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Viewing Indian Smartphone Industry through the lens of SEP Litigation: An Analysis

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Viewing Indian Smartphone Industry through the lens of SEP Litigation: An Analysis

V.K. Unni[1]

Abstract

The role played by technology standards in our modern-day society is very high. Technology industry has to implement standards because of the complexity of products. Since many systems have to work seamlessly in a single product there could be issues pertaining to interoperability. Standard Setting Organisations (SSO) have been set up with the intention of tackling the interoperability problem and it is the SSOs which will determine the standards that entities need to comply with while making their products. Standard Essential Patents (SEPs) are patents which are essential to work or implement a particular industry standard. SSOs while managing SEPs are dutybound to enforce an IPR policy which mandates its members to license their SEPs under Fair, Reasonable and Non-discriminatory (FRAND) terms. However, the lack of uniformity regarding interpretation of FRAND Terms across various jurisdictions has resulted in a flurry of costly litigation around the globe. India has also witnessed a sudden surge in SEP litigations, with around ten lawsuits being filed in High Courts in the recent years, involving some prominent companies like Ericsson, Xiaomi, Micromax etc. This paper examines the approach taken by Indian judiciary and Competition Commission of India regarding SEP litigation in the field of mobile/smartphones along with the court's interpretation regarding the significance of SEPs and FRAND commitments.

Keywords: Standard Essential Patents /SEPs, FRAND, SSOs, patent infringement, Competition Commission of India

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Introduction

During the past few years India has witnessed astonishing growth with respect to the number of mobile phone subscribers. According to the Internet and Mobile Association of India (IAMAI) report the number of mobile internet users had gone up from 173 million users in December 2014, to 450 million users by June 2017.[2] Since more than fifty per cent of India's population uses mobile phone as the sole access point to the Internet, the device also doubles up as the access point to knowledge. Thus today's mobile phone, plays a lead role in bringing a gamut of solutions which can revolutionize socio-economic system, develop sectors like agriculture, small scale industries etc and also connect every Indian to various financial inclusion programs launched by the government. The phenomenal success of mobile devices has resulted in the development of newer wireless system and standards for various kinds of telecommunication dealing with data and voice.

The role played by technology standards in the modern-day society is very high, even though many of us are not fully aware of their impact.[3] These Standards enable us to work without any hindrance when our mobile phones and tablet computers connect to Wi-Fi over different hot spots. Interoperability standards have played a lead role in ensuring that many important innovations quickly reach the marketplace and the same holds true in the case of complex communications networks and sophisticated mobile computing devices that have defined the modern age. Standards used in the field of hardware like USB make sure that our flash drives work on different devices that follow a common drumbeat laid down by standard setting organizations (SSOs). Standards promote competition amongst products that are compliant with a particular standard which in turn forces companies to innovate more which eventually results in lot of benefits to consumers. Standard Essential Patents (SEPs) are patents which are essential to work or implement a particular industry standard and this means that in order to make a standard compliant mobile device those manufacturers will have to utilise technologies that are covered by one or more SEPs. The last few years have witnessed a large number of legal disputes in the field of SEPs and India also plays a major role with regard to SEP jurisprudence with various High Courts and Competition Commission of India dealing with the same.

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[2] http://www.iamai.in/research/reports_details/4860

[3] Jorge L. Contreras, *Implementing Procedural Safeguards for the Development of Bioinformatics Interoperability Standards*, 39 N. Ky. L. Rev. 87, 87 (2012).

Introduction to SSOs and SEPs

Complexity of products drives the technology industry towards standardisation. The main reason for this is the interdependence of different systems which have to work together in commonly used devices like smart phones, tablet, laptops etc. Since many systems need to work together in a single product this also creates an interoperability problem.[4] Standard Setting Organisations (SSO) have been set up with the precise aim of tackling the interoperability problem and it is the SSOs which will determine the standards that entities need to comply with while making their products. These SSOs generally may be a consortium of universities, private companies, vendors, and government agencies. To cite an example the Telecommunications Industry Association is an association of companies providing communications and information technology products and services that will formulate standards for performance testing and compatibility.[5] At the time of standardization, companies who are members of the SSOs are required to disclose patents or patent applications that could be used in the industry standard.[6] Thereafter SSOs will proceed to set up standards to ensure that companies will have discussions and thereafter standardize the use of crucial technologies.[7] If a patent is implemented in the standard, that patent is known as a SEP. According to Judge Posner *"once a patent becomes essential to a standard, the patentee's bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee's mercy."*[8]

One of the most important benefits that standardisation will bring to an SEP owner is the market power which will in turn enable it to demand excessive royalties (which can be many multiples of the value of their patented technology) from those entities who want to implement the technologies protected by these SEPs. Along with the advantages mentioned above, for standardisation there is also the risk of "hold ups". The power of a holder of a patent forming part of a standard to demand more than the value of its patented technology and to attempt to capture the value of the standard itself is referred to as patent "hold-up".[9] On many occasions complex technological products may implement numerous standards each of which may be covered by hundreds of patents. The aggregation of royalty demands by multiple patent holders might result in exorbitant costs on standards-compliant products. This situation is generally termed as royalty stacking.[10]

4 Edith Ramirez, Commissioner, Fed. Trade Comm'n, P*repared Statement of the Fed. Trade Comm'n, Before the U. S. Comm. on the Judiciary Concerning Oversight of the Impact on Competition of Exclusion Order to Enforce Standard-Essential Patent*s 4 (July 11, 2012), available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-oversight-impact-competition-exclusion-orders/120711standardpatents.pdf [hereinafter FTC Oversight] (discussing the "inoperability problem").

5 Details at https://tiaonline.org/about/

6 Jamie Lee, *An Un(frand)ly Game: Preventing Patent Hold-Up by Improving Standardization*, 10 J. Bus. & Tech. L. 375, 379 (2015).

7 FTC supra note 3, 2.

8 Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012).

9 Microsoft Corp. v. Motorola, Inc., C10-1823JLR, 2013 WL 2111217, at 10 (W.D. Wash. 2013)

10 Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2049 (2007).

SSOs mandate SEP owners to agree to license their patents on FRAND (Fair Reasonable and Non-Discriminatory) terms to SSO members, and sometimes, to outside implementers.[11] Technology implementers like Samsung, Apple etc must get permission from all SEP owners by making cash payment, recurring royalties, or cross-licensing if they want to use the relevant standard. The FRAND commitment aims to facilitate widespread adoption of the technology by protecting implementers against hold-ups by SEP owners after the adoption of a particular standard by the concerned industry.[12] If a technology implementer wants to use a particular standard the SEP owner should negotiate a fair and reasonable rate and if the implementer does not agree to pay that rate, the SEP owner can file a patent infringement suit and ask for damages. The main objective of FRAND licenses is to prevent patent hold-up and royalty stacking. It is the FRAND licensing mechanism which helps the SEP users to negotiate and pay a royalty to a patent owner who has agreed to be reasonable and fair to the SSO when the patent was classified an SEP.[13] Theoretically FRAND licensing should offer the same or similar terms to all users or licensees on a given patent and is meant to minimize or prevent licensing abuses and post-standardization hold-ups by the patent owner, like refusing to license the patent or setting exorbitant royalty rates.[14]

Patent Competition Interface

Even though it might appear to be anticompetitive to allow interested industry members and competitors to develop new technology together, on a philosophical plane patent laws and competition laws are complementary in nature as both are intended to encourage innovation and competition. Across the globe patent law tries to reflect the balance between the need to encourage innovation and the avoidance of monopolies (which stifle competition) by stipulating a term of the patent which is generally twenty years from the date of filing. Competition law also recognises the important role played by Intellectual Property Rights (IPR) /patent system by exempting agreements on restraining IPR infringement from the ambit of anti-competitive agreements. The economic benefits that accrue as a result of standardization outweigh the risks of collusion and price-fixing as long as the discussions on new standards are driven by a purely technical perspective.

It is widely accepted that systematic implementation of innovative ideas results in the availability of better goods and services, which, in turn, benefit consumers. Needless to mention the economic growth of a country is very much dependent on the culture of innovation and creativity prevailing there. Governments across the globe devise various policy measures to nurture a congenial environment for innovation. Despite the positive aspects of patents, there have been instances where patent holders have indulged in abusive practices. Most such practices relate to issuance of licences which cause prejudice to an existing trade or industry, licences providing for exclusive grant-back, coercive package

11 Damien Geradin, *Moving Away from High-Level Theories: A Market-Driven Analysis of FRAND*, 59 Antitrust Bull. 327, 354 (2014)

12 Daryl Lim, *Standard Essential Patents, Trolls, and the Smartphone Wars: Triangulating the End Game*, 119 Penn St. L. Rev. 1, 10 (2014).

13 Janice M. Mueller, *Patent Misuse Through the Capture of Industry Standards*, 17 BERKELEY TECH. L.J. 623, 624 (2002).

14 Srividhya Ragavan et. al. *Frand v. Compulsory Licensing: The Lesser of the Two Evils*, 14 Duke L. & Tech. Rev. 83,90 (2015).

licensing, etc. In such situations, competition law has a major role to play as it is premised on preventing artificially-created entry barriers. Interface of IP/patent and competition law can be seen when there is a disparity between the exclusivity rights granted by IP law and anti-competitive practices that the competition law tries to deal with. India is witnessing disputes that raise policy questions regarding the interface between IP law and competition law.

SEP Litigation in India

India being a British colony had its patent law for more than 160 years which was a replica of the then British law. After the country got its independence in 1947 various governmental initiatives were undertaken and finally a new patent law was passed by the Indian Parliament in 1970 called the Indian Patents Act.[15] During the 1990's India joined the World Trade Organisation and as a result the country had to make some changes to its patent law which eventually was completed by 2005 in three phases. In India during the last five years there have been numerous disputes in the high technology wireless sector concerning SEPs. Most of them were filed by the Swedish Telecom company Ericsson. Apart from high-end mobile phones/smartphones there are some SEP cases pertaining to DVD systems where Philips had filed cases against Indian companies to enforce its SEP.[16]

This paper will examine the landmark cases on SEPs that were decided by the High Courts and Competition Commission of India (CCI)

Case 1 Ericsson v Mercury Electronics/ Micromax (March 2013, Delhi High Court) [17]

The main suit was filed by Ericsson against Mercury Electronics and Micromax Informatics Limited (hereinafter Micromax) praying for permanent injunction to stop the Micromax from manufacturing, importing, selling, offering for sale, advertising products which included telephone instruments, mobile handsets, tablets etc and any future devices that contained Adaptive Multi-Rate AMR, 3G and EDGE technology/devices/ apparatus as patented by Ericsson in the suit patents so as to result in infringement of the said suit patents. Ericsson also prayed for a decree of damages of Rs. 100 crores against Micromax and a direction to Micromax to render sales accounts for the years 2008-2012 for the mobile devices that included handsets, tablets etc. that incorporated Ericsson's patented technology. Ericsson further sought delivery up of infringing components/elements etc. from Mercury and Micromax.[18]

15 "The Patents Act, 1970, Act No. 39, Parliament, 1970 (India) (hereinafter the IPA), full text at http://www.ipindia.nic.in/writereaddata/Portal/IPOAct/1_31_1_patent-act-1970-11march2015.pdf".

16 Koninklijke Philips Electronics N.V. vs. Rajesh Bansal And Ors., available at https://indiankanoon.org/doc/156062069/

17 TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) Vs MERCURY ELECTRONICS & ANR. CS (OS) No. 442 of 2013,decision available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=46519&yr=2013

18 Id.

The single bench of the Delhi High Court opined that Ericsson had made out a prima facie case in its favour and balance of convenience was also entirely in its favour. Further, irreparable harm would be caused to Ericsson if the interim injunction order as prayed for was not granted. Accordingly, the Custom Authorities were directed that as and when any consignment was imported by Micromax intimation thereof had to be given to the Ericsson and objections, if any, of Ericsson should be decided under Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 till further orders. Court also designated its officer as the local commissioner to visit Micromax's premises to inspect and collect documents indicating import and sales of various alleged infringing mobile devices (handsets, tablets etc.) and other alleged infringing components for the last three financial years.[19] In this case the court had granted an ex-parte interim injunction without even hearing the contentions of Micromax and it also authorised a court appointed commissioner to seize documents from Micromax's office with respect to the sales and import of the mobile phones which are the subject matter of the present litigation.

This decision was appealed by Micromax before a Division Bench of the Delhi High Court but it was dismissed by the Division Bench during the very first hearing. Thereafter Micromax and Ericsson approached the single bench informing the judge that they had entered into an interim arrangement pending final disposal of the lawsuit.[20]

Ericsson v Mercury Electronics (February 2018 Delhi High Court)

Ericsson and Micromax informed the High Court that during the pendency of the present proceedings, they entered into a Global Patent License Agreement dated 26th January, 2018 and in light of its execution, the parties had put an amicable end to their disputes. Parties also agreed to withdraw all their pending disputes between them including the present suit, counter-claims, contempt petitions as well as applications. The Court permitted Ericsson to withdraw the present suit along with pending applications as well as contempt petitions in pursuance to the Global Patent License Agreement dated 26th January, 2018.[21]

Case 2 : Ericsson v Intex (Delhi High Court March 2015)

The plaintiff Ericsson filed the present suit for permanent injunction restraining infringement of rights in eight patents registered in India along with damages/rendition of accounts and delivery up etc. According to admitted facts the plaintiff, M/s Ericsson was a company incorporated under the laws of Sweden which was founded in Sweden.[22]

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[19] Id.

[20] Court was informed of this settlement on 19th March 2013.

[21] TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) Vs MERCURY ELECTRONICS & ANR. I.A.Nos.1698/2018 & 1623/2018

[22] TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) Vs Intex Technologies India Ltd., http://164.100.69.66/jupload/dhc/MAN/judgement/16-03-2015/MAN13032015S10452014.pdf

The patents which were relevant to this suit belonged to three technologies in the field of telecommunications pertaining inter alia to 2G and 3G devices (mobile handsets, tablets etc), details of which are referred below

1. Adaptive Multi-Rate (AMR) speech codec - a feature that conserves use of bandwidth and enhances speech quality; (AMR)
2. Features in 3G phones - Multi service handling by a Single Mobile Station & A mobile radio for use in a mobile radio communication system; (3G)
3. Enhanced Data Rates for GSM Evolution (EDGE) - A transceiving unit for block automatic retransmission request; (EDGE)

The abovementioned patents were SEPs in the field of telecommunication and were mandatorily required and used for the implementation of the concerned technologies including 2G and 3G technologies. Ericsson in the light of the FRAND commitment made by it to various SSOs including European Telecommunication Standards Institute (ETSI), fairly offered a license for its entire portfolio of patents including the suit patents which were essential for 2G and 3G technologies to the defendant Intex. However, despite being put to notice since December 2008, Intex had failed to obtain licenses from Ericsson for its SEPs including the suit patents. Ericsson contended that from 2008 onwards till the filing of the present suit, though Intex had always averred and in fact continued to state that it was willing to discuss and enter into a FRAND license with Ericsson however the same was not reflected in the conduct of Intex. In spite of repeated requests made by Ericsson, Intex had failed to constructively negotiate a license agreement with Ericsson (the SEP owner) and despite admitting that Ericsson was the owner of SEPs which were necessarily employed and used by Intex in various telecommunication devices like handsets, tablets, dongles etc. that were being sold by it under the Intex brand, no feasible offer had been made by Intex.[23]

Court noted that if a patent covered a particular component/ element/ device/ method etc corresponding to a technical specification or a technology that forms a part of a standard, the patent was regarded as an essential patent for such standard. An essential patent could be said to be a patent that corresponded to an industry standard. The same standard was mutually agreed by various service providers, equipment manufacturers etc to be mandatorily implemented for a particular technology. This was meant to ensure that complete compatibility was achieved. It was impossible to claim compatibility with a technology as defined by the concerned standards without actually infringing the specific patent. So as to avoid a situation whereby standards could not be effectively implemented due to existence of such patents - patentees of such essential patents had broadly committed to FRAND (Fair, Reasonable and Non-discriminatory) licensing. FRAND was a balance between ensuring the availability of an open, global standard to a new entrant and incentivizing development of that standard by rewarding those who contributed to the standard with their research and development skills. Ericsson also supported FRAND

[23] Id. paras 7-8.

licensing and had over 100 global license agreements with vendors in the telecom industry. To support its case that the patents in question pertaining to AMR, EDGE and 3G technologies were essential patents and they corresponded to the standards issued by ETSI related to the aforesaid 2G and 3G technologies, Ericsson demonstrated that the Department of Telecommunications, India had recognized ETSI standards as approved standards for GSM, WCDMA/ UMTS network and equipment providers and as a consequence the same were required to be complied with by various device importers, manufacturers, sellers etc. While Intex had its discussions with Ericsson, it also filed proceedings against the Ericsson before the Competition Commission of India (CCI) for abuse of dominance and filed petitions for revocation of patents in the Intellectual Property Appellate Board. [24]

Intex contended that the essentiality of the patents which were being challenged had not been proven and that there were numerous serious challenges against the same for violations of various provisions of the Patents Act. Intex's argument revolved around the issue pertaining to validity of the patents which had to be proven before any action for infringement. It further contended that it had not been proved that its devices contained the patents owned by Ericsson and questioned the accuracy of Ericsson's in-house testing and its expert.[25]

The Court however rejected the arguments of Intex with respect to the allegation that Ericsson had not proved the essentiality of its patents. Court noted that in view of explanation given by Ericsson coupled with the conduct of the Intex for the last five years, an inference could easily be drawn in favour of Ericsson that the suit patents were prima facie valid and there was no credible defence raised by Intex who was guilty of infringement of patents. The suit patents were SEPs even as per the admissions of Intex who had been corresponding with the Ericsson for many years. Court also noted the contention made by Intex before the Competition Commission of India (CCI) as an admission on part of Intex with respect to the essentiality of patents owned by Ericsson.[26]

The Court opined that Intex had prima facie acted in bad faith during the negotiations with plaintiff, and it had even approached various fora and had made contrary statements in order to get monetary benefit. Court observed that the balance of convenience lied in favour of Ericsson and against Intex. With regard irreparable loss and injury, the Court noted that if a FRAND agreement was not signed by Intex or royalty was not paid, it would have impact on other 100 licensors who were well known companies in the world who were paying the royalty. Finally the Court directed Intex to pay Ericsson 50% of the total royalty amount, as per total selling price of the device from the date of filing the case.[27]

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[24] Id. see generally paras 13-15.
[25] Id. paras 41-42.
[26] Id. para 28.
[27] Id. para 160

Case 3

Ericsson v Best IT World (iBall) [28] (September 2015, Delhi High Court)

Ericsson filed the suit for permanent injunction restraining infringement of patents, damages, rendition of accounts, delivery up etc. against iBall. The patents in question covered three technologies in the field of telecommunications pertaining inter alia to 2G, EDGE and 3G devices (mobile handsets, tablets, dongles etc.), details of which are as under:- (a) Adaptive Multi-Rate (AMR) speech codec – a feature that conserves use of bandwidth and enhances speech quality; (AMR) (b) Features in 3G phones - Multi service handling by a Single Mobile Station & A mobile radio for use in a mobile radio communication system; (3G) (c) Enhanced Data Rates for GSM Evolution (EDGE) - A transceiving unit for block automatic retransmission request; (EDGE).[29]

The contention of Ericsson was that the said patents had corresponding registered patents in several countries of the world and these technologies were essential for mobile devices (handsets, tablets, dongles etc.) to interoperate with network equipment, as per the standards prescribed by international standardization bodies that had been adopted and implemented in India by the Department of Telecommunications (DoT). Ericsson had also produced copies of its declarations to ETSI along with claim charts mapping the said patents to concerned technical specifications of relevant standards. Prior to the suit, iBall filed a complaint before the CCI alleging that Ericsson which owned the SEPs had abused its dominant position.

Subsequently CCI passed an order directing its Director General to start investigation against the Ericsson and the said order of the CCI was challenged by Ericsson vide writ petition filed before the Delhi High Court on the ground that CCI's order passed was arbitrary in nature and without jurisdiction. The Delhi High Court allowed the Director General (DG) of the CCI to call for information from Ericsson but directed that no final report be submitted by the DG and no final orders be passed by the CCI in the said case.[30]

iBall admitted that there were meetings and exchange of communications between the parties from 2011 till 2015 however in spite of many reminders from time to time, Ericsson had failed to provide relevant details to iBall so that it could be aware about the legal rights of Ericsson. iBall argued that it was the obligation of Ericsson to provide all the necessary details which till the day had not been provided by Ericsson. iBall further contended that unless it was satisfied about the legal rights of Ericsson it could not be blamed that iBall was unwilling to have the FRAND license. Ericsson refuted the arguments of iBall and stated that iBall was provided with all the relevant details. Court after hearing both the parties came to

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[28] TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) v. M/S BEST IT WORLD (INDIA) PRIVATE LIMITED full text at http://164.100.69.66/jupload/dhc/MAN/judgement/03-09-2015/MAN02092015S25012015.pdf

[29] Id. paras 6-7

[30] Id. para 9.

the prima facie view that the plea of iBall that it was not aware about the rights claimed by Ericsson had no force in the light of the averments made in the plaint and documents filed by Ericsson. Court thus held that iBall was aware about the claim of Ericsson's portfolio of SEPs related to GSM, GPRS, WCDMA technology for which there was no substitute and which were necessarily used by telecommunication devices claiming to be GSM, GPRS, WCDMA etc.

Finally, the Court held that Ericsson had made out a prima facie case in its favour and balance of convenience also lied in its favour. If the interim direction/ order was not granted, the plaintiff would suffer irreparable loss and injury because of the reason that the defendant would keep on marketing the mobile devices without the FRAND agreement and without paying any royalty. Based on these findings the Court restrained iBall its agents/affiliates from importing of mobiles, handsets, devices, tablets etc.[31] Thus Ericsson won the case against iBall and an interim injunction granted by the Court against iBall restraining the company and its agents/affiliates from importing of mobiles, handsets, devices, tablets etc containing the technologies covered by SEPs owned by Ericsson.

Case 4: Ericsson v Lava[32] (June 2016, Delhi High Court)

Ericsson had filed the present suit for permanent injunction against Lava seeking to restrain violation and infringement of its rights in its eight patents. These patents covered three technologies in the field of telecommunications pertaining inter alia to 2G, EDGE and 3G devices (mobile handsets, tablets, dongles etc.), details of which were as under:-

(a) Adaptive Multi-Rate (AMR) speech codec – a feature that conserves use of bandwidth and enhances speech quality; (AMR)

(b) Features in 3G phones - Multi service handling by a Single Mobile Station & A mobile radio for use in a mobile radio communication system; (3G)

(c) Enhanced Data Rates for GSM Evolution (EDGE) - A transceiving unit for block automatic retransmission request; (EDGE)

Ericsson argued that the said patents had corresponding registered patents in several countries of the world and these technologies were essential for mobile devices like handsets, tablets, dongles etc. to interoperate with network equipment, as per the standards prescribed by international standardization bodies that had been adopted and implemented in India by the Department of Telecommunications (DoT).Ericsson claimed ownership of extensive portfolio of SEPs vis-à-vis GSM, GPRS, WCDMA etc. When a patent was essential for a particular standard, all manufacturers of devices or equipment which were 2G, EDGE or 3G compliant were supposed to use the said technology belonging to

[31] Id. paras 26-28.
[32] TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) v. Lava International full text http://164.100.69.66/jupload/dhc/MAN/judgement/13-06-2016/MAN10062016IA57682015.pdf

Ericsson's patents because it was impossible to claim compatibility with a technology without using those SEPs. This meant that there was no other option but to obtain a license from Ericsson and in absence thereof, it would be considered as infringement of the SEPs.[33]

Ericsson argued that Lava was guilty of infringement, as their phones were compliant with specified ETSI Standards. According to Ericsson, Lava's devices used the same AMR technology in 3G and 2G and possessed EDGE capabilities and thus, it was alleged that all these devices were infringing Ericsson's SEPs. Ericsson also stated that it was obligated to offer a license to SEPs on FRAND terms and had sought to negotiate with Lava but the latter had refused to take license on FRAND Terms.[34]

Lava contended that Ericsson had not furnished the correct technical specifications however the Court dismissed this contention because of the material placed on record by Ericsson. The Court held that Ericsson had sufficiently built a prima facie case to demonstrate the essentiality of patents, by setting out the relevant standards, mapping said standards with claims. The Court noted that Lava was aware about the existence of Ericsson's SEPs since 2011 and was also aware about the fact that the plaintiff owned an extensive portfolio of SEPs relating to GSM. GPRS, WCDMA technology for which there was no substitute and which were necessarily used by telecommunication devices claiming to be GSM, GPRS, WCDMA etc. Lava was also aware about third party proceedings instituted by Ericsson in India on the basis of the suit patents and the orders passed therein. Lava had the full knowledge about the fact that Ericsson had executed various global patent license agreements related to its SEPs with a large number of parties. In spite of this Lava had been consistently delaying execution of a license agreement with Ericsson and in such a case, advance notice of existence of a patent and its infringement ought to go in favour of Ericsson. Court further opined that Lava who had notice of the patents should not get the benefit of the loss of time. Moreover, the fact that Lava was aware of the Ericsson's patents but had not challenged their validity and hence admitted the same, should be a factor in favour of grant of injunction.[35]

Court also dismissed Lava's arguments that Ericsson had wrongly claimed that its patents were not algorithms at all and were in fact product patents, and, therefore, not within the bar of Section 3(k) of the Patents Act. Court held that the bar of Section 3(k) did not apply when a patent involving modern day technology algorithms were employed in order to perform certain calculations or selections which were thereafter utilized by various hardware components or elements to produce/improve a technology and create a practical effect or result in a physical realization. As per the Court each of the inventions claimed in

[33] Id. para 8.
[34] Id. para 9.
[35] Id. paras 98-100.

the suit patent were not mere theoretical or abstract algorithms or mere mathematical or mental methods or even computer programmes per se as was being alleged by Lava. [36]

Court held that once it appeared that there had been a prima facie infringement of a patent and no credible defence was established by the defendant, injunction had to follow even in cases of SEPs. If any party deliberately avoided to enter into license agreement on flimsy grounds, the injunction order had to be passed. Court noted that the approach of Lava was very negative and prima facie the company was adopting a hide and seek policy. Court was of the opinion that Ericsson had made out a strong prima facie case in its favour and against Lava and the balance of convenience also lied in favour of the plaintiff and against Lava. Court observed that in case the interim order was not passed or Lava was not ready to enter into FRAND agreement with Ericsson the other licensees would also take the same stand which was being taken by Lava. The Court passed an injunction order against Lava and directed the company to deposit Rs. 50000/ with the Prime Minister's National Relief Fund.[37]

Case 5 Ericsson v Xiaomi (December 2014, Delhi High Court)

Ericsson filed a suit against Xiaomi for injunction, restraining infringement of rights in eight patents, rendition of accounts, delivery up, etc. According to Ericsson they owned eight patents covering three technologies in the field of telecommunication relating to 2G and 3G devices. Ericsson had previously invited Xiaomi to obtain the requisite licenses for SEPs owned by Ericsson. Instead of obtaining the license Xiaomi launched its infringing devices in India during July 2014. The Court after hearing Ericsson passed an ex parte order that injuncted Xiaomi from selling, advertising, manufacturing or importing devices that infringed the SEPs mentioned by Ericsson in the suit. The Court also directed the customs officials to prevent the imports under the IPR Rules, 2007 and also appointed local commissioners to visit the offices of Xiaomi in order to ensure the compliance of these orders.[38]

Thereafter Xiaomi appealed against the order of the single bench before the Division Bench of the Delhi High Court and the Division Bench allowed Xiaomi to sell its devices in India, with certain riders. These riders mandated that Xiaomi could only sell devices that carried chips imported from Qualcomm Inc., a licensee of Ericsson and that Xiaomi was to deposit Rs. 100 for every device sold in India.[39]

Subsequently in 2016 Xiaomi approached the Delhi High Court with the allegation that Ericsson had suppressed certain facts regarding the existence and contents of a Multi-

[36] Id.
[37] Id. para 114
[38] TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) v. Xiaomi Technology and others CS(OS) 3775/2014, Order dated 08.12.2014 of Delhi High Court
[39] News on vacating of injunction available at https://www.livemint.com/Companies/BP69vGrbfM2JGWTt593dqO/Delhi-HC-allows-Xiaomi-to-sell-in-India-till-8-January-subje.html

Product License Agreement dated 01.10.2011 entered into between Ericsson and Qualcomm Incorporated. Under the said Agreement, the Ericsson had granted a license in respect of some of its patents, at least patents pertaining to CDMA (3G), applications to Qualcomm which vested in them the right to make, use, sell. and import mobile device chipsets and devices incorporating chipsets. The benefits of the said license accrued to purchasers and customers, of Qualcomm chipsets. Xiaomi argued that implementation of Qualcomm chipsets for CDMA (3G) applications was a licensed use of Ericsson's relevant patents and could not be said to be an infringement of such patents. The Court held that because of the prior licensing and applicability of the said license to some of Xiaomi's mobile devices (including the device allegedly subjected by the Plaintiff to testing and infringement analysis), Ericsson had entirely failed to demonstrate or establish a prima facie case in its favour. Based on this the injunction order against Xiaomi had been vacated in part.[40]

Case 6 Vringo v. Xu Dejon/ZTE

Vringo proceeded against ZTE for infringement of its SEP. The Delhi High Court granted an ex parte interim injunction which restrained ZTE from making, importing, selling, using or advertising the infringing products.[41] According to the Court, Vringo had made out a prima facie case showing that Xu Dejon /ZTE were violating and infringing the SEP of Vringo. Court also appointed local Commissioners who were directed to visit the premises of ZTE and prepare an inventory of all the infringing products/ goods i.e. handsets, tablets, dongles, infrastructure equipment, semi-assembled products, brochures, technical specifications, template offer letters etc. Subsequently the injunction was vacated on the condition that ZTE would pay Rs. 5 crores and filed an affidavit disclosing the details of CDMA devices sold along with the revenue accrued.[42]

Case 7 Vringo v Indiamart Intermesh and others

Vrngo filed patent infringement suit against ZTE and its subsidiaries for infringement of its SEPs.[43] According to Vringo its research and development efforts resulted in filing over 25 patent applications on technologies pertaining to internet search and search advertising,

[40] TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) v. Xiaomi Technology and others http://164.100.69.66/jupload/dhc/VKR/judgement/23-04-2016/VKR22042016S377522014.pdf para 24 VII

[41] http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=221627&yr=2013

[42] https://spicyip.com/wp-content/uploads/2013/12/Vringo-ZTE-Order.pdf

[43] Vringo Infrastructure Inc. and Anr v. Indiamart Intermesh Ltd. and Ors., I.A. No.2112/2014 in C.S. (OS) No.314/2014 (High Court of New Delhi), http://164.100.69.66/jupload/dhc/VKS/judgement/07-08-2014/VKS05082014S3142014.pdf

handsets and telecommunications infrastructure and wireless communications. In the present case Vringo was alleging infringement of patent No.IN 200572 which dealt with a method and a device for making a handover decision in a mobile communication system. It was alleged by Vringo that, ZTE and its associates were infringing its suit patent by manufacturing, importing, selling, offering for sale infrastructure equipment including base station controller.

ZTE strongly refuted the allegations levelled by Vringo and contended that the technology used by them was different from the technology owned by Vringo. ZTE further argued that Vrngo was guilty of concealment of fact. Vringo had stated that the cause of action accrued to them in December 2012, when the notice of cease and desist was given to them, while the fact of the matter was that the predecessor-in-interest of Vringo was aware of the fact that ZTE and its associates were using a technology allegedly developed by them right from 2002 not only in India but in different countries and yet, Nokia Telecommunication (who was the predecessor-in-interest of Vringo) had not taken any action against ZTE. Therefore, action for infringement which has been initiated by Vringo against ZTE was hit by latches and delay and was also barred by limitation.[44] In such a situation, it was contended that Vringo would not suffer an irreparable loss in case the ad interim injunction was not granted, instead ZTE would suffer an irreparable loss inasmuch as it would have to stop its commercial activity with regard to the sale of the base station controller.

After hearing both the parties Court held that Vringo had not been able to establish a prima facie case about the patent of Vringo being infringed by ZTE from the evidence which had been produced. Court wanted more evidence to decide the issue. Court also observed that the balance of convenience was not in favour of Vringo because the assignor/original patentee, namely, Nokia Telecommunication as well as the licensee to whom the patented technology had been given to be commercially exploited by Vringo did not complain about the use of the technology by ZTE either prior to the assignment or even after the grant of license. Court further held that Vringo would not suffer an irreparable loss in case injunction granted stood vacated because the interest of the Vringo could be sufficiently protected even if there was no injunction.[45] Based on the above-mentioned reasons the Court vacated he ex-parte injunction.

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[44] Id. para 11.
[45] Id. para 42.

SEP Disputes before the CCI

The Competition Act 2002 (hereinafter CA 2002) provides for the setting up of a market regulator called Competition Commission of India (CCI).[46] CCI consists of a chairperson and not less than two and not more than six other members to be appointed by the Government of India (GoI). CA 2002 deals with three thematic clusters a) anti-competitive agreements, b) abuse of dominant position c) regulation of combinations. There is a Director General (DG) appointed for the purposes of assisting CCI to conduct inquiry into contravention of any of the provisions of CA 2002 and DG is appointed by the GoI.

In order to enforce their SEPs companies like Ericsson and Vringo had filed patent infringement suits in High Courts particularly the Delhi High Court. Companies who were defending the law suits were mainly technology implementers like Micromax, Intex Lava, iBall, Xiaomi, ZTE etc. Apart from defending the cases filed in the High Court some of these companies proceeded against the SEP owners under the relevant provisions of the CA 2002 dealing with abuse of dominant position.

Section 4 of CA 2002 deals with abuse of dominant position and the said section prohibits any enterprise or group from abusing its dominant position in a direct or indirect manner. Dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.[47] Abuse of dominant position happens if any enterprise or a group imposes unfair or discriminatory

i) condition in purchase or sale of goods or service; or

ii) price in purchase or sale (including predatory price) of goods or service.

iii) limits or restricts— production of goods or provision of services or market therefor; or technical or scientific development relating to goods or services to the prejudice of consumers;

iv) indulges in practice or practices resulting in denial of market access

v) concludes contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

vi) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

According to CA 2002, predatory price means the sale of goods or provision of services, at a price which is below the cost of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.[48]

Micromax and Ericsson Case

Micromax filed information against Ericsson before CCI, wherein it was alleged that Ericsson was demanding unfair, discriminatory and exorbitant royalty for its patents regarding GSM

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[46] https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

[47] Explanation to Section 4 of CA 2002.

[48] Id.

technology. The royalty demanded by Ericsson was excessive when compared to royalties charged by other patentees for patents similar or comparable to the patents held by Ericsson.[49] Micromax submitted before the CCI that Ericsson abused its dominant position by imposing exorbitant royalty rates for SEPs, as it was well aware that there was no alternate technology available and Ericsson was the sole licensor for the SEPs of globally acceptable technology standards. Furthermore, Micromax argued that royalty rates imposed by Ericsson were not product based i.e. royalty was not being charged on the basis of cost of the product licensed but was being charged on the basis of value of the phone in which product of Ericsson was incorporated and Micromax had to pay a per centage of cost of the phone as royalty. [50] Ericsson in its defence argued that Micromax had taken different stands before the Commission and Delhi High Court and the latter had started making payments of the royalty as per the interim arrangement recorded by the Delhi High court. According to Ericsson the present dispute was of commercial and civil nature and CCI should not assume the role of a price setter or concern itself with excessive prices ad pointed out that seeking of injunction from court did not constitute abuse of dominance.[51]

CCI noted that Ericsson's SEPs were in the field of 2G, 3G and 4G patents used for GSM smart phones, tablets etc. and thus the relevant product market would be the SEP(s) in GSM compliant mobile communication devices in India. Based on the details submitted by Micromax, CCI made a prima facie view that Ericsson was dominant in the relevant market of GSM and CDMA in India and held large number of GSM and CDMA patents. Ericsson had 33,000 patents to its credit, with 400 of these patents granted in India, and the largest holder of SEPs for mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc. Since Ericsson held the SEPs and there was no other alternate technology in the market, it enjoyed complete dominance over its present and prospective licensees in the relevant product market. Thus the CCI ruled that Ericsson was dominant in the relevant product market.[52]

CCI further observed that the royalty rates being charged by Ericsson had no linkage to patented product and it seemed to be acting contrary to the FRAND terms by imposing royalties linked with cost of product of user for its patents. Refusal by Ericsson to share commercial terms of FRAND licences with licensees similarly placed to Micromax strengthened the accusations of Micromax regarding discriminatory commercial terms imposed by Ericsson. CCI further noted that Micromax had every right to raise issues regarding abuse of dominant position before CCI as Section 62 of CA 2002 made it clear that provisions of Competition Act were in addition to and not in derogation of other existing laws. Based on the above-mentioned analysis CCI opined that it was a fit case for through investigation by the Director General of CCI into the allegations made by Micromax.[53]

Intex and Ericsson Case

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[49] Micromax Informatics (Informant) and Telefonaktiebolaget LM Ericsson (Opposite Party) full text at http://cci.gov.in/sites/default/files/502013_0.pdf
[50] Id. para 8.
[51] Id. para 9.
[52] Id. para 16.
[53] Id. para 19.

Intex Technologies also approached the CCI against Ericsson on more or less similar grounds.[54] Intex alleged that Ericsson, by way of its term sheet for Global Patent License Agreement (GPLA) demanded exorbitant royalty rates and unfair terms for licensing its patents to Intex. Ericsson also made it clear that the jurisdiction and governing law for the GPLA would only be Sweden. Even though Ericsson had publicly claimed that it offered a broadly uniform rate to all similarly placed potential licensees Ericsson refused to share the commercial terms and royalty payments on the grounds of Non-Disclosure Agreements (NDAs) and Intex alleged that this was strongly suggestive of the fact that different royalty rates/commercial terms were being offered to the potential licensees belonging to the same category. Intex pointed out that above said conduct of Ericsson would raise the threat of royalty stacking and patent hold up issues.

CCI while hearing the matter noted that FRAND licences were primarily intended to prevent patent hold-up and royalty stacking. It further noted that Ericsson had declared to ETSI that it had patents over 2G, 3G and EDGE Technology and these patents were SEPs and it was required to offer and conclude licences with patent seekers on FRAND Terms. Since Ericsson held the SEPs CCI ruled that Ericsson was dominant in the relevant product market. CCI further held that the information concerning royalty rates made it clear that the practices adopted by Ericsson were discriminatory as well as contrary to FRAND terms and the royalty rates being charged by Ericsson had no linkage to patented product, contrary to what was expected from a SEP owner.[55] Ericson's unwillingness to share commercial terms of FRAND licences with licensees similarly placed to Intex strengthened the allegations of Intex with respect to the discriminatory commercial terms imposed by Ericsson. CCI thus opined that the present case be clubbed with the case of Micromax that was currently being investigated by the Director General of CCI.

Ericsson v. CCI (Delhi High Court)

The orders of the CCI passed in both cases resulted in an investigation by its DG against Ericsson. This investigation was challenged by Ericsson before the Delhi Court, through a writ petition under Article 226 of the Indian Constitution[56] Ericsson argued that the impugned orders passed by the CCI were without jurisdiction as it lacked the authority to commence any proceeding in relation to a claim of royalty by a patent owner and any issue regarding a claim for royalty would fall within the scope of the Patents Act, 1970 (hereinafter PA 1970) and could not be a subject matter of investigation under the CA 2002. Ericsson further submitted that the abuse of dominance and anti- competitive behaviour as alleged by Micromax and Intex related solely to the royalty sought by Ericsson for use of its patented technology and this issue was outside the jurisdiction of CCI as the PA 1970 provided an adequate mechanism to address all such issues.[57]

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[54] Intex Technologies (Informant) and Telefonaktiebolaget LM Ericsson (Opposite Party), 762013_0.pdf (cci.gov.in)

[55] Id. para 17.

[56] TELEFONAKTIEBOLAGET LM ERICSSON (PUBL) vs. Competition Commission of India and another., W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014,full text at https://indiankanoon.org/doc/164770226/

[57] Id. paras 32-34

CCI in its defence submitted that the impugned orders could not be subjected to judicial review under Article 226 of the Constitution of India as the said orders did not amount to a final expression of opinion on merit. CCI countered the arguments that it did not have the jurisdiction to investigate issues regarding payment of royalty in respect of patents registered under PA 1970 by submitting that the provisions of CA 2002 were in addition to and not in derogation of any other law. CCI contended that it was not concerned with any other aspect regarding grant or exercise of any right pertaining to a patent except to ensure the compliance with Sections 3 and 4 of CA 2002. [58]

The Court noted that there was no irreconcilable repugnancy or conflict between CA 2002 and PA 1970 and in the absence of any such conflict between the two laws the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of patents cannot be excluded.[59] Court observed that seeking injunctive reliefs by an SEP holder in certain circumstances might amount to abuse of its dominant position because the risk of suffering injunctions would in certain circumstances, clearly exert undue pressure on an implementer and thus, place him in a disadvantageous bargaining position vis-a-vis an SEP holder. A patent holder had a statutory right to file a suit for infringement and the Competition Act was not concerned with rights of a person or an enterprise but the exercise of such rights. The position of a proprietor of an SEP could not be equated with a proprietor of a patent which was not essential to an industry standard. While in the former case, a non-infringing patent was not available to a dealer/manufacturer; in the latter case, the dealer/manufacturer might have other non-infringing options.[60] As Ericsson was the owner of SEPs it was not open to Ericsson to contend that its conduct in respect of those SEPs could not be made subject matter of enquiry by CCI on the ground that SEPs had been denied by Micromax and Intex. Finally, the Court held that CCI's Director General can continue its enquiry against Ericsson with regard to the information filed by Micromax and Intext dealing with abuse of dominant position.

Analysis

This paper has tried to cover most of the important litigations pertaining to SEPs in India. As is evident from the cases which have been discussed, SEP owners in the field of mobile/smartphones have been very active to protect their rights. To that extent companies like Ericsson which owns a large number of SEPs have tried the legal route by filing numerous patent infringement suits against many smartphone makers from India and abroad.

In most of these cases, the SEP owner was able to get appropriate remedies either in the form of injunction or interim arrangements. In many of these cases courts have granted ex-parte injunctions. Ex parte injunction is something where an injunction can be given instantaneously where even the opposite party is not even given a notice. [61] However, the Supreme Court has held that an ex parte injunction could be granted only under exceptional

[58] Id. para 38.
[59] Id. para 174.
[60] Id. para 199.
[61] Order 39 (1) and (2) Civil Procedure Code 1908

circumstances.[62] According to the Supreme Court the factors which should weigh with the court in the grant of ex parte injunction are-

(a) whether irreparable or serious mischief will ensue to the plaintiff; (b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;

the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;

(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.

(f) even if granted, the ex parte injunction would be for a limited period of time.

(g) General principles like prima facie case balance of convenience and irreparable loss would also be considered by the court.

But in many of the SEP cases discussed earlier, ex-parte injunctions had been given as a matter of right and this has adversely affected the rights of the defendant/mobile phone manufacturer as they were not even given a chance to explain their position regarding the allegation of infringement raised by the SEP owner. Furthermore, in some instances SEP holders were found guilty of concealing crucial information regarding patent licensing and in some cases the injunction granted to the SEP owner was vacated in part as a result of such abusive practices

The smartphone companies who were being targeted by SEP owners tried to use the provisions under competition law to defend their position. Thus, they approached the CCI to carry out an investigation regarding SEPs abusing their dominant position by charging exorbitant royalty rates. CCI found merit in their allegation and directed its Director General to investigate which was challenged by Ericsson in the Delhi High Court. However, the High Court categorially held that CCI had power to order investigation against SEP owners regarding abuse of dominant position.

The SEP owners have used patent law to repeatedly file infringement suits against various smartphone companies and this has resulted in many companies eventually closing down or drastically losing its market share. Micromax had a market share of about 22% in the quarter 4 of 2014. However, by the corresponding quarter of 2016 its market share dipped to 5%.[63] Even though this might not be entirely due to SEP litigation, it is evident that many

[62] Morgan Stanley Mutual Fund v. Kartick Das, details at https://indiankanoon.org/doc/1120137/
[63] https://candytech.in/smartphone-market-share-india/

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of the Indian mobile phone manufacturers who did not have adequate financial resources were not able to take the license offered by companies like Ericsson because of the exorbitant royalty rates demanded by the SEP owners.

SEP litigation is an attempt to demarcate the extent of public rights and is closely connected with public interest. Whenever a SEP implementer like a mobile/smartphone manufacturer is forced to pay exorbitant charges to the SEP owner it has serious implications on public interest because these higher costs will be eventually passed on to end consumers. These costs could be in the nature of higher royalties and even payment for expired patents which could also be made part of the patent license.

The limited objective of this project is to trace the manner in which technology standards are being created and managed, with special reference to the FRAND licensing commitments of patent owners. After analysing the cases decided by the High Court and CCI it becomes pretty clear that the SEP owners have been abusing the system and their commitments under FRAND licensing and this has resulted in a higher number of disputes and uncertainty in the market which in turn will have cascading impact on the availability of mobile phones at affordable prices. The practice of quick injunctive relief for SEP owners should be re-considered at the earliest.

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