

SAFEGUARDING TRADE SECRETS IN THE UNITED STATES

HEARING BEFORE THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

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TUESDAY, APRIL 17, 2018

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE
INTERNET

Washington, DC.

The subcommittee met, pursuant to call, at 2:00 p.m., in Room 2141, Rayburn House Office Building, Hon. Darrell Issa [chairman of the subcommittee] presiding.

Present: Representatives Issa, Goodlatte, Collins, Chabot, DeSantis, Johnson of Georgia, Nadler, Schneider, and Lofgren.

Staff Present: Tom Stoll, Counsel; Eric Bagwell, Clerk; Jason Everett, Minority Counsel; David Greengrass, Minority Senior Counsel; and Veronica Eligan, Minority Professional Staff Member.

Mr. ISSA. Good morning. The ranking member will be here shortly, well before his opening statement. So, I am going to move this along. We do not know whether we will break at 2:30 for the classified briefing. The assumption right now is we will work through it and members will come and go. So, with that.

The subcommittee on Subcommittee on Courts, Intellectual Property, and the Internet will now come to order. Without objection, the chair is authorized to declare recesses of the subcommittee at any time. We welcome everyone here today for this hearing on Safeguarding Trade Secrets in the United States. I will now recognize myself for an opening statement.

Trade secrets are, by definition, commercially valuable designs, processes, techniques, and other forms of information that provide a competitive advantage in a marketplace when kept a closely held secret, often developed at great cost and through many years of research.

Trade secrets drive investments in research and technology and often are key innovation for growth. Often, a trade secret lies in plain sight to those who are entrusted to work with that. Famously, the Coca-Cola recipe is not in a vault, but in fact, anyone producing the product would see each and every ingredient and in what proportions.

Economists estimate that trade secrets comprise roughly two-thirds of the value of companies' intellectual property portfolios. And that they are important to success for businesses, large and

small. Something as simple as a small company being able to simply work 2 or 3 percent more efficient in something as simple as dry cleaning or in the preparation of meals can give a competitive advantage.

In a large company, it could be a fraction of a percent of efficiency in some commodity that could give somebody the ability to make a profit. While somebody else is only able to break even.

And during the 112th Congress, we passed the America Invents Act to address patent litigation abuse and to respond to calls for stopping patent trolling. Our efforts to address patent trolling have been a vital resource to a rebounding success, although it is still a work in process.

With that unquestionable success on the patent front, companies developing new technologies are now more and more turning to trade secret laws to protect their most valuable technologies. The DTSA provided certain tools for a United States company to protect their trade secrets while creating a Federal civil remedy for trade secret misappropriation.

The trade secrets misappropriation, though, is limited and, in fact, depends on quick action in many cases by those who have had their secrets stolen. Today we will evaluate, among other things, is the DTSA working as intended and what else can Congress do?

Unfortunately, even after the enhancement of the DTSA, thieves are still absconding with digital stacks of information, documents containing the most prized trade secrets of our companies. This hearing will help us to ensure that the DTSA is working as intended or that we consider remedies to make it work as we planned.

One particular area is closing the discovery loophole to safeguarding trade secrets. What we call the discovery loophole for today is a concern under 28 U.S.C. section 1782. The section 1782 portion of the statute allows foreign entities with merely an interest in foreign litigation to compel discovery in the United States. U.S. companies argue that the U.S. courts have interpreted section 1782 more broadly than they should have.

They argue that foreign companies engaged in technology-relevant litigation have been using section 1782 to obtain information—and I want you to hear this carefully—that they could not have obtained in their home court. Again, under section 1782, companies in foreign domiciles are, in fact, gaining discovery they could not have gained in their home country. And that statute provides no protection to safeguard trade secrets of U.S. companies.

The assumption, of course, is when you go in to a litigation in the United States, as a matter of routine a protective order would be granted for a great many things. Not just trade secrets but profits, losses, names of individuals, or even simply what your profit margin is on an item can be protected. And yet, currently, defendants cannot go into court with any assurance that they will have similar protections from a suit, not in the U.S., but in a foreign country who, by definition, would be thought to have less right to your intellectual property rather than more.

It is possible that this could be corrected by court action. It is possible that it could be corrected by administrative action. And it is possible that we will have to correct it by the action of this com-

mittee and the Congress. And with that, I recognize the ranking member, as promised, for his opening statement.

Mr. JOHNSON of Georgia. Thank you, Mr. Chairman. Ladies and gentlemen, today we will examine whether trade secret laws have been adequately protecting United States companies and whether the Defend Trade Secrets Act has been working effectively. Trade secrets provide a valuable competitive advantage in the marketplace and often require companies to invest great sums of money for research and development.

Trade secrets make up a major part of today's economy, and thus, are susceptible to theft. Digitization of critical data and the use of computer technologies and mobile devices have made the theft of trade secrets easier. There are many examples of trade secrets, such as customer lists, manufacturing techniques, and confidential formulas. One of the most well-known being the formula for Coca-Cola.

According to the Commission on the Theft of American Intellectual Property, trade secrets theft cost the U.S. economy between \$180 billion and \$540 billion a year. This fact demonstrates how much of a financial loss trade secret theft can have, not just on U.S. companies, but also on the entire U.S. economy. And also demonstrates why it is so critical that we work to protect trade secrets.

In 2016, Congress passed the Defend Trade Secrets Act, which created a Federal civil cause of action for the misappropriation of trade secrets. Prior to enactment of this bill, trade secrets were protected through State interpretations and selective application of provisions in the Uniform Trade Secrets Act. Since the DTSA was enacted, there have been hundreds of cases filed. It appears that the law is allowing companies to recover for the theft of trade secrets by competitors.

Today we are interested in hearing from the witnesses about whether Congress needs to do more to help companies protect their trade secrets. And we want to hear from the witnesses about whether the Defend Trade Secrets Act is working as it was intended, whether it is providing adequate protections, and whether there may be more that Congress can do to prevent future trade secret theft from U.S. companies and if so, what approach should Congress take? I look forward to hearing from the witnesses, and thank the chairman for holding this hearing, and I yield back the balance of my time.

Mr. ISSA. I thank the gentleman. We now recognize the chairman of the full committee, the gentleman from Virginia, Mr. Goodlatte.

Chairman GOODLATTE. Well, thank you, Mr. Chairman. For the last several years, the House Judiciary Committee has been working tirelessly to protect American innovators' inventions while also ensuring that companies are free to innovate without fear of being harassed. One form of invention that deserves strong protection is trade secrets.

Trade secrets are the formulas, algorithms, and recipes that give companies an edge over their competition, like the recipes that make Little Debbie Oatmeal Creme Pies and Hershey's Heath Bars so delicious. Roald Dahl's fictional Willie Wonka character and his "everlasting gobstopper" teach even children that valuable business

information must be kept secret from the competition, and for good reason.

Estimates show that trade secret theft costs the U.S. economy between \$180 billion and \$540 billion. The threat posed by trade secret theft is real and significant. Protecting trade secrets is a national priority, and this committee has demonstrated its commitment to doing so.

Through the enactment of the Defend Trade Secrets Act, Congress dramatically improved protections for U.S. trade secrets. That legislation established for the first time in our history a Federal right of action for companies to seek redress for the harm caused them through the theft of a trade secret. It also established a new mechanism for companies to obtain the assistance of Federal courts and Federal law enforcement in securing a lost trade secret before it is disseminated or disclosed.

But, given the vital importance of trade secrets to the U.S. economy, Congress must continue to closely monitor the effectiveness of our trade secret protections and do all that it can to protect America's most valuable technologies from theft.

Unfortunately, some of the same technologies that have done so much to improve our lives continue to make it easy to steal valuable trade secrets. A 32 gigabyte USB flash drive can store 640,000 Word document pages, and file sharing and storage facilities allow users to share files at the mere click of a mouse. Using these technologies, thieves continue to steal the crown jewels of large and small companies alike.

Recent examples involve the theft of marine construction technology, the designs for underwater vehicles developed by a defense contractor, the theft of technology used for printing on any type of material, and even rice seeds genetically programmed to express recombinant human proteins extracted for therapeutic uses. In this hearing, we will investigate whether the Defend Trade Secrets Act is, in fact, working as intended. We will also investigate whether additional safeguards are needed to further prevent the theft of U.S. trade secrets.

28 U.S.C. section 1782 allows foreign entities with merely an interest in foreign litigation to compel discovery from U.S. companies. The only protections expressly afforded U.S. companies in the statute are limited to legally applicable privileges, such as the attorney-client privilege. As applied to foreign technology disputes, court interpretations of the statute unquestionably expose the technologies and confidential business information of U.S. companies to possible theft or, at a minimum, disclosure to competitors.

This hearing will provide an opportunity to discuss the need to amend 28 U.S.C. section 1782 to prevent foreign entities from abusing U.S. discovery laws to impermissibly gain access to U.S. trade secrets. I want to thank Chairman Issa for overseeing this hearing, and I thank the witnesses for their participation. I look forward to delving into this very important issue.

Mr. ISSA. I thank the gentleman. It is our pleasure to introduce the ranking member of the full committee, the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman next month marks the 2-year anniversary of President Obama signing

into law the Defend Trade Secrets Act, DTSA. This bipartisan legislation, which passed nearly unanimously, created the uniform Federal civil cause of action for misappropriation of trade secrets. I was proud to be the lead Democratic sponsor of this legislation, alongside the gentleman from Georgia, Mr. Collins, as well as Senators Hatch and Coons.

Trade secrets are proprietary business information that derive their value from being and remaining secret. This includes secret recipes, software codes, and manufacturing processes. Information that, if disclosed, could prove ruinous to a company.

As the U.S. economy becomes more and more knowledge- and service-based, trade secrets are increasingly becoming the foundation of businesses across the country, with one estimate placing the value of trade secrets in the United States at \$5 trillion. Unfortunately, with such fortunes resting on trade secrets, theft of this property is inevitable. And in today's digital environment, it has never been easier to transfer stolen property across the globe with a click of a button.

By one estimate, the American economy loses between \$180 billion and \$540 billion each year due to misappropriation of trade secrets. Millions of jobs are lost as a result. Prior to enactment of the DTSA, victims of trade secret theft had to contend to the patchwork of Federal and State laws that provided uneven and inadequate protection to American companies.

The DTSA filled this gap by creating the uniform Federal civil cause of action for theft of trade secrets. It also provided for expedited ex parte seizure of property but only in extraordinary circumstances where necessary to preserve evidence or prevent dissemination. We are now 2 years after enactment of this legislation, and it is a good time to evaluate how the law is working and whether any further improvements are warranted.

I understand that early indications are that the law has been a great success. As one of the authors, I am gladdened by this. As seen in the recent *Waymo v. Uber* case, companies are successfully using the law to recover damages for the theft of trade secrets, and equally important, the courts have not been overburdened by a surge of litigation.

It also appears that courts are finding a reasonable balance when exercising its extraordinary ex parte seizure authority. But no legislation is perfect, and if additional refinements of the law are necessary, we should certainly consider them in due course. Trade secrets theft is a drag on economic growth and diminishes the incentive to innovate.

With so much at stake, it is vital that the law includes strong protections against theft of trade secrets. We took an important step with passage of the Defend Trade Secrets Act, and we should continue to look for opportunities to protect all forms of American intellectual property. Thank you, Mr. Chairman, for holding this important hearing. I look forward to hearing from our witnesses, and I yield back the balance of my time.

Mr. ISSA. I thank the gentleman. Without objection, all members' opening statements are made part of the record.

Mr. ISSA. Pursuant to the committee's rules, would you all three please rise to take the oath? Raise your right hands. Do you sol-

emly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth? Please be seated. Let the record indicate that all three witnesses answered in the affirmative.

Our distinguished panel of witnesses today include Mr. Kenneth Corsello, chair of the Trade Secrets Committee at the Intellectual Property Owners Association; Mr. James Pooley, of James Pooley, PLC; and Mr. David Almeling, partner at O'Melveny & Myers LLP. In other words, we have some very smart lawyers here today.

It is the custom of the House and the rule of the committee that we do our best to limit you each to 5 minutes so that we can grill you with questions after your short statements. But, as is always the case, your entire written statements will be made a part of the record in the entirety. So, you need not read off of anything. You can go extemporaneous for all 5 minutes, and we will still write down that you said everything that you submitted to us. So, with that, Mr. Corsello.

STATEMENTS OF KENNETH CORSELLO, CHAIR, TRADE SECRETS COMMITTEE, INTELLECTUAL PROPERTY OWNERS ASSOCIATION (IPO); JAMES POOLEY, JAMES POOLEY, PLC; AND DAVID ALMELING, PARTNER, O'MELVENY & MYERS LLP

STATEMENT OF KENNETH CORSELLO

Mr. CORSELLO. Thank you. Chairman Issa, Chairman Goodlatte, Ranking Member Johnson, Ranking Member Nadler, and members of the subcommittee, thank you for the opportunity to testify today on the importance of trade secret protection to American companies. My name is Ken Corsello, and I am the intellectual property counsel for IBM's Watson Customer Engagement business unit. I currently serve as the chair of the Trade Secret Committee of the Intellectual Property Owners Association, which is known as IPO.

I am testifying today on behalf of 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 supported the legislation that became the Defend Trade Secrets Act of 2016, known as the 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.

The trade secret laws set a standard of commercial ethics, good faith, and fair dealing, and thus facilitate the functioning of our economy. Without strong trade secret protections, concern for possible disclosure of valuable information would cause companies to be less willing to share knowledge and companies' security precautions and costs would increase. For American individuals and companies, the availability of adequate legal measures to protect trade secrets has continued to grow in importance during the 2 years since the DTSA came into effect.

Trade secrets 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. 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 businesses increasingly rely upon.

Using sophisticated software, companies can now extract new insights and value from the data they collect. DTSA plays an important role in protecting insights learned by applying data analysis techniques to big data sets. These insights allow businesses to improve and to reduce the costs of the products and services.

But businesses will be less willing to make investments needed to gather data and implement analytics tools without confidence that the legal system will protect their proprietary insights from being taken by others. Another reason for the increased importance of trade secret protection is that information has increasingly become easier to steal. With a few mouse clicks, for example, thousands of files can be copied to a thumb drive. The DTSA provides important Federal legal remedies to discourage such theft.

In addition, decreases in the strength of patent protection over the past decade have, at the margins, increased the importance of trade secret protection. But I want to caution that trade secret protection, copyright protection, and patent protection are complementary, not substitutes for one another.

If, for example, a particular technology cannot by its nature be commercialized without disclosing the innovation, as is common, then trade secret protection is not appropriate, and such innovation can only be protected by patents.

IPO members are grateful to this committee for its work to adopt the protections included in the DTSA. The significant number of cases brought under the DTSA already is evidence of its usefulness. IPO members are watching these developments in courts, and at this time are not aware of any significant complaints about the DTSA itself. But there is more that can be done to protect trade secrets.

The full IPO board recently adopted a resolution supporting improving protection of trade secrets of American companies by reforming 28 U.S.C. section 1782. This 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, legislation reforming section 1782 is needed to prevent compelled production of confidential information in situations where the district court cannot effectively guarantee its protection, as well as to carry out the original intent of the statute by encouraging reciprocal treatment of U.S. persons by foreign jurisdictions. Reforming section 1782 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.

In 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. I thank you for your attention; I will be pleased to respond to any questions.

Mr. ISSA. Thank you.

Mr. Pooley.

STATEMENT OF JAMES POOLEY

Mr. POOLEY. Good afternoon, Chairman Issa, Ranking Member Johnson, Chairman Goodlatte, Ranking Member Nadler, and members of the subcommittee. Thank you for inviting me here today. My name is James Pooley. I became a lawyer in Silicon Valley in 1973, and since then have handled hundreds of trade secret disputes in State and Federal courts throughout the country.

My legal treatise, "Trade Secrets," has been updated continuously since 1997. My most recent business book, "Secrets of Managing Information Assets in the Age of Cyberespionage," was released in 2015. In December of that year, I was privileged to testify to the Senate under then-pending Defend Trade Secrets Act. I am currently chair of the Sedona Conference Working Group 12 on Trade Secrets and am co-chair of the Trade Secrets Task Force of the International Chamber of Commerce.

Over the past 40 years, we have witnessed the most profound change in the nature of business assets since the beginning of the Industrial Revolution. We have transformed an economy that depends primarily on tangible assets, like heavy machinery and railroads, to an economy that depends primarily on data. Importantly, this new property that fuels our economy is mainly protected as trade secrets.

Trade secret theft hurts all kinds of companies. When businesses lose secrets to a competitor, the competitor can go straight to manufacturing without the costs and risks of honest R&D, allowing it to undercut the original innovator, resulting in lost profits and jobs. Companies are increasingly aware that their trade secrets are vulnerable to loss, and they are taking steps to protect themselves. But no management system is perfect.

And so, trade secret law exists to provide judicial intervention when the integrity of a company's confidential information is compromised or threatened. In order to provide more efficient and reliable access to the courts, you enacted the Defend Trade Secrets Act of 2016. I am pleased to report that it has been a great success. As a litigator using the statutes, and in many conversations with other lawyers and with judges handling these cases, we see that this new statute is working as Congress intended.

The fears expressed during consideration of the law that it might encourage a new species of trade secret troll have not materialized. And the major concern over possible misuse of the DTSA's ex parte seizure provisions has also dissipated, since only a small handful of such orders have actually been issued by the courts. In short, the DTSA is well on its way to achieving its goal of strengthening the enforcement and predictability of trade secret rights.

One of the virtues of getting an improved legal environment for the protection of trade secrets is that it is easier to spot weak spots in the system. One of those relates to the operation of the 28 U.S.C. section 1782, which allows foreign litigants to petition U.S. courts for access to testimony and other evidence for use in foreign proceedings.

This statute has been in effect for many years, but due to broad interpretations by the courts, it has come to be used much more

frequently, exposing potentially sensitive data from U.S. companies at the request of foreign entities who themselves do not face reciprocal discovery. In effect, it is a one-way street for the acquisition and export of U.S. information.

What does this have to do with trade secrets? Our own courts have a lot of experience in restricting access and preventing the misuse or publication of discovery material. However, with section 1782, the ultimate recipient of the information is a foreign court, where trade secret protections can vary from relatively weak, to dangerous, to virtually nonexistent.

In fact, the trade secret enforcement frameworks of most countries in the world are substantially weaker than in the U.S. Therefore, when the confidential information of a U.S. business is ordered produced under a section 1782 petition, there are no reliable safeguards to ensure that the receiving court will provide adequate protection to maintain secrecy.

We should all be deeply worried that under section 1782 information belonging to U.S. companies can be sent to a foreign tribunal without any protections imposed by our courts. We should insist that U.S. courts, in granting these petitions, impose reasonable safeguards against misuse or disclosure before the information leaves our country.

In my view, such a modest requirement would provide substantially enhanced protection for the trade secrets of U.S. businesses. I appreciate the opportunity to appear before you today and welcome any questions. Thank you.

Mr. ISSA. Thank you.

Mr. Almeling.

STATEMENT OF DAVID ALMELING

Mr. ALMELING. Thank you. Chairman Issa, Ranking Member Johnson, Chairman Goodlatte, and Ranking Member Nadler, and distinguished members of the subcommittee, thank you for inviting me to testify today. My name is David Almeling, and I am a partner at the law firm of O'Melveny & Myers. I appear today, though, in my individual capacity and not on behalf of my firm, my clients, or anyone else.

As the subcommittee recognized as part of its work on the DTSA a few years ago, trade secrets are increasingly valuable to American companies and increasingly in danger of misappropriation. Those trends continue today.

My colleagues and I conducted a survey, published in January 2018, with attorneys who worked at companies. More than 75 percent of the respondents to our survey said that the risks to their trade secrets have increased over the past 10 years; 50 percent saying those increases have been significant. None—zero—believe those risks have decreased.

The DTSA was enacted in part to address these increased threats to trade secrets. As noted, next month is the DTSA's 2-year anniversary. Therefore, I would like to share with the subcommittee some data on how the DTSA is progressing in its first couple of years.

First, while trade secrets owners are using the DTSA to protect and enforce their trade secret rights, the DTSA did not result in

an unmanageable surge in litigation. The number of new cases filed in Federal district court under the DTSA in its first year of existence was about 500 cases. That is just one benchmark. During that same year, the number of new patent cases was about 10 times that number.

Second, the Defend Trade Secrets Act cases are spread throughout the United States and are not concentrated in a small number of venues. During the first year of the DTSA, no venue had more than 10 percent of DTSA cases. And the most popular venues were the Northern District of California, the Southern District of New York, the Northern District of Illinois, and the Central District of California. The popularity of these venues makes sense as they contain population in commercial centers of San Francisco, Chicago, Los Angeles, and New York.

Third, we now have data on the provision of the DTSA that permits trade secret owners to request on an ex parte basis that certain property be seized from the defendant to prevent the dissemination of trade secrets. This is an important though limited tool to protect trade secrets when other relief would be insufficient. For the approximately 2-year period, from the beginning of the DTSA until last week, there have been at least 21 cases that involved requests for an ex parte seizure, and of those, five were granted. Thus, it appears that litigants and courts are heading the DTSA's instruction that this remedy is only available in extraordinary circumstances.

From these and other statistics, I draw a couple of conclusions. One is that the DTSA has successfully provided trade secret owners with a new means of protecting and enforcing their trade secrets, which trade secret owners are using by filing cases in Federal court when previously they were limited in many instances to State court.

Another conclusion is that courts are applying the DTSA in a way that does not appear to be fundamentally changing trade secret litigation, but that is instead, importantly, moving towards a more uniform, consistent, and efficient application of trade secret. In short, the DTSA is a welcome addition to the trade secret landscape.

One issue that affects trade secrets that does not relate to the DTSA is section 1782, which has been discussed earlier today, and which allows Federal courts to compel U.S. residents to participate in discovery related to a foreign proceeding. That section does not, however, expressly provide for the protection of confidential information. While courts have issued various orders to afford some degree of protection, additional guidance from Congress would be helpful. I thank the subcommittee again for this opportunity, and I look forward to your questions.

Mr. ISSA. Thank you. I will now recognize myself for the first round of questioning. There will be 12 rounds of questioning in case you had questions. You have all alluded to it, but let's just go through the numbers maybe to make the record complete. And I will ask each of you just to respond briefly.

In a United States case in Federal court, in the ordinary course of litigation between two litigators, assuming for a moment, as is often the case, they are competitors. Isn't a protective order one of

the very first items that is essentially adjudicated before the judge or a magistrate?

Mr. CORSELLO. Yes. That is absolutely correct. Yes.

Mr. POOLEY. Yes. That is true, Congressman.

Mr. ALMELING. That is right.

Mr. ISSA. And in patent cases, is that not almost always the first and most argued burden other than motions for dismissals?

Mr. CORSELLO. Yes. It is early, and oftentimes, there are arguments about it.

Mr. POOLEY. Yes. It is quite early, and it is often stipulated by the court what the form should be. So, it is done quickly. Yes.

Mr. ALMELING. It is often early, and certainly before the production of any confidential information.

Mr. ISSA. And the premier court for handling in the U.S. events from outside the U.S. would be an administrative court known as the ITC; would that not be correct—that the ITC handles a huge amount of intellectual property cases on behalf of U.S. companies regularly?

And the question that comes out of that is, is it not true the ITC has a form protective order that is universally almost never modified, and as a result, litigants know that there will be a strong protective order at the time they begin a process before the administrative court known as the ITC? Is that to the extent you practice? Mr. Pooley, I know you have been there.

Mr. POOLEY. Yes, I have, your honor, and yes, you are right. They have one.

Mr. ISSA. Please do not “your honor.”

Mr. POOLEY. Yes. This is very much like a court so, I hope you will forgive me. Thank you, Mr. Chairman. Yes, they do have an order. Everyone knows what it is, and they are very reluctant to change it, and that does add to the predictability of those proceedings.

Mr. ISSA. So, as I said in my opening statement, there were three places in which we could bring some relief to companies who feel that they are going to be or have been ripped off. The administration itself, the Article III courts themselves, or Congress.

So, let me just ask a straight question that is not even on my list. If the courts were to, *sua sponte*, begin developing and producing for these 1782s, a protective order that was robust including, as you mentioned, the retention of jurisdiction as appropriate, would that not go a long way toward correcting something that we see as a problem that could, in fact, really affect American competitiveness?

Mr. CORSELLO. Well, yes. If the courts would uniformly do that, that would help. It might be difficult to get them all to march on the same tune.

Mr. ISSA. Well, the ninth circuit, of course, would lead the way I am sure, but Mr. Pooley, speaking on behalf of the 9th Circuit.

Mr. POOLEY. Yes. I would not dare to do that, Mr. Chairman, but yes. It would be helpful. It would, of course, be most helpful if the courts were informed in each case about the risks of where the information is going. What tribunal is getting it, and that would help them draft an appropriate kind of protective order.

Mr. ISSA. Mr. Almeling, I am going to modify the question for the answer to try to get as much in as I can. If the courts need to do it as uniformly as possible, if they need to consider the fact of, if you will, the worse case scenario of a foreign country—let's say China just for an example—where it could be a government entity essentially on a systematic basis trying to exploit information using litigation, since that is a pattern that we know exists.

If you assume all of that, then do you believe that there is a role or requirement that Congress create that uniformity by dictating or mandating that at least the consideration and certain parameters of a protective order be placed?

Mr. ALMELING. It would certainly be helpful for our Congress to provide some guidance on those protections and the confidential aspects of the discovery that takes place overseas.

Mr. ISSA. I could send them a draft, but I am assuming you are thinking of something a little stronger than just a suggestion.

Mr. ALMELING. There are various things Congress can do that would assist the courts. Unfortunately, right now 1782 does not, which is one of the reasons that we are here today is that it would be helpful if it did have something like that.

Mr. ISSA. Mr. Corsello, I am going to again modify the question. Assuming that that were not the only remedy, and assuming that we did that, what else would you say needs to occur besides this form of guidance, if you will, on a protective order? And I am going to give you the leading question. The Department of Commerce and our State Department regularly engage in global agreements; agreements for standard setting.

Do you believe that some part of the administration's work should include, if you will, reciprocal trade agreements that recognize that this problem could go both ways and that there need to be fair protections between, at least, responsible nations?

Mr. CORSELLO. Yes. I think that is exactly right. I think that would be very helpful. What we want to see is reciprocity. We want to see the other nations, you know, come up to U.S. standards.

Mr. ISSA. So, in closing with my questions, the answers I think I heard was it would be nice if the courts recognized that this gap is fillable, at least in part by their taking responsibility for protective orders, which they have a right to do in a case.

It would be equally, if not better, for the uniformity of those to come from guidance of some sort in a way of legislation from Congress. And the administration needs to weigh-in from a trade standpoint to have reciprocal agreements that envision responsible countries, each directing their courts to do something that would allow for protection?

Mr. CORSELLO. I agree with that.

Mr. ISSA. So, we have got three branches here that all need to work, right?

Mr. CORSELLO. Yes.

Mr. ISSA. With that, I recognize the ranking member for a similar round of questioning.

Mr. JOHNSON of Georgia. Thank you, and unlike a judge, I will be able to—

Mr. ISSA. But you are a judge.

Mr. JOHNSON of Georgia. Well, not in this proceeding. I have often wanted judges to be here to be impartial arbiters. So, I can relate to you, Mr. Pooley. But, Mr. Corsello: has the availability of adequate legal measures to protect and enforce trade secrets grown in importance in the past 2 years that the DTSA has been enacted?

Mr. CORSELLO. Yes. Absolutely it has. I mean, trade secret information has become more valuable, and it has become easier to steal, even in the past 2 years.

Mr. JOHNSON of Georgia. Why has the value increased at this rate? At an incredible rate, actually.

Mr. CORSELLO. Well, I think to a large degree, it is the advances in information technology have made information more important to our economy and to our industry. That is a big part of it.

Mr. JOHNSON of Georgia. How would reforming 28 U.S.C. section 1782 encourage other countries to improve their protections for trade secrets?

Mr. CORSELLO. Well, if we included, for example, a part of section 1782 that would only allow for the disclosure and production information. If it was protected by other countries, then they would have an incentive to add those type of protections to their laws.

Mr. JOHNSON of Georgia. Thank you. Mr. Pooley, is it true that U.S. companies are often singled out for targeting for trade secret theft?

Mr. POOLEY. Yes, it is, Mr. Johnson. Most of the valuable information produced in the Information Age comes from here, and that makes us a target because this is where the valuable property is.

Mr. JOHNSON of Georgia. Thank you. In your testimony, you state that in a recent survey by the National Science Foundation and the Census Bureau, companies classified as "R&D intensive" were asked to rank the importance of various kinds of IP laws in protecting their competitive advantage and trade secrets came out on top. Can you elaborate on that?

Mr. POOLEY. Yes. I think that does not mean that patents are not important because, of course, they protect critical inventions, but information is what is protected by trade secrets, and that is much broader. And so, companies have to look very carefully at what it is that provides them a competitive edge across their entire business, and when they do that, they see that trade secrecy is something that is relevant more of the time than patenting.

Mr. JOHNSON of Georgia. The importance of trade secrets; is it often more to smaller businesses than larger businesses?

Mr. POOLEY. Yes. Indeed, it is. Patents are expensive, and sometimes the innovations of small businesses, in order to succeed in a fast-growing market, they have to rely on simply being able to protect their first mover advantage and keeping the information that they do not want the competition to see inside their own organization.

Mr. JOHNSON of Georgia. Thank you. Mr. Almeling, is precise data on trade secrets and theft of trade secrets difficult to obtain? And if so, why?

Mr. ALMELING. It is. One of the reasons is trade secrets are, by definition, secret, and so there is not a lot of public information that exists about them. Companies are obviously reluctant to share information about what they consider secret.

Another is that the way that we track litigation in the United States often looks at certain information that is tracked for other types of IP. There is not yet that same type of information for trade secret cases. That could change, of course, and it will be useful for statistical purposes if it did, but right now it is difficult to analyze.

Mr. JOHNSON of Georgia. During the first year after the DTSA was enacted, what were the most popular venues for trade secret cases, and were those the most popular venues for trade secrets before DTSA was enacted?

Mr. ALMELING. The most popular venues after the DTSA were in California in the Northern District, in New York in the Southern District, Illinois in the Northern District, and also, California in the Southern District, and the answer to your second part of the question is yes. When you compare the data before the DTSA to the data after the DTSA, the same courts are the most common sources for trade secret cases.

Mr. JOHNSON of Georgia. Does the popularity of those venues make sense? I suppose it does, but what is your opinion?

Mr. ALMELING. I agree. That, it does. They are commercial and population centers. They also are centers of major innovation in the United States, either from a technical perspective, a financial perspective, or from others. They are large, important areas and those are the districts that comprise them.

Mr. JOHNSON of Georgia. Thank you, and I yield back, Mr. Chairman.

Mr. ISSA. Just for the record, are they not also the corporate headquarters of the Fortune 500, New York, Chicago, Los Angeles and so on? So, it is sort of a combination of innovation, but also, to be honest, it is where the records are kept?

Mr. ALMELING. That is correct.

Mr. ISSA. Thank you. We now go to the gentleman from Georgia, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. Thanks for holding this hearing today. I am glad to have it. Trade secrets is, we have talked about before, the lifeblood of many businesses and their value to the economy, and the continuing prevalence and growth in American innovation. It cannot be overstated.

It was with that in mind when we worked on this, and I introduced this Defend Trade Secrets Act in the 114th Congress of Senator Hatch, and it is one of those times when bipartisanship showed through because in 2016 it passed the House with 410 to 2, and 87 to 0 in the Senate, which is something in and of itself is a miracle. It has created the Federal Civil Cause of Action for Trade Secret Misappropriation.

It also required something that I want to point out before we get started, Mr. Chairman, is this. It required the Attorney General to direct the patent and trademark office, and the Intellectual Property Enforcement Coordinator to issue a report on the theft of trade secrets abroad, and recommendations for how to better protect against it and improve it.

Now this was supposed to be an initial one after a year and then biannual after that. Nearly 2 years later that report has not been issued, and that statistics that we were talking about just a second ago is approached in here that we could look at.

“Today I am sending a letter to the Attorney General requesting that this report be issued so that we have more information on the scope and continued problem of trade secret theft. I am glad to have this opportunity today to discuss the importance of trade secret protections and analyze the effects of Defend Trade Secrets Act and look for continued ways to improve our intellectual property.”

I think one of the things that we have seen from the bill that we authored was the simple fact that it is working, and I think that is a good thing to see. Are there things that we can improve on? Yes. I believe so, and Mr. Almeling, one of the biggest parts, and you touched on this, and I do not want to rehash what you said, but the ex parte seizure provision was probably one of the more controversial issues that we had to work out. We did a lot of mitigation in the bill to do that. Would you agree that it is being used as intended and that it has been applied and interpreted in real world cases as we needed it to be?

Mr. ALMELING. I think it has. The statutory provision that was created for the ex parte seizure, as you noted, is very detailed, and courts have been following that structure in issuing orders, and they have been analyzing the elements that Congress required them to analyze. And it has been used not in large share of trade secret cases. The other types of injunctions of temporary restraining orders and preliminary injunctions have been used for those. It has rather been used for those small number of extraordinary cases where it would be most applicable.

Mr. COLLINS. Good. Well, and I think that is one of the things, and one of the things is I think the bill is working. I am glad to see it is working, but there is also some issues that we do have, and I will open this up to anybody. We will start right there since you were just answering.

In your testimony you talked about the TRIPS Agreement setting basic standards for trade secret protection through the industrialized world, but it may not be enough because of weaker trade secret laws and protections overseas, and I have heard this from some companies as well and the issues of it. What can we do there maybe through an improving what we have or making that a little bit perceived differently, I guess is the best way to say it, especially when dealing with foreign countries?

Mr. ALMELING. I think that is where section 1782 comes about because that involves the discovery for use in a foreign proceeding and providing additional details about the protection of confidential information would make that stronger.

Mr. COLLINS. Okay. Mr. Pooley, let's talk real world. One of the things about this is sometimes we do not have this opportunity to come back and look at a bill that maybe is working and maybe things we can do, but this one is working. Can you give us some examples on some actual cases and how it was strengthened that this actually helped?

Mr. POOLEY. Yes. Well it was mentioned earlier—First of all, thank you, Mr. Collins, for your work in bringing the DTSA to reality. Earlier someone mentioned the Waymo v. Uber case. A very well-known case that was in Federal court largely because the patent claim in it went away. It was there because of the Defend Trade Secrets Act original jurisdiction. And so, we can see there an

example of a very significant case being taken to Federal court because it could be.

And in my work I have reviewed probably hundreds of cases that have resulted in opinions from the Defend Trade Secrets Act, and they all have approached it in a very classical, sober way that aligns with the jurisprudence that we are all very familiar with.

So, I think one of the most important things to report is that there has not been anything terribly unusual about the opinions that we have seen come out, and the courts have been, as Mr. Almeling expressed, applying this statute in the way that it was intended.

Mr. COLLINS. Well, that is what you like to have. And just one final—just to end all this, Mr. Chairman, is one of the things we know this did not stop this issue. Okay? We still know trade secrets is a big issue. We still know the theft is going on. In fact, the FBI and the DOJ is continuing to make a handful of these cases every year; 79 currently pending at the end of fiscal year 2017.

Just real quick, if Mr. Corsello, anybody wants to jump in. From an enforcement standpoint, is there anything to improve all or help with that would help the law enforcement address and keep up with the trade secret theft, just as I close out my question?

Mr. POOLEY. Well, my own view, Mr. Collins, is that we need more international discussion over how to help other countries bring up their laws and their enforcement systems to a level that is more effective than what we see now, and that if we can just carry on a dialogue, whether within the context of free trade agreements or otherwise just as best practices. That would be very helpful.

Mr. COLLINS. Okay. Good. Mr. Corsello.

Mr. CORSELLO. I agree.

Mr. COLLINS. Good. Okay. Mr. Chairman, I appreciate it, and I think we are seeing good results, and sometimes it is actually good to see these come back a lot like that. Thanks for your help as well.

Mr. ISSA. Thank you. Now for round 2 of 12. No. I will be brief. I have a question. Since we have been informed by the Department of Justice that they are working on the report that they required us, that we required in legislation one year. Let me ask a question.

I do not want to second guess, but let's just assume that they are working on it right behind the 1.3 million documents that were subpoenaed that are also overdue. Let's just assume that for a moment. In retrospect, would we have been better off having the Office of Management and Budget and OPEC or some other group that really is more related to this gather from the Department of Justice as needed and the other agencies?

The statute seemed pretty neat at the time but, of course, it turned out the Department of Justice is not necessarily very well-suited to this historically. Any comments on that from your experience? You do not have to bash the Department of Justice. You just have to ask should this committee consider, now and in the future, the accumulation of this data being done either by the Office of Management and Budget or some other part of the executive branch?

Mr. CORSELLO. Yeah. I do not have any insights as to which branch would make more sense, but I think it would be good for the committee to think about, given the fact that it is a bit late, whether there is a better part of the government to do this, and I do agree. I have been looking forward to it, personally.

Mr. ISSA. I, personally, would have sent it to Commerce myself, but only because the obvious effect on domestic commerce does give them an interest in—we want to send things overseas. Just not our secrets. Mr. Pooley, any ideas from your years of experience in working with this bureaucracy?

Mr. POOLEY. Most of my years of experience were with a different bureaucracy, but I would not presume to have an opinion on which part of this one here in Washington is the right one to do this. I would only agree that it is critically important that we gather the information from the best sources available.

Mr. ISSA. Any closing comments on that? One of the challenges we have is if they do not meet a revised deadline, how do we gather the information since we have received nothing yet to date?

Mr. ALMELING. I apologize, Chairman. My practice focuses on trade secret counseling and litigation. So, I will defer to the subcommittee on what it believes. I pass.

Mr. ISSA. Then you get my closing question. Up until now, China has not aggressively used this technique as a backdoor for stripping off information. Is there anything under current law and/or practice that would stop this from being a new and effective way using litigation in China. A place where if you sue them for stealing your technology, they sue you back for patent infringement. Your case stalls. Their case goes forward and you typically lose. With the kind of practices that go on in that very large economy, is there any reason to believe that if we do not fix this it could not grow to be more than just opportunistic companies, but rather a more concerted effort to take trade secrets?

Mr. ALMELING. I have not done a detailed analysis or a—

Mr. ISSA. But you are a clever lawyer practicing. If you had a client, let's say China, do you believe that you could advise your client that this loophole could be turned into a manhole?

Mr. ALMELING. It is certainly correct that we do need to fix section 1782, and companies and individuals throughout the world are using that. So, I would say that if there are things that we can do to shut that loophole, we should certainly do them.

Mr. POOLEY. I would only add, Mr. Chairman, that there are lawyers in law firms throughout the world who are promoting this particular statute as a way to do the kinds of things that you have described here.

Mr. ISSA. So, it has been discovered. It is only a question of how fast this wormhole grows.

Mr. POOLEY. It is well known.

Mr. CORSELLO. I do not have anything to add to that.

Mr. ISSA. Okay. Let me just close with a statement and go to the ranking member. In my practice, before I came to Congress, the one thing that I feared the most being lost in the way of intellectual property or trade secrets was the vulnerability of my company. That ultimately, the American people sometimes think of a patent and a trade secret as the same thing.

They think of a trade secret is something that you are keeping secret because you are not patenting it, because you do not want to share it with the world, but if I had a high cost of a product—let's say I was selling a product at break-even just to be competitive—I did not want my competitors to know, especially if they had a lower cost of production than I did.

Vice versa, if I had a lower cost of production, I sure did not want them to know who my source was that was giving me that lower cost of production. And so, I always tell people the difference between much intellectual property, which is about what you have, and trade secrets is trade secrets sometimes are protecting from people knowing what you do not have.

And you cannot patent what you do not have. You cannot patent your vulnerabilities, and yet, if people learn your vulnerabilities it can destroy your company and so, hopefully today we have at least made a down payment on people understanding that we do need to protect it as or more strenuously than we do patents. With that, the ranking member gets the close.

Mr. JOHNSON of Georgia. Thank you. I would like to know a little bit more about the scope of the problem of compelled production under section 1782 of confidential information to foreign tribunals when those tribunals do not protect secrets of U.S. businesses. How many times has that occurred over the last 2 years since passage of the DTSA versus the 2 years prior to passage? We have any idea?

Mr. CORSELLO. Well, I am not aware of any numbers, any counts, statistics on the number of times production has been compelled. We have counted the number of decisions from the courts; written decisions on the section 1782 petitions, and that number has gone up dramatically since the Intel v. AMD decision, 2004.

There were an average of 63 decisions per year, written opinions of the court all based on a 1782 petition since 2004. Before 2004, there were only about 13 decisions per year. So, that Intel v. AMD really opened up the aperture and made it much more widely used than it was.

Mr. POOLEY. And I think in response to your question, there has not been any noticeable difference in filings of these petitions since the DTSA.

Mr. JOHNSON of Georgia. Do you believe the DTSA provides sufficient remedies to discourage the theft of trade secrets?

Mr. POOLEY. Well, in general, absolutely, Mr. Johnson. As we said earlier, the DTSA is an improvement in an environment that is quite challenging, but one of the problems that remains to be attended to is section 1782 because we have not, until now, instructed the courts that confidentiality protection for the information is one of the issues they should be looking at before the information leaves the country. And if we were to fix that, that would improve the situation significantly.

Mr. JOHNSON of Georgia. Thank you. Any other comments?

Mr. CORSELLO. No. I do not have any more.

Mr. JOHNSON of Georgia. All right. Well, I thank you, gentlemen for appearing today and I yield back to the chairman.

Mr. ISSA. Thank you, and in closing, I am simply going to ask that the extract from the Procter & Gamble v. Kimberly-Clark be

placed in the record, and the reason for it is that, although it does not go to the ranking member's statement, it does go to an outline of things which the judge believed could be helpful and could, in fact, lead to some protection.

I might note that in this case in Wisconsin, I guess it was, they did not order it. They simply considered that they could do it. And I think it makes the case that judges do know what could be helpful. They deal with protective orders regularly, and since the judge knew what was right, but in this case did not do it, I think it should be placed in the record so that either the courts, the administration or we can make it clear that they should do it.

Mr. ISSA. And with that, all members will have 5 days in order to supplement their questions and comments. We would ask that you do the same. If you have any additional thoughts that came as a result of this hearing, please submit it to us by the end of the week. We stand adjourned.

[Whereupon, at 3:02 p.m., the subcommittee was adjourned.]

