

**BEFORE THE HON'BLE HIGH COURT OF MUDHIRAS**

---

---

**IN THE MATTERS OF:**

---

**GUO.INC**

**... PLAINTIFF**

**v.**

**BASILTRI.**

**... DEFENDANT**

---

**SUIT NO. CS(COMM) 199A/2017,**

---

---

**UNDER SECTION 104 OF THE PATENT ACT, 1970**

**ON SUBMISSION TO THE HON'BLE HIGH COURT OF MUDHRAS**

---

**MEMORANDUM ON BEHALF OF THE DEFENDANT**

---

**TABLE OF CONTENTS**


---

<b>INDEX OF AUTHORITIES</b> .....	<b>4-7</b>
<b>STATEMENT OF JURISDICTION</b> .....	<b>8</b>
<b>STATEMENT OF FACTS</b> .....	<b>9</b>
<b>STATEMENT OF ISSUES</b> .....	<b>10</b>
<b>SUMMARY OF ARGUMENTS</b> .....	<b>11</b>
<b>ARGUMENTS ADVANCED</b> .....	<b>12-27</b>
<b>1. WHETHER THE SUIT FILED BY GUO INC. IS MAINTAINABLE IN THE COURT OF LAW?</b> .....	<b>12</b>
1.1. THE HON'BLE HIGH COURT DOES NOT HAVE JURISDICTION TO ADJUDICATE THE SUIT MATTER.....	12
1.2. GUO INC. HAS FAILED TO PROVIDE PRIMA FACIE VALIDITY OF THEIR PATENTS.....	13
1.3. BASILTRI HAS PLACED A "CREDIBLE CHALLENGE" AGAINST GUO INC'S PATENTS.....	15
<b>2. WHETHER THE REVOCATION PETITION IS MAINTAINABLE BEFORE THE IPAB?</b> .....	<b>15</b>
<b>3. WHETHER THE CCI HAVE JURISDICTION TO ORDER INVESTIGATION AGAINST GUO INC.? ....</b>	<b>17</b>
<b>4. WHETHER THERE HAS BEEN ABUSE OF DOMINANT POSITION BY GUO INC. HENCE, INVESTIGATION SHOULD BE ORDERED BY CCI ?</b> .....	<b>19</b>
4.1. GUO INC. HAD VIOLATED FRAND TERMS.....	19
4.1.1. GUO INC. HAD VIOLATED FRAND TERMS BY CHARGING ROYALTY RATE ON END PRODUCT.....	19
4.1.2 GUO INC. HAD VIOLATED FRAND TERMS BY FORCING BASILTRI TO SIGN CONFIDENTIALITY AGREEMENT .....	20
4.2. THERE EXISTS A PRIMA FACIE CASE FOR ABUSE OF DOMINANT POSITION.....	21

SURANA & SURANA & SHAASTRA IIT-MADRAS IPR MOOT

4.3. GUO INC. HAS ABUSED ITS DOMINANT POSITION IN THE MARKET..... 22

**5. WHETHER THE CLAIM OF INTERIM INJUNCTION AGAINST BASILTRI SHALL BE HELD TO BE VALID BY THIS HON’BLE COURT? ..... 25**

**PRAYER ..... 28**

---

**INDEX OF AUTHORITIES**

---

**STATUTES**

1. Patent Act, No. 39 of 1970
2. Competition Act, No. 12 of 2003
3. Code of Civil Procedure 05 of 1908.

**BOOKS**

- 1) N.R.SUBBARAM, PATENT LAW PRACTICES & PROCEDURES, (2<sup>nd</sup> Ed., Wadhwa Nagpur, 2007)
- 2) ELIZABETH VERKEY, INDIAN PATENT LAW, (2<sup>nd</sup> Ed., EBC, 2012).
- 3) M.B.RAO & MANJULA GURU, PATENT LAW IN INDIA, (Wolters Kluwer, 2015).
- 3) VERSHAVAHINI, INDIAN COMPETITION LAW, (Lexis Nexis, 2016).
- 4) R. WHISH & D. BAILEY, COMPETITION LAW, (8<sup>th</sup> ed., 2015).
- 5) S.M. DUGAR, GUIDE TO COMPETITION LAW, (U.P. Mathur 5<sup>th</sup> ed. 2010).
- 6) D.P. MITTAL, COMPETITION LAW AND PRACTICE, (Taxmann 3<sup>rd</sup> ed. 2016).
- 7) P. NARAYANAN, PATENT LAW, (Eastern Law House, 4<sup>th</sup> ed. 2013).

**ARTICLE & TREATISES**

- 1) Raghavi Viswanath, *Demystifying the Indian FRAND Regime*, 21 Journal of IPR 89, 89-95 (2016).
- 2) Yogesh Pai, *The Rational Basis for FRANDly Courts Denying Injunctive Relief for SEPs Infringement*, 19, Journal of IPR, 146, 146-156.
- 3) Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs, and Trademarks, 2013.

## SURANA &amp; SURANA &amp; SHAASTRA IIT-MADRAS IPR MOOT

4) Discussion Paper on Standard Essential Patents and Their Availability on Frand Terms, Govt. of India. Dept. of Industrial Policy and Promotion Ministry of Commerce & Industry, 2016.

6) Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, 1995.

7) Paris Convention Treaty, 1883.

## CASES

1. Ajay Industrial Corpn. v. Shiro Kanao of Ibaraki , AIR 1983 Del 496.....	16
2. Aloys Wobben & Anr. v. Yogesh Mehra & Ors., AIR 2014 SC 2210.....	16
3. Arshiya Rail Infrastructure Ltd. (ARIL) v. Ministry of Railways (MOR) & anr. 2012CompLR937(CCI).....	24
4. Best IT World (India) Pvt. Ltd. (iBall) v. Telefonaktiebolaget LM Ericsson (Publ) & Ors., MANU/CO/0040/2015.....	20
5. Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries, AIR 1982 SC 1444.....	16
6. Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries., MANU/SC/0255/1978.....	13
7. Boots Pure Drug & Co., (India) Ltd. v. May & Baker Ltd., MANU/WB/0212/1947.....	26
8. Broadcom v. Qualcomm, MANU/FETC/1913/2007.....	21
9. Chairman, Thiruvalluvar Transport Corpn. v. Consumer Protection Council, (1995) 2 SCC 479.....	19
10. Chemtura Corporation v. Union of India, MANU/DE/1880/2009.....	26
11. Dr. Aloys Wobben v. Yogesh Mehra & Ors., MANU/DE/0149/2012.....	17
12. eBay Inc. v. Merc Exchange , MANU/USSC/0043/2006.....	27
13. Enercon (India) Ltd. v. Aloys Wobben, MANU/IC/0104/2013.....	16
14. F. Hoffman-La Roche Ltd. & Anr. v. Cipla Limited, MANU/DE/0381/2009.....	15
15. F. Hoffman-La Roche Ltd. & Anr. v. Cipla Limited, MANU/DE/0517/2008.....	14
16. F. Hoffmann-La Roche Ltd. & Ors. v. Cipla Ltd., MANU/DE/3672/2015.....	13
17. Franz Xaver Huemer v. New Yash Engineers., AIR 1997 Delhi 79.....	25
18. Fujitsu Ltd. v. Netgear Inc., MANU/USFD/0628/2010.....	14
19. G.Srinivasan v. Voltamp Transformers Limited & Ors., MANU/TN/0520/2017.....	16

## SURANA &amp; SURANA &amp; SHAASTRA IIT-MADRAS IPR MOOT

20. Glaverbel S.A. v. Dave Rose & Ors., MANU/DE/0205/2010.....	14
21. Godrej Soaps Ltd. v. Hindustan Lever Ltd. & Ors., MANU/WB/0537/1993.....	13
22. Helifix Ltd. v. Blok-Lok Ltd., 208 F.3d 1339, (Fed. Cir. 2000).....	15
23. Hind Mosaic & Cement Works & Anr. v. Shree Sahajanand Trading Corpn. & Anr., MANU/GJ/0061/2008.....	14
24. Hoffmann La Roche & Co. AG vs. Commission of European Communities [1979] ECR 461.....	24
25. Hoffmann-La Roche & Co. AG v. EC Commission, (1979) ECR 461, Para 4 (ECJ).....	22
26. HT Media Ltd. v. Super Cassettes Industries Ltd., MANU/CO/0080/2014.....	24
27. In Re, three D Integrated Solutions v. Verifone India Sales Pvt. Ltd., MANU/CO/0026/2015.....	22
28. Intex Technologies (India) Ltd. v. Telefonaktiebolaget LM Ericsson (Publ), [2014] 43 taxmann.com 138/125 SCL 70 (CCI).....	22
29. Intex Techs. (India) Ltd v Telefonaktiebolaget LM Ericsson, MANU/DE/0762/2016....	21
30. J. Mitra v. Kesar Medicaments & Anr., 2008 (36) PTC 568 (Del).....	13
31. Kansan News v. Fast Way Transmission., MANU/CO/0063/2012.....	24
32. Kapoor Glass Pvt. Ltd. v. Schott Glass India Pvt. Ltd., MANU/CO/0034/2012.....	23
33. Lane & Bodley Co. v. Locke, 150 U.S. 193 (1893).....	12
34. Low Heat Driers (P) Ltd. v. Biju George & Anr., (2010) (2) KHC 566. ....	13
35. Mariappan v. A.R. Safiullah., MANU/TN/0828/2008.....	13
36. Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197.....	26
37. Mem'l Coliseum Comm'n v. Nat'l Football League, MANU/FENT/0190/1980. ....	26
38. Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson (Publ,) [2014] 43 taxmann.com 114/125 SCL 73 (CCI).....	22
39. Microsoft corpn. v Motorola Inc., 696 F.3d 872 (9th Cir. 2012).....	20
40. Monsanto Company v. Coramandal Indag Products (P) Ltd., MANU/SC/0737/1986.....	16
41. Prints India v. Springer India Pvt. Ltd., Case 16/2010, ¶ 9 (CCI).....	23
42. R.S. Raghunath v. State of Karnataka & Anr., (1992) 1 SCC 335.....	18
43. Rico Auto Industries Ltd. v. GAIL (India) Ltd., MANU/CO/0066/2016.....	24
44. Rustom Cavasjee Cooper v. Union of India, MANU/SC/0011/1970.....	22

## SURANA &amp; SURANA &amp; SHAASTRA IIT-MADRAS IPR MOOT

45. Sampson v. Murray, MANU/USSC/0201/1974.....	27
46. SBI Staff Association v. Popal & Kotech Property, MANU/WB/0362/2000.....	12
47. Smith v. Grigg, Ld. 41 RPC 149.....	13
48. Surendra Lal Mahendra v. M/s. Jain Glazers & Ors., 1981(1) Delhi 257.....	13
49. Tata Consultancy Services v. State of AP, MANU/SC/0950/2004.....	22
50. Telefonaktiebolaget LM Ericsson (PUBL) v. CCI & Ors., 2016 SCC OnLine Del 19.....	18
51. Telefonaktiebolaget Lm Ericsson (Publ) v. Intex Technologies (India) Ltd., MANU/DE/0774/2015.....	25
52. Ten XC Wireless Inc & Anr. v. Mobi Antenna Technologies (Shenzhen) Co. Ltd., MANU/DE/4436/2011.....	13
53. The Kerala State Electricity Board, Trivandrum v. T.P. Kunhaliumma, MANU/SC/0323/1976.....	12
54. United Brands Co. v. Commission, (1978) 1 ECR 207, Para 65 (ECJ).....	22
55. Urja Vikash Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755.....	18
56. V. ManickaThevar v. M/s. Star Plough Works MANU/TN/0222/1965 : AIR 1965 Mad 327 at p.328.....	17
57. V. Manioka Thevar v. Star Plough Works, Melur, MANU/TN/0222/1965.....	26
58. Vringo Infrastructure Inc. v. ZTE, (2013) EWHC 1591.....	13
59. Wockhardt Ltd. v. Hetero Drugs Ltd. & Ors. MANU/TN/2148/2005.....	25

**F. ONLINE DATABASE**

1) SCC ONLINE

2) LEXIS NEXIS

3) TAXMANN.COM

4) HEIN ONLINE

---

**STATEMENT OF JURISDICTION**

---

Basiltri has approached the Competition Commission of India ('CCI' for short) u/s 19(1)<sup>1</sup> of the Competition Act, 2002.

Basiltri has approached the Intellectual Property Appellate Board, Mudhiras ('IPAB' for short) u/s 117G<sup>2</sup> of Patent Act, 1970.

Guo Inc. has invoked the Jurisdiction of the Hon'ble High Court of Judicature at Mudhiras u/s 104<sup>3</sup> of the Patent Act 1970.

Basiltri reserves its rights of challenging the jurisdiction of High Court as invoked by Guo as mentioned above.

---

<sup>1</sup> The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) receipt of a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

<sup>2</sup> Transfer of pending proceedings to Appellate Board. -All cases of appeals against any order or decision of the Controller and all cases pertaining to revocation of patent other than on a counter-claim in a suit for infringement and rectification of register pending before any High Court, shall be transferred to the Appellate Board from such date as may be notified by the Central Government in the Official Gazette and the Appellate Board may proceed with the matter either de novo or from the stage it was so transferred.

<sup>3</sup> 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.



---

**STATEMENT OF FACTS**

---

**RELEVANT FACTS**

Guo Inc. a company of widget manufacturer incorporated in the United States having large portfolio of standard essential patents is trying to license its SEP's with the Basiltri which is a Indian co. So that Guo would be able to convince the rest of the Indian market. After various request made by Guo Inc., Basiltri finally agreed to meet in its office in Noida. And in the meeting Guo shared a sample list of SEP's.

**MUTUAL DISAGREEMENT**

Guo Inc. put forward its condition for negotiation. A) They asked Basiltri to sign confidentiality agreement before they show their claim chart. B) The offer made to Basiltri was for global portfolio which has over 200,000 patents as they have internal information that Basiltri is exporting to at least China. C) Royalty rate will be disclosed only after they sign confidentiality agreement. D) Guo will show essentiality and validity of not more than 3 patents. E) Guo will charge royalty on the end product of the net selling price. But Basiltri disagreed to the above conditions. A) Basiltri is advised that Guo rates are known to public so they do not need to sign confidentiality agreement. B) Basiltri is only willing to discuss license for Indian Patents. C) Basiltri is willing to charge royalty on the price of component and not on the end product. D) Basiltri is asking Guo to show essentiality and validity of all the patents. E) Basiltri finally agreed to sign confidentiality agreement for 6 months from 6 years. Basiltri has finally agreed to meet on 20<sup>th</sup> August, 2017. Guo Inc. have been given enclosed letter in which Basiltri is inviting the Indian widget manufacturer to increase their exports on June 20<sup>th</sup>, 2017. Before Basiltri is meeting Guo Inc.

**PROCEDURAL BACKGROUND**

- A) On August 18 MD (referred as Gopal) of Basiltri filed information against Guo Inc. before Competition Commission of India.
- B) Gopal has also filed a revocation petition under the Intellectual Property Appellate Board.
- C) Guo. Inc filed a suit for infringement of Indian patent no. 2222b, 2222e, 2222f and 2222g against Basiltri on 25<sup>th</sup> August, 2017. After Basiltri cancelled meeting on August 20 at the last minute before the Mudhiras High court.

**STATEMENT OF ISSUES**

---

- 1. WHETHER THE SUIT FILED BY GUO INC. IS MAINTAINABLE IN THE COURT OF LAW?**
  
  - 2. WHETHER THE REVOCATION PETITION IS MAINTANABLE BEFORE THE IPAB?**
  
  - 3. WHETHER THE CCI HAVE JURISDICTION TO ORDER INVESTIGATION AGAINST GUO INC?**
  
  - 4. WHETHER THERE HAS BEEN ABUSE OF DOMINANT POSITION BY GUO INC. HENCE, INVESTIGATION SHOULD BE ORDERED BY CCI?**
  
  - 5. WHETHER THE CLAIM OF INTERIM INJUNCTION AGAINST BASILTRI SHALL BE HELD TO BE VALID BY THIS HON'BLE COURT?**
-

**SUMMARY OF ARGUMENTS**

---

**1. THE SUIT FILED BY GUO INC. IS NOT MAINTAINABLE IN THE COURT OF LAW.**

It is humbly submitted that the Hon'ble court does not have jurisdiction to adjudicate the suit matter Guo Inc. also it has also failed to provide prima facie validity of their patent and Basiltri has placed a Credible Challenge against Guo Inc Patents given in general without any claim(s) or any product description and therefore cannot be patented.

**2. THE REVOCATION PETITION UNDER IPAB IS MAINTANABLE**

It is most humbly asseverated that the Revocation Petition filled by Basiltri against Guo Inc. is maintainable before the IPAB. The Guo Inc patents fall within the scope of section 64(k) and 64 (e). As Guo(s) patents are not novel and some of Guo(s) patents does not have technical effect.

**3. THE CCI DOES NOT HAVE JURISDICTION TO ORDER INVESTIGATION AGAINST GUO INC.**

It is humbly submitted that CCI has jurisdiction to entertain the case as the remedies given for abuse of dominant position under CCI and patents laws are different. An there is no conflict between two laws.

**4. THERE HAS BEEN ABUSE OF DOMINANT POSITION BY GUO INC. HENCE, INVESTIGATION SHOULD BE ORDERED BY CCI.**

It is humbly submitted that Guo have violated Fair, Reasonable and Non Discriminatory Terms. Hence, the Guo Inc. have violated the FRAND terms by Charging royalty rate on the end product and forcing Basiltri to sign confidentiality agreement. Also Section 4(1) of the act states that no enterprise or group shall abuse its dominant position. Guo is dominant in the relevant market and can affect the market.

**5. THAT THE CLAIM OF INTERIM INJUNCTION AGAINST BASILTRI SHOULD NOT BE GRANTED BY THIS HON'BLE COURT.**

It is most humbly submitted before the Hon'ble court that the interim injunction shall not be granted as there is a general consensus that injunction as a remedy in patent law may not accrue in favour of the patentee in the context of SEPs infringement and there is a prima facie case for validity of the patented product of Guo Inc. & the pillars of injunction lies in favor of Basiltri.

---

**ARGUMENTS ADVANCED**

---

**1. THE SUIT FILED BY GUO INC., IS NOT MAINTAINABLE IN THE COURT OF LAW.**

*It is humbly submitted before this Hon'ble Court that there is no infringement on the part of Basiltri of the suit patents as **Firstly**, The Hon'ble court does not have jurisdiction to adjudicate the suit matter [1.1] **Secondly**, Guo Inc. has failed to provide prima facie validity of their patents [1.2] and **Thirdly**, Basiltri has placed a "Credible Challenge" against Guo Inc's Patents given in general without any claim(s) or any product description and therefore cannot be patented.[1.3]*

---

**1.1 THE HON'BLE HIGH COURT DOES NOT HAVE JURISDICTION TO ADJUDICATE THE SUIT MATTER.**

It is humbly submitted that the Hon'ble High Court does not have jurisdiction to adjudicate the suit matter. That Guo Inc. Had been barred by the limitation period<sup>4</sup>. There is no doubt that in this case *Article 137* will not apply as no time limit is prescribed in the patent act, 1970, also the application for infringement of suit is made to the High Court. This application should have been made within 3 years from the date when the petitioner's right to apply accrued<sup>5</sup> (i.e from the year 1988 when Basiltri started using Guo Inc. Patents).

In this case the period of limitation is 3 years as a presumption of laches arises where a patentee delays bringing suit for more than 3 year after the date the patentee knew or should have known of the alleged infringer's activity<sup>6</sup>. Therefore, the plaint should be rejected under *Order 7 Rule 11* of the Civil Procedure Code on the ground that the suit was barred by limitation in the sense that the suit was filed beyond the limitation period prescribed under the Limitation Act<sup>7</sup>.

---

<sup>4</sup>Art. 137, Limitation Act, 1963.

<sup>5</sup>The Kerala State Electricity Board, Trivandrum v. T.P. Kunhaliumma, MANU/SC/0323/1976.

<sup>6</sup> Lane & Bodley Co. v. Locke, 150 U.S. 193 (1893).

<sup>7</sup>SBI Staff Association v. Popal & Kotech Property, MANU/WB/0362/2000

**1.2 GUO INC HAS FAILED TO PROVIDE PRIMA FACIE VALIDITY OF THEIR PATENTS**

**A.** It is humbly asseverated that in the present case Guo Inc. has failed to establish the first limb apart from its self-serving declarations of essentiality, the Prima Facie validity of the suit patents. Guo Inc. only shared a sample list of its SEP's of various countries in meeting with Basiltri held on 28 Jan 2017<sup>8</sup>. The sealing of a patent by the Controller of Patent does not give rise to a presumption in favour of its validity<sup>9</sup>. It is pertinent to note that this position, viz. the validity of a patent is not guaranteed by the grant, is now expressly provided in Section 13(4) of the Patents Act, 1970<sup>10</sup>. Any presumption in favor of the validity of the patent, cannot be accepted without proving the prima facie validity of the patents<sup>11</sup>. It is a duty of the patentee to prove prima facie case<sup>12</sup>. Even after a suit for infringement the defendant could question the validity of a patent on the grounds set out in Section 64<sup>13</sup>. Despite all the safeguards and circumspection contemplated in various provisions of the Act against grant of patent in respect of a spurious, purloined or fake invention, the Legislature minced no words in clarifying its intendment that no presumption of validity would attach to a patent granted by the Controller under the Act, notwithstanding examination and investigation made under Sections 12 & 13 thereof<sup>14</sup>. The prima facie validity of the patents asserted must be established by the Plaintiff before establishing prima facie infringement on the basis of alleged essentiality<sup>15</sup>. While the actual user and duration of the patent may be one of the factors that may be taken into account, however, that factor alone cannot give rise to a presumption of validity of the patent<sup>16</sup>. Similarly in the present case even after various discovery request, Guo denied to prove essentiality and validity of not more than 3 patents & hence acting *Mala Fide*.

**B.** Guo filed a suit for infringement against Basiltri without providing any claim(s) map. Further it is necessary to compare the claim(s) in suit for infringement and not the product itself<sup>17</sup>. If there is no material produced for comparison of the plaintiff's products and the Defendant's product in

---

<sup>8</sup>Moot Proposition, Page 2

<sup>9</sup>Low Heat Driers (P) Ltd. v. Biju George & Anr., (2010) (2) KHC 566.

<sup>10</sup>Godrej Soaps Ltd. v. Hindustan Lever Ltd. & Ors., MANU/WB/0537/1993.

<sup>11</sup>Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries., MANU/SC/0255/1978.

<sup>12</sup>Mariappan v. A.R. Safiullah., MANU/TN/0828/2008.

<sup>13</sup>Ten XC Wireless Inc & Anr. v. Mobi Antenna Technologies (Shenzhen) Co. Ltd., MANU/DE/4436/2011.

<sup>14</sup>Surendra Lal Mahendra v. M/s. Jain Glazers & Ors., 1981(1) Delhi 257 ; Smith v. Grigg, Ld. 41 RPC 149.

<sup>15</sup>Vringo Infrastructure Inc. v. ZTE, (2013) EWHC 1591.

<sup>16</sup>J. Mitra v. Kesar Medicaments & Anr., 2008 (36) PTC 568 (Del).

<sup>17</sup>F. Hoffmann-La Roche Ltd. & Ors. v. Cipla Ltd., MANU/DE/3672/2015.

a question of infringement then no decision can be taken<sup>18</sup>. In these cases, the patent owner must compare the claims to the accused products or, if appropriate, prove that the accused products implement any relevant optional sections of the standard<sup>19</sup>. An infringement analysis cannot be performed by comparing the product manufactured by the patentee with the allegedly infringing product, and infringement analysis involves comparison of each and every limitation of the claim with the allegedly infringing device<sup>20</sup>. At the interlocutory stage, the Courts shall refrain from commenting on the validity of the patent and that it was sufficient to say that on the basis of the prior arts, there was a substantial, tenable and *credible challenge* made out which would be tested at the time of trial<sup>21</sup>. Thus, it is a well settled principle of law that the court shall not look into the merits of the case, that will have to wait for trial, if any *credible challenge* is placed by the party challenging the validity of the patents than the court shall not presume validity of the Patents. Since, Basiltri has been able to raise *credible challenge* the court shall not go into the merits of the case and therefore not presume validity of Guo Inc's patents.

C. It is respectfully submitted that though the patents of Guo Inc are sufficiently old and satisfy the *Six Year Rule* but this does not make free Guo Inc of its liability to provide prima facie validity of its patents, which defendant has willingly failed in performing so. The "Six Year Rule" is now been interpreted by courts in a different manner. The "Six Year Rule" has lost its significance in view of the latest development in the field of science and technology<sup>22</sup>. The rule has to be seen as a rule of caution and prudence rather than a rigid, ritualistic formula of mathematical application thereof. There is no provision of law or rule in support of this practice<sup>23</sup>. All the recent cases have been of the view that the "sufficient use" and "old patent" can only be one of the grounds that court can take into consideration rather than giving decision solely on the basis of this. Therefore, no presumption can be made in favour of validity of Guo's Patent.

---

<sup>18</sup>HOFFMANN, *Supra Note*, 17

<sup>19</sup>Fujitsu Ltd. v. Netgear Inc., MANU/USFD/0628/2010.

<sup>20</sup>Hind Mosaic & Cement Works & Anr. v. Shree Sahajanand Trading Corpn. & Anr., MANU/GJ/0061/2008.

<sup>21</sup>Glaverbel S.A. v. Dave Rose & Ors., MANU/DE/0205/2010.

<sup>22</sup>MARIAPPAN, *Supra Note* 12.

<sup>23</sup>F. Hoffman-La Roche Ltd. & Anr. v. Cipla Limited, MANU/DE/0517/2008.

**1.3 BASILTRI HAS PLACED A “CREDIBLE CHALLENGE” AGAINST GUOINC’S PATENTS**

A. It is most respectfully asseverated that Basiltri has placed *Credible Challenge* against GuoInc’s patents. As stated above, there is no prima facie validity of Guo Inc’s patents and Guo has also willingly failed to provide validity of its patents. Moreover, “Six Year Rule” has also lost its significance due to latest developments in the field of science and technology and court has now interpreting this rule in a different way, stating it cannot be the sole ground for presumption of validity of a patent. The patents held by Guo being software patents, they are not patentable *per se* unless without any technical implication or combinations with a hardware.<sup>24</sup>. Thus, Basiltri has raised a *credible challenge* against validity of Guo Inc. patents. At this stage the Courts are not expected to examine the challenge in any great detail and arrive at a definite finding on the question of validity until the trial. At the present stage of considering the grant of an interim injunction, the defendant has to show that the patent that which has been granted is vulnerable to challenge<sup>25</sup>. Vulnerability is the issue at the preliminary injunction stage, while validity is the issue at trial. The proof of a question as to invalidity thus requires less validation than substantial the clear and convincing proof necessary to establish invalidity *per se*<sup>26</sup>.

**2. THE REVOCATION PETITION UNDER IPAB IS MAINTANABLE**

*It is humbly submitted that Basiltri is an interested party to this suit and hence can file a suit for revocation against Guo Inc’s Patents and all the patents held by Guo are liable to be revoked as these patents were already being used by Basiltri even before the filing of Patent application by Guo Inc. Some of the Patents held by Guo Inc. are also Computer Programme Per Se which are unpatentable subject matter. Hence, the revocation petition filed by Basiltri against Guo Inc’s Patents is Maintainable.*

A. It is most humbly submitted that the Revocation Petition filed by Basiltri against Guo Inc is maintainable before the Hon’ble Intellectual Property Appellate Board (IPAB). A “person

<sup>24</sup>§ 3(k), Patents Act, 1970.

<sup>25</sup>F. Hoffman-La Roche Ltd. & Anr. v. Cipla Limited, MANU/DE/0381/2009.

<sup>26</sup>Helifix Ltd. v. Blok-Lok Ltd., 208 F..3d 1339, (Fed. Cir. 2000).

interested” means “Engaged in, or in promoting, research in the same field as that to which invention relates”<sup>27</sup>. Simply stating a ‘person interested’ within the meaning of Section 64 must be a person who has a direct, present and tangible commercial interest or public interest which is injured or affected by the continuance of the patent on the register<sup>28</sup>. Under Section 140(1)(d) of the Act, there can be no bar/estoppel against a licensee's right to challenge patent validity despite having accrued benefit out of the use of the patented invention. If such a bar does not act against a licensee, it follows that no such bar can apply against even a prospective licensee<sup>29</sup>. Also GuoInc has denied to prove validity of not more than 3 patents which is an important limb before establishing or proving infringement of a patent in any case<sup>30</sup>.

**B.** It is also submitted that the patents held by Guo Inc are liable to be revoked as the patent held by Guo Inc are already being used by Basiltri even before the Priority Date of filing by Guo Inc of its patents. If the public once becomes possessed of an invention, by any means whatsoever, no subsequent patent for it can be granted either to the true or first inventor himself or any other person; for the public cannot be deprived of the right to use the invention as the public is already possessing everything that he could give<sup>31</sup>. To satisfy the requirement of being publicly known as used in Clauses (e) of Section 64(1)<sup>32</sup>, it is not necessary that it should be widely used to the knowledge of the consumer public. It is sufficient if it is known to the persons who are engaged in the pursuit of the knowledge of the patented product or process either as men of science or men of commerce or consumers<sup>33</sup>. It should be established by the plaintiff that it has not been exploited publicly or used in the country or elsewhere in the world before the date of filing of the patent application with complete specification<sup>34</sup>. Some of the Patents are computer Software and are not patentable as they are not inventions within the meaning of Section 3(k) of the Patents Act, 1970. Plaintiff has obtained the Suit Patents by misleading the Indian Patent Office and deliberately claiming the presence of “Technical Effect”<sup>35</sup> by way of artful and clever drafting of

---

<sup>27</sup>Aloys Wobben & Anr. v. Yogesh Mehra & Ors., 2014 SCC Online SC 484

<sup>28</sup>Ajay Industrial Corporation vs. Shiro Kanao of Ibaraki (AIR 1983 Del 496)

<sup>29</sup>Enercon (India) Ltd. v. Aloys Wobben, MANU/IC/0104/2013

<sup>30</sup>LOWHEAT, *Supra Note 9*.

<sup>31</sup>Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries, AIR 1982 SC 1444.

<sup>32</sup> Patents Act, 1970

<sup>33</sup>Monsant Company v. Coramandal Indag Products (P) Ltd., MANU/SC/0737/1986

<sup>34</sup>G. Srinivasan v. Voltamp Transformers Limited and Ors. MANU/TN/0520/2017

<sup>35</sup>Guidelines for Examination of Computer Related Inventions (CRIs), Office of the Controller General of Patents, Designs, and Trademarks, 2013.



the patent claims.

C. In this case also Basiltri is an “interested party” as it is also engaged in the same field as Guo Inc and Basiltri also has a direct, tangible and commercial interest which is effected by the patent and thus, Basiltri can rightfully file revocation petition against Guo Inc’s patents. It is also submitted that Basiltri was already using Suit Patents from 1998-99 even before the filling of patents application, being in year 1999. If from the objections raised it is clear that a serious controversy exists as to what was known or used prior to the date of the patent; courts would not grant an injunction restraining the defendant from pursuing his normal business activity<sup>36</sup>. It is contended that the suit by Guo Inc was not instituted *Suo Moto* under the provisions of Patents Act, 1970, it is by the virtue of revocation proceeding filed by Basiltri, Guo Inc has filled Suit for Infringement as a Counter Claim. Therefore, it would be in the fitness of things to continue with the proceedings before the IPAB and, it is only when they reach a stage of complete satisfaction that it could be stated that the proceedings, in this court, perhaps could not continue further<sup>37</sup>. Thus, the Hon’ble High Court shall put stay on the current suit for infringement unless the validity of the patents is proved in the revocation proceeding filed in IPAB (Mudhiras).

### **3. THE CCI DOES HAVE JURISDICTION TO ORDER INVESTIGATION AGAINST GUO INC.**

*It is humbly submitted that Guo Inc has clearly abused its dominant position in the market by imposing unreasonable conditions on Basiltri and charging royalty rates on the End Product. Hence, CCI has Jurisdiction in cases of abuse of Patent Rights as long as it deals with abuse of “Dominant Position” by a Party in the market.*

A. It is humbly submitted that the CCI has the jurisdiction to hear and pass any order in cases regarding abuse of Patent Rights. Guo Inc(s) demand for payment of royalty at an *ad valorem* rate based on the value of the product instead of the component that uses the said technology is patently unfair as the products in question use several patented technologies and unreasonable demand of royalties by patent holders would result in 'royalty stacking'. The Patent Act is concerned with grants of rights enabling the patent holder to exclude others from exploiting the

<sup>36</sup>V. ManickaThevar v. M/s. Star Plough Works MANU/TN/0222/1965.

<sup>37</sup>Dr.AloysWobben v. Yogesh Mehra & Ors., MANU/DE/0149/2012

invention, and in that sense promoting rights akin to a monopoly; the competition law is essentially aimed to promote competition and, thus, fundamentally opposed to monopolization as well as unfair and anticompetitive practices that are associated with monopolies<sup>38</sup>.

**B.** Though the Patents Act, 1970 deals with provisions regarding remedies for "abuse of dominant position" as in Section 140<sup>39</sup>, the Competition Act, 2002 also provides for other remedies in case of abuse of dominant position. It is clear that the remedies, as provided under Section 27,<sup>40</sup> for abuse of dominant position are materially different from the remedy as available under Section 84<sup>41</sup>.

**C.** It is also submitted that both Competition Act and Patent Act shall be interpreted harmoniously and it is only in cases where there is irreconcilable inconsistency that the question of which act or provision had an overriding effect may be considered<sup>42</sup>. The provisions of Competition Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force<sup>43</sup>. Section 60 of the Competition Act, which has an overriding effect over any other law for the time being in force, shall be read harmoniously with Section 62 of the Competition Act and in the context of the subject matter of the Competition Act<sup>44</sup> thereof.

**D.** Legislature while enacting a law has complete knowledge of the existing laws and, therefore, where an express provision for repeal of an earlier statute is not provided, it must be presumed that the legislature did not intend to repeal the existing statute and such a presumption can only be rebutted if there is an inconsistency with the earlier act<sup>45</sup>. There is no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. And, in absence of any irreconcilable conflict between the two legislations, the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of Patent rights cannot be ousted<sup>46</sup>. In case of any

---

<sup>38</sup>Telefonaktiebolaget LM Ericsson (PUBL) v. CCI & Ors., 2016 SCC OnLine Del 1951.

<sup>39</sup> § 140, Patents Act, 1970.

<sup>40</sup> § 27, Competition Act, 2002.

<sup>41</sup> § 84, Patents Act, 1970.

<sup>42</sup>Urja Vikash Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755.

<sup>43</sup> § 62, Competition Act, 2002.

<sup>44</sup> ERICSSON, *Supra Note* 38.

<sup>45</sup>R.S. Raghunath v. State of Karnataka & Anr., (1992) 1 SCC 335.

<sup>46</sup>WOBLEN, *Supra Note*, 27.

repugnancy thereof, general act must yield before the special act, but in case of no repugnancy both laws shall be read harmoniously<sup>47</sup>.

E. Thus, for reasons already mentioned above, both the acts must be read harmoniously. Therefore, CCI can rightfully entertain any case relating to abuse of patent rights as long as it affects the whole market and relates to abuse of dominant position in the market.

**4. THERE HAS BEEN ABUSE OF DOMINANT POSITION BY GUO INC. HENCE, INVESTIGATION SHOULD BE ORDERED BY CCI.**

**4.1 THE GUO INC. HAD VIOLATED FRAND TERMS.**

*Basiltri humbly submits that the patents of Guo Inc. are SEP patents as it is de jure standards, in general, set by Standard Setting Organizations (SSOs)<sup>48</sup> like in the present case it is set by SSO Paris. SSOs require the licensing of SEPs through Fair, Reasonable and Non Discriminatory (“FRAND” for short) Terms<sup>49</sup>. Hence, the Guo Inc. have violated the FRAND terms by – (1) Charging royalty rate on the end product.[4.1.1] (2) Forcing Basiltri to sign confidentiality agreement[4.1.2]. DG shall be directed to cause investigation, it is substantiated on the ground that there exist a prima facie case of abuse of dominant position [4.2], GUO has its dominant position in the market and there is abuse of such dominant position by the GUO [4.3].*

**4.1.1 GUO INC. HAD VIOLATED FRAND TERMS BY CHARGING ROYALTY RATE ON END PRODUCT.**

A. It is stated that the SEP holder (hereinafter referred to as Guo Inc.) is charging royalty rate on the end product to the licensee (herein referred as Basiltri) is violation of FRAND terms. As demand for payment of royalty at an *ad valorem* rate based on the value of the product instead of the component that uses the said technology is patently unfair as it amounts to claiming of the value of the product that is attributable to other features and innovations which are unconnected

<sup>47</sup>Chairman, Thiruvalluvar Transport Corpn. v. Consumer Protection Council, (1995) 2 SCC 479.

<sup>48</sup>Discussion Paper on Standard Essential Patents and Their Availability on Frand Terms, Govt. of India. Dept. of Industrial Policy and Promotion Ministry of Commerce & Industry, 2016, <https://mail.google.com/mail/u/0/#search/aryan+singhal/15ff370ef6d58891?projector=1>

<sup>49</sup>OECD, Competition, Intellectual Property and Standard Setting, DAF/COMP(2014)27, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2014\)27&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2014)27&doclanguage=en)

with the technology claimed to be patented<sup>50</sup>. The instant product is a software widget and it uses several patented technologies and unreasonable demand of royalties by patent holders would result in *royalty stacking* which occurs when a single product uses many patents of same or different licensors. It is alleged that excessive demands of royalty by Guo Inc. would amount to a *patent holdup* i.e. to pressure licensee into accepting a higher FRAND rate than was objectively merited<sup>51</sup>. Hence, an increasing royalty base due to the introduction of additional technology in high-end market apart from patent holder SEPs<sup>52</sup> and thereby to frustrate the purpose of the FRAND term. Therefore, Guo Inc. sought to capture more than the value of its patents by inducing holdup.

**B.** In the present case the Guo Inc. is willing to charge royalty on the net selling price of end product<sup>53</sup>. Even upon seeking a royalty of 2.25% on end product, the FRAND terms of the Patent holder stands violated. The court could conclude that Patent- holder actions were intended to induce hold-up. The court added that the FRAND royalty rate should commensurate with the value of the technology added to the overall standard<sup>54</sup>.

**C.** Therefore, the licensing rates paid (real prices) to owners of SEPs for the use of their technology shall reflect the value that the functionality of the claimed invention or inventive feature that contributes to the value of the relevant functionality of the smallest saleable Compliant Implementation that practices the Essential Patent Claim and the royalty rates should target that component which is majorly responsible for the functionality of the patent also referred as ‘smallest saleable patent practicing unit’<sup>55</sup>.

#### **4.1.2 GUO INC. HAD VIOLATED FRAND TERMS BY FORCING BASILTRI TO SIGN CONFIDENTIALITY AGREEMENT**

**A.** In the instant matter, Guo Inc. Forces Basiltri to sign a confidentiality agreement for disclosing the royalty rate charged thereto<sup>56</sup>. It is also contended that the licensing terms of Guo

---

<sup>50</sup>ENERCON, *Supra Note 29*.

<sup>51</sup>Best IT World (India) Pvt. Ltd. (iBall) v. Telefonaktiebolaget LM Ericsson (Publ) & Ors., MANU/CO/0040/2015.

<sup>52</sup>Federal Trade Commission v. Qualcomm, Case 5:17-cv-00220-LHK.

<sup>53</sup> Moot Proposition, Page 5.

<sup>54</sup>Microsoft corpn. v Motorola Inc., 696 F.3d 872 (9th Cir. 2012).

<sup>55</sup>Raghavi Viswanath, *Demystifying the Indian FRAND Regime*, 21 Journal of IPR 89, 89-95 (2016).

<sup>56</sup> Moot Proposition, Page 4.

Inc., in its 'Term Sheet for Global Patent License Agreement', were exorbitant and unfair and thus constituted an abuse of its allegedly dominant position in India's telecommunications market<sup>57</sup>. Guo Inc. also demanded licensees to sign a confidentiality agreement which was restrictive and violated its FRAND commitments<sup>58</sup>. Secondly, the Guo Inc. had abused its position to compel Basiltri to sign the confidentiality agreement by refusing to share the details of its patent infringement unless Basiltri signed the confidentiality agreement thereof. As the purpose of FRAND commitment is to sell license on Non-discriminatory terms and charging different royalties to different manufacturers who use same software widget, are in violation of its FRAND commitment.

**B.** Therefore, it is possible that by making the licensees to sign confidential agreement would enhance the risk of charging discriminatory prices. Hence, such factual allegations of anti-competitive conduct are sufficiently specific to satisfy the first element of an attempted monopolization claim<sup>59</sup>.

#### **4.2 THERE EXISTS A PRIMA FACIE CASE FOR ABUSE OF DOMINANT POSITION**

**A.** It is humbly submitted before the Hon'ble Competition Commission of India (herein after referred as CCI) that investigation should be ordered against Guo Inc., in the information filed by Basiltri (Herein after referred as Informant) on the ground of abuse of dominant position as it is provided under section 26(1) of the Competition Act, 2002 (hereinafter referred as act) that on receipt of a complaint under section 19(1)<sup>60</sup> of the Act, if the commission is of the opinion that there exist a prima facie case, it shall direct the Director General(hereinafter referred as DG) to cause an investigation and it is necessary for abuse of dominant position that there must exist an enterprise<sup>61</sup> and such enterprise must possess dominant position in the market and there must be abuse of dominant position by such enterprise.

**B.** It is apparent from the plain reading of the definition of 'enterprise' that it would include any person engaged in any activity, relating to production, storage, supply, distribution, acquisition

---

<sup>57</sup>Intex Techs. (India) Ltd v Telefonaktiebolaget LM Ericsson, MANU/DE/0762/2016.

<sup>58</sup>*Id.*

<sup>59</sup>Broadcom v. Qualcomm, MANU/FETC/1913/2007.

<sup>60</sup>§ 19(1), Competition Act, 2002.

<sup>61</sup>§ 2(h), Competition Act, 2002

or control of articles or goods.<sup>62</sup> All kinds of property (other than actionable claims, money and immovable property) would fall within the definition of 'goods'.<sup>63</sup> "Property" also includes rights such as trademarks, copyrights, patents<sup>64</sup>. Intellectual property rights also fell within the expression 'goods' under the Sales of Goods Act.<sup>65</sup> Therefore Guo Inc. would fall within the definition of 'enterprise' under Section 2(h) of the Competition Act.

C. In the instant case, Guo Inc. is a firm which is engaged in a activity related to Standard Essential Patents. Therefore, it is submitted that Guo Inc. is an enterprise and thus there as exist a prima Facie case to Enquire the matter under section 19(1) and order DG for Investigation under section 26(1) of the Act. The allegations made in the information concerning royalty rates make it clear that the practices adopted by Guo Inc. appear to be discriminatory as well as contrary to FRAND terms. "It is observed that forcing a party to execute NDA and imposing excessive and unfair royalty rates, prima facie, amount to abuse of dominance in violation of section 4."<sup>66</sup> Wherein the Commission was of the prima facie<sup>67</sup> view that the conduct of company amounts to violation of the provisions of section 4 and had directed the Director General ('DG') to conduct an investigation."<sup>68</sup>

#### **4.3 GUO INC. HAS ABUSED ITS DOMINANT POSITION IN THE MARKET.**

A. Dominant position is defined as a position of strength<sup>69</sup> enjoyed by an enterprise that enables it to operate independently of competitive forces in the relevant market.<sup>70</sup> According to the test laid down in *United Brands*<sup>71</sup> and *Hoffman*<sup>72</sup>, a Firm would be able to behave independently of competitive forces, if it has acquired a position of economic strength.<sup>73</sup> However, CCI stated that independence in the context of dominance does not mean absence of any other player in a

---

<sup>62</sup> § 2(h), Competition Act, 2002.

<sup>63</sup> ERICSSON, *Supra Note* 38.

<sup>64</sup> Rustom Cavasjee Cooper v. Union of India, MANU/SC/0011/1970.

<sup>65</sup> Tata Consultancy Services v. State of AP, MANU/SC/0950/2004.

<sup>66</sup> IBALL, *Supra Note* 51.

<sup>67</sup> Intex Technologies (India) Ltd. v. Telefonaktiebolaget LM Ericsson (Publ), [2014] 43 taxmann.com 138/125 SCL 70 (CCI).

<sup>68</sup> Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson (Publ.) [2014] 43 taxmann.com 114/125 SCL 73 (CCI).

<sup>69</sup> In Re, three D Integrated Solutions v. Verifone India Sales Pvt. Ltd., MANU/CO/0026/2015.

<sup>70</sup> Explanation 2, § 4(2) r/w § 19(4), Competition Act, 2002.

<sup>71</sup> United Brands Co. v. Commission, (1978) 1 ECR 207, Para 65 (ECJ).

<sup>72</sup> Hoffmann-La Roche & Co. AG v. EC Commission, (1979) ECR 461, Para 4 (ECJ).

<sup>73</sup> HOFFMANN, *Supra Note* 17.

relevant market.<sup>74</sup>The ascertainment of the relevant market is essential for analyzing a case of abuse of dominance<sup>75</sup>. The dominant position of an enterprise or a group has to be established in the identified relevant market<sup>76</sup>. When determining what constitutes the relevant market, due regard must be given to both the *relevant product* as well as *geographic market*<sup>77</sup>.

**B.** It is submitted that Guo Inc. holds substantial power in the relevant market. Relevant Market here is License of Patent and the Relevant Product here is Standard Essential Patent. Guo Inc. has shared the Information that they have 20,000<sup>78</sup> Standard Essential Patents on Global Standard. Guo Inc. is exercising its Dominant position by having such a large share of Global standard Patents<sup>79</sup> and since enjoying complete dominance over prospective licensees.

**C.** There have been many instances when the court or the CCI has entertained such matters where an enterprise has exercised its dominance by imposing such conditions on the other party and the court held that such conditions lead to dominance of an enterprise. All those products and services which are regarded as interchangeable or substitutable by the consumer form part of the same relevant product market.<sup>80</sup>The Relevant geographic market should also be taken into consideration to identify the relevant market.<sup>81</sup> The Size, resources and economic power of the opposite party were also analysed and the opposite party was found in dominant position.<sup>82</sup>For the purposes of examining the allegations of the Informants under the provisions of Section 4 of the Act, it is necessary to determine the relevant market at the first instance. Thereafter, it is required to assess whether the Opposite Party enjoys a position of strength required to operate independently of the market forces in the relevant market. Only when such a position is enjoyed by the Opposite Party, it will be imperative to examine whether the impugned conduct amounts to an abuse.<sup>83</sup> CCI held in a case that opposite party is in dominant player on account of its market share, market power and its ability to operate independently of the competitive forces in

---

<sup>74</sup> Kapoor Glass Pvt. Ltd. v. Schott Glass India Pvt. Ltd., MANU/CO/0034/2012.

<sup>75</sup>Prints India v. Springer India Pvt. Ltd., Case 16/2010, ¶ 9 (CCI).

<sup>76</sup>Explanation 2, § 4(2), Competition Act, 2002.

<sup>77</sup>§ 19(5), Competition Act, 2002.

<sup>78</sup> Moot Proposition, Page 3.

<sup>79</sup> INTEX, *Supra Note* 67.

<sup>80</sup>§ 2(t), Competition Act, 2002.

<sup>81</sup>§ 2(s), competition Act, 2002.

<sup>82</sup>THREE. *Supra Note* 69.

<sup>83</sup>Rico Auto Industries Ltd. v. GAIL (India) Ltd., MANU/CO/0066/2016.

the market as well as to affect the competitors, consumers and relevant market in its favour<sup>84</sup>. However, CCI stated that Independence in the context of Dominance does not mean absence of any other player in a relevant market.<sup>85</sup> But that the enterprise whose dominance is being ascertained has market power and is in a position to influence competitive forces to its own advantage and to the detriment of others.

**D.** In the Instant case Guo Inc. is also a dominant player as he has the largest portfolio of SEPs and he is exercising its powers to keep relevant market in its favour by imposing some conditions which are not fair. It is submitted that in the instant matter there not only exist a dominant position by Guo Inc. but there is abuse of such dominance position by the Guo Inc.

**E.** The imposition of onerous conditions<sup>86</sup> in an agreement against the business interest of the informant is proof of significant market. Such behaviour was treated as an abusive behaviour.<sup>87</sup> The court in this case held that the existence of an agreement is not a defence against a case of abuse of dominant position. It is submitted that, the Commission notes that pricing abuses may come under the purview of competition law as abuse of dominance. Here Pricing abuses may be 'exclusionary' i.e. pricing strategies adopted by dominant firms to foreclose competitors. Pricing abuses may also be 'exploitative' i.e. which cover instances where a dominant firm is accused of exploiting its customers by setting excessive prices<sup>88</sup> and the commission notes that the prohibitions or the abusive conduct including both 'exclusionary' and 'exploitative' practices set out in section 4(2) (a), (b), (c), (d) and (e) of the Act include the imposition of 'unfair' or 'discriminatory' condition in purchase or sale of goods or service.

**F.** When an enterprise is in a dominant position in the relevant market and it impose restrictive clause in the agreement and by refusing access to developing tools on reasonable terms and conditions. It is observed that the clause relating to restrictions in licensing agreement appears to be unfair and violated section 4 of the Act.<sup>89</sup> In view of the fact that in case of SEPs, there is no possibility of using a non-infringing technology, CCI formed a prima facie view that Ericsson

---

<sup>84</sup>Kansan News v. Fast Way Transmission., MANU/CO/0063/2012.

<sup>85</sup>KAPOOR, *Supra Note 74*.

<sup>86</sup>Arshiya Rail Infrastructure Ltd. (ARIL) v. Ministry of Railways (MOR) & anr. 2012CompLR937(CCI).

<sup>87</sup>Hoffmann La Roche & Co. AG vs. Commission of European Communities [1979] ECR 461.

<sup>88</sup>HT Media Ltd. v. Super Cassettes Industries Ltd., MANU/CO/0080/2014.

<sup>89</sup>THREE, *Supra Note 69*.



enjoyed complete dominance over its present and prospective licensees in the relevant product market.<sup>90</sup> The Commission observes that forcing a party to execute NDA and imposing excessive and unfair royalty rates, prima facie, amount to abuse of dominance in violation of section 4 of the Act.<sup>91</sup> It is submitted that when unfair Royalty rate demanded by one party, they cannot be grant exclusionary remedies since it is in violation of FRAND obligation.<sup>92</sup>

**G.** In the instant case the opposite party is in dominant position as they have imposed some unreasonable conditions i.e. to provide license for patents only for global portfolio, forcing them to sign confidentiality agreement first and then claiming the royalty rates on the price of the end product not on the component of the product.

**5. THAT THE CLAIM OF INTERIM INJUNCTION AGAINST BASILTRI SHOULD NOT BE GRANTED BY THIS HON'BLE COURT.**

*It is most humbly submitted before the Hon'ble court that the interim injunction shall not be granted as there is a general consensus that injunction as a remedy in patent law may not accrue in favour of the patentee in the context of SEPs infringement<sup>93</sup> and there is a prima facie case for validity of the patented product of Guo Inc. & the pillars of injunction lies in favor of Basiltri<sup>94</sup>.*

**A.** The issue of grant of an interlocutory injunction during the pendency of legal proceedings is contingent upon the exercise of the discretion of the Court. While exercising the said discretion, the Court has to apply the following tests: (1) Whether the plaintiff has a prima facie case. (2) The balance of convenience is in favour of which party; and (3) Whether the plaintiff would suffer an irreparable injury<sup>95</sup>.

**B.** In the instant matter, an objection has been raised by the Basiltri that the patent is not a valid patent under the Patent Act, 1970. It is alleged by the defendant that the plaintiff had failed to establish the first limb since apart from its self-serving declarations of essentiality; neither any Court has verified or upheld this claim capturing the decision of the Court of Rome denying

<sup>90</sup>ERICSSON, *Supra Note* 38.

<sup>91</sup> IBALL, *Supra Note* 51.

<sup>92</sup>Telefonaktiebolaget Lm Ericsson (Publ) v. Intex Technologies (India) Ltd., MANU/DE/0774/2015.

<sup>93</sup> Yogesh Pai, *The Rational Basis for FRANDly Courts Denying Injunctive Relief for SEPs Infringement*, 19, Journal of IPR, 146, 146-156.

<sup>94</sup>Franz Xaver Huemer v. New Yash Engineers., AIR 1997 Delhi 79.

<sup>95</sup>Wockhardt Ltd. v. Hetero Drugs Ltd. & Ors. MANU/TN/2148/2005.

interim injunction to the Plaintiff on the basis that "essentiality", being a complex analysis, cannot be determined at the interim stage<sup>96</sup>. Moreover, the objections raised by the defendant are clear that a serious controversy exists as to whether the invention claimed by the plaintiff can be patented or not. The invention involves any new inventive skill having regard to what was known or used prior to the date of the patent, courts will not grant an interim injunction restraining the defendant from pursuing his normal business activity<sup>97</sup>. As the defendant is certainly not a new entrant in the field but he has himself been a dealer, manufacturer and seller of ploughs of various patterns & a *credible challenge* has been raised by the defendant<sup>98</sup>.

**C.** Since, in the present case the plaintiff has failed to establish prima facie validity & essentiality of its patents. & since the defendant is not new entrant in this field & had established a *credible challenge*. Thus, onus of proving its prima facie case vests upon the plaintiff. Till the revocation petition is pending an interim injunction would not be granted if the defendant disputes the validity of the grant<sup>99</sup>.

**D.** Harm is irreparable when it cannot be remedied except through injunctive relief<sup>100</sup>. In the present case if Basiltri could not prove the invalidity of the Guo's patent then the maximum harm by using Guo's product would be in monetary terms as economic damages are not traditionally considered irreparable because the injury can later be remedied by a damage award. As the Supreme Court explained, the temporary loss of income, ultimately can be recovered, & does not usually constitute irreparable injury<sup>101</sup>. Also, business of the defendant and to the consuming public which is dependent on the affordable product made available by the defendant. Given that the Defendant is not a fly-by-night operator and has made significant investments in its business and has a reputation worth protecting among its consumers, grant of an interim injunction would bring the entire business of the Defendant to a standstill. Further, the Defendant deals in affordable mobile phones which cater to low and mid-segment. In view of these facts, a grant of an interim injunction would result in irreparable harm to the Defendant's business and severely

---

<sup>96</sup> Chemtura Corporation v. Union of India, MANU/DE/1880/2009

<sup>97</sup> V. Manioka Thevar v. Star Plough Works, Melur, MANU/TN/0222/1965.

<sup>98</sup> Boots Pure Drug & Co., (India) Ltd. v. May & Baker Ltd., MANU/WB/0212/1947.

<sup>99</sup> CHEMTURA, *Supra Note 96*.

<sup>100</sup> Mem'l Coliseum Comm'n v. Nat'l Football League, MANU/FENT/0190/1980.

<sup>101</sup> Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197

undermine its reputation in the market<sup>102</sup>. Hence, the irreparable injury lies towards the Basiltri as the loss suffered to the Guo Inc. will be based on monetary & can be recovered afterwards.

**E.** When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest. In addition injunctive relief may have different consequences for the burgeoning number of patents over business methods, as it will amount to threat to the licensees which are not of much economic and does not have legal significance<sup>103</sup>. Hence, the balance of convenience lies towards the defendant as the harm caused to the defendant is greater & much of a public interest.

**F.** For the reasons stated above, the prerequisites of granting an interim injunction stands dissatisfied and therefore the same shall not be granted in favour of Guo Inc. by this hon'ble court.

---

<sup>102</sup>Sampson v. Murray, MANU/USSC/0201/1974.

<sup>103</sup>eBay Inc. v. MercExchange , MANU/USSC/0043/2006.

**PRAYER**

---

In light of the issues raised, arguments advanced, facts proved and matters proposed, Basiltri most humbly prays before this court to grant:

1. Cost, Expenses incurred by the Defendant during the suit.
2. That Interim Injunction should not be granted.
3. Guo Inc. has violated section 4 of the competition Act with respect to the Abuse of Dominant Position.
4. To quash proceedings filed by Guo Inc. in the High Court of Mudhiras.

*Any other order that this court shall deem fit in the interest of justice, equity and good conscience.*

All of which is most respectfully submitted.

Date: 30 November, 2017

Sd/-

Place: Mudhiras

The Counsel for Basiltri