NEW YORK COURT OF APPEALS ROUNDUP

COURT APPLIES PRE-DIGITAL AGE LAW TO DIGITAL AGE TECHNOLOGY

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Earlier this month, the Court of Appeals applied a pre-digital age law to digital age technology and addressed the question of whether intellectual property such as computer source code becomes "tangible" when it is saved to a computer hard drive. In the well-publicized case of *People v. Aleynikov*, the court upheld the conviction of former Goldman Sachs computer programmer Sergey Aleynikov for unlawful use of secret scientific material in a unanimous opinion written by Judge Eugene M. Fahey.

Background

The defendant worked on high-frequency trading software at Goldman Sachs. This software and its attendant infrastructure helped provide the firm a competitive advantage in trading. Defendant signed a confidentiality agreement acknowledging that any software he created was the property of Goldman Sachs and that defendant was prohibited from removing a copy of the software source code from the firm's network. In the Spring of 2009, defendant accepted a job offer from a Chicago-area startup that planned to develop its own high-frequency trading infrastructure and software. Defendant was hired to be the "head of infrastructure" and "the system architect" at a salary that was three times what he had made at Goldman Sachs.

On defendant's last day at Goldman Sachs, he uploaded a large amount of the high-frequency trading source code, via a website, to a remote server in Germany. Defendant subsequently took steps to hide his transfer of source code from the Goldman Sachs network to the server in Germany and then he downloaded the source code from the server to his home computers. In late June 2009, Goldman discovered defendant's unauthorized transfers of source code and alerted the Federal Bureau of Investigation.

Defendant was arrested and charged with, *inter alia*, violation of the National Stolen Property Act, which prohibits the transmission or transfer of goods in interstate or foreign commerce with the knowledge that they were stolen. Defendant was convicted after a jury trial in federal court, but the U.S. Court of Appeals for the Second Circuit reversed on the grounds that the source code was "intangible property" and therefore not a "good" within the meaning of the statute. *United States v. Aleynikov*, 676 F.3d 71, 76-79 (2d Cir. 2012). The Second Circuit noted that the National Stolen Property Act was designed to address the "taking of a physical thing," and "decline[d] to stretch or update statutory words of plain and ordinary meaning in order to better accommodate the digital age." *Id.* at 79.

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Procedural History

Defendant was then charged in state court with two counts of unlawful use of secret scientific material, Penal Law §165.07, and one count of unlawful duplication of computer related material in the first degree. Penal Law §156.30[1]. A defendant commits unlawful use of secret scientific material when she or he "with intent to appropriate...the use of secret scientific material, and having no right to do so...makes a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such scientific material."

Among the evidence presented to the jury was testimony that the source code that defendant uploaded to the network of his new firm was essentially the same as source code on the Goldman Sachs network with only minor modifications. The jury also heard testimony that, while computer source code is intellectual property without physical form, when computer files containing that source code are stored on a hard drive or compact disc, they are physically present and take up physical space on that drive or disc. The jury found defendant guilty of one count of unlawful use of secret scientific material. The trial court then granted defendant's motion for a trial order of dismissal. The court found that the source code was not a "tangible reproduction or representation" of scientific material and reasoned that "an electronic image can become tangible when it is printed on paper [but] computer code does not become tangible merely because it is contained in a computer." 49 Misc.3d 286, 320 (Sup. Ct. NY County 2015).

The Appellate Division, First Department reversed the trial court's order, reinstated the jury's verdict as to the conviction and remanded the case for sentencing. The Court of Appeals granted defendant leave to appeal.

Court of Appeals

The court noted that Penal Law 165.07 was intended to make sure that a defendant who makes an unauthorized copy of secret scientific material does not escape criminal sanction just because he or she did not take the original and, therefore, did not commit actual larceny. In order to fall within the statute, it is not necessary for the secret scientific material to be tangible as long as the reproduction or representation of that material is tangible. In contrast to the Second Circuit which focused on the fact that the source code itself was not sufficiently tangible to constitute a "good" (as that term is used in the National Stolen Property Act), the Court of Appeals looked to the uploading of that source code on the German server and its subsequent downloading onto the hard drives on defendant's computers. The court pointed to the trial testimony that when computer files such as source code are stored on a hard drive, they are physically present and take up physical space on that medium. Accordingly, a rational jury could have found that the representation or recording that defendant made of the Goldman Sachs source code had physical form and was sufficiently tangible to bring defendant's conduct within the statute. The court therefore affirmed the First Department's reinstatement of the jury's verdict convicting defendant of violating Penal Law §165.07.

Conclusion

Although the uploading and downloading of computer source code was probably not within the Legislature's contemplation when it enacted that section of the Penal Law in 1967, the statute is nevertheless broad enough to criminalize defendant's unauthorized appropriation of source code from his employer. By focusing on the reproduction or representation rather than the secret scientific material itself, the Court of Appeals applied this pre-digital age statute to a quintessential digital age crime and, almost nine years after defendant secretly uploaded a copy of the source code to a German server, his conviction has been affirmed.