



SYNOPSIS



SPECIAL ISSUE ON INNOVATION, INTELLECTUAL PROPERTY AND COMPETITION IN INDIA

ON THE “NON-DISCRIMINATION” ASPECT OF FRAND LICENSING: A RESPONSE TO THE INDIAN COMPETITION COMMISSION’S RECENT ORDERS

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In two recent orders, the Indian Competition Commission has challenged Ericsson’s practice of licensing its standards-essential patents (SEPs), relating to cellular standards, for percentage-based royalties based on the selling price of the end-user licensed products. Ericsson had committed to the European Telecommunications Standards Institute (ETSI), the relevant standards-development organisation (SDO), that it would license its SEPs on “fair, reasonable and non-discriminatory” (“FRAND”) terms in accordance with ETSI’s intellectual property rights (IPR) policy. The Commission contends that such percentage-based royalties are “prima facie discriminatory” in violation of the Competition Act, in the (novel) sense that different

products selling for different prices pay different per-unit royalties (as opposed to the more common sense that different licensees who sell their products for the same price are treated in a discriminatory fashion because some firms must pay different royalties from their rivals). As Ericsson’s practice of charging percentage-based royalties is followed by many firms and is common practice in this as in many industries, the Commission’s reasoning has implications far broader than the current disputes between Ericsson and two Indian cellphone manufacturers. We analyse the broader implications of the Commission’s reasoning, concerned that if adopted and upheld, the Commission’s reasoning would disrupt common industry licensing practices in this and many

other industries. India and Indian consumers and firms all benefit greatly from advanced telecommunications technology. The Commission has not contended that Ericsson’s royalties are excessive. If Ericsson were required to charge the same per-unit royalty across different products, as the Commission contends is required to eliminate the “discrimination”, in order to hold its licensing revenue constant, Ericsson would have to raise the royalty on low-priced products and lower it on high-priced products. The Commission has not addressed this issue, nor has it explained why such an outcome would be preferable from a competition policy perspective to the current percentage-based royalties system.

FRAND IN INDIA: EMERGING DEVELOPMENTS

Kirti GUPTA

There is an ongoing debate about the Intellectual Property Rights (IPR) policies of major Standard Setting Organisations (SSOs) and how the licensing disputes related to the valuation of patents that are potentially essential to the standards, commonly referred to as standards-

essential patents (SEPs), should be resolved. The licensing commitments, often based on Fair, Reasonable and Non-Discriminatory (FRAND) terms, have been the focal point of various discussions about their purpose, interpretation, and whether or not they need further clarification. At this

time of intense global debate, IPR policies related to the newly formed Indian telecommunications standards SSO, the Telecommunications Standards Development Society (TSDSI) were formed recently, the jurisprudence on the FRAND licensing practices and related legal disputes is

under formation in both the Indian courts and India's competition watchdog, the Competition Commission of India (CCI), and more recently, the Department of Industrial Planning and Promotion (DIPP) and the Telecom Regulatory Authority of India (TRAI) addressed FRAND licensing in their policy documents. This article connects the legal and economic issues underlying the global

dialogue on SSO IPR policies and licensing of SEPs with the FRAND-related disputes in the Indian jurisprudence currently in formation. Against the backdrop of these legal disputes and policy discussions regarding licensing, India's "Make in India" vision is poised to incentivise local indigenous telecommunications industry to climb up the value chain, and become manufacturers and

designers. Therefore, the policies that India implements and how the jurisprudence evolves is of key importance towards the long-term prospects of the wireless and telecommunications industry that heavily relies on the creation and use of common technology standards. An understanding, therefore, of the key legal and economic theories is critical.

LEVERAGING AFFORDABLE INNOVATION TO TACKLE INDIA'S HEALTHCARE CHALLENGE

Kiran MAZUMDAR-SHAW

Innovation is of critical importance to India to ensure that our future development is sustainable, and inclusive. More than at any time in the past, the value placed on innovation is being measured on its social impact. Affordable innovation, which presents ways to innovate, be flexible, and do more with less, is a practical, alternative model that can help a complex and resource-constrained country like India address its myriad challenges. India faces a huge healthcare challenge as a severe lack of resources means that even basic health services remain inaccessible in many parts of the country. Long-standing apathy towards addressing social determinants of disease and ensuring

high-quality, accountable, universal healthcare for people have ensured India languishes among the worst-performing countries in health matters. A model based on affordable innovation can ensure healthcare is "available" and "accessible" on a sustainable basis for every citizen of the country with minimum financial burden. However innovation in India faces multiple challenges such as a multiplicity of regulations, low risk appetite among investors, stagnant R&D spending, shortfall of scientific talent, and poor patenting culture. To deliver affordable healthcare, India needs to incentivise innovation -- innovation in discovering drugs, developing therapeutics and delivering healthcare. The nation's

innovation capability needs to be boosted with the right kind of fiscal incentives, policy support, financing mechanisms, human capital and best-in-class infrastructure. The "affordable innovation" mantra needs to find a resonance in the technology, strategies, practices and policies implemented in the country. This aim should be to create an ecosystem that incentivises a virtuous cycle of basic and applied science where knowledge is seamlessly translated into practical solutions to address unmet healthcare needs. India also needs to focus on increased adoption of technology to help transform the country's public healthcare system and ensure a healthy future for all Indians.

INNOVATION AND INTELLECTUAL PROPERTY RIGHTS LAW -- AN OVERVIEW OF THE INDIAN LAW

S. Ravindra BHAT

The present article reviews the legal regime governing innovation and intellectual property rights in India. The article begins with examining the relevant guarantees under the Indian Constitution that protect the right to property, which includes intellectual property. While the right to property is not a Fundamental Right (after 1978), nevertheless it enjoys constitutional protection under Article 300A. Moreover, the Chapter on Directive Principles of State Policy of

the Constitution also contains provisions that are relevant for the purposes of protection of intellectual property rights and concomitant concerns regarding public health. The article proceeds to provide an overview of the law of patents in India, dealing with contentious issues such as Fair, Reasonable and Non-Discriminatory (FRAND) licensing, effect of the Novartis decision of the Supreme Court, and considerations of access to life-saving drugs.

Thereafter, the article moves on to deal with the legal regime governing copyrights in India. Within the law of copyright, the article expounds on key concepts such as the idea-expression dichotomy and compulsory licensing. The nature of moral rights and the legal protection that such rights enjoy under the copyright regime are also dealt with. Before proceeding to the law on trademarks, the article analyses the interaction between the law of trademarks,

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