**U.S. v. Aleynikov: Why is Theft of Valuable Code Not Criminal?**

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The Second Circuit, narrowly construing two federal statutes, reverses a conviction.

It seems indisputable that Sergey Aleynikov, a programmer for Goldman Sachs & Co. (Goldman), copied valuable source code for use by a new domestic employer. The Second Circuit nevertheless finds no support in law for his conviction under the National Stolen Property Act (NSPA), 18 U.S.C. § 2314, or the Economic Espionage Act of 1996 (EEA), 18 U.S.C. § 1832. Although the court follows an analogous lead of the Supreme Court, as well as the lead of several circuits in interpreting the NSPA, issues presented by the EEA appear to be ones of first impression.

On Aleynikov's last day at Goldman, he encrypted and uploaded to a server in Germany more than 500,000 lines of mostly proprietary source code needed for a high-frequency trading system (HFT system), but nothing physical was taken. *Aleynikov* at *2; *see also*, *id*. n.1.

His indictment had three counts: first, violating the EEA by downloading a trade secret "related to or included in a product that is produced for or placed in interstate or foreign commerce," with the intent to confer economic benefit on someone other than the owner; second, transporting, transmitting or transferring goods worth "$5,000 or more, knowing the same to have been stolen, converted or taken by fraud;" and, third, violating the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. The first two counts are found legally insufficient; and the third count, dismissed by the district court, is not raised on appeal. *Id*. at *2-3.

The circuit court finds that, except for money, only tangible stolen items are subject to prosecution under the NSPA. *Id*. at *5. It stresses the holdings in Dowling v. United States, 473 U.S. 207 (1985), where bootleg recordings are found not susceptible to prosecution under that Act in part because nothing other than the intangible content of media was stolen. *Id*. at 216.

*Dowling* only applies by analogy, however, because the Court rejects a "blunderbuss solution to a problem treated with precision when considered directly." *Id*. at 226 (quoted in *Aleynikov* at *5 n.4). That statement has as its premise that "copyright is an area in which Congress has chosen to tread cautiously, relying 'chiefly… on an array of civil remedies to provide copyright holders protection against infringement,' while mandating 'studiously graded penalties' in those instances where Congress has concluded that the deterrent effect of criminal sanctions are required." U.S. v. LaMacchia, 871 F.Supp. 535, 544 (D. Ma. 1994) (quoting *Dowling*, 473 U.S. at 221, 225).

As *Dowling* explains, the Copyright Act has long provided for criminal enforcement, but there is nothing equivalent for trade secrets. Thus, U.S. v. Bottone, 365 F.2d 389 (2d Cir.1966), an NSPA prosecution for trade secret theft, might be seen as more relevant. *Bottone*, however, addresses very peculiar circumstances. Having found defendants' photocopying documents offsite to be actionable despite return of the originals, the court admits to reservations. "Alternatively… even if the statute does not reach far enough to include [such activities, the indictment claimed and]… the evidence showed the transportation of cultures [of microorganisms] which were stolen 'goods' on any view." *Id*. at 394.

Finding some encouragement and no hindrance in *Bottone*, *Aleynikov* explicitly joins the

Tenth, Seventh, and First Circuits in finding that "the theft and subsequent interstate transportation of purely intangible property is beyond scope of the NSPA." *Id*. at *5. "By uploading Goldman's proprietary source code to a computer server in Germany, Aleynikov stole purely intangible property embodied in a purely intangible format." *Id*. at *6. Moreover, "because he did not thereby 'deprive [Goldman] of its use,' Aleynikov did not violate the NSPA." *Id*. (quoting *Dowling*, 473 U.S. at 217).

Turning to the EEA, the court notes that §§ 1831 and 1832 address, respectively, theft that benefits a foreign government or enterprise, and theft that does not. Only the latter is applicable here, and only § 1832 references "a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce." *Aleynikov* at *6. This is key because, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely." *Id*. at *7.

The court therefore examines the language unique to § 1832, and finds, "Goldman's HFT system was neither 'produced for' nor 'placed in' interstate or foreign commerce. Goldman had no intention of selling its HFT system. … It went to great lengths to maintain the secrecy of its system. Because the HFT system was not designed to enter or pass in commerce, or to make something that does, Aleynikov's theft… was not an offense under the EEA." *Id*. at *9.

Thus, the opinion implicitly regards Goldman's system as a "product." Yet, given the importance of the definition of "goods" under the NSPA, the court should have explained why something more accurately described as a "process" would qualify as a "product."

But only one ambiguity in § 1832 is needed for Aleynikov to escape its grasp. "[W]hen

choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Aleynikov* at *9 (quoting U.S. v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952)) (surplus quotation marks omitted).

Concurring, Judge Calabresi finds it difficult "to conclude that Congress… actually meant to exempt the kind of behavior in which Aleynikov engaged." *Aleynikov* at *10. He does not dissent, however, "because… of the strength of the majority's analysis of the text and the legislative history, and because… ambiguous criminal statutes must be read in favor of the defendant." *Id*.

Should Congress agree with Judge Calabresi, it should make clear not only that something intended for only secret use can be regarded as "in commerce," but also that a process can qualify as a "product."