

STANDARD ESSENTIAL PATENTS ON LOW-COST MOBILE PHONES IN INDIA: A CASE TO STRENGTHEN COMPETITION REGULATION?

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The realization of the promise of the sub hundred dollar mobile device as a facilitator of access to knowledge is contingent inter alia on its availability in the market place. In turn, the market availability of the sub hundred dollar mobile device is influenced by the existence of an enabling environment for producers to produce, and consumers to consume. From a regulatory perspective, the enabling environment itself is a function of existing laws and policies, and the 'developmental effects' of certain laws and policies (Saraswati, 2012).

This article seeks to examine one such legal and policy lever and the role of a regulator in the development of an enabling environment for access to sub hundred dollar mobile devices. This paper is founded on four assumptions: first, that access to sub hundred dollar mobile devices is influenced by their price; second, that the question of access necessitates conversation between the intellectual property regime and several other actors, sites and tools; third, that one of the fundamental goals of regulatory reform is the creation of a 'stable, open and future- proof environment' (Guermazi and Satola, 2005) that encourages access to these devices; and fourth, that there exist public law implications of intellectual property that justify the involvement of State actors and regulators in matters that may arise out of private transactions.

This article will examine whether there is a role to be played

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by competition law in this narrative of innovation, intellectual property and access to sub hundred dollar mobile devices. In light of increasing litigation around standard essential patents, and the inability of FRAND and International Standard Setting Organizations to find a comprehensive solution, this paper will question the efficacy of competition law as an ex post solution to a problem that might be better addressed by ex ante regulation from a specialized body.

In an attempt to address these questions, this article will examine the role of the Competition Commission of India and the Indian Judiciary. Orders of the Competition Commission will be studied from its inception till March, 2015, in order to draw conclusions about the role that the Commission identifies for itself and the nature of disputes it adjudicates. This article will also examine the role of similarly placed institutions in the United States of America as well as some member states of the European Union.

It will be argued that while Competition Law might address some of the issues arising out of litigation around standard essential patents, and might be a tool to increase access to sub hundred dollar mobile devices, its efficacy as a long term solution in light of its nature as an ex post solution, is questionable. Consequently, it might be prudent to have a conversation leaning towards ex-ante regulation of the market place by a specialized regulator.

I. Preliminary

Why do we need the Low-cost Mobile Phone?

Mobile phone penetration in India has seen marked growth in recent years. A report by the Internet and Mobile Association of India (IAMAI) stated that the number of mobile internet users was to increase from 173 million users in December 2014, to 213 million users by June 2015.¹ While urban India accounted

1 Yuthika Bhargava, *India to have 213 Million Mobile Internet Users by June*, THE HINDU (January. 14, 2015), <http://www.thehindu.com/sci-tech/technology/gadgets/mobile-internet-users-to-reach-213-million-by-june-2015/article6785327.ece>.

for a large chunk of those numbers, rural areas accounted for more than a quarter of them. The same report also stated that on an average, the percentage of the average mobile bill that was spent on mobile internet increased from 45% last year, to 54% this year. Another report by the Boston Consulting Group and IAMAI states that by 2018, there will be 550 million mobile internet users in India, and while 60-70% of users accessed internet on mobile in 2013, that number could rise to 80% by 2018.²

More than 50% of the Indian population uses the mobile phone as a sole access point to the Internet,³ which uniquely positions the mobile phone as the access point to knowledge. The ubiquitous mobile phone, in turn, plays a crucial role bringing about social and economic change, from aiding the development of the agriculture sector,⁴ to helping education in rural areas,⁵ and in the dissemination of financial services. The realization of the promise of the low-cost mobile phone⁶ as a facilitator of access to knowledge⁷ – more so in India where it forms the only mode of access for

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- 2 Bhavana Singh, *The Rise in Internet Penetration and the Changing Face of Digital India*, I AM WIRE (Jan., 2015), <http://www.iamwire.com/2015/01/rise-internet-penetration-changing-face-digital-india/108808>.
 - 3 *India's Mobile Internet: The Revolution Has Begun: An Overview of How Mobile Internet Is Touching the Lives of Millions*, AVENDUS CAPITAL PRIVATE LIMITED (Sept., 2013), http://www.avendus.com/Files/Fund%20Performance%20PDF/Avendus_Report_India's_Mobile_Internet-2013.pdf.
 - 4 Surabhi Mittal & Mamta Mehar, *How Mobile Phones Contribute to Growth of Small Farmers? Evidence from India*, 51(3) QUARTERLY JOURNAL OF INDIAN AGRICULTURE 234-238 (2012); Kevin Donovan, *Module 3: Anytime, Anywhere: Mobile Devices and Services and their Impact on Agriculture and Rural Development*, http://www.ictinagriculture.org/sites/ictinagriculture.org/files/final_Module3.pdf.
 - 5 John-Harmen Valk *et al*, *Using Mobile Phones to Improve Educational Outcomes: An Analysis of Evidence from Asia*, 11(1) THE INTERNATIONAL REVIEW OF RESEARCH IN OPEN AND DISTRIBUTED LEARNING (2010).
 - 6 For the purposes of this article, a low-cost mobile phone refers to a sub-hundred dollar mobile device.
 - 7 See *illustratively* Valk *et al*, *supra* note 5; DEPARTMENT OF ELECTRONICS & INFORMATION TECHNOLOGY, GOVERNMENT APPROVES FRAMEWORK FOR PROVISION OF BASIC FINANCIAL SERVICES THROUGH MOBILE PHONES, <http://deity.gov.in/content/government-approves-framework-provision-basic-financial-services-through-mobile-phones>.

over 50% of the population⁸ – depends *inter alia* on its availability in the marketplace.⁹ In turn, this availability is influenced by the existence of an enabling environment. From a regulatory perspective, the enabling environment comprises existing laws and policies and their developmental effects.¹⁰ This article studies this premise in light of increasing litigation around standard essential patents (“SEPs”) in India’s mobile phone market, reflective of a global phenomenon.¹¹

This article is founded on four assumptions: *first*, that the prices of mobile phones influence their availability and access; *secondly*, that conversations around access necessitate conversations with other actors, tools, and sites; *thirdly*, that one of the goals of regulation is to create a ‘stable, open and future - proof environment’¹² that encourages access to these phones; and *fourthly*, public law implications of intellectual property justify intervention (in essentially a private right) by State actors. This article will examine one external actor – competition law – in this narrative of innovation, intellectual property, and access to low-cost

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- 8 *Supra* note 3; *See also*, *Research Proposal - Pervasive Technologies: Access to Knowledge in the Marketplace*, CENTRE FOR INTERNET AND SOCIETY, <http://cis-india.org/a2k/pervasive-technologies-research-proposal.pdf>; *More Access to Cell Phones Than Toilets in India: UN*, UNITED NATIONS UNIVERSITY, <http://unu.edu/media-relations/releases/greater-access-to-cell-phones-than-toilets-in-india.html>.
- 9 Nehaa Chaudhari, *Pervasive Technologies Project Working Document Series: Document 1 - Research Methodology For A Paper On Competition Law + Ipr + Access To < \$100 Mobile Devices*, CENTRE FOR INTERNET AND SOCIETY (25 Nov., 2014), <http://cis-india.org/a2k/blogs/methodology-sub-hundred-dollar-mobile-devices-and-competition-law>.
- 10 *See generally* JYOTI SARASWATI, DOT. COMPRADORS- POWER AND POLICY IN THE DEVELOPMENT OF THE INDIAN SOFTWARE INDUSTRY (2012).
- 11 *See generally* Ann Armstrong *et al.*, *The Smartphone Royalty Stack: Surveying Royalty Demands for the Components Within Smartphones*, http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/The-Smartphone-Royalty-Stack-Armstrong-Mueller-Syrett.pdf; Damien Geradin, *Pricing Abuses by Essential Patent Holders in A Standard Setting Context: A View from Europe*, 76(1) ANTITRUST LAW JOURNAL 329-357 (2009); Damien Geradin, *Ten Years of DG Competition Effort to Provide Guidance on the Application of Competition Rules to the Licensing of Standard Essential Patents: Where Do We Stand?*, http://www.law.northwestern.edu/faculty/programs/searcenter/workingpapers/documents/Geradin_DG_Competition.pdf.
- 12 *See generally*, Bouthenia Guerhazi & David Satola, *Creating the "Right" Enabling Environment for ICT*, in *E-DEVELOPMENT: FROM EXCITEMENT TO EFFECTIVENESS* (Robert Schware ed., 2005).

mobile phones. It will be argued that competition law¹³ might address some of the issues arising out of SEP litigation in India and might be a tool to increase access to low cost mobile phones. However, given the *ex post* nature of India's competition law and the evolution of the role of its market regulator¹⁴ – the Competition Commission of India (“CCI”) – this article will question the adequacy of competition law by itself as an enabler of access to low cost mobile phones (and its ability to arrest SEP litigation).

This article is divided into five parts. *Part I* is an overview of the argument and the structure of the paper; *Part II* presents a brief overview of mobile phone SEP litigation from the United States and the European Commission, particularly on emerging competition/anti-trust issues; *Part III* discusses the intersection of competition law with mobile phone SEP litigation in India; *Part IV* examines abuse of dominance under the Competition Act, 2002 (“Competition Act”/ “the Act”), the approach of the Competition Commission of India (“the Commission” / “CCI”) and envisions how this could be applied to SEP litigation in India; and *Part V* presents observations on this approach, with suggestions on re-casting the role of the Commission for it to be a lasting solution to the difficulties ensuing from mobile phone SEP litigation.

II. A Brief Timeline of International Mobile Phone SEP Litigation

How are Standards Determined?

Geradin and Rato identify¹⁵ three criteria for the establishment/adoption of an industry standard – *first*, that it is a set of technical specifications; *second*, that these technical specifications provide a common design; and *third*, that the common design provided may be for a product or a process. *Inter alia*, (industry) standards ensure interoperability and compatibility of products from multiple vendors (often, competitors), ostensibly increasing consumer choice, lower costs

13 Unless otherwise specified, throughout this paper, ‘competition law’ refers to India’s Competition Act, 2002.

14 See §7 and §18 of the Competition Act, 2002.

15 Damien Geradin & Miguel Rato, *Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-up, Royalty-Stacking and the Meaning of FRAND*, 3 EUR. COMPETITION J. 101, 103 (2007).

and convenience.¹⁶ As a corollary, a lack of access to certain technologies or patents that make up the standard – SEPs – acts as a barrier to trade as well as a barrier to access for the consumer, once the market standard has been set.¹⁷

The determination of standards occurs through Standard Setting Organizations (“SSOs”), a collaborative effort between companies/industry participants.¹⁸ Companies have the option of becoming a member of an SSO, voluntarily disclosing those patents that they perceive to be essential to standards, which, if the standard were to be adopted, would become SEPs,¹⁹ when earlier, they may have well been dispensable.²⁰ Typically, the existence of alternatives to technologies is eliminated on the adoption of an ‘industry’ standard.²¹ SSOs require the licensing of SEPs through Fair, Reasonable and Non-Discriminatory²² (“FRAND”) Terms²³ as an attempt at preventing patent hold-ups. A patent hold-up arises²⁴ when companies that own the SEPs for the adopted standard effectively block others from using the standard through various means- including obtaining injunctive relief or imposing royalties high enough²⁵ to act as a barrier to the use of

16 Scott A. Sempel *et al*, *Antitrust / Intellectual Property Law Issues for the Transactional Lawyer*, 35, <https://www.michbar.org/ip/pdfs/Fowkes.pdf>.

17 Ravikant Bharadwaj, *Standard Setting in India: Competition Law and IP Issues*, 5 IMJ 1, 2 (2013).

18 Michael A. Carrier, *A Roadmap to the Smartphone Patent Wars and FRAND Licensing*, 2 CPI ANTITRUST CHRONICLE 2 (Apr., 2012).

19 *Id.*

20 Josh Lerner & Jean Tirole, *Standard-Essential Patents*, (Working Paper 441, Toulouse School of Economics).

21 Suzanne Michel, *Bargaining for RAND Royalties in the Shadow of Patent Remedies Law*, 77(3) ANTITRUST LAW JOURNAL 889-911 (2011).

22 FRAND is typically used in the European context, whereas a similar concept in the United States is licensing on Reasonable and Non-Discriminatory terms, i.e., RAND. For the purposes of this article, FRAND will be used and unless otherwise specified, includes RAND as well.

23 OECD, COMPETITION, INTELLECTUAL PROPERTY AND STANDARD SETTING, <http://www.oecd.org/daf/competition/competition-intellectual-property-standard-setting.htm>.

24 *Id.*

25 Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard Essential Patents*, 28 BERKELEY TECH. L. J. 1136-1137 (2013); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991-2050 (2007).

the standard in question²⁶—ironically, the very same practices that the development of FRAND licensing sought to prevent.

Key Issues in SEP Litigation

Unsurprisingly, litigation around SEPs has centred on the issues of determination of FRAND terms and royalty rates, and whether or not obtaining injunctive relief was a violation of, or had an influence on, FRAND licensing terms. It has been observed that there is no unified approach that has developed in the manner in which courts attempt to balance the interests of the SEP holder, public interest, and the rights of third parties to trade.²⁷ Typically, it has been observed that international SEP litigation centres around one of two issues – a failure to disclose patents; or a violation of FRAND terms.

The working of an SSO requires the voluntary disclosure of SEPs by its members, which are in turn to be licensed on a FRAND basis. However, in certain scenarios, firms, seeking to gain an unfair advantage where they hold patents conforming to an industry standard, fail to disclose their patents. Such non-disclosure would also impact other firms, who would now face demands for royalties and allegations of infringement, were they to adopt the standard without the license from the firm ‘holding-out’.²⁸

Failure to Disclose

The case of *Rambus Inc.*²⁹ dealt with a failure to disclose patents regarding the industry standard for Dynamic Random Access Memory (DRAM) chips. The European Commission (“EC”) concluded that *Rambus* was collecting royalties in violation of Article 102 of the Treaty on the Functioning of the European Union, that is, the provision preventing the abuse of dominant position by dominant

26 Phillippe Baechtold, *IPRs and Standards Setting: Some Issues*, 1, http://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_ge_07/wipo_smes_ge_07_www_81604.ppt; Lemley & Shapiro, *Patent Holdup and Royalty Stacking*, *supra* note 25.

27 Baechtold, *supra* note 26, at 18.

28 Damien Geradin, *Pricing Abuses by Essential patent Holders in a Standard-Setting Context: View from Europe*, 76(1) *ANTITRUST LAW JOURNAL* 329-357 (2009).

29 *Rambus*, COMP/38.636, Eur. Comm’n, [2010] OJ C30/17.

undertakings.³⁰ Principles developed in this case included: *first*, that there must be an intentional failure to disclose patents before the adoption of the standard; *secondly*, that in the absence of the failure to disclose, alternative technologies or substitutes would have been selected; *thirdly*, that the industry was locked into the standard on account of significant investments made before the patent holder revealed the patents; and *fourthly*, that the firm acquired a dominant position, and was able to exploit it. In the same case, the Federal Trade Commission (“FTC”) in the USA held that the failure to disclose amounted to *unilateral exclusionary conduct*, and explained that deceptive conduct was different in a standard setting environment, since the deception could only be discovered after the standard was locked in.³¹ This decision was vacated by the DC circuit on the ground that the FTC had not carried out the burden of showing exclusionary conduct and had relied on weak evidence,³² indicating that in the absence of deceptive acts, it might be difficult to demonstrate that a differing standard might have been adopted.³³ This decision also emphasized an argument that was made earlier, in the case of *NYNEX Corp. v. Discon Inc.*,³⁴ that it wasn’t enough to show fraudulent behaviour along with harm to the consumers to prove an antitrust violation when the harm could be chalked up to *the lawful exercise of monopoly power*.

Authorities in the USA have identified a set of criteria that must be fulfilled for conduct of parties to be classified as ‘anti-competitive’. In addition to a wilful failure to disclose patents to the SSO, there must also be enough evidence to prove the link between the said non-disclosure and the adoption (or lack thereof) of a particular standard by the SSO. A mere failure to disclose would not be anti-competitive conduct.

30 See Treaty on the Functioning of the European Union, (Consolidated Version, 2012) OJ C326/50.

31 Rambus, Docket No. 9302 (FTC).

32 Rambus v. FTC, No. 07-1086 (D.C. Cir. 2008).

33 Richard Schmalensee, *Standard-Setting, Innovation Specialists and Competition Policy*, 57(3) THE JOURNAL OF INDUSTRIAL ECONOMICS 526-552 (Sept., 2009).

34 NYNEX v. Discon, 525 U.S. 128 (1998).

Violation of FRAND commitments

FRAND commitments, made by SEP holders to their SSOs, are cast as a waiver of the right to refuse to license intellectual property rights to anyone seeking these licenses. This is on the condition that the negotiations are conducted in good faith (at an arm's length), and that the terms of the licence would be no worse than the terms that would have been offered *ex post*, i.e., in the absence of such a prior commitment to an SSO.³⁵

The EC, the FTC, and the courts in various jurisdictions have witnessed a substantial volume of litigation around the violation of FRAND commitments, with related issues also being the determination of royalties, i.e., at what magic number did royalties become fair, reasonable, and non-discriminatory. Expectedly, while common principles might have emerged, uniform systems of determination in the form of binding tests or precedents have not been developed, with regulators and courts dealing with each dispute on a case by case basis.

The *Orange-Book-Standard* case,³⁶ settled in a German domestic court, where the matter concerned patents for CD-R and CD-RW, is one of the earliest decisions dealing with access to essential patents associated with a technology standard or patent. When there was a refusal by the patentee to grant a licence, the issue before the court was whether injunctive relief may be granted in such cases. It was held that the infringer could sustain its claim of abuse of dominant position if the patentee refused to conclude a patent license agreement on non-discriminatory and non-restrictive terms. This test has been criticised on the ground that the potential licensee only has the option of paying the customary royalty rate, or accept the rate that the patentee has offered, applying 'reasonable exercised discretion'. This does not give much leeway for potential licensees to question validity of the rate.³⁷

35 Damien Neven & Miguel de la Mano, *Economics at DG Competition, 2009-2010*, 37(4) REVIEW OF INDUSTRIAL ORGANISATION 309-333 (Dec., 2010).

36 Bundesgerichtshof [BGH] (Federal Court of Justice) May 6, 2009 – Case No. KZR 39/06 (Ger.).

37 BJÖRN LUNDQVIST, *STANDARDISATION UNDER EU COMPETITION RULES AND US ANTITRUST LAWS* (2014).

The EC in *Qualcomm*³⁸ dealt with a joint complaint by several mobile phone and chipset manufacturers – Nokia, Ericsson, Panasonic, Broadcom, NEC, and Texas Instruments. It was alleged that before the adoption of the WCDMA standard for 3G, *Qualcomm* had committed to licensing patents on FRAND terms, but on the adoption of the standard, rates were revised to above FRAND levels. While FRAND terms do not lead to a specification of a concrete royalty rate *ex ante*, it is clear that there is a waiver of the right to refuse to license.

The United States Court of Appeals for the Third Circuit extended the approach taken in *Rambus in Broadcom Corp. v. Qualcomm*.³⁹ This was the first case in the USA of anticompetitive conduct stemming from a violation of a FRAND commitment, rather than failure to disclose. *Qualcomm* began a pattern of discriminatory and anticompetitive behaviour, such as charging double royalty rates to manufacturers that used components manufactured by competitors, and providing discounts to those who exclusively used their supplies. It was held that *Qualcomm*'s behaviour was anticompetitive since the FRAND commitment was clearly made with the intention of inducing the European Telecommunications Standards Institute ("ETSI") to adopt the technology into the standard and therefore increase market power.⁴⁰

The most relevant decision of the European Commission was in the *Samsung/Apple* case in April 2014, where *Samsung* sought injunctive relief before courts in various jurisdictions against *Apple*, alleging violation of the 3G UMTS standard.⁴¹ *Samsung* had given a FRAND Commitment when the standard was adopted, and the Commission found that this constituted an abuse of dominant position. The same day, a similar decision was given regarding *Motorola* seeking an injunction against *Apple* on the basis of a smartphone SEP. The Commission recognised that normally, seeking an injunction for a patent infringement is legitimate, but may be considered an abuse of dominant position if the infringement relates to SEPs if

38 EUR.COMM'N, *Antitrust: Commission initiates formal proceedings against Qualcomm*, MEMO/07/389 (Oct. 1, 2007).

39 *Broadcom v. Qualcomm*, 501 F.3d 297 (3d Cir 2007).

40 James E Abell, *Setting the Standard: A Fraud-based Approach to Antitrust Pleading in Standard Development*, 75(4) U. CHI. L. REV. 1601-1631 (2008).

41 EUR. COMM'N, *Samsung - Enforcement of UMTS Standard Essential Patents*, CASE AT. 39939 (Apr. 29, 2014).

two conditions are met – *first*, the SEP holder has given a voluntary commitment to license its SEPs on FRAND terms, and *secondly*, the alleged infringer is willing to enter into an agreement on FRAND terms.

The Apple-Samsung battle continues to play out in the United States, recently, with the intervention of the President of the United States. Initially, when Samsung alleged infringement of its SEPs by Apple, the United States International Trade Commission banned the import of Apple's iPhones (pre-4S) and cellular iPods into the US.⁴² However when Apple protested, the ban was overturned by the White House – the first time the White House had employed this power in 26 years – later criticised as the American Government favouring US companies.⁴³

American courts have also taken a stand against firms using injunctions or similar threats against future licensees that are willing to negotiate and accept licenses on FRAND terms. In the *Google / Motorola Mobility* case, the FTC required Google to abide by its commitment to license on FRAND terms and prescribed specific negotiation procedures for the companies to follow.⁴⁴

III. Mobile Phone SEP Litigation in India and Competition Law Responses

Mobile phone SEP litigation made its way to India many years after the wars had begun in the United States and the European Union, with Ericsson's complaint against one of India's largest indigenous mobile phone companies – Micromax, in 2013. In this case,⁴⁵ Ericsson filed a patent infringement suit against Micromax claiming Rs. 100 crore in damages for the infringement of 8 SEPs (3G, AMR and Edge) registered in India. The Delhi High Court first granted an *ex parte* injunction restraining Micromax from selling, importing, or manufacturing devices that were allegedly infringing on the standard. This matter is still pending before the Delhi High Court, with the latest injunction order passed on November

42 *In re* Certain Electronic Digital Media Devices and Components Thereof, Investigation No. 337-TA-796 (USITC).

43 Richard Water, *Obama Overturns Apple Import Ban*, FINANCIAL TIMES (Aug. 3, 2013), <http://www.ft.com/cms/s/0/7321bf0a-fc6b-11e2-95fc-00144feabdc0.html#axzz3SqQnWCxR>.

44 *In re* Motorola Mobility and Google, Docket No. C-4410 (FTC).

45 Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ), Case No. 50/2013 (Competition Comm'n of India).

12, 2014, where the Delhi High Court laid down the rates of royalty to be paid pending completion of the suit. The order is valid until November 12, 2015. After the initial injunction issued by the Delhi High Court, Ericsson and Micromax reached a settlement where the latter agreed to pay Rs. 100 crore as royalties, and also agreed to negotiate FRAND global rates if its operations expanded outside India. Meanwhile, Micromax filed a complaint before the CCI against Ericsson for abuse of dominance, violating the Competition Act⁴⁶ on the grounds of imposing discriminatory royalty rates – a FRAND violation, and using Non Disclosure Agreements.⁴⁷ The Commission has found⁴⁸ both of these allegations to constitute a *prima facie* abuse of dominance and ordered further investigation. However, Ericsson filed a writ petition challenging the jurisdiction of the Commission on a matter that was pending before the Delhi High Court, in response to which the Delhi High Court ordered the CCI to not issue a final order in the matter pending the date of the next litigation, along with imposing other restrictions, effectively curtailing the power of the CCI to undertake an effective investigation into the matter.⁴⁹ It is submitted that Micromax could have chosen to file a Special Leave Petition in the Supreme Court of India, challenging this order by the Delhi High Court. There is no publicly available information at the time of writing this article to verify whether Micromax has indeed chosen to pursue this litigation strategy.

Following this litigation initiated by Ericsson, over the past two years, various other cases concerning mobile phone SEPs have found their way into the

46 *Id.*; Anubha Sinha, *Micromax Files Complaint: CCI Orders Investigation into Ericsson's FRANDLY Licensing*, SPICY IP (29 Nov., 2013), <http://spicyip.com/2013/11/micromax-files-complaint-cci-orders-investigation-into-ericssons-frandly-licensing.html>.

47 See CCI Order under §26(1) of the Competition Act, 2002, *In re Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson* (Publ), Case No. 50/2013 (Competition Comm'n of India).

48 *Id.*

49 See *Telefonaktiebolaget LM Ericsson v. Competition Commission of India*, W.P. (C) 464/2014 (High Court of New Delhi) (regarding the CCI's investigation into complaints lodged by Miramax); see also *Telefonaktiebolaget LM Ericsson v. Competition Commission of India*, W.P. (C) 1006/2014 (High Court of New Delhi), cited in Koren W. Wong-Ervin, *Standard-Essential Patents: The International Landscape*, ABA SECTION OF INTERNATIONAL LAW 14, (Spring 2014), https://www.ftc.gov/system/files/attachments/keyspeechespresentations/standardessential_patents_the_intl_landscape.pdf.

corridors of the Delhi High Court. In *Ericsson v. Gionee*,⁵⁰ Ericsson sued Gionee for the infringement of the same SEPs that were the subject of the dispute with Micromax. In October, the Delhi High Court passed an order regarding the payment of interim royalties and ordered the negotiation of FRAND terms between the parties. The outcome of these negotiations is not publicly available at the time of writing this article.

In 2014, Ericsson also sued Intex for patent infringement.⁵¹ Intex, following in the footsteps of Micromax, has filed a complaint with the CCI alleging abuse of dominant position by Ericsson. In this matter, just like in the complaint instituted by Micromax against Ericsson, the Commission found there to be a *prima facie* case of abuse of dominance.⁵²

In *Ericsson v. Xiaomi*,⁵³ Ericsson filed a suit against Xiaomi, a Chinese manufacturer alleging the violation of the same 8 SEPs claimed against other manufacturers in the earlier cases discussed in this section. The High Court granted an *ex parte* injunction on the sale, manufacture, and import of these devices. The injunction was challenged before a division bench of the Delhi High Court, which allowed Xiaomi to resume the sale and import of the devices subject to certain conditions.

Visibly, while Ericsson is seen as the most active participant in SEP litigation in India, at the moment, *Vringo* has filed two suits in the Delhi High Court for the infringement of its SEPs. In *Vringo v. ZTE*,⁵⁴ Vringo filed a suit for the alleged infringement of its patent. The patent was argued to be an SEP. The Delhi High Court granted an *ex parte* interim injunction against the manufacture, import, sale, use, or advertisement of the infringing products. This injunction was lifted in 2013 on the condition that ZTE paid Rs. 5 crores and filed an affidavit disclosing

50 Telefonaktiebolaget LM Ericsson (Publ) v. Gionee Communication Equipment Co. Ltd. and Anr., CS (OS) 2010/2013 (High Court of New Delhi), at ¶5(3)B.

51 Telefonaktiebolaget LM Ericsson v. Intex Technologies (India), CS (OS) 1045/2014 (High Court of New Delhi).

52 In re Intex Techn. Ltd., v. Telfonaktiebolaget LM Ericsson, Case No. 76/2013 (Competition Comm'n of India).

53 Telefonaktiebolaget LM Ericsson (Publ) v. Xiaomi Technology and Others, CS (OS) 3775/2014 (High Court of New Delhi), at ¶6.

54 ZTE Corporation and Anr. V. Vringo Infrastructure Inc. and Ors., FAO (OS)143/2014 (High Court of New Delhi).

the number of CDMA devices sold in India, along with revenue obtained from them. In *Vringo Infrastructure Inc. and Anr v. Indiamart Intermesh Ltd and Ors.*,⁵⁵ Vringo Infrastructure instituted a suit against ZTE and its subsidiaries for patent infringement. The Delhi High Court granted an *ex parte* interim injunction against the import, sale, advertising, selling, and operating of the devices with infringing components. ZTE has also filed for the revocation of the patent in question on the grounds that it is not innovative, and that it violates Section 64 of The Patents Act, 1970.

When compared to litigation around SEPs internationally, as discussed in the preceding section of this paper, it is observed that litigation in India largely centres around FRAND licensing and the use of interim injunctions as a litigation strategy. The question of non-disclosure to SSOs has not been litigated upon in India at the moment. Additionally, this review of SEP litigation in India presents, *inter alia*, five crucial observations. *First*, it is seen that in almost all of the disputes around SEPs, the Delhi High Court has granted an *ex parte* interim injunction; finding the balance of convenience effectively in favour of the patent holder. The Delhi High Court in these cases has thus chosen to restrain smartphone manufacturers from selling or marketing their mobile handsets in India,⁵⁶ despite the fact that the damage caused by infringement is quantifiable monetarily and royalties may be paid with penalties as well. *Secondly*, it is observed that notwithstanding the order to stop the sale and manufacture of mobile handsets, the court also orders a substantial amount of money to be paid as royalties, along with a deposit or a bank guarantee for a part of the amount, effectively creating a *Catch-22* situation for the local manufacturers. *Thirdly*, it is submitted that competition law questions, while present and raised; have not yet been adequately addressed, given the order by the Delhi High Court restraining the CCI from issuing a final order. *Fourthly*, it is submitted that manufacturers are effectively in a tight corner, facing either a long, litigious process forcing a reconciliation on terms that are likely to favour the SEP holder; or facing a forced reconciliation with the threat of the interim injunction and an effective closure of business, particularly critical for a smaller brand facing off against a much rather corporation.⁵⁷ *Fifthly*, it is observed that

55 *Vringo Infrastructure Inc. and Anr v. Indiamart Intermesh Ltd. and Ors.*, I.A. No.2112/2014 in C.S. (OS) No.314/2014 (High Court of New Delhi).

56 Vaibhav Choukse, *The Debate on Essentials*, BUSINESS LINE (Mar. 29, 2015).

57 John E Matheson, *Patents and Standards, FRAND Challenges for India's ICT Sector*, SPICY IP DISCUSSION PAPER SERIES, PAPER NO. 2014 017 (2014), <http://spicyip.com/wp-content/uploads/2014/09/FRAND-Challenges-for-Indias-ICT-Sector.pdf>; Pankaj

SEP litigation in India is comparable to international SEP litigation on broader issues raised, specifically competition law concerns, but differs crucially where the parties are concerned. International SEP litigation is largely between multinational corporations with substantial patent portfolios, capable of engaging in long drawn out litigations, or engaging in other strategies including setting off against each other's patent portfolios. Dynamics in the Indian market differ – with a larger SEP holder litigating against smaller manufacturers. Particularly with this market dynamic, it is argued that the intervention by the CCI and competition law is crucial for the survival of the low cost mobile device in India.

IV. The Abuse of Dominance in India

The case for competition law intervention in mobile phone SEP litigation is directly made out on the issue of curtailing abuse of dominance. Section 4(1) of the Competition Act prohibits abuse of dominant position by an enterprise of a group. Dominance is defined as a position of strength enjoyed by the enterprise in the relevant market, which enables it to either operate independently of competitive forces or affect its competitors or consumers or the relevant market in its favor.⁵⁸

The Competition Act outlines several factors that should be taken into account to determine market dominance. The first step towards establishing abuse of dominance is establishing the relevant market, which is with reference to the relevant product market and the relevant geographic market.⁵⁹ Whether or not a market is a relevant product market is determined in terms of substitutability, i.e., whether the products are substitutable among themselves given a small but significant non-transitory increase in price (SSNIP).⁶⁰ A relevant geographic market is defined as the area in which 'the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous

Soni & Satyoki Koundinya, *Taking the FRANDLY Approach, a First Look at FRAND Battles in India*, REMFRY AND SAGAR (2015), <http://www.iammedia.com/Intelligence/IAMYearbook/2015/Countrybycountry/TakingtheFRANDlyapproach-a-first-look-at-FRAND-battles-in-India>.

58 *Guide to Abuse of Dominance*, COMPETITION COMMISSION OF INDIA, http://www.cci.gov.in/images/media/Advocacy/Awareness/Abuse_Dominance.pdf.

59 §2(r), Competition Act, 2002

60 §2(t), Competition Act, 2002.

and can be distinguished from conditions prevailing in neighboring areas'.⁶¹

Dominance is usually measured by market share, but a number of other factors also should be considered, such as: the size or resources of the enterprise, size and influence of competitors, economic power of the enterprise, vertical integration, dependence of consumers on the enterprise, entry and exit barriers in the market, countervailing buying power, market structure and size of the market, source of dominant position, social costs and obligations, and contribution of the enterprise to economic development.⁶²

The Competition Act provides an exhaustive list of practices that will constitute abuse of dominance and are therefore prohibited. These practices are: unfair/discriminatory pricing, limiting production of goods or provision of services or market, limiting technical or scientific development to prejudice of consumers, denying market access in any manner, making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with subject of such contracts, and using dominant position in one market to enter into protect another relevant market.⁶³

India, unlike some other countries,⁶⁴ has kept its definition of market dominance generic and flexible, which has found applicability in various orders of the CCI. In the case of *Belaire Owners Association v. DLF*,⁶⁵ the CCI found that DLF was abusing its dominance in the market of sale of flats in Gurgaon through lopsided agreements, and held that the relevant product market was high-end residential markets in Gurgaon. Since DLF held 45% of that market share, they were dominant players in the market. The case of *Pankaj Aggarwal v. DLF Gurgaon*⁶⁶ also had similar conclusions.

61 §2(s), Competition Act, 2002.

62 §19(4), Competition Act, 2002.

63 §4(2) (a-e), Competition Act, 2002.

64 See Federico Etro, *The EU Approach to Abuse of Dominance*, <http://www.intertic.org/Policy%20Papers/EU%20Antitrust.pdf>.

65 *DLF Ltd. v. CCI, Belaire Owners Assn etc.*, Appeal No. 20/2011 (Competition App. Trib.).

66 *Pankaj Agarwal v. DLF Gurgaon Home Developers Pvt Ltd*, Case No. 21/2010, Case no. 31/2010, and Case no. 55/2012 (Competition Comm'n of India).

Standard Essential Patents on Low-Cost Mobile Phones in India: A Case to Strengthen Competition Regulation?

In the case of *Three D Integrated Solutions Ltd v. VeriFone*,⁶⁷ the CCI held that the relevant market being POS terminals in India, Veri Fone held a dominant position. This was because they controlled 72-80% of the market; only had one serious competitor; and were guilty of abuse of that dominance, since they used agreements they had with the informant to impose unfair conditions that restricted provision of services, and limited the technical and scientific development of these services.⁶⁸

In *GHCL and Coal India*,⁶⁹ the CCI held that in the relevant market of production and supply of non-coking coal to thermal power producers, including captive power plants in India, Coal India was dominant by virtue of nationalization Acts, and had abused such dominance by coercive agreements that were a result of unequal bargaining power.

In *MCX Stock Exchange v. National Stock Exchange*,⁷⁰ the CCI, and then the COMPAT, held that the National Stock Exchange was abusing its dominant position by resorting to predatory pricing in the currency derivative segment by waiving transaction fees. With the relevant market being stock exchange services in respect of currency derivatives in India, the CCI and the COMPAT held that NSE had a dominant position as it was established earlier; had a 48% market share; had higher profit shares; wider presence; and a high degree of vertical integration. In this context, for them to waive transaction fees was found to be an abuse of dominant position.

In *Kapoor Glass v. Schott Glass*, the CCI held that Schott Glass, by imposing unfair and dissimilar discounts that resulted in adverse impact on converters in the downstream market, had abused their dominant position.⁷¹

67 *ThreeD Integrated Solutions Ltd v. Verifone India Sales Pvt Ltd*, Case No. 13/2013 (Competition Comm'n of India).

68 *M/s Atos Worldline India Pvt Ltd and VeriFone*, Case No.56/2012 (Competition Comm'n of India).

69 *GHCL Ltd and Coal India Ltd*, Case No.8/2014 (Competition Comm'n of India).

70 *MCX Stock Exchange v. National Stock Exchange*, Case No. 13/2009 (Competition Comm'n of India).

71 *Kapoor Glass Pvt Ltd v. Schott Glass India Pvt Ltd.*, Case No. 22/2010 (Competition Comm'n of India).

In *Shamsher Singh Kataria*,⁷² the CCI held that there existed a separate relevant market for sale of spare parts and repair services. Since the original equipment manufacturers had 100% dominance in this market for genuine spare parts, they had abused their dominance through contracts that restricted supply of such spare parts. They operated on a network of contracts that had limited access of independent repairers and other providers to genuine spare parts. They had indulged in unfair pricing by marking up the price by an average of 100%, to anywhere up to 5000%. They were using their dominance in the spare parts market to protect another relevant market of after-sales service and maintenance.

Observations

The determination of whether conduct qualifies as an abuse of dominant position is thus a determination to be made on a case-by-case basis, within the broader parameters of the Competition Act. The CCI, in its short history, since becoming fully operational in 2009, has been fairly active on matters of abuse of dominance, including the imposition of penalties.⁷³ However, the CCI has refrained from laying down broad principles, and instead restricts all of its rulings to facts of a particular case. It is possible that this stands to change with more decisions from courts or the appellate tribunal on substantive questions of law.⁷⁴ In terms of pure numbers, in 2013-2014, the CCI dismissed 63 cases without referral to the Director General,⁷⁵ and only directed 3 cases to be further investigated;⁷⁶ and in 36 cases, found there to be an abuse of dominant position or a case of anti-competitive agreements.⁷⁷ Within this context, the following section will question whether or not the Competition Commission of India is an effective instrument to deal with SEP litigation in India.

72 *Shamsher Singh Kataria and Honda Siel Cars Ltd*, Case No. 3/2011 (Competition Comm'n of India).

73 Samir Gandhi *et al.*, *Enforcement Trends in India under Competition Act 2002*, PRACTICAL LAW (1 June, 2013), <http://uk.practicallaw.com/2-532-3777?q=&qp=&qo=&qe=#a456237>.

74 Pratibha Jain *et al.*, *Competition Law in India, A Report on Jurisprudential Trends*, NISHIT DESAI & ASSOCIATES, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/ResearchPapers/Competition_Law_in_India.pdf.

75 *Id.*, at 59.

76 Jain *et al.*, *supra* note 74, at 60.

77 Jain *et al.*, *supra* note 74, at 63.

V. Concluding Observations: the Commission, Competition and SEP Litigation

This dispute where the CCI adjudicated on issues relating to SEPs goes to the very heart of the apparent conflict between patent law and competition law. The former seeks to grant temporary and limited monopolies; and the latter seeks to ensure fair competition and check abuse of dominance within the market.⁷⁸ In turn, each of these systems offers its own set of remedies to address the questions posed by SEP litigation as well. Within the intellectual property framework, illustratively, these remedies could include temporary injunctions; orders of search; seizure; forfeiture or destruction of infringing goods; and awards for damages and accounts of profits on proof of infringement.⁷⁹ The framework also allows for remedies of injunctions and damages available in case of groundless threat of infringement,⁸⁰ pre and post-grant opposition to award of patents, and allows for compulsory licensing.⁸¹ However, it is also to be understood that merely these remedies offered by intellectual property law might not be adequate to resolve the issues raised by SEP litigation. Very often, the remedies themselves may create other legal issues, particularly seen in the case of interim injunctions.⁸²

An analysis of Sections 60 and 62 of the Competition Act will demonstrate that while the Competition Act is applicable to anti-competitive behavior,

78 Archana Shanker & Shraddha Singh Chauhan, *How to use Patent and Competition Law Effectively in Tandem*, MANAGING IP (1 Sept., 2014), <http://www.managingip.com/Article/3382427/How-to-use-patent-and-competition-law-effectively-in-tandem.html>.

79 Manisha Singh Nair, *India: Infringement Proceedings under the Indian Patent Law*, MONDAQ (19 Oct., 2005), <http://www.mondaq.com/india/x/35554/Trademark/Infringement+Proceedings+under+the+Indian+Patent+Law>.

80 *Id.*

81 Vijay Pal Dalmia & Pavit Singh Katoch, *Patents Law in India- Everything You Must Know*, VAISH ASSOCIATES AND ADVOCATES 2, 4 (2011), http://www.vaishlaw.com/article/indian_intellectual_property_laws/patents_law_in_india_everything_you_must_know.pdf.

82 Prashanth T. Reddy, *Interim Justice: Troubling Trend*, BUSINESS STANDARD (30 Mar., 2013), http://www.business-standard.com/article/opinion/interim-justice-troubling-trend-113033000223_1.html. and Xiaomi : Paras Khurana, *India: Xiaomi Injunction: Yet Another Injunction Given Too Soon?*, MONDAQ, 15 January 2015, <http://www.mondaq.com/india/x/366712/Patent/Xiaomi+Injunction+Yet+Another+Injunction+Given+Too+Soon>.

notwithstanding other laws,⁸³ it must also be harmonized with existing laws.⁸⁴ Essentially, this would mean that there would be considerable overlap between the jurisdiction of the courts and regulators on the one hand, and the CCI on the other.⁸⁵ Accordingly, there is a need to examine the role of the CCI as a market regulator in India.

One part of the problem with the regulation of SEPs stems from the manner in which SSOs operate. They are invariably private, non-profit industry organisations that decide through consensus of their members what the technology standard will be. However, this means that in the natural trend of commercial development, their relationship with the SEP can be disjointed. It is possible that the SEPs will be traded by non-members and traded without notice to the SSO. Further, a subsequent patent for the standard may be filed by companies outside the SSO. It is not easy to revoke a standard once it has industry-wide acceptance.⁸⁶ A regulatory body, such as the CCI, would be able to overcome many of these difficulties since it would have continued authority over the firms in question. It could thus play a greater role in regulating the process of standard setting as well the manner in which patents are transferred. Further, SSOs are also incapable of overseeing the SEP price setting or holding administrative or regulatory authority over the standard patents.⁸⁷ Some organisations like the ETSI do not let negotiations take place under standard development activities. They take the view that their role is limited to technical rather than commercial issues and the 'fair' and 'reasonable' conditions must be addressed outside this.⁸⁸ A regulatory body would have a greater

83 §60, Competition Act, 2002.

84 §62, Competition Act, 2002.

85 Kanika Chaudhary Nayar, *India: Jurisdiction of the CCI: Navigating Through Muddy Waters*, MONDAQ (28 Apr., 2015), <http://www.mondaq.com/india/x/392738/Antitrust+Competition/Jurisdiction+Of+The+CCI+Navigating+Through+Muddy+Waters>.

86 Nicole Shanahan, *The Policy Issue Surrounding Smart-Phone SEPs, and a Comment on Adjusting Current Patent Laws to Facilitate Clean-Tech Industry Growth*, SOCIAL SCIENCE RESEARCH NETWORK (Apr. 13, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2359908.

87 *Id.*

88 Damien Geradin, *Ten Years of DG Competition Effort to Provide Guidance on the Application of Competition Rules to the Licensing of Standard-Essential Patents: Where do we stand?*, (Jan. 23, 2013).

role to play in the regulatory process, with its approval of the process considered a pre-condition to concluding a license agreement.

The question to be addressed is whether in India, the regulatory body ought to be the CCI.

It has been argued that the fact that the CCI is a relatively new body that has only come into operation in 2009, and the fact that the Patent Act is established law that traces back to 1970, are the cause of the problems in synchronization. The CCI seemingly failed to appreciate the purpose behind laws allowing for SSOs and SEPs, and it has apparently relied on circumstantial evidence to an excessive degree. Therefore, there is a need to harmonize competition law with patent law in India.⁸⁹ The CCI in its current form is riddled by legal lacunae and lacks teeth. It has been contended that since most of its orders have now been appealed in the courts, and as the agency lacks autonomy due to rules of procedure, it is not as effective or efficient as it is portrayed to be, and that it needs to be empowered by further legislation.⁹⁰ Additionally, since competition law in India is *ex post*, decisions are invariably backward looking and adopt a narrow view of the product, looking largely at its demand side substitutability. As a result, a sector specific regulatory body could better address complex technical and economic questions specific to the industry, as opposed to litigation merely being played out in the courts.⁹¹

The US Supreme Court seems to have indirectly expressed the view that antitrust remedies should ideally be pre-empted by non-antitrust issues. In the *Credit Suisse* case⁹² that dealt with allegations of collusion in the IPO process, federal securities law was given preference, since it was recognised that it might deal with such a matter better.⁹³ There is no appropriate regulatory body for this

89 *Supra* note 74.

90 *Competition Commission of India Through the Eyes of the Media: Doing Well*, CUTS 13, (17 Sept., 2012), http://www.cuts-ccier.org/pdf/Competition_Commission_of_India_through_the_eyes_of_the_media-Doing_well.pdf.

91 Peter Alexiadis, *Balancing the application of ex post and ex ante disciplines under community law in electronic communications markets: square pegs in round holes?*, RIGHTS AND REMEDIES IN A LIBERALISED AND COMPETITIVE INTERNAL MARKET (2012).

92 *Credit Suisse v. Billing*, 552 U.S. 264 (2007).

93 George S Cary, Mark W Nelson *et al.*, *the case for Antitrust law to police the patent holdup problem in standard setting*, 77(3) ANTITRUST LAW JOURNAL 913-945 (2011).

issue. Even in the US, while the Patents Office performs the regulatory function of approving patents, there is no connection with patent hold-up. All disputes relating to abuse, infringement, and licensing are resolved either through private litigation or dispute resolution. There is no evidence of active policing behaviour that is seen in the US Securities and Exchange Commission, through patent courts.⁹⁴ Similarly, India does not have a regulatory body like the SEBI to govern the issue of SEPs and the conditions on which licenses are issued; but, it is submitted that the CCI in its capacity as the market regulator would be the most suitable agency to take on this regulatory role.

It has been argued that while determining the remedy in patent infringement cases, it becomes important to assess the royalty that would have been paid *ex ante*. Compensatory damage is only meant to replicate the reward that would have been earned in the absence of infringement. Under-compensation will undermine the patent system while over-compensation will impact innovation. Thus, it is important that the damages should be similar to the amount paid under FRAND licenses.⁹⁵

In the United States, the principles normally followed in this regard are those that were enumerated in *Georgia-Pacific v. United States Plywood*.⁹⁶ These fifteen principles prescribe numerous factors relating to the patents, the commercial environment, and nature of infringement to determine a fair method of calculating remedy.⁹⁷ However the application of these guidelines by a body without the requisite expertise would have far from ideal results. A regulatory body could instead codify the guidelines for patent remedies to be followed in India, and expert members on the panel could help value them in specific cases.

In so far as successor companies are bound, a sector specific regulatory body could be the more appropriate forum. A risk faced by firms is that patentees may trade their SEPs to members outside the SSO and such successors would

94 *Id.*

95 Michel, *supra* note 21.

96 *Georgia-Pacific v. United States Plywood*, 318 F. Supp. 1116 (S.D.N.Y. 1970).

97 Anne Layne-Farrar, A. Jorge Padilla & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organisations: Making Sense of FRAND Commitments*, 74(3) ANTITRUST LAW JOURNAL 671-706 (2007).

not be bound by a FRAND commitment.⁹⁸ The question of whether a FRAND commitment is binding on successor companies/buyers of the patent was partly addressed by the EC when ICom acquired a number of SEPs from Bosch. It was alleged that ICom was in violation of the FRAND commitments of its predecessor. However, following discussions with the EC, ICom declared its willingness to take over Bosch's previous commitments.⁹⁹ Such negotiations regarding FRAND commitments relate more to contract law than antitrust. In such cases, a regulatory body may be a more appropriate authority to oversee such negotiations.

It is undeniable that SEP litigation around the mobile phone presents a set of challenges that might be most suitably addressed by a specialised regulatory body. It is the submission of this author however, that in India, the market regulator – i.e., the CCI, ought to be cast in a slightly different mould from its existing functioning, in order to enable to effectively perform its role as a market regulator – which would in turn facilitate the regulation of licensing of SEPs. It is submitted that while arguments might be made about the manner of addressing issues around SEP licensing, at their core, the issues, including royalty determination and injunctions, are intimately connected with competition law, and ought to be addressed by the competent authority. Accordingly, in India, the CCI would be most suited for this purpose.

Additionally, as Rahul Singh has argued, in a jurisdiction struggle between regulators and the CCI, the CCI should be able to trump the regulators claim because it would reduce transaction costs, create predictability and certainty in the law, would allow for fairness in damages awarded, and because it makes room for private enforcement.¹⁰⁰ While others have argued that both systems of regulation can, and must, co-exist to make laws foolproof,¹⁰¹ he has argued that such a system

98 Nicole Shanahan, *The Policy Issue Surrounding Smart-Phone SEPs, and a Comment on Adjusting Current Patent Laws to Facilitate Clean-Tech Industry Growth* (Apr.13, 2013).

99 EUR. COMM'N, *Antitrust: Commission welcomes ICom's public FRAND declaration*, MEMO/09/549 (10 Dec., 2009).

100 Rahul Singh, *The Teeter Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators*, 8(1) WASH. U. GLOBAL STUD. L. REV. 71, 97-102 (Jan., 2009).

101 K D Raju, *The Inevitable Connection Between Intellectual Property and Competition Law:*

would be inefficient and would compromise goals of predictability and certainty, and lead to forum shopping; and therefore it is important and efficient for the CCI to retain jurisdiction and authority over matters concerning anti-competitive behavior despite the existence of sector specific regulators.¹⁰²

Courts at large have generally failed to respond adequately to the problem of SEP litigation in India. It has been argued that courts have failed to understand concerns regarding hold-ups and reverse hold-ups and have generally granted ex-parte orders,¹⁰³ and stay orders, combined with the *res sub-judice* rule.¹⁰⁴ Further, at least in one case the courts have allowed for royalty stacking,¹⁰⁵ demonstrating a reluctance to bring in perspectives of competition law and viewing the matter as a pure intellectual property matter. It is submitted, therefore, that an empowered CCI would be better located to decide such disputes.¹⁰⁶

A close analogy for an 'empowered' CCI may possibly be drawn from the recent litigation around the enforcement of foreign arbitral awards in India – the cases of *Bhatia International*¹⁰⁷ and *BALCO*.¹⁰⁸ *Bhatia International*, with the ruling that arbitrations having their seat outside India were still within the jurisdiction of the Indian courts, had effectively nullified the entire purpose behind arbitral awards. Subsequently, this decision was overruled in *BALCO*, and extremely restricted grounds were identified to challenge such awards. It is submitted that for the role of the CCI as well, similar law making – either through legislative

Emerging Jurisprudence and Lessons for India, 18(2) JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 111-122 (2013).

102 Singh, *supra* note 100, at 90-96.

103 Reddy, *supra* note 82.

104 Apoorva Shreeja Sen, *Multiple Court Stays Hold UP CCI Investigations*, LIVEMINT (28 Nov., 2014), http://www.livemint.com/Politics/5Lm7tjIuogbBsm6qR_b4exH/Multiple_court_stays_hold_up_CCI_investigations.html.

105 Pradeep S Mehta, *Resolving Patent Wars through Competition Law*, Financial Express, CUTS (31 Mar., 2014), http://www.cuts-ccier.org/Article-Resolving_patent_wars_through_competition_law.htm.

106 In fact, Bills have been tabled in Parliament in order to achieve just that: *Bill Aimed at Giving CCI More Teeth Tabled*, INDIAN EXPRESS (11 Dec., 2012), <http://archive.indianexpress.com/news/bill-aimed-at-giving-cci-more-teeth-tabled/1043320/>.

107 *Bhatia International v. Bulk Trading, S.A.*, (2003) 5 SCC (Jour) 22 (Supreme Court of India).

108 *Bharat Aluminium Co v. Kaiser Aluminium Technical*, CA No. 7019/2005 (Supreme Court of India).

reform, or through judicial pronouncements, is necessary for the regulator to be able to address questions of competition law across different sectors, including SEP litigation, effectively, without the threat of stay orders from courts, rendering the existence of the regulator redundant. This does not, of course, preclude any appeals process that might rely on the judiciary.¹⁰⁹ A similar argument was made by Nick Robinson when he argued that the courts in India have used good governance and the right to life to become essentially second governments regulating everything, from encouraging the use of natural gas; to regulated encroachment on preservation of public forests; to guidelines for school safety at the expense of government and independent regulators.¹¹⁰

The tension and cohesion between intellectual property and competition law, a subject of extensive debate and writing over the years, will increasingly inform the SEP litigation in India. Given that the phenomenon is still at its nascent stages in the country, while we await a final order in our first SEP dispute, we are uniquely placed to develop our system of regulation for SEP litigation, informed by experiences in the USA and the EC, among others. It is clear that at the core of SEP litigation lie competition law concerns to be addressed by the market regulator, which, in the case of India, would be the CCI. It is submitted, therefore, that this framework of the CCI be strengthened and suitably adapted to address of the most conflicted and crucial areas of the intellectual property space.

The ubiquitous mobile device is one of India's greatest success stories, uniquely positioned as a connector as well as the medium of access to knowledge. Fundamentally, therefore, the question of access to the mobile device, at an affordable price point, is a far more important one for India, than perhaps to other more developed countries. With the mobile phone presenting the potential of being a uniquely Indian solution to uniquely Indian problems, it would follow that we develop our own solutions to barriers to access.

109 For a brief summary of *Bhatia and BALCO*, see Karthik Jayakumar, *Bhatia v. Balco, Who Should Stand?*, THE A38 BLOG (18 Aug., 2013), <http://blog.athirtyeight.com/2013/08/bhatia-v-balco-who-should-stand.html>.

110 Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8(1) WASH. U. GLO. STUD. L. REV. (21 Jan., 2009).

Big ticket mobile phone SEP litigation in India, unlike in the United States or Europe, has pitted larger multi-national corporations such as Ericsson, with its significant mobile-phone patent portfolio, against smaller companies including Intex and Micromax, producing low-cost smartphones.¹¹¹ Often, the smaller companies might not have the resources to fund sustained litigation and could pay exorbitant royalty rates, thereby suffering losses, or increasing prices (and decreasing access) of their phones, or simply shutting shop.¹¹² This is in the long run harmful to competition, innovation, and to access to knowledge.¹¹³ With this in mind, while our solutions may be informed by international experiences, we would do well to appreciate that even our experiences with SEP litigation are poised to be distinct from international experiences, and tailor our responses accordingly. A re-imagined CCI could potentially be that lever in the regulatory environment, aiding the production and the consumption of the low cost mobile phone, facilitating connectivity and access to knowledge, and, with it, the realization of the promise of social and economic development.

111 Rohini Lakshane, *Joining the Dots in India's Big-Ticket Mobile Phone Patent Litigation*, CENTRE FOR INTERNET AND SOCIETY (31 May 2015), <http://cis-india.org/a2k/blogs/joining-the-dots-in-indias-big-ticket-mobile-phone-patent-litigation>.

112 Matheson, *supra* note 57.

113 Matheson, *supra* note 57; See also Rohini Lakshane, *Digital India & Make in India: Form a patent pool of critical mobile technologies- CIS India*, MEDIANAMA (24 Mar., 2015), <http://www.medianama.com/2015/03/223-digital-india-make-in-india-form-a-patent-pool-of-critical-mobile-technologies-cis-india/>.