Competitive Intelligence – Law and Ethics

Jonathan Gordon-Till looks at the ethical issues affecting CI and includes the results of an interesting case study asking how we would react to a hypothetical ethical problem

Introduction

Elsewhere in this journal Arthur Weiss's review of competitive intelligence for legal professionals is careful to point out that CI is a lawful and ethical process. It is not, as some senior managers still believe, a cloak-and-dagger shady activity carried out by unscrupulous managers in the FMCG (fast moving consumer goods), hi-tech or pharmaceutical sectors.

This is not to suggest that companies do not employ illegal or unethical methods to acquire competitive information. Later we will see how such methods are still used by organisations to try to gain a competitive edge.

But as Arthur Weiss points out, companies do not need to use such means to get competitive information. All information required for the CI process can be gained from information already available, either currently existing inside the company (in its client and supplier databases, for example, or in the brains of sales and marketing staff), or in published or publicly available information such as trade directories, newspapers, local authority filings, exhibitions, or freely visible construction sites.

At the outset it must be noted that whereas there is usually a clear distinction between legal and illegal (for example, in breaches of contract where confidential information is revealed, or in legally reverse engineering a competitor's product), the distinction between ethical and unethical is not always clear, and there is not necessarily a correlation between legal and ethical.

The legal-ethical spectra

The diagram on pg 18 illustrates the legal-ethical spectra. Note that CI actions can be precisely defined as either legal or illegal, according to statute, regulation or judgment. Theft of confidential information, for example, is illegal. It is difficult, if not impossible, to think of a mitigating circumstance which would permit the legal acquisition of confidential information through theft. We can demarcate the legal/illegal divide with a solid line.

On the other hand, there is an undefinable transition, marked with a dotted line, between ethical and unethical

in the collection of competitive information. Members of SCIP (the Society of Competitive Intelligence Professionals www.scip.org) call this the 'grey zone' (or "gray zone as it is more familiarly known in the USA). Within this area actions may be either ethical or unethical, or both, depending on the circumstances, the ethical framework in use, and the belief system of that particular social group.

Note also that even though an action is legal, it may not necessarily be ethical. For example, the use of perfidy or pretext when speaking with an unwitting competitor employee is perfectly legal, but not necessarily ethical. So too is paying a former employee for information (although the person divulging the information may be in breach of contract).

Methods used to gain competitor information

Andrew Pollard, a UK-based CI expert, carried out a survey of UK companies for his book *Competitor Intelligence* (1999). He asked companies to cite methods used to gain competitor information. The results provide an interesting insight into the unethical and sometimes illegal practices used.

The most common methods companies mentioned were:
- Putting camouflaged questions to competitors' employees at technical or other meetings (used by 78% of respondents)
- Questioning competitors' employees attending job interviews at own company (66%)
- Positioning oneself to overhear a conversation between competitors' employees (65%)
- Calling competitors' suppliers and distributors pretending to do a study of the entire industry (55%)
- Taking exterior photographs/video of competitors' plant/building works/office (52%)
- Posing as a student working on a thesis (51%)

Among the less common though still significant practices Pollard found were:
- Hiring an employee away from a competitor in order to obtain specific information or know-how (44%)

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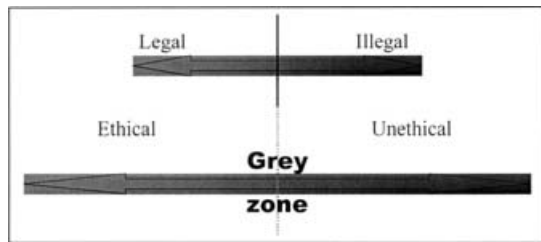
- Paying a consultant who has worked for a competitor for information (39%)
- Giving a competitor's employee a job interview simply to get information out of him/her (31%)
- Hiring a professional investigator to obtain a specific piece of information (29%)
- Going to a job interview at a competitor simply to get information (28%)
- Entering into negotiations with a competitor for a licence to obtain secret information (25%)
- Paying a retired employee of a competitor for information (23%)

A small though statistically significant number of companies adopted practices which were illegal:
- Entering a competitor's plant without permission (8%)
- Using electronic means to overhear conversations (3%)

Information professionals, including law librarians, may sometimes be called upon to assist in or even provide such services. It is very easy, for example, for a librarian to be asked to obtain information about a competing partnership organisation. Knowing the information not to be in the public domain, it would not be unusual (over half of respondents in Pollard's survey, for example) for the librarian to contact the competing organisation posing as a student. Much commercially sensitive information can be unwittingly given away by such methods, and firms should protect themselves against these "attacks" by implementing a comprehensive information security policy, training staff, and refusing to accept unsolicited requests for information without verification of identity of the inquirer (e.g. headed notepaper).

SCIP's Code of Ethics (www.scip.org/ci/ethics.asp) can only provide salient guidance as to what is acceptable behaviour when obtaining competitor information. It does not help the nascent or novice CI practitioner with explicit guidance as to how to deal with some of the more awkward ethical dilemmas which frequently arise in CI work. Such dilemmas have spawned a number of articles and conferences investigating the ethical nuances of each situation. For the present discussion we shall look at perhaps the most popular hypothetical scenario, namely the long-haul airline case.

CI case study

In this scenario you are asked to imagine that you are flying to New York. During the flight the man sitting next to you gets up to go to the lavatory. You notice that he leaves on his seat a document entitled 'Confidential – 5-year strategic plan – XYZ Ltd'. XYZ Ltd happens to be your biggest competitor. What would you do? There are four possible outcomes to this situation:
a) Hide the document in your bag and look innocent when he returns
b) Glance through the document, noting salient points, then return it to the same spot on the seat
c) Ask to be moved to a different seat
d) Don't touch the document but tell the competitor who you are when he returns, and that if he continues to read it's at his own risk

The results of this question according to a SCIP survey in 1997 are shown in the table below (Sapia-Bosch & Tanner, 1998).

	Number	Percentage
a	8	1.0
b	223	30.6
c	43	6.0
d	442	60.7
other	12	1.7

It is not surprising that few respondents to this question admit to stealing the document or to asking to be moved to another seat, but still some do. The former is illegal, the latter overly cautious and not reasonable in most cases. Interestingly there is often a roughly equal division between those who would glance through the document and those who would not look at it but tell the competitor. The ethical reasoning used to reach these conclusions may be diametrically opposed, yet neither action is necessarily wrong, and neither is necessarily more right than the other.

It is impossible to provide full guidance on how to deal with all such situations, but Pooley and Halligan go some way in their chapter in *Millennium Intelligence* (2000):
- Use only publicly available information
- Keep thorough records
- Be cautious in high-risk situations
- If you receive confidential information, get help
- If it seems unethical, it probably is

Reference

Sapia-Bosch, A. & Tancer, R.S. (1998). Navigating through the legal/ethical gray zone: what would you do? CI Magazine, 1(1), April–June 1998 and at http://www.scrip.org/Library/1(1) ethics.pdf

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