

Walking Down an un-FRANDLY Road, India Searches for Answers

Dr. Hardik H. Parikh^{1*}, Ms. Vaishali Singh²

¹ *Assistant Professor, Gujarat National Law University, Gandhinagar, Gujarat.

²Research Scholar, Gujarat National Law University, Gandhinagar, Gujarat.

***Corresponding Author:** - Dr. Hardik H. Parikh

*Assistant Professor, Gujarat National Law University, Gandhinagar, Gujarat.

Abstract

Statistics say India is world's second largest telecommunications market. As the market swells so do the number of innovations and owing to the nature of this industry, an innovation demands combination of various patents more often than not. However, the act of standardization of innovations along with up-front investments required to design, develop, and market products compliant with a standard create the possibility for what has been termed a 'patent holdup'. Accordingly the patent-holder-essential to implementation of a standard set by any standard-setting organizations (SSOs) is able to demand and obtain higher royalties than he would have been able to demand 'but for' inclusion of the SSOs technologies in the set standards. The distinct features predicating a holdup, such as the sheer number of the relevant patents, their fragmented ownership, the condition of strong complementary links in network economies means that patent holdup may arise out of a wide variety of licensing arrangements including fair, reasonable and non-discriminatory (FRAND) commitments administered by SSOs. As a response to the potential holdup problem (i.e., to ensure that the standard can be used at a reasonable cost), SSOs typically require that participants agree to license their standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms.

Indian jurisprudence is at a very nascent stage on FRAND licensing practices for standard essential patents even as the SEP holders get increasingly involved in legal battles concerning the ambiguity on appropriately defining the fair, the reasonable and the nondiscriminatory in the FRAND terms and how to determine a suitable royalty rate for an SEP or a cluster of SEPs. Not only the judiciary but also the SSOs have largely left the concerns unanswered for several reasons including them not wanting to be responsible for policing patent licensing terms. However, it is certain that the answers have important policy ramifications. If FRAND is defined in a manner that allows SEP holders to charge royalties that exceed the level appropriate for the patented technology, widespread adoption of standard and associated economic benefits may be under threat. On the contrary, if it is defined in a way that does not fittingly compensate an SEP holder for the value of the invention, it may prove a deterrent for current or prospective patent holders to participate in SSOs and coupled with a decreased incentive to innovate, this may lead to reduction in welfare.

Although the FRAND licensing theory is understood in broad contours, uncertainty arises from implementation of FRAND terms in practice; heavy dependence on facts of particular industries, licenses, technologies and negotiations make prediction of royalty rates and schedule difficult, if not impossible. Further complications arise with the application of theoretical notions of fairness, reasonableness and non-discrimination in resolving concrete disputes. Identifying criteria that are simultaneously fair, reasonable and non-discriminatory can be an illusive task for any decision-maker, as is observed in any peculiar legal battle. The suitable definition of FRAND and approaches for determining a FRAND royalty are a subject of litigation between SEP holders and product manufacturers.

This paper takes on the FRAND issue in the Indian context in a threefold manner with a doctrinal approach. Firstly, the domestic development of Intellectual Property Law has been intricately linked to political ideologies that inspire the incumbent governments and it is sought to inspect the political motivations and economic impact to arrive at a harmonious understanding of the current framework of FRAND licensing. Secondly, in light of recent judicial pronouncements this paper also tries to examine the potential effects on holders of telecommunications SEP portfolios in the domestic arena. It is felt that the myriad issues related to FRAND are even more challenging with just a handful cases interpreting and applying FRAND in comparison to the overwhelming majority of licensing agreements determined through bilateral negotiations doing away with the need of a dispute resolution process. Lastly, though there is growing convergence between the Patents Law and the relatively young Competition Law, the Indian FRAND cases reflect palpable tension both within and between the institutions. Institutional designs pose a challenge with a major anomaly in their choices on issues such as injunctions, patent scope and the determination of fair and reasonable royalties across multiple jurisdictions. The paper suggests modifications to increase the suitability of the Indian economy while maintaining the balance between public policy and competitive markets.

The SSO-SEP-FRAND framework requires patentees to cross over and, as licensees, enter into license agreements with other patentees that own equally essential patents. Unfortunately, in today's aggressive economy the result is often to fight licensing wars in court – after all, the underlying force is a patent, protected by the law and created to grant a limited monopoly to the patentee.

1. Introduction

Most of the knowledge driven economies in the current scenario have created an ecosystem which essentially foster creation, execution and protection of new ideas in the form of Intellectual Property Rights (IPRs). Considering the global demands, Indian government has also pushed innovations ahead with various policy initiatives such as Make in India and Digital India etc., which calls for an effective IPR regime that incentivizes development of standardized technologies and encourages indigenous local manufacturing of standardized devices. More specifically the Government's "Make in India" policy is driven by the objective of reducing the outflow of foreign exchange on account of digital products. This program requires a strong commitment towards IPR protection to generate patents, thereby enhancing their competitive strength. This will go a long way in creating IP and increasing domestic patent foot print.

2. Patents & FRAND- How standardization gave birth to an essential evil

We are part of a world consumed by 'standards' - be those for social interaction or for manufacturing products, standards are important in many areas of economic life and generally increase efficiency and reduce costs associated with the provision of a wide variety of products and services.¹ For example, an empirical study made way back in 2010 identified that a modern laptop computer has 251 technical interoperability standards!² It also estimated that the total number of standards relevant to such a device is much higher. Such is the tale of a standard regulated world. But a standard setting process can never exist sans a conflict.

India is a key beneficiary of standardization, so it becomes imperative to set technically innovative standards in order to ensure the quality of products and show its commitments to follow the global standards.

Many a time's technology that is required to implement a standard is protected by patents. Those patents without which a standard cannot be implemented are termed as "Standard Essential Patents" (SEPs).³ Therefore it is impossible for manufacturer of standard compliant products, to manufacture products such as smartphones or tablets without using the technologies that comes under the category of standard essential patents (SEP's). In *Microsoft Corp. v. Motorola Mobility, Inc.* the term SEP's is defined as "A given patent is 'essential' to a standard if use of the standard requires infringement of the patent, even if acceptable alternatives of that patent could have been written into the standard."⁴

Both Patents and standards are serving a common objective, to encourage innovation as well as diffusion of technology. Largely, Holders of patented technologies have an advantage over other by virtue of their technologies being essential to standards. Therefore due to their advantageous position they wanted to sell standard compliant products or license SEPs. Ordinarily, if the vendor of a product that allegedly infringes a patent is unable to obtain a license on the terms offered by the patent holder then that vendor comes with three choices: to stop selling the infringing product, to stop designing around the patent, or risk liability as an infringer. The calculus is somewhat different with the standards-compliant products, as it may be impossible to design around the patent or may make the product non-compliant with the standard.⁵ Moreover, once a standard is approved and released by an SSO's⁶, market participants may make significant investments

¹MacCarthy, M. (2009). Open Standards, Competition and Patent Policies. p.2., Available at www18.georgetown.edu/data/people/maccartm/publication-43082.doc. [Accessed 25th October, 2017]

² Biddle, B., White, A., & Woods, S., (2010). How Many Standards in a Laptop? (And Other Empirical Questions). In: *ITU-T Kaleidoscope Academic Conference*. ITU Publications, 123

³ Competition Directorate-General of the European Commission (2014). *Standard Essential Patents: Competition Policy Brief*. p. 8, Available at http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf.

⁴ *Motorola Mobility, Inc., and Gen. Instrument Corp.* [2000] (U.S.P.Q.2D), p.104. [Accessed 25th October, 2017]

⁵ Shapiro Carl. (2001). *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting, Forthcoming Innovation Policy and the Economy*. 1st ed. Massachusetts: The MIT Press Cambridge.

⁶ Biddle, B., White, A. and Woods, S. (2012). The Expanding role and importance of standards in the information and communication technology industry. *Jurimetrics*, [online] 52(2), p.177. Available at: https://www.jstor.org/stable/23239825?seq=1#page_scan_tab_contents [Accessed 14th October, 2017].

on the basis of the standard.⁷Such investment may include contractual commitments, purchases of durable goods and capital equipment, employee training and accumulation of customer's loyalty etc.⁸In such cases, the cost of switching from the standardized technology to alternative technology is prohibitive, dramatically increasing the patent holder's leverage in any ensuing negotiation. This phenomenon has been termed patent hold-up.⁹ Court in *Microsoft Corp. v. Motorola Mobility, Inc.*¹⁰ explained that the "ability of a holder of a SEP 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'." In addition to harming potential competitors, it is also believed that patent hold-up can have other undesirable market effects, including raising prices for consumers and hindering technological innovation.¹¹

The risk of patent hold-up is likely to increase as the number of patents covering a single standard rises. Complex technological products may implement dozens of patents¹², each of which may be covered by hundreds of standards.¹³ As such, any single patent holder could cause significant disruption to the market, and the aggregation of royalty demands by multiple patent holders could lead to cost-prohibitive burden on implementing standards-compliant products.¹⁴ Taking this issue in consideration many SSOs have promulgated internal policies designed to mitigate these risks. Perhaps the most prevalent of these is requirement that SSO's licence the patents to all potential vendors of technologies implementing those standards on terms that are "fair", "reasonable", and "non-discriminatory" (FRAND).¹⁵

The patents covered by FRAND commitments are typically those that are essential to the standard or SEPs.¹⁶ Many SSOs require their members to undertake that they will grant binding licenses to companies that wish to use the standard in question. In case, a particular member does not provide such undertaking, the standard may not be adopted. To promote application of the standard and to avoid any competition concerns, such licenses must be made available under Fair, Reasonable and Non-Discriminatory (FRAND) terms.¹⁷ Thus, this patent right is not absolute like rest of the patent rights. Here the owner of SEP is under an obligation to license its patented technology which sets a standard for the industry and such license must be granted on FRAND terms. Licensing of Standards Essential Patents (SEPs) on Fair, reasonable and Non-Discriminatory (FRAND) terms is a foundation of the standards development process.¹⁸

⁷ Fanrell, J. and Shapiro, C. (2007). Standard selling, patent and patent hold-up. *Antitrust Law Journal*, 74(3), pp.603, 616.

⁸ Lichtman, D. (2010). Understanding the RAND commitments. *Houston Law Review*, [online] 47, pp.1023, 1033. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1783406 [Accessed 10th October, 2017].

⁹ Epstein, R., Kieff, F. and Spulber, D. (2012). The FTC, IP and SSO's: Government Hold-up replacing private coordination. *Journal of Competition Law & Economics*, [online] 8, pp.12, 13. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907450&rec=1&srcabs=1797287&alg=1&pos=2 [Accessed 29th September, 2017].

¹⁰ Sidak, J. (2009). Patent Hold Up and Oligopolistic collusion in standard setting organization. *Journal of Competition Law & Economics*, [online] 5(1), pp.123, 128. Available at: https://www.criterioneconomics.com/.../patent_holdup_and_oligopsonistic_collusion-... [Accessed 5th October, 2017].

¹¹ Biddle, B., White, A. and Woods, S. (2012). The Expanding role and importance of standards in the information and communication technology industry. *Jurimetrics*, [online] 52(2), p.177. Available at: https://www.jstor.org/stable/23239825?seq=1#page_scan_tab_contents [Accessed 14th October, 2017].

¹² Lemely, M. (2007). Ten things to do about patent holdup of standards. *Boston College Law Review*, [online] 48(1), pp.149, 152,153. Available at: <http://lawdigitalcommons.bc.edu/bclr/vol48/iss1/6/> [Accessed 8th October, 2017].

¹³ Lemely, M. (2007). Ten things to do about patent holdup of standards. *Boston College Law Review*, [online] 48(1), pp.149, 152,153. Available at: <http://lawdigitalcommons.bc.edu/bclr/vol48/iss1/6/> [Accessed 8th October, 2017].

¹⁴ Knut Blind (2011). *Study on the interplay between standards and intellectual property rights*. OJEU S136 of 18/07/2009. [online] Berlin: Luxembourg: Publications Office of the European Union. Available at: http://www.iplytics.com/download/docs/studies/ipr_study_final_report_en.pdf [Accessed 7th October, 2017].

¹⁵ Morton, F. and Shelanski, H. (2013). Standard setting organization can help solve the standard essential patents licensing problems. *CPI Antitrust Chronicle*, [online] 3(special issue), pp.1-3. Available at: https://www.google.co.in/search?q=Standard+setting+organization+can+help+slove+the+standard+essential+patents+licensing+problems%2C+&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&dcr=0&ei=anjwWafNGsOL8QeU1q3YDA [Accessed 25th September, 2017].

¹⁶ Contreros, J. (2013). Technical Standard and Ex Ante Disclosure: Results and Analysis of an Empirical Study. *Jurimetric*, 63, pp.163, 181-183.

¹⁷ *Id.*

¹⁸ Sidak, J. (2009). Patent Hold Up and Oligopolistic collusion in standard setting organization. *Journal of Competition Law & Economics*, [online] 5(1), pp.123, 128. Available at: https://www.criterioneconomics.com/.../patent_holdup_and_oligopsonistic_collusion-... [Accessed 5th October, 2017].

The rationale behind FRAND is that it benefits the inclusion of patented technology in technical standards while ensuring that the holder of SEPs should not abuse the dominant market position it gains from widespread adoption of a voluntary technical standard. Hence court in *Microsoft Corp. v. Motorola Mobility, Inc.*¹⁹, changed how parties view the value of Standard Essential Patents. The breach of contract lawsuit arose from Microsoft's claims that Motorola failed to license Standard Essential Patents to Microsoft at a reasonable and non-discriminatory rate²⁰. Court explained that the purpose of the FRAND commitment is to encourage widespread adoption of the standard. When the standard is widely used, the holders of SEPs obtain substantial leverage to demand more than the value of their specific patented technology which may lead to patent hold-up.

3. Intellectual Property Rights and Competition Law- Versus or not

At the outset one clarity needs to be brought, that there is no need for basic explanation of Intellectual Property (IP), Standardization or Competition Law. They operate in and regulate the same market, and work for larger public betterment however the means to an identical goal- promotion of innovation, under both laws, are seemingly different. And that is where the divergence occurs or is believed to occur. Simply put, the holder of an intellectual property right acquires a monopolistic right over his intellectual properties while competition or antitrust law serves to ensure that technologies, products or services are traded, bought, sold etc., in a competitive environment. Thus, a palpable difference between the laws can be reckoned.

Domestically, the IP regime can safely be termed as a law which has found its teeth when compared to the Competition Law- which is definitely at a nascent stage. So how do these laws pair up in relation to standard setting? Do they converge or diverge? This chapter gives insight into the merger till date of Intellectual Property and Competition Laws in the Indian setup, with regard to standard setting and FRAND licensing.

India is new to the concept of Standard Essential Patents (SEPs). The term was introduced to the patent lawyer's and court's vocabulary when Ericsson sought to enforce its SEPs against Micromax- an Indian handset manufacturer. What is the Indian situation? How equipped are courts and the Competition authority to deal with these matters?

As understood, there are various stakeholders involved in the standard setting process- such as technology owners, product manufacturers and service providers etc., thus, upping the possibilities of several horizontal as well as vertical agreements. Thus, the task of merging together various stakeholders is certainly challenging. Not only the standard setting process but also the agreements that emerge therefrom must be fair and viable as to the distribution of know how in terms of Intellectual Property as well as not promoting or creating monopoly.

The Indian Patent Act does not specify provisions or lay down terms and conditions with respect to SEPs and licensing of technology. Without any guidance from law, the determination of terms like pricing value etc. purely depends on the market demand of the technology, making the matter highly subjective and every case different from another. More so, the situation differs in case of SEPs where a patented technology becomes a market standard. Here the patent holder is required to license the technology on FRAND terms i.e. terms that are Friendly, Reasonable and Non-discriminatory. FRAND is a contract enforced by Standard Setting Organizations (SSOs) to bring together licensors and licensees, to negotiate appropriate terms such that the interests of both parties are balanced.²¹ However, disputes erupt in such cases where the licensee alleges that the patent holder is exploiting its dominant position in demanding royalties that are not FRAND-ly. Thus, in most cases involving SEPs, the court's role is to ensure that the holder of a SEP does not abuse the dominant market position it has gained from widespread adoption of a voluntary technical standard.²²

3.1 Indian Jurisprudence

Courts and regulators, globally have been faced a number of issues when considering how to apply IPR and competition law to govern licensing of SEPs. However, when compared to other jurisdictions like EU and US, Indian courts and the Competition Commission of India have only just begun to deal with cases relating to licensing practices for SEPs and the FRAND regime, despite being one of the world's largest wireless cellular markets.

¹⁹ Shapiro Carl. (2001). *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting, Forthcoming Innovation Policy and the Economy*. 1st ed. Massachusetts: The MIT Press Cambridge.

²⁰ *Id.*

²¹ Gupta, K., 2016. FRAND in India: Emerging Developments. In: *Antitrust in Emerging and Developing Countries, 2nd edition*. [online] New York: Concurrences. Available at https://awards.concurrences.com/IMG/pdf/gupta_-_nyu_2015_proofs.pdf [Accessed 24th October, 2017].

²² Narula, R., Pandey, S. (2015) ROUSE- The Magazine. <https://www.rouse.com/>. Available at <https://www.rouse.com/magazine/news/standard-essential-patents/?tag=india> [Accessed 24th October, 2017].

The authors will have a fleeting look at select SEP- FRAND proceedings that have taken place till date in India to analyze the evolution of Indian jurisprudence.

i) *Ericsson v. Micromax*²³

In March 2013, Ericsson brought a suit against Micromax- an Indian supplier of mobile devices, alleging infringement of eight of its 2G and 3G technology SEPs registered in India. According to Ericsson, it initiated the licensing negotiations with Micromax in 2009 after sending an initial notice of infringement. The parties agreed to negotiate a FRAND license in 2012 however, Micromax did not enter into any agreement to license the SEPs, hence the aggrieved Ericsson. The High Court of Delhi, after listening to both parties, granted Ericsson an injunction, directing Micromax to pay royalties to Ericsson ranging from 0.8%-1.3% of the net selling price of the devices containing the infringed technology. In order to compute the royalty rate, the Court based its calculation on 26 licenses signed by Ericsson with other Indian parties.²⁴

ii) *Ericsson v. Gionee*²⁵

Gionee was sued by Ericsson, for infringement of eight SEPs of which the complainant was the owner. The Court fixed an interim royalty to be paid by Gionee to Ericsson for one month and the rate was calculated on the basis of the devices sold by Gionee worth approximately \$24 million in India. The rates were established based on the Micromax case

iii) *Ericsson v. Intex*²⁶

This is a matter with involvement of rather colorful series of facts. In April 2014, Ericsson sued Intex for the infringement of eight of its SEPs, like in the above case. Here, there was no Agreement reached till 2013.

Ericsson alleged that Intex was an unwilling licensee as it demonstrated contradiction in its actions during the time negotiations were taking place, when Intex continued to correspond to the negotiations for a potential license, it initiated proceedings with the Intellectual Property Appellate Board (IPAB) for revocation of Ericsson's patents. It also initiated a complaint with the CCI alleging abuse of dominance by Ericsson. The High Court determined the validity of patents in favour of Ericsson and referred to Intex's statements in its complaint to the CCI that Ericsson's patents are essential to 2G and 3G, leaving companies complying with these standards no choice other than implementing these SEPs. It observed that Intex's complaint to the CCI and IPAB is admission of its infringement of Ericsson's SEPs, based on which Intex was found to be an unwilling licensee.

iv) *Ericsson v. Xiaomi*²⁷

In December 2014, Ericsson brought a suit against Xiaomi before the High Court of Delhi for the same set of 2G and 3G technologies as in the previous matters. It was alleged that Xiaomi was asked to seek for a license for Ericsson's SEPs, instead the former created an Indian subsidiary to market and launch the infringing products without obtaining a license. To the Court's restraining order, Xiaomi appealed arguing that since it had obtained the chipset implementing the said patented technology from Qualcomm Inc., which in turn had a license from Ericsson, there was no patent infringement. Unlike the above two cases, no royalty rate has been discussed or decided here and as a temporary arrangement, Xiaomi is presently allowed to import and sell only devices containing chipsets obtained from Qualcomm Inc.

v) Micromax's complaint against Ericsson with CCI²⁸

After Ericsson's suit against Micromax in the High Court of Delhi, Micromax filed a complaint with the CCI against Ericsson, alleging that the latter was abusing its dominant position by charging "exorbitant rates" during the licensing negotiations, thus violating the domestic Competition Law. Further, it was complained that Ericsson was basing the royalty rates on the value of the device and not the chipset in which the patented technology was implemented- such "misuse of SEPs" ultimately harming the end consumer. With this, it was also alleged that Ericsson subjected all its

²³ Telefonaktiebolaget LM Ericsson v. Mercury Elecs. & Another, High Ct. of Delhi (Mar. 6, 2013), Available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=46519&yr=2013 [Accessed 22nd October, 2017].

²⁴ Telefonaktiebolaget LM Ericsson v. Mercury Elecs. & Another, High Ct. of Delhi (Nov. 12, 2014), Available at <http://lobis.nic.in/dhc/GSS/judgement/17-11-2014/GSS12112014S4422013.pdf> [Accessed 22nd October, 2017].

²⁵ Telefonaktiebolaget LM Ericsson v. Gionee Communication Equipment Co. Ltd., High Ct of Delhi (Oct. 31, 2013) Available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=211053&yr=2013 [Accessed 22nd October, 2017].

²⁶ Telefonaktiebolaget LM Ericsson v. Intex Techs. (India) Limited, High Ct of Delhi (Mar. 13, 2015), Available at <http://lobis.nic.in/dhc/MAN/judgement/16-03-2015/MAN13032015S10452014.pdf> [Accessed 23rd October, 2017].

²⁷ Telefonaktiebolaget LM Ericsson v. Xiaomi Technology and Others, High Ct of Delhi (Dec. 8, 2014), Available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=250092&yr=2014 [Accessed 22nd October, 2017].

²⁸ Micromax Informatics Ltd v. Telefonaktiebolaget LM Ericsson, Competition Commission of India (Nov. 12, 2013), Available at <http://infojustice.org/wp-content/uploads/2013/12/CCI-Case-no-50-2013.pdf> [Accessed 24th October, 2017].

present and prospective licensees to sign an NDA that prevented disclosure of commercial terms between similarly placed patent seekers, thus alleging a major difference in royalty rates with different parties.

vi) Intex's complaint against Ericsson with CCI²⁹

In 2013, Intex Technologies (India) Limited filed a complaint against Ericsson with the CCI, alleging abuse of its dominant position by Ericsson in light of the "exorbitant" licensing rates. Additionally, it was alleged that the NDA Intex was "forced" to sign with Ericsson placed unreasonable restrictions on the former. CCI found Ericsson to be abusive of its position in the market and ordered an investigation.

vii) iBall's complaint against Ericsson with CCI³⁰

In May 2015, Best IT World (India) Pvt. Ltd., filed a complaint against Ericsson with the CCI- the crux of which was the "strict and onerous terms" of Ericsson through the NDA that Ericsson required iBall to sign in order to conduct the licensing negotiations. It argued that certain conducts with "unreasonably high royalty rates" violated the Competition Law. The CCI, similar to its opinions for the Micromax and Intex complaints observed that due to the lack of availability of technology such as with Ericsson in the 2G, 3G and 4G standards it enjoys dominance over its present and prospective licensees. Ericsson's practices were primarily found in violation of Section 4 of the Competition Act and CCI has ordered an investigation into the same.

viii) *Ericsson v. Competition Commission of India*³¹

In the complaints filed against Ericsson by Micromax, Intex and iBall, the CCI found Ericsson prima facie guilty of abusing its dominant position, in response to which Ericsson filed writ petitions in the High Court of Delhi against the CCI's orders directing the DG to investigate further and file a report. The focal point was questioning the DG's authority to file the report. The Court said that the DG can conduct the investigations however shall not submit a final report and also restrained the CCI from passing final orders in all three matters.

The following important observations were made by the Court in this matter³²:

Jurisdiction of the CCI: Countering the allegation of demand of excessive royalty and imposition of unfair and unreasonable terms for grant of patent licenses, Ericsson argued that neither patents nor licenses for patents are "goods" or "services", due to which a patent holder does not fall under the definition of an "enterprise" as per Section 2(h) of the Competition Act. The court held that patents are goods, and consequently, Ericsson would fall within the definition of an "enterprise". It was also noted that the subject matter of the complaints made by Micromax and Intex cannot be excluded from the purview of the Competition Act and that, "...whether there is any abuse of dominance is solely within the scope of the Competition Act and a civil court cannot decide whether an enterprise has abused its dominant position and pass orders as are contemplated under Section 27 of the Competition Act."³³

Conflict between the Patents Act and the Competition Act: The court opined that in the event of any irreconcilable inconsistency between the two legislations, the Patent Act being a specialized statute, would override the general statute, even though the general statute contains a non obstante clause (section 60 of the Competition Act, 2002).³⁴

Scope of section 3 of the Competition Act: The court held that there is no overlap or inconsistency of section 3, which pertains to anti-competitive agreements, with the Patents Act. It also observed that the proceedings under the Competition Act are not in the nature of a private suit and that the scope of enquiry under section 3 would be restricted to whether there has abuse of dominant position as per the Competition Act.

Abuse of dominant position by Ericsson: When Micromax was about to declare an Initial Public Offer (IPO), Ericsson threatened it with complaints to the Securities and Exchange Board of India (SEBI). The court held that, "Such threats were,

²⁹ Intex Techs. (India) Ltd v. Telefonaktiebolaget LM Ericsson, Competition Commission of India (Jan. 16, 2014), Available at http://www.cci.gov.in/sites/default/files/762013_0.pdf [Accessed 24th October, 2017].

³⁰ Best IT World (India) Private Ltd. v. Telefonaktiebolaget LM Ericsson, Competition Commission of India (May 12, 2015), Available at http://www.cci.gov.in/sites/default/files/042015_0.pdf [Accessed 24th October, 2017].

³¹ Telefonaktiebolaget LM Ericsson v. Competition Commission of India & Anr., High Ct. of Delhi (March 30, 2016) Available at <http://lobis.nic.in/dhir/dhc/VIB/judgement/30-03-2016/VIB30032016CW4642014.pdf> [Accessed 24th October, 2017].

³² Lakshane, R (2017). *Compilation of Mobile Phone Patent Litigations in India*. The Centre for Internet & Society. Available at <https://cis-india.org/a2k/blogs/compilation-of-mobile-phone-patent-litigation-cases-in-india> [Accessed 24th October, 2017].

³³ *Id.*

³⁴ *Id.*

undoubtedly, made with the object of influencing Micromax to conclude a licensing agreement... in certain cases, such threats by a proprietor of a SEP, who is found to be in a dominant position, could be held to be an abuse of dominance”.³⁵ The CCI and the Delhi High Court are currently split on whether to apply the price of the end product or the SSPPU (the smallest salable patent practicing unit) as the royalty base. In *Ericsson v. Micromax*, the CCI noted that Ericsson’s practice of calculating royalties as a percentage of the price of a downstream product was “excessive” and “discriminatory,” and instead favored a calculation based on the SSPPU.³⁶

In contrast, the Delhi High Court ordered Micromax to pay FRAND royalties based on the percentages of the net selling prices of the devices incorporating its SEP technologies, and relied on comparable licenses to determine the appropriate FRAND royalty rate.³⁷ Further, the court set the royalty rate as 0.8% to 1.3% of the net selling price of the mobile device; unlike the FRAND rates reached in the Microsoft opinion in the U.S., and the Huawei decision in China.³⁸

4. Conclusion

The interplay of patent law covered broadly under Intellectual Property and Competition law in the standard setting context has been the focal point of debates across the globe. Ideally, they work to serve the same purpose yet cannot be merged, hence the expensive and protracted litigations - which, in the Indian context have not served the purpose. However, considering the evolving jurisprudence, the implementation of Alternative Dispute Resolution (ADR) mechanism in order to resolve SEP conflicts will be highly promising.

However, with government initiatives such as “Digital India” and “Make in India”, it is imperative that India aims at developing IP Policies relating to standardization and FRAND licensing, and does that soon. This is important in order to keep up the position in the global market for telecommunications and keep lucrative, the idea of investments in local R&D as well as manufacturing.

The key issues for the ICT industry are surrounded by standard setting and related IP policies. Especially, in the Indian context, the need of the hour is a well-balanced IP Policy- not overly favoring either the patent holders or users. In the coming times, it will be interesting to track the developments in this sector through the growth and implementation of IP Policies by local SSOs as well as the evolving jurisprudence.

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