

TRAI Consultation Paper on Encouraging R&D in Telecom, Broadcasting, and IT (ICT) Sectors

Counter-comments

29 January 2024

Nokia is grateful for the opportunity to provide counter-comments to the “Consultation Paper (No. 19/2023) on Encouraging R&D in Telecom, Broadcasting, and IT (ICT) Sectors” by the Telecom Regulatory Authority of India (TRAI). In particular, we address various points raised in the submissions made by the ACT | The App Association and India Cellular & Electronics Association (ICEA).

At the outset we would like to reiterate that injunctions have not been found by courts to lead to hold-up, nor are they problematic in the context of SEP licensing. As indicated previously, hold-up is a misplaced theoretical concern because of a FRAND commitment. Courts would not entertain the request for an injunction unless a SEP owner has negotiated in good faith and offered a FRAND license. They would typically look carefully at the behavior of both parties. In this regard, we note that the seminal ruling of the Court of Justice of the European Union (CJEU) in *Huawei v ZTE* provided a well-balanced and flexible framework focused on the good faith conduct required of both parties in SEP licensing negotiations.¹

Courts in India adopt such an approach and they carefully examine the conduct of both parties. They recognize correctly the dangers to innovation and intellectual property (patent) rights if injunctions are not available within a reasonable time. In this regard, the High Court of Delhi has held that: “*absent any realistic prospect of an injunction within a reasonable period of time, the implementers enjoys access to the innovator’s technology, deriving revenues from the products and services that embody that technology, while, during the negotiations and*

¹ When considering whether a request for an injunction for infringement of an SEP infringes Article 102 of the Treaty of the European Union (concerning anti-competitive abuse of a dominant position), the CJEU held that national courts are required to consider the following actions of the parties: (i) did the SEP holder notify the implementer of the infringement, providing details of the infringed patents?; (ii) has the implementer diligently expressed its willingness to conclude a FRAND license?; (iii) did the SEP holder then make a written FRAND offer for a license, specifying the royalty rate and how it was calculated?; (iv) did the implementer diligently respond, either accepting the offer or making a prompt written FRAND counter-offer?; and (v) if the SEP holder rejected the counter-offer, has the implementer provided appropriate security and rendered accounts? The CJEU refrained from specifying the detail or scope of every obligation imposed on the parties as each case is fact specific.

litigation, the innovators earns nothing from the same technology that it developed at great costs and risk ... this effectively transfers wealth from firms that specialize in developing technologies to firms (including some of the world's most valuable companies) that specialize in using and integrating those technologies in branded devices/products sold to consumers".²

As regards the suggestion that SEPs should be licensed to all interested licensees regardless of their position in the value chain, such a "license to all" regime would result in significant legal and practical issues, which would likely exacerbate hold-out behavior and inefficiencies in licensing. Importantly, a license to all regime is inconsistent with the laws of patent exhaustion (the same patent cannot be licensed at multiple levels of the value chain) and the access based IPR policies of standardization organizations and long-standing industry practice.

Licensing at the end-product level, rather than every manufacturer and supplier in any given supply/value chain, is prevalent in the licensing solutions that have been adopted in numerous highly successful industries, including for mobile devices, consumer electronics, and in the automotive sector. The issue of licensing in the supply chain has already been addressed by courts in Europe and in other jurisdictions, which have held that an SEP owner has the right to select the licensing level at which to license its patents, and that competition law does not restrict such a right.³ The courts have considered that approaching only the end-product manufacturer for a license is a reasonable approach and that an SEP holder is not obliged to grant a license to suppliers, but must only grant them access to the standards, and that licensing at the end-product level, combined with so-called have-made rights, provides component manufacturers legally secure access to standardized technology.

We would reiterate our principles of requiring a balanced approach to the protection and enforcement of SEPs to create a fair and efficient licensing ecosystem that incentivizes both sides to conclude timely SEP licenses on FRAND terms. To achieve this goal, policymakers should recognize that:

- Implementers are able to implement and use ("access") standardized technologies prior to concluding any FRAND license – because of this hold-out is a significant issue.
- Both parties should adhere to the conduct provided by the CJEU in *Huawei v ZTE*, which has been cited with approval by Indian courts.
- The availability of injunctions (both at the interim and the final stage of the lawsuit) for the willful infringement of SEPs is necessary because implementers have access to standardized technologies prior to concluding a FRAND license and because damages

² *Intex v Ericsson* 2023: DHC:2243-DB, para 90.

³ *Nokia v Daimler*, 2 O 34/19, Mannheim Regional Court (18 August 2020); *Sharp v Daimler*, 7 O 8818/19 Munich Regional Court (10 September 2020); *Federal Trade Commission v Qualcomm* 969 F.3d 974 (9th Cir. 2020).

are almost never an adequate remedy for the infringement of a large SEP portfolio because such damages only relate to the patents in suit and not to the entire portfolio.

- An enforcement regime where the loser pays reasonable and proportionate legal costs would help discourage bad actors from bringing weak infringement proceedings and also encourage licensees to conclude timely licenses without forcing the patent holder to litigate and not to engage in hold-out.
- Royalties for SEP portfolios should be based upon the value created by the standardized technology and not upon the price of a component which has no relationship to that value. The difference in prices between similar products with and without mobile connectivity (for example tablets or smart watches) is more relevant to the value of connectivity than concepts such as the “smallest saleable patent practicing unit” (SSPPU).
- The *sine qua non* of the FRAND commitment is to make standardized technology accessible for all, not licensed to all, implementers of the technology. “Access” should not be equated to “license”. There can be no requirement to “license to all”. This should be self-evident from the fact that a single patent cannot be licensed to multiple suppliers in a supply chain due to the laws on patent exhaustion.
- A patent holder should be able to determine the level in a supply chain to license its patents.

Finally, regulators should be aware of the issue of “astroturfing”⁴ that takes place in the SEP and FRAND debates, especially with respect to start-ups and SMEs. In this context it should be noted that, ACT | The App Association has been publicly accused of “astroturfing”, i.e. falsely pretending to be a grassroots organization that represents the interests of small app developers, while it is apparently largely sponsored by big tech.⁵ In these circumstances, TRAI may wish to engage with SMEs directly to gain clear insights.

⁴ According to Wikipedia, “*Astroturfing is the practice of hiding the sponsors of a message or organization (e.g., political, advertising, religious, or public relations) to make it appear as though it originates from, and is supported by, grassroots participants. It is a practice intended to give the statements or organizations credibility by withholding information about the source's financial backers.*”

⁵ Emily Birnbaum, ‘Apple Flexes Muscle as Quiet Power Behind App Group’ (19 September 2022) *Bloomberg*, <https://www.bloomberg.com/news/articles/2022-09-19/apple-flexes-muscle-as-quiet-power-behind-app-developer-group?leadSource=verify%20wall> ; Florian Mueller, ‘Vast Majority of ACT | The App Association’s Funding Comes from Apple, Former Employees Tell Bloomberg: Astroturfing Against App Developers’ Interests’ (19 September 2022) *Foss Patents* <http://www.fosspatents.com/2022/09/vast-majority-of-act-app-associations.html> ; David Cohen, ‘On Deceptive Apps and Practices: Unmasking the ACT App(le) Association’ (7 July 2021) <https://kidonip.com/frightful-five/on-deceptive-apps-and-practices-unmasking-the-act-apple-association/>.



We hope that our initial submission and counter-comments are of assistance to TRAI when considering how to encourage R&D in Telecom, Broadcasting, and IT (ICT) Sectors. Nokia would be glad to provide further information and details about the SEP licensing system to TRAI if this would be useful.