

PATENT ROUNDTABLE

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Apple Remarks for ITU Patent Roundtable (Geneva, Switzerland - Oct. 10, 2012)

Apple thanks the ITU for calling this meeting and for the opportunity to share its views on standards essential patent litigation and FRAND licensing. Apple's remarks will draw upon our recent experience with cellular SEPs.

Apple launched the first iPhone in 2007. In 2010, we introduced the iPad. Today, we are licensed to more than 75% of all declared UMTS patents and patent applications. And yet, Apple remains a frequent target of the cellular SEP hold-up.

More often than not, these hold-ups threaten Apple with injunctions or other exclusion remedies. Today, Apple is involved in over 25 cases in 9 countries around the world and is defending against over 75 patents declared essential to at least one cellular standard. These cases continue despite Apple's best efforts to willingly negotiate licenses on FRAND terms.

The FRAND commitment should be a shield that preserves open access to standardized technologies rather than a sword to bully companies into either paying excessive royalties or granting access to product-differentiating innovations.

There is pressing need to restore a standards landscape that is fair, reasonable and non-discriminatory for all – both for licensees and licensors. Last November, Apple outlined -- in a letter to ETSI – an approach intended to do just that. We would like to expand on that here today.

Firstly we would like to address injunctions. Injunctions are not and should not be permitted on FRAND-encumbered SEPs. We believe injunctions are inconsistent with the promise to irrevocably license on FRAND terms. In committing to license FRAND, the licensor exchanged its interest in injunctions for the promise of compensation.

FRAND is about money. And injunctions distort the FRAND bargain. An injunction threat presents would-be licensees with a Hobson's choice of (i) having its products enjoined from sale, or (ii) agreeing to excessive licensing fees or conditions.

We believe seeking injunctions is fundamentally incompatible with the FRAND commitment. And Apple practices what we preach. Despite owning hundreds of standards essential patents,

we have not sought and will not seek injunctions on our FRAND-encumbered SEPs.

Secondly, we would like to address the royalty base. We believe the base should be common as between the parties and should bear the closest possible relationship to the actual functionality covered by the standard.

Several courts and regulatory agencies call this the 'smallest saleable patent practicing unit.' This legal doctrine seeks to avoid unjust enrichment by focusing parties on the component that practices all or substantially all of the standardized technology. In the context of cellular SEPs, the smallest saleable unit would most likely be the baseband chip.

Opponents of this approach argue the base should be the end user product ASP. However, the ASP approach wrongly permits the patent holder to collect value unassociated with its contribution to the standard –like the end product’s materials composition, operating system, unique industrial design, and component choices. Using the ASP of the end user product as the royalty base has the effect of distorting the value of essential patents and discriminating against companies with high value products, like Apple.

Thirdly, we would like to address the royalty rate. An appropriate royalty rate should reflect a party’s *pro rata* ownership of standards essential patents as compared to the total, industry-wide pool of such assets. Such an approach respects both licensors and licensees because the rate is objective, it is proportional among licensors, and it is comparable among licensees.

We recognize that the royalty calculation should be more than a patent-counting exercise. But we also believe that parties would benefit from guidance and consistency in framing a FRAND royalty. *Pro rata* allocation provides a common starting point.

Finally, we would like to address willingness – both that of the would-be licensee and the licensor.

Apple respects the need of patent holders to collect a FRAND return on their innovation investment. We also recognize that the patentee deserves some access to justice when confronted with a recalcitrant, would-be licensee. But the patentee cannot be the only arbiter of what is or is not FRAND.

The would-be licensee must be permitted to criticize and challenge the offered royalty rate, as well as the licensor’s allegations of essentiality, infringement, validity and enforceability.

The unwillingness to accept a royalty demand cannot mean unwillingness to license.

Our industry should look with skepticism upon those who claim that injunctions are necessary to punish “unwilling” licensees. Such an ill-defined, self-serving exception runs the risk of swallowing the critical rule that the FRAND commitment means no injunctions.

In addition, such advocacy focuses too much on the would-be licensee. The patentee has the initial burden to prove it is a *willing licensor* by supporting its royalty demand with logic - and

proof that its request is consistent with FRAND.

The patentee always has access to justice. Consistent with the FRAND commitment, the patentee can pursue a royalty claim by asking an arbiter or court to find its rights are valid, enforceable and infringed. The trier of fact also can declare a FRAND rate. Thereafter, with a judgment in hand, the patentee can use contempt proceedings to enforce any payment due if the prospective licensee is still unwilling to pay.

This balances the rights of the licensor and the licensee. It ensures the patentee is paid a FRAND rate, but also protects the licensee from being pressured into a license it would not otherwise accept, *but for* the threat of an injunction.

In summary, Apple requests that the ITU endorse the following with regard to FRAND-encumbered standards essential patents:

- It is a violation of the FRAND commitment to seek an injunction on a FRAND-encumbered standards essential patent;
- The base to be used in any FRAND royalty calculation should bear the closest possible relationship to the actual functionality covered by the standard;
- The royalty rate to be used in any FRAND royalty calculation should reflect the parties' pro rata ownership of patents essential to the subject standard; and,
- The patentee bears the initial burden of proving it is a willing licensor consistent with its FRAND obligations.

We thank you for this opportunity to share Apple's views on these important topics.

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