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Combating the Lure of Impropriety in Professional Sports Industries: The Desirability of Treating a Playbook as a Legally Enforceable Trade Secret

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COMBATING THE LURE OF IMPROPRIETY IN PROFESSIONAL SPORTS INDUSTRIES: THE DESIRABILITY OF TREATING A PLAYBOOK AS A LEGALLY ENFORCEABLE TRADE SECRET

I. INTRODUCTION

In the 2000 National Football League Super Bowl, the Tennessee Titans failed to succeed on a last second play call as the offensive receiver caught a pass just inches shy of the goal line. "Eighteen more inches, or five more seconds, and [he] would have had the ball in the end zone." The Titans might have won the Super Bowl with a more creative, surprising play. The failure of this final play may have cost the organization thousands of dollars.

Did anyone ever consider whether the St. Louis Rams might have known what play the Titans had called? Of course, nothing indicates that the St. Louis organization was engaged in any impropriety. Perhaps the Rams’ final defensive play merely resulted from a great coaching call by Rams’ head coach Mike Martz. Maybe the offensive player simply ran his route too short of the goal line, or maybe the defensive player made an incredible athletic move to tackle the ball carrier short of the end zone. Still, is it not possible that the Titans might have been the victim of playbook misappropriation? In other words, what if someone had known the Titans’ secret playbook information? What if someone had known the crux of a successful final play that could have won the Rams organization thousands of dollars? Certainly no one enjoys a skeptic, but oftentimes this sort of skepticism breeds innovation in legal thinking.

Businesses constantly create, plan, produce, reproduce, and formulate strategies in order to gain a competitive advantage over others in the marketplace. Companies seek the protection of intellectual property laws to secure proprietary rights in their innovations. The benefits of that protection stem from the rights of exclusion afforded by intellectual property law. The right to prevent others from gaining or using information can foster economic success and

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advancement. Nowhere is this more true than in the world of professional sports. While scholars, academics, and professors have debated the expansion of intellectual property doctrines into the sacred realm of gaming and sporting activities, common law state protections have been increasingly supplanted by federal legislative acts encouraging public disclosure, registration, or notice. Thus, the once prominent field of trade secret law, a creature of state law, has receded to make way for copyright, patent, and trademark protections. Nevertheless, professional sports playbooks may become an exception to the general trend toward providing these forms of federal protection. After all, the crux of trade secret law seems to rest on one plainly intuitive premise: that the most valuable information a person can own is that which no one else knows. Due to registration requirements, copyright and patent law are fundamentally incapable of embracing this element of secrecy. Herein lies the appeal of trade secret law for those seeking protection of sports playbooks.

"In the NFL, playbooks are treated like trade secrets." Whether and how a court might actually apply trade secret law to playbooks, however, remains a matter of speculation. This Note, therefore, addresses the potential application of modern trade secret law to pre-designed, scripted sports playbooks. Part II provides a background perspective on trade secret law and focuses on its evolution from common law origins to its present form under the Uniform Trade Secrets Act (UTSA). Part III discusses professional sports and the technical aspects of scripted football playbooks relevant to an analysis under the UTSA. Part IV evaluates the specific elements of trade secret protection and argues in favor of trade secret protection for playbooks by applying relevant case examples pertaining to misappropriation causes of action. Part V presents a practical look at conflicts that may arise in the professional football industry and suggests potential solutions that could be implemented to facilitate and administer trade secret protection. Finally, Part VI identifies a substantive policy justification for extending trade secret protection to sports playbooks, placing particular emphasis on future incentives for competition and entertainment within the professional sports industries.

4 Samuels & Johnson, supra note 2, at 49.
6 Id.
7 Id. at 39 (contrasting various levels of disclosure under patent, copyright, and trade secret law).
The analysis contained herein certainly will not exhaust the arguments concerning IP protection of professional sports plays, but hopefully will inspire the legal community to consider, if not recognize, the desirability of treating a professional playbook as a business secret. Furthermore, recognition of trade secret protection in this area would surely deter improper conduct and provide incentives for originality, creativity, and fair competition in the professional sports world.

II. TRADE SECRET LAW: A BACKGROUND PERSPECTIVE

"Trade secret law is the oldest form of intellectual property protection."¹⁰ It affords developers of useful commercial information a civil remedy against anyone who wrongfully obtains and uses that business secret.¹¹ Initially, trade secret law developed through state court decisions.¹² Each state created its own substantive body of trade secret doctrine that was modeled, to various degrees, on the Restatement of Torts.¹³ Thus, unlike patent and copyright law, which are the most common forms of intellectual property protection, a comprehensive federal statute does not control trade secret law.¹⁴ Instead, trade secret regulation originated from state common law principles that encompassed an almost unlimited realm of protectable information.¹⁵

Unlike federal intellectual property rights secured under the copyright, patent, or trademark statutes, the basis for trade secret protection is non-disclosure.¹⁶ No requirement of notice, registration, or deposit exists for trade secrets since the value of the information itself originates from the fact that it is not readily known.¹⁷ Trade secret law thereby acknowledges that companies regularly seek to maintain their most valuable information in confidence so that they may maintain a competitive advantage over their rivals;¹⁸ the secret is the business

¹⁰ PERRITT, supra note 5, at 1.
¹¹ Id.
¹³ Samuels & Johnson, supra note 2, at 49-50.
¹⁴ Id. at 50.
¹⁵ See id. at 49; PERRITT, supra note 5, at 79-81 (noting the broad subject matter covered by trade secret law).
¹⁶ See PERRITT, supra note 5, at 1-26 (emphasis supplied) (introducing fundamental concepts of trade secret law).
¹⁷ Id. at 33-64.
¹⁸ Samuels & Johnson, supra note 2, at 49 ("The ability to sustain investment in research and development in a competitive environment is dependent to a large extent upon a company's ability to protect its proprietary information. For many companies, trade secrets are the most valuable form of proprietary information.").
A business considering investing in innovation generally has three options: (1) work only on innovations that will qualify for federal protection; (2) work on innovations that, once created, will be made public without federal protection; or (3) work on innovations that lack federal protection but, once created, will be kept secret. Professional sports franchises may greatly benefit from a workable system of trade secret doctrine protecting innovations in the third category.

All state trade secret laws originate from one, or a combination, of three specific sources of legal doctrine: section 757 of the Restatement (First) of Torts, section 39 of the Restatement (Third) of Unfair Competition, and the Uniform Trade Secrets Act. Under all three doctrines, the cause of action referred to as trade secret misappropriation provides the basis for recovery against competitors who improperly violate a valid trade secret. The cause of action . . . was imported from English common law to American common law in a series of midnineteenth century decisions by the highest courts of several eastern states. While there is considerable theoretical debate over whether misappropriation is properly characterized as a tort or property remedy, the practical application is the same.

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20 The pros and cons of applying trade secret protection to sports playbooks from a policy perspective are developed more fully in Part VI of this Note.

21 Restatement of Torts § 757 (1939).


23 See Uniform Trade Secrets Act (2002). See also Perritt, supra note 5, at 9 ("Lawyers and judges dealing with trade secret misappropriation disputes can look to multiple sources of law to resolve the disputes: the Uniform Trade Secrets Act, the Restatement (Third) of Unfair Competition, the Restatement of Torts, federal law, other types of intellectual property law, and general policy objectives."); Samuels & Johnson, supra note 2, at 49-92 (discussing the lack of uniformity in state trade secret law due to the influence of various common law authority).

24 Perritt, supra note 5, at 3-6.


26 Pace, supra note 25, at 428.
A. RESTATEMENT OF TORTS § 757

Until the 1970s, section 757 of the Restatement (First) of Torts provided the only uniformly-recognized definition of a trade secret: 27 "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." 28 Comment b to section 757 further elaborates that a trade secret "may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers." 29 Comment b goes on to explain the importance of maintaining secrecy and the need for continuous use of the secret in the operation of the business. 30 Specifically, it provides:

The subject matter of a trade secret must be secret . . . [A] substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. 31

Even when a trade secret exists, mere possession of the information by an outsider does not necessarily constitute misappropriation. 32 In order for misappropriation to occur, the Restatement of Torts requires an improper or mistaken disclosure:

One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if: (a) he discovered the secret by

27 1 ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.01[1], at 1-4 (2003).
28 RESTATEMENT OF TORTS § 757 cmt. b (1939).
29 Id.
30 Id.
31 Id.
32 See Pace, supra note 25, at 431.
improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.33

Thus, the Restatement makes clear that a trade secret misappropriation claim only exists if one can establish (1) that he possesses a business secret that affords an economic advantage and (2) that misappropriation of that secret has occurred.34 Portions of comment b have been cited approvingly in virtually every U.S. jurisdiction.35

B. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39

While section 757 of the Restatement (First) of Torts was almost unanimously accepted as the fundamental basis for trade secret law, the reporters of the Restatement (Second) of Torts omitted numerous sections of the original Restatement on the grounds that the subject matter fell outside traditional tort law.36 The Reporters recognized the rapid development of the doctrines of unfair competition and trade regulation into independent bodies of law and decided that the subject of trade secrets would be more appropriately treated elsewhere.37 That "elsewhere" was the then-projected Restatement of the Law of Unfair Competition.38 Although the UTSA had already been adopted by forty-one states and the District of Columbia at the time these sections of the Restatement were released, a comprehensive trade secret analysis would be incomplete without at least mentioning this source of trade secret doctrine.

The Restatement (Third) of Unfair Competition provides a broad definition of a trade secret. Section 39 states that: "[A] trade secret is any information that

33 Restatement of Torts § 757 cmt. b.
34 See Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp., 139 F.3d 1396, 1410, 46 U.S.P.Q.2d (BNA) 1677, 1688 (11th Cir. 1998) (recognizing that this general framework has been carried over from the common law to the UTSA).
35 See Milgrim, supra note 27, § 1.01[1] at 1-5 (citing case law from thirty-four states and every federal circuit that has approved of section 757 comment b).
36 Id. § 1.01[1] at 1-19.
37 Restatement (Second) of Torts §§ 1-2 (1979).
38 Milgrim, supra note 27, § 1.01[4] at 1-136.18-19 (referring to the Restatement (Second) of Torts).
can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." Thus, while section 39 represents a broad, encompassing definition of trade secret information, section 757 of the Restatement of Torts provides a very narrow statement of specific material qualifying for protection. The inconsistency between these two approaches may suggest why courts have routinely preferred the statutory protections set forth by the UTSA.

Section 40 discusses appropriation in the following way:

One is subject to liability for the appropriation of another’s trade secret if:

(a) the actor acquires by means that are improper under the rule stated in § 3 information that the actor knows or should know is the other’s trade secret by means that are improper . . . ; or

(b) the actor uses or discloses the other’s trade secret without the other’s consent and, at the time of the use or disclosure,

(1) the actor knows or has reason to know that the information is a trade secret that the actor acquired under circumstances creating a duty of confidence owed by the actor to the other . . . ; or

(2) the actor knows or has reason to know that the information is a trade secret that the actor acquired by means that are improper . . . ; or

(3) the actor knows or has reason to know that the information is a trade secret that the actor acquired from or through a person who acquired it by means that are improper . . . or whose disclosure of the trade secret to the actor constituted a breach of a duty of confidence owed to the other . . . ; or

(4) the actor knows or has reason to know that the information is a trade secret that the actor acquired through an accident or mistake unless the acquisition was the result of the other’s failure to take reasonable precautions to maintain the secrecy of the information.

C. UNIFORM TRADE SECRETS ACT

The National Conference of Commissioners on Uniform State Laws recognized the growing importance of trade secret protection for setting

40 Id. §§ 39-40.
standards of ethical behavior in the marketplace. Thus, the Uniform Trade Secrets Act was commissioned, recommended for enactment in all states in 1979, and approved by the American Bar Association in 1980. Although this uniform statutory approach has proven revolutionary in modern application (like the Uniform Commercial Code), the National Conference did not radically alter the existing common law standards for trade secret misappropriation. Instead, it simply codified these standards to introduce a uniform approach to trade secret law among the states.

Two versions of the UTSA were adopted: the original in 1979 and an amended form in 1985. For the purpose of this discussion, the two versions are virtually identical and will be addressed collectively as the 1985 UTSA. States’ enactment of the UTSA in various versions represented the first major attempt at legislating trade secret misappropriation—a satisfying departure from reliance on the courts for often inconsistent guidance.

The UTSA does not replace existing state law. Rather, it is designed to supplement the common law foundation with a more precise framework for evaluating potential business secrets. Section 1 of the UTSA defines trade secret in the following way:

[Information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.]

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42 MILGRIM, supra note 27, § 1.01[2] at 1-21.
45 See Pace, supra note 25, at 433 n.19 (citing Samuels & Johnson, supra note 2, at 49).
46 See Samuels & Johnson, supra note 2, at 53 (arguing that the UTSA draws upon many of the Restatement of Torts section 757 concepts, yet ventures far beyond the guidance of the Restatement in attempting to resolve inconsistencies that permeated judicial decisions based on common law principles).
47 UNIF. TRADE SECRETS ACT § 1(4) (2002).
Section 1(2) provides a fairly broad definition of misappropriation as:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (ii) disclosure or use of a trade secret of another without express or implied consent by a person who
   (A) used improper means to acquire knowledge of the trade secret; or
   (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was (I) derived from or through a person who had utilized improper means to acquire it; (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
   (C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. 48

While section 1(4) uses the words “compilation,” “program,” “device,” “method,” and “technique” in defining “trade secret,” thereby deviating from the definitions employed by the Restatement of Torts and the Restatement of Unfair Competition, “the structure of the definition indicates that these terms are not meant to limit the concept.” 49 Still, differences in the definitions do exist. The comment to section 1(4) points out that a significant distinction between it and the Restatement of Torts definition is the abandonment of the requirement that the trade secret be “continuously used in one’s business.” 50 Also, an obvious difference between the definitions of the UTSA and the Restatement of Unfair Competition is that the UTSA provides specific categories of material that will qualify for protection, instead of merely using the open-ended term “any information.” 51

Although a small minority of states still prefer the original approach contained in the First Restatement of Torts, 52 an overwhelming majority of states have

48 Id. § 1(2).
49 PERRITT, supra note 5, at 81.
50 Id. (referring to UNIF. TRADE SECRETS ACT § 1(4) cmt.).
52 Several states still pattern their trade secret laws after section 757 and have not adopted a version of the UTSA: Massachusetts, New Jersey, New York, Pennsylvania, and Texas. See MILGRIM, supra note 27, § 1.01(2)[b].
currently adopted the UTSA in some form or another.\textsuperscript{53} The Restatement of Unfair Competition's approach seems to be relied upon by attorneys simply as additional persuasive authority originating from the common law.\textsuperscript{54}

D. TRADE SECRETS AND FEDERAL INTELLECTUAL PROPERTY LAWS

Copyright and patent law protect innovations via congressional legislation, but as discussed above, trade secret law is a creature of state common law and legislation. Substantively, several distinctions exist between federal copyright and patent protections and state trade secret protections. For example, unlike copyright law, information can qualify as a trade secret even if it has never been written down; no "fixation" is required.\textsuperscript{55} Unlike patent protection, trade secret law neither requires that the information be novel, nor conditions protection on registration and public deposit of a sample of the innovation.\textsuperscript{56} Most importantly, the content and duration of a trade secret is potentially unlimited.\textsuperscript{57} Thus, the potential scope of trade secret protection is much broader than both copyright and patent law.\textsuperscript{58}

One commentator, Proloy K. Das, has evaluated the potential application of federal IP laws to individual scripted sports plays (as opposed to playbooks).\textsuperscript{59} His findings suggest that copyright or patent law protections could provide a workable system in theory.\textsuperscript{60} As Mr. Das also recognizes, however, practical difficulties of disclosure and administration might ultimately undermine the spirit of the game if playbook protection were sought under copyright and patent laws.\textsuperscript{61} Given this concern, sports leagues, public consumers, and the courts have understandably shunned the idea of trade secret protection in the professional

\textsuperscript{53} As of mid-2002, forty-three states and the District of Columbia, including the Eleventh Circuit states of Alabama, Florida, and Georgia, adhered to the UTSA approach: See CAL. CIVIL CODE (West 1997), 235 tbl. 5, "Table of Jurisdictions Wherein Act Has Been Adopted." See also MILGRIM, supra note 27, § 1.01[2][b].

\textsuperscript{54} See MILGRIM, supra note 27, § 1.01[4] ("While the Restatement has made a well-intentioned stab at restating the law, . . . it remains to be seen whether [this provision] . . . will materially affect application of individual state UTSA statutes.").

\textsuperscript{55} PERRITT, supra note 5, at 83.

\textsuperscript{56} Id. at 84-104.

\textsuperscript{57} Id. at 79 ("The subject matter of trade secret is almost unlimited.").

\textsuperscript{58} Id. at 79-84.


\textsuperscript{60} Id. at 1096-97.

\textsuperscript{61} Id. at 1075, 1088-94 (identifying potential problems with copyright or patent protection from practical and legal standpoints).
In light of this hesitation, this Note analyzes the professional sports industry from the perspective of the National Football League and offers a practical solution in the form of state trade secret protection for teams' scripted playbooks.

III. WHAT IS A SCRIPTED, PRE-DESIGNED SPORTS PLAYBOOK? 
THE NATIONAL FOOTBALL LEAGUE EXAMPLE

The National Football League ("NFL") is "full of grown men playing a boy's game for a tycoon's fortune." Professional football is a business. Franchises buy stadiums, sell tickets, pay salaries to players, coaches, and assistants, sell broadcasting rights to television stations, sell advertising rights to marketers, design logos, create uniforms, and license rights to clothing designers and vending suppliers. Like all other businesses, NFL teams compete in a market to outperform each other in hopes of achieving public notoriety and earning substantial profits. When the team wins, the franchise as a whole wins. Players and coaches may get new contracts with higher salaries, and owners profit from increased marketing exposure through television, radio, advertising, and other associated sales. If a team continuously succeeds against its opponents, the team may even enjoy a profitable trip to the Super Bowl.

Successful coaching is one key to winning games in the NFL. Successful coaching means, in part, having an experienced coach and talented players. More importantly though, a team needs a game plan for approaching upcoming games. The game plan revolves around the creation, design, and scripting of specific plays to be run in a certain game against a particular opponent. These plays are

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62 See id. at 1088 (noting that protection of a team playbook may offend "the very notion of fair play that sports aim to instill").
63 The NFL sports industry offers the most appropriate case study for illustration due to the highly visible nature of the sport, the widespread use of tangible playbooks by all teams, and the importance of secret play-calling to a team's success against its opponents.
64 JOE THEISMAN, THE COMPLETE IDIOT'S GUIDE TO FOOTBALL 51 (2d ed. 2001).
65 See id. at 256-58 (discussing commercial aspects of professional football).
66 See HOWIE LONG, FOOTBALL FOR DUMMIES 294 (1998) ("The total obligation of FOX, CBS, ABC, and ESPN for the 1998 season [was] $2.2 billion. Now you can understand why Super Bowl commercials are priced at $1.3 million per 30 seconds.").
67 See THEISMAN, supra note 64, at 256 (explaining how the number of team wins influences salaries and profits); Das, supra note 59, at 1099 (noting that football team wins translate into media exposure valued at tremendous amounts).
68 See Das, supra note 59, at 1099 (noting the financial rewards of a Super Bowl appearance).
69 See THEISMAN, supra note 64, at 52-53 (explaining that scripting the plays refers to the design of a detailed list of plays that are drawn up in team playbooks and which are designed to cover every possible scenario or situation that can occur in a game).
formally memorialized in playbooks and practiced in advance by the players who execute them during the games. The coaching staff decides when to utilize certain plays at different points in the game. The compilation of these pre-designed plays is known as a playbook of scripted sports plays.

An individually scripted play is the combined movement of the eleven participants on the field for one team at one point in time. This entails the total pattern of each player's actions in relation to the movements of others on the team. Scripted plays are pre-designed, orchestrated events that are created in preparation for an upcoming game. In general, an individual play is secretly developed in collaboration with other assistants within the team organization, introduced in practice sessions to those players who will carry out the play, and ultimately included in a formal playbook.

Coaches spend a great deal of time developing new plays, studying old playbooks, researching opposing teams, and analyzing their own team's skills. Coaches often reuse plays that have proven successful against specific opponents. In other instances, coaches create new plays in the few days leading up to a particular game. Moreover, a coach essentially designs a method of reaching a certain result on the field. On offense, the desired result is to score points, but on defense, the desired result is to prevent scoring. The coach evaluates the talent level of players on his or her team and analyzes the strengths and weaknesses of opponents; he or she then uses this information to craft successful plays. "When football teams... decide which play or formation to use, they base the decision on the personnel matchups they want. Coaches study the opposition, examining hours of film, hoping to find the weak links... ."

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70 Id.
71 Id.
72 Id.
73 Id. at 53-54 (arguing that the idea of creating scripted football plays is commonly thought to have originated under the West Coast Offense game plan of Bill Walsh, who designed a set of fifteen plays to be introduced at pre-determined times for each upcoming game). See generally The Unofficial Website of the West Coast Offense, at http://www.westcoastoffense.com (last visited Nov. 7, 2002).
74 See Das, supra note 59, at 1090.
A play, in diagram form, essentially tells a player how and when to move throughout the course of the play. For example, the wide receiver is told to run a post or an out on a certain count and at a certain pace, with his teammates each receiving similar instructions regarding their actions during the play... As such, this constitutes protection for human movement through space.
75 Id. at 1090-93 (discussing the origin of plays and playbooks).
76 Id. at 1092-93.
77 LONG, supra note 66, at 123.
78 Id. at 122.
An individual play is a method of advancing the ball downfield or a process for obtaining a score. A play includes the formation of players on the field before the series of movements for that play begins and contains the combined movements of all eleven players for the duration of the play. It concludes when each player's assignment has ended. Thus, it is this series of actions as a whole that is the key to a particular play's success. The ingenuity of the coach and players is what makes the next scripted play better than the last. No single play will necessarily succeed against any one defense, at any one time, against any one team. "It isn't just a matter of figuring out which plays to call, but when. It's a psychological war with the other coach."

A play is neither one formation nor just an individual player's athletic move. A play does not account for incidental uncertainties that may occur during execution such as opposing players falling down or missing tackles. Furthermore, a specific, magic number of plays that are to be created for a particular game does not exist. Most importantly, plays depend on timing. The design includes information pertaining to when particular plays will be utilized. The plays are scripted to include a combination of movement from the time of the break of the huddle (before the snap), to the audible calls made by the quarterback at the line of scrimmage, and then to the specific patterns of runs, blocks, cuts, and turns made until the play is whistled dead by an official. Determining when each particular element of this sequence of events should occur is part of the creative process. The element of surprise is often the key to the success of a particular play. The secret nature of the playbook thus creates the competitive advantage for the team.

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79 See Das, supra note 59, at 1089 (recognizing that a sports play can fall under the category of a process or business method, as a football team is a business entity with departments that use these methods to reach a specific purpose on the field).
80 Id.
81 THEISMAN, supra note 64, at 53.
82 AMERICAN FOOTBALL COACHES ASSOCIATION, OFFENSIVE FOOTBALL STRATEGIES 3-9 (2000) (discussing the importance of athletic players, execution of pre-designed plays, and the absence of mistakes, penalties, accidents, or injuries during the occurrence of the play to the overall success of scripted plays). This Note focuses only on the aspects of the play design and timing, as the above-mentioned events will always be unforeseeable in particular instances.
83 Therefore, the elements of each scripted play and the order in which a series of plays are employed, both as predetermined by the coaches and in response to unexpected variables which occur during the game, comprise a business secret that ideally creates a competitive advantage.
IV. CAN A PLAYBOOK BE A TRADE SECRET UNDER THE LAW?:
THE APPLICATION OF TRADE SECRET DOCTRINE TO
PROFESSIONAL SPORTS PLAYBOOKS

Over the past 125 years, the basic elements of trade secret protection have experienced little change.\(^\text{84}\) For this reason, a modern-day trade secret analysis not only involves examination of the Uniform Trade Secrets Act but also draws upon policies and theories formulated at common law for guidance.\(^\text{85}\) Additionally, policies underlying other areas of intellectual property law are relevant. For example, intellectual property scholars frequently profess the breadth of IP law by noting that "Congress intended statutory subject matter to 'include anything under the sun that is made by man'"\(^\text{86}\) and that copyright law extends to the bounds of an author's creative expression.\(^\text{87}\) Trade secret protection must be approached with this same level of open-mindedness. As an analogue to the aforementioned clichés of other areas of intellectual property law, Professor Perritt has expressed that, in general, any subject matter is eligible for trade secret protection as long as it gives "a competitive advantage because it is secret."\(^\text{88}\)

The first step in any trade secret analysis is to determine what type of information may be protected.\(^\text{89}\) Next, the economic value of the information must be assessed in order to determine whether others in the field could take advantage of such value through proper means of legal appropriation.\(^\text{90}\) Finally, whether conscious efforts have been made to maintain the secrecy of the information should be considered; without such efforts, a trade secret will not exist.\(^\text{91}\)

A. SUBJECT MATTER

Playbooks contain secret business information that can be protected under prevailing trade secret law. The UTSA specifically describes the subject matter of trade secret protection with the following definition: "'trade secret' means information, including a formula, pattern, compilation, program, device, method,
The realm of information that may be protected under this UTSA definition is conceivably unlimited. After all, the idea of business "information" is an inherently broad concept. For guidance, the statute provides the aforementioned eight general categories of information that may be protected as trade secrets. Furthermore, courts in virtually every jurisdiction have recognized, either expressly or impliedly, certain types of information that necessarily are secret, have value, and afford a competitive advantage due to the nature of the information itself in relation to business objectives. Because an exact definition of trade secret subject matter is not possible, judicial evaluations as to how certain trade information furthers business objectives are illustrative.

No judicial analysis has ever addressed trade secret protection for sports plays, and accordingly, this issue would be one of first impression for a court. This should not, however, discourage its exploration. Because scripted sports plays are similar to other types of secret business information that have been protected under the law, the availability of protection for playbooks merits consideration.

Playbooks contain proprietary business information in the form of detailed descriptions of routes, blocks, cuts, runs, and formations that are to take place at designated times in a game. Under the UTSA definition, plays are arguably methods, techniques, or processes for reaching a goal, and playbooks contain secret information that can provide the means for obtaining a desired end result. If the designed play is executed properly, it may advance the goals of the business (i.e., moving the ball downfield, scoring, winning games, etc.). Of course, no protection could exist for playbooks containing general types of plays or plays...
based only on a general knowledge of their use.\textsuperscript{99} A series of plays designed for execution at a particular time for a pre-determined outcome, however, would seem to qualify as protectable subject matter.

Trade secrets are typically thought to be methods, processes, and formulae for tangible products. That inclination seems quite natural considering that courts have held numerous product design techniques and preparation methods for manufacturing to be protected under the UTSA. For example, methods of preparing components for product design\textsuperscript{100} as well as operating, training, and process manuals for manufacturing products\textsuperscript{101} have all garnered trade secret protection.\textsuperscript{102}

Trade secrets need not exist solely for the protection of production or manufacturing techniques though. Secret methods and techniques are used in a wide variety of different businesses.\textsuperscript{103} For example, a method of utilizing information forms to facilitate communication between medical patients and state agencies was protected in Texas.\textsuperscript{104} The Supreme Court of Georgia has even held that a specific technique for barbecuing meats is a trade secret.\textsuperscript{105} Trade secrets also have been upheld for methods of running group sessions for the purpose of encouraging smoking;\textsuperscript{106} training techniques for teaching individuals how to speed read;\textsuperscript{107} instructional techniques for personal spiritual advance;\textsuperscript{108} methods designed to help individuals achieve proficiency at zip-coding mail;\textsuperscript{109} and instructional materials for preparing professional school graduates for state

\textsuperscript{99} Compare SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1261, 225 U.S.P.Q. (BNA) 441, 452 (3d Cir. 1985) (recognizing that no trade secret protection exists for matters that consist of general knowledge and skill in the field), with Universal Analytics, Inc. v. The MacNeal-Schwendler Corp., 707 F. Supp. 1170, 1177 (C.D. Cal. 1989) (reaffirming that trade secret information must be designed with sufficient specificity such that the claimant could "separate it from matters of general knowledge in the trade or of special knowledge of those persons . . . skilled in the trade" (citing Diodes, Inc. v. Franzen, 67 Cal. Rptr. 19, 24 (Cal. Ct. App. 1968))).

\textsuperscript{100} Monovis, Inc. v. Aquino, 905 F. Supp. 1205 (W.D.N.Y. 1994).

\textsuperscript{101} Minn. Mining & Mfg. Co. v. Pribyl, 259 F.3d 587, 59 U.S.P.Q.2d (BNA) 1705 (7th Cir. 2001).


\textsuperscript{103} See MILGRIM, supra note 27, § 1.09 (discussing examples of trade secret protection within eighteen different categories of business information).

\textsuperscript{104} Gonzales v. Zamora, 791 S.W.2d 258 (Tex. App. 1990).

\textsuperscript{105} Baxley v. Black, 162 S.E.2d 389 (Ga. 1968).


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qualification examination. In one case, trade secret protection was recognized for methods used in improving ballroom dancing moves. Moreover, at least one district court opinion seems to indicate that a process for strengthening interpersonal communication skills might even be protectable in certain instances. Recognition of potential trade secret protection by these courts suggests that objective criteria for measuring the success of an alleged trade secret may not be necessary. Thus, determining the existence of an enforceable trade secret is often a highly subjective determination.

Additionally, measuring the economic value of subjectively judged trade secrets is often appropriately undertaken only on a post hoc basis because many times, only after the secret has been executed or utilized will the certainty of the intended results be readily verifiable. Thus, formulae, processes, and designs for products may produce a tangible object if used correctly (thereby making evaluation of the success of the secret easy to measure), but the lack of an objective measure of success should not be a deterrent to legal recognition of trade secrets that create more subjective results. That result is neither intended by the UTSA nor desired by the courts. While nothing completely guarantees that sports plays in a playbook will succeed as planned on any one occasion, sports plays are arguably as certain to produce the desired result as these aforementioned examples. Thus, scripted sports playbooks are a form of information which surely qualifies as subject matter protectable under the trade secret regime, particularly given the breadth of protection provided by most U.S. jurisdictions and the expansive nature of the field as it developed from the common law.

113 See MILGRIM, supra note 27, § 1.09 (providing examples of trade secret protection where no objective measure for determining the success of the secret exists).
114 See, e.g., Del Monte Fresh Produce Co. v. Dole Food Co., 136 F. Supp. 2d 1271, 1292 (S.D. Fla. 2001) (recognizing that due to the fact-intensive nature of a trade secret, it would be inappropriate to refuse recognition of a secret on a categorical assertion that the matter claimed cannot be a trade secret).
B. ECONOMIC VALUE TO THE BUSINESS

In order for business information to become a trade secret, it must have (1) economic value which affords a competitive advantage, and (2) it must not be exploitable by others in the field who could obtain and use the information by proper means of discovery. These two sub-elements are naturally connected to one another as the value of trade secret information generally arises because it cannot be appropriated by proper means. Each of these elements will be discussed in turn for clarity.

1. Trade Secret Information Must Derive Independent Economic Value to be Protected. Under the Restatement of Torts section 757, comment b definition of a trade secret, the information must have been in actual use in the business. Under a strict application of this definition, only sports plays that are actually implemented in a specific game are worthy of protection. This possibility need not be addressed, however, because the UTSA has expressly abolished the actual use requirement. Instead, the economic value of the secret information must only be "actual or potential." The economic value of a sports play is in fact both actual and potential.

A play can have actual value if it is independently successful when used and directly produces a monetary gain for the organization. Any independent play may succeed at the time it is executed and produce a beneficial result for the team. A play may advance the ball down the field, produce a score, and win a game. If a play independently produces a score, this may lead directly to team victories,
which in turn leads to increased advertising, television, and radio exposure. This exposure often translates into increased merchandise sales or lucrative media contracts. Thus, if routinely used at opportune times, a play may continuously achieve these results and lead to a multitude of franchise wins and substantial monetary gains. As a team organization garners more victories, it reaps increased financial rewards. A playoff berth or Super Bowl opportunity may ultimately result from the consistent use of a well-scripted, creative playbook at the right times. This translates into the highest financial gains possible within this business field.

The creativity of the plays and the timing of their execution combine to generate a surprise factor that give the plays their potential value. This actual or potential economic value in sports plays does not differ from the manufacturing or sales value inherent in successfully marketed products. Although the economic value of a sports play is more difficult to calculate, a sports play can be just as valuable to a sports team as a product design, formula, or process may be to a manufacturing corporation or product developer. A sports team creates the secret "by treating information in a certain manner, thereby demonstrating the information's value and its proprietary nature."

2. Economic Value Under the Law. Economic value gives rise to a competitive business advantage. For example, the most famous trade secret of all, the formula for the Coca-Cola beverage, has immense value because it is used to create a marketed product that cannot be duplicated by other competitors. "[I]t is beyond

120 See LONG, supra note 66, at 294.
121 Id.
122 See Das, supra note 59, at 1099.
123 On the field, [teams] are similarly competing for economic value in two ways. First, wins translate into exposure, be it on television or in the newspapers. This is essentially advertisement that is valued at tremendous amounts. Second, events like . . . the Super Bowl carry with them financial rewards directly linked to wins and loses.

Id.
124 See Super Bowl XXXIII: Number Crunching, ORLANDO SENTINEL, Jan. 31, 1999, available at 1999 WL 2783863 (recognizing that each member of the winning team of the Super Bowl would have received an additional $53,000, compared to the $32,500 given to losing team members).
125 A sports play that is unknown or unanticipated by an opponent generally catches that team off-guard. If the play surprises the opponent, it has a greater chance of being successful. The potential value in a playbook is the potential success that it brings to a team when its plays are executed. Whether this surprise factor proves successful is only recognizable in hindsight. Nevertheless, the playbook's potential value existed all along.
dispute that... the Company possesses trade secrets which... are extremely valuable... (Coca-Cola)'s secret formulae are trade secrets and subject to the maximum protection that the law... allows.  Every Coca-Cola beverage sold earns revenue for the company. The monetary gains arising from product sales stem, in part, from the secrecy of the beverage's formula, just as a football team's secret scripted playbook can lead to scoring, team wins, and franchise revenues when used successfully against unsuspecting opponents.

Furthermore, the economic value of a business secret does not cease to exist simply because "such information could be easily duplicated by others competent in the given field." Even if individual components of a trade secret were widely known or could be combined easily to produce the information that has become the secret, the unique compilation of information is what creates the economic value for a business and gives the information its trade secret status. In the same way, scripted football plays combine individual run, pass, block, and turn routes with a timing factor in games against particular opponents. The result is a combination of information that is secret, although the individual components of the scripted play could not independently achieve trade secret status.

Courts have applied this same analysis to find trade secret value for many different types of information: a chocolate powder produced from common homemade ingredients, the process of combining chemicals for the varicella virus vaccine, training manuals explaining process standards for making resin sheeting equipment, a method of producing unique water color paintings, and

127 Id. at 294.
129 See id. at 134.
130 These individual sports moves or routes are not likely to be protected because, as explained earlier, they would comprise general sports play information with no degree of specificity, and could not create value over competitors unless the fundamental aspects of playing the sport were to be comprised.
even a method of pre-sorting zip-coded mail to achieve discounts. In light of this judicial tendency to make liberal presumptions about the potential market value of secret information, a strong case can be made for the recognition of independent economic value in scripted plays.

C. FORMATION OF COMPETITIVE ADVANTAGE

The economic value of a trade secret affords a competitive advantage in a particular business market when other competitors are unable to access or discover the information. This inability to access or discover certain business information arises for two reasons: (1) the specific information is not generally known in the field of business, and (2) the information cannot be readily discovered by others in the field by proper means. Thus, assuming that reasonable steps are taken to maintain secrecy, a football team’s scripted playbooks are recognizable trade secrets because the information is privileged or within the private knowledge of only those persons in the team organization who assisted in the playbook’s development. Opponents can neither ascertain undisclosed, secret plays in the market nor anticipate the substance or timing of pre-designed plays without resorting to improper means that would constitute misappropriation under the law. Importantly, those improper means of acquisition or discovery would not eviscerate the trade secrecy of the information.

1. Trade Secrets Comprise Information “Not Generally Known” to Other Persons Who Could Obtain Economic Value from its Disclosure or Use. One important element for trade secrecy is that the information not be generally known to other knowledgeable persons in the same business field. This competitive advantage element seeks “to distinguish mundane changes to knowledge already in the public domain from increments to knowledge that are valuable in some sense.” As discussed above, information that is common knowledge cannot achieve trade secret status.

137 See infra Part IV.D and accompanying text.
138 See PERRITT, supra note 5, at 131-48 (explaining that business information which is not commonly known nor easily ascertainable by proper means by others in the relevant field, may facilitate a competitive advantage in that specific market, giving rise to legal trade secret status).
139 See UNIF. TRADE SECRETS ACT § 1(4)(i) (2002) (using the language: “from not being generally known to . . . other persons who could obtain economic value from its disclosure or use . . .”).
140 PERRITT, supra note 5, at 132 (recognizing that this idea of competitive advantage is similar to the originality concept of copyright and the novelty and nonobvious requirements of patent law).
141 See MILGRIM, supra note 27, § 1.03 at 1-159.
information are not likely to constitute trade secrets. Although novelty and investment are not considered independent requirements under the UTSA definition, those factors can be highly probative. Furthermore, trade secrets need not be absolutely unique even in a particular market in order to satisfy the competitive advantage requirement.

Commonly used sports plays are typically known by others in the field. Hence, these may not be protected under trade secret law. In contrast, specific scripted plays that entail a unique combination of otherwise basic formations, routes, or assignments are unknown to opponents and thus protectable. The secret behind the plays contained in a team playbook consists of both the substantive creativity and the timing of their execution. NFL coaches spend extraordinary amounts of time watching films of their opponents' games to perfect a strategy to use against a particular team for a particular upcoming game. Coaches manipulate general run, pass, or blitz formations to produce innovative assignments that will catch opponents by surprise.

Critics of a system of trade secret protection for scripted playbooks would likely argue that teams can recognize trends of plays that are generally used by their opponents by watching films of past games. Moreover, these critics would likely argue that plays become generally known to the public because they are overtly displayed in games at the time they are executed. Thus, the argument follows, scripted plays are not in fact secret because of well-established methods of realizing the information that is likely to be contained in playbooks.

Id.

PERRIT, supra note 5, at 131-44 (noting that jurisdictions following the Restatement of Torts section 757 continue to depend on at least a minimal showing of investment and novelty). For all practical purposes, scripted playbooks do normally contain plays that are novel for the circumstances in which they are used. These plays will not usually have been seen by opponents in the exact formation or at the exact time in which they have been utilized in past games. In addition, it is quite reasonable to believe that most scripted playbooks result from intense preparation and extensive resources. Thus, in the context of scripted plays, investment and novelty factors are likely to be quite probative of trade secret status.

See Religious Tech Ctr. v. Wollersheim, 796 F.2d 1076, 1090 (9th Cir. 1986) (noting that several different competitors in the same market can have trade secret protection for the same information, as long as the information gives each a competitive advantage over some others); PERRIT, supra note 5, at 136-41.

For instance, a standard wide receiver post or flag pattern, or a simple running back toss or dive is the type of play that most football players learn when they are in elementary school leagues, or even younger.

Interview with Mitch Stockwell, Adjunct Professor at the University of Georgia School of Law and Attorney at Kilpatrick Stockton LLP, in Athens, Ga. (Nov. 13, 2002).

See PERRIT, supra note 5, at 231 (recognizing the reverse engineering possibility as a counter to trade secret status).
This public disclosure is legally inconsequential, however, because the timing and substance of these plays is not known to others in the business who could take advantage of the information. Opponents may anticipate types of plays that may be executed in a game, but they cannot be certain as to when the plays will be executed.\textsuperscript{149} This element of surprise creates the competitive advantage that makes a set of scripted plays valuable. The general public’s knowledge of all elements of an idea does not negate trade secret status since the real secret might reside in a special combination of otherwise well-known principles.\textsuperscript{150} While a scripted play may contain general football movements, the creativity, originality, and timing decisions, taken together, may provide a distinct advantage over a competitor.\textsuperscript{151} Although a play is publicly performed in a game, recorded on film, and reviewed later by other coaches in the league, no general indication as to when a similar play will be utilized again may be ascertained. Therefore, a scripted playbook contains secrets that cannot be generally known in advance unless misappropriated prior to their use by improper means.\textsuperscript{152} The Eleventh Circuit appears to support this same concept—that publicly available knowledge in the absence of specific, significant information as to the manner in which that information will be used is implicitly secret.\textsuperscript{153} “Even if all of the information is

\textsuperscript{149} See \textsc{Restatement (Third) of Unfair Competition} § 39(f) (“The fact that some or all of the components of [a] trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements.”).

\textsuperscript{150} See \textsc{Milgrim, supra} note 27, § 1.03 at 1-161.

\textsuperscript{151} For a trade secret to derive value from “not being generally known,” only the precise compilation of information must be “not generally known.” Knowledge of common attributes of a particular form of trade secret information does not prevent the information from existing as a business secret. See Water Servs., Inc. v. Tesco Chems., Inc., 410 F.2d 163, 173, 162 U.S.P.Q. (BNA) 321, 329 (5th Cir. 1969) (“[A] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which in unique combination, affords a competitive advantage and is a protectable secret.”); Salsbury Labs., Inc. v. Merieux Labs., Inc., 735 F. Supp. 1555, 1569 (M.D. Ga. 1989), aff’d, 908 F.2d 706, 15 U.S.P.Q.2d (BNA) 1489 (11th Cir. 1990) (“A unique process which is not known in the industry ‘can be a trade secret even if all of its component steps are commonly known.’” (citing Rohm and Haas Co. v. AZS Corp., No. C.A. 1:85-CV-4337-RCF, 1988 WL 192886, at *9 (N.D. Ga. Mar. 18, 1988))); see Basic Am., Inc. v. Shatila, 992 P.2d 175, 185 (Idaho 1999) (noting that a finding that a specific process is unique to an industry is evidence that the process is not “generally known” or “readily ascertainable.”).

\textsuperscript{152} See infra Part IV.C.2 and accompanying text.

\textsuperscript{153} See \textsc{Capital Asset Research Corp. v. Finnegan}, 160 F.3d 683, 686, 48 U.S.P.Q.2d (BNA) 1853 (11th Cir. 1998) (indicating that the special combination of otherwise unprotectable information may qualify for trade secret protection if the newly-formed compilation of common elements has not been previously discovered in the field) (relying on Essex Group, Inc. v. Southwire Co., 501 S.E.2d 501 (Ga. 1998)).
publicly available, a unique compilation of that information, which adds value, also may qualify as a trade secret." 54

2. Trade Secret Information Must Not Be "Readily Ascertainable" by Proper Means.

Even if secret information is not generally known within the business field, if it could still be "ascertainable" by others, 55 this could prevent the information from existing as a trade secret under the law. In other words, this is simply another way of asking whether the information that is sought to be protected is truly secret. 56

Scripted playbooks meet this "not readily ascertainable" requirement. While some may argue that competitors could obtain the information from playbooks by making personal use of existing game film materials, this argument fails for two reasons. First, it fails to recognize the significance of the "timing factor" of play-calling as the primary source of competitive advantage. Second, to the extent playbook information is readily ascertainable at all, 57 any possible manner of

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154 Finnegan, 160 F.3d at 686, 48 U.S.P.Q.2d (BNA) at 1855.
155 See generally UNIF. TRADE SECRETS ACT § 1(4)(i) (stating that a trade secret "derives independent economic value, from . . . not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use . . . "). The statute thus defines the relative group of persons who would be deemed to have improperly ascertained business information as those persons "who can obtain economic value from its disclosure or use." In the context of professional sports, this would presumably include any person who is affiliated with (employed by) a team organization or competitor thereof; any outside third party who would be willing to sell, bribe, transfer, or otherwise disclose playbook information; or anyone who has the potential to disclose mistakenly the contents of a particular team's playbook to its competitors. This author assumes that business competitors, or employees thereof, might desire or even accept such secret information if made available to them, although this would certainly not be the case in all instances.
156 See MILGRIM, supra note 27, § 1.03.
157 The drafters of the UTSA have defined information as "readily ascertainable" if it "is available in trade journals, reference books, or published materials." UNIF. TRADE SECRETS ACT § 1 cmt. In one Georgia case, the court found trade secret protection for a telecommunications provider's logistics system, even though almost all of the computer hardware components in the system were commercially available. The Georgia Supreme Court explained the concept "readily ascertainable" in the following way:

trade secrets may be acquired by others either through independent development or by reverse engineering, and the acquisition of trade secret information by these means is not improper in the absence of any misappropriation. [O.C.G.A. § 10-1-761(1)]. Thus, the [Georgia Trade Secrets] Act explicitly recognizes that trade secret information is protectable until it has been acquired by others by proper means . . . . "The theoretical ability of others to ascertain the information through proper means does not necessarily preclude protection as a trade secret. Trade secret protection remains available unless the information is readily ascertainable by such means. Thus, if acquisition of the information through an examination of a competitor's product would be difficult, costly, or time-consuming, the trade secret owner retains protection against an improper acquisition, disclosure, or use."
discovering the valuable information (assuming reasonable secrecy), would be improper and otherwise constitute misappropriation.

a. Independent Discovery Methods of Analyzing Game Films Cannot Lead to Successful Acquisition of the Secret Information in Playbooks. The comment to section one of the UTSA defines “proper means” of discovery to include discovery by independent invention, reverse engineering, licensing, and observation of the trade secret via public use or display and by publication. 158 As discussed above, 159 observation of readily available films of past games for a particular team does not provide adequate public disclosure of the secret play information contained in scripted playbooks. Although helpful to a coach in preparing for an opponent, the films do not reveal the substance or timing of future plays. Moreover, the trade secrets are not readily ascertainable by any means of reverse engineering or independent invention. 160 A good sense of anticipation and guesswork cannot be considered independent knowledge of the playbook. 161 Thus, due to the inherent

Essex Group, Inc. v. Southwire Co., 501 S.E.2d 501, 504 (Ga. 1998). See also East v. Aqua Gaming, Inc., 805 So. 2d 932 (Fla. Dist. Ct. App. 2001) (finding that a corporation’s customer list was a trade secret, and thus not readily ascertainable by proper means; where Aqua Gaming showed that its customer list was the product of great expense and effort, that it included information that was confidential and not available from public sources, and that it was distilled from larger lists of potential customers into a list of viable customers for its unique business).

158 UNIF. TRADE SECRETS ACT § 1, commissioners’ cmt.

159 See supra Part IV.c.1 and accompanying text.

160 It should be noted, however, that if two coaches devised the exact same play in the same situation without any knowledge of the other’s playbook, both secrets would exist for each creator simultaneously (at least in theory). Since this author is discussing trade secret status for specific scripted plays on eleven player movements in combination with a specific time of execution, the odds of such a coincidence are very slight.

161 "Trade secrets cease to be trade secrets when competitors duplicate them by ‘legitimate, independent research.’ ” Salisbury Labs., Inc., 735 F. Supp. at 1569 (quoting Thomas v. Best Mfg. Com., 218 S.E.2d 68, 71 (Ga. 1975)). However, independent research such as reverse engineering is not the same as a team trying to anticipate upcoming plays. “Reverse engineering occurs when an entity starts with a known product and, working backwards, divines the process which aided in its manufacture.” Westech Gear Corp. v. Dep’t of Navy, 733 F. Supp. 390, 392 (D.D.C. 1989) (citing Knewance Oil Co. v. Bicrou Corp., 416 U.S. 470, 476, 181 U.S.P.Q. (BNA) 673, 676 (1974)). Educated guesswork does not enable a team coach to “divine” or “know” the secrets contained within a playbook, as exists when a product or computer software is reverse-engineered. Thus, the fact that a coach could theoretically make a correct guess as to a team’s future plays, does not mean the playbook information is not a trade secret. See Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1243, 9 U.S.P.Q.2d (BNA) 1913, 1926 (Fed. Cir. 1989) (quoting By-Buk Co. v. Printed Cellophane Tape Co., 329 F.2d 147, 152, 118 U.S.P.Q. 550, 553 (Cal. App. 1958)) (stating that information can be a trade secret even if it “is something that could be discovered by others by their own labor and ingenuity”); Telex Corp. v. Int'l Bus. Machs. Corp., 510 F.2d 894, 929, 184 U.S.P.Q. (BNA) 521, 526 (10th Cir. 1975) (quoting 367 F. Supp. 258, 358 (D. Okla. 1973)) (holding that information constituted a trade secret even though it could have been procured by a competitor, “given enough time and expense, by independent investigation, research or experience”).

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nature of the information contained in secret scripted plays, other competitors cannot obtain the special information in this manner. This stands in contrast to computer programmers who in order to discern written code can use reverse engineering. Watching film and researching other teams’ tendencies can only be characterized as “professional speculation” or “educated guesswork.”

b. Misappropriation of a Playbook Leading to Discovery by Competitors Would Constitute Illegal Means of Disclosure That Would Not Eviscerate Trade Secret Status. The secrecy of playbook information could be compromised in one of three ways: (1) wrongful disclosure of play information by personnel within a team organization, (2) theft of playbooks and subsequent sale or bribery by third parties, or (3) visual or electronic theft measures by direct competitors which are used to intercept and relay specific play-calling between coaches, coordinators, and players during games. Even if these methods of ascertaining plays were successful, however, the competitor’s actions would constitute improper means of discovery and would not negate the trade secret status of playbook information that could be used in future games. Thus, if a team organization could demonstrate specific damages arising from playbook theft or disclosure, the team would have grounds for a misappropriation cause of action pursuant to the UTSA.

i. Disclosure by Personnel Within a Team Organization. Sports playbooks are developed by the team’s coach in collaboration with a handful of assistant coordinators. Obviously, the players are also privy to the secret plays because they are exposed to them in practice sessions and execute them during games. Players and coaches are employees of a team organization, and these employment relationships exist through formal sports contracts. Employees of the franchises generally agree to formal confidentiality or non-disclosure provisions in their contracts with the team organization. These provisions ensure that employees will not disclose any secret proprietary information obtained in the course of their employment. This relationship of confidence places a duty on

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162 This type of anticipation does not detract from a secret playbook that deserves legal protection.

163 See Merrick T. Rossein, Employment Law Deskbook for Human Resources Professionals § 3:15 (2003) (discussing various methods of wrongful acquisition or disclosure).

164 See, e.g., Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A., 267 F. Supp. 2d 1268 (S.D. Fla. 2003) (holding that hotel licensee was liable under Florida law for misappropriation of trade secrets under the Uniform Trade Secrets Act by acquiring the licensor’s detailed customer profiles through improper means, namely, by theft and by espionage through electronic means).


166 See generally Corporate Compliance Series, supra note 125, § 3:5 (explaining that these clauses are agreements not to communicate or disclose to others any trade secrets or confidential information of the employer).

the employee to refrain from making improper use of secret playbooks. When a trade secret is compromised by illegal disclosure from breach of an express or implied duty, courts are likely to find that misappropriation has occurred. Furthermore, any intentional, accidental, or mistaken disclosure of play information by these team personnel, either directly to competitors or indirectly to persons who may supply it to competitors, would constitute misappropriation. It is irrelevant under the law whether these employees actually sell, provide, or distribute tangible playbooks containing the secret play information. If team employees obtain, access, or simply commit to memory the information contained in these books to use in upcoming games and assist others in exploiting its value, by selling it to competitors or third parties, for instance, they are illegally misappropriating trade secrets.
ii. Acquisition of Tangible Playbook Information by Third Party Theft. If not the result of mistaken, accidental, or intentional disclosure by players or coaches, scripted playbooks nevertheless could be acquired and used by third parties through improper means. Disclosure due to improper acquisition, however, does not cut against the argument for trade secrecy of playbooks, as that conduct would give rise to a valid misappropriation claim. The UTSA uses the term “improper means” as a standard of business ethics. The use of that term “is pivotal because the central policy behind trade secrecy is to deter ‘breach of faith and reprehensible means of learning another’s trade secret.’” The UTSA states that “‘improper means’ includes theft, bribery, misrepresentation, breach, or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means.” It further includes conduct that is situationally improper as well as the unauthorized disclosures of lawfully acquired secrets. This “language represents a broadening of the common law concept of breach of confidence,” and the catalogue of acts that constitute “improper means” is not meant to comprise a complete roster of the possibilities of unethical behavior.

As discussed earlier, pre-designed plays for an upcoming game are developed in practice and then formally drawn up in tangible playbooks. Generally, only the team’s coach, coordinators, and players have access to a playbook itself. Misappropriation could occur, however, if these playbooks were stolen and sold directly to competitors or were illegally disclosed through sale by third parties who of who actually maintains ownership of the physical playbooks, this author assumes that coaches would have very little incentive to disclose voluntarily their own secret playbooks to competitors at any time while they were employed by a specific team. Hence, the issue of ownership of playbooks under circumstances where a coach ends employment for one team and begins as another team’s coach will not be discussed in this Note.

By third parties, this author is referring to persons either inside or outside of the team organization who are not involved in the development of the playbooks, or otherwise do not have legal access to the information. The author assumes that this group of persons includes all individuals other than the coaches, coordinators, and players involved in play development.

See, e.g., Bd. of Regents of State of Fla. v. Taborsky, 648 So. 2d 748, 754 (Fla. Dist. Ct. App. 1994) (holding that a university was entitled to an injunction preventing a former student from using, disclosing, or selling stolen laboratory notebooks which contained proprietary and confidential research).

Samuels & Johnson, supra note 2, at 54, 55.

Id. at 55 (quoting UTSA commissioners’ prefatory note). The Supreme Court in Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974) recognized that “the maintenance of standards of commercial ethics” is a leading policy underlying trade secret law.

UNIF. TRADE SECRETS ACT § 1(1) (2002).

Id. § 1 commissioners’ comment.

Samuels & Johnson, supra note 2, at 55.

UNIF. TRADE SECRETS ACT § 1 commissioners’ cmnt. (2002).

Interception, supra note 8.
have no knowledge of how they were obtained but should have realized that their availability was the result of illegal methods of discovery.\textsuperscript{181} "In the NFL, playbooks are treated like trade secrets. Players can be fined thousands of dollars for losing or misplacing them . . . ."\textsuperscript{182} Due to the immense value of these playbooks, large incentives exist for immoral crusaders to ascertain information pertaining to scripted plays and to distribute that information to those who are willing to pay large sums of money.

The occurrence of illegal acquisition and criminal activity with respect to football playbooks is not as far-fetched as it may seem. For example, in the past year, extremely valuable playbooks were stolen from the University of Miami Hurricanes,\textsuperscript{183} which at the time was the most likely contender for the $12 million BCS Fiesta Bowl in 2003, and from the Philadelphia Eagles franchise,\textsuperscript{184} which at the time was a strong preseason favorite for the 2003 Super Bowl. Certainly, one could suspect that many instances of illegal acquisition and use occur that organizations never discover.\textsuperscript{185}

Acquisition of playbooks by those lacking a team organization's consent is theft, whether it is procured directly by competitors or whether the information is obtained indirectly but with knowledge of improper means of discovery. Theft creates a legal cause of action for misappropriation.\textsuperscript{186} "Strangers may be liable


\textsuperscript{182} Interception, supra note 8.

\textsuperscript{183} The Miami Hurricanes were the National Champions of college football in 2002 and were the frontrunners for the Championship again in 2003. In March 2002, two playbooks, one offensive and one defensive, were stolen and posted on the internet. The playbooks were taken from the office of linebacker coach Vernon Hargreaves and the playbook pages were removed from the binders. Team officials checked the Internet and found playbook pages scanned on the website titled "Sandman's 4-3 Defense On-Line." Id.

\textsuperscript{184} Last fall, three central Texas coaches agreed to pay $3000 each to former Dallas Cowboys offensive coordinator Ernie Zampese, former Philadelphia Eagles coach Buddy Ryan, and two of Ryan's sons in order to settle a pending lawsuit. Zampese, Ryan, and his sons sued the coaches after learning that their NFL playbooks had been posted for sale on the Internet. See id.

\textsuperscript{185} See id. NBA basketball player for the Indiana Pacers, Malik Sealy, left his playbook at Kennedy International Airport in 1993. It was a scouting report on opponents' strengths and weaknesses. The contents were read on a national radio show just hours before the teams began a first-round playoff series. Sealy was heavily fined. In 1996, former Florida coach Steve Spurrier closed practice to the media after some of his "ball plays" ended up on a website.

\textsuperscript{186} See, e.g., Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp., 139 F.3d 1396, 46 U.S.P.Q.2d (BNA) 1677 (11th Cir. 1998) (finding misappropriation by illegal acquisition under the Georgia Trade Secrets Act, where the evidence suggested that a hotel reservations company improperly accessed confidential occupation and pricing data maintained by a commercial property owner, by means of computer systems technology operated by the former, and disclosed that
[for misappropriation] when they use or disclose a trade secret after using improper means to acquire it, or with knowledge that it was misappropriated by someone else. 187 Hence, theft of a team's physical playbooks is clearly improper under the UTSA as a form of misappropriation and in no way renders secret play information "readily ascertainable by proper means" under the statute.

iii. Electronic, Visual, or Other Espionage by Competitors at or Near the Time of Use of the Trade Secret. The final way in which competitors could discover secret playbook information is where an opponent's team personnel directly misappropriate a team's play-calling 188 during games through the use of electronic, visual, or other espionage. Once again, these measures would clearly be considered improper means of discovery under the UTSA, thereby giving rise to a misappropriation cause of action.

This sort of "on-the-scenes" espionage poses a much greater threat to playbook owners. If opponents can know the exact timing of particular plays at the precise moment they are implemented during a game, playbook owners seemingly lose all competitive advantage. 189 Thus, trade secret law should recognize a misappropriation cause of action for playbook theft and establish a manageable framework for the deterrence of espionage and other illegal activity in professional sports industries. 190

"While public policy favors competition, there are limits on how far one may go in ascertaining the trade secrets of a rival." 191 In particular, "[n]either the Restatement nor the UTSA attempts to catalogue" the term "improper means." 192 As a general rule though, "[i]mproper means need not be illegal or criminal, but

valuable information to a directly competing hotel franchise who was able to gain a competitive advantage from its use).


188 In this context, espionage at the time of a play-call pertains to direct espionage of plays just before they are implemented during a game. The only difference is that this type of espionage would not involve theft of tangible playbooks. The information obtained would still indicate the substance and execution of an upcoming play, yet direct espionage at or near the time a play is run would provide additional certainty with respect to the exact timing of that individual play. As explained further in this section, this sort of espionage would still constitute improper misappropriation of playbook information, just without the benefit of the actual playbook.

189 Although employee sale or third party disclosure may reveal information about a team's game plan as to the substance and timing of specific plays, "on-the-scenes" espionage provides an additional element of certainty just before a play is executed. At that point, an opponent is already anticipating a specific play-call, and it is simply a matter of shutting down that play.

190 See infra Parts V and VI and accompanying text.

191 PERRITT, supra note 5, at 190.

192 Id. at 191.
must 'fall below the generally accepted standards of commercial morality and reasonable conduct.' The UTSA includes the category "espionage, through electronic or other means" as part of its definition of "improper means." The commentary notes that otherwise lawful conduct can constitute improper means because of the circumstances, citing airplane overflight used as aerial reconnaissance in *E.I. duPont de Nemours & Co. v. Christopher.* Furthermore, "[t]he Restatement [of Torts] commentary makes it clear that [measures of espionage] . . . may be improper even though they cause no harm to interests other than the trade secret interest."

During NFL games, each team has several assistant coordinators who are stationed above the playing field in team booths. The teams' coaches and players are stationed on the sidelines of the field. The coordinators have copies of playbooks and watch the games develop from an aerial perspective. This provides them with a better view of the plays utilized by an opponent on the field. These coordinators relay play-calling strategy to the head coach on the sidelines by means of electronic headsets. The coach then decides which plays to run at particular times based on the information from his coordinators. The coach relays his play-calls to specific players on the field either by telling them in person through sidelines conferences or by directly communicating through an electronic speaker that certain players have implanted within their helmets.

This verbal exchange of information, whether in-person or through electronic headsets, opens the door for espionage by opponents. Team opponents might attempt to intercept play-calling through electronic eavesdropping or simply use specialized visual devices such as binoculars to read the mouths of team personnel who are communicating on the sidelines or in the team booths. If opponents can decipher which play-calls are made by coaches and coordinators at or just before the time they are executed in a game, opponents' coordinators in team boxes are

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193 *Id.* (quoting RESTATEMENT OF TORTS § 757 cmt. f). See Clark v. Bunker, 453 F.2d 1006, 1011-12, 172 U.S.P.Q. (BNA) 420 (9th Cir. 1972) (awarding punitive damages for extreme and unlawful means employed to obtain a rival's trade secret, including commercial espionage).

194 See UNIF. TRADE SECRETS ACT § 1(f).

195 PERRITT, supra note 5, at 191. See UNIF. TRADE SECRETS ACT § 1 commissioners' cmt. (citing E.I. duPont de Nemours & Co. v. Christopher, 431 F.2d 1012 (5th Cir. 1970)).

196 PERRITT, supra note 5, at 192. See RESTATEMENT OF TORTS § 757 cmt. g (noting that a competitor's liability depends not on the actor's purpose, but only on the means).

197 See LONG, supra note 66, at 298.

198 *Id.*

199 *Id.*

200 The coach receives particular information from his coordinators about what strategies an opponent is using for certain plays in the game and then refers to his playbook, which he maintains in his possession on the sidelines, in order to determine what the appropriate play-call is at a particular time.
then able to unlock the secrets of the playbooks. These coordinators could instantaneously relay this intercepted information to their own team personnel on the sidelines and prevent any surprise from taking place. In other words, the opponents would be able to “steal” a team’s playbook right before the secret plays are executed.201 The playbooks would seem to lose all value, and this disclosure would destroy the secrecy of these “discovered” plays. Just last year, professional baseball teams in the Major League made allegations of sign stealing.202 It seems only rational to presume that this same type of espionage is prevalent in the NFL as well.

“Improper’ means of acquiring another’s trade secret . . . include theft, fraud, [or] unauthorized interception of communications. . . .”203 Interception of play-calling certainly qualifies as “improper means” of acquisition under the UTSA, the Restatement of Torts, and the Restatement of Unfair Competition.

[W]hile using physical force to take a secret formula from someone’s pocket[,] breaking into an office to steal the formula, and fraudulent misrepresentation to induce disclosure are wrongful and also are independently tortious, other means lawful when disassociated with trade secret may be improper when associated with trade secret acquisitions, such as recording telephone conversations and other kinds of eavesdropping or espionage.204

Thus, sports play espionage would be actionable misappropriation under any of the aforementioned doctrines. For these reasons, the misuse of electronic or visual devices does not render otherwise secret plays “readily ascertainable” by
proceeds because any possible manner of discovering the secret information contained in sports playbooks would violate contractual provisions or constitute “improper means” of acquisition under accepted trade secret standards, intellectual property law should afford a remedy to those parties who have been victimized by misappropriation in professional sports.

D. REQUIREMENT OF REASONABLE EFFORTS TO MAINTAIN SECRECY

The UTSA requires reasonable efforts to maintain secrecy. Information is not secret if it is a matter of common knowledge within the industry; “if it is published in trade journals, reference books, or similar materials; or if it is readily copyable from products on the market.” Football playbooks are inherently secret, however, due to the nature of the information and the manner of its use. Having established that playbooks are in fact secret, the issue of what degree of secrecy is required to maintain that trade secret remains. Arguably, NFL teams currently take “reasonable” measures to protect the secrecy of playbooks.

Most courts opine that while absolute secrecy is not necessary, a substantial element of secrecy is required such that it would be difficult for others to properly acquire the information and/or that a modicum of originality separates it from everyday knowledge. “Courts agree that trade secrets lie somewhere on a continuum from what is generally known in a field to what has some degree of uniqueness . . . . [S]ecrecy does not mean that the public must be incapable of discovering it by fair means.” Indeed, “[o]nly as much secrecy is required as is practicable under the circumstances.” The Restatement of Torts has also expressly adopted this notion of relative or qualified secrecy. In the case of a unique secret, the secrecy of the underlying process or formula would not be challenged by the fact that others are carrying on research in an effort to ascertain the secret. Many courts explicitly state that the “degree of secrecy” element is

[References]

205 See, e.g., RKI, Inc. v. Grimes, 177 F. Supp. 2d 859, 875 (N.D. Ill. 2001) (finding misappropriation of customer/financial information by improper means where an employer's confidential computer files were downloaded by a former employee from the business's computer database).

206 UNIF. TRADE SECRETS ACT § 1(4)(ii) (2002). See ROSSEIN, supra note 163, § 3:15 (“[I]he company claiming the trade secret must treat the information in question as a secret and must take reasonable steps to keep it secret.”)

207 PERRITT, supra note 5, at 105.

208 See supra Part IV.C.2.a and accompanying text.

209 MILLS, supra note 167, § 4:7 (describing novelty and secrecy requirements of intellectual property laws).

210 Id.

211 PERRITT, supra note 5, at 108.

212 RESTATEMENT OF TORTS § 757 cmt. b (1939).

213 MILGRIM, supra note 27, § 1.07[2], at 1-345 (noting that the cases which even imply the

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satisfied by the existence of confidential relationships based on the notion of good faith security measures. Others view secrecy as merely a private matter: "something known only to one or a few and kept from others."

In the NFL, football teams do not maintain absolute secrecy because coaches, coordinators, and players all access the team playbooks in preparation for upcoming games. In other words, the secret plays are not hidden in an unknown vault, which may be opened only by a few elite persons. Teams do undertake practical and reasonable measures to maintain relative secrecy though. Specifically, teams require players and coaches to sign confidentiality agreements when they become employees of an organization. These agreements create express fiduciary duties to refrain from disclosing any secret material developed during their employment with the team. Even in the absence of a contract, implied fiduciary duties arise due to the confidential nature of these interrelationships. "Confidentiality agreements with employees help satisfy the secrecy requirement, but they are not strictly necessary because of employee duties implicit in the employment relationship . . . ."

In addition to imposing contractual obligations on people to whom trade secrets are disclosed, trade secret owners who want to satisfy the secrecy requirement might also restrict physical access to the trade secret. NFL teams only allow those persons who are intricately involved in developing, executing, or formally writing plays in playbooks to access copies of a particular playbook. The head coach is generally the only person in an organization who has access to

necessity of absolute secrecy are in a distinct minority, and the prevailing school of thought suggests that secrecy need only be relative).

See Vulcan Detinning Co. v. American Can Co., 67 A. 339, 343 (1907) (explaining that the secrecy requirement expresses a concept of "qualified secrecy that arises from mutual understanding, and that is required alike by good faith and by good morals").

See Kaumagraph Co. v. Stampagraph Co., 138 N.E. 485, 487 (N.Y. 1923) (affirming the idea that relative secrecy is sufficient).

Consider the Coca-Cola formula as a good example of absolute secrecy. The Coca-Cola Company maintains a written version of the secret formula for "Merchandise 7X" in a security vault at the Trust Company Bank in Atlanta, Georgia, and that vault can only be opened by resolution from the company's Board of Directors. It is the company's policy that only two persons in the company shall know the formula at any one time and that only those persons may oversee the actual preparation of "Merchandise 7X." The company refuses to allow the identity of those persons to be disclosed or to allow those two persons to fly on the same airplane at the same time. Similar precautions surround the experimental formulae of the Company. Coca-Cola Bottling Co. of Shreveport v. The Coca-Cola Co., 107 F.R.D. 288, 290, 227 U.S.P.Q. (BNA) 18, 22 (D. Del. 1985).

See MILLS, supra note 167, § 12:34.

Id.

PERRITT, supra note 5, at 120-21.

Id. at 120.

See Interception, supra note 8.
PLAYBOOKS AS TRADE SECRETS

all of the playbooks for a particular game. Players only have access to playbooks containing the plays they will be executing, and coordinators maintain separate playbooks depending on whether they supervise offense, defense, special teams, quarterbacks, linebackers, and so forth. Every facet of game preparation is compartmentalized. These persons are instructed to keep the playbooks locked in their personal home or office space or within their possession at all times. This level of tight, restricted access is most likely sufficient to satisfy the secrecy requirement even though players and coaches carry around their copies of playbooks in public.

Other possible security measures include limited copying, restricted access, proprietary notices, and strict security policies for possession of tangible, secret information. Most NFL coaches have even begun covering their mouths in games when making play-calls. This method of maintaining the secrecy of play-calls is certainly reasonable because it prevents opponents and strangers from discerning what the coach is saying to players or coordinators just before plays are executed. Therefore, since teams actively police their already-stringent policies to ensure that playbooks never leave the coach’s possession in public and take reasonable precautions to ensure that opponents or the media do not ascertain play information prior to implementation, these measures, when taken together, most likely establish reasonable means of maintaining qualified secrecy of professional playbooks.

E. PLAYBOOKS DESERVE TRADE SECRET PROTECTION

Sports playbooks contain information that is secret, valuable, and affords a competitive advantage within professional sports industries. This information

222 See THEISMAN, supra note 64, at 54.
223 Id.
224 See Interception, supra note 8.
225 See id. See, e.g., Innovative Constr. Sys., Inc., 793 F.2d 875, 230 U.S.P.Q. (BNA) 94 (7th Cir. 1986) (finding that security measures to guard formulae were sufficient even though one formula was posted on a wall, because other formulae were kept in a notebook in the manager’s office); Electro-Miniatures Corp. v. Wendon Co., 771 F.2d 23 (2d Cir. 1985) (restricting access to drawings and placing proprietary labels on them was sufficient security); Allen v. Jahar, Inc., 823 S.W.2d 824, 21 U.S.P.Q.2d (BNA) 1854 (Ark. 1992) (holding that a customer list was adequately guarded by restricting access to the list and destroying old customer printouts); Surgidev Corp. v. Eye Tech., Inc., 648 F. Supp. 661 (D. Minn. 1986) (finding security for sales information adequate because material was distributed to employees on a “need-to-know” basis).
227 See MILGRIM, supra note 27, § 1.07[2] (noting that any factors bearing upon use by third parties constitute questions of fact).

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includes detailed instructions pertaining to the substance and execution of particular sports plays against particular opponents for specific upcoming games. The unique nature of sports playbooks and the manner in which they are used for value by teams operating as professional businesses makes this information inherently secret and novel.

Playbooks are neither a matter of general knowledge within sports industries nor readily ascertainable, except by improper means of disclosure, acquisition, or direct espionage and theft, all of which would certainly constitute misappropriation under existing trade secret standards (as defined by the UTSA and reinforced by the Restatements of Torts and Unfair Competition). Moreover, sports teams recognize the immense value of playbook information and take practical measures to ensure that these playbooks remain secret from competitors. Thus, playbooks are a subject matter worthy of trade secret protection under the law.

V. PROPOSAL FOR A PRACTICAL SYSTEM OF ENFORCING TRADE SECRET PROTECTION IN PROFESSIONAL SPORTS

As this Note has explained, there is a strong basis for protecting sports playbooks under existing trade secret standards, but recognition of those legal rights is of little consequence in the absence of satisfactory enforcement or remedies. A manageable system of legal protection can exist in professional sports through the use of a central legal agency which could make evaluations of submitted complaints under an arbitration committee system similar to that currently utilized in many U.S. industries. If sports playbooks comprise information protectable under trade secret law, then a system for enforcing violations of those laws by providing substantial remedies to victimized parties would deter misappropriation and other improper conduct within the industry. A workable system of enforcement would thus provide a real, recognizable remedy for deterring improper acquisition, disclosure, and espionage in the NFL.

Several commentators have recommended the establishment of on-site lawyers and arbitrators at sporting events to evaluate instantaneously legal disputes. They contend that this on-site mediation/arbitration would effectively protect intellectual property disputes and preserve fairness and efficiency throughout sporting events. While satisfactory in theory, on-site legal arbitration would seem to pose administrative concerns that may detract from the integrity of
professional sporting events as great time, effort, and expense would likely be necessary to effectively assess legal disputes. The modern sports game would become an all-day extravaganza filled with repeated stoppages, complaints, and evaluation by numerous legal personnel. That delay would certainly compromise the appeal of professional sports as a source of public entertainment. Therefore, a system of legal arbitration removed from the field itself would likely provide the most practical system of enforcement of trade secret rights involving playbooks. Sports contests could continue unimpeded with legal disputes, and closed panel resolution of trade secret complaints could more effectively preserve the secrecy of playbook information, thereby preventing untimely disclosure to competitors during an on-site game review.

The establishment of a central legal agency to preside over each individual sports industry (NFL, MLB, NHL, NBA, etc.) is the first component of the proposal offered in this Note. The agency would serve as an independent body that would receive, evaluate, and dispense with certain legal claims alleging misappropriation. Teams with a substantial reason to suspect misconduct on the part of competitors or third parties affiliated with competitors could submit a trade secret complaint to a specialized panel of the agency. The complaint would consist of written allegations documented with affidavit-style or video-recorded evidence supporting the truth of the allegations. The accused team would be given an opportunity to respond in the same manner. After those submissions, the agency, acting on its own legal knowledge, would make a decision based on the information received.

To discourage frivolous claims, a high monetary filing fee for the team making allegations to the agency should be required. Moreover, the standard of legal evaluation by the agency should require a high level of prima facie evidentiary proof. Such a system should also incorporate a one-time appeal for the losing party to a separate board of committee members who would render the ultimate decision on the matter. If this board was convinced by the sufficiency of the evidence that playbook misappropriation or other improper conduct had taken place, substantial monetary damages could be assessed against the guilty team organization.

Furthermore, the arbitration agency system should be mandatory and binding on all coaches, players, owners, and other team or franchise personnel and serve as the exclusive remedy for particular playbook misappropriation issues.

Finally, the agency itself should consist only of lawyers who have specialized

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37 See id. (noting that arbitrators could be used to decide particular intellectual property disputes for sports events); Richard C. Reuben, And the Winner Is... Arbitrators To Resolve Disputes As They Arise at Olympics, 82 A.B.A. J. 20 (Apr. 1996) (discussing the use of arbitration committees at the 1996 Olympic Games in Atlanta to resolve disputes).
knowledge in the fields of trade secret and espionage law and who work exclusively for the agency.

The isolated nature of this proposed agency would also preserve the secrecy of playbook information. The inability to pursue litigation, present witnesses, or make oral arguments would further limit the time, expense, and complication of resolving disputes. Independent review by a body which is removed from the actual game setting would alleviate administrative concerns surrounding on-site evaluation and decision. The sanctity of the sporting event itself would not be jeopardized as significant legal resolution would take place behind the scenes.

As far as implementation is concerned, such an agency might provide an exclusive remedy only in particular situations where litigation would be impractical. For instance, the panel could govern misappropriation disputes involving espionage of play-calling during games. Obviously, altering the results of a particular game after the fact would make little sense. Certain play-calls may have been intercepted and successfully taken advantage of by an opponent, but filing litigation in a court of law would provide little opportunity for obtaining a satisfactory remedy.

After all, the time, expense, and great difficulty of proving a misappropriation claim under these circumstances is the primary appeal of the arbitration agency proposed herein. State laws protecting trade secrets already have been heavily criticized by the Senate Judiciary Committee for not providing cost-effective remedies.231

What State law there is protects proprietary economic information only haphazardly. The majority of States have some form of civil remedy for the theft of such information—either adopting some version of the Uniform Trade Secrets Act, acknowledging a tort for the misappropriation of the information, or enforcing various contractual arrangements dealing with trade secrets. These civil remedies, however, often are insufficient. Many companies chose to forgo civil suits because the thief is essentially judgment proof... or too difficult to pursue.... In addition, companies often do not have the resources or the time to bring suit. They also frequently do not have the investigative resources to pursue a case. Even if a company does bring suit, the civil penalties often are absorbed by the offender as a cost of doing business and the stolen information retained for continued use.232

232 Id.
Where a playbook misappropriation dispute involves the theft, bribery, disclosure, or unauthorized use of an actual team playbook, the panel could provide a more limited ruling. Issues of how a playbook was stolen, obtained, or disclosed from within a team organization may be more appropriate questions for impartial fact finders in a court of law. Moreover, issues pertaining to breach of an employment agreement or third party transfer or receipt of playbook information would surely require a more thorough fact-finding process. Resolving these issues would likely entail the admission of third party statements, presentation of witnesses, and determination of credibility. An arbitration panel might be ill-equipped to resolve the intricacies of those disputes. Instead, the panel could provide a preliminary ruling based on any impartial investigation it conducts after receiving a complaint. This ruling might serve as prima facie evidence in further litigation proceedings.

For the resolution of individual play espionage though, this panel would provide significant benefits to a victimized party by reducing the costs, time, and uncertainty of achieving an appropriate remedy. Since misappropriation of a playbook is not necessarily the same as misappropriation of individual plays, this dual system of legal protection, bolstered by an independent governing agency, would be quite advantageous. The ability to obtain an efficient, satisfactory monetary remedy would go a long way toward deterring future unethical behavior while simultaneously providing compensation to injured organizations.

VI. CONCLUSION: PLAYBOOKS DESERVE TRADE SECRET PROTECTION AS A MATTER OF PUBLIC POLICY

Certainly, the above proposal only scratches the surface of the many details that such a system would ultimately entail, but the appeal of a practical approach to trade secret enforcement lies in the ability to provide a remedy for the violation of rights. The existence of a system that provides compensation for misappropriation of trade secrets is far more important than the detailed functioning of the system. The arbitration agency proposed herein is desirable because it could deter misconduct within sports industries and provide just compensation. The improper acquisition, disclosure, or espionage of playbook information carries quite an enticing reward. The secrets behind a team game plan are most valuable and the potential monetary benefit is substantial. Although little documented evidence of widespread espionage in professional sports presently exists, the current "lure of impropriety" is immense.
A. THE REMEDY FOLLOWS THE POLICY

Critics who may disagree with the provision of civil remedies for trade secret misappropriation would likely argue that criminal statutes can provide a more effective deterrent for trade secret espionage. In their opinion, the threats of high fines and prison sentences are adequate without the imposition of civil remedies. An example of such a criminal statute is the Economic Espionage Act ("EEA"). President Bill Clinton signed the EEA into law on October 11, 1996, in response to nationwide studies which revealed that nearly twenty-four billion dollars of corporate property was stolen each year. The EEA created two new federal criminal offenses involving (1) the theft of trade secrets by foreign government agents or instrumentalities and (2) general protection from domestic trade secret theft by anyone. The Act "was passed to fill a large hole in trade secret law that had been enlarged by the emergence of new information technologies" such as sophisticated electronic eavesdropping equipment. The Act's overall purpose was "to provide greater protection for the proprietary and economic information of both corporate and governmental entities from foreign as well as domestic theft and subsequent use." Prior to the EEA's passage, most federal trade secret theft cases were prosecuted under the Interstate Transportation of Stolen Property Act, which was neither designed nor intended to apply to intellectual property. Because of the lack of a federal statute, various state laws, mostly based on some variation of the UTSA, were utilized to fill the gap.

Critics might argue that the general criminal trade secrets provision of the EEA, section 1832, provides any necessary remedy for sports playbook misappropriation. After all, this section broadly applies to anyone who knowingly

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234 Mason et al., supra note 233, at 191.


238 Id.

239 Chamblee, supra note 236, at 617.


241 Id. at 306.

242 Id.

engages in the theft of trade secrets, or an attempt or conspiracy to do so. However, such criticism may be unfounded. The EEA appears to suffer from two crucial drawbacks. First, the statute probably would not apply to misappropriation of sports playbooks because these trade secrets are related to the provision of public entertainment. Second, to the extent the EEA could be used to prosecute criminally playbook theft, the Act fails to address adequately the monetary loss victims sustain as a result of the misappropriation.

The EEA does not protect trade secrets related to services. Because trade secrets must be embodied in a product in the stream of commerce, protection is limited if the trade secret relates to a rendering of services rather than a produced ware that contains or uses the secret. Thus, since the use of professional sports playbooks involves the provision of entertainment services, the EEA may not even allow a prosecution for misappropriation of these trade secrets.

Second, even if the EEA could be used to combat playbook misappropriation, the statute does not provide any civil remedies for the victimized parties. All fines and forfeitures go to the government, and the only compensatory remedy available under federal law is the possibility that the victims may be able to petition the government for restitution. Barring this, the only recourse for trade secret misappropriation victims is filing an action under state civil law, which can be prohibitively expensive and often ineffective in substantially compensating the injured party for real losses sustained. Hence, the arbitration agency proposed herein is advantageous because it would serve as a practical

244 See id. Under section 1832, a defendant first must intend to convert a trade secret “to the economic benefit of anyone other than the owner thereof,” including the defendant. Second, under this section, the defendant must intend or know that the offense will injure an owner of the trade secret. Third, the Act requires that the trade secret be “related to or included in a product that is produced for or placed in interstate or foreign commerce.” Id. The punishment includes imprisonment for up to ten years, and/or a fine of up to five million dollars assessed against guilty organizations. Id.

245 Id.

246 18 U.S.C. § 1832(a) (2000) (trade secrets must be “related to or included in a product that is produced for or placed in interstate or foreign commerce”) (emphasis supplied).

247 Simon, supra note 236, at 631 ("Private entities lack standing to assert civil actions under . . . the [EEA]."). See Mason et al., supra note 233, at 202-03 (fines assessed to guilty parties under the EEA are retained by the government. Because heavy fines are likely to impoverish a defendant, restitution may be precluded, thereby leaving a victim business uncompensated. Therefore, such fines could render a civil, companion-trial moot.). But see 18 U.S.C. § 1838 (declaring that the EEA does not preempt other civil actions, such as state tort or contract claims regarding trade secret misappropriation).

249 Simon, supra note 237, at 316.

250 Id (arguing that the EEA should be specifically amended to correct this oversight, and that federal law should adequately address the losses sustained by victims of trade secret theft).
compromise between the underutilized EEA criminal provisions of section 1832 and the inefficient remedies of UTSA civil litigation.

B. PRACTICALITY PREVAILS

The central policy behind trade secret law is to deter breach of faith and reprehensible means of learning another’s trade secret. Recognition of playbooks as trade secrets would further this goal. With respect to enforcement of the rights arising under trade secret law, an incentives-based approach of deterrence and compensation would preserve the integrity of the sport, as trade secret misconduct becomes less enticing and playbook creativity takes precedence. Industry incentives would sway in favor of coaching, teaching, studying, and developing. Playbooks could remain the true product of a coach’s genius and creativity. Stealing plays, bribing third parties, and espionage tactics become less attractive in light of a credible threat of immense monetary damages.

Trade secret laws could thus inspire greater awareness of ethical conduct in professional sports, where businesses of profit, exploitation, and corruption are discouraged, and games of entertainment, integrity, and pure competition are adored. Sports could remain what they were always meant to be—a good faith battle of competitive spirit arising from the ingenuity of resilient participants. So what are we waiting for?

RICE FERRELLE

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251 Samuels & Johnson, supra note 2, at 55.
252 See Das, supra note 59, at 1098 (with assurances that intellectual property law would protect their creations, “coaches would develop new plays with greater regularity, knowing that they would have an advantage in doing so”).