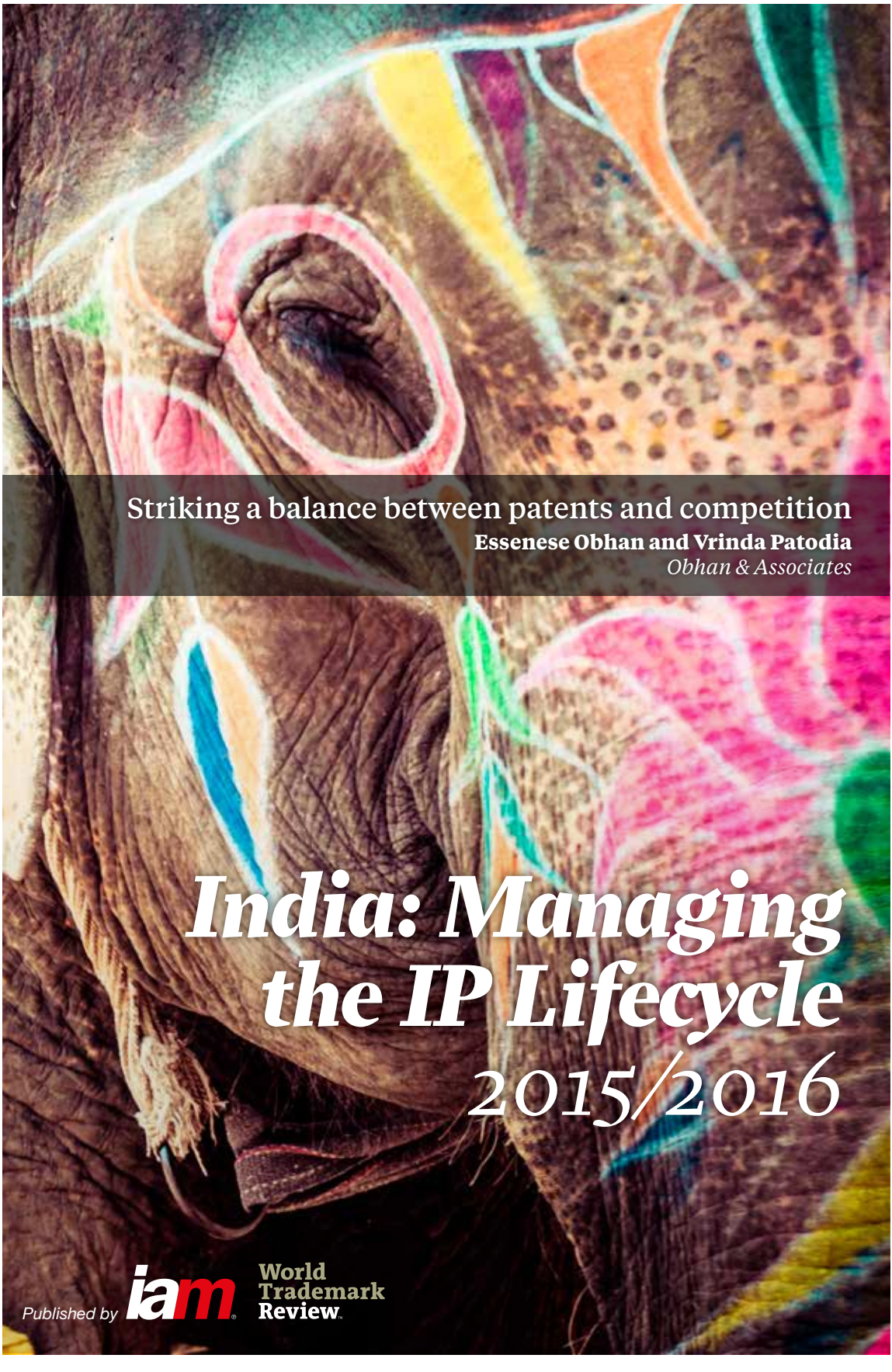

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Striking a balance between patents and competition

By **Essenese Obhan** and **Vrinda Patodia,** Obhan & Associates

Competition law is based on the principle that competition is desirable in a free market. National competition laws seek to promote competition by preventing the inappropriate accumulation or exercise of market power with respect to products or services. IP laws, on the other hand, seek to promote innovation and safeguard the interests of inventors by granting monopolies. The intersection between IP law and competition policies has prompted a longstanding debate the world over, with questions being raised as to whether the grant of IP rights restricts innovation and hinders competition, and whether competition law dilutes the rights granted to inventors under IP law. Whereas IP law grants statutory monopoly rights which inhibit competition to a certain extent, competition law promotes competition in the market by prohibiting anti-competitive conduct.

In India, the Competition Commission – constituted in March 2009 – is responsible for enforcing the Competition Act, 2002. Despite its relatively short tenure, the commission has proven to be a proactive regulator and has already imposed several headline-grabbing fines on enterprises for abusive conduct. A recent decision of the commission brings to the fore the overlap between competition law and IP law. This article examines this by analysing the decision and highlighting the role played by the commission.

Competition law

The Competition Act repealed and replaced the earlier Monopolies and Restrictive Trade Practices Act, 1969, which was passed during India's 'licence raj' period with the objectives of preventing the accumulation of economic power in the hands of a few and prohibiting monopolistic, unfair or restrictive trade practices. With the liberalisation of the Indian economy in 1991, the act's provisions and objectives were no longer sufficient to ensure competition on the market. In light of this, in 1999 the finance minister stated that the Monopolies and Restrictive Trade Practices Act had become obsolete in light of international economic developments relating to competition law and expressed the need for a modern competition law that reflected India's new economic policy.

Although the Competition Act was enacted in 2002, the provisions relating to two of its substantive aspects – abuse of dominant position and anti-competitive agreements – came into force only on May 20 2009. Further, provisions relating to merger control entered into force in June 2011.

Abuse of dominant position

The Competition Act prohibits any conduct which amounts to the abuse of a dominant position which may have an adverse effect on competition in any market in India. The act defines 'dominant position' as a position of strength enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market to influence its competitors or consumers or the relevant market in its favour.

Exactly what constitutes abuse of a dominant position is not defined. However, the act does identify certain forms of conduct which are likely to fall within this general prohibition:

- engaging in predatory pricing or any other form of predatory behaviour;
- limiting production, markets or technical development to the prejudice of consumers;
- indulging in practices that result in denial of market access;
- making the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts; and
- leveraging a dominant position in another market to enter into or protect the relevant market.

Merely being a dominant player in the market does not amount to anti-competitive conduct. Rather, the act is intended to dissuade a dominant player from using its dominance to appreciably adversely affect competition in a market.

While an 'appreciable adverse effect on competition' is not defined in the act, the factors to be taken into account in this regard have been clearly indicated. An agreement creating barriers to entry, driving competition out of the market or foreclosing competition could be considered to result in an appreciable adverse effect on competition. In determining whether an enterprise enjoys a dominant position, the factors to be considered include its market share, its size and resources, the size and importance of its competitors and how dependent its customers are on it.

Patent law

Patents are state-granted monopolies in the form of time-limited property rights. Given the significant amounts that are invested in R&D, organisations seek patent rights to obtain exclusivity over their invention for a certain time and so gain first-mover advantage in the market. Patents may deter rivals and new entrants from entering the market and may lead to higher costs through licensing by the rights holder. However, one could argue that diluting patent rights through competition law is a disincentive to innovation.

Although there is nothing wrong in principle with the strategic use of patents, it does have the potential to negatively impact on competition and consumers in some circumstances. This risk is arguably increased where the strategic use of patents affects, for example, access to technological standards, as in the dispute between Micromax and Ericsson described below.

The problem of excessive patent protection is best illustrated by the software industry, which is innovating at a rapid pace. Software innovation tends to involve not just entire devices, but also components; so a device such as a mobile phone or laptop may have thousands of separate components, each of which is patentable. The result is a bundle of various patents, creating abundant opportunities for infringement.

Micromax-Ericsson dispute

The smartphone patent wars arrived in India with the *Micromax-Ericsson* dispute, in which Ericsson has claimed Rs1 billion against Micromax in a civil suit (CS(OS) 442/2013, 2013(56)PTC585(Del)) filed before the Delhi High Court, alleging the infringement of eight standard-essential patents (SEPs). The amount claimed makes this one of the biggest cases of its kind in terms of damages sought in a patent suit in the Indian IT and telecommunications sector. Ericsson's initiation of the suit prompted Micromax to file a complaint before the Competition Commission, which subsequently ordered an investigation into the anti-competitive licensing of Ericsson's SEPs for mobile communication. The dispute is of considerable significance because of the role that the Indian competition regulator has played and the link between competition law and patent law.

Under normal circumstances, a rights holder is free to license its patents on any terms it wishes. Likewise, it is free to negotiate royalty rates or to refuse to license the technology altogether. However, if the patented technology becomes a market standard, a court may require the innovator to license it to other players on fair,

> **“There is an inherent need to strike a balance between IP laws and competition laws, so as to safeguard the rights of innovators and at the same time protect consumers”**

reasonable and non-discriminatory (FRAND) terms in order to ensure a level playing field.

Take, for example, how computers, smartphones and tablets connect to the Internet. This is done via standardised wireless technologies such as WiFi. In the smartphone and device space, many technologies pertaining to WiFi, 3G and 4G would be considered SEPs. Smartphone manufacturers would be unwilling to manufacture devices without WiFi capabilities and consumers would similarly be reluctant to buy such products. It is impossible to manufacture standard-compliant products such as smartphones or tablets without using technologies covered by one or more SEPs. SEPs differ from patents that are not essential to a standard (non-SEPs), such as design patents, which protect an invention's design features. This is because generally, companies can invent alternative solutions that do not infringe a non-SEP. For example the 'slide to unlock' technology popularised by Apple's iPhone is covered by a non-SEP. However, most smartphone manufacturers have been able to develop alternative technologies to unlock a smartphone screen which do not infringe this patent. This would not have been possible in the case of an SEP such as WiFi.

The dispute arose when Ericsson required Micromax to secure appropriate licences to use its technologies on FRAND terms. After three years of negotiations and Micromax's refusal to accept the FRAND terms offered by Ericsson, the latter instituted a civil suit before the Delhi High Court, alleging infringement of its SEPs for wireless technologies used in 2G, 3G and 4G devices. The single judge passed an *ad interim ex parte* order in favour of Ericsson. Micromax's appeal against the *ex parte* order was dismissed by the Division Bench of the Delhi High Court with the option of filing a fresh appeal if the single judge did not hear Micromax's defence within 30 days. The parties thereafter entered into an interim arrangement under which Micromax started paying royalties to Ericsson at the rates demanded, pending final disposal of the patent infringement suit.

Meanwhile, Micromax also brought a complaint before the Competition Commission (Case 50/2013), alleging that Ericsson has abused its dominant position in the mobile communication space by imposing exorbitant royalty rates for its SEPs.

Micromax also alleged that Ericsson has failed to stick to global commitments to provide its industry-essential patents to handset makers under FRAND terms. Micromax alleged that Ericsson has demanded unfair, discriminatory and exorbitant royalties for its patents relating to GSM technology. It argued that these rates make it apparent that Ericsson's practices in relation to SEPs are discriminatory and contrary to FRAND terms.

Micromax further submitted that Ericsson is in a dominant position, as it is well aware that no alternative technology is available and that it is the sole licensor for the SEPs of globally accepted mobile technology standards.

Ericsson challenged the Competition Commission's jurisdiction in this dispute. It argued that the dispute is of a commercial and civil nature, and that the commission should not play the role of a price setter or concern itself with the question of excessive prices. Ericsson also argued that seeking an injunction against infringement of its valid patents did not constitute abuse of dominance, and that it had every right to restrain Micromax from selling telecommunication devices until the requisite patent licence fee had been paid.

The commission held that Micromax

had every right to raise issues governed by the Competition Act before it, and that the act's provisions are in addition to – not in derogation from – other laws. Analysing several other provisions of the Competition Act, the commission concluded that it could decide on the issue of abuse of a dominant position without interfering with Ericsson's IP rights.

It also held that a royalty calculation based on the entire value of a product using SEPs is indeed unfair and concluded that this is a *prima facie* case of anti-competitive behaviour. It further directed the director-general to institute a proper investigation into Ericsson's practices. Following the commission's order directing an antitrust probe, Ericsson filed a writ petition (WP (c) 464/2014) before the Delhi High Court challenging the commission's orders, as well as its jurisdiction. The court has restrained the commission and its director-general from passing any final orders until the issue of jurisdiction has been resolved. The writ petition filed by Ericsson is pending before the court.

A similar case before the Competition Commission is the complaint filed by Intex Technologies (India) Limited against Ericsson (Case 76/2013), alleging abuse of dominance in negotiations on an SEP licensing agreement. Intex, an Indian mobile handset maker, complained that the terms of the agreement were highly unfair

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and discriminatory, and in particular that the royalty rates demanded by Ericsson were extremely high. The commission again found a *prima facie* determination of abuse of dominant position and ordered an investigation into Intex's complaint. Ericsson has again filed a writ petition challenging the commission's order.

Global scenario

Litigation involving SEPs has been at the forefront of patent litigation since the late 20th and early 21st centuries. Global giants such as Google, Motorola, Apple and Samsung have brought patent litigation of this type to public attention.

The European Commission has pursued several competition law cases aimed at curbing misuse of SEPs, including the recent *Samsung* and *Motorola* cases.

In *Samsung* the alleged infringement involved Samsung seeking injunctions against a willing licensee, Apple, before the German, Italian, Dutch, UK and French courts. The aim was to exclude certain Apple products from the market on the basis of several Samsung 3G SEPs which it had committed to license on FRAND terms.

In *Motorola* the European Commission found that Motorola had infringed EU competition rules in seeking and enforcing injunctions against a willing licensee, Apple, on the basis of one of its SEPs. First, Motorola declared the patent on which it sought the injunction to be essential for implementing the 2G European Telecommunications Standards Institute standard. Second, it committed to license the SEP to third parties on FRAND terms. Third, Apple agreed with Motorola that in case of dispute, the German courts would set the applicable FRAND rate and Apple would pay royalties accordingly. *Motorola* establishes that the agreement of a potential licensee to a judicial setting of a FRAND rate in case of dispute is a clear indication of its willingness to enter into a licence agreement and to pay adequate compensation to the SEP holder.

In *Samsung* and *Motorola* the European Commission clarified that in the context of standardisation, where holders of SEPs have committed to license their SEPs on FRAND terms, it is anti-competitive to seek to exclude competitors from the market by seeking injunctions on the basis of SEPs if the licensee is willing to take a licence on FRAND terms. In these circumstances, seeking an injunction can distort licensing negotiations and lead to unfair licensing terms, with a negative impact on consumer choice and prices.

Conclusion

The *Micromax-Ericsson* dispute marks the first time that the Competition Commission has adjudicated on issues involving SEPs. It has given a preliminary categorical view that royalty calculation based on the entire value of a product using SEPs is indeed unfair. While this preliminary decision does not appear to be an attempt to dilute the IP rights of foreign players in India, it signals the direction that the competition regulator wishes to take.

It will be interesting to see how the commission's final ruling deals with the competition aspects of SEPs and influences the patent licensing business in the mobile communication space in India. There is an inherent need to strike a balance between IP laws and competition laws, so as to safeguard the rights of innovators and at the same time protect consumers. The bigger picture here is whether the commission should be allowed to investigate the conditions imposed by an SEP owner for the protection of its rights and to restrain any infringement. The Competition Commission should certainly investigate the reasonableness of the conditions imposed. ■

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