HIGHLIGHTS FROM THE 2020 LEADERSHIP VIRTUAL EVENT

LEADERSHIP

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WALTER COPAN, MAKAN DELRAHIM & ANDREI IANCU



On September 10, 2020, LeadershIP launched a series of virtual events. The first event, titled *Innovation Policy & the Role of Standards, IP, and Antitrust*, involved a discussion between **Walter Copan**, Under Secretary of Commerce for Standards and Technology and Director of the National Institute of Standards and Technology ("NIST"); **Makan Delrahim**, Assistant Attorney General at the Antitrust Division of the U.S. Department of Justice ("USDOJ"); and **Andrei Iancu**, Undersecretary of Commerce for Intellectual Property and Director of the US Patent Trademark Office ("USPTO"). **David J. Kappos**, partner at Cravath Swaine & Moore LLP and Former Under Secretary of Commerce and Director of the USPTO, moderated the discussion. The panel discussed the role of IP, Antitrust, and Standards policies towards a broader innovation policy framework, highlighted recent developments such as the Joint PTO-DOJ-NIST Policy Statement on Remedies for Standards Essential Patents ("SEPs"), and new initiatives within their respective agencies. Below are the main highlights from the event. The full recording of the event can be found here.

Walter Copan:

"A strong reliable intellectual property system is the bedrock upon which U.S. innovation is built. This mission for innovation and standards of course connects us to the role of standards essential patents and the standards process itself provides a foundation of trust in emerging technologies and enables interoperability and security. There is a special commitment that's made by innovators to license standards essential patents with fair, reasonable and nondiscriminatory terms, but standards essential patents are simply patents and they deserve the protections, they deserve the capabilities that intellectual property protections provide, including all elements of relief such as injunctive relief."

"In recent years the United States' share of worldwide R&D has declined from 37 percent of the global investment in 2000 to 25 percent in 2017. Meanwhile, China has dramatically increased its investments and outputs, including papers, patents, but also in standards participation, and particularly we are seeing hyper-competition in high value technology areas including artificial intelligence and quantum science. In the face of increasing global competition, NIST research and work in standards development are critical for keeping the United States at the forefront of emerging technology areas including quantum science and AI, but also advanced manufacturing, biotechnology, advanced communications, cybersecurity, resilience, and microelectronics to name just a few."

"U.S. standards leadership and engagement is an absolutely essential part of that foundation of trust in new technologies as well as the ability to enable global trade and to provide a revenue stream for innovators who have invested in the development of the technologies that are recognized as part of the standard system and as the standards essential process and we are excited about the ramifications of the new policy paper that has come out. This is an attempt to provide new balance in the United States for adopters of technology, for users of technology and for inventors of technology where standards are part of the process. U.S. standards leadership

relies on ongoing R&D investments and we are looking forward to the United States' continued investment and to remove the acknowledged barriers that we have seen to innovation and to rightly restore the U.S. to that position of intellectual property licensing and commercialization leadership with the technologies that will define tomorrow's landscape."

"All three of our agencies agree…that good faith licensing negotiations between standard-essential patent owners and implementers are absolutely appropriate and necessary to promote technology innovation for this consumer choice and enables industry competitiveness by providing the right kinds of incentives on both sides of a negotiating table."

Makan Delrahim:

"Our New Madison Approach has had four core premises. First, holdup is fundamentally not an antitrust injury to be addressed by antitrust law, but rather, it could be a contract or a fraud injury where it is proven. Second, the standard-setting organizations should not become vehicles for concerted action by competitors and market participants to favor either implementers or patent holders over the other. Third, the fundamental feature of patent rights is the right to exclude and courts should be hesitant to limit that right by, say, disfavoring injunctive remedies absent specific congressional direction, which would not be necessarily consistent with the framework that we have. Fourth, consistent with this right to exclude that our intellectual property laws provide, the antitrust laws ought to regard unilateral decisions not to license a patent as *per se* legal, under the antitrust laws."

"Negotiating [IP licenses] in the shadows of dubious antitrust liability is not only unnecessary, it dramatically shifts the bargaining power between patent holders and implementers in a way that distorts being selected for real competition on the merits through innovation. Giving implementers the threat of treble damages in antirust increases perverse likelihood of holdout, which is the other side of the holdup point and of course, none of this undermines the importance of the negotiations that took place at the time that in the standards for organizations elected competing technologies for inclusion in the standard. In the extent that implementers bargained for some benefit, contract law already provides a solution to the problem of any failure to live up to that contractual bargain. Parties on equal terms get in the shadows of contract law because there's no threat of treble damages skewing the negotiations in favor of an implementor."
"I'm just going to mention a couple of cases without getting further into detail but you'll see international recognition of a lot of the principles of the New Madison Approach and this past FRAND [cases]. We saw *Sisvel v. Haier* decision in the German Federal Court of Justice which was I think a great result for pro-innovation policies. And then, more recently, we saw in the UK Supreme Court the *Unwired Planet v. Huawei Technologies* as yet another decision that aligns perfectly with the New Madison Approach's principles."

"The intersection of patent law and antitrust is a highly technical area of the law. . . . What's important is that the courts have been echoing our concerns with the proper balancing of the interest of patent holders and implementors."

Andrei Iancu:

"Obviously with a strong IP system, inventors are willing to make the investment of time, energy, and resources needed to develop commercial products, methods including the critically important tests and treatments and vaccines that are needed to solve this pandemic, and future pandemics. And in fact, it is these prior investments and inventions that have made possible everything that we see today, including the rapid response with respect to a lot of these technologies; in fact, an unprecedented response when it comes to the development of some of these technologies. But I want to emphasize that the decisions we make today will impact the investments and inventions that will be needed during the next pandemic as well, as well as other humanitarian crises. Inventors and investors are obviously watching what's happening and they need to know that the IP they generate is respected when it is actually needed. They need to know that their IP protections are reliable, because if we do not respect IP rights during the crisis when the technologies they protect are most needed, inventors will not put in the time and resources to develop technologies that will be important to have in the next crisis; and not just a crisis, just everyday life as well."

"We have only one patent system. We have only one trademark, one copyright system. It needs to serve all of our stakeholders in the United States, all industries. It needs to serve the inventors and those who need to use the inventions and implement them in commercial products. So, the system must be balanced, and we always have to be vigilant that the appropriate balance is maintained."

"There is a significant degree of convergence towards a more unified view across the world as to the importance of standard-essential patents, and the innovation policies that are driven by those policies surrounding standard-essential patents…. [T]here's a lot of common language be-

tween what the UK has said, what Germany has said, and what we said when it comes to the incentives given to the various parties to negotiate in good faith, for example, and not create perverse incentives, you know, just like the various courts in Europe. Our joint statement said that we encourage good faith licensing negotiations between the standard-essential patent owners and the implementers, and I think there is a general recognition now that whatever policies we put in place should not have these absolute rules on remedies or whatever that creates negative incentives to reach a negotiated resolution."

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