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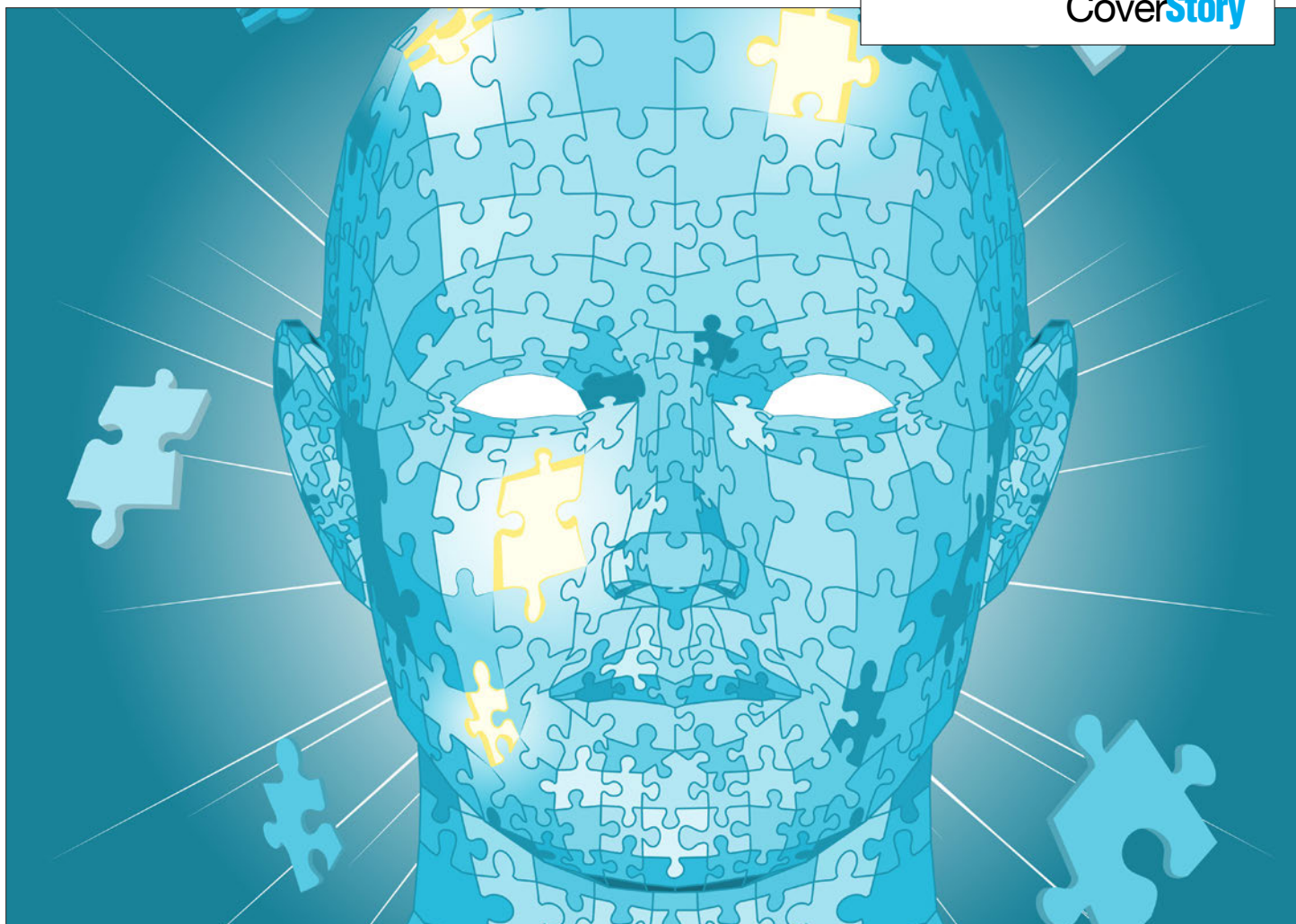


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An interview with David Kappos

David Kappos, a partner at Cravath, Swaine & Moore LLP and the former head of the USPTO, shares his thoughts on the America Invents Act, present patent reform, and his old stomping ground

FRANKI WEBB REPORTS

What's it like being in private practice?

Cravath, Swaine & Moore is a law firm that has a very specific set of issues that it gets to handle, which are really challenging. It gets its clients' most interesting business, and so it's a tremendously fun place to work.

It has personally exceeded my expectations. The work is extremely diverse, from litigation support to M&A, financing-related work and deal negotiations—it is the whole gambit. I'm working with the people who are so smart that they are almost telepathic—you don't even have to convey an idea, everyone gets it. It's also an atmosphere that is focused on client services, full stop. That is very liberating, to have that very simple focus that produces great results for clients and is uncomplicated by any other agenda. It's a luxury.

As head of the USPTO during passage of the America Invents Act, you oversaw much of its implementation—do you consider the reform a success?

The America Invents Act (AIA) is the most ambitious piece of rulemaking that the US Patent and Trademark Office (USPTO) has undertaken in its 224-year history. At times, there were so many different rules coming out of the agency that the US Federal Register had to spread them out over several issues. It was literally enough to choke the federal government's official register—that's a lot of rulemaking.

But to the great credit of the agency, it all got done; on time and expertly. That is not something that I take credit for; I give all of the credit to the career employees at the USPTO.

Was the AIA a success? Certainly, the rulemaking, by any measure, has to be deemed to have been a success. That being said, is the legislation itself successful? It's too early to tell.

It's a very complex piece of legislation. The time it takes for things to happen in the patent world is not a matter of a few years, but more like 10 to 15 years, so we are only beginning to get the first sets of data. I would say that so far, the data looks fairly promising, in that the new processes are being used by the public, which means that they are relevant.

Of course, there are plenty who would disagree that the new processes are great, because these things are about compromise. Having people on either side of an issue like this is normal. So it is too early to say whether

the AIA is a success, but I think the initial results, process-wise, are promising, and are generally heading in the right direction.

I would add that a lot of success, I believe, involves listening in iteration. It was something we did when we were constructing the legislation, and when we were first implementing it in the rules.

If the USPTO keeps doing it now and in the future, then I can almost guarantee that the AIA will be looked back on as successful, because the agency will make the changes that are needed to ensure that everyone's legitimate interests are being looked at and considered.

The US is considering another wave of patent reform—what do you make of it?

There are lots of initiatives, approximately 60 if you include them all, looking at what are complex issues involving patent litigation. I think there is a lot of good in the various bills working their way through Congress. They are by no means perfect—I think more discussion is needed.

Certain provisions that I thought were not good policy have thankfully been removed from the bills, while others require refinement, but that is the way our process works. If that refinement occurs, and it is in the process of occurring now, this could be the second step in a dramatic improvement to the US patent system.

The USPTO has not had a permanent leader since your departure—what effect, if any, has this had on the agency?

I don't want to speculate on what is going on inside the administration, but I will say that I applaud the leaders who have been or are still at the USPTO since my departure, including Teresa Stanek Rea, who was acting director after I left, and now Michelle Lee. I also applaud the career folks, such as Peggy Focarino and Deborah Cohn, the commissioners for patents and trademarks respectively, as well as their teams.

In my view, they have done a great job of continuously improving, as is required for any government agency. Last year, the USPTO was voted the best agency to work for in the entire US government—that was out of three hundred agencies. I think a lot of the credit for that needs to go to the steadiness provided by the career leadership, which has also led to the improvements at the USPTO and to ensuring that in an era in which there is not a stable political leader, the agency continues to go about its business.

The USPTO is supporting Congress as it looks at more patent reform, but shouldn't the agency be focusing on more traditional concerns, such as the patent backlog and training examiners?

In my view, it is not an either/or, but a yes/and. To be as good as it can be and to serve the

interests of the American people, and in fact everyone who looks to the USPTO for services, the agency has to do all of those things.

It has to focus on the fundamentals—continuing to decrease the backlog and improve quality, both of which it is doing, to its credit—while working on blocking and tackling and reaching higher in the policy area. It must also provide global leadership and work with other patent offices around the world, play a role in US and international policy debates, and find time for copyright, which it has done.

It is fair to hold the USPTO to a standard for doing all of those things, not just some of them.

Finally, what do you think you changed the most at the USPTO?

When I went in, I had a list of things I wanted to achieve. On that list was restoring the agency's dignity. At the time I joined, I really felt that the USPTO is a great agency—it has been around for more than 200 years, was started by Thomas Jefferson, and is rooted in the constitution of the US. But I felt like the agency was on hard times, so I wanted to find a way to restore its dignity.

I think it's fair to say, not just through my efforts but through those of everyone at the USPTO, the agency has its dignity back. I think that is an accomplishment that many of us share, and it is something that everyone who cares about having an innovative country should be happy about. **IPPRO**

David Kappos is a partner at Cravath, Swaine & Moore LLP. He is widely recognised as one of the world's foremost leaders in the field of intellectual property, including management and strategy, the development of global norms, laws and practices, as well as commercialisation and enforcement of innovation-based assets. He supports Cravath's clients in a wide range of their most complex IP issues.

From August 2009 to January 2013, Kappos served as director of the US Patent and Trademark Office (USPTO). In that role, he advised the president, secretary of commerce and the administration on intellectual property policy matters. He also led the USPTO in dramatically reengineering its entire management and operational systems as well as its engagement with the global innovation community. He was instrumental in achieving the greatest legislative reform of the US patent system in generations through passage and implementation of the Leahy-Smith America Invents Act, signed into law by President Barack Obama in September 2011.

Prior to leading the USPTO, Kappos held several executive posts in the legal department of IBM, the world's largest patent holder. From 2003 to 2009, he served as the company's vice president and assistant general counsel for IP. In that capacity, he managed global IP activities for IBM, including all aspects of patent, trademark, copyright and trade secret protection. Kappos joined IBM as a development engineer. During his more than 25 years at IBM, he served in a variety of roles including litigation counsel and Asia Pacific IP counsel, based in Tokyo, Japan, where he led all aspects of IP protection, including licensing, transactions support and mergers and acquisitions activity for the Asia-Pacific region.

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