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Saha & Ray's birthday: Saha & Ray has successfully completed three years on 26th July, 2005, with expertise in legal services, manpower and consulting.

Articles:

1. Is the present intellectual property regime anti-competitive in nature? by Mukherjee Deeptarag.
2. Stamp duty on Transaction, a new horizon of revenue for the State by Chowdhury Amarnath.

Is the present intellectual property regime anti-competitive in nature?

by Mukherjee Deeptarag.¹

In India, the law pertaining to free competition is governed by the Competition Act, 2002 (**Act**). Section 3 of the Act enlists some of the agreements regarded as anti-competitive and therefore, are void. A reading of the section would give us the idea that, the conferring of intellectual property rights, such as patents, copyright, trademark, would entail 'refusal to deal', or an assignment of such rights would fall under 'exclusive supply agreement' or 'exclusive distribution agreement', and would thereby be anti-competitive in nature.

However, sub-section (5) to section 3 of the Act further stipulates that this section would not restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights conferred under the Copyright Act 1957, Patents Act 1970, Trade Marks Act 1999, Geographical Indications of Goods (Registration and Protection) Act 1999 and Designs Act 2000.

Thus it is evident that a statutory exemption has been created by the Indian Competition Law in favour of intellectual property rights in order to ensure that the exercise of intellectual property rights, do not encroach upon the territory of anti-trust laws.

Section 51(3) of the Australian Trade Practices Act 1974 recognises that conflicts can occur between the protection and enjoyment of intellectual property rights and the provisions of the Trade Practices Act. It therefore removes the application of all restrictive trade practices provisions other than sections 46 and 46A (misuse of market power) and section 48 (resale price maintenance) in relation to certain conditions in licences and assignments of patents, registered designs, copyrights. This approach is similar to the one taken under the Indian Competition law, whereby the conflict has been avoided by creating exemption in the competition law.

The effect of sections 37, 38, 102 and 103 of the Australian Copyright Act, 1968 is to prohibit a parallel importer from importing into Australia, articles which are subject to copyright protection without the authorisation of the copyright owner or

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the exclusive licensee. The leading case on this topic was the decision of the High Court of Australia in *Interstate Parcel Express Co. Pty Ltd v. Time-Life International (Netherlands) BV (Time-Life case)*.² Here, the Court upheld the right of the copyright owner (or the exclusive licensee) to restrain the importation (and sale at a substantially lower price) of cookery books into Australia, even though the books were genuine and had been acquired by the importer from an overseas wholesaler in a lawful manner. Thus this case gave precedence to the exclusive right of copyright holder in throttling free competition over the possibility of competitive trade between different players for the same product/service.

However, the (Australian) Prices Surveillance Authority (PSA) in its Report 24, has categorised the restrictions on parallel importation contained in the Copyright Act as restrictions over the distribution of the works and has argued that the economic rationale for prevention of copying does not extend to protection against parallel imports because they are not illegally copied in their country of origin. The PSA has concluded that restrictions on parallel importation of both books and sound recordings are anti-competitive and recommended the repeal of those provisions from the Copyright Act.

The European Commission, while dealing with the issue of grant of exclusive licenses by the holder of intellectual property rights, has held that grant of an exclusive licence does not by itself lead to anti-competitiveness and has come out with the principle of 'open exclusivity' and 'close exclusivity' in order to judge whether such a license leads to an adverse effect on competition.

It was held in *The Maize Seed case*,³ that an 'open' exclusive licence which does not affect the position of third parties such as parallel importers and licensees for other territories, is not anti-competitive in nature, whereas a 'closed' exclusive licence where a licensor grants absolute territorial protection to a licensee with both parties undertaking to prevent parallel imports into the territory, is anti-competitive in nature and would be void under Article 81 of the European Community Treaty [article 81(1) states the kinds of agreements that are regarded as anti-competitive and hence void].

The United States courts' opinion also suggest that, antitrust liability is particularly appropriate when the denial of access is motivated by an anticompetitive animus – usually demonstrated by a change in existing

² [1977] 15 ALR 353

³ Case 258/78 Nungesser v. Commission [1982] ECR 2015.

business practices with a specific intent to harm rivals. For example in the case of *Image Technical Services, Inc. v. Eastman Kodak Co.*,⁴ the Ninth Circuit reviewed a jury decision that Kodak, a manufacturer and service provider of copiers, had illegally monopolized the market for service of its copiers by refusing to deal in its patented replacement parts (needed for repair of the copiers).

Here, the award required Kodak to sell such parts on reasonable terms to plaintiff's independent services organizations (who competed with Kodak for servicing Kodak copiers). The court concluded that the abuse of intellectual property rights (such as patent protection) could give rise to antitrust liability. Specifically, the court stated that *"the power gained through some natural or legal advantage such as a patent, copyright or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next."*

Thus, in countries such as the United States and the European Union, a blanket protection has not been given to the exercise of intellectual property rights vis-à-vis their adverse effect on competition. These countries have gone further into details so as to identify the particular acts or instances that lead to anti-competitive practise, and have specifically banned those acts. I believe that a more detailed approach has to be taken by the Indian Legislature and the Judiciary to single out and identify such anti-competitive acts while giving a general protection to intellectual property rights, instead of the overall exemption that is currently available.

End.

Stamp duty on Transaction, a new horizon of revenue for the State

by Chowdhury Amarnath.⁵

Stamp duty is a tax on documents and not on the transactions incorporated or covered by the documents. If there is no document or instrument executed by the parties to record a transaction between them, no stamp duty is payable. Unless the transaction must be recorded in writing under specific law, there is no compulsion to have written documents. It is also possible that a party may record a document but not stamp it. Possessing a document which is not duly stamped is not by itself an offence. An instrument, which is not duly stamped, cannot be received in evidence by a person authorised to receive evidence and

cannot be acted upon by that person or by any public officer. This is the penalty imposed by law on a person who may seek claim to have benefit under an instrument not duly stamped. Once detected, an authority competent to impound documents can recover not only duty but also penalty.

Unlike modern taxes, there is no provision for the tax to be collected directly from the tax-payers. To detect stamp duty evasion the provisions of Stamp Act require that every public officer who has the custody of any register or books, records or documents that may on the inspection, disclose an omission in the payment of duty is required to permit officials authorised by the state to inspect the records.

The constitutional validity of section 73 of the Indian Stamp Act as amended by the State of Andhra Pradesh was considered by Supreme Court (SC) in the case of *District Registrar v. Canara Bank*,⁶ the issue involved was the right of the collector of stamps to inspect the documents executed between the private parties and received and retained in bank's custody in its ordinary course of business. Such documents were inspected and the bank was directed to recover deficit in stamp duties. The SC held that State cannot have unrestricted access to inspect and seize or make enquires into a persons bank records, without any reliable information, prior to inspection.

Documents or copies of documents of the customer, which are in the bank must continue to remain confidential vis-à-vis the person, even if the documents are no longer in the customers house and have been voluntarily sent to the bank. SC however makes it clear that it is difficult for the state to detect evasion of stamp duty and recover evaded duty. In addition to the problems in recovery of stamp duty there are other difficulties in administration of stamp duty law and use of stamp duty as a revenue source.

In *Greaves Cotton & Co Ltd v. State of Maharashtra*⁷ a question came up before the Company Law Board - Whether stamp duty is chargeable on mere allotment of a convertible debentures without an instrument of debenture having been issued? The decision was *Stamp Duty need not be paid if no debenture is issued.*

It has been noticed that high rates of stamp duty are becoming an impediment to introduction of new products in the financial market. Certain new instruments like mortgage backed securities and asset backed securities need to be given the characteristic of free transferability with the benefit of underlying securities without any requirement of stamping every act of transfer. Now with the extensive use of technology, paper based transactions are being replaced with electronic

records and there is a need to devise method for recovering stamp duty on electronic records. States in its attempt to curb evasion of stamp duty have only increased the stamp duty.

Considering the above difficulties in the matter of recovery of stamp duties, there is a need to consider whether the entire stamp duty regime applicable in the country needs to be replaced by a uniform transaction tax, with a shift in the basis of duty on transactions instead of documents.

Maharashtra Government recently presented a Bill that brought advertising, print, electronic telecast and broadcast contracts under its purview. The move is likely to hit the entertainment industry, which State Government justified the decision stating that the main objective is to give legitimacy to various contracts and not to earn revenue.

It is apparent from the above that Maharashtra State Government is heading towards the new duty regime and other states will very soon follow suit.

End.

Legal Quotations.

The law hath not been dead, though it hath slept.

William Shakespeare – Measure for Measure.

The meanest citizen, actuated by the meanest motives, is entitled to insist upon the enforcement of the law. The question is, 'What is the law?' a question which frequently arises in our Courts and sometimes receives a satisfactory answer.

A. P. Herbert.

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

Anatole France.

The law locks up both man and woman
Who steals the goose from the common,
But lets the greater felon loose
Who steals the common from the goose.

Edward Potts Cheyney.

⁴ 125 F.3d 1195, 1201-02 [9th Cir. 1997]

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⁶ [2005] (1) SCC 496

⁷ [2005] 65 CLA 226 (Bom.)