TULANE JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY

VOLUME 27 SPRING 2025

What Is Ready Ascertainability?

Charles Tait Graves*

One of the requirements for establishing that information qualifies as a trade secret is that the information not be "readily ascertainable through proper means"—meaning, the information can readily be assembled from public domain sources. Information that is readily ascertainable is not a trade secret. But that requirement—part of the federal Defend Trade Secrets Act and the Uniform Trade Secrets Act in almost every U.S. state—is often ignored in trade secret cases centered on technology, life sciences, and other complex types of information. This Article is about that problem, and what to do about it.

The ready ascertainability requirement is supposed to prevent trade secret claims in information that, while not found in one single public source as a whole, is still nonetheless easily available through multiple industry sources. The tacit proposition is that something one can easily collect or observe from published materials should not be anyone's secret.

When courts and litigants overlook the ready ascertainability element, it becomes significantly easier to establish a trade secret than the statutes would warrant. This mission creep in expansive trade secret protection poses a threat to scientists and researchers making choices from options and elements that are available to them from a literature review.

The problem is acute when it comes to so-called combination trade secrets, where a party alleges a trade secret in a set of design elements within a technical design or scientific research. To highlight the danger, this Article addresses what I call "gerrymandered" trade secret clams: those where a litigant artificially structures a combination claim to highlight elements in common with the defendant's work, while omitting dissimilarities. Ready ascertainability is a powerful tool to expose such made-for-litigation claims.

Part of this Article is diagnostic: it maps the many reasons why courts overlook the ready ascertainability element. One is that courts have largely relegated consideration of ready ascertainability to simple, small-market customer list trade secret cases rather than complex technology cases. Another is that courts confuse ready ascertainability with other distinct concepts in trade secret law, such as reverse engineering and independent derivation.

* © 2025 Charles Tait Graves, Partner, Wilson Sonsini, San Francisco, and adjunct faculty, UC College of the Law, San Francisco. Jonas Anderson, Victoria Cundiff, Cynthia Ho, Camilla Hrdy, Timothy Murphy, Elizabeth Rowe, Sharon Sandeen, Deepa Varadarajan, and John Villasenor provided helpful comments on drafts, and this Article benefitted from discussions at the January 2024 Virtual Trade Secrets Workshop and the August 2024 IP Scholars Conference at Berkeley Law.

This Article is also prescriptive, offering normative solutions that courts can use. Above all, courts should define ready ascertainability as information that can easily be collected or observed from more than one publicly available source, where those in the field would reasonably recognize the sources as collectively disclosing the alleged secret. This focus on multiple sources is the key: where technological elements appear in several sources, and especially where they appear in several products, their ubiquity renders them part of a toolbox, so to speak, that all those in the field can freely draw upon.

Potentially confounding some readers, this Article does not advocate that ready ascertainability borrow the rules of obviousness from patent law. Although that comparison is tempting, courts have long insisted on maintaining the definitional differences between patent and trade secret law. We must advocate rules for trade secret law immanent to its scope and its history. The result is a lower bar for ready ascertainability than for obviousness, not a mimicking of patent law.

I. INTRODUCTION

This Article describes and offers solutions for a serious problem in trade secret law: The inattention paid to the requirement seen in most trade secret statutes that a valid trade secret cannot be "readily ascertainable by proper means." Said differently, one of the things that a trade secret plaintiff is supposed to prove in almost every U.S. jurisdiction has fallen by the wayside.

To set the stage, imagine a scientist or engineer who changes jobs. That scientist works on a competing device or biological research project. While her new device or research forms a different combination of elements than what was seen at her former company, here or there both share some elements in common. Each such element is publicly available. They do not form a valid "combination trade secret," because they do not, by themselves, form an interconnected whole.[1] Each is merely present within a larger combination of elements that otherwise differ substantially between the two companies. Many of these same elements are also used by different companies, albeit not all at the same time, in their own different combinations.

Can a trade secret plaintiff nonetheless claim that the presence some of the same non-secret elements in two otherwise different combinations is a "trade secret"? In defending herself, can our scientist point to more than one public article or research paper to demonstrate that the various elements are all readily available to those working in the field? Or can the plaintiff say that since no single public source, by itself, shows the

1. Understanding the concept of the combination trade secret is important when evaluating ready ascertainability. *See* Charles Tait Graves and Alexander MacGillivray, *Combination Trade Secrets and the Logic of Intellectual Property*, 20 SANTA CLARA HIGH TECH. L.J. 261 (2004) (historical analysis of the concept, with critical commentary on its more dubious applications); JAMES POOLEY, TRADE SECRETS § 4.03[2] ("Courts have consistently held that there can be discovery and value in the act of combining available ideas and data into something useful."); MILGRIM ON TRADE SECRETS § 1.08[5] (describing the concept).

presence of these common elements within the same device or research project, there is a "trade secret"?

The answer should favor our scientist. The plaintiff gerrymandered a claim by counting up elements the competing technologies had in common, omitting all those that differed, and calling the result its "trade secret." What theory of trade secret law, however, allows our scientist to defeat this sort of made-for-litigation enterprise? What theory allows a defendant to potentially argue that any multi-element trade secret claim is not a valid trade secret? The answer is the concept of ready ascertainability: The notion that information that is easily collected is not a trade secret.

But this outcome is uncertain in today's trade secret practice, even though it is the result that best allows scientists and engineers to draw on the public, unprotected knowledge of their fields. That is so because the ready ascertainability requirement that exists in almost every trade secret statute has been largely cabined to nontechnical cases involving small-business customer lists.

This Article has four parts. It first identifies a problem about how some complex trade secret claims are asserted, one that a heightened focus on the ready ascertainability requirement could help solve. I call this the "gerrymandered" trade secret claim.

Second, it reviews the history of the ready ascertainability concept, from the pre-statutory, common law period to the federal Defend Trade Secrets Act.

The third part is diagnostic. This Article explores the many reasons why the ready ascertainability concept does not always receive judicial attention. The dataset for analysis is comprised of most if not virtually all available cases that have addressed ready ascertainability over the decades.[2] There are five major problems in the law of ready ascertainability:

> *First*, courts have largely relegated the ready ascertainability element to a small-market, small town scenario—where a plaintiff claims to own a secret customer list although local inquiries or directories would readily identify the content of the plaintiff's list—rather than cases addressing complex technology and life sciences-related information.

2. The dataset is current to June 2024, based on queries run on Lexis and Google Scholar and cases I have collected over the years.

Second, the statutes, official commentary, and courts have not provided clear and systematic definitions of ready ascertainability for scientific contexts.

Third, courts sometimes erroneously treat ready ascertainability as a question of what public sources the defendant did, in fact, gather from the public literature, rather than whether a valid trade secret exists in the first place.

Fourth, courts often use the label of ready ascertainability when they are actually discussing other, distinct concepts in trade secret law. Some courts use the language of ready ascertainability when they are analyzing the narrower, more precise concept of reverse engineering.[3] Others use the language of ready ascertainability when they really mean independent derivation, an employee's right to use his or her general, skills, knowledge, and experience from job to job, or even the plaintiff's self-publication of the information at stake.[4]

Fifth, because California omitted ready ascertainability from its version of the UTSA, this has hindered development of the concept. California has often been a leader in the development of trade secret law due to its immense economy and high concentration of technology and life sciences companies. Muddled California case law has been unhelpful.

The final part is prescriptive. Given these considerable problems, how can courts resuscitate the ready ascertainability concept, especially in complex technology and life sciences cases?

In summary, courts should treat the "not generally known" and "not readily ascertainable" elements as distinct requirements. On one hand, information is "generally known" where it is available in one public source all at once or otherwise known to the relevant field as a unitary thing, or where the plaintiff has published or released it as a unitary thing.

3. This Article does not address the distinct question of whether a defendant raising reverse engineering can point to the possibility of reverse engineering, or instead must show that it has undertaken that effort. *See, e.g.*, Kuryakyn Holdings, LLC v. Ciro, 242 F. Supp. 3d 789, 800 (W.D. Wis., 2017) (finding no trade secrets in an air cleaner part based on testimony that it could be reverse engineered); Raytheon Co. v. Indigo Sys. Corp., 598 F. Supp. 2d 817, 821 (E.D. Tex. Feb. 18, 2009) (allowing expert testimony on the possibility of reverse engineering but observing "[t]hat the Defendants did not actually go about ascertaining the purported trade secrets will no doubt quite forcefully undercut [the expert's] opinion.").

4. While one might argue that ready ascertainability should be an umbrella term that encompasses all of these concepts, trade secret law is best served if courts have at the ready sharpened definitions for each of these distinct concepts.

On the other hand, ready ascertainability is a thought experiment about what is easily available in the aggregate, not in a single source. It means that the information could easily be collected from more than one public source such that someone in the field would reasonably recognize the sources as collectively disclosing the information at issue. The more a design element or scientific fact has been published by those in the field, the more it should be readily ascertainable as part of a "toolbox" of information freely available to all.

Some readers, when considering the conundrums raised by ready ascertainability, will doubtless reach for the firmer foundations of obviousness as seen in patent law. An obvious combination of known elements cannot comprise a patentable invention.[5] I do not believe such comparisons have much to offer. Proposing a borrowing from patent law is not something courts will accept. We must craft rules that are native to trade secret law and grounded in what it does and does not protect. In any event, the comparison is not apposite: Given differences between patent and trade secret law, the standard for what is readily ascertainable in trade secret law should be lower than the standard for obviousness in patent law.

II. READY ASCERTAINABILITY AND THE GERRYMANDERING PROBLEM IN TRADE SECRET LAW

It's admittedly bold to suggest that courts and litigants have too often overlooked a basic requirement in almost every jurisdiction for a valid trade secret to exist. But that is the everyday reality in complex trade secret cases. Courts that focus on ready ascertainability tend to do so in simpler trade secret disputes over customer lists—not the complex technology and bioscientific information that increasingly is the focus of expensive and hard-fought trade secret lawsuits across the country.

Before addressing the case law, however, we should highlight the public policy question: Why does ignoring ready ascertainability in trade secret law matter, and for whom does it matter most? Who benefits, and who is disadvantaged, when courts skip over the ready ascertainability requirement?

A non-specialist who reviewed the text of the DTSA or the UTSA would see a seemingly balanced legal regime. There are powerful remedies available against misappropriation. There are also guardrails that prevent the plaintiff from suing over any information whatsoever.

5. *See* KSR International Co. v. Teleflex Inc., 550 U.S. 398, 417 (2007).

But when one steps back from the statutory text, the risk of overclaiming becomes evident. Trade secret lawsuits are a loose form of intellectual property litigation. Because there is no requirement that information be registered with the government or even written down in advance, there is an incentive for plaintiffs to "go broad"—to claim as much territory as possible, often in deliberately vague language.[6] Because there is no *Markman* process like that seen in patent litigation to construe the claimed intellectual property early in a lawsuit, a defendant has little opportunity to address such tactics as the case proceeds.

Other factors also increase risks of claim-inflation. Unlike other types of civil litigation where the plaintiff tends to be an individual suing a powerful corporation, trade secret cases often present the opposite scenario, where a powerful corporate plaintiff sues former employees and a newer, smaller company that employs them. Emotions can run high when the parties know one another, and when company leaders seek out aggressive counsel to damage a competitor. Judges are not always prepared for the technical complexity seen in many trade secret cases, and do not always recognize sharp tactics.

In this difficult environment, then, why does ready ascertainability matter?

Complex technology will rarely have an exact match in a single published article or conference proceeding, unless the plaintiff has published its own design at industry events or in patent filings. At the same time, technologies such as medical devices and cloud computing network designs tend to exist in a context where common design elements can be seen across a range of development efforts. Academics and companies publish, appear at conferences, and otherwise publicly share many ideas and concepts. A plaintiff looking to sue a competitor that has hired its employee therefore probably can't claim a trade secret in any one single product design element, as any one element will often be found in many public sources.

This means that many complex trade secret claims are asserted as multi-element combination trade secrets. When valid, a combination trade secret does not measure whether any individual element is a trade secret, but instead whether the unitary interrelationship of these elements—

6. As one California court memorably put it, "[w]hen you define the proposed boundaries of your own property, and when exclusion is valuable, and when litigation is intense, human nature prompts us to ask for more, not less, and to ask for it in a vague and all-encompassing way." *See* Coast Hematology-Oncology Assoc. Med. Grp., Inc. v. Long Beach Mem'l Med. Center, 58 Cal. App. 5th 748, 757 (2020).

sometimes called a "unified process"—is a trade secret.[7] As with any trade secret claim, combination claims in a given lawsuit may or may not be valid trade secrets.

Because the concept of ready ascertainability examines whether information from more than one public source, together, is easily found, it is the requirement best suited to test whether a combination trade secret claim asserted in a complex case is valid.

There are also problematic types of combination trade secret claims, which I call "gerrymandered," where renewed attention to ready ascertainability could be an effective antidote. This problem can arise when a trade secret plaintiff artificially lists the design elements that the plaintiff's technology and the defendant's technology share in common, omits all the elements that the two do not share, and calls the Venn diagram-style overlap a "trade secret" regardless of whether or not the common elements function together as a unit. In many such cases, the overlapping elements will be design elements common in the industry by themselves, seen in various combination in competing devices and scientific publications.

The ready ascertainability requirement is the doctrine in trade secret law that could enable courts and litigants to highlight the artificiality of such claim tactics, and to demonstrate that the key design elements can be seen in assembled public literature.

Having defined the problem, I turn to understanding the origin of the ready ascertainability requirement—and how it became underutilized in technology centered cases.

III. THE HISTORY OF READY ASCERTAINABILITY

The federal DTSA and almost all state UTSAs recite that a trade secret must be four things: (1) the subject of reasonable security measures, (2) something with some degree of value to competitors resulting from secrecy, (3) not generally known, and (4) not readily ascertainable.[8] The

7. *See, e.g.*, Thermodyne Food Serv. Prod. Inc. v. McDonald's Corp., 940 F. Supp. 1300, 1307 (N.D. Ill. 1996) (finding a valid combination trade secret in a unique set of elements for an oven design; expressing the trade secret as their "interrelationship").

8. *See* 18 U.S.C. § 1839(5) ("the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information). This language varies in some states. For example, Alabama's somewhat unique trade secret statute states that a trade secret "cannot be readily ascertained or derived from publicly available information," while Alaska and Arizona state that a trade secret cannot be "readily ascertainable by proper means" by "other persons who can obtain

fourth element is not new a version of the ready ascertainability concept is seen in the pre-statutory, common law of trade secrecy. Just like today, however, its boundaries were not well-defined.

A. The 1939 Restatement of Torts

The 1939 Restatement of Torts contained a predecessor to the ready ascertainability concept. One of the six factors it asked courts to consider when assessing whether information qualified as a trade secret was "the ease or difficulty with which the information could be properly acquired or duplicated by others."[9] Another was "the extent to which the information is known outside of [the plaintiff's] business."[10]

That both of these elements appeared separately implies two different analyses, one asking if the information is "known," and another asking whether it "could be properly acquired or duplicated." The former seems to ask if the same information can be found in a public source, in the present tense. The latter seems to ask whether the information can be assembled from more than one source with some (ambiguous) degree of ease. Let's note something important about this language, something I will return to below: it is worded in the future tense, inviting a thought experiment about what is possible rather than an examination whether the defendant actually conducted a literature review.

This is close to the ready ascertainability concept seen today. And, indeed, courts applying the Restatement analysis and considering this element considered the question as a thought experiment based on the difficulty of assembling the alleged trade secret from more than one source. For example, a 1980 Ninth Circuit ruling under pre-UTSA California common law noted, in the context of a customer list claim, that "[f]inding that information is readily accessible to competitors indicates the plaintiff did not reasonably spent a great deal of time or effort compiling the information, [. . .] that the plaintiff suffers no injury when a former employee uses the information since he or his new employer could easily discover it from other sources, and perhaps that the plaintiff

economic value from its disclosure or use." *See* ALA. CODE. § 8-27-2(1)(d); ALASKA. STAT. § 45.50.940(3)A); ARIZ. REV. STAT. § 44-401(4)(a).

9. *See* RESTATEMENT (SECOND) OF TORTS § 757, cmt. a (1939); *see* also Sharon Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 493, 522 (2010) (also noting that this Restatement language seems to have been a predecessor of the UTSA's ready ascertainability concept).

10. *See* Sandeen, *supra* note 9, at 522.

are competing in an open market for commonly known customers."[11] The court added, "[w]here customer lists are involved, the fact of ready accessibility is often inferred from evidence concerning whether the information is available in public directories such as telephone directories or more specialized trade directories."[12]

Many other early cases applied this factor, or some similar version of the quasi-ready ascertainability concept.[13] As discussed below,

11. Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1334-35 (9th Cir. 1980) (reversing a grant of summary judgment for the defense based on disputed facts as to trade secrecy).

12. *Id*.

13. *See* Ashland Mgmt. Inc. v. Jamien, 624 N.E.2d 1007, 1013 (N.Y. Ct. App. 1993) (following Restatement factor on ease of duplication by others in reverse engineering analysis; affirming trial court, which credited the defendant's expert testimony "that a financial analyst could, based on the public disclosures made by [plaintiff], reproduce the calculations without access to the internal computer commands which constitute the Alpha software."); Cambridge Filter Corp. v. Int'l Filter Co., Inc., 548 F. Supp. 1301, 1304-6 (D. Nev. 1982) (case decided under pre-UTSA California common law, albeit without expressly mentioning Restatement factors; denying motion for preliminary injunction where defendant's testimony was that "the identity of disk drive manufacturers may be ascertained with a minimum of effort" from "trade and other publications" some of which "provide other information such as sales volume"); Microbiological Rsch. Corp. v. Muna, 625 P.2d 690, 700 (Utah 1981) (same under Utah common law; reversing permanent information where customer information was "readily accessible through public sources and trade journals); Erik Elec. Co., Inc. v. Elliot, 375 So.2d 1136, 1137-38 (Fla. Ct. App. 1979) (reversing judgment for defendant in customer list case; contrasting a situation where a company sells "as a manufacturer or wholesaler dealing primarily with retail merchants or jobbers, or sells to members of a readily ascertainable class," with a customer list of prospects "made by the plaintiff as a result of extensive work and according to a specially developed plan, together with the expenditure of substantial sums of money for the production of the list."); Cherne Indus., Inc. v. Grounds & Assoc., Inc., 278 N.W.2d 81, 90 (Minn. 1979) (affirming judgment for plaintiff; even though some of the information at issue was available in "computer printouts from state and Federal environmental agencies," this did not show that it was readily ascertainable because the "plaintiff's information provided more detail"); Midwest Micro Media, Inc. v. Machotka, 395 N.E.2d 188, 192 (Ill. Ct. App. 1979) (reversing grant of preliminary injunction; "Here it is undisputed that the customers' names and addresses by themselves were not a trade secret, since they were readily obtainable from public directories."); Pressure Sci., Inc. v. Kramer, 413 F. Supp. 618, 629 (D. Conn. 1976) (entering judgment for defendants in case centering on metal seal product; focusing on sixth Restatement factor to determine that a combination of the defendant's general experience and knowledge and the availability of "the literature on the subject and the availability of experienced tool and die makers" provided a lawful means to "readily obtain" the technology at issue "within a matter of a few months); Leo Silfen, Inc. v. Cream, 278 N.E.2d 636, 637-40 (N.Y. 1971) (reversing judgment for plaintiffs; "Generally, where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not enjoin the employee[.]"; "The customers solicited by defendants, as apparently found by the trial court, are openly engaged in business in advertised locations and their names and addresses may readily be found by those engaged in the trade."); Wilson Certified Foods, Inc. v. Fairbury Food Prod., Inc., 370 F. Supp. 1081, 1086, (D. Neb. 1971) (applying Restatement factor six, court found that plaintiff did not have a trade secret in bacon bits food product where

however the Restatement language was broader than what is seen in today's DTSA and UTSA, in that it could encompass concepts beyond ready ascertainability. This made it easier for courts in the Restatement era to use the sixth factor to cover several different concepts under one umbrella, such as reverse engineering.[14] This doubtless has been a contributing factor in the ongoing confusion among courts in separating these concepts and providing satisfactory definitions for each.

B. The Uniform Trade Secrets Act

The model Uniform Trade Secrets Act adopted today's language of ready ascertainability as part of the definition of a "trade secret." The text is unhelpfully worded in the negative—making it more difficult to parse—and commingles three separate elements within one subclause.[15] That said, the use of the conjunctive "and" between "not being generally known" and "not being readily ascertainable by proper means" makes the latter a separate and independent element, distinct from the element that precedes it:

> 'Trade secret' means 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, and not being readily ascertainable by proper means by, other persons who can obtain economic value from

a former employee testified that "he developed a satisfactory cooked bacon particle product after eight to ten hours of work and an expert testified that he could do the same "in less than a week" using information that the plaintiff provided to "brokers"); Water Serv., Inc. v. Tesco Chem., Inc., 410 F.2d 163, 173 (5th Cir. 1969) (following Restatement factors and reversing trial court's finding that design of water purification system was "ascertainable"; finding that the "composition was unique" and that competitors had not duplicated it during its four years on the market); Metal Lubricants Co. v. Engineered Lubricants Co., 284 F. Supp. 483, 488 (E.D. Mo. 1968) (denying injunction against former sales employees in industrial oils business where information at issue, including "price information," was "obtainable"; "[t]here was considerable evidence, supported by expert testimony on behalf of defendants, that even this information could often be obtained by proper means—through laboratory analysis, if not general gleanings from the trade) aff'd 411 F.2d 426, 428 (8th Cir. 1969); Nalley's Inc. v. Corona Processed Foods, Inc., 50 Cal. Rptr. 173, 176 (Cal. Dist. Ct. App. 1966) (customer list was "not readily accessible to competitors" where most of the stores at issue were not in a specific category of the phone book "'nor are they listed in the route lists, area maps and market data published by the Los Angeles Times.'").

14. *See, e.g.*, Zotos Int'l, Inc. v. Young, 830 F.2d 350, (D.C. Cir. 1987) (following Restatement factors and reversing an administrative finding by the FDA that information was easily duplicated because the agency failed to explain seemingly inconsistent conclusions that the information was secret and valuable, yet could be easily reverse engineered under the sixth factor).

15. For an illuminating discussion of the value-from-secrecy element of a valid trade secret, *see* Camilla A. Hrdy, *The Value in Secrecy*, 91 FORDHAM L. REV. 557 (Nov. 2022).

> its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[16]

In jurisdictions that retained this formulation—and in the substantively similar federal Defend Trade Secrets Act[17]—this means a valid trade secret has four elements. One potentially could argue that "not being generally known, and not being readily ascertainable by proper means" is one single element. But the placement of the comma, the use of the conjunctive "and," the difference in tone between the present-tense "generally known" and the more hypothetically oriented "readily ascertainable," and the choice of some states to omit that language convincingly point toward readily ascertainable existing as an independent, free-standing fourth element.[18]

When interpreting "generally known and "readily ascertainable," however, it does not help that the two elements are phrased as the *absence* of a quality, rather than a presence.

The commentary to the UTSA isn't terribly illuminating. It states that "[i]nformation is readily ascertainable if it is available in trade journals, reference books, or published materials."[19] The sentences that follow refer to other concepts, such as the plaintiff's own public disclosure and reverse engineerability:

> Often, the nature of a product lends itself to being readily copied as soon as it is available on the market. On the other hand, if reverse engineering is lengthy and expensive, a person who discovers the trade secret through reverse engineering can have a trade secret in the information obtained from reverse engineering."[20]

---

16. Uniform Trade Secrets Act, Uniform Trade Secrets Act With 1985 Amendments Approved And Recommended For Enactment 4 (cmt. at 6).

17. 18 U.S.C.A. § 1839(3)(B) ("the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information").

18. It is true that some cases quote both elements and proceed to a ruling without distinguishing whether the information is generally known or readily ascertainable. For example, in Bimbo Bakeries USA, Inc. v. Sycamore, the Tenth Circuit reversed a jury verdict against a trade secret defendant because "no reasonable jury could conclude [plaintiff's] purported trade secret was not 'generally known or readily ascertainable' to [defendant]." *See* 39 F.4th 1250, 1262 (10th Cir. 2022). In this instance, the holding appears to be based on the former, as the court pointed to general industry practices, a federal regulation, and sources which broadly disclosed information, as opposed to the hypothetical ability to quickly piece together a claimed trade secret from multiple sources. That courts do not always separate the two elements contributes to confusion over the meaning of ready ascertainability.

19. *See* UTSA, cmt. at 6.

20. *Id*.

The comment does not guide the reader in assessing how many different sources may be used to assemble information such that it is "readily ascertainable," or what commonality or relationship should exist among them. And it is silent as to whether or not the time necessary to assemble such sources is part of the analysis.

For that matter, the commentary does not assist one in understanding the difference between "not generally known" and "not readily ascertainable." The former is expressed as something that already exists—something is either known, or not known. And that suggests a unitary body of knowledge in a single time and place. The latter is expressed in the future-facing terms of a thought experiment, where one must assess how readily the information could be assembled from lawful sources, in some temporal period. But that latent distinction between what is known, and what is knowable, does not provide a concrete standard to apply in specific lawsuits.

The UTSA drafting sessions are also unhelpful. An early, 1972 definition of "trade secret" in the draft act did not use anything close to the final language, and did not contain a "not generally known" or "not readily ascertainable" requirement.[21] Rather, ready ascertainability appears to have been defined at that time as a defense to a claim of misappropriation—that is, something more akin to independent derivation—rather than part of the definition of a valid trade secret.[22] Confusing things further, at least one committee member seems to have treated reverse engineerability and ready ascertainability as the same thing.[23]

---

21. *See* Proceedings in Committee of the Whole, Uniform Trade Secrets Protection Act, Thursday Afternoon, Aug. 10, 1972, at 3 ("'trade secret' means a scientific, technical, or commercial idea, fact or other information which is reduced to a tangible form by means of a writing, recording, process, device or other embodiment, which is undisclosed or is disclosed solely with express or implied restrictions on its disclosure or use, and which confers or could confer a competitive advantage."). It is difficult to assess what weight, if any, to give to the UTSA drafting committee minutes. It is unclear what input or influence speakers recorded in the minutes actually had, or even whether the discussions recorded had any impact on the eventual text. In any event, this August 1972 event was the "first reading" of a draft trade secret statutes after a decade of fits and starts. *See* Sharon Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 493, 513 (2010) (describing origins of the UTSA).

22. *See* Proceedings in Committee of the Whole, Uniform Trade Secrets Protection Act, Thursday Afternoon, Aug. 10, 1972, at 37 (referring to a section of the draft which "makes a defense the fact that a trade secret is readily ascertainable by proper means. This becomes part of the defendant's case, rather than plaintiff's.").

23. *See id.* at 41 ("Now, assume someone misappropriated prior to the product's becoming readily available, and then the product becomes ready available. Any competitor in the industry, through reverse engineering, can find out what the trade secret is. That would be a situation in which the trade secret, after misappropriation, has become readily available to

By 1978, the draft statute in committee contained today's language regarding "not being generally known to, or readily ascertainable by proper means[.]"[24] But again, a committee member seemed to conflate this definition with the distinct concept of independent derivation.[25] And in the 1979 discussions, committee members again appeared to commingle the concepts of reverse engineering and ready ascertainability.[26] The committee minutes do not discuss what ready ascertainability might mean, in terms of what amount of time or what number of relevant sources might render an item of technology readily ascertainable, or other such seemingly fundamental questions.

As late as 1979, the draft UTSA had a separate section entitled "Evidentiary Burdens" that did not appear in the final version. Among other things, it would have made ready ascertainability subject to the defendant's burden of production—though not burden of proof:

> As an alternative to other satisfactory proof, a person against whom relief is sought may satisfy the burden of producing evidence of the nonexistence of a trade secret by the introduction of substantial evidence that at the time of alleged misappropriation, the information was generally known to, or readily ascertainable by proper means by, persons who could obtain economic value from its commercial use."[27]

The lack of clarity in this drafting history and in the official commentary leave us interpreting the text of the UTSA as it was finalized.

---

persons other than the misappropriator. [. . .] [O]nce everyone in the industry knows that the secret is, or can find out very easily, then there's no secret any more.").

24. *See* Proceedings in Committee of the Whole, Uniform Trade Secrets Protection Act, Thursday Afternoon, Aug. 3, 1978, at 12. Sandeen notes that the 1978 "reading" of a new draft was the first since 1972. *See* Sandeen, *The Evolution of Trade Secret Law*, *supra* note 9 at 519; *see* also Sharon K. Sandeen, *A Contract by any Other Name is Still a Contract: Examining the Effectiveness of Trade Secret Clauses to Protect Databases*, 45 IDEA 119, 130-31 & n. 46 (2005) (also noting development of the concept in successive UTSA drafters' comments).

25. *See* Proceedings in Committee of the Whole, Uniform Trade Secrets Protection Act, Thursday Afternoon, Aug. 3, 1978 at 16 ("In the case of a trade secret, of course, there is no protection in the sense of a monopoly against someone else coming up with the same idea. And if it is generally known, or readily ascertainable, our definition points out that that's not even the subject of a trade secret. If you acquire it innocently, without these improper means, you are not protected as you would be in a patent.").

26. *See* Proceedings in Committee of the Whole, Uniform Trade Secrets Act, Monday Morning, Aug. 6, 1979, at 6-7 (seemingly suggesting that "quick and short term reverse engineering," as opposed to reverse engineering that takes longer, is related to the concept of ready ascertainability).

27. *See* Proceedings in Committee of the Whole, Uniform Trade Secrets Act, Monday Morning, Aug. 6, 1979, at 71-72.

The UTSA treats the absence of ready ascertainability as one element necessary for a valid trade secret to exist, alongside three other elements.[28] This conclusion is amplified by the decisions of two important commercial jurisdictions—California and Illinois—to omit ready ascertainability, leaving a three-element test for trade secret validity in those states.

C. The Defend Trade Secrets Act

Like most versions of the UTSA, the federal Defend Trade Secrets Act includes the not-readily-ascertainable element in its definition of trade secrecy.[29] There does not appear to have been any sustained discussion or analysis of the ready ascertainability concept in the DTSA's legislative history before its May 2016 enactment.[30] The concept also applies in the criminal portion of the statute, originally known as the Economic Espionage Act.[31]

D. The Trade Secret Treatises

Given the light UTSA commentary and the lack of definitional guidance in the DTSA, it has been left to treatises to attempt to more clearly define what ready ascertainability means.

Jim Pooley's well-known treatise *Trade Secrets* provides the most detailed discussion of ready ascertainability. Pooley approaches the problem as one that "lies in defining the point on the scale at which the time and effort involved in figuring the formula or recreating the list is so trivial that the law should not recognize the matter as a secret. This area has fuzzy boundaries, and can be called the zone of ready

28. Elizabeth A. Rowe & Sharon K. Sandeen, *Cases and Materials on Trade Secret Law*, 80 (2012) ("It is interesting that the drafters of the UTSA chose a conjunctive between 'generally known' and 'readily ascertainable.' This implies that each term has a separate meaning and purpose.").

29. 18 U.S.C.A § 1839(5).

30. The author obtained a legislative history report for the DTSA from Legislative Intent Services Inc., which is more than 450 pages long. The only comment on ready ascertainability it contains is a passing comment in a Senate Report to Accompany S. 1980, which notes that some state UTSA enactments differ. *See* Legislative Intent Services, Inc., Legislative History Report & Analysis, Public Law 114-1153 (on file with author).

31. *See* U.S. v. Sing, 2016 U.S. Dist. Lexis 651, *22 (C.D. Cal. Jan. 4, 2016) (after criminal defendant waived jury trial, court in bench ruling found that circuit schematics at issue were not generally known or readily ascertainable because "a person could theoretically use a multimeter to determine the connection between the parts. But where there are thousands of connections to dozens or even hundreds of parts, the task would be incredibly tedious and time consuming.").

ascertainability."[32] He states that "the number of possible sources for the information may be relevant; a finite and easily locatable number of sources can preclude trade secrecy."[33] He also (correctly) distinguishes the concepts of reverse engineerability and ready ascertainability by treating the latter as a question of what is available, not whether the defendant has taken any action: "if the 'secret' is in fact readily ascertainable, then there is no secret and it shouldn't matter how the defendant obtained it; there can be no actionable misappropriation."[34]

Pooley's proposal seems convincing in some regards: it properly treats ready ascertainability as a present-facing question of what is available to those in the field through research, rather than a back-facing question of what the defendant actually did. And it properly contemplates an examination of several public domain sources assembled together, which is what distinguishes ready ascertainability from what is simply generally known, *i.e.*, something that is entirely found in one single public industry source. These concepts are close to the definition this Article proposes.

In a separate treatise dedicated to California trade secret law, Pooley defines the concept somewhat differently. Instead of "trivial" effort, a definition that would make establishing ready ascertainability notably difficult, in that work he defines the concept as one requiring a showing of "modest" effort: "[i]f the information, although not 'generally known,' could nevertheless be discovered with very modest effort, it is said to be 'readily ascertainable.'"[35] He proposes that

> "Ready ascertainability" is defined by a spot on the continuum of reverse engineering difficulty. [. . . .] Evidence of publication is relevant, however, even if the defendant did not learn of it. The defendant may challenge the plaintiff's assertion that the information is not generally known to the public (and therefore the assertion that the information is a trade secret) based on the mere availability of information such as directories, industry brochures, or pamphlets.[36]

32. JAMES POOLEY, TRADE SECRETS § 4.04[3] at 4-42 (2022). This author was an editor of this treatise from 2006-2009 but did not contribute to the wording of the ready ascertainability section.

33. *Id*. at 4-43.

34. *See id.* at 4-45.

35. JAMES POOLEY ET AL., TRADE SECRETS PRACTICE IN CALIFORNIA, § 1.8A (2012).

36. *See* JAMES POOLEY ET AL., TRADE SECRETS PRACTICE IN CALIFORNIA, § 1.9.2 (2012). This commentary, to some degree, reflects California's different treatment of the concept, which I explore below.

This language, too, is unsatisfactory. It blends whether information is generally known, as seen in industry publications, and whether information is readily ascertainable from industry publications, without explaining how these concepts differ. And it seems to define the standard as what is "generally known to the public" rather than what is known to the relevant industry, which is not what the state UTSA says.[37]

In addition, Pooley's dueling propositions regarding the amount of effort required to demonstrate ready ascertainability would lead to substantially different evidentiary showings. The difference in how a judge might construe "trivial" efforts versus "modest" efforts is a big one. Just about any plaintiff could claim that research efforts are not "trivial," and thus that information constitutes a trade secret. The statutory word "readily" seems inconsistent with such a sparing interpretation. In addition, the reader is left uncertain if a court is to strictly measure time, effort, or both together as one single measurement.

Pooley's commentaries also seem to assume a 1:1 correspondence between an asserted trade secret and something collected in public sources. But many contemporary cases involve instead a multiplicity of device or technology design elements where the plaintiff gerrymanders a claim to match the defendant's development, and the defendant must rebut that effort by showing public sources that illuminate the variety of choices widely available to developers.

Sharon Sandeen offers that "[g]enerally, whether information is readily ascertainable depends upon how easy it is to find the information without reference to the alleged trade secrets."[38] She adds that "if the alleged trade secrets can be easily gleaned from products that are on the market through reverse engineering or simple observation, they are readily ascertainable."[39] This definition would grant more latitude to a defendant—unlike Pooley, the concept is not constrained by terms like "trivial" or "modest," as "easy to find" presents a different vision for how to adjudicate ready ascertainability. Here, courts are not sternly timing the hours and minutes on a stopwatch needed to locate public sources to allow

37. *See* Cal. Civ. Code § 3426.1(d)(1) (a trade secret "[d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use").

38. *See* Sandeen, *The Evolution of Trade Secret Law*, *supra* note 9 at 524 (citing a dictionary definition of "readily" and cases including Hamer Holding Group, Inc. v. Elmore, 560 N.E.2d 907, 918 (Ill. Ct. App. 1990) ("[T]he key to 'secrecy' [under the Act] is the ease with which information can be developed through other proper means: if the information can be readily duplicated without involving considerable time, effort, or expense, then it is not secret.").

39. *See id.*

a plaintiff to trip up a defendant by arguing that whatever time is needed is too much; defendants are instead showing that those in the field can easily locate them.

The Milgrim trade secret treatise is probably the most widely consulted by nonspecialist practitioners. But on this point, it offers very little. It states that "trade secret protection for information that would be readily ascertainable from the examination of a product will be lost upon the sale or display of the product if, in fact, the sale or display permits such inspection."[40] This confuses a plaintiff's self-publication or other deliberate release of information with industry literature that is easily available in the field at issue.

IV. WHY READY ASCERTAINABILITY IS ILL-DEFINED

The statutes and the treatises do not present us with clear definitions. The case law adds to the confusion, for four major reasons. To start, analysis of ready ascertainability seems to have been largely relegated to simplistic cases where a small-market plaintiff claims a secret customer list in customer information that is arguably available with ease from public sources. In turn, courts that have attempted to offer definitions of the concept—as opposed to applying it without defining it—have not presented unified, clear definitions that one can transport from case to case.

Perhaps most important, courts frequently use the label of ready ascertainability for a host of distinct concepts in trade secret law, such as self-publication by the plaintiff and independent derivation by the defendant. Finally, the omission of ready ascertainability in the statutes of some states—California above all—has contributed to the lack of clarity. I explore each of these problems in turn.

A. The Tacit Small-Market, Customer-List Limitation

Courts and litigants rarely push into new territory. Finding patterns in existing case law and applying them is, for obvious reasons, more comfortable for trial courts and practitioners alike. But when important concepts get stereotyped into narrow fact patterns, the danger of such comfort is that the law too readily skips over required elements outside those inviting confines.

Perhaps the main reason that courts in cases based on complex technology do not typically seriously weigh the ready ascertainability

40. ROGER MILGRIM, MILGRIM ON TRADE SECRETS § 1.03 (2023).

element of a trade secret claim is because there is little precedent for doing so. In contrast, ready ascertainability tends to show up again and again in a narrow band of trade secret cases: Those where a plaintiff claims a trade secret in its customer list, in a market where the number of customers (or suppliers, vendors, or other partners) is a finite universe discoverable though public sources like industry journals and phone books.

There are scores of examples. In a 1997 case in the District of New Hampshire, the court rejected part of a plaintiff's claims in a customer list trade secret case. The plaintiff had attempted to claim a trade secret in a list of dentists in Maine.[41] The court was skeptical, stating that "trade secret protection extends only to that information not readily ascertainable, but no further. A vast amalgamation of information is not protectable as a trade secret simply because some of its elements are not readily ascertainable. [. . . .] Conversely, trade secret protection cannot be denied to all elements of compiled information simply because some of them are publicly ascertainable."[42] It thus found that "information such as names, addresses, and telephone numbers" of dentists in the state of Maine were readily ascertainable "to anyone in the dental supply business with a Maine telephone directory."[43] The court denied summary judgment, however, as other information such as pricing information and a rating of customers "and their potential for future purposes" "reflects levels of creative compilation and is not ascertainable from other sources."[44] Many other decisions have rejected all or part of a plaintiff's trade secret claim in customer information on similar reasoning under the ready ascertainability element.[45]

41. *See Carriage* Hill Health Care, Inc. v. Hayden, 1997 U.S. Dist. Lexis 21755, *19-20 (D.N.H. Apr. 30, 1997).

42. *See id.* at *14.

43. *See id.* at *19-20.

44. *See id.*

45. *See* Aira Jewels, LLC v. Mondrian Collection, LLC, 2024 U.S. Dist. Lexis 54204, *14-15 (S.D.N.Y. Mar. 25, 2024) (granting motion to dismiss DTSA claim centered on customer information where plaintiff did not plead enough to allege that the information was not easily available and thus not readily ascertainable); *Elias Indus., Inc. v. Kissler & Co., Inc*., 2021 U.S. Dist. Lexis 99449, *14 (W.D. Pa. May 26, 2021) (where distributor of plumbing parts sued rival over alleged misappropriation of "customer-specific pricing," claim failed in part on ready ascertainability grounds because customers are free to disclose what they pay to others in the market when seeking a better deal); Sterling Title Co. v. Martin, 831 S.E.2d 627, 634-35 & n.2 (N.C. Ct. App. 2019) (affirming motion to dismiss where claimed trade secret in "guest list" of contacts readily accessible through, a defense noted, state bar records); North Am. Deer Registry, Inc. v. DNA Sol., Inc., 2017 U.S. Dist. Lexis 84687, *20-21 (E.D. Tex. June 2, 2017) (finding a deer registry to be "not readily ascertainable by the public" where "small pieces" were "made public," but the information set was based on "230,000" animals and contained nonpublic "biological materials, genetic information, genotype analysis data" as well as a "membership directory); Cablecom Tax. Serv., Inc. v. Shenandoah Telecomm.

Co., 2013 U.S. Dist. Lexis 76169, *19-20 (W.D. Va. May 30, 2013) (granting motion to dismiss on trade secret claim based on relationships with tax authorities' "[t]he property tax laws and regulations and identities of local tax officials are not secrets and are readily ascertainable by proper means."); RBR Melvilles Contractors, LLC v. Feehan, 2013 N.Y. Misc. Lexis 700, *12 (N.Y. App. Div. Feb. 7, 2013) (customer lists and related information "have not been shown to be trade secrets as there [is ample] proof that they are readily ascertainable from non-confidential sources" as well as the defendant's memory, which is relevant in New York) (correcting apparent typo in original); CDC Restoration & Const., LC v. Tradesmen Contractors, LLC, 274 P.3d 317, 326 (Utah Ct. App. 2012) (affirming finding that construction bid-related information was not a trade secret where "equipment rates" were "readily ascertainable by the public" where they "could be ascertained simply by calling equipment rental companies on the phone."; "Where information alleged to be a trade secret can be readily ascertained by performing a basic research task, the information does not qualify as a trade secret."); Mont. Camo, Inc. v. Cabela's, Inc., 2010 U.S. Dist. Lexis 57895, *7-8 (D. Mont. June11, 2010) (granting defense motion for summary judgment; evidence showed that suppliers were identifiable from a registry "at the library" and at a trade show; "the evidence is undisputed that these suppliers were readily ascertainable[.]"); Sky Cap. Grp., LLC v. Rojas, 2009 U.S. Dist. Lexis 40970, *12-14 (D. Idaho May 14, 2009) (denying request for preliminary injunction on mixed findings; plaintiff failed to show that "customer lists and marketing presentation materials" relating to fuel purchase forecasting information were "not generally known or readily ascertainable in the industry" where one could find customers in a national directory as well as the plaintiff's website, but other, more specific information on a protected website likely qualified as trade secrets); Restivo v. Hanger Prosthetics & Orthotics, Inc., 483 F. Supp. 2d 521, 533-34 (E.D. La. 2007) (on summary judgment, finding as to referral sources "clearly, it would seem that there are a finite number of referral sources doing business related to prosthetic devices in St. Tammany Parrish. Moreover, it would be logical to assume that the contact information of these referral sources would be readily available in the telephone directory. This fact alone would exclude the information from the protections of the Trade Secret Act."; also finding a fact issue on a separate claim about "patient lists"); Atwood Agency v. Black, 646 S.E.2d 882, 884 (S.C. 2007) (reversing trial court where "the information that is the subject of the temporary injunction is readily ascertainable from other sources"; a list of relevant contact information for local homeowners "is a matter of public record available at Town Hall," and names of local renters were also available "through other proper means"); M.K. Plastics Corp. v. Rossi, 838 N.E.2d 1068, 1076-77 (Ind. Ct. App. 1005) (affirming denial of request for preliminary injunction; as to customer list, evidence was that "the names addresses, and telephone numbers of manufacturer representatives and other industrial fan customers are readily available from numerous sources, including the Internet and association directories" and thus was "readily available to the general public"); Ad Assocs. v. Coast to Coast Classifieds, Inc., 2005 U.S. Dist. Lexis 32697, *5, 12 (D. Minn. Dec. 12, 2005) (finding that "list of publication fax numbers" at issue "is not a trade secret" because "[t]he contact information for publications is readily ascertainable from many publicly-available sources, including" an industry directory that listed the fax numbers); Burbank Grease Serv., LLC v. Sokolowski, 693 N.W.2d 89, 97 (Wisc. Ct. App. 2005) rev'd in part on unrelated grounds, 717 N.W. 2d 781 (Wis.. 2006) (affirming finding that customer pricing information was not a trade secret where industry custom was that one could acquire pricing information directly from the customers; "We conclude the evidence is insufficient, as a matter of law, to show that the prices [plaintiff] charges its customers are not readily ascertainable by proper means."), rev'd in part on unrelated grounds, 717 N.W.2d 781 (Wisc. 2006); Konecranes, Inc. v. Sinclair, 340 F. Supp. 2d 1126, 1132 (D. Or. 2004) (in "limited" local market in Portland, trade secret claim in customer list information failed where "[i]f someone with a general knowledge of the industry could quickly identify the likely candidates using basic tools such as the Yellow Pages, a Chamber of Commerce Directory, or construction

Not all cases have found that a limited universe of customers is readily ascertainable, especially when the plaintiff also claims additional financial details that are unique to its business relationships with those customers.

In a recent example, the First Circuit affirmed summary judgment for a trade secret plaintiff that claimed rights in spreadsheets containing detailed information about its customers.[46] The court noted that even though some of the information was available from other sources, "it would be difficult, if not impossible, to develop spreadsheets [. . .] solely through those means."[47]

Similarly, in 2022 the Northern District of Illinois faced a request for an injunction where a departing employee took photos of "contracts and

industry publications, then those names probably no not qualify for protection as a trade secret."); Macpherson's Inc. v. Windermere Real Estate Serv. Co., D.C. No. CV-01-01885-MJP, 2004 WL 1202131, at *7-8 (9th Cir. 2004) (affirming summary judgment on trade secret claims where claimant "sold nearly all of the information on its customer lists to appraisers" and the "remaining information was sufficiently easy for an interested competitor to discover"); Home Paramount Pest Control. Co., Inc. v. FMC Corp., 107 F. Supp. 2d 684, 693 (D. Md. 2000) (granting summary judgment to the defense in a client list case where "the names and addresses of [plaintiff's] customers are obtainable through public sources such as a phone directory and trade associations."); LEXIS-NEXIS v. Beer, 41 F. Supp. 2d 950, 958 (D. Minn. 1999) (court found that as to "detailed financial and usage reports, sales strategies and policies, and product development information", "much of the information contained in these documents is either readily ascertainable or will quickly become obsolete, thereby losing its independent economic value"; the court, however, did not describe the evidence on which it reached that conclusion); Cox v. Dine-A-Mate, Inc., 501 S.E.2d 353, 356-57 (N.C. Ct. App. 1998) (affirming motion to dismiss on evidentiary record where alleged trade secret in local businesses participating in promotional program where one could easily identify such businesses from coupon books, newspapers, handouts, or mailings; finding such information "'readily ascertainable through independent development'", quoting the unusual language of the North Carolina trade secret statute); Vigoro Indus., Inc. v. Crisp, 82 F.3d 785, 790 (8th Cir. 1996) (affirming bench trial in favor of trade secret defendant in case centering on customer identities and related information about their purchase histories; former employee had not taken anything, and employees relied on "their sales experience and their knowledge of the local customers; using readily ascertainable concept to explain that, where there was no non-competition covenant, "[t]he former employer should not be able to achieve this anticompetitive objective indirectly through an overly-expansive definition of customer trade secrets."); LaserMaster Corp. v. Sentinel Imaging, Inc., 931 F. Supp. 628, 637 (D. Minn. 1996) (trade secret claim over customer information failed due to its "accessibility"; one could identify lists of customers for the region in question by purchasing national lists); Sethscot Collection, Inc. v. Drbul, 669 So.2d 1076, 1078 (Fla. Ct. App. 1996) (where alleged trade secret concerned "prospective" customers on a list of 9600 fraternities and sororities, and where that list had been "obtained from commercially available materials," it was "readily ascertainable to the public" and not a trade secret; also finding that an "active customer list," by contrast was a trade secret and thus enjoining defendants from using it).

46. *See* Allstate Ins. Co. v. Fougere, 79 F.4th 172, 189 (1st Cir. 2023) (case under DTSA and Massachusetts common law; considering sixth Restatement factor for the latter).

47. *See id.*

proposals" that "included contact information for key decisionmakers working for [plaintiff's] clients.[48] On a DTSA claim, it rejected a defense argument that one could find these decisionmakers "given the power of search engines." It found that the plaintiff "kept the identity of its client contacts secret using confidentiality agreements, and the fact that [defendant] (having worked in the industry) could locate key industry decisionmakers with ease doesn't mean that the information was readily ascertainable."[49] Again, many other cases have reached similar results on these relatively simple fact patterns.[50]

48. *See* Medcor, Inc. v. Garcia, 2022 U.S. Dist. Lexis 6761, *20-21 (N.D. Ill. Jan. 13, 2022) (denying temporary restraining order on other grounds).

49. *See id.*

50. Kraus USA, Inc. v. Magarik, 17-CV-6541 (ER), 2020 U.S. Dist. Lexis 83481, at *15-18 (S.D.N.Y. May 12, 2020) (rejecting argument that plaintiff's customer list was readily ascertainable "because its customers are well-known retailers like Home Depot and Lowe's" because of pricing information); Liberty Power Corp., LLC v. Katz, 10-CV-1938 (NGG) (CLP), 2011 U.S. Dist. Lexis 7470, at *9-10 (E.D.N.Y. Jan. 26, 2011) (finding that customer list was not readily ascertainable where one would have to cold-call businesses to find out if they were plaintiff's customers, try to learn contract terms, across "twelve deregulated states," meaning "cold-calling potentially hundreds of thousands of businesses."); Movie Gallery US, LLC v. Greenshields, 648 F. Supp. 2d 1252, 1264 (M.D. Al. 2009) (in customer list case, explaining that information was not readily ascertainable; plaintiff's list was "specific to the clients and customers" of its business and "was not readily derivable from public information because it contained detailed and valuable compilations of information from hundreds of small rural stores over thousands of miles; even if one visited the stores and was able to obtain some information from the owner, the internal" information "pertaining to each customer would still be confidential."); Crown Coal & Coke Co. v. Compass Point Res., LLC, Civil Action No. 07-1208, 2009 U.S. Dist. Lexis 26556, at *20 (W.D. Pa. March 31, 2009) (where plaintiff's customer list also contained information about "customers' historic needs, capabilities, reliability, payment history, and delivery requirements," court rejected defense argument that suppliers and buyers are "widely known in the industry and that their needs and capabilities are readily available" if one contacts them); Amerisourcebergen Drug Corp. v. Am. Assoc. Druggists, Inc., Civil Action No. 05-5927, 2008 U.S. Dist. Lexis 6611, at *77-78 (E.D. Pa. Jan. 30, 2008) (denying motion for summary judgment regarding claimed trade secret that combined cost and financial information about multiple stores; "The record does not establish that the compilation of information was readily obtainable from publicly available sources; the record also shows that it could only be compiled through concerted effort."); Patriot Homes, Inc. v. Forest River Housing, Inc., 3:05-CV-471 AS, 2007 U.S. Dist. Lexis 70697, at *7-8 (N.D. Ind. Sept. 20, 2007) (denying defense motion for summary judgment in case centering on pricing, bill of material, and ordering information found in certain manuals; although defendants argued that the information was readily ascertainable because one could request copies of these manuals from state agencies to whom they had been submitted, there was a fact question because it was not clear that it was available "in electronic format," which was needed for efficient use of the information); ATC Distrib. Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 714 (6th Cir. 2005) (noting a distinction between customer lists that would be discoverable only through extraordinary work and years of time and money, or purchasers of unusual goods or services, "and, on the other hand, lists of customers whose identities as purchasers of a given type of product may be obtained through such legitimate channels as telephone books, the internet, or by calling local businesses";

On the surface, there is nothing wrong with these cases. After all, courts are applying the ready ascertainability concept and finding in many instances that where more than one public source readily allows those in the field to identify the customers at issue, there is no trade secret. The problem is that they form a disproportionate number of the cases addressing ready ascertainability. Taken in the aggregate, this shows a pattern of attention in one area of trade secret law, but neglect in others.

The trade secret statutes do not cabin ready ascertainability to customer list cases, but the disproportionate emphasis in this area may contribute to the relative dearth of such cases in the complex technology context. To be sure, there are courts that have addressed ready ascertainability outside the customer list context.[51] For example, in 2023 a Texas court affirmed a jury verdict finding that information relating to a combination of elements comprising a subsea "tree" system used in

affirming finding of non-secrecy where list of purchasers of transmission parts were identifiable from "a telephone book or similar legitimate sources" and contact names could be "ascertained simply by calling each shop and asking."); Nutmeg Tech., Inc. v. Mahshie, No. 89-CV-511, 1989 U.S. Dist. Lexis 6293, at *11-12 (N.D.N.Y. June 6, 1989) (granting motion for preliminary injunction in customer list case; noting distinction between customers which are readily ascertainable and those which are "only discoverable with great effort, and particularly where the patronage of such customers was secured through the expenditure of considerable time and money[.]").

51. Such cases include General Water Tech. Inc. v. Zweden, 515 P.3d 956, 967-68 (Utah App. 2022) (partly affirming jury verdict for plaintiff regarding design of a water filtration system; defining ready ascertainable as that which is obtainable without much difficulty; finding that plaintiff's pricing information did not vary from "standard pricing decisions in the industry" and was thus unprotectable, but design information sought to minimize "how much space it took up in medical labs" and "how often it needed to be serviced," and given the time necessary to develop it, the jury could infer it was not readily ascertainable); Financial Information Tech., LLC v. Icontrol Sys. USA, LLC, 21 F.4th 1267, 1272-74 (11th Cir. 2021) (denying defense motion for new trial on trade secrecy where evidence showed that database architecture was not readily ascertainable; court seemed to focus on details of the architecture to support ruling while noting that defendant had failed to file a JMOL motion in the trial court which would have permitted a more nuanced review); AirFacts, Inc. v. de Amezaga, Civil Action No. DKC 15-1489, 2017 U.S. Dist. Lexis 133483, at *25-26 (D. Md. Aug. 17, 2017) (in a case where a departing employee was accused of taking hard copy documents relating to software, the information "was readily ascertainable by proper means" because the defendant had copied only "column names" from the database of a third party organization that provides airline-related "fare information" which was available to subscribers); Olson v. Nieman's, Ltd., 579 N.W.2d 299, 313-314 (Iowa 1998) (testimony demonstrated that plaintiffs' device idea was not generally known or readily ascertainable from reference to public patent filings, and had value during the time before it was placed on the market; affirming jury verdict of trade secret misappropriation); Boeing Co. v. Sierracin Corp., 738 P.2d 665, 674-76 (Wash. 1987) (affirming jury verdict for plaintiff on trade secret claim; certain "drawings and data" were trade secrets despite defense argument that they include "common tooling" with another type of airplane; "[b]y its very nature, the common tooling did not contain the complete and detailed specifications and tolerances necessary" for complete drawings).

underwater oil fields was readily ascertainable, where the evidence included testimony that a skilled engineer could have "independently determined" the combination of elements.[52] But such cases are relatively rare. The ease and comfort of following a well-trodden path may inadvertently have inhibited analysis and inquiry in cases where more is at stake.

B. Lack of Clear Definitions

Courts have struggled to offer clear definitions of ready ascertainability. Ambiguity exists regarding the nature of the sources one can consult successfully to show that information is readily ascertainable, whether and to what degree the time and effort needed to locate such sources is material, whether one must in fact have located such sources by the time of the alleged misappropriation, and the evidentiary means to establish (or dispute) ready ascertainability.

1. Rule Statements

Few courts have attempted a fulsome definition of ready ascertainability. An exception is a 1993 decision by the Indiana Supreme Court, which is probably the most sustained analysis. In *Amoco Prod. Co. v. Laird*, the trial court enjoined former employees, and the case reached the state supreme court to decide the meaning of ready ascertainability under the state UTSA.[53] The plaintiff had undertaken extensive research and travel to decide upon locations of potential oil fields, generating a map identifying such locations.[54]

The court began by observing that courts "generally agree that information alleged as a trade secret must not be readily ascertainable from another source."[55] Collecting cases, it noted that "[i]n determining what information is 'readily ascertainable,' other jurisdictions have frequently looked to the degree of time, effort, and expense required of a defendant to acquire or produce the alleged trade secret information by other proper means."[56] Noting that the Restatement's sixth factor is relevant to the question, it explained that "[v]ariation exists as to how much time, effort, and funding must be provided in duplicating

52. *See* FMC Tech., Inc. v. Murphy, 679 S.W.3d 788, 816 (Tex. Ct. App. 2023).
53. *See* Amoco Prod. Co. v. Laird, 622 N.E.2d 912, 913 (Ind. 1993).
54. *See id.* at 920.
55. *See id.* at 918.
56. *See id.*

information before such information is eligible for trade secret protection."[57]

In trying to define a rule, the Court began with a statement about "considerable" time and effort: "If the information can be readily duplicated without involving considerable time, effort, or expense, then it is not secret. Conversely, information that can be duplicated only by an expensive and time-consuming method of reverse engineering, for instance, could be secret, and the ability to duplicate it would not constitute a defense."[58]

It then emphasized that the standard is not whether it is impossible to "duplicate or acquire" the information—any such definition would be "singularly extreme" in narrowing what can qualify as a trade secret.[59] Instead, the state supreme court determined that information is not readily ascertainable if it requires a "substantial" investment to replicate: "We thus find that, consistent with the interpretation of the UTSA in other jurisdictions, where the duplication or acquisition of alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found 'not being readily ascertainable' so as to qualify for protection under the Indiana Uniform Trade Secrets Act."[60] The court thus affirmed the trial court's injunction, because the plaintiff's "exploratory effort was a unique undertaking" requiring "a considerable outlay of resources of time, effort, and funding preliminary to and culminating in" its use of certain technology to locate potential oil fields.[61]

Laird thus envisions a sort of definitional middle ground: It is not purporting to put the defense on a stopwatch to measure whether information can be located with only trivial effort. But it also does not require that a trade secret can only exist where it is impossible to replicate the information, because theoretically, complex information could be possibly replicated with herculean investments of time and resources. Its "substantial investment" test allows a showing that even if some degree

57. *See id.*

58. *See id.* The court also cited law review and practitioner articles which made passing comment on ready ascertainability, such as Gerard B. Buechler, Jr., *Revealing Nebraska's Trade Secrets Act*, 23 CREIGHTON L. REV. 323, 340 (1990) ("Here, too, the ultimate question is factual and is based upon an inquiry into the degree of difficulty, time, and expense involved in replicating the production or process at issue. Again, however, neither common law principles nor the UTSA have required that trade secrets be unascertainable at all by proper means, but only that they not be *readily* or *quickly* ascertainable by such means.") (emphasis omitted).

59. *See id.* at 919.

60. *See id.*

61. *See id.* at 920.

of time and expense is needed to acquire information, that can result in a finding that the information is not a trade secret.

No other court in the decades since appears to have devoted as much effort to analyzing ready ascertainability. In 2001, the Vermont Supreme Court affirmed a finding that a customer list was not a trade secret, but it disagreed with the trial court's logic regarding ready ascertainability.[62] The defendant had argued that the names on the list "were available in public documents," while the plaintiff had argued that it took "considerable time and expense" to locate them.[63] The lower court found that the customer list was readily ascertainable because the plaintiff had not used "extraordinary efforts" to develop it.[64] But the state high court disagreed. After reviewing cases from around the country, it found that courts differed as to how much effort to generate substitute information is required to show that information was is not readily ascertainable, with "pedestrian markets" requiring more than customer list cases where information was "extremely difficult to obtain." The court then found that "[g]iven the lack of a standard benchmark for 'readily ascertainable' and the extremely factual nature of the inquiry," there was a triable issue of fact on that question.[65] The case thus left open the type of efforts to gather information that render information unprotectable, because it did not reach a firm conclusion.

Two cases applying the Virginia UTSA offered a more robust definition, taken together. A federal court in Virginia ruled that "[w]hat constitutes readily ascertainable through proper means is heavily fact-dependent and simply boils down to assessing the ease with which a trade secret could have been independently discovered," without defining how "ease" should be analyzed or measured.[66] A 2012 ruling also applying Virginia law took that definition further, in a case where a plaintiff claimed a trade secret in a product combining five microbes.[67] It started by noting that "even if a company has expended significant resources to develop a trade secret on its own, it cannot prevail under VUTSA if the

62. *See* Dicks v. Jensen, 768 A.2d 1279, 1281-84 (Vt. 2001). Vermont has no intermediate appellate court, so the trial court ruling went directly to the state's highest court.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See* Microstrategy, Inc. v. Business Objects, S.A., 331 F. Supp. 2d 396, 416-17, 423 (E.D. Va. 2004) (reaching mixed results after a bench trial; as to a "method of selling," finding that information "was readily ascertainable by any interested party," as a competitor could ask prospects "what the plaintiff had done in making its sales pitch").

67. *See* Trident Prod. & Serv., LLC v. Canadian Soiless Wholesale, Ltd., 859 F. Supp. 2d 771, 779 (E.D. Va. 2012).

barrier to obtaining the trade secret is quite low in reality." In an echo of the prior case, it then observed that ready ascertainability is fact-intensive and addresses the ease by which one could independently discover the trade secret.[68] In a context where competitors sold "products with the same five strains of bacteria," the plaintiff's "particular formula" was a dubious trade secret: "To put it simply, the very combination of the five microbes does little to prove the existence of a trade secret when other products contain the same."[69]

The court then offered more to its definition, stating that "[i]n sum, [plaintiff] needs to prove that other companies that formulate soil-amendment products did have or would have had difficulty coming up with a substantially similar product."[70] This gloss on the "ease" rule makes it harder to prove a valid trade secret, because it requires a showing of "difficulty" not to match the product, but to generate something "substantially similar." This case is a rare decision which speaks to the value of carefully examining ready ascertainability when a plaintiff asserts a technical combination trade secret claim.

A 1993 case applying Wisconsin law also offered "ease" as part of a definition, using *Webster*'s dictionary to define ready ascertainability as "discoverable 'with a fair degree of ease, without much difficulty.'"[71] A 2023 case applying Georgia law did the same when noting that Georgia courts had not defined the phrase, using *Merriam-Webster* to find that "'readily' means 'in a ready manner' such as 'without hesitating' or 'without much difficulty.'"[72]

Addressing a different but equally important type of definition question, a 1995 Washington ruling spoke to whether ready ascertainability is tested by looking at public sources in the plaintiff's narrower market or field, or whether the sources consulted can include a broader definition of the field. It answered "yes" as to the latter question.[73] The plaintiff claimed a trade secret in in the use of a certain type of

68. *See id.*

69. *See id.*

70. *See id.* (the plaintiff failed to do so because it lacked expert testimony on that issue).

71. *See* Editions Play Bac, S.A. v. Western Pub. Co., Inc., 92 Civ. 3652 (JSM), 1993 U.S. Dist. Lexis 18241, at *11-12 (S.D.N.Y. Dec. 28, 1993) (applying Wisconsin UTSA; conflating ready ascertainability with the plaintiff's self-publication of a game concept, which doomed its claim on summary judgment).

72. *See* Card Isle Corp. v. Farid, 689 F. Supp. 3d 1273, 1287 (N.D. Ga. Aug. 30, 2023) (seemingly treating ready ascertainability as equivalent to what the plaintiff itself rendered publicly available, a problem discussed in Section V.C.1 below).

73. *See* Precision Moulding & Frame, Inc. v. Simpson Door Co., 888 P.2d 1239, 1242-1243 (Wash. App. Div. 1 1995).

machine used in wood molding.[74] The appellate court affirmed a summary judgment for the defense because the information was readily ascertainable, that is, "whether others in the woodworking industry could readily ascertain the information by proper means."[75] The court noted that "the fact that the technology, albeit used for other applications, has been available for more than 20 years, leads inevitably to the conclusion that the information was readily available."[76] In the critical part of the ruling for our purposes, the court reviewed the text of the Washington UTSA to "conclude that the statute does not confine the relevant industry only to persons involved in a particular application or certain information or a particular process. Thus, the relevant industry in this case includes not only door molding manufacturers, but also the woodworking industry in general, because persons who can obtain economic value from the use of the process are found in both groups."[77]

Other cases offer tacit definitions of ready ascertainability without offering express rules. For example, in 1999 the Idaho Supreme Court validated the notion that one can collect a variety of public sources to together demonstrate ready ascertainability.[78] Another state supreme court in South Dakota affirmed a ruling that a claimed combination of elements was readily ascertainable in their respective industries because similar combinations were publicly found in various sports stadia, again confirming that one can collect multiple public sources together to show ready ascertainability.[79]

Finally, the Minnesota high court in 1982 suggested that ready ascertainability might turn on whether a plaintiff's combination trade

74. *See id.*
75. *See id.*
76. *See id.*
77. *See id.*
78. *See* Basic Am., Inc. v. Shatila, 999 P.2d 175, 184 (Idaho 1999) (affirming trial court ruling that potato production process was not readily ascertainable; reciting definition of the concept from the UTSA comments and noting that "[t]he district court, after reviewing trade manuals, reference books, numerous potato processing patents and sales brochures written by the manufacturers of food additives, found that the Trade Secret had not been disclosed by publication.").
79. *See* Daktronics, Inc. v. McAfee, 599 N.W.2d 358, 361-62 (S.D. 1999) (affirming summary judgment for defendant; no fact question on ready ascertainability of concept of combining a "radar gun, a console, and a display" for "baseball speed pitch indicator" where "all of these items were readily available on the market," such that combining them is matter of industry general skills and knowledge, other sporting events like skiing "used a speed indicator with a display," and many baseball stadiums had "speed pitch displays").

secret has a "degree of novelty or 'unknownness'" in order to qualify as a valid trade secret.[80]

2. Whether Public Information Constitutes a Match

In struggling with clear rules for ready ascertainability, courts seem to split on another foundational question: Whether it matters that publicly available information that might demonstrate that a claimed trade secret is readily ascertainable matches the claimed trade secret, or is similar to it. This question matters because when it comes to complex technology, exact matches in public literature are unexpected, while overlaps in functionality are much more common.

To be sure, some cases merely find that the public information the defendant offers, or that it claims might be available, is qualitatively different than the plaintiff's claimed trade secret.[81] That is not the troublesome issue I wish to highlight here. Instead, the focus here is the degree to which court does, or does not, base decisions on minute or *de minimis* differences between a claimed trade secret and the demonstrable content of specific public sources.

---

80. *See* Jostens, Inc. v. National Computer Sys., Inc., 318 N.W.2d 691, 699 (Minn. 1982) (Minnesota UTSA; where the plaintiff sued over a "CAD/CAM" system to aid in the design and manufacture of class rings, the court affirmed a finding that the system was "generally known and readily ascertainable"; "[c]learly, the CAD/CAM system as such, as the combination of three generally known subsystems, does not achieve the degree of novelty or 'unknownness' needed for a trade secret.").

81. *See, e.g.,* Cool Runnings Int'l Inc. v. Gonzalez, No. 1:21-cv-00974-DAD-HBK, 2021 U.S. Dist. Lexis 221682, at *16-21 (E.D. Cal. Nov. 16, 2021) (on DTSA and California UTSA claims, rejecting defense argument that a "Project Materials Order Form simply compiles public domain information that is readily ascertainable"; "Even if some of the individual parts or prices in the Order Form are publicly known, it is the secrecy of the claimed trade secret as a whole that is determinative."); Marsh & McLennan Agency, LLC v. Teros Advisors, LLC, Case No. 20-cv-02679-HSG, 2021 U.S. Dist. Lexis 172300, at *11-13 (N.D. Cal. Sept. 10, 2021) (denying defense argument of ready ascertainability on summary judgment where defendant argued that contact information was available from regulatory filings by retirement plan sponsors; court found a fact issue because "Plaintiff's evidence supports a broader scope of relevant client information" than such filings); Luckyshot LLC v. Runnit CNC Shop, Inc., Civil Action No 19-cv-03034-RBJ, 2020 U.S. Dist. Lexis 175237, at *15 (D. Col. Sept. 24, 2020) (denying motion to dismiss; in case about a "plunger design," court ruled that plaintiff's allegation suggesting that "no other plunger design exactly matching" its design existed, and suggestion that defendant would not have needed plaintiff's drawings if the design was "easily ascertainable" sufficed to state a claim); Minnesota Mining & Manufacturing Co, v. Pribyl, 259 F.3d 587, 596 (7th Cir. 2001) (affirming summary judgment for plaintiff in part; cardboard box assembly process a trade secret despite some information within the process being publicly available; "[t]hese manuals and processes, even if comprised solely of materials available in the public domain, have been created by combining those materials into a unified system which is not readily ascertainable by other means.").

A 2015 case in the Eastern District of Pennsylvania is an example of a questionable decision where a court seemingly relied on trivial factors to find a claimed trade secret not readily ascertainable. In *Synygy, Inc. v. ZS Assoc., Inc.*, a company replaced a vendor that had provided incentive compensation services with a competing vendor.[82] In doing so, it provided the replacement vendor with "samples of [incentive compensation] reports" that the plaintiff had previously delivered.[83]

When the first vendor sued the replacement vendor, it claimed a compilation trade secret in the reports.[84] On summary judgment, the defendants noted that the plaintiff had published "many of the features" claimed as trade secrets in a book, shared similar reports at trade shows, and gave a similar report to a third party for a "business pitch."[85] The court denied the motion, finding a question of fact as to whether the reports were "known or readily ascertainable by proper means."[86] In so ruling, it credited testimony from the plaintiff that using a customer's logo and the color blue in the format of the report and its "totality" created a trade secret, even though "there is evidence before me that [the plaintiff] publicly disclosed similar reports including similar information that was formatted in a similar matter[.]"[87]

The court appears to have relied on micro-distinctions in design elements of the report—questionable enough because document design is more of a question of trade dress or copyright law than anything relevant in trade secret law—instead of measuring whether the informational content of the reports was publicly available, as it appears to have been. This approach could allow minor differences in a claimed trade secret compared to widely available public information to override what should be a finding of ready ascertainability. In this vision, a court would hunt for small design or expressive differences and use them to find a potential trade secret. Because public documents will rarely be a perfect match, this approach could nullify the ready ascertainability element altogether.

A 2011 Eighth Circuit ruling also offers the possibility of such dubious distinctions. In *Avidair Helicopter Supply, Inc. v. Rolls-Royce Corp*., the court was faced with a declaratory judgement action over an overhaul process for a helicopter engine containing "details about

82. *See* Synygy, Inc. v. ZS Assocs., Civil Action No, 07-3536, 2015 U.S. Dist. Lexis 26006, at *32-33 (E.D. Pa. March 3, 2015).
83. *See id.* at *3-4.
84. *See id.* at *5.
85. *See id.* at *27-30.
86. *See id.* at *33.
87. *See id.* at *32

processes, procedures, techniques and material specifications."[88] The party accused of misappropriation had obtained a copy of the process and argued that it was not a trade secret because it "was substantially the same as earlier, publicly available revisions."[89] The district court rejected that position on summary judgement, and the same party then moved for reconsideration after purchasing similar information from a third party. But because that information was subject to confidentiality obligations to the plaintiff-owner, the court denied the motion.[90] On appeal, the plaintiff argued that "there is only a trivial amount of information that was not readily ascertainable from prior revision," which "offers no engineering advances from previous revisions."[91] But the Eighth Circuit disagreed, stating that "[u]nlike patent law, which predicates protection on novelty and nonobviousness, trade secret laws are meant to govern commercial ethics."[92] The court noted that, as to ready ascertainability, "the court must look at whether the duplication of the information would require a substantial investment of time, effort, and energy," and that the plaintiff did not dispute avoiding "the burdensome expense of reverse engineering the updated specifications" and instead claimed "that the changes were too trivial to create any value." Ultimately, the court ruled in favor of the trade secret claim for a different reason, because the party failed to support its case that the document was actually freely available.[93] But its analysis that ready ascertainability might be rejected due to trivial differences between the claimed trade secret and other material, and its use of a morality concept as a gap-filler to gloss over the flaws in such a position, is troublesome.[94]

88. *See* Avidair Helicopter Supply v. Rolls-Royce Corp., 663 F.3d 966, 969-970 (8th Cir. 2011).

89. *See id.* at 970.

90. *See id.* at 971.

91. *See id.* at 972.

92. *See id.* at 973 (citing Kewanee Oil. Co. v. Bicron Corp., 94 S. Ct 1879, 1889-1890 (1974) for the proposition that commercial morality is part of trade secret law).

93. *See id.* at 974. For a similar ruling that turned on the limited availability of the information from a third party, *see* John Bean Tech. Corp. v. B GSE Grp., LLC, 480 F. Supp. 3d 1274, 1300-1301 (D. Utah 2020) (granting plaintiff's motion for summary judgment that claimed secrets in equipment schematics were not readily ascertainable; rejecting defendant's argument that because one could license the information "though a licensing agreement that places conditions on the scope of the buyer's use of the secret" because "the buyer is restricted in the use of the secret, and therefore it cannot be said that the secret was readily ascertainable.").

94. Commercial morality is a dubious concept in trade secret law which tends to show up when a court needs a patch to fill a gap in a shaky finding against a defendant. The best treatment of this topic is found in Lynda J. Oswald, *The Role of "Commercial Morality" in Trade Secret Doctrine*, 96 NOTRE DAME L. REV. 125, 166 (2020) ("While courts invoke commercial morality when adjudicating misappropriation claims, they do not define the

In a severe twist on this strictly narrow approach, the Georgia Supreme Court seems to have suggested, albeit in a cursory and under analyzed ruling, that where the only apparent difference between public information and the plaintiff's customer list was that the list made clear that the customers were the *plaintiff's* customers, that was sufficient to defeat ready ascertainability.[95] This sort of logic would turn trade secret law into a non-competition doctrine rather than an intellectual property doctrine. It cannot be correct.

On the other hand, a 1985 federal court ruling under Illinois law in a customer list case took a contrary approach.[96] Focusing on the readily ascertainable element, the court noted that defendants showed that, among other things, many of the customers were listed in the yellow pages or a trade publication, that those in the industry know who each other's customers are, and that it was generally easy to find out who each business's customers are.[97] The court noted that "[h]ere it is undisputed that substantial information as to the identity of [the plaintiff's] customers is available from other sources."[98] Rejecting the notion that an exact match between this collection of public sources and the plaintiff's list was necessary, it held that "[e]specially in a market where customers did business with more than one sales company or were open to the possibility of shifting business from one company to another [. . .] it is simply unreasonable to construe the Act's 'readily ascertainable' standard as requiring exact duplication of the information on the customer list."[99]

3. Whether Some Measurement of Time or Effort is Relevant

Another factor in clarifying the definition of ready ascertainability is whether specific measurements of time and effort to develop information should matter and, if so, to what degree. Case law here appears sparse.

---

meaning of the term or provide reasoned analysis of its application."; "The inherent pliability of the commercial morality doctrine is also evidence of its lack of solid theoretical framework."). *AvidAir* has also been criticized for its approach to the value element of trade secrecy. *See* Camilla A. Hrdy & Mark A. Lemley, *Abandoning Trade Secrets*, 73 STAN. L. REV. 1, 39-40 (2021).

95. *See* DeGiorgio v. Megabyte Int'l, Inc., 468 S.E.2d 367, 369 (Ga. 1996) (affirming injunction as to customer list in short ruling; "The lists at issue contained the identities of actual customers and vendors of [plaintiff] and specific information concerning them. Thus, the information on the lists was not readily ascertainable from any source other than [plaintiff's] business records.").

96. *See* Fleming Sales Co. v. Bailey, 611 F. Supp. 507, 512 (N.D. Ill. 1985).

97. *See id.*

98. *See id.* at 513.

99. *See id.*

In 1997, the South Dakota Supreme Court reversed a judgement in favor of a trade secret plaintiff because a "combination of well-known feed materials provided as a feed supplement" was readily ascertainable.[100] Using the "ease" language explored above, the court explained that "[t]he ease with which one can develop a similar product is examined by focusing on the time and expense involved."[101] The evidence showed "the ingredients in [plaintiff's] product were readily available in the market, and [. . .] it was common knowledge in the feed industry that these kinds of ingredients are used to formulate feed supplements."' Also, expert testimony showed that "[b]y microscopy, the formula of a feed product can be established in twenty minutes. Further testimony revealed that a chemical analysis would take at most four or five days, costing around $27."[102]

By contrast, an Indiana court reversed a ruling for the defense on ready ascertainability, based on evidence of how long it took the plaintiff to develop the information at issue.[103] Although the trial court had found that a claimed compilation of "servo motor data" was readily ascertainable, as the plaintiff used "accessible information already in the public domain" from "manufacturers' manuals and the internet," the appellate court was persuaded that the compilation was a "unique effort" collected "over a period of more than seven years," requiring "at least 1,892 hours to organiz[e] the data."[104]

The statutes contain no direction that clock-counting is part of the ready ascertainability analysis. These cases may simply reflect the parties' factual arguments, as they did not purport to set out a concrete timing rule for all cases.

4. Whether a Defendant Must Have Gathered Readily Ascertainable Sources at the Time of Alleged Misappropriation

Another element of confusion in defining clear rules for ready ascertainability comes with the question of whether the concept is prospective—meaning, the defendant can argue that the information is readily ascertainable even though it is accused of using the plaintiff's information as its sole source—or whether the defendant must show that

100. *See* Weins v. Sporleder, 569 N.W.2d 16, 21-22 (S.D. 1997).
101. *See id.*
102. *See id.*
103. *See* N. Elec. Co., Inc. v. Torma, 819 N.E.2d 417, 426 (Ind. Ct. App. 2004).
104. *See id.*

it, in fact, collected public sources at the time of the alleged misappropriation.[105]

Pooley has noted the difference between the two possibilities in his treatise, stating that "it is often said that no defense lies that a trade secret could have been reverse engineered, if that is not how the defendant obtained it. However, if the 'secret' is in fact readily ascertainable, then there is no secret and it shouldn't matter how the defendant obtained it; there can be no actionable misappropriation."[106]

The Nevada Supreme Court reached the same conclusion in an important 2018 dispute over a jury instruction. In *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc*., it affirmed the trial court's refusal to give a jury instruction that would have stated that the Nevada UTSA "precludes a defendant from demonstrating that information is readily ascertainable and therefore not a trade secret when the defendant acquired the information by improper means, including means that fall below accepted standards of commercial morality and reasonable conduct."[107] The state high court considered the text of the Nevada UTSA and held that "we hold that a defendant's acquisition of information by improper means does not preclude the defendant from demonstrating that the information is readily ascertainable by other persons."[108]

By contrast, a 2012 Texas ruling under pre-UTSA common law found the opposite:

> While appellants repeatedly argue such information was readily available through the internet or by exerting minimal effort to talk with others within the industry, the mere fact that knowledge of a process or product may be acquired through inspection or analysis, 'does not preclude protection from those who would secure that knowledge by unfair means' [. . .] the question is not "How could he have secured the knowledge?" but "How did he?"[109]

105. This question has serious policy implications for how one views trade secret law: is a theory of property, where a plaintiff only has rights if there is protectable property in the first place, or is it a relational theory between principles and agents based on some morality concept, where we focus on alleged bad conduct rather than whether there is a valid property right? I strongly favor the former, as detailed in Charles T. Graves, Trade Secrets as Property: Theory and Consequences, 15 GA. J. OF INTELL. PROP. L. 39 (2007).

106. POOLEY, TRADE SECRETS, § 4.04[3] at 4-45.

107. *See* 416 P.3d 249, 253-54 (Nev. 2018).

108. *See id.* at 254.

109. *See* Reliant Hosp. Partners, LLC v. Cornerstone Healthcare Grp. Holdings, Inc., 374 S.W.3d 488, 500-501 (Tex. Ct. App. 2012) (in trade secret case focused on target analysis for acquisition of acute care facilities, finding valid trade secrets where defendant took and used information; quoting Sharma v. Vinmar Int'l Ltd. 231 S.W.3d 405, 424 (Tex. Ct. App. 2007) (in turn citing older Texas cases)).

Since then, however, Texas has enacted the UTSA, which contains the standard statutory elements where establishing a valid trade secret includes showing the absence of ready ascertainability.[110] A different result, like that seen in Nevada, might arise under the Texas UTSA. Given the variation among state UTSA enactments, however, it should come as no surprise that one state—New Jersey—appears to take a different path, with a non-standard provision stating that "[a]" person who misappropriates a trade secret shall not use as a defense to the misappropriation that proper means to acquire the trade secret existed at the time of the misappropriation."[111] Because "proper means" in New Jersey includes "obtaining the trade secret from published literature," as well as "independent invention," it is unclear how a New Jersey court would address questions of ready ascertainability.[112] The state's revision to the UTSA is ambiguous, but the best reading is that one can point to the availability of published materials to demonstrate that there is no valid trade secret in the first place, but one cannot excuse a "misappropriation" of a valid trade secret on the ground that one could have undertaken some independent effort beyond mere ready ascertainability.

5. The Question of Sufficient Evidentiary Submissions

Another definitional question lies in how evidence of ready ascertainability should best be presented to a trial court. Is this largely a matter for experts? Can a lay witness testify as to public sources? Presumably, both could suffice. Scattered case law suggests that some parties use expert witnesses for ready ascertainability.[113]

110. TEX. CIV. PRAC. & REM. CODE ANN. § 134.002(6)(B) (trade secret definition includes that "the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information").

111. *See* N.J. REV. STAT. § 56:15-4. I have not been able to locate legislative history explaining this language. *See generally* Legislative Intent Service, Inc., Legislative History Report and Analysis, Re: New Jersey Assembly Bill 921 (Chivukula – 2011) (on file with author).

112. *See* N.J. REV. STAT. § 56:15-2 (2012).

113. *E.g.*, Gibraltar Lubricating Serv., Inc. v. Pinnacle Res., Inc., 486 S.W.3d 224, 226-28 (Ark. Ct. App. 2016) (reversing trial court's summary judgment for defense where expert testimony as to ready ascertainability of industrial lubricant blend was sharply conflicted, with one expert opining that one could figure it out within hours at and low cost, but another said it would take days or weeks and cost "much more"); Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 899-900 (Minn. 1983) (with respect to a motor design, "expert testimony conflicted on how 'readily' ascertainable are the features of the motor by reverse engineering," but reversing a judgment in favor of the plaintiff on other grounds).

C. Conflating Ready Ascertainability with Distinct or Narrower Concepts in Trade Secret Law

Perhaps the most exasperating reason that the law of ready ascertainability remains unclear is the tendency of courts to use the phrase as a synonym for other important concepts found in trade secret law instead of using different terminology to refer to distinct concepts. This problem is especially common when it comes to reverse engineering, but definitional commingling also exists for other concepts, such as whether the plaintiff itself has published the alleged trade secret or released it on the market. Not every court evidences this conceptual confusion.[114] But when courts mix up different concepts by using the same phrase to mean different things, this inhibits the development of clear definitions for each of them—ready ascertainability above all. Trade secret law would be better off if courts were to consistently apply the same terminology for the same distinct concepts, without using these terms as synonyms.

1. Defining the Problem

The origin of this problem probably lies in the shift from the Restatement to the UTSA and the DTSA. As discussed above, the sixth Restatement factor for the existence of a valid trade secret was "the ease or difficulty with which the information could be properly acquired or duplicated by others." This is broader wording than "readily ascertainable." It can plausibly encompass not just that concept, but also reverse engineering and independent derivation—neither of which were expressly mentioned in the Restatement's six factors. This history may explain why courts have too often used the terminology of ready ascertainability to cover too much ground.

114. In a 2019 ruling, the Northern District of Georgia took unusual care to clarify differences between ready ascertainability, independent derivation, and reverse engineering. The court rejected as untimely a defendant's effort to raise a belated reverse engineering defense (the defendant wanted to argue that it had used a product sample to generate certain information). *See* Arconic Inc v. Universal Alloy Corp., No. 1:15-cv01466-ELR, 2019 WL 12528963, at *22-23 (N.D. Ga. July 25, 2019). The court first distinguished reverse engineering and independent development: "Reverse engineering assumes that a party property and legally obtained and dissected/analyzed a competitor's product while, by contrast, independent development is predicated on a party's own development." *See id.* at *21. Then, when the defendant sought to treat ready ascertainability as a synonym for reverse engineering in order to argue that the defense was properly at issue, the court noted that under the Georgia UTSA, "'readily ascertainable' is a threshold element of proving a trade secret., while reverse engineering is a defense to misappropriation of a trade secret." *See id.* at *22.

a. Conflation with Reverse Engineerability

There are many cases where courts treat ready ascertainability and reverse engineering as apparent synonyms. A 2022 ruling from the Mississippi Supreme Court provides an example. In *Marshall v. Gipson Steel, Inc*., there was a simple software program created in the late 1990s that could "reduce the amount of time necessary to tabulate the various components" of construction bid estimation process.[115] The court reversed a lower court ruling and found that the claimed trade secret "is information which could be readily ascertainable through reverse engineering."[116] Expert testimony, including a court-appointed expert, showed that one could use "simple math" to figure out the bid information at issue, including labor rates calculable "by hand" if one had prior bids "on previous jobs whose steel requirements were known to them."[117] This seems to have been a straightforward instance of reverse engineering—figuring out the plaintiff's claimed trade secret by making educated guesses to unveil it—and not ready ascertainability, which would instead consist of gathering public literature together to show that a claimed trade secret is not protectable.

The Utah Supreme Court likewise commingled these terms in a more complex 2016 ruling, in part because it fell back to the sixth Restatement factor for guidance. In *USA Power, LLC v. PacifiCorp*, it affirmed a verdict in favor of the trade secret plaintiff.[118] It observed that "'[r]eadily ascertainable' is not a defined term in the UUTSA and does not import any specialized meaning," and thus looked to the *Merriam-Webster Dictionary* to define "readily" as "'without much difficulty.'"[119] It also considered the Restatement's sixth factor.[120] The defendant contended that it had reverse engineered "back-up studies" for developing a power plant from the plaintiff's public information, while the plaintiff contended that the defendant had instead misappropriated trade secrets it had received from the plaintiff. The court ruled that such information was not readily ascertainable because things such as the "cost associated with the project, the extent of profitability, and the return on equity" were "done from the unique perspective" of the plaintiff.[121] Here, the comingling of terms seems to have been the defendant's fault, but the

115. *See* Marshall v. Gipson Steel, Inc., 806 So. 2d 266, 269-70 (Miss. 2022).
116. *See id.* at 273.
117. *See id.* at 272-73
118. *See* 72 P.2d 629, 652-54 (Utah 2016).
119. *See id.* at 652.
120. *See id.*
121. *See id.* at 654.

question at issue seems to have been one of reverse engineering what the plaintiff had itself made publicly available, and not collecting various public literature to argue that the plaintiff's claimed trade secret was readily ascertainable.

Other cases feature the same definitional slippage.[122]

b. Conflation with a Plaintiff's Self-Publication

Trade secret law does not have a special term of art for the situation where a plaintiff loses trade secret rights because it has published the information at issue, or released a product from which the information is visible from simple visual inspection short of reverse engineering. This situation is akin to a plaintiff's failure to use reasonable security measures to guard the claimed trade secret, but it is also akin to a waiver doctrine because the publication or market release is intentional rather than negligent.[123] I have called this concept the "sale on the open market rule" in a class I teach to help students clarify this concept.

However one might label the concept, a plaintiff's self-release or self-publication is distinct from ready ascertainability. It is not a matter of asking whether a collection of third party public sources demonstrates that the information at issue is readily available. It is, instead, an emperor-has-no-clothes sort of point, where a plaintiff's lawyers have mistakenly claimed trade secret rights in information their client chose to render publicly available.

In any event, a surprising number of cases have used the terminology of ready ascertainability to describe this distinct situation.[124] One even

122. *E.g.*, Allergan, Inc. v. Revance Therapeutics, Inc. , 711 F. Supp. 3d 873, 897-98 (M.D. Tenn. 2024) (denying motion to dismiss where defendant argued that information might be reverse engineerable, but confusingly treating reverse engineering and ready ascertainability as the same concept; also erroneously stating that the DTSA does not mention reverse engineering despite the express reference in 18 U.S.C. §) 1839(6)(B)); SCIGRIP, Inc. v. Engineered Bonding Sol., LLC, No. 6:15-cv-653-Orl-22KRS, 2015 WL 13792807, at *3 (M.D. Fla. Dec. 9, 2015) (dismissing complaint with leave to amend where plaintiff failed to plead the ready ascertainability element; stating that "[i]nformation that is publicly available or readily ascertainable—for example by reverse engineering or an internet search—cannot qualify for trade secret protection."); Kubik, Inc. v. Hull, 224 N.W.2d 80, 92-93 (Mich. Ct. App. 1974) (stating that a trade secret cannot be "readily available to the public" and finding a trade secret in a product design did not render "the design information readily ascertainable, *i.e.*, subject to discovery without undue effort or hardship," because the product would be hard to obtain and reverse engineering would take "at least 30 hours and perhaps as long as 4 months.").

123. Self-publication could also be defined as a form of trade secret abandonment. *See generally* Camilla A. Hrdy & Mark A. Lemley, *Abandoning Trade Secrets*, *supra* note 94.

124. *E.g.*, Life Spine, Inc. v. Aegis Spine, Inc., 8 F.4th 531, 540 (7th Cir. 2021) (noting, in case that focused on details not available from public sources, that "a company may not

spent time and effort to define ready ascertainability using a dictionary, only to find that the plaintiff had published the game concept it claimed as a trade secret.[125] One recent article also blends these concepts together.[126]

publicly sell or display a product and then claim trade secret protection in information that is 'readily ascertainable' upon examination of the product."); Warehouse Sol., Inc. v. Integrated Logistics, LLC, 610 Fed. Appx. 881, at *885 (11th Cir. 2015) (affirming summary judgment to defendants; noting that the outward appearance of how a software program "looked and worked was readily apparent to authorized users with an ID and password."); Beardmore v. Jacobson, 131 F. Supp. 3d 656, 672 (S.D. Tex. Sept. 16, 2015) (finding that claimed trade secrets in plaintiff's "pitch deck" were "readily ascertainable from the App itself," which plaintiff had marketed); Detsis v. Victoria's Secret Store, Inc., No. 03 CV 5358(GBD), 2006 U.S. Dist. Lexis 73992, *16-17 (S.D.N.Y. Sept. 29, 2006) (applying sixth Restatement factor on ease of duplication and finding that "design concepts" at issue "are readily apparent from the finished product" and thus not trade secrets); Caesars World, Inc. v. Milanian, 247 F. Supp. 2d 1171, 1204 (D. Nev. 2003) (finding concept of building replica of the Coliseum in Rome readily ascertainable in part because the plaintiff "had made wide use of a Roman-themed design there since 1966"); Linkco, Inc. v. Fujitsu Ltd., 230 F. Supp. 2d 492, 499 (S.D.N.Y. 2002) (holding, under New York common law, that where the elements of a software architecture "will be easily ascertainable by the public once the product is marketed," it could not be a trade secret); Strategic Directions Grp. v. Bristol-Meyers Squibb Co., 293 F.3d 1062, 1065 (8th Cir. 2002) (where plaintiff's allegedly secret market research questions were in the plaintiff's own book and it had released them "in its annual surveys, public seminars, and a copyright filing," court said that they were "readily ascertainable and that [plaintiff] had made no attempt to keep them secret"; finding that plaintiff "repeatedly placed them in the public domain" and noting that [a]nyone calling the toll-free telephone number had access to the questions."); IDX Sys. Corp. v. Epic Sys. Corp., 285 F.3d 581, 584 (7th Cir. 2002) (affirming summary judgment for defendants in software case; stating as one part of ruling, with respect to user interfaces, "things that any user or passer-by sees at a glance are 'readily ascertainable by proper means'."); BioCore, Inc. v. Khorowshahi, 96 F. Supp. 2d 1221, 1233 (D. Kan. 2000) (plaintiff could not claim a valid trade secret in "sales strategies" that they disclosed "in their marketing materials, which both attempted to educate their customers and demonstrate the effectiveness of their product."); Flotec, Inc. v. S. Research, Inc., 16 F. Supp. 2d 992, 1001 (S.D. Ind. 1998) (stating that "[w]hether information is 'readily ascertainable by proper means' is a matter of degree, of course," but then finding that finished product was not a trade secret because "in this case [. . .] the skilled engineers for each party were able to take complete sets of dimensions from the other's product within a few hours."); *see also* ERIC E. BENSON & HAROLD EINHORN, BENSON ON PATENT LICENSING TRANSACTIONS § 1.06[1] (2023) (asserting that "features of a product that are readily visible to those who have no confidentiality obligation to the trade secret owner would be considered 'readily ascertainable by proper means'").

125. *See* Editions Play Bac, S.A. v. Western Pub. Co., Inc., 1993 U.S. Dist. Lexis 18241, *11-12 (S.D.N.Y. Dec. 28, 1993) (applying Wisconsin UTSA; granting summary judgment).

126. *See* Jacob S. Sherkow, *Myth of DNA Trade Secrecy*, 75 U.C. L.J. 1047, 1064 (2024) (suggesting that the element of "ready ascertainment" means "a rival pieces together the supposedly secret information from publicly available materials," but also "if merely eyeballing a competitor's product yields the protected information").

c. Conflation with Other Aspects of Non-Secrecy

Other courts have used the label of ready ascertainability for distinct concepts that also render information non-secret. For example, every employee has a right to transfer a body of information known as general skills, knowledge, and experience, from job to job.[127] A few courts appear to have entangled this concept with ready ascertainability. In a 2012 Utah case, an appellate court first noted that there is no protection for information within an employee's faculties, skill, and experience. It then stated that ready ascertainability is governed not by what is ascertainable by the public, but what is known or ascertainable based on the defendant, taking "into account the relevant experience and knowledge of the specific defendants."[128] A court in Iowa, faced with a simplistic trade secret claim regarding a "method of laying out mailers," found that the plaintiff could not establish that its aspects "were unknown to Defendants specifically or were not otherwise readily ascertainable, and has pointed to no evidence in the record that would support such a conclusion."[129]

More subtly, some courts appear to blend together the "not generally known" and the "not readily ascertainable" requirements of most trade secret statutes. For example, in the 2005 District of Utah case *Medspring Group, Inc. v. Feng*, the court noted that customer identities cannot be trade secrets if they are readily ascertainable.[130] It then found on a motion for a preliminary injunction that two customers were identifiable as prospects based on the content of each of their websites.[131] This was seemingly a "generally known" ruling, as the court pointed to each customer's identity from a single source (the website of each) rather than a collection of sources that together showed that the information was readily ascertainable.

127. *E.g.*, Ret. Grp. v. Galante, 176 Cal. App. 4th 1226, 1237 (Dist. 2009) ("a former employee may use general knowledge, skill, and experience acquired in his or her former employment[.]"). For the outstanding treatment of this topic, *see* Camilla A. Hrdy, *The General Knowledge, Skill, and Experience Paradox*, 60 B.C. L. REV. 2409 (2019).

128. CDC Restoration & Constr., LC v. Tradesmen Contractors, LLC, 274 P.3d 317, 325 (Ut. Ct. App. 2012) (finding defendants to be highly experienced with information at issue).

129. *See* Sun Media Sys., Inc. v. KDSM, LLC, 564 F. Supp. 2d 946, 969 (S.D. Iowa 2008).

130. *See* 368 F. Supp. 2d 1270, 1278-79 (D. Ut. 2005).

131. *See id.*

d. Conflation with Independent Derivation

Courts also mix up the concepts of independent derivation and ready ascertainability.[132] As we will see in the discussion of California law below, this problem is especially acute in the law of that state.

2. Correcting the Conflation Problem

Although the problem of courts using the term "ready ascertainability" when they really mean to address other concepts in trade secret law is widespread, the solution seems clear: if courts and litigants pay closer attention to the controlling statutes, the confusion should dissipate.

To start, consider the simple point that the statutes use different concepts differently. The DTSA separately mentions ready ascertainability, reverse engineering, and independent derivation—one as an element of a valid trade secret and the others as conduct that is not misappropriation by improper means.[133] With some variation among the states discussed above, the model UTSA mentions ready ascertainability. A few state enactments also mention reverse engineering and/or independent derivation in some fashion when defining methods to lawfully acquire information.[134] And the model UTSA comments mention both "independent invention" "reverse engineering" as lawful conduct, separately from providing a definition for ready ascertainability.[135] All of this suggests that in most jurisdictions, these concepts are distinct and have different meanings. This is not universally the case. North Carolina's trade secret statute—which is heavily modified

132. *E.g.*, Zunum Aero Inc. v. Boeing Co., No. C21-0896JLR, 2024 U.S. Dist. Lexis 75909, *10-13 (W.D. Wash. Apr. 22, 2024) (denying defense motion on ready ascertainability where plaintiff's experts created a triable issue of fact with their opinions, but confusingly referring to expert opinions on "independent development" where ready ascertainability was what they were analyzing).

133. *See* 18 U.S.C. §§ 1839(6)(B) ("improper means" does not include "reverse engineering" or "independent derivation"); (3)(B) ("not being readily ascertainable" is part of the definition of "trade secret").

134. *E.g.* , Mass. Gen. L. § 42(1) ("Reverse engineering from properly accessed materials or information is not improper means."); TEX. CIV. PRAC. & REM. CODE § 134A.022(4) ("Proper means" includes "discovery by independent development" and "reverse engineering"); N.J. REV. STAT. § 56-15(2) ("proper means" includes "independent invention" and "discovery by reverse engineering"). California's UTSA does not include ready ascertainability, but does mention reverse engineering and independent derivation as lawful means to acquire information. *See* CAL. CIV. CODE § 3426.1(a).

135. *See* UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS, Comment to § 1 at 6 ("Proper means include [. . .] Discovery by independent invention" and "Discovery by 'reverse engineering'"), available at uniformlaws.org.

from the model UTSA—comingles all three terms by requiring that a trade secret be information that is not "readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use."[136]

Still, the observation that courts are not supposed to construe statutes to render their terms superfluous should go a long way in reminding us that these terms in most jurisdictions must have different meanings.[137] For example, because the DTSA and most UTSA enactments list "not generally known" and "not readily ascertainable" one after the other, they cannot be collapsed into one single concept without rendering one or the other superfluous.

Scholars, courts, and practitioners would benefit from clear delineation of these various concepts. Consider the following chart:

Concept	Practical Definition
Ready ascertainability	The information does not exist as a whole in one single industry source, but it nonetheless can easily be collected or observed from more than one publicly available source, where those in the field would reasonably recognize the sources as collectively disclosing the alleged secret.
Generally known	The information is clearly known in the relevant industry, as demonstrated by its existence as a whole in at least one public industry source (a public product, a patent filing, a conference publication, etc.).
Plaintiff's self-publication	Information is visible by simple inspection in one source published or released by the plaintiff—a product or a publication ("sale on the open market rule").
Employee general skills, knowledge, training, and experience	Information is not protectable because it falls within a zone of skills-application that employees inherently possess simply from practicing an occupation over time.

136. *See* N.C. GEN. STAT. § 66-152(3)(a).

137. *See generally* Corley v. United States, 555 U.S. 303, 314 (2009) (statutes are construed to give effect to each provision to avoid rendering parts superfluous, inoperative, or insignificant); County of Nassau v. Leavitt, 524 F.3d 408, 416 (2nd Cir. 2008) (statutes are not interpreted to make clauses and words "meaningless and superfluous"); United States v. DBB, Inc., 180 F.3d 1277, 1285 (11th Cir. 1999) (construing statutes in a manner that would render terms superfluous is disfavored).

Reverse engineerability	Making an educated guess about how a product was manufactured through disassembly, software decompilation, or more invasive techniques applied to a marketed product.[138]
Independent derivation	One who has been exposed to the plaintiff's valid trade secret demonstrates that he, she, or it nonetheless has independently developed the same or similar information, or has acquired it from someone else who independently developed it.

D. The Special Cases of California and Illinois (and Nebraska)

Another major factor in the lack of clarity regarding ready ascertainability is California's decision to omit the concept from the text of its 1985 enactment of the UTSA. Because California sees the most trade secret litigation, is the center of the nation's technology and life sciences industries, and its courts often lead with influential trade secret rulings, this omission has heightened significance. The major problem California's UTSA has caused is a blending together of ready ascertainability with the distinct concept of independent derivation. Given California's outsized influence on trade secret law, I investigate this problem in some depth, with an aim of correcting poorly reasoned rulings in a manner consistent with the main themes of this Article.

Illinois also omitted ready ascertainability from its UTSA, though it has backdoored the concept by continuing to rely on the sixth factor from the older Restatement. Nebraska, while hardly an influential intellectual property jurisdiction, has an interesting tweak in its UTSA that makes its application unique.

---

138. There are several, largely similar definitions of reverse engineering on offer, though none are as precise as they could be. *See* UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS, Comment to § 1 at 5 ("reverse engineering" is "starting with the known product and working backward to find the method by which it was developed"), available at uniformlaws.org; Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 775 (Iowa 1999) ("'[r]everse engineering is the process by which a completed process [or device] is systematically broken down into its component parts to discover the properties of the product with the goal of gaining the expertise to reproduce the product.'") (citation omitted); TEX. CIV. PRAC. & REM. CODE § 134A(5) ("Reverse engineering" means the process of studying, analyzing, or disassembling a product or device to discover its design, structure, construction, or source code provided that the product or device was acquired lawfully or from a person having the legal right to convey it."); N.J. REV. STAT. § 15-2 ("'Reverse engineering' means the process of starting with the known product and working backward to find the method by which it was developed so long as the acquisition of the known product was lawful or from sources having the legal right to convey it, such as the purchase of an item on the open market."); *see also* Pamela Samuelson and Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575 (2002).

1. California

California's UTSA does not contain a requirement that a valid trade secret not be readily ascertainable.[139] That omission, however, begs the question whether a defendant can still raise ready ascertainability as a defense to a claim of trade secret misappropriation and, if so, what precisely that means. Although California's official jury instruction reflects the right approach, the case law is badly splintered. The result is ongoing confusion.

In California, the UTSA enactment process started in 1983 with the standard 1979 version of the model act.[140] By the time the governor approved the final version in 1984, however, the definition of a trade secret modified the standard UTSA language and removed any reference to ready ascertainability: "Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use[.]"[141]

What happened in the interim? The answer seems to lie in letters and comments from the state bar's intellectual property section. One letter expressed definitional ambiguity regarding the concept of ready ascertainability: "What is 'readily ascertainable'? Is it research by a single trained individual for six months, or is it research by a large corporation's research department for one week, or is it merely going to ready references to find the information? Why have this definition at all? Why not only require that the secret be 'not generally known'?"[142]

139. *See* CAL. CIV. CODE. § 3426.1(d) ("Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use"); *see also* RANDALL E. KAY & REBECCA EDELSON, TRADE SECRET PRACTICE IN CALIFORNIA, at 28 (2d ed. 2009) (noting that California's UTSA omitted ready ascertainability and that a case states that it remains available as a defense, but questionably stating also that "Under California law, information may remain a trade secret, even if it is 'readily ascertainable' by reference to trade directories, telephone books, or other resources, provided that others in the industry have not yet ascertained the information."); JAMES POOLEY ET AL., TRADE SECRETS PRACTICE IN CALIFORNIA § 1.8A (2012) (noting that "Under the Comments to the California UTSA, a defendant may escape liability by proving ready ascertainability. This approach differs from that of the Uniform Act, which places on the plaintiff the burden of proving that the information is not readily ascertainable."). Oregon followed suit, as its 1987 enactment also omits ready ascertainability and also tracks unique elements of California's 1985 enactment. *See* ORS § 646.461(4)(b).

140. *See* Assembly Bill No. 501, Feb. 7, 1983 (not approved; contained standard ready ascertainability language in definition of "trade secret").

141. *See* Assembly Bill No. 501, Sept. 30, 194 (on file with author).

142. *See* Letter to Assemblyman Elihu M. Harris from B.G. Nilsson, May 19, 1983, at 2 (on file with author).

A State Bar report also conflated the "not generally known" element with ready ascertainability and expressed a viewpoint that it should be easier for a plaintiff to establish trade secrecy:

> "[T]he objectionable language could cast a cloud on most trade secrets by introducing another test. It would invite an argument in almost every trade secret case that, "since the 'trade secret' could have been reverse engineered, or could have been learned from a literature search, or could have been compiled from other knowledge, it was 'readily ascertainable.'"[143]

In contrast, at least one organization spoke out against removing the ready ascertainability language. The American Electronics Association stated that "[t]he amendment would delete from trade secret law a basic principle—that items whose nature can be ascertained by a simple examination should not be afforded trade secret status. For example, a valve which [c]an be dissembled and analyzed in three minutes would not, under long-standing trade secret law, be deemed a trade secret. Under the proposed amendment, it might. This is inconsistent with current practice."[144] The legislative history indicates that the former viewpoint won out.[145]

The omission of ready ascertainability as an affirmative element in California's UTSA begged the question whether a defendant could still nonetheless raise the concept as a defense. The answer is "yes," but courts have issued confusing rulings as to what that means. The legislative history states that "the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation. Information is readily ascertainable if it is available in trade journals, reference books, or published materials."[146]

---

143. *See* Assembly Bill 501, Comments by the Patent, Trade and Copyright Section, March 28, 1983, at 3-4 (on file with author). A July 25,1984 letter from the State Bar Office of Legislative Affairs to Assemblyman Elihu M. Harris also proposes deleting the ready ascertainability language on "ambiguity" grounds (on file with author).

144. *See* Letter to Robert H. Cornell from Alan I. Foster, May 18, 1984, at 2-3 (typo in original) (on file with author).

145. *See* Letter to Robert Cornell from Gregory B. Wood, June 6, 1984, at 1 (on file with author); Report of Senate Committee on Judiciary on Assembly Bill 501 at 2 (undated); Senate Committee on Judiciary, 1983-84 Regular Session, Uniform Trade Secrets Act, at 7 (undated). The statutory edit seems to have been made in April 1983. *See* strikethroughs in AB 501 (Harris), as amended 04/21/1983 ("Amended in Senate"), at 1; Concurrence in Senate Amendments, AB 501, Aug. 19, 1984, at 2 (all on file with author).

146. *See* Report on Senate Committee on Judiciary on Assembly Bill 501, at 2 (undated) (on file with author). Jim Pooley appears to have written this language. *See* James Pooley PLC, *The Messy Process of Making and Applying the Law*, email circular, March 30, 2023 (recounting that the California state senators "proposed that we go upstairs and find a room to

The case law on this point has been muddled. A 1991 appellate decision, *ABBA Rubber v. Seaquist*, rejected a defendant's attempt to argue that the information at stake was "'readily ascertainable,' and thus not secret" because it was "revealed in trade directories, telephone books and other sources[.]"[147] The court stated that "[w]hile ease of ascertainability is irrelevant to the definition of a trade secret," the concept remains available as a defense.[148] It suggested that the defendant would need to demonstrate that its "knowledge of the [information] resulted from that identification process and not from the plaintiff's records, then the defendants may establish a defense to the misappropriation claim."[149] That is, *ABBA* suggested that ready ascertainability is not a defense to whether a valid trade secret exists, but instead is a pathway for a defendant to show (if it can) that it consulted public sources to develop its own technology. This commingles independent derivation and ready ascertainability—even though California's UTSA includes independent derivation as a separate, distinct concept.[150]

Adding to the uncertainty, one federal court applying California law in 2012 construed a ready ascertainability defense "as a defense to the intent element of misappropriation."[151] This is self-evidently erroneous, as the intent element is part of the definition of "misappropriation" in the text of the California UTSA, and therefore is a distinct issue from ready ascertainability.[152]

In contrast, some have recognized that a defendant can raise ready ascertainability as a defense with the same meaning as the UTSA drafters intended: that no valid trade secret exists due to the easy availability of a

---

discuss coming to an agreement. Less than two hours later we returned with a deal. The plaintiff would not have to prove that the information was [not] 'readily ascertainable,' but the issue was preserved as an 'affirmative defense,' meaning that a defendant could assert it to avoid liability. I wrote out the compromise language[.]").

147. *See* ABBA Rubber v. Seaquist, 235 Cal. App. 1, 21 (Cal. Ct. App. 1991).

148. *See id.* (quoting legislative committee comments to the California UTSA).

149. *See id.* at n.9.

150. *See* CAL. CIV. CODE. § 3426.1(a) ("Reverse engineering or independent derivation alone shall not be considered improper means."). For an analysis of independent derivation in California trade secret law, *see* Charles Tait Graves, *Should California's Film Script Cases be Merged Into Trade Secret Law?*, 44 COLUM. J. L. & ARTS at 21 (2020).

151. *See* SkinMedica, Inc. v. Histogen, Inc., 869 F. Supp. 1176, 1196 (S.D. Cal. 2012) (denying defense motion for summary judgment, including as to ready ascertainability; the defense apparently treated ready ascertainability as equivalent to the not-generally-known secrecy requirement, as the court characterized the argument as that the alleged trade secrets were "readily ascertainable based on the same proof showing that they information was generally known.").

152. *E.g.*, CAL. CIV. CODE. § 3426.1(b)(1-2) (defining "misappropriation" with intent requirement embedded via language requiring that the defendant "knew or had reason to know" the information was another's trade secret).

collection of public literature. A 2007 state appellate case found a fact issue when reversing a trial court's summary judgment ruling as to whether the trade secret defendant could have quickly replicated allegedly secret project proposals, which consisted of information "individual components generated by or disclosed to third parties," such that they could be found readily ascertainable.[153] Others seem to have noted the same possibility, albeit without analysis.[154]

State jury instructions have been a clarifying step. In 2004, model California Civil Jury Instructions for trade secret trials indicated in a comment that "the advisory committee believes that this [ready ascertainability] is an affirmative defense."[155]

Then, based on the 2007 *San Jose Construction* case, California added a new jury instruction labeling ready ascertainability an affirmative defense. The instruction explained that the drafters rejected *ABBA*'s

153. *See* San Jose Constr., Inc. v. S.B.C.C., Inc., 155 Cal. App. 4th 1528, 1542-43 (Cal. Ct. App. 2007) (reversing a summary judgment in favor of the plaintiff in a fact-intensive dispute over the secrecy of contractor-related information; the court rejected, in passing, a defense argument that the information was "readily ascertainable" from easily available sources, but because the court disagreed with the defendant about what the alleged trade secret was said to be; no discussion of ready ascertainability as a legal concept or its definition; "Thus, a triable issue of fact exists as to whether the entire proposal for each project was indeed readily ascertainable—that is, whether South Bay could have replicated each offer within the short period it claimed to have needed.").

154. *See* generally Brescia v. Angelin, 172 Cal. App. 4th 133, 147 (Cal. Ct. App. 2009) (noting that a trade secret plaintiff must sufficiently identify its trade secret claims so that a defendant can then "develop the defenses of independent development or ready ascertainability (meaning there was no misappropriation)."); Sygenta Crop Protection, Inc. v. Helliker, 138 Cal. App. 4th 1135, 1172 (Cal. Ct. App. 2006) (stating as a general principle that "[i]nformation that is readily ascertainable by a business competitive derives no independent value from not being generally known," without remarking on California's treatment of the concept); Imax Corp. v. Cinema Techs, Inc., 152 F.3d 1161, 1168 n.10 (9th Cir. 1998) (dicta; quoting *ABBA* in describing California law as to ready ascertainability); Courtesy Temp. Serv. v. Camacho, 222 Cal. App. 3d 1278, 1287-88 (Cal. Ct. App. 1990) (stating in general terms that information at issue was "not readily ascertainable to other competitors" without explaining why it was referring to that concept when ruling that the information was a trade secret); American Paper & Packaging Prod., Inc. v. Kirgan, 183 Cal. App. 3d 1318, 1326 (Cal. Ct. App. 1986) (similarly stating that the customer information at stake "may not be generally known to the public, they certainly would be known or readily ascertainable to other persons in the shipping business," without explaining why the reference to ready ascertainability was made).

155. *See* CACI No. 4420 (Affirmative Defense—Information Was Readily Ascertainable by Proper Means), Directions for Use. The author was a member of the State Bar's trade secret committee at the time it began work on model jury instructions for trade secret cases, but did not contribute to this instruction. *See also* Medtronic MiniMed, Inc. v. Nova Biomed. Corp., 2009 U.S. Dist. Lexis 154800, at *5 (C.D. Cal. Aug. 14, 2009) (granting a plaintiff-side motion in limine to preclude evidence of reverse engineering, relying in part on CACI No. 4420 defendant's failure to raise ready ascertainability as an affirmative defense in its answer).

confusing language.[156] The drafters noted that if ready ascertainability required a showing that the defendant had gathered the information from public sources, "[s]uch a requirement would not constitute an affirmative defense but rather would be a denial of the improper-means element of the plaintiff's claim," because an affirmative defense "admits the truth of the essential allegations of the complaint."[157] When courts apply this jury instruction, the effect of California's decision to omit ready ascertainability from the UTSA would merely shift the burden of proof from the plaintiff to the defendant. Its meaning would not change.

This observation—based on an understanding of what an affirmative defense means—is illuminating. Nonetheless, there is a better way to explain the problem. If one collapses the California version of ready ascertainability into a showing that the defendant did not engage in improper means but instead independently gathered the information to develop its own trade secrets, that would be a showing of *independent derivation*, not ready ascertainability. Because California's legislature added the concept of independent derivation to the state UTSA, it already exists as a distinct concept.[158] Underscoring the point, independent derivation is not an affirmative defense under California law, but merely a traverse where the ultimate burden of proof always remains with the plaintiff.[159]

Thus, to the extent some cases have ruled that under California's UTSA ready ascertainability requires a showing that the defendant went and gathered the information independently, this is almost certainly incorrect. It does not make sense to suggest that the state legislature intended some tacit alchemy to transmute ascertainability into a synonym

156. *See* Judicial Council of California, CACI No. 4420 (2007; modified 2009) ("Affirmative Defense—Information Was Readily Ascertainable by Proper Means."), Directions for Use, available at https://www.courts.ca.gov/partners/documents/judicial_council_of_california_civil_jury_instructions_2024.pdf (2023 edition). The jury instruction is modeled on the official UTSA commentary. *See id.* ("There is no fixed standard for determining what is 'readily ascertainable by proper means.' In general, information is readily ascertainable if it can be obtained, discovered, developed, or compiled without significant difficulty, effort, or expense. For example, information is readily ascertainable if it is available in trade journals, reference books, or published materials. On the other hand, the more difficult information is to obtain, and the more time and resources that must be expended in gathering it, the less likely it is that the information is readily ascertainable by proper means.").

157. *See id.* (citing 5 Witkin, California Procedure (4th Ed. 1996) Pleadings, § 1081 for the definition of an affirmative defense under state law).

158. *See* CAL. CIV. CODE. § 3426.1(a) ("Reverse engineering or independent derivation alone shall not be considered improper means.").

159. *See* Sargent Fletcher, Inc. v. Able Corp., 110 Cal. App. 4th 1658, 1663-64, 1670 (2003) (stating rule regarding burden of proof; the defendant seeking to show independent derivation merely has the burden of production regarding such evidence).

for independent derivation, something it had *added* into California's version of the UTSA.

Unfortunately, a poorly reasoned federal case—one that resulted in a confusing, unpublished Federal Circuit ruling—overlooked this logic. Relying on *ABBA* and a Ninth Circuit ruling that mentioned *ABBA* in dicta, the Central District of California treated the concept of ready ascertainability under the California UTSA as a rebuttal to the misappropriation element, rather than an argument against the existence of a valid trade secret.

In *Masimo Corp. v. True Wearables, Inc.*, erstwhile business partners engaged in trade secret litigation over "signal processing techniques" used in medical devices.[160] When the plaintiff sought a preliminary injunction, the defendant offered two conference papers, which the court construed not as evidence that the alleged trade secret was generally known, but "[a]t best" evidence for ready ascertainability.[161] The court noted that "[t]hese papers were found by Defendants' expert and not shown to be the origin of the invention" at issue.[162] The court argued that there would be a "moral hazard" if one could establish ready ascertainability through public literature that the defendant did not actually rely upon:

> [I]f the Court were to accept Defendants' argument, a competitor who wishes to copy a particular trade secret is incentivized to engage in misappropriation of the competitor's trade secret instead of acquiring the readily ascertainable information through other legitimate means. Even if the Defendants did engage in misappropriation, they could always claim that it was unnecessary to use the legitimate means since the mere existence of other means undermines the protection of the trade secret.[163]

This is dubious reasoning. If a defendant obtained a potential trade secret from another party, knew that public literature likely disclosed it, and decided it could use the information lawfully, then it is difficult to see immorality in such conduct. If, by contrast, a company obtained a potential trade secret but proceeded to use it without first canvassing public literature, then the "moral hazard" the court envisioned also would

160. *See* 2021 U.S. Dist. Lexis 88038, at *3 (C.D. Cal. Apr. 28, 2021).

161. *See id.*, at *11 (citing UTSA commentary as found in California UTSA legislative history).

162. *See id.*

163. *See id.* at 12-13; *see also* Masimo Corp. v. True Wearables, 2021 U.S. Dist. Lexis 246928, at *38-40 (C.D. Cal. Oct. 15, 2021) (same point on summary judgment against defendants).

not exist, for a different reason. In that instance, the business would be acting in the dark, without making any decision about available public literature. It would not be looking ahead to a litigation and imagining raising a defense based on public literature. Thus, allowing one to establish readily ascertainability based on public literature one did not consult does not create a moral hazard.

Things got worse from there. In an unpublished opinion, the Federal Circuit largely based its ruling on other grounds.[164] But it also affirmed the trial court's ruling that under the California UTSA, ready ascertainability requires showing that the defendant in fact "independently" obtained the information at issue from public sources, citing dicta in the Ninth Circuit's 1998 *Imax* decision.[165] In a footnote, the Federal Circuit dismissed an argument that the California jury instruction showed that the law was otherwise. It stated that "[i]n the absence of a controlling California court decision to the contrary, it was appropriate for the district court to follow the Ninth Circuit's interpretation of the California statute."[166]

In total, the *Masimo* rulings failed to consider whether their approach improperly turned ready ascertainability into a synonym for the distinct concept of independent derivation. Neither mentioned that independent derivation in California is not an affirmative defense, a fact would tend to heighten the conclusion that it is not the same thing as readily ascertainability. The Federal Circuit ruling overlooked the precedential *San Jose Construction* case, which had inspired the jury instruction when it asserted that no state court case had spoken on the point.[167] The *Masimo* rulings are almost certainly bad law.[168]

---

164. *See* Masimo Corp. v. True Wearables, 2022 U.S. App. Lexis 1923, at *8-11 (Fed. Cir. Jan. 24, 2022) (unpublished).

165. *See id.* at *9 & n.3 (citing *Imax, supra* note154, without noting that its footnote was dicta).

166. *See id.* n.1. After a bench trial, the district court again ruled against the defendants. *See* Masimo Corp. v. True Wearables, Inc., 2022 U.S. Dist. Lexis 208284, at *57 (C.D. Cal. Nov. 7, 2022) ("Thus, under the CUTSA, ready ascertainability is only a defense insofar as the defendant actually gained knowledge of the trade secret by use of those materials which made the trade secret readily ascertainable.").

167. A published state appellate ruling on a point of state law should outrank a conflicting federal court decision. "In deciding an issue of state law, when there is relevant precedent from the state's intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." *In re Salazar*, 470 B.R. 557, 561 (S.D. Cal. 2012) (quoting Hayes v. County of San Diego, 658 F.3d 867, 870 (9th Cir. 2011)).

168. For a different viewpoint, *see* Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 57 (2007) (accepting that in California, ready ascertainability means that a defendant must demonstrate independent derivation of public

California law remains in a state of confusion over the meaning of ready ascertainability. This confusion has inhibited the national development of a clear and consistent standard.

2. Illinois

Illinois also omitted ready ascertainability from its definition of trade secrecy when it enacted its version of the UTSA in 1988.[169] That said, its omission has been less consequential than in California. That is so because Illinois courts have continued, even after the UTSA's enactment, to expressly consider the old, Restatement-based six-factor test for a valid trade secret. As the sixth factor is a predecessor of sorts to ready ascertainability, Illinois courts have continued to consider the concept, putting the state more in line with the DTSA and other UTSA jurisdictions.

For example, a 2007 case ostensibly applied the UTSA, but considered Restatement factors including "the ease or difficulty with which the information can be acquired or duplicated by others[.]"[170] Under this element, it found that a spreadsheet-based means to input elements for repair jobs to "calculate a suggested bid" was not a trade secret based on testimony that it could be reproduced "in two to three days," and because the inputs were "primarily public, as it is either published or can be acquired by a telephone call to a subcontractor, for example."[171] Another Illinois court referred to the same Restatement

sources; arguing that "it does not make economic sense to place the burden on the owner to research whether information might be readily ascertainable elsewhere, nor does it make sense to allow someone who enters into a contract with the owner to use secret information in breach of duty simply because some third party might be able to easily compile the information."). In this view, an employer is an information "owner" regardless whether the information is readily ascertainable, and an employee's confidentiality agreement creates a "duty" not to use what those in the field can easily collect. This would be a terrible policy outcome if it were the law.

169. *See* 765 Ill. Comp. Stat. 1065/2(d)(1) ("is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use"). A 1992 commentary says that the omission was to conform the Illinois UTSA to a common law rule that hypothetical public availability was insufficient to defeat trade secrecy, but does not provide a supporting citation. *See* Caroline Patricia Jamieson, Comment, *Protecting Proprietary Information in Illinois: A Response to the Illinois Trade Secrets Act from a Drafting Perspective*, 41 DEPAUL L. REV. 885, 907 n.212 (stating that the ready ascertainability concept "was deleted from ITSA to follow in line with earlier decisions in Illinois, holding that the mere availability of proper means by which one may acquire knowledge of a trade secret is no defense to an action for misappropriation if, in fact, improper means were used.").

170. *See* Stenstrom Petroleum Servs. Group, Inc. v. Mesch, 874 N.E.2d 959, 973-75 (Ill. Ct. App. 2007).

171. *See id.* at 973.

factor to justify considering the functional equivalent of ready ascertainability even though the Illinois UTSA does not include that element as part of its element of a trade secret.[172]

3. Nebraska

Nebraska ventured in a notably different direction from California and Illinois: it removed the qualifier "readily" from the phrase "readily ascertainable," thus making it harder for a plaintiff to establish a valid trade secret. This left its version of the UTSA stating that a trade secret must not be "ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use."[173] As the state supreme court noted, this "narrows" the information that can be a trade secret.[174] It accordingly found no trade secrets in a claimed compilation of farm-related customer information where "simple Internet searches could identify" a portion of the information, and all or much of the rest could be obtained by asking the farmers identified from such searches.[175]

172. *See* Hamer Holding Group, Inc. v. Elmore*,* 560 N.E.2d 907, 1011 (Ill. Ct. App. 1990) (where plaintiff noted that the Illinois UTSA does not include the concept of ready ascertainability, court stated that "Plaintiff's argument is unpersuasive, however, because the key to 'secrecy' is the easy with which information can be developed through other proper means: if the information can be readily duplicated without involving considerable time, effort or expense, then it is not secret."; finding that customer list was not a trade secret because it "could be easily duplicated"); *see also System Dev. Serv., Inc*., 907 N.E.2d 63, 76 (Ill. Ct. App. 2009) (customer list that was "merely a listing of names, addresses, and telephone numbers" was "common knowledge to people in the computer service trade or is otherwise readily available information. Competitors in the computer network industry can quickly identify potential customers by referring to directories and other sources of publicly available data."); Delta Med. Sys., Inc. v. Mid-Am. Med. Sys., Inc., 772 N.E.2d 768, 791-92 (Ill. Ct. App. 2002) (reversing preliminary injunction in customer list case; noting the six Restatement factors and that "the names of the 72 customers listed, including hospitals and medical clinics, could be derived by merely looking in the yellow pages or from a FOLA request," and thus "can be duplicated with little effort"); Gillis Assoc. Indus., Inc. v. Cari-All, Inc., 564 N.E.2d 881, 885 (Ill. Ct. App. 1990) (ostensibly applying the Illinois UTSA, but finding that plaintiff's customer list was "not readily ascertainable" as working from public sources would require mailings and phone calls to prospects and even then would not be complete); *see also* Learning Curve Toys, Inc. v. PlayWood Toys, Inc., 343 F.3d 714, 723 (7th Cir. 2003) (reversing defense verdict under Illinois UTSA; following Restatement six-factor analysis to find a fact question for the jury regarding "noise-producing toy railroad track" where the product was not yet public and thus ease of duplication was not yet a factor).

173. *See* Neb. Rev. Stat. § 87-502(4)(a).

174. *See* First Express Serv. Group, Inc. v. Easter, 840 N.W.2d 465, 474 (Neb. 2013) (noting that the state version of the UTSA also omits the qualifier "generally" from "generally [known]," which also narrows what is protectable as a trade secret).

175. *See id.* at 474-75; *see also* Standard Nutrition Co. v. Smith, 2024 U.S. Dist. Lexis 49575, at *12-14 (D. Neb. Feb. 16, 2024) (same; noting Nebraska's unique "ascertainable" language and granting summary judgment to defendant in customer information, albeit without sustained analysis of what that word means).

V. SOLUTIONS: CLEARLY DEFINING READY ASCERTAINABILITY

A. A Clear and Usable Standard

I have defined problems in trade secret law where increased attention to ready ascertainability might offer a solution. When it comes to technology- and life sciences-based disputes, this means a better way to analyze multi-element combination trade secret claims. Courts can use ready ascertainability to address ordinary combination trade secret claims and assess whether or not the elements comprising the plaintiff's complete, unified process are easily found in industry literature. Perhaps more importantly, ready ascertainability may be the best way to combat gerrymandered combination claims where a plaintiff artificially lists the design elements its technology shares with the defendant as a combination trade secret, while omitting other, different elements.

Given the problems this Article outlines, how can courts develop a clear, consistent rule for ready ascertainability that will work in complex technology and life sciences disputes?

It's easy to propose that courts apply statutory requirements. It's much harder to propose how to do that, especially when trade secret cases can involve complicated assemblages of scientific information.

First, courts need to address ready ascertainability in every case where it is a potential issue—not merely in customer list cases. Ready ascertainability needs to be extracted from simplistic cases and applied more broadly, because the trade secret statutes do not so restrict its reach. Second, courts must do a better job of labeling distinct concepts in trade secret law, including independent derivation and a plaintiff's self-publication, to avoid definitional confusion. And, courts should follow the Nevada Supreme Court and other courts that have correctly ruled that ready ascertainability does not require a defendant to have actually collected public literature at the time of the alleged misappropriation.[176] Proceeding otherwise mixes up the distinct questions of whether there is a valid trade secret in the first place and whether there was misappropriation.

Most importantly, courts should also apply a clear rule statement for deciding ready ascertainability. To start, courts should construe "not generally known" and what is "not readily ascertainable" as they appear in most of the trade secret statutes—as two separate and distinct elements. "Generally known" means that information appears as a whole in one

176. *See supra* Section III.B.4.

source, is known by those in the relevant field as a unitary thing, or has been published by the plaintiff in its entirety.

As for ready ascertainability, my proposal turns on what can easily be collected from more than one publicly available source, and not on the timing involved. I do not believe that stopwatch-like tests of how much time is needed are useful when almost everything today is being sourced from the Internet. The notion of measuring the time needed to collect a customer list from hard copy phone books and directories is antiquated.

More important than timing, courts should be attentive to how a plaintiff has constructed its trade secret claim, so that gerrymandered combination claims are viewed with greater suspicion. Where a combination trade secret claim does not reflect a plaintiff's true unified process and is instead a cherry-picked, partial selection of elements that overlap with some of the defendant's design elements, that is when courts' antennas should be up.

"Readily ascertainable" should be defined as that which can easily be collected or observed from more than one publicly-available source, where those in the field would reasonably recognize the sources as collectively disclosing the alleged secret.[177] As one court perhaps put it best, "[t]he readily ascertainable test asks whether the information, even if not found in one single published source, nonetheless can easily be gathered from various sources through a minimum of time and labor. The more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely it is to not be readily ascertainable."[178] This ruling correctly defines readily ascertainable information as that which is not found in one single source—that is, no exact match to the plaintiff's design in one single source is required.

177. For a distinction between "not generally known" and "readily ascertainable" along the same lines, *see* Camilla A. Hrdy & Sharon K. Sandeen, *The Trade Secret Standard for Patent Prior Ar*t, 70 AM. U. L. REV. 1269, 1289 (2021) ("The 'readily ascertainable' concept creates an additional hurdle. It extends trade secret law's baseline for publicness significantly beyond the public understanding.").

178. *See* GSI Tech., Inc. v. United Memories, Inc., 2015 U.S. Dist. Lexis 129568, at *n.147 (N.D. Cal. Sept. 25, 2015) (quoting the Trade Secret Practice in California treatise, *supra* n.37; finding a triable issue of fact on motion for summary judgment where defendant argued that "all 25 of the claimed circuit schematics are at least readily ascertainable to [a defendant] through relevant product specifications, patents, textbooks, and past designs that are readily at hand to [defendant]."; rejecting plaintiff's argument that defendant was required to present evidence of actual reverse engineering to present the defense at trial). The author was counsel for the defendant which raised this defense and co-wrote the argument the court accepted. The thinking done for this case was, in some sense, the origin of this Article.

The model UTSA's guideline—"[i]nformation is readily ascertainable if it is available in trade journals, reference books, or published materials"—is the right starting point.[179] But that statement needs to be fleshed out to address today's complex combination trade secret claims.

When addressing combination trade secret claims, a useful metaphor is a "toolbox": A set of known design elements or scientific facts easily found in more than one public source, and practiced by several industry participants in different variations. The more ubiquitous such elements are practiced in the field, the less their use together should be viewed as a valid combination trade secret. The toolbox is a set of options that are free to be combined in different ways, in different variations, without legal penalty. For example, information would be readily ascertainable when a technology (such as a medical device) is comprised of elements that are merely one variation of other combinations among many seen in available literature describing other medical devices in the same or similar fields. If a device contains four elements that can readily be found in other, similar devices—each of which contains a variation of some of those four elements—then the super-set of known elements is "readily ascertainable" as a toolbox of options.

By examining how the elements of a combination can be gathered from more than one source and also by assessing their ubiquity in the field (or lack thereof), factfinders can make more reasoned decisions about combination trade secret claims.

In litigation, opposing sides will retain experts to duel on these questions.[180] But even with the problems inherent in the use of paid

179. *See* Uniform Trade Secret Act with 1985 Amendments, *supra* note16.

180. For examples, *see* Harbor Compliance Corp. v. Firstbase.Io, Inc., 2024 U.S. Dist. Lexis 61026, at *15-19 (E.D. Pa. Apr. 3, 2024) (on motions in limine, permitting expert to offer opinion that information was readily ascertainable from public sources, but barring him from offering legal conclusions); Group14 Tech. Inc. v. Nexeon Ltd., 2024 U.S. Dist. Lexis, at *24-26 (W.D. Wash. Mar. 26, 2024) (on a discovery dispute, finding a "lack of rigor" in an expert declaration purporting to show that certain vendor information was not readily ascertainable and rejecting it on that basis). Fair warning: renewed attention to ready ascertainability will almost certainly result in the same problem in trade secret expert reports that litigants often see with the generally known element: the plaintiff's expert asserts that information is secret without conducting a proper canvass of public literature. For example, in Atmel Corp. v. Information Storage, 189 F.R.D. 410, 416-17 (N.D. Cal. 1999), an expert reviewed solely public literature pre-selected by counsel. The Court held that when an expert refrains "from educating himself on the universe of literature at the relevant time frame" and "deliberately shield[s] himself from a body of highly relevant information" his "methodology [is] inadequate to enable him to opine on what was 'generally known' in the semiconductor industry." *See id.* (limiting expert to testifying to what he personally knew about the public domain during the relevant time period); GSI Tech., Inc. v. United Memories, Inc., No. 5:13-

experts, an outcome where ready ascertainability becomes a regular feature of complex trade secret disputes would be a marked improvement over present practice.

B. Digression: Importing Patent Obviousness Tests is Not a Solution

Some readers will surely ask why I have ignored the patent law doctrine of obviousness in these proposals. After all, the requirements that a valid trade secret not be generally known or readily ascertainable are analogous to the requirements that a valid patent claim be both novel and not obvious.[181] Moreover, obviousness has a rough similarity to ready ascertainability: In patent law, it allows courts to find a patent invalid (and thus unprotectable) because the purported invention is deemed to have been obvious in light of the prior art.[182] Why not simply propose that courts adopt the rules of obviousness into trade secret law, hook, line, and sinker?

My decision to avoid a comparison to obviousness is deliberate. Trade secret law does not exist in the shadow of patent law. That said, anyone who has ever given a presentation on trade secret law before an audience of intellectual property scholars knows the sinking feeling of watching the discussion become sidetracked by a diversion into patent law. Hands in the audience go up, but they are not always questions about trade secret law: all too often, someone just wants to say that something about the presentation reminds them of some aspect of patent law. My position here may be provocative, but comparisons to patent law are rarely beneficial to the advancement of clarity and predictability in trade secret law.

To be sure, it is tempting to borrow from the law of obviousness. In a 2007 decision, the Supreme Court rejected the Federal Circuit's "rigid approach" in favor of a "an expansive and flexible approach," thus making it easier for courts to determine obviousness as a matter of law.[183]

---

cv-01081-PSG, 2015 U.S. Dist. Lexis 140085, at *10-12 (N.D. Cal. Oct. 14, 2015) (excluding secrecy opinion under *Atmel* where expert performed only cursory review of public literature); *see also* Brocade Commc'ns Sys. v. A10 Networks, Inc., No. C 10-3428 PSG, 2013 U.S. Dist. Lexis 8113, at *66-67 (N.D. Cal. Jan. 10, 2013) (distinguishing *Atmel* from situation where an expert properly reviews literature where claimed secrets are likely to be found).

181. I thank Deepa Varadarajan for this observation.

182. *See* 35 U.S.C. § 103(a) ("A patent for a *claimed invention* may not be obtained, notwithstanding that the *claimed invention* is not identically disclosed as set forth in section 102, if the differences between the *claimed invention* and the prior art are such that the *claimed invention* as a whole would have been obvious before the *effective filing date* of the *claimed invention* to a person having ordinary skill in the art to which the *claimed invention* pertains.").

183. *See* KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 415 (2007) (referring to the "need for caution in granting a patent based on the combination of elements found in the prior art.").

The court explained that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results."[184] Patent courts considering obviousness analyze factors that, in at least some instances, might be useful in trade secret cases as well: whether the prior art teaches away from the claimed invention, whether a skilled artisan would have been motivated to combine the prior art references, and indicia that the invention was not obviousness.[185] In these cases, one of the most important factors is whether a person skilled in the art would have been motivated to combine elements found in the prior art.[186] Moreover, the courts construe obviousness under *KSR*'s broad teaching in both ordinary as well as less predictable areas of science and technology.[187]

For example, in 2013, the Federal Circuit reversed a finding of nonobviousness by explaining that, with respect to existing prior art in the field of shipping container design, "it is hard to see why one of skill in the art would not have thought to modify [a prior art reference] to include this feature[.]"[188] Another Federal Circuit case, from 2020, found it "a matter of common sense" that a person skilled in the art would combine prior art in the field of padlocks "with an external sealing mechanism in order to arrive at the claimed invention[.]"[189] It noted that when considering obviousness, courts can consider prior art from both the same field, and

184. *See id.* at 416. In 2024, the USPTO promulgated guidelines for determining obviousness under the *KSR* standard. *See Updated Guidance for Making a Proper Determination of Obviousness*, 89 Fed. Reg. 14449 (Feb. 27. 2024).

185. *E.g.*, Adept Pharma Operations Ltd. v. Teva Pharm. USA, Inc., 25 F.4th 1364 (Fed. Cir. 2022) (affirming trial court's obviousness finding as to a nasal method of administering a drug where the prior art already included a medical device for similar drug administrations). Another Federal Circuit ruling expressed the factors this way: "Among the factual determinations are 'the scope and content of the prior art, differences between the prior art and the claims at issue, the level of ordinary skill in the pertinent art, and any objective indicia of nonobviousness,'" which can include "commercial success traceable to the claimed invention, industry praise, copying, and certain other facts concerning people's actions and statements." *See* Intercontinental Great Brands, LLC v. Kellogg N. Am. Co., 869 F.3d 1336, 1343, 1343 (Fed. Cir. 2017) (affirming summary judgment for defendant on obviousness) (citations omitted).

186. *E.g.*, TQ Delta, LLC v. Cisco Sys., Inc., 942 F.3d 1352, 1357, 1363 (Fed. Cir. 2019) (setting forth rule and reversing a PTAB finding of obviousness because it was based on conclusory expert testimony that a skilled person would have been motivated to combine prior art references).

187. *In re Kubin*, 561 F.3d 1351, 1360 (Fed. Cir. 2009) (rejecting argument that court should not apply the *KSR* obviousness standard to the supposedly "unpredictable" field of gene sequencing in view of the prior art).

188. *See* Randall Mfg. v. Rea, 733 F.2d 1355, 1363 (Fed. Cir. 2013) (remanding to the PTAB for further determinations).

189. *See* Wyers v. Master Lock Co., 616 F.3d 1231, 1245 (Fed. Cir. 2010) (reversing trial court's JMOL ruling on obviousness).

also from a different field if the latter is reasonably pertinent to the issue the invention addresses.[190] This consideration of what prior art counts is known as "analogous art."[191] One could refer to these same issues when thinking about ready ascertainability: to what degree would someone consider combining different references, and are we considering the defendant's viewpoint, or that of a hypothetical skilled person in the field?

Despite this surface appeal, we should tread with caution in comparing ready ascertainability to obviousness. The first consideration is practical: In court, asking a judge to import the law of obviousness into trade secret law is a non-starter. To cite patent law in the midst of a trade secret dispute would be akin to citing case law from the trade secret law of Canada or Australia: Whatever may be precedential in some other legal context has zero weight when interpreting trade secret law under the DTSA or UTSA, even if it serves as controlling precedent in its native context.

Courts facing trade secret cases have hastened to stress that patent and trade secret requirements differ.[192] For example, in 2021 a trade secret plaintiff moved to exclude a defense expert for supposedly "conflat[ing] the test for whether information is publicly known or readily ascertainable under trade secret law with an obviousness analysis for novelty under patent law."[193] The court disagreed that the expert had done so, but the implication was that if he had, there might have been a problem.[194] Similarly, the Idaho Supreme Court denied an argument that the appellate court had erred by referring to the law of obviousness in a trade secret case, but only because it has referred to the trade secret standards of generally known and ready ascertainability in the same sentence. Again,

190. *See id.* at 1237.

191. *E.g.*, Sanofi-Aventis Deutschland GmBH v. Mylan Pharm., Inc., 66 F. 4th 1373, 1377-78 (Fed. Cir. 2023) (exploring concept of analogous art and reversing finding of obviousness where prior art was not analogous; "In evaluating whether a reference is analogous, we have consistently held that a patent challenger must compare the reference to the challenged patent.").

192. That said, some courts and commentators have noted conceptual similarities. E.g., Milgrim On Trade Secret § 1.08 ("Certain threshold concepts found in other areas of intellectual property, such as patent-law notions of novelty and nonobviousness [. . .] are not part of the trade secret analysis."; "With reference to industrial trade secrets, however, courts often require some degree of advance which, although not "invention," constitutes a degree of discovery."); I*n the Matter of Innovative Constr. Sys., Inc*., 793 F.2d 875, 886 (7th Cir. 1986) ("Uniqueness in the patent-law sense is not an essential element of a trade secret. [. . .] Nonetheless, a trade secret must possess at least that modicum of originality that will separate it from everyday knowledge.").

193. *See* Proofpoint, Inc. v. Vade Secure, Inc., 2021 U.S. Dist. Lexis 118313, at *13-15 (N.D. Cal. June 24, 2021).

194. *See id.*

it was a close call and the importation of patent law would not have been permitted.[195] And an older, 1981 case from New Jersey stressed the that the concept of obviousness is relevant "to patent law, but not to trade secret law. The informational context would be the same, but the analysis and tests are not."[196] Finally, while a 1993 Ohio decision held that a court in a trade secret case could consider "concepts of novelty, uniqueness, and obviousness," it was careful to careful to cabin those terms to trade secret contexts, such as "a design that can be viewed through casual observation of the finished product."[197]

That is not to say that a finding of obviousness could never matter. In a 1997 case before the South Dakota Supreme Court, the plaintiff had admitted the purportedly secret combination in a feed recipe was close to the "common knowledge" of those in the industry.[198] The court found that the USPTO's denial of a patent on the same recipe, "based upon obviousness," reinforced the conclusion that the information was not a trade secret.[199] But that was dicta, not a borrowing of concepts from patent law as a basis for the holding.

The reason to avoid comparisons to obviousness when discussing ready ascertainability is not just the simple recognition that oil and water

195. *See* Basic Am., Inc. v. Shatila, 999 P.2d 175, 183 (Id. 1999) ("While 'obviousness' is a patent law concept not within the ITSA, the court's conclusion that the 'generally known' and 'readily ascertainable' test were met satisfied the requirements of the ITSA.").

196. *See* Rohm & Haas Co. v. Adco Chem. Co., 1981 U.S. Dist. Lexis 17587, at *106 (D.N.Y. Oct. 15, 1981) ("The factor must be judged in terms of trade knowledge only, otherwise the risk of applying inappropriate patent concepts would be raised."). It should be noted that not every distinction courts have made between patent law and trade secret law is convincing. Some have asserted, unconvincingly, that trade secret law is about "commercial ethics," whereas patent law is about protecting novelty and nonobviousness. *E.g.*, Pie Dev., LLC v. Pie Ins. Holdings, Inc., 2021 U.S. Dist. Lexis 143323, at *13 (S.D. Miss. July 21, 2021); Pinebrook Holdings, LLC v. Narup, 2022 U.S. Dist. Lexis 97578, at *19 (E.D. Mo. June 1, 2022). Ethics-based language does not appear in the trade secret statutes except for the section about enhanced damages (or attorneys' fees) in case where the plaintiff or the defendant has behaved badly. Trade secret law is about property right as patent law is. For a clear-eyed takedown of commercial morality language seen in some trade secret cases, *see* Lynda J. Oswald, *The Role of "Commercial Morality" in Trade Secret Doctrine*, 96 NOTRE DAME L. REV. 125 (2020).

197. *See* R&R Plastics, Inc. v. F.E. Myers Co., 637 N.E.2d 332, 340 (Oh. Ct. App. Dec. 30, 1993).

198. *See* Weins v. Sporleder, 569 N.W.2d 16, 21-22 & n.10 (S.D. 1997).

199. *See id.* at *22; *see also* Sharon Sandeen & Camilla A. Hrdy, *The Trade Secrecy Standard for Patent Prior Art,* 70 Am. Univ. L. Rev. 1269, 1292-93 (2021) ("Patent law's touchstone of 'accessibility' to the 'person interested in the art," is directly analogous to trade secret law's rule that information loses its status as a trade secret once it has become generally known or readily ascertainable using proper means to another person who could obtain economic value from disclosure or use of the information. Indeed, because the two standards are very similar, they typically reach the same outcome.").

do not mix. Obviousness is also a more exacting standard than ready ascertainability, so the comparison is a poor one. Obviousness in patent law inquires whether a someone would have thought of a novel invention by combining public (prior art) elements. Ready ascertainability in trade secret law asks whether someone could easily gather public references to show that information is not a trade secret, whether or not that act of combining references amounts to anything novel. The difference is small, but significant. When considering scientific and technical information, that which is obvious under patent law is almost certainly readily ascertainable under trade secret law. But the converse is not necessarily true: Information might be readily ascertainable even if combining two or more references does not amount to the novelty of a patentable invention: the information just needs to be available. And, of course, for categories of information that are not candidates for patent protection in the first place, such considerations have no place in the analysis.

The Ninth Circuit made this point in a 1995 case concerning an allegedly secret fried chicken recipe: "The threshold for 'ready ascertainability' is not a high one: the process need not satisfy the 'non-obviousness' standard necessary for patent protection."[200] Put simply, the bar for ready ascertainability is lower than the bar for obviousness, for reasons intrinsic to trade secret law.

Recognizing that obviousness and ready ascertainability share thematic similarities reflects that in both patent and trade secret law, protectability has limits bounded by what has been publicly available to those in the field. We need not mount a doomed campaign to import tests from patent law to propose a clearer standard for ready ascertainability.

VI. CONCLUSION

Overlooking the "not readily ascertainable" requirement has led to substantial overclaiming in trade secret cases, especially those focused on complex developments in technology and life sciences contexts. Robust attention to ready ascertainability can correct this imbalance.

200. *See* Hutchison v. KFC Corp., 1995 U.S. App. Lexis 6211, at *2 (9th Cir. 1995) (affirming summary judgment for the defendant on plaintiff's trade secret claims in the steps of a "process for making skinless fried chicken" because it was readily ascertainable; Plaintiff's claim was not only known in the industry but he was "has also been unable to show that his exact combination of steps would not suggest itself to anyone seeking to achieve the same end product.").