SECRET SABERMETRICS: TRADE SECRET PROTECTION IN THE BASEBALL ANALYTICS FIELD

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INTRODUCTION

The law of trade secrets has been characterized as "the oldest form of intellectual property protection,"[1] and baseball is America's oldest professional team sport.[2] It is surprising, then, that so little has been written about the application of the former to the latter. This article seeks to fill at least part of that gap.

One possible explanation for the dearth of scholarship or press reports in this area is that trade secrets are, by their nature, secret, and thus do not lend themselves to public exposition or dissection.[3] Another possible explanation is that the concept of a trade secret defies simple identification or even categorization because "virtually all information that may, in some more than trivial way, have any value to a company could qualify as a trade secret."[4] Thus, trade secrets in any industry—including baseball—are difficult to pinpoint and then analyze in the abstract.

It is thus unsurprising that discussion of baseball-related trade secrets in published writings is generally fleeting and devoid of extended analysis. For example, the earliest such reference identified in researching this article appears in a July 1949 *Baseball Digest* article discussing the debut of a purportedly livelier, cork-center "rabbit" ball in the 1910 World Series.[5] Then eighty-one-year-old sporting goods executive George A. Reach (whose father, A. J. Reach, became the first professional baseball player in 1866 when he was paid by the Philadelphia Athletics) explained that as far back as the 1890s, his company treated the

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[1] HENRY H. PERRITT, JR., TRADE SECRETS: A PRACTITIONER'S GUIDE § 1:1 (2d ed. 2011).

[2] *See* Lawrence Kahn, *The Sports Business as a Labor Market Laboratory*, *in* THE BUSINESS OF SPORTS 342, 343 (Scott Rosner & Kenneth L. Shropshire eds., 2011).

[3] MELVIN F. JAGER, TRADE SECRETS LAW § 3:2 (2011) ("The single most important requirement of the law is the obvious one that the trade secret *must in fact be secret*."); JAMES POOLEY, TRADE SECRETS § 4.04[1] (2011) ("The most important characteristic of a trade secret is that it is in fact secret.").

[4] David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 155 (2007); *see also* U.S. West Commc'ns, Inc. v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa 1993) ("There is virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret.") (quoting Thomas J. Collin, *Determining Whether Information is a Trade Secret Under Ohio Law*, 19 U. TOL. L. REV. 543, 545 (1988)).

[5] Dick Cresap, *1911 Ball Liveliest of 'Em All*, BASEBALL DIG., July 1949, at 9.

method of manufacturing its baseballs as a "trade secret."[6] In the same article, the author described as another "trade secret" the Pittsburgh club's alleged tactic of keeping two sets of game balls: one in a warm and dry place for when light-hitting teams came to town and Pittsburgh sought to take advantage of its power-hitting lineup, and one in a damp and wet place for neutralizing opposing teams with better offenses.[7]

We would need more information to know for sure whether either purported "trade secret" would qualify then or now for legal protection. For example, we would need to know whether reasonable measures were taken to protect secrecy. However, the odds of trade secret protection are good: both Reach's sporting goods company and the Pirates possessed a secret method of doing something (manufacturing and climate-controlling baseballs, respectively) that gave them an edge over the competition. This is the essence of a trade secret.

More recently, one commentator has suggested, at least implicitly, that signs relayed from coaches to players (e.g., to bunt or steal) may qualify for trade secret protection.[8] It is an interesting proposition. The signals themselves (e.g., a finger to the nose, cap, or ear, or a brush across the letters of the jersey or

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[6] *Id.* at 10.

[7] *Id.* The more things change, the more they stay the same. The modern-day version of this controversial tactic allegedly finds its home at the Colorado Rockies' Coors Field. There, the mile-high elevation leads to decreased air pressure—80 percent of air pressure at sea level, to be exact—which, in turn, leads to batted balls traveling higher and further than at other parks. Christopher Solomon, *The Physics of Cheating in Baseball*, SMITHSONIAN.COM (June 24, 2011), http://www.smithsonianmag.com/science-nature/The-Physics-of-Cheating-in-Baseball.html. In 2002, to limit the eye-popping discrepancy between offensive output at Coors Field and other ballparks, "the Rockies started storing game balls in a humidor that kept the balls at a constant 70 degrees Fahrenheit and 50 percent relative humidity instead of Denver's typical 30 percent humidity. The idea was that higher humidity reduces the bounciness of the ball and slightly increases its weight." *Id.* Both the decrease in the number of home runs at Coors Field and later scientific experimentation proved this method effective. *Id.* Even so, opposing teams and commentators continue to speculate that the Rockies occasionally place non-humidor-stored baseballs into play when they are batting and need a key hit. *See, e.g.*, *Umpires Watching Rockies' Baseballs*, ESPN.COM (Sept. 26, 2010, 9:11 AM), http://sports.espn.go.com/mlb/news/story?id=5616297.

[8] Rice Ferrelle, *Combating the Lure of Impropriety in Professional Sports Industries: The Desirability of Treating a Playbook as a Legally Enforceable Trade Secret*, 11 J. INTELL. PROP. L. 149, 178–81, 180 n.202 (noting that a 2002 "sign-stealing spat" between the Chicago Cubs and St. Louis Cardinals in the context of discussion of trade secret misappropriation of pro football playbook information via electronic or visual espionage).

bill of the cap, or some combination of similar movements) would not qualify as trade secrets: because anyone looking at the coach could see his movements, those movements are not "secret."[9] The trade secret, if any, lies in the *information* conveyed by—or, put differently, the *meaning of*—the signal. This information also appears to meet the basic definition of a trade secret: it is kept in relative secrecy (i.e., only the team's players and coaches know the meaning of each signal) and it has value (i.e., it allows the team to execute a play that the opposing team does not know is coming, resulting in a competitive advantage).[10]

But is an opposing team's "sign-stealing" trade secret *misappropriation*? Unlikely. Legal resolution of the question would be governed (in most states) by the Uniform Trade Secrets Act (UTSA), a product of the National Conference of Commissioners on Uniform State Laws originally authored in 1979 and last amended in 1985.[11] It has since been adopted (with some minor variations) in forty-six states and the District of Columbia[12] and is the "primary source of trade secret law in the United States."[13]

Under the UTSA, misappropriation in this context would require "acquisition" by "improper means"—and here, the latter element appears to be missing.[14] Using a simple example, if in the first inning Team A sees Team B's coach touch his nose, and Team B's base runner attempts to steal a base, and the same thing happens again in the third inning, then Team A will know what to expect the next time Team B's coach touches his nose. Technically, Team A has "stolen" Team B's signs, but no *misappropriation* has occurred because there is nothing "improper" about putting two and two together based on what one observes in a public setting.[15] In reality, a team's signals, and the

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[9] *See* UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 538 (1985).

[10] *See id.*

[11] JAGER, *supra* note 3, § 3:28.

[12] *Id.* § 3:29; *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. INTELL. PROP. L.J. 305, 310 (2009) (describing the history of the Uniform Trade Secret Act); Jason C. Schwartz et al., *2010 Trade Secrets Litigation Round-Up*, 81 PAT. TRADEMARK & COPYRIGHT J. 1, 1–2 (2011). The four states that have not adopted some version of the UTSA are Massachusetts, New Jersey, New York, and Texas. *See* JAGER, *supra* note 3, § 3:29.

[13] Charles T. Graves, *Trade Secrets as Property: Theory and Consequences*, 15 J. INTELL. PROP. L. 39, 62 (2007).

[14] UNIF. TRADE SECRETS ACT § 1(1)–(2)(i), 14 U.L.A. 537.

[15] *See id.* § 1 cmt. n.2, cmt. n.4, 14 U.L.A. 538. (noting that as opposed to

other team's methods of stealing them, are rarely this simple. Teams are regularly accused of using all sorts of trickery and technology (e.g., binoculars, video cameras, scoreboard manipulation) to steal signs.[16] Whether these methods constitute "espionage through electronic or other means," and are, thus, "improper" under the UTSA's definition of "misappropriation" is an interesting, but heavily fact-driven question.[17] So is the question of whether the disclosure of Team A's signals to Team B by one of Team A's coaches or players—or, more likely, a *former* coach or *former* player—would constitute trade secret misappropriation.

In any event, the odds of either claim being litigated in a public courthouse are slim. The reasons for this are twofold: (1) faced with a clear-cut violation, the Major League Baseball commissioner's office would likely impose discipline (e.g., suspension) and/or a fine[18] and (2) in the absence of (or in addition to) action by the commissioner's office, the aggrieved team would likely have to pursue any remedy through private arbitration pursuant to mandatory terms in the employment contracts between teams on the one hand and their coaches and players on the other.[19] Given these factors and the esoteric

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"improper means," "proper means" for acquiring an alleged trade secret includes "[o]bservation of the item in public use or on public display").

[16] Greg Couch, *Stealing Signs: Fair or Foul? Baseball's On-Field Intelligence Gathering Has Been Going on Since the Early Years of the Major Leagues—Decrypting Signals Given by Coaches and Managers*, BASEBALL DIG., Aug. 2002, at 44; Michael S. Schmidt, *Phillies are Accused of Stealing Signs Illegally*, N.Y. TIMES, May 12, 2010, at B15; Tim Kurkjian, *Can You Read the Signs?*, ESPN.COM (Aug. 4, 2004), http://espn.go.com/espn/print?id=1857661&type=story.

[17] *See* UNIF. TRADE SECRETS ACT § 1(2), 14 U.L.A. 537.

[18] *See* ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 96 (1998). The Major League Baseball commissioner "has broad power to approve contracts; resolve disputes between clubs and between clubs and players; discipline players, clubs, and club owners; and make rules governing the administration of the baseball enterprise." *Id.* Judge Walter C. Lindley, in a 1931 case involving the commissioner's power of investigation, memorably described the commissioner as "a benevolent but absolute despot [with] all the disciplinary powers of the proverbial pater familias." Milwaukee Am. Ass'n v. Landis, 49 F.2d 298, 299 (N.D. Ill. 1931). Legal challenges to the commissioner's actions rarely succeed, as courts are reluctant to disturb the commissioner's decisions absent a clear violation of his duties under the Major League Baseball charter. *See* ABRAMS, *supra*, at 113; *see generally* Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409 (1990).

[19] 2007–2011 MLB Basic Agreement, Uniform Player's Contract, para. 3(a),

nature of sign stealing in general, this topic, while interesting, does not provide sufficient fodder for analysis in a law review setting.

Other legal publications engage in a limited exploration of trade secret principles in the baseball context. One author, in a counterfactual legal essay, imagined a potential trade secret dispute between a player and Major League Baseball (MLB), albeit over more than just sign stealing.[20] The essay discusses pitcher Jim Bouton's tell-all chronicle of life as a major league ballplayer in the 1960s, *Ball Four*, which sent shockwaves across professional baseball and the nation following its publication in 1970.[21] Bouton's book exposed not only a womanizing, boozing, pill-popping culture of life in the majors—which reporters had dutifully shielded from public view until then—but damning details about how professional baseball economics were stacked sharply in favor of the owners.[22] Bouton's account claimed, and credibly so, that all but the biggest stars were regularly underpaid, mistreated, and lied to by management.[23] *Ball Four* changed the public's perception of MLB and, in retrospect, "started the trickle" of "bleeding which would eventually divert much of the sport's economic lifeblood from the owners' veins to the players."[24]

After recounting this history, the essay proceeds to examine whether "the stories and anecdotes revealed by Bouton in *Ball*

9(b) (2011), *available at* http://mlb.mlb.com/pa/pdf/cba_english.pdf. The Major League Baseball Uniform Contract is attached as an appendix to the 2007–2011 Basic Agreement, i.e., the existing collective bargaining agreement between the Major League Baseball Players Association (MLBPA) and Major League Baseball. The Uniform Contract contains the standard terms for all player-club employment agreements. Although it does not contain express non-disclosure or trade secret protection language, it does contain the following broad "Loyalty" provision: "The Player agrees to perform his services hereunder diligently and faithfully . . . and pledges himself to the American public and to the Club to conform to high standards of personal conduct, fair play and good sportsmanship." *Id.* para. 3(a). It also contains a wide-ranging arbitration provision for resolution of any dispute between the player and the club. *Id.* para. 9(b).

[20] Mitchell J. Nathanson, *The Tell-All Hurler*, *in* COURTING THE YANKEES: LEGAL ESSAYS ON THE BRONX BOMBERS 89, 94–95 (Ettie Ward ed., 2003).

[21] *Id.* at 94.

[22] *Id.* at 92–93 (describing JIM BOUTON, BALL FOUR (1970)).

[23] *Id.* at 92.

[24] *Id.* at 93 (noting then-MLB Commissioner Bowie Kuhn's efforts to force Bouton to renounce *Ball Four* and admit he made the whole thing up, because Kuhn and the owners "knew where all this was headed": towards free agency and "Alex Rodriguez and the creation of the $25 million dollar-a-year player").

Four constituted legally protected information" such that MLB could have imposed liability on Bouton for trade secret misappropriation.[25] The author posits that Bouton's conduct generally "meets the tests commonly applied to the determination of misappropriation of a trade secret," but absolves Bouton based on the proposition that "courts have repeatedly refused to find in favor of misappropriation if the information disclosed was not intended to be used competitively for advantage against the employer."[26] The author concludes that because "baseball enjoyed (as it does today) the benefits of a judicially protected antitrust exemption which prevents exactly this type of competition, there is not much likelihood it could find relief under the trade secret rubric."[27]

While the author's ultimate conclusion—that MLB could not successfully sue Bouton under trade secret law—is likely correct, it relies on a roundabout approach to the dispositive issues.[28] Major League Baseball's antitrust exemption[29] and its lack of competitors need not enter into the trade secret analysis at all, let alone form its centerpiece, because it is unlikely that MLB could have established the existence of protectable trade secrets in the first instance. For example, while Bouton's "stories and anecdotes" no doubt constituted "information" under the common

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[25] *Id.*

[26] *Id.* at 94.

[27] *Id.*

[28] *Id.*

[29] Unlike virtually every other professional sports league and entity engaged in interstate entertainment, MLB is exempt from the federal antitrust laws by virtue of a trilogy of U.S. Supreme Court decisions beginning with Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Professional Clubs, 259 U.S. 200, 209 (1922). *See also* ABRAMS, *supra* note 18, at 45–69 (discussing *Federal Baseball* and the subsequent Supreme Court decisions leaving baseball's judicially created exemption intact: Toolson v. New York Yankees, 346 U.S. 356 (1953) and Flood v. Kuhn, 407 U.S. 258 (1972)). These decisions are criticized as "inexplicable and indefensible" under controlling antitrust precedent. *See* ABRAMS, *supra* note 18, at 69; *see also* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. (forthcoming 2012) at nn.2–7, *available at* http://ssrn.com/abstract=1905748 (collecting caselaw criticizing the antitrust exemption). To date, Congress has failed (or chosen not) to enact legislation that might "alter the court of baseball's antitrust exemption or [ ] reaffirm its correctness." ABRAMS, *supra* note 18, at 69. It has, however, used the threat of eliminating baseball's antitrust exemption to win concessions from MLB, such as tighter drug testing requirements. *See* Grow, *supra*, nn.253–331 (citing at n.325 Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 39 (2008)).

definition of a trade secret,[30] one is hard pressed to see how MLB might have satisfied its "burden of proving . . . ownership"[31] of that information so as to confer "standing to complain of the misappropriation,"[32] or that the information had "independent economic value" to MLB.[33] Likewise, it is far from clear that MLB could have established any of the secrecy elements of a claim of misappropriation. Were the facts that Bouton disclosed "generally known" or "readily ascertainable by proper means"?[34] Did MLB make "efforts that [were] reasonable under the circumstances to maintain [the] secrecy" of this information?[35] Is there any basis for finding that Bouton had a "duty to maintain its secrecy"?[36]

Because the answer to at least one, and likely all, of these questions militates against a finding of secrecy, any claim by MLB for misappropriation would likely fail. The author points to clubhouse signs ("What you say here, what you see here, what you do here and what you hear here, let it stay here"), "confidential reprimands" of players who spoke "too freely" about off-the-field issues, and annual training camp speeches by the commissioner in which he implored players not to "say anything bad about baseball," and asserts that these created an "explicit code of silence" that Bouton breached.[37] But it is unlikely that these efforts alone would be sufficient to carry MLB's burden of proving misappropriation in court.[38] In any event, the UTSA has

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[30] *See, e.g.*, UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 538 (1985).
[31] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42, cmt. d (1995).
[32] POOLEY, *supra* note 3, § 6.01.
[33] UNIF. TRADE SECRETS ACT § 1(4)(i), 14 U.L.A. 538.
[34] *Id.*
[35] *Id.* § 1(4)(ii), 14 U.L.A. 538.
[36] *Id.* § 1(2)(ii)(B)(II), 14 U.L.A. 537.
[37] Nathanson, *supra* note 20, at 97–98.
[38] *See* Sun Media Sys. v. KDSM, LLC, 564 F. Supp. 2d 946, 970–71 (S.D. Iowa 2008) (rejecting a trade secret misappropriation claim where plaintiff "never told anyone . . . that any particular information . . . was a trade secret in [plaintiff's] view" and the "claimed trade secrets [were] so amorphous as to be nearly incomprehensible"). The court stated that "it would be inappropriate and, indeed, unjust, to find that the generic confidentiality clause employed by [plaintiff] was sufficient to put Defendants on notice that [plaintiff] claimed trade secret rights" in a wide array of information. *Id.* at 971. The court also noted, "One may not impose upon another, by a gratuitous and unilateral act a confidential relationship." *Id.* Likewise, the court in Wheelabrator Corp. v. Fogle, 317 F. Supp. 633, 639 (W.D. La. 1970) stated:

> Assuming, without deciding, that [the plaintiff] had the intent to keep the [alleged trade secrets] secret, that intent will be disregarded where absence of evidence of proper precautions against disclosure is found.

a three-year statute of limitations,[39] so Bouton can rest easy.

Another attempt to prove misappropriation of a baseball-related trade secret—this one real—is detailed in *Daktronics, Inc. v. McAfee*,[40] a 1999 decision of the Supreme Court of South Dakota.[41] In 1988, college baseball coach David Baker approached Daktronics with the idea for "a pitch speed indicator that would display the type and speed of a pitched baseball to spectators at a baseball game."[42] Daktronics built a prototype with materials that "were readily available on the market," after which Miles McAfee became Baker's business partner.[43] McAfee and Baker, along with Daktronics, began pitching the product to MLB ballparks. Between 1988 and 1992, the two also purchased four units from Daktronics.[44] In 1996, Daktronics began manufacturing its own pitch speed indicators, which were different from the original units in that their displays were "permanent installations and show[ed] additional data other than pitch speed and type of pitch," for use in major league ballparks.[45]

McAfee and Baker filed claims against Daktronics alleging, *inter alia*, misappropriation of a trade secret consisting of "the concept of displaying speed and type of pitch thrown for the public to view at a ballpark."[46] After the trial court granted summary judgment to Daktronics, the South Dakota Supreme Court affirmed, holding that McAfee's and Baker's claimed trade secret was not protectable.[47] The court reasoned that because "Baker[']s and McAfee's concept involved combining the use of a radar gun, a console, and a display" and "all of these items were readily available on the market. . . . There [was] nothing novel about combining these materials to display speeds and types of

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> [The plaintiff's] lack of precaution renders it undeserving of the equitable protection it now seeks. To limit a man in the exercise of his knowledge there must be a strong showing that the knowledge was gained in confidence. The plaintiff has failed to carry that burden.

Id. *See also* Conagra, Inc. v. Tyson Foods, Inc., 30 S.W.3d 725, 730–31 (Ark. 2000) (holding that "verbal understandings" and warnings in an employee "Code of Conduct" were insufficient as a matter of law to establish reasonable efforts to maintain secrecy).

[39] UNIF. TRADE SECRETS ACT § 6, 14 U.L.A. 649.

[40] 1999 SD 113, 599 N.W.2d 358 (S.D. 1999).

[41] *Id.* ¶ 18, 599 N.W.2d at 362.

[42] *Id.* ¶ 2, 599 N.W.2d at 360.

[43] *Id.* ¶¶ 3–4, 599 N.W.2d at 360.

[44] *Id.* ¶ 4, 599 N.W.2d at 360.

[45] *Id.* ¶¶ 5–5 n.*, 599 N.W.2d at 360, 360 n.*.

[46] *Id.* ¶¶ 14, 21, 599 N.W.2d at 360–61.

[47] *Id.* ¶¶ 18–21, 599 N.W.2d at 359, 361–63.

pitches thrown for the public's view."[48] The court expressly noted that "the speed of pitches [was] displayed at Houston's Astrodome, the Veterans Stadium in Philadelphia, Pittsburgh's Three River Stadium, San Francisco's Candlestick Park, and the Skydome in Toronto," and that these display systems were designed by companies other than Daktronics.[49] Accordingly, the court denied trade secret protection because "the concept in which McAfee and Baker claim to possess a trade secret contains ingredients that were all in the public realm, could be easily duplicated and, in fact, were already in existence."[50] In short, it was no secret.

Where might baseball trade secrets exist, then? This article posits that a different species of baseball trade secrets is likely eligible for protection: trade secrets related to the collection, compilation, and analysis of statistical data for evaluating ballplayers. Often referred to in the shorthand as "sabermetrics," advanced statistics collection and analysis have revolutionized the business of baseball since being widely accepted and put to use by clubs and commentators in the 1990s and 2000s.[51] Press reports indicate (without extended analysis) that clubs and sabermetricians alike treat their sabermetric strategies and formulas as trade secrets.[52] While not everything related to sabermetrics constitutes a trade secret—not least because so much has been published or is available on the internet—there can be little doubt that protectable trade secrets exist in the

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[48] *Id.* ¶ 17, 599 N.W.2d at 362.

[49] *Id.* ¶¶ 18–19, 599 N.W.2d at 362.

[50] *Id.* ¶ 20, 599 N.W.2d at 363.

[51] Richard Wolfe et al., *Moneyball: A Business Perspective*, 2 INT'L J. SPORT FINANCE 249, 262 n.1 (2007). The term "sabermetrics" refers to the process of developing objective knowledge about baseball through statistical analysis for use in player evaluation and tactical decision-making. *Id.* The word is derived from the acronym "SABR," shorthand for the Society of American Baseball Research, a group founded in 1971 that is dedicated to the preservation and study of baseball history. *Id.*; *see also* ALAN SCHWARZ, THE NUMBERS GAME 109 (2004) (discussing SABR).

[52] Rich Lederer, *Baseball Beat: An Unfiltered Interview with Nate Silver*, BASEBALL ANALYSTS (Feb. 12, 2007), http://baseballanalysts.com/archives/2007/02/an_unfiltered_i.php (quoting statistician Nate Silver in response to question regarding why he kept sabermetric algorithm called "PECOTA" secret: "The short answer is that we're trying to make a living off this stuff, and we're reluctant to give away trade secrets."); Jenny Vrentas, *Mets Statistical Analyst has Seen Growth and Evolution of Sabermetrics in MLB*, STAR LEDGER (N.J.), Apr. 23, 2010 (quoting Mets statistical analyst Ben Baumer: "Teams tend to be very guarded about what they're actually doing with it and getting from it, because it's trade secrets and stuff.").

baseball analytics field.

The remainder of this article discusses what those trade secrets might be and how business entities—professional clubs, the Major League Baseball Players Association (MLBPA), and player agents and agencies, or sabermetricians and their companies, for example—can structure their employment and other contractual relationships to minimize the risk of misappropriation. Part II discusses relevant features of current trade secret law, including the generally accepted elements of a "trade secret," an overview and typical contexts of "misappropriation," and significant issues arising from the UTSA's preemption of other non-contract causes of action. Part III discusses the historical background of sabermetrics and advanced statistical collection and analysis (collectively, for the purposes of this article, hereinafter referred to as "baseball analytics") and several types of potential trade secrets that may exist in the field of baseball analytics. Part IV consists of a brief overview of several primary contractual protections available for baseball analytics trade secrets. Part V concludes with a brief look at the newest development in baseball analytics and related intellectual property issues.

I. KEY CONCEPTS IN TRADE SECRETS LAW

A. The Basic Definition of a Trade Secret: Information That Has Competitive Value Because It Is Kept Reasonably Secret

Despite the great volume of litigation trade secret disputes have engendered,[53] the legal definition of a trade secret is relatively simple. Under the UTSA, a "trade secret" is defined as:

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[53] *See generally* David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 GONZ. L. REV. 57 (2011) [hereinafter *Litigation in State Courts*]; David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291 (2010) [hereinafter *Litigation in Federal Courts*]. In these companion articles, Almeling and a team of litigators at O'Melveny & Myers analyzed and coded 394 federal district court decisions issued between 1950 and 2008, and 358 state appellate court decisions issued between 1995 and 2009, in which substantive issue of trade secret law was decided. *See Litigation in State Courts*, *supra*, at 59, 65. As the authors discuss, these reviewed cases represent only a fraction of the trade secret cases actually litigated during the respective time periods used for the studies. *See id.* at 63 (noting that only appellate decisions were analyzed because state trial court decisions are often inaccessible or do not permit detailed analysis); *see also Litigation in Federal Courts*, *supra*, at 299 (noting that the authors chose to review on a random basis only twenty-five percent of potentially relevant cases identified for the 1950–2007 period).

> [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
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> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[54]

This definition is employed with certain variations[55] in the forty-six states that have adopted some version of the UTSA.[56] In the four states that have not, statutory or common law definitions of "trade secret" contain similar requirements: (1) a process, formula, compilation, or other information (2) that derives economic value or provides a competitive advantage by virtue of being secret, and (3) that is the subject of reasonable measures to maintain such secrecy.[57] Courts in both UTSA and non-UTSA states rely heavily on the language and commentary in the *Restatement (First) of Torts* (1939) and the *Restatement (Third) of Unfair Competition* (1995) both of which employ similar definitional concepts.[58]

Under this definition, secrecy need not be "absolute," but need only be "relative,"[59] i.e., "sufficient to confer an actual or potential

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[54] UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 538 (1985).

[55] A survey of the mostly minor variations that exist in the versions of the UTSA that have been adopted across the country would itself require a lengthy article. *See, e.g.*, JAGER, *supra* note 3, § 3:31. However, an example of a substantive variation in this definition occurs in both the California and Illinois enactments of the UTSA. *Id.* Both states dispense with the requirement that the trade secret "not be readily ascertainable by proper means by others." *Id.* (internal quotation marks omitted). Thus, a defendant can still prevail by proving that the information at issue is readily ascertainable and therefore not secret, but cannot avoid liability for misappropriation simply because it "could have, but in fact did not, obtain the secret information by fair and legitimate means." *Id.* (footnote omitted).

[56] *Id.*

[57] *See id.*, § 39.1 (Massachusetts), § 48.1 (New Jersey), § 50.1 (New York), § 61.1 (Texas).

[58] RESTATEMENT (FIRST) OF TORTS § 757 (1939) (defining "trade secret" as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it"); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995) (defining "trade secret" as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others").

[59] POOLEY, *supra* note 3, § 4.04[2][a].

economic advantage."[60] Thus, a trade secret can be shared with employees, independent contractors, third-party business partners—essentially "anyone who has a need to know it and who knows it is confidential."[61] However, if a trade secret "escape[s] into the maintstream of public knowledge," it is gone forever, and cannot be "called back" or otherwise regain trade secret status.[62]

Whether the trade secret owner has taken reasonable efforts to maintain secrecy depends on the facts of any particular case, and tends "to boil down to a simple cost-benefit analysis."[63] "Heroic" efforts are not necessary, and the use of nondisclosure agreements[64] may alone suffice.[65] Limiting trade secret access on a need-to-know basis,[66] using computer passwords,[67] and stamping documents with confidentiality legends[68] may also help establish reasonable efforts to maintain secrecy.[69]

B. Misappropriation: Overview of Elements and Contexts

Unlike its definition of a "trade secret," the UTSA's definition of "misappropriation" is relatively complex. The first and most basic type of misappropriation consists, in essence, of "industrial espionage,"[70] an "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means."[71] "Improper means" includes, but is expressly not limited to,[72] "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[73] Classic examples of trade secret "acquisition" through "improper means" include the competitor's aerial reconnaissance

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[60] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. f.
[61] POOLEY, *supra* note 3, § 4.04[2][a].
[62] *Id.*§ 4.04(2)(a), 4.04(2)(a) n.6.
[63] *Id.* § 4.04(2)(b).
[64] *See infra* Part III.A.
[65] POOLEY, *supra* note 3, § 4.04[2][b].
[66] JAGER, *supra* note 3, § 5:16.
[67] *Id.* § 5:24.
[68] *Id.* § 5:23.
[69] *See generally id.* §§ 5:16–5:26 (discussing security programs and various methods to maintain secrecy of trade secret information).
[70] POOLEY, *supra* note 3, § 6.01.
[71] UNIF. TRADE SECRETS ACT § 1(2)(i), 14 U.L.A. 537 (1985).
[72] *Id.* § 1 cmt., 14 U.L.A. 538 (quoting RESTATEMENT (FIRST) OF TORTS § 757, cmt. f for the proposition that "[a] complete catalogue of improper means is not possible," and noting that "Section 1(1) includes [only] a partial listing").
[73] *Id.* § 1(1), 14 U.L.A. 537.

of construction of a company's plant to determine secret manufacturing processes[74] or, more commonly, the departing employee's unauthorized downloading of secret information in the final hours of his employment.[75] Improper acquisition can include memorizing trade secret information for the purpose of taking it elsewhere; "memorization is no defense, and . . . asportation of data in one's head is no more proper than taking it on paper or electronic form."[76]

The second (and more analytically challenging) type of misappropriation consists of the "disclosure or use of a trade secret of another without express or implied consent by a person who" either (1) "used improper means to acquire knowledge of the trade secret," just as discussed above; or (2) "knew or had reason to know that his knowledge of the trade secret was":[77]

I. derived from or through a person who had utilized improper means to acquire it;
II. acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
III. derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.[78]

Typically, this second type of misappropriation occurs where trade secret information is disclosed from A to B in the context of a confidential relationship (such as an employer-employee or business partner relationship), there is a breakdown in that relationship, and B retains A's trade secrets and subsequently uses or discloses them without A's authorization.[79] Indeed, recent studies have shown that in approximately ninety percent of

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[74] *See, e.g.*, E. I. duPont de Nemours & Co. v. Christopher, 431 F.2d 1012, 1013–15 (5th Cir. 1970).

[75] *See, e.g.*, Liebert Corp. v. Mazur, 827 N.E.2d 909, 925–26 (Ill. App. Ct. 2005).

[76] POOLEY, *supra* note 3, § 6.02[2][c].

[77] UNIF. TRADE SECRETS ACT § 1(2)(ii), 14 U.L.A. 537. A third type of trade secret misappropriation that does not have significant relevance for the purposes of this article involves the use or disclosure of a trade secret that has been acquired by accident or mistake and without knowledge that it is secret and owned by someone else. *See id.* § 1(2)(ii)(C), 14 U.L.A. 537. A person who uses such a trade secret must "material[ly] change [ ] his [or her] position," before obtaining actual or constructive knowledge that someone else properly claims ownership of the trade secret. *Id.* If that occurs, the person may be "permitted to continue using [the trade secret] under what amounts to a court-imposed license (with payment of a reasonable royalty)." POOLEY, *supra* note 3, § 6.01; *see* UNIF. TRADE SECRETS ACT § 2(b) cmt., 14 U.L.A. 619–20.

[78] UNIF. TRADE SECRETS ACT § 1(2)(ii)(B)(I)–(III), 14 U.L.A. 537.

[79] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40 ill. 2 (1995).

reported trade secret cases, "the alleged misappropriator is either an employee or a business partner."[80]

This second species of trade secret misappropriation requires some basis for establishing a confidential relationship between the secret's owner and the misappropriator. An employer-employee relationship qualifies so long as the employee is in a position "to gain intimate knowledge of the employer's secrets."[81] A contract requiring confidentiality or prohibiting (or effectively limiting) disclosure will also suffice.[82]

Finally, making "slight alterations" to a competitor's secret will not avoid liability.[83] "[S]lavish copying" is not required to establish misappropriation.[84] Thus, materials substantially derived from that trade secret are subject to the UTSA, including information that provides a "starting point" to "assist or accelerate research" or development.[85]

C. The UTSA's Preemption Provision and the Protection of Confidential Information That Does Not Qualify as Trade Secrets

Of course, one of the primary goals of the UTSA was national "uniformity," which the drafters sought to establish through preemption (or displacement) of the "potpourri of legal theories [that] had been applied to trade secret misappropriation actions."[86] Section 7 of the UTSA sets forth the provisions meant to achieve this end. For purposes relevant here, subsection 7(a) provides that the UTSA "displaces conflicting tort, restitutionary, and other [state] law . . . providing civil remedies for misappropriation of a trade secret."[87] Per subsection 7(b), the UTSA "does not affect . . . contractual remedies, whether or not based upon misappropriation of a trade secret."[88]

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[80] *Litigation in State Courts*, *supra* note 53, at 69.

[81] POOLEY, *supra* note 3, § 6.03[2].

[82] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d ("The owner of a trade secret may seek protection against unauthorized use or disclosure through a contract with the recipient of a disclosure.").

[83] JAGER, *supra* note 3, § 3:41.

[84] POOLEY, *supra* note 3, § 6.03[4].

[85] *Id.* § 6.03(4) (quoting Merck & Co. v. SmithKline Beecham Pharms. Co., No. C.A. 15443-NC, 1999 WL 669354, at *20 (Del. Ch. Aug. 5, 1999) and RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40, cmt. c).

[86] *Id.* § 2.03[6].

[87] UNIF. TRADE SECRETS ACT § 7(a), 14 U.L.A. 651 (1985).

[88] *Id.* § 7(b)(1), 14 U.L.A. 651. Section 7 of the UTSA as originally drafted in 1979 was arguably "broader" than the above-quoted operative language appearing in the 1985 draft. *See* POOLEY, *supra* note 3, § 2.03[6]. The states

The somewhat obtuse provisions of section 7 have resulted in a significant amount of litigation.[89] Case law interpreting these (and analogous) provisions exposes two judicial fault lines that arise from the same basic question: whether "confidential" information that does *not* rise to the level of a "trade secret" is protectable.[90]

The first such fault line occurs in cases interpreting subsection 7(a)'s preemption provision.[91] Trade secret plaintiffs will often attempt to have it both ways, alleging UTSA misappropriation to

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have also enacted varying versions of this provision, or, in the case of Iowa, none at all. *Id.* This latter exception notwithstanding, virtually all courts interpreting the UTSA recognize that where misappropriation of trade secrets is indisputably alleged, the only permissible causes of action are those based on the UTSA and, if applicable, contract. *See id*. As discussed *infra*, courts have struggled to determine whether non-UTSA causes of action, or those based on contract, can proceed based on the allegation that "confidential information"—but something less than a "trade secret"—has been misappropriated. *See id.*

[89] POOLEY, *supra* note 3, § 2.03[6] n.50.2 (collecting cases). UTSA preemption issues have arisen in a large number of California cases in recent years, with federal courts tending to take a narrower view by allowing parallel non-UTSA claims to proceed beyond the pleadings stage and state courts tending to take a broader view of preemption by dismissing such claims. *Compare* Bryant v. Mattel, No. CV 04-9049 DOC (RNBx), 2010 U.S. Dist. LEXIS 103851, at *71–74 (C.D. Cal. Aug. 2, 2010) (denying motion to dismiss non-UTSA tort claims based on theft of confidential information); Leatt Corp. v. Innovative Safety Tech., LLC, No. 09-CV-1301-IEG (POR), 2010 U.S. Dist. LEXIS 71362, at *20–21 n.5 (S.D. Cal. July 15, 2010) (holding that "Plaintiffs' unfair competition and tortious interference claims are not preempted by the UTSA to the extent they depend on the misappropriation of otherwise confidential or proprietary, but not trade secret, information . . . ."); Phoenix Techs. Ltd. v. DeviceVM, No. 09-04697 (CW), 2009 U.S. Dist. LEXIS 114996, 2009 WL 4723400, at **9 (N.D. Cal. Dec. 8, 2009) (denying motion to dismiss tort and unfair competition claims based on misappropriation of "Proprietary Information . . . other than trade secrets"); Think Village-Kiwi, LLC v. Adobe Sys., Inc., No. C 08-04166 SI, 2009 U.S. Dist. LEXIS 32450, at **6–7 (N.D. Cal. Apr. 1, 2009) (finding "[N]o authority holding that CUTSA preempts common law claims even if the confidential information is a protectible interest other than a trade secret."); *and* First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 942 (N.D. Cal. 2008) (holding that "Private Eyes may continue to pursue the claim for false promise, so long as the confidential information at the foundation of the claim is not a trade secret, as that term is defined in CUTSA."), *with* Silvaco Data Sys. v. Intel Corp., 109 Cal. Rptr. 3d 27, 53 n.22 (Cal. Ct. App. 2010) (rejecting "suggestion that the uniform act was not intended to preempt common law conversion claims based on the taking of information that, though not a trade secret, was nonetheless of value to the claimant.") (internal quotes and citation omitted), *overruled on other grounds by* Kwikiset Co. v. Benson, 246 P.3d 877 (Cal. 2011), *and* K.C. Multimedia, Inc. v. Bank of America Tech. & Operations, Inc., 90 Cal. Rptr. 3d 247, 259–62 (Cal. Ct. App. 2009) (taking broad view of UTSA's preemption clause and dismissing parallel non-UTSA tort claims).

[90] POOLEY, *supra* note 3, at § 2.03[6].

[91] *Id*.

the extent the allegedly stolen information constitutes a "trade secret" and alternatively alleging common law tort claims (such as conversion, unjust enrichment, or unfair competition) to the extent it does not.[92] The majority of courts reject this dichotomy and hold that non-contract causes of action are preempted by the UTSA "if the same set of facts supports both the trade secret claim and the alternative claims"—*regardless* of whether the allegedly stolen information is characterized as a "trade secret" or something less, such as "confidential" or "proprietary."[93] Under this approach, information simply is *not protectable*—whether under the UTSA or any other tort or restitutionary cause of action—if it does not constitute a "trade secret."

In addressing this issue in *Silvaco Data Systems v. Intel Corp.*,[94] the California Court of Appeal explained the reasoning behind this view:

> We emphatically reject the . . . suggestion that the uniform act was not intended to preempt "common law conversion claims based on the taking of information that, though not a trade secret, was nonetheless of value to the claimant." On the contrary, a prime purpose of the law was to sweep away the adopting states' bewildering web of rules and rationales and replace it with a uniform set of principles for determining when one is—and is not—liable for acquiring, disclosing, or using "information . . . of value." Central to the effort was the act's definition of a trade secret. Information that does not fit this definition, and is not otherwise made property by some provision of positive law, belongs to no one, and cannot be converted or stolen. . . . [P]ermitting [a] conversion claim to proceed on a contrary rationale, [would] *create*[ ] a new category of intellectual property far beyond the contemplation of the Act, subsuming its definition of "trade secret" and effectively obliterating the uniform system it seeks to generate.[95]

Numerous courts in different jurisdictions have held likewise.[96]

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[92] *See id.*

[93] *Id.*

[94] 109 Cal. Rptr. 3d 27 (Cal. Ct. App. 2010), *overruled on other grounds by* Kwikiset Co. v. Benson, 246 P.3d 877 (Cal. 2011).

[95] *Id.* at 53 n.22.

[96] *See* Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322, 1345 (N.D. Ga. 2007) ("[T]he rule of supersession is guided . . . by the [Georgia Trade Secret Act] . . . which require[s] the plaintiff to demonstrate economic value in claimed proprietary information and reasonable efforts to preserve its secrecy in order to recover for an asserted misappropriation of that information."). The court held: "If a plaintiff could alternatively recover for misappropriation of non-proprietary information or misappropriation of unguarded proprietary information, the legislative judgment contained in the GTSA that such

By contrast, a minority of courts hold that non-UTSA claims may offer remedies for the misappropriation of information that does not qualify as a trade secret.[97] This approach purports to adhere to the plain language of subsection 7(a) (i.e., that UTSA "displaces conflicting . . . remedies for misappropriation of a *trade secret*")[98] but has been criticized for ignoring the UTSA's primary goal of uniformity[99] and for extending protection to information that "belongs to no one, and cannot be converted or stolen."[100] As a practical matter, courts may permit parallel non-UTSA claims based not on a definitive interpretation of the statutory language, but, rather, on the pragmatic expectation that discovery and litigation will winnow non-viable claims.[101]

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information should otherwise flow freely in the public domain would be subverted." *Id.*; *see* Hauck Mfg. Co. v. Astec Indus. Inc., 375 F. Supp. 2d 649, 657 (E.D. Tenn. 2004) ("If the information is a trade secret, the plaintiff's claim is preempted; if not, the plaintiff has no legal interest upon which to base his or her claim. Either way, the claim is not cognizable."); BlueEarth Biofuels, LLC v. Hawaiian Elec. Co., 235 P.3d 310, 324 (Haw. 2010) ("[W]e hold that the HUTSA preempts non-contract, civil claims based on the improper acquisition, disclosure or use of confidential and/or commercially valuable information that does not rise to the level of a statutorily-defined trade secret.").

[97] *See* First Advantage Background Servs. Corp. v. Private Eyes, Inc., 569 F. Supp. 2d 929, 941–942 (N.D. Cal. 2008).

> To the extent the claim is based on these trade secrets, it cannot go forward. However, Private Eyes may . . . pursue the claim for false promise, so long as the confidential information at the foundation of the claim is not a trade secret, as that term is defined in CUTSA.

Id.; Stone Castle Fin., Inc. v. Friedman, Billings, Ramsey & Co., 191 F. Supp. 2d 652, 658–59 (E.D. Va. 2002) ("Because 'conflicting law is that law dealing exclusively with trade secrets,' and because it cannot be established at this juncture whether the confidential information at issue in this case is a trade secret, the Court cannot find that Stone Castle's alternative claims are preempted.") (citation omitted); Burbank Grease Servs., LLC v. Sokolowski, 2006 WI 103, ¶ 33, 717 N.W.2d 781, 793 (Wis. 2006) (holding that Wisconsin's enactment of UTSA Section 7 was meant to "leave available all other types of civil actions that do not depend on information that meets the statutory definition of a 'trade secret.'").

[98] UNIF. TRADE SECRETS ACT § 7, 14 U.L.A. 651 (1985).

[99] *See id.* § 8, 14 U.L.A. 656 ("This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.").

[100] Silvaco Data Sys. v. Intel Corp, 109 Cal. Rptr. 3d 27, 53 n.22 (Cal. Ct. App. 2010), *overruled on other grounds by* Kwikiset Co. v. Benson, 246 P.3d 877 (Cal. 2011); POOLEY, *supra* note 3, § 2.03[6].

[101] *See* Bryant v. Mattel, No. CV 04-9049 DOC (RNBx), 2010 U.S. Dist. LEXIS 103851, at *74 (C.D. Cal. Aug. 2, 2010) (rejecting preemption argument and permitting non-UTSA claims to proceed based on "[t]he better approach [of] determin[ing through litigation] whether the information alleged to have converted was 'made property by some provision of positive law,' on grounds

The second major judicial fault line in this area derives from subsection 7(b)'s language exempting "contractual remedies" from UTSA preemption.[102] Assuming *arguendo* the correctness of the majority view discussed above—i.e., that non-trade secret information is not protectable through non-UTSA causes of action—can such "confidential" or "proprietary" (but non-trade secret) information be protected by contract? Put differently, does subsection 7(b)'s carve-out for contract remedies allow for contractual protection of information that does not rise to the level of a trade secret?

The weight of authority suggests the answer is no. One commentator illustrates the "widely recognized principle" that "confidentiality agreements . . . may not be used to protect information that does not qualify as a trade secret" by noting that "one cannot enforceably agree . . . to maintain in confidence the tide tables."[103] A corollary principle is that a party "cannot use [a] confidentiality clause . . . to turn items into trade secrets that are not trade secrets under applicable law."[104] Based on these considerations, courts have routinely refused to enforce confidentiality agreements purporting to protect non-trade secret information.[105]

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that are qualitatively different from the grounds upon which trade secrets are considered property. Resolving this question requires analysis of the facts.") (citation omitted). The court stated that the facts requiring analysis include "what the confidential or proprietary information is, how it was converted, and the property interest alleged to have been harmed as a result of that conversion. All of these questions can be addressed at summary judgment and/or trial." *Id.*

[102] *See* UNIF. TRADE SECRETS ACT § 7(b)(1), 14 U.L.A. 651.

[103] POOLEY, *supra* note 3, § 8.02[4][a] (citing Follmer, Rudzewicz & Co. v. Kosco, 362 N.W.2d 676, 683 n.16 (Mich. 1984)).

[104] Sun Media Sys., Inc. v. KDSM, LLC, 564 F. Supp. 2d 946, 965 (S.D. Iowa 2008); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41, cmt. d (2005).

> [A]n agreement that merely prohibits the use or disclosure of particular information depends . . . upon whether the information . . . qualifies as a trade secret. . . . [A] nondisclosure agreement that encompasses information that is generally known or in which the promisee has no protectable interest . . . may be unenforceable as an unreasonable restraint of trade. *Id.*

[105] *See* Surgidev Corp. v. Eye Tech., Inc., 648 F. Supp. 661, 696 n.19 (D. Minn. 1986).

> The protection afforded plaintiff by tort and contract law is coextensive: to the extent that the customer information constitutes a trade secret, it may be protected by a valid contractual covenant, and conversely, [if] the information is not a trade secret, a contractual covenant which . . . restrict[s] its use is . . . invalid.

Id.; Dynamics Research Corp. v. Analytic Scis. Corp., 400 N.E.2d 1274, 1288

On the flip side, a minority of courts have enforced contractual provisions that protect information that does not rise to the level of trade secrets.[106] This position has been justified by reference to the UTSA's preemption provision itself. By exempting "contractual remedies, whether *or not* based upon misappropriation of a trade secret,"[107] the provision at least "implies that contracts about intellectual property are valid, even when they exceed the domain of trade secrets."[108] Although these courts hold that the plaintiff "need not show its information rises to the level of a trade secret," they may require the plaintiff to "establish that it engaged in reasonable steps to keep the information confidential" to prove breach of a confidentiality agreement.[109]

The overarching lesson that emerges from these different strands of UTSA section 7 jurisprudence is that entities that desire legal protection for their confidential and/or proprietary information *should treat and protect such information as trade secrets*. Anything less carries significant risk. An entity's failure to engage in reasonable efforts to maintain the secrecy of competitively valuable information could deprive such entity of protection not only under the UTSA, but virtually all other legal theories. Even if a well-structured confidentiality agreement with a would-be misappropriator is in place, such an agreement

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(Mass. App. Ct. 1980) ("[A] nondisclosure agreement which seeks to restrict the employee's right to use an alleged trade secret which is not such in fact or in law is unenforceable as against public policy."); *see also* POOLEY, *supra* note 3, § 8.02[4] (citing additional authority).

[106] *See* Hauck Mfg. Co. v. Astec Indus., Inc., 376 F. Supp. 2d 808, 813–15 (E.D. Tenn. 2005) (affirming a jury verdict that found defendant liable for breach of nondisclosure agreement but not liable for trade misappropriation based on same facts; the court held that its prior rulings on UTSA preemption did not "suggest [that] information [falling short of qualifying for trade secret status] does not exist or that it could not be protected through contractual methods, as explicitly contemplated by the UTSA itself."); Ajaxo Inc. v. E*Trade Group Inc., 37 Cal. Rptr. 3d 22, 252 n.381 (Cal. Ct. App. 2005) ("[Sometimes], a breach of contract cause of action may be available where disclosed information does not qualify as a 'trade secret' under the UTSA . . . if the information is protected under a confidentiality or nondisclosure agreement, provided the agreement is not an invalid restraint of trade.") (citation omitted); *see also* POOLEY, *supra* note 3, § 3.04[3] n.22 (listing additional authority).

[107] UNIF. TRADE SECRETS ACT § 7(b), 14 U.L.A. 651 (1985) (emphasis added).

[108] Idx Sys. Corp. v. Epic Sys. Corp., 285 F.3d 581, 585 (7th Cir. 2002) (discussing non-disclosure agreements under Wisconsin law).

[109] *See, e.g.*, Tax Track Sys. Corp. v. New Investor World, Inc., 478 F.3d 783, 787, 790 (7th Cir. 2007) (affirming summary judgment rejecting claim for breach of confidentiality agreement under Illinois law).

may be unenforceable if the entity cannot show that the protected information constitutes trade secrets or at least has actually been kept confidential.

Accordingly, entities whose business depends on baseball analytics should carefully consider whether and what of their confidential and/or proprietary information may qualify for trade secret protection and take measures to protect those assets. The following discussion seeks to shed light on where such trade secrets may be found, what they might look like, and how they might qualify for legal protection.

II. TRADE SECRETS IN BASEBALL ANALYTICS

A. Historical Background: Sabermetrics and the Rise of Modern Baseball Analytics

According to Yogi Berra, "in baseball you don't know nothing."[110] Sabermetricians would argue that for the first one hundred years or so of professional baseball, Berra was right. Position players were evaluated primarily through the use of subjective, in-person scouting and simple, easily calculated metrics, such as hitting for average, hitting for power, errors, throwing arm strength and accuracy, and foot speed.[111] These metrics, it turned out, presented only a limited (and potentially misleading) picture of a player's true value on the field.

In 1977, Bill James—then a security guard at a pork-and-beans cannery and now a Boston Red Sox employee considered "the first and greatest of the saber metricians"—began publishing his annual "Baseball Abstract" newsletter, arguing that non-traditional metrics (e.g., on-base percentage, "properly refined" minor league statistics, ratio of runs scored to runs against) were better measures and predictors of player and/or team success. [112] James pored over a century's worth of historical data to illuminate "truly new" and "interesting" statistical relationships in these[113] and other areas, such as "whether defense was properly measured, whether stolen bases were meaningful, and

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[110] Rob Neyer, *For the Braves' Uggla, Luck Is Not a Statistic*, N.Y. TIMES, Aug. 6, 2011, at SP2.

[111] Wolfe et al., *supra* note 51, at 250.

[112] Tim Marchman, *The Religion of Prediction: Baseball's Sabermetricians are not Scientists but Mystics*, WALL ST. J., Mar. 19, 2011, at C5; *see generally* SCHWARZ, *supra* note 51, at 111–17.

[113] Marchman, *supra* note 112.

how stadiums affected players' performance."[114]

As one author put it, James's foray into rigorous baseball analytics "inspired thousands of passionate fans to dig into baseball's books with obsessive zeal, convinced that everything they thought they knew was wrong."[115] A sabermetrics sub-industry was born. In 1995, several business—and baseball—savvy "smart people" founded Baseball Prospectus, a think tank devoted to sabermetrics.[116] Baseball Prospectus (BP) followed in James's footsteps by "[p]roducing research, articles, and books" consisting of "innovative statistical analysis[,] presented in an entertaining, humorous style."[117] It pioneered the use of the internet as a primary vehicle for publishing baseball data and analysis, and "in 2003 [ ] became one of the first sports-related sites to place content, including forecasts and statistical databases, in a premium-subscription section."[118] Since the 1980s, several other companies, including industry pioneer Sports Team Analysis and Tracking Systems, Inc. (now called STATS, LLC),[119] Inside Edge,[120] the Sports Network,[121] and Baseball Info

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[114] Zak Stambor, *Number Cruncher: Nate Silver Can't Hit a Fastball, But He's an Ace at Dissecting Baseball Stats. and Major League Baseball Has Taken Notice*, U. CHIC. MAG., Jul.–Aug. 2008, at 36, *available at* http://magazine.uchicago.edu/0878/features/nate_silver.shtml. It is worth noting that while James is widely considered the godfather of sabermetrics and rightly credited with its popularization, the trend of rethinking traditional baseball metrics arguably began at the beginning of the twentieth century with the writing of F. C. Lane. *See, e.g.*, F. C. Lane, *Why the System of Batting Averages Should Be Changed*, BASEBALL MAG., Mar. 1916, at 41–47 (criticizing batting average as "a system that place[s] nickels, dimes, quarters, and fifty cent pieces on the same basis . . . ."). Sabermetrics gained additional steam a decade before James with the publication of Earnshaw Cook's book, PERCENTAGE BASEBALL (1966). *See* Stambor, *supra*, at 36; *see also* SCHWARZ, *supra* note 51, at 112 ("Bill James didn't invent statistical baseball analysis . . . but he, more than anyone, *popularized* it, introducing the subject to a public that only clamored for more.") (emphasis added). Cook's book argues against conventional baseball wisdom, such as the typical practice of batting the fastest (but typically not the best) hitter first in the lineup. Stambor, *supra*, at 36. Cook posited that the team's best hitter should bat first to maximize the number of at bats he would get each game. *Id.* Cook also used a "mechanical calculator, slide rule, and colored pencils" to "develop[ ] the scoring index, a measure that sought to distill the essence of a player's worth." *Id.* A few years after publication of Cook's PERCENTAGE BASEBALL, a couple of other early sabermetricians, brothers Harlan and Eldon Mills, used an early IBM computer to "create the win average, a number that delineated a player's contributions to his team's victories." *Id.*

[115] Marchman, *supra* note 112.

[116] Stambor, *supra* note 114, at 34.

[117] *Id.* at 32.

[118] *Id.* at 34.

[119] *See* Data Delivery, X-Info, STATS LLC, http://www.stats.com/x_info.asp

Solutions (founded by former STATS executives)[122] have carved out respective niches in the baseball data collection, analysis, and distribution field.

Sabermetrics 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*.[123] *Moneyball* focused on Oakland Athletics General Manager Billy Beane's decision "to rip up more than 100 years' worth of tradition by adopting, from the owner's box down to the lowest minor league scout, a total organizational approach based on the principles and information hashed out in the thriving and mostly ignored subculture of baseball analysis."[124] In short, it told the story of how the A's used sabermetrics to obtain undervalued players, allowing the club to compete successfully at the top of the league despite having one of MLB's lowest payrolls.[125] *Moneyball*'s emphasis on the value of sabermetrics was buttressed by other publications around that time that heralded and advanced the baseball analytics revolution.[126]

After *Moneyball*'s release, traditionalists pilloried Beane for eschewing the time-old statistics and subjective scouting methods that had dominated baseball analysis in the twentieth century.[127] Beane was also ridiculed by those more sympathetic to sabermetrics for "giv[ing] away his trade secrets"[128]—a largely hyperbolic claim given that the strategy embraced by the A's and exposed in *Moneyball* was based on concepts that had been in the public sphere (albeit mainly ignored) for decades. Rather, as one

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(last visited Nov. 14, 2011).

[120] *See About Us*, INSIDE EDGE, http://inside-edge.com/Aboutus.aspx (last visited Nov. 14, 2011).

[121] *See About Us*, THE SPORTS NETWORK, http://www.sportsnetwork.com/merge/tsnform.aspx?c=sportsnetwork&page=market/about.htm (last visited Nov. 14, 2011).

[122] *See Our Team*, BASEBALL INFO SOLUTIONS, http://www.baseballinfosolutions.com/ourteam.html (last visited Nov. 14, 2011).

[123] *See generally* MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003).

[124] Matt Welch, Balls: *The Joy of Watching Ideas Win*, REASON MAG., Dec. 2003, at 71, *available at* http://reason.com/archives/2003/12/01/balls (reviewing LEWIS, *supra* note 123).

[125] *See* Welch, *supra* note 124; *see generally* LEWIS, *supra* note 123.

[126] *See generally* JIM ALBERT & JAY BENNETT, CURVE BALL: BASEBALL, STATISTICS, AND THE ROLE OF CHANCE IN THE GAME (2001); SCHWARZ, *supra* note 51.

[127] Marchman, *supra* note 112; Welch, *supra* note 124.

[128] Welch, *supra* note 124.

writer notes, *Moneyball*'s biggest legacy may have been that it "move[d] the process along. Amateurs who had previously written for online listservs and wonky outlets like Baseball Prospectus were brought into management by open-minded clubs; bright students joined the public debate, hoping to get hired."[129] Whereas in 2003 the A's were one of only a few clubs employing a management strategy based on advanced baseball analytics, now "[n]early every team relies on sabermetrics analysis to some degree."[130]

As the Associated Press explained:

> The debate no longer centers on whether there is a place for statistical analysis in the game. Instead, it's how prevalent it should be. . . . While there are still holdouts, more teams each year rely more on the numbers, an inevitability considering the investments teams make into players. With so much money and prestige at stake, it's only natural that teams will continue to look for whatever kind of edge they can find. While some speculate that the advantage teams gain by using modern statistical analysis is decreasing as more teams get on board, James believes there will always be a new front that will benefit the most forward-thinking teams.[131]

These "new front[s]" have benefited and will continue to benefit other entities whose business is baseball and who keep these new developments secret in order to obtain a competitive advantage—entities such as the MLBPA, player agents and agencies, baseball software companies, and those companies and individuals whose trade *is* baseball analytics. Several types of potential protectable trade secrets that may be owned by these entities are discussed below.

B. Types of Information for Which Trade Secret Protection May Be Available in the Baseball Analytics Industry

1. Statistical Compilations

As the UTSA's definition of "trade secret" expressly includes the concept of a "compilation,"[132] it is unsurprising that

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[129] Marchman, *supra* note 112.

[130] Jon Krawczynski et al., *UZR, FIP, BABIP: Stats Give Baseball New Language*, SPORTS ILLUSTRATED, Apr. 1, 2010, *available at* http://sportsillustrated.cnn.com/2010/baseball/mlb/wires/04/01/2010.ap.bbo.the.stats.revolution.adv03.2030/index.html#ixzz1RvfcJPSK.

[131] *Id.*

[132] UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 538 (1985).

compilations of baseball statistics that otherwise meet the required criteria are eligible for trade secret protection. Significantly, a statistical compilation may be protected even if some or all of the underlying statistics that constitute it are in the public domain.[133] So long as the statistical compilation itself, as a whole, is kept secret and provides competitive value, the compilation should qualify for trade secret protection.[134]

Given the sheer volume of statistics that are available on the internet at sites such as Baseball-Reference.com, among others, it may at first be difficult to envision how a compilation of otherwise public statistics may qualify for trade secret protection. The way in which Baseball Info Solutions (BIS) calculates defense-related metrics for its respected publication *The Fielding Bible* vol. II[135] provides a good example of how this could be. Without delving too far into the mathematical weeds, BIS's defensive metrics depend on the use of a so-called "Run Matrix," which BIS explains:

> It's simply a chart that tells you how many runs score in an inning following each of the possible 24 situations in an inning (or as we call them "states"). The 24 states are determined by how many men are out (zero, one, or two) and how many men are on which bases. There are eight combinations of men on base: none, man on first, man on second, man on third, men on first and second, men on first and third, men on second and third, and bases loaded. Eight base-situations times three out-situations gives you 24 states.[136]

The Fielding Bible then prints its "Run Matrix—2008," a three-column, eight-row chart displaying numbers ranging from .108 (none on, two outs) to .521 (none on, zero out) to 2.306 (bases loaded, zero out).[137] The book further explains that, for example, the .521 figure "simply means that anytime [the none on, zero out] situation occurred in an inning during 2008, an average of

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[133] *See* POOLEY, *supra* note 3, § 4.03[2] ("Information will not be denied trade secret status merely because each bit of it can be found somewhere in the public domain.").

[134] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. f (1995) ("[I]t is the secrecy of the claimed trade secret as a whole that is determinative. The fact that some or all of the components of a trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements.").

[135] 2 JOHN DEWAN, THE FIELDING BIBLE (2009).

[136] *Id.* at 11.

[137] *Id.*

.521 runs were scored after that point."[138] Likewise, every time that there were none on base and two outs, an average of .108 runs were scored after that point; and every time the bases were loaded with none out, an average of 2.306 runs were scored after that point.[139] "By going through each play in [its] database and using the run matrix table"—leaving the complicated math aside—BIS then determines a player's Plus/Minus Runs Saved, its "most important method (or metric) . . . to evaluate defense."[140]

Naturally, none of the foregoing information constitutes a potential trade secret—it has all been published.[141] The potential trade secret, rather, lies in the *compilation* of play-by-play data and individual player statistics that BIS used to create the Run Matrix and to determine each player's Plus/Minus Runs Saved. For example, the Run Matrix requires a *compilation* of statistics reflecting the "before" and "after" for every play in every game in 2008 to determine the average number of runs scored following each of the 24 "states."[142] Likewise, calculating Plus/Minus Runs Saved requires a *compilation* of data reflecting "the exact direction, distance, speed, and type of every batted ball" over the course of each season,[143] as well as a *compilation* of play-by-play statistics for each player with respect to each such batted ball hit in his direction.[144]

None of the underlying play-by-play data, e.g., that in game X, in the top of the second inning, there were men on first and second and two outs when the batter grounded directly at shortstop Y, who successfully threw to second for the force out to end the inning—constitutes a trade secret. This is because each play is public information: it is viewed by the fans in the park, broadcast to the public by television or radio, recorded by hundreds or thousands of watching or listening scorekeepers, and is accessible on the internet, through real-time game updates (like MLB.com's "Gameday"[145] or ESPN.com's "Gamecast"[146]),

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[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *See* PERRITT, *supra* note 1, § 4:9.6 ("Publication of information in the general literature usually forecloses trade secret status.").

[142] *See* DEWAN, *supra* note 135, at 11–12.

[143] *See id.* at 83.

[144] *See id.* at 11–12, 83.

[145] *Gameday*, MLB.COM, http://mlb.com (search MLB for Gameday) (last visited Nov. 18, 2011).

[146] *Gamecast*, ESPN.COM, http://scores.espn.go.com/mlb/gamecast (last visited Nov. 18, 2011).

team sites, and/or blogs maintained by press outlets or fans.[147] But to the extent this play-by-play data is aggregated or culled to create season, player, or situation-based compilations—e.g., for the purposes of calculating the Run Matrix for first-and-second with one out (.919 in 2008) or determining shortstop Y's Plus/Minus Runs Saved—such a compilation should, if kept reasonably secret, be entitled to trade secret protection.[148]

This is so because such a compilation is itself "useful," i.e., competitively valuable, despite that the underlying play-by-play data is public.[149] In the BIS example, BIS's play-by-play database allows it to develop "what some industry insiders consider the pre-eminent system for evaluating baseball glove work,"[150] to produce and market *The Fielding Bible* (among other publications) to critical acclaim from baseball insiders,[151] to

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[147] Nor can MLB or its member clubs claim a legally protectable proprietary interest in the play-by-play data to the extent it simply reflects independently gathered "facts" as to what transpires during a game (as opposed to reproduction of the copyrighted television, radio, or internet broadcasts themselves). *See, e.g.*, NBA v. Motorola, Inc., 105 F.3d 841, 847–54 (2d Cir. 1997). In that case, the Second Circuit Court of Appeals drew on the "fact/expression dichotomy," which it termed "a bedrock principle of copyright law," to hold that reproduction of "only factual information culled from . . . broadcasts," as opposed to "the copyrightable expression of the games," did not violate federal copyright law. *Id.* at 847–48. The court also held that "expend[ing one's] own resources to collect purely factual information generated in . . . games" does not violate common law principles barring "hot news" (or "free-riding") misappropriation. *Id.* at 853–54.

[148] Simple game logs (i.e., chronological compilations of each play in a given game) have been treated as proprietary and could theoretically qualify for trade secret protection or, at least, could have so qualified in the earliest days of the baseball analytics revolution. *See* SCHWARZ, *supra* note 51, at 117–18. In 1977, Bill James, frustrated that basic newspaper box scores left a lot of important information out, learned that the Elias Sports Bureau in New York "independently gathered comprehensive play-by-play information on its own." *Id.* at 117. When James requested the game logs for his numbers crunching, Elias turned him down, asserting that the game logs were "proprietary." *Id.* at 119. It is not clear whether Elias meant that its game logs constituted trade secrets or, rather, copyrighted works subject to tight licensing and use restrictions that somehow excluded James. In any event, it is questionable whether treating game logs as trade secrets would withstand legal scrutiny today, given their ubiquity on the internet.

[149] POOLEY, *supra* note 3, § 4.03[2] ("Courts have consistently held that there can be . . . value in the act of combining available . . . data into something useful.").

[150] Alan Schwarz, *Keeping Score; Finally, an Error-Free Way to Measure Fielding*, N.Y. TIMES, Apr. 2, 2006.

[151] *See, e.g.*, Keith Glab, *The Fielding Bible Volume II—Book of Revelations*, BASEBALLEVOLUTION.COM, Mar. 19, 2009, http://baseballevolution.com/keith/fbibleii.html (reviewing DEWAN, *supra* note 135) (characterizing *The*

license its statistical compilations and analyses,[152] and to develop goodwill as a reliable and go-to source for baseball analytics. Such data compilations would also have value in the hands of a putative competitor. Not only would such a competitor have information that permits it to compete for BIS's audience, clients, and goodwill,[153] the competitor would be able to do so without having to invest the time and expense of creating such compilations in the first place.[154]

Even if a competitor incurred the time and expense of making compilations similar (or even identical) to those held by BIS—and, of course, kept them secret—it would not deprive BIS's compilations of trade secret protection. There can be "two owners of the same trade secret," so long as the second-in-time owner created the similar or identical compilation independently.[155] While the *value* of BIS's compilations might be diminished because it would "enjoy[ ] a lesser degree of exclusive ownership," these statistical compilations would still be entitled to trade secret protection.[156]

2. Methods of Collecting and Presenting Statistical Data

By its express terms, the UTSA protects "methods" and "techniques" that are secret and competitively valuable.[157] In the

Fielding Bible as "indispensable" and containing "information you cannot get anywhere else").

[151] Welch, *supra* note 124.

[152] *See Special Report Request*, BASEBALL INFO SOLUTIONS, http://www.baseballinfosolutions.com/products_srr.html (last visited Aug. 5, 2011); *see also* POOLEY, *supra* note 3, § 4.05[2] ("[V]alue may also be demonstrated by . . . the fact that others have been willing to pay for access to the information.").

[153] POOLEY, *supra* note 3, § 7.03[2][b] (noting that "lost business opportunities" and "harm to reputation" are two types of damage that may result from trade secret misappropriation).

[154] *See, e.g.*, *Ex parte* Caribe, U.S.A., Inc., 702 So. 2d 1234, 1241 (Ala. 1997) (affirming trial court's finding that certain business "information . . . was confidential, proprietary, and protectable" despite that some of it "was available to the public," because it "was not easily obtainable, but rather was publicly available, if at all, only through expertise, purchase, investigation, or extensive research"); PERRITT, *supra* note 1, § 5:8 ("Evaluating the investment made by both plaintiff and defendant helps determine whether the defendant got a head start on development by a free ride on the plaintiff's confidential information. What is important is whether the defendant avoided the inconvenience of figuring out the trade secret for himself.").

[155] *See* POOLEY, *supra* note 3, § 5.01[1][b].

[156] *Id.*

[157] UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 538 (1985).

baseball analytics industry, such protection would likely extend to proprietary methods and techniques of collecting and presenting statistical data. Put differently, trade secret protection should, under the right circumstances, extend to an entity's choices as to (1) *what* data to collect, (2) *how* to collect it, and/or (3) *how* to present it.

Once again, BIS's development of advanced metrics for evaluating player defense provides a good illustration of the first two concepts above. BIS's "Plus/Minus System" seeks to answer the following question: "How many plays did [a given] player make above or below those an average player at his position would make?"[158] To that end, BIS explains that:

> [It] reviews videotape of every game in Major League Baseball. Every play is entered into the computer where [BIS] record[s] the exact direction, distance, speed, and type of every batted ball. Direction and distance is done on a computer screen by simply clicking the exact location of the ball on a replica of the field shown on the screen. Speed is recorded as soft, medium, and hard, while types of batted balls are groundball, liner, fly, fliner [i.e., a batted ball that is somewhere between a fly and a liner], and bunt.[159]

This data is sorted and totaled by a computer program,[160] which calculates the frequency with which each type of batted ball is converted into an out.[161] Then, roughly stated, Player X's plus/minus rating is determined by adding or subtracting credit based on the frequency with which he turns each type of batted ball into an out, as compared to the frequency league-wide at his position (with one adjustment for each position to improve accuracy).[162]

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[158] DEWAN, *supra* note 135, at 83 (emphasis omitted).

[159] *Id.*

[160] This program (or at least aspects of it) would likely also be entitled to trade secret protection. *See infra* Part II.B.3.

[161] DEWAN, *supra* note 135, at 83.

[162] *Id.* The example used in *The Fielding Bible* provides a more complete explanation:

> The computer totals all softly hit groundballs on Vector 206, for example, and determines that these types of batted balls are converted into outs by the shortstop only 26% of the time. Therefore, if, on this occasion, the shortstop converts a slowly hit ball on Vector 206 into an out, that's a heck of a play, and it scores at +.74. The credit for the play made, 1.00, minus the expectation that it should be made, which is 0.26. If the play isn't made . . . it's -.26 for the shortstop.
>
> . . . .
>
> Add up all the credits the player gets and loses based on each and every play when he's on the field and you get his plus/minus number

In this example, BIS determined *what* data to collect: "direction, distance, speed, and type of every batted ball" over the course of the entire MLB season. BIS also determined *how* to collect it: by reviewing "videotape of every game," "clicking the exact location of the ball on a replica of the field shown on the [computer] screen," and entering into the computer one of three speeds and one of five types for each batted ball.

These choices collectively constitute a *method* of statistical collection that—had it not been published, of course—would likely be a strong candidate for trade secret protection. Assuming *arguendo* reasonable secrecy was maintained prior to publication, BIS's statistical collection method underlying the Plus/Minus System has all the remaining hallmarks of a trade secret: potential economic value in the form of, e.g., future sales of a book illustrating the Plus/Minus System; increased goodwill in the marketplace; and lucrative future contractual relationships with MLB clubs, sports agents, media entities, fantasy baseball platforms, game companies, and private individuals.[163] Prior to publication, this method of data collection, and the Plus/Minus System itself, likely would have been entitled to trade secret status.[164] Certainly, a competitor obtaining this information pre-publication could have gained a significant advantage by using it to preempt BIS's position in the baseball analytics marketplace.[165]

(rounded to the nearest integer). *Id.*

[163] *See id* at 399.

[164] POOLEY, *supra* note 3, § 4.05[1] ("Even where the secret is immediately apparent on marketing of a product, there can still be value in advance of that event, by allowing its holder to 'steal a march on competitors.'"(footnote omitted)).

[165] *See id.* Others have developed similar methods for calculating players' defensive abilities. For example, Ultimate Zone Rating (UZR), which was devised by baseball statistician Mitchel Lichtman, "measures a fielder's success at getting to balls determined to be in his 'zone' of the playing field." Alex Remington, *Everything You Wanted to Know About UZR*, BIG LEAGUE STEW, Jan. 7, 2010, http://ca.sports.yahoo.com/mlb/blog/big_league_stew/post/Everything-you-always-wanted-to-know-about-UZR?urn=mlb-212311. Ultimate Zone Rating, similarly to BIS's Plus/Minus System, involves dividing the field up into zones and then determining, through a complex mathematical formula, a "player's defensive impact on his team in terms of the runs he personally prevents." *Id.* Because the method for collecting relevant statistics for calculating UZR, like that for BIS's Plus/Minus System, has been published, such method would likely not be entitled to trade secret protection. By contrast, the statistical compilations that are created pursuant to these methods likely would be, for the reasons discussed above. However, new statistical collection methods that alter or build upon those used for the Plus/Minus System or UZR in a more than "trivial" way would be entitled to trade secret protection if kept

Even post-publication, certain aspects of BIS's statistical collection method for the Plus/Minus System may be entitled to trade secret protection. For example, to the extent BIS (or another company with similar capabilities) has improved upon existing techniques for reviewing tape and recording data, thus speeding up the process and/or reducing costs, such techniques should qualify for trade secret status (again, assuming secrecy).[166] Likewise, if BIS has since altered its data collection methods—e.g., by collecting additional or different statistics or by recording them differently—these altered methods may be eligible for trade secret protection.[167] Lastly, BIS's employees "have received extensive training" for reviewing video and recording data to ensure "great consistency in the information."[168] Because they likely provide a competitive advantage, the training materials used and any information disclosed in connection with such trainings may also be proper subjects of trade secret protection.[169]

X-Info, a proprietary product marketed by STATS LLC (STATS), provides a useful example of how the *presentation* of data might qualify for trade secret protection.[170] STATS markets X-Info as "provid[ing] the most detailed events that occur in a game and integrat[ing] them with traditional pitch-by-pitch

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reasonably secret. *See* POOLEY, *supra* note 3, § 4.05[1].

[166] *See, e.g.*, Woven Elecs. Corp. v. Advance Grp., Inc., No. 89-1580, 89-1588, 1991 WL 54118, *7 (4th Cir. May 6, 1991) (holding that modifications and improvements to processes already in the public domain were protectable as trade secrets).

[167] *See, e.g.*, Vermont Microsys., Inc. v. Autodesk, Inc., 88 F.3d 142, 149 (2d Cir. 1996) (applying California law) (rejecting defendant's argument that no trade secret existed where plaintiff's technique was simply a variation of a well-known technique, but variation "contributed, if only in small part, to [the product's] commercial attractiveness"); *see also* POOLEY, *supra* note 3, § 4.05[1] (noting that a "slight variation" from what is generally known will be entitled to trade secret protection so long as the "incremental value" is more than "trivial").

[168] Joe Hamrahi, *Defensive Doctrine: An Interview with John Dewan*, BASEBALL DIG. DAILY, Mar. 24, 2006, http://baseballdigestdaily.mlblogs.com/2006/03/25/defensive-doctrine-an-interview-with-john-dewan.

[169] *See, e.g.*, M. Bryce & Assocs., Inc. v. Gladstone, 319 N.W.2d 907, 911–12 (Wis. Ct. App. 1982) (holding that information disclosed during seminar regarding design of a management information system qualified for trade secret protection); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. d (1995) ("A trade secret can relate to . . . the know-how necessary to perform a particular operation.").

[170] *X-Info: Major League Baseball*, STATS, http://www.stats.com/pdfs/Xinfo_MLB.pdf (last visited Nov. 20, 2011). STATS's collection and compilation of data would likely be entitled to trade secret protection for the same reasons discussed in connection with BIS. *See supra* Part II.B.1.

coverage to create never seen before content and information."[171] STATS' X-Info promises "an unparalleled package of hitting, pitching, defensive and base running statistics" that is "imported direct to your database system."[172] To the extent STATS protects (through non-disclosure agreements and/or restrictive licenses) *what* information it collects, *how* it collects that information, and *how* that information is presented to the end-user, all of these *methods* should qualify as trade secrets.

The last of these items—STATS' methods of presenting its baseball analytics—may not seem like an obvious candidate for trade secret protection. Generally, "information intended for sale or constituting the output of the business" will not qualify for protection.[173] Under certain circumstances, however, trade secret protection will be extended to an end-product where the terms of the sale or license "preserve[s] the secrecy in the product itself."[174] Because trade secret protection indisputably extends to "methods" and "designs,"[175] and X-Info is presumably provided under a license that maintains relative secrecy, STATS' method of presenting its baseball analytics may also be entitled to protection.[176]

Data collection and presentation methods developed by other companies or baseball clubs—such as "specific metrics they use to identify [batting] probabilities for [defensive] positioning"[177]—would likely receive similar treatment.

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[171] *See X-Info: Major League Baseball*, *supra* note 170.

[172] *Id.* The software (or at least aspects of the software) that permits STATS to perform these functions would likely be entitled to trade secret protection. *See infra* Part II.B.3.

[173] PERRITT, *supra* note 1, § 3:9.1[E].

[174] *Id.*

[175] *Id.* § 3:9.1[C]; POOLEY, *supra* note 3, § 4.02[1].

[176] *Cf.* State *ex rel.* Carr v. City of Akron, 112 Ohio St. 3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 55 (Ohio 2006) (extending trade secret protection to examinations for firefighter promotion where company and city "implemented numerous security measures to prevent public disclosure of these records, including requiring personnel in test development to sign a confidentiality agreement, prohibiting candidates from removing or copying the contents of the examination, and storing the examinations in a locked and secure facility.").

[177] Sam Borden, *Swallowed by a Shift*, N.Y. TIMES, Aug. 7, 2011 ("[M]ost were reluctant to reveal the specific metrics they use to identify probabilities for positioning, though it is clear that the basic spray chart, which plots the direction of balls a particular batter has hit, has transitioned from a defining document to only one piece of a complex puzzle.").

3. Computer Programs for Analyzing and Interpreting Data

In the baseball analytics field, computer programs are ubiquitous: among other functions, they compile and crunch numbers for analytics shops like BIS;[178] they import STATS' data to end-users of its X-Info product;[179] they provide platforms for companies and individuals engaged in fantasy baseball;[180] and they provide a means for comparing players or teams for purposes of prognostication, performance analysis, contract negotiation, or Hall of Fame eligibility.

A primary example of the latter species of computer program is PECOTA, an acronym for "Player Empirical Comparison and Optimization Test Algorithm."[181] Baseball Prospectus describes PECOTA as follows: "PECOTA is BP's proprietary system that projects player performance based on comparison with thousands of historical player-seasons. PECOTA analyzes similarities with past player-seasons based not only on rate statistics, but also height, weight, age, and many other factors."[182] PECOTA consists of "formulas and algorithms" that create "essentially a separate career path for every player in major league history" and then generate "comparability scores," i.e., "the mechanism by which [the program] picks and chooses from among those career paths."[183] Nate Silver "developed PECOTA using spreadsheets" and later "sold to BP for an equity share in the company."[184] A recent BP report indicates that BP's current version of PECOTA consists of "a computer program."[185]

Baseball analytics computer programs like PECOTA, and perhaps PECOTA itself, typically consist of two different forms: "source code" and "object code."[186] Generally speaking, source

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[178] *See supra* Part II.B.2.

[179] *See id.*

[180] *See* Fantasy Baseball Software & Stat Service*s*, FANTASY BASEBALL HUB 2011, http://www.fantasybaseballhub.com/software_stat_services.html (last visited Nov. 29, 2011) (listing twenty-seven different sources for fantasy baseball software and statistics).

[181] *See* Glossary: PECOTA, BASEBALL PROSPECTUS, http://www.baseballprospectus.com/glossary/index.php?context=6&category=true (last visited Aug. 9, 2011).

[182] *Id.*

[183] Lederer, *supra* note 52.

[184] Stambor, *supra* note 114, at 35–36.

[185] Colin Wyers, *Reintroducing PECOTA: Whatever Happened to the Man of Tomorrow?*, BASEBALL PROSPECTUS, Sept. 28, 2010, http://www.baseballprospectus.com/article.php?type=2&articleid=12102.

[186] *See id.*

code is "human-readable program language" written by a programmer that "includ[es] English words and common mathematical notations."[187] Object code, by contrast, is "machine-readable language, usually in binary number form," that tells the computer what to do by creating "electrical impulses which operate the computer central processing unit (CPU)."[188] Source code is converted into the machine-readable object code through the use of another computer program called a "compiler."[189] The *Silvaco* court analogized the relationships among source code, object code, and the compiler to the use of a recipe (source code) to bake (compile) a pie (object code).[190] Source code can generally be "understood [or] altered" by "skilled programmers," whereas object code "is very difficult, if not impossible, to comprehend by visual inspection."[191]

This distinction is paramount for purposes of trade secret law. While "[b]oth source and object codes are [generally] protected by a copyright on the program," source code is more likely than object code to qualify for trade secret protection.[192] This is because the software that is sold, licensed, or made public tends to be in object code form, so that it can be run on a computer right away.[193] Given that object code is difficult, if not impossible, for a human to decipher, its public release generally will not destroy trade secret protection for the source code.[194] Thus, most entities do not release source code, preferring instead to keep it as a trade secret, because if it "is distributed or sold . . . it"—unlike object code—"can be understood, altered or misappropriated."[195]

Lastly, even though "information intended for sale or constituting the output of the business" typically does not qualify for trade secret protection, in rare circumstances courts have

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[187] JAGER, *supra* note 3, § 9:11.

[188] *Id.*

[189] *Id.*

[190] Silvaco Data Sys. v. Intel Corp., 109 Cal. Rptr. 3d 27, 34 (Cal. Dist. Ct. App. 2010) ("The source code is the recipe from which the pie (executable program) is baked (compiled)."), *overruled on other grounds by* Kwikiset Co. v. Benson, 246 P.3d 877 (Cal. 2011).

[191] JAGER, *supra* note 3, § 9:11.

[192] *Id.*

[193] *Id.*; PERRITT, *supra* note 1, § 3:9.1[C].

[194] *See, e.g.*, Barr-Mullin, Inc. v. Browning, 424 S.E.2d 226, 229 (N.C. Ct. App. 1993); Q-Co Indus., Inc. v. Hoffman, 625 F. Supp. 608, 617–18 (S.D.N.Y. 1985); *see also* JAGER, *supra* note 3, § 9:11 ("Public disclosure of an object code . . . should have less impact on the viability of any trade secrets embodied in the program.").

[195] JAGER, *supra* note 3, § 9:11.

extended such protection to software in object code form where the software program itself is kept reasonably secret.[196] There is no reason why these principles should not apply to baseball analytics computer programs.

4. Other Baseball Analytics Trade Secrets

The foregoing list of potential trade secrets in the baseball analytics field is, of course, non-exhaustive. Because a trade secret can be "virtually anything you wouldn't want the competition to know,"[197] the possibilities are endless. For example, sports agents may have trade secret rights in strategies and data used in negotiating player contracts.[198] Likewise, baseball analytics shops (such STATS, BP, or BIS) may have trade secret rights in information relating to customers and pricing.[199] Even if an entity is not sure that information qualifies for trade secret protection, it should err on the side of caution and take reasonable measures to protect secrecy, including through the use of appropriate contracts with employees, contractors, and business partners. A brief overview of a number of potentially important contractual protections follows.

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[196] PERRITT, *supra* note 1, § 3:9.1[E]; *see also* Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655, 664 (4th Cir. 1993) (finding trade secret in object code where company "took reasonable precautions to keep the Tunnel System object code secret," including "licens[ing] only two complete versions of the Tunnel System object code and extract[ing] promises from both recipients that they would neither copy nor transfer the program, nor use the program for any purpose other than their own construction or engineering projects" and "prevent[ing] unauthorized access to both the in-house and licensed versions of the software by using a system of passwords"); Data Gen. Corp. v. Grumman Sys. Support Corp., 825 F. Supp. 340, 359 (D. Mass. 1993) (finding trade secret in software program where owner took reasonable steps to guard the secrecy of program itself, such as by "requir[ing] customers to sign an agreement which, among other things, prohibited unauthorized disclosure to third parties").

[197] POOLEY, *supra* note 3, § 4.02[2].

[198] *See id.* (noting that trade secret protection extends to an "enormous amount of data within an organization," such as "business methods" and "strategic plans"); *see also* Competitive Techs. v. Fujitsu Ltd., 286 F. Supp. 2d 1118, 1147 (N.D. Cal. 2003) (holding that "information about the existence of negotiations" may constitute a trade secret).

[199] POOLEY, *supra* note 3, § 4.02[2] n.17 (noting that "pricing information" may qualify for trade secret protection if kept reasonably secret); *see also id.* § 4.02[2][a] (discussing protection for customer-related information and stating that "specialized information about customers or potential customers—such as special needs, purchasing history, personnel and the like—is typically protectable as a trade secret, assuming it meets the standards of secrecy and value").

III. OVERVIEW OF PRIMARY CONTRACTUAL PROTECTIONS FOR BASEBALL ANALYTICS TRADE SECRETS

A. Agreements Establishing Trade Secret Ownership

In order to have standing to seek legal protection for a trade secret in court, an entity must be able to show "ownership or some substantial possessory interest" in that secret.[200] Thus, it must take affirmative steps—such as entering into appropriate contracts—to ensure it actually owns the information it seeks to protect.

This is because the "vague and ambiguous" common law provides only limited protection to entities whose employees or independent contractors are engaged in invention, research, and development.[201] For example, "[t]he common law accords to an employer ownership of inventions and discoveries made by an employee [or independent contractor] only when the information is the product of the employee's [or contractor's] assigned duties."[202] When an invention or discovery is made outside the scope of employment, but was created using the employer's equipment and supplies or during work hours, the employer is entitled only to a "shop right," a "royalty-free license to use, but not to transfer, the invention."[203] In such circumstances, the employee will usually be prohibited from disclosing or using the discovery to the employer's detriment only for the duration of his or her employment.[204] Thereafter, the employer will have no trade secret rights in the discovery.[205]

To create certainty where the common law does not, entities engaged in baseball analytics should thus consider using appropriate invention assignment and/or works-made-for-hire

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[200] *Id.* § 5.01[1].

[201] *See* Ingersoll-Rand Co. v. Ciavatta, 542 A.2d 879, 886 (N.J. 1988) ("[C]ommon-law doctrines [are] vague and ambiguous in defining the rights of employers and employees in employees' inventions, most employers use written contracts to allocate invention rights. Such contracts requiring an employee to assign to the employer inventions designed or conceived during the period of employment are valid.") (citations omitted).

[202] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. g (1995); *see also* POOLEY, *supra* note 3, § 5.01[2][b] (noting that the "same rule obtains for independent contractors").

[203] POOLEY, *supra* note 3, § 5.01[2][c].

[204] *See, e.g.*, Avtec Sys., Inc. v. Peiffer, 805 F. Supp. 1312, 1321–22 (E.D. Va. 1992).

[205] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. e.

agreements. Invention assignment agreements providing for employer ownership of all discoveries made by the employee or contractor for the period of employment are generally enforceable.[206] Likewise, because "copyright and trade secret protection may exist side by side" and "provide broader and more effective protection than either alone,"[207] entities with potential baseball analytics trade secrets would be well served to consider using works-made-for-hire agreements.[208] Absent such an agreement, independent contractors may claim copyright protection for their works, preventing the employer from asserting trade secret rights in any information therein.[209]

B. Non-Disclosure Agreements

Assuming there is no question of ownership, a non-disclosure agreement (NDA) is the first line of defense for any entity seeking to protect its trade secrets. One leading commentator aptly explains their importance: "[NDAs] are at the core of trade secret practice. They fundamentally define the nature of the information as valuable and of the relationship as a trust. In this way they protect against misunderstanding, helping to prevent disputes and ensuring that remedies will be available for an unauthorized use."[210]

Indeed, as one commentator notes, a primary "advantage of [NDAs] . . . is that breach of such agreements gives the employer a claim for breach of contract, in addition to a claim for misappropriation . . . ."[211] This is important because, as discussed above, in many jurisdictions NDAs can provide legal protection to

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[206] *Id.* § 42 cmt. g ("[A]bsent an applicable statutory prohibition, agreements relating to the ownership of inventions and discoveries made by employees during the term of the employment are generally enforceable according to their terms"); *but see* POOLEY, *supra* note 3, § 5.01[2][e] n.46 (listing state statutes that "render unenforceable any provision requiring the assignment of an invention that both is unrelated to the employer's actual business and was conceived without contribution of resources by the employer."). For a good example of language to include in an invention assignment agreement, see *id.* § 8.03[3].

[207] POOLEY, *supra* note 3, § 3.02[4].

[208] PERRITT, *supra* note 1, § 6:5.1[C] ("[G]reater certainty is achievable through work made for hire agreements. . . . [T]here is no reason that work made for hire agreements may not cover trade secrets . . . as well as copyrights.").

[209] *See* POOLEY, *supra* note 3, § 3.02[4].

[210] *Id.* § 8.02[1].

[211] PERRITT, *supra* note 1, § 4:13.3[A].

"confidential" or "proprietary" information that does not qualify as a trade secret and thus is unprotected by the UTSA.[212] They may also allow for a longer period in which to file claims, to the extent that state statutes of limitations are longer for contract actions than for UTSA actions.[213]

Because a UTSA claim will often provide more expansive remedies than a contract claim,[214] however, a NDA may be even more valuable insofar as it "enhance[s] protectability [of trade secrets] in litigation."[215] For example, a written NDA may constitute evidence "that a particular matter qualifies as a secret" or that the employer "made reasonable efforts to protect confidential information," both of which are required to establish a viable UTSA claim.[216] Conversely, the absence of a NDA "may indicate a lack of such reasonable efforts" or "the nonexistence of a confidential relationship," either of which would defeat a UTSA claim.[217]

Non-disclosure agreements typically contain the following elements: (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 party; and (4) a requirement to obtain the employer's authorization before making any such use or

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[212] *See supra* notes 106–109 and accompanying text.

[213] *See, e.g.*, Memry Corp. v. Kentucky Oil Tech., N.V., No. C-04-03843 RMW, 2007 U.S. Dist. LEXIS 73311, at *24–25, 39 (N.D. Cal. Sept. 20, 2007) (granting summary judgment on time-barred trade secret misappropriation claim with three-year statute of limitations, but denying summary judgment on contract claim for misuse of confidential information with four-year statute of limitations).

[214] For example, the UTSA may provide a plaintiff with punitive damages and attorney's fees, see UNIF. TRADE SECRETS ACT § 3, 4 U.L.A. 633–34, 624 (1985). By contrast, in the absence of statutory authorization, neither remedy is typically recoverable in a contract action. *See* 22 AM. JUR. 2D *Damages* § 574 (2005) ("Punitive damages are generally not available under a contract theory"); 20 AM. JUR. 2D *Costs* § 55 (2005) (discussing the "American rule" applied in most states, which provides that "each party to litigation must bear its own attorney's fees and may not recover those fees from an adversary.").

[215] POOLEY, *supra* note 3, § 4.04[2]; *see also* Structural Dynamics Research Corp. v. Eng'g Mechs. Research Corp., 401 F. Supp. 1102, 1117 (E.D. Mich. 1975) ("Although SDRC did not use the ultimate in policing measures, the professional caliber of its employees, and the nature of its development work made heavy-handed measures unnecessary. Moreover, the confidential nature of development work was specifically called to each employee's attention in his individual confidential disclosure agreement.").

[216] POOLEY, *supra* note 3, § 8.02[2].

[217] *Id.*

disclosure.[218] NDA provisions can be made part of employment and independent contractor agreements, vendor or supplier agreements, and licensing agreements, among other contracts.[219] So long as they cover protectable trade secrets, NDAs need not contain any durational limitation; a duty not to disclose can continue for the life of the trade secret(s) the NDA seeks to protect.[220]

Major League Baseball clubs use NDAs in connection with the employment of front-office sabermetricians.[221] Other entities in the baseball analytics field should likewise consider using appropriate NDAs to protect their trade secret assets.

C. Noncompetition Agreements

The last type of trade secret-protective contract that this article addresses, noncompetition agreements, are the subject of a "rich body of law" that is "alive with controversy."[222] It would take a lengthy article to address the full scope of these issues and how

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[218] *See* JAGER, *supra* note 3, § 13:3. For examples of typical NDA language, see *id.*, app. B1 and POOLEY, *supra* note 3, at 8.02[5].

[219] JAGER, *supra* note 3, § 13:3; *see also* POOLEY, *supra* note 3, § 8.06[1] (briefly discussing licensing of trade secrets and pointing toward other sources for comprehensive treatment of the subject) (citing DRATLER, LICENSING OF INTELLECTUAL PROPERTY (Law Journal Seminars-Press 2005) (1994); MILGRIM ON LICENSING (1991)).

[220] JAGER, *supra* note 3, § 13:3 (citing Sigma Chem. Co. v. Harris, 586 F. Supp. 704, 710 (E.D. Mo. 1984) ("[A]n employee has an absolute, temporally unlimited duty not to disclose his/her employer's trade secrets and thus the absence of a time limit (in an NDA) is not a defect.")); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 reporter's n. cmt. d (1995).

> The cases requir[ing] durational and geographic limitations (in NDAs) often reflect the concern that broad restrictions on use or disclosure will unfairly inhibit employee mobility. The appropriate inquiry to balance the legitimate interests of the employer and the employee, however, is whether the information is protectable as a trade secret. *Id.*

[221] *See* Robert Cribb, *Sabermetrics: Stats Guru Advising Blue Jays*, TORONTO STAR, Mar. 20, 2010, *available at* http://www.thestar.com/sports/baseball/mlb/bluejays/article/782596--sabermetrics-stats-guru-advising-blue-jays (noting the Blue Jays' hiring of Tom Tango, "a self-taught expert in the science of baseball statistics," and that Tango was subject to a non-disclosure agreement with respect to "Jays-specific intelligence"); Thomas Gorman, *Prospectus Q&A: Mark Johnson*, BASEBALL PROSPECTUS, May 11, 2005, http://baseball.sportsprospectus.com/article.php?articleid=4024&mode=print&nocache=1308297802 (noting that Mark Johnson, former Cardinals' Senior Analyst of Baseball Development, was subject to non-disclosure agreement) (last visited Nov. 16, 2011).

[222] POOLEY, *supra* note 3, § 8.04[1].

they might apply to the baseball industry. Thus, this article will stick to a few major points.

Noncompetition agreements "limit an employee's right to compete following termination of employment" and are an effective method of protecting trade secrets.[223] If 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, the former employer can stop him without having to face the "challenge and uncertainty of litigation to prove trade secrets."[224]

Certain states (e.g., California) prohibit these agreements outright, except where necessary to protect trade secrets.[225] In states where they are not prohibited, noncompetition agreements will be generally enforced if they are "reasonable," i.e., (1) "the restriction is ancillary to a legitimate business purpose or agreement;" (2) "there is a legitimate business interest to protect"; and (3) "the restrictions are reasonable with respect to subject matter, time, and territory."[226]

The existence of an employment relationship and the desire to protect trade secrets will usually satisfy the first and second requirements.[227] The third requirement is fact intensive, but is ultimately a question of law for the court.[228] With respect to duration, "one to two years seems to be the maximum period [of noncompetition] most courts will approve."[229] In industries in which technological advances occur frequently or data quickly becomes stale—such as baseball analytics—even one year may be too long.[230] Geographical restrictions are generally deemed

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[223] *Id.*

[224] *Id.*

[225] JAGER, *supra* note 3, § 13:4 nn.49–51 (citing cases from South Dakota, California, and Oklahoma, and noting other states where noncompetition agreements are void or disfavored); *see also* CAL. BUS. & PROF. CODE § 16600 (West 2005) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."). California employers beware: even *attempting* to impose or enforce a noncompetition agreement that violates section 16600 can result in liability for the employer for engaging in unfair competition. *See, e.g.*, Application Grp., Inc. v. Hunter Grp., Inc., 72 Cal. Rptr. 2d 73, 89–90 (Cal. Ct. App. 1998).

[226] JAGER, *supra* note 3, § 13:4.

[227] *Id.*

[228] *Id.* § 13:7.

[229] POOLEY, *supra* note 3, § 8.04[3].

[230] *See id.* n.15 (citing Unisource Worldwide, Inc. v. Carrara, 244 F. Supp. 2d 977, 982–83 (C.D. Ill. 2003); Earthweb, Inc. v. Schlack, 71 F. Supp. 2d 299, 313

reasonable if they are limited to areas in which the employer's goodwill will be affected.[231] Thus, if a business "has no effective borders"—e.g., an internet-based company with a national audience—an agreement with no territorial limit may be enforced.[232] Finally, the reasonable subject matter requirement will usually be met if the restriction on competition applies "only in the subject areas in which the employee actually worked."[233]

As with NDAs, MLB clubs use noncompetition provisions in their agreements with front-office sabermetricians.[234] Likewise, MLBPA's regulations governing player agents[235] contemplate the use of noncompetition agreements by and among player agents and their employees, and require that such agreements adhere to the common law reasonableness standards discussed above.[236] Other entities engaged in baseball analytics should also consider the merits of noncompetition agreements as another means to protect trade secrets.[237]

(S.D.N.Y. 1999)).

[231] POOLEY, *supra* note 3, § 8.04[3].

[232] *Id.*

[233] *Id.*

[234] Lederer, *supra* note 52 (noting that St. Louis Cardinals senior analyst Mitchel Lichtman had "a limited non-compete clause in [his] contract").

[235] MLBPA, as the exclusive bargaining agent for MLB players under federal labor law, has authority to set eligibility requirements and rules for player agents and agencies. *See* Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 815–16 (2006) ("Players associations in the major professional sports are unions that play a major role in the regulation of the agent industry."); Richard T. Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV. 355, 362–67 (2007) (discussing application of federal anti-trust law labor exemption to union regulation of agents of professional athletes); Jason Gershwin, Comment, *Will Professional Athletes Continue to Choose Their Representation Freely? An Examination of the Enforceability of Non-Compete Agreements Against Sports Agents*, 5 U. PA. J. LAB. & EMP. L. 585, 589 (2003) ("[T]he players' associations of the [major] professional sports leagues . . . have also utilized their legal status as the exclusive bargaining representatives for the athletes in their leagues to establish rules to monitor the agents.").

[236] *See* MLBPA Regulations Governing Player Agents, § 4(L)(2), Oct. 1, 2010, *available at* http://reg.mlbpaagent.org/Documents/AgentForms/Agent%20Regulations.pdf.

[237] The enforceability of noncompetition agreements and the other types of contracts discussed above are subject to the "usual requirements for contract formation, including . . . consideration." PERRITT, *supra* note 1, § 6:5.1. Significantly, only some jurisdictions hold that mere continued employment constitutes sufficient consideration for a NDA, noncompetition agreement, or imposition of workplace policies requiring confidentiality. *See* Asmus v. Pac. Bell, 999 P.2d 71, 76 (Cal. 2000) ("California law permits employers to implement policies that may become unilateral implied-in-fact contracts when employees accept them by continuing their employment."); Millard Maint. Serv.

CONCLUSION

In the conclusion to his 1998 volume *Legal Bases: Baseball and the Law*, Professor Roger Abrams gives "passing mention" to several legal issues that he anticipated would "require additional attention in the years to come."[238] Intellectual property topped his list. Noting that "[o]ne of the most profitable aspects of the baseball business has nothing to do with action on the diamond," Professor Abrams predicted that "[a]s baseball goes global . . . intellectual property issues will proliferate."[239] Although Professor Abrams did not specifically mention trade secrets, there can be no doubt that "trade secret protection is an important part of intellectual property."[240] This is especially true in light of the rapidly "emerging technologies"[241] and analytics that allow us to analyze the game—and the business—of baseball more effectively.

Among these emerging technologies is Sportvision's FIELDf/x system,[242] somewhat breathlessly described as "the holy grail of baseball metrics."[243] A 2009 *New York Times* article described it

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Co. v. Bernero, 566 N.E.2d 379, 384, (Ill. App. Ct. 1990) ("In Illinois, continued employment constitutes adequate consideration for a post-employment covenant not to compete."); Aries Info. Sys., Inc. v. Pac. Mgmt. Sys. Corp., 366 N.W.2d 366, 369 (Minn. Ct. App. 1985) (holding that argument that NDAs "were invalid for lack of separate consideration" was "meritless"); Garcia v. Laredo Collections, Inc., 601 S.W.2d 97, 99 (Tex. Civ. App. 1980) ("Texas courts have held that continued employment is sufficient consideration for a covenant not to compete."). Many other jurisdictions hold to the contrary, invalidating agreements that are unsupported by additional consideration. PERRITT, *supra* note 1, § 6:5.1 (citing cases requiring additional consideration for noncompetition agreements); JAGER, *supra* note 3, § 13:5; *see also* Ferdinand S. Tinio, Annotation, *Sufficiency of Consideration for Employee's Covenant Not to Compete, Entered into After Inception of Employment*, 51 A.L.R.3D FED. 825, § 4(a) (citing additional cases from Oregon, Texas, West Virginia, Wisconsin, and Wyoming). In these states, contracts that seek to protect trade secrets should be executed at the beginning of employment or in connection with "some watershed event in which additional consideration can be offered, such as a promotion" and/or salary increase, in order to ensure enforceability. POOLEY, *supra* note 3, § 8.03[1].

[238] ABRAMS, *supra* note 18, at 203.

[239] *Id.*

[240] *See* Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 180 (7th Cir. 1991).

[241] JAGER, *supra* note 3, § 1:1.

[242] *FIELDf/x Technology*, SPORTVISION, http://sportvision.com/base-fieldfx.html (last visited Nov. 14, 2011).

[243] Kim Bhasin, *FIELDf/x: The Amazing Tracking Technology That's About To Change Baseball Forever*, BUS. INSIDER (Mar. 31, 2011, 12:58 PM), http://www.businessinsider.com/fieldfx-sportvision-technology-baseball-tracking-

as:

> A new camera and software system in its final testing phases [that] will record the exact speed and location of the ball and every player on the field, allowing the most digitized of sports to be overrun anew by hundreds of innovative statistics that will rate players more accurately, almost certainly affect their compensation and perhaps alter how the game itself is played.[244]

The same article noted that the existing "systems to track how many balls are hit to each area of the field, where fielders are positioned and whether balls are hit hard"—like those developed by BIS and STATS—"rely on eyeballed estimates."[245] By contrast, "[t]he new camera-tracking system will assess it all to the inch,"[246] through the use of "four cameras perched high above the field" that "gather[ ] more than 2.5 million records per game."[247]

As of the 2011 season, FIELDf/x had been installed in San Francisco's AT&T Park and as many as four other venues (Yankee Stadium, PETCO Park in San Diego, Kauffman Stadium in Kansas City, and Tropicana Field in St. Petersburg), and could be in all thirty MLB parks by 2012.[248] Another article highlighted the probable effects of this new technology: "No longer tethered to traditional defensive tools, managers will be able to use the new data to optimize player positioning on the field. Scouts will be able to quantitatively analyze an opposing shortstop's defensive weaknesses. Front offices will be able to value free agents more accurately."[249]

Major League Baseball's and Sportvision's plan to make FIELDf/x data available to all thirty clubs[250] would perhaps limit the availability of trade secret protection for that information. But the sheer "mountain of data" (about two terabytes' worth per game)[251] to be generated, the required "[s]oftware and artificial-intelligence algorithms," the "comparative tools to make the data

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[244] Alan Schwarz, *Digital Eyes Will Chart Baseball's Unseen Skills*, N.Y. TIMES, July 10, 2009, at A1.

[245] *Id.*

[246] *Id.*

[247] Ira Boudway, *Baseball: Running the New Numbers*, BLOOMBERG BUSINESSWEEK, (Mar. 31, 2011, 5:00 PM), http://www.businessweek.com/magazine/content/11_15/b4223072802462.htm.

[248] *See id.*

[249] Bhasin, *supra* note 243.

[250] Boudway, *supra* note 247.

[251] *Id.*

come alive,"[252] and the hardware underlying the system all could provide superb fodder for analysis of trade secret (and other intellectual property) issues.

As the Houston Astros' Paul Ricciarini, who has more than thirty-five years of scouting experience, explained: "It's the same diamond and same distances between the bases, but the way the game changes from generation to generation, you have to adapt with it."[253] So, too, with writing about baseball and the law. Hopefully, new advances in baseball analytics will spark more legal scholarship discussing the intersection of trade secret law—or perhaps other intellectual property issues—and our national pastime.

[252] Schwarz, *supra* note 244.
[253] *Id.*