Publication of Hacked Climate Emails Raises Legal

Digital Media and Data Privacy Law Blog

on 12.01.2009
Posted in Prior Restraints

The release of hacked emails written by well-known climate scientists has been widely reported around the world, as those emails have raised questions about whether the science behind global warming has been overstated.

This *New York Times* blog post by the paper's science reporter caused a mini-furor of its own in the blogosphere. In the post, Andrew Revkin writes of the hacked emails:

The documents appear to have been acquired illegally and contain all manner of private information and statements that were never intended for the public eye, so they won't be posted here.

While Revkin's statement was rather unclear, some critics wondered whether this constituted a new *Times* policy, one that was not in effect, for example, when the Pentagon Papers were published or when various leaked documents from the Bush Administration were published. In a follow up to his post, Revkin points out that, from the beginning of the story, the *Times* has quoted the emails and provided links to other sites that have them posted.

Leaving aside the merits of the blogstorm in this case, the controversy does raise -- once again -- the question of how a media outlet should handle the receipt of documents that it has reason to believe were obtained illegally.

The answer, as a legal matter, is fairly simple. Since the United States Supreme Court case of *Bartnicki v. Vopper*, the law is clear that when a media outlet lawfully obtains information from a third party -- even if the third party obtained it illegally -- publication of that material is protected by the First Amendment. In *Bartnicki*, which involved the broadcast of the contents of a cell phone call that had been illegally taped, the Court recognized the important government interest in protecting the privacy interests of the public at large, but held that, "[i]n this case, privacy concerns give way when balanced against the interest in publishing matters of public importance."

Of course, the answer would be different had the radio station that broadcast the tapes actually recorded the conversations itself. The First Amendment does not immunize a reporter from his or her own illegal activity. The answer might also be different if the disclosure did not concern a

matter of public importance, or if the party releasing the material had some independent legal duty not to disclose it (as was the case in Boehner v. McDermott).

The policy question for media outlets is far more complicated. Should the fact that the climate science emails contained "private" information give a media outlet legitimate pause before deciding to publish them? Perhaps, though Andrew Revkin can probably tell you that deciding when to publish and when not to publish "private" information opens you up to charges of hypocrisy.

And yet, a blanket rule favoring publication may be problematic in some cases. For example, to the degree any of these emails containing "private" information came from a government source, the Federal Privacy Act may be implicated. Thus, if the government or a private individual pursues a Privacy Act action against whoever leaked the documents, the media outlet that received those documents may find itself being forced to reveal its sources (or facing the consequences for refusing to do so).

Check back later this week for a story from New Hampshire that implicates both *Bartnicki* and the developing case law on anonymous internet commentary.