UTSA Preemption and the Public Domain: How Courts Have Overlooked Patent Preemption of State Law Claims Alleging Employee Wrongdoing

Charles Tait Graves
Partner
Wilson Sonsini Goodrich & Rosati

Elizabeth Tippett
Assistant Professor
University of Oregon School of Law

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Majority and Minority Positions on Preemption under the UTSA

Majority position – Single Tier of Protected Information

The UTSA preempts common law claims arising from the same facts as a trade secret claim. UTSA claims represent the exclusive tort remedy for allegations that a party misused non-public business information.

Minority position – Second Tier of Protected Information

Overlapping common law tort claims are available for information constituting a failed trade secret claim. Courts typically refer to the information as “proprietary” or “confidential but not secret.”
Majority vs. Minority Position on Trade Secret Preemption

Majority position

Tier 1
Trade Secret

Minority position

Tier 2
“Confidential/Proprietary but not Secret”
Public Domain
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What Kinds of Information are Minority Position States Protecting, and Why?

Common definition of trade secrecy under the UTSA:

(1) Information that ... derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that area reasonable under the circumstances to maintain its secrecy.”