

## What To Expect From The USPTO In The Biden Administration

By Ryan Davis

*Law360 (November 19, 2020, 9:37 PM EST)* -- Attorneys are not expecting big changes at the U.S. Patent and Trademark Office during President-elect Joe Biden's administration, anticipating that he will appoint someone to lead the office with management skills and a balanced approach to intellectual property.

The USPTO director is typically not appointed until many months into a new president's first term, so it's likely too early to speculate about particular candidates for the job. While Biden, whose election victory is being challenged by President Donald Trump in multiple courts with little success, has a somewhat limited background on IP, attorneys say they can see him picking someone in the mold of current director Andrei Iancu.

"I don't think that there's going to be a big shakeup at the office. I don't think that's what the Biden administration would be hoping for," said Michael Drapkin of Holland & Hart LLP. "I would say it would be very successful and good if they chose someone like Director Iancu or David Kappos," who was director during former President Barack Obama's first term, he added.

Iancu, who had been a patent litigator at Irell & Manella LLP, and Kappos, who came to USPTO after being an IP executive at IBM Corp., have both been viewed as strong managers who helped the office operate smoothly, and that may be what the Biden administration is looking for, he said.

The head of the office is "not that political of a position," Drapkin said. "We just want the office to be run well, with someone who is in touch with practitioners and companies and innovators so that when issues arise, they are responsive and make good decisions and have things managed."

There is always a divide in patent law issues between pharmaceutical companies, which favor strong patents, and tech companies, which are more interested in challenging and invalidating patents. Michelle Lee, Obama's second USPTO director, came to the office from Google and was seen as an advocate for tech views, but experts don't see Biden returning to that approach.

"I would expect that Biden would be perhaps less tech-centric. The Obama administration was very tech-centric," said Mark Whitaker of Morrison & Foerster LLP. "I would anticipate that there would be a little bit more focus on pharma and bio industries, because we're in this pandemic and that's going to be top of mind for this administration."

The landscape for the tech industry has shifted dramatically over the past several years, as it now faces

significant public and political criticism across the political spectrum on issues ranging from antitrust to content moderation. As a result, the Biden administration may be less inclined to select a leader of the patent office who reflects the industry's views, attorneys said.

"I don't know that Big Tech is necessarily going to get the same sort of kid-gloves treatment it got under the Obama administration," said Mike Tomasulo of Winston & Strawn LLP.

During the Obama years, when Biden was vice president, Silicon Valley companies were "really at their peak of influence, and they were relatively new," said Brian Pomper, executive director of the Alliance for Trade Enforcement. "I think the Obama administration really defaulted too much to the position of what those companies thought would be good policy."

Toward the end of eight years, though, "I think [the administration] started to realize that they may have gone too far in favor" of the views of tech companies, he said, noting that it dialed back calls for legislation along those lines.

There are some indications that the tech industry may have a voice in the Biden White House. Media reports that former Google CEO Eric Schmidt may be under consideration for some role have sparked criticism from progressive groups.

Biden's transition team also includes several people from tech companies, as well as Santa Clara University law professor Colleen Chien, who was an intellectual property adviser in the Obama White House and whose work has been critical of patent assertion entities.

During the Trump administration, the USPTO under Iancu has been viewed as more favorable to patent owners, implementing rules that are seen as making it more difficult to challenge and invalidate patents and less likely for patent applications to be rejected as invalid. Those moves have been criticized by tech companies, some of which have sued the USPTO over them.

"I don't know that Joe Biden or potential members of his administration have spoken about that, but that is certainly something that the new administration will be able to stop," said Thomas Makin of Shearman & Sterling LLP.

Whether or not Biden selects someone to lead the USPTO with an interest in maintaining those policies, which would please patent owners and drugmakers, or reconsider them, which is the goal of the tech industry, may depend on which members of his inner circle have the strongest voice in the administration on IP issues.

For instance, Sen. Chris Coons, who holds Biden's former Delaware seat in the Senate and is close to the president-elect, is known for his pro-patent views as a leader of the Senate's IP subcommittee and sponsor of the STRONGER Patents Act, which would dial back some of the PTAB's authority to invalidate patents.

However, Vice President-elect Kamala Harris has sponsored legislation in the Senate aimed at reducing drug prices that would create a mechanism for the government to revoke patents for products deemed too expensive, which has alarmed branded pharmaceutical companies.

"Those two people will be insiders and influencers in the administration, so which one of their voices is going to win out, if either, will be an interesting thing to keep an eye on," Tomasulo said. "They seem to

have very different ideas on which direction to take the patent system."

The path Biden takes may not be clear for some time, since "none of this will probably be a top-of-the-line item," he said. "It's not how a new administration makes a splash, coming in and changing the patent system."

"At the end of the day, pharma, Big Tech and manufacturing all have sophisticated lobbyists, and they'll all be there trying to figure out what policies they're going to push the administration to proceed with," Tomasulo said.

Whoever Biden selects for the USPTO, attorneys say they expect patent law to remain apart from the partisan battles that face many other areas of law.

"I don't see IP issues as necessarily problematic between the two parties," said Whitaker, a former president of the American Intellectual Property Law Association. "There was typically fairly broad agreement between Democrats and Republicans on these issues."

--Editing by Brian Baresch.