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Evan Friedman

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How MLB Teams Can Protect Themselves From Cheaters

BY [EVAN FRIEDMAN](#)/ ON NOVEMBER 27, 2018



On Saturday, October 13, 2018, a man claiming to be a Houston Astros employee was removed from an area near the Boston Red Sox dugout during the American League (AL) Championship Series opener at Fenway Park.^[1] According to a Metro report, "the man had a small camera and was texting frequently, but did not have a media credential."^[2]

This is not the first time during this postseason that the Astros have been accused of cheating. In Game 3 of the AL Division Series, the Indians were defeated and were ultimately eliminated in the first round.^[3] According to security sources, the Cleveland Indians have filed a complaint with Major League Baseball claiming a man associated with the Houston Astros attempted to film in their dugout during that game.^[4] Also, in August of this year, the Oakland Athletics filed a complaint with the MLB alleging that there was an elaborate clapping setup in the Houston dugout to relay stolen signs to hitters.^[5] Additionally, the Los Angeles Dodgers believe Houston was stealing signs during the World Series last year.^[6] Two

MLB players told Yahoo Sports they believe the Astros have been “hitting a trash can in the dugout in recent years” as a way to let hitters know about signs.[\[7\]](#)

Houston Astros are not the only team accused of cheating. The MLB released a statement revealing that before the postseason began, a few teams called the Commissioner’s Office about sign stealing and the inappropriate use of video equipment.[\[8\]](#) In response, MLB officials reinforced the existing rules, in addition to instituting a new prohibition on the use of certain in-stadium cameras.[\[9\]](#) Given the impact that analytics and teams’ secrets have had on the game in recent years, this situation could become a legal issue.

Since its inception, the MLB has relied on statistical data to evaluate players and help teams make roster decisions.[\[10\]](#) As early as 1845, even before the first franchise was established, newspapers began printing box scores, which recapped the statistical achievements of players in amateur baseball games.[\[11\]](#) However, the first full-time statistician was not hired until Alan Roth joined the Brooklyn Dodgers in 1947.[\[12\]](#) While the Dodgers won two of the next three pennants with the help of Roth’s collected data, it was not until the early 2000’s that most teams had their own statistical analysts.[\[13\]](#) This new reliance on analytics became mainstream as statisticians created the Society for American Baseball Research (SABR).[\[14\]](#) “Sabermetrics,” as they are now known, are a variety of new metrics to better evaluate the performance of baseball players, and they have subsequently been incorporated by professional teams’ in-house statisticians.[\[15\]](#) Today, almost every MLB team utilizes sabermetric principles to at least some extent when making personnel decisions. MLB teams often build upon the insights of those working in the public domain to create their own proprietary statistical analyses.[\[16\]](#)

In addition to advanced statistical and data analysis, MLB teams also derive value from more traditional forms of proprietary information. For instance, many teams closely guard their signals—hand, verbal, or otherwise—used by coaches to relay strategy to players during a game.[\[17\]](#) Similarly, clubs may wish to protect other information such as scouting reports and records documenting a franchise’s prior and on-going trade negotiations.[\[18\]](#) For sports teams, each type of proprietary information represents another source of potential competitive advantage.[\[19\]](#) The question becomes how can teams legally protect themselves from cheaters?

The answer lies in the law of trade secrets. Trade secret law in the United States is codified in three primary statutes: the Uniform Trade Secrets Act (UTSA), the Economic Espionage Act (EEA), and the Defend Trade Secrets Act (DTSA).[\[20\]](#) In order to establish a claim for misappropriation of a trade secret under the UTSA, a plaintiff must show that a legally protectable trade secret exists, and that the defendant acquired the trade secret by improper means.[\[21\]](#) To establish the existence of a trade secret, a plaintiff must show that its trade secret possesses economic value from being generally unknown, and that it has taken reasonable measures to maintain the secret.[\[22\]](#) The UTSA gives examples of improperly acquired trade secrets, such as theft, bribery, misrepresentation, breach of a duty to maintain

secrecy, and espionage.[\[23\]](#) The USTA entitles plaintiffs to injunctive relief and damages.[\[24\]](#) Punitive damages and lawyer fees may also be awarded if the misappropriation is found to be malicious.[\[25\]](#) The EEA federalized and criminalized the law of trade secrecy, but kept the same definition for trade secret as the USTA.[\[26\]](#) The DTSA, also modeled after the USTA, amended the EEA to create a federal civil cause of action for misappropriation of a trade secret.[\[27\]](#) These statutes lay the ground work for a cause of action that a MLB team might have against an opponent that is caught snooping around.

The first element for a cause of action under the USTA is to show that a legally protectable trade secret exists.[\[28\]](#) The first step in showing that such a trade secret exists is by showing that the trade secret has economic value from being unknown.[\[29\]](#) In *United States v. Correa*, District Court Judge Lynn N. Hughes sentenced the former director of Baseball Development for the St. Louis Cardinals, who had been accessing the Houston Astros' computers without authorization, to 46-month-term of imprisonment.[\[30\]](#) A driving force behind the sentence was that the total intended loss for all the intrusions was approximately \$1.7 million.[\[31\]](#) When baseball teams intrude on opposing teams' secrets, the intrusion causes the opposing team to be unable to compete on as high a level as it could have. Economists have found that losing decreases a team's revenue, resulting in an economic loss.[\[32\]](#) If a team has an economic loss because its' secrets are intruded on, by definition, that means that the secret has economic value from being unknown.

The second step in showing that a trade secret exists is to show that a team has taken reasonable measures to maintain the secret.[\[33\]](#) The fact that most teams have adopted computer security methods, and use NDAs with employees that most likely possess commercially sensitive proprietary information, indicates that teams are protecting their data responsibly.[\[34\]](#) This would appear to satisfy the standard to show there is a trade secret.

A team that is stealing signs or any other information from the opposing team's dugout would also satisfy the element that the defendant acquired the trade secret by improper means under the UTSA. It fits squarely into espionage, a category the USTA provides to satisfy this second element for a cause of action.[\[35\]](#)

Therefore, under the USTA, a team would have the right to sue an opponent caught snooping around.[\[36\]](#) However, USTA claims in the MLB are rare because under the Major League Constitution, teams are prohibited from suing each other or one another's employees. Any dispute between rival franchises and/or their employees are generally subject to arbitration before the league commissioner.[\[37\]](#)

Evan Friedman is a second-year law student at Benjamin N. Cardozo School of Law and a Staff Editor of the Cardozo Arts & Entertainment Law Journal. He is a sports fanatic who enjoys analyzing the repercussions of sports and the law colliding.

[1] Danny Picard, *Astros may have been cheating in Game 1 against Red Sox*, Metro (Oct. 16, 2018), <https://www.metro.us/sports/boston/metro-exclusive-astros-may-have-been-cheating-game-1-against-red-sox-0>.

[2] *Id.*

[3] *MLB looks into allegations Houston Astros have cheated during playoffs*, Associated Press (Oct. 17, 2018), <https://www.theguardian.com/sport/2018/oct/17/houston-astros-cheating-allegations-boston-red-sox-cleveland-indians-mlb>.

[4] *Id.*

[5] Jeff Passan, *Sources: Red Sox were warned by Indians about Astros attempting to steal signs and information*, Yahoo Sports (Oct. 16, 2018, 11:20 PM), <https://sports.yahoo.com/sources-red-sox-warned-indians-astros-attempting-steal-signs-information-032027336.html>.

[6] *Id.*

[7] *Id.*

[8] Kathleen Joyce, *Houston Astros accused of cheating after man spotted filming opposing dugout*, Fox News (Oct. 18, 2018), <https://www.foxnews.com/sports/houston-astros-accused-of-cheating-after-man-spotted-filming-opposing-dugout-mlb-investigating>.

[9] *Id.*

[10] See Alan Schwarz, *The Numbers Game: Baseball's Lifelong Fascination with Statistics* 4 (2004).

[11] *Id.*

[12] *Id.* at 54.

[13] See *Year-By-Year Results*, Wikipedia, https://en.wikipedia.org/wiki/Los_Angeles_Dodgers

(last visited Oct. 19, 2018); Brad Millington & Rob Millington, *The Datafication of Everything: Toward a Sociology of Sport and Big Data*, 32 Soc. Sport J. 140, 153 (2015).

[14] Matthew J. Frankel, *Secret Sabermetrics: Trade Secret Protection in the Baseball Analytics Field*, 5 Albany Gov't L. Rev. 240, 261-63 (2012).

[15] See Schwarz, *supra* note 10, at 230-31.

[16] Jack Moore, *Baseball ProGUESTus: The Secret History of Sabermetrics*, Baseball Prospectus (July 16, 2013), <http://www.baseballprospectus.com/article.php?articleid=21234>.

[17] See Samuel J. Horowitz, *If You Ain't Cheating You Ain't Trying: "Spygate" and the Legal Implications of Trying Too Hard*, 17 Tex. Intell. Prop. L.J. 305, 315-16 (2009).

[18] See Matthew J. Frankel, *Hackers Strike Out: Recent Cases of Alleged Sports Analytics IP Theft*, 1 J. Sports Analytics 83, 84 (2015).

[19] See Anne M. Wall, *Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events*, 7 Marq. Sports L. J. 77, 137 (1996).

[20] See generally Brian T. Yeh, Cong. Research Serv., R43714, *Protection of Trade Secrets: Overview of Current Law and Legislation* (2016), <https://fas.org/sgp/crs/secrecy/R43714.pdf>.

[21] Marina Lao, *Federalizing Trade Secrets Law in an Information Economy*, 59 Ohio St. L.J. 1633, 1653 (1998).

[22] Unif. Trade Secrets Act § 1(4) (Unif. Law Comm'n 1996).

[23] *Id.*

[24] *Id.*

[25] *Id.* at 3.

[26] Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (codified at 18 U.S.C. § 1831-39 (2000)).

[27] See Yeh, *supra* note 20, at 22.

[28] Unif. Trade Secrets Act § 1(4) (Unif. Law Comm'n 1996).

[29] *Id.*

[30] Press Release, Dep't of Just., [Former Cardinals Official Sentenced to Prison for Astros Computer Intrusions](https://www.justice.gov/opa/pr/former-cardinals-official-sentenced-prison-astros-computer-intrusions) (July 18, 2016), <https://www.justice.gov/opa/pr/former-cardinals-official-sentenced-prison-astros-computer-intrusions>.

[31] *Id.*

[32] See, e.g., Stefan Kesenne, *Competitive Balance in Team Sports and the Impact of Revenue Sharing*, 20 J. SPORTMGMT. 39, 40 (2006).

[33] *Supra* note 23.

[34] Phil Goldstein, *Baseball Is Bringing Sports Analytics to the Forefront*, Biztech, July 10, 2017, <https://biztechmagazine.com/article/2017/07/baseball-bringing-sports-analytics-forefront>.

[35] *Supra* note 23.

[36] *Id.* at 3.

[37] See, e.g., MAJOR LEAGUE CONST., art. VI, §1, <http://law.uh.edu/assignments/summer2009/25691-b.pdf>.