THE EXCLUSIVITY OF COPYRIGHTS

- SHRUTHIKKA

ABSTRACT

This paper seeks to provide a panoramic view as to how copyright laws and competition laws are interdependent in nature. Competition policies are merely an extension of limitations invested in the right holder outside of the IP legislation. The immediate goal of copyright is to protect the rights of the owners and to recoup benefits from their investment in the work. The paper goes on to argue that very grant of a copyright does not equate to monopoly of the market. The exclusivity granted as a result of copyright is justified by its by its realization of the creative work and the benefits it brings to the society. The essence of Section 3(5) of the Competition Act is brought out in the paper through case laws. The CCI plays an important role in curbing anti-competitive practices and ensuring that there is no misuse of copyrights. Further, the paper also aims at establishing that blanket licenses are in no way a violation to competition laws and if implemented rightly they are a valuable instrument for encouraging innovation as well as enhancing competition in the market.

INTRODUCTION- THE INTERFACE

Competition Law and IPR has evolved separately as two different systems of law. Each have their own set of laws that govern them. Looking into the two systems of law prima facie, IPR seeks to grant exclusive rights to the owners whereas competition law aims at restricting monopolistic practices in the market. However, there is a considerate overlap in the goals of both the laws as both aspire to promote innovation and economic growth. [1]

The general assumption with IPR and Competition Laws is that they are at conflict with each other, they are at loggerheads with each other. The objective of Competition Law is to prevent market failure as a result of abuse of IP rights. Competition law acts as a limiting agent that basically ensures that the exercise of IPR does not result in market failure. The policies are an extension of limitations imposed on the IPR holder outside of the IP legislation.

Even without a legislative immunity for IPRs, the case law interpreting competition legislation in countries studied demonstrates that the competition rules create certain self-denying ordinances to ensure there is an extensive reconciliation between the two systems of legal regulation.[2]

IP laws, such as patent and copyright, confer exclusive rights to the creators for a limited period of time which acts as an incentive for their creation. Although these "negative" laws result in monopoly, they also encourage innovation and protect their copying. In such situations, CP strike a balance with IPRs by providing protection to the the original inventors and the follow-up inventors. Like Merges and Nelson have pointed out, "Ultimately it is important to bear in mind that every potential inventor is also a potential infringer. Thus, a strengthening of property rights will not only increase incentives to invent; it may do so for some pioneers, but it will also greatly increase an improver's chances of becoming enmeshed in litigation."[3]

For example, in the case of V.T.Thomas vs. Malayala Manorama[4] the creator of an artistic work is regarded as the rightful owner as he is the one that impregnates the idea and executes it. However, the Copyright Act lays a significant distinction between "author" and "employer" which in turn strikes a balance by rewarding the creator for his innovation and encourages 'follow on' innovation.

Copyright is a branch of IPR that gives exclusive legal rights to the creator of its work. Copyright is protected right from its creation and does not need registration. Earlier, copyrights were limited to books, paintings or films but now its ambit has widened to information technology like computer software and compilation of data. In the last 2 decades, there has been tremendous development with regard to copyright protection and its infringement due to the challenges faced because of development

[1] Atari Games Corp vs Nintendo of America Inc, F. 2d, 1572 (Fed. Cir, 1990)
[2] Steven D. Anderson "*The Interface between IPRs and CP*" Pg.5
[3] Microsoft cases in EU and Japan
[4] AIR 1989 Ker 49

of information technology and in due course the subject matter of copyrights. As protection of copyrights increased, the powers of the owners also increased which resulted in abuse of dominance and monopolistic practices. Subsequently policy makers and courts began to embrace competition law more as a counter balancing tool.

COPYRIGHT PROTECTION AND INFRINGEMENT

The rights conferred to the owners of the copyright are monopolistic in nature as they restrain others from exercising that right granted to the owner and are also considered as a negative right in nature as they prevent others from copying or reproducing their work. In India, the rights of a copyright owner extend to the right to reproduce, distribute, derivative works, publicly perform, follow, paternity and Sui Generis rights. These rights differ from country to country but their immediate goal is to protect the rights of the owners and to recoup benefits from their investment in the work.

The U.S. Supreme Court held in Twentieth Century Music Corp. v. Aiken[5]: "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."

Infringement occurs when a person intentionally or unintentionally copies/uses the work of another without credit.[6] The acts that do not amount to infringement are fair use, performance in front of a non-paying crowd, sound recordings made under certain conditions and if connected to judicial proceedings.

There are several landmark cases of copyright infringement which goes ahead to show that the legislation and policy makers are sufficiently protecting the right of copyright owners. In the judgement delivered by Justice Mehta, it was ruled that copyright protection extends only to a concrete expression of a concept, not to the underlying concept or idea itself.[7] This judgement makes it clear that the mere adoption of a concept cannot amount to infringement of copyright. As the American Supreme Court noted in the celebrated judgment of Feist Publication vs. Rural Telephone Service Co[8] : "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work [internal citation omitted]. This principle, known as the idea-expression or fact-expression dichotomy, applies to all works of authorship… This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."[9]

The judgement of the Supreme Court of India in the case R.G.Anand vs. Deluxe Films[10], it was held that a mere idea cannot be the subject matter of copyright. Also, the Court weighed the dissimilarities against the similarities and concluded that there had been no infringement of copyright.

In this context, it is necessary to bring into consideration the doctrine of copyright misuse. This doctrine is an equitable defense against copyright infringement and is applied in the United States. This doctrine allows the alleged infringers of copyright to avoid any infringement liability on the grounds of

[5] 422 U.S. 151 (1975)
[6] https://www.myadvo.in/blog/copyright-infringement-in-india/
[7] Sanjay Kumar Gupta v. Sony Picture Networks India Pvt. Ltd.
[8] 499 U.S. 340 (1991)
[9] *Supra note 3*
[10] AIR 1978 SC (1613)

misuse of copyright by its owner. The doctrine prohibits the right holder to extend his rights beyond the statutory limitations. In the case Princo Operation vs. International Trade Commission[11] the court held that anticompetitive activity or antitrust violation undertaken by the copyright holder amounts to copyright misuse.

Doctrine of Rule of Reason

The rule of reason approach is adopted under the antitrust laws wherein the competition authorities or courts make an approach to assess the pro-competitive features of a restrictive business practice against its anti-competitive effects so as to decide if the practise is to be prohibited. The Rule of Reason approach identifies the interface between competition law and IP rights by drawing a faint line between exclusivity and monopoly. By conducting a thorough case by case analysis, the Court will decide if the practises adopted are illegal and restricts trade. To conclude that a practice is "reasonable" means that it survives antitrust scrutiny.[12]

The doctrine of rule of reason was applied in the case Broadcast Music, Inc. vs. CBS, Inc.[13] wherein the U.S. Supreme Court held that in order to decide if the issuance of blanket licenses involved price fixing, the rule of reason doctrine has to be applied to investigate further into the situation.

Under antitrust rule of reason, the plaintiff must initially show that the defendant has sufficient market power to affect market competition and that the challenged practice threatens competition by facilitating either collusion or anticompetitive exclusion. [14] At this point, the burden shifts to the defendant to provide evidence of a justification or legitimate objective. Then the plaintiff has an opportunity to answer that the same objective could be achieved by a less restrictive alternative.[15]

A blanket use of the per se rule, the opposite of the rule of reason approach, which grants victory to the plaintiff and completely rules the defendant's actions as illegal would in certain cases hinder the competition in the market. The rule of reason approach gives the defendant an opportunity to hear his reasons. The use of this rule has to be embarked upon more seriously by the Indian judiciary in order to strike a balance between exclusivity and wholesome competition in the markets.

Copyright Societies

In the year 1994, the Copyright Act was amended wherein performing rights societies were replaced by copyright societies. Copyright societies is defined under the Act as a society registered under section 33 (3)[16] of the Act. Copyright societies are basically a collective administration society formed by owners

[11] 616 F.3d 1318 (Fed. Cir. 2010)
[12] Herbert J. Hovenkamp, "The Rule of Reason", 2018
[13] 441 U.S. 1
[14] *Supra note 12*
[15] Id.
[16] S.33(3) Registration of copyright society- The Central Government may, having regard to the interests of the authors and other owners of rights under this Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of the applicants, register such association of persons as a copyright society

and authors. They are vested with the power to grant licenses in respect of any work in which the copyright exists. As a result, they attain a position of virtual monopoly. They issue icenses, commercialize the copyrighted works, investigate into matters relating to infringement, get royalties from the licensees of the copyright, collect compensation and so forth. Copyright societies have acquired a status of monopoly in the market. Copyright societies inevitable acquire a status of dominant position as they are statutorily allowed to issue licenses for the use of the work of the creator. Section 33 of the Act also clearly states that the copyright societies have the sole right to issue or grant licenses in cases of cinematographic film. It has also been added that only one copyright society can be registered in one class of work. This easily grants them a position of dominance in the market. The subject of copyright society and its effect on competition law has been debated several times in the CJEU court in the last few years. Many disputes regarding copyright societies and competition law have been decided and ruled that copyright societies will always be subjected to competition law. Copyright societies in India also have a role in affecting the competition in our markets. However, the jurisdiction of India still has room to develop when compared to that of EU and US.

Global Copyright Laws

Although there is no such thing as International Copyright Law, copyright laws exist in every country and almost every other country is a member of the Berne Convention. The leading international copyright treaty is the Berne Convention for Protection of Literary and Artistic Works. There are three foundational copyright treaties- the WCT (WIPO Copyright Treaty), the Berne Convention and the WPPT (WIPO Performance and Phonograms Treaty). Though these treaties were established years ago they still play a major role as to how copyright is handled across the world.

The Berne Convention is one of the oldest treaties and was signed in the 1880s and is currently ratified by 180 countries. This convention stablished the minimum standard that have to be complied with in order for copyrights to be carried from country to country. It states the types of works to be protected, rights of the copyright holder, its duration and the limitations to be imposed on the right holder.

The WCT was signed in the 1996 and played a major role in the development of copyrights in the field of digital technology. In addition to the rights granted under the Berne Convention, the WIPO Copyright Treaty extended the rights to distribute, rent, communicate to public. One key article of the WCT talks about the 'three step test' to determine limitations and exceptions as provided for in the Berne convention.

The WPPT takes into consideration the rights extended to performers and producers of phonograms. The WPPT also includes the three-step test to determine limitations and exceptions as provided for in the Berne convention.

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subject to such conditions as may be prescribed: Provided that the Central Government shall not ordinarily register more than one copyright society to do business in respect of the same class of works.

The WIPO has recently adopted two new copyright treaties. In June 2012, WIPO members voted in favor of adopting the Beijing Treaty on Audiovisual Performances, which provides copyright rights to performers (e.g., film and television actors).[17] A year later, WIPO members voted in favor of adopting the Marrakesh Treaty, which has particular relevance to publishers.[18]

[17] https://publishers.org/priorities-positions/international-copyright-treaties
[18] Id.

SECTION 3(5) OF THE COMPETITION ACT

Section 3 of the Competition Act talks about anti-competitive agreements which have an appreciable adverse effect on the market. In contravention, clause 5 of the same section says that any agreement made with an intent to protect the intellectual property rights of the right holder is considered an exception to section 3. Section 3(5) of the act says that, "reasonable restrictions as may be necessary for protecting IPRs" will not attract Section 3. This means that though some practices of the right holder maybe monopolistic in nature, considering the fact that they are reasonable in nature, they will not be regarded as anti-competitive agreements. However, it is also to be noted that the expression "reasonable conditions" have not been defined anywhere in the Competition Act. In order to effectively distinguish, apply the above clause and infer whether the agreements do have an appreciable adverse effect or not, they have to be done carefully on a case to case basis analysis.

The Competition Committee of India is a specialized Court/Tribunal constituted for the administration and enforcement of Competition Law in India. The CCI plays a major role in eliminating anti-competitive practices and also play its role in competition advocacy. This quasi-judicial body has adjudicated several landmark cases regarding the interface of Competition Law and Copyrights.

Multiplex Owners vs. United Producer/Distributors Forum[19]

In 2009, a dispute arose between Multiplex owners and several film producers/distributors of the Bollywood cinema. The dispute hinged on the fact that the film producers/distributors demanded of a greater share in revenue collection of multiplexes. The Multiplex owners contended that the producers/distributors were unfairly ganging up and stirring anti-competitive issues.

The table below shows the original share between the multiplex owners and the

Type of Films	Big Budged Films	Medium Budget Films	Low Budget Films
1st Week	48%	45%	40%
2nd Week	38%	35%	30%
3rd Week	30%	30%	
4th week and subsequent weeks	25-30%	25-30%	

[19] Case No.1 of 2009 (May 25,2011)

producers/distributors.[20]

After the producers/distributors put a joint pressure on the Multiplex owners to increase their revenue share, their share increased by 2% in the first week and subsequently higher in the next few weeks.

One of the main contentions alleged by the owners were that the producers/distributors had formed a cartel in order for the owners to compromise. They colluded to reduce their supply of movies to the owners which in turn reduced the revenue attained by the multiplex owners. This depicted a cartel like conduct by the producers/distributors.

Some of the arguments posed by the producers/distributors took a Copyright angle stating that cinematographs/feature films are a subject matter of copyright and that according to Section 14 of the Indian Copyright Act,1957 allows the right holder to exploit his works in any manner he deems it to be fit. They also stated that it was upto the producers as to how their films are to be communicated to the public so it is not upto the owners to decide the release of the films and their commercial terms. They also brought in the argument that the CCI does not have jurisdiction to decide the case on the grounds that alternative compulsory licensing is allowed in the Copyright Act.

The Competition Law angle that the producers/distributors took say that there had been no anti-competitive conduct as Section 3(5) of the Indian Competition Act is a *non obstante* clause stating that nothing shall prevent persons from imposing reasonable restrictions in order to protect their rights conferred under the Copyright Act, 1957, their actions are perfectly legal.[21]

The CCI after an exhaustive hearing of both sides had their own take on the application of copyright laws in the case in hand. The CCI firstly ruled that Copyrights are only statutory rights and are not absolute in nature. Also, if there was any action to benefit multiplex owners that the producers have the right to exhibit the films only through them, it will amount to compulsory licensing over which the CCI has no decision to rule over. On finding evidence of the cartel like conduct by the producers/distributors, the CCI held that there was a violation of section 3 of the Competition Act. It was also ruled that since there was no actual infringement of copyright, section 3(5) of the Copyright Act does not apply. One of the main aspects of the decision delivered by the CCI was the holding that the Copyright Act does not have an overriding effect over competition laws. This means that in case of disputes arising between the laws of competition and copyright, the competition laws will always prevail.

[20]https://spicyip.com/2011/05/bollywood-wars-multiplex-owners-v-film.html
[21] Id.

K.Sera Sera Digital Cinema Ltd. vs. Pen India Ltd. & Ors[22]

The judgement delivered in this case makes it clear as to when the exception under Section 3(5) of the Act can be put to use. The dispute arose between a digital cinema exhibition service and producers/distributors of the film 'Kahaani 2'. It was contended by the informant that the producers of the film and the competitors of the Informant had entered in to anti-competitive agreements such as tie-in arrangement, exclusive supply agreement and refusal to deal with the Informant to control the release of the film. It was also alleged that the producers had informed not to release the movies in any theatres related to the Informant. It was also alleged that the distributors had started poaching the theatres of the Informant for installation of their technology/equipment stating that they are the exclusive supplier of the movie 'Kahaani 2'.

The opposing parties rebutted the arguments of the informant stating that there was no evidence to show the existence of an anti-competitive agreement. The distributors argued that the discretion to run shows of the film only on their platform lies with the producers. They also stated that quality and security as the factors for deciding release of a movie and the Informant had caused infringement of copyright in the recent past. It was also alleged that investigations conducted in a previous case involving the Informant proved that they had indulged in online piracy.

The Commission noted that there had been no counter arguments to deny or dispute any of the allegations made by the opposing party. Their mere silence supported that the claims made by the opposing parties were legitimate. It was also observed that since the producers of the film had put in considerable efforts to develop their movie, they had every right to decide the business strategy to release them. Applying Section 3(5)(i)(a) of the Competition Act, it is evident that as owners of the film, they have the right to impose conditions that they feel are 'reasonable' in order to protect their creation from being wrongfully exploited. Since, the Informant has also been previously accused of online piracy, it is deemed rightful that the producers chose to restrict the release of their film to the Informant.

This case brought out the essence of Section 3(5) and the convergence between Copyright and Competition Law. The Commission successfully protected the rights of the owners of the film and at the same time enhanced the competition in that market.

De jure and De Facto Monopoly

[22] Case No.97 of 2016 (June 21,2017)

De jure monopoly is monopoly acquired by law i.e, the monopoly is protected from competition in the market by law. It is otherwise known as legal monopoly or statutory monopoly. As opposed to de jure monopoly, de facto monopoly is that acquired by its public acceptance in the market and without any government intervention. The anti-competitive effect of de facto monopolies are temporary and highly dependent on innovation and the market nature.

It is highly debated that de jure monopolies only hinder competition in the market as they limit the entrance of other potential sellers in the market. Egalitarians contend that de jure monopolies are unjust and result in unequal distribution of resources even if they are a result of consensual transactions.[23] However, this can be argued from an incentive-based point of view. The very reason why Intellectual Property Rights began to be granted to creators was to foster more innovation and to reward the creator with exclusive income rights for their work. In support of this view, it would be unreasonable to not grant exclusive rights to the creators for their work as a reward for their efforts. It is also to be taken into consideration that IPR not amount to monopoly. As long as there are substitutes available in the market, there can be no mention of monopoly. In the copyright market, there are hundreds of thousands of new books released yearly. Competition is very much present in the markets of movies and books. It also to be noted that intellectual property rights are intangible and do have any physical attributes. It is only after the grant of exclusive rights, does an abstract object achieve some of the properties available for physical objects.[24]

[23] Vallentyne (2014)
[24] Andreas Von Guten, "*Intellectual Property is Common Property"* Page no.77

BLANKET LICENSES -Violation of Competition Law?

The music industry has always been one of the biggest to claim copyrights. It is often subjected to copyright protection which consequently results in a complex legal relationship. In simple terms, a blanket license is that given to a music user, such as radio station or TV, that allows to use the music in any form during the period in which the license is effective. This is a much rational option as getting individual licenses are time consuming. Issued by performing rights societies, blanket licenses authorize the use of any work in the repertory of the issuing society for the duration of the license.[25] Although this approach is more often been used, it's legality said to be at dispute with the competition laws. The heart of the issue involves a clash between the promotion of artistic efforts and the prohibition of unfair trade practices.[26]

Broadcast Music, Inc. vs. CBS, Inc.[27]

The case is an important anti-trust case decided by the U.S. Supreme Court in relation to blanket licenses and it's anti-competitive effect. The respondents, CBS originally filed a case against American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), alleging that they had issued blanket licenses for prices negotiated by them. It was contended that ASCAP and BMI had indulged in illegal price fixing and anti-competitive practices.

It was held by the District court that the act of the opposite party amounts to a *per se* violation of anti-trust laws and subsequently on appeal to the Court of Appeal, the similar had been held.

However, the U.S. Supreme court reversed the judgement of the lower court by applying the rule of reason approach. It was argued by the Court that blanket licenses were only a way to escape application of individual licenses and save money. Also, on further research into the situation, it is noted that the license cannot be equated to horizontal agreement amongst competitors. Taking into consideration that the issuance of blanket licenses has been around the performing rights market for several years and has been accepted by many at large, the mere issuance of a blanket license cannot be regarded as illegal or anti-competitive.

Although blanket licencing are debated to be anti-competitive in nature, it is necessary to observe that blanket licenses are a way of licensing the rights to use their creation on a national level. Without blanket licenses, there is a threat of underpayment, theft or over expense in negotiations. Copyright protection gained by way of blanket licensing creates a grant of exclusive rights. This exclusivity is justified by its realisation of the creative work and the benefits it brings to the society . Though the licensing and fee that the Copyright Act allows may seem to work against the consumer's interest by

[25] Glenn A. Clark, (1980) "*Blanket Licensing: The Clash between Copyright Protection and the Sherman Act*" Vol. 55 Issue 5
[26] Id.
[27] 441 U.S. 1

increasing the cost of the product, any detriment is only emphemeral.[28] The sole purpose of granting exclusivity is to provide incentive to the creator for his work as a way of encouragement. Blanket licensing must remain within statutory limits as prescribed under the competition laws and if implemented correctly, they are a valuable instrument for encouraging innovation as well as enhancing competition in the market.

[28] Maralee Buttery, (1983) Columbia Law Review "*Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavor*" Vol. 83, No.5

CONCLUSION

The growing importance of innovation is indisputable.[29] In the modern world, Competition policies and Copyright laws both exist simultaneously to protect the welfare of the consumer and enhance the market competition. Though both the laws have developed independent of each other, they play a significant role in protecting the interest of the creators by granting exclusivity and also maintaining healthy competition. Copyright works to the advantage of the artist by enabling creative process to occur with neither the fear of infringement not damage to either his professional reputation or his pocketbook. Copyright Act merely exists to protect the right of the creator and not in conflict with the competition laws. However, during the implementations of the laws, the fine line between exclusivity and monopoly needs to be identified through case-by-case analysis by applying the rule of reason approach. The present structure of the laws provide ample opportunity for the inquisitive.

[29] Raju K.D. "*Interface between Competition Law and Intellectual Property Rights: A Comparitive Study of US, EU and India"* Retrieved at- https://www.omicsonline.org/open-access/interface-between-competition-law-and-intellectual-property-rights-a-comparative-study-of-the-us-eu-and-india-ipr.1000115.php?aid=26445&view=mobile