The Washington Post

More on the "Sony Disclosure Problem"

By David Post

December 16, 2014

Eugene has already discussed a number of the obstacles Sony might face if it tried to enforce its demand that publishers not "use or disseminate" the material derived from the leaked Sony documents. He touched (but didn't elaborate) on the possibility that Sony might have a claim for misappropriation of trade secrets, or infringement of copyright, against a re-publisher of the leaked documents, both of which raise some interesting issues.

A trade secret claim would depend, first, on exactly what's in the re-published document – is it a "trade secret"? Most states have some version of the Uniform Trade Secrets Act, which defines a "trade secret" as any information that "derives independent economic value . . . from not being generally known to . . . other persons who can obtain economic value from its disclosure or use," and which is subject to "reasonable" efforts to maintain its secrecy. That is, it has to be valuable at least in part because others (especially one's competitors) don't know what it is, and others have to not know what it is because Sony took reasonable efforts to keep it secret. The opening weekend marketing strategy for the upcoming release of "Annie" probably falls within that category – the jokes about President Obama's taste in movies probably not.

[One wrinkle here: once the cat is out of the bag, it's no longer a "secret," and therefore no longer a "trade secret." The opening weekend marketing strategy for Annie might *have been* a trade secret - but if it has already been revealed to the world, it's not a secret anymore, and there can't be a misappropriation claim. So Sony might not have a valid trade secret claim against republisher #2, even though it might have a claim against republisher #1 - and that is going to be very, very difficult for Sony to sort out if it ever tried to enforce any such claims.]

If it *is* a trade secret, publishing it can constitute misappropriation if the publisher "knew or had reason to know that his knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it." It seems pretty clear that "improper means" were indeed used to acquire these documents; do republishers have a "reason to know" that? That might depend on circumstances of the particular republisher in question, but given the widespread publicity this has generated, Sony might well have a strong argument that they do.

Finally, there's the question of remedy; can Sony demonstrate that it sustained damage from any particular republication of a leaked document? I can't speculate too much about that – other than to note that here, too, they face a problem to the extent that the materials become widely

available on the Internet. That is, to the extent that there are many places where document X has been published, the damage suffered by Sony on account of my republication of document X diminishes. Ditto for any injunctive relief – even if Sony were able to enjoin my republication, the availability of the documents elsewhere on the Net would likely make this something of a Pyrrhic victory.

The copyright infringement route, I'm sorry to say, might actually be a more promising one for Sony — yet another reflection of the hyper-protective nature of our current copyright law. The strength of any such claim depends less on *what*'s in the republished documents and more on *who* wrote them. The way that copyright law works these days, pretty much everything that one puts down on paper (or computer screen) instantaneously becomes a copyright-protected work, so there's a potential infringement claim based on damn near every document in the entire trove of hacked documents – and I can say that without having seen them. And unlike trade secret law, copyright law doesn't require Sony to show that an alleged infringer "knew or had reason to know" about the infringement; infringement is a strict liability affair these days, independent of the infringer's state of mind. And copyright law doesn't require the plaintiff to show that it suffered any damage from the infringement – through the Copyright Act's very generous provision that allows copyright owners to recover "statutory damages" (which can be quite substantial – up to $150,000 for each infringed work) without having to show any actual damage at all.

So republication of the leaked documents is very likely an infringement of someone's copyright; the harder question is: whose copyright? Sony can only enforce the copyright in any of the documents if it owns the copyright, and the problem for Sony here would be to show that it does so for any specific republished document. Corporations can only own copyright in two ways - via a written assignment of copyright by the author or authors of the work in question, or by the "work for hire" doctrine, which gives an "employer" ownership of all copyrights in works created by "employees" acting within the scope of their employment. Sony undoubtedly has a strong claim to own the copyright in some of the leaked (given that some of the documents were surely written by "employees" of the company), but not for others (given that, for instance, officers and directors of a corporation are not "employees" subject to the work for hire doctrine, nor are "independent contractors" – and many of the documents were undoubtedly authored by persons falling into these categories).

And one more side note of interest: Sony, of course, like other large entertainment corporations, has elaborate procedures designed to ensure that it gets the copyright rights that it needs to have when it releases a movie, say; in other words, it pays a great deal of attention to the question of whether works are created by employees or not, and whether it has contractual assignments lined up for all "independent contractors" who may work as contributors to the movie. But the "works" in question here were not written for the purpose of public dissemination, and my suspicion is that Sony, like many large corporations, doesn't quite have all of its copyright-ownership ducks in a row in regard to these internal documents in the way that it probably does for its movies and TV programs.

David Post taught intellectual property and Internet law at Georgetown Law Center and Temple University Law School until his recent retirement. He is the author of "In Search of Jeffersons Moose:

Notes on the State of Cyberspace" (Oxford, 2009), a Fellow at the Center for Democracy and Technology, and an Adjunct Scholar at the Cato Institute.