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Standard Essential Patents And Smart Phone Litigation War

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Abstract

The whole issue of competition and standard essential patent starts with violation or infringement of rights and licensees try to reduce the competition by such infringement. Indian patent laws have gone through lot of amendments to fulfil all the characteristics of TRIPS. It is a primary requirement to respect the person for technological innovations and respect the Intellectual Property for which patent is provided by the authorities to the person. The problems come into picture when the creator or patent holder tries to monopolise the patent and influence through it or other people without the permission of creator use such patent for their own benefits. In both the situation there is harm of public interests and public policies. In such an intersection of two laws Antitrust Laws and Intellectual Property Laws at one point makes it necessary to have standard patented technology to bring it in public.[i] So the concept of standard essential patent comes in existence which would provide the reasonable access to the technology for other licensees on FRAND terms and patent holder can also contribute in public interest rather than to monopolise the patent and get in dispute with other players of market.

Introduction

The dispute related to standard essential patents in smart phone market is taking the attention of stakeholders and other experts of IPR and Competition Law. Smart phone market is a market where the demand of uniform standards is prevalent everywhere in the world. Technology is very dynamic and evolving very fast. If anyone wants to survive in market then he has to evolve himself as per the demand of market. Here the issue on which the paper will deal is the jurisdiction of two authorities one is Competition Commission of India which investigate and deal with abuse of dominance matters other are the courts which deal the matter of violation of patent rights. In the matter of above dispute there are lot of issues like injunctions by the SEP holder to prevent the infringing of patent right and other is the investigation of abuse of dominance which recently high court has resolved in the case *Ericsson vs. Competition Commission of India*[ii] saying Competition Commission of India can investigate in the matters related to abuse of dominance of patent rights.

STANDARDS

Standards are very important to bring uniformity and certainty. Standards are documents which define the specifications required to get particular technology and quality, which can be used to current and future products and services.[iii] In another way standards can be defined as fixed set of specification according to the nature of technology, use and its requirement to achieve the uniformity and certainty in product's design, quality and process.[iv] If we observe carefully standards have become essential to live better life because in our daily routine we use lot of technologies and other materials if these are not under uniform and specified form then it would be impossible to sustain easily.[v] Similar kinds of standards also exist in telecommunication market in mobiles, Wi-Fi, internet services. Telecommunication market demands standards and uniformity on global level and that is the reason why the international players of this market have lot of importance. Generally there are two types of standards one

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is de-facto under which one technology is widely accepted and then it dominates and second is de-jure under which standard setting organisations set the standards after observing other technologies on same functionality.[vi]

STANDARD SETTING ORGANISATION

Standard Setting Organisation (SSO) is organisation who sets standard to get qualifying a patent as standard essential patent. These organisation perform activities to make and maintain standards and these activities may include developing, interpreting, re-issuing, coordinating, revising, promulgating, amending.[vii] The standard setting organisation may be on regional level, national level or international level.[viii] In India we have standard setting organisations like Telecom Standards Development Society of India (TSDSI), Telecommunication Engineering Centre (TEC), Bureau of Indian Standards (BIS), The Global ICT Standardization Forum for India (GISFI), Development Organisation of Standards for Telecommunications in India (DOSTI).[ix] These standard setting organisations are related to different industries.[x] Sometime one standard setting organisation may deal with more than one industry like BIS which deal with 14 industries.[xi]

STANDARD ESSENTIAL PATENT

Patents which are set as standards by standard setting organisations or patents which comply with all the standards set by standard setting organisation and they are essential to the technology then these patents become standard essential patents. We can say in other words "Once a patented technology has been selected and implemented in the standard, the use of the patent covering that technology becomes essential- a SEP".[xii] All the manufacturers after a patent as standard essential patent will use the same standards and technology which has been established as standard essential patent. Thus the whole concept is related to the maintainability of FRAND commitments because due to the SEP the SEP holder further licence his SEP to other manufacturers who are in need of SEP. On FRAND terms whole licence agreement is done which we will discuss in the next heading that how FRAND becomes an important commitment and sometimes issue to debate.

FRAND (Fair, Reasonable and Non Discriminatory)

FRAND is fair, reasonable and non-discriminatory terms which are agreed between SEP holder and licensee. Real dispute arise at the stage of forming such terms which becomes very difficult for both the parties as there is no fixed set of parameters to define the FRAND terms. In India the jurisprudence related to SEP and FRAND terms is at very nascent stage as compared to US and EU jurisdiction.[xiii] Thus there is no certainty and definite criteria about FRAND which is the whole issue of dispute. Sometimes in dispute question arise that if anything is not mentioned under the agreement then how can anyone sue for it. Most important is that no SEP provisions are given in any statute so the responsibilities are on the shoulders of court to evolve the jurisprudence for it.

PATENT POOL

Patent pooling is also a good concept where patent owners agreed to license their one or more patents among themselves or to third party.[xiv] In case of standardisation only standard essential patent is used to complete the technology where pooling is required, which is also good to curb anticompetitive activities of players who do not use essential patents.[xv] So

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standard and pooling have connecting concepts as we require lot of standard patent to complete the pool.

So the whole process is in such a way that standard setting organisations set the standards to categorise a patent under the category of standard essential patent and after that SEP holder is under an obligation to licence the standard essential patent further to other needy manufacturers of SEP who need that patent because it has now become a standard and everyone has to follow it. Here the main dispute arises during the formation of agreement to licence the SEP on FRAND terms. Two types of situation may come, first is where manufacturer is violating the rights of SEP holder and not ready to take licence; second is when manufacturer is willing to take licence but SEP holder is not agree. SEP holder then approaches to court to invoke injunctive relief and that is the time from where the whole issue of litigation war begin. In the next part of this paper we will try to understand the whole situation with the help of litigation war happening in India and may take the help of few cases of US and EU which will give the wider view to compare the jurisprudence of more jurisdictions.

INDIAN LITIGATION AND SEP

1- In India starting of litigation regarding SEP started in 2011 when Ericsson (Swedish Company) objected import of goods by Kingtech Electronics (India) through filing an application before Commissioner of Customs, saying that Kingtech was infringing Ericsson's SEPs in AMR Codec technology.[xvi] After detaining consignment of Kingtech, Kingtech approached Hon'ble High Court of Delhi and contended that Commissioners of custom authority detained goods and did not show any reason of reliability on the fact that there was any infringement of patent in goods. High Court set aside the order of customs authority and ordered to release the goods but further Ericsson approached the High Court regarding infringement of patent, consequently Hon'ble High Court said that "Kingtech will not import any mobile phone using AMR Speech Codec Technology".[xvii]

2- After that litigation of Micromax, Intex, Iball and Ericsson started which we will discuss stage by stage and try to understand the whole situation.

(I) Before Competition Commission of India

(a) Micromax Informatics Limited vs. Telefonaktiebolaget LM Ericsson (Publ)[xviii]

In the case, Micromax Informatics Limited alleged in the complaint filed before CCI that Ericsson is abusing its dominant position. CCI formed prima facie opinion that Ericsson is abusing its dominant position by applying exorbitant and excessive royalty rates on the Micromax and by imposing discriminatory FRAND terms; and sent it to DG for further investigation.

Factors which are determining dominant position of Ericsson from the order of CCI are as follows:

1- Ericsson was found under the laws of Sweden and its parent company is one of the largest companies in the field of telecommunication competing with global market share of 38%.

2- Ericsson has 33000 patents of which 400 are granted in India and further it is the largest holder of SEPs in market of mobile communication.

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3- Ericsson has all the SEPs of 2G, 3G and 4G technology and no other alternative were available.

Relevant Market

Here the relevant product market was of 2G, 3G, 4G which collectively comes under GSM market so the relevant product market is SEPs of GSM market and relevant geographic market is 'territory of India'. Thus relevant market here is the "SEP(s) in GSM complaint mobile communication devices in India".

Grounds of abusing dominant position

1- Not refuting the royalty rates.

Ericsson never denied of the fact that royalty rates are high and never show any act of negotiation from his side.

2- No linkage between charged royalty rates and cost of technology.

Royalty was being imposed on the basis of cost of phone rather than the cost of product licenced and due to this process it was becoming very difficult for Micromax because royalty for good smart phone was becoming ten times higher than the ordinary phone.

3- Not sharing terms of FRAND.

Due to the reason of non-discloser agreement, no information of terms of FRAND was being disclosed as non-discloser agreement was made before the agreement for license. Such non-discloser agreement was also showing the abuse of dominant position.

4. Imposing excessive and discriminatory royalty rates.

Imposing excessive and discriminatory royalty rates was the main factor which was narrating the story of Ericsson of being dominant and abusing its dominant position.

The order of CCI was challenged by Ericsson in Hon'ble High Court of Delhi, where the court said that "*till the next date of hearing while the petitioner may give information as called upon by the Director General of Competition Commission of India, no final order/report shall be passed either by the Competition Commission of India or by its Director General*".[xix]

(b) Intex Technologies (India) Limited vs. Telefonaktiebolaget LM Ericsson (Publ)[xx]

In the above case also the grounds, allegations and results were similar. The additional point in this case was the jurisdiction issue. Competition Commission of India said that "*Imposing a jurisdictional clause debarring Informant from getting disputes adjudicated in the country where both parties were in business and vesting jurisdiction in a foreign land prima facie was also an abuse of dominance*". So in this case also Competition Commission of India relied in similar way and reached to the prima facie conclusion that Ericsson is abusing its dominant position in GSM technology market in India.

As in the earlier case CCI has ordered DG to investigate the case so CCI ordered to club this case with Micromax case. Thus DG will combine both the cases and investigate for the abuse of dominant position of Ericsson.

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(c) M/s Best IT World (India) Private Limited (iBall) vs. M/s Telefonaktiebolaget L M Ericsson (Publ)[xxi]

In this case also M/s Best IT World (India) Private Limited (iBall) alleged that an NDA before formation of licence for 10 years for the licence of GSM and WCDMA compliant product and imposing excessive and unreasonable royalty rates are clear ground for forming prima facie opinion of abuse of dominance by Ericsson as here also Ericsson enjoying dominant position because there is no alternative 2G, 3G, 4G technology available. Thus similar to the above cases there are same grounds, cause and order in this case also.

In the above two cases also Ericsson filed appeals before Hon'ble High Court but the similar order as of order in Micromax case dated January 21, 2014 was given by Hon'ble High Court. Thus as per the order of High Court, Competition Commission of India cannot order during the pendency of the case before high court. Competition Commission of India can do their investigation and can call any member of Ericsson in India for investigation but cannot give any final order in this regard.

(II) <u>Before Hon'ble High Court</u>

When Ericsson approached High Court in all the above cases, Hon'ble High Court decided the royalty rates on the basis of net selling price of the product to justify the FRAND terms of imposing royalty.[xxii] The Decision of Hon'ble High Court was on the basis of sound economic principle and court has also taken 26 earlier license agreements in consideration to analyse the way and quantum of imposing royalty. Thus in the above cases defendants agreed to pay the royalty rates decided under interim settlement by the court.

Regarding the appeals filed by Ericsson against Competition Commission of India in various orders also interim stay was granted by the Hon'ble High Court which is changed recently and now Competition Commission of India can investigate further, as it has proper jurisdiction to do it, which we will elaborate it in next paragraph of this paper.

As per the recent judgement given by Hon'ble Mr Justice Vibhu Bakhru Jurisdiction of Competition Commission of India cannot be denied as the main purpose of the Act is to prevent any practice which has appreciable adverse effect on competition.[xxiii] Competition Commission of India has complete jurisdiction to entertain informant and from prima facie opinion, so in the eyes of high court it is not good to reconsider the matter regarding the prima facie view.[xxiv] Hon'ble High Court further said that *"the DG and employees of the CCI are obliged to maintain confidentiality and secrecy of the confidential information provided by Ericsson and must take adequate measures to maintain the same".*[xxv] The most important thing noted regarding the jurisdiction of Competition Commission of India is under section 62 of the Competition Act, 2002 which says that *"the provisions of this Act shall be in addition to, and not in derogation of, the provision of any other law for the time being in force".*[xxvi]

Thus the aim and objective of Competition Commission of India is entirely different from the patent laws. Forming prima facie opinion by Competition Commission of India regarding the abuse of dominant position of Ericsson is something which is given under the Act and not in conflict with any other law.

3- Another litigation related to SEP can be seen in **TELEFONKTIEBOLAGET LM ERICSSON (PUBL) vs. LAVA INTERNATIONAL LIMITED[xxvii].** Here also Ericsson asserted the violation of SEP technologies related to AMR, GSM and EDGE. In defence the

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defendant said that Ericsson did not show any previous license agreement with other parties even after the repeated request. In this case proceedings are at initial stage and court directed to parties to resolve the dispute through mutual understanding and negotiation but parities could not do it and now case is before the court for consideration.[xxviii]

4- Similar kind of litigation was done related to SEP in 2014 in which Vringo and Vringo Infrastructure filed a suit against ZTE for violation of patent, related to technology 2G and 3G. Hon'ble High Court of Delhi *"granted an ad-interim ex-parte injunction restraining ZTE from importing, selling, advertising, installing or operating devices that comprise the infringing components"* and with this order a local commissioner was also appoint to check the consignment of ZTE.[xxix] The same was appealed by ZTE, consequently injunction was removed and ZTE deposited ₹ 17.85 crore to the court.[xxx]

ANALYSIS IN INDIAN CONTEXT

The most disputed points on which there is no agreement in India in most of the cases are as follows:

1- Non Discloser Agreement

Non discloser agreement between the parties to the agreement before the formation of licence on FRAND is the first point which create problem in future because in most of the cases willing licensees ask to show the earlier agreement on which the royalty was decided with other parties. In such case SEP holders do not show the agreements due to which agreement of license of SEP could not be completed and matters go to the court of law to invoke the injunctive remedy for violation of the patent rights.

2- FRAND Terms

In India there is not much clarity on the question of FRAND terms. It is an obligation of the SEP holder to licence the SEP to other manufacturers who require the SEP technology to use in their product. Due to the reason that there are no set criteria that what is FRAND terms and how the way we define to reach to FRAND terms.[xxxi] FRAND term may differ for different clause of agreement like for to determine royalty rate, time period of license agreement, non-discloser terms etc.

3- INJUNCTION

Injunction is a remedy for SEP holder to invoke in case of violation of SEPs. Injunction is such a remedy which can cause huge harm to the defendant so at the time of giving order of injunction, courts must keep in mind everything like damage of other party etc. Here there may be two circumstances one is for "unwilling licensee" and other is for "willing licensee". If we see the case of "unwilling licensee" imposing injunction is justified but in case of "willing licensee" where license is not reaching at final stage due to the non-agreeing on terms of settlement may not be justified.

4- WILLING LICENSEE

There are also no fixed parameters to define who comes under "willing licensee" category and who comes under the category of "unwilling licensee". There may be possibility that and an "unwilling licensee" projecting himself as willing one but in reality he is just playing game with SEP holder and not doing anything in positive mode because his basic aim is just

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to get indulge SEP holder in unnecessary tasks and burden instead of positively forming license agreement on FRAND terms.

In the next part of this paper we will try to know the jurisprudence of US and EU on such issues with the help of some cases and other material.

Unites States and EU

If we see the situation of Unites States then courts are very careful regarding granting injunctive relief to the SEP holder. Before granting the injunction court will see the following four factors as given under ***EBAY INC. v. MERCEXCHANGE, L.L.C.***[xxxii], *"(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."* So getting injunctive relief is not easy, Federal circuit on this issue has suggested in the ***Apple, Inc v Motorola, Inc*** that injunctive relief must be given only in those cases where third party is not paying royalty or doing efforts to delay negotiation.[xxxiii] In ***Microsoft Corp. v. Motorola Inc.*** court permitted third party licensees to enforce agreement according to the FRAND terms as third party beneficiaries in spite of the fact that agreement was between only SSO and SEP holder.[xxxiv] In this third party were the member of SSO but the position is not clear if third party is not member of SSO but as per some commentators this is bit confusing situation because third beneficiary concept is not applicable everywhere.[xxxv] Thus in United Stated courts have full power to deal with framing of FRAND terms or giving injunction but US is very cautious in dealing such matter and has gained lot of experience. Granting Injunction cannot be a cup of tea in United States. United States is very cautious for making the difference between the concept of "willing" and "non-willing" licensee but India does not have such a good experience because India is at initial stage of dealing such matter.

In EU ***Huawei Technologies decision*** was very important decision where the court confirmed that if you are seeking injunction in case related to SEP then it may constitute abuse of dominant position and liable to be rejected.[xxxvi] In this case Huawei sued ZTE before Landgericht Düsseldorf for prohibitory injunction and argued that his patent was standard essential patent in wireless communication technology.[xxxvii] ZTE said that he was always willing to negotiate with Huawei so suit for prohibitory injunction has no meaning and it is clearly showing that Huawei is abusing its dominance.[xxxviii] Court said that for determining abuse of dominance we have to observe some factors. For example we cannot say that SEP owner is abusing its dominance when:

"prior to bringing that action, the proprietor has, first, alerted the alleged infringer of the infringement complained about by designating that patent and specifying the way in which it has been infringed, and, secondly, after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, presented to that infringer a specific, written offer for a licence on such terms, specifying, in particular, the royalty and the way in which it is to be calculated"[xxxix], and

"Where the alleged infringer continues to use the patent in question, the alleged infringer has not diligently responded to that offer, in accordance with recognised commercial practices in the field and in good faith, this being a matter which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics".[xl]

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Thus understanding and experience of US and EU is much wider than India. India has to learn a lot from US and EU. In India issues are still ambiguous and do not have much clarity.

Conclusion

Thus we can conclude the whole concept of SEP and litigation situation in India that in India litigation related to SEP is very new and we are learning it but the progress is good if we infer from the recent cases. We are struggling with the issues like certainty of FRAND terms, willing and unwilling licensees, Injunction and non-discloser agreement. We need to settle the issues on table because if we are taking every issue before the court then we are going to face drastic situation as lot of players are not approaching the court and trying to settle matters on table. Another solution and recommendation is that to bring certainty in the matters related to SEP we need to have fixed guidelines about FRAND terms and others issues of SEP and we must be clear about the definition of willing licensee.

Though these situation are very complicated but not impossible to deal. Further we can thing about to enter the concept of SEP and FRAND in our statute to make it more specific and certainty.

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