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EDITOR'S INTRODUCTION

Introduction to the JGLR special issue on standardization, patents and competition issues: global developments and perspectives

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1 Introduction

Confronting issues interfacing intellectual property and competition in markets driven by high-technology industries has become a challenging task for regulators as also the courts across jurisdictions. The overarching aim of confirming consumer welfare along with encouraging innovation can be daunting in the absence of clear legal framework characterized by processual fairness.

This special issue brings together articles from scholars and practitioners of intellectual property and competition law that discuss how regulatory agencies and courts deal with issues at the interface of interface of intellectual property, competition and standardization of high technology products in India, United States of America, United Kingdom, China, South Korea and the European Union.

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Standards declared by Standard Setting Organizations (SSOs) allow Standard Essential Patent (SEP) holders to negotiate licenses with implementers on fair, reasonable, and non-discriminatory (FRAND) terms and conditions. In most instances, innovators and implementers successfully negotiate licensing of SEPs. However, there have been several instances when disagreements have emerged over issues of, *inter alia*, appropriate base for assessing royalties, reducing ambiguities in FRAND terms and bundling of patents in licensing agreements. In some jurisdictions SEP holders have been granted exclusionary rights to seek injunctions against alleged infringers using the patented technology. Allowing the exercise of these rights without limitations has been viewed as endangering the efficiency of standard-setting and overall competition in the market. Should regulatory bodies such as the Competition agencies be empowered to impose restrictions on the rights of SEP holders to seek injunctions and similar remedies, and thereby regulate standard setting and innovation is debatable. Another prevalent view explores the role of Courts in enforcing FRAND-encumbered patent licenses. Accordingly, should Courts determine appropriateness of royalty base, and intervene in commercial and private negotiations to check alleged willful infringements of essential patents is similarly curious. As jurisdictional overlap becomes a serious impediment, another fear is that of overregulation. Overregulation may hinder the access, availability and affordability of important technologies, which is certainly not an intended aim of innovation characterized by standardization. The overall situation has resulted in a surge of litigation in various jurisdictions and also drawn the attention of competition regulators. Further, a lingering lack of consensus among scholars, industry experts and regulators regarding methods and techniques to resolve the situation has added to the confusion. With this background, we present a special issue where perspectives and global developments are presented at the interface of standardization, patent rights and competition concerns.

2 Background

This special issue highlights some of the contentious issues that have been debated in the last two decades. These include but are not limited to the rights of the SEP holders with respect to their patented technology in the ICT sector; the use of such technology by a licensee; antitrust authorities and orders pertaining to abuse of dominance and courts handling cases relating to infringement of patented technology. There have been additional issues in relation to the extraterritorial reach of antitrust authorities. Over time we see cooperation amongst them to ensure consistency in matters related to the use and misuse of SEPs having global repercussion. With respect to certain jurisdictions, challenges have begun to surface in the last decade or so. Some of these jurisdictions include India, China and South Korea. While the broad contours of the underlying issues have not changed, non-homogeneous regulatory structures in these economies have added an additional dimension to the debates happening in recent times. In the background of heavy

fines, SEP holders have mostly led the talks about procedural fairness and due process.[1]

Courts and regulatory authorities in these jurisdictions have come forth with some decisions and orders. The foundation of these decisions and orders has been set forth in the background of varying presence of SEP holders. For instance, in India there is no competing SEP holder in the ICT sector. The string of cases in the last 6 years or so only provide overall perspectives of implementers or manufacturers of mobile phones on one hand and SEP holders on the other.[2] While there is some guidance from the High Court of Delhi about handling SEP related matters, the Competition Commission of India (CCI) is yet to publish final orders on the complaints pertaining to abuse of dominance. In their prima facie orders the CCI has indicated abuse on the part of SEP holders.[3]

Unlike the situation in India, Chinese SEPs holders in the ICT sector are competing with other SEP holders not only in China but in other jurisdictions as well. There have been major decisions delivered by the Court of Justice of the European Union (CJEU) and the Court in United Kingdom in recent times involving Chinese SEP holders.[4] These decisions have helped in shaping up the jurisprudence relating to SEP cases. The National Development and Reform Commission (NDRC) in China has also handed out an order finding abuse of dominance against one of the major SEP holders.[5] Similar to the NDRC, the Korea Fair Trade Commission (KFTC) has also singled out major SEP holders and found them abusing their dominant position.[6] As a part of this note we chiefly identify some of the emerging trends and complexities embedded in matters involving SEPs.

[1] *Qualcomm Responds to Announcement by Korea Fair Trade Commission*, https://www.qualcomm.com/news/releases/2016/12/27/qualcomm-responds-announcement-korea-fair-trade-commission; *Qualcomm Stay Appeal Denied by Seoul High Court on Absence of Irreparable Harm; Appeal to Seoul High Court on Merits of the Case to Proceed*, https://www.qualcomm.com/news/releases/2017/09/04/qualcomm-stay-appeal-denied-seoul-high-court-absence-irreparable-harm; Hao Zhan & Jing He, *Authority scrutiny of SEP and FRAND Issues in China*, IAM MEDIA (2016), http://www.iam-media.com/Magazine/Issue/78/Management-report/Authority-scrutiny-of-SEP-and-FRAND-issues-in-China; Daniel Sokol, Due Process, *Transparency and Procedural Fairness in Asian Antitrust*, COMPETITION POL' Y. INT'L. (Jan 28, 2015), https://www.competitionpolicyinternational.com/assets/Uploads/AsiaJanuary15.pdf; Wong-Ervin, Koren W., *Protecting Intellectual Property Rights Abroad: Due Process, Public Interest Factors, and Extra-Jurisdictional Remedies*, George Mason Law & Economics Research Paper No. 17–18 (2017).

[2] *Telefonaktiebolaget LM Ericsson (Publ.) v. Mercury Electronics*, (2015) (61)PTC351(Del); *Telefonaktiebolaget Lm Ericsson (Publ.) v. Intex Technologies (Ind.) Ltd*, (2015) (62)PTC90(Del).

[3] *Case No. 50/2013*, Competition Commission of India, (Nov. 12, 2013); *Case No. 76/2013*, Competition Commission of India (Jan. 1, 2014); *Case No. 04 of 2015*, Competition Commission of India (May 12, 2015).

[4] *Case C-170/13*, *Huawei Techs. Co. v. ZTE Corp.* (July 16, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=603775; *Unwired Planet v. Huawei* [2017] EWHC 711 (Pat), (Apr. 5, 2017).

[5] PEOPLE'S REPUBLIC OF CHINA NDRC, Administrative Penalty Decision, Development & Reform Office Price Prison Punishment [2015] No. 1, (Feb. 9, 2015), http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html; *see also* Xu Xinyu, *Antitrust and Intellectual Property Rights: NDRC's Xu Xinyu on the Qualcomm Case*, GLOBAL COMPETITION REV. (Feb. 24, 2016), http://globalcompetitionreview.com/features/article/40566/antitrust-intellectual-property-rights-ndrcs-xu-xinyu-qualcomm-case.

[6] KFTC Decision and Order No. 2009-281, (Dec. 30, 2009), 2009JiSik0329, (S. Kor.).

3 Role of antitrust/competition authorities

Although in India the Competition Commission of India (CCI) has not pronounced any final order as yet, the prima facie orders leading up to the detailed investigations would give us some guidance in cases involving SEPs. It has been suggested in all published orders that signing of a non-disclosure agreement (NDA) would facilitate towards establishing abuse of dominance.[7] Signing of an NDA and the importance of confidentiality while sharing patent related information have been touched upon in the recent CJEU judgement. It was asserted that NDA is a business reality and would amount to an accepted practice followed in this industry.[8] The CCI was also critical about the act of a SEP holder charging different royalty rates from licensees placed in similar positions.[9] The orders refer to the issue of royalty base and how it was justified to consider the patented technology as the base instead of the final selling price of a mobile phone.[10] Largely, all orders that were subsequently passed to the DG for detailed examination reasoned on similar grounds.

The NDRC in China was critical of the practice of portfolio licensing, while establishing the dominant position of the SEP holder in three markets (CDMA, WCDMA, and LTE).[11] NDRC order pointed to a case of abuse of dominance and suggested that the SEP holder was engaging in the process of tying up SEP with non-SEPs.[12] The order suggested that there were expired patents in the licensing portfolio. In the process, NRDC imposed a fine of $975 million dollars against the SEP holder.[13]

The KFTC similarly in their order suggested that in the 2G, 3G and 4G markets, the SEP holder was engaging in discriminatory licensing practices and the rebates granted to selected parties were conditional in nature.[14] These conditions put up by the SEP holder created a barrier for other competitors to enter these markets. Similar to NDRC, the KFTC imposed a heavy fine of $875 million dollars.[15] There has been a similar matter against the same SEP holder where a fine of $275 million dollars was imposed. This case, however, had been appealed before the Supreme Court of Korea.[16]

[7] *Case No. 50/2013*, Competition Commission of India (Nov. 12, 2013); *Case No. 76/2013*, Competition Commission of India, (Jan 16, 2014); *Case No. 04 of 2015*, Competition Commission of India (May 12, 2015).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] People's Republic of China NDRC, Administrative penalty decision, Development and Reform Office Price prison punishment [2015] No. 1, (Feb. 9, 2015), http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html.

[12] *Id.*

[13] *Id.*

[14] *Qualcomm's Abuse of Dominance*, KFTC Decision No. 2009-281, thttp://www.ftc.go.kr/eng/solution/skin/doc.html?fn=62f643971f150af3ff888131360ad88bb95831bce002ac40d3292941915cc300&rs=/eng/files/data/result/files/bbs/2012/.

[15] *Id.*

[16] CNet, *Qualcomm Files Second Appeal Against South Korea FTC Order*, Cnet (Sept. 6, 2017), https://www.cnet.com/news/qualcomm-files-second-appeal-against-ftc-order-in-south-korea/.

In a recent judgement, the CJEU dealt with the issue of quantum of fine. Back in 2009 the Commission had fined the SEP holder, which on appeal was upheld by the General Court of EU in 2014.[17] The Commission argued abuse of the dominance based on the alleged anti-competitive strategy adopted by the SEP holder. Early this month, the CJEU questioned the process followed by the Commission at the time of reaching to such conclusion.[18] CJEU while setting aside the judgement of the General Court suggested the Court to undergo a detailed analysis of the evidences provided by the SEP holder before establishing that rebates given by SEP holder were capable of restricting competition.[19]

We see that antitrust authorities are at various stages in deciding matters relating to complaints concerning abuse of dominance. Therefore, this situation gives enough opportunity for the CCI to expand the scope of investigation and learn from other jurisdictions. It remains to be seen the grounds adopted by the CCI before pronouncing final orders in the pending cases.

4 Adjudication of SEP disputes

The Courts have so far decided matters ranging from patent infringement to the question of injunction in FRAND encumbered SEPs. Also, they have reflected upon critical issues like meaning associated with FRAND and the application of comparable licenses when it comes to setting up of royal rates. The issue of conduct of parties entering into a licensing agreement has been a major issue. The conduct of parties have led to the concepts of a willing and an unwilling licensee.

The High Court of Delhi was asked to decide on the jurisdiction of CCI when a patent infringement case under the law of patents (Patents Act, 1970) was pending in the civil court. The Court suggested that there is no conflict between the two Acts. By virtue of the Competition Act, the CCI can independently exercise its jurisdiction irrespective of a pending matter under the Patents Act.[20] The courts in India have been granting preliminary orders of injunction in SEP cases where the licensee has infringed the patented technology.[21] Under similar circumstances, CJEU provided us with certain guidelines in matters relating to injunctions in FRAND encumbered SEP cases.[22] These guidelines connect to the concept of a willing and an unwilling licensee and lay down certain expectations from the SEP holder and the licensee. In fact, the High Court of Delhi has already reflected upon

[17] *Intel Corporation v European Commission* [2017] Case C-413/14 P, CJEU (Sept. 6, 2017).

[18] *Id.*

[19] *Id.*

[20] *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India, Case* W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 (Mar. 30, 2016).

[21] Preliminary injunction orders granted in India: *Ericsson v Kingtech Electronics (India) Pvt. Ltd*, CS OS 68 of 2012 (Jan. 19, 2012); *Vringo Infrastructure Inc. v ZTE*, CS(OS) 314/2014, (Nov. 11, 2013).

[22] *Case C-170/13*, *Huawei Techs. Co. v. ZTE Corp.* (July 16, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=603775.

the delaying tactics adopted by the licensee at the stage of negotiation. The Court while pronouncing the judgement was critical about the amount of time that the licensee had taken to finalize the rate of royalty.[23] In the recent CJEU judgement, the Court specifically looked at the conduct of the parties. Without touching upon the exact length of time invested towards the process of negotiation, the Court suggested that the commencement of the negotiation process would help in deciding the conduct of the parties and therefore, add up to the jurisprudence of a willing and an unwilling licensee.[24] This judgement also examined the procedural flaws in the steps taken by the Commission at the time of deciding abuse of dominance. Even the quantum of fine imposed was questioned by the CJEU on the ground of lack of detailed analysis of the evidence produced by the SEP holder.[25]

Other than the Courts and competition authorities there is a wide rift amongst academics on a various range of issues. This rift has added to the existing complexities that are already under consideration in various jurisdictions. There are serious disagreements so far as royalty base and royalty rates are concerned and there is no easy way to bridge this gap.[26] There is no consensus as to the understanding of what constitutes FRAND.[27] Further, there are raging debates on the point of injunctions surrounding FRAND encumbered SEPs and lack of evidence in identifying actual harm in alleged cases of abuse of dominance.[28] In recent times, in a number of jurisdictions we have come across multiple proceedings concerning alleged abuse of dominance against prominent SEP holders.[29] These actions raise the importance of considering the issues of due process and fairness in the overall antitrust framework in those jurisdictions.

There is an academic infancy in research at the interface of patents, competition and regulatory policy in India. However, in the past couple of years, inter-disciplinary academic scholarship on this interface is being promoted by selected Indian academic institutions, including Jindal Initiative on Research in IP and

[23] *Id.*

[24] *Id.*

[25] *Intel Corporation v European Commission* [2017] Case C-413/14 P, CJEU, (Sep. 06, 2017).

[26] *LaserDynamics v. Quanta Computer*, 694 F.3d. 51 (Fed. Cir. 2012); Rite-Hite v. Kelley Co., 56 F.3d. 1538 (Fed. Cir. 1995); *CSIRO v. CISCO*, No. 6:11-cv-00343, 2014 WL 3805817 (E.D. Tex.); Qualcomm and China's National Development and Reform Commission Reach Resolution (Feb. 10, 2015), https://www.qualcomm.com/news/releases/2015/02/09/qualcomm-and-chinas-national-development-and-reform-commission-reach; FTC, *The Evolving IP Marketplace: Patent Notice and Remedies with Aligning available Competition*, [2011], http://www.ftc.gov/os/2011/03/110307patentreport.pdf (article on royalty rates and base).

[27] Gregory Sidak, *The Meaning of FRAND, Part II: Injunctions*, 11 J. Competition L. & Econ. 201–269 (2015).

[28] *Id.*

[29] *Micromax Informatics Ltd v. Telefonaktiebolaget LM Ericsson (Publ.)*, (2013) Case No. 50/2013 (Competition Comm'n of India); *Intex Technologies (India) Ltd v. Telefonaktiebolaget LM Ericsson (Publ.)* (2013) Case No. 76/2013 (Competition Comm'n of India); People's Republic of China NDRC, Administrative Penalty Decision, Development and Reform Office Price Prison Punishment [2015] No. 1, (Feb. 9, 2015) available at http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html; KFTC Decision & Order No. 2009-281, 2009JiSik0329, (Dec. 30, 2009) (S. Kor.); Eur. comm' n. *Samsung—Enforcement of UMTS Standard Essential Patents*, CASE AT. 39939 (Apr. 29, 2014); *In re Motorola Mobility and Google*, Docket No. C-4410 (FTC).

Competition (JIRICO)/Jindal Global Law School and National Law University Delhi, who are more closely involved now than ever on these topical issues. In past 2 years, JIRICO at O.P. Jindal Global University has been instrumental in organising some of the largest and high-impact focused international workshops and academic conferences where, for the first time in India, frontline issues of IP policy, patent holdup and holdout in ICT, SEP licensing disputes and the role of competition agencies were deliberated actively by scholars, judges, policymakers, regulators, diplomats, practitioners, and industry experts together. These activities have not only triggered academic curiosity to address unresolved questions with evidence-based research, but also motivated us to devote an entire issue of the Jindal Global Law Review to this exciting theme of contemporary relevance.

5 Contributions

The first article co-authored by **Anne-Layne Farrar** and **Koren W. Wong-Ervin** focuses on *Methodologies for Calculating FRAND Damages: An Economic and Comparative Analysis of the Case Law from China, the European Union, India, and the United States*. Assessment of appropriate licensing terms for SEPs has not been an easy task in technology sectors that rely on technical standards that permeate across jurisdictions. This article combines analysis based on economics and on the expansive case law to date emanating from China (the Shenzhen Intermediate People's Court and the Guangdong Province High People's Court), Unites States (from the District Courts and from the United States Court of Appeals for the Federal Circuit), India (Delhi High Court) and in the European Union (by Courts of member states as well as the Court of Justice of the European Union). They find that consensus is emerging on the symmetrical nature of concerns around patent holdup and that relying on comparable licenses based on end-user device is crucial. Further, with respect to injunctions, Courts in India, China, and the UK have granted such relief on FRAND-assured SEPs, when needed to avoid holdout by implementers.

The next two articles explore different, but related, aspects of litigation and regulation of patents in the United States. **Preston Moore** in his article titled *Negotiating And Litigating Intellectual Property: With And In Confidence* discusses the legal procedures available in the United States to assure confidentiality of IP negotiations and litigation involving either collaborative or adversarial stakeholders. He addresses issues arising in the context of three commonly used approaches that are widely regarded as effective—sealing confidential material submitted to a court; Rule 408 of the U.S. Federal Rules of Evidence; and agreements, commonly labeled joint defense or common interest agreements, concluded among parties to such negotiation and litigation. He contends that there is no basis for expecting that the treatment of settlement negotiation evidence and arguments in relation to litigation will move in the direction of a more consistent, stable approach. The second article shifts the focus towards the United States antitrust law that is expressly applicable to trade involving foreign countries. **Donald E. Knebel** in his article, *Extraterritorial Application of U.S. Antitrust Laws: Principles and Responses*, starts with a discussion on decisions of US Courts that have concluded that antitrust laws do have

a characteristic of extraterritoriality due to which they reach activities occurring outside the United States if they have an effect on commerce in the United States. The article goes on to elaborate on the retaliatory approach taken by some countries that have enacted laws that essentially seek to minimize the extraterritorial reach and impact of antitrust laws of the Unites States. He concludes that considerations of international comity and similar principles can affect the reach of laws of the United States and its enforcement agencies.

This is followed by two articles that specifically discuss experience of Courts and antitrust agencies in matters pertaining to licensing of Standard Essential Patents (SEPs) in the context of China and South Korea. In the first article on *Antitrust Treatment of Standard Essential Patent Abuse: China's Experience and Lessons*, **Jet Deng** reviews practices of China's antitrust powerhouse, National Development and Reform Commission (NDRC), and the enforcement of China's Anti-Monopoly Law in cases involving SEPs since 2008. The article presents an analysis of the guidelines of applying antitrust law in the fields on intellectual property rights, in general, and in SEPs, in particular. He suggests that NDRC has made use of China's competition law as an effective means to balance the interests of the SEP holder and the interests of consumers in the telecommunication sector. The article concludes with suggestions for future policymaking in China and some lessons that international agencies and stakeholders can learn from China's experience in investigating SEP holders. In the second article on *Recent Developments in Korean Antirust Cases Concerning FRAND Encumbered Standard-Essential Patents*, **Jinyul Ju** methodically analyses four antitrust cases concerning FRAND-assured SEPs that have come to the South Korean courts in the last 6 years. These cases include (1) the Seoul Central District Court's decision in Samsung v. Apple (August 2012); (2) the Korean Fair Trade Commission (KFTC)'s consent decision on the Microsoft/Nokia Merger (August 2015); (3) the Seoul High Court's decision in Qualcomm v. KFTC (August 2012) pending in the Supreme Court; and (4) the KFTC's decision against Qualcomm (January 2017) pending in the Seoul High Court. The article ends with comments on the application of the Korean Monopoly and Fair Trade Act towards SEPs that have been committed for licensing on FRAND terms.

In a case note written by **Dipesh A. Jain** on *Substantial Determination of FRAND license terms and competition issues by U.K. High Court*, he deconstructs the recent Unwired Planet v. Huawei decision in the United Kingdom. It is not only an English court's first FRAND decision, it is the first instance in Europe where a judge has directly addressed the question of what amounts to "Fair, Reasonable and Non-Discriminatory" terms of a SEP license. On the basis of reasoned judgments, the English High Court held that it has jurisdiction to determine as well as enforce FRAND commitment, and more importantly, held that there is only one set of license terms that are FRAND-compliant. In determining royalty rates for a worldwide license for valid, essential and infringed patents, the court highlighted the negotiation process by which a license is decided and, additionally, dealt with allegations of antitrust abuse. The case note suggests that this landmark decision is valuable for parties involved in current and future negotiations to finalize patent licenses that are the bedrock of ICT-intensive sectors.

Finally, in a special article on *Data Exclusivity: A Tool to Sustain Market Monopoly*, **Srividhya Ragavan** contributes to the existing literature that questions the use of patents as a means to incentivize and promote innovation across countries. The article focuses on data exclusivity as a tool enabling pharmaceutical industry players to sustain or help maintain the longevity of their market exclusivity and monopoly, consequently impacting access and availability of medicines in economies with high patient population. After an in-depth explanation of the concept, origins and implications of having enhanced term of test data exclusivity, the paper addresses controversial questions around requirements prescribed under Article 39 of World Trade Organisation's Multilateral Agreement on Trade Relates aspects of Intellectual Property Rights (TRIPS), with a special focus on India. In conclusion, the author highlights the need to be cautious in adding a more TRIPS Plus form of exclusivity that may not serve well for innovation in the longer run.

6 Conclusion

In conclusion, we are grateful to all the contributors of this special issue and thank them immensely. Given the enormity of market realities, the variance in the regulatory framework and the jurisprudence in the emerging area interfacing intellectual property and competition, and to allow for appreciation of global perspectives and contemporary debates, we have been intentional in curating the scholarly contributions dealing with the concerns in *China, the European Union, India, South Korea, United Kingdom and the United States*. We hope that this special issue contributes to the improved understanding of the regulatory application and scholarly observation with tentative lessons that can be learnt from the problems faced by these jurisdictions.

We also extend our gratitude to the reviewers for their time and expertise in offering constructive comments to finalize the articles during the pre-publication stage. Our thanks to the proof-readers and assistants for their efforts during the stage of polishing the articles for final publication. This journal volume is now a cohesive and nuanced deliberation on relevant global developments and perspectives concerning standardization, patent and competition issues. Therefore, we hope it makes for useful read and learning for all our readers.