



## **The Trump Administration and International Policies on Intellectual Property**

Donald Trump's campaign slogan was "Make America Great Again," which included halting unfair trade practices by other nations that hurt U.S. businesses. On November 21, 2016, President-elect Trump released a video of his policy plans for the first 100 days of his Administration, including to "restore our laws and bring back our jobs." One of those plans affected U.S. intellectual property rights: his plans to withdraw from the Trans-Pacific Partnership agreement. Instead, he stated that the U.S. would negotiate "fair bilateral trade deals." Mr. Trump has also repeatedly indicated that China has been committing unfair trade practices that have been burdening U.S. commerce.

This article will describe: (1) the scope of unfair trade practices relating to intellectual property and their impact on U.S. commerce; (2) the actions the Administration has taken or is considering during its first 195 days; and (3) the impact on the current state of the leadership of the U.S. Patent and Trademark Office.

### ***Scope of Intellectual Property Theft***

In February of 2017, the Associated Press (AP) published an article headlined "Counterfeit Goods Cost the U.S. \$600 Billion a Year." The headline may have overstated the impact because the study AP was reporting on, issued by the private Commission on the Theft of American Intellectual Property, found that *annual* losses from intellectual property theft range from \$225 billion to \$600 billion. The largest component of those numbers was theft of trade secrets, accounting for 80% to 90% of the totals, with counterfeit goods and pirated software comprising the remainder. That report stated that China (including Hong Kong) was the source of 87% of the counterfeit goods that were seized entering the United States. The report also claimed that the Chinese government encourages the theft of intellectual property.

These estimates are consistent with the 2016 estimate that set the value of the intellectual property stolen by China at \$360 billion, and the 2015 estimate by the Office of the Director of National Intelligence that stated the annual cost of economic espionage by computer hacking was \$400 billion.

### ***What Actions Has This Administration Taken or Considered?***

In its first 195 days, although intellectual property has not been a top priority, this Administration has taken or at least considered some actions.

#### **1. Trans-Pacific Partnership Agreement**

On January 23, 2017—the fourth day of the Administration—President Trump signed an Executive Order formally withdrawing the United States from the Trans-Pacific Partnership (TPP) agreement negotiations. The TPP is a fair trade agreement involving 12 countries that have at least one border on the Pacific Ocean (including the U.S., Canada, and Mexico, but excluding China). The TPP includes several intellectual property provisions, with several provisions relating to patents and would have made intellectual property rights for foreign and domestic owners more similar to each other. The TPP also includes stronger enforcement mechanisms for intellectual property owners, as well as dispute resolution procedures. The 11 remaining members have indicated that they hope to have a final version of the TPP in place by the end of 2017.

## 2. NAFTA

On July 17, 2017, the United States Trade Representative (USTR) released a summary of its objectives for the renegotiation of the North American Free Trade Agreement (NAFTA). NAFTA is a trilateral free trade agreement between and among Canada, Mexico, and the United States and it went into effect on January 1, 1994.

The USTR's goals for the renegotiations of NAFTA include eliminating "burdensome restrictions on intellectual property." The United States' view of NAFTA includes such provisions as strong mechanisms for enforcing intellectual property rights, swift implementation of the World Trade Organization (WTO) Agreement on Trade-Related aspect of Intellectual Property rights (TRIPS), and elimination or prohibition of distinctions between protections of domestic and foreign intellectual property rights.

In addition, the USTR's goals include protection of intellectual property rights that barely existed when NAFTA was originally signed. These new provisions include protections for new technologies relating to digital trade and works distributed over the Internet.

Finally, the USTR has a stated goal of including provisions in the renegotiated NAFTA that would prevent government involvement in cyber theft and piracy.

It is unclear whether the Trump Administration intends for these goals to form a framework for the bilateral free trade agreements that the President-elect described in his November 21 video. It is noteworthy, however, that the USTR's stated goals do not appear to require any change to the Mexican or Canadian laws. In addition, the U.S. has not accused either of those countries' governments of encouraging or being involved in intellectual property piracy or cyber theft.

## 3. Section 301 of the Trade Act of 1974

Although companies have long complained that Chinese companies stole their intellectual property and technology, complaints have increased in recent years when the government of China began insisting on disclosure of proprietary technologies in exchange for the right to operate in China, sometimes referred to as a "forced technology transfer." On August 2, 2017, it was reported that the Trump Administration was considering the use of Section 301 of the Trade Act of 1974 to take action against China, in the form of economic sanctions.

Section 301 places very broad powers in the U.S. Trade Representative. The USTR's official description of Section 301 reads:

Section 301 of the Trade Act of 1974 provides the United States with the authority to enforce trade agreements, resolve trade disputes, and open foreign markets to U.S. goods and services. It is the principal statutory authority under which the United States may impose trade sanctions on foreign countries that either violate trade agreements or engage in other unfair trade practices. When negotiations to remove the offending trade practice fail, the United States may take action to raise import duties on the foreign country's products as a means to rebalance lost concessions.

The text of Section 301 is even broader, giving the USTR the right to take actions "that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country" if the USTR finds an "act, policy, or practice of a foreign country" is "unjustifiable and burdens or restricts United States commerce." (19 U.S.C. § 2411) With respect to intellectual property rights, the law defines "acts policies and practices that are unreasonable" to include any acts, policies or practices which deny "fair and equitable . . . provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of [TRIPS]." The law further defines "adequate and effective protection of intellectual property rights" to include "adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such country to secure, exercise, and enforce rights and enjoy commercial benefits relating to patents, trademarks, copyrights and related rights, mask works, trade secrets, and plant breeder's rights."

The law also defines “acts, policies and practices that are unreasonable” relating to intellectual property to include any acts, policies or practices that deny “fair and equitable . . . nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection.” The law defines “denial of fair and equitable nondiscriminatory market access opportunities” to include restrictions on “market access related to the use, exploitation, or enjoyment of commercial benefits derived from exercising intellectual property in protected works or fixations or products embodying protected works.”

Because the U.S. does not have a free trade agreement with China, it is unclear whether the allegations of a “forced technology transfer” would fall within the purview of the WTO. The USTR’s website describes the WTO as providing a “formal (binding) dispute settlement process for members to address trade practices that fail to comply with commitments in the contest of the WTO.” The USTR also points out that the U.S. is very familiar with WTO proceedings because the U.S. has been involved in over 2/3 of the 300 cases brought before panels of the WTO. Note that, even if the U.S. does not proceed with an action against China in the WTO forum, but instead proceeds with sanctions pursuant to Section 301, China could bring an action against the U.S. under the WTO procedures.

Further developments will occur as the two nations try to work through their trade differences.

#### ***Impact on the United States Patent and Trademark Office (USPTO)***

The Trump Administration has many open positions in cabinet or cabinet-level agencies, at the level of Deputy Secretary or Under Secretary / Assistant Secretaries—although all 22 Secretaries / agency heads have been confirmed by the U.S. Senate. In other words, as of July 20, 2017, of those 210 positions, 33 had been confirmed by the Senate, 63 had been nominated or announced, and 114 (54%) have no announced candidates.

One of those open positions is the Director of the USPTO, in light of the former director, Michelle Lee, leaving the agency on June 6. The following day, the Commerce Department elevated Joseph Matal as the Interim Director (an Interim Director does not require Senate confirmation). Mr. Matal had been with the USPTO for five years. Prior to joining the USPTO, he had served as the General Counsel of the powerful Senate Judiciary Committee for former Senator (and current U.S. Attorney General) Jeff Sessions. Mr. Matal received a bachelor’s degree from Stanford University and a law degree from University of California at Berkeley.

According to speculation in the media, two individuals are being considered as Director. One is Andrei Iancu, a managing Partner of the law firm Irell & Manella LLP, where he obtained large settlements for TiVo Corporation against several large technology firms, totaling more than \$1 billion. He previously worked at Hughes Aircraft Company as an engineer. He received a bachelor’s degree in aerospace engineering, a master’s degree in mechanical engineering and a law degree—all from UCLA, where he currently serves as an adjunct professor to the law school.

The second individual is Phil Johnson, who was a Partner at the law firm of Woodcock Washburn LLP and then joined Johnson & Johnson to become Chief IP Counsel and Senior Vice President of Intellectual Property at the company. He retired from Johnson & Johnson in February of 2017. He has a bachelor’s degree in Biology from Bucknell University and a law degree from Harvard.

On August 3, 2017, the Senate did confirm one intellectual-property-related position: Intellectual Property Enforcement Coordinator, frequently referred to as the “IP czar.” The position was created as a result of a 2008 law, and is intended to serve as the chief advisor to the President on enforcement and to coordinate on the intellectual property efforts of the U.S. Department of Justice, USPTO, and Office of the U.S. Trade Representative. The new IP czar is Vishal Amin, who has long worked in Congress and in the White House, including as Senior Counsel for the House Judiciary committee.

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