
Government intervention on Standard Essential Patents comes under criticism

“Standard Essential Patents on FRAND terms” has been subject of many court disputes around the world. In India, as well, there are many on-going cases on the subject in the mobile phone industry. The Department of Industrial Policy & Promotion (DIPP) With the aim of developing a suitable policy framework to define the obligations of Essential Patent holders and their licensees has published a paper on the subject. The paper is available at Indian Patent Office Website ([Original document](#)). The 28 pages Discussion paper elaborates on a number of topics including the basics of Standard Essential Patents, Competition laws, Standard Setting Organisation, Ongoing recent SEP cases and ends with a list of “Issues for Resolution” seeking the opinion of concerned stakeholders on those issues.

The paper states that *it aims to sensitize the stakeholders, concerned organization and citizens towards need and importance of regulating SEPs as well as facilitating their availability at Fair, Reasonable and Non-Discriminatory (FRAND) terms. By igniting the deliberations on this subject, the department hopes to take a step forward towards achieving the national development and technological goals by protecting private Intellectual Property Rights while securing interest of public at large. In this regard, views and suggestions are invited from public at large, specifically on Section XI of the paper entitled “Issues for Resolution” apart from any other issues of concern relating to Standard Essential Patents (SEPs).*

The “Issues for Resolution” extracted from the paper are outlined below:

- a) ***Whether the existing provisions in the various IPR related legislations, especially the Patents Act, 1970 and Anti-Trust legislations, are adequate to address the issues related to SEPs and their availability on FRAND terms? If not, then can these issues be addressed through appropriate amendments to such IPR related legislations? If so, what changes should be affected.***
- b) *What should be the IPR policy of Indian Standard Setting Organizations in developing Standards for Telecommunication sector and other sectors in India where Standard Essential Patents are used?*
- c) ***Whether there is a need for prescribing guidelines on working and operation of Standard Setting Organizations by Government of India? If so, what all areas of working of SSOs should they cover?***

- d) *Whether there is a need for prescribing guidelines on setting or fixing the royalties in respect of Standard Essential Patents and defining FRAND terms by Government of India? If not, which would be appropriate authority to issue the guidelines and what could be the possible FRAND terms?*
- e) ***On what basis should the royalty rates in SEPs be decided? Should it be based on Smallest Saleable Patent Practicing Component (SSPPC), or on the net price of the Downstream Product, or some other criterion?***
- f) *Whether total payment of royalty in case of various SEPs used in one product should be capped? If so, then should this limit be fixed by Government of India or some other statutory body or left to be decided among the parties?*
- g) ***Whether the practice of Non-Disclosure Agreements (NDA) leads to misuse of dominant position and is against the FRAND terms?***
- h) *What should be the appropriate mode and remedy for settlement of disputes in matters related to SEPs, especially while deciding FRAND terms? Whether Injunctions are a suitable remedy in cases pertaining to SEPs and their availability on FRAND terms?*
- i) ***What steps can be taken to make the practice of Cross-Licensing transparent so that royalty rates are fair & reasonable?***
- j) *What steps can be taken to make the practice of Patent Pooling transparent so that royalty rates are fair & reasonable?*
- k) ***How should it be determined whether a patent declared as SEP is actually an Essential Patent, particularly when bouquets of patents are used in one device?***
- l) *Whether there is a need of setting up of an independent expert body to determine FRAND terms for SEPs and devising methodology for such purpose?*
- m) ***If certain Standards can be met without infringing any particular SEP, for instance by use of some alternative technology or because the patent is no longer in force, what should be the process to declassify such a SEP?***

The last date for submitting comments is **31st March, 2016**.

Interestingly, Industry body, Assocham (<http://www.assochem.org/>) has objected to the consultation paper and stated that any government's intervention in the issues related with standard essential patents (SEPs) will be "counter-productive" to market-driven inter-company licensing regime.

In a letter to Prime Minister Narendra Modi, the chamber has mentioned that any guideline related with SEPs on fair, reasonable and non-discriminatory (FRAND) terms should not appear in the forthcoming National IPR Policy. Assocham has further mentioned "While government has a role in ensuring that technology is accessible, there is a limited or no role that government can play in deciding the licensing terms". Our previous note on some of the issues before the courts can be found here: [Standard Essential Patents](#)

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