



Delhi High Court breaks ground with AASI order

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InterDigital filed a suit before Delhi High Court in July 2020 for the infringement of its 3G and 4G standard essential patents (SEPs). It made an alternate prayer for declaration of FRAND (fair, reasonable and non-discriminatory) terms should Xiaomi elect to execute a licence in lieu of an injunction.

According to InterDigital, Xiaomi had secretly filed a complaint in Wuhan in June 2020, requiring the court to set FRAND terms for a global licence for InterDigital's 3G and 4G SEPs. On 4 August, Xiaomi filed an application before the Wuhan Court, seeking an anti-suit injunction (ASI) against the proceedings in India. On 23 September, the court granted the ASI order and directed InterDigital to withdraw or suspend its injunction proceedings in India, with a rider that a failure to do so would invite a daily penalty up to RMB1 million (US\$154,000). This caused InterDigital to seek an anti-ASI (AASI).

There are fundamental differences between ASIs and AASIs. ASIs seek to deny a party of asserting foreign, national rights through an improper exercise of extraterritorial jurisdiction. AASIs, on the other hand, prevent a party from attempting to prohibit the patent owners' assertion of foreign rights – merely maintaining the status quo. This contrast, and the innate correctness of AASIs, are the very reasons that no court has ever denied an AASI sought in the context of a global SEP litigation, until now.

While the final judgment is awaited, as was reserved on 17 December 2020, the global significance of the ad interim AASI granted is undeniable. This order comes as a relief to SEP owners across the world, who are aggrieved by the increased filing of FRAND complaints in Wuhan (also called the "Wuhan submarine"), and the tactic to secure an ASI against infringement cases in other jurisdictions.

Delhi High Court's AASI order. Alive to the fact that it was dealing with a novel issue in Indian law, and bearing in mind the urgency of the matter and the huge fine looming over InterDigital, the court agreed to split the hearing into two parts, the first and the most immediate being whether to pass an AASI order against Xiaomi or not. On 9 October 2020, Delhi High Court restrained Xiaomi, on an ad interim basis, from pursuing or enforcing the Wuhan ASI order in India, backed by:



The law on AASI

• AASI orders were maintainable and are governed by the law on ASI orders. • There is no real difference between an anti-enforcement injunction and an AASI. Even assuming otherwise, since InterDigital was not served in advance with Xiaomi's ASI application, it had no opportunity to contest it. Therefore, InterDigital's AASI claim in India had merit.

Comity and court's sovereignty

- The subject matter of Indian and Chinese proceedings was different. While the former primarily focused on infringement of SEPs, the latter focused on the fixation of global FRAND rates.
- The FRAND declaration claim in India is only an alternate prayer, and conditioned on Xiaomi's election for a licence from InterDigital.
- An interim FRAND rate set in India can be challenged by Xiaomi in India itself.
- The final determination of FRAND royalties in India will take time, and if the Wuhan court decides final FRAND terms that are not suited to InterDigital, it can seek remedy under appropriate law in China.
- Indian courts alone can decide on infringement of Indian patents, and Xiaomi cannot invoke a foreign decision to halt such proceedings.
- While the ASI order of the Wuhan Court did not follow comity, the AASI order does. The Wuhan Court disregarded the Indian court's process by restraining InterDigital from continuing its Indian suit.

Bad faith

Xiaomi's conduct bordered on fraud. Despite appearing before the Indian court on six occasions, it didn't disclose the filing of the ASI in Wuhan against the Indian suit.

The order opens a new window to the future on FRAND disputes, and is unprecedented in more ways than one, particularly in Indian Patent law.

First, not only is this the first ever AASI order in India, it is also a commendable decision, coming within 10 days of InterDigital moving the court and getting protection through a well-reasoned order.

Second, the order is clearly a distinguishable feature when compared with other similar orders in global SEP disputes. This is the first order (known to the authors) to grant an AASI after a foreign court had issued an ASI order. The AASI decisions in the *IPCom v Lenovo* and *Nokia v Continental/Daimler* disputes were granted in the UK, France and Germany, respectively, when the ASI issue was still pending consideration in the US.



Third, the AASI order distinguishes the Indian suit from the Wuhan complaint, not just on the grounds of subject matter but also on the scope of the FRAND inquiry.

