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FRAND Developments—An Indian Competition Law Perspective

Arshad (Paku) Khan & Dhruv Rajain
Khaitan & Co.

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Arshad (Paku) Khan & Dhruv Rajain¹

I. INTRODUCTION

The antitrust/competition law regime of India has gained considerable importance as a result of India's opening up of its economy commencing in early 1990s, moving towards becoming a liberalized and globally competitive economy. Given the wide ambit of antitrust law, there may arise a conflict with other laws in force in India, particularly intellectual property ("IP") laws. Globally, there has always been a turf war in the implementation of IP laws vis-à-vis competition law, which has further intensified given the short comings in the paradoxes between these two laws, both globally and in India.² The primary cause for this inconsistency is that IP laws are, by definition, exclusionary in nature, whereas competition law tends to mandate fair, equitable, and just treatment to all stakeholders.

Given the paramount importance of information technology ("IT") sector to the Indian economy, the world is carefully watching how India's competition regulator, namely the Competition Commission of India ("CCI"), will balance the potentially conflicting goals of Indian IP laws with the relatively new Indian competition law regime.

II. SEPS & STANDARDIZATION IN THE INDIAN COMPETITION LAW CONTEXT

A simple example of this tension can arise when the holder of an IP right exercises its pricing rights granted under the IP laws, which may be perfectly acceptable under those laws; however, under competition law, the same pricing conduct may amount to abuse of dominance by a monopolist. A more specific example of the intersection of IP and competition laws is when they interject each other and affect public interest by way of Standard Essential Patents ("SEPs"), which are patents that must be used to comply with a technical standard.³ The licensing of SEPs on fair, reasonable, and non-discriminatory ("FRAND") terms for their use is the pillar of the standards-development process involving SEPs.

Standard-setting is usually beneficial and enables market access, increase in market efficiency, quality assurance, promotion, and equitable use of a new technology or innovation. In the Indian context, setting of standards is essential to attract Foreign Direct Investment ("FDI") and particularly so in light of the recent "Make in India" and "Digital India" initiatives launched by the Government of India. These initiatives are critical for Indian economic growth and, if effective, will allow the Indian IT industry to flourish. In this regard, India has the requisite intellectual wealth and institutional capability which, if channeled in the right direction, can be

¹ Paku Khan is the executive director and co-head of the competition/antitrust law team of Khaitan & Co; Dhruv Rajain is an associate in the same office.

² Available at <http://www.fosspatents.com/2013/03/standard-essential-patent-litigation.html>.

³ Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting*, (I) INNOVATION POLICY AND THE ECONOMY, VOLUME I, 2001.

beneficial to these initiatives.

However, the exercise of SEP IP rights will have to achieve a balance under the new Indian competition laws, so that there is neither a chilling of the spirit of innovation by over-enforcement or the negative effects that can ensue from under-enforcement. How this tension will play out in India within the concept of FRAND for SEPs is of particular interest.

The basic rationale behind FRAND is that it benefits the inclusion of patented technology in technical standards, while ensuring that the SEP holder cannot abuse its dominant position in the market that it gains from widespread adoption of a voluntary technical standard.⁴ In spite of the importance attached to setting standards in terms of both licensing practices and securing the business interests of foreign entities in India, Indian jurisprudence and guidance from Indian courts on FRAND licensing practices for SEPs are at an embryonic stage. This, in turn, arises primarily because the enforcement provisions of the (Indian) Competition Act, 2002 (as amended) (“Competition Act”), which are under the sole primary jurisdiction of the CCI, have only been in effect for a little more than six years.

The first FRAND/SEP cases are only beginning their journey through the Indian competition law regime. Globally, there are many instances where companies are troubled by the protectionist concerns on the part of the various jurisdictions and their respective authorities. Antitrust matters relating to patent licensing are increasingly posing a threat to companies doing business worldwide. China, for instance, has moved aggressively to try to curb FRAND abuse. Similarly, there have been cases such as *Motorola v. Microsoft* and *Samsung v. Apple* in Germany, wherein temporary injunctions were granted in respect of violation of SEPs.

These types of complaints are now surfacing in India too. For example, IP right holders have complained about a strong protectionist stance with regard to patents in the pharmaceutical sector. These issues are vital in the Indian context, and India has a unique opportunity to learn and adapt from these experiences from across the globe. In short, there is limited guidance thus far, with only three *prima facie* orders of the CCI⁵ and ongoing related litigation in the Delhi High Court.

FRAND-based competition issues in India gained momentum as a result of litigation in the Delhi High Court and the Director General (“DG”) investigation ordered by the CCI concerning Telefonaktiebolaget LM Ericsson (Publ) (“Ericsson”). More specifically, Ericsson has been subject to three separate complaints (or “information” in the Indian competition law parlance) filed before the CCI for alleged abuses of dominant position under Section 4 of the Competition Act by Micromax Informatics Limited⁶ (“Micromax”), Intex Technologies (India) Limited⁷ (“Intex”), and M/s Best IT World (India) Private Limited⁸ (“iBall”) (collectively referred

⁴ Dore Antoine, *Limiting the Abuse of Market Dominance by Standards-Essential Patents*. Retrieved from - <http://itu4u.wordpress.com/2013/02/06/limiting-the-abuse-of-market-dominance-conferred-by-standards-essential-patents/>.

⁵ Case No. 50 of 2013, 76 of 2013 and 04 of 2015.

⁶ Case No. 50 of 2013.

⁷ Case No. 76 of 2013.

⁸ Case No. 04 of 2015.

to as the “Informants”).

The facts of all three cases are roughly similar. The Informants have basically alleged that Ericsson has abused its dominant position in the relevant market of 2G, 3G, and 4G technologies in GSM standard compliant mobile communication devices in India. The Informants allege that Ericsson, *inter alia*, has imposed exorbitant royalty rates for licensing its GSM technology under FRAND terms, while refusing to share the terms of FRAND licenses given to licensees similarly placed.

The Informants have claimed that Ericsson was imposing discriminatory and non-uniform terms on similarly and uniformly placed players. Further, it was alleged that each user of Ericsson’s SEPs was made to sign a Non-Disclosure Agreement. This meant that users of such SEPs would not be in a position to find out the royalty terms given to other users. This reduced transparency and was contrary to the spirit of “applying FRAND terms fairly and uniformly to similarly placed players.”

Ericsson was also alleged to have imposed a jurisdiction clause preventing a party from having disputes adjudicated in India (where both parties carry on business) and vested jurisdiction in other places like Sweden and Singapore. According to the Informants, these kinds of ouster of jurisdiction also violate FRAND principles, as they contend that FRAND licensing issues should be resolved locally as a foreign jurisdiction clause may lead to distortion of competition due to hold-ups.

In each of the Ericsson cases, the CCI has formed a *prima facie* view under Section 26(1) of the Competition Act that Ericsson was dominant and directed a full investigation based on each of these complaints. The investigation in the *Micromax* and *Intex* cases has been joined, whereas the investigation in the *iBall* case is being conducted separately.

The *Micromax* case is a landmark case in the Indian context and is the first instance where the CCI has dealt with FRAND terms. To further understand the context of the CCI cases in India, it must be noted that the CCI tends to take a lot of guidance from the European Commission (“EC”). The EC, in its recent *Motorola* and *Samsung* decisions, held that a SEP holder can be held to contravene competition laws if the SEP holder tries to exclude competitors from the market by threatening injunctions on the basis of SEPs.

The EC has also held that the various acts of a SEP holder—such as imposing unreasonable royalty demands, refusal to license SEP according to FRAND terms, or charging royalties based on the price of the final product versus the smallest saleable unit, etc.—may also be in violation of competition provisions. Such conduct may lead to distorting licensing negotiations and thus lead to unfair licensing terms, with a negative impact on consumer choice and prices.⁹

Separately, but intimately related to the CCI cases, Ericsson has also filed three writ petitions in the Delhi High Court, challenging the CCI’s jurisdiction to investigate its actions.¹⁰ In its *prima facie* orders, the CCI, which is the sole first instance adjudicator in India under the

⁹ *EU Competition Policy Brief*, Issue 8, June 2014.

¹⁰ W.P. (C) 464 of 2014; W.P. (C) 1006 of 2014; and W.P. (C) 5604 of 2015.

Competition Act, with the Indian judicial courts having no direct power, observes that it has complete jurisdiction to investigate the matter with respect to anticompetitive practices, regardless of contemporaneous proceedings of IP infringement in the Delhi High Court.

Importantly, the CCI cited Section 62 of the Competition Act, making it clear that the provisions of the Competition Act are in addition to, and not in derogation of, other existing laws. Thus, the CCI decided that it was obligated to, and had the jurisdiction to, visit the issues of competition law, and the pendency of a civil suit in any other forum—including a High Court—does not take away the CCI's jurisdiction to proceed under the Competition Act.

In a contrasting *prima facie* observation the Delhi High Court noted that there is a substantial question of jurisdiction that arises from the CCI proceedings. Upon perusal of the CCI's orders, the Delhi High Court, in making a negative observation, believed that the CCI had entered into an adjudicatory and determinative role by recording a detailed and substantial reasoning at a *prima facie* stage itself.

Interestingly, the CCI, in May 2015, ordered the DG to investigate the *iBall* case relying heavily on its previous orders in both *Micromax* and *Intex* but failing to take note of the orders of the Delhi High Court that followed the CCI's orders from 2013. These conflicting CCI orders vis-à-vis the orders of the Delhi High Court mystify the application and use of FRAND to set standards in India.

Apart from the CCI-based litigation in the Delhi High Court, as mentioned above, Ericsson has also filed additional civil suits in the Delhi High Court, which are also *sub judice*. against each of the Informants for enforcing a permanent injunction to prevent the mobile telephone manufacturers from using Ericsson's patents. In light of the multiple legal proceedings, the Delhi High Court has restrained the CCI and DG from passing any final orders until the completion of proceedings before the Delhi High Court itself.

III. CONCLUSION

The CCI's *prima facie* orders have received mix reviews from various quarters of the Indian economy, specifically due to the observations made by the Delhi High Court on the jurisdictional issue. Thus, there has been considerable debate in Indian legal circles to determine the appropriate legal forum to decide the FRAND-related issues given that it involves a question of deciding on patents as well.

The decisions of the Delhi High Court signal that Indian courts may be responsive to the judicial and industrial trends across the globe; by contrast, the CCI's order in the *iBall* case¹¹ has increased the ambiguity of FRAND jurisprudence in India and does not give a clear and precise opinion. The position of India law and the imposition of FRAND terms or the protection of SEPs from a competition law perspective presently suffer because all legal proceedings regarding these issues are still underway, causing a lack in clarity.

Further, it is likely that clarity on FRAND principles in the Indian context and from a competition law perspective will be in line with the Digital India initiative which seeks to lay

¹¹ Case No. 04 of 2015.

emphasis on setting of standards to transform India into a digitally empowered society. Thus, development of FRAND guidelines in the backdrop of the Digital India initiative are extremely important to lay down the basic framework. Similarly, adoption and recognition of these principles will benefit India's Make in India campaign giving some much needed comfort to foreign licensors while protecting the interests of local licensees.

By adopting these balanced principles, India will do much to accelerate the development of critical standards that are enablers of technology and that play to India's strengths as an information technology innovator. Once adopted by Indian standard-setting operators, any breach of these principles can be consistently enforced. However, the cross roads at which the enforcement of these standards under contract and IP laws meet the competition law mandated to check the abuse of market power of SEP holders is yet to be seen.