Standard Essential Patents (SEP) related issues in India

-FICCI Recommendations-

Standard Essential Patents (SEPs), of late, has been a subject of intense discussion in view of concerns raised by the local industry, and it is assuring that that DPIIT is taking steps towards identifying such issues and seeking solutions thereto. FICCI has had the privilege of attending one of the meetings called by Shri Rajiv Aggarwal, the erstwhile Joint Secretary, DPIIT on March 14, 2018, inviting the entire industry to share issues/concerns/comments related to SEPs and we feel it was indeed a welcome move. FICCI had made submissions during the meeting and filed its detailed written comments thereafter. To briefly summarize the submissions: there is enough guidance, such as industry practice and judicial precedents globally regarding SEP related issues, suggesting no imminent need for any new policy framework in India to guide on FRAND licensing. Also, it was submitted that the issues like determination of FRAND royalty rate should be left either to the parties involved to mutually decide or to a Court of Law to adjudicate in the event of breakdown of discussions between the parties. The reason behind this approach is that there is no one-size-fits-all formula that can be applied to any FRAND rate determination scenario.

Importantly, respect for innovation is an essential criterion that must be taken into account by developing markets, like India, so as to attract the technology and foreign investments. By respect for innovation, what is meant is that the latest technology should be available to the public for use. At the same time, the innovator should be adequately compensated for his technological contribution. This also means that the implementor of standardized technology should not be burdened with excessive royalty just for the reason that the technology is a standardized one. A FRAND royalty aims to serve this end. However, as already stated above, a FRAND royalty is determinable by mutual discussion between the licensor and the implementor or by a Court in the event of failure of discussions between the licensor and the implementor.

Various advanced patent jurisdictions of the world, like the US, EU, CN and JP have released guidelines to highlight the ideal or FRAND conduct to be followed by both the discussing parties. Basically, these guidelines specify the level of details both sides need to share with each other so as to conduct an effective discussion that finally results in a FRAND license. It is important to note here that none of the guidelines proposed for any Government intervention in the entire FRAND negotiation process.

Additionally, in US, a policy statement on remedies for SEPs recently issued by US agencies – USPTO, NIST and US Department of Justice – specifies that the said US agencies recognize the importance of bilateral good-faith discussions between parties to arrive at FRAND terms and hence the agencies encourage such discussions. The agencies also recognize that if the licensing discussions fail, appropriate remedies, like injunctive relief, reasonable royalties, enhanced damages for wilful infringement and the like, should be available to the aggrieved party.

Similar developments are taking place throughout the world in respect of SEP related issues and the legal position is continually evolving. Considering the ever-changing scenario, especially in India where final decisions on SEP matter are expected, it would appear that the time is not ripe for the Government to intervene in any manner as of now. The guidelines released by various jurisdictions heavily rely on the legal position established by the courts in such jurisdiction. The prevailing situation in India does not warrant any drastic changes as of now.

In the event that DPIIT takes up SEP-FRAND matter for examination based on all responses received with respect to the meeting held in May 2018, we at FICCI, are hopeful that, as always, a public consultation model would be followed while devising any solution in respect of the SEP related issues.

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