Working Paper on Enforcement of Competition Law on Refusal to License of Intellectual Property Rights

Dr. Ravikant Bhardwaj

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School of Competition Law & Market Regulation, IICA

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ABSTRACT

Denial of access to essential IPRs to competitors and non-competitors has become grave concern in technology markets. The core issue lies at the classic debate to what extent dominant IP owners should be allowed to exercise their rights. When it will be deemed as abuse and ordered to share it with others in the market. The analysis is carried out by analyzing relevant Indian cases and comparing with that of the US and EU approaches. It is observed that there are commonalities and differences in US and EU approach. To some extent, US approach has favoured IPRs over competition concerns. In contrast, EU has carved out an approach, holding that when exceptional circumstances exist, refusal to license IPR can be considered as abuse of dominance. It is observed that that competition authority should consider exceptional circumstances such as absence of substitutes, objective business justification for refusal, effect on innovation in terms of new or improved product in the market and market structure after license in question for deciding nature of refusal to license for abuse of dominance. The objective of analysis should be 'what if' the refusal to license is allowed in the market. Innovation based markets are fast changing and have different economies of scale than traditional economy, however there is need to curtail anti-competitive activities in these markets also to sustain competition and promote consumer welfare.

Key Words: *Abuse of Dominance; Refusal to License; IPRs*

1. INTRODUCTION

An effective IPR protection may provide an enterprise with dominance in relevant market in some cases. Fundamentally, the purpose of IPRs is to limit competition from pirated goods and not from substitution. There has been an expansionist approach in subject matter of IPRs with development of new technologies which increases potential of IPRs to provide dominance. Patent protection is extended to gene sequences, software and business methods similarly copyright protection extended to software as well. However, lawful use of IPRs is not an abuse. Therefore, refusal to license *per se* is not abusive in itself, because a private property right cannot be used effectively without exclusivity. A patent is not only a monopoly right to patentee but it is desired that patented invention is manufactured at commercial scale.[1] Patent right should not be abused to restrain trade or international technology transfer.[2] Patented drugs should be available at affordable prices.[3] This conflict between IPRs and competition law is evident in TRIPs agreement. TRIPs is a multilateral agreement that concerns the international protection of IPRs so as to prevent any barriers in global trade. It provides that some licensing practices relating to IPRs may restrain competition and affect trade.[4] TRIPs allows its member countries to enact legislations to restrict anti-competitive activities to prevent or control any such licensing practices or conditions that may constitute an abuse of IPRs.

This study intends to analyse refusal to license IPRs and remedy under the Competition Act 2002. The analysis is carried out by analyzing relevant Indian cases and comparing with that of the US and EU approaches. It is observed that there are commonalities and differences in US and EU approach. To some extent, US approach has favoured IPRs over competition concerns. In contrast, EU has carved out an approach, holding that when exceptional circumstances exist, refusal to license IPR can be considered as abuse of dominance.[5]

2. Refusal to License of IPRs under Section 4 of the Competition Act 2002

Abuse of dominance provision is applicable on all enterprises. There is a very broad definition of enterprise under the Competition Act 2002. Every person and government department is covered in the definition of enterprise. Person includes individual to every un-incorporated and incorporated entity registered in India or outside in definition of person. So there is wide ambit of application of abuse of dominance.

1 Section 83 (b) of Patent Act 1970.

2 Section 83 (f) of the Patent Act 1970; See 2007-4-LW532, *FDC Limited and Ors. v Sanjeev Khandelwal and Ors.MIPR2007(3)139, 2007(35)PTC436(Mad)*, paragraph 19.

3 Section 83 (g) of Patent Act 1970; *Bayer Corporation v Natco Pharma Ltd.* MANU/IC/0108/2012.

4 Article 40 of the TRIPs agreement.

5 MANU/IC/0108/2012.

2.1 Relevant Markets in IPRs?

In order to determine the dominance of an enterprise and the abuse of dominance, it is first pre-requisite to determine relevant market. The dominance of enterprise or person is with respect to relevant market not otherwise. Defining the relevant market helps competition authority in identifying competitors, whether the activities of enterprise has anti-competitive effects on its competitors or not? If the market is defined broadly, then it is less likely that firm will have dominance on basis of IPRs, setting free the enterprise. If the market is defined narrowly, then it is most likely that firm will have dominance and burden to not to abuse its dominance which may lead to obstruction of legitimate use of IPRs. Therefore first step towards abuse of dominance analysis is defining relevant product market along with its geographical extent to ascertain dominance and their relevance to IP licensing cases.[6]

2.1.1 Product Market

The general concept of market has limited relevance under the modern competition law. Relevant market is market of actually competing products and services. The term product market is broader than the term product. It includes product as well as substitute of the product. The Competition Act 2002 defines interchangeable or substitutable products as

Identifying relevant market is the basis of analyzing competition. Without defining relevant market it is not possible to analyse appreciable adverse effect on the competition in the market. The factors which CCI is going to use are including physical characteristics or end-use of goods; price of goods or service; consumer preferences; exclusion of in-house production; existence of specialised producers; classification of industrial products.[7]

In a similar way product and relevant product market need not be same. A product market may be just part of whole product as in *Hilty* case. Spare parts may constitute a separate product from the whole product. So the product may be the initial point to start relevant market but definitely not end of it. In the leading case of MCX v. NSE, the CCI had commodity market in issue, however the product market was taken as whole secondary security market which includes various types of equity, debt and hybrid instruments. It is not the intended objective of product to satisfy consumer needs that determine it. Rather it is a competition oriented approach in

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6 Pitofsky, Robert. "New definitions of relevant market and the assault on antitrust." *Columbia Law Review* (1990): 1805-1864.

7 Dickson, Peter R., and James L. Ginter. "Market segmentation, product differentiation, and marketing strategy." *The Journal of Marketing* (1987): 1-10.

terms of the conditions of competition and structure of supply and demand of the market in issue. Therefore product and product market may vary.[8]

Hence substitutability of goods for intended objective plays a very important role in this regard. Therefore, legislation gives a broad guidance on determining relevant market of interchangeable goods. It poses a challenge for competition authority to devise a uniform standard of determining relevant market in different industries with different competitive dynamics. For instance, the relevance of patents in pharmaceutical sector has proved to be most important which is not the case in other technology area IP industry.

For instance EC has adopted narrow market approach in Hugin v. Commission that a spare part of a product could constitute a market that was separate from the main product itself. Similarly in *Hilti v. European Commission*, the ECJ accepted a relatively narrow definition of product market as proposed by the Commission. In this case the EC claimed that each part of gun (including of patented gun and cartridge strips, and un-patented nails) constituted a separate relevant market, and there was not one single market for such complex product. Consequently, Hilti[9], which was using its patented cartridges to tie in nails, was found to abuse the dominant position in the market of a particular part of the entire package. For instance, in the Magill case, the CFI found two different product markets for the TV listings itself, and the derivative market for the TV listing magazines. The ascertainment of narrow markets can result into ascertainment of relevant market on the basis of product. The CFI and ECJ held in Magill case that TC channels had dominant position.

Usually geographical market is geographical extent considered for competitive analysis of a product or service. It is the area with homogenous conditions. These conditions can be including: regulatory trade barriers; local specification requirements; national procurement policies; adequate distribution facilities; transport costs; language; consumer preferences; need for secure or regular supplies or rapid after-sales services.[10]

2.2. Dominant Position through IP

After having determination of the relevant market, the next step is to determine whether the enterprise occupies dominance in that market. Under Section 4 of the Competition Act 2002, an enterprise has a dominant position when economic strength enjoyed by an enterprise enables it

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8 Tierce Ladbroke SA v. E.C. Commission.

9 *Hilti* AG v *Commission* of the *European* Communities, C-53/92 P.

10 Section 19(7) of the Competition Act 2002.

to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.[11] It is very clear from the provisions of the Competition Act 2002 that it does not apply solely to monopolies only.

Dominance should not avert some competitors from the market. The objective of the law is to sustain competitive dynamics by which competition will develop. An enterprise is dominant only when it is acquiring or able to acquire large share of market. However the market share is not the only factor for dominance, rather in high-tech markets other factors are more important than market just market share. The other factors are including relevant factors for size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition; any other factor which the Commission may consider relevant for the inquiry.

The courts have applied principles of separating between an existence of an IPR and its exercise.[12] Lawful exercise of an IPR is not condemned under the competition law in any jurisdiction. It is strategic use to restrict competition in market which is anti-competitive. In the Volvo case, the proprietorship of a registered design is not of itself sufficient automatically create a dominant position in every case. When IPR owner exercises the rights deriving from his registered design and substitutable parts cannot be produced due to IP enforcement, there is no doubt that the manufacturer holds a dominant position in the relevant market in the spare parts for which he registered the design. The Advocate General's opinion could be interpreted as stating that both the existence of an IPR and its exercise may not amount to the enterprise

[11] Michelin v. Commission, Case 322/81.

[12] *Hoffmann*-La Roche & Co. AG *v Centrafarm* Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH. EUR-Lex - 61977CJ0102.

holding a dominant position, unless the enterprise effectively prevents competitors from making "substitutable" products available to consumers.

2.3 Abuse of Dominance through IP

Mere holding a dominant position is not abuse in itself. Rather dominant enterprises have duty not to carry our certain activities which are abusive of market. The concept of abuse is relating to the behavior of an enterprise in a dominant position which is such as to influence the structure of a market. Due to activities of firm, the competition is distorted by way of activities which will not happen in absence of dominance.

In the *Volvo* case[13], the court said exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited as abuse of dominance if it involves, on the part of an enterprise holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at unfair level, or decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between member states.

India has experienced three very important cases in relation to refusal to license IPRs: *MCX v. NSE,*[14] *Natco v. Bayer*[15] and *HT Media v. Super Cassettes Industries Limited.*[16] These cases have common fact that a voluntary license was sought by the potential competitor and request for license was refused by the patent holder. Interestingly *MCX* and *HT Media* cases are dealt by CCI and Natco case is dealt by the Patent Controller of India. There are two remedies available to deal with refusal to license. It is important to examine which remedy is most suitable for refusal to license. There is a factor of excessive pricing also in *Natco* case. Refusal to license and excessive pricing are two issues which need attention in case of abuse of dominance through IPRs. The Draft National Competition Policy, 2011 of India includes fair pricing as its one of

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13 Volvo v. Veng C238/87

14 CASE NO. 13/2009.

15 MANU/IC/0108/2012.

16 CCI, Case No. 40 of 2011.

general principle.[17] When a dominant enterprise in a relevant market is involved in such abusive pricing, it is an abuse of dominance.

In the case of *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.* case[18] the issue was denial of access to source code of software. The NSE, a major stock exchange in India, refused to share commodity derivative (CD) segment Application Programme Interface Code (APIC) with Financial Technologies India Ltd. (FTIL) which produces ODIN software. As a consequence, it denied ODIN users access to the NSE Commodity Derivative (CD) segment trading platform through their preferred mode. The unique feature of ODIN software was that a trader could deal with multiple markets through same trading terminal and make transactions. So, the NSE's refusal was likely to hamper trading. The Director General (the investigating authority under the Competition Act 2002) considered the whole stock exchange business as one relevant market. The market share of the NSE was considered to ascertain dominance of NSE in relevant market. The potential competition outside the market and the extent of entry barriers such as IPRs and access to supply and distribution were considered. It was observed that overall the NSE had a 73 percent market share.

CCI stated in MCX case under Indian Competition Act 2002, there is no general duty on the intellectual property owner to license intellectual property to third parties. But in exceptional circumstances some facilities may be part of infrastructure. In case of those essential facilities competition authority for promotion of innovation and competition order a party to compulsory license its product. One aspect of exclusivity is the option to license or not. In some instances only the dominant enterprise has relevant technological information required to make a product, for instance inter-operability information with other products. In such cases if dominant firm refuses to supply the required information to other firms, the ground denial of access is met to cause abuse of dominance. In these cases IPRs can be used to deter others from using information. In other cases spare-parts can be supplied by a source other than original manufacturer of the product, a dominant firm can prevent by not supplying it and exercising IPRs over it to prevent others making or supplying it. The criteria of denial of access are satisfied. If the dominant firm chooses to license it to other enterprises on reasonable terms

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17 Paragraph 5.1 (v) of Revised Draft National Competition Policy, Ministry of Corporate Affairs, Government of India available at http://www.mca.gov.in/Ministry/pdf/Revised_Draft_National_Competition_Policy_2011_17nov2011.pdf (last visited Sept 5 2013).

18 2011CompLR0129(CCI), [2011]109SCL109(NULL).

then it will be not be abuse of dominance. If the IPR owner is a monopolist or dominant player holding infrastructure facility in market, he has the duty to license the intellectual property to competitors. In that case refusal to license will amount to an anti-competitive practice[19]. No duty to license in case of non-competitors.[20] Analysis often applied in determining whether a party's refusal to deal violates competition laws is: whether refusal represents a change in an established pattern of dealing undertaken with the intent to destroy competition.[21]

Requirement for refusal to license is that a sufficiently clear request is made for the provision of required information or product. The request will be sufficient even if it is wider in certain respects than what is found to be abuse of dominant position. A request for information constituting an essential facility need not specifically demand a license under the dominant undertaking's IPRs to use it. A response to such a request must be examined in context of identity of proposer, extent of his knowledge of the technology concerned and approach followed by the dominant undertaking. If the dominant firm's behaviour in a downstream market does not have the goal of strengthening its position in primary market, then there is no business justification for it. If the activity in downstream market is protected by IPRs there is no general duty to license IP to open up the downstream market. Leverage can be considered anti-competitive only when there is a possibility of restriction on creation of a new market.

In *MCX* case, IPRs in software were also considered for entry barrier analysis. The resources, consumer dependency, entry barrier were considered and the NSE was ordered to give access to its software by the CCI, considering the essential facility nature of its platform software.[22] The CCI discussed whether the market has to be related to the upstream market to establish leveraging of dominance. CCI held that refusal to license in this case was refusal to license and NSE was ordered to give access to source code of its software and pay fine for abuse of dominance. The approach of CCI in this case relating to refusal to license is a milestone in competition jurisprudence.

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19 James B. Kobak, Jr., Intellectual Property, Refusals To Deal and The U.S. Antitrust Laws, Intellectual Property Antitrust 2005; *Aspen Skiing Co.* v *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); Oahu Gas Serv. Inc. v Pacific Resources, Inc., 838 F.2d 360, 368 (9th Cir. 1988).

20 Smile Care Dental Group v Delta Dental Plan of California, Inc., 88 F.3d 780 (9th Cir. 1996).

21 Byars v Bluff City News Co., 609 F.2d 843, 855 (6th Cir. 1979)

22 Essential facility is an infrastructure facility which is indispensable for competitors. Essential facility principle evolved under US competition law and European competition law.

In the recent case of *HT Media v. T Series* case, the issue of excessive royalty in relation to IP products was discussed. HT Media Ltd. has the Fever 104 FM radio channels in Delhi, Mumbai, Bangalore and Kolkata. It filed information to CCI against Super Cassettes Industries Ltd (SCIL) for excessive royalty charges. Investigation by the Director General investigated revealed that SCIL is a dominant enterprise and abusing its position in relevant market. T-Series has around 50 per cent market share in the radio music industry. HTM alleged that T-Series was abusing its dominant position by not following the two per cent royalty ruling of the Copyright Board and that the music major was charging the same old rate of Rs 660 per needle hour, four times higher than the two per cent rate. CCI observed that Minimum Commitment Charges (MCC) upon the private FM stations in its existing agreements is excessive and unfair. The fine of Rs 2.83 crore which is eight per cent of Super Cassettes' average turnover of three financial years starting from 2008-09 fiscal was imposed on SCIL. In this case royalty rates set by Copyright Board are considered as reasonable royalty rates. Charging above rates set by Copyright Board significantly is held anti-competitive. This case is a best illustration in an Indian scenario with respect to interface between IP and competition.

A refusal to license IPR *per se* is not anti-competitive. An obligation to license would hamper extent of exclusive rights of IP owner.[23] A dominant firm cannot be permitted to create the monopoly in the market by controlling the ancillary and incidental markets. In exceptional circumstances refusal to license can be abuse of dominance. The Competition Act 2002 imposes extra duty on dominant enterprises to not to abuse their position. Dominant position is position of strength of an enterprise to act independent of market forces or adversely affecting market, competitors or consumer in its favour. In India a four steps approach for ascertaining abuse of dominant position is followed. First of all, the entity should be an enterprise or a group of enterprises connected with each other. The second step is to define the relevant market. The third step is to ascertain whether the company has dominance in relevant market. The fourth step involves determining abuse of dominance. Corresponding provision in US Sherman Act is Section 2. It regulates two types of activities: to monopolise or attempt to monopolize, combine or conspire with another person. Offence of monopoly has two aspects: possession of monopoly in the relevant market and willful acquisition or maintenance of power distinguished from growth or development due to better product, business acumen or due to historic accident.[24] Mere possession of monopoly power is not sufficient to trigger competition violation.

23 Microsoft v Commission, T 201/04 Section 289.

24 US v Grinnell, 384 U.S. 563, 570-71 (1966).

A firm, who has already acquired significant strength and adopts anti-competitive strategies to maintain and enhance dominance in the relevant market. Market power assessment has a fundamental role in abuse of dominance establishment. More market power has more potential of creating monopoly so serious consequences of firm conduct. Practice of US competition law indicates that too much emphasis on unfairness of conduct and lesser emphasis on market power may result into protecting inefficient businesses.

3. Whether Grant of Access of IP is Possible under the Competition Act 2002

The Competition Act 2002 do not provide expressly for grant of access as a remedy for abuse of dominance through refusal to license. However, there are some provisions which indicate that there may be possibility of access to IPRs within the existing framework also. Section 4(2)(c) of the Competition Act 2002 provides that denial of market access by dominant enterprise may constitute abuse of dominance. Market access to IP protected product and licensing may also be included in this provision. Under Section 27 of the Competition Act 2002, CCI has power to direct enterprises and person involved in abuse of dominance to discontinue and desist from it in future. Under Section 27 (g) of the Competition Act 2002, CCI has power to pass an order as it may deem fit, this is the power which may be used by CCI to provide access to IPRs to avoid abuse of dominance in exceptional cases. However these provisions do not guarantee the grant of access to IPRs through these provisions.

4. EU APPROACH TOWARDS REFUSAL TO LICENSE

Under Indian competition law, compulsory licensing of IPRs is not clear so the practice of other jurisdictions is analysed to know how compulsory licensing is undertaken through competition law enforcement. European Courts have imposed duty to license IP in exceptional circumstances. Long term economic incentives and contractual freedom principles play a major role when determining the exceptional circumstances. Recently Magill and IMS health Cases are leading cases on refusal to deal in EU. Only few cases have been decided on compulsory licensing through competition law at EU level in Europe. Most of the cases have come up with the new criteria. Liberal approach towards IPRs has been replaced by more interventionist approach in these cases.

In the *Magill* case, TV channels were denying access to their weekly schedule of programmes to a magazine which was dependent upon these schedules for development of complete catalogue for all channels. This schedule was such a product which was not in existence in market neither provided by copyright owner (TV channels) or by anybody else. There was a kind of vertical relationship between the copyrighted product and the new product. The downward stream market was hampered by the refusal of TV channels. The restriction on downstream market can be relevant only in a case where there is a possibility of restriction on competition in downstream market. Harm of downstream market is more harmful to competition than only refusal to license, because, generally, IP owners have right to deny access to their IPRs through licensing. In the *Magill* Case*,* the EC held that an unjustified refusal to deal is anti-competitive, where the IP owner holds an essential facility in an industry. Competitors cannot survive in the relevant market without access to this facility, then it may have a duty to license it to license seekers.[25] The strength of this case is that it considered the fact dominant firms should not take its dominance from one level to other and extend monopoly from one market to other through exercise of IPR.[26] In the *Magill* case, a three factor test was evolved. These factors are refusal relates to indispensable facility in downstream market, refusal will significantly harm competition in relevant market and a new product could not be developed due to such refusal. The strength of the principle laid down in this case is that it considered innovation as an important constituent of competition. The weakness of this decision is that scope of exercise of IP rights was limited in this case.

In the *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs*[27] case, though IP factor is not significant but compulsory licensing factors are important for IP also. There was a newspaper which had large market share and had its own distribution chain to circulate newspaper door to door. Other newspaper with small market share could not individually or in cooperation with others was not able to maintain supply chain for door to door service. European Court held that this refusal to access is not abuse of dominance. Distribution chain dominant enterprise is not indispensable. There can be other mode of selling paper such as through shops or through post. Commercial hardship to an enterprise is not ground of compulsory licensing. There must be existence of exceptional circumstances. Magill principle diluted to some extent in later cases such

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25 Alaska Airlines, Inc. v United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991).

26 MCI Communications Corp. v AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983); United States v Terminal R.R. Ass'n, 224 U.S. 383 (1912).

In US four factor test is developed to impose duty to license essential facility to the dominant player. Here the question arises what if the company holding essential facility is not a dominant company then what would be the situation.

27 Case C-7/97, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997J0007:EN:HTML (last visited Sept 8 2013).

as the *Tierce Ladbroke* case.[28] In the *Microsoft* case, technical development along with new product and markets was taken.

The *Oscar Bronner* rule was extended further in the *IMS Health*[29] Judgment. IMS Health is a market research company which provide pharmaceutical sector data all over the world. IMS Health arrange its report according to geography in a brick structure. In this case 1,860 brick structure databases relating to information on pharmaceutical sector was built by the IMS Health and some other pharmaceutical firms. IMS Health brought action for violation of its copyright by AzyX and NDC companies. The Commission considered whether the developing similar database was indispensable. It found that it is difficult due to technical and legal reasons to develop substitute to IMS database structure. The Commission held in this case that IMS Health has improved database over a long period of time and now it is using it for restricting competition in market. It is abuse of dominant position. The strength of EC's approach in these types of abuse of dominance is to promote openness and giving access to competing firms to promote competition in market. ECJ re-iterated that there is no general duty to license but exceptional circumstances may force access to refused IP. IP must be indispensable for the product for which license is sought. Three conditions must be satisfied: refusal must prevent the emergence of new product for which there is potential consumer demand; unjustified refusal; it must exclude competition on a secondary market. In *IMS Health* and *Microsoft* cases, there were similar issues of development of new product into the market.[30]

Several factors have emerged in cases to impose duty to license essential facility to the dominant player.[31] The strength of the US and EU cases is that they provide a framework for dealing with refusal to license cases. The factors used by these courts can be considered by other jurisdictions also according to facts and circumstances. The weakness of EU and US cases is that there is no uniform criteria developed in these cases. There is inconsistent approach of courts in this regard. For example in *Microsoft* case in EU, possibility of development of new product is not

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28 Tierce Ladbroke SA v Commission, Case T-504/93, 1997 E.C.R. II-923, 5 C.M.L.R. 309 (1997).

29 [2004] ECR I-5039.

30 IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG. , Case C-418/01, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=62001J0418&lg=en (last visited Aug 27, 2013); Microsoft, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39530 (last visited Aug 27, 2013).

31 MCI Communications Corp., 708 F.2d at 1132-33; Metronet Services Corp. v US West Communications, 2003 WL 1618668 (9th Cir. March 31, 2003).

considered. A new criterion of incentive balance test was evolved. CCI can consider these factors for considering cases of refusal to license. These factors are: control of essential facility in downstream market;[32] lack of availability of substitutes;[33] denial of access should cause severe hardship to the competitor by refusal, this hardship should be more than inconvenience or economic loss;[34] unreasonable terms;[35] No business justification.[36] In *IMS Health* case, Court established a four factor test to establish abuse. Later in Microsoft case, the court significantly relaxed the criteria of abuse. The challenge for competition law is to establish a predictable framework to create deterrence on anti-competitive activities. Exceptional test have been redefined, these hardly seem to have determinate meaning. It could be inferred that it left to the court discretion to decide abuse of IP on case to case basis. Main weakness in above discussed cases is that in same circumstances also there is inconsistency in enforcement of competition law.

Use of IPRs itself does not cause abuse of dominance because IPRs are right provided by legislation to IP owner. *In Volvo v. Veng*[37] related to design rights in car spare parts, it was held that the right-holder's ability to prevent third parties from exploiting his design is the subject-matter of his exclusive right. A refusal to grant such a license cannot in *per se* constitute an abuse of a dominance. A mere refusal to license no matter how selfish or unjustified, is therefore not enough to give rise to abuse of dominance. There is need of plus factor to be shown. In order to amount to an abuse of dominance, the ECJ requires the refusal to license coupled with certain abusive conduct such as arbitrary refusals to supply original spare parts to independent repairers, fixing prices of spare parts at unfair levels and discontinuing production of spare parts for car models that were still in circulation which in usual circumstances will be done. But enterprise is doing so just to limit competition in market not to increase its revenues. A refusal to license can be abusive in the circumstances where refusal prevents others from using certain information or products subject to the right, denial of essential facility, restriction on competition in neighbouring markets, a new product is prevented from appearance in market and the refusal is

32 Alaska Airlines, 948 F.2d at 544.

33 Fishman v Estate of Wirtz, 807 F.2d 520, 540 (7th Cir. 1986); Jamsports and Entertainment LLC v. Paradama Productions, Inc., 2003 WL 1873563 at 10-11 (N.D. Ill. April 15, 2003); Corsearch, Inc. v. Thomson & Thomson, 792 F. Supp. 305 (S.D.N.Y. 1992).

34 Alaska Airlines, 948 F.2d at 544 (quoting Twin Lab., Inc. v Weider Health & Fitness, 900 F.2d 566, 569-70 (2d Cir. 1990).

35 United States v Terminal R.R. Ass'n, 224 U.S. 383, 411 (1912).

36 MCI, 708 F.2d at 1132-33

37 Case 238/87 *AB Volvo v Erik Veng* [1988] E.C.R. 6211; [1989] 4 C.M.L.R. 122.

not justified on basis of business acumen. The strength of this judgment is that IPRs are considered similar to other private property relating to refusal to deal except in case of denial appearance of new product in the market.[38]

4.1 Essential Facilities Doctrine

When a product or information is indispensable for the competitors, due to technical, legal or economic hurdles and other firm cannot stay in market without it.[39] Generally, essential facility criteria do not apply to product which are not supplied earlier, even if it is easier to show that supply of product is indispensable.

To sustain in market, a competitor's product in the neighboring market may have to inter-operate with the dominant undertaking's product in the main market on a level playing field with dominant undertaking's products. If a firm's product is used in conjunction with dominant firm's products which is like a standard then in that case higher level of inter-operability is required. If other firm can sustain on market without access to dominant enterprise's goods or service then in that case the product is not indispensable. Where competitors are gradually being eliminated, in that case, dominant firm's product will be deemed indispensable.

The upstream market of dominant enterprise's product need not be marketed separately, it is sufficient to ascertain to be able to identify a hypothetical market by the existence of a demand for the upstream product or information on the part of undertakings seeking to carry on business in the downstream market. Upstream product should be indispensable for downstream product. This refusal by the dominant firm should exclude competition in the downstream market.

In EC approach, it is observed that there has been changing criterion for abuse of dominance due to refusal to license. Exceptional circumstances evolved by EC can be useful for CCI in dealing with refusal to deal cases. Existing or potential alternative in the relevant market is a constituent factor for exceptional circumstances. In a situation there is no alternative where there are not available even less advantageous products. There are technical, legal or economic barriers causing it impossible or at least unreasonably difficult for any enterprise or person intending to deal in the relevant market to create, possibly in alliance with other enterprises, the alternative products or services. In order to accept the existence of economic obstacles, it must

38 Volvo v Veng C-241.

39 Microsoft v Commission T-201/04 page 229.

be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the enterprise which controls the existing product or service.[40] If a product or service which has become standard in the relevant market is more likely to be ordered to be licensed. If the user or customer has contributed to the development of product is a relevant factor. Whether consumer will accept product without that IPR protected product or not. The economic and legal viability of development of alternative is based on the cost factor, without using IPRs. What will be economies of scale of new product? Whether there will be organisational and financial impossibility in developing alternative without IPR licensing are the aspects relating to competition which make the circumstances exceptional.[41]

New product approach with respect to refusal to license is evident in Magill case. Prevention of new product, limiting production, markets or technical development to the prejudice of consumers can be abuse of dominance. A product is new if the alternative of that product is not provided in the market by the owner or authorized person of IPR owner.[42] A weekly television guide covering channels of different broadcasters was considered as new product. Concept of IP is determined to facilitate development of new products. Therefore, if refusal to license restricts a new product in the market, it is anti-competitive under competition law. If there is a me-too product then IP owner has every right to restrict licensing. Technical development of a product is restricted when consumers are forced to use only homogenous product. Consumer interest is harmed when the better alternative products are forgone because these products are not inter-operable with dominant firm's products.[43] Consumers are harmed when alternative suppliers are discouraged from developing products with innovative features because the dominant firm in the market holds artificial advantage in terms of inter-operability.

IP protection is not an objective justification for refusing to make it available to competitors. A significant impact on dominant enterprise's incentive to innovate, if technology constituting an essential facility was disclosed to competitors, may constitute an objective

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40 *Bronner Case paragraph* 43, 44 and 46.

41 The Brick structure in the *NDC Health* v. *IMS Health* case had become standard due to its free access provision by the IMS Health. In this case, exceptional circumstance was development and exclusionary use of IMS database as a standard. Refusal to a standard without any business justification is abuse.

42 IMS Health v. NDC Health Judgment ECJ COMP/C-3/37/.792.

43 Microsoft v Commission T-201/04 S. 650.

justification for withholding it.[44] Under the abuse of dominance practices, the existence of a valid business reason is an exception to the rule. If there is a valid business reason behind a practice, it could not be anti-competitive.[45]

4. US Approach Towards Refusal to License

There has been a practice in US since *Continental Paper Bag v. Easter Paper Bag*[46] case that IP owner has no obligation to use its IPR at all. There is a codified principle in US law under Section 271(d)(4) of the Patent Act provides that a patent owner cannot be held guilty of misuse of patent by virtue of its refusal to use or license the patent. Similarly in case of copyright also it is established that copyright owner can refuse to license its copyright.[47] In certain cases later, it is held that unused patent right can be used to get damages, not for getting injunction.[48]

US has long established history of compulsory licensing in case of refusal to license. General principle followed in US is that there is no general duty to license. The duty may arise only when the company is a dominant enterprise. Generally, in US jurisprudence, access through competition law in case of refusal to license applies only to competitors, not to the non-competitors.[49] There are three major areas to examine whether there is violation of competition law in refusal to license or not. The first one is a change in pattern of dealing as it was in competitive market.[50] There should be a business reason for the change.[51] It should be done only to exclude the competitors out of market. Second is the extension of dominance in one market to other market as basis of refusal. Third, if a firm refuses to share an essential facility with its competitors, it amounts to unlawful refusal to license.

There is *per se* legality of refusal to license. In US, first case on refusal to license is *Data General Corporation v. Grumman Systems Support Corporation*[52] holding that unlawful exclusionary conduct include a dominant enterprise's refusal to license a copyright. Though refusal to license

44 Oscar Bronner v. Mediaprint [1998] ECR I-791, para 58.

45 Xerox and Kodak cases.

46 210 U.S. 405 (1908).

47 Orson Inc. v. Miramax Film Corp., 189 F.3d 377 (3d Cir. 1999).

48 eBay v. MercExchange 2006.

49 SmileCare Dental Group v. Delta Dental Plan of California, Inc., 88 F.3d 780 (9th Cir. 1996); Interface Group v. Massachusetts Port Authority, 816 F.2d 9, 12 (1st Cir. 1987).

50 As in Aspen Sking case the dominant firm changed the distribution pattern without any justification.

51 Eastman Kodak Co. v. Image Technical. Service Inc., 504 U.S. 451 (1992)

52 36 F.3d 1147 (1st Cir. 1994).

is a valid business justification to protect interest of consumers but is subject to rebuttal. One ground of rebuttal is that dominant enterprise has acquired IP unlawfully. In later case of *Image Technical Services Inc. v. Eastman Kodak Company*[53] held that Data General rule applies to both patents and copyright. Court considered in this case that presumption of legality could be considered on the basis of anti-competitive intent on the part of IP holder in refusing to license. In this case, sixty five parts out of more than a thousand parts were covered by patents and Kodak never enforced its IP rights against infringement. *Data General* case rule was further followed in *CSU v. Xerox*.[54] Approach in these cases was based upon scope of IPRs. This approach has been given up in recent cases. In *Xerox case*[55] it was held that unilateral refusal to license can be anti-competitive if the firm is involved in illegal tie-in sales, acquisition of patent by fraud or patentee entered in litigation with intention to harm his business. In *Trinko* case, company's incentive to maintain long term incentive was main argument.

In *Verizon Communications Inc. v. Trinko, LLP*, [56] Supreme Court relied on three main arguments: maximizing firm's freedom to act and to use their property as they choose is pro-competitive since it induces firms to invest and innovate; courts are in principle unequipped to determine the terms of dealing; compelling negotiation may facilitate collusion. Mere possession of dominance and excessive pricing is not only lawful but part of free market system. Dominance is not unlawful unless it has anti-competitive component. In context of IPRs application of Trinko case is that if there is no duty to deal without IPRs, existence of IPRs will not impose obligation to license. US Supreme Court with line of arguments advocate the theory that monopoly is pro-innovation.

It is not necessary that refusal to license should be initial refusal only. It can be refusal to existing licensee also. Changing terms of licensing to make it difficult for licensee to proceed with the license on changed terms is also refusal to license. A change in pattern of dealing was considered as the basis of unlawful refusal to license. But, the intention to monopolise is not sufficient for treating it as refusal to license. There should be adverse impact on competition as well.[57] In this case of the *Aspen Skiing* US Supreme Court construed narrowly by stating that the change in pattern of dealing applies to instances where there is a prior history of dealing between the

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53 125 F. 3d 1195 (9th Cir. 1997).

54 203 F. 3d 1322.

55 CSU v. Xerox Corp, 203 F.3d 1322 (Fed Cir 2000).

56 540 U.S. 398 (2004).

57 Byars v. Bluff City News Co., 609 F.2d 843, 855 (6th Cir. 1979).

parties. In *C.R. Bard Inc. v. M3 System Inc.*,[58] it was held that change in the design of a medical device was not motivated by business purpose, by the intention to monopolise in the market, it was not to enhance the quality of product. In case of complementary products, change in design to make it non-compatible may be anti-competitive. This case poses a question whether the change of product design within the ambit of patent claims can be anti-competitive or not. Patent law does not protect product designs. Therefore change in product design should be seen irrespective of whether it is within patent claims or outside it. In *United States v. Microsoft Corp.,*[59] it was held that anti-competitive effect of refusal to license should be basis for antitrust liability. Therefore, there is an increasing trend towards using the stricter rule of reason approach in the US. Refusal to license can be justified to avoid the free riding.[60]

In the above discussed cases, there are few factors emerged which can be used for abuse of dominance through IPRs in India. The relevant considerations in US are possibility of development of new product, effect on innovation in market, balancing incentives of IP owner and market, intention to monopolize market and dynamic competition considerations.

5. Comparative Analysis of EU and US Approaches

In EU, Article 102 of the EC Treaty expressly state that abuse of dominance by one or more undertakings within the common market or substantial part of it is prohibited. Similar to Indian definition, a dominance has been defined as a position where a company has a position of strength on a certain market that it can act without taking into consideration how competitors and customers will respond to its strategies and how consumers will be ultimately affected by it. The concept of independence in the relevant market is most significant for dominance. Other factor of dominance in EC law is to prevent effective competition in the market.[61] Dominance and abuse are inter-linked concepts though they are different from each other. For abuse dominant position is pre-requirement. Abuse happens when dominant enterprise has already distorted competition in the market.

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58 157 F.3d 1340 (Fed. Cir. 1998).

59 253 F.3d 34 (D.C. Cir. 2001).

60 Trans Sport, Inc. v Starter Sportswear, Inc., 964 F.2d 186, 190-91 (2d Cir. 1992); Abcor Corp. v AM Int'l Inc., 916 F.2d 924, 929-30 (4th Cir. 1990); Morris Communs. Corp. v PGA Tour, Inc., 364 F.3d 1288, 1295-1296 (11th Cir. 2004)

61 Damien Geradin, Paul Hofer, Frederic Louis, Nicolas Petit & Mike Walker, The Concept of Dominance in EC Competition Law, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=770144.

To consider the guidance from EU and US competition law it is necessary to analyse common and differing factors in competition law of these jurisdictions. Similarity and differences in EC, India and US Competition law are that these provisions deal with unilateral conduct of an enterprise. In all jurisdiction market power to certain degree is relevant factor. Despite these similarities, there are various differences also. A very important difference as it appears from language of statute and case is that dominance itself is not wrong under EC and Indian competition law. It is first prong to analyse abuse. Therefore, attempt claims cannot be pursued in EU and India. Second, most important difference between EU, Indian law and US law is that US law considers intention as important constituent competition law violation. In contrast, Indian and EU competition laws do not consider intention as a relevant factor for competition law violation.[62] In EU, an enterprise may justify its conduct on the basis of meeting losses and competition.[63] In contrast in US law, a conduct can be justified on the basis of extension of benefits to consumers. Balance of pro-competitive and anti-competitive effects is in favour of consumers. In European competition law, objective justification in an exception but in US law, showing efficiency effects is rule. US Competition law examines output restriction and price effect as immediate harm to consumer interest.[64] Actual proof of consumer welfare is not required. In EU law, it focuses on consumer welfare, market structures in market for healthy competition.

EU and Indian competition law has list of activities which amount to abuse of dominant position. The list of activities is not exhaustive. Generally, EU and Indian competition law agency tries to fit into specified categories of abuse. US law does not provide any list of activities in its legislation, it has activity specific approach. The provision is quite broad in nature. Refusal to deal is control of one resource by a person or enterprise, whether tangible or intangible, whose access is *sine qua non* to compete in certain market or separate but related market. Enterprises may take advantage of strategic position and use it to make dominant position in the market. It is accepted fact in US that refusal to deal may amount to abuse of dominance.

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62 Hoffmann-La Roche v Commission [1979] ECR 461, para. 91; Compagnie Maritime Beige Transports and others vs. Commission, [1996] ECR II-1201, para 149.

63 Atlantic Container Line AB and Others v Commission, Joined cases T-191/98, T-212/98 to T-214/98, [2003] ECR II-3275, para. 1113.

64 Eleanor M. Fox, What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect, 70 Antitrust L.J. 371 (2002).

In US, in case an enterprise has exclusive control on a certain essential facility which is indispensable to provide a new product or service and such enterprise refuse access to that facility to its competitors, that activity will be framed as abuse of dominance or as an attempt to monopolize depending on the intensity of market power held by the undertaking.[65] However, in refusal to deal cases an enterprise may be active in two markets and that the allegedly exclusionary behaviour is aimed at monopolizing a distinct market where the enterprise has not a position of dominance. An example is where an enterprise producing both printers and compatible cartridges that engage in exclusionary conduct in the cartridge market where it does not have dominance. Such conduct is often shaped as an attempt to monopolize.[66] It may also happen that the dominant enterprise has dominance in both markets.

European refusal to deal jurisprudence is different from US. In EU and Indian competition law, existence of dominance is the central point of analysis of refusal to deal. Imposition of duty to deal with third party in all cases is not desired by competition law. It will be violation of freedom of contract principle. It is crucial to note when there is duty of dominant firm to deal. General rule is that there should be duty to deal only refusal will distort competition in market. There are various cases in EU and Indian jurisdiction where competition authorities have evidenced leveraging of dominance in one market to other market.[67] European Commission acknowledges that abuse of dominance effects can extend to other market where dominant enterprise does not have dominance.[68] It first focuses on market where enterprise has dominance, once it is established that firm has dominance in one market then it analyse after-effects on secondary market. European competition law envisages a leverage of dominance in one market to other market. Due to this methodology, European Commission tries to dissect markets into upstream market and downstream markets.[69] As observed in *IMS Health* case, EC tries to divide markets even when there is only one market.[70] The difference between US and EU approach is that US law does not require prior dominance. If there is possibility that market

65 Aspen Skiing Co., 472 U.S. 585.

66 Image Technical Service Inc. v Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997); In re Independent Service Organizations Antitrust Litigation, 203 F.3d 1322 (Fed. Cir. 2000); Spectrum Sports Inc., 506 U.S. 447.

67 MCX v. NSE, http://indiankanoon.org/doc/146642883/ (last accessed Jul 5. 2014).

68 Istituto Chemioterapico Italiano and Commercial Solvents v Commission [1974] ECR 223, para. 22.

69 Centre belge d'études de marché – Télémarketing (CBEM) v S.A. Compagnie Luxembourgeoise de Télédiffusion (CLT) and Information Publicité Benelux (IPB), [1985] ECR 3261, para. 27.

70 IMS Health Case, C-418/01.

power will be achieved due to conduct, it will be enough to be covered under Section 2 of Sherman Act. US refusal to deal jurisprudence ignores strategic power that an enterprise might hold in an upstream market where it is dominant, believing that achieving market power will not be easy practically.[71] In contrast, in EU if an enterprise is proved dominant then, proving leverage becomes easier. It is concluded through analysis various cases such as *Magill Case, IMS Health* Cases that there are certain factor which cause dominance on the basis of IP. These are where an IP protected product is indispensable for development of new product, there is no alternative available and refusal is unjustified then in that case IP is the constituent factor for dominance. In absence of IP, the enterprise would not be able to exercise market power, it is due to IP right only the enterprise is able to exercise market power. In some cases creating IP protected product as a standard for industry by unfair means create market power.

6. CONCLUSION

Intellectual property rights are inevitable for markets. Refusal to license *per se* is lawful right of IP owner. Competition law does not condemn refusal to license *per se.* However it is clear from the past experience that unrestrained IPRs owners would be more likely to abusing their rights and thereby harming consumer and competitor interests. In exceptional circumstances, competition law intervenes and may order for compulsory licensing.

There is need to amend the Competition Act 2002 to include access to IPRs to remedy abuse of dominance cases under Section 27 of the Act for better clarity of concept. There should be effective channel to deal with anti-competitive concerns in the compulsory licensing cases by patentee. Section 21 of the Competition Act 2002 is not adequate enough to facilitate inter-authority communication in this regard. EC and FTC cases have shown approval of essential facility doctrine in some of the leading cases like Magill, IMS Health, Microsoft and Tierce Ladbroke cases. The experience of the these jurisdictions shows that competition authority should consider exceptional circumstances such as absence of substitutes, objective business justification for refusal, effect on innovation in terms of new or improved product in the market and market structure after license in question. The objective of analysis should be 'what if' the refusal to license is allowed in the market. Innovation based markets are fast changing and have different economies of scale than traditional economy, however there is need to curtail anti-competitive activities in these markets also to sustain competition and promote consumer welfare.

71 U.S. v Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

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