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on behalf of

Intellectual Property Owners Association

House Committee on the Judiciary

Subcommittee on Courts, Intellectual Property and the Internet

"Safeguarding Trade Secrets in the United States"

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Good morning, Chairman Issa, Ranking Member Johnson, and Members of the Subcommittee. Thank you very much for the opportunity to testify today on the importance of trade secret protection to American companies.

My name is Ken Corsello, and I am Counsel, Intellectual Property, for IBM's Watson Customer Engagement business unit. During my career, I have worked on various trade secret related issues in the context of client counseling, litigation, and IP transactional matters. I currently serve as the Chair of the Trade Secret Committee of the Intellectual Property Owners Association (IPO). I am testifying today on behalf of IPO, which is 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 around 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.

The Stronger Trade Secret Protection Brought by the DTSA Is Increasingly Important to the U.S. Economy

IPO supported the legislation that became the Defend Trade Secrets Act of 2016 (DTSA), and we continue to support strong trade secret laws. As the Supreme Court has recognized, trade secret law "promotes the sharing of knowledge, and the efficient operation of industry; it permits the individual inventor to reap the rewards of his labor by contracting with a company large enough to develop and exploit it."[1] For American individuals and companies, the availability of adequate legal measures to protect and enforce trade secrets has only continued to grow in importance during the two years since the DTSA came into effect.

The trade secret laws set a standard of commercial ethics, good faith and fair dealing, and in this way facilitate the functioning of our modern economy. Without strong trade secret protections, concern for possible disclosure of commercially valuable information would cause companies to be less willing to share knowledge among employees, and companies' security precautions and costs would increase. Entrepreneurs would confine research efforts to a small group, the licensing and sharing of ideas between companies would slow, and research would become fragmented. This reflects the fact that companies would be less willing to share valuable information with another party if that other party could misuse that information with impunity. While a company should be able to trust its employees and business partners who promise not to misuse the company's secrets, human nature being what it is, it is important that that there be a legal remedy to back up that trust, as evidenced by the many cases filed

[1] Kewanee Oil v. Bicron Corp., 416 U.S. 470, 493 (1974).

under the DTSA in the past two years. And in today's national economy, it is important that there is now a specific Federal cause of action for trade secret theft, which allows for the development of a more predictable body of case law.

In just the last two years of our modern information-based economy, the value of trade secrets to American companies has increased at an incredible rate. Fueled by the fast pace of developments in information technology, the rate of change will only increase more in the years ahead. The scope of trade secrets is broad, and they underlie business models across all industry sectors. For the purposes of the DTSA, trade secrets reach "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes . . . ."[2] This includes the proprietary software that is the intelligence behind many of the products and services that we use today, as well as the proprietary data that businesses increasingly rely upon.

The world is generating billions of gigabytes of data every day.[3] This includes sales records, tweets, and data generated by devices that are part of the internet of things. Using sophisticated analytic software, companies are able to extract new insights and value from the data they collect. Trade secret protection plays an important role in the creation, use, and protection of the insights learned by applying data analytics techniques to big data sets. These insights allow business to improve and to reduce the costs of the products and services delivered to their customers. But businesses will be less willing to make the

[2] 18 U.S.C. § 1839 (2018).

[3] See IDC, "The Evolution Of Data Through 2025," available at https://www.seagate.com/files/www-content/our-story/trends/files/data-age-2025-infographic-2017.pdf.

investment needed to gather this data and build and implement these data analytics tools without some confidence that the legal system will protect their proprietary insights from being appropriated by others.

Another reason for the increased importance of trade secret protection is that, at the same time information has become more valuable, it has become easier to steal. With only a few mouse clicks, thousands of files can be copied to a thumb drive or transferred directly to the computer of someone who should not have access to those files. The DTSA provides important Federal legal remedies that discourage such theft and, in certain circumstances, can avoid damage by allowing for an *ex parte* seizure.

In addition, the decrease in the strength of patent protection in the U.S. over the past decade has, at the margins, increased the importance of trade secret protection to U.S. industry. But I want to caution that trade secret protection, copyright protection, and patent protection are complementary, not substitutes for one another. If a particular technology cannot by its nature be commercialized without disclosing the innovation to the public, which is often the case, then trade secret protection is not appropriate, and such innovation can only be protected by patents. This is also true for technologies that can be easily reverse engineered, and in technologies where a trade secret might only yield a very brief edge before a competitor independently commercializes the same technology.

IPO Recommends Additional Improvements to Protect American Trade Secrets

IPO members are grateful to this Committee for its work to adopt the protections included in the DTSA. The significant number of cases that have been brought under the DTSA already is evidence of its usefulness. Members are watching these developments in courts, and at this time we are not aware of any significant complaints about the DTSA itself. But there is more that can be done to protect trade secrets. IPO's Trade Secrets Committee considered, and the full IPO Board recently adopted, a resolution supporting improving protection of trade secrets of American companies by reforming 28 U.S.C. § 1782.[4] Section 1782 is the statutory section that allows foreign litigants to come into U.S. courts and gain access to testimony and other evidence – in many cases including trade secrets – for use in foreign judicial proceedings.

Given the growing importance of trade secrets in our modern economy, such legislation is needed to prevent compelled production of confidential information where the district court cannot effectively guarantee its protection. In addition, changes to § 1782 should address the problems that the evidence being sought in the U.S. may not be discoverable or admissible in the foreign jurisdiction and the fact that there is no reciprocity because access to evidence in the foreign jurisdiction by a U.S. applicant is not available. Reforming § 1782 also would encourage other countries to improve their protections for trade secrets, and will provide an incentive for those countries to bring their civil dispute resolution systems up to U.S. standards.

[4] See Intellectual Property Owners Resolution, "Reciprocity for Foreign Discovery In U.S. Courts," (Mar. 7, 2018), available at https://www.ipo.org/index.php/advocacy/board-resolutions/2018-board-resolutions/

It is also important to include trade secret protection frameworks in any U.S. trade agreements. Improving trade secret protections in other countries will benefit U.S. companies because it will help lower the risk of doing business there and increase predictability.

Conclusion

The member companies of IPO know that our value is in our ideas and our creativity. The DTSA provides important tools for safeguarding our proprietary information so that we can continue to lead the world in creating new and innovative technologies, products, and services. IPO urges you to consider additional improvements by amending § 1782 to further enhance trade secret protection for American companies.