Patent Rights and Competition Law: Conflicts and need for Harmonization

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Abstract

Patent rights and Competition law have developed as disciplines distinct from each other, with their unique set of objectives and modes of achieving them. However, the two disciplines also interact extensively, especially in the current scenario where innovation is a major catalyst for the growth of corporations as well as the economy. The paper will discuss this relationship between the two disciplines, focusing on complicated and fact-specific issues such as tying agreements, Standard Essential Patents, patent pooling, and others. It will analyse jurisprudence from three of the most mature jurisdictions in this respect, the United States of America, the European Union and India. The extent to which patent rights can exist in harmony with competition concerns by preventing infringement and thus encouraging fair market behaviour will be examined. We will also analyse instances wherein patent rights can be exploited to engage in anti-competitive behaviour. The paper will suggest ways in which the interaction between patent rights and competition law can be regulated to aid the development of the competitors, consumers, and various other stakeholders.

Keywords

patents, refusal-to-deal, interface, competition law, intellectual property rights, IPR, standard essential patents

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**INTRODUCTION**

Knowledge and technology have proved to be important catalysts for economic growth in recent times. The patent system promotes the same, allowing an inventor to essentially cover his investments and even profit off his invention. The nature of such protection has undergone changes over the years. The first patent in India was famously granted to George Alfred De Penning from Calcutta for a Punkah Pulling Machine in 1856. Back then, the nature of patent rights was limited to providing exclusive privileges that incentivize the inventions of new manufacturers.\(^{130}\) In the past 150 years, the nature of patent rights has undergone significant changes. While novelty, utility and inventiveness still make up the very essence of a patent; concepts such as Standard Essential Patents (“SEP”), i.e. patents covering portions of a technical standard that is essential to ensure device interconnectivity and interoperability\(^{131}\) have developed in response to the rapidly changing economic scenario. Patents are now valued as key assets by multi-national corporations, proving essential to bringing in profits and enhancing productivity.\(^{132}\) In a knowledge-based economy, patents can be responsible for the growth and in some cases, exploitation. Essentially, patents create the right to keep others from making, using, importing, selling, offering for sale, the invention, and essentially creating a monopoly right.\(^{133}\) The misuse or abuse of these rights, if it amounts to anti-competitive behavior, is part of what Competition Law seeks to prevent and punish.

The conversation on the interface of patent and competition law rights is especially relevant in the current scenario in various industries such as pharmaceuticals and telecom devices technology. Reports from the United States suggest that between 2012 and 2017, prices of 12 best-selling drugs increased by 68%, with the price of Lyrica (a drug used for treating neuropathic pain) increasing by 163%. Pharmaceutical companies seek to eliminate competition by generic players in the market by seeking protection for close to 38 years. This is done by filing multiple patent applications for the same drug, in an attempt to extend the validity of the patent. Herceptin (cancer drug), for example, has numerous patent applications pending which would effectively extend its patent life till 2033.\(^{134}\) The situation in India is bleak too. In January 2019, a high-level Indian government panel made recommendations to lower the prices of patented medicines. Intended to bring down the prices of drugs for cancer and rare

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diseases, it suggested issuing compulsory licenses, notwithstanding the consent of the patent holder.\textsuperscript{135} The trend thus suggests that if the abuse of monopoly is left unchecked, it can prove harmful to the concerns of competitors and consumers alike.

The European Union, the United States and India have significant literature in the form of case laws, guidelines and legislations on the interface of intellectual property rights (“IPR”) and competition law. Courts in these jurisdictions have long attempted to delineate the purview of patent rights. For example, the first half of the 20\textsuperscript{th} century often saw the American courts consider rights inherent in the patent grant essential to determine whether there was a possible competition concern. The courts observed that antitrust law has a role to play only when the rights inherent in a patent are breached or exploited.\textsuperscript{136} However, in the course of time, disputes of various kinds have arisen before the courts, from considering restrictive licensing agreements to the treatment of SEPs. This paper will discuss the relationship of patent law and competition law in the context of the United States, the European Union and India, three of the most experienced jurisdictions in this regard. The author will discuss issues revolving around refusal to deal and tying arrangements as they have come up in the United States of America and refusal to license cases in the European Union. In the Indian context, the discussion will revolve around licensing of IPR. Questions relating to SEPs, being a crucial aspect of the interface between competition law and patent rights, will be discussed in relation to each of the above-mentioned jurisdictions.

**CO-EXISTENCE OF PATENT RIGHTS WITH ANTI-TRUST CONCERNS IN THE UNITED STATES – FTC, DOJ AND EVERYTHING IN BETWEEN**

The Sherman Act, 1890, the Clayton Antitrust Act, 1914 and the FTC Act, 1914 are the primary statutes concerned with competition law disputes in the United States. In addition, the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) occasionally notify guidelines on the antitrust policy of the country with regard to IPR.\textsuperscript{137} This part will initially look at the interface from specific kinds of anti-competitive activities, i.e. refusal-to-deal and tying agreements. In the latter part, the author will discuss competition law issues that have arisen with respect to SEPs.

**Relationship of patent rights with Refusal to deal and Tying Agreements**

Issues pertaining to the interface of competition law and IPR have often arisen in refusal-to-deal cases and are therefore relevant for our discussion. The law relating to refusal to deal has been provided in the Sherman Act. The manner in which the law on refusal to deal is to be interpreted was discussed in


the cases of United States v. Colgate & Co. and in Russell Stover Candies, Inc. v. Federal Trade Commission. The Sherman Act prohibits and punishes combinations and agreements that restrain trade. One of the first interpretations of the legislation in this regard was laid down in the case of United States v. Colgate & Co. The case related to Colgate’s refusal to deal with agents selling below the retail price suggested by the Company. The United States Supreme Court ruled that a manufacturer is not prevented from announcing the prices at which his goods may be resold and refusing to deal with wholesalers and retailers who do not conform to such price.\(^{138}\) The rule was replaced in Russell Stover Candies, Inc. v. Federal Trade Commission which established the ‘rule of reason’.\(^{139}\) The test takes into consideration the relevant market and the power of the defendant’s position in the market. The claim is then decided on the basis of whether the act imposes an unreasonable restraint on competition. Other considerations including the purpose of the alleged act and the intent behind it can also influence the decision of the court.\(^{140}\)

The case of Eastman Kodak Co. v. Image Technical Services Inc. is relevant for the discussion on refusal to deal. In the instant case, Kodak was following a policy of selling repair parts – patented and unpatented, only to direct purchasers. Dozens of Independent Service Organizations (“ISO”) were not given the necessary repair parts. Kodak had also signed agreements with Original Equipment Manufacturers (“OEM”), preventing them from supplying the parts to ISOs. The decision of the 9th Circuit Court was reaffirmed by the Supreme Court stating that even though Kodak lacked sufficient power in the market for its primary product i.e. imaging equipment, it did have significant market power in the repair parts market. The defendant could thus be held liable for an antitrust violation for its refusal to deal with the ISOs. The court also highlighted the fact that the customers were “locked-in” once they agreed to buy Kodak equipment since they could no longer move to another company for repair parts. Once a customer is locked-in, it cannot switch to another seller without incurring substantial costs. The conduct of Kodak in the instant case amounted to a tying agreement,\(^{141}\) which exists when the seller places conditions on the sale of a product which entails the purchase of secondary product along with the primary product.\(^{142}\) Tying agreements are per se illegal under Section 3 of the Clayton Act.\(^{143}\) The court further stated that in order to prove a tying agreement, it has to be established that: first, the sale of the primary item was conditioned on the sale of the secondary item and second, that both the goods are separate and not constitute a single product. In addition, it is to be established that the tying agreement has impacted commerce sufficiently and detrimentally.\(^{144}\) The case presents an appropriate


\(^{144}\) Eastman Kodak Case, supra note 12.
instance of how a seller can refuse to sell its patented products, which may not even be the primary product, and thereby engage in anti-competitive behavior.

Anti-competitive activities through licensing of Standard Essential Patents

SEP$s are patents that are essential for the implementation of an industry standard. Standards, in this context, are those specifications that aim at providing a common design for a product. These standards have been adopted by Standard Setting Organizations or SSOs like International Electrotechnical Commission, International Organization for Standardization, and World Standards Cooperation. In this context, the role of FRAND terms, also called fair, reasonable, and non-discriminatory terms are relevant. In order to utilize a technical standard, a license must be issued by the patent holder, which, it may refuse. The FRAND terms thus regulate the terms of such license agreements in order to ensure fair treatment of both parties. One of the first instances in the United States of violation of SEP terms was in 1992. Dell Corporation had been a part of VESA or the Video Electronics Standards Association which necessitated its members to disclose their IP rights to each other. Dell, in 1991, revealed that it had obtained a patent which it sought to enforce through licensing. The Company was held liable for unfair competition under Section 5 of the FTC Act since it did not reveal its patents to VESA. Dell entered into a consent agreement with the FTC, wherein Dell was prohibited from enforcing the patent against any company for such company’s use of VESA’s relevant standards.

One of the most important decisions in the IPR-Antitrust debate in recent times was given by Judge Koh in *FCC v. Qualcomm Inc.* Conduct of Qualcomm in licensing patents has been investigated in various countries in Asia, Europe and in the United States. In 2015, the Company paid $975 million for its anti-competitive practices in China. The South Korean Antitrust agency also impose a fine of

$853 Million for Qualcomm’s ‘monopolistic’ practices,\(^{153}\) as did the European Commission to a tune of €997 million.\(^{154}\)

In the USA, the Company was sued by the FTC for violating Section 5 of the FTC Act, which enlists unfair methods of competition and unfair/deceptive acts affecting commerce as being unlawful.\(^{155}\) It was alleged that Qualcomm enjoys a dominant position in the supply of modem chips and has the ownership of various patents essential for CDMA and LTE. The company allegedly refused to license these SEPs while maintaining an exclusive dealing arrangement with a downstream handset company.\(^{156}\) The Court ruled that Qualcomm had to issue licenses for its SEPs to its competitors on FRAND terms.\(^{157}\) The instance is significant as it shows that anti-competitive behavior in relation to SEPs can have an impact across jurisdictions and can attract enormous penalties.

The approach of the FTC and DoJ has been focused on checking whether there has been a breach of FRAND terms by SEP owners. However, recently, public statements by the two agencies suggest that a new approach, called the Madison approach, might gain more prevalence. According to the Madison approach, the patent owners should “have adequate incentives to innovate and create exciting new technologies, and that licensees have appropriate incentives to implement those technologies.”\(^{158}\) The approach suggests that competition law should not be utilized as an instrument to regulate FRAND agreements that are made unilaterally to SSOs by patent holders. In addition, rules that rigorously limit the right of patent holders to exclude should be adopted only with a high burden. And lastly, the approach also provides that refusal of license unilaterally by the patent holder, even if it is unconditional, should not be considered *per se* illegal by antitrust law.\(^{159}\)

The interaction of antitrust and patents has given rise to numerous issues, some of which were discussed in the above section. However, other serious concerns have also arisen and are worthy of discussion. The next section on EU law will deliberate upon a few of these concerns.

**THE INTERFACE OF PATENTS AND COMPETITION LAW IN THE EUROPEAN UNION**


The European Union ("EU") policy treats the economic consequences of IPR realistically — it does not make the assumption that exercise of IP rights, including patent rights leads to infringement of competition laws on its own. Instead, it seeks to empirically establish the issue on a case to case basis. The European Courts, while discussing cases, also give due regard to the impact of IP rights on innovation in the field and whether it leads to consumer welfare. Article 101 and 102 of the Treaty on the Functioning of the European Union are the primary provisions dealing with competition concerns in the region. The chapter will analyze landmark cases on refusal to deal and tying arrangements before moving on to the discussion on SEPs.

**Refusal to License and Tying Agreements in context of the Microsoft Case**

One of the landmark cases with regards to enforcement of IPR rights in the competition background in the EU is *Microsoft v. Commission*,\(^ {160} \) which will be discussed at length. The company allegedly withheld information that was essential to interoperate its operating system, which was the dominant OS. The complaint was filed by Sun Microsystems, and the CCI found Microsoft to be indulging in anti-competitive practices through abuse of its dominant position in the market. The CCI stated that the refusal to supply the complainant with the information but providing Sun’s competitors with it amounts to a breach of Article 82. The Company was directed to disclose the required information within 4 months.\(^ {161} \) In addition, the issue of tying agreements also arose in the case. Microsoft was allegedly tying its product, the Windows Media Player with the operating system. The Company was given 90 days’ time to provide a version of the Operating System which did not include the player. In addition, a penalty of 497.2 million Euros was imposed on the company.\(^ {162} \)

The decision was of great significance to potential licensees and other companies engaging in similar conduct, involving a huge penalty to deter companies from engaging in similar practices. An additional 899-million-euro fine was imposed in 2008 for the company’s failure to comply with the 2004 decision. This was the largest fine imposed in 50 years preceding the judgment till 2009 when Intel was fined 1.06 billion Euros for breach of competition laws.\(^ {163} \) In order to discourage other companies from anti-competitive behaviour, penalties of high magnitude are necessary.

While considering the case of *Oscar Bronner GmbH and Co. KG v. MediaprintZeitungs*, an indispensability test was developed by the European Court of Justice. Certain conditions to determine whether the refusal to deal is an abuse of dominant position were given: whether the refusal eliminates all competition in the relevant market, whether there is an actual or potential substitute available and

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\(^ {160} \) Microsoft Corp. v Commission of the European Communities, T-201/04 (2007) [hereinafter ‘Microsoft Case’].

\(^ {161} \) Id.

\(^ {162} \) Microsoft Case, supra note 31.

whether the refusal can be justified by the company objectively. Most importantly, the competitor needs to prove that it is not economically feasible to develop alternatives to the product or service. While it may appear that the European system is inclined towards holding that owning important IP rights is prone to abuse, it is not necessarily true. Even in the Bronner case, the ECJ applied the strict test mentioned above and consequently did not hold the company liable. In CICRA v. Renault and Volvo v. Veng, the CCI reiterated its position, observing that merely refusing a grant of a patent or imposing royalty cannot be considered to be anti-competitive. Only when the conduct is abusive or arbitrary, can the company be held liable.

**STANDARD ESSENTIAL PATENTS (SEPs)**

EU competition law acknowledges that dealing with patents by dominant firms must include a return adequately reflecting the inventive function of patents. When the conduct of firms moves drastically away from the reward and innovation aspect and towards reaping anti-competitive advantages, the European courts intervene. One of the primary reasons for the same is that patent holders might use their dominant bargaining position in the market to demand unnecessarily high royalties once the patents are locked into a standard. This conduct is also known as patent “hold-up.”

There have been numerous cases decided by the CCI keeping in mind FRAND term violations. In 2012, concerns around companies seeking unnecessary injunctions came to the fore. In 2014, EC held even though Apple had already agreed to enter into licensing deals with Motorola, the latter company still obtained and enforced injunction orders in a German court. Motorola also required Apple to renounce the right to challenge the validity of its SEPs. The conduct, the Commission observed, was an abuse of dominant position under Article 102 of the TFEU.

One of the most noteworthy judgments with regards to SEPs is Unwired Planet v. Huawei. The complainant, an American patent assertion entity, brought the case against Huawei, Google, and Samsung for patent infringement. Some of the patents were acquired from Ericsson and were important for 2G, 3G and 4G technologies. During the course of the proceedings, Huawei was left as the only defendant as Google and Samsung reached settlements with the Complainant. The court ruled that there is a single FRAND royalty rate that applies to numerous SEPs and circumstances. In order to bring a claim for competition or breach of contract, it is necessary that the offer of the SEP holder is substantially more than the FRAND rate. In addition, Justice Colin Birss also observed that licenses

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166 Volvo v. Veng, C - 238/87 (1988).
under FRAND terms should not be restrained to a single jurisdiction since the licenses are meant for companies across the world. Lastly, the “non-discrimination (ND) prong of the FRAND commitment does not imply a hard-edged test in which a licensee may challenge the FRAND license that it has been granted on the basis that another similarly situated licensee has been granted a lower rate, so long as the difference does not distort competition between the two licensees.”169 The EC has also been strict as far as imposing penalties for breaching FRAND terms is concerned. Qualcomm was fined close to 997 million Euros in relation to its licensing program. The Company was found guilty of asserting its market dominance for over five years by pushing out competitors in the LTE baseband chipsets market. It even paid billions of dollars to Apple to ensure the latter exclusively uses its chipsets in all its devices. As a result, competitors were denied legitimate business opportunities and consumers were denied access to innovation.170

In the process of holding the Company guilty, the CCI kept in mind the impact on consumers and competitors, the extent of payments made to Apple and evidence that these payments minimized Apple’s incentives to look to rival products for chipsets. The CCI also kept in mind that Apple being a highly influential player in the market can persuade, intentionally or intentionally, choices of other companies. In addition, the CCI also held that the conditions created by Qualcomm created any benefits to stakeholders, including consumers. There was no evidence of any efficiencies arising out of the conduct of Qualcomm.

In an era when innovation is deemed synonymous to growth, the EU law has attempted to keep a balance in protecting inventiveness and market fairness. While certain conduct may be considered legitimate under intellectual property laws, it may not be lawful under competition laws. European Courts have handled such concerns proactively, taking stern action when necessary, for instance, in the case of Qualcomm. At the same time, it will be unfair to assume that every instance of possible breach of competition laws invites strict action, without regard to the nature of the intellectual property. Safeguards are provided within the European law to ensure that the courts get involved only when necessary. For instance, it is widely recognized that monopoly in a market achieved by research and development and the investment that goes in it is legitimate. If and when the conduct of a party moves toward exploitation of monopoly, do the courts interfere. The next part of the paper will discuss the interface of competition law and patent rights in a jurisdiction with relatively less competition law literature, i.e. India. The paper will look at how competition authorities have responded to challenges posed by the interaction of the two disciplines within the last couple of years.

BALKING OF PATENTS RIGHTS AND COMPETITION LAW IN INDIA

A combined study of IPR and Competition law suggests that while their goals are different, the concern for public good and welfare still lies at the heart of the two disciplines. Intellectual property laws seek to do that through differentiation, i.e. incentivizing newer inventions and products, which results from the product’s unique process, design, and inventiveness. Moreover, IP laws provide for compulsory licensing provisions for instances where the patent owner is unable to meet the requirements of the public. On the other hand, competition law ensures the public good by promoting efficiency in the market. This efficiency is encouraged through fair trade principles and keeping the dominant players in check.

The laws in the United States and EU have attempted to achieve the goal of balancing patent rights and competition law through guidelines, regulations and sound judicial pronouncements. While the Indian IP and Competition regime have matured slowly and more recently than the other two jurisdictions, there is significant literature available in the country. The Competition Commission of India (“CCI”) and the High Courts have delivered sound judgments that have been discussed further on issues in the IPR-Competition sphere, keeping in mind concerns of differentiation, dynamic efficiency and most importantly, public good. At the same time, it is necessary to keep in mind that India’s economy is at a stage where innovation is being increasingly operationalized. For instance, the number of patents granted by the Controller was 6,022 in 2015, 8,248 in 2016 and 12,387 in 2017, an increase of almost 50 percent in 2017. The total number of applications filed in 2017 was 46,582, meaning close to 27% of patents filed was granted by the Patent Office. The figures are indicative of the government’s focus on innovation-driven growth as part of the policy in recent years.

In addition to questions relating to SEPs, the chapter will also look at jurisdictional issues as well as a landmark decision on licensing of patent rights.

ROLE OF CCI VIS-À-VIS THE CONTROLLER OF PATENTS

The CCI does have the jurisdiction to rule on IP matters when a competition concern is involved. However, its role, keeping in mind the authority of the Controller of Patents, is necessary to be discussed, especially in the context of compulsory licensing. The Controller while granting a license under Section 84 of the Patents Act can look into “reasonable requirement of the public, availability of

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172 Id.
invention at an affordable price and its working in India.”174 The provision, therefore, allows the Controller to take decisions as far as licensing activities are concerned.

However, the effect of the patent holder’s conduct on competition in the market is the exclusive purview of CCI.175 While the nature of proceedings under Section 84 of the Patents Act is narrow and in personam, the proceedings in front of the Commission are much broader and in rem. This is further evidenced by the fact that while an application for a compulsory license can only be filed by a “person interested”,176 proceedings can also be initiated under the Competition Act by any person or even the CCI itself.

In addition, Section 62 of the Competition Act further clarifies its position with respect to laws that are not in conflict with it. The section states that “provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.”177 This necessarily means that if in case Section 84 of the Patents Act and Section 3 and 4 of the Competition Act do overlap, remedies under both the – the Competition Act and the Patents Act – shall be available to the aggrieved party. On the other hand, Section 60 states that “the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”178

The obvious inference of the section is that if an interpretation of the compulsory licensing provision in the Patent Act is contrary to the Competition Act, the latter shall have an overriding effect. The Competition Act thus foresees and provides for the interaction between the CCI and other authorities.

**Monsanto Case and its impact on various stakeholders**

The conflict between IPR and Competition is often thought to be a purely mercantile issue, with minimum impact on the lowest rung of the economic ladder, i.e. small traders, farmers, etc. However, the issue can have far-reaching consequences for stakeholders other than the patent-holding entity and its competitors in the market. An ideal example of this is the Monsanto saga, which unfolded in 2015 and is likely to take a few more years to conclude. The case of the Department of Agriculture, Cooperation & Farmers Welfare v. M/s Mahyco Monsanto Biotech (India) Limited179 came before the CCI in relation to Monsanto’s BT Cotton Technology. It was alleged that the Respondent, i.e. Monsanto, imposed restrictive conditions on certain licensing agreements with seed manufacturers. The seeds were genetically engineered, possessing traits making them insect resistant. The covenants,

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176 Patents Act, supra note 45, at §84.
177 The Act, supra note 46, at §62.
178 The Act, supra note 46, at §60.
among other things, contained conditions requiring the manufacturers to intimate Monsanto if the formerly developed cotton seeds based on a trait of Monsanto’s competitors. Failing to do this, the clause said, would result in immediate termination of the agreement. Termination would invariably lead to the cessation of selling seeds and destroying seeds already in possession. In addition, it was alleged that the Opposite Party (“OP”) was charging an excessive trait value\textsuperscript{180} which was determined without any rationale.\textsuperscript{181}

The CCI took the view that the OP holds a dominant position in the relevant upstream market for ‘provision for BT cotton technology in India’. It also held that the termination conditions imposed by the OP in its license agreements were “\textit{stringent and unfair, particularly in the light of the ongoing litigations and legislation passed by the Central and State Governments from time to time}”.\textsuperscript{182} The CCI observed that the conduct leads to denial of market access and a constraint on the manufacturers to develop alternate BT cotton technologies. Further, it also stated that the trait value was not based on sound economic principles. Its determination on the basis of maximum retail price (“\textit{MRP}”) ignored factors such as genetic composition and climatic conditions leading to an unfair trait value.

The Commission held the conduct of OP violated Section 4 of the Act, stating that OP seems to be using its monopoly in the upstream market to safeguard its presence in the downstream market with the help of group entities. The agreements entered into by Monsanto were deemed to be violating Section 3(4)(b) and 3(4)(d) of the Competition Act. The protection accorded by Section 3(5) for IPR was also not accorded to the OP, considering the clauses in the agreement were ‘excessively harsh’.\textsuperscript{183} Holding that there is a \textit{prima facie} case, a DG report was thereby ordered by the Commission.

The author believes that the CCI order suffers from a certain naivety, failing to take into account some relevant factors. With regards to Monsanto’s dominance in the market, there is no denying that it holds a significant dominance in the market since Monsanto’s BT Cotton technology is used in more than 99\% of the area under BT Cotton cultivation in India\textsuperscript{184}. However, the CCI should have also considered whether the downstream player or the seed manufacturer has alternatives to the technology and whether it can survive without it. The Commission should have considered the fact that farmers can use pesticides to fight the Boll Worm, instead of using the OP’s technology. This was exactly what farmers did before 2001. Moreover, the patent for only a single genes sequence was granted to Monsanto, leaving scope for competitors to innovate and create novel hybrids of Genetically Modified seeds. Thus,

\textsuperscript{180} ‘Trait value’ is the estimated value for the trait of insect resistance conferred by the gene. The value, OP claimed, is calculated on the basis of MRP of each packed, before each crop season.

\textsuperscript{181} Monsanto Case, supra note 50.

\textsuperscript{182} Monsanto Case, supra note 50.

\textsuperscript{183} Monsanto Case, supra note 50.

\textsuperscript{184} Monsanto Case, supra note 50.
holding that competitors were entirely denied access to the market should have been done only after considering the substitutability of the product.

Section 3(5) of the Act provides that the provision on anti-competitive agreements shall not restrict the right of any person to restrain any infringement of his IPR. He may impose reasonable conditions necessary for the same. The CCI held the agreements by the OP violated Section 3(5) without providing a satisfactory rationale for the same. The CCI’s explanation was limited to words like ‘stringent, excessively harsh, and unfair’ perhaps an indication of the country’s underdeveloped competition jurisprudence. In fact, it is the understanding of the researcher that clauses inserted in the agreements are standard in the context of Technology Transfer Agreements, something that the CCI failed to consider. The CCI ought to have also elaborated further on the laws and litigations in the light of which the agreement was deemed particularly unfair and stringent.

The CCI further ordered a probe into the role of Monsanto’s top executives under Section 48 of the Competition Act, which allows the CCI to proceed and punish a person responsible to the company for the conduct of the business of the company at the time of such a breach. The order was allowed by Delhi High Court in 2018 and then by the Hon’ble Supreme Court in February 2019. The Supreme Court, therefore, clarified that executives of the Company can be probed before the company is found guilty of competition norms.

Monsanto had earlier filed a suit against Nuziveedu Seeds for utilizing its patenting technologies even after the license agreement between the two terminated in 2015. The Delhi High Court had ruled that “plant varieties and seeds cannot be patented under Indian law by companies such as Monsanto and that royalties on GM technology would be decided by a specialized agency of the agriculture ministry.” However, in February 2019, the Hon’ble Supreme Court restored the Company’s claim on the patent, till a Single Judge of the Delhi High Court decided the issue. The Apex Court setting aside the earlier Division Bench order of the High Court, directed Monsanto to resume honouring its sublicense agreements with regards to the patented technology.

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185 The Act, supra note 46, at §48.
The author believes that the *Monsanto* tale is not merely a story of patent holders and manufacturers, but of farmer suicides and the alienation of the lowest strata of society from economic development. Various reports and publications have attributed the increasing number of farmer suicides in the country to the monopolization of the cotton seed sector. Fears of crop failure, elimination of effective alternatives, dominance through patent control and increase in production costs are some of the factors that have aggravated the farmer suicide epidemic in India.\(^{190}\) Even the Acharya Committee report held the BT cotton cultivation to be a major reason for farmer suicides.\(^{191}\) Reports also reveal that in Vidharbha and Andhra Pradesh, 90% of farmer suicides involved those who had planted BT cotton.\(^{192}\)

The Monsanto dispute is thus a perfect yet unfortunate example of the inextricable relationship of competition and intellectual property concerns with the well-being of the masses. It effectively sums up that monopoly power granted by IPR can bring prosperity if used sincerely, but can be contrary to the objectives of the laws if abused.

With regard to SEPs, Indian courts including the CCI are constantly using FRAND terms to determine their validity. The courts are looking to develop a comprehensive approach to deal with cases of SEP-related issues, while still giving room to fact-based determination. The digital revolution in the country needs to be kept in mind in order to understand the significance of SEPs, with new technologies being constantly developed and becoming the subject of standard SEPs. The number of smartphone users in the country was a whopping 404.1 million in 2017 and is anticipated to reach 829 million by 2022, reports have suggested.\(^{193}\) Simultaneously, there is quick growth in the number of internet users as well. The number of internet users is expected to reach 627 million in 2019.\(^{194}\) The figures reveal the extent of penetration of technology in the country, which translates into increased relevance of standardization and licensing.

**STANDARD ESSENTIAL PATENTS AND THEIR TREATMENT UNDER COMPETITION LAW IN INDIA**

India, at present, has various Standard Setting Organizations or SSOs including the Telecom Standards Development Society of India (TSDSI) and Bureau of Indian Standards (BIS). These SSOs involves

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the participation of numerous stakeholders to develop standardization, keeping in mind the unique needs of the country. These organizations also focus on safeguarding IPR, including rights involved in SEPs.

One of the most important disputes to have taken unfolded in the context of SEPs and Competition Law is the one between Micromax and Ericsson. Micromax filed a case against the Swedish company with the CCI alleging abuse of dominant power. It is necessary to discuss how the issue was dealt in front of the CCI and its relevance to the SEP – Competition law debate in the context of FRAND.

Micromax alleged that Ericsson was asking for royalty rates that were ‘unfair, discriminatory and exorbitant for patents regarding GSM technology’. CCI observed the following in the case that the royalty rates were not in consonance with FRAND terms and were discriminatory, with no justifiable connection with the patented product. Further, the fact that Ericsson did not share commercial terms of other similar licenses with Micromax further strengthens the claim of the informant. The CCI further held that it can proceed with the case, even if the suit is pending before the Delhi High Court. With regards to Patent hold-up, the Commission noted that hold up can subvert the competitive process of choosing technologies and undermine the integrity of standard-setting activities.

The CCI order was challenged through a writ in front of the Delhi High Court, stating that the remedy given in the Patent Act for compulsory licensing has an overriding effect on the role of CCI. The Delhi High Court concluded that the remedies provided by both Acts were different and CCI does have jurisdiction to entertain the case. The issue was finally resolved in March 2018 through a settlement between the two companies. A global license agreement was reached wherein “Micromax agreed to pay royalties to Ericsson for every 2G and 3G set sold worldwide.” The two companies also agreed to withdraw all pending cases, including the suit in Delhi High Court and the complaint in front of CCI.

The author believes that the CCI and the Delhi High Court by holding Ericsson guilty of taking advantage of pricing practices ignored the fact the right to charge a price is implicitly included in rights granted by Section 48 of the Patents Act. Monetizing the patent through licenses is an essential right of the patentee, even if the provision does not explicitly mention it. The necessary consequence of the court’s observation is that the patent holder is not allowed to set a high price for his/her invention even

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196 Id.
197 Id., supra note 66.
if the same is not barred by market forces. The patentee may thus refuse to license his patent, leading to an unfortunate situation where consumers do not benefit from the invention at all. The courts need to ensure that the right of patent holders to effectively exploit their invention is protected while protecting the rights of competitors. However, the court’s decisions, in general, have been in line with FRAND licensing principles including "using the net sales price of the downstream product as the royalty base and relying on comparable licenses to derive a FRAND royalty rest on sound economic reasoning."\(^{201}\) The courts are still in the nascent stage of interpreting FRAND license terms. Sufficient time and disputes are required before the principles can be seamlessly applied to the Indian patent regime.

**CONCLUSION**

Keeping in consideration the current era of large-scale innovation and development, the Indian judicial system is expected to receive increasingly complex cases with regards to SEPs. The courts and the CCI will have to ensure that while adjudicating these issues, they do not act as price regulators, and stick to the determination of fairness of prices. The CCI, in particular, needs to make references to patent authorities when encountered with a question it is not competent to determine. Civil courts, CCI and patent authorities need to work in conjunction to ensure jurisdictional issues do not come in the way of effective resolution of cases in the sphere of patent and competition law.

The conflicts and challenges that arise out of technological advancements in the world of IPR will need to be dealt with by countries across the world. SEP related conflicts have largely been dealt with efficiently by authorities in various jurisdictions over the course of years. With the growth of blockchain technologies, artificial intelligence and advanced research in biotechnology and nanotechnology, it is likely that increasingly complicated IPR issues will come up. However, issues relating to competition law concerns and how they are dealt with remains unclear at this stage. Research in legal implications of these technologies should be initiated to prepare for upcoming challenges.

Through the course of this paper, an attempt has been made to establish that there are more stakeholders involved in the discussion than may be depicted. Through the judgment in *Monsanto*\(^{202}\) and others, we observed that it is not just rich competitors or consumers that are affected by anti-competitive practices. Even small businesses, new start-ups and farmers are important stakeholders in the whole scenario. This further view widens the scope of the whole discussion since it impacts not only the economic growth of the country but the share of ‘the little guy’ in dividends of development.

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Legislators and courts need to keep in consideration the above factors, and also explicitly recognize that the fundamental aim of both patent rights and competition law is the same, i.e. consumer welfare. A wider objective of the two fields is to protect the interest of the masses through economic development. Theoretical inculcation of this idea in laws and decisions along with practical steps towards its enforcement will go a long way in balancing patent rights and competition law.