



## **Comment: India considers greater regulation of standard-essential patents to much chagrin from US**

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### **IN BRIEF**

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The move by India comes as several other countries, including China and South Korea, are similarly grappling with how to approach the intersection of intellectual property and competition law in the context of standard-essential patents.

On March 1, India's Department of Industrial Policy and Promotion published a discussion paper on standard-essential patents, inviting public comments on how to "develop a suitable policy framework to define the obligations of Essential Patent holders and their licensees."

The paper – which the agency said is intended "to sensitize the stakeholders, concerned organization and citizens towards need and importance of regulating SEPs as well as facilitating their availability at Fair, Reasonable and Non-Discriminatory (FRAND) terms" – discusses cases from the US and Europe, and highlights three ongoing cases before the Competition Commission of India involving Swedish manufacturer Ericsson.

The paper requests comments on several topics, including whether India should issue guidelines on setting royalties for standard-essential patents, whether royalties should be based on the price of the entire device or smaller components, and whether the use of nondisclosure agreements allows patent-holders to misuse their dominant position in royalty negotiations.

DIPP administers intellectual property functions within India's government, including international aspects such as India's participation in the World Trade Organization and the World Intellectual Property Organization.

An original March 31 deadline for comments was later extended to April 22.

In a comment submitted to the Indian agency last week, George Mason University's Global Antitrust Institute raised concerns about the paper's explanation of US and European case law, noting that no US courts have found that seeking an injunction on a Frand-encumbered standard-essential patent automatically constitutes an antitrust violation. The European Court of Justice last year also adopted a safe harbor for antitrust liability in cases where an SEP-holder is seeking an injunction, they noted.

The George Mason comment was authored by US Circuit Judge Douglas Ginsburg of the US Court of Appeals for the DC Circuit and Republican former US Federal Trade Commissioner Joshua Wright, who now heads the institute, among others. It urged the agency not to recommend legislation or royalty caps related to standard-essential patents.

"We respectfully urge the Department not to adopt or recommend special legislation or amendments to regulate SEPs or licensing on FRAND terms," the commenters said. "Existing intellectual property and antitrust laws are adequate to address the issues relating to FRAND licensing."

The American Bar Association, the United States' largest legal advocacy group, and the American Intellectual Property Law Association are understood to be working on comments about the paper that will be submitted before the April deadline.

Within India, the reception to the DIPP's discussion paper has been mixed. The Federation of Indian Chambers of Commerce and Industry, FICCI, India's largest business organization, has been critical of the paper, saying DIPP intervention is unnecessary.

The Indian Cellular Association, a trade group composed of smartphone manufacturers and Indian handset providers, has praised the paper and supports the position that royalties should be based on the price of individual component at issue rather than the price of the overall device.

The paper only mentions the mobile wireless sector in passing, but that industry is undoubtedly the DIPP's focus; India is the world's second-largest mobile telephone market, with nearly 1 billion subscribers as of last year. While Samsung remains the largest smartphone provider, Indian firms Micromax, Intex and Lava have grown to become the second-, third- and fourth-largest suppliers, respectively, according to a report last year by International Data Corp.

For years, most patent litigation with India has concerned the pharmaceutical sector. Indian patent law allows for compulsory licenses in certain circumstances, including if the patent isn't available at a reasonably affordable price. The government has so far only required compulsory licenses on pharmaceutical patents, though the DIPP has indicated it might be

amenable to requiring compulsory licenses for green technology.

As the mobile wireless sector has grown in India, so has accompanying patent litigation. Much of the intellectual property underlying smartphones belongs to non-Indian companies. In a March 2016 study, University of Utah law professor Jorge Contreras and Rohini Lakshane of the Centre for Internet and Society in Bangalore found that the top 11 holders of Indian telecommunications patents are all non-Indian firms, with multinationals such as Qualcomm, Ericsson, Samsung and Nokia leading the list.

Since 2013, Ericsson has brought six patent suits in India, seeking royalties from four Indian and two Chinese firms that sell smartphones in the Indian market. Vringo, a patent assertion entity that purchased some telecommunications patents and SEPs from Nokia in 2012, has also brought suit against Chinese smartphone maker ZTE and Taiwan's ASUS.

Three of the companies sued for patent infringement by Ericsson – Micromax, Intex and iBall – have subsequently filed complaints with the Competition Commission of India alleging the Swedish company violated antitrust laws by refusing to grant licenses to its essential patents on Frand terms.

Those probes are ongoing. A court in Delhi ruled last week that the CCI has jurisdiction to hear the patent-antitrust disputes (see here).

India isn't alone in seeking to provide more guidance on how to approach issues related to standard-essential patents. Last week, Korea's competition authority, the Fair Trade Commission, issued final guidelines on intellectual property rights (see here).

Two of China's antitrust authorities – the National Development and Reform Commission, or NDRC, and the State Administration for Industry and Commerce, or SAIC – have drawn up draft guidelines on intellectual property rights abuses. The guidelines will be submitted to the State Council's Antimonopoly Commission, and once they are final will apply to all three of China's competition agencies: the NDRC, which has jurisdiction over price-related conduct; SAIC, the antitrust authority for non-price matters; and the Ministry of Commerce, which conducts merger reviews.

#### **Related case file(s)**

IP regulation - India - standard-essential patents