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Protection of Confidential Information in the Sports Industry

Prof. Jacques de Werra

Jacques.dewerra@unige.ch



UNIVERSITÉ
DE GENÈVE

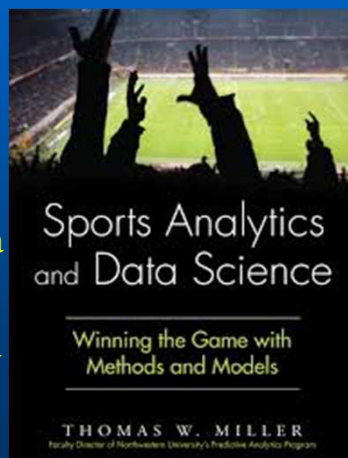
SCHOOL OF LAW

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Introduction

Is it a relevant topic ?

- Data-intensive society (big data)
=> Data-driven economy
- Data has value => control of data
- Sports is a data-intensive industry




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Introduction

Is it a relevant IP topic ?

Wednesday, 2 October 2013

Trade Secrets and Confidential Information: Do They Apply to Sports?



Win At All Costs?: A Glimpse Into Trade Secrets In The Sports And Entertainment Industry

James McQuade and Michael Disotell

Posted on October 30, 2015

orrick
Trade Secrets Watch

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Introduction

Cyber-attacks...

11 AUG 2015 OPINION

Professional Sports Teams are Risking a Cybersecurity Own Goal

The world of professional sport faces a significant cyber-threat, due to the data teams hold and their high profile, writes James Hampshire

During this year's Tour de France, the general manager of Team Sky stunned the world of cycling by **alleging** that unknown hackers had accessed reigning Tour champion Chris Froome's performance data as part of a campaign to discredit him.



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Introduction



...between sports teams...



BASEBALL

Cardinals Investigated for Hacking Into Astros' Database

By MICHAEL S. SCHMIDT JUNE 16, 2015

The New York Times

Christopher Correa, Former Cardinals Executive, Sentenced to Four Years for Hacking Astros' Database

By THE ASSOCIATED PRESS JULY 18, 2016

The New York Times

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Introduction



...and other spy stories in different sports...

- « Swiss America's Cup Team Says Oracle Employed a Spy in Europe » (New York Times, May 13, 2009)

- « McCaw's America's Cup effort sails into courtroom: In spy-heavy sport, ex-employee accused of peddling secrets » (Seattle Post Intelligencer, October 25, 2001)

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Introduction

- « McLaren caught in Ferrari spy row:

McLaren are embroiled in a spying row following claims one of their leading staff illegally received information from arch-rivals Ferrari »

(BBC Sport, July 4, 2007)

- « Renault face charge over McLaren spy claim »

(Telegraph, November 8, 2007)



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Outline

I. Legal framework

II. Conditions of protection

A. Concept of « undisclosed information »

B. Prohibited conducts

III. Conclusion

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I. Legal Framework

Legal Framework

Art. 39 TRIPS: protection of « undisclosed information »

- « 1. In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 [...] »
- Various methods of implementation

Legal Framework

Art. 39 para. 2 TRIPS

« Natural and legal persons shall have the possibility of preventing information lawfully within their control from being **disclosed to, acquired by, or used by** others without their consent in a **manner contrary to honest commercial practices** (10) so long as such information

(a) is **secret** in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has **commercial value** because it is secret; and

(c) has been subject to **reasonable steps** under the circumstances, by the person lawfully in control of the information, **to keep it secret** »

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Legal Framework

New laws

- Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure
- US Defend Trade Secrets Act (May 11, 2016)

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Legal Framework

Sports regulations and sports case law

- How is confidential information protected under sports regulations ?
 - America's Cup
 - Formula One

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II. Conditions of protection of confidential information

Conditions of protection

Two key elements

- Concept of « undisclosed information »
 - => **what information** is protected (A) ?
- Prohibited conducts
 - => What **conducts** are prohibited (B) ?

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II.A Concept of undisclosed information

(1) Secrecy

- Example: Art. 15.3(c) of the Protocol of the 31st America's Cup:
 - « Design or performance information or equipment [...] may not be shared or exchanged with another person or entity except information which may be gleaned without assistance [...] in formal or informal or head-to-head competition »



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Concept of undisclosed information

(2) Information which

« has commercial value because it is secret »

- Design & performance information (of athletes, teams, cars, boats, etc.)
- « Performance information takes months to accumulate, filter, process and evaluate. [...], the performance data is extremely expensive, and time consuming to accumulate »
(decision of the America's Cup Arbitration Panel of Octobre 21, 2001, ACAP 01/4)

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Concept of undisclosed information

- Broad concept of « commercial value » => not only traditional business secrets
- Sporting advantage => commercial advantage / value
« The WMSC believes that the nature of information illicitly held by McLaren was information of a nature which, if used or in any way taken into account, could confer a significant sporting advantage upon McLaren »
(decision of the World Motor Sport Council of September 13, 2007, ch. 7.1)

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Concept of undisclosed information

(3) Reasonable steps to keep the information secret



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Concept of undisclosed information

- Art. 16.2(b) of the Protocol of the 32nd America's Cup:
 « The underbodies of any ACC Yacht may be shrouded from 1 January 2006 until the unveiling ceremony to be held immediately prior to the Fleet Race Regatta in 2007. Thereafter, all ACC Yachts [...] shall not be shrouded until after the conclusion of the Regattas »

(decision of the Jury of the America's Cup of May 3, 2007, ACJ 029)

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Concept of undisclosed information

- What are « reasonable steps » for protecting a secret in the digital age ?
 - Adequate technological infrastructure (IT)
 - +
 - Human prudence (passwords (etc.))

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Hacked French network exposed its own passwords during TV interview

Post-it note on wall revealed network's passwords for YouTube, Instagram.

by Sam Machkovech - Apr 10, 2015 3:37am CEST

Share Tweet 110




Concept of undisclosed information

Quick Quizz (ex cursus)

Top 5 user passwords of AshleyMadison dating website ?

1. 123456
2. password
3. 12345
4. 12345678
5. qwerty

Password for the Youtube account of TV5 Monde ?
« lemotdepassedeyoutube »



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II.B Prohibited conducts

- Types of prohibited conducts:
 - Disclosure (of confidential information) *or*
 - Acquisition *or*
 - Use
- Conducts « contrary to honest commercial practices »

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Relevant conducts

Misappropriation in the absence of proof of use

« The obtaining of another syndicate's design information gives to the syndicate obtaining it an advantage to which it is not entitled. How it might use this information in the evolution of its yacht design will always be difficult to determine objectively [...] »

(decision of the America's Cup Arbitration Panel of August 16, 2002, ACAP 01/8)

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Relevant conducts

« Honest commercial practices » : how to reconcile the protection of confidential information with employee mobility ?

« [...], it is inevitable that competition for the services of top designers in particular areas of yacht design will exist and will result in those services going to the highest bidder. [...]. To interpret the Protocol in a way that would prevent the successful bidder exploiting the knowledge in the mind of such a designer would be both unrealistic and quite impractical »

(decision of the America's Cup Arbitration Board of December 21, 2002 (ACAP 02/11 and 02/12, § 20)

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Conclusion

Conclusion

Good news & bad news

- The law of trade secrets / « undisclosed information »
applies in the sports industry
- Sports regulations can also protect against
misappropriation of confidential information
- Cybercriminality increases the risks of misappropriation

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Thank you for your attention

jacques.dewerra@unige.ch

