
THE BIDEN ADMINISTRATION: WHAT TO EXPECT IN IP

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Undoubtedly, the Biden administration will disrupt the trajectory set by the Trump administration; however, it is unclear what effect the new administration will have on the intellectual property landscape. While it may be quite a while before a clear picture emerges, reviewing Biden's history and examining his platform provides clues as to what to expect.

When it comes to intellectual property, there are concerns that a Biden administration will resume a course of action originally set during Obama's presidency. The legacy of Obama's widely criticized patent law reform is particularly troubling to some. While Biden was vice president, Obama signed into law the America Invents Act (AIA), touted as a modernization and simplification of the U.S. patent process. Although the AIA implemented some positive changes, the legislation is viewed by many to have significantly weakened patent rights.¹

Under the Trump administration, attention was turned toward protecting American intellectual property from foreign threats. Specifically, the administration continually voiced concerns over the Chinese theft of American intellectual property, promising to combat it through strong enforcement of trade rules. This promise came to fruition through various efforts to combat imported counterfeit goods and economic espionage.² In patent policy, the Trump administration nominated and confirmed Andrei Iancu as Director of the United States Patent and Trademark Office (USPTO) in February 2018. Under Iancu's leadership, the U.S. patent system has achieved much-needed clarity: During his tenure, he has made great strides in resolving confusion over Section 101 patent eligibility, and, generally, Iancu has been seen as a stabilizing force in the Patent Office.³

President-elect Joe Biden's stance on intellectual property policy is less clear. He does not have an extensive history of involvement in intellectual property policy, nor does his expressed platform delineate any specific policy proposals. Based on what his platform *does* say, and from his limited history of involvement, we can predict some of what may happen in the next four years.

As vice president during the passage of the AIA, Biden had little involvement with the legislation, but with his Cancer MoonshotSM initiative, Biden spearheaded pharmaceutical efforts to treat and eventually cure cancer, establishing the "Patents 4 Patients" program, which fast-tracks USPTO review for cancer immunotherapy-related patent applications without additional fees.⁴ He was also quite vocal during his vice presidency on the topic of copyright violations and piracy, holding a roundtable on the subject in 2009.⁵

Biden's platform addresses intellectual property policy in some respects.⁶ He promises to create at least 5 million new jobs in manufacturing and innovation through, among other measures, federally funded research and development. He aims to "get off the sidelines" as global competitors and "make aggressive public investments" in science and technology –

¹ For example, see Gene Quinn, [Happy Birthday AIA: Celebrating an Unmitigated Disaster and the Destruction of American Innovation](#), IPWATCHDOG (Sep. 16, 2016).

² See David Shepardson, [U.S. to unveil crackdown on counterfeit, pirated e-commerce goods](#), REUTERS (Jan. 23, 2020) and Andrew Boutros et al., [Tensions Rise Between China and the United States: Intellectual Property Prosecutions Just the Tip of the Iceberg](#), JD SUPRA (Oct. 29, 2020).

³ Mark Marrello, [A Plea to All IP Stakeholders: Support Director Iancu's Efforts to Restore the Value of U.S. Patents](#), IPWATCHDOG (Mar. 5, 2019).

⁴ [Patents 4 Patients](#), USPTO (last visited Nov. 13, 2020).

⁵ Nate Anderson, [Biden's "IP roundtable" brings together Big Content, FBI](#), ARS TECHNICA (Dec. 15, 2009).

⁶ [The Biden Plan to Ensure the Future Is "Made in All of America" by All of America's Workers](#), JOEBIDEN.COM (last visited Nov. 13, 2020).

including investments in health, agriculture, telecommunication, and advanced technologies like 5G, artificial intelligence, advanced materials, biotechnology, and clean energy.

Biden promises further to aggressively combat theft of American intellectual property. He sounds the alarm on the foreign-state-led “assault on American creativity,” stating that he will dismantle the “piecemeal and ineffective approach” of the Trump administration and replace it with a “coordinated and effective strategy.” Specifically, taking umbrage with the Trump administration’s inadequate response to China’s state-sponsored cyber-espionage, Biden promises to develop new sanctions to prevent theft of U.S. technology. This promise could be accomplished, in part, through the Deterring Espionage by Foreign Entities through National Defense (DEFEND) Act. Introduced by Kamala Harris, DEFEND seeks to expand the legal tools available to American victims of trade theft by increasing the available damages, extending the statute of limitations for such actions, and expanding the territorial scope to include offenses occurring abroad.⁷

While Biden advocates for an aggressive approach to international threats to U.S. intellectual property, his views on domestic trade secret protection take a much different tone. He promises to undertake efforts to eliminate non-compete clauses and no-poaching agreements to improve wages, benefits, and working conditions for American employees. Though exceptions are explicitly carved out for agreements “absolutely necessary to protect a narrowly defined category of trade secrets,” this position may raise red flags for employers seeking to protect their valuable competitive edge.

Any intellectual property policy prediction will depend on Biden’s presidential appointments and judicial nominations. Changes in patent policy will hinge on whether and with whom the Biden administration replaces USPTO Director Iancu. While this position is less partisan than others, the possibility exists that the groundwork laid by Director Iancu could be dismantled. The Biden administration has indicated a possible direction for its intellectual property policy with the addition of Colleen Chien to the Commerce Review Team.⁸ Chien, a professor at Santa Clara University School of Law, served as a Senior Advisor on Intellectual Property and Innovation during Obama’s presidency. This appointment may indicate a return to Obama-era patent policy.

It remains to be seen what exactly will happen in the realm of intellectual property with the Biden administration. With many other pressing matters to be addressed, it may be quite a while before a more precise estimation of the new administration’s views can be determined.

ADDITIONAL INFORMATION

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⁷ [Harris Reintroduces Bill to Combat Economic Espionage](https://www.harris.senate.gov/imo/media/doc/news/2019/06/13/2019061301), HARRIS.SENATE.GOV (June 13, 2019).

⁸ Ian Lopez, [Biden Taps Former Obama IP Aide for Commerce Review Team](https://www.bloomberglaw.com/news/2020/11/10/biden-taps-former-obama-ip-aide-for-commerce-review-team), BLOOMBERG LAW (Nov. 10, 2020).