

US Intellectual Property-Based Sanctions Could Be Imminent

By **Ken Nunnenkamp, Eli Rymland-Kelly and Giovanna Cinelli** (November 13, 2024, 11:27 AM EST)

A recent presidential delegation suggests that regulators may be ready to wield the sanctions authority found in the Protecting American Intellectual Property Act of 2022, which has been unutilized for the first 22 months of its life.

In January 2023, PAIPA became law, mandating a range of sanctions against entities and individuals identified by the president as having committed "significant thefts of trade secrets" belonging to U.S. persons, where the trade secret theft is "reasonably likely to result in, or has materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States."^[1]

With the recent decision to fulfill the requirement of a delegation of authority, PAIPA may now take flight. This unique sanctions statute presents opportunities for U.S. businesses that have been victims of trade secret theft from overseas actors, while at the same time representing another field of potential landmines for uninformed foreign persons and firms.

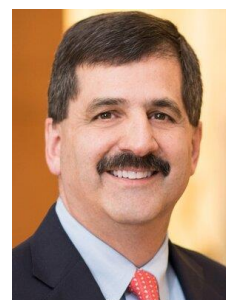
PAIPA Refresher

PAIPA requires the president to file annual reports to Congress identifying "any" foreign person that the president determines meets any one of the following criteria:

(i) has knowingly engaged in, or benefitted from, significant theft of trade secrets of United States persons, if the theft of such trade secrets occurred on or after such date of enactment [Jan. 5, 2023] and is reasonably likely to result in, or has materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States;

(ii) has provided significant financial, material, or technological support for, or goods or services in support of or to benefit significantly from, such theft;

(iii) is an entity that is owned or controlled by, or that has acted or purported to act for or on behalf of, directly or indirectly, any foreign person identified under clause (i) or (ii); or



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(iv) is a chief executive officer or member of the board of directors of any foreign entity identified under clause (i) or (ii).

Once the report has been submitted to Congress, PAIPA mandates that the president "shall" impose at least five sanctions, selected from the menu of sanctions provided in the statute. The sanctions can include blocking sanctions for both entities and individuals.

Until the president formalized implementation, PAIPA's status remained in question. In July, after the anniversary due date for the second PAIPA report to Congress, a presidential delegation was issued.[2] As a result, the U.S. Department of State is now responsible for preparing the first PAIPA report to Congress.

While it is not clear what timelines the State Department will adhere to, if any, the delegation suggests that there may be an appetite to use PAIPA after it lay dormant for the first 18 months of its existence. With the ever-increasing use of sanctions — not only in the U.S., but also by other governments — invoking PAIPA may have an appeal.

What Does the Delegation Mean?

As a result of the delegation, there is now an agency responsible for implementing this significant and potent sanctions weapon. In addition to PAIPA uncertainties that already existed, the recent delegation raises questions regarding the timing of any potential action and whether PAIPA will remain unused for another year.

Pre-Delegation Questions

The statute left many things unanswered.

How will the agencies responsible for implementation — now primarily the State Department — determine whether trade secret theft has occurred? While PAIPA incorporates the definition of "trade secret" from the Economic Espionage Act, PAIPA does not incorporate a criminal standard of proof or evidence. As sanctions practitioners know, the U.S. Department of the Treasury's Office of Foreign Assets Control does not use criminal standards of proof when making sanctions decisions. As such, it remains to be seen what level of proof of a theft of trade secrets will be required for a designation under PAIPA.

With the incorporation of the EEA's definition of "trade secret," will PAIPA's implementation be limited in accordance with decisions under that statute? The U.S. Department of Justice, for example, includes "misappropriation" as reflected in the DOJ Criminal Resource Manual: "The EEA contains two separate provisions that criminalize the theft or misappropriation of trade secrets." Thus, it remains to be seen whether the State Department will develop its own approach or rely on DOJ resources.

Also, will regulations be issued or will the State Department use an ad hoc approach?

And will a court determination of trade secret theft be needed as a predicate to imposing sanctions? If not, and given PAIPA does not exempt determinations from judicial review, will any designations be quickly subject to legal challenge?

Post-Delegation Questions

With the delegation now in place, the previous questions remain and new questions arise, primarily with respect to the timeline the State Department will follow.

When enacted, PAIPA required an initial report by July 4, 2023. That date passed without any indication that it would in fact be used. Now that the State Department owns responsibility for its implementation, will it assume that the initial report date was a one-time requirement that, once passed, can be permanently disregarded, or will the department view the initial report due date to be six months from the delegation (Jan. 15, 2025)?

Equally important, PAIPA directed that each report only look at activity occurring during "the one-year period preceding the date on which the report is required to be submitted." Thus, whenever the State Department decides to act — if it does — it appears limited to, at most, a one-year period during which it can look at trade secret thefts. This raises the question of whether the State Department will use creative approaches to calculate the one-year period.

If the State Department decides it has no further obligation to file the "initial report" required by PAIPA, will the next report due date then be July 4, 2025 (the anniversary of the due date of the initial report)? Keeping in mind that the due dates are end dates, the State Department can issue a report at any time once it makes the requisite findings and determinations.

Whether the State Department is acting under the delegation also remains an open question. The department has not published notice of any further assignment of responsibility or timeline for action. As such, not only is it not clear which section within the State Department will take ownership of this report, but there is also no information about when action might be expected.

At least one issue appears decided: With the U.S. Supreme Court's June 28 ruling in *Loper Bright*, courts will be free to interpret provisions of PAIPA without the extreme deference previously applied under *Chevron*. Given the weighty legal analysis required to find trade secrets violations, PAIPA will need standards to guide the agency's decision-making, and a clear path for parties to engage with the agency.

Are PAIPA Designations Soon to Follow?

With the delegation, PAIPA is now active, and this action suggests that the administration envisions employing this sanctions program. However, it is not clear whether the State Department or other agencies will view the issuance of an implementing executive order or regulations as a necessary predicate, especially since PAIPA leaves a number of essential terms undefined.

Moreover, guidance is likely necessary to inform the public how the department will interpret the part of PAIPA that appears to limit its application to foreign parties guilty of covered trade secret thefts only in the year preceding the report to Congress, which then allows for the imposition of sanctions.

With a responsible agency, the threat of PAIPA designations becomes more real, and more viable. Moreover, the threat of PAIPA sanctions may be wielded as a potential trade secret litigation weapon. Entities that may have hoped PAIPA would fade away and the threat would not materialize may be disappointed.

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[1] In January 2023 and August 2023 publications, we described how PAIPA works and the circumstances under which sanctions would be imposed: <https://www.morganlewis.com/pubs/2023/08/an-initial-look-at-paipas-scope-and-legal-risks>, <https://www.morganlewis.com/pubs/2023/01/new-act-authorizes-sanctions-for-trade-secret-theft>.

[2] <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/07/19/memorandum-on-delegation-of-functions-and-authorities-under-the-protecting-american-intellectual-property-act-of-2022/>.