

This mail sent on 5<sup>th</sup> April 2016 by [president\\_cmai@cmai.asia](mailto:president_cmai@cmai.asia)

Subject - MOST URGENT DIPP DISCUSSION PAPER ON SEP AND FRAND LAST DATE 22 APRIL, 2016.

Dear Sir,

Please attend to this on priority.

DIPP vide press release dated 14th March, 2016 has come out with a "Discussion Paper on Standard Essential Patents and their availability on FRAND Terms dated 1st March, 2016", [http://dipp.nic.in/English/Discuss\\_paper/standardEssentialPaper\\_01March2016.pdf](http://dipp.nic.in/English/Discuss_paper/standardEssentialPaper_01March2016.pdf) ) views or suggestions on which were invited till 31st March, 2016 and now extended till 22nd April, 2016 to be sent to [kapoor.sumit@gov.in](mailto:kapoor.sumit@gov.in)

CMAI TEMA has prepared a draft response. This will be further vetted and improved based on response from you and also further studies.

We have been given to understand that there is rumor that CMAI and TEMA are supporting royalty on full cost of product. THIS IS TOTALLY INCORRECT. On the contrary we have been vocal on support of royalty only on the particular chip/component/part, as would be seen from our draft response.

Request please get the paper studied and also our draft response and we seek your urgent inputs for the mobile industry and Make in India. You and others can also file views directly.

For the sake of brevity we append below after signatures, our recommendations in brief and also points on which DIP is asking views. We are subject to changes and amendments based on advice from industry.

As you know we have formed an expert committee on IPR under chairmanship of Sh Dhanendra Kumar, IAS (Retd) Former Chairman, CCI and several experts from Law Ministry, Senior Advocates. WE ALSO SEEK YOUR NOMINATION ON THIS COMMITTEE.

#### REGARDS

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Executive Summary in very brief:

The executive summary is no substitute for detailed discussions that follows. This is just to give flavor of what the note suggests very briefly and reliance need to be made on detailed views as appearing hereinafter.

1. IPR Policy of India should be targeted as clear demonstration of protection and advancement of National Interests.
2. There is need for balance approach in between IPR and anti competition policies.
3. The royalty should be paid only on the component on which patent is claimed and NOT on the entire cost of product.
4. The Standard Setting organizations appear to have not disclosed the patents relied by them, in the absence of which there is ambiguity as to what patents are to be followed. It is no way to find as on date as to what patents the manufacturer need to follow for manufacture of a telecom or mobile product. This gives rise to uncertainty and unknown demands from alleged patent holders.
5. The applicability of SEP and FRAND need much wider consultation and discussions, specially looking at the fact that these are one of most litigant matters worldwide and hardly there is a universal definition.
6. IPR issues have been contested legally world over very forcefully and at high costs where several cases have been filed on each other and statistics reveal that 99% of the cases are settled or negotiated without waiting for a Court judgment. There is admittedly not wide spread knowledge and expertise available within Country in such matters. As in China, there is need for an institutional

7. In order to implement Make in India there is need for Compulsory Licensing, which is permitted as per International and National Laws.

8. In the case of telecom and mobiles where mostly SKD level manufacturing is started in beginning which is later followed by CKD level. Also the fact is critical component/chips/parts are imported. The purported patents are used not by Indian manufacturers but by the suppliers and manufacturers of chip/components/parts. Hence there is need to address the issue as to how far it is fair to enforce patents on Indian manufacturers, unless they individually make chip/components/parts and actually use the patented technology.

9. Again in case of telecom/Mobile, in some cases the complete built units (CBU) are imported from a foreign manufacturer. Obviously it is the foreign manufacturer who utilizes the purported patent and is responsible to follow patents and pay royalty etc. Need to address that in such cases how far it is fair to force the patents royalty and applicability on Indian importers.

DIPP needs views on following matters

- a) Whether the existing provisions in the various IPR related legislations, especially the Patents Act, 1970 and Anti-Trust legislations, are adequate to address the issues related to SEPs and their availability on FRAND terms? If not, then can these issues be addressed through appropriate amendments to such IPR related legislations? If so, what changes should be affected.
- b) What should be the IPR policy of Indian Standard Setting organizations in developing Standards for Telecommunication sector and other sectors in India where Standard Essential Patents are used?
- c) Whether there is a need for prescribing guidelines on working and operation of Standard Setting organizations by Government of India? If so, what all areas of working of SSoS should they cover?
- d) Whether there is a need for prescribing guidelines on setting or fixing the royalties in respect of Standard Essential Patents and defining FRAND terms by Government of India? If not, which would be appropriate authority to issue the guidelines and what could be the possible FRAND terms?
- e) On what basis should the royalty rates in SEPs be decided? Should it be based on Smallest Saleable Patent Practicing Component (SSPPC), or on the net price of the Downstream Product, or some other criterion?
- f) Whether total payment of royalty in case of various SEPs used in one product should be capped? If so, then should this limit be fixed by Government of India or some other statutory body or left to be decided among the parties?
- g) Whether the practice of Non-Disclosure Agreements (NDA) leads to misuse of dominant position and is against the FRAND terms?
- h) What should be the appropriate mode and remedy for settlement of disputes in matters related to SEPs, especially while deciding FRAND terms? Whether Injunctions are a suitable remedy in cases pertaining to SEPs and their availability on FRAND terms?
- i) What steps can be taken to make the practice of Cross-Licensing transparent so that royalty rates are fair & reasonable?
- j) What steps can be taken to make the practice of Patent Pooling transparent so that royalty rates are fair & reasonable?
- k) How should it be determined whether a patent declared as SEP is actually an Essential Patent, particularly when bouquets of patents are used in one device?
- l) Whether there is a need of setting up of an independent expert body to determine FRAND terms for SEPs and devising methodology for such purpose?
- m) If certain Standards can be met without infringing any particular SEP, for instance by use of some alternative technology or because the patent is no longer in force, what should be the process to declassify such a SEP?