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RESPONSE TO TRAI CONSULTATION PAPER ON PROMOTING LOCAL TELECOM EQUIPMENT MANUFACTURING (CONSULTATION PAPER NO: 12/2017)

The TRAI ‘Consultation Paper on Promoting Local Telecom Equipment Manufacturing’ (TRAI Paper) has been published at the right time given that there is an effort by the Union government to make India a manufacturing hub. Ex Lege Chambers, Advocates and Regulatory, Policy Advisors (ELC) specializes in different legal, regulatory and policy issues, including Intellectual Property Rights (IPR), would like to submit its comments.

The paper addresses a number of issues and raises questions including matters related licensing of IPR that can affect local manufacturing. ELC would like to address some specific issues related to IPR, Standards Essential Patents (SEP) and their licensing, to provide an appropriate understanding of these issues. Comments and suggestions as to the issues and what need to be addressed are made paragraph-wise below as numbered in the Consultation paper.

1. (e) (i) Innovation:

It has been stated that IPRs are not generated locally due to poor state of innovation. While it might not be appropriate to state that innovation in India is in a poor state, it is a fact that they are not necessarily oriented towards creation of IPR. The Union government (Ministry of Commerce) has recently stepped up efforts to promote filing of patents and using the IPR mechanism for transforming the IPR regime in India to global standards and positive results are being witnessed.

There is an increasing trend towards dispersed manufacturing in a global value chain set up where local contribution would add considerable value if there is a component of IPRs in it. With mass adoption of voluntary industry standards, these standards are transforming from defacto to de jure standards. Hence it is very important to structure industrial policy to provide incentives and awards to promote innovation. ELC suggests that apart from financial incentives by way of tax benefits and facilitating filing of IPRs, participation and contribution in Standards Development Organizations (SDO) and there needs to be a structured awarding mechanism laid out in a tiered manner.

- The first tier would be awards for R&D innovations that are lab to market oriented.
- The second tier would be awards for the innovations that bring in inventions that can be patented.
- The third tier would be awards for the inventions that are adopted as standards in the global and Indian SDOs.

1. (e) (ii) Standards Essential Patents):

The concept of SEPs does not have any statutory recognition in the Patents Act 1970, as amended from time to time because they do not have any unique separate identity. They are patents granted to technological inventions that are adopted as standards at a later stage by SDOs. Given that without working these patents it is not possible to meet the adopted standard, they are termed “Standard Essential Patents” for their essential characteristics while they are in no way different patents. These SEP gain significant importance as component of licensing of technologies and failure in licensing can create barrier to access these technologies. To address such access problems, the SDOs mandate licensing of SEPs among other mandatory requirements.

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Considering the above fundamentals of SEPs, one needs to understand that its not just SEPs that have direct bearing on cost of equipment but all patents would have a direct bearing to equipment. Irrespective of whether it's a SEP or a non-SEP patent, one would need to obtain a license from the patent holder for utilizing it hence it is inappropriate to consider that such license would only be applicable for SEP. On the contrary, due to the essential character of the SEP, SDOs mandate licensing of the SEP on "Fair Reasonable And Non-discriminatory" (FRAND) terms while there is no such mandate for other patents.

If Plant and machinery, human resources, rent, all have direct cost implication on manufacturing of telecom equipment, so will technology and if such technology is protected legally, the legal protection's cost would also be included. In a licensing contract between two private parties, disagreement on the acceptable royalty rate is normal. In such cases while SDOs can always adopt guidelines in their IPR policies, any intervention by a third party, including government would create market distortion. However if any of the parties feel that there has been a breach of contract or violation of any statutory right, seeking adjudicatory remedy before appropriate forum can always be availed. Issues pertaining to the basis for calculation of royalty actually influence the market between two business models either in favour of the technology provider or the technology implementer. Before getting involved in determining whether the royalty is to be calculated on the smallest saleable patent practicing component (SSPCC) or the net price of the downstream product, the government must undertake a detailed independent study on their impact. Such study should consider flow of FDI, growth of equipment manufacturing and assembling, creation of jobs and other economic parameters in considering one mode of royalty calculation over the other.

1. (e) (iv) Non-disclosure agreements:

It is stated that non-disclosure agreements may result in differential royalty rates culminating in higher costs for local manufacturers that would ultimately be passed to consumers. It is also stated that the range of royalty rates need to publicly known where possible. Here it is important to understand that non-discriminatory rates as in 'FRAND rates' are not equal rates. Licensing negotiations between two parties are confidential and the royalty rates would depend on many parameters, they would obviously differ, based on differing terms and conditions. These rates are business confidential information that would impact the business if disclosed publicly hence status quo maintained. Instead of interfering in the rates, the Ministry of Commerce should establish necessary institutional mechanisms for necessary capacity building to help local implementers. Local implementers lack ability to negotiate FRAND licenses effectively both due to technical and financial reasons. Capacity building efforts can include determination of FRAND based on claim charts as against following voluntary declaration of essential patents in SDO databases; identification and negotiation of appropriate reasonable royalty rate; etc.

The existing statutory framework through the possibilities of enforcing the patent law and the competition law is sufficient to address the issues of local manufacturing. However as mentioned earlier in this paper, there are many policy issues that can be determined only after detailed study is undertaken. Regarding conflict resolution, there is a global move to adopt alternate dispute resolution (ADR) as preferred mode of dispute settlement, including in India. It is important to study if Mediation and Arbitration can be adopted as the first instance of dispute settlement without forgoing the statutory rights of injunctive relief or adjudicatory action before the CCI. We recommend that TRAI with assistance of Ministry of Commerce, commission an independent detailed study on impact of IPR and SEP on local manufacturing.

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