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Edith Ramirez is Fantastic Choice for FTC Chairman

David Balto (Law Offices of David A. Balto) · Thursday, March 7th, 2013

Commissioner [Edith Ramirez](#) became the new Chairwoman of the Federal Trade Commission on March 4. The White House announced the selection on February 28th.

Chairwoman Ramirez is an excellent choice for antitrust enforcement generally, but is truly an ideal Chair for the FTC as it prepares to face the next generation of anti-competitive practices stemming from patent misuse. She uniquely combines an IP litigation background with a commitment to aggressively enforce the spirit and the letter of the antitrust laws, and may prove a valuable friend in the movement for patent litigation reform.

Prior to joining the FTC, Chairwoman Ramirez was a partner with top intellectual property litigation firm Quinn Emanuel Urquhart & Sullivan where she specialized in litigation and IP. Since joining the FTC, Chairwoman Ramirez has been the Commission's point person on IP matters, and likely is the most influential voice in the building. Her ascension to Chairwoman only reinforces the strength of her message.

Some speeches and comments by Chairwoman Ramirez are representative of both her expertise and her commitment to using the antitrust laws to address competitive problems stemming from IP. For instance, in July 2012, Chairwoman Ramirez [testified before the Senate Judiciary Committee](#) regarding standard essential patents, but also discussed the patentization of the mobile telecommunications industry in general:

Complex multi-component products are the norm in IT markets. For example, a smartphone has hundreds of components and technologies that enable it to communicate over wireless networks, stream video, access the internet, and perform all of the functions that consumers expect. The vast majority of these components and technologies are covered by patents. A conservative estimate of the number of patents that could be in play in a smartphone is in the tens of thousands.

Chairwoman Ramirez also recognizes the harm to competition that can result from this over-patentization of the industry. In a [speech before the Washington State Bar Association](#) she discussed many of the issues that lie at the heart of abusive patent use and patent reform including 1) Competition and Innovation in the Patent Thicket; 2) Injunctions and Hold-Up; and 3) SEPs and Exclusion Orders.

On the first issue, she notes concerns with the acquisitions of patents leading to a costly arms race because it “drives companies to shift their resources from productive activities, like research and development, to less productive ones, like filing a multitude of dubious patent applications and acquiring massive patent portfolios.” She also notes the need for the PTO and the courts to address the concern of patent quality. On injunctions, she points out how the Supreme Court’s decision in *eBay*, gave the courts a framework to use injunctive relief prudently and noted that an injunction should be denied where exclusivity would harm innovation and competition. In addition, she notes that the courts should take into account whether the patent owner practices its patent in deciding whether to grant an injunction, hopefully a factor that will dampen the grants of injunctions for patent assertion entities.

Finally, on SEPs and exclusion orders Chairwoman Ramirez reaffirmed testimony she gave for the Commission that the ITC has the tools, under its public interest authority, to prevent a patent owner from using the threat of an exclusion order to escape its commitment to license on a RAND basis. She emphasized that it is important to remember that SEP litigation is more than merely private disputes because “[o]ver time, hold-up restricts competition and distorts incentives to invest in standardized products and complementary technologies. The result for consumers will be higher prices, fewer choices, and inferior product quality.”

Most notably Chairwoman Ramirez opened her speech with the following remarks:

Patents create exclusive rights that encourage investment in innovation. But a system clogged by too many vague and trivial patents can do just the opposite. Injunctions also play a critical role in preserving the investment incentives at the heart of the patent system, ensuring that inventors can recoup their R&D costs. However, injunctions can also create risks in technology markets, where complex products with multiple components are the norm and interoperability standards are everywhere. In this environment, the threat of an injunction has the potential to deter innovation and distort competition.

Finally, in an article entitled “*A Competition Policy Perspective on Patent Law: The Federal Trade Commission’s Report on the Evolving IP Marketplace*” Chairwoman Ramirez discussed the burgeoning problem of patent assertion entities (“PAEs”):

Although PAEs share certain characteristics with other non-practicing entities (NPEs), such as start-ups, design firms, and universities, their unique business model has generated considerable controversy... The increased number of lawsuits, coupled with the rise in the number of landmark damage awards, has raised significant concerns about the potential adverse impact of PAE activities on innovation.

However, Chairwoman Ramirez follows this description with commentary suggesting PAEs are only responding to incentives created by the patent system, and are a “symptom and not the disease.” Perhaps this bodes well for Chairwoman Ramirez’s support of patent reform, but it may also suggest that there is still work to be done to convince her and the rest of the FTC about how to address the problems of PAEs.

In the past year the FTC has increasingly recognized the problems arising from the assertion of intellectual property rights and how those problems can hamper competition. With the dramatic increase in patent acquisitions and litigation by PAEs these problems are becoming momentous. The FTC, with the DOJ, has begun to use all of its tools – enforcement actions, hearings, amicus briefs, advice letters to other regulators – to begin the process of helping to get courts and regulators to address these problems. President Obama could not have chosen a better steward to lead these efforts.

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