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CRIMINAL LAW—THEFT OF USE OF COMPUTER SERVICES—*State v. McGraw*, 459 N.E.2d 61 (Ind. App. Ct. 1984).

I. INTRODUCTION

With the current profusion of computers in our society, the state of the law concerning the theft of computer time and services becomes increasingly important. Recently, the Indiana State Court of Appeals Second District faced the issue in *State v. McGraw*.[1] In *McGraw*, the court considered whether the unauthorized use of computer services constituted theft as a matter of law under the Indiana statute.[2] The court held that a theft had occurred.[3]

A jury found Michael McGraw guilty of two counts of theft of computer services in Marion Superior Court, Criminal Division.[4] Prior to sentencing, the trial court granted the defendant's motion to dismiss the two counts of theft because the facts stated did not constitute an offense against the state; thus, the court had no jurisdiction.[5] Additionally, the evidence brought to trial did not constitute such an offense as found in the two counts of theft.[6] Subsequently, the State appealed to the Court of Appeals of Indiana.[7]

The defendant was charged with a number of offenses, of which the two counts of theft have relevance in the appellate level opinion.[8] From January, 1980, until March, 1981, the Indianapolis Department of Planning and Zoning employed McGraw as a computer operator and he used a city computer in his private business of selling NaturSlim, a dietary product.[9] When the city discharged McGraw, he asked a colleague to obtain a print-out of the NaturSlim information

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1. 459 N.E.2d 61 (Ind. App. Ct. 1984).
2. IND. CODE ANN. § 35-43-4-2(a) (Burns 1974 & 1984 Supp.).
3. *McGraw*, 459 N.E.2d at 65.
4. *Id.* at 62.
5. *Id.* at 62-63.
6. *Id.* at 63.
7. *Id.*
8. *Id.* at 62. The two identical counts charged that the defendant "did unlawfully and knowingly exert unauthorized control over property belonging to the City of Indianapolis" and used the computer with the intent to deprive the city of something of value, a portion of the computer's services. *Id.*
9. *Id.* The city leased computer service from Marion County to be used by city departments: the defendant's terminal was in the City-County building. McGraw used the computer for client lists, inventory control, client birthdates, client and potential client

and then remove the data from the computer's memory.[10] Instead of doing so, the colleague informed his supervisor. The investigation that followed revealed McGraw's unauthorized activities, overwhelmingly evidenced by the print-out which consisted of a sheaf of papers four inches to five inches thick, eleven inches wide, and fifteen inches long.[11]

II. ANALYSIS

The appellate court relied heavily on Indiana statutes defining theft and property in its analysis and decision. The legislature defined theft as follows:

> A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.[12]

Further, it defined property as:

> anything of value; and includ[ing] a gain or advantage or anything that might reasonably be regarded as such by the beneficiary; real property, personal property, money, labor, and services; intangibles; commercial instruments; written instruments concerning labor, services, or property; written instruments otherwise of value to the owner, such as a public record, deed, will, credit card, or letter of credit; a signature to a written instrument; extension of credit, trade secrets; contract rights, choses-in-action, and other interests in or claims to wealth; electricity, gas, oil, and water; captured or domestic animals, birds, and fish; food and drink; and human remains.[13]

To reinstate the conviction against the defendant, the appellate court had to find that his actions fell within the statutory definitions of theft and property. McGraw had asserted that under the statutes the charges against him could not stand, basing his argument on four factors.[14] First, he argued that because the theft statute is divided into a conduct portion and an intent portion and the word "use" does not appear in the conduct portion, the unauthorized control must be over the property itself.[15] Second, he asserted that the property statute

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correspondence, and other business materials. Further, he had been reprimanded for selling NaturSlim on city time, a factor in his ultimate dismissal. *Id.* at 62-63.

10. *Id.* at 63.

11. *Id.* The print-out constituted the tangible result of the alleged theft.

12. IND. CODE ANN. § 35-43-4-2(a) (Burns 1974 and 1984 Supp.).

13. IND. CODE ANN. § 35-41-1-2 (Burns 1979) (repealed 1983).

14. *McGraw*, 459 N.E.2d at 63.

15. *Id.* at 63.

does not employ the word "use" as such and that the theft statute, which speaks of control over property, does not include the word "use."[16] Further, McGraw claimed that the term "services" in the property statute applies only in the context of labor.[17] Finally, McGraw stated that his conduct was not specifically prohibited by statute, that the city could use the computer while he did,[18] that the value of the services he used were minimal, and that his activities parallelled personal use of an office phone, calculator, or copy machine.[19] He argued that the city could not claim to have been deprived of use of the computer unless he had overloaded the memory with his personal data, or if he had interfered with the city's use.

Because clearly McGraw knowingly and intentionally used the city's computer for his own personal business use, the issue narrowed to whether the "use" of computer time constitutes property subject to theft.[20] The courts have not widely addressed the issue; thus the Court of Appeals of Indiana faced a case of first impression.[21] Looking to any possible source, the court found that the defendant relied too heavily on common law concepts that no longer apply to modern statutes and that establish much broader definitions of "theft" and "property."[22] The court found only one applicable case within its jurisdiction.[23] Although *Moser v. State*[24] deals with cable television services, it nevertheless indicated that the court defined property more broadly than McGraw.[25] The *Moser* court found that cable television services equalled something of value whether categorized as a service, a signal, or both.[26] In addition, a decade earlier, the appellate court had found in *Helvey v. Wabash County REMC*[27] that electricity may be subject to theft.[28] Both *Moser* and *Helvey* exhibited the willingness of the Court of Appeals of Indiana to interpret the property statute

16. *Id.*
17. *Id.*
18. *Id.* at 63-64.
19. *Id.*
20. *Id.* at 64.
21. *Id.*
22. *Id.* at 64-65.
23. *Id.* at 64.
24. 433 N.E.2d 68 (1982). The defendant was charged with using cable television services without paying for them, an offense covered by IND. CODE ANN. 35-43-5-3(a)(5) (Burns Supp. 1984). *Moser*, 433 N.E.2d at 68 n.1.
25. *Moser*, 433 N.E.2d at 70.
26. *Id.* at 71.
27. 151 Ind. App. 176, 278 N.E.2d 608 (1972), citing IND. CODE ANN. § 35-1-66-3 (Burns 1971).
28. *Helvey*, 151 Ind. App. at 179, 278 N.E.2d at 610.

more broadly than McGraw would have preferred. The court in *McGraw* followed, finding that a theft of property had occurred.[29] The *McGraw* court's interpretation is practical because computers and cable television are found everywhere and protection against the theft of their services becomes an increasingly more important issue.

Several cases in other jurisdictions shed light on the *McGraw* situation and gave support to the *McGraw* court's decision.[30] First, a Texas Court of Criminal Appeals found in *Hancock v. State*[31] that property in a theft could include "all writings of every description, provided such property possesses any ascertainable value."[32] Property subject to theft, therefore, could include the computer services and time that McGraw used without authorization for his personal business gain. Thus, under the Texas statute in *Hancock*, McGraw's actions would constitute theft of property.

Further, such support was found in a more recent Alabama case, *National Surety Corp. v. Applied Systems, Inc.*[33] Allied Systems was charged with conversion of computer programs dealing with the payroll systems of some of its clients.[34] Although the defendants claimed that only *tangible* personal property is subject to the offense of conversion,[35] the court found that case law existed which holds that *intangible* personal property can indeed be the subject of larceny.[36] Additionally, the Alabama court stated that it would be "inconsistent" to find that intangible personal property could be subject to theft and yet not be subject to the offense of conversion.[37] The court's analysis lent support to the Indiana court's decision that intangibles such as the use of computer services were property subject to theft.[38] Further, at least one tangible item had been stolen: the computer print-out of McGraw's customer data.[39] The court, therefore, could find that McGraw subjected both tangible and intangible property to theft.

Further support appears in a recent Virginia Supreme Court deci-

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29. *McGraw*, 459 N.E.2d at 65.

30. *Id.* at 64-65.

31. 402 S.W.2d 906 (TEX. CRIM. APP. 1966). In *Hancock*, an employee of a computer corporation was implicated in the theft of computer programs. *Id.* at 907.

32. *Id.* at 908 quoting TEX. PENAL CODE ANN. § 1418 (Vernon 1974).

33. 418 So.2d 847 (Ala. 1982).

34. *Id.* at 848.

35. *Id.* at 849.

36. *Id.* at 850. See Latham v. State, 56 Ala. App. 234, 320 So.2d 747 (1975); Hancock v. Decker, 379 F.2d 552 (5th Cir. 1967); Annot., 18 A.L.R.3d 1121 (1968).

37. *National Surety Corp.*, 418 So.2d at 850.

38. *McGraw*, 459 N.E.2d at 65.

39. *Id.* at 63.

sion, *Evans v. Commonwealth*.[40] Although the *McGraw* court did not cite *Evans*,[41] the case does bolster the *McGraw* court's position in that it found that the unauthorized taking of a computer print-out of a valuable customer list constituted petit larceny.[42] Although the factual similarities of *McGraw* and *Evans* are not numerous, the *Evans* opinion supports the concept that the unauthorized taking of a computer print-out constitutes theft.

Case law in some jurisdictions exists that would lead to an opposite result from the *McGraw* decision.[43] The cases, however, are based upon more restrictive statutes than the Illinois statute with which the *McGraw* court dealt.[44] In *People v. Weg*,[45] for example, the court found the applicable New York statute[46] to apply only to unauthorized use of equipment offered for use in a commercial setting, such as leasing or hiring.[47] Further, the legislature did not intend the statute to make an employee's unauthorized use of office equipment a criminal offense.[48] Under the New York statute, persons commit a theft of services when they have unauthorized control of another party's business, commercial, or industrial equipment and use the control for their own personal service.[49] In *Weg*, the computer was definitely not commercial or industrial in nature; it belonged to a public school district.[50] Additionally, if "business equipment" included any equipment serving a function for the owner, as the prosecution proposed, all persons who made unauthorized use of their employers' computers, telephones, or typewriters would be commiting a criminal offense.[51] Due to the restricted language and nature of the statute, however, at least some unauthorized use of computer services would be tolerated. The unauthorized use of a computer would not be considered criminal behavior unless the equipment were commercial, industrial, or business

40. — Va. —, 308 S.E.2d 126 (1983).

41. This is most likely due to the fact that the *Evans* case was decided only three months before the *McGraw* opinion was written.

42. — Va. at —, 308 S.E.2d at 129. In *Evans*, two employees of a bank resigned and began working for a competitor, taking with them a print-out belonging to the first bank. The second bank valued the print-out because it contained information concerning the first bank. — Va. at —, 308 S.E.2d at 127-28, 129.

43. *McGraw*, 459 N.E.2d at 64.

44. *Id.* The applicable Indiana statutes do appear to be rather broad.

45. 113 Misc. 2d 1017, 450 N.Y.S.2d 957 (N.Y. Crim. Ct. 1982).

46. N.Y. PENAL LAW § 165.15, subd. 8. (McKinney Supp. 1984).

47. *Weg*, 113 Misc. 2d at 1019-20, 450 N.Y.S.2d at 959.

48. *Id.* at 1020, 450 N.Y.S.2d at 959.

49. N.Y. PENAL LAW § 165.15, subd. 8. (McKinney Supp. 1984).

50. *Weg*, 113 Misc. 2d at 1019, 450 N.Y.S.2d at 959.

51. *Id.* at 1023, 450 N.Y.S.2d at 961.

equipment.[52]

A similar holding is found in *Lund v. Commonwealth*[53] in which the applicable statute defined grand larceny as the taking from another party money or another thing of value of five dollars or more, or the taking from the possession of another, goods and chattels of at least $100 in value.[54] Because criminal statutes must be strictly construed to protect the rights and liberties of citizens, the unauthorized use of computer time cannot be construed as the taking of goods or chattels.[55] "Goods and chattels" imply that something tangible is involved, and the use of a computer is intangible.

III. CONCLUSION

The most recent case law is not definitive as to the taking of computer services. Because computers are becoming more and more commonplace, the problem of takings will become more prevalent. We can infer that judicial indecision invites legislative reform. Statutes applicable to computer services theft are not uniform, nor do they lead to predictable results. Further, because many of the statutes deal with theft in general, the courts face the task of interpreting and applying laws to situations never intended by lawmakers, again leading to non-uniform, unpredictable results. The problems will be alleviated as more states choose to enact specific computer service theft statutes.

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52. N.Y. PENAL LAW § 165.15, subd. 8. (McKinney Supp. 1984).
53. 217 Va. 688, 232 S.E.2d 745 (1977).
54. VA. CODE § 18.1-100 (1950), 1960 VA. ACTS c. 358.
55. *Lund*, 217 Va. at 692, 232 S.E.2d at 748.