



BIF Counter Comments to TRAI CP on Promoting Local Telecom Equipment Manufacturing

1. Several constructive comments have emerged from TRAI's consultation on Promoting Local Telecom Equipment Manufacturing, and we believe that they reflect the intricacy of the telecom equipment manufacturing ecosystem. However, we have also observed that some responses have led to an inaccurate depiction of some of the critical issues within the telecom equipment manufacturing sector. We take this opportunity to clarify some of these misstatements, especially in relation to questions 3,4, and 5 of the original Consultation Paper, as below.
2. We are also appending a Document which has FAQs on the SEP framework (APPENDIX)
 - i) **Certainty on royalties payable:** Some stakeholders have alleged that royalties payable on SEPs are not known at the start of projects, leading to uncertainties in amounts payable. This is simply not accurate. Most patent holding companies follow a practice of publicly disclosing royalty statements by publishing them on their websites and thereby provide clarity on their licensing terms. By way of example, Qualcomm's royalty statement on its 5G royalty rates can be found on its website.¹ Most large SEP holders had announced maximum royalty rates for 4G LTE before its standardisation.² Even SSOs promote disclosure by providing for it in their IPR policies. SSOs like VITA, ITU and ESTI now encourage or facilitate the making of ex ante disclosures of licensing terms (including royalty rates) by licensors, at early stages. An ex ante disclosure of licensing terms involves a disclosure of the most restrictive rates at which a patent holder will license their technology.³ This is in addition to ex ante disclosures about which patents are SEPs – another practice that has added to transparency in SEP markets.

As a result, there is substantial clarity on patent royalty rates. If at all there are any variations in royalty rates during inter-party negotiations, they are only in consideration of ad-hoc commercial factors, and do not relate to the value of the

¹ <https://www.qualcomm.com/documents/qualcomm-5g-nr-royalty-terms-statement>

² <https://pdfs.semanticscholar.org/6eb5/1955ffbc2af76ff610dd7779e439a2b3825c.pdf>.

³ More information on ex ante disclosures is available at <http://www.etsi.org/about/how-we-work/intellectual-property-rights-iprs/ex-ante-disclosures> and <http://www.etsi.org/about/how-we-work/intellectual-property-rights-iprs/ex-ante-disclosures>.

patent. Therefore, the suggested recommendation that disclosure obligations be made part of SSO's policies, is already being implemented and there is no need for additional intervention.

- i) **Patent hold-ups:** Some comments also allege that breakdowns in negotiations have led to patent hold-ups in the industry. However, there is no data to support a finding of adverse impact in the Indian context. If patent hold-ups were a problem in India, they would have had a cascading effect, and ultimately been reflected in the form of higher mobile handset prices being borne by consumers. This has not been the case. On the other hand, the demand for handsets has been growing rapidly, and Indian consumers benefit from fast declining mobile handset prices in the last few years.⁴ Even in the US context, there is little empirical evidence of patent hold-up caused by the actions of SEP licensors, as was recently confirmed by a speech by the Department of Justice's antitrust leader on November 10th, 2017,⁵ where he stated that *"there is a growing trend supporting what I would view as a misuse of antitrust or competition law, purportedly motivated by the fear of so-called patent hold-up, to police private commitments that IP holders make in order to be considered for inclusion in a standard. This trend is troublesome. If a patent holder violates its commitments to an SSO, the first and best line of defense, I submit, is the SSO itself and its participants."* Some stakeholders have also claimed that the indiscriminate filing of injunction applications have further led to patent hold-ups and high licensing prices. They suggest that by agreeing to license SEPs at FRAND terms, licensors give up their right to seek injunctions; and have recommended that Indian regulators introduce guidelines to prevent the filing of injunction applications. Not only is this claim not backed by data, it is also entirely incompatible with established principles of law. Indian contract law unequivocally states that parties cannot contract in ways that are contrary to Indian law and policy. The right to seek injunctions is an important remedy available to persons under Indian law; and there are established jurisprudential principles that already take into account the relative positions of parties, to guide courts while granting them. Any other restrictions on individuals' abilities to seek injunctions before courts of law will not only be unprecedented, but also opposed to the common law understanding of contracts and remedies.

Therefore, we submit that these unsubstantiated fears of patent hold-ups and uncertainties in royalty are merely imaginary notions, unsupported by data or reality; and that to promote Indian manufacturing, the focus should be on improving local innovation and practices.

⁴ "The Mobile Revolution: How Mobile Technologies Drive a Trillion-Dollar Impact", BCG Report (2015).

⁵ <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center>

3. The intrusive and detailed regulation of SEPs and their licensing terms is unlikely to produce a positive effect, and instead, will, almost definitely lead to undesirable circumstances. Here, we reiterate the ramifications caused by the introduction of a controlling regulatory regime by the IEEE, in 2015. IEEE's IPR policy had changed to mandate that licensing take place at the SSPPU level, to prohibit references to existing licenses while determining reasonable royalty rates, and to restrict patent holders' abilities to seek injunctions. This has had the effect of discouraging a majority of patent holders from submitting positive letters of assurance. On the other hand, 73% of the letters of assurance submitted with regard to IEEE's 802.11 WiFi standard were negative in nature; and several patent-holders have become unwilling to adhere to the IEEE's policies. There has also been a decline in the number of project authorisation requests being submitted to the IEEE.⁶
4. The IEEE experience shows that any analogous attempt to suppress collaborative processes that are currently followed could result in the Indian telecom sector becoming closed and anti-competitive. The US has already begun to recognise the adverse effects of such over-regulation, with several patent licensees and implementers having recently been served with notice on grounds of abuse of antitrust law. In his previously mentioned speech, M. Delharim, the antitrust leader of the US Department of Justice stated that *"I worry that we enforcers have strayed too far in the direction of accommodating the concerns of technology implementors [...] Perhaps we're risking and undermining the incentives for [intellectual property] creators who are entitled to an appropriate reward for developing breakthrough technologies."* Any move towards shackling the collaborative framework under which SEPs operate today will ultimately harm the local manufacturers and will remove their ability to perform globally.
5. The objective of promotion of local manufacturing should be focused on moving local manufacturers up in the value chain of telecom equipment manufacturing. The promotion of local value addition in manufacturing will need the corresponding encouragement of innovation and SEPs, and the fostering of an enabling ecosystem that allows Indian innovators to commercially license their patents at viable terms. This need is already being recognised in Japan and the EU, where regulators have, in the course of deliberative process, decided to adopt hands-off approaches to SEP regulation. In November, this year, the Japan Patent Office called-off its plans to introduce guidelines which would subject SEP licensing to strong regulatory controls and pre-determined royalty rates. Japanese patent officials have stated that for the sake of their local businesses, they will need to take into account policy changes that favour licensors and comply with global standards. Similarly, patent licensing guidelines and communication document published by the European Commission on November 29th acknowledge the importance of

⁶ http://www.4ipcouncil.com/application/files/6015/0479/2147/Mallinson_IEEE_LOA_report.pdf

standardisation, while leaving it to parties to determine the basis on which royalty rates should be calculated. In its communication, the commission highlighted the need for a balanced approach to the SEP and FRAND issues, calling for a framework which will both preserve “ *fair and adequate return for contributions [to standards], and [ensure] smooth and wide dissemination of standardised technologies*”. According to the commission, the best way to ensure this balance is by determining FRAND royalty rates through bilateral negotiations, and abstaining from setting guidelines on prices or compulsory licensing of SEPs. It is our suggestion that Indian regulators adopt similar positions, while considering SEPs and FRAND.

We are hopeful that TRAI will consider this position and appreciate the detrimental domino impact a prescriptive regulation on SEPs and FRAND, which dictates royalty prices, provides for valuation on SSU and provides for other contractual terms could have.

6. At this juncture, it is important to discuss the role of the TSDSI in the process of setting standards. The responses of some stakeholders have invalidated its role, and recommended approaches that would overlook its existence completely. However, it must be kept in mind that the TSDSI’s IPR policy is the result of a process of considered deliberation. Undermining it, would be an invalidation of this process, as well as the principles of openness, balance, and flexibility upon which this nascent organisation has been established.

In closing, we would like to state that we have immense faith in the ability of the Indian talent pool to boost innovation and manufacturing levels with only a little help from the government. Indian innovators do not require high levels of government protectionism and indulgence in order to meet their full potential. Instead, with some encouragement in the form of funding and incentivisation, they have the capacity to become competent parts of the national and international innovation ecosystems.

Encl: Appendix : **FAQs on SEP Framework with FRAND terms**



APPENDIX

FAQs on SEP Framework with FRAND Terms

Myth 1: It's a myth that royalties asked by SEP holders is excessive that is hampering growth of telecom manufacturing sector?

- a. As per Boston Consulting report, Standardization and telecom technologies has led to 3.3 Tn USD as the turnover for mobile value chain which includes app industry, mobile operators, OEMs, ODMs, Content providers, mobile infrastructure manufacturers.
- b. Out of total 3.3Tn USD turnover, the royalty payments garnered by SEP holders globally is far too low which is 0.3% only. Thus, royalty stack is not an issue at all. In fact the maximum revenue has been generated by manufacturing sector and not the SEP owners.
- c. Royalty revenues garnered by SEP holders from Indian players (telecom equipment providers and Indian handset manufacturers) is close to zero⁷.

⁷ The assumption that excessive royalty payments are made, leading to increased prices of equipment's, is not correct in light of annual reports which clearly shows that majority of them are either not paying up or indulging in delaying tactics thus dis-incentivizing innovation and posing risk to standardization ecosystem. The MCA filings made by 19 telecom equipment manufacturing companies⁷ also show that there is insignificant expenditure made by these companies on royalty payments. Tejas Networks (which has a license for optical technologies from CDOT) paid Rs. 0.15 crores in 2013-14 and Rs. 0.09 crores in 2014-15, MYMO Wireless paid Rs. 4.7 lacs in 2014-15 and Rs. 4.9 lacs in 2015-16, and Nelco paid Rs. 1153 lacs (to CDOT) in 2015-16. For FY 2015-16, at least 14 of the 19 companies showed no expenditure on royalty payments at all. This data shows that the issue of FRAND royalties and SEPs is irrelevant, as far as the telecom equipment manufacturers are concerned. These 17 telecom equipment manufacturing companies were selected on the basis of market capitalisation from moneycontrol.com: Bharti Infratel Ltd., Honeywell Automation India Ltd., Nelco, Astra Microwaves Products Ltd., MIC Electronics Ltd., Valiant Communications Ltd., Aishwarya Technologies and Telecom Ltd., GTL

- d. Royalty stack is thus a myth floated around by unwilling licensees

Myth 2: It's a myth that SEP owners have huge countervailing power

- a. SEP owners do not have any countervailing power, it is rather the unwilling licensees that enjoy their monopoly and have immense countervailing power. The royalty yield of active players shows royalty yields in the range of 3.35 % to 2.64 % and showing gradual declining trend. suggesting that royalty revenue of license holders has remained stagnant but the mobile phone sales number and value has increased over years.
- b. Thus, the fear created by unwilling licensees that SEP owners terrify them does not find any base.

Myth 3: It's a myth FRAND Licensing is Anti-competitive. No R&D payments and stricter competition with innovative Chinese handset players is the key reason

- a. FRAND licensing is pro-competitive. Thanks to FRAND licensing that the homegrown Indian handset manufacturing sector has grabbed significant market share from meagre much less than 12 pc in 2012 as a whole to close to 38-40% altogether in 2015-2016. Infact until 2015, data shows that Indian handset market (smart phone sales) grew at a rate of 14% in India as against 7% globally.
- b. Compared to Q1 of 2016 when Indian handset companies held a market share of 41% and Chinese vendors held 15%, the situation has dramatically changed in Q1 of 2017. In Q1 of 2017, Indian handset companies hold a market share of mere 14% while Chinese vendors' market share has increased to 51%. This is primarily because, Chinese players are investing a lot in R&D as against insignificant or no R&D investments by Indian players.
- c. Close to 6-13% of total turnover is spent on R&D by Chinese Players as against 0.00008% by Indian handset manufacturers and mere 1.8% by telecom equipment manufacturers.
- d. Huge cash outflow (to the tune of 11-12Bn USD annually) because of heavy import dependence by Indian handset players. As a result, local value addition by handset players is less than 6% as against 60% by Chinese handset manufacturers.

Myth 4: China has double the strength of handset players than India, has never diluted or broken standardization ecosystem by keeping up with the Industry Practice of royalty charging on handset. Then Why should India consider that way?

- a. 11 Indian handset players as against 24+ in China.

- b. China has double the strength of handset manufacturers as against India. China has kept global FRAND licensing system intact by retaining royalty payments at handset level. NDRC in a QC case directed Chinese players to pay up royalties using handset as the royalty base
- c. CDAC, India's own agency follows the same system of seeking royalties at device level.
- d. If India considers changing the global system by calling for chipset licensing, it will hurt Indian industry and consumers more, as the low-end feature phones will cost higher because of increased chipset cost.

Myth 5: It's a myth that Indian handset manufacturing sectors don't make enough revenues and hence are unable to pay up IPR costs

- a. Shipments increased by 2083%
- b. Total turnover has grown by 300-2000% in less than 3 years
- c. Healthy profit margins by
- d. Indian handset players cough up close to 3.5% of their total turnover in marketing and promotions but have an issue paying up an IPR cost.

Myth 6: It's a myth that there are multiple SEP holders that are actively seeking licensing revenues

- a. It does not matter as to how many patents are embedded in a mobile device. There are various numbers that are being floated ranging from 400-2,5000, none of which are ever ratified. What matters more is how many patent holders have ownership to such patents and how many of those are active licensors
- b. ABI Research and Signus report there are less than 10 active contributors to standardization ecosystem and much less who are active licensors

Myth 7: It's a myth that majority of cases fought in Mobile telephony sector are related to SEPs

Data till 2014, related to cases filed in US:

- a. Studies reveal that out of total number of cases fought in the field of Mobile telephony, SEP related cases are less than 1/3rd of the cases were related to SEPs. Out of total 2746 cases identified related to smart phone wars fought by 20 companies, only 111 cases related to patents pleading unique patents as SEPs.
- b. Thus far no injunctions have been granted against SEP infringers in US
- c. Even in India, its not interim injunctions but interim arrangements where both the parties (plaintiff and Defendant) have been asked to submit bank guarantees

Myth 8: It's a myth that few major players sit together in cozy corner to get their technologies approved as Standards

- a. Success rate for technology to be adopted as standard is too low

