



3-1-1987

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Elizabeth Blakey

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Recommended Citation

Elizabeth Blakey, *Criminal Copyright Infringement: Music Pirates don't Sing the Jailhouse Rock when they Steal from the King*, 7 Loy. L.A. Ent. L. Rev. 417 (1987).

Available at: <https://digitalcommons.lmu.edu/elr/vol7/iss2/10>

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CRIMINAL COPYRIGHT INFRINGEMENT: MUSIC PIRATES DON'T SING THE "JAILHOUSE ROCK" WHEN THEY STEAL FROM THE KING

THE ECONOMIC PHILOSOPHY BEHIND COPYRIGHT LAW

Back in the days of Homer, music was freely exchanged. No musician sold his songs to pay his keep and no musician paid royalties to perform songs not his own. Musicians memorized each other's songs and performed them at community gatherings. Those entertained at the community gatherings provided food and shelter to the musicians in order to have the joy of their music. Because the community provided for the musician's needs, the musicians shared their music with each other and the community.¹

Today society provides musicians with economic rights in the form of copyright protection, rather than providing them with food and shelter. Specifically, the United States copyright law provides exclusive rights to those who create original works of authorship and fix them in any tangible medium of expression from which they can be perceived.² A copyright holder has the exclusive right, among other things, to reproduce the work, to distribute the work by sale or lease, and to perform it.³ The purpose of United States copyright law is to promote creativity by giving economic gain to the original author.⁴ Because of the

1. *See generally*, Cecil M. Bowra, *Homer*, OXFORD CLASSICAL DICTIONARY 524, 525 ¶ 9 (1970). Bowra offers evidence that Homer owed a great deal to the other musical poets of his tradition. For example, the episodic method of Homer's narrative, full of different dialects and archaisms, indicated that it was the product of an oral tradition many years in the making. Homer also composed in groups of words or formulae that he took from other poets. Further, his plots show hints of earlier treatments which were not his. *Id.* According to Bowra, "it seems certain that [Homer] used [earlier versions of the *Odyssey* and *Iliad*] and improved on them." *Id.*

2. 17 U.S.C.A. § 102 (West 1970).

3. 17 U.S.C.A. § 106 (West 1970).

4. The U.S. Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." U.S. CONST., art. I, § 8, cl. 8. In *Mazer v. Stein*, the United States Supreme Court declared that "the economic philosophy" behind the power of Congress to grant copyrights is "conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. . . ." 347 U.S. 201, 219 (1954). The *Mazer* Court did note that promotion of art for the public welfare was the primary consideration and reward to the author was a secondary consideration. *Id.* (citing *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)). Yet the *Mazer* Court made

economic rights the law provides, musicians no longer simply give their music to each other and society. Today musicians are copyright holders who license their work for money. Music is a good which is bought and sold in the marketplace.

When someone exercises one of the exclusive rights to a musical work without a license from the copyright holder, that someone is usually an infringer.⁵ An infringer can be enjoined⁶ and can be held liable for damages and profits.⁷ Where the infringement is willful and "for purposes of commercial advantage or private financial gain," the infringer also can be subject to criminal fines and imprisonment under the criminal copyright provisions codified at section 506 of Title 17 and section 2319 of Title 18 of the United States Code.⁸ Although the same muse speaks to musicians today as in Homer's time, society has developed a different way of supporting and defending musicians through both civil and criminal copyright law.

THE UNFORTUNATE DECISION IN *DOWLING v. UNITED STATES*

Unfortunately for both musicians and audiences, the United States Supreme Court in *Dowling v. United States* ("*Dowling*")⁹ ignored the economic philosophy underlying United States copyright law. In *Dowling*, the question before the Court was whether general federal criminal statutes, such as the National Stolen Property Act ("*NSPA*"), which provides penalties for transportation of stolen goods across state lines under

clear that the copyright laws are "intended definitely to grant valuable, enforceable rights to authors" in order "to afford greater encouragement to the production of literary [or artistic] works." *Id.* (citing *Washingtonian Co. v. Pearson*, 306 U.S. 30, 36 (1939)).

5. 17 U.S.C.A. § 501(a) (West 1970). Someone who exercises one of the exclusive rights without a license is only "usually" an infringer as there are limitations on the exclusive rights. See note 47 where the fair use limitation on exclusive rights is explained.

6. 17 U.S.C.A. § 502 (West 1970). Infringing articles may also be impounded and destroyed. 17 U.S.C.A. § 503 (West 1970).

7. 17 U.S.C.A. § 504 (West 1970).

8. The criminal penalties for willful infringement, formerly found only in § 506 of the copyright title, Title 17, were revised with the Piracy and Counterfeiting Amendments Act of 1982. Pub. L. No. 97-180, 96 Stat. 91 (1982). Section 506, as amended, 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." 17 U.S.C.A. § 506(a) (West Supp. 1986). Section 2319 provides graded criminal penalties for copyright infringement, depending on the number of works which are reproduced or distributed within a 180-day time period. 18 U.S.C.A. § 2319 (West Supp. 1986).

There are also criminal copyright provisions in state law. For example, misappropriation of recorded music for commercial advantage or private financial gain is a public offense in California. CAL. PENAL CODE § 653(h) (West 1987).

9. 473 U.S. 207 (1985).

its section 2314,¹⁰ apply in cases of criminal copyright infringement. In other words, the Court had to decide whether copyright infringing materials are stolen goods under NSPA section 2314. The majority held that copyright infringing materials are not "goods, wares or merchandise" that can be "stolen, converted or taken by fraud" for purposes of NSPA section 2314. Thus, under *Dowling*, a defendant may be sued for civil damages and prosecuted for criminal copyright infringement, and yet *not* be prosecuted for interstate transportation of stolen property under NSPA section 2314, even though the defendant knowingly transported criminal copyright infringing materials across state lines.

After *Dowling*, criminal copyright infringers still have the economic incentive to conduct nationwide distribution. Musicians, however, are left without effective protection from interstate criminal copyright infringement, which puts a large drain on the economic resources that society has provided. According to the *Dowling* dissent, the difficulty the majority had in applying the interstate transportation of stolen goods statute to copyright infringement had "more to do with [the majority's view] on the relative evil of copyright infringement versus other kinds of thievery, than it does with interpretation of the statutory language."¹¹ As to relative evil, the *Dowling* majority obviously thought it more evil to steal a car than to steal a song.¹² The *Dowling* majority based its reason-

10. *Id.* Section 2314 provides, in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C.A. § 2314 (West 1970).

11. *Dowling*, 473 U.S. at 229 (Powell, J., dissenting).

12. The legislative history of the NSPA does seem to indicate that Congress intended the NSPA to apply to car theft and the like and not federal copyright infringement. The majority, in its analysis of the legislative history of the NSPA, noted that § 2314 was an extension of the National Motor Vehicle Theft Act ("NMVTA"), Pub. L. No. 70, 41 Stat. 324 (codified at 18 U.S.C.A. § 2312 (West 1970)). *Dowling*, 473 U.S. at 218-20. The original intent of both interstate theft statutes, NMVTA and NSPA, enacted under the power of the Commerce Clause, was to strike down the state lines which hampered state law enforcement. *Id.* at 220. The *Dowling* majority commented that there was a need for supplemental federal action regarding state criminal law, while no such need exists regarding interstate acts of copyright infringement: copyright law is federal law enacted under the Copyright Clause and so not subject to the same evasion of enforcement problems as state criminal law. *Id.* See note 17 and accompanying text regarding *Dowling's* evasion of enforcement.

Congress could directly penalize interstate distribution of copyright infringing goods under the Copyright Clause, which it has not done. Congress, however, has made its criminal copyright penalties "in addition to any other law." 18 U.S.C.A. § 2319 (West Supp. 1986). See note 29 and accompanying text. That Congress has not specifically provided penalties for interstate acts of infringement could indicate an intent that there should be no such penalties, but the express criminal copyright penalties are clearly not exclusive. See *United States v.*

ing on the fact that cars are tangible, while songs (as opposed to phonorecords) are intangible.

THE FACTS: SELLING ELVIS WITHOUT A LICENSE AND WITHOUT PAYING COPYRIGHT ROYALTIES

In 1976, defendant Dowling, in conjunction with codefendants Theaker and Minor,¹³ began to manufacture and distribute phonorecords of unreleased Elvis Presley recordings. Dowling and his associates never obtained a license from, nor paid royalties to, the owners of the Presley copyrights ("Elvis copyright holders").¹⁴ Dowling, living in Baltimore, selected and obtained the musical material, and created the record jackets. Theaker, in Los Angeles, took care of arranging for manufacture of the Presley phonorecords, distributing the catalogs and filling the orders. Minor, working out of Miami, also arranged for manufacture and ran his own resale business.¹⁵

Dowling and his codefendants obtained the Presley recordings from a variety of sources, including studio outtakes and tapes of Presley concerts and television appearances. Initially, they had the records manufactured at a record pressing company in Burbank, California. Later, when that company refused to take their orders, they sought out other record pressing companies in Los Angeles and Miami.¹⁶

When Dowling and Theaker began to suspect that the local FBI was investigating the Los Angeles operation, they started shipping large quantities of the phonorecords from Los Angeles to Maryland by way of a commercial trucking company.¹⁷ In their revised operations, Theaker collected the orders in California and sent them to Dowling in Maryland, who would then fill the orders. In addition to the Los Angeles to Mary-

Gottesman, 724 F.2d 1517, 1520-21 (11th Cir. 1984). See note 29 regarding the "any other law" provision. Considerations of state law enforcement problems and the untapped powers of the federal Congress do not necessarily indicate that the economic rights granted under the Copyright Clause are not protected by the interstate theft provisions of section 2314. Does the owner of a stolen car suffer a qualitatively different economic loss than the owner of an infringed song? Is it more of a public offense to take stolen cars across state lines than pirated phonorecords? Are copyright infringing materials stolen goods?

13. *United States v. Minor*, 756 F.2d 731 (9th Cir. 1985), is the decision in the case against Dowling's codefendant Minor.

14. *Dowling*, 473 U.S. at 211. RCA Records has the exclusive right to manufacture and distribute Elvis Presley sound recordings produced after July 26, 1954. The Presley estate, through RCA, has the right to receive royalties on all Presley recordings made after March 1, 1973. *Dowling v. U.S.*, 739 F.2d 1445, 1448 (9th Cir. 1984).

15. *Dowling*, 473 U.S. at 211-12.

16. *Id.*

17. See *supra* note 12 regarding evasion of enforcement.

land shipments, the men made large shipments from Los Angeles to Miami, where Minor had his own resale business.¹⁸

Theirs was a "massive" operation.¹⁹ Dowling and Theaker hired an addressing and mailing service that mailed out over 50,000 catalogs. At the trial, post office employees testified that Dowling mailed "hundreds of packages" containing phonorecords each week. Dowling was spending at least \$1,000 per week on postage alone.²⁰

Dowling was charged with one count of conspiracy to transport stolen property interstate in violation of 18 U.S.C. section 371, seven counts of interstate transportation of stolen property in violation of 18 U.S.C. section 2314, fourteen counts of criminal copyright infringement in violation of 17 U.S.C. section 506(a) and three counts of mail fraud in violation of 18 U.S.C. section 3141. After the trial court found Dowling guilty of all counts against him, he appealed all but the criminal copyright counts.²¹

THE NINTH CIRCUIT DECISION: THE RIGHTS OF COPYRIGHT
OWNERS ARE JUST AS DESERVING OF PROTECTION UNDER
THE NATIONAL STOLEN PROPERTY ACT AS THE
RIGHTS OF OWNERS OF OTHER TYPES
OF PROPERTY

The Ninth Circuit affirmed Dowling's convictions.²² In so doing, the court relied on its earlier decision in *United States v. Belmont* ("*Belmont*").²³ Before the Ninth Circuit, Dowling made two arguments. The first argument was in defense to the mail fraud count and the second in defense to the NSPA section 2314 interstate transportation count. Regarding mail fraud, Dowling argued that the government was limited to one prosecutorial route. He argued that the government could only prosecute copyright infringement under the code sections which expressly address criminal copyright infringement, namely section 506 of Title 17 and section 2319 of Title 18.²⁴ According to Dowling, the mail fraud statute, section 3141 of Title 18, did not apply to copyright infringement as Congress had expressly addressed criminal copyright infringement in sections

18. *Dowling*, 473 U.S. at 210-11.

19. *Dowling*, 739 F.2d at 1446.

20. *Id.* at 1446-47.

21. *Id.* at 1447.

22. *Dowling*, 739 F.2d at 1451.

23. 715 F.2d 459 (9th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

24. See *supra* note 8 and accompanying text regarding the Piracy and Counterfeiting Amendments Act of 1982.

506 and 2319.²⁵ The Ninth Circuit found that argument to be without merit, referring to its treatment in *Belmont* of the “exclusive prosecutorial route” argument in defense to a NSPA section 2314 count against defendant Belmont.²⁶

In *Belmont*, the court addressed whether NSPA section 2314 applied to copyright infringement although Congress had expressly addressed criminal copyright infringement in sections 506 and 2319.²⁷ The *Belmont* court rejected the contention that Congress intended to limit the prosecution of copyright infringing acts to the express provisions of sections 506 and 2319.²⁸ The court reasoned that because section 2319 provided that its “penalties shall be in addition to any other provision of Title 17 and any other law,” sections 506 and 2319 were *not* the only criminal provisions under which criminal copyright defendants could be prosecuted.²⁹ The *Dowling* court, finding merit in the “any other law” reasoning of *Belmont*, stated that Dowling had presented no evidence that Congress intended sections 506 and 2319 to be “the exclusive prosecutorial route with which to punish individuals who infringe copyrights”; accordingly, the Ninth Circuit found nothing in the Copyright Act to prohibit prosecution of Dowling under the mail fraud statute.³⁰

The Ninth Circuit also rejected Dowling’s second argument—his defense against the NSPA section 2314 count.³¹ Dowling argued that the bootleg phonorecords he had transported interstate were not “stolen goods” within the meaning of NSPA section 2314.³² The Ninth Circuit did not analyze whether the phonorecords were “stolen goods.” Instead, it relied on a broad concept it had previously expressed in *Belmont*: that the rights of copyright owners are just as deserving of protection under the NSPA as the rights of owners of other types of property.³³ In *Belmont*, the court had reasoned that “[w]hen society creates new kinds of property and thieves devise new ways of appropriating that property to their own use, the law against transporting property expands with the growth in the varieties of property.”³⁴ On that reasoning, the Ninth Cir-

25. *Dowling*, 739 F.2d at 1448.

26. *Id.* (citing *Belmont*, 715 F.2d 459 (9th Cir. 1983)).

27. *Belmont*, 715 F.2d at 462.

28. *Id.*

29. *Id.*; 18 U.S.C.A. § 2319 (West Supp. 1986) (emphasis added). See *supra* note 12 regarding the “any other law” provision.

30. *Dowling*, 739 F.2d at 1448.

31. *Id.* 1450-51.

32. *Id.* 1450.

33. *Id.* (citing *Belmont*, 715 F.2d at 462).

34. *Belmont*, 715 F.2d at 462. It should be noted that copyright and copyright infringement existed before the law against interstate transportation was enacted; thus copyrights are

cuit affirmed Dowling's convictions under NSPA section 2314 for interstate transportation of stolen goods.³⁵

THE SUPREME COURT REVERSAL: THE COMMON SENSE MEANING OF NSPA SECTION 2314 REQUIRES BOTH PHYSICAL TAKING AND PHYSICAL IDENTITY BETWEEN THE GOODS STOLEN AND THOSE TRANSPORTED; THEREFORE, INTANGIBLE PROPERTY RIGHTS ARE NOT PROTECTED

As its premise, the Supreme Court stated the principle that ambiguities in criminal statutes should be resolved in favor of lenity; that is, the principle that criminal statutes should be construed narrowly.³⁶ The Court then examined whether copyright infringement can be the underlying offense for NSPA section 2314. Dowling, according to the Court, did not contest the goods element or the \$5,000 valuation element contained in section 2314.³⁷ Dowling admitted that the phonorecords he transported were "goods" of a value of \$5,000 or more, but contested whether the goods were "stolen, converted or taken by fraud," under NSPA section 2314.³⁸ The government argued that the phonorecords were stolen under NSPA section 2314 because they physically embodied copyrighted expressions which Dowling had no right to distribute; therefore, the unauthorized use of copyrighted expressions was stealing under the statute.³⁹ The government also noted that the source material from which the Elvis phonorecords were reproduced was obtained through illicit means and so stolen, and that as the phonorecords were "the same"

not "new" kinds of property and copyright infringement is not a "new" way of appropriating property as regards interstate transportation.

35. *Dowling*, 739 F.2d at 1451.

36. *Dowling*, 473 U.S. at 213-14. That principle is, however, only a generality and generalities about statutory construction are of little help in resolving the "special difficulties" encountered when construing a particular statute. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952). Indeed, reference to the principle of narrow construction often merely indicates the court's view as to whether a statute is ambiguous or clear in the first place. For example, in *United States v. Bass*, 404 U.S. 336 (1971), Justice Blackmun joined the dissent that took the view that the criminal statute at issue was clear and should be read broadly. In *Dowling*, Justice Blackmun wrote the majority opinion, taking the view that the criminal statute at issue was ambiguous and should be read narrowly. *Compare Bass*, 404 U.S. at 347-48 and *Bass*, 404 U.S. at 352-53 (Blackmun, J. dissenting) with *Dowling*, 473 U.S. at 215-16 and *Dowling*, 473 U.S. at 232 (Powell, J., dissenting).

37. *Dowling*, 473 U.S. at 214. See *supra* note 10 regarding the NSPA § 2314 elements.

38. *Id.* In effect, however, Dowling did contest the goods element because an argument that the phonorecords were not stolen is an argument that copyrighted expressions are not the sort of good which can be the subject of theft. Dowling admitted that the physical phonorecords were goods, but not that copyrighted expressions are goods.

39. *Id.*

as the source material, the phonorecords also were stolen.⁴⁰ The Court declined to consider the "illicit means" argument.⁴¹

Stating that "interference with copyright does not easily equate with theft,"⁴² the Court held that interstate distribution of copyright infringing materials was not interstate transportation of stolen goods under NSPA section 2314, when that section is narrowly construed.⁴³ To support its conclusion, the Court stated that cases prosecuted under NSPA section 2314 have "always" involved physical goods that have themselves been stolen,⁴⁴ even though some section 2314 cases have involved goods which derived their value from an intangible component or goods which have been physically altered by the defendants.⁴⁵ The Court declared that in order to comport with the "common sense" meaning of the statute, there must be: (i) a prior physical taking of the subject goods; and (ii) a physical identity between the goods stolen and those eventually transported.⁴⁶

In rejecting the government's position that copyright infringement is equivalent to theft, conversion or fraud, the Court made two points about the nature of a copyright: (i) that the copyright owner "holds no ordinary chattel," as the copyright statute confers only a bundle of carefully defined rights; and (ii) that the copyright owner does not have complete control over the work as some use by others is permitted under the doctrine of fair use.⁴⁷ According to the Court, because the copyright owner's rights are subject to defined limits, copyrights are distinct from the possessory interests of the owner of simple goods.⁴⁸ The Court reasoned that because copyright infringers do not assume physical control of the copyright and do not wholly deprive the owner of use of the work,

40. *Dowling*, 473 U.S. at 215 n.7.

41. *Id.*

42. *Id.* at 217-18.

43. *Id.* at 217-18, 229.

44. *Id.* at 216.

45. *Id.* (citing *United States v. Moore*, 571 F.2d 154, 158 (3d Cir. 1978), *cert. denied*, 435 U.S. 956 (1978); *United States v. Seagraves*, 265 F.2d 876 (3d Cir. 1959); and *United States v. Greenwald*, 479 F.2d 320 (6th Cir. 1973), *cert. denied*, 414 U.S. 854 (1973)).

46. *Dowling*, 473 U.S. at 216. See *infra* notes 67, 81 and 88 and accompanying text.

47. *Id.* at 216-17. (citing *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985) and *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984)). Fair use is a limitation on the exclusive rights of the copyright holder which makes non-infringing the use of a copyrighted work without license "for such purposes as criticism, comment, news reporting, teaching . . . scholarship or research . . ." Factors to be considered regarding whether a use is a fair use are the commercial nature of the use, the amount and substantiality of the portion used and the effect of the use on the potential market. 17 U.S.C.A. § 107(1)(3)(4) (West 1977). See *infra* notes 64-66 and accompanying text.

48. *Dowling*, 473 U.S. at 217.

copyright infringement “fits but awkwardly” with the language of NSPA section 2314.⁴⁹

Noting that the Presley copyrights were clearly infringed by Dowling, the Court commented that “[i]t is less clear . . . that the taking that occurs when an infringer arrogates the use of another’s protected work comfortably fits the terms associated with physical removal employed by section 2314.”⁵⁰ Then referring to the principle of narrow construction of criminal statutes, the Court confessed that it was “reluctant” to make an expansive reading of the NSPA.⁵¹

The *Dowling* Court found additional support for its holding in both the history of criminal copyright provisions and the broad consequences of the government’s theory. The Court reviewed the history of criminal copyright provisions, including the Piracy and Counterfeiting Amendments Act of 1982,⁵² and reasoned that the careful approach of Congress in providing criminal penalties for copyright infringement indicates that Congress did not intend to reach copyright infringement with NSPA section 2314.⁵³ The Court stated that the availability of a prison sentence of ten years on the basis of interstate transportation (which is not otherwise relevant to copyright infringement) “convince[d]” the Court that Congress did not intend NSPA section 2314 to apply in copyright cases.⁵⁴

In reviewing the broad consequences of the government’s theory, the Court considered the effect of applying NSPA section 2314 penalties in copyright infringement cases such as *Harper & Row, Publishers v. Nation Enterprises* (“*Harper & Row*”).⁵⁵ In *Harper & Row*, the Court held that *The Nation* magazine had infringed the copyright in former President Ford’s memoirs when *The Nation* published excerpts of Ford’s memoirs prior to publication by Harper & Row of the entire book.⁵⁶ The prosecutors in *Dowling* conceded at oral argument that the section 2314 theory they advocated would permit prosecution of infringers such as *The Nation* for interstate transportation of stolen goods.⁵⁷ The Court thought that the possibility of such outlandish prosecution indicated that NSPA section 2314 should not apply in copyright infringement cases.⁵⁸

49. *Id.* at 217-18. See *infra* notes 65 and 91 regarding deprivation.

50. *Id.* at 217.

51. *Id.* at 218.

52. See *supra* note 8 regarding the Piracy and Counterfeiting Amendments Act of 1982.

53. *Dowling*, 473 U.S. at 221-26.

54. *Id.* at 225-26.

55. 471 U.S. 539 (1985).

56. *Dowling*, 473 U.S. at 226.

57. *Id.*

58. *Id.*

The Court also noted that another consequence of the prosecution's theory could be prosecution under NSPA section 2314 for interstate transportation of patent infringing materials, although Congress has never provided criminal penalties for the distribution of patent infringing materials.⁵⁹

ANALYSIS: THE PRIOR LAW AND THE COURT'S REASONING

The Supreme Court decision in *Dowling* goes against the decisions of five of the six circuits that have addressed the applicability of NSPA section 2314 to copyright infringement cases.⁶⁰ Although the Supreme

59. *Id.* at 226-27.

60. The following circuits have addressed the applicability of NSPA § 2314 to copyright infringement cases and decided that copyright infringing materials were stolen goods under that section. The Second Circuit in three district court opinions: *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981) (unauthorized duplication of sound recordings); *United States v. Gallant*, 570 F. Supp. 303 (S.D.N.Y. 1983) (wholesale distribution of bootleg musical recordings); and *United States v. Steerwell Leisure Corp.*, 598 F. Supp. 171 (W.D.N.Y. 1984) (distribution of video games). The Seventh Circuit in *United States v. Berkwitz*, 619 F.2d 649 (7th Cir. 1980) (manufacture and vending of eight-track tapes). The Ninth Circuit in five appellate opinions: *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978) (unauthorized sale of copies of films, copies indirectly proven to be stolen); *United States v. Atheron*, 561 F.2d 747 (9th Cir. 1977) (unauthorized sale of copies of films); *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984) (sale of copies of films taped off the air, no taking of a physical good); *United States v. Minor*, 756 F.2d 731 (9th Cir. 1985) (Minor was one of Dowling's codefendants); and *United States v. Dowling*, 739 F.2d 1445 (9th Cir.), *rev'd*, 473 U.S. 207 (1985). The Eleventh Circuit in *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984) (unauthorized duplication and distribution of videotapes, no physical good taken) and *United States v. Drum*, 733 F.2d 1503 (11th Cir. 1984) (unauthorized duplication of legitimately acquired phonorecords, no physical good taken). The United States Court of Appeals for the District of Columbia in *United States v. Whetzel*, 589 F.2d 707 (D.D.C. 1978) (unauthorized duplication and distribution of sound recordings).

The only circuit which held that NSPA § 2314 did not include criminal copyright as an underlying offense was the Fifth Circuit in *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982). The *Smith* court commented that stealing is an offense against possessory interests and that taping of copyrighted works off the air "does not implicate a tangible item"; it distinguished *Drebin* where original works were stolen and used to make copies. *Id.* at 243-44 and n.17.

In addition to the § 2314 copyright cases successfully prosecuted before *Dowling*, in several cases before *Dowling* courts found that § 2314 applied in theft of trade secrets, as misappropriated trade secrets were stolen goods. See *Abbott v. United States*, 239 F.2d 310 (5th Cir. 1956) (photocopy of geophysical map on complaining witness's paper was a stolen good, but transportation element not shown); *United States v. Seagraves*, 265 F.2d 876 (3d Cir. 1959) (photocopy of geophysical maps on complaining witness's paper were stolen goods); *United States v. Lester*, 282 F.2d 750 (3d Cir. 1960) (same); *American Cyanamid Co. v. Sharff*, 309 F.2d 790 (3d Cir. 1962) (trade secrets, strains of microorganisms and sample drugs were stolen goods); *United States v. Bottone*, 365 F.2d 389 (2d Cir. 1966) (microorganisms and instructions for drug manufacture were stolen goods; where physical documents were taken from complaining witnesses' offices, handcopied and photocopied and returned to office, only copies moved in

Court is clearly *not* bound by the decisions of the lower courts, the leaning of the prior authority draws the Court's reasoning into question. Beyond nose counting—analysis of the prior law and the Court's reasoning demonstrates that the *Dowling* decision was poorly researched and reasoned.

A. The Prior Law: The test for "stolen good" and the requirement of minimum physicality

1. The test for "stolen good"

Neither the Supreme Court nor the Ninth Circuit reviewed the prior law to determine how the terms "goods" and "stolen" had been defined. The prior law defined "goods" as that which is the subject of commerce⁶¹ and "stealing" as the deprivation of rights and benefits of ownership.⁶²

interstate commerce); *United States v. Greenwald*, 479 F.2d 320 (6th Cir. 1973) (original physical documents taken).

61. The Third Circuit in *Seagraves*, stated that "[t]he terms 'goods, wares, merchandise' is [sic] a general and comprehensive designation of such personal property or chattels as are ordinarily a subject of commerce." 265 F.2d at 880 (citing BLACK'S LAW DICTIONARY 823 (4th ed. 1951)). The *Seagraves* court found that geophysical maps were goods as they were frequently sold. *Id. Accord, American Cyanamid*, 309 F.2d at 796. In *Greenwald*, the Sixth Circuit found that the existence of an established market for chemical formulas rendered those formulas goods under the NSPA. 479 F.2d at 322 (citing *Seagraves*, 265 F.2d at 880). In *Sam Goody*, the Eastern District of New York commented that "[o]n their face, the words 'goods, wares, merchandise' appear to have been intended to extend broadly to all types of property likely to move in commerce, with no distinction between items of a completely tangible character and items of a mixed tangible-intangible character. . . . Judicial construction of § 2314 has consistently focused primarily on the commercial nature of the items involved" 506 F. Supp. at 388. In the case of *In re Vericker*, the court held that stolen FBI documents were not goods under § 2314 because FBI documents are not ordinarily bought and sold in commerce. 446 F.2d 244, 248 (2d Cir. 1971).

In *Smith*, the Fifth Circuit held that in order for an item to fall within the "goods, wares or merchandise" language, the item must have some sort of tangible existence; the court stated that although copyrights are commonly bought and sold, they are not in the nature of personal property. 686 F.2d at 241.

62. The Second Circuit in *United States v. Handler*, 142 F.2d 351 (2d Cir. 1944), reviewed the legislative history of the NSPA and stated "[w]e think it is clear that the [NSPA] was not restricted to the transportation of property taken larcenously. . . . In our opinion the statute is applicable to any taking whereby a person dishonestly obtains goods or securities belonging to another with the intent to deprive the owner of the rights and benefits of ownership." *Handler*, 142 F.2d at 353. In *United States v. Turley*, 352 U.S. 407 (1957), the majority of the Supreme Court stated that the term "stolen" in the National Motor Vehicle Theft Act ("NMVTA"), predecessor to the NSPA, was not limited to common law larceny; "theft" being a broader term than larceny and including "all cases of depriving another of his property, . . . larceny, robbery, cheating, embezzlement, breach of trust, etc." *Turley*, 352 U.S. at 412-14. In *United States v. Plott*, 345 F. Supp. 1229 (S.D.N.Y. 1972), stealing was defined as "any dishonest transaction whereby one person obtains what rightfully belongs to another, and deprives the owner of the rights, and benefits of ownership." *Plott*, 345 F. Supp. at 1231 (citing *Handler*, 142 F.2d at 353, and finding that the State of Georgia was the owner in trust of wild

Thus the prior law set up a commerce-deprivation test.

Applying the commerce-deprivation test to the facts of the *Dowling* case, it is apparent that the phonorecords distributed nationwide by Dowling were not only criminal copyright infringements, but also were stolen goods under NSPA section 2314 as it had previously been construed. Selling Elvis without a license and without paying copyright royalties did "deprive" the Elvis copyright holders of the rights and benefits of their ownership of songs, which were "the usual subject of commerce." Had Dowling wanted to use the Elvis material without infringing, he could have negotiated with the Elvis copyright holders for a mechanical license, or if the copyright holders had already granted a mechanical license, he could have availed himself of the compulsory license provisions found in the copyright statute and simply paid the statutory royalties.⁶³ Had Dowling paid a fee, he would not have deprived the

alligators in the state which the defendant, through poaching and transporting out of state, had stolen under the NSPA).

Conversion under § 2314, as well as stealing, has been broadly defined. The Eleventh Circuit in *United States v. Drum*, held that "copyrights, once given tangible form, may be 'stolen, converted or taken by fraud' and fall within the reach of section 2314." *Drum*, 753 F.2d at 1506 (citing *United States v. Morissette*, 342 U.S. 246, 271-72 (1952) where conversion was defined as "use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for a limited use").

In *Smith*, however, the Fifth Circuit held that copyright infringement is not the equivalent of stealing, converting or taking by fraud because stealing contemplates the removal or moving of something tangible. *Smith*, 686 F.2d at 241-42. The *Smith* analysis was criticized in *Gallant*, 570 F. Supp. at 312-14. The *Gallant* court commented that the *Smith* holding was counter to a "long history and . . . wide acceptance of a broad definition for the terms 'stolen' and 'converted' " as those terms were "clearly intended to offer a range of partly overlapping terms in order to cover illegal acquisitions and uses comprehensively," and the court declined to narrow the traditional reach of § 2314. *Gallant*, 570 F. Supp. at 313-14.

In contexts other than § 2314, copyrights have been considered both capable of conversion and not capable of conversion. See *A & M Records v. Heilman*, 75 Cal. App. 3d 554, 570, 142 Cal. Rptr. 400 (1977) (copyrights converted); *Italiani v. Metro-Goldwyn-Mayer Corp.*, 114 P.2d 370, 45 Cal. App. 2d 464 (1941) (copyrights not capable of conversion); *Local Trademarks, Inc. v. Price*, 179 F.2d 715 (5th Cir. 1948) (copyright infringement is not a conversion action for purposes of applicable statute of limitations). According to Prosser, intangibles are not the proper subject of conversion actions. PROSSER, *THE LAW OF TORTS* 90-92 (5th ed. 1984). Prosser outlines the history of what property could be the subject of an action for conversion. The original rule was that only tangible items capable of being lost and found could be converted. Later, conversion actions were allowed regarding documents in which intangible rights were merged so that one became the symbol of the other, such as a check or stock certificate. Prosser comments that "[t]here is perhaps no very valid and essential reason why there might not be conversion . . . [of intangibles such as goodwill or ideas] or 'any species of personal property which is subject to private ownership' "; but he suggests that remedies other than conversion, such as unfair competition torts, should be fashioned to protect the owners of intangibles. *Id.*

63. The Copyright Act provides a compulsory license for making and distributing phonorecords. 17 U.S.C.A. § 115 (West 1986).

Elvis copyright holders of their rights to songs which were the usual subject of commerce.

The *Dowling* majority commented that infringers do not wholly deprive copyright holders of the use of their work, and that some fair use by others is allowed.⁶⁴ Yet as protested by the *Dowling* dissent, Dowling exercised the very rights that copyright law granted to the Elvis copyright holders: the right to publish, copy and distribute the work.⁶⁵ Further, Dowling's use was not a fair use: rather it was a commercial use of a substantial portion of the work, with a significant damaging effect on the potential market.⁶⁶

The commerce-deprivation test for stolen goods, set forth in the prior definitions of "goods" and "stolen," is a better test than the complete physicality test devised by the Court in *Dowling*. The complete physicality test requires both a physical taking and physical identity between the goods stolen and those transported across state lines.⁶⁷ Thus, the complete physicality test emphasizes Dowling's ownership of the vinyl part of the phonorecords and ignores the fact that the vinyl moved in commerce only because of the copyrighted expressions, owned by the Elvis copyright holders, that were embodied on the vinyl.⁶⁸ While the complete physicality test emphasizes what is insignificant in commerce, the commerce-deprivation test emphasizes what is significant in commerce, the song which was bought and sold.

Had the *Dowling* Court used the commerce-deprivation test for stolen goods, and accordingly found the Dowling phonorecords to be stolen

64. *Dowling*, 473 U.S. at 216-17.

65. See *supra* note 47 regarding fair use. Additionally, complete deprivation is not required for a § 2314 violation. *Schwab v. United States*, 327 F.2d 11, 13 (8th Cir. 1964). See notes 49 and 91 and accompanying text regarding deprivation.

66. See *supra* note 47 regarding the factors to consider when determining if a use is a fair use.

67. See notes 46, 67, 81 and 88 regarding the complete physicality test.

68. In *United States v. Lester*, 282 F.2d 750 (3d Cir. 1966), one of the many geophysical map-trade secret cases, the defendant argued that in many instances the original map was not taken, rather a photocopy was taken, so the maps taken were not stolen property. The Third Circuit noted that the paper was not the object of the theft, the information contained in it was; the court answered the defendant's argument with a statement in his own brief:

But no one would suppose that, because a business man would be willing to pay a large sum of money to his competitor's employee to give him a piece of paper on which such a secret was written, the piece of paper had a market value. It is the idea, not its material paper embodiment, which is valuable.

Lester, 282 F.2d at 755.

Likewise, no one would suppose that the vinyl part of a phonorecord is the object of public purchasing or the object of a pirate's theft. Therefore, the *Dowling* complete physicality test focused on the insignificant: the song is the object of the theft, not the physical vinyl. It is immaterial that the vinyl belonged to Dowling.

goods, the economic philosophy behind copyright law would have been furthered, as copyrighted expressions would have been recognized as objects of commerce. The goals of criminal law also would have been furthered as those persons who deprive others of ownership rights, whether of tangible or intangible items, would have been subject to prosecution.

2. The requirement of minimum physicality

In its opinion, the Court stated that NSPA section 2314 cases have "always" involved physical goods which have themselves been stolen, even though some section 2314 cases have involved goods which derived their value from an intangible component, or goods which have been physically altered.⁶⁹ Contrary to the Court's statement, many section 2314 cases have involved copyright infringement or theft of trade secrets; in such cases, often no physical good was itself stolen; and if a physical good was stolen, it was often a commercially insignificant good, such as the complaining witness's paper, which happened to embody commercially significant trade secrets.⁷⁰

The prior law did not require that a physical good be itself stolen. All that was required was "minimum physicality." The first statement of the minimum physicality requirement is in *United States v. Bottone*.⁷¹ In *Bottone*, the defendant took documents containing instructions for drug manufacture from the files of Lederle Laboratories, the complaining witness. The defendant made photocopies and handwritten notes of the instructions and returned the original documents to the Lederle files. No physical materials belonging to Lederle Laboratories moved in interstate commerce. Although in *Bottone* physical goods were themselves taken (and then returned so that only duplicates moved in interstate commerce), the *Bottone* court in dicta discussed the question whether physical goods must themselves be taken. The *Bottone* court reasoned that only minimum physicality should be required, stating that NSPA section 2314 would not apply when intangibles are memorized and carried across state lines in a defendant's head, but would apply when the defendant makes an intermediate transcription onto any tangible object that is taken, even a tangible object owned by the defendant.⁷² The dicta in *Bottone* set up a "minimum physicality" requirement because the *Bottone* court thought that only movement of any tangible object should be required, not stealing of a tangible object belonging to the complaining

69. See *supra* note 44 and accompanying text.

70. See *supra* note 60 for a listing of the prior cases.

71. 365 F.2d 389 (2d Cir. 1966).

72. *Id.* at 393-94.

witness. The *Bottone* minimum physicality dicta has been relied on by several courts as authority for the proposition that "no theft of the original tangible medium need occur at all; only the intangible component need be taken, and once it is transferred to a physical medium, albeit one legitimately owned by the taker, it [comes] within the meaning of § 2314."⁷³

Copyrighted materials will always meet the minimum physicality requirement. Copyrighted expressions, although intangible in themselves, are necessarily "fixed in a tangible medium of expression from which they can be perceived, reproduced or otherwise communicated."⁷⁴ The copyright statute requires tangible fixation for copyrights to exist,⁷⁵ and the public obviously requires tangible fixation prior to its purchase of music.⁷⁶ Several courts have noted the tangible-intangible nature of copyrighted materials, and stated that as intangible copyrighted expressions are made effectively tangible by their embodiment upon tape or film, NSPA section 2314 may be applied in copyright infringement cases.⁷⁷

Underneath the Courts opinion runs a questioning stream: should we punish music pirates when what they take is intangible? . . . intangible copyrights cannot be seen, touched or carried . . . how can we call something a stolen good if the alleged thief never laid eyes or hands on it . . . ? Unfortunately, the Court never confronted the fact that although we cannot see, touch or carry copyrighted expressions, we can perceive them. The buying public obviously perceives the music it purchases. Courts regularly test for civil and criminal copyright infringement by testing our

73. *Sam Goody*, 506 F. Supp. at 389. For further discussion of the *Bottone* minimum physicality requirement, *Gallant*, 570 F. Supp. at 312 and *Drebin*, 557 F.2d at 1332. In intellectual property-NSPA § 2314 cases, most courts assumed that duplicates could be stolen goods under NSPA § 2314 in accordance with the minimum physicality requirement; the fact that the physical embodiment, whether vinyl, magnetic tape, film or paper, belonged to the defendant did not take the defendant's activities out of the statute.

74. 17 U.S.C.A. § 102(a) (West 1977). *Letter Edged in Black Press v. Public Bldg. Comm'n.*, 320 F. Supp. 1303, 1310 (N.D. Ill. 1970) (copyright can exist only in a perceptible, tangible work; it cannot exist in a vision).

75. 17 U.S.C.A. § 102(a) (West 1977).

76. The public wants the right music fixed on the tangible medium of a phonorecord, so the music can be repeatedly played: but the public generally does not care who owned the tangible medium when the music was affixed.

77. *Gottesman*, 724 F.2d at 1520 (embodiment on tapes makes the copyrighted work a good within § 2314); *Drum*, 733 F.2d at 1505; *Atherton*, 561 F.2d at 752 (embodiment on film makes the copyrighted work sufficiently reified to be a good within § 2314); *Sam Goody*, 506 F. Supp. at 389.

common perception of substantial similarity between works.⁷⁸ Dowling clearly knew what he wanted to take and sell.

All music piracy can be perceived: the minimum physicality requirement⁷⁹ coupled with the tangible-intangible nature of all copyrighted materials⁸⁰ provide that all music piracy can be perceived. Those two requirements, already firmly rooted in the law, render copyrights sufficiently perceivable to be protected by the law of stolen property. Although music pirates never lay eyes or hands on copyrights, their piracy is very real, can be perceived and should be prosecuted. There is no reason why the courts cannot test for a perceivable interstate transportation of copyright infringing materials.

The prior law of "minimum physicality" makes more sense than the complete physicality test devised by the Court.⁸¹ The minimum physicality requirement allows the commerce-deprivation test⁸² to emphasize what is economically valuable, the intangible songs, and only requires that they be embodied in *any* tangible medium from which they can be perceived. The complete physicality test emphasizes what the Court called the "common sense meaning of the statutory language,"⁸³ but what the Court called "common sense" is really cartoon sense: a thief is a masked man climbing out of a window, carrying a t.v. set.⁸⁴

The Court's complete physicality test turns on an insignificant fact: who owns an insignificant tangible object, which embodies a valuable intangible. Under the complete physicality test in the trade secret sphere, the clever thief who brings his own paper for the photocopy machine is not culpable and the thief who uses the photocopy paper belonging to the complaining witness is culpable. Under the complete physicality test in the music sphere, the defendant who buys source material, such as a vinyl phonorecord, makes duplicates on his own physical objects, such as cassette tapes, and then distributes the duplicates nationwide without paying royalties, has not violated NSPA section 2314 because he owns both the vinyl and the tapes.⁸⁵ The thief who, as Dowling, steals his

78. See *infra* note 96 regarding the perception of theft of copyrights as tested by the elements of copyright infringement including the substantial similarity and copying requirements.

79. See *supra* notes 71-73 and accompanying text.

80. See *supra* notes 74-77 and accompanying text.

81. See notes 46, 67 and 88 and accompanying text. The complete physicality test devised by the Court is analyzed below in the section headed "The Court's Reasoning."

82. The commerce-deprivation test found in the prior law is explained in the section headed "the test for 'stolen good.'" See *supra* notes 61 and 62 and accompanying text.

83. *Dowling*, 473 U.S. 216.

84. The most sensible meaning of stolen goods is found in the commerce-deprivation test: stolen goods are those objects of commerce of which the owner has been deprived.

85. The defendant who buys a phonorecord, makes duplicates on stolen blank tapes, and

source material, makes duplicates on his own physical object and sells the duplicates across country also has not violated NSPA section 2314 because he owns the vinyl.⁸⁶ Only the defendant who steals many phonorecords and transports them across country (without duplication) has violated NSPA section 2314 under the *Dowling* complete physicality test.

On analysis, the Court's questions regarding theft of intangibles, relate to enforceability and evidentiary concerns, *not* to whether a theft has occurred. The minimum physicality requirement found in the prior law should have allayed the enforceability and evidentiary concerns which would reasonably arise were no physical object required. The man whistling along with the radio while he drives across country will *not* be prosecuted for interstate transportation of stolen goods because under a rule of "minimum physicality," some physical object is required. Defendants such as *Dowling*, however, who ship pirated phonorecords across state lines, will be prosecuted as their theft is perceivable albeit the theft of an intangible.⁸⁷ The *Bottone* minimum physicality requirement allays enforceability or evidentiary concerns, yet punishes music pirates who victimize copyright holders and the society which set up copyrights to economically promote the arts.

B. The Court's Reasoning: The requirement of physical taking and the requirement of physical identity

The Court devised a complete physicality test, requiring (i) a prior physical taking of the subject goods, and (ii) a physical identity between

sells the duplicates without paying royalties, has supposedly only deprived the blank tape store, not the copyright holder. Likewise, the defendant who steals a phonorecord and makes duplicates on stolen blank tapes, and sells the duplicates without paying royalties, has supposedly only deprived the phonorecord store and the blank tape store, not the copyright holder. Of course, if a defendant stole many phonorecords and then transported them without duplication, copyright issues would not be implicated and the phonorecords would simply be stolen goods.

If a defendant bought many phonorecords and transported them for sale without duplication, that distribution would not be an infringement under the first sale doctrine. 17 U.S.C.A. § 109 (West 1986). The first sale doctrine makes noninfringing the sale of particular copies owned (as opposed to duplicates). It does not make noninfringing distribution of phonorecords "by rental, lease or lending," but those who infringe by rental, lease or lending of particular copies of phonorecords owned are not subject to criminal penalties. *Id.* See also note 104 regarding first sale as a defense to copyright-NSPA § 2314 charges.

86. Under *Dowling*, the thief who steals a phonorecord and makes duplicates on his own tape and sells them *could* be culpable if the right arguments were made. The Court declined to consider the argument that if the source material was obtained by illicit means and duplicates were made, the duplicates would be "the same" and so also stolen goods. See *supra* note 41 and accompanying text.

87. See *infra* note 96 regarding the perception of theft of copyrights as tested by the elements of copyright infringement including the substantial similarity and copying requirements.

the goods stolen and those eventually transported.⁸⁸ As will be demonstrated below, criminal copyright infringement involves both a physical taking, through mechanical reproduction, and a *perceivable* identity between what is stolen and what is transported. Thus criminal copyright infringement either sufficiently meets the complete physicality test or the test asks too much.

1. The requirement of physical taking

The requirement of physical taking asks too much because the physical reproduction which occurs in music piracy should be a sufficient taking for NSPA section 2314 to apply. Common sense should have told the Court that duplication of copyrighted expressions necessarily involves a physical taking of the subject goods through mechanical reproduction. In order for phonorecords to be pressed or photocopies to be made (or films to be videotaped or cassette tapes to be duplicated), a physical taking of the copyrighted expressions occurs. For example, as regards cassette tapes, magnetic impulses or recorded sounds,⁸⁹ the copyrighted expressions are physically taken from one tape and set down on another.⁹⁰ In *Dowling*, the defendants had phonorecords physically manufactured, taking the copyrighted expressions (the subject good) from source material without authorization from the Elvis copyright holders, and setting those expressions down on their own vinyl. The Court apparently thought that the physical reproduction that occurs in music piracy was insufficient to be a theft, as a copy is left behind and the copyright owners still have a copy.⁹¹ Obviously, there is no *complete* physical taking when copies are left behind.

But should complete physical taking be required? The government argued that the new copy was "the same" as the source copy, and that since the source copy was stolen, the duplicate phonorecords were also

88. See notes 46, 67 and 81 and accompanying text.

89. The Seventh Circuit in *Berkwitt* instructed the jury that what was stolen was the fixation of recorded sounds, not the tangible component parts of the tapes. *Berkwitt*, 619 F.2d at 658.

90. See *Berkwitt*, 619 F.2d at 652, where the defendants' physical manufacturing business is described. The defendants kept an apartment specifically for the purpose of eight-track tape manufacture. They had "an Ampex master-maker, a Liberty duplicator with three slave duplicators, one winder, a degausser, a delineator, masters, pancakes, eight-track cartridge components, stereo components, phonographic records [and] a stopwatch" for the physical taking of magnetic impulses or recorded sounds from legitimate phonorecords and setting them down on illegitimate duplicate eight-track tapes.

91. See *supra* notes 49 and 65 and accompanying text regarding physical control of the copyrighted work and complete deprivation of the copyright holder.

stolen.⁹² The government's argument left open the door for a defendant to buy the source material, duplicate it and distribute it across state lines without triggering section 2314.⁹³ Nevertheless, the idea that the new copy is "the same" as the source material is compelling. Under a test of "good" as that which is the subject of commerce, the new copy is the same good as the source material as it has the same value and identity in commerce. An audience would enjoy the new copy in the same way as the source material and so would pay the same price. Regardless of what is left behind, the physical takings of music piracy take something economically valuable. Requiring complete physical taking is unreasonable as physical reproduction alone is enough to be economic deprivation or theft.

Requiring physical reproduction to trigger NSPA section 2314 would better serve the goals of copyright and criminal laws than requiring complete physical taking. Physical reproduction alone causes economic deprivation to the copyright holder and economic gain to the music pirate. Requiring complete physical taking ignores the real economic injury caused by the "mere" physical reproduction of music piracy. Perhaps when the Court required complete physical taking it was thinking that without a guilty hand, there cannot be a guilty mind. Yet a common sense look at what music pirates do reveals that they use their hands to physically reproduce music not their own. Thus, physical reproduction should be enough for NSPA section 2314 to apply.

2. The requirement of physical identity

The requirement of complete physical identity asks too much as the perceivable identity between the music stolen and the music eventually transported should be sufficient for NSPA section 2314 to apply. The Court required complete physical identity: transportation of the same physical object across states lines, not transportation of the same copyrighted expressions reproduced in another physical object.⁹⁴ Obviously, duplicate phonorecords are not the same physical object as the source material from which they were reproduced. Thus copyright-infringing materials when transported across state lines do not meet a complete, or even partial,⁹⁵ physical identity requirement.

92. See *supra* note 40 and accompanying text.

93. See *supra* notes 85 and 86 and accompanying text.

94. The court in *Gallant* commented that "nearly every court considering an indictment under § 2314 has not read the words 'the same' [from the statute] to require literally that what is transported be in exactly the same form as what was stolen." See *Gallant*, 570 F. Supp. at 311 n.10 and cases cited therein.

95. The *Dowling* Court noted that goods which have been altered do come within NSPA

But should *physical* identity be required? Already built into the copyright law is a test of perceivable identity. In order to prove copyright infringement, substantial similarity must be proved.⁹⁶ The requirement of complete physical identity belies common sense of the marketplace, where unauthorized duplicate phonorecords are bought, sold and enjoyed in the same way as authorized phonorecords. As stated above in the discussion of physical taking, the unauthorized copy has the same value and identity in commerce from the audience's perspective.

Requiring perceivable identity, rather than physical identity, to trigger NSPA section 2314, would better serve the goals of copyright and criminal laws. The requirement of physical identity turns on whether a good is tangible or intangible, not on whether the owner of a good, which is the usual subject of commerce, is being deprived of the rights and benefits of that ownership. Requiring physical identity is just another way of saying it is less evil to steal an intangible song than it is to steal a tangible car.⁹⁷ The physical identity requirement does not serve the goals of the copyright and criminal laws at issue, as those laws were meant to encourage music creation and to prevent deprivation of commercial rights. Requiring perceivable identity, on the other hand, would make it a public offense to duplicate someone else's music, and sell it to audiences who perceive pirated music in the same way as authorized music. The perceivable identity requirement turns on deprivation of commercial rights, and so should be enough for NSPA section 2314 to apply.

CONCLUSION: DUE PROCESS CONCERNS AND A CALL FOR LEGISLATIVE ACTION

Applying NSPA section 2314 to copyright infringement gives rise to serious due process concerns.⁹⁸ Music pirates may know that what they do involves criminal penalties, but they probably do not have adequate notice of the potential prosecution for interstate transportation under the NSPA and the penalties available thereunder.⁹⁹

§ 2314. *Dowling*, 473 U.S. at 216 (citing *United States v. Moore*, 571 F.2d 154 (3d Cir. 1978), *cert. denied*, 435 U.S. 956 (1978) (altered concert tickets)).

96. To establish a claim of copyright infringement, the plaintiff must prove:

- (1) ownership of the copyright in the complaining work;
- (2) originality of the work;
- (3) copying of the work by the defendant; and
- (4) a substantial degree of similarity between the two works.

Selle v. Gibb, 741 F.2d 896, 900 (7th Cir. 1984).

97. See *supra* note 12 and accompanying text.

98. See generally Note, *Copyrights and the National Stolen Property Act: Is the Copyright Infringer a Thief?* 12 FORDHAM L. REV. 1242, 1255 (1984).

99. See *supra* note 54 and accompanying text.

Holding the serious due process concerns aside for a moment, it is clear that applying NSPA section 2314 to copyright infringement does not give rise to the outlandish possibility that innocent, or even merely willful infringers will be prosecuted for interstate transportation of stolen goods. The prosecution was wrong when it conceded at oral argument that *The Nation* could be prosecuted under NSPA section 2314 for its scoop publication of President Ford's memoirs.¹⁰⁰ *The Nation* was held a civil infringer, but there was a significant fair use issue.¹⁰¹ In order to have successfully prosecuted *The Nation* under NSPA section 2314, the government would have had a difficult burden of proof: the government would have to have proved not only all the elements of civil copyright infringement,¹⁰² but also several layers of willfulness and knowledge in order to prove the mens rea elements of both criminal copyright infringement and interstate transportation.¹⁰³ *The Nation* lost on its fair use defense, but it probably would have succeeded in a defense to a criminal copyright infringement: its infringement probably would not have been found willful beyond a reasonable doubt as there was a significant fair use issue. *The Nation* also probably would have succeeded in a defense to interstate transportation, as genuine belief in consent from the copyright holder is a defense,¹⁰⁴ and a copyright holder consents to fair use by statute. Thus, had the *Dowling* Court held that NSPA section 2314 ap-

100. See *supra* notes 55-58 and accompanying text.

101. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985). See note 47 for an explanation of the fair use doctrine.

102. See *supra* note 96 regarding the elements of civil copyright infringement.

103. The express criminal copyright provision requires willfulness. 17 U.S.C.A. § 506(a) (West 1986). A prosecutor must prove, beyond a reasonable doubt, five elements to make out criminal copyright infringement:

- (1) [i]nfringement of copyright;
- (2) of a work that has not been the subject of a 'first sale';
- (3) done willfully;
- (4) with knowledge that the copyrighted work has not been the subject of a "first sale"; and
- (5) for profit.

Atheron, 561 F.2d at 749 (interpreting the Copyright Act of 1909).

A prosecutor must prove, beyond a reasonable doubt, four elements to make out a NSPA § 2314 claim:

- (1) the existence of unauthorized copies of copyrighted works;
- (2) having a value of \$5,000 or more;
- (3) transported in interstate commerce by the defendants;
- (4) with knowledge by the defendants of the "stolen" character (i.e., unauthorized duplication) of the works.

Sam Goody, 506 F. Supp. at 386.

104. Both the first sale doctrine, 17 U.S.C. § 109, and genuine belief by the defendant that he has the property owner's consent are defenses to criminal copyright-NSPA § 2314 charges. *United States v. Goss*, 803 F.2d 638, 644 (11th Cir. 1986) (first sale defense). *United States v. Bennett*, 665 F.2d 16, 22 (2d Cir. 1981). See *supra* note 85 regarding the first sale doctrine.

plies to copyright infringing materials, outlandish prosecution would not have resulted.

Turning back to due process, the lower courts consistently rejected due process arguments regarding notice of the increased penalties for interstate transportation of copyright infringing materials.¹⁰⁵ Those decisions are questionable given the current attitude concerning music piracy: that it is not as evil to steal a song as to steal a car. Whether those decisions on due process were correct is, of course, now a moot question. As the *Dowling* rule came down from our highest court, legislative action is necessary if interstate music piracy is ever going to be subject to penalties on par with other forms of interstate theft. Interstate music piracy should be subject to stiffer penalties than local music piracy, just as interstate car theft is subject to stiffer penalties than local car theft. If Congress did enact legislation placing interstate music piracy on a par with other forms of interstate theft, then, over time, the existence of those penalties equating interstate music piracy with interstate car theft penalties would make it normative for persons in our society to consider stealing music as evil as stealing cars. If it becomes the norm to view stealing music as evil as stealing cars, then the due process concerns about music piracy penalties on par with car theft penalties will disappear; the normative view will serve as notice.

Musicians still get their songs freely from the muse, as Homer did. But if our society's laws do not punish theft of the muse's expressions with all the penalties that are available for other forms of theft, then making music creation one's livelihood will be that much more difficult, and fewer of us will hear the muse.

Elizabeth Blakey

105. See *Gallant*, 570 F. Supp. at 311 (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)). *Gallant* argued that the copyright statute does not give notice that infringement is illegal and that interstate infringement is also illegal. The court held that "[a] person who has notice that his infringing and distribution activities are illegal has notice that he treads on dangerous ground." See also *Steerwell Leisure*, 598 F. Supp. at 173.