

Washington's Obsession With Who's 'Winning' in 5G Misses the Point

By David J. Kappos

Reproduced with permission. Published May 3, 2022. Copyright 2022 The Bureau of National Affairs, Inc. 800-372-1033. For further use, please visit <http://www.bna.com/copyright-permission-request/>.

Cravath's David J. Kappos, former director of the USPTO, applauds the patent office for its recent report pushing back on the theory, popular with some policymakers in Washington, D.C., that the U.S. is "losing the race" to 5G technology. He says they should instead focus on advancing patent policies that incentivize 5G innovators.

5G is the communications technology poised to provide a quantum leap in mobile connectivity and computing. It promises everything from fully self-driving cars to untethered virtual reality. It seems like a natural fit for U.S. technology leadership, right? But Washington insiders long ago concluded that America has been overtaken by foreign competitors in developing 5G. Welcome to the popularized and fabricated narrative policymakers love to harp on: The U.S. is in a 5G race, and we are "losers."

In February, the U.S. Patent and Trademark Office published a study that pushes back on this fearmongering. In the study, the USPTO examines patent portfolios of 5G companies and introduces new datasets to challenge the narrative that other countries are running away with 5G leadership. I applaud the USPTO's efforts to provide texture to this discussion by showing that the question of who's "winning" the 5G race does not have a straightforward answer.

I'm very familiar with the oversimplified—and frankly, intellectually lazy—narratives the USPTO is pushing back on in its study. In my recent paper, I explain why the metrics most often relied upon to define 5G leadership, such as patent counts and numbers of technical contributions, are of little help in answering the question of which country is "winning" the 5G race.

Counting the number of patents a company has contributed to 5G is misleading because it does not speak to the technical importance of the patents being counted. Indeed, we have seen a rapid escalation of declarations by some foreign companies that simply do not match reality. Technical contributions are equally strained, as contributions are not required to meet a minimum inventive threshold (nor be accuracy-checked) to be counted.

Evaluate the Quality of Patents

The only way to actually define a “winner” would be to get our hands dirty and evaluate the quality of the patents companies are contributing. So I concur with the USPTO’s conclusion that we cannot blindly rely on convenient metrics that may “sound nice” but are, in fact, profoundly flawed in defining a “winner” in any meaningful way. Countering these simplistic narratives, as the USPTO has done, is important in preventing inaccurate and fatalistic messaging about 5G leadership from becoming the prevailing view.

However, these debunking exercises, including my own, are inherently limited. They operate within a paradigm that has as its lodestar relative value. It’s time to question the question: Why are we so obsessed with the myopic issue of declaring which country is “winning” 5G? The answer, whatever it may be, distracts from what actually matters—the transformative value of 5G, and our national policy failure to incentivize U.S. innovation in 5G.

Cellular technology is a platform that is dramatically improving our world. It has transformed entire economies, brought millions of people out of poverty and created trillions of dollars in consumer surplus. 5G alone is estimated to enable more than \$13 trillion in new value globally. And that’s just viewing its impact through an economic lens. We cannot even conceive of all the ways 5G will improve our safety, health, opportunity, entertainment options and quality of life. Yet, as the USPTO’s report observes, there are only six companies, maybe seven, significantly innovating to develop 5G. And how many of these companies are American? One.

What does it say about the quality of our “innovation engine” when only one American company is making this transformative technology a reality? It shows that we don’t have our act together in advancing policies that incentivize 5G innovation.

Incentivize Innovators

The basic concept is simple: If we want to incentivize innovation, we must incentivize innovators. We do this by strengthening, not further eroding, our system for encouraging investment in innovation—our patent system. This means restoring badly eroded enforcement mechanisms, so that users of standardized innovative technology will be encouraged to proactively seek licenses from innovators, rather than play passive-aggressive games or actively refuse to pay for the technology altogether.

Innovators, in turn, will have confidence that their upfront expenses and toil will be worth the risk, and they’ll invest in 5G innovation, putting America back on track to reap the enormous economic value 5G will generate. We know how to do this; we’re just choosing not to.

It’s time to stop obsessing about who’s “winning” 5G. Our myopic preoccupation with relativism backed by flimsy metrics is distracting from what actually matters—crafting policies that get American innovators focused on creating 5G technology, rather than bickering over what “winning” means.

This article does not necessarily reflect the opinion of The Bureau of National Affairs, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

David J. Kappos is a partner in the Corporate Department of Cravath, Swaine & Moore LLP. Previously, Kappos served as Under Secretary of Commerce and Director of the U.S. Patent and Trademark Office.