

## How patents may fare under the new administration

*By Steven E. Ross and  
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It's safe to say that the U.S. patent system is overburdened and in need of improvement. One can only speculate this early in the new Obama administration as to how patents may fare. However, Obama's policy statements and the Congressional agenda may provide some idea.

### OBAMA'S POLICY STATEMENTS

One of the stated goals of the Obama administration is to reform the patent system.

President Obama has pledged to give the U.S. Patent and Trademark Office ("PTO") the resources it needs to improve patent quality and to open up the patent process to citizen review.

According to the administration's technology policy statement on patent reform:

*"A system that produces timely, high-quality patents is essential for global competitiveness in the 21st century.*

*By improving predictability and clarity in our patent system, we will help foster an environment that encourages innovation.*

*Giving the Patent and Trademark Office (PTO) the resources to improve patent quality and opening up the patent process to citizen review will reduce the uncertainty and wasteful litigation that is currently a significant drag on innovation. As president, Barack Obama will ensure that our patent laws protect legitimate rights while not stifling innovation and collaboration."*

### PREVIOUS PROPOSALS

One of President Obama's previous proposals would permit patent applicants to pay higher fees to obtain more rigorous examination. Specifically, the PTO would offer applicants "who know they have significant inventions the option of a rigorous and public peer review that would produce a 'gold-plated' patent much less vulnerable to court challenge."

The theory is that more rigorous examination would provide patent owners with a stronger presumption of validity. However, the Obama administration's current policy statements do not make any mention of this proposal.

Who President Obama appoints to be the next Secretary of Commerce and the Director of the PTO might give some insight into what direction the new Obama administration will take with regards to patent reform. **(continued on next page)**



*How will the overburdened patent system fare in the new Obama administration?*

**Although it is yet unclear who President Obama may nominate as the Director of the PTO, according to the *Los Angeles Times*, there is speculation that he may be close to appointing John W. Thompson, the CEO of Symantec, to be the next Secretary of Commerce.**

Although not necessarily indicative of Mr. Thompson's position on patent reform, Symantec is a leading member of the Coalition for Patent Fairness, which has lobbied for limiting the power of patents.

**Additionally, perhaps the most significant patent-related appointments that President Obama will have to make are to the Federal Circuit, which will likely have six to eight vacancies over the next few years.**

Duke University School of Law Prof. Arti Rai, who was tasked to coordinate some of the thinking on IP for the Obama campaign, believes the president will take serious interest in Federal Circuit appointees.

#### **PATENT REFORM IN THE 111TH CONGRESS**

**During the last session of Congress, the House passed HR1908, and Senate Judiciary Committee chairman Patrick Leahy (D-Vt.) co-sponsored the *Patent Reform Act of 2007* (S. 1145).**

Both of these bills address patent reform. Some of the major changes proposed in the Patent Reform Act include: implementing a "first-to-file" system instead of the current "first-to-invent" system; making it easier to file a patent application without the inventor's cooperation; limiting infringement damages to only the economic value of the improvement over the prior art; limiting when damages may be trebled for willfulness; adding a new post-grant review of patents, and replacing the Board of Patent Appeals and Interferences with a new Patent Trial and Appeal Board.

**Patent reform appears to be high on the agenda of the Democrat-controlled 111th Congress. Sen. Leahy plans to introduce a new patent reform bill as early in 2009 as possible. That bill will likely be quite similar in some areas to the *Patent Reform Act of 2007*.**

**Based on the stated importance of patent reform by the Obama administration and the 111th Congress, it would be wise for technology companies with intellectual property assets to stay current on the status of this legislation and the patent system.**

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