



# IPR – SEPs and Competition : Conflicting or Complementary

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# What is competition?

- Competition refers to a situation in a marketplace in which firms/entities or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, such as profits, sales, market share, etc.
- A Competitive market is a laissez faire market where every one is price taker and no one can controls or dictates the prices.



# Why Competition

- ❑ Absence of cooperation automatically leads to:
  - Low prices
  - Better quality
  - More choices
  - Innovation
- ❑ Win-Win situation for economy, government, consumers and producers



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# Competition – is not an automatic process



- Markets are prone to distortion by market players
  - By Suppliers
  - By Buyers
  - And by intermediaries
- Information Asymmetry, Seasonal Variations in production and Demand and Trade Barriers impinge on competition
- Government regulation also sometimes impinge on free-markets



# The Competition Act, 2002



## □ Preamble

- To provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having an adverse effect on competition;
  - To promote and sustain competition in markets;
  - To protect the **interest of consumers**; and
  - To ensure freedom of trade carried on by other participants in markets, in India
- Enforcement – Anti-Competitive Agreements (S3), Abuse of Dominance (S4) & Regulation of Combinations (S 5 & 6)
  - Advocacy – Creating Competition Awareness (S 49)



# Historical Background – Patents

- Historically patents were granted to the first importer.
- An Italian, Giacomo Acontio, who invented new kind of furnace and wheel machine and was granted first letter patent in 1559.
- In 1624, both Houses of Parliament in England passed the Statute of Monopolies restricting the grant of monopoly but allowing, inter alia, patents only for invention.
  - See G. A. STOBBS, SOFTWARE PATENTS, (2000).



# Patent Law



- ❑ Patent grants exclusionary rights.
- ❑ A negative right *i.e.* a right to stop others
- ❑ Reward Theory – a conflict with competition
- ❑ Promote innovation by protecting rights and creating incentives



# Standard Essential Patents



- ▶ Standards are necessary
- ▶ Advance technologies require SEPs
- ▶ Necessity of Patent requires FRAND Commitments
  - FRAND requires rule of reason approach
  - The interplay between what is fair & reasonable and where the Abuse starts is a thin line
  - Interplay encourages Forum Shopping





# Competition vis-à-vis IPR- Conflict or Complementary



## Competition Act

- ▶ Competition Act, 2002 specifically protects the rights under IP or Copyright regime under section 3(5) – subject to reasonable conditions
- ▶ However, the protection is under S 3 and not under S 4.

## Patent Act

- ▶ S 140 declares certain conditions in an agreement relating to patents as void for being anticompetitive.



# Competition vis-à-vis IPR Policy - Conflict or Complementary



## IPR Policy :

- ▶ Promote the idea of high quality and cost-effective innovation
- ▶ IPR infrastructure to enhance competitiveness
- ▶ IP interface with competition law and policy.
- ▶ Licensing practices or conditions that may have an adverse effect on competition examined through appropriate measures, including regulation of anti-competitive conduct in the market by the Competition Commission of India.



# Developing Jurisprudence



## **K Sera Sera Vs Digital Cinema (30/2015) :**

- ▶ Commission duly recognized the innovation and security enhancement by DCI standard
- ▶ No proof of dominance provided – case was closed

## **Micromax Vs Ericsson (also Intex Vs) (50 & 76/ 2013)\***

- ▶ SEP and IPR- Rule of reason approach
- ▶ Clause 6 of ETSI Policy- FRAND commitment
- ▶ Prima-facie Dominance established
- ▶ Price variance as per output cost
- ▶ Pendency of Civil suit on IPR does not restrict CCI

\*As the case is under litigations the issues highlighted are as per current decision of the commission and High court.



# Developing Jurisprudence



## **Delhi High Court- Micromax Vs Ericsson (also Intex Vs) (W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014)\***

- ▶ Both Acts are special acts in respective fields
- ▶ Patent Act to prevail in case of irreconcilable difference
- ▶ Remedies under S 27 of Competition Act and S 84 of Patent act are distinct
- ▶ S 84 provides specific remedy to the person having rights
- ▶ Commission to look at *Rights-in-Rem* (Reasonable condition)
- ▶ Abuse of dominance under S 4 can not be dealt by a civil court
- ▶ Scope of enquiry before the commission limited to Anti-competitive Conduct
  
- ▶ Ericsson v. iBall (2015) : settled out of court

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# Way Forward



- Coordination among Controller of Patents and Competition Agency – Use S 21 and S 21 A for Reference
- Periodic awareness and training of officials (both at Patents office and Regulators) & Judiciary



# THANK YOU

