

Trump the reformer?

Despite a lack of pronouncements, President-elect Trump has offered clues as to how he might impact IP. **Colette Reiner Mayer** and **Diek Van Nort** examine the evidence

Intellectual property rights and patent policy were not focal points during Donald Trump's campaign. Even in the final days prior to the vote, when Hillary Clinton advocated ending the practice of fee diversion from the US Patent and Trademark Office (USPTO), Trump was silent on the issues. Although he referenced the tech community on occasion throughout his campaign, it was often in the context of national security or trade. As far we can tell, he did not speak once about patent policy, and there was next to nothing on his website that referenced IP issues.

So what will a President Trump administration mean for IP policy?

Although he has not laid out a road map, we have signposts from which we can infer a likely path forward. For example, Trump focused extensively on strengthening the US economy and bringing jobs back to America. Strong, predictable IP rights are pillars of the US economy. As such, we should expect Trump to strive for IP policies that promote strong US IP rights.

In connection with his businesses, Trump has extensive experience protecting the 'Trump' name through litigation, including trademark litigation. So while he has not spoken on IP rights as a politician, his actions as a businessman show that he recognises their value.

Trump's campaign website advocated vigilance around foreign theft of US trade secrets – another signpost that he will advocate for strong US IP rights.

On the other hand, looking to the people that supported the president-elect and may wield influence with him, patent reform may be on the horizon.

In Silicon Valley, Peter Theil's role as an advisor and Trump supporter was widely reported. Theil has been an outspoken critic of non-practicing entity (NPE) patent litigation, calling well-known NPE Intellectual Ventures "a parasitic tax on the tech industry."¹ Shortly after his election, Trump put Theil on



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the executive committee of his presidential transition team. Another Trump supporter is Congressman Darrell Issa, a former inventor with experience asserting his own patents, and another outspoken critic of NPEs. In fact, in a

hearing on International Trade Commission (ITC) patent litigation, Issa stated “for purposes of my opening statement, plaintiff and troll will be interchangeable.”² In light of potential influence from these individuals that likely have Trump's ear, there is the distinct possibility of further patent reform on the horizon.

With that background (and all the necessary caveats that we have no inside information), here is our prediction for the two most likely patent reform issues President Trump will address:

Patent Office funding

If there is one issue in the patent community that nearly everyone can agree on, it's that funding for the USPTO must be guaranteed. The USPTO is entirely funded by user fees collected from patent applicants, patent owners, third parties challenging patents, and others using the USPTO's services.³ Prior to

the America Invents Act (AIA), the user fees that the USPTO collected were often diverted to fund other parts of the government. From 1991 to 2010, over \$1.1bn was diverted.⁴

While the AIA, enacted in 2011 (and operational in 2012), largely limited fee diversion from the USPTO, in 2013 about \$120m was diverted as part of the sequestration cuts.⁵ The reduction in fees prevented the USPTO from completing updates to critical IT systems, hiring additional patent examiners, and fully funding satellite offices.⁶ The 2013 sequestration shows that the AIA did not eliminate the possibility of fee diversion from the USPTO and also shows how damaging the diversion can be.

Bringing reform to this area may appeal to Trump for a few reasons. For one, it is a topic that has wide appeal. The USPTO is completely self-funded. It makes little sense that fees generated from USPTO activities should fund other, completely unrelated portions of the government.

Secondly, if Trump is looking to show that he is capable of breaking Washington gridlock, this legislation may be a good example. Bills addressing USPTO funding have already been introduced in the House and Senate with bipartisan support. These bills could be combined and passed to show that Trump has the ability to get things done.

Thirdly, reform of USPTO funding has broad support among industry. The Intellectual Property Owners Association, made up of some of the largest technology and life sciences companies in the world, strongly support improvements to how the USPTO is funded.⁷ By passing funding reform, Trump can show that he is listening to industries regarding an area that is critical to maintaining the US as the technological leader of the world.

The fact is, in the area of IP, issues rarely break down neatly along political lines. More often, the issues pit industries against each other or companies within an industry against each other. But in the case of USPTO funding, we see little serious opposition, which presents an opportunity for a legislative victory.

Venue shopping

It is a commonly held belief among many IP practitioners that venue shopping has plagued the patent litigation system for years. Under the general venue statute, the associated common law, and the reach of the internet, plaintiffs are allowed to file patent lawsuits nearly anywhere they choose. As a result of its perceived pro-plaintiff juries and local rules of practice, the Eastern District of Texas (EDT) has long been the most popular venue for patent litigation. Last year, 44% of all patent lawsuits were filed in the district.

This is another issue that Congress has debated over and over, without action, for years. A bill introduced in Congress earlier this year, The Venue Equity and Non-Uniformity Elimination Act of 2016, would require a plaintiff to file in a district with a direct connection to the underlying litigation and parties. The goal of the legislation was to rein in NPEs, who strongly favour the EDT as their venue of choice.

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The bill had the support of several technology companies along with some advocacy groups. But the legislation never made it out of the Senate. The bill echoed an earlier effort in 2015 by supporters of a bill, introduced in the House of Representatives, called the Innovation Act, which was a more comprehensive patent litigation reform. But it, too, failed. Indeed, revisions to the venue statute for patent cases have been included (and dropped) from patent reform efforts for nearly a decade.

Again, due to the broad range of support for venue reform, this could be another opportunity for Trump to notch a legislative win that has previously proved elusive. It also aligns with Trump's support for US industry, which has long argued that the current patent venue rules encourage frivolous litigation. Any venue legislation could be held up by the petition for writ of *certiorari* in *In re TC Heartland LLC*.⁸

This case would allow the Supreme Court of the US to review the Federal Circuit's expansive interpretation of patent venue. If the petition is granted, there is a reasonable chance that Congress will wait to act on venue legislation until the Supreme Court issues a decision.

Summary

The 'X-factor' behind reforms to both fee diversion and venue shopping could be the people with whom Trump surrounds himself. Both Thiel's and Issa's overall views of the patent system would seem to suggest future support for fee diversion and venue reforms. Both are widely viewed as common-sense measures that would strengthen the patent system and help US businesses.

Trump has laid out an aggressive agenda for his first hundred days as president, and IP policy was not on his hit list. Nevertheless, with some relatively easy legislative victories within his grasp on the IP front, he may well take on the issues that have stagnated for years.

Footnotes

1. www.bloomberglaw.com/news/articles/2014-09-04/intellectual-ventures-patent-troll-funds-startups-new-products
2. https://judiciary.house.gov/wp-content/uploads/2016/04/114-67_99782.pdf
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5. www.ipo.org/wp-content/uploads/2016/11/User-Fees-Withheld-1991-2015.pdf
6. www.uspto.gov/about/advisory/ppac/PPAC_2013_AnnualReport.pdf
7. www.ipo.org/wp-content/uploads/2014/03/Letter-Supporting-Feinstein-Patent-Funding-Bill-3-12-14.pdf
8. *In re TC Heartland LLC*, 821 F.3d 1338 (Fed. Cir. 2016) *petition for cert filed*, 85 U.S.L.W. 3107 (US 12 Sept, 2016) (No. 16-341).

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