

***Relationship between Competition  
Law & Patent Law***

***National Workshop on Patent & Public  
Health,  
Ministry of Health, 11 April 05***

*The Affordable Medicines & Treatment  
Campaign*

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# Patents & Competition Law

In theory, **patent protection** to **spur on** innovation and make **new technology** for the consumer

**Anti-competition law** to spur on competition for competitive products at **competitive prices**

**Both** are to be for the **welfare** of the **consumer and the public**

**Both** need to be **strongly articulated** and a **correct balance** has to be struck between the two to achieve the goal to serve the overall interest of the public and the consumer

# **Linking Competition Law to Patent Law: A Common Practice**

In United States Competition law is the system to:

- challenge invalid/trivial patents
- Regulate conduct with respect to a patent, e.g. abuse of dominant position by excessive pricing

European IP protection linked to competition law

# TRIPS: Competition & Patents

## **Control of Anti-Competitive Practices**

Art 40 (1) Understanding that licensing practices or conditions relating to intellectual property may restrain competition & may impede transfer of technology

Art 40 (2) Legislation may provide for licensing practices & conditions in case of abuse of IPRs and for control of such practices

Art 31 (k) Voluntary licensing need not be resorted to in case a practice is judicially or administratively determined to be anti-competitive

# Patents & Competition Law

## **Patentability criteria** and **Pre-grant**

**Opposition** to the grant of patent act as **filters** to protect the public from protection of **frivolous patents**

**Compulsory licensing** (CL) is to ensure that that patents are not abused, that is they not become **anti-competitive**

CL can be granted on 3 grounds (S. 84):-

- a) Reasonable **requirements** not satisfied;
- b) Products not available at affordable **prices**;
- c) Patent is **not worked** in India

Working of patent to protect public health

# Patents & Competition Law

General Principles (Sec 83):

Patent do not impede protection of public health [section 83 (d)]

Patents granted do not prohibit Governments to take measures to protect public health [Section 83 (e)]

Patents make the benefit of the invention available at reasonably affordable prices [section 83 (g)]

# Patents & Competition Law

**Competition law addresses anti-competitive practices by:-**

- a) Prohibition of anti-competitive agreements (those likely to have appreciable adverse effect on competition) [Section 3]**
- b) Prohibition of abuse (unfair discriminatory practices including pricing, limits or restricts production of goods, practices denial of market access) of dominant position (operates independently of market forces, affects competitors, consumers, relevant market) [Section 4]**
- c) Regulation of combinations (monopolies, semi-monopolies) [Sections 5 & 6]**

# Patents & Competition Law

**Patent = Monopoly = No Competition**

In practice therefore patent protection on drugs can lead to abuse of dominant position by the drug companies that adversely impacts consumer **(patient)** welfare:- e.g:

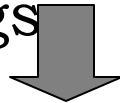
- Excessive **pricing**
- Refusal to **voluntarily licence** the patent in return for a reasonable royalty

# South Africa: A Case Study

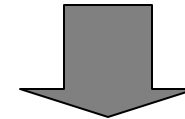
## Patent Regime in South Africa



- Pharma Cos GSK & Boehringer patent owners of ARV (HIV/AIDS) Drugs



**HIV/AIDS Patients faced excessive pricing, many died as drugs unaffordable, e.g. AZT (300 mg) sold at US\$ 0.92 as compared to WHO Generic Price US\$ 0.25**



**Pharma cos. defeated CL negotiation under Patent Act by demanding 25% royalty on sales as compared to the international rate of 4-5%.**

**TREATMENT ACTION CAMPAIGN APPROACHES  
COMPETITION COMMISSION FOR REDRESSAL**

# South Africa: A Case Study

- **In 2003 Competition Commission admits complaint based on their duty to protect consumer interest, based on Section 8 of SA Competition Act (excessive price bearing no relation to the economic value of the good) leading to exclusion and anti-competition**
- **Decision – Pharma co. practices have violated Competition Act prohibitions of excessive pricing and exclusionary acts that have anti-competitive effect**
- **Recommends licences to market generic versions of the patented ARV drugs in return for the payment of reasonable royalty to be decided by the Competition Tribunal.**

# Competition Act, India

- Only parts have been notified in the Gazette
- Drafted at a time when Patents Act was very different
- In the absence of an efficient CL mechanism & effective drug pricing monitoring Authority (.e.g. Gleevec continues to be sold at Rs. 1,20,000 per month per person)
- Price control measures not invoked under Chap.IV A
- Now Chapter IV A repealed
- Possible use of Section 4 of the Competition Act
- Competition Law becomes crucial to addressing consumer(patient) welfare

# Competition Act, India

- Excessive pricing, anti-competitive practices resulting from the new patent regime will have to be addressed
- However crucial legislative synergy between patent & competition law absent
- Who decides what is a anti-competitive practice/monitors excessive pricing & brings it to the Competition Commission notice
- Sec 3 to 6 need to be reviewed keeping in mind anti-competitive practices arising out of abuse of dominant position by patent owner
- Grant of CL should be within the powers of Competition Commission