
SURANA & SURANA AND SHAASTRA IITM INTELLECTUAL PROPERTY LAW MOOT
COURT

IN THE HON'BLE HIGH COURT OF MUDHIRAS

IN THE MATTER OF SECTION 64(1)(k) & 107 OF THE PATENTS ACT, 1970

CS (Comm) 199a of 2017

In the matter between:

GUO INC..... PLAINTIFF

versus

BASILTRI TELECOM PVT. LTD.....DEFENDANT

(AGAINST THE VALIDITY OF PATENTS AND ABUSE OF DOMINANCE)

-MEMORANDUM for DEFENDANT-

DRAWN AND FILED BY THE COUNSELS ON THE BEHALF OF DEFENDANT

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

MEMORANDUM *for* DEFENDANT

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

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4. Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.
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STATEMENT OF JURISDICTION

The Defendant humbly submits this memorandum in response to the petition file before this honorable court. The Defendant submits to the jurisdiction invoked by the Petitioner and also reserve the right to challenge the same. It set forth the facts and the laws on which claims are based.

STATEMENT OF FACTS

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

ISSUE RAISED

ISSUE I:

WHETHER BASILTRI HAS INFRINGED GUO'S INDIAN PATENTS?

ISSUE II:

WHETHER THERE IS AN ABUSE OF DOMINANCE BY GUO?

ISSUE III:

WHETHER INTERIM INJUNCTION SHOULD BE GRANTED AGAINST BASILTRI?

SUMMARY OF ARGUMENTS**I. THAT THE PATENTS OF GUO ARE NOT VALID AND SHOULD BE REVOKED**

In the instant case, it is humbly submitted that Guo's patents are not valid and should be revoked.

Firstly, the validity of the patent has been challenged in the infringement suit. *Secondly*, burden of proof is on Guo. *Thirdly*, widget is not an invention under Patents Act, 1970. *Fourthly*, widget comes under excluded subject matter of Section 3(k). *Fifthly*, widget does not have technical effect. *Lastly*, International position on patentability is not in favour of computer program.

II. THAT THERE IS AN ABUSE OF DOMINANT POSITION BY GUO

In the instant case, it is humbly submitted that Guo has abused its dominant position.

Firstly, by demanding royalty based on price of end product and not on the component price. *Secondly*, by forcing Basiltri to sign a confidentiality agreement before disclosing essentiality and validity of patents. *Thirdly*, by forcing a license only for its global portfolio. *Lastly*, by violation of FRAND commitment.

III. THAT INJUNCTION SHOULD NOT BE GRANTED AGAINST BASILTRI.

In the instant case, it is humbly submitted that injunction should not be granted against Basiltri.

Firstly, credible challenge has been raised by Basiltri against validity of patents of Guo. *Secondly*, *prima facie* patents are not valid. *Thirdly*, balance of convenience lies in favour of Basiltri. *Fourthly*, Guo will not suffer irreparable harm. *Lastly*, violation of FRAND commitment bars injunction.

ARGUMENTS ADVANCED**I. THAT THE PATENTS OF GUO ARE NOT VALID AND SHOULD BE REVOKED**

The question which arises before the court is as to whether Guo's patents are valid. The defendant humbly submits that the validity of the patent has been challenged in the infringement suit [A], burden of proof is on Guo [B], widget is not an invention under Patents Act, 1970 [C], widget comes under excluded subject matter of Section 3(k) [D], widget does not have technical effect [E], lastly, International position on computer program is not in favour of patentability [F].

A. That the validity of the patent has been challenged in the infringement suit

It is humbly submitted that section 64(1)(k)¹ read with section 107² of the Patents Act, 1970 has been invoked to challenge that the validity of the patent has been raised as a defense to the suit of infringement.³ 64(1)(k) of the act states that the subject of any claim of complete specification is not patentable under this Act. Mere registration is not proof of validity of patent. So, for the purpose of the instant suit, section 107 of the Act has been invoked and express reliance has been placed on its revocation petition to challenge the validity of the suit patents.

The credibility of the defendant's challenge to the validity of the patents must be assessed solely on its merits as opposed to being guided by any other extraneous consideration such as alleged delay in challenging the validity. This is because under Section 140(1)(d)⁴ 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.⁵

B. Burden of Proof is on Guo

It is humbly submitted that under the Act, the validity of a patent must be first established before the issue of infringement is considered by the Court. Section 13(4)⁶ of the Patents Act, 1970 has

¹ The Patents Act, 1970, No. 39, Acts of Parliament, 1970, §64(1)(k) (India) [Hereinafter "Patents Act"].

² Patents Act, *supra* note 1, §107.

³ Ten XC Wireless Inc. v. Mobi Antenna Technologies (Shenzhen) Co. Ltd, (2012) 187 DLT 632 (India).

⁴ Patents Act, *supra* note 1, §140.

⁵ Enercon (India) Limited v. Aloys Wobben, 2013 (56) PTC 412; *see also* Lear Incorporated v. John S. Adkins, 395 U.S. 653 (1969).

⁶ Patents Act, *supra* note 1, §13(4).

been interpreted by the Supreme Court to mean that no patent which is granted in India enjoys presumptive validity owing to the mere factum of grant.⁷ The caveat in Section 13(4) of the Act has been interpreted as an obligation on the part of a patentee to establish the validity of his patent in the plaint before he proceeds to address the issue of infringement.⁸

It is humbly submitted that Guo's claim of essentiality of its patents for compliance with technology standards, the *prima facie* validity of the patents asserted must be established by Guo before establishing *prima facie* infringement on the basis of alleged essentiality. This position has been specifically upheld by the court in the matter of *Vringo Infrastructure*⁹.

C. *Widget is not an invention under the Patents Act, 1970*

It is humbly submitted that in section 3(k) of Patent Act, 1970 excludes a mathematical or business method or a computer programme *per se* or algorithms from patentability.¹⁰ Invention to be patentable must be new, non-obvious and capable of industrial application.¹¹

The inventive step must be a feature which is not an excluded subject itself. Otherwise, the patentee by citing economic significance or technical advance in relation to any of the excluded subjects can insist upon grant of patent thereto.¹² Therefore, this technical advance comparison should be done with the subject matter of invention and it should be found that it is not related to any of the excluded subjects.¹³ Widget being a computer programme comes under the excluded subject matter of Section 3(k).

It is humbly submitted that the Delhi High Court,¹⁴ similar to the IPAB in *Yahoo*¹⁵, considered at length the legislative history of Sections 3(k) and 3(m); the provisions of Article 27 of the TRIPS agreement¹⁶; the position of the European Union, the UK, and the USA, including the US Supreme

⁷ Biswanath Prasad Radhey Shyam v. Hindustan Metal Industries Ltd, AIR 1982 SC 1444 (India).

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

⁹ Vringo Infrastructure Inc v. ZTE., (2013) EWHC 1591 (Pat) (U.K.).

¹⁰ Patents Act, *supra* note 1, §3(k).

¹¹ ELIZABETH VERKEY, LAW OF PATENTS 11 (1 ed. 2005).

¹² Yahoo Inc. v. Assistant Controller of Patents and Designs & Rediff.com India Ltd., OA/22/2010/PT/CH (2011) (India).

¹³ *Id.*

¹⁴ *Supra* note 8.

¹⁵ *Supra* note 12.

¹⁶ Agreement on Trade Related Aspects of Intellectual Property Rights, art. 27, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS].

Court's decision in *Alice Corp.*¹⁷, and concluded that "*prima facie* any invention which has a technical contribution or has a technical effect and is not merely a computer programme *per se* is patentable."

It is humbly submitted that in the case of *M/s Aditi Manufacturing Co.*¹⁸, the court revoked the granted patents stating that it is lacking inventive step and all the claims and specification are based on the known inventions. The board stated that in this invention, prior arts have the features of the invention and there is nothing new in the features that have been claimed as new. The invention was already known and there is neither any novelty nor any inventive step. In our case widget lacks inventive step as claims and specifications are based on known inventions.¹⁹

D. Widgets comes under excluded subject matter of Section 3(k)

It is humbly submitted that algorithm is a procedure for solving a given type of mathematical problem.²⁰ Algorithms in all forms including but not limited to, a set of rules or procedures or any sequence of steps or any method expressed by way of a finite list of defined instructions, whether for solving a problem or otherwise, and whether employing a logical, arithmetical or computational method, recursive or otherwise, are excluded from patentability.²¹ The suit patents increases the coding efficiency at lowered bit rates and the coding is done to make more bits transmit on a single signal used for data transmission that are a set of rules for solving a problem, thus, the said patents are to be excluded from patentable subject matter.

It is well-established that, while establishing patentability, the focus should be on the underlying substance of the invention and not on the particular form in which it is claimed.²² Since patents are granted to inventions, whether products or processes, in all fields of technology, it is important to ascertain from the nature of the claimed computer-related invention whether it is of a technical nature involving technical advancement as compared to the existing knowledge or having economic significance or both, and is not subject to exclusion under Section 3 of the Patents Act,

¹⁷ *Alice Corp. v. CLS Bank International*, 134 US 2347 (2014).

¹⁸ *M/s Aditi Manufacturing Co. v. M/S. Bharat Bhogilal Patel*, (2012) MANU/IC/0090.

¹⁹ Clarifications, at ¶31.

²⁰ *Gottschalk v. Benson*, 409 US 63 (1972).

²¹ Intellectual Property India, *Guidelines for examination of Computer Related Inventions*, Office of the Controller General of Patents, Designs and Trademarks, 16 (2017), at ¶4.5.3.

²² *Id.*, 15 (2017), at ¶4.5.

1970.²³ In our case the underlying substance of the invention is not novel²⁴ and does not show technical advancement as compared to existing knowledge, thus, excluded under Section 3(k).

It is submitted that what is important is to judge the substance of claims taking whole of the claim together. If any claim in any form such as method/process, apparatus/system/device, computer program product/ computer readable medium falls under the said excluded categories, such a claim would not be patentable.²⁵

It is humbly submitted that even when the issue is related to hardware/software relation, the expression of the functionality as a method is to be judged on its substance. It is well-established that, in patentability cases, the focus should be on the underlying substance of the invention, not the particular form in which it is claimed.²⁶ Thus, the underlying substance in the present invention lacks novelty,²⁷ the patent falls under excluded subject matter of Section 3(k) of the Act.

E. Widget does not have any technical effect

It is humbly submitted that ‘pure manipulation of data without the production of any physical or real world effect is not patentable’. The court rejected the claims as the contribution to the applications deemed to be made were no more than an advance in a computer program and had no technical effect.²⁸ While the implementation of the program in a computer transforms mathematical values into electrical signals, the electrical signals amount to no more than a reproduction of information which would not be regarded as bringing about a technical effect.²⁹ In the present case the patents are related to digital signal transmission and more particularly to an error rate reduction scheme³⁰ for such transmission to enhance the unified digital interface and is not creating any physical or real world effect, thus having no technical effect.

²³ *Id.*

²⁴ Clarifications, at ¶31.

²⁵ *Supra* note 21, 15 (2017), at ¶4.5.

²⁶ *Supra* note 21, 14 (2017), at ¶4.4.4.

²⁷ Clarifications, at ¶31.

²⁸ *Cappellini v. Comptroller of Patents*, [2007] EWHC 476 (U.K.); *see also Oneida Indian Nation’s Application*, [2007] EWHC 954 (Pat) (U.K.).

²⁹ *Kock & Sterzel v. X-ray apparatus*, T26/86 [1988] (EPO).

³⁰ Clarifications, at ¶37.

It is humbly submitted that in *Vicom v. Computer Related Invention*,³¹ board held that if a mathematical method or algorithm is used in a technical process, that process is carried out on a physical entity, by some technical means implementing the method and provides as its result a certain change in that entity then it would be patentable. Similarly, in *Merril Lynch's Application*,³² the court held that in the case of a computer program, there has to be some technical advance on the prior art in the form of a new result. Such new result could not be one that was excluded from patentability. The invention is associated with conserving bandwidth, reducing error rate and reducing channel disturbance in the method of transmission,³³ thus creating no real effect in the physical entity.

It is humbly submitted that in case of *AT & T Knowledge Ventures*³⁴, "technical effect" can be ascertained with the help of following signposts:

(i) whether the claimed technical effect has a technical effect on a process which is carried on outside the computer;(ii) whether the claimed technical effect operates at the level of the architecture of the computer; that is to say;(iii) whether the effect is produced irrespective of the data being processed or the applications being run;(iv) whether the claimed technical effect results in the computer being made to operate in a new way;(v) whether there is an increase in the speed or reliability of the computer;(vi) whether the perceived problem is overcome by the claimed invention as opposed to merely being circumvented.³⁵

It is humbly submitted that widget does not create any technical effect outside the computer as well as at the level of its architecture. It relates to mode handling in the field of communication system and more particularly to handling the transmission of information associated with requesting and identifying and coding modes in digital communication system³⁶ and it does not result in the device being made to operate in a new way. Therefore, the present invention does not fulfill the criteria of technical effect.

³¹ *Vicom v. Computer Related Invention*, T 0208/84 [1987] (EPO).

³² *Merril Lynch's Application*, [1988] RPC 1 (U.K.).

³³ Clarifications, at ¶37.

³⁴ *AT & T Knowledge Ventures v. Comptroller of patents*, [2009] EWHC 343 (Pat) (U.K.).

³⁵ *Id.*

³⁶ Clarifications, at ¶37.

F. International Position on computer program is not in favour of patentability

It is humbly submitted that "computer programme" means a set of instructions expressed in words, codes, and schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.³⁷ Computer programme are thus globally protected under the copyright law as literary work, since this is the international mandatory norms set in the TRIPS Agreement.³⁸

It is humbly submitted that TRIPS Agreement states that the source code and object code shall be protected as literary work under Berne Convention 1971.³⁹ In *Apple Computer Inc.* case,⁴⁰ it was held that a computer program, whether in object code or source code is a literary work and is protected from unauthorized copying whether from its object code or source code version. The Patent Act in U.K. as well as judicial opinion in U.S.A. also supports the view that law of nature, natural phenomena, mathematical formulae and algorithms are all unsuitable for patenting.⁴¹

It is humbly submitted that according to Article 52 of European Patent Convention (EPC), programmes for computers are not patentable inventions.⁴² Article 52(1) and (2)⁴³ exclude from protection those inventions which are non-technical. If claimed subject-matter relating to a computer program does not have a technical character, it should be rejected from patenting.⁴⁴ It is a consistent international practice to exclude from patentability most of the categories of inventions contained in section 3(k) of the act.

II. THAT THERE IS ABUSE OF DOMINANT POSITION BY GUO

It is humbly submitted that the question which arises before the court is as to whether Guo has abused its dominant position. The defendant humbly submits that Guo has abused its dominant position by demanding royalty based on price of end product [A], by forcing Basiltri to sign a

³⁷ Indian Copyright Act, 1957, No. 14, Acts of Parliament, 1957, §2(ffc).

³⁸ TRIPS, *supra* note 16, art. 10 ¶1.

³⁹ TRIPS, *id.*

⁴⁰ *Apple Computer Inc v. Franklin Computer Corp*, 714 F.2d 1240 (1983).

⁴¹ *Diamond v. Diehr*, 450 US 175 (1981).

⁴² The European Patent Convention, 1977, art. 52.

⁴³ *Id.*, art. 52 ¶1 & 2.

⁴⁴ Guidelines for examination in the European Patent Office, Part G-II, 3.6 (2017).

confidentiality agreement [B], by forcing a license only for its global portfolio [C], by violation of FRAND terms [D].

A. *There is abuse of dominance by demanding royalty based on price of end product*

It is humbly submitted that the smallest salable patent-practicing unit principle states that a damages model cannot reliably apportion from a royalty base without that base being the smallest salable patent-practicing unit.⁴⁵ The court has emphasized that with respect to damages awards for SEPs “the patentee’s royalty must be premised on the value of the patented feature, not any value added by the standard’s adoption of the patented technology.”⁴⁶ In our case Basiltri has negotiated with Guo for the royalty to be calculated on price of components.⁴⁷

In case of *Cornell University*⁴⁸, the court held that the claimed invention is not the entire system but only a component of a component of that system. Royalties for patented technologies that are small components of complex products should generally be based on the “smallest salable patent-practicing unit,” rather than on the entire value of the downstream product.⁴⁹ In the present case widget is a basic component of our component that will be used by the end user.

It is humbly submitted that in case of *Lucent Technologies*,⁵⁰ court held that the only reasonable conclusion supported by the evidence is that the infringing use of the date-picker tool in Outlook is but a very small component of a much larger software program. The court consequently found that Lucent did not meet the necessary evidentiary burden to justify using the entire market value of Outlook as the royalty base, as Lucent did not show that anyone purchased Outlook because of the patented technology.⁵¹ The patented features must create the basis for customer demand or substantially create the value of the component parts and court found that plaintiff had failed to prove that requisite link between the patented features and the final products in which they were

⁴⁵ *CSIRO v. Cisco Systems Inc.*, 809 F.3d 1295, 11 (2015).

⁴⁶ *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1230 (Fed. Cir. 2014); *see also* *University of Pittsburgh v. Varian Medical Systems*, 561 Fed. Appx. 934 (Fed. Cir. 2014).

⁴⁷ Problem Statement, at 5.

⁴⁸ *Cornell University v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 283 (2009).

⁴⁹ *LaserDynamics Inc. v. Quanta Computer Inc.*, 694 F.3d 67 (Fed. Cir. 2012).

⁵⁰ *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1337 (Fed. Cir. 2009).

⁵¹ *Id.*

incorporated.⁵² In our case the patented technology doesn't derive demand for the end product, so, royalty demanded must not be based on price of end product.

It is humbly submitted that where the entire value of a machine as a marketable article is "properly and legally attributable to the patented feature", the damages may be calculated by reference to that value. But where this is not the case, the royalty base "must insist on a more realistic starting point for the royalty calculations by juries, often, the smallest saleable unit and, at times, even less."⁵³ Thus royalty price based on smallest saleable patent-practicing unit represent the actual value of patented feature.

B. There has been abuse of dominance by forcing Basiltri to sign a Confidentiality agreement

It is humbly submitted that confidentiality agreement thrust upon the implementer by patent holder, strengthens this doubt as after signing confidentiality agreement, each of the user of SEPs is unable to know the terms of royalty of other users. This is contrary to the spirit of applying FRAND terms fairly and uniformly to similarly placed players. In the *Orange-Book-Standard case*⁵⁴, it was held that the infringer could sustain its claim of abuse of dominant position if the patentee refused to conclude a patent license agreement on non-discriminatory and non-restrictive terms. In our case Guo has forced Basiltri to sign a confidentiality agreement.⁵⁵

It is humbly submitted that in cases such as *Micromax*⁵⁶, *Intex*⁵⁷, *iball*⁵⁸, the court held that non-disclosure of commercial terms with different licensees is contrary to the principles of FRAND. The reason being that it wouldn't be fair to other licensees as the royalty rates could significantly differ also, it would be unreasonable to disallow transparency as one licensee could be cogently cheated through stricter conditions and less flexible rates while others could be favoured. In our case Guo is not disclosing royalty rates and denying to demonstrate the essentiality of their patents without signing a confidentiality agreement even though their rates are known publicly.⁵⁹

⁵² *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1326 (Fed. Cir. 2014).

⁵³ *supra* note 46.

⁵⁴ *Orange Book Standard case*, KZR 39/06 (2009) (Ger.).

⁵⁵ Problem Statement, at 3.

⁵⁶ *Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson*, Case No. 50/2013 (India).

⁵⁷ *Intex Technologies (India) Ltd. v. Telefonaktiebolaget LM Ericsson*, Case No. 76/2013 (India).

⁵⁸ *Best IT World (India) Private Ltd. (iBall) v. Telefonaktiebolaget LM Ericsson (Publ)*, Case No. 4/2015 (India).

⁵⁹ Problem Statement, at 5.

It is humbly submitted that “non-discriminatory” in the FRAND context as requiring that all licensees seeking to implement a standard, receive licenses to SEPs reading on the standard, and that all “similarly situated” licensees pay the same royalty rate for a given SEP holder’s portfolio. Non-discriminatory pricing should be distinguished from most-favored-nations clauses, which would require royalties to a particular firm to be no greater than those charged to other firms.⁶⁰ Even the court held that charging of two different license fees per unit phone for use of the same technology *prima facie* is discriminatory and also reflects excessive pricing vis-a-vis high cost phones.⁶¹ Therefore, forcing to sign a confidentiality agreement is discriminatory and in violation of FRAND terms.

C. *There has been abuse of dominance by forcing a license only for its global portfolio*

It is humbly submitted that rather than one global license for all patents owned by a licensor, the NDRC decision in China’s *National Development and Reform Commission (NDRC) v. Qualcomm*,⁶² will require licensors to execute separate license agreements for at least China and the rest of the world, and to differentiate SEPs from non-SEPs in China. As licensors and licensees undertake these negotiations, licensees may naturally seek to limit licenses to countries where the licensor has SEPs rather than on global sales and may prefer to litigate the issue in select jurisdictions.⁶³ Licensors, of course, have business models that require them to successfully monetize their patent portfolios and a revenue history that they will be hard pressed to abandon. Basiltri has asked Guo to negotiate for Indian license only⁶⁴ as there is variation in Guo’s patents in other countries.⁶⁵

Abuse of dominant position may be triggered by extensive and strong patent portfolios. The latter may speak to the scope of antitrust liability, particularly with respect to the legality of patent bundling or tying.⁶⁶ Either as pure bundling that leaves the licensee with no option but to accept a

⁶⁰ Roger G. Brooks & Damien Geradin, *Interpreting and Enforcing the Voluntary FRAND Commitment*, 9 INT’L J. IT STANDARDS & STANDARDIZATION RES. 1, 15 (2011).

⁶¹ *Supra* note 57.

⁶² China’s National Development and Reform Commission (NDRC) v. Qualcomm (2015).

⁶³ *Id.*

⁶⁴ Problem Statement, at 4.

⁶⁵ Clarification at ¶37.

⁶⁶ Chryssoula Pentheroudakis & Justus A. Baron, *Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases*, JRC SCIENCE FOR POLICY REPORT, EUR 28302 EN; doi:10.2791/32230 (2017).

license on all patents within the bundle, or as mixed bundling that allows potential licensees to opt either for a license to FRAND-encumbered patents alone or for a license to the full portfolio.⁶⁷

It is humbly submitted that patent holders cannot assert an entire portfolio of patents in litigation. Judicial resource restraints dictate that only a few patents can be asserted at a time.⁶⁸ This constraint is particularly binding for worldwide SEP portfolios, where litigation must proceed one country at a time (absent voluntary global settlement). As a result, even if the SEP holder prevails in a given infringement action, standard implementers can (and typically do) proclaim that they are only obligated to take a license to the specifically adjudicated patents, which have been proven to be valid and infringed.⁶⁹ Thus Guo has abused its dominant position by forcing a license only for its global portfolio.

D. FRAND commitment has been violated by Guo

It is humbly submitted that FRAND commitments, made by SEP holders to their SSOs, are cast as a waiver of the right to refuse to license intellectual property rights to anyone seeking these licenses.⁷⁰ This is on the condition that the negotiations are conducted in good faith (at an arm's length), and that the terms of the license would be no worse than the terms that would have been offered ex post, i.e., in the absence of such a prior commitment to an SSO.⁷¹ FRAND terms do not lead to a specification of a concrete royalty rate ex ante, it is clear that there is a waiver of the right to refuse to license.⁷² Guo has negotiated such terms⁷³ which are abusive and in bad faith.

It is humbly submitted that in case of *Broadcom Corp. v. Qualcomm*⁷⁴, Qualcomm began a pattern of discriminatory and anticompetitive behaviour, such as charging double royalty rates to manufacturers that used components manufactured by competitors, and providing discounts to those who exclusively used their supplies. It was held that Qualcomm's behaviour was anti-

⁶⁷ *Id.*

⁶⁸ Microsoft Corporation, v. Motorola, Inc, et al., Case No. C10-1823 JLR.

⁶⁹ Anne Layne Farrar, *Why Patent Holdout is Not Just a Fancy Name for Plain Old Patent Infringement*, COMPETITION POLICY INT'L, 2 (2016).

⁷⁰ Yogesh Pai, *Standards –Essential Patents: A Prolegomena*, 19 JIPR 59, 62 (2014).

⁷¹ Damien Neven & Miguel de la Mano, *Economics at DG Competition*, 37 REVIEW OF INDUSTRIAL ORGANISATION 309, (2010).

⁷² *Broadcom v. Qualcomm*, 501 F.3d 297 (3d Cir 2007).

⁷³ Problem Statement, at 3.

⁷⁴ *Supra* note 72.

competitive since the FRAND commitment was clearly made with the intention of inducing the ETSI to adopt the technology into the standard and therefore increase market power.⁷⁵ The effect of the grant of a patent is *quid pro quo*. *Quid* is the knowledge disclosed to the public and *quo* is the monopoly granted for the term of the patent.⁷⁶ It is responsibility of Guo to disclose royalty rates, validity and essentiality of its patents. Thus the present conduct of Guo should be held violative of FRAND commitment.

III. THAT THE INTERIM INJUNCTION SHOULD NOT BE GRANTED AGAINST BASILTRI

The question arises before the court is as to whether injunction should be granted against Basiltri. It is humbly submitted that a credible challenge has been raised by Basiltri [A], *prima facie* patents are not valid [B], balance of convenience lies in favour of Basiltri [C], Guo will not suffer irreparable harm [D], lastly, violation of FRAND commitment bars injunction [E].

A. Credible challenge has been raised by Basiltri

It is humbly submitted that the defendant rely on Section 64 read with Section 107 of the Act to contend that the challenge to the validity of the patents can be raised as a defense to a suit for infringement.⁷⁷ The validity of the Guo's patents is being questioned by defendant on the grounds that they are all software patents.⁷⁸ The law requires the defendant to merely demonstrate the existence of a "credible challenge" to the validity of the patents expressly asserted in the Suit.⁷⁹

It is humbly submitted that Delhi High court denying injunctive relief in case of *Glaverbel S. A. v. Dave Rose*,⁸⁰ held that a view taken by a court of foreign jurisdiction on the patentability can be material especially if the foreign country is a signatory to the TRIPS. The challenge to the patent made by the defendant raises a serious credible challenge and the same is discernible from the fact that the German Federal court rejected the claims closest to those of the Indian patents. Thus, as a matter of propriety and also international comity which warrants that the judicial decision of the foreign court may be respected in the same manner as that of the national court, so court held not

⁷⁵ *Id.*

⁷⁶ Raj Prakash v. Mangat Ram, AIR 1978 Del 1 (India).

⁷⁷ *Supra* note 3.

⁷⁸ Problem Statement, at 6.

⁷⁹ F Hoffman La Roche v. Cipla, 2009 (40) PTC 125 (India).

⁸⁰ *Glaverbel S. A. v. Dave Rose*, 2010 (43) PTC 630 (India).

to take a different view at least at an interlocutory stage.⁸¹ In the present case, two patents of Guo (2222d & 2222f) though granted in the U.S. were not granted in Japan⁸² and Guo has not even challenged the rejection order.⁸³ Thus, it raises a serious credible challenge on patents of Guo.

It is humbly submitted that the court has to see the tenability and the credible nature of defense while deciding the grant or non-grant of injunction. If there are serious questions as to validity to be tried in the suit, then the interim injunction in the case may not be granted.⁸⁴ Basiltri has raised a credible challenge against the patents of Guo, so injunction should not be granted at an interlocutory stage.

B. Prima facie patents are not valid

It is humbly submitted that *prima facie* validity of the patents asserted must be established by the plaintiff before establishing *prima facie* infringement on the basis of alleged essentiality.⁸⁵ Where, in an appeal against ad interim injunction conclusions on the point of irreparable injury was not arrived at, and no reason was stated with regard to balance of convenience, it was held that the order granting injunction was liable to be interfered with.⁸⁶

It is submitted that no presumption of validity would attach to the patent granted by the controller under the act, notwithstanding examination and investigation made under Section 12 and 13.⁸⁷ This position has been affirmed in subsequent cases such as *Hindustan Lever Ltd*⁸⁸, *Niky Tasha*⁸⁹, *Standipack Pvt. Ltd*⁹⁰ and injunction has been refused at the interim stage on the ground that the patent is *prima facie* invalid for lack of novelty, inventive step, or due to it falling foul of the prohibited markers under section 3 of the Patent Act.⁹¹ Thus, Guo's patents are *prima facie* invalid as they fall under the excluded subject matter of Section 3(k).

⁸¹ *Id.*

⁸² Problem Statement, at 6.

⁸³ Clarifications, at ¶2

⁸⁴ *Supra* note 79.

⁸⁵ *Supra* note 9.

⁸⁶ *Lark Laboratories (India) Ltd v. Medico Interpharma Ltd*, AIR 2002 Guj 368 (India).

⁸⁷ *Supra* note 7; *see also* *Surendra Lal Mahendra v. Jain Glazers*, 1981 (1) ILR (Del.) 257.

⁸⁸ *Hindustan Lever Ltd v. Godrej Soaps Ltd*, A.I.R. 1996 Cal 367 (India).

⁸⁹ *M/s. Niky Tasha India Pvt. Ltd v. M/s. Faridabad Gas Gadgets Pvt. Ltd*, AIR 1985 Del 136 (India).

⁹⁰ *Standipack Pvt. Ltd v. M/s Oswal Trading Co. Ltd*, AIR 2000 Del 23 (India).

⁹¹ *Arif Abdul Kader Fazlani v. Hitesh Raojibhai Patel*, 2012 GLH (1) (India).

C. *Balance of convenience lies in favour of Basiltri*

It is humbly submitted that the Supreme Court of India has not found or laid down any formula or test to determine how the balance of convenience should be judged in case of injunction.⁹² The principle of balance of convenience applies when the scales are evenly balanced.⁹³

The balance of convenience was held in favour of the defendants because if the injunction were to be granted in favour of the plaintiff, the loss suffered by the defendants would be much higher while if, on the other hand, the injunction were to be denied and the plaintiff were to be ultimately succeed after trial, the plaintiff could well be compensated monetarily.⁹⁴ In our case, Guo can be later compensated monetarily but if injunction would be granted, Basiltri would suffer damages which could not be compensated monetarily.

It is humbly submitted that non-user of the patented product in India was a consideration weighing when denying injunctive relief.⁹⁵ In case such as *Glaverbel S.A.*⁹⁶ and *Telemecanique & Controls*⁹⁷, court while refusing injunction, considered the absence of actual commercial exploitation of the invention in India, a material factor in denying injunctive relief. Guo has patents in India since 2002 but it has not licensed them and since patent create a monopoly, they must be commercially exploited and the parties are not to only register a patent and sit over it.

It is humbly submitted that in *Apple, Inc. v. Motorola, Inc.*,⁹⁸ court held that injunctions against patent infringement “may 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.” In *eBay*⁹⁹, court held that the issuance of an injunction is not automatic upon the finding of patent infringement. Thus, balance of convenience lies in the favour of Basiltri.

D. *Guo will not suffer irreparable harm*

It is humbly submitted that irreparable injury is an injury which is sustained and could never be

⁹² Reliance Petrochemicals Ltd v. Proprietors of Indian Express Newspaper Pvt Ltd., (1998) 4 SCC 592 (India).

⁹³ Kirloskar Diesel Recon Pvt Ltd v Kirloskar Proprietary Ltd, AIR 1996 Bom 149 (India).

⁹⁴ Acme Tele Power Ltd v. Sintex Industries Ltd, AIR 2008 Utr 49 (India).

⁹⁵ Franz Xaver Huemer v. New Yash Engineers, AIR 1997 Del 79 (India).

⁹⁶ *Supra* note 80.

⁹⁷ Telemecanique & Controls (I) Limited v. Schneider Electric Industries SA, 94 (2001) DLT 865 (India).

⁹⁸ Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901 (2012).

⁹⁹ eBay Inc. v. MercExchange, L.L.C., 547 US 388, 391 (2006).

adequately remedied or atoned for by damages, injury which cannot possibly be repaired.¹⁰⁰ The temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.¹⁰¹ The prayer of injunction against levy of the tax was refused on ground that the action of authorities was not causing such irreparable injury to the plaintiff which cannot be compensated in terms of money.¹⁰² Guo will not suffer irreparable harm if injunction is not granted.

It is humbly submitted that a grant of an interim injunction would result in irreparable harm to the defendant's business and severely undermines its reputation in the market, thereby compromising its short and long term interests.¹⁰³ Basiltri will suffer irreparable harm if injunction is granted which would severely damage the business and would undermine its reputation in the market.

It is humbly submitted that irreparable injury does not mean an injury which is not physically capable of being remedied but one which cannot adequately be remedied by damages.¹⁰⁴ In a contract involving project of public interest, where loss, if any, is ascertainable in terms of money, refusal of injunction was held to be proper.¹⁰⁵ Where damages can furnish adequate remedy, an injunction should be refused.¹⁰⁶ Thus, Guo's damages are ascertainable in terms of money and can be adequately compensated.

E. Violation of FRAND commitment bars injunction

It is humbly submitted that seeking an injunction is a legitimate remedy for patent infringement, it could be an abuse of dominance "where SEPs are concerned and the potential licensee is willing to enter into a license on FRAND terms."¹⁰⁷ In *Realtek v. LSI*¹⁰⁸, court specifically acknowledged the inequitable nature of any interim injunction and the violation of FRAND commitments which

¹⁰⁰ *Multichannel (India) Ltd, Mumbai v. Kavitalaya Productions Pvt. Ltd, Chennai*, AIR 1999 Mad 59 (India).

¹⁰¹ *Sampson v. Murray*, 415 US 61, 90 (1974).

¹⁰² *Som Datta Bukders v. Kanpur Jal Sansthan*, AIR 2002 AII 249 (India).

¹⁰³ *Microsoft v. Motorola*, 696 F.3d 872 (9th Cir. 2012).

¹⁰⁴ *Brajendra v. Kashibai*, AIR 1946 Pat 177 (India).

¹⁰⁵ *Envision Engineering, Surat v. Sachin Infa Eviro Ltd.*, AIR 2003 Guj 164 (India).

¹⁰⁶ *Kusuma Gupta v. Sarla Devi*, AIR 1988 AII 154 (India).

¹⁰⁷ Press Release, European Commission, Antitrust: Commission Sends Statement of Objections to Motorola Mobility on Potential Misuse of Mobile Phone Standard-Essential Patents (May 6, 2013), http://europa.eu/rapid/press-release_IP-13-406_en.pdf.

¹⁰⁸ *Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d 998, 1007 (N.D. Cal. 2013).

arise from the grant of such an order.

The determination of standards occurs through SSOs, a collaborative effort between companies/industry participants.¹⁰⁹ The existence of alternatives to technologies is eliminated on the adoption of an 'industry' standard.¹¹⁰ A patent hold- up arises¹¹¹ when companies that own the SEPs for the adopted standard effectively block others from using the standard through various means- including obtaining injunctive relief or imposing royalties high enough¹¹² to act as a barrier to the use of the standard in question¹¹³-ironically, the very same practices that the development of FRAND licensing sought to prevent are carried out by Guo.

It is humbly submitted that in *Apple v. Motorola*¹¹⁴, the court found that Motorola did not show that Apple's infringement of Motorola's SEPs caused Motorola irreparable harm; the court consequently denied the injunction. The preliminary conclusion that the seeking and enforcing of an injunction for SEPs can constitute an abuse of a dominant position in the exceptional circumstances of this case-where the holder of a SEP has given a commitment to license these patents on FRAND terms and where the company against which an injunction is sought has shown to be willing to enter into a FRAND license.¹¹⁵ Guo has committed to license its SEPs on FRAND terms¹¹⁶ and Basiltri is a willing licensee, so injunction should be denied as FRAND license sought to prevent injunction.

¹⁰⁹ Michael A. Carrier, *A Roadmap to the Smartphone Patent Wars and FRAND Licensing*, 2 CPI ANTITRUST CHRONICLE 2 (Apr., 2012).

¹¹⁰ Suzanne Michel, *Bargaining for RAND Royalties in the Shadow of Patent Remedies Law*, 77 ANTITRUST L. J. 889-911 (2011).

¹¹¹ *Id.*

¹¹² Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard Essential Patents*, 28 BERKELEY TECH. L. J. 1136-1137 (2013); *see also* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007).

¹¹³ Phillippe Baechtold, *IPRs and Standards Setting: Some Issues*, 1, http://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_ge_07/wipo_smes_ge_07_www_81604.ppt.

¹¹⁴ *Apple Inc. v. Motorola, Inc.*, 757 F. 3d 1286, 1332 (Fed.Cir.2014).

¹¹⁵ *Innovatio IP Ventures, LLC Patent Litigation*, 886 F. Supp. 2d, (2012).

¹¹⁶ Clarifications, at ¶25.

PRAYER FOR RELIEF

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

- A. That Guo's patents are not valid and should be revoked as they come under excluded subject matter of section 3(k) of the Patents Act, 1970.
- B. That Guo should be held liable for abuse of its dominant position by demanding royalty based on price of end product, by forcing Basiltri to sign a confidentiality agreement and a license only for its global portfolio.
- C. That interim injunction should not be granted against Basiltri.

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

For this, the defendant shall duty bound forever pray.

S/d

All of which is most humbly prayed

COUNSEL FOR THE DEFENDANT