

THE IP COMMISSION

THE COMMISSION ON THE THEFT OF
AMERICAN INTELLECTUAL PROPERTY

IP COMMISSION BACKGROUND MEMO

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Recent Measures to Better Protect American Intellectual Property (IP)

Holding Foreign Companies Accountable Act

- The act passed in December 2020 and requires certain foreign companies that issue securities to prove they are not controlled by a foreign government.
- It seeks to enforce compliance with Public Company Accounting Oversight Board audits and instructs the Securities and Exchange Commission (SEC) to prohibit the listing and trading of securities from foreign companies that fail to allow inspections by the board for three consecutive years.

The IP Commission welcomes this law but urges further legislation that includes IP violations as grounds for the SEC to prohibit the listing and trading of securities.

Securities and Exchange Commission Regulations on IP

- The latest SEC guidance from December 2019 acknowledges that there is no statutory disclosure requirement for IP violations. This remains a significant impediment to ensuring market-based pricing of IP risks and incentivizing companies to mitigate these risks.
- The guidance urges companies to more carefully consider the potential IP risks that they choose to disclose, including those stemming from operations in foreign jurisdictions with limited IP protections and from cyber-enabled economic espionage.

The IP Commission believes that it is vital that the SEC require listed companies to publicly disclose IP risks and violations.

Protecting American Intellectual Property Act of 2020

- The act needs resubmission in the 117th Congress and would require sanctions on individuals and firms found to engage in, benefit from, or enable the significant and serial theft of U.S. IP.
- Required sanctions would consist of prohibiting all property transactions, denying or revoking visas, and placing entities on the Bureau of Industry and Security's Entity List.
- The act would instruct the president to submit a report to Congress every 180 days detailing any foreign person who has knowingly engaged in or benefitted from significant theft of trade secrets from U.S. persons or provided significant support for such theft.

The IP Commission assesses that the passage of this bill would realize our long-standing recommendation of obtaining meaningful sanctions against foreign companies that use stolen IP. It would also strengthen policy and enforcement options in a manner that is consistent with the Commission's views.

National Defense Authorization Act for Fiscal Year 2021

- Section 1260F seeks to deter China from engaging in industrial espionage and cybertheft and calls for a report to be issued on the effectiveness of the National Cyber Strategy to deter industrial espionage and large-scale cybertheft of IP.
- The report will include assessments of the United States' capabilities to deter industrial espionage and cybertheft, as well as China's efforts to engage in such practices.

The IP Commission supports a focus on illegal actions originating from China.

Reform of the International Trade Commission (ITC) and Section 337 process

- The bipartisan Advancing America's Interests Act seeks to reform the Section 337 process to ensure that any party bringing a complaint represents a domestic industry that produces the goods whose IP has been infringed.

- The legislation would prevent companies that are only involved in licensing IP from bringing complaints and thereby improve the speed of ITC proceedings by reducing the number of frivolous cases by patent trolls.
- It would also require the ITC to affirmatively determine that there are public benefits to excluding the goods made with stolen IP.

The IP Commission welcomes efforts to reduce frivolous litigation brought to the ITC. However, this should not come at the expense of ensuring robust protections for all holders of IP. The IP Commission urges additional legislation that would expedite the resolution of Section 337 cases at the ITC.

Important Earlier Legislation to Improve IP Protection

National Defense Authorization Act for Fiscal Year 2020

- Section 1281 creates a continuously updated list of individuals and organizations that have a history of IP theft, technology transfer violations, and cyberespionage or pose a serious risk of improper technology transfer.
- The list also includes individuals and organizations that operate under the direction of a foreign military or intelligence agency.

Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA)

- FIRRMA expands the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to include non-controlling investments, direct or indirect, by a foreign person in certain U.S. businesses.
- FIRRMA applies to investments in U.S. businesses involved with critical technologies, critical infrastructure, or sensitive personal data.
- While FIRRMA and its implementing regulations do not directly target IP, owning IP for a covered technology (“critical” or “emerging and foundational technology” under the Export Control Reform Act of 2018) is sufficient to be covered. Therefore, CFIUS could require a review of any acquisition of covered IP.

Defend Trade Secrets Act of 2016

- The act implemented the IP Commission’s recommendation to create a private right of action for U.S. entities under the Economic Espionage Act.
- It also offers protections for U.S. entities to prevent their trade secrets from becoming public in the course of a trial.

National Defense Authorization Act for Fiscal Year 2015

- The act authorizes the president to prohibit all transactions in property of any person who is determined to knowingly engage in economic or industrial espionage in cyberspace.
- It also directs the president to submit a report to Congress that contains a list of countries that engage in “economic and industrial espionage in cyberspace” and a list of technologies or services that are being targeted by foreign actors.

