



## DECODING THE INTERPLAY OF STANDARD ESSENTIAL PATENTS AND COMPETITION LAW : AN INDIAN PERSPECTIVE

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### ABSTRACT

*In this article titled, 'Decoding the Interplay of Standard Essential Patents and Competition Law: An Indian perspective', the researcher has focused on the interesting yet complicated relationship between SEPs and Competition Law with respect to the Indian scenario. The researcher has confined the discussion to telecommunication industry owing to the fact that India's telecom industry is second largest in the world. With the ever-increasing advancement in technological inventions coupled with the ongoing globalisation, the market has gone global. Consequently, it has become quintessential to bring a certain level of uniformity and standardisation in the technological innovations pertaining to telecommunication industry so as to ensure the interoperability and compatibility of products. The need to bring the uniformity and standardisation across a common industry, (herein Telecom industry) has led to the emergence of Standard Essential patents (SEPs). The meaning as construed from the terminology 'Standard Essential Patents' is a 'patent' i.e. an innovation which is so 'essential', that it is accepted as a standard to be adhered to by all the parties who are involved in the concerned sector. Thus, SEP Holder becomes the owner of this standardised patented technology and assumes market power as a reward to his R&D investment and so on. Enjoyment of*

*monopolistic right is bestowed on the SEP Holder by virtue of Patent Law. However, there are situations wherein such dominant position in the market can be misused thereby conflicting the fundamentals of Competition Law. For this reason, the researcher has attempted to analyse whether this relationship between the two fields is in conjunction or conflict with each other.*

### 1. INTRODUCTION

Today's world is one which is driven by technology, innovation and thriving competition in the markets. Innovative technology is developing and evolving at an ever-increasing pace irrespective of the nature of industry. Patent Law regime sufficiently acknowledges and protects inventions pertaining to technology as well as rewards the inventor's labour, investment, R&D by granting him monopolistic rights for a certain time period. One of the recent significant developments encompassing the field of technology and patents is Standard Essential Patents (hereinafter referred to as SEPs). In simple words, SEPs refers to patented technologies which are so essential as to serve as a standard, which need to be complied with by the various counterparts involved in the particular industry concerned. Though the SEPs are instrumental in bringing in interoperability, co-operation, consumer benefit and at times even pre-competitiveness, there is a general notion that the concept of SEPs frustrates the objectives of Competition Law.

SEPs are patent that claim technologies required to establish the standards, wherein these technologies are core technologies without any alternatives, therefore such standards have to be adhered by every product failing which such product shall be



a commercial failure.<sup>1</sup> SEPs are instrumental in encouraging compatibility and interoperability across competing devices in marketplaces as well as lowering the costs of products for consumers.<sup>2</sup> At the same time, SEP gives monopoly to the SEP Holder as a reward for the R&D put in by the SEP Holder to create and develop the standardised technology. On the other side of the spectrum, there exists competition law which aims to ensure a competitive environment wherein innovative technologies, products, and services are purchased, sold, traded and licensed thereof.<sup>3</sup> Consequently, it is of paramount significance to understand this complex yet intricate interrelationship between SEPs and Competition Law.

## 2. AN ERA OF STANDARDISATION – TUSSELE WITH COMPETITION LAW?

With the advent of Standard Essential Patents (SEPs), the era of standardisation has come into picture. Through the concept of standardisation, there are certain patented technologies accepted as a standard which must be followed by similarly placed industries across a given sector. The International Organisation for Standardisation (ISO) defines a formal standard as '*a document, established by a consensus of subject matter and approved by a recognised body that provides guidance on the design, use or performance of materials,*

*products, processes, services, systems or persons.*' In simpler words, a standard comprises technical specifications which intends to put forth a common or standard design for any process or product.<sup>4</sup>

The practice of standardisation, which has rapidly grown due to industrialisation, ensures compatibility and interoperability amongst the competitive products in the global market. On account of exponential growth in inventions, it becomes quintessential to standardise certain patented technology in order to harmonise the consistency and quality of products from different manufacturers of a common industry.<sup>5</sup> The standardisation is instrumental in establishing universal protocols and ensures development while enabling compatibility and interoperability.

Despite the perks of standardisation, it can't be denied that SEPs raise several concerns with respect to Competition and IP law especially in situations pertaining to FRAND Licensing, patent pools and cross-licensing.<sup>6</sup> In other words, the anti-competitive connotation of SEPs is quite evident and cannot be simply ignored.<sup>7</sup>

In this respect, it is essential to note that monopoly bestowed on a patent is not prima facie anti-competitive since incentivisation of invention can't be denied as the market prices do not necessarily suffice prices incurred on R&D. However, monopoly with respect to SEPs, on account of wide

<sup>1</sup> Ankita Banerjee and Mayank Kapila, 'Standard Essential Patents vis-à-vis Competition Policy: Conflicting or Complementary' (2018)3(1) IJLRS <<https://www.ijlrs.com/papers-vol3-issue1.php>> accessed 12 May 2020

<sup>2</sup> Ankita Tyagi and Sheetal Chopra, 'Standard Essential Patents (SEPs) – Issues and Challenges in Developing Economies' (2017)22 JIPR <<http://nopr.niscair.res.in/handle/123456789/42677>> accessed 5 May 2020

<sup>3</sup> Banerjee and Kapila(n1)

<sup>4</sup> Tyagi and Chopra(n2)

<sup>5</sup> Raghavi Viswanath, 'Demystifying the Indian FRAND regime: The Interplay of Competition and Intellectual Property' (2016)21JIPR <<http://nopr.niscair.res.in/handle/123456789/34083>> accessed 8 May 2020

<sup>6</sup> Banerjee and Kapila(n1)

<sup>7</sup> Viswanath(n5)



acceptability and non-substitutability, confers enormous market power which might result into abuse of power thereby exhibiting anti-competitive behaviour.<sup>8</sup> Although the primary objective of standardisation is to establish widely-acceptable standardized technology, it might raise anti-competitive concerns since there is no alternative available to such standard.<sup>9</sup> In the given scenario, the SEP Holder assumes a higher pedestal and a superior bargaining power to the extent that he might either refuse to license standard patented technology or claim unreasonable royalty rates. The situation takes an anti-competitive colour at this stage as the prospective licensees have an obligation to implement the standardised technology in absence of any plausible or alternative substitute for the same.

It is to be noted that while on the one hand, standardization is a significant process intended to enhance innovation among competitors and benefit all stakeholders involved while on the other hand the process has a tendency to hamper the competitive market resulting into less innovation and dwindling the economic growth.<sup>10</sup>

### 3. ROLE OF STANDARD SETTING ORGANISATIONS (SSOs):

The role of SSOs is of paramount importance in the standardisation process. SSO is basically an organisation or an established group which aims to develop,

coordinate, promulgating, revise, amend and other such incidental purposes in order to produce technical standards meant to meet the requirements of a wide base of affected adopters or implementors.<sup>11</sup> There is absolutely no doubt that the SSOs play a major role in developing a standard by acknowledging SEP Holders' patented technology, however the responsibility of choosing one standard amongst different competing technologies is a mammoth one. It is a herculean task to opt one technology as a uniform standard out of so many potential competing technologies which are equally capable of bringing similar results.

Once a patented technology has been accepted as a standard, the SEP Holder gains a superior bargaining power and dominant position—eventually. However, the competition concerns arise when the SEP Holder charges exorbitant royalties or doesn't want to license the SEP in appropriate terms. Consequently, the situation amounts to abuse of dominant position which might adversely affect the healthy competition in the market forces across the industry. The potential implementors or adopters of the standard would now be under an obligation to adhere to that particular technology as it's a minimum standard which is to be followed across the respective industry in order to sustain in the market.<sup>12</sup>

Thus, it is to be noted, standardisation procedure of SSOs puts a SEP Holder in a

<sup>8</sup> ibid

<sup>9</sup> Banerjee and Kapila(n1)

<sup>10</sup>Jurgita Randakevičiūtė , *The Role of Standard-Setting Organizations with Regard to Balancing the Rights Between the Owners and the Users of Standard-Essential Patents* (2015)

<<https://www.jstor.org/stable/j.ctv941q91.6>

>accessed 10 May 2020

<sup>11</sup> Tyagi and Chopra(n2)

<sup>12</sup> Arpan Banerjee, 'Background Note: Standard Essential Patents, Innovation and Competition: Challenges in India' (2017)7(1) IP Theory Article 1.<<http://www.repository.law.indiana.edu/ipt/vol7/iss1/1/>> accessed 9 May 2020



dominant market position in comparison to its competitor as the patented technology has been accepted as a standard which is to be adhered by all implementors. This situation might lead to market dominance and has the tendency to be abused thereby hampering competition.<sup>13</sup> However, SSOs ensure that the dominant position so attained by the SEP Holder is not abused to the detriment of the adopters or implementors. It is at this juncture that the FRAND (Fair, Reasonable and Non-Discriminatory) commitment comes in to ensure that SEP Holder's monopolistic rights or dominant position is not exploited to the extent that competition in the market is hampered and the implementors of the standardised technology have to undergo hardships as no other alternative to the standardised technology is available.

The role of SSO's in the standard-setting process is so significant with respect to its effect on IPR regime and competition that even WIPO in one of its reports acknowledged the significance of formulation of international standards in the globalising world wherein the market is becoming more global. The report also suggested that certain regulatory mechanisms of SSOs must be chalked out so that there is enhanced accountability and accessibility of SEPs.<sup>14</sup>

It is, therefore, significant to acknowledge that the SSOs can play a constructive role in balancing the competition law issues

pertaining to the standardisation process as well as licensing of the standardised technology to the prospective adopters of the same. However, SSOs must have IP Policies which have the potential to bring in the aspects pertaining to competitive law.

#### 4. ROLE OF COMPETITION COMMISSION OF INDIA AND COURTS IN SEP RELATED DISPUTES:

The recent litigation dealing with SEP and FRAND has brought the opposing relationship between the Competition Law and Standard Essential Patents to forefront. More specifically, disputes have arisen as to what constitutes a FRAND obligation and how it is to be enforced.<sup>15</sup> In India, the development and evolution of the SEP and FRAND is at a nascent stage yet and it is akin to a piece of slate ready to be chalked out in a particular way. As far as the Indian SEP-FRAND litigation is concerned, the issues pertaining to competition came to the limelight when Ericsson, which is one of the key players in global telecommunication market, brought a suit against three local Indian smartphone suppliers namely **Micromax<sup>16</sup>, Intex<sup>17</sup> and Iball<sup>18</sup>**.

A common thread linking the cases is that on one hand SEP Holder (Ericsson) filed infringement suits against the implementors of concerned standardised technology while on other hand latter lodged complaints with CCI on the ground that former's behaviour is abuse of dominant position and levelled

<sup>13</sup> Randakevičiūtė (n10)

<sup>14</sup> Banerjee and Kapila (n1)

<sup>15</sup> 'Standard Essential Patents' (rnaip) <accessed 12 May 2020

<sup>16</sup> Telefonaktiebolaget LM Ericsson v. Mercury Electronics. & Another, CS(OS)442/2013

<sup>17</sup> Telefonaktiebolaget LM Ericsson v. Intex Technologies. (India), CS(OS) No. 1045/2014

<sup>18</sup> Telefonaktiebolaget LM Ericsson v. M/S Best IT World (India) Private Ltd., CS(OS)2501/2015



allegations of exorbitant royalties and NDA Agreements as these raised competition concerns. The litigation brought the Competition law and Patent law at loggerheads. For instance, in the present case, Ericsson (SEP Holder) for filing an infringement suit, approached the Court under The Patents Act, 1970 while local implementors invoked the jurisdiction of CCI under The Competition Act, 2002 to bring an action against abuse of dominant position by Ericsson.

One of the most significant debate which arose in the litigation was pivoted on whether the Competition Commission has jurisdiction in relation to dealing with SEP disputes. In this regard, it is essential to note that Section 3(5) of the Competition Act provides exemption to IPR holders from the provisions of the Act, thereby granting them monopoly over its exercise. While at the same time, Section 62 of the statute provides that all the provisions contained therein are only in addition to any other law and not derogating such other law. Eventually, the Commission asserted on its jurisdiction by emphasising on its welfare legislation capacity on the basis that the aim and objective of the Commission as provided in the Preamble, concerns with protection of consumers any sort of anti-competitive behaviour and dominant position being abused.<sup>19</sup>

Consequently, while hearing the complaints of local manufacturers i.e. **Micromax**<sup>20</sup>, **Intex**<sup>21</sup> and **Iball**<sup>22</sup>, CCI held that Ericsson charged exorbitant royalties from the local manufacturers and thereby violated competition laws. It also held that Ericsson's behaviour triggered competition concerns in relation to patent holdup and royalty stacking. In a ground-breaking approach, the CCI even took upon itself the responsibility to determine the royalty rates and while doing so it became the first Competition Commission in the world to go to the extent of determining royalty rates.<sup>23</sup>

However, simultaneously, Ericsson<sup>24</sup> filed a writ petition in the Delhi High Court challenging the jurisdiction of CCI to initiate any proceedings with respect to the royalty claims by the SEP Holder as issues pertaining to the same would fall within the ambit of The Patents Act, 1970. Consequently, in March 2016, Delhi High Court in its judgement provided some jurisprudence on this matter. While hearing the writ petition challenging CCI's jurisdiction, Justice Bakhru after a careful perusal gave an important finding on the issue of jurisdiction conflict of Court and CCI in relation to SEP related disputes.<sup>25</sup>

Emphasis was laid by the Court on the fact that both the Acts are specific statutes in their own respective fields. It also stated that nature of remedies under S 27 of

<sup>19</sup> Viswanath(n5)

<sup>20</sup> Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson, CaseNo. 50/2013,

<sup>21</sup> Intex Techs. (India) Ltd. v. Telefonaktiebolaget LM Ericsson, Case No. 76 of 2013, } 6

<sup>22</sup> Best IT World (India) Private Ltd. v. Telefonaktiebolaget LM Ericsson, Case No. 4 of 2015

<sup>23</sup> Rashmi Singh and Pabitra Dutta, 'Standard Essential Patents and FRAND Litigation'(2015) 2(7) Law Mantra < accessed on 10 May 2020

<sup>24</sup> Telefonaktiebolaget LM Ericsson v. Competition Commission of India W.P. (C )464/2014 & CM Nos. 911/2014 &915/2014

<sup>25</sup>Kirti Gupta, 'FRAND in India : Emerging Developments'(2018)30(1)IIMB Management Review <<https://doi.org/10.1016/j.iimb.2017.07.005>> accessed 7 may 2020



Competition Act and S 84 of Patent act are sufficiently distinct in their own spheres. Consequently, Court came to the conclusion that it is not for the civil courts to look into abuse of dominance as it falls under the jurisdiction of CCI under Section 4 of Competition Act whereas it also stated that the ambit of powers of CCI is confined only in relation to assessing the Anti-competitive Conduct and does not extend to determining the royalty rates.<sup>26</sup>

Therefore, at present the CCI has the jurisdiction in so far, the investigation of the conduct and the abuse of dominance is concerned, however CCI lacks jurisdiction with respect to the royalty rates determination as it is something which falls within the domain of Court's jurisdiction. It is safe to conclude that with more SEP-FRAND litigation coming up, there is certainly going to be greater clarity on the issue of CCI's power with respect to SEP issues.<sup>27</sup>

## 5. COMPETITION LAW CONCERNS WITH RESPECT TO SEPs:

In order to analyse the competition concerns pertaining to SEPs, the researcher has categorised competition concerns in two aspects i.e. standardisation process and Licensing.

### 5.1 Competition Law Concerns in the Process of Standardisation (i.e. standard setting)

<sup>26</sup> Anil Kumar Bhardwaj 'IPR – SEPs and Competition: Conflicting or Complementary, (Presentation 2016, Competition Commission of India <<https://www.cci.gov.in/node/2800> > accessed 12 May 2020

<sup>27</sup> Gupta(n21)

<sup>28</sup> '4 SEP Disclosure and Information Transparency.' (National Research Council, Patent Challenges for

#### 5.1.1 Non-Disclosure of IP by SSOs members

As it is known, SSOs have their own IP Policies to regulate the process of standardisation. In this context, there are certain SSOs whose IP Policies mandate IP Disclosure while there are IP policies of some SSOs which doesn't include disclosure.<sup>28</sup> It is essential to note here that one of the primary objectives of disclosure of IP is to facilitate the SSO members to make an ideal and informed choice pertaining to the technical merit, implementation costs and availability of the prospective adopters for the given technology.<sup>29</sup> Thus, it is possible that non-disclosure of IP might defeat the purpose of standard setting as it might exhibit anti-competitive behaviour.<sup>30</sup> Therefore, absence of disclosure of IP has the tendency to hamper competitiveness.

#### 5.1.2 Selection of Technology in an anti-competitive manner

Given the enormous benefits and superior bargaining power bestowed on the owner of a standardised technology, there is a possibility that the competing dominant players might abuse the process to ensure that their technology is chosen as a standard. It is therefore, preferable that the technology must be chosen on basis of some expert

Standard-Setting in the Global Economy: Lessons from Information and Communications Technology. Washington, DC, The National Academies Press 2013) <doi: 10.17226/18510.> accessed 12 May 2020

<sup>29</sup> ibid

<sup>30</sup> Ravikant Bhardwaj, 'Standard Setting in India: Competition Law and IP Issues' (2013)5IMJ accessed 15 May 2020



opinion as an unfair selection of technology threatens healthy competition.<sup>31</sup>

### 5.1.3 Refusal by SEP Holder to license on FRAND terms

Once a patent Holder's technology is accepted as a standard, there is a probability such owner of technology might abuse his dominant position. Thus, for this reason, SSOs require the SEP Holders to license the standardised technology on FRAND terms.<sup>32</sup> In a given scenario, wherein SEP Holders refuses to license the standardised technology or the licensing mandate of the SSO itself is unfair, then this situation also raises concerns pertaining to competition law.<sup>33</sup>

## 5.2 Competition Law concerns in SEP Licensing

### 5.2.1 Patent Hold Up

The phenomenon is called 'hold-up' because in absence of any alternative to SEP, the implementors are bound to adhere to the standard of SEP Holder thereby the latter might abuse the situation by 'holding up the implementors'.<sup>34</sup> As per this theory, 'the owner of a patent on just one part of a larger product might demand a disproportionate royalty by leveraging the threat of an injunction against the manufacturer that would block the sale of the entire product.'<sup>35</sup>

Once SEP gains commercial acceptance, then it is said to be 'locked in'. Consequently, bargaining power of SEP Holder surges so much so that the locked in

SEP can be misused to claim unreasonably exorbitant royalty rates. In this respect, while dealing with the complaints lodged by Micromax and Intex, the CCI noted, '*hold-up can subvert the competitive process of choosing among technologies and undermine the integrity of standard-setting activities.*'<sup>36</sup>

### 5.2.2 Royalty Stacking

The concept of royalty stacking refers to the practice wherein each licensor claims exorbitant royalty for its component to be used in the product eventually resulting into price surge of the entire product as the royalties metaphorically gets accumulated.<sup>37</sup> As per this concept, various SEP holders impose similar kind of royalties on their own specific components which forms part of a multi-component product thereby the royalties aggregate so much so as to exceed the total price of the resultant product itself. Consequently, royalties are stacked up together in such a way which results into unreasonable aggregate royalty.<sup>38</sup>

### 5.2.3 Discriminatory Practices

Discriminatory practices, in the context of SEP licensing, means unequal treatment given to different licensees despite equivalent transactions. In a given scenario, if CCI is able to establish that SEP Holder has unequally treated two similarly placed implementors whether in respect of royalty rates or terms of license, then it is a case of abuse of dominance.<sup>39</sup> Since discriminatory

<sup>31</sup> Bhardwaj(n25)

<sup>32</sup> Gupta(n21)

<sup>33</sup> Bhardwaj(n25)

<sup>34</sup> Gupta(n21)

<sup>35</sup> Devlin Hartline & Matthew Barblan, 'Debunking the Royalty Stacking Theory: Real-World Evidence from the Mobile Wireless Industry', (George Mason University, CENTER FOR THE PROTECTION OF

INTELLECTUAL PROPERTY 2016) accessed on 15 May 2020

<sup>36</sup> Singh and Dutta(n20)

<sup>37</sup> Hartline & Barblan(n31)

<sup>38</sup> Singh and Dutta(n20)

<sup>39</sup> Samir Gandhi and Shivanghi Sukumar 'Competition and Antitrust Enforcement Against Standard Essential Patents in India', (2017) 62(3) The Antitrust Bulletin



practices might lead to abuse of dominance , the competitive concerns arising out of such unequal treatment is quite evident.

## 6. CONCLUSION

A flourishing market, irrespective of the industry, is one which promotes competition amongst the various players in the market. In this respect, SEPs have assumed vital importance in the global market. SEPs are basically meant to foster compatibility and interoperability amongst the market players across a common industry thereby promoting healthy competition and innovation. As a matter of fact, standards are looked upon by the market as a springboard for building a competitive environment.<sup>40</sup> It is, therefore, essential to understand that SEPs do not have any inherent conflict with the competition law rather it is in conjunction with it. SEP, being a patent apparently might seem to be at loggerheads with competition law but factually SEPs and Competition Law serve to work in furtherance of each other. In the view of researcher, Competition law is not meant to derogate the domain of SEPs instead it ensures that the true purpose of SEPs doesn't get subjugated by the superior market position of the SEP Holder. Thus, Competition law essentially acts as a system of 'check and balance' so that SEP Holder doesn't abuse his superior market position to the detriment of its competitors and eventually even the consumers. It is to be understood that the competition law is not per se against the monopolistic right or dominant position rather it is concerned with abuse of dominant position. The abuse of dominant position is not just going to raise

concerns pertaining to competition law but it is going to adversely affect the motivation and purpose of the standardisation as well. Last but not the least, the researcher is of the opinion that competition law is quintessential to regulate the implementation of the process of standardisation and licensing of SEPs however it must be resorted in such a way that the competition and innovation exist harmoniously. As it is said, excess of everything can have detrimental effects therefore the relationship between SEPs and Competition Law must be harmoniously construed as such wherein both can cater to each other's fundamental ideology without adverse impacting on each other's development and evolution.

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<<https://journals.sagepub.com/doi/10.1177/0003603X17718679>> accessed 12 May 2020

<sup>40</sup> Telecommunication Standardization Bureau, *Understanding patents, competition & standardization in an interconnected world* (2014)