A NOTE ON STANDARD ESSENTIAL PATENTS

Standardized setting has become an indispensable part of our lives, or the absence of standard would rather render our lives chaotic. We have standard A4/ Legal size sheets and also spend most of our times with standard technologies such as the WiFi. These standards definitely make everything around us simpler to utilize. Imagine not having a standard A4/ Legal sized paper-- we'd probably be spending our days standing next to our printers adjusting papers.

Telecommunication and smartphone industries, these days are highly dependent on Standardized Technology. Standardization of technology matters because of its influence on interoperability across competing devices, lowering the costs of products for consumers and encouraging compatibility amongst various competitor's products. In a nutshell, standards are crucial for products to communicate with each other and provide ease of use and other benefits to consumers.

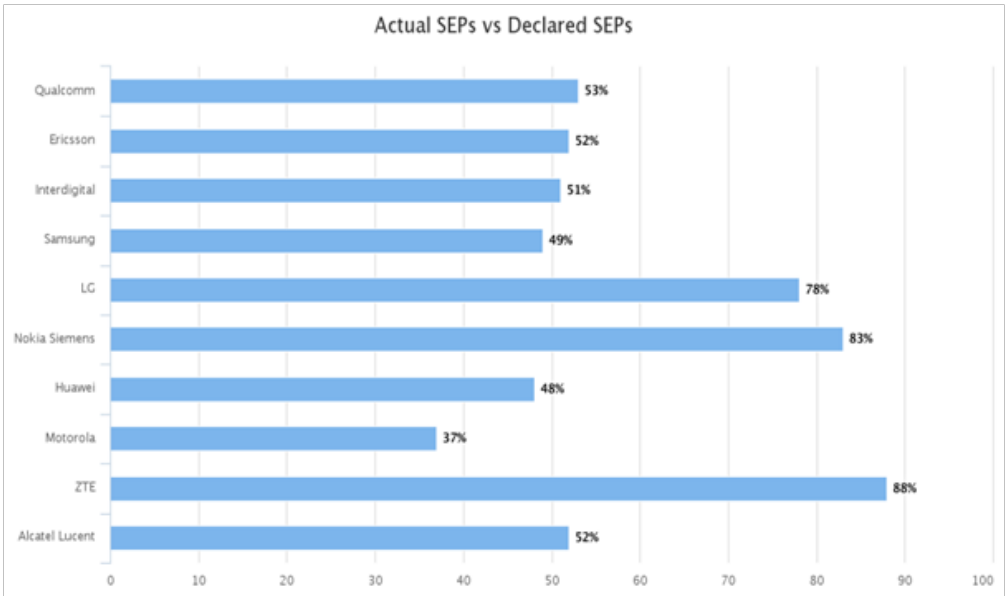
Standard Setting Organizations and Patents:

Standards are usually set by Standard-Setting Organizations (SSOs) such as the European Telecommunications Standards Institute (ETSI) or the International Telecommunication Union (ITU). These SSOs designate certain technologies as 'essential' which need to be made a part of a product. All the manufacturers bringing out their products in the market are expected to adhere to these essential standards pertaining to her/his product in the market. These Standardized Technologies are often protected by patents, and the patents that protect technology essential to a standard is called a Standard-Essential Patent (SEP). Almost all smartphones or tablets that we use today are protected by one or more SEPs.

Patents which are non-standard essential (non-SEPs) may be circumvented or invented around, in order to avoid infringement. One example of a non-SEP would be the 'slide to unlock' technology used in the older iPhone models. Companies were able to invent around this particular feature unlike the Standardized technologies where a particular feature becomes indispensable for the manufacturers. It is also important to note that when technologies are standardized, they are done so as to benefit the consumers. But at times, the exclusive rights conferred by patents may defeat the entire objective of making standards available for public use. To strike a balance, the SSOs have made it mandatory for SEP owners to license their patents on terms and conditions that are 'Fair, Reasonable and Non-Discriminatory' (FRAND). This helps the manufacturers to negotiate in a fair scenario, patent owners can receive an appropriate reward for their research, investment and development and also the consumers to access standardized technology at lower prices.

FRAND Terms, SEPs, Licensing and Litigation:

Once a patent is declared standard-essential, manufacturers and patent owners often enter into licenses for the use of patented technologies. These commercially accepted SEP technologies are then said to be 'locked-in', which makes products marketable. This necessity of a product to incorporate an SEP skews the bargaining power in the favour of the patent owner. Therefore, companies are increasingly trying to protect technologies as SEPs. A study conducted by Cyber Creative Institute says that only 56% of the patents declared as SEP to ETSI are essential. Since the SSOs do not decide the essentiality of the patents, most of the companies and manufacturers end up in lengthy and expensive litigations. Sometimes, the extent of expenses involved could amount to millions of dollars as seen recently in a case where the Korea Fair Trade Commission announced a fine of KRW 1 trillion 30 billion ($865 million USD) on Qualcomm for allegedly refusing to license standard essential patents to competing companies on FRAND terms. According to the Korean authorities, Qualcomm's actions amounted to coercion for the purpose of strengthening its monopolistic power in the patent license market and chipset market.



Recently, Apple and Nokia have again entered the SEP battlefield. Apple has stated that Nokia already has agreements to license its patents on fair and reasonable terms. It was then stated that Nokia had reportedly transferred these patents to Patent Asserting Entities (PAEs) that act on Nokia's behalf in order to extensively pursue the royalties. The outcome of this case is said to be crucial for future patent litigation and could settle the dust around FRAND, SEPs, Licensing and Litigation.

In India, SSOs such as the Telecom Standards Development Society of India (TSDSI) and Telecom Engineering Centre (TEC) play an important role in the development of standards for Telecom Equipment, services, and interoperability among them. Also, there is an SSO known as the Development Organization of Standards for Telecommunications in India (DOSTI), a private SSO committed to the development of telecom standards suitable for Indian conditions amongst many others.

The SEP legal battlefield in India is steadily garnering a number of observers from all over the world and within India as well. Micromax Informatics Limited, Telefonaktiebolaget LM Ericsson and Intex Techs. (India) Ltd. have fought many cases regarding SEPs and FRAND terms before the Competition Commission of India for levy of hefty royalty sums. The cases provided perspectives on basis on which royalty rates in SEPs be decided but hasn't yet clearly addressed queries such as whether the Smallest Saleable Patent Practicing Component (SSPPC), or on the net price of the Downstream Product, or some other criterion should be used to calculate the royalty criteria. Questions have also been raised as to whether the total payment of royalty in case of various SEPs used in one product should be capped, amongst many other less explored avenues. Due to the complexity of the issues being dealt with by the Courts, it would be interesting to observe the future patent licensing practices and the scope for efficiency of licensing is expected to go up if SSOs devise mechanisms to increase transactional efficiency of voluntary exchange of standard essential technologies.

In a nutshell: the Samsung and Motorola cases

The telecommunications industry has recently seen a significant increase in costly patent litigations which some commentators have called "smartphone patent wars".

The precedent set by the two antitrust decisions in the Motorola and Samsung cases provides a path to "patent peace" in the telecommunications industry.

Moreover, these two cases bring legal certainty in all industries where standards and FRAND-encumbered standard-essential patents (SEPs) play a role. They constitute a guide for Member State courts, as well as to standard-setting organisations, on the interpretation of EU competition rules regarding the enforcement of FRAND-encumbered SEPs.

In the Samsung and Motorola cases, the Commission clarifies that in the standardisation context, where the SEPs holders have committed to (i) license their SEPs and (ii) do so on fair, reasonable, non-discriminatory (FRAND) terms, it is anti-competitive to seek to exclude competitors from the market by seeking injunctions on the basis of SEPs if the licensee is willing to take a licence on FRAND terms. In these circumstances, the seeking of injunctions can distort licensing negotiations and lead to unfair licensing terms, with a negative impact on consumer choice and prices.

Source:

https://www.greyb.com/lose-millions-not-checking-essentiality-sep/
http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf
http://www.wipo.int/wipo_magazine/en/2015/03/article_0003.html