To provide for Federal civil liability for trade secret misappropriation in certain circumstances.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 21, 2013

Mr. FLAKE introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for Federal civil liability for trade secret misappropriation in certain circumstances.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Future of American Innovation and Research Act of 2013” or the “FAIR Act”.

SEC. 2. DEFINITIONS.

In this Act—

(1) the term “covered trade secret” means a trade secret that is related to or included in a prod-
uct or service that is used in or reasonably antici-
pated to be used in interstate or foreign commerce;

(2) the term “improper means”—

(A) includes theft, bribery, misrepresenta-
tion, breach or inducement of a breach of a
duty to maintain secrecy, and espionage
through electronic or other means; and

(B) does not include reverse engineering or
independent derivation alone;

(3) the term “misappropriate” means—

(A) to acquire a trade secret of another by
improper means, if the person who acquires the
trade secret knows or has reason to know that
the acquisition is by improper means; or

(B) to disclose or use a trade secret of an-
other without express or implied consent, if the
person who discloses or uses the trade secret—

(i) used improper means to acquire
knowledge of the trade secret; or

(ii) at the time of the disclosure or
use, knows or has reason to know that his
or her knowledge of the trade secret was—

(I) derived from or through a
person who used improper means to
acquire the trade secret;
(II) acquired under circumstances giving rise to a duty to maintain the secrecy, or limit the use, of the trade secret; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy, or limit the use, of the trade secret;

(4) the term "person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity; and

(5) the term "trade secret" means any information, including a formula, pattern, compilation, program, device, method, technique, or process, that—

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public or other persons who can obtain economic value from the disclosure or use of the information; and

(B) is the subject of efforts that are reasonable under the circumstances to maintain the secrecy of the information.
SEC. 3. CIVIL ACTION.

(a) IN GENERAL.—The owner or lawful possessor of a covered trade secret may bring a civil action against a person who misappropriates, threatens to misappropriate, or conspires to misappropriate the covered trade secret—

(1) while located outside the territorial jurisdiction of the United States; or

(2) on behalf of, or for the benefit of, a person located outside the territorial jurisdiction of the United States.

(b) FEDERAL COURT JURISDICTION.—The district courts of the United States shall have exclusive jurisdiction of a civil action under this Act.

(c) EXTRATERRITORIALITY.—A civil action under this Act may arise from conduct outside the territorial jurisdiction of the United States if the conduct, either by itself or in combination with conduct within the territorial jurisdiction of the United States, causes or is reasonably anticipated to cause an injury—

(1) within the territorial jurisdiction of the United States; or

(2) to a United States person.

SEC. 4. REMEDIES.

In a civil action brought under this Act, a court may—

(1) issue—
(A) an order for appropriate injunctive relief against any conduct described in section 3(a);

(B) an order requiring affirmative actions to be taken to protect a covered trade secret from further misappropriation; and

(C) if the court determines that it would be unreasonable to prohibit further possession, disclosure, or use of a covered trade secret, an order requiring payment of a reasonable royalty for any ongoing disclosure or use of a covered trade secret, in addition to the damages described in paragraph (2);

(2) award—

(A) damages for actual loss caused by the misappropriation of a covered trade secret; and

(B) damages for any unjust enrichment caused by the misappropriation of a covered trade secret that is not addressed in computing damages for actual loss under subparagraph (A);

(3) if a trade secret is willfully or maliciously misappropriated, award punitive or exemplary damages in an amount not more than twice the amount of the damages awarded under paragraph (2); and
(4) if a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or opposed in bad faith, or a trade secret is willfully or maliciously misappropriated, award reasonable costs and attorney’s fees to the prevailing party.

SEC. 5. PROCEDURE.

(a) PLEADINGS.—

(1) COMPLAINT.—A complaint filed in a civil action brought under this Act shall include a sworn representation by the plaintiff that the dispute involves conduct described in section 3(a).

(2) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense in a civil action brought under this Act that each alleged covered trade secret in dispute was readily ascertainable through proper means by other persons who did not already know the covered trade secret at the time of any alleged misappropriation, threat to misappropriate, or conspiracy to misappropriate.

(b) FORUM NON CONVENIENS.—In considering a motion to dismiss or stay on forum non conveniens grounds filed in a civil action brought under this Act, a court shall—
(1) give great weight to the plaintiff’s choice of forum; and

(2) consider whether the plaintiff reasonably could receive fair and impartial treatment in the courts of the jurisdiction in which the defendant is domiciled.

(e) Anti-Suit Injunctions.—In a civil action brought under this Act, the court may enter an injunction enjoining a defendant over whom the court has personal jurisdiction from pursuing subsequently filed litigation in another jurisdiction if—

(1) the parties are the same in both matters;

(2) the resolution of the case before the enjoining court will be dispositive of the action to be enjoined; and

(3) the action in the other jurisdiction threatens the jurisdiction of the court or the purposes of this Act.

(d) Confidentiality.—In any proceeding relating to a civil action brought under this Act, the court shall enter any order and take any other action that is necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the requirements of the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and all other applicable laws.
(e) Statute of Limitations.—A civil action brought under this Act may not be commenced later than 3 years after the date on which the conduct described in section 3(a) that forms the basis for the action was discovered or by the exercise of reasonable diligence should have been discovered.

SEC. 6. SEIZURES.

(a) In General.—In a civil action brought under this Act, the court may, upon ex parte application and if the requirements under subsection (b) are satisfied, issue an order (referred to in this section as a “seizure order”) providing for—

(1) the seizure of any property (including computers) used, in any manner or part, to commit or facilitate the commission of conduct described in section 3(a) that is alleged in the civil action; and

(2) the preservation of evidence in the civil action.

(b) Requirements.—A court may issue a seizure order if—

(1) the applicant provides security in an amount that the court determines is adequate to pay any damages a person may be entitled to recover as a result of a wrongful seizure or wrongful attempted seizure under this section; and
(2) the court finds that specific facts clearly show that—

(A) any order other than an ex parte seizure order is not adequate to effectively cause the cessation of the conduct described in section 3(a) that forms the basis of the action;

(B) the applicant has not publicized the requested seizure;

(C) the applicant is likely to succeed in showing that the person against whom seizure is sought misappropriated, threatened to misappropriate, or conspired to misappropriate a covered trade secret of which the applicant is the owner or lawful possessor;

(D) the applicant will suffer an immediate and irreparable injury if a seizure is not ordered;

(E) the matter to be seized is located at the place identified in the application;

(F) the harm to the applicant that would be caused by denying the application outweighs the harm to the legitimate interests of the person against whom seizure is sought that would be caused by granting the application; and
(G) if the applicant were to proceed on no-
tice to the person against whom seizure is
sought, that person, or persons acting in con-
cert with that person, would destroy, move,
hide, or otherwise make the matter to be seized
inaccessible to the court.

(e) PROCEDURE.—A seizure order shall—

(1) direct that service of a copy of the seizure
order shall be made by a Federal law enforcement
officer (such as a United States marshal), who, upon
making service, shall carry out the seizure under the
seizure order;

(2) direct that any items seized shall be taken
into the custody of the court;

(3) include a protective order with respect to
items seized, to ensure that confidential, private,
proprietary, or privileged information contained in
the items seized, including any such information be-
longing to the defendant and third parties, is appro-
priately protected and that access to the items seized
is appropriately restricted; and

(4) specify a hearing date, not earlier than 3
days and not later than 10 days after the seizure
order is issued, for the court to review whether the
items seized should remain in the custody of the court.

(d) ORDER UNDER SEAL.—

(1) IN GENERAL.—Except as provided under paragraph (2), a seizure order, together with any supporting documents, shall be sealed until the person against whom the seizure order is directed has an opportunity to contest the seizure order.

(2) ACCESS AFTER SEIZURE.—A court shall allow a person against whom a seizure order is directed to have access to the seizure order and any supporting documents after the seizure is carried out.

(e) SEIZURE HEARING.—

(1) DATE.—A court that issues a seizure order shall hold a hearing under this subsection on the date set by the court under subsection (c)(4) unless a party shows good cause for setting a different date.

(2) BURDEN OF PROOF.—At a hearing under this subsection, the party that obtained the seizure order shall have the burden of proving that the factual and legal grounds necessary to support the seizure order are still in effect.
(3) Dissolution or Modification of Order.—If a party fails to meet the burden specified under paragraph (2), the court shall dissolve or modify the seizure order appropriately.

(4) Discovery Time Limits.—The court may issue an order modifying the time limits for discovery under the Federal Rules of Civil Procedure as necessary to prevent the frustration of the purposes of a hearing under this subsection.

(f) Injured Party.—

(1) Cause of Action.—A party that is injured by a seizure carried out in a civil action brought under this Act and that prevails in the civil action may bring a civil action under this subsection against the applicant for the seizure order in a district court of the United States.

(2) Remedies.—A party that prevails in a civil action brought under this subsection shall recover—

(A) reasonable costs and attorney’s fees incurred in defense against the seizure order described in paragraph (1) unless the court finds that extenuating circumstances merit denying such costs and fees; and
(B) lost profits and punitive damages if the seizure order described in paragraph (1) was sought in bad faith.