

# Industry spying still flourishes

Criminalizing trade secret theft hasn't led to mass prosecutions.

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WHEN THE federal Economic Espionage Act was signed into law in 1996, the Society of Competitive Intelligence Professionals got very nervous.

The new law criminalized the misappropriation of trade secrets, and members of the Alexandria, Va.-based organization conduct research and analysis on competitors to help their various companies plan strategy. Even before the act, they were hypersensitive about suggestions that their work is espionage or industrial spying.

So the organization brought in Richard J. Horowitz, a New York solo practitioner with a background in surveillance and security services. He prepared an analysis of the new law, concluding that its impact on legitimate competitive intelligence-gathering would be negligible.

Nearly four years later, it appears that Mr. Horowitz' predictions were on target. Criminal charges have been filed in only 21 still-pending cases to date. Surprisingly, only one of those arose in Silicon Valley. And instead of focusing on computer chips and software, many cases have involved lower-tech industrial products, including adhesives and pet food.

## Nothing much changed

Many more investigations have been conducted without charges being filed, says Marc J. Zwilling, a trial attorney at the Computer Crime and Intellectual Property Section of the U.S. Department of Justice. And so far, "none of the cases have involved competitive-intelligence professionals."

The bottom line according to Mr. Horowitz: "[I]f you weren't doing anything illegal beforehand, you aren't doing anything illegal now." Companies should not be quick to brag that they modified their intelligence-gathering rules in the light of the act, he says: "If you had to overhaul...then you weren't doing things legally."

Peter Toren, a partner at New York's Brown & Wood L.L.P., was working in the Justice Department when the act became law. He says one reason there have been so few cases is

that until late 2001, the Justice Department had to sign off on any prosecution. And many U.S. attorneys' offices "have a six or seven-figure loss requirement before they will even look at a white-collar case," he says. "Another factor is whether the victim has available a civil remedy."

James Pooley tried in vain to persuade one U.S. attorney to prosecute a trade secret case. "The guy had taken confidential information and was threatening to use it unless my client would negotiate a deal in his favor, and as he was saying this, he placed a gun on the table," Mr. Pooley said.

Mr. Pooley, a partner at Gray Cary Ware & Freidenrich L.L.P., of San Francisco and Palo Alto, Calif., said that even after he told the prosecutor about the gun, "his response was, 'Have you tried civil remedies?'"

"We're still working our way



Bodyguard: Richard Horowitz was hired to help industry avoid illegal actions.

through prosecutors' getting used to the criminalization of something that historically has not been criminalized," he said.

Criminal defense counsel Thomas J. Nolan, of Palo Alto's Nolan & Armstrong, suggests, however, that victims of trade secret theft are better served by the civil system.

To date, all prosecutions have fallen under Sec. 1832, on

commercial espionage. At first, most attention focused on Sec. 1831, which dealt with "agents of foreign power." "It was passed very quickly in an election year," said Mr. Pooley.

What started as an effort to address foreign states' involvement in espionage, he said, "morphed into a very broad statute addressing domestic theft as well." ■