

ANALYSIS OF STANDARD ESSENTIAL PATENTS IN LIGHT OF COMPETITION LAW IN INDIA

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Abstract

The Competition Commission of India has been presented with several instances that involve standard essential patents (SEPs) as well as fair, reasonable, and non-discriminatory (FRAND) promises (CCI). These cases involve well-established technology companies awarded SEPs in recognition of their contributions to the telecommunications industry due to their innovations. As could be anticipated, most of the accusations come from firms that manufacture or assemble smartphones. In their statements to the Commission, the parties have asserted that the terms granted to licensees by SEP owners in the telecommunications industry breach FRAND requirements of being “fair, reasonable, and transparent.” They believe that royalties are excessive and discriminatory, which indicates misuse by those who have a dominant position in the technology behind GSM, 2G, 3G, and other expanding areas of the sector. Injunctions have also been requested from the High Court of Delhi concerning the royalties’ base and methodology, including royalty stacking of SEPs, which suggests that patent owners are trying to put a hold on the situation. These are the very first cases involving SEPs to be heard in India.

Keywords: *Competition, Monopoly, Commission, Patents, Indian Law*

1. Introduction

The vast majority of competition countries, including China and South Korea, do not regard infractions connected to SEP to be within the purview of antitrust authorities. Accepting the claim that Intellectual Property Rights (IPRs) can lead to market dominance, they have concluded that extending the responsibility related to typical antitrust arguments is incorrect and counterproductive to technological advancement and consumer advantages. However, some people have raised questions about whether or not combining multiple intellectual properties (IPs) into a single portfolio increases the risk of monopolization and unilateral action. This is especially true in light of the proliferation of patent assertion entities (PAEs) and trolls in recent years. On the other hand, the literature on FRAND and SEPs consistently points to the resolution of difficulties through the judicial system rather than as an antitrust concern. It begs the fundamental question of why the CCI would direct an inquiry to be conducted by the Director General (DG) in a matter that is generally recognized as being the purview of the courts and not an antitrust issue. The decision made by the High Court of Delhi to allow the Commission to restart its inquiry on the accusation of dominance and its abuse lends even more weight to the question that was first posed. In this chapter, an attempt is made

to investigate the concerns raised by the Commission prior to the initiation of the investigation, as well as to determine whether or not the Commission's disquiet can be justified.

It is significant that all cases pertaining to SEPs have been considered within the framework of Section 4 (Abuse of Dominance) in terms of their anticompetitive effects, rather than with reference to Section 3(4), which deals with agreements, and Section 3(5), which deals with agreements protected under IPRs. This is because Section 3(4) and Section 3(5) respectively deal with agreements protected under IPRs. This predilection towards Section 4 gives rise to a number of inquiries concerning the starting point of the antitrust probe. Does the Section's textured rigidity and static arguments make it simpler for the Commission to evaluate the effects of anti-competitive behaviour? Or they could be swayed, perhaps ironically, by the sense that informants have of the inclination of the Commission toward the Section. It is assumed that owners of SEPs have dominating market positions and are consequently immune to the effects of competitive restraints. While the presumption and selection of the relevant Section are intertwined, the author believes they support a "per se" approach to competition law and SEP in India. The author goes on to hypothesize that the decision of the Delhi High Court indicates that it was an attempt on the part of the judiciary to endorse a reasoned economic analysis of intellectual property, standard essential patents, and fair and reasonable royalty rates in dynamic markets for innovation carried out by an expert body. Regarding intellectual property rights, the Commission has not yet developed a reasoned methodology or jurisprudence. It is imperative that, in the absence of guidelines dealing with intellectual property and with a track record of conservative judgements, an objective discussion may be initiated based on logic and reasoning in lieu of extending liability under uncertain circumstances. This is because it is imperative that there be a track record of conservative judgements. This chapter investigates two fundamental concerns that are inextricably tied to one another: first, whether or not SEPs are prima facie dominant, and second, whether or not dominance leads to an automatic inference of misuse. In order to answer both of these points in their own right, the chapter is broken up into two parts.

2. Dominance and Standard Essential Patent

About half dozen complaints on abuse of dominance have been brought before the Commission regarding patents in the telecommunications industry and SEPs. These lawsuits were filed before the Commission.¹

The allegations in every one of the cases were to abuses of dominance in accordance with Section 4 of the Act. These allegations are based on the concept that SEP owners are dominant in the market in question. The prima facie Order in the *case Micromax Informatics Limited v Telefonaktiebolaget LM Ericsson (Publ)* identifies dominance as central to the allegation to be addressed. The prima facie Order states, "From the perusal of the information and the

¹ M/S ESYS Information Technologies Private Limited v Intel Corporation CCI Case 48/2011; Micromax Informatics Limited v Telefonaktiebolaget LM Ericsson CCI Case 50/2013; Intex Technologies (India) Limited v Telefonaktiebolaget LM Ericsson CCI Case 76/2013; M/s Three D Integrated Solutions Ltd. v M/s VeriFone India Sales Pvt. Ltd CCI Case 13/2013

documents filed by the Informant prima facie it is apparent that Ericsson is dominant in the relevant market of GSM and CDMA.....” In addition, an explanation sentence can be found in the following paragraph, which reads as follows: “The allegations stated in the information and not denied by OP concerning royalty rates sums up the initial reactions of the Commission.” Even if they are significant, prima facie orders are not in the same category as the order that is issued after an inquiry. There is less importance placed on a pre-investigation order. It provides an indication of the Commission’s mind based on information accessible in the public domain and what is filed by the parties. The investigations, for the most part, adhere to the train of thought established by the prima facie Order. Rather than posing counterfactuals or alternative lines of reasoning, it lends support to the initial assumption that was made. There have also been prima facie Orders that went against the majority opinion, although most members would rather evaluate their decision when they have received the investigative report from the DG. In addition, the Commission has a policy that requires them to:

- (i) request more information from the informant and the deponent; and
- (ii) provide for an initial hearing of the arguments. As a result, the information that was submitted can be challenged during the preliminary stages, when the Commission is still giving it due weight. In the situations involving SEP, decisions made based on comparable information have a greater likelihood of being given weight in subsequent prima facie Orders.

3. Analysis and Discussion

It should be highlighted, however, that a prima facie Order does not necessarily reflect thinking of the Commission; rather, it only conveys worries on the prospect of domination and the scope for abuse. This is an important distinction to make clear. For instance, in the case of *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)* (Ericsson), the market that was defined (GSM and CDMA) suggested that the enterprise dominated the market, which indicated that the enterprise indulged in anti-competitive activities that require further investigation. To begin, let us investigate whether SEPs are invariably dominant in the relevant market, as is asserted in an assertion that is founded on a ‘per se’ understanding that is derived from a static traditional approach to the economics of competition law that patents provide a monopoly right. This understanding states that patents provide a monopoly right. This approach brings up a number of unsettling questions in the telecommunications industry. The industry itself is no longer restricted to the lines and wires networks and related equipment; rather, it has expanded to include internet services, digital transmission of voice and data, cloud computing, the internet of things, and requisite technology that can be accessed by consumers. To begin, a monopoly right and the opportunities it affords for earning monopoly profits serve as an incentive not only for those who already possess patents but also for those who aspire to become innovators. There is also the question of whether or not monopoly revenues are sufficiently favourable to further invention and whether or not they degenerate to the general advantage of a patent as an entrance barrier. The rebuttal to this argument is that patents are only granted to new discoveries that are unique, and patentees are required to provide evidence that their creation is not merely an imitation or, at the very best, an improvisation of an existing

idea. The potential for innovation and the length of time needed to complete an innovation cycle are both different for each industry. Research and anecdotal evidence have both demonstrated that the rate of innovation in the field of telecommunications has accelerated at a startlingly rapid pace.

Secondly, the telecommunications industry and its convergence with the internet and artificial intelligence has seen two developments:

- (i) a wide range of alternatives to the GSM/CDMA technologies; and
- (ii) the combining of different innovations enabling different functions in a mobile device, as well as, of course, the emergence of apps. Both of these developments were brought about by the convergence of the telecommunications industry with the internet and artificial intelligence.

The Order makes note of the fact that Ericsson³ is the leading player in the GSM and CDMA technology markets in India. It was projected that Ericsson had a market share of 35% on a global scale. According to the Order, the corporation in question possesses a total of 30,000 patents, 400 of which have been granted in the country of India.² According to the Order's interpretation, the fact that the company possesses a SEP is evidence that there is no competing technology available on the market. This is evidence of the company's dominant position in the market. The identical debate is carried through into later Orders.³ In the issue of Intel and microprocessors, also known as chips, the Commission determined that the company held a dominant position in three out of the four markets that were established.⁴

According to the data collected from the market, at the end of the 1990s, five companies accounted for 85 percent of the GSM market. These five companies were Ericsson, Nokia, Siemens, Motorola, and Alcatel.⁵ Lucent, Ericsson, Nokia, Interdigital, and Qualcomm are seven of the major SEP owners that have licencing schemes.

The information regarding market share makes two things abundantly evident. To begin, the field of telecommunications is an extremely innovative one, as evidenced by the ever-expanding boundaries of the internet, which range from 2G to LTE to cloud computing. Technology-based markets are characterized by the continual appearance of new companies entering the market with competing technologies that frequently cause disruption. At best, dominance is a fleeting phenomenon that is vulnerable to the ever-present danger posed by the pressures of competitive limitations. Because of the existence of competitive limitations, the capacity of a SEP owner to collect extravagant royalty fees is constrained, as will be argued in the following Section. Given the significance of focusing on competitive restrictions rather than dominance, the Commission need to make progress toward effects-based analysis through the use of rigorous economic research. The claim that SEPs are dominant is a compelling one; nevertheless, the evidence does not necessarily support this conclusion.

² Micromax (n 1).

³ Intex (n 1).

⁴ M/s ESYS (n 1).

⁵ Claudia Tapia, Director IPR Policy, 'DT: A New Technological and Economic Paradigm' (Speech at the Going digital: the future of industry and jobs Workshop, Paris, 24 April 2017).

The second point is the need of recognizing the role that SEP plays in fostering healthy competition. Standardization is a mechanism that was developed by standard setting organizations (SSOs), and as its name suggests, it makes it possible to create a patent portfolio that upholds standards and guarantees compatibility. Standardization was given its name because it enables the creation of such a portfolio. The multiple functionalities that are desired in cellphones are covered by a collection of patents, and newer models include support for an increasing number of these tasks. The process of standardization involves the collection of all patents into one big pile. For a company that is looking to get a licence, the negotiation process is made easier. It is no longer necessary to have several licences. All of the patents in a set can be used under a single licence.

Thirdly, the claim that SEPs generate entry barriers cannot be upheld given the current state of affairs. The evidence demonstrates that the method of standardization is suitable for use in the field of telecommunications in order to meet the needs of interoperability and of introducing new capabilities into smartphones. Standardization is a process in which a collection of patentees who have combined their work into a single package submit it to SSOs for approval. There are various SSOs that are responsible for issuing SEPs that incorporate a variety of technologies. Choosing a SEP from among those offered by a reputable SSO, such as the European Telecommunications Standard Institute, is a foolproof method for selecting a SEP (ETSI). Because there has been so much scepticism directed toward SEPs and the process of standard setting, the Commission should probably think about holding an open forum for discussion on SSOs and the process of selection before making their ultimate decision.⁶

Fourthly, the most distinguishing feature of a portfolio of patents that has been granted SEP approval is that the FRAND condition is voluntary. This assures that a licensee can make the technology available to any company that is willing to pay for it. Both SEP and FRAND have contributed to the explosion of the smartphone market, both in terms of the number of firms that now produce smartphones and the number of additional features that are marketed alongside the release of each new model. The rapid expansion of the smartphone market, which includes more than two dozen different manufacturers⁷ according to even a partial list, is evidence of the fact that SEPs have been instrumental in fostering the development of smart phones and other forms of communication technology. When choosing a particular patent, it is vital to have conversations about standard essential patents (SEPs) and the procedure that is followed by standard-setting organizations (SSOs).⁸

It is essential for an SSO to maintain a high level of credibility because there are a variety of organizations, including public, private, and even newly formed PAEs. In this particular instance, ETSI is an extremely well-established SSO. The issue at hand for the Commission is not ETSI itself but rather Clause 6 of ETSI, which, according to the argument, Ericsson has violated in some way. According to Clause 6, which was referenced by the Commission, “an IPR owner is obligated to make irrevocable written undertaking,” which states that it is entitled

⁶ DoT has attempted such an open forum discussion.

⁷ Apple, Samsung, Dell, Microsoft, Google, Xiaomi, Huawei, BlackBerry etc

⁸ Ankita Tyagi and Sheetal Chopra, ‘Standard Essential Patents (SEP’s)—Issues & Challenges in Developing Economies’ (2017) 22(3) Journal of Intellectual Property Rights 121

to grant irrevocable licences on FRAND terms, which are to be applied equally and uniformly to similarly located participants.

The Commission took a logical approach, and as part of that, it placed an emphasis on the last term of “fairly and equally.” This is because the phrase contains abuse of dominating position, which is specified as being under Section 4(2). Using Clause 6, the Order implies that owners of SEP are not making royalty claims in accordance with what is considered to be “fair, reasonable, and non-discriminatory.” The phrase can be construed in a variety of different ways depending on the context.⁹ An investigation into royalty payments that are “fair, reasonable, and non-discriminatory” is required because of the reference to Clause 6 and the claims included in the Orders.

The Indian Cellular Association recently provoked mobile manufacturers by asking them to calibrate their complaints against SEP owners on royalty payments and the non-disclosure agreement, both of which cite violations of the ‘fair and reasonable’ criteria of FRAND. Claims of royalty that are asserted to be excessive and inappropriate in terms of methodology suggest that attempts are being made to convince the government to declare SEPs as “non-essential,” placing it outside the framework of essential and standard, in a misplaced understanding of what constitutes “essential” in SEP. It is also a decision that will be detrimental to the expansion of smartphone manufacturing businesses as well as the development of robust intellectual property rights norms within the country.¹⁰

4. Misuse of Dominance as a Weapon

In light of the fact that SEP owners hold a dominant position, the Order instructed the DG to move forward with investigations according to the parameters outlined in Section 4, which is titled “Abuse of Dominance.” The potential for a “per se” acceptance of abuse once dominance has been established is an alluring aspect of the Section that should be avoided at all costs. In a form-based approach, the word “shall” in the sentence “No enterprise or organization shall establish its dominating position” is the guiding factor in Section 4 of the Act, which enables circumstances for a “per se” decision. This is because “shall” is a mandatory word. With the exception of the generic paragraph (m), which refers to “any other factor which the Commission may judge relevant for the enquiry,” Section 19(4), which outlines the prerequisites of dominance, offers very little legal comfort for an alternative conception of dominance. In matters of intellectual property rights and patents for standard essential patents in the telecommunications industry, the approach is inadequate primarily due to limited dominance, which, as was said in the preceding Section, is at most a transient phenomenon. It was also mentioned that there are a number of SEPs and SSOs, which is noteworthy considering the velocity with which technical advancements are occurring. Any domination is subject to the limitations imposed by competition. An approach that is “effects oriented” is necessary, yet it is all too easy to fall back on a strategy that is “form based.”

⁹ MCX Stock Exchange Ltd v National Stock Exchange of India Ltd (2009) Competition Commission of India, Case 13/2009.

¹⁰ ‘Handset firms trying to avoid paying royalty worrying’ The Financial Express (12 March 2016).

An “effects-based” strategy convinces investigations to correctly characterize the market, which enables them to determine the competitive limitations that exist as a result of their actions. It is possible to take into consideration a cutting-edge test called the Small but Significant Non-transitory Increase in Prices (SNNIP) test, which investigates alternative technologies and other features that can be incorporated into a smart phone. Whether the SNNIP test is used to define the market or not, one can anticipate a few different outcomes either way. Determine the total amount of SEPs and SSOs that are commonplace and well-liked in the market. A ranking of SEPs according to their level of popularity could serve as a stand-in for an evaluation of price ranges. When it comes to using that patent, there is no obligation to do so despite the fact that it has been deemed “important.” This can be better comprehended by having an understanding of the intricate market signals that were discussed in the first Section. As a matter of fact, an improved comprehension of the idea of “essential” in SEP is brought to the forefront as a condition of supremacy in the Order.

An inaccurate evaluation of dominance can have long-term negative implications, particularly in the developing areas of technology and communications. Based on a review of previous rulings, academics have made hints about the Commission’s conservative stance, and some have named it the “Reductionist Approach of CCI.”¹¹ In addition to this, there is a propensity to obscure the meaning of the term “consumer” and to identify a rival company as the target market.

The Commission has a tendency to take a more conservative approach, with the exception of situations involving intellectual property rights (IPR) and significant empirical problems (SEP) (as they pertain to agreements between an SEP owner and the buyer of the license). Given the latitude that is allowed for evaluating the effects of anticompetitive behaviour, Section 3(4) would be the most relevant Section to use. Establishing dominance is not necessary to satisfy the requirements of section 3(4). By navigating from Section 4 to Section 3(4), dominance is already established, and abuses of Section 3(4) that are considered to cause AAEC are equated with abuses of dominance under Section 4, without the necessity of conducting an investigation into possible efficiency outcomes listed under Section 19. (3). Before arriving at a conclusion, it is necessary to investigate both positive and negative results, as this Section, which outlines the considerations that must be made in determining whether or not vertical agreements have anticompetitive impacts, encompasses both of these types of outcomes. Only variables that can be used to determine dominance are outlined in paragraph 19(4). Section 3 covers the territory that encompasses contracts and agreements (4). The obscuring of portions is a form of distortion that can have unforeseen consequences for the industry, the economy, and the customers.

5. Conclusion

This chapter discusses a few concerns and brings to light some of the most significant misunderstandings that are associated with FRAND and SEPs. An effects-based approach to

¹¹ Yogesh Pai and Nitesh Daryanani, ‘Patents and Competition Law in India: CCI’s Reductionist Approach in Evaluating Competitive Harm’ (2017) 5(2) Journal of Antitrust Enforcement 299.

technology, patents, and SEPs is suggested by the analysis provided by the author. A dynamic market that is supported on creative and disruptive technical breakthroughs is reflected by the constantly rising data that was briefly outlined above. Inducing uncertainty by broadening antitrust actions against dominant firms to include situations in which SEPs are implicated may have a deleterious effect on the expansion of the telecommunications industry and on technological advancement in general.

The author has demonstrated that supremacy in and of itself is fleeting. To effectively capture network economies, a methodical approach is required due to the widespread presence of competitive constraints as well as the continuously shifting scenarios that are represented by SEPs. The pricing of patents and the payments of royalties in accordance with them need to be valued according to the value that is created by networks. It also indicates that the definition of “fair, reasonable, and non-discriminatory” must be based in the economic principles of pricing and cannot be applied in a meaning that is seen to be more usual. A complicated link exists between the SEP, the advancement of technology, and the introduction of new ideas. Multiple competition authorities are working on gaining a grasp of the complexities of competition law and intellectual property rights (IPRs) while minimizing the risk of expanding liability.

References:

- ¹ M/S ESYS Information Technologies Private Limited v Intel Corporation CCI Case 48/2011; Micromax Informatics Limited v Telefonaktiebolaget LM Ericsson CCI Case 50/2013; Intex Technologies (India) Limited v Telefonaktiebolaget LM Ericsson CCI Case 76/2013; M/s Three D Integrated Solutions Ltd. v M/s VeriFone India Sales Pvt. Ltd CCI Case 13/2013
- ² Micromax (n 1).
- ³ Intex (n 1).
- ⁴ M/s ESYS (n 1).
- ⁵ Claudia Tapia, Director IPR Policy, ‘DT: A New Technological and Economic Paradigm’ (Speech at the Going digital: the future of industry and jobs Workshop, Paris, 24 April 2017).
- ⁶ DoT has attempted such an open forum discussion.
- ⁷ Apple, Samsung, Dell, Microsoft, Google, Xiaomi, Huawei, BlackBerry etc
- ⁸ Ankita Tyagi and Sheetal Chopra, ‘Standard Essential Patents (SEP’s)—Issues & Challenges in Developing Economies’ (2017) 22(3) Journal of Intellectual Property Rights 121
- ⁹ MCX Stock Exchange Ltd v National Stock Exchange of India Ltd (2009) Competition Commission of India, Case 13/2009.
- ¹⁰ ‘Handset firms trying to avoid paying royalty worrying’ The Financial Express (12 March 2016).
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