

# 2017 Trade Secrets Symposium

On May 8, 2017, at the one-year anniversary of the enactment of the Defend Trade Secrets Act of 2016, the USPTO convened a one-day symposium on trade secrets: "Developments in Trade Secret Protection – Morning Session

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1-88

00:00:04,471 --> 00:07:38,124

Intro Music

89

00:07:38,758 --> 00:07:42,028

I'm Michael Smith,  
and I am very pleased to introduce Shira Perlmutter

90

00:07:42,028 --> 00:07:45,331

who'll be providing  
welcoming remarks this morning.

91

00:07:45,898 --> 00:07:49,469

Ms.. Perlmutter  
is the chief policy officer and director

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00:07:49,469 --> 00:07:52,839

for International Affairs at the  
United States Patent and Trademark Office.

93

00:07:53,406 --> 00:07:54,841

And in that position, Ms..

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00:07:54,841 --> 00:07:56,576

Perlmutter serves as a policy

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00:07:56,576 --> 00:08:01,614

advisor to the Undersecretary of Commerce  
for Intellectual Property and oversees

96

00:08:01,614 --> 00:08:05,451

the USPTO Domestic and International  
IP Policy Activities.

97

00:08:05,818 --> 00:08:09,789

Legislative Engagement through the Office  
of Governmental Affairs,

98

00:08:09,789 --> 00:08:13,326

Education and Training through the Global  
Intellectual Property Academy,

99

00:08:13,960 --> 00:08:16,963

Global Advocacy  
through the IP, Out of Shape program

100

00:08:17,163 --> 00:08:21,100

and Economic Analysis through the Office  
of the Chief Economist for.

101

00:08:26,138 --> 00:08:26,706

Well,

102

00:08:26,706 --> 00:08:29,275

good morning,  
everyone, and welcome to the U.S.

103

00:08:29,275 --> 00:08:31,344  
Patent and Trademark Office.

104  
00:08:31,344 --> 00:08:34,514  
I'm very pleased to see  
all of you here with us this morning

105  
00:08:34,814 --> 00:08:38,217  
and also welcome the participants  
who are joining over the Internet

106  
00:08:38,551 --> 00:08:41,420  
and from our satellite offices in Detroit,

107  
00:08:41,420 --> 00:08:44,190  
Denver, San Jose and Dallas.

108  
00:08:44,190 --> 00:08:45,458  
This symposium.

109  
00:08:45,458 --> 00:08:47,159  
Well, I wanted to say, first of all,

110  
00:08:47,159 --> 00:08:50,463  
how delighted we are to be able to have  
this second public symposium.

111  
00:08:50,463 --> 00:08:53,766  
I thought the first one we had  
was a year ago, but I was corrected.

112  
00:08:53,766 --> 00:08:56,769  
It was two years ago. Time has flown.

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00:08:56,869 --> 00:09:00,673

And of course, trade secrets  
protection is a topic

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00:09:00,673 --> 00:09:03,843

that's increasingly important  
to innovators all around the world,

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00:09:04,143 --> 00:09:07,547

and we expect that  
trend will only continue if not speed up.

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00:09:09,115 --> 00:09:12,718

This symposium has been planned  
to take place

117

00:09:12,985 --> 00:09:18,057

about a year from the enactment  
of the Defense Trade Secrets Act of 2016.

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00:09:18,758 --> 00:09:23,362

The DTC was a very important landmark  
in the United States in the development

119

00:09:23,362 --> 00:09:29,001

of our trade secrets law, as it provided  
the first federal civil cause of action.

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00:09:30,069 --> 00:09:31,270

And it also provided,

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00:09:31,270 --> 00:09:34,440

as I think everyone in the room  
knows, a number of new remedies,

122

00:09:35,174 --> 00:09:39,612  
such as the potential ex-parte  
seizure of stolen trade secrets.

123  
00:09:40,146 --> 00:09:41,514  
And during the course of today,

124  
00:09:41,514 --> 00:09:44,517  
we'll have opportunities  
to discuss the impact of the new law.

125  
00:09:44,650 --> 00:09:49,255  
So far, another significant development  
in the U.S.

126  
00:09:49,255 --> 00:09:53,392  
in trade secrets  
protection relates to the recent issuance

127  
00:09:53,392 --> 00:09:57,930  
by the Office of the IP Enforcement  
Coordinator of its third

128  
00:09:58,064 --> 00:10:01,467  
Joint Strategic Plan  
on Intellectual Property Enforcement.

129  
00:10:02,335 --> 00:10:06,539  
These joint strategic plans are developed  
every three years

130  
00:10:06,772 --> 00:10:11,410  
with extensive interagency  
input pursuant to a Congressional mandate

131

00:10:12,078 --> 00:10:16,649  
set out in the Pro IP Act of 2008,  
so almost ten years ago now.

132  
00:10:17,416 --> 00:10:20,453  
And the current plan,  
which was issued in December, covers

133  
00:10:20,453 --> 00:10:24,590  
fiscal years, 2017, 2018 and 2019.

134  
00:10:25,725 --> 00:10:28,561  
So just a word or two about the Joint  
Strategic plan.

135  
00:10:28,561 --> 00:10:30,930  
It's organized into four sections.

136  
00:10:30,930 --> 00:10:34,500  
The first section is really a overview

137  
00:10:34,500 --> 00:10:38,004  
and background section that discusses  
the role of intellectual property

138  
00:10:38,004 --> 00:10:42,375  
in spurring economic growth  
in this country, in spurring high

139  
00:10:42,375 --> 00:10:46,846  
paying jobs, economic competitiveness  
and also creative expression.

140  
00:10:48,114 --> 00:10:51,684  
The report also describes

the major challenges that are faced by the

141

00:10:51,684 --> 00:10:55,621

IP intensive industries

and by the law enforcement communities.

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00:10:56,489 --> 00:10:59,759

The second section focuses on illicit

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00:10:59,759 --> 00:11:04,096

IP based activity in the online

environment, and the third section

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00:11:04,096 --> 00:11:09,068

focuses on trade in counterfeit

goods and tangible pirated goods

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00:11:10,202 --> 00:11:13,773

and finally, last

but not least, Section four

146

00:11:13,906 --> 00:11:18,577

focuses on governmental frameworks

and policies to support robust

147

00:11:18,577 --> 00:11:22,748

intellectual property enforcement

in today's rapidly changing environment.

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00:11:23,315 --> 00:11:28,487

The plan outlines, believe it or not,

77 action items to be carried out

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00:11:28,487 --> 00:11:32,658

during the coming three years,

primarily by federal agencies,

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00:11:33,559 --> 00:11:35,695

and it also includes a number of calls

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00:11:35,695 --> 00:11:38,698

for research on a wide range of issues.

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00:11:38,764 --> 00:11:43,703

So of particular relevance to us here today, the plan talks about the scale

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00:11:43,703 --> 00:11:48,808

and impact of trade secret theft in particular, and sets forth a number,

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00:11:48,808 --> 00:11:53,412

a number of those 77 action items relate to trade secrets and also calls

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00:11:53,412 --> 00:11:57,416

for research that focus on enhancing trade secrets protection

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00:11:58,584 --> 00:12:01,487

so well

worth reading if you haven't already.

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00:12:01,487 --> 00:12:04,824

In addition, our regular work here at the PTO

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00:12:05,424 --> 00:12:07,960

on trade secrets issues continues.

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00:12:07,960 --> 00:12:13,065

And if anything is expanding,  
we are committed to promoting the adoption

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00:12:13,065 --> 00:12:15,034

of effective systems of trade, secret

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00:12:15,034 --> 00:12:18,170

protection and enforcement  
in our trading partners around the world.

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00:12:19,238 --> 00:12:21,340

And for example, one of the ways we do

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00:12:21,340 --> 00:12:24,410

this is through our IP attache program,  
which Michael mentioned.

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00:12:24,744 --> 00:12:28,481

Our attache is advocate  
with host governments

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00:12:28,481 --> 00:12:31,951

and their countries and regions  
to achieve that goal.

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00:12:32,618 --> 00:12:36,822

We also offer programs  
both here and abroad to educate government

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00:12:36,822 --> 00:12:40,292

officials on the implementation  
and enforcement of trade secrets law.

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00:12:41,594 --> 00:12:44,430

As part of our ongoing efforts,

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00:12:44,430 --> 00:12:48,467

we will discuss today for interesting topics.

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00:12:48,467 --> 00:12:52,204

Four important topics with panels made up of experts in their fields.

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00:12:52,538 --> 00:12:56,041

So I wanted to just give a short overview of what you'll be hearing today.

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00:12:56,642 --> 00:12:59,011

The first panel is an economic panel.

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00:12:59,011 --> 00:13:00,813

It will focus on how economists

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00:13:00,813 --> 00:13:04,650

estimate the value of trade secrets and calculate damage awards.

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00:13:05,785 --> 00:13:07,086

The panel

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00:13:07,086 --> 00:13:10,523

consists of three economists, all of whom have years of experience

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00:13:10,523 --> 00:13:13,526

providing expert testimony in trade secrets cases.

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00:13:14,059 --> 00:13:18,063

And they will discuss  
how calculating damages in trade

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00:13:18,063 --> 00:13:23,869

secrets cases differs from cases  
involving other forms of IP, and also how

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00:13:23,869 --> 00:13:27,106

the Ctsa and recent case law may impact

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00:13:27,339 --> 00:13:30,342

trends in trade secrets damage awards.

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00:13:30,943 --> 00:13:33,012

The second panel

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00:13:33,012 --> 00:13:35,581

will look at issues  
presented to practitioners

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00:13:35,581 --> 00:13:38,551

and their clients  
since enactment of the Ctsa.

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00:13:38,684 --> 00:13:42,188

So the panel will focus primarily  
on the ex-parte seizure

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00:13:42,188 --> 00:13:45,691

provisions of the DTC  
and their practical impact.

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00:13:47,259 --> 00:13:50,462

The third panel will move to  
an international focus

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00:13:50,796 --> 00:13:53,499

and we'll discuss in that panel  
the protection

189

00:13:53,499 --> 00:13:56,502

and enforcement of trade secrets  
in foreign jurisdictions

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00:13:56,635 --> 00:14:00,272

and how the laws and practices  
in those jurisdictions differ.

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00:14:01,040 --> 00:14:04,176

The panel will look at how countries  
around the world have implemented

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00:14:04,176 --> 00:14:08,147

trade secrets laws and what elements  
make up an effective regime.

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00:14:09,348 --> 00:14:10,316

And then finally,

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00:14:10,316 --> 00:14:13,485

Section four will also continue  
our international theme.

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00:14:13,485 --> 00:14:16,488

But look at it  
from a different perspective.

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00:14:16,922 --> 00:14:17,656

Trade secrets.

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00:14:17,656 --> 00:14:21,927

Disputes involving actions taken outside  
the United States are more

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00:14:21,927 --> 00:14:25,798

and more common  
in today's globalized and connected world,

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00:14:26,398 --> 00:14:30,603

and they can result in competing cases  
being brought in different jurisdictions.

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00:14:31,337 --> 00:14:34,673

So our last panel will look  
at how businesses can address

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00:14:34,907 --> 00:14:37,943

trade secret misappropriation  
occurring overseas

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00:14:38,711 --> 00:14:42,081

through the form of an internal legal  
team meeting.

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00:14:43,048 --> 00:14:46,819

The meeting will be chaired  
by a general counsel who will look

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00:14:47,186 --> 00:14:50,189

to his team to develop enforcement options

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00:14:50,389 --> 00:14:53,392

with regard to a hypothetical case.

206

00:14:54,159 --> 00:14:57,863

So we encourage participation  
from all of you both in person and online.

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00:14:58,063 --> 00:15:00,900

If you're watching online  
and would like to submit a question

208

00:15:00,900 --> 00:15:04,303

for one of the panels,  
please send an email to Hollis

209

00:15:04,637 --> 00:15:09,541

Joliet Dot Robinson at USP dot gov.

210

00:15:10,109 --> 00:15:12,745

And include your name and organization.

211

00:15:12,745 --> 00:15:16,815

And if you're writing from a regional  
office, which office you are writing from,

212

00:15:17,883 --> 00:15:20,886

we have a full and interesting  
day ahead of us.

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00:15:21,320 --> 00:15:24,156

I very much look forward personally  
to learning more

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00:15:24,156 --> 00:15:28,093

from our panels and from the audience  
about where trade secrets protection

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00:15:28,294 --> 00:15:31,830

is going after this important year  
of exciting developments.

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00:15:32,431 --> 00:15:36,902

So I thank you all for your participation  
and I hope you enjoy the conversation.

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00:15:37,236 --> 00:15:40,239

Thanks very much.

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00:15:55,154 --> 00:15:56,055

I'm Alan Marco.

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00:15:56,055 --> 00:15:57,957

I'm the chief economist here at the U.S.

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00:15:57,957 --> 00:15:59,558

Patent and Trademark Office.

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00:15:59,558 --> 00:16:04,063

And while our panelists come up,  
I just want to mention a little bit

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00:16:04,063 --> 00:16:07,666

about what what we're doing in this panel  
and a little bit about them.

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00:16:08,033 --> 00:16:11,804

So all of our panelists have years  
of experience in economic consulting

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00:16:12,471 --> 00:16:16,108

related to all areas,  
all aspects of intellectual property,

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00:16:16,575 --> 00:16:20,713

including IP portfolio  
evaluation, evaluation of trade secrets,

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00:16:21,080 --> 00:16:26,018

licensing strategy and damage estimates  
for trade secret misappropriation.

227

00:16:26,385 --> 00:16:29,388

So in the economics profession,

228

00:16:29,388 --> 00:16:31,557

we have a lot of people,

229

00:16:31,557 --> 00:16:34,193

a lot of economists  
doing studies on patents.

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00:16:34,193 --> 00:16:37,363

We have some economists  
doing studies on trademarks

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00:16:37,763 --> 00:16:41,467

and we have a handful of economists  
doing studies on copyrights,

232

00:16:41,467 --> 00:16:42,935

and we have virtually none doing

233

00:16:42,935 --> 00:16:46,839

actual kind of broad scale  
academic studies and trade secrets.

234

00:16:47,006 --> 00:16:49,708

For the obvious reason  
that they're secret.

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00:16:49,708 --> 00:16:52,711

So it's quite difficult  
to get data on them.

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00:16:52,845 --> 00:16:56,315

However, with the  
the viewpoint from our consultants,

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00:16:56,582 --> 00:16:59,418

they've looked at many,  
many cases over the years

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00:16:59,418 --> 00:17:02,421

and have actually  
seen the data from each case

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00:17:03,655 --> 00:17:04,690

in detail.

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00:17:04,690 --> 00:17:08,260

And they offer us a perspective  
that would be difficult to get from

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00:17:08,460 --> 00:17:10,496

the academic research community.

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00:17:10,496 --> 00:17:12,531

So we're very pleased to have them here.

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00:17:12,531 --> 00:17:16,668  
They've been testifying expert witnesses  
in state and federal courts

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00:17:17,169 --> 00:17:22,207  
before the International Trade Commission  
and other venues, and they are seated.

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00:17:22,207 --> 00:17:23,475  
I want to get my order right here.

246  
00:17:23,475 --> 00:17:24,710  
We are

247  
00:17:24,710 --> 00:17:28,614  
from your left to right.

248  
00:17:28,781 --> 00:17:33,185  
Christopher Girardi is a senior managing  
director at FTI Consulting in New York.

249  
00:17:34,153 --> 00:17:38,323  
Steve Schwartz is a vice president  
at Charles River Associates in Dallas.

250  
00:17:38,524 --> 00:17:42,628  
And Kevin Neal's is a principal  
at the Brattle Group in Washington, D.C.

251  
00:17:42,661 --> 00:17:45,631  
So we all begin now.

252  
00:17:52,471 --> 00:17:53,105  
So first of all,

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00:17:53,105 --> 00:17:56,108

thanks to all of you for joining us today.

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00:17:57,876 --> 00:18:00,679

And why don't we start off.

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00:18:00,679 --> 00:18:06,018

I guess I should start off by saying  
we will take questions throughout.

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00:18:06,018 --> 00:18:10,022

So if you have a question, Gordon,  
come up to a microphone, livestream.

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00:18:10,022 --> 00:18:12,991

Viewers

can email their questions again to Hollis

258

00:18:13,358 --> 00:18:16,195

Robinson at USPTO dot gov.

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00:18:16,195 --> 00:18:19,832

For everybody, both online and present,  
if you have a question, please

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00:18:19,832 --> 00:18:24,736

include your name and affiliation  
before you ask your question.

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00:18:24,736 --> 00:18:27,072

So thank you for that. Okay.

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00:18:28,740 --> 00:18:31,510

So in in looking at

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00:18:31,510 --> 00:18:34,847

valuing damages in trade secret cases,

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00:18:35,614 --> 00:18:37,916

I wonder if the

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00:18:37,916 --> 00:18:41,120

you could give us the three of you  
could could give us kind of a perspective

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00:18:41,286 --> 00:18:44,556

on how you approach that,  
that basic problem of valuing

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00:18:44,556 --> 00:18:49,661

trade secrets, what goes in  
to that valuation and how does it

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00:18:49,661 --> 00:18:54,700

how maybe does it differ from other sorts  
of valuations, say, in a patents case?

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00:18:55,067 --> 00:18:57,703

So in any in any order, I guess

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00:18:57,703 --> 00:19:00,706

in some sitting to your left?

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00:19:01,173 --> 00:19:01,940

Well, look,

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00:19:01,940 --> 00:19:04,943

the the issue that you face

is in these types of matters,

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00:19:04,943 --> 00:19:07,713

the first thing I always struggle with  
what is the it we're talking about.

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00:19:07,713 --> 00:19:07,980

Right.

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00:19:07,980 --> 00:19:10,082

In a patent litigation, you know,

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00:19:10,082 --> 00:19:12,551

you have a patent,  
you have the claims of the patent.

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00:19:12,551 --> 00:19:16,321

And there is usually some understanding  
of what the claims are

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00:19:16,321 --> 00:19:18,390

and what the issues are.  
And you can go from there.

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00:19:18,390 --> 00:19:19,124

One of the things I think

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00:19:19,124 --> 00:19:22,561

you find in trade secrets  
litigation is it's a lot more ambiguous.

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00:19:22,561 --> 00:19:25,297

What is the it that we're talking about,  
at least that I find,

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00:19:25,297 --> 00:19:27,933

you know, coming into a  
into a cases of damages, expert

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00:19:29,001 --> 00:19:32,971

valuation I think is a little different  
than damages in damages.

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00:19:32,971 --> 00:19:37,142

You know, the law generally provides  
for either

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00:19:37,142 --> 00:19:40,812

lost profits or an unjust enrichment  
or a reasonable royalty

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00:19:40,812 --> 00:19:42,047

as a measure of damages.

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00:19:42,047 --> 00:19:44,016

And there's some guidance  
around those things.

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00:19:44,016 --> 00:19:46,251

You know, evaluation, you know,

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00:19:46,251 --> 00:19:47,786

I think is a little bit  
of a different issue

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00:19:47,786 --> 00:19:51,190

if you're looking at the value  
of one of the trade secret to a company

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00:19:51,390 --> 00:19:55,661  
is different than what's the economic harm  
that the company may have incurred

292  
00:19:55,661 --> 00:19:57,896  
as a result of somebody  
using that trade secret.

293  
00:19:57,896 --> 00:20:01,767  
So I think you've got a a identify  
what the it is you're referring to.

294  
00:20:02,000 --> 00:20:05,003  
And then really it's getting into

295  
00:20:05,571 --> 00:20:07,439  
how did the the

296  
00:20:07,439 --> 00:20:11,176  
the defendant use that  
intellectual property, the trade secrets

297  
00:20:11,443 --> 00:20:15,214  
and what is the incremental benefit  
that they derived from that use

298  
00:20:15,214 --> 00:20:19,518  
and really digging into those  
into those types of channels I think is

299  
00:20:20,152 --> 00:20:23,121  
sound straightforward,  
but but you know, you're getting into

300  
00:20:23,121 --> 00:20:23,855

I'll give you an example.

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00:20:23,855 --> 00:20:27,559

We had a case several years ago  
involving some specialty chemical

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00:20:29,161 --> 00:20:30,195

formulas and

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00:20:30,195 --> 00:20:33,599

the defendant was  
was accused of taking this information,

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00:20:33,932 --> 00:20:38,403

bringing it over to India, where they were  
manufacturing these specialty chemicals.

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00:20:38,737 --> 00:20:42,307

We really had to get in and really see  
where those formulas were used

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00:20:42,307 --> 00:20:45,744

and what the incremental benefit  
was to the company.

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00:20:45,744 --> 00:20:49,915

It was it was, you know, increased  
efficiency as a result of the process.

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00:20:49,915 --> 00:20:53,018

So it's not only the economic  
aspect of it, but combining it

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00:20:53,018 --> 00:20:56,021

with the technical expertise to see, okay,

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00:20:56,188 --> 00:20:58,991

they were able to reduce their cycle time  
by X number of hours.

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00:20:58,991 --> 00:21:02,160

They were able to increase their capacity  
by X yield and so on.

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00:21:02,160 --> 00:21:05,430

And so again, it's all sorts of nuances  
I think you have to get into.

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00:21:05,964 --> 00:21:09,101

Well, I think just following up on what  
Chris was saying,

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00:21:09,601 --> 00:21:13,672

when you're talking about the increment,  
you're also talking about compared to what

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00:21:14,273 --> 00:21:17,442

so you're looking at,  
you've got to look at the world in which

316

00:21:17,876 --> 00:21:22,080

the defendant doesn't have the trade  
secrets and what did they do instead?

317

00:21:22,381 --> 00:21:26,318

And it may be that trade  
secret is very important, very valuable,

318

00:21:26,818 --> 00:21:29,621

but that it's incremental contribution

to cost

319

00:21:29,621 --> 00:21:32,624

savings or sales or profits

320

00:21:33,091 --> 00:21:35,894

as compared to the next best alternative

321

00:21:35,894 --> 00:21:39,464

is in the scheme of things, much smaller  
than you might expect.

322

00:21:39,931 --> 00:21:42,901

And the other point  
that I always have to remind myself

323

00:21:42,901 --> 00:21:46,772

of and especially remind clients of,  
is that there's not a symmetry necessary

324

00:21:46,772 --> 00:21:50,976

really between the damages associated  
with the theft of a trade secret

325

00:21:51,243 --> 00:21:54,146

and the value to the  
owner of the trade secret.

326

00:21:56,148 --> 00:21:58,650

You know, I'll echo what Chris said too.

327

00:21:58,650 --> 00:22:00,986

I found that

328

00:22:00,986 --> 00:22:03,422  
one typically has to spend  
quite a bit of time

329  
00:22:03,422 --> 00:22:09,061  
figuring out what it is because in  
any actual instance of misappropriation

330  
00:22:09,061 --> 00:22:12,164  
any more, what you find is lots  
and lots of material has been

331  
00:22:13,732 --> 00:22:15,300  
taken away

332  
00:22:15,300 --> 00:22:18,303  
and a lot of it really doesn't  
have that much value.

333  
00:22:18,503 --> 00:22:20,372  
You have to go through a process  
of figuring out

334  
00:22:20,372 --> 00:22:24,142  
which pieces are really secret,  
which ones could be used

335  
00:22:24,142 --> 00:22:27,679  
by someone outside of the organization  
that generated it originally.

336  
00:22:28,146 --> 00:22:31,149  
And that's actually a pretty big step.

337  
00:22:31,283 --> 00:22:34,820

I think it's worth mentioning that  
when you talk about trade secrets,

338

00:22:34,820 --> 00:22:37,823

you're not talking necessarily  
just about technology.

339

00:22:37,923 --> 00:22:41,426

It can also include business  
information, information about your cost

340

00:22:41,426 --> 00:22:45,464

structure, details of contracts,  
these kind of things come up as well.

341

00:22:46,331 --> 00:22:47,132

And I find

342

00:22:48,967 --> 00:22:52,070

for myself, I, I go back to

343

00:22:52,471 --> 00:22:55,907

basic damage principles, say,  
what's the difference between

344

00:22:56,775 --> 00:22:59,778

sort of status of the injured party now

345

00:22:59,911 --> 00:23:03,482

and how it would have been if the

346

00:23:04,616 --> 00:23:07,519

the person,  
the other person had done the right thing?

347

00:23:07,519 --> 00:23:12,324

And that actually usually frames  
an approach in cases like

348

00:23:12,391 --> 00:23:17,662

it may be the case that I find often  
with trade secrets, you know, it's

349

00:23:18,597 --> 00:23:21,600

there's just a lot of work  
in assembling information.

350

00:23:21,900 --> 00:23:24,903

And so sometimes the time and

351

00:23:25,737 --> 00:23:29,474

cost and effort involved in reproducing it  
legitimately

352

00:23:30,108 --> 00:23:33,111

is a good measure of it, more  
so than in patents,

353

00:23:33,278 --> 00:23:37,816

where you have kind of the the  
the moment it's hard to value.

354

00:23:38,150 --> 00:23:41,153

Well, I think especially if you're  
talking about unjust enrichment,

355

00:23:41,453 --> 00:23:44,022

the the costs avoided

356

00:23:44,022 --> 00:23:46,725  
by getting somebody else's work  
as opposed to having to do it

357  
00:23:46,725 --> 00:23:49,895  
yourself, it's not even that  
you couldn't have reproduced it.

358  
00:23:49,895 --> 00:23:53,432  
It's just  
you took two years of somebody else's work

359  
00:23:53,799 --> 00:23:58,703  
and shrunk your time to implement it  
to a matter of months instead of years.

360  
00:23:59,371 --> 00:24:02,841  
Yeah, in that time, dimension is often  
an important part of it,

361  
00:24:03,508 --> 00:24:08,313  
you know, particularly with complex  
goods, With complex goods, it's important

362  
00:24:08,780 --> 00:24:13,251  
to get a preview of what  
what are the specifications of a project

363  
00:24:13,251 --> 00:24:16,855  
that is going to be introduced to market  
so that you have more time.

364  
00:24:16,855 --> 00:24:21,393  
So if you are a competitor,  
you have more time to to review it

365

00:24:21,393 --> 00:24:24,629

and decide what your best response  
is and implement that.

366

00:24:25,664 --> 00:24:27,032

Yeah, I think

367

00:24:27,032 --> 00:24:30,302

the other challenge that I see, and  
I don't know if you guys have seen this,

368

00:24:30,869 --> 00:24:35,540

is that in thinking about what  
the it is, it's often very difficult

369

00:24:36,041 --> 00:24:38,577

for a plaintiff

370

00:24:38,577 --> 00:24:42,581

to be able to articulate precisely  
what the trade secret is,

371

00:24:42,948 --> 00:24:45,784

because usually when they talk  
about the trade secret,

372

00:24:45,784 --> 00:24:48,787

they're talking about a broad category  
of information,

373

00:24:48,854 --> 00:24:52,390

some of which truly is secret,  
some of which is not.

374

00:24:52,390 --> 00:24:54,726  
And oftentimes

375  
00:24:54,726 --> 00:24:57,762  
one of the one of the tests  
that you have to do

376  
00:24:57,762 --> 00:25:02,234  
when somebody starts to talk about a trade  
secret is to see how public it is.

377  
00:25:02,267 --> 00:25:05,737  
And sometimes what they believe is  
a secret is really not

378  
00:25:05,737 --> 00:25:07,172  
much of a secret at all.

379  
00:25:07,172 --> 00:25:10,141  
And then you have to start to disentangle

380  
00:25:10,242 --> 00:25:15,013  
the domestic to hone in on secret itself.

381  
00:25:15,013 --> 00:25:16,281  
And what the benefit of that

382  
00:25:16,281 --> 00:25:20,085  
one piece is, rather than the whole  
bundle of widgets apart.

383  
00:25:21,286 --> 00:25:24,422  
The other point just to follow  
along with Steve said,

384

00:25:24,422 --> 00:25:26,024

and then I'll pass it back to you  
for the next course.

385

00:25:26,024 --> 00:25:28,760

You know, one of the things I think  
from a practical standpoint you have to

386

00:25:28,760 --> 00:25:31,763

recognize is you got to separate the wheat  
from the chaff.

387

00:25:31,863 --> 00:25:32,998

We were talking about this earlier.

388

00:25:32,998 --> 00:25:35,233

You know, everything  
fits on a thumb drive nowadays, right?

389

00:25:35,233 --> 00:25:39,037

You know, the cases we get involved  
in, it's a lot of documents,

390

00:25:39,037 --> 00:25:40,205

it's a lot of information.

391

00:25:40,205 --> 00:25:43,909

But it all fits on a on a on a little,  
little, you know, four gig thumb drive.

392

00:25:44,342 --> 00:25:47,312

One of the issues we face all the time,  
at least I see

393

00:25:47,879 --> 00:25:50,315  
coming into a case is,  
you know, there's a lot of stuff there.

394  
00:25:50,315 --> 00:25:53,418  
But then you've got to figure out,  
okay, what are you going to go after and

395  
00:25:53,585 --> 00:25:56,821  
where is the time going to be spent  
on determining those damages?

396  
00:25:56,821 --> 00:25:58,356  
Because you can't go after everything.

397  
00:25:58,356 --> 00:26:02,394  
If you look at every customer list  
and every formula and every business plan

398  
00:26:02,394 --> 00:26:06,364  
and every obviously, you know,  
we charge for our services.

399  
00:26:06,364 --> 00:26:08,433  
Right. And, you know,  
the attorneys charge for their time.

400  
00:26:08,433 --> 00:26:09,901  
And when you go into a court,

401  
00:26:09,901 --> 00:26:12,571  
you know, to try a case,  
you can't go after everything.

402  
00:26:12,571 --> 00:26:15,540

So you got to figure out what is the  
what is the

403

00:26:15,540 --> 00:26:15,807

you know,

404

00:26:15,807 --> 00:26:19,611

where are the real jewels, if you will,  
within that within that haystack,

405

00:26:19,611 --> 00:26:22,514

Because at some point you're going  
have to make a decision.

406

00:26:22,514 --> 00:26:25,116

What are you going to go and try to,

407

00:26:25,116 --> 00:26:27,152

you know, put before a judge  
or put before a jury?

408

00:26:27,152 --> 00:26:30,121

And again, the time necessary to perform

409

00:26:30,121 --> 00:26:33,124

those evaluations  
of those damages exercises?

410

00:26:33,124 --> 00:26:36,061

I've gone into cases where the clients  
want to go after everything

411

00:26:36,061 --> 00:26:38,630

without stopping to think, okay,  
that's going to take potentially,

412

00:26:38,630 --> 00:26:40,532

you know, x number of months or even years

413

00:26:40,532 --> 00:26:42,801

to get the discovery

to go through the process and so on.

414

00:26:42,801 --> 00:26:45,737

And then then when they get the budget,  
that's when the light bulb goes off.

415

00:26:45,737 --> 00:26:47,639

As I have to make

some decisions of what I'm going to do.

416

00:26:49,741 --> 00:26:51,443

So in these

417

00:26:51,443 --> 00:26:54,879

in these cases, you're talking about,  
let's say, unjust enrichment

418

00:26:54,879 --> 00:26:58,583

rate as damages as one damages metric.

419

00:27:00,051 --> 00:27:04,723

But in trade secrets, you can have this  
kind of asymmetry, right, in that if the

420

00:27:04,923 --> 00:27:09,661

if the the secret is misappropriated,  
but it's made publicly available.

421

00:27:09,961 --> 00:27:10,261  
Right.

422  
00:27:10,261 --> 00:27:13,264  
That's different  
than if it's misappropriated by one firm.

423  
00:27:13,732 --> 00:27:15,767  
And in that case, you can have a situation

424  
00:27:15,767 --> 00:27:18,770  
where the unjust enrichment by the  
by the one

425  
00:27:20,372 --> 00:27:23,375  
agent, the one firm or the one individual,

426  
00:27:23,708 --> 00:27:25,677  
their unjust enrichment is less than what

427  
00:27:25,677 --> 00:27:28,913  
the owner of the trade  
secret loses. Right.

428  
00:27:28,947 --> 00:27:31,950  
When if the secret is is out.

429  
00:27:32,817 --> 00:27:37,088  
So in how does that factor into, say, a

430  
00:27:37,956 --> 00:27:40,492  
a a trade secret

431  
00:27:40,492 --> 00:27:44,429

or an inventors,  
let's say a calculus in terms of

432  
00:27:45,530 --> 00:27:46,798  
going down the path of

433  
00:27:46,798 --> 00:27:49,801  
trade secrecy, patents, You know,

434  
00:27:50,568 --> 00:27:53,571  
how do they make that decision upfront?

435  
00:27:56,007 --> 00:27:56,374  
That's

436  
00:27:56,374 --> 00:27:59,377  
I think that's a bit of a mystery  
sometimes.

437  
00:27:59,944 --> 00:28:03,515  
I think increasingly I'm seeing trade  
secret cases

438  
00:28:03,515 --> 00:28:07,218  
that could have been brought  
as infringement cases, and they're not

439  
00:28:07,218 --> 00:28:10,321  
because there's  
a trade secrets element and

440  
00:28:12,123 --> 00:28:13,725  
the story that I have heard

441

00:28:13,725 --> 00:28:16,861  
is that trade secret cases  
have certain advantages

442  
00:28:16,861 --> 00:28:21,332  
because you don't have to worry about  
issues and claim construction

443  
00:28:21,666 --> 00:28:25,203  
and having the claim construed  
in a way that that eviscerates

444  
00:28:25,470 --> 00:28:28,473  
the essence of your claim

445  
00:28:29,007 --> 00:28:31,509  
that there is a perception  
that trade secret

446  
00:28:31,509 --> 00:28:34,512  
damages are somehow more discreet.

447  
00:28:35,280 --> 00:28:37,782  
And in fact,  
I don't think that's true at all.

448  
00:28:37,782 --> 00:28:40,652  
I think you're choosing one

449  
00:28:40,652 --> 00:28:44,189  
set of complex  
legal and economic issues over

450  
00:28:44,189 --> 00:28:48,093  
another set of complex

legal and economic issues.

451

00:28:48,460 --> 00:28:53,264

So I think that's a

a as much a substantive business

452

00:28:53,598 --> 00:28:56,434

calculation that a plaintiff has to make,

453

00:28:56,434 --> 00:28:59,704

as well as reflecting

an important element of legal strategy.

454

00:29:00,205 --> 00:29:03,541

I think there's also kind of an upstream  
decision.

455

00:29:04,142 --> 00:29:07,645

You know, when a company

if a company develops a new technology,

456

00:29:07,645 --> 00:29:12,517

they will have to make a choice patent  
this or do we protected this trade secret

457

00:29:12,851 --> 00:29:15,186

you patented. You have to disclose aspects

458

00:29:16,488 --> 00:29:19,924

and you know,

before you get to the point of deciding

459

00:29:20,125 --> 00:29:23,328

what kind of a case you're going to file,  
you will have already decided

460

00:29:23,595 --> 00:29:26,564

what your patenting strategy  
is going to be.

461

00:29:26,564 --> 00:29:29,567

And and I think there you know,

462

00:29:30,235 --> 00:29:34,506

my sense is that the changes  
in the patent law in recent years with ACA

463

00:29:34,773 --> 00:29:37,742

have caused a lot of companies  
to rethink that.

464

00:29:38,343 --> 00:29:40,845

You know, going back to the  
to the to the unjust enrichment point,

465

00:29:40,845 --> 00:29:42,914

you know,  
one of the things I find fascinating is,

466

00:29:42,914 --> 00:29:45,850

you know, you can and look,  
we're quantitative people.

467

00:29:45,850 --> 00:29:46,985

We can measure everything, right?

468

00:29:46,985 --> 00:29:50,755

You know, you get the you get the point  
unjust enrichment as of when.

469

00:29:51,422 --> 00:29:54,392

And so one of the issues

470

00:29:54,659 --> 00:29:58,363

I faced recently is we were again  
dealing with a foreign entity.

471

00:29:58,563 --> 00:30:01,833

You know, it was it was a  
it was an Asian based company.

472

00:30:02,200 --> 00:30:06,271

And the court said, okay,  
I want to put a tiara in place.

473

00:30:06,337 --> 00:30:08,940

Make sure you've cleaned  
all your systems here in the U.S.

474

00:30:08,940 --> 00:30:10,942

We want everything back, etc., etc..

475

00:30:10,942 --> 00:30:13,945

Tiara being temporary restraining order,  
you know,

476

00:30:14,512 --> 00:30:17,515

you know, make sure this stuff  
isn't copied any further, etc..

477

00:30:17,782 --> 00:30:21,286

Lo and behold, to discover  
we find out that a computer ended up

478

00:30:21,753 --> 00:30:22,921  
going over to India.

479  
00:30:22,921 --> 00:30:24,422  
And in fact, on that computer

480  
00:30:24,422 --> 00:30:27,559  
was all this information  
that was alleged to have been taken.

481  
00:30:27,559 --> 00:30:30,595  
And so when you  
when you look at unjust enrichment, as

482  
00:30:30,595 --> 00:30:34,632  
of what point in time and  
and we measured it as of a point in time.

483  
00:30:34,632 --> 00:30:37,635  
But the argument, you know, we we made  
we referred as in the plaintiff

484  
00:30:37,869 --> 00:30:41,940  
is certain information cannot be unlearned  
and the U.S.

485  
00:30:41,940 --> 00:30:45,510  
court doesn't necessarily  
have jurisdiction over the Indian company.

486  
00:30:45,510 --> 00:30:49,280  
So when an Indian company is manufacturing  
this product and receiving

487  
00:30:49,280 --> 00:30:52,283

a benefit  
that it should not have otherwise received

488  
00:30:52,450 --> 00:30:55,186  
and making sales into China  
or other parts of the world,

489  
00:30:55,186 --> 00:30:59,290  
how do you measure the unjust enrichment  
to the to the to the plaintiff?

490  
00:30:59,290 --> 00:31:02,460  
At what point in time what do you do again  
once the case is over?

491  
00:31:02,460 --> 00:31:06,331  
Because again, once the case is over here  
in the United States, what happens next?

492  
00:31:06,331 --> 00:31:10,034  
So, again, those I think the things  
you're starting to to consider again

493  
00:31:10,034 --> 00:31:13,771  
from an economic damages  
perspective is is how do you evaluate

494  
00:31:14,706 --> 00:31:19,110  
a the form of damage lost profits  
reason royalty unjust enrichment within.

495  
00:31:19,110 --> 00:31:19,377  
Okay.

496  
00:31:19,377 --> 00:31:21,713

How do you look at these other

497

00:31:21,713 --> 00:31:24,716

economic harms

that may come at some point in the future?

498

00:31:24,916 --> 00:31:28,853

And I think that actually

those that set of issues is

499

00:31:30,021 --> 00:31:31,122

affecting the

500

00:31:31,122 --> 00:31:34,125

kind of cases that are showing up

at the International Trade Commission,

501

00:31:34,225 --> 00:31:37,395

you know, because there is the possibility  
of leakage of information

502

00:31:37,395 --> 00:31:42,000

internationally, I think more and more  
firms are pressing cases at the ITC

503

00:31:42,300 --> 00:31:46,771

to exclude products that are made using  
misappropriated trade secrets.

504

00:31:47,138 --> 00:31:50,308

So that's one partial response  
to that dilemma.

505

00:31:50,508 --> 00:31:53,077

Will in

506

00:31:53,077 --> 00:31:54,679

going off that point,

507

00:31:54,679 --> 00:31:58,082

are there are there other trends that you  
that you've seen sort of over

508

00:31:58,082 --> 00:32:02,120

the over the course of your careers  
in terms of either trade secret

509

00:32:02,954 --> 00:32:05,957

evaluation,  
the importance of trade secrets

510

00:32:06,157 --> 00:32:10,561

to firms, or the way  
in which those disputes are handled

511

00:32:10,895 --> 00:32:13,898

in courts?

512

00:32:15,466 --> 00:32:16,167

I'd say

513

00:32:16,167 --> 00:32:19,170

with the and again,  
I have no empirical evidence

514

00:32:19,337 --> 00:32:22,307

to support this  
and with a bunch of economists, it's

515

00:32:22,307 --> 00:32:25,009

I think since the ACA you've had a

516

00:32:25,009 --> 00:32:28,446

lot more patents go into

517

00:32:29,614 --> 00:32:31,582

the pit ever in a party review.

518

00:32:31,582 --> 00:32:33,751

A lot of them have not come out.

519

00:32:33,751 --> 00:32:37,488

And so I think that has raised  
a lot of concern with clients

520

00:32:37,922 --> 00:32:41,192

if they're going to go through the cost  
of developing this technology

521

00:32:41,192 --> 00:32:44,429

and patenting and prosecuting it  
and getting this patent out there.

522

00:32:44,762 --> 00:32:47,765

You know, they're they're they're  
they're disclosing what that invention is.

523

00:32:48,132 --> 00:32:51,736

And there may be a higher likelihood  
that that may be challenged

524

00:32:51,903 --> 00:32:52,870

through an intra party review.

525

00:32:52,870 --> 00:32:56,741

And so the secrets out there  
and so I think some clients have now

526

00:32:56,941 --> 00:32:58,409

gone back to Kevin's point

527

00:32:58,409 --> 00:33:01,679

and made a strategy to deter to to  
to protect the trade secret.

528

00:33:02,013 --> 00:33:02,647

Okay.

529

00:33:02,647 --> 00:33:04,415

I agree with Chris.

530

00:33:04,415 --> 00:33:06,150

I think Kevin made a good point.

531

00:33:06,150 --> 00:33:10,355

I think in ten years  
we'll have a much better idea

532

00:33:10,355 --> 00:33:14,792

as to whether the legislative changes  
have led

533

00:33:15,426 --> 00:33:19,530

to different sets  
of strategic decisions because

534

00:33:21,466 --> 00:33:22,333

the current law,

535

00:33:22,333 --> 00:33:27,472

the legislation around trade secrets,  
at least has the potential

536

00:33:28,006 --> 00:33:31,009

to provide much more meaningful

537

00:33:31,275 --> 00:33:34,278

protection and well-defined

538

00:33:35,146 --> 00:33:39,150

ways to pursue damage claims  
than what exists now, where you've got

539

00:33:39,150 --> 00:33:43,054

a lot of state common law claims  
and it becomes a bit of a mess.

540

00:33:44,822 --> 00:33:46,657

And patent law.

541

00:33:46,657 --> 00:33:50,728

Patent trials are fraught  
with the uncertainty.

542

00:33:50,728 --> 00:33:55,266

They're extraordinarily expensive  
and the review process

543

00:33:55,266 --> 00:33:59,303

that now grows out of that litigation  
creates a lot of uncertainty.

544

00:33:59,303 --> 00:34:02,640

So I suspect that we may see that shift,

545

00:34:02,840 --> 00:34:05,843

but I haven't I don't know that I can say  
we've seen it yet.

546

00:34:06,210 --> 00:34:09,814

You know,  
I think I've seen a number of trends that

547

00:34:10,615 --> 00:34:14,752

the time I've been working on  
trade secrets, I think one we referred to

548

00:34:14,752 --> 00:34:18,956

earlier, it's what I call the flash drive  
problem simply because of technology.

549

00:34:18,956 --> 00:34:23,361

It's easier for somebody to walk out  
with an enormous volume of information

550

00:34:23,361 --> 00:34:24,595

than it used to be.

551

00:34:24,595 --> 00:34:28,132

So you're seeing more of these  
kinds of cases where somebody has,

552

00:34:28,800 --> 00:34:32,103

you know, ten, 20,000 documents  
absconded with

553

00:34:33,004 --> 00:34:35,473

as a side effect of that.

554

00:34:35,473 --> 00:34:38,109

I think I've seen an increase  
in the number of cases

555

00:34:38,109 --> 00:34:41,112

that involve not just technology,  
but business information,

556

00:34:41,512 --> 00:34:45,750

because you know, a lot because a lot of  
get swept up in these big sweeping

557

00:34:46,617 --> 00:34:50,455

business plans, pricing information,  
cost information, that kind of stuff.

558

00:34:52,190 --> 00:34:52,824

I think there's

559

00:34:52,824 --> 00:34:55,827

been a increase  
in the number of international cases.

560

00:34:56,627 --> 00:34:58,930

There's more of a concerted effort  
on the part

561

00:34:58,930 --> 00:35:03,968

of some of our international competitors  
to gain an advantage by penetrating U.S.

562

00:35:03,968 --> 00:35:06,971

trade secrets. And

563

00:35:07,071 --> 00:35:10,074

and I think another thing

that's worth mentioning it's it's it's

564

00:35:11,342 --> 00:35:15,146

it's a sort of a place

where trade secrets haven't come into play

565

00:35:15,146 --> 00:35:18,249

as the whole world of complex products

like smartphones,

566

00:35:18,683 --> 00:35:22,120

when you have very complicated products

that require lots

567

00:35:22,120 --> 00:35:26,224

and lots of technologies, trade secrets

don't help you very much because

568

00:35:26,991 --> 00:35:30,228

once you disclose them to other people

that are using them,

569

00:35:30,228 --> 00:35:31,796

they cease to be trade secrets.

570

00:35:31,796 --> 00:35:35,066

So that whole area,

I think, has been evolving

571

00:35:35,066 --> 00:35:39,637

to a large extent

without as much trade secrets be technical

572

00:35:39,637 --> 00:35:43,508

trade secrets tend to be,  
I think, associated with simpler products.

573

00:35:44,408 --> 00:35:47,578

I think that also I don't know  
if this is a trend

574

00:35:47,578 --> 00:35:52,016

or just a question that I hear more often  
and may be the start of a trend.

575

00:35:53,117 --> 00:35:56,120

I've had clients pose the question about

576

00:35:56,654 --> 00:36:00,892

what should be our strategy  
with respect to licensing trade secrets.

577

00:36:01,592 --> 00:36:05,163

And the way businesses  
tend to think about it is

578

00:36:05,163 --> 00:36:10,401

they can pretty easily frame the question  
when they're talking about patents

579

00:36:10,935 --> 00:36:14,438

because they can look  
at the potential licensee,

580

00:36:14,805 --> 00:36:17,742

they have a pretty good idea  
how they're going to use the patent.

581

00:36:17,742 --> 00:36:22,613

They know the extent to which it's  
going to be competitive or complementary

582

00:36:22,980 --> 00:36:26,317

so they can figure out how it fits  
into a broader strategy.

583

00:36:26,884 --> 00:36:30,421

However, once a trade  
secret is out, it's out

584

00:36:30,988 --> 00:36:34,058

and you can identify its value to you.

585

00:36:34,592 --> 00:36:37,461

But in the hands of somebody  
really clever,

586

00:36:37,461 --> 00:36:40,831

that trade secret could be used in ways  
that you might not conceive of.

587

00:36:41,332 --> 00:36:45,636

And and companies are concerned  
by licensing the trade secret.

588

00:36:45,636 --> 00:36:48,873

First of all,  
we let the genie out of the bottle.

589

00:36:48,873 --> 00:36:51,609

Do we lose all control over it? Yes.

590

00:36:51,609 --> 00:36:54,612

And second,  
once we lose all control out of it,

591

00:36:55,079 --> 00:36:59,250

is it possible  
for us to end up in a situation

592

00:36:59,250 --> 00:37:02,653

where the trade secret is used against us  
in ways that we might not have

593

00:37:02,653 --> 00:37:06,557

anticipated couldn't value  
and the royalty is now not sufficient?

594

00:37:07,258 --> 00:37:08,893

Also, because it's a secret

595

00:37:10,928 --> 00:37:13,731

and it's not going to be disclosed  
publicly in a license.

596

00:37:13,731 --> 00:37:16,734

You may not know all the ways that it's  
so how do you capture it?

597

00:37:17,068 --> 00:37:20,071

So in terms of the strategy

598

00:37:20,071 --> 00:37:23,341

of managing that part of the IP portfolio,

599

00:37:23,574 --> 00:37:27,445

I think trade secrets create  
a new set of problems for a company

600

00:37:27,445 --> 00:37:30,615  
trying to manage and maximize  
the value of that IP.

601

00:37:31,349 --> 00:37:34,318  
That's I think you raise  
some really good points there.

602

00:37:34,318 --> 00:37:35,853  
I think,

603

00:37:35,853 --> 00:37:39,123  
you know, the nature of a trade secret,  
if it's a technological trade secret,

604

00:37:39,123 --> 00:37:42,393  
it can't be something  
that you can discover by tearing it

605

00:37:42,393 --> 00:37:45,463  
apart and reverse engineering  
because otherwise it wouldn't last.

606

00:37:45,463 --> 00:37:47,999  
So it's got to be something more  
subtle and upstream,

607

00:37:47,999 --> 00:37:51,302  
which makes it harder to tell  
when somebody is using it.

608

00:37:51,769 --> 00:37:54,305

And there's also the issue,  
if you're thinking about licensing

609

00:37:54,305 --> 00:37:57,942

trade secrets,  
you have to consider the practices

610

00:37:57,942 --> 00:38:02,179

of your potential license  
licensee in terms of protecting it.

611

00:38:02,880 --> 00:38:05,950

Do they do they have a policy  
of respecting trade secrets?

612

00:38:06,150 --> 00:38:09,787

And if they do, do  
their internal procedures really

613

00:38:10,655 --> 00:38:12,223

put some teeth behind it?

614

00:38:12,223 --> 00:38:14,992

That's part of the judgment  
you have to make before you

615

00:38:14,992 --> 00:38:17,762

and your valuable secrets over to someone.

616

00:38:17,762 --> 00:38:20,731

And does that typically become part  
of the part of the agreement?

617

00:38:20,998 --> 00:38:22,800

that's how they're going to fence this.

618

00:38:22,800 --> 00:38:28,706

And now in the  
the licenses that you've been a part of,

619

00:38:29,640 --> 00:38:30,808

sometimes even if it's

620

00:38:30,808 --> 00:38:34,512

a patent license,  
they're actually licensing a technology.

621

00:38:34,578 --> 00:38:35,012

Right.

622

00:38:35,012 --> 00:38:39,050

And sometimes that will be specified  
as that technology that they're licensing,

623

00:38:39,350 --> 00:38:42,053

sometimes that that involves some

624

00:38:42,053 --> 00:38:46,424

and some knowhow as well as just saying  
we're licensing this technology.

625

00:38:46,691 --> 00:38:51,595

So is that knowhow always a trade secret?

626

00:38:53,964 --> 00:38:57,368

Is it generally a trade secret or is it or  
is that something that you'd say, well,

627

00:38:57,368 --> 00:38:59,403

there might be some knowhow here  
that we're helping them?

628

00:38:59,403 --> 00:39:02,406

You know, the licensor  
always thinks it's a trade secret.

629

00:39:03,240 --> 00:39:06,644

And I think whether it is or not  
is it's a fact.

630

00:39:06,644 --> 00:39:08,045

It's a case by case, very fact.

631

00:39:08,045 --> 00:39:10,181

Specific exercise.

632

00:39:10,181 --> 00:39:14,285

Yeah, there is there are some aspects  
of knowhow that are hard

633

00:39:15,319 --> 00:39:19,023

to license  
because if you think about the statement

634

00:39:19,023 --> 00:39:22,193

that you spend 10000 hours doing  
something, you'll be much better at it.

635

00:39:22,193 --> 00:39:25,463

Your intuition will find the right  
course readily.

636

00:39:25,996 --> 00:39:29,500

That can be an advantage

that you have as knowhow,

637

00:39:29,834 --> 00:39:32,903

but you can't really just convey  
that someone else.

638

00:39:33,270 --> 00:39:35,539

So it's got to be something  
more specific and concrete.

639

00:39:37,174 --> 00:39:37,641

Yeah.

640

00:39:37,641 --> 00:39:40,644

Look at  
when especially in the patent world,

641

00:39:40,678 --> 00:39:42,780

you've got the patent  
and you can read the claims.

642

00:39:42,780 --> 00:39:44,715

But again,  
how best to implement those claims

643

00:39:44,715 --> 00:39:46,150

and what were the lessons learned

644

00:39:46,150 --> 00:39:49,820

and developing that technology again,  
Is it really a trade secret?

645

00:39:50,254 --> 00:39:53,691

I think, as Steve said, that, you know,  
it could be it it may not be.

646

00:39:53,691 --> 00:39:56,527

But again,

it doesn't mean it doesn't have value

647

00:39:56,527 --> 00:39:58,396

because, again,

it's just it's the license.

648

00:39:58,396 --> 00:39:59,797

He is going to have to go through

649

00:39:59,797 --> 00:40:03,267

the process of learning that if it wasn't  
provided to them by the licensor.

650

00:40:04,034 --> 00:40:07,938

And one thing you can get into too  
is that the trade secret can involve

651

00:40:07,938 --> 00:40:08,973

what not to do.

652

00:40:08,973 --> 00:40:12,510

Yes, in the life sciences,  
if you're exploring different

653

00:40:12,510 --> 00:40:15,880

biochemical pathways  
to arrest the disease process,

654

00:40:16,247 --> 00:40:19,417

if you've tried eight of them  
and found that they don't work,

655

00:40:19,917 --> 00:40:22,520

that is very valuable knowledge  
to someone else

656

00:40:22,520 --> 00:40:25,790

who's trying to program right?

657

00:40:27,224 --> 00:40:27,925

So when you

658

00:40:27,925 --> 00:40:30,928

are when you're involved in a case and

659

00:40:31,695 --> 00:40:34,698

in order to have a trade secret  
misappropriation

660

00:40:35,266 --> 00:40:38,102

and you're trying to build a

661

00:40:38,102 --> 00:40:39,603

damages model. Right.

662

00:40:39,603 --> 00:40:42,773

What what things are  
you specifically looking for

663

00:40:42,773 --> 00:40:45,776

in order to try to do that data,

664

00:40:46,143 --> 00:40:46,744

it sounds like.

665

00:40:46,744 --> 00:40:49,747

But one of the I think one of the biggest  
I mean, we always want more data, right?

666

00:40:50,281 --> 00:40:53,350

One of the biggest challenges I face

667

00:40:53,918 --> 00:40:56,854

is just getting your client  
to give you the right information.

668

00:40:56,854 --> 00:41:00,024

They want you know, they want  
they want the economic damages

669

00:41:00,691 --> 00:41:03,327

from the plaintiff's perspective,  
but they don't want to necessarily

670

00:41:03,327 --> 00:41:06,530

give you all the information you're going  
to need to perform those calculations

671

00:41:06,864 --> 00:41:08,165

from the defense perspective as well.

672

00:41:08,165 --> 00:41:12,136

If you're trying to defend this, trying  
to get the right information from clients.

673

00:41:14,472 --> 00:41:16,073

And again, it sounds intuitive,

674

00:41:16,073 --> 00:41:19,076

but I mean, I, I

675

00:41:19,977 --> 00:41:23,280

even before I get to the data  
when I'm talking to the client

676

00:41:24,014 --> 00:41:26,617

and it's really whether it's  
on the plaintiff's side of the defense

677

00:41:26,617 --> 00:41:29,854

side, I always start with the set of  
so what questions?

678

00:41:30,721 --> 00:41:32,156

So what if they have this?

679

00:41:32,156 --> 00:41:34,592

What difference does it make?

680

00:41:34,592 --> 00:41:38,796

How much, how much, how much does it  
disadvantage you in the marketplace?

681

00:41:38,796 --> 00:41:41,799

So if I'm talking to somebody  
who's who's lost a trade secret,

682

00:41:41,966 --> 00:41:44,969

would they not have a product  
without the trade secret?

683

00:41:45,736 --> 00:41:48,739

Well, if they would have had a product,  
how much more are they selling?

684

00:41:48,839 --> 00:41:51,609

How much more  
are they cutting into your business?

685

00:41:51,609 --> 00:41:53,110

How have you had to respond?

686

00:41:53,110 --> 00:41:57,348

What what is it about the trade secret  
that makes the product different?

687

00:41:57,882 --> 00:42:00,885

And and once  
you start to get those answers,

688

00:42:01,218 --> 00:42:04,922

then I find it's easier for me  
to ask for the right data.

689

00:42:05,589 --> 00:42:08,025

They don't always want to give it,  
but at least I have a better idea

690

00:42:08,025 --> 00:42:09,360

what to ask for.

691

00:42:09,360 --> 00:42:13,931

But it also gives me the opportunity  
to think, okay, they've identified

692

00:42:13,931 --> 00:42:17,268

a feature of the product they say  
is associated with the trade secret.

693

00:42:17,568 --> 00:42:19,904  
They couldn't have easily gotten  
that feature without it.

694  
00:42:19,904 --> 00:42:23,841  
Is there is there a survey possibility  
Can I survey around

695  
00:42:24,108 --> 00:42:27,111  
that feature  
to try and figure out what the value is?

696  
00:42:27,478 --> 00:42:30,881  
So for me,  
the first step is, is is so what?

697  
00:42:30,881 --> 00:42:32,750  
What difference does it make?

698  
00:42:32,750 --> 00:42:35,686  
And I've had actually a number

699  
00:42:35,686 --> 00:42:38,689  
of cases die on the vine

700  
00:42:38,856 --> 00:42:42,493  
when plaintiffs, sometimes defendants

701  
00:42:43,661 --> 00:42:44,995  
don't have

702  
00:42:44,995 --> 00:42:47,631  
what turned out to be helpful  
answers to that.

703

00:42:47,631 --> 00:42:49,867

So what question for their case

704

00:42:49,867 --> 00:42:53,003

because when you start to probe,  
especially with a plaintiff

705

00:42:53,003 --> 00:42:56,340

and you start to ask the  
so what you realize

706

00:42:56,874 --> 00:42:59,944

that really probably didn't matter  
all that much.

707

00:43:00,311 --> 00:43:02,479

It didn't change things very much.

708

00:43:02,479 --> 00:43:06,216

Now they're weighing  
the cost of litigation,

709

00:43:06,216 --> 00:43:11,822

which is very high against the likelihood  
of injunctive relief,

710

00:43:11,822 --> 00:43:14,959

which may or may not be meaningful  
and damages

711

00:43:14,959 --> 00:43:18,362

which are likely not large enough  
to justify the investment.

712

00:43:18,729 --> 00:43:21,832

And many times they just back off  
because it's simply not worth it.

713

00:43:23,167 --> 00:43:26,270

Yeah,  
I find it's often helpful to think about.

714

00:43:26,637 --> 00:43:29,640

I think of it  
almost as a mechanism of action here.

715

00:43:29,873 --> 00:43:32,443

You're really talking about someone

716

00:43:32,443 --> 00:43:35,446

getting hold of information  
that he shouldn't have access to.

717

00:43:35,746 --> 00:43:39,049

And so the first thing you have to ask is,  
well, what would he do with it?

718

00:43:41,151 --> 00:43:43,654

How would it change his behavior?

719

00:43:43,654 --> 00:43:45,789

What advantage would he gain?

720

00:43:45,789 --> 00:43:48,926

And sometimes you find out that, you know,

721

00:43:49,660 --> 00:43:52,496

it really doesn't have much of an effect.

722

00:43:52,496 --> 00:43:55,432

I think there's also a question,  
as I mentioned before,

723

00:43:55,432 --> 00:43:58,435

I think sometimes with trade secrets,

724

00:43:58,535 --> 00:44:02,306

I find more often than with patents  
issue of what would it take

725

00:44:02,306 --> 00:44:06,343

to pull all this information together  
or to discover this yourself

726

00:44:07,378 --> 00:44:08,245

and that.

727

00:44:08,245 --> 00:44:11,248

And that often raises  
a question of timing.

728

00:44:11,649 --> 00:44:14,652

So you have to think about

729

00:44:14,885 --> 00:44:17,888

whether this is something that, you know,

730

00:44:18,222 --> 00:44:21,992

the defendant in the case  
could have done on his own.

731

00:44:22,626 --> 00:44:24,695

How long would it have taken?

What would it have cost

732

00:44:24,695 --> 00:44:26,897  
and getting it earlier?

733

00:44:26,897 --> 00:44:28,532  
How does that change his behavior?

734

00:44:28,532 --> 00:44:31,135  
And that frames the question, NFC.

735

00:44:31,135 --> 00:44:32,503  
Okay. And what did this do?

736

00:44:33,937 --> 00:44:35,072  
And, you know,

737

00:44:35,072 --> 00:44:38,075  
just thinking this through conceptually

738

00:44:38,342 --> 00:44:42,079  
helps to define what information you need  
and how to frame an analysis.

739

00:44:42,079 --> 00:44:45,082  
I think  
I think back to your question as well.

740

00:44:45,215 --> 00:44:47,718  
I think one of the first things  
is the extent of use.

741

00:44:47,718 --> 00:44:52,389  
So there has to be some type of thorough

investigation upfront by counsel,

742

00:44:53,190 --> 00:44:55,392

by whatever

forensic analysis has been done

743

00:44:55,392 --> 00:44:58,762

to determine the extent of use

that often times

744

00:45:00,030 --> 00:45:04,201

evolves throughout the case

as opposed to early on.

745

00:45:04,368 --> 00:45:08,005

And so there are times in matters like,

you know, you're months,

746

00:45:08,505 --> 00:45:11,141

months into discovering other things

and you're still trying to figure,

747

00:45:11,141 --> 00:45:14,144

okay, you know,

how far was this information

748

00:45:14,378 --> 00:45:17,581

communicated through the company,

who has touched it, who has used it?

749

00:45:17,581 --> 00:45:21,618

And so I think, you know, the better,

750

00:45:23,087 --> 00:45:26,023

the more information you have a front

and to see what those channels were.

751

00:45:26,023 --> 00:45:29,159

And again, that's largely  
there is the responsibility of counsel

752

00:45:29,159 --> 00:45:32,162

to go through that exercise or whatever  
forensic process they're going to go.

753

00:45:32,162 --> 00:45:33,831

That's that's an important point.

754

00:45:33,831 --> 00:45:35,899

I mean, I think in a lot of cases,

755

00:45:35,899 --> 00:45:39,069

what you have is an employee  
moving from one company to another.

756

00:45:39,436 --> 00:45:42,339

And the first thing you'll hear  
from a defendant, that's a rogue employee.

757

00:45:42,339 --> 00:45:43,941

We had nothing to do with that.

758

00:45:43,941 --> 00:45:45,042

We never saw any of it.

759

00:45:45,042 --> 00:45:46,710

We never used any of it.

760

00:45:46,710 --> 00:45:49,213

And actually,

761

00:45:49,213 --> 00:45:52,082

we were talking earlier about the fact  
that as

762

00:45:52,082 --> 00:45:55,185

as more information is stored  
electronically and accessed

763

00:45:55,185 --> 00:45:58,188

electronically,  
it becomes easier to find out

764

00:45:58,188 --> 00:46:03,894

what somebody may have copied or what  
you know or accessed in some way.

765

00:46:04,394 --> 00:46:07,397

But that doesn't tell you  
how much of it was used.

766

00:46:07,431 --> 00:46:10,567

I had one instance where someone at a

767

00:46:11,101 --> 00:46:13,804

a departing employee at some point had

768

00:46:15,205 --> 00:46:18,208

done a cloud backup of a laptop.

769

00:46:18,742 --> 00:46:21,178

And so all this information was up.

770

00:46:21,178 --> 00:46:24,181

It had been accessed,  
it was up on the cloud

771

00:46:24,615 --> 00:46:26,884

and a huge amount of it.

772

00:46:26,884 --> 00:46:30,154

But it wasn't clear that any of  
it had ever been touched again.

773

00:46:31,088 --> 00:46:35,292

So even though it's on first impression,  
it seemed like a lot had been taken

774

00:46:36,093 --> 00:46:39,463

but hadn't actually, you know,  
to go to this point hadn't actually been

775

00:46:40,597 --> 00:46:43,767

all of those wind up being  
pretty important practical considerations.

776

00:46:43,901 --> 00:46:49,740

I think one of the big beneficiaries  
of the new legislation are the forensics

777

00:46:49,740 --> 00:46:53,177

folks, because first of all,

778

00:46:53,410 --> 00:46:56,413

identifying  
what was taken, when it was taken,

779

00:46:56,680 --> 00:47:00,918

what was downloaded  
by whom, etc., becomes an important piece

780

00:47:00,918 --> 00:47:05,589

in understanding what you lost  
and then be proving up your case,

781

00:47:05,989 --> 00:47:10,594

but also, to Kevin's point, figuring out  
once you get to the defendant,

782

00:47:10,594 --> 00:47:14,431

how was it used, how was that information  
shared and forensics

783

00:47:14,698 --> 00:47:17,601

using the forensic capabilities that are

784

00:47:17,601 --> 00:47:22,406

are now out there to actually trace files,  
to trace information,

785

00:47:22,639 --> 00:47:25,909

not to see what was in it,  
but at least to to be able to

786

00:47:26,176 --> 00:47:29,179

to say this went from here  
to here to here to here.

787

00:47:29,213 --> 00:47:32,816

And you can never establish  
precisely that it was used.

788

00:47:33,450 --> 00:47:37,788

But depending on where that chain stops,  
you can make a better or worse case.

789

00:47:38,055 --> 00:47:39,156

But the likelihood

790

00:47:39,156 --> 00:47:42,259

that it was used, if you find copies of it  
all over the company,

791

00:47:42,860 --> 00:47:46,964

it the claim that it was never used  
becomes harder to sustain.

792

00:47:47,231 --> 00:47:50,601

And it's and as we were saying before,  
the technology obviously has changed

793

00:47:51,001 --> 00:47:53,871

the the accessibility. Right right.

794

00:47:53,871 --> 00:47:57,174

The ability to to misappropriate  
it's also changed the ability to

795

00:47:57,341 --> 00:48:00,410

to to track that misappropriation  
potentially.

796

00:48:00,410 --> 00:48:03,046

Right. So you have this I guess a yes.

797

00:48:03,046 --> 00:48:05,549

Just sides of the equation  
related to that relate.

798

00:48:05,549 --> 00:48:07,818

One incident

I was talking with an attorney at

799

00:48:07,818 --> 00:48:11,421

who does a lot of work in Silicon Valley,  
and he was talking about how

800

00:48:11,855 --> 00:48:16,226

there's a more and more of a practice  
that he has seen among startups to tell

801

00:48:16,426 --> 00:48:20,197

employees to bring your own computers  
or barebones operation.

802

00:48:20,430 --> 00:48:21,565

We're not going to supply it.

803

00:48:21,565 --> 00:48:23,267

You just use your own stuff.

804

00:48:23,267 --> 00:48:25,369

And he said he was appalled at

805

00:48:26,503 --> 00:48:28,238

all of the companies

806

00:48:28,238 --> 00:48:31,074

being co-mingled with personal information

807

00:48:31,074 --> 00:48:34,411

from everybody who had ever worked there

trying to get people

808

00:48:34,411 --> 00:48:37,648

to pay attention to this

because it was just a complete mess.

809

00:48:38,649 --> 00:48:41,285

But that illustrates

the complexity of these issues.

810

00:48:41,285 --> 00:48:41,652

Right.

811

00:48:41,652 --> 00:48:47,457

And the and what components of the

of the new act that the Defense

812

00:48:47,491 --> 00:48:51,361

Trade Secret Act,

do you think if you had had to pick one

813

00:48:51,361 --> 00:48:54,364

that's going to be

that would most potentially change

814

00:48:55,699 --> 00:48:57,901

the way that

815

00:48:57,901 --> 00:49:00,904

firms handle their own trade secrets

or the way that you were?

816

00:49:02,439 --> 00:49:05,142

Valuation may

817

00:49:05,142 --> 00:49:06,510

may take place?

818

00:49:06,510 --> 00:49:09,212

You know, do you think these  
which provisions do you think

819

00:49:09,212 --> 00:49:12,215

are going to be most critical for that?

820

00:49:13,617 --> 00:49:15,886

I think the fact that you  
can now be in federal court,

821

00:49:17,654 --> 00:49:19,489

it used to be a state court.

822

00:49:19,489 --> 00:49:22,526

You know, statute said  
that you were arguing and I think

823

00:49:23,093 --> 00:49:26,096

being in federal court  
probably gives you a little more teeth.

824

00:49:27,998 --> 00:49:30,167

Yeah, And again, I'm not an attorney,

825

00:49:30,167 --> 00:49:33,870

but I think there is probably  
a more robust body of case law.

826

00:49:34,771 --> 00:49:36,373

If you look at the patent space,

obviously,

827

00:49:36,373 --> 00:49:39,609

that's in federal jurisdiction  
in the body of case law around

828

00:49:39,609 --> 00:49:42,846

patent damages is although evolving

829

00:49:42,846 --> 00:49:45,849

and continuously

830

00:49:46,416 --> 00:49:47,351

under review there.

831

00:49:47,351 --> 00:49:49,119

There's

I think, a more defined body of case law.

832

00:49:49,119 --> 00:49:52,489

I think you may see some of that  
now with trade secrets in the

833

00:49:52,489 --> 00:49:54,424

in the federal courts, but mostly.

834

00:49:54,424 --> 00:49:57,527

So you'd expect more and more uniformity  
basically over time as as the

835

00:49:57,961 --> 00:50:02,132

as the federal courts think  
there'll be more cross fertilization.

836

00:50:02,132 --> 00:50:05,102

I think where it's appropriate,  
I think that that's that's very

837

00:50:05,535 --> 00:50:08,705

and I would say to that  
the probably a better access

838

00:50:08,705 --> 00:50:12,309

to foreign firms who are engaged  
in trade secret misappropriation

839

00:50:13,543 --> 00:50:14,778

that'll make a big difference.

840

00:50:14,778 --> 00:50:18,515

I think the first thing I can say with  
absolute certainty is that whatever we say

841

00:50:18,515 --> 00:50:22,285

here, we're going to be wrong  
because because the

842

00:50:22,319 --> 00:50:25,489

the the consequence is something that is

843

00:50:25,655 --> 00:50:28,658

I find is almost always unanticipated.

844

00:50:29,126 --> 00:50:32,229

And it usually has to do with  
how the case law starts to evolve.

845

00:50:32,929 --> 00:50:36,700

You know, the language of the statute is

is really just

846

00:50:37,968 --> 00:50:39,469  
the bare bones.

847

00:50:39,469 --> 00:50:43,707  
Its real meaning will come when courts  
start to interpret that language.

848

00:50:44,074 --> 00:50:46,877  
I actually think that it

849

00:50:46,877 --> 00:50:49,913  
the framing  
of specific categories of damage

850

00:50:50,514 --> 00:50:54,418  
and I think you're going to start  
to see people thinking very specifically

851

00:50:54,718 --> 00:50:58,221  
about ways in which you prove up damages

852

00:50:58,622 --> 00:51:01,425  
and the kinds of information  
that you need.

853

00:51:01,425 --> 00:51:05,062  
And I think the first real,

854

00:51:06,930 --> 00:51:08,331  
from my point of view,

855

00:51:08,331 --> 00:51:12,269

noteworthy cases  
that talk about the sufficiency of proof

856  
00:51:12,269 --> 00:51:16,106  
on damages issues is is going to be

857  
00:51:16,106 --> 00:51:19,509  
for for practitioners who do what we do.

858  
00:51:19,976 --> 00:51:24,548  
The biggest revelation,  
because I think right now the what

859  
00:51:24,548 --> 00:51:30,120  
that what those categories of damages  
require in practice is unknown.

860  
00:51:30,720 --> 00:51:33,723  
And so that's  
what I'm actually most anxious to see.

861  
00:51:34,891 --> 00:51:37,127  
And obviously it's too, it's too soon  
now for you, for you

862  
00:51:37,127 --> 00:51:40,330  
to have had experience with it  
in practice.

863  
00:51:41,298 --> 00:51:43,366  
IN And do you,

864  
00:51:43,366 --> 00:51:46,369  
do you think, though, that any of the

865

00:51:46,670 --> 00:51:50,740

how important do you think  
criminal sanctions are in this?

866

00:51:50,740 --> 00:51:51,374

I mean, are there

867

00:51:51,374 --> 00:51:54,377

certain instances where that's going  
to be more important than than others?

868

00:51:55,745 --> 00:52:00,083

I mean, I started my career  
as an antitrust economist and

869

00:52:02,252 --> 00:52:05,222

even before that I was a professor  
and I used to talk about

870

00:52:05,422 --> 00:52:09,759

the criminal element of of section  
one of the Sherman Act price fixing.

871

00:52:10,260 --> 00:52:11,995

And that was a deterrent.

872

00:52:11,995 --> 00:52:17,267

And yet you continue to see firms engaging  
in price fixing and cartel behavior,

873

00:52:17,767 --> 00:52:21,171

because on the one hand, they think, well,

874

00:52:21,872 --> 00:52:24,674

it'll be no one's going to jail,

875

00:52:24,674 --> 00:52:28,512

which is no longer true,  
or the benefits outweigh

876

00:52:28,512 --> 00:52:31,648

the risk of getting caught  
and paying a fine and going to jail.

877

00:52:33,049 --> 00:52:35,785

There is a deterrent element to the threat

878

00:52:35,785 --> 00:52:38,788

of a criminal prosecution,

879

00:52:39,055 --> 00:52:41,958

but I don't know that  
people are going to know how to value that

880

00:52:41,958 --> 00:52:45,328

until they actually see  
whether it's ever prosecuted.

881

00:52:45,795 --> 00:52:50,000

So I think there is  
a theoretical deterrent, but how valuable

882

00:52:50,000 --> 00:52:53,403

it will be,  
I don't think I would be disinclined

883

00:52:53,403 --> 00:52:57,374

to read too much into it  
just as a paper threat.

884

00:52:57,674 --> 00:53:01,511

Again, we're going to have to see how it's  
how it's translated into practice.

885

00:53:03,446 --> 00:53:06,249

Well, I

886

00:53:06,249 --> 00:53:09,252

mean, thinking about this  
as as somebody who actually wants

887

00:53:09,719 --> 00:53:13,323

value stolen trade secrets for purposes of

888

00:53:14,624 --> 00:53:18,094

establishing the value  
of what was stolen in a criminal case

889

00:53:19,996 --> 00:53:21,932

where the CEO was sent,

890

00:53:21,932 --> 00:53:24,935

was convicted of a felony.

891

00:53:25,535 --> 00:53:27,571

I think

892

00:53:27,571 --> 00:53:29,206

although having having

893

00:53:29,206 --> 00:53:33,109

been impressed by that experience,  
I think with Steve,

894

00:53:33,109 --> 00:53:36,112

you'd have to think about how  
how much difference really going to make.

895

00:53:36,479 --> 00:53:40,483

I mean, we've all seen in  
just generally in lots of situations

896

00:53:40,483 --> 00:53:45,121

where some bad act is going on  
and people are higher up

897

00:53:45,121 --> 00:53:47,490

in the organization, claim  
they knew nothing about it.

898

00:53:47,490 --> 00:53:51,461

And you have all of those kinds of issues  
before you get to the,

899

00:53:51,928 --> 00:53:55,165

you know, the incentive effects  
of possible criminal penalties.

900

00:53:55,832 --> 00:53:58,201

I think one thing it does, it may have a

901

00:53:58,201 --> 00:54:02,405

big impact on is the individuals,  
you know, where

902

00:54:03,139 --> 00:54:05,442

where you have one individual  
who's misappropriated it

903

00:54:05,442 --> 00:54:08,645  
information brought a lot of stuff  
with him to a new company.

904

00:54:09,079 --> 00:54:10,580  
That person's career

905

00:54:11,781 --> 00:54:15,118  
can get destroyed  
and they can get in a lot of trouble

906

00:54:15,118 --> 00:54:19,155  
and I've seen some of those individuals  
and I think that that

907

00:54:20,357 --> 00:54:22,459  
that will probably still give people a lot

908

00:54:22,459 --> 00:54:25,729  
more pause  
than, you know, you might think.

909

00:54:25,729 --> 00:54:29,499  
But but then  
you still have the problem of, you know,

910

00:54:29,566 --> 00:54:30,967  
people  
don't think they're going to be caught

911

00:54:30,967 --> 00:54:33,970  
or they don't think it's a big deal  
or they just don't think.

912

00:54:34,471 --> 00:54:39,509

So. It's hard to say if that the Economic Espionage Act was out there for a while.

913

00:54:39,509 --> 00:54:42,512

And back to Kevin's point,  
I've done a few cases where you get the

914

00:54:42,746 --> 00:54:46,483

value of the intellectual property  
to help the in my case, the U.S.

915

00:54:46,483 --> 00:54:49,486

Attorney's office,  
with sentencing of the individuals.

916

00:54:49,486 --> 00:54:51,388

And it does have a little bit

917

00:54:51,388 --> 00:54:54,024

of a different feel to it  
when you're putting a dollar on something,

918

00:54:54,024 --> 00:54:56,326

a dollar value on  
something, because someone's

919

00:54:58,561 --> 00:54:59,929

length of incarceration is

920

00:54:59,929 --> 00:55:03,133

dependent upon, you know, your number,  
it has a different feel to it.

921

00:55:03,133 --> 00:55:06,603

But again, that still hasn't stopped  
the events from happening,

922

00:55:06,603 --> 00:55:10,006

especially where, again,  
a lot of the cases I've seen, you've got

923

00:55:11,775 --> 00:55:14,177

foreign companies  
and some of those foreign companies

924

00:55:14,177 --> 00:55:17,681

may have a lot of state control to them.

925

00:55:18,682 --> 00:55:21,484

They're going to keep doing what they're  
going to keep what they've been doing,

926

00:55:21,484 --> 00:55:24,487

because I don't think they're concerned  
about the criminal aspect of it.

927

00:55:24,854 --> 00:55:25,121

Yeah.

928

00:55:25,121 --> 00:55:27,324

And I think that that's a  
that that's a good point.

929

00:55:27,324 --> 00:55:27,991

And it's is

930

00:55:27,991 --> 00:55:32,095

I think that's one of the growing areas

of trade secret misappropriation.

931

00:55:32,529 --> 00:55:35,732

So I you know, I know what the criminal penalties will do to stop that.

932

00:55:36,099 --> 00:55:39,469

But we've I've had several cases where we've tried to take discovery

933

00:55:39,469 --> 00:55:40,970

and some of those foreign companies and

934

00:55:41,971 --> 00:55:44,941

you're hitting the stone wall.

935

00:55:45,141 --> 00:55:46,910

It's not even worth the effort.

936

00:55:46,910 --> 00:55:48,545

Right? Right. Yeah.

937

00:55:48,545 --> 00:55:51,548

Have you seen a difference over the years in how

938

00:55:52,682 --> 00:55:55,485

sophisticated firms have become or

939

00:55:55,485 --> 00:55:59,389

owners have become about recognizing what, in fact is a trade secret?

940

00:55:59,389 --> 00:56:03,460

We we you know, I've heard  
some anecdotal evidence that this is

941  
00:56:04,127 --> 00:56:07,764  
that this is the case  
and that that consultants

942  
00:56:07,931 --> 00:56:10,900  
may come in  
and and be able to educate the,

943  
00:56:11,935 --> 00:56:12,969  
you know, the client about.

944  
00:56:12,969 --> 00:56:14,871  
Well, in fact,  
that's not your only trade secret.

945  
00:56:14,871 --> 00:56:15,939  
You've got this and this and this.

946  
00:56:15,939 --> 00:56:18,441  
You know, you have a pricing list.

947  
00:56:18,441 --> 00:56:21,444  
You have these, you know, other things  
that the firms may not realize

948  
00:56:21,945 --> 00:56:22,712  
are trade secrets.

949  
00:56:22,712 --> 00:56:25,115  
But have you  
had had seen a change in that?

950

00:56:25,115 --> 00:56:30,820

I have a client  
that was trying to help a law lawyer

951

00:56:30,820 --> 00:56:34,290

who was trying to help his client develop

952

00:56:34,290 --> 00:56:37,794

a trade secret identification plan.

953

00:56:38,828 --> 00:56:43,366

And they were doing a pilot with one small

954

00:56:44,033 --> 00:56:47,036

operating group with within this company.

955

00:56:47,370 --> 00:56:50,874

And they asked people to identify

956

00:56:51,574 --> 00:56:54,511

all of the company's trade secrets

957

00:56:54,511 --> 00:56:57,781

that they were aware of  
in the course of their business.

958

00:56:58,181 --> 00:57:01,751

And I think there were 40  
or 50 people in this group,

959

00:57:02,185 --> 00:57:05,488

and they got answers ranging from none

960

00:57:06,623 --> 00:57:10,160  
to pages and pages  
and pages of descriptions of things

961  
00:57:10,460 --> 00:57:13,463  
that people thought were trade secrets.

962  
00:57:13,630 --> 00:57:18,968  
And they threw up their hands  
and they didn't know what to do with that.

963  
00:57:19,335 --> 00:57:22,705  
I think one of the problems that you have  
is that

964  
00:57:24,641 --> 00:57:27,811  
people have a hard time identifying  
what's a trade secret.

965  
00:57:29,145 --> 00:57:31,548  
Some people will claim that  
something is a trade secret

966  
00:57:31,548 --> 00:57:36,686  
because they want it to be when in fact  
it's really not as novel as they think,

967  
00:57:36,686 --> 00:57:40,390  
or there's only one small element of it  
that's that secret.

968  
00:57:40,790 --> 00:57:43,793  
But I suspect firms are going to try.

969  
00:57:43,793 --> 00:57:48,298

I think the more easily, you know,  
the law establishes a property right,

970

00:57:48,631 --> 00:57:50,900

the more easily  
you can define the property

971

00:57:50,900 --> 00:57:53,703

and let everybody know  
that this is our property.

972

00:57:55,071 --> 00:57:56,406

The I think the

973

00:57:56,406 --> 00:57:59,642

less likely people  
are to try and steal it.

974

00:57:59,642 --> 00:58:03,613

I mean, people will not think of nothing  
of walking out with a thumb drive

975

00:58:03,746 --> 00:58:06,316

their pocket,  
but they are less likely to walk out

976

00:58:06,316 --> 00:58:10,086

with a computer that is stamped  
with the name of their employer

977

00:58:10,086 --> 00:58:13,089

all over it  
because it's readily identifiable.

978

00:58:13,923 --> 00:58:16,593

So I suspect we will start to see that.

979

00:58:16,593 --> 00:58:20,430

But the only effort  
that I saw died on the vine

980

00:58:20,563 --> 00:58:24,400

because it was just  
an an impossible exercise.

981

00:58:24,934 --> 00:58:28,171

I think along Steve's point,  
a lot of the clients, we were like,

982

00:58:28,171 --> 00:58:33,042

they range from the most sophisticated  
in the world to those that I just point.

983

00:58:33,142 --> 00:58:35,512

You know, it could be something  
or it could be nothing. Right.

984

00:58:35,512 --> 00:58:40,783

I think you're seeing more companies,  
though, at least make employees aware

985

00:58:40,783 --> 00:58:43,820

that they are going to be potentially  
in receipt of information

986

00:58:44,153 --> 00:58:45,755

that may be confidential.

987

00:58:45,755 --> 00:58:50,193

And we do have processes in place and,

you know, at least recognize

988

00:58:50,193 --> 00:58:50,560  
that there's a

989

00:58:50,560 --> 00:58:54,030  
there there is there is something called  
intellectual property, that it is

990

00:58:54,030 --> 00:58:57,901  
the right the the property of the company  
and be thoughtful of that.

991

00:58:57,901 --> 00:59:00,103  
Again,  
whether somebody puts it on a thumb drive

992

00:59:00,103 --> 00:59:02,672  
or prints it out or emails, it  
I think is a different.

993

00:59:02,672 --> 00:59:03,573  
But at least there's there's

994

00:59:03,573 --> 00:59:05,942  
there's more recognition  
that you're going to get information

995

00:59:05,942 --> 00:59:08,144  
during the course of business  
that may be proprietary.

996

00:59:09,212 --> 00:59:10,079  
Recognize that.

997

00:59:10,079 --> 00:59:13,650

And so you know, how many people in  
the world know the formula of Coca Cola?

998

00:59:13,716 --> 00:59:16,352

I gave it to three or four or five.  
And what if I pointed that?

999

00:59:16,352 --> 00:59:20,223

That's says Kevin Wall versus, you know,  
you've got these pharmaceutical companies

1000

00:59:20,223 --> 00:59:21,424

that, you know, you have some of these

1001

00:59:21,424 --> 00:59:24,928

some of these different different studies  
going on that, you know, maybe 50,

1002

00:59:24,928 --> 00:59:28,731

60, 70,000 people have access to it,  
but they have to have some recognition

1003

00:59:28,731 --> 00:59:32,201

that what they see and what they touch is,  
is maybe proprietary.

1004

00:59:32,669 --> 00:59:34,470

So I think it's more  
of an educational process.

1005

00:59:34,470 --> 00:59:38,308

And and, again, look, most companies now  
have certain types of agreements with your

1006

00:59:38,341 --> 00:59:40,476

employment agreements  
that have some recognition of that

1007

00:59:40,476 --> 00:59:43,346

you know  
good companies will have some ongoing

1008

00:59:45,949 --> 00:59:48,418

communication with the employees  
to remind them that information.

1009

00:59:48,418 --> 00:59:51,054

So I think it's just a more  
of a communication issue than anything.

1010

00:59:51,054 --> 00:59:53,723

I had  
maybe a different perspective on this.

1011

00:59:53,723 --> 00:59:56,793

I, I was involved in the case that led

1012

00:59:56,793 --> 00:59:59,963

to the first felony conviction  
under the Economic Espionage Act.

1013

00:59:59,963 --> 01:00:02,865

And I know that the attorneys  
I worked with on that case

1014

01:00:02,865 --> 01:00:07,236

for years afterwards had a major practice  
of going to companies

1015

01:00:07,570 --> 01:00:11,007

and working with them  
to help them tighten up

1016

01:00:11,007 --> 01:00:14,310

their procedures  
for protection of trade secrets.

1017

01:00:14,844 --> 01:00:17,647

And I know there was a lot of effort  
that went into that.

1018

01:00:17,647 --> 01:00:20,717

And certainly what  
I've seen is not so much

1019

01:00:20,717 --> 01:00:23,820

inventorying particular trade secrets, but

1020

01:00:25,088 --> 01:00:28,891

putting in place access controls  
and general protection mechanisms.

1021

01:00:28,891 --> 01:00:30,893

If you just think about it.

1022

01:00:30,893 --> 01:00:33,162

You mean company owned computers,

1023

01:00:33,162 --> 01:00:36,799

passwords or controlled access  
on a need to know basis?

1024

01:00:37,066 --> 01:00:39,969

Non-disclosure agreements,  
employment agreements.

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01:00:39,969 --> 01:00:43,172

People

get regular training on this so that

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01:00:44,140 --> 01:00:44,974

I think there's been

1027

01:00:44,974 --> 01:00:49,112

a tremendous

tightening up in terms of thinking

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01:00:49,112 --> 01:00:53,750

more carefully about who gets access to  
what and why and under what circumstances

1029

01:00:54,150 --> 01:00:58,021

about locking systems down  
to prevent unauthorized access

1030

01:00:58,454 --> 01:01:02,091

and reminding people  
very clearly of legal obligations.

1031

01:01:02,091 --> 01:01:06,863

I find I mean, in in all the recent cases  
I've been involved in,

1032

01:01:07,563 --> 01:01:11,134

you know, there has been a ritual of,  
you know, what you go through

1033

01:01:11,134 --> 01:01:14,370

when you join the company, what you go through when leave the company.

1034

01:01:15,304 --> 01:01:18,174

All of that, I think, is  
is much more highly developed than it was

1035

01:01:18,174 --> 01:01:19,442

some years ago.

1036

01:01:19,442 --> 01:01:24,080

I think in terms of inventorying  
what they are, I'd agree with Steve.

1037

01:01:24,080 --> 01:01:25,314

It's hard to tell.

1038

01:01:25,314 --> 01:01:29,118

But, you know, it's as I said,  
you get involved in a case

1039

01:01:29,118 --> 01:01:32,321

and you say, okay, here  
are all the documents that somebody took

1040

01:01:32,789 --> 01:01:35,625

and you still have to go through  
to figure out, well,

1041

01:01:35,625 --> 01:01:38,227

you know, are these really secret  
and do they really have value

1042

01:01:38,227 --> 01:01:40,563

and could they really be put to use

by somebody else?

1043

01:01:40,563 --> 01:01:43,733

So in some sense, you do that part  
ex post, right?

1044

01:01:43,733 --> 01:01:47,103

Yeah, but but ex ante,  
at least you can put into place

1045

01:01:47,970 --> 01:01:50,940

mechanisms to sort of protect  
all of that information and, and you know,

1046

01:01:51,007 --> 01:01:53,009

sort of possess controls,

1047

01:01:53,009 --> 01:01:56,312

encryption, nondisclosure agreements,  
all of those kind of things.

1048

01:01:56,546 --> 01:01:58,514

Yeah, but I think that applies

1049

01:01:58,514 --> 01:02:02,485

to all intellectual property,  
not just trade secrets and

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01:02:04,253 --> 01:02:06,622

I mean, I just  
wonder if it's going to be possible to

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01:02:06,622 --> 01:02:09,625

to for companies to define precisely

1052

01:02:10,359 --> 01:02:12,462

the different what's in each bucket

1053

01:02:12,462 --> 01:02:15,732

of intellectual property,  
patents, copyrights, trademarks.

1054

01:02:15,732 --> 01:02:18,067

That's easy,  
but there's a whole bunch of other stuff

1055

01:02:18,067 --> 01:02:21,537

that's going to be very difficult to  
to identify.

1056

01:02:21,604 --> 01:02:23,673

There's a cost to all this, too, right?

1057

01:02:23,673 --> 01:02:24,540

Companies perspective.

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01:02:24,540 --> 01:02:27,410

There's a cost to have all these things  
in place in the training.

1059

01:02:27,410 --> 01:02:30,913

And so I think that's part of the part  
of the balancing act as well as is,

1060

01:02:31,380 --> 01:02:35,618

you know, how do you the cost  
of implementing these these programs.

1061

01:02:35,752 --> 01:02:37,587

Yeah, and it isn't just a monetary cost.

1062

01:02:37,587 --> 01:02:39,922

One company I worked with,

1063

01:02:39,922 --> 01:02:43,459

you know, after

they'd had a major disclosure event,

1064

01:02:43,926 --> 01:02:46,829

they tightened up their access  
to technical information

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01:02:46,829 --> 01:02:51,000

and they agonized over this  
because part of the culture they had had

1066

01:02:51,000 --> 01:02:54,804

before was open intellectual exchange  
among all their research

1067

01:02:55,171 --> 01:02:58,174

to help them to cross fertilizer efforts.

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01:02:58,574 --> 01:03:02,779

And then they had to cut this back  
and carefully about who had access.

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01:03:02,979 --> 01:03:04,147

But so

1070

01:03:05,114 --> 01:03:07,016

there's it's not just a monetary cost.

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01:03:07,016 --> 01:03:09,418

It can even be a research  
productivity cost.

1072

01:03:09,418 --> 01:03:12,522

I mean, one of the things that I've heard  
discussed

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01:03:12,722 --> 01:03:15,691

is whether

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01:03:15,691 --> 01:03:17,493

part of one implication

1075

01:03:17,493 --> 01:03:20,496

of increased efforts to protect

1076

01:03:20,897 --> 01:03:24,901

intellectual property  
generally and trade secrets in particular

1077

01:03:25,468 --> 01:03:30,039

is to cut back on publication  
by researchers

1078

01:03:30,706 --> 01:03:35,044

because you reveal something,  
it's in the public domain

1079

01:03:35,578 --> 01:03:39,482

and it may completely unintended

1080

01:03:41,083 --> 01:03:44,120

weaken  
an intellectual property position legally

1081

01:03:44,353 --> 01:03:47,123

or just diminish the value  
of the intellectual property,

1082

01:03:47,123 --> 01:03:50,827

because you're you're sharing  
some information that other smart people

1083

01:03:51,127 --> 01:03:53,863

can use to put something else together.

1084

01:03:53,863 --> 01:03:57,400

So I, I think, again,  
we'll have to see whether that happens.

1085

01:03:57,733 --> 01:04:01,370

But I have read concerns about that,  
particularly

1086

01:04:01,637 --> 01:04:06,542

in the pharmaceutical area  
where, you know, Kevin made a great point.

1087

01:04:06,542 --> 01:04:08,578

A lot of times the intellectual property,

1088

01:04:08,578 --> 01:04:11,414

the great secret is in  
knowing what not to do.

1089

01:04:11,414 --> 01:04:14,417

And sometimes

1090

01:04:14,517 --> 01:04:17,954  
presentations at symposia and publications

1091  
01:04:18,287 --> 01:04:22,491  
talk a lot about the research process  
and they reveal what not to do.

1092  
01:04:22,491 --> 01:04:26,395  
So you've now revealed something  
extremely bad and you've done it for free.

1093  
01:04:27,697 --> 01:04:29,932  
Yep. So let me ask

1094  
01:04:29,932 --> 01:04:33,002  
you a question  
you won't be able to answer.

1095  
01:04:33,703 --> 01:04:36,639  
But but maybe do your best.

1096  
01:04:36,639 --> 01:04:38,741  
Let's let's  
see how close we can get to it.

1097  
01:04:38,741 --> 01:04:43,579  
If you look at if you take an intellectual  
property portfolio right, of of

1098  
01:04:44,580 --> 01:04:48,751  
the the let's say the average client  
that you might work with.

1099  
01:04:48,751 --> 01:04:52,622  
So someone is in kind of a science

technology area,

1100

01:04:53,789 --> 01:04:56,492

what do you think

the value of that portfolio

1101

01:04:56,492 --> 01:04:59,962

is relative to with respect to

1102

01:05:01,130 --> 01:05:04,133

patents and with trade secrets?

1103

01:05:04,333 --> 01:05:04,567

Right.

1104

01:05:04,567 --> 01:05:08,404

So what division, you know, is there  
could you say that, you know,

1105

01:05:09,071 --> 01:05:12,375

trade secrets are worth 50%

1106

01:05:12,508 --> 01:05:16,846

their of their patent portfolio,  
20%, 150%.

1107

01:05:17,847 --> 01:05:19,382

Any anybody willing to

1108

01:05:19,382 --> 01:05:22,084

just take a step out there  
and put put something through something.

1109

01:05:22,084 --> 01:05:23,986

I think I can be very precise.

1110

01:05:23,986 --> 01:05:26,188

I think the precise answer is it depends.

1111

01:05:27,256 --> 01:05:29,025

I mean,

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01:05:29,025 --> 01:05:31,994

you know, this this is where you ask  
for a one handed economist.

1113

01:05:31,994 --> 01:05:33,796

Exactly. Exactly.

1114

01:05:33,796 --> 01:05:36,666

I mean, a patent portfolio may contain

1115

01:05:36,666 --> 01:05:40,770

20,000 patents, 200 of which gets used,  
and the other other

1116

01:05:41,037 --> 01:05:44,040

which are sitting in the vault somewhere,

1117

01:05:44,540 --> 01:05:47,543

you know, trade secrets.

1118

01:05:48,611 --> 01:05:48,978

You know,

1119

01:05:48,978 --> 01:05:53,449

they may be extremely valuable  
only in combination with something else.

1120

01:05:53,749 --> 01:05:56,786

So you may have a trade secret  
that doesn't become valuable to you.

1121

01:05:56,786 --> 01:05:58,087

Obtain a patent.

1122

01:05:58,087 --> 01:06:01,757

Well, when that patent expires, that  
trade secret may not be valuable anymore.

1123

01:06:03,092 --> 01:06:04,994

So the answer is, I think it depends.

1124

01:06:04,994 --> 01:06:08,130

I don't know that there's a rule of thumb  
even I could apply.

1125

01:06:09,198 --> 01:06:12,201

Yeah, I think

1126

01:06:13,102 --> 01:06:13,502

I'm not sure

1127

01:06:13,502 --> 01:06:17,006

I can give an answer, but I could  
maybe frame the question a little bit.

1128

01:06:17,006 --> 01:06:21,243

I, I spoke before about how there are,  
you know, certain areas of technology

1129

01:06:21,978 --> 01:06:25,648

where I don't think you see trade secrets playing as much of a role.

1130

01:06:26,082 --> 01:06:30,553

Like, you know, when you get involved in, you know, computers in telecommunications

1131

01:06:30,553 --> 01:06:33,389

where lots and lots of different technologies have to work together

1132

01:06:33,389 --> 01:06:37,560

smoothly, I think it's hard to have trade secrets play a lot of role there

1133

01:06:37,593 --> 01:06:42,031

simply because so many different organizations and companies are involved

1134

01:06:42,031 --> 01:06:46,202

in building components and, you know, own pieces of intellectual property.

1135

01:06:46,502 --> 01:06:50,673

So you tend to I think trade secrets tend to be more valuable in

1136

01:06:52,842 --> 01:06:54,977

simpler products.

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01:06:54,977 --> 01:06:57,980

And so I think you could probably

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01:06:58,948 --> 01:07:01,684

offer an opinion

that the mix is going to be different

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01:07:01,684 --> 01:07:04,920

depending

upon the nature of the technology and,

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01:07:07,023 --> 01:07:09,925

you know, I think that there's

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01:07:09,925 --> 01:07:11,660

my sense is that trade secrets,

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01:07:11,660 --> 01:07:15,664

technical trade secrets

wind up being more valuable when it's a

1143

01:07:16,198 --> 01:07:20,069

there's a development process

as opposed to one product.

1144

01:07:20,669 --> 01:07:23,672

Like it's one thing to, you know,

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01:07:23,906 --> 01:07:25,741

to own a molecule

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01:07:25,741 --> 01:07:29,178

that has beneficial effect

against some disease.

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01:07:29,512 --> 01:07:30,479

It's another thing

1148

01:07:30,479 --> 01:07:35,084

to have a unique process for screening  
that lets you find those more easily.

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01:07:35,551 --> 01:07:39,288

So it's, you know, I found it  
just seems to me

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01:07:39,288 --> 01:07:42,425

sometimes it's these situations  
where it's your trick for,

1151

01:07:43,092 --> 01:07:46,362

for generating new things  
that is really valuable

1152

01:07:46,762 --> 01:07:50,633

that that can I think gives you some idea  
about where the mix will differ.

1153

01:07:52,435 --> 01:07:53,803

I'll support what Steve said.

1154

01:07:53,803 --> 01:07:56,806

It depends but but maybe as an anecdote,

1155

01:07:58,140 --> 01:08:00,076

if we look at the types of cases

1156

01:08:00,076 --> 01:08:02,812

we're working on  
in the industries that they're in.

1157

01:08:02,812 --> 01:08:04,814

So I would say

1158

01:08:04,814 --> 01:08:07,917

I do a lot of pharmaceutical related intellectual property litigation.

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01:08:08,150 --> 01:08:11,153

Most of that is patent related

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01:08:11,320 --> 01:08:15,191

to a lot of chemical or energy related intellectual property litigation.

1161

01:08:15,624 --> 01:08:18,294

A good chunk of that is trade secrets related.

1162

01:08:18,294 --> 01:08:22,031

I mean, yes, there's patents in each, but but, but we've seen over the last

1163

01:08:22,898 --> 01:08:25,901

five, ten years far more

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01:08:27,069 --> 01:08:30,840

trade secrets work in the energy and chemical space, for example,

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01:08:31,040 --> 01:08:32,041

than paid work.

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01:08:32,041 --> 01:08:36,345

And so financial services, we've seen a mix.

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01:08:36,345 --> 01:08:41,784

You have that are out there you've seen  
Goldman Sachs the the the trader that was

1168

01:08:43,619 --> 01:08:44,687

out there for trade secret.

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01:08:44,687 --> 01:08:48,657

You know so so in the financial services  
space a balance.

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01:08:48,657 --> 01:08:48,858

You know,

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01:08:48,858 --> 01:08:51,994

we've seen a lot of patent litigation,  
but you've seen a fair amount

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01:08:51,994 --> 01:08:52,728

of trade securities.

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01:08:52,728 --> 01:08:55,631

So I get back to see that  
every case is different and and so on.

1174

01:08:55,631 --> 01:08:58,634

But if I look at, you know,  
where I've been practicing

1175

01:08:59,268 --> 01:09:03,806

more often than not, if it's in the energy  
and chemical space trade secrets

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01:09:03,806 --> 01:09:05,741

and then bend and vice versa,

1177

01:09:05,741 --> 01:09:09,211

flip on the pharmaceutical side,  
it's it's largely all all patent work.

1178

01:09:09,545 --> 01:09:13,082

And you think look at looking  
at sort of the comparative litigation

1179

01:09:13,082 --> 01:09:16,085

that's going on is gives you at least a

1180

01:09:16,886 --> 01:09:21,023

an approximate sort of first approach of  
of where

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01:09:21,657 --> 01:09:24,660

trade secrets or patents may be becoming  
more valuable or less valuable.

1182

01:09:25,261 --> 01:09:26,595

Looking at that relative litigation.

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01:09:28,864 --> 01:09:29,798

And I think

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01:09:29,798 --> 01:09:32,801

patents are very valuable  
in in pharmaceuticals

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01:09:33,102 --> 01:09:36,005

because there's a whole process around

1186

01:09:36,005 --> 01:09:40,743

pharmaceutical patents

that, provides lots of protections

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01:09:40,743 --> 01:09:44,313

and provides a very clear process  
for defending it.

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01:09:44,713 --> 01:09:48,450

So patent protection is a is huge

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01:09:48,450 --> 01:09:51,453

sledgehammer in the pharmaceutical space.

1190

01:09:51,520 --> 01:09:54,523

I think another space is  
it's not as clear.

1191

01:09:55,291 --> 01:09:58,561

So I'm not sure that other than pharma,  
I'm not sure that you could

1192

01:09:58,794 --> 01:10:03,098

that I could say with any degree  
of confidence that I know what it is.

1193

01:10:03,098 --> 01:10:03,933

Yeah, Yeah.

1194

01:10:03,933 --> 01:10:08,337

And I would think if your question is  
can you look at trends in litigation

1195

01:10:08,337 --> 01:10:12,374

to infer trends in relative valuation,  
I would say

1196

01:10:13,642 --> 01:10:16,645

I still agree with what Steve said,  
but I would say you can,

1197

01:10:16,679 --> 01:10:20,516

with the exception that there's  
there are non litigation aspects of value

1198

01:10:20,849 --> 01:10:24,420

with cross-licensing and freedom  
to practice, which again, things you see

1199

01:10:24,420 --> 01:10:28,624

a lot of in the  
the computer and telecommunications sector

1200

01:10:29,124 --> 01:10:32,728

and that doesn't always  
show up in litigation.

1201

01:10:32,728 --> 01:10:36,332

So, you know, it's hard  
I think, to to gauge those

1202

01:10:39,902 --> 01:10:41,370

issues non litigation

1203

01:10:41,370 --> 01:10:44,373

application again more anecdotally

1204

01:10:45,874 --> 01:10:47,710

over the years more trade secrets

1205

01:10:47,710 --> 01:10:50,713

cases are going through to trial.

1206

01:10:50,846 --> 01:10:53,849

The dollar value of those cases,

1207

01:10:54,216 --> 01:10:56,785

again, just seems to be

1208

01:10:56,785 --> 01:10:59,788

getting higher and higher.

1209

01:11:00,723 --> 01:11:02,925

Is that just because,

you know, we're being

1210

01:11:02,925 --> 01:11:05,894

you know, we're smarter about what  
those things are or not?

1211

01:11:05,894 --> 01:11:06,362

I don't know.

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01:11:06,362 --> 01:11:09,265

But again,

there's there's been far more cases,

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01:11:09,265 --> 01:11:12,034

trade secrets cases

that are going through to some sort

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01:11:12,034 --> 01:11:15,037

some formal adjudication,

whether it's an arbitration or

1215

01:11:16,372 --> 01:11:19,375  
a trial or an arbitration someplace.

1216  
01:11:19,441 --> 01:11:21,844  
And Again, it seems to be that

1217  
01:11:21,844 --> 01:11:25,381  
trade secrets is now the  
maybe the new sport of kings

1218  
01:11:25,381 --> 01:11:28,484  
that used to be patents, used to be  
the sport of kings with a dollar value.

1219  
01:11:29,251 --> 01:11:32,354  
I Think the courts  
have been trying to rein in the

1220  
01:11:32,821 --> 01:11:36,759  
the economic damages awards  
in the patent world.

1221  
01:11:36,759 --> 01:11:40,996  
I don't think you've seen that that  
corralling it in the trade secrets space.

1222  
01:11:40,996 --> 01:11:41,797  
We'll see where that goes.

1223  
01:11:41,797 --> 01:11:46,268  
But it's not uncommon now to see trade  
secrets cases that have hundreds

1224  
01:11:46,268 --> 01:11:49,538  
of millions of dollars

of potential damage.

1225

01:11:50,372 --> 01:11:53,442

Yeah, I think I think what I'm seeing  
in the trade secret litigation

1226

01:11:53,442 --> 01:11:57,546

as compared to the patent is  
there are in patent cases,

1227

01:11:57,546 --> 01:12:02,184

there are a number of opportunities  
for cases to go away or settle there.

1228

01:12:02,251 --> 01:12:08,557

There are certain procedural points  
where something's going to happen and they

1229

01:12:08,924 --> 01:12:11,994

they often revolve around claims  
construction.

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01:12:12,361 --> 01:12:15,164

A lot of cases  
disappear after a Markman hearing.

1231

01:12:17,132 --> 01:12:18,534

I don't think there are those

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01:12:18,534 --> 01:12:22,938

trigger points in trade secret litigation,  
and there may never be,

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01:12:23,272 --> 01:12:27,209

which I suspect is part of the reason

that more of them are actually proceeding

1234

01:12:28,077 --> 01:12:31,080

farther along and many more to trial.

1235

01:12:31,480 --> 01:12:35,984

I also think it's harder to settle a case  
when the case law is evolving.

1236

01:12:35,984 --> 01:12:39,488

So I actually think  
one of the consequences of the new

1237

01:12:40,456 --> 01:12:44,727

legislation is that for a while  
it's going to be harder to settle a case

1238

01:12:44,727 --> 01:12:48,364

because you won't know how to value  
until you see how the case law develops.

1239

01:12:49,465 --> 01:12:49,732

Right.

1240

01:12:49,732 --> 01:12:54,103

And so we'll have to have to see  
how that trend makes itself

1241

01:12:54,470 --> 01:12:57,606

known over the next couple of years,  
because it may actually create

1242

01:12:57,606 --> 01:13:01,877

some of these trigger points where you see  
more and more settlements earlier on.

1243

01:13:01,877 --> 01:13:04,980

But we'll have to wait and see for that.

1244

01:13:05,180 --> 01:13:10,519

I think we've we've come about to  
the end of our time and I wanted to call

1245

01:13:12,654 --> 01:13:14,156

the next the next panel up.

1246

01:13:14,156 --> 01:13:17,693

But first, I'd like to ask you to join me  
in thanking our panelists

1247

01:13:17,693 --> 01:13:20,696

here today.

1248

01:13:26,702 --> 01:13:27,936

But yes, sure.

1249

01:13:27,936 --> 01:13:32,474

If if if there are specific questions  
that we please come up to the microphone

1250

01:13:32,474 --> 01:13:35,511

and tell us who you are  
and your affiliation.

1251

01:13:41,884 --> 01:13:44,887

So I just wanted to

1252

01:13:46,655 --> 01:13:49,658

be either the conflict

1253

01:13:50,526 --> 01:13:53,529

so your

1254

01:14:00,235 --> 01:14:03,238

Jim. Hello.

1255

01:14:03,772 --> 01:14:04,306

Okay.

1256

01:14:04,306 --> 01:14:05,474

Jim Pooley from work.

1257

01:14:05,474 --> 01:14:08,777

So I just wanted to question the idea  
that complex products

1258

01:14:09,077 --> 01:14:12,247

are not a place  
where we see a lot of trade secrets.

1259

01:14:13,115 --> 01:14:16,518

You know, that's, that's very contextual  
in my experience.

1260

01:14:16,718 --> 01:14:18,720

Apple, for example,

1261

01:14:18,720 --> 01:14:22,057

is one of the most trade secret  
intensive companies on the planet.

1262

01:14:22,491 --> 01:14:25,894

And you can take apart their iPhone,

but you can't tell how it was made

1263

01:14:25,894 --> 01:14:28,897

and you can't do the tolerances  
and all the rest of it.

1264

01:14:28,931 --> 01:14:32,301

Google, Amazon and other major software

1265

01:14:32,301 --> 01:14:35,404

companies depend on the secrecy

1266

01:14:35,404 --> 01:14:39,341

of their algorithms in order to maintain  
their competitive advantage.

1267

01:14:39,341 --> 01:14:42,711

A lot of software  
companies are taking their

1268

01:14:44,780 --> 01:14:45,481

their basic

1269

01:14:45,481 --> 01:14:48,884

engines up to the cloud,  
which is about secrecy.

1270

01:14:48,884 --> 01:14:51,720

So it's just,  
you know, a different perspective.

1271

01:14:51,720 --> 01:14:56,358

But I also wanted to want to say I was  
I was glad to hear the comment here

1272

01:14:56,358 --> 01:15:00,996

on the difference

between your observations in patent cases

1273

01:15:00,996 --> 01:15:05,400

and trade secret cases when it comes to

damage calculations, because those of us

1274

01:15:05,400 --> 01:15:08,770

that try both kinds of cases

see a stark difference.

1275

01:15:09,771 --> 01:15:13,742

Patent damage

calculations have been defined

1276

01:15:13,842 --> 01:15:19,314

by a series of court decisions and based

on, you know, a narrow property right,

1277

01:15:19,314 --> 01:15:23,919

Whereas trade secret cases historically

have been based on tort damages.

1278

01:15:24,620 --> 01:15:27,189

And which leads to the other point

1279

01:15:27,189 --> 01:15:30,225

when it comes to resolving

some of these issues around

1280

01:15:30,993 --> 01:15:33,962

whether or not

something actually is a trade secret

1281

01:15:34,263 --> 01:15:38,600

inside one of these cases

or whether there has been use

1282

01:15:38,600 --> 01:15:42,871

or the use was limited

and so on and so forth, juries tend

1283

01:15:42,871 --> 01:15:48,544

to resolve those questions

in favor of the person who was wronged

1284

01:15:48,911 --> 01:15:52,581

by and large,

because another major difference between

1285

01:15:53,181 --> 01:15:56,184

patent and trade cases is fault.

1286

01:15:56,919 --> 01:16:01,523

In every trade secret case,

it is a morality play

1287

01:16:01,757 --> 01:16:05,093

where someone has done

something profoundly wrong.

1288

01:16:05,227 --> 01:16:06,862

It's been treachery of some sort.

1289

01:16:06,862 --> 01:16:08,163

Whereas in patent cases

1290

01:16:08,163 --> 01:16:11,700

you can be walking down the street  
infringing a patent and not know it.

1291

01:16:12,367 --> 01:16:15,704

So that affects how these things play out.

1292

01:16:15,704 --> 01:16:20,008

So if you go into a case and try to argue,  
well, yes, we stole the trade secret,

1293

01:16:20,576 --> 01:16:24,446

but we really didn't use it that much,  
it sounds just like someone

1294

01:16:24,446 --> 01:16:27,616

who stole a car and then tries to argue  
that they didn't drive it very far.

1295

01:16:28,116 --> 01:16:28,684

You know,

1296

01:16:28,684 --> 01:16:33,689

the jury will resolve those questions  
generally in favor of the plaintiff.

1297

01:16:33,722 --> 01:16:34,356

Yeah.

1298

01:16:34,356 --> 01:16:37,359

And I think, too,  
that that affects the litigation strategy,

1299

01:16:37,593 --> 01:16:41,997

because in my experience, if  
you're a plaintiff in a trade secret case,

1300

01:16:42,998 --> 01:16:45,267

it's easy to feel violated.

1301

01:16:45,267 --> 01:16:49,204

If a lot of material has been taken  
by someone you trusted.

1302

01:16:49,805 --> 01:16:53,642

So there's a kind of more it's  
more emotional.

1303

01:16:53,642 --> 01:16:54,843

It's more emotional. Yeah.

1304

01:16:54,843 --> 01:16:58,413

Then I think you find in patent cases,  
and it's because of exactly that point

1305

01:16:58,614 --> 01:17:03,085

that I actually I see a difference  
within the set of trade secret cases.

1306

01:17:04,319 --> 01:17:09,257

A trade secret case  
that involves a violation of an NGO

1307

01:17:09,558 --> 01:17:13,261

is different from a trade secret case.

1308

01:17:13,729 --> 01:17:18,033

An employee  
or a set of employees who are trusted

1309

01:17:18,767 --> 01:17:21,837  
took a bunch of information and

1310  
01:17:23,271 --> 01:17:24,706  
walked away with it.

1311  
01:17:24,706 --> 01:17:27,075  
They they feel different.

1312  
01:17:27,075 --> 01:17:31,146  
And I don't know that I could define  
that feel any more precisely.

1313  
01:17:31,146 --> 01:17:35,784  
But having been involved in both kinds of  
cases, there is just a different feel

1314  
01:17:36,485 --> 01:17:40,322  
to a trial involving  
what is in is, in effect,

1315  
01:17:40,322 --> 01:17:45,761  
a contract dispute, though it's trade  
secrets case as opposed to that betrayal.

1316  
01:17:46,728 --> 01:17:47,596  
One of the things I was

1317  
01:17:47,596 --> 01:17:50,599  
always taught,  
you know, starting talking, I'll

1318  
01:17:51,366 --> 01:17:53,402  
leave the emotion at the door.

1319

01:17:53,402 --> 01:17:56,571

You know, it's a business issue, but it's hard to leave the emotion at the door,

1320

01:17:56,838 --> 01:18:00,742

especially when it's a smaller company who had their information taken.

1321

01:18:00,742 --> 01:18:03,612

It is definitely more, like I said, more.

1322

01:18:03,612 --> 01:18:05,447

There's an emotional reaction.

1323

01:18:05,447 --> 01:18:07,049

They felt violated.

1324

01:18:07,049 --> 01:18:09,584

And so but and in those cases, it's harder

1325

01:18:09,584 --> 01:18:12,721

to get the plaintiff to

1326

01:18:12,988 --> 01:18:15,590

to leave the emotion of the door, which again, has implications

1327

01:18:15,590 --> 01:18:18,026

for what we do and how you're going to value these things and so on.

1328

01:18:18,026 --> 01:18:21,029

But in back to Jim's point,

1329

01:18:21,263 --> 01:18:25,067

when we get a patent case, automatically  
somebody looks to see which district

1330

01:18:25,067 --> 01:18:28,437

we're in, which judge you're in front of,  
how the judges rule on certain

1331

01:18:28,437 --> 01:18:29,037

types of issues,

1332

01:18:29,037 --> 01:18:32,774

you can go back and you can see as a judge  
allowed certain types of damages.

1333

01:18:32,774 --> 01:18:35,777

And how is he or she,  
you know, just qualified experts, etc..

1334

01:18:35,911 --> 01:18:37,646

You can't do that in the trade secrets  
world yet.

1335

01:18:37,646 --> 01:18:39,481

So it's it's  
you know, you got to do your homework

1336

01:18:41,483 --> 01:18:41,683

there.

1337

01:18:41,683 --> 01:18:44,686

The other questions here. All right.

1338

01:18:45,153 --> 01:18:48,557

So thanks again  
and I'll ask the next panel to come up.

1339  
01:18:48,557 --> 01:18:51,560  
I'm Jenny BLANKE will be leading that

1340  
01:19:09,611 --> 01:19:12,614  
review

1341  
01:19:21,389 --> 01:19:24,392  
versus the

1342  
01:19:37,372 --> 01:19:40,375  
you know,

1343  
01:19:42,277 --> 01:19:44,713  
thank you, everybody,  
for being here today.

1344  
01:19:44,713 --> 01:19:48,350  
And thanks to the 124 people  
joining us by live stream.

1345  
01:19:49,651 --> 01:19:52,053  
As Ellen said, my name is Jenny Blank.

1346  
01:19:52,053 --> 01:19:53,622  
I'm an attorney advisor here

1347  
01:19:53,622 --> 01:19:56,992  
at PTO in the Office of Policy  
and International Affairs.

1348  
01:19:57,692 --> 01:20:02,964

And I am pleased to be joined by our panel  
to discuss the use of the Defense Trade

1349

01:20:02,964 --> 01:20:06,301

Secrets Act in practice and to join us

1350

01:20:06,301 --> 01:20:10,105

today we have three practitioners  
and they didn't

1351

01:20:10,105 --> 01:20:13,108

sit down in the order I wrote,

1352

01:20:14,409 --> 01:20:17,412

Let me give it a day

1353

01:20:17,612 --> 01:20:18,980

or so.

1354

01:20:18,980 --> 01:20:23,785

Let me start just by giving you  
a few words about each of my panelists.

1355

01:20:24,186 --> 01:20:26,955

Right here to my left,  
we have Cass Christensen,

1356

01:20:26,955 --> 01:20:30,759

who has more than 19 years of experience  
in complex, high stakes

1357

01:20:30,759 --> 01:20:34,563

litigation, including numerous trials,  
trials and appeals.

1358

01:20:35,096 --> 01:20:39,601

CAS previously led the legacy  
McKenna Longs

1359

01:20:39,601 --> 01:20:43,004

trade secret and IP litigation  
practice CAS.

1360

01:20:43,071 --> 01:20:47,108

His practice focuses on asserting and  
defending claims involving trade secrets,

1361

01:20:47,642 --> 01:20:50,612

patents, trademarks and other IP.

1362

01:20:50,745 --> 01:20:54,249

Cass handles cases involving  
the misappropriation of trade secrets

1363

01:20:54,249 --> 01:20:58,620

or other proprietary information  
he's experienced in securing agreements

1364

01:20:58,620 --> 01:21:02,357

and orders with and without litigation,  
which is always important

1365

01:21:02,691 --> 01:21:06,962

to protect trade secrets and related  
information, He has represented both

1366

01:21:07,295 --> 01:21:12,601

employers and former employees in trade  
secret cases and contract based disputes.

1367

01:21:24,813 --> 01:21:28,083

Ex Next we have Vicky Cundiff is a part.

1368

01:21:28,083 --> 01:21:31,987

She's a partner at Paul Hastings in  
New York and came down today to join us.

1369

01:21:32,554 --> 01:21:36,825

She is a leader of the litigation  
department's Global Trade Secrets Practice

1370

01:21:37,125 --> 01:21:42,030

and is regularly named a leading lawyer  
nationally in the field by legal 500.

1371

01:21:42,564 --> 01:21:47,135

She helps clients acquire, protect and  
maximize value from intellectual property.

1372

01:21:47,669 --> 01:21:50,739

Her clients include emerging companies,  
joint ventures

1373

01:21:50,972 --> 01:21:54,042

and Fortune 50 companies  
in a variety of industries.

1374

01:21:54,709 --> 01:21:57,712

She has extensive litigation experience,

1375

01:21:57,879 --> 01:22:01,149

particularly in seeking  
or opposing immediate injunctive relief,

1376

01:22:01,149 --> 01:22:04,152

which will be very relevant  
to our conversation today.

1377

01:22:04,686 --> 01:22:08,290

She writes extensively on intellectual  
property law issues and is a frequent

1378

01:22:08,290 --> 01:22:11,626

speaker on the implications of recent  
IP developments.

1379

01:22:12,227 --> 01:22:15,897

She is a visiting lecturer, lecturer  
in law at the Yale Law School,

1380

01:22:15,897 --> 01:22:18,900

where she teaches IP law,

1381

01:22:19,000 --> 01:22:22,003

and the furthest down is Fred Meeker.

1382

01:22:22,203 --> 01:22:24,906

He has more than 20 years experience  
handling

1383

01:22:24,906 --> 01:22:30,011

IP matters in primarily  
the cable telephony, satellite Internet,

1384

01:22:30,245 --> 01:22:34,082

Electronic program  
Guide, LTE and automotive industries.

1385

01:22:34,649 --> 01:22:38,653

He represents clients ranging  
from a Fortune 50 telecommunication

1386

01:22:38,753 --> 01:22:41,756  
company down to smaller startup clients.

1387

01:22:41,923 --> 01:22:45,193  
He's handled a number of large Section 337

1388

01:22:45,627 --> 01:22:48,563  
investigations  
at the United States International Trade.

1389

01:22:49,531 --> 01:22:50,131  
He's active in

1390

01:22:50,131 --> 01:22:54,069  
various bar associations  
and has been recognized as a Washington,

1391

01:22:54,069 --> 01:22:58,673  
DC super lawyer and named to the  
I am too 50.

1392

01:22:59,641 --> 01:23:03,345  
So we have a panel of very experienced,

1393

01:23:06,114 --> 01:23:07,382  
very experienced attorneys

1394

01:23:07,382 --> 01:23:11,886  
in the trade secret field who all actively  
practice representing clients,

1395

01:23:12,153 --> 01:23:14,122  
which is important today  
since we're going to talk

1396  
01:23:14,122 --> 01:23:18,093  
about the practical aspects  
of certain parts of the DSA.

1397  
01:23:18,793 --> 01:23:23,598  
And I just want to remind you before we go  
to our discussion, live stream viewers

1398  
01:23:23,798 --> 01:23:26,701  
can send questions by emailing

1399  
01:23:26,701 --> 01:23:29,671  
Hollis H o Elyse

1400  
01:23:29,671 --> 01:23:33,375  
Dot Robinson at USPTO dot gov.

1401  
01:23:33,842 --> 01:23:35,543  
Please include your name,

1402  
01:23:35,543 --> 01:23:39,581  
your affiliation, and if you're writing  
from a regional office.

1403  
01:23:39,614 --> 01:23:42,617  
Which one would that

1404  
01:23:42,817 --> 01:23:45,820  
welcome?

1405

01:23:46,755 --> 01:23:48,723  
We're going to focus today

1406  
01:23:48,723 --> 01:23:52,827  
largely on the seizure provisions  
of the Deferred Trade Secret

1407  
01:23:52,827 --> 01:23:55,864  
Act is a new provision for trade  
secret law.

1408  
01:23:56,131 --> 01:24:01,569  
And a year into it, we're still sort of  
sussing out what is going to happen.

1409  
01:24:02,737 --> 01:24:04,606  
But let's set the stage

1410  
01:24:04,606 --> 01:24:09,077  
by figuring out  
how do we get to a seizure order.

1411  
01:24:10,111 --> 01:24:12,313  
So my question is,

1412  
01:24:12,313 --> 01:24:15,517  
why does a client's pursue a seizure order

1413  
01:24:18,787 --> 01:24:21,790  
and you like to take a stab at it?

1414  
01:24:23,191 --> 01:24:26,428  
Well, so the seizure provisions were what?

1415

01:24:28,129 --> 01:24:32,033  
yes. The seizure provisions were among

1416  
01:24:32,033 --> 01:24:36,671  
the most hotly debated features of what  
became the defend trade secrets Act.

1417  
01:24:37,572 --> 01:24:40,508  
And they were actually discussed  
in in nation

1418  
01:24:40,508 --> 01:24:44,179  
form over the course  
of several sessions of Congress.

1419  
01:24:44,579 --> 01:24:50,051  
And one of the reasons that was suggested  
for why we might need ex-parte

1420  
01:24:50,218 --> 01:24:55,023  
seizure orders was experience  
that some companies had had where

1421  
01:24:56,091 --> 01:24:58,927  
trade secrets  
were transferred to a thumb drive.

1422  
01:24:58,927 --> 01:25:04,232  
And in one notorious case,  
the the thumb drive was intercepted

1423  
01:25:04,532 --> 01:25:08,403  
from a woman who was sitting on the plane  
about ready to take off

1424

01:25:08,403 --> 01:25:12,440  
with the thumb drive in in hand  
going to a foreign country.

1425  
01:25:12,440 --> 01:25:17,212  
And this is what was pointed to  
as a reason why we need to be able to

1426  
01:25:17,245 --> 01:25:22,383  
to rush in quickly without warning  
before this kind of activity occurs.

1427  
01:25:22,784 --> 01:25:27,422  
Well, now that that employee might  
well have been uploading

1428  
01:25:28,022 --> 01:25:33,194  
information to the cloud and the specifics  
of the taking of the thumb

1429  
01:25:33,194 --> 01:25:37,599  
drive might not be the  
the impetus so, so much anymore.

1430  
01:25:37,599 --> 01:25:41,736  
But there is a sense  
that sometimes information

1431  
01:25:41,736 --> 01:25:46,441  
is about to go out of unfriendly  
hands to even worse hands,

1432  
01:25:46,841 --> 01:25:50,411  
and that the usual machinery of the court

1433

01:25:50,411 --> 01:25:53,882  
system may not be fast enough  
to prevent that from happening.

1434  
01:25:54,149 --> 01:25:56,684  
So we'll talk about  
what has happened and how

1435  
01:25:57,719 --> 01:25:59,220  
the existence of

1436  
01:25:59,220 --> 01:26:03,091  
the ex-parte seizure  
remedy may have affected litigation,

1437  
01:26:03,091 --> 01:26:06,094  
even when such a remedy  
isn't actually thought.

1438  
01:26:06,794 --> 01:26:09,164  
I think that was a critical aspect

1439  
01:26:09,164 --> 01:26:12,834  
of the seizure provision  
being included in the DTC.

1440  
01:26:13,368 --> 01:26:17,205  
And I think in addition to that  
what Vickie talked about, which is how

1441  
01:26:17,772 --> 01:26:19,874  
sometimes  
there's an immediate need for relief,

1442  
01:26:19,874 --> 01:26:22,877

there's an immediate risk of loss  
that has to be addressed

1443

01:26:23,444 --> 01:26:26,915  
on the other side of, it if you look back  
at the context of the act and when it was

1444

01:26:26,915 --> 01:26:31,052  
enacted, is the value of trade secrets  
and the recognition

1445

01:26:32,187 --> 01:26:36,925  
in Congress of the value of trade secrets  
and the need to protect U.S.

1446

01:26:36,925 --> 01:26:37,592  
trade secrets.

1447

01:26:37,592 --> 01:26:40,728  
So there have been studies  
that have estimated that

1448

01:26:40,728 --> 01:26:44,699  
the annual loss of trade secrets  
is in the value of the level

1449

01:26:44,699 --> 01:26:48,636  
of \$300 billion per year,  
which has a tremendous impact on jobs.

1450

01:26:49,704 --> 01:26:51,873  
And so at the federal level,

1451

01:26:51,873 --> 01:26:55,710  
when Congress enacted that, it's a

it was with overwhelming support.

1452

01:26:55,710 --> 01:27:01,282

And in fact, I think there were two people who voted against the DSA in Congress.

1453

01:27:01,282 --> 01:27:04,285

So certainly the seizure provision was hotly,

1454

01:27:04,352 --> 01:27:07,622

but the DTC as a whole had overwhelming support.

1455

01:27:08,856 --> 01:27:11,859

And so that the the

1456

01:27:11,893 --> 01:27:13,795

the remedy of a seizure provision

1457

01:27:13,795 --> 01:27:17,365

is an extremely powerful tool that companies can use

1458

01:27:17,699 --> 01:27:21,703

if there is a truly urgent situation, as Vickie was describing.

1459

01:27:22,570 --> 01:27:25,206

So I would just say on the seizure

1460

01:27:25,206 --> 01:27:28,476

provision, why is it necessary?

1461

01:27:28,509 --> 01:27:31,546

So we've all had cases  
where an employee walks off,

1462

01:27:31,546 --> 01:27:35,083

especially with electronic data  
very hard to

1463

01:27:35,383 --> 01:27:38,386

to track, to recover.

1464

01:27:38,486 --> 01:27:41,489

You know, they put it on their laptop,  
then they can erase it.

1465

01:27:42,223 --> 01:27:46,394

I had a case  
where an employee had taken documents

1466

01:27:46,394 --> 01:27:49,530

we could see he downloaded on to a laptop  
through

1467

01:27:49,530 --> 01:27:52,533

forensic examination  
of the company's servers.

1468

01:27:52,634 --> 01:27:54,769

We subpoenaed the laptop.

1469

01:27:54,769 --> 01:27:57,338

Then he ran over the laptop with his truck

1470

01:27:58,473 --> 01:28:00,341

and then claimed it was inoperative.

1471

01:28:00,341 --> 01:28:04,612

So then we subpoenaed the hard drive  
that was in the remnants of the laptop.

1472

01:28:04,612 --> 01:28:09,384

So we got the hard drive and we could  
find out that he had copied over it

1473

01:28:10,051 --> 01:28:13,655

17,000 times over all of his free space

1474

01:28:13,655 --> 01:28:16,658

after erasing the company's files.

1475

01:28:17,292 --> 01:28:19,327

And so, you know, the best

1476

01:28:19,327 --> 01:28:22,597

you can get out of  
that is some sort of speculation evidence.

1477

01:28:22,864 --> 01:28:27,402

You can see sometimes what files were  
there, but it's hard to see everything.

1478

01:28:27,402 --> 01:28:30,171

So a seizure makes a lot of sense.

1479

01:28:30,171 --> 01:28:32,407

So it was very hotly debated.

1480

01:28:32,407 --> 01:28:36,744

And, you know, as we've seen, judges

are very reluctant to grant seizure.

1481

01:28:36,744 --> 01:28:41,115

It's just not done in trade secret cases  
because before, you know,

1482

01:28:41,516 --> 01:28:44,218

you know, with with just the last year,  
we've had

1483

01:28:44,218 --> 01:28:47,322

that remedy and judges  
are still trying to figure it out.

1484

01:28:47,355 --> 01:28:49,457

Right. It's it's complicated for them.

1485

01:28:51,492 --> 01:28:51,993

And U.S.

1486

01:28:51,993 --> 01:28:54,996

Marshals aren't used to seizing things.

1487

01:28:56,164 --> 01:28:57,665

It might be worth noting

1488

01:28:57,665 --> 01:29:02,537

that that one of the reasons  
there was so much debate over

1489

01:29:02,537 --> 01:29:08,343

this was the concern  
that ex-parte seizures would be launched

1490

01:29:08,743 --> 01:29:12,914  
indiscriminately against competitors  
who perhaps

1491  
01:29:12,914 --> 01:29:16,551  
hadn't actually taken trade secrets,  
but that the whole process

1492  
01:29:16,851 --> 01:29:20,788  
could disable some of the legitimate work  
that they were doing.

1493  
01:29:20,788 --> 01:29:25,593  
And so the legislation, as passed,  
makes clear quite explicitly

1494  
01:29:25,860 --> 01:29:29,764  
that it ex-partner's  
seizure orders are extraordinary remedies.

1495  
01:29:30,565 --> 01:29:34,769  
It's a good roadmap, actually,  
for preparing any trade secrets case.

1496  
01:29:34,802 --> 01:29:40,274  
All of the things you have to prove  
in order to get an ex parte seizure order.

1497  
01:29:40,575 --> 01:29:44,779  
But it's important to realize  
so so you have to identify

1498  
01:29:45,012 --> 01:29:47,882  
what the trade secrets are,  
why you believe they're at risk,

1499

01:29:47,882 --> 01:29:49,917

where you believe they they are.

1500

01:29:49,917 --> 01:29:53,721

You have to basically make  
your prima facie case of misappropriation.

1501

01:29:54,956 --> 01:29:57,625

But the remedies for being wrong

1502

01:29:57,625 --> 01:30:01,496

in obtaining an ex parte  
seizure order can be extraordinary.

1503

01:30:02,063 --> 01:30:05,066

Not only attorney's fees,  
there can be damages

1504

01:30:05,566 --> 01:30:07,935

to business interruption and so forth.

1505

01:30:07,935 --> 01:30:12,907

So it is clearly a draconian remedy  
and deliberately so.

1506

01:30:14,041 --> 01:30:17,211

But so when one does think  
maybe if there had been an ex parte

1507

01:30:17,311 --> 01:30:22,116

seizure order before your person  
had had run over the hard drive, that

1508

01:30:22,483 --> 01:30:26,053

that maybe maybe you would have had more than a spoliation remedy.

1509

01:30:26,654 --> 01:30:27,655

Yeah.

1510

01:30:27,655 --> 01:30:31,659

So Vickie makes a great point on just what you have to prove.

1511

01:30:31,659 --> 01:30:35,363

I mean, to prove that something's going to be, you know,

1512

01:30:36,631 --> 01:30:40,802

basically spoiled to to, to prove something is

1513

01:30:41,102 --> 01:30:45,173

they're not going to follow a trial or a preliminary injunction.

1514

01:30:45,473 --> 01:30:46,774

How do you prove that? Right.

1515

01:30:46,774 --> 01:30:49,043

You have to plead with particularity.

1516

01:30:49,043 --> 01:30:52,380

So not only, you know, in federal law, you have to still set

1517

01:30:52,380 --> 01:30:56,517

forth your trade secrets, your reasonable means under Trombley.

1518

01:30:56,517 --> 01:31:00,221

But now you also have to prove they're not going to follow the court order.

1519

01:31:00,588 --> 01:31:01,889

Well, how do you prove that?

1520

01:31:01,889 --> 01:31:05,460

And you have to do so in such a way that you're pleading this.

1521

01:31:06,494 --> 01:31:07,428

Most lawyers are

1522

01:31:07,428 --> 01:31:10,898

reluctant to plead without some extraordinary facts.

1523

01:31:11,599 --> 01:31:15,870

Yeah, I think that's a great point, Fred, because to get a seizure

1524

01:31:15,870 --> 01:31:21,108

order in the GTC, it sets forth eight specific things that a court has to find.

1525

01:31:21,509 --> 01:31:23,244

And it says at the outset,

1526

01:31:23,244 --> 01:31:26,013

for each of those eight things that a court has to find, including that

1527

01:31:26,013 --> 01:31:29,016  
an injunction would not be  
would not be an adequate remedy.

1528  
01:31:29,851 --> 01:31:32,820  
It has to be there has to be  
it has to be clearly shown

1529  
01:31:33,020 --> 01:31:37,625  
Each of those eight things  
has to be clearly shown by specific facts.

1530  
01:31:37,959 --> 01:31:40,962  
And those are scary words  
for a trade secrets lawyers, because,

1531  
01:31:41,562 --> 01:31:44,465  
you know, specificity

1532  
01:31:44,465 --> 01:31:48,035  
and clearly showing that you  
that it's not enough to get an injunction,

1533  
01:31:48,035 --> 01:31:50,338  
which is itself an extraordinary remedy,

1534  
01:31:50,338 --> 01:31:52,740  
is something that courts  
have have generally to date

1535  
01:31:52,740 --> 01:31:55,743  
at least concluded  
that attorneys have failed to show

1536  
01:31:56,010 --> 01:31:58,279

and have failed.  
The attorneys have failed to show

1537  
01:31:58,279 --> 01:32:00,848  
that it's not enough  
to get an injunction or TRO

1538  
01:32:01,949 --> 01:32:02,617  
and that there has

1539  
01:32:02,617 --> 01:32:05,620  
to be a seizure expert, a seizure

1540  
01:32:06,420 --> 01:32:08,222  
in order  
protect the trade secret information

1541  
01:32:08,222 --> 01:32:11,192  
that's just been very,  
very elusive showing so far in the courts.

1542  
01:32:11,959 --> 01:32:15,363  
Yes. So I think there is one case  
where the court did

1543  
01:32:15,363 --> 01:32:18,466  
find that a seizure was appropriate.

1544  
01:32:19,333 --> 01:32:21,969  
So Michigan Capital Advisors is a case

1545  
01:32:21,969 --> 01:32:25,740  
where the court had issued  
a tiara of the employee,

1546

01:32:26,741 --> 01:32:30,144

had taken the data,  
and he had cooperated at first.

1547

01:32:30,144 --> 01:32:34,081

So they knew he had data,  
but then refused to cooperate,

1548

01:32:34,081 --> 01:32:37,618

quit showing up at court  
hearings, quit providing discovery.

1549

01:32:37,952 --> 01:32:39,253

And the court did issue

1550

01:32:39,253 --> 01:32:44,592

a seizure order and sent three marshals  
and a court appointed forensic computer

1551

01:32:44,592 --> 01:32:48,429

expert to go remove all of the trade  
secrets from the employees

1552

01:32:49,263 --> 01:32:53,234

hard drives and thumb drives  
and and seized them.

1553

01:32:53,601 --> 01:32:55,836

But it is, you know, extraordinary, right?

1554

01:32:55,836 --> 01:32:56,671

How you show it.

1555

01:32:56,671 --> 01:33:00,808

Unless the guys actually ignored  
a court order, it's almost impossible.

1556

01:33:00,808 --> 01:33:05,479

And who's going to sign a Rule 11 pleading  
that says you have a fair

1557

01:33:05,479 --> 01:33:08,583

basis, say he's going to ignore the court  
before he's done it.

1558

01:33:08,916 --> 01:33:10,885

It's a hard thing to do.

1559

01:33:10,885 --> 01:33:14,355

And this may resonate actually  
with some trade

1560

01:33:14,355 --> 01:33:17,358

secrets cases outside the United States.

1561

01:33:18,025 --> 01:33:20,561

One of the best tools in

1562

01:33:20,561 --> 01:33:23,564

trade secrets cases can be

1563

01:33:23,798 --> 01:33:26,801

the ability to have conducted discovery.

1564

01:33:27,735 --> 01:33:32,006

In some cases,  
the plaintiff has much of the information

1565

01:33:32,006 --> 01:33:35,009  
in hand at the outset of the case.

1566  
01:33:35,443 --> 01:33:39,847  
Such as there may be a very clear  
forensics evidence

1567  
01:33:39,847 --> 01:33:43,751  
that information  
has been removed and transferred

1568  
01:33:44,852 --> 01:33:47,622  
and outside the United States,

1569  
01:33:47,622 --> 01:33:50,625  
that kind of clear evidence in hand

1570  
01:33:51,359 --> 01:33:53,995  
has enabled U.S.

1571  
01:33:53,995 --> 01:33:59,033  
companies to obtain injunctive relief,  
even in countries that don't provide

1572  
01:33:59,033 --> 01:34:02,770  
for wide ranging discovery  
or indeed any pretrial discovery.

1573  
01:34:03,170 --> 01:34:05,906  
But if you don't have the evidence in hand

1574  
01:34:05,906 --> 01:34:08,909  
at the outset

1575

01:34:09,377 --> 01:34:10,678  
outside the United States

1576  
01:34:10,678 --> 01:34:13,981  
or inside the United States,  
you're going to have trouble.

1577  
01:34:13,981 --> 01:34:18,352  
And here, even if you have the ability  
to show that the person

1578  
01:34:18,753 --> 01:34:22,123  
is most likely  
to have misappropriated information,

1579  
01:34:22,123 --> 01:34:26,394  
you may not be able to show unwillingness  
to give it back or cooperate

1580  
01:34:26,394 --> 01:34:29,897  
unless you actually are in litigation,  
as in that Michigan capital case.

1581  
01:34:30,097 --> 01:34:30,331  
Yeah.

1582  
01:34:30,331 --> 01:34:34,035  
So Vickie makes a great point  
on what happens with your data

1583  
01:34:34,035 --> 01:34:35,336  
when it goes overseas.

1584  
01:34:35,336 --> 01:34:38,572  
So DTIC only applies in the United States.

1585

01:34:38,572 --> 01:34:41,342

It doesn't apply in China  
or other countries.

1586

01:34:41,342 --> 01:34:46,147

So so how can you actually use the DTSC

1587

01:34:46,180 --> 01:34:50,051

to get relief if your data now  
been transferred out of the country?

1588

01:34:50,051 --> 01:34:53,921

So one of the earlier panelists  
said there's effectively

1589

01:34:53,921 --> 01:34:55,923

no discovery in many countries.

1590

01:34:56,891 --> 01:34:59,460

You know, all of us have  
been in a position where we tried to get

1591

01:34:59,460 --> 01:35:03,531

discovery, for example, out of China  
or even some European countries,

1592

01:35:03,931 --> 01:35:07,301

and you basically get nothing back  
in response.

1593

01:35:07,401 --> 01:35:12,540

Your request, but you can't show  
the information was taken usually right.

1594

01:35:12,540 --> 01:35:15,543

The most companies have document management systems.

1595

01:35:15,676 --> 01:35:18,012

They have the ability to do forensic analysis.

1596

01:35:18,012 --> 01:35:18,946

They usually mirror

1597

01:35:18,946 --> 01:35:23,417

the employee's laptop when he leaves, so they have a record of that.

1598

01:35:24,251 --> 01:35:27,154

And so you can show where the data was taken and.

1599

01:35:27,154 --> 01:35:32,359

Three, three, seven has been used effectively for trade secrets.

1600

01:35:32,359 --> 01:35:35,996

As long as there's a domestic industry, you can stop it at the border

1601

01:35:37,131 --> 01:35:40,167

and then you can use the DTC for that.

1602

01:35:42,136 --> 01:35:45,172

yeah, there was a recent case in Florida, I think it was the Calvo case where

1603

01:35:46,107 --> 01:35:49,810  
a judge actually in a footnote  
cited to some of the debate in Congress

1604  
01:35:49,810 --> 01:35:51,378  
about the seizure provision

1605  
01:35:51,378 --> 01:35:54,749  
and what constitutes  
an extraordinary circumstance

1606  
01:35:54,749 --> 01:35:57,451  
that would warrant this type  
of extraordinary remedy.

1607  
01:35:57,451 --> 01:36:00,454  
And the footnote specifically cited

1608  
01:36:00,821 --> 01:36:04,125  
Senator Grassley, who who talked about  
what would be

1609  
01:36:04,125 --> 01:36:07,128  
an extraordinary circumstance,  
and the first example he gave

1610  
01:36:07,194 --> 01:36:09,230  
if someone is about to flee the country.

1611  
01:36:09,230 --> 01:36:12,967  
So it's sort of the Mission Impossible  
Tom Cruise scenario where, you know,

1612  
01:36:12,967 --> 01:36:15,970  
you're chasing the jet down the runway

before it leaves the country.

1613

01:36:16,170 --> 01:36:18,506

Once it's out of the country,  
you have a problem.

1614

01:36:18,506 --> 01:36:21,809

But while you're still in the country,  
you know you can take action.

1615

01:36:21,809 --> 01:36:25,146

And so I think it's unlikely  
that that will happen very often.

1616

01:36:25,479 --> 01:36:28,783

But if and when it does happen,  
this is, again, a very valuable,

1617

01:36:28,783 --> 01:36:32,419

powerful tool that companies can use  
if that situation arises.

1618

01:36:32,419 --> 01:36:35,656

Another example  
that Senator Grassley gave was

1619

01:36:36,457 --> 01:36:38,859

if somebody

1620

01:36:38,859 --> 01:36:42,530

has an imminent intent to affirmatively  
disclose the trade secret,

1621

01:36:44,131 --> 01:36:46,467

clearly

that would be a high level of risk.

1622

01:36:46,467 --> 01:36:49,637

On the other hand, back to Fred's point,  
how are you going to prove that?

1623

01:36:49,637 --> 01:36:50,070

How are you going to

1624

01:36:50,070 --> 01:36:53,073

what evidence are you going to have that  
the person actually intends to do that

1625

01:36:54,241 --> 01:36:55,242

and is about to do it?

1626

01:36:55,242 --> 01:36:56,811

So you can take action?

1627

01:36:56,811 --> 01:36:58,979

There's always a concern  
that that's likely to happen.

1628

01:36:58,979 --> 01:37:02,016

That's the whole impetus of the trade  
secret case when it starts.

1629

01:37:02,016 --> 01:37:04,552

But actually showing  
through specific facts

1630

01:37:04,552 --> 01:37:07,555

that somebody is likely do that  
without a threat, maybe from,

1631

01:37:07,855 --> 01:37:09,657

you know,  
if a former employee or something

1632

01:37:09,657 --> 01:37:12,459

makes the threat,  
maybe that would be a sufficient basis.

1633

01:37:12,459 --> 01:37:15,462

But I haven't seen that so far yet.

1634

01:37:16,063 --> 01:37:20,868

Well, I think it's interesting to see  
how the case law is going to develop.

1635

01:37:21,335 --> 01:37:23,971

Otherwise,  
this provision will become a nullity.

1636

01:37:23,971 --> 01:37:28,542

If you can never prove the risk  
of destruction or lack of cooperation,

1637

01:37:29,143 --> 01:37:29,443

it will.

1638

01:37:29,443 --> 01:37:34,849

They have set the bar at an extraordinarily high level, and particularly for

1639

01:37:36,450 --> 01:37:38,552

like former employees,

1640

01:37:38,552 --> 01:37:42,756

laptops and devices

that they've taken with them.

1641

01:37:42,756 --> 01:37:46,861

And, you know,  
without commenting on any particular case,

1642

01:37:46,994 --> 01:37:52,633

you know, we've all read about the recent  
Uber alphabet case.

1643

01:37:52,633 --> 01:37:57,705

And, you know, there were files  
eventually found on a personal computer.

1644

01:37:57,705 --> 01:38:02,376

And with respect to those situations  
where you have former employees,

1645

01:38:02,376 --> 01:38:06,480

I mean, a lot of employees have files  
of their company on their computers.

1646

01:38:06,480 --> 01:38:08,883

A lot of people work from home these days.

1647

01:38:08,883 --> 01:38:12,753

They're going to have files  
on their computers and getting those back

1648

01:38:12,753 --> 01:38:16,257

in certain circumstances  
makes a lot of sense for the company

1649

01:38:16,590 --> 01:38:19,526

and actually for the other employer,

too, right?

1650

01:38:19,526 --> 01:38:23,230

I mean, if you're an employer,  
you don't want files from a former company

1651

01:38:23,731 --> 01:38:25,666

in, your employees possessions.

1652

01:38:25,666 --> 01:38:29,403

You would just as soon have those given  
back to the former employer.

1653

01:38:29,904 --> 01:38:34,575

So, you know, I think right now  
the bar is set extraordinarily high.

1654

01:38:34,575 --> 01:38:36,377

There was a lot of debate

1655

01:38:36,377 --> 01:38:41,582

and I think they came in  
at an unreasonable level in the act.

1656

01:38:41,582 --> 01:38:44,551

If you're ever going  
to use the seizure provisions.

1657

01:38:44,885 --> 01:38:47,521

But I think that the seizure provisions

1658

01:38:47,521 --> 01:38:50,858

may actually have had an impact.

1659

01:38:50,858 --> 01:38:55,029  
They're hard to tell  
if it was intended or unintended. But

1660  
01:38:56,163 --> 01:38:59,166  
while getting the ex parte

1661  
01:38:59,566 --> 01:39:03,871  
order is very difficult and very rare and,

1662  
01:39:04,204 --> 01:39:08,943  
we don't totally know  
the statistics on this.

1663  
01:39:09,176 --> 01:39:12,746  
There have only been in the year  
since passage of that.

1664  
01:39:12,813 --> 01:39:16,984  
It's a roughly 35 reported decisions.

1665  
01:39:16,984 --> 01:39:21,622  
Actual substantive engagement,  
a very, very small subset of those

1666  
01:39:21,855 --> 01:39:25,326  
have dealt with requests  
for an ex-parte seizure order.

1667  
01:39:26,527 --> 01:39:28,796  
Maybe about five

1668  
01:39:28,796 --> 01:39:30,197  
of those.

1669

01:39:30,197 --> 01:39:33,434

It appears that maybe only two  
have actually been granted.

1670

01:39:33,734 --> 01:39:37,671

But what we do  
see is that people are coming to court

1671

01:39:37,938 --> 01:39:41,041

plaintiffs saying there is this provision.

1672

01:39:41,041 --> 01:39:45,579

I'm not invoking that provision,  
but there's an urgency here

1673

01:39:45,579 --> 01:39:50,951

that means that this ought to go out of  
outside of the normal queue for discovery.

1674

01:39:50,951 --> 01:39:56,223

We shouldn't have to wait 60 days  
to have a rule 16 conference.

1675

01:39:57,124 --> 01:39:59,159

We need expedited discovery.

1676

01:39:59,159 --> 01:40:00,828

We need preservation.

1677

01:40:00,828 --> 01:40:04,431

We need an order from the court  
making clear what is supposed to be

1678

01:40:04,431 --> 01:40:08,302

preserved in letters announcing lawsuits.

1679

01:40:08,302 --> 01:40:12,306

I think people are  
perhaps being more careful in trade

1680

01:40:12,306 --> 01:40:15,776

secrets  
cases to say don't just preserve evidence

1681

01:40:15,776 --> 01:40:19,313

because we have a dispute, preserve  
this specific evidence.

1682

01:40:19,580 --> 01:40:23,684

They're going to court  
and asking for directions

1683

01:40:23,684 --> 01:40:27,321

that laptops, for example,  
be provided to the court

1684

01:40:27,788 --> 01:40:32,359

at the time of a particular hearing  
and that it not be access.

1685

01:40:32,493 --> 01:40:36,130

And so there are workarounds to the TSA

1686

01:40:36,430 --> 01:40:40,200

that are being creatively  
drawn upon in litigation.

1687

01:40:40,200 --> 01:40:44,304

That may be an interesting impact of the

the focus

1688

01:40:44,972 --> 01:40:49,376

on the need to protect and preserve  
information and trade secrets,

1689

01:40:49,743 --> 01:40:54,381

even if you're not going so far as to get  
a truly ex-parte seizure order. Yes.

1690

01:40:54,415 --> 01:40:56,850

So I agree with Vicky 100%.

1691

01:40:56,850 --> 01:41:02,656

I mean, the the practical result of having  
the seizure is you're much more likely

1692

01:41:02,656 --> 01:41:07,227

to get a true or a preliminary injunction  
and not the seizure.

1693

01:41:07,227 --> 01:41:09,630

But having  
the seizure is an extreme remedy.

1694

01:41:09,630 --> 01:41:14,368

And the TRO or preliminary injunction,  
those are being granted at a

1695

01:41:14,468 --> 01:41:16,970

you know, at a higher rate,  
I think in part

1696

01:41:16,970 --> 01:41:20,941

because you have a seizure remedy

that the court is not invoking.

1697

01:41:21,909 --> 01:41:25,212

And there's been, what, at least four  
or five

1698

01:41:25,212 --> 01:41:30,584

preliminary injunctions in two  
or three tiaras that have been granted.

1699

01:41:30,584 --> 01:41:33,587

So I think in practice it's it's helped.

1700

01:41:33,921 --> 01:41:36,457

Even though the seizure order

1701

01:41:36,457 --> 01:41:39,460

is really only been invoked  
once in the last year.

1702

01:41:40,094 --> 01:41:41,328

Yeah, I think absolutely right.

1703

01:41:41,328 --> 01:41:43,030

The the seizure order

1704

01:41:43,030 --> 01:41:46,033

is a great opportunity,  
a vehicle to get the court's attention.

1705

01:41:46,200 --> 01:41:51,138

And in every case where a party has sought  
a seizure order that I'm aware the court

1706

01:41:51,338 --> 01:41:54,208  
has at least granted to enter the TRO

1707  
01:41:54,208 --> 01:41:57,010  
or and or allowed expedited discovery.

1708  
01:41:57,010 --> 01:42:00,147  
So there's there's some order  
coming out of that process,

1709  
01:42:00,180 --> 01:42:03,884  
not a seizure order per se,  
but some order from the court saying

1710  
01:42:03,884 --> 01:42:05,319  
we're going to preserve the evidence.

1711  
01:42:05,319 --> 01:42:08,422  
We're going to require the other party  
to bring the laptop or the phone to

1712  
01:42:08,422 --> 01:42:08,956  
the court.

1713  
01:42:10,023 --> 01:42:11,859  
So it does result in some relief.

1714  
01:42:11,859 --> 01:42:15,662  
It sets up at least another remedy,  
perhaps, if not the seizure itself.

1715  
01:42:17,164 --> 01:42:20,134  
But it seems like courts are the general

1716

01:42:20,134 --> 01:42:25,172  
so far or the trend that's emerging  
so far among the courts is that rule 65

1717  
01:42:25,172 --> 01:42:29,042  
generally is sufficient, and it's the way  
the courts are comfortable

1718  
01:42:29,042 --> 01:42:32,379  
going rather than the remedy of an ex  
parte de seizure.

1719  
01:42:32,379 --> 01:42:35,382  
But you're still getting a remedy.

1720  
01:42:36,583 --> 01:42:38,285  
Well, let's suppose

1721  
01:42:38,285 --> 01:42:41,455  
that we're in that rare case where  
we've made our case for a seizure order.

1722  
01:42:43,891 --> 01:42:46,793  
Let's talk  
about how you walk through that.

1723  
01:42:46,793 --> 01:42:50,731  
One of the things that I have found  
interesting is that you must

1724  
01:42:51,865 --> 01:42:55,469  
you must identify  
reasonable particularity,

1725  
01:42:56,036 --> 01:42:58,705

whatever that means, where the data

1726

01:42:58,705 --> 01:43:02,376

or the item or the secret it resides.

1727

01:43:02,643 --> 01:43:04,611

And that is what must be seized.

1728

01:43:04,611 --> 01:43:08,081

And you can't take other things. So

1729

01:43:09,449 --> 01:43:10,384

do we know yet?

1730

01:43:10,384 --> 01:43:11,652

And I think the answer is no.

1731

01:43:11,652 --> 01:43:13,620

What that really means.

1732

01:43:13,620 --> 01:43:15,989

And how are we dealing with this?

1733

01:43:15,989 --> 01:43:19,993

From a simple mechanics logistics  
point of view?

1734

01:43:21,328 --> 01:43:24,331

You know, if the trade secret resides

1735

01:43:24,431 --> 01:43:27,434

in some way in a jet nozzle

1736

01:43:27,868 --> 01:43:30,737  
and I think I can hold

1737  
01:43:30,737 --> 01:43:32,372  
the marshals can go in and seize that.

1738  
01:43:32,372 --> 01:43:34,741  
But what are we going to do  
about the software

1739  
01:43:34,741 --> 01:43:38,745  
that is in the machining tools  
that made those nozzles

1740  
01:43:39,146 --> 01:43:42,549  
and then compare that to other software  
that might just be spread

1741  
01:43:43,951 --> 01:43:44,551  
a company.

1742  
01:43:44,551 --> 01:43:46,753  
How do you pass that out?

1743  
01:43:46,753 --> 01:43:49,756  
And especially how do you go  
after the digital information?

1744  
01:43:50,824 --> 01:43:53,727  
Well, and the question raises

1745  
01:43:53,727 --> 01:43:56,830  
a whole host of practical considerations.

1746

01:43:57,164 --> 01:44:01,201  
Under the  
the seizure order, it's the marshals

1747  
01:44:01,501 --> 01:44:05,072  
who are supposed to be  
taking the lead in the seizure.

1748  
01:44:05,539 --> 01:44:09,743  
So and the marshals have actually

1749  
01:44:10,711 --> 01:44:12,212  
reflected that.

1750  
01:44:12,212 --> 01:44:15,282  
They will keep the piece,  
they will secure entry,

1751  
01:44:15,282 --> 01:44:18,452  
but they don't want to be looking around  
the, you know,

1752  
01:44:18,552 --> 01:44:23,590  
sit on one of these five computers  
or is it in another room or or so forth.

1753  
01:44:23,590 --> 01:44:26,560  
And judges have said that  
they're not going to enter in order.

1754  
01:44:26,560 --> 01:44:32,299  
That's going to give anybody free rein  
to to look about four for computers.

1755  
01:44:32,299 --> 01:44:38,572

And I think there was a case in Michigan  
where the request for a restraining order,

1756

01:44:38,739 --> 01:44:43,143

an ex parte seizure order, was denied  
because apparently

1757

01:44:43,143 --> 01:44:46,446

the plaintiff talked too much and said,  
well, I think it's on this computer

1758

01:44:47,047 --> 01:44:50,150

or that one or really anyone  
that's in the place.

1759

01:44:50,150 --> 01:44:53,153

And so that gives no guidance course  
to to implementing.

1760

01:44:53,253 --> 01:44:58,425

As to the nozzle piece, by the way,  
that you can clearly identify that.

1761

01:44:58,425 --> 01:45:00,360

But where's the marshal going to take it  
back?

1762

01:45:00,360 --> 01:45:02,195

And some courts have.

1763

01:45:02,195 --> 01:45:07,301

I don't want you bringing gigantic pieces  
of equipment into my courthouse.

1764

01:45:07,301 --> 01:45:10,470

So that's something that has to be thought about ahead of time

1765

01:45:11,038 --> 01:45:13,206

if you're thinking about seizure as well.

1766

01:45:13,206 --> 01:45:15,976

Yeah, that's that's actually a good point.

1767

01:45:15,976 --> 01:45:17,844

Judges don't have a place to store it.

1768

01:45:17,844 --> 01:45:20,847

I mean, I've seen entire snowmobiles brought in

1769

01:45:20,881 --> 01:45:25,085

to the court

to show various trade secret aspects.

1770

01:45:25,085 --> 01:45:28,422

And it's it's a hard thing for a judge to deal with. And

1771

01:45:29,756 --> 01:45:30,223

usually the

1772

01:45:30,223 --> 01:45:33,293

parties work some agreement amongst themselves to deal with that.

1773

01:45:33,293 --> 01:45:37,698

But the

the courts also have been appointing,

1774

01:45:37,731 --> 01:45:41,101

you know, in the one case  
appointed a computer expert to do that.

1775

01:45:41,935 --> 01:45:42,569

Interesting.

1776

01:45:42,569 --> 01:45:46,573

It wasn't a forensic expert from,  
you know, the plaintiff in the case.

1777

01:45:46,573 --> 01:45:52,245

It was a court appointed forensic expert,  
which opens a whole new opportunity

1778

01:45:52,245 --> 01:45:58,018

if these cases actually start developing  
for for court appointed experts.

1779

01:45:58,018 --> 01:46:02,522

For many years, we had lawyers  
that made a living as Markman experts.

1780

01:46:02,522 --> 01:46:08,195

And now in the trade secret case,  
we may have an avenue for for Krall

1781

01:46:08,195 --> 01:46:14,134

and others to become court appointed  
experts to now do their forensic analysis.

1782

01:46:14,134 --> 01:46:18,372

So I think another reason  
it's important to address this issue

1783

01:46:18,372 --> 01:46:22,576

is because the statute  
specifically says that the seizure

1784

01:46:22,576 --> 01:46:24,111

should be as narrow as possible.

1785

01:46:24,111 --> 01:46:26,413

So it should be  
the minimum amount should be seized.

1786

01:46:26,413 --> 01:46:28,281

Whatever properties being seized  
should be only

1787

01:46:28,281 --> 01:46:31,752

what is necessary to prevent dissemination  
of the trade secret.

1788

01:46:32,052 --> 01:46:35,489

And if you seize too much,  
then you're subjecting

1789

01:46:35,789 --> 01:46:38,792

the client potentially to some liability,  
to some exposure

1790

01:46:39,326 --> 01:46:41,395

for a wrongful seizure,  
for an excessive seizure.

1791

01:46:41,395 --> 01:46:43,029

So it's an important question.

1792

01:46:43,029 --> 01:46:46,500  
It's a very difficult one to answer,  
but it's certainly an important question

1793  
01:46:47,701 --> 01:46:49,336  
for that reason as well

1794  
01:46:49,336 --> 01:46:52,339  
and it's interesting as well, that that

1795  
01:46:53,073 --> 01:46:55,909  
there may be a bit of attention that

1796  
01:46:55,909 --> 01:46:59,980  
in your example of the code machining,  
the nozzles,

1797  
01:47:00,814 --> 01:47:05,886  
the aggrieved party may have hash values  
to identify particular files,

1798  
01:47:05,886 --> 01:47:09,589  
but those files may be on a network server

1799  
01:47:09,589 --> 01:47:12,692  
or may be on any of a host of computers

1800  
01:47:13,293 --> 01:47:16,163  
at the target's facilities.

1801  
01:47:16,163 --> 01:47:20,000  
And so identification  
of what's to be seized

1802

01:47:20,300 --> 01:47:24,304  
may be relatively easy, but where to find  
it may be quite difficult

1803  
01:47:25,038 --> 01:47:27,841  
and not just likely, but I mean.

1804  
01:47:27,841 --> 01:47:30,110  
It's very likely  
it would be difficult, right?

1805  
01:47:30,110 --> 01:47:34,481  
I mean, even a phone typically  
has five different cloud storage options.

1806  
01:47:34,815 --> 01:47:38,652  
Your computer has, you know, when you get  
it plugged in your whole network,

1807  
01:47:39,152 --> 01:47:40,487  
I don't know what your home network

1808  
01:47:40,487 --> 01:47:44,090  
looks like, but mine has five,  
six different computers hanging off of it,

1809  
01:47:44,357 --> 01:47:47,561  
especially if you have kids  
and portable devices.

1810  
01:47:47,561 --> 01:47:50,697  
And often those computers are encrypted

1811  
01:47:50,697 --> 01:47:55,335  
and you need an access password

to unlock the computer.

1812

01:47:55,335 --> 01:48:00,006

And it's very difficult  
if Target's not going to cooperate,

1813

01:48:00,307 --> 01:48:03,610

you're basically walk  
in, you have a encrypted computer.

1814

01:48:03,944 --> 01:48:07,814

How are you going to get access to it  
if you have no cooperation from Target?

1815

01:48:07,814 --> 01:48:08,748

Very difficult.

1816

01:48:10,484 --> 01:48:13,487

Or he runs it over with this truck.

1817

01:48:15,755 --> 01:48:19,059

I think there have been some Fifth  
Amendment issues

1818

01:48:19,426 --> 01:48:25,532

raised in relation to requests  
for the decryption code to be turned over.

1819

01:48:25,532 --> 01:48:29,202

So I suppose we'll continue to see that  
in this area.

1820

01:48:29,836 --> 01:48:33,273

Yeah, that that was raised  
in the recently in the Uber case,

1821

01:48:33,273 --> 01:48:35,041

I mean very interesting.

1822

01:48:35,041 --> 01:48:38,512

Can you be required  
to give over your encryption passwords

1823

01:48:38,512 --> 01:48:41,548

and without that it's, it's

1824

01:48:41,548 --> 01:48:44,551

really quite difficult.

1825

01:48:48,822 --> 01:48:50,257

We just got a chime.

1826

01:48:50,257 --> 01:48:52,659

That's right.

1827

01:48:52,659 --> 01:48:53,994

Are we out of time?

1828

01:48:53,994 --> 01:48:56,997

No, we're not. We're good. Good, good.

1829

01:48:57,163 --> 01:49:00,166

So I'm going to talk about  
ask my question again.

1830

01:49:00,800 --> 01:49:02,869

What logistical issues

1831

01:49:02,869 --> 01:49:06,406

do you think I ask sort of  
what would a client face?

1832

01:49:06,406 --> 01:49:09,543

But how would you propose that's

1833

01:49:10,610 --> 01:49:13,179

a seizure seeking

1834

01:49:13,179 --> 01:49:16,816

software, which is essentially indivisible  
from other software.

1835

01:49:17,150 --> 01:49:19,953

So you're at a you know, like you

1836

01:49:19,953 --> 01:49:22,923

said, the personal computers  
and have the work computer.

1837

01:49:22,989 --> 01:49:27,327

How do you seize the data  
and not the whole computer does?

1838

01:49:28,395 --> 01:49:30,530

I don't  
think that's been really dealt with yet.

1839

01:49:30,530 --> 01:49:32,699

Where do you think it's going?

1840

01:49:32,699 --> 01:49:36,269

I think it raises a threshold question  
about do you know where it is?

1841

01:49:36,303 --> 01:49:39,339

Because if you don't know where it is,  
I don't think you can do it as a

1842

01:49:39,339 --> 01:49:42,208

as a practical matter, which means  
you may need expedited discovery,

1843

01:49:42,208 --> 01:49:46,079

You may need to take a quick deposition  
or do something to try to find out,

1844

01:49:46,079 --> 01:49:49,516

you know, a little bit more specifically  
where is this stored.

1845

01:49:49,950 --> 01:49:53,453

I think under the provision in the act,  
you have to show, again, through

1846

01:49:53,453 --> 01:49:57,991

specific facts where the trade secret  
information is that needs to be seized.

1847

01:49:57,991 --> 01:50:02,262

So if you can't show it  
and in many cases you probably can't,

1848

01:50:03,196 --> 01:50:05,532

then I think you have  
a real practical problem, a dilemma

1849

01:50:05,532 --> 01:50:09,903

in terms of trying to, you know,

trying to use seizure as a remedy.

1850

01:50:10,070 --> 01:50:13,673

You may have to go some other route  
and try to get some more information

1851

01:50:13,673 --> 01:50:17,010

first as far as understanding  
where this information is stored

1852

01:50:18,211 --> 01:50:20,680

in. And one thing I think that lawyers

1853

01:50:20,680 --> 01:50:24,918

contemplating the use of this  
need to think about is, first of all,

1854

01:50:25,752 --> 01:50:30,390

if you're needing an expert seizure order,  
you're by definition in a crisis.

1855

01:50:30,757 --> 01:50:32,659

You have to move very quickly.

1856

01:50:32,659 --> 01:50:35,362

You're going to have to think  
both as a lawyer

1857

01:50:35,362 --> 01:50:38,698

and you're going to have to operationalize  
this for the marshals.

1858

01:50:38,698 --> 01:50:42,969

So you're going to have to be dealing  
with your own computer

1859

01:50:42,969 --> 01:50:45,972

experts early on

1860

01:50:46,206 --> 01:50:48,908

to try to figure out

what you should be asking for

1861

01:50:48,908 --> 01:50:53,847

and what instructions should go

into an order recognizing that the expert

1862

01:50:53,847 --> 01:50:59,052

you're working with will not be the expert

who's working with the marshal.

1863

01:50:59,252 --> 01:51:02,722

And so you've got to be thinking about

how can I prove my case?

1864

01:51:02,722 --> 01:51:07,160

How can I take the boxes

on showing each of the legal elements?

1865

01:51:07,527 --> 01:51:10,463

Then you're going to need to to think

what is it

1866

01:51:10,463 --> 01:51:13,867

that is going to need to be seized?

1867

01:51:13,867 --> 01:51:17,470

You're going to work with an expert on

that who's going to be telling you

1868

01:51:17,470 --> 01:51:21,474

presumably

about things like share drives and

1869

01:51:21,541 --> 01:51:26,012

and digital repositories

that may go beyond a particular computer.

1870

01:51:26,579 --> 01:51:28,314

You're going to need to talk about

1871

01:51:29,282 --> 01:51:30,450

are you extract

1872

01:51:30,450 --> 01:51:35,622

data from that or are you imaging

or are you over imaging data

1873

01:51:35,622 --> 01:51:38,625

which which may be a combination

of the secret and

1874

01:51:39,959 --> 01:51:43,596

legitimate information or at least

information that isn't your information?

1875

01:51:44,030 --> 01:51:47,033

You're going to have to draft that

in a way that

1876

01:51:48,535 --> 01:51:49,903

an expert appointed

1877

01:51:49,903 --> 01:51:53,707

either by marshal or by that by the court,  
is going to be able to follow.

1878

01:51:53,707 --> 01:51:58,078

And you're going to have to do this very,  
very fast, which means that you're going

1879

01:51:58,078 --> 01:52:01,114

to need to have to be doing some drills  
with your clients about

1880

01:52:01,114 --> 01:52:04,117

what if the worst happens,  
how could I respond?

1881

01:52:04,250 --> 01:52:08,955

And one thing I would say is the one  
seizure order that did occur, the

1882

01:52:09,222 --> 01:52:14,194

the computer expert actually removed  
the company's files, the stolen files,

1883

01:52:14,194 --> 01:52:19,099

and then overrode them a number of times  
to eliminate them from the computer.

1884

01:52:19,466 --> 01:52:23,269

So, you know, and the only thing  
that was taken was those files.

1885

01:52:23,269 --> 01:52:25,171

He didn't make an image of the computer.

1886

01:52:25,171 --> 01:52:29,275

So in taking those files,  
I mean, there is some evidence lost.

1887  
01:52:29,275 --> 01:52:30,343  
You'll have to prove up.

1888  
01:52:30,343 --> 01:52:35,915  
Now, through putting that computer expert  
on the stand and having him testify,

1889  
01:52:36,249 --> 01:52:39,185  
which is a little dicey anyway,  
because he works for the court.

1890  
01:52:39,185 --> 01:52:42,889  
And now you're going to have him on  
the stand testifying about what he found.

1891  
01:52:42,889 --> 01:52:45,992  
And and then, you know,  
you have to show the chain

1892  
01:52:45,992 --> 01:52:48,962  
of custody  
of how those files came from your company.

1893  
01:52:49,362 --> 01:52:52,332  
And also  
you need to pull the use information.

1894  
01:52:52,332 --> 01:52:53,700  
So just because he has a

1895  
01:52:53,700 --> 01:52:57,604  
file on his computer doesn't

mean he's accessed it since he left.

1896

01:52:57,604 --> 01:53:02,175

So if you're trying to show damages,  
you also have to collect the metadata

1897

01:53:02,175 --> 01:53:06,112

that shows access to those files  
during the time frame after

1898

01:53:06,112 --> 01:53:07,580

which they left the company.

1899

01:53:09,282 --> 01:53:10,383

Plaintiff's attorney must

1900

01:53:10,383 --> 01:53:13,386

have been very persuasive

1901

01:53:13,653 --> 01:53:16,055

because sitting where I am,

1902

01:53:16,055 --> 01:53:20,727

that feels more like a distraction  
than a seizure.

1903

01:53:20,727 --> 01:53:24,631

And I'd be I'd be hard pressed  
to imagine a lot of judges ordering that.

1904

01:53:25,698 --> 01:53:27,534

Yeah, I think it is difficult.

1905

01:53:27,534 --> 01:53:31,571

Plus, if you're a judge,  
do you really want to order a computer

1906

01:53:31,571 --> 01:53:35,875

expert to go rummage around somebody's  
computer looking for files and

1907

01:53:36,643 --> 01:53:38,611

and making judgments? Yeah.

1908

01:53:38,611 --> 01:53:43,216

And then making a judgment call on whether  
or not it's relevant and, you know,

1909

01:53:43,349 --> 01:53:47,554

not collecting data on whatever else  
he might have on his computer or she.

1910

01:53:47,554 --> 01:53:52,759

And it is, I think, very intrusive  
and judge is viewed as intrusive.

1911

01:53:53,092 --> 01:53:56,095

It's the old adage of  
be careful what you ask for.

1912

01:53:56,696 --> 01:53:59,332

And to use, you know, Vicki's term before,  
which I think is

1913

01:53:59,332 --> 01:54:02,335

is a very appropriate term crisis.

1914

01:54:02,402 --> 01:54:03,536

Typically in these cases.

1915

01:54:03,536 --> 01:54:05,972

What we see is

it is sort of a crisis situation,

1916

01:54:05,972 --> 01:54:09,242

particularly for the client

who feels like their data is at risk.

1917

01:54:09,242 --> 01:54:13,079

So you're running it to court,

you have very little time and you have to

1918

01:54:13,179 --> 01:54:14,214

sort of do your best

1919

01:54:14,214 --> 01:54:18,017

with the information that's available,

but it's oftentimes limited at that stage.

1920

01:54:18,518 --> 01:54:22,422

And so it's a challenge, no matter what  
remedy you're seeking at that.

1921

01:54:22,422 --> 01:54:23,723

At the early stage of the case.

1922

01:54:26,192 --> 01:54:26,960

Well, so now your

1923

01:54:26,960 --> 01:54:30,697

client has a crisis

because there's been a theft.

1924

01:54:30,697 --> 01:54:33,633

It's very critical.

There's a time limit on it.

1925

01:54:33,633 --> 01:54:36,936

And you somehow persuade  
the judge to issue your order

1926

01:54:37,270 --> 01:54:39,272

and the judge has a crisis.

1927

01:54:39,272 --> 01:54:42,542

Where do these experts  
that the judge is supposed to

1928

01:54:43,877 --> 01:54:45,812

is supposed to appoint come from?

1929

01:54:45,812 --> 01:54:49,115

You know, so you mentioned a business  
opportunity for companies like role,

1930

01:54:49,983 --> 01:54:54,420

but how does the judge know which expert  
he needs, what flavor expert, etc.

1931

01:54:54,854 --> 01:54:57,690

is there going to be a registry?

1932

01:54:57,690 --> 01:54:59,893

What do you think it will be?

1933

01:54:59,893 --> 01:55:02,762

Vicky, you want to tackle that  
and then I can jump in.

1934

01:55:02,762 --> 01:55:05,765

Well, you know, it's interesting.

1935

01:55:05,765 --> 01:55:08,768

I think that a well-prepared plaintiff

1936

01:55:08,968 --> 01:55:11,537

might suggest to the judge,

1937

01:55:11,537 --> 01:55:14,540

okay,

we need someone with these qualifications

1938

01:55:14,641 --> 01:55:17,610

here are independent people

1939

01:55:17,610 --> 01:55:20,146

who haven't worked

on the dispute, although

1940

01:55:21,614 --> 01:55:24,617

life being

what it is, specialists in this field

1941

01:55:24,751 --> 01:55:27,420

will tend to work

with a variety of experts.

1942

01:55:27,420 --> 01:55:29,122

And so

1943

01:55:29,122 --> 01:55:31,391

it may be necessary to make a disclosure.

1944

01:55:31,391 --> 01:55:36,663

Our firm has worked with this expert  
in other cases with success,

1945

01:55:36,663 --> 01:55:41,100

not on this matter,  
but you'll need to make a presentation

1946

01:55:41,100 --> 01:55:44,604

as to  
why this is someone who's well-suited

1947

01:55:44,604 --> 01:55:48,741

for the job that you'd want to propose  
a list of of perhaps three or four

1948

01:55:49,909 --> 01:55:52,912

so that the judge could could not

1949

01:55:53,012 --> 01:55:57,417

be to be of the view  
that they're being forced to accept

1950

01:55:57,417 --> 01:56:00,653

an expert whom who may be beholden  
to the plaintiff in some fashion.

1951

01:56:00,887 --> 01:56:04,090

I think there will be in in essence,

1952

01:56:04,824 --> 01:56:07,694

a registry that develops over time.

1953

01:56:07,694 --> 01:56:10,263

So, Jenny,

I think that's an excellent question.

1954

01:56:10,263 --> 01:56:15,068

As a practical matter, sort of computer forensic experts come in all different

1955

01:56:15,068 --> 01:56:18,171

skill sets

and some are extremely effective

1956

01:56:18,171 --> 01:56:21,607

and others can't seem to find what you're looking for.

1957

01:56:21,607 --> 01:56:22,275

Right.

1958

01:56:22,275 --> 01:56:26,379

And and we've you know, in some cases we've hired experts

1959

01:56:26,379 --> 01:56:29,882

and then hired a different set of experts until we found someone

1960

01:56:30,249 --> 01:56:33,052

that seemed like they could get it done.

1961

01:56:33,052 --> 01:56:38,124

And especially if there's encryption involved and and more complicated data

1962

01:56:38,124 --> 01:56:42,595

structures cloud storage the same experts  
just not going to get it done

1963

01:56:42,595 --> 01:56:46,399

in every case and trying to recommend  
someone to the judge will.

1964

01:56:46,399 --> 01:56:50,503

If you've already worked with them a lot,  
the judge may view them as biased.

1965

01:56:50,503 --> 01:56:53,806

And if you haven't worked with them, how  
are you going recommend them to the judge?

1966

01:56:53,806 --> 01:56:57,377

I mean, your one shot is  
when you go into the man's apartment

1967

01:56:57,377 --> 01:56:59,946

or his house  
to try and seize the material.

1968

01:56:59,946 --> 01:57:03,182

And if you have the wrong forensic expert,  
you're done.

1969

01:57:03,182 --> 01:57:06,519

And it's not very helpful  
if you go in for a seizure

1970

01:57:06,819 --> 01:57:10,690

and don't find anything  
or find a situation where you can't

1971

01:57:10,690 --> 01:57:15,094  
actually access the data that's there,  
that's not good for you or your client.

1972  
01:57:15,895 --> 01:57:19,532  
And Cass also,  
you know, mentioned some of the remedies.

1973  
01:57:19,532 --> 01:57:23,469  
You know, if you're wrong  
on these seizure orders, which are not

1974  
01:57:23,503 --> 01:57:27,040  
what a lawyer likes  
to step into or his partner's right.

1975  
01:57:29,442 --> 01:57:32,678  
So the short answer, I think, John, is  
it's it's not the judge's problem.

1976  
01:57:32,678 --> 01:57:35,681  
It's the lawyer's problem,  
like most things in litigation.

1977  
01:57:35,882 --> 01:57:38,885  
And there there are  
there are a group of people

1978  
01:57:39,485 --> 01:57:42,422  
who work in this space  
and are very capable, as Fred said.

1979  
01:57:42,422 --> 01:57:46,492  
And so it's a matter of sort of  
finding those people, finding someone

1980

01:57:46,492 --> 01:57:49,495

that neither side has worked with,  
at least in that particular case,

1981

01:57:50,263 --> 01:57:53,499

and offering them and showing the court  
that that's somebody and hopefully

1982

01:57:54,000 --> 01:57:57,003

showing the court that that somebody  
is qualified to do the work.

1983

01:57:57,103 --> 01:58:00,540

And it may also be pertinent to  
to think about the fact

1984

01:58:00,540 --> 01:58:04,110

that the plaintiff's lawyer  
is going to be thinking about,

1985

01:58:04,110 --> 01:58:07,613

okay, we need to have a specialist  
to do the seizure.

1986

01:58:08,147 --> 01:58:11,150

But then once sees, there's going to be

1987

01:58:11,451 --> 01:58:15,421

further interaction with the court  
and presumably at that point,

1988

01:58:15,421 --> 01:58:19,525

each side will have its own experts  
wanting to have access to the information.

1989

01:58:19,826 --> 01:58:22,528

So the plaintiff's counsel ought to be

1990

01:58:22,528 --> 01:58:25,832

thinking ahead to needing two experts, one

1991

01:58:26,165 --> 01:58:29,669

to offer to the court

and one for their own purposes.

1992

01:58:29,669 --> 01:58:35,341

And of course, the defendant,

who eventually is made aware of

1993

01:58:35,341 --> 01:58:39,512

the seizure, will also be wanting

to turn to an expert very quickly as well.

1994

01:58:39,612 --> 01:58:43,349

And I would say the skill set

that you need for a computer forensic

1995

01:58:43,349 --> 01:58:45,751

expert is not an easy skillset to find.

1996

01:58:45,751 --> 01:58:48,654

So you need somebody

who's technically competent

1997

01:58:48,654 --> 01:58:51,724

that can go in, rummage

around the file structure,

1998

01:58:51,991 --> 01:58:55,128

look at all the metadata,  
figure out what's been erased

1999  
01:58:55,128 --> 01:58:58,264  
and when it was erased  
and what date is still there.

2000  
01:58:58,297 --> 01:59:01,901  
Go through firewalls and still be able  
to testify in a jury trial.

2001  
01:59:02,268 --> 01:59:05,638  
So sometimes those two things  
are incompatible, right?

2002  
01:59:05,638 --> 01:59:09,442  
You can find a really good  
technical person, but not necessarily

2003  
01:59:09,442 --> 01:59:12,445  
a person  
that has the presence at a jury trial.

2004  
01:59:13,112 --> 01:59:15,781  
And you really need both in these cases

2005  
01:59:16,949 --> 01:59:18,618  
and sometimes

2006  
01:59:18,618 --> 01:59:22,622  
organizations have assistance  
to the technical expert

2007  
01:59:22,622 --> 01:59:26,425  
and they have a team

of really qualified people.

2008

01:59:26,425 --> 01:59:30,463

And the person that's going to testify  
is more senior and maybe not as

2009

01:59:31,864 --> 01:59:32,098

well.

2010

01:59:32,098 --> 01:59:35,101

Let's just say he has a lot of help.

2011

01:59:39,272 --> 01:59:41,774

So I think we've we've

2012

01:59:41,774 --> 01:59:45,178

probably done a nice job of illustrating

2013

01:59:45,178 --> 01:59:48,181

how daunting the task can be.

2014

01:59:48,347 --> 01:59:52,485

And yet if you have a situation  
where you have reason

2015

01:59:52,485 --> 01:59:56,189

to believe that the trade secret  
is going to be spirited away,

2016

01:59:56,689 --> 02:00:01,260

and and I think we've been focusing  
a great deal about data,

2017

02:00:01,694 --> 02:00:05,431

but there are other kinds of trade secrets  
that can be at risk.

2018

02:00:06,165 --> 02:00:10,770

For example, self strains  
that are being considered

2019

02:00:10,770 --> 02:00:14,507

by pharmaceutical companies  
or those doing biologics

2020

02:00:14,507 --> 02:00:20,746

research, bacteria that may be important  
in a manufacturing process.

2021

02:00:22,582 --> 02:00:24,550

Physical prototypes

2022

02:00:24,550 --> 02:00:30,256

may or may all be very important types  
of information that could wreck

2023

02:00:30,256 --> 02:00:34,060

tremendous havoc on a research program  
if spirited away.

2024

02:00:34,060 --> 02:00:37,063

And so if you've got some of these odd

2025

02:00:38,197 --> 02:00:40,299

sort of

2026

02:00:40,299 --> 02:00:42,635

storage places for data

2027

02:00:42,635 --> 02:00:46,772

and odd secrets like cell strains  
and so forth, again,

2028

02:00:47,039 --> 02:00:50,276

you've got to be doing drills  
with your client about how are we going

2029

02:00:50,276 --> 02:00:53,279

to detect misappropriation,

2030

02:00:53,980 --> 02:00:59,452

how are we going to think  
through impounding information

2031

02:00:59,452 --> 02:01:01,087

that has been taken.

2032

02:01:01,087 --> 02:01:03,689

And you may want to be thinking about

2033

02:01:03,689 --> 02:01:06,692

who's your expert on  
and preserving self strains,

2034

02:01:06,692 --> 02:01:09,662

because if they don't want to have

2035

02:01:09,829 --> 02:01:12,732

mechanical equipment in court,  
they are certainly not going to want

2036

02:01:12,732 --> 02:01:17,003

to have bacteria and strange cells

to store in the courthouse.

2037

02:01:17,003 --> 02:01:21,474

So it's something to think through  
as as part of your potential remedies

2038

02:01:21,474 --> 02:01:24,844

as against a case  
that you hope will never happen.

2039

02:01:30,683 --> 02:01:32,151

I'm assuming

2040

02:01:32,151 --> 02:01:35,154

that the answer would be yes,  
but I will ask the question anyway.

2041

02:01:35,521 --> 02:01:38,491

Do you think we're going to start  
seeing a lot of use of special master's

2042

02:01:41,627 --> 02:01:43,462

self care?

2043

02:01:43,462 --> 02:01:45,698

So you want to take the first one?

2044

02:01:45,698 --> 02:01:48,401

I would say that

2045

02:01:48,401 --> 02:01:51,971

I think it depends  
maybe what you mean by a special master.

2046

02:01:51,971 --> 02:01:54,707

I think that forensic experts

2047

02:01:54,707 --> 02:01:57,877

are always going to play  
a significant role in these types of cases

2048

02:01:57,877 --> 02:02:00,212

because oftentimes not, as Peggy points

2049

02:02:00,212 --> 02:02:03,182

out, it's not always data driven,  
but many times it is data driven.

2050

02:02:03,716 --> 02:02:07,019

Many times you're  
trying to find the needle in the haystack.

2051

02:02:07,019 --> 02:02:11,490

And the haystack is a laptop or it's a  
you know, a phone.

2052

02:02:12,825 --> 02:02:15,061

And courts are always concerned

2053

02:02:15,061 --> 02:02:18,230

about balancing  
the competing interests of the parties.

2054

02:02:18,230 --> 02:02:21,033

So you're always you're trying  
to find something that's confidential.

2055

02:02:21,033 --> 02:02:23,302

Maybe it belongs to a prior employer,

2056

02:02:23,302 --> 02:02:26,072

but on the same device, you're going to have a lot of personal information

2057

02:02:26,072 --> 02:02:28,240

that has nothing to do with the prior employer.

2058

02:02:28,240 --> 02:02:32,478

And courts are sensitive to that and trying to find ways to balance

2059

02:02:32,478 --> 02:02:33,412

the rights of the parties.

2060

02:02:33,412 --> 02:02:35,448

And I think, you know, one of the ways of doing that is

2061

02:02:35,448 --> 02:02:40,386

you get a neutral court appointed expert involved and that person can,

2062

02:02:40,386 --> 02:02:43,656

you know, has no stake in the litigation, but can look at

2063

02:02:44,390 --> 02:02:47,727

sort of protecting both sides interests and trying to separate

2064

02:02:48,094 --> 02:02:50,763

what is the trade secret from what is not the trade secret.

2065

02:02:52,665 --> 02:02:54,767

So I found

2066

02:02:54,767 --> 02:02:58,671

it to be extraordinarily difficult  
to get judges to grant

2067

02:02:58,671 --> 02:03:02,908

you access to personal email accounts  
to to get to do searches

2068

02:03:02,908 --> 02:03:06,412

through those accounts  
and actually look for deleted items.

2069

02:03:07,713 --> 02:03:11,016

Often they'll you know,  
you propounded discovery request

2070

02:03:11,016 --> 02:03:12,752

and you get back nothing.

2071

02:03:12,752 --> 02:03:16,021

And it turns out that the material is  
either deleted

2072

02:03:16,021 --> 02:03:17,923

or it was moved to a thumb drive.

2073

02:03:17,923 --> 02:03:22,728

If you can eventually get access  
to the laptop, you can usually show that.

2074

02:03:22,728 --> 02:03:25,998

So normally

it takes forensics from the company

2075

02:03:25,998 --> 02:03:30,002

to show that the employee

downloaded it onto a laptop.

2076

02:03:30,002 --> 02:03:33,239

And a lot of the current document  
management systems

2077

02:03:33,539 --> 02:03:35,141

will record those events.

2078

02:03:35,141 --> 02:03:38,911

And if you do a mirror of the employee's  
when he leaves,

2079

02:03:39,245 --> 02:03:45,084

you can also tell which thumb drive  
it was downloaded to which computer.

2080

02:03:45,117 --> 02:03:46,986

Often they're downloaded to phones.

2081

02:03:46,986 --> 02:03:49,855

These days and then uploaded to the cloud.

2082

02:03:49,855 --> 02:03:52,558

So if you can track it from  
that perspective,

2083

02:03:52,558 --> 02:03:55,561

you're more likely to have a court

grant access.

2084

02:03:55,561 --> 02:03:59,331

Now, who does the searching  
is a very difficult subject for the court,

2085

02:03:59,331 --> 02:04:02,802

So I just think a lot of judges  
are reluctant

2086

02:04:02,802 --> 02:04:06,605

to give an opponent access  
to someone's personal laptop.

2087

02:04:07,807 --> 02:04:10,309

And in that context, maybe a

2088

02:04:10,309 --> 02:04:13,312

special master  
might make it easier for the court.

2089

02:04:14,246 --> 02:04:16,816

But, you know,  
there's also cost and expense with that.

2090

02:04:16,816 --> 02:04:18,484

These things are very expensive.

2091

02:04:18,484 --> 02:04:21,387

And who pays for that?

2092

02:04:21,387 --> 02:04:24,990

I mean, the certainly the defendants,  
not one, are going to want to pay for

2093

02:04:25,624 --> 02:04:29,495

for a special,  
you know, computer forensic analysis,

2094

02:04:29,762 --> 02:04:32,731

especially if it's a former employee.

2095

02:04:33,065 --> 02:04:34,800

But and, Fred,

2096

02:04:34,800 --> 02:04:37,136

you raised an interesting point

2097

02:04:37,136 --> 02:04:40,439

as well, that in in in relation to

2098

02:04:40,906 --> 02:04:43,442

do you want a spoliation finding

2099

02:04:43,442 --> 02:04:47,379

and an inference that may help  
you win a case

2100

02:04:47,847 --> 02:04:52,952

and may help you win damages  
or some form of permanent injunction?

2101

02:04:53,252 --> 02:04:57,656

Or do you want to stop the migration  
of the information?

2102

02:04:57,656 --> 02:05:01,060

And I mean, presumably you want both,

2103

02:05:01,460 --> 02:05:05,130

but the expertise seizure order  
speaks to that.

2104

02:05:05,397 --> 02:05:08,601

Let's get in  
before the information's gone away.

2105

02:05:08,601 --> 02:05:13,172

And we've talked about all the hard work  
that has to go into that,

2106

02:05:13,572 --> 02:05:17,643

that may may slow down the process  
and may leave you

2107

02:05:17,643 --> 02:05:21,146

at the end of the day  
with a good spoliation case.

2108

02:05:21,146 --> 02:05:24,783

But presumably actually  
want to protect the information.

2109

02:05:24,817 --> 02:05:29,889

Yeah, well, I think spoliation is not  
what it's cracked up to be.

2110

02:05:29,889 --> 02:05:33,092

I mean, it can be very powerful  
in front of a jury, but there's like

2111

02:05:33,392 --> 02:05:36,095

five different variations  
of that jury instructions.

2112

02:05:36,095 --> 02:05:40,399

Some aren't as good as others,  
usually quite helpful in front of a jury.

2113

02:05:40,399 --> 02:05:43,402

But typically have  
multinational companies.

2114

02:05:43,636 --> 02:05:47,406

If all of your development secrets,  
especially your manufacturing

2115

02:05:47,406 --> 02:05:48,807

secrets, get out,

2116

02:05:48,807 --> 02:05:52,144

you know, pretty soon that manufacturing  
is going to go overseas anyway.

2117

02:05:52,144 --> 02:05:56,148

We have a huge cost disadvantage  
in this country, often for our labor.

2118

02:05:56,515 --> 02:06:00,452

There's a tendency to want to move  
that manufacturing overseas and,

2119

02:06:00,452 --> 02:06:04,423

you know, soon all of the technology  
development will follow.

2120

02:06:04,423 --> 02:06:05,958

I mean, if you look at history,

2121

02:06:05,958 --> 02:06:09,962

whatever manufacturing goes somewhere  
almost always the high tech jobs follow.

2122

02:06:09,962 --> 02:06:11,931

Eventually you just

2123

02:06:11,931 --> 02:06:15,801

you want your development to occur  
where your products are being built.

2124

02:06:15,801 --> 02:06:19,438

And so sooner or later  
that is going to move as well.

2125

02:06:19,438 --> 02:06:23,542

So, so far  
kept our high tech jobs in this country.

2126

02:06:23,542 --> 02:06:26,545

But, you know,  
it goes to Vicky's point that

2127

02:06:27,112 --> 02:06:31,083

sometimes speculation of damages  
are not going to help you long term.

2128

02:06:31,116 --> 02:06:32,384

You just can't help it.

2129

02:06:32,384 --> 02:06:36,855

Once you know your secrets  
get out there, it's difficult.

2130

02:06:37,623 --> 02:06:39,858

But maybe in addition to

2131

02:06:41,594 --> 02:06:42,628

work for

2132

02:06:42,628 --> 02:06:45,664

outside experts,

maybe there will come to be known some

2133

02:06:45,664 --> 02:06:49,969

some very effective special masters

who will be in in high demand.

2134

02:06:50,235 --> 02:06:55,074

And I think we've seen

that some more generally in in connection

2135

02:06:55,074 --> 02:06:59,311

with the e-discovery issues

in, you know, other kinds of cases.

2136

02:06:59,511 --> 02:07:03,215

Well, that sometimes special masters

have been appointed who can be helpful

2137

02:07:03,749 --> 02:07:06,552

in fashioning search terms and so forth.

2138

02:07:06,552 --> 02:07:09,722

And I think we would see this

continuing with trade secrets.

2139

02:07:10,689 --> 02:07:12,725

But it's not an overnight process.

2140

02:07:12,725 --> 02:07:15,661

Another wrinkle,  
not a special another sort of role

2141

02:07:15,661 --> 02:07:17,963

that someone could play in these cases  
that could be important,

2142

02:07:17,963 --> 02:07:21,400

is not a special master,  
but a translator or interpreter.

2143

02:07:21,400 --> 02:07:24,503

We've talked a lot about,  
you know, some of some of the exposures

2144

02:07:26,305 --> 02:07:27,439

are sourced in Asia.

2145

02:07:27,439 --> 02:07:29,408

And there was a very high profile

2146

02:07:29,408 --> 02:07:32,511

trade secrets case involving  
someone who worked at a major U.S.

2147

02:07:32,511 --> 02:07:37,182

company, left that company was recruited  
by a company in Asia

2148

02:07:37,683 --> 02:07:41,587

and the case  
ended up in a major litigation in the U.S.

2149

02:07:41,620 --> 02:07:43,489

And during Discovery,

2150

02:07:43,489 --> 02:07:47,926

the company got records  
from the new employer outside the U.S.

2151

02:07:47,926 --> 02:07:50,162

and were all foreign language documents.

2152

02:07:50,162 --> 02:07:53,298

And a lot of them had handwritten  
notations in foreign language

2153

02:07:53,298 --> 02:07:54,466

on the documents.

2154

02:07:54,466 --> 02:07:58,170

And they did a sort of spot translation  
and found a whole bunch of documents

2155

02:07:58,170 --> 02:08:01,607

that had directions on the on the paper  
saying things like destroy

2156

02:08:01,607 --> 02:08:04,877

all these files, erase  
everything related to this project.

2157

02:08:05,310 --> 02:08:07,713

And that became  
a very significant issue in the case.

2158

02:08:07,713 --> 02:08:12,217

So there's certainly, you know,  
certain types of other than just attorneys

2159

02:08:12,551 --> 02:08:14,753

and special masters,  
there are a variety of people

2160

02:08:14,753 --> 02:08:17,056

who get involved in these cases  
that may play an important role.

2161

02:08:18,257 --> 02:08:21,694

I see  
many new career paths developing for.

2162

02:08:24,396 --> 02:08:27,833

Well, I do think the the discovery rules,

2163

02:08:28,200 --> 02:08:31,770

you know, recent changes in the discovery  
rules have impacted that.

2164

02:08:32,071 --> 02:08:33,605

There's the proportionality.

2165

02:08:33,605 --> 02:08:38,610

And in Rule 26,  
some of the new e-discovery rules that

2166

02:08:39,712 --> 02:08:42,715

that require preservation and,

2167

02:08:43,882 --> 02:08:45,918

you know, require,

2168

02:08:45,918 --> 02:08:49,788

you know,  
reasonable steps to be taken. And

2169

02:08:51,090 --> 02:08:55,961

so all of that is now coming into play,  
especially in trade secret cases

2170

02:08:55,961 --> 02:09:00,232

where basically,  
you know, a thumb drive can walk away

2171

02:09:00,232 --> 02:09:03,502

with \$10 billion worth of development  
work.

2172

02:09:03,502 --> 02:09:06,505

Right.

2173

02:09:07,139 --> 02:09:09,808

In our last panel

2174

02:09:09,808 --> 02:09:11,744

at the end, they talked about

2175

02:09:11,744 --> 02:09:14,747

the emotional aspects of these cases.

2176

02:09:15,881 --> 02:09:19,318

And you know how you know,  
we all know that an emotional party

2177

02:09:19,318 --> 02:09:22,321

is a difficult party

to see the business solution.

2178

02:09:23,589 --> 02:09:26,325

What do you think going to happen  
when you layer

2179

02:09:26,325 --> 02:09:30,596

a seizure,  
which is in itself incredibly emotional?

2180

02:09:30,763 --> 02:09:32,030

Talk about feeling violated?

2181

02:09:32,030 --> 02:09:34,099

The U.S. Marshals come in your front door.

2182

02:09:35,100 --> 02:09:37,669

How do you think these seizures

2183

02:09:37,669 --> 02:09:40,339

or seizure  
opportunities are going to affect

2184

02:09:40,339 --> 02:09:43,342

settlement?

2185

02:09:45,477 --> 02:09:47,980

Well, I think it's I think it's likely  
to polarize the parties.

2186

02:09:47,980 --> 02:09:48,180

Right.

2187

02:09:48,180 --> 02:09:48,447

I mean,

2188

02:09:48,447 --> 02:09:50,783

although if you think about it  
at the outset,

2189

02:09:50,783 --> 02:09:52,651

the parties are going to be fairly  
polarized.

2190

02:09:52,651 --> 02:09:54,553

I mean, in most of these cases, you know,

2191

02:09:54,553 --> 02:09:58,290

we're firing off cease and desist letters  
right away to the former employee.

2192

02:09:58,590 --> 02:10:01,727

And, you know, they're  
they're basically either ignoring it

2193

02:10:02,027 --> 02:10:05,130

or digging in and saying, you know,  
I don't know what you're talking about.

2194

02:10:05,130 --> 02:10:06,799

That's not confidential or I don't have it

2195

02:10:06,799 --> 02:10:09,034

or I didn't do anything with it  
or whatever they're saying.

2196

02:10:09,034 --> 02:10:11,904

But it's it is a fairly  
polarized situation at the outset,

2197

02:10:11,904 --> 02:10:13,906

although to your point,  
I think you're right.

2198

02:10:13,906 --> 02:10:15,541

I mean, I don't  
I don't think that's going to do anything

2199

02:10:15,541 --> 02:10:18,510

to bring the  
the parties, you know, together

2200

02:10:18,510 --> 02:10:21,180

or make it more likely  
that they're going to reach some kind of a

2201

02:10:21,180 --> 02:10:22,214

compromise solution.

2202

02:10:24,082 --> 02:10:24,850

I think,

2203

02:10:24,850 --> 02:10:29,254

you know, the reality is, in many cases,  
if the court grants relief at the outset

2204

02:10:29,721 --> 02:10:32,724

and you get your information back  
from the client's perspective,

2205

02:10:32,724 --> 02:10:35,294

if they get the information back  
and they're comfortable

2206

02:10:35,294 --> 02:10:38,497

that is protected and it's not going to be  
further used by a competitor,

2207

02:10:38,964 --> 02:10:43,936

you know, that's a major success  
in many cases and in many ways,

2208

02:10:43,936 --> 02:10:49,074

then that may set the stage, you know,  
to resolve the case as a practical matter.

2209

02:10:49,074 --> 02:10:50,709

But there are certainly emotions  
are likely

2210

02:10:50,709 --> 02:10:53,145

to be running high at the outset,  
and they're going to run higher

2211

02:10:53,145 --> 02:10:57,049

if the marshals, you know, knocking  
down the door and taking taking property.

2212

02:10:58,217 --> 02:11:00,385

Couple of other thoughts.

2213

02:11:00,385 --> 02:11:05,057

One is that that's that's that's  
certainly true, that if the information

2214

02:11:05,057 --> 02:11:09,862

can be seized and retrieved  
and if forensic review shows

2215

02:11:09,862 --> 02:11:13,432

that it was in the nick of time before  
it was onward forwarded,

2216

02:11:14,132 --> 02:11:19,171

that could presumably be helpful  
in bringing a case to a close.

2217

02:11:19,171 --> 02:11:25,611

But you do have the emotional component  
and the Dtsc tried to address some of that

2218

02:11:25,944 --> 02:11:31,950

by putting a ban on publicizing  
the request for the relief and the relief

2219

02:11:31,950 --> 02:11:34,920

at least until the defendant is heard

2220

02:11:35,120 --> 02:11:38,123

so that it won't become a grandstanding.

2221

02:11:38,123 --> 02:11:42,694

You know, the photographs of the marshals  
raiding this competitor's plant.

2222

02:11:43,762 --> 02:11:46,265

However, I will note that

2223

02:11:46,265 --> 02:11:49,568

while the law says that the plaintiff

2224

02:11:49,568 --> 02:11:52,571

is not supposed to seek publicity,

2225

02:11:53,105 --> 02:11:56,141

I became aware of at least one case  
where such an order was

2226

02:11:56,375 --> 02:11:59,945

was set because the filing wasn't  
made under seal and.

2227

02:12:00,245 --> 02:12:03,715

You know, one of those daily news services  
that we get reported.

2228

02:12:03,715 --> 02:12:05,150

That's interesting. Okay.

2229

02:12:05,150 --> 02:12:08,654

So so when suspects that the defendant  
probably learned about it

2230

02:12:08,854 --> 02:12:14,059

and it wasn't truly parte  
and so the prohibition on publicity

2231

02:12:14,793 --> 02:12:17,763

wasn't fully implemented,

2232

02:12:18,263 --> 02:12:19,865

you know, I would say trade

2233

02:12:19,865 --> 02:12:23,902

secret cases are just very emotional  
cases, particularly

2234

02:12:23,902 --> 02:12:28,874  
where two people have worked together  
for many years, built a company together.

2235  
02:12:29,141 --> 02:12:33,745  
One of leaves to go either  
start a competitor or to a competitor,

2236  
02:12:34,479 --> 02:12:38,517  
just very emotional, usually  
at very high levels in the company.

2237  
02:12:39,651 --> 02:12:41,019  
And it can be

2238  
02:12:41,019 --> 02:12:44,856  
difficult for for lawyers  
involved in that situation.

2239  
02:12:44,856 --> 02:12:51,263  
And I had one case many years ago  
where CEO told me is

2240  
02:12:51,697 --> 02:12:56,134  
is one of his highest employees  
left to go start a competitor.

2241  
02:12:56,134 --> 02:12:59,304  
And he bet them a bottle

2242  
02:12:59,304 --> 02:13:02,507  
of 60 year old scotch  
that he was going to win this contract.

2243  
02:13:02,507 --> 02:13:05,077

And I got called in the CEO's office.

2244

02:13:05,077 --> 02:13:06,211

He said he wouldn't

2245

02:13:06,211 --> 02:13:10,182

have bet me a bottle of 60 year old Scotch  
unless he knew he was going to win.

2246

02:13:10,182 --> 02:13:11,583

He took my documents.

2247

02:13:11,583 --> 02:13:13,819

He said, I've been working with him for 40  
years.

2248

02:13:13,819 --> 02:13:15,620

He's got my documents.

2249

02:13:15,620 --> 02:13:19,391

So it's a lot of it's very personal,  
very emotional.

2250

02:13:20,759 --> 02:13:23,462

And I think seizure in there is,

2251

02:13:23,462 --> 02:13:26,365

you know, also can be very emotional.

2252

02:13:26,365 --> 02:13:28,400

These are not easy cases.

2253

02:13:30,469 --> 02:13:31,470

And it's

2254

02:13:31,470 --> 02:13:36,141

like the so-called inevitable disclosure doctrine that you want to be careful

2255

02:13:36,141 --> 02:13:40,979

in discussing terms like seizure with an irate client.

2256

02:13:41,179 --> 02:13:45,751

And so certainly the statute gives you a lot to discuss, saying, okay, it's

2257

02:13:45,751 --> 02:13:50,689

an extraordinary remedy in certain cases here's the showing that has to be made.

2258

02:13:50,689 --> 02:13:53,692

It's not given out like candy,

2259

02:13:53,925 --> 02:13:55,861

but it is available

2260

02:13:55,861 --> 02:13:58,864

when you can make that showing.

2261

02:13:59,231 --> 02:14:02,134

And I would say, you know, of course, TSA doesn't

2262

02:14:02,134 --> 02:14:05,404

really have inevitable disclosure, at least not

2263

02:14:06,471 --> 02:14:08,106  
not for injunctive relief.

2264  
02:14:08,106 --> 02:14:10,542  
Whether damages are available  
is another issue.

2265  
02:14:10,542 --> 02:14:12,344  
Right.

2266  
02:14:12,344 --> 02:14:14,012  
But sometimes, you know, these

2267  
02:14:14,012 --> 02:14:17,716  
these buzzwords get seized  
upon about it is inevitable.

2268  
02:14:17,716 --> 02:14:18,884  
It should be seized.

2269  
02:14:18,884 --> 02:14:22,921  
And so the lawyer's job is certainly  
well cut out for us.

2270  
02:14:23,488 --> 02:14:26,491  
I think there's also there's  
sort of a built in

2271  
02:14:26,992 --> 02:14:30,595  
incentive  
make these cases not emotional per se, but

2272  
02:14:31,596 --> 02:14:34,533  
very adversarial,  
which is if you're on the plaintiff's

2273

02:14:34,533 --> 02:14:37,702

side, you're trying to show  
you need to make a showing right.

2274

02:14:37,702 --> 02:14:40,972

If some kind of bad conduct  
that this person's a bad actor,

2275

02:14:40,972 --> 02:14:41,907

I mean, you're going to get

2276

02:14:41,907 --> 02:14:44,876

the more likely you are to get  
relief is going to be depend

2277

02:14:44,876 --> 02:14:47,879

on how likely you are to get relief  
is going to depend in large part on how

2278

02:14:48,146 --> 02:14:51,116

strong of a showing you can make  
that this person is a bad actor.

2279

02:14:51,116 --> 02:14:53,552

This person is going to disregard  
the court's orders.

2280

02:14:53,552 --> 02:14:56,555

This person is going  
to, you know, take the information and

2281

02:14:57,422 --> 02:15:00,392

act in unlawful ways, disclose it, use it,

2282

02:15:01,326 --> 02:15:02,194  
misappropriated.

2283

02:15:02,194 --> 02:15:05,664  
So at the outset, from the plaintiff's  
standpoint,

2284

02:15:05,664 --> 02:15:08,767  
you're sort of you know, you're  
you're painting this person as a bad actor

2285

02:15:09,101 --> 02:15:13,438  
and that person's obviously  
not going to respond favorably to that.

2286

02:15:13,438 --> 02:15:16,675  
So that's also, I think, part  
of the dynamic in these cases

2287

02:15:19,111 --> 02:15:20,011  
Well, we are

2288

02:15:20,011 --> 02:15:22,948  
winding down quickly on our time

2289

02:15:22,948 --> 02:15:25,350  
before  
I see if you have any last thoughts.

2290

02:15:25,350 --> 02:15:28,353  
I wanted to see  
if there were any questions.

2291

02:15:29,921 --> 02:15:32,924

Well, we've been completely clear,

2292

02:15:34,059 --> 02:15:37,062

so please

just hit me with some last thoughts.

2293

02:15:37,462 --> 02:15:41,166

Well, one thing that occurs to me,  
especially given where we're sitting,

2294

02:15:41,166 --> 02:15:45,737

is that much of the wording of the seizure  
order

2295

02:15:45,737 --> 02:15:49,841

is is familiar

to those who do trademark work as well.

2296

02:15:49,841 --> 02:15:52,844

And I can't imagine  
that a seizure in the trademark field

2297

02:15:53,044 --> 02:15:55,981

is an emotional either.

2298

02:15:55,981 --> 02:15:59,351

And I guess it's a reminder  
that while there isn't

2299

02:15:59,351 --> 02:16:03,221

a long track record yet under the TSA

2300

02:16:04,122 --> 02:16:07,492

we can inform ourselves  
by looking at how people have gone about

2301

02:16:07,726 --> 02:16:09,327  
getting seizure orders

2302

02:16:09,327 --> 02:16:11,496  
in the trademark field,  
because that certainly is

2303

02:16:11,496 --> 02:16:13,865  
what Congress had  
in mind as they drafted this.

2304

02:16:14,966 --> 02:16:17,169  
And I would say I do think

2305

02:16:17,169 --> 02:16:21,806  
seizures will become more common  
as judges get experience with it.

2306

02:16:21,806 --> 02:16:24,809  
They start to see other cases develop,

2307

02:16:25,410 --> 02:16:29,581  
Congress gets less concerned about it,  
maybe loosen some of the provisions

2308

02:16:29,581 --> 02:16:32,951  
a little bit, or relax  
some of the pleading requirements.

2309

02:16:33,752 --> 02:16:37,489  
It has been very effective  
in trademark and copyright areas

2310

02:16:37,722 --> 02:16:40,625  
was one of the reasons  
it was included for trade secrets.

2311  
02:16:40,625 --> 02:16:43,628  
There is a role for it  
from a public policy role.

2312  
02:16:43,962 --> 02:16:46,498  
You can show the employee  
took the documents,

2313  
02:16:46,498 --> 02:16:49,501  
you should be entitled to a seizure.

2314  
02:16:49,868 --> 02:16:52,571  
And I think in copyright

2315  
02:16:52,571 --> 02:16:56,408  
and in trademark,  
you're typically entitled to a seizure

2316  
02:16:56,408 --> 02:17:00,345  
If you show bad conduct, bad acting here,  
if you can show

2317  
02:17:00,345 --> 02:17:04,716  
an employee stole something,  
you should be entitled to retrieve it.

2318  
02:17:06,151 --> 02:17:08,386  
And hopefully the law developed that way.

2319  
02:17:08,386 --> 02:17:11,456  
And I think judges, once they get

a little more familiar with things,

2320

02:17:11,456 --> 02:17:15,727

tend to be more receptive

and and marshals less

2321

02:17:15,727 --> 02:17:20,198

objectionable to the having to go

to somebody's house and sit for the day.

2322

02:17:20,198 --> 02:17:22,267

Right.

2323

02:17:22,267 --> 02:17:23,635

My prediction would be at it.

2324

02:17:23,635 --> 02:17:24,603

We're one year in now.

2325

02:17:24,603 --> 02:17:26,171

I think if we look one year out,

2326

02:17:26,171 --> 02:17:29,341

we'll see additional activity

around the seizure provision.

2327

02:17:29,341 --> 02:17:31,876

I think we'll see some additional seizure  
orders coming out of the courts.

2328

02:17:31,876 --> 02:17:35,513

But I think it'll continue

to be sparingly invoked.

2329

02:17:35,513 --> 02:17:38,083  
And I don't think we'll have you know,  
I don't think we have we haven't seen it.

2330  
02:17:38,083 --> 02:17:41,086  
I don't think we will see  
a problem of abuse

2331  
02:17:41,453 --> 02:17:44,456  
by parties of seizure provisions.

2332  
02:17:46,725 --> 02:17:47,759  
Well, that's great.

2333  
02:17:47,759 --> 02:17:50,762  
Thank you all for joining us today.

2334  
02:17:51,062 --> 02:17:52,430  
It's been a fun discussion.

2335  
02:17:54,099 --> 02:17:56,468  
We're going to take a 15 minute break now.

2336  
02:17:56,468 --> 02:17:59,671  
I think there's a coffee kiosk

2337  
02:17:59,671 --> 02:18:02,641  
kind of place down by those doors  
and we'll see you back.

2338  
02:18:04,175 --> 02:18:04,743  
I'm sorry.

2339  
02:18:04,743 --> 02:18:07,712

This coffee back are great,

2340

02:18:08,013 --> 02:18:11,016

but a rarity for a government event.

2341

02:18:12,150 --> 02:18:12,417

All right.

2342

02:18:12,417 --> 02:18:15,420

We'll see you back here at 1130.

2343

02:18:15,420 --> 02:18:18,423

Thanks,

2344

02:18:21,793 --> 02:18:22,961

Governor.

2345

02:18:22,961 --> 02:32:33,911

Music

2494

02:32:33,911 --> 02:32:34,512

Livestream.

2495

02:32:34,512 --> 02:32:40,050

Viewers can email their questions  
to Hollis Robinson, USPTO dot gov.

2496

02:32:40,584 --> 02:32:43,921

Please

include your name, organization and a

2497

02:32:43,954 --> 02:32:46,957

from a regional office  
switch Office please.

2498

02:32:47,591 --> 02:32:50,461

So our next panel is on trade,

2499

02:32:50,461 --> 02:32:53,430

secret protection

and foreign jurisdictions.

2500

02:32:53,464 --> 02:32:56,800

And we're very fortunate

to have, as panelists

2501

02:32:56,800 --> 02:33:00,070

today, three experts in the field

who I'd like to introduce.

2502

02:33:01,071 --> 02:33:04,775

Jim Pooley is from Orrick

Silicon Valley office and represents

2503

02:33:04,775 --> 02:33:08,479

clients in preventing and resolving

trade secrets and patent disputes,

2504

02:33:08,913 --> 02:33:10,581

is a former deputy director

2505

02:33:10,581 --> 02:33:14,351

general of the World Intellectual Property

Organization in Geneva,

2506

02:33:14,718 --> 02:33:18,222

where he is responsible for managing

the international patent system.

2507

02:33:18,889 --> 02:33:22,159

Through Law Journal Press,  
he publishes his treatise Trade Secrets,

2508

02:33:22,326 --> 02:33:25,062

and his most recent business  
book is Secrets

2509

02:33:25,062 --> 02:33:28,566

Managing Information  
in the Age of Cyber Espionage.

2510

02:33:29,033 --> 02:33:33,237

The Senate Judiciary Committee relied on  
Jen for expert testimony and advice

2511

02:33:33,237 --> 02:33:37,241

during the consideration of the recently  
passed defense Secrets Act.

2512

02:33:39,043 --> 02:33:42,479

Professor Mark Shultz is co-founder  
and director of the Center

2513

02:33:42,613 --> 02:33:45,015

for the Protection  
of Intellectual Property

2514

02:33:45,015 --> 02:33:49,687

at the Antonin Scalia Law School at George  
Mason University in Washington, DC,

2515

02:33:50,120 --> 02:33:51,622

as well as Professor of law

2516

02:33:51,622 --> 02:33:54,625  
at Southern Illinois University  
in Carbondale, Illinois.

2517

02:33:55,226 --> 02:33:58,862  
Professor Shultz is a frequent author  
and speaker known for his work

2518

02:33:58,862 --> 02:34:02,499  
on the law and economics  
of the Global Intellectual property system

2519

02:34:03,100 --> 02:34:05,236  
and one of his most influential projects.

2520

02:34:05,236 --> 02:34:09,073  
He worked with the Organization  
of Economic Cooperation and Development,

2521

02:34:09,506 --> 02:34:14,311  
to construct a groundbreaking  
global trade Secret Protection index.

2522

02:34:14,912 --> 02:34:18,716  
The TSP by the TSP is being used to frame

2523

02:34:18,716 --> 02:34:22,519  
policy discussions on this cutting edge  
topic in capitals around the world.

2524

02:34:23,053 --> 02:34:26,890  
Other recent projects  
have included an empirical that quantified

2525

02:34:26,890 --> 02:34:30,894  
for the first time  
the backlogs in patent offices worldwide.

2526  
02:34:31,195 --> 02:34:35,132  
A report on how patent innovation  
is meeting global health challenges

2527  
02:34:35,432 --> 02:34:39,303  
and the construction of a new global  
index of copyright strength.

2528  
02:34:41,672 --> 02:34:42,106  
Tomoko

2529  
02:34:42,106 --> 02:34:45,142  
Miyamoto  
is the head of the Patent Law section,

2530  
02:34:45,142 --> 02:34:48,512  
the Patent Law Division in the World  
Intellectual Property Organization.

2531  
02:34:48,846 --> 02:34:53,150  
She joined YPO  
in 1997, has worked on on various issues

2532  
02:34:53,150 --> 02:34:57,988  
with respect to patent policy, law  
and practices, including the development

2533  
02:34:57,988 --> 02:35:02,192  
of the international patent system  
and promotion of related treaties.

2534

02:35:02,726 --> 02:35:05,996

She also belongs to a team  
at the Secretariat serving for the YPO

2535

02:35:05,996 --> 02:35:09,199

Standing Committee on the Law of Patents  
that deals with progressive

2536

02:35:09,199 --> 02:35:12,202

development  
of the International patent system.

2537

02:35:12,202 --> 02:35:15,506

In addition to patent related matters,  
the Patent Law Division covers

2538

02:35:15,506 --> 02:35:17,374

the field of trade secrets.

2539

02:35:17,374 --> 02:35:18,909

Prior to working for YPO, Ms..

2540

02:35:18,909 --> 02:35:21,945

Miyamoto was a patent examiner,  
the Japan Patent Office,

2541

02:35:22,246 --> 02:35:25,249

and later worked  
in its international affairs division.

2542

02:35:25,282 --> 02:35:28,585

She holds a master's degree  
in electronics and engineering and an

2543

02:35:28,652 --> 02:35:32,156

LIM on IP law and management.

2544

02:35:34,892 --> 02:35:37,394

In 2014, the

2545

02:35:37,394 --> 02:35:41,999

OECD published a trade policy paper  
titled Approaches to Protection of

2546

02:35:41,999 --> 02:35:47,504

Undisclosed Information Trade Secrets,  
coauthored by Mark Schultz and Doug Lebel.

2547

02:35:47,604 --> 02:35:51,975

The paper utilized a structured  
comparative approach in examining

2548

02:35:52,443 --> 02:35:56,246

legal regimes around the world for  
protecting and enforcing trade secrets.

2549

02:35:57,381 --> 02:36:00,584

A trade Secret protection  
index was developed that set forth key

2550

02:36:00,584 --> 02:36:05,222

aspects of trade secret protection,  
and for the discussion today,

2551

02:36:05,656 --> 02:36:09,360

we will group the issues  
into these particular areas.

2552

02:36:09,626 --> 02:36:13,297

And Mark, could you give us

a brief description of this framework?

2553

02:36:14,865 --> 02:36:16,233

Certainly.

2554

02:36:16,233 --> 02:36:17,568

Thanks, Michael.

2555

02:36:17,568 --> 02:36:20,571

So I have some slides, very brief,

2556

02:36:20,771 --> 02:36:24,608

just just to orient everyone as to where  
we're from in this discussion.

2557

02:36:25,075 --> 02:36:29,079

So the trade Secret Protection  
Index was indeed a work

2558

02:36:29,079 --> 02:36:33,183

done at the request  
of OECD member countries.

2559

02:36:34,385 --> 02:36:36,153

And what they wanted was some

2560

02:36:36,153 --> 02:36:40,023

objective measurement  
of trade secret protection.

2561

02:36:40,491 --> 02:36:43,494

And so we set about doing that

2562

02:36:44,561 --> 02:36:46,397

with by creating an index.

2563

02:36:46,397 --> 02:36:50,534

And the way we did this  
is I liken it to digitizing the law,

2564

02:36:50,534 --> 02:36:53,537

which  
I think I can say to a more technical.

2565

02:36:53,670 --> 02:36:58,142

We we tried to break down the components

2566

02:36:58,142 --> 02:37:02,880

of an effective trade secret regime into  
yes or no questions.

2567

02:37:03,213 --> 02:37:07,985

For example, our is ex party  
preliminary relief available.

2568

02:37:08,619 --> 02:37:09,686

Yes or no.

2569

02:37:09,686 --> 02:37:12,923

And then we were able to score  
those individual components.

2570

02:37:12,923 --> 02:37:16,360

We came up with over three dozen  
individual components.

2571

02:37:16,693 --> 02:37:20,631

We re aggregated them into five  
major areas.

2572

02:37:20,664 --> 02:37:25,636

Those are the five major areas Michael's using to frame our discussion on.

2573

02:37:25,969 --> 02:37:28,338

So far, we've looked at about 40 countries.

2574

02:37:28,338 --> 02:37:30,474

We've looked at it over a span of

2575

02:37:31,508 --> 02:37:34,511

since since 1985 to 2010.

2576

02:37:34,545 --> 02:37:37,548

My academic center is currently

2577

02:37:37,681 --> 02:37:40,651

about to embark on updating the index.

2578

02:37:41,852 --> 02:37:44,855

So these are the five areas we came up with

2579

02:37:44,988 --> 02:37:47,224

definition of trade secrets and coverage.

2580

02:37:47,224 --> 02:37:50,327

You know, how how do how does a law define trade secrets?

2581

02:37:50,761 --> 02:37:52,629

What is covered?

2582

02:37:52,629 --> 02:37:55,232

What are the duties of the actors  
in the system?

2583

02:37:55,232 --> 02:37:58,769

And how is misappropriation  
defined as the second component?

2584

02:37:59,136 --> 02:38:02,673

The third component  
remedies and restrictions on liability.

2585

02:38:03,307 --> 02:38:07,377

The fourth component involves  
enforcement, investigation and discovery.

2586

02:38:07,377 --> 02:38:10,547

The litigation oriented components are.

2587

02:38:10,547 --> 02:38:16,086

The fifth part is, however, the legal  
system functions and related regulation.

2588

02:38:16,086 --> 02:38:18,422

Related regulation  
could be any intervention

2589

02:38:18,422 --> 02:38:23,494

that might prevent a party from enjoying  
its trade secrets, such as technology

2590

02:38:23,494 --> 02:38:27,531

transfer requirements  
that restrict licensing or rewrite

2591

02:38:27,531 --> 02:38:32,336

licensing terms or the term of trade  
secret protection in a license.

2592

02:38:32,703 --> 02:38:34,304

So these are five components.

2593

02:38:35,305 --> 02:38:37,608

And just to give you a quick scan,

2594

02:38:37,608 --> 02:38:43,580

this this slide shows you in a bar graph  
form the spread of scores among countries.

2595

02:38:43,580 --> 02:38:44,615

It's too small to read.

2596

02:38:44,615 --> 02:38:50,787

So this one gives you a sort of  
a brief slide showing you some countries.

2597

02:38:50,787 --> 02:38:54,558

We've got group of high protection  
countries that rank around four

2598

02:38:54,558 --> 02:38:57,995

and 4.5 on the index, which the US ranks

2599

02:38:58,195 --> 02:39:01,031

the the highest among all countries.

2600

02:39:01,031 --> 02:39:04,468

We had a group of middle protection

countries around 3.5

2601

02:39:04,735 --> 02:39:07,504  
and the low protection countries,  
including India,

2602

02:39:07,504 --> 02:39:10,908  
China, Indonesia  
and Russia, clustered around 2.5.

2603

02:39:11,441 --> 02:39:15,779  
I want to emphasize that  
these scores were not normative.

2604

02:39:15,812 --> 02:39:21,285  
They weren't based on opinion,  
although we did consult expert opinion

2605

02:39:21,285 --> 02:39:24,354  
as to  
whether something was actually available.

2606

02:39:24,488 --> 02:39:27,824  
If there was a law in the books that said  
you could get a preliminary injunction.

2607

02:39:28,158 --> 02:39:32,629  
But the consensus of expert  
was that that it was impossible.

2608

02:39:32,863 --> 02:39:35,566  
Are there  
injunctions were greatly delayed.

2609

02:39:35,566 --> 02:39:37,401

We did take that into account.

2610

02:39:37,401 --> 02:39:40,404

But but this

we tried to be as objective as possible.

2611

02:39:41,171 --> 02:39:44,074

And this slide finally just shows  
that among all countries,

2612

02:39:44,074 --> 02:39:47,544

there's been an evolution  
in trade secret protection,

2613

02:39:48,245 --> 02:39:50,681

that that all countries,  
even low protection

2614

02:39:50,681 --> 02:39:53,684

countries like the BRICS  
and the higher protection countries

2615

02:39:53,684 --> 02:39:57,120

like the OECD have strengthened  
their protection over the decades,

2616

02:39:57,621 --> 02:40:00,057

partly in response to the TRIPS agreement.

2617

02:40:00,057 --> 02:40:02,492

But it was happening before then.

2618

02:40:02,492 --> 02:40:05,762

And with that,  
I think, and the last while this slide

2619

02:40:05,762 --> 02:40:09,633

this for discussion later,  
but I'll just stop there

2620

02:40:10,367 --> 02:40:13,403

could you go back to the first slide  
that listed the five five areas?

2621

02:40:13,704 --> 02:40:14,371

Absolutely

2622

02:40:17,341 --> 02:40:18,842

right.

2623

02:40:18,842 --> 02:40:21,812

So we will we will

2624

02:40:22,179 --> 02:40:25,682

begin with the definition  
of trade secrets and coverage.

2625

02:40:25,916 --> 02:40:27,751

And if I could

2626

02:40:27,751 --> 02:40:29,086

ask the first question.

2627

02:40:29,086 --> 02:40:32,089

Sure.

2628

02:40:32,189 --> 02:40:35,192

Can you go back to the slide  
that shows Russia

2629

02:40:36,393 --> 02:40:39,396

my mark knows where I'm headed with this.

2630

02:40:39,429 --> 02:40:41,264

You know,

2631

02:40:41,264 --> 02:40:43,800

my own view is that the that

2632

02:40:43,800 --> 02:40:47,070

the work that Doug and Mark did on

2633

02:40:47,070 --> 02:40:51,375

this issue is probably the most impactful  
and helpful thing

2634

02:40:51,375 --> 02:40:55,078

that's happened in international trade  
secret protection since TRIPS.

2635

02:40:55,746 --> 02:40:57,948

It's a very, very useful study.

2636

02:40:57,948 --> 02:41:00,951

However, I want to point out one,

2637

02:41:01,151 --> 02:41:05,889

if you look at Russia at 2.5 and the U.S.

2638

02:41:05,889 --> 02:41:09,493

at 4.5, you might be forgiven for thinking

2639

02:41:09,493 --> 02:41:13,830  
that perhaps Russia provides about 55%

2640  
02:41:13,830 --> 02:41:17,367  
as good trade secret protection  
as does the U.S.

2641  
02:41:17,367 --> 02:41:21,638  
The reality it's closer to zero and,  
you know,

2642  
02:41:21,872 --> 02:41:24,641  
there are a number of reasons for this,  
and I think Mark can get into it.

2643  
02:41:24,641 --> 02:41:28,378  
But the the point is  
the actual on the ground

2644  
02:41:28,378 --> 02:41:32,883  
protect ability of secrets  
doesn't necessarily

2645  
02:41:33,216 --> 02:41:38,622  
lend itself to an examination  
according to, you know, putting things

2646  
02:41:38,622 --> 02:41:42,359  
into five equally weighted categories  
where you have a yes no

2647  
02:41:42,626 --> 02:41:48,765  
and the yes or the no may itself  
be something that's fairly qualitative.

2648

02:41:49,933 --> 02:41:51,601

So I just think we need to

2649

02:41:51,601 --> 02:41:56,339

keep in mind that this is very helpful,  
particularly

2650

02:41:56,339 --> 02:42:00,544

in looking for where it is  
that we need to focus our attention

2651

02:42:01,411 --> 02:42:04,514

in trying to bring the protection

2652

02:42:04,514 --> 02:42:08,251

systems of the world  
up to a rougher equilibrium.

2653

02:42:08,685 --> 02:42:13,423

But, you know, let's not draw to find

2654

02:42:13,523 --> 02:42:17,761

a conclusion from the ratios  
that we see here.

2655

02:42:18,628 --> 02:42:19,796

Thank you.

2656

02:42:19,796 --> 02:42:22,966

The With regards to definition  
and coverage,

2657

02:42:22,966 --> 02:42:27,370

the trip's definition of a trade secret  
requires that the information secret

2658

02:42:27,738 --> 02:42:31,541

as commercial value,  
because it's secret and has been subject

2659

02:42:31,541 --> 02:42:34,544

to reasonable steps to keep it secret.

2660

02:42:34,845 --> 02:42:37,347

What are some additional requirements  
that exist

2661

02:42:37,347 --> 02:42:41,718

in some jurisdictions for establishing  
the scope or the trade secret protection?

2662

02:42:42,152 --> 02:42:46,456

And are there challenges  
that these additional requirements

2663

02:42:46,456 --> 02:42:49,459

present?

2664

02:42:50,360 --> 02:42:51,061

Thanks, Michael.

2665

02:42:52,395 --> 02:42:55,132

Yes. So one thing I'll note

2666

02:42:55,132 --> 02:42:59,102

is that that that trip  
certainly succeeded in

2667

02:42:59,703 --> 02:43:03,206

propagating a common definition  
of trade, secret protection

2668

02:43:03,507 --> 02:43:08,044

and in fact a number, large  
number of countries simply cut and pasted

2669

02:43:08,145 --> 02:43:12,082

the trips Article 39 into their their law.

2670

02:43:12,949 --> 02:43:16,186

But what we find is extra requirements  
sneaking in

2671

02:43:16,186 --> 02:43:18,288

sometimes through court practice.

2672

02:43:18,288 --> 02:43:23,393

So what what experts in China  
will consistently tell you, for example,

2673

02:43:23,760 --> 02:43:27,864

is that Chinese courts have a strong  
preference for documentary evidence

2674

02:43:28,198 --> 02:43:31,401

combined with very limited opportunity  
for discovery.

2675

02:43:31,768 --> 02:43:35,005

So if you're supposed to put  
in original documentary evidence, but

2676

02:43:35,005 --> 02:43:39,743

you have no opportunity to discover it,

this creates a problem.

2677

02:43:40,010 --> 02:43:45,148

And effectively,

what the experts recommend

2678

02:43:45,148 --> 02:43:48,485

in Chinese courts

tend to require is a reduction to writing,

2679

02:43:49,653 --> 02:43:52,656

marking of trade secrets,

2680

02:43:52,923 --> 02:43:56,493

identification of trade secrets

to recipients

2681

02:43:57,060 --> 02:44:00,063

which which amounts to a set of extra requirements.

2682

02:44:00,430 --> 02:44:03,767

Russia is similar in this the set of extra

2683

02:44:03,767 --> 02:44:06,770

requirements of reduction

to writing and marking

2684

02:44:07,304 --> 02:44:11,708

and these are the sorts of very sorts of things that make trade secret cases hard

2685

02:44:11,875 --> 02:44:12,676

to prove.

2686

02:44:14,044 --> 02:44:16,947

And I

think Jim has some commentary on that.

2687

02:44:16,947 --> 02:44:21,251

Well, it's just just a little bit

more detail, I mean, to give you a flavor.

2688

02:44:22,152 --> 02:44:25,155

In in Russia and I'm told this

2689

02:44:26,089 --> 02:44:29,092

resulted from or is a

2690

02:44:30,093 --> 02:44:34,865

residual of the Soviet era in order

for your trade secrets to be recognized

2691

02:44:34,865 --> 02:44:39,402

as such, you have to keep an inventory,

I mean, an actual physical list.

2692

02:44:40,036 --> 02:44:43,106

And it

and it must be done by a certain person

2693

02:44:43,540 --> 02:44:47,978

who is designated for that,

who keeps track of exactly

2694

02:44:48,144 --> 02:44:53,350

which persons have access

to which secrets, at what period of time.

2695

02:44:53,950 --> 02:44:58,889

I you know, I've been told that results  
from the old days when the government

2696

02:44:58,889 --> 02:45:02,959

wanted to know what everybody knew  
about everything all the time.

2697

02:45:03,260 --> 02:45:06,029

But it at the end of the day,

2698

02:45:06,029 --> 02:45:09,032

you cannot be sure that your secrets

2699

02:45:09,032 --> 02:45:12,335

will be protected when you're working  
against a standard like that.

2700

02:45:12,335 --> 02:45:16,172

Yes, you can have trade secrets,  
but If they're going to be enforced.

2701

02:45:16,506 --> 02:45:20,710

You must show  
that you have been following a system

2702

02:45:20,710 --> 02:45:24,547

that is completely impractical  
for most modern businesses.

2703

02:45:25,582 --> 02:45:28,585

Tomorrow, the only thing to.

2704

02:45:33,623 --> 02:45:37,193

Yes. Well, in terms of the

some of the topics

2705

02:45:37,193 --> 02:45:41,798

or some of the issue that we discussed,  
now you are maybe.

2706

02:45:42,699 --> 02:45:43,500

Well, okay. Yes.

2707

02:45:43,500 --> 02:45:46,903

It's related to the definition  
of these trade secret

2708

02:45:46,903 --> 02:45:50,307

in terms of the secrecy, in terms of where

2709

02:45:51,341 --> 02:45:55,312

reasonable steps are taken, in terms of  
there is a value as a

2710

02:45:55,712 --> 02:46:01,885

as it being a secret,  
but it might more related to how

2711

02:46:02,252 --> 02:46:07,457

what kind of proof or what  
how you how you prove

2712

02:46:07,857 --> 02:46:11,227

that a certain piece of information  
is secret or not,

2713

02:46:11,394 --> 02:46:15,265

or that those type of issues  
are also involved

2714

02:46:15,332 --> 02:46:19,135  
in these questions  
and like to point out that

2715

02:46:20,270 --> 02:46:25,141  
according to this or OECD study,  
some of the elements

2716

02:46:25,675 --> 02:46:30,780  
as an additional event  
includes the issue of they

2717

02:46:32,148 --> 02:46:33,683  
the criterion of the

2718

02:46:33,683 --> 02:46:37,020  
use of the information  
to the detriment of the.

2719

02:46:37,554 --> 02:46:42,492  
In other words,  
that the it's a to be a trade secret

2720

02:46:42,759 --> 02:46:45,762  
that information should be used

2721

02:46:45,962 --> 02:46:48,965  
to the detriment of the owner.

2722

02:46:49,265 --> 02:46:52,202  
And I think this is a kind  
of a very good example

2723

02:46:52,202 --> 02:46:56,439  
of how these national laws  
or national practices

2724

02:46:56,673 --> 02:47:00,910  
are pretty much influenced  
by the legal tradition

2725

02:47:01,311 --> 02:47:05,048  
or the national legal framework  
in this particular case

2726

02:47:05,048 --> 02:47:08,918  
of the use of the information  
to the detriment of owner,

2727

02:47:09,019 --> 02:47:12,022  
which is more found in the

2728

02:47:12,055 --> 02:47:15,392  
in the English law tradition,

2729

02:47:15,959 --> 02:47:19,796  
where the trade secrets are more

2730

02:47:19,929 --> 02:47:25,802  
coming from the concept  
of the breach of confidence

2731

02:47:26,302 --> 02:47:31,307  
or when there are trusted relationship  
and somehow that trust to

2732

02:47:31,307 --> 02:47:36,413  
a relationship is breached and that brings

2733

02:47:36,579 --> 02:47:39,582  
some kind of liability to it.

2734

02:47:39,883 --> 02:47:41,184  
So this

2735

02:47:42,252 --> 02:47:44,387  
type of,

2736

02:47:44,387 --> 02:47:48,158  
let's say, very deep legal

2737

02:47:48,425 --> 02:47:51,761  
tradition might influence the ways

2738

02:47:52,028 --> 02:47:57,434  
that the current national laws express  
What the trade secret might be.

2739

02:47:57,700 --> 02:47:59,269  
Thank you.

2740

02:47:59,269 --> 02:48:03,273  
There are a variety of acts  
covered by civil infringement

2741

02:48:03,273 --> 02:48:07,644  
that include breach of duty,  
misappropriation, third party liability.

2742

02:48:08,445 --> 02:48:12,816  
Could we discuss some challenges  
that arise, for instance,

2743

02:48:12,816 --> 02:48:15,819

where a breach of duty is recognized  
as the only covered

2744

02:48:17,120 --> 02:48:20,557

and what problems

2745

02:48:20,557 --> 02:48:23,560

this could could present for trade  
secret owners?

2746

02:48:25,462 --> 02:48:26,930

You want to start?

2747

02:48:26,930 --> 02:48:28,298

Well, Jim.

2748

02:48:28,298 --> 02:48:31,301

Yeah, I mean, as a as a practical matter,

2749

02:48:32,368 --> 02:48:36,139

you know, access improper access  
to, trade secrets comes

2750

02:48:36,139 --> 02:48:41,778

not just from those who necessarily  
have made a direct relationship

2751

02:48:41,778 --> 02:48:45,782

with the trade secret holder,  
but perhaps for

2752

02:48:46,082 --> 02:48:51,020

perhaps the employees who work for that  
that owner.

2753

02:48:51,054 --> 02:48:56,759

And without a direct contractual  
relationship, if the system requires there

2754

02:48:56,759 --> 02:49:01,564

to be privity of contract, for example,  
you've lost the opportunity for

2755

02:49:02,198 --> 02:49:05,568

for effective enforcement. So

2756

02:49:06,836 --> 02:49:07,570

you know, and

2757

02:49:07,570 --> 02:49:11,941

not to mention hacking  
where there's no relationship at all.

2758

02:49:12,475 --> 02:49:17,380

So the ideal situation is one

2759

02:49:17,380 --> 02:49:20,450

in which I think as as the

2760

02:49:21,718 --> 02:49:25,822

as TRIPS anticipates  
liability is established

2761

02:49:25,822 --> 02:49:30,093

when someone knew or had reason

2762

02:49:30,093 --> 02:49:34,597  
to know because of the circumstances  
that the information was to be

2763  
02:49:34,597 --> 02:49:37,600  
confidential  
and misused, used it in some way.

2764  
02:49:39,202 --> 02:49:40,670  
So at a high level,

2765  
02:49:40,670 --> 02:49:43,673  
this is is one place

2766  
02:49:43,673 --> 02:49:47,010  
where where countries differ  
in one important place,

2767  
02:49:47,010 --> 02:49:51,014  
where countries differ is there there's  
there's a large number of countries where

2768  
02:49:51,314 --> 02:49:56,052  
a third party misappropriation  
is not covered by trade secret law.

2769  
02:49:56,352 --> 02:50:00,390  
So corporate espionage,  
it has to be based on a breach of duty.

2770  
02:50:01,658 --> 02:50:07,830  
And as as noted, countries  
where there's an English legal heritage is

2771  
02:50:07,964 --> 02:50:11,034

is based there trade secret protection

2772

02:50:11,401 --> 02:50:14,370

on the idea of breach of confidence  
or breach of duty.

2773

02:50:14,637 --> 02:50:17,774

Now, these are some countries  
that tend to rely on

2774

02:50:17,774 --> 02:50:20,977

the common law still for the most part,  
rather than statute.

2775

02:50:21,511 --> 02:50:24,814

And in England, English law has evolved

2776

02:50:24,847 --> 02:50:29,152

beyond a strict requirement  
of of breach of duty

2777

02:50:29,552 --> 02:50:34,624

on the one of the leading cases  
of the 1948 case of Saltzman.

2778

02:50:34,924 --> 02:50:38,628

And the reason I'm bringing up  
that it's a 19 eight case

2779

02:50:38,628 --> 02:50:42,765

is there's a large number of countries  
that soon became independent

2780

02:50:42,765 --> 02:50:46,436

from England after soon after 1948.

2781

02:50:46,769 --> 02:50:49,706

And so their reliance  
on English precedent,

2782

02:50:49,706 --> 02:50:53,042

the direct applicability of English  
precedent, ends there.

2783

02:50:53,343 --> 02:50:56,446

What they chose to do  
after that makes a difference.

2784

02:50:56,479 --> 02:50:57,080

So you find

2785

02:50:58,381 --> 02:50:59,616

surprising countries like

2786

02:50:59,616 --> 02:51:03,386

New Zealand, where there is no clear  
third clear

2787

02:51:03,386 --> 02:51:07,557

sanction of third party misappropriation  
under the laws of New Zealand.

2788

02:51:08,157 --> 02:51:11,160

India is another country  
where there's no clear

2789

02:51:11,261 --> 02:51:13,830

sanction of third party misappropriation.

2790

02:51:13,830 --> 02:51:18,468

You have to have a duty, a prior duty  
which is based on relationship.

2791

02:51:19,269 --> 02:51:21,904

So so in some countries,

2792

02:51:21,904 --> 02:51:26,175

proving third party corporate espionage  
or these more complex situations

2793

02:51:26,175 --> 02:51:30,813

like are like Jim Jim talked about  
is going to be extremely difficult.

2794

02:51:31,214 --> 02:51:34,150

Are there some other quirks  
you find in loss, too,

2795

02:51:34,150 --> 02:51:37,153

with respect to this this coverage issue?

2796

02:51:37,920 --> 02:51:40,923

So there are some countries where,

2797

02:51:41,357 --> 02:51:45,395

for example, in Germany  
where the employee, an employee is allowed

2798

02:51:45,395 --> 02:51:49,832

to use a secret on their own behalf  
so they could start their own business.

2799

02:51:50,066 --> 02:51:52,001

They just can't give it to a third party.

2800

02:51:53,603 --> 02:51:54,470

And then

2801

02:51:54,470 --> 02:52:00,043

under Swedish law, criminal sanctions  
don't apply against parties

2802

02:52:00,043 --> 02:52:04,380

who had who had authorized access  
originally.

2803

02:52:04,614 --> 02:52:08,951

So an employee is  
who was allowed to access the secret

2804

02:52:09,118 --> 02:52:12,255

can't be held  
criminally liable under Swedish law.

2805

02:52:13,122 --> 02:52:16,192

Finally, a more these  
those are two quirky exceptions.

2806

02:52:16,192 --> 02:52:20,229

And a more important point  
is even in countries

2807

02:52:20,229 --> 02:52:24,467

where there's a breach of duty  
basis or trade secret law,

2808

02:52:25,234 --> 02:52:28,137

you to look to whether there is

2809

02:52:28,137 --> 02:52:32,608

an implied duty to keep your employers  
or business partners secrets,

2810

02:52:33,543 --> 02:52:37,547

or whether it's based  
strictly privity of contract, as Jim said.

2811

02:52:37,880 --> 02:52:42,452

And so there are there's a large variance  
as to whether implied duty

2812

02:52:43,453 --> 02:52:44,187

applies.

2813

02:52:44,187 --> 02:52:48,291

And then there's there's variance  
as to whether implied

2814

02:52:48,291 --> 02:52:52,128

duty lasts  
beyond the employment relationship.

2815

02:52:52,895 --> 02:52:56,432

And so this is why  
we get this uneven coverage.

2816

02:52:56,432 --> 02:53:00,236

And it can really matter as as Mike  
Michael asked

2817

02:53:00,269 --> 02:53:04,140

that does it you know, how does it affect  
the enforcement of a case where you can

2818

02:53:04,140 --> 02:53:07,944

imagine if you don't have a specific  
contract with an employee

2819

02:53:08,911 --> 02:53:10,012

or your contract's not

2820

02:53:10,012 --> 02:53:14,650

specific enough as to what their duty was  
and they leave employment?

2821

02:53:14,684 --> 02:53:17,887

If you're in a jurisdiction  
where you're relying on implied duty,

2822

02:53:17,887 --> 02:53:21,391

but implied duty ends with employment,  
you're out of luck.

2823

02:53:21,391 --> 02:53:25,261

And that's usually exactly  
when you need to rely on the of duty

2824

02:53:25,261 --> 02:53:28,798

is is they after they leave employment  
not while they're still employed.

2825

02:53:29,632 --> 02:53:32,602

Tomoko

2826

02:53:33,536 --> 02:53:35,037

I don't have any points

2827

02:53:35,037 --> 02:53:39,008

on this breach of confidence,  
but I have another point if I may.

2828

02:53:39,041 --> 02:53:41,978

Can I read it now?

2829

02:53:41,978 --> 02:53:46,315

Okay, then it's completely there's a point  
that before the coffee break

2830

02:53:46,315 --> 02:53:51,154

we've heard a lot  
about how the technology influences

2831

02:53:51,521 --> 02:53:54,357

the protection of trade secret, and

2832

02:53:54,357 --> 02:53:57,360

I think that's also

2833

02:53:57,360 --> 02:54:00,363

the technological development  
may also affect

2834

02:54:00,496 --> 02:54:03,332

how this of the trade secret

2835

02:54:03,332 --> 02:54:06,269

act can be either interpreted

2836

02:54:06,269 --> 02:54:09,272

or how it can be developed as well.

2837

02:54:09,272 --> 02:54:11,174

And I think  
these technological developments

2838  
02:54:11,174 --> 02:54:15,344  
it is kind of a double  
edged sword in a way.

2839  
02:54:15,511 --> 02:54:18,614  
It help us to better protect

2840  
02:54:18,981 --> 02:54:22,752  
our secret information  
and also better identify

2841  
02:54:22,752 --> 02:54:25,755  
the misappropriation  
as we have heard before.

2842  
02:54:25,788 --> 02:54:28,591  
But as the same time, the

2843  
02:54:28,591 --> 02:54:31,828  
what could have been a secret information

2844  
02:54:32,161 --> 02:54:35,698  
in decades ago may not be the secret

2845  
02:54:36,332 --> 02:54:39,836  
information qualifying  
to trade secret protection anymore.

2846  
02:54:40,203 --> 02:54:41,204  
As an example,

2847

02:54:42,505 --> 02:54:45,842  
as clearly stated in the trust agreement,

2848  
02:54:46,142 --> 02:54:49,712  
even if a piece of information  
can be a public information,

2849  
02:54:49,712 --> 02:54:53,449  
the assembly of those known information

2850  
02:54:53,449 --> 02:54:56,486  
can be protected as a trade secret.

2851  
02:54:57,053 --> 02:54:59,989  
And in those cases, this

2852  
02:54:59,989 --> 02:55:03,459  
with all these technical development,  
all the big data,

2853  
02:55:04,727 --> 02:55:06,796  
big data processing

2854  
02:55:06,796 --> 02:55:10,933  
and the analysis of the digital datas  
and so on,

2855  
02:55:11,501 --> 02:55:14,770  
it might be possible to think that

2856  
02:55:15,705 --> 02:55:18,307  
these assembling all of the data's

2857  
02:55:18,307 --> 02:55:21,978

which could be subject  
the trade secret before, may not

2858

02:55:23,045 --> 02:55:26,048  
well be the cases

2859

02:55:27,116 --> 02:55:30,753  
to be qualified  
as a trade secret protection.

2860

02:55:30,753 --> 02:55:35,625  
And also the same thing  
happens to the test of taking

2861

02:55:35,625 --> 02:55:39,662  
a reasonable two step  
to keep the information secret,

2862

02:55:39,662 --> 02:55:43,799  
and that could be also affected  
by the technological development.

2863

02:55:44,200 --> 02:55:45,234  
Thank you.

2864

02:55:45,234 --> 02:55:47,670  
The second component listed in

2865

02:55:47,670 --> 02:55:50,706  
the OECD  
study is duties and misappropriation.

2866

02:55:50,740 --> 02:55:54,710  
And I'd like to turn to something  
we I don't think we've talked about yet

2867

02:55:54,710 --> 02:55:57,914

this morning,  
and it has to do with something Marc

2868

02:55:58,514 --> 02:56:01,817

happened to mention  
with regards to employees

2869

02:56:03,586 --> 02:56:04,554

changing jobs.

2870

02:56:04,554 --> 02:56:09,692

So with regard to employee and non-compete  
agreements, can can you discuss

2871

02:56:09,692 --> 02:56:13,663

how different jurisdictions  
handle this, handles this issue?

2872

02:56:15,831 --> 02:56:16,399

Sure.

2873

02:56:16,399 --> 02:56:17,633

Okay.

2874

02:56:17,633 --> 02:56:21,003

Well, as you can imagine,  
there's there's there's wide variance.

2875

02:56:21,003 --> 02:56:23,906

There's one point I'll start with, though.

2876

02:56:23,906 --> 02:56:26,909

I'd say essentially everywhere

2877

02:56:27,243 --> 02:56:29,912

there's there's some version

2878

02:56:29,912 --> 02:56:32,915

of a an exception

2879

02:56:32,949 --> 02:56:37,353

or a limitation,

I'd say on secret protection.

2880

02:56:37,486 --> 02:56:43,192

Any post employment

duty is limited in some way, shape or form

2881

02:56:43,526 --> 02:56:47,263

by the employees

need to be able to make a living

2882

02:56:47,597 --> 02:56:51,500

and their ability to take their general  
skills and knowledge with them.

2883

02:56:52,134 --> 02:56:55,371

You know, my my pet theory

as to why this is so universal

2884

02:56:55,504 --> 02:56:58,507

that we're all we're all both

2885

02:56:58,941 --> 02:57:02,578

some of us may sometimes

wear employer hats or we may be lawyers

2886

02:57:02,945 --> 02:57:06,983

or judges adjudicating a case,  
but are also employees.

2887

02:57:06,983 --> 02:57:11,954

And we certainly are horrified at the idea  
and sympathetic to the idea of of

2888

02:57:12,655 --> 02:57:16,125

of needing to be able to to move on

2889

02:57:16,125 --> 02:57:20,630

and take a new job and be able to continue  
to practice in our field.

2890

02:57:21,297 --> 02:57:23,699

With that said, there's wide variance

2891

02:57:23,699 --> 02:57:27,236

as to whether some of these duties are

2892

02:57:28,204 --> 02:57:29,005

the legal

2893

02:57:29,005 --> 02:57:32,008

forms  
of some of these duties are enforceable.

2894

02:57:33,075 --> 02:57:36,078

So, for example, agreements,

2895

02:57:36,078 --> 02:57:40,082

just as there are varying,  
there's wide variance among U.S.

2896

02:57:40,082 --> 02:57:43,519

states as to the enforceability  
of non-compete agreements.

2897

02:57:43,953 --> 02:57:48,457

There's Wide variance among countries.

2898

02:57:48,457 --> 02:57:52,595

And as you can imagine,  
I think some countries with a more

2899

02:57:53,262 --> 02:57:57,166

I'd say a socialist origin,  
a socialist legal origin,

2900

02:57:57,166 --> 02:58:02,004

or where the last or labor  
movements have been more important are

2901

02:58:02,271 --> 02:58:06,842

are extremely restrictive of agreements,  
if not prohibitive, of them.

2902

02:58:07,209 --> 02:58:10,813

So China doesn't  
allow non-compete agreements

2903

02:58:10,813 --> 02:58:14,050

except for senior management,  
and then only with compensation.

2904

02:58:14,517 --> 02:58:17,520

Vietnam doesn't allow for non-compete  
agreements.

2905

02:58:17,820 --> 02:58:21,290

Ah, you find in many Latin  
American countries where labor movements

2906

02:58:21,290 --> 02:58:22,692

were strong

2907

02:58:22,692 --> 02:58:26,662

noncompete agreements  
are severely limited, severely limited on,

2908

02:58:27,063 --> 02:58:30,199

you know,  
they're either prohibited or compensation

2909

02:58:30,533 --> 02:58:35,037

equivalent  
to a large percentage of salary required.

2910

02:58:36,272 --> 02:58:39,508

And so the bottom line is

2911

02:58:39,508 --> 02:58:44,580

there's there's quite a bit of restriction  
on these agreements.

2912

02:58:44,880 --> 02:58:50,419

I'd also say another kind,  
another kind of limitation that's that's

2913

02:58:50,419 --> 02:58:53,422

pretty common is not

2914

02:58:53,556 --> 02:58:56,492  
are you allowed  
to use your general skills and knowledge.

2915  
02:58:56,492 --> 02:59:01,564  
But I'd say almost everywhere universally  
they're limited to reasonableness

2916  
02:59:01,564 --> 02:59:06,102  
with respect to time, duration, scope

2917  
02:59:06,235 --> 02:59:10,506  
of, of fields covered and even geography.

2918  
02:59:10,806 --> 02:59:13,542  
So what we find is, is,

2919  
02:59:13,542 --> 02:59:16,545  
you know,  
very familiar restrictions in the U.S.

2920  
02:59:16,712 --> 02:59:19,715  
are in some way, shape or form,

2921  
02:59:20,316 --> 02:59:23,319  
you know, almost universally applied.

2922  
02:59:24,386 --> 02:59:29,291  
You know, the whole issue of non-compete  
agreements is very controversial,

2923  
02:59:29,291 --> 02:59:33,829  
both as a matter of practice and,  
of course, public policy within the U.S.

2924

02:59:34,163 --> 02:59:36,532

And we've seen

2925

02:59:36,532 --> 02:59:39,368

we've seen communications from the White House in the last couple of years

2926

02:59:39,368 --> 02:59:44,173

about the previous administration on issue critical of non-compete.

2927

02:59:44,206 --> 02:59:45,641

On the other hand, businesses

2928

02:59:46,809 --> 02:59:47,810

justify them.

2929

02:59:47,810 --> 02:59:51,313

And it's and it's a rational argument that trade secret

2930

02:59:51,313 --> 02:59:55,584

litigation is messy and it's difficult because the person

2931

02:59:55,584 --> 02:59:59,522

who has taken the information usually does it in secret.

2932

02:59:59,755 --> 03:00:03,692

And figuring out that they've done it much less figuring out

2933

03:00:03,692 --> 03:00:08,297

how is sometimes beyond the capability  
of the trade secret owner.

2934

03:00:08,297 --> 03:00:13,836

And so having a non-compete agreement  
while appearing to be a fairly blunt

2935

03:00:14,236 --> 03:00:19,742

instrument serves  
and in the view of business, the purpose

2936

03:00:19,742 --> 03:00:25,181

of ensuring that their secret information  
will not be abused.

2937

03:00:25,181 --> 03:00:30,452

Now, to the extent that you are operating  
in a jurisdiction that does not allow

2938

03:00:30,986 --> 03:00:32,955

non-compete agreements, I'm sorry,

2939

03:00:32,955 --> 03:00:36,692

back up to the extent that you're  
operating in a jurisdiction that doesn't

2940

03:00:36,992 --> 03:00:42,331

provide robust enforcement  
for trade, secret rights, then

2941

03:00:42,498 --> 03:00:45,901

having access to non-compete agreements  
may be

2942

03:00:46,202 --> 03:00:49,205

that much that much more important.

2943

03:00:49,672 --> 03:00:54,543

And also just observe that, you know,  
apropos to what Mark was just saying,

2944

03:00:54,977 --> 03:01:00,883

when we  
when we saw the debate happening in the EU

2945

03:01:00,883 --> 03:01:06,021

before the European Parliament  
about the EU Trade Secrets Directive,

2946

03:01:06,789 --> 03:01:10,926

mobility of labor was a very,  
very strong theme,

2947

03:01:11,427 --> 03:01:14,864

you know, driven,  
some people felt by a strong populist

2948

03:01:16,365 --> 03:01:18,801

sense within within that body in it.

2949

03:01:18,801 --> 03:01:22,671

And it led to not only some exceptions  
that have to do

2950

03:01:22,671 --> 03:01:26,876

with the ability of labor  
to discuss certain issues

2951

03:01:28,110 --> 03:01:31,580

among themselves, but also some very broad

2952

03:01:31,580 --> 03:01:35,718

exceptions that exist under the EU  
Trade Secrets Directive

2953

03:01:35,718 --> 03:01:39,021

that that don't exist under U.S. law.

2954

03:01:39,455 --> 03:01:42,458

So that may have been fueled  
by these kinds of concerns

2955

03:01:42,691 --> 03:01:46,195

and perhaps even the the misconception

2956

03:01:46,562 --> 03:01:50,532

that exists frequently  
in a lot of countries that trade

2957

03:01:50,532 --> 03:01:54,270

secret protection,  
that the protection of commercial secrecy

2958

03:01:54,503 --> 03:01:59,041

automatically acts  
as a drag on employee mobility.

2959

03:01:59,441 --> 03:02:02,244

There is that suspicion that exists.

2960

03:02:02,244 --> 03:02:06,115

And it's whether,  
you know, it's grounded in any experience

2961

03:02:06,782 --> 03:02:08,217  
is a is another question.

2962  
03:02:08,217 --> 03:02:14,089  
But that very frequently  
the attitude that you run into that trade,

2963  
03:02:14,089 --> 03:02:19,261  
that trade secrets, business  
secrets are a bad thing, in part

2964  
03:02:19,261 --> 03:02:23,565  
because they somehow affect employee  
mobility, in part

2965  
03:02:23,565 --> 03:02:27,770  
because they keep important information  
from the public

2966  
03:02:28,270 --> 03:02:32,341  
about ingredients that are being used  
that could be dangerous, etc., etc..

2967  
03:02:32,441 --> 03:02:35,444  
And the whole idea of secrecy  
is just anathema

2968  
03:02:35,511 --> 03:02:39,982  
in a society that we like to think  
is more and more transparent.

2969  
03:02:39,982 --> 03:02:44,553  
So we have those attitudes that operate  
behind the scenes on these issues.

2970

03:02:45,287 --> 03:02:47,222  
Tomoko, Do you have anything to add?

2971  
03:02:49,425 --> 03:02:50,993  
Yes, Well,

2972  
03:02:50,993 --> 03:02:56,432  
in connection with this employment issue,  
I think since a trade secret covers

2973  
03:02:56,432 --> 03:02:59,902  
quite the Varela type of information,  
not only the technical

2974  
03:03:00,302 --> 03:03:05,341  
technical information, but  
all kind of business information or even

2975  
03:03:06,542 --> 03:03:11,113  
sometimes personal data  
or personal information,

2976  
03:03:11,747 --> 03:03:15,784  
There is definitely  
some political discussions

2977  
03:03:15,784 --> 03:03:21,123  
that goes beyond the pure trade secret

2978  
03:03:22,358 --> 03:03:24,193  
protection law.

2979  
03:03:24,193 --> 03:03:28,197  
When we discuss this, this topic

2980

03:03:28,497 --> 03:03:33,669

that really goes to the human rights  
or competition labor law too,

2981

03:03:33,669 --> 03:03:36,672

just to name a few and,

2982

03:03:36,872 --> 03:03:42,745

it's also well, that that is a case,  
I think in the case of the EU directive,

2983

03:03:42,745 --> 03:03:46,015

when the discussion is going  
beyond one country

2984

03:03:46,281 --> 03:03:49,852

that involves more than one country,  
more than one jurisdiction,

2985

03:03:50,152 --> 03:03:54,423

or even going to  
the international discussions,

2986

03:03:54,957 --> 03:03:57,893

it gets very complex when it touches upon

2987

03:03:57,893 --> 03:04:01,964

all kind of different laws and the basic

2988

03:04:01,964 --> 03:04:05,868

principle of the basic basic principle,

2989

03:04:06,235 --> 03:04:09,405

because if it's a discussion

within the one jurisdiction,

2990

03:04:09,638 --> 03:04:13,842

you have your Constitution,  
you have your your common understanding

2991

03:04:14,143 --> 03:04:19,715

of your basic right, which not be the case  
when the discussion goes to the

2992

03:04:19,982 --> 03:04:26,055

at the international level, where you do  
not necessarily have the enforceable

2993

03:04:27,489 --> 03:04:30,492

law governing these

2994

03:04:30,692 --> 03:04:34,096

common, let's say, basic principles.

2995

03:04:34,696 --> 03:04:38,000

Thank you for one.

2996

03:04:38,100 --> 03:04:41,970

One point about the skepticism regarding

2997

03:04:41,970 --> 03:04:45,541

what trade secret protection  
might do to employee mobility.

2998

03:04:46,041 --> 03:04:49,411

There's there's a distinction  
I like to make that that's important

2999

03:04:49,411 --> 03:04:52,781  
when thinking about this area of law  
and this this type of protection.

3000  
03:04:53,415 --> 03:04:59,388  
The the in the absence of effective  
legal protection, effective and reliable

3001  
03:04:59,388 --> 03:05:03,692  
legal protection of trade secrets,  
what you don't get is no secrecy.

3002  
03:05:03,692 --> 03:05:08,964  
You get more secrecy and businesses  
take more measures

3003  
03:05:08,964 --> 03:05:14,570  
to hold their secrets, close  
physical measures and business practices.

3004  
03:05:14,570 --> 03:05:17,573  
What are some of those business practices  
that involve employment?

3005  
03:05:17,840 --> 03:05:20,943  
Well, one thing you might do  
is keep your business

3006  
03:05:20,943 --> 03:05:24,279  
smaller, restrict  
your secrets to a smaller control group.

3007  
03:05:24,513 --> 03:05:26,448  
People on whom you can rely.

3008

03:05:26,448 --> 03:05:30,419

Who can you rely on family,  
Or maybe you use ethnic

3009

03:05:30,419 --> 03:05:35,324

or clan networks,  
some sort of affinity to that.

3010

03:05:35,324 --> 03:05:37,192

You keep your secrets closer,

3011

03:05:37,192 --> 03:05:40,829

which means you're less likely  
to collaborate with other businesses,

3012

03:05:41,096 --> 03:05:44,199

less likely to hire people  
who might eventually leave,

3013

03:05:44,700 --> 03:05:47,870

less likely to spread your knowledge  
to the organization.

3014

03:05:48,437 --> 03:05:53,609

And so having less effective  
trade secret protection may ironically

3015

03:05:54,109 --> 03:05:59,448

lead to more secrecy of a certain kind  
and less employee,

3016

03:05:59,848 --> 03:06:03,752

less spreading of knowledge  
and general skills among employees.

3017

03:06:03,886 --> 03:06:07,389

Yeah, this was a point  
made by the Supreme Court in the quantity

3018

03:06:07,389 --> 03:06:12,995

versus background decision in 1974  
that if we didn't have trade secret

3019

03:06:12,995 --> 03:06:17,266

protection, there would tend to be  
hoarding and businesses

3020

03:06:17,266 --> 03:06:20,669

would have to spend a whole lot more on  
physical security and they wouldn't grow.

3021

03:06:22,304 --> 03:06:22,971

Thank you.

3022

03:06:22,971 --> 03:06:27,276

The moving on to the  
to the next component under the Oakley

3023

03:06:27,376 --> 03:06:31,079

study is remedies  
and restrictions on liability

3024

03:06:31,947 --> 03:06:35,117

with regard to civil remedies,  
there's there's a bundle of remedies

3025

03:06:35,117 --> 03:06:36,318

that could be available,

3026

03:06:36,318 --> 03:06:39,655

including preliminary  
and permanent injunctions, ex parte de

3027

03:06:40,355 --> 03:06:43,091  
preliminary injunctions, delivery  
or destruction

3028

03:06:43,091 --> 03:06:47,563  
of the merchandise, compensatory damages  
and defendants profits,

3029

03:06:47,563 --> 03:06:50,799  
and then possibly punitive  
or statutory damages.

3030

03:06:52,334 --> 03:06:54,303  
In your view what's required

3031

03:06:54,303 --> 03:06:57,773  
to have an effective  
injunctive relief in practice.

3032

03:06:58,140 --> 03:07:01,410  
And does injunctive relief  
typically include the delivery

3033

03:07:01,410 --> 03:07:04,413  
of infringing materials  
and or destruction?

3034

03:07:06,915 --> 03:07:07,382  
Well,

3035

03:07:07,382 --> 03:07:11,220  
yeah, injunctive relief requires

well, we'll

3036

03:07:11,220 --> 03:07:15,190  
probably get into this in the next issue,  
but it requires access to proof.

3037

03:07:15,190 --> 03:07:18,293  
So that the plaintiff understands  
what's going on

3038

03:07:18,560 --> 03:07:22,364  
and can fashion  
a reasonable request to the court.

3039

03:07:22,364 --> 03:07:27,469  
If you can't do that,  
then you know, it it it's a

3040

03:07:28,937 --> 03:07:31,940  
it's something to aspire  
to, but you'll never be able to get it.

3041

03:07:32,207 --> 03:07:35,410  
But if you can get you know, if you have  
the proof and can get into court,

3042

03:07:35,410 --> 03:07:39,314  
what you need is a court  
that can act quickly

3043

03:07:39,615 --> 03:07:42,985  
based on the evidence  
that is presented to it

3044

03:07:43,252 --> 03:07:50,559

and that can issue effective orders  
that will stop further promulgation of the

3045

03:07:50,592 --> 03:07:54,630  
of the information and basically maintain  
this to the status quo.

3046

03:07:54,630 --> 03:07:56,865  
That's The that's the whole idea.

3047

03:07:56,865 --> 03:08:00,302  
Now, sometimes  
part of part of making that happen

3048

03:08:00,469 --> 03:08:04,306  
involves  
seizing something and returning it.

3049

03:08:04,840 --> 03:08:08,377  
But again, you have to  
you have to start with the structure

3050

03:08:08,377 --> 03:08:13,649  
of having a judicial system  
that can effectively get compliance

3051

03:08:14,516 --> 03:08:17,286  
and do it quickly

3052

03:08:17,286 --> 03:08:22,457  
or so the the importance of of preliminary  
relief is

3053

03:08:22,524 --> 03:08:27,896  
is is so essential

because, you know, as Jim said,

3054

03:08:28,330 --> 03:08:32,901

really that that may be  
the most binary choice in the system.

3055

03:08:32,901 --> 03:08:34,469

If you if you don't have that,

3056

03:08:34,469 --> 03:08:37,472

you don't really have  
effective trade secret protection.

3057

03:08:37,639 --> 03:08:38,740

There are a number of other things

3058

03:08:38,740 --> 03:08:41,209

that can destroy  
effective trade secret protection.

3059

03:08:41,209 --> 03:08:45,314

And and as Jim said in his opening comment  
about our index,

3060

03:08:45,314 --> 03:08:49,484

there's really a discontinuity you either  
have effective protection or you don't.

3061

03:08:49,484 --> 03:08:55,257

It's it's not not on a sloping scale  
like like the the original slide showed

3062

03:08:56,425 --> 03:08:59,928

preliminary relief  
is one of those points of discontinuity

3063

03:08:59,928 --> 03:09:04,633

If you can't stop your  
if you can't stop your competitors

3064

03:09:05,267 --> 03:09:09,404

from using your secrets,  
you really don't have an effective system.

3065

03:09:09,738 --> 03:09:12,140

Is this a good time  
to talk about some differences

3066

03:09:12,140 --> 03:09:14,543

among countries,  
or is that your next question?

3067

03:09:14,543 --> 03:09:18,013

So one one question  
Michael asked me to to addresses

3068

03:09:18,347 --> 03:09:23,318

is how common is ex-parte  
relief, injunctive relief.

3069

03:09:23,685 --> 03:09:27,089

It's it's hard to quantify that  
because our sample is not random.

3070

03:09:28,056 --> 03:09:33,962

Of the 40 countries we surveyed, I'd  
say it's a surprising number.

3071

03:09:33,962 --> 03:09:36,965

Don't provide expertise really 40%.

3072

03:09:37,099 --> 03:09:41,069

And there are some notable countries  
where it's absent Japan,

3073

03:09:41,069 --> 03:09:45,006

Australia, France, Germany,  
China as well, Italy and Sweden.

3074

03:09:46,174 --> 03:09:49,244

And then there's some countries  
that notably do provide ex

3075

03:09:49,244 --> 03:09:53,348

ex-parte injunctions,  
not only the United States

3076

03:09:53,348 --> 03:09:57,853

but India, Singapore,  
Mexico, Argentina, Malaysia.

3077

03:09:58,320 --> 03:10:01,156

The patterns aren't really clear  
as to legal heritage.

3078

03:10:01,156 --> 03:10:04,292

It's it's it's just a difference

3079

03:10:04,292 --> 03:10:07,295

among of really particular difference  
among countries.

3080

03:10:07,562 --> 03:10:09,965

I mean it makes makes a huge difference.

3081

03:10:09,965 --> 03:10:10,799

As I said,

3082

03:10:12,067 --> 03:10:15,070

another problem is the

3083

03:10:15,437 --> 03:10:18,874

speed

at which your injunction is addressed.

3084

03:10:19,541 --> 03:10:23,912

Some countries are not noted by experts  
for lack of speed.

3085

03:10:24,579 --> 03:10:27,015

So you theoretically have an injunction  
available.

3086

03:10:27,015 --> 03:10:32,287

But Brazil and Japan are two places  
where the lack of speed is is

3087

03:10:32,287 --> 03:10:36,124

said to be incompatible with the dynamics  
of trade secret protection.

3088

03:10:37,426 --> 03:10:40,429

So this is this is really, you know,

3089

03:10:40,529 --> 03:10:43,532

a big discontinuity among countries.

3090

03:10:44,132 --> 03:10:47,135

TIMOKO from wipers perspective, I have,

3091

03:10:48,370 --> 03:10:51,373

what comments

would you have with regards to

3092

03:10:53,341 --> 03:10:56,011

where injunctive relief

is not available in practice?

3093

03:10:56,011 --> 03:10:59,247

To what degree does

that sort of hinder trade secret

3094

03:10:59,247 --> 03:11:02,250

protection?

3095

03:11:02,384 --> 03:11:04,119

What I can say is

3096

03:11:04,119 --> 03:11:07,489

maybe this is not only relating to the

3097

03:11:09,224 --> 03:11:10,926

ex-parte to permit the injunction,

3098

03:11:10,926 --> 03:11:14,729

but more in any kind of the enforcement

in general

3099

03:11:15,063 --> 03:11:19,367

that I think one thing is

what is what appears in the law.

3100

03:11:19,835 --> 03:11:24,239

And another thing is  
how that can be effectively

3101  
03:11:25,407 --> 03:11:27,108  
and operation.

3102  
03:11:27,108 --> 03:11:29,177  
Thank you.

3103  
03:11:29,177 --> 03:11:31,813  
Related to this discussion,  
then the next component

3104  
03:11:31,813 --> 03:11:35,150  
is enforcement investigation  
and and discovery.

3105  
03:11:35,717 --> 03:11:38,653  
And with regard to Michael. Sure.

3106  
03:11:38,653 --> 03:11:43,458  
Before before we leave remedies,  
maybe could could we address damages for

3107  
03:11:43,525 --> 03:11:44,092  
for a moment?

3108  
03:11:44,092 --> 03:11:47,762  
Because I think that's one of the areas  
where the study found.

3109  
03:11:47,762 --> 03:11:51,066  
And I think experience tells us  
that there are

3110

03:11:51,500 --> 03:11:54,236

significant differences

3111

03:11:54,236 --> 03:11:58,373

related in part to the issue

of whether or not there's

3112

03:11:58,373 --> 03:12:02,777

a restriction on recovery of profits,

unjust enrichment,

3113

03:12:03,578 --> 03:12:06,581

because, of course,

there can be a lot of commercial advantage

3114

03:12:06,781 --> 03:12:11,086

that is obtained by getting access

to information inappropriately that

3115

03:12:11,086 --> 03:12:15,690

doesn't necessarily show up in profits,

which can be manipulated anyway.

3116

03:12:16,057 --> 03:12:19,227

And more fundamentally, we have the

3117

03:12:19,561 --> 03:12:23,865

we have the issue of potential efficient

infringement.

3118

03:12:23,865 --> 03:12:25,100

Right.

3119

03:12:25,100 --> 03:12:28,470

Because as we've heard,  
that term used in patent cases,

3120  
03:12:28,904 --> 03:12:34,042  
if it's cheap enough to misappropriate  
trade secrets, well, it'll happen.

3121  
03:12:34,042 --> 03:12:38,580  
Now, we have a lot of jurisdictions  
that don't allow for punitive damages.

3122  
03:12:39,848 --> 03:12:40,282  
You know, the

3123  
03:12:40,282 --> 03:12:43,685  
punishment that  
would deter this sort of thing in advance.

3124  
03:12:44,319 --> 03:12:47,956  
If they don't, then it's  
critically important

3125  
03:12:48,056 --> 03:12:53,862  
that those jurisdictions  
allow for the awarding of all costs,

3126  
03:12:53,862 --> 03:12:58,833  
including attorney's fees,  
so that at least the

3127  
03:12:59,634 --> 03:13:03,138  
the the trade secret holder is made whole

3128  
03:13:03,371 --> 03:13:08,877  
and there's not a disincentive to

bring the action in in in the first place.

3129

03:13:08,877 --> 03:13:13,548

And there is a a better measure  
of deterrence against misappropriation

3130

03:13:13,548 --> 03:13:14,416

itself.

3131

03:13:14,416 --> 03:13:18,486

So those kinds of issues are,  
I think, in some ways

3132

03:13:18,486 --> 03:13:21,690

equally important as injunctive relief.

3133

03:13:22,657 --> 03:13:25,160

Thank you.

3134

03:13:25,160 --> 03:13:29,364

How can a trade secret  
misappropriation case effectively be

3135

03:13:29,364 --> 03:13:34,970

brought in jurisdictions that do not have  
a robust discovery procedure?

3136

03:13:35,370 --> 03:13:39,240

And how can a court encourage  
disclosure of information to the parties

3137

03:13:39,240 --> 03:13:40,041

in litigation?

3138

03:13:40,041 --> 03:13:43,011  
I think internationally, I think this is a

3139  
03:13:43,144 --> 03:13:45,981  
very relevant I think

3140  
03:13:48,183 --> 03:13:49,517  
well, I'd just say

3141  
03:13:49,517 --> 03:13:52,053  
this may be the biggest question.

3142  
03:13:52,053 --> 03:13:54,089  
I referred to it earlier.

3143  
03:13:54,089 --> 03:13:58,193  
Trade secret cases are special  
because the holder doesn't

3144  
03:13:58,193 --> 03:14:01,363  
really typically know all the facts  
as compared

3145  
03:14:01,363 --> 03:14:04,799  
to most commercial transactions  
that have gone awry.

3146  
03:14:05,200 --> 03:14:08,570  
And so the holder needs somehow

3147  
03:14:08,803 --> 03:14:12,741  
to get access to information  
about what happened in order

3148

03:14:12,741 --> 03:14:17,012  
for this to be presented  
in any way for a judicial remedy.

3149  
03:14:17,946 --> 03:14:20,715  
I would not wish on any other country  
in the world

3150  
03:14:20,715 --> 03:14:24,452  
our discovery system, the way it has

3151  
03:14:25,453 --> 03:14:26,888  
developed over the years.

3152  
03:14:26,888 --> 03:14:28,957  
I mean, if they want to do it,  
that's fine.

3153  
03:14:28,957 --> 03:14:30,558  
But it's very expensive.

3154  
03:14:30,558 --> 03:14:34,963  
You don't need that much,  
but you do need a mechanism

3155  
03:14:35,263 --> 03:14:38,066  
that will allow access either by way

3156  
03:14:38,066 --> 03:14:41,069  
of some sort of seizure of evidence

3157  
03:14:41,202 --> 03:14:45,306  
or an early required disclosure

3158

03:14:45,707 --> 03:14:52,414  
that comes on the heels of an application  
to the court that does not require

3159  
03:14:52,447 --> 03:14:57,285  
your case to be 100%  
made the first time you appear in court.

3160  
03:14:58,019 --> 03:15:02,257  
In the U.S.,  
we benefit from a system that allows

3161  
03:15:02,457 --> 03:15:06,361  
plaintiffs to file cases  
based on reasonable suspicion

3162  
03:15:06,361 --> 03:15:11,700  
and then get access  
to discovery to reinforce

3163  
03:15:11,933 --> 03:15:14,936  
and make their complete case.

3164  
03:15:15,270 --> 03:15:18,440  
If There isn't  
that kind of a standard, if,

3165  
03:15:19,207 --> 03:15:22,510  
you know, as we heard from Mark,  
you have a jurisdiction

3166  
03:15:22,510 --> 03:15:27,949  
where you have to come in with all of  
the original necessary to prove your case.

3167

03:15:28,149 --> 03:15:29,417

You may never go there.

3168

03:15:29,417 --> 03:15:33,321

In fact, some of these difficulties  
that exist generally in civil

3169

03:15:33,321 --> 03:15:39,060

law countries that don't allow  
anything that looks much like discovery

3170

03:15:39,461 --> 03:15:43,498

are part of the problem that led to the EU  
Trade Secrets Directive.

3171

03:15:43,498 --> 03:15:48,002

The observation that a lot of companies  
that had problems would not go to court

3172

03:15:48,303 --> 03:15:52,707

because they knew they couldn't  
get effective remedies.

3173

03:15:52,707 --> 03:15:56,478

Now it would have been nice  
if the Trade Secrets

3174

03:15:56,478 --> 03:16:00,281

Directive had referenced  
the IP enforcement directive.

3175

03:16:00,281 --> 03:16:04,452

That does require some early disclosure,

3176

03:16:05,053 --> 03:16:07,922

but the opposite tack was taken

3177

03:16:07,922 --> 03:16:11,760  
and trade secrets were declared  
to be not intellectual property.

3178

03:16:11,760 --> 03:16:14,763  
Right? So we can't use that up.

3179

03:16:14,896 --> 03:16:19,334  
An alternative  
to the kind of early disclosure

3180

03:16:19,334 --> 03:16:23,271  
might be a burden shifting approach

3181

03:16:23,671 --> 03:16:27,408  
in, which again, if the plaintiff,

3182

03:16:27,909 --> 03:16:30,578  
the trade secret holder, can come to court

3183

03:16:30,578 --> 03:16:35,517  
with a plausible case  
that is quite circumstantial,

3184

03:16:35,517 --> 03:16:38,853  
but basically comes down  
to reasonable suspicion

3185

03:16:39,387 --> 03:16:44,259  
based on something that's objective,  
then in cases like the court

3186

03:16:44,259 --> 03:16:49,397  
can shift the burden to the accused party  
to demonstrate independent development

3187  
03:16:50,431 --> 03:16:53,368  
or independent access, proper access  
to the information

3188  
03:16:53,368 --> 03:16:58,339  
and then we might have a system  
that that provides something more like,

3189  
03:16:59,174 --> 03:17:02,177  
you know, the effect that we get  
from having access to discovery.

3190  
03:17:02,310 --> 03:17:06,915  
But we need tackle that issue  
because otherwise trade secret ones,

3191  
03:17:06,915 --> 03:17:12,253  
although they appear to be very similar  
throughout the world, really don't provide

3192  
03:17:12,253 --> 03:17:15,256  
meaningful remedies at the same level

3193  
03:17:16,457 --> 03:17:18,993  
to you.

3194  
03:17:18,993 --> 03:17:21,262  
So Marc

3195  
03:17:21,262 --> 03:17:24,098  
Thiessen,

since Jim talk about this reverse

3196

03:17:24,098 --> 03:17:28,236  
of the burden of proof,  
I just would like to share with you

3197

03:17:28,236 --> 03:17:32,740  
the new Japanese Prevention  
of Unfair Competition Act, which

3198

03:17:33,908 --> 03:17:38,179  
such kind of the provision that deals  
with are reverse burden of proof.

3199

03:17:38,613 --> 03:17:43,651  
So it's basically said  
that if the the alleged

3200

03:17:43,751 --> 03:17:46,754  
infringer of the trade secret,

3201

03:17:48,122 --> 03:17:50,358  
well,  
there is a breach of its very secret.

3202

03:17:50,358 --> 03:17:54,529  
And if he is  
and this person is deemed to have

3203

03:17:54,529 --> 03:17:58,600  
misused it with secret  
if that trade secret is

3204

03:17:59,634 --> 03:18:01,135  
either manufacturing misled

3205

03:18:01,135 --> 03:18:04,405

or production misled first  
and then the second,

3206

03:18:05,907 --> 03:18:09,310

there is a unlawful appropriation  
of a such trade secret.

3207

03:18:09,444 --> 03:18:12,447

And then the third, the alleged infringer

3208

03:18:12,513 --> 03:18:16,584

manufactured a product  
using that trade secret method

3209

03:18:16,618 --> 03:18:20,755

or otherwise  
undoubtedly used that trade secret.

3210

03:18:21,322 --> 03:18:23,791

So and it's related to

3211

03:18:23,791 --> 03:18:27,362

or it is limited  
to the technical trade secret.

3212

03:18:28,029 --> 03:18:31,032

So it is not  
for all the trade secret information.

3213

03:18:31,132 --> 03:18:34,135

And under very specific circumstances,

3214

03:18:34,636 --> 03:18:37,372  
there is this

3215  
03:18:37,372 --> 03:18:40,008  
reverse burden of proof, which

3216  
03:18:40,008 --> 03:18:42,844  
sounds a little bit similar  
to this burden.

3217  
03:18:42,844 --> 03:18:45,914  
We were spreading proof  
for process patent.

3218  
03:18:48,616 --> 03:18:52,687  
So as as Jim's is, Jim's thoughts on this

3219  
03:18:53,855 --> 03:18:58,293  
indicate the big in the world

3220  
03:18:58,293 --> 03:19:01,296  
is between civil  
and common law jurisdictions.

3221  
03:19:01,763 --> 03:19:04,265  
And it's, it's the civil law jurisdictions

3222  
03:19:04,265 --> 03:19:07,568  
where it's hardest  
to obtain access to proof.

3223  
03:19:08,903 --> 03:19:11,372  
In the civil law jurisdictions.

3224

03:19:11,372 --> 03:19:14,342  
There's some variance among countries

3225  
03:19:14,642 --> 03:19:17,645  
as to how difficult it to obtain proof.

3226  
03:19:18,613 --> 03:19:20,715  
So focusing on those countries

3227  
03:19:20,715 --> 03:19:23,785  
where we're a large part of the problem  
lies.

3228  
03:19:24,152 --> 03:19:27,689  
Some of them do have some limited form

3229  
03:19:27,689 --> 03:19:30,725  
of preliminary disclosure.

3230  
03:19:30,925 --> 03:19:34,896  
Even even a few of them  
have the opportunity to do the equivalent

3231  
03:19:35,730 --> 03:19:38,866  
suffer  
some sort of deposition type procedure.

3232  
03:19:38,866 --> 03:19:41,869  
It's often done in court, but

3233  
03:19:42,737 --> 03:19:45,006  
but preliminary to a trial,

3234  
03:19:45,006 --> 03:19:49,177

But that is that is going to be the  
the big challenge among countries.

3235

03:19:49,177 --> 03:19:53,781

Now, I like this  
this more novel burden shifting proposal.

3236

03:19:53,781 --> 03:19:57,685

Let me point out point  
a couple of other things that that

3237

03:19:58,319 --> 03:20:02,457

that practitioners  
and aggrieved parties use

3238

03:20:02,457 --> 03:20:05,760

because they don't just  
throw up their hands and give up a one.

3239

03:20:05,760 --> 03:20:08,463

One thing  
that's used a lot is the criminal law.

3240

03:20:08,463 --> 03:20:11,733

And in fact, I've noticed there's

3241

03:20:11,933 --> 03:20:17,071

there's some rough correspondence  
to just how actively criminal law is used.

3242

03:20:17,271 --> 03:20:18,873

In some jurisdictions.

3243

03:20:20,108 --> 03:20:20,675

There's some rough

3244

03:20:20,675 --> 03:20:23,878

correspondence to just how hard it is  
to get proof in a civil case.

3245

03:20:24,278 --> 03:20:27,215

So a lot of times the criminal law

3246

03:20:27,215 --> 03:20:30,385

is used to gather, gather evidence.

3247

03:20:30,385 --> 03:20:33,421

Now, of course, there's  
there's all the issues that come with that

3248

03:20:33,521 --> 03:20:37,125

in every every country where concerned  
with the rights of the accused.

3249

03:20:37,759 --> 03:20:40,762

And so universally,  
those cases are harder to bring.

3250

03:20:41,662 --> 03:20:45,099

And you have to, in any event,  
to persuade a prosecutor,

3251

03:20:45,099 --> 03:20:48,102

although in some countries  
it's much easier to do so

3252

03:20:49,037 --> 03:20:52,040

to initiate a criminal investigation.

3253

03:20:52,273 --> 03:20:56,177  
So in many civil law jurisdictions,  
including some notable ones,

3254  
03:20:56,177 --> 03:21:00,314  
such as Germany, there's  
there's a heavier reliance on criminal law

3255  
03:21:00,982 --> 03:21:03,985  
to initiate the to set up

3256  
03:21:03,985 --> 03:21:06,988  
proof for the civil law action.

3257  
03:21:07,221 --> 03:21:11,592  
Another procedure  
that's often used is what I refer

3258  
03:21:11,592 --> 03:21:15,096  
to generally as a preliminary action  
to preserve proof.

3259  
03:21:15,663 --> 03:21:19,767  
This is exactly what we spent  
a lot of the prior panel talking about.

3260  
03:21:20,601 --> 03:21:23,471  
And is it okay to say a words about that?

3261  
03:21:23,471 --> 03:21:24,772  
Michael Okay.

3262  
03:21:24,772 --> 03:21:29,911  
So I on this topic, the preliminary action  
to seize proof

3263

03:21:29,911 --> 03:21:34,749

that an ex party, action to seize proof,  
seize evidence or preserve evidence

3264

03:21:35,450 --> 03:21:39,854

is something that's widely available,  
not universally available.

3265

03:21:40,054 --> 03:21:43,524

It is often used in civil jurisdictions

3266

03:21:44,225 --> 03:21:46,727

to to obtain evidence.

3267

03:21:46,727 --> 03:21:51,532

So this is often the kind of forced quick  
discovery that occurs in some civil

3268

03:21:51,566 --> 03:21:52,500

order addictions.

3269

03:21:53,701 --> 03:21:57,138

Now, the experience with it is such that

3270

03:21:58,139 --> 03:22:01,676

I would say that the  
some of the restrictions the last panel

3271

03:22:02,143 --> 03:22:06,948

about are restrictions you'll actually  
find in many jurisdictions.

3272

03:22:07,415 --> 03:22:10,852

So in some ways we skipped over  
the evolutionary period

3273

03:22:11,219 --> 03:22:13,855  
and went right to the more restricted form

3274

03:22:13,855 --> 03:22:16,858  
that we've seen in many jurisdictions.

3275

03:22:17,125 --> 03:22:20,128  
The in the what what

3276

03:22:20,761 --> 03:22:25,299  
English heritage jurisdictions refer to  
is the Anton Piller order

3277

03:22:25,600 --> 03:22:30,238  
provides for preliminary seizure,  
and the experience under

3278

03:22:30,238 --> 03:22:34,775  
that is instructive  
as to why a country may want to restrict

3279

03:22:35,476 --> 03:22:38,479  
that procedure.

3280

03:22:38,913 --> 03:22:40,414  
And it was noted

3281

03:22:40,414 --> 03:22:44,519  
that in many cases that procedure  
was used to actually, ironically

3282

03:22:44,719 --> 03:22:48,656  
just steal  
the secrets of the alleged defendant

3283  
03:22:49,157 --> 03:22:52,160  
rather than to  
to vindicate the rights of the plaintiff.

3284  
03:22:52,693 --> 03:22:56,664  
And so and Sir Hugh Laddie,  
who was the litigator,

3285  
03:22:56,664 --> 03:22:59,500  
the lawyer  
who who originally the English lawyer

3286  
03:22:59,500 --> 03:23:03,004  
who originally developed  
and designed the first Anton Piller order,

3287  
03:23:03,271 --> 03:23:07,108  
later became a chief  
of a judge of the high court and

3288  
03:23:07,441 --> 03:23:12,046  
and a distinguished intellectual property  
expert called this Frankenstein monster.

3289  
03:23:12,413 --> 03:23:17,051  
Because what had happened with the Anton  
Piller order was that it had had

3290  
03:23:17,185 --> 03:23:20,855  
it was widely perceived  
as getting out of control. So.

3291

03:23:21,088 --> 03:23:26,160

So English heritage jurisdictions  
have have severely restricted it.

3292

03:23:26,160 --> 03:23:30,198

And the restrictions  
look a lot like what ended up in Nazi.

3293

03:23:30,898 --> 03:23:35,136

The Australian Supreme Court  
has a long list of restrictions.

3294

03:23:35,736 --> 03:23:39,974

The Canadian Supreme Court,  
in a case in 2006

3295

03:23:40,308 --> 03:23:45,947

imposed about 18 different specific  
requirements on these Anton Piller orders.

3296

03:23:46,180 --> 03:23:49,383

And the reason was,  
and I think this is important to a U.S.

3297

03:23:49,383 --> 03:23:53,521

audience, the reason they said, is  
is this kind of ex parte

3298

03:23:53,654 --> 03:23:56,958

search is contrary to important common law

3299

03:23:57,091 --> 03:24:00,595

principles and traditions  
restricting searches.

3300

03:24:00,828 --> 03:24:04,832

And the experience had been one  
where the procedure had been abused.

3301

03:24:05,166 --> 03:24:08,569

The court discussed at length  
a case where a

3302

03:24:09,337 --> 03:24:14,508

the order was served on the defendant's  
ten year old son, who was alone at home.

3303

03:24:14,909 --> 03:24:19,981

And the the  
the defendant came home to find neighbor

3304

03:24:19,981 --> 03:24:23,951

barricading the door against what  
the court described as a cadre of suits,

3305

03:24:24,318 --> 03:24:28,289

an upset ten year old and the neighbors  
who are

3306

03:24:28,723 --> 03:24:32,159

who as court said, could be expected  
to know the law in general,

3307

03:24:32,360 --> 03:24:36,931

but not expect that somebody could obtain  
a secret order to search your home.

3308

03:24:37,198 --> 03:24:41,369

May be wonder what rightly  
what kind of country we live in.

3309

03:24:41,702 --> 03:24:46,607

And so because of this history of abuse,  
of this kind of preliminary procedure,

3310

03:24:46,774 --> 03:24:49,744

it has been severely restricted  
in other countries.

3311

03:24:49,744 --> 03:24:53,481

The restrictions look about  
like what we ended up with in the dataset.

3312

03:24:53,981 --> 03:24:55,049

Right. Thank you.

3313

03:24:55,049 --> 03:24:58,719

Tomoko, could you talk about  
why pose role in the protection

3314

03:24:58,719 --> 03:25:02,556  
of trade secrets and how this role  
has evolved over the years?

3315

03:25:11,065 --> 03:25:13,267

Well, in

3316

03:25:13,267 --> 03:25:16,370

in the area of a trade secret,  
I think we all agree

3317

03:25:16,370 --> 03:25:21,842

that it's a very old concept,  
but at the international level,

3318

03:25:21,842 --> 03:25:26,847

this is really a new field,  
maybe starting from the TRIPS

3319

03:25:27,014 --> 03:25:31,485

agreement, really to start to have it  
in the international arena.

3320

03:25:31,752 --> 03:25:34,922

So we basically have 20 years plus

3321

03:25:35,923 --> 03:25:39,794

experience so far and the

3322

03:25:42,396 --> 03:25:44,298

well, many people views

3323

03:25:44,298 --> 03:25:47,401

YPO as a norm setting organization.

3324

03:25:47,401 --> 03:25:50,905

And of course, the normal setting  
is one of the important parts

3325

03:25:51,339 --> 03:25:53,908

of our activities.

3326

03:25:53,908 --> 03:25:57,578

But for the international  
legal development,

3327

03:25:57,778 --> 03:26:01,615

I would say that it is also

3328

03:26:02,216 --> 03:26:07,855

the well, other aspects  
such as like the fact based information

3329

03:26:07,855 --> 03:26:11,959

provisions, capacity building awareness,

3330

03:26:13,260 --> 03:26:17,064

and also providing a kind of forum

3331

03:26:17,465 --> 03:26:20,468

for our member states to cooperate.

3332

03:26:20,501 --> 03:26:25,172

All those are important  
for the international legal development.

3333

03:26:25,840 --> 03:26:29,510

And we do not

3334

03:26:29,510 --> 03:26:32,880

see much in  
why plus activities at this moment.

3335

03:26:32,880 --> 03:26:35,416

But that doesn't mean  
that we're not doing anything

3336

03:26:36,450 --> 03:26:38,352

like the in there.

3337

03:26:38,352 --> 03:26:41,188

But capacity building,

3338

03:26:41,188 --> 03:26:43,324

for example, of the programs,

3339

03:26:43,324 --> 03:26:48,963

our programs like summer schools  
and others, they integrate the topic

3340

03:26:48,963 --> 03:26:54,034

of a trade secret in any in these capacity  
building activities.

3341

03:26:54,034 --> 03:26:58,672

And also we haven't  
had talk about this much, but the YPO

3342

03:26:58,706 --> 03:27:04,178

has arbitration and mediation center  
and the MVA was a nature

3343

03:27:04,211 --> 03:27:08,215

of the trade secret,  
which is secrecy is very important.

3344

03:27:08,549 --> 03:27:09,216

Arbitration.

3345

03:27:09,216 --> 03:27:15,022

Mediation is definitely a one  
alternative way of solving the disputes.

3346

03:27:15,022 --> 03:27:19,593

And we do have cases  
coming to our centers as well.

3347

03:27:21,195 --> 03:27:25,499  
So So they are those activities

3348  
03:27:25,499 --> 03:27:28,836  
and as we have been observing

3349  
03:27:28,836 --> 03:27:33,140  
that there are a lot of  
national developments not only the U.S.,

3350  
03:27:33,140 --> 03:27:38,045  
but also in other parts of the world,  
and not only in limited

3351  
03:27:38,045 --> 03:27:42,249  
to the developed countries,  
but more in the wider areas.

3352  
03:27:42,450 --> 03:27:46,086  
As I saw some reports prepared in the Epic

3353  
03:27:47,321 --> 03:27:47,822  
among the

3354  
03:27:47,822 --> 03:27:51,459  
APIC countries in relation  
to the trade secret topic.

3355  
03:27:51,992 --> 03:27:56,664  
So I we see that the discussion  
is coming out

3356  
03:27:57,031 --> 03:28:00,000  
to more global audiences

3357

03:28:00,434 --> 03:28:03,771

and we are looking for

3358

03:28:04,238 --> 03:28:08,342

what we're seeking, what we could,  
what would be our role

3359

03:28:08,342 --> 03:28:12,513

and how we could support  
the member States in area.

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03:28:12,513 --> 03:28:14,949

And at the end of the day,

3361

03:28:14,949 --> 03:28:17,685

why was an international organization?

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03:28:17,685 --> 03:28:22,490

I think our role is really to assist  
Member States to identify, fight

3363

03:28:22,490 --> 03:28:25,559

the issues that can be brought up

3364

03:28:25,659 --> 03:28:28,662

at the international level  
and which helps them

3365

03:28:29,029 --> 03:28:32,900

to have an international solution  
other than seeking a solutions

3366

03:28:33,467 --> 03:28:37,304

in at the national level

in an isolated manner.

3367

03:28:37,304 --> 03:28:39,974

So that I think it's really our role.

3368

03:28:39,974 --> 03:28:41,475

Thank you.

3369

03:28:41,475 --> 03:28:47,181

Could We summarize in a few words  
to conclude the panel discussion on

3370

03:28:47,181 --> 03:28:51,752

in your opinion briefly, what what makes  
an effective trade secret law. And

3371

03:28:52,720 --> 03:28:55,556

Jim, we could start with you.

3372

03:28:55,556 --> 03:28:56,056

Okay.

3373

03:28:56,056 --> 03:28:59,059

Well, you know, first of all,

3374

03:28:59,460 --> 03:29:01,862

I think there are probably four elements.

3375

03:29:01,862 --> 03:29:05,900

One is very broad coverage  
because we live in the information age

3376

03:29:06,300 --> 03:29:11,272

and we have to ensure that businesses

that depend on data

3377

03:29:11,272 --> 03:29:14,942

in some form to distinguish themselves  
and their competitive advantage

3378

03:29:15,175 --> 03:29:21,181

have a way to protect that  
and to encourage others to develop it.

3379

03:29:21,515 --> 03:29:24,151

Access to proof, as we've already

3380

03:29:24,151 --> 03:29:27,154

discussed, is a second principle

3381

03:29:27,655 --> 03:29:30,658

Robust remedies,

3382

03:29:30,858 --> 03:29:33,727

including remedies,  
as we've already discussed,

3383

03:29:33,727 --> 03:29:37,231

would be a third and fourth  
we haven't really touched on,

3384

03:29:37,231 --> 03:29:41,669

but seems to be a feature  
of most of the newly discussed

3385

03:29:42,903 --> 03:29:45,573

broad approaches,  
including the EU Trade Secrets

3386

03:29:45,573 --> 03:29:50,311

Directive, is the importance  
of protecting secrets during litigation.

3387

03:29:50,878 --> 03:29:53,480

During the process notwithstanding,

3388

03:29:53,480 --> 03:29:57,718

you know, constitutional issues  
like in Japan for open courtrooms.

3389

03:29:57,718 --> 03:30:03,724

We have to have a way to ensure that  
information once put the judicial system

3390

03:30:03,991 --> 03:30:08,729

for resolution,  
is not compromised in an ironic way.

3391

03:30:08,729 --> 03:30:11,932

So those would be my elements. Thank Bach.

3392

03:30:12,900 --> 03:30:14,268

Well, it's rather boring.

3393

03:30:14,268 --> 03:30:18,072

I had found myself sitting next to Jim  
on these panels, and we agree.

3394

03:30:18,872 --> 03:30:21,408

And so I put up my slide

3395

03:30:21,408 --> 03:30:24,411

with for my four points.

3396

03:30:24,678 --> 03:30:25,412

Indeed.

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03:30:25,412 --> 03:30:28,382

Is is the coverage broad and normal?

3398

03:30:28,682 --> 03:30:31,085

One thing I think infective remedies can.

3399

03:30:31,085 --> 03:30:33,087

I get a preliminary injunction quickly.

3400

03:30:33,087 --> 03:30:34,955

Can I stop?

3401

03:30:34,955 --> 03:30:37,191

Can I stop the harm?

3402

03:30:37,191 --> 03:30:40,194

Can I investigate my claim effectively

3403

03:30:41,028 --> 03:30:45,265

and can I protect my secrets  
from further exposure during litigation?

3404

03:30:45,466 --> 03:30:48,902

We didn't talk about that on this panel,  
but that was one of the motivations

3405

03:30:48,902 --> 03:30:51,872

for the European Trade Secret Directive.

3406

03:30:52,072 --> 03:30:55,175

And that's one of the big fears  
companies have. It's

3407

03:30:55,175 --> 03:30:59,580

one of the things the European Commission  
found was a big motivating factor.

3408

03:30:59,580 --> 03:31:01,382

They did some

3409

03:31:01,382 --> 03:31:04,918

and they found among businesses  
who did not bring trade secret cases,

3410

03:31:04,918 --> 03:31:09,323

even though they believed they had won,  
they were afraid of exposing their secrets

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03:31:09,323 --> 03:31:13,327

more broadly than they already were  
if they went to litigation.

3412

03:31:13,560 --> 03:31:14,328

Thank you. Tomoko.

3413

03:31:16,096 --> 03:31:18,565

Not being a practitioner,

3414

03:31:18,565 --> 03:31:23,570

my list is more from the public policy  
perspective,

3415

03:31:23,971 --> 03:31:28,642

and I would say that

the maybe the first point is the balance.

3416

03:31:29,309 --> 03:31:32,613

The balance, the protection  
of the confidential information

3417

03:31:32,613 --> 03:31:36,917

visa V So  
natural spillover of the information.

3418

03:31:36,917 --> 03:31:39,920

At the end of the day,  
the information is a public goods

3419

03:31:39,953 --> 03:31:43,424

and how we balance this  
I think is the first point.

3420

03:31:43,991 --> 03:31:48,896

And then the second point  
may be the sufficient flexibility

3421

03:31:48,896 --> 03:31:54,601

to respond to the variety of the different  
circumstances and the different cases.

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03:31:55,035 --> 03:31:57,738

Since trade secret.

3423

03:31:57,738 --> 03:32:01,442

The subject matter of the trade secret  
can cover really

3424

03:32:01,442 --> 03:32:05,646

a variety of information,

and there's a variety of circumstances.

3425

03:32:06,480 --> 03:32:10,451

And also in connection this flexibility,

3426

03:32:11,151 --> 03:32:14,288

I think that the effective traceability

3427

03:32:14,488 --> 03:32:19,993

law is something that withstands  
a technological development.

3428

03:32:20,327 --> 03:32:25,165

So therefore that can be something  
very technology neutral and flexible.

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03:32:25,899 --> 03:32:28,068

Thank you. Are there any questions?

3430

03:32:30,104 --> 03:32:31,171

Okay.

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03:32:31,171 --> 03:32:32,039

Well, thank you very much.

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03:32:32,039 --> 03:32:34,374

I'd like to thank our panel  
for coming here today.

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03:32:34,374 --> 03:32:37,377

So thank you.

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03:32:38,078 --> 03:32:42,916

So we will break for lunch

and we'll return at 130

3435

03:32:42,916 --> 03:32:48,122

for our final topic on considerations  
of business in international cases.

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03:32:48,122 --> 03:32:48,555

Thank you.