

114TH CONGRESS  
1ST SESSION

**S.** \_\_\_\_\_

To amend chapter 90 of title 18, United States Code, to provide Federal jurisdiction for the theft of trade secrets, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

Mr. HATCH (for himself, Mr. COONS, Mr. FLAKE, Mr. DURBIN, Mr. TILLIS, and Ms. BALDWIN) introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

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**A BILL**

To amend chapter 90 of title 18, United States Code, to provide Federal jurisdiction for the theft of trade secrets, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Defend Trade Secrets  
5 Act of 2015”.

1 **SEC. 2. FEDERAL JURISDICTION FOR THEFT OF TRADE SE-**  
2 **CRETS.**

3 (a) IN GENERAL.—Section 1836 of title 18, United  
4 States Code, is amended by striking subsection (b) and  
5 inserting the following:

6 “(b) PRIVATE CIVIL ACTIONS.—

7 “(1) IN GENERAL.—An owner of a trade secret  
8 may bring a civil action under this subsection if the  
9 person is aggrieved by a misappropriation of a trade  
10 secret that is related to a product or service used in,  
11 or intended for use in, interstate or foreign com-  
12 merce.

13 “(2) CIVIL SEIZURE.—

14 “(A) IN GENERAL.—

15 “(i) APPLICATION.—Based on an affi-  
16 davit or verified complaint satisfying the  
17 requirements of this paragraph, the court  
18 may, upon ex parte application, issue an  
19 order providing for the seizure of property  
20 necessary to prevent the propagation or  
21 dissemination of the trade secret that is  
22 the subject of the action.

23 “(ii) REQUIREMENTS FOR ISSUING  
24 ORDER.—The court may not grant an ap-  
25 plication under clause (i) unless the court

1 finds that it clearly appears from specific  
2 facts that—

3 “(I) an order issued pursuant to  
4 Rule 65(b) of the Federal Rules of  
5 Civil Procedure would be inadequate  
6 to achieve the purpose of this para-  
7 graph because the party to which the  
8 order would be issued would evade,  
9 avoid, or otherwise not comply with  
10 such an order;

11 “(II) an immediate and irrep-  
12 arable injury will occur if such seizure  
13 is not ordered;

14 “(III) the harm to the applicant  
15 of denying the application outweighs  
16 the harm to the legitimate interests of  
17 the person against whom seizure  
18 would be ordered of granting the ap-  
19 plication and substantially outweighs  
20 the harm to any third parties who  
21 may be harmed by such seizure;

22 “(IV) the applicant is likely to  
23 succeed in showing that—

24 “(aa) the information is a  
25 trade secret;

1                   “(bb) the person against  
2 whom seizure would be ordered—

3                   “(AA) misappropriated  
4 the trade secret of the appli-  
5 cant by improper means; or

6                   “(BB) conspired to use  
7 improper means to mis-  
8 appropriate the trade secret  
9 of the applicant; and

10                  “(cc) the person against  
11 whom seizure would be ordered  
12 has possession of the trade se-  
13 cret;

14                  “(V) the application describes  
15 with reasonable particularity the mat-  
16 ter to be seized and, to the extent rea-  
17 sonable under the circumstances,  
18 identifies the location where the mat-  
19 ter is to be seized;

20                  “(VI) the person against whom  
21 seizure would be ordered, or persons  
22 acting in concert with such person,  
23 would destroy, move, hide, or other-  
24 wise make such matter inaccessible to

1 the court, if the applicant were to pro-  
2 ceed on notice to such person; and

3 “(VII) the applicant has not pub-  
4 licized the requested seizure.

5 “(B) ELEMENTS OF ORDER.—If an order  
6 is issued under subparagraph (A), it shall—

7 “(i) set forth findings of fact and con-  
8 clusions of law required for the order;

9 “(ii) provide for the narrowest seizure  
10 of property necessary to achieve the pur-  
11 pose of this paragraph and direct that the  
12 seizure be conducted in a manner that  
13 minimizes any interruption of the business  
14 operations of third parties and, to the ex-  
15 tent possible, does not interrupt the legiti-  
16 mate business operations of the person ac-  
17 cused of misappropriating the trade secret  
18 that are unrelated to the trade secret that  
19 has allegedly been misappropriated;

20 “(iii)(I) be accompanied by an order  
21 protecting the seized property from dislo-  
22 sure by restricting the access of the appli-  
23 cant, including during the seizure, and pro-  
24 hibiting any copies, in whole or in part, of  
25 the seized property, to prevent undue dam-

1 age to the party against whom the order  
2 has issued or others, until such parties  
3 have an opportunity to be heard in court;

4 “(II) if access is granted to the appli-  
5 cant, the access shall be consistent with  
6 subparagraph (D);

7 “(iv) set a date for a hearing de-  
8 scribed in subparagraph (F) at the earliest  
9 possible time, and not later than 7 days  
10 after the order has issued, unless the party  
11 against whom the order is directed and  
12 others harmed by the order consent to an-  
13 other date for the hearing, except that a  
14 party against whom the order has issued  
15 or any person harmed by the order may  
16 move the court at any time to dissolve or  
17 modify the order after giving notice to the  
18 applicant who obtained the order; and

19 “(v) require the person obtaining the  
20 order to provide the security determined  
21 adequate by the court for the payment of  
22 the damages that any person may be enti-  
23 tled to recover as a result of a wrongful or  
24 excessive seizure or wrongful or excessive  
25 attempted seizure under this paragraph.

1           “(C) PROTECTION FROM PUBLICITY.—The  
2           court shall take appropriate action to protect  
3           the person against whom an order under this  
4           paragraph is directed from publicity, by or at  
5           the behest of the person obtaining the order,  
6           about such order and any seizure under such  
7           order.

8           “(D) MATERIALS IN CUSTODY OF  
9           COURT.—Any materials seized under this para-  
10          graph shall be taken into the custody of the  
11          court. The court shall secure the seized material  
12          from physical and electronic access during the  
13          seizure and while in the custody of the court.  
14          If the seized material includes an electronic  
15          storage medium, or if the seized material is  
16          stored on an electronic storage medium, the  
17          court shall prohibit the medium from being con-  
18          nected to an electronic network or the Internet  
19          without the consent of both parties, until the  
20          hearing required under subparagraph (B)(iv)  
21          and described in subparagraph (F).

22          “(E) SERVICE OF ORDER.—The court shall  
23          order that service of a copy of the order under  
24          this paragraph, and the submissions of the ap-  
25          plicant to obtain the order, shall be made by a

1 Federal law enforcement officer, or may be  
2 made by a State or local law enforcement offi-  
3 cer, who, upon making service, shall carry out  
4 the seizure under the order.

5 “(F) SEIZURE HEARING.—

6 “(i) DATE.—A court that issues a sei-  
7 zure order shall hold a hearing on the date  
8 set by the court under subparagraph  
9 (B)(iv).

10 “(ii) BURDEN OF PROOF.—At a hear-  
11 ing held under this subparagraph, the  
12 party obtaining the order shall have the  
13 burden to prove that the facts supporting  
14 the findings of fact and conclusions of law  
15 necessary to support the order are still in  
16 effect. If the party fails to meet that bur-  
17 den, the seizure order shall be dissolved or  
18 modified appropriately.

19 “(iii) DISSOLUTION OR MODIFICATION  
20 OF ORDER.—A party against whom the  
21 order has been issued or any person  
22 harmed by the order may move the court  
23 at any time to dissolve or modify the order  
24 after giving notice to the party who ob-  
25 tained the order.

1                   “(iv) DISCOVERY TIME LIMITS.—The  
2                   court may make such orders modifying the  
3                   time limits for discovery under the Federal  
4                   Rules of Civil Procedure as may be nec-  
5                   essary to prevent the frustration of the  
6                   purposes of a hearing under this subpara-  
7                   graph.

8                   “(G) ACTION FOR DAMAGE CAUSED BY  
9                   WRONGFUL SEIZURE.—A person who suffers  
10                  damage by reason of a wrongful or excessive  
11                  seizure under this paragraph has a cause of ac-  
12                  tion against the applicant for the order under  
13                  which such seizure was made, and shall be enti-  
14                  tled to the same relief as is provided under sec-  
15                  tion 34(d)(11) of the Trademark Act of 1946  
16                  (15 U.S.C. 1116(d)(11)). The security posted  
17                  with the court under subparagraph (B)(v) shall  
18                  not limit the recovery of third parties for dam-  
19                  ages.

20                  “(H) MOTION FOR ENCRYPTION.—A party  
21                  may make a motion at any time, which may be  
22                  heard ex parte, to encrypt any material seized  
23                  or to be seized under this paragraph that is  
24                  stored on an electronic storage medium. The

1 motion shall include, when possible, the desired  
2 encryption method.

3 “(3) REMEDIES.—In a civil action brought  
4 under this subsection with respect to the misappro-  
5 priation of a trade secret, a court may—

6 “(A) grant an injunction—

7 “(i) to prevent any actual or threat-  
8 ened misappropriation described in para-  
9 graph (1) on such terms as the court  
10 deems reasonable, provided the order does  
11 not prevent a person from accepting an  
12 offer of employment under conditions that  
13 avoid actual or threatened misappropria-  
14 tion described in paragraph (1);

15 “(ii) if determined appropriate by the  
16 court, requiring affirmative actions to be  
17 taken to protect the trade secret; and

18 “(iii) in exceptional circumstances  
19 that render an injunction inequitable, that  
20 conditions future use of the trade secret  
21 upon payment of a reasonable royalty for  
22 no longer than the period of time for which  
23 such use could have been prohibited;

24 “(B) award—

1                   “(i)(I) damages for actual loss caused  
2                   by the misappropriation of the trade se-  
3                   cret; and

4                   “(II) damages for any unjust enrich-  
5                   ment caused by the misappropriation of  
6                   the trade secret that is not addressed in  
7                   computing damages for actual loss; or

8                   “(ii) in lieu of damages measured by  
9                   any other methods, the damages caused by  
10                  the misappropriation measured by imposi-  
11                  tion of liability for a reasonable royalty for  
12                  the misappropriator’s unauthorized disclo-  
13                  sure or use of the trade secret;

14                  “(C) if the trade secret is willfully and ma-  
15                  liciously misappropriated, award exemplary  
16                  damages in an amount not more than 3 times  
17                  the amount of the damages awarded under sub-  
18                  paragraph (B); and

19                  “(D) if a claim of the misappropriation is  
20                  made in bad faith, a motion to terminate an in-  
21                  junction is made or opposed in bad faith, or the  
22                  trade secret was willfully and maliciously mis-  
23                  appropriated, award reasonable attorney’s fees  
24                  to the prevailing party.

1           “(c) JURISDICTION.—The district courts of the  
2 United States shall have original jurisdiction of civil ac-  
3 tions brought under this section.

4           “(d) PERIOD OF LIMITATIONS.—A civil action under  
5 subsection (b) may not be commenced later than 5 years  
6 after the date on which the misappropriation with respect  
7 to which the action would relate is discovered or by the  
8 exercise of reasonable diligence should have been discov-  
9 ered. For purposes of this subsection, a continuing mis-  
10 appropriation constitutes a single claim of misappropria-  
11 tion.”.

12           (b) DEFINITIONS.—Section 1839 of title 18, United  
13 States Code, is amended—

14           (1) in paragraph (3), by striking “and” at the  
15 end;

16           (2) in paragraph (4), by striking the period at  
17 the end and inserting a semicolon; and

18           (3) by adding at the end the following:

19           “(5) the term ‘misappropriation’ means—

20                   “(A) acquisition of a trade secret of an-  
21 other by a person who knows or has reason to  
22 know that the trade secret was acquired by im-  
23 proper means; or

1           “(B) disclosure or use of a trade secret of  
2 another without express or implied consent by  
3 a person who—

4           “(i) used improper means to acquire  
5 knowledge of the trade secret;

6           “(ii) at the time of disclosure or use,  
7 knew or had reason to know that the  
8 knowledge of the trade secret was—

9           “(I) derived from or through a  
10 person who had used improper means  
11 to acquire the trade secret;

12           “(II) acquired under cir-  
13 cumstances giving rise to a duty to  
14 maintain the secrecy of the trade se-  
15 cret or limit the use of the trade se-  
16 cret; or

17           “(III) derived from or through a  
18 person who owed a duty to the person  
19 seeking relief to maintain the secrecy  
20 of the trade secret or limit the use of  
21 the trade secret; or

22           “(iii) before a material change of the  
23 position of the person, knew or had reason  
24 to know that—

1 “(I) the trade secret was a trade  
2 secret; and

3 “(II) knowledge of the trade se-  
4 cret had been acquired by accident or  
5 mistake;

6 “(6) the term ‘improper means’—

7 “(A) includes theft, bribery, misrepresenta-  
8 tion, breach or inducement of a breach of a  
9 duty to maintain secrecy, or espionage through  
10 electronic or other means; and

11 “(B) does not include reverse engineering  
12 or independent derivation; and

13 “(7) the term ‘Trademark Act of 1946’ means  
14 the Act entitled ‘An Act to provide for the registra-  
15 tion and protection of trademarks used in commerce,  
16 to carry out the provisions of certain international  
17 conventions, and for other purposes, approved July  
18 5, 1946 (15 U.S.C. 1051 et seq.) (commonly re-  
19 ferred to as the “Trademark Act of 1946” or the  
20 “Lanham Act”)’.”.

21 (c) EXCEPTIONS TO PROHIBITION.—Section 1833 of  
22 title 18, United States Code, is amended, in the matter  
23 preceding paragraph (1), by inserting “or create a private  
24 right of action for” after “prohibit”.

25 (d) CONFORMING AMENDMENTS.—

1           (1) The section heading for section 1836 of title  
2           18, United States Code, is amended to read as fol-  
3           lows:

4           **“§ 1836. Civil proceedings”.**

5           (2) The table of sections for chapter 90 of title  
6           18, United States Code, is amended by striking the  
7           item relating to section 1836 and inserting the fol-  
8           lowing:

          “1836. Civil proceedings.”.

9           (e) **EFFECTIVE DATE.**—The amendments made by  
10          this section shall apply with respect to any misappropria-  
11          tion of a trade secret (as defined in section 1839 of title  
12          18, United States Code, as amended by this section) for  
13          which any act occurs on or after the date of the enactment  
14          of this Act.

15          (f) **RULE OF CONSTRUCTION.**—Nothing in the  
16          amendments made by this section shall be construed to  
17          modify the rule of construction under section 1838 of title  
18          18, United States Code, or to preempt any other provision  
19          of law.

20          (g) **APPLICABILITY TO OTHER LAWS.**—This section  
21          and the amendments made by this section shall not be con-  
22          strued to be a law pertaining to intellectual property for  
23          purposes of any other Act of Congress.

1 **SEC. 3. REPORT ON THEFT OF TRADE SECRETS OCCUR-**  
2 **RING ABROAD.**

3 (a) DEFINITIONS.—In this section:

4 (1) DIRECTOR.—The term “Director” means  
5 the Under Secretary of Commerce for Intellectual  
6 Property and Director of the United States Patent  
7 and Trademark Office.

8 (2) FOREIGN INSTRUMENTALITY, ETC.—The  
9 terms “foreign instrumentality”, “foreign agent”,  
10 and “trade secret” have the meanings given those  
11 terms in section 1839 of title 18, United States  
12 Code.

13 (3) STATE.—The term “State” includes the  
14 District of Columbia and any commonwealth, terri-  
15 tory, or possession of the United States.

16 (4) UNITED STATES COMPANY.—The term  
17 “United States company” means an organization or-  
18 ganized under the laws of the United States or a  
19 State or political subdivision thereof.

20 (b) REPORTS.—Not later than 1 year after the date  
21 of enactment of this Act, and biannually thereafter, the  
22 Attorney General, in consultation with the Intellectual  
23 Property Enforcement Coordinator, the Director, and the  
24 heads of other appropriate agencies, shall submit to the  
25 Committees on the Judiciary of the House of Representa-  
26 tives and the Senate, and make publicly available on the

1 Web site of the Department of Justice and disseminate  
2 to the public through such other means as the Attorney  
3 General may identify, a report on the following:

4 (1) The scope and breadth of the theft of the  
5 trade secrets of United States companies occurring  
6 outside of the United States.

7 (2) The extent to which theft of trade secrets  
8 occurring outside of the United States is sponsored  
9 by foreign governments, foreign instrumentalities, or  
10 foreign agents.

11 (3) The threat posed by theft of trade secrets  
12 occurring outside of the United States.

13 (4) The ability and limitations of trade secret  
14 owners to prevent the misappropriation of trade se-  
15 crets outside of the United States, to enforce any  
16 judgment against foreign entities for theft of trade  
17 secrets, and to prevent imports based on theft of  
18 trade secrets overseas.

19 (5) A breakdown of the trade secret protections  
20 afforded United States companies by each country  
21 that is a trading partner of the United States and  
22 enforcement efforts available and undertaken in each  
23 such country, including a list identifying specific  
24 countries where trade secret theft, laws, or enforce-

1       ment is a significant problem for United States com-  
2       panies.

3           (6) Instances of the Federal Government work-  
4       ing with foreign countries to investigate, arrest, and  
5       prosecute entities and individuals involved in the  
6       theft of trade secrets outside of the United States.

7           (7) Specific progress made under trade agree-  
8       ments and treaties, including any new remedies en-  
9       acted by foreign countries, to protect against theft  
10      of trade secrets of United States companies outside  
11      of the United States.

12          (8) Recommendations of legislative and execu-  
13      tive branch actions that may be undertaken to—

14           (A) reduce the threat of and economic im-  
15      pact caused by the theft of the trade secrets of  
16      United States companies occurring outside of  
17      the United States;

18           (B) educate United States companies re-  
19      garding the threats to their trade secrets when  
20      taken outside of the United States;

21           (C) provide assistance to United States  
22      companies to reduce the risk of loss of their  
23      trade secrets when taken outside of the United  
24      States; and

1                   (D) provide a mechanism for United States  
2                   companies to confidentially or anonymously re-  
3                   port the theft of trade secrets occurring outside  
4                   of the United States.

5 **SEC. 4. SENSE OF CONGRESS.**

6           It is the sense of Congress that—

7                   (1) trade secret theft occurs in the United  
8                   States and around the world;

9                   (2) trade secret theft, wherever it occurs, harms  
10                  the companies that own the trade secrets and the  
11                  employees of the companies; and

12                  (3) chapter 90 of title 18, United States Code  
13                  (commonly known as the Economic Espionage Act of  
14                  1996), applies broadly to protect trade secrets from  
15                  theft.