

Importing Privacy Analogies in Trade Secret Law

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When a photographer uses an airplane to take unauthorized aerial photographs of a company's plant, under existing precedent the legal framework under which the case will be evaluated as well as the outcome of the case depends on whether the photographer was hired by a private actor or the government. If a competitor hired the photographer, the aerial photography would constitute improper trade secret misappropriation. If, however, the government hired the photographer, the aerial photography would not violate the Fourth Amendment. This illustrates a broader phenomenon in which trade secret law is seen to provide greater protection against surveillance by competitors than the Fourth Amendment does against surveillance by the government. Nonetheless, some courts have analogized between the trade secret and Fourth Amendment contexts. The literature largely supports such analogies when they increase privacy-importing trade secret law into Fourth Amendment law, but not when they reduce privacy-importing Fourth Amendment law into trade secret law. This privacy-increasing pattern of analogizing does not, however, remain true across all areas of the law. For example, whether an employee concerned about privacy from surveillance by an employer is likely to prevail in court depends in part on whether the employer is in the private or public sector. The longstanding wisdom is that public sector employees receive stronger workplace privacy protections than similarly situated private sector employees as a result of constitutional protections. Yet, both the majority and concurring Supreme Court opinions in *City of Ontario v. Quon* suggest that analogies to the private sector are appropriate in evaluating questions of public workplace privacy. Courts thus import privacy analogies across the private and public sectors without any meaningful consideration of when such analogies make sense. This Article suggests a new way to think about when privacy analogies are appropriate across the private-public divide in cases outside the criminal context. In deciding whether privacy analogies make sense, courts ought to engage in a more nuanced examination of features of the privacy-invading party such as the purpose of the surveillance, the access to technology and the power dynamic at issue.

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