

Demystifying the Indian FRAND regime: The Interplay  
of Competition Law and Intellectual Property

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## Introduction

Today's liberalized economy survives on the merits of innovation. Naturally, inventors are entitled to protect their creations and enjoy the rewards of their labor. These privileges and rights are recognized through the grant of patents.

Patents are monopoly rights bestowed upon human inventors by governments for a limited period of time.<sup>1</sup> Upon the expiration of this period, this creation can be freely manufactured and sold. The owners are free to license or sell off their patents to third parties. Likewise, non-owners can enter into legally enforced negotiations with the patent-holders to earn access to the patented product.

As the world welcomes newer inventions, it becomes imperative for technical standards to be set in order to ensure consistency in the quality of products. A standard can be defined as a document which provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose.<sup>2</sup> A practice popularized during the industrialization of the West, standardization ensures compatibility and interoperability in the international marketplace.<sup>3</sup> It would be impossible for mobile phone operators, computer manufacturers and even television receivers to function without such interoperability.

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<sup>1</sup> G. Sidak, Meaning of Royalties, J. of Competition Law & Econ., 931, 1055, (2013).

<sup>2</sup> International Organization for Standardization (ISO): What is a standard?, <http://www.iso.org/iso/home/standards.htm> (last visited May 29, 2015).

<sup>3</sup> Understanding patents, competition and standardization in an interconnected world, ITU Telecommunication Standardization Bureau, (2014), <http://www.itu.int/en/ITU-T/ipr/Pages/Understanding-patents,-competition-and-standardization-in-an-interconnected-world.aspx>.

Standard Essential Patents are “patents essential to implement a specific industry standard. This means that it is impossible to manufacture standard-compliant products such as smartphones or tablets without using technologies that are covered by one or more standard essential patents (SEPs).”<sup>4</sup> In the case of *Microsoft v. Motorola*, the Court defined a given patent to be essential to a standard if use of the standard requires infringement of the patent, even if acceptable alternatives of that patent could have been written into the standard.<sup>5</sup>

Standard Setting Organizations (“SSO”) are entrusted with the responsibility of monitoring the interactions between competing companies in arriving at the appropriate technical standards, ensuring transparency and inclusive decision making at every stage. The Institute of Electrical and Electronic Engineers (“IEEE”) and International Telecommunication Union (“ITU”) are prominent SSOs in the cellular and Wi-Fi space.

During the development of standards, SSOs are typically presented with a range of competing technology solutions that can potentially achieve the same result. However, once an SSO chooses a particular technology, the SEP-holder’s “*bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee’s mercy.*”<sup>6</sup> The prima facie anti-competitive connotation of SEP’s cannot be ignored. In order to prevent discriminatory behavior by patent-holders, SEP-holders are permitted to license their patents only on fair, reasonable and non-discriminatory terms (“FRAND”), with the added incentive of immunity from punitive action. It needs to be noted that the SSO is only responsible to ensure that

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<sup>4</sup> Antitrust decisions on standard essential patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently asked questions, European Commission, Memo 14-322 (April 29, 2014), [http://europa.eu/rapid/press-release\\_MEMO14-322\\_en.htm/](http://europa.eu/rapid/press-release_MEMO14-322_en.htm/).

<sup>5</sup> *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872 (9th Cir. 2012).

<sup>6</sup> *Apple, Inc. v. Motorola Inc.*, 869F, Supp.2d, 901, 913 (N.D Ill.2012).

the licensing agreement is negotiated on FRAND terms and not for the ascertainment of the validity of the SEP itself.

The introduction of FRAND licensing has created a whirlwind in patent regimes all over the globe. The ambivalence created by FRAND-encumbered SEP licenses has assumed a geo-economic color as Standard Setting Organizations, patent-holders and the users of the inventions have all become equal stakeholders.

### **Understanding FRAND Terms**

FRAND licensing was introduced to ensure that SEP-holders are bound to Standard Setting Organizations by their commitments of fairness and reasonableness and prevention of obstructing technological development. However, there is considerable dispute regarding the objective standards qualified by the FRAND commitments.

The first prong deals with ‘reasonableness’. Some experts are of the view that the royalty claimed should be equal to the incremental value of the standardized technology, when compared to its alternatives. There are other proponents who argue that the royalty should target that component which is majorly responsible for the functionality of the patent. This is often referred to as the ‘smallest saleable patent practicing unit’.<sup>7</sup>

FRAND royalty rates were determined for the first time in the case of Microsoft Corp v. Motorola Inc., that involved the 802.11 Wi-fi standard and H.264 video coding standard developed by the IEEE and ITU respectively. Delivering a landmark judgement, Justice Robart considered a

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<sup>7</sup> The Evolving IP Marketplace 212, <http://www.ftc.gov/news-events/events-calendar/2010/05/evolving-ipmarketplace/> (last visited Mar. 2011).

hypothetical negotiation setup, consistent with the Georgia Pacific factors.<sup>8</sup> According to this approach, the negotiations between the licensor and the licensee prior to the adoption of the standard are taken into account. The Court added that the FRAND royalty rates should be commensurate with the value of the technology added to the overall standard.<sup>9</sup>

Once the patented standard receives commercial acceptance, it becomes locked in since the licensee is obligated to implement the standard. Most SEP-holders exploit this patent to their advantage. Patent hold-ups can be averted by prompt intervention of the SSO's. However, Courts are best equipped to determine the most reasonable royalty rates, evaluating the benefits of the product and the equity considerations involved.

Lately, SEP-holders have begun to engage in unfair practices such as royalty stacking in order to extract unreasonable royalties. Royalty stacking refers to the addition of royalty for each of the components of an SEP. While this is a logical and natural phenomenon in most wireless technology, royalty stacking becomes worrisome when the royalties for each component are compounded to achieve a higher aggregate than the price of the product itself. As a result, the licensee cannot bear the licensing fee while maintaining a reasonable profit margin. However, some manufacturers have been blamed for keeping profit margins too low. Recent litigations also demonstrate the lack of genuineness in royalty stacking claims, with most defendants failing to convince the judges of its actual harm.<sup>10</sup>

The second aspect deals with 'non-discriminatory' practices. The ambit of this prohibition is subject to much debate. While some scholars are of the view that patent-holders should be

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<sup>8</sup> Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116 (S.D.N.Y. 1970).

<sup>9</sup> Supra see 5.

<sup>10</sup> Ericsson Inc., v. D-Link Sys. Inc., No. 2013-1625, 2014 WL 6804864 (Fed. Cir. Dec. 4, 2014); In re Innovatio IP Ventures, LLC Patent Litig., No. 11 C 9308, 2013 WL 5593609 (N.D.Ill. Oct.3, 2013).

permitted to choose the licensees of their intellectual property at any level of the supply chain, others do not seem to support the notion of permitting SEP-holders to engage in such selective licensing practices.

### **The Economics of FRAND Licensing**

Scholars have compared the system of FRAND licensing to that of a joint venture that is headed by Standard Setting Organizations, equating the FRAND commitments to ancillary restraints that are necessary for the collective success of the joint venture. Evolved through the course of common law,<sup>11</sup> the doctrine of ancillary restraint permits few firms to collectively restrain competition, as a trade-off for the greater good of productive efficiency.

There is no doubt that mainstream economics sees patents as a tool for granting monopoly to patentees.<sup>12</sup> The underlying assumption of this notion, inspired by the Schumpeter doctrine,<sup>13</sup> is that monopoly profits are the only means of incentivizing invention since the rents generated from competitive pricing are not sufficient enough to cover the expenses incurred on research and development.<sup>14</sup> However, this assumption is laden with discrepancies that require deliberation.

Since the standards are not substitutable, there is no question of competition between the patent-holders. In fact, the standard setting organizations promote competition among market players, only not at the cost of the technology offered to the consumers. This circles back to the most important internal tool of patent law itself, which is the right to exclude. The patent itself

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<sup>11</sup> Mitchel v. Reynolds, (1711) 24 Eng. Rep. 347(Q.B.).

<sup>12</sup> E. Kitch, Patents: Monopolies or Property Rights?, 8 Res. in Law and Econ. (1986).

<sup>13</sup> J. Schumpeter, Capitalism, Socialism and Democracy 31, 32, (1950, Harper Perennial).

<sup>14</sup> K. E. Maskus, Intellectual Property Rights in the Global Economy 29 et seq. (2000, Institute for International Economics).

does not guarantee the right to exclude. It is the market acceptability and non-substitutability of the product that confers such market power upon the patent-holder.<sup>15</sup> In essence, the right to exclude is the property of the patent. If this right is taken away, then no value remains in having the patent.<sup>16</sup> The basic structure of the FRAND system is therefore economically sound and does not threaten the licensee's interests. However, this system is not immune to abuse and it is this abuse that qualifies as anti-competitive behavior.

### **Theory of Injunctive Relief**

Traditionally, the plaintiff in patent suits is entitled to injunctive relief. By way of issuing an injunction, the infringer is prevented from producing the invention and compensatory damages are awarded to the patent owner for the past infringement.<sup>17</sup>

Some experts are of the view that FRAND-encumbered SEP-holders should be prevented from obtaining injunctive relief. The rationale is the potential for abuse by SEP-holders who have the discretion to extract exorbitant royalties and impede the implementation of the standard. The precedent of denying injunctive relief is primarily based on the balance of convenience rule and the inadequate remedy rule.<sup>18</sup> Courts did not believe in granting injunctive relief when the cost to the defendant of obeying the injunction was substantially greater than the objective benefit to the plaintiff.<sup>19</sup> On the other hand, those who support the grant of injunctive relief stress the fact-specific nature of FRAND commitments.

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<sup>15</sup> D. Josef, The relationship between the legal exclusivity and economic market power in Intellectual Property, Market Power and the Public Interest, 13, 14 (P.I.E Peter Lang ed., 2008).

<sup>16</sup> Thomas W. Merrill, Property and the right to exclude, 77 Neb. Law Rev., 730 (1998).

<sup>17</sup> Y. Pai, The Rational Basis for FRAND-ly Courts denying injunctive relief for SEP's infringement, 19 Journal of Intell. Prop. Rts. (2014).

<sup>18</sup> T. Barton, Injunction Negotiations: An Economic, Moral, and Legal Analysis, 27 Stan. Law Rev., 1563, 1577 (1975).

<sup>19</sup> Id.

The United States' Supreme Court has enunciated a four-pronged test in order to issue injunctions. According to the test, "*plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.*"<sup>20</sup> In the recent dispute between Ericsson and TCT Mobile in France, the Courts emphasized the principle of proportionality of the interests involved while granting injunctions and took the contractual context into consideration while pronouncing their decision.<sup>21</sup>

While most national laws allow injunctive relief in FRAND cases, the degree of discretion conferred on the injunction issuing authorities varies from country to country. In some jurisdictions, such as Germany, once infringement is proved, there is no discretion conferred upon the Courts with respect to the granting of injunctions. In contrast, China has incorporated the aspect of FRAND-based defense which is available absolutely if the patentee has participated in the standard-setting process and subsequently filed a suit for infringement. Indian courts have not adopted a consistent approach in this regard and continue to evaluate the public policy implications of denying benefit to the consumers on a case to case basis. Since Standard Setting Organizations are not responsible for determination of the essentiality of the patent<sup>22</sup>, the burden on the litigants is heightened.

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<sup>20</sup> eBay Inc. v. MercExchange, L. L. C., 547 U.S. 388 (2006).

<sup>21</sup> Ericsson v. TCT Mobile, Docket, № 12/14922 (2013).

<sup>22</sup> According to a study, only 16% of the SEP's are actually SEP's, available at <http://cis-india.org/a2k/blogs/conference-on-standards-settings-organizations-ss-and-frand-nlsiu> (last visited May 28, 2015).



## The Political Backdrop for the Indian IPR Laws

Intellectual property rights significantly contribute to the distribution of political power among different countries. India has been able to withstand pressure from the United States and the European Union thus far. The Indian Patents Act, 1970, based on the Ayyangar Committee Report<sup>23</sup>, is an exemplary legislation that demonstrates the importance of balancing the needs of the Indian social milieu and the international standards governing intellectual property regimes (with special emphasis on the pharmaceutical industry). After much persuasion and deliberation, India became a signatory to the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) agreement in 1995.<sup>24</sup> A highly controversial agreement, the TRIPS, required patent agreements in all sectors notwithstanding the fact that at least 50 countries did not have patents over food and other essentials.<sup>25</sup>

Western lobbies have particularly expressed their disapproval of Section 3(d) of the Indian Patents Act, which was the subject of the Novartis dispute.<sup>26</sup> The stated provision disallows patents for similar products to encourage market competition and prevent abuse of the patent system. India has also been accused of favoritism towards patents filed by Indian companies.<sup>27</sup>

During this time, the contentious issue of parallel imports was raked up. Parallel import is the import of patented products outside the distribution channels that are contractually negotiated between the licensee and the patent holder. The doctrine of international exhaustion, which is

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<sup>23</sup> Report on the Revision of the patent law, Rajagopal Ayyangar Committee, (1959).

<sup>24</sup> A. Nandkumar, Was the TRIP worthwhile, Forbes India Magazine, (2011).

<sup>25</sup> Baruah S., Modi shames India, calls patent laws under-developed, (2015), <http://spicyip.com/2015/04/modi-shames-india-calls-patent-laws-under-developed.html> (last visited May 29, 2015).

<sup>26</sup> Novartis AG & Ors. v. Union of India & Ors., C.A. Nos. 2706-2716 OF 2013.

<sup>27</sup> Supra see 26.

attracted in such a scenario, states that the patentee loses his or her rights of control after the first sale of the patented product.<sup>28</sup>

Under Section 107(A)(b) of the Indian Patents Act, subsequent to its amendment in 2005, such an importer did not need to ensure that any of the subsequent sellers that he or she buys from were expressly or implicitly authorized by the patentee.<sup>29</sup> The Amendment seeks to ensure availability of the patented product at the minimum international market price.<sup>30</sup> A harmonious construction of Section 107(A)(b) leads to the understanding that the law of the exporting country will be the applicable law,<sup>31</sup> which ensures that the legislation is in compliance with the TRIPS requirements<sup>32</sup> as well as Section 48 of the Patents Act itself.<sup>33</sup>

Prima facie, this move embodies the spirit of international exhaustion. However, the underlying public policy considerations which are fundamentally associated with India's founding principles cannot be undermined. This legislation essentially seeks to make life-saving drugs more affordable for the Indian population, contributing towards the increasing price differences between developed and developing economies.

Truly, governments have persistently endeavored to accommodate the needs of the indigenous manufacturers as well the Indian population within the IPR framework, the latest efforts being the Make-in-India and Digital India schemes. While the Union Government's flagship initiatives may be doing the rounds amidst global investor circles, they also highlight the

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<sup>28</sup> M. Kochupillai & S Basheer, Exhausting Patent Rights in India: Parallel Imports and TRIPS compliance, 13 Jour. of Intell. Prop. Rts., (2008).

<sup>29</sup> Id.

<sup>30</sup> Patents (Amendment) Act, 2005 (Act No. 15 of 2005) published in the Gazette of India on 5 April, 2005.

<sup>31</sup> Supra see 29.

<sup>32</sup> Article 28(1) of the TRIPS Agreement.

<sup>33</sup> Section 48 of the Indian Patents Act, 1970 grants exclusive rights to the patentee.

loopholes in the existing judicial protection for intellectual property in India. The Union Budget for the 2015-16 year has provided a 11.5% duty advantage to domestically manufactured mobile phones and 10.5% duty advantage to tablets. Indirect taxes have also been slacked to reduce manufacturing costs.

Based on data released by the Telecom Regulatory Authority, India is the world's second-largest mobile market by number of subscriptions.<sup>34</sup> Its active user base is more than 770 million and there is still ample room for expansion, as this figure accounts for only 62% of the country's population. Thriving on the government's promises and the scope for expansion, Indian manufacturers like Spice and Lava as well as foreign firms such as Mediatek have made heavy investments in mobile phone plants.<sup>35</sup> However, the IP run has not been smooth ever since.

### **The “FRAND-ly” Wars**

The mobile phone industry has been severely affected by the caprices of the FRAND regime. The first Asian case involving standard essential patents was the patent dispute between mobile giants Apple and Samsung in 2012. The Grand Panel of the IP High Court in Tokyo held that seeking damages exceeding the FRAND conditions would be deemed an abuse of right unless special circumstances justified such behavior. Therefore, the Court ruled that Samsung could not claim damages exceeding the tune of \$100,000.<sup>36</sup>

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<sup>34</sup> Mobile subscribers largest in Uttar Pradesh, Tamil Nadu, The Hindu (May 5, 2013), <http://www.thehindu.com/business/Industry/mobile-subscribers-largest-in-uttar-pradesh-tamil-nadu/article4686257.ece/>. (last visited May 29, 2015).

<sup>35</sup> D. Khan, Handset Manufacturers take PM Modi's Make in India initiative to heart, Economic Times, (2015), <http://tech.economictimes.indiatimes.com/news/mobile/handset-manufacturers-make-in-india-initiative/46037739/>. (last visited May 28, 2015).

<sup>36</sup> Apple Japan LLC v. Samsung Electronics Co.Ltd. (Decision Number: Fufuku2011-8105/06/07/08).

Soon enough, India was chosen as the arena of conflict for FRAND-based litigation. In 2013, Ericsson, a global giant in mobile manufacturing, filed a patent suit against Micromax in the Delhi High Court seeking an ex parte and permanent injunction alongside damages for Micromax's usage of wireless technology such as EDGE and 3G without paying royalties.<sup>37</sup> This case set many legal precedents. Ericsson claimed compensatory damages to the tune of approximately 16 million dollars, which is the highest claim for damages ever made in a patent suit in India. A single judge of the Delhi High Court granted an ex parte injunction and ordered confiscation of Micromax consignments at customs.<sup>38</sup> The Court, in an unprecedented ruling, also ordered Micromax to deposit money in the range of 1.25% -2% of sale price of affected as a condition precedent to the release of such products.<sup>39</sup>

Secondly, this was the first time that the jurisdiction of the Competition Commission was invoked in a patent infringement suit as a result of the counterclaim filed by Micromax in the Competition Commission of India ("CCI") alleging abuse of dominance by Ericsson. It claimed that the royalty charged by Ericsson was based on the value of the entire product rather than only the functional component. The CCI in turn ordered an investigation of the issue and found Ericsson to have prima facie violated its FRAND commitments to Micromax. It also expressed concern that the threat of injunctions in the patent battle (at the Delhi High Court) could distort FRAND licensing negotiations and lead to licensing terms that licensees would normally have rejected in the absence of this threat.<sup>40</sup>

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<sup>37</sup> Ericsson Inc. v. Micromax, CS(OS) 442/2013.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Micromax v. Ericsson, Case No. 50/2013, Competition Commission of India.

Inspired by the first bout of litigation, Ericsson filed a similar suit on the same grounds against Intex, a domestic manufacturer of computer peripherals, mobile phones seeking damages worth \$ 9 million and an ex parte and permanent injunction. Intex adopted the non-essentiality argument and claimed that an injunction could be awarded only after validity of the patent was established beyond doubt under Sections 8 and 64 of the Indian Patents Act.<sup>41</sup> However, the Court rejected Intex's arguments and granted an ex parte injunction. Ericsson is also involved in a pending suit against Chinese vendor Xiaomi, alleging violation of requests for patent royalties.

### **The Interplay of Competition Law and Patent Law**

The legal tussle between Ericsson and Micromax highlighted the growing interface between competition law and intellectual property rights law. Since SEP's are *sine quo non* to the implementation of technologies, it is only but natural that the risk of abuse of dominance exists. The European Union Treaty prohibits anti-competitive and abusive behavior under Article 82; as does the Competition Act of 2002.<sup>42</sup>

In both cases<sup>43</sup>, the CCI remarked that Ericsson was a dominant player having 33,000 patents to its credit, with 400 of them granted in India. The royalty rates charged by Ericsson had no linkage to the patented product and increased proportionately with the cost of the product, thereby qualifying as discriminatory (on grounds of patent hold-up as well as royalty stacking). In the Intex dispute<sup>44</sup>, each user was made to sign a non-disclosure agreement. By virtue of this arrangement, users were denied information pertaining to the royalty rates charged from other users. This hindered the FRAND spirit and reduced transparency. The Intex –Ericsson agreement

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<sup>41</sup> Ericsson .v Intex, WP(C) 464/2014.

<sup>42</sup> Section 4(1) of the Competition Act, 2002.

<sup>43</sup> Supra see 37.

<sup>44</sup> Supra see 41.

also barred Intex from approaching Indian courts (which is the applicable jurisdiction since both parties conduct business in India) and conferred jurisdiction to Sweden and Singapore. The CCI therefore held Ericsson liable for abuse of dominance under Section 19(1)(a) of the Competition Act, 2002.<sup>45</sup>

### **The Politics of Jurisdictions**

Ericsson challenged the jurisdiction of the CCI before a single judge bench of the Delhi High Court, which expressed its displeasure at the CCI's intervention and directed the Director General of the CCI to refrain from further inquiry.<sup>46</sup>

In both cases<sup>47</sup>, the CCI relied on the Clause 6 of the ETSI IPR policy<sup>48</sup> and determined the royalty rates on FRAND rates, rejecting Ericsson's claims that the same was a purely contractual issue.

With prominent firms embroiled in patent litigation, the debate over the jurisdiction of the Competition Commission has been rekindled. Section 3(5) of the Competition Act exempts IPR holders from the provisions of the Act, granting them monopoly over its exercise. However, Section 62 of said Act states that the provisions of the Act are only in addition to and not in derogation of any other law. The Preamble also makes it clear that the objective of the Commission is to protect consumers from anti-competitive behavior and abuse of dominant position. The Commission, therefore, played the welfare legislation card to justify its jurisdiction.

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<sup>45</sup> Intex v. Ericsson, Case No 76/2013, CCI.

<sup>46</sup> Ericsson v. Intex, Interim Application No. 6735 of 2014 in Civil Suit (Original Side) No. 1045 of 2014, <http://lobis.nic.in/dhc/MAN/judgement/16-03-2015/MAN13032015S10452014.pdf> (last accessed on 29 May, 2015).

<sup>47</sup> Supra see 46 and 41.

<sup>48</sup> Annexure-6 of the ETSI IPR Policy, November 2014, p.36.

As has been discussed in the previous section, the Standard Setting Organizations were formed to enhance and promote competition by developing standards. Everyone competes, but not at the cost of technology reaching out to people.<sup>49</sup>The licensing fees incurred imposed on non-patent owners will naturally be slightly higher owing to the lack of negotiable patents, as a trade-off to giving them the opportunity to partake in the innovation and to offer them to consumers. Thus, technical contributors and non-contributors can make, sell, import products compliant with the set standards and contribute to the patenting process. However, the CCI failed to appreciate this. In both the cases, the CCI arrived at its decision on the basis of circumstantial evidence ignoring the nuances of the FRAND regime.

Furthermore, the jurisdiction of the Courts cannot be undermined since SEP-holders thrive on the contractual negotiating powers of the parties. Ignoring the contractual nature of SEP agreements is a disincentive to the SEP-holders and is an indirect deterrent to innovation itself because the threat of injunction is the driving force behind the proof of essentiality of the patent. An unwilling licensee should not be able to hide behind competition or a public good to force the SEP holder into a royalty rate – that would make it a compulsory license.<sup>50</sup>Surely, only time will put to rest the debate sparked over the jurisdiction of the CCI.

### **Conclusion**

That foreign manufacturers have begun approaching the Indian dispute resolution forums is proof of the growing appeal and accessibility of the Indian intellectual property rights

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<sup>49</sup> Shanker A & Chauhan S, The patents and competition crossroads, World Intell. Prop. Rev., (2014), <http://www.worldipreview.com/article/the-patents-and-competition-crossroads> (last visited May 28, 2015).

<sup>50</sup> Soni P & Koundinya S, Taking the FRAND-ly approach: a first look at FRAND battles in India, (2015), <http://www.iam-media.com/Intelligence/IAM-Yearbook/2015/Country-by-country/Taking-the-FRAND-ly-approach-a-first-look-at-FRAND-battles-in-India> (last visited May 28, 2015).

framework. Nevertheless, there are pressing considerations that need to be evaluated before a precise determination of our laws is made.

Indian courts have a looming predisposition to introduce the public policy element in most patent suits. This may not fare well with a majority of the SEP-holders. Since India cannot allow Western capitalism to permeate through all its industries to the extent of eroding its own foundations, an equally benefiting compromise has to be worked out, if the Make in India scheme does wish to see the light of day in IPR policy.

While it is going to be extremely difficult for a standard to be fixed in the determination of royalty rates, the adjudication of alleged violation of FRAND terms should take into account the high-volume nature of the Indian market.

Moreover, the current trend of granting interim injunctions may not be beneficial to the consumer interest. India cannot afford to succumb to the dominance of the SEP-holders, since this weakens the reputation of the Indian judiciary. Such decisions also thwart innovation from the local manufacturers who cannot bear the costs of patent litigation. As has been discussed earlier, any concessions on India's part will naturally have deep-seated implications on the international power-play. The criticism directed at the Government's recent expression of willingness to abide by international standards of intellectual property laws is also founded on India's resistance against pressure from the global superpowers.<sup>51</sup>

Some experts have proposed the creation of patent pools of critical technologies and mandate compulsory licenses, as is the practice in the United States. Such compulsory licenses

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<sup>51</sup> *Supra* see 26.



ensure that consumers can avail of inexpensive products and the local manufacturers are protected from litigation. Considering that India's tryst with the compulsory licenses in the past did not fare quite well, it is but natural that the apprehensions prevail.

As we face more IPR battles, the flaws of the judicial system become apparent. It is amply clear that despite its flaws, Indian courts are consciously trying to make the Indian regime more suitable to the FRAND requirements by arriving at legally justified decisions.