

## PATENT AND TRADEMARK LAW

## Expert Analysis

# The Impact of the Biden Administration On IP Law and Policy

**W**ith each new presidential administration, innovators and intellectual property practitioners alike begin their watch for signs of changing policy tides. With little over three months into Joe Biden's presidency, it is far too early to call, particularly as efforts to combat the COVID-19 pandemic and accelerate the vaccine rollout remain center stage. And over his almost 50-year political career, President Biden has rarely articulated strong IP policy positions. That said, certain indicators can offer insight into the potential policy avenues that the Biden administration may pursue over the coming years.

### Geopolitical Threats and America's Global Innovation Standing

If anything can be gleaned from President Biden's "Made in America" platform materials, published dur-

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ing the 2020 presidential campaign, *The Biden Plan To Ensure the Future Is "Made in All of America" by All of America's Workers*, it is his determination to take a tough stand against the theft of American IP abroad—a

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position this administration shares with the outgoing administration. The platform highlights the critical role that IP rights play in national security, especially in view of tense geopolitical relations with China. The

Biden administration there clearly signaled its intent to prioritize efforts to push back against Chinese state-sponsored cyber espionage, forced technology transfer, and unfair trade practices, not only in view of national security concerns, but also with an eye towards fostering American innovation at home. Id.

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These issues will remain in the spotlight as many lament a weakening of America's IP dominance on the world stage. As just one example, the U.S. previously ranked first in Bloomberg's Innovation Index ranking, which considers factors including "patent activity," "R&D intensity," and "researcher concentration"; in the recent 2021 edition, the United States no longer even

cracks the top 10. Michelle Jamrisko et al., *South Korea Leads World in Innovation as U.S. Exits Top Ten*, Bloomberg (Feb. 3, 2021). The first three slots are now occupied by South Korea, Singapore and Switzerland, and China is on the move. The China National Intellectual Property Administration recently released data on patent commercialization rates indicating rapidly accelerating growth. *Patent Commercialization Gains Momentum During Past Five Years*, CNIPA (Feb. 24, 2021). From 2016 to 2020, China experienced a near doubling of patent transactions, including transfer, licensing, and pledge financing rates, from the previous five years. *Id.* The data is indirect and imperfect, but highlights the national importance of Biden's innovation strategy.

Relevant to these issues, reforms to trade secret law may also be on the horizon, especially given Vice President Kamala Harris's sponsorship of the Deterring Espionage by Foreign Entities through National Defense (DEFEND) Act. Originally introduced in 2018, the bill would increase punitive damages available for trade secret violations, extend the statute of limitations for filing trade secret misappropriation claims, and expand the scope of trade secret law to cover conduct occurring outside the United States if the violation causes "substantial economic harm" inside the United States. DEFEND Act, S.1865, 115th Cong. §2 (2018). The bill's passage would provide relief to domestic companies who currently must otherwise turn

to civil remedies when foreign actors misappropriate trade secrets.

### President Biden's Selection Of USPTO Director

Andrei Iancu, the former Trump-appointed Director of the USPTO, stepped down after Biden took office. Iancu was lauded for his time at the helm of the patent office for bringing increased clarity to patent eligibility determinations, introducing reforms to the Patent Trial and Appeal Board ("PTAB"), and for his overarching advocacy in favor of strengthened U.S. patent rights. See, e.g., Ryan Davis, *Iancu Leaves Pro-Patentee Legacy as*

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*USPTO Director*, Law360 (Jan. 21, 2021). Given the central role played by the USPTO Director in shaping patent law and policy, Biden's selection of the new USPTO Director will be telling.

The Biden administration has thus far remained silent as to potential contenders and timelines. President Obama did not make his initial USPTO leadership determination until almost seven months into his first term, when he named David Kappos as Director. He then selected Michelle

Lee as Director almost one year after starting his second term. President Trump appointed Director Iancu over two years after the beginning of his presidency, following Director Lee's resignation eight months earlier. The bottom line: Appointment of a USPTO Director has typically not been a top priority for new administrations, and surely that will not change in the midst of a pandemic. Still, while it likely will be some time before the administration makes this pick, an examination of those close within Biden's orbit may be a useful proxy, and provide some insight into the type of USPTO Director Biden may select.

### Pro Patent Rights Leadership

In light of the data surrounding America's waning global strength in innovation, President Biden may choose to maintain the status quo at the USPTO and select a Director in the Iancu mold. Like Iancu, this Director would favor strong patent rights and perhaps continue Iancu's effort to reform the PTAB. Iancu's reforms included matching the PTAB's claim construction standard to that used in district court, establishing a precedential opinion panel (POP) to help classify Board decisions as precedential or informative, and providing patent owners increased ease in amending their claims. Richard Lloyd, *Love him or loathe him, few USPTO directors have left an impression like Iancu*, iam-media (2021). These reforms continue to remain popular among patent owners, see, e.g., Carrie Lukas, Coalition

Letter: Support for PTO Dir. Iancu's PTAB Reforms to Improve Patent Reliability, Independent Women's Forum (Nov. 2, 2020), as do any reforms aimed to soften a PTAB that previously had been described as a "patent death squad." Greg Stohr and Susan Decker, *'Death Squad' That Tossed 2,000 Patents Challenged at High Court*, Bloomberg Law (Feb. 27, 2021).

Signs pointing to a USPTO Director similar to Director Iancu include Biden's close relationship with Senator Chris Coons, D-Del, who is widely regarded as one of President Biden's closest confidantes and who has been a staunch supporter of strong patent rights. Coons is author of the Support Technology and Research for Our Nation's Growth and Economic Resilience (STRONGER) Patents Act, the purpose of which is "[t]o strengthen the position of the United States as the world's leading innovator by amending title 35, United States Code, to protect the property rights of the inventors that grow the country's economy." S. 2082, 116th Cong. (2019). Coons has worked to pass versions of this bill since 2015, and has helped lead Senate hearings on §101 patent eligibility reforms. STRONG Patents Act, S. 632, 114th Cong. (2015); *What Coons and Tillis Learned at Patent Reform Hearings*, Law360 (Jan. 21, 2021).

However, in February, the Subcommittee Chairs of the Senate Judiciary Committee were announced, and Senator Coons will not be the Ranking Member of the Senate IP Subcommittee.

Instead, Sen. Patrick Leahy, credited with co-authoring the Leahy-Smith America Invents (AIA) which implemented the PTAB and its patent invalidation proceedings, will take on that role. Dani Kass, *Senators' PTAB Reform Efforts May Lose Steam Under Leahy*, Law360 (Feb. 19, 2021). The AIA was drafted in large part in response to growing concerns voiced by big tech companies and others about non-practicing entities, or patent trolls, who broadly assert patents to extract nuisance value settlements. The AIA as a result formed the PTAB, which provided quicker and less expensive vehicles for invalidating weak patents.

### Anti-Patent Rights Leadership

President Biden may alternatively select a USPTO Director more like Director Michelle Lee, who President Obama tapped while Biden served as Vice President. Biden's inclusion of Colleen Chien on his technology transition team lends support to this possibility. Chien served in the White House's Office of Science and Technology Policy as part of the Obama administration, and may have had influence in Director Lee's selection. Jackson Barnett, *Here Are the IT and Cyber Experts Helping With the Biden Transition*, fedscoop (Nov. 11, 2020). Lee, who served as Deputy General Counsel for Google prior to her appointment as USPTO Director, garnered a reputation among some in the IP community as favoring an overall weakening of patent rights. See, e.g., Gene Quinn, *Michelle Lee's views on patent quality*

*out of touch with reality facing patent applicants*, IPwatchdog (Feb. 2, 2017).

Chien's recent work may further illuminate the IP policy positions held by at least some within the Biden administration. Chien recently contributed to the "Day One Project," a USPTO transition document released in January. Notably, the document highlights the importance of the PTAB in maintaining patent quality, and additionally proposes that the USPTO work with Congress to expand of the scope of inter partes review (IPR) to allow the PTAB to revisit additional invalidity issues when reviewing patents, including §112 enablement and double patenting issues, as well as additional factors not directly tied to the merits, such as the age, market value, and prior litigation history of a patent. *Transition Document for the United States Patent and Trademark Office*, Day one project (January 2021).

### Looking Ahead

For now, Commissioner for Patents Drew Hirshfeld assumes the role of Acting Director of the USPTO, and innovators and practitioners may have to wait some time for clarity on the Biden administration's direction regarding IP policy. In the meantime, and until the pandemic further recedes, the IP community may find itself continuing along with the status quo set by the Trump administration.