Competition Policy for the IP Marketplace

Keynote Address by Commissioner Edith Ramirez
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Good morning. I appreciate the opportunity to be here with you today.[1] The Federal Trade Commission has had a longstanding focus on competition issues in the technology arena. So it is fitting that I am here in Seattle, home to some of the largest high-tech players in the world. In fact, Seattle's place in the tech economy is only growing. Last year, the Wall Street Journal named the city, which has seen a 43% increase in tech employment in the last decade,[2] as the next Silicon Valley.[3] Given the setting, I would like to speak today about the Commission's policy work in the technology sector.

The news has recently been dominated by reports about the patent wars in the smartphone sector.[4] And while high-stakes patent litigation between rivals is nothing new, the battles we are seeing today have reached striking proportions. An important part of the FTC's mission is to advocate for sound competition policy. We have a long history of applying our competition expertise to the patent system and speaking out for reform.[5] I would like to focus today on two issues that are at the center of the smartphone wars: patent quality and the proper scope of injunctive relief. While currently front page news, these issues have been on the Commission's policy agenda for many years.

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. This morning, I want to share some of

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[1] The views expressed in these remarks are my own and do not necessarily reflect the views of the Commission or any other Commissioner.
[2] Joel Kotkin, *The Best Cities For Tech Jobs*, FORBES, May 17, 2012, *available at* http://www.forbes.com/sites/joelkotkin/2012/05/17/the-best-cities-for-tech-jobs/.
[3] *See* Nick Wingfield, *Bay Area Technology Firms Put Down Roots in Seattle*, WALL ST. J., June 2, 2011, *available at* http://online.wsj.com/article/SB10001424052702303745304576357764272422044.html?mod=googlenews_wsj.
[4] *See* Charles Duhigg & Steve Lohr, *The Patent, Used as a Sword*, N.Y. TIMES, Oct. 7, 2012, *available at* http://www.nytimes.com/2012/10/08/technology/patent-wars-among-tech-giants-can-stifle-competition.html.
[5] *See* FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003) (hereinafter "2003 Report"), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf; FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: A

other suppliers. This strategy of "mutually assured destruction" can deter lawsuits between manufacturers.

But from a competition policy perspective, a costly arms race is a far from ideal solution. 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.

And in the aggregate, the strategy can be self-defeating. Filing questionable patent applications for minor product improvements or nearly obvious methods adds to the flood of patents in the sector. Then, if patentees go bankrupt or change business models, these defensive portfolios hit the street, creating an active secondary market in patents. This secondary market, which the Commission examined in its most recent IP report issued in 2011, has opened profit opportunities for what the FTC refers to as patent assertion entities, or PAEs—what others pejoratively call "patent trolls."[9] PAEs are in the business of buying, selling and asserting patents. We distinguish PAEs from other non-practicing entities like universities because PAEs do not engage in research, development, or technology transfer. Because PAEs do not produce products, they are not vulnerable to countersuit. This renders the mutually-assured destruction strategies that fueled the rise of PAEs a weaker shield against litigation risk for practicing entities.

Some have blamed PAEs for increasing litigation and transaction costs in the IT sector. In fact, there is some evidence suggesting PAEs are responsible for a growing percentage of lawsuits in the IT sector.[10] But others argue that PAEs serve a vital role in promoting innovation, compensating small inventors and facilitating the monetization of IP.[11] I won't be delving too deeply into this debate, but suffice it to say that the competitive implications of the PAE business model are far from clear.

As a side note, let me take this opportunity to mention that the FTC will hold a joint workshop with the Department of Justice on December 10th in Washington, D.C. This workshop will explore some of the key legal and economic issues associated with the PAE business model by seeking input from industry, IP practitioners, economists, and other academics. I hope some of you attend or watch a webcast of the event.

Turning back to the issue of patent quality, courts can improve the landscape by continuing to tighten the standards for patentability. Increasing funding to the overburdened Patent and Trademark Office is, of course, also essential. And I was happy to see Congress incorporate our recommendation for a more streamlined post-grant review process in the America Invents Act.[12] But I have to acknowledge that change to patent quality is likely to come slowly and incrementally. While the Commission will continue to advocate for better patent quality, we can minimize the drag on competition from too many bad patents by also focusing

[9] 2011 Report at 8.
[10] *Id.* at 58-62.
[11] *Id.* at 67-70.
[12] 2003 Report at 7; Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284-341 (2011).

our attention on remedies, particularly the threat of injunctions. So let me now turn to that topic.

II. Injunctions and Patent Hold-Up

Injunctions have recently become a hot button issue in the smart phone wars. But the economics have been clear for some time. The threat of an injunction can give a patent owner unwarranted leverage in licensing negotiations. Let's go back to our smartphone example. Imagine that a device manufacturer makes an early design decision about email notification. The manufacturer designs the phone so the screen will blink when a new email arrives. The device could have been designed instead with a small

In our view, when considering whether to grant injunctive relief, courts should also take

Once a technology is embedded in a standard, it is there to stay until the standard is revised, which generally doesn't happen for many years. Moreover, after a standard is published, an entire industry begins to invest in products and technologies that are tied to the standard. As a result, owners of standard-essential patents that once faced competition may gain newfound leverage solely as a result of the standard-setting process.

IV. Exclusion Orders and the ITC

But federal courts alone cannot eliminate the power of an injunction threat. Today, patent owners often seek relief at the International Trade Commission. As many of you know, the ITC is an independent federal agency with a number of trade-related responsibilities, including the duty to investigate and adjudicate patent infringement claims involving imported goods. Under Section 337 of the Tariff Act of 1930, a U.S. patent holder can file a complaint with the ITC.[18] If the agency finds in favor of the complainant, it has the authority to issue an exclusion order, which directs Customs to stop infringing products at the border. The ITC does not have the authority to award damages. Because an ITC exclusion order has the same economic effect as an injunction, and because exclusion orders are issued almost automatically

We have urged the ITC to use its public interest authority to prevent a patent owner from using the threat of an exclusion in order to escape its RAND commitment.[21] Specifically, we have recommended that the ITC deny an exclusion order if it finds that the patent holder has not complied with its RAND obligation, leaving it the option of seeking monetary relief in district court. Or the ITC could delay the effective date of any order until the parties mediate a monetary settlement in good faith.

Let me add just one final thought on this subject before I close. While federal courts and the ITC have tools to reduce the exercise of bargaining power by firms that own standard-essential patents, standard setting organizations could certainly solve the problem more quickly. I am pleased to see that several major SSOs are currently exploring whether their written policies should expressly bar a patent owner from seeking an injunction on a RAND-encumbered patent against a willing and able licensee. Taking that clear step would help ensure that consumers enjoy the benefits of competition on the merits in the tech sector.

V. Conclusion

Let me close by saying how much I appreciate the opportunity to discuss with you the important role that patent law plays in the competitive dynamics of high-tech markets. I assure you that the FTC will continue to speak up for innovation and consumers by advocating for needed reform to the patent system.

Thank you.

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[21] *See* Prepared Statement of the FTC, *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents: Hearing before the S. Comm. on the Judiciary*, 112th Cong. (July 11, 2012), *available at* http://ftc.gov/os/testimony/120711standardpatents.pdf; *see also* Third Party United States Federal Trade Commission Statement on the Public Interest, *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745 (2012), *available at* www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf, and *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752 (2012), *available at* http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf.