Purloined Papal Papers Prompt Query

Thomas G. Field, Jr.

As many know, the pope's butler did it, bringing a well-known cliché to life. But would his conduct be criminal in the United States?

As reported by Nicole Winfield on Oct. 6th, "The pope's butler was convicted Saturday of stealing the pontiff's private documents and leaking them to a journalist…." Pope's butler convicted in leaks, given 18 months. Although convicted of "theft," his lawyer argued that taking "only photocopies, not original documents" should not be criminal. By disagreeing, the Vatican tribunal inspired this paper discussing how such a scenario might play out in U.S. federal and state courts.

Both state and federal law protect trade secrets, whereas exclusively federal law governs copyright in documents. *See* 17 U.S.C. § 301(a). Protecting religious documents seems remote from both, but trade secret law was applied in, e.g., Religious Technology Ctr. v. Netcom On-Line Comm. Servs., Inc., 923 F. Supp. 1231, 1255 (N.D.Cal. 1995) and Religious Technology Center v. Lerma, 908 F. Supp. 1362 (E.D.Va. 1995). Copyright law could also be used. *See, e.g.,* Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F.Supp.2d 1290 (D.Ut. 1999) (halting links to copies of a handbook); Society of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colorado, 685 F.Supp.2d 217 (D. Mass. 2010) ("dispute over the copyrights to English language translations of seven ancient Greek religious texts").

Those were civil cases. Specific statutes may also generate criminal liability, but what of generic larceny statutes? Florida courts have found that both may apply; a Massachusetts court disagrees.

In Regents v. Taborsky, 648 So.2d 748, 749 (1994), the Florida 2d District Court of Appeals recounts, “Taborsky [who took] laboratory notebooks containing proprietary and confidential research… was charged with… one count of second degree grand theft and… one count of theft of trade secrets.” Following repeated refusals to return the notebooks and repeated revocation of probation, he was imprisoned. *See* Taborsky v. State, 659 So.2d 1112 (Fl.2dDCA 1995). On the first count, he could have served fifteen, and, on the second, five years. It is widely reported, however, that he that served only eighteen months, but two of those were on a chain gang.

Commonwealth v. Yourawski, 425 N.E.2d 298, 299 (Mass.1981), holds otherwise: “We do not read the definition of “property” in [the state’s larceny statute], as reaching the property… alleged to have been stolen in this case.” Because the property in issue was pirated music, the court may have sought to evade preemption under 17 U.S.C. § 301(a). *See id*. at 300 n.4. The ruling would nevertheless bar conviction for trade secret theft.

At the federal level, copyright and trade secret statutes both contain criminal provisions. *See*, respectively, 17 U.S.C. § 506 and 18 U.S.C. §§ 1831-39 (the Economic Espionage Act of 1996 (EEA)).

The EEA would not make the conduct such as the butler’s criminal, however. Unless theft serves foreign interests, secrets must be “related to or included in a product that is produced for or placed in interstate or foreign commerce.” § 1832.

Criminal copyright liability is more likely. 17 U.S.C. § 506(a)(1)(B) penalizes willful copying, within a 180-day span, of materials having “a retail value of more than $1000.” Although copies neither intended for sale, nor sold, have no “retail” value in the hands of owners, the value to

transferees should satisfy the requirement.

What if subject-specific statutory requirements cannot be satisfied or prosecutors view their penalties as inadequate? That was addressed soon after *Yourawski* in Dowling v. U.S., 473 U.S. 207 (1985), another case involving music piracy. Although Dowling violated a version of § 506 that required financial gain, prosecutors also pursued apparently larger penalties under other statutes, only one of which was considered there.

Dowling, exploring liability under the National Stolen Property Act (NSPA), *id*. at 209 n.1, first notes that copyrights are not ordinary chattels: "The infringer invades a statutorily defined province…. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use." *Id*. at 216-17. Next, the opinion finds NSPA liability problematic based on its language and origins. *Id*. at 218-22.

Last, the Court observes, "The history of copyright infringement provisions affords additional reason to hesitate…. Not only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution." *Id*. at 221 (citations omitted). Moreover, *Dowling* notes, "The broad consequences of the Government's theory, both in the field of copyright and in kindred fields of intellectual property law, provide a final and dispositive factor against reading [the NSPA] in the manner suggested." *Id*. at 226.

The Court uses Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (addressing unauthorized reproduction of President Ford's memoirs) to illustrate its concern: "[W]e would pause, in the absence of any explicit indication of congressional intention, to bring such conduct within the purview of a criminal statute making available serious penalties for the interstate transportation of goods 'stolen, converted or taken by fraud.'" 473 U.S. at 226.

Indeed, *Dowling* finds, "the field of copyright does not cabin the Government's theory, which would as easily encompass the law of patents and other forms of intellectual property. … Thus… its view of the statute would readily permit its application to interstate shipments of patent-infringing goods." *Id*. at 226-27 (citations omitted). *See also*, *id*. at 227 n. 20 (trademarks).

As noted above, secrets must involve "a product that is produced for or placed in interstate or foreign commerce," to warrant penalties under § 1832 of the EEA. When secrets did not satisfy that condition, *Dowling's* logic, if not its holding, recently induced the Second Circuit to join other Circuits in finding theft of trade secrets outside the NSPA's ambit. *See* U.S. v. Aleynikov: Why is Theft of Valuable Code Not Criminal? (2012).

Rejection of criminal liability for theft of intangibles is well founded when subject-specific statutory requirements are unmet. Therefore, properly briefed courts having an option should follow *Dowling* and *Yourawski* rather than *Taborsky*.

.