ARTICLE

UNPACKING TRADE SECRET DAMAGES

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TABLE OF CONTENTS

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I. INTRODUCTION

The United States is on the verge of a new era of trade secret litigation in federal courts. On May 11, 2016, President Barack Obama signed the Defend Trade Secrets Act of 2016 ("DTSA"). The DTSA is the first federal law in the United States to create a federal civil cause of action for trade secret misappropriation.[1] For almost two hundred years, the development of civil trade secret law in the United States has occurred exclusively under

1. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376–86 (2016). The DTSA amended the earlier enacted Economic Espionage Act of 1996 (the "EEA") which designated trade secret misappropriation a federal crime. *Compare* 18 U.S.C §§ 1831–39 (2012), *with* Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376–80 (codified at 18 U.S.C. § 1836 (Supp. 2016)).

state law and largely in state courts. Because the DTSA now provides an easier federal forum for trade secret misappropriation, there is expected to be a large increase of trade secret cases entering the federal courts.[2] Even prior to the enactment of the DTSA, trade secret misappropriation cases in federal courts were growing rapidly,[3] with claims filed under the Uniform Trade Secrets Act ("UTSA"), which has been adopted by most states. To some extent, the new legislation also puts trade secrecy on par with its other intellectual property siblings, as it was the only remaining area not covered by federal law.

The increasing importance, and some might argue prominence, of trade secrecy is regrettably matched with a dearth of empirical work[4] to help better understand and contextualize the field for scholars, litigants, practitioners, businesses, and the courts.[5] While much has been written about damages in patent infringement cases,[6] none have focused on trade secret misappropriation cases. This Article helps to fill that void with respect to damages and, indirectly, the value of trade secrets, as measured by outcomes in actual cases. It also, more broadly, draws connections between remedies and other litigation variables and makes significant contributions in providing deeper context and understanding for trade secret litigation and IP litigation generally.

This is the first in-depth empirical analysis of damages in trade secret cases in the U.S. From an original dataset developed from fifteen years of cases in federal courts, from 2000 to 2014, this Article analyzes the damages awarded on trade secret claims. In addition, a wide range of other variables are incorporated into the analysis, including those related to

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2. *See* Christopher B. Seaman, *The Case Against Federalizing Trade Secrecy*, 101 VA. L. REV. 317, 368 (2015).

3. *See* David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 GONZ. L. REV. 57, 68 (2010) [hereinafter Almeling State Study].

4. The value of empirical legal research to the study of intellectual property law is increasingly being recognized by scholars. However, these studies have largely been conducted for patent law. *See, e.g.*, Christopher Seaman, *Willful Patent Infringement and Enhanced Damages After in re Seagate: An Empirical Study*, 97 IOWA L. REV. 417, 432–33 (2012).

5. David Almeling and his colleagues broke new ground in 2009 with the publication of their first study of trade secret litigation in federal courts, followed by their study of state courts. *See* David S. Almeling et al, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291 (2009) (hereinafter Almeling Federal Study); *see also* Almeling State Study, *supra* note 3, at 66–67.

6. *See, e.g.*, William F. Lee and A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385 (2016); Seaman, *supra* note 2, at 380; The Sedona Conference, *The Sedona Conference Commentary on Patent Damages & Remedies*, 15 SEDONA CONF. J. 53 (2014).

background court and jurisdiction information, the kinds of trade secrets at issue, background details about the parties, the related causes of action included with claims of trade secret misappropriation, and, of course, details about the damages awarded. This Article then disaggregates the data to reveal underlying trends, patterns, and questions deserving deeper exploration.

This first paper from the study provides highlights of the descriptive statistics. Analysis of this data and the relationship between and among the variables yields insightful observations and answers some fundamental questions about the nature of damages in trade secret misappropriation cases. For instance, the study finds that average trade secret damage awards, at about $11 million, are comparable to those in patent cases and much larger than trademark cases; very positive overall outcomes for plaintiffs; much higher awards from jury trials than bench trials; and higher damages on business information secrets than on technical trade secrets. Generally, the results also reveal much higher damages than those awarded in typical tort cases. Going forward, the results provide a window from which to anticipate what the damages and ultimately, the stakes, for trade secret litigation might be in the new frontier of federal courts.

The Article begins Part II by summarizing background information about the legal principles governing damages for trade secret misappropriation, including those that are available under the new DTSA. Part III reviews the methodology and data collection for this original dataset and study. The ground-breaking results of the study are presented in Part IV, beginning with the rankings and averages from the disaggregated data: average award sizes, state rankings, types of damages most awarded, the top ten awards, and the time span to resolve cases. Next, several notable patterns and observations are discussed: plaintiffs are more likely to win, most cases involve digital trade secrets and business information secrets, allegations of misappropriation were based mostly on actual use of trade secrets, and claims were most often accompanied by other contract, tort, and intellectual property claims. The final set of findings discuss other litigation variables that had statistically significant effects on the amount of damages awarded: confidentiality agreements, business information, juries, and competitors, as well as the grant of permanent injunctions. Finally, the Article concludes in Part V that this study yielded interesting and novel insights, and identifies a host of questions that will be explored in subsequent papers from the dataset.

II. BACKGROUND ON TRADE SECRET DAMAGES

The remedies that are available for trade secret misappropriation under both the UTSA and the DTSA (which adopted the UTSA's remedies) mirror the remedies that are available under common law tort principles in many ways.[7] However, there are some important differences. Under tort law, the available remedies generally include compensatory damages measured by the actual harm suffered by the plaintiff, or, when the plaintiff is a company alleging a business tort, lost profits.[8] Depending upon the tort that was alleged and the evidence that was presented, the plaintiff may also be entitled to an award of damages for such things as pain and suffering, emotional distress, and loss of consortium.[9] Preliminary or permanent injunctive relief is available, but only upon a showing that court intervention is needed to prevent irreparable harm.[10] Generally, attorney's fees are not awarded to the prevailing party, unless there is a contract that includes an attorney's fees provision, or where a statute allows for the award of attorney's fees for specified claims.[11] Similarly, punitive damages (also known as exemplary damages) are not available for a breach of contract claim, but are generally available in tort cases upon a showing of willful and malicious behavior.[12]

An important difference in a trade secret case is that a plaintiff can seek an award of damages without having to prove actual harm.[13] The threatened use or disclosure of a trade secret can provide the grounds for preliminary and permanent injunctive relief, even if the acts of trade secret misappropriation did not cause the trade secret owner to suffer actual harm.[14] It is also noteworthy that trade secret plaintiffs do not need to prove actual harm in order to establish liability.[15] They do, however, need a showing of actual harm to recover monetary damages.[16] Additional distinctions for trade secret remedies are discussed below.

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7. *See* 18 U.S.C. § 1836(b)(3) (Supp. 2016).

8. *See* JEROME NATES ET AL., DAMAGES IN TORT ACTIONS § 1.01 (Matthew Bender & Co., Inc. 2017).

9. *Id*.

10. *See* ELIZABETH A. ROWE & SHARON K. SANDEEN, CASES AND MATERIALS ON TRADE SECRET LAW 354 (2012).

11. *See* Howard Friedman & Charles J. DiMare, *Litigating Tort Cases* § 50:15 (2015).

12. *See* NATES, *supra* note 8, at § 40.01.

13. *See* SHARON K. SANDEEN & ELIZABETH A. ROWE, TRADE SECRET LAW IN A NUTSHELL § 6.3 (West 2013).

14. *Id*.

15. *Id*.

16. *Id*.

Even though the DTSA is in effect, its development is just beginning, and it does not preempt the long existing and rich state laws that form the trade secret jurisprudence in this country.[17] Indeed, the DTSA is modeled after, and will continue to be heavily influenced by, the state interpretations of the UTSA, which has been adopted by most states. Accordingly, learning trade secret law continues to require an understanding of the UTSA and the common law of trade secrets.

Throughout the period covered by the study (2000 to 2014), trade secret damages were governed by state law. Thus, most civil trade secret claims were filed in state courts.[18] However, trade secret cases could be filed in federal court based on diversity jurisdiction if the amount in controversy exceeded $75,000.[19] Cases could also be removed by the defendant from state to federal court if there was a federal claim (such as a patent infringement claim) to which the state claim was supplemental.[20] Indeed, in this study, 22% of the cases were initially filed in state court and were later removed to federal court. Cases filed in federal court would generally apply the trade secret law of the state in which the court is located, unless choice of law principles require otherwise for that particular case.[21]

Since most of the states have adopted the UTSA, usually the trade secret law applied would be that from the UTSA. Therefore, this Article will make reference to the remedies and damages provided under the UTSA and will note where significant exceptions may have been carved out in particular states.[22] Because it was often difficult for trade secret plaintiffs to prove actual damages, the remedies provision of the UTSA attempted to help solve the problem by specifying the types of available remedies, and the conditions under which they will be granted.[23]

A. Injunctive Relief

The basic principles of injunctive relief that were developed at common law and in courts of equity continue to be applied in both UTSA and non-UTSA jurisdictions. They are also likely to be applied under the DTSA. Generally, before a preliminary

17. *See* H.R. REP. NO. 114-529, at 6 (2016); 18 U.S.C. § 1836(f) (Supp. 2016).

18. *See* Almeling State Study, *supra* note 3, at 70.

19. *See* 28 U.S.C. § 1332 (2012).

20. *See* 28 U.S.C. §§ 1367, 1446 (2012).

21. *See* Almeling State Study, *supra* note 3, at 75.

22. In jurisdictions that have not adopted the UTSA, available remedies have been developed for trade secret misappropriation. The common law or state statutes must be examined in the states to determine the scope of damages.

23. UNIF. TRADE SECRETS ACT §§ 2–5 (amended 1985).

injunction will be granted, the plaintiff must establish: (1) a likelihood of success on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is denied; (3) that the balance of hardships favors the moving party; and (4) that the injunction will not disserve the public interest.[24] Also, in the case of preliminary injunctive relief, the plaintiff is usually required to post a bond (also known as "security" or "an undertaking") that will compensate the defendant in the event that preliminary relief was improperly granted.[25]

Special and more detailed requirements apply to any request for an *ex parte* Civil Seizure Order under the DTSA.[26] If granted, the seizure order requires the U.S. Marshall's Service to seize the property specified in the Order.[27] This could include not only the alleged trade secrets, but property that might be used to disseminate the trade secrets.[28] Further, the DTSA also limits the scope and nature of available injunctive relief in employment related cases.[29]

Requests for preliminary relief in the form of a temporary restraining order or a preliminary injunction (or sometimes both) often accompany the filing of a trade secret misappropriation case.[30] In particular, the UTSA provides that both actual and threatened misappropriation of trade secrets can be enjoined.[31] Generally, the purpose of a temporary restraining order or preliminary injunction is to preserve the status quo until a decision on the merits of the plaintiff's claims can be reached.[32]

After a decision on the merits has been reached, a court may enter a permanent injunction.[33] Permanent injunctive relief is an available remedy when a plaintiff in a trade secret case cannot show monetary harm, but it is also available in addition to damages.[34] The UTSA limits the length of permanent injunctive relief to the time period during which the subject information

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24. *See* Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co., 506 N.E.2d 140, 141–44 (Mass. 1987); Town of Brookline v. Goldstein, 447 N.E.2d 641, 644 (Mass. 1983).

25. *See* FED. R. CIV. P. 65(c).

26. *See* 18 U.S.C. § 1836(b)(2)(A)(i)–(ii)(Supp. 2016).

27. *See id.* at § 1836(b)(2)(A)(i).

28. *Id.*

29. *See id.* at § 1836(b)(3)(A)(i)(I).

30. *See* SANDEEN & ROWE, *supra* note 13, at § 6.2.

31. *See* UNIF. TRADE SECRETS ACT § 2(a) (amended 1985).

32. *See* Tom Doherty Associated, Inc. v. Saban Entm't, Inc., 60 F.3d 27, 34 (2d Cir. 1995).

33. *See*, *e.g.*, E.I. DuPont de Nemours and Co. v. Kolon Indus., 894 F. Supp. 2d 691, 708 (E.D. Va. 2012).

34. *See* SANDEEN & ROWE, *supra* note 13, § 6.2.

remains a trade secret.[35] Typically, the length of a permanent injunction depends on the facts of the case, and courts will often consider the commercial advantage that a defendant might have gained from misappropriating the trade secret.[36]

B. Compensatory Damages

Although a request for injunctive relief is central to many trade secret cases, plaintiffs who successfully prove that their trade secrets have been wrongly used or disclosed (as opposed to merely acquired) can also seek an award of monetary relief.[37] However, plaintiffs in trade secret cases have been known to seek an award of monetary damages even in cases where trade secrets were merely acquired, and not used.[38]

Indeed, the UTSA provides that "actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss" can all be included as a measure for trade secret damages.[39] Accordingly, the trade secret plaintiff may recover both actual losses and the "unjust benefit" caused by the defendant.[40] While compensatory damages can be combined with injunctive relief, the UTSA cautions that "injunctive relief ordinarily will preclude a monetary award for a period in which the injunction is effective."[41]

Where there is evidence that the defendant used or disclosed the trade secret, thus causing actual harm, an award of compensatory damages is justified. The measure of damages in these circumstances is likely to be the actual or potential value of the trade secrets to the plaintiffs without the disclosure.[42] A number of different measures are available to establish compensatory damages. These include lost profits, erosion of market share, out-of-pocket expenses, and advantage to the defendant.[43]

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35. *See* UNIF. TRADE SECRETS ACT § 2(a) cmt. background (amended 1985).

36. *See, e.g.*, Gen. Elec. Co. v. Sung, 843 F. Supp. 776, 780 (D. Mass. 1994).

37. UNIF. TRADE SECRETS ACT § 3(a).

38. Univ. Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 529, 534 (5th Cir. 1974).

39. UNIF. TRADE SECRETS ACT § 3(a).

40. UNIF. TRADE SECRETS ACT § 3 cmt. background.

41. *Id*.

42. *See* SANDEEN & ROWE, *supra* note 13, § 6.4.

43. *See, e.g.*, In re Jonatzke, 478 B.R. 846, 861 (Bankr. E.D. Mich. 2012); *Univ. Computing Co.*, 504 F.2d at 536.

C. Reasonable Royalties

Under the UTSA and the DTSA, reasonable royalties are not generally a form of compensatory damages. "In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret."[44] Where proof of the amount of actual harm or of the defendant's profits is difficult to show, reasonable royalties can be used as an alternative measure of damages.[45] However, there must first be a finding of the defendant's actual use or disclosure of the trade secret, thus establishing the actual harm. The study results were consistent with this principle: reasonable royalties were only awarded in cases with allegations of actual use.[46]

The amount awarded as reasonable royalty will usually be based on expert testimony concerning the type of trade secret at issue and norms in the applicable industry.[47] Incidentally, the UTSA also provides for what is effectively a "royalty injunction" in rare situations where the grant of injunctive relief, while warranted, might be against public policy or principles of equity. In such "exceptional circumstances, an injunction may condition use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited."[48] This provides for a reasonable royalty to the plaintiff instead of an injunction against the defendant. The DTSA incorporates similar language.[49] Apparently, members of the Patent, Trademark, and Copyright Committee of the ABA advocated for the "exceptional circumstances" language in Section 2 "in order to preclude routine judicial licensing of misappropriated trade secrets."[50] Thus, rather than creating a new remedy not previously recognized at common law, the provision limited the circumstances under which reasonable royalties could be granted in lieu of an injunction.

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44. UNIF. TRADE SECRETS ACT § 3(a).

45. The DTSA and UTSA are consistent on this principle. *See* 18 U.S.C. § 1836(b)(3)(B)(ii).

46. There were only nine cases based on "acquisition only" misappropriation, and reasonable royalties were not awarded in any of them. *See infra* Part IV.A.3 for more results on the types of damages awarded.

47. *Univ. Computing Co.*, 504 F.2d at 539.

48. UNIF. TRADE SECRETS ACT § 2(b).

49. *See* 18 U.S.C. § 1836(b)(3)(A)(iii) (Supp. 2016).

50. *See* Richard F. Dole, Jr., *The Uniform Trade Secrets Act—Trends and Prospects*, 33 HAMLINE L. REV. 409, 437 (2010).

D. Punitive Damages

Under both the UTSA and the DTSA, exemplary damages can be awarded in the case of "willful and malicious misappropriation," but may not exceed two times the award of damages.[51] The UTSA allows for punitive or exemplary damages in cases of "willful and malicious misappropriation" and only in an amount that does not exceed twice the amount of compensatory damages.[52] The majority of the states adopted the standard and the maximum cap of no more than twice the amount of damages.[53] A few states have modified[54] or eliminated the cap.[55] Some are silent on the issue.[56] In order to discourage trade secret misappropriation, Alabama expressly deviated from the norm by instituting a minimum punitive damage award of $10,000 if willful and malicious conduct is found (and even if only nominal damages are awarded), but sets a maximum at the amount of actual damages awarded.[57] In general, willful and malicious behavior is behavior that is different in kind from that which is required to prove trade secret misappropriation. The cases suggest that to justify punitive damages there must be a showing of actual malice.[58] The same evidence that justifies an award of punitive damages may also sometimes justify an award of attorney's fees.[59]

E. Attorney's Fees

Finally, the UTSA and DTSA create an exception to "the American Rule" by providing for the award of attorney's fees to the prevailing party in a trade secret misappropriation case, where there is a showing of bad faith or willful and malicious misappropriation.[60] Under the UTSA, attorney's fees may be

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51. For a wonderful discussion of punitive damages under the UTSA *see generally*, Richard F. Dole, Jr., *Punitive Damage and Attorney Fee Awards in Trade Secret Cases*, 20 MARQ. INTELL. PROP. L. REV. 1 (2016).

52. UNIF. TRADE SECRETS ACT § 3(b).

53. Dole, *supra* note 51, at 8–10.

54. *See, e.g.*, OHIO REV. CODE. ANN. § 1333.63(B) (2016).

55. *See, e.g.*, MO. REV. STAT. § 417.457 (2016); Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 576 (8th Cir. 1997).

56. *See, e.g.*, MICH. STAT. ANN § 445.1901 (2016); NEB. REV. STAT. ANN. § 87-504 (2016).

57. *See* ALA. CODE § 8-27-4(a)(3) (2016).

58. *See* Roton Barrier, Inc. v. Stanley Works, 79 F.3d 1112, 1120–21 (Fed. Cir. 1996).

59. *See, e.g.*, Vacco Indus. v. Van Den Berg, 5 Cal. App. 4th 34, 54 (Cal. Ct. App. 1992).

60. *See* UNIF. TRADE SECRETS ACT § 4(iii); *see also* 18 U.S.C. § 1836(b)(3)(D) (Supp. 2016). Under the American Rule, attorney's fees cannot be recovered by the successful party in the absence of statutory authority for the award. Int'l Chem. Workers Union (AFL-CIO), Local No. 227 v. BASF Wyandotte Corp., 774 F.2d 43, 47 (2d Cir. 1985). A court may award

awarded to the prevailing party in a trade secret misappropriation case if one of three circumstances is present: (1) a claim of misappropriation is made in bad faith;[61] (2) a motion to terminate an injunction is made or resisted in bad faith; or (3) willful and malicious misappropriation exists.[62] It is entirely within a court's discretion whether or not to grant attorney's fees and how much to award.[63] One of the objectives of the attorney's fees provision is to serve as a deterrent to specious claims. Thus, attorney's fees may be awarded to the prevailing party, whether it's the plaintiff or the defendant, and it can be used to discourage parties from seeking injunctive relief for anticompetitive purposes.[64] In addition to attorney's fees, costs can be awarded to prevailing parties at the discretion of the judge, according to applicable procedural rules. These costs usually include filing motion fees, deposition costs, and expert witness fees.[65]

F. Damages under the DTSA

In recent years, changes have been made to enhance the penalty provisions under the EEA. The Foreign and Economic Espionage Penalty Enhancement Act of 2013 provides that if convicted of a violation of Section 1831 of the EEA, an individual is subject to a sentence of 15 years in prison and a fine of $5,000,000 (formerly $500,000), while a corporation can be fined not more than the greater of $10 million or three times the value of the stolen trade secret to the organization (formerly $10 million).[66] It is unclear, however, precisely how the "value" of the trade secret to the organization will be determined. The DTSA increased the financial penalties under Section 1832.[67] The penalty under Section 1832 specifies: 10 years in prison for an individual, or a fine of up to the greater of $5 million for a corporation or three times the value of the stolen trade secret to

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attorney's fees without statutory authority when the opposing counsel acts "in bad faith, vexatious, wantonly, or for oppressive reasons." *Id.*

61. The UTSA does not define "bad faith" but one may look to applicable state law. In California, for instance, the standard is "more culpable than mere negligence." *See* Gemini Aluminum Corp. v. Cal. Custom Shapes, Inc., 95 Cal. App. 4th 1249, 1261 (Cal. Ct. App. 2002).

62. UNIF. TRADE SECRETS ACT § 4 (amended 1985).

63. *See, e.g.*, Real-Time Labs., Inc. v. Predator Sys., Inc., 757 So.2d 634, 638 (Fla. App. 2000).

64. UNIF. TRADE SECRETS ACT § 4 cmt. background.

65. *See, e.g.*, FED. R. CIV. P. 54(d).

66. 18 U.S.C. § 1831(b) (2012).

67. *Id.* § 1832 (b).

the organization.[68] Unlike in Section 1831, the maximum fine for an individual is not specified. Having not provided a specified fine, the maximum fine of $250,000 for felony offenses is likely to serve as the ceiling.[69] Now that the revised criminal EEA has turned into the civil DTSA, it would be interesting future research to consider the significance and effectiveness of the criminal monetary penalties and civil damages under the statute. Since, based on this study, the average civil damages for trade secret misappropriation appear to be higher than that provided for individuals and organizations under the EEA, a valid query is whether these increased penalties are reasonable and/or sufficiently punitive.

III. DATA AND METHODOLOGY

This Part explains the techniques and methods used to locate, collect, and code the original dataset for this study. This includes a discussion of how cases were selected for the study. Potential limitations are also addressed.

A. Data Collection

Starting in 2015, a significant amount of time was spent designing this study, in part because no single source contained all of the cases necessary for building the data set, and because of the thoughtful deliberation regarding the selection of variables. Initially, to get a sense of the various resources available and the scope of their content, the study selected two years at random (2011 and 2014), and ran searches to compare the results obtained by the different search methods. The databases used were Westlaw Next Case Evaluator, Westlaw Verdict and Settlement Summary, Lexis Advance Verdict & Settlement Analyzer, and a broad Westlaw key term search, as well as a broad Lexis search. Each search method produced very different results.

It became apparent that no predesigned search would produce all of the cases from any one source.[70] Accordingly, cases from each of the databases meeting the definition of a trade secret case were reviewed and cross checked for inclusion in the data set. For the purpose of this study, a "trade secret case" is defined as "a case containing either a trade secret claim or counterclaim." The time period selected for examining

68. *Id.*

69. *See id.* § 3571(b)(3).

70. Almeling State Study, *supra* note 3, at 64.

verdicts and judgements was January 1, 2000 through December 31, 2014. Therefore, the cases in the study were all decided during this fifteen-year period.[71] Ultimately, the bulk of cases came from the jury verdict reports available on Westlaw and Lexis. The study focused on cases filed only in federal court, as this appeared to be the most manageable and feasible process for this initial study. Among other reasons, the state courts' dockets were less standardized,[72] more difficult to search for the relevant variables, and would have required coding over a thousand cases that initially appeared to fit the definition.[73] Ultimately, there were a total of 157 usable cases[74] included in the data set. This represents about 6% of the trade secret cases filed from 1994 to 2012.[75] This percentage is actually on the higher end of the percentage of civil cases that typically go to trial, which is usually around 2–3%.[76] Most cases settle or are otherwise disposed of without a trial.[77]

A variable list was created and used for coding all of the cases.[78] These cases were coded for multiple variables in approximately nine categories. The categories include background court and jurisdiction information, the kinds of trade secrets at issue, background details about the parties, the related causes of action included with claims of trade secret misappropriation, details about the trial, experts, and jury, details about the damages awarded (both generally and specifically on the trade secret claims), and any post trial modifications by the trial court.

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71. The end date of 2014 was selected because it was the most recent year-end prior to the start coding.

72. Michael Risch, *Empirical Methods in Trade Secret Research*, *in* 2 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 12 (Peter Menell and David Schwartz eds., forthcoming 2017).

73. An initial search of the applicable databases for state and federal cases identified 1,244 potential cases.

74. Cases were filtered for duplicate entries and also for cases that ultimately did not meet the definition of a trade secret case as defined by the study (having a trade secret claim or counterclaim). Some cases were also excluded because sufficient information was not available in the public databases or because they were sealed.

75. A search of the district court dockets in Bloomberg, with the search string "misappropriate! /s 'trade secret'" revealed 2,795 cases filed between 1/1/1994 and 12/31/2012.

76. *See* John B. Meixner & Shari Seidman Diamond, *Does Criminal Diversion Contribute to the Vanishing Civil Trial*?, 62 DEPAUL L. REV. 443, 443 (2013); Margo Schlanger, *What we Know and What we Should Know About American Trial Trends*, 2006 JOURNAL OF DISPUTE RESOL. 35, 37 (2006) (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 466, 533–34 (2004)).

77. *See* Meixner & Diamond, *supra* note 76, at 455–56.

78. *See* Appendix 1 (on file with Author).

A team of research assistants coded all of the cases. In order to ensure consistency and reliability, the same person coded the same set of variables on all of the cases. The first point of review for receiving the information in the coding process were the summary reports in Westlaw and Lexis. From there, using the case docket number, additional information was obtained and verified from the case pleadings. For instance, jury verdict forms and final orders of judgment were used to verify and complete the information available in the summary reports. The Bloomberg docket searching tool proved especially useful as a resource for locating relevant case information.[79] It also appeared to be the most reliable source.

The data was compiled for statistical analysis using SPSS and was then disaggregated to reveal underlying trends, patterns, and other insights. Statisticians were consulted throughout the study to ensure accuracy in the analysis and interpretation of the data. The results, for this initial paper, appear in the next Part.[80]

B. Potential Limitations

The sample size[81] is relatively modest. This is because it includes only federal cases that went to trial and in which a verdict was issued. Because most cases settle, trial awards represent only a subset of all cases that were originally filed. Indeed, the cases in the study were filed between 1994 and 2012. There appear to have been approximately 2,795 trade secret cases filed in federal courts during that period.[82] This number is likely to be smaller after removing duplicates and other cases that should not be included. Therefore, the cases in the dataset are approximately 6% of those filed during that period. This is consistent with the number of cases that usually go to trial.[83] However, the focus of the study is on damages post-trial and it does not attempt to capture any information about cases or settlements that were not the result of a trial. The dataset also does not include damages from settled cases.

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79. Bloomberg's docket feature contains the same data on federal court dockets that can be found in PACER. *See Docket Research*, YALE LAW SCHOOL LIBRARY, http://library.law.yale.edu/docket-research [https://perma.cc/P33K-3Q85].

80. *See infra* Part IV.

81. *Id.* While the number of cases in the dataset is believed to be the available population of all the applicable federal cases, for the purpose of statistical analysis and interpretation, this study treats it as a sample, in order to be conservative.

82. A search of all district court dockets in Bloomberg, with the search string "misappropriate! /s 'trade secret!'" yielded 2,795 cases for the period 01/01/1994 through 12/31/2012.

83. *See* Almeling Federal Study, *supra* note 3, at 316 tbl. 13.

Most of the cases in the dataset came from the jury verdict tools on Lexis and Westlaw. From direct contacts with both Lexis and Westlaw representatives to inquire about the criteria used to select cases for inclusion in their respective jury verdict tools, certain inherent limitations became apparent. For instance, the cases selected for inclusion in these databases are selected by third-party vendors, and are not necessarily comprehensive. While Westlaw appeared to have a much larger volume of coverage than Lexis, there were still some cases that appeared in Lexis reports that were not present on Westlaw. The specific criteria used by the third-party vendors in selecting cases for inclusion was also unclear. Other studies of this kind suffer from the same limitation.[84]

Virtually all of the trade secret cases had accompanying claims.[85] Where possible, the damages on the trade secret claims only were recorded separately. However, in many cases either the damages awarded on other claims, or how the damages were apportioned by claim could not be determined from the available court documents. Therefore, they were recorded as a general damages figure. Accordingly, where applicable, this Article specifies when the data relates specifically to the trade secret claims and when it refers to general damages.

IV. RESULTS

The following notable observations were made from analyzing the dataset. This study of trade secret cases includes about 150 decisions entered from 2000 to 2014 with damages totaling over $2 billion. The largest damages award during the entire period is the *E.I Dupont de Nemours v. Kolon* case decided in 2011 in the Eastern District of Virginia, for over $919 million.[86] Results are organized below to present: (a) averages and rankings of trade secret damage awards for the fifteen year period; (b) notable patterns from several of the variables considered; and (c) statistically significant relationships that

84. For instance, the annual PricewaterhouseCoopers patent litigation studies use only the information available in LexisNexis, which appears to be a much more limited data set than the data set available through Westlaw. *See* CHRIS BARRY ET AL., PRICEWATERHOUSECOOPERS, 2016 PATENT LITIGATION STUDY: ARE WE AT AN INFLECTION POINT? 7 (2016) [hereinafter PWC 2016 PATENT STUDY], http://www.pwc.com/us/en/forensic-services/publications/patent-litigation-study.html [https://perma.cc/W7PC-3JSB].

85. *See infra* Part IV.B.5.

86. Jonathan Stempel, *U.S. Court voids $920 million DuPont award in Kevlar case*, REUTERS (April 3, 2014), http://www.reuters.com/article/us-dupont-kolon-lawsuit-idUSBREA321FB20140403.

affect whether damages were awarded, and the amount of damages awarded on trade secret claims.

A. Damages Rankings and Averages

1. Average size of trade secret damage award. The average[87] size award on a trade secret claim for the fifteen-year period from 2000 to 2014, adjusted for inflation,[88] was $11,354,315.34. More recently, the average award for the five-year period from 2010 to 2014 was even higher, at $17,181,176.52.[89] This may indicate a possible upward trend in the amount of damages. As shown in Table 1, the upward trend also appears to coincide with an increase in the number of cases from the earliest part of the measured period (2000–2003) having an average of 4.25 cases per year, then moving up to an average of about 12 cases per year starting in 2004 through 2014. The last five years of the measured period (2010–2014) show a further increase of about 15 cases per year. With passage of the DTSA, case filings are already rolling in at a relatively brisk pace.[90]

The annual averages of damages on trade secret claims for the fifteen-year period from 2000 to 2014 are represented in Table 1, showing both the raw/nominal average and the real average adjusted for inflation. Since 2004, the annual average has exceeded $1 million, except for 2008 when the average was $861,051. Of the trade secret damages awarded, about 25% were over $1 million with about 15% exceeding $5 million.

The average trade secret damages are less than, but comparable to, damages in patent litigation.[91] They are larger than those for trademark litigation. The average award in patent cases is about $19 million, and about 25% of the damage

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87. Average awards rather than median awards are reported because they are probably more meaningful to practitioners, and likely provide a better sense of representative damages. They also appear to have been relatively stable over time compared to the median. There were several years where the median damages were zero, and this proportion led to a median of zero on trade secret claims for the time period measured. The average can, however, be skewed based on outliers. Where appropriate, log responses and other techniques were used to try to account for this issue.

88. This average was calculated by adjusting the sum of total damages for each year for inflation using the CPI for 2016, then taking the adjusted gross total for all years, and dividing by the total number of cases (148). An inflation calculator is available at http://www.coinnews.net/tools/cpi-inflation-calculator/ [https://perma.cc/HM42-KL44]

89. *See* Table 1.

90. Within two months of passage, over twenty cases have already been filed under the DTSA. Appendix 1 (on file with Author).

91. The overall median award in patent cases is about $8 million. *See* PWC 2016 PATENT STUDY, *supra* note 84, at 4.

awards are over $1.7 million.[92] Average trademark damages were about $1–2 million with over half of the awards less than $500,000.[93] One peculiarity of trademark litigation, however, is that the vast majority of the trademark damages come from default judgments and consent judgments, rather than from bench or jury trials.[94]

It is worth noting, however, that the wide variability on the amount of damages on trade secret claims in the dataset could lead to a fair degree of unpredictability. The damages ranged from zero dollars to $919.9 million. Damages were awarded on the trade secret claims about 50% of the time,[95] so half the time there were no damages. Even when a party won on a trade secret claim, the party may have received a permanent injunction, but no damages. Such was the case about 19% of the time.[96] This all contributed to a calculated median of zero damages.[97] Figure 1 shows the averages of the log responses for each year in order to remove the skew in the data due to outliers.

When damages were granted on the trade secret claims, Table 2 shows damages in the 60th percentile of about $34,000 and 70th percentile at $420,000. It then jumps to about $2.2 million in the 80th percentile and over $15 million in the 90th percentile. To the extent damage awards represent the value of certain types of cases, then trade secret cases appear to be of much higher value than other tort cases. Only about 25% of all tort judgments were over $5,200, and indeed, a mere 0.2% of tort cases had awards higher than $500,000.[98]

One year stands out and appears to be an outlier for the

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92. *See* BRIAN C. HOWARD & JASON MAPLES, LEX MACHINA PATENT LITIGATION YEAR IN REVIEW 2015 27 (2016), http://pages.lexmachina.com/rs/098-SHZ-498/images/2015%20Patent%20Litigation%20Year%20in%20Review.pdf [https://perma.cc/EHW8-PYWR]

93. *See* J. SHAWN MCGRATH & KATHLEEN M. KEDROWSKI, DAMAGES TRENDS IN PATENT AND LANHAM ACT CASES (2010), http://apps.americanbar.org/litigation/committees/corporate/docs/2010-cle-materials/05-hot-topics-ip-remedies-injunctions/05b-damages-trends-ga-bar.pdf [https://perma.cc/Y8AY-AN8U]; *see also* Kenneth L. Port, *Trademark Extortion: The End of Trademark Law*, 65 WASH. & LEE L. REV. 585, 623 (2008).

94. *See* BRIAN C. HOWARD & JASON MAPLES, LEX MACHINA TRADEMARK LITIGATION REPORT 2016 9 (2016), http://pages.lexmachina.com/rs/098-SHZ-498/images/LexMachina%202016%20TM%20Litigation%20Report.pdf [https://perma.cc/EHX7-VQBV].

95. *See infra* Part IV.B.5.

96. *See infra* Part IV.C.5, Table 18.

97. *See supra* note 87.

98. *See* PAULA HANNAFORD-AGOR ET AL., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 24 (2015), http://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx [https://perma.cc/28DZ-5US2]

average amount of trade secret damages awarded: 2011. This was a banner year for trade secret plaintiffs, due to a few extremely large cases contributing to a raw average of $115.6 million, almost ten times more than the second highest year in 2004. The first of these very large verdicts was *Member Services v. Security Mutual Life Insurance Co. of N.Y.* from the Northern District of New York. It had a $16 million award which was supplemented by $10 million in punitive damages.[99] The next big case was *Contour Design, Inc. v. Chance Mold Steel Co.* from the District of New Hampshire with an award of $15.4 million.[100] From the Central District of California was *Mattel Inc. v. MGA Entertainment*, with an award of $88.5 million. This award was eventually reduced to nothing after several additional proceedings.[101] Finally, the largest of all the cases in the dataset was *E. I. du Pont de Nemours v. Kolon Industries* from the Eastern District of Virginia with an award of $919,900,000. This judgment was later vacated and remanded on appeal.[102] The parties, in April 2015, settled and Kolon Industries agreed to pay $275 million in damages to DuPont.[103] Kolon Industries also pleaded guilty on criminal charges against it, under the EEA, and was ordered to pay $85 million in criminal penalties.[104]

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99. Judgment (doc. 401) at 1, Member Servs., Inc. v. Sec. Mut. Life Ins. Co., No. 3:06-cv-01164-DEP (N.D.N.Y Oct. 13, 2011).

100. Transcript of Reading of the Verdict at 190–91, Contour Design, Inc. v. Chance Mold Steel Co. Ltd., 2011 WL 7737882 (D.N.H. May 24, 2011).

101. *See* Mattel, Inc. v. MGA Entm't, Inc., 705 F.3d 1108 (9th Cir. 2013).

102. *See* Jef Feeley & Christie Smythe, *DuPont's $920 Million Verdict in Kolon Kevlar Case Tossed*, BLOOMBERG NEWS (Apr. 3, 2014), http://www.bloomberg.com/news/articles/2014-04-03/dupont-s-919-million-verdict-in-kolon-kevlar-case-tossed.

103. *See* Jacob Bunge, *Dupont Settles Trade-Secrets Case Against Kolon Industries*, WALL ST. J. (Apr. 30, 2015), http://www.wsj.com/articles/dupont-settles-trade-secrets-case-against-kolon-industries-1430420080.

104. *Id*.

TABLE 1. YEARLY AVERAGES OF TRADE SECRET DAMAGES AWARDS

Year	Nominal Yearly Average	Real Average (adjusted for inflation)[105]	Number of Cases
2000	$0	$0	3
2001	$135,856.56	$185,009.00	4
2002	$3,267,500	$4,377,941.44	6
2003	$260,000	$340,597.17	4
2004	$12,393,916.25	$15,814,742.11	5
2005	$2,066,666.67	$2,550,666.67	6
2006	$2,660,217.33	$3,180,622.35	11
2007	$4,681,625	$5,442,455.11	11
2008	$861,051	$963,971.76	9
2009	$2,561,076.57	$2,877,437.34	14
2010	$1,501,208.64	$1,659,428.44	14
2011	$115,607,294.40	$123,881,367.96	9
2012	$5,064,833.80	$5,317,287.95	21
2013	$1,149,727.27	$1,189,609.94	11
2014	$2,450,118.81	$2,494,642.71	22

105. Adjusted for inflation using the 2016 Consumer Price Index (CPI). An inflation calculator is available at http://www.coinnews.net/tools/cpi-inflation-calculator/ [https://perma.cc/HM42-KL44]

FIGURE 1. YEARLY AVERAGES OF LOG RESPONSES FOR TRADE SECRET DAMAGES

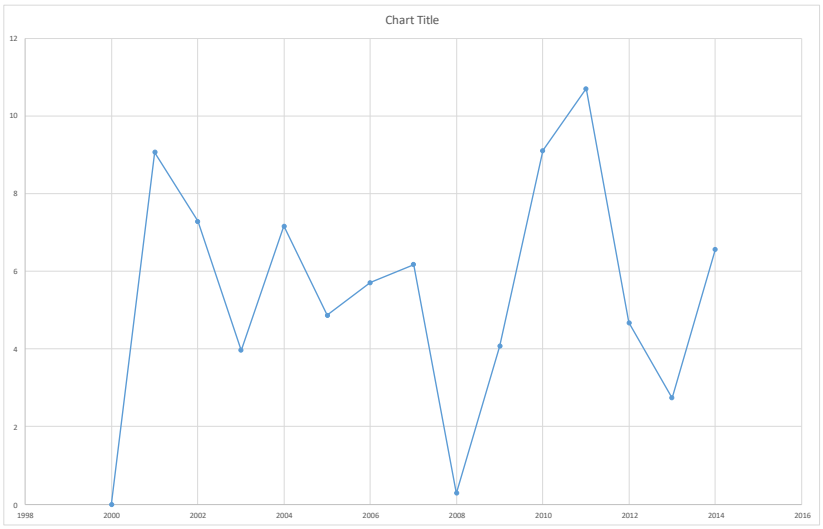

TABLE 2. PERCENTILES ON TRADE SECRET DAMAGES

Percentile	Amount
50th	$0
60th	$34,657.94
70th	$420,000.00
80th	$2,246,256.00
90th	$15,320,000.00

2. States with highest average trade secret damages. As illustrated in Table 3, the top ten states with the highest average damage awards were Virginia, Missouri, New York, Georgia, Michigan, New Hampshire, California, Colorado, Utah, and Texas ranked from first to tenth. Virginia topped that list with an average damage award of $459,950,000. This is because Virginia was home of the *E. I. du Pont de Nemours v. Kolon Industries* case with a chart-topping award of $919.9 million.[106] Without that case, which skews the data in favor of Virginia, it completely drops off the list because Virginia's average drops to zero![107] In fact, most of the states in the top ten had three or fewer cases.[108] Nonetheless,

106. *See* discussion *infra* Part IV.A.1.

107. Virginia only had two cases in the study, and there were no damages issued on the other case. Appendix 1 (on file with Author).

108. The states with three or fewer cases were Virginia (2), Missouri (3), New York (1),

these ten states were also the top ten for total awards, albeit in different order: Virginia, California, Missouri, Michigan, Texas, Georgia, Colorado, Utah, New York, and New Hampshire ranked from first to tenth. The top ten states with the highest total damages comprised 97% of the gross total awards, claiming the lion's share of the damages.

TABLE 3. TOP TEN STATES WITH HIGHEST AVERAGE DAMAGES

Rank	State	Raw Average on Trade Secret Claims
1	VA	$459,950,000
2	MO	$22,318,333.33
3	NY	$16,000,000
4	GA	$15,000,000
5	MI	$11,145,944.17
6	NH	$7,700,000
7	CA	$7,632,439.25
8	CO	$7,173,058.67
9	UT	$4,980,000.50
10	TX	$1,698,077.62

3. Types of damages most often awarded. Consistent with that provided under the law,[109] total compensatory damages, including lost profits and unjust enrichment,[110] formed the vast majority of damage awards for trade secret claims. Approximately 85% of the awards consisted of compensatory damages. Awards based on a reasonable royalty were only 4.73% of awards on trade secret claims, with much higher royalties awarded from judges than juries.[111] This is very different from patent litigation where reasonable royalties are awarded three times more than lost profits.[112] This is likely because of the higher legal standards for proving lost profits in patent litigation.[113]

Attorney's fees and costs comprised about 8% of the damages awarded. These are presumably cases where the non-prevailing

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Georgia (2), New Hampshire (2), and Colorado (3). Appendix 1 (on file with Author).

109. *See* discussion *supra* Part II.B.

110. Separately, lost profits and unjust enrichment awards were 4.94% and 3.38%, respectively. *See* Appendix 1 (on file with Author).

111. *See* Table 5 below showing an average of about $1.1 million in reasonable royalties from bench trials and $434,578.12 from juries.

112. *See* PWC 2016 PATENT STUDY, *supra* note 84, at 6.

113. *See* Lee & Melamed, *supra* note 6, at 398.

party engaged in bad faith or willful and malicious misappropriation.[114] The average award of attorney's fees was $832,858.37.[115] Curiously, none of these awards came from bench trials.[116] This suggests that it is very difficult to convince judges that the bad faith standard has been met. It also raises several questions, for future research about process. For instance, are juries making these attorney's fees determinations or are judges? Perhaps judges are less likely to make the finding themselves at a bench trial, but more likely to find it reasonable if a jury finds that such fees should be awarded? Is this what the statute intended (that juries would be making these decisions and that they would be lumped in with other damages on verdict forms)? Federal Rule of Civil Procedure 54(d)(2) provides that parties must make a motion for attorney's fees or it can be proved at trial as a substantive part of damages if it is an element of damages.[117] Does this present a conflict of law or *Erie* problem, where it is unclear whether the attorney fees were an element of damages?

Punitive damages, requiring "willful and malicious misappropriation" or actual malice,[118] were, on average, awarded in smaller amounts than attorney's fees. The average amount of punitive damages was $224,299.66. Even though the same evidence used to justify an award of attorney's fees can also suffice for punitive damages,[119] punitive damages constituted a smaller percentage of the overall damages pie (2.15%). However, they were awarded slightly more frequently (12%) than attorney's fees (9%), and were much more likely to come from a jury trial (13%) than a bench trial (7%).

Curiously, there were three cases where, contrary to the UTSA provisions,[120] the amount of punitive damages awarded on the trade secret claim was more than twice the compensatory damages cap. The first case, from the Southern District of California in 2006, *Excelsior College v. Charles M. Frye*, had compensatory damages in the amount of $693,588, but punitive damages of $2,529,834.[121] The second, from the Western District of Texas, *Myriad Development v.*

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114. *See supra* Part II.E.

115. The average attorney's fees from the broader measure of damages of all claims are $957,898.46.

116. *See* Table 5 below showing average attorney's fees awards on trade secret claims from juries at $900,477.57 and zero from bench.

117. Fed. R. Civ. P. 54(d)(2)(A).

118. *See supra* Part II.D.

119. *Id.*

120. *Id.*

121. This award was ultimately upheld, and it appears that the defendant filed for bankruptcy after the jury award. *See* Excelsior Coll. v. Frye, 04CV0535WQH, 2007 WL 672517 at *1 (S.D. Cal. Feb. 21, 2007).

Alltech in 2010, had zero compensatory damages,[122] but $2,000,000 in punitive damages.[123] Finally, a 2010 case from the Southern District of Florida, *Chetu Inc. v. Mohamed Safir Salihu,* appears to have had no compensatory damages on the trade secret claim, but $100,000 in punitive damages.[124]

There were differences between bench and jury trials for damages awarded by category on the trade secret claims. As illustrated in Table 5, awards on compensatory and punitive damages were much higher from jury than from bench trials. On compensatory damages, juries awarded an average of about $9.8 million versus about $226,000 from bench trials. [125] The reverse was true for reasonable royalties. The average amount of reasonable royalties from bench trials was more than double that awarded by the juries: about $1.1 million compared to about $435,000.

TABLE 4. OVERALL BREAKDOWN OF DAMAGES ON TRADE SECRET CLAIMS[126]

Compensatory	Reasonable Royalty	Punitive Damages	Attorney's Fees and Costs
85.15%	4.73%	2.15%	7.97%

TABLE 5. AVERAGE AWARDS BY TYPE BETWEEN JURY AND BENCH ON TRIALS

	Compensatory Damages	Reasonable Royalties	Punitive Damages	Attorney's Fees
Bench	226,478.03	1,133,813.07	30,778.57	0

122. There were $250,000 in reasonable royalties. *See* Myriad Dev., Inc. v. Alltech, Inc., 817 F. Supp. 2d 946, 956 (W.D. Tex. 2011).

123. Ultimately, Myriad's recovery of the $2 million in exemplary damages was not upheld. *Id*. at 990.

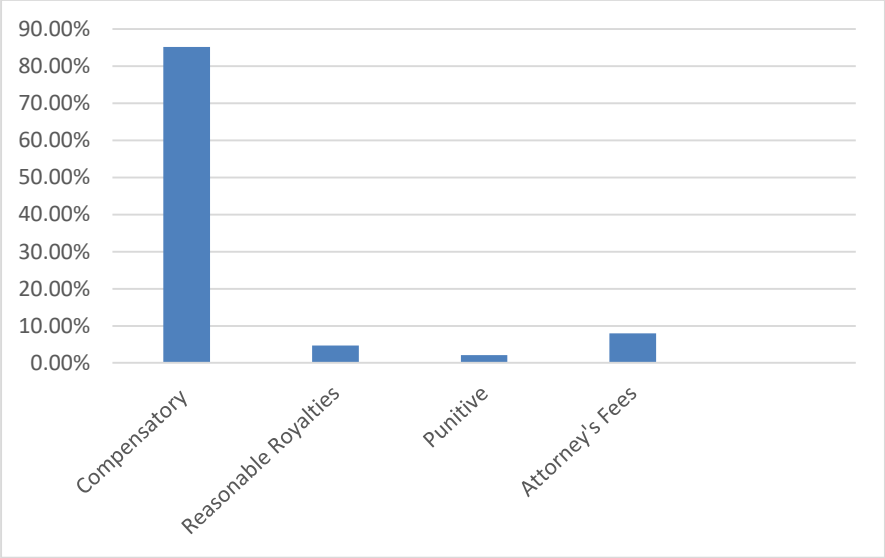
124. There was an award of $279,586 for what appeared to be general compensatory damages in this case. The jury verdict form and the subsequent court orders did not make clear that any of that amount was attributable to the trade secret claim. Thus, the trade secret compensatory damages were coded as zero. If those assumptions are incorrect, then the case would not be illustrative of one that appears to violate the punitive damages rule. *See* Chetu, Inc. v. Salihu, 09-60588-CIV-COHN, 2010 WL 2680088, at *1 (S.D. Fla. July 6, 2010); *see also* Chetu Inc. v. Salihu, 2010 WL 1347301 (S.D. Fla. Feb. 19, 2010).

125. *See* discussion *infra* Part IV.C.3 for more on jury awards being generally much higher than bench awards.

126. The percentages in the table do not add up to 100% because some cases had more than one of the categories of damages. *See e.g.*, Excelsior College v. Frye, 2007 WL 672517 *1, (S.D. Cal.) (illustrating a case that had more than one category of damages).

Jury	9,864,907.39	434,578.12	248,223.10	900,477.57

FIGURE 2. TYPES OF AWARDS ON TRADE SECRET CLAIMS



4. Top ten trade secret damage awards. The top ten awards on trade secret claims totaled approximately $1.2 billion. These ten cases account for half of the total damages of the approximately $2.4 billion awarded since 2000. As Table 6 illustrates, the top ten awards were spread relatively evenly across the fifteen-year period, with each of nine years, ranging from 2002 to 2014, having a top award, and 2012 leading with two. Perhaps the most striking observation here is that every one of the top ten awards came from a jury. Not surprisingly, the *E.I. du Pont v. Kolon* case from the Eastern District of Virginia mentioned earlier, tops the list at almost $920 million.[127] This is the only case from Virginia to make the list. Six different states are represented among this group: Virginia, California, Missouri, Michigan, Georgia, and Utah. California has more top ten cases than any of the other states (3), with two cases from the Central District and one from the Northern District. Missouri and Michigan tie for second place with two cases each. Six of the top ten cases involved business information trade secrets, three involved technical trade secrets, and one involved both technical and business trade secrets. The most common claims among these ten cases alleged

127. *See* discussions *supra* Part IV.A.1 and Part IV.A.2.

misappropriation of a proprietary drawing or design of a product, or a business strategy for marketing to customers.

TABLE 6. TOP 10 TRADE SECRET TOTAL DAMAGES AWARD AMOUNTS

Rank	Case	Damages	Year	Court
1	E. I. du Pont de Nemours v. Kolon Industries Inc.	919,900,000	2011	E.D. Va.
2	Mattel Inc. v. MGA Entertainment	88,500,000	2008	C.D. Cal.
3	Hallmark Cards v. Monitor Clipper Partners	49,025,000	2012	W.D. Mo.
4	Mike's Train House, Inc. v. Lionel L.L.C	40,775,665	2004	E.D. Mich.
5	UniRAM Technology Inc. v. Taiwan Semiconductor Manufacturing Corporation	30,500,000	2007	N.D. Cal.
6	Lockheed Martin Corp. v. L-3 Comms Corp	30,000,000	2009	N.D. Ga.
7	TECHFORWARD INC. vs. BEST BUY CO. INC. ET AL	27,000,000	2012	C.D. Cal.
8	MSC.Software Corp. v. Altair Eng'g	26,100,000	2014	E.D. Mich.
9	Bancorp Services v. Hartford Life Ins. Co	17,930,000	2002	E.D. Mo.
10	Ronald D. Russo v. Ballard Medical Products	17,000,000	2006	D. Utah

5. Cases took about three years to resolve. The average amount of time from filing of the complaint to resolution at trial for a trade secret misappropriation case in the federal courts is just under three years.[128] This shows that the cases have moved at a relatively steady

128. This does not include any appeal period.

pace through the courts even when their numbers have increased over the years. The three states with the most cases, Texas, California, and Florida, were all below the average of 3 years. Texas and California were roughly even at 2.55 and 2.65 years, respectively. Florida courts were much quicker on average, coming in under two years (1.67). On average, civil cases usually take about 1 year to make it through the federal trial courts.[129]

As is illustrated in Figure 3, the time span appears to have spiked in 2014. While the preceding twelve years had an average of 2.77 years, the 2014 average jumped to 4.05 years. Not since 2000 had the average time span exceeded 4 years (4.67). It is unclear what accounts for this increase, although it would require a longer-term view, post-2014, to determine whether this is an aberration or something more meaningful. One explanation could be an increase in the number of cases. While 2014 had the highest number of cases in the study (22), a very close second was in 2012 (21 cases) when the average time span was only 2.14 years. Therefore, the number of cases in itself would not necessarily seem to explain the longer span.

In thinking about any relationships between time to trial of these cases and damages, a few interesting observations emerged. First, perhaps counterintuitively, states with more cases tended to have shorter case time spans. Texas and California, for instance, were the two highest states in number of cases, and both of their case time span averages were only about 2.5 years. Florida, the state with the third most cases, had an even lower time span of 1.67 years. These average time spans were very low compared to the remaining states. Second, there seemed to be no difference in time span versus whether or not damages were awarded. That is, of the cases where trade secret damages were not awarded, the average case length was 2.90 years. Of the cases where damages were awarded, the average case length was 2.84 years. Third, there was also no real difference between judge and jury trials. The average time span on jury cases was 2.93 years, while the average time span on bench trial cases was 2.57 years. Thus, jury cases did seem to take a few months longer, but the difference does not seem substantial.

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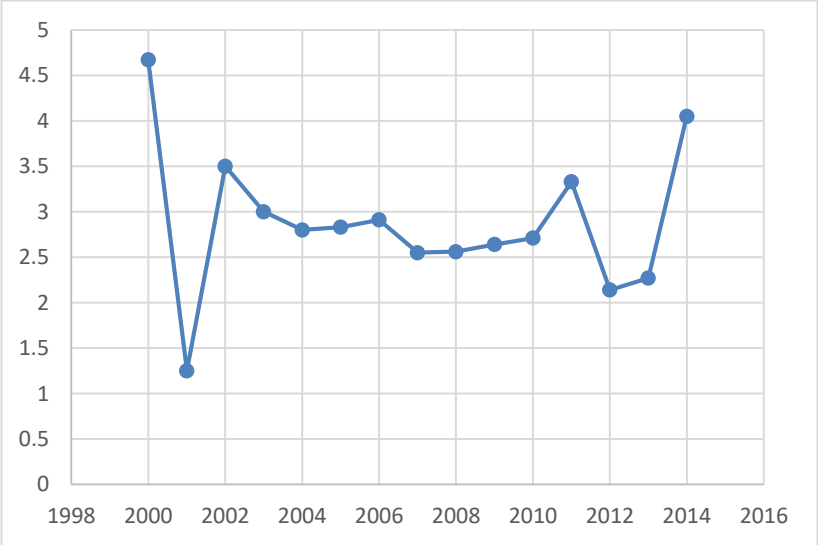
129. *See* Mattia Landoni, *Justice Delayed . . . An Overview of the Options to Speed Up Federal Justice* 18 J. PUB. & INTN'L. AFFS. 127 (2007), *jpia.princeton.edu/sites/jpia/files/2007-6.pdf*.

TABLE 7. AVERAGE TIME SPAN BY YEAR

Year	Avg. Time Span
2000	4.67
2001	1.25
2002	3.5
2003	3
2004	2.8
2005	2.83
2006	2.91
2007	2.55
2008	2.56
2009	2.64
2010	2.71
2011	3.33
2012	2.14
2013	2.27
2014	4.05

FIGURE 3. AVERAGE TIME SPAN BY YEAR



B. Notable Patterns

This section contains some noteworthy observations about trends and patterns among the federal trade secret cases. The observations include: (1) plaintiffs are more likely to win; (2) most cases involved trade secrets in digital form; (3) most cases involved business information; (4) allegations of misappropriation were based largely on trade secret use, not acquisition; and (5) contract, tort, and intellectual property claims are likely to accompany trade secret claims.

1. Plaintiffs are more likely to win. Plaintiffs who choose to take their trade secret cases to trial are taking a good gamble. As illustrated in Table 8, the study results show that plaintiffs received a favorable verdict 66% of the time, whereas for defendants, it was less than half that number at 25%. Both plaintiffs and defendants won in split verdicts 9.5% of the time. Note that a favorable verdict did not always include damages; for instance, a plaintiff could have received a permanent injunction, but no damages.[130] Additionally, whichever party was the trade secret owner in the litigation was very likely to be successful, with damages awarded to trade secret owners 80% of the time, when damages were awarded (Table 9). Plaintiffs were also more likely to receive attorney's fees than were defendants. Table 10 shows that when attorney's fees were awarded, they went to plaintiffs the vast majority of the time (68%) as compared to defendants (11%).

Analysis of the general damages picture, on both the trade secret claims and other claims, also favors plaintiffs. The average amount of damages awarded to plaintiffs in the study was $15,920,089.10. This was almost twenty times more than that awarded to defendants, at $831,617.50.

TABLE 8. CASE RESOLUTION

	Frequency	Percent
Plaintiff Verdict	98	66.2
Defendant Verdict	36	24.3
Mixed Verdict	14	9.5
Total	148	100.0

130. A permanent injunction issued without damages in 19% of cases. *See* Table 18, *supra*, Part IV.C.5.

TABLE 9. DAMAGES TO TRADE SECRET OWNER

	Frequency	Percent
No	31	20.9
Yes	117	79.1
Total	148	100.0

TABLE 10. ATTORNEY'S FEES TO PARTIES

	Frequency	Percent
Plaintiff	32	68.1
Defendant	5	10.6
Both	3	6.4
Neither	7	14.9
Total	47	100.0

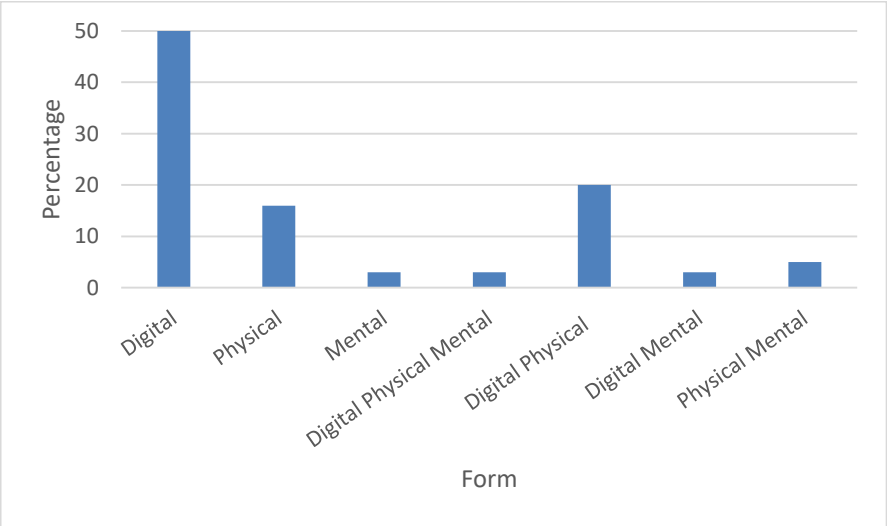
2. Most cases involved trade secrets in digital form. The cases in the data set were coded for the form or embodiment of the alleged trade secrets in each case along several categories. Not surprisingly, as illustrated in Figure 4, a majority of the trade secrets alleged to be misappropriated were in digital or electronic form (50%). The other categories included "physical" such as models or books (15.6%); "mental" including know-how, memorization, ideas, and concepts (3.1%). The remaining categories involved combination categories: "digital-physical" (20.3%), digital-physical-mental" (3.1%), "digital-mental" (3.1%), and "physical-mental" (4.7%). While half of the cases involved purely digital trade secrets, another approximately 35% involved trade secrets in both digital and physical form. Thus, allegations of trade secret misappropriation in 85% of all the cases involved trade secrets that were in digital and/or physical form. In contrast, a very small percentage of the cases (about 15%) involved trade secrets that were mere ideas or conceptual in nature.

This suggests that most trade secrets from these cases were embodied in tangible form, a finding that would be consistent with general expectations. Even though intangible information can be protected as a trade secret,[131] where information is said to reside in the mind of the defendant, it appears that trade secret owners do not allege misappropriation based solely on those types of trade secrets. The practical reality is that plaintiffs would have much

131. *See* SANDEEN & ROWE, *supra* note 13, at § 2.5.1.

difficulty identifying their trade secrets with sufficient specificity and proving misappropriation without some tangible evidence of those trade secrets.[132]

FIGURE 4. FORM OF TRADE SECRETS



3. Most cases involved business information. The UTSA, unlike the older codification of trade secrecy under the Restatement of Torts, protects all types of information as eligible for trade secret protection as long as the information meets the requirements of secrecy, value, and reasonable efforts to maintain secrecy.[133] This information falls into two broad categories of technical information and business information.[134] Technical information covers information about how devices are manufactured or designed, for instance.[135] The definition of a trade secret from the Restatement of Torts provides that it "may consist of any formula, pattern, [or] device,"[136] and this language is reminiscent of the types of information that were traditionally protected by patent law. The more modern language of the UTSA and DTSA embrace other non-technical information, that falls under the umbrella of "business

132. *Id.*
133. UNIF. TRADE SECRETS ACT § 1(4) (amended 1985).
134. *See* Almeling State Study, *supra* note 3, at 71.
135. *Id.*
136. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b, (AM. LAW INST. 1939).

information."[137] This includes information that is commercially useful to an enterprise, such as financial information, marketing information, and pricing information.[138] While the type of information has no bearing on whether the information is entitled to protection, some courts seemed to more easily recognize technical trade secrets as deserving of protection than business information.[139] The results of this study suggest that technical information is not more valued than business information.[140]

The study coded different types of trade secrets. "Business Information" included information for internal business use, customer lists, and marketing information.[141] "Technical Information" encompassed information primarily designed for external use, information related to products such as formulas, programs and other technical information.[142] Over half the cases (56%) involved business information.[143] Technical information comprised 27% of the types of trade secrets at issue, and 16% of the cases involved allegations of both technical and business information.[144] This is consistent with the general assumption that most trade secrets now involve business information[145] and that intellectual property owners often choose to protect their technical information via patenting and other business information through trade secrecy.

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137. *See generally* UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985).

138. *See* Almeling Federal Study, *supra* note 5, at 304.

139. *See* & SANDEEN & ROWE, *supra* note 10, at 96–101.

140. *See infra* Part IV.C.2.

141. *See* Almeling Federal Study, *supra* note 5, at 304.

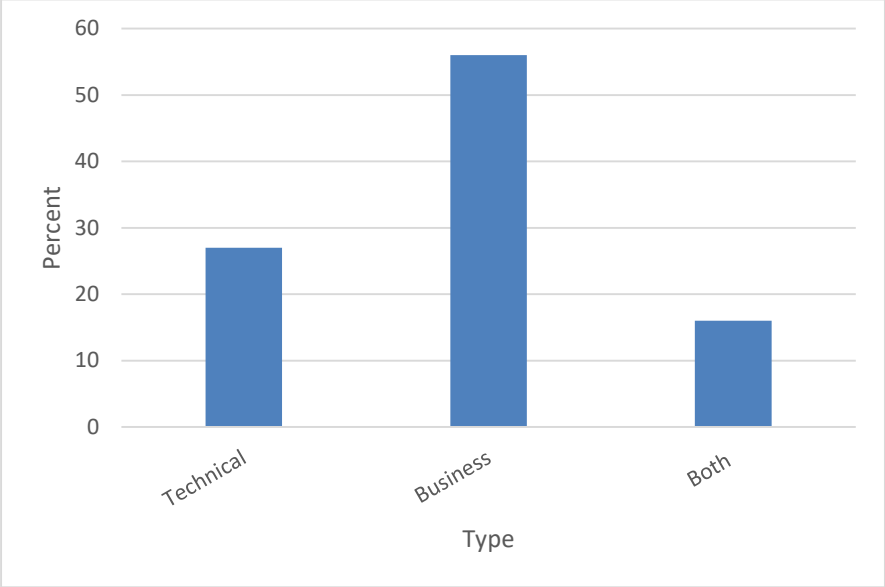
142. These categories were roughly similar to those used in prior studies. *See* Almeling Federal Study at 304-5.

143. *See* Figure 5, *supra* Part IV.B.3.

144. *See infra* Part IV.C. for how these categories fared on damages.

145. The Almeling Federal Study published in 2009, noted at that time an increasing presence of business information cases over technical information cases. Almeling Federal Study, *supra* note 5, at 304-5. "Specifically, internal business trade secrets were involved in 48% of the historical cases and 52% of the modern cases, while technical trade secrets were involved in 58% of historical cases and 50% of modern cases." *Id*.

FIGURE 5. TYPES OF TRADE SECRET INFORMATION



4. Allegations of misappropriation were based largely on use, not acquisition. While the UTSA provides liability for trade secret misappropriation based on acquisition alone,[146] the vast majority of the trade secret claims in these cases alleged misappropriation by actual use of the trade secret. Indeed, a whopping 93% of the cases claimed misappropriation through actual use rather than acquisition only.[147] For example, the facts in *Mike's Train House, Inc. v. Lionel L.L.C.* were based on the misappropriation of the design of a toy train.[148] Those in the previously noted second largest award case, *Mattel Inc. v. MGA Entertainment*, involved a former employee leaving Mattel and taking the idea to develop the popular Bratz dolls.[149]

The inevitable disclosure doctrine is one of the most controversial areas in trade secret litigation.[150] Parties who rely on the doctrine often argue that even without a noncompetition agreement, a former employee should be enjoined from working for a new employer (often a competitor) because it is inevitable that he or she will disclose or use the trade secret owner's

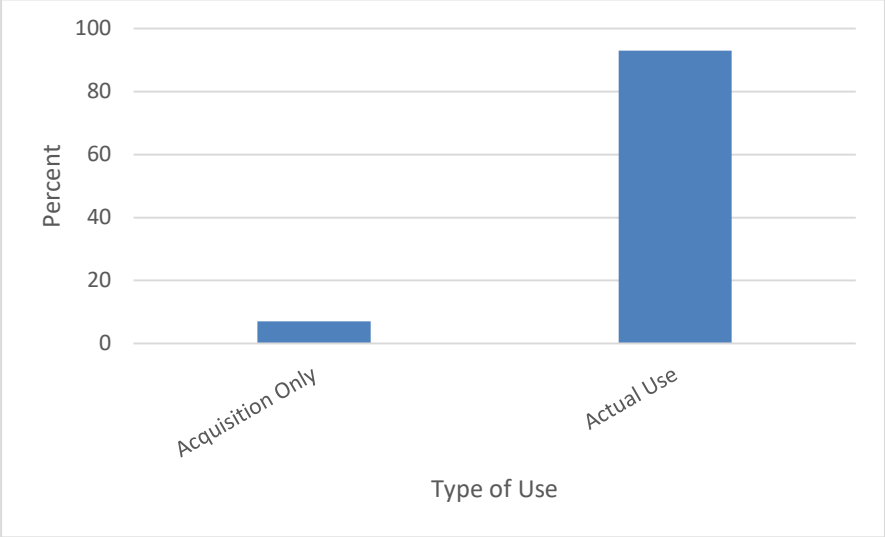
146. UNIF. TRADE SECRETS ACT § 1(2)(i) (amended 1985).
147. *See* Almeling Federal Study, *supra* note 5 at 134.
148. Mike's Train House, Inc. v. Lionel, LLC, 472 F.3d 398, 403-4 (6th Cir. 2006).
149. Mattel, Inc. v. MGA Entertainment, Inc., 705 F.3d 1108, 1109 (9th Cir 2013).
150. *See* Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 TUL. J. TECH. & INTELL. PROP. 167, 169–70 (2005).

secrets in his or her new employment.[151] The doctrine is typically used as a form of circumstantial evidence to prove threatened misappropriation when there is no direct evidence (or other circumstantial evidence) of misappropriation.[152] Indeed, concern about the inevitable disclosure doctrine made its way to the DTSA, contributing to certain narrowing of the remedies provided under the DTSA, compared to the UTSA. In particular, the DTSA does not permit injunctions that would prevent a person from "entering into an employment relationship."[153] The statute further provides, in an attempt to reject the inevitable disclosure doctrine, that conditions on employment must be based on "evidence of threatened misappropriation and not merely on the information the person knows."[154]

This study coded for whether there were allegations of misappropriation using the inevitable disclosure doctrine. The findings showed that such allegations were extremely rare. Less than 1% of the cases (0.7%) in the study relied on the doctrine.[155] Rather, 86% of the cases alleged misappropriation or threatened misappropriation based on direct or other circumstantial evidence.[156] This is also consistent with the above noted observation that parties are relying on allegations of actual use rather than on mere acquisition alone.

151. *See, e.g.*, Pepsico, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995).
152. *See* SANDEEN & ROWE, *supra* note at 13, § 7.7.
153. 18 U.S.C. 1836(b)(3)(A)(i)(I) (Supp. 2016).
154. *Id.*
155. Appendix 1 (on file with Author).
156. The remaining 10% was unknown. *See id.*

FIGURE 6. ALLEGATIONS BASED ON TYPE OF USE



5. Contract, tort, and intellectual property claims are likely to accompany trade secret claims. In most trade secret misappropriation cases, the trade secret claims are accompanied by other claims.[157] As reported in Table 11 below, the types of claims that most often appeared in these federal trade secret cases were contract claims (67%), tortious interference (55%), unfair competition (42%), and other intellectual property claims (35%).[158] Claims under the Computer, Fraud and Abuse Act (CFAA) were present in 10% of the cases. The study did not reveal a statistically significant effect from any of these claims on the likelihood of damages being awarded on trade secret claims, or the amount of such damages. However, it appears that plaintiffs are more likely to receive damage awards on these non-trade secret claims (56%) than on the trade secret claims (44%). The unfair competition claims yielded higher average damages than the other types of claims on the non-trade secret claims, and this difference was statistically significant.[159]

157. *See* SANDEEN & ROWE, *supra* note 13, at § 4.15.

158. Because a single case can have multiple claims, these percentages do not add up to 100%. *See e.g.*, Eldorado Stone, LLC v. Renaissance Stone, Inc., No. 04CV2562, 2006 WL 4569360, at *1 (S.D. Cal. Feb. 6, 2006) (alleging contracts, intellectual property, patents, unfair competition, tortious interference, and NDA conflicts claims); Brocade Commc'n Sys., Inc. v. A10 Networks, Inc., 873 F.2d 1192, 1199 (N.D. Cal. 2012) (alleging contract, intellectual property, patent, copyright, unfair competition, tortious interference, and NDA claims).

159. The mean damages on the unfair competition claims was about $12 million. p=0.020. *See* Appendix 1 (on file with Author).

TABLE 11. FREQUENCIES OF OTHER CLAIMS

	Percentages	Frequency
Contract	67%	88
Tortious Interference	55%	73
Unfair Competition	42%	57
Other intellectual property	35%	52

C. Significant Relationships Affecting Damages

The relationships described below were statistically significant correlations among some of the variables in the data set. Statistical significance is the probability that an observed relationship between or among variables is not due to chance.[160] This study uses the traditional p-value of less than 0.05 to determine statistical significance.[161]

1. Damages were more likely to be awarded when there was a non-disclosure agreement in place. Of the cases in which trade secret damages were issued, 50% had a confidentiality or non-disclosure agreement in place.[162] Without a confidentiality agreement, there was a 70% chance of *not* receiving damages.[163] Merely having a non-disclosure agreement in place was not enough to obtain damages. In half of the cases, no damages were issued despite the presence of a non-disclosure agreement.[164] This is probably because reasonable efforts require more than just confidentiality agreements to create a trade secret. Reasonable efforts to protect the trade secret are required and are arguably the most important component of establishing that a trade secret exists in the first place.[165] Courts often assess the evidence of security procedures that were in place to protect the trade secret and decide whether those procedures were reasonable under the circumstances. Confidentiality agreements are usually one of many measures that can serve to show reasonableness.[166] Indeed, non-disclosure agreements were present

160. *See* David H. Kaye, *Is Proof of Statistical Significance Relevant?*, 61 WASH. L. REV. 1333 at 1333 (1986).

161. *Id.* at 1342–43.

162. *See* Table 12, *supra* Part IV; *see also* Appendix 1 (on file with Author).

163. *See* Table 12, *supra* Part IV.C.1.

164. *Id.*

165. *See* UNIF. TRADE SECRETS ACT § 1(4)(ii) (amended 1985).

166. *See* Elizabeth A. Rowe, *Contributory Negligence, Technology, and Trade Secrets*, 17 GEO. MASON L. REV. 1 at 9 (2009).

in 70% of the cases in the study.[167] Further study could consider what other evidence of measures to protect trade secrets, alone or in combination, might have affected the grant or amount of damages.

TABLE 12. DAMAGE AWARDS AND NON-DISCLOSURE AGREEMENTS

	No NDA	NDA
No damages	70.7% (29)	50.0% (45)
Damages Awarded	29.3% (12)	50.0% (45)
Total	100% (41)	100% (90)

2. Business information yielded higher damages to plaintiffs than other types of trade secrets. As discussed earlier, business information was the most prevalent type of trade secret information alleged to have been misappropriated.[168] This study coded different types of trade secrets. "Business Information" included information for internal business use, customer lists, and marketing information.[169] "Technical Information" encompassed information primarily designed for external use, information related to products such as formulas, programs and other technical information.[170] The average amount of damages to plaintiffs on business information trade secrets was $21,442,570.12 as compared to $11,713,832.15 for technical information.[171]

The higher damages for business information secrets were consistent for both bench and jury verdicts,[172] with jury awards being consistently higher than bench awards (see Table 13).[173] The average trade secret award for business information from juries was about $18 million compared to about $2 million from judges.[174] There was an even wider gap between bench and jury for technical

167. *See supra* Table 12; *see also* Appendix 1 (on file with Author).

168. *See* discussion *supra* Part IV.B.3.

169. *Id.*

170. *Id.*

171. *See* Table 14.

172. I only used the cases that had known values for both total award and type of case. If a case was missing either or both of those values, it was not included in this table. This still left about 130 cases, so only about 20 were excluded from the calculations. *See id.*

173. *See supra* Table 13; *see also* Appendix 1 (on file with Author)

174. *See supra* Table 13; *see also* Appendix 1 (on file with Author).

information, with about $4 million from juries and only about $20,000 from judges.[175]

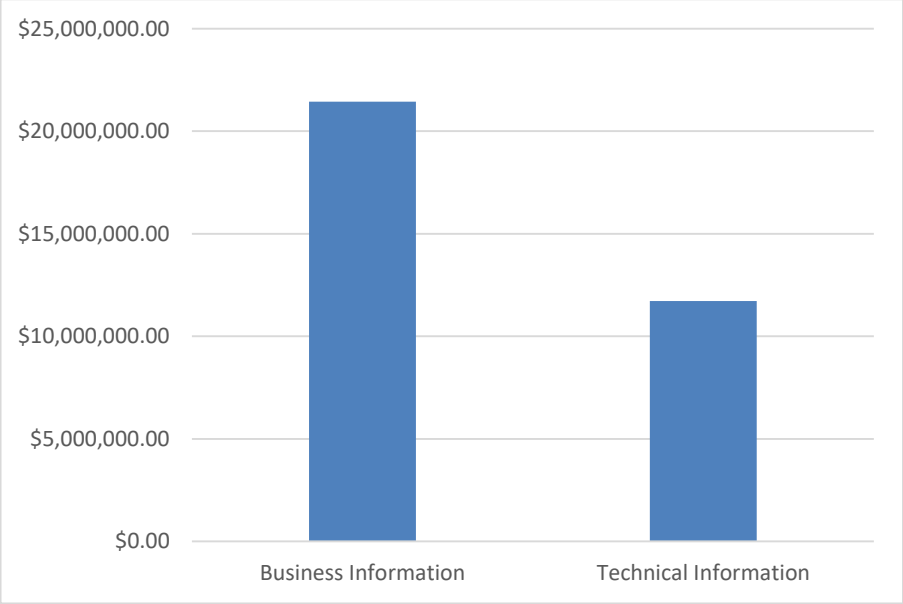
TABLE 13. AVERAGE TRADE SECRET AWARD BY TYPE CASE

	Technical	Business	Both
Bench	20,625	2,087,486.16	215,450
Jury	4,142,590.78	18,051,373.26	2,243,870.68

TABLE 14. DAMAGES TO PLAINTIFFS BY TYPE OF TRADE SECRET

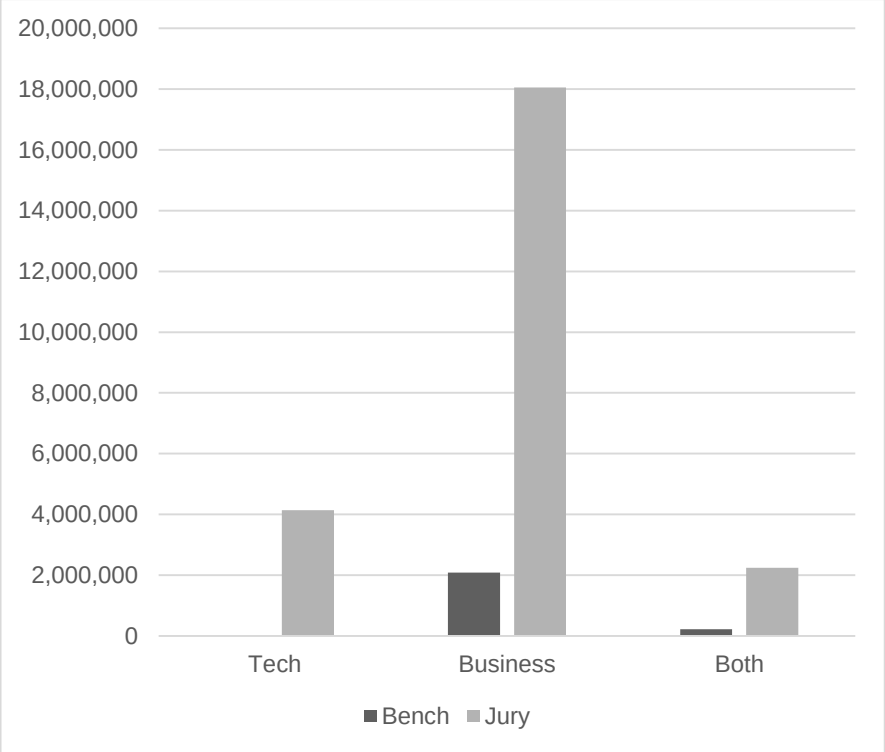
Type	Amount
Business Information	$21,442,570.12
Technical Information	$11,713,832.15

FIGURE 7. DAMAGES TO PLAINTIFFS ON BUSINESS AND TECHNICAL INFORMATION



175. *See supra* Table 13; *see also* Appendix 1 (on file with Author).

FIGURE 8. TRADE SECRET DAMAGES ON BUSINESS ANDTECHNICAL INFORMATION BY BENCH OR JURY



3. Juries awarded much higher damages than judges. Consistent with conventional thinking on civil cases in general,[176] juries in trade secret cases granted far larger awards, about ten times larger, than judges. The average jury award was $10,547,708.07 compared to $1,391,069.68 from judges.[177] This is consistent with damages for patent infringement where jury awards are significantly higher than bench awards.[178] It should also be noted that the vast majority of plaintiffs chose jury trials over bench trials (presumably with the expectation of a more favorable outcome in the first place).[179]

176. *See* BRIAN C. HOWARD & JASON MAPLES, LEX MACHINA: PATENT LITIGATION YEAR IN REVIEW 2015 at 29 (2016). *See also* PAULA HANNAFORD-AGOR ET AL., NATIONAL CENTER FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS at 25–28 (2015) (discussing judgment amounts generally in jury trials compared to bench trials).

177. *See* Table 15.

178. *See* PWC 2016 Patent Study, *supra* note 80, at 5 (2016).

179. The findings of this study revealed that 89% of the cases were tried by a jury, 9% were bench trials, and 1% went to arbitration. *See* Table 15; *see also* Appendix 1 (on file

Even the arbitration awards (averaging $5,957,000) were higher than the bench awards, but there were only two such cases in the dataset.[180]

Almost half of the time judges are likely to modify the jury's damages award. Indeed, the trial judge did not modify the jury's award in 52% of cases. However, when changes were made, the award was reduced 22% of the time, increased 13% of the time, vacated only 5% of the time, and 8% of the cases settled post award (see Table 17).

TABLE 15. AVERAGE AWARDS BY TYPE OF TRIAL

	Mean	Frequency
Jury	$10,547,708.07	132
Bench	$1,391,069.68	14
Arbitration	$5,957,000.00	2

TABLE 16. AVERAGE AWARDS BY TYPE OF CASE

	Technical	Business	Both
Bench	$153,356.59	$2,309,741.83	$286,518.94
Jury	$12,514,155.05	$25,514,396.90	$7,913,462.77

TABLE 17. MODIFICATIONS TO JURY AWARDS BY TRIAL JUDGE

Action	Frequency
No Modification	52.4
Reduced	21.8
Increased	12.9
Vacated	4.8
Settled	8.2

4. Higher damages were awarded when the parties were competitors. Trade secret plaintiffs make the initial decision about who to sue and name in the complaint. In the typical trade secret case, named defendants could be one or more individuals (usually former employees) and/or their new employer. The cases in the study revealed that plaintiffs, who are often

with Author).

180. *See* Table 15; *see also* Appendix 1 (on file with Author).

companies,[181] chose to name both companies and individuals as defendants (54% of the time, companies only 28% of the time, and individuals only 8% of the time).[182] Thus, in about 80% of the cases, the defendants were either an entity alone or an entity with an individual.[183]

In the vast majority of cases (80%), the parties were competitors.[184] This is consistent with the typical trade secret misappropriation narrative which often seems to involve a former employee who leaves to start a competing business or to join his or her former employer's competitor. The study findings showed that 29% of the cases involved a former employee starting a competing business.[185] In the majority of cases the parties did not appear to have entered into non-competition agreements. However, these agreements were present in 30% of the cases.[186] Interestingly, awards to trade secret owners when the misappropriator was a competitor were over three times higher than when they were not competitors. This difference was statistically significant.[187] In particular, the average award to competitors was $11,994,928.21 as compared to $3,151,682.92 to non-competitors (see Figure 9).[188]

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181. 80% of the plaintiffs in this sample of trade secret cases were entities; 8% were individuals, and 6% included both an entity and an individual. *See* Appendix 1 (on file with Author)

182. *See id*.

183. *Id*.

184. The results showed that in 80% of the cases the parties were competitors, and in 20 % they were not. *Id.*

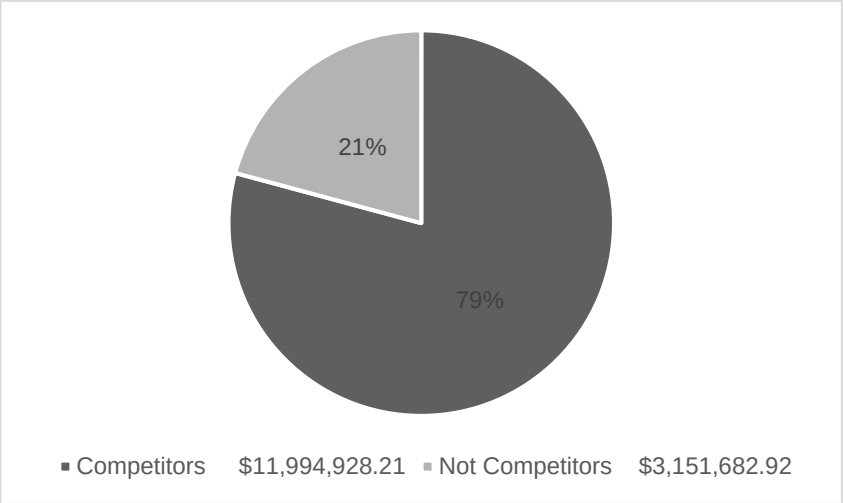
185. Coding results for circumstances involving allegations where a former employee started a competing business showed that in 70% of the cases that was not the case, but in 29% of the cases former employees started competing businesses. *See* Appendix 1 (on file with Author).

186. The results showed that in 68.4% of the cases there was no noncompetition agreement, but such an agreement was present in 31.6% of the cases. *Id.*

187. $p < 0.05$. *Id.*

188. *Id*.

FIGURE 9. AVERAGE AWARDS TO COMPETITORS AND NON COMPETITORS



5. Permanent injunctions usually come with damages. Preliminary injunctions (pre-trial) were granted and denied at virtually equal rates, 24% and 23%, respectively.[189] This may be reflective of the subset of cases that proceed to trial after the grant or denial of a preliminary injunction.[190] Presumably, most cases settle after a preliminary injunction has been entered in the case. These numbers are also strikingly similar to the 20% of cases where a permanent injunction issued, post-trial.[191] Moreover, those cases where permanent injunctions were granted were also highly positively correlated with the receipt of monetary damages.[192]

Damages on a trade secret claim are accompanied by a permanent injunction about 80% of the time.[193] This is interesting considering that permanent injunctive relief was intended to be more of an alternative to damages than an add-on.[194] A permanent injunction was issued without damages in 19% of cases.[195] In 36% of

189. Preliminary injunctions were granted in 24.0 % of cases, denied in 23.3% of cases, and not requested in the remaining 52.7% of cases. *Id.*

190. This appears to be consistent with the Almeling Federal Study where plaintiffs won about one third of preliminary injunctions and temporary restraining orders. *See* Almeling Federal Study, *supra* note 5, at 317.

191. Permanent injunctions were granted in 19.6% of the cases and denied in 80.4% of the cases. *See* Appendix 1 (on file with Author).

192. *See infra* Part IV.C.5.

193. This percentage is even higher (96.6%) when looking at whether the trade secret owner received damages on any claim as well as a permanent injunction. *See* Appendix 1 (on file with Author).

194. *See supra* II.A.

195. *See* Table 18, *infra* Part IV.C.5.

the cases, damages were issued without an injunction.[196] This suggests that a trade secret owner who prevails on damages is likely to also receive a permanent injunction as a penalty.

Certainly, the length and scope of the injunctions vary based on fact-specific circumstances.[197] They could be mandatory (as, for example, mandating that any misappropriated trade secrets be returned) and/or prohibitory (such as barring the use or disclosure of the secret).[198] Prohibitory injunctions could themselves range from simple to complex based on the extent to which it restricts the other party.[199] Some may merely prohibit any disclosure of the trade secret, while others may restrict use of the trade secret in such a way that it impedes manufacturing or production of the infringing product. For example, in *Mike's Train House v. Lionel L.L.C.*, Lionel was permanently enjoined from using Mike's Train House's existing design drawings to manufacture the specific toy trains they had copied and from producing more wax molds utilizing the stolen drawings.[200] In the more stringent circumstances, injunctions could be seen as anticompetitive.[201]

TABLE 18. TRADE SECRET DAMAGES AND PERMANENT INJUNCTIONS

	No Permanent Injunction	Permanent Injunction Entered
No Damages	63.9% (76)	19.2% (5)
Damages Awarded	36.1% (43)	80.8% (21)
Total	100% (119)	100% (26)

196. *Id.*

197. This study did not record the terms of the injunctive relief, but it could be an interesting follow-up for further study. *See* Appendix 1 (on file with Author).

198. *See* ELIZABETH A. ROWE & SHARON K. SANDEEN, TRADE SECRECY AND INTERNATIONAL TRANSACTIONS 116 (2015).

199. *Id.*

200. Mike's Train House, Inc. v. Lionel L.L.C., No. 00-71729, 2004 U.S. Dist. LEXIS 22680, at *3 (E.D. Mich. Nov. 1, 2004).

201. *See* Parrish v. Latham & Watkins, 189 Cal. Rptr. 3d 388, 394–95, (Cal. Ct. App. 2015).

V. CONCLUSION & FURTHER STUDY

This Article presented the initial findings from the first in-depth empirical analysis of damages in trade secrets cases in the U.S. The study yielded interesting and novel insights from descriptive statistics about the nature of trade secret damages, as well as the relationships between other case variables and damages.

Moreover, just as significantly, the results also raise many questions that will be addressed in subsequent papers analyzing the dataset and for further study generally. For example: (i) Do qualitative differences among the cases effect the granting or amount of damages?[202] (ii) Why are attorney fee awards coming from jury trials and not bench trials, and are the determinations of attorney fee awards consistent with what was intended under the UTSA and DTSA?[203] (iii) What explains the differences in the awards of punitive damages and attorney's fees?[204] (iv) What are the qualitative characteristics of the cases where trade secret owners receive permanent injunctive relief but no damages?[205] (v) What explains the apparent shift in favor of the value of business information over technical information? Is it a result of changes to patentability, such as difficulty in patenting business methods, or is it reflective of the subset of the cases that are more likely to go to trial?[206] (vi) What other evidence of reasonable efforts to protect trade secrets, other than confidentiality agreements, might have an effect on the grant or denial of damages?[207] (vii) Are permanent injunctions issued in a manner that is consistent with the statutory intent of the UTSA and the DTSA?[208]

In short, the Article provides a window from which to anticipate what the damages and ultimately, the stakes, for trade secret litigation might be going forward in the new frontier of federal courts. Furthermore, it begins the discourse about the complicated nature of trade secret damages, and more generally, damages in other intellectual property cases.

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202. *See* discussion *supra* Part IV.A.2.
203. *See* discussion *supra* Part IV.A.3 and Part IV.B.1.
204. *See* discussion *supra* Part IV.A.3.
205. *See* discussion *supra* Part IV.B.1.
206. *See* discussion *supra* Part IV.B.3 and IV.C.2.
207. *See* discussion *supra* Part IV.C.1.
208. *See* discussion *supra* Part IV.C.5.

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