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Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports

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Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports

Lara Grow* & Nathaniel Grow**

Abstract

The protection of trade secrets within the professional sports industry became a hot-button issue in the summer of 2015, after news reports emerged revealing that officials from Major League Baseball's St. Louis Cardinals were under federal investigation for having illegally accessed proprietary information belonging to their league rival, the Houston Astros. Indeed, professional sports teams in the United States and Canada often possess various forms of proprietary information or processes—ranging from scouting reports and statistical analyses to dietary regimens and psychological assessment techniques—giving them a potential competitive advantage over their rivals. Unfortunately, as with the rest of the economy at-large, little empirical data exists regarding either the types of proprietary information owned by these teams, or the measures that teams are taking to protect their trade secrets.

Drawing upon freshly-collected survey data, this Article helps to fill this void in the literature by providing novel empirical evidence regarding the modern trade secret practices of the teams in the four major North American professional sports leagues. Based on the results of a first-of-its-kind survey conducted in the spring of 2016 of the general counsels of teams in the four major leagues, this Article sheds light on both the types of information subjected to trade secret assertion by these firms, as well as the methods they are using to safeguard their data. In the process, this Article examines the implications of these survey results for the professional sports industry, while also identifying potential new lines of inquiry for future trade secret research.

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Table of Contents

I. Introduction	1568
II. Propriety Information in the Professional Sports Industry	1571
III. The Law of Trade Secrets in the United States and Canada.....	1581
A. United States.....	1581
1. Uniform Trade Secrets Act	1583
a. Existence of a Trade Secret.....	1584
2. Non-Disclosure Agreements	1586
3. Non-Compete Agreements.....	1588
a. Misappropriation or Acquiring a Trade Secret by Improper Means	1592
4. Economic Espionage Act.....	1594
5. Defend Trade Secrets Act	1597
B. Canada.....	1599
IV. Survey Methodology and Results	1601
A. Survey Methodology	1602
B. Survey Results.....	1603
V. Implications and Suggestions for Future Research.....	1616
VI. Conclusion.....	1622

I. Introduction

*Seal up your lips, and give no words but mum:
The business asketh silent secrecy.*

—Shakespeare¹

A veil of secrecy has descended over sports unlike anything the industry has ever seen.

—Matthew Futterman²

1. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 1, sc. 2.

2. Matthew Futterman, *Baseball After Moneyball*, WALL ST. J. (Sept. 30, 2011), <https://www.wsj.com/articles/SB10001424053111903791504576584691683234216> (last visited Sept. 21, 2017) (on file with the Washington and Lee Law Review).

Society is currently in the midst of a “big data” revolution.³ Across wide swaths of the economy, businesses are increasingly marshalling previously unimaginable amounts of data to derive valuable new insights in fields as diverse as health care,⁴ financial services,⁵ and transportation.⁶ Indeed, through the use of data analytics, firms can more efficiently “anticipate future needs and concerns, plan strategically, avoid loss, and manage risk,” all for the betterment of the bottom-line.⁷

Nowhere has this big data revolution played out more publicly—or, perhaps, more prominently—than in the professional sports industry. Every day, millions of sports fans are exposed to countless new and ever more sophisticated statistics while watching their favorite teams play.⁸ Meanwhile, behind the scenes, teams in all four major North American professional sports leagues⁹ are increasingly using statistical and data analysis to not only formulate in-game strategy, but also to evaluate their players’ on-field performance, physical health, and even psychological make-up.¹⁰

3. See, e.g., Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 WAKE FOREST L. REV. 393, 393 (2014) (stating that “[w]e are on the cusp of a ‘Big Data’ Revolution” in which “[i]ncreasingly large datasets are being mined for important predictions and often surprising insights”).

4. See Janine S. Hiller, *Healthy Predictions? Questions for Data Analytics in Health Care*, 53 AM. BUS. L.J. 251, 251 (2016) (observing that “[b]ig data, analytics, and predictive algorithms are poised to play a large part in the transformation of health-care delivery in the United States”).

5. See Dru Stevenson & Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, 67 FLA. L. REV. 1337, 1387 (2015) (noting “the advent of big-data-based decision-making in the financial sectors”).

6. See Katherine Britton, *Handling Privacy and Security in the Internet of Things*, 19 J. INTERNET L. 3, 6 (2016) (predicting that the transportation industry will be able to derive “tremendous economic value realized as a result of Big Data”).

7. Ian Kerr & Jessica Earle, *Prediction, Preemption, Presumption: How Big Data Threatens Big Picture Privacy*, 66 STAN. L. REV. ONLINE 65, 66 (2013).

8. See Steve Eder, *Modern Stats Bring WAR to Broadcast Booth*, N.Y. TIMES, Apr. 1, 2013, at A1 (noting that teams in professional baseball increasingly expect their announcers to discuss advanced statistics during broadcasts).

9. For purposes of this Article, the four major North American sports leagues are Major League Baseball (MLB), the National Basketball Association (NBA), National Football League (NFL), and the National Hockey League (NHL).

10. See David L. Gregory & Joseph Gagliano, *A Message From the Symposium Chairs*, 22 SETON HALL J. SPORTS & ENT. L. 163, 165 (2012) (finding that professional sports teams use “the never-ending litany of increasingly

Despite the growing importance of big data in the modern economy, however, surprisingly little is known about the specific manner in which firms—either in the professional sports industry or the economy at-large—protect their proprietary information. Because methods of data analysis are most commonly protected under the law of trade secrecy,¹¹ and because trade secrets generally lose their legal protection if they are disclosed publicly,¹² firms have traditionally been understandably reluctant to discuss either the types of trade secrets they possess, or the steps that they are taking to protect this information.¹³

complex statistics . . . to evaluate and ‘value’ players”); *see also* Rian Watt, *New Technologies Are Forcing Baseball to Balance Big Data with “Big Brother”*, VICE SPORTS (May 27, 2016, 10:20 AM), https://sports.vice.com/en_us/article/8qygbp/new-technologies-are-forcing-baseball-to-balance-big-data-with-big-brother (last visited Sept. 21, 2017) (discussing the various ways in which MLB teams are utilizing new biometric tracking technology to evaluate players) (on file with the Washington and Lee Law Review).

11. *See* Michael Mattioli, *Disclosing Big Data*, 99 MINN. L. REV. 535, 556 (2014) (stating that “[m]any big data practices can probably be maintained as trade secrets”); *see also* Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure With Big Data*, 112 MICH. L. REV. 1417, 1435 (2014) (reporting that “many uses of Big Data are being kept as proprietary trade secrets”); Matthew J. Frankel, *Secret Sabermetrics: Trade Secret Protection in the Baseball Analytics Field*, 5 ALBANY GOV’T L. REV. 240, 250 (2012) (observing that professional baseball teams “treat their [statistical] strategies and formulas as trade secrets”). For a more in-depth discussion of the reasons why data analysis is typically protected under trade secret law, *see infra* notes 50–51 and accompanying text.

12. *See infra* Part II (discussing the legal requirements for obtaining trade secret protection under U.S. and Canadian law).

13. *See* David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 295 (2009) (“[L]ittle statistical analysis exists on either trade secrets or trade secret litigation. For trade secrets, the explanation is simple—because trade secrets must be kept secret to qualify for protection, there is little publicly available material to study.”); *see also* Frankel, *supra* note 11, at 242 (“One possible explanation for the dearth of scholarship or press reports in this area is that trade secrets are, by their nature, a secret, and thus do not lend themselves to public exposition or dissection.”). Indeed, the only prior studies that the authors could locate that (1) identified the types of information that were being subjected to trade secret protection or (2) discussed the specific methods that businesses were using to protect this information, came from two industrial surveys conducted back in 1965 and 1971, respectively. *See generally* J. ROGER O’MEARA, HOW SMALLER COMPANIES PROTECT THEIR TRADE SECRETS (1971) [hereinafter O’MEARA, HOW SMALLER COMPANIES PROTECT THEIR TRADE SECRETS] (reporting survey data regarding the trade secret practices of small businesses in the early 1970s); J. ROGER O’MEARA, EMPLOYEE PATENT AND SECRECY AGREEMENTS (1965) [hereinafter O’MEARA, EMPLOYEE

This Article aims to help fill this void in the existing literature by presenting freshly-collected data from the professional team sports industry regarding both the types of information being subjected to trade secret protection, as well as the manner in which those secrets are being guarded. Drawing upon the results of a survey recently conducted of the general counsels of teams belonging to the four major North American professional sports leagues, this Article sheds new light on the scope of trade secret protection in the modern economy, as well as the steps that these firms are taking to shield their increasingly valuable, but highly sensitive, information.

The Article proceeds in four parts. Part II briefly summarizes the historical evolution of statistical and data analysis in the professional sports industry, describing the various forms of proprietary information that a modern-day sports team may possess.¹⁴ Part III follows by offering an overview of the law of trade secrets in both the United States and Canada.¹⁵ Part IV then presents our survey methodology and results, providing novel empirical data regarding the manner in which North American professional sports teams are asserting and protecting their rights under trade secrecy law.¹⁶ Finally, Part V concludes by discussing the implications of this survey data, as well as offering some recommendations for future research.¹⁷

II. Propriety Information in the Professional Sports Industry

Since its inception, the professional sports industry has, to varying degrees, relied on a plethora of statistical data to evaluate players and help teams make roster decisions. As early as 1845—nearly a quarter century before the first professional sports franchise, the Cincinnati Red Stockings of 1869, was established—newspapers began printing box scores recapping the statistical

PATENT AND SECRECY AGREEMENTS] (reporting survey data regarding business's use of employee confidentiality and non-disclosure provisions to protect trade secrets).

14. *Infra* Part II.

15. *Infra* Part III.

16. *Infra* Part IV.

17. *Infra* Part V.

achievements of players in amateur baseball contests.¹⁸ This focus on documenting and quantifying the events transpiring on the playing field was only natural; as the former president of baseball's National League, John Heydler, once explained: "Without records, we would have merely a series of exhibitions, meaningless after the game was over . . . [Statistics] give a permanency to the game which it could never otherwise enjoy."¹⁹

Of the four major North American team sports, statistical and data analysis have historically been utilized most prominently in professional baseball.²⁰ This is largely due to the fact that the performance of individual baseball players is, in many respects, easier to accurately quantify than it is for players in the other professional sports.²¹ Much of the action occurring on the playing field in baseball is largely attributable to a one-on-one matchup between a batter and a pitcher.²² If the batter successfully hits the ball and gets on base, he has "won" the matchup; conversely, if the pitcher successfully gets the batter out, he is the victor. In contrast, quantitatively assessing the performance of basketball, football, and hockey players tends to be more difficult, as the performance of any one player on any particular play hinges to a great extent

18. See ALAN SCHWARZ, *THE NUMBERS GAME: BASEBALL'S LIFELONG FASCINATION WITH STATISTICS* 4 (2004) (reporting that "the first primitive (baseball) box score—initially termed an 'abstract'—appeared in the *New York Morning News* on October 22, 1845"); see also Ed Edmonds, *Arthur Soden's Legacy: The Origins and Early History of Baseball's Reserve System*, 5 ALBANY GOV'T L. REV. 38, 40 (2012) (describing the Cincinnati Red Stockings of 1869 as "the first professional baseball team").

19. SCHWARZ, *supra* note 18, at 25.

20. See *supra* note 18 and accompanying text (describing the origin of sports statistics in baseball).

21. See ROBERT E. KELLY, *BASEBALL'S OFFENSIVE GREATS OF THE DEADBALL ERA: BEST PRODUCERS RATED BY POSITION, 1901–1919*, at 1 (2009) ("Of all sports, baseball is the easiest to quantify.").

22. See Roger Allan Ford, *Trade Secrets and Information Security in the Age of Sports Analytics*, in *THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW* 4 (Michael McCann ed., forthcoming 2018), <https://poseidon01.ssrn.com/delivery.php?ID=476013072022122122103077104081099095028032023043029030023009007088117100065124020070033000021120038125121100106017091003084112010060038093078009094069093018088112054044001072100099006105071070091106065002079085088007000119027065097029122121102094088&EXT=pdf> ("Baseball is less a team game than a series of individual pitcher-hitter encounters, which made it easy to develop statistics that predict, rather reliably, the number of runs a team will score and the number of games it will win per year.").

not only on the performance of the player in question, but also on his or her interactions with four or more teammates working together as a single unit on the playing field.²³ As a result, due to the more individualized nature of its competition, along with its status as the continent's oldest professional sport, baseball has traditionally boasted the richest history of statistical and data analysis of the four major North American sports.²⁴

Nevertheless, despite the fact that professional baseball teams have had access to a veritable cornucopia of statistical data since the industry's formation, no MLB team went so far as to hire a full-time statistician until 1947.²⁵ That year, the Brooklyn Dodgers, led by legendary executive Branch Rickey, hired Allan Roth to provide the team with novel and proprietary statistical analyses.²⁶ Roth began charting every play that the Dodgers were involved in that season, allowing him to formulate a series of never-before-seen data regarding the performance of the team's players (such as a player's batting average with runners on base, and "spray charts" documenting where each of a particular hitter's batted balls landed).²⁷ The insights that Roth was able to glean

23. See *id.* at 5 ("Things become more complicated in sports like basketball and football in which the data is more complex and player interactions matter more.").

24. See SCHWARZ, *supra* note 18, at xiv ("No other sport has anywhere near such reverence for its statistics.").

25. See *id.* at 54 (stating that Allan Roth was the "first full-time statistician ever hired by a major league club").

26. See *id.* (noting Allan Roth's contribution to the major leagues); see also Alan Roth, 74, *Dies; Baseball Statistician*, N.Y. TIMES (March 5, 1992), <http://www.nytimes.com/1992/03/05/sports/alan-roth-74-dies-baseball-statistician.html> (last visited Sept. 21, 2017) ("Mr. Rickey was intrigued, and Mr. Roth became the first full-time statistician hired by a major league club, touching off a trend that has made the personal computer an essential element of clubhouse paraphernalia.") (on file with the Washington and Lee Law Review); J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L.J. 391, 401 (1999) (describing Rickey as a "legendary baseball executive"). Rickey is perhaps most famous for signing Jackie Robinson to play for the Dodgers in 1947, thereby breaking baseball's color barrier. See Alfred Dennis Mathewson, *Major League Baseball's Monopoly Power and the Negro Leagues*, 35 AM. BUS. L.J. 291, 291 (1998) (noting that "Branch Rickey lured Jackie Robinson from the [Negro League's] Kansas City Monarchs to play for the Brooklyn Dodgers").

27. See, e.g., Bryan Gottlieb, Comment, *Avoiding Contractual Liability to Baseball Players Who Have Used Performance Enhancing Drugs: Can We Knock it Out of the Park?*, 77 ALBANY L. REV. 615, 632 (2014) (observing that Allan Roth developed a variety of new statistical measurements to assess players'

from this data helped the Dodgers capture the National League pennant twice in his first three years with the team.²⁸

Despite Roth's contributions, however, other teams were slow to follow the Dodgers' lead and hire their own full-time statisticians. In fact, with a few passing exceptions,²⁹ it wasn't until the late-1990s and early-2000s that most MLB teams employed their own statistical analysts.³⁰

In the interim, amateur statisticians from outside of the baseball establishment filled the void.³¹ Led by pioneers like Bill James and his fellow members of the Society for American Baseball Research (SABR), baseball fans looking to more precisely assess the performance and contributions of baseball players and teams began to question and challenge the value of traditionally relied-on statistics such as batting average, runs batted in (RBIs), and pitchers' win-loss records.³² These efforts—popularly dubbed “sabermetrics”—gained momentum in the 1990s, when the Internet allowed what had previously been a collection of geographically dispersed enthusiasts to more easily collaborate with one another electronically.³³ Through websites such as

performance).

28. See *Year-By-Year Results*, L.A. DODGERS, http://losangeles.dodgers.mlb.com/la/history/year_by_year_results.jsp (last visited Sept. 21, 2017) (reporting that the Brooklyn Dodgers finished first in the National League in both 1947 and 1949) (on file with the Washington and Lee Law Review).

29. For instance, the Houston Astros temporarily hired a statistician in 1979, while the Oakland Athletics employed one in the 1980s. SCHWARZ, *supra* note 18, at 136, 219–20.

30. See Brad Millington & Rob Millington, *The Datafication of Everything: Toward a Sociology of Sport and Big Data*, 32 SOC. SPORT J. 140, 153 (2015) (quoting Moneyball author Michael Lewis, “[t]he virus that infected professional baseball in the 1990s, the use of statistics to find new and better ways to value players and strategies, has found its way into every major sport”).

31. See Frankel, *supra* note 11, at 261–63 (recounting the history of the fan-based statistical revolution in professional baseball).

32. See Jack Moore, *How Wall Street Strangled the Life Out of Sabermetrics*, VICE SPORTS (Oct. 22, 2014, 8:30 AM), https://sports.vice.com/en_us/article/aem895/how-wall-street-strangled-the-life-out-of-sabermetrics (last visited Sept. 21, 2017) (finding that “for men like Pete Palmer and Bill James, some of the earliest popular sabermetric authors, sabermetrics centered around understanding, around reconciling the differences between what they saw on the field and how those within baseball said the game was played and won”) (on file with the Washington and Lee Law Review).

33. See Millington & Millington, *supra* note 30, at 145 (noting that “it is an increasingly accepted premise that computers, together with the drive to know

Baseball Prospectus, and later FanGraphs, statistically inclined fans created a variety of new metrics to better evaluate the performance of baseball players, tools that have subsequently been incorporated by professional teams' in-house statisticians.³⁴

Sabermetrics was thrust into the mainstream—both within the baseball industry and among the public at-large—by the publication of Michael Lewis' best-selling book, *Moneyball: The Art of Winning an Unfair Game*, in 2003.³⁵ *Moneyball* documented the efforts of MLB's Oakland Athletics, led by the team's general manager, Billy Beane, to challenge the baseball industry's then-conventional wisdom by using sabermetric principles to identify and exploit inefficiencies in the way in which most teams assessed and valued their players.³⁶ For instance, by targeting batters with high on-base percentages³⁷—a trait undervalued by most teams at the time—the Athletics were able to build offenses that helped propel the team to the playoffs for four straight seasons in the early-2000s, all despite the fact that the team boasted one of MLB's lowest player payrolls.³⁸ By recounting this story, *Moneyball* propelled sabermetric principles into the limelight, helping introduce the masses to new ways of thinking about the sport.³⁹ As a result, practically every team in MLB today utilizes sabermetric principles to at least some extent when making personnel decisions, often building upon the insights of those

the (consuming) population, have helped spur the arrival of an Age of Big Data" in sports).

34. See SCHWARZ, *supra* note 18, at 230–31 (discussing the importance of the *Baseball Prospectus* website in the sabermetrics revolution).

35. MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003).

36. See *id.* at xiv (explaining that “the Oakland A's general manager, Billy Beane, had set about looking for inefficiencies in the game”).

37. On-base percentage measures the rate at which a hitter reaches base (whether via a hit, walk, or by being hit by a pitch) out of the hitter's total number of plate appearances (i.e., number of times at bat).

38. See LEWIS, *supra* note 31, at 59 (stating that the Athletics' “corporate culture [centered] around a single baseball statistic: on-base percentage”).

39. See Frankel, *supra* note 11, at 263 (stating that “[s]abermetrics was first introduced to the non-baseball obsessed through the publication in 2003 of Michael Lewis's best-selling book, *Moneyball: The Art of Winning an Unfair Game*”).

working in the public domain to create their own proprietary statistical analyses.⁴⁰

In contrast to the experience of professional baseball, the other major North American sports leagues have generally been slower to incorporate their own forms of advanced data analytics.⁴¹ That being said, the NBA is, by most accounts, the second most advanced league when it comes to statistical analysis, with professional basketball teams increasingly developing their own proprietary methods to look for any possible competitive advantage that can be gleaned from newer, more precise statistical measurements.⁴² Meanwhile, although franchises in the NFL and NHL generally lag behind their MLB and NBA counterparts when it comes to developing their own advanced statistical models,⁴³ teams in both sports have slowly been making strides in this area as well in recent years.⁴⁴

40. See SCHWARZ, *supra* note 18, at 213 (reporting that “by 2002 most major league organizations had someone either on staff, or retained as a consultant, to conduct sabermetric studies to evaluate players and other moves”); see also Jack Moore, *Baseball ProGUESTus: The Secret History of Sabermetrics*, BASEBALL PROSPECTUS (July 16, 2013), <http://www.baseballprospectus.com/article.php?articleid=21234> (last visited Sept. 21, 2017) (concluding that “[e]very major league team has established an analytics department, in some form”) (on file with the Washington and Lee Law Review).

41. See BENJAMIN BAUMER & ANDREW ZIMBALIST, *THE SABERMETRIC REVOLUTION: ASSESSING THE GROWTH OF ANALYTICS IN BASEBALL*, at xii (2013) (claiming that it is “not surprising that since its early days, baseball has produced a copious quantitative record” as compared to other sports).

42. See, e.g., Scott Bukstein, *A New Solution for Salary Disputes: Implementing Salary Arbitration in the National Basketball Association*, 22 MARQ. SPORTS L. REV. 25, 32 (2011) (noting the “increasing use of analytics and sabermetrics for player and team performance in basketball”); see also Ehram Khan, *Advanced NBA Stats for Dummies: How to Understand the New Hoops Math*, BLEACHER REP. (Oct. 18, 2013), <http://bleacherreport.com/articles/1813902-advanced-nba-stats-for-dummies-how-to-understand-the-new-hoops-math> (last visited Sept. 21, 2017) (summarizing the most popular advanced statistics being used in the NBA) (on file with the Washington and Lee Law Review).

43. See, e.g., Kevin Clark, *The NFL's Brewing Information War*, RINGER (June 2, 2016, 1:13 PM), <https://www.theringer.com/2016/6/2/16077478/nfl-information-war-data-advanced-stats-73b6eee2d39f> (last visited Sept. 21, 2017) (finding that NFL teams generally lag “behind other professional leagues amid an otherwise widespread analytics revolution”) (on file with the Washington and Lee Law Review).

44. For a brief overview of the use of advanced statistics in the NFL, see *Methods to Our Madness*, FOOTBALL OUTSIDERS, <http://www.footballoutsiders.com/info/methods> (last visited Sept. 21, 2017) (discussing a plethora of

The use of data and statistical analysis in the sports industry is only likely to continue to grow in the future, as new technologies enable teams in all four leagues to assess their players' performance in previously unimaginable ways.⁴⁵ Over the past few years, for instance, each of the four major North American sports leagues have begun to implement new systems that, through the use of intricate series of cameras and sensors, allow teams to track and record every event that transpires on the playing field in much more precise detail than ever before.⁴⁶ In MLB, for example, the league's new StatCast system not only records players' every movement on the field, but also tracks the flight of the baseball itself, including both the number of times the ball rotates after being thrown by a pitcher, and the velocity and angle with which it leaves a hitter's bat.⁴⁷ Similarly, in the NFL, all players were fitted with special shoulder pads for the 2015 season that included two tiny computer chips, allowing a series of receivers located throughout the stadium to continuously record each player's location and movement.⁴⁸ The copious amounts of data produced

advanced statistics in football) (on file with the Washington and Lee Law Review). Similarly, for an overview of the emerging use of advanced statistics in professional hockey, see Sam Page, *Fancy Stats Primer: Your Guide to Hockey's Advanced Analytics Jargon*, SPORTS ILLUSTRATED (Sept. 29, 2014), <https://www.si.com/nhl/2014/09/28/fancy-stats-primer-advanced-analytics-corsifewick-pdo-qualcomp> (last visited Sept. 21, 2017) (overviewing how to meaningfully breakdown and understand hockey statistics) (on file with the Washington and Lee Law Review).

45. See Millington & Millington, *supra* note 30, at 156 (predicting that "with the advent of technologies . . . with the steady 'flow' of analysts, investors, and ideas" in Big Data in sports, "the volume and variety of data" will only continue to grow).

46. See, e.g., Christian Frodl, *Commercialisation of Sports Data: Rights of Event Owners Over Information and Statistics Generated About Their Sports Events*, 26 MARQ. SPORTS L. REV. 55, 62 (2015) (observing that "[t]he National Basketball Association (NBA) announced an agreement with STATS in 2013 to install player-tracking systems at all NBA games").

47. See Ben Lindbergh, *Ready, Set, Statcast: What the New Data Stream Can Teach Us About MLB*, GRANTLAND (April 9, 2015), <https://grantland.com/the-triangle/mlb-2015-statcast-advanced-hitting-pitching-defensive-stats/?print=1> (last visited Sept. 21, 2017) (explaining that StatCast "captur[es] the physical position of every player, pitch, and batted ball many times per second") (on file with the Washington and Lee Law Review).

48. See Clark, *supra* note 43 (noting that the NFL's tracking system "decipher[s] all movements on the field, measuring everything from player speed to how open a pass-catcher manages to get on a given play").

by these new tracking systems promise to yield untold new insights into each of the four major sports, and thus represents a potentially significant source of competitive advantage for the teams that are best able to develop proprietary methods for analyzing this new information and incorporate it into their decision-making processes.⁴⁹

At the same time, teams across the professional sports industry are also beginning to make use of new biometric-tracking technology, enabling them to monitor their players physiologically.⁵⁰ Through the use of Fitbits and similar devices, for instance, teams can now measure the number of calories their players consume and burn in a given day, their heart rate during practice and games, and even the amount and quality of their sleep each night.⁵¹ Meanwhile, other new technologies such as Motus sensors enable teams to view, in real-time, the amount of stress that athletes are placing on their various joints and tendons, especially those that are most susceptible to injury.⁵² The data gleaned from these sorts of biometric tracking devices represents another source of potential competitive advantage for teams, allowing them to fine-tune dietary and physical training regimens to help their players avoid injury and achieve peak physical performance on the playing field.⁵³

49. See Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61, 63 (2011) (stating that “[f]irms continuously seek a competitive advantage over rivals”).

50. See Watt, *supra* note 10 (discussing the use of biometric-tracking technology in professional baseball).

51. See *id.* (observing same); see also Steven I. Friedland, *Of Clouds and Clocks: Police Location Tracking in the Digital Age*, 48 TEX. TECH L. REV. 165, 167 (2015) (explaining that Fitbit devices “track[] a person’s everyday health and fitness”).

52. See The Associated Press, *Putting Data Science on a Player’s Sleeve*, N.Y. TIMES (Apr. 2, 2016), <https://www.nytimes.com/2016/04/03/sports/baseball/putting-data-science-on-a-players-sleeve.html> (last visited Sept. 21, 2017) (reporting that through the use of “five blue sensors attached” to a player’s body, Motus sensors “record[] 39 sets of measurements, including shoulder rotation, hip speed and stride”) (on file with the Washington and Lee Law Review).

53. See Robert Guthrie, *The Future of Biometric Tracking Will Make Step Counters Look Like Antiques*, DIGITAL TRENDS (Dec. 13, 2016, 4:30 PM), <https://www.digitaltrends.com/health-fitness/future-of-biometrics-beyond-the-wrist-tracker/> (last visited Sept. 21, 2017) (claiming that advances in biometric technology “offer the opportunity to find out exactly what your body is capable of, helping customers truly fine-tune their fitness, nutrition, and general

In addition to advanced statistical and data analysis, sports franchises also derive value from more traditional forms of proprietary information. For instance, many teams closely guard their playbooks—compilations of all of their strategies and plays—along with the various signals (hand, verbal, or otherwise) used by coaches to relay play calls to players during a game.⁵⁴ Similarly, scouting reports regarding the strengths and weaknesses of both a franchise’s own players, as well as those playing for opposing teams, are another type of information that clubs may wish to protect, as are records documenting a franchise’s prior and on-going trade negotiations with other clubs.⁵⁵ Meanwhile, like any business, a professional sports team is also likely to possess proprietary information relating to its general business plans, marketing strategies, and customer lists, all of which will also usually be of commercial value.⁵⁶ As with newer, more advanced forms of statistical and data analysis, each of these types of proprietary information represent another source of potential competitive advantage for sports teams.⁵⁷

Lest there were any doubt regarding the value that sports franchises place on these various forms of proprietary information, those questions were largely laid to rest in June 2015, when news

well-being”) (on file with the Washington and Lee Law Review).

54. See Rice Ferrelle, Note, *Combating the Lure of Impropriety in Professional Sports Industries: The Desirability of Treating a Playbook as a Legally Enforceable Trade Secret*, 11 J. INTEL. PROP. L. 149, 150 (2003) (“In the NFL, playbooks are treated like trade secrets.”); see also Samuel J. Horovitz, *If You Ain’t Cheating You Ain’t Trying: “Spygate” and the Legal Implications of Trying Too Hard*, 17 TEX. INTEL. PROP. L.J. 305, 315–16 (2009) (describing the lengths teams will go to protect their playbooks).

55. See *Nat’l Football Scouting, Inc. v. Rang*, 912 F. Supp. 2d 985, 995–96 (W.D. Wash. 2012) (concluding that scouting reports of players’ abilities are potentially protectable under trade secret law); see also Matthew J. Frankel, *Hackers Strike Out: Recent Cases of Alleged Sports Analytics IP Theft*, 1 J. SPORTS ANALYTICS 83, 84 (2015) (noting the sensitivity of a “team’s confidential player-evaluation programs”).

56. See Anne M. Wall, *Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events*, 7 MARQ. SPORTS L.J. 77, 138 (1996) (observing that “[b]usiness plans, marketing strategies, formal game plans, technical information, financial data, and customer lists” are all potentially valuable commercial information for a sports team).

57. See *id.* at 137 (noting that “[d]isclosure of a company’s know-how and trade secrets to competitors or to the public could result in a loss of the company’s competitive advantage”).

reports emerged that the Federal Bureau of Investigation (FBI) was investigating whether officials from MLB's St. Louis Cardinals had illegally accessed, or hacked into, an internal computer network belonging to their league rival, the Houston Astros.⁵⁸ The government had launched its investigation nearly a year earlier, after notes memorializing the Astros' trade discussions with other clubs were taken from the team's network—whimsically named “Ground Control”—and leaked to the sports website Deadspin.⁵⁹ While the FBI's investigation into the incident remains ongoing, to date one former member of the Cardinals' front office staff, Christopher Correa, the team's then-scouting director, has pled guilty to charges that he illegally accessed the Astros' internal network in order to view the team's proprietary information (including Houston's player scouting reports and statistical analyses, in addition to the leaked trade-discussion notes).⁶⁰

This incident highlights the growing importance of proprietary data in the professional team sports industry, and thus illustrates the need for sports franchises to take measures to secure and legally protect their most valuable and sensitive information.⁶¹

58. See Michael S. Schmidt, *Cardinals Investigated for Hacking Into Astros' Database*, N.Y. TIMES, June 16, 2015, at A1 (“Investigators have uncovered evidence that Cardinals employees broke into a network of the Astros that housed special databases the team had built” and “[i]nternal discussions about trades, proprietary statistics and scouting reports were compromised.”).

59. See Barry Petchesky, *Leaked: 10 Months Of The Houston Astros' Internal Trade Talks*, DEADSPIN (June 30, 2014, 1:19 PM), <http://deadspin.com/leaked-10-months-of-the-houston-astros-internal-trade-1597951970> (last visited Sept. 21, 2017) (“Documents purportedly taken from Ground Control and showing 10 months' worth of the Astros' internal trade chatter have been posted online at . . . a site where users can anonymously share hacked or leaked information.”) (on file with the Washington and Lee Law Review).

60. See Plea Agreement at 10, *United States v. Correa*, Case No. 4:15-CR-00679 (S.D. Tex. Jan. 8, 2016), ECF. No. 15 (recounting that Correa accessed the Astros' evaluations of current and prospective players, the team's ongoing statistical analysis projects, and trade discussions). On July 18, 2016, Judge Lynn Hughes of the Southern District of Texas sentenced Correa to forty-six months in jail and ordered him to pay the Astros \$279,038 in restitution for his unauthorized access of the team's computer network. Associated Press, *Ex-Cardinals Official Gets Nearly Four Years for Hacking*, N.Y. TIMES, July 19, 2016, at B10.

61. Indeed, in the aftermath of the Cardinals-Astros' hacking affair, MLB has reportedly encouraged its teams to take greater steps—including the

III. The Law of Trade Secrets in the United States and Canada

As noted above, firms within both the professional sports industry and the economy at-large most frequently rely on the law of trade secrets to protect their data analysis and related forms of proprietary information.⁶² This is true for several reasons. First, it is questionable whether much of this sort of information would qualify for protection under other forms of intellectual property law.⁶³ Second, even if it did, proving the unauthorized use of a proprietary method of data analysis, for example, would be nearly impossible, since any infringing activities would usually be carried out behind closed doors without producing any readily discernible evidence of the infringement. Therefore, to the extent that a North American professional sports team wishes to legally protect its proprietary data, trade secrecy law will often prove to be its only practical option.

Consequently, an overview of the law of trade secrets is in order. This Part, therefore, provides a summary of the current state of trade secrecy law in both the United States and Canada (the latter of which currently houses teams in three of the four major North American sports leagues).

A. United States

In contrast to the constitutional underpinnings of patent and copyright law, American trade secrecy law has evolved from the common law.⁶⁴ As the labor market shifted in the 1800s from an

modernization of their employment contracts—to protect their intellectual property. See Derrick Goold, *MLB Commissioner: Teams Need to Protect Intellectual Property*, ST. LOUIS POST-DISPATCH (Nov. 10, 2015), http://www.stltoday.com/sports/baseball/professional/birdland/mlb-commissioner-teams-need-to-protect-intellectual-property/article_4c2ed647-65e6-5edd-b17a-e3cdcf510fd3.html (last visited Sept. 21, 2017) (reporting same) (on file with the Washington and Lee Law Review).

62. See *supra* note 11 (discussing the fact that data analysis methods are most commonly protected under trade secret law).

63. See, e.g., Mattioli, *supra* note 11, at 553–55 (observing that “[a]lgorithms that amount to abstract ideas, for instance, do not meet the threshold eligibility requirements for patent protection,” while “copyright protection does not provide exclusivity in processes or methods”).

64. See Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL.

apprenticeship model to greater industrialization, nineteenth-century American courts began to recognize ownership in confidential business information, importing common law doctrines established during the English Industrial Revolution.⁶⁵

In an effort to summarize and harmonize the growing body of state laws on trade secrecy, the American Law Institute included the topic in its Restatement (First) of Torts (Restatement), published in 1939.⁶⁶ The Restatement defined a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives [the business] an opportunity to obtain an advantage over competitors who do not know or use it.”⁶⁷ In addition, it required that secrecy was needed in order for the confidential information to receive legal protection.⁶⁸ For liability to arise for the misappropriation of a trade secret, however, the Restatement specified that the

PROP. L. REV. 1, 6 (2007) (“Whereas copyright and patent law in the United States find legal justification in the Constitution and implementing federal statutes, trade secret law grew out of the common law and has now been codified separately in most states.”).

65. See *Vickery v. Welch*, 36 Mass. (19 Pick.) 523, 525 (1837) (citing English case law, this is the first reported U.S. case involving the protection of a trade secret, specifically the method of making chocolate); see also Benjamin A. Emmert, Comment, *Keeping Confidence with Former Employees: California Courts Apply the Inevitable Disclosure Doctrine to California Trade Secret Law*, 40 SANTA CLARA L. REV. 1171, 1174 (2000) (noting early American reliance on nineteenth-century English trade secret case law).

66. David S. Almeling, *Seven Reasons Why Trade Secrets are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1096 (2012) (“When the Restatement of Torts was published in 1939, it included a section summarizing the law of trade secrets.”).

67. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939); see also Christopher B. Seaman, *The Case Against Federalizing Trade Secrecy*, 101 VA. L. REV. 317, 325 (2015) (describing the history and content of the trade secrecy provisions of the Restatement (First) of Torts). Notably, the Restatement also failed to protect negative information, i.e., knowledge about how not to do something, as well as “single use” information lacking a continuous business use. See RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (stating that a trade secret “differs from other secret information in business in that it is not simply information as to single or ephemeral events in the conduct of business”); see also Risch, *supra* note 64, at 8 (noting the Restatement’s more restrictive definition of a trade secret, excepting “single use” information); Emmert, *supra* note 65, at 1176–77 (observing the failure of the Restatement to protect negative information and information with a “short life span, such as a contract for sale or a marketing plan”).

68. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

information must have either been discovered by “improper means,” or else disclosed or used in breach of a duty of confidence.⁶⁹ Although the Restatement was frequently cited by courts, “due to [its] nonbinding nature . . . trade secret law remained geographically inconsistent, developing unevenly from state to state.”⁷⁰

In an attempt to overcome this geographic inconsistency, trade secret law in the United States was eventually codified in three primary statutes: the Uniform Trade Secrets Act (UTSA), the Economic Espionage Act (EEA), and—most recently—the Defend Trade Secrets Act (DTSA).⁷¹ This subpart reviews each of these three statutory provisions in turn.

1. Uniform Trade Secrets Act

The National Conference of Commissioners on Uniform State Laws attempted to address the shortcomings of the Restatement by “codify[ing] existing common law standards and . . . provid[ing] a uniform approach to trade secret misappropriation among the states” through its enactment of the UTSA in 1979.⁷² Today, forty-eight states and the District of Columbia have adopted some version of the UTSA.⁷³ Meanwhile, despite not having formally enacted the UTSA themselves, both of the two outlier states—New

69. *Id.* § 757(a)–(b).

70. Almeling, *supra* note 66, at 1096–97.

71. See generally BRIAN T. YEH, CONG. RES. SERV., PROTECTION OF TRADE SECRETS: OVERVIEW OF CURRENT LAW AND LEGISLATION (2016), <https://fas.org/sgp/crs/secracy/R43714.pdf> (summarizing the current law and legislation governing trade secrets in the United States).

72. Christopher Rebel J. Pace, *The Case for a Federal Trade Secrets Act*, 8 HARV. J.L. & TECH. 427, 432–33 (1995).

73. See *Latest Updates on Federal Trade Secrets Legislation*, SEYFARTH SHAW, <http://www.tradesecretslaw.com/latest-update-on-federal-trade-secret-legislation/> (last visited Sept. 21, 2017) (noting that Texas is the most recent adoptee of the UTSA with the two holdout states, Massachusetts and New York, adhering to the common law) (on file with the Washington and Lee Law Review); see also Seaman, *supra* note 67, at 330 (noting that the Restatement (Third) of Unfair Competition, promulgated in 1995, generally mirrors the provisions of the UTSA and “has had only a modest impact at best on the development of trade secret law”).

York and Massachusetts—impose similar requirements in order for trade secret protection to arise.⁷⁴

Specifically, in order to establish a claim for misappropriation of a trade secret under the UTSA, a plaintiff must show that (1) a legally protectable trade secret exists; and (2) the defendant acquired the trade secret by improper means.⁷⁵

a. Existence of a Trade Secret

As to the first requirement, the UTSA defines a trade secret as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁷⁶

Parsing this language, the UTSA requires two elements to establish the existence of a trade secret.

First, a plaintiff must be able to show that its trade secret possesses economic value from not being “generally known.”⁷⁷ Under this standard, courts have held that information has economic value if a competitor would have to expend time and money to independently discover the information and would materially benefit from its discovery.⁷⁸ Meanwhile, a trade secret

74. See Frankel, *supra* note 11, at 252 (reporting that the states that have not yet adopted the UTSA nevertheless impose similar standards on parties seeking to protect their trade secrets). However, it should be noted that even in states that have adopted the UTSA, some courts nonetheless “continue to invoke principles from cases decided under the First Restatement of Torts.” Geraldine Szott Moohr, *The Problematic Role of Criminal Law in Regulating Use of Information: The Case of the Economic Espionage Act*, 80 N.C. L. REV. 853, 871 (2002).

75. See, e.g., Marina Lao, *Federalizing Trade Secrets Law in an Information Economy*, 59 OHIO ST. L.J. 1633, 1653 (1998) (defining the scope of the term “trade secret” under the Uniform Trade Secrets Act).

76. UNIF. TRADE SECRETS ACT § 1(4) (UNIF. LAW COMM’N 1996).

77. *Id.*

78. See John H. Matheson, *Employee Beware: The Irreparable Damage of the*

is not generally known so long as it has not “escap[ed] into the mainstream of public knowledge.”⁷⁹ Along these lines, “absolute secrecy” is not required.⁸⁰ Instead, a trade secret may properly be “shared with employees, independent contractors, [or] third-party business partners” without losing its legal protection, so long as these individuals have a need to know the information and are made aware of its confidentiality.⁸¹

Second, a plaintiff must also be able to show that it has taken reasonable measures to maintain the secrecy of its proprietary information in order for a legally protectable trade secret to exist under the UTSA.⁸² This is a fact-specific inquiry.⁸³ Courts in this respect often engage in a cost-benefit analysis, balancing the necessity of a company taking adequate precautions to protect its trade secrets against concerns that these measures not be unduly burdensome.⁸⁴ Indeed, many courts view the efforts to maintain secrecy as a function of the value of the underlying trade secret. In other words, “[s]ome courts may reason that there is a direct

Inevitable Disclosure Doctrine, 10 LOY. CONSUMER L. REV. 145, 148 (1998) (explaining how courts define whether information is generally known).

79. JAMES POOLEY, TRADE SECRETS § 4.04(2)(a) (2011).

80. Elizabeth A. Rowe, *Contributory Negligence, Technology, and Trade Secrets*, 17 GEO. MASON L. REV. 1, 9 (2009) (observing that it is well established that “reasonable efforts do not require absolute secrecy”); *see, e.g.*, *Sheets v. Yamaha Motors Corp.*, 849 F.2d 179, 183 (5th Cir. 1988) (explaining relative secrecy under Louisiana law).

81. Frankel, *supra* note 11, at 253.

82. UNIF. TRADE SECRETS ACT § 1(4)(ii) (UNIF. LAW COMM’N 1996).

83. *See Rowe, supra* note 80, at 2 (“This [reasonable measures] standard is very flexible, and intuitively necessitates a fact-intensive case-by-case determination that considers a host of factors in trying to ascertain reasonableness.”).

84. *See id.* at 9

These decisions necessitate a balancing between using sufficient precautions to protect a company’s secret on the one hand, while not imposing overly-burdensome precautions that would impair the functioning of its business on the other hand. The inquiry necessarily calls for a cost-benefit analysis, which varies in each case based on the costs of the protective measures relative to the attendant benefits of protecting the information.

POOLEY, *supra* note 79, at § 4.04(2)(b); *see also* *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 179 (7th Cir. 1991) (“[T]he answer [to what is reasonable to maintain secrecy] depends on a balancing of costs and benefits that will vary from case to case and so require estimation and measurement by persons knowledgeable in the particular field of endeavor involved.”).

relationship between the value of the information and the extent to which the company made efforts to protect it such that the more valuable the information to the company, the more costly or extensive the measures ought to be to protect it.”⁸⁵

Ultimately, a company need not undertake “[h]eroic’ efforts” to protect the secrecy of its trade secrets.⁸⁶ Instead, examples of sufficient reasonable efforts to maintain secrecy may include electronic surveillance, computer passwords, and physical measures to secure or lock the information.⁸⁷ Among the many potential tools for maintaining secrecy at a company’s disposal, two of the most commonly used tend to be requiring employees to sign (1) a non-disclosure or confidentiality agreement (NDA) and/or (2) a non-compete agreement.⁸⁸

2. Non-Disclosure Agreements

One way that a company can establish that it is taking reasonable measures to protect its trade secrets is the use of an NDA.⁸⁹ An NDA is often included as part of an employment or independent contractor agreement, and typically specifies: “(1) a description of the information to be held in confidence; (2) a bar against the use of such information on behalf of oneself or a third party; (3) a bar against disclosure of such information to a third

85. Rowe, *supra* note 80, at 10.

86. Frankel, *supra* note 11, at 253.

87. See Rowe, *supra* note 80, at 11

The language the courts use is not always consistent, but courts often look for the use of the following kinds of security measures in assessing reasonableness: (1) confidentiality agreements; (2) exit interviews reminding departing employees of their confidentiality obligations; (3) security badges to enter the premises or secured areas; (4) security guards and closed-circuit television cameras; and (5) computer passwords or access codes restricting access to certain personnel.

88. See, e.g., Tim McInturf & Tim Rybacki, *Keeping Your Secrets Secret: An Employer’s Primer on Trade Secret Protection, Noncompetition Agreements, and Unfair Competition in Texas*, 44 TEX. J. BUS. L. 233, 244–45 (describing non-disclosure and non-compete provisions as “reasonable steps” to be taken to “keep the trade secrets substantially secret”) (internal quotation marks omitted).

89. See Alan J. Tracey, *The Contract in the Trade Secret Ballroom—A Forgotten Dance Partner?*, 16 TEX. INTELL. PROP. L.J. 47, 63 (2007) (noting “one of the most commonly used and well-recognized approaches to safeguarding the access of trade secret information is a confidentiality agreement”).

party; and (4) a requirement to obtain the employer's authorization before making any such use or disclosure."⁹⁰ While the use of an NDA is not dispositive, in and of itself, in establishing that reasonable measures have been taken to protect a trade secret, many view NDAs as constituting "the core of trade secret [protection]," helping to "fundamentally define the nature of the information as valuable."⁹¹ Thus, the lack of an NDA may cut against a finding of reasonable measures to establish secrecy unless the trade secret owner has undertaken other sufficient precautions.⁹²

States adopt varying approaches when scrutinizing the enforceability of NDAs. While some courts only enforce "reasonable" NDAs, other courts do not require NDAs to contain reasonable limitations.⁹³ Even among courts engaging in a reasonableness analysis, there is no uniform approach to the definition of reasonable.⁹⁴ Nonetheless, these courts generally consider nondisclosure covenants reasonable, and thus enforceable, if they contain temporal, geographical, and/or scope-of-activity limitations, as appropriate under the circumstances.⁹⁵ In addition, like any contract, courts may elect not to enforce an NDA if it is unconscionable or contrary to public policy objectives of "fostering socially valuable activities, such as

90. Frankel, *supra* note 11, at 279.

91. POOLEY, *supra* note 79, at § 8.02[2]. In addition, an NDA also provides the added benefit of giving "the employer a claim for breach of contract, in addition to a claim for misappropriation" of a trade secret. Frankel, *supra* note 11, at 278.

92. See Tracey, *supra* note 89, at 68 ("Of course, the lack of a confidentiality agreement will not eliminate trade secret protection in all cases if the trade secret owner takes other significant steps to safeguard the information.").

93. Compare Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 639 (1999) (noting that Michigan, Georgia, Illinois, South Dakota, Pennsylvania, and Virginia only enforce reasonable NDAs), with *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App. Dallas 1992) (concluding that unlike a non-compete agreement, in Texas there is no requirement that NDAs be reasonable to be enforceable).

94. See Bast, *supra* note 93, at 639 ("What is reasonable varies from state to state.").

95. See, e.g., *id.* at 640–41 (describing the reasonableness standards for enforceability of NDAs in Illinois, North Carolina, and Pennsylvania).

an employee proving employment discrimination or protecting whistleblowers.”⁹⁶

3. Non-Compete Agreements

Another increasingly popular,⁹⁷ albeit controversial,⁹⁸ means of protecting trade secrets is the use of non-compete clauses in an employment agreement. In other words, by imposing restrictions on a departing employee’s ability to work in a particular field and/or location for a certain time period, the employer all but ensures that the former employee will not have an opportunity to utilize or disclose any of its trade secrets.⁹⁹ Some commentators note that in addition to being a reasonable measure to protect the secrecy of a trade secret, non-competes also effectively function as an alternative regime to trade secret law, enabling employers to preemptively prevent any trade secret misappropriation without the formalities of establishing a UTSA violation.¹⁰⁰

96. Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 IND. L.J. 979, 988 (2012).

97. See THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSE 3 (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf (“Research suggests that 18 percent, or 30 million, American workers are currently covered by non-compete agreements.”).

98. See *id.* at 5 (citing evidence that “noncompetes . . . hamper the efficiency of the economy as a whole by depressing wages, limiting mobility, and inhibiting innovation”).

99. See Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 117 (2008) (“In the protection of trade secrets, noncompete agreements are used as a means of minimizing the potential for trade secret misappropriation by preventing an employee from working for a competitor or engaging in a competing enterprise.”).

100. See Frankel, *supra* note 11, at 281 (arguing that “[i]f any former employee cannot work for the competition, he is unlikely to hand over his former employer’s trade secrets; and if the former employee attempts to do so, [he can be stopped without] the ‘challenge and uncertainty of litigation to prove trade secret’”); see also Garrison & Wendt, *supra* note 98, at 117 (recognizing the preventative nature of a non-compete, which “allows employers to prevent any improper use of trade secrets before it occurs rather than responding to a misappropriation, when the harm (which may be significant) is done”); Charles Tait Graves, *Analyzing the Non-Competition Covenant as a Category of*

Nonetheless, courts place limitations on the enforceability of non-competes.¹⁰¹ While only two states, California¹⁰² and North Dakota,¹⁰³ generally prohibit non-competes outright, the remaining states typically employ a reasonableness test in assessing the enforceability of a non-compete agreement.¹⁰⁴ Although states have adopted various tests guided by either a state statute or common law development,¹⁰⁵ a common standard considers a non-compete reasonable, and thus enforceable, if it is “necessary to protect a legitimate business interest, reasonably

Intellectual Property Regulation, 3 HASTINGS SCI. & TECH. L.J. 69, 76 (2011) (observing that “although courts tell us that the non-competition agreement functions as an alternative type of trade secret regulation, it is a curious alternative, seemingly free of the procedural and substantive safeguards found in the official law of [trade secrets]”).

101. See 104 AM. JUR. 3D *Proof of Facts* § 393 (“Many states have provided by statute that covenants not to compete are void entirely or permitted with limited exceptions. If a covenant not to compete is statutorily permitted, many courts will only enforce the covenant if it is reasonable in its time and geographic restrictions.”).

102. See Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 607 (1999) (“Other than two statutory exceptions (which track the general rule outside of California) allowing enforcement of covenants not to compete associated with the sale of a business, the [California] statute’s prohibition [against non-competes] is essentially unqualified.”).

103. See Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 945 (2012) (noting that North Dakota only allows non-competes in connection with the sale of a business or dissolution of a partnership).

104. See Norman D. Bishara & Michelle Westermann-Behaylo, *The Law and Ethics of Restrictions on an Employee’s Post-Employment Mobility*, 49 AM. BUS. L.J. 1, 17 (2012) (“In the vast majority of jurisdictions that do enforce noncompetes, courts will use a reasonableness test.”); see also Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 758 (2011) (“Whatever consensus exists among the enforcing states has coalesced around a reasonableness test that balances the rights of parties to the restrictive covenant while assessing the effect on the public interest.”); Moffat, *supra* note 103, at 943, 948–49 (contending that despite “the fact that a majority of states apply some version of this ‘reasonableness’ approach, there is hardly uniformity or predictability even among those states” and further detailing the “wide state-to-state variation in the treatment of non-compete provisions”).

105. See Robert W. Gomulkiewicz, *Leaky Covenants-Not-To-Compete As The Legal Infrastructure For Innovation*, 49 U.C. DAVIS L. REV. 251, 262 n.37 (2015) (observing that states either address non-competes through common law or a statute (citing BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE, A STATE-BY-STATE SURVEY (4th ed. 2004 & Supp. 2014))).

limited in time and space, and consonant with the public interest.”¹⁰⁶ This approach is similar to the standard set forth in the Restatement (Second) of Contracts regarding the enforceability of non-competes, which balances the employer’s need to protect legitimate interests against the harm to the employee and public.¹⁰⁷

Protecting trade secrets generally satisfies the legitimate business interest requirement for the enforceability of a non-compete,¹⁰⁸ while the reasonableness of the duration and geography restraints is a more fact-specific inquiry.¹⁰⁹ When analyzing the reasonableness of a geographic limitation, for instance, courts will generally “uphold a restriction on competition that is coextensive with the area where the [former employer] is doing business.”¹¹⁰ Non-competes have been upheld, for example, when limited to a certain state or geographic radius from the former employer.¹¹¹ Meanwhile, in terms of durational restraints,

106. Bishara & Orozco, *supra* note 96, at 758 (citing a Massachusetts standard); *see also* Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 69 (2d Cir. 1999) (“The issue of whether a restrictive covenant not to compete is enforceable by way of an injunction depends in the first place upon whether the covenant is reasonable in time and geographic area.”).

107. RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW. INST. 1981); *see also* Moffat, *supra* note 103, at 947–48 (noting that New York and Virginia, among other jurisdictions, follow a similar balancing test in line with the Restatement).

108. *See* Garrison & Wendt, *supra* note 99, at 116 (“Traditionally, the courts recognized two primary interests as legitimate justifications for a noncompete agreement: the employer’s interests in protecting the goodwill of the business and in protecting its trade secrets.”).

109. *See* NDSL, Inc. v. Patnoudé, 914 F. Supp. 2d 885, 891 (W.D. Mich. 2012) (discussing six different factors the court considers when evaluating the reasonableness of a territorial restriction in a covenant not to compete).

110. *Liataud v. Liataud*, 221 F.3d 981, 988 (7th Cir. 2000).

111. *See* Thomas M. Hogan, *Uncertainty in the Employment Context: Which Types of Restrictive Covenants are Enforceable?*, 80 ST. JOHN’S L. REV. 429, 443 (2006) (citing *Safety-Kleen Sys., Inc. v. Hennkens*, 301 F.3d 931, 934, 937 (8th Cir. 2002)) (enforcing a non-compete restricting competition within the state); *see also* *Ticor Title Ins. Co.*, 173 F.3d at 66, 73 (upholding a non-compete that prohibited a salesman from competing in the state of New York); *A.N. Deringer, Inc. v. Strough*, 103 F.3d 243, 244–45, 249 (2d Cir. 1996) (allowing a non-compete restricting competition to a one-hundred-mile radius in Vermont). *But see* *Nat’l Starch & Chem. Corp. v. Newman*, 577 S.W.2d 99, 104–05 (Mo. App. 1978) (enforcing a two-year customer non-solicitation clause with no geographic limitation that was limited to customers with whom the employee dealt); *Angie Davis, Eric D. Reicin & Marisa Warren, Developing Trends in Non-Compete Agreements and Other Restrictive Covenants*, 30 ABA J. LAB. & EMP. L. 255, 256

courts often consider a time limit of two years or less to be reasonable,¹¹² with “six months to one year being quite common and ordinarily within the range of reasonableness.”¹¹³

If a non-compete contains unreasonable terms—e.g., is found to contain an overbroad geographic or durational restraint—courts employ varying approaches to its enforceability. In a majority of states, courts will reform the non-compete to be compliant with state law.¹¹⁴ However, courts in some states will void the non-compete in its entirety if any provision is unreasonable (the so-called “red pencil” approach), while other courts will strike (or “blue pencil”) the unreasonable terms but enforce the remaining provisions provided they are grammatically correct.¹¹⁵

In addition, courts require that an employer provide adequate contractual consideration to the employee to support a non-compete agreement.¹¹⁶ If a non-compete is entered into at the inception of employment, the promise of a job is usually deemed sufficient consideration.¹¹⁷ However, if the non-compete is

(2015) (“With respect to the reasonableness of geographic limitations, an evolving issue is whether a customer restriction may substitute for a geographic limitation.”).

112. See Davis, Reicin & Warren, *supra* note 111, at 263 (“In general, [non-compete] agreements extending beyond one or two years are scrutinized more closely, particularly when the sale of a business is not involved.”); see also Hogan, *supra* note 111, at 454 (noting cases upholding a two year non-compete durational threshold).

113. Garrison & Wendt, *supra* note 108, at 186 n.45. *But see* EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999) (refusing to enforce the one-year duration of a non-compete because it was “too long given the dynamic nature of this [information technology] industry [and] its lack of geographical borders”).

114. See THE WHITE HOUSE, *supra* note 97, at 11 (explaining the three main approaches to unenforceable non-competes, and noting that a majority of states will reform or rewrite the non-compete to make it compliant with the law); see also Moffat, *supra* note 103, at 950 (describing the partial enforcement or reformation approach).

115. See Moffat, *supra* note 99, at 949–50 (detailing how courts implement the red and blue pencil doctrines).

116. See Mark B. Wessman, *Retaining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 795 (1996) (describing the consideration required when non-compete clauses are included in employment contracts).

117. See *id.*

In most cases if an employee agrees, at the time the employment relationship commences, that upon termination he or she will not

negotiated during the midst of a preexisting employment relationship, some states will require additional consideration, apart from continued employment (e.g., a promotion), to enforce the non-compete.¹¹⁸

*a. Misappropriation or Acquiring a Trade Secret by
Improper Means*

Assuming that the plaintiff can establish the existence of a legally protectable trade secret, one must also prove that that information has been misappropriated in order to recover under the UTSA.¹¹⁹ Notably, one need not show that the defendant has actually used the misappropriated trade secret, as the UTSA authorizes injunctive relief merely upon a defendant's improper acquisition of the protected information.¹²⁰ Indeed, misappropriation of a trade secret can occur by either: (1) acquiring a trade secret by improper means; or (2) knowingly disclosing or using a trade secret acquired by improper means.¹²¹ The UTSA includes a catalogue of examples of behavior constituting such improper means, including, but not limited to, "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."¹²² Conversely, the UTSA also identifies

compete with the employer or disclose confidential information obtained from the employer, the initial promise of employment supports the covenant not to compete as well as any other commitments made by the employee.

118. See Gomulkiewicz, *supra* note 105, at 264 (noting continued employment is not sufficient consideration in some states for non-competes entered into during employment).

119. See UNIF. TRADE SECRETS ACT § 2 (UNIF. LAW COMM'N 1996) (defining misappropriation as an "acquisition of a trade secret by means that should be known to be improper and unauthorized disclosure or use of information that one should know is the trade secret of another").

120. Jeff Danley, Cadence v. Avant!: *The UTSA and California Trade Secret Law*, 19 BERKELEY TECH. L.J. 289, 292 (2004) ("Consequently, under the UTSA, a trade secret holder may seek an injunction against another party that has improperly acquired its trade secret even before that other party has used or disclosed it.").

121. UNIF. TRADE SECRETS ACT § 1(2) (UNIF. LAW COMM'N 1996).

122. *Id.* § 1.

actions that do not qualify as misappropriation, including reverse engineering, observing the information in public display, and discovery by independent creation.¹²³

In addition to issuing an injunction preventing the disclosure or use of another's trade secrets,¹²⁴ courts may even go so far as to enjoin a departing employee from working for a competitor. Under what is known as the inevitable disclosure doctrine, some courts will issue an injunction preventing a company's former employee from working for a competing firm—even if the employee has never signed a non-compete agreement—if it can be proven that a “defendant's new employment will inevitably lead [the defendant] to rely on the plaintiff's trade secrets.”¹²⁵ In other words, even though the departing employee has neither engaged in actual misappropriation nor consented to a non-compete, a court may nevertheless enjoin employment when the former employee “cannot help but rely on [the former employer's] trade secrets [in his/her new position] . . . and [it has been shown] that these secrets will enable [the new employer] to achieve a substantial advantage.”¹²⁶

When assessing the inevitability of disclosure—and thus deciding whether to grant an injunction—courts evaluate the following factors: (1) the degree of competition between the former and current employer; (2) whether the job duties of the two positions are comparable; and (3) “the extensiveness of the former employee's knowledge of technical or managerial trade secrets.”¹²⁷ Courts have found that these factors were satisfied, and thus

123. *Id.* § 1 cmt.

124. *See id.* § 2 cmt. (observing that “[i]njunctive restraining [the] future use and disclosure of misappropriated trade secrets [are] frequently sought”).

125. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995).

126. *Id.* at 1270; *see also* Jonathan O. Harris, Note, *The Doctrine of Inevitable Disclosure: A Proposal to Balance Employer and Employee Interests*, 78 WASH. U. L.Q. 325, 328 (2000) (“This doctrine is so named because employers base an inevitable disclosure claim on the theory that a former employee will inevitably disclose the former employer's trade secrets in the performance of his new job.”); Shannon Aaron, Note & Comment, *Using the History of Noncompetition Agreements to Guide the Future of the Inevitable Disclosure Doctrine*, 17 LEWIS & CLARK L. REV. 1191, 1203 (2013) (“For most states, the inevitable disclosure debate centers around the interpretation of Section 2 of the UTSA that states, ‘[a]ctual or threatened misappropriation may be enjoined.’”).

127. *Garrison & Wendt, supra* note 99, at 155.

awarded injunctive relief, in cases involving managerial executives¹²⁸ and salespersons,¹²⁹ for example. Although a majority of states have adopted some version of the inevitable disclosure rule along these lines,¹³⁰ a growing number of jurisdictions have opted to reject the doctrine.¹³¹ California, for instance, has declined to enforce the doctrine because it “creates a de facto covenant not to compete’ and ‘runs[s] [sic] counter to the strong public policy . . . favoring employee mobility.’”¹³²

In addition to injunctive relief, the UTSA also entitles plaintiffs to damages for “both the actual loss caused by misappropriation and [any] unjust enrichment” received by the misappropriator.¹³³ Punitive damages and attorney’s fees may also be awarded for willful and malicious misappropriation.¹³⁴

4. *Economic Espionage Act*

The law of trade secrecy was first federalized and criminalized in 1996 with the passage of the EEA.¹³⁵ Prior to the EEA, federal prosecutors had to primarily rely on federal statutes prohibiting mail and wire fraud—or, alternatively, a law targeting the

128. *See PepsiCo*, 54 F.3d at 1279 (holding that a former executive of a beverage company would inevitably disclose marketing and product development trade secrets to a competitor).

129. *RKI, Inc. v. Grimes*, 177 F. Supp. 2d 859, 876 (N.D. Ill. 2001) (enjoining a tube and pipe mill manufacturing salesperson from working for a competitor given evidence of both actual and inevitable misappropriation of proprietary data and customer contact information).

130. *See id.* at 156 (“Although the courts that have embraced inevitable disclosure have not done so in an entirely consistent fashion, the doctrine is now considered the majority rule.”).

131. *See id.* at 160–63 (detailing cases in California, New York, and Maryland rejecting the inevitable disclosure doctrine).

132. *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1463 (2002) (“Lest there be any doubt about our holding, our rejection of the inevitable disclosure doctrine is complete.”) (citation omitted).

133. UNIF. TRADE SECRETS ACT § 3(a) (UNIF. LAW COMM’N 1996); *see also id.* § 3 cmt. (“A claim for actual damages and net profits can be combined with a claim for injunctive relief, but, if both claims are granted, the injunctive relief ordinarily will preclude a monetary award for a period in which the injunction is effective.”).

134. *Id.* § 3(b).

135. Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831–39 (2000)).

unauthorized access of a computer¹³⁶—to attack trade secret theft, none of which were designed to specifically address the misappropriation of a trade secret.¹³⁷ Indeed, in many cases these statutes did not apply to a specific incident of trade secret theft when it turned out that the misappropriator either avoided using the mail or electronic communications as part of his theft, or alternatively failed to permanently deprive the owner of the information (for instance, by simply memorizing a trade secret).¹³⁸ These limitations, combined with Congress' growing concern over foreign economic espionage, led to the passage of the EEA.¹³⁹

The EEA's definition of a trade secret generally echoes that of the UTSA,¹⁴⁰ requiring that the owner has taken reasonable measures to keep the information a secret and that "the information derives independent economic value from not being generally known."¹⁴¹ The EEA criminalizes two types of trade secret theft: (1) theft benefiting a foreign entity;¹⁴² and (2) cases of domestic theft for economic gain.¹⁴³ Although targeting different types of trade secret theft, both forms contain nearly identical definitions of misappropriation, imposing liability on anyone who:

- (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a

136. Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213 (codified at 18 U.S.C. § 1030(a)(1)–(6)) (2008).

137. See Kelley Clements Keller & Brian M.Z. Reece, *Economic Espionage and the Theft of Trade Secrets: The Case for a Federal Cause of Action*, 16 TUL. J. TECH. & INTELL. PROP. 1, 8 (2013) (describing federal criminal statutes "that were not designed to penalize trade secret theft").

138. See Seaman, *supra* note 67, at 331 (noting the difficulty in relying on more generalized federal criminal provisions to address trade secret theft).

139. See Keller & Reece, *supra* note 137, at 9–12 (describing the legislative history of the EEA).

140. See H.R. Rep. No. 104-788, at 12 (1996), as reprinted in 1996 U.S.C.C.A.N. 4021, 4031 ("The definition of the term 'trade secret' [in the EEA] is based largely on the definition of that term in the Uniform Trade Secrets Act.").

141. 18 U.S.C. § 1839(3) (2012).

142. *Id.* § 1831(a)

143. *Id.* § 1832(a); see also Adam Cohen, *Securing Trade Secrets in the Information Age: Upgrading the Economic Espionage Act After United States v. Aleynikov*, 30 YALE J. ON REG. 189, 203 (2013) ("One of the main reasons for the expansion of the EEA to domestic trade secret theft cases—which are far more common than theft by foreign ones—was concern that a foreign-only law would violate international trade treaties.").

trade secret; (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret; [or] (3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization¹⁴⁴

In contrast to civil liability under the UTSA, the EEA also prohibits both attempted trade secret theft and conspiracies to commit misappropriation, whether domestic or foreign.¹⁴⁵ In addition, the EEA has a unique *mens rea* component, requiring proof of unlawful intent.¹⁴⁶ Under the foreign espionage provision, for instance, the defendant must intend or know that the misappropriation will benefit a foreign entity.¹⁴⁷ Similarly, under the more generalized domestic trade secret theft provision, the defendant must “(1) intend[] to misappropriate the secret and (2) either intend[] to use it for the economic benefit of someone besides the owner or intend[] or know[] that the use of the misappropriated secret will injure the owner.”¹⁴⁸ Further, the trade secret must be “related to a product or service used in or intended for use in interstate or foreign commerce.”¹⁴⁹

An individual found in violation of the foreign espionage provision can face up to fifteen years in prison and a maximum \$5 million fine.¹⁵⁰ An organization in violation of the foreign

144. 18 U.S.C. §§ 1831(a)(1)–(3); *see also id.* § 1832(a)(1)–(3) (substituting “information” for “trade secret”).

145. *Id.* §§ 1831(a)(4)–(5), 1832(a)(4)–(5).

146. *See* Seaman, *supra* note 67, at 333 (“Unlike trade secret misappropriation under state law, the EEA demands proof of unlawful intent.”).

147. 18 U.S.C. § 1831 (2012).

148. Adam Waks, Note, *Where the Trade Secret Sits: How the Economic Espionage Act is Inflaming Tensions in the Employment Relationship, and How Smart Employers and Employees are Responding*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 391, 397 (2014) (citing 18 U.S.C. § 1832(a)).

149. 18 U.S.C. § 1832; *see also* Robert Damion Jurrens, *Fool Me Once: U.S. v. Aleynikov and the Theft of Trade Secrets Clarification Act of 2012*, 28 BERKELEY TECH. L.J. 833, 849 (2013) (remarking that the EEA broadened the definition of trade secrets by “removing the confusing ‘product produced for or placed in’ language [in the original definition] and acknowledging services as well as products”).

150. *Id.* § 1831, *amended by* The Foreign and Economic Espionage Penalty Enhancement Act, Pub. L. No. 112-269, 126 Stat. 2442 (Jan. 14, 2013).

espionage provision can be fined the greater of \$10 million or three times the value of the stolen trade secret.¹⁵¹ Similarly, there are also criminal fines and prison terms associated with domestic trade secret theft.¹⁵²

5. Defend Trade Secrets Act

Amidst growing concerns about foreign trade secret theft,¹⁵³ and the attendant costs to American companies,¹⁵⁴ as well as calls for greater uniformity¹⁵⁵ and a federal forum in this area of law,¹⁵⁶ Congress enacted the Defend Trade Secrets Act (DTSA) on May 11, 2016.¹⁵⁷ The DTSA amends the EEA to create a federal civil cause of action for misappropriation of a trade secret.¹⁵⁸ Specifically, the new law covers the theft of any trade secret “related to a product

151. *Id.* § 1831(b).

152. *See id.* § 1832(a)–(b) (stating that individuals face a fine with no specified cap and a prison term of up to 10 years while organizations may be fined up to \$5 million).

153. *See, e.g.*, EXEC. OFFICE OF THE PRESIDENT, ADMINISTRATION STRATEGY ON MITIGATING THE THEFT OF U.S. TRADE SECRETS 1 (2013), <https://www.justice.gov/criminal-ccips/file/938321/download> (“Emerging trends indicate that the pace of economic espionage and trade secret theft against U.S. corporations is accelerating . . . Foreign competitors of U.S. corporations, some with ties to foreign governments have increased their efforts to steal trade secret information through the recruitment of current or former employees.”); *see also* Seaman, *supra* note 67, at 339 (discussing various government reports on the growing threat of trade secret theft).

154. *See* EXEC. OFFICE OF THE PRESIDENT, *supra* note 152, at 1 (“Trade secret theft threatens American businesses, undermines national security, and places the security of the U.S. economy in jeopardy.”).

155. *See* Seaman, *supra* note 67, at 352–53 (documenting and countering the scholarly concern over a lack of procedural and substantive consistency under the current regime of state trade secret misappropriation laws).

156. *See, e.g.*, David S. Almeling, *Four Reasons to Enact a Federal Trade Secrets Act*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 769, 780–81, 791 (2009) (discussing the procedural benefits of the Federal Rules of Civil Procedure and the advantage of federal court expertise in intellectual property law).

157. 18 U.S.C. § 1836 (2012).

158. *See* YEH, *supra* note 71, at 22 (“The legislation would amend the EEA’s definition section (18 U.S.C. Section 1839) to include definitions of the terms ‘misappropriation’ and ‘improper means.’”).

or service used in, or intended for use in, interstate or foreign commerce.”¹⁵⁹

Notably, the DTSA does not preempt any state law trade secret claims.¹⁶⁰ Instead, the DTSA is modeled after the UTSA, containing the same definition of a trade secret, similarly requiring that the trade secret owner take reasonable measures to maintain the secrecy of the information, and that the trade secret “derive[] independent economic value . . . from not being generally known.”¹⁶¹ Likewise, there is a similar three-year statute of limitations.¹⁶² Consistent with the UTSA, the DTSA prohibits two types of misappropriation: (1) acquisition by improper means and (2) use or disclosure of a trade secret acquired by improper means.¹⁶³ And as with the UTSA, “improper means” is further defined to include “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means,” but not reverse engineering or independent creation.¹⁶⁴

The DTSA is unique, however, in that it contains an *ex parte* seizure provision allowing a court, “under extraordinary circumstances, [to] issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret”¹⁶⁵ To prevail on a seizure order, the plaintiff must establish, among other things, immediate and irreparable harm without the seizure, the inadequacy of other equitable relief, the likelihood of success in establishing misappropriation by improper means, and the existence of a trade secret.¹⁶⁶

Otherwise, the DTSA provides traditional injunctive and monetary relief for trade secret misappropriation, including actual damages, damages for unjust enrichment, and reasonable royalties for the unauthorized disclosure or use of the trade secret, as

159. 18 U.S.C. § 1836(b)(1).

160. *See* YEH, *supra* note 71, at 24 (stating that “the DTSA includes a ‘rule of construction’ provision that declares that nothing in the DTSA shall be construed . . . to preempt any other provision of law” including state laws).

161. 18 U.S.C. § 1839(3).

162. *Id.* § 1836(d).

163. *Id.* § 1839(5)(A)–(B).

164. *Id.* § 1839(6).

165. *Id.* § 1836.

166. *Id.* § 1836(b)(2)(A)(ii).

necessary.¹⁶⁷ However, the DTSA does not allow an employer to seek injunctive relief based on the inevitable disclosure doctrine; indeed, injunctive relief requires “evidence of a threatened misappropriation” and cannot be premised “merely on the information the person knows.”¹⁶⁸

B. Canada

With the exception of the province of Québec, the law governing trade secrets in Canada has not been codified, but instead has evolved from the common law.¹⁶⁹ Rooted in tort and contract doctrine, Canadian courts recognize a cause of action for breach of confidence at common law when someone misuses a company’s confidential information.¹⁷⁰ Civil enforcement is the primary means of addressing trade secret misappropriation as there are no criminal provisions in Canada specifically addressing

167. *Id.* § 1836(b)(3)(C).

168. *Id.* § 1836(b)(3)(A)(i)(I).

169. *See* 1 FRANÇOIS PAINCHAUD ET AL., *TRADE SECRETS THROUGHOUT THE WORLD* § 6:3 (2015) (“Although there are no trade secret statutes that set out the Canadian common law, there have been restatements that can be used as guidance for the Canadian common law.”). Aside from having been codified, Québec’s trade secrecy law is generally consistent substantively with that of the rest of the country. *See, e.g.*, 2 JAMES POOLEY, *LAW OF INTERNATIONAL TRADE* § 48:11 (2016)

One unusual aspect of Canadian trade secret law is the existence of dual systems: while Québec is a civil law jurisdiction with its own Civil Code, the other provinces of Canada base their rules on the common law of England. Nevertheless, in general, trade secret protection is governed by the same basic principles

170. *See* Allyson Whyte Nowak, *Trade Secrets and Confidential Information*, 27 No. 8 ACC DOCKET S4, S4 (2009) (“While there is no statutory cause of action for the misappropriation of trade secrets or confidential information in Canada, the misuse of your company’s confidential information can give rise to a cause of action for breach of confidence at common law.”).

trade secrets.¹⁷¹ Both monetary and injunctive relief are available under Canadian law.¹⁷²

Similar to U.S. law, in order to prevail on a breach of confidence claim for the misappropriation of a trade secret, Canadian courts typically require the plaintiff to establish that it used appropriate methods under the circumstances to maintain the secrecy of the information at issue.¹⁷³ However, unlike U.S. law, the plaintiff must additionally establish “the information was communicated in circumstances in which an obligation of confidence arises.”¹⁷⁴ The knowledge of the confidential nature of the information may be established by the presence of a confidentiality agreement or implicit in a fiduciary or master and servant relationship.¹⁷⁵ Surprisingly, however, Canadian law does not appear to directly address cases of industrial espionage or

171. See *Protecting Trade Secrets: A Worldwide Survey*, MANAGING INTELL. PROP., Dec. 1997–Jan. 1998, at 40, 43 (noting the lack of Canadian criminal trade secret statutes but recognizing that criminal theft or fraud laws may be applicable if the trade secret is considered property); see also Emir Crowne & Tasha De Freitas, *Canada’s Inadequate Legal Protection Against Industrial Espionage*, 13 CHI.-KENT J. INTELL. PROP. 192, 194–97 (2013) (discussing *R. v. Stewart*, where the court held the unauthorized use of confidential information could not be recognized as theft under the Criminal Code); Nowak, *supra* note 170, at S5 (noting Canadian law does not consider misappropriation of trade secrets to be theft under the Criminal Code).

172. Damon L. Boyd, *Trade Secret Doctrines of the NAFTA Countries: The Sources of Law, the Remedies Available, and Suggestions for Improvement*, 14 ARIZ. J. INT’L & COMP. L. 879, 898 (1997).

173. See Nowak, *supra* note 170, at S5 (2009) (“As in the United States, in Canada the ability to prevent the unauthorized use of a trade secret depends upon the owner’s ability to demonstrate that it has been maintained as confidential through the use of physical or contractual means.”).

174. *Id.*; see also *Saltman Eng’g Co. Ltd. v. Campbell Eng’g Co. Ltd.*, [1963] 3 All E.R. 413 (C.A.).

175. See Boyd, *supra* note 172, at 892 (“Essentially, in order for the information to be considered confidential it must be sufficiently private and it must also be communicated to the other party either with a warning that it is considered confidential, or under circumstances that make the confidential character sufficiently clear.” (internal quotation omitted)); see also Nowak, *supra* note 170, at S5 (“Obligations of confidence can arise through contract or relationships of confidence, whether they be fiduciary or that of a master and servant.”); *Coco v. A. N. Clark (Engineers)*, [1969] R.P.C. 41, 48 (“[I]f the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised [sic] that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.”).

other forms of trade secret theft, in which the proprietary information is obtained via means other than being communicated to the misappropriator in confidence.¹⁷⁶ Finally, Canadian law requires the plaintiff to establish that the unauthorized use of the information would cause a harm or detriment to the plaintiff.¹⁷⁷

IV. Survey Methodology and Results

Most of the various forms of proprietary data and knowledge potentially owned by North American professional sports teams—as identified in Part I, *supra*—will easily satisfy the first criterion for trade secret protection under U.S. and Canadian law, as they will almost always constitute “information” under the prevailing legal definitions.¹⁷⁸ Moreover, such information will also typically possess commercial value, as it will either allow the team to better market its product to consumers,¹⁷⁹ or else enable the club to improve its performance on the playing field (economists have consistently found that winning increases a sports team’s revenues).¹⁸⁰

Consequently, whether a sports team’s proprietary information will qualify for legal protection under trade secrecy law will usually hinge on the extent to which the information is not publicly known, and the measures that a team takes to protect

176. See, e.g., Crowne & De Freitas, *supra* note 171, at 192 (“Canadian law provides little protection for individuals and corporations against the very real threat and damage of industrial espionage.”).

177. See Boyd, *supra* note 172, at 892 (“The third and final element of the doctrine of confidentiality is that the information must have been used to the detriment of the owner.”).

178. See *supra* note 76 and accompanying text (discussing the definition of “information” under the UTSA); see also Frankel, *supra* note 11, at 265 (concluding that “compilations of baseball statistics” would fall within the UTSA’s definition of information under the conception of a “compilation”).

179. See *supra* note 56 and accompanying text (discussing business-related trade secrets that teams may possess).

180. See, e.g., Stefan Kesenne, *Competitive Balance in Team Sports and the Impact of Revenue Sharing*, 20 J. SPORT MGMT. 39, 40 (2006) (noting, “[t]he season revenue of each club depends on three important variables: a) the size of the market, which affects the potential of the club to draw supporters and players; b) the winning percentage of the team, because supporters prefer to watch a winning team; and c) the uncertainty of outcome” (emphasis added)).

it.¹⁸¹ And while one cannot assess how publicly widespread the knowledge of a particular piece of information might be without a team disclosing the secret—thereby undermining its claim to secrecy—ascertaining the steps that professional sports teams are taking to protect their proprietary knowledge presents a more reasonable inquiry.

A. Survey Methodology

Along those lines, we conducted a survey of teams in the four major North American professional sports leagues to determine both (i) the general types of proprietary information that they are asserting trade secret protection over, and (ii) the measures that they are taking to protect that data or knowledge. Specifically, through the use of non-random, purposive sampling,¹⁸² we began by identifying a population of potential survey recipients consisting of the in-house legal counsel or chief legal officers¹⁸³ for all of the teams in the four major North American sports leagues.¹⁸⁴ Of the 122 teams currently belonging to these four leagues, all but four employed one or more attorneys in some sort of legal capacity.¹⁸⁵ For those 118 teams that employed a lawyer,

181. See *supra* notes 78–86 and accompanying text (explaining that trade secrets must not be publicly known and must have been protected by reasonable measures to keep the information secret).

182. In a survey using purposive sampling, “a specific population is identified and only its members are included in the survey.” Kate Kelley et al., *Good Practice in the Conduct and Reporting of Survey Research*, 15 INT’L J. QUALITY IN HEALTH CARE 261, 264 (2003).

183. While most professional sports teams employ one or more individuals in a position titled general counsel or director of legal affairs, in a few cases lawyers serving in other roles (e.g., team president, chief operating officer, or even the team’s owner) appeared to be chief legal officer for the franchise.

184. This identification process occurred in March and April of 2016.

185. In several instances, teams list an attorney employed by their parent corporation as their general counsels; these individuals were included in the pool of potential survey recipients. Similarly, in a few cases, a team identified a lawyer practicing at an outside law firm as its general counsel; these individuals were also listed as potential survey recipients. In other instances, the same individuals serve as legal counsel for two commonly owned franchises belonging to different leagues.

Meanwhile, it is interesting to note that—for whatever reason—the four teams who did not appear to employ any in-house lawyers or regular outside counsel were all in the NHL (the Calgary Flames, Chicago Blackhawks, San Jose Sharks,

we were then able to locate e-mail addresses for an attorney employed by 115 of these teams through public searches. These individuals were each sent an email containing a link to an online, ten-question survey.¹⁸⁶ Recipients then subsequently received two follow-up messages over the course of the next month. In order to maximize the number of responses, the survey was conducted anonymously, with respondents promised that specific responses would not be tracked or associated with a particular team.

Ultimately, responses were received from 19 of the 115 teams to whom the survey was sent, representing a response rate of 16.5%.¹⁸⁷ This response rate is generally consistent with—if not slightly above—that of the average online survey.¹⁸⁸ Indeed, considering the potential sensitivity of the information sought in the survey, this rate of response was arguably quite high. Notably, however, this response rate, coupled with the fact the survey was conducted on an anonymous basis, means that no degree of statistical representativeness can be inferred from the survey results; instead, the data presented below are offered strictly on a descriptive basis.

B. Survey Results

Although the identity of each respondent's team affiliation was not tracked, Question 1 of the survey asked respondents to identify which league their team belonged to. As listed in Table 1, with the exception of MLB, the responses were roughly divided

and St. Louis Blues).

186. The website SurveyMonkey.com was used to host the survey and process the responses.

187. The nineteen respondents reported here answered at least a majority, if not the entirety, of the ten questions appearing on the survey. Because some of these responses omitted answers to one or more questions, however, some of the percentages listed below are based upon a smaller number of total responses, reflecting the number of responses that answered each particular question. Meanwhile, one respondent only provided an answer to the survey's first question—identifying which league his or her team belonged to—and therefore was not included among the nineteen total responses discussed above.

188. See Andrea Fryrear, *Survey Response Rates*, SURVEYGIZMO (July 27, 2015), <https://www.surveygizmo.com/survey-blog/survey-response-rates/> (last visited Sept. 21, 2017) (reporting that most external, online surveys receive a response rate of 10–15%) (on file with the Washington and Lee Law Review).

evenly among teams in the other three major North American sports leagues.

Table 1. League Membership of Survey Respondent Teams

League	Number of Respondents
Major League Baseball	2
National Basketball Association	7
National Football League	4
National Hockey League	6
Total	19

It is not clear why MLB teams responded at such a relatively low rate. Indeed, while nearly one-quarter of NHL teams that were contacted provided responses to the survey (6 of 25), only two of the 29 MLB teams contacted ultimately responded (a rate of less than 7%). One possible explanation is that, because MLB teams have traditionally relied on statistical and data analysis on the most widespread basis,¹⁸⁹ these teams may consequently be more hesitant to discuss this information. Alternatively, because an MLB team was the first to fall victim to corporate espionage in the digital age,¹⁹⁰ baseball teams may have simply been more reluctant to share information in this regard. Meanwhile, because the survey was conducted in May and June of 2016, it is also possible that the response rate from professional baseball teams was lower due to the fact that MLB was the only one of the four leagues in the midst of its regular playing season,¹⁹¹ presumably one of the busiest times of the year for teams' in-house counsel. Finally, however, MLB teams' lower response rate could, of course, simply be the result of random chance.

Unsurprisingly, the overwhelming majority of responding teams reported that they currently assert trade secret protection over at least one of the categories of information listed in Table 2.

189. See *supra* notes 21–24 and accompanying text (discussing the prominence of statistical analysis in professional baseball).

190. See *supra* notes 58–61 and accompanying text (discussing the first instance of corporate espionage in the professional sports context).

191. See *Schedule*, MLB, www.mlb.com/schedule (last visited Sept. 21, 2017) (providing the Major League Baseball's season schedules from March 2008 to present) (on file with the Washington and Lee Law Review).

Table 2. Types of Information Subject to Trade Secret Assertion

Types of Information	Number of Respondents	Percentage of Total Respondents (n=19)
Scouting reports (player or team)	17	89.47%
Trade proposal or discussion notes	15	78.95%
Playbooks	9	47.37%
Verbal/hand signals used on playing field	2	10.53%
Player skill development techniques	10	52.63%
Physical training techniques	8	42.11%
Dietary or nutritional regimens	8	42.11%
Physical therapy techniques	7	36.84%
Statistical analyses	14	73.68%
Biometric analyses	10	52.63%
Psychological assessment techniques	8	42.11%
Not applicable	1	5.26%
Other	2	10.53%

Indeed, the most surprising aspect of the results above would probably be the fact that one team—belonging to the NBA—reported that it did not claim trade secret protection over any of the types of information identified on the survey. In addition, one respondent noted that his or her franchise also asserted trade secret protection over a variety of other, more core-business-related processes, in addition to the more directly sports-competition-related types of information listed above.

Of those teams that reported that they do currently assert trade secret protection over one or more of the categories of information above, the most common forms of proprietary information identified—scouting reports (89.47%) and trade discussion notes (78.95%)—were both among the more traditional types of sports-competition-related knowledge that a team might possess. Notably, however, the next most common types of information listed were statistical analyses (73.68%) and biometric

analyses (tied with skill development techniques at 52.63%), both of which are among the more advanced types of potential trade secrets in use today. This finding would appear to support the anecdotal evidence discussed above suggesting that the use of data analysis is emerging as a growing source of potential competitive advantage for teams in all four major North American sports leagues.¹⁹²

Table 3. Methods Used to Protect Trade Secrets

Type of Protection Used	Number of Respondents	Percentage of Total Respondents (n=19)
Computer security methods (password protection, ewalls, etc.)	18	94.74%
Non-compete agreements	15	78.95%
Non-disclosure/confidentiality agreements	18	94.74%
Not applicable	1	5.26%
Other	1	5.26%

Of those 18 respondent-teams that reported that they currently assert trade secret protection over at least one form of proprietary knowledge, all 18 of these franchises stated that they utilize both computer security methods and NDAs to help keep this information secret (as indicated in Table 3). In addition, over 78% of responding teams also reported using non-compete agreements to maintain secrecy as well.¹⁹³ This result suggests that the use of non-compete agreements may be even more commonplace in the professional sports industry than in other sectors of the economy,

192. See *supra* notes 40–44 and accompanying text (comparing the use of data analytics across the four sports).

193. Although three responding teams neglected to list non-compete agreements as being among the methods they used to protect their trade secrets in response to Question 3, these clubs' subsequent answers to later questions in the survey strongly suggested that they did, in fact, ask at least some of their employees to sign a non-compete. As a result, it appears that these three teams inadvertently neglected to select non-compete agreements as an option when answering this question, and thus for both completeness and consistency sake, these franchises have been included among the 15 teams that are listed as using non-compete agreements in the data presented in Table 3.

as prior studies examining firms' use of non-competes have found that anywhere from 55% to 70% of surveyed companies use these agreements.¹⁹⁴ Finally, one respondent notes that in addition to the methods identified above, his or her team also attempts to protect its trade secrets "by hiring people who take these rights seriously."

Table 4. Team Employees Required to Sign Non-Compete Agreements

Type of Employee	Number of Respondents	Percentage of Total Respondents (n=18)
Coaches	6	33.33%
Players	3	16.67%
Front office personnel (general managers, etc.)	9	50.00%
Scouts	4	22.22%
Trainers / doctors / nutritionists	4	22.22%
Statistical analysts	7	38.89%
Computer programmers / developers	5	27.78%
Not applicable	4	22.22%
Other	3	16.67%

The survey's next four questions all dealt specifically with teams' use of non-compete agreements. As revealed in Table 4, the category of team employee most likely to be subjected to a non-compete agreement was front-office personnel such as the club's general manager or assistant general managers (i.e., the employees most directly responsible for building a franchise's player roster through trades, free agency signings, and draft picks). Indeed, 50% of responding teams said they require at least some of their front office personnel to sign a non-compete. Meanwhile, the second most common category of employee subjected to a non-compete agreement was statistical analyst, another position whose duties directly relate to building the team's playing roster, suggesting that franchises are most protective of

194. See Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 520 (2016) (summarizing the existing literature on firm use of non-compete agreements).

the competitive advantages they believe workers employed in this capacity give them over their rivals.

Interestingly, three teams—two in the NBA, and one in the NHL—reported that they required their players to sign non-compete agreements as well. This result is particularly surprising considering that player mobility in each of the four major North American sports leagues is governed by a collective-bargaining agreement (CBA) between the applicable players union and league, with all four leagues guaranteeing their players the right to freely move between franchises after reaching a certain level of seniority.¹⁹⁵ As a result, it is not clear what the scope of these non-compete agreements between a player and team may be.¹⁹⁶

Finally, it is also worth noting that the data reported in Table 4 should not be read to suggest that all of a team's employees in a particular category are necessarily subject to non-compete agreements. Indeed, as discussed in greater detail below,¹⁹⁷ in some cases a team may elect to subject some of its employees in a certain category to a non-compete agreement, but decide not to subject others working in a similar capacity to the same restraint.¹⁹⁸ Consequently, it is impossible to determine what

195. See, e.g., Chris Deubert, Putting Shoulder Pads on Schleck: How the Business of Professional Cycling Could Be Improved Through A More American Structure, 37 BROOK. J. INT'L L. 65, 80–81 (2011)

In American sports, we are familiar with the concept of free agency, e.g., when a player has accrued a certain amount of experience as determined by a collective bargaining agreement ("CBA") between his union and the teams, and his contract has expired, he may offer his services to any and all bidders for a salary limited only by the terms of the CBA.

196. One possibility is that teams are restricting players from going to work for competing franchises in a front-office, coaching, or scouting capacity once their playing careers have ended. Alternatively, these respondents may be characterizing provisions in their leagues' standard players contract prohibiting players from playing for another franchise during the term of the contract as constituting a non-compete agreement.

197. See *infra* notes 201–203 and accompanying text (discussing how teams may be reluctant to subject some categories of employees to non-compete agreements because they each wish to be able to freely recruit executives away from one another).

198. For example, even though a number of teams reported requiring some of their front office personnel to sign non-compete agreements, teams frequently recruit high-level front office executives away from one another, suggesting that

percentage of a responding team’s employees—either within any of the individual categories above, or overall—are subject to a non-compete agreement from the data reported above.

Question 5 inquired as to the reasons why a team might elect not to require its employees to sign a non-compete agreement. Notably, relatively few teams appear to be concerned with the potential legal unenforceability of a non-compete agreement, a finding consistent with the fact that some form of non-compete agreement is enforceable in most jurisdictions.¹⁹⁹ Unfortunately, given the anonymous nature of the survey, it is impossible to determine whether those teams expressing concern about the legal enforceability of non-compete agreements happen to reside in California, one of the two states whose law generally takes the most restrictive view of such contracts.²⁰⁰

Table 5. Reasons Why Team Employees Are Not Required to Sign a Non-Compete Agreement

Reason	Number of Respondents	Percentage of Total Respondents (n=18)
Lack of need; employee does not have access to trade secrets	4	22.22%
Perceived legal unenforceability	4	22.22%
Ethical concerns	0	0.00%
League-wide rules prohibit use	1	5.56%
League-wide custom against use	3	16.67%
Employee refusal to sign	0	0.00%
Recruiting concerns	0	0.00%
Not applicable	7	38.89%
Other	1	5.56%

not all of these employees are subject to a non-compete agreement.

199. See *supra* notes 102–104 and accompanying text (noting that non-compete agreements are enforceable under the law of most states).

200. See *supra* note 102 and accompanying text (noting that non-compete agreements are generally unenforceable under California state law). Meanwhile, the other state taking a highly restrictive view of non-competes, North Dakota, does not host a team in any of the four major North American sports leagues.

Also noteworthy is the fact that three teams—one from MLB and two from the NFL—reported that there is a general custom against the use of non-compete agreements within their league. To the extent such a custom exists, it is likely motivated by a recognition that the potential universe of qualified applicants for many of the vacancies that a sports team may need to fill can often be quite small, due to the fact that assessing and coaching playing talent is a highly unique and specialized skill in each of the four sports.²⁰¹ So even if it might be in a team's short-term interest to subject all of its coaches, scouts, or front office personnel to non-compete agreements, in the long-run franchises may recognize that they would ultimately be hurt by the league-wide adoption of such a strategy, since it could hinder clubs from ever hiring qualified external candidates.²⁰² As a result, it would make sense that some leagues would adopt a custom against the use of non-compete agreements for at least some categories of employees, in order to ensure that their franchises will be able to freely access a sufficient pool of qualified candidates for the inevitable future vacancies that may arise.²⁰³ At the same time, however, the fact that 63% of responding teams—including at least one from each of the four major North American sports leagues—reported using non-compete agreements raises questions regarding just how widespread the recognition of such a custom may actually be.

201. In other words, the ability to assess the skills of professional baseball players does not necessarily translate into an ability to assess those of professional basketball players, and vice versa. Similarly, the exact knowledge and skills needed to build a quality team roster, or to best physically train players for peak on-field performance, will also vary across sports.

202. See Moore, *supra* note 40 (observing that the increasingly advanced nature of MLB teams' proprietary statistical analyses makes it harder for those outside the industry to stay current on the latest and most advanced knowledge).

203. Indeed, as revealed in Table 9 below, at least one team has refrained from requiring certain of its employees to sign NDAs due to the concern that widespread use of this technique within its league could hamper its future recruiting efforts.

Table 6. Scope of Non-Compete Agreements

Scope of Restraint	Number of Respondents	Percentage of Total Respondents (n=17)
Working for team in same league	12	70.59%
Working for team in a different league	2	11.76%
Working for non-sports-related business in same geographic region	0	0.00%
Not applicable	4	23.53%
Other	0	0.00%

Given the unique and specialized nature of many of the skills utilized by a team's various employees in each of the four sports,²⁰⁴ it is not surprising that—as reported in Table 6—teams most frequently restrict their employees from going to work for a competing franchise in the same league. Interestingly, however, at least two teams extend this restriction to working for franchises in competing leagues as well. Indeed, while certainly rare, there has been at least one case in which an executive left a team in one sport to join a franchise in a different league.²⁰⁵

Finally, as noted in Table 7, respondent teams varied with regard to the length of time that they restrict their employees from working for a competing franchise. That having been said, 10 of the 11 teams to identify a temporal limit to the duration of their non-compete agreements limit the restriction to no more than two years. This majority approach is generally consistent with the growing trend among courts to restrict the allowable duration of

204. *See supra* note 201 and accompanying text (discussing the level of specialization necessary to identify, assess, and coach playing talent in each of the four major North American sports).

205. Specifically, in 2016, Paul DePodesta, the former vice president of player development and scouting for MLB's New York Mets, left the team to join the NFL's Cleveland Browns as the franchise's new chief strategy officer. *See* David Fleming, *Why Paul DePodesta is Bringing Moneyball to the Browns*, ESPN (Apr. 11, 2016), http://espn.go.com/nfl/story/_id/15159159/why-paul-depodesta-bringing-moneyball-browns (last visited Sept. 21, 2017) (discussing same) (on file with the Washington and Lee Law Review).

non-compete agreements to two years or less,²⁰⁶ while at the same time likely providing sufficient protection for much of a team's proprietary information (which will often be outdated within the span of a season or two). Meanwhile, one NFL team reported that its non-compete provisions typically apply for the duration of the term of the contract, should the employee prematurely terminate his or her employment with the club.

Table 7. Duration of Non-Compete Agreements

Duration of Restraint	Number of Respondents	Percentage of Total Respondents (n=17)
Less than six months	0	0.00%
Six months to one year	4	23.53%
1+ years	6	35.29%
2+ years	1	5.88%
3+ years	0	0.00%
4 or more years	0	0.00%
Not applicable	6	35.39%

The survey's final three questions related to teams' use of non-disclosure or confidentiality agreements. As with the non-compete agreements discussed above, Table 8 suggests that front office personnel are also the most likely to be required to sign an NDA. Once again, this is not particularly surprising given that front office workers are among the most likely categories of team employees to possess the types of proprietary information directly related to a club's team-building activities (such as statistical or biometric data analyses, scouting reports, and trade discussions). For this same reason, it is unsurprising that responding teams reported that their statistical analysts and computer developers are frequently asked to sign NDAs as well.

206. See *supra* notes 112–113 and accompanying text (discussing the allowable duration of non-compete agreements under the law of most states).

Table 8. Team Employees Required to Sign a Non-Disclosure / Confidentiality Agreement

Type of Employee	Number of Respondents	Percentage of Total Respondents (n=16)
Coaches	13	81.25%
Players	5	31.25%
Front office personnel (general managers, etc.)	15	93.75%
Scouts	11	68.75%
Trainers / doctors / nutritionists	9	56.25%
Statistical analysts	12	75.00%
Computer programmers / developers	10	62.50%
Not applicable	0	0.00%
Other	3	18.75%

Interestingly, however, coaches are the second most likely category of team employee to be subjected to a confidentiality agreement. This is notable because whereas only 33% of responding franchises required their coaches to sign non-compete agreements, 81% of these same franchises asked their coaches to sign NDAs. This suggests that teams may be hesitant to prevent coaches from freely moving between franchises—perhaps in recognition of the frequent need to look outside of their own organizations for coaching talent—but nevertheless recognize the potential for their coaches to take valuable proprietary information to a new employer.

Similarly, it is also noteworthy that five of the responding teams reported requiring their players to sign NDAs. As with coaches, this strategy makes some sense—to the extent it is permitted by a league's CBA²⁰⁷—as even though teams may be unable to restrict their players from freely moving between franchises, they still undoubtedly wish to prevent these players from disclosing the team's proprietary information—such as

207. One responding team from the NBA reported, for instance, that its league CBA prevented it from imposing an NDA on its players.

playbooks, and training or dietary regimens—to their new employers.

Finally, three respondents, all from the NBA, noted that their teams require all of their employees to sign NDAs as a condition of employment.

Table 9. Reasons Why a Team Employee Is Not Required to Sign a Non-Disclosure / Confidentiality Agreement

Reason	Number of Respondents	Percentage of Total Respondents (n=16)
Lack of need; employee does not have access to trade secrets	6	37.50%
Perceived legal unenforceability	0	0.00%
Ethical concerns	0	0.00%
League-wide rules prohibit use	0	0.00%
League-wide custom against use	3	18.75%
Employee refusal to sign	0	0.00%
Recruiting concerns	1	6.25%
Not applicable	7	43.75%
Other	1	6.25%

Meanwhile, Table 9 reveals that responding teams indicated that an employee's lack of access to trade secret information is the most common reason why a particular worker would not be required to sign a confidentiality agreement. Similarly, three responding teams—one each from the NFL, NHL, and MLB—observed that there was a custom against the use of NDAs for certain categories of employees across their league. This is the same number of teams that indicated their use (or lack thereof) of non-compete agreements was restrained due to a league-wide custom.²⁰⁸ Meanwhile, one team also reported that it was concerned that widespread use of NDAs within its league could hamper its efforts to fill vacancies in the future.

208. See *supra* notes 201–203 and accompanying text (discussing the reasons why a sports team may not subject an employee to a non-compete agreement).

Finally, Table 10 supplies data regarding the duration of the NDAs that teams require their employees to sign. Unlike for non-compete agreements—which the overwhelming majority of clubs restricted in duration to less than two years—responding teams were much more divided over the length of the confidentiality requirements. Some of this discrepancy may be due to the fact that states take differing views as to the allowable duration of legally enforceable NDAs,²⁰⁹ while some teams may have instead determined that there is no need to impose a confidentiality obligation of more than a year or two on their employees because many of their most valuable trade secrets will likely have a relatively short shelf life. Indeed, the longer the duration of a non-disclosure provision that employees in an industry are subjected to, the more difficult it can be for employees to freely move between employers (or, at least, fully integrate themselves into their new employer’s operations after being hired).²¹⁰ Thus, some teams may be opting to shorten the duration of their confidentiality agreements in order to help facilitate free movement within the industry.

209. See *supra* note 95 and accompanying text (reporting that states impose different permissible time limits on NDAs).

210. See, e.g., Alan L. Durham, *Natural Laws and Inevitable Infringement*, 93 MINN. L. REV. 933, 986 (2009) (noting that “a confidentiality agreement could later restrict [employee] mobility”); Patricia A. Meier, *Looking Back and Forth: The Restatement (Third) of Unfair Competition and Potential Impact on Texas Trade Secret Law*, 4 TEX. INTELL. PROP. L.J. 415, 439 (1996) (stating that “confidentiality . . . clauses can . . . severely limit a workers mobility, inhibit the use of acquired skills, and stifle economic growth”).

Table 10. Duration of Non-Disclosure / Confidentiality Agreements

Duration of Restraint	Number of Respondents	Percentage of Total Respondents (n=15)
Less than six months	0	0.00%
Six months to one year	1	6.67%
1+ years	5	33.33%
2+ years	3	20.00%
3+ years	1	6.67%
4 or more years	2	13.33%
Not applicable	3	20.00%

V. Implications and Suggestions for Future Research

While a precise assessment of whether teams in the four major North American professional sports leagues are taking sufficient precautions to protect the secrecy of their proprietary information would require a heavily fact-intensive, case-by-case analysis, the survey data reported in Part IV, would appear to suggest that teams are generally taking sufficient measures to guard their trade secrets. Indeed, the uniform adoption of computer security methods,²¹¹ as well as the widespread use of NDAs with the employees most likely to possess commercially sensitive, proprietary information,²¹² indicates that the responding teams are, for the most part, protecting their data responsibly. Assuming that these teams also generally restrict access to their proprietary information on a need-to-know basis—and that the underlying information is not publicly known—then it would appear that they would typically be able to satisfy the current standard for trade secret protection under existing law.²¹³

Considering that most teams are likely taking sufficient means to protect their proprietary information, along with the relative frequency with which employees tend to move between

211. *Supra* Table 3.

212. *Supra* note 207 and accompanying text.

213. *See supra* Part II (discussing the standards for trade secret protection under U.S. and Canadian law).

professional sports franchises, it may be somewhat surprising that trade secret disputes have not generated more litigation to date within the industry. Even without a non-compete agreement, for instance, teams would often appear to have a strong argument that a departing front-office executive, statistical analyst, coach, or trainer should be subject to an injunction under the inevitable disclosure doctrine.²¹⁴ Since these individuals cannot be expected to completely forget any proprietary information they may have learned from their prior clubs upon beginning employment with a new franchise, teams would appear to have valid grounds to seek an injunction preventing their former employees from working in a similar capacity for rival clubs under this doctrine, at least in the states where it is recognized.²¹⁵

Nevertheless, it does not appear that any professional sports team has ever gone to court to prevent an employee from working for a rival franchise—or from otherwise using or disclosing its proprietary information—on trade secret grounds. Indeed, the only reported court decision considering the status of proprietary sports-related knowledge under trade secrecy law came in 2012, in the case of *National Football Scouting, Inc. v. Rang*.²¹⁶ Rather than involving a trade secret claim by a professional sports team, however, the *Rang* case centered on a journalist's use of scouting reports belonging to a private scouting service.²¹⁷

The lack of litigation activity by professional sports teams in this area can likely be attributed in no small part to the restrictive rules that each of the four leagues imposes on its franchises. Under

214. See *supra* notes 125–127 and accompanying text (explaining the standard for an injunction under the inevitable disclosure doctrine).

215. See *supra* notes 130–132 and accompanying text (finding that a majority of states have adopted the inevitable disclosure doctrine).

216. *Nat'l Football Scouting, Inc. v. Rang*, 912 F. Supp. 2d 985 (W.D. Wash. 2012).

217. See *id.* at 988 (discussing the facts of the case, such as the plaintiff's role as a scouting organization in providing reports to its shareholders). In *Rang*, the court ultimately held that the plaintiff's proprietary scouting reports constituted "information" and thus were potentially protectable under trade secret law. *Id.* at 996. However, because the court believed that a "factual dispute exist[ed] over whether [the plaintiff] ha[d] made reasonable attempts to preserve the secrecy of the information," the court refused to grant summary judgment on the plaintiff's misappropriation claim. *Id.* at 996–97. The parties ultimately settled before that latter question could be resolved. See Frankel, *supra* note 55, at 85 (noting that the parties in *Rang* eventually settled the case).

each league's constitution, for example, teams are generally prohibited from suing each other, or one another's employees, in court.²¹⁸ Instead, any dispute between rival franchises and/or their employees is generally subject to arbitration before their respective league commissioner.²¹⁹

Given that the four leagues have each largely prevented their teams from litigating any potential trade secret disputes—along with the fact that teams face differing legal landscapes under their applicable state's trade secrecy laws²²⁰—this is an area that would seem to be particularly ripe for the formulation of league-wide policies regarding the protection of proprietary data. Under existing law, for instance, teams residing in California would appear to be at a significant competitive disadvantage due to their state's prohibition of non-compete agreements,²²¹ especially considering the frequency with which the survey data reported above suggests these restraints are being utilized across the team-sports industry.²²²

However, depending on the nature of the policy adopted, attempts to formulate league-wide trade-secret protection standards could raise potential antitrust concerns. Should a league

218. See, e.g., MAJOR LEAGUE CONST., art. VI, § 1, <http://law.uh.edu/assignments/summer2009/25691-b.pdf>

All disputes and controversies related in any way to professional baseball between Clubs or between a Club(s) and any Major League Baseball entity(ies) (including, in each case, without limitation, their owners, officers, directors, employees and players) . . . shall be submitted to the Commissioner, as arbitrator, who, after hearing, shall have the sole and exclusive right to decide such disputes and controversies [and whose decision shall be final and unappealable].

219. See, e.g., NAT'L HOCKEY LEAGUE CONST., art. VI, § 6.3(b)(5), <http://v1.theglobeandmail.com/v5/content/pdf/CoyotesDaly.pdf>

The Commissioner shall have full and exclusive jurisdiction and authority to arbitrate and resolve . . . any dispute involving a Member Club or Clubs, or any players or employees of the League or any Member Club or Clubs, or any combination thereof, that in the opinion of the Commissioner is detrimental to the best interests of the League or professional hockey or involves or affects League policy.

220. See *supra* Part II (observing, for instance, that states take differing views on the enforceability of non-disclosure and non-compete agreements).

221. See *supra* notes 102–104 and accompanying text (discussing California's limitations on the use of non-compete agreements).

222. See *supra* notes 193–194 and accompanying text (noting that over 78% of responding teams reported using non-compete agreements).

mandate a minimum length for its clubs' NDAs, for instance, affected employees could potentially file suit under the Sherman Act contending that the league's rule illegally restrains trade by preventing teams from competing in the employment marketplace by offering more attractive (i.e., less restrictive) terms to their prospective employees.²²³

That having been said, a league could nevertheless presumably adopt other, less restrictive rules that would help to level the playing field among its teams with respect to trade secret protection. By enacting a league-wide prohibition against non-compete agreements, for example, leagues could ensure that their California-based franchises are on equal footing with their rival teams. Similarly, by enacting a league-wide limitation on the maximum length of a potential non-disclosure obligation, leagues could ensure that teams in states taking a more restrictive view of these covenants are not disadvantaged in the same way.²²⁴ Because league rules along these lines would not directly harm any third parties by artificially restraining competition between teams, they would appear to be less likely to trigger potential legal liability, and would thus represent a sensible strategy for the leagues to adopt to help place their teams on equal footing with regards to protecting their trade secrets.

Another area in which leagues may wish to regulate their teams' protection of proprietary information—albeit for entirely different reasons—relates to the use of certain biometric analyses and physical training or therapy techniques. As noted in Table 2,

223. Because most team employees subjected to non-disclosure or non-compete obligations—unlike players—have never formed a union, these league-wide rules would not be shielded from scrutiny under the Sherman Act by the so-called non-statutory antitrust exemption, and therefore would expose the leagues to potential treble damages. *See, e.g.,* Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN. ST. L. REV. 341, 365 (2010) (explaining that the non-statutory labor exemption “shields from antitrust scrutiny any conduct that is reached through the proper workings of the collective bargaining relationship”). Admittedly, this concern may not be as compelling for MLB, due to its historic exemption from antitrust law. *See, e.g.,* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211 (2012) (providing an overview of the historical development of baseball's antitrust exemption).

224. *See supra* notes 93–96 and accompanying text (discussing state-level restrictions placed on NDAs).

supra, more than half of responding teams reported possessing trade secrets relating to biometric analyses, while over 35% and 40% of teams, respectively, reported that they protect various physical therapy and training techniques. While much of this activity is unlikely to raise concern, the creation and use of some proprietary methods in this area could give rise to potential ethical issues that warrant league action.

For instance, if a single team were to develop a proprietary formula allowing it to identify players who are at particular risk for a career-threatening injury—such as a torn ulnar collateral ligament (UCL) in a baseball pitcher’s elbow²²⁵—or were to create a training or therapy regimen that enabled its players to better avoid the risk of such injuries in the future, the resulting method would represent a tremendous source of competitive advantage for the franchise.²²⁶ At the same time, however, allowing one team to retain proprietary control over this type of information would have potentially profound ethical implications for the rest of the industry, subjecting countless other players—at both the amateur and professional levels—to a needless risk of future injury.²²⁷

As a result, considering that the survey data reported above suggests that a significant number of teams may already be claiming trade secret protection over these types of proprietary information, each of the four major sports leagues should consider taking steps to regulate their franchises’ activity in this regard. Along these lines, leagues could limit the use of, or entirely prohibit their teams from enforcing, NDAs or covenants not to compete against the categories of employees—such as doctors or trainers—most likely to possess knowledge relating to injury

225. For an in-depth discussion of the increasing frequency of UCL injuries in both amateur and professional baseball, see JEFF PASSAN, *THE ARM: INSIDE THE BILLION-DOLLAR MYSTERY OF THE MOST VALUABLE COMMODITY IN SPORTS* (2016).

226. See, e.g., Matthew Trueblood, *Rubbing Mud: A Solution Does Not Exist*, *BASEBALLPROSPECTUS* (Mar. 5, 2015), <http://www.baseballprospectus.com/article.php?articleid=25709> (last visited Sept. 21, 2017) (quoting Andrew Friedman, president of MLB’s Los Angeles Dodgers, as saying, “I would contend that any kind of advantage in injury prevention is significant”) (on file with the Washington and Lee Law Review).

227. See *Injuries Increase As Pitchers Throw Harder, Faster And Younger*, *NPR* (Mar. 31, 2016), <http://www.npr.org/2016/03/31/472541597/injuries-increase-as-pitchers-throw-harder-faster-and-younger> (last visited Sept. 21, 2017) (noting the “inherent conflict” when teams “are doing everything they can to figure out [injury prevention techniques] and not tell[ing] anyone about it”) (on file with the Washington and Lee Law Review).

prevention techniques. At a minimum, leagues should make an effort to invest in their own injury prevention research, centralized within the league office, to help ensure that any strides made in this area will benefit all players and teams on an equal basis.

Finally, with regards to future research activity, this study has highlighted the current lack of empirical data regarding the types of information that are being subjected to trade secret protection in the modern economy, as well as the ways in which the secrecy of this knowledge is being protected. Indeed, prior to this study, it appears that the only published research of this sort dates back to 1965 and 1971, respectively.²²⁸ While researchers may have previously assumed that firms would be reluctant to share this type of information, given its potential sensitivity, the present study suggests that companies in other industries—especially those in less intensely competitive fields than professional sports—would likely be willing to disclose some general details regarding their trade secret practices.

Meanwhile, although the survey data presented here provides a novel look at the protection of trade secrets within the professional sports industry, it does not paint a complete picture. In particular, further research regarding the manner in which teams differentiate between employees when deciding whom to subject to a non-disclosure or non-compete obligation would be instructive.²²⁹ Along these lines, although potentially difficult to conduct, a survey conducted at the employee-level could, if feasible, yield particularly interesting results. Such data would help provide a clearer indication of the overall rate at which employees in the professional sports industry are subject to non-disclosure or non-compete agreements.

228. See generally O'MEARA, HOW SMALLER COMPANIES PROTECT THEIR TRADE SECRETS, *supra* note 13; O'MEARA, EMPLOYEE PATENT AND SECRECY AGREEMENTS, *supra* note 13.

229. For instance, as noted above, despite the fact that 50% of responding teams reported requiring their front-office personnel to sign non-compete agreements, the fact that teams routinely hire front-office executives away from one another would suggest that the enforcement of these provisions may not be uniform. *Supra* Table 5; *supra* notes 202–203 and accompanying text.

VI. Conclusion

This Article has explored the protection of trade secrets in the professional sports industry. In particular, through the presentation of freshly collected survey data, the Article has shed new light on both the types of information being subjected to trade secret protection by franchises in the four major North American sports leagues, as well as the methods that these teams use to preserve the secrecy of their proprietary knowledge. In the process, this Article has identified ways in which sports leagues may wish to act in order to level the playing field amongst their franchises—especially in light of the differing legal regimes governing teams in this area at the state level—while also highlighting the need for additional research regarding the trade secret protection practices of firms within both the professional sports industry and the economy at-large. Indeed, considering the increasingly significant role that big data is poised to play in the economy in coming years, issues surrounding the legal protection of this sort of proprietary information will only take on heightened importance in the future.