FICCI Suggestions

On

Draft National Competition Policy

Promulgated by

Ministry of Corporate Affairs

FICCI's RESPONSE

FICCI appreciates the efforts of Ministry of Corporate affairs in promulgating a draft National Competition policy that aims to foster greater innovation while also enhancing & preserving competition in the market. This comports with the overall objectives of other laws and policies including the Intellectual Property laws of India, which seeks to strike a balance between the interests of the IP right holders by granting them exclusive rights for limited time in exchange for their efforts in innovation and the interests of the consumers.

It is suggested that while working on the proposed competition policy, adequate care must be taken so to ensure that it does not conflict with the basic principles of the existing rules/regulations/Acts. The National Competition Policy should not introduce any provision/s or introduce interpretation of the statute in any manner so restrictive, that it goes against the legislative intent of the statute and/or the existing rules/regulations administering the same.

The preamble of proposed Competition Policy should be to foster and protect competition and not the inefficient competitors.

Inclusion of para 5.1(vi)[i] would have restrictive powers

Section 3(5) of the Competition Act exempts from its purview, the rights of the IP owner towards imposing **reasonable conditions** or restricting infringement. The term reasonable conditions have not been defined and hence left on the enforcers or the judiciary to decide what falls within the ambit of term "unreasonable" where Competition Act can be invoked. The unreasonable conditions may vary ranging from "imposing unfair pricing, limiting market access, and continued royalties even after expiry of IP rights, price fixing, rent seeking, territorial restrictions etc". Similarly, section 84(1) read along with section 84(7) of the Indian Patents Act mentions various circumstances such as non-affordability, non-availability, non-working, restrictive licensing conditions etc., where Government of India already has the right to judiciously intervene to decide on the matter of issuance of Compulsory license. Inclusion of para 5.1(vi) overly restricts the powers of the tribunals/boards/enforcers/judiciary/quasi-judicial bodies to adequately invoke Competition Act or Patents Act, only in cases, which do not deal with "IP as essential facility". This would go against the letter and spirit of various provisions embedded in different laws and regulations which aims to keep a check on the abusive practices.

It would therefore be worthwhile to have a competition policy as broad as possible by deleting reference to Intellectual property right holders from para 5.1(vi) from the draft Competition Policy.

Inclusion of para 5.1(vi) (IP as essential Facility) might lead to unnecessary litigations

Application of the "Essential Facilities" doctrine to IPR, as proposed in para 5.1(vi) would be inconsistent with patent law and contrary to its underlying policy, and also lead to unnecessary and costly litigation.

The Doctrine of Essential Facility finds its genesis from US, which was later adopted by many other jurisdictions albeit with certain modifications including UK, South Africa, European Union, Australia. This Doctrine was propounded in US when the need was felt to limit certain property rights, however this was applied quite narrowly by Judiciary which can be seen through the decision of United State Supreme Court in US vs Terminal Railroad of st. Louis Association by confining it to physical property. EC Competition Law also subscribe to the same restrictive measure through Sealink/B&I Holyhead where it was found that mandatory access to essential facility would be required in limited circumstances that such an excess was essential for competitors to enter downstream markets.

There have been many cases in various jurisdictions such as EU and US including the one recently decided by Indian Copyright Board where the doctrine of Essential facility has been used quite restrictively and in very exceptional circumstances by the Judiciary. Generally, those are very rare set of cases wherein the essential facility, over which IP owner, has a control cannot at all be duplicated and is essential to competition or where the facility over which owner has the control becomes essential ingredient for the very survival of the business of other. US Courts made it very clear in Verizon Vs Trinko that the cases pertaining to Essential Facility would be dealt with great skepticism. Many cases filed in EU and US courts on this count have also expressly been rejected (such as Alaska Airlines vs. United Airlines). The doctrine of essential facility has hardly been used to cover Intellectual Property Rights as is also apparent from Volvo decision in ECJ.

This aforesaid is clarified by following excerpts:

Decision of Indian Copyright Board in Music Broadcast Vs. Phonographic performance limited, *.....music is an* ***essential ingredient*** *for the* ***survival*** *of the radio industry as the industry is restricted to broadcast than any other kind of content*

Twin Laboratories Inc. vs. Weider Health and Fitness: *At the very least, a plaintiff must demonstrate that "****duplication*** *of the facility would be* ***economically infeasible****" and that "denial of its use inflicts* ***a severe handicap*** *on potential [or current] market entrants. As the word "essential" indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible. E.g., McKenzie, supra, 854 F.2d at 370; Driscoll, supra, 650 F.Supp. at 1530; Areeda & Hovenkamp, supra, ¶ 736.2, at 678-80.*

Volvo Decision in ECJ: "*the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject matter of its exclusive rights. It follows that an obligation imposed upon proprietor of the protected design to grant to third parties, even in return for a reasonable royalty, a license for supply of the products incorporating the design would lead to proprietor thereof being deprived of the substance of its exclusive right and that a* ***refusal to grant such a license*** *cannot in itself constitute an abuse of dominant position".*

Richard Whish, Butterworths, Fourth edition: ...*control of the infrastructure give rise to what*

is often referred to as a 'bottleneck' problem: that competition is impossible where one firm, or a combination of firms, can prevent others from operating on the market by denying access to a facility ***which is essential and cannot be duplicated.***

Sealink/B&I Holyhead: *Where access to a* ***facility is a precondition for competition*** *on a related market for good or services for which there is a limited degree of interchangeability*

or the case where ***duplication of facility is impossible or extremely difficult*** *owing to physical, geographic or legal constraint*

IP rights holder will already be in the ambit of the law if the patented products are part of an essential facility. Inclusion and expansion of essential doctrine facility to cover IPRs under the proposed Competition Policy might have negative impact on the Indian IP rights holders towards de-incentivizing them from innovating in certain areas that have the possibility of becoming essential facilities (like infrastructure) and that is precisely what the GOI does not need if India is to make a name for itself as an innovating hub for the world. Australian system, from which many good inspiration has come, doesn't not add IP into the ambit of essential facilities.

The aforesaid clearly reveals that the Doctrine of Essential Facility can be applied only in very egregious circumstances and therefore explicit mention of Intellectual Property as essential facility **without explicit mention of safeguards** might have **"One Size Fit All" effect** and may therefore trigger many baseless litigations thus causing load on Indian Judiciary which is already witnessing huge backlogs.

Keeping in view the aforesaid and so as to obviate broader application of Essential Facility doctrine, it is therefore recommended to delete reference specifically to IP from para 5.1(vi) in Indian interest.

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[i] Third party access to 'essential facilities', i.e. requiring dominant infrastructure and intellectual property right owners to grant access to third parties their essential infrastructure and platforms (e.g., electricity, communications, gas pipe lines, railway tracks, ports, IT equipment etc) on agreed reasonable and non-discriminatory terms and conditions aligned with competition principles.