

An Empirical Analysis of Permanent Injunction Life in Trade Secret Misappropriation Cases

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ABSTRACT: This empirical study explores the disconnect between doctrine and practice in the calculation of the life of permanent injunctions issued in trade secret misappropriation cases. The study draws upon findings from a content analysis of cases decided in federal trial court in the fourteen-year period between January 1, 2009 and December 31, 2022.

Case law and scholarly commentary on this topic suggest a legal doctrine that is rich, nuanced, and, indeed, rather elegant in its design. Modern doctrine directs courts to carefully refine the life of a permanent injunction barring further misappropriation by considering the time it would take for the misappropriator (or a good faith competitor) to independently develop the trade secret through legitimate business practices. The resulting injunction life, in theory at least, is fact-dependent, narrowly tailored, and precise in its terms.

The key finding of this study is startling: What is said in doctrine is seldom what is applied in practice by courts in this arena. The great majority of courts issuing permanent injunctions for trade secret misappropriation paid little to no attention to the nuanced rules set forth by statute and case law; instead, they issued sparse permanent injunction provisions that did not reference time limits. In addition, in most instances the parties to the litigation did not engage with doctrine and did not seek more specificity on injunction duration. The study speculates that current practice may be efficient in terms of conserving judicial and litigant resources. However, we should not discount the value of nuanced rules for providing overarching frameworks for decision-making or for guiding outcomes in cases at the margin where the facts demand the application of more refined approaches.

This study thus provides empirical evidence of actual practice regarding permanent injunction life in trade secret misappropriation cases and highlights pathways for future exploration into doctrinal development and judicial decision-making. It demonstrates that scholars, practitioners, and courts alike

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should approach doctrinal nuances with a degree of caution; it is patently risky to assume that an elegant, refined doctrine, even though articulated in statute or precedent, is necessarily what the parties will assert or what the courts will apply in the trenches of actual litigation.

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INTRODUCTION

Do the nuanced rules articulated by modern legal doctrine reflect the actual practices of courts granting permanent injunction relief to trade secret owners whose trade secrets have been misappropriated? The answer to that question, as revealed by the results of this qualitative empirical analysis of cases decided in federal trial courts between January 1, 2009 and December 31, 2022, is an unequivocal “no.”

The legal doctrine pertaining to permanent injunction relief in trade secret misappropriation cases is rich, nuanced, and, indeed, rather elegant in its design. Modern doctrine instructs the trial court judge to carefully refine the life of a permanent injunction prohibiting further misappropriation by a defendant by considering the time it would take for the misappropriator (or a good faith competitor) to independently develop the trade secret through legitimate business practices and to ensure that any unfair advantage that the misappropriator may have achieved through its wrongful actions is eliminated.¹ In theory at least, the period of the permanent injunction might be very short in industries such as high tech, reflecting the often-fleeting life of confidential information in that setting. In more traditional industries where technological advances are slow-moving, a permanent injunction hypothetically might last for many years. In either event, the permanent injunction putatively is customized to the facts of the case.

While the academic in me is intrigued by the thought of a doctrine capable of such precise tailoring to the specific circumstances of a case, the pragmatist in me wonders whether busy trial court judges are able to routinely engage in such meticulous calculations of equitable relief—particularly with subject matter as notoriously amorphous and unquantifiable as trade secrets.² Commentators have explored the life of permanent injunctions in trade secret misappropriation cases.³ However, these analyses tend to focus on

1. See *infra* Section II.C (discussing “head start” / “lead time” provisions of the Uniform Trade Secrets Act (“UTSA”)).

2. See *infra* note 5 and accompanying text (discussing the indeterminate nature of trade secret law).

3. See, e.g., Jack W. Berryhill, *Trade Secret Litigation: Injunctions and Other Equitable Remedies*, 48 U. COLO. L. REV. 189, 195 (1977); Thomas L. Casagrande, *Permanent Injunctions in Trade Secret Actions: Is a Proper Understanding of the Role of the Inadequate Remedy at Law/Irreparable Harm Requirement the Key to Consistent Decisions?*, 28 AIPLA Q.J. 113, 114–15 (2000); Richard F. Dole, Jr., *Permanent Injunctive Relief for Trade Secret Misappropriation Without an Express Limit Upon Its Duration: The Uniform Trade Secrets Act Reconsidered*, 17 B.U. J. SCI. & TECH. L. 173, 174–75 (2011); Chris Scott Graham, *Weaponizing Headstart Injunctions in the Battle Between the Clear and Clever Thinker*, LANDSLIDE, May–June 2010, at 24, 25; D. Kirk Jamieson, *Just Deserts: A Model to Harmonize Trade Secret Injunctions*, 72 NEB. L. REV. 515, 530–31 (1993); Michael Barclay, Comment, *Trade Secrets: How Long Should an Injunction Last?*, 26 UCLA L. REV. 203, 215 (1978); Ruth E. Leistensnider, Comment, *Trade Secret Misappropriation: What is the Proper Length of an Injunction After Public Disclosure?*, 51 ALB. L. REV. 271, 273 (1987).

theory and on the application of doctrine in the limited percentage of cases that result in published decisions. Most litigation outcomes are necessarily obscured in this approach. How do we know whether trial court judges really go through precise calculations and balancing in the typical case, or whether actual practice is more ad hoc or less reasoned than theory would suggest?

Empirical studies are beginning to flesh out our understanding of trade secret law and practice, but those studies are still scarce, and none to date have focused specifically on the life of permanent injunctions in this setting.⁴ This study seeks to fill this gap in existing analysis and literature. The results of the study indicate that practice is markedly different from doctrine in this arena: The great majority of courts issuing permanent injunctions for trade secret misappropriation pay little or no attention to the nuanced rules set forth by statute and case law and instead issue breviloquent permanent injunctions that more often than not fail to specify any time limit at all. This stark discrepancy between practice and theory suggests pathways for future exploration of the relationship between doctrinal development and judicial decision-making that have implications beyond just the area of trade secret misappropriation.

Part I describes the motivation and scope of this empirical study and provides a brief literature review. Part II provides an overview of the development of doctrine relating to permanent injunctions in trade secret cases, starting from its common law foundations through the Uniform Trade Secrets Act (“UTSA”) and the recent federal Defend Trade Secrets Act (“DTSA”). Part III describes the methodology for the empirical content analysis of trade secret permanent injunction cases that forms the basis of this study’s findings and outlines the research questions to be examined.

Part IV analyzes the seven main findings derived from the empirical analysis and discusses the implications of those findings for trade secret doctrine and practice. Ultimately, this study does more than offer a mere snapshot of permanent injunction outcomes in trade secret disputes. It highlights how divergences in doctrine and practice may not necessarily be problematic and, in fact, may promote more efficient outcomes by conserving judicial and litigant resources.

I. MOTIVATION, BACKGROUND, AND SCOPE OF STUDY

Scholars have long debated the uneasy place that trade secret law occupies in the intellectual property pantheon. This debate is often existential in nature, addressing questions such as whether trade secret doctrine finds its roots in contract, property, or unfair competition law (or some combination of these) or whether it is a sui generis form of intellectual property law.⁵ The life of

4. See *infra* Part I (discussing empirical studies of trade secret law).

5. See, e.g., Robert G. Bone, *The (Still) Shaky Foundations of Trade Secret Law*, 92 TEX. L. REV. 1803, 1811 (2014); Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 289–90 (1998) [hereinafter Bone, *A New Look*]; Eric R. Claeys, *Intellectual Usufructs: Trade Secrets, Hot News, and the Usufructuary Paradigm at Common Law*, in INTELLECTUAL

permanent injunctive relief for trade secret misappropriation is yet another, more practical, manifestation of the thorny issues posed by trade secret law's opaque foundations.

While monetary damages are a typical remedy in misappropriation cases,⁶ the trial court may also award permanent injunctions in appropriate cases. Permanent injunctions come at the end of the litigation, after a decision on the merits, and are intended to return the plaintiff to its “rightful position.”⁷ Vocabulary can be tricky in this area: “[P]ermanent” in this context means “final” and not necessarily “perpetual” or infinite.⁸ A “permanent” injunction may last for a specific period⁹ or an indefinite period.¹⁰

PROPERTY AND THE COMMON LAW 404 (Shyamkrishna Balganesch ed., 2013); Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 319–27 (2008); Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 21–23, 33–37 (2007); Deepa Varadarajan, *The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1556–73 (2018).

6. See generally PATRICK J. FLINN, HANDBOOK OF INTELLECTUAL PROPERTY CLAIMS AND REMEDIES § 9.04 (1st ed. Supp. 2022).

7. JAMES M. FISCHER, UNDERSTANDING REMEDIES 157 (4th ed. 2021). Preliminary injunctions, by contrast, occur before a decision on the merits and are intended “to maintain the status quo” until the litigation has been resolved. *Id.* at 150. Other types of provisional remedies, such as attachment, garnishment, or temporary restraining orders, are also used to maintain the status quo pending final judgment. See *Provisional Remedies*, CORNELL L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/provisional_remedies [<https://perma.cc/Y57L-6VBM>]. As explained by the Federal Circuit:

A permanent injunction issues to a party after winning on the merits A preliminary injunction is extraordinary relief that alters the status quo during the course of litigation. It is granted only after the requesting party has shown that it is likely to succeed on the merits, that it will incur irreparable harm in the absence of such relief, and that the balance of the equities and the public interest favor granting the injunction Because of the exacting standards that a party must meet to obtain a preliminary injunction, it frequently happens that a party is denied a preliminary injunction pending the disposition of the lawsuit but ultimately prevails on the merits and is awarded a permanent injunction as part of the final judgment in the case. The two instruments are distinct forms of equitable relief that have different prerequisites and serve entirely different purposes.

Lerner Ger. GmbH v. Lerner Corp., 94 F.3d 1575, 1577 (Fed. Cir. 1996).

8. FISCHER, *supra* note 7, at 157 (explaining that a permanent injunction “is permanent in the sense that it is final, but its duration is determined by the particular case”). This is an important distinction that not all parties and courts recognize. See, e.g., *Hair Club for Men, LLC v. Ehson*, No. 16-cv-236, 2016 WL 6780310, at *5 (E.D. Va. Nov. 14, 2016) (court equating “permanent” and “perpetual”); Reply Memorandum of Points and Auths. in Support of Plaintiffs Eldorado Stone, LLC & Eldorado Stone Operations, LLC’s Application for Permanent Injunction Following Trial at 2 n.1, *Eldorado Stone, LLC v. Renaissance Stone, Inc.*, No. 04-cv-2562 (S.D. Cal. Apr. 26, 2007) (plaintiffs equating “permanent” and “perpetual”); *XP Power LLC’s Sur-reply to Plaintiffs’ Motion for Permanent Injunction at 2*, *Comet Techs. USA Inc. v. XP Power LLC*, No. 20-cv-06409-NC (N.D. Cal. Apr. 27, 2022) (defendant equating “permanent” and “perpetual”).

9. The defined-life injunctions in this study’s dataset averaged just under two and one-half years. See *infra* Figure 3 (depicting lengths of defined-life injunctions in the dataset).

10. Theoretically, at least, the indefinite period may be terminated at some point in the future, usually upon a showing of changed conditions rendering the injunction no longer necessary or no longer equitable. See *infra* Section IV.A.2 (discussing termination or modification of injunctions upon changed circumstances).

Empirical studies of trade secret doctrine generally, and of misappropriation remedies specifically, are scarce.¹¹ Trade secrets are, as their nomenclature indicates, *secret* and, unlike other areas of intellectual property, these rights arise and exist in the absence of governmental sanction, registration, or oversight.¹² This “informal” nature of trade secret doctrine “creates a formidable challenge for empirical work.”¹³ Trade secret owners are not required to reveal or even publicly acknowledge the existence of their trade secrets and may choose not to litigate in the event of a misappropriation or theft for fear of losing additional competitive advantage.¹⁴ While other types of intellectual property rights may be tracked through government filings or publicly available databases, such as the searchable, online tools of the U.S. Patent and Trademark Office (“USPTO”),¹⁵ no comparable resources are available for

11. See Michael Risch, *Empirical Methods in Trade Secret Research*, in 2 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 638–39 (Peter S. Menell & David L. Schwartz eds., 2019) (noting that “despite the best efforts of a handful of scholars conducting research in this area,” trade secret doctrine is still underexplored); 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, 120 (2018) (noting that as compared to other intellectual property law doctrines, such as patent and copyright, “trade secret law operates in a relative empirical information vacuum”); David S. Levine & Ted Sichelman, *Why Do Startups Use Trade Secrets?*, 94 NOTRE DAME L. REV. 751, 776 (2018) (“[E]mpirical studies of trade secrets are still in their infancy . . .”).

12. Patents must be granted by the federal government through the U.S. Patent and Trademark Office (“USPTO”) and upon a showing that all necessary requirements have been met. See 35 U.S.C. §§ 101–103 (2018). Copyrights and trademarks arise without government action, but the owner may choose to federally register these rights and, in doing so, obtain significant federal advantages. See 17 U.S.C. § 102 (stating that copyrights arise when “original works of authorship” are “fixed in any tangible medium of expression”); *id.* § 408 (noting that copyright registration is permissive); U.S. COPYRIGHT OFF., COPYRIGHT BASICS 5 (2021), <https://www.copyright.gov/circs/circo1.pdf> [<https://perma.cc/K8ST-DES4>] (listing benefits of registration of copyrights); *What Is a Trademark?*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trade-marks/basics/what-trademark> [<https://perma.cc/5F6C-PEM8>] (noting ownership arises as soon as the mark is used in connection with “goods or services” but is limited “to the geographic area” of use in the absence of federal registration); 15 U.S.C. § 1051 (“The owner of a trademark used in commerce may request registration” with the USPTO.); *Why Register Your Trademark?*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/why-register-your-trademark> [<https://perma.cc/2XUG-4QG9>] (listing benefits of federal registration of marks).

13. Bronwyn Hall, Christian Helmers, Mark Rogers & Vania Sena, *The Choice Between Formal and Informal Intellectual Property: A Review*, 52 J. ECON. LIT. 375, 378 (2014).

14. See Josh Lerner, *Using Litigation to Understand Trade Secrets: A Preliminary Exploration* 6 (Aug. 7, 2006) (unpublished manuscript), <https://ssrn.com/abstract=922520> (on file with the *Iowa Law Review*) (“[T]he prosecution of a trade secret case may involve a cost to the plaintiff that is not incurred in a patent case: the widespread dissemination of the trade secret, and the consequent loss of strategic advantage and legal protection.”).

15. See *Search for Patents*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents/search> [<https://perma.cc/9QAP-44SM>] (outlining the process for searching for U.S. patents); *Search Our Trademark Database*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/search> [<https://perma.cc/NR7E-NgAX>] (outlining the process for searching for U.S. trademarks).

trade secrets.¹⁶ Data on the prevalence or scope of trade secrets simply do not exist as they do for other, more formal intellectual property rights.

The diverse court settings in which trade secret litigation occurs also make empirical research in this area challenging.¹⁷ Patent and copyright cases, for example, arise solely under federal law that vests exclusive subject-matter jurisdiction in federal courts.¹⁸ Federal dockets are accessible through the federal courts' PACER service, as well as through private services such as Bloomberg Law.¹⁹

Trade secret civil cases, by contrast, historically arose under state law, where access to dockets and related documentation is much more limited.²⁰ State trial court opinions are not often reported, and the court dockets may not be available electronically or may be accessible only via physical visits to local offices or archives.²¹ The few empirical studies of state trade secret cases that have been conducted thus have typically focused on published cases (which are more readily accessible than unpublished decisions) and have generally examined appellate opinions (which are more apt to be published than trial court decisions).²² In so doing, these studies necessarily exclude the many state trade secret trial court cases that were not reported or not appealed.

Despite arising under state law, a significant number of civil trade secret cases historically have been heard in federal court, either under diversity

16. See 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, 295 (2009).

17. Risch identified two primary strands of research in trade secret doctrine. The first pertains to research on the “welfare justifications” of trade secret law. This strand attempts to answer inquiries such as: Why does the law protect trade secrets? Are trade secrets beneficial or harmful to innovation? What impact do they have on employee mobility? Risch, *supra* note 11, at 641–47. Risch’s second strand—research relating to “measurement and analysis of litigation behavior”—is the one of relevance here. *Id.* at 647–51; see also Levine & Sichelman, *supra* note 11, at 778–81 (collecting citations of empirical studies of trade secret law or litigation). Other disciplines have also conducted theoretical and empirical studies of trade secrecy. See generally Hall et al., *supra* note 13 (surveying economic literature on intellectual property); Risch, *supra* note 11 (explaining how differential research and efficiency analysis affect litigation behavior).

18. 28 U.S.C. § 1338(a).

19. PACER is the Public Access to Court Electronic Records service. It was established by the Judicial Conference of the United States in 1988 and provides electronic public access to over one billion documents filed at over two hundred federal courts. See *About Us*, PACER, <https://pacer.uscourts.gov/about-us> [<https://perma.cc/3BNR-AL5Y>]. Bloomberg Law is a subscription-based legal analytics/legal research site. See *Legal Research and Software*, BL, <https://pro.bloomberglaw.com/products/legal-research-and-software/#overview> [<https://perma.cc/9GC6-XTYP>].

20. See Sharon K. Sandeen & Christopher B. Seaman, *Toward a Federal Jurisprudence of Trade Secret Law*, 32 BERKELEY TECH. L.J. 829, 833 (2017) (noting that, prior to passage of the DTSA, “state law governed civil trade secret principles in the United States”). The federal criminal statute for trade secret theft or misappropriation has been in place since 1996. See Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–1839.

21. Risch, *supra* note 11, at 648.

22. *Id.* at 648–49; see, e.g., 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, 62–65 (2010) (discussed *infra* notes 29–31 and accompanying text); Lerner, *supra* note 14, at 8 (study based on reported decisions in two states).

jurisdiction or because of the presence of a federal question (such as a patent law claim) to which the trade secret claim was related.²³ Trade secret cases heard in federal court can be difficult to isolate, as PACER historically had no “nature of suit” code to allow easy identification of trade secret cases.²⁴ With the advent of the DTSA in 2016, however, civil trade secret claims can now arise in federal court under federal law.²⁵ PACER has assigned a code to such claims,²⁶ making it easier to identify DTSA cases. Researchers have begun conducting empirical research on these newly emerging cases.²⁷

The difficulty of constructing and analyzing an appropriate dataset of cases in the complex trade secret legal environment was highlighted by Almeling et al. in their pair of pioneering empirical studies of trade secret litigation published in 2009 and 2010. Their first study examined 394 federal district court cases (culled from 1,523 “representative” decisions issued between 1950 and 2008 found on the Westlaw U.S. District Courts cases database).²⁸ Their second study examined 358 state court cases (culled from 2,077 state appellate court decisions issued between 1995 and 2009 found on the LexisNexis state cases database).²⁹ Thus, the two Almeling et al. studies were not parallel—the federal study looked at trial court decisions, while the state study examined appellate decisions.³⁰ Almeling et al. explained that this difference in state and federal cases dataset construction was driven by the dearth of published

23. Diversity jurisdiction permits a state law claim to be heard in federal court if there is: (1) no overlap in state of citizenship between any plaintiff and any defendant and (2) more than \$75,000 in controversy. 28 U.S.C. § 1332; *see also* 28 U.S.C. §§ 1331, 1367 (discussing federal questions and supplemental jurisdiction, respectively). I am unable to locate statistics indicating how many trade secret cases appear in state court versus federal court, although it is clear that the advent of the DTSA increased federal filings. *See infra* notes 152–53 and accompanying text.

24. The “nature of suit” codes used by the federal courts in categorizing types of cases include codes for copyright (820), patent (830) and trademark (840) cases, but historically there was no code for trade secret cases. *Nature of Suits*, <https://pacer.uscourts.gov/sites/default/files/files/nature%20of%20suit%20codes.pdf> [<https://perma.cc/HW5U-84MN>].

25. The DTSA’s effective date was May 11, 2016. *See* Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376; *see also infra* Section II.D (discussing the DTSA).

26. The new code 880 was created to identify cases involving the DTSA; that code took effect on Oct. 1, 2020. *See* ADMIN. OFF. OF THE U.S. CTS., OFF. OF CASE MGMT. SYS., CM/ECF RELEASE NOTES FOR PACER USERS, NEXTGEN CM/ECF RELEASE 1.6 (2020), <https://pacer.uscourts.gov/sites/default/files/files/PACERDC16NGrn.pdf> [<https://perma.cc/2MJS-MYAF>].

27. *See* Levine & Seaman, *supra* note 11. Levine and Seaman used Bloomberg Law as their “primary resource” in constructing their dataset of all federal court cases involving a DTSA claim in the first year following passage of the act. *Id.* at 124. They supplemented that search with WestlawNext and Lexis Advance searches to arrive at a final dataset of 486 federal cases. *Id.* at 125.

28. Almeling et al., *supra* note 16, at 299–300 (describing methodology for creating federal court case dataset).

29. Almeling et al., *supra* note 22, at 62–65 (describing methodology for creating state court case dataset). The authors noted the asymmetry in data gathering between the two studies—the federal court study analyzed trial court decisions while the state court study examined appellate decisions—but explained the difficulty of accessing state trial court decisions. *Id.*

30. *Id.* at 63.

decisions by state trial courts and by the lack of detailed factual findings or judicial reasoning in the few that were published.³¹

The Almeling et al. studies examined a number of different elements of trade secret misappropriation litigation, such as the characteristics of the defendant and the type of trade secret involved.³² While providing invaluable and pathbreaking insights on trade secret litigation, these studies did not delve into remedies and, in particular, did not examine whether (and on what terms) permanent injunctive relief was provided to trade secret owners in successful litigation.³³

Rowe investigated remedies for trade secret misappropriation in two comprehensive empirical studies published in 2017 and 2020.³⁴ Rowe constructed a dataset that included 157 federal trade secret cases over a fifteen-year period from January 1, 2000 to December 31, 2014, drawn primarily from jury verdict reports available on Westlaw and Lexis.³⁵ She explicitly excluded cases filed in state courts for much of the same reasons identified by earlier commentators: lack of access to state court dockets in accessible standardized formats.³⁶ The date parameters of Rowe's studies preceded adoption of the DTSA, so all of the cases examined arose under state trade secret law.

Rowe's studies provide important insights into remedies in trade secret litigation. The 2017 study was primarily focused on damages awards in trade secret cases,³⁷ but Rowe also reached some preliminary findings regarding

31. *Id.* Risch drew upon a subset of the two Almeling et al. datasets for his study of continued judicial reliance on common law after adoption of the UTSA. See Michael Risch, *An Empirical Look at Trade Secret Law's Shift from Common to Statutory Law*, in INTELLECTUAL PROPERTY AND THE COMMON LAW, *supra* note 5, at 151, 157 (explaining choice of dataset for study).

32. Almeling et al. looked at these types of questions in the context of their state study. See Almeling et al., *supra* note 22, at 69 (was the defendant a current or former employee, former or expected business partner, unrelated individual or entity); *id.* at 72 (did the trade secret involve customer lists and internal business information versus "technical" information, such as formulas or software); *id.* at 76–77 (did the court cite "persuasive authority"); *id.* at 79 (did the court rely on the *Restatements*); *id.* at 81 (what types of security measures were undertaken by the trade secret owner). Almeling et al. explored similar questions in the context of their federal study. See, e.g., Almeling et al., *supra* note 16, at 302–04 (characteristics of defendants); *id.* at 304–05 (types of trade secrets at issues); *id.* at 306–12 (type of law applied).

33. Indeed, their state study called out the question of permanent injunctive relief as a topic for future research. Almeling et al., *supra* note 22, at 94.

34. See generally Elizabeth A. Rowe, *Unpacking Trade Secret Damages*, 55 HOUS. L. REV. 155 (2017) [hereinafter Rowe, 2017]; Elizabeth A. Rowe, eBay, *Permanent Injunctions, and Trade Secrets*, 77 WASH. & LEE L. REV. 553 (2020) [hereinafter Rowe, 2020].

35. Rowe, 2017, *supra* note 34, at 166–68 (describing formation of dataset and noting the use of the Bloomberg docket searching tool in locating needed case information).

36. *Id.* at 167 ("Among other reasons, the state courts' dockets were less standardized, more difficult to search for the relevant variables, and would have required coding over a thousand cases that initially appeared to fit the definition." (footnote omitted)).

37. Rowe also observed that plaintiffs were more likely to win than defendants, that digital trade secrets were at issue in most cases, that most allegations of misappropriation were based on wrongful use rather than wrongful acquisition, and that trade secret claims were usually brought in conjunction with contract, tort, and other intellectual property claims. *Id.* at 158, 182–89.

permanent injunctive relief.³⁸ In particular, she noted that fewer than eighteen percent of the cases in her dataset resulted in permanent injunctive relief.³⁹ In addition, Rowe noted that “the length and scope of the injunctions var[ied] based on” the facts of the case, and that those injunctions could be either mandatory or prohibitory in nature.⁴⁰ Rowe identified paths for future research, including exploration of the cases in which injunctions were issued but damages were not awarded and an inquiry into whether permanent injunctions complied “with the statutory intent of the UTSA and DTSA.”⁴¹

In her 2020 study, Rowe undertook a qualitative empirical review of permanent injunctions in trade secret cases. In particular, she examined the influence of the equitable principles laid out by the U.S. Supreme Court in *eBay Inc. v. MercExchange, LLC* (involving permanent injunctions in patent cases) on lower courts’ decisions to grant or deny permanent injunctions in trade secret cases.⁴² Using her original dataset in conjunction with a review of published federal cases,⁴³ Rowe concluded that the courts did not necessarily adhere to the *eBay* factors in the trade secret context,⁴⁴ but that irreparable harm was “the most prominent of the [*eBay*] equitable factors” appearing in the cases studied.⁴⁵

38. Rowe also found that “[p]reliminary injunctions . . . were granted and denied at virtually equal rates, 24[percent] and 23[percent], respectively.” *Id.* at 195.

39. Over one-half (52.41 percent) of the cases in Rowe’s dataset resulted in no award of damages and no injunction; 29.66 percent of the cases resulted in a damage award but no injunction. *Id.* at 196. Only 14.48 percent of the cases resulted in damages and a permanent injunction. *Id.* A mere 3.45 percent of the cases resulted in a permanent injunction but no damages. *Id.*

40. *Id.* Rowe found that prohibitory injunctions could range from “simple” orders that banned disclosure of the trade secret to “complex” ones that restricted use of the trade secret so as to prevent manufacture or production of the infringing item. *Id.* Prohibitory injunctions are forward-looking in the sense that they prevent future harm (e.g., by banning future use of the trade secret by the defendant); mandatory injunctions are restorative in the sense that they require the defendant to take affirmative actions to return the plaintiff to its original position (e.g., by requiring the return of documents containing trade secrets). See *infra* notes 166–67 and accompanying text (discussing distinction between prohibitory and mandatory injunctions in context of this study).

41. Rowe, 2017, *supra* note 34, at 197.

42. Rowe, 2020, *supra* note 34, at 553. *eBay* held, in the context of the Patent Act, that “well-established principles of equity” required the following test be met before a permanent injunction could be awarded:

[A] plaintiff [must] demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006). See generally Deepa Varadarajan, *Trade Secrecy Injunctions, Disclosure Risks, and eBay’s Influence*, 56 AM. BUS. L.J. 879 (2019) (discussing application of the *eBay* factors in trade secret cases).

43. Rowe, 2020, *supra* note 34, at 557–59.

44. *Id.* at 557.

45. *Id.* at 559.

Rowe noted that the scope of the injunction orders that she examined “tended to be a mix of broad and narrowly tailored.”⁴⁶ These orders, which again included both mandatory and prohibitory injunctions, were generally “quite perfunctory” and undetailed.⁴⁷ The length of the injunction was almost never provided, which Rowe found “striking.”⁴⁸ She further noted that it was “not uncommon” for a court to issue a permanent injunction after a jury verdict without providing reasoning,⁴⁹ and that in some cases it appeared that the defendant did not file an opposition brief.⁵⁰

My empirical study builds upon this small but important body of empirical research in trade secret law by examining specifically how courts measure the life of permanent injunctions issued in trade secret misappropriation cases. It recognizes the hurdles regarding dataset formation outlined by earlier studies and attempts to overcome some of them by using Lex Machina, a legal analytics database that enables access to the dockets of trade secret cases filed in federal trial courts, and in which “trade secret” is a recognized, searchable category of cases. Lex Machina allows comprehensive searching of unpublished as well as published cases, permitting a wide view of judicial practices.

Thus, this study, like earlier studies, focuses on cases decided in federal courts.⁵¹ However, the date parameters of this study, which extend to December 31, 2022, include cases arising under the federal DTSA as well as those state law trade secret cases arising in federal court. As a result, this study also provides insights into the impact of this new federal cause of action on the provision of permanent injunctive relief in trade secrets cases.

II. EVOLUTION OF PERMANENT INJUNCTION DOCTRINE IN TRADE SECRET CASES

Calculating the life of a permanent injunction in the trade secret area is a knottier issue than calculating similar relief in other areas of intellectual property law. Patents, for example, have a defined lifespan,⁵² so a permanent

46. *Id.* at 585.

47. *Id.* at 582.

48. *Id.* at 585–86.

49. *Id.* at 583.

50. *Id.*

51. As of February 16, 2023, Lex Machina’s state court coverage was limited to certain courts in eight states only. See *Legal Analytics for State Courts*, LEX MACHINA, https://law.lexmachina.com/court/?tab=state_courts [<https://perma.cc/6EEF-A679>]. Lex Machina continues to add state courts to its database, which raises the possibility of a fruitful state study in the future. However, the advent of the DTSA, which creates a federal cause of action for trade secret misappropriation, is likely to shift more cases to federal court, resulting in fewer state court decisions. See *infra* notes 152–55 and accompanying text (discussing growth in DTSA cases).

52. Utility patents typically terminate twenty years after the date of patent application. 35 U.S.C. § 154(a)(2). Design patents terminate fifteen years after the date of patent issuance. *Id.* § 173.

injunction issued in a patent infringement case has a natural termination point: when the patent ends, the permanent injunction likewise ends.⁵³

Trade secrets, however, have no set life.⁵⁴ Depending upon the nature of the secret involved, a trade secret may persist for a very short time, a very long time, or anywhere in between. Trade secrets may be lost through the legitimate actions of others, such as reverse engineering or independent creation,⁵⁵ or may be lost through illegitimate acts of acquisition or access, such as theft or espionage.⁵⁶ Once the secrecy is destroyed (however that might occur), the trade secret is gone.⁵⁷

The lack of a set termination point for the life of the trade secret makes determination of the life of a permanent injunction protecting that trade secret ambiguous. In most circumstances, the injunction should end when the trade secrecy is lost.⁵⁸ That date is not known at the time the injunction is being crafted, however, so courts must decide how to handle the temporal uncertainty. The court could attempt to estimate the likely life of the trade secret up front (and allow either party to petition for removal or extension of the injunction depending upon how circumstances evolve). Or the court could issue an open-ended injunction and require the defendant to proactively request termination of the injunction once it can be shown that the secret is out.⁵⁹ In either event, the court may choose to consider that the defendant's wrongful behavior might have given it a "head start" in accessing the secret and so may extend the injunction for a period beyond the loss of the secret so as to extinguish any unfair advantage gained by the wrongdoer; in such instances, the life of the permanent injunction will extend beyond the life of the trade secret.

This Part explores the historical development of doctrine relating to the life of permanent injunctions in trade secret cases and outlines the modern

53. See, e.g., *AstraZeneca AB v. Apotex Corp.*, 782 F.3d 1324, 1343 (Fed. Cir. 2015) ("We have long held that 'there can be no infringement once the patent expires,' because 'the rights flowing from a patent exist only for the term of the patent.'" (quoting *Kearns v. Chrysler Corp.*, 32 F.3d 1541, 1550 (Fed. Cir. 1994))). But see Christopher A. Cotropia, Note, *Post-Expiration Patent Injunctions*, 7 TEX. INTELL. PROP. L.J. 105, 107 (1998) (describing unclear Federal Circuit precedent for granting post-expiration injunctions in patent cases).

54. See, e.g., H.R. REP. NO. 114-529, at 2 (2016) (noting that trade secrets "can be protected for an unlimited time . . . and require[] no formal registration process" but that "once this information is disclosed it instantly loses its value and the property right itself ceases to exist").

55. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 489-90 (1974) ("[T]rade secret law does not forbid the discovery of the trade secret by fair and honest means, e.g., independent creation or reverse engineering." (emphasis omitted)).

56. See 4 ROGER M. MILGRIM & ERIC E. BENSON, MILGRIM ON TRADE SECRETS § 15.01[1][d] (2023) (noting improper acquisition of or unauthorized use or disclosure of a trade secret is misappropriation).

57. See, e.g., *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984) ("A trade secret once lost is, of course, lost forever.").

58. However, some courts have opted for the more punitive measure of a perpetual injunction. See *infra* notes 80-94 and accompanying text (discussing perpetual injunctions under common law); *infra* Section IV.A.3 (discussing perpetual injunctions in dataset).

59. As will be discussed, see *infra* Section IV.A.1, this is the method chosen by most courts in the cases reviewed for this study.

approach to this issue. This exploration is complicated by the multitude of sources of law that may govern in this area—common law, *Restatements* in the areas of torts and unfair competition, a uniform act adopted by virtually all states (the UTSA⁶⁰), and a relatively new statute providing a federal civil cause of action (the DTSA⁶¹). Given this crowded doctrinal setting, it is not surprising that the courts have struggled to determine how best to calculate permanent injunctive relief in the trade secret arena, nor is it surprising that commentators have characterized many of the cases as being “inconsistent and inaccurate”⁶² or “in conflict.”⁶³

A. THE COMMON LAW RULES: SHELLMAR, CONMAR, AND WINSTON RESEARCH

Unlike patent and copyright law, which are explicitly recognized in the U.S. Constitution⁶⁴ and which were the subject of legislative enactments by the early Congresses,⁶⁵ American trade secret doctrine initially developed in the state courts as a branch of the common law in the 1800s.⁶⁶ The first hint of the availability of injunctive relief in trade secret cases came in 1863 when a New York trial court intimated that the court had jurisdiction to issue such relief although it did not offer the remedy in the dispute before it.⁶⁷ The first actual award of injunctive relief for trade secret misappropriation appears to have occurred in *Peabody v. Norfolk*, decided by the Massachusetts Supreme Court in 1868.⁶⁸ By 1892, a review of English and American case law enabled

60. See *infra* Section II.C (discussing UTSA).

61. See *infra* Section II.D (discussing DTSA).

62. Jamieson, *supra* note 3, at 516.

63. Dole, *supra* note 3, at 174; see also Casagrande, *supra* note 3, at 124 (describing the notion of the courts agreeing on principles for injunctive relief in this area as “over-optimistic, or just plain fiction”).

64. See U.S. CONST. art. I, § 8, cl. 8.

65. See Patent Act of 1790, ch. 7, 1 Stat. 109 (1790); Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790).

66. See William B. Barton, *A Study in the Law of Trade Secrets*, 13 U. CIN. L. REV. 507, 507–15 (1939) (tracing early development of American and English trade secret law). For discussion of the development of U.S. trade secret law, see generally Bone, *A New Look*, *supra* note 5, at 251–59 (tracing the intellectual history of the theory of trade secret law in the United States); 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, 450–88 (2001) (tracing the early practices used to restrict dissemination of trade secrets); Lemley, *supra* note 5, at 315–16 (providing a short history of trade secret law); and 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, 498–502 (2010) (describing the evolution of U.S. trade secret common law from 1837 to 1939).

67. *Hammer v. Barnes*, 26 How. Pr. 174, 176 (N.Y. Sup. Ct. 1863) (overruling demurrer on grounds that the court had jurisdiction to issue an injunction to prevent trade secret misappropriation). This was a major departure from *Deming v. Chapman*, 11 How. Pr. 382, 384 (N.Y. Sup. Ct. 1854), decided less than a decade earlier, which had suggested that damages were available for misappropriation of secret information but that injunctive relief was not.

68. *Peabody v. Norfolk*, 98 Mass. 452, 454 (1868). Although the earliest American trade secret case was *Vickery v. Welch*, 36 Mass. (19 Pick) 523 (1837), many scholars consider *Peabody* to be the first fully developed and thus leading early American trade secret case. See 1 MELVIN F. JAGER, *TRADE SECRETS LAW* § 2:3 (2023); Bone, *A New Look*, *supra* note 5, at 252–59.

a New York trial court, in *Eastman Co. v. Reichenbach*,⁶⁹ to conclude that injunctive relief was available in a trade secret misappropriation case as “legal relief [was] totally inadequate for plaintiff’s protection.”⁷⁰ By 1913, the California Supreme Court confidently declared: “That equity will always protect against the unwarranted disclosure of trade secrets . . . is, of course, settled beyond peradventure.”⁷¹

This development of common law doctrine regarding the availability of injunctive relief for trade secret misappropriation was bolstered by commentators in both the United States and England. For example, Justice Story, writing on American and English law in 1843, noted that “Courts of Equity will restrain a party from making a disclosure of secrets, communicated to him in the course of a confidential employment.”⁷² An 1873 treatise on English and American law asserted that injunctions were available in trade secret cases.⁷³ A 1905 treatise explained that while various American and English cases had articulated “different” grounds underlying the courts’ power to issue injunctions against “the disclosure or use of secrets of trade,” the courts undisputedly wielded this equitable power in both countries.⁷⁴

However, while the *availability* of injunctive relief for trade secret misappropriation may have been indisputable, the *measurement* of the life of such injunctions proved a much thornier issue. Over the course of three decades in the mid-twentieth century, three distinct common law approaches to fashioning permanent injunctive relief for trade secret misappropriation were identified: the *Shellmar* Rule (1936),⁷⁵ the *Conmar* Rule (1949),⁷⁶ and the *Winston Research* “head start” or “lead time” Rule (1965).⁷⁷ Each of these three common law approaches was articulated by a federal appellate court applying state trade secret law. They can be viewed as existing along a continuum,

69. *Eastman Co. v. Reichenbach*, 20 N.Y.S. 110, 114–16 (N.Y. Sup. Ct. 1892).

70. *Id.* at 115.

71. *Empire Steam Laundry v. Lozier*, 130 P. 1180, 1182 (Cal. 1913); *see also* 4 MILGRIM & BENSON, *supra* note 56, § 15.02[1][a] (citing *Empire Steam Laundry*, 130 P. at 1181–83).

72. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA § 952, at 265 (3d ed., London, A. Maxwell & Son 1843).

73. *See* JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 22 (Chicago, Callaghan and Company 1873) (“The disclosure of secrets which have come to one’s knowledge during the course of a confidential employment will be restrained by injunction.”).

74. 1 JOHN NORTON POMEROY, A TREATISE ON EQUITABLE REMEDIES § 268, at 489–90 (1905) (collecting cases and noting these grounds may include protection of a property right, breach of an implied contract stemming from employment, or breach of trust or confidence); *see also* 1 HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS § 451, at 676–77 (1909) (discussing English and American cases that protected trade secrets through injunctions as a matter of enforcing implied contracts).

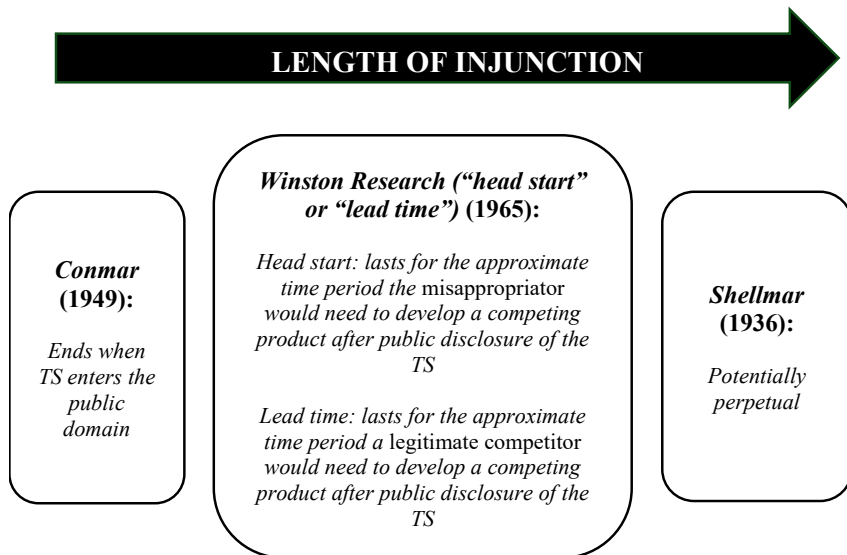
75. *Shellmar Prods. Co. v. Allen-Qualley Co.*, 87 F.2d 104, 107–10 (7th Cir. 1936) (endorsing perpetual injunctions).

76. *Conmar Prods. Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 154–56 (2d Cir. 1949) (endorsing injunctions that cease when the trade secret enters the public domain).

77. *Winston Rsch. Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 142–43 (9th Cir. 1965) (endorsing injunction life tied to time period a legitimate competitor would need to develop a successful application after public disclosure of the trade secret).

anchored at one end by the rather draconian possibility of a perpetual injunction (the *Shellmar* Rule) and at the other by a rule that would automatically terminate the injunction once the trade secret becomes publicly known (the *Conmar* Rule). The evolution of these three rules has been analyzed by several commentators,⁷⁸ and only a brief overview is provided here.

Figure 1: Three Common Law Approaches to Injunction Life



The oldest of these three rules, the *Shellmar* Rule, endorsed perpetual permanent injunctions—that is, injunctions that would continue to prohibit use by the defendant even once the trade secret became publicly known and available to other competitors. In *Shellmar Products. Co. v. Allen-Qualley Co.*,⁷⁹ decided in 1936, the Seventh Circuit acknowledged the equitable principle that “an injunction issued to protect a right will be dissolved upon the extinguishment of that right.”⁸⁰ However, the court reasoned, where a defendant has engaged in inequitable conduct (here, by breaching the confidence the plaintiff had placed in it when it violated the terms of the parties’ licensing agreement⁸¹), the defendant should not “profit by its own wrong.”⁸² Thus, the court found, “the reason for the injunction still exists,”

78. See, e.g., Casagrande, *supra* note 3, at 125–28; Dole, *supra* note 3, at 187–90; Jamieson, *supra* note 3, at 531–35.

79. *Shellmar*, 87 F.2d at 107–10.

80. *Id.* at 106.

81. *Id.* at 109–10.

82. *Id.* at 110.

even though the trade secret did not, and a perpetual permanent injunction was justified.⁸³

The *Shellmar* Rule did not appear out of thin air but rather captured what appears to have been prevailing judicial practice at the time. Jamieson's analysis of early trade secret case law found that the courts "overwhelmingly" issued perpetual permanent injunctions, albeit without providing "any supporting analysis."⁸⁴ Jamieson speculated that this harsh remedy was either viewed as a penalty for the wrongful behavior or perhaps was motivated "by the difficulty of ensuring that the misappropriator developed a competing product independently of the trade secret technology."⁸⁵

Perpetual permanent injunctions for trade secret misappropriation have been issued in a few modern decisions.⁸⁶ The Texas courts, in particular, purport to use perpetual injunctions as the default form of permanent injunctive relief in trade secret litigation.⁸⁷ Most courts awarding this expansive form of relief, however, seem to emphasize misappropriation arising from the breach

83. *Id.* at 109–10 ("It is quite true that [the company]'s trade secrets have been disclosed to the world. . . . We are dealing here not with [the company]'s right against the world, but with that company's right against [the misappropriator]. We hold, therefore, that the reason for the injunction still exists and that [the company]'s right thereto has not been extinguished." (citation omitted)).

84. Jamieson, *supra* note 3, at 530–31, 531 n.59 (collecting cases); *see also* 1 JAGER, *supra* note 68, § 7:13 n.1 (collecting more modern cases).

85. Jamieson, *supra* note 3, at 531. Jamieson concluded: "Courts came to read *Shellmar* for the proposition that perpetual injunctions should be granted as a general rule in trade secret cases and that the termination of a trade secret was irrelevant." *Id.* at 532.

86. *See, e.g.*, *Wyeth v. Nat. Biologics, Inc.*, No. Civ. 98–2469, 2003 WL 22282371, at *27 (D. Minn. Oct. 2, 2003), *aff'd*, 395 F.3d 897 (8th Cir. 2005) (affirming trial court's award of perpetual injunction because evidence showed no one had been able to legitimately replicate the trade secret, but noting that enjoined party could move for termination of the injunction upon a showing of changed circumstances under the Minnesota UTSA); *Pre-Paid Legal Servs., Inc. v. Harrell*, No. Civ-06-019, 2008 WL 111319, at *12–13 (E.D. Okla. Jan. 8, 2008) (granting perpetual injunction styled as "permanent" because misappropriator could "never" recreate the trade secrets by legitimate means); *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 492 N.E.2d 814, 820 (Ohio 1986) (noting that while injunctions would normally terminate when the trade secret becomes known by good faith competitors, the trial court may issue a perpetual injunction where the facts are "egregious and violative of the" parties' relationship); *Halliburton Energy Servs., Inc. v. Axis Techs., LLC*, 444 S.W.3d 251, 257 (Tex. Ct. App. 2014) (finding "no such trend" in the case law "away from perpetual injunctions in favor of more limited 'lead time' injunctions" and noting that perpetual injunctions are the default absent proof an injunction with a shorter life will suffice to protect plaintiff's interests); *Vention Med. Advanced Components, Inc. v. Pappas*, No. 217-2014-cv-604, 2016 N.H. Super. LEXIS 13, at *53 (N.H. Super. Ct. Sept. 7, 2016) (awarding a perpetual injunction because plaintiff's product was unique, incapable of being reversed engineered, and no other competitors were able to replicate it); *see also* E.I. Dupont de Nemours & Co. v. Kolon Indus., Inc., 894 F. Supp. 2d 691, 719–21 (E.D. Va. 2012), *vacated*, 564 Fed. App'x. 710 (2014); *Curtiss-Wright Corp. v. Edel-Brown Tool & Die Co.*, 407 N.E.2d 319, 326 (Mass. 1980). *See generally* 1 JAGER, *supra* note 68, § 6.9 (analyzing the *Shellmar* Rule); AMÉDÉE E. TURNER, *THE LAW OF TRADE SECRETS* 447–53 (1962) (collecting cases following the *Shellmar* Rule); Jamieson, *supra* note 3, at 535 n.79 (collecting cases).

87. *See, e.g.*, *Halliburton*, 444 S.W.3d at 259 ("[T]he burden is on the defendant to show at trial that an injunction for a period of time less than perpetual will be adequate to protect the rights of the injured plaintiff.").

of some sort of special relationship.⁸⁸ For example, the Ohio Supreme Court explained in a 1986 decision that one purpose for a perpetual injunction was to punish the defendant for his breach of confidence.⁸⁹

Modern applications of the perpetual injunction approach can be hard to identify as the courts may not reference the term “perpetual,” much less the case name “*Shellmar*.” The Supreme Court of Massachusetts, for example, affirmed a “permanent” (which in reality was apparently a “perpetual”) injunction where the trial judge had found it unlikely that the trade secrets could be learned through any legitimate procedures.⁹⁰ A later Massachusetts court explained that “injunctions granted to prevent trade secret violations are not punitive and only rarely are truly permanent, as they must be reasonable as to time and scope.”⁹¹ However, the court noted, “what is reasonable depends upon the facts of each particular case,”⁹² thus leaving the door ajar to perpetual injunctions in rare but appropriate instances.⁹³

In 1949, renowned Judge Learned Hand of the Second Circuit explicitly rejected the *Shellmar* Rule in *Conmar Products Corp. v. Universal Slide Fastener*.⁹⁴ The *Conmar* Rule states instead that a permanent injunction should cease

88. See, e.g., *Valco Cincinnati, Inc.*, 492 N.E.2d at 820 (noting that the close employment relationship between the parties rendered the misappropriation sufficiently “egregious” to warrant a perpetual injunction); *Elcor Chem. Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204, 212 (Tex. Civ. App. 1973) (noting a perpetual injunction for misappropriation was mandated given the fiduciary relationship between the parties). The Maryland Court of Appeals explained:

The rationale of the *Shellmar* rule is that a person wronged has an action for breach of confidence entitling him to a perpetual injunction against the person who breached it of which the owner of the trade secret can not be deprived by an intervening publicity of the disclosure. The wrongdoer has deprived himself of the opportunity, open to the rest of the world, by his own violation of confidence.

Space Aero Prods. Co. v. R.E. Darling Co., 208 A.2d 74, 90 (Md. 1965) (emphasis added).

89. *Valco Cincinnati, Inc.*, 492 N.E.2d at 820 (noting that one of “[t]he underlying purposes of the [perpetual] injunction” at issue was “to penalize” the wrongdoers “for their unethical and unlawful behavior”). Commercial morality is a recurring theme in trade secret case law. See generally Lynda J. Oswald, *The Role of “Commercial Morality” in Trade Secret Doctrine*, 96 NOTRE DAME L. REV. 125 (2020). The dissenting justice, however, argued that a perpetual injunction was contrary to the public’s interest in promoting competition and allowing employees to benefit from their general knowledge and skills. *Valco Cincinnati, Inc.*, 492 N.E.2d at 821 (Wright, J., dissenting). If a punitive measure was warranted, the dissent contended, it should come in the form of punitive damages and not a perpetual injunction. *Id.*

90. *Curtiss-Wright Corp.*, 407 N.E.2d at 326. The court did leave open the possibility, however, that the defendant could seek dissolution of the injunction in the future should there be a significant change in circumstances. *Id.* at n.8; see also *E.I. DuPont de Nemours & Co.*, 894 F. Supp. 2d at 719–21 (issuing a perpetual injunction that was labeled “permanent”); *Wyeth*, 2003 WL 22282371, at *27 (issuing a perpetual injunction that was labeled “permanent”).

91. *Specialized Tech. Res., Inc. v. JPS Elastomerics Corp.*, No. HS-cv-200700200, 2011 WL 1366584, at *16 (Mass. Super. Ct. Feb. 10, 2011), *aff’d*, 957 N.E.2d 1116 (Mass. App. Ct. 2011).

92. *Id.* (citations omitted).

93. Perpetual injunctions were issued in only two cases in this study’s dataset. See *infra* Section IV.A.3.

94. *Conmar Prods. Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 155–56 (2d. Cir. 1949) (“We have twice refused to follow this doctrine; and we adhere to our decisions.”).

once the trade secrets enter the public domain.⁹⁵ As the Maryland Court of Appeals explained in a 1965 case:

[O]nce a trade secret becomes public, its original owner can no longer be irreparably harmed by the use of the former secret by persons who originally used it wrongfully, because the rest of the world is also using it. Under this rule, a distinction is made between the use of an injunction to protect proper lawful interests and its use as a penalty.⁹⁶

Like the *Shellmar* Rule, the *Conmar* Rule did not originate in the case bearing its name; earlier cases had already articulated the principle that a permanent injunction protects only secret subject matter and nothing more.⁹⁷

The “head start” or “lead time” rule articulated by the Ninth Circuit in *Winston Research Corp. v. Minnesota Mining & Manufacturing Co.* in 1965 affirmed the trial court in providing that the injunction would last for the period it would have taken a competitor to have legitimately and independently developed the trade secret.⁹⁸ Here, the trade secret owner had itself publicly disclosed its trade secrets through marketing of its product during the pendency of the lawsuit. There thus was no trade secret left to protect, yet the former employees had clearly misappropriated by taking the secret to start their own competing firm prior to that disclosure.⁹⁹

The appellate court described the trial court’s middle ground approach as “sound.”¹⁰⁰ The trade secret owner had sought a perpetual permanent injunction, as envisioned in *Shellmar*; such an injunction, the Ninth Circuit opined, “would subvert the public’s interest in allowing technical employees to make full use of their knowledge and skill and in fostering research and development” even once public disclosure had occurred.¹⁰¹ On the other hand, the court also rejected the misappropriator’s argument that the *Conmar*

95. *Id.* at 156. In *Conmar*, the secret had been disclosed through patenting. *Id.* While some subsequent cases also involved patenting of the trade secret, see, for example, *Timely Prods. Corp. v. Aron*, 523 F.2d 288, 304 (2d Cir. 1975), *Bickley v. Frutchey Bean Co.*, 173 F. Supp. 516, 520 (E.D. Mich. 1959), loss of the trade secret could also occur through other types of disclosure. See, e.g., *Space Aero Prods. Co. v. R.E. Darling Co.*, 208 A.2d 74, 91 (Md. 1965) (noting that an injunction should “be terminated if and when [the trade secret] become[s] generally known to the public, without contribution in any way to such public knowledge through disclosures by” defendant). See generally 1 JAGER, *supra* note 68, § 6.10 (discussing *Conmar* Rule).

96. *Space Aero Prods. Co.*, 208 A.2d at 123–24; see also TURNER, *supra* note 86, at 442–47 (collecting cases applying the *Conmar* Rule). Commentators have argued that the *Conmar* Rule failed to account for the “inequities” that could arise from the misappropriator receiving a head start from its own wrongful actions. See 1 MILGRIM & BENSON, *supra* note 56, § 1.06[3] (citing *Barclay*, *supra* note 3, at 214–15). Commentators have also posited, however, that the *Conmar* Rule furthers policy objectives of employee mobility and free competition. See Casagrande, *supra* note 3, at 128 n.60 (citing HENRY H. PERRIT, JR., TRADE SECRETS: A PRACTITIONER’S GUIDE 514–15 (1994); Leistensnider, *supra* note 3, at 287–88; *Barclay*, *supra* note 3, at 214–15).

97. See TURNER, *supra* note 86, at 443 (“The *Conmar* rule gains its name from a case which neither was the first to stress its principle nor does it attempt completeness.”).

98. *Winston Rsch. Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 142 (9th Cir. 1965).

99. *Id.* at 141.

100. *Id.* at 142.

101. *Id.*

Rule should apply to terminate the injunction in its totality immediately upon public disclosure; such an outcome would allow the misappropriating former employees “the benefit of a headstart [sic] over legitimate competitors who did not have access to the trade secrets until they were publicly disclosed.”¹⁰²

The appellate court thus affirmed the district court’s nuanced solution of extending the injunction to eliminate any advantage the misappropriators might have derived from their wrongdoing:

By enjoining use of the trade secrets for the approximate period it would require a legitimate . . . competitor to develop a successful machine after public disclosure of the secret information, the district court denied the employees any advantage from their faithlessness, placed [the trade secret owner] in the position it would have occupied if the breach of confidence had not occurred prior to the public disclosure, and imposed the minimum restraint consistent with the realization of these objectives upon the utilization of the employees’ skills.¹⁰³

Over time, the “head start” / “lead time” approach came to dominate trade secret doctrine relating to permanent injunction life;¹⁰⁴ it was adopted by the UTSA in 1979¹⁰⁵ and the *Restatement (Third) of Unfair Competition* in 1995.¹⁰⁶ Application of this approach can be a complicated and imprecise matter, however, and courts and commentators have disagreed as to how the injunction period should be calculated.¹⁰⁷ The “head start” rule is generally seen as a subjective approach (i.e., how long would it take the misappropriator itself to reproduce the trade secret through legitimate means); the “lead time” rule is generally viewed as objective (i.e., how long would it take a good faith competitor to do so).¹⁰⁸ Commentators have debated the relative merits of each approach,¹⁰⁹ but, as will be demonstrated below, the distinction turns out to

102. *Id.*

103. *Id.*

104. *See, e.g.,* K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 474 (9th Cir. 1974); *Schulenburg v. Signatrol, Inc.*, 212 N.E.2d 865, 869–70 (Ill. 1965); *Analogic Corp. v. Data Translation, Inc.*, 358 N.E.2d 804, 808 (Mass. 1976); *Carboline Co. v. Jarboe*, 454 S.W.2d 540, 552–53 (Mo. 1970). *See generally* Jamieson, *supra* note 3, at 534 n.76 (collecting cases); 1 JAGER, *supra* note 68, § 7:14 (collecting cases).

105. *See infra* Section II.C (discussing the UTSA).

106. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 44 (AM. L. INST. 1995).

107. *See* Dole, *supra* note 3, at 190.

108. *See id.* at 190–94.

109. Dole noted that the *Winston Research* court applied an objective approach. *Id.* at 194; *see* *Winston Rsch. Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 146 (applying “the approximate period it would require a legitimate . . . competitor to develop a successful machine after public disclosure of the secret information”). Jamieson argued that the courts should reject the objective approach in favor of the subjective approach. *See* Jamieson, *supra* note 3, at 517–18; *infra* Section IV.A. The *Restatement (Third) of Unfair Competition* also supports the subjective approach, although it leaves open the possibility of an objective approach “[i]n some cases.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 44 cmt. f (AM. L. INST. 1995).

be of little significance in the cases surveyed for this study.¹¹⁰ For ease of discussion, therefore, this distinction will be ignored for purposes of this study.

B. THE APPROACHES OF THE RESTATEMENTS

Two *Restatements* addressed permanent injunctions for trade secret misappropriation. The first was contemporaneous with the *Shellmar* Rule. The *Restatement of Torts*, published in 1939, addressed the types of acts of wrongful disclosure or use of a trade secret that could give rise to liability for trade secret misappropriation in three short sections, followed by extensive commentary.¹¹¹ In particular, the commentary to Section 757 noted that injunctive relief was available “against future harm by disclosure or adverse use,” as were “[d]efenses generally available in tort actions and actions for injunctive relief . . . insofar as they are applicable.”¹¹² This *Restatement* did not explicitly address the *life* of permanent injunctions for trade secret misappropriation, however. The *Restatement* was widely cited by state courts over the next four decades or so, although Almeling et al. demonstrated that its influence waned as states began adopting the UTSA in the early 1980s.¹¹³

The *Restatement (Third) of Unfair Competition*, adopted in 1995, also addressed the topic of trade secrets.¹¹⁴ Unlike the earlier *Restatement of Torts*, this document explicitly addressed the life of permanent injunctive relief for trade secret misappropriation. It adopted the “head start” / “lead time” rule that had been articulated in *Winston Research* in 1965, which had also been adopted in the UTSA in 1979.¹¹⁵ Section 44(3) of the *Restatement (Third)* provides: “The duration of injunctive relief in trade secret actions should be limited to the time necessary to protect the plaintiff from any harm attributable to the appropriation and to deprive the defendant of any economic advantage

110. See *infra* Section IV.A.6.

111. 4 RESTATEMENT OF THE LAW OF TORTS §§ 757–59 (AM. LAW. INST. 1939). Section 757 dealt with general principles of liability for disclosure or use of another’s trade secrets; Section 758 addressed issues of innocent discovery of a trade secret followed by notice or change of position; Section 759 addressed the procurement of information through improper means. *Id.*

112. *Id.* § 757 cmt. e.

113. Almeling et al., *supra* note 16, at 307–08, 307 tbl.5; see also Sandeen, *supra* note 66, at 501 (“Between 1939 and 1988, the *Restatement First* was the primary source for an understanding of the purpose and meaning of trade secret law in the United States.”). The *Restatement (Second) of Torts* in 1979 explicitly omitted coverage of trade secrets. Herbert Wechsler, *Introduction to 4 RESTATEMENT (SECOND) OF TORTS*, at vii (AM. L. INST. 1979). The drafters explained that this topic (among others) had been removed because the topics “ha[d] become substantial specialties, . . . governed extensively by legislation and largely divorced from their initial grounding in the principles of torts.” *Id.* (describing the omitted chapters—34, 35, 36, and 38 of the first *Restatement*—which had addressed “trade practices and labor disputes”). The drafters left restatement of these topics to possible future “separate projects.” *Id.* at vii–viii.

114. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 39–45 (AM. L. INST. 1995).

115. See *supra* text accompanying note 98 (addressing *Winston Research*); *infra* Section II.C (addressing the UTSA).

attributable to the appropriation.”¹¹⁶ The comments to this section explain that the strong public interest in promoting competition dictates that injunctive relief for trade secret misappropriation not be punitive in nature;¹¹⁷ rather, injunctions should be structured “to protect the plaintiff from further harm caused by the use or disclosure of the trade secret and to deprive the defendant of further unjust gain.”¹¹⁸ Generally, injunctions should terminate at the time when the defendant could have accessed the information “by proper means,”¹¹⁹ such as “reverse engineering or independent discovery.”¹²⁰ Longer injunctions are warranted only if necessary to ensure the defendant does not benefit from a head start or other unfair advantage arising from its misappropriation.¹²¹ In determining the appropriate time period, the opinions of industry experts and the outcomes of competitors’ attempts to legitimately access the information are relevant.¹²² The comments specifically note that the “ease and certainty with which the appropriate duration of relief can be determined in advance” will dictate whether it is more appropriate for the court to estimate the time it would take for the defendant to legitimately access the secret and specify the injunction life up front, or whether an open-ended injunction should be issued, with the burden placed on the defendant to seek modification or termination of the injunction when circumstances warrant it.¹²³

Despite the thoroughness with which the drafters of the *Restatement (Third) of Unfair Competition* approached this topic, Almeling et al.’s studies in 2009 and 2010 found that Section 44(2) had seldom been cited by state or federal courts.¹²⁴ Citations of the *Restatement (Third) of Unfair Competition* since Almeling’s studies remain rare¹²⁵ and it was not cited in any of the cases within this study’s dataset.

116. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 44(3) (AM. L. INST. 1995). The drafters indicated that the rules of the *Restatement* were intended to apply both to common law actions and to cases arising under the UTSA. *Id.* § 39 cmt. b.

117. *Id.* § 44 cmt. c.

118. *Id.* cmt. f.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Almeling et al., *supra* note 22, at 79 tbl.8 (finding that only two percent of the cases in the state dataset cited the *Restatement (Third) of Unfair Competition*); Almeling et al., *supra* note 16, at 311 tbl.8 (finding that only one percent of the cases in the federal dataset from 1950–2007 and two percent of such cases from 2008 cited the *Restatement (Third) of Unfair Competition*).

125. *But see* Fin. Info. Techs., LLC v. iControl Sys., USA, LLC, No. 17-cv-190-t-23, 2020 WL 6382005, at *1–2 (M.D. Fla. Oct. 30, 2020) (citing the *Restatement (Third) of Unfair Competition* when denying motion for permanent injunction); W. Plains, L.L.C. v. Retzlaff Grain Co., No. 13-cv-47, 2016 WL 165698, at *7 (D. Neb. Jan. 13, 2016) (stating the head start rule of the *Restatement (Third) of Unfair Competition* could be applied to damages as well as injunctive relief). In at least one such case, the citation predated the state’s adoption of the UTSA. *See* Specialized Tech. Res., Inc. v. JPS Elastomerics Corp., No. cv200700200, 2011 WL 1366584, at *1, *16 (Mass. Super. Ct. Feb. 10, 2011). Massachusetts adopted the UTSA effective October 1, 2018. *See* Aaron Nicodemus,

C. THE UNIFORM TRADE SECRETS ACT

The UTSA was presented to and approved by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in August 1979,¹²⁶ and has since been adopted by forty-eight states.¹²⁷ It was the product of thirteen years of study, negotiation, and effort by a number of interested parties.¹²⁸ The drafters framed the UTSA in terms of codifying the existing common law of trade secrets.¹²⁹ However, the proponents of a uniform act in this area also saw the need for more adequate remedies for misappropriation, both in the form of damages and injunctive relief.¹³⁰

In particular, Section 2(a) of the UTSA addresses the availability and life of injunctive relief for trade secret misappropriation:

Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the

Massachusetts Adopts Uniform Trade Secrets Law, BL (Aug. 16, 2018, 4:29 PM), <https://news.bloomberglaw.com/ip-law/massachusetts-adopts-uniform-trade-secrets-law> (on file with the *Iowa Law Review*). In another case, the federal trial court cited both the *Restatement (Third) of Unfair Competition* and the state’s version of the UTSA in articulating the state’s “head start” rule for injunctive relief in trade secret cases. *Whiteside Biomechanics, Inc. v. Sofamor Danek Grp., Inc.*, 88 F. Supp. 2d 1009, 1019–20 (E.D. Mo. 2000) (citing both *Restatement (Third) of Unfair Competition* § 44(3) and the Missouri UTSA provision, MO. REV. STAT. § 417.455 (1995), in denying motion for permanent injunction).

126. UNIF. L. COMM’N, UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS 3 (1985) [hereinafter UNIFORM TRADE SECRETS ACT]. The 1985 amendments did not affect the injunctive relief section of the UTSA. *See id.*

127. *See Trade Secrets Act*, UNIFORM L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-age2-90373dco5792> [https://perma.cc/YM7-BQDC]. New York has yet to adopt the UTSA. *Id.* North Carolina has not formally adopted the UTSA but does apply its own, very similar, statute. *See* N.C. GEN. STAT. §§ 66-152–157 (2023). The relevant section of the N.C. statute provides:

Except as provided herein, actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation for the period that the trade secret exists plus an additional period as the court may deem necessary under the circumstances to eliminate any inequitable or unjust advantage arising from the misappropriation.

Id. § 66-154(a).

128. Sandeen, *supra* note 66, at 519–20. *See generally id.* (detailing history of the UTSA drafting process).

129. UNIFORM TRADE SECRETS ACT, *supra* note 126, at 1–2 (“The Uniform Act codifies the basic principles of common law trade secret protection, preserving its essential distinctions from patent law.”). As Risch has shown, “[t]he UTSA did not represent a complete break from the common law,” which remains part of “the penumbra of statutory interpretation.” Risch, *supra* note 31, at 151.

130. The UTSA contemplates a wide range of possible monetary remedies for trade secret misappropriation, including monetary damages, *see* UNIFORM TRADE SECRETS ACT, *supra* note 126, § 3(a) (allowing recovery of actual loss and unjust enrichment, or award of reasonable royalties), exemplary damages, *id.* § 3(b) (allowing exemplary damages of up to twice the amount awarded if the misappropriation was “willful and malicious”), and attorney’s fees. *Id.* § 4 (“[T]he court may award reasonable attorney’s fees” in the event of “willful and malicious misappropriation,” bad faith in moving to terminate or resist an injunction, or bad faith “claim of misappropriation.”). *See* Sandeen, *supra* note 66, at 506 & n.62, 514 & n.106, 531.

trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.¹³¹

The second sentence of this provision addresses termination of the injunction but only in the context of a trade secret that has become publicly known. As explained in the accompanying comment, the UTSA position is that “an injunction should last for as long as is necessary, but no longer than is necessary, to eliminate the commercial advantage or ‘lead time’ with respect to good faith competitors that a person has obtained through misappropriation.”¹³² Once the trade secret can be lawfully “reverse engineered” or has become “generally known to good faith” participants in the industry, the injunction should cease.¹³³

Although courts have acknowledged that defendants may petition to have a UTSA permanent injunction terminated because of public disclosure or other loss of the trade secret,¹³⁴ there are few instances of defendants successfully doing so. The one prominent example is a 2009 case in which the Washington Court of Appeals affirmed a trial court’s dissolving of an injunction nine years after issuance because other companies had since independently developed the secret technology.¹³⁵ It appears that the great majority of permanent injunctions issued under the UTSA either terminate by their own terms (because they have a defined life) or continue indefinitely (because the misappropriator does not seek dissolution based on changed circumstances). Both scenarios are represented in the cases found in the dataset of this study.¹³⁶

Finally, the UTSA is not truly “uniform” across all states. Some state legislatures chose to alter the language of Section 2(a) when adopting it.¹³⁷

131. UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a).

132. *Id.* § 2(a) cmt.

133. *Id.*

134. *See, e.g.*, Walmart Inc. v. Cuker Interactive, LLC, 949 F.3d 1101, 1112–13 (8th Cir. 2020) (noting that an injunction can be dissolved by a court if the trade secret ceases to exist); Halliburton Energy Servs., Inc. v. Axis Techs., LLC, 444 S.W.3d 251, 259–60 (Tex. App. 2014) (noting a perpetual permanent injunction may be terminated by the court if the trade secret ceases to exist); Vention Med. Advanced Components, Inc. v. Pappas, No. 217-2014-cv-604, 2016 N.H. Super. LEXIS 13, at *55 (N.H. Super. Ct. Sept. 7, 2016) (noting that a defendant may petition for modification of an injunction if they are able to produce the products at issue without use of the plaintiff’s trade secrets) (citing *Halliburton*, 444 S.W.3d at 259–60). *See generally infra* Section IV.A.2 (noting few cases in the dataset referenced this right).

135. *Petters v. Williamson & Assocs.*, 210 P.3d 1048, 1056 (Wash. Ct. App. 2009). *Compare* Global Protein Prods., Inc. v. Le, No. 105-cv-043903, 2023 WL 371763, at *5–8 (Cal. Ct. App. Jan. 24, 2023) (affirming on law-of-the-case grounds the trial court’s denial of motion to dissolve trade secret because of continuing validity of trade secret), *with* MicroStrategy, Inc. v. Bus. Objects, S.A., 369 F. Supp. 2d 725, 734 (E.D. Va. 2005), *aff’d*, 429 F.3d 1344 (Fed. Cir. 2005) (noting that the defendant had failed to show that an injunction should be terminated based on a loss of trade secret status).

136. *See infra* Sections IV.A.1 (addressing changed circumstances), IV.A.4 (addressing defined-life injunctions).

137. *See generally* BRIAN M. MALSBERGER, TRADE SECRETS: A STATE-BY-STATE SURVEY (7th ed. 2020).

Most of the changes relating to injunctive relief were minor tweaks and are unlikely to affect the calculation of the life of the permanent injunction.¹³⁸ However, as summarized in Table 1, six states enacted more significant alterations to the injunction provisions of the UTSA. Each of these changes seemingly was intended to increase the ability of trade secret owners to obtain permanent injunctions in the event of misappropriation.

Table 1: Significant State Statutory Alterations to UTSA Language

| State | Alteration to UTSA |
|----------------|---|
| Alabama | Eliminated second sentence of Section 2(a) |
| Colorado | Eliminated second sentence of Section 2(a) |
| Georgia | Amended Section 2(a) to allow extension of the injunction beyond the life of the trade secret to eliminate any unwarranted commercial advantage or “where the trade secret ceases to exist due to the fault of the enjoined party or others by improper means” |
| Illinois | Amended Section 2(a) to allow extension of the injunction beyond the life of the trade secret to eliminate any unwarranted commercial advantage or “deterrence of willful and malicious misappropriation, or where the trade secret ceases to exist due to the fault of the enjoined party or others by improper means” |
| Tennessee | Same as Illinois language |
| South Carolina | Amended Section 2(a) to allow extension of injunction to “take into account the average rate of business growth that would have been gained from nonmisappropriated use of the misappropriated trade secret” |

138. See, e.g., CAL. CIV. CODE § 3426.2 (West 2023) (eliminating “reasonable” from “additional reasonable period of time” (UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a))); MICH. COMP. LAWS § 445.1903 (2023) (stating “court of competent jurisdiction” instead of “court” (UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a))); MONT. CODE ANN. § 30-14-403(1) (2024) (providing that the “injunction must be terminated” as opposed to UTSA’s requirement that the “injunction shall be terminated” (UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a))); NEV. REV. STAT. § 600A.040(1) (2023) (providing that the “injunction must be terminated” as opposed to UTSA’s requirement that the “injunction shall be terminated,” and adding “or other advantage” after “commercial” (UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a))). Texas adopted the UTSA’s provision but added a provision protecting the employee’s freedom of mobility. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.003(a) (West 2023) (“Actual or threatened misappropriation may be enjoined if the order does not prohibit a person from using general knowledge, skill, and experience that person acquired during employment.”). Massachusetts altered the first sentence of Section 2(a) by providing: “Actual or threatened misappropriation may be enjoined upon principles of equity, including but not limited to consideration of prior party conduct and circumstances of potential use, upon a showing that information qualifying as a trade secret has been or is threatened to be misappropriated.” MASS. GEN. LAWS ch. 93, § 42A(a) (2023).

Two states—Alabama and Colorado—relaxed the language of Section 2(a) by omitting language found in the UTSA. Alabama’s statute eliminates the second sentence of Section 2(a) of the UTSA;¹³⁹ Colorado similarly eliminated the second sentence of Section 2(a) of the UTSA and its time constraints.¹⁴⁰ The elimination of the second sentence of Section 2(a) in each of these states has the practical effect of removing the express restriction that the injunction be lifted at the end of the trade secret’s life (although, as noted below, general equitable principles might still require the termination of an injunction upon the cessation of the trade secret¹⁴¹).

Three states—Georgia, Illinois, and Tennessee—added language to Section 2(a) that defines additional circumstances that would justify a temporal extension of the injunction. Georgia allows extension of the injunction beyond the life of the trade secret to eliminate any unwarranted commercial advantage “or where the trade secret ceases to exist due to the fault of the enjoined party or others by improper means.”¹⁴² Illinois and Tennessee adopted identical language that is very similar to Georgia’s but includes extension to deter “willful and malicious misappropriation.”¹⁴³ Finally, South Carolina added an additional sentence at the end of the section that more specifically addressed unfair commercial advantage arising from the misappropriation: “Such reasonable period of time shall take into account the average rate of business growth that would have been gained from nonmisappropriated use of the misappropriated trade secret.”¹⁴⁴

In sum, the legislatures of all six of these states altered the language of the UTSA so as to, theoretically at least, extend the lives of permanent injunctions in misappropriation cases. This study examines whether these differences in

139. ALA. CODE § 8-27-4 (2023) (providing merely for “[s]uch injunctive and other equitable relief as may be appropriate with respect to any actual or threatened misappropriation of a trade secret”). The omitted sentence of the UTSA provides: “Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.” UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a).

Alabama technically has adopted the UTSA, see *Trade Secrets Act*, *supra* note 127 (indicating that Alabama enacted the UTSA in 1988), but some commentators would disagree with that characterization given the significant differences between the UTSA and Alabama’s trade secret statute generally. See, e.g., *Understanding the Uniform Trade Secrets Act*, FREIBERGER HABER LLP (Apr. 4, 2018), <https://fhnylaw.com/understanding-uniform-trade-secrets-act> [<https://perma.cc/PH5N-335Z>] (“There is some debate about whether Alabama . . . adopted the UTSA . . .”); *Trade Secrets Laws and the UTSA: 50 State and Federal Law Survey*, BECK REED RIDDEN LLP (Jan. 24, 2017), <https://beckreedriden.com/trade-secrets-laws-and-the-utsa-a-50-state-and-federal-law-survey-chart> [<https://perma.cc/SB5D-AXWW>] (same).

140. COLO. REV. STAT. § 7-74-103 (2021) (providing that “[t]emporary and final injunctions including affirmative acts may be granted on such equitable terms as the court deems reasonable to prevent or restrain actual or threatened misappropriation of a trade secret”).

141. See *infra* notes 299–301 and accompanying text (discussing general equitable power of court to modify or terminate an injunction).

142. GA. CODE ANN. § 10-1-762(a) (2023).

143. 765 ILL. COMP. STAT. 1065/3(a) (2023); TENN. CODE ANN. § 47-25-1703(a) (2023).

144. S.C. CODE ANN. § 39-8-50 (2023).

statutory provisions influenced how courts structured permanent injunctive relief in the cases found in the dataset.¹⁴⁵

D. THE DEFEND TRADE SECRETS ACT OF 2016

The DTSA created a new federal civil cause of action for trade secret misappropriation to supplement the existing state causes of action.¹⁴⁶ The DTSA mimics the range of remedies found under the UTSA, including injunctive relief for actual or threatened misappropriation.¹⁴⁷

However, the DTSA's language regarding the life of permanent injunctions is significantly more succinct than the language found in the UTSA. It does not contain the provision for termination of the injunction upon a showing of changed circumstances that is found in Section 2(a) of the UTSA.¹⁴⁸ Rather, the DTSA merely provides that "a court may . . . grant an injunction (i) to prevent any actual or threatened misappropriation . . . on such terms as the court deems reasonable."¹⁴⁹ The DTSA provides an additional caveat that an injunction may not inappropriately interfere with an individual's job mobility or conflict with state prohibitions on restraint of trade or business.¹⁵⁰

The impact of the DTSA taking effect in May 2016 is visible in filing statistics. Lex Machina reported a thirty percent uptick in trade secret case filings in federal district court between 2015 and 2017, following the enactment of the DTSA.¹⁵¹ Further, 72.9 percent of trade secret case filings in federal district courts in 2020 included DTSA claims.¹⁵² A 2020 report by Stout reported that in the five years preceding the DTSA (2010–2015), approximately 1,100 trade secret cases were filed in federal court each year.¹⁵³ In 2017

145. See *infra* Section IV.A.5 (concluding that these statutory alterations have had no impact on the calculation of permanent injunction lives).

146. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified as amended at 18 U.S.C. § 1836). The DTSA does not preempt state trade secret law. See H.R. REP. NO. 114-529, at 6 (2016) ("[T]he legislation is designed to avoid disruption of legitimate businesses, without preempting State law."). For background on the enactment of the DTSA, see Levine & Seaman, *supra* note 11, at 115–20.

147. See 18 U.S.C. § 1836(b)(3)(A). Legislative history indicates that the DTSA's provisions on equitable relief were "drawn directly from Sec[ti]on 2 of the [UTSA]." H.R. REP. NO. 114-529, at 12. See generally Rowe, 2017, *supra* note 34, at 159–66 (describing remedies available under the UTSA and DTSA). The DTSA permits civil seizure in certain circumstances. See 18 U.S.C. § 1836(b)(2). This remedy is not found in the UTSA. The monetary relief found under the DTSA includes monetary damages, exemplary damages, and attorney's fees. *Id.*

148. *Id.* § 1836(b)(3)(A).

149. *Id.* § 1836(b)(3)(A)(i).

150. *Id.* § 1836(b)(3)(A)(i)(I)–(II). The UTSA has no similar provision addressing the impact of injunctive relief on employees.

151. RACHEL BAILEY, LEX MACHINA TRADE SECRET LITIGATION REPORT 2021, at 4 (Gloria Huang & Jason Maples eds., 2021) (on file with the *Iowa Law Review*).

152. *Id.* at 5. Similarly, 72.5 percent of trade secret cases in 2019 included DTSA claims. *Id.*

153. STOUT, TRENDS IN TRADE SECRET LITIGATION REPORT 2020, at 13 (2020), <https://www.winston.com/a/web/203824/trends-in-trade-secret-litigation-report-2020.pdf> [<https://perma.cc/GJK7-RYET>]. Stout's methodology used the Lexis Advance database for U.S. district courts to

through 2019, however, that number jumped to approximately 1,400 annual filings.¹⁵⁴ We can expect to see more DTSA cases in the future as litigants continue to turn to this federal cause of action in addition to, or perhaps even in lieu of, state actions.

The relative newness of the DTSA means that the cases decided under this federal statute have only recently begun to reach their termination stages. This study's findings regarding the impact of the DTSA to date on permanent injunctions in trade secret misappropriation cases are discussed below.¹⁵⁵

III. RESEARCH QUESTIONS AND METHODOLOGY

This Part identifies the research questions addressed in this empirical study of the life of permanent injunctions in trade secret misappropriation cases issued by the federal trial courts in the fourteen-year period between January 1, 2009 and December 31, 2022. It also describes the study design and the collection process, and acknowledges the limitations raised by the dataset.

The complexities posed by the elegant and nuanced permanent injunction doctrine articulated in the UTSA and the *Restatement (Third) of Unfair Competition* are substantial.¹⁵⁶ Scrupulous application of this doctrine would require a considerable amount of detailed analysis and careful parsing of facts by trial court judges. To implement this scheme effectively, the court must choose a protocol for calculating the life of the injunction. Should the court engage in thoughtful prognostication and estimate a specific time period up front (perhaps allowing either party to challenge the demise or continuance of the injunction if circumstances change or evolve differently than expected)? Or should the court leave the injunction life open-ended and require the misappropriator to proactively request termination of the injunction once it can be shown that the confidential information has become legitimately known within the industry such that no trade secret continues to exist? Is it ever appropriate to issue a perpetual injunction (that is, a never-ending injunction that bans the defendant from using the trade secret even once the information becomes generally known), or are such injunctions punitive measures antithetical to equitable relief?

This study does not address those doctrinal questions.¹⁵⁷ Rather, in broad strokes, this study examines how federal trial courts have, in practice, calculated the life of the permanent injunctions in trade secret misappropriation cases.¹⁵⁸ This study is constructed as a content analysis that attempts “to document

examine cases identified by that database as pertaining to trade secret claims, as well as Lexis Advance's Jury Verdicts and Settlements database of reported judicial decisions and an examination of the dockets of the 639 cases so identified. *Id.* at 50.

154. *Id.* at 13.

155. *See infra* Section IV.A.7.

156. *See supra* Section II.C (discussing UTSA doctrine) and notes 113–24 and accompanying text (discussing *Restatement (Third) of Unfair Competition* doctrine).

157. Other commentators have examined these questions, however. *See, e.g.*, sources cited *supra* note 3.

158. The study does not address whether a permanent injunction should be issued or the standards applied by the court in making that determination.

what courts do and what they say” in “a systematic and objective way”¹⁵⁹ by examining the actual opinions and injunctions issued by trial courts and the relevant pleadings submitted by the parties. The objective of the study is to shed light on the actual interplay between doctrine and practice in the complex area of trade secret injunction remedies.

Specifically, the research questions addressed in this study are:

(1) How often do courts issue open-ended or undefined-life permanent injunctions in trade secret misappropriation cases?

(2) Do courts specifically reference the misappropriator’s ability to have a permanent injunction dissolved or modified in the future, and if so, do they define the circumstances that would trigger that ability? How often and under what circumstances have courts actually terminated or altered permanent injunctions after their issuance?

(3) How common are perpetual injunctions, and what rationales do courts provide for imposing such seemingly punitive measures?

(4) How often do courts specify a defined life for a permanent injunction? How do they calculate that life, and what support do they cite?

(5) Do courts structure the life of a permanent injunction differently when deciding a case under the law of one of the six states that redrafted the UTSA language to provide additional relief to trade secret owners?

(6) Do courts explicitly apply the “head start” / “lead time” approach adopted by the UTSA and the *Restatement (Third) of Unfair Competition*? If so, how do those rules impact the court’s calculation of permanent injunction life?

(7) Has the enactment of the DTSA influenced how courts address permanent injunction life in trade secret misappropriation cases?

This study examines exclusively federal trial court cases in which permanent injunctions were issued. The dataset of federal cases was drawn from Lex Machina, a legal analytics service.¹⁶⁰ Lex Machina recognizes trade secrets as a discrete practice area and categorizes cases accordingly; it also identifies remedies at a granular level, including permanent injunctions granted or denied, and makes pleadings and court orders relevant to the issuance of permanent injunctions relatively easy to identify and search.¹⁶¹

The date parameters of the search were January 1, 2009 through December 31, 2022. The dataset thus specifically includes DTSA cases as well

159. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 99 (2008). Hall and Wright described content analysis of judicial opinions: “Using this method, a scholar collects a set of documents, such as judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning.” *Id.* at 64.

160. For an explanation of how Lex Machina gathers its data, see *How It Works*, LEX MACHINA, <https://lexmachina.com/how-it-works> [<https://perma.cc/634E-H394>].

161. See *Legal Analytics for Trade Secret Litigation*, LEX MACHINA, <https://lexmachina.com/practice-areas/trade-secret-litigation> [<https://perma.cc/XWG6-gGCT>]. Although Lex Machina includes a growing number of state court filings, see *Lex Machina Coverage*, LEX MACHINA, <https://lexmachina.com/coverage> [<https://perma.cc/FE2W-LXCQ>], its coverage in that area is significantly more limited. Thus, this study focuses exclusively on the federal court database. However, one direction for future research would be to examine those state jurisdictions included within Lex Machina to see whether the results might differ.

as those arising under state law. The study's search parameters further specified cases in which: (1) trade secret misappropriation was a cause of action; (2) there was a judgment on the merits; and (3) a permanent injunction was issued as a remedy.¹⁶² This resulted in an initial dataset of 161 cases.¹⁶³

Court orders and relevant pleadings were then examined in each case to determine whether the case should remain in the dataset. Three types of cases were culled: (1) cases in which the defendant was not found liable for trade secret misappropriation (but was found liable on other grounds, such as breach of contract or patent infringement); (2) cases in which the trade secret claims were resolved by consent or default judgment; and (3) cases in which only a mandatory (as opposed to prohibitory) injunction was issued.

The reason for the first of these three limitations is self-evident. The second search limitation was chosen to narrow the set of cases to those in which the life of the permanent injunction relief offered was more likely to have been actively litigated by the parties. Thus, cases in which the trade secret claims were resolved by a default or consent judgment were excluded on the theory that the injunctive relief issued was less likely to have been vigorously contested before the court.¹⁶⁴

The third search limitation, which culled those cases with only mandatory permanent injunctions, was implemented to ensure that the injunction at issue was not automatically time-limited by its nature. Mandatory injunctions are restorative in the sense that they require "the defendant to take affirmative action to restore the plaintiff to [its] original situation."¹⁶⁵ In the trade secret misappropriation context, this often takes the form of requiring the defendant to return materials containing trade secrets (for example, thumb drives or schematics) or to destroy computer files or paper copies that contain the plaintiff's trade secrets. Mandatory injunctions customarily have a very short life—the mandated actions can and should occur quickly (and if they do not, the plaintiff presumably has quick recourse to the courts). Once the restorative task is completed, the purpose of the injunction has been fulfilled, and there is no continuing obligation.

162. The search was: Trade Secret cases; with General: Permanent Injunction: Grant at Judgment on Merits as a remedy; with General: Permanent Injunction: Deny or General: Permanent Injunction: Grant at Judgment on Merits as remedies; with General: Permanent Injunction: Grant as a remedy; pending between 2009-01-01 and 2022-12-31. The final search was run on January 12, 2023.

163. As of February 17, 2023, ninety-eight percent of the cases in the dataset had terminated; the median time to termination was 791 days.

164. Lex Machina's 2021 Trade Secret Litigation Report noted that for cases in its database "terminating from 2016 to 2020, 51 cases had permanent injunctions granted on the merits [versus] 656 cases with permanent injunctions granted by consent." BAILEY, *supra* note 151, at 16. The Report speculated that "[a]s many defendants are individuals, they are often inclined to consent to an injunction rather than engage in litigation against a company with more resources." *Id.*

165. See F.R., Comment, *Injunction—Mandatory or Prohibitory?*, 25 YALE L.J. 589, 590 (1916); see also William Q. de Funiak, *Means of Equitable Protection Against Torts*, 37 KY. L.J. 158, 158 (1949) ("Mandatory injunctions are those which require the defendant to do some act.").

Prohibitory injunctions, by contrast, are “preventative and protective.”¹⁶⁶ In the trade secret misappropriation context, this typically results in a ban on the use or dissemination of the trade secret by the defendant. The court must decide how long this ban should last. Thus, prohibitory injunctions are the ones relevant to this study’s analysis of how courts calculate a permanent injunction’s life in the trade secret arena.

This culling resulted in a final dataset of fifty-three cases. The dockets of those fifty-three cases were then examined individually, looking at attributes such as arguments made by the parties regarding injunctive life, the length of the prohibitory injunction issued, the rationale (if any) given by the court for that length, the law applied, and the support (if any) cited by the court. The study’s findings and implications are identified and interpreted in the next Part.

I acknowledge the limitations of a study that excludes permanent injunctions issued by state trial courts. In a perfect world, a researcher would examine all state and federal cases, published or unpublished, in which a permanent injunction was issued in a trade secret misappropriation case to answer the research questions addressed in this study.¹⁶⁷ In reality, the unique characteristics of trade secret cases discussed above in Part I make collection of that type of data infeasible, particularly at the state level.¹⁶⁸ The study is designed, however, to minimize distortions by drawing from a comprehensive database that includes both published and unpublished decisions at the federal trial court level. While unpublished decisions are not relevant in terms of precedential development, this study focuses on identifying and analyzing actual outcomes for litigants, not the creation of precedent. The inclusion of unpublished decisions in the dataset provides a much fuller picture of actual judicial practice in this area.

IV. FINDINGS AND IMPLICATIONS

Section A of this Part summarizes the seven major findings of this study and discusses the inferences that can be drawn from them regarding the development and application of doctrine surrounding permanent injunctions for trade secret misappropriation. Section B highlights the manner in which these findings inform our understanding of judicial practice and the type and availability of permanent injunction relief in trade secret actions.

166. F.R., *supra* note 165, at 590; de Funiak, *supra* note 165, at 158 (“Prohibitory injunctions are those requiring the defendant to abstain from doing a certain act or from pursuing a certain line of conduct.”).

167. The research world is imperfect, however, as noted by Hall & Wright:

There is slippage at each point in the litigation process: most human interactions do not produce disputes, only some disputes result in legal claims, many claims are settled, and many trial decisions are not appealed. Appellate courts regularly dispose of cases without opinions or decide not to publish some opinions, and computer databases inconsistently include cases that are not officially published. At each juncture, a variety of factors potentially distort what one stage can reveal about the other.

Hall & Wright, *supra* note 159, at 104.

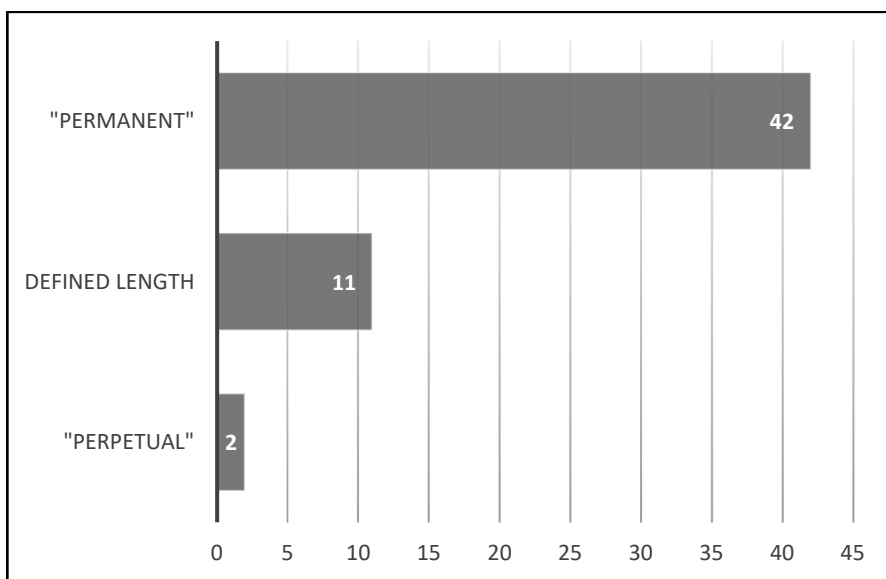
168. See *supra* notes 20–22 and accompanying text (discussing difficulties of gathering trial court data at the state level).

A. FINDINGS

1. The Majority of Permanent Injunctions in the Dataset Had No Specified Life

As Figure 2 illustrates, forty-two of the fifty-three cases in the dataset resulted in a permanent injunction without a specified life.¹⁶⁹ Only eleven of the cases involved injunctions with a duration that could be measured in finite periods of months or years.¹⁷⁰ Two of the cases resulted in perpetual injunctions.¹⁷¹ The total (fifty-five) exceeds the number of cases in the dataset (fifty-three) because two cases fell into two of these three categories.¹⁷²

Figure 2: How Injunction Life was Measured (# of Cases)



Most of the cases in the study's dataset provided no detail in the final injunction about the life of the injunction but rather simply stated that the injunction was "permanent."¹⁷³ As discussed above, the commentary to the *Restatement (Third) of Unfair Competition* in 1995 provided courts with two choices in calculating permanent injunction relief: (1) estimate the approximate life up

169. See *infra* Appendix A.

170. See *infra* Appendix C.

171. See *infra* Appendix B.

172. See *ShowCoat Sols., LLC v. Butler*, No. 18-cv-789, 2020 WL 1467215, at *6 (M.D. Ala. Mar. 19, 2020) (issuing a multi-part injunction that included both defined length injunctive relief and a perpetual injunction provision); *Injunction Order* at 2–3, *Allergan, Inc. v. Merz Pharms., LLC*, No. SACV 11-446 (C.D. Cal. Mar. 9, 2012) (issuing a multi-part injunction that included both defined length injunctive relief and indefinite relief).

173. See *infra* Appendix A.

front and issue a defined-life injunction or (2) issue an open-ended injunction and allow the misappropriator to petition for modification or termination of the injunction when circumstances change.¹⁷⁴ Courts in only about twenty percent of the study's dataset opted for the first choice.

This first finding—that the majority of the cases involved injunctions without a time limit—empirically supports assertions made by Jamieson in 1993. He described this as the “older approach” and noted that these injunctions are “unlimited on their face and either contain no reference to later termination or authorize later reconsideration without providing any useful standard to determine when they should be dissolved.”¹⁷⁵ Jamieson stated that “[t]his approach [was] expressly favored in about a half dozen states and [was] applied intermittently in many more.”¹⁷⁶

At the time of publication of Jamieson's article, thirty-seven states had adopted the UTSA, although twenty-one of those had done so in 1988 or later. Thus, there had been relatively little opportunity for the UTSA to be applied to trade secret cases arising under those state laws.¹⁷⁷ Section 2(a) of the UTSA does not, of course, literally mandate that the court specify the life of a permanent injunction.¹⁷⁸ However, as noted earlier, the comments to the UTSA section clearly state “that an injunction should last for as long as is necessary, but no longer than is necessary, to eliminate the commercial advantage or ‘lead time’ with respect to good faith competitors that a person has obtained through misappropriation.”¹⁷⁹ This language implies the existence of a time limit on the life of the injunction although that termination might occur only at the instigation of the defendant upon a showing of changed circumstances.¹⁸⁰

The dockets of only a few of the cases in this study's dataset reveal any significant debate by the parties regarding the length of the injunction, even when other aspects of the injunction, such as compliance with the *eBay* factors, were at issue and were addressed in the pleadings.¹⁸¹ In some cases, the parties did not appear to dispute the appropriateness of permanent injunctive relief,

174. See *supra* note 124 and accompanying text.

175. Jamieson, *supra* note 3, at 516.

176. *Id.*

177. See *Trade Secrets Act*, *supra* note 127 (listing the years of enactment by each state).

178. See *supra* note 131 and accompanying text (quoting UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a)).

179. UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a) cmt. (discussed *supra* notes 132–33 and accompanying text).

180. Few cases in the dataset referenced the termination provision. See *infra* Section IV.A.2.

181. A notable exception is *ASC Engineered Sols., LLC v. Island Indus., Inc.* See ASC Engineered Sols., LLC's Memorandum in Support of Its Motion for Permanent Injunction at 2–4, ASC Engineered Sols., LLC v. Island Indus., Inc., No. 20-cv-02284 (W.D. Tenn. Aug. 20, 2021). Plaintiff's motion for permanent injunction proposed order indicated that the parties had consulted regarding plaintiff's proposed motion for a permanent injunction and that defendant's counsel did not consent but also did not intend to object to the motion. *Id.* at 2.

and the misappropriating party did not argue for any kind of time limitation.¹⁸² In others, defendants failed to raise the lack of a specific life span for the injunction even when raising other objections to the injunction's provisions,¹⁸³ or failed entirely to respond to plaintiff's motion for a final injunction that would be "permanent."¹⁸⁴ In a couple of cases, the misappropriator argued that any "head start" from misappropriation had dissipated through the passage of time, thus rendering a permanent injunction no longer appropriate.¹⁸⁵

2. Courts and Parties Seldom Referenced Termination or Modification of the Permanent Injunction Upon a Showing of Changed Circumstances

The right to petition the trial court for modification of a permanent injunction because of changed circumstances was called out in the commentary to the *Restatement (Third) of Unfair Competition* and explicitly included in Section 2(a) of the UTSA.¹⁸⁶ In only six cases in the dataset did the court explicitly reference the right of the misappropriator to petition for termination or modification of the permanent injunction upon a showing

182. In *Silicon Knights, Inc. v. Epic Games, Inc.*, for example, the only dispute between the parties was "the scope of the injunction"—i.e., which technology would be included—and not the appropriateness or length of permanent injunctive relief. See Defendant Epic Games, Inc.'s Memorandum of L. in Support of Its Motion for a Permanent Injunction at 6–7, *Silicon Knights, Inc. v. Epic Games, Inc.*, No. 5-07-cv-00275 (E.D.N.C. July 2, 2012).

183. See, e.g., Opinion and Order at 29–31, *Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Grp., Inc.*, No. 15 Civ. 211 (S.D.N.Y. Apr. 20, 2021) (objections raised included lack of specificity in defining trade secrets and in listing prohibited activities and extraterritorial reach of injunction but did not address lack of a defined life span for the permanent injunction).

184. See, e.g., Order at 16, *Advanced Control Tech., Inc. v. Iverson*, No. 19-cv-1608 (D. Minn. Apr. 8, 2021). The order copied the language proffered by plaintiff in its motion for summary judgment. See Plaintiff Advanced Control Tech., Inc.'s Memorandum of L. in Support of Its Motion for Summary Judgment Against Defendants Steven Iversen and Elite IBS, LLC at 38, *Advanced Control Tech.*, No. 19-cv-1608 (D. Minn. Jan. 12, 2021). Defendants did not respond to that motion.

185. Walmart's Response Memorandum in Opposition to Cuker's Request for a Permanent Injunction at 5, *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, No. 14-cv-5262 (W.D. Ark. May 17, 2017) (arguing defendant had at most a six month head start and plaintiff had "already been compensated for that"); Opinion and Order at 7–8, *Wal-Mart Stores, Inc.*, No. 14-cv-5262, 2017 WL 3206942, at *3 (W.D. Ark. July 28, 2017) (issuing "permanent" injunction but noting defendant could petition for termination of injunction upon a showing that trade secret had ceased to exist); Defendants' Further Points and Auths. RE: Injunctive Relief at 3, *ATS Prods., Inc. v. Ghiorso*, No. CV 10-4880 (N.D. Cal. Jan. 6, 2012) (arguing that the trade secret could have been "developed in seven months," the alleged misappropriation had occurred four years ago, and that a permanent injunction eliminating a head start was thus unwarranted); Findings of Fact, Conclusions of L. & Permanent Injunction at 20–22, *ATS Prods., Inc.*, No. C10-4880 (N.D. Cal. Jan. 26, 2012) ("permanently" enjoining defendant, but noting that defendant could petition for a termination of the injunction upon a showing the trade secret had ceased to exist).

186. See *supra* notes 114–23 and accompanying text (discussing *Restatement (Third) of Unfair Competition*); UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a). The DTA has no parallel provision, although one treatise asserted that "there is no indication in the legislative history that this was intended to produce results different from that which would obtain under the UTSA." JAMES POOLEY, TRADE SECRETS § 7.03 n.11 (2022).

of changed circumstances.¹⁸⁷ In one case, decided by a federal trial court in California, the court noted that under the California UTSA, “[d]efendants may be relieved from any portion of” the permanent injunction if they could prove that the relevant information “ha[d] ceased to exist as trade secrets.”¹⁸⁸ Similarly, in another case, a federal trial court in California “permanently restrained and enjoined” defendants from “further misappropriation,” but also provided: “Any party may seek modification of this [o]rder, at any time, by written motion and for good cause based on changed circumstances or otherwise.”¹⁸⁹ A third federal trial court likewise issued an order that “permanently enjoined” the defendants,¹⁹⁰ yet also acknowledged in its memorandum that both common law and the California UTSA limit an injunction against “actual or threatened misappropriation of a trade secret until the trade secret ceases to exist.”¹⁹¹ In another case, the trial court merely stated that its order would “remain in effect indefinitely until further order of the [c]ourt,” although there was no mention of what would trigger such additional review by the court.¹⁹²

Only very rarely did the parties highlight in their pleadings the court’s ability to modify or terminate the injunction in the future. In *Eldorado Stone, LLC v. Renaissance Stone, Inc.*, for example, plaintiffs requested a permanent injunction from the court without specifying the length of that relief.¹⁹³ Defendants challenged this omission in their response, stating: “Plaintiffs do not limit the injunction to any period of time. As drafted, the injunction would be in effect for perpetuity. The evidence does not support such a draconian order.”¹⁹⁴ Defendants argued that plaintiffs’ products were not “one of a kind” and that competing products “could be reproduced, and it [would] not take

187. See Opinion and Order, *supra* note 185, at 7–8; Findings of Fact, Conclusions of L. & Permanent Injunction, *supra* note 185, at 22; Permanent Injunction at 1–2, *PQ Labs, Inc. v. Qi, LP v. Teeters*, No. 19-cv-02774 (D. Md. Mar. 29, 2021); Permanent Injunction at 1, *De Lage Landen Operational Servs., LLC v. Third Pillar Sys., Inc.*, No. 09-2439 (E.D. Pa. Mar. 5, 2010); *Hair Club for Men, LLC v. Ehson*, No. 16-cv-236, 2016 WL 6780310, at *1–2 (E.D. Va. Nov. 14, 2016).

188. Findings of Fact, Conclusions of L. & Permanent Injunction, *supra* note 185, at 22.

189. See Permanent Injunction, *PQ Labs, Inc.*, *supra* note 187, at 1–2 (“permanently” enjoining the defendant but noting either party could “seek modification based on . . . changed circumstances”).

190. Permanent Injunction, *De Lage Landen Operational Servs.*, *supra* note 187, at 1.

191. Memorandum Including Findings of Fact & Conclusions of L. at 14, *De Lage Landen Operational Servs.*, No. 09-2439 (E.D. Pa. Mar. 5, 2010) (citing CAL. CIV. CODE § 3426.2(a); *Nalley’s Inc. v. Corona Processed Foods, Inc.*, 240 Cal. App. 2d 948, 952 (Cal. Ct. App. 1966)).

192. Permanent Injunction Order, *Brightview Grp.*, *supra* note 187, at 2. The accompanying Memorandum Opinion did not shed light on the court’s reasoning regarding injunction life. See generally Memorandum Opinion, *Brightview Grp.*, No. 19-cv-02774 (D. Md. Feb. 28, 2020).

193. Memorandum of Points & Auths. in Support of Plaintiffs Eldorado Stone, LLC & Eldorado Stone Operations, LLC’s Application for Permanent Injunction Following Trial at 8, *Eldorado Stone, LLC v. Renaissance Stone, Inc.*, No. 04-cv-2562, 2007 WL 1144714 (S.D. Cal. Apr. 16, 2007) (stating plaintiff “seeks an [o]rder permanently enjoining” defendants from, inter alia, “further misappropriating” plaintiffs’ trade secrets). The jury had found that the defendants’ misappropriation was “willful and malicious.” *Id.* at 4.

194. Defendants’ Amended Opposition to Plaintiffs’ Application for Permanent Injunction at 1, *Eldorado Stone, LLC*, No. 04-cv-2562 (S.D. Cal. Apr. 24, 2007).

an eternity to do so.”¹⁹⁵ Plaintiffs countered that “[t]he very essence of a permanent injunction is, indeed, that it is permanent.”¹⁹⁶ Plaintiffs found it “telling” that defendants offered “no alternative timeframe” and noted that the other side was “free to move the [c]ourt to modify or lift the injunction if a change in facts, circumstances or law ever renders such action appropriate.”¹⁹⁷ In the end, the court did not limit injunction life in its order, instead merely ordering that defendants were “hereby enjoined” from using plaintiffs’ trade secrets in manufactured stone products, and without referencing the right of the defendants to petition for modification or termination of the injunction in the future.¹⁹⁸

By contrast, the court in *Hair Club for Men, LLC v. Ehson* did acknowledge the right of an enjoined party to petition for termination of a permanent injunction, but it did so only after conflating “permanent” injunctions with “perpetual” ones.¹⁹⁹ Plaintiff requested an injunction barring defendants from using its trade secret information “in perpetuity” but defendants argued that the Virginia UTSA provided that “an injunction [should] be terminated when the trade secret” no longer exists.²⁰⁰ Plaintiff asserted that its trade secrets would “always” remain secret and would “always derive independent economic value from” not being generally known to the public.²⁰¹ The court found that defendants had provided no evidence countering those assertions and that in any event, under the statute, defendants could always petition the court for modification or dissolution of the injunction should circumstances change.²⁰² The court specifically noted that defendants objected to the use of the words “in perpetuity” in the injunction, but dismissed this concern: “The requested injunction is permanent. The phrase ‘in perpetuity’ is redundant.”²⁰³ Ultimately, the parties agreed to the removal of this term during a hearing before the court,²⁰⁴ and the final order merely issued a “permanent injunction” against defendants.²⁰⁵

195. *Id.* at 1–2.

196. Reply Memorandum of Points and Auths. in Support of Plaintiffs Eldorado Stone, LLC & Eldorado Stone Operations, LLC’s Application for Permanent Injunction Following Trial, *supra* note 8, at 2 n.1.

197. *Id.*

198. Order Re: Permanent Injunction Following Trial at 2, *Eldorado Stone, LLC*, No. 04-cv-2562 (S.D. Cal. Apr. 27, 2007).

199. *Hair Club for Men, LLC v. Ehson*, No. 16-cv-236, 2016 WL 6780310, at *5–6 (E.D. Va. Nov. 14, 2016).

200. *Id.* at *5 (quoting VA. CODE ANN. § 59.1-337(A) (West 2016)).

201. *Id.* at *5; *see also* *Hair Club’s* Reply in Support of Its Motion for Injunction at 8–9, *Hair Club for Men, LLC*, No. 16-cv-236 (E.D. Va. Nov. 3, 2016) (arguing a perpetual injunction is warranted “when the potential exists for repetitive injury and future harm”).

202. *Hair Club for Men, LLC*, 2016 WL 6780310, at *5 (citing VA. CODE ANN. § 59.1-337 (West 2016)) (providing injunction may terminate “[u]pon application to the court”).

203. *Id.*

204. *Id.*

205. *Id.*

The *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC* court was seemingly troubled by the concept of termination or modification of a permanent injunction, although it ultimately recognized that right.²⁰⁶ Wal-Mart Stores, Inc. had sued Cuker Interactive, LLC for breach of contract; Cuker counter-claimed for, inter alia, “misappropriation of trade secrets.”²⁰⁷ In evaluating Cuker’s request for a permanent injunction after a jury finding of misappropriation,²⁰⁸ the court stated that it found no evidence to suggest “that Walmart would have *ever* independently developed Cuker’s trade secrets” (as opposed to Wal-Mart being able “to independently develop *some* set of solutions to the problems” Cuker’s trade secrets addressed).²⁰⁹ Wal-Mart challenged the possibility of an unlimited-life injunction, arguing that the Arkansas UTSA did not permit “permanent injunctions, but rather, prohibits any injunction from extending beyond the life of the trade secret in question.”²¹⁰

The court acknowledged the statutory language of the UTSA regarding the termination of an injunction upon cessation of the trade secret but questioned its operation. The court was uncertain what the legal standard for such a petition would be: “[W]hich party would bear the burden of proof or persuasion, what the burden would be, etc.”²¹¹ But, the court concluded, this uncertainty as to future termination did not prevent the court from issuing the permanent injunction: “Though the injunction may be styled as ‘permanent,’ that characterization will not operate to prevent Walmart from petitioning the [c]ourt for relief at a later time under” the statutory provision for termination of an injunction.²¹²

3. “Perpetual” Injunctions Are Rare

In no case in the dataset did a court employ the term “perpetual” in articulating the life of its permanent injunction. However, in two cases the courts did issue “permanent” injunctive relief that appeared to have been intended to last in perpetuity.

In what is undeniably the most thoroughly reasoned discussion of injunction life in the dataset, *ShowCoat Solutions, LLC v. Butler*, plaintiff, which “develop[ed]

206. See Opinion & Order, *supra* note 185, at 7–8.

207. *Id.* at 1.

208. Verdict Forms at *9, *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, No. 14-cv-5262, 2017 WL 2381905 (W.D. Ark. Apr. 21, 2017).

209. Opinion & Order, *supra* note 185, at 6–7.

210. *Id.* at 7. Wal-Mart was relying upon Ark. Code Ann. § 4-75-604(b), which provides: “Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist; however, the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.” *Id.* at 7–8; ARK. CODE ANN. § 4-75-604(b) (West 2024).

211. Opinion & Order, *supra* note 185, at 7–8.

212. *Id.* at 8. The final judgment provided that “Walmart is hereby prohibited from utilizing” the trade secrets of Cuker. *Wal-Mart Stores, Inc.*, No. 14-cv-5262, 2017 U.S. Dist. LEXIS 119147, at *16 (W.D. Ark. July 28, 2017). The word “permanent” appears only in the mandatory part of the injunction, which required Walmart to “permanently delete” specified “code, files and programmatic references” from certain locations. *Id.*

and distribute[d] cattle haircare products,” “terminated [their] distribution relationship with” the individual defendants after it suspected defendants “were distributing counterfeit products.”²¹³ The individual defendants then formed their own competing company and plaintiff sued both the individuals and the new company for, inter alia, trade secret misappropriation of its shampoo formula under the Alabama UTSA.²¹⁴

Plaintiff argued that “[d]efendants should be prevented from ever again participating . . . in the livestock haircare industry” because defendants’ misappropriation would “forever taint” defendants’ competing products.²¹⁵ The court found this request too broad and noted that while the Alabama UTSA gave courts broad discretion in fashioning injunctive relief, the life of the injunction should be restricted to “the period of time that would be required for independent development” by the defendants.²¹⁶ The court then went on to issue a four-part injunction, one part of which was a limited-life injunction.²¹⁷ Specifically, two of the individual defendants were barred from working in the livestock haircare industry for three years—a period the court found “sufficient, but not greater than necessary, to remove the unlawful benefit that the defendants gained” through misappropriating plaintiff’s product formula.²¹⁸ Because the court found that these defendants, “left to their own devices,” reasonably could develop a similar “formula within three years,” it would be “inequitable” to issue an injunction for a longer period.²¹⁹ The fact that the court issued one defined-life injunction in the case indicated the court knew how to restrict the life of a permanent injunction when it felt it was appropriate to do so.

The *ShowCoat Solutions* court then went on to issue three additional injunction provisions, which were, in effect, perpetual injunctions. First, the court decreed that the same two defendants and the company they formed were “permanently prohibited from using or otherwise referring to the stolen formula”²²⁰ as the stolen formula would otherwise “have remained a secret indefinitely.”²²¹ The court thus framed this injunction provision as an inevitable consequence of its finding that plaintiff’s trade secret was incapable of independent development by others.²²²

²¹³. *ShowCoat Sols., LLC v. Butler*, No. 18-cv-789, 2020 WL 1467215, at *1–2 (M.D. Ala. Mar. 19, 2020).

²¹⁴. *Id.*

²¹⁵. *Id.* at *4. Plaintiff’s proposed order for permanent injunctive relief can be found at Exhibit A of Plaintiff’s Motion for Permanent Injunction. Plaintiff’s Motion for Permanent Injunction at Ex. A, *ShowCoat Sols., LLC*, No. 18-cv-789 (M.D. Ala. Feb. 17, 2020).

²¹⁶. *ShowCoat Sols., LLC*, 2020 WL 1467215, at *4 (quoting 4 MILGRIM & BENSON, *supra* note 56, § 15.02(1)(d)).

²¹⁷. *Id.* at *4–5.

²¹⁸. *Id.* at *5.

²¹⁹. *Id.*

²²⁰. *Id.*

²²¹. *Id.*

²²². *Id.* at *4–5.

Second, the company that the defendants formed was likewise “permanently enjoin[ed] . . . from being sold or transferred” or from distributing livestock haircare products or from working in the industry in any capacity.²²³ The court noted that the company was likely to be bankrupted by the large damages assessed against it but that “[a] permanent injunction against the company would prevent the inequitable result of allowing the company to retain any lingering goodwill or brand strength” it obtained through misappropriation of plaintiff’s trade secrets.²²⁴ Any future efforts by the individual defendants in the livestock haircare industry would have to compete on their own merits and not rely upon “a company that was built on the misappropriation of [another’s] trade secrets.”²²⁵ Finally, the court noted that the remaining individual defendant was “permanently” barred from using any interest he had in the defendant company to participate in the livestock haircare industry.²²⁶ The *ShowCoat Solutions* court’s intent in issuing perpetual injunctions seemingly was not to punish the defendants. Rather, the court was acknowledging its findings that independent development of certain trade secrets was not possible such that only a perpetual injunction would adequately protect the trade secret owner’s rights.

In the second case, *Compass iTech, LLC v. eVestment Alliance, LLC*, the trial court issued a permanent injunction that “hereby and forever enjoined [Compass iTech] from accessing eVestment’s” protected database.²²⁷ The court noted that the eVestment had electronically compiled a database of detailed information on over two thousand investment managers, at a cost of over ten million dollars over a fifteen-year period; eVestment also spent “millions of dollars each year to maintain and update” the database.²²⁸ Compass iTech had failed to show that it had any capacity “to compile [the] vast amount of data” contained in the database on its own.²²⁹

The “forever” portion of the injunction distinguishes it from other cases in which the defendant was merely “hereby” enjoined²³⁰ or “permanently”

223. *Id.* at *5.

224. *Id.*

225. *Id.*

226. *Id.* In addition, this defendant was barred from working with the other individual defendants while the three-year injunction was in effect against them. *Id.*

227. Order Granting eVestment’s Motion for Injunction at 7, *Compass iTech, LLC v. eVestment All., LLC*, No. 14-cv-81241, 2017 WL 5153210, at *5 (S.D. Fla. Aug. 11, 2017). Compass iTech, LLC was the plaintiff/counterdefendant in the action; eVestment Alliance was the defendant/counterplaintiff. *Id.* at 1. Summary judgment had earlier been entered dismissing Compass’s claims against eVestment. *See generally* Order Granting in Part Motion for Partial Summary Judgment, *Compass iTech, LLC*, No. 14-cv-81241 (S.D. Fla. June 23, 2016).

228. Order Granting eVestment’s Motion for Injunction, *supra* note 227, at 6.

229. *Id.* at 7. This case was decided under Florida’s UTSA. *Id.* at 5–7.

230. *See* Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, No. 14-cv-5262, 2017 U.S. Dist. LEXIS 119147, at *16 (W.D. Ark. July 28, 2017) (“hereby enjoined”); Final Judgment & Permanent Injunction at 1–2, Masimo Corp. v. True Wearables, Inc., No. 18-cv-02001 (C.D. Cal. Dec. 22, 2022) (“hereby enjoined”); Final Judgment & Injunction as to Cory Weiland Following Bench Trial at 14, FX Grp., LLC v. Vision Mgmt. & Ent., LLC, No. 20-cv-468 (M.D. Fla. Sept. 21, 2021) (“hereby enjoined”).

enjoined²³¹ as it indicates the injunction will not terminate. The “hereby and forever” language appeared in the proposed findings of fact and conclusions of law filed by eVestment.²³² Compass iTech’s response in opposition argued that eVestment’s request was “overly broad” and would deny Compass iTech the ability to engage in even lawful database services for firms, but it did not directly address the issue of length of injunction in this response.²³³

4. Over Twenty Percent of the Cases in the Dataset Had Permanent Injunctions with Defined Lives; Those Lives Averaged Less Than Two and One-Half Years

Rowe noted in her 2020 study that “[o]ne striking observation was that the length of the injunction was almost never provided.”²³⁴ In this study’s dataset, by contrast, the length of the injunction was provided in over twenty percent of the cases (eleven out of fifty-three cases). But that still means that almost eighty percent of the cases contained *no* provision regarding the limited life of the permanent injunction.

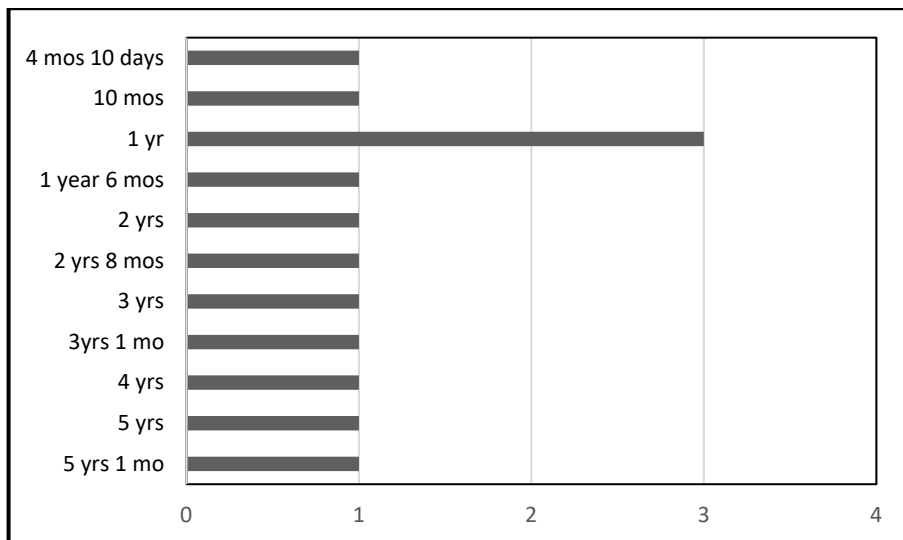
The terms of the defined-life injunctions were surprisingly short: The median life of a permanent injunction was two years, and the mean life was two years and four months. In sum, it appears that courts issuing permanent injunctions with defined lives structure this relief with restraint.

231. See, e.g., Order Granting Application for Injunctive Relief in Aid of Judgment Against Yovan Garcia at 2, *Tyan, Inc. v. Garcia*, No. cv 15-5443 (C.D. Cal. Sept. 20, 2017) (“permanently enjoins”); Permanent Injunction & Order at 2, *Advanced Cable Ties, Inc. v. Bay State Cable Ties, LLC*, No. 06-40204 (D. Mass. July 28, 2009) (“permanently enjoined”).

232. eVestment’s Proposed Findings of Fact & Conclusions of Law at 7, *Compass iTech, LLC*, No. 14-cv-81241 (S.D. Fla. Apr. 21, 2017) (proposing the following language: “Accordingly, the Court Orders and Adjudges that Compass and all of its managers, members, officers, directors and agents (the ‘Enjoined Parties’) are hereby and forever enjoined from accessing eVestment’s website and database in any fashion whatsoever, directly or indirectly.”).

233. Compass’ Response in Opposition to eVestment’s Request for Entry of Injunctive Relief at 2, *Compass iTech, LLC*, No. 14-cv-81241 (S.D. Fla. May 31, 2017).

234. Rowe, 2020, *supra* note 34, at 585–86.

Figure 3: Length of Injunctions with a Defined Life²³⁵

It can be hard to tease out why the courts selected a particular life for an injunction. In some instances, the injunction life appeared to be influenced by employment contract provisions. For example, in one case, it appeared that the two-year life for the injunction barring further misappropriation of trade secrets was tied to a two-year noncompete clause.²³⁶ Similarly, the very short (four months, ten days) life of another permanent injunction had been suggested by the plaintiff and was apparently linked to an employment contract.²³⁷

^{235.} The total number of injunctions (thirteen) exceeds the total number of cases identified in Appendix B as having defined lives; this is because one case had four injunction provisions, each with a different life. *See infra* Appendix B; Order Granting Brocade’s Motion for Permanent Injunction re Trade Secrets & Denying Brocade’s Motion to Strike at 27, *Brocade Commc’ns Sys., Inc. v. A10 Networks, Inc.*, No. 10-cv-03428 (N.D. Cal. Jan. 23, 2013) (injunction terms of (1) two years and eight months; (2) three years and one month; (3) five years and one month; and (4) five years).

^{236.} *See* Order at 1–2, *T.H. Glennon Co. v. Monday*, No. 18-30120 (D. Mass. Nov. 18, 2019) (issuing injunction to last “two years from the date of this order”). Although the court offered no explanation for the two-year term, plaintiff’s proposed rulings of law emphasized a two-year noncompete clause although its request for injunctive relief did not reference any lifespan. *See* Proposed Rulings of L. Under Rule 52 at 2, 8–9, *T.H. Glennon Co.*, No. 18-30120 (D. Mass. Oct. 23, 2019).

^{237.} *See* Permanent Injunction at 1–2, *Drummond Am. LLC v. Share Corp.*, No. 08-cv-1665 (D. Conn. Apr. 12, 2010); *see also* Plaintiff’s Memorandum in Support of Motion for Entry of Permanent Injunction at Ex. A at 1–2, *Drummond Am. LLC v. Share Corp.*, No. 08-cv-1665 (D. Conn. Feb. 25, 2010) (arguing the injunction should be tied to the remaining life of the employment contract).

Another complicated case arose out of bankruptcy proceedings. Defendants were found liable for trade secret misappropriation and assessed damages. Final Judgment at 2, *Thomas v. Hughes*, No. 16-cv-951 (W.D. Tex. Mar. 4, 2020). The court also issued a “permanent injunction” prohibiting defendants “from manufacturing or selling any products utilizing, incorporating, or

In other instances, the courts explicitly referenced the life of the trade secret when explaining the life of the injunction (although they generally provided little explanation of how the life of the trade secret was calculated). Plaintiff in *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, for example, had argued for no limitation on the length of the permanent injunction; the court rejected that request and instead imposed a four-year life, explaining “that any value of the confidential information . . . would be limited value [sic] by the end of the four-year period.”²³⁸ Similarly, the court in *Strikepoint Trading, LLC v. Sabolyk* rejected plaintiff’s proposed language for the permanent injunction, which would not have specified a lifespan.²³⁹ The court found “that equitable considerations warrant[ed] an expiration date for the . . . permanent injunction” as with the “passage of time, the information forming the subject matter of this lawsuit . . . will have grown stale.”²⁴⁰ The court thus “provid[ed] for the expiration of the permanent injunction after one year of its entry date.”²⁴¹

In *SKF USA Inc. v. Zarwasch-Weiss*, the court rejected plaintiff’s request for a two-year permanent injunction against defendants doing business with any of the customers on plaintiff’s list (which had been found to be a misappropriated trade secret).²⁴² The court explained: “Equity demands that defendants return information that they misappropriated. Equity does not demand that [a plaintiff] gain by injunction the non-compete clause it was unable to gain by persuasion.”²⁴³ But, the court found, neither was a one-year injunction sufficient, as “defendants were able to jump-start their business” by using misappropriated customer information.²⁴⁴ This, coupled with defendants’ bad behavior (in the form of spoliation of evidence and continued possession and use of confidential information during the pendency of the case), led the court to impose an eighteen-month permanent injunction instead.²⁴⁵ This compromise timespan, the court found, was sufficient to “eliminate the advantages defendants gained

derived from the” trade secret formulas at issue. *Id.* The injunction was to remain in effect only as long as the damages (and interest thereon) and “attorney’s fees awarded by the [c]ourt” were unpaid. *Id.*

238. Opinion & Order at 2, *Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, 14-cv-748, 2016 WL 6477011, at *1 (W.D. Wisc. Nov. 2, 2016). Plaintiff had requested that defendants be “permanently enjoined,” with a four-year period of oversight by an ombudsman or monitor. See Proposed Permanent Injunction at 2–3, *Epic Sys. Corp.*, 14-cv-748 (W.D. Wisc. Apr. 18, 2016).

239. Proposed Order Granting Plaintiff’s Motion for Permanent Injunction at 2, *Strikepoint Trading, LLC v. Sabolyk*, No. SA-cv-07-1073 (C.D. Cal. July 1, 2009) (proposing that defendants be “hereby enjoined”); Order Granting in Part & Denying in Part Motion for Permanent Injunction at 13–15, *Strikepoint Trading, LLC*, No. SA-cv-07-1073 (C.D. Cal. Aug. 18, 2009).

240. Order Granting in Part & Denying in Part Motion for Permanent Injunction, *supra* note 239, at 13.

241. *Id.*

242. Memorandum of Opinion at 63, 66, *SKF USA Inc. v. Zarwasch-Weiss*, No. 10-cv-1548 (N.D. Ohio Feb. 3, 2011).

243. *Id.* at 66.

244. *Id.* at 66–67.

245. *Id.* at 67.

from their improper acts without unnecessarily burdening [their] ability to do business.”²⁴⁶

In other cases, it can be harder to identify how the influencing factors impacted injunction life. In *Alturamats, Inc. v. Harry*, for example, the court acknowledged that the customer lists at issue were trade secrets and not easily replicated, yet denied the trade secret owner’s request for a multi-year injunction, stating: “[W]e find, based upon a consideration of all relevant equitable factors, that an injunction of a shorter period will provide adequate protection.”²⁴⁷ However, the court provided no explanation of what those “relevant equitable factors” were that led to a permanent injunction with a one-year life.²⁴⁸

By contrast, the court in *Brocade Communications Systems, Inc. v. A10 Networks, Inc.* relied on expert testimony in drawing unusually fine lines with regard to the life of the various provisions of the permanent injunction.²⁴⁹ Defendants had objected to plaintiffs’ proposed “injunction of unlimited duration,” which they argued violated the California UTSA and Ninth Circuit law, both of which would limit a permanent injunction’s life to the time it would have taken to legitimately develop the trade secrets.²⁵⁰ The court likewise rejected plaintiffs’ proposed injunction as it would have prevented defendants “from ever using the [misappropriated] trade secrets, even if [defendants] could reverse engineer the trade secrets or independently derive them in a clean room environment.”²⁵¹ This, of course, is tantamount to a perpetual injunction and, the court found, would give plaintiffs “a level of protection for its trade secrets beyond that which the law permits.”²⁵² Ultimately, the court settled on a four-part injunction in which each period corresponded to the times that an expert testified it had taken plaintiffs to develop the relative trade secret²⁵³: (1) two years and eight months for certain trade secrets; (2) three years and one month for another

246. *Id.*

247. Memorandum Opinion at 23, *Alturamats, Inc. v. Harry*, No. 07-337 (W.D. Pa. Sept. 16, 2008).

248. *Id.* at 23–24.

249. Order Granting Brocade’s Motion for Permanent Injunction re Trade Secrets & Denying Brocade’s Motion to Strike, *supra* note 235, at 19–21.

250. Defendant A10 Networks, Inc.’s Opposition to Plaintiffs’ Motion for Entry of Permanent Injunction at 21, *Brocade Commc’ns Sys. v. A10 Networks, Inc.*, No. C 10-cv-03428 (N.D. Cal. Oct. 12, 2012) (citing CAL. CIV. CODE § 3426.2(a) (2012); *Winston Rsch. Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 142 (9th Cir. 1965); *K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471, 474 (9th Cir. 1974)).

251. Order Granting Brocade’s Motion for Permanent Injunction re Trade Secrets & Denying Brocade’s Motion to Strike, *supra* note 235, at 25.

252. *Id.*

253. *Id.* at 20. The parties later reached a stipulated judgment in which they agreed, *inter alia*, that the permanent injunctions entered in the case would be dissolved when the terms of the agreement reached by the parties had been satisfied. Revised Stipulated Final Judgment at 2, *Brocade Commc’ns Sys.*, No. 10-cv-03428 (N.D. Cal. June 10, 2013). The judgment was satisfied, and the injunctions lifted four months later. Revised Order re Satisfaction of Judgment at 2, *Brocade Commc’ns Sys.*, No. 10-cv-03428 (N.D. Cal. Oct. 9, 2013).

set of trade secrets; (3) five years and one month for another set; and (4) five years for a final set.²⁵⁴

5. The Alterations to the UTSA's Language Made by Six States Had No Apparent Impact on the Courts' Formulation of Permanent Injunction Relief

As noted above in Table 1, six states—Alabama, Colorado, Georgia, Illinois, Tennessee, and South Carolina—altered the UTSA's language regarding permanent injunction relief when adopting the uniform statute.²⁵⁵ Two—Alabama and Colorado—eliminated language found in Section 2(a) providing for termination of the injunction upon cessation of the trade secret;²⁵⁶ four added language intended to broaden the grounds on which trade secret owners could acquire injunctive relief.²⁵⁷

One might hypothesize that these broadenings of the bases for the grant of permanent injunctions in these states would result in more or longer permanent injunction relief in those states. In fact, however, these statutory modifications had no discernable impact on the structuring of permanent injunctions in the study's cases. Three of the states—Georgia, Illinois, and South Carolina—had no cases in the dataset. The two cases from Colorado and the two from Tennessee all resulted in permanent injunctions with no specified life.²⁵⁸ In none of these cases did the court cite the specific language of the state UTSA in issuing its order, and in no instance did that language appear to influence the outcome.

The single case arising under the Alabama UTSA was the decision of the district court in *ShowCoat Solutions, LLC v. Butler*.²⁵⁹ As discussed above, that case resulted in a multi-pronged injunction, one provision of which was a defined-life injunction and three provisions of which were perpetual injunctions.²⁶⁰ It does not appear that the alteration to the UTSA made by the Alabama state legislature had any influence on this particular outcome, however.

254. Order Granting Brocade's Motion for Permanent Injunction re Trade Secrets & Denying Brocade's Motion to Strike, *supra* note 235, at 27 (the document is redacted so as to obscure the actual trade secrets at issue).

255. See *supra* Section II.C.

256. ALA. CODE § 8-27-4 (2023); COLO. REV. STAT. § 7-74-103 (2021).

257. GA. CODE ANN. § 10-1-762(a) (2023); 765 ILL. COMP. STAT. 1065/3(a) (2023); TENN. CODE ANN. § 47-25-1703 (2023); S.C. CODE ANN. § 39-8-50 (2023).

258. See Findings of Fact & Conclusions of L. at 55, *Atlas Biologicals, Inc. v. Kutrubes*, No. 15-cv-00355 (D. Colo. Sept. 23, 2019) (ordering that preliminary injunction barring use and further disclosure of trade secrets be made "permanent"); Findings of Fact, Conclusions of L. & Order at 62, *Electrology Lab'y, Inc. v. Kunze*, No. 11-cv-01907 (D. Colo. Mar. 14, 2016) ("permanently" enjoining defendant); Order Granting Plaintiff's Motion for Permanent Injunction at 1, *ASC Engineered Sols., LLC v. Island Indus., Inc.*, No. 20-cv-02284 (W.D. Tenn. Sept. 7, 2021) (issuing "permanent injunction"); Judgment & Permanent Injunction at 1, *Ecimos, LLC v. Carrier Corp.*, No. 15-cv-2726 (W.D. Tenn. Nov. 26, 2018) ("permanently enjoined").

259. See generally *ShowCoat Sols., LLC v. Butler*, No. 18-cv-789, 2020 WL 1467215 (M.D. Ala. Mar. 19, 2020).

260. See *supra* notes 213–26 and accompanying text (discussing *ShowCoat Solutions*).

6. The Modern “Head Start” / “Lead Time” Approach Did Not Play a Prominent Role in Outcomes

As discussed earlier, three approaches to permanent injunction life for trade secret misappropriation emerged under the common law and are commonly identified and discussed by competitors as alternatives to each other.²⁶¹ The cases for which these three doctrinal approaches were named were virtually ignored by the parties and courts in the dataset cases.

Neither the *Shellmar* Rule nor the *Conmar* Rule was cited by any court in the dataset.²⁶² For example, a 2014 decision by the Texas state appellate court indicates that a perpetual injunction (à la *Shellmar*) is the default approach in Texas absent a showing by the misappropriator that a shorter term is adequate,²⁶³ yet none of the five cases in the dataset decided under Texas law explicitly applied this rule. Four of the cases resulted in permanent injunctions of undefined life;²⁶⁴ the fifth case resulted in a permanent injunction with a measured life.²⁶⁵

It is not surprising that citations to *Shellmar* and *Conmar* did not show up in cases in the dataset; these are, after all, older rules that contravene the more modern “head start” / “lead time” approach adopted in the *Restatement (Third) of Unfair Competition*²⁶⁶ and the UTSA.²⁶⁷ However, *Winston Research*, which is commonly accepted as the progenitor of the modern approach, was cited in only a single case, *Brocade Communications Systems, Inc. v. A10 Networks, Inc.*, and even then, only in the pleadings.²⁶⁸ Defendants challenged plaintiffs’ request for an injunction of “unlimited duration,” noting that the California UTSA, as well as Ninth Circuit precedent (which included *Winston Research*),

261. See *supra* Section II.A (discussing the *Shellmar*, *Conmar*, and *Winston Research* approaches).

262. A search of the full dataset of 161 cases revealed no citations to *Shellmar* and only a single citation to *Conmar*—but that citation appeared only in a pleading by the defendant and only for the proposition that an innocent acquirer of a trade secret was not liable for misappropriation. See Defendant’s Proposed Jury Voir Dire, Instructions & Verdict Form at 8, *Advanced Cable Ties, Inc. v. Bay State Cable Ties, LLC*, No. 06-40204 (D. Mass. Apr. 9, 2009) (citing *Conmar Prods. Corp. v. Universal Slide Fastener Co.*, 172 F.2d 150, 156–57 (2d Cir. 1949)).

263. See *Halliburton Energy Servs., Inc. v. Axis Techs., LLC*, 444 S.W.3d 251, 257 (Tex. App. 2014) (finding “no such trend” in the case law “away from perpetual injunctions in favor of more [restricted] ‘lead time’ injunctions” and noting that perpetual injunctions are the default absent proof an injunction with a shorter life will suffice to protect plaintiff’s interests).

264. See Final Judgment & Permanent Injunction at 2, *Aspen Tech., Inc. v. Kunt*, No. H-10-1127 (S.D. Tex. June 6, 2012) (“permanently enjoined”); Final Judgment at 1, *Weeco Int’l, Inc. v. Superior Degassing Servs., Inc.*, No. H-09-4003 (S.D. Tex. Dec. 27, 2011) (“permanently enjoined”); Final Judgment at 4, *M-I LLC v. Argus Green LLC*, No. 10-cv-03364 (S.D. Tex. Dec. 14, 2011) (“permanently enjoins”); Permanent Injunction at 12, *Myriad Dev., Inc. v. Alltech, Inc.*, No. 08-cv-0253 (W.D. Tex. Mar. 28, 2011) (“permanently restrained and enjoined”).

265. Final Judgment, *supra* note 237, at 2 (permanent injunction to last until damages and attorney fee awards were satisfied).

266. See *supra* Section II.B.

267. See *supra* Section II.C.

268. Defendant A10 Networks, Inc.’s Opposition to Plaintiffs’ Motion for Entry of Permanent Injunction, *supra* note 250, at 21 (citing *Winston Rsch. Corp. v. Minn. Mining & Mfg. Co.*, 350 F.2d 134, 142 (9th Cir. 1965)).

would “limit[] the length of [permanent] injunctions for trade secret” misappropriation to the period that “competitors would require after public disclosure to develop a competitive machine.”²⁶⁹ The court agreed that while an injunction could exceed the life of the trade secret in order to alleviate any kind of unfair head start acquired by the misappropriator, it must still be time-restricted, but the court did not cite to *Winston Research* in reaching its decision.²⁷⁰

The concept of injunction life being constrained by the modern “head start” / “lead time” approach did arise without a reference to *Winston Research*, although still not often.²⁷¹ The parties were typically the ones to raise the approach. From the perspective of the trade secret owner, the “head start” / “lead time” rule is advantageous because it can extend the life of the permanent injunction beyond the life of the trade secret itself on the basis that a longer injunction is needed to eliminate any inappropriate advantage gained by misappropriators as a result of the wrongdoing.²⁷²

For example, plaintiffs in *Comet Technologies USA Inc. v. XP Power LLC* argued that defendant’s misappropriation had given it an “unfair head start”²⁷³ that warranted a “permanent injunction” (presumably one without a limitation on life).²⁷⁴ Defendant countered that a permanent injunction was inappropriate because plaintiff had already received extensive monetary damages to compensate for any harm incurred.²⁷⁵ In response, plaintiffs cited, inter alia, *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.*,²⁷⁶ to support its argument that the damages awarded by the jury did “not account for

269. *Id.* (citing and quoting *Winston Rsch. Corp.*, 350 F.2d at 142) (citing CAL. CIV. CODE § 3426.2(a) (West 2012)).

270. Order Granting Brocade’s Motion for Permanent Injunction re Trade Secrets & Denying Brocade’s Motion to Strike, *supra* note 235, at 9 (citing DVD Copy Control Ass’n v. Bunner, 10 Cal. Rptr. 3d 185, 194–95 (Cal. Ct. App. 2004)).

271. *See, e.g.*, Opinion and Order, *supra* note 185, at 5–7 (addressing head start under Arkansas UTSA).

272. *See, e.g.*, Trizetto’s Opposition to Syntel’s Motion for Judgment as a Matter of L., a New Trial, or Remittitur and Motion for a Permanent Injunction and Pre- and Post-Judgment Interest at 58–59, *Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Grp., Inc.*, No. 15-cv-00211 (S.D.N.Y. Jan. 5, 2021) (arguing opposing party had “obtained an unquantifiable head start through its misappropriation” and that “[a]n injunction may be used to eliminate [that] unfair” advantage (quoting *Netlist Inc. v. Diablo Techs. Inc.*, No. 13-cv-05962, 2015 WL 153724, at *7 (N.D. Cal. Jan. 12, 2015) (internal quotation marks omitted))).

273. Plaintiffs’ Motion for Permanent Injunction Public - Redacted Version at 8, *Comet Techs. USA Inc. v. XP Power LLC*, No. 20-cv-6408 (N.D. Cal. Mar. 25, 2022).

274. *Id.* at 13 (requesting court issue “a permanent injunction”); Proposed Permanent Injunction Order at 1, *Comet Techs. USA Inc.*, No. 20-cv-6408 (N.D. Cal. Mar. 25, 2022) (proposing court order that would “permanently enjoin[]” defendant).

275. XP Power LLC’s Opposition to Plaintiffs’ Motion for Permanent Injunction at 6–7, *Comet Techs. USA Inc.*, No. 20-cv-06408 (N.D. Cal. Apr. 8, 2022) (arguing precedent revealed no case in which a plaintiff received both “significant money damages and a permanent injunction” (footnote omitted)).

276. Plaintiffs’ Reply in Support of Request for Permanent Injunction at 3, *Comet Techs. USA Inc.*, No. 20-cv-06408 (N.D. Cal. Apr. 15, 2022) (citing *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, No. 84-cv-6746, 1993 WL 286484, at *6 (N.D. Ill. July 29, 1993)). Plaintiffs also cited *Netlist Inc. v. Diablo Techs. Inc.*, No. 13-cv-05962, 2015 WL 153724, at *7 (N.D. Cal. Jan. 12, 2015). Plaintiffs’ Reply in Support of Request for Permanent Injunction, *Comet Techs. USA Inc.*, *supra*, at 3.

[defendant's] significant temporal head start from its theft, which is itself an irreparable harm that must be addressed by an injunction."²⁷⁷ In its sur-reply, defendant argued that *Rockwell* was not a "permanent" injunction case, but rather the court there entered "an injunction for two years" in order to counter any inappropriate head start.²⁷⁸ (Defendant thus appeared to be equating a "permanent" injunction with a "perpetual" injunction.)²⁷⁹ Ultimately, the court did not address the issue of a "head start" or even whether the injunction's life should be limited, instead issuing simply a "permanent injunction."²⁸⁰

By contrast, defendants raised the "head start" rule in *Allergan, Inc. v. Merz Pharmaceuticals, LLC*.²⁸¹ Defendants noted "that California law provides that 'an injunction *shall* be terminated when the trade secret has ceased to exist,' [unless] necessary 'to eliminate commercial advantage that otherwise would be derived from the misappropriation.'"²⁸² However, the plaintiff had moved for an indefinite injunction.²⁸³ The lack of evidence of any "head start" gained by defendants from their misappropriation, defendants argued, mitigated against such a broad and seemingly endless injunction.²⁸⁴ In addition, they argued California case law provides that a trade secret injunction "should 'only last as long as is necessary to preserve the rights of the parties' and 'as long as is necessary to eliminate the commercial advantage that a person would obtain through misappropriation.'"²⁸⁵ The final injunction issued by the court, however, had no time limit on the prohibition against defendants' "retaining, disclosing, or using" the trade secrets of the plaintiff.²⁸⁶

7. The DTSA Worked No Major Changes in Doctrine Regarding the Life of Permanent Injunctions

Eight cases in the final dataset were decided under both the state cause of action and the new federal cause of action, the DTSA. Seven of these involved

²⁷⁷. Plaintiffs' Reply in Support of Request for Permanent Injunction, *Comet Techs. USA Inc.*, *supra* note 276, at 3. Plaintiffs further argued that if a permanent injunction were not entered by the court, a minimum royalty term of ten years should be imposed to eliminate "the head start [defendant] obtained through its theft." *Id.* at 15.

²⁷⁸. XP Power LLC's Sur-reply to Plaintiffs' Motion for Permanent Injunction, *supra* note 8, at 2 (emphasis omitted) (discussing *Rockwell Graphic Sys., Inc.*, 1993 WL 286484, at *2).

²⁷⁹. See *supra* notes 7–10 and accompanying text (noting challenges of vocabulary in this area).

²⁸⁰. Order Granting Permanent Injunction with Respect to Trade Secrets D, E, & L at 6, *Comet Techs. USA Inc.*, No. 20-cv-06408 (N.D. Cal. Sept. 30, 2022).

²⁸¹. Merz Pharms. LLC's & Merz Aesthetics, Inc.'s Reply in Support of Memorandum Regarding [Proposed] Permanent Injunction at 2, *Allergan, Inc. v. Merz Pharms., LLC*, No. SA-cv-11-446 (C.D. Cal. Mar. 9, 2012).

²⁸². *Id.* at 1 (quoting CAL. CIV. CODE § 3426.2(a) (West 2020)).

²⁸³. *Id.*

²⁸⁴. *Id.* at 1–2.

²⁸⁵. Merz Pharms. LLC's & Merz Aesthetics, Inc.'s Memorandum Regarding Proposed Permanent Injunction at 2, *Allergan, Inc.*, No. SA-cv-11-446 (C.D. Cal. Mar. 8, 2012) (quoting *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1452 (2002)).

²⁸⁶. Injunction Order, *supra* note 172, at 2–3. Other provisions of the injunction limited prohibitions on sales or solicitations of purchases of certain products to a ten-month period. *Id.*

permanent injunctions with an undefined life;²⁸⁷ one involved a permanent injunction of two years.²⁸⁸ *Comet Technologies USA Inc. v. XP Power LLC* was the sole example of a case decided only under the DTSA and not under state law as well.²⁸⁹ In none of these cases did the court focus on the DTSA in determining the life of the permanent injunction being issued. This result is unremarkable, as the DTSA's provision regarding the life of permanent injunctions is less constrained than the UTSA's language. The DTSA merely provides that "a court may . . . grant an injunction . . . to prevent any actual or threatened misappropriation . . . on such terms as the court deems reasonable."²⁹⁰ It does not even contain the UTSA's provision for the termination of the injunction upon a showing of changed circumstances.²⁹¹

B. IMPLICATIONS OF FINDINGS

The key finding of this study of the life of permanent injunctions in trade secret misappropriation cases can be stated succinctly: What is said in doctrine is seldom what is applied in practice by the courts. Calculation of injunction life under doctrine is an intricate undertaking that most courts choose to forgo. However, the findings of this study also permit broad observations about permanent injunction relief in this setting, some of which are counterintuitive and some of which have interesting implications for doctrinal development generally (and not just in the field of trade secret law).

The study demonstrates that true perpetual permanent injunctions are vanishingly rare. Only two of the cases in the dataset involved a perpetual injunction.²⁹² However, almost eighty percent of the cases in the dataset resulted in a permanent injunction with no temporal constraints²⁹³ (which in practical terms equates to a perpetual injunction, as will be discussed below).²⁹⁴ Permanent injunctions with a measured life comprised just over twenty percent

287. See, e.g., Findings of Fact; Conclusions of L. & Judgment at 7, *SolarCity Corp. v. Doria*, No. 16-cv-03085 (S.D. Cal. Dec. 7, 2021) ("permanently restrained and enjoined"); Findings of Fact, Conclusions of L. & Permanent Injunction, *supra* note 185, at 20 ("permanently restrained, enjoined and prohibited from"); Final Judgment and Injunction as to Cory Weiland Following Bench Trial, *supra* note 230, at 14 ("hereby enjoined"); Permanent Injunction Order, *Brightview Grp.*, *supra* note 187, at 2 ("remain in effect indefinitely until further order of the Court"); Permanent Injunction Order at 7, *Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Grp., Inc.*, No. 15-cv-00211 (S.D.N.Y. May 18, 2021) ("permanently enjoined"); Order for Permanent Injunction at 6, *Capstone Logistics Holdings, Inc. v. Navarrete*, No. 17-cv-4819 (S.D.N.Y. Mar. 4, 2021) ("permanently ENJOINED"); Order Granting Plaintiff's Motion for Permanent Injunction at 1, *ASC Engineered Sols., LLC v. Island Indus., Inc.*, No. 20-cv-02284 (W.D. Tenn. Sept. 7, 2021) ("permanent injunction").

288. Order, *supra* note 236, at 2 ("two years from the date of this order").

289. Order Granting Permanent Injunction with Respect to Trade Secrets D, E, & L, *supra* note 280, at 1 (noting the jury's finding of misappropriation under the DTSA).

290. 18 U.S.C. § 1836(b)(3)(A)(i).

291. *Id.* § 1836(b)(3)(A).

292. See *supra* Section IV.A.3.

293. See *supra* Section IV.A.1.

294. See *infra* note 309 and accompanying text.

of the dataset.²⁹⁵ Courts issuing defined life injunctions did so in a surprisingly expedient manner. They provided little discussion of the theory or rationale behind their calculations of injunction life²⁹⁶ and seldom recounted the facts or factors that led to the choice of injunction life.²⁹⁷ Certainly, the nuanced “head start” / “lead time” approach to calculation of permanent injunction life that dominates modern trade secret doctrine played at best a negligible role.²⁹⁸ Finally, courts almost never cited precedent when fashioning permanent injunction relief for trade secret misappropriation (and this was true of both defined life and indefinite life injunctions).

This lack of engagement with doctrine was not limited to the courts. In most instances, the parties themselves did not request more specificity on injunction duration. Trade secret owners, of course, have little motivation to expend resources advocating for a defined-life permanent injunction. As discussed below, the study suggests that an open-ended, undefined-life injunction will almost certainly operate as a perpetual injunction, which inures to the benefit of trade secret owners.²⁹⁹ Enjoined misappropriators, however, presumably do have an incentive to seek a defined end to the injunction. Moreover, the average defined-life injunction in the dataset was less than two and one-half years in length.³⁰⁰ One would think that misappropriators would find a short defined-life injunction preferable to an open-ended one.

Yet, the study demonstrates that misappropriators faced with an impending permanent injunction seldom raised the issue of the length of the injunction and did not protest when the courts failed to put in place limited-life provisions.³⁰¹ We can only speculate as to the reasons. Perhaps the nature of the trade secret and/or the industry involved indicated that the trade secret was not likely to be of long-term value; accordingly, an indefinite injunction would cause no real harm to the misappropriator.³⁰² Perhaps the misappropriator concluded that the value of future access to the trade secret was insufficient to offset the litigation expenses necessary to calculate a defined-life injunction. Or perhaps the litigation spurred the misappropriator to change its business practices to

295. See *supra* Section IV.A.4.

296. But see Order Granting Brocade’s Motion for Permanent Injunction re Trade Secrets & Denying Brocade’s Motion to Strike, *supra* note 235, at 9.

297. See *supra* Section IV.A.4.

298. The one exception was *ShowCoat Sols., LLC v. Butler*, No. 18-cv-789, 2020 WL 1467215 (M.D. Ala. Mar. 19, 2020), where the court explicitly acknowledged that the life of the injunction should be restricted to “the period of time that would be required for independent development” by the defendants. *Id.* at *4. This led the court to issue a defined-life injunction measured by the time it would take the defendants, if “left to their own devices,” to replicate the trade secret at issue (in addition to other injunction provisions). *Id.* at *5; see *supra* notes 213–26 and accompanying text (discussing *ShowCoat Solutions*).

299. See *infra* note 304 and accompanying text.

300. See *supra* Figure 3 and accompanying text.

301. See *supra* Section IV.A.2.

302. Only in the rare case did a court discuss the value of the trade secret when setting injunction life. See *supra* notes 238–41 (discussing *Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, 14-cv-748 (W.D. Wisc. 2016); *Strikepoint Trading, LLC v. Sabolyk*, No. SA-cv-07-1073 (C.D. Cal. 2009)).

ensure it would never make future use of the trade secret, rendering the life of the permanent injunction irrelevant from its perspective.

The safety valve offered by the UTSA's language providing parties the right to seek termination or modification of the injunction upon changed circumstances might partially explain the disinclination of both courts and enjoined misappropriators to pursue great specificity on temporal terms at the time of issuance.³⁰³ The existence of this right helps ensure that the injunction will not persist for an inequitable time period and might induce enjoined misappropriators to forego arguments for a defined life. For similar resource-efficiency reasons, courts may also be reluctant to devote judicial resources to fashioning defined lives for injunctions. Should circumstances never change or should the protected trade secret be of insufficient value to the misappropriator, neither the court nor the parties will be forced to commit resources to defining the appropriate life for the injunction.

Despite the prominence of this right in the UTSA, observations from the study's dataset revealed that only a few courts explicitly referenced in their orders this right to seek modification or dissolution of the permanent injunction in the future.³⁰⁴ That does not necessarily indicate that the courts or parties have overlooked or dismissed the ramifications of this provision of the UTSA however. Courts, in particular, may not feel a need to highlight this specific statutory language as it simply replicates the traditional equitable powers of the courts. Courts acting in equity generally retain jurisdiction over permanent injunctions and have the power to modify or terminate the injunction as circumstances warrant, even in the absence of an express statutory provision such as that found in the UTSA.³⁰⁵ This power to modify permanent injunctions in the future "ensures that the injunction does not impose obligations on the defendant, the performance of which are, because of changed circumstances, absurd, unwarranted, unnecessary, or unduly burdensome."³⁰⁶ The party seeking the modification or termination (in our situation, typically the misappropriator)

303. See *supra* notes 131–33 and accompanying text (discussing UNIFORM TRADE SECRETS ACT, *supra* note 126, § 2(a)).

304. See *supra* notes 187–92 and accompanying text.

305. See FISCHER, *supra* note 7, at 164 (footnote omitted) ("An injunction . . . has continuing benefit for the plaintiff and impact on the defendant after the injunction is entered The court's power and duty of continuing oversight and supervision of the injunction provides the justification for post-judgment modification of the injunction."); see also WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 243 (4th ed. 2006) ("Consistent with the flexibility of equity, equitable decrees are generally modifiable at a later time if circumstances change."); *id.* ("If the purposes of the decree have been carried out, the defendant may even have the decree rescinded.") (citing *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991)); Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1104–05 (1986); Charles B. Blackmar, Comment, *Injunctions—Power of a Court to Modify a Final Permanent Injunction*, 46 MICH. L. REV. 241, 241–42 (1947).

306. FISCHER, *supra* note 7, at 283; see also 42 AM. JUR. 2D *Injunctions* §§ 284, 288 (2024) (noting that the court always retains an "intrinsic or inherent power," under general equitable principles, to modify or terminate the injunction as circumstances change).

“bears the burden of [proof in] establishing [the existence of] changed circumstances [that] warrant [such] relief.”³⁰⁷

One could argue that requiring misappropriators to return to court to challenge the continuance of an undefined-life injunction is itself inefficient. A defined-life injunction would eliminate the need for this additional expenditure. However, it may be equally, if not more, inefficient to require the court to calculate the injunction duration up front. The nuanced modern approach is neither simple nor costless to apply. It invites significant advocacy by the parties to influence the court’s determination and the expenditure of significant resources on experts and attorneys, as well as the time commitment by the court in sorting out an appropriate measure.

An unlimited-life permanent injunction, by contrast, avoids these up-front costs. At the time a permanent injunction is issued, the modern approach to defined-life injunctions requires the court to contemplate numerous possible fact patterns regarding the possible longevity of the trade secret and the development capabilities of the misappropriator and/or good-faith competitors.³⁰⁸ An undefined-life permanent injunction allows a court to defer these calculations until later, when facts are known, and the court can benefit from hindsight when modifying or terminating the injunction.

Moreover, that day of reckoning is unlikely to ever arrive. In no case in this dataset did a court terminate or modify a permanent injunction upon a showing of changed circumstances or a cessation of secrecy, nor does there appear to be more than an isolated example in published cases outside this dataset.³⁰⁹ Once issued, a permanent injunction with an undefined life seems, in practice, to persist forever. Again, we can only speculate as to why this might be so. Perhaps the trade secret at issue remains valid and protected such that the permanent injunction is still warranted. Or perhaps the trade secret did cease to exist but the enjoined party no longer cared—maybe because it was no longer operating in the same industry or had moved onto other technology or strategies that rendered the disputed trade secret no longer of interest. Or perhaps the trade secret owner no longer valued the trade secret and so did not seek enforcement of the permanent injunction even in the light of an obvious violation of the injunction by the misappropriator. In such instances, there would be no point in investing effort or money to reverse or alter the injunction.

So, what inferences should we draw from the findings of this study? It would be easy to dismiss the nuanced approach of modern trade secret doctrine

307. 42 AM. JUR. 2D *Injunctions* § 288 (2024) (citing *Horne v. Flores*, 557 U.S. 433, 447 (2009)).

308. See *supra* notes 98–109 (discussing the “head start” or “lead time” rule articulated in *Winston Rsch. Corp.*). As noted earlier, see *supra* notes 108–10 and accompanying text, a subjective application of the modern approach requires the court to calculate the time it would take the misappropriator to legitimately recreate the trade secret; an objective application requires the court to calculate the time it would take a good faith competitor to do so. See *Dole*, *supra* note 3, at 193 (discussing approaches); Jamieson, *supra* note 3, at 539–40 (same).

309. See *supra* notes 135–36 and accompanying text. The only example of dissolution of permanent injunctions in a published trade secret case appears to be *Petters v. Williamson & Assocs.*, 210 P.3d 1048, 1055–56 (Wash. Ct. App. 2009) (affirming trial court’s dissolution of injunction upon a showing that the trade secret “had ceased to exist”).

relating to permanent injunctions as being irrelevant or ineffective, given the courts' overwhelming tendencies to ignore it when fashioning their injunction orders. It would be equally facile to infer that the trial courts' persistent adoptions of unlimited life injunctions reveal a doctrine that is broken or unmanageable.

It would be a mistake to extrapolate such broad conclusions from this study, however. The current practice in this setting is pragmatic and conserves judicial and litigant resources. In many instances, it appears, the temporal term of the injunction is unimportant to both plaintiff and defendant and, hence, not worth litigating. Where it turns out that the life of the permanent injunction does matter, for example, because of changed circumstances, both parties have access to the backstop of returning to court for modification or termination of the injunction. An *ex-ante* estimate of the life of the injunction is simply not critical to the final outcome. This more streamlined approach saves judicial and litigant resources in the vast majority of cases, yet the refined, more detailed approach of modern doctrine remains available for the small number of cases that warrant a more nuanced analysis.³¹⁰

But neither should we discount the inherent value of nuanced doctrine, even if it is applied only at the margins or in rare cases. Doctrine is important for ensuring that outcomes are not *ad hoc*, unpredictable, or inconsistent. However, the value of nuanced doctrine may be obscured. In the trade secret misappropriation area, that value might be in providing a rubric of the types of considerations that may facilitate reaching flexible, more equitable outcomes, either in the rare cases in which the facts demand a defined life injunction up front or in the even rarer cases that use the UTSA's safety valve in reopening the injunction.

In sum, this study has revealed an important finding: Doctrine and practice sharply diverge in the area of permanent injunction life for trade secret misappropriation. While this study focused on identifying and documenting actual practice in the issuance of permanent injunctions for trade secret misappropriation, this revelation of this unexpectedly stark disconnect between doctrine and practice suggests important paths for future research into the interface between doctrine, advocacy, and judicial decision-making.

CONCLUSION

This qualitative empirical study explored the disconnect between doctrine and practice in the calculation of the life of permanent injunctions in trade secret misappropriation cases, drawing upon findings from a content analysis of cases decided in federal trial court in the fourteen-year period between January 1, 2009 and December 31, 2022. The observations of this study contribute to our understanding of the relationship between modern trade secret doctrine and actual practice with respect to equitable relief for trade secret misappropriation. Given the dearth of empirical analysis in the trade secret field, providing insight into litigant advocacy practices, judicial decision-

310. See, e.g., *ShowCoat Sols., LLC v. Butler*, No. 18-cv-789, 2020 WL 1467215, at *4-6 (M.D. Ala. Mar. 19, 2020) (discussed *supra* notes 213-26).

making, and doctrinal development in this important area of intellectual property law is a valuable contribution to the literature.

The key finding of this study was startling: What is said in doctrine was seldom what was applied in practice by courts. The great majority of courts in the dataset issuing permanent injunctions for trade secret misappropriation paid little to no attention to the nuanced rules set forth by statute and case law and instead issued sparse permanent injunction provisions that did not impose time limits and did not overtly rely upon doctrine or precedent. Moreover, litigants almost always acquiesced in this outcome. Scholars, practitioners, and courts alike should approach doctrinal nuances with a degree of caution; it is patently risky to assume that an elegant, refined doctrine that is articulated, even in statute or precedent, is necessarily what the parties will assert or what the courts will apply in the trenches of actual litigation.

APPENDIX

A. *CASES ISSUING PERMANENT INJUNCTIONS WITH NO MEASURED LIFE***Arkansas:**

Wal-Mart Stores, Inc. v. Cuker Interactive, LLC, No. 14-cv-5262, 2017 U.S. Dist. LEXIS 119147, at *16 (W.D. Ark. July 28, 2017) (“hereby enjoined”).

California:

Final Judgment & Permanent Injunction at 1–2, Masimo Corp. v. True Wearables, Inc., No. 18-cv-02001 (C.D. Cal. Dec. 22, 2022) (“hereby enjoined”); Findings of Fact & Conclusions of Law at 84–86, Masimo Corp. v. True Wearables, Inc., 18-cv-02001, 2022 WL 17083396, at *36 (C.D. Cal. Nov. 7, 2022) (“permanently enjoined”).

Order Granting Permanent Injunction with Respect to Trade Secrets D, E, & L at 6, Comet Techs. USA Inc. v. XP Power LLC, No. 20-cv-06409 (N.D. Cal. Sept. 30, 2022) (“permanently enjoined”).

Findings of Fact; Conclusions of L. & Judgment at 7, SolarCity Corp. v. Doria, No. 16-cv-03085 (S.D. Cal. Dec. 7, 2021) (“permanently restrained and enjoined”).

Order Granting Application for Injunctive Relief in Aid of Judgment Against Yovan Garcia, Tyan, Inc. v. Garcia, No. cv 15-5443 (C.D. Cal. Sept. 20, 2017) (“permanently enjoins”).

Permanent Injunction at 1, PQ Labs, Inc. v. Qi, No. C 12-0450 (N.D. Cal. Oct. 2, 2014) (“permanently restrained and enjoined”).

Judgment Against Defendants Gregory G. Cremarosa & Mallard Group, Ltd. in Favor of Plaintiffs at 2, Midas Int’l Corp. v. Mallard Grp., Inc., No. 10-cv-03232 (E.D. Cal. Apr. 24, 2012) (“the Preliminary Injunction . . . shall become a permanent injunction”).

Injunction Order at 2–3, Allergan, Inc. v. Merz Pharm., LLC, No. SA-cv-11-446 (C.D. Cal. Mar. 9, 2012) (ten months on certain activities; no time limit on “retaining, disclosing or using” trade secrets).³¹¹

Findings of Fact, Conclusions of L. & Permanent Injunction at 20, ATS Prods. Inc. v. Ghiorso, No. C10-4880 (N.D. Cal. Jan. 26, 2012) (“permanently restrained, enjoined and prohibited from”).

311. This case appears in both Appendix A and B.

Colorado:

Findings of Fact & Conclusions of L. at 55, *Atlas Biologicals, Inc. v. Kutrubes*, No. 15-cv-000355 (D. Colo. Sept. 23, 2019) (making preliminary injunction “PERMANENT”).

Findings of Fact, Conclusions of L. & Order at 62, *Electrology Lab’y, Inc. v. Kunze*, No. 11-cv-01907 (D. Colo. Mar. 14, 2016) (“PERMANENTLY ENJOINED”).

Florida:

Final Judgment & Injunction as to Cory Weiland Following Bench Trial at 1, 14, *FX Grp., LLC v. Vision Mgt. & Enter., LLC*, Case No. 8-20-cv-468 (M.D. Fla. Sept. 21, 2021 (“hereby enjoined”).

Findings of Fact & Conclusions of L., *Pinch a Penny, Inc. v. SR & JG, Inc.*, No. 15-cv-80067 (S.D. Fla. Sept. 18, 2017) (“permanently ENJOINED”).

Permanent Injunction at 1, *Chetu, Inc. v. Salihu*, No. 09-60588 (S.D. Fla. Apr. 7, 2010) (“permanently refrain”).

Iowa:

Order Granting in Part, & Denying in Part, Defendants’ Motion for Permanent Injunctive Relief at 6–7, *Deghedy v. Viztek, Inc.*, No. 12-cv-00048 (S.D. Iowa June 10, 2016) (“permanently restrained and enjoined”).

Kentucky:

Permanent Injunction at 1, *Babcock Power, Inc. v. Kapsalis*, No. 13-cv-717 (W.D. Ky. Dec. 13, 2018) (“PERMANENTLY RESTRAINED”).

Maryland:

Permanent Injunction Order at 1–2, *Brightview Grp., LP v. Teeters*, No. 19-cv-02774 (D. Md. Mar. 29, 2021) (“remain in effect indefinitely until further order of the Court”).

Order at 1, *Agora, Inc. v. Associated Publishers Network*, No. 12-2998 (D. Md. Aug. 22, 2017) (“PERMANENTLY ENJOINED”).

Massachusetts:

Permanent Injunction & Order at 2, *Advanced Cable Ties, Inc. v. Bay State Cable Ties, LLC*, Civ. No. 06-40204 (D. Mass. July 28, 2009) (“permanently enjoined”).

Michigan:

Opinion & Order Granting in Part & Denying in Part Plaintiffs' Motion for Summary Judgment at 20, *Nedschroef Detroit Corp. v. Bemas Enters. LLC*, No. 12-10095 (E.D. Mich. May 22, 2015) ("permanent injunction"); *see also* Amended Judgment & Order of Permanent Injunction at 2, *Nedschroef Detroit Corp.*, No. 12-10095 (E.D. Mich. Dec. 1, 2015) ("enjoined and restrained").

Minnesota:

Order at 16, *Advanced Control Tech., Inc. v. Iverson*, No. 19-cv-1608 (D. Minn. Apr. 8, 2021) ("permanently restricting").

Order at 10–11, *Mayo Clinic v. Elkin*, Civ. No. 09-322 (D. Minn. May 6, 2011) ("permanent injunctive relief").

New Jersey:

Permanent Injunction Order at 7, *Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Grp., Inc.*, No. 15-cv-00211 (S.D.N.Y. May 18, 2021) ("permanently enjoined").

Opinion & Order at 35, *Syncsort Inc. v. Innovative Routines, Int'l, Inc.*, No. 04-3623 (D. N.J. Aug. 11, 2011) ("permanently restrained and enjoined").

New York:

Order for Permanent Injunction at 6, *Capstone Logistics Holdings, Inc. v. Navarrete*, Civ. No. 17-cv-4819 (S.D.N.Y. Mar. 4, 2021) ("permanently ENJOINED").

Findings of Fact, Conclusions of L., & Final Judgment at 99, *C.D.S., Inc. v. Zetler*, 16 Civ. 3199 (S.D.N.Y. Mar. 31, 2018) ("permanently enjoined").

Opinion & Order; Findings of Fact & Conclusions of L. at 57, *SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 07 Civ. 2700 (S.D.N.Y. Mar. 31, 2009) ("permanently enjoined").

North Carolina:

Order at 38, *Bridgetree, Inc. v. Red F Mktg., LLC*, No. 3-10-cv-00228 (W.D.N.C. Feb. 5, 2013) ("immediately and permanently" refrain from specified acts).

Order at 39–40, *Silicon Knights, Inc. v. Epic Games, Inc.*, No. 07-cv-00275 (E.D.N.C. Nov. 7, 2012) ("permanently cease" trade secret misappropriation and copyright infringement).

Ohio:

Order at 1, Polymet Corp. v. Newman, No. 16-cv-734 (S.D. Ohio Aug. 28, 2018) (“permanent injunction”).

Oregon:

Order at 10, Wells Fargo Bank, N.A. v. Clark, No. 11-cv-06248 (D. Ore. Oct. 5, 2012) (“permanently enjoined”).

Pennsylvania:

Permanent Injunction at 1, Ally Fin. Inc. v. Blackwell, Civ. No. 11-4964 (E.D. Pa. June 19, 2012) (“permanently enjoined and restrained”).

Permanent Injunction at 1, De Lage Landen Operational Servs., LLC v. Third Pillar Sys., Inc., No. 09-2439 (E.D. Pa. Mar. 5, 2010) (“permanently enjoined”).

Tennessee:

Order Granting Plaintiff’s Motion for Permanent Injunction at 1, ASC Engineered Sols., Inc. v. Island Indus., Inc., No. 20-cv-02284 (W.D. Tenn. Sept. 7, 2021) (“permanent injunction”).

Judgment & Permanent Injunction at 1, Ecimos, LLC v. Carrier Corp., No. 15-cv-2726 (W.D. Tenn. Nov. 26, 2018) (“permanently enjoined”).

Texas:

Final Judgment & Permanent Injunction at 2, Aspen Tech., Inc. v. Kunt, No. H-10-1127 (S.D. Tex. June 6, 2012) (“permanently enjoined”).

Final Judgment at 1, Weeco Int’l, Inc. v. Superior Degassing Servs. Inc., No. H-09-4003 (S.D. Tex. Dec. 27, 2011) (“permanently enjoined”).

Final Judgment at 4, M-I LLC v. Argus Green LLC, No. 10-cv-03364 (S.D. Tex. Dec. 14, 2011) (“permanently enjoins”).

Permanent Injunction at 12, Myriad Dev v. Alltech, Inc., No. 08-cv-0253 (W.D. Tex. Mar. 28, 2011) (“permanently restrained and enjoined”).

Utah:

Permanent Injunction at 1, 3, ClearOne Commc’n., Inc. v. Chiang, No. 07-cv-37 (D. Utah Apr. 8, 2009) (“permanently enjoined”).

Virginia:

Hair Club for Men, LLC v. Ehson, No. 16-cv-236, 2016 WL 6780310, at *5-6 (E.D. Va. Nov. 14, 2016) (“permanent”).

*B. CASES ISSUING “PERPETUAL” INJUNCTIONS***Alabama:**

ShowCoat Sols., LLC v. Butler, Case No. 18-cv-789, 2020 WL 1467215, at *5–6 (M.D. Ala. Mar. 19, 2020) (issuing one injunction term of three years, and three terms that appear to be perpetual).³¹²

Florida:

Order Granting eVestment’s Motion for Injunction at *5, Compass iTech, LLC v. eVestment All., LLC, No. 14-cv-81241, 2017 WL 5153210 (S.D. Fla. Aug. 11, 2017) (“hereby and forever”).

312. This case appears in both Appendix B and C.

*C. CASES ISSUING INJUNCTIONS WITH DEFINED LIFE***Alabama:**

ShowCoat Sols., LLC v. Butler, No. 18-cv-789, 2020 WL 1467215, at *5-6 (M.D. Ala. Mar. 19, 2020) (issuing one injunction term of three years, and three terms that appear to be perpetual).³¹³

California:

Order Granting Brocade's Motion for Permanent Injunction re Trade Secrets & Denying Brocade's Motion to Strike at 27, Brocade Commc'ns Sys. v. A10 Networks, Inc., No. 10-cv-03428 (N.D. Cal. Jan. 23, 2013) (injunction terms of (1) two years and eight months; (2) three years and one month; (3) five years and one month; and (4) five years).

Injunction Order at 2-3, Allergan, Inc. v. Merz Pharm., LLC, No. SA-cv-11-446 (C.D. Cal. Mar. 9, 2012) (ten months on certain activities; no time limit on "retaining, disclosing or using" trade secrets).³¹⁴

Order Granting in Part & Denying in Part Motion for Permanent Injunction at 13, Strikepoint Trading, LLC v. Sabolyk, No. SA-cv-07-1073 (C.D. Cal. Aug. 18, 2009) ("providing for the expiration of the permanent injunction after one year of its entry date").

Connecticut:

Permanent Injunction at 1-2, Drummond Am. LLC v. Share Corp., No. 08-cv-1665 (D. Conn. Apr. 12, 2010) (issuing injunction "through and including August 22, 2010," i.e., four months, ten days).

Massachusetts:

Order at 2, T.H. Glennon Co. v. Monday, No. 18-30120 (D. Mass. Nov. 18, 2019) ("two years from the date of this order").

Ohio:

Memorandum of Opinion at 66, SKF USA Inc. v. Zarwasch-Weiss, No. 10-cv-1548 (N.D. Ohio Feb. 3, 2011) (issuing injunction of eighteen months).

313. This case appears in both Appendix B and C.

314. This case appears in both Appendix A and C.

Oklahoma:

Judgment at 2–3, *Drummond Am. LLC v. Share Corp.*, No. CIV-08-1004 (W.D. Okla. Sept. 3, 2009) (extending terms of preliminary injunction for one additional year from date of judgment).

Pennsylvania:

Memorandum Opinion at 23–24, *Altturnamats, Inc. v. Harry*, Civ. No. 07-337 (W.D. Pa. Sept. 16, 2008) (issuing injunction of one year).

Texas:

Final Judgment at 2, *Thomas v. Hughes*, No. 16-cv-951 (W.D. Tex. Mar. 4, 2020) (permanent injunction to last until damages and attorney fee awards were satisfied).

Wisconsin:

Opinion & Order at 6, *Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, 14-cv-748, 2016 WL 6477011, at *3 (W.D. Wisc. Nov. 2, 2016) (“four years from its effective date of this order”).