STANDARD ESSENTIAL PATENTS AND COMPETITION LAW

_______________________________________________

INTERNSHIP PROJECT REPORT

SUBMITTED BY:

SAUMYA SRIVASTAVA

5th Year, B.B.A., LLB (Hons.)

SCHOOL OF LAW, KIIT UNIVERSITY, BHUBANESWAR

UNDER THE GUIDANCE OF:

MR. PRAMOD KUMAR SINGH

ADVISOR (ANTITRUST)

-----------------------------------------------

COMPETITION COMMISSION OF INDIA

NEW DELHI

JANUARY 2013
ACKNOWLEDGEMENT

On completion of this report I would like to acknowledge the invaluable support I have received from Competition Commission of India in the completion of my project work. I would specially like to thank my mentor Mr. Pramod Kumar Singh, Advisor (Antitrust) CCI who took the time out of his busy schedule to meet and support me.

I am also very grateful to Ms. Deepali Liberhan, Expert (Law) who supported me throughout my project work. The same would not have been possible without the support and facilities which were made available to me during the course of my internship with CCI.

Lastly I would like to thank the library staff who was always present to aid in finding whatever material was needed and ever present with a helping hand.

SAUMYA SRIVASTAVA
DISCLAIMER

This paper has been prepared by the author as an intern under the Internship Program of the Competition Commission of India for academic purposes only. The views expressed are personal and do not reflect the view of the Commission in any manner. This report is the intellectual property of the Competition Commission and the same or any part thereof may not use in any manner whatsoever without express permission of the Commission in writing.

SAUMYA SRIVASTAVA
# TABLE OF CONTENTS

ABSTRACT.................................................................................................................................................. 1

INTRODUCTION TO PATENTS............................................................................................................. 2
  1. Definition........................................................................................................................................... 2
  2. History.............................................................................................................................................. 2
  3. Rationale........................................................................................................................................... 4
  4. Licensing......................................................................................................................................... 5

STANDARD SETTING ORGANIZATION & STANDARD ESSENTIAL PATENTS.. 6
  1. Standard Setting Organization (SSO).............................................................................................. 6
  2. Standard Essential Patents (SEP)..................................................................................................... 8

COMPETITION CONCERNS RELATING TO SEPs............................................................... 11
  1. FRAND/RAND Terms....................................................................................................................... 11
  2. Competition Concerns.................................................................................................................... 14

CONCLUSION.......................................................................................................................................... 20
ABSTRACT

Standard Essential Patents aim at providing all the competitors equal opportunity of accessing the essential patent in question. These patents also grant temporary exclusionary rights on the use of inventions. These patents are indispensable to produce a product or offer a service based on a standard. To prevent the situation in which standards cannot be implemented in practice due to the existence of patents covering inventions related with these essential components of the product or service in question, standards bodies have developed policies that establish rules for their members with regard to the availability and conditions of licenses for essential patents. Most of these policies require the members to disclose (‘declare’) their essential patents. One such policy is commitment of the company to make its technology available at a fair, reasonable and non-discriminatory term to other interested competitors, if it is adopted as a standard. These terms are called FRAND/RAND terms. This article provides an overview of FRAND/RAND terms and also the competition concerns relating thereto.

Research Question
The researcher seeks to review the importance of Standard Essential Patents and recent legal developments relating to the same.

Research Methodology
The research-methodology adopted is mainly Non-doctrinal and descriptive. The sources of data include secondary sources like Articles, books and Journals.

Limitations of the Research
The research paper suffers from certain limitations, for e.g. the limited access to sources of data and materials, limitations with respect to time and also with respect to the limited space in which the researcher has restricted his research work. However, the researcher has ensured that only standard text books, commentaries and materials are being resorted to while carrying on her research.
INTRODUCTION TO PATENTS

1. Definition

A patent may be defined as a statutory privilege granted by the government to inventor and to other persons deriving their rights from the inventor for a fixed period of years, to exclude other persons from manufacturing, using or selling a patented product, or from utilizing a patented method or process. At the expiration of time for which the privilege is granted, the patented invention is available to the general public or it is sometimes put into the public domain. A patent is a statutory right. It is a legal monopoly granted to the owner of a new invention which is capable of industrial use, for a limited period of time. It is a properties which like any other business commodity, may be bought, sold, hired or licensed.\(^1\)

Patent is issued in the form of a document by Government office which describes invention and creates a legal situation in which the patented invention can normally be exploited with the authorization of patentee.\(^2\) A patent is a creation of statute and is therefore territorial in existence. Thus a patent granted in one country cannot be enforced in another country unless the invention concerned is patented in that country also.\(^3\)

2. History

The word patent originates from the Latin word *litterae patentes*, which means an open letter. Patents help innovators in protecting their innovation from which they derive benefits, specially the right to exclude others from making and using that invention. Patents were granted for the first time in 12\(^{th}\) century in the form of privileges to citizens in Venice for their invention. The rationale behind granting such privileges was to protect innovations for domestic use and to reduce imports.\(^4\)

---

\(^1\) ‘Indian Patent Law and Procedure’ by D.P Mittal, published by Taxmann, 2002, Pg. 4.
\(^2\) Ibid.
Possibility of existence of patents dates back to 500 B.C according to Greek history where monopolies were granted to new dishes for a period of one year. Similarly the associations of various craftsmen in Rome monitor the training of youngsters for teaching the techniques of the craft. As a result of this the product becomes a communal property rather than a monopoly held by an individual. For example, the Venetian glass makers had reputation for glassmaking during the Renaissance time. Glassmaking was strictly restricted to the members of the association and was closely controlled by them. As the reputation of their craft increased the commercial value also increased, with it the realization that the craft must be strictly forbidden from being exported to other parts of Europe. Thus the earliest form of monopoly emerged in the form of a communal property, restricted to a region and the association. The need for increased revenue, prevailing high taxes meant that the royalty could fill their coffers by allowing foreigners to practice new art within the realm. They were granted exclusive rights to practice their art for a certain period of time.

The increase in the process of granting patents was widely adopted by various countries because of industrial revolution. One of the major players who introduced the first enacted patent law was The United States in the year 1790 which was then followed by France which introduced its first patent law in 1791. The signing of the Paris Convention internationalized the patent system in 1883. Under the Paris Convention, an applicant can file a patent application for his invention in any of the Paris Convention member countries within one year of the filing of the first filed patent application.

Britain was the first country to bring into force the Patents, Designs and Trademarks Act in 1883. It initiated a limited form of examination in the patent system. The patent system in Britain until 17th century had no roots in the common law. It was issued in the form of Royal charters, Letters close and Letters patent by the Kings as permission for conducting business in the region. There were certain groups or associations which were controlled by the municipality. The rules of

---

6 Ibid.
7 Supra Note 5.
8 Supra Note 3.
9 Supra note 2.
practice, the price of the goods, wages and working conditions were decided by the association. This was a kind of regional monopoly which did not apply to other parts of the England.10

In India, a patent for invention has always found its roots in statutes of Indian legislature. The first Act relating to patent rights was passed in 1856 which granted certain exclusive privileges to inventors of new manufacture for a period of 14 years. This Act was based on English Patent Act, 1852 wherein patent monopolies were termed as “exclusive privileges”. During the period from 1911 to 1970 various amendments were made and subsequently the Indian Patents and Designs Act was passed replacing all previous Acts. Recently, the Patents (Amendment) Act 2002 came into force in 2003 by making the term of every patent which is in force including patents which can be restored under the provisions of the Act to 20 years from the date of filing.11

3. Rationale

The object of granting a patent is the encouragement and development of new technology and industry in the state.12

The philosophy behind the patent system is based on the opportunity of acquiring exclusive rights in an invention stimulates technical progress in four ways; 1) it encourages research and invention; 2) it induces the inventor to disclose his discoveries instead of keeping them a trade secret; 3) it offers the reward for the expenses of developing inventions to the stage at which they are commercially practicable and 4) it provides an inducement to invest capital in new lines of production which might not appear profitable if many competing producers embarked on them simultaneously.13

Patents are important for both individual inventor whose rights are protected and for the economy. It makes sure that no one is able to take unfair advantage of the work and ideas of other inventors. It ensures that businesses and individuals work to create new ideas, for encouraging innovation and improving economy. Patents can be particularly important for

10 Ibid.
12 Supra Note. 1
13 Supra Note. 10.
individual inventors and small businesses, since they can prevent larger companies from taking advantage of their creations. It encourages people to come up with new ideas by ensuring that their rights will be protected, which helps move the economy forward.\textsuperscript{14}

4. Licensing of Patents

Rights of a patent owner includes using, selling, transferring, licensing, mortgaging and pledging his property in order to derive benefits out of it. It is not necessary that every license granted for using patent also transfers interest in the patent, it varies from one licensing agreement to another. It can be a transfer of any right that rests with the owner of the property.\textsuperscript{15}

A license authorizes the person to whom it has been granted to make use of the patent legally and this authorization is given by the patent holder. A licensee has no interest in the property. His right is only to do or continue to do something which, in the absence of such right, would be unlawful. License is thus a permission given by the patentee to work the patent, otherwise it would be illegal. The legal ownership over a patent is not separated. It continues with the patentee. Only permission is granted to make use of the patented invention.\textsuperscript{16}

STANDARD SETTING ORGANIZATIONS AND STANDARD ESSENTIAL PATENTS

1. Standard Setting Organizations (SSO’s)

An SSO is an entity performing functions of maintaining standards which cater to the interest of users. These functions are developing, coordinating, promulgating, revising, amending, reissuing and interpreting the set standards.

SSO tries to set standards or make recommendations which, when widely implemented, become de facto standards that means it is considered to be the actual or genuine standard which everybody should follow. There are many SSOs, national, regional as well as industry-based which set standards. A formal SSO refers to one that is recognized directly or indirectly by a government entity as the national standards body and which has the authority to designate a specification as the national standard for the country. Thus, for example, in India, the Bureau of Indian Standards (BIS) is the national standards body; in the USA, the American National Standards Institute (ANSI) is the official body; while in the United Kingdom, it is the British Standards Institute (BSI).

Now when we talk about setting of standards for a particular technology, the very first question that comes to our mind is what does the term standard mean? The possible answer could be that standard is virtually a characteristic by which classes of objects are compared. More exactly a “standard” is a set of technical specifications which either does, or is intended to provide a common design for a product or process. Standards are widely acknowledged to be one of the engines driving the modern economy. Standards can make products less costly for firms to produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a "fundamental building block for international trade." Standards make networks, such as the Internet and wireless telecommunications, more valuable by allowing products to interoperate. The most successful standards are often those that provide timely, widely adopted, and effective solutions to technical

problems. Standards can be established in several ways. Industry may agree upon them; government may impose them; or the market may determine them. Often a standard is established by the dominant producer of a new technology, but such de facto standards can take considerable time to emerge if several competitors offer different designs. Major consumers can also create de facto standards, as in the case of military standards and specifications on certain electronic assemblies.

While any organization can come up with its own specification and call it its standard, to be internationally acceptable a standard has to be either set or adopted by an SSO that is recognized as an international standard-setting body. The three organizations having the highest international recognition the International Organization for Standardization (ISO), International Electro-technical Commission (IEC) and the International Telecommunication Union (ITU).

The importance of technological standards has grown tremendously over the past two decades. The growing recognition of the importance of the standardization process has been attributed in large part to the growth of the information technology and communications industries, for which standards are critical. The commercial stakes attached to standards and patents have become so important, that the adoption of technical approaches covered by specific patents, the requirement of backwards compatibility with earlier technologies, and the relative emphasis on cost and performance has all been highly contentious issues.

They are especially important in the information and communication technology industries, where the need for devices and networks to interoperate creates strong pressure for industry participants to devise common technical standards. In economic terms, the basis for this strong pressure on standards in this industry is the presence of strong network effects. A network effect exists when the value of a product or service crucially depends on the number of people who use it. Many economists have therefore coined the term “network industry” to describe an industry in which this characteristic is especially strong.

---

18 ‘Competition Concerns When Patents Are Incorporated into Collaboratively Set Standards’, Available at http://www.justice.gov/atr/public/hearings/ip/chapter_2.htm on 22/01/2013.
20 Ibid.
21 Ibid.
These organizations develop standards by collaborating with industries which will be beneficial for the competition. For example, interoperability standards, like those governing certain aspects of the Internet and electrical outlets, enable consumers to exchange information and interconnect products from a variety of manufacturers without any effort, and performance standards can enhance quality and improve consumers’ health and safety. Moreover, coordinating the selection of industry standards can expedite the implementation of new technologies, facilitate entry, and reduce costs.

These standards are mostly exclusive and are the means by which one can point the finger at the patent concerned. These offer significant benefits in "avoiding customer 'lock-in'' and "creating markets by enabling firms to achieve scale economies in production. The various ways in which standards are created: through formal, long-lived SSOs, informal unplanned associations of interested parties formed for a certain purpose, and de facto standards developed as markets characterized by network effects tip towards one product.23

2. Standard Essential Patents (SEPs)

An SEP is a patent that claims an invention that must be used to comply with a technical standard.

The patent system promotes innovation and economic growth by providing incentives to inventors to apply their knowledge, take risks, and make investments in research and development and by publishing patents so that others can build on the disclosed knowledge with further innovations. These efforts, in turn, benefit society as a whole by disseminating knowledge and by providing new and valuable technologies, lower prices, improved quality, and increased consumer choice.24

Standards offer significant benefits, such as enhancing product interoperability and increasing competition. But standards may not be utilized where the owner of intellectual property

---

22 Lock in Period means Period for which a patent owner agrees to hold steady the agreed upon interest rate on the terms irrespective of the market rate. See http://www.businessdictionary.com/definition/lock-in_period.html#ixzz2JLaCWQcX
23 Ibid.
(hereinafter referred as IP) that is essential to the implementation of the standard refuses to license it. Not surprisingly, then, many SSOs have adopted rules restricting their members' use of IP. These rules typically require members to search for, disclose, and license at a "reasonable and non-discriminatory" rate any IP (usually patents) that is implicated by the standards.  

Technical standards are essential to the smooth functioning of society. For instance, the 802.11 Wi-Fi standards allow consumers to connect any Wi-Fi equipped device to any network. Interoperability standards have covered half the way for moving many important innovations into the marketplace, including the complex communication networks and sophisticated mobile computing devices that are the building blocks of the modern age. These technical standards are not set by the government agencies but by the industrial organizations such as the Institute of Electrical and Electronics Engineers (IEEE). Such organizations provide information regarding hundreds of different standards on different subjects like aerospace, electronics, and computer technology, nuclear power, wired and wireless.  

Standards are clearly integral to the functioning of almost any kind of technical product. These essential standards are established by technical or industrial experts and these experts are usually the insiders of the industry because every company or industry involved has proprietary technology and they want to see their technology used in the standard. Involvement of industries and technology naturally brings patent into play while setting standards. As soon as the organization agrees to cover a patent as part of the standard the company demands for the licensing of that patent on fair, reasonable and non-discriminatory terms and then that becomes the standard essential patent. The problem arises when the patent owner tries to holdup the patent that happens when an owner of an SEP uses that patent to either exclude a competitor from the market or to set an unreasonably high price for a royalty which would give the patent owner an unfair advantage in the marketplace. Since the costs of switching to a different standard are so high or in some cases there are no alternatives left then the patent owner has much greater power.

and leverage than is usually the case. To sort this problem there has to be a reasonable compromise between the patent owner and the interest of the public at large.\textsuperscript{27}

\textsuperscript{27} Ibid.
COMPETITION CONCERNS RELATING TO SEPs

1. FRAND/RAND Terms

The relevant standard set out by SSO gives birth to a body inclusive of essential features that must be fulfilled by any device to be in conformity with a particular standard. When a device is found to be in conformity with an essential standard it is allowed to bear a mark to indicate to the public that the product is compliant with the set standards. In order to produce a standard compliant device, use of certain patents is required. The main requirement for using a patent is obtaining license from the owner of the patent concerned. SSOs require their members to undertake to grant binding licenses to companies that wish to use the standard in question. In case a particular member does not provide such an undertaking, the standard will not be adopted. To promote application of the standard and to avoid any competition concerns, such licenses must be made available under fair, reasonable and nondiscriminatory (FRAND) terms.

FRAND or FRAND stands for "Fair, Reasonable, and Non-Discriminatory” terms of a licensing agreement. Standard-setting organizations commonly have rules that govern the ownership of patent rights that cover the standards they adopt. One of the most common rules is that a patent covering the standard must be adopted on "reasonable and nondiscriminatory terms" (RAND) or "fair, reasonable and non-discriminatory terms" (FRAND). The two terms are generally interchangeable; FRAND is preferred in Europe and RAND in the United States.

In licensing, FRAND terms refer to the obligation that is often required by SSOs for members which participate in the standard setting process. SSO’s include this obligation in their bylaws as a means of enhancing the pro-competitive character of their industry. A patent owner who commits to license its patents on FRAND terms and conditions has irrevocably committed to allow the standard to be implemented on a FRAND basis and thereby waived the right to exclude others from practicing the standard. Once the patent owner commits to license its patents on FRAND terms and conditions he/she cannot use its hold-up power resulting from the

29 http://itlaw.wikia.com/wiki/F/RAND
incorporation of its technology into the standard to demand royalties that do not comply with F/RAND.\textsuperscript{30}

- Fair terms means terms which are not anticompetitive and that would not be considered unlawful if imposed by a dominant firm in their relative market.

- Reasonable refers mainly to the licensing rates. A reasonable licensing rate is a rate charged on licenses which would not result in an unreasonable aggregate rate if all licensees charge a similar rate. Clearly aggregate rates that would significantly increase the cost to the industry and make the industry uncompetitive are unreasonable.

- Non-Discriminatory term requires that licensors treat each individual licensee in a similar manner. This does not mean that the rates and payment terms cannot change dependent on the volume and creditworthiness of the licensee. However it does mean that the underlying licensing condition included in a licensing agreement must be the same regardless of the licensee.\textsuperscript{31}

Fair and reasonable royalties are, in normal commercial licensing transactions, determined by competitive pressures and generally based on what can be described as a “willing licensor/willing licensee” arrangement. However, where a technology is standardized and patents, or other IPRs, exist which are essential to the standard, the normal competitive processes relating to licensing are disrupted. In this situation a licensee cannot avoid taking a license by designing around an IPR. A standard and a patent essential to that standard operate in collaboration with each other to enhance the value of the patent. For this reason many Standards bodies insist that licenses be available on fair and reasonable terms and conditions, before the Standards are formally accepted. The primary test of fair and reasonable must be based on the licensing terms and conditions which would emerge from a balanced negotiation between a willing licensee and a willing licensor.\textsuperscript{32}

\textsuperscript{30} \url{http://jcle.oxfordjournals.org/content/7/3/523.abstract} frand: challenge for competition authority

\textsuperscript{31} ‘What do you mean by FRAND?’ Available at \url{http://itlaw.wikia.com/wiki/F/RAND} on 17/01/2013.

\textsuperscript{32} ‘Determination of Fair and Reasonable Royalty Rates’ by Roger Miselbach and Ron Nicholson N&M Consultancy Limited, Available at \url{http://www.licensingforstandards.co.uk/docs/fairroys.pdf} on 16/01/2013.
Take for instance, an SSO beginning to consider technologies for a particular feature that limits undesirable noise in audio transmissions and the preferred choices may be patented technologies ‘A’, ‘B’, and ‘C’, and also technology ‘D’, who’s patent, has expired. ‘D’ may not be quite as good as the patented alternatives, but it is free. Until the owners of patented technologies ‘A’, ‘B’ and ‘C’ have made commitments they are all likely to have positive but uncertain costs. To the extent that any questions persist about the validity or scope of A’s, B’s, or C’s patents there may be additional uncertainty.\(^{33}\)

This is where the FRAND royalty comes in. FRAND refers to a firm’s commitment to make its technology available at a “fair, reasonable and non-discriminatory royalty” if it is adopted as the standard. Patent owners can grant license to an unlimited number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to use the patented material necessary in order to manufacture, use, and/or sell implementations of the standard considered.

This commitment permits the members of the SSO to focus on technical issues and worry about the price later. The nondiscrimination provision creates at least a strong presumption that the terms given to a first licensee will also apply to subsequent licensees. Of course, patentees can be expected to claim that their particular patent is unusually valuable because of the features that it covers.\(^{34}\)

As soon as a patent is declared by an SSO to be standards essential and incorporated into technology, the bidding is over. If we ignore the FRAND commitment, the patent’s value is largely determined by the costs of extraction from that particular technological element, not from anything inherent in the patent itself. Further, firms know all of this in advance, so if they wish to assert later that a particular patent within their standards-adaptable portfolio is unusually valuable, they can always say so and leave the SSO to decide whether or not to adopt it. Absent that, there does not seem to be any good reason for not treating all patents alike, and the cost of determining individual value would very likely swamp the entire system.\(^{35}\)

---

\(^{33}\) Ibid.

\(^{34}\) ‘Competition in Information Technologies: Standards-Essential Patents, Non-Practicing Entities and FRAND Bidding’ by Herbert J. Hovenkamp, University of Iowa, College of Law, Available at http://ssrn.com/abstract=2154203 on 18/01/2013.

\(^{35}\) Ibid.
The underlying rationale of this system is that any patentee which is a member of the standard-setting organization benefits because its technology is promoted by using a patent as a standard. In return, patentees must grant any entity that wants to make use of its essential patents a license under FRAND terms. More specifically, this system prevents a patentee from obtaining an injunction against any entity that offers to take a license under FRAND terms. The benefit for patentees is that there is possibility of receiving more license revenues than if their patent were not standard essential. The benefit for entities that seek to make use of the standard is that they are entitled to do so, subject to entering into a license agreement with the patentees of essential patents and paying the necessary license fees.36

2. Competition Concerns

Standard setting raises a variety of antitrust/competition issues. These standard setting organizations involve competitors agreeing on certain specifications of the product they plan to market which is connected with the competition issues and collusions.37 Such issues arise only when patent owners tend to hold up their patent by creating a gap between economic commitments and subsequent commercial negotiations which enables one party to capture part of the fruits of another's investment. Hold-up can arise, in particular, when one party makes investments specific to an agreement before all the terms and conditions of the agreement are agreed. It leads to economic inefficiency.38

In an effort to reduce these hold ups in the adoption of standards, while encouraging participants to include the best available technology in standards, some Standard Developing Organizations (hereinafter referred as SDO) have relied on voluntary licensing commitments by their participants, including commitments to license the patents they own that are essential to the standard on F/RAND terms. SDOs and their members rely on these voluntary F/RAND commitments to facilitate the bilateral licensing negotiations necessary for successful widespread adoption of a standard and to provide assurances to implementers of the standard that the patented technologies will be available to parties seeking to license them.

36 Supra Note. 28
38 Ibid.
In making such voluntary F/RAND licensing commitments, patent holders that also sell products and services related to the standard benefit from expanded marketing opportunities, and patent holders that focus on licensing their inventions benefit from an expanded source of revenue. These incentives encourage patent holders to contribute their best technology to the standardization process. F/RAND commitments may also contribute to increased follow-on innovation by allowing non-discriminatory access to networks both to new entrants and to established market participants to introduce new generations of network-operable devices.

A patent owner’s voluntary F/RAND commitments may also affect the appropriate choice of remedy for infringement of a valid and enforceable SEP. In some circumstances, the remedy of an injunction or exclusion order may be inconsistent with the public interest. This concern is particularly acute in cases where an exclusion order based on F/RAND-encumbered patent appears to be incompatible with the terms of a patent holder’s existing F/RAND licensing commitment to an SDO. A decision maker could conclude that the holder of a F/RAND-encumbered, SEP had attempted to use an exclusion order to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the F/RAND commitment, in essence concluding that the patent holder had sought to reclaim some of its enhanced market power over firms that relied on the assurance that F/RAND-encumbered patents included in the standard would be available on reasonable licensing terms under the SDO’s policy. Such an order may harm competition and consumers by degrading one of the tools SDOs employ to mitigate the threat of such opportunistic actions by the holders of F/RAND-encumbered patents that are essential to their standards.39

Fortunately, antitrust concerns have not prevented a great many co-operative standard setting efforts from proceeding forward. Some participants go so far as to say that much of the innovation taking place now in the telecommunications, internet, and computer areas is standard based. Indeed, even the fiercest enemies often team up in the software industries to promote new standards.40

Litigation on standard essential patents has recently become a very hot topic worldwide. Numerous decisions have been issued by courts of various jurisdictions specializing in IP in

39 Supra Note 24
40 Navigating the Patent Thicket, cross licensing and patent pools
these last months concerning the enforceability, in preliminary injunction proceedings, of these rights.

Essential patents contain one or more claims that are necessary to implement a standard for which they are essential.

In order to balance the conflicting and opposing interests of the companies that have obvious economic interests and needs to implement a standard, and therefore to use essential patents, and those of the patentees, the SSO requires their members to disclose any patents they consider essential for the implementation of the standard, and to grant irrevocable licenses to use these patents on FRAND terms.41

SEPs are patents that include a standard and are declared essential to practicing that standard by their owners and have attracted the attention of competition authorities all over the world.42

In Rambus Inc.43 the FTC filed a complaint alleging that Rambus had unlawfully obtained monopoly power by participating in an SSO process for several years without disclosing that it was actively seeking patents for technologies that were ultimately adopted as the relevant standards. The Commission determined that Rambus’ deceptive conduct constituted exclusionary conduct that contributed to the company’s acquisition of monopoly power. The Commission required Rambus to license its technology, setting a maximum royalty rate. Rambus appealed, and the D.C. Circuit overturned the Commission’s decision. The court held that the FTC did not establish that Rambus’ conduct “created or reinforced” its market power because there was insufficient evidence that the SSO would have selected an alternative standard or demanded a favorable licensing commitment “but for” Rambus’ allegedly deceptive conduct. Therefore, according to the D.C. Circuit, the FTC failed to satisfy the exclusionary conduct.44

44 ‘Standard-Setting and Antitrust’ by Laura A. Wilkinson and Brianne L. Kucerik, Available at http://www.weil.com/files/Publication/300f2734-1671-4b84-83e5-3386a4f2b5ca/Presentation/PublicationAttachment/f6c91ef-17dc-44c1-9162-3676cc8e8987/Standard-Setting%20and%20Antitrust%20-%20TPL%20Feb%202010.pdf on 22/01/2013.
In Broadcom Inc. v. Qualcomm Inc.\textsuperscript{45}, the licensing practices of Qualcomm were challenged by Broadcom and also the investigation of such practice was demanded. It was alleged that Qualcomm was demanding high royalty rates for its essential UMTS patent, which violated the commitment made when the standard was under development to license its patents on FRAND terms. Here Court held that when a company participating in a standard setting process intentionally makes a false commitment to license its technology on certain terms and then goes back on that commitment, it may be actionable anticompetitive conduct if an SSO relied on the commitment when incorporating the company’s technology into a standard.\textsuperscript{46}

Sometimes standards pose challenges relating to competition policy before the regulators like the European Commission and the US Federal Trade Commission (FTC). On eliminating the competing technologies which are in favor of selected standard, companies’ use it as powerful weapon for anticompetitive purposes. When the patent holder is assured that no other alternative technology is available he/she forces the licensee to pay high rates to access the standard technology. This is what the European Commission and the US Federal Trade Commission (FTC) fear could have happened in the Samsung and Google-Motorola cases.\textsuperscript{47}

In the U.S Google-Motorola\textsuperscript{48} case it was found that Google was trying to monopolize the market by excluding other competitors from using its standard technology. Motorola Mobility was acquired by Google last year for $12.5 billion, to strengthen its patent portfolio in an industry. But there has been controversy on the extent to which companies should be able to use standard-essential patents to seek injunctions against competitors’ products. As per the deal between FTC and Google, Google is required to withdraw its claims for injunctive relief on standard-essential patents covered under FRAND terms, and to offer a FRAND license to any company that wants to license Google's standard-essential patents in the future. The objective of

\textsuperscript{45} Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007); The district court granted Qualcomm's motion to dismiss, but the Third Circuit recently reversed the dismissal of the Sherman Act monopolization and attempted monopolization claims, and affirmed the dismissal of the unlawful monopoly maintenance claim.

\textsuperscript{46} Supra note 41


\textsuperscript{48} Case No. COMP/M.6381 –Google/Motorola Mobility, Available at http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf
FTC behind this deal was to stop seeking injunctions or exclusion order against companies who want to access the standard technology. But there still appears to be considerable ambiguity on whether Google is required under the settlement to withdraw existing injunction actions before the ITC (International Trade Commission) and courts, with persons close to the situation holding that Google was not required under its settlement with the FTC to withdraw the claims against Microsoft. In the end Google has withdrawn its claims for exclusion orders against Microsoft as required by FTC. A policy paper by the U.S. Department of Justice and the U.S. Patent and Trademark Office stated that a patent owner's voluntary F/RAND commitments may also affect the appropriate choice of remedy for infringement of a valid and enforceable standard-essential patent.49

In Samsung v. Apple50, Samsung claimed to be the owner of several essential patents concerning 3G/UMTS and requested the Court of different jurisdictions to grant a preliminary injunction against Apple, preventing the latter to produce, commercialize and advertise the smartphone denominated iPhone4S, allegedly infringing the standard essential patents at issue. Apple argued that it started negotiations in order to obtain a license on these patents but objected that the patent owner failed to fulfill its obligation, refusing to provide important information and requesting a non-FRAND royalty fee. The Court pointed out that the patent owner applying for preliminary injunction abuses its dominant market position when it acts in bad faith. The refusal of such an offer by the patent owner can be seen as an unreasonable conduct or when the principle of non-discrimination is breached. In this way, the owner of essential patents is completely free to independently determine the percentage of royalties, provided that they are FRAND and the subject matter of negotiations. There are just two limitations to this freedom: (i) it must not intentionally interfere with the aspiring licensee's activity or (ii) discriminate against it with respect to other licensees. Otherwise, the refusal to grant the license due to the insufficiency of the offer can be considered lawful. Furthermore, when the parties have been involved in negotiations and the interested party has requested a license, injunctive relief cannot be granted.

50 678 F.3d 1314 (2012); See http://scholar.google.co.in/scholar_case?case=8926878352616614421&hl=en&as_sd=2&as_vis=1&oi=scholarr&sa=X&ei=yXHUeaoFM6OrgeV0ICYDQ&sqi=2&ved=0CCsQgAMoADAA
A simple request is not sufficient to protect from all claims of infringement. Instead, it is necessary that the desire to obtain a license is followed by serious negotiations. The seriousness of the offer can be identified by the percentage of royalties calculated by the possible licensee. In light of such considerations, the Court denied the injunctive relief to Samsung.\textsuperscript{51}

\textsuperscript{51} Supra note 40.
CONCLUSION

To conclude this paper, it may be noted that Standard Essential Patents are important for the patent owners for practicing their patents effectively and efficiently. These standards are also important for a country’s economy as it helps in developing the collaborative market where companies play role of pure innovators and pure implementers and by licensing such patent on fair, reasonable and non-discriminatory terms which not only helps the multinational corporations but also the infant industries. These patents have also attracted the attention of competition regulating authorities all over the world. Their main concern is the alleged abuse of the market power conferred by SEPs which has been analyzed in different cases and the leading ones are the Rambus’s conduct of creating monopoly, Qualcomm’s licensing practices and issues that arose after the merger of Google and Motorola. The aim of the regulating authorities in all the above mentioned cases was to curb the antitrust practices going on and to provide equal opportunity to the new industries coming up. The issue raised here is of complex nature as it involves both, the interest of the patent owner and the interest of public at large which includes consumers and other competitors in the market. It would be interesting to see that how regulatory authorities balance the interest of public and patent owners without keeping anybody at loss and also to see that how future developments take place particularly in relation to Google-Motorola Merger.