

What's At Stake In The Apple, Qualcomm Antitrust Trial

By **Matthew Perlman and Bryan Koenig**

Law360 (April 11, 2019, 8:11 PM EDT) -- Two of the world's largest technology companies will go head-to-head next week in front of a California federal judge and jury on Apple's antitrust claims against Qualcomm and the chipmaker's counterclaims for breach of contract, in a clash that could help shape intellectual property licensing around the world.

So what's at stake in one of the most expensive corporate legal battles ever waged?

The lawsuit is rooted in Qualcomm's chip licensing practices and Apple's allegations that they're anticompetitive, shirking obligations to license essential technology on fair terms. Those claims are mirrored in multiple enforcement actions brought by government officials around the world. But the immediate fight's key elements also include contract disputes, a globe-spanning fight over patent infringement and questions about the standards on which key technology is moored.

Here, Law360 looks at where the parties are coming from and where they might be going after U.S. District Judge Gonzalo P. Curiel decides some of their claims and a jury decides the rest once trial kicks off April 15.

The Combatants

An early entrant to the mobile communications space and the world's largest producer of the baseband processor chips that connect every smartphone and tablet to a mobile network, Qualcomm has amassed a valuable portfolio of patents covering cellular technology, some of which have been incorporated into industry standards.

These standards help equipment made by different manufacturers work together, and companies that own so-called standard essential patents generally agree to license them on reasonable terms because they need to be used by any product that employs the standard.

Antitrust agencies around the world began attacking Qualcomm's licensing practices several years ago, with actions brought by authorities in China, Taiwan, South Korea, the European Union and the U.S. alleging the chipmaker uses its dominance to wrench high fees for its technology. Those actions have yielded billions of dollars in fines outside the U.S., while American enforcers are typically limited to injunctive relief when targeting anticompetitive conduct.

Apple, which jockeys for the title of the most valuable company in the world, fired the opening salvo in the instant case when it filed suit in January 2017, alleging Qualcomm was using its crucial patents to extort exorbitant sums in licensing payments, creating billions of dollars in overcharges. But the volley has echoed globally as Apple and Qualcomm clash in multiple jurisdictions in the U.S. and abroad.

The fight has included patent infringement disputes in federal court and before the U.S. International Trade Commission, as well as overseas, with Qualcomm accusing Apple of infringement and seeking to block imports into the U.S. and other countries of iPhones that allegedly infringe its products, namely ones using chips made by Qualcomm rival Intel.

"What's going on with Qualcomm is a war within the mobile device industry itself," Ankur Kapoor, a partner at Constantine Cannon who focuses on antitrust litigation and counseling, told Law360.

The instant suit had originally been between only Apple and Qualcomm. But it broadened to include the contract manufacturers, or CMs, that make Apple's iPhones and other products — Wistron, Compal, Foxconn and Pegatron — when the chipmaker sought to force the CMs to pony up on intellectual property licenses for its chip technology that Apple had stopped reimbursing.

Qualcomm says the CMs stopped paying it for the licenses at Apple's direction. In addition, Qualcomm says that Apple forced the CMs to manipulate sales figures on devices sold to Apple.

In the U.S., Qualcomm is also waiting on a decision from U.S. District Judge Lucy Koh in a case brought against it by the Federal Trade Commission, whose own antitrust allegations closely mirror the ones raised by Apple and was filed just days earlier.

"The opinion from her will, with one exception, really sort of set the table for the future of this war. The one exception is what happens in the antitrust case that Apple has brought against Qualcomm," Kapoor said, noting that while Judge Koh could issue a decision before the Apple v. Qualcomm jury reaches a verdict, he suspects she'll wait.

"That's not to say that the jury verdict will determine her decision, but I think she wants all of the information that she can reasonably get," he said.

One factor that may weigh more immediately on the instant case, according to Kapoor, is Qualcomm's success so far in its patent infringement litigation against Apple. While the ITC cases have been mixed, a San Diego federal jury concluded last month that Apple ran afoul of three Qualcomm patents, yielding a \$31 million damages judgment against Apple.

The jury verdict, Kapoor said, will make Apple "hard-pressed" to show that the royalties on those patents weren't fair and reasonable.

"A jury has already concluded that Qualcomm was entitled to them," Kapoor said, adding that the royalties were only a "whopping" \$1.41 per iPhone. While not a legal point but merely a trial issue, Kapoor said, no jury would find that amount "unfair" for a \$1,000 handset.

Kapoor did note, however, that Apple's case involves other conduct, as well as earlier phones and technology that are covered by different patents.

Also important is Apple's assertion that Qualcomm exhausted its patent rights when it sold its chips, thus preventing it from double-dipping by requiring payments for both chips and licenses.

The Chips

The core antitrust allegations against Qualcomm boil down to what Apple and enforcers say is its "no license, no chips" policy. Under that policy, according to Apple, the chipmaker will sell its chips only if technology companies agree to license Qualcomm's technology. Qualcomm's chips are so crucial to core functionality and compatibility with cellular networks, according to the allegations, that Apple and others are forced to pay exorbitant rates.

According to the FTC, unlike Qualcomm, most companies don't require royalties to buy technology components. The agency says Qualcomm demands the royalties from those buying chips from competitors in order to steer customers back to its own products.

A central element to the allegations against the chipmaker, and a big part of what makes the case so crucial well beyond the name recognition of the parties and the price tag involved, is what makes Qualcomm's technology so valuable. Much of its IP has been designated as a standard-essential patent by standard-setting organizations, anchoring the technology as a core building block of telecommunications technology.

When companies get their technology established as an SEP, they do so on the condition that the patent will be licensed on fair, reasonable and non-discriminatory, or FRAND, terms. However, SEP agreements don't establish exactly what FRAND means, leaving the definition as a crucial element to the outcome of much of the allegations against Qualcomm. The FTC and others say the chipmaker has breached its FRAND licensing obligations by charging so much.

"The complaint has been made for years that Qualcomm has not licensed those patents on a FRAND basis," Kapoor said. "What Apple and the FTC are alleging in their respective antitrust cases against Qualcomm is that Qualcomm, as a condition of selling its chips ... to mobile device manufacturers like Apple, is requiring manufacturers to take non-FRAND licenses, these excessively priced terms."

Lisa Kimmel, a senior counsel in Crowell & Moring LLP's antitrust group, told Law360 the case may not have much impact beyond the companies involved, saying that FRAND obligations are set by the organizations that issue the standards and that they differ from body to body.

"FRAND doesn't mean one blanket thing; it's defined by the specific [standard development organization's patent] policy," she said.

Another complicating factor is the question of to whom Qualcomm is obligated to license its technology. Right now, the company licenses only to handset makers but refuses to license to rival chipset producers like Intel — Apple even says that Qualcomm has actively tried to exclude Intel as the only nascent competitive threat to a U.S. monopoly on chips.

Under U.S. law, sellers are allowed to pick with whom to deal. But companies like Samsung have said in court that the FRAND commitment obligates Qualcomm to sell to any willing buyer, attacking the chipmaker's refusal to sell to rivals in an amicus brief submitted in the FTC case.

"This is, at its core, about whether Qualcomm is required to license its chip set rivals, or whether it's

allowed, under the various [patent] policies of the organizations that it participates in, to license at the downstream level," Kimmel said, adding that licensing downstream is a standard industry practice that Qualcomm's rivals, obviously, do not like.

"They would like to have the licenses directly themselves," she said.

The business arrangements entwined in the dispute cover more than just buyer and seller. They also cover what's been called a "no snitch" deal that purportedly barred Apple from telling antitrust enforcers about Qualcomm's licensing practices.

Apple says Qualcomm withheld nearly \$1 billion in rebates after the iPhone maker nevertheless spoke with South Korean enforcers who ultimately hit the chipmaker with \$854 million in fines. Apple claims it abided by the business cooperation and patent agreement, not volunteering information to enforcers but simply responding to requests.

Judge Curiel has already weighed in on the no-snitch dispute, clearing Apple of those allegations and stating that responding to enforcer information requests was in the public interest. In ruling for Apple, Judge Curiel refused to release Qualcomm from its BCPA payment obligations to Apple.

In its own counterclaims, Qualcomm has accused Apple of simply refusing to pay up on technology essential to its phones. Qualcomm also says that Apple interfered with the chipmaker's contracts with iPhone and iPad manufacturers. According to Qualcomm, Apple withheld payments that spurred the CMs to stop paying Qualcomm royalties. In addition, Qualcomm says that Apple lied to government enforcers, inciting antitrust allegations against the chipmaker.

Qualcomm's contract claims also target the CMs to try and wrench the unpaid licensing fees.

The End?

However the instant case ends, Qualcomm's antitrust woes will not be over. The chipmaker continues to battle a class action from smartphone consumers representing a U.S. class estimated at 250 million people, alleging Qualcomm's licensing practices forced higher phone rates onto customers. The class action is currently on hold as Qualcomm appeals the certification order granted by the same judge currently mulling the FTC lawsuit.

Observers are watching the spat carefully in part because of how it and especially the FTC case might affect licensing practices more broadly. That impact boils down to the tether for licensing fees currently paid to Qualcomm, which are based on the price of the entire handset.

But antitrust enforcers say the fees should be based on the far cheaper individual component on which the technology is licensed, the chipset that makes up only a fraction of the entire phone's cost. Pegging licenses to the chips, rather than the phone, would dramatically decrease the fees that must be paid and cut deep into Qualcomm's profits.

Kimmel said she's not sure of the impact the case will have beyond the specific standard organizations involved, but said the allegations are "trying to stretch, at least under U.S. law, the limits of duty to deal or duty to assist rivals in the context of standard-development and patents that are subject to a FRAND assurance."

At the end of the day, the Apple case is about money that the companies may owe. Kapoor noted that both companies have a "tremendous amount of cash" and that the dispute likely won't shake up the industry. The FTC's case on the other hand, attacks Qualcomm's core business model as illegal.

This is what could have a greater impact on the company, and by extension the industry more broadly, Kimmel said.

"No company wants to pay massive fines, but in the longer run, forcing a change to the business model that they've relied on to achieve success in the market is more problematic, and potentially more problematic for consumers too," Kimmel said. "These are companies that have succeeded in the market with certain practices, and if the agencies are going to come in and take a hacksaw to what's worked, then that's a little risky."

The case is Apple Inc. v. Qualcomm Inc., case number 3:17-cv-00108, in the U.S. District Court for the Southern District of California.

--Editing by Philip Shea and Michael Watanabe.