

April 22, 2016

ATTN: Kapoor Sumit  
Ministry of Commerce and Industry  
Department of Industrial Policy and Promotion  
Udyog Bhawan  
New Delhi 110011

Dear Mr. Sumit:

ACT | The App Association writes to provide comments to the Government of India's Department of Industrial Policy and Promotion (DIPP) on its "Discussion Paper on Standard Essential Patents and Their Availability on FRAND Terms" (Discussion Paper).<sup>1</sup> ACT | The App Association represents more than 5,000 small- and medium-sized application development companies from around the world, including Indian startups such as iCoderz Solutions Pvt. Ltd. of Gujarat, and Exousia Tech of Chandigarh. ACT | The App Association is committed to preserving and promoting innovation generally as well as accelerating the growth of technology markets such as the Internet of Things through robust standards development and a balanced intellectual property system. ACT | The App Association applauds DIPP for undertaking a public consultation on this matter.

## I. Summary

ACT | The App Association strongly supports DIPP's goal of developing a suitable policy framework to clarify the obligations of essential patent holders who commit to license their standard essential patents (SEPs) on Fair, Reasonable and Non-Discriminatory (FRAND) terms. We believe the clarification of FRAND commitments can increase competition by reducing intellectual property (IP) abuse and reduce unnecessary and burdensome litigation. By way of comparison, officials from the U.S. Department of Justice (DOJ) have provided guidance on how SSOs might revise their patent policies to "benefit competition by decreasing opportunities to exploit the ambiguities of a F/RAND licensing commitment."<sup>2</sup>

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<sup>1</sup> [http://dipp.nic.in/English/Discuss\\_paper/standardEssentialPaper\\_01March2016.pdf](http://dipp.nic.in/English/Discuss_paper/standardEssentialPaper_01March2016.pdf)

<sup>2</sup> Renata Hess, Deputy Assistant Attorney General, *Six 'Small' Proposals for SSOs Before Lunch*, Prepared for the ITU-T Patent Roundtable (October 10, 2012), p. 9, available at <https://www.justice.gov/atr/speech/six-small-proposals-ssos-lunch>.

To date, some standard setting organizations (SSOs) such as the Institute of Electrical and Electronics Engineers (IEEE) have, after much effort, successfully revised their intellectual property rights (IPR) policies to clarify the FRAND commitments they require from technology contributors. ACT | The App Association believes such clarifications are extremely beneficial to both SEP holders and standard implementers (in particular, SMEs that act in good faith and very typically do not have the resources to commit to extended licensing negotiations and related litigation), as well as consumers of the technologies standardized by this SSO. However, most SSOs struggle to follow IEEE's example because their membership includes SEP holders that make significant sums of money through licensing their patents and do not want FRAND commitments to restrain their ability to charge high royalties. These SEP holders argue that (i) SSOs should be free to define FRAND how they want; (ii) courts are fully capable of resolving any contractual disputes; and (iii) thus, competition agencies need not be involved in providing guidance or enforcing FRAND commitments.

ACT | The App Association's members include thousands of SMEs that are both SEP holders and standards implementers. ACT | The App Association's experience is that some form of guidance on FRAND from DIPP would be very beneficial to India (particularly Indian SMEs) and consistent with the policy direction of other jurisdictions, both mature and emerging. The negative effects of abusive licensing of SEPs can be particularly harmful to emerging business in a less developed country. SMEs, such as the many software companies in India and ACT | The App Association's members that implement numerous technology standards, do not have the resources to effectively deal with much larger enterprises that hold many SEPs. Thus, they either incur financially debilitating litigation with no predictable outcome (especially in a jurisdiction like India where FRAND related litigation is nascent) or they are forced to accept excessive royalty demands made by the SEP holders. In the worst case, if they cannot afford the litigation or the expensive SEP licenses, they may have to change their product market or abandon their business plans. These patent licensing abuses could undermine the Indian government's ambitious plans and programs, such as Digital India and Make in India.

## II. **Detailed Response**

Below, ACT | The App Association provides responses to select questions posed by DIPP, and has grouped some of the questions together based on their common theme in order to respond efficiently. ACT | The App Association hopes these are responsive to the critical issues DIPP has raised. DIPP is urged to contact our organization if we can be of further assistance.

- 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.*

- 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?*
- 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?*

ACT | The App Association believes that the existing provisions of Indian law, particularly the Competition Act (2002) and the Patents Act (1970), establish an adequate legal framework to ensure that SEP licenses are made available on FRAND terms to all implementers and can address the unique issues raised by abusive licensing of SEPs. Notably, the High Court of Delhi<sup>3</sup> recently dismissed a challenge to the jurisdiction of the Competition Commission of India (CCI) to investigate abusive practices related to SEPs, holding that “[t]here is no irreconcilable conflict between the [Competition Act, 2002] and the [Patents Act, 1970] and in the absence of any irreconcilable conflict between the two legislations, the jurisdiction of [Competition Commission of India] to entertain complaints of abuse of dominance in respect of patents rights cannot be ousted.” Both the Indian Patent Law and the Competition Act are essential to ensure that FRAND commitments can be made, are honored and will be appropriately enforced when breached.

In addition, other jurisdictions are increasingly discovering that guidance by relevant authorities to develop the general meaning of FRAND commitments can be very beneficial. In India’s case, ACT | The App Association recommends that DIPP issue guidelines in consultation with CCI to fill in the details left unaddressed by the existing Indian legal framework. Such guidance would provide SSOs, courts, SEP holders, and implementers with more clarity and certainty on how Indian law will be applied. ACT | The App Association’s response to question (c) below summarizes the guidance a number of competition authorities and patent regulators have provided in order to aid stakeholders. As DIPP may note, none of the guidelines in other jurisdictions establish specific royalty rates related to FRAND commitments; rather, they establish general principles that can be applied to determine whether a proposed royalty or other licensing term is reasonable.

With such guidance, DIPP will find that there is no need to establish an independent expert body to determine the details of FRAND licensing terms, as the national Indian courts have jurisdiction to adjudicate infringement, validity, and enforceability of patents. Though their guidance, DIPP and CCI can help courts understand the difference between legitimate exercises of patent rights in the standardization context and

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<sup>3</sup> W.P.(C) 464/2014 and CM Nos. 911/2014 and 915/2014, *Telefonaktiebolaget Lm Ericsson v Competition Commission of India and others* available at <[http://lobis.nic.in/d\\_dir/dhc/VIB/judgement/30-03-2016/VIB30032016CW4642014.pdf](http://lobis.nic.in/d_dir/dhc/VIB/judgement/30-03-2016/VIB30032016CW4642014.pdf)>

contractual breaches of FRAND commitments, including instances where such breaches constitute abuses of unearned market power and harm to competition.

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?*

SSOs vary widely in terms of their memberships, the industries and products they cover, and thus the procedures for establishing standards.<sup>4</sup> Thus, each SSO will necessarily tailor its patent policy for its particular requirements. ACT | The App Association believes that some variation in patent policies among SSOs are necessary, and that the Government of India should not prescribe detailed rules and policies that all Indian SSOs must implement.

At the same time, however, there are basic principles that underlie the FRAND commitment and serve to ensure that standard-setting is procompetitive and the terms of SEP licenses are in fact reasonable. Ideally, an SSO's IPR policy would include all of the following principles that prevent patent "hold up" and anti-competitive conduct:

- Patents provide a clear and powerful incentive for innovation and continue to play an important role in driving competition and economic growth.
- Standards provide the foundation for the entire Internet ecosystem and are a critical enabler of innovative startups and small and mid-size firms.
- Holders of patented technologies that are essential to a standard may voluntarily commit to license such patents on FRAND terms, which allows standard essential patent (SEP) holders to obtain fair and reasonable royalties from a large body of standard implementers.
- Companies who voluntarily participate in standards bodies and choose to commit their patents to a standard under FRAND terms must live up to their promises.
- A commitment to FRAND patent licensing is a broad commitment that means:
  - **Fair and Reasonable to All** – A holder of a SEP subject to a FRAND commitment must license such SEP on fair, reasonable, and non-discriminatory terms to all companies, organizations, and individuals who implement or wish to implement the standard.
  - **Injunctions Available Only in Limited Circumstances** – Injunctions and other exclusionary remedies should not be sought by SEP holders or allowed except in limited circumstances. The implementer or licensee is

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<sup>4</sup> See U.S. Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at 33-34, footnote 5 (2007), available at <https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf> ("2007 DOJ-FTC IP Report").

always entitled to assert claims and defenses.

- **FRAND Promise Extends if Transferred** – If a FRAND-encumbered SEP is transferred, the FRAND commitments follow the SEP in that and all subsequent transfers.
- **No Forced Licensing** – While some licensees may wish to get broader licenses, the patent holder should not require implementers to take or grant licenses to a FRAND-encumbered SEP that is invalid, unenforceable, or not infringed, or a patent that is not essential to the standard.
- **FRAND Royalties** – A reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on several factors, including the value of the actual patented invention apart from its inclusion in the standard, and cannot be assessed in a vacuum that ignores the portion in which the SEP is substantially practiced or royalty rates from other SEPs required to implement the standard.

We also note that SSO IPR policies require SSO participants to disclose patents or patent applications that are or may be essential to a standard under development. Reasonable disclosure policies can help SSO participants evaluate whether technologies being considered for standardization are covered by patents. Disclosure policies should not, however, require participants to search their patent portfolios as such requirements can be overly burdensome and expensive, effectively deterring participation in an SSO. In addition, FRAND policies that do not necessarily require disclosure, but specify requirements for licensing commitments for contributed technology, can help accomplish many of the purposes of disclosure requirements.

As noted in our summary, the U.S. DOJ has encouraged SSOs to define FRAND more clearly. For example, Former Assistant Attorney General Christine Varney explained that “clearer rules will allow for more informed participation and will enable participants to make more knowledgeable decisions regarding implementation of the standard. Clarity alone does not eliminate the possibility of hold-up...but it is a step in the right direction.”<sup>5</sup> As another example, Renata Hesse, the current leading attorney of the DOJ’s Antitrust Division, provided important suggestions for SSOs to guard against SEP abuses that included at least three of the aforementioned principles.<sup>6</sup>

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<sup>5</sup> Christine A. Varney, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Promoting Innovation Through Patent and Antitrust Law and Policy, Remarks as Prepared for the Joint Workshop of the U.S. Patent and Trademark Office, the Federal Trade Comm’n, and the Dep’t of Justice on the Intersection of Patent Policy and Competition Policy: Implications for Promoting Innovation 8 (May 26, 2010), available at <http://www.atrnet.gov/subdocs/2010/260101.htm>.

<sup>6</sup> Renata Hess, Deputy Assistant Attorney General, *Six ‘Small’ Proposals for SSOs Before Lunch*, Prepared for the ITU-T Patent Roundtable (October 10, 2012), available at <https://www.justice.gov/atr/speech/six-small-proposals-ssos-lunch..>

In response to DOJ's calls for more clarity, IEEE recently revised its patent policy to clarify the required FRAND Commitments. IEEE's revised patent policy incorporates many of the principles we listed above and that DOJ suggested SSOs adopt. Unfortunately, IEEE's revised IPR policy has been under attack by a few entities that receive significant royalties and would prefer to leave FRAND undefined. To date, only a small number of SSOs that ACT | The App Association is aware of have taken steps similar to IEEE. This is largely due to the fact that most SSOs struggle to follow IEEE's example because their membership includes SEP holders that make significant sums of money through licensing their patents and do not want FRAND commitments to restrain their ability to charge high royalties. For this reason, we believe there is a need for regulatory guidance – not just for SSOs, but also courts to guide them in their decisions.

*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?*

ACT | The App Association encourages the Government of India to issue formal guidelines to promote effective standard setting and discourage abusive licensing of FRAND-committed SEPs by issuing guidelines on the enforcement of FRAND commitments and the working of SSOs. For the reasons set forth above, ACT | The App Association does not believe that deferring completely to the courts to handle FRAND related disputes is wise.

In recent years, regulatory authorities in the United States, Europe, Canada and various jurisdictions in Asia have provided guidance that has given important direction to private parties, SSOs, enforcers, and courts. This guidance ranges from administrative cases, to formal IP enforcement guidelines, to studies or workshops followed by written recommendations, to detailed statements or less formal speeches by senior government officials, to submissions in connection with government proceedings involving authorities other than the one providing the guidance. Particularly, for SMEs, informal and non-binding guidance tends to provide timely responses to concerns that arise in the real world of SEP licensing, thus serving as deterrence to abusive practices.

Specifically, clear and timely guidance from government authorities helps private parties negotiating licenses for SEPs to better understand how disputes will be resolved by litigation or government investigation. Such guidance is critical for SMEs. With more realistic expectations, the chances that the parties settlement on reasonable terms increases.

Below, ACT | The App Association provides a non-exhaustive list of guidances issued by regulators regarding a wide variety of recurring issues in SEP enforcement and licensing. ACT | The App Association is most familiar with guidance in the United States, but even in this jurisdiction we have not included all the relevant examples of FRAND-related guidance. Please see <http://www.allthingsfrand.com/letters-statements/regulatory/> for links to and more information on the regulatory initiatives

summarized below as well as additional regulatory initiatives not included here.

## United States

- In 2011, the U.S. Federal Trade Commission issued a report entitled *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011), in which the FTC addresses the issue of a reasonable royalty for FRAND-encumbered SEPs and recommends that “[c]ourts should cap the royalty at the incremental value of the patented technology over alternatives available at the time the standard was chosen.” The FTC explains that setting the royalty for a FRAND-encumbered SEP “based on the ex-ante value of the patented technology at the time the standard is chosen is necessary for consumers to benefit from competition among technologies to be incorporated into the standard – competition that the standard setting process itself otherwise displaces.” The FTC also addresses the question of the appropriate royalty base in patent cases and recommends that “[c]ourts should identify as the appropriate base that which the parties would have chosen in the hypothetical negotiation as best suited for accurately valuing the invention. This may often be the smallest priceable component containing the invention.” According to the FTC, “the practical difficulty of identifying a royalty rate that accurately reflects the invention’s contribution to a much larger, complex product counsels toward choosing the smallest priceable component that incorporates the invention.”
- The U.S. Department of Justice and Federal Trade Commission issued a report in 2007 entitled *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, which discusses various way to minimize patent holdup, including SEP disclosure policies, FRAND undertakings, and *ex ante* disclosure of licensing terms.
- The U.S. Federal Trade Commission issued a Decision and Order in 2013 accompanying its challenge to an injunction sought by Google’s Motorola Mobility Division, which sets forth in detail procedures that a declared SEP holder must undertake before it may seek an injunction or other exclusionary relief based on a SEP and makes clear that a potential licensee may challenge infringement, validity, and enforcement of a declared SEP before being ordered to pay a royalty.
- In August 2013, the U.S. Trade Representative (USTR), acting on behalf of the President of the United States, overturned a U.S. International Trade Commission ruling that would have issued (i) an exclusion order (similar to an injunction) prohibiting importation into the United States of Apple products that purportedly infringed Samsung SEPs; and (ii) a cease and desist order that would have prevented Apple from engaging in certain activities, such as the sale of these products in the United States. The USTR decision included substantial discussion of the policy reasons for disallowing the exclusion order.
- In January 2013, the U.S. Department of Justice and U.S. Patent & Trademark Office issued the Policy Statement On Remedies For Standards-Essential Patents Subject To Voluntary F/RAND Commitments, which recognizes the harms of patent

hold up and explains that FRAND commitments are designed as a solution to that problem that benefits both standard implementers and SEP holders. The policy statement reasons that FRAND commitments may be incompatible with injunctive relief: “A decision maker could conclude that the holder of a F/RAND-encumbered, standards-essential patent had attempted to use an exclusion order [a form of injunctive relief] to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the F/RAND commitment—in essence concluding that the patent holder had sought to reclaim some of its enhanced market power over firms that relied on the assurance that F/RAND-encumbered patents included in the standard would be available on reasonable licensing terms under the SDO’s policy.” However, such relief may be appropriate in some circumstances, “such as where the putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder’s commitment to license on F/RAND term” or “is not subject to the jurisdiction of a court that could award damages.”

- The US Department of Justice issued a detailed response in February 2015 to a “Business Review Letter” request from the IEEE seeking guidance on its updated patent policy. The DOJ’s response addressed several important aspects of SEP licensing, including injunctive relief, reasonable royalty rates, availability of FRAND licenses to standard implementers at all levels of the production chain, and reciprocal licenses. DOJ found the IEEE revised patent policy discussed earlier to be consistent with U.S. law.

### European Union

- The European Commission’s guidelines regarding horizontal co-cooperation agreements, published in 2011, discuss the anticompetitive threat of patent “hold up” in the SSO context and the importance of the effective use of FRAND commitments in combating that threat. “While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen and the standard has been set, competing technologies and companies may face a barrier to entry and may potentially be excluded from the market.” (Par. 266). This characteristic of standard-setting presents the potential of enabling “companies to behave in anti-competitive ways, for example by ‘holding-up’ users after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive royalty fees thereby preventing effective access to the standard.” (Par. 269). To avoid this anticompetitive outcome, the guidelines stress that SSOs should adopt IPR policies that “require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms (‘FRAND commitment’).” (Par. 285). The Commission points out that “FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging



discriminatory royalty fees.” (Par. 287). In case of a dispute involving a FRAND commitment, “the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR.” (Par. 289). Because FRAND commitments are voluntary, however, IPR holders should be permitted “to exclude specified technology from the standard-setting process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard.” (Par. 285).

- On April 29, 2014, The European Commission issued a decision in which it determined that “Motorola Mobility’s seeking and enforcement of an injunction against Apple before a German court on the basis of a smartphone standard essential patent (SEP) constitutes an abuse of a dominant position prohibited by EU antitrust rules.” The Commission explained that FRAND commitments are “designed to ensure effective access to a standard for all market players and to prevent ‘hold-up’ by a single SEP holder.” The Commission determined that seeking an injunction against a willing licensee of a FRAND-encumbered SEP “could risk excluding products from the market” and “lead to anticompetitive licensing terms that the licensee of the SEP would not have accepted absent the seeking of the injunction. Such an anticompetitive outcome would be detrimental to innovation and could harm consumers.” On the same day, the Commission issued a press release on the case that provided further guidance, including the point that (i) the licensee can challenge the validity, essentiality or infringement of SEPs and still be considered a “willing” licensee; and (ii) the specific rate of a reasonable royalty should be determined by courts or arbitrators.
- On April 29, 2014, the European Commission formally accepted commitments from Samsung to not seek injunctions with respect to FRAND-encumbered SEPs for smartphones and tablets against licensees that agree to an approved licensing framework. This framework will give licensees the choice of having a reasonable royalty rate and other FRAND terms determined by a court or, if both agree, by an arbitrator. The Commission also iterated the same principles that it stated in connection with its abuse of dominance action against Motorola, discussed immediately above.
- In the European Commission’s market testing in December 2012 of a set of proposed commitments offered by Rambus to license its SEPs on reasonable terms, some respondents expressed the concern that Rambus would seek to “extract royalties based not on the price of the individual chips or controllers, but on the value of the end-product (such as PCs, mobile phones and other devices integrating DRAMs), even if the licensed technologies only represent a small percentage of such end-products.” In response, the Commission made clear that the “royalty shall be determined on the basis of the price of the individually sold chip and not of the end-product. If they are incorporated into other products, the individual chip price remains determinative.”

## Canada

At the end of March, the Canadian Bureau finalized revisions to its IP enforcement guidelines that address breaches of FRAND commitments as a competition issue for the first time. The IP guidelines note that (i) bundling of SEPs and non-SEPs can cause competitive harm; (ii) there are only limited circumstances under which SEP holders can obtain injunctive relief; (iii) while contract law may be sufficient to resolve contractual breaches of FRAND, competitive effects from some breaches may need to be addressed under competition law; and (iv) the Bureau is not a rate regulator and would likely only find a royalty rate alone (without the accompanying threat / use of injunctive relief) to be a competition problem if the SEP owner had set a maximum rate during standard development and then breached it. The Bureau acknowledges in its guidelines that competition enforcement policy in this area is undergoing rapid development, so the Bureau will regularly revisit its guidance later in light of experience, relevant developments, etc.

## China

- On February 9, 2015, China's National Development and Reform Commission ("NDRC") issued an administrative penalty decision against Qualcomm, Inc., in which it determined that several aspects of Qualcomm's licensing of telephony SEPs constituted an abuse of a dominant position. The specific practices deemed to be unlawful were: (i) charging royalties for expired SEPs, (ii) conditioning SEP licenses on licensees' agreement to take licenses to other Qualcomm patents that were not SEPs ("non-SEPs"), (iii) requiring SEP licensees to grant back royalty-free licenses to their non-SEPs, (iv) imposing a "relatively high royalty" calculated on a device-level royalty base, and (v) requiring baseband chip purchasers to agree to licenses with unreasonable conditions such as the ones listed above and not to challenge Qualcomm's licenses.
- China's State Administration for Industry and Commerce issued a Regulation on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition on April 7, 2015, which prevents SEP holders with a dominant market position from engaging in conduct that eliminates or restricts competition by refusing to license implementers, tying SEPs to non-SEPs, or imposing other unreasonable conditions in violation of the FRAND commitment.

## Japan

- In January, the Japan Fair Trade Commission's updated its Guidelines for the Use of Intellectual Property under the Antimonopoly Act, which state that a refusal to license or the bringing of an action for injunction against a party who is "willing" to take a license based on FRAND terms can be considered exclusionary conduct under Japan's Antimonopoly Act. The Guidelines indicate that a "willing" licensee will be judged on a case-by-case basis by the conduct of both parties in the

negotiations--for example, by looking at whether the licensor notified the prospective licensee of a specific patent that has been infringed and how it was infringed; whether the licensor made a licensing offer based on reasonable conditions; whether the prospective licensee made a prompt and reasonable counteroffer; and whether the parties otherwise acted in good faith. A prospective licensee's challenge regarding the validity, essentiality or alleged infringement of the SEP(s) at issue will not be grounds for determining that it is not a willing licensee as long as it undertakes the negotiations in good faith in light of standard business practices.

### South Korea

In December 2014, the Korean Fair Trade Commission revised its Guidelines on the Unreasonable Exercise of Intellectual Property Rights to address breaches of FRAND commitments as a competition law matter. According to the KFTC, the following licensing practices by SEP holders may be deemed to be abusive:

- Coercing the licensee to accept a license of a non-SEP as a condition for licensing a SEP;
- Not disclosing patents applied for or registered to increase the possibility of one's technology being standardized or to avoid prior consultations on license conditions;
- Unreasonably refusing to license the SEP;
- Not licensing the SEP on FRAND terms so the patentee can strengthen its monopoly power or exclude competitors in the relevant market;
- Requesting discriminatory terms for a SEP license, or imposing an unreasonable level of royalties;
- Imposing licensing conditions that unreasonably restrict the licensee's exercise of related patents held by the licensee;
- Seeking injunctive relief unless (i) the potential licensee refuses to enter into a license agreement on FRAND terms objectively confirmed in proceedings in a court or an arbitration forum, or (ii) a willing licensee is unable to pay damages due to imminent bankruptcy, etc.; or
- Unreasonably imposing licensing conditions that require a cross-license of non-SEPs held by the licensee. (See Section III.3.A, B & D(5)).

The KFTC also indicated that a FRAND commitment obligates SEP holders to negotiate in good faith with willing licensees, and listed various factors to help the agency make that determination. As noted earlier, more complete summaries of the regulatory initiatives listed above and links to them are available on <http://www.allthingsfrand.com/letters-statements/regulatory/>.

Although guidance in the different jurisdictions varies in detail, it does present common licensing principles for FRAND-committed SEPs. In particular, the guidance in a number of jurisdictions indicate that the following conduct can be a breach of the FRAND

commitment, and in many cases also an abuse of competition law: refusing to license SEPs to standard implementers; coercing the licensee to accept a license of a non-SEP as a condition for the licensing of a SEP; requesting discriminatory terms for a SEP license; imposing an unreasonable level of royalties or other non-FRAND conditions; seeking or using injunctive relief against willing licensees that are able to pay a reasonable royalty; or imposing licensing conditions that unreasonably restrict the licensee's exercise of related patents it owns. On the other hand, such guidance does not prescribe specific royalty rates for SEPs due to the highly-fact specific nature of SEP licensing.

In brief, we recommend that the Government of India establish fundamental principles to guide standardization activities, help ensure SEP licensing on FRAND terms, prevent and effectively resolve disputes over the meaning of FRAND, and encourage the enforcement of FRAND commitments. With such principles, private parties and SSOs will still have plenty of room to negotiate the specifics of FRAND licensing terms.

### **III. Conclusion**

ACT | The App Association believes that DIPP's open and comprehensive approach in addressing the licensing practices of FRAND-committed SEPs will help India achieve its technological goals. It is important that the Government of India learn now how to effectively balance the protection of IPR against the public interest where standardized technologies are involved. Increasingly, some companies that voluntarily license their patented technologies to SSOs under FRAND terms in exchange for access to a much greater pool of potential licensees are now reneging on their promises by engaging in unfair, unreasonable or discriminatory licensing practices. These practices undermine competition, negatively impact innovation, and as a result, impede the development of new markets. These negative impacts impact SMEs to a far greater degree than other businesses. ACT | The App Association believes that DIPP can help the Government of India become a leader in ensuring fairness in standardization and in preventing anti-competitive abuses, and urges careful consideration of the views expressed above.

ACT | The App Association looks forward to helping DIPP on this critical project. Please do not hesitate to contact us with any questions.