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

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**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.**

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**MEMORIAL ON BEHALF OF THE DEFENDANT**

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- a. P. Narayanan, Patent Law, 558, (Eastern Law House 4th ed. 2006).

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- a. Abdulgafar A. Nadiadwala v. Assistant Commissioner of Income-Tax and others, (2004) 267 ITR 488.
- b. Allied Blenders & Distilleries v. R.K. Distilleries, (2017) 241 DLT 48.
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- l. Manugraph India Ltd v. Simarq Technologies Pvt. Ltd. & Ors, AIR 2016 Bom 217.
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### **3. International Sources**

- a. Eur. Telecomm. Standards Inst. [ETSI], *ETSI Directives*, (April 5, 2017), [https://portal.etsi.org/directives/37\\_directives\\_apr\\_2017.pdf](https://portal.etsi.org/directives/37_directives_apr_2017.pdf).

### **4. Statutes**

- a. Code of Civil Procedure, 1908, Acts of Parliament, 1908 (India).
- b. The Limitations Act, 1963, § 3, No. 63, Acts of Parliament,1963 (India).
- c. The Patents Act, 1970, No. 39, Acts of Parliament, 1970 (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, 1970 since it contends that its rights granted under section 48 of the Indian Patents act, 1970<sup>1</sup> have been infringed. Plaintiff has also filed an application seeking interim injunction under section 108 of the Indian Patents Act, 1970<sup>2</sup>. However the defendant most respectfully submits that the present suit is not maintainable in this court.

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<sup>1</sup> **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.

<sup>2</sup> **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**

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

### **Summary of Pleadings**

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

Guo Inc. has filed a suit against Basiltri Telecom Pvt. Ltd. Claiming infringement of Indian patents no. 2222b, 2222e, 2222f, 2222g by the latter in Mudhiras High Court on 25 August, 2017. Defendant Basiltri most respectfully contends the maintainability of this suit in Mudhiras High court and alleges that it is not maintainable basically for the lack of territorial jurisdiction and bar to the suit under the limitations act, 1963. Also since section 10 of the Code of Civil Procedure says that every suit has to be filed in lowest competent court hence the present suit must have been filed in District Court rather than High Court. Hence in light of all these averments this suit CS (Comm) 199a of 2017 in Mudhiras High court is not maintainable.

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

It is submitted by the defendant that there has not been any infringement of the SEP's of the Guo Inc. by defendant. In fact defendant challenges the validity as well as essentiality of the suit patents by claiming that SEP's of the plaintiff are all software patents and software patents being Computer programme cannot be patented as per section 3(k) of Indian Patents act. It is also submitted by the basiltri that the Guo has failed to establish any reliable evidence since apart from its self-serving declarations of essentiality. Also it couldn't comply with the Section 8(1) of the Indian Patents Act, 1970 and the non-compliance of which must make its patents invalid in India

#### **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 not entitled to an interim injunction based on 3 main grounds viz. The plaintiff had failed to demonstrate irreparable injury, there is an availability of adequate alternate remedies in law, and the balance of convenience lies in the favour of the defendant by way of the injunction harming public interest. The counsel further submits that the plaintiff seeking an injunctive relief is an abuse of dominant position. The counsel submits this based on 2 main grounds viz. the plaintiff holds a dominant position, the defendant has offered a license on "acceptable" contract terms to the plaintiff and that the plaintiff has attempted to license its SEPs in contravention to FRAND terms, thereby preventing the defendant from acting in accordance to the initial licensing offer.



## Arguments Advanced

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

Guo Inc. has filed a suit against Basiltri Telecom Pvt. Ltd. Claiming infringement of Indian patents no. 2222b, 2222e, 2222f, 2222g by the latter in Mudhiras High Court on 25 August, 2017. Defendant Basiltri most respectfully contends the maintainability of this suit in Mudhiras High court and alleges that it is not maintainable.

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.”<sup>3</sup>*

It proscribes any suit of patent infringement to be filed in any civil court inferior to district court, however it does not specifically prescribe either High court or district court.

According to section 15 of the Code of Civil procedure, 1908 every suit must be filed in lowest competent court to adjudicate over a matter.

*Court in which suits to be instituted— Every suit shall be instituted in the Court of the lowest grade competent to try it.<sup>4</sup>*

Since both district court and high court are eligible to hear and entertain this suit, it must have been filed in district court rather than directly filing the claim in high court.

In the light of above sections of statutes Basiltri most respectfully contends that this suit is not maintainable in High court of Mudhiras for the want of appropriate jurisdiction.

**Lack of territorial Jurisdiction-** Principal office of Basiltri Telecom Pvt. Ltd. Is in Dilhi (India). Its registered address must also be in Dilhi only. But it has filed a suit of patent infringement in Mudhiras High court which is para materia to Madras High court, India.

Section 20 of the Civil Code of procedure, 1908 is reproduced as under

*“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—*

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

<sup>4</sup> The Code of Civil Procedure, § 15, No. 5, Acts of Imperial Legislature, 1908 (India).

*(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; or*

*(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.”<sup>5</sup>*

Since this is a case of patent infringement, it falls within the ambit of “other cases” under section 20 of C.P.C and Basiltri just has a subordinate office in Madras, its registered office is in Dilhi and no cause of action either wholly or partly has arisen in Madras at all

The SC had clarified in para 14 that the place where a corporate principal place of business, i.e. where the place where it “carries on business”, is the location of its registered office since the controlling power exists<sup>6</sup> there and suit against that corporate also must be brought at its principal office not at far flung subordinate or satellite offices.

Hence it can be deemed that a corporate company is said to carry on its business at a place where it has its principal office and where the controlling power exists.

In the case of Indian Performing Rights Society v. Sanjay Dalia Supreme Court was of the opinion that

*“In our opinion, in a case where cause of action has arisen at a place where the Plaintiff is residing or where there are more than one such persons, any of them actually or voluntarily resides or carries on business or personally works for gain would oust the jurisdiction of other place where the cause of action has not arisen though at such a place, by virtue of having subordinate office, the Plaintiff instituting a suit or other proceedings might be carrying on business or personally works for gain.”<sup>7</sup>*

The intention of the Supreme Court in this decision was to address mischief brought by plaintiffs by filing *suit of infringement* in the courts in whose jurisdiction those satellite or field offices were located, even though no cause of action arose there. Similar is the position in the present case as the cause of action has also arisen in Delhi since the proposed meeting was cancelled at

<sup>5</sup> The Code of Civil Procedure, § 20, No. 5, Acts of Imperial Legislature, 1908 (India).

<sup>6</sup> Indian Performing Rights Society v. Sanjay Dalia & Anr.,(2015) 10 SCC 161 (hereinafter “Dalia”).

<sup>7</sup> *ibid*, note 6.

Delhi and defendant has its principal office too at Dilhi. Therefore in the present case Civil Courts in Dilhi may have jurisdiction rather than Mudhiras High Court.

The court in the decision of Manugraph India Ltd v Simarq Technologies Pvt Ltd & Ors<sup>8</sup> interpreted the intent of the Supreme court in IPRS v. Sanjay Dalia stating that

*“Corporates have branch, field or satellite offices throughout the country. Only one of them is the registered or principal place of business. The intent of the court in Sanjay dalia was to address the mischief to prevent plaintiffs to file suits in any location where it carries its business. Referring to the ‘mischief’ described above — dishonest plaintiffs bringing suit in remote locations where there was neither defendant nor cause of action — they say that it was to prevent this abuse that Supreme Court gave such ratio in Sanjay Dalia.”*<sup>9</sup>

Since the Judicial intent in the case of Sanjay Dalia (supra) was to prevent plaintiffs from suing at places where no cause of action arise, then also they file suit at these places only by the virtue of having a subordinate office at that place, similar proposition should be applied in the case at hand because there was no cause of action in Madras but only the fact that the defendant has it’s subordinate office in Madras.

The division bench of Delhi High Court in decision of Ultra home (p) Ltd. v. Choice Hotels International Inc.<sup>10</sup> reiterated the principle established by Sanjay Dalia (supra) as under:

*“On examining the provisions of section 20 of the code, it is evident that a defendant could be sued inter alia where the defendant carried on business. If the defendant was a corporation (which expression includes a company), by virtue of the explanation after clause (c), it would be deemed to carry on business:-*

*(1) if it had a sole office in India then at the place of the sole office;*

*(2) if it had a principal office at one place as well as a subordinate office at another place then:-*

*(i) in case the cause of action arose at the place of the subordinate place, at that place; or*

*(ii) in case no part of the cause of action arose at the place of the subordinate office, at the place of the principal office.”*<sup>11</sup>

Thus Division bench of Delhi High Court held that unless the cause of action has arisen at a place of subordinate office, plaintiff cannot sue there and jurisdiction in such cases resides with the courts the territory of which is located the principal office. Now, the Delhi HC has further

<sup>8</sup> Manugraph India Ltd v. Simarq Technologies Pvt. Ltd. & Ors, AIR 2016 Bom 217.

<sup>9</sup> Dalia *supra* note 6.

<sup>10</sup> Ultra home (p) Ltd. v. Choice Hotels International Inc.,(2012) SCC Online Del 245.

<sup>11</sup> Dalia *Supra* note 6.

fortified this position in *Allied Blenders & Distilleries v. R.K. Distilleries*<sup>12</sup> and in *RSPL v. Mukesh Sharma*<sup>13</sup> wherein again it held that plaintiff must sue at the court over principal office when cause of action is absent from the place of subordinate office. This ratio is re-implemented by the Delhi High Court in the latest judgment of *Federal Express Corporation v. Fedex Securities Limited and Ors.*<sup>14</sup>

Therefore in the light of above arguments defendant humbly submits that the present suit is not maintainable in the Mudhiras High Court, therefore court must return the plaint of the plaintiff under order VII rule 10 of the code of civil procedure, 1908.

**Limitation period** – There is no direct provision of limitation period in Patents act, 1970 however immaterial things such as Patents would come under incorporeal property and the expression “movable property” include both corporeal as well as incorporeal properties hence the present suit muse be subject to the Limitations Act, 1963 and must be barred by its provisions.

In *Bayer Corporation and Ors. v. Cipla, Union of India*<sup>15</sup> Delhi High Court described that

*“Patents right are property rights granted by states, to inventors in exchange with their covenant to share its details with the public”*

The U.S. Supreme Court as also described that patents should have the status of property. In *Kaiser Aetna v. United States*<sup>16</sup> it held that “*patents shall have the attributes of personal property*”

In *Vikas Sales Corporation v. Commissioner of Commercial Taxes*<sup>17</sup>, the Supreme Court referred to the definition of 'property' in Black's Law Dictionary, Sixth Edition; Dictionary of Commercial Law by A.H. Hudson (published by Butterworths) and noticed the expansive meaning in which the expression 'property' is understood. The Supreme Court also referred to the Law of Property, in Salmond's Jurisprudence (Twelfth Edition, 1956) and observed that the expression 'property' would include immaterial things such as patents, copyrights and trademarks which along with leases, servitudes and securities were described as 'incorporeal property' and the expression 'movable property' included corporeal as well as incorporeal property.

<sup>12</sup> *Allied Blenders & Distilleries v. R.K. Distilleries*, (2017) 241 DLT 48.

<sup>13</sup> *RSPL v. Mukesh Sharma*, (2016) 229 DLT 651.

<sup>14</sup> *Federal Express Corporation v. Fedex Securities Limited and Ors.*, (2017) 240 DLT 378.

<sup>15</sup> *Bayer Corporation and Ors. v. Cipla, Union of India (UOI) and Ors.*, (2009) 162 DLT 371.

<sup>16</sup> *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

<sup>17</sup> *Vikas Sales Corporation v. Commissioner of Commercial Taxes*, (1996) 4 SCC 433,

In *Rustom Cavasjee Cooper v. Union of India*<sup>18</sup>, the Supreme Court, while considering the scope of the expression "property" as appearing in Entry 42 of List III of the Seventh Schedule of the Constitution of India, observed as under:

"Under that entry "property" can also be referred to rights such as trade-marks, copyrights, patents and even rights in personam capable of transfer or transmission, such as debts.

Thus it can be concluded that patents are movable incorporeal properties and hence would come under the ambit of Limitations act, 1963.

According to section 3(j) of the Indian Limitations Act, 1963

*"period of limitation" means the period of limitation prescribed for any suit, appeal or application by the Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act.*<sup>19</sup>

And as per the part VI of the Schedule the limitation period is of three years for this patent infringement claim. And as per the facts it is clear that the period of three years is over since the defendant started using the alleged technology.

In the light of the above arguments it is humbly submitted that the claim of Basiltri must be dismissed as per section 3 of the Indian Limitations Act, 1963, therefore the suit of the plaintiff in this court is not maintainable.

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

It is submitted by the defendant that there has not been any infringement of the SEP's of the Guo Inc. by defendant. In fact defendant challenges the validity as well as essentiality of the suit patents.

The main defence raised by the basiltri in the written statement is that:-

- (i) Under the Act, the validity of a patent must be first established before the issue of infringement is considered by the Court.

<sup>18</sup> *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248.

<sup>19</sup> The Limitations Act, 1963, § 3, No. 63, Acts of Parliament, 1963 (India).

- (ii) Section 13(4) of the Act has been interpreted by the Supreme Court to mean that no patent which is granted in India enjoys presumptive validity owing to the mere factum of grant.

The caveat in Section 13(4) of the Act has been interpreted as an obligation on the part of a patentee to establish the validity of his patent in the Court before he proceeds to address the issue of infringement.

- (iii) It is submitted that the basiltri's prior-filed revocation petitions represent a serious challenge to the validity of the guo's Suit patents. Thus, no relief can be granted to the Guo. Therefore, until the issue of validity is not conclusively adjudicated upon, the guo is not entitled to the grant of any relief by this Court.
- (iv) Softwares even once coded can be run/performed on any general purpose widget Handset, hence there is no question of technical effect or any specialized hardware being disclosed in the suit patents.
- (v) The Abovementioned 4 patents are, software patents and software, as per Section 3(k) of Indian Patents Act<sup>20</sup> falls under the definition of a computer programme<sup>21</sup>, hence the 4 Patents, of which all of them are concerned with Data Transmission, with no involvement of any kind of hardware whatsoever, are not Patentable. On the issue of validity of such patents, Section 3 (k) of the Act must be referred. It states that

*“Following are not inventions within the meaning of this act*

*(k) a mathematical or business methods or a computer programme per se or algorithms.”*

It is submitted that since the patents of the Guo Inc. are computer programmes and they must not come under the ambit of invention and hence deserves not to be patented Which makes the 4 patents invalid and revocable as per the Section 64(1)(k) of Indian Patents Act, 1970.

- (vi) It is submitted by the basiltri that the Guo has failed to establish any reliable evidence since apart from its self-serving declarations of essentiality, Therefore, any presumption of essentiality of the Guo's Suit patents is unfounded in facts and law. The device widget handsets comprise both of software and hardware parts as well as

<sup>20</sup> The Patents Act, 1970, § 3(k), No. 39, Acts of Parliament, 1970 (India).

<sup>21</sup>Abdulgafar A. Nadiadwala v. Assistant Commissioner of Income-Tax and others, (2004) 267 ITR 488.

the standard mandatory part of patented softwares and optional parts and the suit filed by the plaintiff does not identify which portions of the technology standards are mandatory and which portions are optional. **Since the Guo has not been able to establish that the Suit Patents are indeed standard essential, the Guo's compliance with ETSI standards cannot be used to prove infringement.** In this regard, reliance must be placed on the decision of the United States Court of Appeals for the Federal Circuit in Fujitsu Ltd. v. Netgear Inc. Following were the critical observations of the Court of Appeals in Fujitsu

*“We acknowledge, however, that in many instances, an industry standard does not provide the level of specificity required to establish that practicing that standard would always result in infringement Or, as with the patent, the relevant section of the standard is optional, **and standards compliance alone would not establish that the accused infringer chooses to implement the optional section also.** In these instances, it is not sufficient for the patent owner to establish infringement by arguing that the product admittedly practices the standard, therefore it infringes.”<sup>22</sup>*

- (vii) The licensing rates are not confidential information. In fact ETSI encourages parties to declare the rates publically. However, the plaintiff refuses to do so as a part of its unfair licensing practice.
- (viii) One of the four concerned patents here i.e., 2222f also part of its global portfolio, though granted in the U.S.A., was not granted in Japan<sup>23</sup>. Under Section 8(1) of the Indian Patents Act<sup>24</sup>, applicant for the patent has to provide a statement disclosing the detailed particulars of application(s) filed outside India corresponding to its Indian patent application. According to the Clause (b) of this section the applicant provides an undertaking that he would keep the controller updated about the progress of applications filed elsewhere in the world relating to the same or substantially the same invention up to the grant of patent in India. The applicant failed to keep the

<sup>22</sup> Fujitsu Ltd. v. Netgear Inc., 620 F.3d 1321.

<sup>23</sup> Problem Statement, Page 6.

<sup>24</sup> The Patents Act, 1970, § 8(1), No. 39, Acts of Parliament, 1970 (India).

Patent Office updated, with its rejection of application for the patent no. 2222f in Japan, which it knew, yet it didn't challenge.<sup>25</sup>

3. As Guo couldn't furnish the information regarding, its patent application rejection in Japan for the same information, it couldn't comply with the Section 8(1) of the Indian Patents Act, 1970 and the non-compliance of which also took place in the case of Tata Chemicals Ltd. Vs. Hindustan Unilever Ltd.<sup>26</sup>, resulted in revocation of HUL's patents by Intellectual Property Appellate Board. Hence, the patent no, 2222f should be revoked on the grounds of Section 64(1)(m) of Indian Patents Act, 1970.

In the light of all the above arguments it is humbly submitted that there has not been any infringement of the suit patents of Guo Inc. by the defendant.

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

1. As submitted earlier, the plaintiff has approached the Hon'ble Court as the defendant has allegedly infringed on the plaintiff's standard essential patents, no. 2222b, 2222e, 2222f, and 2222g. Relief in a suit for infringement, as per section 108(1) of the Patents Act, 1970<sup>27</sup> 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) and, at the option of the plaintiff, either damages or an account of profits*". The counsel for the defendant humbly submits that the plaintiff is not entitled to injunctive relief on two main grounds i.e. the case does not fulfil the conditions required for the grant of an interim injunction and that the plaintiff has abused its dominant position.

2. It does not fulfil the conditions required for the grant of injunctive relief:

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<sup>25</sup> Query No. 2, Clarifications.

<sup>26</sup> Tata Chemicals Ltd. Vs. Hindustan Unilever Ltd., IPAB 108 [2012] IPAB 106.

<sup>27</sup> Patents Act, 1970, § 48, No. 39, Acts of Parliament, 1970 (India).



In *EBay Inc. v. Mer Exchange, L.L.C.*<sup>28</sup>, 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
  - 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.
3. A similar test was put forth by the Hon'ble Supreme Court of India in *Dalpat Kumar v. Prahlad Singh*<sup>29</sup> 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 favor of granting injunction..."*.
4. No demonstration of an irreparable injury: The counsel humbly submits that there has been no infringement of the plaintiff's invalid patents by the defendant. In arguendo, if the Court finds infringement, the plaintiff is not entitled to injunctive relief as there has been no irreparable injury caused to the plaintiff. The claim is pecuniary in nature and the plaintiff will certainly bring up loss of sales, as proof of irreparable injury. Pecuniary damages alone do not constitute irreparable injury as they can be compensated through repayment of lost profits or setting of a reasonable royalty rate. The plaintiff is a widget company that is a widget manufacturer and owner of a large portfolio of standard essential patents. It exports to about 15 countries, including India and has not disputed the fact that it holds a dominant position in the market. The plaintiff has not suffered any irreparable harm as the relevant damages can be calculated with certainty, by referring to

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<sup>28</sup> *EBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

<sup>29</sup> *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719, 53.

sales and there is a judicial remedy available. In *Thyssenkrupp Fabco Corp v Heidtman Steel Prods, Inc,CA*.<sup>30</sup> 22, the court denied the plaintiff's motion for a preliminary injunction because inter alia the plaintiff had not established that it would suffer irreparable harm.<sup>24</sup> This element, the court held, is not met if the buyer can avoid irreparable harm by paying the seller's demand, can afford to pay the demand, and can seek a judgment for money damages, as seen in the present case.

5. Adequate remedies in law are available: The plaintiff has filed for an injunction in between negotiations and this does not reflect inadequacy in law but an ulterior motive on the part of the plaintiff. Section 41 of the Specific Relief Act 1963 clearly states that an injunction shall not be granted if there is an alternative efficacious remedy. In the case of *Ericsson v. Micromax*, the Delhi High Court ordered the infringer, Micromax to pay royalty instead of granting an injunction, and took it upon itself to determine a FRAND Royalty based on comparable licenses. The availability of such a remedy clearly indicates that alternate remedies are available to the plaintiff and grant of an injunction only serves to harm the defendant and not relieve the plaintiff.
6. Balance of Convenience lies in favor of the defendant: The counsel humbly submits that the balance of convenience lies in favor of the defendant, and not the plaintiff, as there is irreparable harm being caused to the public as well as the defendant. The grant of an injunction would in fact cause irreparable harm to the business of the Defendant and to the consuming Indian public which is dependent on the affordable widget handsets made available by the defendant. Given that the defendant is the largest widget manufacturer in India and has made significant investments in its business, it has a reputation worth protecting among its consumers. Therefore, the grant of an interim injunction would bring the entire business to a standstill. This results in the absence of benefits for both the parties and the larger public. In view of these facts, a grant of an interim injunction would result in irreparable harm to the defendant's business and severely undermine its reputation in the market, thereby compromising its short and long-term interests.

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<sup>30</sup> *Thyssenkrupp Fabco Corp v Heidtman Steel Prods, Inc,CA*

7. The plaintiff has abused its dominant position: The counsel for the defendant would like to submit that the plaintiff has not acted in accordance with its obligation regarding the grant of licenses under clause 6.1 of the WSO IPR Policy<sup>31</sup> (para materia to the ETSI Directives). The plaintiff has abused its position in the market in contravention of Section 4 of the Competition Act<sup>32</sup>, as mentioned in an information filed by the defendant before the CCI. Therefore, the plaintiff cannot claim injunctive relief. In a Supreme Court Advisory Opinion in 2008 in China, the Court said that it will not find patent infringement in cases of SEP if the licensor claims injunctive relief. Even in Samsung Electronics v. Apple<sup>33</sup> in a Tokyo District Court, the Court refused Samsung's request for a preliminary injunction on the grounds that the asserted patents are SEPs encumbered with a FRAND commitment. The plaintiff was also in possession of SEPs that Basiltri wished to license and had adopted outrageous practices during negotiations, which were indeed a clear abuse of its dominant position. If the FRAND commitment is breached then the plaintiff is not entitled to injunctive relief.
8. The German Federal Supreme Court allowed the FRAND defense in the Orange Book case and held that, *"Where a company with a dominant position on the market discriminates [against] the company seeking a license in commerce usually accessible to similar companies, or of it inequitably obstructs the proposed license agreement it has been offered, the enforcement of the patent-law claim for injunctive relief constitutes an abuse of dominant position on the market, because the dominant company prevents the other company from gaining the very access to the market that it is obliged to grant by entering into the license agreement."*<sup>34</sup> The counsel humbly submits that the Court should look at the present case as not just a violation of a patent but also as an abuse of dominant position. The patented technology in question is a "standard" and cannot be treated as a purely monopoly right and because the regular injunction rules that apply to other Patents cannot apply here.

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<sup>31</sup> Eur. Telecomm. Standards Inst. [ETSI], *ETSI Directives*, (April 5, 2017), [https://portal.etsi.org/directives/37\\_directives\\_apr\\_2017.pdf](https://portal.etsi.org/directives/37_directives_apr_2017.pdf).

<sup>32</sup> Competition Act, 2002, § 4, No. 12, Acts of Parliament, 2003 (India).

<sup>33</sup> *Apple v. Samsung Electronics* (Tokyo District Court, February 28, 2013), published at the web site of Courts of Japan (Japanese only) (<http://www.courts.go.jp/>).

<sup>34</sup> *Orange Book Standard* (German Federal Supreme Court, May 6, 2009, doc. no. KZR 39/06).

9. The defendant claims an abuse of dominant position mainly on three grounds i.e. the plaintiff holds a dominant position, the defendant has offered a license on “acceptable” contract terms to the plaintiff and that the plaintiff has attempted to license its SEPs in contravention to FRAND terms, thereby preventing the defendant from acting in accordance to the initial licensing offer. These conditions were laid down by the German Federal Supreme Court for a successful FRAND defense.
  
10. It is not disputed that the plaintiff is in a dominant position in the market as it is the holder of SEPs pertinent to the manufacture of widget handsets. The second and third conditions are also fulfilled by the defendant as the defendant wanted the plaintiff to demonstrate the validity and essentiality of all the Indian patents, said that they would sign the confidentiality agreement only if it was for 6 months as oppose to the plaintiff’s 15 years, and would only pay royalty on the price of components and not the end product. An enumerated characteristic of FRAND is transparency.<sup>35</sup> A confidentiality agreement goes against the principles of transparency and is an abuse of dominant position. In *Best IT World (India) Pvt. Ltd. v. Ericsson*<sup>36</sup>, the CCI opined that the practice of forcing a party to execute an NDA and imposing excessive and unfair royalty rates, prima facie amounts to abuse of dominant position and is a violation of section 4 of the Competition Act. The CCI also regards using the downstream product’s sales price as royalty base as being excessive and having no link to the value of the SEP in almost case.
  
11. The plaintiff would not demonstrate the essentiality and validity of more than 3 patents and this forced the hand of Basiltri to file revocation petitions in the IPAB, as they were software patents. The defendant could not act according to the offer given before as the plaintiff’s conduct was an abuse of dominant position which is why the defendant filed an information in the CCI.

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<sup>35</sup> Intex Technologies (India) Ltd. V. Ericsson (2013) Case No. 76 of 201, CCI.

<sup>36</sup> M/s Best IT World (India) Private Limited (iBall) And M/s Telefonaktiebolaget L M Ericsson (Publ) &Anr., Case No. 04 of 2015, CCI.

12. The position of Courts on the matter of the royalty rate offered is also clear as stated by the CCI in *Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson*<sup>37</sup>. The CCI said that Ericsson's royalty rates were excessive and discriminatory, given that they were set as a percentage of the price of the downstream products instead of as a percentage of the price of the GSM or COMA chip.
13. Therefore, the counsel for the defendant humbly requests the court to not grant an interim injunction against the defendant.

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<sup>37</sup> *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)*, Case No. 50 of 2013, CCI.

**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 of the plaintiff is barred by the limitation.
2. Declare that the present suit is not maintainable in this court.
3. Declare and find that patents of plaintiff are invalid and liable to be revoked.
4. Declare that the defendant is not an unwilling licensee.
5. Declare and find that there has not been any infringement of SEP's granted to Guo Inc. by Basiltri.
6. Hold that the plaintiff did not offer license on fair, reasonable and non-discriminatory terms and regulations.
7. Declare and find that the plaintiff has been abusing its dominant position
8. Reject the plea of plaintiff for interim injunction.

Or

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

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