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The New Criminal Copyright Sanctions: A Toothless Tiger?

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Willful is "an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, 'wilful' would lead all the rest." n1

-Judge Learned Hand

I. Introduction

Prior to 1998, civil copyright infringements were violations of criminal copyright laws only if a defendant willfully infringed a copyright "for purposes of commercial advantage or private financial gain." n2 Noncommercial copyright infringement, though civilly actionable, failed to establish criminal copyright liability. However, people may infringe copyrights for fun or malice and not just for money, n3 and noncommercial infringement may damage the market for copyrighted works as much as

[*528] commercial infringement. n4 The No Electronic Theft Act ("NET Act") was signed into law on December 16, 1997. n5 The Act as codified provides criminal sanctions for willful infringement associated with commercial motive n6 or reproduction or distribution during any 180-day period of one or more copyrighted works having a total retail value exceeding \$ 1,000. n7 Commentators have expressed concern because a person who merely gives away a copyrighted work or libraries that make copies of copyrighted works regularly may now be subject to liability under the new law - the "commercial motive" requirement no longer exists under the law. The single-copyrighted-work and \$ 1,000-minimum-value thresholds may expose those individuals and institutions to liability for copyright infringement.

The first criminal sanctions for copyright infringement were introduced over one hundred years ago, n8 but criminal copyright enforcement has not increased significantly over the years. Originally treated as a misdemeanor under the 1897 Act, n9 copyright infringement under the Copyright Act of 1976 included a maximum fine of \$ 10,000, imprisonment of up to a year or both. n10 In addition, the 1976 Act provided enhanced penalties for copyright infringement of motion

[*529] pictures. n11 The 1982 Amendment to the Copyright Act made it a felony to n12 copy motion pictures or sound recordings. Although the Copyright Act of 1897 provided for criminal as well as civil remedies, criminal copyright sanctions were infrequently imposed, while enforcement of criminal sanctions has gradually increased since 1978. n13 Criminal copyright infringement cases, however, have been few in number compared to the total number of copyright infringement cases. n14 Of the 3,300 copyright infringement cases published over the past fifty years, only sixty-eight have involved criminal infringement. n15 Criminal sanctions may not be imposed unless the defendant both 1) committed a wrongful act and 2) did so with the requisite mens rea or culpable mental n16 state. In a copyright infringement prosecution, the government may

[*530] win a criminal action against a copyright infringer only when "willfulness" is established. n17

The NET Act, however, does not clearly define willfulness for criminal copyright infringement. n18 The legislative history of the new law merely states that "nothing in the bill . . . modifies liability for copyright infringement, including the standard of willfulness for criminal infringement." n19 Thus the new law was not intended to change the interpretations of willfulness as developed by case n20 law.

"'Willful' . . . is a 'word of many meanings,' and 'its construction is often . . . influenced by its context.'" n21 Some courts have held that willfulness only means intent to copy, not intent to infringe. n22 For instance, if willfulness means merely intent to copy, a defendant who intentionally copied copyrighted works without permission would be subject to criminal copyright sanctions. Other courts have required proof

[*531] that the defendant's actions were knowing or voluntary. n23 A defendant in these courts would not be liable for criminal copyright infringement unless he knew that his conduct constituted copyright infringement.

When interpreting willfulness for the purpose of assessing criminal copyright infringement, it is helpful to first consider what willfulness means in the civil copyright infringement context. n24 For copyright purposes, willfulness is required not only for criminal copyright sanctions, but also for increased statutory damages. n25 Part II discusses willfulness in civil copyright infringement cases and how fair use, which has been the most uncertain area in copyright law, affects the establishment of willfulness. Part III addresses the historical development of criminal copyright law and demonstrates that the NET Act, although eliminating the government's burden to prove "commercial motive" in criminal prosecutions, is still unlikely to dramatically increase criminal copyright liability. This is because proof of willfulness is a statutory impediment to the prosecution of copyright infringement.

II. Willfulness in the Context of Civil Actions for Copyright Infringement

A. Overview of Copyright Protection

The Copyright Act protects the exclusive rights of reproduction, adaptation, distribution of copies, public performance, and public display. n26 A violation of any one or combination of the exclusive rights is considered copyright infringement. n27

[*532] Once the plaintiff has proven that he owns the copyright in a particular work and that the defendant has infringed one of those rights, he has proven copyright infringement. n28 Civil copyright infringement is determined without regard to the intent or the state of mind of the infringer.

In a civil action, the infringer is liable either for the copyright owner's actual damages and the infringer's profits n29 or for statutory damages. n30 A copyright owner who prevails in a civil action is also entitled to court costs and attorneys' fees. n31 The willfulness of the infringing activity is most relevant to the award of statutory damages. n32 In the field of civil copyright infringement, courts may increase statutory damages in cases of willful infringement and lower the damages where the infringer acted unknowingly. n33

Fair use is an affirmative defense to copyright infringement. To balance the protection of copyright owners' rights with the needs of users to disseminate information, the Copyright Act provides limitations on the exclusive rights of copyright owners. n34 Section 107 of the Copyright Act provides four nonexclusive factors for determining when the principles of the fair use doctrine apply: 1) the purpose and character of the use, n35 2) the nature of the copyrighted work, n36 3) the amount and

[*533] substantiality of the portion used n37 and 4) the effect of the use on potential markets for the work or the value of the copyrighted work. n38 In a groundbreaking decision, one court decided that a copyshop's commercial duplication of copyrighted works for educational purposes did not constitute fair use. n39 Further, the court found that the copyshop's activity was not willful. n40 This seemingly disjointed decision has impeded the establishment of willfulness as the standard for increasing statutory damage awards.

B. Innocence and Willfulness in Awarding Statutory Damages

A copyright owner may elect to recover statutory damages instead of actual damages and profits. n41 The purposes of statutory

[*534] damages for copyright infringement are to deter copyright infringement and to compensate injured copyright owners when actual damages and profits are difficult to establish. n42 In determining the amount of damages, a court may consider several factors, including "the expenses saved and profits reaped by the defendants in connection with the infringements, the revenues lost by the plaintiffs as a result of the defendants' conduct, and the infringers' state of mind whether willful, knowing, or merely innocent." n43 Statutory damages may be awarded in an amount between \$ 500 and \$ 20,000 per work infringed. n44 However, if a copyright owner proves that the defendant's infringement was willful, the court may increase the statutory damages up to a maximum of \$ 100,000. n45 On the other hand, if the infringer proves that he was not aware and had no reason to believe that his acts constituted an infringement, the court may reduce the award of statutory damages to a minimum of \$ 200. n46 Furthermore, the court must remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under

107 if the infringer was a nonprofit educational institution or library. n47 The burden of proving willfulness rests on the copyright owner, and the burden of proving innocence rests on the infringer. n48

A finding of innocent infringement does not absolve the defendant of liability. Instead, a defendant can use the defense of innocence to reduce the amount of statutory damages, especially if he is sued for willful infringement. n49 Section 504(c)(2) of the Copyright Act allows an infringer to show "innocence" when the infringer shows he or she "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." n50 In *Video Views, Inc. v.*

[*535] Studio 21, Ltd., n51 plaintiff Video Views owned and licensed public performance rights in adult films. Studio 21 was an adult bookstore that provided customers with the opportunity to view adult films, some of which belonged to Video Views. n52 Not only had Studio 21 neglected to take a license from Video Views, n53 but Video Views had actually notified Studio 21 by letter of its rights in some adult films. n54 The court found, however, that the only two films at issue were never specifically listed in the letter. n55 The court held that Video Views had not established willful infringement because there was not enough evidence that Studio 21 knew that its conduct infringed Video Views' copyrights. n56

Additionally, innocent infringement occurs when one, notified that his conduct constitutes copyright infringement, reasonably and in good faith believes the contrary. n57 In *Hickory Grove Music v. Andrews*, n58 restaurant owners installed a sound system that often played a local radio station in the restaurant. The plaintiffs owned the copyrights to many musical compositions that they licensed through the American Society of Composers, Authors, and Publishers ("ASCAP"). n59 ASCAP contacted the restaurant owners numerous times to facilitate licensing for the performance of copyrighted materials. n60 The restaurant owners refused to enter any licensing agreement with ASCAP, maintaining that their use of the sound system was merely personal and that their establishment was so small that they were exempt from the copyright infringement laws. n61

[*536] The court held that the restaurant owners, who believed in good faith that they were entitled to a home-system defense, could not be found to have willfully violated the copyright laws. n62

If a copyright notice has been used, the civil copyright law precludes defendants from arguing innocence. n63 However, the mere absence of a copyright notice is not sufficient to establish innocence; the court must consider other factors to determine whether a defendant's conduct was innocent. In *D.C. Comics, Inc. v. Mini Gift Shop*, n64 the court held that retail store owners who sold unauthorized "Batman" goods infringed innocently. The court found that there were no copyright notices on the copyrighted goods and that a layman would not be able to distinguish between licensed and unlicensed goods based on the style or quality of the art work. n65 It also noted that the store owners were recent immigrants who spoke little English and lacked the sophistication that would prompt them to inquire about possible copyright infringement. n66 Therefore, the court concluded that the store owners were not aware and had no reason to believe that they committed copyright infringement. n67

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Willfulness, when used in civil copyright law for awarding increased statutory damages, has been interpreted to mean "whether the defendant had knowledge that its conduct represented infringement or perhaps recklessly disregarded the possibility." n68 Willfulness and innocence are not the converse of one another. It is possible in the same action for a plaintiff to be unable to prove a defendant's willfulness and, at the same time, for the defendant to be unable to show that he acted innocently. n69 However, it seems clear that "'willfully' means with knowledge that the defendant's conduct constitutes copyright infringement. Otherwise, there would be no point in providing specially for the reduction of minimum awards for innocent infringement" n70 In other words, "[j]ust as the lack of . . . knowledge will establish an innocent intent, so a defendant's . . . knowledge proves willfulness." n71

Courts have found willfulness even in the absence of proof of a defendant's actual knowledge that its actions constituted copyright infringement. n72 Evidence that the alleged infringer was notified of the copyright infringement is perhaps the most persuasive evidence of willfulness for the purpose of awarding or increasing statutory damages. In *N.A.S. Import Corp. v. Chenson Enterprises, Inc.*, n73 the court held that willfulness could be actual or constructive, and that it could be proven directly or inferred from an infringer's conduct. In *N.A.S.*, the defendant's buckle store was in close proximity to the plaintiff's store, and the defendant continued copying the plaintiff's buckle designs and selling infringing bags long after the defendant's attorney notified the

[*538] plaintiff that his client would stop. n74 The court found that the defendant knowingly appropriated the plaintiff's buckle designs or at least had constructive knowledge that its actions constituted copyright infringement. n75 The court concluded that the defendant willfully infringed the plaintiff's copyrights. n76

In *Schmidt v. Holy Cross Cemetery, Inc.*, n77 the court held that a cemetery corporation willfully committed copyright infringement by continuing to use a copyrighted cemetery plat on file with the county register of deeds after receiving notice of the copyright owner's lack of consent. Similarly, in *Canopy Music Inc. v. Harbor Cities Broadcasting, Inc.*, n78 the court held that a radio station's infringement of copyrighted songs was willful. The station had been previously sued for the same conduct, and a performing rights licensing organization had repeatedly notified the station of its infringing behavior. n79

C. Willfulness and Fair Use

Statutory damages are an important method of compensating injured copyright owners for civil copyright infringement. On the other hand, once a plaintiff has made a prima facie showing of copyright infringement, a defendant may raise the defense of fair use. If an alleged infringer's use is commercial, it is more difficult for him to claim that his use is fair. n80 Initially, courts found that if the use of a work was primarily commercial, then damages were presumed because such use might evidence some meaningful likelihood of future harm. n81 On the other hand, if a use was noncommercial, the burden of proof rested with the copyright owner to show "by a preponderance of the evidence that some

[*539] meaningful likelihood of future harm exists." n82 The crux of the commercial/noncommercial distinction was not whether the sole motive of the use was monetary gain, but whether the user stood to profit from exploitation of the copyrighted material without paying the customary price. n83

The Supreme Court, however, recently found that other factors might establish fair use despite the use's commercial character. n84 In *Campbell v. Acuff-Rose Music*, the issue of fair use arose when members of the rap group 2 Live Crew recorded a parody of Roy Orbison's song, "Oh, Pretty Woman." n85 Before releasing the parody, 2 Live Crew first sought permission from Acuff-Rose Music and offered to pay the appropriate fees. n86 They failed to obtain permission to parody the song, but 2 Live Crew released its version nonetheless. Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew for copyright infringement. n87 The district court granted summary judgment for 2 Live Crew, reasoning that the commercial purpose of 2 Live Crew's song was not a bar to a finding of fair use. n88 The Court of Appeals for the Sixth Circuit reversed, holding that the blatantly commercial purpose prevented the song from being a fair use and that the district court had put too little emphasis on the

[*540] commercial nature of 2 Live Crew's use. n89 The Supreme Court reversed and remanded, declaring that "if commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of section 107." n90

The fair-use doctrine gives courts flexibility to determine whether a defendant's use is legal. When determining fair use, courts rely on the circumstances of individual cases. n91 To determine willfulness for awarding increased statutory damages, however, courts need to further consider a defendant's state of mind. Although an infringer's conduct may serve a commercial purpose, it will not be willful for the purpose of awarding increased statutory damages if the infringer, in good faith, believes that his conduct constitutes fair use.

In *Princeton University Press v. Michigan Document Services, Inc.*, n92 defendant Michigan Document Services ("MDS") was a Michigan for-profit corporation. n93 MDS sold, without permission from the copyright owners, compilations of academic materials, selected and arranged by professors and assigned to students in the professors' classes. n94 The publishers brought an action against MDS for copyright infringement and contended that MDS's infringement was willful. n95 MDS argued that its compilation and sale of the compilations were a fair use under

107 of the Copyright Act. n96 MDS maintained that, based upon its

[*541] good faith and reasonable belief that its activity was permitted under the law, its infringement was not willful. n97

Because of MDS's commercial exploitation of the copyrighted materials, the district court held that its conduct did not constitute fair use n98 and that its activity was willful, justifying increased statutory damages. n99 However, a panel of the Court of Appeals for the Sixth Circuit reversed, finding MDS's use was fair use. n100 The panel's decision did not stand for long. The Sixth Circuit vacated the panel's decision and reheard the case en banc. n101 It affirmed the district court's decision that MDS's use was not fair use, n102 but reversed the lower court's finding of willful infringement, declaring that "the fair use doctrine has been said to be so flexible as virtually to defy definition." n103 Based upon consideration of MDS's good faith belief that its conduct constituted fair use, n104 the Sixth Circuit declined to find "that the defendant's belief that their copying constituted fair use was so unreasonable as to bespeak willfulness." n105

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III. Criminal Copyright Infringement

A. Historical Development of Criminal Copyright Sanctions

Beginning in 1897, Congress imposed misdemeanor penalties on the unauthorized performance or representation of dramatic and musical compositions. n106 The 1909 Copyright Act applied criminal infringement provisions to the statutory protection given to all types of copyrighted works except sound recordings. n107 In response to the growth of record piracy, Congress passed a bill n108 which applied criminal sanctions to the willful infringement of sound recordings. n109 In 1982, Congress established felony sanctions to deter copyright infringement of motion pictures and sound recordings. n110 Up until 1992, piracy of computer software was a misdemeanor offense. n111 In 1992, Congress modified the application of felony sanctions by: 1) applying criminal sanctions to the infringement of all types of works, rather than just motion pictures and sound recordings n112 and 2) changing the thresholds that trigger felony treatment of infringement; rather than being based solely on the number of copies made, as was the case previously, n113 felony sanctions are now triggered, in

[*543] part on the basis of the monetary value of the infringing copies copies. n114 In response to the growth of technology, Congress has amended and increased criminal copyright sanctions. However, relatively few criminal cases n115 have been decided.

Part of the reason why criminal copyright enforcement has been weak is that criminal statutes have been construed narrowly. n116 Courts have been reluctant to extend criminal copyright sanctions to copyright infringement without explicit legislative guidance. n117 Copyrights exist wholly as a creation of federal statute, n118 and remedies for copyright infringement must be specifically designated by Congress, not the courts. n119 In Dowling, the defendant made and distributed by mail

[*544] bootlegged recordings of Elvis Presley performances without having obtained authorization from, or paying royalties to, the owners of the copyrights in the musical compositions. n120 The government attempted to prosecute the copyright infringement under the National Stolen Property Act, which prohibits the interstate transportation of stolen or fraudulently obtained property in order to reach criminal activity that crosses state lines. n121 The Supreme Court held that because the National Stolen Property Act did not plainly and unmistakably cover the defendants' copyright-related conduct, the government could proceed only under the Copyright Act, not under the National Stolen Property Act. n122

Other courts later used narrow interpretations of criminal laws where there was no express legislative intent to charge a defendant who did not infringe a copyright for "commercial advantage or private financial gain." In *United States v. LaMacchia*, n123 defendant David LaMacchia, an MIT student, encouraged lawful purchasers of copyrighted computer games and other software to upload these copyrighted works via a special password to an electronic bulletin board on the Internet. He then transferred the copyrighted works to another electronic address and permitted users with access via a second password to download the works into their home computers for free. n124 Because his infringement was not for "commercial advantage or private financial gain," he was indicted for violation of the Federal Wire Fraud Statute. n125 LaMacchia moved to dismiss the indictment, arguing that the government's use of the wire fraud statute as a vehicle to enforce the copyrights was improper under the decision set forth in n126 *Dowling*. The district court agreed, granting

[*545] LaMacchia's motion on the ground that Congress had no intent to impose criminal copyright sanctions through other criminal statutes rather than through the Copyright Act. n127 Accordingly, LaMacchia, whose conduct was without commercial motive, could not be charged under either the Copyright Act or the Federal Wire Fraud Statute. n128

The NET Act amended the criminal copyright law to increase criminal copyright liability. It includes a new criminal provision to criminalize noncommercial copyright infringement. n129 An infringer is subject to criminal copyright sanctions when one or more copies with a total retail value of at least \$ 1,000 are reproduced or distributed. n130

[*546] Pursuant to the NET Act, the government can prosecute a defendant who neither realizes a direct financial benefit nor substantially damages the market for copyrighted works, such as the situation in LaMacchia.

B. Willfulness Required for Criminal Copyright Infringement

Although mistake or ignorance of the law generally does not constitute a defense to criminal liability, n131 courts have been reluctant to impose criminal penalties on those who do not know the law. n132 The complexity of certain statutes or regulations has made it difficult for the average citizen to know and to comprehend the extent of the duties and obligations imposed by those laws. n133 Therefore, courts have recognized that cases involving prosecution under complex regulatory schemes with the potential of snaring unwitting violators are considered exceptions to the general rule that ignorance of the law is no excuse. n134

A finding of willfulness has been based on a defendant's state of mind, regardless of whether it is objectively reasonable. n135 The term

[*547] willful, as used in criminal tax statutes, has been found to mean a "voluntary, n136 intentional violation of a known legal duty." The Supreme Court in *Cheek v. United States* established that the element of willfulness required the government to prove that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated a known legal duty." n137 Cheek failed to file tax returns for several years in the belief that wages were not income and that he was not a taxpayer as defined under the tax laws. n138 The Supreme Court held that Cheek's conduct was not willful because he had a good faith belief that he was not violating the criminal tax laws. n139

Similarly, the willfulness standard established in *Cheek* is applicable to currency reporting statutes. In *Ratzlaf v. United States*, n140 the defendant Ratzlaf attempted to avoid the filing of a currency transaction report after he was informed by a casino that all transactions involving more than \$ 10,000 must be reported to state and federal authorities. There was no dispute that Ratzlaf knew about the currency reporting requirements and that he intentionally structured his transactions to avoid having the casino and several banks comply with those rules. n141 However, because the government could not prove that Ratzlaf knew that trying to avoid the reporting requirements was unlawful, the Supreme Court held that Ratzlaf did not willfully violate the currency reporting statutes. n142

A majority of courts that have faced this issue have held that the definition of willfulness applied in criminal tax cases is also the

[*548] appropriate standard for determining the requisite intent under the criminal copyright law. In *United States v. Moran*,¹⁴³ the defendant was charged with criminal copyright infringement for his practice of making single copies of validly purchased videocassettes and renting out the copies instead of the originals.¹⁴⁴ Moran believed that to duplicate an original cassette in order to "insure it" was lawful so long as only one copy was made and the original and the copy were not both rented.¹⁴⁵ The court held that the defendant did not act willfully because of the defendant's good faith belief that the copyright laws allowed him to make one copy of a lawfully purchased videocassette to insure against vandalism.¹⁴⁶

Thus, willful intent is often the most difficult element to prove in a criminal prosecution for copyright infringement, and prosecutors must consider carefully all evidence bearing on the willfulness element before recommending prosecution for copyright infringement. Courts have defined willfulness as a defendant's knowledge of a violation of the law. A defendant who believes in good faith that his conduct does not violate the copyright law will not be subject to criminal sanctions, regardless of whether he infringes a copyright for commercial motive. Therefore, the NET Act, although eliminating the government's burden to prove the commercial motive in criminal prosecutions, is still unlikely to dramatically increase criminal copyright liability.

In addition, individuals and institutions such as libraries, that do not copy for profit, have no criminal liability if they believe in good faith that copying copyrighted works is permissible under the provisions of the Copyright Act. Even a commercial enterprise, such as a copyshop, that believes in good faith that its conduct does not infringe a copyright is free from criminal copyright sanctions since the willfulness requirement cannot be established. Furthermore, bulletin board operators are more likely to be sued for criminal copyright infringement because the threshold requirements established by the NET Act are extremely low and easily exceeded.¹⁴⁷ In a digital environment where the volume of

[*549] material is too large to monitor or screen, a bulletin board operator, though willing and able to monitor the material on its system, cannot always identify infringing material. n148 However, if bulletin board operators in good faith believe that their conduct does not constitute copyright infringement, courts are likely to find that their good faith belief is reasonable and that they are not subject to criminal copyright sanctions.

IV. Summary

Willfulness, as determined by the courts for civil litigation and applied to criminal cases, has been based upon a defendant's knowledge of his legal obligations. While civil copyright liability is established without regard to the state of mind of an infringer, the innocence or willfulness of infringing conduct is required for reduced or increased statutory damages. If a defendant has a good faith belief that his conduct does not infringe a copyright, then his conduct is not willful for purposes of increased statutory damages. Even where an infringer's conduct serves a commercial purpose, it will not be willful if the infringer, in good faith, believes that his conduct is not an infringement and that his use was reasonable given the circumstances of the case. Furthermore, where a defendant is ignorant of a legal duty and has not knowingly or

[*550] intentionally violated that duty, he lacks the willfulness required for criminal copyright infringement. It is difficult to satisfy the willfulness element for prosecution. Therefore, notwithstanding the NET Act, which effectively eliminates the commercial motive requirement to criminalize LaMacchia-like behavior, criminal copyright enforcement remains hampered by the statutory requirement that a defendant's conduct be willful.

[*551] [SEE TABLE IN ORIGINAL]

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n1 Model Penal Code and Commentaries 2.02, at 249 n.47 (1985) (quoting A.L.I. Proc. 160 (1955)).

n2 *17 U.S.C. 506(a)(1)* (1994). See also H.R. Rep. No. 105-339, at 5 (1997) (criminal copyright infringement law has always required proof that a defendant infringed a copyright for commercial advantage or private financial gain).

n3 See Timothy D. Howell, *Intellectual Property Pirates: Congress Raises the Stakes in the Modern Battle to Protect Copyrights and Safeguard the United States Economy*, 27 *St. Mary's L. J.* 613, 643 (1996) (modern pirates successfully avoid the "commercial motive" requirement of criminal copyright sanctions in two ways: by infringing copyrighted works without financial motive and by bartering infringed works for other infringed works instead of money).

n4 See generally *United States v. LaMacchia*, 871 *F. Supp.* 535, 537, 33 *U.S.P.Q.2d* (BNA) 1978, 1979 (D. Mass. 1994) (noncommercial infringer's behavior caused losses of more than one million dollars to software copyright holders); H.R. Rep. No. 105-339, at 4 (1997) ("copyright piracy flourishes in the software world. Industry groups estimate that counterfeiting and piracy of intellectual property - especially computer software, compact discs, and movies - cost the affected copyright holders more than \$ 11 billion last year (others believe that the figure is closer to \$ 20 billion)"); Howell, *supra* note 3, at 618 (copyright infringement accounts for billions of dollars in losses annually).

n5 Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended at *17 U.S.C. 101*, 506, 507; *18 U.S.C. 2319*, 2319A, 2320; *28 U.S.C. 1498* (Supp. III 1997)). The Act was introduced on July 25, 1997 in response to *LaMacchia* so that a defendant who did not infringe copyrights for profit could still be punished with criminal sanctions.

n6 *17 U.S.C. 506(a)(1)* (Supp. III 1997). This section requires proof that a defendant willfully infringed a copyright for purposes of commercial advantage or financial gain. *Id.* The term "financial gain" is defined as "receipt or expectation of receipt of anything of value including the receipt of other copyrighted works." *17 U.S.C. 101* (Supp. III 1997).

n7 *17 U.S.C. 506(a)(1)* (Supp. III 1997).

n8 Law of Jan. 6, 1897, ch. 4, 29 Stat. 481.

n9 *Id.* at 482.

n10 Pub. L. No. 94-553, sec. 101, 506(a), 90 Stat. 2541, 2586 (1978).

n11 *Id.* Prior to the 1976 Act, enhanced penalties were only available for infringement of sound recordings.

n12 Pub. L. No. 97-180, sec. 2, 2319, 96 Stat. 91, 92 (1982) (infringement of films or recordings was punishable by a five-year prison sentence and a \$ 250,000 fine). See also

4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* 15.01[B][1], at 15-12 (rel. no. 47, Dec. 1998) [hereinafter "Nimmer"].

n13 See Appendix. The statistics reported here and in the Appendix were derived from results generated by the following research strategy: 1) using the Westlaw database U.S.P.Q., 2) for each year from 1948 to 1997, running a search using the terms, DA(YEAR) & COPYRIGHT /P INFRINGEMENT, 3) excluding cases that were not copyright infringement cases, and 4) eliminating duplications resulting from appealed decisions.

n14 Id.

n15 Id.

n16 See generally *Smith v. California*, 361 U.S. 147, 155 (1959) (criminal responsibility could not be imposed without some element of scienter on the part of the defendant); *Dennis v. United States*, 341 U.S. 494, 500 (1951) ("The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."). In the words of *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995), Congress does not intend to impose criminal liability without some showing of mens rea . . . It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. *Id.* at 931; See also *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994) (if criminal statute does not specify heightened mental element, such as specific intent, general intent is presumed to be the required element); Model Penal Code 2.02(1) (1985) (providing the general rule that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.").

n17 U.S.C. 506(a) (Supp. III 1997). See also *United States v. Haldeman*, 559 F.2d 31, 114 n.226 (D.C. Cir. 1976). According to Haldeman, The main distinction between specific and general intent is the element of bad or evil purpose which is required for the former. Thus a person who knowingly commits an act which the law makes a crime may be said to have general intent, while the person who commits the same act with bad purpose either to disobey or disregard the law may be said to have specific intent. *Id.* Furthermore, under *United States v. Blair*, 54 F.3d 639, 642 (10th Cir. 1995), A specific intent crime is one in which an act was committed voluntarily and purposely with the specific intent to do something the law forbids . . . [A] general intent crime is one in which an act was done voluntarily and intentionally, and not because of mistake or accident . . . In short, a specific intent crime is one in which the defendant acts not only with knowledge of what he is doing, but does so with the objective of completing some unlawful act. *Id.* See also *Darby*, 37 F.3d at 1065 ("The difference between a specific intent and general intent crime involves the way in which the intent is proved - whether by probing the defendant's subjective state of mind or whether by objectively looking at the defendant's behavior in the totality of the circumstances.").

n18 Pub. L. No. 105-147, sec. 2(b)(a), 111 Stat. 2678, 2678 (1997).

n19 H.R. Rep. No. 105-339, at 10 (1997). In the absence of a clarification of "willfulness," those with questions concerning the meaning of willfulness and its

application in the electronic environment were reluctant to rely on the report language or existing case law for guidance.

n20 *Id.*

n21 *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)).

n22 See, e.g., *United States v. Taxe*, 380 F. Supp. 1010, 1017, 184 U.S.P.Q. (BNA) 5, 9 (C.D. Cal. 1974).

n23 See, e.g., *United States v. Cross*, 816 F.2d 297, 300, 2 U.S.P.Q.2d (BNA) 1356, 1358 (7th Cir. 1987); *United States v. Moran*, 757 F. Supp. 1046, 1050 (D. Neb. 1991).

n24 See, e.g., *United States v. Manzer*, 69 F.3d 222, 227, 36 U.S.P.Q.2d (BNA) 1520, 1524 (8th Cir. 1995) (finding Manzer liable for criminal copyright infringement, using the standard for willfulness that applies to civil copyright infringement); *Cross*, 816 F.2d at 303, 2 U.S.P.Q.2d at 1360 ("In order to understand the meaning of criminal copyright infringement, it is necessary to resort to the civil law of copyright."); 4 Nimmer, supra note 12, 15.01[A][2], at 15-4 (rel. no 47, Dec. 1998).

n25 17 U.S.C. 504(c)(2) (1994 & Supp. III 1997).

n26 17 U.S.C. 106(1-5) (1994 & Supp. III 1997).

n27 17 U.S.C. 501(a) (1994).

n28 See, e.g., *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 18 U.S.P.Q.2d (BNA) 1275, 1284 (1991).

n29 17 U.S.C. 504(b) (1994).

n30 17 U.S.C. 504(c)(1) (1994).

n31 17 U.S.C. 505 (1994).

n32 David Nimmer, *Criminal Copyright and Trademark Law: The Importance of Criminal Sanctions to Civil Practitioners*, 9 Ent. L. Rep. 3, 3 (1987) (criminal copyright and trademark lawsuits are infrequently filed).

n33 17 U.S.C. 504(c)(2) (Supp. III 1997). See also 35 U.S.C. 284-285 (1994) (in patent infringement case, establishment of willfulness may be sufficient for the courts to increase damages up to three times the amount found or assessed or to award reasonable attorneys' fees to prevailing party); 15 U.S.C. 1117(b) (1994) (in trademark infringement case, court has discretion to award up to three times the amount of actual damages and attorneys' fees if willful infringement is established).

n34 17 U.S.C. 107-120 (1994 & Supp. III 1997).

n35 See, e.g., *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1388, 40 U.S.P.Q.2d (BNA) 1641, 1647 (6th Cir. 1996) (holding that purpose and character of use weighed against finding of fair use); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530, 18 U.S.P.Q.2d (BNA) 1437, 1442 (S.D.N.Y. 1991) (considering two elements when examining purpose and character of use: 1) commercial or noncommercial purpose and 2) productivity or nonproductivity).

n36 See, e.g., *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 925, 35 U.S.P.Q.2d (BNA) 1513, 1523 (2d Cir. 1995) (holding that scientific journal articles were not within core of copyright's protective purposes); *Basic Books*, 758 F. Supp. at 1532-33, 18 U.S.P.Q.2d at 1444 ("factual works, such as biographies, reviews, criticism and commentary, are believed to have a greater public value and, therefore, uses of them may be better tolerated by the copyright law").

n37 See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586, 29 U.S.P.Q.2d (BNA) 1961, 1968 (1994) (explaining that there are no absolute rules as to how much of a copyrighted work may be copied under the protection of fair use); *Basic Books*, 758 F. Supp. at 1523, 18 U.S.P.Q.2d at 1444 ("This third factor considers not only the percentage of the original used but also the 'substantiality' of that portion to the whole of the work; that is, courts must evaluate the qualitative aspects as well as the quantity of material copied."); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565, 225 U.S.P.Q. (BNA) 1073, 1082-83 (1985) (holding fair use defense to be inapplicable, observing that although defendant took only 300 words out of President Ford's memoirs, the portion amounted to "the heart of the book," the part most likely to be newsworthy and important.); *Princeton*, 99 F.3d at 1389, 40 U.S.P.Q.2d at 1647 (quoting 17 U.S.C. 107(3) (1994)) ("The third statutory factor requires us to assess 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole.'") In that case, the court was persuaded that the amount and substantiality of the excerpts copied by the defendants weighed against a finding of fair use. *Id.*

n38 The fourth factor has been held to be the single most important element of fair use. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 220 U.S.P.Q. (BNA) 665, 682 (1984) (explaining that burden of proof as to market effect rests with copyright owner if challenged use is of noncommercial nature; alleged infringer has burden, on the other hand, if challenged use is "commercial" in nature.); *Princeton*, 99 F.3d at 1386, 40 U.S.P.Q.2d at 1644 (explaining that the fourth factor is generally demonstrated by showing that purpose or character of use was commercial). The Copyright Act also contains certain exemptions for uses by libraries and nonprofit educational institutions. See 17 U.S.C. 108 (1994 & Supp. III 1997).

n39 *Princeton*, 99 F.3d at 1383, 40 U.S.P.Q.2d at 1642.

n40 *Id.*

n41 17 U.S.C. 504(c)(1) (1994). See also 17 U.S.C. 412 (1994) (statutory damages are available for infringement of unpublished works only when copyright is registered prior to infringement, and statutory damages are available for published works only when copyright is registered before infringement or within three months of first publication).

n42 *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233, 95 U.S.P.Q. (BNA) 396, 398 (1952).

n43 *N.A.S. Import Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252, 23 U.S.P.Q.2d (BNA) 1387, 1388 (2d Cir. 1992) (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* 14.04[B], at 14-41 (1991)).

n44 17 U.S.C. 504(c)(1) (1994).

n45 17 U.S.C. 504(c)(2) (Supp. III 1997).

n46 Id.

n47 Id.

n48 Id.

n49 Id.

n50 Id.

n51 925 *F.2d* 1010, 1012, 17 *U.S.P.Q.2d* (BNA) 1753, 1754 (7th Cir. 1991).

n52 Id.

n53 Id.

n54 *Id.* at 1021, 17 *U.S.P.Q.2d* at 1761.

n55 Id.

n56 Id.

n57 17 *U.S.C.* 504(c)(2) (Supp. III 1997). See also *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 *F.2d* 1332, 1336, 15 *U.S.P.Q.2d* (BNA) 1530, 1533 (9th Cir. 1990) (defendant must show reasonable good faith belief to refute evidence of willful infringement); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 *F.3d* 1381, 1392, 40 *U.S.P.Q.2d* (BNA), 1641, 1649-50 (6th Cir. 1996); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 *F. Supp.* 1522, 1544, 18 *U.S.P.Q.2d* (BNA) 1437, 1454 (S.D.N.Y. 1991) ("The defendant shoulders the burden of proving his good faith and that its belief was a reasonable one").

n58 749 *F. Supp.* 1031, 1034 (*D. Mont.* 1990).

n59 *Id.* at 1033.

n60 *Id.* at 1034.

n61 Id. See also 17 *U.S.C.* 110 (1994). The relevant statutory language states: Notwithstanding the provisions of [17 *U.S.C.*] section 106, the following are not infringements of copyright: . . . (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless (A) a direct charge is made to see or hear the transmission; or (B) the transmission thus received is further transmitted to the public Id.

n62 *Hickory Grove*, 749 *F. Supp.* at 1039.

n63 17 *U.S.C.* 401(d) (1994) ("If a notice of copyright in the form and position specified by this section [is placed] on the published copy or copies . . . then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement."). See also 17 *U.S.C.* 401(a) (1994) ("Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright . . . may be placed on publicly distributed copies from which the work can be visually perceived."). The Copyright Act had traditionally emphasized placement of a copyright notice on all published copies and phonorecords of a works. Failure to attach a notice of copyright led to forfeiture of the copyright under the

Copyright Act of 1909. The 1976 Copyright Act retained mandatory notice requirements but made less draconian the consequences of an error or omission. To join the Berne Convention, which requires that all member nations to refrain from conditioning protection upon compliance with formalities, Congress eliminated a notice requirement for copyright protection.

n64 912 F.2d 29, 36, 15 U.S.P.Q.2d (BNA) 1888, 1893 (2d Cir. 1990).

n65 *Id.* at 35, 15 U.S.P.Q.2d at 1892-93.

n66 *Id.* at 32, 15 U.S.P.Q.2d at 1890.

n67 *Id.* at 36, 15 U.S.P.Q.2d at 1893.

n68 *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1382, 27 U.S.P.Q.2d (BNA) 1001, 1013 (2d Cir. 1993). See also *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020, 17 U.S.P.Q.2d (BNA) 1753, 1761 (7th Cir. 1991) (explaining that copyright infringement is "willful" for purpose of imposing increased statutory damages if infringer knows that his conduct is infringing or if the infringer acts in reckless disregard of copyright owner's right); *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1115, 1 U.S.P.Q.2d (BNA) 1261, 1265 (2d Cir. 1986) (defendant's knowledge that his or her actions constituted an infringement establishes willfulness); 4 Nimmer, *supra* note 12, 14.04[B][3], at 14-59 (rel. no. 47, Dec. 1998).

n69 *Fitzgerald*, 807 F.2d at 1115, 1 U.S.P.Q.2d at 1265.

n70 4 Nimmer, *supra* note 12, 14.04[B][3], at 14-59 to 14-60 (rel. no. 47, Dec. 1998).

n71 *Fitzgerald*, 807 F.2d at 1115, 1 U.S.P.Q.2d at 1265.

n72 *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375, 380-81, 8 U.S.P.Q.2d (BNA) 1050, 1054-55 (7th Cir. 1988) (infringement was willful where defendant did not seek counsel of attorney in light of notice from plaintiff that defendant was violating the copyright laws).

n73 968 F.2d 250, 252, 23 U.S.P.Q.2d (BNA) 1387, 1389 (2d Cir. 1992).

n74 *Id.* at 253, 23 U.S.P.Q.2d at 1389.

n75 *Id.*

n76 *Id.*

n77 840 F. Supp. 829, 835, 30 U.S.P.Q.2d (BNA) 1177, 1184 (D. Kan. 1993).

n78 950 F. Supp. 913, 917, 41 U.S.P.Q.2d (BNA) 2008, 2011 (E.D. Wis. 1997).

n79 *Id.*

n80 See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562, 225 U.S.P.Q. (BNA) 1073, 1081 (1985) (commercial use is less likely to be deemed fair use than noncommercial use); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 220 U.S.P.Q. (BNA) 665, 681 (1984) (every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright).

n81 *Harper & Row*, 471 U.S. at 540, 225 U.S.P.Q. at 1081; *Sony*, 461 U.S. at 451, 220 U.S.P.Q. at 681.

n82 *Sony*, 464 U.S. at 451, 220 U.S.P.Q. at 682. See also *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1385-86, 40 U.S.P.Q.2d (BNA), 1641, 1644 (6th Cir. 1996) ("The burden of proof as to market effect rests with the copyright holder if the challenged use is of a 'noncommercial' nature. The alleged infringer has the burden, on the other hand, if the challenged use is 'commercial' in nature").

n83 *Princeton*, 99 F.3d at 1386-88, 40 U.S.P.Q.2d at 1645-47 (finding that the copying complained of was performed on a profit-making basis by commercial enterprise, thus of commercial nature, even though students and professors used coursepacks for nonprofit educational purposes). See also *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1529-35, 18 U.S.P.Q.2d (BNA) 1437, 1441-46 (S.D.N.Y. 1991) (holding that Kinko's could not rely on fair use defense when defendant copied and sold excerpts from books that plaintiffs held copyrights in, without permission and without payment of required fees.).

n84 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584, 29 U.S.P.Q.2d (BNA) 1961, 1967 (1994).

n85 *Id.* at 573, 29 U.S.P.Q.2d at 1963.

n86 *Id.* at 572-73, 29 U.S.P.Q.2d at 1962-63.

n87 *Id.* at 573, 29 U.S.P.Q.2d at 1963.

n88 *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1154, 18 U.S.P.Q.2d (BNA) 1144, 1146-47 (M.D. Tenn. 1991).

n89 *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437-39, 23 U.S.P.Q.2d (BNA) 1817, 1822-24 (6th Cir. 1992) (the court relied on the *Sony* and *Harper & Row* decisions that held every commercial use was presumptively unfair).

n90 *Acuff-Rose*, 510 U.S. at 584, 29 U.S.P.Q.2d at 1967. See also *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 921, 35 U.S.P.Q.2d (BNA) 1513, 1519-20 (2d Cir. 1995). Although *Texaco* was a for-profit corporation conducting research primarily for commercial gain, the court declined to conclude that *Texaco's* copying of eight particular *Catalysis* articles amounted to commercial exploitation. *Id.*, 35 U.S.P.Q.2d at 1520. Despite the fact that the copying might have led to the development of new products and technology that could have improved *Texaco's* commercial performance, the immediate goal of *Texaco's* copying was to facilitate its employee's research in the sciences. *Id.*

n91 *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561, 225 U.S.P.Q. (BNA) 1073, 1081 (1985) (fair use requires a case-by-case determination whether a particular use is fair). See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 220 U.S.P.Q. (BNA) 665, 682 (1984).

n92 99 F.3d 1381, 40 U.S.P.Q.2d (BNA) 1641 (6th Cir. 1996).

n93 *Id.* at 1383, 40 U.S.P.Q.2d at 1642.

n94 *Id.*

n95 *Id. at 1392, 40 U.S.P.Q.2d at 1649-50.*

n96 *Id. at 1384-85, 40 U.S.P.Q.2d at 1643.* The defendants argued that their actions constituted fair use because the practice had been widespread and on-going for nineteen years, publishers had not been able to document sales loss, their practice had not hurt the publishers, and their actions were done for students and professors for educational purposes. *Id.*

n97 *Id. at 1392, 40 U.S.P.Q.2d at 1650* (recognizing that willfulness means with knowledge that the defendant's conduct constitutes copyright infringement).

n98 *Princeton Univ. Press v. Michigan Document Servs., Inc., 855 F. Supp. 905, 910-12, 32 U.S.P.Q.2d (BNA) 1045, 1049-51 (E.D. Mich. 1994)* (finding that the defendant's use was commercial in nature and did not constitute fair use).

n99 *Id. at 910-13, 32 U.S.P.Q.2d at 1049-51* (finding that MDS's conduct would bring significant loss of revenues to publishers and was in reckless disregard of copyright holders' rights, thus holding that MDS's infringing activity was willful).

n100 *Princeton, 99 F.3d at 1383, 40 U.S.P.Q.2d at 1642.*

n101 *Id.*

n102 *Id. at 1392, 40 U.S.P.Q.2d at 1659.*

n103 *Id.*

n104 *Id.* The defendant believed that it was fair use because the copies were used by the students and professors for educational purposes. *Id.*

n105 *Id.* But see *Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1545, 18 U.S.P.Q.2d (BNA) 1437, 1453-54 (S.D.N.Y. 1991)* (ruling that Kinko's knew its conduct constituted copyright infringement, that its good faith belief was not reasonable, and that Kinko's willfully infringed the publishers' copyrights, triggering increased statutory damages).

n106 Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

n107 Copyright Act of 1909, ch. 320, 5, 33 Stat. 1075.

n108 Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391.

n109 *Id.*, sec. 2 (codified at *17 U.S.C. 101(e)*).

n110 See Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, sec. 3, 96 Stat. 91, codified at *18 U.S.C. 2319* (infringement of the reproduction and distribution rights in motion pictures and sound recordings is punishable by a prison sentence of up to five years and a fine of up to \$ 250,000).

n111 Greg Short, *Combating Software Piracy: Can Felony Penalties for Copyright Infringement Curtail the Copying of Computer Software?*, 10 *Santa Clara Computer & High Tech. L.J.* 221, 230 (1994). Prior to 1992, criminal felony penalties applied only to the infringing reproduction or distribution of sound recordings, motion pictures and other audiovisual works. *Id.*

n112 See 4 *Nimmer*, *supra* note 12, 15.01[B], at 15-11 (rel. no. 47, Dec. 1998).

n113 Under 18 U.S.C. 2319(b), as enacted by Pub. L. No. 97-180, a fine of up to \$ 250,000 and a jail term of up to two years could be imposed for activity that (A) involves the reproduction or distribution, during any one- hundred-and-eighty-day period, of more than one hundred but less than one thousand phonorecords or copies infringing the copyright in one or more sound recordings; or (B) involves the reproduction or distribution, during any one-hundred-and eighty- day period, of more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works. Id. The same statute authorized the imposition of a fine of up to \$ 250,000 and a jail term of up to five years for a second offense or for a first offense involving at least one thousand phonorecords or copies infringing the reproduction or distribution rights to a sound recording or involving at least sixty-five copies infringing the reproduction or distribution rights to a motion picture.

n114 See Act of Oct. 28, 1992, Pub. L. No. 102- 561, sec. 1, 106 Stat. 4233 (codified at 18 U.S.C. 2319(b)(1), 2319(b)(2) (1994)). Under the current version of 18 U.S.C. 2319(b), imprisonment of up to five years and a fine may be imposed upon an individual for "the reproduction or distribution, during any 180-day period, of at last [sic] 10 copies or phonorecords, of 1 or more copyrighted works, with a retail value of more than \$ 2,500." Id. A second offense may be punished by a fine jail term of up to 10 years. Id. While the current language of 2319(b) omits the dollar values of the fines it imposes, they remain the same as the fines that could be imposed under the earlier version of the statute. See 4 Nimmer, supra note 12, 15.01[B][1], at 15-14 n.97 (rel. no. 47, Dec. 1998); 18 U.S.C. 3571 (1994).

n115 See Appendix.

n116 *United States v. Brooks*, 945 F. Supp. 830, 831, 40 U.S.P.Q.2d (BNA) 1948, 1948 (E.D. Penn. 1996) (explaining that 18 U.S.C. 1001 (1994) "criminalizes false statements made 'in any matter within the jurisdiction of any department or agency of the United States'"). The defendant, charged with making false statements to the Copyright Office and with criminal copyright infringement, moved to dismiss the false statement counts. *Id.* at 831, 40 U.S.P.Q.2d at 1949. The court held that because the Copyright Office was part of the legislative, not executive, branch of the government, 1001 could not be applied. *Id.* at 833, 40 U.S.P.Q.2d 1950.

n117 *Dowling v. United States*, 473 U.S. 207, 214, 226 U.S.P.Q. (BNA) 529, 532 (1985) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820)) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."). See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431, 220 U.S.P.Q. (BNA) 665, 673 (1984) (noting "the judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance") (citations omitted).

n118 See *Sony*, 464 U.S. at 431, 220 U.S.P.Q. at 673 (citing *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661-62 (1834)).

n119 *Id.*, (quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1989)).

n120 *Dowling*, 473 U.S. at 209-10, 226 U.S.P.Q. at 530.

n121 *Id.* See also 18 U.S.C. 2314 (1994) (providing for the imposition of criminal penalties "upon any person who 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").

n122 *Dowling*, 473 U.S. at 228, 226 U.S.P.Q. at 538.

n123 871 F. Supp. 535, 536, 33 U.S.P.Q.2d (BNA) 1978, 1978 (D. Mass. 1994).

n124 Id.

n125 Id. See also 18 U.S.C. 1343 (1994) (imposing criminal penalties for fraud involving the use of interstate or foreign wire, radio, or television transmissions).

n126 473 U.S. at 214, 226 U.S.P.Q. at 532 (concluding that it was legislature, not the court, that was to define a crime and ordain its punishment). See also Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, at 228 (1995) (explaining that the *Dowling* and *LaMacchia* decisions demonstrate that the Copyright Act is insufficient to prevent flagrant copyright violations in the electronic networks, and large-scale infringement might escape prosecution because of the loopholes in the copyright criminal provisions); Howell, *supra* note 3, at 656 (explaining that it is important to note that the courts in *LaMacchia* and *Dowling* did not hold that criminal sanctions were inapplicable to the defendant's infringement, only that there was no legislative intent to make the defendant's conduct criminal since defendants acted without "commercial advantage or private financial gain").

n127 *LaMacchia*, 871 F. Supp. at 545, 33 U.S.P.Q.2d at 1985-86.

n128 Id. at 542-45. But see *United States v. Wang*, 898 F. Supp. 758, 37 U.S.P.Q.2d (BNA) 1409 (D. Colo. 1995).

n129 17 U.S.C. 506(a)(2) (Supp. III 1997).

n130 Id. It is unclear that the retail value is based on the value of the infringing or genuine items. See, e.g., *United States v. Cho*, 136 F.3d 982, 984 (5th Cir. 1998) ("the retail value of the infringing items in the United States Sentencing Guidelines (U.S.S.G.) 2B5.3, 'Criminal Infringement of Copyright or Trademark,' was based on the retail value of the counterfeited items"); *United States v. Kim*, 963 F.2d 65, 68, 23 U.S.P.Q.2d (BNA) 1227, 1229 (5th Cir. 1992) (explaining that the phrase "retail value of the infringing items" was not expressly defined in U.S.S.G. 2B5.4(b)(1) for an increase in the offense level for criminal infringement of a trademark, and using retail value of the counterfeit merchandise that was seized by customs agents). Furthermore, courts have found that if there was insufficient evidence to determine the retail price of counterfeit items, the retail value of genuine merchandise was relevant evidence in determining the retail value of the infringing items. See *Cho*, 136 F.3d at 985 (finding insufficient evidence of price of counterfeit items, and that district court was therefore not clearly erroneous in relying on price of genuine articles); *United States v. Larracuenta*, 952 F.2d 672, 674-75 (2d Cir. 1992) (explaining that if counterfeits were prepared with sufficient quality to permit distribution through normal retail outlets, value of infringing items was normal retail price to ultimate consumers who purchase from such outlets, further explaining that it would be different question if infringing items were of obviously inferior quality and were for that reason distributed to consumers who pay far less than retail price of authentic items); *Kim*, 963 F.2d at 69, 23 U.S.P.Q.2d at 1229-30 (explaining that the

court in *Larracuente* correctly used retail value of genuine merchandise to determine increase in defendant's offense level under U.S.S.G. 2B5.3). See also H.R. Rep. No. 102-997, at 6-7, reprinted in 1992 U.S.C.C.A.N. 3569, 3574-75 (for copyrighted works that are not sold through normal retail channels or that are infringed before retail value has been established, courts may look to suggested retail price, wholesale price, replacement cost of the item, or financial injury caused to copyright owner).

n131 *Hamling v. United States*, 418 U.S. 87, 123 (1974) (defendant could not avoid prosecution by simply claiming that he had not "brushed up on the law"). See also *Lambert v. California*, 355 U.S. 225, 228 (1957) (ignorance of the law would not excuse criminal liability).

n132 *Cheek v. United States*, 498 U.S. 192, 199 (1991).

n133 *Id.*

n134 *United States v. Baker*, 63 F.3d 1478, 1491 (9th Cir. 1995) (recognizing "two categories of cases as exceptions to the general rule that ignorance of the law is no excuse [T]he second category involves prosecution under complex regulatory schemes that have the potential of snaring unwitting violators"). See also *United States v. Zerbach*, 47 F.3d 1252, 1261 (3d Cir. 1995) (in those cases involving criminal offenses for which proof of knowledge of illegality is an element of government's prima facie case, mistake of law is complete defense).

n135 *Cheek*, 498 U.S. at 203-04 ("the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the government has carried its burden of proving knowledge"). See also *United States v. Morris*, 20 F. 3d 1111, 1115 (11th Cir. 1994) (good faith of defendant in tax cases need not be objectively reasonable); Francis Funaro, Assessing Willfulness in Criminal Tax Cases: Supreme Court Rejects Objective Reasonableness Standard - *Cheek v. United States*, 25 *Suffolk U. L. Rev.* 904, 910 (1991) (the court decision in *Cheek* settled dispute among the circuit courts as to proper standard for evaluating misunderstanding of law defenses in criminal tax cases, and it provided that even an objectively unreasonable misunderstanding can serve to negate willfulness).

n136 *Cheek*, 498 U.S. at 200.

n137 *Id.* at 201.

n138 *Id.* See also 26 U.S.C. 7201 (1988 & Supp. III 1991) (providing that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall be guilty of a felony"); 26 U.S.C. 7203 (1988 & Supp. III 1991) (providing that "any person who willfully . . . fails to make tax return shall be guilty of a misdemeanor").

n139 *Cheek*, 480 U.S. at 201-02 (finding that willfulness is not established if defendant has good faith belief that he was not violating any provisions of the tax laws because "one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist").

n140 *510 U.S. 135, 137 (1994)*. See also *31 U.S.C. 5324 (1988 & Supp. IV 1992)* (prohibiting financial transactions structured to avoid currency transaction reports); *31 U.S.C. 5322 (1988 & Supp. IV 1992)* (providing for fine of not more than \$ 250,000, imprisonment for not more than five years, or both for violations of currency reporting statutes); Kathryn Keneally, Supreme Court Raises "Specific Intent" Threshold for Some Criminal Violations, *81 J. Tax'n 44 (1994)*.

n141 *Ratzlaf, 510 U.S. at 140*.

n142 *Id. at 149*.

n143 *757 F. Supp. 1046 (D. Neb. 1991)*.

n144 *Id. at 1047*.

n145 *Id.*

n146 *Id. at 1052*.

n147 Marc S. Friedman & Kristin Bissinger, 'Infojacking': Crimes on the Information Super Highway, 9 J. Proprietary Rts. 2, 6 (1997) (explaining that the Internet has enabled a global software piracy industry since a large amount of pirated works can be copied easily and rapidly, and within a few hours or minutes multiple users around the world can instantly make thousands of copies). See also Teddy C. Kim, Taming the Electronic Frontier: Software Copyright Protection in the Wake of *United States v. LaMacchia*, 80 *Minn. L. Rev. 1255, 1276 (1996)* (explaining that there are no boundaries on the Internet, so once copyrighted material is posted on the Internet there is virtually no limit to its distribution; a combination of copy protection and civil actions are best suited for the amelioration of noncommercial software piracy since criminal copyright laws are ineffective in cyberspace).

n148 2.04[A][3][e], at 12-97 (rel. no. 46, Sept. 1998); Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, at 115-16 (1995); The On-Line Copyright Liability Limitation Act, H.R. 2180, 105th Cong., 1st Sess. (1997). Introduced on July 17, 1997, H.R. 2180 sought to amend the Copyright Act to reduce the liabilities of on-line service providers. But see *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1556-57, 29 U.S.P.Q.2d (BNA) 1827, 1831 (M.D. Fla. 1993) (holding bulletin board operator liable for publicly distributing and displaying copyrighted works uploaded by users over bulletin board service).