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CORNERSTONE RESEARCH

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HOT TOPIC

ASSESSING DAMAGES IN TRADE SECRET LITIGATION

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Sikellis: How have recent developments reshaped the key trends in assessing damages in trade secret litigation?

Vigil: Three developments in the US stand out. First, judicial scrutiny of large awards has intensified. Several major awards, including nine and 10 figure verdicts, have been reversed, vacated or reduced because of defects involving causation, apportionment and evidentiary support. Second, the Seventh Circuit's *Motorola* decision held that the Defend Trade Secrets Act (DTSA) can reach foreign sales when section 1837 is satisfied, including through an act in furtherance in the US, provided the claimed foreign damages were caused by the misappropriation. Third, there is a circuit split between the Fifth and Second Circuits over whether a plaintiff can recover a defendant's avoided research and development (R&D) costs as unjust enrichment without separately proving corresponding compensable harm beyond that captured by actual-loss damages. In practice, experts are building tighter causation, apportionment, evidentiary support and remedy design into damages models, extending remedies analysis globally where justified, and framing unjust-enrichment theories consistently with emerging case law.

Irwin: Two recent trends come to mind that affect how economic damages are assessed in trade secret litigation. First, while plaintiffs are understandably reluctant to disclose details about their asserted trade secrets, courts have required them to define and describe those secrets with more specificity, including categorising trade secrets if appropriate. Second, judges and magistrates are increasingly aware of the need to apportion the incremental value of any misappropriated trade secrets. Courts and juries frequently find that certain asserted trade secrets do not meet the legal definition or that misappropriation did not occur. The trier of fact needs a reasonable basis to determine damages. If an expert's opinion is only presented in the aggregate – such as treating all the asserted trade secrets as a 'bundle' – then the verdict can be challenged and, in some cases, overturned.

McSorley: Recent legal developments have significantly heightened precision and rigour in trade secret damages assessments. Under the DTSA and parallel state Uniform Trade Secrets Act (UTSA) statutes, courts now strictly enforce apportionment requirements borrowed from patent law. For example, appellate decisions like *Motorola Solutions v. Hytera Communications* (2024) affirm that plaintiffs are entitled to calculate dual damages paths – unjust enrichment versus total lost profits – and receive whichever measure produces the greater recovery.

Meanwhile, courts have tightened proximate causation standards for disgorgement, refined the head start doctrine to limit recovery windows, and subjected expert valuation methodologies to aggressive Daubert scrutiny. These trends require businesses to adopt granular, secret by secret financial modelling early in litigation.

Serwin: One key development is the ongoing change in the human capital market toward greater employment mobility. The weakening of noncompete agreements and the elimination of anti-poaching agreements have increased the mobility of valuable human capital. This shift is especially impactful in high technology and software, where the pace and value of innovation are increasing, including in artificial intelligence (AI). Increasingly, therefore, damages in employee mobility matters are less often based on the value of relationships or confidential business information, which are more traditional measures of damages in such matters, and more often based on the value of a company's underlying technology.

Sikellis: In what circumstances can a defendant's avoided development costs be recovered as unjust enrichment?

Irwin: Depending on the facts of the case, avoided development costs can be an appropriate measure of a defendant's unjust enrichment. To assess the reasonableness of this approach, it is important to understand the process by which the plaintiff developed the trade secrets. Was it labour-intensive? Did the plaintiff invest in R&D by employing engineers or other skilled professionals to develop the trade secrets? Did they retain a third party to assist in the development? In addition, analysis should consider the efforts and expense the defendant incurred to ultimately benefit from the trade secrets. Significant effort and expense by a defendant, even assuming misappropriation, can indicate that the defendant did not necessarily avoid all of the plaintiff's costs. Ultimately, the plaintiff's business records are key to estimating with reasonable certainty the amount invested in developing the asserted trade secrets.

McSorley: A defendant's avoided R&D costs can be recovered as unjust enrichment when misappropriation allows the defendant to skip costly development phases, provided the recovery avoids double counting actual losses. Recoverability varies significantly by jurisdiction. Under the Fifth Circuit's framework, avoided costs are readily recoverable based solely on the windfall benefit realised by the defendant. Conversely, the Second Circuit and Seventh Circuit require proof that the plaintiff suffered actual commercial harm or lost competitive advantage beyond simple intellectual property

(IP) acquisition, holding that disgorging saved R&D without actual injury yields an impermissible punitive windfall. Furthermore, New York state common law categorically rejects avoided-cost recovery. To recover avoided costs, commercial litigants must demonstrate proximate causation, establish proper temporal limits via the head start doctrine and carefully apportion saved costs directly to the misappropriated secrets.

Serwin: A defendant's avoided development costs can generally be recovered as a basis for the defendant's unjust enrichment. Such avoided costs can accompany sales and profits achieved by the defendant from the 'head start' afforded by the theft of trade secrets, or they may be claimed independent of any defendant sales, particularly when the theft of trade secrets failed to generate defendant profits. Avoided costs can be an economically reasonable basis for trade secret damages, but basing such avoided costs on plaintiff development costs may result in overly inclusive accounting of defendant's avoided costs. It is important that a clear nexus be established between the costs avoided by the defendant and the plaintiff's development costs to ensure that this remedy is not a windfall for the plaintiff.

Vigil: In some cases, avoided development costs may be recovered as unjust enrichment when misappropriation allowed a defendant to bypass identifiable R&D expenditures it otherwise would have incurred. If the defendant avoided $1m in development costs, a payment in damages of that amount may return it to the financial position it would have occupied absent the misappropriation. The plaintiff must still establish causation and reliably quantify the development expenditures the defendant would have incurred absent misappropriation. A limited circuit split has emerged. The Fifth Circuit focuses on the defendant's benefit and does not require separate proof of a quantifiable injury to the trade secret owner. The Second Circuit's more restrictive, fact-specific approach looks for corresponding compensable harm to the plaintiff. Separately, courts have also examined whether an avoided-cost award overlaps with actual-loss damages or injunctive relief. Recoverability may therefore depend on the governing circuit and overall remedial framework.

Sikellis: To what extent does the Defend Trade Secrets Act allow recovery for misappropriation-related sales outside the US, and how should this be reflected in damages models?

McSorley: The DTSA provides robust extraterritorial reach under 18 US Code section 1837, allowing plaintiffs to recover damages for worldwide

sales resulting from trade secret misappropriation. To unlock extraterritorial recovery, a plaintiff must establish statutory nexus by demonstrating either that the offender is a US citizen, resident or entity, or that an act in furtherance of the misappropriation occurred within the US. As affirmed in *Motorola Solutions v. Hytera Communications* (2024) and *dmarcian v. DMARC Advisor* (2026), once this domestic act nexus is proven, global sales caused by the misappropriation are fully recoverable. In contrast, state UTSA statutes lack express extraterritorial provisions and cannot reach foreign conduct. Corporate damages models must incorporate worldwide revenue streams, isolate foreign sales linked causally to domestic misconduct and adjust for foreign market economic dynamics to survive judicial scrutiny.

Vigil: The DTSA does allow for damages recovery associated with non-US sales, but it does not create automatic worldwide recovery. Section 1837 applies when the offender is a US citizen, permanent resident or US-organised entity, or when an act in furtherance of the offence occurred in the US. In *Motorola,* the Seventh Circuit held that section 1837 applies to the DTSA's private cause of action and affirmed recovery based on profits from worldwide sales after finding that Hytera, the defendant, marketed products incorporating the misappropriated secrets at US trade shows as part of the broader misappropriation. The qualifying domestic act need not itself cause the foreign sales, but section 1836 separately requires that the claimed foreign profits be caused by the overall misappropriation.

Serwin: To the extent that a plaintiff seeks to recover damages on a defendant's worldwide sales, the damages model needs to establish how the misappropriation in the US is economically connected to those foreign sales. For example, the damages model might seek to establish how marketing at a trade show in the US directly generated the sales leads that resulted in subsequent sales in Europe or Asia. Given the limited jurisprudence on this issue to date, the damages model should seek to establish a rigorous nexus between the domestic act and the foreign sales. If damages from sales outside the US are sought, the damages model should also correct for relevant economic differences between US and non-US sales, such as differences in currencies or profit margins across countries.

Irwin: Setting aside the legal aspect, analysis should measure the extent of the plaintiff's harm and the defendant's benefit from using the trade secrets, both in the US and abroad. Companies typically maintain business and financial records separately for the US entity and any international

affiliates. Drawing on reliable information and, where necessary, reasonable assumptions, an expert can estimate damages by country. A breakdown by geographic region allows the judge and the jury the option to determine an award without speculating about how to divide damages between US and international operations.

Sikellis: To what extent have generative AI tools been subject to trade secret claims?

Serwin: While many cases have made headlines recently, trade secret claims involving generative AI (genAI) tools have only just begun. The use of trade secrets to protect IP is likely to grow rapidly with the growth of generative and other forms of AI. Improper exfiltration of trade secrets through employee mobility has been, and will likely continue to be, central to how these matters are litigated in the future. I would also expect these matters to continue to grow as AI labour markets seek to fill overwhelming demand and firms seek to protect their IP in what are often viewed as 'winner take all' competitions.

Irwin: In the world of AI model development, secrecy is the primary source of IP protection. Model developers are racing one another to achieve artificial general intelligence, using know-how developed in house. For these companies, patent protection that requires disclosure, and generally does not cover valuable information such as modelling, is not an option. Trade secret litigation among model developers has surged recently, with cases filed just this year involving Google, Meta and OpenAI, involving claims of stolen algorithms and chip architectures.

"Under the DTSA and parallel state Uniform Trade Secrets Act statutes, courts now strictly enforce apportionment requirements borrowed from patent law."

Robert McSorley, Ocean Tomo

Vigil: We are still in the early stages, but the trajectory is clear. AI-related trade secret filings have increased significantly in 2025, signalling that this area is rapidly developing. Recent complaints have asserted trade secrets in system prompts, model architectures or technical parameters, training data,

fine-tuning methods, source code and related know-how. While courts are beginning to address these claims, published decisions have not yet established settled standards for protecting or valuing particular AI assets. For damages, the core challenge remains quantification: AI systems derive value from the interaction of multiple components, which can make it difficult to isolate the marginal value of any single misappropriated element. We expect to see AI-specific refinements to established valuation methodologies over the next several years.

McSorley: GenAI tools have become a central front in trade secret litigation, primarily falling into two categories: AI developers protecting proprietary model architecture, source code and training workflows against departing talent, and third parties alleging their confidential data was improperly scraped or ingested into AI training sets. In high-profile cases like *x.AI Corp. v. OpenAI* (2026), courts apply established DTSA frameworks rather than AI-specific legal doctrines. Key evidentiary hurdles involve proving that proprietary algorithms derive independent economic value from secrecy, demonstrating reasonable security measures amid collaborative research, and establishing actual derivation or use within complex, multilayered neural networks. Courts rigorously scrutinise claims of irreparable harm given rapid industry evolution. For enterprise AI deployments, businesses must enforce strict access controls, track data provenance and maintain comprehensive audit trails for algorithms, weights and training datasets to successfully prosecute or defend AI trade secret disputes.

> **"Trade secret litigation among model developers has surged recently, with cases filed just this year involving Google, Meta and OpenAI, involving claims of stolen algorithms and chip architectures."**
>
> *Carlyn Irwin, Cornerstone Research*

Sikellis: Where an injunction is granted, how should courts approach awarding damages without creating double recovery?

Irwin: Assuming the defendant complies with the terms of the injunction, an assessment of the defendant's profits associated with the asserted trade secrets should, in theory, already account

for the injunction's impact. In other words, the defendant's actual financial performance should not reflect any economic gain associated with the use of the trade secrets that are subject to an injunction. Excluding that gain avoids double-counting. In some cases, however, an injunction is awarded for the use of one type of asserted trade secret, like a customer list, but not for other types, like a pricing list. Modelling the but-for world in these cases requires attention to the timing of the injunction, its effect on the defendant's actual financial performance and the incremental contribution of the trade secrets left outside the injunction.

Vigil: Our advice is to build the overlap analysis into the model from the outset rather than leave it for post-trial motions. The model should identify, by remedy and time period, which amounts address completed losses or unjust benefits already realised and which depend on continued future use that an injunction would prevent. Temporal separation is useful, but it is not always sufficient: an avoided-cost award may reflect past use yet still overlap with an injunction if the award's counterfactual assumes the defendant retains access to a product or capability that the injunction prohibits. Courts may address that overlap by reducing damages, narrowing the injunction or requiring an election between overlapping remedies. A damages model could therefore provide alternative calculations corresponding to different injunction scopes, enabling the court to award both monetary and injunctive relief where they address distinct economic consequences without double counting.

McSorley: When granting injunctive relief, courts prevent double recovery by establishing strict temporal and operational boundaries between prospective equitable remedies and retroactive monetary damages. Under the DTSA and state UTSA framework, compensatory measures of recovery – whether actual lost profits or unjust enrichment – are confined to pre-injunction past harm. Once a permanent injunction takes effect, it halts ongoing commercialisation, neutralising future unjust enrichment and preventing future lost sales. Courts are split on avoided R&D costs. While the Third, Fifth and Seventh Circuits permit recovering avoided development costs alongside permanent injunctions because R&D savings occur at inception, the Second Circuit restricts avoided cost disgorgement when full injunctive relief eliminates future commercial injury. Furthermore, courts apply the head start doctrine to cap both damages durations and injunction lengths to the time a competitor would have needed for lawful independent development, ensuring the plaintiff is made whole without enjoying an anti-competitive windfall.

Serwin: Double recovery in injunction circumstances is unlikely to be a concern where the damages award is based on past plaintiff lost profits or unjust enrichment based on actual past defendant sales and profits. An unjust enrichment award based on avoided development costs, however, is more susceptible to potential double recovery with an injunction. Damages based on development costs may imply the defendant received something akin to a fully paid-up licence in the but-for world. This is not compatible with additional remedies such as an injunction because economically it may imply double recovery. In situations where an injunction is at issue, courts should consider limiting damages to a running royalty instead of unjust enrichment based on full avoided costs or requiring that avoided costs be apportioned to account for the defendant's injunction-constrained use of the trade secrets.

Sikellis: How important is apportionment in trade secret damages, and what methods are proving most effective in practice?

Serwin: Apportionment is very important in trade secret damages to ensure that damages are limited to only the value contributed by the trade secrets. Apportionment among a multiplicity of claimed trade secrets should be considered to avoid the exclusion of a damages analysis if liability is found for some, but not all, trade secrets. Additionally, apportionment of the defendant's profits between the trade secrets at issue and other economically relevant drivers of the defendant's sales and profits should always be evaluated. There is no 'one size fits all' approach to apportionment. Instead, apportionment should be approached with three key factors in mind. First, apportionment should be inexorably tied to the facts of the matter and the parties. Second, apportionment should be based on quantifiable metrics, such as feature-level contribution and technical or economic contribution of the trade secrets. Third, any apportionment should pass an economic 'smell test'.

McSorley: Apportionment is a threshold requirement in trade secret damages litigation, ensuring that monetary recovery is strictly tied to the incremental value of the misappropriated trade secrets rather than the defendant's non-accused products or entire business. Applying patent law principles by analogy, courts routinely vacate non-apportioned jury awards and exclude non-apportioned expert testimony under Daubert, as highlighted in *Trinseo Europe v. Kellogg Brown & Root* (2026). Effective apportionment methods in practice include per-trade-secret or per-category reasonable royalty breakdowns, incremental profit isolation assessing feature-level market demand, cost-based development savings disaggregation

and head start modelling that limits damages to the precise timeframe saved by avoiding independent development.

Vigil: Apportionment is critical in trade secret damages, as in any IP case, particularly when multiple trade secrets or a multi-feature product are at issue. A damages analysis should tie the claimed award to the value contributed by the trade secrets found to be misappropriated and, where other value drivers are present, separate that value from non-secret technology, brand, marketing and other contributions. There is no 'one size fits all' method. Depending on the facts, experts may use incremental cost or profit analysis, regression or survey evidence, and appropriately adjusted comparable licences, supported by technical and contemporaneous business evidence. Where multiple secrets are asserted, experts may value them individually, place interdependent secrets into supported groups, or provide a methodology that permits the factfinder to calculate damages for any combination found misappropriated. The key is a transparent causal link between each damages component and the proven misappropriation.

Irwin: There are two types of apportionment in calculating trade secret damages. The first is to estimate damages associated with each trade secret, or with combinations thereof. The second isolates the incremental value of the trade secrets from other value-drivers, such as brand recognition or an in-place workforce, that generate economic value independent of the trade secrets. To account for the first type, a model flexible enough to include or exclude revenue associated with individual trade secrets, or combinations of them, gives the trier of fact the ability to determine an award that is consistent with their liability finding. For the second type, various comparisons of profitability or demand for a product or service, with and without the use of the trade secrets, can indicate the incremental value of the trade secret.

> **"Apportionment is very important in trade secret damages to ensure that damages are limited to only the value contributed by the trade secrets."**
>
> *Kenneth Serwin, Ankura*

Sikellis: When are reasonable royalty damages the most appropriate form of recovery in trade secret cases?

Vigil: Reasonable royalty damages typically are most appropriate when unauthorised use or disclosure is proven but actual loss and unjust enrichment cannot be measured reliably. Examples include pre-commercial use, disclosure without identifiable downstream sales, internal use that saved time but cannot be reconstructed with confidence, markets where many factors make lost profits too speculative, or cases where the parties are not direct competitors. Where available under the governing law, reasonable royalties can serve as more than a fallback measure. In some cases, a properly supported royalty may exceed measurable lost profits or unjust enrichment, particularly where a hypothetical negotiation at the time of misappropriation would have reflected substantial expected value not yet realised in the market. This can make reasonable royalties valuable for emerging technologies where contemporaneous expectations exceeded actual market outcomes, provided those expectations are well supported and tied to the scope of the unauthorised use.

McSorley: Reasonable royalty damages are most appropriate when actual losses or unjust enrichment cannot be calculated with reasonable certainty, when the defendant has commercially used or disclosed the secret without generating profits, or when an injunction is legally or practically inequitable. Standardised under 18 US Code section 1836(b)(3)(B)(ii) and state UTSA counterparts, royalty damages construct a hypothetical licence negotiation between a willing licensor and licensee at the moment misappropriation commenced. Statutory availability varies across jurisdictions. The DTSA and most state UTSA statutes allow reasonable royalties as a flexible alternative in lieu of other methods, whereas California law strictly treats royalties as a remedy of last resort, allowable only when actual damages and unjust enrichment are unprovable. Reasonable royalties are calculated using multifactor frameworks that evaluate technical utility, commercial advantages, alternative technologies and customary industry licensing terms.

Irwin: Setting aside the legal question, whether reasonable royalties are an appropriate form of trade secret damages depends on the nature of the allegedly misappropriated trade secrets. If the trade secrets relate to know-how that is frequently licensed alongside related patents, their economic value is likely closely associated with other technology that carries significant value in its own right. One example is a method of formulation included in a patent licence for a

branded pharmaceutical. Here, reasonable royalty damages can help isolate the incremental economic benefit of the trade secrets from the value of the drug itself. However, if the trade secrets involve technology that is highly technical and unique, it establishes a reasonable starting point for a hypothetical negotiation. In addition, if trade secrets are part of licences that allow related-party use for manufacturing or other purposes, it may be appropriate to consider this as an indication of an 'arm's length' royalty rate for a reasonable royalty analysis.

Serwin: Reasonable royalty damages are generally an allowable remedy where lost profits and unjust enrichment are unavailable or difficult to establish. Reasonable royalty damages tend to be underutilised in trade secret matters. There are several reasons for this underutilisation, including a more complex calculation that is less familiar in many courts outside of the more common patent districts, where reasonable royalty damages are far more common; the fact that a reasonable royalty is similar to, but may be lower than, a properly calculated and apportioned unjust enrichment remedy; and the increasing use of a plaintiff's development cost as a basis for unjust enrichment. Where the claimed trade secrets contribute only a small benefit to the overall sales and profitability of a product, a reasonable royalty based on a direct evaluation of this limited benefit may be more economically reasonable than an unjust enrichment remedy.

Sikellis: Looking ahead, what major trends are likely to shape the future of damages assessment in trade secret litigation?

McSorley: Future monetary recovery for trade secret misappropriation will likely be shaped by several major trends, including mandatory disaggregation and apportionment requiring secret by secret financial proof, resolution of circuit splits regarding avoided R&D cost recovery, heightened Daubert scrutiny targeting expert valuation methodologies, refined application of head start timeframes to cap disgorgement, expanded extraterritorial recovery under the DTSA for foreign sales, increased use of doubled exemplary damages and mandatory attorney fees for wilful misappropriation, and sophisticated judicial mechanics to avoid double recovery when combining monetary awards with permanent injunctions. As proprietary assets increasingly shift toward complex software, algorithms and AI models, business leaders must align IP governance with litigation realities by maintaining granular R&D cost accounting, documenting secret-specific

commercial values, and implementing robust data loss prevention protocols before disputes arise.

Irwin: To date, district and appellate courts have issued inconsistent, and at times conflicting, rulings on apportionment and other key concepts in calculating economic damages for trade secrets. Practitioners also tend to approach trade secret damages 'like we always have', despite the particular facts of a given case. For example, plaintiffs may assert that multiple trade secrets function as a 'bundle' that require no apportionment, and present a single damages number at trial to represent the 'bundle'. If the judge or jury finds that the defendant never used or disclosed one or more of the trade secrets, then no reliable basis remains for determining damages for the remaining trade secrets. A standard requiring courts to consider apportionment would improve the consistency and quality of information presented to the trier of fact. As DTSA claims continue to be litigated and appealed, I hope to see convergence on the important concepts that shape damages assessments in trade secret litigation.

Serwin: The continued development and implementation of AI will have disruptive effects across business, including the role and valuation of trade secrets. The rapid pace of AI innovation, coupled with the importance of a limited pool of human capital, is likely to increase the use and importance of trade secrets as a means of protecting that innovation. As AI agents expand and become pervasive across business functions, the trade secrets that underlie those agents will become increasingly valuable. Correspondingly, the value of those trade secrets will often relate to only a portion of the relevant business function, a role more akin to a single patent incorporated into a product that benefits from a multiplicity of patented technologies. Accordingly, apportionment and the use of reasonable royalties to assess damages in trade secret matters are likely to become more prominent in AI trade secret disputes.

> **"AI will require experts to adapt established valuation methods to novel assets while isolating each asset's incremental contribution."**
>
> *Robert Vigil, Analysis Group*

Vigil: We see four converging trends. First, federal trade secret filings reached a record high in 2025, growing 20 percent, slightly faster than the increase in patent district court filings. That growth may be fuelled partly by employee mobility: as states strengthen mobility rights by restricting noncompetes, movement between competitors creates more opportunities for alleged transfer or misuse of confidential information, pushing employers toward trade secret claims. Second, the framework remains fragmented. The DTSA created a federal cause of action but preserved state law remedies, and DTSA interpretation itself varies by circuit, as the avoided-cost split shows. Third, AI will require experts to adapt established valuation methods to novel assets while isolating each asset's incremental contribution. Fourth, the *Motorola* case is likely to make worldwide revenue and profit analysis a routine consideration in multinational cases when section 1837 is satisfied, and the claimed foreign damages were caused by the overall misappropriation. CD

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