CI, Law and Ethics: The EEA Revisited

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Law and ethics are important aspects of competitive intelligence (CI), both to the CI practitioner and firm and to the corporate clients who use their services. They are also topics that had been greatly debated in the years following the 1996 passage of the Economic Espionage Act (EEA), resulting in short-term concerns for the CI industry but with long-term positive implications.

The EEA debate began in February 1997 when SCIP held a two-day symposium in Washington, D.C. analyzing the effect of EEA on CI. The EEA made theft of a trade secret a federal crime for the first time in U.S. history, generating concern and confusion over what was to be considered legal and ethical means of collecting competitive intelligence.

Following the passage of the EEA, a spate of articles and presentations warned that this new law would jeopardize the activities of CI professionals and firms. Subsequent situations emerged where corporate clients of CI firms and in-house CI departments were being held back from properly doing their jobs based on these EEA concerns. One of the warnings given at SCIP's February 1997 symposium: "Your industry is crawling with criminals and you may be one of them. So might your company . . . [the EEA] will surely lead to greater interest in federal jurisdiction over civil trade secret disputes."

THE LEGAL VALIDITY OF CI

The long-term, positive effect of these warnings was to highlight the legal and ethical aspects of CI. Now that the EEA made theft of a trade secret a federal crime, CI firms and practitioners took an added interest in knowing what made a particular act illegal and in understanding the accepted industry ethics standards. The result of this industry introspection however was the opposite of the dire warnings announced during the EEA debate. Rather than limiting CI activities, CI professionals and firms developed a better understanding of the legal validity of CI. They understood how the law draws the line between legal and illegal collection techniques and when to identify situations where a legal question should be asked, allowing for more aggressive yet legal CI collection.

Passage of the EEA helped CI professionals better understand the legal validity of CI.

I participated in the SCIP 1997 symposium and stated then that the EEA was not intended to regulate the CI industry nor was it enacted in response to any problems arising from the CI industry, that the EEA does not change the rules of the game, only the consequences violating them, and since the appropriate legal standards have been instilled in the CI industry over the years of its development, properly trained CI professionals should not run afoul of trade secret law or the EEA.

In the summer of 1998, SCIP's Board of Directors adopted a Policy Analysis I wrote at the request of SCIP's then Ethics Chair, Carl Ward, entitled "Competitive Intelligence and the Economic Espionage Act." SCIP made the Policy Analysis public at its 1999 Convention. That document, and an article I wrote in the July/August 1998 edition of Competitive Intelligence Review entitled "The Economic Espionage Act: The Rules Have Not Changed," provide an analysis of the legal parameters of CI collection techniques. More importantly, they explained why accepted industry standards of professional ethics are more stringent than what the law allows.

TRADE SECRET LAW

The key to understanding the legal validity of CI can be found in the Restatement of Torts, published in 1939:

"The privilege to compete with others includes a privilege to adopt their business methods, ideas, or processes of manufacture. Were it otherwise, the first person in the field with a process or idea would have a monopoly which would tend to prevent competition (Section 757)."

Trade secret law allows one to 'figure out' another's trade secret or confidential information, provided all the means used to acquire that information were themselves legal. As the Restatement explains, the privilege to compete is limited "when the thing copied is a trade secret;"

"It is the employment of improper means to procure the trade secret, rather than the mere copying or use, which is the basis of the liability under the rule in [Section 757] (Comment a)."

These legal concepts put into perspective why properly trained CI professionals should not run afoul of

trade secret law and why the EEA does not alter this perspective. As the law allows for acquiring information on a competitor as part of healthy business competition, the appropriate legal standards by which this is to be accomplished had been instilled in the CI profession over the years. The methods employed by properly trained CI professionals therefore are inherently legal, even if that professional cannot articulate the legal rationale underlying them.

Properly trained CI professionals shoul d not run afoul of trade secret laws.

NOW BOTH FEDERAL AND STATE

The EEA does not change this dynamic. The EEA is a federal criminal law, while most pre-EEA trade secret law had been state civil law (though some states had their own criminal law regarding theft of trade secrets).

What the EEA did was create "federal jurisdiction" over trade secret matters: the EEA is the federal law which allows the U.S. Justice Department and FBI to investigate and prosecute trade secret theft. The EEA does not fundamentally change what was and was not considered "improper means" under pre-EEA state trade secret law.

The "added risk" the EEA poses to the potential criminal is that now trade secret theft subjects the perpetrator to both federal criminal law and state civil law penalties. This added risk is of no consequence to the professional who had been practicing CI in a legal manner all along.

An understanding of trade secret law and the EEA therefore not only leads to the conclusion that CI is legally valid by also encouraged by the law. Indeed, in my opinion the most significant passage from SCIP's EEA Policy Analysis is "Companies who have curtailed their CI efforts out of misplaced fear of the EEA have awarded a competitive advantage to companies whose CI activities continue unimpeded."

Richard Horowitz is an attorney and holds a private investigator's license. His writings on the legal and ethical aspects of CI can be found on his website (www.rhesq.com).

Congratulations and best wishes to Carolina Olivieri, SCIP's director of marketing, on her wedding.