

unfair competition/trade secrets lawflash

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New Federal Statute Strengthens Trade Secret Protection

Trade secret protection expanded to include products or services “used in or intended for use in interstate or foreign commerce.”

On December 28, 2012, President Barack Obama signed into law the Theft of Trade Secrets Clarification Act of 2012 (the TTSCA), S. 3642, which broadens the scope of protection for trade secrets to include protection for products or services “used in or intended for use in interstate or foreign commerce.” A related bill, the Foreign and Economic Espionage Penalty Enhancement Act of 2012, which was passed by Congress and is expected to be signed into law soon, will increase penalties for misappropriating trade secrets.

Background

Congress passed the TTSCA in response to the highly anticipated decision from the U.S. Court of Appeals for the Second Circuit in *United States v. Aleynikov*, 676 F.3d 71 (2d Cir. 2012), which many observers felt unreasonably restricted trade secret protection. In that case, Sergey Aleynikov was convicted of stealing a proprietary computer source code associated with his employer’s high-frequency trading system (HFTS) in violation of the Economic Espionage Act of 1996, 18 U.S.C. § 1832 (the EEA).

The indictment charged Aleynikov with “violating the EEA by downloading a trade secret ‘that is related to or included in a product that is produced for or placed in interstate or foreign commerce,’ with the intent to convert such trade secret and to injure its owner, to the economic benefit of anyone other than the owner[.]” *Aleynikov*, 676 F.3d at 74 (citing 18 U.S.C. § 1832(a)). Aleynikov appealed, and the Second Court vacated the conviction by reasoning that Aleynikov’s employer had no intention of selling its HFTS system or licensing it to anyone. Because the HFTS 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. The Second Circuit narrowly interpreted the statute by holding that the EEA applies only to trade secrets that are part of a product that is produced for or placed in interstate commerce, rather than simply used in interstate commerce.

New Law

The TTSCA amended the EEA by replacing the bolded language in the phrase “**or included in a product that is produced for or placed in** interstate or foreign commerce” with “a product or service used in or intended for use in.” The TTSCA now provides for protection of trade secrets relating not only to products but also services, which greatly expands protection. The law also affords protection of proprietary systems, tools, and instruments used by companies internally but not necessarily placed in interstate or foreign commerce.

Once signed into law, the Foreign and Economic Espionage Penalty Enhancement Act of 2012 will increase the maximum fine for economic espionage (i.e., stealing or obtaining, duplicating or conveying, or buying or possessing trade secrets without authorization and with the intent or knowledge that the offense will benefit any foreign government, foreign instrumentality, or foreign agent) committed by individuals (from \$500,000 to \$5 million) or by organizations (from not more than \$10 million to not more than the greater of \$10 million or three times the value of the stolen trade secret to the organization).

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