

LICENSING ROYALTIES AND RELEVANT MARKET CONCERNS: THE ‘RELEVANCE’ OF PREPARING THE FIELD BEFORE THE MATCH

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The Competition Commission of India (CCI) has always been vested with the jurisdiction of delineating the relevant market in cases of abuse of dominance. However, recently, in the case of Telefonaktiebolaget Lm Ericsson (Publ) v. Competition Commission of India, it was held that the Patents Act, 1970 and the courts would prevail over the CCI in the assessment of the rights of a patentee. Within the case text, one of the contentions that ultimately paved the path for such a detrimental ruling was that the calculation of Fair, Reasonable and Non-Discriminatory rates (‘FRAND’) does not require the delineation of a relevant market and hence, the CCI does not exercise jurisdiction over it. However, figuring out a rightful FRAND rate (which deters the abuse) depends entirely on the comparative analysis of substitutes of a product in a given relevant market since such a rate cannot be fixed arbitrarily and has to be equal for all licensees. Hence, in this article, the authors argue that the jurisdiction of the determination of licensing royalties in the cases of abuse of dominance by a patent holder lies with the CCI alone.

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I. INTRODUCTION

Just like a match cannot be played before preparing the field, a product's 'relative' performance cannot be determined without understanding its performing ground, which is the relevant market. In the realm of competition law, a 'relevant market' refers to a subset of the entire market space where substitutable products compete with each other. It is essential to delineate a relevant market to assess the market power of a company, which enables the Competition Law authorities to evaluate potential anti-competitive behaviour.¹

The delineation of a relevant market becomes indispensable even in the cases of abuse of dominance by a patent holder because the market position cannot be measured before understanding what exactly the surrounding market looks like for a particular product. This is one of the key concepts arising at the intersection of two major legal fields: competition law and intellectual property rights Law ('IPR'). The conflict between the two fields becomes evident upon noting that competition law regulates abusive market practices² and protects the free market economy. However, IPR law provides legal protection for innovations and prevents the misuse of well-established goodwill and market share. Applying IPR law often leads to the provocation of a single market player with immense power to control and drive the market forces detrimentally, often by charging 'exorbitant' rates as licensing royalties.³ This is because the charging of high rates by a single market player acts as a deterrent for those licensors who cannot afford such rates; and effectively leads to market foreclosure.⁴ For this reason, IPR must be seen from the eyes of anti-competitive practices.

Cases involving the abuse of dominance by a patentee are often accompanied by a vital question of determining the licensing rates *via* which one would validate the usage of their patented technology to retailers and other smaller producers. The recent case of *Telefonaktiebolaget Lm Ericsson (Publ) v. Competition Commission Of India & Anr* ('Telefonaktiebolaget 2023') ruled that the Competition Commission of India ('CCI') shall have no jurisdiction to determine the Fair, Reasonable, and Non-Discriminatory ('FRAND') rates allied to Standard Essential Patents ('SEPs') since this was not a question pertaining strictly to Competition Law and did not require defining a relevant market.⁵ This ruling wrongfully diluted the CCI's jurisdiction regarding anti-competitive patent allied practices.

To elaborate upon these terms, the term 'standard' (in SEPs) is a set of rules that allows materials, goods, processes, and services to interact with one another so that they can

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¹ Paulo Burnier da Silveira, *Relevant Market*, CONCURRENCES, available at <https://www.concurrences.com/en/dictionary/Relevant-market> (Last visited on February 1, 2024).

² Deborah Healey, *Abuse of Dominant Position*, CONCURRENCES, available at <https://www.concurrences.com/en/dictionary/abuse-of-a-dominant-position> (Last visited on February 1, 2024).

³ OECD, *Licensing of IP Rights and Competition Law*, April 29, 2019, available at [https://one.oecd.org/document/DAF/COMP\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf) (Last visited on February 2, 2024).

⁴ *Id.*, 15.

⁵ *Ericsson AB v. CCI*, 2023 SCC OnLine Del 5022, ¶¶51-54.

interoperate.⁶ A standard assimilates technical specifications for mainstream and novel technologies, for instance, radio technology. Examples of such technologies include Wi-Fi, Bluetooth, and JPEG, among others. The patents salient to such standards, validated by the Standard Setting Organization ('SSO'), are known as SEPs.⁷ The licensing of such patents at exorbitant rates could injure their accessibility for public use tremendously. To remedy this, SSO members must ensure adherence to the FRAND terms. Essentially, FRAND rates ensure that licensing costs for crucial patents are not excessive, unreasonable, or discriminatory. This promotes the widespread use of standardised technology while removing barriers to competition. Their determination is influenced by comparable licenses, market conditions, among other factors, and they contextualise the value of a particular patent in the broader context of the standard.⁸ The idea behind FRAND rates is that their value should not be so high that it impedes the provider from investing back in the research and development ('R&D') operations used to create new technological advances.⁹

The authors argue that delineating a relevant market is a necessary first step to determine FRAND rates. As discussed, the non-compliance with the said FRAND rates can lead to abuse of dominance by the patent holder. This potential abuse of dominance in the SEP market and its relevant market connotations across both categories, whether in the sale of goods and services or even licensing, are among the lesser-discussed areas of competition-IPR law. This is because there was a predominant presumption of market power allied to patents for aeons, and the courts did not deem it fit to determine a relevant market in which the particular patented product or service fell.¹⁰ However, the authors have profusely discussed in this article that such a presumption is ill-founded since, observations drawn from such an incomplete process are often inaccurate. Along these lines they have argued that a thorough investigation of market substitutes, their comparative rates, among other factors is unavoidable to project a right image of market share, dominance, and its abuse.

This article explores the indispensable need to demarcate a relevant market in cases of abuse of dominance vis-a-vis patent licensing. It puts forth that FRAND rates can only be determined accurately with such demarcation and further, that the CCI alone has the appropriate expertise to determine the relevant market, thereby proving that its jurisdiction cannot be ousted in this regard.

In Part II, the authors analyse the settled law on licensing royalties for SEPs across leading jurisdictions. In Part III, they touch upon the recent ground-breaking developments in Indian competition-IPR law. In Part IV, they establish the need to determine a relevant market in patent abuse of dominance cases. Part V critically analyses the hindrances caused upon ousting the jurisdiction of the CCI in such cases and lastly, Part VI presents recommendations to remedy the

⁶ Daniel F. Spulber, *Licensing Standard Essential Patents with FRAND Commitments: Preparing for 5G Mobile Telecommunications*, Vol. 18(1), COLO. TECH. L.J., 79 (2020).

⁷ Erik Hovenkamp, *Tying, Exclusivity, and Standard-Essential Patents*, Vol. 19(1), COLUM. SCI. & TECH L. REV., 79 (2017).

⁸ Georgios Effraimidis et al, *Determination of FRAND Royalty Rates: An Examination of Prominent SEP Cases*, Vol. 19(1), JIPLP, 67 (2024).

⁹ Geeta, *India: Standard Essential Patents (SEPs) And Frand Licensing*, MONDAQ, May 11, 2020, available at <https://www.mondaq.com/india/patent/930032/standard-essential-patents-seps-and-frand-licensing> (Last visited on October 13, 2023).

¹⁰ Thomas P. Walsh III, *Defining the Relevant Market: Impacts of the Abolition of the Presumption of Market Power in Patent Tying Cases*, Vol. 84(1), DENV. L. REV., 274 (2006).

hindrances thereof. Throughout the study, the authors have carefully analysed their observations with illustrations. Part VII concludes the research conducted.

II. THE LEGAL TREATMENT OF PATENT LICENSING ABUSE IN LEADING JURISDICTIONS

While there is no clear identification of countries with a well-developed FRAND framework for SEPs, it is notable that this concept gained traction with respect to competition lawsuits within two leading jurisdictions;¹¹ the United States of America ('US') and the European Union ('EU'). In this segment, the authors expound on the practice and jurisprudence adopted by these jurisdictions as follows; in Part A, they elucidate the importance of determining a relevant market to detect abusive practices. They lay down the Antitrust Guidelines for the Licensing of Intellectual Property ('IP Guidelines'), which provide the principles governing the intersection between competition law and IPR in the USA, then pointing out how pro-competitive licenses can be achieved through FRAND rates. They also highlight how FRAND rates for SEPs are determined through factors like the Georgia-Pacific case, further arguing that the case-by-case application of these factors is necessary for determining a reasonable royalty rate.

In Part B, the authors establish an essential link between the violation of FRAND rates and Article 102 of the Treaty on the Functioning of the European Union ('TFEU').¹² They further underline how different EU jurisdictions employ diverse approaches to determine the market definition for a given product, emphasising the need for a contextualised understanding of reasonable SEP licensing rates, thereby necessitating a relevant market analysis.

A. UNITED STATES OF AMERICA

In the USA, §2 of The Sherman Antitrust Act, 1890 ('the Sherman Act') provides that it is illegal for anyone to attempt, combine or conspire to monopolise any part of trade or commerce.¹³ As opposed to this, natural monopolies, which exist where economic factors, by default, lead to a situation of only one supplier in the market, are not considered against the law (but the same depends on the case being adjudicated upon).¹⁴ Intended monopolies are against the law since they involve an element of abusive tactics to reach monopolistic ground. The existence and, further, the magnitude of such abuse by the intended monopolies cannot be detected without zeroing in on the relevant market. Only after such determination can a successful antitrust investigation into the abuse be carried out.

Further, an earlier position deemed that having a patent was a criterion conferring exclusive market rights and even monopoly power in the relevant market, irrespective of substitutes of a given product.¹⁵ In other words, there was a 'presumption' of market power by a

¹¹ Jeffrey Atik, *The FRAND Ceremony and the Engagement of Article 102 TFEU in the Licensing of Standard Essential Patents*, Vol. 42(3), FORDHAM INT. LAW J., 952 (2016).

¹² The Treaty on the Functioning of the European Union, 1958, OJ L. 326/47-326/390, Art. 102.

¹³ The Sherman Antitrust Act, 1890, §2 (U.S.A.).

¹⁴ Neil W. Hamilton & Anne M. Caulfield, *The Defense of Natural Monopoly in Sherman Act Monopolization Cases*, Vol. 33(3), DENV. L. REV., 465 (1984).

¹⁵ Sheila F. Anthony, *Antitrust and Intellectual Property Law: From Adversaries to Partners*, FEDERAL TRADE COMMISSION, May 5, 1999, available at <https://www.ftc.gov/news-events/news/speeches/antitrust-intellectual-property-law-adversaries-partners> (Last visited on October 17, 2023).

patent holder. However, the position has now been reversed, with the Federal Trade Commission ('FTC') and Department of Justice ('DOJ') taking a complementary approach to the application of antitrust principles to patent law, with the use of the IP Guidelines.¹⁶ These guidelines lay down three basic principles. First, the same general antitrust principles are to be applied to matters allied to both intellectual and other kinds of property;¹⁷ second, simply owning a patent does not confer market power from an antitrust point of view (the ability to profitably keep prices above, or output below competitive levels for an extended length of time);¹⁸ and third, intellectual property licensing is to be encouraged when done in a pro-competitive way.¹⁹

One of the significant subject areas related to the third principle of pro-competitive patent licensing is determining and enforcing FRAND rates. This is because reasonable FRAND rates pave the way for competitive patent licensing, by providing access to SEPs. For instance, in the telecommunications market, FRAND terms enable fair and reasonable licensing of SEPs. Without FRAND, patent holders could monopolise essential technologies, which would stifle the competition. With FRAND, many firms can access patents at reasonable rates, encouraging innovation and diverse product offerings in the market, which would ultimately benefit the consumers.²⁰ There is no settled criterion to determine such rates within the USA; however, courts have set powerful precedents over the years.²¹ The first FRAND case saw the usage of predetermined factors known as the 'Georgia-Pacific factors' and a hypothetical negotiation based on them. First laid down in the case of *Georgia-Pacific v. US Plywood Corp*,²² they consist of a series of fifteen factors such as, the rates paid by the licensee for using other patents that are comparable to the patent in question, the nature and extent of the license, the opinion testimony of qualified professionals, among other factors. These factors help to create an information base of all comparable patents out of which a relevant market can be delineated. Once the relevant market is delineated, a comparative analysis can be drawn, resulting in an accurate and reasonable royalty rate.²³ This framework became an excellent measure for determining the rates as it was adopted in other cases, too, such as in *Innovatio IP Ventures*, which further contributed to this discourse by stating that the reasonableness should be determined from the perspective of the SEP holder.²⁴ Given the negotiable nature of FRAND rates, the framework created by the Georgia-Pacific factors

¹⁶ The Antitrust Guidelines for the Licensing of Intellectual Property, 2017 (U.S.A.).

¹⁷ *Id.*, §2.1.

¹⁸ *Id.*, §2.2.

¹⁹ *Id.*, §2.3.

²⁰ Berkley Research Group LLC, *A Practical Guide to Determining FRAND in the Telecommunications Industry*, LEXOLOGY, October 12, 2016, available at <https://www.lexology.com/library/detail.aspx?g=81a123ca-6f2e-486f-b589-9c60a8ac7991> (Last visited on April 2, 2024).

²¹ Samuel Brenner et al, *United States: SEPs and FRAND – Litigation, Policy and Latest Developments*, GLOBAL COMPETITION REVIEW, December 2, 2022, available at <https://globalcompetitionreview.com/hub/sepfrand-hub/2022/article/united-states-seps-and-frand-litigation-policy-and-latest-developments#:~:text=In%20the%20first%20FRAND%20rate,setting%20in%20the%20United%20States> (Last visited on October 13, 2023).

²² *Georgia-Pacific v. U.S. Plywood Corp*, (1970) 318 F. Supp. 1116, 1120 (United States District Court for the Southern District of New York).

²³ Stephen Thimonds, *Determining Reasonable Royalty Damages in Patent Infringement Cases*, SCHNEIDER DOWNS, March 18, 2015, available at <https://www.schneiderdowns.com/our-thoughts-on/determining-reasonable-royalty-damages-patent-infringement-cases> (Last visited on October 18, 2023).

²⁴ *Innovatio IP Ventures, LLC, Patent Litigation* (2013) No. 1:2011cv09308 - Document 565 (N.D. Ill.) (United States District Court for the Northern District of Illinois).

was subjected to fervent scrutiny. While the case of *Ericsson, Inc. v. D-Link Sys.*²⁵ tried to make the parameters more rigid and less contextual, in *Microsoft v. Motorola*,²⁶ a greater emphasis was placed on the discretion of courts in determining rates within the broader framework of the Georgia-Pacific factors.

Essentially, while there are diverse perspectives vis-a-vis the treatment of the Georgia-Pacific factors to reach the concrete, numerical FRAND rate, it is notable that these factors have laid a broad path to the seemingly abstract idea of a FRAND rate. The authors strongly believe that a case-by-case application of these factors would be a catalyst for the determination of a well-rounded and reasonable royalty rate for standard essential patents, but not sufficient. This is because while the answer to each of these criteria or factors might provide a simple set of figures, reasonability itself is a relative criterion. Reasonability cannot be conclusively ascertained without contextualising it against other comparative rates within the market. In essence, the determination of a well-rounded royalty rate necessitates a nuanced analysis that considers not only individual factors but also their interplay and comparison with prevailing rates in the market. As established above, the information base created by these factors needs to be narrowed down to ‘relevant’ patents to the comparative analysis. Hence, the delineation of the relevant market is inescapable to determine reasonable FRAND rates.

B. EUROPEAN UNION

Under the well-developed EU antitrust regime, Article 102 of the TFEU, emphasises on what constitutes an abuse of dominance by an undertaking and prohibits the same. The question of dominance requires defining the market or relevant market in question, which involves identifying the scope within which the undertaking operates. Subsequently, the position of the undertaking within this relevant market is evaluated to ascertain whether it holds a dominant position or not. This assessment is crucial in determining the potential for any abuse of dominance by the undertaking.²⁷

Article 102 of the TFEU lays down certain categories of abuse of dominance. Within this, Article 102(a) prohibits the imposition of unfair purchase or sale prices or unfair conditions of trade, which provides a broader outlook towards abusive rates allied to any transaction.²⁸ For instance, the European Court of Justice (‘ECJ’), in its seminal decisions like *United Brands v. Commission*²⁹ and *Konkurrensverket v. TeliaSonera Sverige*³⁰ has interpreted that charging excessive prices for a product or a service can constitute an abuse under Article 102(a) of the TFEU. Furthermore, Article 102(c) disallows applying different restrictions to similar transactions to put other parties at a competitive disadvantage.³¹ A classic example of such discriminatory abuse is the ‘margin squeeze’,³² in which an undertaking provides products or services at a cheaper rate to its favourable market players, thereby indulging in discriminatory

²⁵ *Ericsson Inc. v. D Link Sys.*, (2014), 773 F.3d 1201 (United States Court of Appeals for the Federal Circuit).

²⁶ *Microsoft Corp. v. Motorola Inc.*, (2012) 696 F.3d 872 (United States Court of Appeals for the Ninth Circuit).

²⁷ Alison Jones et al, *JONES & SUFRIN’S EU COMPETITION LAW: TEXT, CASES AND MATERIALS* (Oxford University Press, 7th edn., 2019).

²⁸ The Treaty on the Functioning of the European Union, 1958, OJ L. 326/47-326/390, Art. 102(a).

²⁹ *United Brands v. Commission*, Case 27/76, February 14, 1978 (Ct. J. E.U).

³⁰ *Konkurrensverket v. TeliaSonera Sverige AB*, Case C-52/09, February 17, 2011 (Ct. J. E.U), ¶34.

³¹ The Treaty on the Functioning of the European Union, 1958, OJ L. 326/47-326/390, Art. 102(c).

³² *Deutsche Telekom AG v. Commission*, Case C-280/08, October 14, 2010 (Ct. J. E.U), ¶4.

pricing for equivalent competitors. The objective of imposing FRAND rates is to ensure reasonable and equal licensing rates for all licensees. Hence, the disputes involving the imposition of exorbitant licensing rates, thereby violating FRAND rates, fall within Articles 102(a) and 102(c) of the TFEU.

As established, an analysis of abuse within EU Competition Law requires delineation of the relevant market.³³ Now, the importance of determining the relevant market must also be understood in the SEP context. It is a widely established principle of EU Competition Law that the ownership of an SEP does not in itself lead to a ‘presumption’ of a dominant position, and Article 102 is infringed only if the holder has a dominant position.³⁴ As a result, the market power of the patent holder is a key determination for the interpretation of market dominance. Now, there are some key approaches that the European Commission (‘EC’) has taken while assessing the market dominance of SEP holders. In some cases, the EC has assessed a greater preponderance of dominance where the SEP relates to widely used standards.³⁵ Otherwise, dominance is also measured from the perspective of certain forms of abusive behaviour, such as discriminatory licensing terms, demanding excessive royalties, and refusal to grant license for monopolistic purposes.³⁶ For instance, in the seminal Rambus Patent Ambush case,³⁷ the EC alleged that the company was engaged in charging exorbitant royalty rates. This allegation was made upon concluding that Rambus enjoyed a dominant position in a considerable part of the ‘relevant market’. Subsequently, Rambus was found liable for abusing its dominant position.³⁸

It is a general misconception that the theoretical foundation for standardised products is similar to mainstream, traditional products.³⁹ However, upon closer examination, it becomes abundantly clear that the task of demarcating the relevant market for such standardised technology is highly complex. This difficulty often leads to varying degrees of subjectivity and must be done through the cross-examination of all crucial factors and substitutes. For instance, in various cases where a substantial degree of complexity is attached to the product, the EC has employed a narrow definition of markets, making it convenient to establish dominance.⁴⁰ Another approach taken by the EC to define the market has been to deem each SEP a relevant market since an SEP is irreplaceable to comply with the standard.⁴¹ This approach is the narrowest approach the

³³ Tuire Anniina Väisänen, ENFORCEMENT OF FRAND COMMITMENTS UNDER ARTICLE 102 TFEU: THE NATURE OF FRAND DEFENCE IN PATENT LITIGATION, (Nomos Verlagsgesellschaft mbH, 2011).

³⁴ Thomas Vinje, *Standard-Essential Patents in European Union*, LEXOLOGY, August 21, 2019, available at <https://www.lexology.com/library/detail.aspx?g=88b4c9d2-67cc-432a-be27-d35ca85f765d> (Last visited on October 9, 2023).

³⁵ *Id.*

³⁶ Jurgita Randakeviciute, *Patent Ambush: The Commitment Decision of the European Commission in the Rambus Case*, 4IPCOUNCIL, January 22, 2018, available at https://www.4ipcouncil.com/application/files/8715/1638/1033/Patent_Ambush_the_Commitment_Decision_of_the_EC_in_the_Rambus_Case.pdf (Last visited on October 9, 2023).

³⁷ Commission Decision of 9 December 2009 relating to a proceeding under Article 102 of the Treaty on the functioning of the European Union and Article 54 of the EEA Agreement (European Commission), Commission decision, December 9, 2009, Case COMP/38.636- RAMBUS.

³⁸ *Id.*, ¶75.

³⁹ Väisänen, *supra* note 33, 34.

⁴⁰ Commission decision of June 15, 2005 relating to proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (European Commission), Commission Decision, June 15, 2005, COMP/A.37.507.F3- Astra Zeneca, ¶370.

⁴¹ Vinje, *supra* note 34.

EC takes because each SEP holder has a 100% market share of a tightly limited market.⁴² From these findings, it becomes evident that there is no straight-jacket formula to determine market dominance. Hence, it is necessary to assess the relevant market on a case-to-case basis, depending on the type of SEP.

The EU, through its various jurisdictions with their own judicial prowess exercises its own way of valuing an SEP. The outward character of each of these approaches is thoroughly different from the other approaches discussed so far. However, it can be evaluated that a single issue that persists is the constant necessity for a comparable framework to determine a reasonable licensing rate for an SEP. This is because such a framework (involving a comparative analysis) becomes essential to ensure fairness in the determination of licensing rates. This framework, it is argued, can only be formulated by constructing the relevant market for the given SEP.

III. INDIA: SETTLED LAW AND RECENT DEVELOPMENTS

In India, §2(m) of the Patents Act, 1970 defines the term ‘patent’ as an offering granted within the act to secure an invention.⁴³ However, this definition becomes more comprehensive through a perusal of §3 of the Act, which elucidates the meaning of the term ‘invention’ by excluding certain fields, such as one claiming something contrary to well-established laws, causing harm to public order, morality and harm to animal life and humans, among others.⁴⁴ In essence, a patent is granted for inventions that are not only non-obvious but also significantly different from existing solutions thereby improving the standard of living.⁴⁵

Patent suits categorically pertaining to the abuse of dominance through patent licensing require an understanding of the relevant market. The relevant market essentially relates to a subset of the entire market ecosystem of similar inventions to the patent at hand. Within the Competition Act 2002, a relevant market includes two main things: a relevant geographic market⁴⁶ with area-based connotations concerning the homogeneity of demand and supply of goods or services and a relevant product market⁴⁷ which includes those products or services that can be seen as interchangeable with other substitutes that are similar to that product by virtue of its characteristics, prices, and intended use. Together, a relevant product market and a relevant geographic market constitute a foreground of substitutable products,⁴⁸ which helps to stratify a diverse market and categorise a particular product in a more specific manner.

As discussed above, a lesser-seen yet salient form of patent abuse of dominance is the imposition of exorbitant licensing rates for using the patent. In the case of SEPs, such rates must be fixed as FRAND rates. When licensing is not done on such rates owing to the dominant position of the patent holder in the market, the burden to establish the range of rates or at least the criteria for just rates should depend on the CCI. While the jurisprudence on FRAND rates and abuse of domination by patent holders is well-developed in nations like the US and EU, it finds

⁴² *Id.*

⁴³ The Patents Act, 1970, §2(m).

⁴⁴ *Id.*, §3.

⁴⁵ Chandra Nath Saha & Sanjib Bhattacharya, *Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry*, Vol. 2(2), J. ADV. PHARM., (2011).

⁴⁶ The Competition Act, 2002, §2(s).

⁴⁷ *Id.*, §2(t).

⁴⁸ *Id.*, §2(r).

itself at a nascent stage in India. The deliberations on the issue of the determination of FRAND rates and CCI's jurisdiction in cases involving the abuse of dominance by patent holders started with the seminal holding of the Delhi High Court in *Telefonaktiebolaget LM Ericsson v. Competition Commission of India & Another* ('Telefonaktiebolaget 2016'), wherein the court reasoned that the CCI has been entrusted with jurisdiction in matters concerning patent abuse but at the same does not imply the power to assume jurisdiction in cases involving the ascertainment of rates of royalties.⁴⁹ The cogitation on this jurisdictional turf further occurred in *Monsanto Holdings Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.*,⁵⁰ wherein the court maintained that the CCI has jurisdiction in patent abuse cases. It also noted that there was no incompatibility between the Patents Act and the Competition Act which could not be remedied.⁵¹ However, the Delhi High Court later reversed both of these judgments vide its order in *Ericsson*,⁵² whereby the court ousted the CCI's jurisdiction entirely in cases concerning the abuse of dominance by a patentee and determination of FRAND rates. It instead conferred jurisdiction to the courts under the application of the Patents Act.

It is not unreasonable to assert that the Hon'ble High Court has, through this ruling, established a precedent with potentially far reaching ramifications. This was primarily because the court did not appreciate the dire need for the demarcation of a relevant market as a consequence of comparative analysis in patent abuse of dominance and FRAND rates determination cases for which there are abundantly established precedents across the well-endowed antitrust and intellectual property laws of EU and US.⁵³ Additionally, it is argued that the ruling of the court in the *Telefonaktiebolaget 2016* also suffers from partial inconsistency as the CCI is equipped well enough to determine the royalty rates in cases involving abuse of dominance through patents. Such a detrimental ruling was further perpetuated in the *Telefonaktiebolaget (2023)* judgment. The CCI is the appropriate authority to determine royalty rates. This is because properly determining such rates in any patent law case involving an abuse of dominance necessitates a CCI-led analysis of the relevant market since an explanation of the same is contained in the competition act thereby bestowing upon the CCI to authority to decide such cases. This will be further discussed in the subsequent parts of the paper.

IV. THE NEED TO DEMARCATATE THE RELEVANT MARKET

A. MARKET POWER CANNOT BE ASSUMED

The patent holder is granted special rights to protect his invention under the specific patent law applicable to a particular jurisdiction. However, a common misconception is that holding a patent itself confers monopoly power over such an inventor.⁵⁴ Various judicial

⁴⁹ *Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India*, 2016 SCC OnLine Del 1951, ¶¶208,209 (per Vibhu Bakhru, J).

⁵⁰ *Monsanto Holdings Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.*, 2020 SCC OnLine Del 598, ¶38.

⁵¹ Essense Obhan & Sneha Agarwal, *India: CCI Has Jurisdiction when Patent Rights are Abused: Delhi High Court*, MONDAQ, July 27, 2020, available at <https://www.mondaq.com/india/patent/969550/cci-has-jurisdiction-when-patent-rights-are-abused-delhi-high-court> (Last visited on October 20, 2023).

⁵² *Ericsson AB v. CCI*, 2023 SCC OnLine Del 5022, ¶¶51-54.

⁵³ *Oetiker v. Jurid Werke, G.m.b.H.*, (1977) 556 F.2d 1, 6 (United States Court of Appeals, District of Columbia Circuit).

⁵⁴ Walsh III, *supra* note 10.

developments worldwide have long rendered this assumption a misconception. The US Supreme Court, in the case of *Illionois Tool Works Inc. v. Independent Ink*,⁵⁵ while rejecting the arguments favouring the presumptive market power of the patent holder, ruled that the existence of a dominant position in a relevant market must be proved with cogent evidence to justify a violation of §2 of the Sherman Act. The US Intellectual Property guidelines ('IP guidelines') also replicate the notion that market power should be assessed on a case-to-case basis. For instance, 'tying-in' refers to a practice where a seller makes the sale of one product (the 'tying' product) contingent upon the buyer's agreement to purchase a separate product (the 'tied' product) from the same seller.⁵⁶ It was deemed ordinary, for a long time, to presume that 'tying-in arrangements' entered into by the patent holder were inconsistent with the antitrust laws and constituted an abuse of the patent.

For example, a patent holder for a printing device licenses that patent on a pre-condition that the licensee must also buy the ink for that printing device from the patentee. This pre-condition may be perceived as an abusive practice by many. However, this scenario will not lead to an abuse of dominance by a patentee unless proof of genuine market power in the relevant market is shown. The seminal case of *Times-Picayune Publishing Co. v. United States*⁵⁷ substantiated this position and laid down that the abuse of monopoly power under the Sherman Act is limited to cases where the seller enjoys a dominant position in the relevant market of the 'tying' product, which in the present case seems to be the market of ink cartridge. In this way, the US courts have interpreted the presumption of market power as legally unsound.⁵⁸ Thus, it is observed that while the legality of a tying-in arrangement cannot be ruled out completely, the illegal ones can be demarcated by facilitating a relevant market analysis.

It is now established that any attempt to presume monopoly power for a patented product leads to a misconception of dominance. Hence, the extent of market power needs to be established, which requires the demarcation of a relevant market.

B. PATENT ABUSE OF DOMINANCE: COMPARATIVE ANALYSIS OF EXISTING SUBSTITUTES

Whenever there is a claim of patent abuse of dominance, it becomes imperative for the party alleging the same to prove the monopoly power enjoyed by the patent holder, which requires an examination of the relevant market. For instance, the seminal case of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.* emphasised that a failure to examine the relevant market would make it difficult to assess the patent holder's ability to affect market competition.⁵⁹ This affirms the notion that analysing any abuse of dominance begins with defining the relevant market. The aforementioned understanding entails the calculation of other existing competitors' market shares (by providing a context) which further acts as a catalyst to determine the potential market power of the patent holder.⁶⁰ Hence, a comparative approach of other market players is unavoidable to determine the abuse of a patent by a patent holder.

⁵⁵ *Illionois Tool Works Inc. v. Independent Ink*, (2006) 126 S. Ct. 1281 (United States Supreme Court).

⁵⁶ Kurt A. Strasser, *An Antitrust Policy for Tying Arrangements*, Vol. 34(2), EMORY L. J., 253 (1985).

⁵⁷ *Times-Picayune Publishing Co. v. United States*, (1953) 345 U.S. 594 (United States Supreme Court).

⁵⁸ *Jefferson Hosp. Dist. No. 2 v. Hyde*, [1984] 466, S. 2, 37 n.7 (United States Supreme Court).

⁵⁹ *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, (1965) 382 U.S. 172 (United States Supreme Court).

⁶⁰ Silveira, *supra* note 1.

This also applies to antitrust cases that arise when a patent holder fails to adhere to FRAND regulations, potentially resulting in abusive conduct by the patent holder. Here, the demarcation of relevant markets is called for because a comparative analysis of all the existing market players will help determine reasonable FRAND rates. The US jurisprudence has produced many seminal cases that provide a comparative market approach to determine fair patent licensing rates. For instance, in *Ericsson Inc. v. D Link Sys., Inc.*,⁶¹ the court asserted the importance of undertaking a comparative analysis of comparable licenses to formulate fair licensing rates. Similarly, even the adjudicatory authorities in Germany⁶² and the UK,⁶³ while determining the fair rate of royalties while licensing the patent, adopted a comparative market approach.

For instance, a telecommunications company, 'A', holds a patent for '5th Generation Wireless Tech' that falls under the category of SEP. 'A' enters into an agreement with a mobile manufacturing firm, 'B', to license its patent rights at a 2% royalty rate per device. Subsequently, due to certain grievances with the royalty rate pitched, 'B' sues 'A' for not complying with the FRAND rates. Now, the 'authority' called upon to decide the FRAND rate will do so through a comparative market analysis. To determine the comparative 5G licensing rates, it will have to look at other market players, which would require an initial step of defining the market. Let us assume that there are three comparative licenses in the demarcated relevant market to which 'A' belongs, charging a royalty rate of 3%, 4%, and 1.5%, respectively. Now, on the basis of these, the 'authority' will undergo a proper comparative analysis of all the market substitutes of 'A's' patented technology and will devise the proper FRAND rates of royalties that should be charged. As a result, there will be a fixed, numerical, range set out by the court, which has to be complied with by the parties.

Looking at the scenario above, it is evident that determining FRAND rates requires a thorough comparative analysis of the available substitutable licenses in the market. The 'authority' must demarcate the relevant market to undergo this comparative analysis. In the Indian context, the CCI is the only authority that fits best in the definition of 'authority' used in the above illustration, as it has appropriate tools such as the Demand Substitution Method (Cross Elasticity Test)⁶⁴ and the Small but Significant Non-Transitory Increase in Price ('SSNIP') Test⁶⁵ to demarcate and investigate the relevant market cases involving abuse of dominance using patents. These tests are based on the main factor of substitutability or interchangeability of the existing market product to delineate the relevant market.

An alternate method for ascertaining FRAND rates is treating the data according to the Top-Down and Bottom-Up approaches. The Top-Down approach involves two steps; first, the reasonable price to license all patents covered under the standardised technology is determined as an aggregate.⁶⁶ Second, this aggregate royalty is allocated proportionally to the SEP owners.

⁶¹ *Ericsson Inc. v. D Link Sys.*, (2014), 773 F.3d 1201 (United States Court of Appeals for the Federal Circuit).

⁶² *Sisvel v. Haier*, (2020) Case No. KZR 36/17 (German Federal Court of Justice).

⁶³ *Unwired Planet v. Huawei*, (2018) UKSC 2018/0214 (United Kingdom Supreme Court).

⁶⁴ *United Brands v. Commission*, Case 27/76, February 14, 1978 (Ct. J. E.U.).

⁶⁵ *United States v. E. I. du Pont de Nemours & Co.*, (1956) 351 U.S. 377 (United States Supreme Court).

⁶⁶ Nick Schuneman, *The Proposed EU SEP Regulations: A Quiet Move Toward a Top-Down World*, MCDERMOTT WILL & EMERY, June 7, 2023, available at <https://www.mwe.com/insights/the-proposed-eu-sep-regulations-a-quiet-move-toward-a-top-down-world/#:~:text=In%20Depth,the%20standardized%20technology> (Last visited on October 15, 2023).

Contrastingly, the Bottom-Up approach looks at a patent-by-patent valuation of individual SEPs.⁶⁷ Interestingly, both methodologies require a measuring ground and not just a singular element of comparison. This, it is argued, can only be formulated by conducting a comparative market study, which pre-supposes a ‘market’ definition for that particular product or, as it is said in antitrust terms, a relevant market.

Hence, in cases involving determination of FRAND rates, each subsequent litigation would yield a greater understanding of the rates due to a greater familiarity with the relevant market, overcoming the issues associated with undervaluation or overvaluation. Further, the inefficiency of courts in addressing these matters and the rationale for vesting jurisdiction in the CCI are elaborated upon in Part V of this paper.

C. CONFLICT IN MARKET DEFINITION

The market definition can severely impact the outcome of cases in suits concerning patent fraud or monopolisation claims. This impact leads to a classic conundrum, with two opposing parties wanting to define a relevant market differently. In a typical patent dispute concerning antitrust claims, the patentee would prefer employing a broader understanding of the market with many substitutes for the product to establish that the firm does not have monopoly power. Conversely, the party accusing the patentee firm of the abuse would prefer a comparatively narrower market to prove the monopoly power of the patentee firm.⁶⁸

As an illustration, there exist various kinds of Artificial Intelligence (‘AI’) technologies such as AI writers, AI voice makers, AI logo makers, and many more. For instance, let us assume that a firm, ‘X,’ licensing patented AI writer technology, is accused by a party, ‘Y,’ of patent abuse of dominance. Further, if it is supposed that it will have a market share of 80% if only ‘AI writers’ are included as substitutes for its product within the market definition, however, its market share will reduce to 20% if such a definition comprises AI technologies as a whole. The party ‘Y’ will prefer the former market definition as it is easy to establish dominance since the market definition is narrower because of less substitutability. As opposed to this, the firm ‘X’ will prefer the latter, making it relatively more challenging to establish dominance because of more product substitutes.

Similar conflicts regarding market definition would arise in all the cases concerning patent abuse of dominance, such as the narrow market of graphic cards or the broader market of Central Processing Units (‘CPU’), the narrow market of high-end smartphones, or the broader market of smartphones, and other such examples. All the situations mentioned above lead to a situation of demand for conflicting royalty rates from both sides of the suit. Thus, it can be sufficiently seen how a slight change in market definition can lead to a change in outcomes of the cases involving patent abuse of dominance. Hence, there is a dire need to demarcate the relevant market in cases involving patent abuse of dominance.

⁶⁷ *Id.*

⁶⁸ Alyssa Lutz & Lauren Stroh, *The Relevant Market in Antitrust and IP Litigations*, NERA, June 30, 2003, available at <https://www.nera.com/content/dam/nera/publications/archive1/6302.pdf> (Last visited on October 15, 2023).

V. PROBLEMS WITH NOT CONFERRING JURISDICTION TO THE CCI

Now that it is established that a relevant market is an absolute necessity when dealing with patent abuse of dominance, it becomes imperative to understand that the jurisdiction of patent abuse of dominance cases inclusive of determination or re-determination of royalty rates must fall within the ambit of the CCI for the following two reasons.

A. *DETERMINING A RELEVANT MARKET: INADEQUACY OF THE PATENTS ACT, 1970*

A closer examination of the provisions of the Patents Act shows that it is yet to be developed to deal with suits regarding licensing rates. The lacunae in the law are quite evident. For instance, the lack of discussion surrounding the terms ‘relevant market’ or ‘market power’ in the act which are considered essential elements for adjudicating upon cases dealing with the abuse of dominance, as opposed to §4 of the Competition Act, 2002, which deals with it in detail. The only provision concerning patent abuse within the Patents Act, 1970 is found under §83(f),⁶⁹ which talks about the abuse of patent rights by the patent holder and mentions the phrase “that the patent right is not abused”. It is argued that this phrase cannot be seen as a concrete mechanism to establish patent abuse since it is incredibly vague, merely listing patent abuse as against the *vires* of an act in a declaratory sense. Even if the possibility of explaining the relevant market within the Patents Act, 1970 is explored, the argument of conferring this jurisdiction to the courts instead of the CCI is still fallacious since the actual delineation of the relevant market is a technical procedure which has always been entrusted to the CCI.

Presently, it is foreseeable that the CCI is the most efficient authority within the Indian legal regime to deal with abuse of dominance cases involving the determination of patent licensing rates. This is because it has devised a proper structure over the years to determine abuse of dominance by taking into account factors such as the ‘relevant market’ and ‘market power’.⁷⁰ The structure primarily involves the delineation of the relevant market corresponding to the product in question. Subsequently, several factors enlisted under §19(4)⁷¹ of the Competition Act, 2002 come into play while determining the dominant position, like market share, size and resources of the enterprise and its competitors, entry barriers, consumer dependence and costs in the relevant market. It is notable that only after a thorough analysis of the above-mentioned steps, potential market abuse can be detected.⁷² Thus, until the Indian patent law appreciates a definition of a relevant market and gives detailed provisions thereof, it is in the best interest of the law that the competition law prevails over such matters.

B. *MULTIPLICITY OF LITIGATION*

At any given point of time, if a single dispute entails on one hand a question of law over which the CCI can exercise jurisdiction (patent abuse of domination) and on other a question

⁶⁹ The Patents Act, 1970, §83(f).

⁷⁰ Andrew Blair-Stanek, *Increased Market Power as a New Secondary Consideration in Patent Law*, Vol. 58 (4), AM. U. L. REV., 716 (2009).

⁷¹ The Competition Act, 2002, §19(4).

⁷² CCI, *Provisions Relating to Abuse of Dominance*, January 4, 2014, available at https://www.cci.gov.in/public/images/publications_booklet/en/provisions-relating-to-abuse-of-dominance1652177254.pdf (Last Visited on February 2, 2024).

falling outside the jurisdiction of the CCI (determination of royalties), it will lead to multiple litigations emanating from the same suit.⁷³ This issue also arises if CCI's jurisdiction is not extended to determining the royalty rates in patent abuse of dominance cases, which has its allied issues such that it hinders ease of due process. Very often, parallel litigations can run amok due to different periods that the litigations might take place in. The litigations in patent disputes already suffer from multiple proceedings because the parties involved are typically large enterprises with huge assets that take advantage of the jurisdictional turfs among different jurisdictions and purposely file several suits, squandering the already encumbered court system.⁷⁴

This cluster of litigation processes can be averted by bestowing upon the CCI jurisdiction on all matters, as the paper has already established that determining royalty rates also requires the demarcation of the relevant market. CCI is the only Indian authority equipped well enough to deal with the concept of the relevant market.

VI. RECOMMENDATIONS

The best way forward is to understand that determining the relevant market pertaining to a particular SEP is not just important but necessary to understand whether there is any market dominance. The most feasible and accurate technique to determine the licensing rate seems to be conducting a comparative analysis of market substitutes. Furthermore, the CCI must be given the discretion to determine such substitutes on a case-to-case basis. Looking at the well-established Competition Law jurisprudence of the EU and USA, the CCI may borrow specific criteria to determine the FRAND rates. Inspiration could be drawn from the IP guidelines conferring similar principles for patent abuse of dominance as provided under the general competition regime. Further, the CCI can also consider looking at something specific like the appropriate Georgia Pacific factors as seen in the case of *Microsoft v. Motorola*. While the CCI may not be able to apply American case law factors to Indian cases wholly, it can develop a similar framework based on Indian precedents. In this way, it will have a proper scale to determine the FRAND rates. In our view, the CCI must properly lay down some fundamental principles to determine FRAND rates, which would become the yardstick for future judicial endeavours and research. However, to facilitate this, the power to carry out this analysis must be bestowed upon the CCI, without which the determination of abuse would become an incorrect and futile exercise.

VII. CONCLUSION

The term patent abuse may contain words pertaining to two different statutes, yet their adjudication is not interchangeable between the CCI and the courts. The two most developed jurisdictions on antitrust law, the USA and the EU, have been instrumental in determining valid FRAND rates and the indispensable usage of relevant market analysis. The well-developed jurisprudence in these two jurisdictions has paved the way for the understanding that a comparative analysis of market substitutes is necessary for relevant market analysis. The inherent complexities related to such a determination cannot be stressed enough, even in the Indian context, especially when there are multiple interpretations of what a product market ought to be in every case. Ultimately, there cannot be a uniform yardstick or a simplistic expression to determine the abuse

⁷³ Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India, 2016 SCC OnLine Del 1951.

⁷⁴ Surabhi Sharma, *Patent: A Dynamic Change to Stop Multiplicity of the Proceedings: A Critical Analysis*, Vol. 4(5), INDIAN J. LAW AND LEGAL RES., 1392-1403 (2002).

of dominance by any entity. It must be done based on subjective criteria such as prevailing market conditions and substitutes at any given time. With its prowess in relevant market demarcation, analysis, and generalizations based on the same, the CCI is the irreplaceable forum for adjudicating such disputes.