PATTON BOGGS LLP

April 13, 2012

Court of Appeals Reverses Conviction on U.S. Trade Secret Statutes

Intellectual Property Client Alert

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On April 11, the U.S. Court of Appeals for the Second Circuit handed a victory to a former Goldman Sachs employee convicted of stealing and transferring proprietary computer source code in violation of the National Stolen Property Act (NSPA), 18 U.S.C. § 2314, and the Economic Espionage Act of 1996 (EEA), 18 U.S.C. § 1832. The Court narrowly construed key terms in the statutes. The decision is available here.

In United States v. Aleynikov, the defendant spent two years at Goldman developing source code for its proprietary in-house high frequency trading system. When Aleynikov left the company he allegedly encrypted and uploaded to a computer server in Germany source code for the trading system in violation of his confidentiality agreement. He later allegedly downloaded the source code to his home computer, copied some of it to other computers and flash drives and brought it with him to a meeting in Chicago with his new employer (which was looking to develop a trading system). When he returned to New Jersey, he was arrested for violating provisions of the NSPA and EEA, found guilty and appealed to the Second Circuit.

The NSPA makes it a crime to "transport[], transmit[], or transfer[] in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." 18 U.S.C. § 2314. Aleynikov argued that he did not violate the statute because computer source code did not constitute "goods," "wares," or "merchandise." The Second Circuit agreed with Aleynikov. It held that those terms meant tangible property and that source code was intangible property. It ruled that source code was not a "good" that could be stolen and Aleynikov did not violate the NSPA. The Second Circuit thus joined the First, Seventh and Tenth Circuits in ruling that the statute does not apply to "intangible information."

Aleynikov also was convicted of violating part of the EEA. The statute provides that: "Whoever, with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly . . . without authorization . . . downloads, uploads, . . . transmits, . . . or conveys such information" is guilty of a federal offense. On appeal, Aleynikov argued that he did not violate this section of the EEA because he did not steal a trade secret related to a product that is "produced for or placed in interstate or foreign commerce." He asserted that the alleged trade secret, Goldman's trading system, did not fall within the statutory language because it was intended to be used by Goldman itself and was not being sold as a product to a third party.

The Second Circuit again agreed with Aleynikov and reversed his conviction. The Court wrote:

> Goldman had no intention of selling its HFT system or licensing it to anyone. It went to great lengths to maintain the secrecy of its system. The enormous profits the system yielded for Goldman depended on no one else having it. Because the HFT system was not designed to enter or pass in commerce, or to make something

that does, Aleynikov's theft of source code relating to that system was not an offense under the EEA.

As a result of the ruling, in the Second Circuit an employee's theft of an employer's source code for a purely in-house computer program is not considered a crime under the EEA.

In a concurring opinion in the Aleynikov case, Judge Calabresi wrote that while he did not disagree with the Court's interpretation of the EEA, he did not believe that Congress "actually meant to exempt the kind of behavior in which Aleynikov engaged." The judge wrote that he "hope[d]" that Congress would reconsider and modify the language of the EEA to capture the conduct it intended to be a crime.

Patton Boggs will monitor whether Congress accepts the invitation or other courts decide to follow the Second Circuit ruling.