

## APPLE ACCUSES NOKIA OF “UNFAIR COMPETITION”

by **Peter Scott**

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US technology company Apple has hit back at a Nokia patent infringement suit, alleging that the phone company is violating California competition law by refusing to license its patents on fair, reasonable and non-discriminatory (FRAND) terms.

Apple filed its counterclaim last week, alleging several violations, including breach of contract, patent infringement, unfair competition, estoppel and patent misuse. It claims that Nokia is using its position providing essential patents for European Telecommunications Standards Institute (ETSI) technology standards to demand non-FRAND royalties and reciprocal licences in violation of its obligations.

Nokia initially filed suit in October, saying Apple was infringing its patents that are incorporated in wireless and telecoms standards. Apple claims Nokia demanded exorbitant royalties and the rights to some of Apple's smart-phone technology in return for licences, as well as infringing its patents.

Apple general counsel Bruce Sewell says: “Other companies must compete with us by inventing their own technologies, not just by stealing ours.”

Unusually, the intellectual property rights policy agreed to by the parties to the ETSI standards says that FRAND commitments “may be made subject to the condition that those who seek licences agree to reciprocate.”

Antitrust specialist Richard Wolfram in New York says he is “not aware of any other standard setting dispute in which the owner of other intellectual property which has been subject to a standard has asserted the grantback of reciprocal licences as part of its FRAND rights.” He says the claims would provide a test case for the US court system. “A court would have to decide whether demands for grantback are properly included within FRAND, and also what the understanding of the participants in the ETSI standard-setting process was at the time.”

Though it has alleged “unfair competition” Apple has not alleged any Sherman Act violations in its counterclaim, though many of its allegations are consistent with those made in previous standard setting disputes that have resulted in Sherman Act complaints.

“I would say that Apple probably calculated, as has happened in other cases, that proving an antitrust claim would be a bridge too far,” Wolfram adds. “Nonetheless, Apple has alleged the conduct elements of such an antitrust claim - what we call antitrust patent ‘hold-up’.”

US courts have so far been difficult to persuade when it comes to ‘patent hold-up’. The Supreme Court declined to hear the US Federal Trade Commission's case against Rambus, which alleged similar conduct, while Nokia itself agreed to a settlement last year with patent holder Qualcomm, after the Finnish phone company had alleged Qualcomm was overcharging for its patents.

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