

A Novel Injunction Pushing India's IP Frontier

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On May 3, 2021, India got its first Anti-Anti-Suit injunction. The historical order is novel not just because it is India's first such injunction but also because it displays a creative use of defensive offensive strategy, emphasizes the importance of injunctions as opposed to damages and most importantly, it goes on to strike a distinction between anti-anti-suit and anti-enforcement injunctions, pointing out how the latter do not really require special care and caution.

Before going into the details of the judgement, here is a brief overview of the genesis of the SEP-FRAND dispute titled *InterDigital Corp & Ors v Xiaomi Corp & Ors* which culminated in the Delhi High Court granting the AASI in favour of InterDigital.

Facts

(a) The Plaintiff ("InterDigital") claims that at least 5 named Standard Essential Patents in its India portfolio have been infringed by Xiaomi through manufacture and sale in India of its cell phones.

(b) Xiaomi had filed, unknown to the Plaintiff on 09.06.2020 a lawsuit against the Plaintiff in Wuhan, China, seeking determination of a global FRAND rate.

(c) The Indian Court heard arguments on the setting up of a Confidentiality Club and after a few hearings, were informed that in the Wuhan Suit, Xiaomi had claimed an Anti-Suit injunction as on 04.08.2020 and the Wuhan Court granted the same on 23.09.2020 restraining InterDigital from proceeding with its injunction application (or law suit).

The Wuhan Court granted a penalty of RMB 1 Million per day, should InterDigital breach the said injunction.

(d) InterDigital filed an application seeking an Anti-Anti-Suit injunction against Xiaomi.

Outcome

On October 9, 2020, the Delhi High Court granted an ad-interim AASI against Xiaomi directing it to not pursue or enforce the injunction it had secured from the Wuhan Court.

This order was made absolute on May 3, 2021.

The Court also directed Xiaomi to indemnify InterDigital against any penalty in case the Wuhan Court imposes a cost of RMB 1 million (approximately US\$154,000) per day against InterDigital for pursuing the suit filed by it in India, claiming injunction and damages (amongst other relief) for infringement of its Standard Essential Patents (SEPs). The court further mandated that Xiaomi will have to deposit such amount in the court within one week of imposition of such costs on InterDigital, if any, and that InterDigital can then withdraw this amount.

Realising that it was setting on deciding a novel question, the Delhi High Court laid down some fundamental guidelines:

- (a) There is a distinction between an Anti-Suit injunction; an Anti-Anti-Suit injunction and an Anti-Enforcement injunction. Since the Wuhan Anti-Suit proceedings had concluded (although the suit for FRAND rate setting for a global license to InterDigital's 3F, 4G SEPs is still continuing), the Indian injunction was in the nature of an Anti-Enforcement injunction;
- (b) That the Court does not subscribe to the view that special care ought to be taken while granting Anti-Enforcement injunctions (as opposed to Anti-Suit injunctions) as the latter can interfere to a greater extent with the proceedings in a foreign jurisdiction. By doing so, the Court has struck down the defence which is raised ever so often, i.e., AASI orders should be passed in even rarer circumstances when compared with an ASI. The Court clarified that there is no reason for AASI to be seen as being rarer than ASIs, especially when grounds justifying it have been established.
- (c) That the Wuhan Anti-Suit injunction was not justified as Xiaomi had concealed its filing from InterDigital and had not served InterDigital with the action. Simply because there was some overlap in the reliefs sought in the two proceedings or there may have been inconsistent findings by the Delhi High Court and the Wuhan Court (although doubtful) did not justify the said action even for a day.
- (d) The Wuhan Court could not possibly pass an order of injunction restraining the infringement of Indian Patents and therefore, had no business to interfere with the sovereignty of the Indian Courts and the plaintiff's right to enforce patents of its choice.

InterDigital by filing the Indian action did not interfere with or exclude the Wuhan FRAND rate setting proceedings in any way.

The Court has given careful attention to addressing the limited application that the principle of Comity of Courts will have, especially when the impugned order itself was oppressive and did not respect the jurisdiction of an Indian Court to hear matters covered under Indian law. The Court upheld the principle that Comity is a two-way street after all.

Emphasizing the importance of injunctions in the context of patent enforcement before an Indian Court, the learned Judge held:

- (i) The Plaintiffs can't be expected to sit back and watch their rights being violated as this would render the "statutory guarantees" available under the Patents Act otiose and impotent.
- (ii) By treating damages or other non-injunctive reliefs as sufficient succour for infringements undermines the very sanctity of Intellectual property Rights.

The principle grounds which motivated the Court to grant the AASI were:

1. InterDigital had no prior knowledge of the fact that an ASI application had been filed in the Wuhan Court, until the order was already published. Thus, it had no occasion to take pre-emptive remedies against the order of the Wuhan Court.
2. InterDigital was only served with notice of the fact that a complaint had been filed in Wuhan, which sought establishment of global, FRAND royalty rates for the entire SEP portfolio of InterDigital.
3. That a suit seeking injunction against infringement of Indian patents, can only be tried before competent courts in India.
4. The Wuhan Court was wrong to have restrained InterDigital from pursuing its injunction remedies in India, as the Delhi High Court was the only forum to adjudicate it.
5. Any overlap between the proceedings in Wuhan and those in India, is minor, and unless an overlap is such that it makes the Indian proceedings *oppressive and vexatious*, there was no reason for the Wuhan Court to have restrained InterDigital from pursuing its claims for an injunction against Xiaomi in India.
6. Xiaomi chose to remain silent and did not inform the Court, or InterDigital that it had filed an anti-suit-injunction against the Indian proceedings. Xiaomi was present before the Indian Court on 6 occasions after it filed an ASI application in Wuhan, but chose not to disclose this fact. This constitutes fraud on the Court.
7. If the Wuhan Court enforces its ASI order, and directs InterDigital to deposit penalties for prosecuting its Indian suit, then Xiaomi must compensate it by depositing a corresponding amount with the Court in India. This amount could be secured by InterDigital thereafter.

What makes the ad-interim AASI of October 09, 2020 and now the final decision of May 03, 2021 unique is that it is arguably the first case in the world where an AASI was granted after an ASI was already passed by a foreign court. In contrast, all previous AASI orders in patent infringement disputes like the ones between *IPCom* and *Lenovo* in UK, France, and the *Nokia v Continental / Daimler* in Germany, have been passed only when the ASI proceedings in foreign courts were still pending and being argued. This judgment will contribute greatly not just to Indian, but international jurisprudence on this aspect.

