FRAND WARS IN INDIA: BALANCING THE INTERESTS OF THE PATENT-HOLDER AND THE LICENSEE

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ABSTRACT

The competing policy questions of individual rights and the public interest seem reinvigorated with the patent wars before the Delhi High Court and the Competition Commission of India. The Indian jurisprudence concerning FRAND litigation is at its nascent stage, which is evident from the contrary opinions rendered by the Judiciary and the Competition Commission. The unique nature of SEP contracts has not been completely appreciated by the Indian courts, considering the exceptions under which injunctive relief that can be granted and the basis of determining the royalty rates. These contentious issues can only be resolved through an equitable policy approach of balancing the rights of the patent holder and the potential licensee. The distortion of the equilibrium will either lead to anti-competitive acts such as hold ups, which in effect impacts innovation and public interest. The primary jurisprudential correction in FRAND (Fair, Reasonable and Non-discriminatory) litigation is to prevent the abuse of process through injunctive reliefs and resorting to appropriate tests in determining the royalty rates. This research paper analyzes the manner in which Indian courts have dealt with these issues and the reform necessitated to render legal stability and consistency in the burgeoning Indian market, especially the telecommunications sector. The courts around the world have evolved equitable grounds as tests for determining the grant of injunctive relief and the methodology of determining the royalty rates. The Indian legal system must also accordingly attune its jurisprudence to the global wavelength and accord the necessary public interest in disputes concerning FRAND licensing, its rightful consideration.

STANDARDIZATION: FOR THE SAKE OF THE CONSUMER'S INTEREST

Standardization is termed as a voluntary process, wherein compromise through a *de-jure* Standard Setting Organization (*hereinafter* "SSO") leads

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to the adoption of a Standard Patent, for which there exists no non-infringing alternative.[2] The process of standardization creates several economic benefits in the form of compatibility and interoperability, increased competition and reduced R&D costs, but it also creates a monopoly for the standard patent holder.[3] In order to resolve the anti-competitive effects of such an arrangement, the patent-holder has an obligation to offer a license on FRAND terms. The lack of clarity on the meaning of the terms such as fair, reasonable and non-discriminatory has led to patent litigation, which in itself creates anti-trust issues[4] and a more pervasive equity question of abuse of process. The issues that have arisen concern are the determination of the royalty rates on FRAND terms and the grant of injunctive relief in such cases. The anti-trust question arises when post standardization, the SEP (Standard Essential Patent) holder can abuse his dominant position considering the prohibitive costs of shifting from the standard and the lack of a non-infringing alternative. This can result in hold ups and royalty stacking, which renders the competition and consumer interest ineffective.[5]

SSOs are the solution to the issue of preventing patent hold ups, which create contractual FRAND obligations of licensing on the patent-holder. The lack of a fixed methodology in determining the rates of royalty, are contentious as the FRAND terms are subject to interpretation, as concepts of "fairness and reasonability" are highly objective and subjective. Determining a middle ground needs an appropriate test. In comparison to the manner in which courts have dealt with the issues originating from FRAND terms, the Indian courts have adopted a completely contrary position, whilst not even terming it as an anti-trust issue.

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2 Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson, Case No. 50 of 2013 (Competition Commission of India 2013).

3 Damien Geradin and Miguel Rato, Can Standard-Setting lead to exploitative abuse? A dissonant view on Patent Hold-up, Royalty stacking and the meaning of FRAND, 3 Eur. Competition J. 101 (2007).

4 *Id*. at 102.

5 *Id*. at 109.

THE INDIAN SCENARIO OF FRAND LITIGATION: INTERIM INJUNCTION AND FRAND ROYALTY RATES

The Competition Commission of India (*hereinafter* "CCI") in its initial orders whilst dealing with the case of Micromax,[6] termed the approach of Ericsson as violative of the FRAND obligations, on the basis of the methodology adopted for fixing the royalty rates on the end value of the product and the non-disclosure and jurisdictional clauses offered in these agreements. A similar line of reasoning was adopted by the CCI in determining a *prima facie* case of abuse of dominant position in the Intex case[7] and ordered an investigation of both the cases.[8] The increase in royalty rates on the basis of the value of the phone, as the CCI termed is "without contribution to the value of the product,"[9] whilst other features also require payment of royalty, which add to the cost of the phone. Thus charging two different license fees is discriminatory and creates a situation of royalty over royalty, i.e., royalty stacking. The Competition Act imposes reasonable restrictions on the exercise of rights by the intellectual property holder,[10] which cannot be abused under Section 4 by resorting to unfair royalty rates, foreign jurisdiction and mandatory non-disclosure agreements. When Ericsson before the Delhi High Court brought the patent infringement case, the court after an examination of the royalty rates that Ericsson had entered into India with other licensees directed the payment of royalty on the basis of the net selling prices of the devices.[11] The grant of the injunction was also contended on the basis of injunction[12] rendering injustice to the

6 Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ) Case No. 50 of 2013 (Competition Commission of India 2013).

7 Intex Techs. (India) Ltd. v. Telefonaktiebolaget LM Ericsson, Case No. 76 of 2013, (Competition Commission of India 2014).

8 Competition Act, 2002, Sec. 26.

9 *Supra* note 5.

10 Competition Act, 2000 Sec. 3(5).

11 In re Innovatio IP Ventures, L.L.C. Patent Litigation, MDL No. 2303, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013). Microsoft Corp. v. Motorola, Inc., No. C10–1823JLR, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013).

12 Telefonaktiebolaget LM Ericsson v. Intex Techs. p.74, at 64; Realtek Semiconductor Corp. v. LSI Corp., 946 F. Supp. 2d 998 (N.D. Cal. 2013).

parties. The Delhi High Court's reasoning in the Intex case[13] relied on the US district court decision[14] and the Chinese Competition Authority and therefore applied the same royalty rates awarded in the Micromax case.[15] The success of these two cases led to the case against Xiaomi,[16] whereby the Delhi High Court granted injunction to Ericsson and on appeal the division bench allowed for import by Xiaomi whilst depositing an amount with the Court. The Delhi High Court decision does not take into consideration the anti-trust issues involved in FRAND encumbered patents and nor does it substantially address FRAND arguments, the basis of royalty rate determination advanced by the CCI or provide exceptions with regard to the grant of interim injunction. Moreover, the interim orders of the Delhi High Court restraining the CCI from deciding these cases, do not bode well for the anti-trust issues that need resolution, in order to prevent the SEP holder using injunctive relief as negotiation ammunition.

THE CONTRADICTORY INDIAN APPROACH

The jurisprudential development of the meaning of FRAND obligations in India is at its nascent stage, which is evident from the initial approach adopted by the CCI and the Delhi High Court. The contrary approaches adopted by the CCI and the Delhi High Court, represent the continuing legal debate over the methodology of determining royalties and violation of FRAND obligations. The Delhi High Court's judgment has been hailed as an approach in consonance with "industry standards, economic policy and judicial trends around the world."[17] But contrary to this approval of

13 Telefonaktiebolaget LM Ericsson v. Intex Techs. (India) Ltd., Int. Appl. 6735 No. 1045 of 2014,(Delhi High Court 2015).

14 CSRIO v. CISCO Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc., No. 6:11-CV-343, 2014 WL 3805817 (E.D. Tex. July 23, 2014) (Davis, C.J.).

15 Telefonaktiebolaget LM Ericsson (Publ) v. Mercury Electronics and Anr., CS(OS) 442/2013, (Delhi High Court 2013).

16 Telefonaktiebolaget LM Ericsson v. Xiaomi Technologies, CS(OS) 3775/2014, (Delhi High Court 2014).

17 J. Gregory Sidak, Frand in India: The Delhi High court's Emerging Jurisprudence on Royalties for Standard-Essential Patents, *available at* http://www.criterioneconomics.com/docs/frand-in-india-royalties-for-standard-essential-patents.pdf (Last visited 27 June 2016).

the decision of the Delhi High Court,[18] the AIPPI Special Committee on Patents and Standards terms the orders "not very detailed in their reasoning whilst…not considering FRAND arguments."[19] The criticism advanced in the Micromax case[20] is with regard to the court not advancing reasons for determining *prima facie* patent infringement and preferring the balance of convenience in the plaintiff's favour.[21] Therefore, the grant of interim injunctions in FRAND licensing cases is a highly contested domain, with the adoption of varying approaches. In totality, all the FRAND licensing cases in India, do not deal in detail with the immense legal and anti-trust policy considerations that arise from FRAND-related SEPs. The issue of injunctions in such cases is also a prohibitive approach, considering that the purpose of SEPs, is to further competition, innovation and consumer interest.[22] The willingness of the parties cannot be judged from the parties approaching an appropriate forum to enforce their rights in a situation where the ambiguity lies with regards to the nature of terms offered to the licensee and the restrictions imposed on the jurisdiction of the Competition Commission of India (CCI). Therefore, the reasoning adopted by the Delhi High Court judging the willingness of the licensee merely on the basis of a comparative approach does not resolve the questions raised by the initial probe of the CCI. The ambiguity also persists regarding the circumstances in which licensee's acts would amount to "willingness to license."

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18 Telefonaktiebolaget LM Ericsson v. Micromax Informatics Ltd. and Mercury Electronics Ltd., Docket no. C.S. (OS) 442/2013 (Delhi High Court 6/03/2013); Vringo Infrastructure, Inc., v. ZTE Corp., et. al., Docket no. CS(OS) 2168/2013, (Delhi High Court 08/11/2013).

19 Michael Fröhlich, AIPPI Special Committee on Patents and Standards Report – Work Plan Item 5, Availability of Injunctive relief for FRAND-committed Standard Essential Patents, incl. FRAND-defence in patent infringement proceedings SC Q222 (March 2014).

20 Telefonaktiebolaget LM Ericsson v. Micromax Informatics Ltd. and Mercury Electronics Ltd., Docket no. C.S. (OS) 442/2013 (Delhi High Court 6/03/2013).

21 Michael Fröhlich, AIPPI Special Committee on Patents and Standards (Q222) Report – Work Plan Item 5-Availability of injunctive relief for FRAND-committed Standard Essential Patents: FRAND-Defence in patent infringement proceedings SC Q222, (March 2014).

22 Apple, Inc. v. Motorola Mobility, Inc., 2011 WL 7324582, at 1 (W.D.Wis. June 7, 2011); Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (And One Not To)*, 48 B.C. L.Rev. 149 (2007).

The interim injunction passed by the Delhi High Court in the Micromax case based its reasoning on the basis of the *prima facie* case of patent infringement and the balance of convenience entirely in its favor. The primary problem lies in the legal uncertainty that prevails in the Indian market with regard to FRAND standard setting and royalty rates, considering the developing jurisprudence of resolving conflicting policy questions of innovation and consumer interest. The CCI has acknowledged the threat of injunction as a measure, constitutive of impeding competition in the market, but the exception to such a rule is the absence of good faith on behalf of the licensee.[23] The inequitable bargaining position of the patent-holder through enforcing injunctive reliefs can render the licensee to accept onerous licensing terms.[24] The grant of injunctions in cases dealing with SEPs, results in a complete ban over the sale of the product. This situation is compounded with the varied time period of litigation in the courts, which adds to the deterrence of the licensee. This chilling effect that the patent holder exercises over the licensee, is comparable to the situation where the very unrestricted right to seek injunctive relief, curtails the bargaining power of the licensee. Therefore, limitations must be imposed in cases dealing with SEPs seeking injunction so as to balance rights of the licensor and the licensee, to promote competitiveness and the larger public interest.

In the Micromax case, the CCI, clearly stated that imposing royalties on the basis of the cost of the product and refusing to share commercial terms of the FRAND licensees, amounted to a *prima facie* case of discriminatory commercial terms.[25] The non-disclosure agreements before the CCI constituted differential royalty rates but the Delhi High Court did review all the royalty rates before arriving at its decision. But the question that remains to be understood is whether those private agreements were of any importance in determining FRAND terms considering the fact that the

23 European Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, Case No COMP/M.6381 – *Google/Motorola Mobility*, 106-109.

24 *Id.*, 124-128.

25 Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ) Case No. 50 of 2013 (Competition Commission of India 2013).

royalty rates must also be reasonable and also subject to the application of the FRAND terms on the component rather than the product itself, whereby the latter would result in royalty stacking and stagnate a burgeoning telecommunications market. The analysis of the CCI in the Micromax case[26] acknowledges the fact that charging royalty rates with "no linkage to patented product"[27] is contrary to the position adopted with regard patents licensed on FRAND terms.

INJUNCTIVE RELIEF IN INDIA

In India, the Specific Relief Act[28] and the Civil Procedure Code[29] governs the criterion under which interim injunctions are to be granted, but the courts have also evolved certain principles to effectuate a teleological interpretation of this equitable relief. The determination of the grant of injunction on the basis of irreparable loss and the subsequent balance of convenience in favor of the plaintiff, have not been considered in the FRAND licensing cases in India, considering the absence of an anti-trust analysis. The public interest question in determination of the balance of convenience is quite evident when the relative hardship of the defendant in FRAND licensing cases is much more, considering that the absence of the product from the market for a considerable time, can make or break the company. The relative hardship that the plaintiff suffers can be resolved through an approximation of the damages at the merits stage, which also serves the public interest question in the grant of interim injunction. The public interest exception in the grant of interim injunction in FRAND licensing cases has been applied as a criterion in *eBay* v. *MercExchange*,[30]

26 *Id*.
27 Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ) Case No. 50 of 2013 (Competition Commission of India 2013).
28 Specific Relief Act, 1963, Sec. 37.
29 Civil Procedure Code, 1908, Order XXXIX, Rule 1 and 2.
30 eBay v. MercExchange , L.L.C., 547 U.S. 388 (2006).

but a similar judicial approach has been adopted in India,[31] though not in most of the patent infringement cases.[32] The teleological interpretation in the *Roche* v. *Cipla* case,[33] was quite evident when the Delhi High court accorded public interest as a criterion for the determination of grant of interim injunction in patent infringement cases and refused interim injunction. The reasoning reaffirms the public interest exception especially in FRAND encumbered patents that SEP holder impliedly waives[34] the rights of granting exclusive licenses.

THE GLOBAL APPROACH TO FRAND LICENSING

In order to seek injunctive relief, the patent holder must demonstrate the lack of a good faith obligation to negotiate on part of the licensee. The European Commission has evolved this exception of the obligation to a good faith negotiation in FRAND based cases to balance the anti-trust issues that arise from allowing for unabated access to injunctive relief. In the Motorolla Mobility case,[35] the European Commission clarified the good faith obligation to negotiate on the basis of "passiveness and unresponsiveness" on part of the licensee and considered the "employing delaying tactics"[36] as tantamount to the unwillingness to negotiate on part of the licensee. In the Orange Book Standards case, the German Supreme Court[37] laid down two conditions under which the licensee could claim an anti-trust violation, firstly if the licensees before agreement pay royalties into an escrow account and secondly on the basis of a binding "unconditional and reasonable offer" from the patentee. Though this methodology tries to balance countervailing

31 *Id*.
32 Yogesh Pai, The Rational Basis for FRANDly Courts denying Injunctive Relief for SEP's Infringement, 19 JIPE 149 (March 2014).
33 Hoffmann-La Roche Ltd. v. CIPLA Ltd., 2008 (37) PTC 71.
34 Damien Geradin and Miguel Rato, Can Standard-Setting lead to exploitative abuse? A dissonant view on Patent Hold-up, Royalty stacking and the meaning of FRAND, 3 Eur. Competition J. 101, 109, (2007).
35 Apple v. Motorola Mobility Inc., 886 F. Supp. 2d 1061, 1086.
36 European Commission, DG Competition, Case No. COMP/39985, Memo of 6 May 2013 (MEMO/13/403): "Commission sends Statement of Objections to Motorola Mobility on potential misuse of mobile phone standard-essential patents- Questions and Answers."
37 KZR 39/06 of 6 May 2009.

interest, it leaves more questions unanswered due to the ambiguity over the very nature of the offer and obligations permissible under the contract. The question with regard to the requirement of the unconditional nature of the offer has been referred to the CJEU in the Huawei case,[38] seeking determination of the nature of the acts, which would amount to a willing licensee.

The willingness to pay FRAND royalty from the licensee would prevent enjoining the licensee from infringement proceedings[39] and injunctions cannot be granted in such cases, which would hamper the public interest.[40] Injunctions cannot be granted when they were used for leverage during negotiations.[41] SSOs do not define FRAND terms and moreover include disclaimers, which delegate the determination of such considerations to the parties themselves. The courts have also interpreted the obligation upon the SEP holder towards potential licensees to arguably include the guarantee not to resort to seeking an injunction.[42] The willingness licensee criterion in the Motorolla case arose from acceding to third parties settling the disputes concerning FRAND obligations. Similarly in the Samsung case[43] before the European Commission, Apple's willingness was primarily determined on the basis of the workaround proposed by Samsung which was licensing framework, which included a time period of 12 months and an obligation on part of the patent holder not to enforce SEP Patents against a licensee if in compliance with the conditions. It also provided for dispute resolution of FRAND terms by the courts or through arbitration. There can be two solutions that can be proposed to the issue of clarifying the nature and scope

38 Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH Court of Justice of the European Union.
39 Apple, Inc. v. Motorola, Inc. WL 2376664 (N.D.Ill.2012).
40 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 396-97, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006).
41 *Id*.
42 Microsoft Corporation v. Motorola, Inc 696 f.3d 872 Court of Appeals for the Ninth Circuit No. 12-35352 (2012).
43 European Commission, DG Competition, Case No. COMP/39985, Commission sends Statement of Objections to Motorola Mobility on potential misuse of mobile phone standard-essential patents- Questions and Answers Memo of 6 May 2013 (MEMO/13/403).

of FRAND obligations, firstly the courts could develop limitations on the use of injunctive relief in FRAND based patent infringement cases and secondly the SSOs can clarify their patent policies for obligating the SEP holder to restrict the use of injunctions and lay down the methodology for determining the royalty rates.[44] These solutions have already been applied as in the case of eBay v. MercExchange,[45] whereby the court laid down a four-fold test to determine the grant of interim injunctions, which included public interest as a criterion, therefore encompassing the anti-trust issues, which remain neglected considering the characterization of the issue as merely a case of patent infringement.

The Institute of Electrical and Electronics Engineers, an SSO, has amended its FRAND patent policy to render ineffective the ambiguity that has persisted over resolving FRAND terms,[46] with obligations on the SEP holder to abhor from threatening to seek injunctions against willing licensees. Though these amendments have been criticized considering the determination of the royalty rates and the use of interim injunctions,[47] the very reason for the amendments was the abuse of process by the SEP holder.[48] The amendments in their entirety reduce legal ambiguity, a particular hindrance to standardization, and in effect competition, innovation and consumer interest. The pending case of *Huawei* v. *ZTE*[49] before the Court of Justice of the European Union, would clarify the pertinent issues of interim injunction and royalty rates, but the opinion

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44 Kai-Uwe Ku□hn, Fiona Scott Morton, & Howard Shelanski, Standard Setting Organizations can help solve the Standard Essential Patents Licensing Problem, CPI Antitrust Chronicle (March 2013).

45 eBay v. MercExchange , L.L.C., 547 U.S. 388 (2006).

46 Dennis Crouch, IEEE Amends its Patent (FRAND) Policy (2015) *available at* http://patentlyo.com/patent/2015/02/amends-patent-policy.html (Last **visited 24 June** 2016).

47 J. Gregory Sidak, Proposed IEEE Bylaw amendments affecting FRAND Licensing of SEP's (2015) *available at* https://www.criterioneconomics.com/docs/proposed_ieee_bylaw_amendments_affecting_frand_licensing_of_seps.pdf (Last visited 26 June 2016).

48 Microsoft Corporation v. Motorola, Inc 696 f.3d 872 Court of Appeals for the Ninth Circuit No. 12-35352 (2012).

49 Press and Information Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH Case C-170/13.

of the Advocate General[50] lays down certain principles which in essence reiterate the issue of the good faith obligation to negotiate before seeking injunctions in FRAND encumbered patents. The Advocate General opines that the SEP holder before seeking injunction must convey the reason and nature of infringement to the infringer and also present an offer of licensing on FRAND terms in writing, in order to convey to the court that the licensor was willing in good faith to negotiate on FRAND terms. The infringer on the other hand must diligently present a counter-offer if not satisfied with the terms of the offer. The approach of seeking injunction would not constitute an abuse of dominant position, when the it can determined that the negotiating acts of the infringer were "dilatory and tactical."[51] Therefore, the balancing act between the SEP holder and the licensee can be achieved through a mechanism by which equitable rights and duties are encumbered on both parties, reducing the scope for abuse of rights, as in the case of interim injunctions.

The Royalty rates must be determined in such a manner that it they do not hamper the interests of the patent holder to recover its investment whilst ensuring that the licensee is not burdened with royalty stacking which in effect results in expensive products. In order to arrive at such a formula / test in determining the royalty test, the royalty cannot be based on the net profit or the sale value of the entire product, as this amount to royalty upon royalty considering the fact that in high technology industries, as in the case of the mobile phone involves 1,00,000 patents as per the White House Report.[52] The questions posed in the Huawei case concern the determination of the licensee's willingness exception to the patent holders injunction. The primary question entails as to whether merely willingness to negotiate on part of the potential licensee is enough or an unconditional offer to conclude

50 Court of Justice of the European Union Press release No. 155/14 Luxembourg, (20 November 2014) ***available at*** http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-11/cp140155en.pdf (Last visited 8 July 2016).

51 *Id*.

52 Alexander Italianer, European Commission, Shaken, Not Stirred, Competition Law Enforcement and Standard Essential Patents, http://ec.europa.eu/competition/speeches/text/sp2015_03_en.pdf (last visited 7 July 2016).

a license from the potential licensee is required to constitute the exception to patent infringement proceedings which will amount to abuse of dominance.

Therefore, the critical issue that needs determination is based on the point in time, where the willingness to negotiate is affirmed, as merely stating willingness to negotiate or entering negotiations or depositing royalty in an escrow account does not necessarily amount to the willingness to negotiate, as it more of a substantial requirement than a being procedural. In determination of the FRAND terms, the fairness, reasonableness and non-discriminatory nature have to be determined in consideration of the fairness and reasonableness to that potential licensee rather than on the basis of royalty rates of previous licensees. Therefore, the determining factor should not exclusively be the prices charged in comparison to other license holders, but value addition of the patent to the final product. The European Commission has released Horizontal Guidelines[53] suggest a fee regulating authority, which can monitor the reasonability of the rates offered and prevent patent infringement cases, which produce anti-competitive effects and hamper the consumer interest. The guidelines also expressly mandate that the SSO's extract a compulsory obligation from the patent holders to license their patent on FRAND terms to all third parties.[54]

The Competition Commission of India, should also provide a framework through which the FRAND terms can be effectuated and prevent FRAND wars through litigation, an eventual zero-sum game for all the stakeholders. The criterion for determining the willingness to negotiate, can be determined from the negotiation process and the submission of the dispute to a third party for resolution in case of failure of the negotiations. The third party in such a case can be the Competition Commission or arbitration to determine the royalty rates. Therefore, such a criterion encompasses a good faith obligation to negotiate and qualifies that with the obligation to submit the

53 European Commission Horizontal Guidelines, *available at* https://www.ipo.org/wp-content/uploads/2013/03/IPO_Comments_Regarding_the_Draft_EC_Horizontal_Guidelines_with_Cover_Letter.pdf (last visited 21 May 2016).

54 *Id*.

dispute to Competition Commission of India or arbitration. In such cases the willingness to negotiate on part of the potential licensee is apparent and reasonable. Therefore framework agreements agreed to in the Samsung case[55] and the submission of the dispute to a third party, balances the interests of the SEP holder and the licensee, initially providing for the freedom of the parties to determine royalty rates and thereafter the resolution through appropriate dispute resolution mechanism such as the CCI appointed license fee regulator or through arbitration. This methodology of determining the willingness to negotiate in good faith by the potential licensee, recalibrates the strategy of the patent holder to negotiate in good faith rather than use injunction as weapon of monopolistic market exploitation.

CONCLUSION

The primary approach adopted by the courts in dealing with patent infringement cases is the grant of injunctive relief on the basis of the property right that is vested in the patent holder but the rights and remedies attached to the patent transform when the patents are encumbered with FRAND obligations. In an exchange for the benefits the patent holder for takes certain obligation to license, therefore the test of willing licensee should also apply to determine whether the licensor was willing, considering the fact that offering unfair terms eventually results in the resolution of the dispute. The Delhi High Court decisions regarding FRAND licensing render many questions unanswered, considering the anti-competition issues and the rights and duties applicable to a SEP holder and licensee. The recent Delhi High court judgment[56] has allowed for the anti-competitive claims concerning FRAND licensing to be investigated by the Competition Commission, but the policy questions remains unanswered, with only the determination of the jurisdiction of the Competition Commission of India.

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55 Alexander Italianer, European Commission, Shaken, not stirred. Competition Law Enforcement and Standard Essential Patents, *available at* http://ec.europa.eu/competition/speeches/text/sp2015_03_en.pdf (last visited 22 May 2016).

56 Telefonaktiebolaget LM Ericsson v. Competition Commission of India and another, W.P.(C) 464/2014 Del. H.C (2016).

The implications of the grant of an injunction in the case of FRAND licensing can have deleterious affects on the technology specific market. This remedy must be resorted to based on factors which are not merely based on the satisfaction of the terms under the Specific Relief Act, but other pertinent factors such as consumer interest.[57] Thus the automatic grant of an injunction for patent infringement renders a remedy, which grants a higher bargaining position to demand high royalties[58] from the patentee, leading to infructuous litigation. In refusing the grant of injunction as a remedy the district court of Washington[59] even went to the extent to determine the royalty rates for the FRAND license based on the 15 factors elucidated in the Georgia Pacific[60] decision. The Georgia Pacific factors pertain to the assessment of damages for patent infringement, but their omnipresent application has been rejected for determining FRAND licensing.[61] It has been suggested that an alternative to FRAND litigation would be to provide for a reasonable FRAND royalty range for same category of standard or device.[62] The discussion paper released by the government on SEP and their availability on FRAND terms, asks the necessary questions, which should culminate into regulatory guidance and policy framework to provide consistency in FRAND licensing policies.[63]

The Indian government's policy of Make-in-India necessitates a resolution to the fixing of the royalty rates in consideration of the manufacturing sector and the impact of FRAND licensing on the economy. The interests of the technology sector and the sub sequential impact on the consumer interest are quintessential matters with legal and economic effects, which necessitate a policy framework by the government to facilitate FRAND licensing.

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57 eBay Inc. v. MercExchange, L.L.C 547 U.S. 388 (2006).
58 Srividhya Ragavan, Brendan Murphy, and Raj Davé, FRAND v. Compulsory licensing: The lesser of the two evils, Duke Law & Tech. Rev. (14, 2014) 94.
59 Microsoft Corp. v. Motorola, Inc., 864 F. Supp. 2d 1023, 1039 W.D. Wash. 2012.
60 Georgia-Pacific Corp. v US. U.S. Plywood Corp, 318 F.Supp. 1116, 1120 (S.D.N.Y. 1970).
61 Ericsson Inc., v. D-Link Systems, 773 F. 3d. 1201, 1227 (Fed. Cir. 2014).
62 *Supra* note 57 at 106.
63 Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, *available at* http://www.ipindia.nic.in/Whats_New/standardEssentialPaper_01March2016.pdf (last visited 7 July 2016).