

Roundtable Discussion on Growth of ICT Sector in India: Issues and Challenges pertaining to SEPs



August 22, 2016 | Maple Hall, India Habitat Centre | New Delhi

BACKGROUND

CUTS Institute for Regulation & Competition (CIRC) organised a roundtable discussion on the theme ‘*Growth of ICT Sector in India: Issues and Challenges pertaining to SEPS*’ on 22nd August 2016 in India Habitat Centre, New Delhi, India. The discussion was helmed by the Mr. Sunil Jain, Managing Editor, The Financial Express, and six senior expert speakers with participation by stakeholders including academicians, lawyers, economists, telecom industry and associations. A dynamic discussion on the most debated aspects of standard setting, FRAND terms, behaviour of inventor and implementer firms, role of courts and competition authorities in determination of licensing rates etc. took place. This was followed by questions from the participants and open debate. This discussion also contributed towards the ongoing CompIP Project at CIRC which relates with exploring contemporary debates at the interface of IP and competition law.

Proceedings

A welcome note was delivered by **Dr. Arvind Mayaram, Former Finance Secretary of India & Chairman, CIRC**. He said that the information and communication technologies (ICT) sector offers immense potential to aid the socio-economic development of the country and thus a fair and competitive environment should be encouraged in the sector. Since deals in this sector are more technology oriented, patent authorities and competition commission should attempt to work in tandem. **Mr Saket Sharma, Associate Fellow, CIRC**, introduced the panellists and welcomed them and the participants for joining in the roundtable discussion.

The Chair, Mr. Sunil Jain, Managing Editor, The Financial Express gave the introductory spark to the discussion by putting forward two major talk points i.e. firstly the uncertainty around FRAND terms and SEPs licensing that has been making news lately and secondly how is the part of royalty determined in what the consumer pays for the final instrument (mobile/laptops etc.).

Mr. Rajiv Kr. Choudhary, Partner RHA Legal defined the telecom market as a symbiotic relationship between the licensor and the licensees. Phone sets continue to get cheaper and more affordable for the consumer despite the complaints from the mobile companies that standard patent holders charge high royalties. The same mobile companies like micromax, intex etc. are selling the cheapest mobile phones in the market. Mr. Choudhry emphasized this is because the components of the mobiles cost differently in different times, e.g. Silicon getting cheaper.

Prof. Payal Malik, Associate Professor, University of Delhi explained that problems arise because people have been putting up the questions in a negative way. She questioned that by calling the royalties demanded as monopolistic, ICT market should be analysed as a failing market and which is certainly not the case for India. Instead it is the most growing and competitive market at present. There are no evidences of consumer harm in the sector. She clarified that no licensor would

charge exorbitantly, because he had invested in the patent to bring it to the market and sell. In fact, in cases of SEP holders, they compete to create a market hold by licensing the patents at fair rates.

Prof. Jay Kesan, University of Illinois at Urbana-Champaign, College of Law agreed with Prof. Malik and claimed that there have been different studies on royalty rates charged by the SEPs holder firms. He also said the profit margins of these licensee mobile manufacturers are way higher than what they pay out as royalties to the licensor firms. He said that the mobile manufacturers (licensees) have full bargaining power in this market.

Mr. Rajiv Aggarwal, Joint Secretary, Department of Industrial Policy & Promotion(DIPP) questioned as to whether it is actually possible to determine what all patents a handset carries to which Prof. Kesan responded that for a given handset it is possible.

Mr. Mahesh Uppal, Director Comfirst India brought forward the debate point as to whether it was required for the government or any authority to regulate these royalty rates, because the ICT market has been fairly competitive and self-determining. Mr. Uppal insisted the focus should be on promoting innovation and IP protection in India.

To this Mr. Aggarwal commented that the government does not attempt nor looks forward to regulate these rates.



Mr. K.D. Singh, Joint Director (Law) Competition Commission of India contributed that CCI interferes only towards the competition matters and the competency of the commission cannot be precluded before analysing the merits in detail. It was also discussed that it is a fair market if all the

licensees are paying the same royalty rates for a given bundle of patents and in such a market there should be no interference of a regulator. The issue as to how can it be ensured that all licensees are paying same royalty rates for a said standard patent arose and the reluctance of the SEP holders on sharing the contract details with judicial/competition authorities was discussed.

From the participants, advocate Sai Deepak affirmed to the fact that no clear information is shared with the authorities on how much the licensees are paying to the SEP holder. Also he stressed that the licensor cannot be asked to give out the patents at same rates to all as there are reciprocal contracts as well which should be kept in consideration. He shared the fact that the discussions during the negotiations between the licensor and licensee while drafting a deal are completely different from what are discussed during the court proceedings.

Mr. Rajiv Aggarwal congratulated CIRC and CUTS for the fact that such important aspects are being brought forward in the discussion, and he stressed that the main outcome of the DIPP discussion paper on SEPs is that there are now more constructive debates like this happening in India. He also stressed on the need to foster innovation in Indian industries in order to enhance the value in 'Make in India'. Towards this he suggests that the patent examination authorities need to work harder and speed up the processes and equally stands the need to augment the staff of these authorities. The role of government has to be motivated for the cause. In sync with the discussion, Mr. Pradeep Mehta, Secretary General, CUTS International also stressed on the need to promote innovation and patent filing in India, and simultaneously to ensure a check on their abuse.

Mr. Sunil Jain put forward another question to the discussion table, as to whether the functioning of SSOs is fair and whether the discussions held in their meetings are made public. To which Prof. Kesan replied that role of SSOs is not to set royalty rates but to only derive an agreement amongst the stakeholders as to which technology should be treated as the standard technology for future devices. Ms. Kirti Gupta, Director Economics strategy, Qualcomm from the participants and Prof. Kesan both defined the process of standard setting that is followed in meetings conducted by SSOs and Ms. Gupta also commented that SEP holder firms are only 1-5% of the stakeholders voting for the standard technology. Majority votes rest with the manufacturing companies and other stakeholders/engineers while determining which patent should become a standard for the forthcoming technology products. There is competition within the standards, i.e. the companies that have brought their bundle of technology patents to the table as a proposed standard face a tough competition getting them approved. Therefore, the risk of investing in a technology hoping it to become a standard is very high.

Conclusion

Take back points for the discussion were that for ICT sector it is an innovation ecosystem supported by patents and there is no force/ company big enough to monopolise the markets. There is a give and take relationship shared between the licensee and licensor, and neither can grow

without supporting the other. The market forces are strong and no barriers can be evidenced for the manufacturing industry as there have been newer and cheaper devices made available for the consumer. It is a fairly competitive market therefore the consumer is at benefit from this sector. As for determination of royalty rates in case of standard patents, only in rare cases have antitrust authorities jumped into that role. Due to non-disclosure terms and cross licensing, the rates for previous agreements between the SEP holder and licensees are difficult to discuss. But the competition authorities have the authority and can ask the firms to share such details to determine and check foul play. The discussion ended with a vote of thanks to the panellists and the participants for intriguing debate on the complex issue of SEPs.

Roundtable Discussion on

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AGENDA

Indian jurisprudence on fair, reasonable, and non-discriminatory (FRAND) licensing practices for standard essential patents (SEPs) is at a nascent stage. Department of Industrial Policy & Promotion (DIPP) came up with a consultation paper on this important issue. Indian Judiciary and the Competition Commission of India (CCI) are simultaneously addressing the first complaints ever filed in India concerning FRAND licensing. This roundtable aims at discussing issues and challenges which SEPs can raise in achieving growth in the ICT sector in India.

15:00 – 15:30 hrs Registration & Networking Tea

15:30 – 15:45 hrs Welcome Remarks by Dr Arvind Mayaram, IAS(R), Former Finance Secretary of India & Chairman, CUTS Institute for Regulation & Competition

15:45 – 17:15 hrs Roundtable Discussion on Standard Essential Patents

A panel of senior experts from academia, practitioners, think tanks and government representatives will deliberate on the issues and challenges related to Standard Essential Patents in India.

Chair & Moderator: **Sunil Jain**, Managing Editor, The Financial Express

- **Rajiv Aggarwal**, Joint Secretary, Department of Industrial Policy & Promotion
- **K.D. Singh**, Joint Director (Law) Competition Commission of India
- **Jay P. Kesan**, University of Illinois at Urbana-Champaign, College of Law
- **Mahesh Uppal**, Director Comfirst India
- **Payal Malik**, Associate Professor, University of Delhi; Former Adviser Economics, Competition Commission of India
- **Rajiv Kr. Choudhry**, Co-founder RHA Legal

17:15 – 17:30 hrs Q&A

17:30 – 18:00 hrs High Tea
