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# THE RISE OF TRADE SECRET LITIGATION IN THE AGE OF ARTIFICIAL INTELLIGENCE

April 9, 2025

# AGENDA

1. Recent Trends
2. Using Trade Secrets to Protect AI
3. Available Damages Remedies
4. ITC as an Enforcement Forum
5. Practice Tips



01

RECENT TRENDS

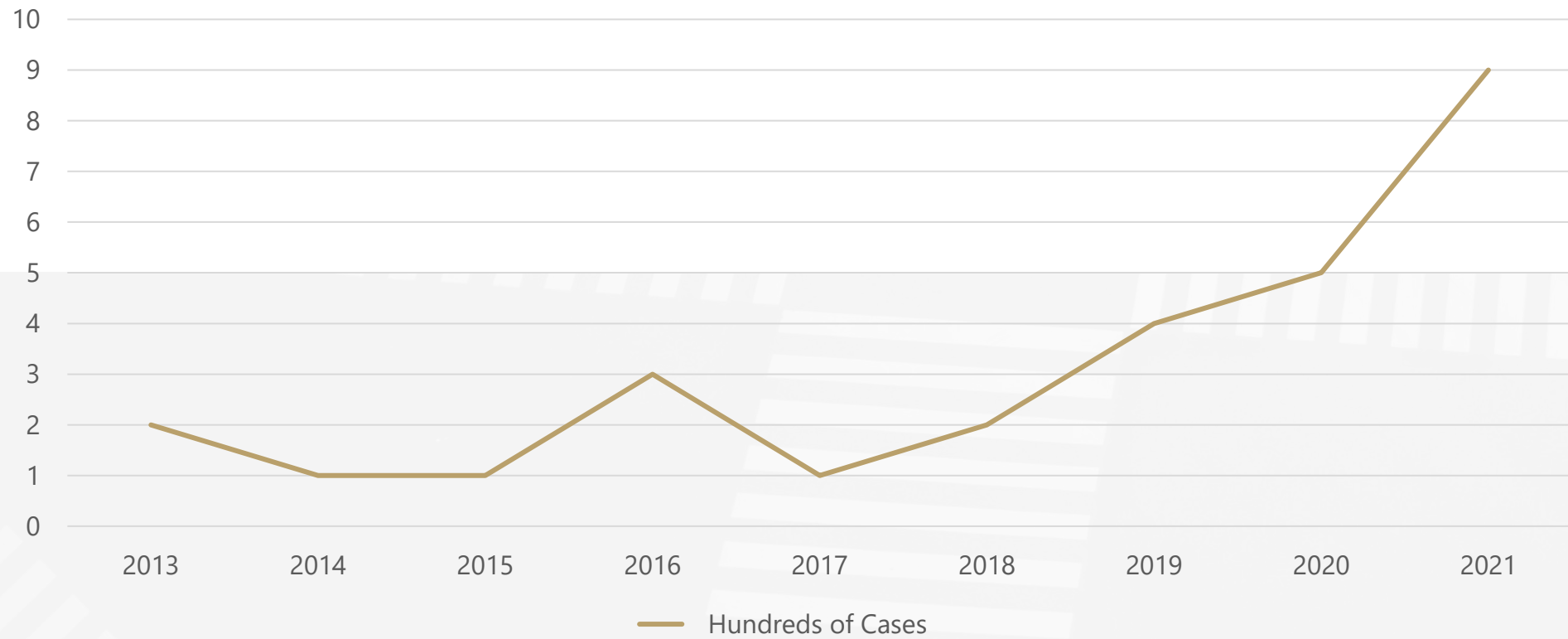


## TRADE SECRET LITIGATION IS ON THE RISE

- The Defend Trade Secrets Act (DTSA) was enacted in 2016.
  - Since the DTSA became law, the number of trade secret cases filed in district court each year has consistently remained above pre-DTSA levels.
  - Within a year of the DTSA enactment, trade secret litigation increased by 25%.
  - While the number of trade secret cases filed in federal court fell briefly during COVID, that number is back on the rise.
  - Last year, over 1,200 cases were filed.
  - At the same time, patent litigation is experiencing the opposite trend.



## ITC HAS ALSO SEEN A SPIKE IN TRADE SECRET CASES



## UNCERTAINTY WITH PATENTS IS FUELING INTEREST IN TRADE SECRETS

- Patent protection in the US has become somewhat unpredictable over the past decade.
  - Supreme Court decisions have made many patents easier to invalidate under 35 U.S.C. §§ 101 and 112.
  - Several Federal Circuit decisions have limited plaintiffs' ability to secure large damages awards.
  - There is uncertainty around whether patents can adequately protect technologies involving artificial intelligence.





## RECORD-BREAKING DAMAGES AWARDS ARE GROWING INTEREST IN TRADE SECRETS

### *Biggest Trade Secret Awards in the Last 5 Years*

- In May 2022, a Virginia state jury awarded **\$2 billion** in *Pegasystems Inc. v. Appian Corp.*
  - Damages verdict overturned in *Pegasystems Inc. v. Appian Corp.*, 81 Va. App. 433, 904 S.E.2d 247 (2024) and remanded.
- In February 2020, an Illinois federal jury awarded **\$764 million** in *Motorola Solutions Inc. et al. v. Hytera Communications Corp. Ltd.*
  - Damages vacated in 7th Cir. appeal in *Motorola Sols., Inc. v. Hytera Commc'ns Corp. Ltd.*, 108 F.4th 458 (7th Cir. 2024), reh'g and reh'g in banc dismissed, No. 22-2370, 2024 WL 4416886 (7th Cir. Oct. 4, 2024).
- In October 2024, a California state jury awarded **\$605 million** in *Proper Fuels Inc. v. Phillips 66 Co.*
- In December 2024, a Massachusetts federal jury awarded **\$452 million** in *Insulet Corp., v. Eoflow Co., Ltd.*
- In December 2021, a Miami federal jury awarded **\$300 million** in *Taxinet Corp. v. Santiago Leon.*
  - Damages vacated in 11th Cir. appeal in *Taxinet Corp. v. Leon*, 114 F.4th 1212 (11th Cir. 2024).

# EXTRATERRITORIAL PROTECTION VIA THE DTSA IS ENCOURAGING INCREASED TRADE SECRET LITIGATION

*Several district courts have recognized that the DTSA provides extraterritorial protection.*

- In *Motorola Solutions, Inc. v. Hytera Communications Corp.*, Motorola filed suit alleging, *inter alia*, that Hytera had misappropriated its trade secrets in violation of the DTSA. No. 1:17-cv-01973 (N.D. Ill.)
  - Hytera argued that the DTSA should not be applied to its sales of infringing products that occurred outside the US.
  - The district court rejected this argument, a finding that was upheld by the Seventh Circuit. *Motorola Sols., Inc. v. Hytera Commc'ns Corp. Ltd.*, 108 F.4th 458 (7th Cir. 2024), *reh'g* and *reh'g in banc dismissed*, No. 22-2370, 2024 WL 4416886 (7th Cir. Oct. 4, 2024).
  - The Supreme Court denied cert on February 24, 2025.
- Other courts have embraced the analysis of the *Motorola* decision. *See, e.g., Inventus Power v. Shenzhen Ace Battery Co.*, No. 20-CV-3375, 2020 WL 3960451, at \*1 (N.D. Ill. July 13, 2020).







# 02

USING TRADE SECRETS TO PROTECT AI



### WHAT IS ARTIFICIAL INTELLIGENCE?

The “ability of computers to emulate human thoughts and perform tasks in real-world environments”

## TYPES OF ARTIFICIAL INTELLIGENCE (AI)

- **Machine Learning (ML)** is a subset of AI that refers to technologies and algorithms that allow a machine to identify patterns, make decisions, and improve based upon experience and data.
- **Deep Learning** is a type of ML based on artificial neural networks in which multiple layers of processing are used to extract progressively higher levels of features from data.
- **Neural Network** is modeled on human brain and uses multiple interconnected nodes and a layered structure.



## THE COMPONENTS OF AI TO CONSIDER PROTECTING

**01**

*Algorithms –*

codes and rules by which the AI operates

**02**

*Model –*

output of the ML algorithm based upon training data that includes the rules, numbers, and other algorithm-specific data structures

Artificial Neural Network – type of AI Model based upon nodes, weights, and biases

**03**

*Datasets –*

Training – data initially used to train the model

Validation – data that helps identify problems with the model

Test – unknown to the model and used to test accuracy of the model

**04**

*Results –*

output of a model



## WHICH AI COMPONENTS CAN TRADE SECRETS PROTECT AND AGAINST WHAT?

- Each component can be protected provided the following are true:
  - The information derives independent economic value from not being generally known;
  - The company takes reasonable efforts to keep the information secret; and
  - In litigation, the component can be described with reasonable particularity
- May offer best method of protection for the components individually
  - Algorithm by itself likely only protectable as a trade secret
  - Unique collection of data probably best protected by trade secrets
  - Structure of model may be best protected by trade secret to avoid publication
- Prevents use of the components by any third party that obtains the information by improper means



## WHY CONSIDER TRADE SECRETS AS A TOOL TO PROTECT AI?

- US courts have rejected the notion that AI may be the sole inventor or creator of a patented invention or copyrighted work.
- Certain aspects of generative AI may face challenges overcoming the patent eligibility, written description, enablement, and novelty hurdles to patentability.
- DTSA does not require a human creator.
  - Ownership is defined by possession—not creation.
  - Parties can allocate of ownership through contractual provisions.
- DTSA also defines a “trade secret” broadly to include all forms and types of information so long as it meets certain requirements.



## DESCRIBING AI COMPONENTS WITH REASONABLE PARTICULARITY

*A trade secret plaintiff must identify the alleged trade secrets with sufficient specificity to inform the defendant of what information is at issue.*

- In *T2 Modus LLC v. Williams-Arowolo*, the court held that it is not enough to “merely describe the end results of or functions performed by the claimed trade secrets” or “merely describe the claimed trade secret in conclusory terms such as ‘artificial intelligence,’ ‘machine learning,’ or ‘proprietary software without additional specific information.” No. 4:22-CV-00263, 2023 WL 6221429, at \*5 (E.D. Tex. Sept. 25, 2023); *Yammine v. Toolbox For HR*, 21-cv-00093, 2023 WL 6259412, at \*6 (D. Az. Aug. 8, 2023).
- In collaboration or licensing scenarios, consider using contractual provisions to define technology that is the trade secret.



## BLACK BOX NATURE OF AI PRESENTS DIFFICULTY IN SHOWING MISAPPROPRIATION

*When competitor's algorithms are used to train AI algorithm, structure of model may be difficult to understand*

1. Need to establish a basis to assert a misappropriation of trade secrets.
2. Important to establish access to the AI trade secrets while balancing the need to show that the company has taken necessary steps to protect the AI trade secrets.



## REASONABLE MEASURES TO PROTECT AI COMPONENTS

- A trade secret plaintiff must establish that the owner has taken reasonable measures to keep such information secret.
  - Reasonable measures typically include nondisclosure and confidentiality agreements, employee trainings, security restrictions, and exit interviews.
  - What is reasonable will depend on the particular circumstances, including the company's size, sophistication, and industry.
  - Given that both AI and companies' use of it is rapidly evolving, generic practices adopted by a company before its use of AI may be insufficient. Companies should develop measures that identify what aspects of AI a company believes are confidential.
    - If AI can access password protected and encrypted databases, would those protective measures suffice?



# IMPORTANT TO CONTROL DATA USED FOR TRAINING AND INFERENCE WITH AI MODEL

Use Of External Data To Train	Use Of Internal Data To Train Model May Expose Data	Use Of Internal Data In AI Model Without Restrictions May Present Issues
<ul style="list-style-type: none"><li>• Consider third-party rights.</li><li>• Trade secret protection may arise with unique combination of public information.<ul style="list-style-type: none"><li>– Challenge may arise to whether output would be readily ascertainable to others using the AI model.</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Responses to prompts may provide confidential information</li><li>• Important to control access to AI model</li></ul>	<ul style="list-style-type: none"><li>• Company confidential data in prompts can be incorporated into AI model</li><li>• The potential for subsequent users to benefit from data may support lack of reasonable measures argument</li></ul>



## POTENTIAL LIABILITY FOR ACCESSING AND USING DATA FROM ANOTHER MODEL

- Allegations that Deepseek queried competitor AI models to obtain responses used to train its models.
- Compilations of data may meet the definition of trade secret – has independent economic value by not generally known.
  - A compilation of public data may also be a trade secret under the 9th Cir. case *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012).
- Using computer “scraping” techniques to harvest substantial amounts of data from a data compilation could be found to be use of “improper means.”
  - *Compulife Software, Inc. v. Newman*, 111 F.4<sup>th</sup> 1147 (11<sup>th</sup> Cir)
    - Affirmed finding of trade secret misappropriation where a competitor used “scraping” to obtain millions of insurances quotes from a proprietary database and used the data compete.
    - Does it matter that AI applications are meant to disclose large amounts of information?
  - *See also, UAB “Planned5D” v. Facebook, Inc.*, 2020 WL 4290733, \*7 (N.D.Ca. July 24, 2020)





## IMPROPER MEANS – VIOLATION OF TERMS OF USE AND “PROMPT INJECTION”

- OpenEvidence Inc. alleges that Pathway Medical improperly obtained trade secrets through submitting dozens of “prompt injection” attacks.
  - “Prompt injection” can cause an AI system to provide proprietary information like the system prompts that govern how the AI operates.
- Asserts that Pathway Medical violated various terms of use, e.g., misrepresentation of user data, showing malicious intent
- Points to consider:
  - Do reasonable measures to protect exist if a dozen carefully worded prompts can cause AI system to divulge proprietary information?
  - Will the fact that OpenEvidence was able to detect the malicious activity and sought to stop the activity suffice to show that it implemented reasonable measures to protect?
  - Importance of the ability to raise multiple allegations—*theft of trade secrets, breach of contract, unfair competition, copyright violations.*

# ECONOMIC VALUE OF AI COMPONENTS

*A trade secret plaintiff must establish that the alleged trade secret has value because it is unknown to others.*

## ONE

This means that publicly disclosed outputs will necessarily prevent trade secret protection from applying to the output themselves.

## TWO

Care must be taken when using open-source code.

## THREE

Plaintiff also needs to be able to isolate the economic value that results from each asserted trade secret.



**SHOULD A COMPANY  
RELY UPON TRADE  
SECRETS OVER  
PATENTS?**

**P R O S**

---

**C O N S**

SHOULD A COMPANY  
RELY UPON TRADE  
SECRETS OVER  
PATENTS?

P R O S

---

C O N S

1. Trade secret avoids the barriers of patent protection
2. Trade secrecy immediacy helpful in rapidly developing technology
3. Unlimited term provided secrecy remains

SHOULD A COMPANY  
RELY UPON TRADE  
SECRETS OVER  
PATENTS?

P R O S

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C O N S

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1. Do not provide a monopoly against all competitors
2. Independent development and reverse engineering defenses
3. May be difficult to detect trade secret misappropriation





# 03

## AVAILABLE DAMAGES REMEDIES

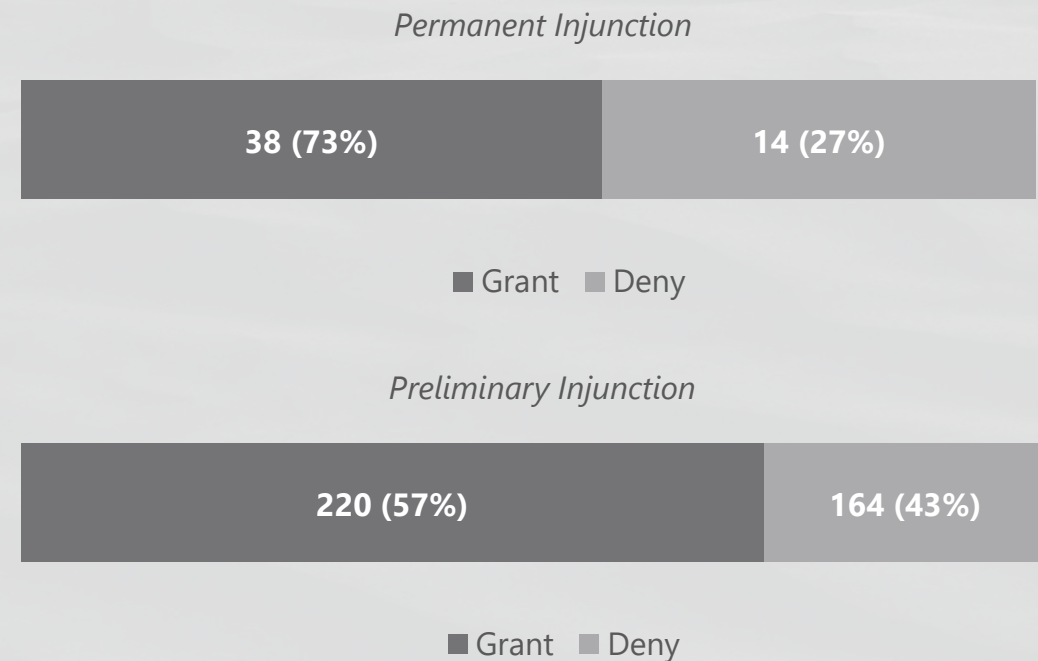
## AVAILABLE REMEDIES: INJUNCTION

*The typical remedy for trade secret misappropriation is an injunction.*

The court will order the wrongdoer to cease use, disclosure, or publication of the secret information.

To obtain an injunction, the plaintiff must show that the information was a protectable trade secret, that the defendant acquired it improperly, and that plaintiff will suffer irreparable harm without an injunction.

## TRADE SECRETS TERMINATED FROM 2021 TO 2023



## AVAILABLE REMEDIES: MONEY DAMAGES

*While the availability of damages will differ depending on whether the case is in federal or state court, there are generally three monetary remedies:*

**01**

### ACTUAL LOSSES

Lost profits, price erosion, increased costs incurred, and destruction of business value as a result of the misappropriation

**02**

### UNJUST ENRICHMENT

Sales gained by defendant due to misappropriation, avoided research and development costs, and the benefit of a head start

**03**

### REASONABLE ROYALTY

Requires the defendant to pay the amount it would have been paid had it fairly bargained for a license to use plaintiff's trade secret





## INTERPLAY OF MONEY DAMAGES AVAILABLE

- The DTSA does not displace any remedies available to plaintiffs under state law for trade secret misappropriation.
- States vary in the measures of money damages available:
  - CA, IN, GA, and IL allow reasonable royalty damages when the plaintiff's actual damages and defendant's unjust enrichment are unable to be proven.
  - VA allows reasonable royalty damages only if a plaintiff is unable to prove a greater amount of damages by other methods of measurement.
  - NY does not allow as damages remedies the defendant's avoided development costs or any other gain by the defendant that is not used as a proxy for the plaintiff's actual loss.

## MONEY DAMAGES: IMPORTANCE OF APPORTIONMENT

- In a trade secret case, the plaintiff is required to prove the amount of its damages with reasonable certainty and that this amount has been caused by the misappropriation.
- As a result, the trade secret owner should be prepared to explain how its claimed or awarded damages are sufficiently apportioned to the trade secrets alleged or found to have been misappropriated.
- A recent case shows the importance of apportioning the economic contribution of the stolen trade secrets from non-protected product features.
  - In *Versata v. Ford Motor Co.*, No. 15-cv-10628, 2023 WL 3175427 (E.D. Mich. May 1, 2023), a jury returned a verdict that three of the four asserted trade secrets had been misappropriated and awarded \$22 million in damages.
  - Because the trade secret owner presented a damages claim based on the misappropriation of all four alleged trade secrets, the district court struck the damages award for lack of sufficient apportionment.





## AVAILABLE REMEDIES: PUNITIVE DAMAGES

- Under both the Uniform Trade Secrets Act (UTSA) and DTSA, exemplary damages can be awarded in the case of “willful and malicious misappropriation,” but may not exceed two times the award of damages.
- The majority of states has adopted this standard and the maximum cap of not more than twice the amount of damages.
- During the period from 2021 to 2023, courts awarded punitive damages in nearly 10% of the cases where any form of damages was awarded. The average punitive damages award during this time period was almost \$20 million.



## AVAILABLE REMEDIES: ATTORNEY'S FEES

The UTSA and DTSA create an exception to “the American Rule” by providing for the award of attorneys’ fees to the prevailing party in a trade secret misappropriation case, where there is a showing of bad faith or willful and malicious misappropriation.

*One of the objectives of the attorneys’ fees provision is to serve as a deterrent to specious claims.*

*Thus, attorneys’ fees may be awarded to the prevailing party, whether it’s the plaintiff or the defendant.*

*During the period from 2021 to 2023, courts awarded attorneys’ fees in nearly 53% of the cases where any form of damages was awarded.*



# 04

ITC AS AN ENFORCEMENT FORUM

## TRADE SECRET PROTECTION AT ITC

In a trade secret investigation at the ITC, a complainant must prove that:

1. There is an imported product;
2. The importation or sale of the product arises from an unfair act or method of competition (e.g., trade secret misappropriation);
3. There exists a US industry that would be destroyed, substantially injured, or prevented from forming as a result of the unfair act; and
4. Specific injury (or threat thereof) to the domestic industry.



## BENEFITS OF LITIGATING AT ITC: WORLDWIDE JURISDICTION

*The ITC can investigate claims of trade secret misappropriation occurring anywhere in the world, provided the trade secret relates to a physical product imported into the US.*

- A complainant does not need to prove that there is personal jurisdiction over respondents, as the Commission only needs in rem jurisdiction over the accused products to exclude imported goods.
- More than 80% of Section 337 trade secret misappropriation claims since 2011 have concerned conduct in Asia-Pacific, including Taiwan.

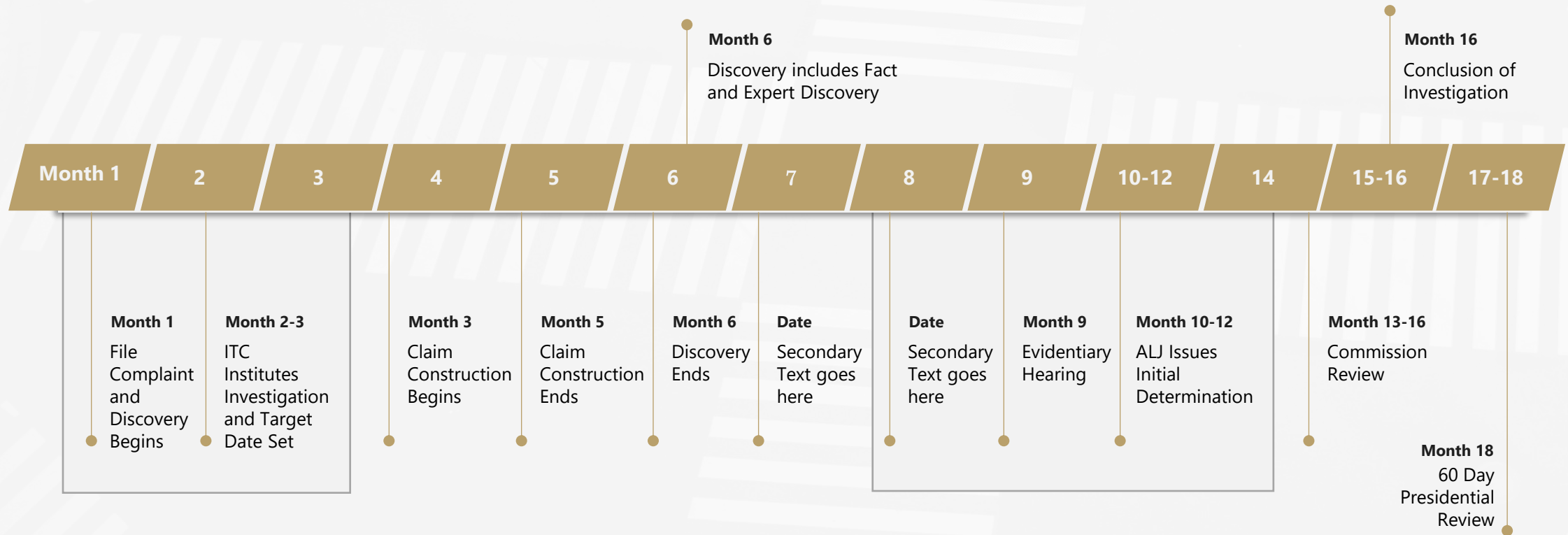


## BENEFITS OF LITIGATING AT ITC: SPEED TO TRIAL

*The ITC has a compressed procedural schedule.*

- By statute, Section 337 investigations must conclude at the earliest practicable time.
- From 2018 to 2022, the average time from commencement of an investigation to final determination by the ITC on the merits was 17.6 months, which includes an approximate six-month delay due to COVID-19
- Trade secret cases have tended to take about three months longer to resolve on the merits.
- In comparison, the average time to verdict for a trade secret case in a district court was about 27.8 months over the same time period.

# ITC TIMELINE







## BENEFITS OF LITIGATING AT ITC: MANDATORY INJUNCTION

- If the ITC finds that a respondent has violated Section 337, it will issue an order excluding the violating products from entering the US, unless it finds that the public interest weighs against exclusion, which is exceedingly rare.
  - The duration of the exclusionary period is highly fact-dependent, because it corresponds to the time it would have taken to independently develop the trade secrets.
  - Exclusionary periods have ranged from one month to 26 years.



## THE INJURY REQUIREMENT

- Section 337 requires a complainant to satisfy a unique and often complicated element of proof: that the respondent's misappropriation has the threat of effect of destroying, substantially injuring, or preventing the establishment of an industry in the US.
  - This “injury requirement” is intended to protect US companies, universities, and inventors from unfair foreign competition.
  - To satisfy the injury requirement, a complainant must define a domestic injury and show that the misappropriation has caused, or will cause, substantial injury to it.
  - The ITC will closely scrutinize the injury claim and, if the complainant fails to satisfy this element of proof, will find no violation in the investigation.



05

PRACTICE TIPS



## USING TRADE SECRETS TO PROTECT AI - TAKEAWAYS

- Develop an IP strategy that appreciates trade secrets may offer benefits over statutory IP
- Coordinate with technical employees to identify components of AI that offer value and cannot easily be reverse engineered
- Defining the trade secret – importance of understanding the court’s requirement related to defining the trade secret
  - Selecting forum could impact the level of disclosure and the potential for defendant to limit discovery or dismiss the case at the outset
- Developing a story related to improper means aligned with recent case development



## AVAILABLE DAMAGES REMEDIES - TAKEAWAYS

- Engage damages expert early.
- If bringing state claims along with DTSA claims, develop an understanding of the remedies that are available under state law and the requirements for proving them.
- Consider whether it is appropriate to seek damages for sales of infringing products that occurred outside the U.S.
- When asserting misappropriation of multiple trade secrets, it is important to apportion the economic value of each trade secret.
- If seeking exemplary damages, it is vital to develop evidence to support an allegation that misappropriation was willful and malicious.

## ITC AS AN ENFORCEMENT FORUM - TAKEAWAYS

- Rules of evidence are relaxed, so avoid getting bogged down in rules of evidence at hearing
- Plan out what key documents need to be introduced at trial because every document needs to be sponsored through testimony
- Time limits are strictly enforced so don't waste time on side issues
- Make sure to ensure time for rebuttal at trial



## OUR TEAM



PARTNER  
INTELLECTUAL PROPERTY

**BRIAN W. NOLAN**

NEW YORK +1 212 506 2517  
BNOLAN@MAYERBROWN.COM



PARTNER  
INTELLECTUAL PROPERTY

**MANUEL J. VELEZ**

NEW YORK +1 212 506 2296  
MVELEZ@MAYERBROWN.COM



PARTNER  
INTELLECTUAL PROPERTY

**KAITLYN M. HUNT**

NEW YORK +1 212 506 2582  
KHUNT@MAYERBROWN.COM



PARTNER  
INTELLECTUAL PROPERTY

**BRIAN W. NOLAN**

NEW YORK +1 212 506 2517  
[BNOLAN@MAYERBROWN.COM](mailto:BNOLAN@MAYERBROWN.COM)

Brian W. Nolan helps clients to achieve successful outcomes in intellectual property litigation, licensing, counseling, and due diligence in patent, trade secret, unfair competition, antitrust, trademark, counterfeit goods, and copyright law. Brian has handled matters related to technologies, from life sciences to high tech to consumer goods. Chambers quotes clients saying that "he understands a client's needs and applies it to the business issue at hand very effectively." LMG Life Sciences recognized Brian as a "Life Sciences Star," and according to IAM 1000, "Brian takes a very pragmatic approach and completely understands the business side of things; he has also committed to memory all the case precedents for the most frequently litigated pharmaceutical patent issues. Brian is recognized by clients as being highly responsive and is highly effective at managing projects within budget constraints." Clients are impressed by Brian's "ability to cross over seamlessly into other fields such as semiconductors and information technology."



PARTNER  
INTELLECTUAL PROPERTY

**MANUEL J. VELEZ**

NEW YORK +1 212 506 2296  
[MVELEZ@MAYERBROWN.COM](mailto:MVELEZ@MAYERBROWN.COM)

Manuel Velez serves clients on patent infringement litigations and PTAB proceedings regarding pharmaceuticals, biotechnology, and medical devices. His experience runs the full gamut, from conducting pre-case assessments to managing litigations for innovator companies in high-stakes cases in federal courts. Manuel has been a member of trial teams that obtained favorable trial decisions and settlements for branded pharmaceutical clients in Hatch-Waxman and BPCIA litigations. He performs due diligence in connection with M&A transactions, including providing freedom-to-operate opinions.





ASSOCIATE  
INTELLECTUAL PROPERTY

**KAITLYN M. HUNT**

NEW YORK +1 212 506 2582  
[KHUNT@MAYERBROWN.COM](mailto:KHUNT@MAYERBROWN.COM)

Kaitlyn Hunt is a senior associate in the Intellectual Property group of Mayer Brown's New York office. Her practice focuses on litigating complex trademark, trade dress, and trade secret disputes in courts and arbitration tribunals across the country, as well as before the United States International Trade Commission (ITC). Kaitlyn is a trial attorney whom clients turn to for assistance with all phases of litigation, including fact discovery, taking and defending depositions, drafting dispositive motions, coordinating with expert witnesses, preparing witnesses for trial, and conducting cross-examinations of witnesses in court. Kaitlyn has represented clients across a wide range of industries, including food and beverage, technology, and entertainment. Prior to joining Mayer Brown's Intellectual Property group, Kaitlyn practiced in Mayer Brown's Litigation and Dispute Resolution group, where she maintained a broad litigation practice and dedicated significant time to federal securities litigation, shareholder derivative litigation, and other complex matters.



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