
SURANA & SURANA AND SHAASTRA IITM INTELLECTUAL PROPERTY LAW MOOT
COURT

IN THE HON'BLE HIGH COURT OF MUDHIRAS

IN THE MATTER OF SECTION 48 & 104 OF THE PATENTS ACT, 1970

CS (Comm) 199a of 2017

In the matter between:

GUO INC..... PLAINTIFF

versus

BASILTRI TELECOM PVT. LTD.....DEFENDANT

(AGAINST THE INFRINGEMENT OF INDIAN PATENTS NO. 2222b, 2222e, 2222f AND
2222g)

-MEMORANDUM *for* PLAINTIFF-

DRAWN AND FILED BY THE COUNSELS ON THE BEHALF OF PLAINTIFF

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PRAYER FOR RELIEF XVI

TABLE OF ABBREVIATIONS

&	AND
¶	PARAGRAPH
AIR	ALL INDIA REPORT
BOM.	BOMBAY
C.A.	CONFIDENTIALITY AGREEMENT
CAL.	CALCUTTA
CRI	COMPUTER RELATED INVENTION
DEL.	DELHI
EWHC	ENGLAND AND WALES HIGH COURT
EMVR	END MARKET VALUE RATE
EPC	EUROPEAN PATENT COMMISSION
EPO	EUROPEAN PATENT OFFICE
ETSI	EUROPEAN TELECOMMUNICATION STANDARDS INSTITUTE
FED. CIR.	FEDERAL CIRCUIT
FRAND	FAIR, REASONABLE AND NON-DISCRIMINATORY
<i>Id.</i>	IBID
INC.	INCORPORATION
LTD.	LIMITED

MEMORANDUM for PLAINTIFF

MAD.	MADRAS
NDA	NON-DISCLOSURE AGREEMENT
NDRC	NATIONAL DEVELOPMENT AND REFORM COMMISSION
ORS.	OTHERS
PVT.	PRIVATE
SCC	SUPREME COURT CASES
SEC.	SECTION
SEP	STANDARD ESSENTIAL PATENTS
SSO	STANDARD SETTING ORGANISATION
U.K.	UNITED KINGDOM
U.S.	UNITED STATES
v.	VERSUS

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STATEMENT OF JURISDICTION

The Plaintiff has the honour to submit before the Hon'ble High Court of Madras, the memorandum for the plaintiff under Section 104 of Patent Act, 1970.

“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.”

Plaintiff has invoked the original civil jurisdiction of Madras High Court under clause 11 of Letter Patent for the High Court of Judicature of Madras and Madras High Court (Jurisdictional Limits) Act, 1927.

STATEMENT OF FACTS

Date	Event
Aug.15, 2016	Guo Inc. contacted the Managing Director of Basiltri via email (to negotiate upon the licensing agreement for Guo's standard essential patents [SEP]).
Aug. 29	Patent licensing head at Guo inquires the status of the licensing negotiations. No response till date was received from Basiltri.
Aug. 30	In furtherance of the email, Guo. writes to Basiltri requesting a meeting with the latter's representative to discuss the license to the Guo's SEP.
Sep. 15	Reminders sent to Basiltri regarding the licensing negotiations.
Nov. 1	Basiltri writes to Guo Inc. to schedule a meeting.
Jan. 28, 2017	Guo Inc.'s meeting with Basiltri at its office in Noida. Key issues discussed at the meeting were (a) Confidentiality agreement (C.A.) to be signed by Basiltri so that Guo could share its patent claims; (b) Guo Inc. offered a license to a global portfolio of 20000 patents and applications essential to Widget standards; (c) Royalty rate to be disclosed by Guo only post the signing of the aforesaid C.A; (d) Another meeting for March end scheduled.
March 5	Basiltri agrees to meeting subject to the following terms- (i) Meeting should be to discuss license only for India patents; (ii) Validity and essentiality of each Indian patent to be discussed by Guo Inc.; (iii) No C.A. would be signed by Basiltri.
June 10	No meeting scheduled till date, Guo shared the draft confidentiality agreement with Basiltri and intended to share essentiality and validity of not more than 3 patents.
July 23	Basiltri intended to reduce duration of C.A. from 15 years to 6 months; governing law changed to Indian law and royalty to be payable on components' price.
August 18	Information against Guo filed by Basiltri before CCI for abusing dominant position.Revocation petition filed against Guo's patents in IPAB of Mudhiras.
August 25	Guo filed a patent infringement suit and an interim injunction application against Basiltri before the Mudhiras HC. Pleadings have been completed. Arguments pending.

ISSUE RAISED

ISSUE I:

WHETHER BASILTRI HAS INFRINGED GUO'S INDIAN PATENTS?

Issue II:

WHETHER THERE IS AN ABUSE OF DOMINANCE BY GUO?

Issue III:

WHETHER INTERIM INJUNCTION SHOULD BE GRANTED AGAINST BASILTRI?

SUMMARY OF PLEADINGS**I. THAT BASILTRI HAS INFRINGED GUO'S INDIAN PATENTS AND THE CLAIM OF PATENT BEING INVALID IS ERRONEOUS.**

In the instant case, it is humbly submitted that Guo has filed the present suit for infringement against Basiltri and the claim of patent being invalid is erroneous.

Firstly, Widget does not come under excluded subject matter of Section 3(k). *Secondly*, Widget shows technical effect. *Thirdly*, Widget comes under means plus function format. *Fourthly*, Idea and behaviour need patent protection. *Lastly*, International position on computer program is in favour of patent protection.

II. THAT THERE IS NO ABUSE OF DOMINANCE BY GUO.

In the instant case, it is humbly submitted that there is no abuse of dominance by Guo.

Firstly, by claiming royalties based on the price of the end product and not on the component price. *Secondly*, by negotiating a confidentiality agreement for disclosing essentiality and validity of patents. *Lastly*, by offering license for a global portfolio.

III. THAT INTERIM INJUNCTION SHOULD BE GRANTED AGAINST BASILTRI AS IT IS INFRINGING GUO'S PATENTS.

In the instant case, it is humbly submitted that the present application, being application no. 123 of 2017 has been filed seeking interim injunction against Basiltri.

Firstly, *Prima facie* patents have been infringed by Basitri. *Secondly*, Balance of convenience lies in the favour of Guo for granting interim injunction. *Thirdly*, Guo will suffer irreparable harm if injunction is not granted. *Lastly*, FRAND commitment does not limit injunction.

ARGUMENTS ADVANCED**I. THAT BASILTRI HAS INFRINGED GUO'S INDIAN PATENTS BY NOT TAKING LICENSE AND THE CLAIM OF PATENT BEING INVALID IS ERRONEOUS.**

The question which arises before this court is as to whether Basiltri has infringed Guo's Indian patents. It is humbly submitted that patents have been infringed by Basiltri [A], Widget does not come under excluded subject matter of Section 3(k) [B], Widget shows technical effect [C], Widget comes under means plus function format [D], Idea and behaviour need patent protection [E] and International position on computer program is in favour of patentability [G].

A. *Infringement of patent by Basiltri*

It is humbly submitted that by virtue of Section 48 of the Patents Act, 1970¹ 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.² As a result, in order to prevent Basiltri from infringing its patent rights, the present suit has been instituted.³

Guo has filed an application, being application no. 123 of 2017 in the present suit⁴ for interim injunction against Basiltri seeking inter alia to restrain violation and infringement of its patent rights. Guo owns a large portfolio of SEPs related to widgets and as such enjoys the position of dominance *qua* the same. Any manufacturer/ importer of widget devices has to obtain license in response to plaintiff's SEPs. Basiltri is also necessarily required to employ its patents in its widget manufacturing as SEPs are one for which there are no non-infringing alternatives. Therefore, Basiltri has infringed Guo's Indian patents (2222b, 2222e, 2222f & 2222g) by not taking license.

¹ The Patents Act, 1970, No. 39, Acts of Parliament, 1970, §48 (India) [Hereinafter "Patents Act"].

² Hindustan Lever Ltd v. Lalit Wadhwa, 2007 (35) PTC 377 (India).

³ Problem Statement, at 6.

⁴ Problem Statement, at 6.

B. Widget does not come under category of excluded subject matter of Section 3(k)

It is humbly submitted that section 3(k) of the Act excludes a mathematical or business method or a computer programme *per se* or algorithms from patentability.⁵ The legislative intent to attach suffix *per se* to computer programme has been stated by Joint Parliamentary Committee: “*In the new proposed clause (k) the words "per se" have been inserted. This change has been proposed because sometimes the computer programme may include certain other things, ancillary thereto or developed thereon. The intention here is not to reject them for grant of patent if they are inventions.*”⁶ The present invention relates to digital signal transmission more particular to an error rate reduction scheme for such transmission which is connected between transmitting and receiving units, thus fulfilling the legislative intent and it cannot be rejected for grant of patent.

It is humbly submitted that in *Accenture Global Service GmbH's*⁷, when invention was analyzed on merits, Indian Patent Office held that ‘The invention as claimed is not software *per se* but, a system is claimed which is having the improvement in web services and software. The invention since not falling in the category of section 3(k), viz software *per se*, objection is waived and patent is granted. Similarly, widget is a system having improvement in the telecommunication services.

It is submitted that in the case of *Ericsson v. Intex Technologies*⁸, the court held that any invention which has a technical contribution or has a technical effect and is not merely a computer program *per se* as alleged and the same is patentable. Similarly, in the case of *Ericsson v. Lava International Ltd.*⁹, court held that the claims as granted do not fall under the auspices of Section 3 of the Patents Act, 1970 as it appears that these inventions which have resulted in an improvement (technical advancement) in telecommunication technologies and have had a huge effect upon the manner in which these technologies function thereby resulting in practical implementation and actual physical representation. The present invention is associated with conserving bandwidth, reducing

⁵ Patents Act, *supra* note 1, §3(k).

⁶ The Patents (second amendment) Bill, 1999, *Report of the Joint Committee*, presented to the Rajya Sabha on 19th December, 2001.

⁷ *Accenture Global Service GmbH's v. Assistant Controller of Patents & Design and the Examiner of Patents*, OA/22/2009/PT/DEL (India).

⁸ *Telefonaktiebolaget Lm Ericsson v. Intex Technologies*, 2015 (62) PTC 90 (Del.).

⁹ *Telefonaktiebolaget Lm Ericsson v. Lava International Ltd.*, 2016 (67) PTC 596 (Del.).

error proliferation, reducing channel disturbance, reducing uplink and downlink error rate in the method of transmission, thus creating technical advancement in telecommunication technology.¹⁰

It is submitted that in *Symbian Ltd's Application* case,¹¹ the invention in question provides a way of indexing the library functions so that the computer will continue to work reliably after changes are made to the library. The court held the invention patentable. The Court extended the scope of protection when they said that a '*computer running faster or more reliably may be considered to provide a 'technical contribution' even if the invention solely addressed a problem in the programming*'.¹² The present invention relates to system and methods for reducing error rate, conserving bandwidth and high speed data transmission, thus solving the problems of conventional telecommunication technology.¹³

C. *Widget shows technical effect*

It is humbly submitted that a computer program can be used to implement an algorithm and produce a useful result is proof of its technical character.¹⁴ Computer instructions represent a technical process. What was recorded in the instructions could be a means to carry out a technical process with the aid of a computer. In such instances the program was not barred from patentability.¹⁵ A computer programmed to perform a task which makes a contribution to the art which is technical in nature, is a patentable invention and may be claimed as such.¹⁶ The present invention helps in reducing the number of overhead bits, improve in coding efficiency and reduction in bandwidth consumption, and thus produce a useful result which is proof of its technical character.¹⁷

It is humbly submitted that if an invention is implemented by a computer, it will be considered to use technical means and by that very token will be taken to have technical character.¹⁸ Where a computer program enhances the internal operations of a computer it will have technical character:

¹⁰ Clarifications, at ¶37.

¹¹ *Symbian Ltd v. Comptroller General of Patents* [2008] EWCA Civ. 1066, ¶55 (U.K.).

¹² *Id.*

¹³ Clarifications, at ¶37.

¹⁴ ANANTH PADMANABHAN, ET AL., *INTELLECTUAL PROPERTY RIGHTS: INFRINGEMENT AND REMEDIES* 527 (2012).

¹⁵ *Gale's Application*, [1991] RPC 305 (CA) (U.K.).

¹⁶ *Halliburton Energy Services Inc. v. Comptroller of Patents*, [2011] EWHC 2508 (Pat) (U.K.).

¹⁷ Clarifications, at ¶37.

¹⁸ *Infineon Technologies v. Circuit simulation I*, T1227/05 [2006] (EPO).

so long it goes beyond the elementary interaction of hardware and software of data processing.¹⁹ All technical features/technical characters implemented in a hardware or network are patentable in nature.²⁰ In our case digital signal transmission is taking place which is beyond the elementary interaction of software and hardware.

In the case of *Microsoft*,²¹ the application in question, which was a way of ‘facilitating data exchange across different formats’, consisted of both method claims and a claim to program on a computer readable medium. The court said that the ‘method was implemented in a computer and this amounted to a technical means sufficient to escape the prohibition.

It is humbly submitted that in *IBM v. Computer Programs*,²² the court held that the exclusion of computer programs “as such” meant only the exclusion of those programs that did not produce a technical effect. This technical effect cannot be said to lie merely in the fact that programs are used to operate computers, but it may be found in the further effects deriving from the execution by the hardware of the instruction given by the program.²³ If the invention exhibited technical character or then problem that the invention solves was technical,²⁴ this was taken to mean that it fell outside the scope of excluded subject matter.²⁵ The present invention is a method for conserving bandwidth, reducing error rate and high speed data transmission that are executed by the hardware, thus creating a technical effect.²⁶

D. Widget comes under means plus function format

It is humbly submitted that computer programmes are often claimed in the form of algorithms as method claims or system claims with some means indicating the functions of flow charts or process steps.²⁷ It is well-established that, in patentability cases, the focus should be on the underlying

¹⁹ *Microsoft v. Clipboard formats I*, T0424/03 [2006] (EPO); *see also IBM v. Computer program product*, T 1173/97 [1998] (EPO).

²⁰ *Fujitsu Ltd.*, T 1351/04 [2007] (EPO); *see also Game account Limited*, T 1543/06 [2007] (EPO); *SHARP Kabushiki Kaisha*, T 1188/04 [2008] (EPO).

²¹ *Supra* note 19.

²² *IBM v. Computer Programs*, [1999] EPOR 301 (EPO).

²³ *Id.*

²⁴ *IBM v. Data processor network*, [1990] EPOR 91 (EPO); *see also IBM v. Computer-related invention*, [1990] EPOR 107 (EPO).

²⁵ *Pension Benefit Systems Partnership*, T931/95 [2001] OJEPO 441, 450 (TBA) (EPO).

²⁶ Clarifications, at ¶37.

²⁷ *Intellectual Property India, Guidelines for examination of Computer Related Inventions*, Office of the Controller General of Patents, Designs and Trademarks, 14 (2017), at ¶4.4.4.

substance of the invention, not the particular form in which it is claimed.²⁸ There is no contribution lying outside excluded matter until the claim also covers the result of performing the claimed algorithm.²⁹

It is submitted that the claims concerning CRIs are often phrased in means for performing some function such as means for converting digital to analog signal etc.³⁰ The means mentioned in the claims shall clearly be defined with the help of physical constructional features and their reference numerals to enhance the intelligibility of the claims.³¹ Widget consist of both software and hardware elements³² and can be defined with the help of physical constructional features. In our case hardware is a means for performing functions like for conserving bandwidth, method for transmission, reducing error rate and high speed data transmission,³³ thus, can be patented under means plus function format.

It is humbly submitted that even when the issue is related to hardware/software relation, the expression of the functionality as a method is to be judged on its substance.³⁴ It is well-established that, in patentability cases, the focus should be on the underlying substance of the invention, not the particular form in which it is claimed.³⁵ In *Duns Licensing Associates*,³⁶ the technical character/feature test was reaffirmed and it was specifically clarified that while deciding the question of excludable subject matter, issues related to novelty and inventive step ought not to be considered.

It is submitted that in case of *Research Affiliates LLC*,³⁷ the court said that for a method to be patentable, it must produce a product in which a new and useful effect may be observed. In the case of computer programs, it is necessary to look to the application of the program to produce a practical and useful result, so that more than mere information is involved.³⁸

²⁸ *Id.*

²⁹ *Cappellini v. Comptroller of Patents*, [2007] EWHC 476, at ¶8 (U.K.).

³⁰ *Supra* note 27, at ¶4.4.5.

³¹ *Id.*

³² Clarifications, at ¶31.

³³ Clarifications, at ¶37.

³⁴ *Supra* note 27, at ¶4.4.4.

³⁵ *Id.*

³⁶ *Duns Licensing Associates*, Case No. T 154/04 [2006] (EPO).

³⁷ *Research Affiliates LLC v. Commissioner of Patents*, 71 FCA (2013) (Australia).

³⁸ *Id.*

In the case of *HTC v. Apple*,³⁹ the Court of Appeal relying upon the *Halliburton case*,⁴⁰ held that the claim would be patentable by looking at the substance and not the form and if the invention made a technical contribution. The court held that if the invention could solve a problem within the computer or outside the computer, in either case it can have a technical effect and hence be patentable.⁴¹ Thus, widget having an underlying substance,⁴² is making a technical contribution and solving a problem through a gadget⁴³ and hence does not come under the excluded subject matter of section 3(k).

E. Idea and Behaviour need Patent protection

It is humbly submitted that in case of computer program, the function or purpose of the program would be idea and everything else was part of expression which was therefore copyrightable.⁴⁴ In case of *R. G. Anand*,⁴⁵ the Supreme Court of India by placing reliance on various Indian⁴⁶ and foreign authorities⁴⁷ came to a conclusion that the idea-expression dichotomy was a well-established principle in copyright law. It said that there could be no protection in ideas and only the expressions were protected. The inventive step in the telecommunication services is the idea that needs patent protection.

It is submitted that functionality in a computer program is reflective of the behavior.⁴⁸ Behavior is not a secondary by-product of a program, but rather an essential part of what programs are.⁴⁹ Program behavior consist of all the action that a computer can perform by executing program instructions.⁵⁰ Although the text of a program is designed to produce certain behavior, program text and behavior are independent. A second comer can develop a program having identical

³⁹ *HTC v. Apple*, [2013] E.W.C.A. Civ. 451 (U.K.).

⁴⁰ *Supra* note 16.

⁴¹ *Supra* note 39.

⁴² Clarifications, at ¶31.

⁴³ Clarifications, at ¶24.

⁴⁴ *Whelan Associates Inc. v. Jaslow Dental Laboratory Inc.*, 797 F.2d 1222 (1986).

⁴⁵ *R. G. Anand v. Delux Films and Ors.*, AIR 1978 SC 1613 (India).

⁴⁶ *The Daily Calendar Supplying Bureau, Sivakasi v. The United Concern*, AIR 1967 Mad. 381 (India); *see also* *N. T. Raghunathan v. All India Reporter Ltd.*, Bombay, AIR 1971 Bom. 48 (India); *C. Cinniah and Co. v. Balraj and Co.* AIR 1961 Mad. 111 (India); *K R. Venugopal Sharma v. Sangu Ganesan*, 1972 Cr. L. J 1098 (India).

⁴⁷ *Donoghue v. Allied Newspapers*, (1937) 3 All E.R 503 (U.K.).

⁴⁸ *Lucky George, IPR and Computer Programme*, 7 MLJ 63, 72 (2010).

⁴⁹ *Pamela Samuelson et al., A Manifesto concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2310, 2317 (1994).

⁵⁰ *George, supra* note 48, at 64.

behavior but completely different text.⁵¹ Code for which copyright protection extends has an inner character of functionality, which is indeed valuable and definitely prone to copying.⁵² Widget shows a certain behaviour that has inner character of functionality and hence need patent protection.

It is humbly submitted that in the cases of *Bancorp Services*⁵³, *Gotschalk*⁵⁴, *Mayo*⁵⁵ and *Alice Corp.*⁵⁶ while dealing with the excluded exception of 'idea', the courts have propounded that any invention which adds "significantly more to the abstract idea is patentable". Thus if there are improvements to technical fields or to the functioning of the computer they can be granted patents. The court broadly agreed with the need to separate the idea from the expression in the non-literal parts of the computer program.⁵⁷ Idea of widget needs to be protected as many of the deficiencies of conventional technology have been resolved.

F. International position on computer program is in favour of patentability

It is humbly submitted that Article 27 of TRIPS states that 'patent shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application'.⁵⁸ TRIPS states that the patent protection is available for all inventions and patent rights can be enjoyed without discrimination on the basis of the fields of technology.⁵⁹ Further, Article 27 Paragraphs 2 and 3 speak about exclusion from patentability. In both of these paragraphs nowhere it has been mentioned that the computer programme or software should be excluded from patentable subject matter.⁶⁰

It is submitted that the EPO, in its guidelines,⁶¹ emphasized on the technical contribution of software related invention. If claimed subject-matter relating to a computer program does not have

⁵¹ John Swinson, *Copyright or Patent or Both: An Algorithmic Appeal to Computer Software Protection*, 5 HARV. J.L. & TECH. 145, 148 (1991).

⁵² George, *supra* note 48, at 72.

⁵³ *Bancorp Services, L.L.C. v. Sun Life Assurance Co. of Canada (US)*, 687 F.3d 1266 (2012).

⁵⁴ *Gotschalk v. Benson*, 409 U.S. 63 (1972).

⁵⁵ *Mayo Collaborative Services v. Prometheus Labs Inc*, 132 S.Ct. 1289 (2012).

⁵⁶ *Alice Corp. v. CLS Bank International*, 134 S.Ct. 2347 (2014).

⁵⁷ *Computer Associates International Inc. v. Altai Inc.*, 982 F.2d 693 (1992).

⁵⁸ Agreement on Trade Related Aspects of Intellectual Property Rights, art. 27 ¶1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

⁵⁹ TRIPS, *id.*

⁶⁰ TRIPS, *id.* ¶2 & 3.

⁶¹ Guidelines for examination in the European Patent Office, Part G-II, 3.6 (2017).

a technical character, it should be rejected under Article 52 (2) and (3) of EPC.⁶² The practice followed by the EPO and the decisions by the Board of Appeals show that the computer programme having some technical effect can be considered for patent.⁶³ Therefore, international position also favours the computer programme patentability.

II. THAT THERE IS NO ABUSE OF DOMINANCE BY GUO.

The question which arises before this court is as to whether there is abuse of dominance by Guo. It is humbly submitted that there is no abuse of dominance in demanding royalty based on price of end product [A], by negotiating a non-disclosure agreement [B], lastly, by offering license for a global portfolio [C].

A. There is no abuse of dominance in demanding royalty based on price of end product.

It is humbly submitted that net price of the downstream product (EMVR) would be the preferred measure to determine royalties as it would account for the functional value of a SEP and it would also take into account the value added by the portfolio to an end device.⁶⁴ Using the retail price of the downstream product as the royalty base enables the patent holder to capture the complementarity and network effects generated by its technology.⁶⁵ There is a need to set a FRAND rate high enough to maintain the innovator's incentives to invest in future R&D and to contribute its inventions to SSOs.⁶⁶ In our case, Basiltri's product claim to be complaint with Guo's standards⁶⁷ which add value to the end product.

It is submitted that the benefit of the patent lies in the idea, not in the small components that happen to be where that idea is physically implemented.⁶⁸ Basing a royalty solely on chip price is like valuing a copyrighted book based only on the costs of the binding, paper and ink needed to actually produce the physical product. While such a calculation captures the cost of the physical product,

⁶² The European Patent Convention, 1977, art. 52 ¶2 & 3.

⁶³ Ravindra Chingala & Srikrishna Deva Rao, *Software Patent in India: A Comparative Judicial and Empirical Overview*, 20 JIPR 210, 211 (2015).

⁶⁴ Anne Layne-Farrar et al., *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 ANTITRUST L.J. 671, 706 (2007).

⁶⁵ J. Gregory Sidak, *The Proper Royalty Base for Patent Damages*, 10 J. COMPETITION L. & ECON. 989, 995 (2014).

⁶⁶ *Innovatio IP Ventures, LLC Patent Litigation*, 886 F. Supp. 2d (2012).

⁶⁷ Clarifications, at ¶3.

⁶⁸ *CSIRO v. Cisco Systems Inc.*, 809 F.3d 1295 (2015).

it provides no indication of its actual value.⁶⁹ In the present case actual value of Guo's patents cannot be calculated on price of component.

Multi-component products include numerous complementary components. The combinatorial interaction of those components generates complementarity effects and enhances the value of the product, such that the value of the product transcends a simple arithmetic sum of the value of the components.⁷⁰ The court held that the EMVR should be applied when it can be shown that the patented feature drives the demand for an entire multicomponent product.⁷¹

It is humbly submitted that when the patented invention is a small component of a much larger commercial product, awarding a reasonable royalty based on either sale price or number of units sold can be economically justified.⁷² All the components together must be analogous to components of a single assembly or be parts of a complete machine, or they must constitute a functional unit.⁷³ In our case Guo's standards in combination with other components generate complimentary effects and enhance the value of the product.

The failure to award damages that included the value of complementarity effects and network effects would frustrate overriding purpose of affording patent owner complete compensation for infringement.⁷⁴ In case of *CSIRO*,⁷⁵ the court found that Ericsson's practice of charging a royalty based on the price of the downstream product is FRAND. It is submitted that the court⁷⁶ have permitted license agreements based on the entire product value as evidence of a reasonable royalty rate despite a lack of showing that the patented feature formed the 'basis' for customer demand.⁷⁷ Therefore, Guo's demand for royalty based on price of end product is reasonable.⁷⁸

⁶⁹ *Id.*

⁷⁰ Sidak, *supra* note 65, at 990.

⁷¹ Tekmax, Inc. v. Exide Corp., 1999 WL 435755, 7 (Fed. Cir. 1999); *see also* LaserDynamics Inc. v. Quanta Computer Inc., 694 F.3d 67 (Fed. Cir. 2012).

⁷² Lucent Technologies, Inc. v. Gateway, Inc., 580 F.3d 1339 (2009).

⁷³ Rite-Hite Corp. v. Kelley Co. Inc., 56 F.3d 1538, 1549-50 (Fed. Cir. 1995).

⁷⁴ Gen. Motors Corp. v. Devex Corp., 461 U.S. 648, 655 (1983).

⁷⁵ Telefonaktiebolaget LM Ericsson v. Micromax Informatics Ltd. and Mercury Electronics Ltd. C.S. (OS) 442/2013 (India); *see also* Telefonaktiebolaget LM Ericsson v. Xiaomi Technology and Ors., CS (OS) 3775/2014 (India); Telefonaktiebolaget LM Ericsson v. Intex Techs. (India) Ltd, CS (OS) No.1045/ 2014 (India).

⁷⁶ *Supra* note 72, at 1338-39.

⁷⁷ Microsoft Corp. v. Motorola, Inc., 904 F. Supp. 2d 1109, 1119 (W.D. Wash. 2012).

⁷⁸ Problem Statement, at 5.

B. There is no abuse of dominance by negotiating a confidentiality agreement

It is humbly submitted that confidentiality Agreements are antecedent to any negotiation process, and are a versatile and valuable tool for both licensor and licensee to protect confidential information. Confidentiality Agreements provide firms a method to collaborate yet maintain their competitive strategy and advantage with respect to others.

It is humbly submitted that in *Ericsson v. Intex*⁷⁹, the Delhi High Court held that confidentiality agreements are a ‘*sine qua non*’ in every licensing deal which entails exchange of various confidential business and technical information between the parties. Confidentiality agreements *per se* do not lead to abusive conduct. Courts in other jurisdictions have also held confidentiality agreements to be *per se* non-discriminatory.⁸⁰ In our case Guo has negotiated a non-disclosure agreement with Basiltri to entail exchange of confidential information.⁸¹

It is submitted that in case of *Microsoft Corp.*⁸², non-discriminatory does not mean that Microsoft must impose the same conditions on every undertaking seeking such licenses. The requirement of non-discrimination does not require an SEP holder to license its SEPs under the same licensing terms to all implementers.⁸³ Outside the context of SEPs, courts have clarified that non-discriminatory licensing terms need not be identical.⁸⁴

It is recognized that confidentiality agreements 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.⁸⁵ Therefore, there is no abuse of dominance by negotiating a non-disclosure agreement.

C. There is no abuse of dominance by offering a license for global portfolio

It is humbly submitted that every licensing situation has only one FRAND rate, which can be determined by adjusting a benchmark royalty rate calculated based on the SEP holder's portfolio.⁸⁶

⁷⁹ *Supra* note 8.

⁸⁰ *Microsoft Corp. v. Comm'n T-201/04* (2007) (EPO).

⁸¹ Problem Statement, at 3.

⁸² *Supra* note 80.

⁸³ J. Gregory Sidak, *The Meaning of FRAND, Part I: Royalties*, 9 J. COMPETITION L. & ECON. 931, 996–97 (2013).

⁸⁴ *Supra* note 80.

⁸⁵ ETSI Guide on Intellectual Property Rights, Version adopted by Board #94, §4.4 (2013).

⁸⁶ *Unwired Planet v. Huawei*, [2017] EWHC 711 (Pat), 164 (U.K.).

In the case of a licensor with a worldwide patent portfolio, and a licensee that manufactures or sells in multiple countries (multinational implementer), a worldwide license is FRAND.⁸⁷ In our case Guo has global portfolio of 20,000 patents⁸⁸ in about 15 countries, including India.⁸⁹ Country-by-country licensing is inefficient, and tracking individual licenses and royalty payments require considerable effort, which the court observes no rational business would choose to do.⁹⁰

In China, the National Development and Reform Commission (NDRC) adopted a similar favorable approach to the offer of a global portfolio license in the field of SEPs.⁹¹ A patent-holder can engage in pure bundling/tying of licenses to FRAND-encumbered and non-RAND encumbered patents and still honor its FRAND commitments provided that it charges a royalty that would be FRAND for the FRAND-encumbered patents alone.⁹²

It is humbly submitted that in *Microsoft v. Motorola*,⁹³ the court determined a global FRAND rate to Motorola's SEP portfolio. Outside the US, German Courts have held that offering a worldwide portfolio license may seem reasonable or, in principle, appropriate given that licensing agreements are usually concluded on a worldwide basis, cover entire portfolios and are concluded between groups of companies.⁹⁴ Therefore, Guo has not abused its dominant position in negotiating for granting a license for the global portfolio.

III. THAT INTERIM INJUNCTION SHOULD BE GRANTED AGAINST BASILTRI AS IT IS INFRINGING GUO'S PATENTS.

The question which arises before this court is as to whether interim injunction should be granted against Basiltri. The plaintiff humbly submits that the present application, being application no. 123 of 2017 has been filed seeking interim injunction [A], *prima facie* patents have been infringed by Basiltri [B], balance of convenience lies in the favour of Guo [C], Guo will suffer irreparable harm [D], FRAND commitment does not limit injunction [E].

⁸⁷ *Id.*, at 572.

⁸⁸ Problem Statement, at 3.

⁸⁹ Clarifications, at ¶13.

⁹⁰ *Supra* note 86, at 544.

⁹¹ *Huawei v. InterDigital*, Guangdong Higher People's Court of China (2013).

⁹² Chryssoula Pentheroudakis & Justus A. Baron, *Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases*, JRC SCIENCE FOR POLICY REPORT. EUR 28302 EN; doi:10.2791/32230. (2017).

⁹³ *Supra* note 77.

⁹⁴ *St Lawrence v. Deutsche Telekom*, 2 O 103/14 (2015).

A. *An Application, being application no. 123 of 2017 has been filed seeking interim injunction*

It is humbly submitted that 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.⁹⁵ That the plaintiff has filed a suit seeking injunction restraining infringement of patents registered in India under *Order XXXIX, Rule 1 and 2* of CPC, 1908.⁹⁶

In case of *NRDC*,⁹⁷ court held that for the grant of temporary injunction, principles applicable to the infringement of patent actions are that there is a *prima facie* case that the patent is valid and infringed, that the balance of convenience is in favour of the injunction being granted and that the plaintiff will suffer from an irreparable loss. Similar observations were made in *Sadhu Ram v. Gram Panchayat*⁹⁸; *Radhakrishnan v. Purnanand*⁹⁹ and *Sitaram v. Banwarilal*.¹⁰⁰

It is submitted that an SEP holder may be able to request and obtain an injunction against an implementer that is unwilling to accept FRAND terms.¹⁰¹ It may be legitimate for the holder of SEPs to seek an injunction against a potential licensee which is not willing to negotiate in good faith on FRAND terms.¹⁰² Once a violation is established in case of a registered patent, subject of course, to the patent being used, it will not be permissible to contend that the said patentee is not entitled to an injunction.¹⁰³

B. *Prima facie patents have been infringed by Basiltri*

It is humbly submitted that the existence of these *prima facie* right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction.¹⁰⁴ Where there is a serious question to be tried as in this case, this court would grant injunction. A strong *prima facie*

⁹⁵ Patents Act, *supra* note 1, §108.

⁹⁶ Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, Order XXXIX, Rule 1 & 2.

⁹⁷ National Research and Development Corporation of India v. Delhi Cloth & General Mills Co. Ltd, AIR 1980 Del; *see also* Niky Tasha v. Faridabad Gas, AIR 1985 Del 136.

⁹⁸ *Sadhu Ram v. Gram Panchayat*, AIR 1984 P&H 262 (India).

⁹⁹ *Radhakrishnan v. Purnanand*, AIR 1978 A.P. 103 (India).

¹⁰⁰ *Sitaram v. Banwarilal*, AIR 1972 Cal 105 (India).

¹⁰¹ *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014).

¹⁰² *Google v. Motorola Mobility*, Case No. COMP/M.6381 (2012) (EPO).

¹⁰³ *Telemecanique & Controls (I) Limited v. Schneider Electric Industries SA*, 2002 (24) PTC 632 (Del.).

¹⁰⁴ *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719 (India).

case having been made out by the plaintiff, denial of interim relief would cause prejudice to him.¹⁰⁵ The burden on the defendant here was greater on account of the fact that there was no opposition, pre-grant or post-grant, to the Guo's patent.¹⁰⁶ The onus lies on the party asserting invalidity to show that want of validity is a triable question.¹⁰⁷

The court may consider the case of the plaintiff and hold it that he has a *prima facie* case because the question of law involved in the suit has to be tried.¹⁰⁸ It was observed that the plaintiff must show that he has a fair question to raise as to the existence of right which he alleged and must satisfy the court that the property in dispute should be preserved in its present actual condition until such question is disposed of.¹⁰⁹ It is submitted that placing reliance on cases, such as *Ericsson*¹¹⁰ and *Vringo*¹¹¹, it can be said that *prima facie* Basiltri has infringed Guo's patents.

C. *Balance of convenience lies in the favour of Guo*

It is humbly submitted that where *prima facie* a patent is not invalid, and infringement established, if the defendants are not enjoined, anyone would violate the patent and this would become a precedent for others to violate the patent. In such a case the balance of convenience would be in favour of granting an injunction.¹¹² The plaintiff must show a clear necessity for affording protection to his alleged right, which would otherwise be seriously injured or impaired.¹¹³

The legal injury caused to the plaintiff in the case is far greater than those that may be caused to defendants, grant of temporary injunction would be proper.¹¹⁴ In the similar case of *Ericsson v. Intex*¹¹⁵, the Delhi High Court held that the balance of convenience lies in the favour of Ericsson, who in absence of an injunction will suffer irreparable loss.

¹⁰⁵ Jagmohan Dalmia v. BCCI, AIR 2008 Cal 227 (India).

¹⁰⁶ Strix Ltd v. Maharaja Appliances Ltd, MIPR 2010 (1) 181 (India).

¹⁰⁷ Hexal Australia Pty Ltd v. Roche Therapeutics Inc, [2005] FCA 1218 (Australia).

¹⁰⁸ Kanraj Khatri v. Nathuram Jain, AIR 1997 MP 92 (India).

¹⁰⁹ Adani exports Ltd. v. Hindustan organic Chemicals Ltd., (2000) 3 GLR 2759 (India).

¹¹⁰ *Supra* note 8.

¹¹¹ Vringo Infrastructure Inc. and Anr. v. Xu Dejun and Ors., C.S. (OS) 2168/2013 (India).

¹¹² National Research and Development Corporation of India v. Delhi Cloth & General Mills Co. Ltd, AIR 1980 Del 132; *see also* E.A.R. Corp. v Protector Safety Products [1980] FSR 574 (U.K.).

¹¹³ Graftek Pvt. Ltd. v. Shri Lord Lingaraj Mahaprabhu, AIR 1999 Ori 49 (India).

¹¹⁴ Geetanjali Nursing Home (P) Ltd. v. Dileep Makhija, AIR 2004 Del 53 (India).

¹¹⁵ *Supra* note 110.

D. *Guo will suffer irreparable harm*

It is humbly submitted that harm is irreparable when it cannot be remedied except through injunctive relief.¹¹⁶ Irreparable injury is one which cannot adequately be remedied by damages.¹¹⁷ In case the royalty is not paid by the defendant, it would have impact on other licensors who are well-known companies in the world and are paying royalty.

Also, 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.¹¹⁸ A scenario could be defined as “reverse royalty stacking,” whereby the aggregate litigation costs that implementers impose on the SEP holder by infringing its SEPs is too high to allow the SEP holder to remain a viable market participant. In such circumstances, the SEP holder could suffer irreparable harm from the infringement of its SEPs.¹¹⁹

It is submitted that there is no reason to presume that an SEP holder that has committed to license its SEPs on FRAND terms will not suffer irreparable harm and consequently will not be able to meet the legal criteria required to obtain an injunction.¹²⁰ It is submitted that the plaintiff suffered an irreparable loss due to the continuous infringement of his SEPs by the defendant and hence, it is an injury to the plaintiff’s legal right.

E. *FRAND commitment does not limit injunction.*

It is humbly submitted that a FRAND commitment aims to ensure that an SEP holder will be fairly awarded for its contribution to the standard.¹²¹ Courts have implicitly confirmed such an approach by determining that SEP holder’s requests for injunctions did not violate the contractual obligations of the SEP holder arising from a FRAND commitment.¹²² It wasn't enough to show

¹¹⁶ Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007).

¹¹⁷ Brajendra v. Kashibai, AIR 1946 Pat 177 (India); *see also* Kesho Prasad v. Srinibash, (1911) ILR 38 Cal 79 (India); Begg, Dunlop & Co. v. Satish Chandra, (1919) ILR 46 Cal 1001 (India).

¹¹⁸ Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 1991–92 (2007).

¹¹⁹ Shapiro, *id.*

¹²⁰ Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1332 (Fed. Cir. 2014).

¹²¹ ETSI Intellectual Property Rights Policy at §3.2 (2017).

¹²² Apple, Inc. v. Samsung Elecs. Co., 2012 WL 1672493 (N.D. Cal., 2012); *see also* Realtek Semiconductor Corp. v. LSI Corp., 946 F. Supp. 2d 998, 1007 (N.D. Cal. 2013).

fraudulent behaviour along with harm to the consumers to prove an antitrust violation when the harm could be chalked up to the lawful exercise of monopoly power.¹²³

Although, the infringement of an individual implementer and its failure to negotiate licensing terms in good faith might not seem to inflict irreparable harm on the SEP holder, the severity of the harm is magnified when such behaviour becomes the industry norm.¹²⁴ When the largest implementers systematically infringe SEPs and fail to negotiate licensing terms in good faith, it becomes far costlier for the SEP holder to enforce its SEPs effectively.¹²⁵ The court has also held that initial offers do not have to be on RAND terms so long as a RAND license eventually issue.¹²⁶ Basiltri being the largest widget manufacturer in India¹²⁷ infringed Guo's SEPs and failed to negotiate licensing terms in good faith.

It is humbly submitted that in *Apple v. Motorola*¹²⁸, court held that it is incorrect to apply a *per se* rule that injunctions are unavailable for SEPs. An SEP holder may request and obtain an injunction against an implementer that is unwilling to accept FRAND terms.¹²⁹ Guo is a SEP holder and can demand interim injunction against Basiltri.

It is humbly submitted that limiting an SEP holder's ability to obtain an injunction might encourage free-riding on the SEP holder's invention and decrease the implementer's incentives to negotiate the licensing terms in good faith.¹³⁰ There is no risk for an implementer, if the only consequence of using an SEP without a license "is to pay a FRAND based royalty or fee."¹³¹ Limiting the availability of injunction against infringers of SEPs will encourage infringers to behave opportunistically during the licensing negotiation in an attempt to secure lower royalties.¹³² Thus, interim injunction is not limited by FRAND commitment and should be granted against Basiltri.

¹²³ NYNEX v. Discon, 525 US 128 (1998).

¹²⁴ J. Gregory Sidak, *The Meaning of FRAND, Part II: Injunctions*, 11 J. COMPETITION L. & ECON. 201, 226 (2015).

¹²⁵ Sidak, *id.*

¹²⁶ Microsoft v. Motorola, 696 F.3d 872 (9th Cir. 2012).

¹²⁷ Problem Statement, at 1.

¹²⁸ *Supra* note 120.

¹²⁹ *Supra* note 102.

¹³⁰ James Ratliff & Daniel L. Rubinfeld, *The Use and Threat of Injunctions in the RAND Context*, 9 J. COMPETITION L. & ECON. 1, 9 (2013).

¹³¹ Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof at 114, USITC Inv. No. 337-TA-868 (2014).

¹³² Roger G. Brooks, *Patent "Hold-Up," Standards-Setting Organizations and the FTC's Campaign Against Innovators*, 39 AIPLA Q.J. 435, 446-49 (2011).

PRAYER FOR RELIEF

WHEREFORE, in the lights of the facts used, issues raised, arguments advanced and authorities cited, it is most humbly and respectfully prayed that this Hon'ble court may be pleased to adjudge and declare:

- A. That Basiltri has infringed Guo's Indian Patents (No. 2222b, 2222e, 2222f AND 2222g) by not taking a license.
- B. That Guo's patents are valid and does not come under excluded subject matter of section 3(k) of the Patents Act, 1970.
- C. That Guo has not abused its dominant position by demanding royalty based on price of end product, by signing non-disclosure agreement and by offering license for a global portfolio.
- D. That the interim injunction should be granted against Basiltri.

And any other relief that the Hon'ble Court may be pleased to grant in the interests of justice, equity and good conscience.

For this, the plaintiff shall duty bound forever pray.

S/d

All of which is most humbly prayed

COUNSEL FOR THE PLAINTIFF