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## I. INTRODUCTION

Enforcement of antitrust rules in India is comparatively recent, having only commenced in May 2009. Likewise, significant amendments to update India's patent regime only took place 10 years ago.[2] Nonetheless, India may soon become a key jurisdiction in determining the balance between intellectual property laws and competition laws that will continue to capture the attention of lawyers, economists and academics.

In recent years, tensions between those seeking to enforce their intellectual property rights ("IPR") and those seeking access to essential inputs have arisen in technology-driven industries such as the telecommunications and mobile devices industries. This is increasingly likely in India, which is expected to have the second largest user base of smartphones by 2016, second only to China and ahead of the United States.[3] India is also expected to grow into a major manufacturer of smartphones in the near future, with companies such as Samsung, HTC, Xiomi, and Lenovo (including Lenovo's Motorola unit) shifting manufacturing capacity to India.[4] Despite significant developments in relation to both IPRs and competition laws in India, it remains to be seen whether Indian courts and the Competition Commission of India ("CCI") will navigate the regulatory waters to facilitate the continued growth of these industries in India.

While IPRs, by their very nature, are exclusionary (in the sense that an IPR holder can legitimately exclude others from using or exploiting their proprietary product or technology), competition laws typically view exclusionary conduct with suspicion. The underlying tension between the two is particularly palpable in the case of standard essential patents ("SEPs")—patents that claim an invention that must be used to comply with a chosen industry standard. In this article, we analyze the latest developments and challenges in India in relation to SEPs, including the limits of an SEP holder's right to exploit their intellectual property on account of it constituting an abuse of a dominant position.

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[2] The Patents (Amendment) Act, 2005 made significant amendments to India's patent regime.

[2] *See* http://dazeinfo.com/2014/12/18/worldwide-smartphone-users-2014-2018-forecast-india-china-usa-report/, last accessed on October 7, 2015.

[4] *See* http://indianexpress.com/article/technology/mobile-tabs/lenovo-motorola-start-smartphone-manufacturing-in-india-with-moto-e/ and http://economictimes.indiatimes.com/tech/hardware/make-in-india-after-samsung-htc-to-manufacture-mobile-handsets-in-the-country/articleshow/47873827.cms, last accessed on October 7, 2015.

When it comes to SEPs[5] competition authorities, who otherwise may be hesitant to interfere with IPR-protected technology, feel more compelled to intervene. Ordinarily, the grant of exclusive rights is recognized as an essential factor for fostering innovation. Since innovation is a contributor to competitiveness, it is often argued that, but for IPR protection, enterprises would lose the incentive to innovate, a process which entails significant investments with no certainty of recoupment. In recognition of this, for example, the (Indian) Competition Act, 2002 ("Competition Act") grants a limited carve out for restrictions necessary to protect a legitimately accorded IPR, incorporated in agreements, without casting a "duty to deal."[6]

However, the rules change when it comes to SEPs, which cannot be exploited like any other patent. Once a standard is selected, competitors and downstream market participants typically invest heavily to ensure that their production processes and devices comply with the relevant standard. The adoption of a standard usually requires the use of particular (patented) technology that is compatible with the standard, resulting in industry stakeholders being "locked in." This means that certain patents are essential for compliance with the relevant standard, and vest SEP holders with market power.

In particular, an outright failure to license to a competitor could result in the SEP holder being liable for abuse of dominant position by denying market access (contravention of Sections 4(2)(c)), or using its dominant position in one market to protect another (contravention of Section or 4(2)(e) of the Competition Act). Alternatively, asserting an excessively high royalty rate for use of a SEP could result in the SEP holder being liable for abuse of dominant position by imposing an unfair or discriminatory price in contravention of Section 4(2)(a)(ii) of the Competition Act.

There may be several advantages to adopting an industry standard, such as enabling products and services offered by different vendors to interoperate. However, where adopting a standard involves the incorporation of a patent, it is important to ensure that the patent holder does not unjustly exploit its market power. One of the ways in which this may be prevented is by securing "FRAND" commitments, where owners of SEPs commit to make them available to third parties on "fair, reasonable and non-discriminatory" ("FRAND") terms. FRAND terms are typically made to standard-setting organizations such as the European Telecommunications Standards Institute.

Adoption of FRAND terms appears to be a mutually beneficial solution. Patent owners benefit from their SEPs being widely used and remaining stakeholders ensure they are able to license the relevant SEPs and are protected from paying exorbitant royalty rates. However, the efficacy of FRAND terms is determined by their enforceability. As a result, the often asked (yet unsatisfactorily answered) question is: What are the best methods and institutions to determine and enforce FRAND terms?

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[5] A patent is deemed essential if an independent evaluator concludes that the patent is essential to the practice of a technical standard.

[6] Section 3(5)(ii) of the Competition Act.

## II. CHALLENGES IN ENFORCING FRAND TERMS IN INDIA

The rapid development of technology-based industries and growth of the smartphone user base in India increases the likelihood of industry participants choosing India as a jurisdiction in which to challenge FRAND commitments. This is a role that Indian courts and regulators rarely take on. In the United States, FRAND breaches are litigated before courts that are typically well versed with the economic and legal underpinnings of both intellectual property and antitrust laws.[7] In contrast, in several jurisdictions, including India, competition authorities are specialist regulators tasked first and foremost with ensuring "freedom of trade carried on by other participants in markets."[8]

Under the Competition Act, while there is a limited carve out accorded to IPR holders to enforce restrictions to protect their intellectual property in respect of horizontal or vertical agreements, Section 4 of the Competition Act—intended to prevent abuses of dominance—does not contain a similar dispensation. This means that in the context of a FRAND dispute, the CCI may examine the royalty rates being demanded for SEPs as a possible abuse of dominance. On the other hand, a breakdown of licensing negotiations sometimes results in a SEP holder instituting infringement proceedings in a common law court against the prospective licensee for patent infringement under the (Indian) Patents Act, 1970 ("Patents Act"). In such a case, where the courts are arguably in a position to grant and enforce a license under FRAND terms, jurisdictional conflicts are likely to arise.

Case in point: India's first ever FRAND litigation is currently being played out before the Delhi High Court. Telefonaktiebolaget LM Ericsson (Publ) ("Ericsson"), as the registered owner of eight valid and existing patents in India referred to as AMR Patents, 3G Patents, and EDGE Patents, filed an infringement suit against Micromax Informatics Limited ("Micromax") for using Ericsson's patented technology in the handsets imported into India. This occurred after Micromax failed to accept the terms of the FRAND license agreement proposed by Ericsson. The Delhi High Court granted an interim injunction in favor of Ericsson and directed the customs authority to notify Ericsson whenever Micromax imported a consignment of handsets into India.[9] By way of an interim arrangement, the Delhi High Court directed Micromax to pay the royalty rates demanded by Ericsson and directed the parties to enter into mediation. When the mediation talks failed, in November 2013, Micromax approached the CCI[10] alleging that Ericsson had abused its dominant position by imposing exorbitant royalty rates for its SEPs.[11]

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[7] While the United States Department of Justice Antitrust Division and the Federal Trade Commission share responsibility for investigating and litigating cases under the Sherman Act, 1890, decisions *re* antitrust violations are taken by federal courts that entertain disputes under all laws, specialized and general.

[8] Recital to the Competition Act, 2002.

[9] Relevantly, as a holder of an SEP, Ericsson had given FRAND commitments to European Telecommunications Standards Institute ("ETSI"), which would have included not seeking an injunction against the use of its patent; the DHC completely failed to take note of this fact and granted an injunction in favor of Ericsson on the very first day of hearing.

[10] Ericsson by Micromax Case no. 50 of 2013.

[11] It was contended that Ericsson was not charging product-based royalty, i.e. it was charging royalty not for the patented product (technology) but the end product in which the patented product was being used (phone), which increased the royalty rates by an exorbitant margin.

The CCI took a *prima facie* view that when royalty rates are based on the cost of the final product rather than the patent itself,[12] such terms cannot be considered to be "FRAND" terms. Accordingly, the CCI found Ericsson to have *prima facie* violated its FRAND commitments by licensing its essential patents for 3G and 4G technologies on unfair terms in contravention of Section 4(2) of the Competition Act. The CCI directed its investigative arm, the Director General, to conduct a detailed investigation.

Ericsson challenged the decision of the CCI before the Delhi High Court as being one without jurisdiction, as the very same issues were being deliberated before the Delhi High Court. By way of an interim order, the Delhi High Court prohibited the CCI from passing any final orders until it determined whether the CCI has jurisdiction over this matter. A decision is pending and is expected in the next few months. Several similar complaints have now been filed against Ericsson[13] before the CCI making similar allegations against Ericsson's refusal to grant licenses on FRAND terms.

The jurisdictional tussle between the Delhi High Court and the CCI assumes significance in India primarily because disputes in respect of the Patents Act have traditionally been in the domain of civil courts (for the limited purpose of infringement suits). However, since the Patents Act does not distinguish between regular patents and SEPs—the question of its applicability to SEPs is moot. While a licensee may apply to the Controller of Patents under the Patents Act[14] to obtain a license to use the patented product on reasonable terms, in order to approach the Controller of Patents, the licensee is required to have an existing license or patent which it cannot use/effect without access to the patent in question. This effectively limits the scope of the Patents Act and does not apply to parties seeking a remedy based on the patent holder's FRAND commitment.

Equally, there exist reservations on the appropriateness of the CCI to effectively resolve FRAND disputes. Given that the CCI is a competition authority rather than a price regulator,[15] its role in settling FRAND disputes, particularly those involving allegations of price exploitation, may be short of effective. While the CCI may reach a conclusion that the prevailing royalty rates are "excessive" so as to constitute an abuse of dominance, the CCI may be hesitant to actually determine the FRAND rate—more often the primary issue in FRAND disputes. However, the CCI could garner guidance from other leading jurisdictions. Several principles of determining a FRAND rate have been set out in jurisdictions outside India—for instance, guidance on determining a FRAND rate range is set out in *Microsoft v. Motorola*[16] and guidance on setting a

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[12] An allegation against Ericsson by Micromax.

[13] Case no. 4/2015 and Case no. 76/2013 by Intex Technologies (India) Limited and Best IT World (India) Private Limited (iBall) respectively.

[14] While the Patents Act makes no distinction between SEPs and regular patents, Section 91 of the Patent Act allows a person who has a right to use a patented invention, but is prevented from doing so due to non-access of another patent, to approach the Controller of Patents to request that it grant a license to use the second patent, on reasonable terms.

[15] CCI has shown reluctance to play the role of a price regulator in the past in *Manjit Singh Sachdeva v. DGCA*, Case no. 68/2012; and *Citizens Grievance Foundation v. Mumbai Airport Authority Limited and another*, Case no. 51/2013

[16] W.D.Wash, Case no. C10-1823-JLR.

specific FRAND rate is set out in *Huawei v. InterDigital*.[17]

No matter whether the courts or the CCI are ultimately the arbiter, Indian industry would benefit greater from the setting of economically sound principles to determine a FRAND range or FRAND rate, rather than the actual determination of a FRAND rate.

## III. CONCLUSION

Given the role played by competition agencies in relation to the alleged abuse of dominance through the refusal to license SEPs or excessive prices demanded in respect of SEPs, it appears unlikely that the CCI would freely relinquish its jurisdiction. As such, it will be interesting to see how the Delhi High Court decides the question of the CCI's jurisdiction with respect to FRAND disputes.

What is not in question is that the existing jurisdictional and substantive legal uncertainty will hinder India's ability to emerge as a key jurisdiction where FRAND disputes arise in the foreseeable future. Independent of whether the Indian courts or the CCI are the arbiter of disputes relating to FRAND rates, it becomes all the more imperative for Indian courts or the CCI to set out principles for determining FRAND rates or ranges based on economically sound principles.

[17] As was done by the Guangdong High Court of China in *Huawei v. InterDigital.* These include the "ex-ante competitive rate" where FRAND royalty rates are based on the competitive rate for such technology prior to its inclusion in a standard or royalties charged by licensors for the previous generation of the technology or royalties charged by the same licensor for patents that are essential to other comparable standards.