Fast Track to Justice for Trade Secret Theft at the ITC: New Senate Bill Would Expand ITC Authority to Curtail Trade Secret Theft by Foreign Governments

Article By
Michael T. Renaud
Richard G. Gervase, Jr.
Nicholas W. Armington
Mintz
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Amid the continuing threat to U.S. intellectual property rights posed by foreign actors, the International Trade Commission (ITC) is poised to become the latest federal agency to bolster protections for U.S. IP owners. The ITC’s broad power to exclude the importation into the U.S. of products that infringe American intellectual property now has the potential to be made even more robust through a new bill introduced by Senators John Cornyn (R-Tex.), Christopher Coons (D-Del.), and
Todd Young (R-Ind.) on June 15, 2021 that would provide expedited relief for trade secret theft victims. The bill would create a special committee within the ITC to investigate importation of products that “contain, were produced using, benefit from, or use” trade secrets acquired by “improper means or misappropriation by a foreign agent or foreign instrumentality.”

Under the proposed bill, owners of a trade secret, or the committee on its own initiative, could file a complaint alleging an imported or to be imported product incorporates trade secrets misappropriated with the assistance of a foreign government. The committee would then have 30 days to conduct an ex parte investigation into the allegation. If the committee determined that “it is more likely than not” that the accused import involved trade secret misappropriation, the committee would be required to issue an exclusion order barring the import from entry into the United States. The President would then have 15 days to review the committee’s determination. This private right of action coupled with the “more likely than not” evidentiary standard creates a powerful tool for trade secret owners to protect their intellectual property.

The new committee would be comprised of representatives from the Department of Justice, the Treasury Department, the Department of Homeland Security, the Department of Commerce, the Office of the U.S. Intellectual Property Enforcement Coordinator, and the Office of the United States Trade Representative. The Office of the Director of National Intelligence would also be allowed one nonvoting representative.

Although the proposed bill applies to all countries, the title—Stopping and Excluding Chinese Rip-offs and Exports with United States Trade Secrets Act of 2021—suggests that this bill is in response to numerous allegations of trade secret theft by entities that are owned or backed by the Chinese government. A common allegation is that American manufacturers attempting to work jointly with Chinese companies end up having their trade secrets misappropriated by those companies during the course of that joint work and the Chinese entity later uses that stolen information to compete.

There has recently been a marked increase in the number of complaints filed by businesses at the ITC alleging misappropriation of trade secrets and the unauthorized use of those trade secrets in, or in the manufacture of, articles imported into the United States. Currently, the ITC handles trade secret misappropriation claims under its Section 337 investigative authority, where a complainant must generally show that:

• There is an imported product;

• The importation or sale of that product arises from trade secret misappropriation;

• A U.S. industry would be destroyed, substantially injured, or prevented from forming as a result of the misappropriation; and

• There is a specific injury or threat of injury to that domestic industry.
While ITC investigations into trade secret misappropriation have always been swift—averaging about a year-and-a-half to complete—this new bill could allow the ITC to address trade secret theft even faster. But it is unclear from the current language how normal ITC procedure would be affected because the bill includes a prohibition, with yet-to-be-issued exceptions, on disclosure of information submitted to the committee in connection with a trade secret misappropriation investigation.

The bill’s level of support within the Senate and chances of overall passage are still unclear but, if it does pass, it will add another robust tool in the trade secret tool belt that the ITC already has at its disposal. As trade secret litigation becomes more prominent at the ITC, and also in federal district courts, and state courts, it is important for trade secret owners to be aware of all the protections, established and emerging, that are available for use in protecting what could be a company’s most valuable IP. We will be watching as this bill continues through Congress and will provide updates as they occur.

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