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AN ANALYTICAL STUDY OF INTERFACE BETWEEN PATENT POOLING AND COMPETITION LAWS IN INDIA

by

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ABSTRACT

The object of this article is to assess the anti-competitive and pro-competitive effects of patent pooling in light of the competition laws in India. This article also attempts to analyze the interrelation between patent pooling and the legal validity of the same in view of the provisions of the Competition Act, 2002. As patent pooling is a nascent concept on the Indian jurisdiction, there is need for a critical analysis as to how the patent pooling arrangements shall prevail under the Indian antitrust legal structure. Patent pooling may entail numerous economic benefits to the consumer in terms of ease of access to essential goods and also increased competition in the market, however, in absence of adequate regulations the same can also give way to collusive and anti-competitive behavior between horizontal firms competing in the market. Patent pools can also be a case of cross-licensing of patents between horizontal players by way of an agreement which is per se anti-competitive under the competition laws in India. In the light of the above statement, application of the per se rule will be deemed to be inappropriate because of the economically beneficial and pro-competitive effects of patent pools. This article evaluates such effects of patent pooling on competition in the market. The article concludes by stating that patent pooling although not being prima facie anti-competitive in nature, it can be consequentially anti-competitive and adequate guidelines in respect of patent pools are necessary to ensure that the economic benefits are well received and the competition in the market in not diminished to the detriment of the consumer.

Keywords: patent pooling, antitrust, competition laws, patents.

I. Introduction

Competition in the present market is majorly influenced by two areas of laws namely, competition laws and patent laws. In a preliminary inspection, both areas of law seem to be contradictory to each other in principle as competition legislations are mainly focused towards promotion of competition in the market and patent laws empower the patent holder a considerable measure of exclusivity in the respect of trade relating to the patented product. Monopoly is created and protected to a certain extent by one body of law, whereas proscription of the same is sought by the other law. There exists a need to maintain a balance between patent rights and competition laws such that there is enough deterrence for abuse of dominant position created by patent rights while the benefits are left intact when utilised in a pro-competitive manner.

A dominant position has never been held to be inherently illegal by competition laws except for instances which have seen an abuse of such dominant position. Patent law offers a dominant position to the patent holder and that in itself is not violative of competition policies, however, the abuse of such position by patent holders does violate competition policies. 'A patent pool is an arrangement by which two or more patent holders put their patents together and in return receive a license to use them.'[1] Patent Pooling gives way for anti-trust concerns as it entails genesis of anti-competitive practices in market by enterprises participating in the patent pool. As much as it encourages competition and innovation, patent pooling can also instigate anti-competitive behaviour as any cooperation among competitors, also involves an inherent risk of collusive behaviour and may also involve a risk of cartelisation.[2] Patent pooling may also result in sharing of markets by competitors in the same relevant market by way of territorial exclusivity or by price fixing. Although, patent pooling increases the supply efficacy in the market by eliminating the complementary patents problem, it also encourages potential

[1] Floyd. L. Vaughan, *The United States Patent System: Legal and Economic Conflicts in American Patent History*, Norman, Oklahoma 1st ed., 1956, p. 39-40.
[2] Shama Mahajan, Patent Pooling and Anti-Competitive Agreements: A Nascent dichotomy of IPR and Competition Regime, 6(2) NLUJ Law Review 35 (2020) p. 39.

collusion among competitors in the form of anti-competitive sensitive information sharing and price fixing. There is also a problem of the expensive nature of patent pooling negotiation which can lead to exclusion of enterprises which hold only a small number of patents while the major enterprises are enabled to form a cartel to restrict market access to new competitors. The overlap of patent laws and competition laws is a nascent phenomenon in the Indian Jurisdiction.

II. Types of Patents in a Patent Pool

The term "pool" has been often utilized for denotation of multitude of differential arrangements or agreements in which patents have been combined in some manner by the patent owners[3] Patent Pooling is defined by United States Patent and Trademark Office as an agreement between two or more patent owners to allow or license one or more of their patents to one another or third parties[4]. Fundamentally, a company, which requires resources for production, may acquire a license collectively instead of separately from two more companies which hold multiple patents. Different types of patents maybe involved under Patent Pooling which may include competing patents, complementary patents and essential or non-essential patents.

Certain patents which may be used as in an alternative way or in other words, may be substituted to achieve the same outcome fall under the category of competing patents. Acquisition of license of a competing patent by an individual company would significantly decrease the demand of that individual company in respect of other competing patents[5]. Thus, a patent pool involving competing patents is harmful for the overall competition in the respective relevant market. Patents which are essentially needed to be utilized collectively for production of certain goods, technological, pharmaceutical or otherwise, are known as complementary patents. Such patents warrant the requirement of being used together in the process of production which justifies their involvement in a patent pool. Patent Pooling of complementary patents is aimed at increasing the efficiency of production which in turn promotes the competition in the market. With regards to standardization, essential patents are required to achieve a standard set by the relevant authority. A Standard Essential Patent is granted in respect of an exceptional advancement in technology that is recognized to be a standard in a particular industry by a standard setting authority. A pool involving Standard

[3] Roger B. Andewelt, *Analysis of Patent Polls under the Antitrust Laws*, 53(3) Antitrust Law Journal 611, 611 (1984).
[4] Manas Bhulchandani, Akshay Khanna, *Patent Pooling in Indian Scenario*, 4(2) International Journal of Law 15, 15 2018.
[5] Roger B. Andewelt, *supra* note 3, at 613.

Essential Patents may ultimately result in advancement of competition in the relevant market as it facilitates production of goods with adherence to industrial standard in respect of the same.

III. Economic Effects of Patent Pooling

Patent Pooling is a nascent concept in India scenario and the primary focus is seen to be for affordable health care. One of the major objectives of patent pooling has been the creation of compilation for multiple patents owned by various countries, in order to increase the rate of development and ease of access of medicines for people belonging to the lower economic strata of developing countries[6].

A patent pool may lead to economic benefits by way of immunity granted in respect of patent infringement suits which leads to efficiency in production resulting in increased choices and lowered prices to consumers.[7] A patent pool can also be viewed as a highly efficient recourse for legal conflicts relating to patent interference. The first ever patent pool was a consequence of continual legal battle between Baker, Grover, Singer, and Wheeler & Wilson in 1856 for patent infringement in respect of patents involved in the production of the sewing machine. In 1856, nine complementary patents owned by different holders, were pooled together in order to achieve the production of a functional sewing machine[8]. A proposal was put forward by an advocate, by the name of Orlando B. Potter, to all of the above named parties to settle the dispute by granting permission to use technology owned by each by way of pooling instead of resorting to legal disputes leading to minimised profits.

Patent owners may also be enabled to obtain efficiency in respect of licensing the patents owned by them by way of creation of a single entity capable of licensing all their patents. A demand by a large number of licensees to secure access to multiple patents may be addressed by patent owners efficiently by way of pooling. In the absence of a pool such a demand would warrant the requirement of a multitude of expensive negotiations between patent owners and multiple licensees. A pool effectively decreases the transactions and their costs by enabling negotiations through a single entity capable of granting access to the required collection of patents. Pooling may also enable patent owners in securing the entire value of patent contribution and encourage investment in research and development. If a producer is of the

[6] Manas Bhulchandani, Akshay Khanna, *supra* note 4, at 18.
[7] Roger B. Andewelt, *supra* note 3, at 614.
[8] Indrani Barpujari, *Facilitating Access or Monopoly: Patent Pools at the Interface of Patent and Competition Regimes*, 14 Journal of Intellectual Property Rights 347, 345 (2010).

knowledge that they can utilise a combination of patent and its complements through pooling, then it proves as an incentive to investing in producing patents.

As mentioned above, immunity obtained by the virtue of patent pooling has a greater probability of being economically beneficial, however, that may not always be the case. Immunity obtained against patent infringement by the licensee may give way to collusive behaviour in the marketplace. Patent pools which create an obligation for patent owners to grant legal immunity to licensees in respect of future patents may cause an adverse effect to the degree of innovation in the area of impact in technological research and development. In the presence of a such a patent pool, there exists an absence of economic incentives to firms for investments relating to research and development in respect of future patents as the discovery of patentable inventions do not grant them any comparative advantage over fellow competitors who are participants in the pool.

Anticompetitive effects may be effected by unreasonable restraints in a patent pool completely unrelated to the patents in the pool. In the case of technologies which compete with each other, the participants in patent pool of such technologies are construed as horizontal players as the patented technologies are utilised to achieve similar outcomes. The probability of diminishing competition in the market between such horizontal firms with competing technologies will be increased to the extent of the restrictions contained in the pool in respect of licensing of such competing technologies.

IV. Anti-Competitive Effects of Patent Pools

Patent Pools which involve competing patents may result in an anticompetitive effect on the market. If patents which are substitutable or in competition with each other, in respect of the licensees, are pooled together then the negotiating capabilities of the licensees are diminished and the licensees are forced to be agreeable to the terms set by the pool for the licensing of such competing technologies. In absence of the pool, the licensees would be in a position to conduct negotiations with the patent owners separately and obtain the license for one of the patents on favourable terms which is in line with the competitive spirit of the marketplace conduct. Such elimination of competition by way pooling of competing patents can have enormous economic effects depending upon the existing competition in the relevant market.

Patent pools have the probability of facilitating collusive behaviour between horizontal competitors. A virtual horizontal merger of the patent owners if effectuated by a pool and they

are allowed to jointly decide upon the licensing rates for the patents. Such practice departs from competitive behaviour and leads to restoration of monopoly pricing in a competitive market[9]. Patent pools also facilitates patent owners in development of *de facto* standards by dominating a technological area in the absence of a standard setting organization. Patent owners may pool their patents by settlement of legal differences and establish a singular proprietary standard of technology. The anticompetitive effect of this is such that the patent pool would diminish competition between rival patent holders who, in the absence of the pooling arrangement, would have been in competition for recognition by a standard setting organization.[10]

IV. Patent Pooling in the Indian Legal Structure

Patent Owners participating into a patent pool become a part of horizontal agreements or vertical agreements which are restricted under Section 3(3)[11] and Section 3(4)[12] of the Competition Act, 2002 respectively. There is no express provision relating to patent pooling agreements under the Patents Act, 1970. However, Section 68 enables transfer of patent[13] and Section 84 provides for the compulsory licensing of patents leading to the conception of a patent pool[14] which creates a conflict between the two legislations. The Competition Commission of India has labelled patent pooling to be a restricted trade practice as it may adversely affect the competition in the market, even though, Section 102 of the Patents Act, 1970 facilitates the creation of a patent pool by the government[15]. There exists a lacuna in the existing provisions relating to patent pooling agreements under Competition Act, 2002 and the Patents Act, 1970 in respect of the anti-competitive effects of the same.

Patent pooling agreements may consequentially create a dominant position in the market. Due to the absence of any specific provisions with respect to intellectual property in Section 4 of the Competition Act, 2002, patent pooling agreements have a high probability of being considered as abuse of dominant position. Even though there is an exemption to agreements in respect of intellectual property under Section 3(5), patent pooling agreements can be considered to be in contravention of Section 4 which prohibits unilateral conduct of a dominant undertaking that amounts to abuse of its dominance.

[9] Steven C. Carlson, *Patent Pools and the Antitrust Dilemma*, 16 Yale Journal on Regulation 359, 388 (1999).
[10] *Id*. at 395.
[11] The Competition Act, 2002, § 3(3), No. 12, Acts of Parliament, 1949 (India).
[12] *Id*. § 3(4).
[13] The Patents Act, 1970, § 68, No. 39, Acts of Parliament, 1949 (India).
[14] Id. § 84.
[15] Id. § 102.

Section 140[16] of the Indian Patent Act declares unlawful the insertion of a number of conditions in a licence to manufacture or use a patented article, in so far as the condition may: a) to require the purchaser, lessee, or licensee to acquire from the vendor, lessor, or licensor or his nominees, or to prohibit from acquiring or to restrict in any manner or to any extent his right to acquire from any person or to prohibit him from acquiring except from the vendor, lessor, or licensor or his nominees any article other than the patented article or an article other than that made by the patented process; or b) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee, to use an article other than the patented article or an article other than that made by the patented process, which is not supplied by the vendor, lessor or licensor or his nominee; or c) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee to use any process other than the patented process; d) to provide exclusive grant back, prevention to challenges to validity of Patent & Coercive package licensing. Thus, there is already existence of safeguards against anticompetitive practices in the Indian Patent Act which warrants no recourse to the Competition Act, 2002.

The new Competition Act, 2002 seeks to promote competition in the market and only restricts the anticompetitive agreements which may have an appreciable adverse effect on the Indian markets. This can be interpreted to understand that practices such as patent pooling which may increase efficiency in production and distribution of products may be granted a liberal view by the CCI as long as anticompetitive practices like price-fixing, tying agreements and package licensing are kept at a bay in the pool[17].

Patent pools have a probability of entailing numerous economic benefits as discussed above, therefore, *per se* anticompetitive consideration of patent pools will not be appropriate. This does not amount to mean that deliberate anticompetitive conduct of parties under the guise of a patent pool such as price fixing of products which are no way in relation to the patents being pooled and agreements relating to market allocation should not be held unlawful. However, restraints in respect of field of use for a license which consequentially leads to allocation of markets for patent licensees is not per se anticompetitive[18]. The reasoning for above statement is that such restriction would not diminish any competition that would have been occurring otherwise as the licensees would not be in a state of competition in the absence of such patent license.

[16] Id. § 140.
[17] Indrani Barpujari, *supra* note 8, at 354.
[18] Roger B. Andewelt, *supra* note 3, at 619.

V. Conclusion

The school of thought that is of the belief that the exception given under Section 3(5) of the Competition Act, 2002 may be considered to be absolute in respect of agreements related to intellectual property might prove to be an incorrect way of interpretation. There has to be a reasonable nexus between the conditions imposed on a third party by an IP owner such as a patentee and the object of preventing infringement of the IP right[19]. Thus, the patent holders participating in a pool and resorting to anticompetitive practices should attract the provisions of the Competition Act, 2002 and consequentially patent pools should be under the legal jurisdiction of the Competition Commission of India in addition to the Controller of Patents.

With that being said, there certainly exists a lack of guiding lines for the interpretation and administration of the Competition Act 2002 when it comes to legal issues relating to intellectual property. The European Commission (EC) and the Federal Trade Commission (FTC) and the Department of Justice (DOJ) in the United States regularly issue guidelines, studies, and reports that reflect their interpretation of relevant legislation and their likely approach to various types of agreements and forms of conduct, such as the EU Guidelines on Technology Transfer Agreements and the FTC–DOJ Guidelines on IP Licensing mentioned above[20]. The Competition Commission of India does commit to market research and studies about different sectors of the market but there exists a lack of authoritative guidance about their approach. The absence of adequate regulations in India relating to patent pooling may either cause an appreciable adverse effect on the competition in the market with horizontal players engaging in anti-competitive practices under the guise of patent pooling agreements or may cause an impairment to the economic benefits that follow from patent pooling arrangements. Thus, proper guidelines are required to be issued relating to patent pooling so that the ambiguity in interface with competition law is appropriately dealt with. Practices like patent pooling must be given a liberal treatment as it is the need of the hour for efficient production and distribution of pharmaceutical products so that they can be easily accessed by the lower income groups of the country.

[19] J. Sai Deepak, *Patent law and Competition Law: Identifying Jurisdictional metes and bounds in the Indian context*, 27 National Law School of India Review 135, 140 (2015).
[20] Yogesh Pai, Nitesh Daryanani, *Patents and Competition Law in India: CCI's reductionist approach in evaluating competitive harm*, 5 Journal of Antitrust Enforcement 299, 303 (2017).