Lex Machina

Trade Secret Litigation Report 2018

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Executive Summary

Lex Machina's first ever Trade Secret Litigation Report delivers the latest trends and insights from litigation brought under state trade secret laws and the federal Defend Trade Secrets Act of 2016. Encompassing over 9,800 cases, the Trade Secret Litigation Module represents the most comprehensive and accurate dataset available for analyzing trade secret misappropriation cases. This module analyzes the track records of law firms, the experience and behavior of judges, case timings, findings, damages, injunctions, and more.

From precise timing metrics that inform legal budgeting, to trends among top law firms and leading judges, Legal Analytics provide customized insights that supplement traditional research and accumulated experience. Leveraging this data gives companies and firms a competitive edge—companies can select counsel based on a proven track record, and firms can provide better outcomes by applying data to their strategies, whether drafting a demand letter response or negotiating a settlement.

Key Trends and Highlights

- Federal district court filings increased in 2017 in correlation with the passage of the federal Defend Trade Secrets Act.
- When courts rule on the merits of a motion for injunction, the grant/deny rates tend to favor Claimants.
- Claim Defendants tend to win on summary judgment when the court decides the Claimant has failed to demonstrate the existence of a protectable trade secret. However, Claimants who make it to trial tend to be able to show they have a trade secret and it was misappropriated.
- The top law firms for Plaintiffs and Defendants consist of nationwide law firms known for their labor and employment practices.

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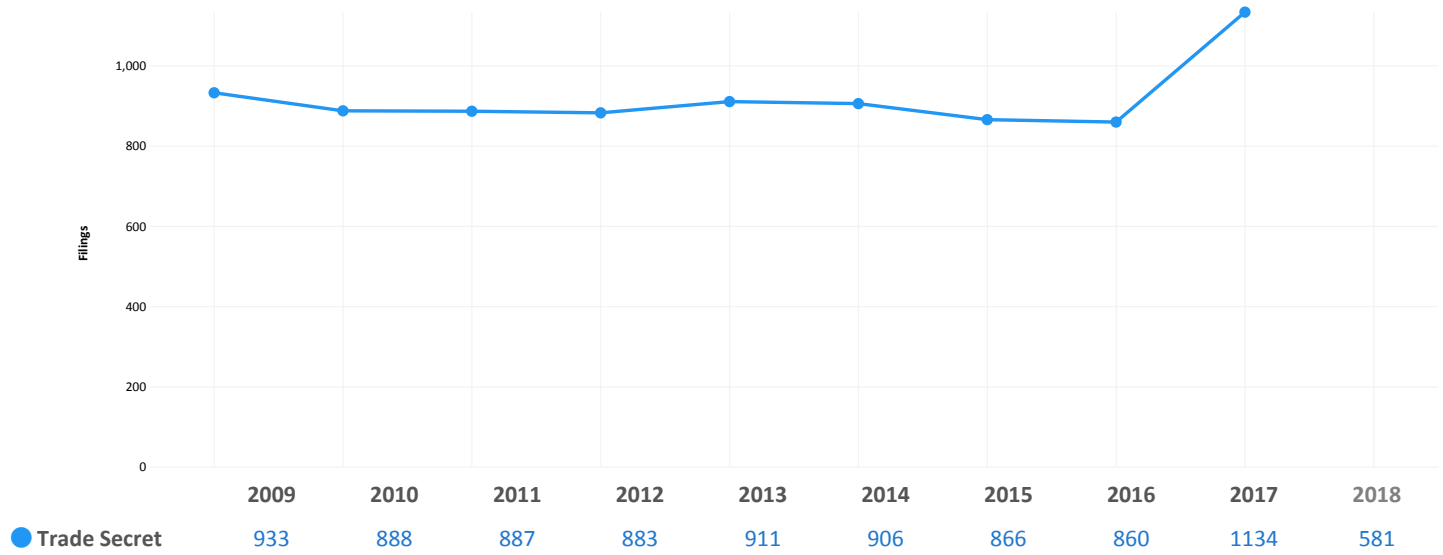
District Court Filings

Trade Secret case filings in federal district court were steady at around 900 cases per year until 2017, when filings increased sharply by over 30% over the previous year. A significant factor for this increase is likely the passing of the Defend Trade Secrets Act ("DTSA").

On May 11, 2016, Congress passed the DTSA. This statute allows litigants to include a trade secret misappropriation cause of action in cases filed directly in federal court based on federal question jurisdiction as long as the claim is "related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. § 1836(b)(1). Prior to its passage, prospective litigants had to either satisfy diversity jurisdiction requirements or include another cause of action under a federal statute in order to maintain their suit in federal court.

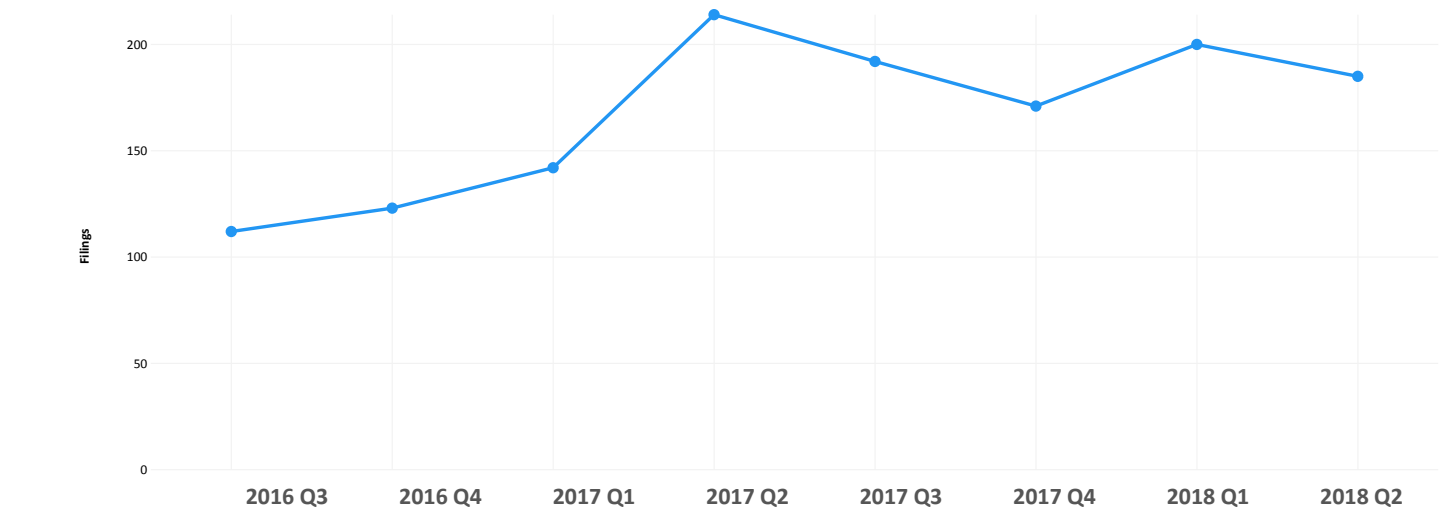
Figure 1: All Trade Secret Cases Filed from 2009 to 2018 Q2



	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Trade Secret	933	888	887	883	911	906	866	860	1134	581

Lex Machina distinguishes cases brought under the Defend Trade Secrets Act through case tagging using natural language processing. Below is a focused look at filings under the act since its enactment. Cases including a claim under the DTSA steadily increase over the first four quarters since enactment.

Figure 2: DTSA Cases Filed from May 11, 2016 to 2018 Q2



	2016 Q3	2016 Q4	2017 Q1	2017 Q2	2017 Q3	2017 Q4	2018 Q1	2018 Q2
Trade Secret	112	123	142	214	192	171	200	185

Trade Secret litigation is spread out evenly through the various district courts. The top district courts are located in highly populated areas and consist of popular districts for all Lex Machina case types. The Top District Courts chart shows the percentage of Trade Secret cases filed by district. Cases are spread out amongst districts and no district court hears more than 10% of Trade Secret cases.

So far, the DTSA does not appear to have shifted Trade Secret filings to resemble other federal intellectual property practice areas, where a smaller number of districts see a higher percentage of overall litigation. Rather, case filings are spread out in various districts similar to Commercial litigation.

Figure 3: Trade Secret Litigation Top District Courts by Filings from 2009 to 2018 Q2

C.D.Cal.	533	**6%**
N.D.Ill.	417	**5%**
S.D.N.Y.	372	**4%**
D.N.J.	331	**4%**
E.D.Pa.	304	**3%**
Other Courts	6,797	**78%**

Trade Secret cases tend to overlap with cases that also appear in other Lex Machina practice modules. Given the importance of trade secrets to business transactions, complaints bringing trade secret claims are often accompanied by a claim for breach of contract, or tortious conduct arising from a business relationship. The largest overlap is with Lex Machina's Commercial case type, with about 60% of Trade Secret cases overlapping. Additionally, Claimants tend to be companies that are protecting proprietary information. Therefore, litigants often include claims to protect other types of intellectual property. As a result, about 11% of Trade Secret cases also include a Copyright claim, about 22% include a Trademark claim, and about 6% include a Patent claim.

Figure 4: Overlap of Trade Secret Cases with Other Lex Machina Practice Areas, Cases Filed from 2009 to 2018 Q2

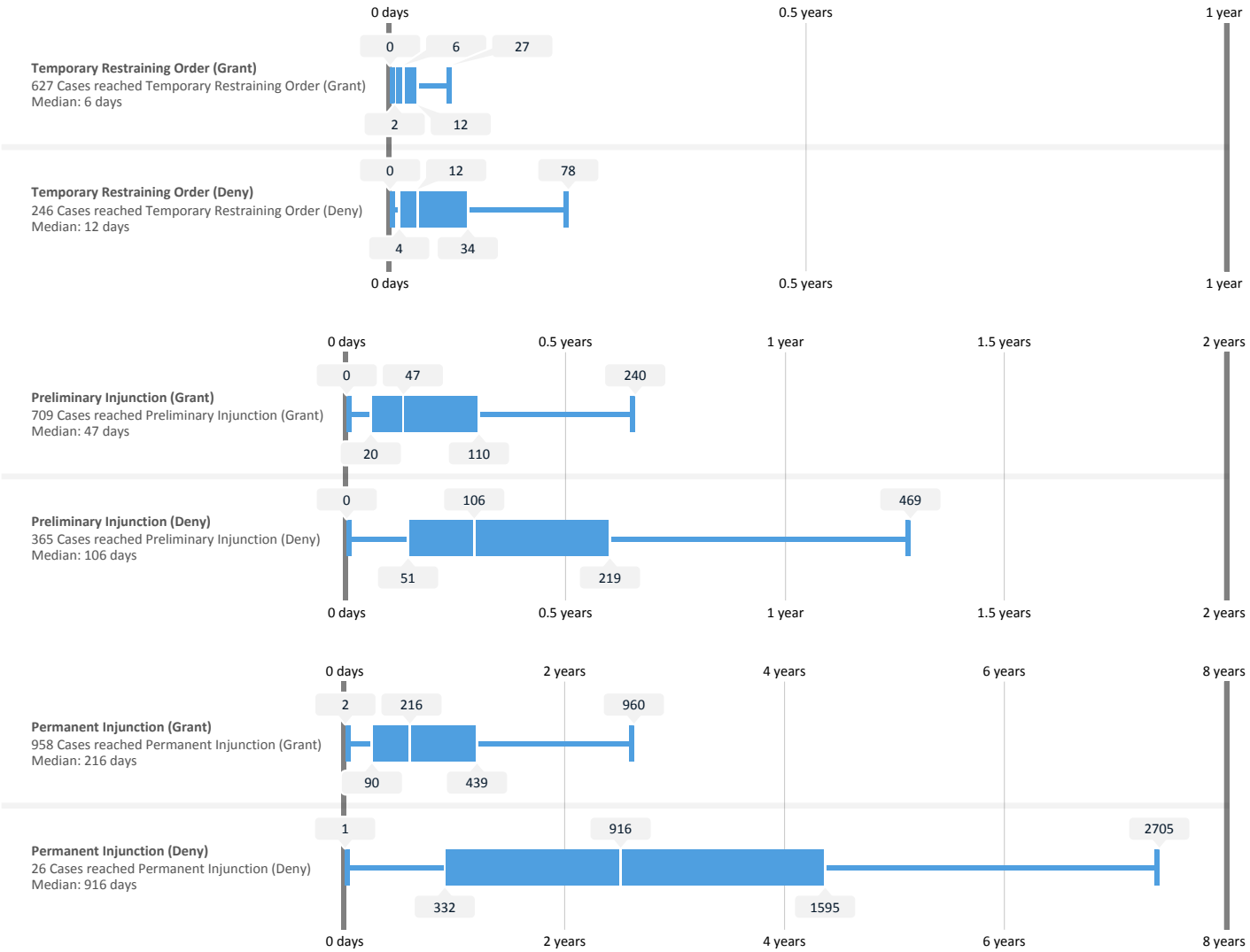
Case Types	Cases
Trade Secret	8849
Trade Secret Alone	2723
Commercial	5192
Trademark	1927
Copyright	971
Patent	528
Antitrust	94
Securities	33
Employment	12

Injunctive Relief

Injunctions are incredibly important in Trade Secret cases. Parties often allege trade secret misappropriation after an employee or business partner takes a hard drive or other proprietary information to another company or their own new venture. Injunctions often require the return of physical material in order to stop the flow of information.

Timing is an important metric when the potential spread of confidential information is at stake. The following boxplots show timing metrics for various types of injunctions in Trade Secret cases. (Boxplots are further explained at the end of this report.) Timing analytics help practitioners in calendaring, planning for costs, and outlook at the beginning of a case. For temporary restraining orders and preliminary injunctions, the median time to a granted injunction is roughly half as long as the median time to a denied injunction. The longer boxplots for injunction denials indicate that injunction grant timings are generally more predictable, whereas injunction denials are spread over a much longer period of time.

Figure 5: Trade Secret Timing Boxplots for Cases Terminated from 2009 to 2018 Q2



When courts rule on the merits of a motion for injunction, the grant/deny rates favor Claimants. For each type of injunction (TRO, preliminary, and permanent) more trade secret injunctions are granted than denied on the merits, but are subject to considerable scrutiny. Temporary restraining orders are granted on the merits in seven out of ten cases, and the success rate for preliminary injunctions granted on the merits drops to six in ten cases.

Only one in ten permanent injunctions are awarded on the merits, with three out of every four being on consent judgment. By contrast, temporary restraining orders are awarded on the merits in five out of six instances, and preliminary injunctions are granted on the merits in two out of three instances.

Figure 6: Trade Secret Injunctive Relief by Judgment Type, Cases Terminated from 2009 to 2018 Q2

Permanent Injunction

Judgment on Merits

Grant: 92 (79%) Deny: 25 (21%)

	Default Judgment	Consent Judgment	Judgment on Merits
Grant	131	748	92
Deny	0	0	25
Total	131	748	117

Preliminary Injunction

Judgment on Merits

Grant: 476 (57%) Deny: 365 (43%)

	Default Judgment	Consent Judgment	Judgment on Merits
Grant	0	234	476
Deny	0	0	365
Total	0	234	841

Temporary Restraining Order

Judgment on Merits

Grant: 522 (68%) Deny: 242 (32%)

	Default Judgment	Consent Judgment	Judgment on Merits
Grant	0	104	522
Deny	0	0	242
Total	0	104	764

Findings and Case Resolutions

Trade Secret case resolution data tells a distinct story. While Claimants tend to win cases at trial (whether bench or jury trials), Claim Defendants tend to win cases based on a judgment on the pleadings and summary judgment. More than half of Claimant wins are by consent.

This case resolution data reflects the the two key stages of trade secret litigation: first, providing the court with enough evidence to warrant trade secret protection, and second, demonstrating that misappropriation occurred. Claim Defendants usually win on summary judgment when the court decides the Claimant has failed to demonstrate the existence of a protectable trade secret. However, Claimants tend to win cases that end at the trial stage.

Figure 7: Case Resolutions, All Cases Terminated from 2009 to 2018 Q2

Judgement Type	Claimant Win	Claimant Win Percentage	Claim Defendant Win	Claim Defendant Win Percentage
Default Judgment	181	97.84%	4	2.16%
Consent Judgment	656	99.54%	3	.46%
Judgment on the Pleadings	1	3.12%	31	96.88%
Summary Judgment	95	36.12%	168	63.88%
Trial	168	71.79%	66	28.21%
Judgment as a Matter of Law	4	28.57%	10	71.43%

This report divides findings into sections related to the stages of litigation mentioned above. The first table has findings related to establishing the ownership and validity of a protectable trade secret. These findings are only annotated on cases where ownership or validity is at issue in the case. While a large number of cases do not challenge Claimants' trade secret ownership or validity, those that do tend to find that there is no trade secret protection. On summary judgment, Claim Defendants receive favorable findings nine times as often as Claimants in orders related to trade secret ownership and validity. By contrast, courts favor Claimants when these issues are resolved at trial.

Figure 8: Trade Secret Ownership Findings for Cases Terminated from 2009 to 2018 Q2

Findings	Default Judgment	Consent Judgment	Judgment on the Pleadings	Summary Judgment	Trial	Judgment as a Matter of Law	Any Judgment Event
Ownership / Validity	0	4	4	21	49	0	78
Failure to Identify Trade Secret	3	0	20	77	8	1	109
Failure to Maintain Secrecy	0	0	12	65	11	2	88
Generally Known / Readily Ascertainable	0	0	1	49	8	1	59
No Ownership / Validity: Wrong Entity	1	0	0	7	0	0	8

This second section has findings as to whether or not the court found misappropriation occurred, including a growing number of cases where trade secret misappropriation was analyzed under the DTSA. So far, there are very few judgments on the merits for trade secret misappropriation. For state law misappropriation claims, Claim Defendants prevail on summary judgment far more often than Claimants.

Figure 9: Trade Secret Misappropriation Findings for Cases Terminated from 2009 to 2018 Q2

Findings	Default Judgment	Consent Judgment	Judgment on the Pleadings	Summary Judgment	Trial	Judgment as a Matter of Law	Any Judgment Event
DTSA Trade Secret Misappropriation	6	3	0	0	1	0	9
No DTSA Trade Secret Misappropriation	0	1	3	3	2	1	10
State Law Trade Secret Misappropriation	136	21	0	18	102	0	270
No State Law Trade Secret Misappropriation	7	2	38	192	89	13	334
Willfulness / Malicious Behavior	27	2	0	1	50	1	81
No Willfulness / Malicious Behavior	0	0	0	0	17	1	18

Lastly, Lex Machina annotates findings related to common defenses. A significant number of cases have findings of Equitable or Time-barred Defense, highlighting possible detrimental conduct by Claimants themselves.

Figure 10: Trade Secret Defense Findings for Cases Terminated from 2009 to 2018 Q2

Findings	Default Judgment	Consent Judgment	Judgment on the Pleadings	Summary Judgment	Trial	Judgment as a Matter of Law	Any Judgment Event
Independent Development Defense	0	0	0	7	1	0	8
No Independent Development Defense	0	0	0	1	1	0	2
Equitable or Time-Barred Defense	0	0	9	39	1	1	49
No Equitable or Time-Barred Defense	0	1	5	4	6	0	14

Top Law Firms

Because Trade Secret cases are often filed against former employees, it is fitting that the top law firms for Plaintiffs and Defendants consist of nationwide law firms known for their labor and employment practices.

This illustrates the intersection of legal subject matters involved in litigating Trade Secret cases. Trade secrets are sometimes referred to as a form of intellectual property and some judges treat misappropriation similar to infringement. However, they are generally protected by a contract or a duty, which means judges may refer to misappropriation under contract or tort law. Litigators may come from a cross section of specialties to litigate these claims.

Figure 11: Top Law Firms for Cases Filed 2009 to 2018 Q2

Plaintiff Firm	Case Count
Littler Mendelson	201
Jackson Lewis	133
Seyfarth Shaw	132
Ogletree Deakins Nash Smoak & Stewart	131
Fisher & Phillips	103
Greenberg Traurig	103
Duane Morris	66
Perkins Coie	59
Foley Lardner	59
Faegre Baker Daniels	57
Cozen O'Connor	57
Buchanan Ingersoll & Rooney	54
Gordon & Rees	54
DLA Piper	50
Blank Rome	49

Defendant Firm	Case Count
Ogletree Deakins Nash Smoak & Stewart	93
Jackson Lewis	89
Littler Mendelson	74
Foley Lardner	70
DLA Piper	60
Morgan Lewis & Bockius	58
Greenberg Traurig	56
Fox Rothschild	49
Jones Day	48
Duane Morris	45
Gordon & Rees	44
Perkins Coie	44
Locke Lord	43
Holland & Knight	43
Fisher & Phillips	43

Damages

Lex Machina annotates three types of damages specific to Trade Secret cases: Actual Damages / Lost Profits, Punitive / Willfulness Damages, and Reasonable Royalty. This table shows the frequency and total damages of each damage type. Courts rarely award Reasonable Royalties, perhaps given the speculative nature and need for expert witnesses to determine a reasonable royalty rate.

Figure 12: Trade Secret Aggregate Damages Awarded from 2009 to 2018 Q2

Damages Type	Damage Amount	Cases with Damages Awards
Actual Damages / Lost Profits	$1,331,502,006.03	103
Punitive / Willfulness Damages	$295,344,362.48	47
Reasonable Royalty	$93,165,760.00	7

Trade Secret damages are characterized by their large jury awards. In particular, the award for $919,900,000 in *E. I. du Pont de Nemours and Company v. Kolon Industries, Inc. et al*, is a historically high verdict. This case involved technical and manufacturing information related to Kevlar brand products. The decision was later vacated by the Fourth Circuit Court of Appeal in 2014 based on relevant evidence being excluded from trial.

When looking at Actual Damages / Lost Profits, it is important to note that large awards in a small number of cases do impact this number. For example, the $919,900,000 award discussed above is 69% of the total Actual Damages / Lost Profits damages. Lex Machina subscribers can perform customized searches across these damages awards based on litigation time-frame, courts, judges, custom party groups, and more, in order to pinpoint case outcomes similar to their clients' circumstances.

Figure 13: Top Ten Jury Awards Awarded from 2009 to 2018 Q2

Date	Amount	Damage Types	Against	Case
2011-09-14	$919,900,000.00	Actual Damages / Lost Profits	Kolon Industries, Inc.	E. I. du Pont de Nemours and Company v. Kolon Industries, Inc. et al
2017-05-15	$74,600,000.00	Actual Damages / Lost Profits Punitive / Willfulness Damages	Caterpillar, Inc.	Miller UK Ltd. et al v. Caterpillar, Inc.
2016-05-19	$70,000,000.00	Reasonable Royalty (Trade Secret)	Neovasc Inc. Neovasc Tiara Inc.	CardiAQ Valve Technologies, Inc. v. Neovasc Inc. et al
2015-03-06	$58,783,007.00	Actual Damages / Lost Profits Punitive / Willfulness Damages	Intersil Corporation	Texas Advanced Optoelectronic Solutions, Inc. v. Intersil Corporation
2009-05-21	$30,000,000.00	Actual Damages / Lost Profits	L-3 Communications Corporation L-3 Communications Integrated Systems, LP	Lockheed Martin Corporation v. L-3 Communications Corporation et al
2011-05-20	$26,179,725.00	Actual Damages / Lost Profits	Accenture, LLP	Wellogix, Inc. v. BP America, Inc. et al
2011-10-13	$26,000,000.00	Punitive / Willfulness Damages Reasonable Royalty (Trade Secret)	Archway Technology Services, Inc. Security Mutual Life Insurance Company of New York	Member Services, Inc. et al v. Security Mutual Life Insurance Company of New York et al
2014-03-28	$22,282,000.00	Actual Damages / Lost Profits	Patriot Rail Corp. Patriot Rail LLC	Patriot Rail Corp. v. Sierra Railroad Company
2012-11-16	$22,000,000.00	Actual Damages / Lost Profits	Best Buy Co., Inc. Best Buy Enterprise Services, Inc. Best Buy Purchasing LLC	TechForward, Inc. v. Best Buy Co., Inc.
2014-11-20	$15,000,000.00	Actual Damages / Lost Profits	Software AG Inc Software AG USA Inc	GlobeRanger Corporation v. Software AG et al

DTSA Trade Secret Damages

A small number of cases have damages awards under the DTSA. In five of these cases, damages were awarded on default judgment. While most are mixed lump sum damages or attorneys' fees and costs, in *Solarcity Corporation v. Girma* the court awarded $61,360 actual damages as well as $122,720 trebling damages for willfulness. In two cases, defendants received attorneys' fees and costs for successfully defending trade secret claims.

There have also been two jury awards under the DTSA. In *Steves and Sons, Inc. v. Jeld-Wen, Inc.* a jury awarded $1.2 million each for state and DTSA trade secret misappropriation claims, totally $2.4 million in Trade Secret damages. In *Dalmatia Import Group, Inc. v. Foodmatch Inc. et al.*, the jury awarded $500,000 in damages as one award under both state law and the DTSA.

Data and Methodology

This report presents data from Lex Machina's Legal Analytics platform. Using Machine Learning and in-house legal expertise, raw data is extracted from sources like PACER, EDIS, PTAB, Orange Book, and others, which is then cleaned, tagged, structured, and loaded into our proprietary platform. The charts and graphs in this report are created directly from our platform. This report is prepared by the Lex Machina Product Team and commentary is provided by Lex Machina's legal experts for the respective practice area.

Drawing from a data set of over 9,800 cases, this report analyzes recent trends in trade secret litigation from United States Federal District Courts. Lex Machina collects cases based upon PACER Nature of Suit (NOS) Codes and Cause of Action (CoA) codes, then analyzes each complaint for the presence of one or more of the following causes of action:

- Trade Secret Misappropriation under the Defend Trade Secrets Act
- Trade Secret Misappropriation under any state law
- Taking or Trade Secret Misappropriation at common law

This approach allows Lex Machina to find Trade Secret cases, and filter out cases that do not bring one of the above causes of action, despite the lack of any specific NOS Codes that correspond to trade secret litigation.

Lex Machina supplements and corrects primary data from PACER in a variety of ways, including:

- Correcting errors ranging from spelling mistakes to complex data problems
- Normalizing data on judges, parties, law firms, and attorneys
- Extracting records of law firms and attorneys not found in docket reports
- Tagging and categorizing cases
- Annotating case resolutions, damages, and dispositive rulings

Lex Machina's Trade Secret Litigation data is derived from trial court proceedings before the U.S. Federal District Courts and does not include appeals, or modifications of judgments on appeal, or state court cases.

What is a Trade Secret Case?

A case is included in the Trade Secret Module if the pleadings contain at least one claim for trade secret misappropriation under federal, state, or common law.

How Does Lex Machina Identify Trade Secret Cases from PACER?

Lex Machina actively analyzes complaints filed under many different NOS Codes using automated processes and human review for inclusion in the Trade Secret data set. Several different natural language processing (NLP) tags are utilized to identify both positive matches and candidate cases for human review. Additionally, the PACER Cause of Action Code is used in certain NOS Codes to identify Trade Secret cases.

What Kinds of Data Does Lex Machina's Offer?

Lex Machina maintains a specialized database containing information about litigation in U.S. District Courts, the Delaware Court of Chancery, the U.S. Patent and Trademark Office's Patent Trial and Appeal Board, and the U.S. International Trade Commission. On a daily basis, Lex Machina requests and receives data from the various district courts' PACER systems on new cases and docket entries filed. Lex Machina's automated systems ensure the completeness and consistency of this data, before analyzing it in conjunction with other data sources.

What Case Tags Are Associated with Trade Secret?

Case Tags are added to cases to identify aspects for searching and faceting.

Defend Trade Secrets Act

Trade Secret cases with one or more claims under the federal Defend Trade Secrets Act, 18 U.S.C. § 1836.

What Findings and Remedies are annotated for Trade Secret Cases?

Ownership / Validity
Proof that the trade secret is valid and that the party asserting the trade secret has the right to do so.

Failure to Identify Trade Secret
The Claimant has not disclosed enough information about the trade secret to allow the court to further evaluate legal consequences.

Failure to Maintain Secrecy
The Claimant's actions allowed the trade secret to be publicly disclosed.

Generally Known / Readily Ascertainable
The trade secret itself is publicly known or can be readily discovered through legitimate means.

No Ownership / Validity: Wrong Entity
The alleged trade secret is owned by someone other than the Claimant.

DTSA Trade Secret Misappropriation
Use, disclosure, or acquisition by improper means of a trade secret enforced under the federal Defend Trade Secrets Act.

State Law Trade Secret Misappropriation
Use, disclosure, or acquisition by improper means of a trade secret enforced under state law.

Willfulness / Malicious Behavior
Action taken intentionally, with malice, or in bad faith. The violator had knowledge of or reckless disregard for its illegality.

Independent Development Defense
The trade secret was not used, disclosed, or acquired, because the alleged violator produced the trade secret on its own.

Equitable or Time-barred Defense
The trade secret misappropriation claim is barred because of the Claimant's actions. Either there is some sort of equitable defense involving license, acquiescence, or laches defense, or the Claimant did not file a timely complaint.

What is a Claimant Win vs a Claim Defendant Win?

When a case terminates, a Claimant or Claim Defendant may be categorized as a winner in the case. This assessment is based on the Findings, Remedies, Damages, and/or Defenses, and evaluating which party got the better outcome overall. Some examples of pertinent information include:

• Rulings in a Claimant’s favor, such as State Law Trade Secret Misappropriation, DTSA Trade Secret Misappropriation, Ownership / Validity, or Permanent Injunctions.

• Rulings in Claim Defendant’s favor, such as No State Law Trade Secret Misappropriation, No DTSA Trade Secret Misappropriation, Failure to Identify Trade Secret, Failure to Maintain Secrecy, Generally Known / Readily Ascertainable, No Ownership / Validity: Wrong Entity, or a Defense finding.

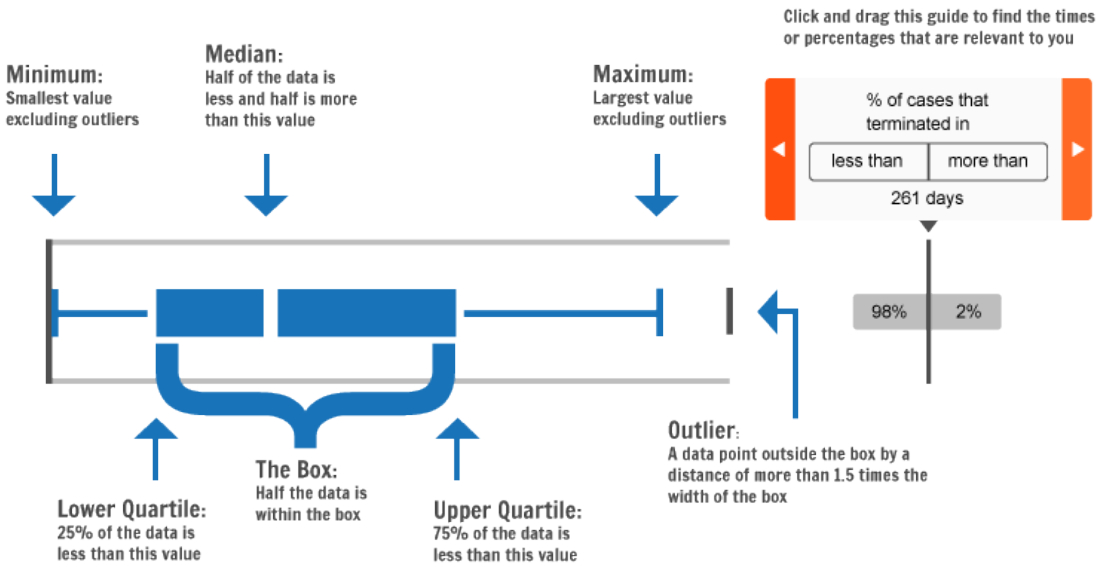
Understanding Boxplots

Lex Machina's analytics use a data visualization known as the boxplot to convey information about the timing of significant events in a case. Knowing how to interpret this data gives you an advantage when it comes to strategy, budgeting, and setting expectations, as well as in other decisions that involve case timing.

Consider a newly filed case: Regardless of whether you're an outside counsel trying to determine how large of a flat fee to charge or trying to make sure two trials don't overlap, or an inside counsel estimating legal spend and evaluating a firm's proposed budget, case timing matters. Knowing the lower and upper bounds of how long it may reasonably take the case to reach injunction can give both counsel a strategic advantage over opponents lacking such nuanced information. Moreover, knowing the best and worst case scenarios for timing, or exactly how likely it is that a case will be active in 6 months enables more far-sighted contingency planning.

A boxplot summarizes a series of data points to help you understand the shape, or distribution of the values in those points. The boxplot is drawn based on five numbers: the median, the upper and lower quartiles, and the whiskers for a distribution.

Figure 14: Paying attention to these key parts of the plot will help you quickly understand what you need to know.



Although boxplots provide a wealth of information, the four observations below, in order from simplest onwards, are all one needs to easily grasp the significance of a boxplot.

Median

•The middle dividing line of the box splits the data points evenly so that 50% fall to either side. It's a form of average that gives a single number representation of what to reasonably expect.

Box bounds

• The box encloses the middle-most 50% of the datapoints (from the 25th percentile to the 75th), with 25% of the datapoints falling outside to either side. This makes the box a good representation of the range one can reasonably expect.

Box compressed or elongated

• A more compressed box means that more datapoints fall into a smaller range of time and therefore are more consistent; in contrast a longer box means that the datapoints are spread out over a wider time period and are therefore less predictable.

Whiskers

• Whiskers are drawn to show the outside bounds of reasonable expectation, beyond which datapoints are considered outliers. By statistical convention, boxplots define outliers as points beyond more than 1.5 times the width of the box (sometimes called the "interquartile range").