

**PATENT POOLING AND ANTI-COMPETITIVE
AGREEMENTS: A NASCENT DICHOTOMY OF IPR AND
COMPETITION REGIME**

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ABSTRACT

Intellectual Property Rights (hereinafter referred to as “IPR”) are known to encourage and create a system of monopoly in the market while competition laws aim to discourage the same. The question is, do competition laws discourage monopoly per se or do they aim at regulating monopoly when it ventures beyond the permissible field, demarcated for its operation? It is important to understand that IPR and Competition law aim to achieve wealth-maximization in an economy. Therefore, it would be erroneous to say that there is a constant tussle between the two. The interface of IPR and Competition law is indeed at a nascent stage as far as India is concerned. In this paper, the primary focus is on analysing when patent pooling agreements qualify to be termed as anti-competitive agreements and further how the threshold of this qualification is determined. It provides a comparative study of the position prevalent in the United States of America and the European Union as far as patent pooling agreements and their anti-competitive effects are concerned. It also analyses the validity of conflation of §§3 and 4 of the Competition Act, 2002 for determining the anti-competitive effect of patent pooling agreements and

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the efficaciousness of 'The Essential Facilities Doctrine' as a test for qualification of a patent pooling agreement as anti-competitive under §3 of the Competition Act, 2002.

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I. INTRODUCTION

Before delving into the question of patent pooling agreements it is imperative to have clarity on the objectives of the two legal regimes, i.e., Competition Law and IP Law, which are always considered to be at loggerheads. The aim of Competition Law is to create and enforce regulatory policies in the economy which allow it to prosper, by ensuring fair competition in the market. It does not aim to hinder growth of the society or prevent any market player from gaining profits, rather it provides an equal opportunity to all, to earn profits by discouraging concentration of power and profit in the hands of a few.

IP Laws on the other hand aims to provide incentive for the innovators recognizing their efforts and money spent in innovation by providing for restrictive monopolies. The argument that IP Laws encourage monopoly therefore contravening the objectives of Competition Law, fails in its inception as, the premise that ‘Competition Law prohibits monopoly’ is a misnomer. The co-existence⁸³ of these seemingly contradictory branches of law was recognised by the US Supreme Court in 1948 where it ruled that, monopoly created by a patent, when operates beyond such limits, the provisions of Sherman Act, 1890 are attracted.⁸⁴ Therefore, it is settled that Competition law governs and discourages monopoly when it tends to become anti-competitive. Every monopoly cannot be treated as anti-competitive.

⁸³ Atari Games Corp v. Nintendo of America Inc. 897 F.2d 1572, 1576 (Fed Cir 1990).

⁸⁴ United States v. Line Material Co., 333 U.S. 287, 308, 76 U.S.P.Q. (BNA) 399, 408 (1948).

Now that some basic misnomers stand cleared, it is important to have conceptual clarity on patent pooling. ‘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.’⁸⁵ The United States Patent Office (USPTO) defines a patent pool as “an agreement between two or more patent owners to license one or more of their patents to another third party or parties.” Patent pools have been given the credit for navigating the way through patent thicket and were used to clear patent blockings, cease patent hostilities and create market division among horizontal competitors.⁸⁶ As much as it encourages competition and innovation, patent pooling can also instigate anti-competitive behavior as, any cooperation among competitors, also involves an inherent risk of collusive behavior and may be regarded as a cartel. There may be competition-related concerns regarding the licensing practices and restrictions they entail.⁸⁷ The so-called ‘patent thickets’ i.e., [overlapping patent rights controlled by rights holders that require innovators to reach licensing deals for multiple patents from multiple sources],⁸⁸ can lead to increased transaction costs thereby to chilling effects on the development of new products.⁸⁹ It is due to this, that patent pooling agreements, attract the provision of §3 of the Competition Act, 2002.

⁸⁵ VAUGHAN, FLOYD L. THE UNITED STATES PATENT SYSTEM: LEGAL AND ECONOMIC CONFLICTS IN AMERICAN PATENT HISTORY, 39, 40 (Oklahoma 1st ed. 1956).

⁸⁶ Ashutosh Sinha, *Patent Pools*, IRUNWAY (Feb 2, 2020) <https://www.i-runway.com/images/pdf/Patents%20Pools.pdf>.

⁸⁷ Secretariat WIPO, *Patent Pools and Antitrust-A Comparative Analysis*, WIPO, (Feb 2, 2020), https://www.wipo.int/export/sites/www/ip-competition/en/studies/patent_pools_report.pdf [*hereinafter* “**Secretariat WIPO**”].

⁸⁸ IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH, 18 (2011).

⁸⁹ Secretariat WIPO, *supra* note 87.

§3 of the Competition Act, 2002 prohibits any agreement which causes or is likely to cause appreciable adverse effects on competition in the Indian market. §4 on the other hand prohibits unilateral conduct of a dominant undertaking that amounts to abuse of its dominance. However, there is hardly any guidance available on the manner in which the provisions are to be interpreted and administered. The Competition Commission of India (*hereinafter* referred to as “**CCI**”) in its decision-making has relied on static analysis focusing on price and output which is popular among economists and competition analysts.⁹⁰ These legal standards are informed by economics and as economics evolves the law ought to evolve with it.⁹¹ The next section highlights the inconsistent approach of the CCI as far as §§3 and 4 of the Competition Act, 2002 are concerned and the need for maintaining the distinction between the two from IPR perspective.

II. §§3 & 4 OF COMPETITION ACT: RISING ABOVE THE ERRONEOUS CONCEPTUAL APPROACH

§4 prohibits abuse of dominant position in the market and hence, entails an analysis of the relevant market to determine, whether a firm is a dominant player in the market, so as to prevent it from engaging in exclusionary and exploitative practices, which would otherwise be permissible to a non-dominant player.⁹² While §3 provides a non-exhaustive

⁹⁰ Yogesh Pai & Nitesh Daryanani, *Patents and Competition Law in India: CCI's Reductionist Approach in Evaluating Competitive Harm*, J. OF ANTITRUST ENFORCEMENT, 299, 303 (2017) [*hereinafter* “**Yogesh Pai**”].

⁹¹ Robert D Atkinson and David B Audretsch, *Economic Doctrines and Approaches to Antitrust*, RESEARCH PAPER SERIES NO 2011-01-02, INDIANA UNIVERSITY-BLOOMINGTON: SCHOOL OF PUBLIC & ENVTL. AFFAIRS (2011).

⁹² *Nederlandsche Banden-Industrie Michelin (Michelin) v. Commission*, ECR 3461 (1983).

list of agreements, which can qualify as anti-competitive due to their appreciable adverse effect on competition which also requires that, its application is done on the basis of factors that include exclusionary effects such as creation of entry barriers, market foreclosure, etc. enumerated §19(3) of the Act.

The problem arises with the approach of the CCI while dealing with these primarily different sections and their conjunction. A combined reading of §3(1) of the Competition Act, 2002, modelled on Article 101(1) of the Treaty on Functioning of European Union (*hereinafter* referred to as “TFEU”), with §2(b) of the act which defines an ‘agreement’, paves a logical path for concluding that, §3 can be applied only when it can be proven that two or more parties have acted in collusion or concert, and cause or are likely to cause an appreciable adverse effect on competition in India. In the light of this understanding let us now critically analyze the CCI’s approach towards certain land mark cases and compare the same with EU and USA’s stance on such similar issues.

A. CCI’S APPROACH IN INDIA

In *Department of Agriculture, Cooperation & Farmer’s Welfare v. M/s Mahyco Monsanto Biotech India Ltd.*,⁹³ the CCI held that the agreements entered into by Mahyco Monsanto Biotech India Ltd. with its sub-licensees, with regards to its Bt Cotton Technology, was considered to have appreciable adverse effect on competition of ‘Bt Cotton technology market’ and the conditions imposed through the agreement on termination were

⁹³ Department of Agriculture, Cooperation & Farmer’s Welfare v. M/s Mahyco Monsanto Biotech India Ltd., Order dated 10 February 2016 in Reference Case No 2 of 2015.

also harsh and thus beyond the realm of protection guaranteed under IP Laws as envisaged under §3(5) of the Act.

The factual circumstance however indicates that application of §3 in this circumstance was erroneous. In this case the Monsanto group through its sub-license agreements whereby Bt Cotton technology patents are sub-licensed to the seed manufacturing companies in India was charging unfair trait value; limiting scientific development relating to Bt Cotton Technology and Bt cotton seeds and also imposed unreasonable termination conditions. All of its activities amounted to unilateral abuse of its dominant position in the market whereby it forced the seed manufacturers to bow down to its will.⁹⁴ There lacks any agreement or consensus governed by free will between the seed manufacturers and Monsanto for it to qualify as an agreement as per §2(b) of the Competition Act, 2002 for application of §3.

B. EC JURISPRUDENCE

The European jurisprudence emphasizes on the distinction, as far as anti-competitive agreements and abuse of dominant position is concerned. In *Bayer AG/Adalat*,⁹⁵ when the EC held that reduction of supplies by Bayer to its wholesalers in France and Spain, with the objective of maintaining its price strategy and parallel exports prevention to the UK, was an anti-competitive agreement between Bayer and the wholesalers, amounting to violation of Article 85(1) of the EC Treaty which is now Article 101(1) of TFEU, the General Court reversed this decision. The

⁹⁴ Yogesh Pai, *supra* note 90.

⁹⁵ Bayer AG/Adalat, OJ L201/1 (1996).

Court has laid down the fundamental basis of distinction between the two by holding that, there cannot exist an agreement where one person tacitly acquiesces in measures adopted by others.⁹⁶ This rationale was upheld by ECJ in the appeal establishing the foundation that a unilateral policy of one combined with an act governed ‘out of no choice’ of another, having an effect of hindering competition does not *ipso facto* mean that there exists an agreement in contravention of the Article 101(1) of TFEU.

C. STANCE OF USA

USA’s Antitrust laws also cater to the prominent distinction between an anti-competitive agreement and abuse of dominant position as, for the former to be established, the plaintiff has to satisfy a two-fold test; first that the parties to the agreement share common intent to harm or restrict competition and; second that they must also receive some benefit out of it.⁹⁷ The US Supreme Court has expressly laid down that unwilling compliance with unilaterally imposed policy does not constitute concerted action.⁹⁸ Unreasonable concerted action will be held in violation of §1 of the Sherman Act, 1890 while §2 of the Sherman Act, 1890 proscribes unilateral conduct that creates, maintains, or threatens an actual monopoly through anti-competitive means.

⁹⁶ Bayer v. Commission [2000] ECR II-3383.

⁹⁷ Christopher Leslie, *Unilaterally Imposed Tying Arrangements and Concerted Action*, 5 OHIO STATE L.J. 60, 1806 (1999) [*hereinafter* “Leslie”].

⁹⁸ Monsanto v. Spray-Rite Service, (1984) 465 U.S. 752.

D. WHAT DIFFERENCE DOES A SECTION MAKE?

The question is, what difference a section makes when ultimately the act is anti-competitive. This question stems from a lot of practical aspects of functioning of the competition laws in the above discussed jurisdictions. In USA for example, the need to maintain the distinction is important because, if the distinction between concerted action and unilateral conduct is not maintained, then §1 of the Sherman Act, 1890 would subject all parties to the agreement to antitrust liability and damages irrespective of whether they have an intent to restrain trade.⁹⁹ Indeed in India, no such consequence can arise as the CCI under §3 of the Competition Act, 2002 has discretion to hold even one party guilty of violating §3 of the Competition Act, 2002 even if it goes against the very notion of the concept of agreement. A unilaterally motivated act, which imposes obligation on another lacks the ‘consent’ aspect of an agreement and is in the nature of a command. Tying arrangements, are the best example of when the same conduct would be classified as an abuse of dominant position and also qualify as concerted conduct.

However, the pertinent reason for this discussion in the context of this paper and its topic is that, such blurring of lines results in conflation of applicable standards for evaluating competitive harm. Furthermore, there is significant dilution of the permissible limits for certain conducts. This becomes very relevant when the question involves an interface of IPR and Competition Law. This becomes clearer upon analysis of the CCI’s

⁹⁹ Leslie, *supra* note 97 at 1804.

approach in the *Automobile Spare Part's Case*.¹⁰⁰ In this case the CCI examined the agreements entered between the automobile manufacturers and Original Equipment Suppliers (*hereinafter* referred to as “OESs”) which restricted them from supplying spare parts directly in the Indian aftermarket, where such parts are manufactured by OESs or using the IP of OEMs in some form. CCI had reached the conclusion that §4(2)(c) of the Competition Act, 2002 was violated as automobile manufacturers had resorted to means other than legitimate competition to deny market access to independent workshops consequently strengthening their dominant position as only source of supply in aftermarket. The CCI did not stop here, it went ahead to evaluate these agreements on the yardstick of §3 of the Competition Act, 2002 to conclude that, the imposed restrictions on OESs are in violation of §§3(4)(b), 3(4)(c) and §3(4)(d) read with §3(1) of the Competition Act, 2002 due to its appreciable adverse effects on competition in automobile sector.

Restricting the scope of this paper only to the application of §3 merits a discussion. One of the justifications posed by automobile manufacturers included the exemption under §3(5) of the Competition Act, 2002 for measures protecting IP which went unheard by the CCI. The ground for this refusal stems from the parallel drawn between §§3 and 4 of the Competition Act, 2002 and that is, there is no equivalent of §3(5) under §4 of the Competition Act, 2002. Thus, if an enterprise is found to be in abuse of its dominant position under §4 of the Competition Act, 2002 then it is no defence that such conduct is within the permissible limits of the IP

¹⁰⁰ Samsher Kataria v. Honda Siel Cars India Ltd., Case No. 03/2011 (India).

rights, in this case of OEMs.¹⁰¹ However, the IP argument merited discussion and analysis under §3 of the Competition Act, 2002 for violation, for which the OESs were held liable. This clearly highlights the confusion that arises due to the lack of importance given to the element of consent given/obtained under free will, with respect to the conduct of the parties concerned.

This decision leads to the establishment of a principle which attacks the very notion of exercise of patent rights. The absurdity arising out of this conclusion is that, every vertical restraint that is employed to complement the exercise of patent rights, will be deemed to be in violation of §4 of the Competition Act, 2002 even if it is within reasonable limits of §3(5) of the Competition Act, 2002.¹⁰² This means that non-dominant players can enter into agreements that cause foreclosure of markets, while enhancing certain distribution efficiencies, and the CCI, balancing the factors under §19(3) of the Competition Act, 2002 may conclude that it does not have appreciable adverse effect on competition in the market. However, this leeway is not available to dominant players,¹⁰³ which in a way deprives them of the independence to carry out their trade operations.¹⁰⁴ The expected behaviour from organisations must not be in contravention of the prohibitions laid down under the competition regimes and not in engagement of conduct which causes inconvenience to other competitors. Anti-competitive

¹⁰¹ *Id.*

¹⁰² Yogesh Pai, *supra* note 90.

¹⁰³ Samsher Kataria v. Honda Siel Cars India Ltd., Case No. 03/2011 (India).

¹⁰⁴ Cases C-2/01 P, C-3/01 P Bundesverband der Arzneimittel-Importeure eV v. Bayer AG [2004] ECR I-23.

behaviour/conduct and inconvenience due to legitimate strategies to enhance competitive positions can't be regarded as synonymous to each other.

In India it is important to note that, under §3 of the Competition Act, 2002 what is taken into consideration is the effect of the agreement and not its object. This is a conscious departure from the *per se rule* of EU. US Supreme Court's observation in this regard shed some light on the need of the CCI to restrain itself in application of the competition laws especially when IPR issues are involved. US Supreme Court held that, §1 of the Sherman Act, 1890 doesn't apply to 'every contract' but only those which unreasonably restrain trade as, all contracts necessarily restrain trade at some level,¹⁰⁵ and applying §1 of the Sherman Act, 1890 prohibition on every contract restraining trade would have the effect of outlawing the body of private contract law.¹⁰⁶

Thus, it is important to maintain distinction between §3 and §4 of the Competition Act, 2002 and as far as analysis of agreements under §3 of the Competition Act, 2002 is concerned, question of dominance is irrelevant. This becomes more necessary from patent pooling agreements point of view as, if such agreements are tested on the anvil of §4 of the Competition Act, 2002 then it is more likely to fail, as patents inherently create a kind of domination, and patent pooling in absence of any guiding clause for IP under §4 of the Competition Act, 2002, is more than likely to be considered as an abuse of dominant position. Therefore, when patent

¹⁰⁵ Standard Oil Co. v. United States, 221 U.S. 1 (1911).

¹⁰⁶ National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

pooling agreements are tested for their anti-competitive effect it must be restricted to §3 of the Competition Act, 2002. The test of reasonability must be applied to determine whether a patent pooling agreement qualifies for exemption under §3(5) of the Competition Act, 2002.

III. PATENT POOLING: KINDS AND ADVERSE IMPLICATIONS

Historically, patent pools have been concentrated in Europe and the United States although recently Asian companies increased their participation in patent pools given their growing role in technological innovation.¹⁰⁷ The major reason for formation of patent pools is the issuance of competing or overlapping patents. This relation between patents can be described as substituting and complementary.

A. SUBSTITUTE PATENTS

Two patents are called substitutes if they cover alternative technologies and are non-blocking. A patent concerning a particular subject-matter is non-blocking when it does not prevent the use of another patent in the same field because it relies on a different subject-matter not covered by the first patent.¹⁰⁸ The subject-matter covered by such patents can be used parallelly without infringing each other.

B. COMPLEMENTARY PATENTS

Two mutually blocking patents are complementary from a legal perspective. Such patents are generally described as those infringing upon

¹⁰⁷ World Intellectual Property Report 2011, *The Changing Face of Innovation, Chapter 3: Balancing Collaboration and Competition*, 121, WIPO, (Feb. 6, 2020), https://www.wipo.int/e-docs/pubdocs/en/intproperty/944/wipo_pub_944_2011.pdf.

¹⁰⁸ Secretariat WIPO, *supra* note 87.

each other. Mutually blocking patent rights are the result of cumulative innovation, where no technological component can be marketed individually without the technological complements protected by patent rights of different companies.¹⁰⁹ Thereby necessitating patent licensing for producing desired output without infringing patent claims. Patents can be one-way blocking, meaning that one patent infringes another patent while the latter doesn't necessarily infringe the first patent.¹¹⁰

It is on the basis of their nature that, US and EU antitrust regulations permit and consider pooling of complementary patents as generally pro-competitive. *Summit v. VIX*¹¹¹ stands as a testimony to the anti-competitive nature of a patent pool where it was held that, pooling of patents concerning laser eye surgery technology was restricting competition which would otherwise exist and this was because of the patents being substitutes in nature.

In addition to substituting and complementary patents, in the context of standardization, patents can be classified as essential and non-essential. Essential patents are those required in order to comply with a technical standard. As a consequence, essential patents are by nature also complementary because they are standard-essential.¹¹² Patents are non-

¹⁰⁹ Justus Baron & Henry Delcamp, *Patent Quality and Value in Discrete and Cumulative Innovation*, WORKING PAPER 2010-07, CERNA WORKING PAPER SERIES, 3, (Feb. 5, 2020), https://hal-mines-paristech.archives-ouvertes.fr/docs/00/53/66/50/PDF/Quality_indicators_16-11-10_VF.pdf

¹¹⁰ Charles River Associates Ltd., *Report on Multiparty Licensing*, 6, EC EUROPA, (Feb. 5, 2020), http://ec.europa.eu/competition/antitrust/legislation/multiparty_licensing.pdf

¹¹¹ William J. Baer, *Report from Bureau of Competition*, FED. TRADE COMM'N (Feb. 6, 2020), https://www.ftc.gov/public-statements/1998/04/report-bureau-competition# N_3_.

¹¹² Secretariat WIPO, *supra* note 87.

essential if there are substitutes to the covered technology.¹¹³ Therefore, patent pools comprising of non-essential patents are more likely to be anti-competitive as compared to essential patents.

C. ADVERSE IMPLICATIONS OF PATENT POOLING

The need to differentiate the kinds of patent arises mainly because of the need of assessing their impact on competition. Substitute patents compete with each other, and therefore shouldn't be bundled in a pool, as competition between such substitute technologies would be eliminated. This concern however, doesn't apply to complementary patents because actual or potential competition remains unaffected. Hence, the pooling of complementary patents is generally considered pro-competitive.

Patent pooling agreements may *prima facie* seem pro-competitive but they also discourage outside firms to invest in R&D if they increase the threat of litigation, pools may slow innovation if they redirect R&D by outside firms towards technologies that are not covered by pool patents, especially if those technologies are inferior substitutes to innovation.¹¹⁴ In addition, patent pools giving rise to cooperation among competitors is likely to encourage potential collusion for creating a forum for sharing competition sensitive information, price fixing etc.¹¹⁵ All these considerations play a crucial role when an effect of a patent pooling

¹¹³ *Id.*

¹¹⁴ Thomas D. Jeitschko & Nanyun Zhang, *Adverse Effects of Patent Pooling on Product Development and Commercialization*, 30 et seq, JUSTICE (Feb. 7, 2020) www.justice.gov/atr/public/eag/283557.pdf.

¹¹⁵ NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF ANTITRUST AND UNDISCLOSED INFORMATION, (Kluwer Law International, 161 et seq. 2008).

agreement has to be evaluated for example as per Indian standards whether it is creating an appreciable adverse effect on competition. Patent pooling is capable of being used as instrument to control price or output of downstream product affecting normal functioning of the market. Since such agreements qualify as horizontal agreements, there exists the danger of unlawful allocation of market.

Licensing practices which do not allow members of the patent pools to liberally license the patents covered by the pool and charge such prices which are above the competitive rate are likely to raise anti-competitive concerns. In a report of the Department of Justice (*hereinafter* referred to as “**DOJ**”) and the Federal Trade Commission (*hereinafter* referred to as “**FTC**”) warned that pools which do not license technologies freely “may pose a barrier to entry if existing relationships make it harder for ‘new firms to come in and overcome the patent thicket.’”¹¹⁶ So long as licensing conditions are not restrictive the question of anti-competitive behaviour would not arise.

It is due to such adverse impact that it is necessary to evaluate the patent pooling agreements on the threshold of competition law so as to prevent abuse IP Rights.

¹¹⁶ DOJ & FTC, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, 62, JUSTICE (Feb. 6, 2020), www.justice.gov/atr/public/hearings/ip/222655.pdf.

D. PATENT POOLS: AN EVOLUTION ON GLOBAL FORA

Serafino's survey of about 35 patent pools organized or proposed from 1856 to the present across a number of industries indicate that 'each of the patent pools was organized in response to a particular set of policy objectives and circumstances' and there is 'no single reason for creating a patent pool and no single way to manage a pool.'¹¹⁷

Some of the well-known patent pools include the Sewing Machine Combination of 1856, a voluntary arrangement bringing together nine complementary patents held by different patent holders, to build a functional sewing machine. Its formation was necessitated owing to the ongoing litigation between the parties due to which the sales figures took a major hit.¹¹⁸ Another one was the Manufacturers' Aircraft Association (MAA), a government enforced pool formed in 1917, encompassing most of the aircraft manufacturers in the United States. Need for its creation was rendered by the two major patent holders, the Wright Company and the Curtiss Company as, they had effectively blocked the building of any new airplanes which the Govt. had to deploy given the World War I situations.¹¹⁹

In recent times the patent pools have evolved in the field of consumer electronics. They are mainly set up as a response to the standard

¹¹⁷ SERAFINO D, *Survey of Patent Pools Demonstrates Variety of Purposes and Management Structures*, KNOWLEDGE ECOLOGY INTERNATIONAL RESEARCH Note 6 (2007).

¹¹⁸ Indrani Barpujari, *Facilitating Access or Monopoly: Patent Pools at the Interface of Patent and Competition Regimes*, 15 J. OF INTELL. PROP. RTS. 345, 348 (2010) [*hereinafter* "Barpujari"].

¹¹⁹ *Id.*

setting regime to keep pace with the need of promoting new standard.¹²⁰ Like the MPEG-2 Patent Pool which combined 27 patents held by 9 patent holders necessary to meet MPEG-2 standard; it being a video data storage compression standard used in connection with Digital Versatile Disc (DVD) technology. The 1995 DVD Patent Pool of Philips and Sony, with the former to be the licensor. Six months later, another DVD pool was formed by Hitachi, Matsushita, Mitsubishi, Time Warner, Toshiba and JVC, and both the pools were cleared by the Anti-Trust Division of the US Department of Justice. The Golden Rice pool, on the other hand, is based on an altruistic principle for making available the product for developing countries.¹²¹

Patent pools have been prevalent since late 19th Century in USA and have been broken down due to its cartel-like attributes by means of judicial intervention as was the case of patent pooling arrangement set up by the Radio Corporation of America, along with General Electric, Westinghouse and American Telephone and Telegraph, which was ultimately broken up through a consent decree of the court in *United States v. Radio Corporation of America et al.*¹²² Similarly, the members of the pool of 600 patents relating to Glass-blowing technology were forced by the court to license the patents to all new comers at reasonable royalty rate.¹²³

¹²⁰ SHAPIRO C., *Navigating the Patent Thicket: Cross Licenses, Patent Pools and Standard Setting*, in INNOVATION POLICY AND THE ECONOMY, 119-150 (A B Jaffe, J Lerner, S Stern ed., 2001) [*hereinafter* “Shapiro”].

¹²¹ Barpujari, *supra* note 118.

¹²² *United States v. Radio Corporation of America*, 341 U.S. 412 (1951).

¹²³ *Hartford Empire v. United States*, 323 U.S. 386 (1945).

What is more important is that, even though it was observed that patent pools can be anti-competitive, the courts still acknowledged the need for such pools for functioning of the IP regime. Through various legal precedents like, *E. Bement & Sons v. National Harrow Co.*,¹²⁴ *Standard Sanitary Manufacturing Co. v. United States*,¹²⁵ and *Standard Oil Co. v. United States*,¹²⁶ the courts have traced the need of maintaining an equilibrium between the antitrust and the IP regime. It has recognized the monopolistic nature of patents however, highlighted that the *per se* rule applicable to cartels under the antitrust law will not be applicable to patent pools unless they degenerate into cartels. The *rule of reason* was developed, where contracts and licensing agreements were subject to antitrust scrutiny only when they were unreasonably in restraint of trade. The next section highlights the legal development in different jurisdictions based on their experience in relation to IP and Competition interface especially patent pooling agreements.

E. JURISDICTIONAL PERSPECTIVE OF PATENT POOLING AGREEMENTS

i. USA

There exist some formal recognition of the interface of IP and Competition law in US evident from its Antitrust Guidelines for the Licensing of IP,¹²⁷ updated in January 2017, keeping pace with statutory

¹²⁴ *E Bement & Sons v. National Harrow Co.*, 226 US 20 (1912).

¹²⁵ *Standard Sanitary Manufacturing Co. v. United States*, 226 US 20 (1912).

¹²⁶ *Standard Oil Co. v. United States*, 221 US 1 (1911).

¹²⁷ Antitrust Guidelines for the Licensing of Intellectual Property, Issued by the US DOJ and the FTC (1995), <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf> [hereinafter "**Antitrust Guidelines**"].

case laws and the 2010 Horizontal Merger Guidelines.¹²⁸ These principles recognize that excessive antitrust intervention, curtailing the exercise of right of exclusivity may undermine the incentive to innovate which forms the basis of the patent system.¹²⁹

The IP Guidelines expressly recognize the pro-competitive benefits of patent pooling agreements and cross-licensing arrangements.¹³⁰ At the same time the guidelines also offer a word of caution in evaluation of the pooling agreements. It enumerates 4 circumstances in which antitrust scrutiny is warranted and they are:

1. Collective price or output restraints in pooling arrangements that do not contribute to an efficient integration of economic activity;
2. Settlement agreements that combine intellectual property assets of horizontal competitors and that have the effect of diminishing competition;
3. Exclusion of competitors from patent pool when the excluded firms cannot effectively compete in the relevant market and when the pool participants collectively possess market power and
4. Pooling arrangements that deter research and development.¹³¹

¹²⁸ Antitrust Guidelines for the Licensing of Intellectual Property, Issued by the US DOJ and the FTC, (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.

¹²⁹ Thomas Cheng, *Putting Innovation Incentives back in the Patent-Antitrust Interface*, 11 NW J TECH IP 385, 386–93 (2013).

¹³⁰ Steven C. Carlson, *Patent Pools and the Antitrust Dilemma*, 16 YALE J. ON REG. (1999).

¹³¹ Antitrust Guidelines, *supra* note 127 at Guideline 5.5.

In *Northwest Wholesale Stationers v. Pacific Stationery & Printing*,¹³² the court held that the exclusion of a competitor from a purchasing cooperative was not *per se* unlawful in absence of existence of market power. Thus, there exists some legal jurisprudence guiding patent pooling and their anti-competitive effects.

ii. EU

As far as EU is concerned, patent pooling agreements are not expressly covered under the Technology Transfer Regulation.¹³³ As per this Regulation certain agreements are exempted from application of Article 101(1) of TFEU so long as market shares of the given entities do not exceed 20% and satisfaction of other relevant criteria. Thus, irrespective of the market shares of the involved undertakings, patent pools do not enjoy a safe harbour treatment.¹³⁴ The Technology Transfer Guidelines address analysis of Patent Pools and also acknowledge that they may have both pro and anti-competitive effects.¹³⁵

The Guidelines recognize two kinds of patents i.e. essential and non-essential patents whereby essential patents are those where there are no substitutes for such patented subject-matter inside or outside the pool

¹³² Cf. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

¹³³ Commission regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, EUROPA, (Feb. 5, 2020, 11:00 PM), http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=C_ELEX:32004R0772:EN:HTML.

¹³⁴ Secretariat WIPO, *supra* note 87.

¹³⁵ Commission Notice, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, (2004/C 101/02) [*hereinafter* “**Technology Transfer Guidelines**”].

and such essential patents are by necessity complements.¹³⁶ There exists a presumption in favour of patent pools of essential patents that they generally do not infringe Article 101(1) of TFEU.¹³⁷ On the contrary a pool which is substantially composed of non-essential patents which are substitute patents, amount to price fixing,¹³⁸ and hence regarded as anti-competitive and in violation of Article 101(1) and not capable of fulfilling the conditions of Article 101(3) of TFEU. Under the Technology Transfer Guidelines, patent pools covering non-essential patents that have a significant position on the market are likely to fall under the prohibition of Article 101 TFEU.¹³⁹

On 21 March 2014, the European Commission adopted the new rules for the assessment of technology transfer agreements between two undertakings.¹⁴⁰ The revised guidelines cater to the advancements in technology and aim to improve the IPR-Competition functioning dynamics. The guidelines aim to encourage innovation and sharing of IP by regulation of the means through which such sharing is achieved i.e. the licensing and patent pooling agreements.

With specific focus directed towards patent pooling, the revised guidelines are said to have provided a ‘soft safe harbour’ for patent pools

¹³⁶ Recital 216 of the Technology Transfer Guidelines.

¹³⁷ *Id* at Recital 220.

¹³⁸ *Id* at Recital 219.

¹³⁹ *Id* at Recital 221.

¹⁴⁰ Commission Regulation (EU) No. 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (OJ L93/17 of 28.3.2014).

referred as ‘technology pools’ for the first time.¹⁴¹ These guidelines expand on application of article 101 of TFEU and also acknowledge its pro-competitive effects along with the fact that it can allow for one-stop licensing of the technologies covered by the pool [which] is particularly important in sectors where IP rights are prevalent and licenses need to be obtained from a significant number of licensors in order to operate on the market.¹⁴²

The patent pool is legitimate and will be declared beyond the scope of article 101 of TFEU if, all the factors at 261 of the Guidelines are satisfied irrespective of the market shares or position of the parties to the pool in question. This ‘safe harbour’ applies also to licensing out from the pool to third parties which are not members of the pool.¹⁴³ The yardsticks which determine whether or not the pool would avail the safe harbour are:

1. Barriers to pool creation process to all technology right owners;
2. Sufficiency of safeguards to ensure pooling of only essential technologies;
3. Sufficiency of safeguards in respect of exchange of sensitive information which is essential for efficient functioning of the pool;

¹⁴¹ Maria Gaia Pazzi, *Revised Technology Transfer Block Exemption Rules*, ANTITRUST & PUB. POLICIES, (Feb. 7, 2020) <http://a-p-p-review.com/article/view/10205/9496>.

¹⁴² Communication from the Commission - Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements OJ C 89, 28.03.2014, pp. 3-50 , 94-143, 242-273, and Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements OJ L 93, 28.03.2014, pp. 17-23.

¹⁴³ *Id.*

4. Licensing of pooled technologies is on non-exclusive basis;
5. Licensing of pooled technologies to all potential licensees on terms of FRAND (fair, reasonable and non-discriminatory terms);
6. Availability of freedom to challenge the validity and essentiality of the pooled technologies to the parties contributing to the concerned technologies and the licensees and
7. Their freedom to develop competing technologies and products.¹⁴⁴

The revised guidelines aim to balance competition and innovation by exempting blanket approval to certain clauses in a Technology Transfer Agreement from competition rules. It introduces a case-to-case basis analysis for such clauses to determine its competitive validity. These clauses include; allowing licensor to terminate a non-exclusive agreement if the licensee challenges the validity of the intellectual property rights and also clauses forcing the licensee to license any improvements it makes to the licensed technology to the licensor on an exclusive basis.¹⁴⁵ They also adopt a cautionary approach in terms of patent pools involving dominant players by providing for “non-discriminatory and non-excessive” licensing terms as well as “non-exclusive licenses” to prevent anti-competitive effects on downstream markets.¹⁴⁶

¹⁴⁴ Guideline at 261, Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements OJ C 89, 28.03.2014, pp. 3-50, 94-143, 242-273 [*hereinafter* “**Commission Communication**”].

¹⁴⁵ Antitrust: Commission adopts revised competition regime for technology transfer agreements, EC EUROPA, (Feb. 6, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_14_299.

¹⁴⁶ Commission Communication, *supra* note 144 at Guideline 269.

iii. Japan

The recently amended “Guidelines Concerning Use of Intellectual Property” in Japan act as the guiding principles as far as competitive analysis of the Patent Pool is concerned.¹⁴⁷ It recognizes the advantages of patent pool and provides that it is not *per se* in restraint of trade. It also highlights four circumstances, in existence of which a patent pool will be considered as anti-competitive and they are:

1. The creation of a patent pool relating to substitute (i.e., competing) technologies and jointly setting forth licensing conditions relating to these substitute technologies;¹⁴⁸
2. Collusion among the entities that form the patent pool aimed at preventing any improvement to the technology licensed to the pool;¹⁴⁹
3. The creation of a patent pool by competing entities to jointly determine the price, quantity or customers of their products using the licensed technology;¹⁵⁰ and
4. The creation of a patent pool by competing entities and refusing to license the covered technology to new entrants or certain existing entrepreneurs without reasonable grounds.¹⁵¹

Due to the above guidelines any agreement of patent pooling in contravention of the above guidelines can be classified as anti-competitive.

¹⁴⁷ The IP Guidelines, www.jftc.go.jp/en/legislationguidelines/ama/pdf/070928_IP_Guideline.pdf.

¹⁴⁸ *Id* at Part 3, §2 (i)(b).

¹⁴⁹ *Id.*

¹⁵⁰ *Id* at Part 3, §2 (i)(c).

¹⁵¹ *Id.* at Part 3, §2 (i)(d).

This clearly indicates that patent pooling agreements are required to be governed and regulated in an efficient manner such that enforcement of one law does not adversely affect the functional regime of another. The next section provides an Indian perspective towards patent pooling agreements and analyses the efficacy of ‘Essential Facilities Doctrine’ as an instrument for testing whether patent pooling agreements fall within the scope of exception under §3(5) of the Competition Act, 2002 or will be considered to have appreciable adverse effect on competition in the market.

IV. PATENT POOLING AGREEMENTS AND ESSENTIAL FACILITIES

DOCTRINE: AN INDIAN PERSPECTIVE

As far as India is concerned patent pools and pooling agreements are relatively a new concept yet to be formally recognised in any statute or legal regulations thus, there is a dearth of case law and legal jurisprudence on this subject-matter. It due to this that, we have to rely on derived jurisprudence from other jurisdictions and case law of nations like USA and EU which has a history of patent pooling tracing as far back as 150 years.

A. WHAT DOES PATENT POOLING MEAN ‘IN’ AND ‘TO’ INDIA?

Patent pools prove to be of advantage to the developing nations to get the benefits of all materials, substances, tools or any other thing which holds patent. As the name may suggest patent pooling involves pooling of technology, resources, expertise, facilities and services. It has helped in making the availability of medicines in developing countries like India relatively easier. They are also perceived as a solution to the problem of in access to affordable health care. The Medicines Patent Pool, for instance, proposed by Medicines sans frontiers (MSF) seeks to bring together patents

held by different entities relating to the manufacture, sale and distribution of HIV-AIDS anti-retroviral medicines (and potentially other medicines that meet significant public health concerns) in the developing world.¹⁵²

It is important to note that even though a pool may be international in its scope yet, it is governed by the national laws of competition and IP of the country in which manufacture/sale of product arising out of pool is likely to occur. As far as India is concerned, this concept is very nascent hence, not prevalent among the Indian Companies as yet. However, if we complain that there exist no law governing patent pooling then we must also acknowledge that there is no legal barrier hindering or denying the formation of such pools either.

However, the Patent (Amendment) Act, 2005 contains certain provision which must be granted due consideration while forming a patent pooling agreement. Like the sections governing licensing and assignment of patents are of utmost relevance as, the basis of a pooling agreement is cross-licensing.¹⁵³ Certain provisions of Patent Act, may also be interpreted to provide for formation of patent pooling agreements and has inbuilt regulation mechanism for their anti-competitive aspects.¹⁵⁴ §102 of the Indian Patent Act, 1970 provide for setting up of patent pooling agreements which are administered, managed and regulated by Government. However, what is unfortunate is the approach taken by the CCI towards patent pooling agreements by labelling them as 'restrictive trade practice' as it has

¹⁵² Shapiro, *supra* note 120.

¹⁵³ §68 and 69, Indian Patents (Amendment) Act, 2005.

¹⁵⁴ §140, Indian Patents Act, 1970.

provided a set of practices which are anti-competitive in nature.¹⁵⁵ This response can be said to have been prompted due to the anti-competitive nature of such pooling agreements which is capable of being regulated under the competition law. Thus, the next relevant question is whether Indian Competition regime is equipped to regulate such agreements.

B. HOW REASONABLE IS ‘REASONABLE’?

§3(3) of the Competition Act, 2002 deals with horizontal agreements while §3(4) deal with vertical agreements. It is a matter of common knowledge that IPR confers upon its owner the right of exclusivity and freedom to use his product as per his own will up to a certain degree. §3(5) of the Competition Act, 2002 allows IPR owners to enter into any agreements so long as he imposes reasonable restrictions under such agreements which are necessary to protect his rights, and such agreements shall be permissible though they are otherwise restricted under §§3(3) and 3(4) of the Competition Act, 2002 Act. Therefore, the test provided for an agreement related to IP to qualify for the exemption provided under §3(5) of the Competition Act, 2002 is that of ‘reasonability of restrictions.’ Hence if under the garb of such agreement an IPR owner tries to impose unreasonable restrictions, he might have to forego his right of exclusivity.

There surrounds an air of uncertainty when it comes to deciding what can qualify as reasonable and what is unreasonable. For the purpose of application of §3(3) or §3(4) of the Competition Act, 2002 and to evaluate the appreciable adverse effect on competition of a patent pooling

¹⁵⁵ Manas Bulchandani and Akshay Khanna, *Patent Pooling in The Indian Scenario*, 4 INDIAN J. OF L. 15, 20 (2018).

agreement the first step is to prove that it falls beyond the scope of protection granted under §3(5) of the Act. It would be erroneous to use the appreciable adverse effect on competition as the yardstick for deciding the validity and competency of a patent pooling agreement keeping in mind the US Courts observation discussed in previous section that every contract/agreement is likely to have some adverse and restraining effect on the market. Furthermore, §3(5) of the Competition Act, 2002 provides that so long as conditions of the agreement are 'reasonable' it enjoys the exemption.

What exactly will qualify as reasonable is nowhere defined in the act. Through an advocacy booklet however, CCI has offered some clarity through certain instances which qualify as unreasonable restrictions and they include: licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services, agreement which divides the markets among firms that would have competed using different technologies, arrangements that effectively merges the R&D activities of two or only a few entities that could plausibly engage in R&D in the relevant field, exclusive licensing arrangements, including cross-licensing by parties collectively possessing market power, grant backs, exclusive licensing and acquisition of IPRs.¹⁵⁶ All of the above will be considered to fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs. However, this

¹⁵⁶ Advocacy Booklet on Intellectual Property Rights under the Competition Act, 2002, Competition Commission of India; Aditya A Kutty and Sindhura Chakravarty, *The Competition-IP Dichotomy: Emerging Challenges in Technology Transfer Licenses*, 16 J. OF INTELL. PROP. RTS., 258, 264 (2011).

does not really help in case of patent pooling agreements as it in itself requires a threshold defining reasonability.

In USA for that matter, the antitrust authorities adopt a ‘rule of reason approach’ while considering any such restrictive licensing arrangements.¹⁵⁷ The framework for evaluating licensing restraints is spelt out in part 3.4 of the Guidelines.¹⁵⁸ §3(5) of the Competition Act, 2002 also adopts this approach. However, USA also has specific guidelines governing patent pooling agreements unlike India. The question is how to apply this test of reasonability to patent pooling agreements which are not inherently anti-competitive though may have restrictive effects.

C. ESSENTIAL FACILITIES DOCTRINE

It is in my opinion a better practice to adopt ‘essential facilities doctrine’ to test the reasonability of the patent pooling agreements in Indian context. The term “essential facilities” is not officially used in cases or judicial documents in the U.S or E.U.¹⁵⁹ The doctrine traces back its origin to the landmark *Terminal Railroad Association* case in which an agreement between the rail road companies of St. Louis relating to restricting the operation of bridges and terminals to get across river Mississippi to members of association was held to be in violation of the Sherman Act,

¹⁵⁷ Antitrust Guidelines for the Licensing of Intellectual Property, Issued by the US DOJ & the FTC (1995).

¹⁵⁸ *Id.*

¹⁵⁹ Sebastian J. Evrard, *Essential Facilities in the European Union: Bronner and Beyond*, 10 COLUM. J. FOR EUR. L., 491 (2004).

1890.¹⁶⁰ The essential facilities doctrine is used in US as an exception to application of IP laws as well.¹⁶¹

The underlying principle of this doctrine may be ascertained as, to prevent one player from taking advantage of his position by colluding with others so as to deprive those who lack such advantage from having a fair chance of participation in the market. The term ‘essential’ can be understood to connote a level of distinctiveness and ‘facilities’ to mean any asset which holds some monopoly power and proprietorship due to its uniqueness.¹⁶² *Prima facie* this may seem to be a test for dominant position however, it may be applied to the agreements between the patent pooling parties to ascertain whether assets having monopoly power are being used in anti-competitive manner by their respective holders through collusion. This will be determined by the nature of assets involved in the agreement. If the patented assets are of such nature that their independent existence devoid of the pool is essential for advancement of fair market and survival of competitors then such agreements shall be considered unreasonable and hence beyond the scope of exemption of §3(5) of the Competition Act, 2002.

¹⁶⁰ *United States v. Terminal Railroad Assn. of St. Louis*, 236 U.S. 194, 35 S. Ct. 408, 59 L. Ed. 535 (1915); *Terminal RR Assn. v. US*, 266 U.S. 17, 45 S. Ct. 5, 69 L. Ed. 150 (1924).

¹⁶¹ Sergio Baches Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are Intellectual Property Rights Still Sacrosanct?* 11 (2) *FORDHAM INTELL. PROP. MEDIA AND ENTMT'L J.*, 410 (2001).

¹⁶² Meenakshi K.K.; Hardik Jain, *IPR-Antitrust Crossroads: Is Essential Facility Doctrine a Solution*, 11 *NUALS L.J.* 123, 146 (2017).

The doctrine can be applied such that for the patent pooling agreement to be anti-competitive following factors will have to be proved:

1. Inability of the players beyond the pool to duplicate the assets
2. Denial of the use of facilities to competitor
3. Prevention of new product from entry in market
4. The patents covered by the agreement are substitute patents
5. Availability of substitutes to covered technology in the patent pooling agreement.

This provides a yardstick for defining reasonability so that there exists uniformity of approach.

The reasoning applied by USA in dealing with exclusive dealing arrangements reflects the application of essential facilities doctrine. In this context, exclusive dealing arrangements may give rise to the possibility of anticompetitive exclusion only if the monopolist is able to exclude rival suppliers from a large enough fraction of the market to deprive them of the opportunity to achieve minimum efficient scale.¹⁶³

This approach is more suitable as it caters to the need and nature of restrictive covenants that form part of the patent pooling agreements. Restrictive covenants cannot be *ipso facto* considered to be ‘stringent and unfair’ or ‘harsh’ specially when they can have pro-competitive and IPR governed reasoning. If not all but most of the times the vertical non-price restraints justify enhancement of distribution efficiency and stimulation of

¹⁶³ Joshua D Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 1(5) COMP. POL'Y INT'L (2009).

inter-brand competition by resolution of the free rider problem, i.e. particular dealers enjoying cost advantages by benefiting from the demand-stimulating activities of other dealers.¹⁶⁴

If we compare 4 circumstances in which antitrust scrutiny is warranted for agreements under US's Antitrust Guidelines for the Licensing of IP it is evident that, they collectively incorporate the doctrine of essential facilities. The four circumstances discourage patent pooling agreements when, such collusion can deprive other players a chance at competition. Therefore, when the patent pooling agreements are such that they incorporate patents whose independent existence devoid of pooling are essential for existence of other players in market and their pooling shall inadvertently deprive such other players of the market of functioning, will be held to be beyond the scope of §3(5) of the Competition Act, 2002 and subject to §§3(3) and 3(4) of the Competition Act, 2002.

The previously highlighted CCI's approach in dealing with cases involving IP and Competition interface highlights its tendency of sidelining the rule of reason approach which will have adverse impact on IPR regime specially when the CCI will be faced with the challenges of patent pooling agreements and competition law. Applying the 'essential facilities doctrine' it may be argued that the conditions imposed in Monsanto's patent licensing agreements were designed to meet the conditions of competition in the market for licensing of Bt cotton technology, which is a

¹⁶⁴ JOHN R ALLISON, *An Analysis of the Vertical Price-Nonprice Dichotomy*, 21 AKRON L. REV., art 1 (1987), (Feb. 7, 2020).

market that thrives on dynamic efficiency driven by competition through innovation.

Furthermore, in case the parties to the pooling agreement are dominant players in the market, EU's cautionary approach whereby "non-discriminatory and non-excessive" licensing terms as well as "non-exclusive licenses" in terms of patent pooling be given due regard while testing the agreement on 'essential facilities' threshold. However, the mere fact of an entity is dominant player would *ipso facto* render the pooling agreement anti-competitive. Since, the essential facilities doctrine is applied as a test for dominant position as well, its application to test validity of patent pooling agreements would in other way allow IP to also act a factor in deciding abuse of dominant position. It would be erroneous to regard IP only as an exception to §3 of the Competition Act and be disregarded in evaluation of §4 when the contemporary times demand contrary.

V. CONCLUSION

From the above analysis it may be concluded that, interface of IP and Competition Law is inevitable with the advent of technological advancements in the market. Indian jurisprudence as far as this interface is concerned is at a very nascent stage. Furthermore, India also lacks in a clarity of approach as far as such interface is concerned. The CCI will have to adopt an approach which allows the two legal regimes to function complementarily as has been recognised in USA and EU.

As far as the conflation of standards of §§3 and 4 of the Competition Act, 2002 are concerned it is very important that CCI

maintains a clear distinction of evaluative norms for these two sections. This is more essential from Patent Pooling Agreements perspective as it allows such agreements an opportunity to be tested for its reasonability. Patent Pooling Agreements are not *per se* anti-competitive and the 'essential facilities doctrine' can pave the way for determining its reasonability for the purpose of exemption under §3(5) of the Competition Act, 2002. The US Guidelines also reflect the incorporation of this principle in an indirect manner as far as reasonability of patent pooling agreements is concerned.

This regime would allow Patent Holders to function freely and within the scope of competition law without unwarranted intervention by CCI which plays a crucial role in discouraging patent pooling which in turn has adverse effect on competition as well as innovation. It is important to ensure that confluence of both IP and Competition regime is in furtherance of the economy which is the all-encompassing objective shared by both regimes in question.