UNDERSTANDING THE CONCEPT OF ABUSE OF DOMINANCE IN COPYRIGHT

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Abstract

Indian competition law follows the philosophy of contemporary competition laws and targets at nurturing competition and at protecting the relevant Indian markets to counter the anticompetitive practices by enterprises. The Competition Act, 2002 prohibits anticompetitive agreements, abuse of dominant position by enterprises, and regulates combinations with a view to ensure that there is no appreciable adverse effect on competition in the relevant Indian market. Section 4 of the Act deals with the abuse of dominant position by an enterprise. Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result, that competition is prevented or lessened substantially. Dominant position of a business entity or a group in its relevant market is determined by its capability to act independently of its competitors. In a perfectly competitive market, no enterprise has control over the market, especially in the determination of price of the product. In this article author attempts to identify the conditions under which there will be an abuse of copyright under the Competition Act, 2002. Under an economic analysis of copyright, author attempts to identify the conditions of abuse of a dominant position through a refusal to licence copyright should be. This articles, serves to elucidate the muddle prevailing in this area of the law. Article also intends to clarify the circumstances under which holder of a copyright abuses its dominant position.

Keywords: Abuse of dominance, Copyright, Competition law, Section 4(2), Section 3(5)

This is the unedited version of the Article published with following citation.

Vishnu, S. (2018). Understanding the concept of abuse of dominance in copyright, *Kerala University Journal for Legal Studies.* pp. 208-220. ISSN 2278-2702

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Electronic copy available at: https://ssrn.com/abstract=4507393

Introduction

Dominance is a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to operate independently of the competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour[1]. Dominance is not considered per se bad. Its abuse is. Abuse is stated to take place when an enterprise or a group of enterprises practices its dominant position in the relevant market in an exclusionary or/and an exploitative or manipulative manner[2].

Intellectual Property Rights (IPR) involve grant of exclusive rights to the right holders to exploit the results of their innovation so as to provide incentive to innovate. Competition Act, 2002 exempts the reasonable use of such rights by right holders from the provisions of Section 3 related to agreements. However, the actions by enterprises that shall be treated, as abuse[3] shall stand applicable equally to IPR holders provided such rights are considered by the Commission to render the holder a dominant player in the relevant market.

As with all verticals of Intellectual Property, Copyright is concerned with securing the effort of the human intellect. The domain of copyright is the protection of literary and artistic works. Apart from these, it may also include technology – based works such as, computer programs, electronic database etc. Copyright[4] is a legal term describing rights given to creators for their literary and artistic works[5]. TRIPS agreement has enlarged the scope of copyrights by including computer programs, broadcasting, performances and designs under its umbrella. This has brought in a number of new problems, along with the benefits promised.

Further, the protection available under the copyright law has been greatly expanded to respond to the challenges posed by the latest technologies in the field of communications as well as other copyrightable subject matter. Competition Act, 2002 provides[6] express exception to copyrights, as long as they are exercised in reasonable manner, well within the boundaries of rights guaranteed under the Copyright Act. However, no such exception is given under Section 4.

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[1] Section 4, The Competition Act, 2002
[2] *Jupiter Gaming Solutions Private Limited v. Government of Goa & Anr.,* Case No. 15 of 2010 decided on 12.05.2011 (CCI)
[3]Section 4(2)
[4] The kinds of works covered by copyright include: literary works such as novels, poems, plays, reference works, newspapers and computer programs; databases; films, musical compositions, and choreography; artistic works such as paintings, drawings, photographs and sculpture; architecture; and advertisements, maps and technical drawings.
[5]Available at http://www.wipo.int/about-ip/en/copyright.htmllastaccessedon
[6]Section3(5)

Vishnu, S. (2018). Understanding the concept of abuse of dominance in copyright, Kerala University Journal for Legal Studies. pp. 208-220. ISSN 2278-2702

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Competition Law and Copyright

Prima facie, competition law might seem to have diminutive, if any, role to play in the outcome of a copyright litigation. In its various appearances, competition law seeks to ensure full and fair competition in the sale of goods and services[7]. Copyright law does serve a procompetitive role; not in the market for the particular book, painting, or film, but in the larger market for ideas.

Author of a copyright possess an elite right, where he or she can sell his or her own expression as a *commodity* in the relevant market. The author's own expression, together with the expressions created by others, will compete in this broader market for the underlying idea. Once we distinguishes the significance of copyright for this larger market, it becomes clear that competition law can play a vital role in the result of a copyright suit. In some cases, it is possible that a copyright owner's dominant position, or acts taken by the owner to protect its rights, will restrict or destroy competition in other markets, possibly even the market for ideas.

Under the right conditions, competition law may intervene to preserve some degree of competition in these other markets; the immediate effect of the copyright law is to secure a fair return for an author'screativity. However, the ultimate objective is to stimulate artistic creativity for the general public good[8]. The emergence of new communications technologies and the proliferation of new copyrightable subject matters have led to the gradual expansion of copyright protection.The widespread use of mass-market contracts and alternative technological protection measures, along with the newly instituted protection against the circumvention of those measures, has also greatly enhanced the market power of copyright owners[9]. Regrettably, this mounting power has tempted some copyright owners to exercise their exclusive rights outside what is allowable under the grant or beyond what is in the public interest.

Economic analysis of Copyright

Copyright relates to literary and artistic creations, such as books, music, paintings and sculptures, films and technology-based works (such as computer programs and electronic

[7]Thomas F. Cotter, the Procompetitive Interest in Intellectual Property Law, 48 WM. & MARY L. Rev. 483 (2006).
[8]Twentieth Century Music Corp. v. Aiken, US Supreme Court
[9]Peter K. Yu, Five Disharmonizing Trends in the International Intellectual Property Regime, in 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 73, 91-94 (Peter K. Yu ed., 2007); Peter K. Yu, AntiCircumvention and Non-AntiCircumvention, 84 DENV. U. L. REV. 13 (2006).

Vishnu, S. (2018). Understanding the concept of abuse of dominance in copyright, Kerala University Journal for Legal Studies. pp. 208-220. ISSN 2278-2702

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databases). In certain languages, copyright is referred to as authors' rights. For the purposes of copyright protection, "the expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.[10]"

Copyright protects works, which embody information. Information is intangible, generally costly to create, but cheap to copy. Information is a public good. Public goods are non-rivalrous. "Non-rivalness in consumption is usually defined by saying that the consumption possibilities of one individual do not depend on the quantities consumed by others[11]."Being non-rivalrous, intangible goods are also generally non-excludable; this means that one person cannot exclude other persons from consuming the good in question. This non-excludability arises because reproduction costs are also generally very low for anybody other than the author of the copyrighted works.

Since the cost of production of the original copyrighted work is high as compared to the reproduction costs (for the free rider), if the copyright holder does not have a means to stop the free riders, he will not have the chance to recoup his investment, and the same will discourage the people to come up with creative works. Hence, the State must remedy by the creation of copyright law, which grants a limited monopoly for the copyright holder in excluding others from infringing his rights and thereby enabling him to have a chance to recoup his investment.

However, the copyright *per se* do not create monopoly. It all depends on the substitutability of the copyrighted material available in the relevant market. Therefore, if there is sufficient substitutability in the relevant market, then the question of monopoly does not arise[12]. As for copyright, it is because the original expression of the idea in the work cannot be copied without permission of the copyright holder.

However, everyone is free to copy ideas and creative ways around the copyright in a work are generally easy to find. Hence, monopolies are bound to arise quite rarely in copyright law.Thus, the major issue while considering cases in connection with abuse of dominance in copyright is what is an abuse of copyright. The question is so far left unanswered by the authorities, at least in connection with the *refusal to license* a copyrighted work.

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[10] Article 2, Berne Convention, 1886

[11] P. Belleflamme, "Pricing information goods in the presence of copying", (2002) paper presented at the SERCIAC Madrid, p. 2.

[12] E. Kitch, "Patents: monopolies or property rights?", (1987) 8 Research in Law and Economics 31

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Therefore, under an economic analysis of copyright, author attempts to identify the notion of abuse, conditions of abuse of a dominant position through a refusal to licence copyright should be. This article, aids to illuminate the existing issue of identifying the *abuse* in this area of the law.

Abuse of Dominance

Section 4 of the Competition Act, 2002 is similar to Chapter II of the UK Competition Act, 1998 and Article 82 of the EC Treaty. The standards to be satisfied to justify initiating any action with respect to the abuse of dominance primarily are;

- Whether an enterprise in question holds a “dominant position” in the relevant product and or geographic market in India.
- Whether, said enterprise has abused such dominant position

The factors constituting the “abuse”, “relevant product or geographic market”, “predatory pricing” and what constitute “dominant position” are detailed in the Competition Act, 2002. By virtue of Section 4(1), of the said Act, no enterprise or group shall abuse its dominant position. The Act only restricts the abuse of dominant position by an enterprise or a group and not from achieving such dominant position.

Dominant position is a “position of economic strength enjoyed by the enterprise which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately the consumers”.[13] It is interesting to note that, the Act did not define the term dominant position based on any arithmetical parameters or any particular share of the market as is the case in the MRTP Act, 1969. On the other hand, the dominant position of an enterprise is to be judged by its strength to operate independently of its competitors or to affect its consumers or competitors in its favour.

The said definition is similar to that of in the competition laws of various jurisdictions including the European Union. An organisation having dominant position *per se* is not illegal, but abuse of such dominance is illegal. Dominance is said to be abused when there is an appreciable adverse effect on competition due to the actions of the dominant enterprise.

[13] Explanation (a) below the Section 4(2)(e) of the Competition Act, 2002; See also United Brands Company and United Brands Continental BV v. Commission of the European Communities, [1978] EUECJ C-27/76 (February 14, 1976)

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Under the Act, 2002[14], an abuse of dominance includes following practices;

- Directly or indirectly imposing unfair or discriminatory conditions in the purchase or sale of goods and services;
- Restricting technical or scientific development relating to goods or services to the prejudice of the consumers;
- Indulging in practices resulting in denial of market access;
- Making conclusions of the contracts subject to acceptance by other parties, which have no connection with the subject of such contracts;
- Using dominant position in one relevant market in order to enter into another market.

The Act lays down the number of factors which the Commission needs to take into consideration in determining whether an enterprise enjoys a dominant position or not, such as the market size, share and resources of the enterprise, size and importance of the competitors, economic power of the enterprise, vertical integration of the enterprises, entry barriers etc. which would involve a fair amount of economic analysis[15].

Under the provisions of the MRTP Act, 1969 dominance was defined only in terms of market share, i.e. 25% or more. However, under the Competition Act, 2002 though the market share remains an important factor, other factors such as entry barriers, size, resources, economic power etc. were also given due weightage. Therefore, even if an enterprise's share is 30% or 40%, it may not be considered as dominant in the market. On the other side, an enterprise with mere 10% market share may be adjudges as dominant player in its relevant market.

However, the Act does not prevent an enterprise from coming into or acquiring a dominant position in the market. All that, the Act condemns is the abuse of such dominant position. Therefore, the Act targets the abuse of dominance and not the dominance *per se.* It is also significant to note that, the provisions under Section 4 does not provide any protection to the IPR holders from the hardships of the Competition law. Hence, if an enterprise or an association abuses its dominant position, then the Commission irrespective of any intellectual property rights acquired by such enterprise or association may enquire such an act.

Copyright and Refusal to license

[14] Section 4(2)

[15] Patel, B. N., Nagar, R., & Thakkar, H. (Eds.). (2016). Law and Economics in India: Understanding and practice. Routledge.

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The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labour[16]. However, the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good[17]. One of the characteristic of copyright is the right to curb the development of a derivative market by refusing to license copyright. Although it is likely that unilateral refusal to license copyright may give rise to misuse of claim but the broad assumption is that the desire to exclude is a presumptively valid business justification[18].

Nothing in the copyright statutes would prohibit an author from hoarding all of his works during the tenure of the copyright. Indeed, a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work[19].As a copyright owner, a film producer can, at his sole discretion, determine the manner of communicating his film to the public and this includes commercial terms on which the film is permitted to be communicated to the public[20]. Likewise, unilateral refusal to license diagnostic software is not an antitrust violation[21].

Just as the owner of real property, or a material object is entitled to legitimately assert his domain over it, and protect it from unfair appropriation by another, the intellectual property owner is, by these laws, enabled to protect unwarranted exploitation or unauthorized use of what are his property right. There is no public interest in insisting that such copies should be permitted, on the ground that the cinematograph films are not made available in the country. If that is the position, the defendant is always free to negotiate the terms of a license, in such of the films as are not available, for the purpose of their publication or performance in India[22].

It is well established principle that, mere refusal to license a copyrighted work will not attract the provisions of competition law as it may not confer a dominant position or such an act may constitute an abuse of dominance[23]. Thus, the question to be addressed here is under what condition, a refusal to license by a copyright holder constitute an abuse of dominance within the meaning of the competition law? Or under what circumstances, a compulsory licensing of a copyright can be made?

Conditions constituting the abuse of dominance in copyright

[16] Groves, P. (1997). Sourcebook on intellectual property law. Routledge p. 309
[17] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)
[18]*A&M Records, Inc. v. Napster, Inc*. 4239 F.3d 1004
[19] Stewart v. Abend, 495 U.S. 207, 228-29 (1990)
[20] Warner Bros. Entertainment Inc. v. Santosh V.G. (MANU/DE/0406/2009)
[21]*A&M Records, Inc. v. Napster, Inc*. 4239 F.3d 1004
[22] Warner Bros. Entertainment Inc. v. Santosh V.G. (MANU/DE/0406/2009)
[23] Parke Davis & Co v Probel, [1968] C.M.L.R. 47.

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As everyone is free to copy ideas and creative ways around the copyright in a work are generally easy to find. Therefore, monopolies are bound to arise quite rarely in copyright law. Thus, the major issue while considering cases in connection with abuse of dominance in copyright is what is an abuse of copyright.Though there has been large number of cases came up before the authorities in connection with the abuse of copyright, courts in India has not strictly defined under what circumstances, a copyright is abused. Hence, in this article author is relaying on following few foreign judgments in identifying the conditions on which a refusal to license a copyright will become an abusive practice.

Magill[24] constitutes the first case in which the authorities elaborates the conditions under which a refusal to license will become an abusive practice. It stated that, in order to become a refusal to license an abusive practice, the circumstances must remain exceptional viz.

a. The prevention of the appearance of the new product which the copyright holder did not offer and for which there was a potential consumer demand.
b. The refusal is not justified and/or;
c. The copyright holder reserves himself a secondary market by excluding all competition on that market.

That means, a refusal to license will infringe the provisions of Article 82, if it is a new product whose introduction might be prevented, despite specific consent and regular potential demand on the part of the consumers. Similarly, it will also infringe the provisions of Article 82 if it concerns a product or service, which is essential for the exercise of the activity in question in that, there was no potential substitute available.

An obligation imposed upon the proprietor of the protected design to grant third parties even in return for a reasonable royalty, a license for the supply of products incorporating the design would lead the proprietor thereof being deprived of the substance of his exclusive right and that a refusal to grant such a license cannot itself constitute an abuse of dominant position. Therefore, the significance of this case lies in determining the boundaries of *compulsory licensing*. It is pertinent that, merely a refusal to grant license may not be anti-

[24]Joined cases C-241/91P and C-242/91P RTE and ITP v. Commission (1995) ECR I-743
Magill, a Dublin company was the compiler of comprehensive weekly television guide combining the listing of three television companies broadcasting in UK and Ireland. Since, these listings were protected under the provisions of the copyright, Magill invariably required a license, the grant of which was refused by these companies. The ECJ affirmed the grant of compulsory license by the Commission on the ground of Article 82 and held that, the copyright itself do not justify a refusal to license in the "exceptional circumstances", where there was a consumer demand for the new product, where the TV companies had a de facto monopoly over the listings by virtue of the scheduling of their programs, where a license of the listing was an indispensable input for the comprehensive TV Guide and where they were not themselves supplying the product to the consumers.

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competitive in nature. Such refusal should be arbitrary, to compel involuntary compulsory licensing in order to mitigate the rigors of abusive conduct[25].

Further, on a referral from the Germen Court[26], the ECJ emphatically reiterated that, the criteria of the exceptional circumstances as stated in *Magill* must be fulfilled in order for a compulsory license to be granted. In the absence of such exceptional circumstances, the copyright holder has the exclusive right to reproduction and a refusal to grant a license even by a dominant undertaking cannot of itself constitute an abuse of Article 82. Court reasserted that, the three cumulative criteria must be met for a refusal to be regarded as abusive;

a. The undertaking, which requested the license, must intend to offer new product or service not offered by the owner of the copyright and for which there is a potential consumer demand.
b. The refusal cannot be objectively justified.
c. The refusal must be such as to exclude competition on a secondary market.

Conclusion

If a copyright is granted, it is for a good reason: allow the creation of works. Promoting the creation of works is in the general, public interest. If there were no copyright, no works would be created and therefore the public would be worse off.The most important quality of copyright, which allows it to deserve a different treatment to tangible property, is the fact that it is non-rivalrous. In short, intangible property deserves more protection because it is inherently fragile, in other words, subject to free riding. Since copyright is created to remedy a problem in the public interest, copyright is prevalent in comparison to competition. Not only the potential dominant position or monopoly, which a copyright can generate, is justified by the public interest but also because copyright is of limited length, the dominant position or monopoly is by nature limited in time. There will only be an abuse if the dominant position made possible by copyright is used against the public interest. Under economics of copyright, it is the maximisation of the public's welfare. The public's welfare is fulfilled when there are as many works as possible in the market. Thus, abuses will be situations when the copyright holder restricts the availability of new works on the market. This brings us to what the conditions of abuse of copyright.

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[25]AB Volvo v. Erik Veng, [1989] 4 CMLR 122
[26] IMS Health GmbH & Co. v. NDC Health GmbH & Co., KG (2002)

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