
**SURANA & SURANA AND SHAASTRA IITM INTELLECTUAL
PROPERTY LAW MOOT COURT**

Before

THE MUDHIRAS HIGH COURT

APPLICATION NO. 123 OF 2017, IN CS (COMM) 199A OF 2017

GUO, INC.....APPLICANT

v.

BASILTRI TELECOM PVT. LTD.....RESPONDENT

[MEMORIAL ON BEHALF OF THE RESPONDENT]

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3. Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs and Trade Marks, 2017.
4. John Andrew Soltesz, Inequitable Conduct as a Defense to Patent Infringement: What will the Effect of the Federal Circuit's Decision in Therasense, Inc. Have?, 43 Seton Hall L. Rev. 1 (2013).
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6. T. Leigh Anenson and Gideon Mark, Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies, 62 Am. U. L. Rev. 1441, (2013).
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STATEMENT OF JURISDICTION

SUIT NO. 123 OF 2017, IN CS (COMM) 199A OF 2017

1. The Applicant has approached this Hon'ble Court under Sec. 104 of the Patents Act, 1970 read with Sec. 151 of the Code of Civil Procedure, 1908.
2. Respondent submits to the jurisdiction of this Court

APPLICATION NO. 123 OF 2017, IN CS (COMM) 199A OF 2017

1. The Applicant has approached this Hon'ble Court under Order XXXIX Rule 1 and Rule 2 read with Section 151 of Civil Procedure Code, 1908.
 2. Respondent submits to the jurisdiction of this Court.
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STATEMENT OF FACTS

Guo Inc. is a widget company incorporated in the US, which owns a large portfolio of Standard Essential Patents (SEPs). It wants to license its SEPs to Basiltri, which is the largest widget manufacturer in India. Thereafter, on Guo's request a meeting was held where the key issues discussed were affiliated to the signing of a confidentiality agreement. The purpose of signing confidentiality agreement was to disclose the royalty rate and to demonstrate the essentiality of the patents. Apart from that, Guo made an offer for licensing its global portfolio of 20,000 patents, which are essential to Widget standards, set my Widget Standard Organisation, Paris. Accordingly, Guo shared with Basiltri a sample list of its SEPs whereby all the patents in the aforesaid list were registered in India, China, and US.

Subsequently, Guo conveyed to Basiltri by an email that it would charge royalty rates on the basis of net selling price of the end product and not on the price of components. Thereafter, Basiltri communicated its concerns pertaining to the licensing terms proposed by Guo. For instance, it requested a license only for Guo's Indian patents and also requested to demonstrate validity and essentiality of all Indian patents before such a licensing agreement can fructify. Further, it declined to sign a confidentiality agreement owing to the legal advice tendered to it that Guo's royalty rates are known publicly.

Apparently in two Internal memo of Guo, Deepika who was leading negotiations on behalf of Guo, communicated Basiltri's concerns to Peter who heads patent licensing at Guo. She updated Peter about the status of ongoing negotiations whereby Basiltri objected to the governing law of the agreement. It wants to change the governing law from US to Indian law and wants to reduce the term of the confidentiality agreement from 15 years to 6 months. Further, Deepika apprised Peter about two recent developments that took place during the course of negotiations. First, they got some data to show that Basiltri was exporting its products to at least China, and second that Basiltri had sent a letter to all widget manufacturers in India. The letter acquainted the widget manufacturing companies that Guo intends to license its SEPs all related to widget standards.

Thereafter, Basiltri filed information before CCI against Guo's alleged abuse of dominant position. It also filed revocation petition before IPAB contending that all of Guo's patents were software and for some of them patents was not granted in Japan. Similarly, Guo filed a suit against Basiltri in Mudhiras HC claiming infringement of some of its patents. It also sought interim injunction on the same matter. Hence, the present matter arises for a hearing.

STATEMENT OF ISSUES

I.

WHETHER BASILTRI HAS INFRINGED GUO'S PATENTS?

II.

WHETHER GUO HAS ABUSED ITS POSITION OF DOMINANCE?

III.

WHETHER GUO'S PATENTS CAN BE REVOKED?

IV.

WHETHER AN INTERIM INJUNCTION ORDER CAN BE PASSED AGAINST BASILTRI?

SUMMARY OF PLEADINGS

I. BASILTRI HAS NOT INFRINGED GUO'S STANDARD ESSENTIAL PATENTS.

Basiltri had entered into negotiations with Guo for licensing of their portfolio comprising of SEPs. However, Guo filed a suit claiming that Basiltri had infringed four of its SEPs. It is submitted that there has been no infringement on Basiltri's part since the patents of which infringement is claimed are all software patents, and are hence not patentable in India. Therefore, the patents in question are not valid in the first place. In any case, barring the invalidity of patents, Basiltri is guarded by the defense of inequitable conduct.

II. GUO HAS ABUSED ITS DOMINANT POSITION IN THE PATENT LICENSING NEGOTIATIONS.

Guo had *prima-facie* abused its dominant position in the patent licensing negotiations. This is pertinent because the terms proposed by Guo were in contravention to FRAND obligations of a SEPs holder. For instance, Guo demanded royalty on the basis of net selling price of the end product and offered a license only for its global portfolio. Also the duration and governing law of the agreement proposed was unreasonable, discriminatory, and inimical to Basiltri's commercial interests. Thus it is mooted that by coaxing Basiltri to execute one sided agreement, Guo had abused its position of dominance.

III. GUO'S PATENTS MUST BE REVOKED.

Guo had never demonstrated the essentiality of its patents. Further, all of Guo's patents were software which are excluded from the subject matter of patentability. Hence, they must be revoked, as they cannot be classified as novel inventions under the Patents Act. Guo had also violated its statutorily mandated duty by not disclosing the material information, pertaining to the rejection of its patent application in Japan. Thus, it poses a credible challenge to the validity of Guo's patents and provides further a ground for revocation of its patent.

IV. AN INTERIM INJUNCTION ORDER SHOULD NOT BE PASSED AGAINST BASILTRI.

Guo Inc. has applied for an interim injunction order to be passed against Basiltri because they claim that Basiltri has infringed their patents. It has been argued that Basiltri has not, however, infringed Guo's patents. It is submitted that the injunction order should not be passed because Guo, as an SEP holder has an obligation towards licensing its patents on FRAND terms and an injunction order would be in contravention with this obligation. Further it is submitted that even if Basiltri were to infringe Guo's patents, the law provides for an adequate remedy to compensate for the alleged infringement and an injunction is not required.

ARGUMENTS ADVANCED

I) BASILTRI HAS NOT INFRINGED GUO'S STANDARD ESSENTIAL PATENTS.

Basiltri had entered into negotiations with Guo for licensing of their portfolio comprising of standard essential patents (“SEPs”).¹ However, Guo filed a suit claiming that Basiltri had infringed four of its SEPs.² It is submitted that there has been no infringement on Basiltri's part since the patents of which infringement is claimed are all software patents, and are hence not patentable in India.³ Therefore, the patents in question are not valid in the first place [A]. In any case, barring the invalidity of patents, Basiltri is guarded by the defense of inequitable conduct [B].

[A]. THE PATENTS IN QUESTION ARE NOT PATENTABLE IN INDIA AND HENCE, INVALID.

(i) *Guo's software patents do not adhere to the CRI Guidelines nor the Patents Act.*

The four Indian patents that Guo has claimed to have been infringed are all software patents. As per Section 3(k) of the Patents Act, any “*mathematical or business method or a computer programme per se or algorithms*” does not fall within the ambit of an “*invention*”, and hence cannot be patented.⁴ Further, the Office of the Controller General of Patents, Designs and Trade Marks issued updated guidelines for the examination of patent applications and determine the patentability of computer related inventions. The Guidelines have adopted a standard Oxford dictionary definition of the term “software” as “*the programs, etc. used to operate a computer*”.⁵ The examination procedure laid down in these Guidelines envisages a four-step test of software patentability, the determining markers being— Novelty, Inventive Step, Industrial Applicability and Sufficiency of Disclosure.⁶

In this case, the most significant test for patentability that Guo's softwares fail to pass is the

¹ Page 1, Moot Problem.

² Page 6, Moot Problem.

³ Patents Act 1970, s 3(k); Patents Act 1970, s 2(m).

⁴ Patents Act 1970, s 3(k).

⁵ Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs and Trade Marks, 2017.

⁶ Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs and Trade Marks, 2017.

sufficiency of disclosure. The Guidelines expressly state that granting of patents is *quid pro quo* to disclosure. In case of a patent concerning CRIs, the following specifications about the invention must be disclosed by the party holding the patent—the particulars of each function of the invention, the best of performing the invention, claims defining the scope of the invention, form and substance, and means plus function of the invention.⁷ However, it must be noted that in the instant case Guo has failed to provide any information about its patents to the licensing party, that is, Basiltri. As a result, none of the other parameters such as, novelty, inventiveness and industrial applicability can be determined without sufficient disclosure on Guo’s part.

(ii) *There can be no infringement as per the test laid down in Global Tech.*

In *Global Tech Appliances, Inc. v SEB S.A.*⁸, the United States Supreme Court stated in its decision that there exist two primary prerequisites that constitute a patent infringement—firstly, there must be knowledge of the existence of the patent; and secondly, there must also be knowledge that the acts performed constitute patent infringement. The court reasoned that one cannot infringe an invalid patent since a good faith belief that the patent is not valid negates the specific intent required for infringement.⁹ In the present case, Basiltri held a good faith belief of invalidity of Guo’s patents on the grounds that they were all software patents.¹⁰ Since the patent is invalid, the knowledge of existence of the patent, which is an essential precondition to infringement¹¹, is absent in this instance. Therefore, Basiltri’s acts cannot be construed as infringing Guo’s patents.

In conclusion, Indian patents numbered 2222b, 2222e, 2222f, and 2222g all stand invalid on two grounds: *firstly*, softwares are not patentable in India as they are precluded from the definition of an “invention” under Sec. 3(k) of the Patents Act, 1970; *secondly*, the softwares also fail to meet the patenting requirements enlisted in the Guidelines for Examination of CRIs. Moreover, since Basiltri had belief of invalidity of Guo’s patents, it does not meet the two-step test of infringement as laid down in *Global Tech*.

⁷ Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs and Trade Marks, 2017.

⁸ *Global Tech Appliances, Inc. v SEB S.A.*, 563 U.S. 754 (2011).

⁹ Timothy R. Holbrook, *The Supreme Court’s Quiet Revolution in Induced Patent Infringement*, 91 *Notre Dame L. Rev.* 1007,1021 (2016).

¹⁰ Page 6, Moot Problem.

¹¹ *Global Tech Appliances, Inc. v SEB S.A.*, 563 U.S. 754 (2011).

[B]. THERE HAS BEEN INEQUITABLE CONDUCT ON BEHALF OF GUO INC.

(i) Guo was not negotiating in good faith.

In any patent licensing deal, SEPs play a key role in defining the royalty rates of a patent portfolio. It thus becomes increasingly important to check the essentiality of the patents before entering licensing negotiations.¹² Patent holder's duty to act with candor and in good faith is the *sine qua non* of any patent licensing agreement. Whether or not a patentee is delivering upon this duty can be ascertained through its conduct during the negotiation process as well as through the terms of agreement it proposes.¹³ If there is any egregious misconduct on the part of the patentee, the defense of inequitable conduct can be invoked. In *Therasense, Inc. v. Becton, Dickinson and Co.*,¹⁴ the Federal Circuit laid down the two requirements of "intention" and "materiality" for invoking this defense. However, in the instant case, Guo created lopsided terms of agreement, refusing to demonstrate the essentiality of patents until Basiltri signs a confidentiality agreement.¹⁵ Guo also refused to disclose the royalty rates if the confidentiality agreement is not signed.¹⁶ Moreover, Guo, through this agreement, imposed very strict term of fifteen years of confidentiality.¹⁷ Though it is a well-established fact that Non-Disclosure Agreements ("NDAs") play a crucial role in guarding the patent, however, withholding material information by binding the licensee through a strict NDA may be deemed to be anti-competitive.¹⁸ Guo's conduct, wherein it refused to share any information about the SEPs until the execution of the confidentiality agreement is strongly suggestive of the fact that Guo was not negotiating in good faith.

(ii) The "but-for" materiality laid down in Therasense applies to the present case.

In *Therasense*, the court laid down the "but-for" materiality standard, according to which a party might not have entered into a patent licensing agreement, had it been aware of the undisclosed

¹² Tim Pohlman and Knut Blind, *Landscaping Study on Standard Essential Patents (SEPs)*, IPLYtics EU Report, 2016.

¹³ John Andrew Soltesz, *Inequitable Conduct as a Defense to Patent Infringement: What will the Effect of the Federal Circuit's Decision in Therasense, Inc. Have*, 43 *Seton Hall L. Rev.* 1, 19 (2013).

¹⁴ *Therasense, Inc. v. Becton, Dickinson and Co.*, 649 F.3d 1276 (Fed. Cir. 2011).

¹⁵ Page 3, Moot Problem.

¹⁶ Page 4, Moot Problem.

¹⁷ Page 5, Moot Problem.

¹⁸ *Best IT World India Private Limited (iBall) v. Telefonaktiebolaget LM Ericsson*, (Publ) & Anr., [2015] C.C.I 104.

information.¹⁹ In the present case, there exists a strong probability that Basiltri would have decided to not proceed with the negotiations had they been aware of the material information that Guo was deliberately withholding, such as the details of the SEPs and royalty rates.

Hence, except for invalidity of the patents, Basiltri is anyway qualified to invoke the defense of inequitable conduct. In conclusion, it is submitted that Basiltri has not infringed any of Guo's SEPs.

II) GUO HAS ABUSED ITS DOMINANT POSITION IN THE LICENSING NEGOTIATIONS AGAINST BASILTRI

The Competition Act, 2002 expressly states that if there is a *prima facie* view of an enterprise abusing its dominant position in a relevant market, the Commission shall have the power to order investigation against its alleged abuse of dominant position. In the present scenario it is submitted that *firstly*, Guo is a dominant player in the relevant market owing to the fact that it is the sole proprietor of large number of Standard Essential Patents(SEPs)[A]. *Secondly*, Guo had obliterated its FRAND obligations to license its SEPs on FRAND terms and has thus, engaged in abuse of its dominant position[B].

[A]. GUO IS A DOMINANT PLAYER IN THE RELEVANT MARKET

(i) Determination of a relevant market

The Competition Act, 2002 stipulates that the dominance of a company is to be primarily ascertained within the contours of a "*relevant market*."²⁰ For that reason, the relevant market is categorised into two broad realms: relevant product market²¹ and relevant geographic market.²² Hence, determination of a relevant market is a pre-requisite to ascertain the dominance of the company whose conduct is alleged as to be abusive.²³

In the light of the pertaining facts, it is submitted that Guo is a dominant player both in the relevant product market and the relevant geographic market. *First*, Guo holds over 20000

¹⁹ T. Leigh Anenson and Gideon Mark, Inequitable Conduct in Retrospective: Understanding Unclean Hands in Patent Remedies, 62 Am. U. L. Rev. 1441, 1457 (2013).

²⁰ Competition Act 2002, s 4(e)(a).

²¹ Competition Act 2002, s 2(t).

²² Competition Act 2002, s 2(s).

²³ Pankaj Aggarwal v. DLF Gurgaon Home Developers, [2015] C.C.I. 108.

standard essential patents and applications which are essential to implement Widget standards.²⁴ Hence, it enjoys its dominance in the relevant product market that is the market of widgets which are necessarily required for interoperability and for implementing the Widget standards.²⁵ *Second*, Guo is also dominant in the relevant geographical market which is the territory of India due to its substantial operations therein.²⁶ Further, it is contended that as a owner of large portfolio of SEPs,²⁷ Guo can be categorised as a prospective seller for the purpose of patent licensing, whereby buyers like Basiltri can practically turn to it for the supplies.²⁸ Hence, it is submitted that Guo is in a dominant position in the "*relevant market*."

(ii) In any case, there exists a prima facie case against Guo that it enjoys a dominant position owing to the ownership of large portfolio of SEPs

Section 26(1) of the Competition Act, 2002 contemplates that if there exists a *prima facie* case of a dominant position of an enterprise, the Commission shall direct the Director General to cause an investigation into such a matter.²⁹ In the present case, Guo holds over a large global portfolio of 20000 SEPs which are essential to implement widget standards.³⁰ In a landmark decision of *Microsoft Corp. v. Motorola Mobility Inc.*, the court defined SEPs as those essential patents whose use requires infringement of it so as to comply with a standard.³¹ Thereby, it becomes inevitable for the manufacturers like Basiltri to infringe upon Guo's SEPs so as to make their products standard compliant. Further, Guo has the dominance to act independently in the relevant market as it being the sole proprietor of several SEPs which are used in components of widget products.³² Thus, it is submitted that there exists a *prima facie* view that Guo enjoys a complete dominance over its prospective licensees in the relevant market.

²⁴ Page 3, Moot Problem.

²⁵ Telefonktiebolaget LM Ericsson (Publ.) v. Lava International Ltd. 2016 S.C.C. OnLine Del 3716.

²⁶ M/s Best it World (India) Private Limited (iBall) v. M/s Telefonaktiebolaget L.M. Ericsson (Publ) & M/s Ericsson India Private Limited, [2015] C.C.I. 104.

²⁷ Page 1, Moot Problem.

²⁸ Hecht v. Pro-Football, Inc., 570 F.2d 982, 988 (D.C. Cir. 1977).

²⁹ \ Competition Act 2002, s 26(1).

³⁰ Page 3, Moot Problem.

³¹ Microsoft Corp. v. Motorola, Inc., Motorola Mobility, Inc., and Gen. Instrument Corp. 104 U.S.P.Q.2D 2000.

³² Jupiter Gaming Solutions Private Limited v. Government of Goa &Anr., [2011] C.C.I. 22.

[B] GUO HAS ABUSED ITS DOMINANCE IN LICENSING NEGOTIATIONS AGAINST BASILTRI

(i) Coaxing Basiltri to enter into one sided and onerous terms of an agreement constitutes an abuse of the dominant position

It is submitted that Guo had abused its dominant position, *thereby*, violating Section 4(2) of the Competition Act by forcing Basiltri to execute an unreasonable and onerous agreement without giving due regard to the procedure that governs licensing negotiations.³³ *First*, till the time of the initiation of this suit, Guo had never demonstrated the validity and essentiality of its patents vis-à-vis the relevant standards.³⁴ *Second*, there is no claim chart mapping provided to Basiltri by Guo to ascertain whether the infringement claim delineates to the mandatory or optional aspect of a standard,³⁵ and *third*, it had refused to identify all those SEPs, so infringed by Basiltri.

Further, the Delhi High Court in *Telefonktiebolaget LM Ericsson (Publ.) v. Lava International Ltd.*, had observed that mere factum of grant of patent by the Standard Setting Organisations (SSOs) in no way guarantees the validity and essentiality of such patents.³⁶ Hence, on account of not receiving the aforesaid information, it is submitted that it would be unfair and discriminatory for Basiltri to execute a confidentiality agreement with Guo.

(ii) Duration and Governing Law of the confidentiality agreement is prima-facie abuse of dominant position

It is contended that Guo had imposed very strict terms in a confidentiality agreement such as fifteen years time period pertaining to disclosure of confidential information by either parties.³⁷ Consequently, this breaches section 4 of the competition act and is in derogation to several SSOs adopted policies which provides that a SEP holder must negotiate with prospective licensees on fair, reasonable, and non-discriminatory (FRAND) terms.³⁸ From the account of the correspondence, it is established that Guo's conduct was far from being FRAND compliant. As despite Basiltri's repeated requests to adopt lenient terms and conditions in an agreement, it had refused to address its concerns.

³³ Clause 6, ETSI IPR Policy.

³⁴ Page 5, Internal Memo, Guo Inc., June 10, 2017, Moot Problem.

³⁵ Page 3, Moot Problem.

³⁶ *Telefonktiebolaget LM Ericsson (Publ.) v. Lava International Ltd.* 2016 S.C.C. OnLine Del 3716; The Patents Act 1970, s 13(4).

³⁷ Page 5, Moot Problem.

³⁸ Clause 6, ETSI Intellectual Property Rights Policy; Orange Book Standard (BGH KZR, 39/06); Microsoft Corp. v. Motorola, Inc., 854 F. Supp. 2d 993, 999 (W.D. Wash. 2012); Apple Inc. v. Motorola Mobility Inc., 886 F. Supp. 2d 1061, 1085 (W.D. Wash 2012).

Furthermore, the governing law of the confidentiality agreement was vested in the US jurisdiction.³⁹ This is *prima-facie* unfair, as observed by the CCI in *M/s Best IT World* case.⁴⁰ Moreover, in several other cases, the CCI had held that vesting the jurisdiction in a foreign land would amount to abuse of dominant position as it would debar parties to adjudicate disputes in a country where they are engaged in doing business.⁴¹ Hence, it is argued that by imposing an unfair jurisdiction clause, Guo had intended to expose Basiltri to high litigation cost in US. Thus, it is submitted that it would be inimical to Basiltri's commercial interests if it executes confidentiality agreement with Guo on these arbitrary and unreasonable terms.

(iii) Demanding royalty on the basis of the net selling price of the end product amounts to abuse of the dominant position

It is contended that royalty rates offered by Guo were exorbitant, discriminatory, and contrary to the FRAND obligations of SEPs holder. In the instant case, the royalty rates were charged on the net selling price of the end product rather than on the price of components.⁴² Thus, Guo had intended to unfairly appropriate profits created by others with respect to the Basiltri's end product. On these grounds, it is submitted that Guo had abused its dominant position in the licensing negotiations.

Perpetually, the unfairness of demanding royalty on the basis of end price of the product has been well recognized in several seminal cases.⁴³ For instance, *In re Innovatio IP Ventures LLC*,⁴⁴ Judge Holderman opined that royalties must be calculated based upon the smallest saleable patent practicing unit (SSPPU). This is because calculating royalties on the end price of the product would invite errors, as any given product involves myriad technologies that are unrelated to the patented technology. Similarly in *LaserDynamics* case also the court ruled that the proper royalty base should be calculated based on the SSPPU.⁴⁵ Additionally, CCI had itself decided in *In re Micromax Informatics Limited*,⁴⁶ that royalty charged on the net value of the product by superseding the value of product sought to be licensed is arbitrary and

³⁹ Page 5, Moot Problem.

⁴⁰ Para 14, *M/s Best it World (India) Private Limited (iBall) v. M/s Telefonaktiebolaget L.M. Ericsson (Publ) & M/s Ericsson India Private Limited*, [2015] C.C.I. 104.

⁴¹ *In Re Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson (Publ.)*, [2014] C.C.I. 10.

⁴² Page 5, Moot Problem.

⁴³ *Telefonaktiebolaget L.M. Ericsson (Publ). v. Competition Commission of India &Anr.*, (2016) 232 D.L.T. (CN) 1.

⁴⁴ *In re Innov atio IP Ventures, LLC Patent Litigation*, 956 F.Supp.2d 925 (2013) at 25.

⁴⁵ *LaserDynamics*, 694 F.3d at 67.

⁴⁶ *Microsoft Informatics Limited vTelefonaktiebolaget LM Ericsson (Publ.)*, [2013] CC.I. 77.

discriminatory. This is because increase in royalty for SEPs holder is without any contribution to the manufactured product. Hence, it is contended that Guo cannot make a claim to earn royalty on the net selling price of the product.

Further, it is submitted that Guo had engaged in patent holdup by demanding exorbitant royalty even when its patents had no linkage with Basiltri's end product. Patent holdup restrains competition, restricts supply of patented products to the consumers, and also undermines the integrity of the SSOs. Therefore, it squarely violates Section 4 of the competition act which contemplates that if any enterprise through its dominance affect consumers, it would amount to abuse of dominant position.⁴⁷ This was also recognised in *Eurofix-Baucof. Hilti*,⁴⁸ where the European Commission decided that if a SEPs holder demands excessive royalties so as to engage in patent holdup, it would constitute abuse of dominant position under Article 102 TFEU.⁴⁹

Hence, on these grounds the Informant submits that no negotiations can fructify or be sustainable if its concerns are not addressed by Guo in a transparent manner. Furthermore, Guo had not provided any objective methodology to arrive at its royalty rates and instead proposed onerous terms in an agreement which were in contravention to the spirit of FRAND negotiations.⁵⁰ Thus, it is established that Guo had abused its dominant position in the licensing negotiations against Basiltri.

(iv) Offering a license only for its global portfolio is anti-competitive and hence abuse of the dominant position

It is well recognized that SEPs licensing negotiations must comply with FRAND terms taking into consideration reasonable expectations of the parties.⁵¹ In a landmark decision in *Huawei Technologies Co. Ltd v. ZTE Corp.*,⁵² the court ruled that SEPs holder had an obligation to grant licences on FRAND terms which thence creates legitimate expectation on the prospective licensees, that proprietor of SEPs will in fact grant licences on such terms. So, any refusal to

⁴⁷ Competition Act, 2002, s 4(2)(e)(ii).

⁴⁸ Case T-30/89, Hilti AG v. Commission: [1991] E.C.R. II- 1439; *See also* United Brands Company and United Brands Continental BV v. Commission, [1978] E.C.R. 207.

⁴⁹ Article 102, Treaty on the Functioning of the European Union.

⁵⁰ Clause 6, ETSI IPR Policy.

⁵¹ *Microsoft Corp. v. Motorola, Inc.*, 795 F3d at 1045-1046.

⁵² *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH (Case C-170/13)*.

obliterate that undertaking constitutes abuse of the dominant position under Article 102 of TFEU.

In the instant case, Guo had forced Basiltri to acquire a license to its global portfolio, without giving any choice to it to acquire rights to its specific Indian patents.⁵³ Thus, it is contended that by coaxing Basiltri to acquire license to its global portfolio, Guo had engaged in coercive patent packaging licensing. Thus, it had tended to avoid economic competition by indulging in patent bundling of both its infringing and non-infringing SEPs. Altogether, there is no certainty pertaining to whether these patents are valid and enforceable in India. Hence, it is submitted that Guo should not be entitled to derive monetary benefits for its non valuable patents only on grounds of being a SEPs holder.

Furthermore, coercive packaging licensing contravenes substantive provisions of the Patents Act, 1970. *First*, it violates Section 140 of the act which states that all agreements which provide for coercive packaging licensing shall be unlawful.⁵⁴ *Second*, it violates Section 84(7) of the Patents Act which expressly mentions that if a patentee imposes a condition to the licensee to provide a license to its global portfolio, it may be deemed anti-competitive,⁵⁵ and *third*, it violates TRIPS agreement which provides the member nations the power to control anti-competitive practices that restrains competition such as coercive packaging licensing.⁵⁶ Hence, it is established that Guo had abused its dominant position in licensing negotiations.

III) GUO'S PATENTS MUST BE REVOKED

Guo had acquired SEPs for its software patents which are excluded from the subject matter of patentability. Hence, *firstly* they must be revoked as they are not novel inventions [A]. *Secondly*, granting patents to software is contrary to the legislative intent of the Parliament [B]. Apart from that, *thirdly*, Guo had violated its statutorily mandated duty to update COP about the status of its foreign applications [C].

⁵³ Page 4, Moot Problem.

⁵⁴ Patents Act, 1970, s. 140.

⁵⁵ Section 84(7), The Patents Act, 1970; Page 7, Intellectual Property Rights Under the Competition Act, 2002, Competition Commission of India, *available at* http://www.competition-commission-india.nic.in/advocacy/Intellectual_property_rights.PDF (Last visited on November 25, 2017).

⁵⁶ Agreement on Trade Related Aspects of Intellectual Property Rights, Art. 40(2).

[A] SOFTWARES ARE INELIGIBLE TO BE PATENTED UNDER THE PATENTS ACT

It is well established that '*computer programs per se*' are excluded from the subject matter of patentability.⁵⁷ Accordingly, software also incorporates a computer program which encapsulates a set of logical instructions and algorithms.⁵⁸ Thus, software are ineligible to be patented under Section 3(k) of the Patents Act. In the present instance, Guo had shared a list with Basiltri cataloguing software patents for the purpose of patent licensing.⁵⁹ Hence, it is submitted that all of Guo's patents be revoked on grounds of its ineligibility under Section 3 of the Patents Act.

Furthermore, the US Supreme Court laid down a two-fold test to determine when a software claim is patent eligible.⁶⁰ *First*, is to ascertain whether a claim is an abstract idea that falls beyond the subject matter of patentability.⁶¹ This includes computer programmes per se, algorithms, mathematical ideas, *etc.* *Second*, if the answer to the first prong is in affirmative, then whether such claim embodies '*something more*' which can be categorised as '*inventive concept*,' and thereby warrants protection.⁶² In the instant case, patents were held as invalid as the court ruled that mere implementation of abstract ideas on a computer is not sufficient to transform that idea into patentable subject matter. Correspondingly, it is argued that Guo's SEPs widget are just '*computer programs per se*' that are implemented on tangible platforms such as widget handsets.⁶³ Moreover, the hardware components of Guo's claimed invention are not novel.⁶⁴ Thus, they cannot be embodied as an '*innovative step*' so as to warrant patent protection. Hence, it is submitted that Guo's patents be revoked on account of the ineligibility of its subject matter.

Similar is the position in UK where courts have consistently applied *Aerotel* test to ascertain whether the subject matter of the software is patentable or not. The seminal authority on this is *Aerotel v. Telco*,⁶⁵ in a four step test to determine the patentability of the software was laid down. This involves "(1) *properly construe the claim*; (2) *identify the actual contribution*; (3) *ask whether it falls solely within the excluded subject matter*; and (4) *check whether the actual*

⁵⁷ Patents Act, 1970, s. 3(k).

⁵⁸ Indian Copyright Act, 1957, s. 2(ffc).

⁵⁹ Page 6, Moot Problem.

⁶⁰ *Alice Corp. v. CLS Bank International*, 573 US __ (2014).

⁶¹ *Alice Corp. v. CLS Bank International*, 573 US __ (2014).

⁶² *Alice Corp. v. CLS Bank International*, 573 US __ (2014).

⁶³ 1, Clarifications to the Moot Problem.

⁶⁴ 31, Clarifications to the Moot Problem.

⁶⁵ *Aerotel Ltd v Telco Holdings Ltd*, EWCA Civ 1371.

or alleged contribution is actually technical in nature."⁶⁶ Accordingly, it is contended that Guo had failed to identify the actual contribution of its SEPs in substance and not in form. This is because, *first*, it had failed to demonstrate the validity and essentiality of its patents *vis-à-vis* the relevant standards. *Second*, it is well recognised principle of patent law that mere factum of grant of patent no way constitutes the validity of such patents.⁶⁷ Thus, it is contended that Guo's SEPs cannot make an actual contribution to the technological advancement without demonstrating the nature of their SEPs. Thus, it is submitted that Guo's patents be revoked on account of the non-satisfaction of the *Aerotel* test and similarly the '*technical contribution*' test laid down in *Ericsson v. Intex* case.⁶⁸

[B] GRANTING PATENTS TO SOFTWARE IS AGAINST THE LEGISLATIVE INTENT

It is submitted that Guo cannot seek a higher legal pedestal than provided in the statute for the purpose of validating its software patents. Thus, it cannot contend that the validity of its SEPs be affirmed because they are essential for implementing standards in an industry. As this would be in contravention to the legislative intent, whereby Parliament had rejected the 2004 Patent ordinance which provided for patentability of those software that have technical applications to the industry.⁶⁹ Hence, the position of law stands as such that a computer program having technical application to the industry cannot be a subject matter of patentability. Consequently, it is submitted that Guo's contention to grant validity to its SEPs must be rejected.

[C] GUO WITHHELD VITAL INFORMATION FROM CONTROLLER OF PATENTS (COP) WHICH PROVIDES A GROUND FOR REVOCATION OF PATENTS.

Guo had suppressed material information pertaining to the prosecution of its corresponding foreign patent applications in Japan. For instance, two of the Guo's patents which were filed in India- 2222d and 2222f- were not granted in Japan owing to software patentability issues.⁷⁰ Thus, there exists a credible challenge to the validity of its patents.

Accordingly, it is submitted that Guo had failed to comply with Section 8 of the Patents Act which casts an obligation upon it to furnish such information to the COP '*from time to time*',

⁶⁶ *Aerotel Ltd v Telco Holdings Ltd*, EWCA Civ 1371.

⁶⁷ Section 13(4), The Patents Act, 1970.

⁶⁸ *Telefonaktiebolaget LM Ericsson (PUBL) v. Intex Technologies (India) Limited*, 2015 SCC OnLine Del 8229.

⁶⁹ Patents Amendment Ordinance, 2004; Section 3(k) was substituted by "*computer programme per se other than its technical application to industry or a combination with hardware*".

⁷⁰ Page 6, Moot Problem.

till such patent is granted in India.⁷¹ Correspondingly, the courts have also interpreted the expression '*from time to time*' in Section 8 as the periodicity of furnishing information by the applicant and akin to updating COP about the present status of foreign application.⁷² Thus, it is submitted that Guo's patents must be revoked under Section 64(1)(m) of the Patents Act, as Guo had violated its statutorily mandated duty by not disclosing the material information, pertaining to the rejection of its patent application in Japan.⁷³⁷⁴ The seminal case pertaining to this issue is *Hindustan Unilever Limited (HUL)*,⁷⁵ wherein the respondent HUL failed to file International Preliminary Examination Report (IPER) which was necessary to process the patent application outside India. Conclusively, the IPAB held that failure to disclose vital information by filing IPER obliterates respondent's obligation under Section 8 of the Patents Act.⁷⁶ It is further contended that Guo cannot plead that non-disclosure of rejection of patent application in Japan was not a material information so as to warrant its disclosure before the COP. As in *Allergan's* patents case,⁷⁷ IPAB observed that Section 8 of the Patents Act does not encapsulate that the failure to disclose information must be deliberate or in regard to material particulars. If once a case for non-compliance with Section 8 is established, it would be sufficient to attract Section 64(1)(m) which provides a ground for revocation of such patents.

IV) AN INTERIM INJUNCTION ORDER AGAINST BASILTRI MUST NOT BE PASSED

Guo Inc. has filed an interim injunction application before the judge in order to have an injunction order passed against Basiltri Telecom Pvt. Ltd. There lies no reason for such an order to be granted as *firstly* Guo Inc. is abusing its dominant position in the licensing negotiations with Basiltri rather than complying with FRAND terms [A]. In any case, even if Basiltri was guilty of patent infringement, Guo can avail of adequate remedies before the law and does not require an injunction order to be passed [B]. Further, it has already been asserted that since the revocation proceedings are still pending before the IPAB, the injunction cannot be granted as the suit is not maintainable.

⁷¹ Section 8(1)(b), The Indian Patent Act, 1970.

⁷² *Chemtura Corporation v. Union of India*, 2009 (41) P.T.C. 260 (Del.).

⁷³ 2, Clarifications to the Moot Problem.

⁷⁴ *Para 37, Koninklijke Philips Electronics v. Maj. (Retd) Sukesh Behl & Anr on 6 November, 2013 CS (OS) No. 2206 of 201.*

⁷⁵ *Tata Chemicals Limited v. Hindustan Unilever Limited*, ORA/18/2010/PT/MUM.

⁷⁶ *Tata Chemicals Limited v. Hindustan Unilever Limited*, ORA/18/2010/PT/MUM.

⁷⁷ *Ajanta Pharma Limited v. Allergan Inc., Allergan India Pvt. Ltd.*, ORA/21/2011/PT/KOL.

[A] GUO INC. IS ABUSING ITS DOMINANT POSITION IN LICENSING NEGOTIATIONS WITH BASILTRI TELECOM PVT. LTD. RATHER THAN COMPLYING WITH FRAND TERMS.

It is abundantly clear that Guo Inc. is in a position of dominance as they are the owners of a large portfolio of standard essential patents. In *Ericsson v. Best It*⁷⁸, it was argued that “*By their very nature, the SEPs are not substitutable with any other technology and mobile device manufactures are reliant on these patents to manufacture standard compliant devices*”. Since it has been established that these SEPs are indispensable to other widget manufacturers, it puts Guo Inc. on a superior footing as they are able to dictate the terms of the patent license. The terms laid down by Guo Inc. are unreasonable as it imposes a confidentiality agreement of an excessive time period⁷⁹, seeks royalties that are too high⁸⁰ and pressurizes Basiltri to acquire a license for a global portfolio⁸¹.

In *Apple v. Motorola*⁸², the court laid down that, “*once a patent becomes essential to a standard, the patentee’s bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee’s mercy*”. It is due to this that the licensee feels coerced to accept the terms of the license negotiation as they cannot proceed in the market without doing so. SEPs confer an enormous market power and hence often results in patent hold up⁸³. Guo Inc. is well aware of the negotiating power that they hold and hence are laying down exploitative licensing terms. The prospect of an injunction order being granted gives the SEP holder additional supremacy. If the implementer does not agree to their conditions, then the patentee can simply file for an injunction and eradicate the implementer’s products from the market altogether. Guo Inc.’s actions are in direct accordance with Section 4(2)(a)(i) of The Competition Act, 2002⁸⁴ which states that “*There shall be an abuse of dominant position if an enterprise or a group directly or indirectly imposes unfair or discriminatory condition in purchase or sale of goods or services*”.

Guo Inc. is in affiliation with a Standard Setting Organisation (SSO) which is the Widget Standard Organisation⁸⁵ and therefore has an obligation to license its SEPs on Fair, Reasonable

⁷⁸ Telefonaktiebolaget LM Ericsson v. Best IT World (India) Private Limited (iball), 2015 S.C.C. OnLine Del 11684.

⁷⁹ Page 5, Moot Problem.

⁸⁰ Page 5, Moot Problem.

⁸¹ Page 3, Moot Problem.

⁸² Apple Inc. v. Motorola, Inc., No. 12-1548 (Fed. Cir. 2014).

⁸³ Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson, 2013 S.C.C. OnLine C.C.I. 78.

⁸⁴ Section 4(2)(a)(i), The Competition Act, 2002.

⁸⁵ Page 3, Moot Problem.

and Non Discriminatory (FRAND) terms. It is widely argued that an SEP holder, by principle must be barred from seeking an injunction if it has committed to license its patent on FRAND terms⁸⁶. The prospect of seeking an injunction will result in patent holdup because it provides the patent holder, who is already in a superior position with further leverage against the implementer. Patent holdup is a demand for a higher royalty rate by an SEP holder because the standard technology is protected by patent rights⁸⁷. Guo Inc. is seeking royalties based on the end product and not on the price of the components. The royalty base must necessarily be in a direct link with the claimed intellectual property and not on the end product⁸⁸.

It is further submitted that Guo Inc. has sought an injunction on account of the conception that their patents have been infringed⁸⁹. Guo has not, however explicitly notified Basiltri of the alleged infringement and hence can not seek an interim injunction before doing so as laid down in *Huawei v. ZTE*⁹⁰. Assuming that Guo has made an attempt to communicate with Basiltri about the alleged infringement, an injunction cannot be granted nevertheless. Basiltri has expressed its willingness to take a FRAND license to Guo's SEPs while Guo is asserting negotiations that are not in accordance with FRAND terms⁹¹. Guo Inc, therefore, is not in a position to claim an injunction against Basiltri. An SEP holder who seeks an injunction against a willing licensee is indulging in anticompetitive practices and is considered to be striving towards eliminating a player from the market which is harmful to both consumers and innovators⁹². Basiltri has agreed to enter into a license on FRAND terms such as a considerable but reduced confidentiality time period, a smaller portfolio of patents and a proportionate royalty rate. It is hence submitted that Guo Inc. must not be granted injunctive relief as they are abusing their dominant position and should instead act in compliance with their FRAND commitment.

[B] GUO INC. HAS ADEQUATE REMEDY AVAILABLE AT LAW TO COMPENSATE FOR AN ALLEGED SEP INFRINGEMENT AND DOES NOT REQUIRE AN INTERIM INJUNCTION ORDER TO BE GRANTED

It is clear that Guo Inc. has filed for an interim injunction order in concurrence with a patent infringement suit. In the event of a patent infringement however, there is no automatic issuance

⁸⁶ Mark A. Lemley & Carl Shapiro, Patent Holdup and Royalty Stacking, 85 Tex L. Rev. 1991, 1992 (2007).

⁸⁷ Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson, 2014 SCC OnLine CCI 8.

⁸⁸ No.13-1489 (Fed. Cir. 2014).

⁸⁹ Page 6, Moot Problem.

⁹⁰ Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH (Case C-170/13).

⁹¹ Page 4, Moot Problem.

⁹² Apple Inc. v. Motorola, Inc., No. 12-1548 (Fed. Cir. 2014).

of an injunction. It has been held in *eBay v. MercExchange*⁹³, that an SEP holder must fulfil a four-factor test in order to attain an injunction order. The test necessitates the plaintiff to prove that “(1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction”. However, there are adequate remedies available at law which are adequate to compensate for the injury in question and this is a ground for denying injunctive relief.

It has been established that once the plaintiff makes a commitment towards licensing their SEPs on FRAND terms, there is an underlying implication that damages can be ascertained⁹⁴. In the case of *Nokia NYJ v. ICom GmbH & Co KG*⁹⁵, the court noted that when an SEP holder is willing to grant a license and an implementer is willing to accept the license on FRAND terms, the question of an injunction must not arise. The motive behind approaching a court of law in such a case is, in essence to get the royalties that are due to the patent holder. If the two parties are not able to agree upon the terms of the license, then a court will help determine them. The damages can easily be monetarily quantified and the granting of an injunction would be highly oppressive to Basiltri⁹⁶.

It has further been established that the principle of proportionality plays a vital role in granting an injunction order⁹⁷. Guo cannot seek to eliminate Basiltri’s entire product from the market because the patented components, which have allegedly been infringed constitute only a small part of the product. Justice Kennedy popularly opined that “when the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest”⁹⁸. It is hence submitted that injunctive relief in this case would be a disproportionate and unnecessary remedy as legal damages would suffice in the case of an SEP infringement.

⁹³ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

⁹⁴ *Apple Inc. v. Motorola Inc.*, 869 F. Supp. 2d 901 (N.D. Ill. 2012).

⁹⁵ *Nokia NYJ v. ICom GmbH & Co* [2012] E.W.H.C. 3545.

⁹⁶ *Shelfer v City of London Electrical Lighting Co.*, [1895] 1 Ch 287.

⁹⁷ *Ericsson v. TCT Mobile*, Docket No. 12/14922, 29 November 2013.

⁹⁸ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

PRAYER

Wherefore, in light of the issues raised, arguments advanced and the authorities cited, it is humbly prayed that this Honourable Court may be pleased to adjudge and declare that:

- Basiltri Telcom Pvt. Ltd. has not infringed Guo Inc's patents.
- Guo Inc. has abused its dominant position in licensing negotiations with Basiltri.
- Guo Inc's patents be adjudged invalid and revoked on grounds of statutory violation.
- An interim injunction order is not passed against Basiltri Telecom Pvt. Ltd.

And pass any other order it may deem fit in the interests of Justice, Equity and Good Conscience.

All of which is humbly submitted.

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Counsel for the Respondent