

COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHTS

PRESENTATION BY

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**FORMER MEMBER, MRTP COMMISSION, MEMBER
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FOR DRAFTING THE NEW COMPETITION LAW FOR
INDIA.**

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Competition Policy and Law**

NEW DELHI

22 JULY 2005

INTELLECTUAL PROPERTY INCLUDES

- 1. COPYRIGHT AND RELATED RIGHTS**
- 2. TRADE MARKS**
- 3. GEOGRAPHICAL INDICATIONS**
- 4. INDUSTRIAL DESIGNS**
- 5. PATENTS**
- 6. LAYOUT – DESIGNS OF CIRCUITS**
- 7. PROTECTION OF UNDISCLOSED INFORMATION.**

INTELLECTUAL PROPERTY IS GROWING IN IMPORTANCE BECAUSE

- **NUMEROUS EXPLOITABLE IDEAS ARE BECOMING SOPHISTICATED**
- **INDUSTRIAL COMPANIES PIN THEIR HOPES FOR THEIR SUCCESSFUL ECONOMIC FUTURE ON THEIR SUPERIOR CORPUS OF NEW KNOWLEDGE**
- **POLITICAL AND LEGAL ACTIVITIES ARE ASSERTING AND STRENGTHENING PROTECTION FOR THE RIGHTS**
- **THEY FOSTER IMMENSE COMMERCIAL RETURNS**

CHALLENGES TO INTELLECTUAL PROPERTY

IN DEVELOPING COUNTRIES:

- a) **THEY HAVE YET TO EXPLOIT INTELLECTUAL PROPERTY ON THEIR OWN**
- b) **PROTECTIONIST LAWS AS INHERITED ENABLE THE FOREIGN INDUSTRY TO CREAM OFF SCARCE RESOURCES (ROYALTY PAYMENTS)**
- c) **THEY DESIRE TO ACQUIRE TECHNOLOGY FROM ADVANCED COUNTRIES.**
- d) **DEROGATIONS AND DILUTIONS OF THE RIGHTS- COMPULSORY LICENSING, CLOSER SCRUTINY OF TERMS ETC.**

CHALLENGES TO INTELLECTUAL PROPERTY

IN DEVELOPED COUNTRIES:

- a) **POWERFUL ANTI-COMPETITIVE COLLABORATIONS RESULT FROM THE PROTECTION GIVEN TO IPRs**
- b) **SUCH COLLABORATIONS EXCLUDE COMPETITORS**
- c) **THEY HELP ACCRETIONS OF MARKET POWER**
- d) **RESULTANT IMPOSITION OF RESTRICTIONS ON RIGHTS.**

EXTANT COMPETITION LAW OF INDIA

MONOPOLIES AND RESTRICTIVE TRADE

PRACTICES ACT,1969

BROUGHT INTO FORCE IN 1970

THRUST AREAS

- **REGULATION OF CONCENTRATION OF ECONOMIC POWER**
- **COMPETITION LAW**
- **CONSUMER PROTECTION**

NEW INDIAN COMPETITION LAW COMPETITION ACT 2002

- **HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW PRESENTED ITS REPORT TO GOVERNMENT IN MAY 2000**
- **THE DRAFT LAW PREPARED AND CLEARED BY THE CABINET IN JULY 2001**
- **THE COMPETITION ACT HAS BEEN ENACTED BY THE PARLIAMENT IN DECEMBER 2002**
- **THE ACT ADDRESSES THE CONCERNS OF ANTI-COMPETITIVE PRACTICES THAT MAY ACCOMPANY THE EXERCISE OF IPRs**

DICHOTOMY

- **IPRs ENDANGER COMPETITION**
- **COMPETITION LAW ENGENDERS COMPETITION**
- **EXISTENCE OF IPRs MAY NOT BE CHALLENGED BY COMPETITION LAW**
- **EXERCISE OF IPRs MAY BE CHALLENGED BY COMPETITION LAW**
- **THE LITMUS TEST FOR INVOCATION OF COMPETITION LAW IS DETRIMENT TO PUBLIC INTEREST OR CONSUMER INTEREST**

TRIPS AND ANTI-COMPETITIVE PRACTICES

- **ARTICLES 6, 8, 31 AND 40 OF TRIPS DEAL WITH TREATMENT OF ANTI-COMPETITIVE PRACTICES.**
- **THERE IS THUS A BASIC COMPLEMENTARITY BETWEEN IPR LAW AND COMPETITION LAW.**
- **IPR LAW PROVIDES FOR IP TO BE VALUED AND EXCHANGED**
- **COMPETITION LAW ENSURES THAT MARKET ASSIGNS A FAIR AND EFFICIENT VALUE TO IP**
- **WHAT IS NEEDED IS TO GIVE EQUAL WEIGHT TO RISKS OF UNDER-PROTECTION AND OVER-PROTECTION OF IPRs**

MRTP ACT AND IPRs

SECTION 15 OF THE OUTGOING MRTP ACT EXCLUDES PATENTS FROM ITS APPLICATION.

SECTION 15 MENTIONS ONLY PATENTS AND NOT OTHER IPRs.

MRTP COMMISSION IN GODFREY PHILLIPS CASE RULED THAT MANIPULATION, DISTORTION, CONTRIVANCES AND EMBELLISHMENTS ETC BY WAY OF MISUSE OF TRADE MARK INVITE THE APPLICATION OF THE MRTP ACT.

(VALLAL PERUMAN AND DILEEP SINGH BHURIA VS. GODFREY PHILLIPS (INDIA) LTD- IA 91/92 IN UTPE 180/92 -MRTP COMMISSION, NEW DELHI, 24 MAY 1994 AND MANJU BHARDWAJ VS. ZEE TELEFILMS LTD. AND OTHERS- UTPE 148/95, MRTP COMMISSION, NEW DELHI DATED 2 JAN. 1996)

COMPETITION ACT 2002 AND IPRs

SECTION 3 (5) DECLARES THAT

“NOTHING CONTAINED IN THIS SECTION SHALL RESTRICT:-

- (I) THE RIGHT OF ANY PERSON TO RESTRAIN ANY INFRINGEMENT OF, OR TO **IMPOSE REASONABLE CONDITIONS**, AS MAY BE NECESSARY FOR PROTECTING ANY OF HIS RIGHTS WHICH HAVE BEEN OR MAY BE CONFERRED UPON HIM UNDER:-**
- (A) THE COPYRIGHT ACT, 1957 (14 OF 1957)**
- (B) THE PATENTS ACT, 1970 (39 OF 1970)**
- (C) THE TRADE AND MERCHANDISE MARKS ACT, 1958 (43 OF 1958) OR THE TRADE MARKS ACT, 1999 (47 OF 1999)**
- (D) THE GEOGRAPHICAL INDICATIONS OF GOODS (REGISTRATION AND PROTECTION) ACT, 1999 (48 OF 1999)**
- (E) THE DESIGNS ACT, 2000 (16 OF 2000)**
- (F) THE SEMI-CONDUCTOR INTEGRATED CIRCUITS LAYOUT-DESIGN ACT, 2000 (37 OF 2000).**

KITTY OF UNREASONABLE CONDITIONS (ANTI-COMPETITIVE)

- PATENT POOLING (LOCKING TECHNOLOGY)
- TIE-IN ARRANGEMENTS (ACQUIRE PARTICULAR GOODS SOLELY FROM PATENTEE)
- ROYALTY PAYMENT AFTER EXPIRY OF PATENT
- PROHIBIT LICENSEE TO USE RIVAL TECHNOLOGY
- PROHIBIT LICENSEE FROM CHALLENGING VALIDITY OF IPR
- GRANT BACK REQUIREMENT (ANY KNOW-HOW OR IPR ACQUIRED BACK TO THE LICENSOR)
- FIXING PRICES FOR THE LICENSEE TO SELL
- TERRITORIAL AND CUSTOMER RESTRICTION

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KITTY OF UNREASONABLE CONDITIONS (ANTI-COMPETITIVE)

- COERCING LICENSEE TO TAKE LICENSES IN IP EVEN IF HE DOES NOT NEED THEM (PACKAGE LICENSING)
- RESTRICTING SALE OF PRODUCT TO THOSE OTHER THAN DESIGNATED BY LICENSOR (OFTEN FOUND IN LICENSING OF DUAL USE TECHNOLOGY)
- IMPOSING TRADE MARK USE REQUIREMENT
- INDEMNIFICATION OF LICENSOR TO MEET EXPENSES IN INFRINGEMENT PROCEEDINGS
- UNDUE RESTRICTION ON LICENSEE'S BUSINESS
- CONDITION ON LICENSEE TO EMPLOY/USE STAFF DESIGNATED BY LICENSOR
- LIMITING THE MAXIMUM AMOUNT OF USE OF THE INVENTION

ILLUSTRATIVE CASE

STUDY -1

US vs S C JOHNSON & SONS

(CIV. No. 4089 – 15 FED. REG. 43, 859, 25 AUGUST 1994)

- 1. BAYER AG – A MAJOR GLOBAL SUPPLIER OF INSECTICIDES EXCEPT IN USA**
- 2. BAYER DEVELOPED A NEW UNIQUE AND POTENT ACTIVE INGREDIENT FOR INSECTICIDES**
- 3. IT LICENSED TECHNOLOGY TO S C JOHNSON & SONS, A DOMINANT MARKET LEADER IN PESTICIDES MARKET**
- 4. ANTITRUST DIVISION CHALLENGED THIS LICENSING ARRANGEMENT WHICH REDUCED INCENTIVES OF BAYER TO COMPETE WITH JOHNSON AND WHICH HELPED JOHNSON TO INCREASE ITS DOMINANCE IN THE USA MARKET**

JUDGEMENT: BAYER WAS REQUIRED TO OFFER THE PATENTED INGREDIENT TO OTHER PESTICIDE MANUFACTURERS ON REASONABLE TERMS. FURTHER JOHNSON'S COMPETITORS WERE ALLOWED ACCESS TO ACTIVE INGREDIENTS THAT BAYER MAY INTRODUCE LATER

ILLUSTRATIVE CASE

STUDY - 2

RADIO TELEFIS WIREANN (RTE) vs EUROPEAN COMMISSION

{C 241 – 242/91P, (1995) IECR 743, (1995) 4 CMLR 718}

1. **T V STATIONS IN UK AND IRELAND PUBLISHED WEEKLY TV GUIDES COVERING THEIR PROGRAMMES EXCLUSIVELY AND CLAIMED COPYRIGHT PROTECTION**
2. **MAGILL TV GUIDE WANTED TO PUBLISH A COMPREHENSIVE GUIDE OF TV PROGRAMMES, BUT WERE PREVENTED BY TV STATIONS ON THE GROUND OF COPYRIGHT INFRINGEMENT.**

JUDGEMENT: ECJ CONCLUDED THAT ONLY THOSE RESTRICTIONS ON COMPETITION INHERENT IN PROTECTION OF IPR CAN BE PROTECTED, BUT NOT ABUSE OF A DOMINANT POSITION. BECAUSE OF THE PUBLIC DEMAND FOR A COMPREHENSIVE TV GUIDE, THE T V STATIONS' REFUSAL TO PROVIDE INFORMATION ON THE GROUND OF COPYRIGHT PREVENTED THE CREATION OF A NEW PRODUCT BY MAGILL. TV STATIONS DID NOT PRODUCE THAT PRODUCT AND THEIR CONDUCT WAS EXCLUDING COMPETITION IN THE MARKET AND THUS CONSTITUTED ABUSE OF DOMINANCE

ILLUSTRATIVE CASE

STUDY - 3

US vs PILKINGTON

{CIV No. 94-345, 59 FED. REG. 30, 604 – 14 JUNE 1994}

1. **PILKINGTON, UK GLASS MANUFACTURER, ENTERED INTO PATENT AND KNOW-HOW LICENSING AGREEMENTS WITH SEVERAL MANUFACTURERS**
2. **THE LICENSES RESTRICTED MANUFACTURE IN SPECIFIC TERRITORIES, SHIPMENT OF GLASS OUTSIDE DESIGNATED TERRITORIES AND SUB-LICENSING AND IMPOSITION OF FIELD OF USE**

JUDGEMENT: THOUGH PILKINGTON'S PATENTS HAD EXPIRED, THE LICENSEES WERE STILL SUBJECT TO RESTRICTIONS. THEY WERE ALSO RESTRICTED FROM EXPORTING THEIR GLASS MANUFACTURING TECHNOLOGIES AND WERE PREVENTED FROM TAKING OVERSEAS BIDS. THESE RESTRICTIONS WERE UNREASONABLE

ILLUSTRATIVE CASE

STUDY- 4

US FTC vs DELL COMPUTERS ON VL – BUS PATENT

{<http://www.ipmag.com/moore.html>}

1. **DELL AS A MEMBER OF VIDEO ELECTRONICS STANDARDS ASSOCIATION (VESA) HAD A REPRESENTATIVE ON ITS COMMITTEE THAT APPROVED THE NEW STANDARD FOR VL-BUS IN 1992.**
2. **DELL REPRESENTATIVE STATED THAT THE STANDARD DID NOT INFRINGE ANY IPR THAT DELL POSSESSED**
3. **HOWEVER 8 MONTHS LATER DELL INFORMED CERTAIN VESA MEMBERS THAT IMPLEMENTATION OF THE STANDARDS INFRINGED A 1991 DELL PATENT**
4. **FTC CHARGED THAT DELL RESTRICTED COMPETITION AND UNDERMINED THE STANDARDS-SETTING PROCESS**

JUDGEMENT: DELL WAS REQUIRED NOT TO ENFORCE ITS PATENT RIGHTS AGAINST COMPUTER MANUFACTURERS. THE JUDGEMENT SET THE CODE OF CONDUCT FOR ORGANISATIONS PARTICIPATING IN STANDARDS-SETTING ACTIVITIES AND FOR DISCLOSURE OF THEIR INTELLECTUAL PROPERTY THAT COULD INFLUENCE THE STANDARDS - SETTING PROCESS.

GEOGRAPHICAL INDICATIONS

ARTICLE 22 OF TRIPS AGREEMENT DEFINES GI AS THOSE “WHICH IDENTIFY A GOOD AS ORIGINATING IN THE TERRITORY OF A MEMBER OR A REGION OR LOCALITY IN THAT TERRITORY, WHERE A GIVEN QUALITY, REPUTATION OR OTHER CHARACTERISTIC OF THE GOOD IS ESSENTIALLY ATTRIBUTABLE TO ITS GEOGRAPHICAL ORIGIN” (EXAMPLE: SCOTCH WHISKY)

TRIPS REQUIRES MEMBERS TO PROVIDE LEGAL MEANS TO PREVENT USE OF GI THAT

- 1. MISLEADS THE PUBLIC OR**
- 2. CONSTITUTES AN ACT OF UNFAIR COMPETITION**

COMPETITION LAW SHOULD ADDRESS UNFAIR COMPETITION UNDER GI.

INDIAN PRODUCTS NEEDING GI PROTECTION

BASMATI RICE

DARJEELING TEA

MADRAS PAAN

KASHMIR CARPETS

SHIVAKASHI CRACKERS

POCHAMPALLY SAREES

MALABAR PEPPER

HYDERABAD ANEA-BE-SHAHI GRAPES AND

ALPHONSO MANGOES

NOTE: THIS LIST IS ILLUSTRATIVE, NOT EXHAUSTIVE

INDIA'S SUCCESSFUL CHALLENGE OF BASMATI PATENT

- ✿ RICE TEC INC WAS GRANTED US PATENT FOR TEXMATI
- ✿ US PATENT CLAIMED CHARACTERISTICS SIMILAR TO TRADITIONAL INDIAN BASMATI RICE LINES
- ✿ INDIA APPREHENDED THAT BASMATI EXPORTS TO US WOULD BE AFFECTED
- ✿ INDIA CHALLENGED THE PATENT THROUGH DOCUMENTARY EVIDENCE AND TECHNICAL OPINION OF INDIAN SCIENTISTS
- ✿ RICE TEC WITHDREW ITS CLAIMS AND THREAT TO EXPORT OF BASMATI FROM INDIA AVERTED

SUGGESTIONS

- **IPR IMPERATIVE FOR ENCOURAGING INNOVATION AND FOR ECONOMIC AND TECHNOLOGICAL DEVELOPMENT**
- **TRIPS AGREEMENT NEEDS TO BE NEGOTIATED FURTHER IN NATIONAL ECONOMIC INTEREST**
- **A NATIONAL AND NOT A PARTY INTEREST POSITION NECESSARY**
- **WHILE AMENDING IPR STATUTES, PROVISIONS FOR PREVENTING THE ABUSE OF IPRs, UNREASONABLE RESTRAINT OF TRADE AND UNREASONABLE SHACKLES ON TECHNOLOGY TRANSFER NEED TO BE INCORPORATED.**

(contd)

SUGGESTIONS

- **ARTICLE 40 OF TRIPS ACCEPTS ADVERSE EFFECTS OF IPRs ON TRADE AND COMPETITION (EXCLUSIVE GRANT- BACK, PATENT POOLING ETC.)**
- **COMPETITION LAW SHOULD BE SUFFICIENTLY FLEXIBLE TO DEAL WITH THE ADVERSE EFFECTS BY RESORTING TO ARTICLE 40**

FINALE

PROTECTION OF IPRs

NEEDS TO METAMORPHOSE INTO

PROTECTION OF IPRs

WITH EQUITY AND ETHICS

**THANK YOU
FOR YOUR
KIND
ATTENTION**