

House Judiciary Committee
Subcommittee on Courts, Intellectual Property and the Internet

Hearing on *Safeguarding Trade Secrets in the United States*

April 17, 2018

Overview

On April 17, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet held a hearing which presented witness testimony on the progress, as well as the future, of the Defend Trade Secrets Act (DTSA) as the legislation nears its second birthday. Subcommittee Chair Darrell Issa (R-CA) opened testimony to a trio of IP professionals (Kenneth Corsello, Chair, Trade Secrets Committee Intellectual Property Owners Association (IPO); James Pooley, James Pooley, PLC; David Almeling, Partner, O'Melveny & Myers LLP) in order to determine what Congress could do to further improve the effectiveness of the positively-regarded DTSA. Issa explained that due to the increasing relevance of information technology in IP fields, trade secrets comprise roughly 2/3 of IP company portfolios. Increased protection of these trade secrets translates to increased efficiency for companies, which can make all of the difference for small (or even large) companies on the threshold of breaking even or profiting.

Subcommittee Ranking Member Hank Johnson (D-GA) and Committee Chair Bob Goodlatte (R-VA) cited a statistic showing that trade secret theft costs companies \$180-540 billion per year, a loss capable of sending shockwaves through the economy as a whole. With Committee Ranking Member Jerrold Nadler (D-NY) citing an estimate of U.S. trade secrets at \$5 trillion, the committee was understanding that additional protections under DTSA and other statutes may serve as a general safeguard for the entire economy itself.

Issues Discussed

The centerpiece to the discussion of strengthening DTSA became the "discovery loophole" first introduced by Chairman Issa. Under 28 U.S.C § 1792 (assistance to foreign and international tribunals and to litigants before such tribunals), the witnesses expressed their concern with the court's broad interpretation of the statute which has opened a loophole now being used more frequently by foreign litigants in the U.S. Such a loophole has given foreign litigants access to information and documents, including trade secrets of U.S. companies, that would be unavailable to obtain through court proceedings in their respective countries.

Witness James Pooley concluded that such a loophole to access threatens individual business assets, as well as the economy as a whole, due to the fact that "the most profound change in the nature of business assets" now leaves the American economy dependent on data- a large amount being individual trade secrets. He and witness David Almeling seemed to be in agreement that companies covet trade secrets more than individual patents due to their scope of

information, and the magnitude of trade secret thefts/losses only increases a company's attachment to their trade secrets. Although all witnesses acknowledged the benefits of DTSA were clear at this point, a survey brought to testimony by Mr. Almeling showed that 75% attorneys working for businesses in the U.S. still feel their risk of trade secret losses has increased, while 0 respondents concluded the opposite.

Conclusion

By closing the loophole in 28 U.S.C § 1792, the witnesses agreed that a sense of uniformity and consistency would be brought to a situation originally meant to be clear-cut in its interpretation. Once foreign nations realize they may no longer (intentionally or unintentionally) pursue this loophole in order to gain otherwise inaccessible info from the U.S. courts, the witnesses also argued it would encourage other nations to specify and improve their individual policies on confidentiality of trade secrets and other information that should be more heavily protected. Mr. Pooley suggested that this topic become an international discussion in order to create level playing fields, while Chairman Issa suggested further action may need to include all 3 branches of government involvement. Nonetheless, the committee seemed encouraged to pursue further safeguards for trade secrets by amending the aforementioned statute.

Testimony

Kenneth Corsello: Chair, Trade Secrets Committee Intellectual Property Owners Association (IPO) <https://judiciary.house.gov/wp-content/uploads/2018/04/04.17.18-Corsello-Trade-Secrets-Testimony.pdf>

James Pooley: James Pooley, PLC
<https://judiciary.house.gov/wp-content/uploads/2018/04/04.17.18-Pooley-Trade-Secrets-Testimony.pdf>

David Almeling: Partner , O'Melveny & Myers LLP

<https://judiciary.house.gov/wp-content/uploads/2018/04/04.17.18-Almeling-Trade-Secrets-Testimony.pdf>