

**Pervasive Technologies : Access to Knowledge in the
Marketplace**

The Curious Case of the CCI : Competition Law and SEP Regulation in India

Nehaa Chaudhari

w- www.cis-india.org

e- nehaa [at] cis-india [dot] org

t - @nehaachaudhari

The 4th Global Congress on Intellectual Property and the Public
Interest, New Delhi, India | 15 – 17 December, 2015

Outline

- ▶ Mobile phone patent litigation in India w/competition law issues
- ▶ Ericsson v. Micromax [v.CCI] as a case study
- ▶ Taking stock
 - We have a problem
 - Is competition law a tool to ensure access to the low-cost mobile phone in India?
 - Is the CCI a site to ensure access to the low-cost mobile phone in India?
- ▶ Where do we go now?

Mobile phone patent litigation in India

- ▶ What are the patent infringement lawsuits in which competition law issues have been raised?
 1. Ericsson v. Micromax (2013) : judgment expected in December, 2015/January, 2016
 2. Ericsson v. Intex (2013) : sub-judice
 3. Ericsson v. iBall (2015) : settled out of court

Ericsson v. Micromax as a case study

▶ Timeline

March, 2013

Ericsson files patent infringement suit against Micromax :
claims INR 100 crore in damages + interim royalty rate fixed
(b/w 1.25 and 2% of the sale price, depending on the
technology involved)

March, 2013

Micromax files a complaint with the Competition
Commission of India (CCI) : Alleges abuse of dominant
position by Ericsson

November, 2013

CCI finds prima facie case against Ericsson, orders its
Director General (DG) to investigate

In response, Ericsson files a writ petition in the Delhi High
Court, challenging the authority of the CCI.

...contd.

November, 2014

Court fixes new interim royalty rate + Sets deadline of December 31, 2015 for the trial.

May, 2015

Delhi High Court passes an interim order, stating **while DG is free to carry out the investigation, no final order shall be issued.**

Order spoke to the complaints filed by Micromax, Intex and by iBall with the CCI

...contd.

Also asks DG to first inform Ericsson if calling an officer stationed abroad.

Should Ericsson find DG's requests unreasonable, Ericsson was entitled to move court.

...contd.

September, 2015

Court sets aside the summons issued to Ericsson by the CCI
Orders no coercive action against Ericsson until the next
hearing; subsequently converted to a final order, pending
decision of the patent infringement suit.



Taking stock.

We have a problem.

- ▶ As of 2013, Ericsson claimed to hold **a third of 2G SEPs, and a quarter of 3G SEPs**
- ▶ Indian competition law SEP litigation sees Ericsson pitted against much smaller companies: Micromax, Intex, iBall
 - Generic manufacturers do not have large patent portfolios : cannot 'set-off' and negotiate royalty rates
 - Lack resources to pursue sustained litigation : pendency of litigation is a very real problem in India
- ▶ How do we ensure access to the low cost mobile device?
 - Last mile connectivity + internet access + access to knowledge/innovation

...contd.

In Law

- ▶ Is competition law a tool to ensure access to the low cost mobile phone?
 - Anticompetitive agreements are prohibited – Section 3, Competition Act, 2002 **but nothing in this section applies to a person acting to protect her IPR/restrain infringement of her IPR**
 - Abuse of dominance is prohibited – Section 4, Competition Act, 2002
 - The Competition Act, 2002 has an overriding effect over other laws for the time being in force – Section 60, Competition Act, 2002
 - But application of other laws not barred – Section 62, Competition Act, 2002.
 - The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.
 - Ex-ante problem v. ex-post regulation through competition law – problem solution mismatch?

...contd.

- ▶ Is the CCI a site that will ensure access to the low cost mobile phone?
 - Duty of the CCI to eliminate practices that have an adverse effect on competition – Section 18, Competition Act, 2002
 - CCI has the power to inquire into agreements/ dominant position of enterprises. Can undertake this inquiry on its own motion or on the basis of information received or on the reference of Central/State government or statutory authority – Section 19, Competition Act, 2002
 - Power to order further investigation, or to dismiss the complaint after the DG's report – Section 26, Competition Act, 2002

...contd.

- ▶ Wide ranging powers should it find a violation of Sections 3 and 4 – Section 27 Competition Act, 2002
 - Discontinue agreement/abuse of dominance
 - Monetary penalty – up to **10% of the average turnover for the past three years upon each person/enterprise party to such abuse/agreement**
 - Modify the agreement + direct compliance with modified agreement
 - Any other order/direction
- ▶ More powers – Section 28, Competition Act, 2002
 - Direct division of the enterprise abusing its dominance. Includes transferring rights/liabilities; adjustment of contracts; transfer of shares etc.
- ▶ Can examine acts taking place outside India if they have an effect on competition in India – Section 32, Competition Act, 2002
 - Potential to examine FRAND commitments by companies to the international standard setting organizations?

...contd.

- ▶ Jurisdiction of **civil courts excluded** - Section 61, Competition Act, 2002
 - No **civil court** shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the [Commission or the Appellate Tribunal] is empowered by or under this Act to determine **and no injunction shall be granted** by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

...contd.

▶ BUT

- Constitutional powers of the High Court
 - Article 226 empowers the High Court to issue certain writs
 - Can be issued to any person or authority
 - Includes, in **appropriate cases**, the Government
 - including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them,
 - for the enforcement of any of the rights conferred by Part III **and** for **any other purpose**
 - Article 227 of the Constitution of India vests the High Court with supervisory jurisdiction that it can exercise over all courts and tribunals within its territory
 - CCI and the COMPAT are within the territory of the Delhi High Court
 - The Supreme Court of India recognized and upheld these powers in the L. Chandra Kumar case (1997)
- The central government has the power to supersede the CCI - Section 56, Competition Act, 2002.

Where do we go now?

- ▶ Ericsson v. Micromax reserved for judgment – to be out in December, 2015/January, 2016
- ▶ Need an ‘empowered CCI’
 - Bhatia International (2003) and BALCO (2005) - The ruling in Bhatia International, that arbitrations having their seat outside India were still questionable within the jurisdiction of the Indian courts, had effectively nullified the entire purpose behind the arbitral awards. Subsequently, this decision was overruled in BALCO, and extremely restricted grounds were identified to challenge such awards.
 - Judicial review of L. Chandra Kumar
 - But, L. Chandra Kumar was about administrative tribunals!
 - Law Commission of India recommendation in 2008 suggested review by a larger SC bench.