

OPINION: Bipartisan Trade Secrets Legislation Is Back

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Bipartisan, bicameral legislation is back. Acting to secure the valuable trade secrets of America's most innovative and creative companies, a bipartisan group in both the Senate and the House introduced legislation on July 29 that will create a federal civil remedy for trade secret misappropriation.

Trade secrets are increasingly important to companies in all industry sectors and all sizes. From product designs for jet engines to the literal and figurative "secret sauce," which can include the source code and data analytics that power Silicon Valley, trade secrets are an essential form of intellectual property. Often developed at great cost, they give companies a competitive edge in today's challenging global markets and drive key segments of the U.S. economy. But trade secrets lack federal civil protection.



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The Defend Trade Secrets Act of 2015 (S. 1890 and H.R. 3326) will fix that. The legislation will provide trade secret owners with the same access to federal court that copyright, trademark and patent owners already enjoy. The legislation is based on the same standards for trade secret protection, and remedies for misappropriation, that are found in the Uniform Trade Secrets Act and the Economic Espionage Act of 1996 ("EEA"), which will preserve the settled expectations about balance in trade secret law.

The act is supported by companies and associations in a broad array of industries, including biopharmaceutical, software, semiconductors, consumer goods, medical devices, automobiles, heavy equipment, chemicals, aerospace and agriculture. They know the risk of trade secret theft: Businesses are increasingly the target of sophisticated efforts to steal their proprietary information. Would-be thieves are looking to short circuit the years of expensive research and development that go into the innovative products and technologies produced by market-leading companies.

In this digital age, greater connectivity, increased data storage, and globalized supply chains have made trade secrets more vulnerable than ever before. But our laws remain stuck in a different era. The only civil remedy available to combat trade secret theft is an array of state laws that made sense when trade secret theft was largely a local matter — when a company's greatest risk was that a competitor down the street would steal its customer list. But state laws are less appropriate for addressing the increasingly interstate and international nature of trade secret theft that occurs today. A federal civil remedy is needed.

The EEA makes it a federal crime to steal a trade secret used in interstate commerce, but, as a criminal law, it has important limitations. First, the U.S. Department of Justice lacks the resources to investigate and bring

criminal charges in every case of interstate theft. (Indeed, the FBI reported in July that it has seen a 53 percent increase in its trade secret theft caseload in just the last year.) And, second, criminal law punishes the defendant, but the process for compensating the victim is unwieldy.

The Defend Trade Secrets Act fills this gap in trade secret law by creating a uniform, national standard for trade secret misappropriation, harmonizing U.S. law, and providing companies the tools to protect themselves. And, in narrow circumstances, the law provides for ex parte seizure relief when time is of the essence and the thief would not obey an injunction. The bill includes safeguards to ensure this relief is not abused.

For many of the most innovative companies, the Defend Trade Secrets Act is critical to their continued growth and ability to maintain good, well-paying jobs in the United States. Once a 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.

Last year, Sen. Orrin Hatch, R-Utah, and Sen. Christopher Coons, D-Del., introduced the Defend Trade Secrets Act of 2014 (S. 2267), and similar legislation, the Trade Secrets Protection Act of 2014 (H.R. 5233), was subsequently introduced in the House of Representatives. Both the Senate and House Committees on the Judiciary held hearings on the legislation. The House Judiciary Committee voted without dissent to report the bill favorably just before the elections, and it was never considered by the full House.

The legislation, introduced last week by Sens. Hatch and Coons and four other senators in the Senate, and by Rep. Doug Collins, R-Ga., and Rep. Jerrold Nadler, D-N.Y., with 14 cosponsors in the House, builds on the hard work done in the last Congress on this important issue. It reflects a consensus that among our most valuable currency in the global marketplace is our knowledge and creativity. We must foster and protect it to continue to lead the world in creating new and original technologies, products and services. The Defend Trade Secrets Act will give companies an important tool with which to do that in an increasingly competitive world.

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