

# IP HOT TOPICS

The Podcast | Episode Transcript



## Innovation Conversations: Andrei Iancu

November 2020

### Trey Powers:

Welcome to Innovation Conversations, a special series of Sterne, Kessler, Goldstein and Fox's IP Hot Topics podcast. I'm your series host Trey Powers, a director in Sterne Kessler's litigation and biotech practice groups. Joining me as a guest host on this episode is Rob Sterne, a director in our electronics practice group and co-chair of the firm's patent office litigation practice.

Our guest today is Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director of the US Patent and Trademark Office. Director Iancu provides leadership and oversight to one of the largest intellectual property offices in the world, with more than 12,000 employees and an annual budget of over \$3 billion. He also serves as the principal advisor to the Secretary of Commerce on domestic and international intellectual property and policy matters. Rob and I discuss several topics with Director Iancu and what he had to say was fascinating.

Welcome to all of our listeners.

Director Iancu, thank you very much for being with us today. We're delighted to have you on the program.

### Andrei Iancu:

Great to be with you. Thanks for inviting me.

### Trey Powers:

Director Iancu, you immigrated to this country from Romania when you were about 10 years old. Can you describe what kind of governmental circumstances you left behind and how that shaped your worldview coming to the US?

### Andrei Iancu:

Sure. I actually came when I was 12 years old and Romania at the time was in the midst of a oppressive communist regime. My father, who was born before World

War II, he grew up as a child in the middle of an awful regimes and an awful period in history. And then by the time he was a young man in college, he wanted to leave and he always wanted to come to the United States. Well, that was in the mid 1950s and it took him and the rest of our family, it took about 25 years to get out. Obviously I was a kid and I didn't know much of it until we left, but I was very much aware of the reasons we're leaving and the reason we're coming to the United States.

And the upshot of it all is that I have an unbelievably high appreciation for the amazing country that we live in. This is the greatest country in the world, it's the greatest country in the history of the world. The system that we have established by our Constitution more than 200 years ago is the best system that exists that any human society has ever developed. And from the very beginning, but especially since I've grown up here for the past almost 40 years, I think we must do everything we can to protect it and make sure that the liberties and the freedoms and the amazing system of opportunity that this country offers are preserved.

My story of immigration is not unique obviously, and lots and lots of people around the world look up to the United States as a beacon of hope and freedom, sight unseen, Trey, frankly. I'm reminded of a great Romanian author that was writing in the middle of the war. He's in Bucharest and it's in the middle of World War II and bombs are falling on the streets of Bucharest. And these folks it's in the middle of the night and they gather around the radio. Very few radios were still existing, but they gather around the radio and they tune in to speeches from the West. And in particular, that one particular night they were listening to Roosevelt's speech. And these are folks who have never visited the United States, knew nothing in any detail about the United States and this is what he said.

He said, "Glued to our radios. We lived in a world which though so far away we consider our own." In other words, sight unseen, folks in the midst of the deepest, horrible human conditions, thought about the United States as their own. And I think that's been true for me and it's been true and it is true for millions and millions of people around the world. And it's been true from the beginning of this country and it's something I'm keenly aware of. And it's one of the reasons I'm doing what I'm doing. To do everything I can to make sure that this system continues and it's the greatest it can be. The American dream exists. It's real and I want to do everything I can in my power to give back. Everything I have is a result of the generosity of the people of this country and I want to make sure that as many Americans as possible, all Americans have access to the American dream and they can achieve and succeed within it.

**Rob Sterne:**

Director Iancu, Rob Sterne here. And it's so great to have you on this podcast today. And when you were in private practice in Los Angeles, you were known as an outstanding and highly effective patent litigator, not so much as a patent prosecutor who obtained patent protection for your many clients. I suppose it's fair to say that your direct interactions with the USPTO were more limited than a practitioner who prosecutes patents every day. How do you think your

background as a patent litigator in court has shaped the way you have led the office as our Director?

**Andrei Iancu:**

Thanks, Rob and good to be with you again. Yeah, you're right that the majority of my time was spent as an IP litigator. Although I have done my fair share of patent prosecution and appearances at the PTO. But I tell you as a practitioner in private practice and as you indicate, primarily a litigator. My basic understanding and philosophy is that the IP system, all the IP systems, patents, copyrights, trademarks and so on, they need to be balanced. We only have one patent system, for example, and it's got to work for the biopharma companies and it's got to work for the high tech companies and every other technology in between. It's got to work for the big companies and the small companies and the individual inventors and every size entity in between. And it's the same system that's got to work for the rights owners and rights users, plaintiffs and defendants.

For that to work well in a sustained manner over time, you have to have the right balance. And I think coming from private practice where I represented clients of all sizes and shapes and denominations and technologies across the board, plaintiffs and defendants and so on, I understand that system has to be so carefully calibrated to make sure it works well for everyone. And as soon as we fall out of balance in one direction or another, problems develop in a whole host of ways. I've focused for the past three years to address that balance. And I tell you, Rob, one other thing in addition to balance that I think as a private practitioner I've realized, although I think this is, I think most people in our space understand, the importance of predictability, the importance of certainty. That's true across the spectrum when it comes to legal instruments and the law and financial instruments. It is especially true for patents and other forms of IP, because people rely on them a lot.

They build businesses around them. They build businesses with them. They make huge investments of time, resources, money and so on, based on those rights and their understanding of those rights and being able to analyze them and predict them within a certain reasonable band of certainty is so important to the economy overall. And from the beginning, I said, Rob, that I think it's critically important to have a reliable and a predictable IP system. And I've been working towards that as well.

**Trey Powers:**

Director Iancu, upon taking the helm at the PTO, were there any inner workings of the office that surprised you? For example, was there anything particularly frustrating or challenging at first?

**Andrei Iancu:**

Well, those two things are not necessarily the same thing. In other words, the surprise and the frustration, because sometimes you can have positive surprises and that's what I found when I first came here. I knew I'm coming to the government. I had never worked in government before, but I was a little bit surprised that the PTO, although it is a government agency, of course, it's operates in large parts as a private entity with which I was quite familiar.

It's a three and a half billion dollar, 13,000 people entity. Obviously has features of government, no question about it. But given the fact that we are not dependent on taxpayer dollars and we rely virtually entirely on user fees, we have to have a budget and we have to meet the budget. And on a continuous basis, all those things made it very much familiar to me and I was pleasantly surprised with how well the office is organized and set up and the executives here, how well they attend to it and how professionally they attend to it and did not have all the elements that somebody on the outside thinks about when you think about government.

In terms of something that I think you said, particularly frustrating, is a potential challenge, that is the additional features that do come from the fact that we are a government agency. That I was not all that familiar with at the beginning. For example, all the levels and layers of approvals you have to get to move anything through. And every time I thought we would be done and we sign it and they come and they say, "Well, now we need to go to this other place and get their approval." And then there's potentially one more and so on, but I've gotten used to that. I understand that now how it works. And the fact is all those things are in place for a good reason, to ensure that we doing things the right way, that we're taking into consideration all the various interests, both on the public side, as well as within the various government agencies. I understand it. Makes sense. That's when you first come in, it's a bit of a surprise.

**Rob Sterne:**

Director, you have implemented a lot of positive changes at the office and strengthened the value of patents since your appointment. You have been a strong proponent and advocate of the importance of IP and the USPTO on US innovation and robust innovation funding. Are there any changes you've implemented that you are particularly proud of? And if so, why?

**Andrei Iancu:**

Well, over the past three years or so, we have implemented quite a few changes with the overall goal or goals being what I've mentioned earlier, increased balance, increased predictability, increased access to our innovation ecosystem. In terms of specifics, I am very proud of the changes we've made here at the PTO with respect to section 101. And we can talk more about any of these details if you'd like, Rob, but that is such an important area of law that addressing it was critically important and we did address it and it's worked out very well in my view. Another area that I'm particularly proud of is with respect to additional balance to PTAB, post grants, IPR type proceedings. And we've made a number of changes that I think are a positive move in that direction, such as the claim construction standard now being the same here as well as in the court system so that patents don't have different meanings based on the tribunal you might by chance end up in at least the standard objective level.

In addition, making sure that while post grant challenges are available as contemplated by the AIA statutes, do not enable multiple challenges and multiple attacks on the patents in a continuous fashion. At some point, the patent owner needs to have quiet title that is good for everyone. As I said, the IP owner themselves, but also the public that needs to make decisions based on that IP. I'm

also proud about a bit more ephemeral, but I said at the very beginning that we need to change the dialogue, when it comes to IP in this country, we need to have a pro innovation, pro intellectual property dialogue to emphasize the importance of IP to innovation and to the human condition and the improvements of the human condition. The great benefits, innovation and inventors bring to the economy and to society focus on that instead of a constant and relentless focus on the faults in the system.

Obviously we have to address faults in the system and any areas of potential abuse and we of course do that, but the overall thrust of any successful system needs to be on the positive goals of that system. And I actually think this is obviously this is a continuous effort. It can never stop, but I do think the conversation has changed a little bit and I think folks are more focused on the great role IP plays in innovation. And finally, there are quite a few things, but just in the interest of time, finally, of critical importance is the broadening of the innovation ecosystem. We have in the past few years and especially more recently this year spent increased efforts and added attention to broadening the innovation ecosystem geographically, demographically and economically to bring into our ecosystem as many Americans as possible.

I say that the intellectual properties is a tool. It's obviously a very important tool, but it's just a tool to the higher goal of creating more innovation and then ultimately job creation, economic growth and the improvement of the human condition. Intellectual property is so critically important to enable all of that. Human history simply does not know progress the way we've known it without the American intellectual property system. I like to tell a story that when this country was founded at the end of the 18th century, the state of the human condition was basically the same as it was in ancient Rome and beforehand. Here we are talking far away and instantaneously, obviously over highly advanced telecommunications media, instantaneously across space. When the country was founded to send a message, you basically have Paul Revere on horseback, which is not very different from the way Alexander the Great had to communicate with his capital in 300 BC.

And great things have happened since this country was founded and many things have come into play to enable that, but our intellectual property system that democratized the invention for the first time, is critically important for it has played a critically important role for that. And as I say, human history simply doesn't know progress without and I would be concerned about experimenting with that now. All of this is especially important to small companies, individuals, startups, university labs that need move technology from lab to market. Because without that protection for their ideas, they have very little else to penetrate and to actually provide society with disruptive new technologies and enabling more and more of those folks access to this amazing ecosystem is critically important for them, for their communities and for the United States. I am particularly proud of playing a role in elevating that conversation. And as I said, even for this, this is going to be a continuous effort. It's not something where we can say, "Okay, job all done now." It's something we all have to work together in a continuous fashion.

**Trey Powers:** Let's talk about the interface between the US patent system and the competitiveness of the US economy. It's come up a couple of times already. Director Iancu, when you look at the world stage and the rise of China and other major influencers in the IP space, what do you think the USPTO needs to do to protect innovation and innovators here in the US? And what policy goals do you have to strengthen our system?

**Andrei Iancu:** Well, I think we have the best system in the world. We are the first modern democratized intellectual property system, as established through our Constitution, and we on a continuous level have improved it and continue to have the best system in the world. And I think we must continue to pay very careful attention to it because now the global competitive ecosystem is increasingly more crowded. Everybody has figured out that innovation is key to economic growth so everyone is across the world is trying to be involved when it comes with innovation and IP and for us to maintain our competitive edge, we must continuously attend to making sure things are improved.

I think in terms of further policy goals, we need to continue to attend to section 101, patentable subject matter. I think we've done a great job. Here the USPTO in terms of how we use the existing law for our internal operations, obviously the courts are not bound by what we've done here, the courts are independent and we have to make sure that we continue in the court to try to increase detectability when it comes to section 101 and if not there, through possible legislation. And we continuously have to work on making sure we're in the right balance when it comes to the system overall and if tweaks have to be made, we should be willing to make them.

**Rob Sterne:** Director, should governments around the world continue to work to harmonize patent laws and IP laws? And if so, how would you suggest that this work proceed? And are there aspects of US law that you wish other countries would adopt? And conversely, are there aspects of other systems that you think the US should adopt?

**Andrei Iancu:** Yes. Well Rob, substantive harmonization within the patent laws is something that we have been working on for a very long time and we'll continue to work on. It's difficult to achieve for many, many reasons, but as you can imagine, each country has its own difficulties adopting a new law or changing their laws and then when you're multiplying this across the world where everybody needs to move in a same certain direction, gets increasingly more difficult. We've been working along for a long time, for example, to harmonize as a grace period. The United States thinks that tell our 12 month grace period is important and it would be good for other countries to adopt it.

In terms of aspects of foreign patent laws that I wish the US would adopt, I don't know that there are any specific laws that I would point to. I do emphasize that I do think on overall and on balance, we continue to have the best patent system in the world. I would like us to resolve section 101. I think the way we're looking at it

here now with the USPTO is actually in line with what foreign countries have done. We need to keep looking at that. But, let me leave you with something on this question that you didn't quite ask, but it's related and that is in addition to harmonizing patent laws, which as I said, I think it's difficult, even though we should keep trying in certain areas. I think there are some things that we can do procedurally and this is more easily achievable and of significant benefits to stakeholders.

I'll give you one small example although there are any others. When you file a patent application in one country, you have to fill out whatever form we might have. And then you go and you try to file a patent application in another country and they have their own form. And then you go to a third and fourth and fifth country and then they each have their own form and you have to reenter all this information. And of course the vast majority of that information is the same, the name of the inventor, the address, name of the company, whatever. Wouldn't it be great if you fill out one form once electronically and then whenever you want to go file elsewhere, wherever you might want to be, that information would they use to pre-populate the form in the countries of your choice, at least making it easier for you. And this seems to me, it seems like it's a simple thing that I think countries can get behind and it would be of some help. And there are other things like that that we can work on in the international system. And we are doing so.

**Trey Powers:** Director Iancu, thank you so much for your time today. You've been very generous with it. And we just have one further question for you for fun. Will you please share with us and our listeners, something interesting about you, either personally or professionally that most people would be surprised to learn?

**Andrei Iancu:** My favorite sport is skiing. I'm an avid skier since I was four years old. I try to do that whenever possible. Although it's been more difficult since I've been in this job for the past three years. I love to do that. And I guess I'll leave you with this. I'm not a great cook. I don't myself do a lot of cooking, but I can make one thing, I can pickle pickles. I'll leave it at that. And we can explore that in more detail when we see each other.

**Trey Powers:** A useful skill. That's great. Thank you very much for your time today.

**Andrei Iancu:** Thank you both.

**Trey Powers:** Thanks very much for listening to Sterne Kessler's Innovation Conversations. We hope you enjoyed today's episode.