

IN DEFENSE OF CONFIDENTIALITY

As lawyers from two factions
exchanged arguments, the protective
anonymity surrounding reviewers
of scientific manuscripts
hung in the balance.

David Lazarus

On 15 March 1989 the principle of confidentiality in peer review received a strong legal foundation, in the form of a unanimous decision of the United States Court of Appeals for the Federal Circuit.

Important principles frequently get established with little trumpeting and under innocuous rubrics: *Roe v. Wade*, *Brown v. Board of Education*. This decision goes by the name of *Solarex Corporation and RCA Corporation v. Arco Solar Inc v. The American Physical Society*, Fed. Cir. No. 88-1542. The consequences of the judgment on the side issue between Arco Solar and APS that arose from this suit should go far beyond the immediate case, into the realm of protection of the confidentiality of all the thousands of referees who have reviewed and will review papers for the journals of The American Physical Society and for other scholarly journals.

A rude awakening

The APS, like nearly all other publishers of scholarly journals, has always maintained a policy of keeping the identity of referees completely confidential, presuming that this long-established procedure was well grounded in law as well as in custom. We received a rude awakening on 29 June 1987 when, without warning, we were served with a subpoena ordering us to disclose to a Federal District Court, within a few weeks, all of the files relating to a paper entitled "Substitutional Doping of Amorphous Silicon" that had been submitted to *Physical Review Letters* over ten years earlier but ultimately was not published in that journal. (It was returned to the authors with suggestions for its revision, but they chose to withdraw it. It did appear a few months later in another journal.) The defendant in a case pending before the US District Court for the Eastern District of New York—Arco Solar Inc—had requested this information, including the identities of all of the referees of the paper.

In APS attorney Richard A. Meserve's words, "the underlying litigation concerned Arco Solar's alleged infringement of certain patents owned by RCA. [A] letter [submitted by Arco] asserted that two authors submitted a manuscript to the Society describing work identical to the later-patented RCA effort and that the manuscript was denied publication. Arco Solar sought discovery from the Society concerning the manuscript, including . . . the identity of referees. . . . Arco Solar speculated that publication 'was blocked by a referee having ties to RCA,' and it asserted, without further explanation, that discovery from

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the Society might raise 'legal issues of the derivation of the invention and whether the paper is prior art.'"

The APS was not in any way a party in the suit, but this did not negate our legal responsibility to respond to a valid subpoena from a Federal court. Accordingly, we did not walk, we ran, to Meserve, our valiant attorney at the law firm of Covington and Burling in Washington, DC. Dick Meserve has represented The American Physical Society for several years, generally in far more mundane matters. Dick has a special relationship with APS: He is not only a splendid attorney; he is also a PhD physicist and an APS member. We need hardly explain to him the importance of our profession and its traditions.

With Dick now entered into the legal fray, the rest of us stood aside, somewhat like spectators at an arena watching knights duel but only dimly understanding the rules of engagement. For the following 18 months we observed the nuances of the encounter, which proceeded in a highly ritualized fashion.

The duel

Thrust. In June 1987, Arco requests the files and the District Court issues its subpoena requiring APS to produce the information within three weeks.

Parry. On 1 July 1987, Sonya Winner, a colleague of Dick Meserve's (Dick was away when the case was handed to his office), phones Arco Solar's attorneys and requests that the company cancel its request, citing APS's long-standing policy of referee confidentiality. This is followed by a letter from Meserve on 8 July.

Thrust. Arco's lawyers refuse to drop the request, insisting that they must have the requested information for their defense.

Counterthrust. Meserve now requests an extension of several weeks to prepare a legal argument to suppress the subpoena. The court grants this request.

Thrust. On 29 July, Arco writes a letter in support of its request for the information as part of a "discovery" to ascertain whether or not the publication of the article in *Physical Review Letters* "was blocked by a referee having ties to RCA," asserting that the discovery from the Society may raise "legal issues of the derivation of the invention and whether the paper is prior art."

Counterthrust. On 5 August, Meserve writes a letter

quality-control feature of the scientific profession in the United States." He also argues that a "protective order" offered by Arco's attorneys would not suffice to protect the identity of anonymous referees.

Thrust. On 6 August, Arco's attorneys file a brief in support of the "Motion to Compel" APS to disclose the requested information, citing, among other things, the historic right of access of a defendant to all materials necessary to prepare a defense against the allegations of its accusers (a basic right that has been upheld in a long series of court decisions).

Counterthrust. On 20 November, Meserve files a 30-page brief with a 30-page set of appendices, spelling out in great detail the legal arguments on behalf of APS opposing the "Motion to Compel." His brief contains citations of 35 relevant cases, plus three statutes and three treatises. It also includes a formal declaration from me, in my capacity as editor in chief of The American Physical Society, stating the traditional role of anonymous referees in evaluating papers for all of our journals and the fact that it is common for papers to require some modification in response to critical comments before they are accepted for publication.

A second formal declaration from Bill Havens, the executive secretary of The American Physical Society, recounts the history of the Society and describes the peer review process as "a central and common quality-control feature in science." Havens notes that APS "has never intentionally disclosed the identity of a referee" of any of the more than 60 000 papers the Society published between 1975 (the date of the paper in question) and 1986, and that "the forced disclosure of a referee's name would cause irreparable harm to . . . the quality of scientific literature in the United States . . . [since] if the confidentiality of the peer review process is breached, all referees must provide their advice to the Society in the expectation that disclosure might occur."

Meserve argues for a judgment that the Society's peer review system is entitled, under rule 501 of the Federal Rules of Evidence, to a "qualified privilege" against forced disclosure. (In the case of a qualified privilege, the party seeking disclosure must show a "compelling necessity" for the specific information requested, a hurdle only infrequently surmounted in legal actions.)

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to the judge who is hearing the case, The Honorable Charles T. Sifton of the US District Court for the Eastern District of New York. The letter describes in general terms the history of APS and the basis for the Society's request that the subpoena be suppressed. Meserve argues that the disclosure would violate "the principle of confidential peer review . . . [which] is a central and common

As a backup claim, Meserve argues that the peer review process is entitled to protection from discovery because the court "is authorized to refuse discovery requests that are oppressive and create an undue burden"—a judgment it may arrive at by balancing "the hardship imposed on the Society by permitting discovery against the need for and the relevance of the discovery."

Meserve questions the relevance of Arco's request by pointing out "Arco's shifting justifications for intrusions on the peer-review process." He notes that Arco changed the justification for its discovery request from an allegation that one of the Society's referees had ties to RCA (a statement for which "there was absolutely no evidence") to a claim that circulation of the paper to the referees might constitute "printed publication or prior art." This change, he writes, was made "in evident recognition of the flimsiness of Arco's initial justification for discovery."

Meserve then cites evidence on what constitutes "printed publication," namely, "anything that is printed and is distributed to any part of the public in any country without any injunction of secrecy." He concludes, "The

whether marginally relevant discovery might otherwise be permissible in the absence of countervailing considerations. Rather, the Society has shown hardships attendant upon disclosure of its referee's identity which, under the authorities, require Arco to meet a higher standard of relevance to overcome the Society's need for confidentiality. Because Arco's showing falls far short of that higher standard, the rule 26(c) balance of need against burden favors nondisclosure in this case."

Death-throes. On 13 April, Arco's attorneys file a 43-page brief with Judge Sifton at the US District Court, seeking to overturn the judgment of Magistrate Ross. On 28 April, Dick Meserve files a 35-page counterbrief opposing Arco's objections. On 29 June, Judge Sifton

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Thrust. Arco's attorneys next counter with a brief citing 14 cases, one statute, one rule and one treatise in support of their argument that the Society's request should be denied and that discovery should be granted.

Referee's decision. The matter of the discovery is referred to United States Special Magistrate Allyne R. Ross for adjudication. She issues her opinion on 30 March 1988, in a scholarly 52-page analysis.

In this opinion, she declines Arco's motion to compel disclosure, but also declines to support the Society's request for a qualified privilege, since this "seems calculated to advance a society interest in a close personal relationship, such as attorney-client or husband-wife." Citing several references, she concludes that "weighty judicial authority counsels against creation of a rule that will presumptively impinge upon the truth-finding process."

The magistrate notes, however, that "there is not even a need to overcome these venerable principles cautioning judicial restraint in the creation of expansion of privileges... [because] the Federal Rules of Civil Procedure provide a framework for balancing, in the pretrial discovery context, a litigant's need for disclosure against a societal interest in confidentiality." On this latter ground, she finds that the "balancing approach" clearly compels a judgment in support of APS, which "has demonstrated a strong interest in preserving the confidentiality of its reviewer's identity, and the values it seeks to foster in resisting this disclosure have traditionally been accorded substantial weight. . . . Arco, by contrast, has shown little, if anything, to tip the scales in its favor. . . . Of significance, too, . . . is the Society's status as a nonparty to this litigation.

"The question presented here, however, is not

sustains the magistrate's decision on behalf of the US District Court. On 26 July, Arco files a notice to appeal the District Court decision; subsequently the company files a brief with the US Court of Appeals for the Federal Circuit. On 22 November, Meserve files his counterbrief with the Court of Appeals, and oral arguments are heard in January 1989.

On 15 March 1989, the US Court of Appeals, by a unanimous 3-to-0 decision, sustains the earlier judgment in favor of the Society and, importantly, accepts Magistrate Ross's learned decision and the opinion of the Federal District Court as its own official decision in this matter.

The rewards of victory

Barring any possible attempt by Arco to appeal this decision to the US Supreme Court, which hardly seems warranted for its defense in the original patent-infringement case, the matter is now closed. The existence of Magistrate Ross's and the Federal District Court's opinions in the records of the US Court of Appeals furnishes the legal community with a very important precedent inhibiting possible future legal actions that might jeopardize confidentiality for scholarly publications. The American Physical Society and the entire community of scholarly publishers owe an enormous debt of gratitude to our stalwart defenders, Dick Meserve and his associate Bruce Kuhlik, for their tireless efforts in successfully resolving this issue.

A final unanticipated and wonderful event nicely illustrates the mysterious workings of justice. On 4 April 1989 we learned that because of the final judgment in this case, the Society is entitled to recover "certain allowed costs" associated with the action: in this case, a total of exactly \$106.37 in filing costs that we paid for some of our briefs. Sweet are the rewards of victory! ■