

NOW CANADA DECIDES: INFORMATION CANNOT BE STOLEN

Last summer we reported on the Scottish TNT Roadfreight case (PL&B Aug '87 p.16) which decided that it is not a criminal offence to copy and attempt to sell a company's customer list. Information as such is not capable of being stolen. In May this year, the Canadian Supreme Court handed down a similar decision in the long-running case of [REDACTED], reports David Goldberg.

The story behind this seven year saga is quite simple. In October 1981, the Constellation Hotel in Toronto had 600 employees. A union sought to organise them, but needed names and addresses. Mr Stewart, a "self-employed consultant", was approached by someone he assumed was from the union to help out. Stewart then contacted a security guard employee in the hotel, and offered him money to obtain the information. The guard had no authority to access such data, and he knew it was the hotel's policy to treat it as confidential. He reported the incident to his superior and the police. A subsequent phone-call between the two men was intercepted, and Stewart was charged with "counselling a hotel employee to commit fraud and theft of information." Had the scheme been allowed to run its course there would have been no taking of anything; as with the Scottish case the issue before the Court was: can confidential information itself be stolen even though no list or document recording that information has been taken?

Rights and Protection

Is the law failing to protect owners of confidential information by ruling that criminal charges are not appropriate in the current state of the law? In the context of business, privacy can be looked at in two ways. First, there are the rules which are of prime concern to readers of PL&B, those which create duties for business by giving rights to customers, consumers etc. Second however, are the rules which business (and others) seek to use to protect their information. It is with this second group that these cases are concerned. True, in the Canadian case it could be argued that the information was the property of the individuals whose names etc. Stewart was attempting to discover. But the charge also claimed that the names were the "property of the Constellation Hotel and its employees".

The reasons for the decision

The Canadian Criminal Code (R.S.C. 1970, c.C-34, ss.283 (1)) says that anyone commits theft if they take or convert "anything" - which includes any property, physical or not. Since information clearly does not fall into the category of physical property (and this case was not concerned with the theft of a list or document reporting the information), should it come within a category which treats information like, for example, a bank credit? In 1986 in Alberta, a person was charged with counselling theft for offering money to a police officer to run checks on job applicants through the Canadian Police Information Center. He was acquitted.

Information unprotected by civil and criminal law

The problem is that the courts - in England as well as in Canada - have not conclusively determined that confidential information can be

property even for the purposes of the civil law. The "anything" referred to in the Canadian Criminal Code's definition of theft must be something which is capable of being the subject of proprietary right. Cases on trade secrets for example have been decided on the basis that there has been a breach of good faith, or that damage has been suffered by someone who has to carry on a business whose formulae are now share with others.

Even if for the purposes of civil law, information is treated as property, it would not follow that it is so for the criminal law, because of the absurdity of certain consequences that would follow. For example, if X was convicted of theft, how could the property (the information) be returned to Y? X, if her memory was good, would always retain it! And if she retains it, should, as the Court, put it, X "be charged with an offence of possession each day that she is unable to forget the information?"

"Also," the court asked, "would society be willing to prosecute the person who discloses to the public a cure for cancer, although its discoverer wanted to keep it confidential?" One of the functions of criminal law is to prevent wrongs against society as a whole. The demands of the rule of law in criminal matters require greater certainty than can be applied to the transfer of information. It would be difficult to define criteria to distinguish "confidential" or "commercial" from "other" information.

Does taking information mean that the victim is deprived of it?

In Stewart's case the court is clear - the answer is "no". Someone who memorises or writes down or copies information, or who simply overhears a conversation and uses it to his or another's advantage, has not deprived anyone else of the use or possession of that information. True that the information itself has been deprived of its quality of confidentiality, but confidentiality itself is not capable of being owned. The Court of Appeal regarded the Hotel as being potentially deprived of its confidentiality, and therefore decided it would have lost something. But the Supreme Court argued that that was not so because "...one cannot own confidentiality. One enjoys it."

Is information a "literary work" under the Copyright Act?

If this is true, then unauthorised reproduction is theft. But this is not so, because the right to reproduce the "copyright" or to authorise copying it is still held by the owner. A copier does not acquire the copyright nor does he deprive the owner of it. It is an infringing act but does not constitute theft of the work copied.

Could attempted copying be regarded as fraud?

No; the Hotel had been previously approached for their employee lists but it had shown that it would not sell or rent them, so there would be no significant economic loss if the security man had sold the list to Stewart. In any case under the Criminal Code (s.338(i)), the object of fraud has to be "property, money or valuable security." But employee information does not fall into any of these categories.

The next move forward

The Canadian court is quite clear that as a matter of policy it is "best to exclude altogether confidential information from the realm of theft". However, its stricture was not quite so absolute. Like the Scottish court last year, it wheeled into prospect the reforming touch of Parliament. Judges should not extend the concept of property or the scope of the Criminal Code. "But," said Lamer J. "...given recent technological developments, confidential information, and in some instances, information of a commercial value is in need of some protection through our criminal law" by Parliament reforming the law.

A Protection of Commercially Valuable Information Act?

Interestingly, the question of the disclosure of "private information" and whether that ought to be a criminal offence has been the subject of some recent attention by the U.K. Government. It surfaced in a rather unlikely source: the White Paper on Reform of Section 2 of the Official Secrets Act 1911 (Cm 408). The Government's previous attempt at reform, the Protection of Official Information bill 1979, contained a provision that where companies provided information to Crown servants or government contractors in confidence, unauthorised disclosure would be an offence. The Government is concerned that, since it believes it is narrowing the range of information protected by criminal law, some private information communicated to the Government in confidence which merits protection might not be covered by the law any longer. Therefore it is to consider whether specific legislation is called for. For example, information provided to the tax authorities is specifically mentioned. Readers of PL&B will be kept informed of any developments in this area which emerge during the course of the enactment of a new secrets law.

Does business want criminal law to protect information?

The open question which remains is this: does business want certain information protected by means of the criminal law, and if so, what items specifically? Revealing information can be regarded as criminal - the developing body of rules on insider dealing can attest to that - but on the other hand the House of Lords recently ruled that accessing Prestel was not an offence, and presumably that would have been so even if the information obtained had been sold to a third party. The English Law Commission's Report on Computer Crime, to be published this September, is likely to discuss this area in the light of that decision; an analysis of that Report will appear in PL&B.

PL&B can become a forum for this issue. If specific legislation on particular subjects seems to be the only likely route to change - assuming the desirability of extending the criminal law to this area - which items should such law cover? Please tell us what your views are on this sensitive matter.

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