

November 13, 2017

ATTN: Shri Arvind Kumar, Advisor (BB&PA)  
Telecom Regulatory Authority of India  
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Dear Mr. Kumar:

ACT | The App Association writes to provide comments on the Telecom Regulatory Authority of India's ("TRAI") Consultation Paper on Promoting Local Telecom Equipment Manufacturing ("Consultation Paper").<sup>1</sup> The App Association represents more than 5,000 small- and medium-sized app development companies from around the world, including iCoderz Solutions Pvt. Ltd. of Gujarat, and Exousia Tech of Chandigarh. The App Association is committed to preserving and promoting innovation while accelerating the growth of technology markets through robust standards development and a balanced intellectual property system.

Below, the App Association provides general feedback on the Consultation Paper, and specific responses to questions raised in the Consultation Paper related to dispute resolution mechanisms for fair, reasonable, and non-discriminatory (FRAND) royalty determinations for standards essential patents.

## **I. App Association Feedback on the Consultation Paper and the Rise of the Internet of Things in India**

The App Association appreciates TRAI's consultation on India's potential in equipment manufacturing to explore avenues that would enable the Indian telecom industry to transition from an import-dependent industry to a global hub for manufacturing.<sup>2</sup> Our members' innovations provide the interface for the internet of things (IoT), an all-encompassing concept where everyday products use the internet to communicate data collected through sensors. IoT will continue to enable improved efficiencies in processes, products, and services across every sector. The rise of IoT is demonstrating

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<sup>1</sup> [http://traai.gov.in/sites/default/files/CP\\_on\\_Manufacturing\\_18\\_09\\_17.pdf](http://traai.gov.in/sites/default/files/CP_on_Manufacturing_18_09_17.pdf).

<sup>2</sup> Consultation Paper at pg. 7.

efficiencies in key segments of the Indian economy, including retail, agriculture, and healthcare, and it is projected to be worth more than \$947 billion worldwide by 2019.<sup>3</sup>

The real power of IoT comes from the actionable information gathered by sensors embedded in connected devices. IoT devices are useful in direct consumer interactions, but have huge potential as part of what is now commonly referred to as “big data.” For this document, we define this term to mean structured or unstructured data sets so large or complex that traditional data processing applications are not sufficient for analysis. As sensors become smaller, cheaper, and more accurate, big data analytics enable more efficiencies across consumer and enterprise use cases.

IoT deployment will be highly use case-dependent, yet it will depend on standardized solutions to ensure the ability for data to flow between parties. To date, the technology industry has utilized open Application Programming Interfaces (APIs) and other widely-adopted standards (e.g., TCP/IP) to enable interoperability. For example, in healthcare, a miniaturized IoT sensor embedded in a connected medical device must be able to communicate bidirectionally in real-time. This capability enables a healthcare practitioner to monitor a patient’s biometric data, and allows the patient to communicate with a caregiver in the event of a medical emergency. Other uses, such as sensors deployed to alert security of an unauthorized presence, may only require the ability to send data to security professionals with minimal (or even no) capability to receive communications.

Though the app industry has been in existence for less than a decade, it has experienced rapid growth alongside the rise of smartphones. As detailed in our annual *State of the App Economy* report,<sup>4</sup> apps have revolutionized the software industry, touching every sector of the economy. The app ecosystem is worth \$143 billion today, and is largely driven by startups and small businesses. While IoT sensors can be found in nearly every fathomable object in our lives, apps will serve as the main interface for communicating with these devices. As a result, the rise of IoT will hinge on the app economy’s continued innovation, investment, and growth.

Given the intertwined relationship between mobile smartphones, apps, and IoT-enabled connected devices, we strongly encourage TRAI to enact clear and predictable policies that will help secure the Indian market’s global competitiveness, and will not create barriers for Indian innovators to share their products and services with global customers. Mandates to localize manufacturing processes make it difficult, if not

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<sup>3</sup> “Internet of Things Market and M2M Communication by Technologies, Platforms and Services (RFID, Sensor

Nodes, Gateways, Cloud Management, NFC, ZigBee, SCADA, Software Platform, System Integrators), by M2M Connections and by IoT Components - Global Forecasts to 2019,” MarketsandMarkets (November 2014),

available at [http://www.marketsandmarkets.com/Purchase/purchase\\_report1.asp?id=573](http://www.marketsandmarkets.com/Purchase/purchase_report1.asp?id=573).

<sup>4</sup> ACT | The App Association, *State of the App Economy 2017* (Apr. 2017), available at [https://actonline.org/wp-content/uploads/App\\_Economy\\_Report\\_2017\\_Digital.pdf](https://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf).

impossible, for manufacturers to access and leverage global hardware and software development chains, putting Indian manufacturers and Indian consumers at a significant disadvantage. These types of mandates ultimately lead to a lack of market choice and reduce the number of ways our members' innovations can provide new efficiencies and solutions to end users, also increasing prices for consumers. The App Association commits to work with TRAI to help shape policies that promote IoT growth across all sectors of the Indian economy. We reiterate our recommendation that India establish fundamental principles to guide standardization activities, help ensure SEP licensing on FRAND terms, prevent and effectively resolve disputes over the meaning of FRAND behavior in this context, and encourage the enforcement of FRAND commitments. With these established principles, private parties and standard setting organizations (SSOs) can focus on negotiating the specifics of FRAND licensing terms.

## II. **Responses of the App Association to TRAI Questions on Potential Dispute Resolution Mechanisms for Determination of Royalty Distribution on a Fair Reasonable and Non-Discriminatory (FRAND) Basis**

As we discussed in April 2016 comments filed with India's Department of Industrial Policy & Promotion (DIPP),<sup>5</sup> the App Association strongly supports the development of an Indian policy framework to clarify the obligations of standard essential patent (SEP) holders who commit to license on FRAND terms. We believe the clarification of FRAND commitments can increase competition by reducing intellectual property (IP) abuse as well as unnecessary and burdensome litigation. By way of comparison, officials from the U.S. Department of Justice (DOJ) have provided guidance on how SSOs might revise their patent policies to "benefit competition by decreasing opportunities to exploit the ambiguities of a F/RAND licensing commitment."<sup>6</sup> We strongly urge India's policy reflect basic principles that underlie the FRAND commitment, promote procompetitive technical standard setting processes, and ensure terms of SEP licenses are reasonable. Ideally, an SSO's IP policy would include all of the following principles, which prevent patent "hold up" and anti-competitive conduct:

- Patents provide a clear and powerful incentive for innovation and continue to play an important role in driving competition and economic growth.
- Standards provide the foundation for the entire internet ecosystem and are a critical enabler of innovative startups and small and medium-sized firms.
- Holders of patented technologies that are essential to a standard may voluntarily commit to license such patents on FRAND terms, which allows SEP holders to obtain fair and reasonable royalties from a large body of standard implementers.

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<sup>5</sup> App Association comments are available at <http://actonline.org/wp-content/uploads/ACT-Comments-re-DIPP-SEP-Discussion-Paper-042216.pdf>.

<sup>6</sup> Renata Hess, Deputy Assistant Attorney General, *Six 'Small' Proposals for SSOs Before Lunch*, Prepared for the ITU-T Patent Roundtable (October 10, 2012), p. 9, available at <https://www.justice.gov/atr/speech/six-small-proposals-ssos-lunch>.

- Companies who voluntarily participate in standards bodies and choose to commit their patents to a standard under FRAND terms must uphold their promises.
- A commitment to FRAND patent licensing is a broad commitment that means:
  - **Fair and Reasonable to All** – A holder of a SEP subject to a FRAND commitment must license such SEP on fair, reasonable, and non-discriminatory terms to all companies, organizations, and individuals who implement or wish to implement the standard.
  - **Injunctions Available Only in Limited Circumstances** – Injunctions and other exclusionary remedies should not be sought by SEP holders or allowed, except in limited circumstances. The implementer or licensee is always entitled to assert claims and defenses.
  - **FRAND Promise Extends if Transferred** – If a FRAND-encumbered SEP is transferred, the FRAND commitments follow the SEP in that and all subsequent transfers.
  - **No Forced Licensing** – While some licensees may wish to get broader licenses, the patent holder should not require implementers to take or grant licenses to a FRAND-encumbered SEP that is invalid, unenforceable, or not infringed, or a patent that is not essential to the standard.
  - **FRAND Royalties** – A reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on several factors, including the value of the actual patented invention apart from its inclusion in the standard, and cannot be assessed in a vacuum that ignores the portion in which the SEP is substantially practiced or royalty rates from other SEPs required to implement the standard.

To date, some SSOs such as the Institute of Electrical and Electronics Engineers (IEEE) have successfully revised their intellectual property rights (IPR) policies to clarify the FRAND commitments they require from technology contributors. The App Association believes such clarifications are extremely beneficial to consumers, SEP holders, and standard implementers – particularly small- and medium-sized enterprises (SMEs) that act in good faith and often do not have the resources to commit to extended licensing negotiations and related litigation. Unfortunately, most SSOs struggle to follow IEEE’s example because their membership includes SEP holders that make significant sums of money through the licensing of their patents and thus do not want FRAND commitments to restrain their ability to charge high royalties. These SEP holders argue that (i) SSOs should be free to define FRAND; (ii) courts are fully capable of resolving any contractual disputes; and thus, (iii) competition agencies need not be involved in providing guidance or enforcing FRAND commitments. The App Association firmly disagrees with such proposals, and strongly urges TRAI to do the same.

We believe that unified and coordinated FRAND guidance from the Indian government would be beneficial to Indian companies and SMEs, which would align with the policy direction of mature and emerging jurisdictions and also position India as a leader. The

negative effects of abusive licensing of SEPs can be particularly harmful to emerging businesses, especially in countries that are emerging to better leverage the global economy and its opportunities. SMEs, including many of the App Association's members, often do not have the resources to challenge much larger SEP-holding enterprises that abuse their position. These SMEs either face financially-debilitating litigation, with no predictable outcome (especially jurisdictions like India where FRAND-related litigation is nascent) or are forced to accept excessive royalty demands made by the SEP holders. In the worst case, SMEs may be forced to change their product design or abandon business plans if they cannot afford the litigation or the expensive SEP licenses. SEP licensing abuses therefore undermine the effectiveness of the Indian government's ambitious programs, such as Digital India and Make in India.

Separately, within the Consultation Paper, TRAI requests commenters "suggest a dispute resolution mechanism for determination of royalty distribution on FRAND (Fair Reasonable and Non Discriminatory) basis."<sup>7</sup> We initially note that the voluntary FRAND commitment (with very few exceptions) enables parties negotiating a SEP royalty to successfully reach acceptable licensing terms without the assistance of a government regulator or court, provided that the FRAND commitment is adhered to. However, a handful of large SEP holders (some referenced in the Consultation) continue to seek to memorialize endorsements of their abusive SEP licensing practices in government policies, advisory guidance documents, etc. The suggestions we provide below are solely intended to speak to instances when the voluntary negotiation processes for SEP licensing that do not reach an acceptable finale and therefore require government action through a government regulatory agency or in the courts.

First, we strongly urge that Indian government policies avoid reducing the ability of parties in a SEP licensing scenario to seek appropriate redress in the court. We do not, however, support proposals that would punish companies for seeking redress in the courts and instead favor an alternative dispute resolution (ADR) process. Parties can sign contracts that require them to seek ADR processes, and therefore be held to account if they violate those contracts, but no government should alter the right of parties to seek judicial remedies. Ultimately, ADR mechanisms should continue to be voluntary. Where such ADR mechanisms are used, we urge the Indian government to recognize the well-settled concept that FRAND violations give rise to competition law and contract law liability, because the abuse can trigger demonstrated harm to consumers and enterprise end users. ADR processes should not be used to circumvent the competition law issues caused by FRAND abuse.

Second, should TRAI seek to create a *voluntary* ADR process for the determination of royalty distribution on a FRAND basis, we strongly suggest that such a process reflect several crucial fairness principles, consistent with leading ADR service providers around the globe. These include, but are not limited to:

- Fair and unbiased mediators should be used to offer ADR solutions, without exception.

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<sup>7</sup> Consultation Paper at pg. 16.

- Transparency in the process (e.g., access to controversy-specific confidential information held by an opponent in the ADR process needed). This transparency should be paired with processes that ensure the protection of sensitive (but not all) information released to the public.
- Ability to raise all the assertions and protections afforded to parties in the courts, and to voluntarily relinquish such rights.

Finally, because of the potential for SEPs in the future of the IoT, we strongly urge TRAI to seek public comment on proposed text of any such policy, and that all input received be duly considered, before finalizing the policy.

### **III. Conclusion**

The App Association appreciates TRAI's seeking of public input on its Consultation Paper. We stand ready to have further discussions with TRAI (and any other stakeholder) on the policies raised in the Consultation Paper.

Sincerely,



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