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PERSPECTIVE

How a robot named 'Tappy' could cripple Huawei

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In the ongoing confrontation between the U.S. government and Chinese telecom giant Huawei, a civil trade secret dispute between two companies that might have resolved without much fanfare in previous years has grown into a full-blown criminal prosecution and a major point of leverage in the United States' political maneuverings with one of its largest world rivals.

The Huawei Trade Secrets Prosecution

In May 2017, a Seattle federal jury awarded T-Mobile USA, Inc. \$4.8 million, finding that Huawei had misappropriated its trade secret, a smartphone-testing robot named "Tappy." The jury awarded just a small fraction of the over \$500 million that T-Mobile had sought in damages. Nearly two years later in January 2019, the U.S. attorney's office indicted Huawei in the Western District of Washington for conspiracy to steal trade secrets, attempted theft of trade secrets, wire fraud, and obstruction of justice. Huawei pled not guilty to all charges on February 28, and trial is set to begin in March 2020.

The indictment alleges a brazen scheme to steal T-Mobile's technology based on the same facts as the civil case. It alleges that in June 2010,



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A Huawei store in Beijing, May 20, 2019.

Huawei entered into a supply agreement with T-Mobile to supply wireless phones to T-Mobile. The agreement contained a provision protecting T-Mobile's confidential trade secrets. In August 2012, T-Mobile granted Huawei engineers access to T-Mobile's Tappy robotic testing system to test Huawei phones prior to release. Earlier that year, Huawei had begun developing its own phone-testing robot to improve the quality of its phones. Huawei first tried to buy or license the Tappy robot system from T-Mobile, but allegedly resorted to stealing T-Mobile's trade secrets after T-Mobile declined. Among other allegations, the indictment claims that Huawei engineers entered the Tappy laboratory without authorization, took

photos of the robot, and stole the robot's arm before returning it and claiming it was a "mistake." The indictment cites alleged emails between Huawei executives and engineers, including one email from an engineer describing his goal to "go to the [T-Mobile] laboratory for reconnaissance and obtain measurement data." Perhaps worst of all, the indictment alleges that Huawei launched a formal program awarding bonuses to any employees who succeeded in stealing confidential information from competitors.

DOJ Increasingly Prosecuting Civil Defendants for Trade Secret Theft

The Huawei prosecution demonstrates the Department of Justice's increasing shift

away from its long-standing reticence to become involved in otherwise civil disputes between two companies. A fully developed civil record complete with deposition transcripts, discovery responses and thousands of produced company records gives the government a serious advantage in their pre-indictment investigation and ultimate prosecution of a case. Although T-Mobile has not commented publicly on the criminal case, chances are that as the "victim" company it is in contact with and assisting prosecutors. In many cases, such "victim" companies will make a presentation to prosecutors to convince them to bring a case against the alleged offender with the hope of gaining leverage in a civil case. Here, the government did not bring charges while the civil case was pending, but it has done so in other cases such as the one pending in the Northern District of California against United Microelectronics Corp. alleging theft of Micron trade secrets.

Huawei and DOJ's China Initiative

The Huawei case is a prime example of DOJ's "China Initiative" in action. In November 2018, former Attorney General Jeff Sessions announced the initiative's goal to "identify priority Chinese trade theft cases, ensure that we have enough resources dedicated to them, and make

sure that we bring them to an appropriate conclusion quickly and effectively.” After the announcement and in the months leading up to it, DOJ brought numerous charges against companies and individuals linked to China alleging theft of trade secrets from high-profile American companies such as Apple, Genentech, General Electric and Micron.

Since the November 2018 announcement, U.S.-China relations have devolved rapidly with the ongoing trade dispute and the arrest of Huawei’s CFO Meng Wanzhou in Canada. She and Huawei face charges of violating the U.S.’s sanctions on Iran in a separate case pending in the Eastern District of New York, in which the U.S. seeks to extradite Meng. In April 2019, DOJ ramped up its rhetoric on the China Initiative. It called China’s “Made in China 2025 Notice” — a 10-year plan launched in 2015 to comprehensively upgrade China’s industry and economy with a focus on higher value-added manufacturing sectors, such as advanced information technology, robotics and aerospace — a “roadmap to theft.” DOJ emphasized that “since 2011, more than 90 percent of the Department’s economic espionage prosecutions ... involve China, and more than two-thirds of all federal trade secret theft cases during that period have had at least a geographical nexus to China.”

The DOJ also announced in April that, aside from criminal prosecutions, it plans to use “economic tools available to the Departments of the Treasury and

Commerce and the U.S. Trade Representative, diplomacy by the State Department, and engagement by the military and intelligence community” to remediate harm and deter future theft. Indeed, last month the Trump administration declared a national emergency in light of alleged threats against American technology and issued an executive order to block transactions that involve information or communications technology that “poses an unacceptable risk to the national security of the United States.” The Department of Commerce subsequently blacklisted Huawei and its affiliates from doing business with U.S. companies by adding them to the Bureau of Industry and Security’s Entity List. These moves follow the Trump administration’s barring of federal agencies and their contractors from procuring Huawei’s equipment and services last August, a law that Huawei is challenging in court as unconstitutional. As the economic strain on Huawei increases, it faces mounting pressure to resolve the criminal trade secrets case either by plea or trial.

Individual Huawei Employees Avoid Trade Secret Charges, for Now at Least

Given the U.S. government’s apparent strategy of applying pressure to Huawei from all angles, it is surprising that there is no indication of any individual Huawei employees being indicted for trade secret theft. This is especially curious given the fully developed evidentiary record from the civil

case and in light of DOJ’s stated policy of holding accountable individuals substantially involved in alleged corporate misconduct. This policy was articulated originally in DOJ’s 2015 Yates Memorandum. It was a direct response to criticisms that no top Wall Street executives served prison time following the 2008 financial crisis, despite DOJ’s extraction of large fines from corporate entities. In other high-profile trade secret theft cases, DOJ has charged individuals, such as former employees of Apple, General Electric, Micron and Genentech. The government often works its way from the bottom, seeking to obtain cooperation from individual employee defendants in order to pressure the corporate defendant to capitulate. It is unclear why the Huawei employees accused of wrongdoing in the indictment have not been charged. It is possible that they have already struck a deal to avoid prosecution, or are otherwise out of the government’s reach because of jurisdictional or other reasons. It is also possible that the government could seek a superseding indictment to add additional individual defendants.

As a major battlefield in the war between the U.S. and Huawei, the criminal trade secrets case against Huawei could not be more fraught. Any admission or finding of guilt against the company would further strengthen the government’s position in choking off Huawei’s access to U.S. technologies and markets. As the value of the U.S. economy becomes increasingly linked to

the intellectual property of American companies, foreign companies must take extra precautions to avoid even the appearance of impropriety when given access to American companies’ proprietary technologies or when onboarding and offboarding employees who may come and go from competitor companies. Any missteps to the contrary will draw the increasingly intense scrutiny of prosecutors enforcing the China Initiative. How effective the China Initiative will be in remediating and preventing intellectual property theft remains to be seen. ■

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