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Protecting Secrets

Jason Boulette

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The Honey Stick Project

http://www.symantec.com/connect/blogs/introducing-symantec-smartphone-honey-stick-project

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The Honey Stick Project

Application / File	% Access
• Photo app	72%
• Social networking app	60%
• Personal email app	60%
• Online banking app	43%
• Corporate email app	45%
• Remote Admin app	49%
• "HR Salaries" file	54%
• "HR Cases" file	40%
• "Saved Passwords" file	57%

http://www.symantec.com/connect/blogs/introducing-symantec-smartphone-honey-stick-project

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TUTSA

- "[D]isplaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret ," other than contractual remedies and criminal remedies
- Liability centers on "misappropriation" of a "trade secret"

TEX. CIV. PRAC. & REM. CODE §§ 134A..002(3), 134A.007

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TUTSA

REQUIRE A CONTRACT

TEX. CIV. PRAC. & REM. CODE §§ 134A..002(3), 134A.007

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TUTSA

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

TEX. CIV. PRAC. & REM. CODE §§ 134A..002(3), 134A.007

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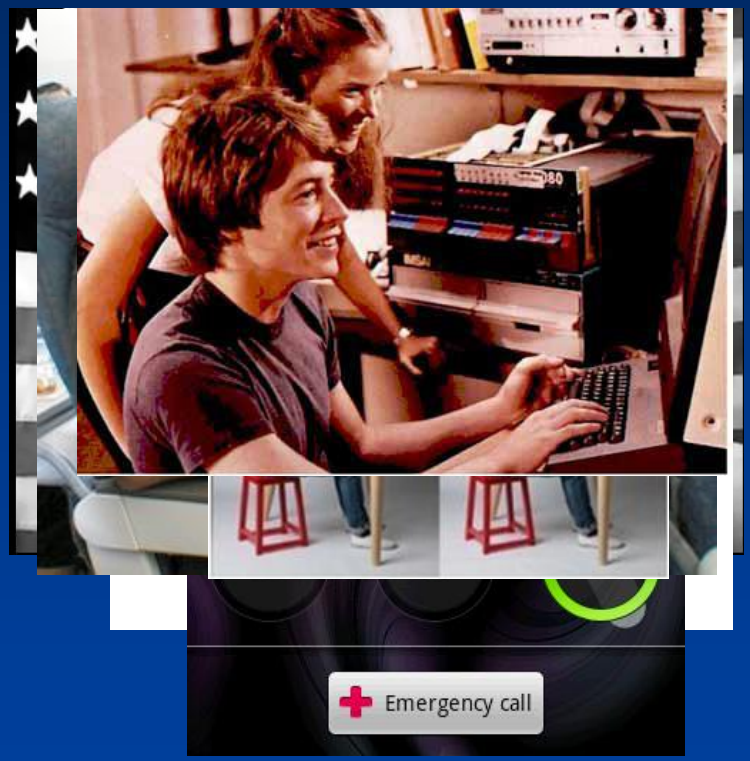
Protecting Secrets

- Address BYOD
- Restrict access
- Require passwords
- Address work in public places
- Address third parties
- Limit scope of access (CFAA)



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CFAA

"Whoever … intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—

(A) information contained in a financial record of a financial institution, or of a card issuer …, or contained in a file of a consumer reporting agency on a consumer …;

(B) information from any department or agency of the United States; or

(C) information from any protected computer; :

… shall be punished …

18 USC §§ 1030(a)(2)

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CFAA

"(2) the term 'protected computer' means a computer—

(B) which is used in or affecting interstate or foreign commerce or communication … ;

(6) the term 'exceeds authorized access' means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;"

18 USC §§ 1030(e)(2)(B)

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CFAA

- *U.S. v. John (5th Cir.)* – Employee exceeded her authorized access by accessing confidential information in violation of Citigroup's computer use restrictions
- *Int'l Airport Centers v. Citrin (7th Cir.)* – Employee exceeded authorized access by accessing computer to destroy files that incriminated him in violation of his duty of loyalty
- *U.S. v. Nosal (9th Cir.)* – Employee did not exceed authorized access by misappropriating confidential information he was otherwise permitted to access
- *WEC v. Miller (4th Cir.)* – Same as *Nosal*

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Stored Communications Act

- It is an offense to "intentionally access[ ] without authorization a facility through which an electronic communication service is provided ... and thereby obtain[ ] ... access to a wire or electronic communication while it is in electronic storage. …"
- Excepts from liability "conduct authorized ... by a user of that service with respect to a communication of or intended for that user."

18 U.S.C. § 2701(a)(1), (c)(2)

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Stored Communications Act

- Pilot creates a website critical of his employer, which can only be accessed by entering an eligible employee's name and creating a password
- Two eligible employees who have never accessed the site allow a VP to use their names to access the site
- Ninth Circuit – the two employees were not "users," because they had never accessed the site; accordingly, they could not authorize the VP under the SCA

Konop v. Hawaiian Airlines, 302 F.3d 868 (9th Cir. 2002)

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Stored Communications Act

- Waiter creates a website critical of his employer, which could only be accessed by invitation
- A greeter joins and accesses the site by invitation and then permits a manager to use her credentials to access the site
- D.N.J. – Fact issues regarding whether the greeter was under "duress" when she provided her consent, thus precluding summary judgment under the SCA

Pietrylo v. Hillstone Rest. Grp., 2008 WL 6085437, *4 (D.N.J. 2008)

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Stored Communications Act

- Employer files suit alleging non-compete breach and points to 546 e-mails obtained from the employees' Hotmail and GMail accounts
- Employer gained access to these emails, because the the employer's computers "auto-stored" the user-name and password fields for the web-based accounts
- SDNY – Employer violated SCA because it did not have consent to access the emails

Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, Inc., 587 F.Supp.2d 548, 555 (S.D.N.Y. 2008)

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PUBLIC POLICY

- Employee uses employer's computer to access private web-based email and communicate with her attorney
- After employee quits and sues, employer uses a forensics expert to retrieve login credentials for employee's account and reviews her emails
- NJ SCT – Employer's broadly worded IT policy did not specifically address personal web-based email and thus did not destroy expectation of confidentiality

Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 657 (N.J. 2010)

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PUBLIC POLICY

Because of the important public policy concerns underlying the attorney- client privilege, even a more clearly written company manual—that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system—would not be enforceable.

Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 657 (N.J. 2010)

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PUBLIC POLICY

- Employee uses her work email to communicate with her attorney
- After employee quits and sues, employer reviews her emails, which suggested she quit and filed suit at the urging of her attorney
- CA APP– Emails were not confidential, because employer's policy advised employees emails could be reviewed and that employees had no privacy rights

Holmes v. Petrovich Development, 119 Cal.Rptr.3d 878 (Cal.App. 3d Dist. 2011)

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PUBLIC POLICY

[Holmes] used defendants' computer, after being expressly advised this was a means that was not private and was accessible by Petrovich, the very person about whom Holmes contacted her lawyer and whom Holmes sued. This is akin to consulting her attorney in one of defendant's conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by Petrovich would be privileged.

Holmes v. Petrovich Development, 119 Cal.Rptr.3d 878, 896 (Cal.App. 3d Dist. 2011)

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The Constitution

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. ... At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve. … A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted.

City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010)

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