

Intellectual Property Under A Donald Trump Presidency

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Last week brought about a significant upset in American politics with the election of President-elect Donald Trump. Intellectual property practitioners and owners alike have a stake in trying to predict what effect his administration is likely to have on future intellectual property policies. Unlike his opponent, Hillary Clinton, who published a fairly detailed platform on intellectual property and technology issues called the "Initiative on Technology and Innovation," President-elect Trump has been a mystery. We are therefore left to gather insights from various comments by Trump and his closest supporters.



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So far most of Trump's statements regarding intellectual property have been directed at China and mixed in with other concepts like dumping of products and trade. For example, in his nomination acceptance speech, he stated, "We are going to enforce all trade violations against any country that cheats. This includes stopping China's outrageous theft of intellectual property, along with their illegal product dumping, and their devastating currency manipulation." This statement is consistent with the Republican Party's platform statement that in China, our technology is stolen and intellectual property and copyrights are mocked in an economy based on piracy. Unfortunately, no details of the intended approach are given. So what can we expect?

Trademarks

Donald Trump is no stranger to trademarks. In fact, "Donald Trump" is the first presidential name that is also a registered trademark for fragrances and as part of other trademarks for apparel and eyewear. Trump started building his portfolio of applications and registered trademarks back in 1985 and has filed around 300 U.S. federal applications since then. Trump understands the value of trademark registration.

Trump's trademark strategy has been to file numerous applications, abandon those that show no promise and move forward with those that show value. Certainly, this past experience of frequent applications suggests that he would be an advocate of streamlining the registration process while maintaining strong protections.

Trump certainly should have an interest in encouraging the protection of geographically descriptive marks. Among his portfolio are the registrations for "Central Park," "Fifth Avenue" and "Westchester." The former two have been particularly profitable and a thorn in the side of the New York City government, which woke too late to the value of trademark registrations.

Copyrights

As a published author (with a little help) of nearly 20 books, one would think that Trump would have strong and public positions on copyrights. Unfortunately, his views are unknown. Here again we are left to speculate as to his possible policies.

Trump's stated opposition against the Trans-Pacific Partnership trade deal also carries with it opposition against the copyright policies proposed in the treaty (expanded terms, enhanced digital-rights management protection, limits to fair use and criminal sanctions). However, by the same token, Trump's promise to end the North American Free Trade Agreement puts at risk treaty rights particularly for the protection of software copyrights with a neighbor that shares a long common border. In both cases, Trump's position is less dictated by concerns about copyright law than by trade issues so they provide little domestic guidance on his administration's likely positions.

Certainly, many would agree that copyrightable creations such as software and entertainment are key factors in American cultural influence worldwide. As a television personality and author, Trump should appreciate this more than most. It is hard to see a platform that promotes itself as "Making America Great Again" without strong support for the domestic and international protection of copyrights.

One area where Trump has indicated a direct interest in publishing and media was in his promise to the press to broaden libel laws. This threat directed at the media during the campaign, if acted upon, would likely run into First Amendment issues but could have a significant chilling effect on news outlets and less sophisticated online blogging.

Patents

In the field of patents, Trump is walking into a situation where political figures have been speaking for years about the need for reform. However, Trump has not expressed any public opinions or interest in the problem. What we can glean from those around him is not encouraging.

Vice President-elect Mike Pence has been a highly rated favorite of the American Conservative Union, a group before which he spoke as recently as July and which has labeled him the most conservative candidate in years. The ACU has condemned patent law reform as "a risk to American innovation." In fact, the ACU goes on to state that the "claim that such 'patent trolls' do not make productive use of their patents themselves, but instead use the patents to harass businesses into inefficient licensing arrangements and nuisance-value settlements" is an argument that is "specious and false." As Trump's new transition chief, Vice President-elect Pence is likely to have a strong influence on Trump's view of the desirability of patent reform.

Nevertheless, others on the transition team such as Sen. Jeff Sessions, R-Ala., has substantial experience in prior efforts for patent reforms. He was a ranking member on the Senate Judiciary Committee during the negotiation and passage of the America Invents Act. His public comments about post-grant patent review (inter partes review) as a low-cost vehicle to revisit patents that were improperly granted, suggests some appreciation of the substantial expense that overbroad or mistakenly granted patents cause. Nevertheless, he pushed to limit the scope of such proceedings.

Internet

The Internet and IP rights on the Internet is another area where Trump has shed little light on his intended policies. Certainly, he has been clear on one point, which is increasing cybersecurity and cyber-counterstrike capabilities. However, these statements directed at the Chinese were undermined by his cavalier attitude regarding alleged Russian hacks from which his campaign benefited. Rudy Giuliani recently told Fox News that he would “love to become the person that comes up with a solution to cybersecurity” in the Trump administration.

Net neutrality, the concept that internet service providers cannot favor some internet sources while blocking or charging more for others, is another area of concern for the new administration. Some large media companies have already indicated they intend to press the Republican majority in Congress to challenge net neutrality. Trump himself has previously opposed net neutrality. In 2014, he equated net neutrality with the now defunct Fairness Doctrine that required TV and radio stations to air opposing opinions on important topics. He made the accusation that net neutrality would be used by President Obama to target conservative media. However, in the intervening years it has become apparent that net neutrality has actually served many of the extreme right wing blogs that support Trump by preventing blocking or special pricing. The president-elect’s current thinking on the matter is therefore hard to gauge.

Conclusion

So let’s look into the crystal ball and try to make some predictions. Initially, it is very unlikely that intellectual property will be one of the issues on which the new administration will focus. Health care, job creation and reproductive rights have already been announced as the initial targets of the administration. Subsequently, to the extent that intellectual property is addressed, it is likely to be addressed as part of the administration’s treatment of foreign trade issues. Whether the administration then moves on to more complex issues such as net neutrality or patent reform, will depend on the influence that special interest lobbyists have with the new administration. Certainly, if Trump listens to many of the intelligent and experienced leaders in these different areas of industry and technology, he will likely tread cautiously and change things very modestly. On the other hand, if he is swayed by the loudest voice in the room with the largest budgets to get access to his advisors, then we may see dramatic changes in the coming years. Keeping a careful eye on who surrounds the president-elect and who has his ear on this topic is a wise strategy for anyone advising others or managing their own intellectual property portfolio.

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Correction: An earlier version of the article inaccurately said Trump has filed applications as co-inventor for five patents in the medical field. The error has been corrected.

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