

Patent and Competition law - A Cross Perspective

Patent law grants private monopoly to a patentee for a limited period (approximately 20 years). Competition law, on the other hand, is anti-monopoly law that regulates anti-competitive practices by companies that are against consumer welfare. When one law grants monopoly and the other is against it, inherent tension between the two is obvious. This has particularly come to fore in the Internet, Computing and Telecommunications (ICT) sector, where, when a patented technology is accepted as a standard by a Standard Setting Organizations (SSO), that technology has to be adopted by other members of the SSO in order to be in conformance with the industry standards. Patents protecting such technologies are called Standard Essential Patents (SEPs).

Here's where patent law and competition law enter a conflicting zone. The patentee of an SEP may abuse this dominant position by demanding exorbitant licensing fee from the SSO member for using the patented technology, which is now necessitated as a standard. In order to avoid such exploitation, the SSO enters into a contract with the patentee to license out the SEP (s) at royalty rates in accordance with Fair, Reasonable, and Non-Discriminatory (FRAND) terms to the SSO members. The SEP owners are also required by the SSO not to file for injunctions against SSO members.

In many jurisdictions, mostly when patentees have enforced their SEPs on SSO members through litigation, they have been countersued for their action being anti-competitive for demanding royalty rates in contravention with the FRAND terms. Thus, the issue mostly revolves around royalty rate for an SEP. In US, the criteria to ascertain these royalty rates

based on FRAND terms have been decided using Georgia-Pacific factors, as in the case of *Microsoft v. Motorola*¹.

Indian Scenario

One of the first cases in India that touched on this inherent tension involved infringement of Ericsson's SEP on GSM technology by Indian mobile handset manufacturers. In this case, the Indian handset manufacturers filed a complaint against Ericsson with the Competition Commission of India (CCI) for demanding exorbitant royalty rates in contravention to FRAND terms. The CCI was however, restrained from issuing a final order in this case by the Delhi High Court (HC). The Delhi HC stated that CCI does not have the jurisdiction to go into the reasonableness of royalty payment. While hearing the interim injunction, the Delhi HC directed one of the mobile handset manufacturers to pay royalty to Ericsson at the rates ranging from 0.8% to 1.3% on sales of per unit. A final conclusion of this case may help define the methodology that is to be used to decide royalty rates for an SEP patent in India.

Issues with SEPs

In an ideal world, SEPs would encourage innovation and healthy competition in the market, however, in the real world; many companies misuse these provisions and stifle innovation in the process. When a patent is adopted as an SEP, there is an assurance of at least getting some royalty out of the patent from the SSO members, which might not have been the case, had the patent not been adopted as an SEP. Moreover, the SEP route is much faster and substantially cheaper to get royalties, when compared with costly litigations in the court.

¹ 696 F.3d 872 (9th Cir. 2012)

To this end, many companies push for adoption of a complete portfolio of their patents as SEPs. Some of these patents are either invalid, are small innovations, or are not even relevant to the standard. As a result, many patents that have been adopted as SEPs are not necessary to implement the core technology described in the standard. In some cases, companies resort to forming shell companies that become members of an SSO and then lobby to get their patented technology adopted as a standard.

Suggested Solutions

For a patent to be adopted as an SEP, a patent validity report conducted by an external entity appointed by the SSO must be made a requirement. The SSOs may also look for availability of alternative competing technologies to be adopted as standard rather than a particular patented technology. Additionally, SSOs may attach relevancy ratings to each SEP to indicate relevancy of an SEP to an adopted standard. These relevancy rating can be further used as a factor for determining royalty rates for an SEP. Moreover, the royalty rates should not be calculated based only on selling value of a device, but based also on contribution of the SEP in that device.