



Clearing Your Name: When Trade Secret Disputes Become a National Security Issue

The U.S. Department of Justice's now one-year-old China Initiative has made clear that trade secret theft between the U.S. and China is indeed a matter of national security. In their ongoing discussion on IP disputes between the two countries, Kobre & Kim's cross-border IP disputes team offers a number of defensive strategies for non-U.S. entities to consider when a civil trade secret theft dispute turns criminal and the U.S. federal government gets involved.

December 15, 2019

[Click here to read "Clearing Your Name against U.S. Civil Trade Secret Theft Claims" Part 1 of our "Clearing Your Name" series.](#)

As the ongoing trade war with China intensifies, U.S. entities have increasingly alleged trade secret theft against Chinese individuals and companies, in cooperation with U.S. law enforcement actions. With this in mind, Chinese parties in global trade secret disputes will need to anticipate and respond to the risk that their disputes could quickly turn criminal.

In November 2018, the U.S. Department of Justice launched the "China Initiative," which focuses on prosecuting instances of Chinese trade secret theft, computer hacking, and economic espionage. The Initiative promises to tackle both traditional threats to U.S. trade secrets (Chinese companies unlawfully acquiring secrets from U.S. businesses) as well as non-traditional threats (e.g., research labs and universities).

Now one year old, the China Initiative has expanded the scope and sped the pace of trade secret investigations, with no sign of slowing: In the field of biomedical research alone, [recent reports](#) identified 180 individual U.S. investigations of intellectual property theft, primarily at U.S. universities and research labs.

Chinese companies and individuals in the crosshairs of a U.S. criminal trade secret theft proceeding should quickly assess the peril and devise a strategy to defend themselves against enforcement actions brought by U.S. federal or state agencies. The following guideposts offer a targeted defendant a place to start:

Map Out Your Legitimate Discovery of the Information

Federal law requires the U.S. government to prove beyond a reasonable doubt all elements of the offense, including that the alleged trade secret information was discovered by dishonest means. Aggressively developing and using evidence to show otherwise - whether through purchase or licensing of the information, accidental disclosure, or development of the idea in parallel - will help weaken the government's arguments.

Separate Development or Discovery from Commercial Benefit

Trade secret theft violates U.S. criminal law only when the person who misappropriated a trade secret intends for it to bring commercial benefit to "anyone other than the owner." Defendants that are able to separate their commercial interests from the information in question can undercut the government's assertions. This tactic is especially relevant to any entity that is not in direct competition with a U.S. business, or those who work in academic or non-profit institutions.

Consider Possible Asset Forfeiture Implications

In addition to trade secret theft, the U.S. government has also been adding criminal forfeiture allegations to China Initiative cases for both companies and individuals. These allegations allow the government to seize property used or derived from the alleged crime if it obtains a conviction. In particular, if defendants decide not to show up for criminal trial, it grants the U.S. government authority to pursue and recover assets even beyond the borders of the United States.

Prepare for Non-Criminal Government Enforcement

KOBRE & KIM

Because of the China Initiative, any U.S. law enforcement investigation involving cross-border trade secret theft is likely to lead to a criminal prosecution. However, the U.S. government has other non-criminal tools to bring significant pressure on trade secret theft defendants, including civil injunctions and sanctions based on perceived national security threats (which are broadly defined). Entities that focus their defense strategy on criminal proceedings alone may not be mounting a sufficiently aggressive defense.

A cross-border civil dispute over alleged trade secret theft is complex enough, and the involvement of the U.S. government places Chinese parties at additional risk. Off-ramping a criminal investigation, or clearing one's name in a criminal prosecution for alleged trade secret theft, requires a keen understanding of criminal and civil U.S. trade secret laws, as well as the intersection of intellectual property and national security matters.

About Kobre & Kim's Intellectual Property Disputes Team

Kobre & Kim is a global law firm focused on cross-border disputes and investigations, often involving fraud and misconduct. Our conflict-free model allows us to advocate aggressively on behalf of our clients, even in the face of the industry-wide opposition common in trade secret cases.

Our Intellectual Property & Technology Litigation team understands the complex technologies that are often at the center of these types of disputes, and is well-versed in advocating for clients in complex disputes in the U.S. courts and other English-law-based jurisdictions.

Frequently working with other law firms as special counsel, Kobre & Kim regularly represents China-based clients in cross-border government enforcement actions. The Shanghai-based team includes the only former U.S. prosecutor in China from the Department of Justice's National Security division. The team also offers native language support including Mandarin, Cantonese and Shanghainese.