

Surana & Surana and Shaastra IIT Madras Intellectual Property Law Moot Court Competition, 2018

---

---

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

---

---

**ORIGINAL CIVIL JURISDICTION**

**I.A. No. 123 of 2017,**

**In CS (Comm) 199a of 2017**

---

**GUO INC. .... Applicant**

**v.**

**BASILTRI TELECOM PVT. LTD. ....Respondent**

---

---

**UPON SUBMISSION TO THE HON'BLE CHIEF JUSTICE AND HIS COMPANION  
JUSTICES IN THE MUDHIRAS HIGH COURT**

---

**MEMORIAL ON BEHALF OF THE RESPONDENT**

---

**TABLE OF CONTENTS**

**LIST OF ABBREVIATIONS ..... 2**

**INDEX OF AUTHORITIES..... 6**

**1. CASES REFERRED ..... 6**

**2. BOOKS REFERRED..... 9**

**3. POLICY..... 11**

**4. JOURNALS & REPORTS ..... 11**

**5. LEGISLATIONS..... 12**

**6. ONLINE SOURCES ..... 13**

**STATEMENT OF JURISDICTION..... 14**

**STATEMENT OF FACTS..... 15**

**STATEMENT OF ISSUES ..... 16**

**1. Whether Guo is entitled to seek an injunction against the alleged patents?..... 16**

**2. Whether the impugned patents among the Indian patents are liable to be revoked? 16**

**3. Whether Basiltri, a willing licensee, is reasonably exercising its rights to secure FRAND terms as well as to verify essentiality of patents?? ..... 16**

**SUMMARY OF PLEADINGS ..... 17**

**1. Guo is not entitled to seek an injunction against the alleged patents. .... 17**

**2. The impugned patents among the Indian patents are liable to be revoked. .... 17**

**3. Basiltri, a willing licensee, reasonably exercising its rights to secure FRAND terms as well as to verify essentiality of patents..... 17**

**PLEADINGS ..... 18**

**1. Guo is not entitled to seek an injunction against the alleged patents. .... 18**

**2. The impugned patents among the Indian patents are liable to be revoked. .... 22**

**3. Basiltri, a willing licensee, reasonably exercising its rights to secure FRAND terms as well as to verify essentiality of patents..... 24**

**PRAYER..... 27**

<b>LIST OF ABBREVIATIONS</b>
------------------------------

ABBREVIATION	EXPANSIONS
&	AND
§	SECTION
¶	PARAGRAPH
A.C.	APPEALS CHAMBER
AIPLA	AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION
AIR	ALL INDIA REPORTS
All ER	ALL ENGLAND REPORT
Anr.	ANOTHER
Art.	ARTICLE
BGH	BUNDESGERICHTSHOF
BLR	BUSINESS LAW REPORT
C.C.P.A.	UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS
C.D. Cal.	CENTRAL DISTRICT CALIFORNIA
CCI	COMPETITION COMMISSION OF INDIA
Ch.	CHAPTER
Cir.	CIRCUIT
Co.	COMPANY
COMM. & ENT. L.J.	COMMUNICATIONS AND ENTERTAINMENT LAW JOURNAL

Corp.	CORPORATION
DB	DIVISION
Del.	DELHI
DELNP	DELHI NUMBER PATENT
DIPP	DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION
DRJ	DELHI REPORTED JUDGMENTS
E.C.R	EUROPEAN COURT REPORTS
EBC	EASTERN BOOKS COMPANY
ed.	EDITION
e.g.	EXAMPLE
EPO	EUROPEAN PATENT OFFICE
EPOR	EUROPEAN PATENT OFFICE REPORT
ETSI	EUROPEAN TELECOMMUNICATIONS STANDARDS INSTITUTE
EU	EUROPEAN UNION
F. Supp.	FEDERAL SUPPLEMENT
FCA	FEDERAL COURT OF AUSTRALIA
Fed. Cir.	FEDERAL CIRCUIT
FRAND	FAIR, REASONABLE AND NON DISCRIMINATORY
Gen.	GENERAL
HC	HIGH COURT
IITM	INDIAN INSTITUTE OF TECHNOLOGY, MADRAS
Inc.	INCORPORATED

Inc.	INCORPORATION
Int'l	INTERNATIONAL
IPAB	INTELLECTUAL PROPERTY APPELLATE BOARD
IPR	INTELLECTUAL PROPERTY RIGHTS
J. PAT. & TRADEMARK OFF. SoC'Y	JOURNAL OF PATENT AND TRADEMARK OFFICE
JIPR	JOURNAL OF INTELLECTUAL PROPERTY RIGHTS
L. Rev.	LAW REVIEW
Ld.	LEARNED
LLC	LIMITED LIABILITY COMPANY
Ltd	LIMITED
Mfg.	MANUFACTURING
MIPR	MANUPATRA INTELLECTUAL PROPERTY REPORT
N.D. Cal.	NORTHERN DISTRICT OF CALIFORNIA
N.D. Ill.	NORTHERN DISTRICT OF ILLINOIS
Nat'l L	NATIONAL
NDA	NON-DISCLOSURE AGREEMENT
NLSIR	NATIONAL LAW SCHOOL OF INDIA REVIEW
No.	NUMBER
O.	ORDER
Ors.	OTHERS
p.	PAGE NO
PTC	PATENT & TRADE MARKS CASES

Pte	PRIVATE
PTY	PROPRIETARY LIMITED
PUBL.	PUBLIC LIMITED
Pvt.	PRIVATE
Q.B.	QUEEN'S BENCH
R.	RULE
Rep.	REPUBLIC
Rev.	REVIEW
RPC	REPORTS OF PATENT CASES
SC	SUPREME COURT
SCC	SUPREME COURT CASES
Sch.	SCHOOL
SCL	SEBI AND CORPORATE LAWS
SEP	STANDARD ESSENTIAL PATENT
U. Ill. J.L. Tech. & Pol'y	UNIVERSITY OF ILLINOIS JOURNAL OF LAW, TECHNOLOGY & POLICY
U.S.	UNITED STATES
U.S.P.Q.	UNITED STATES PATENTS QUARTERLY
v.	VERSUS
Vol.	VOLUME
W.L.R.	WEEKLY LAW REPORTS

<b>INDEX OF AUTHORITIES</b>
-----------------------------

**1. CASES REFERRED****INDIAN CASES****SUPREME COURT CASES**

<b>SL. NO.</b>	<b>NAME OF THE CASE</b>	<b>CITATION</b>	<b>PG. No.</b>
1.	Dalpat Kumar v. Prahlad Singh	(1992) 1 SCC 719	20
2.	Empire Industries Ltd. V. Union of India	(1985) 3 SCC 314	21
3.	Spice Mobiles Ltd. v. Shri Somasundaram Ramkumar & Controller of Patents	2012 SCC OnLine IPAB 100.	22
4.	Wander Ltd. And another v. Antox India Pvt. Ltd.	1991 (11) PTC 1 (SC)	20

**HIGH COURTS CASES**

<b>SL. NO.</b>	<b>NAME OF THE CASE</b>	<b>CITATION</b>	<b>PG. No.</b>
1.	Ajay Industrial Corporation v. Shiro Kanao of Ibaraki City. In Medline A.G's Patent	(1973) R.P .C 91	22
2.	Enercon Indian ltd v. Alloys Wobben Aurich.	AIR 1983 Del 496	22
3.	Pepsi Co. Inc. and Anr. v. Hindustan Coca Cola and Ors.	(2001) 94 DLT 30	20
4.	Pepsi Foods v. Jai Drinks (P) Ltd.	(1996) 36 DRJ 711	20

5.	S.C. Shukla and Ors. v. Delhi Development Authority and Anr.	(1998) 73 DLT	20
6.	Telefonaktiebolaget LM Ericsson v. Competition Commission of India and Anr.	(2016) 232 DLT (CN) 1	25
7.	Telefonaktiebolaget Lm Ericsson v. Intex Technologies (India)	2015 (62) PTC 90 (Del)	24

### FOREIGN CASES

#### U.S. CASES

SL. No.	NAME OF THE CASE	CITATION	PG. No.
1.	Apple v. Samsung	888 F. Supp. 2d 976,982 (N.D. Cal. 2012)	20
2.	Apple, Inc. v. Motorola, Inc.	869 F. Supp. 2d 901, 913-15 (N.D. Ill. 2012)	18
3.	Ebay Inc. v. MercExchange	L.L.C., 547 U.S. 388, 393 (2006)	18
4.	Fantasy Sports Props. Inc. V Sportslines. Com	Inc. 287 F.3d 1108	22
5.	In Re Innovatio IP Ventures LLC Patent Litigation	921 F.Supp.2d 903 (2013)	24
6.	Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.	518 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007)	20
7.	Microsoft Corp. v. Motorola, Inc., Motorola Mobility, Inc., and Gen. Instrument Corp.	696 F.3d 872 (Fed. Cir. 2012)	18



8.	Realtek Semiconductor Corp v. LSI Corp.	13-16070 (9th Cir. Mar. 20, 2014)	21
9.	Special Equipment Co. v. Coe	(1945) 324 US 370	21

### EUROPEAN UNION CASES

SL. NO.	NAME OF THE CASE	CITATION	PG. No.
1.	American Cyanamid Co v. Ethicon Ltd.	(1975) A.C. 396	20, 24
2.	Frazer V Evans	(1969) 1 All ER 8	19
3.	Hubbard and Another v. Vosper and Another	(1972) 1 All ER 1023 at 1029	19
4.	Orange-Book-Standard	KZR 39/06 May 6, 2009 [BGH]	21
5.	Rene Clavel's Patent	(1928) 45 RPC 222	22
6.	Unwired Planet International Ltd. v. Huawei Technologies Co Ltd.	[2017] EWHC 711 (Pat)	20, 24
7.	Vringo Infrastructure Inc. v. ZTE:	(2013) EWHC 1591	19

### TRIBUNAL CASES

SL. NO.	NAME OF THE CASE	CITATION	PG. No.
1.	Best IT World (India) Private Limited v. Telefonaktiebolaget L M Ericsson (Publ) and Anr.	[2015] 131 SCL 392 (CCI)	24, 25

2.	Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson	[2013] CCI 77	25
3.	Microsoft decision, Controller of the Indian Patent Office	5763/DELNP/2005	23
4.	Yahoo application, Controller, Indian Patent Office	1833/CHE/2007	23

## 2. BOOKS REFERRED

SL. No.	DETAILS
1.	BRIAN C REID, A PRACTICAL GUIDE TO PATENT LAW (2nd ed. 2010)
2.	BRYAN A. GARNER, BLACK'S LAW DICTIONARY, (9 <sup>th</sup> ed. West Publication 2009)
3.	C.K. TAKWANI, CIVIL PROCEDURE (7 <sup>th</sup> ed., EBC 2014)
4.	CRAIG ALLEN NARD, ASPEN CASE BOOK SERIES, THE LAW OF PATENTS (2 <sup>nd</sup> ed., Wolters Kluwer 2011)
5.	D.P. MITTAL, COMPETITION LAW AND PRACTICE (3 <sup>rd</sup> ed. 2011)
6.	DANIEL CLOSA, Alex Gardiner, Falk Giemsa & Jorg Machek, PATENT LAW FOR COMPUTER SCIENTISTS (Springer 2010)
7.	DANIEL GERVAIS, THE TRIPS AGREEMENT, DRAFTING HISTORY AND ANALYSIS (3 <sup>RD</sup> ed. Sweet & Maxwell 2011)
8.	ELIZABETH VERKEY, LAW OF PATENTS (1 <sup>st</sup> ed., EBC 2005)
9.	GREGORY A. STOBBS, SOFTWARE PATENTS (2 <sup>nd</sup> ed., Wolters Kluwer Aspen Publishers 2007)

10.	HALSBURY'S LAWS OF ENGLAND VOL 18( 5 <sup>th</sup> ed. LexisNexis 2009)
11.	HALSBURY'S LAWS OF ENGLAND VOL 79 (5 <sup>th</sup> ed. LexisNexis 2008)
12.	HALSBURY'S LAWS OF INDIA, INTELLECTUAL PROPERTY-II vol. 20(2) (5 <sup>th</sup> ed. LexisNexis Butterworths 2006)
13.	KALYAN C. KANKANALA, ARUN K. NARASANI & VINITA RADHAKRISHNAN, INDIAN PATENT LAW AND PRACTICE (Oxford Publication 2010)
14.	M.B.RAO & MANJULA GURU, PATENT LAW IN INDIA (Wolters Kluwer 2010)
15.	MERGES, MENELL & LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE (5 <sup>TH</sup> ed., Aspen Publisher 2011)
16.	MICHAEL A. EPSTEIN , EPSTEIN ON INTELLECTUAL PROPERTY (5 <sup>th</sup> ed., Wolters Kluwer 2008)
17.	MICHAEL J. LENNON, DRAFTING TECHNOLOGY PATENT LICENSE AGREEMENTS, (2 <sup>nd</sup> ed. Aspen Publishers 2010)
18.	P.NARAYAN, PATENT LAW (4 <sup>th</sup> ed., Eastern Law House 2010)
19.	RAMAN MITTAL, LICENSING INTELLECTUAL PROPERTY, (1 <sup>st</sup> ed., Satyam Law International 2011)
20.	ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS (5 <sup>th</sup> ed. 2011)
21.	SN DUGAR, GUIDE TO COMPETITION LAW, VOL. 1 (5 <sup>TH</sup> ed. 2010)
22.	T. RAMAPPA, COMPETITION LAW IN INDIA, (3 <sup>rd</sup> ed., Oxford Publication 2014)
23.	VJ TARAPOREVALA, LAW OF INTELLECTUAL PROPERTY (2 <sup>nd</sup> ed. Thomson Reuters 2013)
24.	VK AHUJA, INTELLECTUAL PROPERTY RIGHTS IN INDIA, VOL.I, (LexisNexis Butterworths Wadhwa 2012)

### 3. POLICY

SL. NO.	DETAILS
1.	ETSI INTELLECTUAL PROPERTY RIGHTS POLICY, RULES OF PROCEDURE, at 6.1 (2017)

### 4. JOURNALS & REPORTS

SL. NO.	DETAILS
1.	Carl Shapiro, <i>Injunctions, Hold-Up, and Patent Royalties</i> , 12 AM. L. & EcON. REV. 280(2010)
2.	Daryl Lim, <i>Patent Misuse And Antitrust: Rebirth Or False Dawn?</i> 20 Mich. Telecomm. & Tech. L. Rev. (2014)
3.	Mark Kochuk, <i>In the Matter of Certain Electronic Devices: Apple, Samsung, Patent Holdup, and the Public Interest</i> , 40 N.C.J. Int'l L. & Com. Reg. (2015)
4.	Mark Lemley & Carl Shapiro, <i>Patent Holdup and Royalty Stacking</i> , 85 TEx. L. REV. 2163, 2172-73 (2007)
5.	Thomas F. Cotter, <i>Comparative Law and Economics of Standard-Essential Patents and FRAND Royalties</i> , 22 Tex. Intell. Prop. L.J. 311, 364 (2014)
6.	Alison Jones, WC2R 2LS (2014).; Committee in Intellectual Property Management in Standard-Setting Processes, National Research Council, <i>Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and Communication Technology</i> (2013)

7.	J Kanter, <i>What Difference a Year Makes: An Emerging Consensus on the Treatment of Standard-Essential Patents</i> 1 CPI Antitrust Chronicle 1, 3 (2013)
8.	R Knox, <i>Hesse Suggests Antitrust Could be Useful in Addressing Patent Abuses</i> , GCR (2013)
9.	Guidelines for Invention of Computer Related Programs, Office of the Controller General Of Patents, Design and Trademarks, (2017)

### 5. LEGISLATIONS

SL. No.	NAME
1.	Code of Civil procedure, 1908
2.	Competition Act, 2002
3.	Patents Act, 1970
4.	Specific Relief Act, 1963
5.	U.S. Patents Act-35 US CS

**6. ONLINE SOURCES**

<b>SL. No.</b>	<b>NAME</b>
1.	Manupatra online resources, <a href="http://www.manupatra.com">http://www.manupatra.com</a>
2.	SCC online resources, <a href="http://www.scconline.com">http://www.scconline.com</a>
3.	Heinonline resources, <a href="http://www.heinonline.com">http://www.heinonline.com</a>
4.	Jstor online resources, <a href="http://www.jstor.com">http://www.jstor.com</a>
5.	Ssrn online resources, <a href="http://www.ssrn.com">http://www.ssrn.com</a>
6.	Supreme Court Judgements, <a href="http://www.judic.nic.in">http://www.judic.nic.in</a>
7.	Westlaw online resources, <a href="http://www.westlaw.com">http://www.westlaw.com</a>
8.	Lexis Nexis Academica, <a href="http://www.lexisnexis.com/academica">http://www.lexisnexis.com/academica</a>
9.	Lexis Nexis Legal, <a href="http://www.lexisnexis.com/in/legal">http://www.lexisnexis.com/in/legal</a>

**STATEMENT OF JURISDICTION**

The original civil jurisdiction of Mudhiras High Court is invoked and has been approached under Section 104 of the Patents Act, 1970. The Respondent submits to the jurisdiction of the Hon'ble Court. Interim injunction is being heard by the court under Section 94 read with Order 39 Rule 1 & Rule 2 of the Code of Civil Procedure, 1908.

<b>STATEMENT OF FACTS</b>
---------------------------

**August 29, 2016:** At the annual general meeting, Peter, head of patent licensing at Guo Inc. asked about the licensing negotiations with Basiltri to Deepika who was leading negotiations on behalf of Guo. Guo Inc., is the owner of a large portfolio of Standard Essential Patents, set by the Widget Standard Organization, which has over twenty thousand patents and applications that are essential to widget standards.

**January 28, 2017:** After repeated attempts, a productive meeting was finally held on January 28, 2017 at Basiltri's office in Noida. The sample list of the SEPs were shared by Guo and the need to sign a confidentiality agreement for 15 years, for demonstration of essentiality and Validity of the patents were discussed. Guo offered to disclose the royalty rates only after the signing of a confidentiality agreement.

However, Basiltri through mail stated that after consulting their lawyers they decided to negotiate on some new terms. They will be discussing license only for Indian patents and to demonstrate the validity and essentiality of all the Indian Patents. There is no need to sign a confidentiality agreement for the royalty rates are known publicly.

**July 23, 2017:** In the internal memo of Guo Inc., it is stated that Basiltri wants to reduce the duration of the confidentiality agreement from 15 years to 6 months. The royalty base was broadly discussed with Basiltri. Basiltri had finally agreed to meet on August 20, 2017. Peter was also given the enclosed letter that Gopal had sent to the manufacturers all over India.

**August 18, 2017:** Gopal is informed by his lawyer that they have filed the application before the CCI against Guo Inc. for seeking investigation for abuse of its dominant position. It had also filed revocation petition before the IPAB against Guo's 10 Indian software patents. The respective notices has been served on Guo.

**August 25, 2017:** The suit for infringement, CS (Comm) 199a of 2017, has been filed by Guo against Basiltri before the Mudhiras High Court. Currently, the application, 123 of 2017, in CS (Comm) 199a of 2017, on Guo's behalf seeking interim injunction is listed before the judge for arguments. Parties have completed pleadings in this application.



**STATEMENT OF ISSUES**

1. **Whether Guo is entitled to seek an injunction against the alleged patents?**
  - 1.1. Guo has forsaken its rights to seek injunction.
  - 1.2. There is no Prima facie infringement.
  - 1.3. Guo Does not suffer any irreparable harm.
  - 1.4. The Balance of convenience is in favour of Basiltri.
  
2. **Whether the impugned patents among the Indian patents are liable to be revoked?**
  - 2.1. The patents are not inventions within the scope of Section 3 of Patents Act, 1970.
  
3. **Whether Basiltri, a willing licensee, is reasonably exercising its rights to secure FRAND terms as well as to verify essentiality of patents??**
  - 3.1. Guo has abused its dominant position violating S. 4(1) of Competition Act, 2002.
    - 3.1.1. *Guo is charging unreasonable rates by claiming royalties based on the price of the end products.*
    - 3.1.2. *Guo is forcing its global portfolio for licensing.*
    - 3.1.3. *Guo is forcing Basiltri to sign an unreasonable confidentiality agreement.*

<b>SUMMARY OF PLEADINGS</b>
-----------------------------

1. **Guo is not entitled to seek an injunction against the alleged patents.**

Guo is the owner of Standard essential patents, and they cannot revoke the license of SEPs on any grounds. The mere use of the patents, without exploring the other possibilities, cannot be told to be infringing the patents in the instant case. There is no irreparable harm caused to Guo as there are availability of other remedies to the plaintiff and the there is no grave inconvenience caused to Guo as comparison to Basiltri.

2. **The impugned patents among the Indian patents are liable to be revoked.**

The Standard essential patents are software patents and are beyond the scope of patentability. Widgets are software abstraction which are not patented under the Indian patent law and the mere combination of a hardware with it won't make it patentable, unless the hardware is novel. The ingenuity of the standard essential patents in the instant case raises a question on its essentiality and therefore the weight of the defence of the defendant for interim injunction is also scaled up.

3. **Basiltri, a willing licensee, reasonably exercising its rights to secure FRAND terms as well as to verify essentiality of patents.**

Basiltri is a willing licensee and has rightfully approached the respective forums for the wrong actions of the plaintiff. Guo has not conformed to FRAND terms and has abused its dominant position in making the offer of licensing agreement. There is an obligation on Guo to license it, but Basiltri equally has the right to secure its interest by verifying that the patents are essential and that there licensed to it on FRAND terms. However, it is conclusive that Guo has put forward unreasonable terms in the licensing agreement.

<b>PLEADINGS</b>
------------------

**1. Guo is not entitled to seek an injunction against the alleged patents.**

**1.1. Guo has forsaken its rights to seek injunction.**

It is humbly submitted that, in the instant case Guo being an SEP owner, is obligated to irrevocably license its SEPs and being the nature of the patents, Guo cannot claim for injunction. The Widget Standard Setting Organization IPR policy states that when an essential IPR pertaining to a standard is established, the SEP owner has to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable license.<sup>1</sup> The fact that it has to grant irrevocable license makes it clear that as every player in the market has to use the said patents for manufacturing standard complaint products, they cannot revoke the license on any grounds. However, the intent behind the said clause is to allow everyone to use the said SEPs and not to obstruct their use.

Judge Robart in the *Microsoft case*<sup>2</sup> held that Motorola would not have been entitled to a permanent injunction against Microsoft's alleged infringement of Motorola's FRAND-encumbered SEPs, because the FRAND commitment demonstrates the existence of an adequate remedy at law and the absence of irreparable harm if an injunction is not entered.<sup>3</sup> The factors of interim injunction also arguably weigh against the entry of injunctive relief in the typical case involving FRAND-encumbered SEPs, given that the defendant typically needs access to SEPs in order to market its products, and that injunctive relief therefore creates a substantial risk of patent holdup.<sup>4</sup> Therefore, it is humbly submitted that granting of injunction obstruct the market players to use the SEPs and is against the intention of the policy makers and will cause disparity in the market.

---

<sup>1</sup> ETSI INTELLECTUAL PROPERTY RIGHTS POLICY, RULES OF PROCEDURE, at 6.1 (2017).

<sup>2</sup> *Microsoft Corp. v. Motorola, Inc., Motorola Mobility, Inc., and Gen. Instrument Corp.* 696 F.3d 872 (Fed. Cir. 2012); *See also, Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913-15 (N.D. Ill. 2012). *See also, eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006).

<sup>3</sup> *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913-15. (N.D. Ill. 2012).

<sup>4</sup> Thomas F. Cotter, *Comparative Law and Economics of Standard-Essential Patents and FRAND Royalties*, 22 *Tex. Intell. Prop. L.J.* 311, 364 (2014).

**1.2. There is no Prima facie infringement.**

It is humbly submitted that in the instant case, the mere use of the patent does not amount to infringement. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject to strict rules.<sup>5</sup> If substantial grounds for disputing the validity of the patents are shown to be present, the court may not grant an interlocutory injunction.<sup>6</sup> In considering whether to grant an interlocutory injunction, Lord Denning, M.R. observed that the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is to be done.<sup>7</sup> If a defence proved to be right, would be so great compared with the triviality of the damage to the plaintiff if he is refused the injunction, then an interlocutory injunction should be refused.<sup>8</sup>

Therefore, it is humbly submitted, there are several possibilities like parallel imports and the invalidity of patents. As the plaintiff is exporting its widget handsets to about fifteen countries<sup>9</sup>, there is a scope for the defendant to use it through parallel imports. The defendant is entitled to adopt a contingent position where there is no basis on which the court could compel the defendants to accept a licence without having a judicial determination of validity and infringement<sup>10</sup>.

**1.3. Guo Does not suffer any irreparable harm.**

It is humbly submitted that the plaintiff's claim is essentially one for money recovery, recovery of licence fees allegedly owed to it by the Defendant. Therefore, its claim is compensable by way of damages if it establishes its case at the trial<sup>11</sup>. Consequently, there is no irreparable harm caused to the Plaintiff which calls for an interim injunction, particularly when complex issues of technology and law are involved. An injunction<sup>12</sup>

---

<sup>5</sup> Frazer V Evans, (1969) 1 All ER 8.

<sup>6</sup> P.NARAYAN, PATENT LAW 595 (4<sup>th</sup> ed., Eastern Law House 2010).

<sup>7</sup> Hubbard and Another v. Vosper and Another, (1972) 1 All ER 1023 at 1029.

<sup>8</sup> Frazer V Evans, (1969) 1 All ER 8.

<sup>9</sup> Clarifications, Moot Proposition, Surana & Surana and Shastra IITM Intellectual Property Law Moot Court Competition, 2018, at 13.

<sup>10</sup> Vringo Infrastructure Inc. v. ZTE: (2013) EWHC 1591.

<sup>11</sup> Manohar Lal Chopra v. Seth Hiralal, AIR 1962 SC 527.

<sup>12</sup> Specific Relief Act, § 41, (1963).

should not be granted if there is an alternative efficacious remedy available<sup>13</sup>. Harm is irreparable when it cannot be remedied except through injunctive relief<sup>14</sup>. Economic damages are not traditionally considered irreparable because the injury can later be remedied by a damage award.<sup>15</sup> If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage<sup>16</sup>.

It is contended that grant of an injunction would in fact cause irreparable harm to the business of the defendant and to the consuming public which is dependent on the widget handset made available by the defendant. The grant of an interim injunction would bring the entire business of the Defendant to a standstill.<sup>17</sup> Since the injunction relates to future activity, no injunction should be warranted.<sup>18</sup> There is a consensus among competition authorities that injunctive relief in connection with a FRAND-encumbered SEP should be a remedy of last resort<sup>19</sup>. Where there is a commitment to license SEPs on FRAND terms and where a potential licensee has shown itself to be willing to negotiate a FRAND license for the SEPs, then recourse to injunctions harms competition<sup>20</sup>. Since injunctions generally involve a prohibition of the product infringing the patent being sold, such recourse risks excluding products from the market without justification and may distort licensing negotiations unduly in the SEP-holder's favour. Such misuse of SEPs could ultimately harm consumers<sup>21</sup>. The threat of an injunction can impose a large ongoing loss on a

---

<sup>13</sup> Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719; *See also*, Pepsi Foods v. Jai Drinks (P) Ltd. (1996) 36 DRJ 711; *See also*, S.C. Shukla and Ors. v. Delhi Development Authority and Anr. (1998) 73 DLT; *See also*, Pepsi Co. Inc. and Anr. v. Hindustan Coca Cola and Ors. (2001) 94 DLT 30.

<sup>14</sup> Microsoft Corp. v. Motorola, Inc., Motorola Mobility, Inc., and Gen. Instrument Corp. 696 F.3d 872 (Fed. Cir. 2012).

<sup>15</sup> Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007).

<sup>16</sup> American Cyanamid Co v. Ethicon Ltd. (1975) A.C. 396.

<sup>17</sup> Wander Ltd. And another v. Antox India Pvt. Ltd. 1991 (11) PTC 1 (SC).

<sup>18</sup> Unwired Planet International Ltd. v. Huawei Technologies Co Ltd. [2017] EWHC 711 (Pat).

<sup>19</sup> Alison Jones, WC2R 2LS (2014).; Committee in Intellectual Property Management in Standard-Setting Processes, National Research Council, Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and Communication Technology (2013).; *See also*, J Kanter, What Difference a Year Makes: An Emerging Consensus on the Treatment of Standard-Essential Patents 1 CPI Antitrust Chronicle 1, 3 (2013); *See also*, R Knox, Hesse Suggests Antitrust Could be Useful in Addressing Patent Abuses, GCR (2013).

<sup>20</sup> Apple v. Samsung, 888 F. Supp. 2d 976,982 (N.D. Cal. 2012); *See also*, Mark Kochuk, In the Matter of Certain Electronic Devices: Apple, Samsung, Patent Holdup, and the Public Interest, 40 N.C.J. Int'l L. & Com. Reg. (2015).

<sup>21</sup> Daryl Lim, Patent Misuse And Antitrust: Rebirth Or False Dawn? 20 Mich. Telecomm. & Tech. L. Rev. (2014).

prospective licensee who has made a specific investment, and that this will improve the bargaining position of the patent holder<sup>22</sup>.

#### 1.4. The Balance of convenience is in favour of Basiltri.

It is humbly submitted that the plaintiff can be adequately compensated by way of damages<sup>23</sup> if they succeed in the given suit, therefore balance of inconvenience is in the favour of Basiltri. The loss suffered by Basiltri would be irreversible if the injunction is granted. The alleged patents are Basiltri's only source of business. The hardship on the defendant can be devastating because it has to withdraw its produce from the market before trial<sup>24</sup>.

However, it is humbly submitted that Guo on the other hand has a worldwide market with a number of entities paying royalties for its patents. Guo is exporting to about 15 countries including India.<sup>25</sup> No irreparable harm would be caused to Guo's business if Basiltri does not license its patents. Basiltri would not sustain if injunction is placed on its widgets as it will eventually decline the demand of its widgets in future. Interim orders have no precedential value and an applicant cannot claim grant of interim relief on the ground that in similar matters interim relief has been granted by the court<sup>26</sup>. There is a violation of FRAND commitments which arise from the grant of such an order<sup>27</sup>. The prospective licensee can avoid an injunction by making a FRAND offer and complying with associated formalities<sup>28</sup>. Further, the serious threat posed by such orders to public Interest has to be taken into account<sup>29</sup>. Indian public would be deprived of the user interface they were acquainted for so long. Therefore, no interim injunction should be granted for the use of the said patents.

---

<sup>22</sup> Carl Shapiro, *Injunctions, Hold-Up, and Patent Royalties*, 12 AM. L. & ECON. REV. 280(2010).; *See also*, Mark Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 2163, 2172-73 (2007).

<sup>23</sup> The Patents Act, § 108, (1970).

<sup>24</sup> CRAIG ALLEN NARD, ASPEN CASE BOOK SERIES, THE LAW OF PATENTS 840 (2<sup>nd</sup> ed., Wolters Kluwer 2011).

<sup>25</sup> Clarifications, Moot Proposition, Surana & Surana and Shaastra IITM Intellectual Property Law Moot Court Competition, 2018, at 13.

<sup>26</sup> *Empire Industries Ltd. V. Union of India*, (1985) 3 SCC 314.

<sup>27</sup> *Realtek Semiconductor Corp v. LSI Corp* 13-16070 (9th Cir. Mar. 20, 2014).

<sup>28</sup> *Orange-Book-Standard*, KZR 39/06 May 6, 2009 [BGH].

<sup>29</sup> *Special Equipment Co. v. Coe* (1945) 324 US 370.

Injunctions against patent infringement would not serve the public interest in cases where 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<sup>30</sup>.

## **2. The impugned patents among the Indian patents are liable to be revoked.**

It is humbly submitted that Basiltri, being an interested person<sup>31</sup>, has rightfully filed the application for revocation of the ten standard essential patent before the IPAB. The patents being software patents<sup>32</sup> fall outside the scope of patentable subject matter and are not eligible for patent.

### **2.1. The patents are not inventions within the scope of Section 3 of Patents Act, 1970**

It is humbly submitted that the alleged patents are software patents and computer program *per se* is not a patentable subject matter as per section 3(k)<sup>33</sup>, and hence needs to be revoked. Software are series of instructions, known as source code and object code<sup>34</sup>, which directs a computer to perform specified functions or operations.<sup>35</sup>

Building a software is basically writing, testing and maintaining a computer program code to implement a solution.<sup>36</sup> It is humbly submitted that the impugned patents are software which are essential for making standard compliant widgets. Widgets are graphical user interface<sup>37</sup> which enables user interaction with electronic devices such as computers or

<sup>30</sup> Microsoft Corp. v. Motorola, Inc., Motorola Mobility, Inc., and Gen. Instrument Corp. 696 F.3d 872 (Fed. Cir. 2012).

<sup>31</sup> P.NARAYAN, PATENT LAW 187 (4<sup>th</sup> ed., Eastern Law House 2010).; *See also*, Enercon Indian ltd v. Alloys Wobben Aurich, AIR 1983 Del 496; *See also*, Ajay Industrial Corporation v. Shiro Kanao of Ibaraki city. In Medline A.G's Patent (1973) R.P .C 91.; *See also*, Rene Clavel's Patent (1928) 45 RPC 222.; Spice Mobiles Ltd. v. Shri Somasundaram Ramkumar & Controller of Patents, 2012 SCC OnLine IPAB 100.

<sup>32</sup> Problem statement, Surana & Surana and Shaastra IITM Intellectual Property Law Moot Court Competition, 2018, at p.6.

<sup>33</sup> The Patents Act, § 3(k), (1970).

<sup>34</sup> CRAIG ALLEN NARD, ASPEN CASE BOOK SERIES, THE LAW OF PATENTS 204 (2<sup>nd</sup> ed., Wolters Kluwer 2011).

<sup>35</sup> Fantasy Sports Props. Inc. V Sportslines. Com, Inc. 287 F.3d 1108

<sup>36</sup> GREGORY A. STOBBS, SOFTWARE PATENTS 54 (2<sup>nd</sup> ed., Wolters Kluwer Aspen Publishers 2007).

<sup>37</sup> Clarifications, Moot Proposition, Surana & Surana and Shaastra IITM Intellectual Property Law Moot Court Competition, 2018, at 1.

hand-held devices.<sup>38</sup> The underlying layer of a software interface is an abstraction.<sup>39</sup> It is well established that, while establishing patentability, the focus should be on the underlying substance of the invention and not the form in which it is claimed.<sup>40</sup> The refusal to grant patent to *Yahoo Application*<sup>41</sup> was an action in the said established direction, additionally stating, that a mere presence of a hardware doesn't allow the claim to escape the ambit of the statute<sup>42</sup>. Therefore, it is humbly submitted that widgets are mere software and the patents used in its manufacture are simply a code within a code and a compilation of codes necessary for an interface<sup>43</sup>, to make it standard compliant.

It is humbly submitted that the claims relating to software program products are nothing but computer programs per se which are simply expressed in computer readable storage medium and hence not allowable.<sup>44</sup> The computer programme has no substantial practical application except in connection with a digital computer<sup>45</sup>, which meant that if the patent is valid it could completely pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself.<sup>46</sup> Therefore it is humbly submitted that without any inventive ingenuity<sup>47</sup> in the hardware, no matter, whether claimed as a 'computing device' or a 'graphical user interface' is not patentable within Section 3(k) of the Patents Act, 1970.<sup>48</sup>

---

<sup>38</sup> Daniel Closa, Alex Gardiner, Falk Giemsa & Jorg Machek, PATENT LAW FOR COMPUTER SCIENTISTS 103 (Springer 2010).

<sup>39</sup> GREGORY A. STOBBS, SOFTWARE PATENTS 52 (2<sup>nd</sup> ed., Wolters Kluwer Aspen Publishers 2007).

<sup>40</sup> GUIDELINES FOR INVENTION OF COMPUTER RELATED PROGRAMS, OFFICE OF THE CONTROLLER GENERAL OF PATENTS, DESIGN AND TRADEMARKS, (2017).

<sup>41</sup> Yahoo application, Controller, Indian Patent Office, 1833/CHE/2007.

<sup>42</sup> Yahoo application, Controller, Indian Patent Office, 1833/CHE/2007.

<sup>43</sup> Microsoft decision, Controller of the Indian Patent Office, 5763/DELNP/2005.

<sup>44</sup> Microsoft decision, Controller of the Indian Patent Office, 5763/DELNP/2005.

<sup>45</sup> Gottschalk v Benson, 409 US 63 (1972).

<sup>46</sup> ELIZABETH VERKEY, LAW OF PATENTS 190 (1<sup>st</sup> ed., EBC 2005).

<sup>47</sup> Microsoft decision, Board of Appeal of the European Patent Office, T 0411/03 - 3.5.01 (2006).

<sup>48</sup> Microsoft decision, Controller of the Indian Patent Office, 5763/DELNP/2005.



**3. Basiltri, a willing licensee, reasonably exercising its rights to secure FRAND terms as well as to verify essentiality of patents.**

It is humbly submitted that the plaintiff has never fairly negotiated with the defendant. The allegation by the plaintiff that the defendant is an unwilling licensee is frivolous in nature. The prospective licensee cannot merely accept the licensor's representation that the terms being offered to them are indeed non-discriminatory. The offer should be Fair, Reasonable and Non-discriminatory and "fairness and reasonableness" taking into account the prevalent conditions in the relevant market and actual financial implications for licensees<sup>49</sup>.

The defendant agreed to negotiate on FRAND terms which allows for adequate remuneration of the SEP-holder and thus seeking injunctions is no longer justified once a potential licensee has accepted such a process<sup>50</sup>. The FRAND undertaking gives an implementer who is prepared to accept whatever terms are FRAND a right which amounts to a defence to the claim for an injunction because the implementer is entitled as a matter of law to be granted a FRAND licence<sup>51</sup>

**3.1. Guo has abused its dominant position violating S. 4(1) of Competition Act, 2002.**

That despite the exclusionary nature of the patentee's right, implementers have a legitimate expectation that the SEP owner will grant licences on FRAND terms so that refusal to grant such a licence may in principle constitute abuse.<sup>52</sup> Guo has the monopoly in the Indian market of "standard essential patents in widget technology" as there are no alternatives available to its specific SEPs. Guo is exercising this position of strength to exploit the informant and forego its FRAND obligations.

**3.1.1. Guo is charging unreasonable rates by claiming royalties based on the price of the end products.**

That Guo abused its dominant position by imposing exorbitant royalty rates for SEPs, as it was well aware that there was no alternate technology available and Guo was the sole

<sup>49</sup> Telefonaktiebolaget Lm Ericsson v. Intex Technologies (India) 2015 (62) PTC 90 (Del).

<sup>50</sup> American Cyanamid Co. v. Ethicon Ltd. 1975 AC 396.

<sup>51</sup> Unwired Planet International Ltd. v. Huawei Technologies Co Ltd. [2017] EWHC 711 (Pat).

<sup>52</sup> Unwired Planet International Ltd. v. Huawei Technologies Co Ltd. [2017] EWHC 711 (Pat).

licensor for the SEPs of globally acceptable technology standards<sup>53</sup>. Royalty must be charged on the cost of the component that is using the patented technology and not on the end product that uses the components as has been held in several landmark cases discussing FRAND royalty rate calculation.<sup>54</sup> Guo has no value addition to the end product and hence has no claims on the price of the end product. Guo only enables the component, not the end product, and the cost of the component cannot vary based on the end product in which it is used.<sup>55</sup> Guo is misusing the position of advantage and strength to beget an unreasonable royalty rate for licensing which is contrary to FRAND terms<sup>56</sup>. Guo is not abiding by its obligation to offer licenses to SEPs on FRAND terms<sup>57</sup>. Charging different royalties for the same product is discriminatory and contrary to FRAND terms<sup>58</sup>. Such practices also harm consumers as it will lead to royalty stacking and will increase the price of widgets considerably.<sup>59</sup>

### 3.1.2. Guo is forcing its global portfolio for licensing.

Basiltri is the largest widget manufacturer of India. It only requires the license to Indian patents for marketing its products. Guo being the dominant party is forcing Basiltri to license its global portfolio where as Basiltri is only interested to take license for Indian portfolio.<sup>60</sup> Guo is violating the section 4(1)<sup>61</sup> by putting unfair condition in purchase of licenses by way of package licensing. Basiltri doesn't need global portfolio but yet it is being forced to buy global portfolio merely because Guo is in a dominant position. The condition of coercive packaging is void<sup>62</sup>. Yet Guo was pushing for package licensing knowing that Basiltri had no other choice but to accept. Guo abusing its dominant position.

---

<sup>53</sup> Best IT World (India) Private Limited v. Telefonaktiebolaget L M Ericsson (Publ) and Anr. [2015] 131 SCL 392 (CCI).

<sup>54</sup> Microsoft Corp. v. Motorola, Inc., Motorola Mobility, Inc. and Gen. Instrument Corp. 696 F.3d 872. (Fed. Cir. 2012); *See also*, In Re Innovatio IP Ventures LLC Patent Litigation, 921 F.Supp.2d 903 (2013).

<sup>55</sup> Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson [2013] CCI 77

<sup>56</sup> Best IT World (India) Private Limited v. Telefonaktiebolaget L M Ericsson [2015] 131 SCL 392 (CCI).

<sup>57</sup> Telefonaktiebolaget LM Ericsson v. Competition Commission of India and Anr., (2016) 232 DLT (CN) 1.

<sup>58</sup> Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson [2013] CCI 77.

<sup>59</sup> Best IT World (India) Private Limited v. Telefonaktiebolaget L M Ericsson [2015] 131 SCL 392 (CCI).

<sup>60</sup> Best IT World (India) Private Limited v. Telefonaktiebolaget L M Ericsson [2015] 131 SCL 392 (CCI).

<sup>61</sup> Competition Act, § 4(1), (2002).

<sup>62</sup> The Patents Act, § 140, (1970).

3.1.3. Guo is forcing Basiltri to sign an unreasonable confidentiality agreement.

Guo is bound to license its patents on FRAND terms as it has a covenant with the Widget Standard Organisation, Paris to that effect<sup>63</sup>. The present confidentiality agreement is contrary to FRAND terms. Guo is claiming that the royalty they charge is confidential where as their rates are known publicly<sup>64</sup>, making the need for signing the NDA obsolete. The obligation of Guo to grant license on FRAND terms is forsaken by the NDA as the prospective licensees are barred from disclosing the royalty rates to each other. Guo, under the garb of NDA, can charge from the Informant royalty rates many times the royalty being charged from others.<sup>65</sup> This is against the spirit of FRAND licensing.

---

<sup>63</sup> Best IT World (India) Private Limited v. Telefonaktiebolaget L M Ericsson [2015] 131 SCL 392 (CCI).

<sup>64</sup> Problem statement, Surana & Surana and Shaastra IITM Intellectual Property Law Moot Court Competition, 2018, at p.4.

<sup>65</sup> Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson [2013] CCI 77.

**PRAYER**

In the light of facts stated, issues raised, arguments advanced and authorities cited, the respondent most humbly and respectfully in the interest of equity and justice prays and requests the Honourable Court:

1. To dismiss the application for interim injunction.
2. To issue any appropriate directions and orders as the Hon'ble Court deems fit in the interest of justice, equity and good conscience.

AND FOR SUCH ACT OF KINDNESS YOUR RESPONDENT SHALL BE IN DUTY AS  
EVER PRAY.

COUNSELS FOR THE RESPONDENT

Place:

Date: