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Ryan Baal

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Intellectual Property Law – What Happens After the “Vote-From-Home” Election?

BY [RYAN BAAL](#)/ ON NOVEMBER 23, 2020



Photo by Katie Moum on Unsplash

If Biden were to carry on with the Obama administration’s approach to intellectual property law, the America Invents Act of 2013 (AIA) would be the best place to start in analyzing how the president-elect might influence IP law over the coming years. At its core, the AIA transitioned the United States to a first-to-file system and modified the bars to patentability under the patent law statutes.¹ While then-President Obama claimed that the AIA was “long overdue reform [that] is vital to our ongoing efforts to modernize America’s patent laws,”² patent law expert and commentator Gene Quinn stated:

During the historic election week for the 2020 presidential race between challenger Joe Biden and incumbent Donald Trump, Americans held their breaths while voters cast their ballots and thousands of mail-in votes were counted. What few individuals (perhaps only those heavily involved in the field) pondered while checking off their boxes was a consideration that rarely finds its way into presidential debates, yet is integral in the operation of American business and the economy: intellectual property (IP), along with the laws that govern it. Now that numerous media outlets have declared Biden as the president-elect, the question of where intellectual property law is headed is of great importance. While not hotly debated in the public sphere, this issue will likely have a highly significant impact on the economy of the United States over the next four, if not more, years. While “concrete details on IP policy are lacking on Joe Biden’s presidential platform,”³ it may be telling that “Biden was Vice President

to former President Barack Obama, whose administration was arguably not kind to the most vulnerable stakeholders in America's intellectual property system."⁴

[T]he Obama Administration can write all they want about the importance of the patent system and how patents are critically important for innovation, but the reality is that the future of American innovation has been forfeited (or at least heavily mortgaged) by a calculated, intentional, and willful dismantling of the U.S. patent system"⁵

Essentially, the argument is that the Obama administration, featuring its passage of the AIA, "spent most of the past 8 years intentionally seeking to change U.S. patent law, weaken patent rights and ultimately destroy the U.S. patent system to the point where China is now a far more favorable jurisdiction for patent protection than is the United States."⁶ While the passage of the AIA occurred while Biden was Obama's right-hand man, there exists the potential for him, as president, to reevaluate the results of the influential statute and determine if any changes should be implemented in light of how the AIA has operated since its advent.

Similar to political debates over patent law, trademark law implications are not exactly a "vote magnet."⁷ However, the Trump administration did take a "defiant stance on a China trade deal" that pledged to "crackdown on the 'theft of American intellectual property,'" while Biden promised to address "'a coordinated and effective strategy' in China of assailing American creativity and intellectual property."⁸ Furthermore, Biden has proposed that companies that "falsely label products as 'made in America' even if they are produced abroad" would be punished.⁹ While these rather broad statements indicate general support for protecting domestic IP holders against the threat of intellectual theft and incentivizing the use of the U.S. IP system over those of foreign jurisdictions such as China, they still do not describe any detailed plans of exactly *how* these goals would be accomplished. However, Harvard Law School Professor and notable trademark law commentator Rebecca Tushnet has claimed that with respect to the USPTO, "a Biden administration would prioritise [sic] governance and competence," which could lead to a "renewed effort to deal with the mess caused by fraudulent applications"¹⁰ This certainly sounds like a good thing for the legitimacy of the trademark law system in the United States, but could potentially come at a cost in efforts redirected away from IP issues that function on a more global level. Thus, while some speculation predicts that Biden will focus trademark-related efforts on reforming the USPTO itself, his broad statements regarding his platform on the subject present questions as to what Biden will actually implement now that the presidential race is over.

While we all hope that Americans can soon finally fully breathe after the 2020 election, the four years ahead are nothing but uncertain regarding the status of IP law. Biden has already demonstrated his willingness to go along with enormous overhauls in the field when he was vice-president to President Obama. However, it remains unclear what Biden will change, if anything at all, with respect to IP and the laws that govern it now that he himself is the leader

of the country. Regarding what will ultimately happen to the system as a result of this election, only time will tell.

Ryan Baal is a Second Year Law Student at the Benjamin N. Cardozo School of Law and a Staff Editor at the Cardozo Arts & Entertainment Law Journal. Mr. Baal recently completed his judicial internship in the chambers of Justice John M. Leventhal of the New York Appellate Division – Second Judicial Department. Mr. Baal's work experience prior to law school and his undergraduate studies in chemistry and business at Cornell University exhibit his dedication to integrating science, business, and the law. Before beginning his studies at Cardozo, Mr. Baal was a court clerk at the New York managing attorney's office of Kasowitz, Benson, Torres LLP.

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