EXTRATERRITORIALITY OF STATE TRADE SECRET LAW

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I. INTRODUCTION

In *E.I. DuPont de Nemours and Co. v. Kolon Industries*, after the jury returned a $919.9 million verdict in favor of DuPont, the court banned Kolon, a Korean company, from producing and selling para-aramid fiber anywhere in the world for twenty years for misappropriation of DuPont’s trade secrets.\(^1\) Because of both unusually large damages and the injunction, the decision drew the attention of the Korean and American media.\(^2\) Many in the Korean media expressed serious doubts about the fairness of the trial because it was held in Virginia, one of the biggest business places of DuPont, and the jury was comprised of Virginians.\(^3\) The Korean media also expressed doubts that a U.S. court could command a foreign company to cease production and sales outside of U.S. territory.\(^4\) As a result of the U.S. Department of Justice’s indictment of Kolon for misappropriation of trade secrets under the Economic Espionage Act (“EEA”), there is mounting tension between these two communities.

In order to avoid unintended conflicts with foreign nations, courts frequently refrained from adjudicating U.S. law over its territorial authority under the doctrine of presumption against

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extraterritoriality.⁵ Courts, however, have rarely applied the presumption in the context of state law.⁶ As a result, the question of applicability of U.S. state law to foreign conduct is unresolved.⁷

Over the past decade, many scholars have debated about issues of extraterritoriality of patents, copyrights, and trademarks.⁸ These debates focused on whether or not there should be a geographic limitation in the scope of remedies in intellectual property (“IP”) cases.⁹ On the other hand, scholars relatively alienated the question of the geographic scope of trade secret law.¹⁰

First and foremost, there is a presumption against extraterritoriality in U.S. laws.¹¹ The Supreme Court has stated that U.S. law is presumed to have no extraterritorial effect unless a contrary intent of Congress is found.¹² U.S. patent and copyright laws presumed not to be applied extraterritorially.¹³ U.S. trademark law, however, overcome the presumption.¹⁴

The applicability of the presumption against extraterritoriality to trade secret law is unclear because trade secrets have been almost exclusively governed by state law, not federal law.¹⁵ In the absence of clear guidance from either the Supreme Court or both state and federal legislatures, some courts ruled in favor of extending the scope of state trade secret law to conduct

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⁷ Id.
⁸ See Bradley, supra note 5, at 505.
⁹ See id.
¹² Id.
¹³ Bradley, supra note 5, at 520-26.
¹⁴ Id.
abroad. This practice can cause problems in foreign relations, such as the foreign offense or interference with the sovereignty of the foreign nations. To avoid unintended conflicts with foreign nations, issues in the current extraterritorial application of state trade secret law and possible remedies for the issues should be discussed.

This Note discusses the geographic scope of trade secret law from the perspective of intellectual property rights and suggests a new approach to reaching foreign conduct. The courts should exercise restraint in extraterritorial application of trade secret law in light of other concerns, such as the presumption against extraterritoriality, choice-of-law issues, and practical problems in enforcing injunctions. First, the presumption against extraterritoriality is applicable to state law. Second, courts’ reliance on choice-of-law analysis deludes courts into disregarding extraterritoriality issues. Third, implementing world-wide injunctions is practically difficult.

Furthermore, this Note also addresses remedies to resolve such issues through legislative, judicial, and political branch action. These remedies include enacting a federal trade secret statute at the legislative level, adopting the presumption against extraterritoriality or the ITC approach at the judicial level, and having treaties or agreements at the political level. Through enacting a federal trade secret statute and adopting the presumption or the ITC approach, courts will be able to make more predictable, uniform, and restrained judgments. Once improved trade secret protection is ensured by treaties, agreements, or sanctions, the need to apply U.S. trade secret law abroad will decrease.

Part II discusses the presumption against extraterritoriality both in general and as applied in intellectual property laws. Furthermore, Part II explores how courts approach foreign conduct in trade secret cases. Part III discusses concerns about applying trade secret law extraterritorially.

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16 See Nordson Corp. v. Plasschaert, 674 F.2d 1371 (11th Cir. 1982); Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970 (9th Cir. 1991); DuPont, 2012 WL 4490547, at *27.
such as the presumption against extraterritoriality, choice of law issues, and practical problems in implementing injunctions. Part III also outlines remedies to resolve such issues through legislative, judicial, and political branch action.

II. BACKGROUND

As intellectual property has given heightened attention as a valuable business asset, the claims for the protection of U.S. intellectual property rights outside the United States have increased. In some fields of law, such as admiralty, antitrust, securities, and trademark laws, courts have applied U.S. law to conduct that occurred outside of the United States. Nonetheless, courts generally presume not to apply U.S. law beyond U.S. borders. This presumption is called the “presumption against extraterritoriality.” This section will discuss the presumption against extraterritoriality with a particular focus on intellectual property laws.

A. Courts Generally Employ the Presumption Against Extraterritoriality in Federal Law.

Congress has the power to legislate extraterritorially, but congressional intent is often unclear. Since the early 1800s, courts have employed the presumption against extraterritorial application of U.S. law to guide the construction of ambiguous statutes as to their geographic scope. Courts have used the presumption to limit the reach of federal statutes within U.S. territory. In Equal Employment Opportunity Commission v. Arabian American Oil Co., the Supreme Court reaffirmed that U.S. law is presumed to have no extraterritorial effect. Courts

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17 See Bradley, supra note 5, at 506-07.
18 Id. at 519.
19 Equal Emp’t Opportunity Comm’n, 499 U.S. at 258-59.
23 Equal Emp’t Opportunity Comm’n, 499 U.S. at 258-59.
can overcome the presumption if they find a clear congressional intent to apply the law extraterritorially, such as a clear statement in the language of the statute itself.\(^{24}\)

The Supreme Court decisions reveal at least five rationales for the presumption: international law, international comity, choice-of-law principles, congressional intent, and separation of powers.\(^{25}\) First, the international law justification is that under customary international law, some limitations are imposed on the application of a country’s law to persons or activities foreign to it.\(^{26}\) Second, international comity theory justifies the presumption by describing it as a limitation to prevent unintended conflicts with foreign laws and nations.\(^{27}\) Third, the presumption is consistent with the early domestic choice-of-law principles that apply the law of the place where wrongful conduct occurred.\(^{28}\) Fourth, assuming the assertion that “Congress generally legislates with domestic conditions in mind,” the presumption is justified to serve this generally applicable Congressional intent.\(^{29}\) Finally, the presumption is justified by the separation of powers doctrine that sets forth the theory that authority over foreign affairs is exclusively vested in the legislative and executive branches, rather than the judicial branch.\(^{30}\) This is because the judicial branch lacks competence and authority to adjudicate on foreign issues.\(^{31}\)

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\(^{24}\) Dodge, *supra* note 22, at 86.

\(^{25}\) Bradley, *supra* note 5, at 513-16.

\(^{26}\) *Id.*

\(^{27}\) *Id.*; *Equal Emp’t Opportunity Comm’n*, 499 U.S. at 248.

\(^{28}\) Bradley, *supra* note 5, at 513-16.

\(^{29}\) *Id.*; Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

\(^{30}\) Bradley, *supra* note 5, at 513-16; *Equal Emp’t Opportunity Comm’n*, 499 U.S. at 259.

\(^{31}\) Bradley, *supra* note 5, at 513-16.
The Supreme Court stated that the presumption applies “regardless of whether there is a risk of conflict between the American statute and a foreign law.”  

Recently, the Supreme Court increasingly applies the presumption more rigidly to cases with foreign elements. Critics of the presumption contend that the international law justification is no longer valid because extraterritorial application of national law under certain circumstances is better accepted now in the international community. Critics, therefore, argue that the rationale does not support the presumption in the modern era. The presumption, however, should be valid because other justifications for the presumption are still valid. Although courts generally restrain the extraterritorial application of federal law under the presumption, they rarely employ the presumption when applying state law to foreign conduct as long as some connections between the state and the case are found. This pattern of court’s practice will be discussed more in the section III.A.2.

B. Patent and Copyright Laws Follow the Presumption, but Trademark Law Overcomes the Presumption.

Practitioners and scholars have disputed the extraterritorial scope of patent, copyright, and trademark laws. Although each intellectual property law is generally designed to protect the owner’s right, its extraterritorial scope is different. Patent law and copyright laws follow the presumption against extraterritoriality. According to the Patent Act adopted in 1952, the scope

33 Florey, supra note 6, at 547.
34 Bradley, supra note 5, at 517-19.
36 Florey, supra note 6, at 538-39.
37 Bradley, supra note 5, at 506-507.
38 Id. at 520-26; VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS, 2 Litigation of International Disputes in U.S. Courts (LOID) § 8:43 (2012).
of patent rights is limited to the U.S. territory. The language of the Act specifically confines the scope of the patent owners’ rights to exclude others within the United States. In *Microsoft Corp. v. AT&T* (2007), the Supreme Court continually adhered to the strict view of a patent’s terrestrial limits. Therefore, inventors need to find recourses in the country where the infringement of the patent occurred.

In three situations, however, courts apply patent law extraterritorially. First, under 35 U.S.C. § 271(f), the doctrines of induced and contributory infringement, conduct abroad constitutes an infringement of U.S. patent law if active inducement or contribution to infringement is shown. Second, under 35 U.S.C. § 271(g), importation, offer to sell, or use of the product made abroad by a U.S. process patent constitutes an infringement of U.S. patent law unless the product is materially changed by a subsequent process or is a trivial and nonessential component of another product. Third, recoverable profits include the profits from foreign sales of the invention as long as the patent is infringed in the United States.

Unlike the patent statutes, no language in the copyright statute suggests to limit its geographic scope to the U.S. territories. Nevertheless, courts have limited U.S. copyright law within U.S. borders and, thus, have only applied the law to conduct that takes place in the United States. As in patent law, there are exceptions to the presumption, such as contributory

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42 Bradley, *supra* note 5, at 520-23.
43 *Id.*
44 35 U.S.C. § 271(f) (2006); Bradley, *supra* at 520-23
46 Bradley, *supra* note 5, at 520-23.
47 *Id.* at 520-26.
48 *See* Subafilms Ltd. v. MGM-Pathe Commc’n Co., 24 F.3d 1088, 1097 (9th Cir. 1994) (en banc); *see also* Bradley, *supra* note 5, at 520-26.
infringement and extraterritorial profits.\footnote{Bradley, supra note 5, at 520-26.} The protection of copyright in the global market has been resolved by treaties.\footnote{See United States Copyright Office, International Copyright, http://www.copyright.gov/fls/fl100.html (last visited Oct. 30, 2012).} Many countries protect foreign works under international copyright treaties and conventions such as the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) and the Universal Copyright Convention (“UCC”).\footnote{Id.}

Unlike patent and copyright laws, trademark law is applied to conduct that occurred abroad.\footnote{Bradley, supra note 5, at 526-27.} Steele v. Bulova Watch Co. significantly contributed to this departure from other IP laws.\footnote{Steele v. Bulova Watch Co., 344 U.S. 280, 291-92 (1952).} In Steele, the Supreme Court held that the Lanham Act applied to the defendant’s conduct that mainly occurred outside of the United States.\footnote{Id.} After Steele, most courts adopted three-step balancing test asking: 1) the effects of the defendant’s conduct on U.S. commerce, 2) the citizenship of the defendant, and 3) the likelihood of a conflict between U.S. law and foreign law.\footnote{Id.} Under this test, any conduct which has a significant effect on U.S. commerce can be regulated by U.S. courts under the Lanham Act, even if the conduct took place overseas.\footnote{Id.}

\section*{C. Although the Extraterritoriality of State Trade Secret Law Is Unclear, Some Courts Applied the Law Extraterritorially.}

Unlike patent and copyright laws, trade secret law is almost exclusively governed by state law.\footnote{David W. Quinto, TRADE SECRETS 1 (2d ed. 2012).} 48 states have adopted the Uniform Trade Secrets Act (UTSA).\footnote{Id. at 1-2.} Restatement (Third) of Unfair Competition (1995) also provides the basis for current trade secret law in many states.\footnote{Id.} Notwithstanding the adoption of the UTSA, state trade secret law varies subtly from state to state.
Massachusetts, New York, New Jersey, and Texas did not adopt the UTSA, and North Carolina only loosely adopted the UTSA. Furthermore, courts’ different interpretations and non-uniform amendments made even the trade secret laws of states adopting UTSA subtly different.

In 1996, Congress enacted the federal Economic Espionage Act (“EEA”), 18 U.S.C. §§ 1831-1839, that makes misappropriation of trade secrets a federal crime. The EEA specified that courts have extraterritorial jurisdiction if “(i) the offender is a U.S. corporation or business entity, citizen, or resident alien; or (ii) an act in furtherance of the offense was committed in the United States.” Therefore, a trade secret action under the EEA is applicable to extraterritorial conduct. However, Congress is silent in the civil trade secret actions.

Similarly, there is no Supreme Court decision on the extraterritoriality of trade secret law in civil actions. Some federal courts, however, have ruled in favor of extending trade secret law extraterritorially. In Nordson Corp. v. Plasschaert, the Eleventh Circuit enjoined plaintiff’s former foreign employee from using or disclosing confidential information. The Eleventh Circuit extended the injunction extraterritorially to Western Europe as well as to the United States and Canada. The court stated “most confidential information is worthy of protection

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61 Quinto, *supra* note 57, at 1.
63 Quinto, *supra* note 57, at 303-05.
64 *Id.*
65 Bradley, *supra* note 5, at 554-55.
67 Nordson, 674 F.2d at 1372.
68 *Id.*
without geographic limitation because once divulged the information or the fruits of the information quickly can pass to competitors anywhere in the world."

In *Lamb–Weston, Inc. v. McCain Foods, Ltd.*, the Ninth Circuit enjoined the misappropriator from producing or selling the products made with the technologies in question anywhere in the world. The Ninth Circuit added “[a]n injunction in a trade secrets case seeks to protect the secrecy of the misappropriated information and to eliminate any unfair head start the defendant may have gained.” Both Nordson and Lamb–Weston courts, when determining the scope of injunction, did not consider extraterritoriality issues or the presumption against extraterritoriality.

More recently, in *DuPont*, the district court issued 20-year worldwide injunction barring Kolon, a foreign company, from making body armor fiber for the misappropriation of DuPont’s trade secrets. The DuPont court denied the necessity of considering extraterritoriality issues in a state trade secret action. The DuPont court’s ruling relied on the comment on the Restatement (third) of Unfair Competition, section 44 that “[g]eographic limitations on the scope of injunctive relief in trade secret cases are ordinarily inappropriate.”

Most state trade secret cases with foreign elements relied on a choice-of-law analysis. Applying a choice-of law analysis, some courts dismissed cases on the basis of the doctrine of

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69 Id. at 1377.
70 Lamb-Weston, 941 F.2d at 971.
71 Id.
72 DuPont, 2012 WL 4490547, at *27.
73 Id. at *22.
forum non conveniens. Some courts, however, did not dismiss despite the foreign elements. Relying on the choice-of-law analysis, both courts failed to consider extraterritoriality issues.

The International Trade Commission (“ITC”) also deals with trade secret cases under section 337. Recently, in TianRui Group Co. v. International Trade Commission, the Federal Circuit decided that in trade secret actions section 337 is applicable to conduct that occurred abroad. The TianRui court rejected the applicability of the presumption against extraterritoriality in a section 337 case for three reasons. First, congressional intent to apply section 337 to conduct abroad can be inferred from the language of statute, “in the importation of articles.” Second, the remedy is limited to the domestic area. Finally, the legislative history of section 337 also supports this interpretation of the Commission.

However, the decision in TianRui is significantly different from the decision in Dupont in terms of the scope of injunction. The TianRui court actually did not apply section 337 extraterritorially to conduct abroad. The TianRui decision only prevented the importation of the

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75 See Delta Brands Inc. v. Danieli Corp., 99 F.App'x. 1, 9-10 (5th Cir. 2004); EFCO Corp. v. Aluma Systems USA, Inc., 268 F.3d 601, 602-03 (8th Cir. 2001); Westinghouse Overseas Serv. Corp. v. Austl. Def., 83 F.3d 417, *1 (4th Cir. 1996).
77 See Delta, 99 F.App'x. 1; EFCO, 268 F.3d at 602-03; Westinghouse, 83 F.3d at *1; BP Chems., 29 F.Supp. 2d at 1182-85; K-V Pharm., 648 F.3d at 597-98; Manu, 641 F.2d at 64-68; Synygy, 2009 WL 1532117 at *2-3; Triflo, 44 F.App'x. at 266-67.
80 Id. at 1329-31.
81 Id.
82 Id.
83 Id.
84 Feldman, supra note 15, at 541-42.
infringing product, and the court did not ban TianRui from producing or selling the infringing products outside of the United States.  

III. ANALYSIS

In *Nordson*, the Eleventh Circuit stated “most confidential information is worthy of protection without geographic limitation.” Most patents and copyrights, however, are as worthy as trade secrets. Protection of patents and copyrights is geographically limited because of overriding concerns, such as risks of foreign offense or interference with the sovereignty of foreign nations. As in patents and copyrights, trade secrets owners’ interests should be balanced with three important concerns: presumption against extraterritoriality, choice-of-law issues, and practical problems in implementing injunctions. This section considers these concerns and discusses remedies in combination of legislative, judicial, and political branch action.

A. Current Extraterritorial Application of State Trade Secret Laws Poses Issues, such as the Presumption against Extraterritoriality, Choice-of-Law, and Problems in Implementing Extraterritorial Injunctions.

Although courts constrain the extraterritorial application of U.S. federal law, the courts impose few limitations on the extraterritorial application of state law as long as some connections between the state and the case exist. Courts’ tenuous constraints on the application of state law to foreign conduct are contributable to the courts’ lack of consideration of the presumption against extraterritoriality, choice-of-law issues, and practical problems in implementing extraterritorial injunctions.

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85 *Id.*
86 *Nordson*, 674 F.2d at 1377.
87 Bradley, *supra* note 5, at 513-16.
88 Florey, *supra* note 6, at 538.
1. **The Rationales for the Presumption against Extraterritoriality, Particularly, Separation of Powers, Congressional Intent, and International Comity, Supports the Application of the Presumption to State Trade Secret Laws.**

Whether the presumption against extraterritoriality is applicable to state trade secret laws is not clear. Courts have rarely discussed the presumption when applying state laws.\(^{89}\) However, the rationales for the presumption, particularly, separation of powers, congressional intent, and international law and comity, support the application of the presumption to state trade secret laws.

   **i. Under the Separation of Powers Doctrine, Foreign Affairs Are Best Left to Political Branches.**

The separation of powers doctrine provides strong justification for the application of the presumption to state trade secret laws. Under the separation of powers doctrine, questions of foreign policy are best left to Congress and the executive, rather than the judicial branch.\(^{90}\) State and federal courts lack competency and authority in the extraterritorial application of state trade secret laws;\(^{91}\) courts lack the information or ability to deal with difficult international or political issues arising out of the extraterritorial application of state law.\(^{92}\)

Furthermore, the extraterritorial application of state law that is enacted by state legislatures seems to be inappropriate. The Supreme Court and many commentators have expressed that the external affairs power is exclusively vested in the federal government, not shared by the States.\(^{93}\) In addition, state legislatures are more likely to legislate with only domestic conditions in mind. Therefore, state law shows a lack of consideration for extraterritoriality issues.

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\(^{89}\) Florey, *supra* note 6, at 551-52.

\(^{90}\) Knox, *supra* note 21, at 386.

\(^{91}\) *Id.*

\(^{92}\) See *id.*

The separation of powers justification is even stronger in intellectual property law. The extraterritorial application of trade secret law will interfere with government activities and international agreements, such as TRIPS or NAFTA. For example, the extraterritorial application of trade secret law can impede political branch’s efforts to motivate foreign countries to advance their trade secret protection. In addition, it may interfere with the United States’ foreign policy or diplomatic stance. Therefore, courts applying state law extraterritorially should be more cautious and need certain limits like the presumption against extraterritoriality.

The extraterritorial application of state law raises another constitutional issue: whether a state law impinging on foreign relations is valid. Some courts invalidated the application of state law to conduct abroad under principles of preemption or the dormant Foreign Commerce Clause. In Zschernig v. Miller, the Supreme Court stated that state action interfering with foreign affairs is invalid without any showing of conflict or federal activity in the subject area of law under field preemption doctrine. In some other cases, the Supreme Court also struck down state statutes for interfering with federal foreign affairs, in which clear or substantial conflicts were found, under conflict preemption doctrine. In addition, the Supreme Court invalidated state statutes on the basis of the dormant Foreign Commerce Clause. Under the Clause, state

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94 See Florey, supra note 6, at 550-51.
96 See Bradley, supra note 5, at 562.
97 See id.
98 Florey, supra note 6, at 560-61; Lear, supra note 94, at 123-24.
action touching foreign commerce is invalid if it “prevent[s] the Federal Government from speaking with one voice when regulating commercial relations with foreign government.”\textsuperscript{102}

These histories of invalidation suggest that courts can invalidate the application of state trade secret law to conduct abroad, if not in conflict with any federal law, under the field preemption doctrine or the dormant Foreign Commerce Clause. Furthermore, these invalidation examples indicate that the Court recognizes the need to limit state law’s extraterritorial reach.\textsuperscript{103} Therefore, the presumption against extraterritoriality may be applicable to state trade secret law as a means to limit state law’s extraterritorial reach.

\textit{ii. Congressional Intent That Can Be Inferred from Its Inaction in the Field of Civil Trade Secret Law Supports the Presumption.}

The Congressional intent justification also supports the presumption against extraterritoriality. Congress has not yet proposed any federal civil trade secret law. Nonetheless, Congress has more interest in the extraterritorial application of state law than state legislatures do.\textsuperscript{104} Most of all, as mentioned in Part II.A.1.i, Congress is better equipped to deal with foreign affairs than the States.\textsuperscript{105} Moreover, the application of state law or federal law abroad is not different in that both are an application of U.S. law extraterritorially.\textsuperscript{106}

In trade secret law, Congressional intent can be inferred from the EEA, a criminal trade secret statute. When enacting the EEA, Congress specified that the EEA is applicable to events abroad in criminal actions.\textsuperscript{107} Contrastingly, Congress was silent in the field of civil trade secret

\textsuperscript{104} Florey, supra note 6, at 565-66.
\textsuperscript{105} Belmont, 301 U.S. at 330-31; Pink, 315 U.S. at 233; Lear, supra note 94, at 123-24.
\textsuperscript{106} Florey, supra note 6, at 571.
\textsuperscript{107} Quinto, supra note 57, at 303-309.
The Congressional inaction indicates its intent to refrain from applying trade secret law abroad in civil actions.109

iii. The International Law and Comity Justification Fits More in Trade Secret Law Than Other IP Laws Because Trade Secret Law Is Less Harmonized Both at the International and Domestic Level.

The Supreme Court has stated that the presumption prevents unintended clashes between U.S. laws and foreign laws that could result in international discord.110 This international law and comity justification is more persuasive in trade secret law than other IP laws. First, unlike patent or copyright laws, trade secret law is globally less uniform.111 Even some countries do not protect trade secrets.112 Less harmonized trade secret laws between countries causes more foreign relations problems. For example, when a foreigner’s act constitutes misappropriation of trade secrets in the United States, but not in the foreign country, the risk of conflicts with foreign nations is more likely.

Second, even when foreign trade secret law is similar to U.S. law, conflicts with foreign nations are possible. Even if the prohibition is similar, if other parts of foreign law like damages differ, conflicts with foreign nations are possible.113 Actually, different countries have different damages and statutes of limitations for trade secrets.

108 Lemley, supra note 10, at 315-16.
109 Bradley, supra note 5, at 554-55; Smith, 507 U.S. at 204 n.5; Equal Emp’t Opportunity Comm’n, 499 U.S. at 248.
111 Jerry Cohen & Alan S. Gutterman, TRADE SECRETS PROTECTION AND EXPLOITATION 409-10 (1998); See also Robin J. Effron, Secrets and Spies: Extraterritorial Application of the Economic Espionage Act and the Trips Agreement, 78 N.Y.U. L. REV. 1475, 1477 (2003)(“Though the agreement requires all member nations to adopt laws ensuring enforcement of the minimum standards, TRIPS acts merely as a floor, and indicates that, beyond meeting the minimum standard, nations are free to establish individual levels of intellectual property protections and mechanisms of enforcement”).
112 Cohen, supra note 111, at 409-10.
Finally, trade secret actions involving foreign conduct are subject to fifty different state trade secret laws. Therefore, results are less predictable and more conflicts with foreign laws are expected.\textsuperscript{114} For international comity, the presumption is required to avoid unintended clashes between U.S. and foreign laws.


Theoretically, two distinctive concepts, judicial and legislative jurisdiction, are related to adjudicate extraterritorial conduct.\textsuperscript{115} Judicial jurisdiction means simply jurisdiction to adjudicate.\textsuperscript{116} Legislative jurisdiction means a state or nation's power to assert its jurisdiction over persons or conduct.\textsuperscript{117} When applying state law to events abroad, courts generally only regard it as its assertion of judicial jurisdiction (choice of state forum), and fail to regard it as its assertion of legislative jurisdiction (application of state law).\textsuperscript{118} As a result, courts ignore important questions of legislative jurisdiction, such as issues regarding assertion of state power over events abroad.\textsuperscript{119}

In real practice, state courts or federal courts applying state law rarely consider extraterritoriality issues – the question of legislative jurisdiction.\textsuperscript{120} In analyzing cases with foreign elements, courts generally rely on choice-of-law doctrine – the question of judicial jurisdiction.\textsuperscript{121} The problem with such courts’ reliance is that state choice-of-law doctrine does not differentiate foreign law from sister-state law.\textsuperscript{122} Choice-of-law analysis might be appropriate

\textsuperscript{114} See Florey, supra note 6, at 538.
\textsuperscript{115} Id. at 551-52.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 551-53.
\textsuperscript{122} Id.
to harmonize slightly different state laws between states.\textsuperscript{123} However, the Choice-of-law analysis is inappropriate to deal with different laws between a state and a foreign nation because it lacks extraterritorial considerations.\textsuperscript{124}

Practical differences found in courts’ application of federal and state law contribute to the blindness to the extraterritoriality issues. When considering the reach of federal law, courts generally consider congressional intent or international law.\textsuperscript{125} However, when considering the reach of state law, courts rarely ask the question of legislative intent or international law.\textsuperscript{126} Courts generally restrict the application of state law to events abroad by the Due Process and Full Faith and Credit Clauses.\textsuperscript{127} The existence of constitutional limits, if minor, seems to prevent courts from expanding its analysis beyond choice-of-law doctrine.\textsuperscript{128} In addition to modest constitutional limits, the presumption in favor of the plaintiff’s choice of forum, the general acceptance of state extraterritorial regulation, and the common preference for forum law all reinforce courts to apply forum law, once courts find personal jurisdiction over the defendant.\textsuperscript{129}

Trade secret cases with foreign elements show this pattern of blindness. Most courts generally regard those trade secret cases in terms of judicial jurisdiction, and fail to consider the question of legislative jurisdiction. That is, courts generally rely only on choice-of-law or Due Process analysis when discussing extraterritorial application of state trade secret law.\textsuperscript{130} For

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{123} \textit{Id.} at 559.
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.} at 552-53.
\item \textsuperscript{126} \textit{Id.} at 551-53.
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.} at 558.
\item \textsuperscript{130} \textit{DuPont}, 2012 WL 4490547, at *22 (denying the need to consider question of legislative jurisdiction); \textit{Nordson}, 674 F.2d at 1377(analyzing the extraterritoriality issues under choice of law doctrine, the court ignored extraterritoriality issues); \textit{Delta}, 99 F.App’x. at 8-10 (relying on Due Process and reasonableness analysis, the court denied on grounds of forum non conveniens); \textit{K-V Pharm.}, 648 F.3d at 597-98 (focusing on due process analysis, the court denied motion for forum non conveniens); \textit{Syngy}, 2009 WL 1532117 at *2-3 (only focusing on forum non conveniences analysis).
\end{itemize}
\end{footnotesize}
example, in *DuPont*, the court stated that analysis under judicial jurisdiction is sufficient and denied the necessity of considering the question of legislative jurisdiction, such as extraterritoriality issues.\(^{131}\)

It is in this Court by virtue of diversity jurisdiction. And, the claim at issue is based on the substantive law of the forum state, not federal law. Accordingly, it does not appear that the rule in *Nintendo* or *Steele v. Bulova Watch Co.* [trademark cases] would even apply to assessing the propriety of an extraterritorial injunction in this case.

As a result, when applying state trade secret law to events abroad, courts disregard the possible interference with the sovereignty of foreign nations. Possible limits under judicial jurisdiction analysis are principles of preemption and the dormant Foreign Commerce Clause. However, invalidation of state trade secret actions under those principles is very rare.\(^{132}\)

There are other possible limits under judicial jurisdiction analysis, such as dismissal for forum non conveniens and assessment of “reasonableness” of personal jurisdiction. To some extent, courts actually have taken heed of adjudicating trade secret cases with substantial foreign elements by dismissing on grounds of forum non conveniens or reasonableness of personal jurisdiction.\(^{133}\) However, forum non conveniens dismissal and reasonableness inquiries are insufficient to ensure the imposition of extraterritoriality concerns into state trade secret law analysis.\(^{134}\) For example, although the presence of foreign law issues generally favors forum non

\(^{131}\) *DuPont*, 2012 WL 4490547, at *22. After denying the necessity of considering the question of legislative jurisdiction, the DuPont court analyzed the case pursuant to trademark law and concluded that the result is the same. However, the court failed to explain why trademark law approach, rather than patent or copyright law approach should be governed in trade secret cases.
\(^{133}\) See *Delta*, 99 F.App’x. at 9-10 (Dismissing on grounds of forum non conveniens); *EFCO*, 268 F.3d at 602-03 (dismissing action based on forum non conveniens); *Westinghouse*, 83 F.3d at *1 (affirming the district court’s dismissal of Westinghouse’s action upon the claim of forum non conveniens.); *See also Synygy*, 2009 WL 1532117 at *2-3 (reversing district court’s decision of Dismissal on grounds of forum non conveniens); *Triflo*, 44 F.App’x. at 266-67 (reversing district court’s decision of Dismissal on grounds of forum non conveniens); *See also Florey, supra* note 6, at 560-61.
\(^{134}\) Florey, *supra* note 6, at 561-62.
conveniens dismissal, cases where a court decides to apply state law are likely to survive the dismissal. The presumption in favor of plaintiff’s choice of forum and the common preference for forum law also reinforce the denial of a motion for forum non conveniens.

Without considering the question of legislative jurisdiction, courts blindly followed the rule in the Restatement (third) of unfair competition that requires an unlimited territorial scope of injunction. Current unrestricted and blind approaches to trade secret law have a potential to cause international conflicts with foreign nations. The approaches will also implant wrong impression about the scope of the United States’ regulatory power.

In addition to the blindness, choice-of-law analysis itself poses a risk of causing conflicts with foreign nations. For example, interest analysis, one of the choice-of-law principles, requires courts to weigh the interests of state and foreign nations by inappropriately assessing foreign laws and policies or deciding which law is better. Commentators criticized application of interest analysis to cases involving foreign conduct because of courts’ bias toward forum law. Misunderstanding of foreign law by U.S. judges also causes conflicts with foreign nations. Assessment of foreign law poses the risk of foreign offense and is best left for the legislative or executive branches.

\footnotesize{135 See K-V Pharm., 648 F.3d at 597-98 (denying motion for forum non conveniens because court in Missouri is in a better position to apply Missouri law); Florey, supra note 6, at 561-62.
136 See Triflo, 44 F.App’x. at 266-67 (holding that the district court erred because it failed to consider this presumption in favor of plaintiff’s choice of forum); see also Florey, supra note 6, at 558.
137 Restatement (Third) of Unfair Competition, § 44 cmt. d (1995), See also Melvin F. Jager, TRADE SECRETS LAW, 1 Trade Secrets Law § 7:17
138 Florey, supra note 6, at 571.
139 Id.
140 Id. at 572-74. Interest analysis allows courts to consider the interests of states or nations, unlike other analysis where its consideration is limited to mere contact counting or the location of events. Therefore, interest analysis addresses extraterritoriality concerns better than other choice-of-law principles.
141 Id.
142 Id.
143 Id.}
Even if the bias toward forum law is overcome, application of foreign trade secret law is problematic. U.S. judges lack expertise in foreign law practice. Misunderstanding foreign law may cause more serious problems in this context. Moreover, U.S. judges may be blind to important social and economic polices implicated by foreign laws.\textsuperscript{144}

3. **Implementing World-Wide Injunctions Is Practically Problematic.**

In addition to extraterritoriality and choice-of-law issues, implementing the world-wide injunction is practically difficult and problematic. First, there are few practical means to implement the injunctions. U.S. courts have very limited authority over foreign nations to command a foreign entity’s action.\textsuperscript{145} Unless foreign courts decide to enforce the U.S. court’s judgment under the internal laws of the country or international comity, the judgment is meaningless.\textsuperscript{146}

It is possible for U.S. courts to impose a penalty on the misappropriator if the misappropriator continues its business in the United States. However, it will be controversial to penalize the foreign entity for producing or selling products made by misappropriated technology abroad although the foreign entity does not sell the infringing products in the U.S. market. If the product was sold or produced only in a foreign country where it is not a violation of its trade secret law, the penalty is more problematic. It may have unintended impacts in the U.S. market, such as lessening competition and increasing attempts to monopolize by frivolous trade secret law suits against foreign businesses.


\textsuperscript{146} See id. (“The common perception is that the U.S. states freely recognize and enforce foreign judgments, but that other countries do not accord reciprocal treatment to U.S. judgments”).
When there is no practical way to implement injunctions abroad, the extraterritorial application of trade secret law to prevent unfair competition abroad may actually promote it. If conduct prohibited under U.S. trade secret law is legal under the foreign law, only U.S. exporters will be punished for misappropriation.

**B. Remedies**

The need to protect trade secrets is well shared throughout the world. One seemingly easy remedy is finding recourse in the foreign country where the misappropriation occurred. This remedy, however, is often not effective. Foreign countries may not have trade secret law or enforcement of trade secret law in a foreign country may be too burdensome or practically impossible. Considering the complex issues in extraterritoriality of trade secret law as seen in part II, a combination of various approaches, such as legislative, judicial – both federal and state, and political branch action will be effective to remedy the issues mentioned in Part III.A.

1. **Legislative Action, such as Enacting a Federal Trade Secret Statute, Will Be Effective to Remedy the Issues and The Extraterritorial Scope Should Be Between Patent and Trademark Law under the “Exception Approach.”**

Among intellectual property rights, the trade secrets area is the only one that lacks a federal statute. Commentators have suggested federalization of trade secret law. A federal trade secret statute has the potential to remedy the extraterritoriality issues. First, once a federal

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148 See id.

149 Intellectual Property in Mergers and Acquisitions - IP in Mergers & Acquisitions § 3:46


151 Rustad, supra note 60, at 459.

152 Bradley, supra note 5, at 513-16; See also Feldman, supra note 15, at 533-39.
statute is enacted, courts will apply the presumption against extraterritoriality. As a federal statute, the presumption will rein in extraterritorial application of trade secret law.

Second, application of a federal trade secret law will ensure more uniformity and predictability in cases with foreign elements.\textsuperscript{153} Although USTA or the Restatement (Third) of Unfair Competition is adopted by a majority of states, each state’s law is subtly different, for example, in its definition of trade secret or misappropriation, and statutes of limitation.\textsuperscript{154} Therefore, application of different state law can change the outcome.\textsuperscript{155} Uniform application of a federal trade secret law will prevent outcome determinative cases and ensure predictability that is preferred in the international arena.\textsuperscript{156}

Third, uniform federal trade secret law will help in dealing with political matters with foreign nations. For example, federal trade secret law will ensure the United States’ compliance with the minimum standards set in international agreements, such as NAFTA or TRIPS.\textsuperscript{157} Finally, enactment of federal trade secret law will resolve choice-of-law issues caused by disregarding extraterritoriality issues. Courts will consider not only choice-of-law issues, but also extraterritoriality issues.

It seems to be appropriate to find the scope of extraterritorial injunctions of federal trade secret law between the scopes of patent and trademark laws. Too broad of a scope in trademark law may interfere with efforts by political branches to use multinational agreements to improve trade secret protection abroad. Too narrow a scope, as in patent and copyright laws, has the potential to encourage economic espionage and to leave victims without remedies.

\textsuperscript{153} Florey, \textit{supra} note 6, at 538.
\textsuperscript{154} See Feldman, \textit{supra} note 15, at 535-36; Florey, \textit{supra} note 6, at 566.
\textsuperscript{155} See Feldman, \textit{supra} note 15, at 535-36; Florey, \textit{supra} note 6, at 566.
\textsuperscript{156} See Feldman, \textit{supra} note 15, at 533-39; Florey, \textit{supra} note 6, at 566.
Intuitively, considering the scope of extraterritoriality by comparing the context or policy of trade secret law with other IP laws seems reasonable. Commentators argued three reasons for a broader extraterritorial scope of trademark law than the scope of copyright and patent laws. First, some find a broader scope in trademark law from different policies that trademarks serve. While copyright and patent laws serve to protect rights holders, trademark law serves to protect consumers. Second, some find the justification from different public effects. Trademark confusion can affect the reputations of products, which “can reach a remote foreign market.” Therefore, the holder loses not only the sales of products abroad, but also its reputation in the U.S. market. The third justification is that although extraterritorial application of trademark law only takes the symbol from the foreign market, patent and copyright laws deprive technological innovation and artistic creations. Commentators argue that, therefore, extraterritorial application of U.S. patent or copyright laws is more offensive.

Trade secret law appears to fall in the middle ground between patent and trademark laws. Similar to patent and copyright laws, trade secret law serves to protect holders rather than consumers. Misappropriation of trade secrets does not affect the U.S. market as much as misappropriation of trademarks does. In addition, extraterritorial application of trade secret law deprives foreign markets of products or technologies.

However, trade secrets are also meaningfully different from copyrights and patents in that the misappropriation of trade secrets has the potential to depreciate or to deprive the holder of the value of the secrets by disclosure. Disclosure of trade secrets is also possible through litigation in

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159 Bradley, supra note 5, at 513-16.
160 Schechter, supra note 158, at 628-31; Toraya, supra note 144, at 1171-72 n.41.
161 Schechter, supra note 158, at 628-31.
162 Id.
163 Toraya, supra note 144, at 1171-72 n.41.
a foreign country, such as Japan. For example, the Japanese constitution requires that all court proceedings must be publicly disclosed. Most of all, trade secret protection in a foreign country is not guaranteed as much as copyrights and patents are because trade secret law is less harmonized than copyright and patent laws internationally. Therefore, the scope somewhere between patent and trademark laws seems to be reasonable.

One possible suggestion to determine the scope is the “exception approach.” Under this approach, federal trade secret law follows the presumption against extraterritoriality, but some exceptions in certain areas or conduct permit the court to apply trade secret law extraterritorially. Congress can extend the exceptions through amendments to cope with new circumstances. This approach can be found in other IP laws. For example, although patent law is not considered as extraterritorial, there is an exception for importation of infringing products under 35 U.S.C. § 271(g). Through the exception approach, Congress can apply trade secret law extraterritorially to a foreign country where there is no trade secret law or where the trade secret protection is below the minimum standard set in NAFTA or TRIPS.

2. Judicial Action, such as Adoption of the Presumption against Extraterritoriality or the ITC Approach as Seen in TianRui Will Be Effective to Remedy the Issues.

Until Congress enacts a federal trade secret statute, judicial action to resolve current issues is essential. To begin with, courts need to realize that application of state trade secret law to conduct in a foreign country is different from one in a sister state. Out of this recognition, courts need to revise the way they apply state trade secret law to conduct abroad. One of the most plausible options is to adopt the presumption against extraterritoriality to state trade secret

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165 Id.
166 Bradley, supra note 5, at ??.
167 Florey, supra note 6, at 570-71.
168 Id.
actions involving foreign elements. This option seems most plausible and just because the application of state law abroad is no less than the application of U.S. law abroad.\textsuperscript{169} In this way, courts can better address concerns about international law and conflicts with foreign nations.\textsuperscript{170} Furthermore, more uniform and predictable application of state trade secret law and less interference with efforts by political branches for multilateral agreements is expected. In addition to the adoption of the presumption, courts can utilize principles of field preemption and the dormant Foreign Commerce Clause to dismiss themselves from cases with substantial foreign elements.

Alternatively, courts can follow the approach taken in a trade secret action under section 337 as seen in \textit{TianRui}. That is, courts limit the scope of injunctions to the domestic level. Under this approach, courts can only prevent importation of the product manufactured by misappropriation of trade secrets.\textsuperscript{171} Patent law also adopted this approach. Under 35 U.S.C. § 271(g), importing, offering to sell, or using the product made abroad by a U.S. process patent is an infringement of a U.S. patent law.\textsuperscript{172} Because many trade secrets are more likely to concern processes than products, adoption of the section 337 approach or §271(g) in federal trade secret law seems more appealing.

By adopting these approaches, courts can avoid choice-of-law issues and unintended conflicts with foreign nations. Any loopholes in these approaches should be filled by political branch action, not by judicial action, by having treaties or agreements with foreign countries. This is also commensurate with the principle of separation of powers by letting the political branches working on foreign relations.

\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.} at 574-75.
\textsuperscript{171} Feldman, supra note 15, at 541-42.
\textsuperscript{172} 35 U.S.C. § 271(g)
3. **Political Branch Action, such as Treaties, Agreements, or Sanctions, Will Improve Trade Secret Protection in Foreign Countries and Decrease the Need to Apply U.S. Trade Secret Law Abroad.**

Another important way to ensure U.S. trade secret protection abroad is political branch action. Negotiation with foreign countries for bilateral or multilateral trade agreements, unilateral threats of sanction, or dispute settlement procedures are examples of political branch action.\(^{173}\) These efforts are important because once trade secret protection is globally guaranteed, the necessity of applying U.S. trade secret law abroad will also decrease.\(^{174}\) Examples of efforts to protect intellectual property through multilateral treaties or agreement include the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Universal Copyright Convention, GATT and NAFTA trade agreements.\(^{175}\) Two principles govern these treaties.\(^{176}\) First, the “national treatment” principle ensures that foreign nationals receive the same protection as the country’s citizens do.\(^{177}\) Second, the “minimum rights” principle ensures certain minimum levels of protection in each signatory country.\(^{178}\)

The first two international agreements to deal with trade secrets were NAFTA and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), which came under GATT. Both set minimum standards for trade secret protection for each member country.\(^{179}\) As in NAFTA or TRIPS, the U.S. government can continue its efforts to improve trade secret protection abroad through bilateral or multinational agreements. Additionally,

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\(^{173}\) Bradley, *supra* note 5, at 572.


\(^{175}\) *Id.* at 546-47.

\(^{176}\) *Id.* at 547-48.

\(^{177}\) *Id.*

\(^{178}\) *Id.*

negotiation with non NAFTA or TRIPS member countries will also improve global trade secret protection.

In addition to international agreements, the U.S. government can also induce countries with deficient trade secret protection to improve trade secret protection in the foreign country through threats of sanction.\textsuperscript{180} The Executive can also sanction countries violating trade secret treaties or agreements through international dispute settlement procedures, such as the World Trade Organization (“WTO”) procedures.\textsuperscript{181} The United States has already brought many intellectual property cases before the WTO.\textsuperscript{182}

**IV. CONCLUSION**

The DuPont decision highlights the risk of conflicts with foreign nations by overreaching application of state trade secret law abroad. The courts – both federal and state - should exercise restraint in extraterritorial application of trade secret law in view of concerns, such as the presumption against extraterritoriality, choice-of-law issues, and practical problems in enforcing injunctions. Considering the rationales of the presumption against extraterritoriality, particularly separation of powers, Congressional intent, and international law or comity, the presumption seems to be applicable to state trade secret law. Courts’ reliance on choice-of-law analysis and practical problems in enforcing extraterritorial injunctions also point out that the courts should exercise restraint in extraterritorial application of trade secret law. Action from legislative, judicial – both federal and state, and political branches in combination will resolve such issues. At the legislative level, enacting a federal trade secret statute will be an effective remedy. At the judicial level, adopting the presumption against extraterritoriality or the ITC approach as seen in

\textsuperscript{180} Bradley, \textit{supra} note 5, at 506.


\textsuperscript{182} Id.
TianRui will ensure more predictable, uniform, and restrained judgments. Finally, political branch action by treaties, agreements, or sanctions will improve trade secret protection in foreign countries and decrease the need to apply U.S. trade secret law abroad.
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