

Peer Review and the Economic Espionage Act of 1996

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Scientific journals and their peer reviewers have to be confidentiality conscious. Many papers submitted for publication contain confidential information which authors expect will remain confidential during the typical two-to-ten month pre-publication review and preparation period.

There are, obviously, many reasons why authors or others will want the substance of a manuscript kept confidential. For instance, a submitted article may reveal a novel technique or device which is about to become the subject of a patent application. Premature release of the patentable material, whether by the journal or its reviewer, might impair or destroy an inventor's right to obtain a patent, or the ability to enforce an existing one. Or, in a different context: it may be important that confidential information not be released prior to an intended marketing effort, or prior to a planned change in manufacturing technique.

Technical journals typically refer submitted articles to peer review. Generally speaking, peer reviewers (also called "referees"), as experienced professionals in the appropriate field, are fully conscious of their obligation to treat confidential material confidentially. Moreover, journals typically reinforce their referees' understanding by circulating rules respecting confidentiality.

Nevertheless, premature releases or misappropriations of confidential material do occur, whether by inadvertence or with wrongful intent. An editor of a prominent scientific journal, to which 2,500 articles are submitted annually, indicated in an interview during preparation of this editorial that one or two incidents of misappropriation may be expected each year in the course of operations of that one journal. Such incidents are potentially career-destroying for misbehaving referees, and can have damaging consequences for third parties as well, for which civil remedies, e.g., damages, may be obtained against malefactors.

Often the concern of peer reviewers to maintain confidentiality has to be exercised in the context of conflict of interest, since referees skilled enough to be able to perform the review function will often be high-level researchers, including participants in companies in a position to make use of the technology which is the subject of the article. A reviewer might regard a submitted manuscript as unworthy of publication, and recommend rejection by the journal, thus delaying or even blocking publication. If the reviewer's company then employs the technology, thus getting a head start on the rest of the industry, there may be some suspicion of a connection between the rejection and subsequent use by the referee's company.

There is legal authority holding that a journal may refuse to disclose the identity of a peer reviewer. This result occurred in a case where a peer reviewer was alleged to have disclosed to a patent applicant confidential technical information from a submitted, but not yet published, manuscript six weeks before the patent application was filed. That raised the question whether the patent could be enforced against an alleged infringer who claimed the disclosure invalidated the patent on specific statutory grounds, i.e., that the invention had been described in a printed publication, or was prior art, or that the applicant had acted "inequitably"

before the Patent and Trademark Office ("PTO") by allegedly making use of the information in the application without disclosing that fact to the PTO. In a court proceeding, the alleged infringer wanted to learn the identity of the peer reviewer in order to investigate these alleged facts. But the court refused to require the journal to disclose the identity of the reviewer, ruling that the public interest in protecting against disclosure of identity of peer-reviewers outweighed the need for the alleged infringer to prove its defenses.

However, the inclination of courts to protect against disclosure of the identity of peer reviewers may have to yield before a new set of public interests. A dramatic development in late 1996 seems poised to expand greatly the consequences of breach of the obligation to maintain confidentiality of information. In October, 1996, the federal Economic Espionage Act of 1996 ("EEA"), became effective.

This romantically titled Act is not limited to Mata Hari-like international intrigue. EEA is concerned with protection of all kinds of industrial and commercial confidential information; and makes it a federal crime, where interstate commerce is involved, to misappropriate trade secrets for the benefit of any unauthorized person, whether done inside the US or abroad. A "trade secret" is defined broadly as any information which derives value from being confidential. That includes, therefore, not only technical information, but also financial, personnel, administrative, commercial and other information.

The penalties for violation of EEA can be severe, including imprisonment for up to 10 years; and "any organization" convicted under the act can be fined up to \$5,000,000. Conduct which violates the Act so as to benefit a foreign government, instrumentality or agent, can subject convicted individuals to fines up to \$500,000 and imprisonment for up to 15 years; and "organizations" can be fined up to \$10,000,000. While there is no definition of "organization" in EEA, safety would seem to dictate that all business and private entities (e.g., corporations, partnerships, LLC's, LLP's, unincorporated associations, trusts) take careful heed of EEA's provisions.

Thus, to the already-existing professional penalties arising from misappropriation of confidential information, plus possible liability for damages under the law of most states, there is now added a series of most serious criminal penalties which can be sought by federal prosecutors against not only peer reviewers, but also, in appropriate circumstances, against journals and their employees.

Misappropriation can violate EEA, however, only if the confidential information has been reasonably protected from unauthorized disclosure. Moreover, innocent misappropriation is not a violation; but as in other legal contexts, the question whether or not criminal intent of an accused person is present may not be easily proved. It will usually have to be determined by after-the-fact analysis of his or her objective behavior and other external facts of the case tending to show state of mind, rather than through trying to establish directly the person's thought processes - reading the mind.

The enactment of EEA creates new possibilities in connection with disclosure of the identity of a peer reviewer, as in the patent case discussed above. There is every reason to expect that identity will not be exempt from disclosure by the journal in a case where the reviewer is himself or herself the subject of a criminal action under the Act. Therefore, if that case were to arise now, there could be a perhaps anomalous result, namely, that the identity of the referee would be safe from disclosure in a patent infringement lawsuit, but the referee

might well find himself prosecuted under EEA if unauthorized disclosure and criminal intent could be proved.

Journals can become violators of the Act. Therefore, to protect themselves, their employees and their referees, journals inviting submission of articles which may contain confidential information will be well advised to publish rules carefully delineating precautionary procedures governing such submissions. Such rules should include guidance as to the obligations of the reviewers, and a requirement that whenever an article contains confidential information, the writer must stamp, "CONFIDENTIAL", legibly on every page, thus reminding referees and journals of their obligations of confidentiality.

It will be some time before court decisions in cases under EEA will yield answers to questions regarding the precise meaning of some of the Act's provisions. In addition, it is not yet clear what will be the likely range of enforcement efforts to be undertaken by the federal authorities.

As a potential historical parallel, however, it should be noted that RICO (the federal Racketeer Influenced and Corrupt Organizations Act) was originally enacted as a law-enforcement tool in the war on organized crime. However, it has been applied in circumstances not typically associated with organized crime, e.g., prosecution of manager of a bill-collecting agency for cheating on postage payments; prosecution of mobile-home operators for unlawful practices in connection with renting space.

Regardless of how broadly or narrowly the EEA enforcement authorities end up viewing the proper scope of their prosecution activities under EEA, it would appear that high-tech, publishing and research fields will be prime candidates for scrutiny. Participants in those fields should proceed with due caution.

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