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

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*Before*

**THE MUDHIRAS HIGH COURT**

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

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GUO, INC.....APPLICANT

V.

BASILTRI TELECOM PVT. LTD.....RESPONDENT

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**[MEMORIAL ON BEHALF OF THE APPLICANT]**

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29. VICOM Systems Inc., Case No. T 208/84 EPO (1986).
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**MISCELLANEOUS**

1. Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs and Trade Marks, 2017.
2. J. Gregory Sidak, Enhanced Damages for Infringement of Standard Essential Patents, 1 Criterion J. on Innovation 1101, 1109 (2016).
3. Joseph S. Miller, Standard-Setting, Patents and Access Lock-in: RAND Licensing and the Theory of the Firm, 40 Ind. L. Rev. 351 (2017).
4. Mark A. Lemley & Carl Shapiro, Patent Holdup and Royalty Stacking, 85 Tex. L. Rev., 1991 (2007).

**STATEMENT OF JURISDICTION**

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**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

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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**

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**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

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### **I. BASILTRI HAS INFRINGED GUO'S PATENTS**

In August, 2016, Guo had entered into a series of negotiations with Basiltri for licensing of their patent portfolio comprising of over 20,000 SEPs. It is submitted that firstly, Basiltri's flagrant conduct throughout the negotiation phase is equivalent to egregious infringement of Guo's patents. Secondly, Basiltri had attempted to instigate fellow Indian widget manufacturers to collude against Guo, which amounts to induced infringement of their patents.

### **II. GUO HAS NOT ABUSED ITS POSITION OF DOMINANCE IN LICENSING NEGOTIATIONS**

Guo had engaged in licensing negotiations on FRAND terms. Despite the fact that Basiltri was an unwilling licensee, Guo never coaxed Basiltri to execute a confidentiality agreement by giving the threats of injunction. Contrastingly, it always made bona fide efforts to license its patents on FRAND terms. This is evident from the fact as it made a specific offer to Basiltri to acquire a license to its patents by paying a reasonable royalty. Hence, this can no way constitute abuse of dominant position or derogate Guo's FRAND obligations.

### **III. GUO'S PATENTS ARE NOT SUBJECT TO REVOCATION**

Basiltri has filed a revocation petition against 10 of Guo's patents on the ground that they are software patents. However, they are not software or computer programmes per se and have been judicially interpreted to be patentable subject. Further, Guo's patents satisfy the "Means plus Function" requirement stated in the Guidelines for CRIs. In any case, even if the patents were computer programmes, they are patentable material according to the test laid down by the VICOM Systems case.

### **IV. AN INTERIM INJUNCTION ORDER MUST BE PASSED AGAINST BASILTRI**

Guo has applied for an interim injunction order to be passed against Basiltri. This order must be passed because Basiltri has not acted in good faith during the licensing negotiations and has caused irreparable harm towards Guo. Further, Guo, as an SEP holder under the present circumstances, can avail of the right to seek injunctive relief and is not disbarred from doing so by virtue of being party to a FRAND contract.

**ARGUMENTS ADVANCED**

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**I) BASILTRI HAS INFRINGED GUO'S INDIAN PATENTS.**

In August, 2016, Guo had entered into a series of negotiations with Basiltri for licensing of their patent portfolio comprising of over 20,000 Standard Essential Patents (“SEP”s).<sup>1</sup> It is submitted that *firstly*, Basiltri’s flagrant conduct throughout the negotiation phase is equivalent to egregious infringement of Guo’s patents [A]. *Secondly*, Basiltri had attempted to instigate fellow Indian widget manufacturers to collude against Guo, which amounts to induced infringement of their patents [B].

[A]. BASILTRI HAS EGREGIOUSLY INFRINGED GUO’S STANDARD ESSENTIAL PATENTS.

*(i) Basiltri had knowledge of the SEPs when infringing.*

In *Halo Electronics, Inc. v Pulse Electronics, Inc.*,<sup>2</sup> the Supreme Court held egregious behaviour to include conduct that amounts to willful and bad-faith infringement that also includes reckless or intentional disregard for the patent holder’s rights. To constitute egregious misconduct, the SEP infringement must manifest come culpability exceeding mere negligence.<sup>3</sup> The infringer’s knowledge of the SEPs is fundamental to whether its infringement was egregious. One of the primary ways in which it can be ascertained that the infringer had knowledge of the SEPs while infringing it is when a licensing agreement existed with a SEP holder to license the infringed SEPs on FRAND terms.<sup>4</sup> This way, the SEP holder discloses the details of the patented technology to the infringer. This situation is analogous to the present case, where Guo had entered into a licensing agreement with Basiltri, and provided a list of their SEPs for the same.<sup>5</sup> Therefore, it can be easily ascertained that Basiltri had the knowledge of these standard essential patents during the infringement.

*(ii) Basiltri’s conduct during licensing negotiations is indicative of egregious infringement.*

The conduct of the infringer in negotiating a license for SEPs is the second most crucial determinant of egregious infringement. Even in the absence of explicit infringement, the

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<sup>1</sup> Page 1, Moot Problem.

<sup>2</sup> *Halo Electronics, Inc. v Pulse Electronics, Inc.*, 579 U.S. (2016).

<sup>3</sup> J. Gregory Sidak, *Enhanced Damages for Infringement of Standard Essential Patents*, 1 *Criterion J. on Innovation* 1101, 1109 (2016).

<sup>4</sup> *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317 (Fed. Cir. 2016).

<sup>5</sup> Page 3, Moot Problem.

infringer's conduct can amount to constructive refusal to negotiate a license.<sup>6</sup> Basiltri's conduct during negotiations amounts to egregious infringement in two ways.

Firstly, Basiltri refused to sign a standard non-disclosure agreement (NDA) as requested by Guo.<sup>7</sup> For parties entering into a license agreement, it is a standard commercial practice to execute a NDA.<sup>8</sup> Basiltri's constant refusal to execute the NDA and thereby stalling the commencement of license negotiations constitutes a constructive refusal to negotiate the license agreement. Such behaviour epitomises the "egregious conduct" under Halo.<sup>9</sup>

Secondly, Basiltri also delayed the licensing negotiations despite constant reminders sent by Guo.<sup>10</sup> Courts have interpreted that prolonged infringement supports a finding of egregious infringement. It is believed that if the infringing party unduly delays the timely execution of a licensing agreement, then it increases the infringer's culpability.<sup>11</sup> Moreover, a last minute cancellation of an important meeting with Guo further indicates that Basiltri's behaviour departs from the standard commercial practice.<sup>12</sup> It can therefore be concluded that Basiltri showed complete disregard of Guo's rights as a patent holder and engaged in egregious infringement.

[B]. THERE HAS BEEN INDUCED INFRINGEMENT ON BASILTRI'S BEHALF.

It is a well-established position in law that when a party purposefully urges or encourages another to act in a manner that infringes an asserted claim, it amounts to induced infringement of the patent.<sup>13</sup> In the present case, it had come to Guo's notice that Basiltri circulated a letter to fellow widget manufacturers in India, which instigated them to collude against Guo.<sup>14</sup> It is submitted that *firstly*, Basiltri, by the means of circulating this letter, had intended to encourage and assist actions by others; and *secondly*, despite being aware of such an act has a high probability of constituting patent infringement, Basiltri deliberately ignored the risk. Thus, the two essential requirements that constitute induced infringement are satisfied in this case.<sup>15</sup>

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<sup>6</sup> J. Gregory Sidak, Enhanced Damages for Infringement of Standard Essential Patents, 1 Criterion J. on Innovation 1101, 1112 (2016).

<sup>7</sup> Page 4, Moot Problem.

<sup>8</sup> Convolve, Inc. v. Compaq Computer Corp., 527 F. Appx 910 (Fed. Cir. 2013).

<sup>9</sup> Halo Electronics, Inc. v Pulse Electronics, Inc., 579 U.S. (2016).

<sup>10</sup> Page 1 and 2, Moot Problem.

<sup>11</sup> Read Corp. v. Portec, Inc., 970 F.2d 816 (Fed Cir. 1992).

<sup>12</sup> Arctic Cat Inc. v. Bombardier Recreational Products., Inc., No.14-cv-62369, 2016 WL 4249951.

<sup>13</sup> MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

<sup>14</sup> Page 3, Moot Problem.

<sup>15</sup> Power Integrations, Inc., v. Fairchild Semiconductor International, Inc., No.15-1329 (Fed. Cir. 2016).

It is also submitted that it is immaterial if the actual infringement has occurred due to the party's actions. All that is required is that the party took steps to encourage that infringement, regardless of whether that encouragement succeeded, or was even received.<sup>16</sup> Therefore, in the present case, it is irrelevant if Basiltri's letter was able to achieve the intended effect, the mere fact that it purposefully issued a letter, which encouraged acts that constitute direct infringement, is sufficient to prove that Basiltri possessed the requisite intention for inducing other widget manufacturers.

## II) GUO HAD NOT ABUSED ITS DOMINANT POSITION IN LICENSING NEGOTIATIONS

Guo had conducted the licensing negotiations with Basiltri since August 2016 and their message exchange goes to show that they did not attempt to abuse their dominant position. *Firstly*, they were always in compliance with FRAND terms and despite the fact that Basiltri was an unwilling licensee, Guo never coaxed Basiltri to execute a confidentiality agreement by giving the threats of injunction [A]. *Secondly*, FRAND licensing negotiations does not come under the purview of Competition Act [B]. *In any case*, Guo always made bona fide efforts to license its patents on FRAND terms. This is evident from the facts where it made a specific offer to Basiltri to acquire a license to its patents by paying a reasonable royalty [C]. *Finally*, Guo was acting within the purview of its FRAND obligations by offering a global portfolio of patent licenses [D]. Hence, this can no way constitute abuse of dominant position or derogate Guo's FRAND obligations.

### [A]. GUO HAD ENGAGED IN LICENSING NEGOTIATIONS ON FRAND TERMS.

Guo had always sought to license its SEPs to Basiltri on fair, reasonable, and non discriminatory (FRAND) terms. This pertains to its FRAND obligations<sup>17</sup> whereby it made a specific offer to Basiltri to license its patents. Hence, after taking into consideration commercial market practices, Guo presented an objective terms and conditions in an agreement to Basiltri so as to execute a confidentiality agreement.<sup>18</sup> However, Basiltri instead of concluding an agreement in good faith, engaged in mala fide practices and delaying tactics.

For instance, during the ongoing negotiations Basiltri colluded with other manufacturers which was against the very spirit of FRAND negotiations. This would have caused irreparable harm to Guo's commercial interests, considering that all the parties were Guo's prospective

<sup>16</sup> Power Integrations, Inc., v. Fairchild Semiconductor International, Inc., No.15-1329 (Fed. Cir. 2016).

<sup>17</sup> Clause 6 of the ETSI IPR Policy.

<sup>18</sup> Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH, CJEU.

licensees.<sup>19</sup> Further, Basiltri filed for revocation of Guo's patents which were infringed by its widget handsets since 1998.<sup>20</sup> It is to be highlighted that Basiltri had never challenged the validity of Guo's patents until the time Guo notified it to take a license to its SEPs. Simultaneously, it also filed an Information before CCI contending that Guo had abused its dominant position in the licensing negotiations. Thereby, essentially certifying the validity of Guo's patents which were challenged by it, though altogether in a different *fora*. Hence, from the aforesaid conduct, it can be established that Basiltri was an unwilling licensee who in order to avoid execution of FRAND agreement had maliciously assailed against Guo the charge of abuse of its dominant position. Thus, it is submitted that court must grant injunction in favour of Guo so as to stop Basiltri from infringing its patents.

[B]. FRAND LICENSING NEGOTIATIONS DO NOT COME UNDER THE PURVIEW OF COMPETITION ACT

It is submitted that licensing negotiations between Guo and Basiltri are not under the purview of anti abuse provisions of the Competition Act. This is because Guo had made an offer to license its SEPs to Basiltri on FRAND compliant terms which are in consonance with ETSI IPR policy. Admittedly, in cases of non abuse of dominant position by an enterprise, Section 3(5) of the Competition Act gives power to the patentee to impose reasonable restrictions so as to protect its rights conferred under the Patents Act.<sup>21</sup> Thus, it is contended that Guo would had a right to practice restrictive monopoly within the contours of the Patents Act. Hence, no anti abuse provisions of the Competition Act could govern such restrictions which are in compliance with FRAND terms. Other than that, the Delhi High Court in *Ericsson v CCI*,<sup>22</sup> had decided that if there is a conflict between the provisions of the Patent Act and the Competition Act in so far as anti abuse provisions are considered, provisions of the Patent Act would prevail. This is because Patents Act is a special statute and thus would override the provisions of the Competition Act. Similarly, the Supreme Court had also affirmed this proposition in the case of *Damji Shah v. LIC*,<sup>23</sup> whereby the court ruled that tribunals constituted under the Life Insurance Act would have the jurisdiction to adjudge claims against the Life Insurance Companies, notwithstanding the non obstante clause in the Companies Act

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<sup>19</sup> Page 1, Moot Problem.

<sup>20</sup> Clarification No. 21, Moot Problem.

<sup>21</sup> Competition Act 2002, s. 3(5)(i)(b).

<sup>22</sup> Telefonaktiebolaget LM Ericsson (PUBL). v. Competition Commission of India and Another, (2016) 232 D.L.T. (CN) 1.

<sup>23</sup> *Damji Valji Shah And Anr. v. Life Insurance Corporation of India & Ors.*, A.I.R. 1966 S.C. 135.

which expressly gives this power to the Company Court.<sup>24</sup> Thus, on these grounds, it is submitted that licensing negotiations on FRAND terms cannot be brought under the purview of anti abuse provisions of the Competition Act when there already exists a special statute and an exception crafted for that purpose in the Competition Act.<sup>25</sup>

[C]. ROYALTY RATE PAID ON THE END VALUE OF THE PRODUCT IS FRAND COMPLIANT

It is submitted that Guo did not act in contravention to FRAND terms by demanding royalties for its patents on the basis of net selling price of the product. This is based upon two prongs. *First*, paying royalty on smaller components would not have captured the true value of the invention alongside the importance of that invention in an industry.<sup>26</sup> *Second*, courts have taken the view that the term '*reasonable*' royalty in FRAND is too broad to be given a range or altogether fixed for a price.<sup>27</sup> Thus, taking into account these considerations, it is contended that proper royalty rates must be adjudged based on the net selling price of the end product.

Further, the Delhi High Court in *Ericsson v. Micromax*,<sup>28</sup> endorsed this opinion by observing that Ericsson's patents used in Micromax's mobile device contributes to the value of the device as a whole rather than being a single component in the device. Thus, it ordered Micromax to pay royalty on the net selling price of the end product. This approach was subsequently applied in several other cases as well such as Ericsson SEPs litigation with iBall,<sup>29</sup> Gionee,<sup>30</sup> Intex,<sup>31</sup> Lava,<sup>32</sup> Xiaomi.<sup>33</sup> In all these cases, Delhi High Court had calculated FRAND royalty rates on the basis of the end value of the product. Hence, it is submitted that royalty rates put forward by Guo for the purpose of the patent licensing be upheld as FRAND compliant.

[D]. GUO IS ENTITLED TO OFFER A GLOBAL LICENSE AS IT FALLS UNDER THE PURVIEW OF

FRAND

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<sup>24</sup> Companies Act 1956, s. 446(2).

<sup>25</sup> Competition Act 2002, s 3(5)(i)(b).

<sup>26</sup> Commonwealth Scientific And Industrial Research Organisation v. CISCO Systems, Inc. Case No. 6:11-cv-343.

<sup>27</sup> Unwired Planet International Ltd v. Huawei Technologies Co. Ltd, [2017] E.W.H.C. 711 (Pat).

<sup>28</sup> Telefonaktiebolaget LM Ericsson (Publ) v. Mercury Electronics & Anr., 2014 S.C.C. OnLine Del 6383.

<sup>29</sup> Telefonaktiebolaget LM Ericsson (Publ) v. M/s. Best IT World (India) Private Limited (Iball), 2015 S.C.C. OnLine Del 11684.

<sup>30</sup> Gionee Communication Equipment Co. Ltd. & Anr. v. Telefonaktiebolaget LM Ericsson (Publ)., FAO(OS) 574/2015, Delhi High Court.

<sup>31</sup> Telefonaktiebolaget LM Ericsson (PUBL) v. Intex Technologies (India) Limited, 2015 S.C.C. OnLine Del 8229.

<sup>32</sup> Telefonktiebolaget LM Ericsson (Publ.) v. Lava International Ltd., 2016 S.C.C. OnLine Del 3716.

<sup>33</sup> Telefonaktiebolaget Lm Ericsson (Publ) v. Xiaomi Technology & Ors., 2016 S.C.C. OnLine Del 2404.

It is submitted that global licenses are FRAND, and therefore, patent holder has a right to license its patents on a global license. This is qualified by an assertion that a patentee must charge reasonable royalty for its global portfolio so as to prevent patent 'hold up'.<sup>34</sup> In the present fact situation, it is reasonable for Guo to insist upon a global license when Basiltri is exporting its widget handsets to China.<sup>35</sup> Thus, Guo cannot be deprived to accrue monetary benefits for its inventions since its patents are infringed globally by Basiltri's products.

In the seminal decision in *Unwired Planet v. Huawei* Case,<sup>36</sup> the Court of Chancery Patents Division ruled that global rate is a benchmark to determine the FRAND rates by appropriately adjusting them upwards. Hence, it is contended that even if the royalty rates were based upon Indian specific patents, they would be much higher than the global rates. This is because they would not be FRAND neutral rates. Further, it is well recognised that global portfolio rates brings efficiency as it saves the transaction costs for both the licensor and the licensee to determine the royalty for each specific patent. Hence, the contention of Basiltri that portfolio licensing is abuse of dominant position cannot be sustained in FRAND negotiations.

### III) GUO'S PATENTS ARE NOT SUBJECT TO REVOCATION

Guo's patents cannot be revoked under any of the grounds specified in Section 64 of the Patents Act, 1970. It is submitted that firstly, Guo's patents are not computer programmes per se and therefore, are not precluded from the definition of an "invention" under the Act [A]. Secondly, in any case, as per the "technical contribution test" laid down in *VICOM Systems Inc.*, the technical processes through which these softwares shall be brought to use are patentable subject matter [B]. Finally, there arises the issue of maintainability of the suit. Basiltri is barred from filing a counter-claim in the infringement suit as it has already initiated proceedings before the IPAB [C].

#### [A]. GUO'S PATENTS ARE NOT COMPUTER PROGRAMMES PER SE.

*(i) Computer programmes have been widely construed as patentable subject matter.*

As per Section 2(ffc) of the Copyright Act, a "computer programme" has been defined as "a set of instructions expressed in words, codes, schemes or in any other form, including a

<sup>34</sup> *Unwired Planet International Ltd v. Huawei Technologies Co. Ltd*, [2017] E.W.H.C. 711 (Pat).

<sup>35</sup> Clarification No. 24, Moot Problem.

<sup>36</sup> *Unwired Planet International Ltd v. Huawei Technologies Co. Ltd*, [2017] E.W.H.C. 711 (Pat).

*machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result*".<sup>37</sup> The general meaning of the term "per se" has been taken to be "by itself" or "in itself".<sup>38</sup> This has caused the judicial interpretation of patentability of computer programmes to become very liberal. For instance, in the case of *Ericsson v Intex Technologies*<sup>39</sup>, the Court adopted a wide construction and held computer programmes to be patentable subject matter. Similarly, in *Astron Clinica*<sup>40</sup>, it was held that a computer that has been programmed to perform a technical task is a patentable invention. In the instant case, Guo's patents also aim to perform technical tasks with the aid of computer programmes. Therefore, Guo's patents adhere to the general legal position and are patentable inventions.

(ii) *Guo's patents meet the Means plus Function stipulation.*

Moreover, the Means plus Function requirement laid down in the Guidelines for Examination of CRIs is also satisfied. As per this requirement, inventions that are performed solely by the computer programme are not patentable.<sup>41</sup> However, in the present case, Guo's patents comprise of both software and hardware components. Both these elements work in concert to perform the desired function.<sup>42</sup> Thus, Guo's patent claims are in the "means+function" format and constitute patentable subject matter.

[B]. IN ANY CASE THE TECHNICAL PROCESSES THROUGH WHICH THESE SOFTWARES SHALL BE BROUGHT TO USE ARE PATENTABLE SUBJECT MATTER

It has been stated that Basiltri Telecom Pvt. Ltd. has filed a revocation petition against 10 of Guo's patents by virtue of them being software patents<sup>43</sup>. As per Section 3(k) of The Patents Act, "a mathematical or business method or a computer programme per se or algorithms" is not considered to be an invention and hence cannot be patented<sup>44</sup>. It has already been established that Guo's patents are not computer programmes per se. However, it was laid down by the VICOM Systems case, that "even if the idea underlying an invention may be considered to reside in a mathematical method a

<sup>37</sup> Copyright Act 1957, s. 2(ffc).

<sup>38</sup> Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs and Trade Marks, 2017.

<sup>39</sup> *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson*, 2014 S.C.C. OnLine CCI 8.

<sup>40</sup> *Astron Clinica Ltd & Ors v. Comptroller General*, [2008] EWHC 85 (Pat).

<sup>41</sup> Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs and Trade Marks, 2017.

<sup>42</sup> Clarification Nos. 26 and 37.

<sup>43</sup> Page 6, Moot Problem.

<sup>44</sup> Patents Act 1970, s. 3(k).



*claim directed to a technical process in which the method is used does not seek protection for the mathematical method as such*<sup>45</sup>. Therefore the technical process that employs the underlying method can warrant the title of an invention and hence is patentable. Patent 2222a, which is one of the 10 patents that Basiltri has filed a revocation petition against, is described as “Method and apparatus for conserving bandwidth by using predictive analysis”<sup>46</sup>. It is evident that the patent not only covers the method but also the apparatus that the method resides in. This is similar in the subsequent patents in which patentability is being contested. It was conclusively held in the case that “*an invention which would be patentable in accordance with conventional patentability criteria should not be excluded from protection by the mere fact that for its implementation modern technical means in the form of a computer program are used*”<sup>47</sup>. It is hence submitted, that, according to the technical contribution test laid down by VICOM Systems, it is clear that Guo’s patents must not be revoked.

[C] BASILTRI IS BARRED FROM FILING COUNTER-CLAIM FOR THE REVOCATION OF PATENTS

It is submitted that Basiltri is barred from filing a counter-claim in an infringement suit instituted by Guo. This is because it had already initiated the revocation proceedings before another forum IPAB.<sup>48</sup> Concurrently, this contention is also in consonance with Section 64 of the Patents Act which expressly states that revocation petition may be either filed before the IPAB “or” in a counter-claim in a suit for infringement of a patent.<sup>49</sup> Hence, both the remedies available under Section 64 are not conjunctive, thus they cannot be adopted simultaneously. Hence, it is submitted that Basiltri is barred from filing a counter-claim in an injunction suit against revocation for Guo's patents.

In this context, Supreme Court of India in *Aloys Wobben v. Yogesh Mehra*,<sup>50</sup> rendered a landmark decision to avoid multiplicity of proceedings on the same subject matter in a different *fora*.<sup>51</sup> The court observed that seeking a similar relief in different forums amounts to abuse of judicial process. In the instant case, Dr. Wobben who was an scientist held several Indian patent pertaining to wind turbines and wind generators. After the license agreement terminated, the licensee, Enercon India filed for revocation of Dr. Wobben patents before the IPAB. The same remedy was also sought by Enercon through a counter-claim in an infringement suit brought

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<sup>45</sup> VICOM Systems Inc., Case No. T 208/84 EPO (1986).

<sup>46</sup> Moot Clarification 37.

<sup>47</sup> VICOM Systems Inc., Case No. T 208/84 EPO (1986).

<sup>48</sup> Page 6, Moot Problem.

<sup>49</sup> Patents Act, 1970, s. 64(1).

<sup>50</sup> *Dr. Aloys Wobben And Another v. Yogesh Mehra And Others*, (2014) 5 M.L.J. 90 (SC).

<sup>51</sup> *Dr. Aloys Wobben And Another v. Yogesh Mehra And Others*, (2014) 5 M.L.J. 90 (SC).

by Dr. Wobben in Delhi High Court. Supreme Court ruled that since the prayer sought before both these forums is same and the matter is pending before the IPAB, hence the matter is *res sub-judice*.<sup>52</sup> Correspondingly, it is submitted that Basiltri is also barred from seeking a similar remedy for revocation of Guo's patents under the provision of Section 10 of CPC read with Section 151 of CPC and also by the provisions of the Patents Act.

**IV) AN INTERIM INJUNCTION ORDER AGAINST BASILTRI TELECOM PVT. LTD. MUST BE PASSED**

Guo has filed a patent infringement suit against Basiltri and has subsequently applied for an interim injunction to avoid Basiltri from availing of an unfair market advantage by infringing patents that other implementers are paying royalties on. *Firstly*, Basiltri is not negotiating in good faith and has caused irreparable harm to Guo [A]. *Secondly*, Guo, under the current circumstances can seek injunctive relief despite being an SEP holder and the FRAND contract cannot bar them from doing so [B].

[A] BASILTRI TELECOM PVT. LTD. IS NOT NEGOTIATING IN GOOD FAITH AND HAS CAUSED IRREPARABLE DAMAGE TO GUO INC.

It can be established, through the multiple interactions between Guo Inc. and Basiltri Telecom Pvt. Ltd. that the latter is not approaching the licensing negotiations in good faith. It has been laid down in *Apple v. Samsung*<sup>53</sup> that the patent holder has a duty with regard to its FRAND commitment to the ETSI to negotiate with a potential licensee in good faith. However, the obligation to negotiate in good faith also extends to the implementer<sup>54</sup>. The implementer is a third party beneficiary to the FRAND contract<sup>55</sup>. The terms that Guo Inc. has set during licensing negotiations suggest that they are striving to reach the best possible deal for themselves. One cannot characterize self-interest as bad faith<sup>56</sup>. It cannot be asserted, therefore, that Guo is not complying with FRAND terms. Basiltri, however is proving to be an unwilling licensee by refusing to enter into a FRAND agreement that they themselves have proposed<sup>57</sup>.

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<sup>52</sup> Dr. Aloys Wobben And Another v. Yogesh Mehra And Others, (2014) 5 M.L.J. 90 (SC).

<sup>53</sup> Apple v. Samsung, 2012 W.L. 1672493.

<sup>54</sup> Ericsson Inc. v. D-Link Systems Inc., No. 13-1625 (Fed. Cir. 2014).

<sup>55</sup> Microsoft Corp. V. Motorola Inc., 864 F. Supp. 2d 1023 (W.D. Wash. 2012).

<sup>56</sup> Feldman v. Allegheny, 452 F. Supp. 151 (D. Conn. 1976).

<sup>57</sup> FTC Decision and Order, Robert Bosch GmbH, No. C-4377 (F.T.C. 2012).

It is known that Basiltri cancelled a scheduled meeting after multiple attempts made by Guo to arrange one<sup>58</sup>.

Basiltri has further, sent out an email to all other widget manufacturers in the country seemingly conspiring against Guo Inc<sup>59</sup>. It is clear that Basiltri is a very influential player in the market<sup>60</sup>. An email suggesting that all the widget manufacturers in the country should meet up to collude against Guo Inc can be very detrimental to Guo's image and harmful to any further licensing negotiations that they initiate<sup>61</sup>. The four-factor test laid down in *eBay v. MercExchange*<sup>62</sup>, which determines whether an SEP holder can avail of an injunction order states that the patent holder must prove “(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”. The harm that Basiltri has done to Guo by involving other widget manufacturers and additionally also irrespectively infringing Guo's standard essential patents is irreparable and cannot be monetarily compensated for through court awarded damages.

Basiltri has not only neglected their duty to negotiate the licensing agreement in good faith but has also infringed the SEPs and by virtue of them being the largest implementers in India, they are making it a lot more expensive and difficult for Guo to subsequently license its SEPs<sup>63</sup>. Such behaviour becomes common market practice. This could lead to reverse royalty stacking, where the accumulated cost of litigation is too high to allow the SEP holder to participate in the market<sup>64</sup>. Furthermore, FRAND royalties are very difficult to quantify as there is no accurate measurement of what is fair and therefore, even if damages were awarded, there is no way of knowing whether or not the harm caused to the SEP holder is repaired<sup>65</sup>. It is hence submitted that Guo Inc. has been irreparably harmed by Basiltri's actions and the Court must grant an interim injunction.

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<sup>58</sup> Page 6, Moot Problem.

<sup>59</sup> Page 5, Moot Problem.

<sup>60</sup> Page 1, Moot Problem.

<sup>61</sup> Page 6, Moot Problem.

<sup>62</sup> *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388.

<sup>63</sup> J. Gregory Sidak, *The Meaning of FRAND, Part II: Injunctions*, 11(1) J. Comp. L. & Econ. 201 (2015).

<sup>64</sup> J. Gregory Sidak, *The Meaning of FRAND, Part II: Injunctions*, 11(1) J. Comp. L. & Econ. 201 (2015).

<sup>65</sup> *Ericsson Inc. v. D-Link Systems Inc.*, No. 13-1625 (Fed. Cir. 2014).

[B] GUO INC. AS AN SEP HOLDER IS ELIGIBLE TO SEEK AN INJUNCTION ORDER AGAINST  
BASILTRI TELECOM PVT. LTD.

It is widely held that an SEP holder must be barred from seeking an injunction after it has committed to licensing its patents on FRAND terms<sup>66</sup>. It is said that the essence of a FRAND promise is an irrevocable waiver of injunctive relief<sup>67</sup>. However, the granting of an interim injunction is expressed as a statutory right in Section 37(1) of the Specific Relief Act stating that “*Temporary injunctions are such as are to continue until a specific time, or until the further order of the court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908*”. It has been established, as a convention of legal interpretation that the waiver of a statutory right must be clear and unambiguous<sup>68</sup>. The ETSI, which is in pari materia with the Widget Standard Organisation<sup>69</sup> abandoned the undertaking regarding including the waiver of injunctive relief in its policy in 1994.

It is reasonable to believe that not all SEP-related litigation is the same and it is unfair to apply a per-se rule that injunctions are unavailable for all SEPs<sup>70</sup>. An SEP holder’s mere request for an injunction cannot alone culminate in an abuse of dominant position<sup>71</sup>. It has been stated that an SEP holder is permitted to seek an injunction if an implementer does not provide the written confirmation requested in a FRAND Terms Letter within 30 days<sup>72</sup>. Guo Inc. has been attempting to communicate with Basiltri Telecom Pvt. Ltd regarding licenses for their patents for over one year. Basiltri has, however proceeded to infringe the patents nonetheless. The principles of equitable estoppel indicate that Basiltri can defend the claim of patent infringement if they can prove that Guo has, through their conduct, implied that they never meant to license their SEPs or have misled them to infringe the patent<sup>73</sup>. It is evident that these conditions are absent from the communication between Basiltri and Guo over their year-long exchange of emails.

It has been laid down in *ITT v. Promedia*<sup>74</sup> that it is indeed lawful to initiate proceedings to enforce an injunction with the limited exceptions of the claim being manifestly unfounded or

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<sup>66</sup> Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev., 1991, 1991 (2007).

<sup>67</sup> Joseph S. Miller, *Standard-Setting, Patents and Access Lock-in: RAND Licensing and the Theory of the Firm*, 40 Ind. L. Rev. 351, 358 (2017).

<sup>68</sup> *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270.

<sup>69</sup> Moot Clarification 25.

<sup>70</sup> *Apple v. Samsung*, 2012 W.L. 1672493.

<sup>71</sup> Opinion of Advocate General in *Huawei Technologies Co. Ltd. v. ZTE Corp.*, Case C-170/13 (2015).

<sup>72</sup> FTC Decision and Order in *Motorola Mobility*.

<sup>73</sup> *AC Aukerman Co. v. RL Chaides Const. Co.*, 960 F.2d 1020. (Fed. Cir. 1992).

<sup>74</sup> *I.T.T. v Promedia*, Case T-111/96 (1998).

if the claim was brought forward as an effort to eliminate a product from the competitive market. These conditions are both unfulfilled in this case. *Firstly*, it cannot be said that Guo's claims are manifestly unfounded as it does not serve to simply harass the other party. Guo evidently only wants to enforce the rights of the company which is clear from the several attempts they made to communicate with Basiltri prior to filing an injunction suit. *Secondly*, it has been reiterated that Guo Inc. was very keen on licensing their SEPs and did not have any such anti-competitive motives.

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**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 infringed Guo Inc's patents.
- Guo Inc. has not abused its dominant position in licensing negotiations with Basiltri.
- Guo Inc's patents be adjudged valid and not revoked on grounds of statutory violation
- An interim injunction order is 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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