

Where Will The Cards Fall When Trump Reshuffles The Deck On IP Policy?

By Howard Hogan

As President-Elect Trump and his team prepare to assume the reins of government, one aspect of the transition that has received relatively little attention—but that is incredibly important to the U.S. economy—is the new administration’s attitude toward the enforcement of intellectual property (IP) rights. In 2014, IP-intensive industries like publishing, broadcasting and software development accounted for about 30% of U.S. jobs and 38% of the GDP.

Disclosure: Mr. Hogan represents numerous IP owners.

Some commentators have been assuming that the new Trump administration will be an advocate for IP owners. This view largely stems from the President-elect’s status as owner of one of the world’s most recognizable brands, and his criticisms of Chinese theft of U.S. IP.

But it has also been widely reported that the new administration has been developing relationships with leading Internet companies, including Google’s CEO Larry Page and the chair of its parent company, Eric Schmidt, both of whom recently met with the President-Elect. One important member of the transition team, former Federal Trade Commissioner Josh Wright, was widely seen as a key ally of Google during his tenure on the Commission. And Google has reportedly been building up its lobbying ties to the new administration.

Arguably, no company has been more influential than Google in setting policy in America in recent years. Google’s lobbying budget placed it among the five biggest spenders for the first quarter of 2015, and according to the Center for Responsive Politics, Google’s parent company spent \$16.6 million on lobbying in 2015.

These ties have bought access. The Center for Accountability reports that through October 2015, White House officials met with employees of Google or related companies 427 times—an average of more than once a week, while approximately 30 Google personnel have taken positions in the Obama Administration, and about 20 former members of the White House staff have landed at Google. Mr. Schmidt serves as a member of the President’s Council of Advisors on Science and Technology, and a former Google vice president serves as the U.S. Chief Technology Officer.

One of the consistent goals of this political machine has been to promote policies that have the effect of weakening legal protections for IP rights. The reason for these policy preferences lies in Google’s role as content distributor and advertiser. Google does not create the overwhelming majority of the content that its users seek; it generates much of its revenue by displaying ads while connecting users to content created by others, or by selling platforms to access such content. For Google, the ability to distribute popular third-party content or sell rights to use other companies’ trademarks with few strings attached is tantalizingly profitable.

Google openly underwrites the work of several nominally independent groups and thought leaders that lobby to weaken protections against IP infringement. For example, Google is one of the key supporters of groups like the Electronic Frontier Foundation, Public Knowledge, the Internet Association and the Consumer Video Choice Coalition, advocacy groups that share a distaste for strong IP protections and lobby hard against the use of tools that allow IP owners to track down infringers online.

A recent example was the so-called “set-top box rule” proposed by the Chairman of the Federal

Communications Commission. The proposal would have used a statute designed to promote competition among cable television set-top boxes as a vehicle to force cable companies to give tech companies like Google free access to the raw video and data feeds that cable companies provide to their customers.

While much about the proposed rule remains controversial, there is no doubt that it would have benefited the Googles of the world, who could sell devices and advertising based on content that they had not licensed from copyright owners, without paying royalties, and with little fear that the owners would be able to enforce the licensing restrictions that led them to offer the video content to cable companies in the first place.

Google and its allied advocacy groups all filed comments in support of the proposal. Even President Obama threw his support behind the rule, prompting some to question whether he was exerting undue pressure on a supposedly independent agency.

In the midst of this controversy, Congress turned for advice to the head of the Copyright Office, a long-standing, non-partisan agency designed by Congress to provide expert advice on copyright issues. Register of Copyrights Maria Pallante prepared an 18-page letter explaining how the proposed rule would violate basic copyright protections and, as a result, the FCC was forced to scrap the proposal. Two months later, Pallante was summarily removed from her position and reassigned by a recently minted Obama appointee—the first time in 119 years that the head of the Copyright Office has been dismissed.

The set-top box rule is far from the only example of recent policy choices in Washington that conspicuously benefit Google and its IP agenda. In August, the Federal Trade Commission brought an enforcement action against 1-800 Contacts, claiming that it violated antitrust laws when it asserted and settled trademark claims against other retailers who were paying Google for the right to use 1-800 Contacts trademarks to trigger online search advertising that had been accused of causing consumer confusion. The FTC's action was a direct boon to Google, which has fought hard against similar claims brought by other trademark owners.

The Obama administration's decision to cede federal oversight of the Internet Corporation for Assigned Names and Numbers (ICANN) has similarly raised concerns among IP owners. ICANN manages top-level domains like ".com" and ".org," and many trademark owners have expressed concern that without the U.S. government's guiding hand, ICANN will be at the mercy of "stakeholders" that favor the exploitation of IP over its protection.

There is no doubt that tech companies like Google are leading contributors to the American economy. But any policy framework designed to grow the American economy also needs to provide adequate protections for what may be America's greatest competitive advantage, its intellectual property.

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