

360) data. These findings showcase a grim picture of the current economic and social status of FEHs.

► Nearly two-thirds of FEHs are headed by widows and 5% by divorcees, while only 24% are headed by married

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Another significant fact that emanates from the study is that FEHs are

as no surprise that female chief wage earners earn significantly lower incomes than their male counterparts. While the annual average income of an MEH is ₹2,07,264, an FEH earns just 59% of that (₹1,22,308). At the bottom-

them respectable social status.  
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# Innovation, but at a reasonable cost

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**T**IMES change, and so do business models. This is especially true for licensing of standard-essential patents (SEPs). What was an excellent business practice in the 1990s is not a viable business strategy today. The cross-licensing rates of those days cannot be used as a benchmark today. If old rates are used, then it would jeopardise Digital India and Make-in-India initiatives.

Spending on R&D is required for innovation. However, that does not mean the public should pay for research that is unproductive. Reasonable profits multiplied by volumes is the hallmark of operations of the high-tech industry.

The issue of remuneration for SEPs is not new. However, in India, it definitely is

not the case that FRAND (fair, reasonable and non-discriminatory) assured SEPs are ensuring the growth of the mobile industry. Even advanced patent law jurisdictions saw SEP-related cases as recently as in 2012-13—around the same time they came up in India. It is more of a case of torpedo action—surfacing for claiming royalties when Indian parties become large enough to warrant the attention of patent holders.

Technologies do not become SEPs on pure merits. It is done by a vote, and a vote is not necessarily going to bring in the best technology. Standard-setting organisations (SSOs) themselves do not vet the claim of essentiality—it is a self-declaration/claim. There are several studies of repute—all showing that over-declaration is rife, and most if not all SEP owners over-declare their patents as being essential at least 7-8 times.

Views about over-declaring are countered by treating the prospective licensee as holding out on the patent holder. US courts have countered the issue of patent hold-up by asking for evidence on

the same. Till date, no such evidence has been presented by any SEP owner. Calling a prospective licensee as unwilling is a very simple tactic adopted by the right holder to counter a claim of invalidity, non-essentiality, etc. The European Commission paper on SEPs provides that “potential licensees of SEPs should remain free to challenge the validity, essentiality or infringement of SEPs. It is in the public interest that potentially-invalid patents can be challenged in a court and that companies, and ultimately consumers, are not obliged to pay for patents that are not infringed.”

Injunctions against prospective licensees who question the basis of the extortionary claim are somewhat alien to Indian jurisprudence. The right holder has himself agreed for a FRAND royalty, i.e. it

agrees that money is the ultimate remedy, and if someone questions the demand it does not mean that they should be sent out of business by way of an injunction. If there is any issue of amount, it can and should be decided after trial. In the recent Ericsson matter, under the current scheme of things, parties are financing litigation against themselves.

There are several reports that reflect the nature of royalty stacking for this industry. For example, a study provides that, put together, the royalty burden on a smartphone, if it is on end-device, is more than \$150, i.e. for a device whose bill of material is around \$150, the royalty is another \$150!

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There are SSOs like IEEE (Institute of Electrical and Electronics Engineers) which have clearly stated in their IPR policy (February

2015) that royalty imposed is on component basis. In fact, the US Department of Justice's Antitrust Division had a good look at the IEEE policy change and found it to be proper.

By charging a royalty on an end-product, not only is contribution by other IP owners misappropriated, but a royalty is imposed for non-technical aspects such as taxes, duties, freight, insurance, marketing costs, packaging, etc. For example, SEPs have got no relationship with the screen, or memory, or camera module. These components are the three most expensive parts of a device, and a royalty is paid to the vendor who supplies them. What is the additional contribution by SEPs, in a low-cost screen versus a high-cost screen, which is entitled to a higher royalty?

Just because there are other licences does not mean that the entire patent portfolio is valid, essential and used. We don't know what those other licence terms were. And there are several licences where chipset-based licensing has been done by the same licensors. For

## petitive marketplace

example, Bluetooth SIG patent licence with semiconductor companies is a clear example of the practice of licensing on a chipset basis. In the Intex matter, the judge may be limiting the view only to the interim stage, with complete facts being ascertained after trial.

As a nation, we should decide how we want our policy to encourage innovation, as well as have a well-functioning competitive marketplace where consumer interest trumps firm interest. We are going towards 5G, where cars, roads, entire cities would be connected. Whether we pay royalty for a 20-cent chip or the car or products in which that 20-cent chip is incorporated is up to us. Either way, it is an issue that we must decide for posterity.

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This article is a rebuttal to Divya Rajput's column "Revisiting the price of innovation" (<http://goo.gl/sG0miD>)