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Considering Copyright Crimes

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Considering Copyright Crimes
Brace Lecture
The Copyright Society of the U.S.A.
Wednesday, April 26, 1995
Time Auditorium
6:00 p.m.

In the face of the epidemic of copyright infringement that has been afflicting our nation, I suggest that the federal courts have been under-utilized for the prosecution of copyright crimes. There are those who might find this a strange statement for me to make, since I am the author of a number of articles railing against the expansion of the criminal jurisdiction of the federal courts.¹ But my criticism has been directed at the congressional exercise of power to criminalize conduct that traditionally has been the concern of the States. I have recommended that the definition of federal crimes be limited to anti-social behavior that primarily is a matter of national concern.²

In an effort to consolidate and pare down the 3,000-odd United States Code provisions criminalizing acts and omissions of various kinds, I would also eliminate a number of anachronistic provisions. Among these are the transportation of water hyacinths in interstate commerce,³ the impersonation of a member of the 4-H Club,⁴ and the movement of dentures into a State without the permission of a local dentist.⁵ Ever since the Supreme Court decided that Congress could define a crime on the basis of conduct that somehow affects interstate commerce,⁶ Congress has demonstrated precious little capacity for self-restraint in this area. After all, what legislator can resist

advising his or her constituents that a new federal crime has been defined and, accordingly, that some problem or other has been solved? The fact that a corresponding state crime already exists is of no moment to those who enact our federal laws.

The situation is much different, in my opinion, when it comes to the definition of copyright crimes. Copyright is a matter of national interest, and it has been so since the adoption of the federal Constitution. The Constitution not only confers upon Congress the power to legislate in the area of copyrights and patents, but it also tells us why such legislation is socially beneficial: the power is to enact laws to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;" the beneficial purpose of such laws is "[t]o promote the Progress of Science and Useful Arts."⁷ James Madison, one of the authors of that well-known series of persuasive articles urging ratification of the Constitution, made some interesting comments about these provisions. In Federalist No. 43, Madison wrote:

The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to inventors. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provisions for either of these cases.⁸

Madison thus made two important points, both of which favor copyright enforcement through federal criminal prosecution. First, he observed that the public good, by which he meant the

national interest, coincides with the copyright claims of individuals, by which he meant the private interest. Second, he asserted that the States cannot be effective in separately providing for copyright enforcement. I shall return to the second point a little later. As to Madison's first point, the Supreme Court has made it abundantly clear just what is the more important interest to be served. The Court has written that the monopoly privileges granted to authors and inventors are "limited in nature and must ultimately serve the public good."⁹ The Court also has written that "copyright law . . . serves the purpose of enriching the general public through access to creative works,"¹⁰ and that "private motivation must . . . serve its cause of promoting broad public availability of literature, music and the other arts."¹¹ In a recent case holding that ordinary compilations generally are not copyrightable, the Supreme Court put it this way:

[C]opyright assures authors the right to their original expression, but encourages them to build freely upon the ideas and information conveyed by a work.¹²

We are thus left with the understanding that the purpose of copyright law is no less than the dissemination of knowledge, the promotion of cultural enrichment, the conveyance of information and the consequent betterment of society through the encouragement of creativity and innovation. This being so, what could be a more important matter of national interest than the enforcement of copyright law?

Although the first Congress recognized the national policy

implications of the Copyright Clause by enacting the first copyright law in 1790,¹³ it was not until 1897 that the first criminal copyright provision found congressional approval.¹⁴ That provision established a misdemeanor penalty for unlawful performances and presentations of copyrighted dramatic and musical compositions. In order for the penalty to be imposed, it was necessary to establish that the defendant's conduct was "willful" and "for profit."¹⁵ The 1909 Copyright Act extended the misdemeanor penalty to all types of copyrighted works, except sound recordings, and continued the same mens rea language.¹⁶ Sound recordings were brought within the coverage of the statute by the Sound Recording Act of 1971.¹⁷ The 1976 Copyright Act restated the offense of copyright infringement as a misdemeanor, providing fines of not more than \$10,000 or imprisonment of not more than one year or both.¹⁸ In the case of sound recordings or motion pictures, the statute provided for fines of up to \$25,000 or imprisonment for not more than one year or both. Repeat offenders could be fined up to \$50,000 or punished by up to two years of imprisonment or both. The 1976 Act changed the mens rea element to require that the infringing conduct be engaged in "willfully and for purposes of commercial advantage or private financial gain."¹⁹

It was not until 1982, almost two hundred years after the first copyright statute and eighty-five years after the first criminal provision, that felony sanctions for copyright infringement were authorized. In that year, responding to the

demands of the sound recording and motion picture industries,²⁰ criminal copyright infringements involving the reproduction or distribution of records, motion pictures and audiovisual works were designated as felonies.²¹ While the criminal offense was still defined in Title 17, the Copyrights title of the U.S. Code, the felony penalty provisions were established in a new section of Title 18, the Crimes and Criminal Procedure title.²² The felony penalty provision applied to a defendant convicted of reproducing or distributing, during any 180-day period, at least one thousand phonorecords or copies infringing the copyright in one or more sound recordings or at least sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works.²³ The penalties consisted of imprisonment of the infringer for up to five years, a fine of up to \$250,000 or both.²⁴ The same fine, with imprisonment for no more than two years, applied in the case of more than one hundred but less than one thousand phonorecords and more than seven but less than sixty-five copies of motion pictures or other audiovisual works.²⁵ All other criminal copyright infringement offenses continued to be classified as misdemeanors.²⁶

A case involving a felony prosecution under the 1982 Act came to my court in 1991.²⁷ The defendant, one Julio Larracuenta, owned and operated a videocassette rental store. An investigator for the Motion Picture Association of America identified tapes rented by the store as counterfeit, and a surveillance was undertaken by the investigator and, later, by an

FBI agent. The defendant was observed unloading boxes of blank videotapes from his car into his home and taking videotapes from his home to his store. A search of his house, conducted pursuant to a warrant, revealed 1,670 counterfeit videocassettes of movies, 78 VCRs, videotape copying equipment of various types and hundreds of cassette covers and stickers. The jury convicted defendant of both the substantive and conspiracy offenses of criminal copyright infringement. In answer to interrogatories, the jury specifically found that the defendant had made at least sixty-five copies of copyrighted films within a 180-day period, the statutory threshold calling for a punishment of up to five years in prison and a fine of up to \$250,000. The district court imposed a sentence of twelve months, the bottom of the Guidelines sentencing range.

We took the opportunity in the Larracuente case to address two issues previously unresolved in our circuit. One was a defense analogous to the defense of "first sale,"²⁸ and the other was the method of ascertaining "retail value" under the Sentencing Guidelines.²⁹ It was the contention of the defendant on appeal that the government had failed in its obligation to prove that licensees of the copyright owners had not authorized him to reproduce the films. We decided that the elements of the criminal offense to be proven were the same as those in a civil copyright case -- ownership of a valid copyright and copying. It was, of course, also necessary for the government to establish the mens rea requirement as well as the numerosity and temporal

threshold requirements. The possession of a sub-license, we held, was a matter of affirmative defense.³⁰ Even if the absence of a sub-license was an element, a defendant would have to introduce some evidence of a sub-license in order for the prosecution to shoulder the burden of negating that element beyond a reasonable doubt. This shifting of the burden of production seems to be the better approach and has been taken by most courts in connection with the similar defense of "first sale," which permits the owner of a copy lawfully made to sell or otherwise dispose of the copy without the authority of the copyright owner.³¹ The first sale doctrine is said to vitiate the copyright owner's power to prevent further sales or dispositions, and the legislative history seems to oblige a defendant to come forward with evidence that the copies were legally made in order to take advantage of the first sale doctrine.

Turning to the sentencing issue in Larracuente, I first note that I am no fan of the Sentencing Guidelines. When the Guidelines took effect in November of 1987, their starting point was the average sentence that had been imposed before the effective date of the Sentencing Reform Act of 1984, which spawned the Guidelines.³² The Sentencing Commission never has really taken a fresh look at those averages, with the result that some sentences remain much too high and some remain much too low. In any event, we now have a formulaic approach to sentencing, based in large part on the offense rather than upon the offender.

So much for giving sentencing discretion to a commission rather than to a judge! It seems to me, in light of the national policy with which we are concerned, that the penalties for copyright felonies are much too low. Turning to the specific formula for the offense of copyright infringement, we find that the base offense level of six is to be enhanced as follows: "If the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table" that applies to fraud and deceit offenses.³³ If that is not confusing enough, the Guidelines Commentary advises us that "[i]nfringing items" means the items that violate the copyright . . . laws (not the legitimate items that are infringed upon)."³⁴ We are also told that "the value of the infringing items . . . will generally exceed the loss or gain due to the offense."³⁵

In Larracuente, we approved the district judge's application of the Sentencing Guidelines.³⁶ The judge accepted the prosecution expert's testimony that the retail price of the films copied averaged \$73 per copy. She multiplied that price times 2,652 tapes, which included those seized from defendant's home and from a store he supplied as well as those purchased by investigators. The total, \$193,596, resulted in a 7-level adjustment, which, in the case of Larracuente converted to a sentencing range of twelve to eighteen months. He was sentenced on the low end of the range, an especially light sentence considering the statutory maximum of five years. Defendant's operation appeared to be a substantial one, but, according to the

Sentencing Guidelines table, defendant as a first offender would have had to infringe more than \$80 million dollars worth of retail value to get the maximum sentence of imprisonment. And that is one of the reasons why I say that the Guidelines make no sense.

The most recent amendment to the criminal copyright statute, enacted in 1992, has an interesting history. Congress originally had before it a bill to elevate the piracy of computer software from a misdemeanor offense to a felony offense.³⁷ The bill came in response to a serious escalation in the infringement of computer software copyrights and was intended to make the unauthorized production and distribution of multiple copies of computer software equally as culpable as the unauthorized production and distribution of multiple copies of phonorecords, sound recordings and motion pictures.³⁸

Remarks attributed in the Congressional Record to Senator Hatch included the statements that "stiffer penalties toward piracy do act as a deterrent to these types of crimes," and that "these new penalties for large-scale violations of copyright in computer software will have a similar deterrent effect."³⁹ The remarks also included the following: "If we do not address the piracy of these programs, we may soon see a decline in this vibrant and important sector of our economy."⁴⁰ Referring to the 1982 statute and the felony penalties provided therein, Senator Hatch said: "It is my understanding that this law, the criminal enforcement of copyright statute found at 18 U.S.C. §

2319, has worked well since its enactment."⁴¹ I do not know where Senator Hatch obtained this information, but it is wrong. If the 1982 statute was intended to deter piracy in records and movies, it has failed woefully. But I suppose that rose-colored glasses are part of the equipment of a United States Senator.

The bill to increase criminal sanctions for the violation of software copyrights underwent a metamorphosis in the House of Representatives. It was there decided that the felony penalty provisions should be extended across-the-board to all types of large-scale copyright infringement, including motion pictures, books, records and computer software.⁴² The bill eventually became "An Act to amend title 18, United States Code, with respect to criminal penalties for copyright infringement." Further remarks attributed to Senator Hatch on the return of the bill from the House included this important comment:

[T]his criminal statute is not designed to reach instances of permissible, private home copying, nor does it represent any infringement on traditional concepts permitting the fair use of copyrighted materials for purposes of research, criticism, scholarship, parody and other long-recognized uses.⁴³

We hear in these remarks the language of fair use, which apparently is to be as good a defense to criminal copyright infringement as it is to civil copyright infringement. Moreover, the legislative history indicates that the Copyright Felony Act is not to be applied to "ordinary business disputes such as those involving reverse engineering of computer programs or contract disputes over the scope of licenses."⁴⁴

Section 2319 in its new form still refers to Title 17 to define the mens rea element of criminal copyright infringement.

Title 17 provides:

Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18.⁴⁵

But effective October 28, 1992, the penalty provisions of section 2319 were expanded to apply to all copyright infringements. For purposes of the felony penalties, the threshold numerosity requirements have been significantly reduced, but a minimum value threshold has been added.

The five-year sentence, \$250,000 fine provisions now apply to one who reproduces or distributes during any period of 180 days "at least 10 copies or phonorecords, of 1 or more copyrighted works, with a retail value of more than \$2,500."⁴⁶ For a second or subsequent copyright felony offense, the maximum prison sentence is ten years.⁴⁷ Again, it is unlikely that anyone will ever receive such a sentence. According to those wonderful Sentencing Guidelines, a defendant would need to be responsible for more than \$80 million dollars worth of infringing items and have something like five prior felony convictions to get a ten-year sentence.

For criminal copyright infringements that cannot meet the threshold requirements, as regards reproduction or distribution rights, misdemeanor penalties continue to apply. Such penalties also continue to apply to violations of adaptation, performance

and display rights. It is a rare thing indeed for a United States Attorney to initiate a misdemeanor prosecution in any case, let alone a copyright infringement case. It should be noted, however, that in connection with any criminal copyright conviction the court must order the forfeiture and destruction of the infringing copies or phonorecords as well as all equipment used in manufacturing the items.⁴⁸ Any sentence for a copyright infringement crime may also, of course, entitle the victim to restitution under the federal Victim and Witness Protection Act.⁴⁹

The addition of a minimum retail value threshold in the 1992 amendment to the felony copyright statute has raised once again the question posed by the Sentencing Guidelines' reference to "retail value." It is generally understood that the definition given by my court in Larracuenta was the correct one: retail value, in a case involving copies of good quality, is the suggested retail price of the legitimate copyrighted work when it was released and not the value of the infringing copies.⁵⁰ If the work is not ordinarily marketed through normal retail channels, courts may look to the wholesale price, the replacement cost of the item or financial injury to the copyright owner.⁵¹ Whatever approach is used, it should not be difficult to reach the \$2,500 retail value threshold for a felony prosecution, considering value generally in this day and age. And that raises some interesting questions.

For example, a panel of my court recently held that the

defense of fair use was not established where a company reproduced and distributed to its scientists for archival use certain articles of interest taken from scientific journals.⁵² I do not say whether or not the panel opinion is the last word on the subject. I do raise the question whether, if enough copies of the articles (certainly more than ten) were distributed within a period of 180 days and had a value that could be proved to exceed \$2,500, the felony threshold could be met. And that would lead to the question of whether there could be said to exist a willful infringement for purposes of commercial advantage or private financial gain. Is the distribution of articles to be filed away by scientists for possible future use in their work an activity manifesting a purpose of commercial activity or private financial gain? The Seventh Circuit Court of Appeals has said that it is sufficient in a criminal prosecution to show that infringing activity is intended for commercial advantage or private financial gain, and that such advantage or gain need not be realized.⁵³ In the context of our civil case, we noted that the company did not gain a direct or immediate commercial advantage, and we classified the use as "intermediate."⁵⁴ How such a classification would stand up in a criminal case remains to be seen.

The failure of the fair use defense also may result in the imposition of criminal liability upon book publishers. There is at least exposure to criminal liability in cases where large chunks of copyrighted material are lifted from the work of the

original author and inserted in the work of another. Having written an opinion on the issue of fair use of unpublished material in a biographical novel,⁵⁵ I am well aware of the fine line between fair use and foul play.⁵⁶ Although my opinion did not receive the unanimous approval of the copyright community and may well have been a contributing cause to the amendment of the fair use statute, the defendant publisher actually prevailed on the defense of laches. Assuming that the use of the unpublished material was impermissible, would criminal liability attach? Certainly there was distribution for commercial advantage. I think that a good criminal defense lawyer would argue that willfulness could not be established and, accordingly, that mens rea could not be proved beyond a reasonable doubt. The lifting of entire books and publications, however, clearly would fall under the criminal copyright statute, although it does not appear that very many prosecutions of book infringers have occurred to date.

It does not in fact appear that very many prosecutions of any kind have occurred under the copyright infringement statute. According to the Statistical Reports of the United States Attorneys' Offices, 46 criminal copyright cases were filed and 64 cases were terminated in 1993.⁵⁷ In 1992, 54 cases were filed and 46 were terminated.⁵⁸ These are national statistics and seem to pale into insignificance in the face of the enormity of the problems the criminal copyright statute was designed to resolve. For example, the Software Publishers of America ("SPA")

has estimated that software vendors lost \$2 billion in the United States in 1991 due to illegal software copying.⁵⁹ 93% of those polled by the SPA said that they had copied or used software illegally at some time.⁶⁰ It was estimated that there were ten illegal copies for every legal copy of a computer game and five illegal copies for every legal copy of non-game software.⁶¹ In a household survey, up to 50% of software in household use was found to be copied.⁶² The problem of identifying software piracy in homes, referred to by one author as "softlifting,"⁶³ is a particularly difficult one. Software piracy in general has proven difficult to investigate, and the SPA, sometimes referred to as the "software police," have gone so far as to provide a Manual to assist the FBI and the United States Attorneys in the investigation and prosecution of software piracy.⁶⁴ According to one news dispatch, the SPA is considering the pursuit of legislation that would criminalize the illegal copying of software, whether done for profit or not.⁶⁵

The disease is only slightly less virulent in the case of recordings and motion pictures. The Motion Picture Association of America estimates that filmmakers lose \$220 million dollars a year in domestic sales.⁶⁶ The Recording Industry Association says it loses \$600 million each year due to domestic music piracy.⁶⁷ Estimates of the losses sustained through the piracy of American copyrighted works world-wide are mind-boggling: \$1.2 billion dollars annually in the case of recordings; \$2 billion dollars annually in the case of films; and \$7.5 billion annually

in the case of business application software.⁶⁸ The protection of American industry from foreign piracy has become a goal of our national foreign policy. This is so because foreign nations have seemed quite reluctant to assist in the enforcement of our country's copyrights, especially by criminal prosecution. For example, it has been estimated that 95% of all software installed in Russia has been obtained illegally.⁶⁹ Bootleg videocassettes in Russia are available in titles not yet available in the United States.⁷⁰ Copyright laws generally are ignored, and there are no criminal enforcement penalties in Russia.

The problems of intellectual property piracy in China have been widely reported, and one source has estimated the cost to United States industries through the piracy of U.S. patents, trademarks and copyrights in China at nearly \$1 billion dollars per year.⁷¹ According to one news dispatch, "[t]he U.S. has been pressing China to raid 29 plants in Southern China, which allegedly flood Asia with pirated laser and compact discs."⁷² On the verge of imposing punitive tariffs on Chinese exports, the U.S. Trade Representative reported to Congress on a recent agreement whereby China promised to enforce vigorously copyright and other intellectual property rights.⁷³ An enforcement mechanism supposedly was created to investigate, prosecute and punish infringing activities throughout China. Time will tell whether the Chinese government is interested in eradicating this billion-dollar industry.

But China and Russia are not the only countries that fail to

enforce copyright laws with adequate criminal penalties. Mexico was, until 1991, one of seven countries with the largest pirate industries and least effective intellectual property protections.⁷⁴ Apparently, Mexico reformed its copyright laws in 1991 to expand enforcement activities. The North American Free Trade Agreement, to which Mexico is a signatory, refers to criminal enforcement of intellectual property but leaves it to each signatory to define the violations. There are recent reports of the enactment of criminal provisions for the infringement of copyright law in Poland,⁷⁵ Belgium,⁷⁶ Thailand,⁷⁷ and Panama.⁷⁸ But as with every criminal statute, there must be investigation and prosecution if the statute is to have any meaning. Past experience does not bode well for the future on the international scene. In the event that we cannot get the cooperation of other countries, I have a thought with regard to the matter.

It is a well-settled principle of international law that a nation may attach criminal liability to acts occurring outside the nation that produce effects within the nation.⁷⁹ This theory of jurisdiction was enunciated by Justice Holmes in a 1911 Supreme Court decision in which he wrote: "Acts done outside a jurisdiction, but intended to produce and producing effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."⁸⁰ Of course, Justice Holmes was talking about a domestic state rather than a foreign state,

but the principle is the same. Congress has relied on this theory of jurisdiction to prohibit the manufacture of drugs in foreign nations intending the substances to be imported into the United States or knowing that they will be so imported.⁸¹ If we cannot get the cooperation of foreign nations for the investigation and prosecution of copyright crimes that victimize the American economy and American national interests, extra-territorial jurisdiction may be an option.

Prosecution begins at home, however, and there seems to be precious little of that at present. Given the tendency of United States Attorneys to become interested in high-profile crimes, there probably is not much romance for them in the prosecution of copyright crimes. To be fair, however, the federal prosecutors cannot possibly prosecute in every situation involving an activity defined as criminal by a generous Congress. Selectivity is necessary. There are, nevertheless, certain other crimes that often accompany criminal copyright infringement and that can be charged along with it. This is the type of "piling on" that may be interesting to prosecutors. The number of these other crimes is severely restricted by the Dowling case, decided by the Supreme Court in 1985.⁸² In that case, which involved the manufacture and distribution of bootleg Elvis Presley recordings, the Court held that the statute proscribing the interstate transportation of goods stolen or taken by fraud did not cover this conduct. The Court observed that the property rights of copyright holders have a character distinct from the possessory

interests of the owners of other goods. It concluded that the history of the criminal infringement provisions of the Copyright Act indicated that Congress did not intend to cover the conduct in question under the interstate transportation rubric. Most commentators are of the opinion that the Dowling case restricts the prosecution of copyright infringement to the criminal copyright statute.⁸³

There are some other federal criminal statutes dealing specifically with copyright activities other than the felony statute whose evolution I have been discussing. These include fraudulent use of a copyright notice,⁸⁴ fraudulent removal of a copyright notice,⁸⁵ and false representation in connection with a copyright application.⁸⁶ Conspiracy to commit any of the copyright crimes also is, of course, a separate crime.⁸⁷ The crime of money laundering encompasses criminal copyright infringement as a "specified unlawful activity."⁸⁸ It is interesting that felony copyright infringement is not listed as one of the predicate offenses under the Racketeer Influenced and Corrupt Organization statute.⁸⁹ I think that the prosecution of copyright crimes would be considerably enhanced if it were included. Effective December 8, 1994, a new copyright felony has been added: unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances.⁹⁰ A new section 2319A has been added to Title 18 of the U.S. Code as part of the Bill entitled "An Act to Approve and Implement the Trade Agreements Concluded in the Uruguay Round of Multilateral

Trade Negotiations." The new statute pertains to sounds and images of a live musical performance and provides felony penalties for violations. The lack of performance protection in the provisions of section 2319 finally are remedied by the adoption of section 2319A.

There is a serious question whether copyright-related activities can be the subject of criminal prosecution in the state courts. Apparently, some state law enforcement agencies proceed on the basis of state fraud laws or statutes imposing sanctions for passing off counterfeit merchandise.⁹¹ In 1973, the Supreme Court decided that it was permissible to convict under a California statute providing criminal penalties for piracy of sound recordings.⁹² The Court held there was no violation of the Supremacy Clause because there was then no conflict with the federal copyright law. This situation changed entirely when the Sound Recording Act of 1971 was passed by Congress. Latman makes the flat-out statement that "[s]tate prosecution for criminal activity with regard to copyright infringement are, of course, preempted, except as regards pre-1972 sound recordings."⁹³ His authority is section 301 of Title 17, which does provide for federal preemption of the entire field of copyright. I am not as sure as Latman that state laws can so easily be written off. In this regard, I refer to section 3231 of the Federal Criminal Code:

The district courts of the United States shall have original jurisdiction exclusive of the States of all offenses against the laws of the United States.

Nothing in this Title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.⁹⁴

Whether or not the states have some residual or peripheral area of responsibility, it seems clear that Madison had it right when he said that states cannot make effective provisions in these cases. The states just do not have the resources or the expertise to pursue the criminal prosecution of copyright infringement. I predict that there will be greater involvement of federal law enforcement agencies in these prosecutions. The author of one article suggesting that the Copyright Office may become obsolete in the next century has observed "that it appears that virtually every copyright infringement is a misdemeanor and a great many are felonies."⁹⁵ Accordingly, one of her proposals is that the FBI might take over the Copyright Office. I would not go that far!

In view of the national interests served, copyright infringement properly has been designated a federal crime. The provisions for increased penalties have not yet had much of a deterrent effect, as is evidenced by the rise in large-scale infringements of all types of copyrighted works. The resourcefulness of the infringers is well-known to all who are interested in copyright protection. Some adjustments in the Sentencing Guidelines may be required so as to increase the penalties for copyright crimes. Also, the RICO statute might be extended to include copyright felonies as predicate acts, but the real problem seems to be that too few federal prosecutions have

been instituted to make the criminal provisions a credible deterrent to copyright infringement. Greater efforts must be made by those affected to cooperate with federal law enforcement authorities by bringing infringements to their attention and assisting in the investigations.⁹⁶ With this type of assistance, perhaps there would be more activity in this area by the United States Attorneys. In any event, it seems to me inevitable, given the increasing boldness of those who engage in large-scale copyright infringement, that all of us who are concerned with copyright law will be more and more involved in considering copyright crimes.

ENDNOTES

1. See, e.g., Roger J. Miner, Crime and Punishment in the Federal Courts, 43 *Syr. L. Rev.* 681 (1991); Roger J. Miner, The Consequences of Federalizing Criminal Law, *Criminal Justice*, Spring 1989, at 16.
2. Roger J. Miner, Federal Courts, Federal Crimes, and Federalism, 10 *Harv. J.L. & Pub. Pol'y* 117, 127 (1987).
3. 18 U.S.C. § 46.
4. Id. § 916.
5. Id. § 1821.
6. See Perez v. United States, 402 U.S. 146, 155 (1971).
7. U.S. Const. art. I, § 8, cl. 8.
8. The Federalist No. 43, at 217-18 (James Madison) (Bantam Classic ed. 1982).
9. Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1029 (1994).
10. Id. at 1030.
11. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
12. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991).
13. Act of May 31, 1790, ch. 15, 1 Stat. 124.
14. Act of January 6, 1897, ch. 4, 29 Stat. 481-82.
15. Id.
16. Copyright Act of 1909, ch. 320, 33 Stat. 1075-82.
17. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391.
18. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.
19. Id.
20. Mary Jane Saunders, Criminal Copyright Infringement and the Copyright Felony Act, 71 *Denv. U. L. Rev.* 671, 676 (1994).
21. Act of May 24, 1992, Pub. L. No. 97-180, 96 Stat. 91.

22. 18 U.S.C. § 2319 (1982).
23. Id.
24. Id.
25. Id.
26. Id.
27. See United States v. Larracuenta, 952 F.2d 672 (2d Cir. 1992).
28. Id. at 673-74.
29. Id. at 674-75.
30. Id. at 673-74.
31. See 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.12[B] [hereinafter Nimmer].
32. Federal Sentencing Guidelines Manual, Ch. 1, Pt. A, 4(g).
33. Id. § 2B5.3(b)(1).
34. Id. appl. note 1.
35. Id. appl. note background.
36. 952 F.2d at 674-75.
37. S. Rep. No. 893, 102nd Cong., 1st Sess. (1991).
38. S. Rep. No. 268, 102nd Cong., 2nd Sess. (1992).
39. 138 Cong. Rec. S7580 (June 4, 1992).
40. Id.
41. Id.
42. See 138 Cong. Rec. H1129 (Oct. 3, 1992).
43. 138 Cong. Rec. S17958 (Oct. 8, 1992).
44. H.R. Rep. No. 997, 102nd Cong., 2d Sess. 4 (1992).
45. 17 U.S.C. § 506(a).
46. 18 U.S.C. § 2319(b)(1).

47. Id. § 2319(b)(2).
48. 17 U.S.C. § 506(b).
49. See 18 U.S.C. § 3663; see also Roger J. Miner, Victims and Witnesses: New Concerns in the Criminal Justice System, 30 N.Y.L. Sch. L. Rev. 757 (1985).
50. See 138 Cong. Rec. S17958 (Oct. 8, 1992); see also Nimmer, supra note 31, § 15.01[B], at 15-7.
51. Nimmer, supra note 31, § 15.01[B], at 15-7.
52. American Geophysical Union v. Texaco Inc., 37 F.3d 881 (2d Cir. 1994).
53. United States v. Cross, 816 F.2d 297, 301 (7th Cir. 1987).
54. American Geophysical, 37 F.3d at 889-90.
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