January 2017) available at https://www.financialexpress.com/opinion/to-ensure-success-of-startup-india-digital-india-regulators-must-encourage-innovation/510759/

THE COMPLEMENTARITY PRINCIPLE:-

SEP's are essential to the development of the final product and act as a standard industrial requirement. The technologies which are innovated upon are somewhat based on the SEP technology and compliment it in the best possible way envisioned by the innovator. In other words, different technologies tend to interact differently with the SEP technology, and the act of developing a novel compliance mechanism and using certain intricate features of the SEP to differently develop the end-product, in itself is a factor which contributes to the novelty of the end product. Hence, for example, it can be argued that the SEP technology, i.e. the Chip set interacts differently with the technology of different phone technologies depending upon their capability. The network effects produced by such complimentary usage, are universally believed to be significant. It enhances the network effects already present and plays an efficient role in the novelty related with the functioning of the final product. The CCI has been unmindful of the same. The rewards provided upon IPR, should imperatively align with market considerations rather than being based on the cost incurred. The primary approach incentivises innovation and more creative indulgence, which is concurrent with the Make In India and Start Up India policies of the government. The approach taken by China has also been to implement its policy objective of an incentive and innovation driven market. It needs to be recognised that the price charged by an innovator should not merely be based on the consideration of covering the costs of the product, but also to cover the risks inherent to this innovative process. Such a reductionist approach results in loss of the incentive to take risks and consequently reduces the inducement to innovate. A relative analysis of the incremental value to each final approach is a sound one, as it takes into consideration the network effect rather than a standard value of the technology. Such arguments of royalty stocking and patent holdup have no empirical backing and merely rely

on the conceptual claim of equity, without taking into account the network effects and the relative value of the SEP's in the relation to the final product.

THE COMPARABLE LICENCES APPROACH

This approach is more feasible economically and has been argued for to determine the royalty that would ideally be payable by a willing licensee to a licensor by virtue of the prevailing market forces. There is a prevalent fluctuation in the market with respect to demand for the end product incorporating the patented technology, as time passes. Hence, this approach again takes into account the network effects and its implication on the value of the final product. This approach acknowledges the presence of competition in the domain of the standardised technology as well. Standards keep changing as per technological development and innovation, and a total assumption of market power due to an SEP holding, is a fallacious approach to take in the long run. The nature of technology involved in Hi-Tech innovation precludes the possibility of a persisting market power in the long run, due to innovation and competition amongst standard setting organisations as well. Hence, a comparable licence approach coupled with the economic state of the jurisdiction reflects the market valuation of the SEP's . A voluntary licence agreement determines a mutually agreed upon rate, which is essential for the incentive to innovate to survive, and is also evaluative of the forces of demand and supply with respect to the SEP particularly. They depict the willingness to pay in the most appropriate way and work on the principle of an industrial norm. Even in the UK, the landmark judgment rendered in the case of *Unwired Planet Intl'n v. Huawei Technologies*[10] stated that "asking what a willing licensor and a willing licensee in the relevant circumstances, acting without holding out or holding up would agree upon" is the most economically sound approach to determine what's a FRAND rate of royalty would be.

[10] [2017] EWHC 711 (Pat)

3. *IBALL v. ERICSSON*[11]

CCI has again mindlessly and without giving any consideration to the pronouncements and reasoning of the Delhi HC, stuck to the reasoning of provision of royalty on the basis of the value of the patented technology rather than the market value of the downstream product. iBALL had argued that the approach taken by Ericsson in charging its royalty involved bundling in of other patents which were not a part of its licencing agreement. CCI, maintaining it stand, stated that this mechanism of calculating the royalty is not FRAND and is a violation of section 4 of the Competition act. Such inconsistency with the economic policy of the country, is disruptive for the concept of consumer welfare in the long run. It directly undermines the importance of the economy while analysing competition in the market and takes a very strict legal role, which is not why regulators have been established in the first place. It's not a purely legal body, but rather a quasi-judicial one, which implies that it is imperative to take into account the factual state of the economy while rendering binding interpretations. Another issue with the CCI's decision is the inconsistency with the jurisprudence and the reasoning of the Delhi HC, which is a higher body in the hierarchy of legal enforcement and interpretation. It creates multiplicity of fora, with prevalence of a conflicting opinion. This is detrimental to the interest of the innovators because of a possibility of inefficient and uncertain legal regime with respect to competition, in the jurisdiction. Litigation costs are anyway on a rise, and a further increase in the approachable forums for legal remedy may contribute to such a rise. Such additional costs de-incentivise the investors to indulge in technological dealings in India and are excessively detrimental and regressive to the policies envisioned for the betterment of the Indian economy as a whole, in the long run. The CCI must recognize the fact that firms indulging in investment decisions seek clear, predictable rules as to how the intellectual property and competition regimes will operate. The mechanism for a legitimate exercise of patent rights must be

[11] *Best IT World (India) Private Ltd. v Telefonaktiebolaget LM Ericsson* (Publ) Case No. 4/2015 (CCI)

objectively clear to ensure promotion of investment in innovation and subsequent economic progress.[12]A contradiction in judicial pronouncements of the same jurisdiction is bound to have an adverse impact on investment by companies and specially start-ups which are pioneering the hi-tech industry lately. It creates uncertainty in the mind of the licensors of patented technology as well as the licensees, inadvertently hampering the growth and investment prospects.

4. *MATRIMONY.COM LTD. v GOOGLE*

Further, there is inconsistency in the approach taken by CCI as well, as has been depicted in the recent Google cases, where the CCI has taken a pro-innovation approach tilting towards the opinion pronounced by the Delhi HC. This opinion in the case of *Matrimony .com Ltd. v. Google India*[13] has taken an economic rationale in contrast to the other cases which have taken more of equity and competitor driven approach. It has asserted the need of a self- imposed prohibition upon enquiring into product designs of the search engine, as that could affect legitimate product improvements. CCI, as a first, has finally acknowledged that innovation might harm competitors but ultimately benefits consumers and hence need to be taken into account. These in contrast to the royalty setting approaches taken by it in the Ericsson cases as the rationale does not take into account, the factor of innovation at all. Although this is a positive step which has been taken by the CCI, this innovation based approach is essential to be taken in determination of FRAND as well to incentivise innovation to the maximum.

To conclude, the practice shown by the CCI in the Ericsson cases has the potential to adversely impact the collaborative standard development process as it does not take into account the inherent risk in the massive R&D efforts put in by technology developers, and subsequently potentially disincentivises them from indulging into more innovative developmental projects.

[12] Yogesh Pai, Nitesh Daryayani "Patents and Competition Law in India: CCI's Reductionist Approach in Evaluating Competitive Harm" (2017) 5 Journal of Antitrust enforcement 299

[13] Case no 07/2012 (CCI)

There needs to be an economic-evidence based regulatory approach towards the standardisation and licencing of IP, to promote Hi-tech and innovative development and investment in India. Hence it is argued that, it can reasonably be concluded that CCI's decisions with respect to the interface between competition and IP rights are inconsistent with the policy objective, inconsistent in its own approach and is not amenable to developing the economy as a whole, by incentivising high-tech innovation in the territory of India.