

## Anticipating Patent System Change-Ups Under Biden

By **Kevin Schubert** (June 23, 2021, 4:29 PM EDT)

Although President Joe Biden took office five months ago, the direction the new administration will take regarding the patent system remains unclear.

However, three early signs indicate that enhancing the rights of patent owners is not a priority of the Biden administration.

For some, this is a welcome change from the last four years, which saw pro-patentee reform at the U.S. Patent and Trademark Office as well as district courts awarding many patent verdicts over \$100 million and several over \$1 billion.

To others, more should be done to repair a patent system weakened by the Leahy-Smith America Invents Act and other patent reforms of the last decade. Regardless of one's views on the patent system, practitioners are wise to take note of the current patent landscape in advising clients.



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### COVID-19 Intellectual Property Waiver

The first and most notable sign that the Biden administration does not view enhancing patent rights as a priority is the decision on May 5, 2021, to support a proposed waiver of COVID-19 vaccine IP with the rationale of trying to increase access to COVID-19 vaccines in developing countries.[1]

Functionally, the waiver would remove restrictions on patents, trade secrets, and other forms of IP related to the vaccines and their development, and it would allow member countries of the World Trade Organization to make or export their own generic vaccines.[2]

This decision faced considerable backlash from patent rights advocates, including former director of the USPTO Andrei Iancu, who called it a dangerous decision.[3] Waiving IP rights "will make it more difficult for companies to collaborate around the world," according to Iancu, per Bloomberg Law.[4]

A group of U.S. Senate Republicans have criticized the waiver as a "giveaway" of crucial IP to China.[5] Others fear that COVID-19 vaccines would be just the beginning of such waivers, with other technologies closely related to public health and the environment facing similar threats of compulsory licensing.[6]

There are significant hurdles before any such waiver could be implemented, including approval at the World Trade Organization level. In addition, recent developments suggest that the Biden administration

may be backing away from its initial full support for the waiver. Indeed, a recent conference of leaders of the G-20 nations, including Vice President Kamala Harris, focused on supporting voluntary licensing of COVID-19 IP.[7]

### **Key Changes in Leadership**

Key changes in leadership also suggest that the Biden administration may not view enhancing patent rights as a priority. Iancu's departure from the USPTO is largely viewed as a loss for those who support greater patent rights.

In addition, many view the departure earlier this year of Assistant Attorney General Makan Delrahim of the U.S. Department of Justice Antitrust Division as another blow to patent protection. Delrahim often advocated for patent rights in areas in which patent and antitrust law intersected, including filing briefs supporting the patent owner in several cases in which patent and antitrust law intersected.[8]

The Biden administration has also added new leaders who do not appear to prioritize enhancing patent rights. For example, Colleen Chien, a law professor at Santa Clara University School of Law, was appointed senior counselor to the U.S. Department of Commerce last month.[9] Some of her more controversial actions include suggesting that the best way to handle patent infringement is simply to ignore it[10] and opposing the 2019 Support Technology and Research for Our Nation's Growth and Economic Resilience, or STRONGER, Patents Act, which would have made invalidation at the USPTO more difficult.[11]

The Biden administration has also made former governor of Rhode Island and venture capitalist Gina Raimondo the new secretary of commerce. While her views on patent rights are less known, it does not appear that Raimondo has made enhancing patent rights a priority since taking office. That said, Raimondo recently stated that "strong patents matter to protect innovation," and time will tell how she will affect the patent system.[12]

### **Vacant USPTO Director Post**

Finally, the lack of a nominee for a new USPTO director somewhat suggests that the Biden administration does not view enhancing patent rights as a priority. To be fair, then-President Donald Trump did not appoint Iancu until August 2017, seven months after he took office, and the Biden administration has been occupied with the pandemic and other urgencies.

That said, it has been five months since Biden took office, and many believe the new administration could have benefited from having a new USPTO director advise on IP issues like the COVID-19 waiver.

There is much speculation about who the nominee for the next director will be, with some speculated top considerations including Colleen Chien, as well as former general counsel of InterDigital Inc. Jannie Lau and Kirkland and Ellis LLP partner Ellisen Turner.[13]

The recent U.S. Supreme Court decision in *U.S. v. Arthrex Inc.* affords the USPTO director more control over inter partes review rulings from the Patent Trial and Appeal Board, with the court holding that the "Director has the authority to provide for a means of reviewing PTAB decisions."

The Arthrex decision may affect the search for a new USPTO director as the post now has increased authority, meaning that competing voices on who should be the new director now have an additional

reason to advocate more forcefully for their particular view. This could make the process for filling the role lengthier and more heated.

For now, the post has not been filled, and who will take the reins at the USPTO, as well as whether that person will make enhancing patent rights a priority, remains uncertain.

### **Takeaways**

Practitioners should monitor the current patent landscape in advising clients. Practitioners counseling clients on IP related to public health should monitor the ongoing COVID-19 IP waiver and advise clients of any potential risk that their IP may be waived.

Practitioners should also advise clients of changes in relevant leadership. For example, attorneys counseling clients on filing an action in which patent and antitrust law intersect should advise on the likelihood the government will intervene, as the Antitrust Department under Delharim did many times, and on which side.

In addition, practitioners should monitor who fills the vacant USPTO post in counseling clients on USPTO issues, such as whether and when to file IPRs in the face of new leadership that may affect how often they are discretionarily denied.

### **Conclusion**

The direction the Biden administration will take regarding patent rights remains unclear. The recent announcement of support for the COVID-19 IP waiver, key changes in leadership, and the lack of a nominee for the USPTO director post suggest that enhancing patent rights is not a priority.

But it is still early in the administration, and key decisions, like the nominee for the USPTO director post, will provide more guidance on where the patent system will go over the next four years. Practitioners should keep abreast of changes in the dynamic patent landscape in advising clients.

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