

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 9 | Issue 2

2026

© 2026 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for free and open access by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact support@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

The Section 3(5) Paradox: A Structural Lacuna in the Interface of Intellectual Property and Competition Law in India

SUPREET KAUR SETHI¹ AND TRAPTI VARSHNEY²

ABSTRACT

*The present study highlights an inherent structural paradox within the Competition Act of India, 2002, which is referred to as the 'Section 3(5) Paradox' in the paper. According to Section 3(5), any person exercising his rights under an intellectual property right license is immune from prosecution under Section 3 (Anti-Competitive Agreements) if he imposes reasonable conditions in his licensing agreement. However, no such provision exists in Section 4, which deals with the abuse of dominance. As such, the result is that the same person who holds the dominant position through the exercise of his IP rights may be held liable under Section 4 for engaging in activities that are protected under Section 3(5) by virtue of the IP license. Using the examples of CCI in *Micromax v. Ericsson* (2013) and *Umar Javeed v. Google LLC* (2022), the different rulings of the Delhi High Court in its Single Bench judgment (2016) and Division Bench judgment (2023), and the procedural dismissal of the appeal by the Supreme Court in September 2025, it is illustrated that the existing approach lacks coherence from both legal and economic perspectives. On conducting a comparison of the European Union's 'doctrine of exceptional circumstances' approach and the American rule-of-reason approach, one can observe that the Indian inability to create either the statute of reasonableness or an effective FRAND system is an aberration amongst leading countries. There are three legislative suggestions made at the end of this study: (i) a reasonableness defense statute inserted as Section 4(3), (ii) a statutory consultative process between the Competition Commission of India and IP regulatory bodies, and (iii) statutory SEPs legislation with a FRAND framework.*

Keywords: *Section 3(5) Paradox, Competition Act 2002, Abuse of Dominance, IP Licensing, Standard Essential Patents, FRAND, CCI, Section 4*

I. INTRODUCTION

Intellectual property law and competition law have long been uneasy companions within the academic discourse of jurisprudence and in practice. Philosophically, one would be hard pressed

¹ Author is a Student at Amity University, Noida, Uttar Pradesh, India.

² Author is an Assistant Professor at Amity University, Noida, Uttar Pradesh, India.

to see how the two systems of law are not at odds: intellectual property law seeks to create monopoly by design as a means to spur innovation, whereas competition law aims to break down market concentration as a way of safeguarding consumer welfare. As Hovenkamp notes, “it has generally been assumed that the two legal disciplines pull in opposite directions – one favoring exclusivity and the other open access³.”

In a world where innovation is a key factor in economic activity, however, the two systems of law must work in tandem, and indeed overlap at certain junctures, including the issue of intellectual property licensing. Whenever a company with a considerable degree of market power engages in patent or copyright licensing activities, each decision it makes – setting the royalty fee, setting conditions, choosing who to license to – becomes both an expression of its rights under intellectual property laws and potentially an abuse of its market power.

However, India's solution to this dilemma, enshrined in the Competition Act, 2002, suffers from an inherent defect, known as the "Section 3(5) Paradox." In essence, while Section 3(5) of the Competition Act offers a safe harbor to IP holders who make reasonable restrictions on licenses, thereby absolving them of any liability under Section 3, which prevents anti-competitive agreements, there is no similar provision for the same action under Section 4 of the Act, which prevents abuse of dominance. Consequently, a dominant IP holder ends up operating in a world of regulatory inconsistency, where a certain action that is shielded under Section 3(5) as a proper exercise of IP rights might be viewed as abuse of dominance under Section 4 of the Act. This is further complicated by the fact that IP holders are often dominant in IP-intensive sectors owing to their rights.

The practical significance of this dilemma has been brought to the forefront in the context of more than a decade of SEP disputes in India, largely focussing on conflicts between Ericsson and Indian manufacturers of mobile phones, and the seminal investigation by the Competition Commission of India (CCI) into Google's licensing of its Android software platform. These have not only highlighted the statutory lacuna mentioned above but have also pointed towards an underlying institutional conflict regarding whether the CCI or the Controller of Patents has the authority to investigate the reasonableness of terms of intellectual property licenses. This is highlighted by conflicting decisions in 2016 and 2023 made by the Delhi High Court, which have been summarily dismissed by the Supreme Court in September 2025 without determining the underlying jurisdictional issue.

³ Herbert J. Hovenkamp, 'Intellectual Property and Competition' (University of Pennsylvania Carey Law School, 2008).

The paper is divided into five sections. Section II examines the legislative language of Sections 3(5) and 4 of the Competition Act to understand the exact nature of the paradox. Section III looks at the judicial precedent whereby Indian courts and the CCI have tried to deal with the problem of IP licensing issues, concentrating especially on the Ericsson and Google cases, along with the conflicting High Court decisions from Delhi of 2016 and 2023. Section IV compares India's laws with those from other countries namely the EU's 'exceptional circumstances' principle and the US' rule of reason principle. Section V offers three legislative proposals to address the paradox, while Section VI concludes.

II. THE SECTION 3(5) PARADOX: A LEGISLATIVE ANATOMY

A. The Structure of the Competition Act, 2002

The Competition Act, 2002⁴ governs competitive behavior in three major areas: anti-competitive agreements (Section 3)⁵, abuse of dominant position (Section 4)⁶ and combinations (Sections 5 and 6). In this context, the key sections are S3 and S4, in particular the different treatment they give to the IP rights.

Section 3(1)⁷ creates a broad anti-competitive agreement clause that prohibits agreements which may cause or have the possibility to cause an Appreciable Adverse Effect on Competition (AAEC) in India. Section 3(3)⁸ establishes a rebuttable presumption of an AAEC in horizontal agreements among competitors, such as price-fixing, market sharing and bid-rigging. Section 3(4)⁹ deals with vertical agreements and involves an AAEC analysis on a case-by-case basis.

Section 3(5)¹⁰ poses, however, is a key qualification. The operative words are 'reasonable conditions as may be necessary for protecting' IP rights, which includes, in relevant part, the Patents Act, 1970, the Copyright Act, 1957, the Trade Marks Act, 1999, the Geographical Indications of Goods (Registration and Protection) Act, 1999, the Designs Act, 2000, and the Semiconductor Integrated Circuits Layout-Design Act, 2000. This brings a proportionality principle into the analysis: not all IP licensing restrictions are protected, but only those which are reasonably required to protect the IP right.

B. The Gap in Section 4

⁴ The Competition Act, 2002 (Act 12 of 2003)

⁵ *Ibid.*, s 3

⁶ *Ibid.*, s 4

⁷ *Ibid.*, s 3(1)

⁸ *Ibid.*, s 3(3)

⁹ *Ibid.*, s 3(4)

¹⁰ *Ibid.*, s 3(5)

The prohibition in Section 4(1)¹¹ against abuse of dominance in the relevant market is accompanied by an explicit list of forms of abuse in Section 4(2)¹², including: imposing unfair or discriminatory conditions on the purchase or sale of goods or services; limiting or restricting production, supply or technical or scientific development; denying access to the market; making the conclusion of contracts dependent on the acceptance of supplementary obligations that are not related to the subject of the contracts; and the predatory use of dominance in one market to enter into, or protect, another relevant market.

There is no corresponding provision to Section 3(5) in Section 4. No provision allows a dominant firm to rely on the nature or value of its IP rights as a defence to action that would otherwise be covered by one of the listed abuses. The current wording of the statute makes it impossible for the IP owner/licensor of a dominant position to say that the terms of the license, however high the royalty rate, whatever the restrictive conditions, are "reasonably necessary for protecting" its IP rights in order to justify a complaint of abuse of dominance. The CCI is therefore only allowed to evaluate IP licensing conduct in the light of competition law, without considering the IP rationale that may lie behind the conduct.

The contradiction this presents can be exactly put into words. Imagine a company that has a patent on a technology that is necessary for producing a specific type of product. The firm is not dominant – perhaps one of several patent holders may have a technology that can be used in place of each other. Such restrictions can be considered a defense under Section 3(5) of this act if they are contained in the terms and conditions of the license granted by this firm. The CCI will have to consider whether the conditions are 'reasonable' in the context of the IP right. Now, think about the same company when its technology has been adopted into an industry standard and is now a Standard Essential Patent (SEP). The firm now has a dominant position – indeed, an automatic dominance – the standard cannot be implemented without the license of the firm's patent. Under Section 3(5), if the firm continues to impose the same conditions of licensing as it did before, then it will have no defence against a Section 4 complaint. The CCI is unable to delve into whether such conditions are 'reasonably necessary' to protect the IP right. The very nature of the standardisation process, which is based on industry consensus and sometimes even demanded by the regulators, has turned the firm's legally recognised IP right into a potential source of competition law liability, with no protection.

The essence of the Section 3(5) Paradox is that IP rights create a market power, the market

¹¹ Ibid.,s 4(1)

¹² Ibid., s 4(2)(a),(b),(c),(d),(e)

power leads to a determination of infringement under Section 4, but Section 4 does not provide a defense based on IP rights. The paradox has led to skewed results in case law in India as will be discussed below and has given technology licensing in India a disincentive effect.

C. Dominance and the Role of IP Under Section 19(4)

Intellectual property rights are not mentioned in the list of factors under Section 19(4)¹³ while determining dominance, but they can play a part in dominance in a number of ways, such as by being used to create barriers to entry, to provide commercial advantages over competitors, and to create consumer dependence.

This can be most clearly seen in the context of SEPs. In other words, the CCI found Ericsson to be dominant in the 'relevant market for Standard Essential Patents for 2G, 3G and EDGE technologies in GSM-compatible mobile communication devices' not only because of its market share but because of the necessity of obtaining a license for Ericsson's patents to manufacture devices compliant with the relevant standards¹⁴. The Section 3(5) Paradox then kicked into full effect as the CCI found itself in the position of examining Ericsson's conduct in licensing without any IP defence of reasonableness.

III. THE PARADOX IN PRACTICE: KEY DECISIONS

A. Micromax v. Ericsson (CCI, 2013) and Related SEP Litigation

The most significant debate on Section 3(5) Paradox in Indian law has been in relation to Standard Essential Patent issues in telecommunication technologies, and in this context the litigation between Ericsson and Indian mobile device manufacturers Micromax and Intex.

In June 2013, Micromax presented a complaint to the CCI that the company (Ericsson)¹⁵ had acted unfairly by invoicing Micromax with the net selling price of the device instead of charging for the chipset or the Smallest Saleable Patent Practicing Unit (SSPPU) – which meant that royalties were being charged at different rates depending on the device's sales price, despite the same technology being being licensed – and that Ericsson had moved for injunctive relief while it was making FRAND offers to Micromax, concealing whether its offers were discriminatory or not by requiring the execution of a Non-Disclosure Agreement as a condition to disclosure.

The CCI found prima facie case on all three grounds and directed the Director General to investigate. The CCI, in its turn, took an implicit stance that acknowledged that Ericsson's SEP

¹³ Ibid.,19(4)

¹⁴ Micromax Informatics Ltd. v Telefonaktiebolaget LM Ericsson (Publ.), Case No. 50 of 2013, CCI. Order dated 12 November 2013

¹⁵ Ibid

licensing practices, without IP-based safe harbour, were covered by Section 4. Ericsson did not have a statutory rights to contest that its royalty's methodology (however controversial) was 'reasonably necessary for the protection of' the rights to its patent.

Substantially the same analytical path was followed by A parallel complaint from Intex Technologies in November 2013¹⁶, and a third complaint from Best IT World in 2015¹⁷. All these cases create the Section 3(5) Paradox for SEPs in Indian Competition law: dominant SEP owners are subject to scrutiny under Section 4 of Indian Competition law – the same law which allowed the IP rationale to remain a statutory defense.

B. The Google Android Decision (CCI, 2022)

In *Umar Javeed v Google LLC*, the CCI in October 2022¹⁸, further expanded the Section 3(5) Paradox into the realm of digital platform licensing. The Mobile Application Distribution Agreement (MADA), Google's Android license agreement with Original Equipment Manufacturers (OEMs), required OEMs with interest in accessing the Google Play Store (or, really, in having a viable, commercial device) to install the complete package of Google Mobile Services (GMS), which includes Google Search, Google Chrome, Google Gmail, Google YouTube, and Google Maps, in designated locations on the device.

The CCI found five distinct relevant markets and found that Google is dominant in each, including market for licensable operating systems for smartphones in India¹⁹. As far as relevance of the market definition is concerned, the CCI had found that the iOS operating system was a closed, non-licensable system, which could not act as a substitute to Android from an OEM's perspective who wants to license a smartphone operating system.²⁰

The CCI agreed that Google's requirement for the Play Store to be pre-installed on devices as part of the Android license represented an abuse of dominance under Sections 4(2)(a)(i) and 4(2)(d). Google was fined Rs. 1,337.76 crore, and it authorized OEMs to install the Play Store, but also gave them the option to not install other apps that are part of the GMS. Most importantly, Google did not present an argument for the 'reasonableness' of the conditions in the context of being granted use of the IP right, in other words, a 'reasonableness' argument as a statutory defence. The only argument Google can make for such a submission in the

¹⁶ *Intex Technologies (India) Ltd. v. Telefonaktiebolaget LM Ericsson (Publ)*, Case No. 76 of 2013, CCI, Order dated 16 January 2014.

¹⁷ *Best IT World (India) Pvt. Ltd. v. Telefonaktiebolaget LM Ericsson (Publ)*, Case No. 4 of 2015, CCI, Order dated 12 May 2015.

¹⁸ *Umar Javeed v. Google LLC*, Case No. 39 of 2018, CCI, Order dated 20 October 2022

¹⁹ *Ibid*

²⁰ *Ibid*

substantive AAEC analysis is as a factual submission, not as a legislative carve-out like Section 3(5).

C. The Delhi High Court Judgments: 2016 and 2023

The jurisdictional aspect of the Section 3(5) Paradox clearly emerged in the context of two conflicting judgments of the Delhi High Court, where both judgments were issued within a span of seven years.

In the first case, Ericsson appealed the jurisdiction of CCI against its investigation into Ericsson's SEP licensing practices before a Single Bench headed by Justice Vibhu Bhakru on 30 March 2016 in case of *Telefonaktiebolaget LM Ericsson v. CCI*.²¹ Ericsson contended that the provisions of the Patents Act of 1970 were a special statute relating to patent licensing, so the general provisions of the Competition Act did not apply. The Single Bench dismissed this argument for three reasons. First, Ericsson's licensing activity in India was deemed to be an 'economic activity' under the Competition Act and thus Ericsson is an 'enterprise' under the Competition Act. Second, the Patents Act and the Competition Act were not mutually contradictory — the Patents Act covered the rights of the patent holder, the Competition Act, the behaviour of the market. Thirdly, Section 60 of the Competition Act expressly stated that it would not be affected by any other law that is inconsistent with it, showing Parliamentary intent in this regard.

The economists and competition law practitioners largely hailed the resolution of the jurisdictional question as a pragmatic and economic one by the Single Bench. It maintained the capacity of the CCI to review any anticompetitive practice in markets where SEPs are at play, but also clarified that mere ownership of a patent right is not an abuse of dominance.

The second judgment, issued on 13 July 2023 by a Division Bench of the Delhi High Court in *Telefonaktiebolaget LM Ericsson v. CCI*²² (which also included Monsanto's appeal), substantially reversed the 2016 judgment. The Division Bench ruled that the question of 'reasonableness' of the licensing conditions set by the patent holder is only a matter for the Controller of Patents under Chapter XVI of the Patents Act and not Section 4 of the Competition Act before the CCI.

The Division Bench's reasoning is interesting and should be carefully considered because it actually uses, albeit incorrectly, in this paper's view, the Section 3(5) Paradox. The court stated

²¹ *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, W.P.(C) Nos. 464/2014 and 1006/2014, Delhi High Court, Single Bench, decided 30 March 2016.

²² *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, LPA 247/2023, Delhi High Court Division Bench, decided 13 July 2023.

that the intention of the legislature was not to remove the 'reasonable IP licensing conditions' from the ban in Section 3 of the Competition Act, as this was dealt with in the Patents Act. The presence of Section 3(5) to limit the CCI's jurisdiction under Section 4 is an analytically flawed interpretive step for at least two reasons.

In the first place, by the very wording of Section 3(5) it can only be made subject to Section 3. It does not mention Section 4. By taking the words "on account of which" from one section and the words "on account of" from another, the text must mean the two sentences are distinct and cannot be read as referring to the same cause of action. Second and, more fundamentally, the Division Bench's approach does not resolve the Section 3(5) Paradox, it makes it worse. The court shifts the burden of deciding IP licensing reasonableness from the CCI, which is more suited to do economic analysis, to the Controller of Patents, who lacks any such powers and analytical tools to deal with competition law abuses. The Controller of Patents does not have financial penalty powers, does not have the powers to issue cease and desist powers like those under the Competition Act and cannot do a market-wide AAEC analysis.

The Supreme Court's disposal, without adjudicating the underlying jurisdictional issue, which had been settled between the parties, of the CCI's SLP filed on 2 September 2025, has left the 2023 Division Bench judgment as the law in India for these cases – at least for the time being, pending a future authoritative Supreme Court judgment. This is a far from pleasant situation.

IV. COMPARATIVE PERSPECTIVES: EU AND UNITED STATES

A. The European Union: Exceptional Circumstances and Objective Justification

It is not the first time that the European Union has faced the dilemma between IP rights and competition law anti-abuse provisions since the 1990s, and it has built a subtle doctrinal framework which India should study. It is noteworthy that Article 102 of the Treaty on the Functioning of the European Union (TFEU) does not contain an express IP exception; its scope is parallel to the scope of India's Section 4. But, with a series of recent landmark rulings, the Court of Justice of the European Union (CJEU) has established a doctrine that is of value to the dominant IP holder in a limited sense.

In *Magill* (1995)²³, the CJEU ruled that an abuse of dominance occurred where television broadcasters did not grant a license for a copyright-protected weekly programme schedule to a company offering a comprehensive guide to television programming. The court stressed, however, that refusal to license would be an abuse only in 'exceptional circumstances' – namely

²³ Case C-241/91P, *Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission* (*Magill*) [1995] ECR I-743.

where refusal would stop a new product from being produced for which there is consumer demand but from which the dominant firm would not be producing – where the refusal is not objectively justified – and where the firm would exclude all competition in a secondary market. This 3-part ‘exceptional circumstances’ test gives dominant IP holders a lot of protection – in the most limited circumstances a refusal to license will be considered an abuse.

IMS Health (2004)²⁴ simplified the Magill framework and Microsoft (2007)²⁵ adapted it for interoperability information for software. The common denominator of EU jurisprudence is the ‘objective justification’ principle: If an EU dominant firm raises an arguable justification for its conduct – such as a justification based on the nature and value of its IP – it places the burden on the competition authority to prove that the justification is inadequate. Article 102 does not have an IP carve-out, similar to India's Section 3(5), but case law under the EU offers one via judicial doctrine.

The SEP holder will be able to obtain an injunction without abuse of dominance in the SEP context according to the SEP decision of Huawei v. ZTE (2015)²⁶. The court established that before seeking injunctive relief, a SEP holder who has made a FRAND undertaking to an SBO should notify the alleged infringer of the alleged infringement, and make a FRAND specific written offer to the alleged infringer, before the alleged infringer has the opportunity to respond. If this process is not followed it will be an abuse of dominance. On the other hand, the implementer who does not act promptly to accept a FRAND response may not use the FRAND commitment as a defence to an injunction. The Huawei framework thus creates a set of procedural requirements for both sides that encourages both sides to conduct negotiations in good faith and lowers the possibility of hold-up and hold-out at the same time.

B. The United States and the Rule of Reason; Presumptive Pro-Competitiveness

The United States model on IP-competition law interface is more lenient about IP rights than the EU model, but also still allows for antitrust scrutiny of IP licensing through the rule-of-reason approach. The 2017 Antitrust Guidelines for the Licensing of Intellectual Property by the Department of Justice and the Federal Trade Commission,²⁷ state that the basic principle for antitrust purposes is that IP is treated as any other type of property, IP licensing agreements are procompetitive, and only antitrust laws will be enforced when the conduct of the IP holders is

²⁴ Case C-418/01, IMS Health GmbH and Co OHG v. NDC Health GmbH and Co KG [2004] ECR I-5039.

²⁵ Case T-201/04, Microsoft Corporation v. Commission [2007] ECR II-3601.

²⁶ Case C-170/13, Huawei Technologies Co. Ltd. v. ZTE Corporation and ZTE Deutschland GmbH [2015] 5 CMLR 14.

²⁷ US Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (2017).

likely to have an anti-competitive effect — not to impede innovation or the IP holder's market position.

The rule of reason calls for balancing procompetitive justifications against anticompetitive effects. Importantly, IP-based arguments, such as the need to recover R&D investment, the value of the licensed technology, the need for the licensing condition to ensure the integrity of the IP right are legitimate arguments in the rule-of-reason analysis. In American anti-trust law, the 'necessity' of the IP owner's license conditions does not need to be proven in a statutory sense – it is an issue of balance: is the behavior more likely to harm competition than to help it? The implication of this is that there is significant room in the U.S. antitrust laws for conduct that in India would raise the spectre of an undefended Section 4 claim. In effect, the Supreme Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko* (2004) has held that there is no antitrust obligation to deal with other firms – including by offering to license – a stance significantly more favorable to dominant IP holders than is now the case in India.

C. Lessons for India

Comparative survey shows that India is an outlier. The EU and the US have put in place (albeit in different ways) a series of structures intended to allow the holders of dominant IP positions to promote IP-based interests in their licence practices. The EU has done so by judge-made doctrine (the "exceptional circumstances" test and objective justification); the US has done so by rule of reason and the presumption of the procompetitiveness of IP licensing. India has not done any such thing. Section 4 of the Competition Act is strictly worded, does not contain any IP-based reasonableness defence and lacks any judicial doctrine to fill the legislative vacuum. This lacuna has been identified by the Delhi High Court in its ruling of 2023 which directed all reasonableness related queries to the Controller of Patents. The Delhi High Court in its Judgment of 2023 had highlighted this problem and directed to the Controller of Patents all the reasonableness related queries.

V. RECOMMENDATIONS FOR LEGISLATIVE REFORM

A. Recommendation One: Section 4 should be amended to include a Reasonableness Defense.

The most basic reform that needs to be made is to add a reasonableness defence for dominant IP holders under Section 4 of the Competition Act. The following terms (or terms of equivalent effect) are suggested for a new Section 4(3):

"Nothing in this section shall restrict the right of any person who holds a dominant position by

virtue of any intellectual property right granted under any law for the time being in force relating to the protection of intellectual property from imposing reasonable conditions as may be necessary for protecting such right, provided that the burden of demonstrating that such conditions are reasonable shall lie upon the person seeking to rely on this sub-section."

The proposed provision is quite distinct from Section 3(5) in two significant ways. In contrast to Section 3(5), the proposed Section 4(3) does not work as a threshold carve-out, but rather as an affirmative defence which must be pleaded and established by the dominant IP holder. This is fitting in the context of increased responsibility of dominant firms. Second, the proposed provision explicitly puts the burden on the party invoking the defence, allowing the CCI to examine business practices related to IP licensing in appropriate cases and giving a statutory underpinning to justification based on IP.

In the context of applying the proposed reasonableness test, this paper suggests that the CCI should take into account the following from the economic literature and comparative law: whether the condition is necessary for the protection of the legitimate commercial interests of the IP holder in the licensed right; whether the condition is proportionate to the legitimate IP-protection purpose served; whether the cumulative effect of the conditions imposed to all the licensees is consistent with the preservation of competition in the relevant market; and in the specific context of SEPs, whether the royalty rate reflects the incremental value of the patented technology, over the most viable alternative technology, at the time of the standardisation exercise.

B. Recommendation Two: A Statutory Consultation Mechanism between CCI and IP Offices

The issue of jurisdiction highlighted by the 2016 and 2023 Delhi High Court rulings is one that can neither be resolved through courts, but needs a legislative fix. This paper suggests that the CCI, when issuing a final order in any case in which it has issued a prima facie finding of alleged abuse of dominance in IP licensing, should seek a written opinion from the relevant IP authority, Controller General of Patents, Designs and Trade Marks for patents and Copyright Office for copyright, on whether the conduct complained of is within the legitimate scope of the IP right under the relevant IP statute.

The opinion of the IP authority should be issued within a reasonable time (as suggested in this paper: 90 days) and should cover three issues: Is the conduct consistent with the rights granted by the relevant IP statute? Does the relevant IP statute have special mechanisms to address the conduct? Have or will any such mechanisms be invoked by the parties? The opinion of the IP

authority needs to be taken into account but not binding upon the CCI and neither preclude the CCI to assess the competition law issues.

This way, the inter-regulatory discussion that is needed to avoid the mutually exclusive consequences the Division Bench judgment of 2023 would cause would be institutionalized. It is based on the already existing provision in Section 21 of the Competition Act, under which statutory authorities can consult the CCI with respect to competition issues, but adds to it the obligation for the CCI to consult itself with respect to the issues raised by the statutory authorities.

C. Recommendation Three: Statutory Recognition of SEPs and a Legislative FRAND Framework

There is no definition of Standard Essential Patent in the Patents Act, 1970 or the Competition Act, 2002 and there is no statutory requirement to license SEPs on FRAND terms. The FRAND obligation in India does not have a legislative basis, but is purely contractual, based on participation in the SSO. This regulatory vacuum has created much uncertainty in SEP litigation in India for the last 11 years or so.

This paper suggests two complementary legislative measures. First, the Patents Act needs to be amended so as to incorporate a statutory definition of SEPs as patents that are, or likely to be, essential for the implementation of a technical standard adopted by a recognised SSO, and to impose on SEP holders a corresponding obligation to license such patents to all "bonafide" applicants on FRAND terms. Second, there should be a dedicated SEP and FRAND Determination Tribunal, either within the CCI or as an independent statutory entity, with the institutional capacity and expertise to deliver economically informed, consistent and binding determinations of FRAND royalties.

While drafting the FRAND determination framework, there are several proposals made by the European Commission in its 2023 proposal to draft a Regulation on Standard Essential Patent (COM(2023) 232 final) that India should look into for designing a centralised framework for SEP registration, essentiality and FRAND conciliation. It is a framework that would offer the clarity and predictability which the current regime lacks.

VI. CONCLUSION

This paper has uncovered and explained a structural issue with the Indian Competition Act, 2002, namely, the Section 3(5) Paradox, which stems from the disparate application of IP under Section 3 and Section 4 of the Competition Act, 2002 ("Competition Act"). Section 3(5) allows

IP owners to impose reasonable conditions on their licensing agreements without being liable under Section 3(1)'s anti-competitive agreements prohibition. There is no comparable defence in the context of Section 4 (abuse of dominant position). This imbalance puts dominant IP owners at risk of Section 4 liability for acts which are also IP rights protected behavior under Section 3(5) of the TRIPS agreement, as the Ericsson/SEP and Google Android decisions clearly demonstrate.

This conundrum has further been complicated by a dispute between the CCI and the Controller of Patents which has been unsettled after controversial rulings by the Delhi High Court in 2016 and in 2023, and the Supreme Court's refusal to examine the question in September 2025. As per the comparative law analysis, India has failed to craft a statutory reasonableness defense for a dominant IP holder and a functional FRAND determination mechanism, which would otherwise be considered very unusual in key jurisdictions. The EU has responded to the tension by developing a 'judge-made doctrine', and the US by adopting the doctrine of 'rule of reason'. Neither has India done, and the position of the 2023 Division Bench ruling, which purports to solve the issue by excluding the CCI from IP licensing proceedings, has left the country in a worse-off state than it was in before the ruling.

The three proposals for legislation presented in this paper are not radical, nor are they unprecedented, as they aim to provide a reasonableness defence under Section 4, introduce a statutory consultative process between the CCI and IP authorities and give statutory recognition to SEPs with a FRAND determination framework. They are specific and proportionate measures that would ensure Indian Competition law is aligned with global best practices and keep the CCI as the 'guardian of the competitive market in technology-intensive industries as it is now.' India's Parliament failed to make these reforms in the Competition (Amendment) Act, 2023. The price of inaction regulatory uncertainty, reduced technology licensing and loss of consumer and innovator interest is too high for India's economy to bear.

VII. BIBLIOGRAPHY

1. The Competition Act, 2002 (Act 12 of 2003), as amended by the Competition (Amendment) Acts of 2007 and 2023.
2. The Patents Act, 1970 (Act 39 of 1970), as amended.
3. The Copyright Act, 1957 (Act 14 of 1957).
4. Article 102, Treaty on the Functioning of the European Union.
5. EU Proposal for a Regulation on Standard Essential Patents, COM(2023) 232 final.
6. ETSI Rules of Procedure, Annex 6 — ETSI Intellectual Property Rights Policy.

Cases

1. Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson (Publ), Case No. 50 of 2013, CCI.
2. Intex Technologies (India) Ltd. v. Telefonaktiebolaget LM Ericsson (Publ), Case No. 76 of 2013, CCI.
3. Best IT World (India) Pvt. Ltd. v. Telefonaktiebolaget LM Ericsson (Publ), Case No. 4 of 2015, CCI.
4. Telefonaktiebolaget LM Ericsson (Publ) v. CCI, W.P.(C) Nos. 464/2014 and 1006/2014, Delhi HC, 30 March 2016.
5. Telefonaktiebolaget LM Ericsson (Publ) v. CCI, LPA 247/2023, Delhi HC Division Bench, 13 July 2023.
6. CCI v. Telefonaktiebolaget LM Ericsson (Publ), SLP(C) No. 25026/2023, Supreme Court of India, dismissed 2 September 2025.
7. Umar Javeed v. Google LLC, Case No. 39 of 2018, CCI, Order dated 20 October 2022.
8. Mahyco Monsanto Biotech (India) Pvt. Ltd. v. CCI, W.P.(C) 1673/2016, Delhi HC, 20 May 2020.
9. Case C-241/91P, Magill [1995] ECR I-743.
10. Case C-418/01, IMS Health [2004] ECR I-5039.
11. Case T-201/04, Microsoft v. Commission [2007] ECR II-3601.
12. Case C-170/13, Huawei v. ZTE [2015] 5 CMLR 14.
13. Unwired Planet International Ltd. v. Huawei Technologies Co. Ltd. [2020] UKSC 37.

Articles

1. Hovenkamp HJ, 'Intellectual Property and Competition' (University of Pennsylvania Carey Law School, 2008).
2. Lemley MA and Shapiro C, 'Patent Hold-Up and Royalty Stacking' (2007) 85 Texas Law Review 1991.
3. Raju KD, 'Interface between Competition Law and Intellectual Property Rights: A Comparative Study of the US, EU and India' (2014) 2 Intellectual Property Rights 115.
4. Sidak JG, 'FRAND in India: The Delhi High Court's Emerging Jurisprudence on Royalties for Standard Essential Patents' (2015) 10 Journal of Intellectual Property Law and Practice 609.
5. Venegas VB, 'Intellectual Property Rights, Enforcement Costs and EU Competition Law' (2023) 11 Journal of Antitrust Enforcement i37.
6. High Level Committee on Competition Policy and Law (Raghavan Committee), Report (2000), Ministry of Finance, Government of India.
7. US Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (2017).
