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Safeguarding confidential business information is not anti-competitive

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Ten years ago, only 12 out of 100 people in India had phone connections. Since then the Indian telecom market has leapfrogged achieving a teledensity of 80% now, and active smartphone subscribers crossing 220 million. One of the main factors for Indian telecom revolution can be mapped to the availability of technologies to indigenous low cost smartphone manufacturers. The dichotomy in the Indian telecom industry is that despite the huge revenue potential due to the growing number of subscribers and penetration of mobile technologies in rural area, the propensity to innovate in mobile communication technologies is abysmally low.

In the domestic market, top three Indian manufacturers (Micromax, Intex and Lava) hold over 30% of market share. However, they do not hold any patents in India on chipsets, processors, communication networks and other core mobile technologies; and they hold only a handful of patents and that too on software related to audio and keyboards. Although Indian firms have design studios, their focus is on hardware development (such as casing, batteries and chargers) and further localization of components imported from elsewhere. Therefore, the dependence is understandably on more innovative and research-oriented firms that have patent portfolios for technological standards such as 3G, 4G and LTE.

The holders of these standard-essential patents (SEP) have to commit to provide them on reasonable and non-discriminatory license terms to device manufacturers who cannot afford to miss taking part in the great mobile revolution. The difference in understanding what constitutes a reasonable return on these essential patented technologies has led them to knock on the doors of courts and competition commission. While the SEP holder is fighting against patent infringement and trying to get suitable return on its investment, devise manufacturers are desperately trying to prove anticompetitive behavior on the part of the patent holder for seeking excessive royalties. Homegrown mobile phone sellers, Micromax and Intex, 'informed' the Competition Commission of India (CCI) in mid 2013 of anticompetitive practices by Ericsson, which was *prima facie* found by the commission. This was after the parties individually failed to sign a patent licensing agreement with negotiations spanning 3-4 years not yielding any result. The most important arguments CCI relied upon were (1) thrusting manufacturers with a Non-Disclosure Agreement (NDA), and (2) seeking royalties that were not uniform across 'similarly situated' players. The antitrust watchdog seems to have erred on both counts. It acted in haste by not taking into account the interim arrangement ordered by the Delhi High Court, which held that NDAs are legitimate and *sine qua non* in every licensing deal, particularly in patent licensing.

NDAs become necessary safeguards for any party that is reliant on high-tech inventions and, by extension, on holding, managing or using intellectual property rights embedded in those inventions. NDAs are antecedent to any negotiation process, and are a versatile and valuable tool for both licensor and licensee. During the negotiation, Intex had revealed that it was rather unaware of the infringement and of the underlying patents essential to the functioning of technologies in their devices, such as those that conserve use of bandwidth and enhance speech quality in 2G and 3G enabled smartphones. It sought confidential details of infringing patents, without signing a NDA, to discuss with its vendors in China from whom it was importing the device.

According to the NDA used by the Centre for Development of Telematics (C-DOT), a telecom technology development centre of the government of India administered by the DoT, in collaborative R&D arrangements and technology transfer deals, confidential information includes 'any information on design, fabrication & assembly drawings, know-how, processes, product specifications, raw materials, trade secrets, market opportunities, or business or financial affairs or their customers, product samples, inventions, concepts and any other technical and/or commercial information'. Licensing of deals between patent holders and manufacturers of devices using the patented technology would typically cover details of underlying patents (granted or pending patents) and a variety of business-related financial and market information. While the latter concerns both parties, information on patents is absolutely crucial to the holder's business.

The discussion paper recently released by the Department of Industrial Policy & Promotion (DIPP) on standard essential patents seems to have followed CCIs order having a gestated notion of "NDAs being abusive". So far perhaps no judicial body in US, which has a much more evolved jurisprudence in this area, has found NDA-based patent licensing

arrangement to be anticompetitive. Finding NDAs *per se* abusive seems to be overstretching the contours of abusive instruments and anticompetitive behavior. It is absolutely essential for DIPP to fully understand the benefits of non-disclosure agreements between businesses entering into patent licensing deals involving standard essential patents.

The current government is striving to boost the telecom sector and has assured to implement measures to enhance ease of doing business in India by attracting foreign investors and innovative companies. The debate around non-disclosure agreements being misconstrued as anticompetitive and abusive in the context of SEPs is misconceived and decision makers need to understand the grave implications of this. Other than the adverse impact on the growth of the industry, it also has implications for India's ranking in the 'ease of doing business' index which can be enhanced, among other parameters, by making contracts more enforceable and ensuring that confidential information of companies especially in high-innovation, high-tech and high-stake smartphone industry is not tinkered with.

(The article is co-authored by Girish Nagaraj, Research Analyst, Jindal Global Law School)

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