Proxy Wars in Patent Litigation: Not Always a Viable Strategy

Thought Leadership • May 15, 2023

'First published on India Business Law Journal'

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A recent decision by the Competition Commission of India has put the lid on infringers with frivolous patent allegations

There has been a proliferation of proxy wars for patent supremacy in recent years. What is at the core an IP litigation has infringers rushing to antitrust authorities with frivolous pleas for investigations into business practices of the rightful patent holders.

These practices are aimed at harassing an IP holder into either granting a licence to the infringer on terms favourable to the infringer; or stalling the patent infringement suit on citing the pendency of antitrust complaints.

One such proxy war, or rather a battle, was waged by a generic company against the Swiss pharmaceutical company Vifor International, accusing it of anti-competitive practice. However, tactful and swift legal representation saw Vifor dealing the knockout blow, even before the battle really began.

The victory for Vifor – in convincing the Competition Commission of India (CCI) that the complaint was meritless, and that Vifor should not have to undergo an investigation – represents a significant milestone in India's nascent jurisprudence on the IP competition law space.

The case saw an employee of a generic manufacturer's affiliated company – currently embroiled in a patent litigation battle with Vifor before the Delhi High Court for the infringement of Vifor's ferric carboxymaltose (FCM) patent – secretly approaching the CCI, accusing Vifor of anti-competitive business practices and of abuse of its dominant position in commercialisation of its trailblazing patented product for the intravenous treatment of iron deficiency anaemia.

The claim against Vifor accused it of allowing only two companies in India to market soluble FCM iron injectables; and of pricing them highly and foreclosing competition in the Indian pharmaceutical industry by not granting a licence (to an Indian generic manufacturer revealed to be West Bengal Chemical Industries Limited [WBCIL]) despite high consumer demand.

The complaint, however, fell flat on each of these grounds, with the CCI being "mindful of the fact

that not every company has a right to seek access to the patent of Vifor, unless it demonstrates that there is indeed a need for such access, based on the existing supply conditions of an essential product/ facility as against its demand by consumers, so as to affect the market adversely by non-dealing on the part of the entity with significant market power".

Appearing for Vifor, the team at Anand and Anand convinced the CCI to take the *prima facie* view that in this case there was no requirement to define a precise relevant market and assess Vifor's dominance, since its agreements with its Indian licensees are neither restrictive nor exclusive.

The commission found it noteworthy that the licences entered by Vifor were not long term, and that there was no restriction that Vifor could not enter more licensing agreements should it want to.

Vifor succeeded in defeating allegations of discriminatory pricing as the CCI held that the informant was not right in drawing a comparison between prices offered in government procurement and the private market, and dismissed the complaint at the pre-investigation stage.

The CCI also deemed it significant to note that the patent granted to Vifor in respect of its soluble FCM iron injectables is to expire in 2023, and it is expected that the patented FCM should thereafter be available for free exploitation by interested parties.

The CCI regulator, while refusing to completely refrain from exercising its jurisdiction in assessing the conduct of entities exercising their IP rights, has acknowledged that this can be done only in "appropriate cases".

In this case, the commission, after a reasoned assessment of the merits at the pre-investigation stage, had taken the *prima facie* view that the exercise of its patent rights by Vifor, including Vifor's right in choosing who to license its patent to, does not amount to anti-competitive conduct, and dismissed the complaint.

The significance of the decision cannot be overstated, inasmuch as any indulgence shown by the CCI on the kinds of allegations raised against a patent holder has the potential of opening the floodgates for motivated, vexatious, bad-faith complaints against IPR owners as counterblasts, or pre-emptive strikes, against patent infringement lawsuits.

Vifor's win shows that such proxy wars before the competition regulators are not a viable strategy to arm-twist an IP holder against exercising the right to choose the licensee.

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