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white paper

October 2014

Digital Rights Review:

Summer/Fall 2014 Federal Copyright and Trade Secret Legislation Update

VENABLE LLP ON INTELLECTUAL PROPERTY LAW

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Since the Winter 2014 update, the 113th Congress has continued to devote effort to establishing or amending certain federal statutes related to the protection, enforcement, and exploitation of trade secrets or copyrights. Some legislation aims to establish a private right of action for trade secret theft under federal law or to prevent or deter trade secret theft through cyberattacks. Other bills are designed to modify the royalties owed to authors of certain sound recordings or visual works under federal copyright law. If signed into law, these bills would have important implications for a wide range of interested parties, including songwriters, certain performing artists, authors of visual works, entertainment industry or content right stakeholders, and any business intent on exerting greater control over its trade secrets.

In addition to these bills making their way through Congress, President Obama recently signed a bill into law that allows consumers to "unlock" their mobile devices without fear of committing copyright infringement. Set forth below in Sections 1 and 2 is a summary of these recent trade secret and copyright bills and the newly enacted legislation. Section 3 of this document also provides a brief update on the status of the proposed legislation discussed in the Winter 2014 update.

1. Trade Secrets

There appears to be renewed momentum in Congress to pass legislation that would establish a federal civil cause of action for trade secret theft in order to strengthen the trade secret protection regime in the US. A growing number of lawmakers have voiced support for this legislation largely because the Economic Espionage Act of 1996 (EEA) currently only provides for criminal prosecution, there are material differences among the versions of the Uniform Trade Secrets Act (UTSA) adopted in some form by 48 states, and state courts that hear civil trade secret misappropriation cases have limited jurisdiction to obtain evidence and witnesses located in other states or countries.

Introduced in the Senate with bipartisan support on April 29, 2014, the Defend Trade Secrets Act of 2014 (S. 2267) (DTSA) would amend the EEA and authorize trade secret owners to bring civil actions for:

1. violations of Section 1831 of the EEA (economic espionage);
2. violations of Section 1832 of the EEA (trade secret theft); or
3. a "misappropriation of a trade secret that is related to a product or service used in, or intended for use in, interstate or foreign commerce."

Although the DTSA is predominantly modeled on the UTSA (*e.g.*, both define "trade secrets" very similarly and offer nearly the same robust remedies), the DTSA appears to have certain advantages over the UTSA. First, the statute of limitations under the DTSA is five years compared to the three-year period under the UTSA. Second, the DTSA allows for punitive damages in an amount up to three times actual damages, while the UTSA caps such damages at two times actual damages. Third, the DTSA authorizes courts to issue *ex parte* orders for the seizure of any property used to commit or facilitate the alleged misappropriation when the plaintiff can satisfy certain requirements for injunctive relief set forth in the Trademark Act of 1946. This provision would presumably allow plaintiffs to seize computers, tablets, cellular phones and/or any other equipment used in the alleged misappropriation. Finally, unlike the UTSA, the DTSA does not preempt state common law remedies, which would allow plaintiffs to plead state common law claims in lawsuits filed under the DTSA.

A companion bill inspired by and principally based on the DTSA, the Trade Secrets Protection Act of 2014 (H.R. 5233) (TSPA) was introduced in the House of Representatives with bipartisan support on July 29, 2014. The TSPA largely offers the same rights and protections as the DTSA, although the TSPA appears a bit broader and more flexible in certain respects. For example, while the DTSA only authorizes courts to seize property that was *actually used* to facilitate an alleged misappropriation, the TSPA appears to allow courts to seize additional property that *was not* directly used in furtherance of a scheme to steal trade secrets when doing so would "prevent the propagation or dissemination of the trade secret that is the subject of the action." Moreover, the TSPA seems to require the applications that must be submitted by plaintiffs to obtain seizure orders to contain less detail and particularity than the DTSA. Furthermore, unlike under the DTSA, the TSPA does not require plaintiffs to provide US Attorneys with advance notice of their intention to file applications for seizure orders, and does not expressly permit the court to deny such orders if the public interest would be served by criminally prosecuting the alleged perpetrator.

Although other bills introduced in the 113th Congress that aimed to establish a federal private right of action under the EEA failed to advance beyond the committee stage, either the DTSA or TSPA appear to have better prospects of becoming law. These bills have received broad bipartisan support by high-ranking legislators in both houses of Congress and ringing endorsements from the National Association of Manufacturers, US Chamber of Commerce, and more than a dozen Fortune 500 companies. Moreover, the Obama Administration would likely support either bill, given its conclusion in the Administration Strategy on Mitigating the Theft of US Trade Secrets that preventing trade secret theft is critical to US economic and national security. If signed into law, either the DTSA or the TSPA would dramatically broaden and strengthen trade secret protection in the US.

The federal private right of action would empower companies to directly combat theft of their trade secrets in federal court rather than having to rely on the Department of Justice (DOJ) – which only brought 25 trade secrets cases in 2013 – to investigate and prosecute their cases. Furthermore, the federal civil cause of action would presumably help facilitate multi-jurisdictional litigation involving witnesses and critical evidence located in another state or country. In addition, either bill would help foster the development of a national standard for trade secret misappropriation for use by businesses of all types and sizes to protect their intellectual property. Moreover, all other forms of intellectual property – patents, copyrights, and trademarks – are afforded a civil cause of action at the federal level. Either the DTSA or the TSPA would therefore confer upon trade secrets a similar level of protection as other forms of intellectual

property at a time when new technologies are making it easier to store, access, disseminate, and publish trade secret information.

Another noteworthy bill was introduced on May 22, 2014 to prevent and deter trade secret theft resulting from cyber invasions or cyberattacks. An updated version of a 2013 bill, the **Deter Cyber Theft Act of 2014 (S. 2384)** (DCTA) is largely reactionary to the recent wave of cyber intrusions against US companies, as illustrated by a 2013 report indicating that the Chinese military had hacked into the computers of many US businesses to steal valuable trade secrets and a May 1, 2014 indictment filed by the DOJ against certain Chinese military officers involving the first ever charges against state-sponsored actors for computer hacking and economic espionage. The DCTA would authorize the Department of the Treasury to freeze assets of individuals or companies that benefit from theft of US technology or other commercial information, and would also require the President to report annually to Congress certain key information about cyberattacks (*e.g.*, the countries engaging in such practices and a priority watch list of the most egregious offenders).

2. Copyrights

There have also been several important developments in the copyright law arena. Signed into law by President Obama on August 1, 2014, the **Unlocking Consumer Choice and Wireless Competition Act (S. 517)** (Unlocking Act) repealed a Library of Congress (LOC) rule that classified bypassing or "unlocking" technical access controls on cellular phones as copyright infringement under the **1998 Digital Millennium Copyright Act** (DMCA). Consequently, the Unlocking Act allows consumers to reprogram their mobile devices in order to change wireless service providers, although its benefits may be rather modest and short-lived. This law predominantly benefits AT&T and T-Mobile customers because these carriers use the same technology to deliver wireless services that is utilized throughout the world. Such customers may therefore switch carriers on unlocked devices by simply swapping SIM cards (*i.e.*, the embedded circuit that contains subscriber identity information). By contrast, Verizon and Sprint customers must have their unlocked devices "provisioned" (*i.e.*, programmed) by the new service provider before they can receive wireless services. Moreover, the Unlocking Act applies only to customers who *fully* own their cellular phones, which means that it does not apply to customers who are still under contract with their carriers and/or who bought their phones at a subsidized price. Finally, the Unlocking Act expires in 2015, at which point the LOC will again consider whether cellular phone unlocking should constitute copyright infringement under the DMCA.

Two bills recently introduced in Congress are designed to address the royalties owed to certain artists for digital transmissions of their songs through services such as Pandora, Spotify, and Sirius. First, the **Respecting Senior Performers as Essential Cultural Treasures Act (H.R. 4772)** (RESPECT Act), would amend the **US Copyright Act** (Copyright Act) to require services that digitally transmit musical works to pay royalties for transmissions of any songs that were recorded before February 15, 1972 which are currently covered by a hodgepodge of state laws that do not require payment of such royalties. Introduced in the House of Representatives on May 29, 2014, the bill has generated significant buzz by addressing a controversial copyright issue that is central to several pending lawsuits involving satellite and Internet radio companies and record labels.

Along similar lines as the RESPECT Act, the Songwriter Equity Act of 2014 (SEA) would amend Section 114(i) of the Copyright Act to allow the courts that set royalty rates under federal copyright law to consider all relevant evidence when establishing royalty rates applicable to digital transmissions of musical works

through streaming services such as Pandora, Spotify, or Sirius, which is currently prohibited by law. Moreover, the SEA would also amend Section 115 of the Copyright Act to require the Copyright Royalty Board (the government entity responsible for setting royalty rates) to consider the rates that would have been negotiated in the marketplace between a willing seller and willing buyer when setting royalty rates for the reproduction and distribution of musical works. In this regard, the SEA Act is designed to modernize the music licensing system under the Copyright Act to ensure that songwriters, composers, and publishers receive fair compensation for the reproduction, distribution, and performance of their songs. Initially introduced in the House of Representatives on February 25, 2014 (**H.R. 4079**), momentum to pass the SEA into law has recently picked up in Congress as the Senate introduced a companion version of this bill on May 12, 2014 (**S. 2321**).

Congress has also introduced a bill designed to ensure that artists receive a resale royalty for sales of certain visual works (*e.g.*, paintings, drawings, or prints). Known as the American Royalties Too Act of 2014 (ARTA), this bill would amend the Copyright Act to establish a resale royalty rate equal to the lesser of (i) 5% of the purchase price, or (ii) $35,000, for any work of visual art sold by a major auction house (*i.e.*, one that has sold at least $1,000,000 worth of works during the previous year) or in an online auction. Predictably, major auction houses and online sales platforms have voiced opposition to the ARTA, which has been introduced in substantially similar forms in both the House of Representatives (**H.R. 4103**) and the Senate (**S. 2045**).

3. Status Update Regarding The Bills Cited in The Winter 2014 Update

The table below provides a brief update on the status of the proposed legislation discussed in the Winter 2014 update.

Bill	Status
Future of American Innovation and Research Act (S. 1770)	Referred to the Committee on the Judiciary on November 21, 2013 and has not moved beyond this stage.
Private Right of Action Against Theft of Trade Secrets Act of 2013 (H.R. 2466)	Referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations on June 20, 2013 and has not moved beyond this stage.
Cyber Economic Espionage Accountability Act (H.R. 2281)	Referred to the Subcommittee on Immigration and Border Security on June 6, 2013 and has not moved beyond this stage.
Deter Cyber Theft Act (S. 884)	Referred to the Committee on Finance on May 7, 2013 and has not moved beyond this stage. Although, as noted above, a new version of this bill was introduced on May 22, 2014.
Strengthening and Enhancing Cybersecurity by Using Research, Education, Information and Technology Act (H.R. 1468)	Referred to the Subcommittee on Research and Technology on June 24, 2013 and has not moved beyond this stage.
Cyber Intelligence Sharing and Protection Act (H.R. 624)	Referred to the Select Committee on Intelligence on April 22, 2013 and has not advanced beyond this stage.

Free Market Royalty Act (H.R. 3219)	Referred to the Subcommittee on Courts, Intellectual Property, and the Internet on October 15, 2013 and has not advanced beyond this stage.
Next Generation Television Marketplace Act (H.R. 3720)	Referred to the Subcommittee on Courts, Intellectual Property, and the Internet on January 27, 2014 and has not advanced beyond this stage.
Television Consumer Freedom Act of 2013 (S. 912)	Referred to the Committee on Commerce, Science, and Transportation on May 9, 2013 and has not advanced beyond this stage.
Unlocking Technology Act of 2013 (H.R. 1892)	Referred to the Subcommittee on Courts, Intellectual Property, and the Internet on June 6, 2014 and has not advanced beyond this stage. Although, as noted above, a similar bill was recently signed into law that permits cellular phone unlocking.

As illustrated by the developments described above, Congress has been working on meaningful trade secret and copyright legislation. The pending legislation described herein may lead to amended US federal laws relating to the protection, enforcement, and exploitation of trade secrets and copyrights. Consequently, interested parties should monitor these bills to ensure they are fully aware of any developments that may affect their rights and obligations under US federal law. Stay tuned for further updates from Venable's Intellectual Property team on important developments in this area.

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