

Trump's Impact on IP During His First 100 Days in Office

By Colette Reiner Mayer

When President Trump took office, few intellectual property practitioners knew what that meant for U.S. IP policy. IP concerns were not an issue during his presidential campaign, and his public statements on IP before running for office were sparse.

Post-election, many practitioners looked to his statements on trade and his personal track record with protecting his own brand to try to glean his potential positions on IP.

Although Trump has continued to say little that might foreshadow his positions on IP protection, his actions in his first 100 days since taking office have been somewhat revealing. They indicate that his administration may seek to promote patent enforcement over antitrust issues, encourage review

of administrative agency decisions such as from the Patent Trial and Appeal Board (PTAB), and take a more active role concerning copyright issues. Collectively, Trump's early actions have laid the foundation for significant changes to intellectual property law and policy.

Appointments to the DOJ and FTC

President Trump's appointments to the Federal Trade Commission and the Department of Justice may reshape how intellectual property and antitrust issues interact. These appointments include Makan Delrahim to serve as Assistant Attorney General for the DOJ's Antitrust Division and Maureen Ohlhausen as Acting FTC Chair. These appointments could represent a sharp divergence from the Obama administration's antitrust



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enforcement policies, especially in the area of standard essential patents.

For example, as a Commissioner, Ohlhausen dissented from the FTC's consent agreements with Robert Bosch GmbH and Motorola Mobility LLC regarding the use and licensing of standards essential patents. She also dissented from the FTC's last major enforcement action before President Trump took office—its filing of a

large antitrust suit alleging that Qualcomm's standard essential licensing practices were anticompetitive.

As for Delrahim, he has a master's degree from Johns Hopkins University in biotechnology and is a registered patent attorney. In his writings and speeches on IP and antitrust issues, Delrahim has consistently advocated the view that antitrust laws should not be enforced in ways that would stifle creativity and innovation. In his comments to the Antitrust Modernization Commission, for example, Delrahim explained: "Antitrust enforcers should also strive to eliminate as much as possible the unnecessary uncertainties for innovators and creators in their ability to exploit their intellectual property rights, as those uncertainties can also reduce the incentives for innovation."

Justice Gorsuch

President Trump's first Supreme Court appointee, Justice Neil Gorsuch, is almost as much of a black box on IP issues as President Trump. Having sat on the 10th Circuit, he did not hear patent cases, and his past record on other IP cases is sparse. His widely discussed concurrence in

Gutierrez-Brizuela v. Lynch, however, may offer insight into his views on IP issues. In that case, he criticized deference to administrative agencies' interpretation of their own rules and regulatory regimes under the *Chevron* doctrine.

The appropriate level of deference, of course, currently is a hot button topic for appeals from the PTAB. Part of the U.S. Patent Office, the PTAB is the administrative body that oversees the three new post-grant review proceedings (*i.e.*, post grant reviews, covered business method patent reviews, and *inter partes* reviews). In its 2016 decision in *Cuozzo Speed Technologies v. Lee*, the Supreme Court applied *Chevron* deference to the PTAB's application of the broadest reasonable construction (BRI) standard during *inter partes* review. It concluded that the PTAB's use of BRI was a "reasonable exercise of the rulemaking authority that Congress delegated to the Patent Office."

Appointment of the Register of the Copyright Office

The Register of Copyrights is the highest ranking official in the Copyright Office and is

responsible for setting policy, prioritizing expenditures, and leading the effort to modernize the Office. On April 26, 2017, the House of Representatives passed bill HR1695 with strong bipartisan support. H.R.1695 proposes to make the appointment of the Register of the Copyright Office a presidential appointment, instead of an appointment by the Librarian of Congress. Assuming this bill passes the Senate (and there are no indications it will not), President Trump will soon have the power to select the next Register.

What's ahead?

In the first 100 days, IP policy was collateral to President Trump's core issues. Indeed, we have yet to hear any concrete statement on IP policy from him. Despite his silence on IP issues, his appointments and pending legislation will continue to shift IP policy in significant ways during the coming years.

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