A Report on the Public Lecture on
Interaction between Competition Law and Intellectual Property Rights
by Allan Asher, Former Member of the UK's Office of Fair Trading
Organised by CUTS Institute for Regulation & Competition
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Mr. Anand Pathak, Chairperson, FICCI Task Force on Competition Law and Mr. Dipak Chatterjee, Director General, CIRC introduced the subject and the speaker, Mr. Allan Asher. In his welcome address, Mr. Pathak briefly discussed the tension between IPR law and competition law, and the conditions of usage between a patent holder and a license holder. Introducing the theme, Mr. Chatterjee, emphasised the need to strike a balance between sustaining innovation and competition.

Mr. Asher, at the outset, spoke about the two views on the relationship between competition law and IPRs. He described how the two schools of thought view the two as: a) contradictory and/or b) complementary. He subscribed to the latter view. He said that after having reformed the economic policies significantly during last 15 years, Indian economy might over-protect or under-protect the market power given to IPR holders. Since enhancing the welfare of consumers is very important, we cannot have economies where the private right of action is unfettered.

Referring to a general tendency of businesses to monopolise, he said that there are two types of anti-competitive activities: structural and behavioural. Structural anti-competitive practices may emanate from mergers and acquisitions while behavioural practices may include cartels and collusion for price fixing, etc. IPRs cover both. IPR protection may be justified otherwise people will not invest in research. He cited several international cases in the domain of IPRs and competition law.

According to him, regulatory intervention can also prevent competitive conduct. However such intervention is not actionable under competition laws. He added that producers would gain if they had a genuine desire to improve their product. Producers cannot assume that IPRs-backed domination would last forever because pretty soon the cost structure can become disproportionate.

Referring to the Competition Act 2002 (CA02), he said it came close to dealing with competition problems of yesteryears and not of this century whereas these days most of the cases are technology-related. He ended his lecture at this point and invited questions and comments.

Mr. Anand Pathak spoke about block exemptions which are present in the European Union unlike in India.

Making his observations, Mr. Augustine Peter, Economic Advisor, Competition Commission of India mentioned four provisions relating to IPRs in the Indian Competition Act 2002 (as amended in 2007):

- In anti-competitive agreements and specifically in horizontal agreements, reasonable exercise of IPRs is exempt but unreasonable exercise may come under the purview of the law. In vertical agreements, there is a lot of flexibility for IPR holders.

- Regarding abuse of dominance, IPRs are no longer treated as *per se* monopoly. However, once the CCI identifies IPR abuses as part of dominance, there is no escape.
- Regarding mergers, if two competitive companies are doing research towards the same product and they merge, they would have no reason to commercialise or even if they do commercialise, they would charge a high price.
- Coming to advocacy, he said that IPRs and competition law were complementary and the latter acted as a restraint on absolute IPRs.

Several questions were raised from the floor. One query was related to interaction between competition law and trademarks. Mr. Asher said that the Act refers to situations where the licensor forces the licensee to use the trademark in a certain way. However, courts have struck down the use of trademark rules to restrict competition.

A point was raised regarding the stoppage of Indian generics by a European country. To this Mr. Asher said, India and other developing countries should be quite vigilant in multilateral forums so that this kind of protectionist strategy is tackled. In order to do that, countries like India should show that they put consumer interest before producer interest. If IPRs are given then they constrain public welfare.

Another question touched upon the CA02 specifically which is silent on abuse of dominance due to patents. Mr. Asher stated that conflict between sectoral regulators and CCI could be much greater than conflict between CCI and Patent Office.

An interesting point was made when a participant stated that we should have process patents instead of product patents. Not surprisingly, none of the speakers responded to that. Mr. Asher only said that it was inappropriate in public policy terms for the IPR holder to set prices. When it was said that foreign concepts would percolate to India since our Supreme Court relies on overseas jurisprudence for persuasive value, Mr. Asher responded that he will look forward to the day when Indian jurisprudence is cited in European Courts.

Mr. Chatterjee concluded the programme by thanking Mr. Asher and others.