



**Oral Testimony of David Hirschmann
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Before
The United States Sentencing Commission
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****AS PREPARED FOR DELIVERY****

I. Introduction

Good morning Commissioners, and thank you for the opportunity to speak with you on the important subject of deterrent penalties for trade secret theft. My name is David Hirschmann and I am the President and CEO of the Global Intellectual Property Center and a Senior Vice President of the U.S. Chamber of Commerce.

The Global Intellectual Property Center was established in 2007 as an affiliate of the U.S. Chamber of Commerce. Today, the GIPC is leading a worldwide effort to champion intellectual property rights as vital to creating jobs, saving lives, advancing global economic growth, and generating breakthrough solutions to global challenges.

The U.S. Chamber of Commerce is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations.

The GIPC and the Chamber advocate for the right rules to protect intellectual property, the necessary resources for critical government agencies, and enforcement of the law against IP criminals.

On behalf of the broad business community, I am here this morning to urge you to adopt appropriate, deterrent penalties for trade secret theft, including minimum penalties that include some amount of imprisonment. These are necessary to deter crimes that threaten American businesses and competitiveness, and the jobs of American workers.



II. What are trade secrets?

Trade secrets are a form of IP. The “secret” may be almost anything from the formula for a popular soft drink, to a manufacturing technique, to a computer algorithm. But that doesn’t begin to describe their significance to the companies that hold them. It has been estimated that of the S&P 500, 81% of their market value is derived from their intangible portfolios.¹

Trade secrets are often the crown jewels of a company. Because that formula may make their drink uniquely appealing, that technique may lower their costs of production, or that algorithm may make their service superior, trade secrets are nothing short of a company’s competitive advantage in the marketplace. And that is precisely why industry competitors and even foreign governments covet them.

III. Trade secrets are under attack

Unfortunately, the theft of trade secrets has reached epidemic proportions. Measured by the number of civil cases in Federal courts, trade secret theft has grown exponentially over the past fifty years, and shows no sign of slowing down.²

Translating that increase into estimates of business losses is staggering: from hundreds of millions of dollars lost by individual companies, to \$13 billion lost by a group of companies collectively over a six-month period, to *over \$1 billion lost by a single company in a matter of only days*.³ This is the scenario that makes executives

¹ H. Rept. 112-610, July 19, 2012 at 4 *citing, Underground Economies: Intellectual Capital and Sensitive Corporate Data Now the Latest Cybercrime Currency*, March 28, 2011 at 6, available at: <http://www.mcafee.com/us/resources/reports/rp-underground-economies.pdf>.

² Almeling *et al*, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 Gonzaga L. Rev. 291, 301 (2010).

³ H. Rept. 112-610 at 4-5.



wake up in the middle of the night in a cold sweat. Overall, it has been estimated that trade secret theft costs U.S. companies as much as \$300 billion every year.⁴

This reality is understood not only throughout the business community, but in Congress and the Administration as well. The law that brings us here today, the Foreign and Economic Espionage Penalty Enhancement Act, enjoyed bipartisan support in Congress, was supported by the Administration, and was lauded by the Chamber. And, as you know, the Administration's Intellectual Property Enforcement Coordinator recently released an enforcement strategy particularly directed to reducing the theft of trade secrets from American companies.⁵

IV. Why greater penalties are needed

As we in the IP field know well, the advent of digital technology and the interconnectedness of the Internet have been incredible boons to companies and consumers alike. They have brought us new services, innovation, creativity, and opened new markets. But criminals have also abused them to engage in theft on an unprecedented scale.

Deterrence is the goal; we seek to reduce the amount of trade secret theft by intimidating potential thieves away from that course of action. Once the theft has occurred and the crown jewels are out the door, seeing the thief prosecuted is surely justice, but that is scant consolation to the people laid off because the company lost its competitive advantage.

We recognize that deterrence is a formula also involving the risk of detection and the risk of conviction. Both of those factors weigh in favor of strong penalties.

⁴ Almeling at 292, *citing* Office of the Nat'l Counterintelligence Executive, Annual Report to Congress on Foreign Economic Collection and Industrial Espionage – 2002 vii (2003), *available at* <http://www.fas.org/irp/ops/ci/docs/2002.pdf>.

⁵ *Available at* http://www.whitehouse.gov//sites/default/files/omb/IPEC/admin_strategy_on_mitigating_the_theft_of_u.s._trade_secrets.pdf.



As has been the case in other contexts, those engaged in theft utilizing the latest technology are difficult to track down and thus have a degree of confidence that their crimes will not be detected.

In addition to the low risk of being detected and caught, thieves may indulge their hopes because of the low risk of prosecution and the high standard of evidence sufficient to reach the level of proof needed in criminal prosecutions.

The final variable in the deterrence equation is the potential profitability of the crime. As is discussed above, the value of trade secrets is tremendous. That, of course, translates into incredibly high profit potential for the thief.

This almost perfect storm of high potential profits and low chances of detection and successful prosecution means that to achieve deterrence, severe penalties must be available and applied. The Chamber also supports a minimum sentence that guarantees imprisonment as a key element of deterrence. And we note with appreciation the Administration's support for increased penalties in this area as well.

V. Conclusion

Intellectual property – trademarks, patents, copyrights, and trade secrets are the foundation of a tremendous part of the American economy. Collectively, IP-intensive industries provide over 55 million American jobs, over \$5 trillion in output, and 74% of American exports. It is no wonder that these industries and their valuable IP are the envy of the world and a target for thieves. Companies spend untold millions fighting to protect their innovation, creativity, and good name, but they cannot do it alone. Law enforcement is a partner and has a critical role. We urge you to provide the right rules for criminal trade secret theft to protect American companies, competitiveness, and our economic wellbeing. Thank you.