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Standard Essential Patents

From 'Anti Suit Injunction' to 'Anti Anti Suit Injunction', Where would this Journey End? Part-I

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Right to seek justice is the most basic tenet of human life, but what if this right to seek justice is desisted by courts of justice itself? Yes, this crude statement with other paraphernalia insinuates a concept known as 'Anti Suit Injunction', (ASI) by virtue of which a court restrains a party from prosecuting and/or instituting a suit between same parties, in any other court of law. But certainly that's not where things terminate! To cease the conflicting judgments emanating from various jurisdictions and for amicable resolution of disputes by one court only, a relatively novel concept of 'Anti-Anti-Suit Injunction'(A2SI), with a primary intent of reversing the efficacy of ASI by preventing the other party to take shed under ASI, has took the centre stage. As the functioning of both ASI and A2SI is not in coherence with the basic notions of international law along with some coordinative rules, so the appropriateness of them as a remedy is vastly questionable.

These remedies have recently surfaced into the domain of 'Standard Essential Patents' (SEP), leaving the parties to the dispute concerning SEP licensing (which are global in effect, as legal actions centering on identical patents or related issues are often taken in parallel and multiple jurisdictions[1]) in legal chaos as to which court of law will hear them.

What motivated the authors to usher into this domain is the topical, contemporaneous nature along with increase in its relevance in its confrontation with the SEPs, the same itself being a highly contemporary and ever evolving domain of patenting landscape. With the ever advancement of technology, this field is highly debated and is being pondered over in various sectors including academics! The present paper is a part of the ongoing research, to give a thorough discourse through a series of articles spanning across the year in upcoming volumes of this journal. The current and first installment of this yearlong series would try to apprise the readers towards this multidimensional issue of A2SI with its confrontation with SEPs with the subsequent issue briefing the global scenarios and way forward concerning this issue of A2SI. The latter part of this yearlong series would then try to provide a fundamental overview of SEPs from the very scratch itself to satiate the questions so raised by the former issues amongst the mind of readers.

Keywords: SEPs, Anti-Suit Injunctions, Anti- Anti-Suit Injunctions, Comity, FRANDS

In contemporary times, it is simply impossible for anyone to stay aloof from technology. You enter in any domain; you will find yourself engrossed with technology of nearly every kind. From health to education, from development to entertainment, technology has become the most basic essential of human survival. This Technology has its interface in various domains and being a student of law one such domain to appreciate is 'IP laws'. When a walk is undertaken to those narrow aisles of operational aspects of technology *vis-à-vis* IP laws, we come to a concept known as 'Standard Essential Patents' (SEPs). Has anyone ever wondered why do we have Interoperability and consistency across all the devices of telecommunications? The answer to this and many other assorted issues owed their origin to this fast-evolving domain of Standard Essential Patents. To any layman, for the most basic understanding, as the name suggests Standard Essential Patents are simply a category of patents which protects a technology or rather an invention which in turn is essential to a standard. The technologies that make up the standards are frequently covered by patents which are known as SEPs, and the owners of those patents generally agree to provide a license to those SEPs on terms that are fair, reasonable, and non-discriminatory (FRAND).[2] The goal of FRAND terms is to guarantee that implementers may easily access the standard while also giving technology creators enough profits on their investments.[3] At times, SEP owners and implementers can disagree on the exact definition of FRAND license conditions.[4] But still, the majority of license agreements are reached amicably without knocking the judicial remedies. The FRAND rules' transparency and adaptability allow licenses to be tailored to the particulars of each sector and company. More about

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FRAND will be discussed in next issues in an yearlong series. Being a relatively novel domain, the jurisprudence concerning this topic of SEP is still at a naïve stage and scholars across the globe are deeply pondering over the issues that are arising out of operational aspects of the SEPs. One such issue is the availability of 'A2SI' relief which is the subject matter of the present article.

Right to seek justice has always been the most basic tenet of human life, but the same right is sometimes desisted by courts of justice itself! Yes, this crude statement with other paraphernalia insinuates a concept known as 'Anti Suit Injunction', (ASI) by virtue of which a court restrains a party from prosecuting and/or instituting a suit between same parties, in any other court of law. But certainly that's not where things terminate! To cease the conflicting judgments emanating from various jurisdictions and for amicable resolution of disputes by one court only, a relatively novel concept of 'Anti-Anti-Suit Injunction'(A2SI), with a primary intent of reversing the efficacy of ASI by preventing the other party to take shed under ASI, has took the centre stage. When this domain of special type of injunction is viewed from the perspective of the subject matter of SEP, it was discovered that, despite the FRAND framework's overall effectiveness in fostering the kind of innovation previously unheard of in the information and communications technology (ICT) sector, some disagreements have developed over time over SEP-related concerns.[5] The accessibility of injunctions to SEP owners, the place in the production chain for licensing, the appropriate methodologies to quantify FRAND royalties, the suitable royalty base for assignment of a FRAND royalty rate, and the implementation of competition laws to the conduct of the SEP owners are a few of the contentious issues that have recently surfaced in SEP litigation.[6] Another most problematic is the issuance of ASI in one country that forbids a party from starting or continuing SEP litigation in another jurisdiction. In retaliation, other courts may issue a corresponding A2SI, which forbids the party from requesting or enforcing an ASI.

In this context, the objective of this article is to analyze, what made the usage of remedies in the form of ASI and A2SI so rampant globally while dealing with disputes emanating from SEP Licensing, where would such a direction lead and shape the jurisprudence to? And what possible remedies can be resorted to mitigate their rampant usage? By the end, readers inter alia would be able to appreciate the basic understanding of this special type of injunctive remedy in its application to SEPs licensing. Also, what are the circumstances in which such remedies are granted and what are the different approaches across different international jurisdictions and how the same is dealt *vis-à-vis* the principle of 'International Comity'.

The present article inculcates following heads; firstly, the disputes arising out of operational aspects of SEP licensing would be explained to give a glimpse of global nature of problem this domain of SEP licensing amalgamates.[6] Secondly, certain conditions and circumstances that paves the way for granting of ASIs and A2SI across various jurisdictions would be examined to understand the conditions of its application. This head would then go on to discuss usage of these injunctive remedies in their application in SEP litigation. The concluding head of this article would suggest certain measures and best practices which could encourage parties to concentrate on fixing the fundamental problem;[6] it would also suggest a way forward which courts of law may opt to give a holistic termination to inter-territorial jurisdictional conflicts concerning SEP licensing disputes.

Operational Aspects of SEP Licensing

Contemporary globalised world in its ever-growing path of digitization is filled with powerful SEP owners as well as implementers having their presence at a worldwide scale. Tensions between a global commercial dispute and national patent rights are often developed when there is disagreement over the specifics of a FRAND license. If discussion fails to deliver their commercial licensing goals, both parties have a number of offensive options at their disposal before the jurisdiction of national courts. The SEP owner may file a lawsuit based on its national SEPs and may ask the court to impose an injunction in that concerned jurisdiction or award damages for national SEPs infringement. As a result, SEP litigation is regularly filed in several jurisdictions throughout Europe, North America and Asia. For instance, a recent legal battle between Ericsson and Samsung[7] involved courts across the US, China, Germany, Belgium, and the Netherlands. The SEP proprietor may also request a declaratory judgment that it provided FRAND specifications in places where such proceedings are permitted.[8] On the other hand,

implementers may also take proactive measures to invalidate SEPs or request certifications of non-infringement.[9] In places where the FRAND agreement is defined as a contract that is executable by the intended third party recipient, implementers may also claim breach of contract accusations that the SEP proprietor failed to offer FRAND licensing terms and seek the court to impose the terms of a FRAND license.[10] Thus, a variety of SEP licensing strategies have come under scrutiny as being indicative of both structural and strategic issues with FRAND licensing in the context of private ordering. Thus, it is typically asserted that the FRAND commitment, being vague and weak, must be interpreted to have particular legal implications in order to control the "monopoly power" surrounding SEPs.[11]

Historically, courts have always been cognizant about the territorial essence of the patent rights and hence have always been hesitant to surpass the reach of their jurisdiction. This tradition got a break with the decision of English court in *Unwired Planet* v *Huawei* that they have the authority in the context of domestic patent infringement litigation to style the provisions of a worldwide license agreement, which obviously an implementer has to acknowledge under distress of getting an injunction order by the court. The effects of decision in Unwired Planet case are being felt all over the globe, as the British courts appear to have started a race to the bottom among jurisdictions in an effort to entice plaintiffs with the prospect of establishing universal FRAND rates.

It would not take long for other countries to follow suit in the drive to stay up with their peers after Chinese courts declared they have the authority to establish worldwide FRAND pricing. The use of so-called "anti-suit injunctions" (ASIs), a relief hitherto traditionally conferred by common law jurisdictions but now more frequently by civil law jurisdictions like China, is being used by litigants to try to stop their opponents from introducing litigation in a less favorable forum. Litigants are vying to grab their favored forum by launching pre-emptive strikes, while also racing to prevent their opponents from doing the same. However, ASIs are no longer always the final decision in a case. Instead, litigants frequently request and receive anti-anti-suit injunctions (AASIs) or even the anti-anti-anti-anti-suit injunctions (AAASIs), frequently on an ex parte status and in the nature of preliminary injunctions. This strange game of jurisdictional rolling ball is a disturbing trend because it wastes judicial resources, erodes public confidence in the legal system, and favors the person who acts first or simply has the biggest bankroll.

ASI and A2SI Interplay

In order to prevent other courts from meddling with domestic procedures, courts that are dealing with SEP disputes may employ a variety of procedural measures. There are three distinct remedies underlying such measures, in the form of three types of injunctions and probably many more if the trend continues, namely, 1) anti-suit; 2) anti-enforcement; and 3) anti-anti-suit.

The initial part of discourse spanning across yearlong articles in the subsequent volume of this journal would familiarize the readers with idea of ASIs along with the requirements for awarding such relief under Chinese law, as Chinese courts have only recently begun issuing similar relief, as well as under the British and American law, which historically have been the two jurisdictions under which such injunctions were frequently granted. The discourse then would proceed towards understanding how ASIs have been typically employed in the parlance of global SEP litigation. Court orders in the forms of so called ASIs prevent a party from undertaking extralegal actions.[12] They are mainly issued by common law courts, including those in the US and England. They can be dated to the English common law courts' issuance of writs of prohibitions upon ecclesiastical tribunals in the fifteenth century.[13]

Operational aspect of ASIs is that it functions in *personam*, i.e., they are generally addressed towards the claimant rather than the foreign court in any international proceedings. In layman terms it can be said that an ASI has no extra-territorial impact. However, an ASI may be a very effective instrument in the context of global litigation because it can be indirectly enforced by exposing the party against whom the injunction was granted to harsh penalties in the jurisdiction where the order of injunction was issued for its noncompliance.[14] Due to the fact that ASIs interfere with the jurisdiction of the foreign court in an ambiguous way, British and American courts have long recognized that they may raise comity issues.[15] With this brief outline we would give an interim end to this discourse, and in the upcoming issue, we will briefly visit certain

jurisdictions as to how British, American and Sino law apply to granting of ASIs followed by which an holistic Indian scenarios would be discussed. The same has become more relevant as the Indian courts have also entered this domain of ASI and A2SI, to quote for instance *Interdigitial* v *Xiaomi*[16] is the first such case in which Indian court has entered this global race of A2SI.

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