

Intellectual Property

FTC's Qualcomm Suit Could Disrupt Innovation Balance

BNA Snapshot

- FTC suit against Qualcomm could disrupt patent holder/competitor balance
- Competitors want court to state limits of patent holder powers



By **Alexei Alexis**

Supporters of the Federal Trade Commission's antitrust lawsuit against smartphone chipmaker Qualcomm Inc. want a decision that would clarify the limits of a patent owner's ability to control the use of essential technology by other innovators.

Patent attorneys and industry analysts agree that the case in a California federal court raises cutting-edge antitrust questions whose answers could disrupt the balance of power among patent owners, competitors, and companies that want to license patents for their own innovations. Billions of dollars are at stake.

The law is murky when it comes to which patent licensing practices go too far and how much the FTC can intervene. The FTC says that Qualcomm's refusal to license to competitors violates both antitrust laws and typical industry patent agreements. But that assertion isn't shared by everyone.

Among the dissenters is the acting chairman of the FTC, Maureen Ohlhausen. The FTC filed its suit Jan. 17, just days before President Donald Trump's inauguration. At the time, the action prompted a strong dissent from Ohlhausen, who at the time was a Republican commissioner. She said the case, by its very existence "will undermine U.S. intellectual property rights in Asia and worldwide."

For now, Ohlhausen can't drop the complaint since the only other sitting commission member, Democrat Terrell McSweeney, backs the suit. Two commissioners are needed to support removal.

The agency's May 12 filing said it has a "forceful" antitrust case against Qualcomm, but said in a footnote that Ohlhausen hasn't changed her view that the case is unwarranted.

Qualcomm has filed to dismiss the case, and its reply to the FTC's argument to sustain it is due June 2.

Out of Bounds?

"We'd love to see a solution clarifying that certain behaviors are out of bounds," Morgan Reed, president of the App Association, a technology trade group in Washington, told Bloomberg BNA. Reasonable licensing will be a "must have" for many small companies who want a chance to compete and innovate in this space, he said.

Among the App Association's sponsors are Apple Inc. and Intel Corp. Both companies have criticized Qualcomm's patent licensing practices.

Earlier this month, the App Association submitted an amicus brief saying the case raises critical issues that warrant attention. The American Antitrust Institute, a competition advocacy group, took a similar position.

The FTC's **complaint**, filed in the U.S. District Court for the Northern District of California, accuses Qualcomm of violating antitrust laws by employing abusive patent licensing tactics that have harmed chip competitors, cell phone manufacturers, and consumers.

High Stakes

The outcome could cause significant losses for Qualcomm and other patent holders that rely on licensing fees, legal analysts said.

"Qualcomm's business model is at issue, including the manner in which it sells products and licenses its intellectual property, as well as whether Qualcomm must license potential competitors rather than the handset manufacturers," Robert Masters, a litigation partner in the Washington office of Fried, Frank, Harris, Shriver & Jacobson LLP, told Bloomberg BNA. He isn't involved in the FTC's litigation.

More generally, the decision could provide much needed legal clarity concerning the licensing of “standard-essential patents,” Masters added.

Patents are designed to protect the innovator by preventing copycats, but some companies using the patents say patent holders wield too much power, squelching their own attempts at innovation.

Qualcomm holds patents that are considered “essential” to meet industry standards that enable cellular connectivity. The standards were adopted by industry-led organizations that include Qualcomm and its competitors. In exchange for having their patented technologies included in such standards, patent holders typically promise to license their patents on “fair, reasonable, and non-discriminatory” (FRAND) terms.

The FTC says Qualcomm’s refusal to license standard-essential patents to competitors amounts to both a breach of the company’s FRAND commitments and a violation of antitrust laws. Qualcomm says it licenses at the device level instead, a common industry practice.

The complaint also says Qualcomm illegally used its dominant position to force cell phone manufacturers to pay a “tax” on products that use a Qualcomm competitor’s technology.

“The [FTC] case has the potential to significantly alter FRAND rate calculations in the mobile device industry,” Bloomberg Intelligence analyst Matt Larson said.

‘No Coherent Theory’

When the FTC filed its brief to continue the case, Qualcomm promptly issued a statement saying the agency has “no coherent theory of competitive harm and no allegations of the type of conduct that the antitrust laws are designed to address.” Qualcomm also argues that even if a refusal to license competitors constitutes a breach of FRAND terms, it’s not enough to make an antitrust claim.

That position enjoys support among conservative antitrust specialists who are skeptical of aggressive enforcement. “An SEP holder’s deviation from a FRAND assurance made in good faith amounts to no more than post-contractual opportunism,” Koren Wong-Ervin, director of the Global Antitrust Institute at George Mason University, told Bloomberg BNA. “That is properly analyzed under contract, not antitrust, law.”

The FTC’s complaint “sends the wrong message internationally about valuing intellectual property rights and preserving incentives to innovate,” Wong-Ervin added. “The stakes are incredibly high as the outcome could potentially disrupt the carefully balanced FRAND ecosystem in a sector where we’ve seen exponential output growth.”

Ideal Test Case?

Advocates of robust competition enforcement disagree, saying Qualcomm’s arguments, if adopted, would undermine the enforcement of antitrust laws in the cellular industry and other sectors that depend on standards setting. For that reason, the case is an ideal one to highlight the challenges faced by competitors of patent holders, Richard Brunell, AAI vice president and general counsel, told Bloomberg BNA.

“The patent holder has enormous leverage that’s conferred upon it by the standards-setting process,” said Brunell, who drafted the group’s brief.

Qualcomm competitors Intel and Samsung Electronics Co. also have filed briefs supporting the FTC. They’re hoping for an outcome that would force the company to change its behavior.

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