

THE VALUE IN SECRECY

Camilla A. Hrdy*

Trade secret law is seen as the most inclusive of intellectual property regimes. So long as information can be kept secret, the wisdom goes, it can be protected under trade secret law, even if patent and copyright protections are unavailable. But keeping it a secret does not magically transform information into a trade secret. The information must also derive economic value from being kept secret from others. This elusive statutory requirement—called “independent economic value”—might at first glance seem redundant, especially in the context of litigation. After all, if information had no value, why would the plaintiff have bothered to keep it secret, and why would the parties be arguing over the right to use or disclose it? Surely, well-kept secrets that end up in court must be valuable.

That assumption is pervasive. But it is wrong. Secrecy does not demonstrate value. Even a company’s best-kept secrets might be commercially worthless if vetted against what is known in the rest of the industry. Nor does the decision to pursue litigation indicate value. Trade secret litigants have plenty of exogenous reasons for pursuing lawsuits that have little to do with information’s inherent value. Most importantly, “value” is not the statutory standard; the standard is economic value that comes specifically from secrecy.

Some federal courts have begun to call out weak assertions of independent economic value and, in the process, are redefining the role of this neglected statutory requirement. By analyzing this case law and drawing on insights from the larger field of intellectual property law, this Article generates a

* Professor of Intellectual Property Law, University of Akron School of Law; Affiliated Fellow, Information Society Project, Yale Law School; Visiting Scholar, Engelberg Center on Innovation Law & Policy, NYU School of Law. Thanks to Victoria Cundiff, Sharon Sandeen, Deepa Varadarajan, Tait Graves, Barton Beebe, Dan Brean, Michael Burstein, Chris Buccafusco, Rochelle Dreyfuss, Mike Gentithes, Deborah Gerhardt, Julia Haines, George Horvath, Jeanne Fromer, Julia Knight, Sonia Katyal, Vera Korzun, Mark Lemley, Dave Levine, Yvette Joy Liebesman, Orly Lobel, Ngozi Okidegbe, Michael Pollack, Stefan Padfield, Michael Risch, Elizabeth Rowe, Jason Schultz, Mike Schuster, Stewart Sterk, and Katherine Strandburg. Thanks also to those who provided comments at the Virtual Trade Secrets Workshop held on July 17, 2020, the 18th Annual Works-in-Progress Intellectual Property Colloquium at the Texas A&M University School of Law held virtually on February 13, 2021, the University of Akron School of Law’s Faculty Research and Development (FReD) Workshop held virtually on May 20, 2021, the Corporate Innovation & Legal Policy Colloquium at the University of San Diego School of Law held on October 13, 2021, and the Information Society Project Ideas Lunch held virtually at Yale Law School on January 20, 2022.

typology of “value failures” that can arise in any given trade secret dispute—amount failures, causation failures, type failures, and timing failures. Courts in trade secret cases should screen for value failures far more consistently than they currently do. Otherwise, courts risk giving trade secret status to mere confidential information. This leads to wasted court resources and has detrimental consequences for competition, innovation, speech, and employee mobility.

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INTRODUCTION

The conventional wisdom is that the primary requirement for owning a trade secret is secrecy. To some degree, this is true. Whether the information is a formula for a soft drink or a list of customers in need of frequent roof repairs, the primary step that would-be trade secret owners must take is to keep the information secret. They must ensure that it does not become widely known in the industry, and they must use “reasonable” secrecy precautions, such as locks, digital security, and nondisclosure agreements.¹ However, secrecy is not the be-all and end-all. To be a legally enforceable *trade* secret, the information must also possess a certain degree of economic value attributable to the fact that it is being kept secret from others.

This legal requirement is hardly a secret. It is contained in the plain language of the state and federal trade secret statutes, which provide that the claimed information must derive “independent economic value, actual or potential,” from not being known to others who could themselves obtain economic value from the information.² The requirement was also prominent in the common law, where, among other things, a trade secret had to give the holder “an opportunity to obtain an advantage over competitors who do not know or use it.”³ The law of trade secrecy has never protected mere secrets; it has always limited protection to secrets that confer some degree of economic advantage over others.

At a conceptual level, “independent economic value” performs an essential line-drawing function in trade secret law. It distinguishes mere secrets, which abound in human society, from trade secrets, which are treated as a form of intellectual property.⁴ And yet, historically, courts sitting in trade

1. See Camilla A. Hrdy & Sharon K. Sandeen, *The Trade Secrecy Standard for Patent Prior Art*, 70 AM. U. L. REV. 1269, 1287–91 (2021).

2. See 18 U.S.C. § 1839(3)(B); see also Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified as amended in scattered sections of the U.S.C.); UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 636–37 (2021); see also, e.g., Deepa Varadarajan, *The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1551 (2018); Joseph P. Fishman & Deepa Varadarajan, *Similar Secrets*, 167 U. PA. L. REV. 1051, 1063 (2019).

3. As explained herein, the common law concept of “competitive advantage” is the precursor for today’s requirement of “independent economic value.” RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939); see also *infra* notes 41–44 and accompanying text.

4. See also Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 311 (2008). But see Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 241 (1998). See generally *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (assessing trade secrets as innovation incentives and as potential alternatives to patents).

secret litigation have not closely scrutinized plaintiffs' assertions of independent economic value.⁵ Many courts recite the statutory language but do not assess value in any depth, focusing instead on the other statutory requirements—in particular, whether the plaintiff took reasonable measures to keep the information secret.⁶ Independent economic value, if it appears at all, is an afterthought, something that courts assume can be shown easily from circumstantial evidence, such as the time, money, and effort invested in developing the information.⁷ There is also a surprising paucity of law review articles on the subject, with only a few delving specifically into this particular doctrinal component of the law.⁸

It is not difficult to see why this is the case. Courts and commentators assume, not irrationally, that any information that ends up in court as the plausible subject of trade secret litigation has at least *potential* economic value sufficient to satisfy the statute. Why else would the plaintiff have bothered to take secrecy precautions?⁹ Why else would the plaintiff be going to court to defend the secret?¹⁰ Also, why else would the parties be arguing over the right to use or disclose it? Surely the information has potential value to someone. As one trade secret expert astutely observes, the common reasoning goes: “[A]fter all, if the information did not have value to the party now seeking the court’s aid in protecting it, that party would not be in court and if it did not have value to the party accused of misappropriating it the alleged misappropriation would not have occurred.”¹¹

5. See 1 ROGER M. MILGRIM & ERIC E. BENSON, MILGRIM ON TRADE SECRETS § 1.07A (Matthew Bender & Co. 2020) (1967); ELIZABETH A. ROWE & SHARON K. SANDEEN, CASES AND MATERIALS ON TRADE SECRET LAW 146 (3d ed. 2021); Eric E. Johnson, *Trade Secret Subject Matter*, 33 HAMLINE L. REV. 545, 557 (2010); Michael Risch, *Trade Secret Law and Information Development Incentives*, in THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH 152, 166–67 (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011); Camilla A. Hrdy & Mark A. Lemley, *Abandoning Trade Secrets*, 73 STAN. L. REV. 1, 31–41 (2021).

6. See *infra* notes 195–202 and accompanying text.

7. See *infra* notes 121–25 and accompanying text.

8. But see Johnson, *supra* note 5, at 556–57, 567–73 (positing economic value as a particularly important component of trade secret subject matter); Eric R. Claeys, *The Use Requirement at Common Law and Under the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 583, 587, 613–14 (2010) (discussing economic value as a replacement for the common law’s use requirement); Hrdy & Lemley, *supra* note 5, at 31–41 (arguing that economic value plays a crucial role in setting the expiration date for a trade secret); see also Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 493, 524–26 (2010) (discussing the drafting history of economic value); Charles Tait Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 GEO. L.J. 1337, 1407 (2021) (suggesting that “revisiting” economic value provides one way to address overreliance on trade secrecy in nontraditional contexts).

9. See Deepa Varadarajan, *Trade Secret Precautions, Possession, and Notice*, 68 HASTINGS L.J. 357, 375 (2017) (explaining the view that “plaintiff’s secrecy precautions are circumstantial evidence of . . . the information’s independent economic value”).

10. See Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 697–98 (1980) (“[T]he plaintiff apparently thinks the secret has value, for he is willing to invest in the litigation.”).

11. Victoria A. Cundiff, *A Trade Secrets Crash Course 2019: What to Learn from Disputes over Driverless Cars, Data Analytics, and More (July 5, 2019)*, in TRADE SECRETS 2019: WHAT EVERY LAWYER SHOULD KNOW 35, 73 (Victoria A. Cundiff ed., 2019) (noting

This assumption is pervasive, but wrong. Independent economic value cannot be presumed from the mere fact that the plaintiff kept information secret, or from the mere fact that the plaintiff is suing to stop another from using or disclosing the information. Trade secret plaintiffs have plenty of exogenous reasons for pursuing litigation that have little to do with information's inherent value. Possible motivations include strategically harassing potential competitors, threatening litigation to deter a star employee from leaving, or acting on a desire to prevent the leakage of embarrassing facts.¹² Although there are some external limits on trade secrecy's ability to shield information that the public needs to know—such as a new federal whistleblower provision¹³ and a sliver of First Amendment protection that can be triggered when trade secret laws prohibit disclosure of information of high public interest¹⁴—independent economic value is the only *internal* limit on protection for information that does not have the right amount or the right kind of value. It tells us that some of this information is just not a trade secret at all. Moreover, independent economic value applies in every case, not just in cases that interest the public at large. “Value failures,” as this Article calls them, can arise in disputes over all sorts of confidential information. The universe of secrets affected is vast, and the policy considerations are diverse.

In recent years, some federal courts have grown skeptical of the type and quality of information asserted to be trade secrets and have begun to reference independent economic value as a limiting principle.¹⁵ These decisions have challenged the status of information previously assumed to be standard trade secrets, ranging from a political campaign's donor lists, to salary and office revenue data, to documents outlining internal company procedures, to software code.¹⁶ The upshot of these opinions is that secrecy

critically that “[t]he UTSA and DTSA’s requirement that information claimed to be a trade secret must have independent economic value (actual or potential) is often overlooked”).

12. Graves & Katyal, *supra* note 8, at 1341 (suggesting that companies utilize the strategy of “labeling sensitive or embarrassing information as a ‘trade secret’ or ‘confidential’ [in order to] stall or silence calls for disclosure”).

13. The new federal whistleblower provision creates immunity from liability under state or federal law for those who disclose “a trade secret . . . solely for the purpose of reporting or investigating a suspected violation of law . . .” 18 U.S.C. § 1833; *see also* Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1, 1–7 (2017) (advocating for a safe harbor provision to protect those who disclose potential trade secrets in order to report illegal activity).

14. *See* Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777 (2006); Pamela Samuelson, *First Amendment Defenses in Trade Secrecy Cases*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH*, *supra* note 5, at 269, 269.

15. *See infra* Part III.B.

16. *Democratic Nat’l Comm. v. Russian Fed’n*, 392 F. Supp. 3d 410, 448 (S.D.N.Y. 2019) (holding political campaign’s donor lists and fundraising strategies lacked independent economic value); *Danaher Corp. v. Gardner Denver, Inc.*, No. 19-CV-1794, 2020 U.S. Dist. LEXIS 89674, at *45 (E.D. Wis. May 20, 2020) (holding template for leading internal meetings lacked independent economic value); *Providence Title Co. v. Truly Title Inc.*, 547 F. Supp. 3d 585, 610–11 (E.D. Tex. 2021) (holding employee salary and office revenue data lacked independent economic value); *see also* *Yield Dynamics, Inc. v. TEA Sys. Corp.*, 66

is not enough; plaintiffs also need to make a plausible case for why their information derives economic value from secrecy. As one court put it:

Just because a business benefits from keeping certain information confidential, does not necessarily mean that the information has independent economic value derived from its confidentiality. Otherwise, all confidential business information would constitute a trade secret and the additional statutory requirement that the information have independent economic value would be rendered meaningless.¹⁷

By analyzing this case law and by drawing on insights from the broader field of intellectual property, this Article generates a typology of “value failures”—scenarios in which information asserted in trade secret litigation fails to derive independent economic value and in which courts may accordingly dismiss the claim, or deny the requested relief, due to failure to satisfy this criterion.¹⁸ Value failures operate along multiple dimensions.

The first is the “amount failure.” This occurs when the information simply fails to meet a minimum quantitative threshold of actual or even potential value. Trade secret law, similar to patent and copyright law, adopts a hands-off approach that leaves the ultimate assessment of information’s value to private markets. However, a low standard is not the same as no standard. If information’s value is too minimal to be legally cognizable, then there is no trade secret.¹⁹

The second, far more subtle value failure is the “causation failure.” This occurs when information’s asserted value is not actually caused by the fact that it is being kept secret. A lot of information is valuable in a certain sense. Perhaps the holder invested significant time and money in development; perhaps employees rely on the information in day-to-day operations. But “value” is not the same as value that comes “independent[ly]” from secrecy, which is what the statute expressly requires.²⁰ If information’s only plausible value comes from what is already well known in the industry, then this is not a trade secret. For example, if the putative trade secret is the design of a product that is alleged to be valuable because it is superior to others on the market, the *secret* aspects of the design, not the generally known aspects, must be responsible for that superiority. If properly applied, this causation component raises the bar on what can be protected and simultaneously reinforces the secrecy requirement itself. Secrecy ensures that the law does

Cal. Rptr. 3d 1, 18–20 (Ct. App. 2007) (holding software code whose functionality stemmed mostly from open-source public elements lacked independent economic value).

17. *Providence Title Co.*, 547 F. Supp. 3d at 610–11; *see also, e.g.*, *Elsevier Inc. v. Dr. Evidence, LLC*, No. 17-cv-5540, 2018 U.S. Dist. LEXIS 10730, at *18 (S.D.N.Y. Jan. 23, 2018) (“[C]onfidential information is not the same as a trade secret.”).

18. As discussed herein, most trade secret rulings are issued very early in the case, often on a motion to dismiss or motion for preliminary injunction. Sometimes, it is appropriate for courts to give plaintiffs leave to amend in order to clarify how information derives independent economic value. *See infra* note 191 and accompanying text.

19. *See infra* Part IV.A.

20. This Article’s interpretation of the statutory term “independent” is discussed in Part I.B.4.

not protect what is already known and free to use.²¹ The value-from-secrecy mandate ensures that the law does not protect holistic “value” that comes only from what is widely known. If there is no value in secrecy to protect, then there is no right under trade secret law to prevent disclosure or use by others.²²

The third value failure is the “type failure.” Here, the information has the wrong *type* of value. Unlike patent and copyright law, which do not require inventions or works of authorship to have commercial merit,²³ trade secret law specifically requires *economic* value. While the term sweeps broadly, recognizing countless ways to capture the value of information, the asserted value must at least be connected to the business or to some form of wealth-seeking activity.²⁴ The putative economic value cannot stem purely from the fact that the secret-holder would prefer that the information be kept confidential or from the fact that disclosure would harm their reputation; the information must be plausibly connected to some underlying economic activity.²⁵

The final value failure is the “timing failure.” This occurs when the putative trade secret is asserted during the incorrect time frame. Other intellectual property rights come with fixed statutory terms²⁶ or require “use in commerce” to tether their term lengths to ongoing commercial activity.²⁷ Trade secret law today has neither of these. Instead, it relies on independent economic value to set the time frame for protection. When properly applied, independent economic value ensures that trade secrets are transitory rights, protectable only during a certain window of time. Information cannot be protected too early, before it possesses even potential economic value, or too late, after the information has become so outdated that it is no longer conceivably valuable to anyone.²⁸ Either of these situations results in a timing failure.

The most important message here is that secrets can end up in court even if they do not have independent economic value. Courts must assess this legal requirement in every case in a meaningful way, screening for all four

21. See Lemley, *supra* note 4, at 343 (arguing that requirement of “[s]ecrecy is critical to ensuring that trade secret law does not interfere with robust competition or with the dissemination of new ideas”).

22. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) (applying common law and stating that it is the “competitive advantage over others” that the holder of the secret “enjoys by virtue of its exclusive access” that the law protects against disclosure or use by others that “would destroy that competitive edge”).

23. See, e.g., Michael Risch, *Reinventing Usefulness*, 2010 BYU L. REV. 1195, 1204.

24. This concept does not literally require “for profit” activity. Entities deemed nonprofits for tax purposes can still own trade secrets. They can own trademarks, too. See Leah Chan Grinvald, *Charitable Trademarks*, 50 AKRON L. REV. 817, 829 (2016); see also *infra* note 274 and accompanying text.

25. See *infra* notes 275–84 and accompanying text.

26. See, e.g., 35 U.S.C. § 154(a)(2) (setting patent term at twenty years); 17 U.S.C. § 302(a) (setting copyright term at life of author plus seventy years for single-author works).

27. 15 U.S.C. § 1127 (delineating “use in commerce” requirement and establishing rule for “abandonment” due to discontinuance of use).

28. See Hrды & Lemley, *supra* note 5, at 1.

kinds of value failures. Otherwise, courts will inevitably protect secrets that are not meant to be protected under trade secret law, leading to a variety of negative and unintended consequences, including wasted court resources, needless restrictions on access to information, and unjustified barriers to employee mobility, competition, and innovation.

Trade secret law is at an important crossroads. For the first time, civil plaintiffs can now bring both federal claims under the Defend Trade Secrets Act of 2016²⁹ (DTSA) and state law claims under their jurisdiction's version of the Uniform Trade Secrets Act³⁰ (UTSA).³¹ At the same time, developments in patent law have cast doubt on the viability of patents in protecting certain types of inventions and led to enhanced mechanisms for weeding out invalid patents.³² Consequently, companies are likely to turn more often to trade secret law.³³ Given the new importance of trade secret law on the federal stage and within the field of intellectual property law, this is a crucial time to get the law right. More courts should take this opportunity to reevaluate assumptions about what can and cannot be a trade secret under the law.

Defendants are not the only ones who would benefit from courts paying more attention to independent economic value. Companies that possess truly valuable trade secrets that give them an economic advantage in the marketplace should also support such a turn. Since the movement toward federalization that culminated in the enactment of the DTSA, there have been critiques of trade secrets from all sides: Trade secrets should be protected under state law, not federal law.³⁴ Trade secrets are bad for employees.³⁵ Trade secrets stand in the way of the disclosure of information of high public interest.³⁶ Trade secrets are contributing to a “black box” society in which

29. Pub. L. No. 114-153, 130 Stat. 376 (codified as amended in scattered sections of the U.S.C.).

30. UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 628–830 (2021).

31. Note that New York has not adopted the UTSA; it still uses the common law. *See infra* notes 42, 60, 103 and accompanying text.

32. Lisa Larrimore Ouellette, *Patentable Subject Matter and Nonpatent Innovation Incentives*, 5 U.C. IRVINE L. REV. 1115, 1117 (2015); *see also* Megan M. La Belle, *Public Enforcement of Patent Law*, 96 B.U. L. REV. 1865, 1869 (2016).

33. *See, e.g.*, JEFFREY MORDAUNT, NEIL EISGRUBER & JOSHUA SWEDLOW, STOUT, TRENDS IN TRADE SECRET LITIGATION REPORT 2020, at 16 (2020), <https://www.winston.com/images/content/2/0/v2/203824/trends-in-trade-secret-litigation-report-2020.pdf> [https://perma.cc/8YTY-Q7RX].

34. *See* Letter from Eric Goldman et al., Professors, to Charles E. Grassley, Robert W. Goodlatte, Patrick J. Leahy & John Conyers, Jr., Sens. (Nov. 17, 2015), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2090&context=historical> [https://perma.cc/VDY2-SZKG].

35. *See* ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 7–8 (2013) [hereinafter LOBEL, TALENT WANTS TO BE FREE]; Orly Lobel, *The DTSA and the New Secrecy Ecology*, 1 BUS. ENTREPRENEURSHIP & TAX L. REV. 369, 376–81 (2017).

36. *See* David S. Levine, *The Impact of Trade Secrecy on Public Transparency*, in THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH, *supra* note 5, at 406, 431–32 (critiquing trade secret exemption that prevents government from releasing information of public interest); Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1356–57 (2018)

commerce and discourse are controlled by algorithms whose functions are opaque.³⁷ If trade secret plaintiffs brought higher quality claims, at least some of these critiques might subside. Taking independent economic value more seriously is a first step toward taking trade secrets more seriously.

This Article proceeds as follows. Part I lays the groundwork by introducing the major concepts and statutory terms underlying independent economic value. Part II exposes and critiques the prevailing assumptions that seem to justify courts' behavior in ignoring or downplaying the requirement. Part III reveals that at least some courts, particularly during the DTSA's first five years, have found that independent economic value is *not* satisfied in certain circumstances, casting doubt on the notion that the requirement is redundant and revealing a possible future in which value plays a greater role in litigation than it currently does. Part IV draws on these case law findings and insights from across the intellectual property field to develop a typology of value failures, which should help courts screen cases for value issues and more effectively assess them when they arise.

This Article concludes by urging courts to assess the statutory requirement of independent economic value more consistently, like they do with secrecy and reasonable secrecy precautions. Courts and commentators are wrong to ignore or trivialize this requirement.

I. STATUTORY INTERPRETATION OF INDEPENDENT ECONOMIC VALUE

The statutory requirement of independent economic value is a vestige of the common law concept of competitive advantage. This part therefore begins with an analysis of the common law and then moves to a detailed statutory interpretation of independent economic value as codified in federal and state law today.

A. *The Common Law Concept of Competitive Advantage*

Trade secret law was originally designed to remedy the consequences of breaches of trust by employees, to safeguard firms' investments in valuable secrets, and to prevent unfair or immoral acts of competition in the

(discussing implications of trade secret privilege in the criminal justice system); Robin Feldman & Charles Tait Graves, *Naked Price and Pharmaceutical Trade Secret Overreach*, 22 YALE J.L. & TECH. 61, 63–64 (2020) (discussing trade secrets covering drug pricing information); Deepa Varadarajan, *Business Secrecy Expansion and FOIA*, 68 UCLA L. REV. 462, 462 (2021) (discussing recent expansion of the Freedom of Information Act exemption for trade secrets or “confidential information”); Christopher J. Morten & Amy Kapczynski, *The Big Data Regulator, Rebooted: Why and How the FDA Can and Should Disclose Confidential Data on Prescription Drugs and Vaccines*, 109 CALIF. L. REV. 493, 493 (2021) (critiquing trade secrecy's interference with disclosure of information related to the safety and efficacy of drugs and vaccines); Amy Kapczynski, *The Public History of Trade Secrets*, 55 U.C. DAVIS L. REV. 1367, 1382–1413 (2022) (using history to critique current approach to trade secrets as triggering a government taking of property).

37. FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 2, 14–15 (2015); Sonia K. Katyal, *The Paradox of Source Code Secrecy*, 104 CORNELL L. REV. 1183, 1186–87 (2019).

marketplace.³⁸ Until the drafting in 1979 of a uniform act that states gradually adopted in the 1980s, trade secret law was exclusively based in common law³⁹ and was generally lumped within a larger body of law called unfair competition.⁴⁰

The concept of “competitive advantage” was central to trade secrecy under the common law. Several sources indicate that, to be protected under the common law, a trade secret had to confer on its owner a competitive advantage over others who did not know the information. The Restatement (First) of Torts (“First Restatement”), drafted in 1939 and generally seen as reflecting the state of the common law at that time, defined a 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.*”⁴¹ The First Restatement also instructed courts to consider, as one of six factors, “the value of the information to the plaintiff’s business and to its competitors.”⁴² The Restatement (Third) of Unfair Competition (“Third Restatement”), which was drafted in 1995 to restate the common law, defined a 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.*”⁴³ Last but hardly least, the U.S. Supreme Court itself, in the course of assessing the common law to determine whether trade secrets are “property” under the Takings Clause, once described “[t]he economic value” of a trade secret as “the *competitive advantage over others*” that it imparts to its owner.⁴⁴

While commentators tend to discuss only the “used in one’s business” component of the common law,⁴⁵ the competitive advantage requirement was

38. See AMÉDÉE E. TURNER, *THE LAW OF TRADE SECRETS* 3–4 (1962); see also ROWE & SANDEEN, *supra* note 5, at 21–28; Sharon K. Sandeen & Christopher B. Seaman, *Toward a Federal Jurisprudence of Trade Secret Law*, 32 *BERKELEY TECH. L.J.* 829, 834–43 (2017); Lynda J. Oswald, *The Role of “Commercial Morality” in Trade Secret Doctrine*, 96 *NOTRE DAME L. REV.* 125, 125 (2020).

39. See, e.g., Michael Risch, *An Empirical Look at Trade Secret Law’s Shift from Common to Statutory Law*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 151 (Shyamkrishna Balganesh ed., 2013).

40. See, e.g., HARRY D. NIMS, *THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS* § 1, at 1–2, §§ 141–143, at 294–98 (2d ed. 1921); JAMES LOVE HOPKINS, *THE LAW OF TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION* §§ 90–93, at 208–17 (3d ed. 1917); 3 LOUIS ALTMAN & MALLA POLLACK, *CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES* § 14 (4th ed. 2020); see also Bone, *supra* note 4, at 251–61; Lemley, *supra* note 4, at 312–22; Hrdy & Lemley, *supra* note 5, at 16–17.

41. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939) (emphasis added).

42. *Id.* New York courts continue to use the common law and the First Restatement. See *Telerete Sys., Inc. v. Caro*, 689 F. Supp. 221, 232 (S.D.N.Y. 1988) (“Even a slight competitive edge will satisfy this requirement of trade secret protection.”); see also, e.g., *Sheridan v. Mallinckrodt, Inc.*, 568 F. Supp. 1347, 1352 (N.D.N.Y. 1983).

43. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. L. INST. 1995) (emphasis added).

44. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) (emphasis added); see also U.S. CONST. amend. V.

45. See, e.g., Claeys, *supra* note 8, at 588.

arguably far more important. It could arise in virtually every case, regardless of whether the trade secret was being used or not.⁴⁶ And, unlike the “used in one’s business” requirement, it is still incorporated into the law today via the statutory requirement of independent economic value.⁴⁷ Thus, it is essential to understand this nuanced and somewhat elusive concept.

In economics, a firm has a competitive advantage if it can earn a higher rate of profit than other firms in the market.⁴⁸ Firms can achieve a competitive advantage through a variety of means, such as by lowering costs compared to rivals, by hiring the best talent, or by adopting aggressive marketing campaigns.⁴⁹ One of the main ways to gain a competitive advantage is to invest in research and development that results in an “innovation”—i.e., something that one’s competitors do not have.⁵⁰ Indeed, investing in innovation may be the most effective way to gain a competitive advantage over rivals,⁵¹ at least until the rivals catch up. This is where trade secret law comes in.

From a firm’s perspective, trade secrets are legal tools used to preserve competitive advantages that would otherwise dissipate due to espionage, subversive employees, or the passage of time.⁵² Firms may elect to protect some inventions through patents, willingly risking public disclosure in exchange for a twenty-year-long exclusive right.⁵³ But firms often choose protection through trade secrecy instead, usually supplemented by a thicket of contractual protections like nondisclosure agreements.⁵⁴ They choose

46. In fact, courts sometimes interpreted the use requirement loosely, protecting research and know-how when it was related to use, was the result of significant expenditures, and imparted an advantage over others. See TURNER, *supra* note 38, at 32–37, 111–12.

47. See *infra* note 58 and accompanying text. For example, the Third Restatement, which was also intended to reflect the modern statutory regime that many states had adopted by 1995, addressed the “[r]equirement of value” and equated value with competitive advantage, stating in relevant part that “[a] trade secret must be of sufficient value in the operation of a business or other enterprise to provide an actual or potential economic advantage over others who do not possess the information.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmts. b, e (AM. L. INST. 1995).

48. See DAVID BESANKO, DAVID DRANOVE, MARK SHANLEY & SCOTT SCHAEFER, *ECONOMICS OF STRATEGY* 295–99 (6th ed. 2013); MICHAEL PORTER, *COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE* 3 (1985).

49. PORTER, *supra* note 48, at 11–12; BESANKO ET AL., *supra* note 48, at 308–10; see also Glenn Purdue, *Understanding the Economic Value of Trade Secrets*, AM. BAR ASS’N (Mar. 28, 2014), <https://www.americanbar.org/groups/litigation/committees/intellectual-property/articles/2014/understanding-economic-value-trade-secrets/> [<https://perma.cc/XAN8-CPBT>].

50. CHRISTINE GREENHALGH & MARK ROGERS, *INNOVATION, INTELLECTUAL PROPERTY, AND ECONOMIC GROWTH* 4 (2010).

51. See PORTER, *supra* note 48, at 20; see also ERIC VON HIPPEL, *THE SOURCES OF INNOVATION* 5 (1988).

52. See JAMES POOLEY, *SECRETS: MANAGING INFORMATION ASSETS IN THE AGE OF CYBERESPIONAGE* 1–36, 59–75 (2015); see also WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 354–71 (2003).

53. 35 U.S.C. §§ 101–112, 154; see also Jeanne C. Fromer, *Patent Disclosure*, 94 IOWA L. REV. 539, 545 (2009).

54. Contracts serve both as an alternative means of protection and as a way to shore up firms’ legal argument that they took “reasonable” measures to protect their secrets. See Varadarajan, *supra* note 2, at 1543. A contract claim may persist even if trade secrecy fails. See Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*,

trade secrecy for strategic reasons, not wanting to publicly disclose in patents subject matter that is easy to keep secret, or because the information in question is not patentable.⁵⁵ A lot of information falls into both categories when the information is neither self-disclosing nor patentable, and is also the type of information that is necessarily exposed to the firm's own employees.⁵⁶ By many accounts, one of the main reasons for which trade secret law arose was to help employers protect hard-won competitive advantages against their own employees, who might otherwise be tempted to leave with their former employers' best secrets.⁵⁷ For all these reasons, it should not be surprising that the common law—and now the modern statutory regime—use competitive advantage as the touchstone for trade secret protectability.⁵⁸ The need to help companies retain competitive advantages is a big part of why certain information is legally protected as a trade secret in the first place.

B. Statutory Independent Economic Value Under the UTSA and DTSA

We move now to the modern statutory text. In 1979, the American Bar Association approved the Uniform Trade Secrets Act. Drafted by the Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws, the UTSA is a uniform act that was intended to effectuate codification of the common law.⁵⁹ The UTSA was eventually adopted by virtually every state except for New York.⁶⁰ Decades later, in 2016, Congress passed the Defend Trade Secrets Act to provide a new federal civil cause of action that supplements a preexisting criminal cause of action and expressly modeled the text of the federal law on the

96 B.U. L. REV. 869, 890 (2016); *see also* Michael J. Burstein, *Exchanging Information Without Intellectual Property*, 91 TEX. L. REV. 227, 227 (2012).

55. *See* *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 493 (1974); *see also* Katherine J. Strandburg, *What Does the Public Get?: Experimental Use and the Patent Bargain*, 2004 WIS. L. REV. 81, 104–18 (discussing disclosing versus self-disclosing inventions); *see also, e.g.*, David Teece, *The Strategic Management of Technology and Intellectual Property*, in *COMPETING THROUGH INNOVATION: TECHNOLOGY STRATEGY AND ANTITRUST POLICIES* 3, 13–14 (David Teece ed., 2013); R. MARK HALLIGAN & RICHARD F. WEYAND, *TRADE SECRET ASSET MANAGEMENT 2018: A GUIDE TO INFORMATION ASSET MANAGEMENT INCLUDING RICO AND BLOCKCHAIN* 2–16 (2018).

56. *See* POOLEY, *supra* note 52, at 29–36.

57. *See id.* at 17–18; *see also* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 450–60 (2011).

58. 1 MILGRIM & BENSON, *supra* note 5, § 1.07A (describing competitive advantage as the “touchstone” for modern independent economic value).

59. UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 636–37 (2021); *see also* Bone, *supra* note 4, at 247; Sandeen & Seaman, *supra* note 38, at 841–42.

60. New York still uses the common law, which includes the “use” requirement. *See, e.g.*, *Softel, Inc. v. Dragon Med. & Sci. Comm’n, Inc.*, 118 F.3d 955, 968 (2d Cir. 1997) (applying RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939)).

UTSA.⁶¹ While there are some specific differences,⁶² the UTSA's and DTSA's definitions of "trade secret" are nearly identical.⁶³ The DTSA did not preempt the UTSA, meaning plaintiffs can now bring both federal and state law claims.⁶⁴

The modern statutes explicitly eliminated the common law's "used in one's business" requirement. The primary reasons for this included the concern that early-stage research and prototypes would not qualify for protection if trade secrecy required actual use in a business,⁶⁵ as well as the emerging belief that trade secret law should fill the "economic holes" left by patent law by helping inventors protect their inventions in the vulnerable precommercial stages.⁶⁶ Trade secrecy was also increasingly seen as a legal mechanism that would generally facilitate efficient sharing of information and reduce wasteful expenditures on self-help measures.⁶⁷

However, while actual use is no longer required, the law still demands that a trade secret derive independent economic value from not being generally known to others "who can obtain economic value from the disclosure or use of the information."⁶⁸ Commentators sometimes use the terms "value" or "economic value" as shorthand for independent economic value,⁶⁹ but the requirement is extremely specific. Each of the defining statutory terms—"economic," "potential," "other persons" or "another person," and "independent"—is infused with meaning. The following sections interpret

61. See David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act*, 53 WAKE FOREST L. REV. 105, 114, 119 (2018); see also Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (codified as amended in scattered sections of the U.S.C.).

62. There are some differences with respect to misappropriation, damages, and injunctions limiting employment. See, e.g., 18 U.S.C. §§ 1836(b)(3), 1839(5)–(6).

63. H.R. REP. NO. 114-529, at 5 (2016) ("The Act's definition of misappropriation is modeled on the Uniform Trade Secrets Act . . ."); S. REP. NO. 114-220, at 10 (2016). Courts have determined that the definitions are virtually identical. See, e.g., *Brand Energy & Infrastructure Servs., Inc. v. Irex Contracting Grp.*, No. CV-16-2499, 2017 U.S. Dist. LEXIS 43497, at *8–9 (E.D. Pa. Mar. 24, 2017); *Deerpoint Grp., Inc. v. Agrigenix, LLC*, 345 F. Supp. 3d 1207, 1227 (E.D. Cal. 2018); *Bombardier Inc. v. Mitsubishi Aircraft Corp.*, 383 F. Supp. 3d 1169, 1178 (W.D. Wash. 2019).

64. 18 U.S.C. § 1838 (declining to preempt state remedies for misappropriation of a trade secret).

65. UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 637 (2021) ("The broader definition in the proposed Act extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use."); see also Hrdy & Lemley, *supra* note 5, at 21–22, 24–25, 30–31.

66. LANDES & POSNER, *supra* note 52, at 359; see also UNIF. TRADE SECRETS ACT prefatory note (amended 1985), 14 U.L.A. 629 (2021) ("In view of the substantial number of patents that are invalidated by the courts, many businesses now elect to protect commercially valuable information through reliance upon the state law of trade secret protection.")

67. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 485–86, 493 (1974); see also Lemley, *supra* note 4, at 311, 338–39.

68. UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 636–37. The DTSA is identical, except it uses the singular "another person" instead of "other persons." 18 U.S.C. § 1839(3)(B); see *infra* note 96.

69. See, e.g., *Sun Media Sys. Inc. v. KDSM, LLC*, 564 F. Supp. 2d 946, 969–70 (S.D. Iowa 2008).

statutory text, relying on various tools of construction like dictionaries,⁷⁰ legislative history,⁷¹ restatements, and a major treatise.⁷² They also incorporate responses from an interview with a drafter of the UTSA.⁷³

1. Economic

The First Restatement defined the universe of trade secrets narrowly, indicating that a “trade secret” would generally be a “process or device for continuous use in the operation of the business” and would “generally . . . relat[e] to the production of goods, as, for example, a machine or formula for the production of an article.”⁷⁴ In contrast, the modern UTSA and DTSA regimes expand the universe of trade secrets to “information” writ large and do not contain limiting requirements like use in business or relation to the production of goods.⁷⁵ They also use the extremely broad term “economic” in defining the type of value that matters.

The UTSA drafters initially proposed the term “commercial” to modify value, but they rejected “commercial” in favor of the modifier “economic.” There has been some debate over the significance of this choice,⁷⁶ but a variety of evidence suggests that the drafters perceived the terms “economic” and “commercial” value to be virtually identical in substance. The drafters of both the UTSA and the DTSA continued to use the term “commercial” value alongside the text’s reference to “economic” value.⁷⁷ The dictionary definitions are similar in spirit, referencing analogous concepts such as trade, industry, wealth creation, and profitability.⁷⁸ But instead, the UTSA’s

70. Sandeen & Seaman, *supra* note 38, at 865–84 (discussing various sources of interpretation for the DTSA).

71. H.R. REP. NO. 114-529 (2016); S. REP. NO. 114-220 (2016); UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 637–38 (2021); *see also* Sandeen & Seaman, *supra* note 38, at 865–84 (discussing various sources of interpretation for the DTSA, including the UTSA and its accompanying commentary).

72. 1 MILGRIM & BENSON, *supra* note 5, § 1.07A.

73. I interviewed Richard Dole about the meaning of these terms. *See generally* Interview with Richard Dole, Bobby Wayne Young Professor of Consumer L., Univ. of Hous. L. Ctr. (Dec. 14, 2020) (on file with author). Dole was a member of the Special Committee on Uniform Trade Secrets Protection Act and was involved in drafting the UTSA. *See* Sandeen, *supra* note 8, at 513. This Article uses this interview solely to get a sense of how the drafters may have perceived the meaning of the terms in 1979, not as a definitive source of statutory interpretation. *See also id.* at 512–13, 518.

74. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939).

75. UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 636–37; 18 U.S.C. § 1839(3).

76. Compare Ramon A. Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277, 289 (1980) (suggesting the choice of the word “economic” was important), with Sandeen, *supra* note 8, at 525–26 (arguing “economic” is synonymous with “commercial”).

77. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. e, § 44 cmt. c (AM. L. INST. 1995); *see also* S. REP. NO. 114-220, at 1 (2016).

78. The Oxford Dictionary of English defines “economic” as “[r]elating to economics or the economy,” relating to “trade, industry, and the creation of wealth,” “[j]ustified in terms of profitability,” or “[r]equiring fewer resources or costing less money.” *Economic*, in OXFORD DICTIONARY OF ENGLISH 557, 557 (Angus Stevenson ed., 3d ed. 2010). The same dictionary defines “commercial” in relevant part as “[c]oncerned with or engaged in commerce,” “[m]aking or intended to make a profit,” or “having profit rather than artistic or other value as a primary aim.” *Commercial*, in OXFORD DICTIONARY OF ENGLISH, *supra*, at 349, 349. On the

drafters decided to eschew the term “commercial” in order to highlight the fact that current use of the information in commercial operations is no longer required, and that the asserted value can now include “potential” future value as well as actual current value.⁷⁹ In other words, the choice of “economic” over “commercial” was intended to modify the timeline on which value is to be measured, rather than the substance of the value.

Whether we call it “commercial” or “economic” value, it seems clear that the UTSA and the DTSA recognize that there is an exceptionally broad range of ways to capture the value of information. Economic value can be generated in the traditional way by using information to improve a business’s production of goods. Economic value can also come from early-stage research and “negative know-how” (knowledge of what not to do),⁸⁰ from licensing information to others for use,⁸¹ and even from intentionally hiding the information to avoid competing with a business’s other product lines.⁸²

However, the concept of economic value is not without limit. Information whose value lacks any relationship to economic activity—to wealth creation, profit-seeking, industry, or trade—does not qualify as having economic value. This principle does not deny trade secret protections to nonprofit companies.⁸³ Nonprofit entities have successfully protected their donor lists as trade secrets, for example.⁸⁴ Yet there are some scenarios in which the value in question is simply not economic in nature. For instance, a secret recipe for cookies that a person uses only at home in the kitchen, and for which they have no commercial intentions, does not derive economic value from secrecy.⁸⁵ More broadly, as explained in Part IV, if the putative trade secret consists of information with no connection to what a business actually does, then this too would fail to derive value that is “economic” in nature.⁸⁶

use of dictionary evidence to interpret the DTSA and UTSA, see Sandeen & Seaman, *supra* note 38, at 863–64.

79. Dole expressed the view that the terms “economic value” and “commercial value” are the same, *except* that “economic value” encompasses “potential commercial value.” See Interview with Richard Dole, *supra* note 73.

80. UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 637–38 (2021).

81. For a recent example of a case recognizing licensing value as a form of economic value under the DTSA, see, for example, *Zabit v. Brandometry, LLC*, 540 F. Supp. 3d 412, 421, 424 (S.D.N.Y. 2021) (finding that plaintiffs alleged facts supporting a plausible claim that “the information derives independent economic value, actual or potential” because they alleged that they can license the algorithm, “the DTSA covers potential value,” and “th[e] license was valued at \$540,000” (emphasis omitted) (quoting 18 U.S.C. § 1839(3)(B))).

82. See *supra* note 81.

83. The Third Restatement, for example, states that “[a]lthough rights in trade secrets are normally asserted by businesses and other commercial enterprises, nonprofit entities . . . can also claim trade secret protection for economically valuable information such as lists of prospective members or donors.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. d (AM. L. INST. 1995).

84. See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs.*, 923 F. Supp. 1231, 1251 (N.D. Cal. 1995) (“[N]onprofit entities such as . . . religious organizations can also claim trade secret protection for economically valuable information such as lists of prospective members or donors.” (alterations in original) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. d (AM. L. INST. 1995))).

85. See *infra* notes 274–76 and accompanying text.

86. See *infra* notes 283–85 and accompanying text.

2. Potential

One of the most legally significant features of the statutory text of the UTSA and the DTSA is use of the word “potential.” Both the UTSA and the DTSA provide that the economic value of a trade secret can be “actual *or* potential.”⁸⁷ Some commentators have suggested that this indicates that the trade secret owner can protect practically anything.⁸⁸ However, the modifier “potential” does not necessarily make it easier to obtain and maintain a trade secret in every situation.⁸⁹ Rather, the commentary to the UTSA indicates that its drafters utilized the modifier “potential” in order to clarify that, unlike under the common law, trade secrets did not have to be used in a business, and could thus consist of research, prototypes, and other information that was not yet in regular use in a business.⁹⁰ They intended to expand the timeline for trade secret protection to earlier stages of development.

The UTSA commentary states that the UTSA’s definition of a trade secret “extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use.”⁹¹ This “includes information that has commercial value from a negative viewpoint,” such as “the results of lengthy and expensive research which proves that a certain process will *not* work” and which “could be of great value to a competitor.”⁹²

Along with this so-called negative know-how, another example of a trade secret with “potential” economic value that was contemplated by the UTSA drafters is a prototype for an invention that the inventor has not yet perfected or acquired the means to put into use. The commentary suggests that these sorts of early-stage inventions should be protected, even if the common law would have excluded them due to its use-in-business requirement.⁹³ A prototype, though not yet in-use, has “potential” economic value that may come to fruition in the future; information embodied in the prototype can be protected as a trade secret before that value materializes, during the period in which the inventor is trying, for instance, to obtain patent protection or secretly share the prototype with potential buyers or investors.⁹⁴ The fact that the value has not yet been achieved is not fatal. Likewise, the fact that the prototype may one day be disclosed to the public does not destroy the possibility of trade secrecy protection early on, before that disclosure occurs.

Far from opening the door to granting trade secret protection in instances of merely hypothetical value, the reference to “potential” value in fact suggests that there is a window of time during which trade secret protection

87. 18 U.S.C. § 1839(3) (emphasis added); UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 636–37 (2021) (emphasis added).

88. See Risch, *supra* note 5, at 166–67; Claeys, *supra* note 8, at 599.

89. See Sandeen, *supra* note 8, at 524.

90. UNIF. TRADE SECRETS ACT § 1 cmt., 14 U.L.A. 637–38.

91. *Id.*, 14 U.L.A. 637.

92. *Id.*

93. See *id.*

94. See, e.g., *Leatt Corp. v. Innovative Safety Tech., LLC*, No. 09-CV-01301, U.S. Dist. LEXIS 37382, at *15–21 (S.D. Cal. Apr. 15, 2010) (holding prototype for neck brace protectable as trade secret).

can be granted—specifically, the window of time during which information has actual or potential value due to its secrecy. The corollary to this is that some information may fall outside of that time frame, either because it is far too early for the information to have even potential value or because any value the information once had has dissipated over time.⁹⁵ These issues are discussed further in Part IV.

3. Economic Value from Not Being Known to Other Persons or Another Person

The statutory text of the UTSA and the DTSA incorporate the common law concept of competitive advantage. The UTSA provides, in relevant part, that information must derive economic value from not being known to “other persons,” or, under the DTSA, to “another person,”⁹⁶ who could “obtain economic value from the [information’s] disclosure or use.”⁹⁷

This text is unwieldy, but it seems clear that the drafters’ goal was to codify the common law’s requirement that a trade secret had to give its owner an opportunity to obtain an advantage over others who did not know it or use it.⁹⁸ The general rule in interpreting statutes is that they are assumed to incorporate common law principles that were “well established” at the time of drafting, except where a “statutory purpose to the contrary is evident.”⁹⁹ As discussed above, competitive advantage was well established at common law. It was also explicitly referenced in the UTSA commentary, which suggests in places that the drafters assumed that a trade secret would “confer a competitive advantage.”¹⁰⁰ Moreover, Congress also used the phrase repeatedly throughout the DTSA’s legislative history. For instance, the

95. *Cf.* Hrdy & Lemley, *supra* note 5, at 43–48 (arguing that trade secrets can lose their potential value over time and become unprotectable, or be abandoned by their former owner).

96. The DTSA might seem at first glance to have made the economic advantage standard less strict by using a singular noun “another person” in lieu of the UTSA’s plural noun “other persons.” *Compare* UNIF. TRADE SECRETS ACT § 1(4)(i) (amended 1985), 14 U.L.A. 637 (2021), *with* 18 U.S.C. § 1839(3)(B). However, the change was intended to make the federal definition of “secrecy” stricter and “in conformity” with the UTSA’s. It was not intended to be “meaningfully different from the scope of that definition as understood by courts in States that have adopted the UTSA.” *See* S. REP. NO. 114-220, at 10 (2016). The Economic Espionage Act of 1996 had used “the public” to refer to the audience from whom information must be secret—this was viewed as a problematic reference point for defining secrecy. *See* *United States v. Lange*, 312 F.3d 263, 267 (7th Cir. 2002) (“A problem with using the general public as the reference group for identifying a trade secret is that many things unknown to the public at large are well known to engineers, scientists, and others . . .”). Notably, the UTSA drafters themselves had considered using a singular term to describe for whom the information must be unknown. *See* UNIF. TRADE SECRETS ACT § 1 cmt., 14 U.L.A. 637–38.

97. 18 U.S.C. § 1839(3); UNIF. TRADE SECRETS ACT § 1(4)(i), 14 U.L.A. 637; *see also* Johnson, *supra* note 5, at 567–69.

98. Dole, when asked, “How does ‘independent economic value’ relate to ‘competitive advantage?’” answered: “They are similar concepts.” *See* Interview with Dole, *supra* note 73.

99. *See* *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

100. *See, e.g.*, UNIF. TRADE SECRETS ACT § 1 cmt., 14 U.L.A. 637 (“Because a trade secret need not be exclusive to confer a competitive advantage, different independent developers can acquire rights in the same trade secret.”).

Senate report states that trade secrets are “an integral part . . . of the competitive advantage . . . of many U.S.-based companies” and refers to trade secrets as “commercially valuable” information because they give companies an edge in a competitive marketplace.¹⁰¹ A diverse range of courts and commentators have concluded that “independent economic value” was intended to carry forward the concept of competitive advantage or similar concepts like business or economic advantage.¹⁰²

Further evidence of the continuing relevance of the competitive advantage concept comes from Massachusetts, which was the last state to adopt the UTSA¹⁰³—and only did so after the passage of the DTSA. The Massachusetts legislature specifically replaced the phrase “independent economic value” with the phrase “economic advantage.”¹⁰⁴ This reflects the common perception that “independent economic value” just means economic advantage due to secrecy. The phrase “economic advantage” is arguably more accurate than “competitive advantage,” because courts had long held under the UTSA that the “other persons” to whom a trade secret must have value need not be direct competitors.¹⁰⁵ The concept of economic advantage clarifies that information can have the requisite independent economic value to a wider variety of actors than just current competitors, including potential future competitors or others who might benefit from the disclosure or use of the information. This caveat is especially important for early-stage companies for whom there is no identifiable competitor in the market and to whom information might have value.¹⁰⁶

4. Independent

The term “independent” is the most ambiguous term in the trade secret statutes. The UTSA and DTSA state, in relevant part, that the secret has to derive “*independent economic value*” from not being known to others.¹⁰⁷

101. See S. REP. NO. 114–220, at 1 (2016).

102. 1 MILGRIM & BENSON, *supra* note 5, § 1.07A; 1 MELVIN F. JAGER, TRADE SECRETS LAW § 3:35 (Thomson Reuters 2019); ROWE & SANDEEN, *supra* note 5, at 146; *see also, e.g.*, *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 900 (Minn. 1983); *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1090 (9th Cir. 1986); *Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731, 736 (Ct. App. 1997); *Calisi v. Unified Fin. Servs., LLC*, 302 P.3d 628, 633 (Ariz. Ct. App. 2013); *Altavion, Inc. v. Konica Minolta Sys. Lab., Inc.*, 171 Cal. Rptr. 3d 714, 743 n.26 (Ct. App. 2014).

103. New York still uses the common law and the First Restatement. *24 Seven, LLC v. Martinez*, No. 19-CV-7320, U.S. Dist. LEXIS 15480, at *12 (S.D.N.Y. Jan. 26, 2021).

104. MASS. GEN. LAWS ch. 93, § 42(4)(i) (2020) (defining trade secret, in part, as “provid[ing] *economic advantage*, actual or potential, from not being generally known” (emphasis added)); *see also* Act of Aug. 10, 2018, ch. 228, § 19, 2018 Mass. Acts 101.

105. See UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 637–38 (2021); *see also, e.g.*, *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*, 923 F. Supp. 1231, 1253 (N.D. Cal. 1995); *Altavion, Inc.*, 171 Cal. Rptr. 3d at 743. I also asked Dole: “Who are the ‘other persons’ who could obtain value from the information?” He said: “Actual or potential competitors.” See Interview with Richard Dole, *supra* note 73.

106. See Hrdy & Lemley, *supra* note 5, at 19–24.

107. UNIF. TRADE SECRETS ACT § 1(4)(i) (amended 1985), 14 U.L.A. 637 (2021) (emphasis added); 18 U.S.C. § 1839(3)(B).

The law does not define “independent” or explain what it means. It leaves significant room for speculation and divergence in opinion.¹⁰⁸

One view is that “independent” means that the information must be valuable in its own right, rather than derive its value from other information.¹⁰⁹ So, for example, one court dismissed a claim seeking to protect passwords as trade secrets, reasoning that the value of a password is dependent on the information it protects.¹¹⁰ But this view sweeps too broadly. Virtually all trade secrets are, to some degree, dependent on other information or inputs in order to be considered valuable.¹¹¹ It is unlikely that this is the interpretation the drafters had in mind.

The better interpretation of “independent,” and the one this Article adopts, is that the word emphasizes that a trade secret’s economic value must derive precisely from the fact that it is secret. Several courts¹¹² and commentators¹¹³ share this interpretation. To understand the importance of this principle, consider a world in which the statutes did not clarify that value must come from secrecy. If this were the case, trade secret law could protect an infinite variety of competitive advantages, even if they have nothing to do with secrecy at all. Perhaps a company has economies of scale that allow it to operate at lower costs; perhaps it hires the best talent; perhaps the company has more experience in the field than others. These are valuable competitive advantages, but they are not afforded trade secret protection because their value to the owner is not due to the secrecy of any specific piece of information.¹¹⁴

108. See Johnson, *supra* note 5, at 570–73.

109. See, e.g., Providence Title Co. v. Truly Title Co., 547 F. Supp. 3d 585, 611 (E.D. Tex. 2021) (“[A] trade secret must have *independent* economic value” and plaintiff’s “salary and revenue information is not *independently* valuable; rather, the information is valuable only to the extent that it can be used successfully to aid in the solicitation of valuable [plaintiff] employees.”).

110. See State Analysis, Inc. v. Am. Fin. Servs. Ass’n, 621 F. Supp. 2d 309, 321 (E.D. Va. 2009). But see Compass iTech, LLC v. eVestment All., LLC, No. 14-81241-CIV, 2016 U.S. Dist. LEXIS 195907, at *43–44 (S.D. Fla. June 24, 2016) (holding that “usernames and passwords” can potentially be trade secrets under Florida’s UTSA); see also Simmons Hardware Co. v. Waibel, 47 N.W. 814, 816 (S.D. 1891) (granting injunction under common law to protect secret code used to decipher contents of catalogues used by salesmen and noting that “[t]he original catalogue was of itself of but trifling value, but with the private code or system of plaintiff marked therein it was of great value”).

111. For example, the UTSA was expressly intended to cover negative know-how (knowledge of what not to do), which is valuable only to the extent that it can be used to aid in the successful creation of positive secrets about what does work. See UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 637 (2021).

112. See, e.g., Mangren Rsch. & Dev. Corp. v. Nat’l Chem. Co., 87 F.3d 937, 942 (7th Cir. 1996); see also DTM Rsch., LLC v. AT&T Corp., 245 F.3d 327, 332 (4th Cir. 2001).

113. Dole, for his part, stated that the purpose of the term “independent” is “to emphasize that the value of the information should derive from its secrecy.” See Interview with Dole, *supra* note 73; see also, e.g., ROWE & SANDEEN, *supra* note 5, at 146 (“[I]dentified information must have demonstrable commercial value *because* it is a secret.”); POOLEY, *supra* note 52, at 29–30, 63 (discussing competitive advantage and value derived from secrecy).

114. As one commentator observes, a showing of competitive advantage does not by itself establish independent economic value “because the competitive advantage may be due to something other than the alleged secret, such as, for example, to the owner’s expertise in the

One might argue that, on this reading, the addition of the word “independent” is redundant because the statute already provides that information’s asserted economic value must derive from the fact that it is not generally known to others.¹¹⁵ However, this is not the case. By stating that information must derive “independent” economic value from its secrecy, the statute clarifies that the secret nature of the information, in particular, must be what creates the value. If the asserted trade secret involves a combination of public and nonpublic elements, as is often the case, the value at issue must come from the secret elements, not the public or otherwise unprotectable elements.¹¹⁶ One court illustrated this concept using the example of a design for the wing of an airplane.¹¹⁷ Simply alleging that the airplane’s wing design is valuable because it helps the airplane fly does not demonstrate that the *secret aspects* of the wing design generate this value—let alone that the secret aspects of the wing design give the holder an economic advantage over others.¹¹⁸ “Airplanes need wings to fly,” the court wrote, “but that does not mean that all wing designs have independent economic value.”¹¹⁹

Importantly, this value-from-secrecy component cuts both ways. It limits protection for information whose economic value does not come specifically from secrecy, yet it also grants protection for information whose economic value does come from secrecy, even if it might not resemble a traditional trade secret. For example, take the cases involving protectability of passwords, discussed directly above. A password quite literally derives its value from secrecy. A password’s entire economic value rests on being kept secret, and if it were disclosed, it would lose that value. Passwords thus give an economic advantage to their holder as a result of being kept secret, even if they do not seem economically valuable in a traditional sense.¹²⁰

This interpretation of “independent” is essential. Its importance will become clearer in Part IV, where this Article defines “causation failure” as a situation in which the asserted economic value does not come specifically from secrecy.

II. CHALLENGING THE PREVAILING WISDOM ABOUT INDEPENDENT ECONOMIC VALUE

The prevailing wisdom is that courts apply a low bar for assessing independent economic value, and that independent economic value is

field.” See 1 MILGRIM & BENSON, *supra* note 5, § 1.07A; see also *SI Handling Sys., Inc. v. Heisley*, 753 F.2d 1244, 1267 (3d Cir. 1985) (Adams, J., concurring) (noting the complications that arise when employees’ knowledge, skill, and experience are “inextricably related to the information or process that constitutes an employer’s competitive advantage”).

115. 18 U.S.C. § 1839(3)(B); UNIF. TRADE SECRETS ACT § 1, 14 U.L.A. 636–37.

116. See *infra* notes 259–62 and accompanying text.

117. See *Yield Dynamics, Inc. v. TEA Sys. Corp.*, 66 Cal. Rptr. 3d 1, 19 (Ct. App. 2007).

118. See *id.*

119. See *id.*

120. One could try to argue that a password’s value is not sufficiently economic in nature. However, this is too strict a reading of “economic.” Passwords, unlike information about management or employees, *are* connected to the business, so long as what they are protecting is connected to the business.

generally “the subject of less litigation than the secrecy or reasonable efforts requirements.”¹²¹ Moreover, even when courts do assess it, they tend to “allow a secret’s economic value to be established through inference”¹²² and “circumstantial evidence”—in particular, by evaluating “the amount of resources invested by the plaintiff in the production of the information” and “the precautions taken by the plaintiff to protect the secrecy of the information.”¹²³ There is some empirical evidence that reflects this assumption. Research on both state and federal trade secret cases decided before the DTSA was passed found that courts rarely addressed independent economic value and addressed it much less frequently than the requirement of taking reasonable secrecy precautions. In a 2009 study of trade secret claims brought in federal courts between 1950 and 2008, David Almeling and several coauthors found that “only a few courts addressed the value element, and only a few of those courts held that the element was not satisfied.”¹²⁴ Two years later, the same group of authors found similarly low numbers in a study of trade secret cases brought in state courts.¹²⁵

It is not hard to discern why courts have given economic value short shrift. The reason is that courts generally assume that any information that the plaintiff has developed and successfully kept secret, and that thereafter ends up as the subject of litigation, has at least potential economic value to the plaintiff or to others.¹²⁶

Economic value, in this sense, resembles other doctrines within the intellectual property field that, at first blush, appear redundant, such as patent law’s requirement of “utility.”¹²⁷ One might think that there is no need for the law to legally require that a patented invention be useful. After all, “a truly useless invention should be worthless, so who would go through the expense of patenting it?”¹²⁸ And why else would the patentee ever be in a

121. 1 MILGRIM & BENSON, *supra* note 5, § 1.07A; *see also* ROWE & SANDEEN, *supra* note 5, at 146.

122. DAVID QUINTO & STUART SINGER, *TRADE SECRETS: LAW AND PRACTICE* 103 (2d ed. 2012).

123. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. e (AM. L. INST. 1995).

124. David S. Almeling, Darin W. Snyder, Michael Sapoznikow, Whitney E. McCollum & Jill Weader, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 319 (2010).

125. David S. Almeling, Darin W. Snyder, Michael Sapoznikow, Whitney E. McCollum & Jill Weader, *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 GONZ. L. REV. 57, 92 (2010).

126. *See* Cundiff, *supra* note 11, at 73; *see also* Johnson, *supra* note 5, at 557 (noting that commentators assume that any information that ends up in litigation has “considerable value” (quoting ROGER E. SCHECHTER & JOHN R. THOMAS, *PRINCIPLES OF PATENT LAW* 417 (2d ed. 2004))); QUINTO & SINGER, *supra* note 122, at 103 (noting that “if the secret were not valuable, the plaintiff would not have expended substantial resources to develop it and would not have undertaken extraordinary means to protect its secrecy”).

127. 35 U.S.C. § 101; ROBERT P. MERGES & JOHN F. DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 211 (5th ed. 2011).

128. MERGES & DUFFY, *supra* note 127, at 211 (provocatively posing this question); *see also* Bedford v. Hunt, 3 F. Cas. 37, 37 (C.C.D. Mass. 1817) (writing that if an invention’s utility is “very limited, it will follow, that it will be of little or no profit to the inventor; and if it be trifling, it will sink into utter neglect”).

position to enforce the patent against someone else in court?¹²⁹ But utility, it turns out, is not redundant. In certain situations, a legal mandate of utility plays an important role in controlling patentability.¹³⁰ These include situations in which the patent applicant asserts a utility for the invention that is not credible based on current science,¹³¹ that is vague and nonspecific,¹³² or that is purely hypothetical and not presently availing.¹³³

In this respect, trade secret law's independent economic value requirement is similar to requirements like patent utility.¹³⁴ Independent economic value at first seems redundant. Just as no one would bother to patent a useless invention, so too would no one bother to protect, let alone litigate, a valueless trade secret. Yet closer scrutiny reveals this premise to be entirely unfounded and based on a number of erroneous assumptions. The mere fact that a company has taken steps to keep information secret and has hired lawyers to enforce the secret in court does not prove that the information has any value at all—let alone the sort of value required by the statutes. There are a variety of premises at work that need to be identified and evaluated. As shown below, none of these on its own provides a solid case for ignoring or downplaying independent economic value.

A. Secrecy Does Not Necessarily Indicate Economic Value from Secrecy

The first wrong assumption is that secrecy, on its own, indicates that information derives economic value from secrecy. Some commentators have suggested that the fact that information is secret—not “generally known” or “readily ascertainable through proper means” to others¹³⁵—indicates that the

129. As the U.S. Court of Appeals for the Federal Circuit once put it, the fact that someone else, the defendant, is allegedly using or selling the claimed invention, and the plaintiff wants them to stop, serves as “proof of that device’s utility,” for “[p]eople rarely, if ever, appropriate useless inventions.” *Raytheon Co. v. Roper Corp.*, 724 F.2d 951, 959 (Fed. Cir. 1983).

130. See MERGES & DUFFY, *supra* note 127, at 212–14 (discussing incredible utility doctrine); *id.* at 231–32 (discussing utility’s role in controlling the timing for when a patent can be obtained); *id.* at 256–59 (discussing utility’s impact on racing and patent scope).

131. See, e.g., *In re Swartz*, 232 F.3d 862, 864 (Fed. Cir. 2000) (denying patent for methods of generating energy using cold fusion due to both lack of utility and failure of enablement). In these cases, utility can overlap with “enablement” under 35 U.S.C. § 112. Sean B. Seymore, *Making Patents Useful*, 98 MINN. L. REV. 1046, 1083–84 (2014).

132. See *In re Fisher*, 421 F.3d 1365, 1371–72 (Fed. Cir. 2005) (holding that patent application “must disclose a use which is not so vague as to be meaningless” and identify a “specific utility” that “is particular to the subject matter claimed” and “would not be applicable to a broad class of invention”); see also MERGES & DUFFY, *supra* note 127, at 231–32.

133. See *Brenner v. Manson*, 383 U.S. 519, 534–35 (1966) (holding that to satisfy utility requirement, the invention must be “refined and developed” to the point “where specific benefit exists in currently available form”).

134. This Article is not the first to draw the analogy between independent economic value and utility. See Risch, *supra* note 5, at 166–67 (observing briefly that trade secret value “resemble[s] the patent requirement for usefulness”); Graves & Katyal, *supra* note 8, at 1407 (“The requirement of independent economic value resembles the patent requirement for usefulness.”).

135. 18 U.S.C. § 1839(3); see also Hrды & Sandeen, *supra* note 1, at 1287–89 (explaining this secrecy standard).

information represents “some degree of advance over the common place.”¹³⁶ The Supreme Court itself once casually suggested that “secrecy, in the context of trade secrets . . . implies at least minimal novelty.”¹³⁷

The comparison between secrecy and novelty is misleading. In patent law, inventions are compared to prior art—printed publications, patents, and the like—to determine whether they are sufficiently novel and nonobvious to receive a patent.¹³⁸ But secrecy, for trade secret law purposes, does not indicate that information is new when compared to the publicly available prior art, or even that the information is exclusive to a single company.¹³⁹ Multiple firms can possess the same trade secret and use it competitively in private, so long as it is not “generally known” to people in the industry.¹⁴⁰ When information’s secrecy is challenged in court, there is no reliable way to discern what other companies know or do not know behind closed doors. Unless the information is available in public sources, the parties must rely mainly on the statements of experts.¹⁴¹

Moreover, even if secrecy does imply “minimal novelty” in the sense of being unknown to most other firms in an industry, this says little about whether the information imparts economic value due to its secrecy. Even if the secret is a fully novel invention in the patent law sense, this does not mean that it has economic value.¹⁴² A new way of performing a task, for instance, might be new and nonobvious, but it might be much less effective than methods known in the prior art and, thus, commercially worthless.¹⁴³

The assumption that secrecy equals value might be appropriate in a world in which trade secrets were limited to potentially valuable inventions that many entities in the marketplace are striving to achieve.¹⁴⁴ For example, if the secret is a solution to a recognized problem in a given field, then the fact that only one or a few firms possess the solution is itself strong evidence that

136. 1 MILGRIM & BENSON, *supra* note 5, § 1.08.

137. *Kewanee Oil Co. v. Bicon Corp.*, 416 U.S. 470, 476 (1974).

138. 35 U.S.C. §§ 102–103; *see also* Hrdy & Sandeen, *supra* note 1, at 1278–84.

139. *See* Hrdy & Sandeen, *supra* note 1, at 1288–1307.

140. *Id.* at 1288, 1315–16; *see also* UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 637 (2021) (“If the principal persons who can obtain economic benefit from information are aware of it, there is no trade secret.”).

141. *See, e.g.*, *U.S. Gypsum Co. v. Lafarge N. Am. Inc.*, 670 F. Supp. 2d 748, 764 (N.D. Ill. 2009) (permitting defendant’s technical expert to “opine on what information constitutes a trade secret, based on what was known and generally available in the wallboard industry at the time in question”).

142. *See* 35 U.S.C. § 102(a)(1) (providing that an invention cannot be patented if it was, among other things, in “public use” or described in a “printed publication”).

143. Courts held early in patent law’s history “that an invention need not ‘supersede all other inventions now in practice’ or even be commercially useful at all.” *See* Risch, *supra* note 23, at 1204 (quoting *Bedford v. Hunt*, 3 F. Cas. 37, 37 (C.C.D. Mass. 1817)); *see also* Risch, *A Surprisingly Useful Requirement*, 19 GEO. MASON L. REV. 57, 67 (2011).

144. William Landes and Judge Richard Posner appear to make this assumption in their analysis, where they suggest that “inventions” that are successfully kept as trade secrets, instead of patented and disclosed, are likely to be “nonobvious and deserving of some legal protection” under patent law standards, since others in the field, by definition, do not know the invention and have failed to figure it out despite striving to reinvent it. LANDES & POSNER, *supra* note 52, at 358.

it is valuable to the holder and would be to others, too. But the assumption that secrecy equals value is unfounded with respect to the larger universe of trade secrets. Certainly, the classic example of a trade secret is a tremendously valuable formula or process that competitors only wish they could replicate.¹⁴⁵ But putative trade secrets can be run-of-the-mill modifications to well-known processes and products.¹⁴⁶ They can be business methods like how to run a group meeting or information like the identities of customers and clients.¹⁴⁷

In sum, even a company's best-kept secrets might be commercially worthless, especially if they were vetted against what is known in the rest of the industry. Secrecy does not necessarily indicate economic value due to secrecy.

*B. Secrecy Precautions May Not Be Probative of Economic Value
from Secrecy*

Another wrong assumption is that independent economic value can be inferred from the fact that the plaintiff took special precautions to keep the information secret. Under the law, anyone seeking to protect information as a trade secret must show that they used "reasonable" secrecy measures,¹⁴⁸ such as safes, passwords, firewalls, and nondisclosure agreements.¹⁴⁹ Some courts reason that a plaintiff's efforts to restrict access to information indicate that the information is valuable and even necessary for "maintaining an advantage over its competitors."¹⁵⁰ As Elizabeth Rowe observes, courts tend to see a "direct relationship between the value of the information and the extent to which the company made efforts to protect it."¹⁵¹ The reasoning is that if information were highly valuable, the company would try hard to

145. *Cf. Rohm & Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 430–31 (3d Cir. 1982) (finding for plaintiff, Rohm & Haas, where defendant, Adco, had been actively striving, without success, to replicate plaintiff's process for making a popular vehicle for latex paint).

146. *See* 1 MILGRIM & BENSON, *supra* note 5, § 1.09[4].

147. *Id.* § 1.09[7].

148. 18 U.S.C. § 1839(3); *see also* David W. Slaby, James C. Chapman & Gregory P. O'Hara, *Trade Secret Protection: An Analysis of the Concept "Efforts Reasonable Under the Circumstances to Maintain Secrecy,"* 5 SANTA CLARA COMPUT. & HIGH TECH. L.J. 321, 323 (1989).

149. *See, e.g.*, Robert G. Bone, *Trade Secrecy, Innovation, and the Requirement of Reasonable Secrecy Precautions*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH*, *supra* note 5, at 46, 46–60, 60 n.56; Varadarajan, *supra* note 9, at 390.

150. *See, e.g.*, *Teva Pharms. USA, Inc. v. Sandhu*, 291 F. Supp. 3d 659, 675 (E.D. Pa. 2018) ("These documents contain information that was not available outside Teva because it was classified as confidential and Teva took measures to restrict access to it. Its value was essential to Teva's maintaining an advantage over its competitors."); *see also* *Gen. Sec., Inc. v. Com. Fire & Sec., Inc.*, No. 17-CV-1194, 2018 U.S. Dist. LEXIS 105794, at *5 (E.D.N.Y. June 25, 2018).

151. Elizabeth A. Rowe, *Contributory Negligence, Technology, and Trade Secrets*, 17 GEO. MASON L. REV. 1, 10 (2009).

protect it, whereas few rational entities would bother to spend resources guarding worthless information.¹⁵²

However, it is not true that any information that entities bother to keep secret is valuable. Gone are the days when keeping secrets primarily meant building an unbreakable vault or placing a massive roof over a chemical plant.¹⁵³ In practice, the most important secrecy measures may be legal, like having everyone sign nondisclosure agreements,¹⁵⁴ and digital, like mandating that everyone use two-factor authentication.¹⁵⁵ To be sure, increasing digitization of information and increasing use of machines in the workplace can make the misappropriation of trade secrets easier. Hackers can spy, collect, and countermand from a distance, and employees can transfer data with the click of a button.¹⁵⁶ But automation can also facilitate secrecy. When the only entities interacting with the secrets are machines, fewer standard secrecy precautions—physical *or* legal—would be required to prevent human workers from taking the information when they leave.¹⁵⁷ There are also considerable economies of scale in keeping secrets. If a large company has a secrecy plan in place, adding more information is not necessarily more expensive. In fact, it might be more costly for a large company to sift through everything and decide what is valuable and what is not. As a recent report from the Sedona Conference working group on trade secrets observes, the value of information retained by a company “may range from ‘crown jewels’ to ephemeral data of minimal value.”¹⁵⁸ It may be extremely tempting for a company to keep all of its information secret using the same measures, irrespective of value.¹⁵⁹

152. Deepa Varadarajan, *Trade Secret Fair Use*, 83 *FORDHAM L. REV.* 1401, 1409 n.35 (2014) (discussing *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.*, 925 F.2d 174, 179–80 (7th Cir. 1991)); *see also, e.g.*, *Cemen Tech, Inc. v. Three D Indus., LLC*, 753 N.W.2d 1, 8–9 (Iowa 2008).

153. *See, e.g.*, *E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) (“To require DuPont to put a roof over the unfinished plant to guard its secret would impose an enormous expense to prevent nothing more than a school boy’s trick.”).

154. Varadarajan, *supra* note 2, at 1557–62 (discussing courts’ tendency to allow the mere use of nondisclosure agreements to satisfy plaintiff’s obligation to prove reasonable secrecy precautions).

155. *See* Rowe, *supra* note 151, at 36 (noting that “technological tools such as firewalls, user monitoring, and encryption are now more widely used to protect data”); *see also* Jonathan Green, *Trade Secrets and Data Security: A Proposed Minimum Standard of Reasonable Data Security Efforts When Seeking Trade Secret Protection for Consumer Information*, 46 *CUMB. L. REV.* 181, 183 (2016) (proposing a “minimum standard of reasonable data-security protection within trade secret law when certain trade secret information is generated from or contains consumer information”).

156. Elizabeth Rowe, *Trade Secrets, Data Security and Employees*, 84 *CHL.-KENT L. REV.* 749, 749–50 (2010) (addressing challenges of maintaining secrecy in a digital world).

157. Jeanne C. Fromer, *Machines as the New Oompa-Loompas: Trade Secrecy, the Cloud, Machine Learning, and Automation*, 94 *N.Y.U. L. REV.* 706, 717–27 (2019).

158. *See* THE SEDONA CONF., COMMENTARY ON PROTECTING TRADE SECRETS THROUGHOUT THE EMPLOYMENT LIFE CYCLE 1, 24 (2021), <https://thesedonaconference.org/download-publication?fid=5836> [<https://perma.cc/E8LT-7JLB>] (click on terms agreement and then “Download”).

159. The Sedona report does not condone this. Instead, it has urged companies to adopt a “tailored” approach to protecting trade secrets that takes into account the value of the

In sum, it is quite possible that a lot of the information that companies successfully keep secret is not very valuable. Of course, a plaintiff's secrecy precautions might supply decent circumstantial evidence of economic advantage from secrecy *if* the plaintiff shows that they took significant secrecy precautions, and those precautions were tailored *specifically* to the information at issue. On the flip side, the fact that a plaintiff took virtually no secrecy precautions could demonstrate a *lack* of independent economic value, since this conduct is inconsistent with the assertion that information is valuable due to its secrecy.¹⁶⁰ But as a general matter, it is wrong for courts to infer that the mere existence of secrecy precautions is sufficient for a finding of independent economic value.

C. "Sweat Work" Does Not Equal Economic Value from Secrecy

One of the most common forms of evidence used to support independent economic value is the time, effort, and money that the plaintiff used to develop the information.¹⁶¹ Under the common law, one factor that courts assessed in deciding whether a trade secret existed was "the amount of effort or money expended by [the plaintiff] in developing the information."¹⁶² Under the UTSA¹⁶³ and now the DTSA,¹⁶⁴ many courts use time, effort, and

information, among other things, *id.* at 1, 5, 7, and urges employers to "be mindful not to sweep in information that is not their trade secrets" if they wish to protect this later on in court. *Id.* at 25.

160. *Abrasic 90 Inc. v. Weldcote Metals, Inc.*, 364 F. Supp. 3d 888, 898 (N.D. Ill. 2019) (denying motion for preliminary injunction).

161. *See, e.g.*, 1 MILGRIM & BENSON, *supra* note 5, § 1.07A (noting courts will "generally conclude" that the necessary value element is met so long as the secret "would require cost, time, and effort to duplicate" (footnote omitted)).

162. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939); *see also* TURNER, *supra* note 38, at 107–12 (reviewing cases assessing expenditure of time, money, or work, often as evidence of other factors like secrecy, novelty, or value).

163. *See, e.g.*, *De Lage Landen Operational Servs., LLC v. Third Pillar Sys., Inc.*, 693 F. Supp. 2d 423, 439 (E.D. Pa. 2010) ("Furthermore, we credit the testimony of Martinko and Milone that the development of the use cases took ten full-time employees over two years to complete. This expenditure of time and money by DLL substantiates DLL's claim that they have independent economic value."); *Reingold v. Swiftships, Inc.*, 126 F.3d 645, 650 (5th Cir. 1997) (finding ship mold had independent economic value because, among other things, "it had cost \$1 million and had taken nine months to construct the 90 foot ship mold"); *see also, e.g.*, *ISC-Bunker Ramo Corp. v. Altech, Inc.*, 765 F. Supp. 1310, 1319 (N.D. Ill. 1990); *KCH Servs., Inc. v. Vanaire, Inc.*, No. 05-777-C, 2008 U.S. Dist. LEXIS 73059, at *1–2, *8–9 (W.D. Ky. Sept. 23, 2008); *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 972 (8th Cir. 2011); *Dayton Superior Corp. v. Yan*, No. 12-CV-380, 2013 LEXIS 55922, at *35–36 (S.D. Ohio Apr. 18, 2013).

164. For example, in *Medidata Solutions v. Veeva Systems*, the U.S. District Court for the Southern District of New York denied the defendant's motion to dismiss, finding that the complaint plausibly alleged independent economic value under the DTSA for a variety of reasons, including because the plaintiff Medidata had "spent a great deal of time and money, \$500 million, developing its technology." No. 17 Civ. 589, 2018 U.S. Dist. LEXIS 199763, at *10 (S.D.N.Y. Nov. 26, 2018); *see also, e.g.*, *Brock Servs., LLC v. Rogillio*, No. 18-867, 2019 U.S. Dist. LEXIS 231954, at *18 (M.D. La. June 17, 2019) (finding that information has independent economic value because plaintiff "invests significant time, money, and energy" into research and development); *Trahan v. Lazar*, 457 F. Supp. 3d 323, 343 (S.D.N.Y. 2020) (finding that information has independent economic value because plaintiff alleges that its "IP

money as evidence that the statutory requirement of independent economic value has been met. Irrespective of whether this approach was appropriate under the common law—which, again, used a factor-based analysis¹⁶⁵—it is not appropriate under the statutory regime.

Value that comes purely from investment of time, effort, and money is called “sweat work” or “sweat of the brow.”¹⁶⁶ In patent, copyright, and trademark law, sweat work alone is an insufficient basis for asserting an intellectual property right. No matter how much is invested in research and development, or in advertising and marketing, other substantive criteria like novelty, originality, and distinctiveness govern protectability.¹⁶⁷ The assumption seems to be that trade secret law *does* accept sweat work as a sufficient basis for obtaining an intellectual property right, so long as the information is kept secret.¹⁶⁸

It is true that, as one factor in the analysis, sweat work helps support the assertion that information has value from secrecy. If a plaintiff spent \$500 million in development, the information is more likely to impart a competitive advantage than if the plaintiff had spent \$10. However, sweat work is, at best, only circumstantial evidence of value from secrecy.¹⁶⁹ To others, the information might be easy to develop and only marginally valuable. As the Minnesota Supreme Court observed in the early days of the UTSA, sweat work is a “possible element of proof” but does “not support a finding of competitive advantage *unless* . . . a prospective competitor could

was very valuable and developed through great effort . . . [and was] the product of extensive research, sweat equity, and ingenuity, and worth many millions of dollars” (internal quotation marks omitted); *Castellano Cosm. Surgery Ctr., P.A. v. Rasha Doyle, P.A.*, No. 21-CV-1088, 2021 U.S. Dist. LEXIS 140610, at *14–15 (M.D. Fla. July 28, 2021) (finding that customer list has independent economic value based on testimony “that return customers comprised a substantial source of revenue” and “that the practice cultivated the email list over many years and that it had expended many resources to create the list”).

165. See *supra* note 42 and accompanying text.

166. PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES & SHYAMKRISHNA BALGANESH, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2020*, at 3–4 (2020).

167. See *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 591 (2013); see also *Feist Publ’ns, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 354–61 (1991); see also, e.g., *Snyder’s Lance, Inc. v. Frito-Lay N. Am., Inc.*, 542 F. Supp. 3d 371, 381 (W.D.N.C. 2021) (noting that “[n]o matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise,” it cannot protect a generic term (quoting *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976))).

168. See Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 518 & n.7 (1981); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1873–1916 (1990); see also Risch, *supra* note 5, at 166–67 (asserting with respect to value that “minimal ‘sweat of the brow’ is usually sufficient for protection”); 1 MILGRIM & BENSON, *supra* note 5, § 1.07A (noting courts will “generally conclude” that the necessary value element is met so long as the secret would require cost, time, and effort to duplicate).

169. See, e.g., *Mattel, Inc. v. MGA Ent., Inc.*, 782 F. Supp. 2d 911, 972 (C.D. Cal. 2011) (“Independent economic value can be evidenced by ‘circumstantial evidence of the resources invested in producing the information.’” (quoting *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 923 F. Supp. 1231, 1253 (N.D. Cal. 1995))).

not produce a comparable [object] without a similar expenditure of time and money.”¹⁷⁰ Worse yet, what if the information were costly to develop for the plaintiff, but the most valuable part of the information was in fact generally known in the industry? This would contradict the entire premise that the law protects only secret information, and not public or generally known information.

Some courts assume that substantial investment in development necessarily supports a finding of economic advantage due to secrecy, because anyone who gets the information from the plaintiff, instead of developing it themselves, necessarily saves “substantial development expense[s].”¹⁷¹ But the fact that a former employee, or the competitor who hires them, saves time and money does not show that the information imparted an economic advantage from secrecy at the time of the alleged misappropriation. For example, imagine that a longtime employee departs with information that they learned while working for their former employer—say, certain lines of software code that the employee developed for the company years ago. Further imagine that the employee continues to use the software code at a new job on behalf of a new company. The employee, as well as their new employer, may benefit to some degree from the employee’s continued use of the code because the employer would otherwise have needed to develop the same code, or an alternative, on their own dime. But the mere existence of this benefit to the new employer does not prove that the software code gave the original company an economic advantage due to secrecy. It shows, at best, that the employee and the new employer have been unjustly enriched. But being unjustly enriched by another’s efforts is not the same thing as misappropriating another’s trade secret.¹⁷² Of course, the original company’s investment in developing the code can support economic

170. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 901 (Minn. 1983) (emphasis added).

171. *See id.*; *see also* Slaby et al., *supra* note 148, at 324 (“A trade secret has commercial value if it derives independent economic value from being secret, or if substantial time and money would be required of a competitor to develop the same information.”); Kurt M. Saunders & Nina Golden, *Skill or Secret?—The Line Between Trade Secrets and Employee General Skills and Knowledge*, 15 N.Y.U. J.L. & BUS. 61, 72 (2018) (“In assessing economic value, courts tend to look for evidence of how the information is useful—how much time, labor, or money it saves—and whether these are more than trivial in giving the business a competitive edge.”); *see also, e.g.*, *Source Prod. & Equip. Co. v. Schehr*, No. CV 16-17528, 2017 U.S. Dist. LEXIS 138407, at *7 (E.D. La. Aug. 29, 2017) (“By misappropriating these technologies, defendants allegedly will be able to compete with plaintiffs without investing the time and resources required to develop the technologies independently. The secrecy of plaintiffs’ technologies therefore has independent economic value.” (footnote omitted)).

172. *See* Hrdy & Lemley, *supra* note 5, at 38–41. This assumption is especially curious because unjust enrichment is a common law claim that in many jurisdictions is preempted by state trade secret statutes. *See* UNIF. TRADE SECRETS ACT § 7 (amended 1985), 14 U.L.A. 818–19 (2021) (preempting noncontract claims that provide civil remedies for misappropriation of a trade secret); *see also* Charles Tait Graves & Elizabeth Tippet, *UTSA Preemption and the Public Domain: How Courts Have Overlooked Patent Preemption of State Law Claims Alleging Employee Wrongdoing*, 65 RUTGERS L. REV. 59, 61 (2012); *see also, e.g.*, *Hauck Mfg. Co. v. Astec Indus., Inc.*, 375 F. Supp. 2d 649, 656 (E.D. Tenn. 2004); *Yeiser Rsch. & Dev. LLC v. Teknor Apex Co.*, 281 F. Supp. 3d 1021, 1049 (S.D. Cal. 2017).

advantage due to secrecy, given the presence of other factors like a showing that the company's use of the code improved its performance compared to others, or that the company was secretly licensing the code to others for a fee. But sweat work alone should not be treated as dispositive.

In sum, it makes little sense to assume that information imparts an economic advantage due to secrecy just because it cost the plaintiff time, effort, and money to develop, and another entity might be saved from incurring the same costs.

D. Most Trade Secret Litigation Involves Information Obtained Lawfully

What if the defendant has also gone out of their way to obtain the information? Does that not supply the necessary additional element of proof? Here, things get trickier. One common refrain is that the very fact that a defendant in a trade secret case is trying to use or disclose the information supports the assumption that the information must impart economic advantage from secrecy. As one court put it, in such a case, the defendant's mere desire to obtain the information is itself "circumstantial proof of its value," since "[t]here would be little purpose in using the information if defendants did not believe the information was valuable."¹⁷³

Sometimes, this logic works. If the entity accused of trying to access a secret is an outsider—a competitor, an unrelated third party, a foreign entity—then that might help validate the information's perceived economic value. Why else would the defendant have obtained "wrongful knowledge" of the information after actively seeking it out?¹⁷⁴ But this is not necessarily true in all or even most trade secret cases. Most trade secret lawsuits are not brought against outsiders who are caught red-handed trying to steal the crown jewels. Most trade secret cases are brought against *insiders*—a company's own employees or business partners—who have obtained the information lawfully through the course of their work or business dealings with the plaintiff. The defendant may be a departing employee who is continuing to use the tools they lawfully acquired, or developed themselves, in their former job. It is incorrect to assume that the employee's mere continuing use shows that the information does or ever did impart economic advantage due its secrecy.

173. *Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661, 692 (D. Minn. 1986), *aff'd*, 828 F.2d 452 (8th Cir. 1987).

174. *Id.* ("If the idea of another saves a person who has wrongful knowledge of it time and money, such person has been materially benefited and the information has economic value."); *see also, e.g.*, *GlobalTranz Enters. Inc. v. Murphy*, No. CV-18-04819-PHX, 2021 U.S. Dist. LEXIS 58689, at *31 (D. Ariz. Mar. 26, 2021) ("[Plaintiff] GTZ alleges the information's secrecy is valuable. GTZ argues that [defendant] Murphy's 'extreme steps to siphon [the KIK information] to his personal email account' demonstrates the inherent value and usefulness of the information." (citation omitted)).

E. Plaintiffs Have Plentiful External Motivations for Bringing Trade Secret Lawsuits

What about the fact that the plaintiff is bothering to bring the lawsuit? A surprisingly common assumption is that plaintiffs will only bring trade secret lawsuits if the asserted information has at least “potential” economic value.¹⁷⁵ However, it is absolutely plausible that plaintiffs would incur the costs of going to court to “protect” information that is not itself valuable enough to justify such costs.

Companies and individuals go to court for all kinds of reasons. There are several obvious motivations for pursuing a trade secret lawsuit that have nothing to do with the value of the information per se. One obvious motive is simple enmity. Maybe the plaintiff is angry that the defendant used or disclosed certain information in breach of a duty of confidentiality. Another plausible motive is a desire to deter competition. Maybe the plaintiff is using the lawsuit for strategic reasons—for example, to push a competitor out of the same market space or to deter a future competitor from entering.¹⁷⁶ In a different vein, perhaps the plaintiff is an employer who is suing a departing “star employee” for the sole purpose of preventing them from leaving. An obvious way to do that is to threaten, or bring, a trade secret lawsuit.¹⁷⁷ Lastly, perhaps the plaintiff just does not want the information to get out due to the potential harm to its reputation upon disclosure.¹⁷⁸

All of these are plausible motives to sue and are not necessarily illogical ones. However, none of them proves or even necessarily supports the argument that information derives economic value from secrecy.

III. AN EMERGING TREND IN THE COURTS

The conventional wisdom has been that courts do not usually scrutinize a plaintiff’s assertions of independent economic value.¹⁷⁹ Recently, however, since the passage of the DTSA, trade secret practitioners have observed more instances of courts dismissing trade secret cases for failure to satisfy the independent economic value requirement.¹⁸⁰ This part reviews recent DTSA

175. See Johnson, *supra* note 5, at 557; QUINTO & SINGER, *supra* note 122, at 103.

176. See Sharon K. Sandeen & Elizabeth A. Rowe, *Debating Employee Non-Competes and Trade Secrets*, 33 SANTA CLARA COMPUT. & HIGH TECH. L.J. 438, 455–64 (2017) (debating the view that noncompete agreements and related legal restraints are anticompetitive).

177. Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 TUL. J. TECH. & INTELL. PROP. 167, 169–70 (2005).

178. See Graves & Katyal, *supra* note 8, at 1404 (discussing seclusion for purpose of avoiding reputational harm).

179. See *supra* notes 5, 121–25 and accompanying text.

180. For example, trade secrets expert Victoria Cundiff wrote in a 2019 Practising Law Institute report that “[t]he UTSA and DTSA’s requirement that information claimed to be a trade secret must have independent economic value (actual or potential) is often overlooked[, but] the past year has brought renewed attention to this prong.” Cundiff, *supra* note 11, at 73; see also ROWE & SANDEEN, *supra* note 5, at 177 (stating, without citing to specific case examples, that “numerous federal courts have considered Motions to Dismiss in which it was asserted that the economic value requirement was not properly pleaded”). A 2020 Law360 article proclaimed that independent economic value is “crucial” in trade secret cases. Robert

cases from a variety of jurisdictions in which independent economic value appeared to be dispositive in the court's decision to dismiss or deny a motion for an injunction. This review suggests that some courts are indeed taking independent economic value more seriously, refusing to accept assertions of independent economic value based on the usual circumstantial evidence.

A. *The Turning Point*

Before moving to the DTSA cases, it is important to mention a very significant pre-DTSA case called *Yield Dynamics, Inc. v. TEA Systems Corp.*¹⁸¹ Several practitioners cite *Yield* as representing a turning point in how courts assess independent economic value.¹⁸² The plaintiff, Yield, was a software company alleging that its former employee misappropriated eight segments of source code that he had developed while employed at Yield.¹⁸³ Upon departure, the former employee used the eight code routines to make a competing product at his new company, TEA.¹⁸⁴ Yield sued for misappropriation under California's UTSA but lost after a bench trial due to its failure to prove independent economic value.¹⁸⁵ On appeal, Yield conceded that the eight secret code routines did not involve "any new or innovative advances in software programming," and that much of the code came from public sources.¹⁸⁶ Yield nonetheless argued that the secret elements of the code were valuable because they "would provide 'some help' and 'save time' for a programmer" wanting to achieve similar functionality—that was presumably why the departing employee continued to use it.¹⁸⁷

However, in a lengthy opinion, a California appeals court held for the defendant. Merely stating that something is "helpful or useful" or might "save someone time," the court wrote, was not enough to prove that Yield derived an economic advantage from retaining the secrecy of those eight code routines.¹⁸⁸ The court rejected the usual circumstantial evidence. For example, the court noted that the fact that Yield kept all the code secret did

Manley, Phillip Aurentz, Kevin McElroy & John Bone, '*Independent Economic Value' Crucial in Trade Secret Cases*, LAW360 (June 23, 2020, 5:20 PM), <https://www.law360.com/articles/1283638> [<https://perma.cc/QR4V-NPNH>] (citing *Plastronics Socket Partners Ltd. v. Highrel Inc.*, No. CV-18-03201-PHX, 2019 U.S. Dist. LEXIS 78569, at *10–11 (D. Ariz. May 9, 2019)); *see also* *Yield Dynamics, Inc. v. TEA Sys. Corp.*, 66 Cal. Rptr. 3d 1, 18 (Ct. App. 2007).

181. 66 Cal. Rptr. 3d 1, 7 (Ct. App. 2007).

182. *See* Robert B. Milligan, *Recent California Appellate Decision Finds that Company Failed to Demonstrate that Its Source Code Had Independent Economic Value*, SEYFARTH (Nov. 29, 2007), <https://www.tradesecretslaw.com/2007/11/articles/trade-secrets/recent-california-appellate-decision-finds-that-company-failed-to-demonstrate-that-its-source-code-had-independent-economic-value/> [<https://perma.cc/97PH-568X>]; Manley et al., *supra* note 180, at 1–2 (citing *Yield* as an example of value being "crucial" in trade secret cases).

183. *Yield Dynamics, Inc.*, 66 Cal. Rptr. 3d at 7–9.

184. *Id.*

185. *Id.*

186. *Id.* at 15–16, 18–19, 19 n.15.

187. *Id.* at 17–21.

188. *Id.* at 18.

not prove that the nonpublic parts of the code derived independent economic value from secrecy:

Yield's protection of its code from general disclosure could hardly show that the eight routines at issue possessed independent economic value. Apparently it kept *all* of its code confidential, even though some of it came from outside sources, including public ones.

. . . . A decision to view information as confidential thus reflects at most an *opinion* that secrecy *may* be advantageous.¹⁸⁹

The holding in *Yield* was surprising to practitioners who viewed the opinion as diverging from what other courts had required for a finding of independent economic value under the UTSA. As Robert Milligan put it, *Yield* adds “an additional wrinkle” by emphasizing that “[s]ecrecy and usefulness alone will not establish independent economic value.”¹⁹⁰ Instead, *Yield*'s heightened standard meant that a plaintiff would have to show that the claimed information gave it an economic advantage precisely because it was kept secret, and that the asserted economic value of the information came specifically from its secret elements.

B. *Skepticism Among Federal Courts Applying the DTSA*

Since the passage of the DTSA in 2016, several federal district courts have followed the approach in *Yield* in the pretrial stages of litigation, dismissing cases or denying motions for preliminary injunctions when plaintiffs fail to plead or sufficiently prove independent economic value.¹⁹¹ This section

189. *Id.* at 19–20.

190. Milligan, *supra* note 182, at 1.

191. *Ukrainian Future Credit Union v. Seikaly*, No. 17-cv-11483, 2017 U.S. Dist. LEXIS 194165, at *25 (E.D. Mich. Nov. 27, 2017) (applying motion to dismiss standard and denying plaintiff's motion to add a DTSA claim); *Elsevier Inc. v. Dr. Evidence, LLC*, No. 17-cv-5540, 2018 U.S. Dist. LEXIS 10730, at *17–18 (S.D.N.Y. Jan. 23, 2018) (granting motion to dismiss); *Democratic Nat'l Comm. v. Russian Fed'n*, 392 F. Supp. 3d 410, 448 (S.D.N.Y. 2019) (granting motion to dismiss); *Signal Fin. Holdings LLC v. Looking Glass Fin. LLC*, No. 17 C 8816, 2018 U.S. Dist. LEXIS 15106, at *16 (N.D. Ill. Jan. 31, 2018) (limiting scope of preliminary injunction to exclude draft agreements); *Plastronics Socket Partners Ltd. v. Highrel Inc.*, No. CV-18-03201-PHX, 2019 U.S. Dist. LEXIS 78569, at *14 (D. Ariz. May 9, 2019) (granting motion to dismiss with leave to amend); *ATS Grp., LLC v. Legacy Tank & Indus. Servs. LLC*, 407 F. Supp. 3d 1186, 1198 (W.D. Okla. 2019) (granting motion to dismiss with leave to amend); *Abrasic 90 Inc. v. Weldcote Metals, Inc.*, 364 F. Supp. 3d 888, 898 (N.D. Ill. 2019) (denying motion for preliminary injunction); *Kairam v. West Side GI, LLC*, 793 F. App'x 23, 28 (2d Cir. 2019) (holding district court properly dismissed but should have granted leave to amend); *Danaher Corp. v. Gardner Denver, Inc.*, No. 19-CV-1794, 2020 U.S. Dist. LEXIS 89674, at *45 (E.D. Wis. May 20, 2020) (granting motion to dismiss); *Intrepid Fin. Partners, LLC v. Fernandez*, No. 20 CV 9779, 2020 U.S. Dist. LEXIS 244742, at *12–13 (S.D.N.Y. Dec. 30, 2020) (granting motion to dismiss); *Attia v. Google LLC*, 983 F.3d 420, 425–26 (9th Cir. 2020) (affirming grant of motion to dismiss); *Payward, Inc. v. Runyon*, No. 20-cv-02130, 2020 U.S. Dist. LEXIS 173907, at *6 (N.D. Cal. Sept. 22, 2020) (granting motion to dismiss with leave to amend); *Zirvi v. Flatley*, 433 F. Supp. 3d 448, 465 (S.D.N.Y. 2020) (granting motion to dismiss); *NEXT Payment Sols., Inc. v. CLEAResult Consulting, Inc.*, No. 17-cv-8829, 2020 U.S. Dist. LEXIS 94764, at *31–32 (N.D. Ill. May 31, 2020) (granting summary judgment); *24 Seven, LLC v. Martinez*, 19-CV-7320, 2021 U.S. Dist. LEXIS 15480, at *4 (S.D.N.Y. Jan. 26, 2021) (granting motion to dismiss); *Sirius Comput.*

discusses these cases. They are divided into four categories based on the reason that the court gave for why the independent economic value requirement was not satisfied.

Importantly, the courts in these cases are acting in the very early stages of litigation. For a variety of reasons, most trade secret cases focus exclusively on pretrial relief; the cases rarely go to trial.¹⁹² The typical procedural posture in these cases is an order on the plaintiff's motion for preliminary injunction or an order on the defendant's motion to dismiss for failure to state a claim.¹⁹³ As a result, courts are usually hesitant to force plaintiffs to expose the full details of their secrets before a protective order is in place, and thus, they give plaintiffs time to develop their claims.¹⁹⁴ This makes these recent opinions—many of which dismissed the case *with prejudice*—all the more significant.

1. No Plausible Assertion of Independent Economic Value

In the first category of DTSA cases, courts found that plaintiffs failed to provide plausible evidence, or at least a plausible story, for how their information imparted independent economic value. Instead, the plaintiffs in these cases attempted to rely on other factors—in particular, the fact that they took reasonable measures to keep the information secret.¹⁹⁵ Courts have found this reasoning to be insufficient in demonstrating economic advantage from secrecy.

For example, in *ATS Group, LLC v. Legacy Tank & Industrial Services LLC*,¹⁹⁶ the U.S. District Court for the Western District of Oklahoma dismissed a DTSA claim for failure to demonstrate independent economic value.¹⁹⁷ The alleged trade secrets ran the gamut from information about “ongoing or prospective jobs” to “pricing and profit margins,” to “software,

Sols., Inc. v. Sachs, No. 20-cv-1432, 2021 U.S. Dist. LEXIS 77595, at *10–11 (N.D. Ill. Apr. 22, 2021) (granting motion to dismiss).

192. See THE SEDONA CONF., COMMENTARY ON EQUITABLE REMEDIES IN TRADE SECRET LITIGATION 10–24 (2021), <https://thesedonaconference.org/download-publication?fid=6186> [<https://perma.cc/K3DS-5VS8>]. See generally Elizabeth Rowe, *eBay, Permanent Injunctions, and Trade Secrets*, 77 WASH. & LEE L. REV. 553 (2020).

193. See FED. R. CIV. P. 65(a) (preliminary injunction); *id.* 65(b) (temporary restraining order); see also *id.* 12(b)(6) (a party may assert a motion to dismiss for “failure to state a claim upon which relief can be granted”).

194. For examples of courts expressing concern about forcing disclosure of secrets during litigation, see *Mighty Deer Lick, Inc. v. Morton Salt, Inc.*, No. 17-cv-05875, 2020 U.S. Dist. LEXIS 23206, at *12–14 (N.D. Ill. Feb. 11, 2020); *Copart, Inc. v. Sparta Consulting, Inc.*, 277 F. Supp. 3d 1127, 1153–55 (E.D. Cal. 2017); *Design Nine, Inc. v. Arch Rail Grp., LLC*, No. 18 CV 428, 2019 U.S. Dist. LEXIS 49079, at *12 (E.D. Mo. Mar. 25, 2019).

195. See, e.g., *Elsevier Inc., LLC*, 2018 U.S. Dist. LEXIS 10730, at *17–18 (dismissing New York and DTSA claims, holding that “the only factor under New York law that [counter-plaintiff] does address is the third—the extent of measures taken to safeguard the information [and t]aking steps to protect information through a confidentiality agreement does not, on its own, suggest the existence of . . . bona fide trade secrets”).

196. 407 F. Supp. 3d 1186 (W.D. Okla. 2019).

197. See *id.* at 1197. As is common in these DTSA cases, the plaintiff also brought a state law claim under Oklahoma's version of the UTSA. See *id.* at 1198.

processes and procedures” to “customer names.”¹⁹⁸ The court found that the plaintiff, ATS, sufficiently pled that it took reasonable measures to maintain secrecy,¹⁹⁹ but indicated that maintaining secrecy alone was not enough. ATS completely failed to allege that the information it had “designated” as trade secrets derived “‘independent economic value’ from remaining confidential” or “provided it with a competitive advantage.”²⁰⁰ Thus, the court dismissed the complaint, though it gave the plaintiff leave to amend.²⁰¹ The plaintiff thereafter filed an amended complaint, in which it took pains to explain how its information gave it a competitive advantage, using the words “competitive advantage” at least ten times.²⁰²

2. Economic Value Not Specifically from Secrecy

A second line of DTSA cases reveals courts fleshing out the most subtle feature of independent economic value: the requirement of a causal connection between value and secrecy. Courts chastened plaintiffs who failed to explain precisely how the value they identified came from the information’s secrecy. Merely asserting that information had “value” in a holistic sense, or that others would save time and money if they obtained it, was not sufficient.²⁰³

For example, in *Danaher Corp. v. Gardner Denver, Inc.*,²⁰⁴ the plaintiff asserted trade secret protection for a “Growth Room Template” that was essentially an internal teaching document used by employees to conduct “a growth-focused meeting.”²⁰⁵ The U.S. District Court for the Eastern District of Wisconsin denied a preliminary injunction and granted defendant’s motion to dismiss because the plaintiff failed to explain how the Growth Room Template derived economic value from its secrecy.²⁰⁶ The Growth Room Template was kept generally secret within the company, and it may have been valuable in a holistic sense because it helped “guide development meetings” and enabled the “organization to operate in a consistent fashion.”²⁰⁷ But the plaintiff failed to identify anything specific about the

198. *Id.* at 1198–99.

199. The court found that the plaintiff’s provision of confidentiality policies in the employee handbook, as well as its use of password protections and access restrictions, were sufficient to satisfy reasonable efforts to maintain secrecy. *Id.* at 1199.

200. *Id.* at 1200.

201. *Id.*

202. See Amended Complaint, *ATS Grp., LLC v. Legacy Tank & Indus. Servs. LLC*, 407 F. Supp. 3d 1186 (W.D. Okla. 2019) (No. CIV-18-994-R), 2019 WL 6178620.

203. See, e.g., *Signal Fin. Holdings LLC v. Looking Glass Fin. LLC*, No. 17 C 8816, 2018 U.S. Dist. LEXIS 15106, at *5–6, *16 (N.D. Ill. Jan. 31, 2018) (rejecting plaintiff’s argument that draft employee agreements had independent economic value because they could “serve as templates for future agreements, thereby saving it legal fees” and save development costs, because the draft agreements did not derive their economic value from secrecy and in fact would have existed “even if the documents were public”).

204. No. 19-CV-1794, 2020 U.S. Dist. LEXIS 89674 (E.D. Wis. May 20, 2020).

205. *Id.* at *3, *20, *24.

206. *Id.* at *30–31, *45.

207. *Id.* at *30.

Growth Room Template that derived value from its secrecy.²⁰⁸ The Growth Room Template's value, the court wrote, does not lie "in its secrecy from others," but only in what it represents for the plaintiff's own employees—"an ability to conduct a growth and development meeting effectively."²⁰⁹ "Certainly, a well-run growth and development department will impart value to its company—that is the entire point. But simply because information is valuable does not mean that it is a trade secret."²¹⁰ The court permanently dismissed the plaintiff's claim without leave to amend.²¹¹

3. Mere Threat of Harm upon Disclosure Is Not Enough

In another line of DTSA cases, courts found plaintiffs' allegations of independent economic value to be insufficient because plaintiffs asserted merely that disclosure would be harmful to them without explaining how the information gave them an economic advantage over others. For example, in *Democratic National Committee v. Russian Federation*,²¹² the Democratic National Committee (DNC) filed a lawsuit alleging, among other things, that the Russian government violated the DTSA by obtaining trade secrets from the DNC's computers and leaking them to WikiLeaks.²¹³ The complaint described the DNC's alleged trade secrets as consisting of "donor lists" and "fundraising strategies."²¹⁴

The DNC's claim was not frivolous. As noted above, nonprofit entities have successfully protected their donor lists as trade secrets.²¹⁵ But the U.S. District Court for the Southern District of New York dismissed without leave to amend,²¹⁶ holding that the DNC had not identified anything economically valuable about its donor lists or fundraising strategies, or "shown how their particular value derive[d] from their secrecy."²¹⁷ Instead, the DNC alleged only that disclosure of this information would be bad because it "would reveal critical insights into the DNC's political, financial, and voter engagement strategies."²¹⁸ Merely asserting that disclosure would somehow be harmful to the DNC, the court's dismissal suggested, was not the same as explaining how it gave the DNC an economic advantage over other entities.²¹⁹

A court made a similar determination in *Ukrainian Future Credit Union v. Seikaly*,²²⁰ holding that merely asserting negative "regulatory consequences"

208. *Id.* at *30–31 ("Danaher has not alleged facts to support the requirement that the Growth Room Template's value is derived from the information's secrecy . . .").

209. *Id.* at *30–31.

210. *Id.* at *31.

211. *Id.* at *45.

212. 392 F. Supp. 3d 410 (S.D.N.Y. 2019).

213. *Id.* at 417–19.

214. *Id.* at 436, 448.

215. See *supra* note 84 and accompanying text.

216. *Democratic Nat'l Comm.*, 392 F. Supp. 3d at 451 (dismissing with prejudice).

217. *Id.* at 448.

218. *Id.* at 436.

219. *Id.* at 436, 448.

220. No. 17-cv-11483, 2017 U.S. Dist. LEXIS 194165 (E.D. Mich. Nov. 27, 2017).

due to disclosure of certain customer information did not prove that the information afforded plaintiff “a competitive advantage by having value to the owner and potential competitors.”²²¹ The complaint emphasized the plaintiff’s need for the information to remain confidential and the negative consequences of disclosure, but it said “nothing about the economic value of the information to a competitor or anyone else.”²²²

4. Undeveloped Ideas and Stale Information

In a final line of DTSA cases, courts suggested that independent economic value from secrecy, while it might exist at some point in time, was not present during the correct time frame. Either the requisite value did not yet exist or it had long since expired.

For example, in *Pawelko v. Hasbro, Inc.*,²²³ the plaintiff argued that Hasbro misappropriated her idea to develop two new Play Doh product lines, “Play Doh Plus” and “DohVinci.”²²⁴ Hasbro argued that the plaintiff’s product ideas lacked even potential independent economic value because they were not sufficiently developed and had not been deemed safe and approved for children.²²⁵ The court denied Hasbro’s motion for summary judgment, stating that “[i]ndependent economic value . . . does not require that the designs be completely refined, developed, and manufactured.”²²⁶ However, the court observed that, at trial, the plaintiff might face a challenge in proving that her idea was sufficiently developed to satisfy the independent economic value requirement.²²⁷

In another case, the opposite timing problem arose. A court found that the asserted trade secrets, although they may have been valuable in the past, no longer had that value. In *24 Seven, LLC v. Martinez*,²²⁸ the plaintiff alleged that it owned a “compilation” trade secret consisting of “client names, candidate names, client contacts, revenues by client, and commission amounts.”²²⁹ The plaintiff, 24 Seven, alleged that it worked hard to develop the information but failed to explain how the information retained “economic value . . . vis-à-vis its competitors,” given that significant time had passed.²³⁰ In all probability, the court wrote, “the economic edge that 24 Seven’s reports would give competitors is marginal and would dissipate with the age of the

221. *Id.* at *24–26.

222. *Id.*

223. No. 16-00201, 2018 U.S. Dist. LEXIS 196741 (D.R.I. Nov. 19, 2018).

224. *Id.* at *1–5.

225. *Id.* at *12.

226. *Id.* at *11 (quoting *Giasson Aerospace Sci., Inc. v. RCO Eng’g, Inc.*, 680 F. Supp. 2d 830, 844 (E.D. Mich. 2010); and then citing *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 726–27 (7th Cir. 2003) (discussed at *infra* notes 298–99 and accompanying text)).

227. *Id.* at *18–19.

228. No. 19-CV-7320, 2021 U.S. Dist. LEXIS 15480 (S.D.N.Y. Jan. 26, 2021).

229. *Id.* at *4.

230. *Id.* at *27.

report.”²³¹ In the end, the court dismissed the plaintiff’s claim without leave to amend.²³²

IV. A TYPOLOGY OF VALUE FAILURES

A purely descriptive account is useful for those wishing to know how courts actually behave “on the ground.” It also begs for order and further analysis. This part draws on the case law, as well as insights from the broader intellectual property law field, to provide a framework for conceptualizing independent economic value that can be used to identify, categorize, and evaluate “value failures” that may arise in the future. Value failures occur along four dimensions—amount, causation, type, and timing. One or more of these value failures can arise in virtually any trade secret case. Each category brings its own policy concerns. This part explains the four value failures, identifies the associated policy concerns, and shows how the legal requirement of independent economic value, if properly applied, can prevent them.

A. Amount Failures

Independent economic value establishes a minimum quantitative threshold for the value that information must have in order to be a trade secret. An “amount failure” occurs when a putative trade secret simply does not reach this minimum threshold. The threshold is not particularly high. Both federal and state statutes specifically refer to “potential” independent economic value, suggesting that they contemplate information with modest present value.²³³ The Third Restatement’s oft-cited commentary counsels that the value “need not be great”: “It is sufficient if the secret provides an advantage that is more than trivial.”²³⁴ At a practical level, courts have not generally required the trade secret owner to “provide a formal valuation of the trade secret or identify revenues associated with the trade secret.”²³⁵

A low threshold for value makes sense. The conventional view of value in intellectual property law is that markets, not government, should determine the merit of inventions and creative works and the direction of technological development.²³⁶ Under this view, the value of a trade secret should be

231. *Id.* at *27–28.

232. *Id.* at *35. The court granted leave to refile state law claims in state court. *Id.* But see *Vendavo, Inc. v. Long*, 397 F. Supp. 3d 1115, 1133 (N.D. Ill. 2020) (holding that some information satisfied independent economic value, but information older than three years did not).

233. 18 U.S.C. § 1839(3)(B); UNIF. TRADE SECRETS ACT § 1(4)(i) (amended 1985), 14 U.L.A. 637 (2021).

234. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. e (AM. L. INST. 1995); see also, e.g., *Smithfield Packaged Meats Sales Corp. v. Dietz & Watson, Inc.*, 452 F. Supp. 3d 843, 855–56 (S.D. Iowa 2020).

235. 1 MILGRIM & BENSEN, *supra* note 5, § 1.07A. But see HALLIGAN & WEYAND, *supra* note 55, at 122–27 (noting that valuation is a good business practice and can be a requirement for obtaining damages).

236. For patents, see Robert P. Merges, *Intellectual Property in Higher Life Forms: The Patent System and Controversial Technologies*, 47 MD. L. REV. 1051, 1062–69 (1988)

evaluated primarily based on industry's perceptions of value, not those of courts or government officials.²³⁷

However, a low standard is not the same as no standard, and there must be a standard. There is an infinite number of secret tidbits that could theoretically serve as the basis for a trade secret lawsuit.²³⁸ James Pooley offers, as an example, the fact that a company secretly paints its manufacturing equipment with racing stripes. “[T]hat may be amusing,” Pooley writes, “but it doesn’t give you any competitive advantage, so it couldn’t qualify.”²³⁹ This is a hypothetical illustration, but in the real world, trade secret lawsuits can similarly hinge on low-value information whose competitive advantage is not readily apparent. For example, in one case, a boating company sued a competitor started by a former employee, asserting trade secrecy protection in, among other things, the fact that the former employer used volume discounts.²⁴⁰ Such claims can come from the other direction too, with employees suing employers over information that their employer continued to use after they left (although this is far, far less common). For example, in one recent DTSA case, a former employee alleged that her employer had misappropriated the billing template that she had used to optimize billing procedures in her former job.²⁴¹

Some of these claims may turn out to involve information that is moderately valuable. But many will not justify a response from the law. As Judge Richard Posner once observed, the law’s “machinery is far from costless” and should be reserved for trade secrets with “real value deserving of legal protection.”²⁴² We may postulate that cost-benefit analysis will necessarily screen out low-value secrets, for who would protect, let alone sue

(suggesting limited role for patent office in assessing utility of technology); Seymore, *supra* note 131, at 1076 (arguing that judging the utility of inventions requires a “subjective and arbitrary value judgment” as to when or whether an invention is useful enough to count under the law); Risch, *supra* note 23, at 1205–06 (explaining why a “commercial utility” standard might be difficult to administer). For similar views on the “originality” requirement in copyright, see, for example, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”); see also Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 456 (2009); Joseph P. Fishman, *Originality’s Other Path*, 109 CALIF. L. REV. 861, 863 (2021).

237. *But see* Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 984–85 (2012) (critiquing assumption that difficulty in aggregating information in private markets makes it impossible for government to effectively incentivize innovation); *cf.* Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents-Prizes Debate*, 92 TEX. L. REV. 303, 327–28 (2013); Camilla A. Hrды, *Commercialization Awards*, 2015 WIS. L. REV. 13, 67.

238. *See* POOLEY, *supra* note 52, at 63.

239. *Id.*

240. *See* *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1298 (11th Cir. 2018) (affirming district court’s grant of summary judgment, which found that information about a volume discount lacked independent economic value).

241. *See* *Kairam v. West Side GI, LLC*, 793 F. App’x 23, 28 (2d. Cir. 2019) (holding claim was properly dismissed for lack of value and reasonable measures, with leave to amend).

242. *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 179–80 (7th Cir. 1991).

over, information that lacks value?²⁴³ Judge Posner's assumption, in making the statement above, was that "the owner's precautions" serve as "evidence that the secret has real value."²⁴⁴ However, as explained above, this inference is dubious.²⁴⁵ Secrecy need not be costly or narrowly tailored to what is of value. There are plentiful scenarios in which plaintiffs would be well served by using virtually valueless information as the basis for a lawsuit. Perhaps a star employee is trying to depart, and the employer does not want them to leave for reasons unrelated to trade secrets.²⁴⁶ Perhaps a former business partner is now directly competing for the same contract. A devious but rational solution is to identify information to which they had lawful access and bring a trade secret lawsuit against them.²⁴⁷

This is why courts must be free to use independent economic value to screen for amount failures. If there were no quantitative standard for value at all, then many of these shenanigans would be legal, and courts would be left to deal with the fallout.²⁴⁸ Courts can use the "plausibility" pleading standard to dismiss baseless claims.²⁴⁹ But without independent economic value, there would be nothing for courts to object to; they would have to rely purely on secrecy, reasonable secrecy precautions, and cost-benefit analyses to control what is protectable. Thanks to independent economic value, courts can and should dismiss for failure to state a claim when the asserted trade secret is not quantitatively valuable enough to justify legal protection.

B. Causation Failures

The most subtle feature of independent economic value is that it contains an implicit causation requirement. The information's asserted value must derive specifically from its secrecy. When that is not the case, the information does not have independent economic value from secrecy, as the statute requires. This is a "causation failure."

The causation failure is based on the statutory mandate that a trade secret's asserted economic value must come "independently" from the fact that information is being kept secret. If the information's economic value does not accrue from the information's secrecy, then the information is not a trade secret.²⁵⁰ To give an obvious example, if the alleged trade secret is the

243. See Kitch, *supra* note 10, at 697–98; Cundiff, *supra* note 11, at 73.

244. *Rockwell*, 925 F.2d at 179.

245. See *supra* Part II.B.

246. See Camilla A. Hrdy, *The General Knowledge, Skill, and Experience Paradox*, 60 B.C. L. REV. 2409, 2410–12 (2019).

247. See *Gemini Aluminum Corp. v. Cal. Custom Shapes, Inc.*, 116 Cal. Rptr. 2d 358, 368–69 (Ct. App. 2002) (holding that trade secret claim against rival for a contract to build a workbench was specious, in part because the alleged trade secret consisted of the identity of the parties to the contract, which was known to all).

248. See David S. Levine & Sharon K. Sandeen, *Here Come the Trade Secret Trolls*, 71 WASH. & LEE L. REV. ONLINE 230, 244 (2015) (arguing that stronger trade secret laws run the risk of trade secret claims being used as "anti-competitive weapons").

249. See *supra* Part III.B.1.

250. *Signal Fin. Holdings LLC v. Looking Glass Fin. LLC*, No. 17 Civ. 8816, 2018 U.S. Dist. LEXIS 15106, at *16 (N.D. Ill. Jan. 31, 2018) (discussed in *supra* note 203).

information making up the chemical composition for a drug that treats cancer, then the economic value of that drug's composition must be causally linked to what is secret about it. If most of the composition of the drug is already well known in the industry, and the only thing that is secret about the drug is an alteration or addition, it must be the case that the specific secret alteration or addition gives the holder an economic advantage over others due to being kept secret from others.

The requirement of a causal connection between value and secrecy raises the bar on what is needed for protection, and for good reason. Not only can information that is public not be protected as a trade secret, but secret information whose value does not stem from secrecy cannot be a trade secret either. The policy significance of this rule recalls the policy reasoning behind the secrecy requirement itself. Requiring value to come from secrecy, as opposed to allowing protections for what is publicly known, is critical to ensuring that trade secret law does not needlessly interfere with "robust competition or with the dissemination of new ideas."²⁵¹ The practical significance of this rule is to ensure that remedial assistance from a court in the form of an injunction will *actually help* the complaining party. If the information's value is not specifically attributable to its secrecy, then an injunction to preserve the information's secrecy does not help protect that value. This is why the Supreme Court once stated that the "economic value" of the trade secret "property right" lies in the "competitive advantage over others" that the holder enjoys by virtue of retaining exclusivity, such that "disclosure or use by others . . . would destroy that competitive edge."²⁵² Value must come from secrecy, and disclosure must threaten to destroy both secrecy and value. If this link is not enforced, trade secret law serves a distinct purpose from protecting the value that lies in secrecy. At best, it serves only to prevent another from benefiting from the plaintiff's investments (i.e., unjust enrichment); at worst, it serves ulterior motives—restricting competition, restricting mobility, restricting speech, or furthering mere enmity—that have nothing to do with protecting value.

A powerful illustration of a causation failure in practice is the *Yield Dynamics* case, discussed in Part III, where the court held, after a trial, that the plaintiff's source code lacked independent economic value. The functionality provided by the code, and thus the basis for its economic value, did not derive from the code's secret parts. Instead, it came from the code's public, open-source parts.²⁵³ Yield asserted that the lines of code had value because they "would provide 'some help' to a programmer in creating new routines or a similar function or save time in programming."²⁵⁴ But unless there was a causal link between the economic advantage of the code and the

251. Lemley, *supra* note 4, at 343.

252. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) (emphasis added).

253. *Yield Dynamics, Inc. v. TEA Sys. Corp.*, 66 Cal. Rptr. 3d 1, 14–15, 15 n.13, 17–18 (Ct. App. 2007).

254. *Id.* at 17.

secret parts of the code, the mere fact that the former employee benefitted from continuing to use the code was not enough.

Unfortunately, many courts do not take this extra step in assessing economic value. To give a typical example, in *Luckyshot LLC v. Runnit CNC Shop, Inc.*,²⁵⁵ the U.S. District Court for the District of Colorado found that a design for a toilet plunger “unquestionably” possessed independent economic value under the DTSA because the “proprietary plunger design ‘enabled [plaintiff] to market those plungers . . . to customers . . . for substantial amounts,’” and plaintiff had “generated over \$1.3 million in revenue” from one of its customers over two years.²⁵⁶ The issue should have been more specific: Did the *secret aspects* of the plaintiff’s plunger design permit the plaintiff to market the plunger for “substantial amounts” and help generate the stated revenues? In other words, did the plunger have *value from secrecy*? If the plunger design was valuable due to other factors besides secrecy—such as the generally known part of the design, the unprotectable skill, knowledge, and experience of the plaintiff’s employees,²⁵⁷ or the marketing provided by plaintiff’s brand—then the plunger design did not derive independent economic value. It was not a trade secret. There are plentiful other cases revealing similar oversights. Particularly at the pleading stage, courts do not typically require the plaintiff to directly link the economic value in question to what is actually a secret.²⁵⁸ If courts begin to take this causation requirement more seriously, as the *Yield* court did and as some courts are doing, the implications for trade secret litigation and enforcement could be significant.

The causation issue concededly does not arise all the time. Some trade secrets are entirely secret or secret in all material respects. Thus, there will be no question that the asserted value derives from secrecy. But causation failures probably arise far more often than one might assume. Many trade secrets are made up of a combination of both public and nonpublic information or consist of a minor divergence from what is already known.²⁵⁹

255. No. 19-cv-03034, 2020 U.S. Dist. LEXIS 175237 (D. Colo. Sept. 24, 2020).

256. *Id.* at *4 (second alteration in original).

257. See Hrды, *supra* note 246, at 2409.

258. Indeed, in an ongoing case, *Amimon Inc. v. Shenzhen Hollyland Tech Co.*, a district court recently implied that these issues did not matter. No. 20 Civ. 9170, 2021 U.S. Dist. LEXIS 229162, at *28 (S.D.N.Y. Nov. 30, 2021). Rejecting the defendant’s argument that the plaintiff, Amimon, had not alleged that its source code imparted “any economic value to [plaintiffs] or their competitors,” the court wrote that plaintiff’s allegations that it is “a leader of the video transmission industry” and “spends 5 to 10 million dollars annually to research and develop new technologies” were sufficient. *See id.* (“Although Amimon has failed to allege specifically how much it spent on the Source Code in question, or the current value of the Source Code, in light of the other information provided, Amimon has alleged sufficient facts to plausibly assert that the Source Code is a trade secret.”). Spending on research and development and being an industry leader do not show or even necessarily support that the specific software code in question derives economic value from secrecy.

259. See ROWE & SANDEEN, *supra* note 5, at 92. See generally Tait Graves & Alexander Macgillivray, *Combination Trade Secrets and the Logic of Intellectual Property*, 20 SANTA CLARA COMPUT. & HIGH TECH. L.J. 261 (2004) (critiquing trade secret protection for combination trade secrets).

Within the field of software engineering, for example, a lot of source code incorporates open-source code.²⁶⁰ This code should only be protectable to the extent that the secret part of the code imparts an economic advantage. Similarly, data compilations often consist of private and public data. Courts often observe that compilations are specifically contemplated in the statutory text as potentially protectable trade secrets.²⁶¹ However, compilations of non-secret and secret information are only protectable to the extent that the secret aspects of the data, or some unknown combination of all the data, provide an economic advantage due to secrecy.²⁶² If 99 percent of the data in the compilation is public, and the secret aspects impart only trivial additional value, then the compilation as a whole may well not derive sufficient economic value due to secrecy.

The causation issue can also arise in virtually all cases involving minor alterations to commonly sold products or general industry knowledge.²⁶³ For example, in the now infamous *Waymo LLC v. Uber Technologies, Inc.*²⁶⁴ case, plaintiff Waymo's former employee downloaded more than 14,000 files containing designs for autonomous vehicles before he left to work for defendant, Uber.²⁶⁵ But the information contained in those files was not all secret.²⁶⁶ Much of it likely consisted of alterations to what engineers already knew about self-driving cars.²⁶⁷ If the case had not settled, Waymo would have had to prove that specific secrets within those 14,000 files—which the judge had narrowed to *eight* by the time of trial—imparted actual or potential economic advantage over others.²⁶⁸

260. See Katyal, *supra* note 37, at 1252.

261. 18 U.S.C. § 1839(3)(B); UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 636–37 (2021).

262. See, e.g., *WHIC LLC v. NextGen Labs., Inc.*, 341 F. Supp. 3d 1147, 1163 (D. Haw. 2018); *Intel Corp. v. Rais*, No. 19 Civ. 20, 2019 U.S. Dist. LEXIS 4932, at *10 (W.D. Tex. Jan. 10, 2019).

263. Compare *Kendall Holdings, Ltd. v. Eden Cryogenics LLC*, 630 F. Supp. 2d 853, 863 (S.D. Ohio 2008) (holding that “shop drawings” for cryogenic bayonets did not “create independent economic benefit to Plaintiff by not being known or disclosed to other cryogenics competitors” because they were indistinguishable from “standardized, non-novel products widely produced by cryogenics manufacturers”), with *Sexual MD Sols., LLC v. Wolff*, No. 20-20824-CIV, 2020 U.S. Dist. LEXIS 79581, at *40–41 (S.D. Fla. May 6, 2020) (holding that, although techniques for marketing a sexual wellness product were based in part on “publicly available, third-party sources,” plaintiff’s “enhancements to the marketing principles found in third-party sources added economic value” as evidenced by fact that plaintiff spent “considerable time and money” in developing its marketing plan).

264. See No. C 17-00939, 2017 U.S. Dist. LEXIS 73843 (N.D. Cal. May 15, 2017).

265. See *id.* at *1.

266. See *id.*

267. See Hrdy, *supra* note 246, at 2412–13.

268. Uber was apparently preparing to challenge this point. See Defendants Uber Technologies, Inc. and Ottomotto LLC’s Opposition to Lyft Inc.’s Motion to Quash Subpoena at 1, *Waymo LLC v. Uber Techs., Inc.*, No. C 17-00939, 2017 U.S. Dist. LEXIS 73843 (N.D. Cal. May 15, 2017), 2017 WL 4174067.

Recent DTSA cases have been dismissed due to plaintiffs' failures to allege value due specifically to secrecy.²⁶⁹ More courts should identify these causation failures and urge the parties to address them as soon as possible. If the case does end up going to trial, then it will be up to the plaintiff to prove whether the asserted economic value really comes from secrecy.²⁷⁰

C. Type Failures

A fundamental function of the independent economic value requirement is that it constrains the *type* of value that can be protected as a trade secret. Unlike patent law, which does not mandate that an invention have any commercial merit to be protectable,²⁷¹ trade secret law demands that information have, specifically, *economic* value.²⁷² Information whose value is not sufficiently economic in nature cannot be protected as a trade secret, no matter how great its perceived value might be. This is a "type failure."

The fact that trade secrecy looks to information's economic value instead of its technical merit is usually framed as an expansion of protectable subject matter. Trade secret law, as compared to patent law, protects mere business and market information like customer lists and business strategies, thus rewarding and incentivizing all sorts of research and experimentation beyond what occurs in a science lab and might result in a patentable invention.²⁷³ However, trade secret law's insistence that value be of an economic type is as much a limitation as an expansion of the right. The statutory concept of economic value sweeps broadly but does not encompass all conceivable human pursuits. If someone is engaging in purely noneconomic activities that do not have any economic purpose or impact on the economy, they do not have a trade secret.²⁷⁴ Examples range from baking cookies for one's family using a secret recipe to writing a wedding speech that is not revealed until the big night.²⁷⁵ Neither the recipe nor the wedding speech is a trade secret under the law. No matter how much value they have to the owner, their value is not economic in nature. Even if the baker or the speechwriter shares their secrets with others under a strict duty of secrecy, which is thereafter shattered, there is no cause of action under state or federal trade

269. *See, e.g.,* Danaher Corp. v. Gardner Denver, Inc., No. 19-CV-1794, 2020 U.S. Dist. LEXIS 89674, at *26–27 (E.D. Wis. May 20, 2020) (finding that growth template used internally to run meetings did not derive value from secrecy).

270. *Yield Dynamics, Inc. v. TEA Sys. Corp.*, 66 Cal. Rptr. 3d 1, 14–18 (Ct. App. 2007).

271. *Cf. Risch, supra* note 23, at 1204.

272. *See supra* Part I.B.

273. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 485–93 (1974); *see also* LANDES & POSNER, *supra* note 52, at 359–60; Risch, *supra* note 5, at 154; Lemley, *supra* note 4, at 329–30; *see also, e.g.,* Michael Abramowicz & John Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337, 390–91 (2007) (arguing that trade secrets rightly protect so-called market experimentation along with technological experimentation).

274. Again, "noneconomic" does not mean "nonprofit." Courts have long since concluded that nonprofit entities can own trade secrets irrespective of their tax status. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. d (AM. L. INST. 1995).

275. *But see* *Peggy Lawton Kitchens, Inc. v. Hogan*, 466 N.E.2d 138, 139–40 (Mass. App. Ct. 1984) (holding that chocolate chip cookie recipe used by a commercial bakery "had competitive value so far as [plaintiff] was concerned").

secret law. When this sort of pure type failure occurs, a court must dismiss a trade secret claim due to lack of independent economic value.²⁷⁶

Another example of a type failure occurs when the information itself is inherently noneconomic in nature. For example, a few cases have tested whether religious scriptures or yoga techniques derive economic value from secrecy.²⁷⁷ Courts have erred on the side of protectability, but only so long as the claimant clearly explains how their noneconomic subject matter is being used to generate commercial value.²⁷⁸ These cases teach that the asserted economic value can stem from the fact that the trade secret owner is licensing otherwise noneconomic information to others as part of a business model. For example, the Church of Scientology achieved different outcomes in two cases in which it sought to protect secret “training materials and course manuals of the Scientology religion.”²⁷⁹ In one case, the church lost because it did not explain how it made a profit from keeping its materials secret.²⁸⁰ However, in the other case, the church successfully demonstrated that the materials generated “substantial revenue” for the church “in the form of licensing fees paid by Churches that are licensed to use the [materials],” as well as “from donations by parishioners for services based upon the [materials].”²⁸¹

A final example of a type failure occurs when the plaintiff asserts trade secrecy status for information that does not relate to what the company actually does in its business. Examples of secrets that do not derive *economic* value from secrecy might include the fact that a company is breaking the law, or some other piece of embarrassing information that would be reputationally harmful but is not illegal *per se*. A high-profile illustration is the attempt by various tech firms, including Microsoft, to claim employee diversity data as trade secrets.²⁸² These firms tried to argue that they derive the same type of

276. This also fails to meet the DTSA’s jurisdictional interstate commerce requirement. See 18 U.S.C. § 1836(b)(1) (stating that information must be “related to a product or service used in, or intended for use in, interstate or foreign commerce”). Congress’s power to protect trade secrets under the Commerce Clause is broad, but activity that does not have any effect on commerce would not be within Congress’s power to regulate. U.S. CONST. art. I, § 8, cl. 3; see also Christopher B. Seaman, *The Case Against Federalizing Trade Secrecy*, 101 VA. L. REV. 317, 348–51 (2015) (discussing scope of federal trade secret law’s interstate commerce requirement).

277. See generally *Art of Living Found. v. Does* 1–10, No. 10 Civ. 5022, 2012 U.S. Dist. LEXIS 61582 (N.D. Cal. May 1, 2012); *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995).

278. See *Art of Living Found.*, 2012 U.S. Dist. LEXIS 61582, at *64 (finding yoga manuals and teacher training materials did not lack “independent economic value” because plaintiff attested that they helped distinguish its courses from others and thus attract students).

279. See *Lerma*, 897 F. Supp. at 264; *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 923 F. Supp. 1231, 1253 (N.D. Cal. 1995).

280. *Lerma*, 897 F. Supp. at 266 (“[P]laintiff has not demonstrated that the AT documents [containing religious philosophy and training materials] provide plaintiff with any economic advantage over any competitors.”).

281. *Netcom On-Line*, 923 F. Supp. at 1253.

282. See Jamillah Bowman Williams, *Why Companies Shouldn’t Be Allowed to Treat Their Diversity Numbers as Trade Secrets*, HARV. BUS. REV. (Feb. 15, 2019), <https://hbr.org/2019/>

value from keeping their diversity data secret as they do from keeping their technology and business strategies secret.²⁸³ But many speculate that the firms' real reason for seeking protection was that they did not wish for the embarrassingly low diversity numbers to become public.²⁸⁴

The disclosure of this type of reputationally harmful information might theoretically benefit the company's competitors or others who could obtain value "from the *disclosure* or use of the information."²⁸⁵ But this sort of information does not impart economic-type value under the statutes. In Microsoft's case, the company could try to argue that its diversity numbers affect its economic performance, and therefore, that competitors or others might benefit from imitating this strategy. But if Microsoft does not provide such an explanation—or if, as happened in one case,²⁸⁶ the explanation is not seen as plausible—then the information does not possess *economic* value as a result of secrecy.

To be clear, "negative know-how" can be protectable as a trade secret. But this term refers specifically to information regarding mistakes and wrong turns in the course of researching a product or invention that is related to the business and was costly to develop, and from which others could benefit in their own business operations.²⁸⁷ It surely does not extend to *any* negative information held within the company.

Protecting potentially embarrassing information that is not related to what a company actually does is virtually impossible to justify under traditional incentives theory.²⁸⁸ At the same time, as Charles Tait Graves and Sonia Katyal recently observed, facilitating the "seclusion" of secrets that have little to do with companies' core business operations can come at a social cost.²⁸⁹ For instance, what if the information is relevant to an employee's decision to take a job at the company?²⁹⁰ What if it is relevant to the public

02/why-companies-shouldnt-be-allowed-to-treat-their-diversity-numbers-as-trade-secrets [https://perma.cc/YD8R-FTRC].

283. *Id.*

284. *See id.* (documenting several instances of "companies, particularly in tech," seeking to protect diversity data and initiatives as trade secrets); *see also* Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1697–98 (2019) (discussing *Moussouris v. Microsoft Corp.*, No. 15-cv-1483, 2018 U.S. Dist. LEXIS 34685, at *38 (W.D. Wash. Feb. 16, 2018), *report and recommendation adopted*, No. 15-cv-1483, 2018 U.S. Dist. LEXIS 34558 (W.D. Wash. Mar. 1, 2018)).

285. 18 U.S.C. § 1839(3) (emphasis added).

286. *Moussouris*, 2018 U.S. Dist. LEXIS 34685, at *38 (observing that what Microsoft was calling "competitive harm" due to disclosure of its raw diversity data was "essentially business reputational harm").

287. UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 637–38 (2021); *see also* Charles Tait Graves, *The Law of Negative Knowledge: A Critique*, 15 TEX. INTELL. PROP. L.J. 387, 391–92 (2007).

288. *Cf. Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 493 (1974).

289. *See* Graves & Katyal, *supra* note 8, at 1380–90.

290. *See* Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 588–96 (2020) (arguing that "pay secrecy" and legal limits on workers' ability to reveal their salary to coworkers or others in the industry exacerbates unjustified wage gaps); *see also* Graves & Katyal, *supra* note 8, at 1385–86

at large?²⁹¹ A few courts applying the DTSA have reached conclusions consistent with the notion that the mere risk of reputational harm does not suffice to show economic value from secrecy.²⁹² Courts should look out for type failures in future cases.²⁹³

D. Timing Failures

The final value failure is the timing failure. This is where a trade secret is sought to be protected during the incorrect time frame. The timing failure occurs on both the front end (when it is too early) and the back end (when it is too late). Each of these situations is discussed below.

1. No Potential Future Economic Value

Intellectual property law has a complicated relationship with undeveloped ideas, and, for policy reasons, it has not traditionally protected mere “products of the mind.”²⁹⁴ Modern trade secret law is explicitly designed to be available for research, prototypes, strategies, and other information held by start-ups and other entities in the precommercial phase.²⁹⁵ Nonetheless, trade secret law is only triggered *if* the information has at least potential independent economic value.²⁹⁶ This is a crucial limitation on protection for mere ideas whose economic value remains purely hypothetical. When a trade secret plaintiff seeks to protect secrets too early in the development timeline, a “timing failure” occurs that should result in dismissal of the claim.

Courts have already recognized that timing failures arise in the context of so-called “idea submission” cases. This is where the plaintiff asserts legal rights to an idea and claims that they deserve compensation after someone with whom they shared the idea in confidence uses it without permission.²⁹⁷

(discussing situations where an employer claims to own trade secrets consisting of the salaries of its employees).

291. See Morten & Kapczynski, *supra* note 36, at 494–96 (critiquing secrecy of clinical trial data).

292. Democratic Nat’l Comm. v. Russian Fed’n, 392 F. Supp. 3d 410, 440, 448 (S.D.N.Y. 2019); Ukrainian Future Credit Union v. Seikaly, No. 17-cv-11483, 2017 U.S. Dist. LEXIS 194165, at *23–26 (E.D. Mich. Nov. 27, 2017).

293. For example, Waymo recently alleged that safety information related to its driverless cars, including descriptions of past crashes, constitutes trade secrets. See Russ Mitchell, *Waymo Sues State DMV to Keep Robotaxi Safety Details Secret*, L.A. TIMES (Jan. 28, 2022, 5:00 AM), <https://www.latimes.com/business/story/2022-01-28/waymo-robot-taxi-sues-state-secret-black-ice> [<https://perma.cc/FRW5-KP2S>]; see also *infra* notes 303–08 and accompanying text.

294. See also *Int’l News Serv. v. AP*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). See generally Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 703 (2006).

295. See UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 637–38 (2021); see also Hrdy & Lemley, *supra* note 5, at 30–31.

296. See Robert Denicola, *The New Law of Ideas*, 28 HARV. J.L. & TECH. 195, 200, 220 (2014).

297. These cases may implicate both implied-in-fact contract and trade secret claims. See Charles Tait Graves, *Should California’s Film Script Cases Be Merged into Trade Secret Law?*, 44 COLUM. J.L. & ARTS 21, 23–24 (2020); Camilla Hrdy, *Charles Tait Graves: Idea*

Courts have held that idea submissions can potentially be protected as trade secrets, even if they are not yet fully developed. For example, in *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*,²⁹⁸ the U.S. Court of Appeals for the Seventh Circuit found that a prototype for a toy train track that made a “clickety-clack” sound was protectable as a trade secret, even though the idea was preliminary and did not work perfectly.²⁹⁹ However, courts have recognized that, sometimes, it is just too early to claim legal rights. For example, in a pre-DTSA case, *Postal Presort, Inc. v. Stasieczko*,³⁰⁰ a Kansas state court held that the plaintiff’s early-stage business concept for a direct mail marketing service failed to meet the independent economic value requirement, explaining that the possibility that the concept might come to fruition in the future was not sufficient.³⁰¹ The court suggested that “[e]ven meeting with potential investors or design engineers to discuss the concept” might not have been enough.³⁰²

Outside of idea-submission cases, there are broader implications for early-stage technologies and nascent industries. If the alleged trade secret relates to a new industry in which commercialization is a remote prospect, it is possible to argue that the secret lacks even “potential” economic value. This issue arose recently in *Wisk Aero LLC v. Archer Aviation, Inc.*,³⁰³ a trade secret dispute between two air taxi service start-ups. The plaintiff Wisk claimed that Archer misappropriated Wisk’s trade secrets relating to its air-taxi service through former Wisk employees.³⁰⁴ Wisk claimed that it “created the world’s first all-electric, self-flying, vertical takeoff and landing air taxi,” that it invested at least one billion dollars to develop five prototypes, and that it had already taken over 1,500 flights.³⁰⁵ But the company was not yet selling air-taxi seats to the general public, and the rapidly evolving industry’s future is uncertain. Archer seized on this weakness, alleging that Wisk failed in its pleadings to address “whether any one of its alleged trade secrets derives economic value by virtue of being secret.”³⁰⁶ The judge

Submission Cases, Desny Claims, and Trade Secret Law, WRITTEN DESCRIPTION (Mar. 10, 2021, 2:44 PM), <https://writtendescription.blogspot.com/2021/03/charles-tait-graves-idea-submission.html> [<https://perma.cc/N765-ANM3>].

298. 342 F.3d 714 (7th Cir. 2003).

299. *See id.* at 718, 725–27.

300. No. 110,489, 2015 Kan. App. Unpub. LEXIS 91 (Ct. App. Feb. 13, 2015).

301. *Id.* at *6–7.

302. *Id.*

303. No. 21-cv-02450, 2021 U.S. Dist. LEXIS 160001 (N.D. Cal. Aug. 24, 2021).

304. Complaint at 3–4, *Wisk Aero LLC v. Archer Aviation, Inc.*, No. 21-cv-02450, 2021 U.S. Dist. LEXIS 160001 (N.D. Cal. Aug. 24, 2021).

305. WISK, <https://wisk.aero/> [<https://perma.cc/FBU4-UM72>] (last visited Oct. 7, 2022); *see also* Scott Graham, *Wisk Aero’s Flying Taxi Suit Isn’t Yet Ready for Takeoff, Judge Hints*, LAW.COM (July 21, 2021, 11:11 PM), <https://www.law.com/therecorder/2021/07/21/wisk-aeros-flying-taxi-suit-isnt-yet-ready-for-takeoff-judge-hints/?slreturn=20210625121633> [<https://perma.cc/6FTQ-JFDA>]; Tim Hornyak, *The Flying Taxi Market May Be Ready for Takeoff, Changing the Travel Experience Forever*, CNBC (Mar. 7, 2021, 10:30 AM), <https://www.cnbc.com/2020/03/06/the-flying-taxi-market-is-ready-to-change-worldwide-travel.html> [<https://perma.cc/DNH6-HSZB>].

306. Motion to Strike at 1, 6, 10, 26, *Wisk Aero LLC v. Archer Aviation, Inc.*, No. 21-cv-02450, 2021 U.S. Dist. LEXIS 160001 (N.D. Cal. Aug. 24, 2021).

appeared to share Archer's skepticism, denying Wisk's motion for a preliminary injunction³⁰⁷ because Wisk had "failed to show that the putative secrets derive economic value from their secrecy."³⁰⁸

When independent economic value is triggered in these early-stage situations, it sets a de facto start date for the legal right, preventing trade secrets from accruing too early before there is anything of sufficient value to protect. Independent economic value denies intellectual property rights to putative trade secret owners whose ideas are too far from realization to deserve protection. There are several analogous doctrines in other areas of intellectual property law.³⁰⁹ Courts should not ignore what this requirement does for trade secret law. When courts find that the information at issue looks too much like a mere idea, they should hold that it lacks independent economic value.³¹⁰

2. End of Economic Value

The independent economic value requirement also operates on the back end by ensuring that trade secrets cannot be protected too late in the information's commercial life cycle. Trade secret protection, unlike patent or copyright protection, does not have a fixed statutory term limit.³¹¹ Many commentators state offhandedly that trade secrets can last forever so long as they remain secret.³¹² But this is not accurate. Many trade secrets are commercially relevant for only a short window of time and may someday lose their economic value from secrecy. When this occurs, the trade secret expires as if it had become public. This is yet another species of "timing failure."

307. Order Denying Motion for Preliminary Injunction, *Wisk Aero LLC v. Archer Aviation, Inc.*, No. 21-cv-02450, 2021 U.S. Dist. LEXIS 160001 (N.D. Cal. Aug. 24, 2021).

308. Tentative Ruling and Hearing Procedure at 1, *Wisk Aero LLC v. Archer Aviation, Inc.*, No. 21-cv-02450, 2021 U.S. Dist. LEXIS 160001 (N.D. Cal. Aug. 24, 2021).

309. One is trademark law's "use in commerce" requirement. 15 U.S.C. § 1127 (defining use in commerce); *see also, e.g.*, *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918). In fact, funnily enough, a well-known trademark case invalidated a trademark for the name AIRFLITE, which was supposed to be the name for an air taxi service, but the service "never got off the ground." *See Aycock Eng'g, Inc. v. Airflite, Inc.* 560 F.3d 1350, 1353–54 (Fed. Cir. 2009); *cf. Hrdy & Lemley, supra* note 5, at 15–24 (comparing trade secret's common law use requirement to trademark's). A less obvious analogy can be drawn to patent utility, which is sometimes conceptualized as a "timing device" that ensures that patentees do not seek rights too early in the development timeline, before the invention has a presently availing or plausibly achievable use. *See* Rebecca S. Eisenberg, *Analyze This: A Law and Economics Agenda for the Patent System*, 53 VAND. L. REV. 2081, 2087 (2000); Julian David Forman, *A Timing Perspective on the Utility Requirement in Biotechnology Patent Applications*, 12 ALB. L.J. SCI. & TECH. 647, 648–49, 661–62 (2002).

310. *Accord* Denicola, *supra* note 296, at 220.

311. Hrdy & Lemley, *supra* note 5, at 12–13; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. d (AM. L. INST. 1995) (noting that there is no fixed duration for a trade secret protection).

312. *See, e.g.*, W. Nicholson Price II, *Regulating Secrecy*, 91 WASH. L. REV. 1769, 1777 (2016) ("Trade secrecy . . . lasts as long as the information is kept secret."); Natalie Ram, *Innovating Criminal Justice*, 112 NW. U. L. REV. 659, 666 (2018) ("So long as the information at issue remains secret, the legal protections of trade secret law will attach indefinitely.").

Once again, analogies can be drawn to several other intellectual property doctrines—in particular, to trademark law’s doctrine of abandonment due to cessation of use.³¹³ In trade secret law, independent economic value supplies a similarly “functional” way to set the expiration date of the trade secret. Like in trademark law, there is no fixed statutory term. But if a secret no longer possesses independent economic value at the time of the alleged act of misappropriation, then it is no longer an enforceable trade secret. Many courts and commentators have recognized this principle.³¹⁴ Unfortunately, though, some courts continue to get the time frame wrong, assuming that the trade secret must still have value *when the claim is brought*.³¹⁵ For example, in *Sirius Computer Solutions, Inc. v. Sachs*,³¹⁶ a court found that independent economic value was not established because the plaintiff brought its DTSA claim “approximately ten months after” the alleged act of misappropriation, by which time, the court determined, the information had “become stale and any competitive advantage it may have conferred, no longer exist[ed].”³¹⁷ But under the modern statutes, the requisite independent economic value has to exist *at the time of the misappropriation*.³¹⁸ The DTSA and the UTSA embed this time frame into the definition of “misappropriation,” clarifying that the trade secret needs to exist at the time of the alleged disclosure or use.³¹⁹

313. For example, in trademark law, when a trademark ceases to be used in commerce, it is deemed abandoned. *See, e.g.*, 15 U.S.C. § 1127 (defining abandonment). Independent economic value can be seen as codifying an abandonment principle akin to trademark law’s. Hrdy & Lemley, *supra* note 5, at 17–18.

314. Hrdy & Lemley, *supra* note 5, at 43–44, 44 n.205 (citing cases); *see also* HALLIGAN & WEYAND, *supra* note 55, at 136–37 (noting that trade secrets can become “obsolete” not only when they lose their secrecy, but also when they become “stale or devoid of economic value,” and giving the example of a methodology for complying with certain regulations or technical standards that are superseded).

315. At least one common law decision used this time frame, assuming that a business that had stopped using the trade secret by the time of litigation could not obtain an injunction. *See* Victor Chem. Works v. Iliff, 132 N.E. 806 (Ill. 1921) (discussed in Hrdy & Lemley, *supra* note 5, at 20–21 nn.91–92).

316. No. 20-cv-1432, 2021 U.S. Dist. LEXIS 77595 (N.D. Ill. Apr. 22, 2021).

317. *Id.* at *10–11; *see also* Gemini Aluminum Corp. v. Cal. Custom Shapes, Inc., 116 Cal. Rptr. 2d 358, 368–69 (Ct. App. 2002) (observing that any value that the secrets once had ended by the time of litigation).

318. A defendant can still make a better argument against granting an injunction if the value of the trade secret has dissipated by the time of judgment. Camilla Hrdy, *Elizabeth Rowe: Does eBay Apply to Trade Secret Injunctions?*, WRITTEN DESCRIPTION (Nov. 10, 2019, 9:03 PM), <https://writtendescription.blogspot.com/2019/11/elizabeth-rowe-does-ebay-apply-to-trade.html> [<https://perma.cc/PD8H-DZEG>]; Camilla Hrdy, *Deepa Varadarajan on Trade Secret Injunctions and Trade Secret “Trolls,”* WRITTEN DESCRIPTION (Feb. 22, 2020, 12:38 PM), <https://writtendescription.blogspot.com/2020/02/deepa-varadarajan-on-trade-secret.html> [<https://perma.cc/LQL7-MYVA>].

319. *See* 18 U.S.C. § 1839(5); *see also* UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 636–37 (2021); *see also* Hrdy & Lemley, *supra* note 5, at 29. The new Massachusetts statute, arguably superior on this point, embeds this time frame into the definition of a “trade secret,” stating, in relevant part, that a trade secret constitutes information that, “at the time of the alleged misappropriation,” provides “economic advantage, actual or potential, from not being generally known.” MASS. GEN. LAWS ch. 93, § 42(4)(i) (2020).

The upshot is that, if independent economic value has lapsed by the date of the alleged misappropriation—for instance, due to a change in the marketplace or a game-changing advancement in the state of the art—then the misappropriation is no longer actionable.³²⁰ Courts have held as much under the UTSA.³²¹ At least one court has dismissed for lack of independent economic value under the DTSA in part because the court found that the information had become outdated.³²² As the newly federalized framework evolves, courts should continue to use timing failure analyses more often to weed out cases based on expired secrets.

CONCLUSION

Independent economic value is a crucial element of trade secrecy that has been remarkably underexplored. At first blush, independent economic value may seem redundant. Surely no one would bother to protect, let alone litigate, a trade secret that lacks independent economic value. But well-kept secrets that lack economic value can, and do, end up in court as the subject of trade secret litigation. The standard circumstantial evidence that courts use to show independent economic value, including reasonable secrecy precautions and “sweat work,” do not prove very much in the end. This is troublesome because independent economic value is the only tool that courts have for directly assessing the value of information being claimed as a trade secret. When courts fail to use this tool, a variety of negative consequences can result, including wasted court resources,³²³ threats to competition and innovation, needless impingement on employee autonomy and mobility,³²⁴ and worrisome restrictions on speech and disclosure of information of public importance.³²⁵

This Article has revealed that several kinds of “value failures”—amount failures, causation failures, type failures, and timing failures—can and do arise in trade secret litigation, probably far more often than we know. If courts continue to ignore independent economic value or assume that it can be proven from other factors in the case, negative policy consequences will

320. The plaintiff can still have a cause of action if the value dissipates *after the date of misappropriation*—for instance, perhaps the defendant’s own actions caused the disclosure. Remedies include damages or a “head start” injunction to eliminate any ill-gotten “commercial advantage.” UNIF. TRADE SECRETS ACT § 2 (amended 1985), 14 U.L.A. 749 (2021); *see also* 18 U.S.C. § 1836(b)(3) (listing remedies available).

321. *See, e.g.,* Fox Sports Net N., LLC v. Minn. Twins P’ship, 319 F.3d 329, 335–36 (8th Cir. 2003) (holding outdated financial information no longer protectable because “obsolete information cannot form the basis for a trade secret claim because the information has no economic value”).

322. 24 Seven, LLC v. Martinez, No. 19-CV-7320, 2021 U.S. Dist. LEXIS 15480, at *4 (S.D.N.Y. Jan. 26, 2021).

323. *See* Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 179 (7th Cir. 1991).

324. Lemley, *supra* note 4, at 343; Graves & Katyal, *supra* note 8, at 1338, 1407–08; LOBEL, TALENT WANTS TO BE FREE, *supra* note 35, at 1–11; Hrdy & Lemley, *supra* note 5, at 14–15.

325. Levine, *supra* note 36, at 431–32; Graves & Katyal, *supra* note 8, at 1337; Williams, *supra* note 284, at 1698.

continue to result. Information that does not derive economic value from secrecy is not a trade secret. To realize the full benefit of this underused statutory element, courts should assess it more comprehensively and consistently, as they do with secrecy and reasonable secrecy precautions. Taking independent economic value more seriously is a first step toward taking trade secrets more seriously.