ANTI-COMPETITIVE TECHNOLOGY TRANSFER AGREEMENTS IN LIGHT OF FLEXIBILITIES PROVIDED UNDER TRIPS AGREEMENT

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1. Introduction

Intellectual Property Rights are negative rights and thus give right holders the power to exclude others from using the product without the consent. In this light, holder of IP can enforce his rights in a better manner if protection of IP is stronger; i.e. holder can reach larger market. Market expansion depends upon transfer of technology to a large extent. There are views on both sides that extensive IP protection may promote or hinder transfer of technology as Carlos Correa contended that extensive protection of IP under TRIPs agreement would increase market share of right holder which in turn would allow them to act in abusive manner thereby restricting technology transfer specially to poorest countries.[1] This study also indicated that patent policies do influence technology transfer to emerging countries negatively and is limited to patent sensitive industries.[2] Any multinational company before transferring technology to a country would look at the not only IP protection regime of that specific country but also other measures like investment environment, market structure and government policies etc. Moreover, such company even if agreed to transfer such technology could place restrictive terms and conditions for its application which could harm the interests of importing country. Multinational companies holding relevant technologies negotiate the transfer of technology via commercial agreements. Such agreements on the one hand, provides opportunity for developing countries to gain access to technology and on the other hand, can impede the competition on technological front, if not controlled by appropriate measures. Anti-competitive practices can prevent consumers of developing countries from accessing the technology at affordable price. In this study, we will analyse the objectives of both IPR law and competition law and determine how both of them serve the same purpose. Then analysis of relevant provisions of TRIPs agreement that promotes transfer of technology via competitive means will be done. Later, the anti-competitive practices followed in different jurisdictions and how countries like US and EU dealt with them followed by implications it has for developing countries will be done.

2. Intellectual Property and Competition Law

IP law and Competition law both have evolved differently and have their own set of goals to achieve by different methods. IP law grant a legal monopoly to right holder, which in turn may lead to economic monopoly if there are no substitutes in the market. Thus, IP rights are criticized from competition point of view for creating monopoly rights that are against consumer interests. On the other hand, Competition law protects consumer interests by eliminating obstacles to competition. Thus, from point of view of IPRs, competition law could take away what IP law has provided.

However, relationship between IP law and Competition law is now settled as many commentators have agreed that both serve the same objective of promoting consumer welfare.[3] Almost all scholars and practitioners now concur that the goals of competition law and IP law are complementary and mutually reinforcing. They share the common purpose of promoting innovation and commercialization, and enhancing and benefiting

*[1] Carlos M Correa, 'Review of the Trips Agreement: Fostering the Transfer of Technology to Developing Countries' (2005) 2 The Journal of World Intellectual Property 939 <http://doi.wiley.com/10.1111/j.1747-1796.1999.tb00100.x> accessed 7 January 2021.

[2] Ruchi Sharma and Sunil Kumar Ambrammal, 'International Technology Transfer and Domestic Patent Policy: An Empirical Analysis of Indian Industry' (2015) 49 The Journal of Developing Areas 165 <https://muse.jhu.edu/content/crossref/journals/journal_of_developing_areas/v049/49.3.sharma.html> accessed 15 January 2021.

[3] B.N. Pandey and Prabhat Kumar Saha, 'COMPETITION FLEXIBILITIES IN THE TRIPS AGREEMENT: IMPLICATIONS FOR TECHNOLOGY TRANSFER AND CONSUMER WELFARE' 57 Indian Law Institute 18.

consumer welfare as well as efficiently allocating economic resources.[4] Competition law promote consumer welfare by restricting certain actions that may cause injury to competition with reference to new ways of serving customers; While Intellectual property law protects innovations and encourages them by granting temporary monopoly rights and in turn benefitting consumers in a long run by ensuring optimal flow of technical knowledge. Thus, it is clear that both work alongside each other to bring new products and services to customers at low price.

Although both serve the same function but it is equally important to notice that there has to be a balance while enforcing them. If either of them is pursued too strongly or too weakly, then that will discourage their aforementioned purpose. Form IP perspective, if there are too many patents granted very easily, then potential innovators would be discouraged. Similarly if competition law is enforced strongly, then competitors would gain access to other's innovation easily and there will be rare benefits to innovate.[5] There is also a requirement of balance between these two form of protections. Under IP law, rights have been determined extensively along with exceptions. But that does not mean that IP law is immune from Competition law. Competition law acts an extra filter of regulation to curtail practices like anti-competitive licensing agreements, monopolistic conduct or other anti-competitive practices, which deny parties access to market and harm consumer welfare.[6] Similarly, measures to control such anti-competitive practices must not be used to undermine the provisions of minimum standard set by TRIPs agreement.

Hence to sum up, as pointed by Shubha Ghosh[7], IPRs should itself be regarded as pro-competitive unless practices by right holders turn it into an anti-competitive tool. Both IP law and Competition law should act as first and second filter respectively. They both are seen as part of competition policy in which IP law creates the market for innovations and their commercialization, while competition law controls and corrects malfunctions of that market.

3. TRIPs Provisions containing competition rules related with technology transfer:

Note 3 of TRIPs agreement states that:

> "For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters *affecting the use of intellectual property rights* specifically addressed in this Agreement."

Hence any matter which affects the use of IPRs could become subject matter of consideration for member nations. As noted above, anti-competitive practices of IP right holder can impede the uses of IPR and in turn restrict transfer of technology. This is the reason TRIPs provisions contain rules regulating such practices.

Although Preamble of TRIPs agreement does not contain any direct reference to technology transfer, but usage of words like 'reduce distortions and impediments to international trade' could be considered as indirect encouragement to same concept. Article 7 of TRIPs agreement[8] contains objectives of TRIPs agreement which explicitly mentions that promotion and enforcement of IPRs should contribute to transfer and dissemination of

[4] Michael A Carrier, *Innovation for the 21st Century* (Oxford University Press 2009) <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780195342581.001.0001/acprof-9780195342581> accessed 9 January 2021.

[5] 'COMPETITION POLICY AND INTELLECTUAL PROPERTY RIGHT.pdf' <http://www.oecd.org/competition/abuse/1920398.pdf> accessed 9 January 2021.

[6] B.N. Pandey and Prabhat Kumar Saha (n 3).

[7] Shubha Ghosh, 'Intellectual Property Rights: The View from Competition Policy' (2009) 103 Northwestern University Law Review Colloquy 8.

[8] Article 7 states "The protection and enforcement of intellectual property rights *should contribute* to the promotion of technological innovation and *to the transfer and dissemination of technology*, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

technology. Further Article 8.2 recognized the need to take appropriate measures to prevent IPR abuses by right holders, practices that unreasonably restraint trade and practices which adversely affect the international transfer of technology.[9] Such practices include the contractual restraint on IPR related trade. Article 40 must be read with Article 8.2 regarding anti-competitive practices in contractual licenses. Article 40 stipulates :

1. "Members agree that some licensing practices or conditions pertaining to intellectual property rights which *restrain competition* may have adverse effects on trade and may impede *the transfer and dissemination of technology*.
2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for *example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing*, in the light of the relevant laws and regulations of that Member."

Reading Article 40 with Article 8.1, it can be said that WTO members need to take reasonable measures to control all anti-competitive practices relating to technology licensing agreements, provided such measures are consistent with agreement of TRIPs.[10] Although Article 40.1 recognizes that few practices relating to IP are anti-competitive but article does not specify any of them. On the other hand, Article 40.2 does specify few anti-competitive practices in contractual licenses (exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing), but these are in the nature of examples and hence not exhaustive.[11] Hence it is up to domestic law to determine which practices are and to what extent such practices are anti-competitive.

Further, Article 31(k) of TRIPs agreement[12] grants compulsory license to remedy anti-competitive practices and in effect could be useful in making technology transfer a reality. Moreover, Article 66(2) of agreement[13] desirability of technology transfer to least developed countries has been mentioned. In spite of these mentioned provisions, TRIPs agreement also contains some pro-competitive provisions for example Article 6 which talks about IPR exhaustion regime (national, international or regional), which is fundamentally directed at maintaining competitive markets.

It can be analysed from the competition rules under TRIPs agreement that they are open-ended in nature. That is these provisions do not specify exact obligations to member nations rather give them enough discretion to enact laws depending upon domestic requirement.[14] Hence TRIPs agreement provided a legal framework that encourages technology transfer. But how technology transfer is effectuated in reality depends largely upon country's IP law, competition law and how country utilizes flexibilities provided under TRIPs agreement while drafting the law.

4. Position in US and EU:

In US, if we consider provisions of IP and competition and its overlap, then US enacted Sherman Antitrust Act in 1890 to restrict economic power of large business

[9] Article 8.2 states "Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."
[10] UNCTAD-ICTSD, Resource Book on TRIPS and Development 547.
[11] Ibid
[12] "Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive."
[13] "Developed country Members shall provide incentives to enterprises and institution in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base."
[14] UNCTAD-ICTSD (n 9).

owners. Section 1 of the act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations". Section 2 of the act[15] aims to prohibit conduct which is implemented to "monopolize, or attempt to monopolize, or combine or conspire ... to monopolize any part of the trade or commerce". Later in 1995, Antitrust guidelines for licensing of intellectual property were made[16], recognizing that both IP law and competition law share the common purpose of promoting innovation.

In EU, For the purpose of 'ensuring that competition in the internal market is not distorted', 'Treaty Establishing the European Community in 1957' (Treaty of Rome) contained provisions related to competition. Similar to what has been specified in Section 1 and Section 2 of the Sherman Act, Article 81 EC prohibits "agreements or concerted practices between undertakings affecting trade between Member States and restraining competition", while Article 82 EC regulates the "unilateral conduct of undertakings by prohibiting the abuse of a dominant position". Later in 2004 Commission enacted 'Technology Transfer Block Exemption Regulation'(TTBER) and 'TT Guidelines' aimed at safeguarding effectual competition.

Language of Section 1 of Sherman Act seems to bar every act which is 'in restraint of trade'. However, over the period of time 'rule of reason' and 'per se rule' has been established to determine legality of restraint. If restraint is anti-competitive prima facie and not efficient, then per se rule can be applied to declare that it violates Section 1 of Sherman Act. If the restraint does not seem to come under purview of per se rule, then it will be measured under rule of reason. In this test, comparison of anti-competitive effects and pro-competitive benefits by taking into account broad range of factors like facts peculiar to case, market situation and market power of company involved will be done.[17] In EU, rule of reason has been prescribed in form of Section 81(3) exemptions. Section 81(1) EC forbids anti-competitive agreements while Section 81(3) exempts such agreements if they satisfy four criterion; that is, efficiency gains, fair share for consumers, indispensability (imposing such restrictions that are indispensable to fulfilment of objective) and no elimination of competition.

As has been observed in *US Philips Corp. vs ITC* [18] Technology Transfer is generally pro-competitive as it encourages merger of technology and in turn increases production and distribution. It can encourage innovation, distribute technology and save cost of production and distribution. Restraints in transfer of technology are measured under Rule of reason[19] in US and EU.

Section 2 of the Sherman Act attempts to prohibit firm or combination of firm to monopolize or attempt to monopolize. But that does not give authorities to condemn those competitors who have attained monopoly through legitimate competition. To find the offence of monopolization, authorities must satisfy 2 step test. (i) Whether the firm possess monopoly power in market. (ii) Whether such monopoly power was acquired through wilful acquisition or was a result of superior product, business acumen or historic incident.[20] This test signify that possession of monopoly power will not be termed unlawful unless requirement of anti-competitive conduct has not been proved. Use of Intellectual property could definitely give any firm superior products and thereby creating an exception to this test. *US vs Microsoft Corp.*[21] is a good example to discuss this 2 step test. In this

[15] Section 2 States: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."
[16] 'Antitrust guidelines for licensing of intellectual property' <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf> accessed 9 January 2021.
[17] Michael A Carrier, 'The Four-Step Rule of Reason' 33 American Bar Association 6.
[18] [2005] 424 F.3d 1179
[19] Articulated for the first time in *Standard Oil vs US* [1911] 221 US 1
[20] *Pacific Bell Telephone co. vs Linkline Communications Inc.* [2009] 555 US 438
[21] [2001] 253 F.3d 34

case Microsoft was found to have monopoly power in Intel compatible OS market. Microsoft justified their actions based on IPR but it was rejected by court. Court ruled that 'IPRs do not confer a privilege to violate antitrust law'. Both elements of test has been proved to be satisfied and Microsoft was therefore held for violation of Section 2 of Sherman Act. On the similar line Section 82 of EC is intended to restrict dominant position in market through recourse of unlawful means.

Keeping in mind these developments, we will try and analyse some specific technology licensing practices which have an impact in competition aspect. Although Article 40 of TRIPs agreement specifically mentions few of them but they are definitely not exhaustive.[22] Following are some of the widely used practices that might have an impact on competition if dominant technology holder uses his position in market unfairly. It is not possible to discuss each practice in detail due to procedural limitations and paucity of time but we will look at few practices briefly in terms of what is the outcome of such practice.

i. Royalty Concern:

As we know IPRs are granted to reward investment made by right holder by enabling right holder to benefit from their innovation. Licensor tend to maximise their benefits and licensees tend to minimize. It is the negotiating power of parties which could determine the royalty provision in an agreement. To measure the real value of transferred technology is not an easy task and thus is subject of concern. EU TT guidelines provides that parties to technology transfer agreements are normally free to determine the royalty payable by licensee as well as method of royalty payment and generally competition authorities or courts should not work as price regulator. However, excessive pricing may become a subject of concern under Section 82(a) of EC which explicitly prohibit dominant firm from 'directly or indirectly impose unfair purchase or selling prices.' ECJ in *AB Volvo v. Erik Veng (UK) Ltd*[23] confirmed that IPR related excessive prices set by firm holding a dominant position may be anti-competitive and prohibited by Article 82 EC. It also stated that 'an undertaking abuses its dominant position where it charges for its services fees which are unfair or disproportionate to the economic value of the service provided'. This ruling could also be applied to technology transfer related royalty concern in IPR.

ii. Grant back:

It is a provision in agreement in which improvement made by licensee in licensed technology, protected by IP, has to be assigned back to licensor. For example if any person has obtained a Patent A and licensed it and licensee has made improvement on that product B, then grant back clause requires licensee to 'grant back' any improvements made to the invention. This can be done exclusively or non-exclusively. Non-exclusive grant back license require the licensee to license back the improvement to licensee but that need not be done exclusively. This is the reason it can have pro-competitive benefits as it allows both licensor and licensee the value of innovation to which they both have made contributions. This type of non-exclusive arrangement could also serve as an option for royalty rate concerns where determination of royalty is not certain due to nature of technology.[24] However, if licensee is compelled by licensor to grant an exclusive license, then grant back could adversely affect competition. In such a scenario, licensor could accumulate all the improvements made by licensees and in turn extend the term of protection.[25] Hence the practise of grant back has to be passed through the test of rule of reason to consider its pro and anti-competitive outcomes in terms of Section 2 of Sherman act and Section 82 EC.

iii. **Package Licensing:**Under this practice, party who sells a product put a stipulation through agreement to buyer to purchase a different product or tied product also.

[22] UNCTAD-ICTSD (n 9).
[23] [1988] ECR 6211
[24] Herbert J Hovenkamp, 'Antitrust and the Patent System: A Reexamination' [2014] SSRN Electronic Journal <http://www.ssrn.com/abstract=2486633> accessed 11 January 2021.
[25] ibid.

When licensor of technology transfers his technology only to those licensee who agree to buy another tied technology, it can come under the purview of package licensing. This is also referred as 'tying'. Like any other practice, it also has some adverse effects[26]. It may hinder the rational purchasing power of buyer, may effect competition in both tied and tying technology market. Pro-competitive benefits include ability of seller to enter into a market which was not easily penetrable. It may also increase the reward of seller for innovation.[27] Important example to consider for this practice is *Microsoft III case*[28] in which Microsoft tied its internet explorer browser with its Windows operating system. Hence to determine if anti-competitive effects of tied product outweighs the benefits of tying arrangement, Court ruled that it has to pass the rule of reason test. Similarly in EU, in effect the same ruling was made in case of *Microsoft vs Commission*[29].

iv. Non Challenge Clause:

This practice incorporates a 'non challenge clause' in technology transfer agreements between licensor and licensee. This was intended to avoid expensive litigation between parties but such a provision could in turn nullify the remedy of challenging validity of IPR itself available to licensee. Supreme court in *Lear, Inc. v. Adkins*[30] overruled such a practice based on public interest. Thus, patent licensee cannot be estopped from challenging the validity of licensed patent.[31]

v. Refusal to License Technology

In context of IPRs, refusal to license refers to a scenario in which owner of intellectual property denies third party license to use the product thereby constituting the barrier for other firms to enter into market. In EU, *Microsoft case*[32] is the best example to understand how EU deals with practices of Refusal to license. In present case complaint was filed by Sun microsystem alleging that Microsoft did not provide the interoperability information in relation to the Windows Operating System needed to facilitate communication between Windows and Sun's Solaris Operating System. According to Sun, the withheld interoperability information was necessary to viably compete as a work group server operating system supplier. EC held that Microsoft abused its dominant position and thereby infringed A82 of EC Treaty.[33] It is important to note that court did not try to stretch competition provisions in a manner that affects the objective of IPRs and held what was being referred as 'exceptional circumstances approach', i.e. only in certain cases refusal to license can be termed as abuse of dominance and thereby producing anti-competitive effect.[34] The Court stated

> "The following circumstances, in particular, must be considered to be exceptional: in the **first** place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market (essential facility doctrine); in the **second** place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market; in the **third** place, the refusal prevents the appearance of a new product for which there is potential consumer demand."[35]In US, Patent act specifically mentioned that patent owner cannot be

[26] TT Guidelines
[27] Edward J Kessler and Reid G Adler. 'Package Licensing' (1981) 9 APLA Q J 318
[28] [2001] 253 F.3d 34
[29] Case T-201/04, [2007] ECR II 3601
[30] [1969] 395 U.S. 653
[31] Christian Chadd Taylor, 'No-Challenge Termination Clauses: Incorporating Innovation Policy and Risk Allocation into Patent Licensing Law' 69 INDIANA LAW JOURNAL 41.
[32] Case T-201/04, [2007] ECR II 3601
[33] Pradeep S Mehta, 'Interface between Competition Policy and Intellectual Property Rights': [2020] Sustainable Development Policy Institute 28.
[34] 'Refusal to License Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law.Pdf' <https://www.konkurrensverket.se/globalassets/forskning/uppsatser/uppsats-2016_haris-catovic.pdf> accessed 14 January 2021.
[35] *Microsoft* (n 31).

deemed guilty of misuse by virtue of its refusal to license or license the patent.[36] Thus section mentions that mere non-use cannot be termed as misuse. Same has been determined in *Verizon Communications Inc v. Law Offices of Curtis V. Trinko*[37]. In this case Trinko alleged that Verizon, a local telephone service provider refused to share its network, which restricts competitor to compete effectively. Supreme Court of US held that

> "Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. *Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law*, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. *Enforced sharing also requires antitrust courts to act as central planners,* identifying the proper price, quantity, and other terms of dealing – *a role for which they are ill suited*. Moreover, *compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion*. Thus, as a general matter, the Sherman Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[38]

The comparison between two developed countries shows a completely differing opinions of respective courts. Although in US no concept of essential facility doctrine recognised and thereby giving primacy to IPR law. However that does not mean that each and every refusal to transfer would be justified. A2 of Sherman act postulating rule of reason will definitely come to rescue and thereby creating balance between IPR and Competition Law.

5. Implication for developing Countries:

From developing countries perspective, they can apply the flexibilities provided under TRIPs agreement to negate the effect. As discussed above, refusal to license normally cannot be anti-competitive unless exceptional circumstances has been proved. On the similar line, South African Competition Court also held that refusal to deal contravenes the Competition Act if five conditions are all met, "namely:

(i) the dominant firm refuses to give the complainant access to an essential facility (an infrastructure or a resource);
(ii) the complainant and the dominant firm are competitors;
(iii) the infrastructure or resource concerned cannot reasonably be duplicated;
(iv) the complainant cannot reasonably provide goods or services without access to the infrastructure or resource; and
(v) it is economically feasible for the dominant firm to provide its competitors with access to the infrastructure or resource."[39]

These conditions are similar in line with what has been described as essential facility test or in general need to pass test of rule of reason.

Case law of developed countries demonstrated that domestic competition policies can intervene where consumer is harmed due to anti-competitive application of IPRs. On the same line developing countries can also use domestic competition law to curtail such practices, as was done by South African court in *Wellcome Case* discussed above. There is nothing in provisions of TRIPs agreement that can stop developing countries from applying domestic competition law that limit the dominant position of company behaving in an anti-competitive manner due to monopoly behaviour achieved by application of

[36] 35 USC 271(d)(4)
[37] [2004] 540 US 398.
[38] Ibid.
[39] *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others*, Case No. 15/CAC/Feb02 [2002] ZACAC3

IPR. As the commission observed "it follows expressly from Article 40(2) of the TRIPS Agreement that the members of the WTO are entitled to regulate the abusive use of such rights in order to avoid effects which harm competition"[40].

There are chances that exercise of competition law in a developing country may jeopardize the continuance of IPRs and in effect lower innovation. Investment in R&D or foreign investment may no longer be preferred in that country. This could be an important consideration for developing countries to restrict extensive application of competition law in order to promote transfer of technology. Members in addition to application of domestic competition law also have an another mean for remedying the anti-competitive behaviour in terms of granting compulsory license under Patent Law itself. This flexibility is provided in terms of A31(k) of TRIPs itself to correct anti-competitive conducts such as refusal to license and others in order to correct such conduct through grant of compulsory license. As it has been mentioned in Indian Competition case of *Ericcson vs Micromax*[41] that the order passed under Section 27 of Competition act[42] for abuse of dominant position is materially different form the order passed under Section 84 of Indian Patent Act for compulsory license. That is, recourse of one remedy will not affect other. India in 2012 for the first time granted compulsory license in *Natco Pharma Case*[43] based on one of the ground that drug was not available in India at reasonable price. Section 90 of Indian Patent act which determines terms and conditions of compulsory license is noteworthy to that end also.[44]

6. Conclusion:

In the era of globalization, developing countries need to attract investment and technological development in their own country. As many such countries import the technology from developed world in order to accelerate economic growth, they are often faced with anti-competitive practices by multinational companies.[45] Various practices discussed along with relevant case laws shows that developed world has often countered this problem by application of domestic law and through judicial construction of rule of reason to be applied on case to case basis. TRIPs agreement also provides leeway to member nations to apply domestic competition law to restrict abuse of IPR. Developing countries like India, South Africa where examples of IPR related anticompetitive practices are limited and jurisprudence is yet to be developed can use the practices developed by countries like US and EU. However, in doing so developing country must keep in mind domestic need and context. As it has been mentioned in this paper[46] that IPR related competition law must be 'glocalised'.

Developing countries may choose either competition law or provisions of TRIPs agreement like compulsory licenses in order to remedy such practices. Application of either of the provisions can have an effect on investment and technological development. To identify what could be a better remedy out of two, extensive empirical analysis has to be done.

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[40] *Microsoft* (n 31).

[41] Case No. 50/2013; This case was also relevant from point of view of abuse of dominance resulting from excessive royalties.

[42] Section 27 states "Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:……"

[43] Order No. 19/2013 (Intellectual Property Appellate Board, Chennai), (Cited at 24 Jan, **2016**). Available at www.ipabindia.in/Pdfs/Order-19-2013.pdf

[44] Under S.90, the patent authority, among other things, shall have to make efforts to secure that the patented articles are made available to the public at reasonably affordable prices. It has powers to see whether patent royalty is 'reasonable'.

[45] Hovenkamp (n 24).

[46] B.N. Pandey and Prabhat Kumar Saha (n 3).