

Hearing on

**Protecting Trade Secrets:
the Impact of Trade Secret Theft on American
Competitiveness and Potential Solutions
to Remedy This Harm**

United States Senate Committee on the Judiciary

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I. Introduction

Good morning Chairman Grassley, Ranking Member Leahy, and Members of the Committee. My name is Tom Beall. I am Vice President and Chief Intellectual Property Counsel to Corning Incorporated. Thank you for holding this hearing. I appreciate the opportunity to testify today about the importance of trade secret protection.

Background on Corning

For context, let me give you a little background on Corning Incorporated. We have been in business as an American manufacturer for over 160 years and take great pride in our heritage as one of America's oldest and most innovative companies. We are on pace to be issued over 400 patents in the U.S. this year, and over 1,200 globally, making us one of the top patent awardees in the materials sciences category. We operate in 26 states, and have manufacturing in 11 of those states, including, a state of the art automobile emissions control facility in Erwin, New York, the world's most advanced optical fiber manufacturing plants in Wilmington and Concord, North Carolina, life science products facilities in California and Utah, and telecommunications products facilities in Arizona and Texas.

Corning's strategy for success is based on two key foundations. First, we invent and innovate with tenacity, consistently investing 8-10 percent of our sales in research, development & engineering (RD&E). Second, we manufacture efficiently. Invention is only valuable if you can successfully commercialize the product. So once we introduce a new product, we relentlessly drive down our cost of manufacturing through process engineering. Today, we are the world's lowest-cost manufacturer for 80 percent of the products we make.

Simply put, invention, innovation, and low-cost manufacturing through process engineering are the keys to success in American manufacturing.

Because of our commitment to RD&E, we have been fortunate to develop a number of life-changing technologies. In the 19th century, we invented the process to manufacture the glass envelope for Thomas Edison's light bulb. Subsequently, we invented the ceramic core of the catalytic converter that has removed 4 billion tons of harmful emissions from the atmosphere, optical fiber that enables the Internet, and LCD glass providing the foundation for display technologies in a wide range of consumer electronics. And when you touch your mobile phone, you are likely touching Corning® Gorilla® Glass, now found on 4.5 billion mobile devices worldwide. Inventions like these have earned Corning the National Medal of Technology and Innovation four times.

In order to protect those life-changing discoveries and provide the incentive to continue this innovation legacy, Corning relies on strong intellectual property protection, most importantly in the form of patents and trade secrets.

I am honored to testify before this Committee, which over the last two decades has passed numerous measures fundamental to the health of American innovation. For Corning your

dedication to patent protection has been particularly important. We applaud your work over the course of multiple Congresses to find common ground on the Leahy-Smith America Invents Act, and we appreciate your current efforts to make progress against patent trolls through the PATENT Act.

Today I am here to discuss trade secret protection and its importance to companies like Corning. Primarily I want to discuss the Defend Trade Secrets Act. Later I will discuss other steps the federal government can take to encourage global trade secret protection.

II. Trade Secrets Are Vital to a Company's Competitiveness

The know-how a company has developed and protects as a trade secret is often its key ingredient for success. A company that does not protect its know-how—or cannot protect it—cannot afford to continue innovating because its competitors will gain the same knowledge without having invested similarly in research and development.

Trade secrets are therefore among a company's most valuable assets. Trade secrets include a wide variety of confidential, commercially-valuable information, including proprietary technologies, formulas and codes, unique designs, industrial techniques, and customer lists. For high-tech manufacturers like Corning, they include manufacturing processes that give us a competitive edge in the global marketplace. And every innovative company, from large to small, relies on trade secrets in some fashion to set it apart.

As with other forms of intellectual property, trade secrets are often developed at significant cost. But, unlike other forms of intellectual property, the competitive advantage trade secrets provide depends on the information remaining confidential. Ensuring robust protection for trade secrets is therefore vital—it allows companies to maintain their edge, keeps workers on the job, and creates an environment that is conducive to continued innovation and creation of the next generation of ideas, processes, and products.

Unfortunately, trade secrets are increasingly the targets of theft and misappropriation. The threat may come from outside a company or from within—rival companies, foreign governments, and company insiders who recognize the value of our confidential information may take our trade secrets and sell them for their own profit, or use them to replicate our innovations at a fraction of the cost.

A 2014 analysis by CREATE.org and PwC estimates the value of U.S. trade secret loss at 1% to 3% of GDP annually, equating to \$160 billion to \$480 billion a year in a \$16 trillion economy.¹ Trade secret theft affects every segment of the U.S. economy, and the threat is growing: The 2013 U.S. Intellectual Property Enforcement Coordinator Report stated that the

¹ CREATE.org, PwC, *Economic Impact of Trade Secret Theft*, February 2014, available at <https://create.org/resource/economic-impact-of-trade-secret-theft/>.

FBI has experienced a 39 percent increase in new trade secret theft cases since 2009.² The 2013 Report of the Commission on the Theft of American Intellectual Property provides specific examples of trade secret theft against U.S. companies in chemical, aerospace, financial services, software, and other industries.³ The Commission, co-chaired by Dennis Blair and Jon Huntsman, found that “American companies of all sizes are victimized” by trade secret theft, which “is undermining both the means and the incentive for entrepreneurs to innovate.”⁴

III. Trade Secret Law Should Keep Pace with the Threat

Currently, the legal tools available to protect trade secrets in the United States include the federal criminal statute - the Economic Espionage Act (“EEA”) - and civil remedies available under various state laws. The EEA criminalizes the misappropriation of trade secrets for the benefit of a foreign government or for economic gain. It is an essential statute, but it is not a panacea. First, federal investigators and prosecutors have limited resources and are unable to bring charges in all cases of trade secret theft. Second, although the EEA punishes the wrongdoer, it provides no private cause of action for the victim to seek compensation for the theft.

At the state level, most states have enacted laws modeled on the Uniform Trade Secrets Act. These state law protections are important, but are less efficient and effective as the nature of our economy – and trade secret misappropriation – becomes more interstate and international.

Many of today’s innovative companies, both large and small, operate across state and international borders and have their trade secrets threatened by competitors around the world; they maintain company data digitally, trade around the globe, and may have employees in multiple states and countries. For these companies, the existing patchwork of state laws is inadequate for several reasons. First, trade secret theft often requires immediate action in order to preserve the value of the stolen property, particularly when a stolen trade secret is taken across state lines, or when the misappropriator seeks to leave the country. In many states, courts lack sufficient tools to act quickly to prevent dissemination of a stolen trade secret across state lines. Second, state courts lack procedures equivalent to federal court to seamlessly conduct cross-jurisdictional discovery. Because trade secret misappropriation often involves actors in multiple states, litigating in state court can be highly inefficient. Third, variation in state laws creates challenges for companies seeking an efficient, unified compliance plan, and results in the additional unnecessary cost of navigating different state laws.

² U.S. Intellectual Property Enforcement Coordinator, Joint Strategic Plan on Intellectual Property Enforcement, at 43 (2013), *available at* <https://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf>.

³ The National Bureau on Asian Research, The Report of the Commission on the Theft of American Intellectual Property, at 39–45 (May 2013), *available at* http://www.ipcommission.org/report/IP_Commission_Report_052213.pdf.

⁴ *Id.* at 1.

IV. Importance of a Federal Civil Remedy for Trade Secret Misappropriation

Once a trade secret has been divulged, irreparable harm may be suffered because the value of the secret may be lost forever. In light of this reality, a consistent, unified body of trade secret law is necessary to fill the gap left by the EEA and state laws. Owners of other forms of intellectual property—patents, copyrights, and trademarks—can protect that property by enforcing their rights in federal court with a civil cause of action. We believe there should be corollary for trade secret protection.

In the two decades since Congress made it a federal crime to steal trade secrets, the nature of misappropriation has continued to evolve, and our laws protecting trade secrets should as well. Corning is proud to support the Defend Trade Secrets Act and encourages the Committee to move it forward with all appropriate speed.

The Defend Trade Secrets Act (S.1890/H.R. 3326) will create a uniform standard for the protection of trade secrets nationwide, improving the efficiency and predictability of litigation and allowing companies to create one set of best practices to protect their intellectual property in every jurisdiction. With a federal cause of action available, parties can streamline multi-state discovery and service of process, resulting in faster and less costly litigation. The legislation will also provide a mechanism for obtaining expedited relief when a company's trade secret is threatened with imminent destruction or dissemination. In extraordinary cases, this includes ex parte seizure of the stolen trade secret when necessary to preserve the value of the property. Of course, any legislation must be balanced, and the Defend Trade Secrets Act also contains safeguards to prevent abuse, including damages in the event of a wrongful seizure.

The Defend Trade Secrets Act enjoys support from large and small companies in industries as diverse as software, biotech, pharmaceutical, manufacturing, medical devices, semiconductors, agriculture, automotive, and apparel.

We thank Chairman Grassley and Ranking Member Leahy for their leadership on trade secret issues and intellectual property more generally. We thank Senators Hatch, Coons, and Flake for introducing this important legislation, and the Committee members who have co-sponsored the Defend Trade Secrets Act: Senators Durbin, Tillis, Blumenthal, Sessions, Klobuchar, and Perdue.⁵ Your consensus-oriented approach to this legislation has helped to attract support from all industry sectors, and we look forward to continuing to work together on this issue that is so important to the American economy.

V. Other Recommendations

⁵ We also thank Senators Ayotte, Baldwin, Blunt, Crapo, Kirk, and Risch for their cosponsorship of S.1890. In the House, H.R. 3326 was introduced July 29, 2015 concurrently and with language identical to S.1890 by Representatives Doug Collins, Nadler, Holding, Jeffries, Chabot, Conyers, Lamar Smith, DelBene, Richmond, Marino, Trent Franks, Deutch, Hanna, Reed, Guthrie and Farenthold. H.R. 3326 currently has a total of 90 cosponsors. We thank all the supporters of the bill.

We recommend three other actions by the federal government aimed at promoting trade secret protection internationally.

First, we believe every future international trade agreement to which the United States is a party should require all signatories to enact and enforce effective criminal and civil trade secret protections. Corning was one of many companies urging the adoption of such language in the Trans-Pacific Partnership, and we were pleased to see it included. (In fact, passage of the Defend Trade Secrets Act will help American trade negotiators secure such commitments in the future by providing a U.S. example of the civil-law component to complement the EEA as an example of the criminal-law component.)

Second, we urge the federal government to encourage other nations to adopt meaningful discovery practices in order to achieve equity in the access to sensitive company information through litigation. Most foreign countries lack the kind of open discovery process that is available in the United States. As a result, foreign companies suspected of misappropriation can simply refuse to respond to inquiries from their U.S. competitors, even when the U.S. company specifically describes the information believed to be stolen. The opaque nature of most foreign litigation systems thus becomes a shield for misappropriators, in contrast to the transparency of the U.S. system. We urge Congress and the Administration to work to achieve greater reciprocity from our major trading partners regarding the availability of sensitive company information in trade secret litigation.

Third, we recommend that the United States initiate an on-going dialogue on trade secret misappropriation with other nations equally committed to intellectual property protection. Such a dialogue would assist in developing effective international trade secret protection.

VI. Conclusion

Twenty years ago this Committee became a leader in the protection of trade secrets with the enactment of the Economic Espionage Act. We appreciate today the opportunity to discuss the need for federal civil protections. We urge you to enact the same legal protections for trade secrets that other forms of intellectual property have long enjoyed. A federal civil remedy for trade secret misappropriation will help safeguard valuable company information that serves as the foundation for American innovation. In addition, we recommend standard trade secret protection as mandatory in all international trade agreements, efforts to achieve greater reciprocity from our major trading partners regarding the availability of sensitive company information in trade secret litigation, and an on-going dialogue with other nations regarding trade secret misappropriation.

Thank you for the opportunity to appear before you today. We appreciate your leadership and look forward to working with you on trade secret protection and other important issues facing our nation.