

**TEMA/CMAI response to DIPP “Discussion Paper on Standard Essential Patents and their availability on FRAND Terms dated 1st March, 2016” as press release dated 14th March, 2016**

**CMAI/TEMA Note on IPR Policies for Make in India-Mobiles and Telecom Sector**

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## Background

DIPP vide press release dated 14th March, 2016 has come out with a “Discussion Paper on Standard Essential Patents and their availability on FRAND Terms dated 1st March, 2016”, [http://dipp.nic.in/English/Discuss\\_paper/standardEssentialPaper\\_01March\\_2016.pdf](http://dipp.nic.in/English/Discuss_paper/standardEssentialPaper_01March_2016.pdf) ) views or suggestions on which were invited till 31st March, 2016 and now extended till 22nd April, 2016 to be sent to [kapoor.sumit@gov.in](mailto:kapoor.sumit@gov.in) The stated purposes of discussion paper are:

- i) *Department believes that discussion on the subject will assist the Government to develop a suitable policy framework which aids the growth in telecom sector in India and worldwide which will benefit the ultimate users of technology.*
- ii) to develop a suitable policy framework to define the obligations of Essential Patent holders and their licensees.
- iii) need and importance of regulating SEPs as well as facilitating their availability at Fair, Reasonable and Non-Discriminatory (FRAND) terms.
- iv) achieving the national development and technological goals by protecting private Intellectual Property Rights while securing interest of public at large.`

Make in India is an important scheme of Government of India. There has been great interest from national and foreign companies to invest in India for Make in India. Several proposals are coming up in various sectors. CMAI and TEMA are promoting Make in India for electronics, telecom, and Mobile sector.

Of late IPR on electronics, telecom, and mobile has been receiving attention with manufacturers and there are undefined costs on manufacturing. There is also ambiguity on SEP, FRAND. In India royalty has been prescribed by

Delhi High Court on net sale price of finished product rather than on the component/chip on which patent is claimed to have been used.

By the nature of the purported technology patent accepted by SSO and Government later, there is no escape for manufacturers but to follow the same and that tantamount to be dominance and anticompetitive. Government does not disclose the IPR/SP/Patent royalties payable. There is hardly any definition or procedure available for FRAND for determining the royalty. **Hence there is need for a policy of declaration of SEP by a statutory authority and FRAND terms and procedures.**

A reference is made to the news that appeared in Hindustan Times on 23.2.2016 with heading “Make in India runs into high royalty fee hurdle”. The news highlighted the grievances of the manufactures of smart phones/cell phones in India, particularly on the issue of high cost of Royalty payable to the entities having Standard Essential Patents (SEPs). Such high cost has become a hurdle in the Govt. of India’s initiative of “Make –in-India”. The news report also said that it is also a matter of concern that the Royalty is being charged on the value of entire device of mobile phone in place of the value of the component in which such Patents are used.

High cost of Royalty has always been a cause of concern in the minds of mobile and telecom manufactures and the rate of Royalty has always been the issue contested in the Courts not only in India but also abroad. There have also been instances where the royalty rates have been increased once the patent has been accepted. There have also been cases where patentee has bullied the user into accepting the royalty terms by coercion and forces. In several cases the Courts have reduced substantially the royalty asked by patentee. The law regarding fixation of Royalty is in the developing stage. Any determination, though claimed to be on FRAND basis, is hardly a standard industry practice. The determination on so called FRAND basis and

also validity and nature of patents has always been a question challenged in the Courts and in majority of cases there have been settlements out of Courts. That means validity of patents or royalty terms unsettled by Courts and settled in private way without full knowledge to world as to what has been settled.

In India the IPR related issues for mobiles have been raised in Delhi High Court and CCI, as are mentioned in separate para later in this note. As of now following matters are pending (there may be others not immediately known):

- i) FAO Appeal 555/2015, 138/2015 by Micromax/Intex Division Bench of Delhi High Court against orders dated 7.7.2015 of Delhi High Court.
- ii) Final decision in matter of Micromax/Intex at Delhi High Court.442/2013
- iii) Investigations to be carried out by DG, CCI
- iv) DIPP to consider views to be received by it and consider appropriate policy measures.

### **Why this Note & Need for Discussions**

There is need to discuss these issues with all stake holders and come out with appropriate status on date and its relevance on Make in India and also any suggestions in this behalf for industry or for policy makers and for making submissions to DIPP and other Government Departments and stakeholders.

This note has been prepared by CMAI association of India and Telecom Equipment Manufacturers Association of India (TEMA) (both together hereinafter called as CMAI) on the basis of available information and data on public domain and also on the basis of discussion paper of DIPP

(hereinafter referred as “DIPP Paper”) and represents the views which CMAI/TEMA suggests and recommends in the interest of Make in India and a vibrant growth of India coupled with IPR regime and Competition policies. The note would also be submitted to DIPP in response to DFP Paper and to other Authorities concerned in the matter.

TEMA/CMAI appreciates and acknowledges various notes/research papers/news items/judgments etc. of several persons/bodies which has been relied upon while preparing this note.

### **Executive Summary in very brief:**

The executive summary is not a substitute for detailed discussions that follows. This is just to give gist of notes and suggestions very briefly and reliance need to be made on detailed views as appearing hereinafter.

1. Make in India, Digital India are big focus of NDA Government and the study shows that number patents that claim an invention on these standards is constantly increasing. Hence there is definite need to look into this as a policy statement/issue.
2. IPR Policy of India should be targeted as clear demonstration of protection and advancement of National Interests. The role of the Government should be to facilitate, and not to actively promote intellectual property rights. These rights do not themselves translate to increased innovation, economic growth or well being; they are mere proxies for unclear productive gains. Actively encouraging a ‘service’ or ‘performance’ based corporate approach to increasing the ‘use’ or ‘take-up’ of intellectual property rights, risks privatizing the public goods nature of these rights.”
3. *CMAI would like to recommend that the principal of “eminent domain”*- which essentially allows the State to subordinate private

property right to the public interest in certain circumstances – must be considered for India.

4. There is no need to get concerned by statements of IPR Indexes.
5. The Standard Setting Organizations appear to have not disclosed the patents relied by them, in the absence of which there is ambiguity as to what patents are to be followed. There is no way to find as on date, as to what patents the manufacturer need to follow for manufacture of a telecom or mobile product. This gives rise to uncertainty and unknown demands from alleged patent holders. **Hence there is Need for appropriate regulations making it compulsory to disclose to statutory authority the patents involved in standards made by SSO. This can be enforced at the time of acceptance of the standard by Indian departments.**
6. A private body called SSO setting standards and various Countries adopting the same under the excuse of seamless connectivity without knowing that it involves which patents or SEP and without knowing that it involves payment of royalties at what rates. SSO also hardly scrutinize or verify the validity of patent.
7. There is no authority who decides if particular patent is SEP or not. SEP is declared by the patent holder, which may or may not be verified & legally sustainable. The contention that the particular patent is SEP or its validity is also contested legally and mostly decided out of Courts or by negotiated settlements. That also does not answer the question on validity of patent or its SEP nature. In some cases even after Courts passed orders for royalty, later the patent was not found to be valid. **There is definite need for a statutory agency/Body to verify, validate, authenticate and then announce the correctness**

**of declaration of SEP by patent holders and FRAND terms and procedures.**

- i) The technology provider does give undertaking to SSO that it will license the technology on FRAND basis. No one knows what is FRAND terms and conditions. FRAND has no formal definition or procedure or statutory backing. There is hardly any way to find out what reasonable royalty is and the existing royalty terms for other licensees, in the absence of all data provided by patent holder on the pretext of NDA signed with other users. The NDA when offered to Indian companies says applicable as per laws of Sweden/Singapore or other Countries. It is left for negotiations between parties ie. Patent holder and manufacturers. SSO also does not help or coordinate FRAND terms. SSO is also not involved in FRAND negotiations. So it is left to Civil Courts to adjudicate and give judgments on individual cases world over. **There is Need to address the FRAND issue/terms and conditions and mandatory applicable of Indian laws. There is also need for a statutory provision in statute for SSO and its experts from different fields to provide inputs, logics/basis, guidelines supported with legal and statutory backgrounds and keeping in view the economic viability and need for the public at large to inform about different methods that can be used to quantitatively determine royalty terms. There is definite need for a statutory provision for cap on total royalty that can be claimed, so that it does not exceed exponentially. There is need for some statutory provision for a correlation between the cost of acquiring technology/patent and the rates of royalty. There is thus need for a statutory provision for patentee to arrive at reasonable basis on which royalty can be demanded keeping the shelter of FRAND. There is a need for a**

**statutory provision to address the royalty/tax issues and jurisdiction between places of manufacture/selling and IPR residing in which Country.**

8. Department of Telecommunications (DOT) has accepted the standards as informed by ETSI and other SSO formed by SSO without any knowledge of the patents or SEP involved and no information about the percentage/extent of royalties payable. DOT has made them mandatory to be followed. Other Departments like Department of Electronics and IT, BIS, Tec etc. also accept and prescribe the standards without any knowledge of patents/SEP/royalties involved. This has created a situation where the standards cannot be met without following the SEP. This has exposed the Indian companies to unknown liabilities. **There is a Need for Government Departments to consider the SEP/Patents/Royalties while approving the standards so that its impact on viability and consumer is assessed. Hence there is need for appropriate regulations making it compulsory to disclose to statutory authority the patents involved in standards made by SSO and the terms and rates of royalty offered to other licenses worldwide and also make it mandatory to follow the Indian laws and jurisdiction. This can be enforced at the time of acceptance of the standard by Indian departments. There is also a need to ascertain at the time of accepting the standards, as to which SEP holders were member of the Committee/ETSI while forming the standards. This will help decision makers to have a view of the interested parties in standard making by ETSI or other SSO. There is further need for Government/ DOT to find out from records if ETSI informed Government/DOT of the patents and SEPs. If not, it is important that**



**a formal protest need to be taken to ETSI even now and a policy to be cautious in future.**

9. The applicability of SEP and FRAND need much wider consultation and discussions, specially looking at the fact that these are one of most litigant matters worldwide and hardly there is a universal definition.
- 10. FRAND has no formal definition or procedure or statutory backing and is left for negotiations between parties ie. Patent holder and manufacturers. There is hardly any way to find out what is reasonable royalty in the absence of all data provided by patent holder on the pretext of NDA signed with other users. The NDA when offered to Indian companies says applicable as per laws of Sweden/Singapore or other Countries. There is need to provide statutory disclosure of terms and conditions of FRAND/Royalty across world and also NDA and other matters to be applicable as per Indian Laws and jurisdiction.**
11. By the very nature of SEP, there is no choice or alternative and thus it becomes dominant player and anticompetitive. While IPR is to be respected, the anticompetitive behaviors can hardly be accepted. **CMAI recommend that a proper balance need to be maintained between Competition Laws and IPR Policies and promotion of Innovations/Start Up India and Make in India. While patent needs to be protected the anticompetitive behaviors cannot be allowed.**
12. Normally the patentee files claim for royalty with a self certified and self tested report of the purported infringement. **There is need for a procedure under Indian laws to provide for a statutory/ Government authority to certify and test this matter.**
13. IPR issues have been contested legally world over very forcefully and at high costs where several cases have been filed on each other and

statistics reveal that **99% of the cases are settled or negotiated without waiting for a Court judgment.** There is admittedly not wide spread knowledge and expertise available within Country in such matters. As in China, **there is a need in India for a strong support from Government and statutory provisions for an institutional mechanism to deal with IPR related cases as a country rather than leaving it to individual companies to contest.** There is also need for statutory provisions for the concerned Indian agency/body to be equipped with experienced background to make balanced view out of arguments pleaded and great amount of research needed to find out the alternative or counter decisions/judgments. There is also need for a statutory provision for a strong IPR cell in India to keep watch on happenings around world, which have bearing on Indian side.

**14. In order to implement Make in India there is need for Compulsory Licensing, which is permitted as per International and National Laws.**

**15. In the case of telecom and mobiles mostly SKD level manufacturing is started in beginning which is later followed by CKD level. Also the fact is critical component/chips/parts are imported. The purported patents are used not by Indian manufacturers but by the suppliers and manufacturers of chip/components/parts. Hence there is need for statutory provisions to address the issue as to how far it is fair to enforce patents on Indian manufacturers, unless they individually make chip/components/parts and actually use the patented technology. Also for the purpose of equal treatment, there is also need to ensure that the purported royalties are also charged on other companies supplying products in India.**

16. The purported royalty should be charged from the component manufacturer and inbuilt in the price of the product, rather than demanding from use of chip/component. **There is need for policy initiatives and statutory provisions in India to ask the patent holders to claim royalty and file cases against with component manufacturers in the Countries of actual manufacturing such as China, USA, Taiwan, Finland, Japan etc.**
17. Again in case of telecom/Mobile, in some cases the complete built units (CBU) are imported from a foreign manufacturer. Obviously it is the foreign manufacturer who utilizes the purported patent and is responsible to follow patents and pay royalty etc. **There is need for statutory provisions to address that in such cases how far it is fair to force the patents royalty and applicability on Indian importers. Similar treatment to CBU imports whatsoever in India and royalty on the same.**
18. The SEP holder demanding royalties from Indian companies but not on other brands/products marketed in India. These are subject to service tax/sales tax. **There is need for a policy so that demand of service tax/sales tax also needs to be raised on other brands/products utilizing the same technology and marketing in India to enable equal treatment to all and not put Indian companies in disadvantages position.**
19. **There is accordingly need for the Government to find out the royalties paid on use of Ericsson patents in India by other telecom Companies and the sales/service tax paid on the same. If not then the consequential actions thereon.**
20. **There is need for the Government/ Revenue Department to find out how much royalties have been paid on patented technologies by others and service tax/sales tax paid on that. If not paid, then what are consequential actions needed.**
21. **With regard to taxes and duties:**

- **There is need to give exemption to Service Tax/VAT/TDS**
- **Or there is need for reimbursement/refund of said tax amounts, as industry is going to be badly affected due to such additional liability on the brands.**
- **In case of Direct Tax...royalty payment attracts TDS deduction also....hence royalty amount should be inclusive of all taxes. Else there will be additional tax/TDS burden on brand owner in India.**
- **Or we request lower TDS rate on royalty for mobile industry.**

## **PARA WISE DISCUSSIONS:**

### **1. Brief outlines of IPR Issues in Delhi High Court and CCI**

#### **1. a) Delhi High Court matters**

##### **i) Ericsson vs. Kingtech**

Perhaps earlier instance in India for mobile phone patent infringement started in March 2011. Ericsson requested Customs not to grant clearance to import of Kingtech Electronics consignment stating it contains 1,900 handsets comprising 18 models of the G'Five brand. The allegation was that it infringed 5 of its AMR patents (IN203034, IN203036, IN234157, IN203686, and IN213723). Same on which later cases were filed. Ericsson filed so called independent expert lab test report with 18 models infringing its patents.

Customs detained the goods as per the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007. Kingtech filed a writ in the Delhi High Court challenging the detention. Kingtech contended that the Deputy Commissioner of Customs was not appropriate authority to determine the validity of a granted patent and to decide if goods infringed on that patent. It was further stated that DC Customs is overstepping her authority by suspending the release of goods without an injunction from the Court and asked for release of consignment.

December 2011, the Delhi High Court ordered for the release of Kingtech's consignment.

Ericsson appealed for a stay on the order and requested that sample mobile phones from Kingtech's consignment be lab-tested independently to determine patent infringement. In April 2012, the Court rejected the appeal and ordered for a sample to be sent to two laboratories, Sasken and CanvasM.

- ii) 4th March, 2013 Ericsson filed patent infringement suit against Micromax 442/2013 in Delhi High Court claiming Rs 100 Crores in damages.
- iii) On 6.3.2013 Delhi High Court passed some interim orders on, appealed by Micromax and disposed off by High Court on 12.3.2013 with some directions.
- iv) On 19th March, 2013 the High Court passed interim payment of royalties in Court at given rates of 1.25, 1.75, 2% and USD 2.50 (on dongle data card) pending determination of royalties payable. This was on total cost of mobiles even though patent was for a portion on particular chip/component.
- v) On 10.4.2013 Delhi High Court extended the interim arrangement and appointed Justice AP Shah, Former Chief Justice Delhi High Court as a Mediator. He could not arrive at decision.
- vi) The Delhi High Court on 12.11.2014 modified above orders and Interim royalties rates fixed varying from 0.8 to 1.3% to be paid to patentee by the Company on NET SELLING PRICE
- vii) Micromax sought modification of aforesaid orders of 12.11.2014, which was not accepted by High Court vide its orders on 7.7.2015. The Micromax appeal against this before Division Bench is pending (FAO No 555/2015).
- viii) The final decision in above case no 442/2013 is pending before High Court.
- ix) Almost similar facts are in the case of Ericsson vs Intex.
  - On 15.4.2014 Ericsson filed a patent infringement case against Intex CS (OS) 1045/2014, which was similar to Micromax. *Telefonaktiebolaget LM Ericsson (PUBL) Vs. Intex Technologies (INDIA)* claiming Rs. 56 crores in damages for

the alleged infringement of 8 of its SEPs, the same ones over which Micromax and Gionee were sued.

- On 13.3.2015 Delhi High Court Interim Judgment pronounced (I.A. No. 6735/2014 in CS (OS) No.1045/ 2014), similar to Micromax. In this case also though final order is not yet passed, but by way of interim order Royalty has been asked to be paid till appropriateness of the Royalty rate is adjudicated or determined. The Court ordered Intex to pay 50% of the amount of royalty for the duration from the date the lawsuit was filed to March 1, 2015, directly to Ericsson. The royalty amount was determined on the basis of Micromax case. Intex was ordered to pay the remaining 50% with a bank guarantee within 4 weeks. The Court also declared these terms would be applied every six months until the trial completes.
  - Hence royalty payments have started on net sale value of product without getting final decision of Hon'ble Court
  - Intex filed appeal against above before Division Bench FAO 138/2015. That is pending for decision.
  - Final decision on above Intex case is also still pending at Delhi High Court.
- x) On 23.8.2014 Intex filed 8 set of revocation petitions in respect of five SEPs of Ericsson before Intellectual Property Appellate Board (IPAB). Gionee also has filed. Micromax contends that while Section 13(4) of the Indian Patents Act allows the patent holder to file a suit in case of infringement, it is not proof of the validity of such a patent. Ericsson, on the other hand, has claimed that the burden of proving invalidity of patents lies on Micromax. An independent third party (Mobility Vision Research) has also filed revocation petitions. In all these Ericsson has been taking extensions. Pending.
- xi) Intex Techs. (India) Limited and Xiaomi Technology and Ors...Delhi High Court took similar view as in Micromax
- xii) Ericsson vs. iBall

In November 2011, Ericsson filed case against iBall for violation of 8 SEPs in mobile device.

iBall said it was importing product from China and marketing in India hence cannot be said to be violating any patent. At the most it can be an innocent infringer.

iBall filed before CCI abusing Ericsson of its dominant position under Section 4 of Competition Act, 2002 on account of: Ericsson's refusal to identify the allegedly infringed SEPs; the threat of patent infringement proceedings; the attempt to coax iBall to enter into a "one-sided and onerous NDA"; tying and bundling patents irrelevant to iBall's products by way of a GPLA; demanding unreasonably high royalties by way of a certain percentage value of handset as opposed to the cost of actual patented technology

May 2015, the CCI found prima facie abuse of dominant position by Ericsson in the domain of "Standard Essential Patents for 2G, 3G and 4G technologies in GSM standard-compliant mobile communication devices in India", and asked the Director General to conduct an investigation within 60 days.

May 2015 itself, Ericsson challenged the CCI's order in Delhi High Court. The alleged ground was that the order was "arbitrary in nature and without jurisdiction". In September 2015, the Court ordered that the Director General of the CCI shall not submit a report of the investigation or pass a final order in the case before the CCI.

The Court also passed an interim injunction against iBall in light of interim orders passed in the matters of Ericsson vs. Xiaomi (December 2014), Ericsson vs. Gionee (October 2013), and Ericsson vs. Micromax (March 2013). While the injunctions imposed on Xiaomi and Micromax were on the sale, manufacture, advertisement and import of their devices, iBall and its agents and affiliates have been restrained from only importing devices that are allegedly infringing in nature.

- xiii) Ericsson v/c Lava Mobiles Delhi High Court (No.23) Case No. CS (OS) 764/2015 Pending before Delhi High Court over its SEP relating to AMR, GSM and EDGE technologies.

The matter was first heard in Court in March 2015. Both companies tried to negotiate a FRAND agreement but failed.

Subsequently, the Delhi High Court decided in April 2015 and later in May 2015 that the case would be heard on its merits. Pending.

- xiv) 2013 Year: Ericsson v/s Gionee 2013 over the alleged infringement of the 8 SEPs.

October 2013, the Delhi High Court fixed an interim royalty by Gionee to Ericsson for one month, calculated on the basis of the sales of Gionee's devices about US \$24 million in India as per Ericsson v/s Micromax. Case Pending

- xv) December 2014, Ericsson v/s Xiaomi alleged infringement of the 8 SEPs

Delhi High Court granted an ex-parte injunction on the sale, manufacture, advertisement, and import of Xiaomi's devices.

Xiaomi stated that its devices Mi3, Redmi S and Redmi Note 4G, contained Qualcomm chipsets, which implemented technologies licensed by Ericsson. The Redmi Note 3G and previous models of the Mi and Redmi ranges, however, contained chipsets from Mediatek, which does not have a licensing agreement with Ericsson.

Xiaomi challenged the injunction in Division Bench of the Delhi High Court. The DB issued temporary orders to allow Xiaomi to resume the sale, import, manufacture, and advertisement of its mobile devices subject to:

- Xiaomi would only sell devices that contained Qualcomm chips.
- Xiaomi would deposit Rs. 100 towards "royalty for every device it imported to India from the date of the launch of the device in India to January 5, 2015. This amount was to be kept in a fixed deposit for three months while the case proceeded.

- xvi) Lava and Micromax have also filed counter claims in the Delhi High Court. Pending

## 1. b) CCI Matters



- i) On 24.6.2013 Micromax filed before CCI accusing Ericsson of abusing its dominance position and anticompetitive practices. (Case No. 50 Of 2013)
- ii) On 30.9.2013 Intex filed before CCI (Case No. 76/2013)
- iii) On 12.11.2013 and 16.1.2014 50/2013 & 76/2013 CCI passed orders in both the above referred cases and observed that prima facie it is apparent that Ericsson is dominant in the relevant market of GSM and CDMA in India, enjoys complete dominance over its present and prospective licensees in the relevant product market, seemed to be acting contrary to the FRAND terms by imposing royalties linked with cost of product of user for its patents. **The CCI concluded that the requested royalties 'had no linkage to the patented product' and were thus 'discriminatory as well as contrary to FRAND terms'. CCI ordered** directing the DG CCI to investigate the matter regarding violations of the provisions of the Competition Act by Ericsson, as SEP holders. The CCI has further directed that if DG finds that Ericsson has contravened the provisions of the Competition Act, he shall also investigate the role of persons who at the time of such contravention, were in-charge of and responsible for the conduct of Ericsson so as to fix the responsibility of such persons under Section 48 of the Competition Act.
- iv) The Competition Commission of India also found Ericsson prima facie guilty of abuse of its dominant position in the matter of Ericsson vs. iBall (September 2015).
- v) This was challenged in Delhi Court. Delhi High Court in its order dated 30.3.2016 Telefonaktiebolaget LM Ericsson (PUBL) versus CCI W.P.(C) 464/2014 & CM Nos.911/2014, 915/2014 and WP ( C) 1006/2014 & C M Nos. 2037/2014, 2040/2014 has upheld the authority and views of CCI orders dated 12.11.2013 and 16.1.2014.
- vi) It may be brought to notice here that there may be several other cases, which are now immediately known. In one such case one

of purported SEP holder for 3G patent has asked one of Indian manufacturer for 100 K Euro Bank Guarantee and pre port royalty. The company is not utilizing any patents.

## 2. Demonstration of protection and advancement of National Interests

CMAI recommend that the IPR Policy of India should be targeted as clear demonstration of protection and advancement of National Interests. India already has a fully TRIPS-compliant IP regime and policies on IPR should promote local innovation, entrepreneurship and access to technologies.

### Background

- i) The “Second Modi-Obama Summit” by “Brookings India” published in January, 2015 in Article” IP Rights-Signs of Convergence” by Mr Subir Gokarn, Former RBI Governor vide Page 29 bring out following:

*India’s negotiating position must be based on a clear demonstration of protection and advancement of national interests, relating to both the innovation environment and the spread of benefits of technology*

- ii) And in the same reference on Paged 27 is brings out:

*The Ministry of Commerce announced the setting up of a think on IPR issue. Chaired by a former judge, .....It emphasized a larger and very signification motivation: the need to stimulate and incentivize innovation in India. In effect, **it opened up the question of whether the current regime was serving India’s own interests;***

- iii) *Prof Sivaramjani Thambisetty, an Associate Professor of Intellectual Property Law at London School of Economics and Political Science*

vide the article appearing on 19.12.2014  
<http://spicyip.com/2014/12/guest-post-the-twelve-gifts-of-a-national-intellectual-property-policy.html> opined:

***“The role of the Government should be to facilitate, and not to actively promote intellectual property rights. These rights do not themselves translate to increased innovation, economic growth or well being, they are mere proxies for unclear productive gains. Actively encouraging a ‘service’ or ‘performance’ based corporate approach to increasing the ‘use’ or ‘take-up’ of intellectual property rights, risks privatizing the public goods nature of these rights.”***

### **3. Eminent Domain**

***CMAI would like to recommend that the principal of “eminent domain”- which essentially allows the state to subordinate private property right to the public interest in certain circumstances – must be considered for India.***

#### ***Background***

The “Modi Obama Summit” published by “Brookings India” in September, 2014 in Article” IP Rights-An eminent Domain approach for India and US” by Mr Subir Gokarn, Former RBI Governor vide Page 45 bring out following:  
(Extracts of the Article is attached Annexure C)

*The issue of patents and regulatory data protection is undoubtedly the most contentious. ....To the extent that such knowledge is in the private domain, the power of the state to make it public, at least in a*

*limited way, must be used. This situation seems to resemble the ones in which the “**eminent domain**” power is used in the U. S. that power is based on the premise that the public good sometimes outweighs the private interest. Using it in the context of IPR clearly brings a cross-border dimension to an otherwise largely domestic issue, but the principal is valid and could provide the basis for a middle-ground solution.*

This is again covered in other Article by Mr Subir Gokarn( as mentioned above) in another issue of “ The Second Modi-Obama Summit” published in January, 2015, where vide Page 29 it says:

*On the larger technology for development, the principal of “**eminent domain**”- which essentially allows the state to subordinate private property right to the public interest in certain circumstances – must be given some space. Which would require capping the potential returns on IPR Eminent domain is a well-established principal in U. S. jurisprudence.*

#### **4. Be aware of IPR Indexes and Lobbyists**

i) There is some news or statements of India IPR index being low. This statement in isolation can hardly be seen in right perspective. Moreover these are issued by industry chambers or private bodies. **There is no need to get concerned by statements of IPR Indexes.** India has to make policies what are best for it keeping in view its priorities. Some of such statements are given below:

a) As per news 27.4.2015 appearing in Financial Express:

<http://www.financialexpress.com/article/fe-columnist/ipr-must-promote-local-innovation/67087/>

*“According to the **US Chamber of Commerce’s** Global Intellectual Property Center, India continued to score lowest in its International Intellectual Property Index (for 25 countries), and most notably in categories relating to patents, copyrights and international treaties. India did slightly better in categories such as enforcement, trademarks and trade-secrets.”*

b) As per news appearing in Financial Express on 13.4.2016:

*Global Intellectual Property Index presents a dismal picture of India in respect of safeguarding IPR, with it being ranked 37th out of 38 countries. It scored 7.05 out of 30.....*

ii) It need to be appreciated that in the context of IPR cases in world for decades and several patent companies, several SSOs, several SEPs, multi fold litigations across globe, billions of dollars at stake, there are several lobbyist firms/bodies/legal luminaries/NGOs/self declared experts, who are ready to do batting for a particular side. India has witnessed the experience in the matter of net neutrality, where millions of responses were filed with telecom regulator. However India is competent and seasoned enough to decide the matters keeping in view the interest of India above everything and the net neutrality case has proved that.

## **5. Competition and IPR Policies**

**CMAI recommend that a proper balance need to be maintained between Competition Laws and IPR Policies and promotion of Innovations/Start Up India and Maker in India**

### **Background**

- i) Competition law and Intellectual Property Rights policies are linked together by the needs of innovation and several legal rules

- regulations to arrive at reasonable balance the scope and effect of each policy.
- ii) IPRs policy is meant to foster innovation. This benefits consumers through the new technologies/products. This is expected to spur economic growth. It provides innovators provision to exclude other parties from the commercial use of innovative products/technologies/services for a defined period. This in one way it creates monopoly for some period.
  - iii) Competition law is essential to curb market distortions, prevention of Anti competitive practices, abuse of monopoly, giving consumers benefits of good prices/ choice/qualities/services.
  - iv) The provisions in the Indian Patents Act facilitate competition while at the same time preserve the core exclusive rights of patent holders to commercially exploit their inventions and recoup their investment.
  - v) As per DIPP Paper *the competition law aims to prevent the misuse of dominant position or stockpiling of market power while patent law grants monopoly rights with certain exceptions to prevent abuse of such rights. The basic idea behind the Standard Essential Patents (SEPs) system is to reconcile the interaction between patents which are primarily 'private' and 'exclusive' as against standards which are meant to be 'public' and 'non-exclusive'.*
  - vi) Para 110 of Delhi High Court Judgment dated 30.3.2016 brings harmony between competition and IPR:
 

*whereas patent laws are concerned with grants of rights enabling the patent holder to exclude others from exploiting the invention, and in that sense promoting rights akin to a monopoly; the competition law is essentially aimed to promote competition and, thus, fundamentally opposed to monopolization as well as unfair and anticompetitive practices that are associated with monopolies*
  - vii) As regards anticompetitive practices, the Competition Act of Canada gives the Federal Court power to expunge trademarks, to license patents (including setting all terms and conditions), to void

- existing licenses and generally to abridge or nullify normal patent or trademark rights where the trademarks or patents have been used to injure trade or commerce unduly or to prevent or lessen competition unduly.
- viii) The existence of anti-competitive practices is also considered a ground for the granting of compulsory licenses in the laws of Chile, Argentina and the Andean Group Countries etc. In South Africa, a compulsory license can be granted if the demand for a protected product is being met by importation and the price charged by the patentee is "excessive in relation to the price charged therefore in countries where the patented article is manufactured by or under license from the patentee or his predecessor or successor in title".
- ix) CCI in its order dated 12.11.2013 concluded that the requested royalties (as asked by Ericsson) 'had no linkage to the patented product' and were thus 'discriminatory as well as contrary to FRAND terms'. CCI further ordered investigation in the matter by the Director General.

Extracts from DIPP Paper in this behalf are given below:

*10.2.2.2 Micromax Informatics Ltd v Telefonaktiebolaget LM Ericsson*

*Micromax Informatics Limited filed a complaint with the CCI, alleging that Ericsson abused its allegedly dominant position by imposing exorbitant royalties for the use of its SEPs, thereby violated the Competition Act, 2002. Micromax further argued that using the sales price of the downstream product, as the royalty base constitutes misuse of SEPs that would ultimately harm consumers. Micromax alleged that Ericsson was charging exorbitant royalties as no alternate technology is available and Ericsson is sole licensor for the SEPs necessarily implemented in 2G and 3G Wireless Telecommunication Standards.*

*CCI in its preliminary order stated that, in the relevant product market, Ericsson was 'the largest holder of SEPs for mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc. and thus was in a dominant position in the market for devices that implement such standards. CCI expressed that 'FRAND licenses are primarily intended to prevent "patent holdup" and "royalty stacking" and observed that "patent hold-up" undermines 'the competitive process of choosing among technologies' and thus threatens 'the integrity of Standard Setting activities. CCI also said that Ericsson's royalty rates were excessive and discriminatory, given that they were set as a percentage of the price of downstream products instead of as a percentage of the price of the GSM or CDMA chip.*

*The CCI concluded that the requested royalties 'had no linkage to the patented product' and were thus 'discriminatory as well as contrary to FRAND terms'. CCI further ordered investigation in the matter by the Director General.*

#### **10.2.1.2. Intex Techs. (India) Ltd v Telefonaktiebolaget LM Ericsson**

*Conclusion in this case is in many regards similar to that of Micromax*

***CCI held that a refusal to share the commercial terms of the FRAND license may lead to discriminatory commercial terms***

***CCI also said that charging different licensing fees for the use of the same technology from different users is against FRAND terms.***

***CCI further said that imposing a jurisdiction clause of the agreement that prevented Intex Tech. (India) Ltd. from adjudicating its disputes in a Country where both parties were in business also provided prima facie evidence of an abuse of a dominant position***



*10.2.1.3. Best IT World (India) Private Ltd. v Telefonaktiebolaget LM Ericsson*

*CCI observed that, because there is no alternate technology available for Ericsson's patents in the 2G, 3G, and 4G standards, Ericsson enjoys a complete dominance over its present and prospective licensees in the relevant market. **CCI opined that practice of forcing a party to execute NDA and imposing excessive and unfair royalty rates, prima facie, amount to abuse of dominance in violation of Section 4 of the Act***

- x) Ericsson challenged the order of CCI in Hon'ble High Court of Delhi. The Delhi High Court has upheld the jurisdiction of Competition Commission of India (CCI) in the judgment delivered on 30<sup>th</sup> March, 2016.
- xi) After investigations, if the DG, CCI find the conduct of Ericsson violative of sections 3/4 of the Act, and the CCI accepts the same, then CCI may impose penalty up to 10% of the applicable turnover of Ericsson. CCI may also mandate the manner for charging the royalty. Affected parties can file compensation claim before the COMPAT. The CCI may also direct Ericsson to change its distortionary / abusive practices, and ask them to limit royalties on a component basis only.
- xii) It has also been seen that on several occasions the rates of royalties' have been increased manifold by patentee, once his patent is validated and accepted. Some relevant extracts:
  - a) Martin Shkreli Founder and former CEO of Turing Pharmaceuticals in Sep 2015 raised price of Daraprim drug by 5,556 percent (from US\$13.5 to US\$750 per tablet) after acquiring patent rights for drugs.

- b) Extracts from news item appearing in Financial Express on 27.4.2015 indicating patent holders started higher prices post TRIPS, though related top pharmaceutical industry:  
<http://www.financialexpress.com/article/fe-columnist/ipr-must-promote-local-innovation/67087/>

*Increased R&D and patenting activity by foreign affiliate firms (subsequent to strengthening of IP regimes) have rarely strengthened local innovation systems in developing countries. The Indian experience in this regard is no different.*

- c) It is alleged that post-TRIPS new drugs have become exclusive monopoly of innovating firms. The Indian experience indicates that post-TRIPS, multinationals in India have started marketing new patented drugs at higher prices..... No wonder that Indian Courts have often upheld pro-consumer and pro-competitive merits in cases of IP conflicts between foreign and domestic drug manufacturers,***

***xiii)*** The Delhi High Court in its Judgment dated 30.3.2016 has referred some judgments, extracts of which are given below:

- a) Para 188/189: In ***Broadcom Corporation v. Qualcomm Incorporated: 501*** On an appeal preferred by Broadcom,.....It observed that "*when a patented technology is incorporated in a standard, adoption of the standard eliminates alternative to the patented technology*". In such circumstances, the patent holder may be in a position to demand supra-competitive royalties. The Court proceeded to hold that "***in a consensus-oriented private standard-setting environment, a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, coupled***

***with an SDO's reliance on that promise when including the technology in a standard, and the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct”***

- b) Para 191: In the Matter of Rambus, Inc., No. 9302, at 4 (F.T.C. Aug.2, 2006), The Federal Trade Commission found that Rambus had distorted the standard setting process and engaged in anti-competitive
- c) Para 192: ***Eurofix-Bauco v. Hilti***, the European Commission held that it was an abuse to demand excessive royalty with the sole object of blocking or unreasonably delaying a licence. Upheld on appeal (Case T-30/89 Hilti AG v. Commission: **[1991] ECR II-1439**).
- d) **Para 193**: Orange Book Case, Germany 6<sup>th</sup> May, 2009 in **KZR 39/06, (Orange-Book Standard)**
- e) **Para 194**: *in Germany Courts Motorola for GPRS and Samsung for UMTS against Apple. European Commission held that that Motorola has abused its dominant position by seeking injunctive reliefs against Apple. In the case of Samsung, Commission did not proceed for decision, but accepted the Samsung's binding commitments not to seek injunctions in relation to any of its present or future SEPs for mobile devices for a period of five years against any potential licensee who accepted the specified licensing framework which provided for (a) a negotiation period of 12 months; and (b) in absence of a consensus, a determination by Court or an arbitrator of FRAND terms.*
- f) **Para 195**: **Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH: (Case C-170/13) on LTE standard 16 July, 2015**: The European Court of Justice held that a refusal of a proprietor of

an SEP to grant a licence on FRAND terms may, in principle, constitute an abuse within the meaning of Article 102 of TFEU

## 6. Compulsory Licensing

CMAI/TEMA recommend that the Government should invoke Compulsory licensing by taking on record that the public requirements with regard to a patented product have not been met and the product is not available for the public at an affordable price.

### Background

#### International Compliance

- i) This is a TRIPS & Indian Patent Act compliant provision empowering the Governments to check and control the misuse of patents.
- ii) The concept of Compulsory License at international level was first recognized and provided for vide Article 5(A)(2) the Paris Convention of 1967. The convention specifically mentioned that the member Countries have right to take legislative measures providing for the grant of Compulsory licenses to prevent the abuses which might result from the exercise of exclusive rights conferred by patent.
- iii) With the advent of the WTO, Compulsory license is now dealt in the TRIPS Agreement, and the relevant parts of the Paris Convention are inscribed into the TRIPS Agreement (*Article 2 of the TRIPS Agreement.*) The TRIPS Agreement and the Paris Convention for the Protection of Industrial property do not limit the grounds for application of Compulsory licenses by member States. (Paris Convention 1883 as amended by the Stockholm Act of 1967. at [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html) )

- iv) The TRIPS Agreement only lays down the conditions which have to be respected in granting and working of a compulsory license. These conditions basically require the license to be given only after negotiations with the patent owner for authorized use on reasonable terms have failed, and should last only until the ground for such grant subsists. This condition of prior negotiations can also be waived in situations of 'national emergency', 'other circumstances of extreme urgency', 'public non-commercial use' and 'anti-competitive practices', but the patent Owner has to be informed.
- v) Article 31 of TRIPS outlines conditions under which a Government can legally impose compulsory licensing, including the following:
  - . b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time, except in the case of a national emergency*
  - the requirement for prior efforts to seek authorisation and for producing predominantly for domestic use may be waived in cases where the compulsory license is permitted in order to remedy an anti-competitive practice; and*
  - Compulsory license can extend to dependant patents with conditions.*
- vi) Countries who have used flexibilities under the TRIPS Agreement or harnessed provision of compulsory licensing are Zimbabwe, Zambia, South Africa, Indonesia, Brazil , Malaysia, Thailand, etc.
- vii) Refusal to deal as a ground for granting a compulsory license has been provided in many national laws, such as the patent laws of China, Argentina and Israel.

- viii) The existence of anti-competitive practices is also considered a ground for the granting of compulsory licenses in the laws of Chile, Argentina and the Andean Group Countries etc. In South Africa, a compulsory license can be granted if the demand for a protected product is being met by importation and the price charged by the patentee is "excessive in relation to the price charged therefore in countries where the patented article is manufactured by or under license from the patentee or his predecessor or successor in title". *(This Para also appear hereinbefore in the heading of Competition, but repeated here for compulsory licensing provisions)*

### ***Compulsory Licence Provisions in India***

- i) The Government can invoke compulsory licensing if it feels that the public requirements with regard to a patented product have not been met and the product is not available for the public at an affordable price.
- ii) India has promoted compulsory licensing in its National Manufacturing Policy as a mechanism available for Government entities to effectuate technology transfer in the clean energy sector. India is also stated to have taken view to multilateralise compulsory licensing approach in negotiations under the UNFCCC.
- iii) In India, the first Compulsory Licence was given in March, 2012, as per news appearing on 17.11.2015 Financial Express

<http://www.financialexpress.com/article/industry/companies/india-needs-predictable-ipr-regime-novartis/166905/>

In March 2012, Controller General of Patents Design and Trademarks, P H Kurian had granted the first-ever CL to Hyderabad-based Natco Pharma to sell a generic version of Nexavar, a patented kidney cancer drug invented by German pharma giant Bayer

- iv) **The USTR Report 2014 Special 301 Report vide page 44 states that India's Controller-General of Patents granted a compulsory license under Section 84 of India's Patents Act (which allows private parties to initiate proceedings seeking a compulsory license of a patented article). This was upheld by a IPAB Judgment. The grant of the compulsory license was based, in part, on the innovator's failure to "work" the patent in India because it imported its products, rather than manufacturing them in India. The IPAB modified the Controller-General's reasoning to clarify that "in some cases" the "working" requirement could be met solely by importation. The IPAB, however, rejected the innovator's explanation that economic factors prevented manufacturing in India, stating, "the patentee must show why it could not be locally manufactured. A mere statement to that effect is not sufficient, there must be evidence."** This decision was appealed to Bombay High Court. The decision of Bombay High Court is not readily available.
- v) Compulsory licensing can be granted on the grounds of the existence of: (i) a refusal to license and (ii) anticompetitive exercises of IPRs by Patent holders.
- vi) It may be noted that in India in the case of Ericsson, the Competition Commission of India has already prima facie found it to be anti competitive and against its enforceability. This was stayed by Delhi High Court in interim judgment. However in the final judgment dated the 30th March, 2016, the Delhi High Court has upheld the authority of CCI and upheld their views. This has been discussed hereinbefore

### ***Indian Patent Laws for Compulsory Licensing***

- i) The Patent Act 1970 of India (Section 84, 90) provided for compulsory licensing of a patented invention to an interested person (only after the expiration of three years from the date of

sealing of the patent). Section 92 of the Patents Act provides that compulsory licence could be granted even prior to the expiry of the period of three years. Section 84(1) provides three grounds mentioned below:

*(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied ,or*

*(Taken from some here else) which may be the consequence of:*

- inadequate manufacture in India or failure to grant licenses on reasonable terms, resulting in (1) prejudice to an existing trade or industry or its development, (2)prejudice to the establishment of a new trade or industry in India, (3) prejudice to the trade or industry of any person or class of persons, (4) demand for the patented article not being met by local manufacture, (5) failure to develop an export market for the patented articles made in India, and (6) prejudice to the establishment of commercial activities in India;*
- prejudice to the establishment or development of trade or industry in India in goods not protected by the patent arising from restrictive conditions imposed by the patentee;*
- non-working of the patent in India on a commercial scale;*
- demand for the patented article being met by importation from abroad; and commercial working of the patented invention in India being hindered or prevented by import of the patented articles from abroad.*

*(b) that the patented invention is not available to the public at a reasonable affordable price.*

*(c) that the patented invention is not worked in the territory of India*

- ii) **Very Importantly**, some of the grounds as per Sub Section(7) of Section 84 of the Patent Act( vide para 129 of Delhi High Court Judgment dated 30.3.2016) for fulfillment of “*that the reasonable requirements of the public with respect to the patented invention have not been satisfied* “ are:

*d) if the patented invention is not being worked in the territory of India on a commercial scale to an adequate extent or is not being so worked to the fullest extent that is reasonably practicable; or*



*e) if the working of the patented invention in the territory of India on a commercial scale is being prevented or hindered by the importation from abroad of the patented article by-*

*(i) the patentee or persons claiming under him; or*

*(ii) persons directly or indirectly purchasing from him; or*

*(iii) other persons against whom the patentee is not taking or has not taken proceedings for infringement."*

- iii) Since the coming into force of the WTO TRIPS Agreement, the Act has been amended three times. The Patents (Amendment) Act, 2002 replaced the old chapter on compulsory licensing.
- iv) The Indian law requires authorities to give regard to certain general considerations while granting compulsory licenses. These considerations, given in Section 83, include some directly relevant to the relationship between IP and competition law. They include, inter alia that patents are not granted merely to enable a patentee to enjoy a monopoly for the importation of the patented article; that the patentee does not abuse his rights including through resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and that patents are granted to make the benefits of the patented invention available at reasonably affordable prices to the public.
- v) Section 84 specifies the grounds for applying for a compulsory license, which include public interest, affordability and working in India. *(Public interest is explained in sub-section 7. From a competition perspective, any action or omission by the patentee that impedes commercial activity in India could be adjudged as against public interest.)*
- vi) Section 89 explains the general purposes of granting compulsory license as:
  - (i) That the patented inventions are worked on a commercial scale in the territory of India without undue delay and to the fullest extent that is reasonably practicable;*

*(ii) That the interests of any person for the time being working or developing an invention in the territory of India under the protection of a patent are not unfairly prejudiced.*

- vii) Section 90 of the Act also empowers the Controller to settle the terms and conditions for compulsory licences.
- viii) Sections 92 (1) and 92 (3) enable the Central Government and the Controller, respectively, to deal with circumstances of national emergency or circumstance of extreme urgency related to public health crises by granting relevant compulsory licences.
- ix) The new amendment also requires an applicant for a compulsory license to prove that s/he approached the patentee with reasonable terms for a license. Similarly, where the patent holder imposes a condition for a grant-back, prevention of challenges to the validity of the patent is deemed to be against public interest.
- x) The Controller, if satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price, may order the patentee to grant a licence upon such terms as he may deem fit.

**Thus, many provisions in the Indian Patents Act facilitate competition while at the same time preserving the core exclusive rights of patent holders to commercially exploit their inventions and recoup their investment.**

## **7. Royalty on Patented Components and not on entire product**

CMAI/TEMA recommend suitable legal provisions so that royalty is payable only on the cost of component/part/chip where Patent is held and not on the entire cost of product.

## **Background**

It is a matter of concern that in India the Royalty is being charged (as per interim judgment of Delhi High Court dated 13<sup>th</sup> March, 2015) on the value of entire device of mobile phone in place of the value of the component in which such Patents are used and the patent was for a particular component/chip/part. This practice has been seriously frowned at in major jurisdictions across the globe.

To quote from DIPP Paper:

*Page 25 Para 10.2.2*

*Telefonaktiebolaget LM Ericsson against Micromax: The Court used the net sales price of the downstream device as a royalty base in calculating amount of royalty.*

*Intex Techs. (India) Limited<sup>1</sup> and Xiaomi Technology and Ors*

*High Court in both the cases took similar view and passed similar orders based on principle followed in Micromax case.*

- ii) As per para 8 of CCI order dated 12.11.2013 Case No. 50/2013, Micromax has said that: The OP ( ie. Ericsson) had arbitrarily imposed royalty on basis of sale price of the phone, while the royalty should be charged on basis of value of technology/chipset used in the phone. Due to this, royalty for use of same chipset in a smart phone is more than 10 times the royalty for ordinary phone, while the chipset gives no additional value to a smart phone, then it gives to an ordinary phone.

- iii) It may be relevant here to refer to para 17 of CCI order dated 12.11.2013 Case No. 50/2013, wherein CCI observed:

*17. The allegations made in the information and not refuted by OP (ie Ericsson) concerning royalty rates **make it clear that the practices adopted by the OP were discriminatory as well as contrary to FRAND terms. The royalty rates being charged by the OP had no linkage to patented product, contrary to what is expected from a patent owner holding licences on FRAND terms. The OP seemed to be acting contrary to the FRAND terms by imposing royalties linked with cost of product of user for its patents. Refusal of OP to share commercial terms of FRAND licences with licensees similarly placed to the informant, fortified the accusations of the Informant, regarding discriminatory commercial terms imposed by the OP. For the use of GSM chip in a phone costing Rs. 100, royalty would be Rs. 1.25 but if this GSM chip is used in a phone of Rs. 1000, royalty would be Rs. 12.5. Thus increase in the royalty for patent holder is without any contribution to the product of the licensee. .... Charging of two different license fees per unit phone for use of the same technology prima facie is discriminatory and also reflects excessive pricing vis-a-vis high cost phones.***

- iv) It may be submitted here that as per para 180/181 of Delhi High Court dated 30.3.2016:

Para 180

Intex claimed that Ericsson's demand for payment of royalty at an *ad valorem* rate based on the value of the product instead of the component that uses the said technology is patently unfair as it

amounts to Ericsson claiming part of the value of the product that is attributable to other features and innovations which are unconnected with the technology claimed to be patented by Ericsson.

Intex further alleged that the products in question use several patented technologies and unreasonable demand of royalties by patent holders would result in 'royalty stacking'. It is alleged that excessive demands of royalty by Ericsson amounts to a 'patent holdup' and, thus, prevents supply of products to the consumers.

#### Para 181

Intex has also complained that Ericsson had indulged in "bundling and tying licensing" which according to Intex is anti-competitive and proscribed under the Competition Act.

- v) Even on the face of it, this looks strange as the total cost of product/mobile varies from company to company, brand to brand, features to features.
- vi) There are several cases in this behalf. Especially in some cases of pharmaceutical the entire product cost has been considered in some instances. The facts of case are entirely different. One cannot segregate the components/parts in the final product ie. Medical tablet or syrup. That is not the case in telecom/mobile/electronics. Also there is no concept of SKD/CKD in case of pharmaceutical industry. If a particular chemical is imported for use in formulation, then it cannot be asked to pay royalty on the said chemical. It is difficult to apply same principal to electronic/mobile/telecom products, where there are thousands of patents on several components/parts and the cost of final product varies substantially.

vii) For electronics/mobile/telecom, there are several case laws in this behalf confirming that royalty cannot be asked on the entire cost of product. Some of which are:

a) One of interesting case is **Cornell University v. Hewlett-Packard Co.**, 609 F.Supp.2d 279 (2009) (United States District Court, N.D. New York)

In this case HP was asking royalty on entire product even though he had patent for a small part. The Courts give detailed judgment with arguments and justifications. The decision quoted in summary are:

Holdings:

The District Court, Randall R. Rader, Circuit Judge, sitting by designation, held that:

[1] entire market value rule could not be applied to damages calculation;

[2] hypothetical processor revenue was appropriate royalty base;

.....

[5] jury included quantifiable amount in verdict that could be stricken, allowing for remittitur;

*(Remittitur is the process by which a Court compels a plaintiff to choose between reduction of an excessive verdict and a new trial.)*

*(A district Court's duty to remit excessive damages is a procedural issue, not unique to patent law,)*

[6] maximum recovery rule would have been violated by making upward adjustment to unchallenged royalty rate component of verdict.

.....

Damages: An over-inclusive royalty base in patent infringement suit, including revenues from the sale of non-infringing components, is not permissible simply because the royalty rate is adjustable. 35 .S.C.A. § 284.

- b) In Mauritis Dolmans Institute for Prospective Technological Studies, SEP Workshop Seville, Oct 27, 2014, reference has been made to the following decisions wherein the issue that whether or not the Royalty should be charged on the entire value of device.

Entire Market Value – limiting case law

IP Innovation v RedHat (2010): sound economic basis needed

“In invoking the entire market value rule, Mr. Gemini included 100% of Red Hat’s and Novell’s total revenues from sales of subscriptions to the accused operating systems in his proposed royalty base. Mr. Gemini’s methodology **however does not show a sound economic connection between the claimed invention and this broad proffered royalty base. The claimed invention is but one relatively small component of the accused operating systems.**”

- c) In Uniloc v. Microsoft (2011):

CAFC reaffirms limitation of entire market value, but using a □ low royalty rate is no excuse for using the “entire market

value” for minor features: “Uniloc argues that the entire market value of the products may appropriately be admitted if the royalty rate is low enough, relying on the following statement in Lucent Technologies. [...] **The Supreme Court and this Court’s precedents do not allow consideration of the entire market value of accused products for minor patent improvements simply by asserting a low enough royalty rate.**”

## **8. Indian Government Departments accepting Standards without knowing the IPR/SEP and royalty terms**

1. Department of Telecommunications (DOT) has accepted the standards as informed by ETSI and other SSO formed by SSO without any knowledge of the patents or SEP involved and no information about the percentage/extent of royalties payable. DOT has made them mandatory to be followed. This has created a situation where the standards cannot be met without following the SEP. This has exposed the Indian companies to unknown liabilities. **There is a Need for policy measures to ensure that the Government Departments consider the SEP/Patents/Royalties while approving the standards so that its impact on viability and consumer is assessed.**
  - i) Delhi High Court in its Judgment dated 30.3.2016 vide Para 194. Has said *“In recent times, there has been much advancement in the telecommunication sector and technology. Companies - such as Ericsson -have acquired a large portfolio of patents which have been accepted as a part of the standards established by various SSOs. Enforcement of these SEPs has become a major area of dispute between the technology company holding the SEPs and mobile phone manufacturers.”*



- ii) A reference is made here to para 14 of CCI order dated 12.11.2013 Case No. 50/2013, vide which CCI observed:

***Ericsson's patents having been accepted by Department of Telecommunication, India and every telecom service provider in India is required to enter into a "Unified Access Service License Agreement with Department of Telecommunication ( Dot ). As per letter dated 03.10.2008, DoT has directed that All GSM/CDMA network equipment imported into India should also meet the standards of international telecommunication technology, as set by International Telecommunication Union, Telecommunication Engineering Center and International Standardization bodies such as 3GPP, 3GPP-2, ETSI, IETF, ANSI, EIA, TIA, IS.***

- iii) CCI in its orders dated 12.11.2013 and 16.1.2014 has “expressed a prima facie view that the patent holder enjoys complete dominance over its present and prospective licensees. The CCI concluded that the requested royalties 'had no linkage to the patented product' and were thus 'discriminatory as well as contrary to FRAND terms'. CCI ordered directing the DG CCI to investigate the matter regarding violations of the provisions of the Competition Act by Ericsson, as SEP holders.”
- iv) As para 20 of Delhi High Court Judgment as stated above, it has been observed by CCI “that Ericsson was a member of ETSI and held several SEPs which were recognized as standards by ETSI”. Thus there was conflict of interest in SSO while standards were formed. **In view of this, there is a need to ascertain at the time of accepting the standards, as to which SEP holders were member of the Committee/ETSI while forming the standards. This will help**

- decision makers to have a view of the interested parties in standard making by ETSI or other SSO.
- v) **There is need for Government/ DOT to find out from records if ETSI informed Government/DOT of the patents and SEPs. If not, it is important that a formal protest need to be taken to ETSI even now and a policy to be cautious in future.**
  - vi) It would be seen from the para 164 of Delhi High Court Judgment dated 30.3.2016, that **the Section 21 of the Competition Act provides for a statutory authority to make a reference to the CCI if it proposes to take a decision which may be contrary to the provisions of the Competition Act.** We request Government/DOT to find out from records the view taken for not making reference to CCI. We also request that it be mandated for all Government Departments in future that a reference be made to CCI while accepting a SEP for standards that may have affect contrary to Competition Act i.e., Dominance or anticompetitive.
  - vii) The Delhi High Court Judgment dated 30.3.2016 clarifies that IPR are goods and hence liable for service/sales tax. **There is accordingly need for the Government to find out the royalties paid on use of Ericsson patents in India by other telecom companies and the sales/service tax paid on the same. If not then the consequential actions thereon.**
  - viii) It is said that SEP has been widely used in telecom technologies in India. Whereas one company Ericsson has raised demand for royalties from mobile manufacturers Micromax, Intex, **there is need for the Government/ Revenue Department to find out how much royalties have been paid on patented technologies by**

**others and service tax/sales tax paid on that. If not paid, then what are consequential actions needed.**

## **9. Role of Standard Setting Organizations (SSO)**

- i) As per DIPP Paper, *while there are various definitions for the term "Standard, in simple terms, a standard can be defined as 'a set of technical specifications that seeks to provide a common design for a product or process'. These standards could be mandatory when enforced by law or voluntary.*  
*The de jure standards are, in general, set by Standard Setting Organizations (SSOs) such as the European Telecommunications Standards Institute (ETSI), the International Telecommunication Union (ITU), Institute of Electrical and Electronics Engineers (IEEE) etc. The role of SSOs is to coordinate and facilitate a standard setting process with the involvement of various stakeholders. Standards can be adopted at a worldwide scale, or only at a regional scale or even national scale*
- ii) There are several Standards bodies spread across world and they differ from one another in their membership and areas of operation or vision. They also differ on the technology underlying the standard, and the IPR policies meant to safeguard the interests of patent licensors as well as the licensees. Most of them are private entities. The Countries have hard time in reconciling various standards set by different SSOs. On some occasions there is also contradiction in between different SSOs standards.
- iii) Incidentally there is only one and the one a formal statutory body ITU-International Telecom Union, Geneva, a subset of UN, where 197 member Countries elect the officers and all decisions are based on majority and consensus. Their working by and large takes a view

which is technology independent and not catering to any particular patent or SEP. There is hardly any reference to standards of ITU in most of the IPR related litigations.

- iv) A reference be made here to para 11 of CCI order dated 12.11.2013 Case No. 50/2013, wherein CCI observed :

*Standardisation is a voluntary process wherein a number of market players reach a consensus for setting “common technology standards” under the support of a Standard Setting organisation, which in the present case is ETSI. In simple terms, standardisation is the process of developing and implementing technical standards. Such technological standards are termed as **Standard Essential Patent, when they are patented and for which there are no non-infringing alternatives. Once a patent is declared as Standard Essential Patent, it faces no competition from other patents until that patent becomes obsolete due to new technology/inventions.***

- v) Delhi High Court in its Judgment dated 30.3.2016 also referred to standardization vide para 9 as:

*Thus, any technology accepted as a standard would have to be mandatorily followed by all enterprises involved in the particular industry.*

*The implication of accepting a patented technology as a standard is that all devices/equipments compliant with the established standard would require to use the patented technology and its manufacture would necessarily require a licence from the patentee holding the SEP.*

- vi) This is a big dilemma. A private body called SSO setting standards and various Countries adopting the same under the excuse of seamless connectivity without knowing that it involves which patents or SEP and without knowing that it involves payment of royalties at what rates.
- vii) Membership of SSOs and contribution or no contribution of technology providers is a voluntary work rather than a statutory or legal requirement. The working of SSO tends to form standards which its members submit and to that extent it favour to members. To that extent there is a conflict of interest.
- viii) By and large SSO does not inform as to what patents are involved or which is SEP. SSO does not appear to have disclosed the patents relied by them and need to be followed by manufacturers to meet the standards. There is no way to find as on date, as to what patents the manufacturer need to follow for manufacture of a telecom or mobile product. This gives rise to uncertainty and unknown demands from alleged patent holders.
- ix) SSO also hardly scrutinize or verify the validity of purported patent. It is left to patent holder to announce that it has SEP.
- x) Every SSO has its own IPR related policy.
- xi) The SSOs does take commitment from technology providers that they will give licenses on FRAND basis. These are a private contract between the standards body and the members. These are not disclosed to world. No fixed royalties and other terms are informed to world. No one knows what is FRAND terms and conditions. SSO does not help or coordinate FRAND terms. There is lack of information of existing royalty terms due to NDA and no statutory backing for FRAND. As a result of negotiations between patent

- holders or SEP and users is left to individual negotiations and terms and laws and interpretations. So it is left to Civil Courts to decide if FRAND has been followed or not or if the same is anti competitive or not and also to adjudicate and give judgments on individual cases world over. These are then interpreted and relied to settle disputes between patentee and manufacturers; according to the laws governing patents and contracts of the individual Country. This is true for India, USA and other Countries.
- xii) Added to this is the fact that negotiations between SEP and users on royalty and other terms are termed as private. Even in most of litigations, the result is a negotiated agreement outside the Court system. And there is a system of NDA, whereby SEP holder and user are not permitted to disclose the terms at what they have licensed to other users. It becomes difficult then to know as to on what terms royalties have been decided for other users. To that extent, this can be seen as nontransparent.
  - xiii) **There is need for a provision in statute for SSO and its experts from different fields to provide inputs, logics/basis, guidelines supported with legal and statutory backgrounds and keeping in view the economic viability and need for the public at large to inform about different methods that can be used to quantitatively determine royalty terms.** Yet it is too much to expect from a private members body, unless Government provides statutory requirement for the same.
  - xiv) **There is also need for appropriate regulation making it compulsory to disclose the patents involved in standards made by SSO and terms of royalty etc.**

## 10. ETSI .... one of SSO

At times it is argued that ETSI determines the FRAND and SEP. It is not correct. ETSI determines standards. ETSI has no role in determining FRAND.

## **Background**

Uniloc v. Microsoft (2011):

It has been mentioned in above that the standards setting bodies like European Telecommunications Standards Institute (ETSI) ETSI, do not play role in determining FRAND. The observations are as under:-

*“It is important to note that standards setting bodies, and in particular the European Telecommunications Standards Institute (ETSI) ETSI, do not dictate the terms of template licenses nor do they give guidance on what FRAND might be. Further they do not set a royalty rate, which may be considered FRAND, and they do not check or scrutinize the purported essentiality of any patent notified to them. Consequently, there is scope for uncertainty, debate and, potentially, litigation.”*

## **11. Standard Essential Patent- SEP declarations by patent holders fared badly in Courts .....Need Government Intervention**

- i) Make in India, Digital India are big focus of NDA Government and the study shows that number patents that claim an invention on these standards is constantly increasing. Hence there is definite need to look into this as a policy statement/issue.**
- ii) As per DIPP Paper with an increasing pervasiveness of standardized technology in virtually all sectors, and particularly**

telecommunications, in India and worldwide, issues associated with SEPs are increasingly agitated

- iii) There is no authority who decides if particular patent is SEP or not. SEP is declared by the patent holder, which may or may not be verified & legally sustainable. The contention that the particular patent is SEP or its validity is also contested legally and mostly decided out of Courts or by negotiated settlements. That also does not answer the question on validity of patent or its SEP nature. In some cases even after Courts passed orders for royalty, later the patent was not found to be valid. **There is need to provide legal provisions to some Indian authority to verify and validate and then announce that a particular patent is SEP.**
- iv) As per European Commission Competition Policy brief [http://ec.europa.eu/competition/publications/cpb/2014/008\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf)  
there are thousands of SEPs reading on technologies implemented in various standards set by the SSOs. For example, **the total number of SEPs declared to ETSI is 155, 4748. More than 23,500 patents have been declared essential to the GSM and the "3G" or UMTS standards developed by ETSI.** These standards need to be implemented in virtually all smart phones and tablets sold in Europe.
- v) As per para 1 of CCI order dated 12.11.2013 Case No. 50/2013, **"Ericsson, on its official website, claims to have 33,000 patents to its credit, with 400 of these patents granted in India,** and the largest holder of "Standard Essential Patents for mobile communication.



vi) It may be relevant to refer here Para 16 of CCI order dated 12.11.2013 Case No. 50/2013 vide which CCI observed:

*16. From the perusal of the Information and the documents filed by the Informant, prima facie it is apparent that Ericsson is dominant in the relevant market of GSM and CDMA in India and holds large number of GSM and CDMA patents. Ericsson has 33,000 patents to its credit, with 400 of these patents granted in India, and the largest holder of SEPs for mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc.*

*Further, since the OP (ie. Ericsson) holds SEPs and there is no other alternate technology in the market, **OP enjoys complete dominance over its present and prospective licensees in the relevant product market. As such, OP can be said to be dominant.***

vii) The RPX Study <https://www.rpxcorp.com/wp-content/uploads/2014/01/Standard-Essential-Patents-How-Do-They-Fare.pdf> points out:

- **Overall, Alleged and Declared SEPs were relatively unlikely to succeed. Plaintiffs won on slightly more than a quarter of Alleged and Declared SEPs on a Unique Patent Basis across District Court and ITC proceedings.**
- **Alleged and Declared SEPs were generally less successful than other patents.** Plaintiffs won nearly twice as often on a Unique Patent Basis on other patents than Alleged and Declared SEPs.
- Alleged and Declared SEPs fared poorly in District Court proceedings. Plaintiffs won on only about a fifth of Alleged and Declared SEPs on a Unique Patent Basis and 28% of Alleged and Declared SEPs on a Defendant Patent Basis. Plaintiffs won on 12% of Alleged and Declared SEPs on a Defendant Patent Basis if patents

that were dropped or that lost prior to a verdict are taken into account.

- Alleged and Declared SEPs fared better at the ITC. Plaintiffs won on one third of Alleged and Declared SEPs on a Unique Patent Basis and on nearly half of Alleged and Declared SEPs on a Defendant Patent Basis. (Plaintiffs won on only one third of Alleged and Declared SEPs on a Defendant Patent Basis
  - Cases involving Alleged and Declared SEPs tended to proceed further. Defendants in cases involving Alleged and Declared SEPs were roughly twice as likely to reach a summary judgment order (9.8% vs. 5.3%) and trial (2.4% vs. 1%) than defendants in cases that did not involve alleged and declared SEPs.
- viii) In Japan also, the Tokyo District Court ruled that Samsung had indeed illegally abused its Standards Essential Patents to demand a sales ban and excessive royalties against the iPhone maker.

<http://appleinsider.com/articles/14/05/17/japanese-court-rules-samsung-abused-frand-patents-against-apple>

Japanese Courts found Samsung had abused SEPs in three ways.

- **First, by failing to honor its duty under Japanese Civil Code to negotiate with licensees in good faith**, given that its SEPs were created under a commitment to offer other firms licensing under Fair, Reasonable and Non Discriminatory (FRAND) terms.
- Second, the Court determined that Samsung had **declared its "E-bit patent" to be essential to practicing the 3GPP mobile standard, but then subsequently attempted to win a preliminary sales injunction against Apple with that patent. Courts worldwide have recognized that sales bans are in**

**inappropriate remedy in SEP cases where the two parties are simply negotiating a FRAND license.**

- **Third, the Court found that Samsung did not disclose its E-bit patent to the ETSI standards body until about two years after its 3GPP working group adopted the "invention" claimed by Samsung in its patent as part of its standard that any phone manufacturer would have to license in order to make a functional device.**
- **The Court capped Samsung's licensing demand to 9.9 million Yen (\$95,000 U.S.) for the patent against its excessive demands.**

- ix) *As per DIPP Paper para 10 Indian jurisprudence on Fair, Reasonable, and Non-Discriminatory (FRAND) licensing practices for standard-essential patents (SEPs) is at a relatively nascent stage.....para 9, Standard Essential Patents are yet to receive a legislative definition*
- x) No other jurisdiction in the world recognizes SEPs explicitly, i.e. in the IP Policy or Acts; it is always on a case to case, and on a patent basis by judicial determination.
- xi) In India SEP for telecom/mobile has been claimed by Ericsson. It is understood that Nokia, SiproLab, Sisvel, Core etc. have also issued letters to Indian Companies claiming patents and royalty. Nobody knows how many more may claim in near future. **There is definite need for a statutory provision for cap on total royalty that can be claimed, so that it does not exceed exponentially.**
- xii) Another issue is self certification done by patentee and royalty demanded. In case of Ericsson v/s Intex, **Ericsson submitted results and reports of lab tests it had conducted in-house on four "representative" Intex handsets available in the market. The reports were accompanied by an affidavit from telecom expert**

**Vijay Ghate and another by Max Olofsson, the Director of Patent Licensing at Ericsson.**

Issue is how far reliance can be made on some self identified and self selected alleged expert. In this case the alleged expert was not known to conduct such tests before, nor does he appear to have an accredited/certified test lab. It is alleged that the test report said that the sample is following standards of SSO. And that Ericson has SEP on that. There was not clarity if the test certified that the company infringed the patents.

**In view of this, there is need for a procedure under Indian laws to provide for a statutory/ Government authority to certify and test that the product has infringed the purported patent.**

- xiii) *As per DIPP Paper, SEP is a patent that claims an invention that must be used to comply with a standard. ....Standards organizations often require members to disclose and grant licenses to their patents and pending patent applications that cover a standard that the organization is developing..... Patent hold-up can occur when the owner of a patented technology fails to disclose its patent to an SSO and then later asserts that patent, when access to its patented technology is required to implement the standard. This conduct may provide the patent owner with market power that is derived from its technology being necessary to access the standard rather than its ex-ante value to buyers.*

*..... In order to ensure that standard setting remains beneficial, it is necessary to ensure that in cases where adopting a standard necessarily involves the incorporation of a patent into the industry standard, the relevant patent holder is not in a position to unjustly*

*exploit its market power newly accrued to it (for example, by extracting exorbitant royalty rates) to the detriment of the entire industry.*

There appears to be little or no information available in public domain with SSO and manufacturers in India as to what patents are to be followed, as has been stated hereinabove.

xiv) As per European Commission Competition Policy brief

[http://ec.europa.eu/competition/publications/cpb/2014/008\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf)

In the Samsung and Motorola cases, the Commission clarifies that in the standardization context, where the SEPs holders have committed to (i) license their SEPs and (ii) do so on fair, reasonable, nondiscriminatory (FRAND) terms, **it is anti-competitive to seek to exclude competitors from the market by seeking injunctions on the basis of SEPs if the licensee is willing to take a licence on FRAND terms. In these circumstances, the seeking of injunctions can distort licensing negotiations and lead to unfair licensing terms, with a negative impact on consumer choice and prices.**

**As a result of the Commission's investigation, Samsung committed to not seek injunctions in Europe on the basis of SEPs for mobile devices for a period of five years against any potential licensee of these.**

xv) **There is definite need for an agency/Body to declare authenticate the declaration of SEP by patent holders**

## **12. FRAND....a undefined term**

i) High cost of Royalty has always been a cause of concern in the minds of manufactures and the rate & basis of Royalty has always

been the issue contested in the Courts not only in India but also abroad.

- ii) The SEP holders are stated to have given undertaking to SSO that they will license patents on FRAND basis. There are confusion on FRAND ie. Fair, Reasonable and Non Discriminatory. The determination on so called FRAND basis also has always been a question challenged in the Courts.
- iii) This has been discussed substantially in SSO and SEP
- iv) The applicability of SEP and FRAND need much wider consultation and discussions, specially looking at the fact that these are one of most litigant matters worldwide and hardly there is a universal definition.
- v) 'FRAND licenses are primarily intended to prevent patent hold-up and royalty stacking. This means that when standard technologies are protected by patent rights, there is a possibility for "hold-up" by the patent owner to demand higher royalties or burdensome licensing terms before the standard was chosen. Hold-up can subvert the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Ultimately, the high costs of such patents get transferred to the final consumers.
- vi) FRAND has no formal definition or procedure or statutory backing and is left for negotiations between parties ie. Patent holder and manufacturers. There is hardly any way to find out what is reasonable royalty in the absence of all data provided by patent holder on the pretext of NDA signed with other users. The NDA when offered to Indian companies says applicable as per laws of Sweden/Singapore or other Countries. **There is need for a**

**statutory provision for patentee to disclose the terms and rates of royalty offered to other licenses worldwide and also make it mandatory to follow the Indian laws and jurisdiction.**

- vii) The SEP holders on several occasions use unfair and nontransparent practices. In view of NDA these details are not disclosed, leading to nontransparent and one sided negotiations.

For example:

- *charging separate rates from SEP holding and non SEP holding companies*
- *the terms also vary from Country to Country, client to client.*
- *offering entire pool of patents as a bouquet instead of the specific patent which is claimed to have been used by company.*
- *offering the entire pool of patents of 2G/3G etc.*
- *demanding exorbitant and excessive royalties. There are cases where Courts passed substantially reduced amounts (Some examples given below)*

- viii) **There is need for some statutory provision for a correlation between the cost of acquiring technology/patent and the rates of royalty.** It is said Ericsson purchased technology patents from the Inventor for Rs. 65 (USD 1) in 1998. Against this royalty from India for 20 years can be estimated to be in thousand of Crores.

- ix) Indian Companies did started negotiations with alleged patent holders that remained inconclusive, as is trend world over leading to Court cases.

- x) It may be stated here that patentee and Ericsson in the present case refuses to share with companies the commercial terms and royalty payments it had with other companies on the grounds of NDA with them, which strongly suggested that different royalty rates/commercial terms were being offered to the potential licensees belonging to the same category.

- xi) Martin Shkreli Founder and former CEO of Turing Pharmaceuticals in Sep 2015 raised price of Daraprim drug by 5,556 percent (from US\$13.5 to US\$750 per tablet) after acquiring patent rights for drugs. It is difficult to justify this with FRAND.
- xii) World over the royalties fixed by Courts were substantially lower than demanded by patentee. That brings the point that SSO and patentee have failed by and large to demand fair reasonable royalty on which basis FRAND has been started. And also this means litigations. **There is thus need for a statutory provision for patentee to arrive at reasonable basis on which royalty can be demanded keeping the shelter of FRAND.**

Some of the cases in the past have been:

- a) Microsoft v Motorola: Royalty reduced from 2.25 % of end product ie.6 Bn \$ per year to 1.4 Mn USD per year

Details:

- SEPs for IEEE 802.11 (WiFi) and ITU H.264 (MPEG)
- October 2010 – Motorola demanded license fees @ 2.25% of end product (about \$6B per year)
- November 2010 – Microsoft filed suit claiming the offer was not based on FRAND
- July 2011 – Moto sued for injunction in Germany
- US Court granted “anti-suit” injunction and awarded damages in favor of Microsoft for \$ 14.5M and set royalty @ \$0.035 per H.264 patent; \$0.316 per 802.11 patent (about \$1.4M per year)



b) Innovatio: Court reduced royalty asked by Innovatio from \$ 2500-3500 per installation to 0.0956 \$ per WIFI Chip or royalty per patent \$ 83-100 to 0.0050

Details:

- IEEE 802.11 (WiFi) SEPs
- 2011: Innovatio purchased about 30 WiFi patents and declared 19 as SEP and demanded from end users \$2500 - \$3000 per WIFI installation or about \$83 - \$100 per patent
- December 2011: CISCO, Netgear etc. filed cases against Innovatio for FRAND breach
- After analysis, Court fixed FRAND royalty of \$0.0956 per WiFi chip, or \$0.0050 per patent.

xiii) There are also cases where even after fixing the royalty by Courts, the patent was found to be invalid. For example

Realtek Semiconductor Corp. v. LSI Corp. et al., Case number 5:12-cv-03451, in the United States District Court for the Northern District of California, San Jose Division. Realtek v LSI  
<http://www.law360.com/articles/548585/print?section=ip>

Details

- IEEE 802.11 (WiFi) SEPs
- 24.6. 2012: Realtek requested FRAND license and on 29.6.2012 filed suit for FRAND breach
- 16.6.2014, the Court awards \$3.8M in damages in favor of Realtek

- Court determined royalty on FRAND basis at 0.12% and 0.07% for the patents (about \$0.001 - \$0.003 per WiFi chip) about half of what LSI was seeking royalties.
  - The jury finding followed a decision in May 2013 in which **Judge Whyte ruled that LSI had initiated a complaint with the U.S. International Trade Commission only to gain leverage in its royalties dispute.** Judge White found that LSI had sued at the ITC in an attempt to force Realtek, a Wi-Fi chipmaker suing for breach of contract, to pay higher royalties for the standard-essential patents.
  - International Trade Commission (ITC) subsequently found one of the patents invalid and not infringed
- xiv) In some cases the Court did not determined FRAND and decided that no injunction. For example:

a) Apple v Motorola (US)

Details

- *SEPs for ETSI GSM standard, others*
- *In August 2007 Motorola offered license @2.25% of each end user product*
- *In October 2010 Motorola filed ITC complaint, seeking exclusion of Apple products from import into US*
- *In October 2010 Apples files patent infringement case; Moto counterclaims*
- *Appeals Court rules Motorola may not seek or enforce injunction because Apple was not an “unwilling licensee” and because Motorola could be adequately compensated by payment of FRAND royalties. No FRAND rates were fixed.*

b) Apple v Motorola (EU): case similar to US case as above

Details:

- *Motorola filed for injunction in Germany*
- *Apple filed complaint with EC (DG Comp)*
- *German Court issued injunction*
- *EC found Motorola abused its dominant position, held that seeking or enforcing an injunction on the basis of SEPs is abusive when (1) FRAND commitment, and (2) willing licensee*

c) Samsung v Apple (EU). In this case Court did not decide FRAND royalty but said it be arrived by independent adjudicator or Court or Arbitrator

Details:

- *Various ETSI Telecom SEPs*
- *Samsung and Apple global dispute regarding smart phones, right from 2009.*
- *In December 2012: EC (DG Comp) informed Samsung of its preliminary view that Apple was willing to enter a FRAND license, and Samsung seeking injunction against Apple based on SEPs could be a violation of EC Competition Law*
- *Samsung entered a binding commitment with the following material terms:*
  - *It will not seek or enforce an injunction against a party who agrees to the Licensing Framework*
  - *Licensing Framework means negotiations for 12 months; if no agreement even then, FRAND to be*

*determination by independent adjudicator, Court or arbitration if mutually agreed*

### **13. Globally Patent Litigations are high costs and complexed...Need for Government Intervention**

CMAI/TEMA recommends suitable institutional mechanism to address the litigations in IPRS and also Special Courts to consider IPR Patent cases.

#### **Background**

- ii) World is full of litigations for IPRs between several Companies. IPR issues have been contested legally world over very forcefully, where several cases have been filed on each other.
- iii) The legal battle is extremely costly. The contesting of patents cases involve very high costs. World over patent cases are contested intrinsically. The case involves technical as also legal expertise. There are millions of patents and thousands of contest cases. The success rate is very low. There is compromise in most of the cases.
- iv) The modern era of digitalization has also created a challenge from taxation perspective. The MNCs operate in a global environment in various Countries by multilayered and criss cross companies and subsidiaries in different parts of world. Hence it is easy for Multi-National Companies to fragment their production and supply chain across various low tax jurisdictions. They can park and manage the Intellectual Property Rights in a particular country tax jurisdiction, production and delivery from different and several Country tax jurisdictions. This poses challenge to determine as to which place/country the IPR resides. The final products pass through several countries and their tax jurisdictions and may or may not be taxed either depending upon the concerned treaty/FTA/ domestic

laws. That also gives them choice of licensing the IPR from any Country of their choice and on different terms for different customers.

- v) One critical issue is if a licensee/company files case for revocation of patent, then the patentee expects the company to prove it. Similar was in the case of **Ericsson claimed that the burden of proving invalidity of patents lies on Micromax. That is a herculean task and costly task in terms of research and lack of knowledge due to NDA.**
- vi) There are questions of tax jurisdiction whether where products are manufactured or where products are sold. In Indian context the decisions are generally where product is manufactured, as would be seen from cases below (may not be fully relevant here). Their relevance for IPR cases with international cases needs examination. **There is a need for a statutory provision to address the royalty/tax issues and jurisdiction between places of manufacture/selling and IPR residing in which Country.**
- <http://www.lakshmisri.com/Uploads/MediaTypes/Documents/Situations%20of%20IP%20for%20taxing%20rights.pdf>
- *Qualcomm- Delhi Tribunal 56 taxmann.com 179 (Delhi - Trib.)*
  - *royalties for use of a technology is taxable in the place where the technology is used.....hence when used in manufacturing then manufacturers place and if used in product operations/working, then at place of use.*
  - *Anglo French Textiles- Madras High Court [1993] 199 ITR 785 (Mad.)....where manufacturing takes place*
  - *Lufthansa- [2015] 278 CTR 1 (Delhi)*
  - *Havells - [2012] 253 CTR 271 (Delhi)*

- *Metro & Metro- [2013] 158 TTJ 308 (Agra - Trib.)*
  - *Titan [2007] 11 SOT 206 (Bangalore)*
- vii) Traditionally India has not been able to develop patent litigation expertise due to lack of abundant Indian patents and other economic conditions. India also does not have specialized Courts for patent cases and the cases are bundled with other several pending cases, whereby on several times adequate attention and time is hardly available to argue and submit the details.
- viii) Indian Courts and Companies by and large hardly possess full technical knowledge/expertise by international standards/IPR disputes. We also hardly possess complete technical knowledge to study and examine the patent v/s others. Let us admit that India does not have expertise for contesting the IPR cases, as the battle is fought world over by several leading lawyers and also as proxy by Governments especially of China and USA.
- ix) Let us realize the fact that Countries like the US and UK have had a head start of over 100 years of IPR litigations. There can always be a decision taken/argued/decided sometime, somewhere that suits the particular Legal Counsel to argue. **This give rise to need for statutory provisions for the concerned Indian agency/body to be equipped with experienced background to make balanced view out of arguments pleaded and great amount of research needed to find out the alternative or counter decisions/judgments.** It is easy said than done.
- x) The statistics **reveal that 99% of the cases are settled or negotiated without waiting for a Court judgment.** That means final decision on who owns IPR is not certain. That also does not answer the question on validity of patent or its SEP nature.

- xi) There is admittedly not wide spread knowledge and expertise available within Country in such matters. As in China, **there is need for an institutional mechanism to contest IPR cases at Government level rather than individual level.**
- xii) Given below are some of facts with regard to litigations world over:

**a) 99% of cases are settled.**

As per Nalsar University of Law Paper ( Copy attached at Annexure....), A typical patent infringement case in the US costs 1 - 3 million dollars in legal fees for each side. This is despite the fact that 99% of all patent infringement cases are settled.

- b) Obviously the patent numbers are large. As per IAM study <http://www.iplytics.com/general/iam-magazine-publishes-study-on-standard-essential-patents/>

“Future technologies such as Internet of Things, smart cars, smart home and smart energy will increasingly rely on patented technology standards such as LTE, Wifi, NFC, RFID and Bluetooth. The number of patents that claim an invention on these standards is consequently constantly increasing. So called Standard Essential Patents (SEPs) can be extremely lucrative in terms of royalty income, but also in terms of being strong bargaining chips in cross-licensing negotiations. Accordingly, also the number of SEP litigation cases as well as the number of SEP transfer deals has been become more frequent.”

The study makes use of data from the IPlytics Platform tool, connecting information on:

- 80 million world-wide patents documents
  - 2 million world-wide standards documents
  - 300,000 declared standard essential patents (licensing statement, FRAND commitment, reciprocity statement, etc.)
  - 450,000 patents referencing standard as prior art
  - 15,000 patents that are subject to a patent pools
  - 42,000 patents that are subject to US litigation
- xiii) Interestingly, it is seen that companies like Ericsson does not appear to conduct its licensing activities in China, where most of the manufacturing for mobile and telecom is done. If it does, then according to Indian patent law, it cannot ask for a royalty again, as the patents have been exhausted. As stated earlier the actual use of purported patent is in the manufacture of chip, which is then used as a component for manufacturing mobile phone. So obviously it is for the chip manufacturers to follow the patents and not for the mobile manufacturers. Hence, the Companies claiming patent should logically file claims in the Country where components are being manufactured.
- xiv) Incidentally Chinese companies also have faced litigation in India ... Xiaomi from Ericsson and ZTE from Vringo. Interestingly the mobiles are manufactured in China, the purported technology patent is used in china, and even then there is no such ongoing litigation in China.
- xv) There are several rulings worldwide that preliminary injunction cannot be granted when the parties are engaged in negotiations for a license. Delhi High Court, however, passed interim judgment and payment of royalties without waiting for final judgment.

Some of the global cases, and also as quoted by DIPP Paper and European Commission are:



**a) DIPP Paper:**

**9.1.1 eBay Inc. v. Merc Exchange, L.L.C, the US Supreme Court** clarified that there is no special "patent law" that provides for granting injunctions in patent infringement.

**9.2.2.2 Samsung v. Apple** Court in this case held that seeking an injunction during negotiation of the FRAND license must be considered as an abuse of law or a breach of pre-contractual good faith. The Court held that injunction would put Apple under considerable pressure in the negotiation of the terms and conditions of the FRAND license. The injunction could compel Apple to agree to a license fee that exceeds the level that Apple could claim on the basis on Samsung's FRAND declaration ( CMAI comments: This case is discussed hereunder separately also)

**9.2.3.2 Nokia v. I.P Com's** High Court of Justice did not grant IP Com's request for injunctive relief, but ordered Nokia to plead on further issues, including FRAND

**9.3 Samsung Electronics vs. Apple, The Tokyo District Court** refused Samsung's request for a preliminary injunction on the ground that the asserted patents are SEPs encumbered with a FRAND commitment

**9.4 China** A Chinese Supreme Court advisory opinion issued in 2008 suggested that a Court will not find patent infringement if a patentee participates in standard-setting or otherwise agrees that the patented technology may be incorporated into a standard and subsequently files suit seeking injunctive

**b) European Commission**

Also as per European Commission Competition Policy brief (this is repeated here)

[http://ec.europa.eu/competition/publications/cpb/2014/008\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf)

*In the Samsung and Motorola cases, the Commission clarifies that in the standardization context, where the SEPs holders have committed to (i) license their SEPs and (ii) do so on fair, reasonable, nondiscriminatory (FRAND) terms, **it is anti-competitive to seek to exclude competitors from the market by seeking injunctions on the basis of SEPs if the licensee is willing to take a licence on FRAND terms. In these circumstances, the seeking of injunctions can distort licensing negotiations and lead to unfair licensing terms, with a negative impact on consumer choice and prices.***

*As a result of the Commission's investigation, Samsung committed to not seek injunctions in Europe on the basis of SEPs for mobile devices for a period of five years against any potential licensee of these.*

c) **[Ericsson v. TCT Mobile \(standard essential patents; injunction\)](#)**

Feb 2014 Detailed Judgment at:

[http://www.eplawpatentblog.com/2014/February/2013-11-29\\_TGI\\_Paris\\_JME\\_Ericsson\\_c\\_TCT%20Mobile\\_translation.pdf](http://www.eplawpatentblog.com/2014/February/2013-11-29_TGI_Paris_JME_Ericsson_c_TCT%20Mobile_translation.pdf)

And discussions on this subject vis a vis EU/Germany etc. are at

<http://www.eplawpatentblog.com/eplaw/2014/02/fr-ericsson-v-tct-mobile-standard-essential-patents-injunction.html>

Ericsson in this case accused TCT Mobile of infringing the French designations of these patents by marketing product ranges of mobile phones suitable and intended for use on the 3G network

**A preliminary injunction cannot be granted for standard essential patents (SEP) when the parties are engaged in negotiations for a license where they agree on the geographical**

and technological scope of the license, the only disagreement being on the financial terms; such a measure would confer an unjustified advantage on the patentee.

On 29 November 2013, the Judge dismissed Ericsson's injunction request. This judgment by the tribunal de grande instance de Paris deals with preliminary injunction proceedings based on standard essential patents (SEP) in the telecom industry

**In France, it is only the second decision on such a legal issue in the same industry after the Samsung v. Apple judgment dated 8 December 2011 of the same Court which denied Samsung's request for an injunction in view of Apple's argument that the chips of the allegedly infringing smartphones had been manufactured by Qualcomm under a licence of Samsung's patents, the patentee's rights being thereby exhausted. ( Samsung v. Apple Samsung Electronics Co. and Samsung Electronics France v. S.A.R.L. Apple France, Tribunal de Grande Instance, Paris, France, 8 December 2011, Case No. 11/58301)**

This French decision is in line with the European Commission's position (press release of 21 December 2012 and Statement of Objections to Motorola Mobility on potential misuse of mobile phone standard-essential patents of 6 May 2013) **that dominant patent holders should not have recourse to injunctions when SEPs are concerned and the potential licensee is willing to enter into a licence on FRAND terms.**

Samsung v. Apple case dealt with by the Rechtbank Den Haag on 14 March 2012, which held that, in view of the negotiations on the terms of a FRAND licence between the parties, **Samsung's request for an injunction should be seen as an abuse of**

**authority and contrary to the pre-contractual obligation to negotiate in good faith.**

- xvi) The violations of FRAND in the Netherland Case has been mentioned in the France Judgment dated 8.12.2011 Case No. 11/58301 Samsung v/s Apple  
[http://www.eplawpatentblog.com/2011/December/2011-12-08\\_TGI\\_Paris\\_Samsung\\_Apple\\_translation%284%29.pdf](http://www.eplawpatentblog.com/2011/December/2011-12-08_TGI_Paris_Samsung_Apple_translation%284%29.pdf)

On 27 June 2011, Apple Inc. served a summons upon Samsung Electronics Co. Ltd, Samsung Electronics Benelux B.V., Samsung Electronics Europe Logistics B.V. and Samsung Electronics Overseas B.V. to appear in preliminary proceedings in order to obtain a preliminary injunction upon Samsung concerning its Galaxy S, Galaxy S II and Galaxy Ace smartphones, as well as its Galaxy Tab tablets, on the grounds that Samsung implemented the claims of three patents, six community designs and copyrights.

**In a decision of 24 August 2011, the Dutch Court dismissed all of Apple's requests, except for one of the patents, concerning certain products at issue.**

Apple Inc. lodged an appeal against this decision. The appeal proceedings are pending.

On 12 July and 9 August 2011, Samsung brought counterclaims against Apple according to which the Apple products iPhone 3G, iPhone 3GS and iPhone 4, as well as the iPad and the iPad 2 in their "Wi-Fi + 3G" versions, infringed four patents (European patent No. 1 188 269, European patent No. 1 478 136, European patent No. 1

097 516 and European patent No. 1 114 528) covering the UMTS standard and declared essential in that respect

The hearing of the oral pleadings concerning patents No. 1 097 516 and No. 1 114 528 is scheduled on 17 and 18 October 2011.

On 8 September 2011, Samsung Electronics Co. Ltd initiated an action for a declaration of non-infringement against Apple Inc. requesting the judge to hold that the Samsung Galaxy Tab tablets do not infringe community design No. 000181607-0001 held by Apple Inc.

**On 14 October 2011, the Hague Court handed down a decision in preliminary proceedings holding that the price offer made by Samsung was obviously not FRAND, and that Samsung violated its obligation to negotiate in good faith with Apple concerning the terms of a licence, therefore its request for an injunction relating to the Apple products was not founded.**

The Hague Court also mentioned that it could not be excluded that Samsung's action be considered on the merits as an abuse of the right to initiate legal actions.

- xvii) World over there are interesting criss cross suits in between the parties. In some cases even the two same companies are in Courts in different countries. One such example is mentioned in the judgment dated 8.12.2011 Case No. 11/58301 Samsung v/s Apple [http://www.eplawpatentblog.com/2011/December/2011-12-08\\_TGI\\_Paris\\_Samsung\\_Apple\\_translation%284%29.pdf](http://www.eplawpatentblog.com/2011/December/2011-12-08_TGI_Paris_Samsung_Apple_translation%284%29.pdf)

The judgment records that both Samsung and Apple in IPR cases have filed various suits in the Courts of

**Europe:** France, Netherlands, Germany, UK, Spain, Italy, OHIM;  
**Other parts of world:** US, Japan, Korea and Australia.

In such situation it is obvious that the litigant costs are high and need thorough study of various Courts in world as to the progress, decisions, appeals etc. as they all have relevance on each other.

- xviii) It must be reiterated here (as is mentioned elsewhere in this note) that the SKD/CKD manufacturers in India are actually importing components/chips and assembling in India. Intex/Micromax and other mobile manufacturers source custom-made mobile devices, among other products from various Countries and marketed them in India under its brand name. Hence the purported technology is being used not by manufacturers in India, but by the foreign component/chip supplier. Logically the demand of royalty should be from company, who is actually using it who happens to be component/chip manufacturer. Also perhaps the royalty cost can be easily included in the cost of component/chip.
- xix) In some cases the same patent holder fails to file patent case or get relief in other Countries but come to Indian Courts and get relief here. ( Ex. Xiaomi case in India)
- xx) In some cases the companies claiming patent royalty pays huge sum as compromise money or fine in other Countries, but hardly discloses this facts in Indian Courts. Or in other words Indian Courts have little time to dig out such cases world over and consider their relevance in India.
- xxi) One such case was in China, where Qualcomm paid 975 Mn. USD to Government to settle all pending IPR cases. Details given below:

<http://phys.org/news/2015-02-qualcomm-mn-china-antitrust-probe.html>

**China fines Qualcomm record \$975M in anti-monopoly case (Update)**

**February 9, 2015 by By Joe Mcdonald**

**China fined chipmaker Qualcomm 6 billion yuan (\$975 million) in the biggest of a wave of anti-monopoly penalties that have rattled foreign companies.**

.....

Qualcomm Inc. abused its dominance in wireless technology to charge manufacturers "unfairly high" licensing fees, a Cabinet agency announced Tuesday. China is the world's biggest producer of mobile phones and other wireless devices, and Beijing has complained about the high cost of technology licenses.

China has launched a series of anti-monopoly investigations over the past two years against foreign automakers, technology suppliers and other companies in an apparent effort to force down prices. Business groups say the secretive way the investigations are conducted is alienating companies, but regulators deny they are treated unfairly.

**Qualcomm, one of the biggest makers of chips used in mobile phones, said Monday it also agreed to change some of its practices for licensing technology to Chinese companies.**

San Diego-based Qualcomm expressed disappointment with the findings by the **Chinese Cabinet's National Development and Reform Commission**, but said it will not contest the matter.

The fine was the highest imposed to date by Chinese authorities on a foreign company. It was twice the size of the 3 billion yuan (\$492 million) fine for GlaxoSmithKline, a British pharmaceutical company, in September in a bribery case.

**The NDRC said Qualcomm improperly bundled unrelated licenses with mobile phone technology, forcing Chinese customers to pay for licenses they didn't need.**

**"Qualcomm's acts to eliminate or restrict market competition, hinder and inhibit technological innovation and development and harm the interests of consumers violate China's anti-monopoly law," the agency said in a statement.**

Qualcomm said it will offer licenses for its current 3G and 4G Chinese patents separately from licenses to its other patents. It also will give existing licensees in China an opportunity to adopt the new terms for sales of branded devices for use in China going back to Jan. 1.

"We are pleased that the investigation has concluded and believe that our licensing business is now well positioned to fully participate in China's rapidly accelerating adoption of our 3G/4G technology," said Derek Aberle, president of Qualcomm, in a statement.

Qualcomm makes most of its profit from licensing fees paid by companies that use its chips. China accounts for about half the company's revenue.

The NDRC said the fine was calculated on the basis of 8 percent of Qualcomm's 2013 revenue in China.

Business groups welcomed the enactment of China's anti-monopoly law in 2008 as a step toward clarifying operating conditions. Since then, they have said it is enforced more actively against foreign companies than against local rivals. That



has fueled sentiment among foreign companies that they are less welcome in China.

Almost half of companies that responded to a survey by the American Chamber of Commerce in China in September said they believed they were targeted for "selective and subjective enforcement" of anti-monopoly, food safety and other rules. The chamber warned China risked damaging its status as an attractive place to invest.

Business groups complain Chinese regulators pressure foreign companies to attend regulatory proceedings without bringing lawyers and to refrain from challenging penalties.

Last year, 12 Japanese auto parts suppliers were fined a total of \$202 million after regulators said they colluded to raise prices. Audi and Chrysler were fined for enforcing minimum prices dealers could charge for vehicles and service. A regulator cited by state media said Daimler AG's Mercedes Benz unit violated the law but no penalty was announced.

In 2013, five foreign dairy companies and one from Hong Kong were fined for enforcing minimum prices for distributors.

Among technology companies, the government also is looking at Microsoft Corp.'s Windows operating system and how it handles compatibility, bundling and publication of documentation.

Qualcomm said Monday the fine will reduce its earnings for the fiscal year ending Sept. 27.

Qualcomm Inc. now forecasts earnings per share between \$3.56 and \$3.76, down from its previous estimate of \$4.04 to \$4.34.

But its adjusted earnings, which exclude charges related to the settlement, are now expected to range from \$4.85 to \$5.05 per share, up from its prior range of \$4.75 to \$5.05 per share, partly due to higher revenue.

For investors, the Chinese ruling resolves significant uncertainty about the future of Qualcomm's business in China. Its stock added \$1.93, or almost 3 percent, to \$69.04 in after-hours trading on Monday. It had ended regular trading up 76 cents to \$67.11.

- xxii) As would be seen from above, in China the IPR cases are defended by a Government body. (Chinese Cabinet's National Development and Reform Commission). In USA even though it is private Companies who contest IPR cases, but USA Government heavily supports IPR Cases of USA Companies in other Countries through various mechanisms such as India US forums, Country Reports etc. Left to private parties, as it is a very Herculean and costly task to defend IPR cases in Courts based on International Legal firms.

**Hence CMAI/TEMA recommends:**

- **There is a need in India for a strong support from Government and statutory provisions for an institutional mechanism to deal with IPR related cases as a country rather than leaving it to individual companies to contest.**
- **There is need for policy initiatives and statutory provisions in India to ask the patent holders to claim royalty and file cases against component manufacturers in the Countries of actual manufacturing such as China, USA, Taiwan, Finland, Japan etc.**

## 14: Needed Equal Treatment for Taxes and Duties on IPR Royalties

- i) As standards have been forced on manufacturers without knowledge of the Government or Companies, there is need to realize that there is additional liability of Service Tax/VAT.
- ii) The Delhi High Court Judgment dated 30.3.2016 clarified that IPR are goods and hence liable for service/sales tax.

We accordingly request Government to find out the royalties paid on use of Ericsson patents in India by other telecom companies and the sales/service tax paid on the same. If not then the consequential actions thereon.

The relevant parts of judgment are:

*Para 47: Mr Kathpalia ( Sr. Advocate appearing on behalf of CCI) also controverted the contention that the SEPs were not 'goods'. He submitted that intellectual property rights also fell within the expression 'goods' under the Sales of Goods Act and referred to the decision in the case of Tata Consultancy Services v. State of AP: AIR 2005 SC 371 in support of his contention.*

*Para 94: This brings us to the question whether patent are "goods" as defined in the Sale of Goods Act, 1930. Sub- Section 7 of Section 2 of the Sale of Goods Act, 1930 defines 'goods' as under:-*

*(7) "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale"*

*Para 95: As is apparent from the above, the definition of goods is extremely wide and takes within its fold every kind of movable property.....*

*Para 96: .....Thus, plainly, the word 'goods' would encompass all kinds of property other than land,*

iii) The other issues connected with this are:

- **There is need to give exemption to Service Tax/VAT/TDS**
- **Or there is need for reimbursement/refund of said tax amounts, as industry is going to be badly affected due to such additional liability on the brands.**
- **In case of Direct Tax...royalty payment attracts TDS deduction also....hence royalty amount should be inclusive of all taxes. Else there will be additional tax/TDS burden on brand owner in India.**
- **Or we request lower TDS rate on royalty for mobile industry.**

## **15. Global decisions on IP shall have affect in India.**

**There is need for a statutory provision for a strong IPR cell in India to keep watch on happenings around world, which have bearing on Indian side.** One such example is:

Link: [http://www.smart-biggar.ca/en/articles\\_detail.cfm?news\\_id=1103](http://www.smart-biggar.ca/en/articles_detail.cfm?news_id=1103)

**i)** Google's appeal of worldwide injunction to be heard by Supreme Court of Canada (19 February, 2016)

The Supreme Court of Canada has agreed to hear Google's appeal of a worldwide injunction forcing it to block certain infringing websites from its search results. The appeal raises issues of how to provide meaningful protection of rights over a borderless Internet, while not unduly burdening innocent third parties or preventing access to information.

We seek earnest support of the Government to make success of Make in India by conducive policies for IPR SEP FRAND as discussed hereinabove