

Standard Essential Patents:

The concept of Standard Essential Patents (SEPs) is new to India. It became part of Patent lawyers and court's vocabulary about three years back when Ericsson sought to enforce its SEP's against a local Indian handset manufacturer, Micromax that essentially imports phones from China.

The Indian Patent does not contain any special provisions with respect to SEP's. In general the Patent Act does not lay down any specific criteria or terms & conditions to be complied when licensing a technology. Thus determination of the terms like pricing value etc. is purely based on the market demand of technology and thus is very subjective in nature differing from case to case. The situation does becomes different in case of SEP where a patented technology becomes a market standard. Thus Patentee is required to license the technology on terms that Friendly, Reasonable and Non discriminatory popularly known as FRAND terms. Often Licensee would allege that Patentee is exploiting its dominant position to demand royalty that is not based on FRAND terms. Thus in most SEP cases the court's role is to ensure that the holder of a Standard Essential Patent (SEP) does not abuse the dominant market position it has gained from widespread adoption of a voluntary technical standard.

The basic idea behind the patent system is to reconcile the interaction between patents which are primarily 'private' and 'exclusive' as against standards which are meant to be 'public' and 'non-exclusive'. There is seen the crossing point between the competition law and Patent law. The competition law aim to prevent the stockpiling of market power while patent law grants monopoly rights. The Competition Commission of India, (which is a govt. Constituted body with judicial powers) was formed with the objective to create and sustain fair competition in the economy that will provide a 'level playing field' to the producers and make the markets work for the welfare of the consumers. The Competition Act 2002 is based on the principle that competition is desirable for the progress of technology with the parallel aim of dealing with issues like "abuse of dominant position" and "anti-competitive agreement". The recent SEP litigation cases are the result of overlapping ambit between patent law and the competition law.

Determination of FRAND terms

Though the companies give commitments to license their patent which has been included in a Standard, there is considerable ambiguity over what constitutes 'Fair, Reasonable and Non Discriminatory' license terms. There is an inherent tussle regarding the royalty rates between the company who spent its resources in R&D to develop the Standard and the company that seeks to license it. The situation becomes more subjective since Indian Patent act does not have any reference for the standard essential patent(s). Thus, in the present scenario, the SEP license holder tends to approach court for filing infringement suit against licensee who are found not obeying the terms of license while on the other hand the licensee in turn approach the Competition commission of India for filing complaints for the "abuse of dominant position" and "anti-competitive agreement" against SEP holder.

Recent Litigations in India:

The SEP cases so far have been brought by involves Ericsson against Micromax, Gionee, Intex and recently against Xiaomi and in some cases Ericsson was able to obtain injunction order against some of these parties.

The First SEP case Micromax - Ericsson dispute

The brief facts of the case are:

1. The suit arose when Ericsson required Micromax to pay royalties to use its technologies. Micromax refused to accept the FRAND terms offered by Ericsson.
2. Ericsson claimed Rs. 1 billion (approx US \$ 17 million) against Micromax in a civil suit filed against Delhi High Court alleging the infringement of its eight SEP's. The single judge passed an ad interim ex-parte order in favour of Ericsson.
3. Micromax appealed against ex-parte order, which was however dismissed by the Division bench of Delhi High Court.
4. Meanwhile, parties entered into an interim arrangement under which Micromax started paying royalties to Ericsson at the demanded rate while the infringement suit was still pending
5. Micromax thereafter filed a complaint before competition commission alleging that Ericsson has abused its dominant position by imposing exorbitant royalty rates which is contrary to FRAND terms.

6. Ericsson challenged the Competition Commission jurisdiction stating that the dispute is of commercial/civil nature and commission should not play the role of a price setter.
7. The competition commission held that it could decide the issue of abuse of dominant position without interfering with Ericsson's IP rights and mentioned that royalty calculation based on the entire value of a product using SEP is a prima facie case of anti-competitive behaviour.
8. Competition commission ordered investigation into the anti-competitive licensing terms of Ericsson's SEP for mobile communication
9. Ericsson challenged the order by filing a writ petition before Delhi High Court seeking stay of commission's order to probe anti-competitive licensing terms
10. The court further restrained commission from passing any final order until the jurisdiction issue is resolved. The writ petition is still pending before court.

This is one of the instances of interfaces between intellectual property and competition laws. This case brings to the forefront the issue of grant of injunction in case of infringement of SEPs.

A similar complaint was also filed by **Intex Technologies Limited** (another local mobile manufacturer importing phones from China) with the Competition Commission against Ericsson alleging abuse of the dominant position. The commission ordered the investigation while Ericsson has again filed a writ petition challenging commission's order.

Latest, in the series of law suit filed by Ericsson is against **Xiaomi**. It alleged that Xiaomi failed to agree to license terms and continue to expand its business in India. Xiaomi had recently set up an Indian subsidiary to sell its handsets and entered into an exclusive agreement with Flipkart (an e-commerce portal) to sell and market its devices/handsets in India that use Ericsson's Patents. The court was satisfied that Ericsson had made out a prima facie case for grant of ad interim injunction in its favour and the balance of convenience also lies in its favour as in the absence of an injunction order, it will suffer irreparable loss and injury. The interim order was modified in Appeal as Xiaomi brought to the court attention that it used Qualcomm based chipsets in some of its models which were licensed by Ericsson.

The interim order passed by the court in Xiaomi has set the debate on the need to grant interim injunction in cases concerning essential patents where the main issue involved is the royalty terms. Those against the court order argue how can an injunction be granted without even hearing the defendant in a patent dispute involving standard or essential Patents? In such cases

the dispute is on royalties therefore can the injury be said to be "irreparable" which is one of the pre-requisites for the grant of an injunction. On the other hand Patent holders argue that they are willing to grant license on FRAND terms therefore the handset manufacturers need to be open and willing to negotiate. It cannot be that handset manufacturers exploit their Patents to sell their products, earn revenue but not pay the royalties. Thus, the patentee has the right to seek a restraint order if the handset manufacturer without license is using the Patents. The counter argument being made is that the patented technology is a "standard" here, and cannot be treated as a purely monopoly right and therefore the regular injunction rules that apply to other Patents cannot apply here. Thus, in case of Standard Essential Patents the courts should not grant injunctions and rather order expedited trial to determine appropriate royalty rates. In theory this seems like a sound argument but in practice the Indian courts have huge backlog of cases and trial takes 5-7 years. Thus, interim arrangements are as important as the final outcome. Further, in practice interim injunction orders help both parties to mediate the dispute and reach settlement.

The jurisprudence related to SEPs and related injunction is still in evolutionary stage, it would be worth noting the decision in the pending cases that will ultimately shape India's FRAND jurisprudence and also would help in determining important issues namely whether competition commission has jurisdiction to decide the royalty rates in SEP licensing agreement, injunctive relief and whether there would be any guideline which could maintain a balance between the exclusive rights of patentee along with the public interest.

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