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# COPYRIGHTS AND THE NATIONAL STOLEN PROPERTY ACT: IS THE COPYRIGHT INFRINGER A THIEF?

## INTRODUCTION

Criminal copyright infringement<sup>1</sup> has become one of the most pervasive problems in the area of white-collar crime.<sup>2</sup> In response to the concern that the criminal penalties provided by the Copyright Revision Act of 1976 (1976 Act)<sup>3</sup> were too lenient to curb the proliferation of copyright infringement,<sup>4</sup> Congress recently strengthened the laws against such infringement by passing the Piracy and Counterfeiting Amendments Act of 1982 (PCAA).<sup>5</sup> Despite the stiff penalties embodied in these amendments,<sup>6</sup> some prosecutors and courts are not content to rely on criminal copyright laws as the sole statutory means of combatting piracy. Consequently, copyright infringers have been convicted of violating not only the criminal copyright laws, but also

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1. Criminal copyright infringement is defined as any willful infringement of a copyright "for purposes of commercial advantage or private financial gain." 17 U.S.C. § 506(a) (1982). Such infringement is a form of piracy, which is the unauthorized copying of any original commercial product. S. Rep. No. 274, 97th Cong., 1st Sess. 3 (1981) [hereinafter cited as 1981 Senate Report], *reprinted in* 1982 U.S. Code Cong. & Ad. News 127, 129. The sound recording and motion picture industries are those most damaged by this form of piracy. *See id.* at 3-4, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 129-30; *see also* 18 U.S.C. § 2319 (1982) (harshes penalties for infringements involving "sound recordings" and films or "other audiovisual works").

2. 1981 Senate Report, *supra* note 1, at 3-4, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 129-30.

3. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§101-810 (1982))

4. 1981 Senate Report, *supra* note 1, at 6-7, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 132-33.

5. Pub. L. No. 97-180, §§ 2-3, 96 Stat. 91 (1982) (codified at 18 U.S.C. §§ 2318-2319 (1982)).

6. The amendments prescribe a maximum prison term of five years or a fine not to exceed \$250,000, or both, for infringements involving the reproduction or distribution, within a 180-day period, of at least 1,000 illegal copies of a copyrighted sound recording or at least 65 illegal copies of a copyrighted audiovisual work. 18 U.S.C. § 2319(b)(1)(A), (B) (1982). An infringement involving the reproduction or distribution, within a 180-day period, of either 101 to 999 illegal copies of a copyrighted sound recording or 8 to 64 copies of a copyrighted audiovisual work is punishable by a \$250,000 fine or two years in prison, or both. *Id.* § 2319(b)(2). A second or subsequent such offense carries the maximum penalty of five years imprisonment and a \$250,000 fine. *Id.* § 2319(b)(1)(C). All other criminal copyright infringements are punishable by a \$25,000 fine or one year in prison or both. *Id.* § 2319(b)(3).

the National Stolen Property Act (NSPA),<sup>7</sup> which prohibits interstate transportation of certain stolen goods.<sup>8</sup>

To determine whether the NSPA covers copyright infringement, this Note looks first to the language of the NSPA. Part I discusses whether the NSPA covers theft of intangibles, whether statutory copyright comports with traditional notions of property ownership, and whether strict rules of construction should be used to interpret the language of the NSPA. The Note then explores the interplay between the NSPA and the criminal copyright laws, particularly the PCAA, to determine whether the NSPA was intended to encompass copyright infringement. The Note concludes that the NSPA should not be used to combat copyright infringement.

## I. THE PLAIN MEANING OF THE NSPA

### A. *The NSPA's Application to Intangibles*

The NSPA prohibits interstate transportation of "goods, wares or merchandise" worth \$5,000 or more and known to be "stolen, converted or taken by fraud."<sup>9</sup> Whether the statute prohibits interstate transportation of pirated copies of copyrighted material depends on whether copyright infringement constitutes theft or conversion of goods, wares or merchandise.<sup>10</sup>

The first step in analyzing whether copyright infringement constitutes theft of goods is to identify what is taken when a copyright is

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7. 18 U.S.C. § 2314 (1982); *see, e.g.*, *United States v. Gottesman*, No. 81-5663, slip op. at 1639 (11th Cir. Feb. 16, 1984); *United States v. Belmont*, 715 F.2d 459, 461-62 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 1275 (1984), *petition for cert. filed sub nom. Hampshire v. United States*, 52 U.S.L.W. 3704 (U.S. Mar. 19, 1984) (No. 83-1445); *United States v. Gallant*, 570 F. Supp. 303, 314 (S.D.N.Y. 1983). *But see* *United States v. Smith*, 686 F.2d 234, 249 (5th Cir. 1982) (NSPA inapplicable to copyright infringement). The NSPA was applied to copyright infringement prior to the passage of the PCAA in 1982. *See, e.g.*, *United States v. Berkwitz*, 619 F.2d 649, 656 (7th Cir. 1980); *United States v. Whetzel*, 589 F.2d 707, 710 n.10 (D.C. Cir. 1978); *United States v. Atherton*, 561 F.2d 747, 752 (9th Cir. 1977); *United States v. Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), *aff'd in part, rev'd in part and remanded on other grounds*, 572 F.2d 215 (9th Cir. 1978), *cert. denied*, 436 U.S. 904 (1978).

8. 18 U.S.C. § 2314 (1982).

9. *Id.*

10. *See* *United States v. Smith*, 686 F.2d 234, 238-39 (5th Cir. 1982); *United States v. Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), *aff'd in part, rev'd in part and remanded on other grounds*, 572 F.2d 215 (9th Cir. 1978), *cert. denied*, 436 U.S. 904 (1978); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 385 (E.D.N.Y.), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

infringed.<sup>11</sup> Several courts have identified the copyright itself as the object of the infringer's alleged theft.<sup>12</sup> This analysis, however, fails to recognize that though infringement damages the infringed right, it does not transfer the right to the infringer.<sup>13</sup> A criminal that transports pirated works does not transport the "right to produce legitimate [works]."<sup>14</sup> Therefore, whether copyrights themselves are "goods, wares or merchandise" is immaterial to the NSPA's applicability to copyright infringement.

Alternatively, the infringing copies of the copyrighted material may be considered stolen goods under the NSPA.<sup>15</sup> The NSPA is clearly violated when the tangible items transported interstate have been illegally removed from their owner's possession. For example, such a violation occurs when an infringer illegally duplicates copyrighted material onto the copyright owner's paper, film or other material and then transports the illegal copies across state lines.<sup>16</sup> Defining the copies as stolen goods is problematic, however, when the infringer

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11. See, e.g., *United States v. Smith*, 686 F.2d 234, 239 (5th. Cir. 1982) (analysis begins by assuming that copyrights are stolen "goods"); *United States v. Gallant*, 570 F. Supp. 303, 310-11 (S.D.N.Y. 1983) (analysis begins by comparing defendant's and Government's arguments regarding what, if any, "goods" were stolen); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 387 (E.D.N.Y.) (first inquiry is "whether the aggregation of sounds taken in violation of the copyright laws" constitutes stolen goods), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

12. See *United States v. Smith*, 686 F.2d 234, 239-41 (5th. Cir. 1982); *United States v. Atherton*, 561 F.2d 747, 752 (9th Cir. 1977); *United States v. Gallant*, 570 F. Supp. 303, 314 (S.D.N.Y. 1983); cf. *King Bros. Prods. v. RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271, 277 (S.D.N.Y. 1962) (considering whether "literary property," a form of copyright, has been converted); *Italiani v. Metro-Goldwyn-Mayer Corp.*, 45 Cal. App. 2d 464, 466, 114 P.2d 370, 372 (Cal. Dist. Ct. App. 1941) (same).

13. *Pickford Corp. v. De Luxe Labs., Inc.*, 169 F. Supp. 118, 120 (S.D. Cal. 1958); 2 M. Nimmer, *Nimmer on Copyright* § 8.23, at 8-272.9 n.1 (1983).

14. *United States v. Whetzel*, 589 F.2d 707, 710 (D.C. Cir. 1978).

15. See *United States v. Belmont*, 715 F.2d 459, 461-62 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1275 (1984), *petition for cert. filed sub nom. Hampshire v. United States*, 52 U.S.L.W. 3704 (U.S. Mar. 19, 1984) (No. 83-1445); *United States v. Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), *aff'd in part, rev'd in part and remanded on other grounds*, 572 F.2d 215 (9th Cir.), *cert. denied*, 436 U.S. 904 (1978); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 385-86 (E.D.N.Y.), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

16. See *United States v. Bottone*, 365 F.2d 389, 393 (2d Cir.) (dictum), *cert. denied*, 385 U.S. 974 (1966); *United States v. Lester*, 282 F.2d 750, 752, 755 (3d Cir. 1960), *cert. denied*, 364 U.S. 937 (1961); *United States v. Seagraves*, 265 F.2d 876, 878-80 (3d Cir. 1959).

copies onto his own materials.<sup>17</sup> If anything is stolen in such a case, it is only the intangible subject matter of the copyright rather than the tangible copy.<sup>18</sup>

The term "goods, wares or merchandise," however, has rarely been defined to include purely intangible matter.<sup>19</sup> Consequently, some courts, while acknowledging that the infringer has taken only intangible matter, have relied on the tangible nature of the transported copy to find the infringer liable under the NSPA.<sup>20</sup> For example, one court ruled that "the intangible idea protected by the copyright is effectively made tangible by its embodiment upon the tapes and therefore constitutes 'goods, wares, or merchandise' within the meaning of [the NSPA]."<sup>21</sup>

Judicial reluctance to define intangibles as "goods, wares or merchandise" is troublesome. To bring the defendant within the ambit of the NSPA, courts may identify the tangible component of the infringing copy as "stolen."<sup>22</sup> Yet, in determining whether the NSPA's \$5,000 valuation requirement is met, courts are forced to acknowledge that

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17. This situation, in which the infringer legitimately obtains the tangible components of his infringing copies, is the typical factual setting of a case involving the NSPA's application to copyright infringement. *See, e.g.*, *United States v. Smith*, 686 F.2d 234, 243 (5th Cir. 1982); *United States v. Berkwitz*, 619 F.2d 649, 658 (7th Cir. 1980); *United States v. Sam Goody, Inc.*, 506 F.Supp. 380, 388 (E.D.N.Y.), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

18. *See, e.g.*, *United States v. Gottesman*, No. 81-5663, slip op. at 1639 (11th Cir. Feb. 16, 1984) (stolen goods consist of stolen intangible property affixed to legitimately obtained tangible property); *United States v. Berkwitz*, 619 F.2d 649, 658 (7th Cir. 1980) (jury instructed that what was stolen was the "fixation of recorded sounds," not the tangible tape parts); *United States v. Whetzel*, 589 F.2d 707, 710 (D.C. Cir. 1978) (defendants stole the "aggregation of sounds").

19. *See, e.g.*, *United States v. Gottesman*, No. 81-5663, slip op. at 1638 (11th Cir. Feb. 16, 1984); *United States v. Smith*, 686 F.2d 234, 241 (5th Cir. 1982); *United States v. Bottone*, 365 F.2d 389, 393 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966).

20. *See, e.g.*, *United States v. Gottesman*, No. 81-5663, slip op. at 1635, 1638 (11th Cir. Feb. 16, 1984) (intangible idea protected by copyright made tangible by embodiment on tapes); *United States v. Bottone*, 365 F.2d 389, 393 (2d Cir.) (a court would be "hard pressed" to find that "goods" had been stolen when nothing tangible was taken or transported), *cert. denied*, 385 U.S. 974 (1966); *United States v. Sam Goody, Inc.* 506 F. Supp. 380, 388 (E.D.N.Y.) (a stolen intangible component and a lawfully obtained tangible component together constitute a stolen item), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

21. *United States v. Gottesman*, No. 81-5663., slip op. at 1638 (11th Cir. Feb. 16, 1984).

22. *See supra* note 15 and accompanying text.

the same tangible component is not "stolen."<sup>23</sup> Furthermore, requiring the existence of a tangible copy to find a violation of the NSPA precludes use of the statute to convict an infringer who memorizes legally-protected information and then waits until after he crosses a state line to write it down.<sup>24</sup> The same infringer would be liable under the NSPA if he wrote the information down just before he crossed the state boundary.<sup>25</sup> Therefore, reluctance to define intangibles as "goods, wares or merchandise" under the NSPA engenders inconsistent reasoning and disparate results.

These problems can be avoided simply by finding that intangibles can be "goods, wares or merchandise" under the NSPA.<sup>26</sup> The commonly-accepted judicial interpretation of the NSPA's "goods, wares or merchandise" is "a general and comprehensive designation of such personal property or chattels as are ordinarily a subject of commerce."<sup>27</sup> Property is normally defined to include intangibles,<sup>28</sup> and

23. See *United States v. Gottesman*, No. 81-5663, slip op. at 1639 (11th Cir. Feb. 16, 1984); *United States v. Belmont*, 715 F.2d 459, 462 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1275 (1984), *petition for cert. filed sub nom. Hampshire v. United States*, 52 U.S.L.W. 3704 (U.S. Mar. 19, 1984) (No. 83-1445); *United States v. Berkowitz*, 619 F.2d 649, 656-58 (7th Cir. 1980).

24. *United States v. Bottone*, 365 F.2d 389, 393 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); M. Epstein, *Modern Intellectual Property* 59 (unpublished manuscript 1983) (available in the files of *Fordham Law Review*); see *United States v. Smith*, 686 F.2d 234, 241 n.10 (5th Cir. 1982) (quoting *Bottone*, 365 F.2d at 393); *United States v. Gallant*, 570 F. Supp. 303, 312 n.13 (S.D.N.Y. 1983) (same).

25. *United States v. Gallant*, 570 F. Supp. 303, 312 n.13 (S.D.N.Y. 1983); M. Epstein, *supra* note 24, at 59-60.

26. An American Bar Association Subcommittee has recommended that Congress amend the NSPA to cover theft of trade secrets regardless of whether the tangible item embodying the trade secret is taken. Subcommittee B, A.B.A. Section of Patent, Trademark and Copyright Law, *Establishment of Federal Criminal Statute on Interstate Transportation of Misappropriated Trade Secrets*, 1971 Comm. Repts. 217, 219. Some states prohibit theft of a trade secret only if it is embodied in a tangible form; other states cover theft of a trade secret even if it is in a purely intangible form. Compare N.Y. Penal Law § 165.07 (McKinney 1975) (requiring making of a "tangible reproduction or representation" to constitute unlawful use of a trade secret) with N.H. Rev. Stat. Ann. § 637:2, :3 (1974), (requiring only "unauthorized control" to constitute theft of a trade secret and therefore covering theft of purely intangible matter).

27. *United States v. Seagraves*, 265 F.2d 876, 880 (3d Cir. 1959); see *United States v. Smith*, 686 F.2d 234, 240-41 (5th Cir. 1982) (quoting *Seagraves*, 265 F.2d at 880); *United States v. Greenwald*, 479 F.2d 320, 322 (6th Cir.), *cert. denied*, 414 U.S. 854 (1973) (same); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 388 (E.D.N.Y.) (same), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

28. *Computing Scale Co. v. Toledo Computing Scale Co.*, 279 F. 648, 671 (7th Cir. 1921), *cert. denied*, 257 U.S. 657 (1922); *Black's Law Dictionary* 1095 (5th ed. 1979); R. Brown, *The Law of Personal Property* § 1.7, at 11 (3d ed. 1975); see

intangibles may be ordinary subjects of commerce.<sup>29</sup> Therefore, whether an item is tangible should not dictate whether it constitutes "goods, wares or merchandise" under the NSPA.<sup>30</sup>

The NSPA's application to intangible matter, however, is not determined solely by the meaning of "goods, wares or merchandise."<sup>31</sup> The statute applies only to property that can be "stolen, converted or taken by fraud."<sup>32</sup> Those terms, in the context of the NSPA, denote all forms of wrongful taking that are aimed at depriving an owner of the rights and benefits of property ownership.<sup>33</sup> Therefore, assuming it is the subject of ownership, and is capable of being taken from its owner, an intangible may be stolen or converted within the meaning of the NSPA.

### B. Copyrights Distinguished From Ownership of Copyrighted Material

The NSPA protects the rights associated with property ownership.<sup>34</sup> Consequently, whether copyright infringement is covered by the

Waring v. Dunlea, 26 F. Supp. 338, 340 (E.D.N.C. 1939); cf. Jones v. Corbyn, 186 F.2d 450, 452 (10th Cir. 1950) (defining property within tax laws).

29. United States v. Smith, 686 F.2d 234, 241 (5th Cir. 1982) (item such as a copyright may be commonly bought and sold); *In re Vericker*, 446 F.2d 244, 248 (2d Cir. 1971) (secret manufacturing procedures are ordinary subjects of sale); *Painton & Co. v. Bourns, Inc.*, 442 F.2d 216, 223 (2d Cir. 1971) (recognizing validity of licensing agreements involving trade secrets); 12 R. Milgrim, *Business Organizations: Trade Secrets* § 1.06, at 1-27 (1983) (trade secrets considered licensed property).

30. See *United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 388 (E.D.N.Y.) ("Judicial construction of [the NSPA] has consistently focused primarily on the commercial nature of the items involved, with consideration of the tangible or intangible nature of the items a secondary concern."), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

31. Several courts, in addition to investigating whether the statutory phrase "goods, wares or merchandise" precludes the NSPA's application to intangible, intellectual material, have conducted separate investigations into whether the phrase "stolen, converted or taken by fraud" bars such application. See, e.g., *United States v. Smith*, 686 F.2d 234, 242 (5th Cir. 1982) (only tangibles can be "stolen, converted or taken by fraud," therefore the NSPA does not cover copyright infringement); *United States v. Gallant*, 570 F. Supp. 303, 312 & n.13 (S.D.N.Y. 1983) (intangibles can be stolen); *United States v. Sam Goody, Inc.*, 506 F.Supp. 380, 390-91 (E.D.N.Y.) ("stolen, converted or taken by fraud" covers all forms of wrongful taking), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

32. 18 U.S.C. § 2314 (1982). See *supra* note 31.

33. See *United States v. McClain*, 545 F.2d 988, 995 n.6 (5th Cir. 1977); *United States v. Handler*, 142 F.2d 351, 353 (2d Cir.), *cert. denied*, 323 U.S. 741 (1944); *Crabb v. Zerbst*, 99 F.2d 562, 565 (5th Cir. 1938); cf. *United States v. Turley*, 352 U.S. 407, 417 (1957) (In the context of the National Motor Vehicle Theft Act, "stolen" refers to "all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership.").

34. See *supra* note 32 and accompanying text.

NSPA depends on whether the owner of a copyright owns the copyrighted work.<sup>35</sup> Central to the concept of ownership is the right to exclude others from that which is owned.<sup>36</sup> This right of exclusion is so essential to ownership that the law generally does not recognize a right of ownership in things such as light, air or wild animals, which are not amenable to exclusive control.<sup>37</sup> The underlying principles and functional characteristics of statutory copyright indicate that it does not provide the copyright owner with the kind of exclusive control over the copyrighted material that undergirds property ownership.

Copyright protection has historically been provided by both state and federal law.<sup>38</sup> State copyright law is generally referred to as "common-law" copyright; federal copyright law is generally described as statutory copyright.<sup>39</sup> Traditionally, common-law copyright protected unpublished works while statutory copyright protected published works.<sup>40</sup> Although the Copyright Revision Act of 1976 has virtually pre-empted common-law copyright,<sup>41</sup> a comparison

35. One court that applied the NSPA to copyright infringement distinguished ownership rights from the rights afforded by a copyright. Nonetheless, the court stated that both types are equally worthy of protection. *See United States v. Belmont*, 715 F.2d 459, 461 (9th Cir. 1983) ("The rights of copyright owners in their protected property are just as deserving of protection . . . as are the ownership interests of those who own other types of property."), *cert. denied*, 104 S. Ct. 1275 (1984).

36. *See International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting); *United States v. Lutz*, 295 F.2d 736, 740 (5th Cir. 1961); *Washington Medical Center, Inc. v. United States*, 545 F.2d 116, 125 (Ct. Cl. 1976) (quoting 73 C.J.S. Property § 1, at 148 (1951)), *cert. denied*, 434 U.S. 902 (1977); *Desny v. Wilder*, 46 Cal. 2d 715, 731, 299 P.2d 257, 265 (1956) (en banc); *Millar v. Taylor*, 98 Eng. Rep. 201, 233 (K.B. 1769); R. Brown, *supra* note 28, § 1.6, at 8; Bhalla, *Legal Analysis of the Right of Property*, 10 *Anglo-Am. L. Rev.* 180, 183-84 (1981).

37. R. Brown, *supra* note 28, § 1.6, at 8; *see Missouri v. Holland*, 252 U.S. 416, 434 (wild birds not owned by anyone because not possessed by anyone); *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (air is free for common use).

38. S. Rep. No. 473, 94th Cong., 1st Sess. 112 (1975) [hereinafter cited as 1975 Senate Report]; N. Boorstyn, *Copyright Law* § 1:1, at 2 (1981); 1 M. Nimmer, *supra* note 13, § 1.01[A], at 1-3 (1983).

39. N. Boorstyn, *supra* note 38, § 1:3, at 4; 1 M. Nimmer, *supra* note 13, § 1.01[B], at 1-8.

40. 1975 Senate Report, *supra* note 38, at 112; N. Boorstyn, *supra* note 38, § 1:1, at 2; 1 M. Nimmer, *supra* note 13, § 1.01[A], at 1-3. The states have concurrent power to enact copyright laws that do not conflict with federal legislation. N. Boorstyn, *supra* note 38, § 1:3, at 4; *see Goldstein v. California*, 412 U.S. 546, 571 (1973); 1 M. Nimmer, *supra* note 13, § 1.01[A], at 1-6.

41. In 1978, the effective date of the 1976 Act, common-law copyright protection of unpublished works was pre-empted by statutory copyright. Copyright Revision



of common-law and statutory copyright is relevant because it indicates that the latter is not a form of property ownership.

Common-law copyright is based on the principle that the author of an intellectual work is entitled to the opportunity to profit from his labor.<sup>42</sup> The author is deprived of this opportunity if others are allowed to publicize the contents of his work before he publishes it.<sup>43</sup> Therefore, works protected by common-law copyright are recognized as a form of personal property<sup>44</sup> and cannot be published or used in any manner without the owner's consent.<sup>45</sup> Common-law copyright

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Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2572 (1976) (codified as amended at 17 U.S.C. § 301 (1982)); see 1975 Senate Report, *supra* note 38, at 114 ("The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law."); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 129-33 (1976) [hereinafter cited as 1976 House Report], *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5745-49 (federal preemption of common-law copyright). Works that are not embodied in a tangible medium, such as "choreography that has never been filmed or notated, an extemporaneous speech, [or] 'original works of authorship' communicated solely through conversations," are outside the scope of federal copyright law and therefore, continue to be protected by common-law copyright. 1975 Senate Report, *supra* note 38, at 114-15; see *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 349, 244 N.E.2d 250, 256, 296 N.Y.S.2d 771, 779 (1968) (common-law copyright might extend to certain kinds of spoken dialogue).

42. See *Wheaton v. Peters*, 33 U.S. 498, 554, 8 Pet. 591, 657 (1834); *Werckmeister v. American Lithographic Co.*, 134 F. 321, 324-25 (2d Cir. 1904); *Bevan v. CBS*, 329 F. Supp. 601, 608 (S.D.N.Y. 1971); 1 M. Nimmer, *supra* note 13, § 2.02, at 2-22.

43. *Millar v. Taylor*, 98 Eng. Rep. 201, 232 (K.B. 1769); see *Harper & Row, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983). Mere publicity concerning the contents of an unpublished work, as opposed to publication of the work, can diminish the financial return upon publication. *Harper & Row*, 557 F. Supp. at 1072 n.11. The author of an unpublished work, therefore, has a financial interest in preventing not only the unauthorized copying of his work, but any unauthorized use of the work that might prematurely publicize its contents. This financial interest may partially explain why common-law copyright, which protects unpublished works, prohibits any unauthorized use of the copyrighted work, see *infra* note 45 and accompanying text, while statutory copyright, which has historically protected published works, see *supra* note 40 and accompanying text, affords the copyright owner narrower rights in regulating use of the copyrighted work. See *infra* notes 51-57 and accompanying text.

44. *Palmer v. De Witt*, 47 N.Y. 532, 539 (1872) ("Until published, the work is the private property of the author . . ."); *Jenkins v. News Syndicate Co.*, 128 Misc. 284, 285, 219 N.Y.S. 196, 198 (Sup. Ct. 1926) ("[L]iterary, dramatic and musical creations among those which are recognized as property by the common law."); *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 439, 194 A. 631, 634 (1937) ("At common law, rights in a literary or artistic work were recognized on substantially the same basis as title to other property.").

45. *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299 (1907) ("[T]he property of the author or painter in his intellectual creation is absolute until he

protection is also based on the principle that an author has a right to keep his works private.<sup>46</sup> This protection, if not terminated by publication,<sup>47</sup> is perpetual.<sup>48</sup>

Trade secrets, like works protected by common-law copyright, are widely accepted as a form of property.<sup>49</sup> For an idea to receive protection as a trade secret, its owner must take reasonable measures to maintain its secrecy.<sup>50</sup> Thus, the rights of both trade secret and com-

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voluntarily parts with the same."); *Bobbs-Merrill Co. v. Straus*, 147 F. 15, 18 (2d Cir. 1906) ("The property of an author in his intellectual work production is absolute until he voluntarily parts with all or some of his rights.") (quoting E. Drone, *The Law of Property in Intellectual Productions* 8, 102-03 (1879)), *aff'd*, 210 U.S. 339 (1908); *McCarter v. Barton Music. Corp.*, 115 U.S.P.Q. 299, 299 (N.Y. Sup. Ct. 1957) (right to prevent publication or use of an unpublished musical composition recognized at common law); *Berry v. Hoffman*, 125 Pa. Super. 261, 264-65, 189 A. 516, 518 (1937) ("The property rights in a literary production before publication are exclusively in the author."). *But see* 2 M. Nimmer, *supra* note 13, § 8.23, at 8-273 (Though the rights afforded by common-law copyright are broader than those furnished by statutory copyright, case law does not support the conclusion that the former protects against all unauthorized uses of its subject matter.).

46. *Estate of Hemingway v. Random House Inc.*, 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255, 296 N.Y.S.2d 771, 778 (1968); 1 M. Nimmer, *supra* note 13, § 1.10[B], at 1-70; *see Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981) (author's freedom to speak or remain silent is an end in itself), *cert. denied*, 455 U.S. 948 (1982).

47. *Wheaton v. Peters*, 33 U.S. 498, 554, 8 Pet. 591, 657-58 (1834); *Hirshon v. United Artists Corp.*, 243 F.2d 640, 644 (D.C. Cir. 1957); N. Boorstyn, *supra* note 38, 1:4, at 5; 2 M. Nimmer, *supra* note 13, § 9.01, at 9-2 n.1.

48. N. Boorstyn, *supra* note 38, § 1:4, at 4-5; *see American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299 (1907); *Bobbs-Merrill Co. v. Straus*, 147 F. 15, 18 (2d Cir. 1906), *aff'd*, 210 U.S. 339 (1908); 1975 Senate Report, *supra* note 38, at 113.

49. *See* 12 R. Milgrim, *supra* note 29, § 1.01[2], at 1-7; *see, e.g., Scharmer v. Carrollton Mfg. Co.*, 525 F.2d 95, 99 (6th Cir. 1975); *Underwater Storage, Inc. v. United States Rubber Co.*, 371 F.2d 950, 954 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 911 (1967); *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52, 56-57 (9th Cir.), *cert. denied*, 363 U.S. 830 (1960); *Ferroline Corp. v. General Aniline & Film Corp.*, 207 F.2d 912, 922 (7th Cir. 1953), *cert. denied*, 347 U.S. 953 (1954); *Aktiebolaget Bofors v. United States*, 194 F.2d 145, 147 (D.C. Cir. 1951). *But see* E.I. DuPont deNemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917) (trade secrets cannot accurately be described as property); *Northern Petrochem Co. v. Tomlinson*, 484 F.2d 1057, 1060 (7th Cir. 1973) (tort law, not property law, is the basis for a trade secret misappropriation action). Many states have recently amended their criminal laws to designate trade secrets as property that may be the subject of larceny. *See, e.g., Ark. Stat. Ann. §§ 41-2201(6) & Commentary*, 41-2207 (1977); *Colo. Rev. Stat. § 18-4-408* (1973); *N.H. Rev. Stat. Ann. § 637:2* (1974); *see also* M. Epstein, *supra* note 24, at 62-64 (compilation of state criminal laws dealing with theft of trade secrets).

50. *Greenberg v. Croydon Plastics Co.*, 378 F. Supp. 806, 812 (E.D. Pa. 1974); *see E.I. DuPont deNemours & Co. v. Christopher*, 431 F.2d. 1012, 1017 (5th Cir.

mon-law copyright owners include the right to exclude others from protected property. Therefore, both trade secrets and common-law copyright comport with traditional notions of property ownership.

By contrast, statutory copyright, though it provides the copyright owner with many exclusive rights regarding the use of the copyrighted work,<sup>51</sup> is not the equivalent of property ownership. Historically, statutory copyright applied to published works.<sup>52</sup> Because publication affords the author an opportunity to profit from his labor, the need to protect his work as personal property is less compelling after than before publication.<sup>53</sup> Furthermore, after publication, the author's rights to his work must accommodate the property rights acquired by the purchasers of the published copies of the work.<sup>54</sup> For example, though an author's financial interests are injured when a purchaser lends the purchased copy to friends, the author is unable to prevent such lending.<sup>55</sup> Distinct from purchasers' property rights, the public

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1970), *cert. denied*, 400 U.S. 1024 (1971); *Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp.*, 401 F. Supp. 1102, 1117 (E.D. Mich. 1975); 12 R. Milgrim, *supra* note 29, § 2.04, at 2-26 to 2-29.

51. Statutory copyright provides the copyright owner with five fundamental, exclusive rights concerning the copyrighted work: (1) right to reproduce the work, (2) right to prepare derivative works based on the copyrighted work, (3) right to distribute copies of the work, (4) right to publicly perform the work, and (5) right to publicly display the work. 17 U.S.C. § 106 (1982).

52. See 1975 Senate Report, *supra* note 38, at 112; N. Boorstyn, *supra* note 38, § 1:3.

53. See *Wheaton v. Peters*, 33 U.S. 498, 554, 8 Pet. 591, 657 (1834) (argument that a literary man is entitled to the product of his labor is answered by the fact that he realizes that product upon his first publication); *Millar v. Taylor*, 98 Eng. Rep. 201, 232 (K.B. 1769) (an author is not "totally robbed" of the profit of his labor by the unauthorized publication of his published manuscript, as he is when his unpublished manuscript is surreptitiously published). Whether one has received the opportunity to profit by his labor is an important consideration in determining whether the law should recognize the product of that labor as his property. See *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 251 (1905) ("[I]nformation will not become public property until the plaintiff has gained its reward."); *Associated Press v. International News Serv.*, 245 F. 244, 250 (2d Cir. 1917) ("[H]ere it is reasonable and just that . . . plaintiff . . . should have a property right in its news until the reasonable reward . . . is received . . ."), *aff'd*, 248 U.S. 215 (1918).

54. The purchaser of a copy of a published work is not subject to an implied contract with the author restricting the use of the work. See *Wheaton v. Peters*, 33 U.S. 498, 554, 8 Pet. 591, 657 (1834).

55. 17 U.S.C. § 109 (1982). The legislative history of the 1976 Act suggests that the Act was not aimed at, nor can it control, certain private uses of copyrighted products. See *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 Before Subcomm. No. 3 of House Judiciary Comm.*, 92d Cong., 1st Sess. 22-23 (1971) (testimony of Barbara Ringer, Assistant Register of Copyrights) (unable to control home taping of broadcasted music); H.R. Rep. No. 487, 92d Cong., 1st Sess. 7 (1971) (not aimed at home use).

acquires a right to benefit from the free dissemination of the author's ideas,<sup>56</sup> which on publication are no longer protected by the author's right to keep his thoughts private.<sup>57</sup> Thus, the author's right to exercise exclusive control over his published work is outweighed by the purchasers' property rights and the public's right to free dissemination of ideas.

The constitutional provision that empowers Congress to enact copyright laws reflects the predominance of the public's rights over those of the author.<sup>58</sup> Both Congress<sup>59</sup> and the Supreme Court<sup>60</sup> have determined that the constitutional purpose underlying Congress' authority to promulgate copyright statutes is not to reward authors. Instead, it

56. See *Sony Corp. v. Universal City Studios, Inc.*, 104 S. Ct. 774, 782 (1984); *Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Chafee, *Reflections on the Law of Copyright: I*, 45 Colum. L. Rev. 503, 511 (1945); Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569, 1571 (1963); cf. *Sidis v. F-R Publications Corp.*, 113 F.2d 806, 809 (2d Cir.) (public interest in obtaining information overrides the defendant's right to privacy), *cert. denied*, 311 U.S. 711 (1940).

57. See 1 M. Nimmer, *supra* note 13, § 4.03, at 4-15 to 4-16.

58. The Constitution empowers Congress to "[secure] . . . to Authors . . . the exclusive Right to their . . . Writings." U.S. Const. art. I, § 8, cl. 8. The use of this legislative power, however, must "promote the Progress of Science and useful Arts." *Id.* Therefore, Congress can furnish authors with exclusive rights only for "limited Times." *Id.* The "promotion" clause of this provision is often cited in support of the "fair use" limitation on copyright. See, e.g., *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Berlin v. E.C. Publications*, 329 F.2d 541, 543-44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); see also Note, *Parody and Copyright Infringement*, 56 Colum. L. Rev. 585, 595 (1956) (doctrine has constitutional basis). The "limited times" limitation mandates that statutory copyright "not enjoy a property status fully comparable to other forms of personalty." 1 M. Nimmer, *supra* note 13, § 1.03[A], at 1-30.2 n.6. Congress cited the "limited times" provision as an important factor in its decision to replace common-law copyright protection of unpublished works with federal statutory protection, 1975 Senate Report, *supra* note 38, at 113, the latter being a more limited right than its common-law counterpart. See *infra* note 62 and accompanying text. Therefore, it is apparent that these constitutional provisions undergird a statutory copyright that furnishes the author with less than exclusive rights to his work.

59. See H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909) ("[C]opyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served . . . by securing to authors for limited periods the exclusive rights to their writings.") [hereinafter cited as 1909 House Report].

60. *Sony Corp. v. Universal City Studios, Inc.*, 104 S. Ct. 774, 782 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); see *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

is to provide an incentive for artistic endeavors that will promote the public good.<sup>61</sup>

The nature of statutory copyright reflects its purpose. Although common-law copyright is a traditional property right, federal copyright statutes create a more restricted right.<sup>62</sup> This right has a fixed duration and contains numerous limitations that are designed to benefit the public.<sup>63</sup> These limitations deprive the copyright owner of exclusive control of the copyrighted material.<sup>64</sup> For example, broadcasters cannot prevent copying of their copyrighted broadcasts for

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61. *Sony Corp. v. Universal City Studios, Inc.*, 104 S. Ct. 774, 782 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1974); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); see 1909 House Report, *supra* note 59, at 7.

62. See H.R. Rep. No. 7083, 59th Cong., 2d Sess. 3 (1907) ("The laws passed under the Constitution do not extend the natural right, but limit it. Constitutional provisions regarding copyrights and laws passed thereunder do not grant property rights, but limit them."). A Senate Judiciary Committee report introducing the provision in the 1976 Act that prescribes the preemption of common-law copyright protection for unpublished works by statutory copyright states: "The preemption . . . is complete . . . even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been." 1975 Senate Report, *supra* note 38, at 115. This report also states that, due to preemption, "authors will be giving up [their] perpetual, unlimited exclusive common law rights." *Id.* at 118. The use of the word "unlimited" is significant. The word does not refer to the unlimited duration of common-law protections which is conveyed by the word "perpetual." Instead, it draws a contrast between the statutory copyright, which is explicitly subject to numerous "limitations," 17 U.S.C. §§ 107-12 (1982), see *infra* note 64 and accompanying text, and the common-law copyright, which is not so limited, see *supra* notes 44-48 and accompanying text.

63. 17 U.S.C. § 302 (1982) (in general, life of the author plus fifty years for works created on or after January 1, 1978, the effective date of the 1976 Act).

64. See, e.g., *id.* § 107 (allowing the "fair use" of a copyrighted work for purposes such as criticism, teaching or research); *id.* § 110 (allowing the performance or display of a copyrighted work, for certain non-commercial purposes, by educational, governmental or religious institutions); *id.* § 111 (allowing, under certain circumstances, the unlicensed retransmission of copyrighted broadcast signals and providing a "compulsory licensing" system for the retransmission of copyrighted broadcast signals by cable television companies); *id.* § 115 (providing a "compulsory licensing" system whereby persons may obtain a license to make and distribute phonorecords of nondramatic musical works that have been distributed to the public).

The "fair use" doctrine is closely related to the constitutional aim of promoting the public good through the advancement of arts and sciences. See *supra* note 57 and accompanying text. The compulsory licensing of published musical works is intended to avoid the monopolization of those works, *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392, 395-96 (3d Cir.), *cert. denied*, 421 U.S. 1012 (1975); see *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 269-70 (2d Cir. 1959); H.R. Rep. No. 83, 90th Cong., 1st Sess. 66 (1967) [hereinafter cited as 1967 House Report], and thus provide the public with reasonably priced, high quality records and tapes. See 1967 House Report, *supra*, at 66. The educational

later viewing at home,<sup>65</sup> authors cannot prevent the reproduction of their copyrighted works for purposes of research or commentary,<sup>66</sup> and composers, once they have released a song to the public, cannot prevent recording companies from obtaining a "compulsory license" to produce that song.<sup>67</sup> Thus, the copyright owner, while possessing a valuable statutory right that resembles ownership of the copyrighted work, does not possess the right of exclusion that distinguishes property ownership from other interests. Statutorily-copyrighted material, therefore, is not the personal property of the copyright owner.<sup>68</sup> Consequently, the NSPA, which protects the rights associated with property ownership, does not apply to copyright infringement.

### C. *Strict Construction of the NSPA*

This interpretation of the NSPA, which restricts the statute's coverage to crimes that violate the right of property ownership, is consistent with the rule that criminal statutes should be narrowly construed in favor of the criminal defendant.<sup>69</sup> This rule is designed to prevent courts from usurping the legislature's exclusive right to define, and

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broadcasting limitation, defined in 17 U.S.C. § 110(2) (1982), which allows the unauthorized performance or broadcasting of nondramatic literary or musical works for certain educational purposes, is designed, *inter alia*, to provide adult education, combat illiteracy and promote cultural interests. See 1967 House Report, *supra*, at 43.

65. *Sony Corp. v. Universal City Studios, Inc.*, 104 S. Ct. 774, 796 (1984) (Congress did not make it illegal for television viewers to record broadcasts for "time-shifting" purposes).

66. See *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1362-63 (Ct. Cl. 1973), *aff'd per curiam by an equally divided Court*, 420 U.S. 376 (1975); 17 U.S.C. § 107 (1982).

67. 17 U.S.C. § 115(a) (1982).

68. Property, in this context, refers to things that are subject to the right of ownership. See *Black's Law Dictionary* 1095 (5th ed. 1979); R. Brown, *supra* note 28, § 1.5, at 6. Thus, whether the owner of a copyright owns the copyrighted work is essentially the same inquiry as whether the copyrighted work is the personal property of the copyright owner.

69. See *Williams v. United States*, 458 U.S. 279, 290 (1982); *United States v. Bass*, 404 U.S. 336, 347 (1971); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *United States v. Scharton*, 285 U.S. 518, 521-22 (1932); *McBoyle v. United States*, 283 U.S. 25, 26-27 (1931); *Prussian v. United States*, 282 U.S. 675, 677 (1931); 3 C. Sands, *Sutherland Statutory Construction* § 59.03 (4th ed. 1974). As a felony provision with harsh penalties, see 18 U.S.C. § 2314 (1982) (maximum penalty of ten years in prison and a \$10,000 fine), the NSPA warrants very narrow interpretation. See 3 C. Sands, *supra*, § 59.03, at 7-8.

prescribe punishment for, criminal conduct.<sup>70</sup> Admittedly, broad interpretation of the NSPA to include copyright infringement would not define as illegal what Congress has not already designated as such. Such interpretation, however, renders the copyright infringer susceptible to penalties far greater than those Congress articulated.<sup>71</sup> A broad judicial interpretation of the NSPA, therefore, substantially encroaches upon Congress' penalty-prescribing prerogative. Furthermore, due process demands that statutes provide unequivocal notice not only of what conduct is illegal, but also of what punishment such illegality elicits.<sup>72</sup> Therefore, even though the copyright infringer knowingly commits a crime, it is unfair to subject him to penalties that are either devoid of congressional approval or beyond the scope of statutory notice.

Strict construction does not require the narrowest construction that a statute's language permits.<sup>73</sup> Moreover, "general language should not be restricted by the courts to the particularized application which motivated its adoption."<sup>74</sup> Thus, the fact that Congress may not have envisioned interstate transportation of intangible, stolen property as a serious criminal problem when the NSPA was enacted should not necessarily exclude intangibles from the NSPA's current embrace. The law should retain the flexibility necessary to deal with criminals who invent new ways of committing crimes.<sup>75</sup>

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70. See *Fasulo v. United States*, 272 U.S. 620, 628 (1926); *Krichman v. United States*, 256 U.S. 363, 367-68 (1921); *Merrill v. United States*, 338 F.2d 763, 770 (5th Cir. 1964); 3 C. Sands, *supra* note 69, § 59.03, at 8.

71. The maximum penalty for criminal copyright infringement is five years in prison and a \$250,000 fine. See *supra* note 6. The NSPA, on the other hand, provides a maximum penalty of 10 years in prison and a \$10,000 fine. See *supra* note 69. Thus, conviction under both the copyright laws and the NSPA could result in a 15 year prison sentence and a \$260,000 fine. Furthermore, conviction under the NSPA is a predicate offense to conviction under the Racketeer Influenced a Corrupt Organizations Act (RICO) provisions, 18 U.S.C. §§ 1961-1968 (1982), see *id.* § 1961; *United States v. Gottesman*, No. 81-5663, slip op. at 1639-40 (11th Cir. Feb. 16, 1984); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 391 (E.D.N.Y.), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982), which prescribe a maximum prison sentence of 20 years, 18 U.S.C. § 1963 (1982).

72. W. Lafave & A. Scott, *Criminal Law* § 11, at 83-84 (1972); see *United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Evans*, 333 U.S. 483, 494 (1948); 3 C. Sands, *supra* note 69, § 59.03, at 7.

73. *United States v. Bramblett*, 348 U.S. 503, 509-10 (1955); *Singer v. United States*, 323 U.S. 338, 341-42 (1945); *United States v. Raynor*, 302 U.S. 540, 552 (1938); *Belarde v. Municipality of Anchorage*, 634 P.2d 567, 568 (Alaska 1981); 3 C. Sands, *supra* note 69, § 59.06, at 18-19.

74. *Bostick v. Smoot Sand & Gravel Corp.*, 260 F.2d 534, 539 (4th Cir. 1958); see 3 C. Sands, *supra* note 69, § 59.06, at 18.

75. *United States v. Belmont*, 715 F.2d 459, 461-62 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1275 (1984), *petition for cert. filed sub nom. Hampshire v. United States*,

Copyright infringement, however, is not a new means of stealing property. Indeed, it is a distinct offense that long preceded enactment of the NSPA.<sup>76</sup> The NSPA's coverage of copyright infringement does not represent a rational development of the law to accommodate modern criminal methods. Rather, it represents an attempt by prosecutors to increase penalties without congressional approval.

## II. THE INTERPLAY BETWEEN THE NSPA AND THE CRIMINAL COPYRIGHT LAWS

The legislative histories of both the NSPA and the criminal copyright laws support the theory that copyright infringement is not a form of theft under the NSPA. The NSPA's primary purpose is to prevent criminals from exploiting the territorial limitations on state law enforcement.<sup>77</sup> Thus, the NSPA's drafters contemplated coverage of crimes that were violations of existing state law.<sup>78</sup> Copyright infringement, at the time the NSPA was enacted, was almost exclusively a federal offense.<sup>79</sup> Furthermore, the legislative history indicates that the type of state crimes contemplated by the NSPA's drafters were traditional tangible-property offenses.<sup>80</sup> Not surprisingly, therefore, the NSPA's legislative history contains no mention of copyright infringement.<sup>81</sup>

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52 U.S.L.W. 3704 (U.S. Mar. 19, 1984) (No. 83-1445); see *United States v. Dege*, 364 U.S. 51, 52 (1960) (criminal statutes should not "be construed by some artificial and conventional rule") (quoting *United States v. Union Supply Co.*, 215 U.S. 50, 55 (1909)).

76. The Act of March 4, 1909, ch. 320, 35 Stat. 1075, which contained criminal copyright provisions, see *id.* 25, 35 Stat. 1081-82, was passed 25 years prior to enactment of the NSPA. See Act of May 22, 1934, ch. 333, 48 Stat. 794 (codified as amended at 18 U.S.C. § 2314 (1982)).

77. H.R. Rep. No. 2528, 70th Cong., 2d Sess. 2 (1929); 78 Cong. Rec. 2947 (1934) (remarks of Sen. Ashurst, quoting letter from Homer Cummings, Att'y Gen.); accord *United States v. Sheridan*, 329 U.S. 379, 384 (1946); *United States v. Smith*, 686 F.2d 234, 245 (5th Cir. 1982); *United States v. McClain*, 545 F.2d 988, 994 (5th Cir. 1977); *United States v. Gallant*, 570 F. Supp. 303, 314 (S.D.N.Y. 1983).

78. *United States v. Sheridan*, 329 U.S. 379, 384 (1946); *United States v. Smith*, 686 F.2d 234, 245 (5th Cir. 1982); *United States v. McClain*, 545 F.2d 988, 994 (5th Cir. 1977); *United States v. Gallant*, 570 F. Supp. 303, 314 (S.D.N.Y. 1983).

79. State copyright protection, since passage of the Copyright Act of 1909, has applied only to unpublished works. See *supra* note 40 and accompanying text.

80. *United States v. Smith*, 686 F.2d 234, 245-46 (5th Cir. 1982). The NSPA was introduced as an "anti-gangster" measure intended to suppress "particularly the more violent crimes of violence." 78 Cong. Rec. 2946-47 (1934) (remarks of Sen. Ashurst, quoting letter from Homer Cummings, Att'y Gen.). Therefore, Congress, when it enacted the NSPA, was aiming at the kind of property "normally the subject of theft by gangsters." *In re Vericker*, 446 F.2d 244, 248 (2d Cir. 1971).

81. *United States v. Smith*, 686 F.2d 234, 246 (5th Cir. 1982); see *United States v. Gallant*, 570 F. Supp. 303, 314 (S.D.N.Y. 1983) (Congress has not explicitly



The PCAA, on the other hand, is expressly designed to combat copyright infringement.<sup>82</sup> Admittedly, the PCAA provides that criminal copyright penalties are not necessarily the exclusive criminal penalties for piracy,<sup>83</sup> and this provision has been used as a basis for holding that the NSPA applies to copyright infringement.<sup>84</sup> Clearly, a single criminal act can give rise to indictments under several federal statutes as long as the statutes require proof of different facts.<sup>85</sup> The NSPA and the PCAA indisputably require different standards of proof. Any willful copyright infringement for profit, by definition, violates the PCAA.<sup>86</sup> The NSPA, however, requires that the stolen goods be worth at least \$5000 and be transported across state lines.<sup>87</sup> At first impression, therefore, the NSPA could be read to apply to a limited category of copyright infringement.

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indicated whether the NSPA covers copyright infringement). The NSPA was enacted in 1934, Act of May 22, 1934, ch. 333, 48 Stat. 794. The legislative history of this enactment reveals no congressional intention to include copyrights within the scope of goods whose theft is subject to the NSPA. See H.R. Rep. No. 1599, 73d Cong., 2d Sess. (1934) (Conference Committee Report); S. Rep. No. 538, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1462, 73d Cong., 2d Sess. (1934). The law was codified with minor amendments in 1939, Act of Aug. 3, 1939, ch. 413, 53 Stat. 1178, and has been amended four times since then. See Act of Sept. 28, 1968, Pub. L. No. 90-535, 82 Stat. 885; Act of Oct. 4, 1961, Pub. L. No. 87-371, 75 Stat. 802; Act of July 9, 1956, ch. 519, 70 Stat. 507; Act of May 24, 1949, ch. 139, 63 Stat. 89. None of these amendments relate to copyrights or any other intangible property. See H.R. Rep. No. 1728, 90th Cong., 2d Sess. 1 (1968) (traveler's checks bearing forged countersignatures), *reprinted in* 1968 U.S. Code Cong. & Ad. News 3654, 3654; S. Rep. No. 1086, 87th Cong., 1st Sess. 1 (1961) (fraudulent state tax stamps), *reprinted in* 1961 U.S. Code Cong. & Ad. News 3264, 3264; H.R. Rep. No. 2474, 84th Cong., 2d Sess. 1-3 (1956) (confidence game swindles), *reprinted in* 1956 U.S. Code Cong. & Ad. News 3036, 3036-38; S. Rep. No. 303, 81st Cong., 1st Sess. 1 (1949) (minor language changes), *reprinted in* 1949 U.S. Code Cong. & Ad. News 1248, 1248.

82. 18 U.S.C. § 2319(a) (1982).

83. See *id* § 2319(a) ("and such penalties shall be in addition to any other provisions of title 17 or any other law").

84. See *United States v. Gottesman*, No. 81-5663, slip op. at 1639 (11th Cir. Feb. 16, 1984); *United States v. Belmont*, 715 F.2d 459, 461-62 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1275 (1984), *petition for cert. filed sub nom. Hampshire v. United States*, 52 U.S.L.W. 3704 (U.S. Mar. 19, 1984) (No. 83-1445).

85. See *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975); *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Gavieres v. United States*, 220 U.S. 338, 342-43 (1911); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380, 386 (E.D.N.Y.), *motion for new trial granted*, 518 F. Supp. 1223 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

86. Criminal copyright infringement encompasses any willful infringement of a copyright "for purposes of commercial advantage or private financial gain." 17 U.S.C. § 506(a) (1982). The PCAA prescribes penalties for criminal copyright infringement. 18 U.S.C. § 2318(a) (1982).

87. 18 U.S.C. § 2314 (1982).

A closer examination of the legislative history of the criminal copyright laws, however, suggests that the NSPA was not intended to apply to copyright infringement. The legislative histories of both the 1976 Act<sup>88</sup> and the PCAA<sup>89</sup> include no reference to the NSPA. This omission is significant because the NSPA prescribes a maximum prison term twice as long as that provided by the PCAA. Furthermore, conviction under the NSPA, unlike a conviction under the copyright laws, is a predicate offense to conviction under the Racketeer Influence and Corrupt Organizations Act (RICO).<sup>90</sup> Thus, joint coverage of copyright infringement by the NSPA and the copyright laws creates a potential deterrent that dwarfs the deterrent represented by the latter alone. This potential deterrent would have been worthy of mention by legislators whose aim was "to develop a deterrent that pirates . . . cannot ignore."<sup>91</sup> Therefore, Congress' failure to mention the NSPA in enacting the criminal copyright laws strongly suggests that Congress did not think the NSPA covered criminal copyright infringement.<sup>92</sup>

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88. *United States v. Smith*, 686 F.2d 234, 247 (5th Cir. 1982); see *United States v. Gallant*, 570 F. Supp. 303, 313-14 (S.D.N.Y. 1983) (Congress did not indicate, in its enactment of the 1976 Act, whether the NSPA covers transportation of copyright-infringing goods.); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 161-64 (1976) (no mention of the NSPA in section on remedies for copyright infringement), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5777-80; *id.* at 180 (no mention of the NSPA in section on amendments to other statutes), *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5796; S. Rep. No. 473, 94th Cong., 1st Sess. 143-46 (1975) (no mention of the NSPA in section on remedies for copyright infringement); *id.* at 159 (no mention of the NSPA in section on amendments to other statutes).

89. See *United States v. Gallant*, 570 F.Supp. 303, 313-14 (S.D.N.Y. 1983) (Congress failed to indicate, in its enactment of the PCAA, whether the NSPA covers transportation of copyright-infringing goods.); H.R. Rep. No. 495, 97th Cong., 2d Sess. 4 (1982) (no mention of the NSPA in section on criminal penalties for copyright infringement) [hereinafter cited as the 1982 House Report]; 1981 Senate Report, *supra* note 1, at 3 (no mention of the NSPA in section on relationship of PCAA to other statutes), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 127.

90. See 18 U.S.C. § 1961 (1982). See *supra* note 71.

91. 1982 House Report, *supra* note 89, at 3; 1981 Senate Report, *supra* note 1, at 6-7, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 132-33.

92. The legislative discussion regarding passage of the PCAA focused on the interplay between the lack of a meaningful penalty for criminal copyright infringement and the increasing involvement of organized crime in the perpetration of that offense. See 1982 House Report, *supra* note 89, at 3; 1981 Senate Report, *supra* note 1, at 6-7, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 132-33. The NSPA provides a prison sentence twice as long as the maximum sentence prescribed by the PCAA's penalty provisions. See *supra* notes 6, 69. Moreover, RICO, 18 U.S.C. §§ 1961-1968 (1982), which provides a maximum prison sentence four times as long as that of the PCAA's, *id.* § 1963 (twenty years), is specifically designed to combat organized crime. 18 U.S.C. § 1961 Congressional Statement of Findings and Purpose (1982); see *United States v. Turkette*, 452 U.S. 576, 589 (1981).

Moreover, had Congress contemplated the NSPA's coverage of copyright infringement, it is difficult to understand why Congress would have amended the 1976 Act in 1982 to provide stiffer penalties for infringement. The narrow range of offenses that do not meet the NSPA's valuation and travel requirements hardly seems significant enough to warrant a major amendment to the copyright laws.<sup>93</sup> In addition, there is no indication in the legislative history of either the PCAA or the 1976 Act that Congress intended to punish interstate piracy more severely than its intrastate equivalent.<sup>94</sup> Application of the NSPA to criminal copyright infringement, however, could have this effect. For example, a criminal convicted of intrastate piracy faces a maximum of five years in prison and a \$250,000 fine.<sup>95</sup> A person convicted of interstate piracy of the same material, on the other hand, who is also prosecuted under the NSPA and RICO, could be sentenced to thirty-five years in prison.<sup>96</sup> The legislative history of the criminal copyright laws indicates that Congress never contemplated this result.<sup>97</sup> Thus, the interplay between the NSPA and the criminal copyright laws demonstrates that the NSPA should not apply to copyright infringement.

#### CONCLUSION

Statutory copyright is theoretically and functionally distinct from ownership of the copyrighted material. The constitutional policy un-

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93. See *United States v. Smith*, 686 F.2d 234, 249 (5th Cir. 1982) (PCAA would have been unnecessary if the NSPA, with its harsh penalties, were available). The NSPA applies when stolen goods worth \$5000 or more are transported interstate. See 18 U.S.C. § 2314 (1982). The PCAA's maximum penalties apply when a criminal copyright infringement involves 1000 or more infringing copies of a sound recording or 65 or more infringing copies of an audiovisual work. *Id.* § 2319(b)(1). Thus, unless his pirated tapes are worth less than \$5.00 each, or his pirated films are worth less than \$76.94 each, an infringer who possesses the minimum number of copies necessary to trigger the PCAA's maximum penalty also satisfies the NSPA's valuation requirement. Assuming his activities are interstate in nature, therefore, an infringer who can be punished under the harshest PCAA provisions can often be punished even more severely under the NSPA, if that statute applies to copyright infringement.

94. *United States v. Smith*, 686 F.2d 234, 246 & n.21 (5th Cir. 1982). Congress did not need to use the commerce clause to gain jurisdiction over activities involving copyrights. *Id.*; see U.S. Const. art. I, § 8, cl. 8. Therefore, it had no reason to distinguish between intrastate and interstate copyright infringement.

Admittedly, Congress would have a rational basis for considering interstate infringement more dangerous than its intrastate equivalent if the former were shown to involve, on the average, larger criminal operations. Congress, however, has already addressed the issue of magnitude by basing the severity of copyright penalties on the number of infringing copies involved. See 18 U.S.C. § 2319(b) (1982).

95. See 18 U.S.C. § 2319(b)(1).

96. See *supra* notes 69, 71.

97. See *supra* note 94 and accompanying text.

derlying copyright subordinates the author's right to profit from his labor to the public interest in promoting the arts and sciences. Consistent with this constitutional policy, statutory copyright provides limited public access to the copyrighted material and thus deprives the copyright owner of the right of exclusion that characterizes property ownership.

The NSPA, according to its language and legislative history, is aimed only at crimes that violate rights associated with property ownership; therefore, it does not apply to copyright infringement. Instead, copyright infringement is expressly prohibited by the criminal copyright laws, which were recently amended to increase the deterrent against such infringement. These amendments reflect a congressional belief that the NSPA does not apply to copyright infringement and a congressional intention to punish copyright infringers without regard to whether their activities are intrastate or interstate in nature. Because the NSPA applies only to interstate criminal activities, it is clearly not intended to cover copyright infringement. In the absence of such congressional intent, courts should not mislabel the copyright infringer as a thief.

*Conrad Jordan*