STANDARD ESSENTIAL PATENTS: A DOUBLE-EDGED SWORD FOR THE COMPETITION LAW IN INDIA

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ABSTRACT

The Indian Intellectual Property Rights system experienced a significant transformation following India's entry to TRIPS in 1995. In the Patents Act of 1970 and the Trade Marks Act of 1999, many amendments were made to make these laws TRIPS-compliant. Meanwhile, the Good (Registration and Protection) Geographical Indications Act, 1999, and the Designs Act, 2000, were also passed. Since then, India's intellectual property policy has progressed through several stages, encountering new challenges and finding answers. The IPR regime is now focused on the consolidation and promotion of a fair balance between the security of IP and the public interest. Standard Important Patents (SEPs) are among the issues that need consideration, among others.

Standards provide the foundation for product growth by establishing standardized practices that are easily understood and implemented. Not only does it lead to usability and interoperability, but it also promotes the creation and adoption of innovations that influence and change the way people live, function and connect. With the growing proliferation of standardised technology, issues associated with SEPs are becoming increasingly agitated in virtually all sectors particularly telecommunications, in India and worldwide. This paper addresses such issues particularly in the telecommunications sector and autonomous vehicles.

Keywords - Standard Essential Patents , Competition Law, Standard Setting Organizations , Technology Patent

Introduction to Standard Essential Patents – what are they

In innumerable forms and artefacts, norms come. When manufacturers integrate them, they seem to us the consumers, to go unnoticed, but any adjustment or inconsistency leaves us baffled. For example, because most, if not all, of our electrical outlets have the same circular 3-pin combination, using the same phone charger across India is easy. Travelling overseas, on the other hand, becomes a difficulty because one needs to invest in a variety of adapters or just buy a new charger that fits the sockets at your destination. Customers may be excited by the prospect of innovation if a phone or laptop maker decides to modify the layout of the QWERTY keyboard or abolish the 3.5-millimeter headphone connector, but they may be unhappy with the pressure and cost of accepting the change. Conformity to standards is thus the favoured practice in society.

Patents grant inventors the exclusive right to produce, use or sell their inventions on the market (for limited periods). A patent is considered a Standard Important Patent ('SEP') on an invention that is required to comply with a standard. Just to deliver Long Term Evolution ("LTE"), the present 4G technology, Apple must comply with SEPs owned by more than 50 corporations.

SEPs in FMCG Market

SEP holders like *Qualcomm, Ericsson,* and *Huawei* make a substantial percentage of their money by developing technologies that are components of these global standards, which are then licensed to various market players. These royalties have been measured at approximately 5 percent of global cell phone sales on average. In order to provide all stakeholders with the benefits of standardisation, the worldwide tradition of a licensing agreement between the SEP holder and the manufacturer/seller/assemblers is that the agreement must be on equal, equitable, and non-discriminatory ('FRAND') terms. Conflicts over patent infringement, violations of SEP holders' superiority, or claims against the validity of the granted patent lead to challenges. With the introduction of 5G, the argument on SEPs has gained traction, with more than 80,000 patent declarations detected, as well as late issues about competition law and international relations. This blog article intends to raise reader understanding of the issue, as well as current SEP developments in India.

Given the benefits of standards in today's economy, the recent introduction of SEPs, which protect proprietary technologies that are critical to industry standards, has tended to create a setting for anticompetitive practices that, at the very least, have the potential to harm

competition and consumer welfare. An opportunistic SEP owner can hide the presence of his patents throughout the standardisation process, or afterwards hold up manufacturers and impose exploitative licensing conditions on them.

Standard Setting Organizations – the Ombudsmen

SEPs are widely used in the telecommunications sector. Standard setting organizations (SSOs) announce standards, allowing innovators to negotiate FRAND terms and conditions with implementers. In most circumstances, inventors and implementers are able to effectively negotiate the licensing of SEPs. However, there have been cases where disagreements have developed over royalties and royalty rates, license terms, patent license bundling, and license pooling. This has resulted in an increase in litigation in a number of jurisdictions, as well as the scrutiny of competition and antitrust officials. Furthermore, there is still a lack of consensus among academics, industry professionals, and regulators on the solutions and strategies that can be used across countries in these cases, which has contributed to the uncertainty.

Because SSOs play such an important role in defining and declaring standards, their involvement in developing policies that aim to serve the public interest in a number of ways through fostering interoperability across complementary goods must be investigated. It is necessary to investigate the role of SSO procedural modifications and the level of responsibility imposed by SSOs in modifying IPR policy.

Although SSOs may be facially similar to collusion between competitor groups in a specific industry, in the sense of the standard setting, antitrust concerns were relatively minimal. It is true that SSOs have the ability to establish horizontal competitor agreements that may "raise prices, decrease output or otherwise reduce competitive options." In general, however, antitrust liabilities do not apply to otherwise valid SSO operations. One of the key reasons the courts are reluctant to reject such cooperative practises, even among horizontal competitors, is that the overall public gain provided by standards has been recognised and embraced. This is not to suggest that SSOs should be automatically exempted from antitrust review, but the courts have typically considered SSO operations to be compliant with antitrust objectives when they are run legitimately. Actually, most valid SSOs also promote rivalry among rivals.

The most common concern in terms of competition law is the possibility of competition law infringement due to the existence of patents/trademarks/copyright, which grant holders of intellectual property rights (IPR) exclusive power that can be exploited to the detriment of

consumer welfare and innovation. As a result, competition law applies to the realm of intellectual property (IP), and customers can employ any interested/affected third party to guarantee that holders of IP rights do not abuse their (dominant, if not monopolistic) position. At the same time, IP rights holders can use competition legislation to safeguard themselves from anti - competitive behaviour while also encouraging further competitiveness in the market.

Market control is most likely to be exploited by patent holders by various activities, such as failure to license, excessive pricing, unequal or discriminatory licensure, anti-competitive use of SEPs; abuse of dominance and delaying rivals' entry into the market through the misuse of patent/regulatory processes, excessive pricing, and the termination of an anti-competitive agreement. Companies having intellectual property rights are seen as powerful, and their actions are increasingly being scrutinized by competition authorities.

On the basis of the SEP, IP property holders may seek to prohibit rivals' products from accessing the market, therefore violating competition legislation. The SEP is concerned with technology that is critical to the standard (in other words, without the use of certain technologies protected by the SEP, it is difficult to produce standard-compliant products). There is no alternate option; for example, 'Slide to Unlock' technology is non-SEP since different solutions to unlock a smartphone screen may be created. This will not be possible with SEPs. Telecommunications are included in the SEP, as well as audio/video, security and biometrics, transportation, logistics, aerospace, power generation, electronics, and industrial equipment.

SEPs provide their owners significant market power, which they might abuse by enacting restrictions to exclude competitors or to eliminate unreasonable royalty payments, such as cross-license fees that the licensee would not have committed to otherwise. The SEP will protect a needed and standard innovation for the use of a certain technology. Because functioning in the downstream sector requires access to the commodity in the upstream market, the SEP becomes a "essential facility."In the face of worries that "SEP owners may have abused market dominance and maintained innovation through unfair or discriminatory licensing requests," antitrust regulators throughout the world have focused on this. To address these difficulties, Standard Setting Organizations (SSOs) now require SEP owners to adhere to FRAND (equal, reasonable, and non-discriminatory) licensing of their SEPs, which is intended to supplement the required licensing suggested by the SEP. FRAND ensures that manufacturers

of standard-compliant goods have access to the technology used in the standard, and rewards SEP holders financially through licensing revenue.

The Indian Competition Law regime's Essential Facilities Doctrine

With the advent of industrialization, the question becomes whether these businesses can now be forced to share their expensive infrastructure with new rivals on an equitable and non-discriminatory basis in order to promote competition. Restricting opportunities, policies that result in market entrance denial, and using power to protect another market are all instances of misuse of dominant position, according to Section 4 of the Competition Act. It is foreseen as a benefit transition from one organization to another. If the activity is expected to eradicate any successful competition in the industry, the doctrine should be applied.

In the matter of Arshiya Rail Infrastructure Limited, the CCI looked into this doctrine (ARIL). The CCI found that Container Corporation of India (CONCOR) did not have a dominant position in the relevant market, but as an obiter on the issue of access to CONCOR terminals, the CCI found that the essential facilities doctrine can only be invoked in the following circumstances: (a) technical feasibility of having access; (b) possibility of replicating the facility in a reasonable period of time, distinct possibility of lack of equivalence. Despite the fact that the criteria are significantly larger than those used in Europe, CONCOR decided that there were no scientific, legal, or economic reasons why the other Container Train Operators did not invest. It'll be interesting to observe if the same criteria are applied in future cases or if they're just an afterthought.

In the landmark decision of *Shamsher Kataria v. Honda Siel Cars India Ltd*., the DG determined that spare parts, diagnostic tools, manuals, and other OEM facilities will be required for independent repairers to conduct effective after-sale repair and maintenance services to clients.Independent repairers will need this to compete successfully with OEM-approved dealers. According to the Commission, the following factors must be considered when determining whether OEM spare parts will be considered vital facilities for independent repairers: (a) monopolist ownership of the essential facility; (b) inability to replicate the facility; (c) prohibition of use of the facility; and (d) viability of delivering the facility. As a result, every firm offering after-sales services needed access to such technology in order to succeed in the sector.

Despite the fact that the necessary facilities concept has yet to be officially invoked in India under competition law, it is far from a blank slate in Indian law, with various sector-specific regulations openly admitting it. Because the Indian telecom industry has traditionally been dominated by a few corporations, it is necessary to provide other players access to crucial infrastructure in order to stimulate facility-based competition. Section 11 of the TRAI Act assures that telecom services supplied by various companies are interconnected and technologically consistent. Section 2 of the Petroleum and Natural Gas Regulation Board Act of 2006 was passed to specify rules for critical resource sharing. In order to attain its goals, the Electricity Act of 2003 integrates the critical facilities theory into its purview. The relevant commission, in particular, is empowered under Section 2(47) of the Act to adopt regulations controlling the non-discriminatory use of transmission lines or delivery facilities by licensees, consumers, and all other individuals involved in the generation of electricity.

Competition law in India is likewise in its infancy. Though the Indian Supreme Court has yet to apply the critical facilities theory in principle, there is enough room in Indian competition law for its interpretation. Section 4(2)(c) of the Competition Act of 2002, for example, made it illegal for a corporation to utilize its competitive position to deny consumers access. In well-known instances like *Shamsher Kataria vs. Honda Siel Cars India Ltd.* and *Turbo Aviation Pvt. Ltd. vs. Bangalore International Airport Ltd*., the topic has been presented before the Competition Commission of India (hereafter "CCI"), although the Commission has not officially decided on it. The fact that most key facilities in India are governed by some type of legal or regulatory system is a fascinating aspect. For example, the National Telecom Policy of 1994, which has been in the news for a long time, provides a system for spectrum licensing, which is a crucial facility in the telecom industry. In industries including medicines, oil & gas, and power, licensing structures operate similarly. The concept cannot be extended in conditions covered by some regulatory provision that must be defined in terms of legislative policy as a consequence of applying the Trinko clause.The critical facilities doctrine is only used in specific circumstances, such as the nature of technological viability to provide access, the likelihood of replicating the facility in a reasonable amount of time, the distinct possibility of losing competitive competition if access is denied, and the possibility of providing access on reasonable terms.

Finally, the Commission found that such facilities are unnecessary since they may be created for free by informants (private businesses) because there are no barriers.

The author would like to come forward and suggest that the above discussed doctrine shall be applied to the Indian cases and scenario as well. As previously said, CCI has not directly addressed any case of the doctrine. This opens the door for speculation on how the theory may be applied in India. Furthermore, if the theory is implemented in India, the next step will be to restrict its application.

Refusal to deal

The theory is likely to be dealt with under the "refusal to contract" standard. The distinction between refusing to contract and the vital facilities doctrine is that the former requires an established trading partnership between the dominant company and its rivals, while the latter does not. Assume A is a dominating corporation with an agreement to provide B access to a certain facility (owned by A) for the delivery of specific items. It is possible that such a privilege will be disallowed in the future. In the event that a dominating business is unable to contract, this scenario will be handled. The essential facilities theory, on the other hand, is generally applied in circumstances when potential rivals are denied admission to the market by a dominant party's refusal to make vital facilities available.

1. **Strict Application of the Competition Act:** It's crucial to address the notion of 'abuse of dominant position,' as defined in Section 4 of the Act, and its link to the required facility theory at this point. Domination is not an infringement of competition law in and of itself, according to recognized doctrine in competition law jurisprudence. moreover, the dominant company bears a particular obligation against other firms. Such special obligation for not violating a superior position should not be used to justify liberally extending the doctrine.According to Lahiri and Sivakumar, the courts, as well as the CCI, must exercise vigilance when reading Sec. 4's open language. The support for this point can also be seen in the previously mentioned negative interactions of the United States and the EU

2. **Lessons from the EU and the US**: According to Malik, the right of possession of a facility in the United States belongs completely to the corporation that created it, showing the difference between American and Indian rule. n India, on the other hand, the innovator has an exclusive right to use the facility, and when that right expires, the facility is handed over to the government. This indicates that the United States' strict

adherence to the critical facility theory isn't always true in India.Furthermore, it is obvious that European law has had a bigger influence on Indian competition law, and there is a good probability that Indian competition law will follow European law rather than American law's criteria. On the other hand, this is a differentiation without a distinction. Today, all of these countries have set high standards for the doctrine's execution, relegating it to a supporting role.

3. **Role of IP law**: In respect to a country's intellectual property policies, the crucial facility theory is frequently disputed. Ravichandran added that the respective clauses of the two statutes offer the CCI substantial authority to deal with patent law matters, while reflecting on the Indian competition and IP law regimes. It's worth noting that India's competition legislation lacks an IP defence for abuse of a dominant position. Antitrust law, on the other hand, is well-known for being created with intellectual property's exclusive protection in mind. As a consequence, as long as a patent's freedom to use is granted on reasonable conditions, the critical facility concept would not apply.

4. **Formulation of Regulations**: According to Bajaj and Sharma, CCI has used the theory on an ad hoc basis till now, and the Commission can use its jurisdiction under Section 64(1) of the Competition Act to establish a policy on the topic. While the author supports such a remedy, it is vital that CCI remembers that the doctrine may only be applied in extraordinary circumstances when other sections of the Competition Act do not apply.

Conclusion

Problems with competition law can arise in any area of IP, including patents, trademarks, and copyright. In such circumstances, it is the IPR owner that is responsible who wield significant consumer control (if not all dominance) who must be particularly careful about the consequences of competition law to their activities, since a company in a leading position is subject to a It's especially crucial not to engage in any behaviour that might stifle competition. The most common competition law issues involving patents are related to the abuse of market power through various practices, such as refusal to license/deal, excessive charges/pricing, unfair/discriminatory licensing, anticompetitive use of SEPs/abusive litigation by SEP holders, delaying market entry of competitors through misuse of patent/regulatory process (SPC), excessive pricing, and others (PSAs). Customers must have access to a varied range of

innovative and inventive products and services at reasonable prices, according to everyone involved in the discussion regarding the link between IP law and competition law. The current — and mostly recent — case law appears to meet the criterion for predictability. In any event, the indisputable reality remains that market and intellectual property policies should "operate hand in hand to foster economic progress."

We can clearly see that IP law as well as competition law both are in their infant stages in India right now both of them are evolving and trying to overcome obstacles, we should look at US and EU to understand the mistakes when it comes to a conflict between the two laws and we should also be careful as to what not make the same errors.

SEP's should be governed in a way that does not hamper the right of the patient holder and at the same time does not hinder any competitor from progressing in that industry.

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