

GOVERNMENT AND INTERNAL INVESTIGATIONS  
LABOR AND EMPLOYMENT

## **New York's High Court Gives State Prosecutors—Like Their Federal Counterparts—Wide Range To Combat Digital Theft**

The saga of Goldman Sachs computer programmer Sergei Aleynikov—who took the investment bank's valuable high-speed trading source code with him as he changed jobs—has now come to an end, and that saga has strengthened the ability of both federal and New York state prosecutors to combat similar crimes in the future.

As some may recall, Aleynikov beat all the federal charges against him, persuading an appellate court that neither of the tools federal prosecutors had wielded—the National Stolen Property Act (NSPA) and the Economic Espionage Act (EEA)—made his source code theft a federal crime. Congress reacted swiftly, enacting the Theft of Trade Secrets Clarification Act in December 2012, to make sure similar crimes would result in federal convictions going forward.

The State of New York then pursued Aleynikov for unlawfully using secret scientific material in violation of state law and, this year, the New York Court of Appeals unanimously affirmed a jury's guilty verdict against Aleynikov. Together, the New York Court of Appeals' decision and the amended federal laws provide a framework that allows criminal prosecution of cases like Aleynikov's involving theft of valuable computer code.

### **Failed Federal Proceedings Led to Revitalized Federal Tools**

The federal government convicted Aleynikov of violating the NSPA and EEA in December 2010. Aleynikov had spent more than two years working at Goldman developing source code for the bank's high frequency trading system, but he left for a higher-paying position with a Chicago-based start-up with no similar trading system. Aleynikov violated Goldman's confidentiality agreement by removing copies of source code from the company network and uploading that code to his personal computer and a server in Germany used by his new company. Aleynikov was arrested after Goldman's information security department detected unauthorized transfers from the company's source code repository and referred the matter to law enforcement.

Aleynikov's conviction was overturned by the U.S. Court of Appeals for the Second Circuit in April 2012. The federal appellate court found that the NSPA applied only to physical property, not the stolen source code, which was "purely intangible property embodied in a purely intangible format." And the court swept aside the EEA charges because they required some showing that Goldman intended to sell the source code, which was not the case. Aleynikov was released. In a concurrence, respected Second Circuit Judge Guido Calabresi expressed "hope that Congress will return to the issue" and expand the EEA to cover intellectual property crimes like Aleynikov's.

Congress reacted quickly. Citing the "dangerous loophole" in the EEA revealed by the Aleynikov decision, and quoting Judge Calabresi's concurrence, Congress adopted the Theft of Trade Secrets Clarification Act in

2012. The Act widened the scope of federal criminal statutes to better fit the digital age by removing language requiring that a product be “produced for interstate or foreign commerce,” and inserting language allowing an EEA charge to be based on either a product or a service, whenever “used in or intended for use in” (rather than sold into) interstate or foreign commerce.

Federal prosecutors learned their lessons, as well. Even before the EEA amendments came into effect, federal prosecutors in the Southern District of New York discovered that they could successfully charge EEA counts if they could identify tangible products related to stolen source code and could convict under the NSPA if they could identify physical objects taken to steal that code. In fact, just one year after the Aleynikov decision, the U.S. Court of Appeals for the Second Circuit upheld the conviction of a Société Générale analyst who stole high frequency trading source codes, just as Aleynikov had done. In the Société Générale case, the government proved that the stolen code was related to the sale of a product (securities), thereby satisfying the original EEA requirements, and the government proved the defendant grabbed physical objects (thousands of pages printed with the source code), thereby satisfying the NSPA as well.

### **New York’s Highest Court Took a Broad View of State Criminal Laws**

Aleynikov, of course, could not be prosecuted again by the federal government due to the Double Jeopardy Clause of the Constitution. But the State of New York could, and did, come after him for the unlawful use of secret scientific material under New York Penal Law 165.07. The state statute prohibits making a “tangible reproduction” of “secret scientific material” with the “intent to appropriate” that material. Yet again, a jury returned a guilty verdict against Aleynikov. But, again, it was set aside. This time, a state trial judge held that, because source code is not “tangible,” the state criminal law did not apply.

Now New York’s highest court, the Court of Appeals, has reinstated the guilty verdict. In its opinion, the Court distinguished between “secret scientific material” (here, the Goldman source code) and any reproduction of that material, explaining that only the latter must be tangible. As the Court held: “What must be tangible is not the secret scientific material—here, the source code—but the reproduction or representation thereof. . . . A copy of source code may be tangible even if the source code itself is not.” Aleynikov uploaded the stolen code onto a server; and a server is a tangible object. Thus, the jury properly found him guilty of the crime.

### **Federal and State Charges Loom for Digital Crimes**

Today, an employee stealing source code or other valuable intellectual property from her or his employer would face both federal and state criminal jeopardy, at least in New York. The Second Circuit’s decision in the Aleynikov case spurred amendments to the EEA, allowing federal prosecutors to more readily charge such crimes. And Aleynikov’s case in New York has led to a definitive—and broad—interpretation of state law by the New York Court of Appeals, which will likewise permit state prosecutors to charge such crimes in most circumstances.

**Additional Information**

If you face circumstances involving the potential theft of intellectual property and would like our assistance, or if you have any questions about this LEGALcurrents, please contact any member of our [Government and Internal Investigations](#) or [Labor and Employment](#) practice groups at (585) 232-6500.

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