

GTW ASSOCIATES



Comments of GTW Associates

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**Consultation Paper on Promoting Local
Telcom Equipment Manufacturing made
available by the Telecom Regulatory
Authority of India September 18, 2017**

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Introduction

GTW Associates welcomes the opportunity to contribute to the record and comment on the *Consultation Paper on Promoting Local Telecom Equipment Manufacturing* made available by the Telecom Regulatory Authority of India September 18, 2017 .¹

The author as President of GTW Associates gives permission to disclose any information in this comment document, including my name, affiliation and contact information to any member of the public.

GTW Associates² is an International Standards and Trade Policy consultancy. The author as President of GTW Associates³ is a member of the ANSI Intellectual Property Rights Policy Committee and contributed as a member of the IEEE Standards Association to the IEEE Standards Association Patent committee revision of the IEEE Patent policy.

Previously I served on the W3C patent policy-working group and the ITU Telecommunications Standards Bureau (TSB) Director's Ad Hoc Group on IPR; GTW Associates monitors the patent policies of numerous standards organizations and maintains an online database of such policies⁴.

Previously I served on the ABA Science & Technology Section Technical Standardization and Infrastructure Committee which completed in 2007 the *Standards Development Patent Policy* Manual and I have authored several articles on standards policy available on SSRN⁵.

These comments are the views of GTW Associates and are not submitted on behalf of any GTW Associates' clients.

GTW Associates compliments the *Telecom Regulatory Authority of India* for its solicitation and consideration of public comments on its proposal.

Comments

Presented on following pages as "comments" on the TRAI text .

¹ <http://www.trai.gov.in/consultation-paper-promoting-local-telecom-equipment-manufacturing>

² GTW Associates www.gtwassociates.com

³ Credentials and Experience of George T. Willingmyre, P.E., President, GTW Associates <http://www.gtwassociates.com/gtw/gtwresume.html>

⁴ Intellectual Property Rights Policies of selected standards developers October 2016 <http://www.gtwassociates.com/answers/IPRpolicies.html>

⁵ https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1027082

Page 6 However, past the advent of mobile era, mobile phones and telecom equipment were permitted to be imported duty free, while this has provided the consumers with better choices and bargaining power, it has also restricted growth of mobile phone and telecom equipment manufacturing in India.

Comment: Note the competing priorities of consumer choice and bargaining power with the stated restricted growth of local manufacturing. Any proposed actions must balance these two priorities. While this may seem obvious, there must be an economic assessment of the value of better consumer choice and bargaining power.

Page 6 Telecom sector being dynamic in nature, both in terms of technology and the services, requires sustained heavy investments on Research and Development (R&D) . Major telecom equipment manufacturing companies of the world are therefore rolling out equipments manufactured as per the latest standards and quality to maintain their relevance and dominance in the sector.

Comment: The first sentence comports with the fact that heavy investments in Research and Development (R&D) are made by industry players who wish to remain competitive. The second sentence needs to reflect that it is generally these major telecom businesses making these R&D investments. To remain competitive in this global market is not merely a matter of making equipment meeting relevant standards. To remain competitive in this global market requires substantial investment in R&D.

Page 10 and 11 India's total research and development expenditure was only 0.8% of its GDP. Other countries such as the Republic of Korea and Israel's expenditure on research and development are 4.3% and 4.1% of their respective GDPs¹³. Since IPR's are not held with the Indian telecom manufacturers, they incur higher expenditures on royalty payments which ultimately results in increase in price of locally manufactured telecom equipments.

Comment: The general thrust that intellectual property is related to investments in R&D and innovation is correct. But it is important to recognize this as "one" business model. There are many possible business models. The observation that local manufacturing often requires payments of royalties may be true, but it does not follow that such payments automatically result in increased prices for locally manufactured products. First there must be data collected on actual prices charged in the India market for products manufactured locally and products manufactured remotely. Then there must be some rationale that any observed price differentials are the result of royalty payments.

Page 12 Standard Essential Patents (SEP) The concept of SEPs does not have any statutory recognition in the Patents Act, 1970, however, by virtue of its practical implication, it has been recognized by the Delhi High Court and the Competition Commission of India.

Comment: Resolution of disputes over license terms for SEPs has resulted in litigation seen before various courts. It is logical that agencies of government with direct involvement with matters related to SEPs produce various findings.

Page 12 A patent which is accepted as a standard (for instance 3G, 4G technology standards) for any equipment acquires the status of SEP. This is determined by the Standard Setting Organisations like European Telecommunications Standards Institute (ETSI) and Institute for Electrical and Electronics Engineers (IEEE).

Comment: Generally speaking, it is the owner of a patent that determines it may be an SEP. It is not generally determined by any standard setting organization that a patent is an SEP.

Page 12 SEP has a direct bearing on cost of equipments. For example, if Company A wants to manufacture 3G, 4G compliant devices (hand phones, tablets, etc.) it has to obtain license from the SEP holder having patent over the said standards.

Comment: It is true that royalty payments can be a factor in the cost of manufacturing equipment. However there are many and varied costs applicable to manufacturing equipment. It could be that equally true that a manufacturer apportions R&D expenses to its costs of making a product. The relationship of costs to manufacture to prices charged for final products is in many instances a business decision

Page 12 Therefore, once a patent holder acquires the status of SEP holder, it is bound by the obligation to grant the license on Fair, Reasonable and Non-Discriminatory (FRAND) terms.

Comment: The policies of an SDO determine this. It often may be a “voluntary” assurance that the owner of a SEP makes. I am aware of statements submitted to SDOs where the submitter declares it has an SEP but it will NOT license it according to FRAND terms. Once a positive assurance is made it is true that the maker should grant license to practice the patent on the conditions stated in its assurance. It is interesting that there are generally NOT SDO patent policy requirements on the behaviors of parties that seek or may need licenses to SEPs

Page 12 and 13 Presently, calculation of royalty on FRAND basis remains a challenge and is the bone of contention in the ongoing SEP disputes. Therefore, there is a need to devise formula/mechanism to determine the basis on which SEPs can be licensed on FRAND. The term „reasonable“ used in the expression FRAND is often interpreted differently by a patent licensor as opposed to patent licensee. While royalty determination is primarily a commercial negotiation, but lack of any guiding factors and asymmetric bargaining capacity between licensor and licensee often ends up in litigation. Issues pertaining to the basis for determination of royalty i.e., whether on the value of the Smallest Saleable Patent Practicing Component (SSPPC) or on the net price of the downstream product, or some other criterion remains open ended.

Comment: There are many true statements above. The statement that there is a need to devise a formula/mechanism to determine the basis for a FRAND license may be an important factor that the private parties in a negotiation take in to account. But there could be many many factors the private parties in a negotiation take in to account. The statement that disputes may end in litigation is true but perhaps that is an appropriate disposition? There are several alternatives available to address disputes between parties over licensing terms for SEPs. It is consistent with the lack of global consensus on the “best” solution that there are many possibilities.

Page 13 Non Disclosure Agreements may result in differential in royalties to be paid. Rate of royalty differs substantially from one potential licensee to another. This results in higher costs for the local manufacturers and therefore higher purchase costs for the consumers. A need therefore exists to transparently mention the range of royalties to be paid in percentages wherever feasible.

Comment: there needs to exist evidence of royalty differences between licensees leading to higher costs for local manufacturers and higher purchase costs for consumers. Certainly there may be different license royalty payments or terms in agreements between SEP owners and different entities that remain consistent with the “Non discrimination” condition in a FRAND assurance

Page 16 Q.4 Is the existing mechanism of Standardisation, Certification and Testing of Telecom Equipments adequate to support the local telecom manufacturing? If not, then please list out the short-comings and suggest a framework for Standardisation, Certification and Testing of Telecom Equipments.

Comment: Active participation in the creation and setting of relevant internationally applicable standards is key.

Page 16 Q.5 Please suggest a dispute resolution mechanism for determination of royalty distribution on FRAND (Fair Reasonable and Non Discriminatory) basis.

Comment: Litigation and Alternative dispute resolution are the main means parties who disagree on terms for licenses to practice SEPs. It could be helpful to collect and share data from such currently active means. It is helpful to document deficiencies or the problems that may exist with current means to resolve disputes