

**Hearing on**

**“Trade Secrets: Promoting and Protecting  
American Innovation, Competitiveness and  
Market Access in Foreign Markets”**

**U.S. House of Representatives Committee on the Judiciary  
Subcommittee on Courts, Intellectual Property and the Internet**

**June 24, 2014**

**Written Statement of Thaddeus Burns  
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**on behalf of**

**Intellectual Property Owners Association  
(IPO)**

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**Introduction and Summary**

Good afternoon Chairman Coble, Ranking Member Nadler, and Members of the Committee. Thank you for inviting me to testify today on the importance of trade secret protection for American companies.

My name is Thaddeus Burns, and I am Senior Counsel, Intellectual Property & Trade, at General Electric, a company that has been at the forefront of innovation since 1892. I am here today on behalf of Intellectual Property Owners Association (“IPO”), a trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO’s membership includes more than 200 companies and more than 12,500 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members.

Trade secrets are an increasingly important part of IPO members’ intellectual property portfolios. IPO members have developed, at significant cost, a host of trade secrets that give each of us a competitive edge and help us outcompete in today’s challenging global markets. These trade secrets are manufacturing processes, industrial techniques, proprietary technologies, formulas, codes, designs, and customer lists. Our competitiveness in the global economy

depends on this information remaining confidential. In all, trade secrets constitute roughly two-thirds of the value of companies' information portfolios.<sup>1</sup>

The value of our trade secrets is not lost on competitors here and around the world. Trade secret misappropriation is a large and growing problem. The threat comes from company insiders who would take our trade secrets and sell them to the highest bidder, and outsiders including both competitors who try to infiltrate our networks and foreign governments and companies overseas using their espionage capabilities against American companies. The rise of sophisticated technology, perpetual connectivity, and globalized supply chains has made it even easier for would-be thieves to access competitively sensitive information. And when that information lands in the hands of a rival, the rival can replicate market-leading innovations at a fraction of the cost, bypassing the years of research and development we put into our products.

We have raised our defenses and are employing the best technologies and strategies to protect our intellectual property. But federal law has not kept pace with the technological innovation that has enabled increased trade secret theft. IPO therefore supports the creation of a federal civil remedy for trade secret misappropriation, to enhance trade secret protection for innovators and give us the tools to protect ourselves. Owners of other forms of intellectual property - copyrights, patents, and trademarks - can enforce their rights in federal court. Trade secret owners should have a similar remedy. At stake are the continued competitiveness of market-leading American companies and the millions of jobs we provide.

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<sup>1</sup> Forrester Consulting, *The Value of Corporate Secrets*, at 2 (March 2010), *available at* <http://www.nsi.org/pdf/reports/The%20Value%20of%20Corporate%20Secrets.pdf>.

## **I. The Current Legal Regime Does Not Provide Sufficient Trade Secret Protection**

The current legal tools available to remedy trade secret theft are unnecessarily inefficient and inconsistent with other areas of intellectual property law. In the United States, these tools comprise the Economic Espionage Act of 1996 (“EEA”), a criminal law, and an array of state laws that provide civil relief.

The EEA is an important law that makes it a crime to steal trade secrets for the benefit of a foreign government or for economic gain. But the EEA is a criminal statute, and criminal law to protect intellectual property has two important limitations. First, the Department of Justice has limited resources and is not in a position to bring charges in all cases of interstate trade secret theft. Second, criminal law punishes the defendant, but the process for compensating the victim is unwieldy, particularly when compared to relief available under civil law.

Federal statutes provide owners of other forms of intellectual property (patents, copyrights, and trademarks) the right to bring a civil action in federal court to recover damages and, in appropriate cases, enjoin further infringement. There is, however, no analogous federal right to enforce trade secrets. We believe there should be. A federal civil remedy would provide a consistent, unified framework for intellectual property protection at the federal level. The tactics employed by those seeking to steal trade secrets are becoming increasingly sophisticated and frighteningly effective; our law simply must keep pace.

Most states have adopted civil remedies based on the Uniform Trade Secrets Act. These laws work well to remedy local and intrastate trade secret theft, such as the case of an employee who takes a customer list to the competitor across town. But today, the increased digitization of critical data and increased global trade have made it easier than ever before to misappropriate vast quantities of data and transport it across state and international boundaries. As a result, trade secret misappropriation cases today often involve actors and witnesses in multiple

jurisdictions within the United States and, increasingly, overseas. State courts, unlike federal courts, are not able to provide for prompt nationwide service of process to join parties and to secure testimony and other evidence. And the fact that data can be copied and transferred far more quickly than in the past heightens the need for immediate relief to halt misappropriation, before the value of a trade secret is lost.

The need for immediate action to remedy trade secret theft is perhaps most pronounced when the theft is by an individual looking to flee the country. State courts are not well equipped to respond to applications for urgent assistance in cases where the defendant has crossed state lines, and they lack the ability of the federal system to protect a trade secret stolen by such a defendant. Whatever the mode of misappropriation, once the trade secret has been divulged, or is made known to a competitor, trade secret protection may be lost forever and the harm from disclosure is often irreparable.

## **II. IPO Supports a Federal Remedy for Trade Secret Misappropriation**

Innovative companies would benefit greatly from a uniform federal remedy that reflects the sophisticated nature of trade secret misappropriation today. IPO supports efforts to create a federal remedy that give trade secret owners access to federal courts to respond quickly to trade secret misappropriation. In IPO's view, an effective remedy would provide the advantages of federal service of process and provide for the speedy entry of orders, including on an *ex parte* basis when warranted to prevent an imminent misappropriation, the dissemination of a stolen trade secret, and to preserve evidence.

Any legislation should be balanced, however, and provide adequate protection against improper use of the statute - particularly when an *ex parte* process is used. While the federal civil remedy should authorize the seizure of a stolen trade secret in limited, appropriate circumstances, the provision must contain safeguards to prevent abuse, including damages in the

event of wrongful seizure and protection of the information seized to protect against inappropriate access to the information.

A federal civil remedy will not lead to increased litigation. Businesses will never be shy about protecting our rights when our investments in research and development, protected by trade secret law, are stolen. We will act to protect our trade secrets, whether it means going to state court or federal court. But a federal remedy will be more efficient and effective. We will be able to go to a single federal judge, rather than running to multiple state courts to stop interstate and international misappropriation.

The need is urgent. The U.S. Department of Defense has noted that “[e]very year, an amount of intellectual property larger than that contained in the Library of Congress is stolen from networks maintained by U.S. businesses, universities, and government departments and agencies.”<sup>2</sup> In a 2012 speech, General Keith Alexander, the then-head of the National Security Agency and U.S. Cyber Command, stated that IP theft due to cyber espionage is the “greatest transfer of wealth in history,” estimating that U.S. companies lose \$250 billion per year due to IP theft.<sup>3</sup> In the United States, federal cases of trade secret theft doubled between 1988 and 1995, doubled again between 1995 and 2004, and are projected to double again by 2017.<sup>4</sup>

The effect of trade secret misappropriation can be measured in dollars lost, jobs cut, new hiring not undertaken, and innovation stifled. For example, when a Ford Motor Co. engineer

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<sup>2</sup> Dep’t of Defense, *Strategy for Operating in Cyberspace*, at 4 (July 2011), available at <http://www.defense.gov/news/d20110714cyber.pdf>.

<sup>3</sup> Josh Rogin, *NSA Chief: Cybercrime Constitutes the “Greatest Transfer of Wealth in History,”* The Cable, July 9, 2012, available at [http://thecable.foreignpolicy.com/posts/2012/07/09/nsa\\_chief\\_cybercrime\\_constitutes\\_the\\_greatest\\_transfer\\_of\\_wealth\\_in\\_history](http://thecable.foreignpolicy.com/posts/2012/07/09/nsa_chief_cybercrime_constitutes_the_greatest_transfer_of_wealth_in_history).

<sup>4</sup> David S. Almeling, *et al.*, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 293 (2010).

copied 4,000 documents and went to work for a competitor, Ford estimated its losses at \$50 million.<sup>5</sup> A technology company shut down after its proprietary source code was misappropriated.<sup>6</sup> The Commission on the Theft of American Intellectual Property, co-chaired by Dennis Blair and Jon Huntsman, found that “illegal theft of intellectual property is undermining both the means and the incentive for entrepreneurs to innovate, which will slow the development of new inventions and industries that can further expand the world economy and continue to raise the prosperity and quality of life for everyone.”<sup>7</sup>

The passage of legislation to create a federal civil remedy will provide an important additional tool to protect American innovation and promote investment in research and development, and the jobs and economic prosperity such R&D will generate.

### **III. Protection of Trade Secrets Abroad**

The ability of American companies to access foreign markets is affected by the protection those markets provide for intellectual property. The Office of the United States Trade Representative (USTR) prepares a “Special 301 Report” each year that identifies trade barriers to American companies due to inadequate or ineffective intellectual property protection. The Special 301 Report is an important tool for putting trade partners on notice about concerns related to their intellectual property protection and, in some instances, for setting the stage for

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<sup>5</sup> See Matthew Dolan, *Ex-Ford Engineer Pleads Guilty in Trade-Secrets Case*, Wall St. J., Nov. 17, 2010.

<sup>6</sup> See S. Rep. No. 104-359, at 9 (1996) (reporting how the source code of Ellery Systems of Boulder, Colorado, which supplied software technology to government projects, was stolen, destroying the financial viability of the company).

<sup>7</sup> The National Bureau on Asian Research, *The Report of the Commission on the Theft of American Intellectual Property*, at 1 (May 2013), available at [http://www.ipcommission.org/report/IP\\_Commission\\_Report\\_052213.pdf](http://www.ipcommission.org/report/IP_Commission_Report_052213.pdf).

trade enforcement action. In 2013, for the first time, USTR included a designated section on trade secret theft in its Special 301 Report.

IPO submitted comments earlier this year to USTR in response to USTR's request for public comment in preparation for the Special 301 Report. IPO's comments highlighted the problem of trade secret misappropriation overseas and discussed where there are significant problems around the world. Issues of concern include forced regulatory disclosure of trade secrets, compulsory licensing, uneven enforcement, difficulties in evidence gathering to prove trade secret theft, and an overall lack of effective intellectual property protection. Inadequate protection of trade secrets abroad harms not only companies whose property is stolen, but also the country where the theft occurs, because companies are then less likely to form joint ventures and make high-value global supply chain investments in those countries.

Despite the challenges, we see some near-term opportunities to strengthen the global framework for intellectual property rights. The United States must be a leader in trade secret protection. A federal civil remedy for trade secret misappropriation is important for our global trade agenda. To date, the United States has not consistently received cooperation from international jurisdictions in protecting trade secrets in part because it does not have its own federal civil statute to reference in encouraging the adoption and enforcement of similar legislation by its treaty partners. Many countries provide insufficient protections for trade secrets, which presents significant economic risks to American companies seeking to expand operations globally. Establishing such a remedy is particularly important as the European Union considers its Trade Secrets Directive and as the United States negotiates multilateral trade agreements and bilateral investment treaties.



The issue of trade secret protection has already been included in draft negotiating agendas for both U.S. and EU negotiators in the Transatlantic Trade and Investment Partnership (TTIP) negotiations. Including trade secrets in a future TTIP Agreement will allow the U.S. and EU to set the “gold standard” for trade secrets protection worldwide. Trade secrets language has also been included in the Trans-Pacific Partnership (TPP) negotiations. Japan’s entry into the negotiations provides a further opportunity to strengthen trade secrets protection in the agreement and throughout the Asia-Pacific region.

#### **IV. Conclusion**

IPO supports a federal civil remedy for trade secret theft because our member companies — creators of innovative products in demand around the world and creators of good, well-paying jobs in the United States — know that our value is in our ideas and our creativity. We are increasingly being targeted by sophisticated efforts to steal our proprietary information. In our global, information-based economy, the U.S.’s most valuable currency is our knowledge. A federal civil remedy will provide important tools we need to safeguard our valuable know-how and to continue to lead the world in creating new and innovative technologies, products, and services.