The Necessity of India's Confidentiality Clubs

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By **Vaishali Mittal** and **Siddhanth Chamola**.

The IP litigation landscape has changed dramatically in the past decade with businesses becoming more technology-driven and technology-dependent than ever before.

Innovation companies today command a prominent place at the table, and a larger piece of the pie, even if they don't sell products themselves, but license technology put to use by others. Those with an eye towards the future are rapidly developing technology that serves as the bedrock for growth. The catch, therefore, is not just money anymore. It is the information that one acquires. Amid all this lies the secret to being successful: Proprietary, confidential information, which is priceless, and precisely why it is a source of conflict.

When competitive disputes exit meeting rooms and enter courtrooms, the most basic questions before judges are if the defendant's gains are based on its own efforts, a misuse of the plaintiff's IP, or worse, theft of classified information? It is therefore to protect sensitive information that courts have devised the mechanism of "confidentiality clubs".

Evolution of confidentiality clubs

Genesis. The first case to discuss the need for confidentiality clubs was Vestergaard, which saw the division bench of Delhi High Court recognize that sensitive documents must be deposited with the court in a sealed cover, while accepting the need to set a procedure to discuss these documents, hear legal arguments on their impact and prevent their leak.

The court developed a procedure that has been followed in a number of cases. The features of confidentiality clubs, which evolved from cases such as MVF; *Ericsson v Lava* and others are:

(1) Documents to be filed in a sealed cover, with irrelevant information being redacted;

(2) Limited membership – usually a couple of lawyers from either party, along with an expert;

(3) All members are bound by rules of confidentiality and must file affidavits declaring their solemn oath not to divulge information to outsiders.

Discourse. Next came the club's membership. Initially, the high court took a conservative approach

in *Ericsson v Xiaomi*. Opining that the risk of leaks was a genuine reason for parties to prevent access to other club members, it held that parties could only access (and not copy) redacted information through club members.

Sanctification. These rules were only soft law until 2018, when Delhi high court ushered the Original Side Rules, 2018. Chapter VII, rule 17, codified them. It laid down that the club includes less than three lawyers on either side and external experts, and excluded in-house-lawyers. This composition led to a resurfacing of the question of which *Ericsson v Xiaomi* had touched briefly and conservatively – what good would lawyers and experts do if the parties themselves can't access sensitive documents at the heart of the dispute?

Clarity. This question was put to rest in the Transformative and Genentech cases, wherein it was held that parties (and internal experts) need to necessarily have access to sensitive information, since the lack of it renders them, and the court, helpless in addressing moot questions.

Confidentiality in SEP litigation

Standard Essential Patents (SEP) litigation has acquired pole position in IP in the past few years, as it involves the confluence of quite a few areas of law (antitrust, statutory IP, contracts, etc.). One of the main questions in SEP litigation is whether the licence rates offered to the defendant were fair, reasonable and non-discriminatory (FRAND).

One way to determine this is to see if it compares well with the licences taken by other parties. Courts in India have given protection against leaks. For instance, all information must be redacted, apart from the licence rate itself.

Clubs necessary and reasonable

The notion that SEP holders and big corporations use confidentiality clubs to muscle out defendants is flawed. Rules of confidentiality apply to both parties, and any party that refuses to share confidential information will inevitably "face the music". Equally flawed is the notion that defendants in SEP cases have no confidential information. First, their sales information may be sensitive, or at least not for public scrutiny. Second, defendants themselves have executed FRAND agreements and demand a licence on similar rates. But they, too, don't want to disclose the terms.

License agreements are also often subject to confidentiality, i.e., the parties cannot disclose terms unless they secure permission from those who executed the contract. After all, it's not just the parties to the suit, but also parties to the contracts, whose interests need to be preserved.

There is a belief that comparable licences are not good enough since no one knows if they were signed under duress. This notion, once stretched logically, can lead to a stalemate in each case. If agreements are signed (and strangely honoured for years) under duress, they can be challenged by the party concerned, thus making them public. There have to be some objective standards, otherwise no dispute would reach a resolution.

As each case reveals the gaps in the scheme of confidentiality clubs, it will also push the need for bridging those gaps, and the system will continue to strengthen and evolve through judicial tinkering.

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