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Title: Is information property? (Legally Speaking)

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Summary: On one side of the battle over freedom of information are people who believe that sharing information with other interested people is a good thing even if the information comes from someone who does not want it to be shared. Individuals and companies that would prefer that the information remain proprietary are on the other side of the fight. The criminal charges leveled against electronic publisher Craig Neidorf reveal the differing views that computing professionals have about the nature of information. Craig Neidorf was accused of publishing information about the 911 telephone system that he received from a proprietary document. One of the questions that comes up is whether the information was truly proprietary. Another is whether the government could prove that Neidorf was trying to acquire money or property from the rightful owner of the document. Although charges against Neidorf have been dropped, it may be wise to use the event as an occasion to ask questions such as why the law has largely resisted treating information as property.

Descriptors..
Topic: Information Theory
           Rights
           Intellectual property.
Person: Neidorf, Craig (Cases).

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Is Information Property? This column will discuss why the law has traditionally resisted characterizing information as the sort of thing that can be private property, and will speculate about why judges may be more receptive nowadays to assertions that information should be treated as property. This new attitude is illustrated by a 1987 U.S. Supreme Court decision which upheld criminal convictions based solely on the misappropriation of information which the Court found to be the property of one of the defendants' employers.

Within the field of computing professionals, as in the law, differing views about the nature of information, its ownability, and the social value of disseminating it may be found. How computing professionals react to the criminal charges against electronic publisher Craig Neidorf may reveal these differing views. A debate featured in this issue will discuss the Neidorf case in more detail. It will suffice here to say that the criminal charges against Neidorf stemmed from his having published, in his electronic newsletter, information about the 911 emergency telephone system this information was derived from a document in which BellSouth claimed proprietary rights.

Neidorf and those who share his views tend to perceive themselves as information freedom fighters--not as thieves, defrauders, or purveyors of

stolen goods. They think that sharing information with other interested people is a good thing to do, even when a company from which the information comes would prefer that it not be distributed. BellSouth, like many other firms and some individuals, is likely to consider information it generates to be proprietary. It will have no hesitation about using legal means to enforce its proprietary rights to the fullest extent allowed by law.

One of the many interesting questions raised by the criminal prosecution of Craig Neidorf is whether the information Neidorf disseminated in his electronic newsletter really was BellSouth's "private property." Neidorf was not charged with having wrongfully entered BellSouth's computer system, or with having taken from it an electronic copy of a BellSouth document containing the 911 information. But Neidorf received a copy of the document electronically and inserted portions of it into his newsletter (editing out BellSouth's proprietary notices and certain other information). This was the basis for the criminal charges against him for wire fraud and transporting stolen goods.

The federal wire-fraud statute under which Neidorf was charged requires the government to prove that the aim of the defendant's fraudulent scheme was to take some "money or property" from its rightful owner. A second statute under which Neidorf was charged similarly requires proof that the defendant transported stolen "goods, wares, or merchandise" across state lines. Although the main concern Congress had when passing these two statutes was to penalize more conventional kinds of thefts and frauds, some would argue that the statutes can be interpreted to cover information theft. But it is clear from reading the statutes that in order for Neidorf to be successfully prosecuted, the judge (or jury in a jury trial) would have had to find that the 911 information was BellSouth's property. As we will see, the Neidorf case nicely illustrates some of the proof problems that tend to arise when people seek to treat information as private property.

While the government has dropped its prosecution of Neidorf, the issues raised by this case are deep ones and will undoubtedly recur in the future. For this reason, it may be wise to spend some time in the aftermath of this prosecution considering the complex issues raised when information is claimed as someone's private property--"theft" of which is criminally prosecutable.

Why the Law Has Generally

Resisted Treating Information

as Property

The traditional rule of the criminal law was that someone could not be prosecuted for theft of information alone. Unless tangible items embodying the information (such as documents) were misappropriated, the law would not recognize a theft had occurred. If tangible items were taken, they were the property that the law recognized to be stolen.

The reason for this rule was simple but profound: When a person took another's documents, the taker deprived the other person of possession and use of the documents. When someone instead took just information, the other party still had as much use and possession of the information (and/or the documents embodying it) as they had always had. A similar theory underlay a U.S. Supreme Court decision that considered whether a copyright infringer's transporting of pirate tapes could be the basis for a conviction under an

interstate transportation of stolen goods statute. The Supreme Court decided it could not provide such a basis because, though the tapes may have been infringing copies of copyrighted works, the tapes themselves had not been stolen from the copyright owner (or anybody else). Consequently they were not "stolen goods" within the meaning of that statute. Although some states have in recent years adopted criminal statutes making some information misappropriations prosecutable, it is still fairly rare for theft of information alone to be the basis for criminal charges.

The criminal law's traditional attitude toward information finds a strong parallel in the branch of civil law in which information products are most often sought to be protected. Often cited is this eloquent expression by Thomas Jefferson, himself a prolific author and inventor and a moving force behind the nation's first intellectual property laws:

"If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it.... He who receives an idea from me, receives instructions himself without lessening mine as he who lights his taper at mine, receives light without darkening me. That ideas should be spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature...." [1]

The Jeffersonian attitude is reflected in copyright law, which gives writers limited property rights in their expression of ideas, but regards the information contained in a copyrighted work, like the work's ideas, to be in the public domain and available to be freely used by all. It is also reflected in patent law, which places in the public domain, upon the issuance of a patent, information about how to make and use the invention (and even the best mode known to the inventor of making it), placing restrictions only on the ability of unauthorized persons to practice the invention for a period of time.

Trade secret law has been the principal body of law used to protect valuable information from misappropriation but it has generally offered protection only against use of an improper means (such as trespass, fraud, or coercion) to obtain the secret, or against disclosures of the information in breach of the confidence under which it was first disclosed. Trade secret law has generally not regarded the secret itself as the "property" of its holder, but only as an interest that should be protected from unfair methods of competition.

Trade secret law offers many examples of firms charging individuals or other firms with trade secret misappropriation where, upon examination, it appears that the accusing firm has not been consistent or diligent enough about maintaining the information as a secret to succeed in the misappropriation lawsuit. Stamping documents "confidential" or "proprietary," for example, will not suffice to preserve the trade secret status of information they contain if the firm has not taken reasonable and consistent measures to restrict access to the documents. Nor will strict security measures suffice if the valuable information sought to be protected as a trade secret is readily available to the public from other sources. While courts will sometimes enforce contracts not to disclose information which, upon examination, is not really a secret, sometimes judges even decide not to

enforce contracts aimed at protecting valuable information for public policy reasons.

The implications of these trade secret principles for the Neidorf case are evident. The fact that BellSouth marked the document from which Neidorf got the information as proprietary does not, by itself, make it so under the law. The adequacy of the steps BellSouth took to guard against unauthorized entry to its computer systems is legally relevant to whether the information can be protected as a trade secret. But the Neidorf prosecution mainly foundered on the evidence that the information he published could actually be lawfully obtained elsewhere, and for a fee considerably less than the $23,900 value originally assigned to the information.

While these traditional legal principles continue to be recited in the judicial caselaw, there are some signs that the attitude of the law toward information may be changing. The Carpenter case discussed below is the strongest harbinger of such a change.

The Carpenter Decision

Foster Winans was a reporter for the Wall Street Journal and a regular contributor to its popular "Heard On the Street" daily column. The column typically discussed particular stocks or kinds of stocks, giving positive or negative evaluations of them. Because of the perceived quality and integrity of its assessments, the column became an influential source of recommendations about securities. Winans gathered information for the column from public sources and from interviews with corporate executives and other knowledgeable people.

Winans's legal troubles arose after the temptation to make money from his own stock recommendations became too great to resist. Along with two stockbroker friends and his roommate David Carpenter, Winans began participating in a scheme to trade in the securities on which Winans was going to report in his next WSJ column. Over a four-month period, the net profits from these trades totaled $690,000. Eventually, the venture was discovered, and the participants charged with and convicted of criminal violations of the federal securities laws, and wire and mail fraud.

The main focus of what became known as the Carpenter case was always on the federal securities fraud charges. Winans and his confederates argued that the securities laws only prohibited trading on nonpublic information about companies by corporate insiders, quasi-insiders, or people who had received the information from insiders or quasi-insiders. Since Winans and Carpenter had not received their information from one of these sources, they argued they could not be convicted for securities fraud.

The government, however, argued that anyone who "misappropriated" nonpublic information violated the securities laws. Winans and Carpenter were the guinea pigs in the government's test case for its novel misappropriation theory of securities fraud. Because of this, the lower court judicial opinions mainly focused on the securities fraud charge, and upheld the government's theory. (The wire and mail fraud charges in the case were backups for the government in case the courts would not go along with interpreting the securities laws as broadly as the government wanted.)

Winans hoped the Supreme Court would overturn the securities fraud conviction just as it had overturned a similar conviction in a case involving a

typesetter who had traded in securities after guessing the identity of the target of a hostile takeover (the name itself being in code) in the course of preparing documents for the anticipated takeover. If that typesetter could not be convicted of securities fraud because he was not an insider and did not get his information from an insider, Winans argued that he and Carpenter should not be convicted either.

The Supreme Court was unable to resolve the securities fraud issue in the Carpenter case, splitting four to four over whether to affirm or reverse the convictions on this charge. (An even split of this sort means that the decision being appealed from is affirmed, but it does not have the precedent-setting effect that a majority decision of the Court would have. Winans's and Carpenter's convictions on the securities fraud count were thus unaffected by the Supreme Court's decision.)

The Court was, however, unanimous in upholding the convictions of Carpenter and Winans for mail and wire fraud. It concluded that the information on which they traded--the stock recommendations about to be published in the WSJ--was WSJ's "property," and that a scheme to take this information which involved use of telephones or the U.S. mail was a scheme prosecutable under the wire and mail fraud statutes. In trading on this information, Winans had, said the Court, deprived the WSJ of its right of exclusive use of the information, and since Winans knew of the WSJ's policy of keeping prepublication information confidential, he must have known the paper considered the information its property.

This aspect of the Carpenter decision may prove the old adage that hard cases make bad law. What Winans and Carpenter did was wrong, and violated the spirit, if not the letter, of the securities law prohibitions against insider trading. But it is stretching things some to say that the information they used was the WSJ's property which Winans and Carpenter stole. Consider, for example, that Winans himself gathered this information from public sources and was the one who revealed it to the WSJ. Consider also that the WSJ suffered no economic loss as a result of Winans's use of the information. And consider that the decision seems to suggest that as the owner of the information, the paper could lawfully have traded on the information before publication of the column--a result hardly in keeping with the spirit of the rules against insider trading which, after all, was the wellspring for the prosecution in this case.

In addition, the Supreme Court's ruling on the wire and mail fraud counts in Carpenter was somewhat surprising since only a year before, the Court had, under these statutes, overturned a conviction of a defendant who had breached his duties as a government employee by participating in a scheme to direct certain business to his coconspirators. The Supreme Court held that "intangible rights" of this sort were not property, and thus an element of proof needed for a wire and mail-fraud conviction was missing. Winans's conduct too can, in the author's view, more appropriately be characterized as a breach of his duties to his employer than as a theft of property. If Winans only breached duties owed to his employer, his conviction for wire or mail fraud would have had to be reversed.

The Implications of Carpenter

Elsewhere I have argued that the Court's analysis in Carpenter was flawed and that the precedents on which the Court relied were not as firm a base for its conclusion on the property point as the Court seemed to think [2]. For this

reason, the Court might, in a different case, be persuaded to take a second look at the "information as property" issue, and might reach a different conclusion or might at least offer more guidance about when information should be regarded as property and when not.

The Neidorf prosecution, although discontinued, raises some serious questions about the responsibilities of publishers when given opportunities to publish information that some would claim has a proprietary character. A parallel problem arose some years ago in what was known as the Pentagon Papers case. Some of Communications's readers are old enough to recall this controversy which erupted during the Vietnam War when the government tried to stop the New York Times and the Washington Post from publishing some Defense Department studies about the war (which came to be known as the Pentagon Papers). The studies were "leaked" to the papers by a man named Daniel Ellsberg.

The Pentagon Papers case was decided many years before the Carpenter or Neidorf cases, but raises some of the same issues. Consider, for example, whether, under the Carpenter decision, the New York Times could have been criminally prosecuted for mail and wire fraud for "scheming" with Daniel Ellsberg about publishing the Pentagon Papers. The Times undoubtedly had reason to think Ellsberg was giving the Papers to it without Pentagon permission. (It is safe to assume that a telephone or the mail was used in the course of communication about the Papers.) Might not the Pentagon have regarded the Papers as its property? If the information in the Papers "belonged" to the Pentagon, wouldn't the act of publishing it in the Times involve the same kind of interstate transportation of stolen goods as the Neidorf case was said to involve? The Supreme Court in the Pentagon Papers case recognized that there were significant First Amendment issues raised by the Times's publication of the Pentagon Papers, and although the government brought a civil rather than a criminal case against the Times, the Court's decision was that the government could not stop the Times from publishing the Papers.

The increasing willingness of the U.S. courts to characterize information as property and to interpret criminal statutes as covering its theft has coincided with, and may well reflect some fundamental changes in the American economy. It may not, however, be either necessary or desirable to adopt a general legal rule that information is property in order for the information economy to prosper. If new legislation is needed to protect information from certain kinds of misappropriations, it may be better to address this need directly, so that the rules about when information should be treated as property can be carefully delineated and kept in bounds, rather than force-fitting information misappropriation situations into old statutes meant to deal with different problems. A world in which all information is its discoverer's property under all circumstances is unthinkable. Before we start labeling information as property, we need a coherent theory about when information should be treated as property, and when not. This is a task to which little thought has been given, but much must be.

References

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