# The Legal Aspects of Trade Show Intelligence

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Trade shows are invaluable opportunities to collect competitive intelligence. Exhibitors, after all, want to inform attendees about their companies and products. The value of the information actually acquired is often more a function of an attendee's competitive intelligence skills than the of exhibitor's marketing.

"Reading between the lines" is the hallmark of a good competitive intelligence practitioner. Most of the collected raw information comes from open sources, with the analysis of that information giving the successful competitive intelligence practitioner a competitive edge. Concomitant with collection and analysis of open-source material is information obtained directly from human sources, which also requires proper analysis.

This chapter reviews the legal basics of competitive intelligence, emphasizing specific issues relevant to trade shows. Though it sounds counterintuitive, competitive intelligence practitioners who understand these fundamental principles can be more aggressive in their work by recognizing the legal reasons for what is permitted as well as what is not.

## TRADE SECRET LAW

The key to understanding the legal validity of competitive intelligence 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 therefore 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)

In short, the law not only permits but even encourages competitors to seek competitive intelligence.

You may acquire a competitor's trade secret and confidential information provided you do so in a legal manner. The law is concerned with the means used to acquire the information, not the acquisition of the information itself. Companies whose policy is to respect the trade secret information of their competitors — therefore instructing their employees and subcontractors not to seek such information — are well advised to inspect whether their policy is based on other, valid considerations or on a misunderstanding of trade secret law.

## WHAT ARE IMPROPER MEANS?

Trade secret law protects the information holder from someone who misappropriates or uses improper means to acquire that information. It is therefore incorrect that the trade secret holder has perpetual legal protection by self-declaration: "I own a trade secret; you, therefore, are prohibited from acquiring it." There is no trade secret protection against someone who successfully "figures out" your trade secret by acquiring various pieces of information in a legal manner, reading between the lines, and understanding something you hoped to keep secret.

There has to be something illegal or improper in the way the information was acquired for it to be considered misappropriated. Most examples of improper means are not surprising: bribery, trespass, electronic eavesdropping, and outright theft — actually stealing documents or products.

Misrepresentation and inducing another to breach his duty of confidentiality to his employer are also considered improper means. The two are connected in practice: a misrepresentation that induces a breach of confidentiality will trigger trade secret liability. In other words, obtaining confidential information from a competitor by claiming to be a coworker working on a confidential project can trigger legal liability.

While against most corporate ethical policies, claiming to be a student will in itself not trigger liability. It is not misrepresentation alone that triggers liability, but a misrepresentation that induces a breach of confidentiality. While there is room for a deeper analysis of this matter, the issue is in actuality not dramatic; claims of being a student do not produce answers containing trade secrets.

## REASONABLE PRECAUTIONS

What if you told a competitor you were a student and he in turn did reveal trade secrets? To qualify as a trade secret, the information owner must have taken reasonable precautions to keep the information secret. Claiming trade secret protection based on the value of the information is inadequate. The law will offer protection only to those who protected that information as reasonably as possible under the circumstances. You cannot expect the court's assistance if you did not do your share.

The holder of trade secret information is expected to know that she is to share that information only with those authorized to receive it. Claiming to be a student should, therefore, not elicit trade secret information. If it does, arguably the information lost its trade secret protection by being given to someone not authorized to have it, The person exposing the secret understood that no confidentiality agreement had been signed by that "student."

## TRADE SHOW ISSUES

While the unethical mind can always find or create legal trouble, collecting competitive intelligence at trade shows is not fraught with legal danger. What are the legal guidelines competitive intelligence practitioners should know in deciding how to behave at trade shows?

As a matter of principle, you are entitled to obtain a competitive advantage through the legal collection of competitive intelligence. It is, therefore, not only legal but expected that you collect whatever material exhibitors distribute. Similarly, the law does not prohibit you from speaking with a competitor, nor is there any law that per se requires you to identify yourself prior to speaking with another.

While many companies prohibit their employees from speaking with competitors as matter of policy, with others making an exception for trade show attendees, the law itself may penalize the withholding of information only where doing so violates some legal obligation to have made that disclosure. (For a detailed legal analysis, see Horowitz, 1998, pp 6–7.) This does not apply to casual conversation, at trade shows or otherwise.

What if a trade show exhibitor mistakenly gives you his company's trade secret information? Arguments, legal and other, for and against using this information can be made. In practice, bring the matter to your corporate counsel for a decision.

To be sure, there are ways to misrepresent yourself or otherwise trick your competitor without violating the law. But of what value is knowing how to do this if your company's policy and SCIP's code of ethics expect you not to? As Justice Oliver Wendell Holmes wrote in the 1930 U.S. Supreme Court case, Superior Oil Co. v. State of Mississippi, "The very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it." The legal line, however, is not your only or even primary consideration. You may begin to recognize that most "gray zone" activities unacceptable to the competitive intelligence industry are so designated as a matter of policy and not law — acting unethically in a legal manner is not career-enhancing.

## CONCLUSION

A great deal of valuable information can be acquired at trade shows. As a bottom-line issue, competitive intelligence practitioners are expected to act in accordance with their company's policy. Corporate policies are almost invariably more restrictive than what the law allows.

Nonetheless, there is value in understanding the legal fundamentals of trade secret law as it applies to competitive intelligence. A basic understanding of the relevant law highlights the validity of collecting competitive intelligence. Rather than justifying questionable activity, this understanding can serve as an impetus for competitive intelligence professionals to feel confident in strengthening their use of proven, legal, and effective methods of collecting and analyzing competitive information.

## Reference

Horowitz, Richard (1998). *"The Economic Espionage Act: The rules have not changed," Competitive Intelligence Review 9/3*, July-August. p 30-38.