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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 47

SERGEY ALEJNIKOV,

Appellant.

20 Eagle Street
Albany, New York
March 27, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 47, the People of
2 the State of New York v. Sergey Aleynikov.

3 Counsel.

4 MR. MARINO: Good afternoon, Your Honors, and may
5 it please the court. With the court's permission, I would
6 like to reserve two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. MARINO: Sergey Aleynikov's conviction under
9 the Unlawful Use statute must be reversed for two reasons.
10 First, the digital transfer of computer source code does
11 not make a tangible representation or reproduction of that
12 intangible property. It makes an equally intangible copy,
13 one that can only be seen with the aid of a computer. The
14 source code Mr. Aleynikov copied was as intangible on the
15 computers and flash drive that he owned - - -

16 JUDGE RIVERA: Let me ask you this.

17 MR. MARINO: Yes.

18 JUDGE RIVERA: If - - - if your client had put
19 together a PowerPoint - - - and I know you can't really
20 read code in this way which is part of my problem with your
21 argument. But let's say he put up a slide on the screen
22 and it's got some snippets of the code.

23 MR. MARINO: Yes.

24 JUDGE RIVERA: Is that a tangible reproduction?

25 MR. MARINO: Absolutely not.



1 JUDGE RIVERA: Why not?

2 MR. MARINO: Because tangible has a specific
3 meaning in the law and it always has.

4 JUDGE RIVERA: You have to be able to touch it?
5 So if he printed out that PowerPoint slide and handed it
6 out - - -

7 MR. MARINO: Yes.

8 JUDGE RIVERA: - - - it's a tangible
9 reproduction?

10 MR. MARINO: Yes, it would be. Yes, it would be.
11 But a tangible reproduction means exactly what that term
12 has always said which is something that can be perceived by
13 the senses. That's the big deal. That's why Agrawal said
14 what it said.

15 JUDGE RIVERA: Well, why - - - why isn't the
16 court below correct that if it's taking up space on the
17 hard drive that is tangible within the meaning of this
18 statute - - -

19 MR. MARINO: Because - - -

20 JUDGE RIVERA: - - - for - - - for this kind of
21 secret material?

22 MR. MARINO: Because, Your Honor, that's as
23 metaphysical a distinction as I could possibly imagine.
24 The reality is when the - - - when the legislature in 1967
25 - - -



1 JUDGE RIVERA: Well, if it's taking up space that
2 means something else can't sit there.

3 MR. MARINO: It doesn't - - -

4 JUDGE RIVERA: So it's tangible.

5 MR. MARINO: It doesn't mean that one can
6 perceive it. It doesn't mean perceptible by the senses.
7 That's what tangible means and always has meant.

8 JUDGE FAHEY: Well - - -

9 MR. MARINO: That - - -

10 JUDGE FAHEY: Well, slow down. Black's Law
11 Dictionary has "having physical form", number one. Number
12 two, "capable of being touched or possessed", and number
13 three, "capable of being understood by the mind." Maybe
14 not my mind, but there are minds who can understand source
15 code. And it seems to me that it would fit within that
16 third category. The other part is is that the tangibility
17 of source code or in fact any intellectual property in its
18 first conception will not be there. It - - - it's only in
19 the reproduction of - - - of a particular intellectual
20 endeavor where it exists. For instance, an alphabet
21 doesn't exist. It's - - - it exists in my mind, but it
22 does not tangibly exist until I reproduce what's in my mind
23 and put it on a piece of paper. The same would apply to a
24 piece of music, a poem, or, you know, a variety of other
25 things, and source code I would consider to be that kind of



1 endeavor.

2 MR. MARINO: Every single court to consider this
3 issue - - - and I mean all the judges that sat on the
4 Agrawal panel and the Aleynikov panel and many judges on
5 many other courts around the country - - - but those judges
6 considered this very source code and they recognized that
7 it is as intangible on Mr. Aleynikov's computer as it was
8 on Goldman's computer. You say it - - - it doesn't really
9 have any form until it's reproduced. How can that be? In
10 its native form, it's intangible property and every court
11 to consider the issue has said it. What does it mean?
12 America Online, the Eastern District of Virginia:
13 "Computer data can be transmitted and stored in a variety
14 of ways but none of them renders the data capable of being
15 touched. A bit on a computer disk is not palpable.
16 Electrical impulses that carry computer data may be
17 observable" - - -

18 JUDGE RIVERA: But if - - - if you copy it on a
19 thumb drive - - -

20 MR. MARINO: Yes, you copy it onto a - - - the
21 thumb drive is tangible, but the - - - the - - -

22 JUDGE RIVERA: The vessel is tangible, correct.

23 MR. MARINO: The - - -

24 JUDGE RIVERA: It's - - - excuse me.

25 MR. MARINO: I'm sorry, Your Honor.



1 JUDGE RIVERA: It's like copying it onto a piece
2 of paper.

3 MR. MARINO: No, it isn't.

4 JUDGE RIVERA: The paper is the vessel. You move
5 it around, right?

6 MR. MARINO: Respectfully, Your Honor - - -

7 JUDGE RIVERA: Okay.

8 MR. MARINO: - - - I have something printed out
9 on a piece of paper.

10 JUDGE RIVERA: Correct.

11 MR. MARINO: I can perceive this with my senses
12 without any difficulty whatsoever. But I cannot perceive
13 computer data on a computer without the aid of a computer.
14 Why does - - - why do you think "tangible" was in that
15 statute in 1967? Because historically that was a critical
16 component of theft, that you could only take something
17 tangible. This court in Thyroff tackled this issue, and it
18 said - - - and it was - - - there was no mystery in
19 Thyroff. Thyroff made it very clear that to become
20 tangible intangible things like source code have to be
21 attached to something tangible, right. That's the tangible
22 basis. That's for conversion law. In the law - - - the
23 tort of conversion, this court is free and it's quite
24 appropriate for this court to modify the common law to meet
25 the felt necessities at the time.



1 JUDGE RIVERA: But, you know, the only way to
2 reproduce it is in this way - - -

3 MR. MARINO: No.

4 JUDGE RIVERA: - - - when you have a source code
5 - - - excuse me. The only way to reproduce it is in this
6 way, right?

7 MR. MARINO: That's - - - no, that's not
8 accurate.

9 JUDGE RIVERA: And so we're talking about the
10 reproduction being tangible.

11 MR. MARINO: It - - - that's - - - and that's
12 what it has to be. The reproduction has to be intangible.
13 That's what happened in Agrawal. Agrawal did exactly what
14 - - -

15 JUDGE RIVERA: You say - - - you say there are
16 other ways to reproduce it that fit under the statute.
17 What would that be?

18 MR. MARINO: Printed out.

19 JUDGE RIVERA: And what meaning would that have
20 to someone?

21 MR. MARINO: Because you can touch it, you can
22 see it, you can read it.

23 JUDGE RIVERA: But I - - - no, I get that part of
24 it. But what meaning would it have?

25 MR. MARINO: It's - - -



1 JUDGE RIVERA: How would one use the - - - that
2 source code?

3 MR. MARINO: Oh, I'm sorry, Your Honor. I didn't
4 take your meaning.

5 JUDGE RIVERA: Yeah, yeah. Yeah.

6 MR. MARINO: Because computer source code is
7 human-readable instructions.

8 JUDGE RIVERA: Yes.

9 MR. MARINO: You print it out it will tell you
10 precisely what to do. When Mr. Agrawal was in his office
11 at - - -

12 JUDGE STEIN: Well, but - - - but, no, if you see
13 it on your computer screen it will exactly in the same way
14 tell you exactly what to do, won't it?

15 MR. MARINO: Well, first of all, no, that's not
16 correct.

17 JUDGE FEINMAN: Be capable of being understood by
18 a mind that is versed in computer source code.

19 MR. MARINO: Well, Your Honor, respectfully, if
20 the - - - if the phrase means capable of being understood
21 by the mind I would submit that it is entire - - - entirely
22 superfluous in the statute.

23 JUDGE STEIN: But the point is - - -

24 MR. MARINO: What would an intangible
25 reproduction look like?



1 JUDGE STEIN: But the point is is what - - - what
2 is the purpose of being able to touch it? The purpose is
3 being able to use it isn't it?

4 MR. MARINO: Well, Your Honor, the purpose in the
5 law of larceny as it has developed over the years, the
6 purpose in a statute such as this is that historically only
7 tangible reproductions, only tangible property could be
8 stolen. This is - - -

9 JUDGE STEIN: But that's the whole point is we're
10 not talking about larceny. This statute was created to - -
11 - to fill a loophole that larceny didn't cover.

12 MR. MARINO: Your Honor, I - - -

13 JUDGE STEIN: And so - - -

14 MR. MARINO: I respectfully completely disagree
15 with that. This statute was passed in 1967. It was
16 created after United States v. Bottone made it clear that
17 the National Stolen Property Act did not apply to
18 intangible property. The idea was if someone could steal
19 your photocopies by taking the then nascent technology of a
20 Xerox copy machine and walk out the door with it and not
21 have copy - - - not have stolen it, that was a problem.

22 JUDGE WILSON: So - - -

23 MR. MARINO: That's the - - - that's the gap that
24 this was to fix.

25 JUDGE STEIN: Isn't that what happened here?



1 JUDGE WILSON: If the source code - - - if the
2 source code was printed - - -

3 MR. MARINO: Yes.

4 JUDGE WILSON: - - - you agree this is a problem?

5 MR. MARINO: A hundred percent. That's what
6 happened in Agrawal.

7 JUDGE WILSON: All right. So - - - so hold on.
8 So what if it's printed in 1 point font so that you and I
9 can't read it with our naked eye but we need a magnifying
10 glass to read it?

11 MR. MARINO: I - - - I guess you could - - -

12 JUDGE WILSON: Why is the magnifying glass - - -

13 MR. MARINO: - - - fathom the circumstance - - -

14 JUDGE WILSON: - - - different from the computer?

15 MR. MARINO: A magnifying glass is different from
16 a computer.

17 JUDGE WILSON: Why?

18 MR. MARINO: But Your Honor is positing a
19 scenario in which something is written so small - - -

20 JUDGE WILSON: That's right.

21 MR. MARINO: - - - that it doesn't really - - -
22 it's not really perceptible by the senses. But I would
23 tell you if I hold it close enough to my face I can do
24 exactly what a magnifying glass can do. The problem is - -
25 -

1 JUDGE WILSON: Yeah, you would not be able to do
2 that with 1 point font. You wouldn't.

3 MR. MARINO: I beg your pardon?

4 JUDGE WILSON: You wouldn't be able to do that
5 with a 1 point font. You would not.

6 MR. MARINO: I - - - Your Honor, if - - - if the
7 notion is that the legislature of New York meant nothing
8 when it incorporated that word "tangible" into the statute,
9 I agree with you, it means nothing because Mr. Aleynikov
10 did something that should be punished, right. The - - -
11 the DA knows that this is improper. The Task Force Report
12 could not - - -

13 JUDGE RIVERA: Well, let me ask you this.

14 MR. MARINO: - - - make this clearer.

15 JUDGE RIVERA: Do you - - - do you - - - is it
16 your argument that it's not a reproduction? Put aside
17 tangible for one moment. You just say this is just not
18 even a reproduction?

19 MR. MARINO: It's an intangible reproduction.
20 It's a - - - it's the reproduction of bits and bytes on a
21 computer. These are electrical impulses. I would
22 respectfully submit that there isn't a conceivable chance
23 in - - -

24 JUDGE RIVERA: But - - - but since you say it's a
25 reproduction you do say it's different from what he left at



1 Goldman Sachs, correct?

2 MR. MARINO: It is different. The "it" being
3 what was transferred?

4 JUDGE RIVERA: The code - - - the source code.
5 Where we started, the original source code - - -

6 MR. MARINO: Yeah. Yes.

7 JUDGE RIVERA: - - - on Goldman's computers - - -

8 MR. MARINO: Yes.

9 JUDGE RIVERA: - - - however they - - - they
10 retain it.

11 MR. MARINO: Okay.

12 JUDGE RIVERA: Right, you - - - I asked you if
13 you were taking the position that what your client did here
14 would not be a reproduction of that source code putting
15 side the word tangible in the statute.

16 MR. MARINO: Yeah, it's a - - - yes, it's a - - -
17 yes, it's a reproduction of the source code, a hundred
18 percent.

19 JUDGE RIVERA: Okay. So - - -

20 MR. MARINO: And that's what he did. He made a
21 copy of it.

22 JUDGE RIVERA: So he reproduced it.

23 MR. MARINO: Yes, he did.

24 JUDGE RIVERA: And he didn't reproduce it by
25 merely bringing it up and viewing it on the screen,



1 correct?

2 MR. MARINO: He never brought it up and viewed it
3 on the screen.

4 JUDGE RIVERA: All right.

5 MR. MARINO: He reproduced it by - - -

6 JUDGE RIVERA: Well, we don't - - - okay.

7 MR. MARINO: He reproduced it by digital
8 transfer.

9 JUDGE RIVERA: At some point, he brought it up on
10 the screen. But we don't - - -

11 MR. MARINO: Actually - - -

12 JUDGE RIVERA: I don't need that answer right
13 now.

14 MR. MARINO: I understand.

15 JUDGE RIVERA: But is it your position then that
16 when he saves it and it now is displacing where something
17 else would go it's not a reproduction that at that point
18 becomes tangible?

19 MR. MARINO: It is not tangible property ever.
20 That's what America Online - - -

21 JUDGE STEIN: But if we disagree with you about
22 the definition of tangible then does the fact that it takes
23 up space, physical space on something, that we can say it's
24 located either in Germany at some point in time or in New
25 Jersey at some point in time. Do those things mean that



1 then, you know, it - - - it's tangible?

2 MR. MARINO: Your Honor - - - Your Honor, it
3 doesn't take up space in any sense of that phrase - - -

4 JUDGE STEIN: Well, there's certainly evidence,
5 there's testimony that it does.

6 MR. MARINO: It - - - Navin Kumar testified, Your
7 Honor, that it does not have physical form. Everyone knows
8 what we're talking about. The - - - the - - - you know,
9 the judges of the - - - of the Court of Appeals for the
10 Second Circuit said the following, the computer source code
11 that Sergey Aleynikov transferred was intangible when he
12 took it and it always remained intangible. Why do you
13 think that the White Collar Crime Task Force has
14 recommended these sweeping changes to the statute that
15 would - - - to the larceny law that would get rid of all of
16 this? And earlier Your Honor said this is not a larceny
17 statute. It's not grand larceny. It is a larceny statute
18 beyond peradventure. It's a larceny statute because it
19 exists in Title J. It takes the definitions from Title J.
20 And it is - - - for that reason it's about stealing. What
21 Justice Conviser said in his very thoughtful 72-page
22 opinion on the subject was you don't steal something
23 without actually taking it away. This is this whole notion
24 that while appropriate and deprive are - - - somehow they
25 are - - - you don't have to have a deprivation when you



1 have appropriation.

2 JUDGE STEIN: And what about when you steal
3 somebody's cable services?

4 MR. MARINO: Yes?

5 JUDGE STEIN: Isn't that - - - is that a crime?

6 MR. MARINO: It - - - is it a crime to steal
7 someone's - - -

8 JUDGE STEIN: Yeah, so - - - well, they - - -
9 they have the use of their cable TV subscription or
10 whatever and - - - and you hack into it. And so you're now
11 using it as well, okay. But so are they. So - - -

12 MR. MARINO: That's right. Certainly, it's a
13 crime. Certainly.

14 JUDGE STEIN: Okay. Well, how is this different?

15 MR. MARINO: This - - - this is different because
16 what Mr. Aleynikov did here is make a copy that in no way,
17 shape, or form deprived Goldman Sachs of anything. The - -
18 -

19 JUDGE STEIN: Well, in the same way as the cable
20 user, okay, the cable user still had full access to their
21 cable, okay, but now somebody else does too. And for
22 Goldman that may mean a loss of market share, it may mean a
23 whole bunch of things. So how can you say that they
24 haven't lost anything?

25 MR. MARINO: Because you'd have to prove that



1 what Mr. Aleynikov took in some way, shape, or form did - -
2 - deprived Goldman Sachs of something.

3 JUDGE FAHEY: Well, isn't that - - - isn't that
4 what Kumar's testimony really shows?

5 MR. MARINO: I don't believe so, Your Honor.

6 JUDGE FAHEY: Well, it seemed to me to be the
7 biggest difference between the proof that was offered was
8 his testimony. I thought his testimony was kind of key.
9 Would you agree with that?

10 MR. MARINO: I would. He agreed with every
11 single concept that I proposed to him on cross-examination.
12 I thought he was terrific.

13 JUDGE FAHEY: Well, we'll see if the - - - how
14 the People feel about it. Okay.

15 CHIEF JUDGE DIFIORE: Thank you, Mr. Marino.

16 MR. MARINO: Thank you very much.

17 CHIEF JUDGE DIFIORE: Counsel.

18 MS. ROPER: Thank you, Your Honors. May it
19 please the court, Elizabeth Roper for the People.

20 JUDGE FAHEY: Do me a favor and go to - - - go to
21 that point. Let's stay on that point, on Kumar's
22 testimony.

23 MS. ROPER: Okay. Of course. Navin Kumar
24 testified very clearly that when computer data is saved
25 electronically to a hard drive it physically exists on that

1 hard drive and takes up space. He gave the helpful example
2 or analogy of data that's saved to a compact disk.

3 JUDGE FAHEY: And - - - and Mr. Kumar of course
4 worked for Goldman Sachs.

5 MS. ROPER: He did, and he was one of the - - -

6 JUDGE FAHEY: And he developed a system, the - -
7 - what is it called? - - - OBD is - - - ODD?

8 MS. ROPER: OBB, the Order Book Builder.

9 JUDGE FAHEY: All right. And did he testify, as
10 I recall, that there was - - - there was elements of that
11 that were outside of the open source code and were
12 proprietary to Goldman Sachs?

13 MS. ROPER: Absolutely, the testimony - - -

14 JUDGE FAHEY: And he had personally developed
15 that particular type of source code?

16 MS. ROPER: That's absolutely true.

17 JUDGE FAHEY: Okay. Go ahead.

18 MS. ROPER: Under every common meaning of the
19 word tangible the reproduction of Goldman's code that the
20 defendant created on the German server was tangible. It
21 had physical presence. It took up space. It was capable
22 of being possessed. And it was just as perceptible to
23 touch as it would have been on a piece of paper. The
24 Unlawful Use statute is incredibly clear, and it describes
25 in clear terms precisely what the defendant in this case



1 did. He surreptitiously electronically reproduced material
2 making a physical copy of it so that he could use it later
3 for his own benefit.

4 JUDGE RIVERA: Can you have an intangible
5 reproduction of a source code?

6 MS. ROPER: I'm sorry?

7 JUDGE RIVERA: Which is his position. Can you
8 have an intangible reproduction of a source code?

9 MS. ROPER: In this context, it's hard to think
10 what an intangible reproduction would be. I think in this
11 statute the word tangible emphasizes that in order for a
12 defendant to be criminally liable there needs to be a
13 physical reproduction of the material.

14 JUDGE WILSON: What if you memorized it?

15 MS. ROPER: A defendant would not be liable for
16 mere memorization.

17 JUDGE WILSON: That would be intangible?

18 MS. ROPER: That could be considered an
19 intangible reproduction, absolutely. And that might give
20 rise to civil liability for something like the violation of
21 a confidentiality agreement, but the Unlawful Use statute
22 clearly emphasizes that for criminal liability to attach
23 there needs to be a physical representation or reproduction
24 made. And the statute goes further and specifically
25 enumerates the ways in which a defendant can make a



1 tangible reproduction: Writing, drawing, photographing, or
2 mechanically or electronically reproducing material. And
3 so it explicitly describes exactly what the defendant in
4 this case did. He created a physical copy of this data by
5 electronically reproducing it. Our common sense tells us
6 the same thing. We all - - -

7 JUDGE RIVERA: Well, isn't the physical copy if
8 he had printed it out?

9 MS. ROPER: It - - - it also would have been a
10 physical copy if he had printed it out. To Your Honor's
11 earlier point, it might not have been as useful to him, but
12 in - - - in either circumstance, it would have been
13 physical by virtue of its manifestation on a physical
14 medium, and that's what the statute requires.

15 JUDGE RIVERA: So your argument is it's physical
16 because it's in the hard drive - - - something that one can
17 touch?

18 MS. ROPER: Yes, absolutely. It's - - - it's
19 connected to a physical medium, and that's what the statute
20 contemplates. That's exactly the type of physical
21 existence that the statute requires. This court's holding
22 in Kent also supports the view that digital files can be
23 tangibly reproduced and possessed. In that case, the court
24 was considering whether a defendant knowingly possessed
25 certain digital images, and in conducting that analysis the



1 court referred to the tangibility of the images as their
2 permanent placement on the defendant's hard drive and his
3 ability to access them later. And there's certainly
4 nothing controversial about the notion that a defendant can
5 possess digital files. That's the basis for prosecutions
6 under several statutes. And so here the tangibility of
7 these files was their placement on the German server, the
8 fact that they took up space on that server, and the fact -
9 - - the fact that the defendant could and did go back and
10 access them later.

11 There's also no question that the defendant had
12 the requisite intent in this case. He had the intent to
13 exercise permanent control over the use of the code that he
14 copied, and that's what the statute requires. The
15 defendant took extensive steps to obfuscate what he had
16 done. He copied thousands of proprietary files in the
17 final hours of his last day of work at Goldman. He
18 encrypted those files as he sent them out of the network.
19 He backdated the program that he had run to copy those
20 files. And he erased the history of commands that he had
21 run on his computer. All conduct that was designed to make
22 it unlikely that his copying would ever be discovered.

23 And more importantly, we know that he did use the
24 files. He uploaded them to Teza's servers after he began
25 work there and presented them as his own work product. So



1 there's no question that this defendant had the intent to
2 appropriate the use of that material. He did use it.

3 There's no - - -

4 JUDGE FAHEY: Are - - - are you familiar with
5 this court's case, People v. Kent I think it is?

6 MS. ROPER: Yes, Your Honor.

7 JUDGE FAHEY: Okay. For us to rule in your
8 favor, would we be overruling Kent?

9 MS. ROPER: No, you - - - the ruling would be
10 completely consistent with Kent.

11 JUDGE FAHEY: How so?

12 MS. ROPER: Well, as the Appellate Division held,
13 Kent supports the notion that digital files are tangible
14 and can be possessed. In Kent, the question was whether
15 the defendant knowingly possessed certain files that were
16 present in his internet cache, and so there wasn't
17 necessarily evidence that the defendant had deliberately
18 downloaded and saved those files. There were other files
19 where it was clear that the defendant had deliberately
20 downloaded and saved them. The court noted in holding that
21 the cached files were not knowingly possessed, the court
22 noted that there was precedent in some other jurisdictions
23 where courts found knowing possession just based on the
24 tangibility of the images. And it defined the tangibility
25 of the images as their permanent placement on a defendant's



1 hard drive and his ability to access them later. So the
2 same definition of tangibility applies in this case. These
3 files were permanently present on the German server, and
4 the defendant could and did go back and access them later.

5 CHIEF JUDGE DIFIORE: Counsel, your colleague
6 made several references to the White Collar Task Force
7 report and the conclusions that were drawn. Do you care to
8 address that?

9 MS. ROPER: Yes, Your Honor. What this defendant
10 did should be punishable as the Class B felony of Grand
11 Larceny in the First Degree. We're talking about the
12 misappropriation of millions of dollars - - - hundreds of
13 millions of dollars' worth of materials. And the task
14 force report advocated reforms that would enable us to
15 prosecute it that way. The point wasn't that the Unlawful
16 Use statute or other existing laws aren't applicable. The
17 point of the task force report was that those laws aren't
18 sufficient, that this should be punishable as a Class B
19 felony.

20 JUDGE FAHEY: Well, what - - - what about the
21 argument that an open source code is available worldwide
22 and that the vast majority of information in the open
23 source code was available to the public on the internet,
24 and - - - and so to punish this one person for this thing
25 seems to be like an enormous overreach given the



1 availability of most of this information?

2 MS. ROPER: Your Honor, there simply was no
3 evidence that any of this material was open source
4 material. Just to the contrary, several - - - Navin Kumar
5 and other programmers testified that they had personally
6 developed - - -

7 JUDGE FAHEY: The way I understood their
8 testimony was that parts of it - - - parts of the code - -
9 - you're going to know this better than us, but parts of
10 the code were open source and parts weren't. And that
11 Kumar's testimony may have been helpful to you because it
12 identified those areas of parts that were not open source
13 code.

14 MS. ROPER: In fact, the - - - the words open
15 source did not appear in the testimony at all.

16 JUDGE FAHEY: Okay.

17 MS. ROPER: There was testimony that certain
18 programs, including the programs developed by Mr. Kumar,
19 had used what I think the witnesses called textbook
20 principles that they had learned over the course of years.
21 But that doesn't mean that those materials were open
22 source. That has a specific meaning, and there was simply
23 no evidence that any of this material fit that definition.
24 In fact, it was just to the contrary, and the jury found
25 beyond a reasonable doubt that this was secret scientific



1 material which is defined as secret material that confers a
2 competitive advantage on its owner. So not only was there
3 no evidence of it being open source material, there was
4 evidence affirmatively that it was not open source
5 material.

6 JUDGE FEINMAN: Can - - - can we go on to
7 appropriate and discuss any response you may have to your
8 adversary's argument that in order to appropriate you have
9 to deprive of economic benefit - - -

10 MS. ROPER: Absolutely.

11 JUDGE FEINMAN: - - - deprive the person you're
12 appropriating it from of economic benefit?

13 MS. ROPER: This statute simply does not require
14 an intent to deprive or a deprivation at all. As the court
15 is certainly aware, the intent to appropriate and the
16 intent to deprive are separately defined mens reas under
17 New York's larceny statutes. And the Unlawful Use statute
18 refers exclusively to the intent to appropriate, and it's
19 the intent to appropriate the use of the material, not the
20 material itself. Both of those things underscore the fact
21 that this statute doesn't contemplate any sort deprivation.
22 It's a statute that talks not about the taking of material
23 but the copying of it. And the Legislative Annual
24 introducing this statute explicitly stated that it was
25 intended to cover conduct that would not traditionally be

1 subject to a larceny prosecution because there is no
2 traditional taking.

3 So there's no intent to deprive required here,
4 but the fact is that the evidence did show that Goldman was
5 deprived of something, their exclusive use and possession
6 of this code. Exclusive possession is an important
7 possessory right. That's what the Almeida case recognized.
8 And it's particularly significant where the property at
9 issue is secret - - - secret intellectual property,
10 essentially the entire value of this property rests in its
11 exclusivity. And so while there was no requirement that we
12 show the defendant intended to deprive Goldman of anything,
13 the fact is he did deprive them of something incredibly
14 significant. Your Honors, I see that my light is on, and
15 so if there are no further questions I would just conclude
16 by saying that this is not an awkward or strained
17 application of this statute at all. The defendant's
18 conduct was exactly what the Unlawful Use statute was
19 designed to prohibit, and we respectfully ask that the
20 court affirm the Appellate Division's unanimous decision.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MS. ROPER: Thank you.

23 CHIEF JUDGE DIFIORE: Mr. Marino.

24 MR. MARINO: Thank you very much, Your Honor.

25 Judge Fahey, you asked the question would you have to



1 overrule Kent - - - a hundred percent. Here's what Kent
2 said: "Federal courts have held that for digital images to
3 constitute evidence of knowing possession of child
4 pornography such images much be connected to something
5 tangible, e.g. the hard drive." The entire principle
6 underlying Kent and for that matter underlying Thyroff was
7 exactly this. This is intangible property. The - - - the
8 question was put what would an intangible reproduction look
9 like, and if the answer is I can't think of one that makes
10 the word tangible superfluous in the Unlawful Use statute.
11 So in Thyroff this court well recognized and at great
12 length went through the history of the civil law of
13 conversion and it explained - - - and it did this for this
14 - - - in this exact - - - exact circumstance involving
15 computer information. And it realized that there was no
16 way the traditional tort of conversion would cover that.
17 And the reason - - - and that - - - and the reason for that
18 is plain. For time immemorial conversion has entailed the
19 use of tangible property. So the court says - - - and it's
20 - - - it's really quite interesting. This is what you're
21 being asked to do. You're being asked to do what the court
22 in Thyroff - - -

23 JUDGE RIVERA: Sure, you take the property, you
24 keep it, and you use it, but of course with the source code
25 what he has done is make a copy of it. He - - -



1 MR. MARINO: Yes, and - - -

2 JUDGE RIVERA: In fact, he didn't want anyone to
3 know he made a copy of it.

4 MR. MARINO: Yes, that's - - -

5 JUDGE RIVERA: That's the whole point.

6 MR. MARINO: There's no doubt about that.

7 JUDGE RIVERA: Right?

8 MR. MARINO: In - - -

9 JUDGE RIVERA: Unlike in the - - - in tangible
10 property, the owner knows the property is gone and missing
11 as they say.

12 MR. MARINO: That's right. That's right. And in
13 - - - in Thyroff what happened was Nationwide decided that
14 it was going to take Mr. Thyroff's computer property back.
15 They decided that it was no - - - he was going to - - - no
16 longer going to work for them so they were going to just
17 take it back. And he sued them for conversion, and he won,
18 right? He won. Why did he win? Because the court said
19 and I quote: "We believe the tort of conversion must keep
20 pace with the contemporary realities of widespread computer
21 use." That's not your province with a criminal statute.
22 The Supreme Court of the United States said this last week
23 in Marinello, we are very loath to expand the scope. Is
24 what Mr. Aleynikov saying not plausible? Is it not
25 plausible? Is what Agrawal - - - is what the three learned



1 judges of the United States Court of Appeals for the Second
2 Circuit said in Agrawal that it was intangible property
3 that always stayed tangible even when it was on a hard
4 drive, are they - - - is that implausible? Because under
5 Golb if it's not implausible or if it's not implausible to
6 believe when you say you appropriated something from me you
7 actually stole it? If that's not implausible Mr. Aleynikov
8 must win.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. MARINO: Thank you very much.

11 (Court is adjourned)

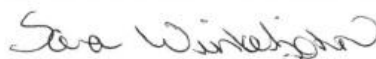
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Sergey Aleynikov, No. 47 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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