A SHORT HISTORY OF THE EEA DEBATE, AN OPEN E-MAIL, March 29, 2010

It is ten years this month since the *National Law Journal* reported on the Policy Analysis that SCIP's Board of Directors asked me to write on the Economic Espionage Act (EEA). SCIP's board adopted this analysis as the society's policy and made it public at its 1999 annual convention. After ten years I thought it appropriate to review the issue.

Competitive Intelligence is not an inherently legally risky profession. In response to the passage of the Economic Espionage Act in October 1996 however SCIP held a two-day symposium on the implications of this new law. While many lawyers on the first day of the conference took the position that the EEA drastically changed how CI professionals should carry out their professional responsibilities, I stated the following on the second day of the symposium:

> [That] the EEA was not intended to regulate the CI community nor was it developed in response to any problems arising from the CI community; that the EEA does not change the rules of the game-only the consequences of violating them, and that my concern was not that the Department of Justice would misuse this law but that companies and their attorneys might attempt to use the EEA to intimidate their competitors who are attempting to collect competitive intelligence on them.

In 1998 I wrote a detailed legal analysis of this issue: The Economic Espionage Act: The Rules Have Not Changed, *Competitive Intelligence Review*, July-August 1998. This passage from my article emphasizes the scope of the misinformation the CI industry had to contend with:

> Adding to the confusion regarding the EEA has been series of articles and presentations that has created the impression that the EEA fundamentally alters how CI professionals must conduct their affairs: "New Spy Law Could Cramp Economy," "New Spy Act To Boost White-Collar Defense Biz," "Go Directly To Jail: New Federal Law Protects Trade Secrets," "U.S. Economic Espionage Act: Tough EEA Enforcement Reveals Need for Strict Compliance," "The Economic Espionage Act: A Wake-Up Call," "The Economic Espionage Act: Turning Fear Into Compliance," "Economic Espionage Act: A Whole New Ball Game." Among the more notable assertions:
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> "Your industry is crawling with criminals. And you maybe one of them. So might your company. . . Cases involving a customer list used to be a concern only of private lawyers; now they can be investigated by the FBI and prosecuted by the Department of Justice. All of this came about with the enactment of the [EEA]… the fact of its passage will surely lead to greater interest infederal jurisdiction over civil trade secret disputes."

After debates with lawyers at various conferences throughout the coming year, SCIP asked me to write its policy analysis on the EEA – SCIP Policy Analysis on Competitive Intelligence and the Economic Espionage Act (1999) – which as I stated above SCIP's board adopted as the society's

policy and made public at its 1999 annual convention. The Policy Analysis contains letters of endorsement from three legal authorities, Elkan Abramowitz, Mark Halligan, and Peter Toren.

Before publishing this analysis I met with the FBI's deputy general counsel who told me that the intention of the EEA was to foster competition, not stifle competition, that the FBI is not in the business of resolving trade secret disputes, and that by enacting the EEA, there was no intention to change the intricacies of trade secret law. Our exchange of correspondence: Correspondence with FBI Deputy General Counsel on the SCIP EEA Policy Analysis, February 1999.

A year later *The National Law Journal* reported on this matter: *National Law Journal* article on SCIP's Policy Analysis on CI and the EEA, March 29, 2000. The article stated that [SCIP] was "hypersensitive about suggestions that their work is espionage or industrial spying" so they asked me to "prepare[d] an analysis of the new law [which] conclude[ed] that its impact on legitimate competitive intelligence gathering would be negligible. Nearly four years later, it appears that Mr. Horowitz' predictions were on target."

In the conclusion of my 1998 *The Rules Have Not Changed* article I wrote the following: "Perhaps the most important lesson to be learned from this matter is that the ethical standard is more restrictive than the legal standard. Properly trained CI professionals who recognize what this standard means and have incorporated it into their business practice need not be distracted or concerned by the EEA debate."

Along these lines I believe of interest to SCIP members are the revisions SCIP's then Ethics Chair, Carl Ward, asked me to make to its Code of Ethics. SCIP's Board of Directors incorporated these revisions into the society's Code: Correspondence with former SCIP Ethics Chair on the Revision of SCIP's Code of Ethics, September - October 1999.

Also of interest, in 2004 I co-authored an article with Jan Herring: Forging a Strategic Alliance with Your Legal Department, with Jan Herring, *Competitive Intelligence Magazine*, March-April 2004.

After giving numerous presentations throughout the years at SCIP annual conventions and chapter meetings on the legal and ethical aspects of CI, I decided to give a slightly different presentation at SCIP's 2009 convention which I titled "Is The CI Industry Obsessed With Ethics?" The opening sentence of the presentation's description:

> Ethics remains a matter of serious concern for all CI professionals and often creates distress and acrimonious debate within the CI industry. *But should this be?* Is the CI industry overly concerned with ethics or is what CI professionals do itself ethical?

I gave this presentation to show that of all the information gathering professions, the CI industry is the most conservative in its information collection techniques yet at the same time the most preoccupied and scrutinized about law and ethics. I explained how this developed and its implications.

I began this e-mail by stating that Competitive Intelligence is not an inheherently legally risky profession. In my 1998 *The Rules Have Not Changed* article I wrote that "Cl practitioners who are properly trained and abide by SClP's Code of Ethics should not run afoul of trade secret law or the EEA. This is because the appropriate legal standards have been instilled in the CI profession in the decade that SCIP has been in existence. Again, from personal experience I know many CI professionals who 'are doing everything right' from a legal perspective but cannot explain why this is so in legal terms."

This remains true today. I concluded my 1998 article with the following: "Finally, I encourage those who disagree with any part of my analysis to critique or challenge it in writing." To date no one has and my challenge still stands.

P.S. In the July/September 2011 volume of *Comptetitive Intelligence Magazine* I published Competitive Intelligence, Law, and Ethics: The Economic Espionage Act Revisited Again (and Hopefully for the Last Time). The reason for its publication is clear in the article. I still challenge anyone to critique this article in writing.

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