

**SURANA & SURANA AND SHASTRA IITM INTELLECTUAL PROPERTY LAW MOOT COURT,
2018**

IN THE HIGH COURT OF MUDHIRAS

CS (COMM) No: 199A OF 2017

IN THE MATTER CONCERNING THE PATENT INFRINGEMENT

BETWEEN

PLAINTIFF: GUO INC.

V.

DEFENDANT: BASILTRI TELECOM PVT. LTD.

MEMORIAL ON BEHALF OF THE PLAINTIFF

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 - e. The Limitations Act, 1963, No. 63, Acts of Parliament, 1963 (India).

STATEMENT OF JURISDICTION

The plaintiff (Guo Inc.) has invoked the jurisdiction of the The Hon'ble High court of judicature at Mudhiras under the section 104 of the Indian Patents act, 1970¹ since it's rights granted under section 48 of the Indian patents act have been infringed by the defendant. Plaintiff has also filed an application seeking interim injunction under section 108 of the Indian Patents Act, 1970². The High Court of Mudhiras exercises proper judicature to hear and adjudicate over the matter under this matter.

¹ Section 104 "Jurisdiction".—No suit for a declaration under section 105 or for any relief under section 106 or for infringement of a patent shall be instituted in any court inferior to a district court having jurisdiction to try the suit: Provided that where a counter-claim for revocation of the patent is made by the defendant, the suit, along with the counter-claim, shall be transferred to the High Court for decision.

² Section 108- "Reliefs in suit for infringement".—(1) The reliefs which a court may grant in any suit for infringement include an injunction (subject to such terms, if any, as the court thinks fit) and, at the option of the plaintiff, either damages or an account of profits. (2) The court may also order that the goods which are found to be infringing and materials and implements, the predominant use of which is in the creation of infringing goods shall be seized, forfeited or destroyed, as the court deems fit under the circumstances of the case without payment of any compensation.

STATEMENT OF FACTS

Guo Inc. (Hereinafter known as the plaintiff) is a widget company that is a widget manufacturer and owner of a large portfolio of standard essential patents. The plaintiff had initiated licensing negotiations via mail on August 15, 2017. Three reminders were sent to the defendant on August 30, September 15 and October 2, 2016. The defendant responded on November 1, 2016, suggesting meet up either at the end of December or after January 15, 2017. The meeting finally took place on January 28, 2017 at the defendant's office in Noida wherein the plaintiff shared a sample list of its SEPs for the widget standards set by the Widget Standard Organization. The key issues put forth by the plaintiff were that the defendant had to sign a confidentiality agreement before the plaintiff would share their claim charts to demonstrate essentiality of some of their patents, that the offer was for a license to a global portfolio which has over 20,000 patents and applications that are essential to Widget standards, and that the royalty rate would be disclosed only after the defendant signs a confidentiality agreement with the plaintiff. The next meeting was set to be held at the end of March. The defendant then mailed on March 5, 2017 to state their conditions for the license viz. the defendant would only discuss a license for Indian patents, the plaintiff should demonstrate validity and essentiality for each Indian patent and that since the rates of the plaintiff were known publicly, a confidentiality agreement was unnecessary. The defendant concluded that the next meeting could be set only after the plaintiff agrees to the terms mentioned. In later stages in the negotiation, the plaintiff communicates to the defendant that they are willing to demonstrate validity and essentiality of patents. The defendant then conveys to the plaintiff that they want to reduce the duration of the confidentiality agreement from 15 years to 6 months, and that they would like to pay royalty on the price of the components and not the end product. A meeting is then set up on August 20, 2017 in India. The defendant then filed an information against the plaintiff before the CCI and revocation petitions against the plaintiff's 10 Indian patents on the grounds that they are software patents. The plaintiff then filed the present suit, CS (Comm) 199a of 2017, claiming infringement of its patents 2222b, 2222e, 2222f and 2222g against the defendant on August 25, 2017 before the Hon'ble Court. The plaintiff has been served with notices from both the CCI and the IPAB, to show cause why investigation shouldn't be ordered and in the matter of revocation respectively. The present application is an interim injunction, application no. 123 of 2017 on the plaintiff's behalf.

STATEMENT OF ISSUES

- I. Whether the suit CS (Comm) 199a of 2017 in Mudhiras High court is maintainable?**
- II. Whether Basiltri Telecom Pvt. Ltd. Has infringed Guo Inc.'s Indian Patents no. 2222b, 2222e, 2222f and 2222g?**
- III. Whether an interim injunction as per the application no. 123 of 2017 should be granted or not?**

THE SUMMARY OF PLEADINGS

1. Whether the suit CS (Comm) 199a of 2017 in Mudhiras High court is maintainable?

Guo Inc. has filed a suit of patent infringement by Basiltri telecom Pvt. Ltd. In Mudhiras High Court and it is humbly submitted by the plaintiff that the court has due jurisdiction to hear and entertain this suit and this suit is maintainable here. The counsel humly submits the same based on three main grounds viz. the Mudhiras High Court possesses original jurisdiction to entertain the suit, territorial and pecuniary limits are satisfied, and that there is no express/implied provision in the Patents Act, 1963 regarding the bar of limitation.

2. Whether Basiltri Telecom Pvt. Ltd. Has infringed Guo Inc.'s Indian Patents no. 2222b, 2222e, 2222f and 2222g?

The counsel humbly submits that the defendant has infringed the plaintiff's Patents no.2222b, 2222e, 2222f and 2222g on 4 main grounds viz. the patents are valid until invalidity is proven, the patents are essential for compliance with Widget Standards, the acts of the defendant amounts to infringement as it is a breach of the rights granted under Section 48 of the Patents Act, 1970, and that the defendant has been unwilling to obtain a license for the patents on Fair, Reasonable and Non- Discriminatory[FRAND] terms.

3. Whether an interim injunction as per the application no. 123 of 2017 should be granted or not?

The counsel humbly submits that the plaintiff is entitled to an interim injunction against the defendant as per section 48 of the Patents Act,1970. The counsel submits this based on 3 main grounds viz. the plaintiff has suffered an irreparable injury, there is adequate alternate remedy at law, and the balance of convenience lies in favor of the plaintiff. The plaintiff further contends that the defendant cannot employ a defense that the plaintiff has abused its dominant position, and hence is not entitled to injunctive relief on 2 main grounds viz. The defendant has not offered a license on acceptable terms to the plaintiff and that the defendant has not behaved from the point of the offer as the plaintiff had accepted the offer.

ARGUMENTS ADVANCED

I. The suit CS (Comm) 199a of 2017 in Mudhiras High court is maintainable

Guo Inc. has filed a suit of patent infringement by Basiltri telecom Pvt. Ltd. In Mudhiras High Court and it is humbly submitted by the plaintiff that the court has due jurisdiction to hear and entertain this suit and this suit is maintainable here.

1. Section 104 of the Patents act, 1970 which is reproduced as under

“Jurisdiction. —No suit for a declaration under section 105 or for any relief under section 106 or for infringement of a patent shall be instituted in any court inferior to a district court having jurisdiction to try the suit.”³

Mudhiras High Court is para materia to the Madras High Court and madras High Court has original Jurisdiction for city of Madras⁴ and office of the defendant is also located in the city of Madras hence it possesses jurisdiction for this suit.

According to the Madras City Civil courts act, 1892 and the recent amendment of Chennai City Courts (Amendment) Act of 2010 the pecuniary jurisdiction of the Assistant Judge is raised to an upper limit of Rs.10.00 lakhs and that of Principal Judge of City Civil Court to awards exceeding Rs.10.00 lakhs but not exceeding Rs.25.00 lakhs. The cases where value exceeds Rs.25.00 lakhs, have to be instituted in the Principal Seat of High Court at Madras⁵. Hence it is clear from the aforesaid provision that a suit must be filed in High court Madras when the pecuniary compensation award is exceeding Rs.25 Lakhs. In the present suit too Royalties demanded for infringed patents are in few Crores as per the FRAND terms and certainly above 25 lakhs therefore the suit was filed directly in High court.

2. Territorial Jurisdiction

- The defendant has an office at Madras city and hence can be deemed to be working for gain in Madras city. According to section 20 the Code of Civil procedure, 1908, *“Other suits to be instituted where defendants reside or cause of action arises— Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction—*

³ The patents Act, 1970, § 104, No. 39, Acts of Parliament, 1970 (India).

⁴ Jurisdiction and Functions-Madras High Court, <http://www.hcmadras.tn.nic.in/citi-juris.htm> (last visited on Aug 30, 2017, 9.10 AM).

⁵ Jurisdiction | District Court of India, <http://ecourts.gov.in/chennai/jurisdiction> (last visited on Aug 30, 2017, 9.15 AM).

- (a) *the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain.*
- (b) *any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or*
- (c) *the cause of action, wholly or in part, arises.*⁶

Since this is a case of patent infringement, it falls within the ambit of “other cases” under section 20 of C.P.C, And the defendant has been working for gain in the city of Madras hence Madras high court reserves due jurisdiction to entertain the present suit.

Delhi High Court in *World Wrestling Entertainment v. M/S Reshma Collection*⁷ in 2014 held that **place of business includes the place where the customers place orders, make payment and receive the goods from the trader**. Since the defendant has its subordinate office in Madras too it can be lawfully ascertained that the defendant carries business there, at least sells products and make payments in Madras. Defendant personally works for gain there in Madras.

The defendant therefore clearly carries on business at Madras and hence would also be considered as personally working for gain in Madras. Since defendant is carrying its business at Madras and is personally working for gain there, Madras high court has due jurisdiction for the present suit as per the section 20 (a) of the Civil code of Procedure, 1908.

The plaintiff was undergoing negotiations with the defendant since long and was under the bona fide view that the defendant will sooner or later sign the license agreement. But the defendant filed a revocation petition in the IP appellate Board of Mudhiras, therefore the plaintiff got a prima facie opinion after this that the defendant is unwilling licensee and is not interested in out of the court negotiation. Plaintiff filed the present suit of patent infringement only after it became aware of the revocation petition filed by the defendant in the IPAB, Mudhiras, hence the immediate cause of action arose in Mudhiras only. Therefore as per section 20(c) of the Civil Code of procedure, 1908, at least the immediate cause of action arose in Mudhiras, therefore Mudhiras High Court has due jurisdiction to entertain this suit. Cause

⁶ The Code of Civil Procedure, § 20, No. 5, Acts of Imperial Legislature, 1908 (India).

⁷ *World Wrestling Entertainment v. M/S Reshma Collection*, (2017) 237 DLT 197.

of action as defined by the U.S. Court in *Corning v. Mc-Cullough* is, “*That which produces an immediate effect; whatever moves, impels, or leads; a ground of action*”⁸

3. Limitation Period

There is no express/implied provision in Patents act, 1963 regarding the bar of limitation. The plaintiff most respectfully submits that since the patents are not under the ambit of any particular category under the Patents act, 1970 including the “movable property”, it must not be subject to the provisions of Patents law, 1970.

Insofar as tangible property is concerned, the ownership carries with it, the right to use that property and to that extent, patent rights are different inasmuch as they only grant a right to exclude without further right to use. In the case of real or personal property, the right to exclude others essentially follows from the proprietor's right to fully enjoy that property, but in case of a patent, the right to exclude is the only substantive right that is granted to the patentee. Hence it must not be considered under the category of property, patents are rights not the property rights hence patents must not be included under the category of property and must not be subject to any bar of limitation period.

Adam Mossoff, Associate Professor of Law at George Mason University, School of Law, in an article captioned "Exclusion and Exclusive Use in Patent Law" states the above in the following words, "*In other words, patents are conceptually differentiated from property because of the alleged uniqueness of propertized inventions and because of seemingly important doctrinal differences between the enforcement of tangible and intangible property entitlements.*"⁹

Hence the patents must not be included under the ambit of the expression “property”.

Arguendo, In case that the patents rights are considered as the Property rights then, it is requested to Court under section 5 of the Indian Limitations Act, 1963 the delay in filing the suit can be condoned. “*Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*”¹⁰

⁸ *Corning v. Mc-Cullough*, N. Y. 47, 49 AM.

⁹ Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 Harv. J.L. & Tech, 321, 330-331 (2009).

¹⁰ The Limitations Act, 1963, § 5, No. 63, Acts of Parliament, 1963 (India).

Since this is not an appeal under order XXI of the Code of Civil Procedure, 1908, it is requested to the honorable Court to condone the delay in the proceedings.

Plaintiff had to delay the proceedings because of the ongoing negotiations between the plaintiff and the defendant. The Plaintiff was hitherto in bona fide view that the defendant is willing to get licenses of SEP's of the Guo Inc., however it was much later at the moment when the defendant cancelled the meeting on August 20, 2017 that the plaintiff realized that the defendant is an unwilling licensee and the patent infringement claim must be brought against it.

This must be the sufficient cause under the section 5 of the Indian Limitations Act, 1963 as in the case of Collector Land Acquisition, v. Mst. Katiji & Ors it was held that the expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaning- full manner which subserves the ends of justice--that being the life-purpose for the existence of the institution of Courts.¹¹

The ratio laid down in the Sandhya Rani v. Subha Rani¹², decision, is not much different from the ratio laid down in the case of Collector Land Acquisition (supra). Para 8 of the said decision discusses the scope of Section 5 in general and then goes on to observe that the party which seeks condonation has to satisfy the Court that he had "sufficient cause" for not preferring the appeal or making the application within the prescribed time. However, it is not possible to lay down precisely as to what cause or matters would constitute "sufficient cause". All that their Lordships held is that **Those words should be liberally construed so as to advance substantial justice when no negligence or any inaction or want of bona fides is imputable to a party.**

Rules of Limitation are not meant to destroy the rights of the parties, they are meant to see that parties may not resort to deliberate tactics. They ensure that parties may seek their remedies promptly. While considering a case of condonation of delay, the court must always remember that in every case of delay there can be some lapse of time on the part of the litigant concerned but that alone cannot be sufficient to turn down his plea and shut the door against him. Unless the explanation is smack of mala fides or is not forth as a part of a dilatory strategy the court must show utmost consideration to the suitor.¹³ In the case at hand the plaintiff was under bon

¹¹ Collector Land Acquisition v. Mst. Katiji & Ors, 1987 AIR 1353.

¹² Sandhya Rani v. Subha Rani, AIR 1978 SC 537.

¹³ State of J&K v. Ghulam Rasool Rather, AIR 1989 SC 2125.

vide view of ongoing negotiation did not file the suit within the barred period of negotiation hence if it may please the court, court is requested to condone this delay.

In the light of the above arguments and precedents it is humbly submitted that the present suit of patent infringement is maintainable under the Mudhiras High Court.

II. Basiltri Telecom Pvt. Ltd. has infringed Guo Inc.'s Indian Patents no. 2222b, 2222e, 2222f and 2222g.

1. The Patents are valid: -

Guo Inc. (Hereinafter referred as Guo) has filed the present Suit against Basiltri Telecom Pvt. Ltd. (Hereinafter referred as Basiltri) seeking inter alia to restrain violation and infringement of its rights in its patents being:

S.No.	Patent No.	Date of Grant	Invention Title
1.	2222b	21.09.1999	Conserving bandwidth by limiting videos communicated in a network
2.	2222e	03.04.2006	Error detection in downlink transmission
3.	2222f	19.05.2006	Method and apparatus for transmitting frames across a network
4.	2222g	04.04.2008	High-speed data transmission protocol and system

It is humbly submitted, that the abovementioned patents have been granted by the Patent Office after detailed scrutiny and examination under Section 12¹⁴ and 13 of the Act.¹⁵ However, it is pertinent to note that the validity of a patent is not guaranteed by the grant, and is now expressly provided in Section 13(4) of the Patents Act, 1970.¹⁶

In accordance with Section 13(4) of the Patents Act, 1970, the counsel admits that the aforementioned patents have not been guaranteed validity, but under Section 114(e) of the Indian Evidence Act, 1872, there is a presumption that All judicial and official acts have been regularly performed.¹⁷ As per the latin maxim *omnia praesumuntur rite at solenniter esse acta donec probetur in contrarium*, everything is presumed to be rightly and duly performed until

¹⁴ The Patents Act, 1970, § 12, No. 39, Acts of Parliament, 1970 (India).

¹⁵ The Patents Act, 1970, § 13, No. 39, Acts of Parliament, 1970 (India).

¹⁶ The Patents Act, 1970, § 13(4), No. 39, Acts of Parliament, 1970 (India).

¹⁷ Indian Evidence Act, 1872, § 114(e), No. 1, Acts of Indian Legislative Council, 1872 (India).

the contrary is shown. It will be presumed that the examiner has conducted the examination properly and exercised due diligence unless proved otherwise.

Also, In the case of P.J. Ratnam vs. D. Kanikaram, the Supreme Court of India held that, “*There would be a presumption of regularity in respect of official and judicial acts and it will be for the party who challenges such regularity to plead and prove his case.*”¹⁸

Hence, it shall be concluded and inferred that the above-mentioned patents are valid and shall presumed to be unless proved otherwise by Basiltri, hence the onus is on the defendant to prove the invalidity of the concerned patent.

2. The Patents are Essential for compliance with Widget Standards: -

The concerned Standard Essential Patents of Guo protect the technology which have been set as standards to bring benefits to consumers and businesses alike in terms of interoperability and innovation. These standards have been set by Widget Standards Organization, Paris, which is a part of European Standards Organization.¹⁹

The said Patents namely 2222b, 2222e, 2222f and 2222g are essential, which has been defined in the Clause 15.6 of WSO IPR Policy ²⁰ as “*ESSENTIAL as applied to IPR means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR. For the avoidance of doubt in exceptional cases where a STANDARD can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered ESSENTIAL*”

The concerned patents here are essential for the compliance with, Widget Standard 1 Widget Standard 2 and Widget Standard 3, hence these are Standard Essential Patents.

3. Acts of Basiltri Amounts to Infringement: -

What constitutes an infringement of a patent has not been yet defined in The Indian Patents Act, 1970. One has, therefore, to gather the meaning of infringement from the scope of the monopoly rights conferred on the patent holder; for infringement is the violation of those

¹⁸ P.J. Ratnam vs D. Kanikaram and Others, 1964 AIR 244, 1964 SCR (3) 1.

¹⁹ Query No. 46, Clarifications; Statutes of the European Telecommunications Standards Institute, Art. 2, 1998.

²⁰ Query No. 25, Clarifications; European Telecommunications Standards Institute Intellectual Property Rights Policy, Clause 15.6, Annexure 6.

rights.²¹ Section 48 of the Indian Patents Act²² at its core confers the exclusive right on the patent holder, to protect the use, distribution, sale and import of the patented product or use of the patented process to produce a product, by any third party, without the consent of the patent holder.

Also, the Universal Declaration of Human Rights in article 27²³ states that, “*Everyone has the right freely to participate in the cultural life of the community to enjoy the arts and to share in scientific advancement and its benefits.*’ Further, *everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*”

As outlined above, intellectual property being intangible are yet bound by ownership and such benefits accruing are to be in the favour of the owner. Here, the patents infringed are Standard Essential Patents (Hereinafter, referred as SEPs), essential to comply with Widget Standards, for the manufacturing of Widget Handsets. The technology protected by the aforementioned patents have been recognized by Widget Standard Organization, Paris as standards, namely 1, 2 and 3, which have to be followed by any and every Widget Manufacturer.

It is humbly submitted that the defendant had been complying with the said standards of WSO since its commencement of business i.e. the financial year 1998-99.²⁴ Which means that Basiltri has also been using the technology patented in the aforementioned Guo Inc.’s SEPs. In the light of Section 48 of The Indian Patents Act and Clause 15.6 of WSO IPR Policy as discussed above, the unauthorized use of Guo Inc.’s SEPs, by the defendant, amounts to infringement.

4. Unwilling to obtain License for the patents on Fair Reasonable and Non-Discriminatory (FRAND) terms:-

The SEPs of Guo Inc. derive their validity and authority from Widget Standards Organization’ Paris. As a quid quo pro to this validity and authority, Guo Inc. is required to oblige to Fair Reasonable and Non-Discriminatory (FRAND) terms of licensing.²⁵

FRAND commitment means that

²¹ P. Narayanan, Patent Law, 498, (Eastern Law House 4th ed. 2006).

²² The Patents Act, 1970, § 48, No. 39, Acts of Parliament, 1970 (India).

²³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

²⁴ Query No, 21, Clarifications.

²⁵ Query No. 25, Clarifications; European Telecommunications Standards Institute Intellectual Property Rights Policy, Clause 6.1, Annexure 6.

- (i) The Patent proprietor, on any unreasonable ground, cannot exclude any willing third party from obtaining a license to their patents.
- (ii) Incentivizes the Patent proprietor, who contribute to the said standard, with their research and development.

Then Guo Inc. found that Basiltri Telecom Pvt. Ltd., the largest manufacturer of widget handsets in India, had been complying with the aforementioned Widget Standards without having the license to Guo Inc.'s SEPs, then it approached Basiltri, on the date of August 15, 2016, to initiate negotiations for licensing of GUO's SEPs.

Basiltri replied to Guo, after 3 constant gentle reminders, on the date of November 1, 2016. The first mail sent by Guo was merely an offer to initiate negotiations for licensing, yet Basiltri took 78 days with a mere response of stipulation of a date for a meeting. This nonchalant attitude of Basiltri signifies, that it has been actively delaying and avoiding licensing discussions, this situation often referred as 'Patent Hold-Out', is a sign of unwillingness to obtain license over patents.²⁶

The meeting held on January 28, 2017, where Guo shared a sample list of its SEPs, offered a license to its Global Portfolio and asked for a confidentiality agreement for the sake of demonstration of claim charts and disclosure of royalty rates.

In response, dated March 5, 2017, after 36 days Basiltri declined to sign the confidentiality agreement, which is in transgression to Clause 4.4 of WSO Guide on IPRs²⁷ (which has also been referred by The Hon'ble Delhi High Court²⁸), which states that, *"It is recognized that Non-Disclosure Agreements (NDAs) may be used to protect the commercial interests of both potential licensor and potential licensee during an Essential IPR licensing negotiation, and this general practice is not challenged"*

This confidential information includes claim charts and amount of royalty rates that will be charged, which will aid and assist both the parties in negotiating and executing a FRAND license. Execution of such an NDA is a norm in the industry for the purpose of negotiating and executing a FRAND license as it helps parties to exchange their proprietary information.²⁹ This

²⁶Huawei Technologies Co. Ltd Vs. ZTE Corp., ZTE Deutschland GmbH, Case C- 170/13.

²⁷ Query No. 25, Clarifications; European Telecommunications Standards Institute Intellectual Property Rights Policy, Clause 4.4, Annexure 6.

²⁸ Telefonktiebolaget LM Ericsson (PUBL) Vs. Lava International Ltd., I.A. Nos. 5768/2015 and 16011/2015 in CS(OS) No. 764/2015.

²⁹ *Ibid.*

proves further that both the parties have their interests vested in the information, hence a Confidentiality Agreement should be the only recourse.

In response, dated March 5, 2017, Basiltri did not just decline to sign a confidentiality agreement, but also threatened not to meet again, if Guo doesn't agree to their terms. Again, a sign of unwillingness to comply with FRAND licensing terms.

Later, Basiltri did agree to sign a confidentiality agreement, owing to Guo's insistence, but wanted to reduce the duration of the agreement to 6 Months from the period of 15 Years, a confidential agreement of such a short duration totally defeats the purpose of a confidentiality agreement, as the information regarding both the parties, which ought to be confidential would be accessible to the public after a very short period of 6 Months.

After a broad discussion regarding the Royalty Rates, Basiltri demanded the Basis of Royalty to be the price of the component of the patented technology, rather than based on the net selling price of the end product, which Guo proposed within the bounds of FRAND royalty rates. To substantiate further, European Commission on Antitrust Decisions on Standard Essential Patents (SEPs), in a press release, said that, the Commission doesn't outline what a reasonable Royalty Rate is but believes that courts and arbitrators are well-placed to set FRAND rates in cases of disputes.³⁰ The Hon'ble High Court of Delhi in past, in similar cases of Ericsson v. Lava³¹ & Ericsson v. Intex³², has set the Royalty rate at the net selling price of the end product, which brings us to the conclusion, that the Royalty Rates as proposed by Guo shall be followed as the same has also been set by courts in India.

After the discussion, pertaining to Royalty Rates, Basiltri Finally agreed to meet on August 20, 2017, but to Guo's surprise, Basiltri didn't stand on its own commitments and cancelled the meeting on the last minute. This cancellation of the meeting on the last minute acted as a confirmation to believe that Basiltri is unwilling to get the license, and had been delaying or rather avoiding the negotiations, in order to Hold-Out the Patent until the licensing terms are in their favour.

On the basis of abovementioned submissions presented, the counsel on the behalf of Guo, would conclude that, Basiltri had been using Guo's patents since it commenced business and

³⁰ European Union, [http://europa.eu/rapid/press-release MEMO-14-322_en.htm](http://europa.eu/rapid/press-release_MEMO-14-322_en.htm) (Last Visited November 27, 2017).

³¹ *Supra* note 28.

³² Telefonktiebolaget LM Ericsson (PUBL) Vs. Intex Technologies (India) Limited, I.A. No. 6735/2014 in CS(OS) No.1045/ 2014.

as these Patents are essential to comply with standards set by Widget Standard Organization, Basiltri's utter disregard and unwillingness for FRAND terms of negotiations for the licensing, makes the actions of Basiltri infringement of Guo's Standard Essential Patents.

III. An interim injunction should be granted

As submitted earlier, the plaintiff has approached the Hon'ble Court as the defendant has infringed on the plaintiff's standard essential patents, no. 2222b, 2222e, 2222f, and 2222g. By virtue of Section 48 of the Patents Act, till the term of validity of the suit patents, the plaintiff is entitled to prevent any third party, who does not have its permission, from the act of making, using, offering for sale, selling or importing for those purposes an infringing product in India.³³ This right is also enshrined in the form of Article 27 in the UDHR³⁴, which provides for the "*right to benefit from the moral and material interests resulting from authorship of scientific, literary or artistic productions.*" Relief in a suit for infringement, as per section 108(1) of the Patents Act, 1970³⁵ is provided as, "*(1) The reliefs which a court may grant in any suit for infringement include an injunction (subject to such terms, if any, as the court thinks fit) ...*" It is submitted that in view of the non-cooperative attitude of the defendant, the plaintiff has been left with no recourse but to pursue the present infringement action before this Court seeking remedy of, inter alia, an interim injunction against the defendant. In the judgment by the Delhi High Court in the case of Telefonaktiebolaget LM Ericsson v. Intex³⁶, the plaintiff, Ericsson, was granted an injunction against Intex for any devices that infringed on the eight Standard Essential Patents that were a part of Ericsson's portfolio. The Court also ordered Intex to pay 50% of the royalties. Based on the similar nature of the case, the counsel humbly requests the Court to consider the same.

In eBay Inc. v. Merc Exchange, L.L.C.,³⁷ a four-factor injunction test was implemented. The Court ruled that the plaintiff must demonstrate:

- a. An irreparable injury
- b. That remedies available at law, such as monetary damages are inadequate to compensate for that injury

³³ Patents Act, 1970, § 48, No. 39, Acts of Parliament, 1970 (India).

³⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

³⁵ Patents Act, 1970, § 108, No. 39, Acts of Parliament, 1970 (India).

³⁶ Telefonaktiebolaget LM Ericsson (PUBL) v. Intex Technologies (India) Limited, 2015 SCC OnLine Del 8229.

³⁷ eBay, Inc. v. MercExchange, L.L.C, 547 U.S. 388 (2006).

- c. Considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted.
- d. That Public Interest would not be disserved by a permanent injunction.

A similar test was put forth by the Hon'ble Supreme Court of India in *Dalpat Kumar v. Prahlad Singh*³⁸ where the Court held that, "*The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction...The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession... The third condition also is that "the balance of convenience" must be in favour of granting injunction...*".

1. *Demonstration of an irreparable injury*: The defendant is the largest widget manufacturer in India and the plaintiff also possesses data that shows that the defendant has indulged in the export of products that infringe the plaintiff's SEPs. The SEPs in question, Patent no. 2222b was filed on 21.9.1999, no. 2222e was filed on 3.4.2006, no. 2222f was filed on 19.5.2006, and no. 2222g was filed on 4.4.2008. Given their filing dates and the plaintiff's attempt to begin licensing negotiations around August 2016, shows that infringement has started from around that period. Therefore, it is reasonable to conclude that the defendant has been infringing the plaintiff's patents and reaping the benefits of the same for the designated period. The plaintiff had offered to licence its patents on FRAND terms as per the WSO IPR Policy, but the unwillingness of the defendant to license the said patents is a pertinent fact in the plaintiff's request for an injunction. Therefore, counsel for the plaintiff humbly submits that the plaintiff has already suffered an irreparable injury at the hands of the defendant and will be affected deeply as a result of such breach of the plaintiff's property.
2. *Inadequate remedies at Law*: The counsel further submits that the plaintiff has not only suffered monetary damage but has also been deprived of its right as a patent holder. Applying the principle of *injuria sine damnum*, albeit the presence of monetary damage, a patent holder suffers loss of face value and substantial devaluation of its SEPs. When

³⁸ *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719, 53.

faced with an unwilling licensee, a patent holder needs to be able to protect its Intellectual property. In these cases, recourse to injunctive relief is generally a legitimate remedy as without it, unwilling licensees have no or little incentive to enter into licenses.³⁹ Instead they adopt measures such as litigation for abuse of dominant position as undertaken by the defendant before the Competition Commission of India and file revocation petitions. This forces patent holders to start litigation, which puts a disproportionate and excessive burden on the latter and would trigger a substantial devaluation of the SEPs.⁴⁰ Therefore, the counsel humbly submits that damages would be an inadequate remedy as there would continue to be an uninterrupted use of the patents.

3. *Balance of convenience lies in favour of the plaintiff:* In the event of not being granted an interim injunction, the defendant will continue to violate the plaintiff's rights and reap the benefits through large sales in and outside India. As submitted earlier, the defendant is the largest widget manufacturer in India and hence, controls the market to a significant extent. On top of the matter, the defendant is also seen colluding with other market players, as the Managing director of Basiltri Telecom Pvt. Ltd. is also the Chairman of the association of widget manufacturers. Non-grant of the injunction will encourage unwilling licensees to take advantage of the patents, not pay royalties and earn unprecedented profits during the settlement of the dispute. The interim order will also help in creating a possibility of negotiating a license on suitable terms. Where an infringer is allowed to operate in the interim during the trial, it may result in a reduction in price by that infringer since it has no research and development expenses to recoup and hence, most revenue becomes profit.⁴¹ The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted.⁴² Therefore, it is humbly submitted that the balance of convenience lies in favour of the plaintiff.

³⁹ Ericsson, *Ericsson on FRAND and Standards*, ERICSSON ON FRAND AND STANDARDS – GLOBAL POSITION PAPER, <https://www.ericsson.com/assets/local/networked-society/innovation/patents--licensing/frand-and-standards.pdf>.

⁴⁰ *Id.* at 5.

⁴¹ Merck Sharp & Dohme Corp & Anr. V. Glenmark Pharmaceuticals, 2013 SCC OnLine Del 1319.

⁴² DALPAT KUMAR V, PRAHLAD SINGH, *supra* note 5.

4. *The plaintiff's actions are not an abuse of its dominant position:* Furthermore, the counsel for the plaintiff would like to submit that the plaintiff has acted in accordance with its obligation regarding the grant of licenses under clause 6.1 of the WSO IPR Policy (para materia to the ETSI Directives)⁴³ and has attempted to grant a license to the defendant on FRAND terms. The plaintiff has not abused its position in the market in contravention of Section 4 of the Competition Act⁴⁴, as alleged through an information filed by the defendant before the CCI, Therefore, the defendant cannot claim that the injunctive relief is an abuse of dominant position. In *Philips v. SK-Kassetten*⁴⁵, the Court ruled that, *“The existence of an obligation to grant a FRAND license does not necessarily prevent the holder of an essential patent from enforcing its patent, including through a suit seeking injunctive relief”*. In rejecting the defendant’s FRAND defense, the Court emphasized that SK- Kassetten should have asked Philips for a license before it started using Philips’ SEPs. If Philips had rejected such a license request, SK-Kassetten could have filed a motion with the Court requesting that Philips be ordered to license its SEPs under FRAND terms.

The Federal Supreme Court in the Orange Book Case⁴⁶ imposed three requirements for a FRAND defence to be successful i.e. The plaintiff has a dominant position, the defendant has offered a license on acceptable contract terms to the plaintiff, and The defendant has behaved from the point of its offer as if the plaintiff had accepted the offer. The burden of proof lies on the defendant to prove the above conditions in order for it to claim that an injunctive relief is an abuse of the plaintiff’s market position. However, the counsel humbly submits that that even though the first condition is fulfilled by the plaintiff as it is the holder of SEPs, the other two conditions are not fulfilled by the defendant.

The defendant (and not the plaintiff) must make an offer to license on reasonable terms, i.e., the terms and conditions of its offer must reflect the terms and conditions that are customarily used in the industry for licensing such technology. *Basiltri* had set forth the

⁴³ Eur. Telecomm. Standards Inst. [ETSI], *ETSI Directives*, (April 5, 2017), https://portal.etsi.org/directives/37_directives_apr_2017.pdf.

⁴⁴ Competition Act, 2002, § 4, No. 12, Acts of Parliament, 2003 (India).

⁴⁵ *Philips v. SK-Kassetten* (District Court of The Hague, March 17, 2010, doc. no. 316533/HA ZA 08-2522).

⁴⁶ *Orange Book Standard*, doc. no. KZR 39/06.

conditions that they wanted Guo Inc. to demonstrate the validity and essentiality of all the Indian patents, that they would sign the confidentiality agreement only if it was for 6 months and would only pay royalty on the price of components and not the end product. The plaintiff has repeatedly attempted to arrive on common ground and has often been the one initiating contact. The defendant has taken on the role of an unwilling licensee and is therefore, incapable of taking the FRAND defense. The defendant is said to be an unwilling licensee as there was no response to the plaintiff's attempts to set up a meeting, despite 2 reminders on September 15, 2016 and October 2, 2016. The defendant was even unwilling to sign a confidentiality agreement which is an essential practice in a licensing negotiation to protect the licensor. The defendant had also cancelled a meeting scheduled on August 20, 2017 at the last minute, and filed revocation petitions before the IPAB and an information in the CCI alleging abuse of dominant position, which amounts to adopting delaying tactics. In *Huawei v. ZTE*, it was held that *"It is for the alleged infringer diligently to respond to that offer, in accordance with recognised commercial practices in the field and in good faith, a point which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics."*⁴⁷

Further, the defendant must not implement the patent without obeying the contractual obligations that would be in place had the plaintiff accepted the offer. For example, the defendant must account for the use of the patent on a regular basis and must pay the applicable royalties directly to the plaintiff. Furthermore, where the alleged infringer is using the teachings of the SEP before a licensing agreement has been concluded, it is for that alleged infringer, from the point at which its counter-offer is rejected, to provide appropriate security, in accordance with recognised commercial practices in the field, for example by providing a bank guarantee or by placing the amounts necessary on deposit. The calculation of that security must include, inter alia, the number of the past acts of use of the SEP, and the alleged infringer must be able to render an account in respect of those acts of use.⁴⁸ The counsel humbly submits that the defendant's conduct has not reflected any such values.

⁴⁷ Huawei Technologies Co. Ltd Vs. ZTE Corp., ZTE Deutschland GmbH, Case C 170/13.

⁴⁸ Orange Book Standard, *supra* note 13.

The counsel humbly reiterates that the license offered to the defendant was in accordance with FRAND terms and the allegations of unreasonable royalty rates are completely false. The Delhi High Court has found that Ericsson's practice of charging a royalty based on the price of the downstream device is FRAND.⁴⁹ In determining the royalty base for a FRAND royalty, the court asserted that, in *CSRIO v CISCO*⁵⁰, the US District Court for the Eastern District of Texas had "*rejected that royalty should be based on chipset price*". The court also referred to the direction that the Chinese Competition Authority (the National Development and Reform Commission, NDRC) gave with respect to Qualcomm's SEPs for 3G and 4G technologies, fixing the royalty rates as a percentage of the net selling price of devices incorporating 3G and 4G standards.⁵¹ The court further noted that a coordinate Delhi High Court bench, which passed an order in a similar suit concerning the same patents, had also determined royalty rates based on the net selling price of the devices.

Therefore, the counsel for the plaintiff humbly requests the court to grant an interim injunction against the defendant and submits that the defendant cannot defend itself against the same by claiming that the plaintiff is abusing its dominant position by seeking injunctive relief.

⁴⁹ Telefonaktiebolaget LM Ericsson v Intex Techs. ¶ 158, at 250

⁵⁰ Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc, No. 6:11-CV-343, 2014 WL 3805817 (E.D. Tex. 23 July 2014) (Davis, C.J.)

⁵¹ National Development and Reform Commission Ordered Rectification of Qualcomm's Monopolistic Behavior and Fined Six Billion Yuan], National Development & Reform Commission, People's Republic of China (10 February 2015), http://www.ndrc.gov.cn/xwzx/xwfb/201502/t20150210_663822.html.

PRAYER

In the light of the facts stated, issues raised, authorities cited and arguments advanced, the Counsel for the defendant respectfully requests the court to

1. Declare that the present suit is maintainable in this court.
2. Declare that the plaintiff is the registered proprietor of the patents 2222b, 2222e, 2222f, 2222g.
3. Declare that the defendant is an unwilling licensee.
4. Declare that the defendant is infringing the suit patents being. 2222b, 2222e, 2222f, 2222g.
5. Hold that the plaintiff has offered to defendant a license on fair, reasonable and non-discriminatory terms and conditions.
6. Hold that the suit patents being. 2222b, 2222e, 2222f, 2222g are valid in nature.
7. Declare that the plaintiff is entitled to the damages/payment of royalties from the defendant for the sales made by it of the widget handsets since 1998.
8. Grant an interim injunction against the defendant in order to restrain the defendant to cease importing, manufacturing/ assembling, marketing, advertising, selling, offering for sale etc in India any product which infringes the plaintiff's suit patents.

Or

Any other order as it deems fit in the interest of equity, justice and good conscience.

For This Act of Kindness, the plaintiff Shall Duty Bound Forever Pray.

This written submission is respectfully submitted by:

The Counsel on Behalf of Guo Inc. (Plaintiff)