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# STANDARD ESSENTIAL PATENTS VIS-À-VIS COMPETITION POLICY: CONFLICTING OR COMPLEMENTARY

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***Abstract*--The Intellectual property rights regime in India underwent significant change in conformity with the obligations under TRIPS in 1995. In the aftermath, the Intellectual property rights (IPR) regime in India passed through various phases, facing new challenges and finding new remedies. The focus of the IPR regime has been gradually consolidating as well as promoting a balance between intellectual property protection and public interest. One of the emerging issues in this context is in reference to standard essential patents (SEPs). Standard forms are fundamental building blocks for product development and establishment of consistent protocols that can be universally adopted and understood. It further enables compatibility and interoperability and fuels development and implementation of technologies that significantly impact and transform the lives of people, working, and communications. Standardized technologies are becoming essential in almost all sectors, specifically in the telecom sector. Standardization has various concerns with respect to competition and IP law. In certain situations there may be interface between competition law and IPRs in standards such as FRAND licensing, patent pools and cross licensing. There is a need to consider IP laws and competition laws in order to avoid the adverse implications in these arenas. This paper intends to discuss the issues in relation to SEPs vis-à-vis competition laws in the context of Indian telecom sector. Further the paper highlights the Indian judicial approach towards SEPs and their availability on FRAND terms followed by the role of private standard setting organisations and competition authority in standard setting process.**

***Key words: SEPs (Standard Essential Patents), FRAND (Fair Reasonable and Non Discriminatory) Terms, Anti Competitive, Abuse of Dominant Position.***

## I. INTRODUCTION

Intellectual property is an outcome of human intellect. The main motivation for its protection is to encourage the creative activities and inventions. The role of intellectual property is sine qua non in the economic and technological development of a nation. The prosperity achieved by developed nations is the result of exploitation of their intellectual property. In absence of efficient law to protect intellectual property, there will hardly be any creative activity or inventions and the economic and technological development of a nation will come to a halt. It is, therefore, inevitable to protect and promote intellectual property.[1]

Intellectual property rights (IPRs) grants certain privileges to the right owners that gives them exclusionary powers in the market. IPRs by granting legal exclusivity confer to their holders the ability to exercise their market powers to detrimentally affect other competitors. Such exercise of market power sometimes leads to allocative inefficiencies and consumer exploitation[2]. The licensing of intellectual property serves to benefit the competitive process by diffusing innovation and by helping innovators to capture their rewards, thereby increasing the incentives to others to innovate as well. However, such licensing agreements can also serve to cartelize an industry or to increase the market power of a single licensor. This has given rise to the need to strike a balance between the individual rights of IP holders and the public at large. Such issues make intellectual property licensing a challenging topic for competition authorities.[3]

The relationship between these two areas of law poses unique challenges to policy makers, particularly in developing countries like India, as we have little or no experience in the application of competition law and policies especially in cases of interaction with intellectual property rights. [4]The growth of new technologies in

[1] V. K. Ahuja, Law *Relating to Intellectual Property Rights,* 2009 edn. Lexis Nexis Butterworths
[2] Dr. Sumanjeet Singh, Convergence: Infrastructure, Services and Policy,6-8th December, 2010, Xi'an, CHINA
[3] Globally it has been recognized that this balancing act can be done by way of a sound competition policy to regulate the malpractices and IPR abuses.
[4] Raju KD "Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India" .Available at : https://www.esciencecentral.org/journals/interface-between-competition-law-and-intellectual-property-rights-a-comparative-study-of-the-us-eu-and-india-ipr.1000115.pdf (Last visited on March 11, 2017).

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recent years has posed new challenges and opportunities across these two fields of law. One of the emerging issues in this context is in reference to standard essential patents (SEPs). Standard forms are fundamental building blocks for product development and establishment of consistent protocols that can be universally adopted and understood. Standard setting enables compatibility and interoperability and fuels development and implementation of technologies that significantly impact and transform the lives of people, working, and communications. Standardized technologies are becoming essential in almost all sectors, specifically in the telecom sector. Standardization has various concerns with respect to competition and IP law. In certain situations there may be interface between competition law and IPRs in standards such as FRAND licensing, patent pools and cross licensing. There is a need to consider IP laws and competition laws in order to avoid the adverse implications in these arenas. This paper intends to discuss the issues in relation to SEPs vis-à-vis the interface between IPR and competition laws in the context of Indian telecom sector. Further the paper highlights the Indian judicial approach towards SEPs and their availability on FRAND terms followed by the role of private standard setting organisations and competition authority in standard setting process.

## II. Intellectual Property Rights And Competition Policy: The Innovation Nexus

Intellectual property rights allow creators, or owners of works to benefit from their own work or investment in a creation.[5] These privileges are highlighted in Article 27 of the Universal Declaration of Human Rights[6]. By the virtue of these rights a holder of any Intellectual Property acquires a monopolistic right over his intellectual properties. These rights are awarded by the state under the national intellectual property rights regime which allows the users to exercise these rights to restrain others from using them without their consent.[7] Any violation of these rights leads to infringement. On the other hand, competition laws, ensure that new proprietary technologies, products, and services are bought, sold, traded, and licensed in a competitive environment[8]. In the modern day, dynamic marketplace, new technological improvements constantly replace older technologies, and competitors are driven by the market forces to improve their existing products and innovate in order to maintain their market share. [9] In such situations competition law seeks to prevent the misuse of dominant position or market power which is acquired as a result of the protection granted under IPR. [10]

There has been a long battle between the IP Laws and Competition Law as their objectives seem to be contradicting with each other. Although it may seem like the intellectual property rights regime and competition policy is at odds with each other at several occasions, gradually it has been globally recognized that the two co-exist with each other. [11] When looked closely both the IPR regime and competition policy highlight the

[5] Abbe E. L. Brow, "A Legal Solution to a Real Problem: the Interface between Intellectual Property, Competition and Human Rights" Available *at*: https://www.era.lib.ed.ac.uk/bitstream/handle/1842/3243/AEL%20Brown%20PhD%20thesis%2009.pdf?sequence=1&isAllowed=y (last visited on March 12, 2017).

[6] Universal Declaration of Human Rights, Article 27 reads:-

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

[7] Dan L Burktand Mark A. Lemle "Is Patent Law Technology-Specific?" 4(1) *Berkeley Technology Law Journal* 16(2002).

[8]Government of India Department of Industrial Policy and Promotion Ministry of Commerce & Industry "Discussion Paper on Standard Essential Patents and Their Availability on FRAND terms" March 2016.Available at: http://dipp.nic.in/English/Discuss_paper/standardEssentialPaper_01March2016.pdf (last visited on March 9, 2017).

[9] *Ibid*.

[10] Intellectual Property Attorney (RNA) Report on "Standard Essential Patents". *Available at* : http://rnaip.com/wp-content/uploads/2015/07/standard-essential-patents.pdf (last visited on February 27, 2017).

[11] In 1948 US Supreme Court defined the boundaries of immunity granted by intellectual property rights regime by stating that 'the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly. United States v. Line Material Co., 333 U.S. 287, 308, 76 U.S.P.Q. (BNA) 399, 408 (1948) (patent pool struck down on price fixing grounds apparently without examination of pro-competitive effects of pool on innovation and consumer welfare).

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common objective of promoting innovation, creativity and a better market for consumers.[12]Jurisdictions around the globe are coming to terms with the idea that a strong competition law can provide a solution to the problems raised by the interface between the two regimes by preventing anti-competitive agreements and improving economic efficiency and consumer welfare.[13] One of the emerging issues in this context is in reference to standard essential patents (SEPs). Intellectual property rights allow creators, or owners of works to benefit from their own work or creation.[14] By the virtue of these rights a holder of any Intellectual Property acquires a monopolistic right over his intellectual properties. These rights are awarded by the state under the national intellectual property rights regime which allows the users to exercise these rights to restrain others from using them without their consent.[15] Any violation of these rights leads to infringement. On the other hand, antitrust laws or competition laws in turn, ensure that new proprietary technologies, products, and services are bought, sold, traded, and licensed in a competitive environment[16]. In the modern day, dynamic marketplace, new technological improvements constantly replace older technologies, and competitors are driven by the market forces to improve their existing products and innovate in order to maintain their market share. [17] In such situations competition law seeks to prevent the misuse of dominant position or market power which is acquired as a result of the protection granted under IPR. [18]

The parallel policy of competition and IPR intersect at a point which invokes public interest. This intersection point is reached when a patented technology becomes essential to achieve a standard. Thus the basic idea behind the Standard Essential Patents (SEPs) 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'.[19]

## III. Standard Essential Patents: Issues And Challenges

Standard forms are fundamental building blocks for product development and establishment of consistent protocols that can be universally adopted and understood. [20] A standard can be defined as 'a set of technical specifications that seeks to provide a common design for a product or process'. [21] Standards can be adopted at a worldwide scale, or only at a regional scale. It is usually the interest of industrial players on the market to create products that comply with standards. [22] Standards are becoming increasingly important as products that do not use standardized technologies are generally seen to be commercial failures, as consumers want their devices to interact with that of others and standardization allows that point of interaction.[23] Standards can be either voluntary of made mandatory by law. World trade organization distinguished between voluntary standards and

[12]Intellectual Property and Competition Law: The Innovation Nexus. *Available at:* http://www.circ.in/pdf/Intellectual_Property_and_Competition_Law-The_Innovation_Nexus.pdf (Last visited on 26, 2017).

[13] A study of competition policy reveals the requirement of various kinds of state interventions that affect acquisition and the use of IPRs . When a patent holder adopts any kind of anti-competitive practices, governments can adopt measures like the compulsory licensing of such technologies under the provisions of the WTO Trade Related Aspects of Intellectual Property Law (TRIPs) Agreement. *See Supra* note 2at 6

[14] *Supra* note 5.

[15] *Ibid.*

[16] *Supra* note 8 at 4.

[17] *Ibid.*

[18]*Supra* note 10.

[19] *Supra* note 8 at 5.

[20]*Id.* at 6.

[21] A standard is a document that sets out requirements for a specific item, material, component, system or service, or describes in detail a particular method or procedure. Available at :http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf (last visited on March 11, 2017).

[22] According to the ISO/IEC Guide 2: 2004 Standardization and related activities - General vocabulary, the term Standard is defined as a "document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context." *Available at*: standard and patents document scp/13/2 http://www.wipo.int/edocs/mdocs/scp/en/scp_13/SCP_13_2.PDF ( Last visited on March 11, 2017).

[23] Dufey Guillaume, "Patents and Standardisation: Competition Concerns in New Technology Markets" *Available at :* http://www.icc.qmul.ac.uk/GAR/GAR2013/GAR%202013_1_Guillaume%20Duffey.pdf

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standards enforced by law.[24] A standard which may constitute of a document approved by a recognized body, which provides , rules, guidelines or characteristics for products or related processes , production procedures and methods, to which compliance is not made mandatory and there are certain technical regulations for standard setting, the compliance to which is made mandatory by law.[25] Standards can be adopted at a worldwide scale, or only at a regional or national scale.

There are two broad categories of technical standards namely, de facto standards and de jure standards. A 'de facto' standard comes into existence when a particular technology is widely implemented by market players and accepted by the public that makes such a technology a dominant technology in the market so much so that even if it has not been adopted by a formal standard setting body it is recognized as a standard in that particular relevant market. On the other hand 'de jure standards' are set by formal standard setting organizations (SSOs)[26]. These are usually referred to as legal standards. Moreover, sometimes private organizations, may also cooperatively agree on a standard. The technologies which are required to establish the standards are core technologies without any alternatives hence every product which is based on a standard requires a mandatory access over these technologies. When such standard establishing technologies are granted patent rights they are called standard essential patent (SEP).[27]

Standardization has various concerns with respect to competition and IP law. In certain situations there may be interface between competition law and IPRs in standards, such as, licensing, patent pools and cross licensing specifically in the telecom sector. This section intends to discuss the issues in relation to SEPs vis-à-vis competition laws in the context of Indian telecom sector along with a comparative analysis with other countries. The Indian Patent law does not contain any special provisions with respect to SEP's. The patent laws in India and around the globe do not have any specific criteria or terms & conditions are complied with for licensing a patented technology. This creates the possibility of abuse by the patent holder's especially in the cases of essential technologies such as SEPs. The determination of price and value etc. is purely based on the market demand of technology making it subjective in nature, differing in each case. The possibilities of abuse are aggravated in the cases of technologies that have been mandated by standard setting agencies.

Standard setting organizations specifically in sectors dealing with technological advancement provide for essential features that must be met by the product to be marketed to be in conformity with a particular industry standard. In order to produce standard compliant products, use of certain patented technologies becomes mandatory. In such situations acquiring a license for using the essential patent becomes a major competition policy concern.

To bridge the contradictions in patent laws and competition policy many SSOs require their members to grant binding licenses to companies that wish to use the standard essential patent in question. The complexity of standards in information and communication technology (ICT) creates a tension between the need to reward the owners of SEPs that may cover standard specifications and the need to make standards available to all for public use. Recently, this tension has turned into a difficult debate on principles of licensing that must be Fair, Reasonable and Non-Discriminatory (FRAND or FRAND licensing).To promote application of the standard and to avoid any competition concerns, such licenses must be made available under fair, reasonable and non-

[24] The WTO Agreement on Technical Barriers to Trade (TBT) has however defined such documents to distinguish between those enforced by law and those for voluntary adoption. See AGREEMENT ON TECHNICAL BARRIERS to trade, Annexure I, Available at: https://www.wto.org/english/docs_e/legal_e/17tbt.pdf ( last visited on march 10,2017).

[25] Technical regulation may be a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

[26] A Standards Setting Organization is an organization whose primary activities are developing, promulgating, revising, amending, re-issuing, interpreting, coordinating or otherwise producing technical standards that are intended to address the needs of some relatively wide base of affected adopters. The role of SSOs is to coordinate and facilitate a standard setting process with the involvement of various stakeholders. *See Supra* note 20 at 10.

[27] Such rai and Gyanadra Kumar, "India's Overview On Standard Essential Patent (SEPs)". *Available at*: http://www.mondaq.com/india/x/349008/Patent/Indias+Overview+On+Standard+Essential+Patent+SEPs ( Last visited on February 23, 2017).

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Discriminatory (FRAND) terms.[28] Thus, this patent right is not absolute like rest of the patent rights. Here the owner of SEP is under an obligation to license its patented technology which sets a standard for the industry and such license must be granted on fair reason able and non-discriminatory pricing terms. Realising the importance of standard setting and its impact on competition and IPR regime, World Intellectual Property Organization(WIPO) in its report suggested that " in view of globalization and increased economic interactions among states, the importance of developing international standards is increasing in many industries". In the report, it also supported the fact that patents and standards serve certain common objectives insofar as they both encourage or support innovation as well as the diffusion of technology.[29] As the licensing terms specifically in cases of SEPs have a significant impact on proper functioning of the patent system, the report suggested the need for a regulatory mechanisms of SSOs to suggests enhanced transparency and accessibility to patented technologies that cover the standards.[30]

Although the patent system and the standards system share certain common objectives, there are inherent tensions that exist between patents regime and standard setting. The clash is prominent in the case of implementation of a standard that calls for the use of technology covered by one or more patents.[31] On the one hand, the objective of standardization is to establish standardized technology that can be used as widely as possible in the market. On the other hand, patent owners of a technology who have invested resources in developing the patented technology have an interest in using the patented technology which may bring them larger profits by way of royalty. If the patent holders are not allowed to use it for their benefit they become reluctant to contribute their technology to the standardization process.[32] Moreover, exclusive patent right, which granted as a statutory right is enforced in a manner that may hamper the widest use of standardized technology, and it creates an ambivalence between the two systems. The intangible nature of IP assets allow them to be used simultaneously by many. Moreover, their value is subject to the size of the market, and their usage increases their value, contrary to tangible assets. Therefore, the inclusion of patented technology in standards setting provides the patent holder to exploit these characteristics of IP assets. On the other hand, it equally allows the exploitation of patent rights in cases of the wide implementation of technical standards.[33]

The inherent tensions between the two systems have been increasingly brought to light in debates in the recent past due to the increasing number of cases that have been coming up before the courts. The reasons are, firstly, there is a growing importance of patents and standards in both business strategies and government's national and international policies. Secondly, the business enterprises are increasingly emphasizing on new technologies to foster new business models and various business strategies that can make the most of the patent system and the standardization system. This has given rise to the need to find a way of handling numerous proprietary technologies in standards and meet the objective of wide dissemination.[34] The next section intends to highlight the national and international judicial approach in ameliorating the inherent contradictions in the cases of SEPs.

[28] Bernd Allekotte and Urich Blumenröder Grünecker kinkeldey stockmair & Schwanhäusser "Europe: When Patents Become Standards & litigation for Essential Patents" *Available at* :http://www.iammagazine.com/issues/article.ashx?g=42b52360-6080-4d09-b92a-122caa87da21. (lasr visited on February 28, 2017).

[29] WIPO Report of Standing Committee on the Law of Patents on Standard Setting and Patents (2009).*Available at:* http://www.wipo.int/edocs/mdocs/scp/en/scp_13/scp_13_2.pdf (last visited on march 11, 2017).

[30] *Id*. at 17.

[31] *Id.*at 15.

[32] Once a patented invention is incorporated in the standard, the patent owner may in fact have a competitive advantage over other market players, since others may have no choice but to use the patented technology in order to comply with the standards. If a technology covered in the standard is under patent protection and there is no alternative technology available, the patent becomes essential for the implementation of the standard concerned. In such a situation, depending on the costs that would be involved in obtaining an agreement with the patentee for the use of the patented technology, other parties may be discouraged from using the standard. This certainly goes against the objectives of standardization.

[33] *Supra* note 8.

[34] *Supra* note 30 at 12.

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## IV. PATENT WARS AND THE JUDICIAL APPROACH

The telecommunications industry has recently seen significant increase in costly patent litigations which has been termed as "smartphone patent wars".[35] SEPs have not yet received a formal legislative definition in any jurisdiction. However, the over the few years the courts worldwide have played significant role in developing the jurisprudence to deal with the various cases in the relation to SEPs. Majorly the disputes arising in this context are based on granting injunction order in cases pertaining to violation of SEPs. This section seeks to highlight the important cases worldwide and judicial response in India.

In United States, the U.S. Department of Justice, Antitrust Division (DOJ), and the U.S. Patent & Trademark Office (USPTO), an agency of the U.S. Department of Commerce issued a policy statement on remedies for Standards-Essential Patents subject to voluntary FRAND commitments on January 8, 2013.[36] However, the cases in the U.S show that in determination of an appropriate remedy for cases involving Standards Essential Patents the object should be in favour of promoting both appropriate compensation to patent holders and strong incentives for innovators to participate in standards-setting activities. The principles of licensing based on FRAND terms were used in several cases to strike a balance. For instance, the Federal Circuit court, USA had imposed a mandatory injunction rule that compelled district courts to issue an injunction once the asserted patent was adjudged valid and infringed. However, *eBay Inc. v. Merc Exchange, L.L.C*[37] court rejected the mandatory injunction rule and clarified that there is no special law that provides for granting injunctions in patent infringement cases.

*In cases of Microsoft* v. *Motorola Inc*[38] and *In re Innovatio IP Ventures LLC Patent Litigation*[39] *along with the decisions in the* three court of appeal cases *Microsoft v Motorola* (Ninth Circuit, July 30 2015), *Ericsson* v. *D-Link Systems* [40](2014) and *Commonwealth Scientific and Industrial Research Organization* v. *Cisco Systems*[41] (2015) summarized the FRAND goals for wide spread adoption of relevant standards.[42]

In the European Union as well, the precedent set by the two antitrust decisions in the Motorola and Samsung cases provided a path to peace in the telecommunications industry. These two cases brought legal certainty in all the respective in industries which standards and FRAND-encumbered standard-essential patents (SEPs) play a role. In the Samsung[43] and Motorola[44] cases, the Commission clarified that in the context standardization the SEPs holders have to committed to (i) license their SEPs and (ii) do so on fair, reasonable, nondiscriminatory (FRAND) terms. Moreover, it deemed to be anti-competitive to seek to exclude competitors from the market by seeking injunctions on the basis of holding SEPs, especially when the licensee is willing to take a license on FRAND terms. As this can have a negative impact on consumer choice and prices. These principles constituted

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[35] European Commission Report on "Standard Essential Patents" Competition Policy Brief(2014). http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf (last visited on March 11, 2017).

[36] United States Department of Justice and United States Patent & Trademark office Policy Statement on Remedies for Standards-Essential Patents subject to voluntary FRAND commitments. *Available at:* http://www.uspto.gov/about/offices/ogc/final_doj-pto_policy_statement_on_frand_seps_1-8-13.pdf (Last visited on March 10, 2017).

[37] *Ebay Inc. v. Merc Exchange, lLLC* 547 U.S. 388 (2006)

[38] Case 696 F.3d 872 (9th Cir. 2012) was a United States Court of Appeals for the Ninth Circuit case about Reasonable and Non-Discriminatory (RAND) Licensing and foreign anti-suit injunction.

[39] 956 F.Supp.2d 925 (2013)

[40] Federal Circuit Nos. 2013-1625, -1631, -1632, -1633, December 4, 2014.

[41] Federal Circuit, December 3, 2015, 2015-1066.

[42] The following principles were collectively laid down :

Firstly there shall be widespread adoption of the relevant standard; Secondly, an appropriate return to the patent holder shall be ascertained to encourage participation in and contribution to standard-setting process ;Thirdly, avoidance of the excessive royalties that arise by adding together the royalty on all SEPs which a standard may include Fourthly, recognition of the value to the standard of the patent at issue and appropriate apportionment of the value of the patented technology to the device accused of infringement; and Lastly, avoidance of the attribution of value to a patent that arises from the inclusion of the patent in the standard. *See* Report on SEPs and FRAND terms. *Available at*: http://www.iam-media.com/Magazine/Issue/78/Management-report/FRAND-and-SEPs-in-the-United-States. (Last visited on March 11, 2017).

[43] Case AT.39939-Samsung - Enforcement of UMTS standard essential patents, Commission Decision of 29 April 2014 (see IP 14/490). See also MEMO/14/322

[44] Case AT.39985-Motorola - Enforcement of GPRS standard essential patents, Commission Decision of 29 April 2014 (see IP 14/489).

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a guide for Member State courts, as well as to standard-setting organizations, on the interpretation of EU competition rules regarding the enforcement of FRAND-terms in the context of SEPs.[45]

In India the jurisprudence on FRAND licensing practices for SEPs is a nascent stage.[46] After stakeholders approached the Competition Commission of India (CCI) and High Court, jurisprudence on SEPs is gradually developing in India. Some Standard Setting Organizations[47] emerged in India, which formulate the standards in various sectors, have evolved their IPR policies, whereby they require patent holders to disclose SEPs, along with a requirement to commit to FRAND terms of licensing.

In October of 2009, the CCI proceeded with investigations involving SEPs, in November 2013, and another in January 2014, both cases were against Ericsson. The allegations were that Ericsson violated its FRAND commitments by imposing excessive and discriminatory royalty rates and using Non-Disclosure Agreements (NDAs) [48] which amounted to abuse of dominant position[49].

In both the matters, the CCI stated that the relevant product market was '"the provision of SEP(s) for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices, in India". In this relevant market CCI held that Ericsson to be dominant.[50] The investigations alleged that Ericsson acted contrary to the FRAND terms by imposing royalties linked to cost of product of user for its patents.[51]According to the CCI, "charging of two different license fees per unit phone for use of the same technology prima facie is discriminatory and also reflects excessive pricing vis-à-vis high cost phones. Furthermore, the CCI contended that , transparency is the hallmark of fairness, and alleged that, Ericsson's use of NDAs was contrary to the spirit of applying FRAND terms fairly and uniformly to similarly placed players.

The second contention was that, although Ericsson publicly claims to offers broadly uniform rate to all similarly placed potential licensees, its refusal to share commercial terms and royalty payments on the grounds of NDAs strongly suggested that different royalty rates were being imposed even on same category of potential licensees. The CCI further expressed its concern regarding the fact that the practices to patent hold-up and royalty stacking and violated FRAND terms. CCI's initial orders the above cases firmly regarded using the downstream product's sales price as a royalty base as being excessive and having no link to the value of the SEP. Ericsson filed a patent infringement case against the licensees along with an appeal challenging the orders of CCI. Hon'ble High Court of Delhi granted interim stay on all such orders passed by CCI in different cases.

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[45] *Supra* note 36.

[46] Jones Day "Standard Essential Patents and Injunctive Relief" April, 2013. *Available at*: http://www.jonesday.com/files/publication/77a53dff-786c-442d 8028906e1297060b/presentation/publicationattachment/270fc132-6369-4063-951b 294ca647c5ed/standardsessential%20patents.pdf (last visited on February 23, 2017).

[47] Telecom Standards Development Society of India (TSDSI)) has come up with IPR policy for application of FRAND terms , similarly, Telecommunication Engineering Center (TEC) department of telecommunications in ministry of communications and information technology is running a telecommunication engineering center (TEC) which plays an important role in the development of standards for telecom equipment, services, and interoperability among them

[48] according to the cci, "forcing a party to execute an NDA" and "imposing excessive and unfair royalty rates" constitutes "prima facie" abuse of dominance and violation of section 4 of the Indian Competition Act, as does "imposing a jurisdiction clause debarring complainants from getting disputes adjudicated in the country where both parties were in business."

[49] Section 4, Competition Act, 2002.

[50] Here the court discussed the issue of whether the refusal to grant a patent license can amount to anticompetitive behavior. The court discussed that since the only manner in which a patent can be exercised is through the right to prevent third parties from making use of the patent in any manner, it is difficult to reconcile the use of the only available right of the patent holder as amounting to an antitrust violation. However on the other hand, a refusal by a patentee to grant a license may result in adverse effect on competition. In the light of comprehending this interface between exercise of IP rights and antitrust laws, important precedents in competition cases pertaining to SEPs from the United States and Germany were discussed, with special reference to Article 102 of the Treaty of the Functioning of the European Union (anti-abuse provision). The similarity in purport of the Article with S.4 of the Competition Act demonstrates that as per international precedent on SEPs, there is sufficient ground to seek relief before the CCI for abuse of dominance.

[51]For instance, GSM chip in a phone costing Rs 100, royalty which would be Rs. 1.25 but when the GSM chip is used in a phone of Rs. 1000, royalty would be Rs. 12.5. Thus SEPs licensing priced on the price to ultimate customer is a unfair and unreasonable.

*See* Suchi rai and Gyanendra Kumar, "India: India's Overview On Standard Essential Patent (SEPs)". *Available at*:http://www.mondaq.com/india/x/349008/Patent/Indias+Overview+On+Standard+Essential+Patent+SEPs. (Last visited on March 12, 2017).

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## V. CONCLUSION

The growing interest by competition authorities in licensing agreements between essential patent holders and standard implementers can be seen as starting point of ushering FRAND term for ensuring that high technology markets are not monopolized by patent holders. There is a need to apply laws cautiously as anti-competitive practices can significantly affect dissemination of technology to the detriment of consumers and the competitive process. The instances discussed above have shown that the FRAND licensing regime underlying the IPR licensing policies of most SSOs can performed well by allowing potential licensors and licensees to negotiate mutually acceptable agreements that take account of the objectives and needs of each party. Thus competition policy can be effectively used to strike a balance between IPR policy and larger public interest.

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