

**IP as Immigration Policy:
The Economic Espionage Act, Labor Markets, and International Trade in
Information**

Precis

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Scholars have commented on the role of intellectual property in high velocity, highly skilled labor markets. Alan Hyde has studied the limiting effects of strong intellectual property rights in Silicon Valley, noting that internal labor markets and free mobility of skilled labor across firms promotes competitive innovation. Anne Saxenian has written extensively on this point in her comparative work of Silicon Valley and Route 128, concluding that limited uses of covenants not to compete and accompanying restrictions on trade secret law is a reason for the dynamism of West Coast innovation.

This Article builds on this scholarship by addressing the question of international trade. Specifically, I focus on the Economic Espionage Act and its effects on the international movement of labor and information. To the extent that immigration policy broadly covers any set of legal regulations governing the movement of people across borders, the Economic Espionage Act, I argue, is a form of immigration policy. In this way, the Act creates tensions with the goals of intellectual property law in promoting global and domestic innovation, especially in light of the work of scholars like Hyde and Saxenian.

The Economic Espionage Act presents a fruitful case study for examining the relationships among intellectual property, the international movement of labor and trade in information. The Act criminalizes two types of behavior: (1) the misappropriation of a trade secret in order to benefit a foreign power (either corporate or governmental) and (2) the misappropriation of a trade secret with intent to harm the owner of the trade secret. Although the Act covers perpetrators of all nationalities, a majority of the prosecutions under both substantive provisions of the Act have been against non-US citizens, in many cases high skilled workers holding H-1 B visas. Consequently, the application of the Act invites analysis of the question of whether protecting intellectual property rights criminally is consistent both with the goals of innovation and open competition in goods and services.

Early scholarly study of the Act criticized as unnecessary both the federalization and criminalization of trade secret law. Consistent with the work of Hyde and Saxenian, one would also be wary of the effects of the Act on innovation. But there are may be reasons why the Hyde-Saxenian arguments in favor of open labor markets would not extend to international economies. First, the concerns over national security arise for cross-border transactions while they are less salient and non-existent for regional

markets. While national security concerns can be addressed in more direct ways than the Economic Espionage Act, the policy concerns over international economic espionage are relevant in assessing the need for government intervention in international labor markets. Second, firm and industry scale effects are more important at the national than at the regional level and some limits on the movement of labor may be needed for realizing these scale effects. While regional markets may thrive on competition, competition among nations may require firm expansion through limitation on the movement of labor and knowledge between firms. Finally, there is the normative question of whether intellectual property laws are designed to promote innovation at the national level or the global level. Trade institutions arguably have traditionally been designed with the nation state at the core, and national sovereignty may require the free movement of labor ends at national, rather than regional borders. These three rationales together suggest that while the Economic Espionage Act may be problematic from the perspective of the theory of trade secret law, it may not be problematic from the Hyde-Saxenian view of dynamic labor markets and innovation.

Economic theories of international trade, however, contradict this intuition and lend some support to the Hyde-Saxenian view. The neoclassical theory of international trade, based on comparative advantage, lends support to the free movement of labor in response to relative price signals that reflect differences in the relative advantages of nations in specialization in the production and distribution of products and services. This traditional theory would explain the movement of labor as a response to the immobility of final products and services across borders. For example, if ideas and innovations are not fully mobile, then labor will move across borders to equalize the price between countries for the immovable product. Under the neoclassical view, intellectual property laws can serve as a barrier to trade, especially if targeted at the price equilibrating and efficiency enhancing movement of the unconstrained resource. Consequently, the Economic Espionage Act would be suspect under the terms of neoclassical trade theory.

As a theoretical explanation, neoclassical trade theory is lacking and therefore an inadequate basis by which to guide policy. Traditional theory ignores distributional consequences and the presence of economies of scale, both within and across countries. More recently developed theories, associated with the economist Paul Krugman, emphasize the role of returns to scale from the expansion of firms, the more intensive use of resources, and specialization. In this Article, I focus principally on the role of knowledge spillovers across countries and their implications for intellectual property policy. While there may be some justification for strong intellectual property rights for the promotion of within country returns to scale, the existence of benefits from cross-border spillovers supports restrictions on intellectual property rights. The movement of labor is a mechanism for the realization of these spillovers, and restrictions on movements may lead to both global inefficiencies and the poor distribution of resources across borders. A complete analysis, however, would also include negative spillovers. If there is the possibility that knowledge can be used for purposes of markets innovation and for political competition (for example, through expansion of military uses or threats to security), then some restrictions on knowledge flows would be desirable. However,

these restrictions may best be addressed through mechanisms other than intellectual property laws.

An examination of the case law within the framework of more modern trade theories demonstrates that the Economic Espionage Act is not only questionable in application from the perspective of trade secret policy, but also from the efficiency and distributional goals of international trade. The Act is applied in a way that is unpredictable and suspect in terms of the motivation for and desirability of prosecution. The problem is that policy goals are mixed, and the ends of security blend with those of innovation with the result that the tools of intellectual property are being used for non-intellectual property ends. The Article will also examine how overly zealous immigration may also adversely affect the goals of intellectual property. The problem, once again, is lack of clarity about the ends to which the law is being applied.

The main policy recommendations cluster around the need for more clarity in the law. The Economic Espionage Act can be reformed if targeted against more concrete thefts that benefit non-domestic entities at the expense of domestic ones. If the Economic Espionage Act focuses on acts that are more akin to physical theft of resources that may have negative security and political spillovers with minimal innovation and competitive spillovers, then the Act may work. There are questions, however, whether such implementation is feasible given the politics of federal prosecution. Finally, I consider ways in which changes to the international enforcement of private intellectual property laws may better police the concerns of intellectual property owners while promoting positive cross-border spillovers. Specifically, I focus on the extraterritorial application of patent law (by rethinking the analysis in the Microsoft case) and of trade secret law (by allowing access to federal courts for state trade secret claims against non-US citizens).