
PATENT THICKETS AND NON-PRACTICING ENTITIES IN THE 5G AND 6G ERA: A CRITICAL EVALUATION OF MARKET EXCLUSIONARY TACTICS UNDER ANTITRUST LAW

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ABSTRACT

The commercialisation of fifth-generation ('5G') wireless telecommunications infrastructure has concentrated intellectual property rights within a narrow class of patent holders, including structurally disruptive Non-Practicing Entities ('NPEs'). As the global industry advances toward sixth-generation ('6G') networks, tensions between intellectual property maximalism and competitive market access intensify. This article evaluates market exclusionary tactics deployed by NPEs through patent thickets, royalty stacking, and strategic injunctive relief against implementers of standard essential patents ('SEPs').

The analysis situates these developments within India, where the antitrust landscape was profoundly unsettled by the Delhi High Court Division Bench ruling in *Telefonaktiebolaget LM Ericsson (Publ) v Competition Commission of India ('Ericsson v CCI')*. Premised on the principle of *generalia specialibus non derogant*, the court stripped the Competition Commission of India ('CCI') of jurisdiction to investigate abusive patent licensing, assigning the regulatory space entirely to the Controller of Patents under Chapter XVI of the Patents Act, 1970 ('the Patents Act'). This jurisdictional vacuum creates a systemic policy failure, leaving India's nascent telecommunications manufacturing sector structurally exposed to predatory NPE conduct.

By comparing the European Union's framework in *Huawei Technologies Co Ltd v ZTE Corp* and the United States' approach under Section 2 of the Sherman Act, this article proposes a recalibrated regulatory synthesis premised on concurrent jurisdiction, targeted legislative amendment, and modified application of the essential facilities doctrine to aggregated patent thickets, concluding with a concrete blueprint for reform.

Keywords: Patent Thickets, Non-Practicing Entities ('NPEs'), Standard Essential Patents ('SEPs'), Antitrust Law, Jurisdictional Vacuum.

I. INTRODUCTION

The transition from 4G Long-Term Evolution architectures to 5G new radio standards was, by any meaningful measure, a transformative inflection point in the history of mobile communications. Yet the transition now underway toward 6G connectivity promises to be qualitatively distinct in ways that extend well beyond raw performance metrics. Sixth-generation networks are envisaged not merely as faster pipes for data transmission, but as the foundational nervous system of an interconnected digital society, incorporating terahertz spectrum utilisation, near-zero-latency communication for autonomous industrial systems, and integrated sensing and communication functionalities that blur the boundary between the physical and digital worlds. This technical ambition is matched, in rather less salutary fashion, by an unprecedented surge in patent declarations to Standard Development Organisations ('SDOs') such as the 3rd Generation Partnership Project ('3GPP').¹

The sheer density of these declarations produces what the academic literature has termed a 'patent thicket,' namely an overlapping web of intellectual property rights through which any downstream manufacturer must navigate in order to commercialise a standard-compliant product.² In earlier generations of standardisation, this thicket was managed, however imperfectly, through bilateral cross-licensing agreements between the major telecommunications equipment manufacturers. A company possessing essential patents would typically grant a licence to a competitor in exchange for access to the competitor's own essential portfolio, thereby maintaining a form of mutual deterrence that constrained the most egregious royalty demands. This bilateral equilibrium has, however, been progressively dismantled over the past decade, displaced by an asymmetric licensing architecture in which NPEs occupy the commanding position.

NPEs are entities that hold patents but do not themselves manufacture or sell products embodying those patents.³ Their structural immunity from cross-licensing counter-assertions, combined with their unconstrained appetite for injunctive relief, converts the 5G/6G patent landscape into an environment of acute and largely unmitigated risk for downstream device manufacturers, network operators, and ultimately consumers. In India, this risk is compounded

¹Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting* (2001) 1 Innovation Policy and the Economy 119, 121. <<https://www.nber.org/system/files/chapters/c10778/c10778.pdf>> accessed 18 May 2026.

²Patents Act 1970 (India), s 2(1)(m).

³Competition Act 2002 (India), s 4.

by a regulatory architecture that has, since the *Ericsson v CCI*⁴ ruling of 2023, rendered the country's principal antitrust regulator effectively powerless to address the systemic market distortions that NPE activity routinely produces.

This article proceeds from the premise that intellectual property rights, properly understood, are instruments of innovation policy, not weapons of market exclusion. The critical question it addresses is whether the current Indian regulatory framework is structurally capable of sustaining that distinction in the face of sophisticated, portfolio-driven NPE litigation strategies. Part II examines the mechanics of 5G and 6G patent thickets and the structural characteristics of the asymmetric litigant. Part III analyses the legal and economic dimensions of patent hold-up, royalty stacking, and the subversion of FRAND commitments through injunctive relief. Part IV provides an exhaustive critique of the jurisdictional dichotomy created by *Ericsson v CCI* and the institutional inadequacy of Chapter XVI of the Patents Act as a substitute for antitrust regulation. Part V situates India's position within a comparative framework drawing on European Union and United States jurisprudence, and advances concrete proposals for regulatory recalibration. Part VI offers a conclusion that synthesises the analytical findings into a legislative and judicial blueprint for reform.

II. THE MECHANICS OF 5G AND 6G PATENT THICKETS AND ASYMMETRIC LITIGANTS

To appreciate the legal and economic gravity of the arguments advanced in this article, it is necessary to first understand, with some precision, the structural mechanics through which patent thickets form in the context of wireless telecommunications standards. The process of standardisation in the 5G and 6G context is not a neutral technical exercise; it is a fiercely contested arena of strategic intellectual property positioning, in which the declarations of essentiality made by participants to SDOs carry consequences that extend far beyond the conference rooms in which they are made.

A. The Structural Dynamics of Patent Stacking

The standard-setting process for wireless telecommunications operates on a voluntary declaration model. Participating entities, which include both operational manufacturers and NPEs, submit technical proposals to SDOs and, when those proposals are incorporated into the

⁴*Telefonaktiebolaget LM Ericsson (Publ) v Competition Commission of India* 2023 SCC Online Del 4078.

resulting standard, declare the underlying patents to be ‘standard essential,’ meaning that implementation of the standard necessarily requires use of the patented technology. The FRAND commitment, whereby the declaring entity undertakes to license the declared patent on fair, reasonable, and non-discriminatory terms, is the quid pro quo for this inclusion.⁵ In theory, this framework is elegantly functional; in practice, it is susceptible to systematic abuse.

The first and most pervasive form of abuse is strategic over-declaration, or what scholars have termed ‘patent flooding.’ Entities seeking to maximise their licensing leverage have powerful financial incentives to declare as essential every patent that might conceivably be read as covering some aspect of the standard, regardless of whether true essentiality exists. Because SDOs do not, as a rule, independently verify declarations of essentiality at the time they are made, the declared pool of standard essential patents (‘SEPs’) inevitably contains a substantial proportion of patents that are either non-essential, invalid, or so narrowly drawn as to be commercially trivial.⁶ Studies of declared 5G SEP portfolios have consistently found that a significant proportion of declared patents, sometimes exceeding forty percent, cannot withstand independent technical scrutiny of their essentiality claims. The practical effect of this over-declaration is twofold. First, it artificially inflates the size of the declaring entity’s portfolio, enhancing its negotiating leverage against downstream manufacturers who, lacking the resources to challenge thousands of individual patents, frequently accede to royalty demands that reflect the declared rather than the verified portfolio. Second, and more insidiously, it forecloses market entry by imposing upon new manufacturers a daunting landscape of potential infringement claims that cannot be efficiently navigated without access to considerable legal and technical resources.

The second structural dynamic of patent stacking is the ‘marginal patent phenomenon.’ As a standard grows in technical complexity across successive generations, from 4G to 5G and imminently to 6G, the incremental technical contribution of each additional declared patent diminishes, while the aggregate licensing burden imposed upon implementers grows. Each individual patent holder, applying a royalty methodology based on the value of the end device rather than the value of their specific technical contribution, produces a cumulative royalty

⁵ Jorge L Contreras, *The New 5G Patent Wars: Injunctions, Hold-Up, and Anti-Suit Injunctions* (2021) 36 Berkeley Technology Law Journal 443, 451.< <https://fordhamipinstitute.com/wp-content/uploads/Contreras-Judicial-Restraint-NYU-11-8-2021.pdf>> accessed 18 May 2026.

⁶Mark A Lemley and Carl Shapiro, *Patent Hold-Up and Royalty Stacking* (2007) 85 Texas Law Review 1991, 1993.< <https://faculty.haas.berkeley.edu/shapiro/stacking.pdf>> accessed 18 May 2026.

stack that can reach commercially unsustainable levels. Economists studying this phenomenon have modelled scenarios in which, for a moderately priced smartphone, the aggregate declared royalty burden attributable to all 5G SEPs, if each holder's preferred royalty rate were applied simultaneously, would exceed the retail price of the device itself.⁷ This is not a theoretical curiosity; it is the precise mechanism through which patent thickets foreclose competitive market access.

B. The Rise of the Asymmetric Litigant

The classical model of SEP enforcement assumed a world populated by symmetric actors, namely manufacturing companies that both held patents and made products that infringed the patents of others. Within this symmetrical framework, the threat of cross-licensing counter-assertions functioned as a powerful constraint upon excessive royalty demands. A company considering whether to litigate aggressively against a competitor was deterred by the knowledge that the competitor held its own portfolio of essential patents, the assertion of which could prove equally damaging. This mutual vulnerability produced a culture of bilateral cross-licensing that, while far from perfect, at least prevented the most flagrant forms of hold-up.

The NPE model eliminates this constraint entirely. Because an NPE does not manufacture products, it faces no exposure to counter-assertions of patent infringement. It cannot be threatened with an injunction, because it has no production line to enjoin. It cannot be harmed by a cross-licence, because it has nothing to cross-license in return. Its entire business model consists in acquiring portfolios of declared SEPs, frequently purchased from distressed manufacturers or assembled through targeted prosecution of incremental continuation patents, and deploying those portfolios aggressively against implementers who lack the structural immunity that only a manufacturing NPE can possess.⁸

Professor Lemley and Professor Melamed have described the NPE business model as one that 'converts the patent from a defensive shield for innovation into an offensive financial asset,'⁹ a characterisation that captures with precision the mechanism by which the FRAND

⁷Rudi Bekkers and others, *Intellectual Property and Standard Setting* in Shane Greenstein and others (eds), *The Oxford Handbook of the Economics of Networks* (Oxford University Press 2016) 581, 597.

⁸Qualcomm Incorporated v Apple Inc 4 F4th 873 (9th Cir 2021); see also FTC v Qualcomm Inc 969 F3d 974 (9th Cir 2020).

⁹Mark A Lemley and A Douglas Melamed, 'Missing the Forest for the Trolls' (2013) 113 Columbia Law Review 2117, 2119. <<https://www.jstor.org/stable/23561228>> accessed 18 May 2026.

commitment is structurally subverted by entities that were never intended to be its primary beneficiaries. It is a mismatch that the drafters of the standard-setting framework did not, and perhaps could not, have fully anticipated, and one that the existing legal and regulatory architecture in India is manifestly ill-equipped to address.

III. INJUNCTIONS, HOLD-UPS, AND THE SUBVERSION OF FRAND COMMITMENTS

The most potent instrument in the NPE's legal arsenal is not the royalty demand itself, but the credible threat of injunctive relief. An injunction in a standard-essential patent case does not merely restrain the manufacture of a single infringing product; it threatens to halt the sale of every device that depends upon the standardised network for its core functionality. In a 5G or 6G context, this means smartphones, industrial routers, connected medical devices, autonomous vehicles, and the full constellation of Internet of Things apparatus that constitutes the commercial promise of next-generation connectivity. The disproportionality of this remedy to the magnitude of any individual patent's technical contribution is, as this Part argues, a central driver of the hold-up problem.

A. Patent Hold-Up and Royalty Stacking

Patent hold-up, in the standard-setting context, arises from the interaction of two structural features: the lock-in effect of standards adoption and the injunction threat. Once a manufacturer has committed substantial capital to the design and production of standard-compliant devices, the economic cost of switching away from the standard to avoid a particular patented technology becomes prohibitive. The manufacturer is, in the precise economic sense of the term, 'locked in' to the standard, and therefore to every patent that has been declared essential to it. This lock-in fundamentally alters the negotiating dynamics between the patentee and the implementer. A royalty demand that, at the pre-standardisation stage, the implementer could have resisted by adopting an alternative technology now carries the implicit threat that refusal will result in an injunction halting the manufacturer's entire product line.

The economic literature has documented, with considerable empirical rigour, how this dynamic permits SEP holders to extract royalties that bear no rational relationship to the actual technological value of the patented contribution. The appropriate measure of royalty for an SEP, on any principled analysis, should reflect the incremental value that the patented

technology added to the standard at the time of adoption, discounted by the availability of non-infringing alternatives and by the patent's proportionate contribution to the overall technical achievement of the standard. In practice, NPEs routinely demand royalties calculated as a percentage of the end device's entire selling price, a methodology that attributes to their marginal technical contribution the entire commercial value of the device. When multiplied across dozens or hundreds of independent SEP holders, each applying an equivalent methodology, the resulting royalty stack becomes commercially prohibitive and constitutes, in its aggregate effect, a structural foreclosure of competitive entry.

B. FRAND as a Behavioural Constraint

The FRAND commitment was designed, in principle, to operate as a meaningful behavioural constraint upon the SEP holder's exercise of market power. By undertaking to license on fair, reasonable, and non-discriminatory terms, the SEP holder accepts, implicitly, that the injunctive threat is not a freely deployable weapon but is conditioned upon the completion of a good-faith licensing negotiation. The foundational question, one that has generated extensive litigation across multiple jurisdictions, is whether the pursuit of an injunction by a holder who has made FRAND commitments constitutes an abuse of dominant position when the implementer has not refused to take a licence in principle but disputes the specific royalty rate demanded.

The European Court of Justice, in *Huawei v ZTE*,¹⁰ addressed this question by establishing a procedural framework that conditions the availability of injunctive relief upon the patentee's compliance with specific notification and negotiation obligations. Before seeking an injunction, the SEP holder must alert the implementer of the infringement with specificity, present a written FRAND offer setting out the royalty rate and calculation methodology, and allow the implementer a reasonable period within which to respond. An injunction sought in the absence of compliance with these conditions risks constituting an abuse of dominant position. This framework, whatever its practical limitations, at least recognises that the FRAND commitment has genuine legal content and that its subversion through the premature deployment of injunctive relief is an antitrust concern.

India, by contrast, currently lacks any equivalent procedural or substantive framework

¹⁰*Huawei Technologies Co Ltd v ZTE Corp* (C-170/13) [2015] EU:C:2015:477.

governing the conditions under which an SEP-holding dominant entity may seek injunctive relief. The post-*Ericsson v CCI* landscape leaves implementers facing injunction threats from NPEs without access to the antitrust regulator, without equivalent procedural protection, and with a patent authority whose institutional mandate and remedial toolkit are wholly unsuited to adjudicating the economics of FRAND compliance.

IV. THE JURISDICTIONAL DICHOTOMY IN INDIA: ERICSSON V CCI AND ITS AFTERMATH

The *Ericsson v CCI* decision of 2023 represents the most significant development in Indian competition law and patent law in the past decade, and arguably the most consequential single judicial ruling for the country's telecommunications sector since the liberalisation of spectrum policy. Its implications extend well beyond the immediate dispute between Ericsson and the CCI; it fundamentally reconfigures the balance of regulatory power in a domain where the stakes, both economic and geopolitical, are extraordinarily high.

A. The Overruling of the CCI's Jurisdiction

The background to the case lies in a series of complaints filed before the CCI by Indian mobile handset manufacturers, most notably Micromax Informatics Limited and Intex Technologies, alleging that Ericsson had abused its dominant position in the market for licensing of 2G, 3G, and 4G SEPs by demanding excessive and discriminatory royalties and by threatening injunctive proceedings against manufacturers who declined to accept its preferred licence terms. The CCI, exercising jurisdiction under Section 4 of the Competition Act, 2002 ('the Competition Act'),¹¹ directed its Director-General of Investigation to investigate the allegations, a direction that Ericsson challenged before the Delhi High Court on the ground that the Patents Act provided the exclusive remedial framework for disputes concerning the exercise of patent rights.

The Division Bench, in its 2023 ruling, accepted this argument in its most expansive formulation.¹² The court applied the maxim *generalia specialibus non derogant*, holding that where a special statute governs a particular field, the general statute yields to it. In the court's analysis, the Patents Act, as the legislation specifically governing patent rights and their

¹¹ Competition Act 2002 (India), s 4.

¹² *Ericsson v CCI* 2023 SCC Online Del 4078.

exercise, constitutes the *lex specialis* that prevails over the Competition Act as the *lex generalis*, at least in matters concerning the conditions and terms upon which a patentee exercises its statutory rights. The court reasoned that Chapter XVI of the Patents Act, which empowers the Controller of Patents to grant compulsory licences and to revoke patents in cases of non-working or unreasonable terms, provides an adequate and exclusive statutory remedy for the grievances that the complainant manufacturers had raised before the CCI.¹³

This reasoning, with respect, is open to fundamental challenge at multiple levels. In the first place, the premise that Chapter XVI constitutes an ‘adequate’ remedy for NPE-driven market foreclosure conflates two analytically distinct categories of harm. The compulsory licensing regime is designed to address a bilateral failure of licensing negotiation between a specific patentee and a specific implementer; it is not designed to address, and its statutory architecture cannot accommodate, the systemic, multi-party, market-wide competitive harm that results from coordinated NPE portfolio aggregation and the cumulative effect of royalty stacking across hundreds of independently held patents. The Controller of Patents has no jurisdiction to investigate the aggregate competitive effect of licensing practices across an industry; the Controller’s mandate is bilateral, applicant-specific, and relief-limited to the individual compulsory licence.¹⁴

In the second place, the court’s application of *generalia specialibus non derogant* elides the critical distinction between the subject-matter of the two statutes. The Patents Act governs the grant, exercise, and revocation of individual patent rights. The Competition Act governs the structure and conduct of markets. These are not merely different remedies for the same wrong; they are different responses to different categories of harm, analysed through different economic and legal frameworks, and requiring different institutional competencies to adjudicate. The CCI, equipped with specialised economic expertise, power to investigate across an entire relevant market, and authority to impose structural and behavioural remedies extending beyond the bilateral dispute, is institutionally equipped to do something that the Controller of Patents manifestly cannot.¹⁵ The equation of the two is, at its core, a category error.

¹³ibid.

¹⁴ibid.

¹⁵Competition Act 2002 (India), s 4(2)(a)-(e).

B. The Policy Gaps of Chapter XVI

The institutional and remedial inadequacy of the Chapter XVI regime as a substitute for CCI oversight is best illustrated by a comparative analysis of the two frameworks across several key regulatory parameters. The table below presents this comparison in structured form, with the caveat that quantitative parameters are necessarily approximations drawn from the statutory text and reported experience of practitioners in both domains.

Regulatory Parameter	Patents Act, 1970 (Controller of Patents)	Competition Act, 2002 (CCI)
Institutional Focus	Bilateral disputes, individual property rights, and compulsory licensing in specific cases.	Market-wide competition, systemic foreclosure, and the preservation of overall market health.
Remedial Scope	Limited to the specific applicant seeking a compulsory licence; no power to issue cease-and-desist orders or address industry-wide harm.	Power to impose severe financial penalties, order structural divestitures, issue cease-and-desist orders, and grant interim relief.
Economic Analysis	Lacks the institutional expertise and statutory mandate to define relevant product markets or calculate systemic entry barriers.	Equipped with specialised economic tools and a dedicated Director-General of Investigation to assess systemic abuse of dominant position.
Speed of Relief	Compulsory licensing proceedings under Section 84 routinely extend beyond three years of adjudication before a final order is made.	Interim orders under Section 33 may be granted within weeks; final orders within months of investigation.

The practical consequence of this institutional gap is not merely theoretical. During the period between the filing of a complaint and the eventual resolution of a compulsory licensing application, which the statutory framework under the Patents Act routinely extends to three years or more,¹⁶ the NPE continues to deploy its injunction threats unimpeded. Manufacturers, unable to risk a halt to production while awaiting a distant and uncertain remedy, are compelled to accept whatever licence terms the NPE dictates. The compulsory licence, when it finally arrives, provides relief to the individual applicant but leaves the systemic market distortion entirely intact; no market-wide remedy, no structural intervention, and no deterrent penalty attaches to conduct that may have foreclosed competition for years.¹⁷

The regulatory sanctuary that this vacuum creates for NPEs is not a coincidental by-product of the *Ericsson v CCI* ruling; it is its foreseeable, and arguably its principal, practical effect. An NPE operating in a jurisdiction where the antitrust regulator has been disarmed, where the only available remedy is a slow-moving bilateral compulsory licensing proceeding, and where no interim market-wide relief is available, operates in conditions that are close to a regulatory paradise. The *Ericsson v CCI* ruling has, in substance, placed India in that position, at the very moment when its telecommunications manufacturing ambitions and its aspirations to contribute meaningfully to 6G standard-setting make the integrity of the licensing environment most critically important.¹⁸

V. COMPARATIVE PERSPECTIVES AND HARMONISED REGULATORY RECALIBRATION

The challenge of reconciling intellectual property enforcement with antitrust oversight in standard-setting contexts is not uniquely Indian; it is a global policy problem that has engaged regulators and courts across the world's major technology jurisdictions. What distinguishes India's current position is the severity of the vacuum created by *Ericsson v CCI*, a severity that stands in stark contrast to the more nuanced and balanced frameworks that have been developed elsewhere. A comparative analysis of these frameworks both illuminates the deficiencies of the Indian position and suggests the contours of a workable solution.

¹⁶Patents Act 1970 (India), s 90.

¹⁷*Competition Commission of India v Bharti Airtel Ltd* (2019) 2 SCC 521.

¹⁸*Telefonaktiebolaget LM Ericsson v CCI* 2023 SCC Online Del 4078; see also the dissenting analysis in Competition Commission of India, 'Case No 50 of 2013: In Re: Micromax Informatics Limited v Telefonaktiebolaget LM Ericsson' (CCI, 2013).

A. Global Antitrust Jurisprudence

The European Union's approach to the SEP enforcement problem was substantially clarified by the European Court of Justice in *Huawei Technologies Co Ltd v ZTE Corp*,¹⁹ a case that arose from a dispute over the licensing of LTE standard essential patents and that required the Court to delineate the conditions under which an SEP holder in a dominant position may seek an injunction without falling foul of Article 102 of the Treaty on the Functioning of the European Union ('TFEU'), which prohibits abuse of dominant position.

The Court's answer was carefully calibrated to avoid both extremes. It rejected the proposition that an SEP holder who has made FRAND commitments is entirely precluded from seeking injunctive relief; the right to enforce intellectual property rights remains a fundamental principle of EU law.²⁰ But equally, the Court rejected the proposition that the FRAND commitment is a mere aspiration that imposes no meaningful constraints upon the patentee's litigation strategy. Instead, the Court established a procedural safe-harbour framework: an SEP holder may seek injunctive relief without antitrust liability only where it has, prior to bringing proceedings, provided the implementer with specific notice of infringement and a detailed FRAND offer, and where the implementer has failed to respond diligently and in good faith. This framework effectively embeds antitrust oversight into the licensing negotiation process itself, incentivising good-faith conduct on both sides while preserving the patentee's ultimate right to enforce.

The European Commission has more recently reinforced this framework through its 2023 Communication on Standard Essential Patents,²¹ which proposed the establishment of an independent SEP essentiality checking body, a centrally administered FRAND royalty determination mechanism, and enhanced transparency obligations for SDO participants. While these proposals remain the subject of ongoing legislative development, they reflect a coherent policy commitment to treating the SEP licensing ecosystem as an object of active regulatory governance rather than a matter of private contractual autonomy.

In the United States, the evolution of the law has proceeded along a somewhat different axis,

¹⁹ *Huawei Technologies Co Ltd v ZTE Corp* (C-170/13) [2015] EU C 2015 477

²⁰ *ibid.*

²¹ European Commission, 'Intellectual Property and Standard Essential Patents (SEPs)' (Communication COM(2023) 234 final, 27 April 2023), <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2454> accessed 18 May 2026.

shaped primarily by the Supreme Court's landmark ruling in *eBay Inc v MercExchange LLC*²² and the subsequent antitrust enforcement actions of the Federal Trade Commission ('FTC'). The *eBay* decision established that injunctive relief in patent cases is not automatic upon a finding of infringement but is subject to the traditional four-factor equitable test, a development that significantly constrained the availability of injunctions in standard-setting contexts where the disproportion between the patentee's technical contribution and the threatened commercial harm is most acute.

The FTC's enforcement action against Qualcomm, while ultimately unsuccessful on several antitrust theories at the circuit level,²³ established important precedential principles regarding the relationship between FRAND commitments and the duty to deal under Section 2 of the Sherman Act. Taken together, the *eBay* doctrine and the FTC's Qualcomm jurisprudence reflect an American regulatory posture that, whatever its specific doctrinal contours, at least maintains active antitrust engagement with the SEP licensing environment. Critically, neither the United States nor the European Union has taken the view, as the *Ericsson v CCI* ruling effectively does, that the existence of a specialist intellectual property statute entirely displaces antitrust oversight of licensing conduct.

B. Proposed Solutions

1. A Concurrent Jurisdiction Model

The most direct legislative response to the jurisdictional vacuum created by *Ericsson v CCI* would be a statutory amendment to the Competition Act expressly affirming concurrent jurisdiction between the CCI and the Controller of Patents in matters where patent licensing conduct is alleged to constitute an abuse of dominant position.²⁴ Such an amendment could take the form of an amendment to Section 60 of the Competition Act, which currently provides for the Act's application 'notwithstanding anything inconsistent therewith contained in any other law,' by inserting a specific, non-obstante provision addressing patent licensing conduct. Alternatively, a provision mirroring the structure of Section 62, which preserves the application of the Act alongside other legislation, could be specifically extended to provide that nothing in the Patents Act shall be construed to exclude the CCI's jurisdiction over conduct that amounts

²²*eBay Inc v MercExchange LLC* 547 US 388 (2006), 394.

²³*FTC v Qualcomm Inc* 969 F3d 974 (9th Cir 2020).

²⁴Competition Act 2002 (India), ss 60, 62.

to an abuse of dominant position within the meaning of Section 4 of the Competition Act.

Such a concurrent jurisdiction model would not, it bears emphasis, entail any displacement of the Controller of Patents' existing authority over individual patent disputes. The bilateral compulsory licensing regime under Chapter XVI would continue to operate precisely as the Delhi High Court envisages, addressing specific bilateral failures of licensing negotiation. What the concurrent jurisdiction model would restore is the CCI's power to investigate and remedy the systemic, market-wide effects of coordinated or cumulative licensing conduct that individually falls outside the Controller's bilateral mandate but collectively produces precisely the kind of market foreclosure that antitrust law exists to prevent.

2. Legislative Amendment to the Patents Act

In addition to amendments to the Competition Act, targeted reform of Chapter XVI of the Patents Act would address the institutional inadequacy of the Controller's remedial toolkit. The most urgent such reform would be the introduction of interim relief powers enabling the Controller, upon a prima facie finding of abusive licensing conduct, to issue temporary orders restraining the patentee from pursuing injunctive proceedings before civil courts while the licensing dispute remains under active investigation. This would not constitute a bar to the civil enforcement of patent rights; it would, rather, impose upon both parties the kind of structured procedural framework that the *Huawei v ZTE* decision contemplates, ensuring that the injunction threat is not deployed as a negotiating weapon before FRAND obligations have been genuinely engaged.

3. The Modified Essential Facilities Doctrine

A third avenue for regulatory recalibration lies in the modified application of the essential facilities doctrine to aggregated patent thickets in the 5G and 6G context.²⁵ The classical essential facilities doctrine, in its antitrust formulation, imposes upon the holder of a facility that is essential to market participation, and which cannot be reasonably replicated, an obligation to provide access on reasonable terms. In the standard-setting context, the aggregate of SEPs embodied in a telecommunication's standard functions, economically, as precisely such a facility: no manufacturer can sell a standard-compliant device without access to those

²⁵Essential Facilities Doctrine: see *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004), and its contested application in telecommunications contexts.

patents, and no alternative, by definition, exists because the standard has been mandated by the regulatory and market environment alike.

A modified application of this doctrine would not require individual patent holders to license indiscriminately at any demanded price; that would extinguish the innovation incentive that the patent system exists to preserve. What it would require is that, where a dominant entity's aggregate patent portfolio constitutes an essential input to market participation, the conditions upon which that input is made available must be subject to regulatory scrutiny for their competitive effects, regardless of whether those conditions are characterised by the holder as exercises of individual intellectual property rights. The CCI, armed with its existing economic toolkit for market definition and the assessment of dominant position, is far better placed to conduct this analysis than the Controller of Patents, whose statutory mandate does not extend to it.

VI. CONCLUSION

This article has argued, with the weight of comparative legal analysis, economic reasoning, and statutory interpretation, that the regulatory architecture governing the intersection of patent rights and competition law in India is, in its current post-*Ericsson v CCI* configuration, structurally inadequate to the challenges posed by the 5G and 6G patent landscape. The Division Bench's application of *generalia specialibus non derogant* was, at a doctrinal level, an understandable exercise in statutory construction; at a policy level, it produced an outcome whose costs fall almost entirely upon the downstream manufacturers, network operators, and consumers who are least able to absorb them, and whose benefits accrue disproportionately to the NPEs whose market conduct gives rise to the most acute competitive concern.

The problem is not that the Patents Act has been applied; it is that it has been applied to the exclusion of the Competition Act in a domain where the Patents Act, by its own institutional design, cannot perform the functions that antitrust law requires. The Controller of Patents is an expert in patent law; the CCI is an expert in market structure. Both forms of expertise are necessary; neither is sufficient alone. The court's ruling, in privileging one over the other, has not resolved the tension between intellectual property and competition law but has merely suppressed it, at the cost of leaving the competitive market unprotected.

The comparative analysis presented in Part V of this article demonstrates that no other major

technology jurisdiction has adopted the Indian court's categorical approach. Both the European Union, through the *Huawei v ZTE* framework and the 2023 SEP Communication, and the United States, through the *eBay* doctrine and FTC enforcement practice, maintain active antitrust engagement with the SEP licensing ecosystem while preserving the core of intellectual property protection. India's post-*Ericsson v CCI* position is, in this comparative light, an outlier, and a particularly unfortunate one given the country's ambitions to become a significant manufacturer and eventually a significant contributor to the 6G standard-setting process.

The legislative blueprint this article advances is deliberately practical. An amendment to the Competition Act, inserting a specific non-obstante provision affirming the CCI's concurrent jurisdiction over patent licensing conduct that constitutes an abuse of dominant position, would be the most direct and legally robust remedy. Complementary amendments to Chapter XVI of the Patents Act, introducing interim relief powers modelled on those available to the CCI and imposing structured procedural obligations upon SEP holders before injunctive relief is sought, would address the bilateral dimension of the problem. And the application by the CCI, within its existing jurisdiction, of a modified essential facilities doctrine to the aggregate SEP portfolios of dominant NPEs would provide an economically principled basis for regulatory oversight of the licensing ecosystem as a whole.²⁶

India stands at a critical juncture. As the country positions itself to host large-scale telecommunications manufacturing under the Production Linked Incentive scheme, to deploy domestic 5G networks at scale, and to seek a meaningful role in the international bodies that will define 6G standards over the coming decade, the integrity of the intellectual property licensing environment is not merely a legal technicality. It is a foundational condition for the achievement of those ambitions.²⁷ An ecosystem in which NPEs may operate with structural impunity, unconstrained by either a functional antitrust regulator or a procedurally adequate patent authority, is not an ecosystem that will attract or sustain the investment in standard-compliant manufacturing that national policy requires.

The Supreme Court of India, should the *Ericsson v CCI* ruling come before it on further appeal, has the opportunity to correct the doctrinal error at its source, reaffirming the complementary, concurrent operation of intellectual property and competition law in a manner consistent with

²⁶Shapiro (n 1).

²⁷Competition Commission of India, 'Market Study on the Telecom Sector in India' (CCI, 2021) <<https://www.cci.gov.in/study-reports>> accessed 18 May 2026.

both the text and the purpose of the relevant statutes, and with the overwhelming weight of comparative jurisprudence.²⁸ Short of that judicial intervention, the legislature must act. The cost of inaction, measured in foreclosed competition, suppressed innovation, and the competitive disadvantage of Indian manufacturers in the global 5G and 6G market, is simply too high to defer.²⁹

²⁸Contreras (n 5).

²⁹Lemley and Melamed (n 9).