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Frand and Compulsory Licenses: Analysis and Comparison

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§ 9.01 FRAND AND COMPULSORY LICENSES: ANALYSIS AND COMPARISON*Srividhya Ragavan and Raj S. Davé***[A] Introduction**

Licenses are important tools to capture the full market value of many of the intangible assets. In that, licenses serve an important function in all areas of intellectual property rights to effectively capitalize on the value of the property. Operationally, intellectual property licenses are private agreements between two parties, one of whom will be the owner of the intellectual property, typically detailing the rights relating to the use, dissemination, development of the property. Especially in the area of patents, licenses are the most important tools deployed by the inventor to ensure that the technology is appropriately captured by the market. Without a license, the patent owner would be forced to singularly engage in all effort towards manufacturing and marketing the invention. Using different forms of licenses, the patentee can engage in various exclusive and non-exclusive forms of licenses in different markets. Similarly, while retaining rights of ownership, the patent owner can engage in distribution and marketing of the invention by imposing appropriate terms and conditions of sale, use and further development over the technology.

Licenses, in general, being agreements structured within the boundaries of privity of parties, typically reflect of different bargaining parities and expectations of the particular licensor and licensee. Nevertheless, basic fundamental issues such as identifying the technology, its boundaries, its terms of use are common threads that are seen several licensing arrangements. In that, the strength of technology as well as the bargaining parities of parties remains major items that in turn, reflect on the strength of the different terms of the license. Notwithstanding the privity of parties that characterize licenses, the complexity of the market, the players and the globalization of each of the channels of manufacturing and distribution has necessitate policies that streamline this area of law. A well-structured license regime especially those that involve inventions can encourage incremental innovation over existing technology by facilitating dissemination to a wider audience of researchers and collaborators while continuing to generate income for the patent owner.

This section compares two different forms of licenses being FRAND and compulsory license. Both forms of licenses are critical to achieve access to otherwise difficult to access technologies. The FRAND licenses have been widely embraced, especially in the software, mobile phones, and communications sectors. Compulsory licenses have been sparingly used by Governments where the public's need for the invention was considered to over-weigh the needs of the patentee, essentially for pharmaceuticals. Compulsory licenses have been universally criticized for being an imposed burden on the patentee. In comparing these two forms of licenses, this section outlines that despite the obvious differences

operationally both of these have stark similarities and highlights areas where compulsory licenses operate more efficiently. In doing so, this section highlights that perhaps each of the forms of licenses can borrow from the other to minimize the weaknesses to ultimately enable more access for critical inventions.

[B] FRAND Licenses

The term FRAND is an acronym for “Fair, Reasonable and Non-Discriminatory,” which signifies the presence of these specific features in the license. Products embodying information and communication technology (ICT) usually embody multiple patents from different owners that have to work on a common platform to create the required outcome. The FRAND licenses were a response to technological development, which necessitated inter-operability of and between such devices. As the diversity of technological offerings increased, the interoperable feature became important not just for consumers (to preserve the option to move from one device to another) but also for the patent holder to exploit the patent effectively. That is, once a standardized technology (or technical standards) is put in place, innovations should develop using the standard as a basic platform. Standards harmonize various operational aspects of the industry and thus, create a broad, uniform platform to interact effectively. Such standards take the form of a set of technical specifications that provide, or attempt a common design to a product or process in a given sector.¹ The several devices that are developed using android as the platform in the market serve as a great example. In fact, it would be cost-ineffective for every device maker to switch to or create new technical platforms or standards. Given this, as a certain level of inter-operability is established as the standard, the industry has a stake in ensuring that the owner of patents over a technological standard could license it with a view to prevent hold-over problems. A hold-over problem arises when a patent owner refuses to engage in a reasonable license of a technology which becomes a base for the development of further innovation. When identified patents become essential to achieve the goal of interoperability, it naturally becomes difficult for one patent owner to operate in a space that is delineated from the rights of other owners. Thus, organizations that set technical–standards freeze certain patents as standards essential and cause the patent owners to subject such patents to FRAND licenses.

Historically, Professor Contreras suggests that from World War II through the 1970s, courts, when considering antitrust and abuse of patent issues, has passed more than “one hundred decrees ordering patent holders to license their patents to

¹ See generally Mark A. Lemley, *Intellectual Property Rights & Standards-Setting Organizations*, 90 CAL. L. REV. 1889 (2002).

all applicants on terms that were fair, reasonable and non-discriminatory.”² Modern day FRAND licenses are used under the umbrella of Standards Setting Organizations (SSOs). The contemporary use of FRAND licenses by the SSOs can be owed to various reasons. The proliferation of patents especially in the ICT sector has created what is termed as patent thickets. The term *patent thicket* refers to the presence of several overlapping patents, which necessitates any third party interested in commercializing the technology to navigate through dense patents and negotiate the rights to commercialize the technology.³ Given this, the enormous market power that the holder will generate from owning a Standards Essential Patent (SEPs) has necessitated that the industry self-regulates with some oversight to ensure access to the technology. Consequently, the SSOs are vested with the task of ensuring that the important standard setting patents are sieved out and remains licensable for use by all companies. The SSOs play a role enabling owners of patents dealing with standards that bear essential interoperable features to designate their patent as a standard.

SSOs & FRAND

In gist, the SSOs and SDOs (Standards Developing Organizations) are membership organizations to which leaders and aspiring leaders of the industry can belong. These organizations can be accredited or unaccredited and can cover a variety of technical areas in which they play a role in establishing standards.⁴ In the United States, the American National Standards Institute, or ANSI (www.ansi.org) is an important global SSO, which “oversees the creation, promulgation and use of thousands of norms and guidelines that directly impact businesses in nearly every sector: from acoustical devices to construction equipment, from dairy and livestock production to energy distribution, and many more.”⁵ The predecessor of ANSI, the American Engineering Standards Committee (AESC), played an important role in the creation of the International Standards Association (ISA),⁶ which over time became the International Organization for Standardization (ISO).⁷ Other independent standard setting organizations like the Institute

² See Jorge L. Contreras, A Brief History of FRAND, Working Paper Series, SSRN Abstract: 2374983, Aug. 7, 2014, available at <http://ssrn.com/abstract=2374983> or <http://dx.doi.org/10.2139/ssrn.2374983> (last visited January 2015).

³ See Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting*, INNOVATION POLICY & THE ECONOMY 1 118-50, available at <http://faculty.haas.berkeley.edu/shapiro/thicket.pdf> (last visited Mar. 30, 2014).

⁴ Andrew Updegrove, *What and (Why) is an SSO?*, THE ESSENTIAL GUIDE TO STANDARDS, available at <http://www.consortiuminfo.org/essentialguide/whatisansso.php> (last visited January 2015).

⁵ See ANSI: Historical Overview, available at http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1 (last visited January 2015).

⁶ See ANSI: Historical Overview, available at http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1 (last visited January 2014).

⁷ See International Organization for Standardization, ISO’s Mission, available at <http://www.iso.org/iso/home/about.htm> (last visited January 13, 2015).

of Electrical and Electronics Engineering (IEEE) and the Internet Engineering Task Force (IETF) publish standards and work with the objective of fostering “technological innovation and excellence for the benefit of humanity.”⁸

Patent owners submit their patents to SSOs, which can elevate their patents as SEPs. For example, the European Telecommunications Standards Institute (ETSI),⁹ an SSO covering the telecommunications industry in Europe has a specific form for declaration of patents that can become a standard.¹⁰ If a standard cannot be implemented without a particular patent being infringed, then that patent is said to be standards essential.¹¹ Alternately, an SSO can adopt a particular recommendation or specification as a standard, then companies owning patents that cover the said standard should make declarations of their patents.¹² Sometimes members of an SSO work together towards creating a common standard. The ETSI publishes a Work Program every year that provides an overview of the standardization projects that are underway. Similarly, the International Telecommunications Union, a United Nations body that sets standards in this area also provides an overview of work in progress in this area.¹³ Under such circumstances, members tend to work together to develop standards although there have been instances where members approved standards-requests from third parties without disclosing a pending patent only to reveal them later.¹⁴ For instance, Dell was accused of not disclosing its patent contrary to the policy of Video Electronics Standards Association (VESA) during the VL-bus standard development process.¹⁵ The issue arose when, after the standard was approved, Dell sought to enforce its 7481 patent rights against various VL-bus manufacturers who had implemented the standard.¹⁶ This resulted in antitrust scrutiny of Dell’s patents

⁸ See Institute of Electrical & Electronics Engineering, IEEE’s Mission, available at http://www.ieee.org/about/vision_mission.html (last visited January 13, 2015). See also Internet Engineering Task Force, IETF’s Mission, available at <http://www.ietf.org/about/mission.html> (last visited Nov. 30, 2014).

⁹ See also European Telecommunications Standards Institute, ETSI’s Mission, available at <http://www.etsi.org/about> (last visited Nov. 30, 2014).

¹⁰ See, e.g., ETSI Guide on Intellectual Property Rights (IPRs) 52, 53 (last modified Dec. 19, 2014), available at <http://www.etsi.org/images/files/IPR/etsi-guide-on-ipr.pdf> (last visited January 2015).

¹¹ See Janice M. Mueller, *Potential Antitrust Liability Based on a Patent Owner’s Manipulation of Industry Standards Setting*, 2003, A.B.A. Sec. Antitrust L., available at <http://apps.americanbar.org/antitrust/at-committees/at-exemc/pdf/liability.pdf> (last visited January 13, 2015).

¹² See Andrew Updegrove, *Everything You Always Wanted to Know About FRAND (But Didn’t Know Who to Ask)*, available at <http://www.consortiuminfo.org/standardsblog/article.php?story=20120221074826486> (last visited Nov. 30, 2014).

¹³ See generally International Telecommunications Union, available at <http://www.itu.int/en/ITU-T/Pages/default.aspx> (last visited January 2015).

¹⁴ Andrew Updegrove, *Laws, Cases and Regulations*, THE ESSENTIAL GUIDE TO STANDARDS, available at <http://www.consortiuminfo.org/essentialguide/laws.php#dell> (last visited January 2015).

¹⁵ *In re Dell Computer Corp.*, 121 F.T.C. 616 (May 1996).

¹⁶ *In re Dell Computer Corp.*, 121 F.T.C. 616 (May 1996). See also Updegrove, note 14, *supra*.

resulting in a consent decree issued by the FTC preventing Dell, among other things, from enforcing any patent right required to use or implement an industry standard since it had intentionally failed to disclose such right during the standard setting process.¹⁷

Policies of SSOs detail the terms for licensing SEPs, one of which generally dictates that the patent is licensed on FRAND terms.¹⁸ FRAND licensing is thus, an industry-adopted practice to enable users of an SEP to pay fair and reasonable royalties as part of the patent owner's negotiations with the SSO.¹⁹ Once a patent is designated as an SEP using an independent evaluation process, then the patent owner can make it available for licensing as a standard on negotiated terms. Alternately, the owner can refuse to license leaving the patent as an area that the SSO would have to design around. Generally, patent owners recognize that it is in their own interest to have their patents adopted as a standard. Owning a SEP patent that is licensed on FRAND terms provides the strategic ability to influence the trajectory of technological development of a standard by being a part of the Governing members of the SSO. Further, it can create opportunities to develop certification and branding for standards-compliant products.²⁰ Furthermore, the patent is posited to gain volume licensing in place of a lesser licenses for higher royalties.

The expectation with all SEP patents is that the licensor would offer the same or similar terms to all users, which will lead to competitiveness of the given patent's prospective market. Notably, while the general requirement is to be fair and reasonable, the constituents of these terms are left undefined, especially in relation to two or more licensees, which have raised more questions in this area of law.²¹ Generally, the term "fair" relates to the anti-competitive nature of the underlying terms, while "reasonable" relates to the value of technology

¹⁷ In the Matter of Dell Computer Corp., Docket No. C-3658, May 20, 1996.

¹⁸ See generally Keith Maskus & Stephen A. Merrill, PATENT CHALLENGES FOR STANDARD-SETTING IN THE GLOBAL ECONOMY: LESSONS FROM INFORMATION AND COMMUNICATION TECHNOLOGY, National Research Council 31-50 (2013).

¹⁹ See Janice M. Mueller, *Patent Misuse Through the Capture of Industry Standards*, 34 J. MARSHAL L. REV. 897 (2001), available at <http://www.law.berkeley.edu/journals/btlj/articles/vol17/mueller.pdf> (last visited January 13, 2015).

²⁰ See Updegrave, note 14, *supra*, at *Participating in Standard Setting Organizations: Value Propositions, Roles and Strategies*, available at <http://www.consortiuminfo.org/essentialguide/participating1.php> (last visited Nov. 30, 2014).

²¹ See Roger G. Brooks & Damien Geradin, *Taking Contracts Seriously: The Meaning of the Voluntary Commitment to License Essential Patents on "Fair and Reasonable" Terms*, available at http://www.cravath.com/files/Uploads/Documents/Publications/3233990_1.pdf (last visited January 13, 2015). See, e.g., Saumya Srivastava, *Standard Essential Patents and Competition Law*, 2013, Competition Commission of India, available at <http://cci.gov.in/images/media/ResearchReports/Standard%20Essential%20Patents%20and%20competition%20law.pdf> (last visited January 2015).

considering the other prevailing patents in this area, the “non-discriminatory” means to ensure comparable licensing terms between competitors.²²

Generally, patent owners allow licensees the rights to use their patents in addition to other patents declared “essential” or “necessary” by the SSO.²³ The patent owner cannot block implementation of a standard by licensing at exorbitant prices and cannot refuse to license the patent or disclose them.²⁴ Despite the voluntary nature of a FRAND license, its inherent contractual nature causes them to suffer from the same malaise that every contract is subject to.²⁵ In the event of a dispute, the confluence of contractual issues with the associated intellectual property rights provides a diversity of remedies, the choice of which determines the outcome rather than clear policy or legislative guidelines. Patent owners have successfully used contractual remedies and other injunctive relief, although the battles have been long and arduous.²⁶

[C] Compulsory Licenses

Compulsory licenses are meant to balance the patent owner’s right with the societal need for the product, and operate where public interest concerns outweigh the patent holders’ rights.²⁷ Compulsory licenses are best defined as “involuntary contract[s] between a willing buyer and an unwilling seller imposed and enforced by the state.”²⁸ Unlike a FRAND license, which is a “voluntary” commitment by the licensor to negotiate fair, reasonable and non-discriminatory terms, a compulsory licenses forces the patent owner to license.²⁹ However, both

²² See *id.* See also Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standards-Essential Patents*, 28 J. BERKELEY L. & TECH. 1135-66 (2013), available at <http://faculty.haas.berkeley.edu/shapiro/frand.pdf>.

²³ See Jonathan Radcliffe & Gillian Sproul, *FRAND and the Smartphone Wars*, INTELLECTUAL PROPERTY MAGAZINE 45-47 (Winter 2011/2012); See generally John Cassels, *What is FRAND* (last modified Aug. 29, 2013), Mondaq, available at <http://www.mondaq.com/x/260184/Patent/What+Is+FRAND> (last visited January 2015).

²⁴ See *id.*

²⁵ See *id.*

²⁶ Mark Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991-96 (2007).

²⁷ Rafael V. Baca, *Compulsory Patent Licensing in Mexico in the 1990’s: The Aftermath of NAFTA and the 1991 Industrial Property Law*, 35 IDEA 183, 184-85 (1994); see also David J. Henry, *Multi-National Practice in Determining Provisions in Compulsory Patent Licenses*, 11 GEO. WASH. J. INT’L L. & ECON. 325 (1977).

²⁸ See Gianna Julian-Arnold, *International Compulsory Licensing: The Rationales and the Reality*, 33 IDEA 349, 349 (1993) (quoting Paul K. Gorecki, *Regulating the Price of Prescription Drugs in Canada: Compulsory Licensing, Product Selection, and Government Reimbursement Programmes*, Economic Council of Canada (1981)).

²⁹ See Srividhya Ragavan, *The Jekyll and Hyde Story of International Trade: The Supreme Court in Pharma v. Walsh and the Trips Agreement*, 38 U. RICH. L. REV. 777, 782 (2004).

FRAND and CLs means to result in a fair and reasonable license of an intellectual property protected technology. While FRAND licenses emphasize providing the licensee with reasonable terms, compulsory licenses enable access to an otherwise inaccessible invention. Both forms can affect market exclusivity and the market price of the licensed product by creating a value for the licensed product that can be remarkably different from its true market value. Nevertheless, both forms ultimately result in benefitting the end-consumer who pays less to access a product subject to either of these forms of licenses.

While FRAND licenses have been universally embraced but it is also acknowledged that the diversity of remedies has caused differences in the outcome and thus, has muddied the picture. For instance, a patent owner who alleges infringement of SEP can seek injunctive relief under Title 35.³⁰ In a standards-setting environment, if an injunction is issued by a court order, it increases the bargaining parity of the patent owner and forces potential licensees to the negotiating table contributing to the patent hold-up problem.³¹ Conscious that a guarantee of automatic injunctions for alleged infringement empowers the patent owner to stall competitors, courts issue injunctions only if the SEP plaintiff can prove harm beyond failure of royalty negotiation.³² Similarly, money damages to remedy the breach of FRAND contract require proof of infringement with harm to the patent owner, as per the court in *Apple v. Motorola*.³³ The alternate remedy is for a breach of the FRAND contract, is generally pursued by the licensee as the third-party beneficiary of the contract. In the dispute between Motorola and Microsoft, Judge Robart of the District Court for the Western District of Washington State to reset the royalty rates Motorola was charging on their SEPs, rather than force Motorola to settle. Patentees also tend towards the alternative under Section 337 of the Tariff Act of 1930³⁴ under which the patent owner has the option of approaching the International Trade Commission (ITC) seeking an exclusion order preventing the defendant from importing his product into the United States on the grounds that “domestic industries” are affected until resolution of either the breach of contract claim from the FRAND agreement, or, the patent infringement suits. The exclusion order creates the same effect as an

³⁰ 35 U.S.C. § 283. See also Standards Essential Patents and Injunctive Relief, available at <http://www.jonesday.com/files/Publication/77a53dff-786c-442d-8028-906e1297060b/Presentation/PublicationAttachment/270fc132-6369-4063-951b-294ca647c5ed/Standards-Essential%20Patents.pdf> (last visited January 13, 2015).

³¹ *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 914 (N.D. Ill. 2012); See e.g., Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1 (2012).

³² See for e.g., *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872 (9th Cir. 2012).

³³ *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 909 (N.D. Ill. 2012); See Mikey Campbell, *Apple's Patent Case Against Motorola Dismissed "With Prejudice,"* available at http://appleinsider.com/articles/12/06/22/apples_patent_case_against_motorola_dismissed_with_prejudice (last viewed January 13, 2015).

³⁴ See also The Tariff Act of 1930, 19 U.S.C. § 1337.

injunction by pushing the defendant to negotiate with the plaintiff. Further, the status of the ITC as an administrative body makes it relatively convenient and faster to get relief.³⁵ In a recently released report of the Department of Justice, the ITC was urged to re-consider the use of exclusion order in favor of FRAND-licensors on the grounds that a royalty negotiation occurring under threat of an exclusion order would skew in favor of the patentee in a manner inapposite to the patentee's RAND commitment. In addition to all of these, antitrust remedies are still possible and widely used in Europe. In summation, although SSOs and FRAND licensing have potential to be positive forces, they currently use up court time and remain highly inefficient.

Compulsory licensing bypasses the issues of FRAND licensing because the Government establishes license terms including the royalty rates. Although that royalty may not be ideal, it is clearly defined up front and in a good compulsory license regime, there is scope for patentee to challenge that rate. When India compulsorily licensed Bayer's Sorafenib when it was sold at an egregious price of Rs.2,80,428 per month (about \$5,000) to cater to cancer patients, the royalty rates were raised from 6% to 7% on appeal based on the market conditions by the Intellectual Property Appellate Board. Most compulsory licensing litigation tends to be with the Government and hence, can potentially reduce the issues that result from defensive strategies. Further, the upfront determination of royalties provides the patentee with information to take into consideration. For instance, Gilead successfully negotiated a voluntary license in India for its hepatitis C drugs perhaps seeing how Bayer's pricing became an exemplar of publicity disaster for the company. Operationally compulsory licenses are more efficient when compared with FRAND licensing. For instance, the mere presence of compulsory licensing options will minimize the patentee's use of pricing or other strategies with a view to create an artificial demand, which has become a common issue with FRAND licenses. Notwithstanding all of the above, the primary issue is that the compulsory nature of such licenses can work to dis-incentivize patent owners.

Compulsory licenses are an example of regulatory mechanism where the government interferes to make corrections. That is, compulsory licenses are a by-product of the government's determination that the need of the public for the patent outweighs the patentee's rights to exploit it commercially. FRAND licenses represent an example of market forces working through the industrial associations to determine that a patent is integral for the further development of that technology, and that it should be licensed by the owner on FRAND terms. That is, the SSO as an industry-body determines that a patent is standards essential and should be licensed on FRAND terms. In effect though, while in FRAND licenses the patent owner retains the right to refuse to license the patent, market conditions would dictate licensing on FRAND terms as the more prudent option. Thus, ultimately, both of types of license prevail upon the patent owner, although

³⁵ Chien & Lemley, Patent Holdup, the ITC, and the Public Interest, note 31, *supra*.

compulsory licenses prevail directly. Also, having the governments negotiate the value is generally perceived by the patent owner as being disadvantageous on the grounds that the bargaining parties may be pitted against them in spite of instances such as the Gilead example in India and GSK's successful negotiations in Brazil where patent owners have negotiated a reasonable bargained for royalty.

From the consumers' perspective, compulsory licenses removes the biggest debilitating factor of the FRAND license being, the uncertainty involved with royalty negotiation. The pre-set royalty rates in the case of a compulsory license lend a certain level of stability for users of the technology. In software patent terms, for end-users this system reduces the cost, litigation and patent-hold over related inefficiencies. Also, one of the biggest criticisms with the FRAND licenses is that SEPs have become defensive tools used to gain business strength between competitors rather than a tool to innovate. For example, Google's purchase of the Motorola mobility's patents was a defensive acquisition given that Oracle accused Google of infringing upon Oracle's Java patents. When Google acquired Motorola's patents, the portfolio consisted of patents on networking and video encoding technology thereby creating a defense for Google which could counter-allege that Oracle was infringing on some of Google's patents. Considering this and other similar cases, both in the United States and Europe, investigations have been commissioned to determine the presence of any prevailing abuse of the involved SEPs.³⁶ A compulsory license regime will largely eliminate such defensive acquisitions.

[D] A Hybrid of FRAND and Compulsory License

While the above narrative compared both of these forms of licenses, the section asserts that a more workable model would be a hybrid of these licenses that operates to eliminate the inherent debilitating constraints of both forms of licenses. Importantly, just like the SSOs prevail in the ICT sector, there are organizations such as the Medicines Patent Pool that work towards a license model to provide access to medication. These models rely on licenses based on fair-royalties, which are typically negotiated to provide access to innovative products in poorer areas of the world and like FRAND licenses are lesser than the market rate of royalties.

Organizations that operate with different types of technologies should identify patents that would be considered as standard for that particular technology. Having a system to negotiate standard agreements from patentee will benefit all parties involved including the users by reducing the litigation and associated costs

³⁶ See U.S. Department of Justice (DOJ) & U.S. Patent & Trademark Office (U.S.P.T.O.), *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary FRAND Commitments* (last modified Jan. 8, 2013), available at <http://www.justice.gov/atr/public/guidelines/290994.pdf> (last visited January 2015).

therein. Standardization of the terms of licenses are not a new phenomenon—several organizations including the International Telecommunication Union, the Department of Justice, United States Patent and Trademarks Office, Competition Policy International are just some examples of organizations that have already undertaken work to reduce litigations that seem to plague the proliferation of these licenses.³⁷ Where a patent owner reneges on the standard terms and conditions, a system that provides the ability to seek alternatives would result in more voluntary licenses and access. Given the falling quality of patents, a system that facilitates less litigation and more licenses would increase efficiency.

Interestingly, access to technology is as important as access to medicines. One caters to the digital divide, which affects the larger economy as a whole while the other caters to right to health issues. Access to medicines is required to avoid public health crisis while access to technology increases interaction by connecting people, provides educational, job related opportunities, and reduces the gap for the marginalized in society. In poorer nations, access to technology is important to achieve the objectives of the international trade regime while access to medicines is important to maintain labor capital. Both forms of access remain critical to achieve the larger objective of TRIPS outlined in Article 7.³⁸ The objectives of TRIPS, outlined in Article 7, assert the importance of “protection and enforcement of IP rights” to “national social and economic welfare of members.” When access to technology and health care becomes a privilege of a certain class, it reiterates the class system and perpetuates the class-based divisions that cause more social and economic malaise, which is exactly what the international trade agreements hope to prevent.

The section does not suggest that governments should jump in and compulsorily license medicines and technology but it does propose the need to work towards a hybrid model that can lead to meaningful access to achieve the goals of the trade regime. Thus, a hybrid form of license that standardizes the rates or the ranges as well as other terms of the licenses would improve efficiencies of two diverse sets of industry, being the ICT and pharmaceuticals.

³⁷ See, e.g., William New, *ITU Undertakes Work On Standards Essential Patents*, IP-watchdog, Oct. 12, 2012, available at <http://www.ip-watch.org/2012/10/12/itu-undertakes-work-on-standard-essential-patents/> (last visited January 2015); see also Kai-Uwe Kühn, Fiona Scott Morton, & Shelanski, *Standard Setting Organizations Can Help Solve the Standard Essential Patents Licensing Problem*, CPI Anti-trust Chronicle, Mar. 23, 2013, available at <https://www.competitionpolicyinternational.com/assets/Free/ScottMortonetalMar-13Special.pdf> (last visited January 2015); see also Florian Mueller, *UN Agency ITU to Hold High-Level Talks on Standard-Essential Patent Litigation in October*, FOSS Patents, July 9, 2012, available at <http://www.fosspatents.com/2012/07/un-agency-itu-to-hold-high-level-talks.html> (last visited January 2015).

³⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex I.C.,

LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND Vol. 31, 33 I.L.M. 81 at arts/ 7, 8 (1994) [hereinafter TRIPS].