

April 22, 2013

The Honorable Victoria A. Espinel
United States Intellectual Property Enforcement Coordinator
Office of Management and Budget
Executive Office of the President
The White House
Washington, DC 20500

Submitted via www.regulations.gov
Docket No: OBM-2013-0002

Re: Response to Request for Public Comments for “Trade Secret Theft Strategy Legislative Review” (78 Fed. Reg. 16875, March 19, 2013)

Dear Ms. Espinel:

The American Intellectual Property Law Association (AIPLA) is pleased to have this opportunity to present its views with respect to the “Request for Comments and Notice for Trade Secret Theft Strategy Legislative Review” as published in the Federal Register (the “Notice”).

AIPLA is a U.S.-based national bar association with approximately 15,000 members who are primarily lawyers in private and corporate practice, government service, and the academic community. AIPLA represents a diverse spectrum of individuals, companies and institutions involved directly and indirectly in the practice of patent, trademark, copyright, unfair competition, and trade secret law, as well as in other fields of law affecting intellectual property.

As the Administration is no doubt aware, there has been a significant increase in media reports and commentary describing a growing rise in trade secret theft from foreign hackers, international companies, and rogue employees interested in stealing trade secrets of U.S. businesses. As you know, in recognition of that emerging threat, President Obama’s Administration recently released a 140-page report that presented a government-wide strategy designed to reduce trade secret theft by foreign competitors and foreign governments. In that plan, the Administration has recognized the accelerating pace of economic espionage and trade secret theft against U.S. corporations.

Last year, the National Security Agency described trade secret theft as the greatest transfer of wealth in history, estimating the losses of theft of trade secrets and cyber breaches to be in excess of \$334 billion per year. In February 2013, security company Mandiant Corporation issued a report finding that the Chinese government was sponsoring cyber-espionage to attack top U.S. companies. Likewise, CREATE.org has recently released a white paper that highlights how far-reaching and deeply challenging trade secret theft is for companies operating on a global scale.

For these reasons, AIPLA believes that the time has come to consider a federal civil remedy for international trade secret misappropriation.

Accordingly, AIPLA would like to make the following four points to consider in response to your Request for Public Comments for an Administration legislative review related to economic espionage and trade secret theft:

1. Consider expansion of federal enforcement through enactment of legislation authorizing a private civil action for the theft of trade secrets by international misappropriation utilizing the existing framework of the Economic Espionage Act (“EEA”).¹
2. Any federal civil cause of action or remedy should not undermine, preempt or disturb existing state law causes of action and remedies, including those arising out of the Uniform Trade Secret Act and/or existing common law for each state.
3. Any federal civil cause of action would be directed exclusively to remedying situations involving the theft of trade secrets by international misappropriation.
4. Any federal civil cause of action would provide similar remedies provided in the Uniform Trade Secret Act, including providing for appropriate injunctive relief, unconditional royalty damages, attorneys’ fees, and exemplary damages equating to at least the twice any award of damages.

Senator Chris Coons (D-DE) previously introduced legislation (S. 3389, 112th Congress), known as the Protecting American Trade Secrets and Innovation Act of 2012 (“PATSLIA”), that would have amended the EEA to provide, among other things, a private civil cause of action for trade secret theft. While not taking specific positions on the bill, we believe that PATSLIA could serve as a starting point for legislation that addresses the aims identified above.

AIPLA believes the recent expansion of penalties and expanded definition of trade secrets covered under the EEA demonstrate a recognition by the federal government that the EEA is a critical tool for protecting commercial trade secrets. Indeed, the strong support and speed in enacting that legislation further demonstrate that the Administration and Congress can work together in a bipartisan effort to address the theft of American trade secrets. Consequently, we believe that the EEA could serve as the framework for a federal civil cause of action.

¹ AIPLA recognizes that legislation directed exclusively at the conduct of foreign entities could raise concerns over the U.S. “national treatment” obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, Part I, Article 3 (TRIPs). However, trade secret relief is already available here under State law, and the proposed Federal legislation appears intended to extend corresponding relief to actors that may be beyond the reach of individual State jurisdictions.

We believe that a federal cause of action empowering companies to protect their own trade secrets from international misappropriation is imperative. U.S. companies understand their own technology and trade secrets best and they are incentivized to litigate aggressively to protect those assets. In addition, despite their best efforts, government agencies and prosecutors may not be able to move as quickly or with the nimbleness of a private litigant in some circumstances. Given the importance of speed and injunctive relief in trade secret cases, a federal private right of action would be a powerful tool in the case of international trade secret misappropriation.

While state trade secret laws afford U.S. companies many protections, they may not provide adequate procedural remedies or protection in the case of international trade secret misappropriation. The ability to issue and serve subpoenas throughout the U.S. and the broad jurisdictional powers of federal courts would greatly assist many trade secret claimants. In addition, at the present time, trade secret law in the United States is composed of a compilation of trade secret protection laws that were not intended to provide a civil remedy for companies whose trade secrets are stolen by international misappropriation. Not all states have adopted the Uniform Trade Secret Act, and many states have differing interpretations and procedures for certain trade secret laws.

Legislation like PATSIA is a starting point toward efficiency and effectiveness in combating trade secret theft in violation of the EEA. The bill proposes to help U.S. companies protect their valuable trade secrets by giving them the ability to seek redress in federal courts when they are victims of economic espionage or trade secret theft. Any federal legislation should not preempt state trade secret laws, but should instead complement them and should provide jurisdiction for civil actions involving claims involving the international theft of trade secrets.

Thank you for allowing AIPLA the opportunity to provide comments on this initiative. We would be pleased to engage in further dialog on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey I.D. Lewis". The signature is written in a cursive, flowing style.

Jeffrey I.D. Lewis
President
American Intellectual Property Law Association