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Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement

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DIGITIZATION, COMMODIFICATION, CRIMINALIZATION: THE EVOLUTION OF CRIMINAL COPYRIGHT INFRINGEMENT AND THE IMPORTANCE OF THE WILLFULNESS REQUIREMENT

LYDIA PALLAS LOREN*

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Some degree of abuse is inseparable from the proper use of every thing[.]

-James Madison¹

A recent addition to the arsenal of weapons given to copyright owners threatens to tip a delicate balance. The United States Constitution plainly states that the purpose of copyright law is to promote the progress of knowledge and learning.² In order to achieve this goal, the Copyright Act grants to creators of original works of authorship certain limited rights, often referred to as monopoly rights. But the rights of copyright owners are limited by and subject to rights guaranteed by the Copyright Act to users of copyrighted works.³ If copyright law is to continue to advance its constitutionally mandated goal, the balance between the rights of copyright owners and the rights of the users of copyrighted works must not be weighted too heavily in favor of copyright owners.⁴

1. Gertz v. Welch, 418 U.S. 323, 340 (1974) (citing *The Report on the Virginia Resolutions of 1798*, in 4 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION OF 1787, 571 (1876)).

2. U.S. CONST. art. I, § 8, cl. 8. This clause is the source of Congress's authority to enact the Copyright Act. The clause provides that Congress shall have the power "[t]o promote the Progress of Science . . . by securing for Limited Times to Authors . . . the exclusive Right to their . . . Writings." *Id.* The use of the word "science" in this context should be understood in its eighteenth century meaning, broadly denoting knowledge and learning. See Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 5, 12 n.14 (1966) (noting that the most authoritative dictionary at the time listed "knowledge" as the first definition of "science").

3. The rights granted to copyright owners in 17 U.S.C. § 106 are expressly "subject to" the rights granted to users of copyrighted works codified in 17 U.S.C. §§ 107-120 (1994).

4. Copyright law is often referred to as incorporating a balance between the rights granted to copyright owners and the rights granted to the users of copyrighted material. See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (discussing copyright as reflecting a "balance of competing claims upon the public interest"); *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) (noting a balance between the rights of copyright owners and the rights of the public).

On December 16, 1997 President Clinton signed into law the “No Electronic Theft (NET) Act”⁵ expanding the types of activities that give rise to liability for criminal copyright infringement by eliminating the requirement that the defendant’s infringement be motivated by profit or commercial gain. This expansion in the scope of activities subject to criminal penalties threatens to undermine the fundamental purpose of copyright; the promotion of knowledge and learning.

The NET Act was proposed for the express purpose of closing a loophole identified in *United States v. LaMacchia*,⁶ but it accomplished far more than merely filling an inadvertent gap in the law. The NET Act brings within the scope of criminal copyright infringement a broad range of activities that previously would not have given rise to criminal liability.

Despite its name, the NET Act applies to more than infringement on the Internet or infringement in electronic media. This Act criminalizes the reproduction or distribution of one or more copies of copyrighted works that have an aggregate retail value of over \$1,000 during any 180 day period, regardless of how those copies are created or distributed.⁷ While the infringement must be willful to qualify as a criminal violation, the statute no longer requires that the infringement be undertaken for commercial advantage or private financial gain in order to give rise to criminal liability.

The ultimate aim of copyright in the United States, as stated in the Constitution, is the promotion of knowledge and learning.⁸ Copyright achieves this goal by both providing a mechanism for the remuneration of authors of creative works, and permitting certain types of uses of copyrighted works without the need for authorization from the copyright owner. Over the past two hundred years the monopoly of the copyright has expanded significantly. From increasing the basic term of a copyright⁹ to increasing the types of activities that

5. No Electronic Theft (NET) Act, Pub.L. No. 105-147, 111 Stat. 2678 (1997) [hereinafter the “NET Act”]. The idea of a “net” being cast around criminal infringers was used earlier in *United States v. Bily*, 406 F. Supp. 726, 733 (E.D. Pa. 1975) (noting that the copyright act “casts a smaller net” around criminal violations).

6. 871 F. Supp. 535 (D. Mass. 1994).

7. The NET Act provides that willfully infringing copyright by “reproduction or distribution, including by electronic means,” is a criminal offense. 17 U.S.C. § 506(a)(2) (Supp. III 1997). However, the “including” language is expressly defined in the Copyright Act to be “illustrative and not limitative.” 17 U.S.C. § 101 (1994).

8. *See supra* note 2.

9. The original term of copyright in this country was fourteen years, with a possible renewal for another fourteen years. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790). The current term of copyright is measured by the life of the author plus seventy years. 17 U.S.C.A. § 302 (West Supp. 1999).

a copyright owner can control,¹⁰ copyright law has evolved into a profit maximizing tool for the powerful content industry. The NET Act is but one of the latest expansions of the rights of copyright owners in the saga of ever increasing monopoly rights for copyright owners in this country.¹¹ The pace with which Congress has increased the scope of the criminal sanctions in copyright law has accelerated exponentially in the last fifteen years, culminating with the NET Act.¹²

With each expansion of copyright owners rights, the justification has been that increased protection will lead to greater incentives for creation. With the NET Act, advocates of expansion made their case in a different form. They argued that without the sought-after criminal sanctions, the incentives to produce certain kinds of works or to place existing works in digital media would remain at an unacceptably low level.¹³ Digitization has changed the landscape of how creative works, the subject of copyright protection, may be distributed. Supporters of the NET Act argued that the fear of rampant, unauthorized copying has the potential to slow the transition to digital technology and digital transmission. Copyright owners worry that if they place their works in digital

10. Originally, copyright owners were given the right to print, publish, and vend their works. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790). Under the current law, copyright owners not only have the right to control reproduction (printing and publishing) and public distribution (vending), they also have the right to create derivative works based on the copyrighted work, to publicly perform the work, and to publicly display the work. 17 U.S.C. § 106 (1994).

11. The increase of criminal sanctions in the area of copyright law can be seen as a form of economic rent seeking. See Lanier Saperstein, Comment, *Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to The Criminal Law Formulation Process*, 87 J. CRIM. L. & CRIMINOLOGY 1470 (1997). The main goal of the groups seeking to increase the criminal sanctions available for copyright infringement is simple wealth maximization. *Id.* at 1493.

12. It is perhaps inaccurate to characterize the NET Act as the *culmination* of the increase in criminal sanctions. Less than one year after the enactment of the NET Act, Congress passed the Digital Millennium Copyright Act which created criminal penalties for willfully circumventing technological protections placed on copyrighted works. These new criminal sanctions also apply to those who alter or omit copyright management information. The criminal penalties carry a maximum fine of \$500,000 or imprisonment for not more than five years, or both, for the first offense; and maximum fines of \$1,000,000 or imprisonment for not more than ten years, or both, for any subsequent offense. Digital Millennium Copyright Act, § 103, 17 U.S.C.A. § 1204 (West Supp. 1999). These new criminal sanctions are part of a unique right codified in title 17 of the United States Code. This paracopyright grants to the owner of a copyrighted work an additional right to control access to their work through technological protections and to have legal protection against the circumvention of those technological protections. 17 U.S.C.A. § 1201 (West Supp. 1999). See Note, *The Criminalization of Copyright Infringement in the Digital Era*, 112 HARV. L. REV. 1705, 1716-18 (1999).

13. NET Act, 1997: *Hearing on H.R. 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Greg Wrenn, on behalf of the Business Software Alliance) (noting that “piracy acts as a powerful disincentive to entrepreneurs who might otherwise bring new products to market but are worried that they will be unable to do so profitably because of the theft of their products.”).

medium the ease of copying will reduce their revenue stream to unacceptable levels. Thus, the increase in criminal sanctions was justified as a means to encourage not only the creation of new works but the use of digital technology.¹⁴

The NET Act, as written, may expand the scope of rights granted to copyright owners too far. However, several important aspects of criminal copyright infringement, if properly applied by prosecutors and judges, will help to keep the copyright monopoly from becoming overly broad. With this proper application, the NET Act can still function as a deterrent for the majority of the types of infringement that were the catalyst for its passage.

Part I of this Article examines the historical evolution of criminal copyright infringement in this country, culminating in the adoption of the NET Act. Part I also provides an overview of the changes in criminal copyright infringement affected by the NET Act.

Part II analyzes why, after 100 years, Congress eliminated the requirement of a profit motive for criminal liability and significantly expanded the reach of the criminal sanctions of the Copyright Act. Part II also describes not just the decisional impetus for the amendment to the Copyright Act, *United States v. LaMacchia*,¹⁵ but the underlying pressures placed on copyright law by the digitization of copyrighted works and the commodification of the intangible rights granted by copyright law.

Part III explores the possible reach of this new Act, questioning whether it casts the net of criminal infringement too wide.

Finally, Part IV addresses the importance of the element of willfulness retained in the statute. This section discusses the interpretation of the term “willful” by the Supreme Court in other areas of law and the interpretation that term has been given by lower courts in the context of the Copyright Act. This section proposes that to prove criminal copyright infringement the government should be required to show that the defendant intentionally violated a known legal duty and that the defendant lacked a good faith belief that the conduct at issue was lawful. Only with this standard in place can the NET Act be kept within reasonable bounds and not risk deterring the lawful and socially productive activity which underlying policies of the Copyright Act seek to encourage.

14. See, e.g., INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 178 (1995) [hereinafter THE WHITE PAPER].

15. 871 F. Supp. 535 (D. Mass. 1994).

I. THE HISTORICAL EVOLUTION OF CRIMINAL COPYRIGHT INFRINGEMENT

A. *An Early History*

Federal copyright protection existed for more than 100 years without any criminal penalties for infringement. From 1790, the year of the first federal copyright act,¹⁶ until 1897, copyright infringement was exclusively a civil matter. In 1897 Congress added the first criminal provision to the Copyright Act.¹⁷ This provision created criminal sanctions only for unlawful public performances and representations of copyrighted dramatic or musical compositions. The mens rea¹⁸ standard under this first criminal provision required that the infringement be done “willfully.”¹⁹ The infringing conduct also needed to be “for profit” in order to constitute a criminal offense.²⁰ Criminal copyright infringement was classified as a misdemeanor offense.²¹ The 1897 Act was very narrow in scope. Infringement by activities other than public performances or representations²² or infringement of copyrighted works other

16. Act of May 31, 1790, 1 Stat. 124 (1790). While the Act of May 31, 1790, was the first federal copyright act, seven years earlier the Continental Congress passed a resolution recommending that the several states secure copyrights to authors or publishers of new books. *Resolution of the Continental Congress Respecting Copyright*, JOURNAL OF THE UNITED STATES CONGRESS ASSEMBLED, CONTAINING THE PROCEEDINGS FROM NOV. 1782 TO NOV. 1783, pp. 256-57 (Philadelphia, C.D. Claypoole 1783) reprinted in MELVILLE B. NIMMER & DAVID NIMMER, 8 NIMMER ON COPYRIGHT, app. 7-11 (1998) [hereinafter NIMMER]. None of the state statutes provided for criminal sanctions for violations of the copyrights granted to authors. North Carolina came closest to imposing criminal-like sanctions, requiring that double damages be assessed against an infringer with half of the damage amount paid to the state. LAWS OF THE STATE OF NORTH-CAROLINA. PUBLISHED ACCORDING TO ACT OF ASSEMBLY, BY JAMES IREDELL 563-64. (Edenton, Hodge & Wills 1791) reprinted in 8 NIMMER app. 7-34 (1998). For over 100 years, federal copyright law also provided for a similar type of civil forfeiture of one half of the damages assessed in infringement actions. See 2 Stat. 171 §§ 3, 4 (April 29, 1802); 4 State. 36 §§ 6, 7, 11 (Feb. 3, 1831); 6 Stat. 212 §§ 98, 100 (July 8, 1870); Rev. Stat., Title 60, §§ 4963, 4965 pp. 957-960 (1873); 26 Stat. 1106 §§ 6, 8 (March 3, 1891); 28 Stat. 965 (March 2, 1895); 29 Stat. 694 (March 3, 1897) reprinted in 8 NIMMER app. 7-45 to 7-95 (1998).

17. Act of Jan. 6, 1897, 29 Stat. 481 (1897).

18. Mens rea is but one basic premise defining criminal conduct. The other premise is actus reus. The actus reus and mens rea must occur simultaneously, the conduct must have resulted in harm, the conduct must have been the legal cause of the harmful result, and the conduct must have been forbidden expressly by law with advance notice that the conduct is criminal. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.1 (2d ed. 1986).

19. Act of Jan. 6, 1897, 29 Stat. 481 (1897).

20. *Id.*

21. *See id.*

22. A copyrighted work may be infringed in several different ways. For example, reproducing the work in copies constitutes an infringement, as does creating a derivative work or selling copies of the copyrighted work. Under the current Copyright Act, six different rights are granted to copyright owners: (1) the right to reproduce the work in copies; (2) the right to prepare derivative works based on the

than dramatic or musical compositions²³ were not subject to criminal penalties, even if undertaken willfully and for profit.

The 1909 Copyright Act retained the requirement that the infringement “be willful and for profit” in order to give rise to criminal sanctions, but expanded criminal infringement to include all types of copyrighted works and all categories of infringing activity.²⁴ As in the 1897 provision, the 1909 Act classified criminal infringement as a misdemeanor offense.²⁵

The criminal provision of the Copyright Act remained basically unchanged for the next sixty years.²⁶ The 1976 Copyright Act, the current copyright law, resulted in only minor changes in the realm of criminal copyright infringement. First, the 1976 Act changed the wording of the mens rea standard for criminal culpability. Under the 1909 Act, criminal liability required infringement that was “willful and for profit,” whereas the 1976 Act defined criminal infringement as infringement done “willfully and for purposes of commercial advantage or private financial gain”²⁷ While it is debatable whether this change in phraseology actually altered the proof required for criminal liability,²⁸ a profit or financial motive clearly remained the touchstone of criminal infringement.

The second change implemented by the 1976 Act was an increase in the

copyrighted work; (3) the right to distribute copies of the work to the public; (4) for certain types of works, the right to perform the work publicly; (5) for certain works, the right to publicly display the work; and (6) for sound recordings, the right to publicly perform the work by means of a digital audio transmission. 17 U.S.C. § 106 (1994 & Supp. I 1995). This first criminal infringement provision only addressed infringement through public performance or representation.

23. Under current copyright law many different types of works are eligible for protection, including literary works, pictorial works, sculptural works, musical works, dramatic works, architectural works, and sound recordings. *See* 17 U.S.C. § 102(a) (1994).

24. *See* Copyright Act of Mar. 4, 1909, ch. 320, § 28, 35 Stat. 1075, 1082 (codified as amended at 17 U.S.C. § 104 (1947)).

25. The 1909 Act retained the classification of criminal copyright infringement as a misdemeanor, with penalties of up to one year in jail. The 1909 Act also permitted a fine between \$100 and \$1,000 to be applied. *See id.*; *see also* Act of Mar. 4, 1909, ch. 321, § 335, 35 Stat. 1152 (1909) (defining misdemeanors as offenses punishable by imprisonment for one year or less).

26. In those sixty years Congress made only one change. In 1974, Congress added criminal liability for “knowingly and willfully” aiding and abetting an infringement. Act of Dec. 31, 1974, Pub. L. No. 93-573, title I, § 102, 88 Stat. 1873 (1974).

27. 17 U.S.C. app. § 506(a) (1976) (effective Jan. 1, 1978).

28. *See* *United States v. LaMacchia*, 871 F. Supp. 535, 539 (D. Mass. 1994) (suggesting that the mens rea requirement was eased by the language in the 1976 Act); *see also* Saperstein, *supra* note 11, at 1478. The legislative history of the 1976 Act indicates that Congress may not have thought it was changing the standard. *See, e.g.*, H.R. REP. NO. 94-1476 at 163 (1976); S. REP. NO. 94-473 at 145 (1975) (referring to the basic criminal offense under the 1976 Act as “willful infringement for profit”); *see also* 4 Nimmer § 15.01 n.1.2 (1999) (stating that the new phraseology of the 1976 Act was intended as the equivalent of the phrase “for profit” used in the 1909 Act).

penalties for criminal infringement. Previously, misdemeanor penalties of up to one year imprisonment and \$1,000 in fines constituted the maximum punishment for criminal infringement.²⁹ The 1976 Act, while retaining the misdemeanor designation, provided that first time offenders could be imprisoned for up to one year and fined up to \$10,000.³⁰ The fine could be increased to \$25,000 if the infringement involved sound recordings or motion pictures.³¹ Repeat offenders were subject to imprisonment for up to two years and fines of up to \$50,000.³² The 1976 Act also provided for the mandatory destruction of all infringing copies or phonorecords and “all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.”³³

B. Felonious Infringement

While the criminal provisions of the Copyright Act had remained essentially unchanged for almost 70 years, once change began a snowball effect occurred, culminating in the NET Act.³⁴ Significant change first began in 1982. During the late 1970's and early 1980's, representatives of the motion picture and record industry argued that the misdemeanor provisions were too lenient.³⁵ First, they argued that misdemeanor penalties did not deter large scale copyright pirates.³⁶ They also asserted that because the offense was only a misdemeanor,

29. *See supra* note 25.

30. 17 U.S.C. app. § 506(a) (1976).

31. *Id.* This increased penalty was only available if the infringement consisted of the unauthorized exercise of the right to reproduce the work or the right to publicly distribute the work. Additionally, if the work infringed was a sound recording, creating a derivative work could give rise to criminal liability. In addition, if the work was a motion picture, performing the work publicly could also give rise to criminal liability. *See supra* note 22 (discussing the different rights granted to a copyright holder that create the different ways to infringe a work).

32. 17 U.S.C. app. § 506(b) (1976).

33. *Id.* Section 506(b) of the Act provides that “the court in its judgement of conviction shall . . . order the forfeiture and destruction or other disposition of all infringing copies or phonorecords . . .” *Id.* (emphasis added).

34. The NET Act may not be the final culmination in the expansion of scope of criminal copyright infringement. *See supra* note 12 and accompanying text.

35. In a joint statement to Congress, the Motion Picture Association of America, Inc., and the Recording Industry Association of America, Inc., estimated that by 1979 record and film piracy was “stealing” more than “\$650 million annually from legitimate sales and rentals in both industries.” *Hearings on Reform of Federal Criminal Laws Before the Senate Comm. on the Judiciary*, 96th Cong. 10,694, 10,697 (1979). Industry also argued that even first offenses should be punishable as felonies as are other “economic” crimes, such as antitrust violations. *Hearings on H.R. 2223, Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice*, 94th Cong. 716 (1975) (statement of Jack Valenti, President of the Motion Picture Association of America and the Association of Motion Picture and Television Producers, Inc.).

36. *See id.*

U.S. Attorneys were not interested in prosecuting individuals for criminal copyright infringement.³⁷ This argument was confirmed by representatives from the Department of Justice.³⁸

In early 1982, Congress obliged industry and, for the first time, designated certain categories of first-time infringements as felonies. Congress did not, however, alter the requisite mental intent element for criminal liability; infringement still had to be committed “willfully” and the infringement still needed to be “for purposes of commercial advantage or private financial gain”³⁹ Congress, however, significantly enhanced the penalties for various types of infringement. The 1982 amendments applied these increased penalties *only* to infringement of motion pictures, audiovisual works, and sound recordings and *only* if the infringement occurred through reproduction or distribution⁴⁰ of infringing copies or phonorecords.⁴¹ Importantly, reproduction or distribution of these limited categories of works were felonies only if they were significant in quantity.

The types of activities classified as felonies under the 1982 amendments were based on the number of copies made or sold within any 180-day period. Congress created two classes of felonies. The more serious infringements carried penalties of up to five years imprisonment and \$250,000 in fines.⁴² These more serious felonies required the reproduction or distribution during any 180 day period of at least one thousand copies of one or more sound recordings.⁴³ For motion pictures or audiovisual works the threshold number required was only sixty-five copies of one or more works.⁴⁴ The 1982

37. See *id.*; see also, Robert A. Spanner, *The Brave New World of Criminal Software Infringement Prosecutions*, 12 COMPUTER LAW. 1, 2 (Nov. 1995) (noting software industry concerns that law enforcement policies result in piracy). The problem of prosecutors not wanting to prosecute individuals for criminal copyright infringement led to a focus on prosecuting these individuals on other, more serious charges, such as mail or wire fraud and even interstate transportation of stolen property. See *id.*; see also Mary Jan Saunders, *Criminal Copyright Infringement and the Copyright Felony Act*, 71 DENV. U. L. REV. 671, 675 (1994). The Supreme Court, however, put an end to that practice in *United States v. Dowling*, 473 U.S. 207 (1985), discussed *infra* Section II.A.

38. See Saunders, *supra* note 37, at 683.

39. Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 (1982) (codified at 17 U.S.C. § 506(a) (1982)).

40. See *supra* note 22 (explaining the different rights granted to a copyright owner).

41. The Copyright Act uses the term “copies” to refer to material objects, other than phonorecords, in which a work is fixed, whereas “phonorecords” are defined by the Act as material objects in which sounds (other than the sounds accompanying a motion picture or other audio visual work) are fixed. 17 U.S.C. § 101 (1994).

42. 18 U.S.C. § 2319(b)(1) (1988).

43. 18 U.S.C. § 2319(b)(1)(A) (1988).

44. 18 U.S.C. § 2319(b)(1)(B) (1988).

amendments also subjected repeat offenders to the maximum penalties regardless of the number of copies at issue or the types of works infringed, so long as both offenses involved sound recordings, motion pictures, or other audiovisual works.⁴⁵ The 1982 amendments also created a second category of felonies involving smaller numbers of copies. For the reproduction or distribution within any 180 day period of at least one hundred copies of sound recordings or at least seven copies of motion picture or audiovisual works, the penalties included up to \$250,000 in fines, but only a maximum of two years imprisonment.⁴⁶

All remaining criminal infringements were misdemeanors, subjecting the offender to up to \$25,000 in fines and one year imprisonment.⁴⁷ Thus, misdemeanor offenses included those infringements that were committed “willfully and for the purpose of commercial advantage or private financial gain,” but (1) were not infringements of sound recordings, motion pictures, or audiovisual works, regardless of the magnitude of the infringement, (2) were infringements of those types of works through reproduction or distribution, but did not meet the threshold quantity of copies set out above, or (3) were infringements of sound recording, motion picture, or audiovisual works, but were infringements committed by the creation of a derivative work or by public performance.⁴⁸

Because the changes in 1982 only applied to motion pictures and other audiovisual works and sound recordings, computer software manufacturers felt disadvantaged. As their market grew, computer software manufacturers turned to Congress, seeking the application of felony penalties for infringement of their works as well.⁴⁹ In 1991, Senator Hatch introduced Senate Bill 893 to add computer software to the types of works which, when infringed willfully and for commercial advantage or private financial gain, would be a felony.⁵⁰ This proposed legislation turned into The Copyright Felony Act⁵¹ which expanded the scope of the felony provisions to include not just computer software, but *all* types of works.⁵² The Copyright Felony Act also increased the severity of the

45. 18 U.S.C. § 2319(b)(1)(C) (1988).

46. 18 U.S.C. § 2319(b)(2) (1988).

47. 18 U.S.C. § 2319(b)(3) (1988).

48. *United States v. Gallant*, 570 F. Supp. 303, 314 (S.D.N.Y. 1983). *See also supra* notes 22-23 (explaining the different ways to infringe a copyright and the different categories of works subject to copyright protection).

49. *See Spanner, supra* note 37, at 2.

50. S. 893, 102d Cong. (1991).

51. The Copyright Felony Act, Pub. L. No. 102-561, 106 Stat. 4233 (1992).

52. While S. 893 passed the Senate, CONG. REC. S7581 (daily ed. June 4, 1992), there was no

applicable penalties for second offenders to ten years imprisonment and significantly lowered the number of copies necessary to qualify as a felony. After the 1992 amendments, a felony required the reproduction or distribution of a mere ten copies or phonorecords in any 180 day period so long as the retail value was more than \$2,500.⁵³

C. Felonies Without Profit—The NET Act

The 1982 and 1992 amendments to the Copyright Act marked a turning point in criminal copyright infringement by classifying certain kinds of infringement as felonies. Yet, both of these amendments left intact the central elements of criminal copyright infringement: to be criminal, infringement had to be undertaken willfully and for commercial advantage or private financial gain. The NET Act changed that, departing from what had been the standard for more than one hundred years.

While the NET Act retained the element of willfulness, it created a new type of criminal infringement that does not require a profit motive. Now, to be criminal, infringement must be willful and be *either* (1) for purposes of commercial advantage or private financial gain,⁵⁴ *or* (2) infringement through the reproduction or distribution, including by electronic means, during any 180-day period, of one or more copies or phonorecords of one or more copyrighted works, which have a total retail value of more than \$1,000.⁵⁵ This latter category of infringement can be referred to as non-commercially motivated infringement.

Significantly, only infringement through reproduction or distribution⁵⁶ is criminally actionable when the infringement is non-commercially motivated. The willful reproduction of one infringing copy of a high priced software program would be a criminal offense even if the infringer lacked a profit motive for the copying. For example, it would violate the NET Act if a person made a

companion bill in the House. In the House, an amendment in the nature of a substitution was endorsed and later approved by both the Senate and the House. The reason given by Representative William Hughes, who proposed the amendment, was to avoid a piecemeal approach to copyright legislation and to treat all types of copyrighted works equally. *See* H.R. REP. NO. 102-997 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3569, 3572.

53. *See* 18 U.S.C. § 2319(b)(1) (1994); 18 U.S.C. § 357(b)-(c) (1994).

54. NET Act § 2(b), 17 U.S.C. § 506(a)(1) (Supp. III 1997). The NET Act also clarified the definition of “financial gain” to include the “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.” 17 U.S.C. § 101.

55. 17 U.S.C. § 506(a)(2).

56. *See supra* note 22 (explaining the different rights granted to a copyright owner).

copy of a licensed program from her computer at work for her home computer so that she could continue to work on a project while caring for an elderly relative.⁵⁷

When first introduced into the criminal copyright infringement scheme by the Copyright Felony Act, numerical thresholds of the number of copies made or distributed and the retail value of those copies were rationalized as the determining factor in the felony/misdemeanor distinction because a larger number of copies indicated a more serious crime, deserving of classification as a felony. However, these numerical thresholds only came into play for infringements that were already determined to be willful and for profit. Now, the numerical thresholds have become a dividing line not between degrees of criminal offense, but between civil and criminal infringement, without regard to a profit motive. The NET Act eliminated the requirement of a profit motive for infringement to give rise to criminal liability, and instead uses a numerical threshold of *one copy* and a retail value requirement of only \$1,000 to define criminal infringement.⁵⁸ Because the numerical thresholds are set so low pursuant to the NET Act and the profit motive requirement has been eliminated, the only criterion which truly distinguishes civil versus criminal infringement is “willfulness.”⁵⁹

Because the NET Act criminalized non-commercially motivated infringement, the Act did provide for somewhat lessened punishment for that type of felony infringement. While a criminal offense motivated by profit can be punished by up to five years imprisonment plus fines,⁶⁰ the non-commercially

57. There are many programs that have a retail price of over \$1,000. *See, e.g., CDW Product Overview* (visited Aug. 23, 1998) <<http://www.cdw.com>> (listing DenebaCad for Macintosh at \$1,289.12, and Adobe After Effects V4.0 Bundle for \$1,336.65). Additionally, there are numerous other, seemingly innocuous, ways to exceed the \$1,000 threshold. *See infra* Part III.A for a discussion of three other scenarios. With this scenario, and the others described later in this Article, the importance of the “willful” element cannot be overstated. Willfulness is discussed in Part IV of this Article.

58. One who willfully infringes a copyright “by the reproduction or distribution, including by electronic means, during any 180-day period, of one or more copies or phonorecords of one or more copyrighted works, which have a total retail value of more than \$1,000” is a criminal infringer even if that person does not engage in the infringement for commercial advantage or private financial gain. 17 U.S.C. § 506(a)(2) (Supp. III 1997). While the NET Act created an entirely new type of criminal infringement, it left intact the numerical and monetary thresholds for distinguishing a felony from a misdemeanor: a felony still requires a minimum of ten copies which have a minimum retail value of \$2,500 within any 180 day period. 18 U.S.C. § 2319(b)(1), (c)(1) (Supp. III 1997). The NET Act also clarified that reproduction or distribution by electronic means is included in the felony provisions. NET Act § 2(d)(2)(A). The retail value of \$2,500 is a *total* retail value. NET Act § 2(d)(2) (striking “with a retail value of more than \$2,500” and inserting “which have a total retail value of more than \$2,500”).

59. The significance of the “willfulness” requirement is discussed in Part IV of this article.

60. 18 U.S.C. § 2319(b)(1).

motivated infringement carries a maximum penalty of three years plus fines.⁶¹ Likewise, repeat offenders engaged in willful infringement for profit face a ten year maximum sentence⁶² while repeat offenders engaged in willful infringement that is non-commercially motivated face a maximum of six years imprisonment.⁶³ Infringements classified as misdemeanors include for-profit criminal infringement that fails to meet the felony \$2,500 retail value requirement⁶⁴ and non-commercially motivated infringement that fails to meet the felony threshold of \$2,500, but does exceed the criminal threshold of \$1,000.⁶⁵

The number of offenses, the numerical and retail value thresholds, and the maximum penalties are summarized in the following tables.

Type 1 Violations:⁶⁶ *Infringing willfully and for purposes of commercial advantage or private financial gain*

Retail Value*	Under \$1,000	\$1,000-\$2,500	\$2,500+	Repeat Offenders
Minimum No. of Copies*	1	1	10	N.A.
Criminal	Yes	Yes	Yes	Yes
Classification	Misdemeanor	Misdemeanor	Felony	Felony
Maximum	1 yr.	1 yr.	5 yrs.	10 yrs.

* The number of copies made and the total retail values are calculated for any 180-day period.

Type 2 Violation:⁶⁷ *Infringing willfully by reproduction or distribution (no commercial or financial motive required)*

Retail Value*	Under \$1,000	\$1,000-\$2,500	\$2,500+	Repeat Offenders
Minimum No. of Copies*	1	1	10	N.A.
Criminal	No	Yes	Yes	Yes
Classification	N.A.	Misdemeanor	Felony	Felony
Maximum	N.A.	1 yr.	3 yrs.	6 yrs.

61. 18 U.S.C. § 2319(c)(1).

62. 18 U.S.C. § 2319(b)(2).

63. 18 U.S.C. § 2319(c)(2).

64. 18 U.S.C. § 2319(b)(3).

65. 18 U.S.C. § 2319(c)(3); 17 U.S.C. § 506(a)(2).

66. 17 U.S.C. § 506(a)(1); 18 U.S.C. § 2319(b).

67. 17 U.S.C. § 506(a); 18 U.S.C. § 2319(c).

* The number of copies made and the total retail values are calculated for any 180-day period.

As these tables illustrate, unless the total retail value of the copies made is less than \$1,000, willful infringement without a profit motive is equally criminal as with a profit motive. If convicted, however, the penalty a non-commercially motivated infringer faces may be slightly less than if the defendant engaged in the infringement for purposes of commercial advantage or private financial gain.⁶⁸

D. Other Details of the NET Act

Although not nearly as significant as the elimination of the profit motive, the NET Act made two other notable changes to criminal prosecutions for copyright infringement. First, the Act increased the statute of limitations for criminal prosecutions to five years.⁶⁹ Previously, civil and criminal actions had to be brought within three years. The justifications given for increasing the limitations period to five years included arguments that such increase brings copyright crimes into line with other criminal acts under title 18,⁷⁰ and that it may take longer to track these new-age criminals.⁷¹ In an era of digital technology where everything seems to move at a much quicker pace this latter argument seems difficult to understand.

A statute of limitations that is two years longer for criminal actions than for civil actions may create unintended consequences. While the NET Act does bring criminal copyright prosecutions in line with other criminal prosecutions, it places the criminal copyright prosecutions out of sync with civil copyright infringement actions. One consequence of this disharmony is that prosecutors may see more demands for criminal prosecution when the infringement is discovered more than three years after it occurred. At that point civil action would be foreclosed,⁷² but criminal prosecution could still be brought.⁷³

68. The actual time served will depend on the sentencing guidelines which could make the actual sentence meted out quite similar.

69. 17 U.S.C. § 507(a).

70. See 143 CONG. REC. S12,689-S12,691 (daily ed. Nov. 13, 1997) (statements in support of passage of the NET Act by Sen. Ott and Andrew Fois, Assistant Attorney General).

71. See *Copyright Piracy, and H.R. 2265, The No Electronic Theft (NET) Act: Hearing on H.R. 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 149 (1997) (statement of Fritz Attaway, Senior Vice President, Motion Picture Association of America).

72. 17 U.S.C. § 507(b) (1994).

The difference between the civil and criminal statutes of limitations may also impact the civil trial strategy. In the past some civil plaintiffs may have waited for the criminal case to conclude before pursuing civil actions with regard to the same infringing activities.⁷⁴ Strategically, such a delay is efficient because a criminal conviction, with its higher burden of proof, can be used as evidence in the subsequent civil case.⁷⁵ Now, in some cases, this efficient delay strategy will no longer be an option because the civil statute of limitations will run before some criminal cases are concluded.

Finally, the NET Act specifies that victims of criminal copyright infringement shall be permitted to submit victim impact statements.⁷⁶ In addition to the holder of the copyright in the works infringed, the NET Act defines the victim of criminal copyright infringement to include both producers and sellers of legitimate works affected by the defendant's conduct.⁷⁷ These victims of infringement shall be permitted to include information identifying the scope of injury and loss suffered, including an estimate of the economic impact of the offense on that victim. This testimony, in turn, will provide useful evidence for purposes of the sentencing guidelines established pursuant to this Act.⁷⁸ The mandatory inclusion of victim impact statements places yet another weapon in the hands of copyright owners and their licensees: the ability to influence the sentence in each instance of criminal conviction.⁷⁹

73. Section 507 now provides that a criminal proceeding must be brought "within 5 years after the cause of action arose," while civil actions must be commenced "within three years after the claim accrued." 17 U.S.C. § 507(a)(b) (Supp. III 1997). It remains to be seen whether this difference in phrasing will have any significance. See 3 NIMMER § 12.05[A] n.2 (1998) (noting the query). The time the claim accrued is the time that the infringement occurred. See *Hoste v. Radio Corp. of Am.*, 654 F.2d 11 (6th Cir. 1981) (*per curiam*). Any tolling of the statute of limitations must be based on "an equitable ground recognized under federal law," not state tolling statutes. 3 NIMMER § 12.05[B].

74. See, e.g., *R.S.O. Records, Inc. v. Peri*, 596 F. Supp. 849, 854 (S.D.N.Y. 1984).

75. See FED. R. EVID. 803(22) (providing that a felony conviction is admissible "to prove any fact essential to sustain the judgment").

76. See NET Act § 3, 18 U.S.C. § 2319(d) (Supp. III 1997).

77. See *id.* The NET Act also included similar amendments concerning the submission of victim impact statements in offenses involving the unauthorized fixation and trafficking in live musical performances and the trafficking in counterfeit goods or services. See 18 U.S.C.A. §§ 2319A(d), 2320(d) (West Supp. 1999).

78. The mandatory inclusion of this kind of information is in keeping with the trend of allowing victim impact statements in other criminal cases. See generally DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL LAW 621-65 (1999).

79. As of May 1999, the Sentencing Commission had not yet implemented any of the changes required by the NET Act because of a lack of Sentencing Commissioners. See *Statement of the Honorable Howard Coble before the Senate Subcomm. on Courts and Intellectual Property* (May 12, 1999) (available at 1999 WL 16947634). Senator Coble also indicated that as of May 1999 there had been no prosecutions under the NET Act. *Id.* Subsequent to those hearings, the government obtained its first conviction under the NET Act when a University of Oregon student pleaded guilty to criminal

II. WHY DID CONGRESS ELIMINATE THE PROFIT MOTIVE REQUIREMENT AFTER 100 YEARS IN THE STATUTE?

The NET Act instituted major changes in the definition of criminal copyright infringement. Criminal infringement had existed in this country for over 100 years, always requiring that the government prove the defendant engaged in the infringing activity for profit or commercial gain. Why, after 100 years, did Congress feel the need to eliminate this requirement? Some would answer that question with one name—David LaMacchia. While the court decision in *United States v. LaMacchia*⁸⁰ did highlight a growing problem, the underlying reasons for the NET Act are much more complex and stem from the impact of digital technology and the increasingly prevalent view of copyright as property equivalent to automobiles and jewelry.

A. *The Simple Answer: David LaMacchia*

The NET Act was expressly proposed to address a gap in the law identified in *United States v. LaMacchia*.⁸¹ In *LaMacchia*, a twenty-one-year-old student at the Massachusetts Institute of Technology, David LaMacchia, had facilitated the uploading and downloading of significant quantities of copyrighted software on an electronic bulletin board.⁸² The defendant was not prosecuted for criminal copyright infringement because he was not receiving payment from anyone for copies of the software.⁸³ At the time of his prosecution, criminal copyright infringement required a showing that the infringement was undertaken for “commercial advantage or private financial gain.”⁸⁴ Because this necessary

copyright infringement for operating a site where copyrighted software, music, and movies were available for free downloading. Ashbel S. Green, *Net Piracy Law Gets First Conviction: UO Student*, OREGONIAN, Aug. 21, 1999, at A1.

80. 871 F. Supp. 535 (D. Mass. 1994).

81. See, e.g., “This bill plugs the ‘LaMacchia Loophole’ in criminal copyright enforcement.” 143 CONG. REC. 12,689 (daily ed. Nov. 13, 1993) (statement in support of passage of the NET Act by Sen. Hatch).

82. David LaMacchia used MIT’s computer network to gain access to the Internet where he encouraged correspondents to upload popular software programs (for example Excel 5.0 and Wordperfect 6.0) to an encrypted address on an electronic bulletin board. He then transferred these programs to a second address where he invited correspondents to download the programs for no charge. *LaMacchia*, 871 F. Supp. at 536.

83. The court never held that LaMacchia was not engaging in the infringement for profit because the government chose not to prosecute him for criminal copyright infringement and did not allege that he sought or derived any personal benefit from the activity. *LaMacchia*, 871 F. Supp. at 536-37. Thus the issue of the profit nature of his activities was not before the court.

84. 17 U.S.C. § 506 (1994).

element was lacking, David LaMacchia was prosecuted for wire fraud rather than criminal copyright infringement.⁸⁵

Mr. LaMacchia brought a motion to dismiss his indictment, arguing that the use of the wire fraud statute in this context was improper and precluded by the Supreme Court's decision in *Dowling v. United States*.⁸⁶ In *Dowling*, the Supreme Court reversed the defendant's convictions for interstate transportation of stolen property, holding that "a copyrighted musical composition . . . impressed on a bootleg phonograph record is not property that is stolen, converted, or taken by fraud within the meaning of the Stolen Property Act."⁸⁷ The Supreme Court went on to state that copyright is no ordinary chattel, that the property right conferred by the Copyright Act does not give the copyright owner exclusive dominion over the thing owned, and that copyright "plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion or fraud."⁸⁸ The *Dowling* Court emphasized the history of Congress's measured use of criminal sanctions for copyright infringement, concluding that Congress did not intend prosecutors to use the Interstate Transportation of Stolen Property Act, with its harsh penalties, to prosecute copyright infringers.

In *LaMacchia*, the court correctly interpreted *Dowling* as standing for the proposition that, absent a clear indication from Congress, general criminal laws should not be used to subvert the "finely calibrated" reach of criminal liability under the Copyright Act.⁸⁹ The court held it would not permit the government to prosecute Mr. LaMacchia for wire fraud when his conduct was not criminal under the Copyright Act.⁹⁰ In its concluding paragraph, however, the court took the opportunity to lobby Congress for change:

This is not, of course, to suggest that there is anything edifying about what LaMacchia is alleged to have done. If the indictment is to be believed, one might at best describe his actions as heedlessly irresponsible, and at worst as nihilistic, self-indulgent, and lacking in any fundamental sense of values. Criminal as well as civil penalties should

85. Unlike the criminal copyright infringement statute, the mail and wire fraud provisions do not require proof of a personal profit motive. See *LaMacchia*, 871 F. Supp. at 541-42; see also 18 U.S.C. §§ 1341, 1343 (1994).

86. 473 U.S. 207 (1985).

87. *Id.* at 216.

88. *Id.* at 217-18.

89. *LaMacchia*, 871 F. Supp. at 545.

90. See *id.* at 542-43.

probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer. One can envision ways that the copyright law could be modified to permit such prosecution. But, “[i]t is the legislature, not the Court which is to define a crime, and ordain its punishment.”⁹¹

The aftermath of *LaMacchia* brought calls for criminal copyright infringement reform. Press reports exaggerated the perceived “lawlessness” that the opinion allegedly endorsed.⁹² For example, one press story stated: “There’s no copyright law in cyberspace and computer bandits are free to walk off with all the software they can carry until Congress does something about it”⁹³ *LaMacchia* did not address the application of copyright law in cyberspace, only the inappropriate use of the wire fraud statute to prosecute what was, at the time, clearly against the law, but just not a criminal offense.⁹⁴ The ruling in *LaMacchia*, however, did highlight a growing problem: the massive copying of copyrighted works in digital media.

Unfortunately, the NET Act represents an overreaction to the *LaMacchia* “loophole.” The Act has the potential to encompass the activities of a wide range of average citizens, making them criminal copyright infringers, and even felons. In eliminating the requirement of a profit motive, the NET Act makes possible the parade of horrors that the court in *LaMacchia* warned against by criminalizing the conduct of the “myriad of home computer users who succumb to the temptation to copy even a single software program for private use.”⁹⁵ Given that the \$1,000 threshold created by the NET Act is calculated as a total over any six month period, it is quite possible that the numerous home computer

91. *Id.* at 545 (quoting *Dowling*, 473 U.S. at 214).

92. See Barbara Carton, *Judge Drops Charges Against Student Who Ran Service for Software Pirates*, WALL ST. J., Dec. 30, 1994, at B5; *Software Unprotected*, CINCINNATI ENQUIRER, Dec. 30, 1994, at A2; Jules Crittenden, *Ruling Clears Way for Computer Bandits*, BOSTON HERALD, Dec. 30, 1994, at 1.

93. Crittenden, *supra* note 92.

94. David LaMacchia’s actions clearly constituted copyright infringement. His actions involved the reproduction and distribution of copyrighted works, perhaps even the public performance and/or public display of those works. See Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547 (1997). Such actions constitute civil infringement, without regard to why they are undertaken or the mental state of the actor at the time such actions are undertaken. See 17 U.S.C. § 501 (1994).

95. *LaMacchia*, 871 F. Supp. at 544. The court also noted that the software industry itself, at least at one point in time, did not desire to make criminals of a large number of consumers of computer software. *Id.* at 544 & n.18 (citing 1992 testimony of the Vice-President and General Counsel of the Computer & Communications Industry Association before the House Judiciary Subcommittee on Intellectual Property and Judicial Administration).

users who succumb to this temptation could be classified as criminals.⁹⁶

B. The More Complex Answers: Digitization and Copyright as “Property”

The NET Act represents more than just a congressional response to a single case. Had there not been David LaMacchia, there would have been another individual facilitating the copying of copyrighted works on a massive scale without a profit motive.⁹⁷ More fundamentally, the NET Act is a reaction to the dual phenomena of the digitization of society and the increasingly prevalent view of copyrighted works as property just like jewelry, automobiles, and television sets.⁹⁸ A case like *LaMacchia* may have been necessary to convince Congress that the Copyright Act needed amending, but the reasons substantiating that need are far more complicated than those presented by one twenty-one-year-old student from MIT.

1. Digitization

In large measure, the NET Act responded to the increasing prevalence of digital technology. Digitization of copyrighted works permits rapid and easy reproduction and distribution, whether the work is a literary work, musical work, dramatic work, pictorial or graphic work, motion picture or other

96. See discussion *infra* Parts III & IV, concerning the possible overbreadth of the NET Act and the importance of Congress’ retention of the remaining requirement that the infringement be undertaken “willfully.”

97. In his testimony before Congress, Cary Sherman, Senior Executive Vice President and General Counsel for the Record Industry Association of America demonstrated to the committee members, with a slide show, several pirate sites on the World Wide Web, including “Jon’s Take But Don’t Tell Page” filled with sound files of popular musical works. In his testimony, Mr. Sherman also tried to drive home for Congress the magnitude of copying now permissible with digital technology and the Internet:

For example, in 1991, 12 counterfeiting operations, employing hundreds of individuals, manufactured approximately 28 million counterfeit cassettes. Today, one individual, in less time than it takes me to read this testimony, can send a full-length album to more than 50 million Internet users. As I said, the rules of the game have radically changed.

The No Electronic Theft (NET) Act, 1997: Hearing on H.R. 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. 146-149 (1997) (statement of Carey Sherman).

98. See, e.g., *The No Electronic Theft (NET) Act, 1997: Hearing on H.R. 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Sandra A. Sellers, Vice President, Intellectual Property Education and Enforcement, Software Publishers Association) (“If one were to walk into a jewelry store, steal some jewels, and then give them away on the street the thief would probably be prosecuted, despite the fact that he did not gain financially from his actions. The same should be true with respect to software.”).

audiovisual work, or sound recording.⁹⁹ The ease of reproduction and distribution of digital technology significantly reduces the costs to the copyright owners for distributing works to consumers. If content providers can fully embrace this technology, they stand to reap great rewards through cost savings. Presumably some of those rewards will be passed on to the public through reduced prices for copyrighted works.

While digitization presents an immense range of new possibilities for copyright owners, it also has created a crisis in copyright: digitization of a work permits rapid and easy *unauthorized* reproduction and distribution. Unauthorized reproduction and distribution of any significance¹⁰⁰ in the analogue world are, in large measure, obvious and visible activities, making it relatively easy to catch any infringer worth catching. Conversely, unauthorized copying of little significance is not worth the effort of finding, pursuing, and punishing the culprit. Certainly this is true for many kinds of criminal, and perhaps for some civil, infringement actions as well. Sometimes, however, copyright owners have pursued small-scale infringers with allegations of civil infringement in order to discourage other potential infringers.¹⁰¹

Previously, copyright owners also were protected by the fact that a significant investment in capital was necessary to engage in infringement on any kind of a scale that might threaten the copyright owner's profits. Such an investment usually correlated with engaging in that activity for financial gain, thus implicating the criminal sanctions of the Copyright Act. The significant capital required also meant there existed assets upon which the copyright owner could levy to satisfy a civil judgement for infringement. This, in turn, meant a civil judgement for infringement was a real deterrent to those kinds of infringers.

Digital technology, on the other hand, requires little investment in capital in order to reproduce copyrighted works on a massive scale. The lack of capital investment necessary creates three major implications for copyright infringement. First, mass-scale copying may not necessarily be for profit. This was the major factor leading to the proposal for and passage of the NET Act.

99. These works are all but two of the works of authorship eligible for copyright protection. See 17 U.S.C. § 102 (1994). The two categories of works not included in this example are (1) pantomimes and choreographic works, and (2) architectural works, although representations of both of these could be easily digitized as well.

100. By any significance, I mean reproduction and distribution on a scale that threatens to harm the market for the copyrighted work at an appreciable level.

101. An example of such a case where one has the sense that the litigation is pursued by the plaintiff, not only to stop the defendant in the case, but to make an example of that defendant as a means of deterring others is *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D.Cal 1995).

Second, the lack of capital required also means that mass-scale digital copying may not involve any kind of calculated decision required for mass-scale analog copying. Millions of individuals, because they own a computer which is connected to the Internet, have the immediate capacity to engage in mass scale copying without much thought for the consequences of such actions. This reality may mean that the net of criminal infringement has now been cast too wide, catching within it otherwise innocent individuals, an issue explored in Part III of this article.

Finally, the low level of capital investment needed for mass-scale copying leads to a situation where people engaged in non-commercially motivated infringement, like David LaMacchia, are often judgement proof.¹⁰² At least when an investment in capital was required, an infringer would possess assets on which a copyright owner could levy to satisfy a civil judgement or which would be lost if criminal infringement were found.¹⁰³ In the case of digital copying, the threat of civil liability may not be enough of a deterrent.¹⁰⁴ Yet the damage done by non-commercially motivated infringers can equal and sometimes surpass the damage done by infringers engaged in reproduction and distribution for financial gain. Criminal sanctions, it is hoped, will deter this type of mass-scale infringement.

The content industry pointed to their fear of massive unauthorized reproduction of copyrighted works, based on the reality of what was occurring with digital technology, as the main reason for not fully embracing this technology. Congress and the Administration had clearly demonstrated that they wanted to encourage the growth of digital technology and its use throughout society.¹⁰⁵ An important aspect in encouraging that growth was assuring that sufficient content in digital form existed. The established content industries assured Congress that without increased copyright protections, digital

102. While these defendants may not have the assets to satisfy the judgement at the time of its entry, there is authority suggesting that a judgement for willful copyright infringement is not dischargeable in bankruptcy, meaning that the judgement would follow the infringers for the rest of their lives. See *In re Pineau*, 149 B.R. 239 (D. Maine 1993); *In re Massier*, 51 B.R. 229 (D. Co. 1985).

103. See 17 U.S.C. § 506(b) (1994) (requiring a judgement of conviction to order the forfeiture and destruction or other disposition of not only all infringing copies, but also all the equipment used in the manufacture of such infringing copies).

104. See *The No Electronic Theft (NET) Act, 1997: Hearing on H.R. 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Cary H. Sherman, Senior Executive Vice President, Recording Industry Association of America).

105. See THE WHITE PAPER, *supra* note 14, at 11; see also S. REP. NO. 105-190 (1998) (additional views of Sen. Leahy).

technology and the global information infrastructure would grow at a much slower speed.¹⁰⁶

Congress confronted the phenomenon of the Internet, and consistent with the maximalist trend in copyright law, strengthened the rights of copyright owners by fortifying the imaginary walls. However, the following questions are certainly worth asking: is our public policy in the copyright area being held hostage by the publishing, music, motion picture, and computer software industries, and does our copyright law need to provide incentives that include the ability to have criminal sanctions imposed on non-commercially motivated infringers in return for the services offered by the content industry? Prior to the proliferation of digital technology, the public needed publishers and record companies for their reproduction and distribution services. With digital projects, these tasks can now be performed by much smaller companies and even individuals because a large investment of capital is no longer required. Since the ultimate aim of copyright law is to promote knowledge and learning, perhaps the widespread adoption of digital technology may require a drastic rethinking of copyright law.¹⁰⁷

2. Copyright as “Ordinary Chattel”

In addition to the pressure exerted on existing copyright law by digital technology, the increasing tendency to view copyright as “property” also contributed to the passage of the NET Act. Copyright falls within the ambit of “intellectual property,” or property of the mind, and many view copyright as property.¹⁰⁸ Others insist that copyright is *not* property at all, but rather is a

106. See, e.g., *The No Electronic Theft (NET) Act, 1997: Hearing on H.R. 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Mr. Berman); see also note 13 and accompanying text. The call for increased protection is consistent with the maximalist trend in copyright throughout copyright’s history. The United States has consistently increased the protection afforded to copyright owners, and has rarely, if ever, decreased the protection of copyrighted works in favor of increased public use or access to those works.

107. This inquiry is clearly beyond the scope of this article. Several interesting ideas regarding a new way to achieve this goal have been proposed. See generally Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 41 (1996) (suggesting that a possible way to revise our copyright law is to have the right of commercial exploitation as the basic right of a copyright owner); John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age (Everything You Know About Intellectual Property Is Wrong)*, WIRED, Mar. 1994, at 84; Jessica Litman, *New Copyright Paradigms* (visited Oct. 22, 1999) <<http://www.msen.com/~litman/paradigm.htm>>.

108. See, e.g., THE WHITE PAPER, *supra* note 14, at 205 (1996) (suggesting that the concepts of copyright can be taught to children because they can “relate to the underlying notions of property—what is ‘mine’ versus what is ‘not mine,’ just as they do for a jacket, a ball, or a pencil”).

limited statutory monopoly.¹⁰⁹ The Supreme Court has made clear that copyright is a limited statutory monopoly granted by Congress pursuant to the Constitution and not a natural law right of the creator of a work.¹¹⁰ The debate between copyright as a natural law right or a limited statutory monopoly has raged for centuries.¹¹¹ The Lockean conception of a copyrighted work as an extension of oneself embodies the notion that the creator should have a property right in all that is created.¹¹² The copyright laws of many European nations clearly stem from a notion of the creators' natural law property right.¹¹³ Thus, increased international harmonization may explain the rising prevalence of the view in the United States that copyright is "just like" other forms of tangible personal property.¹¹⁴

Whether the term "property" is used or not, copyright possesses unique attributes, unlike other forms of property. One of the most salient aspects of copyright is that, unlike tangible property, the public's interest is paramount, not the interests of the property owner, *i.e.*, the copyright owner.¹¹⁵ As with other forms of public goods, copyrighted works are characterized by non-rivalrous

"By passing this legislation, we send a strong message that we value intellectual property, as abstract and arcane as it may be, in the same way that we value the real and personal property of our citizens. Just as we will not tolerate the theft of software, CD's, books, or movie cassettes from a store, so will we not permit the stealing of intellectual property over the Internet."

143 CONG. REC. S12,689-S12,691 (1997) (statement in support of passage of the NET Act by Sen. Leahy), *see also* 143 CONG. REC. H9883 (daily ed. Nov. 4, 1997) (statement of Representative Coble in support of the NET Act, indicating that "the public must come to understand that intellectual property rights, while abstract and arcane, are no less deserving of protection than personal or real property rights").

109. *See, e.g.*, Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 5 n.12 (1997); L. Ray Patterson, *Copyright and "The Exclusive Right" of Authors*, 1 J. INTELL. PROP. L. 1, 37-41 (1993) (noting that copyright "wears the property label uneasily" and is more regulatory in nature). As the Supreme Court has recognized, "[t]he copyright owner . . . holds no ordinary chattel." *Dowling v. United States*, 473 U.S. 207, 216 (1985).

110. *See Dowling*, 473 U.S. at 216.

111. *See, e.g.*, GRANTLAND RICE, *THE TRANSFORMATION OF AUTHORSHIP IN AMERICA* 77 (1997) (noting that outside of slavery there was no greater debate for writers in the antebellum America than the issue of an author's rights in literary property); *see also* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Alfred Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L. REV. 517 (1990).

112. *See* Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1222-29 (1998).

113. *See* Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

114. *See infra* note 120 and accompanying text.

115. *See* *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (recognizing that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts'").

use.¹¹⁶ Another distinguishing feature of the “property” of a copyrighted work is that its value improves with use.¹¹⁷

Despite copyright’s non-property attributes, there appears to be an increasing use of the label “property” for copyright. The significance of this trend for criminal copyright infringement is, of course, that the more copyright is viewed as property, the more any kind of copying of a copyrighted work looks like theft. Generally, stealing, regardless of its motive, is wrong.¹¹⁸ Even when one steals for non-commercial purposes, the law still punishes that person. Because underlying ethical concepts shape criminal law,¹¹⁹ when a copyright is considered property, any copying begins to look morally or ethically wrong and therefore deserving of criminal sanctions. Even the title of the NET Act bears this out: The No Electronic *Theft* Act.¹²⁰

The common law crime of larceny traditionally required the prosecution to prove a “trespassory taking and carrying away of the personal property of another with intent to steal the same.”¹²¹ In attempting to apply these common law principles¹²² to the theft of intangible property, such as copyright, there are a few obvious problems. First, a defendant cannot “carry away” intangible

116. Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 502 (1998).

117. See Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 300 (1996). Physical property, on the other hand, degrades with use. An extreme way in which the value of a copyrighted work increases with use involves network effects, where the value of a work to a user of the work increases as others use the same work. See Mark Lemly & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998).

118. Our criminal laws do make some exceptions for theft of property in exigent circumstances. For example, criminal law generally recognizes a defense of duress or necessity in certain exceptional circumstances. Self-defense or defense of others or property may also sometimes provide a defense from criminal conviction. See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW ch. 5 (2d ed. 1986).

119. See, e.g., Francis Bows Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988 (1932).

120. The legislative history makes it clear that members of Congress sought to treat copyright “just like” other examples of personal property:

By passing this legislation, we send a strong message that we value intellectual property, as abstract and arcane as it may be, in the same way that we value the real and personal property of our citizens. Just as we will not tolerate the theft of software, CD’s, books, or movie cassettes from a store, so will we not permit the stealing of intellectual property over the Internet.

143 CONG. REC. S12,689-S12,691 (1997) (statement in support of passage of the NET Act by Sen. Leahy); see also 143 CONG. REC. H9884 (daily ed. Nov. 4, 1997) (statement of Representative Coble in support of the NET Act, indicating that “the public must come to understand that intellectual property rights, while abstract and arcane, are no less deserving of protection than personal or real property rights”).

121. ROLLIN M. PERKINS, CRIMINAL LAW 234 (2d ed. 1969).

122. The Model Penal Code uses the term “theft” as opposed to “larceny.” MODEL PENAL CODE § 223 (1962). Theft of movable property requires that a person “takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.” *Id.* § 223.2. “Deprive” is defined as requiring a withholding of property, either permanently or for an extended period. *Id.* § 223.0.

property. While a defendant may carry away *copies* embodying the copyrighted work, such as books, CDs, or computer disks, one cannot “carry away” the work itself.¹²³ Second, at common law, proving “intent to steal” required showing that the defendant had the intent to deprive the possessor permanently of his property.¹²⁴ Committing an act of infringement, for example, by copying a copyrighted work, does not permanently deprive the copyright owner of her “property.”

Because of the intangible nature of copyright, it is impossible to have a trespassory taking or permanent deprivation. Infringing copyright, however, does invade the rights granted to copyright owners by the Copyright Act. This invasion is much clearer when the infringement is undertaken for financial gain because the infringer appears to be reaping profits that would otherwise be realized by the copyright owner. When the infringer is not commercially benefitting from the activity, however, there remains an invasion of the rights granted by statute but such actions are not widely accepted in society as being morally or ethically wrong. With non-commercially motivated infringement the essence of the right of a copyright owner, the right to *profit* from the copyrighted work, does not appear to be invaded.

An appropriate parallel in the law of theft of tangible property may be the temporary theft of an automobile, an act sometimes referred to as “joyriding.”¹²⁵ The law recognizes that despite the lack of intent to permanently deprive the owner of the automobile of its use, the temporary interference with the property ownership of the automobile is still a form of theft.¹²⁶ The essence of the right of a property owner, permanent possession of the property, is not invaded by joyriding, but the possessory interest still has been interfered with. Non-commercially motivated copyright infringement is similar to joyriding in that the infringer does not exercise what might be considered the essence of what a copyright owner possesses—the right to profit¹²⁷ from the copyrighted work.¹²⁸

123. The distinction between the copyrighted work and copies or phonorecords embodying the work is so critical that it is codified in the statute. 17 U.S.C. § 202 (1994).

124. PERKINS, *supra* note 121, at 266-67.

125. “Joyriding” is a non-legal term used to describe the unauthorized taking of a motor vehicle for a brief period of time without intent to permanently deprive the owner of possession. The offense is classified as a misdemeanor in some jurisdictions, and as a felony in others. *See* B. Finberg, Annotation, *Automobiles: Elements of Offenses Defined in “Joyriding” Statutes*, 9 A.L.R. 3d §§ 633-34 (1967).

126. *See, e.g.*, UTAH CODE ANN. § 41-1a-1314 (1998); OR. REV. STAT. § 164.135 (1997); MODEL PENAL CODE § 223.9 (1962).

127. The Model Penal Code reflects this focus on the economic value of tangible property when it provides that the requisite intent to deprive someone of their property must be either an intent to withhold the property permanently or “for so extended a period as to appropriate a major portion of its economic value.” MODEL PENAL CODE § 223.0 (1962).

Yet a fundamental distinction exists between stealing a car, even simply to joyride, and making a copy of a copyrighted work for one's friends. Joyriding deprives the owner of the automobile of the use of the vehicle, even if only temporarily. Copying a copyrighted work does not deprive the copyright owner of the use of that work. Non-commercially motivated infringement may not even deprive the copyright owner of revenue the copyright owner might otherwise receive.

Individuals who commit copyright infringement without a commercial motive often believe that what they are doing is not theft. They believe that the person who copies a copyrighted work for free never would have purchased a copy anyway. Because they could not afford to, or for some other reason they would not have purchased a copy, the free copy they received does not decrease the profits realized by the copyright owner.¹²⁹ This, of course, is the problem with so-called theft of intangibles. Just because one person makes a "free" copy of the work does not mean that the copyright owner has been commercially harmed.

But what about the type of non-commercially motivated mass-scale copying facilitated by individuals like David LaMacchia? Viewing copyright as property, commentators refer to these individuals as "pirates,"¹³⁰ neglecting the fact that they are not seeking to profit from their activities, whereas true pirates engage in their activities for financial reward.¹³¹ The individuals who commit non-commercially motivated yet massive copying on the Internet often have a Robin Hood complex. They believe they are giving to the "poor" by permitting access to works that not all users can afford or permitting access to works that they believe are only sold at ridiculously inflated prices.¹³² Robin Hood, however, gave to the poor by stealing from the rich. In the context of electronic

128. Of course, to be criminal the copying would need to be classified as willful, see *infra* Section IV, and the total retail value of the copies made in any six month period would need to be more than \$1,000. See *infra* Section IV; see also 17 U.S.C. § 506(a) (Supp. III 1997).

129. See Spanner, *supra* note 37, at 6-8.

130. See, e.g., Timothy D. Howell, Comment, *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, 643-44 (1996).

131. See GEORGE WOODBURY, THE GREAT DAYS OF PIRACY IN THE WEST INDIES 11 (1951) ("Piracy as practiced in the classical period was principally a matter of ransom. . . ."). The use of the term "pirates" in the context of copying in digital media, particularly reproductions made and distributed over the Internet, may also be the result of the general notion of the Internet as a new frontier. Pirates often thought of themselves as belonging to an "adventurous, often outlaw, breed that gravitates toward all frontiers. . . ." *Id.*

132. See Spanner, *supra* note 37, at 8; John Gibeaut, *Zapping Cyberpiracy*, A.B.A. J., Feb. 1997, at 60.

reproduction of copyrighted works, these modern-day Robin Hoods believe that no theft or harm occurs because the owner of the copyrighted work is not denied the use or benefits of the copyright.¹³³ Yet with this type of non-commercially motivated mass-scale copying, harm still occurs in the lost sales that might have been realized had the infringing copies not been distributed.

The combined impact of digitization and the view of copyright as “just like” any other kind of property has resulted in the casting of a much wider net for criminal infringement. Certainly, mass-scale copying should be halted. But given the underlying goals of copyright, have we reached too far with the NET Act? The remaining sections of this article explore that question.

III. DOES THE NET ACT CAST THE NET OF CRIMINAL COPYRIGHT INFRINGEMENT TOO WIDE?

In urging passage of the NET Act, Senator Hatch described the Act as prohibiting “willful, commercial-scale pirating of copyrighted works”¹³⁴ Yet, as discussed above, the numerical and retail value thresholds set by the NET Act to define criminal infringement are minimal and far lower than necessary to encompass “commercial-scale” copying. In the past, copyright had been an area in which Congress chose to tread cautiously, relying primarily on civil remedies to provide protection against infringement, while mandating “studiously graded penalties” in those instances where Congress concluded that the deterrent effect of criminal sanctions was required.¹³⁵ “This step-by-step, carefully considered approach [was] consistent with Congress’ traditional sensitivity to the special concerns implicated by the copyright laws.”¹³⁶ These special concerns include the ability of the public to access information, allowing the public to use the underlying facts and ideas contained in a work, and the inherent tension with the values embodied in the First Amendment that are present when people are given a monopoly over expressive works.

After the *LaMacchia* decision, the Criminal Copyright Improvement Act of 1995 was proposed.¹³⁷ Described by one commentator as a “cautious and

133. See Catherine Therese Clarke, *From CrimINet to Cyber-Perp: Toward an Inclusive Approach to Policing the Evolving Criminal Mens Rea on the Internet*, 75 OR. L. REV. 191, 216 n.109 (1996) (citing an interview with Jeffrey Schiller, Manger of Systems and Operations of M.I.T. Distributed Computing and Network Services).

134. 143 CONG. REC. S12,689 (daily ed. Nov. 13, 1997) (statement in support of passage of the NET Act by Sen. Hatch).

135. *Dowling v. United States*, 473 U.S. 207, 221, 225 (1985).

136. *Id.* at 225.

137. See S. 1122, 104th Cong. (1995); 141 CONG. REC. 11,452-54 (daily ed. Aug. 4, 1995)

measured attempt to expand the protection afforded under the current copyright system,¹³⁸ the proposed act would have set the monetary threshold for non-commercially motivated criminal infringement at \$5,000, five times higher than the NET Act that was eventually passed.¹³⁹ The felony threshold would have required a retail value in excess of \$10,000, four times that set by the NET Act.¹⁴⁰ As late as July of 1997, the threshold for non-commercially motivated infringement in the proposed legislation remained at a minimum of ten copies and a total retail value of \$5,000.¹⁴¹ As part of an en bloc amendment by the Judiciary Committee, the thresholds were reduced to one copy and \$1,000.¹⁴² The reason given for this reduction was the Department of Justice's belief that it would want to pursue some actions involving infringements that did not meet the higher thresholds.¹⁴³

Throughout the various revisions to the criminal provisions of the copyright law in the last two decades, even industry representatives have acknowledged that copyright law should not "be accidentally taking a large percentage of the American people, either small business or citizens, into the gray area of the criminal law."¹⁴⁴ Congress has been urged repeatedly to carefully draft copyright laws in a manner calculated to avoid criminalizing the daily activities of millions of people.¹⁴⁵ At various times industry representatives have also expressed concern that the felony provisions might be misapplied to ordinary business disputes and situations involving reverse engineering.¹⁴⁶

Until 1997, Congress had "acted with exceeding caution" in expanding the

(statement of Sen. Leahy) (noting that this bill was specifically tailored toward preventing another LaMacchia.).

138. Howell, *supra* note 130, at 645.

139. The \$5,000 threshold was also supported by the Clinton Administration in its White Paper. See THE WHITE PAPER, *supra* note 14, at 229.

140. See S. 1122, 104th Cong. § 2(B)-(D).

141. See S. 1044, 105th Cong. § 2 (1997).

142. See H.R. REP. NO. 105-339 (1997).

143. See *id.* This is a stance seen frequently in federal law. Prosecutors seek broad statutory definition of criminal conduct and urge Congress to rely on prosecutorial discretion to not apply the statute as broadly as it is worded.

144. *Hearings on S. 893 Before the House Judiciary Subcom. on Intellectual Property and Judicial Admin. on the 1992 Amendments to the Copyright Act*, 102d Cong. at 65 (Aug. 12, 1992) (Congressional testimony of the Vice President and General Counsel of the Computer & Communications Industry of America) (cited in *United States v. LaMacchia*, 871 F. Supp. 535, 544-45 n.8 (D. Mass. 1994)).

145. See Howell, *supra* note 130, at 649.

146. See, e.g., *Criminal Sanctions for Violation of Software Copyright, 1992: Hearings on S. 893 Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong. (1991).

reach of criminal copyright infringement.¹⁴⁷ Congress appears to have thrown that caution to the wind with the passage of the NET Act. Even supporters, as they urged passage of the Act, feared that its scope might be too broad.¹⁴⁸ Despite recognizing this danger, Senator Hatch was persuaded to support the bill “because of the severity of the potential losses to copyright owners from widespread LaMacchia-like behavior and the little time remaining in the session.”¹⁴⁹

The potential overbreadth of the NET Act can be examined by exploring the possible types of activities that might reach the numerical thresholds that make non-commercially motivated infringement a crime. The example given earlier of an individual who makes one copy of a high-end computer program to complete work on their home computer is but one way to easily reach the \$1,000 threshold.¹⁵⁰ In order to fully analyze whether the NET Act has cast the net of criminal infringement too wide, three examples of non-commercially motivated activities are described and analyzed below.

A. *Hypotheticals*

1. Janet is a sales representative for a small pharmaceutical company. She has over 100 different customers to whom she markets the company’s product. Janet occasionally reads medical articles that she believes her customers might find useful. In January, she sent copies of two such articles to twenty customers, and in April she sent copies of two different articles to another twenty customers. If the articles each have a value of \$12.50 or more, Janet’s copies meet the threshold for criminal liability.¹⁵¹ If the value of each article is \$31.25, her copies meet both the number of copies threshold and the total retail value threshold for felony classification.¹⁵² For medical journal articles, such retail values are not unusual.¹⁵³

147. See *Dowling*, 473 U.S. at 221.

148. See 143 CONG. REC. S12,689 (daily ed. Nov. 13, 1997) (statement in support of passage of the NET Act by Sen. Hatch) (expressing concern that “the language was so broad that the net could be cast too widely . . . so that minor offenders or persons who honestly believed that they had a legitimate right to engage in the behavior prohibited by the bill would be swept in”).

149. *Id.*

150. See *supra* note 57 and accompanying text.

151. Janet sent a total of 80 copies. To meet the threshold for criminal liability the articles would need to have a retail value of only \$12.50 each ($\$1,000 \div 80 = \12.50).

152. The thresholds for felony classification are more than ten copies and a total retail value of more than \$2,500. Thus, because more than ten copies were made, the felony level would be met if each of the articles had a retail value of \$31.25 ($\$2,500 \div 80 = \31.25).

153. For example, the copyright notice in the *JOURNAL OF PHARMACY AND PHARMACOLOGY* states

2. Jim participates in several Internet e-mail listservs¹⁵⁴ focused on popular music. Over the last four months, Jim posted three different messages to one of these lists, called RETROMUSIC, in which he typed the complete lyrics to three songs written by the rock group Devo, along with his own analysis of the messages contained in the lyrics. More than 500 people subscribe to the RETROMUSIC list. Because of the way an e-mail listserv works,¹⁵⁵ each subscriber automatically received copies of Jim's messages. If a court were to accept that all 1,500 copies of the lyrics should be considered for purposes of determining the total retail value of the infringement, and if each individual lyric had a value of only \$.67, the criminal infringement threshold would be met. A retail value of only \$1.67 would be needed to raise the total retail value sufficiently to meet the felony threshold. For song lyrics, these values are actually quite low.

3. Finally, consider Jason, a professor of law at a public university. Jason teaches intellectual property to a class of ninety students. Over the course of one semester, there were three important intellectual property cases argued before the Supreme Court. Jason passed out summaries of the arguments prepared by a large publisher of legal periodicals. In less than 180 days Jason reproduced and distributed 270 copies of copyrighted works. If the value of each copy exceeds \$3.70, the criminal liability threshold has been met, with a value of only \$9.26 needed to meet the felony threshold. Again, these values are by no means out of the realm of possibilities.¹⁵⁶

As these hypotheticals illustrate, the \$1,000 total retail value is extremely

that authorization to make photocopies for internal or personal use is granted provided that a base fee of \$15 per article is paid to the Copyright Clearance Center. *See, e.g.*, 51 J. PHARMACY & PHARMACOLOGY, Sept. 1999, at title page. The per-copy fee for THE JOURNAL OF PHYSIOLOGY is \$12.50. *See, e.g.*, 512 J. OF PHYSIOLOGY, ii (1998).

154. A listserv is a broad term that describes generally a software program that permits people to subscribe to and unsubscribe from mailing lists. *See generally* CONSTANCE HALE, WIRED STYLE: PRINCIPLES OF ENGLISH USAGE IN THE DIGITAL AGE 50 (1996).

155. A listserv is used to distribute electronic mail to all members whose addresses appear on a particular mailing list. Mailing lists exist for any number of specific or general interests of a subscriber. A listserv provides an efficient means of communication between members on a list because the single posting of an e-mail to a list automatically results in multiple copies being sent to all those on the list. *See generally* MARTIN GAY & KATHLYN GAY, THE INFORMATION SUPERHIGHWAY 63 (1996).

156. For example, the Bureau of National Affairs ("BNA") routinely publishes summaries of Supreme Court oral arguments. The BNA reporter for intellectual property, the *Patent, Trademark & Copyright Journal*, contains a copyright notice which permits reproductions only if the subscriber is registered with the Copyright Clearance Center and pays the \$1.00 *per page per copy* fee (emphasis added). *See, e.g.*, 56 *Patent, Trademark & Copyright Journal* (BNA) No. 1383, at 269 (July 2, 1998). If each of the summaries which Jason copied were a mere four pages long, the copies he made would have exceeded the \$1,000 threshold (270 x 4 x \$1.00 = \$1,080).

easy to reach and the felony level of \$2,500 is not that difficult either. Is it really as bad as this? Are Janet, Jim, and Jason criminals? Or worse yet, are they felons? Has Congress set the net of criminal copyright liability too wide? For each of these scenarios, three factors should be considered in determining if criminal copyright law has reached too far: (1) proving infringement for non-commercially motivated activities; (2) prosecutorial discretion; and (3) proving that the defendant willfully infringed. The first two of these factors are discussed below, while the final factor is explored in the final section of this article.

B. Limits on the Scope of the NET

1. Infringement

In order to be liable for criminal infringement, the conduct must constitute infringement. While this may seem elemental, many comments made about the impact of the NET Act indicate ignorance on this point. Some criticized the Act for not including a fair use exemption.¹⁵⁷ Yet in order to prove its case against a criminal defendant, the government would need to prove infringement. Proving infringement in a criminal case requires negating certain defenses, including a claim of fair use. While in a civil context the burden is on the defendant to prove fair use,¹⁵⁸ in the criminal context fair use is a negating defense. A negating defense prevents the prosecution from proving an element of the crime. Since criminal infringement requires proof that the defendant infringed and the Copyright Act provides that a fair use is “not an infringement of copyright,”¹⁵⁹ the burden is on the government to prove that the defendant’s use is not a fair use.

Prior to the passage of the NET Act, an argument often asserted to defend a charge of criminal infringement was that the copies distributed were subject to a valid “first sale.” One of the limitations on the right granted to copyright owners

157. See, e.g., Wendy M. Grossman, *Cyber View: Downloading As a Crime*, SCI. AM., Mar. 1998, at 37. Perhaps those criticizing the act had reviewed the criminal provisions of the 1909 Copyright Act. While the criminal provisions of the 1909 Act did expressly contain exemptions for non-profit groups, Copyright Act of Mar. 4, 1909, § 28, 54 Stat. 1075, 1082 (*codified and amended as § 104*), the 1976 Act no longer included those exemptions in the criminal infringement provision. 17 U.S.C. app. § 506 (1976). The reason for this, however, is not that the exemptions no longer existed, but that the 1976 Act codified fair use as a right granted to users notwithstanding the rights granted to copyright owners. Prior to the 1976 Act, the right of fair use was a judicial doctrine. Thus, the express exemption from criminal liability for non-profit activity was clearly understandable in the 1909 Act but unnecessary under the 1976 Act.

158. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

159. 17 U.S.C. § 107 (1994).

to publicly distribute a copyrighted work is the first sale doctrine. The Copyright Act provides that the owner of a lawfully made copy is entitled to sell or otherwise dispose of that copy without violating the distribution right of the copyright owner.¹⁶⁰ Several courts have ruled that when the criminal offense alleged is the distribution of unauthorized copies, the government is required to prove beyond a reasonable doubt that the copies had not been subject to a valid first sale.¹⁶¹ Now that non-commercial uses have been brought within the scope of criminal infringement, whether the use at issue is a fair use will become an important issue in many criminal prosecutions.

The assertion of the fair use defense will be quite common when the defendant is not engaged in the alleged infringing conduct for commercial advantage or private financial gain because under the fair use provisions of the Copyright Act,¹⁶² the Supreme Court has held that a non-commercial use is presumptively a fair use.¹⁶³ As with the first sale issue, when a defendant asserts fair use in a criminal case the burden should be on the government to prove beyond a reasonable doubt that the use at issue is not a fair use. The fair use analysis is complicated, involving an examination of four statutory factors on a case-by-case basis. Often, who has the burden of proof regarding fair use can determine the outcome.¹⁶⁴ Not only is the burden of proof placed on the government in a criminal case, but the burden involves overcoming the presumption that a non-commercial use is a fair use.¹⁶⁵

In addition to examining whether the use at issue is for commercial or non-commercial purposes, courts examine the nature of the copyrighted work that is alleged to have been infringed, the amount and substantiality of the portion of that work that has been used by the defendant in relation to the work as a whole,

160. See 17 U.S.C. § 109 (1994 & Supp. III 1997).

161. See *United States v. Wise*, 550 F.2d 1180, 1188, 1194 (9th Cir. 1977); *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977). In *Wise*, the court ruled that not only did the government need to show that there had been no valid first sale but that it also had to prove that the defendant knew the copies had not been the subject of a valid first sale. *Wise*, 550 F.2d at 1188, 1194. The proof required concerning a defendant's knowledge is discussed *infra* at Part IV.

One court characterized the first sale issue as a defense but held that if the defendant presented any evidence that the copies were legally made and that she owned them then "the burden shifts to the government to demonstrate beyond a reasonable doubt that the pertinent copies were either not legally made or not owned by the defendant." *United States v. Goss*, 803 F.2d 638, 644 (11th Cir. 1986).

162. 17 U.S.C. § 107 (1994).

163. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984). Additionally, just because a defendant is engaging in an activity for profit does not mean that the use at issue is not a fair use. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

164. Loren, *supra* note 109, at 44-45.

165. See *Sony*, 464 U.S. at 449.

and the effect of the use on the market for, or value of, the copyrighted work.¹⁶⁶ These four statutory fair use factors are not exclusive. Courts can consider additional factors as well.¹⁶⁷ In the fair use analysis there are no bright line rules.¹⁶⁸ Each assertion of fair use is to be judged on a case-by-case basis.¹⁶⁹ This provides flexibility within the law, but it also reduces the predictability of whether any particular use will be found to be a fair use.¹⁷⁰

The three hypotheticals presented above are illustrative of the unpredictability in applying the fair use analysis. Janet's photocopying of articles was not undertaken with a purpose to sell those copies, thus one might legitimately think that this use would not be characterized as commercial in a fair use analysis. However, she did send the articles to customers in hopes of increasing her sales indirectly. A court could view her conduct as commercial in nature, thus weighing against a finding of fair use.¹⁷¹ In Janet's case, the nature of the copyrighted work is scientific and scholarly. While scholarly and scientific publications are protected by copyright law, courts will sometimes allow greater latitude in the uses allowed for those types of works.¹⁷² Additionally, Janet might believe that because she copied only one article out of the entire journal that the amount copied was a small portion. But typically,

166. See 17 U.S.C. § 107 (1994). The fair use doctrine in copyright law is extremely complex. Entire books and countless law review articles have been written discussing various aspects of the doctrine and case law. See, e.g., WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995).

167. A court's ability to consider factors beyond the four listed in section 107 is indicated by Congress' use of the word "include" to introduce those factors. 17 U.S.C. § 107 (1994). The Copyright Act expressly defines the word "include" to be "illustrative and not limitative." 17 U.S.C. § 101 (1994).

168. See *Campbell*, 510 U.S. at 577.

169. *Id.*

170. The lack of predictability in fair use analysis is readily apparent. For example, each of the three major fair use cases that have reached the Supreme Court have involved a decision by the Court reversing the holding of the Court of Appeals which had, in turn, reversed a district court. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). This kind of flip-flopping on appeal can also be seen in another recent fair use case that was heard en banc by the Sixth Circuit. In *Princeton University Press v. Michigan Document Services*, the district court held that the use at issue was infringement and not fair use. *Princeton Univ. Press v. Michigan Document Servs.*, 855 F. Sup. 905 (E.D. Mich. 1994). A panel of the Sixth Circuit held the use to be a fair use and therefore not infringement. *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 1996 WL 54741 (6th Cir. 1996). Finally, in an en banc decision the Sixth Circuit held the use to be infringement and not fair use, with five judges dissenting in three separate dissenting opinions. *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (*en banc*).

171. See *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994) (holding the photocopying by research scientists for personal use at a for-profit company was a commercial use and not a fair use) *cert. dismissed*, 116 S. Ct. 592 (1995).

172. See *id.* at 925.

each article is viewed as a separate work.¹⁷³ Therefore, Janet photocopied the entire copyrighted work, which normally weighs against a finding of fair use.¹⁷⁴

The final fair use factor is the impact of the use on the market for the copyrighted work. Janet might believe that photocopies of individual articles do not impact the sale of individual journals or journal subscriptions, and this factor, therefore, weighs in her favor. However, journals typically license for a fee the right to photocopy individual articles. At least two courts have recognized the lost licensing fees for photocopying portions of works as a market harm that weighs heavily against a finding of fair use.¹⁷⁵ Despite the inappropriate use of this circular reasoning,¹⁷⁶ the lost licensing fees argument contributed significantly to a finding of infringement in both of those cases.¹⁷⁷ Even if the burden is on the government to disprove fair use, there may be enough evidence for a court to find that Janet's actions constitute infringement.¹⁷⁸

Jim's posting of lyrics from the rock group Devo may fare somewhat better under fair use analysis.¹⁷⁹ Jim's posting does not raise any inference of commercial use, thus favoring a finding of fair use based on the presumption of fairness to which non-commercial uses are entitled.¹⁸⁰ That the purpose for Jim's posting was to comment on the lyrics also weighs in favor of a finding of fair use.¹⁸¹ The nature of the work allegedly infringed, however, weighs against a finding of fair use because music lyrics could be said to be near the core of copyright's protection and thus entitled to greater protection. Additionally, Jim copied the entire expressive work which also weighs against a finding of fair

173. See *id.* at 926.

174. See *Sony*, 464 U.S. at 449-50.

175. See *Princeton Univ. Press v. Michigan Document Servs, Inc.*, 99 F.3d 1381, 1391 (6th Cir. 1996) (*en banc*); *American Geophysical Union*, 60 F.3d at 931.

176. This reasoning is circular because the license fee would not need to be paid if the use at issue were a fair use. Thus, in determining whether the use is a fair use, consideration of lost license fees assumes that the use is unfair and thus the license fee should have been paid. See Loren, *supra* note 109, at 38-41.

177. See *supra* note 175.

178. While a view of this use as infringement may upset some, it is supported by the decision in *American Geophysical Union*, 60 F.3d at 917.

179. While those who use lyrics may think Jim's activity must certainly be a fair use, representatives of those who hold the copyright in those lyrics believe copying even a few lyrics in cyberspace is illegal. *Lyrics Lawsuit*, BILLBOARD, Feb. 6, 1999 (quoting Edward Murphy, President of the National Music Publishers' Association).

180. See *Sony*, 464 U.S. at 449.

181. Generally, fair use is more likely to be found when the use by the defendant can be said to be transformative, using the pre-existing work in a way that creates a new work. See *Campbell*, 510 U.S. at 579. Transformative uses, however, can also be seen as derivative works not entitled to fair use protection.

use. The copyright owner could argue that Jim did not need to duplicate the entire lyrics in order to make his comments.¹⁸² Finally, the fourth factor may also weigh against a finding of fair use if the court is willing to accept the lost licensing fee argument, especially given the number of copies potentially distributed by Jim.¹⁸³ If however, the burden is on the government to prove infringement beyond a reasonable doubt, it may well be that the evidence is insufficient to deem Jim's postings an infringement.

Jason's reproductions for his class also do not clearly represent fair use. Jason may believe that because he is making multiple copies for classroom use, a use specifically mentioned in the fair use provision of the Copyright Act, his action *must* be fair use.¹⁸⁴ Unfortunately for Jason, his use exceeds the classroom guidelines that are part of the legislative history to the 1976 Act.¹⁸⁵ These guidelines, while not part of the law,¹⁸⁶ have been used by courts to help guide them in the amorphous fair use analysis.¹⁸⁷ The licensing fees lost by the copyright owner in this instance could also play a role in determining whether Jason's use is fair use.¹⁸⁸ Alternatively, a court could view the use by Jason, a professor, in making multiple copies for classroom use, to be a fair use when no

182. See *id.* (explaining that in parody, one is entitled to use only so much as is necessary to conjure up the original work that is the subject of the parody).

183. In the context of lyrics distributed over the Internet, a Swiss lyric web site was shut down by the National Association of Music Publishers upon allegations of both civil and criminal copyright infringement. Swiss authorities seized the computer equipment hosting the web site where users from around the world had been posting their favorite song lyrics. Adam Sweeting, *Charlatan's Web: Lyrics on the Internet—Reference Tool or Felony?* THE GUARDIAN, Feb. 12, 1999.

184. Section 107 begins with a statement of what are sometimes referred to as "illustrative" fair uses: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107 (1994) (emphasis added). These illustrative uses, however, are not always fair use. The four factors must still be examined in any given case.

185. AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS, H.R. REP. NO. 94-1476, at 68-71 (1976) [hereinafter, THE CLASSROOM GUIDELINES].

186. THE CLASSROOM GUIDELINES were developed by an ad hoc committee representing various interest groups and became part of a committee report upon submission by the ad hoc committee. See Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 875-77 (1987). While the ad hoc committee did include some representatives of the education community, the guidelines themselves were opposed by major groups representing higher education. See H.R. REP. NO. 94-1476 at 72 (1976) (noting strong opposition from the American Association of University Professors and the Association of American Law Schools).

187. Although the guidelines purport to "state the minimum and not the maximum standards of educational fair use," courts have effectively turned them into the extent of permissible copying in an educational setting. See *Princeton Univ. Press*, 99 F.3d. at 1390-91. See also Loren, *supra* note 109, at 42 n. 174.

188. Again, while many may find the result that Jason's use is infringement to be unpalatable, that conclusion finds support in the case law. See *Princeton Univ. Press*, 99 F.3d at 1381.

charge is made to the students for those copies.¹⁸⁹

As is evident from the above discussion, a determination of infringement as an element of criminal copyright infringement may not be an easy one when the defendant's use is not motivated by commercial advantage or private financial gain. Once a defendant raises fair use, and perhaps provides some evidence concerning the possibility that the use is a fair one, the government should have the burden of proving beyond a reasonable doubt that the use at issue is not fair.¹⁹⁰ This burden should significantly reduce the number of cases in which non-commercially motivated activity will give rise to criminal liability.¹⁹¹

2. Prosecutorial Discretion

The second factor in determining whether the net of criminal liability has been cast too wide concerns a reliance on prosecutorial discretion. Even within the legislative history there is express reliance on this longstanding doctrine of criminal law to ameliorate the possible over-breadth of the statute.¹⁹² Prosecutors should take this express reliance on their discretionary power seriously and not pursue small scale infringement that is non-commercially motivated. Copyright law is not solely concerned with protecting the owners of copyrighted works. The level of protection afforded to copyright owners "must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."¹⁹³ This ultimate goal of copyright is not simply some lofty ideal espoused by law professors. Rather, it is embodied in the constitutional grant of power to Congress enabling the enactment of the copyright law.¹⁹⁴ This fundamental basis for copyright law should be considered by prosecutors when determining whether to charge an individual with

189. A finding of fair use under these circumstances would be supported by the language of section 107 and by the Supreme Court's decision in *Campbell*. See *Campbell*, 510 U.S. at 579 n. 11 (noting that "multiple copies for classroom use" is the obvious exception to a bias against nontransformative uses being fair uses). The decision in *Princeton Univ. Press*, 99 F3d. 1381, could also be distinguished because, in that case, the defendant was a for-profit copyshop that charged a per page copying fee for the classroom copies. *Id.*

190. See *supra* note 159 and accompanying text.

191. Of course, a copyright owner may be able to prevail on a claim of civil infringement.

192. See 143 CONG. REC. S12,689 (daily ed. Nov. 13, 1997) (statement in support of passage of the NET Act by Sen. Hatch) (indicating a reliance on "the good sense of prosecutors and judges").

193. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnotes omitted).

194. U.S. CONST. art. I, § 8, cl.8.

infringement.

Prosecutors, however, have not always been willing to look away from small-scale copyright infringement.¹⁹⁵ Previously, those small scale infringements involved commercially motivated transactions. The deliberation should be affected in the future by the non-commercial nature of the defendant's activity. However, prosecutors may interpret the NET Act to constitute a directive to pursue the small volume copier more aggressively because the NET Act has lowered the numerical threshold to only *one* copy.¹⁹⁶ Reliance on prosecutorial discretion also increases the possibility that the large content owning industries, (the motion picture, music, and publishing industries), may use their influence to promote prosecution of small-scale infringers.¹⁹⁷

Even if comfort is found in relying on prosecutorial discretion to curb the possible over-breadth of the NET Act, the mere threat of criminal prosecution will deter at least some lawful uses of copyrighted works. Unfortunately some of these lawful uses are precisely the types of conduct that the policies underlying copyright law seek to encourage, not discourage.¹⁹⁸ While the NET Act was passed for the express purpose of deterring the sort of mass-scale infringement that occurred in the *LaMacchia* case, it may result in discouraging other types of lawful activity thereby hampering the ultimate aim of copyright which is to promote the progress of knowledge and learning.¹⁹⁹

Finally, the third factor which must be considered in determining whether the net of criminal infringement has been cast too wide is the requirement that the government prove the infringement has been *willful*.

IV. THE IMPORTANCE OF WILLFULNESS IN CRIMINAL COPYRIGHT

195. See, e.g., *United States v. Moran*, 757 F. Supp. 1046, 1049 (D. Neb. 1991) (prosecuting the owner of a "mom-and-pop" movie rental store for making a single unauthorized copy of six movies); *United States v. Wells*, 176 F. Supp. 630 (S.D. Tex. 1959) (prosecuting the seller of aerial maps which were purchased from licensees of copyright owner). Because reported decisions only reflect those cases in which the defendant has chosen to fight the prosecution rather than accept a plea, they are not indicative of the true quantity of small-scale infringers pursued.

196. The legislative history indicates that the Justice Department wanted the threshold lowered from the originally proposed 10 copies and retail value of \$5,000 to the adopted level of one copy and retail value of \$1,000 because it anticipated wanting to pursue smaller-scale infringers. H.R. REP. NO. 105-339, at 7 (1997).

197. See KENNETH C. DAVIS DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 3 (Frank J. Remington ed., 1969).

198. See Note, *supra* note 12, at 1718. See also GOLDSTEIN, COPYRIGHT § 11.4.1, at 295 n.23 (1989).

199. See Part IV.C.2.(c) *infra* concerning the importance of not deterring lawful activities in the realm of copyright law.

INFRINGEMENT

With the broadened scope of activities that qualify as criminal infringement and the removal of the profit motive as an element of the offense, the requirement that the infringing conduct be undertaken *willfully* clearly takes on added significance. Even if the requisite numerical thresholds are met, there can be no criminal liability if the infringement is not willful.

In presenting the NET Act to the Senate, Senator Hatch, the sponsor of the legislation, lamented that he was “afraid that the language was so broad that the net could be cast too widely . . . so that minor offenders or persons who honestly believed that they had a legitimate right to engage in the behavior prohibited by the bill would be swept in.”²⁰⁰ The example he gave to illustrate his fear was that of an educator who, not unlike Jason in the hypothetical described above, believed his use was a fair use. Senator Hatch supported passage of the bill despite his concern of its over-breadth, largely relying on the requirement that the infringement be undertaken *willfully* to limit the reach of the criminal sanctions.²⁰¹

What it means to be “willful” in the context of copyright infringement is far from clear. Under the Copyright Act, willful infringement is used both as an element of criminal infringement²⁰² and as a standard for increased statutory damages in a civil infringement suit.²⁰³ Yet what it means to be a willful infringer is not defined in the Copyright Act. Perhaps due to this lack of definition, willfulness, as interpreted by the courts, seems to mean different things even within the Copyright Act itself.

The lack of a clear meaning for the term *willful* in the legislation is not surprising given that courts also have had great difficulty in defining the term.

200. 143 CONG. REC. S12,689 (daily ed. Nov. 13, 1997) (statement in support of passage of the NET Act by Sen. Hatch).

201. *See id.* In addition to relying on the willfulness requirement to temper the reach of the bill, Senator Hatch also emphasized his reliance on “the good sense of prosecutors and judges.” *Id.* For a discussion of prosecutorial discretion in this area see *supra* notes 192-99 and accompanying text. *See also* 4 NIMMER § 15.01[A][2] (noting that the willfulness requirement is “the only bar against an overzealous prosecutor criminalizing nearly every copyright infringement case”). The legislative history to the most recent revision of the criminal penalties for copyright infringement prior to the NET Act also made clear that de minimis copying would not be subject to the new criminal penalties. *See* H.R. REP. NO. 102-997, at 6 (1992) (stating that the new felony provisions would not apply to “children making copies for friends as well as other incidental copying of copyrighted works having a relatively low retail value”).

202. 17 U.S.C. § 506(a) (Supp. III 1997).

203. 17 U.S.C. § 504(c)(2). While not set forth in the section concerning awards of attorney’s fees, 17 U.S.C. § 505, courts also have used willfulness as an element to be considered when determining whether to award attorney’s fees to a prevailing plaintiff. *See, e.g.,* Canopy Music Inc. v. Harbor Cities Broad., Inc., 950 F. Supp. 913, 917 (E.D. Wis. 1997).

As the Supreme Court has recognized, “[t]he word ‘willfully’ is sometimes said to be ‘a word of many meanings’ whose construction is often dependent on the context in which it appears.”²⁰⁴ Congressional failure to define *willful* leaves the task to the courts.

Most importantly, in defining the contours of what it means to *willfully* infringe copyright for purposes of criminal liability, the courts should remember the ultimate aim of copyright. Copyright is not primarily about providing the strongest possible protection for copyright owners so that they have the highest possible incentive to create more works. The control given to copyright owners is only a means to an end: the promotion of knowledge and learning. Achieving that underlying goal of copyright law also requires access to copyrighted works and it requires permitting certain kinds of uses of copyrighted works without the permission of the copyright owner. While a particular defendant may appear to be deserving of criminal sanctions, the standard for determining willfulness should be set with reference to the the larger goals of copyright embodied in the Constitution and the history of copyright in this country.

Before considering the influence of the fundamental purpose of copyright, this section first describes the interpretation by various courts of willfulness in both civil and criminal copyright infringement. Next, this section discusses the Supreme Court’s approach to interpreting two of the terms used by Congress to indicate a heightened level of mental awareness: “knowing” and “willful.” Finally, this section ends with a proposal for the appropriate interpretation of what it means to be a “willful” infringer for purposes of criminal copyright infringement. In supporting the standard proposed, this section considers the constitutional goals of copyright law and the constitutional issues raised by criminalizing non-commercially motivated infringement.

A. *Willfulness Under the Copyright Act*

The courts have not provided much detailed consideration to the interpretation of the willfulness requirement in the context of criminal copyright infringement. While numerous opinions review the evidence of willfulness in the civil infringement context, civil penalties are not informed by the same

204. *Bryan v. United States*, 524 U.S. 184, 190 (1998) (citing *Spies v. United States*, 317 U.S. 492, 497 (1943)). Judge Learned Hand despised the use of the word “willful” in criminal statutes: “It’s 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, “willful” would lead all the rest in spite of its being at the end of the alphabet.” Model Penal Code and Commentaries, § 2.02, at 249 n.47 (Official Draft and Revised Comments 1985) (quoting ALI Proceedings 160 (1955)).

considerations that inform the interpretation of the mental element requirement of a criminal offense. Because of the possible confusion between civil willfulness and criminal willfulness and the lack of specific guidance by Congress, it is essential that courts apply an appropriate standard when deciding criminal infringement cases. To fully understand the difficulty in interpreting the requirement of willfulness in the context of criminal copyright infringement, this section begins with an exploration of that term in the civil context. It then moves on to explore the few cases that have interpreted the willfulness requirement in the criminal context.

1. *Civil Willfulness*

In a civil suit for infringement, if a plaintiff elects statutory damages²⁰⁵ the court may award anywhere between \$500 and \$20,000 for the infringement.²⁰⁶ If the copyright owner proves²⁰⁷ that the civil infringement was committed willfully, the court has the discretion to increase the civil damages award up to \$100,000.²⁰⁸ The exact nature of the defendant's mental state required for enhanced statutory damages is less than clear.²⁰⁹ Several courts have stated that civil willfulness is a question of whether the defendant had "knowledge that its actions constituted an infringement."²¹⁰ These courts hold that such knowledge may be either actual or constructive.²¹¹ Courts have considered many factors in determining whether the plaintiff has proved constructive knowledge including

205. 17 U.S.C. § 504 (1994 & Supp. III 1997) permits a copyright owner to elect statutory damages or actual damages. Section 504 requires that the copyright owner comply with certain registration requirements in order to be eligible to elect statutory damages in lieu of actual damages. Section 412 of the Copyright Act sets forth the registration requirements that are the prerequisites for statutory damages and also for an award of attorney's fees under section 505. 17 U.S.C. § 412 (1994).

206. 17 U.S.C. § 504(c)(1) (1994). This section provides for such an award for all infringements involved in the action with respect to any one work. Thus, if more than one work is at issue, separate statutory damages are available for each work infringed.

207. The copyright owner has the burden of proving willful infringement. *See* 17 U.S.C. § 504(c)(2) (Supp. III 1997).

208. *Id.* Proof that a defendant willfully infringed also can support an award of attorney's fees. *See Canopy Music*, 950 F. Supp. at 917; *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 570 (S.D.N.Y. 1995); *Chi-Boy Music v. Charles Club, Inc.*, 930 F.2d 1224, 1230 (7th Cir. 1991); *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652 (N.D. Ill. 1987).

209. *See Ting Ting Wu, The New Criminal Copyright Sanctions: A Toothless Tiger?*, 39 IDEA: J. L. & TECH. 527, 531-538 (1999) (discussing the various cases concerning willfulness in the civil context).

210. *N.A.S. Import Corp. v. Chenson*, 968 F.2d 250, 252 (2d Cir. 1992) (quoting *Fitzgerald Publishing Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1115 (2d Cir. 1986)).

211. *See, e.g., N.A.S. Import Corp.*, 968 F.2d at 252.

whether the defendant consulted an attorney,²¹² whether the defendant failed to investigate a possible infringement,²¹³ whether the defendant disregarded warning letters,²¹⁴ the size and nature of the defendant,²¹⁵ the defendant's past copyright violations,²¹⁶ intentional misrepresentations to others concerning the legality of the infringing conduct,²¹⁷ and the failure to appear or cooperate in litigation.²¹⁸ Often these courts also apply an objective standard of reasonableness, holding that defendants were willful infringers because they knew or *should have known* that their activities constituted copyright infringement.²¹⁹ Other courts have stated that the willfulness standard in the civil context requires *either* knowledge that the conduct is an infringement of copyright or a reckless disregard of the copyright owner's rights.²²⁰

Some courts have held that knowledge of potential liability is not equivalent to willfulness when the infringer possesses a reasonable and good-faith belief that her actions do not constitute infringement.²²¹ This standard requires proof of both an objective element, a reasonable belief, and a subjective element, a good faith belief, in order for the infringement not to be deemed willful. While this may be a good standard in the civil context, it is not an appropriate standard for criminal infringement cases, as explained below.

212. See *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375 (7th Cir. 1988); *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988); *Rare Blue Music, Inc. v. Guttadauro*, 616 F. Supp. 1528 (D. Mass. 1985).

213. See *Kowalczyk*, 855 F.2d at 375; *Original Appalachian Artworks, Inc. v. J.F. Reichert, Inc.*, 658 F. Supp. 458 (E.D. Pa. 1987); *Worlds of Wonder, Inc. v. Vector Intercontinental, Inc.*, 1 U.S.P.Q.2d (BNA) 1982 (N.D. Ohio 1986).

214. See *N.A.S. Import Corp.*, 968 F.2d 250 (2d Cir. 1992); *Fitzgerald Publ'g Co.*, 807 F.2d at 1115.

215. *Fallaci v. New Gazette Literary Corp.* 568 F. Supp. 1172 (S.D.N.Y. 1983); *Worlds of Wonder*, 1 U.S.P.Q.2d 1982.

216. See *Flyte Tyme Tunes v. Miszkiewicz*, 715 F. Supp. 919 (E.D. Wis. 1989); *Delman Fabrics, Inc., v. Holland Fabrics, Inc.*, 228 U.S.P.Q. 596 (S.D.N.Y. 1985); *Wow & Flutter Music v. Len's Tom Jones Tavern, Inc.*, 606 F. Supp. 554 (W.D.N.Y. 1985).

217. See *Fitzgerald Publ'g*, 807 F.2d 1110; *Cormack v. Sunshine Food Stores, Inc.*, 675 F. Supp. 374 (E.D. Mich. 1987); *Johnson v. Salomon*, 197 U.S.P.Q. (BNA) 801 (D. Minn. 1977).

218. See *Fallaci*, 568 F. Supp. at 1172.

219. See *Fitzgerald Publ'g*, 807 F.2d at 1115; *Nick-O-Val Music Co. v. P.O.S. Radio, Inc.*, 656 F. Supp. 826 (M.D. Fla. 1987); *Wow & Flutter Music*, 606 F. Supp. 554; *Fallaci*, 568 F. Supp. 1172.

220. See *Video Views, Inc. v. Studio 21*, 925 F.2d 1010 (7th Cir. 1991); *Kowalczyk*, 855 F.2d at 379-82; *Lauratex Textile Corp. v. Allton Knitting Mills*, 519 F. Supp. 730 (S.D.N.Y. 1981).

221. See *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381 (6th Cir. 1996) (en banc); *Peer International Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990); *Blendingwell Music, Inc. v. Moor-Law, Inc.*, 612 F. Supp. 474, 486 n.18 (D. Del. 1985). In *Peer International* the court held that once the plaintiff had met its burden the defendant could refute the showing of willful infringement by establishing its good-faith belief in the innocence of its conduct *and* the reasonableness of such belief. In that case, the defendant failed to meet that burden. See also 4 NIMMER § 14.04[B][3] (1999).

The level of knowledge required for willful infringement in the civil context is further confused by examining the three categories of civil infringement addressed in the statutory damages provision of the Copyright Act: innocent, ordinary, and willful. Ordinary infringement is the default rule. The burden is on the defendant to shift the category of infringement from ordinary to innocent, whereas the burden is on the plaintiff to shift the category of infringement from ordinary to willful. Some have argued that because an innocent civil infringer is defined in the statute as one who is “not aware and had no reason to believe that his or her acts constituted infringement of copyright,”²²² then an ordinary infringer must be one who, at a minimum, is knowing or negligent, and a willful infringement must, therefore, mean something more than just knowledge.²²³ However, civil infringement is also a strict liability offense, requiring no knowledge or intent on the part of a defendant.²²⁴ Therefore, requiring knowledge for willfulness does distinguish an ordinary civil infringer from a willful civil infringer. Yet if ordinary infringement does not require knowledge that the acts constitute infringement, how is innocent infringement distinguished from ordinary infringement?²²⁵

The better view is that innocent civil infringement requires not only a subjective lack of awareness that the acts constitute infringement, but also an objective element that there was no reason to believe that such acts could constitute copyright infringement. Put differently, in order to be an innocent infringer the defendant would need to show both (1) a subjective lack of knowledge that the conduct constitutes infringement, which would include a subjective good-faith belief that the activity did not constitute infringement; *and*

222. 17 U.S.C. § 504(c)(2) (Supp. III 1997).

223. See Jeffrey M. Thomas, Comment, *Willful Copyright Infringement: In Search of a Standard*, 65 WASH. L. REV. 903, 912-13 (1990). This Comment proposes the standard for willfulness in the civil context should require “knowledge of the likelihood of adverse rights of another and . . . an affirmative duty to investigate and determine in good faith whether the activity will infringe upon those rights.” *Id.* at 915. This standard draws on a test once used in patent law for determining whether enhanced civil damages should be awarded. Courts now use a totality of the circumstances test for that determination. See Timothy N. Trop, *The Evolution of the Totality of the Circumstances Test for Willful Infringement*, 27 IDEA: J. L. & TECH. 241 (1986). However, under our current copyright law, any work “fixed in a tangible medium of expression,” 17 U.S.C. § 102 (1994), is likely protected by copyright law unless it is an extremely old work. No registration is needed, nor is a copyright notice required. Thus, potentially, everyone always has knowledge of the likelihood of adverse rights of another when they know that they are copying from another work. The proposed standard then becomes a duty to investigate and determine in good faith whether the activity infringes.

224. See GOLDSTEIN, *supra* note 198, § 9.4 (1999); *Fitzgerald Publ'g. Co.*, 807 F.2d 1110.

225. 4 NIMMER § 14.04[B][3] (1999) (stating that due to the three types of infringement in section 504, “one who has been notified that his conduct constitutes copyright infringement, but who reasonably and in good faith believes the contrary, is not ‘willful’”).

(2) that such subjective state of mind was objectively reasonable. This is consistent with the language of the statute.²²⁶ An ordinary infringer is one who cannot prove both of these elements. With this distinction between an innocent and an ordinary infringer in place, a willful infringer in the civil context would be one whom a plaintiff could prove lacks *both* an objectively reasonable belief in the lawfulness of the activity *and* a subjective good faith belief in the lawfulness of the activity.

While many cases interpret whether a plaintiff has proven willfulness in the civil context, relatively few cases analyze the willfulness requirement in the criminal context. The interpretations of what constitutes willful infringement in cases seeking an enhancement of statutory damages must be viewed cautiously, if at all, for guidance on the issue of willfulness in the criminal context. The ramifications of a criminal conviction require that the courts consider more carefully the element of “willfulness” in the criminal context. Civil damages do not necessarily require an awareness of wrongdoing. However, the Supreme Court has indicated that absent clear evidence of congressional intent to the contrary, felony convictions require some awareness of wrongdoing.²²⁷

2. Criminal Willfulness

The mens rea requirement of willfully infringing copyright for criminal liability has been in the statute from the time criminal sanctions were first added to copyright law in 1897. When it passed the Copyright Felony Act, Congress indicated that it intended the courts to continue to define “willful” in the context of criminal infringement.²²⁸ Yet the courts have not had much occasion to examine the mens rea underpinnings of the willfulness requirement for criminal copyright infringement.

Several sources, including the legislative history of the NET Act itself, cite a split in authority concerning the knowledge level required to be a willful infringer guilty of criminal infringement.²²⁹ These sources explain that there is a minority view that holds that “willful” means only an intent to copy, not an intent to infringe. The two cases typically cited to support that purported

226. See 17 U.S.C. § 504(c)(2) (Supp. III 1997).

227. See *Liparotta v. United States*, 471 U.S. 419, 425 (1985).

228. See H.R. REP. NO. 102-997, pt. 4-5, at 4 (1992), reprinted in 1992 U.S.C.C.A.N. 3569, 3573.

229. See 143 CONG. REC. H9883, H9885 (daily ed. Nov. 4, 1997) (statement of Rep. Goodlatte); Saunders, *supra* note 38, at 688; Lilli Hsieh et al., *Intellectual Property Crimes*, AM. CRIM. L. REV. 899, 917 (1998) (describing a majority view and a minority view adopted by the Second and Ninth Circuits); 4 NIMMER § 15.01[A][2] nn.43-44 and accompanying text.

minority view²³⁰ are not nearly as definite as commentators have made them out to be. Neither of these cases involves any outright statement of the standard and at least one, and perhaps both, appear to require not just knowledge of the act of copying but also knowledge that the law forbids such copying.²³¹

What several sources describe as the majority view holds that showing criminal willfulness requires proof of a “voluntary, intentional violation of a known legal duty.”²³² Yet even with this majority view, the cases discussing criminal willfulness are less than satisfactory in their analysis. Only one, *United States v. Moran*,²³³ provides any discussion of the possible standards and the justification for using one standard over another.

In *Moran*, the defendant, a police officer for over twenty-two years, admitted to copying copyrighted motion pictures on video cassettes and then renting those copies to the public through his movie rental business. Mr. Moran testified that he believed that his actions were legal because he purchased the video cassettes from which he made the copies, he did not make multiple copies of any one tape he had purchased, and he did not try to rent both the purchased tape and the duplicate he made.²³⁴ After exploring the interpretation of willfulness in both the civil and criminal copyright contexts, Magistrate Judge Richard G. Kopf came to the conclusion that the standard enunciated by the Supreme Court in *Cheek v. United States*²³⁵ should be applied.²³⁶ In *Cheek*, the Supreme Court held that

230. *United States v. Taxe*, 380 F. Supp. 1010 (C.D. Ca. 1974), *aff'd in part rev'd in part* 540 F.2d 961 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977); *United States v. Backer*, 134 F.2d 533, 535 (2d Cir. 1943). Hsieh, *supra* note 229, also cites *United States v. Hernandez*, 952 F.2d 1110 (9th Cir. 1991). *Hernandez*, however, does not involve an analysis of willfulness in the context of copyright infringement, but rather the intent necessary to be convicted of joining a conspiracy to infringe. *Id.* at 1114.

231. In its discussion of the sufficiency of the evidence of willfulness, the *Backer* court indicated that the defendant had issued instructions to copy the works at issue “as closely as they might ‘without copyright trouble.’” *Backer*, 134 F.2d at 535. At a minimum, this statement clearly indicated the defendant’s awareness of the copyright law’s prohibition on copying and its application to his conduct. *Id.* In *Taxe*, the court also indicated that the jury needed to determine whether the defendant was aware of the law that prohibited his conduct. *Taxe*, 540 F.2d at 969 (noting that the statements made by counsel for the copyright owner to the defendant concerning the infringing nature of defendant’s conduct could be used by the jury to determine whether defendant’s actions were willful).

232. *Moran*, 757 F. Supp. at 1049; *see also* *United States v. Cross*, 816 F.2d 297, 303 (7th Cir. 1987) (requiring proof that defendant engaged in conduct with knowledge that his activity was prohibited by law); *United States v. Heilman*, 614 F.2d 1133, 1137-38 (7th Cir. 1980) (citing evidence of defendant’s knowledge of the illegality of his conduct to support a finding of willfulness), *cert. denied*, 477 U.S. 922 (1980); *United States v. Wise*, 550 F.2d at 1194 (9th Cir. 1977) (requiring that the prosecution prove that the defendant knew the copies he sold had not been first sold by the copyright owner for purposes of the first sale limitation), *cert. denied*, 434 U.S. 929 (1977).

233. *Moran*, 757 F. Supp. 1046.

234. *See id.* at 1048. Mr. Moran explained that he made these copies to protect against destruction of the tapes he was renting.

235. 498 U.S. 192 (1991).

showing willfulness requires proof that the defendant was aware of the duty at issue and also requires negating a defendant's claim of either ignorance of the law or a good-faith belief in the lawfulness of the activity at issue.²³⁷ This negation is part of the government's burden "because one cannot be aware that the law imposes a duty upon him and yet . . . believe that the duty does not exist."²³⁸

The *Moran* court justified the application of the *Cheek* standard by comparing the civil willfulness cases and determining that the criminal standard of willfulness should be no less stringent. The court went on to clarify that the defendant's belief that his conduct is lawful is not to be judged by an objective standard but rather a subjective, good-faith belief in the lawfulness of the activity. The court, citing *Cheek*, noted that the more unreasonable that belief is, the more difficult it will be for the finder of fact to believe the credibility of an assertion of a good-faith belief, but that such credibility determination is to be left to the trier of fact.²³⁹

Despite the clear and concise opinion in *Moran*, courts and commentators continue to offer different formulations of the proof required to show criminal willfulness. Professor Paul Goldstein has stated that in order to show criminal willfulness, the government must "prove that the defendant knew that his acts constituted copyright infringement or, at least, knew that there was a high probability that his acts constituted copyright infringement."²⁴⁰ At least one court has used this standard as well.²⁴¹ Knowing that there is a high probability that certain actions constitute infringement may or may not negate a good-faith belief that the actions are not infringement, but Professor Goldstein's proof standard does appear to be easier for the government to meet than the standard announced in *Cheek*. The assessment of whether there is a "high probability" that an activity constitutes infringement involves an element of objective reasonableness. It is possible for a defendant to hold a good-faith belief that the activity is not infringing and yet also be aware that there is a high probability, although not a certainty, that the activity constitutes infringement. Using the "high probability" standard imports a level of objectivity, by judging the

236. *Moran*, 757 F. Supp. at 1050-51.

237. *Cheek*, 498 U.S. at 202.

238. *Id.*

239. *Moran*, 757 F. Supp. at 1051.

240. 2 PAUL GOLDSTEIN, COPYRIGHT § 11.4.1. at 11:51-11:52 (2d ed. Supp. 1999).

241. See *Heilman*, 614 F.2d at 1138 (holding that willfulness had been proved because the defendant "chose to persist in conduct which he knew had 'a high likelihood of being held by a court of competent jurisdiction to be a violation of a criminal statute'") (citations omitted).

defendant's belief based on the probability of an outcome.

Other commentators have suggested that a reckless disregard for the rights of copyright owners could be sufficient to show willfulness in a criminal context.²⁴² When it comes to copyright law, with all of its complications and gray areas, a reckless disregard for the rights of copyright owners may be considerably different from a lack of a good-faith belief in the lawfulness of one's conduct.

The courts have not given much detailed consideration of the standard of willfulness required under the criminal provisions of the Copyright Act. The result is uncertainty in an area already filled with vagueness, gray areas, and doctrines with no bright line rules. The imposition of criminal sanctions, however, is a serious matter, and the retention of the willfulness requirement by Congress is a significant indication of the types of activities meant to give rise to criminal liability. Therefore, the next section of this article describes the Supreme Court's interpretation of the specific intent requirements in federal statutory criminal law.

242. See 142 CONG. REC. H9883, H9884 (daily ed. Nov. 4, 1997) (statement of Rep. Coble).

B. Willfulness in Criminal Law

Historically, crimes involved a mens rea or “evil-meaning mind.”²⁴³ That evil-meaning mind existed when an individual consciously chose to engage in an activity that was wrong in the moral sense of the word.²⁴⁴ At early common law, most activities that were morally wrong were not difficult to determine, as the social convictions of relatively homogeneous societies reflected generally acknowledged wrongs.²⁴⁵ Thus, those acts that constituted crimes were generally known among the individuals in society and prosecutors could prove a defendant’s evil-meaning mind by showing that the defendant had chosen to engage in one of those acts. As criminal offenses moved from the common law of generally recognized wrongs to regulatory statutory offenses, acts that were “crimes” no longer necessarily reflected generally acknowledged wrongs. The justification for convicting someone of a statutory crime because they had committed an act with an “evil-meaning mind” became more difficult to find.²⁴⁶

One rationalization for permitting the conviction of a person who had violated a criminal statutory provision was the now generally accepted maxim of criminal law that ignorance of the law is no defense.²⁴⁷ If all individuals are deemed to be aware of the law, then violating that law necessarily means having an evil-meaning mind. The defendant *knows* that the act is against the law, yet violated it anyway and therefore should be punished. While the assumption that all citizens are deemed to be aware of the law may be justifiable when the laws reflect a broad moral consensus or make criminal extremely immoral behavior, justification for criminal liability is illusory when the activity proscribed is less reprehensible or not as universally condemned.

The normative, or culpability-based aspect of criminal law slipped fully out of the picture when courts began interpreting many regulatory crimes as strict

243. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 70-72 (2d ed. 1960). Historically, the term “mens rea” reflected normative, or moral, notions. See Susan Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1177 (1995). While the term has more recently been used in a descriptive way to generally refer to a “mental state,” *id.* at 1178, it is used in this article in its normative sense. *Id.* at 1178.

244. Mandiberg, *supra* note 243, at 1178.

245. *See id.*

246. *Id.* at 1180.

247. *See, e.g.*, Bryan v. United States, 524 U.S. 184, 193 (1998) (stating that the background presumption that every citizen knows the law makes it unnecessary to adduce specific evidence to prove that ‘an evil-meaning mind’ directed the ‘evil-doing hand.’”); *Cheek*, 498 U.S. at 201. Other justifications developed included branding all civil wrongs as immoral and declaring that if congress determined an act should be criminal it was therefore immoral. *See* Mandiberg, *supra* note 243, at 1179-81.

liability offenses, with no requirement of a bad purpose or evil-meaning mind.²⁴⁸ Courts widely recognize, however, that Congress can modify strict liability for regulatory offenses by specifying a mental element for the offense.²⁴⁹ Often the words used to indicate such a mental element are that the act be undertaken “knowingly” or “willfully” or, in some instances, “knowingly and willfully.”²⁵⁰

When used to define the mental state of an offense, *knowingly* is commonly understood to require only “proof of knowledge of the facts that constitute the offense.”²⁵¹ For example, the *knowing* violation of an escape statute could be shown by demonstrating that the “escapee knew his actions would result in his leaving physical confinement without permission.”²⁵² There are, however, exceptions to this standard interpretation of the term “knowingly.” For example, in *Liparota v. United States*,²⁵³ the Supreme Court concluded that “knowingly” referred to knowledge of the law as well as knowledge of the relevant facts.²⁵⁴ At issue in *Liparota* was a conviction for the felony offense of knowingly purchasing food stamps “in any manner not authorized by [the statute] or the regulations.”²⁵⁵ The government produced evidence that the defendant was aware of buying the food stamps and of paying less than face value for them. The Supreme Court reversed the convictions, holding that the government was also required to show “that the defendant knew his conduct to be unauthorized by statute or regulation.”²⁵⁶

The two different interpretations of the term *knowingly*²⁵⁷ correspond to the category in which the offense at issue is classified. If the offense is a “public

248. See Mandiberg, *supra* note 243, at 1185-86.

249. This “mental element” is different from the concept of mens rea when used in its normative sense. See *supra* note 243 and accompanying text. The interaction between traditional mens rea and the evolving use of specific intent language by Congress is complex. The summary provided here does not reflect the full subtlety of the issues. For example, strict liability under the common law means there is no requirement of a bad purpose or evil-meaning mind, a.k.a mens rea, whereas under the Model Penal Code strict liability means no mental element for the offense. See MODEL PENAL CODE §§ 2.02 & 2.05.

250. See, e.g., 26 U.S.C. § 7203 (1998); 5 U.S.C. § 552a(g)(4) (1996); Section 15(b)(4)(D), 15 U.S.C. § 78o(b)(4)(D) (1997), and Section 32(a), 15 U.S.C. § 78ff(a) (1997), of the Securities and Exchange Act of 1934; section 523(A)(1)(C) of the Bankruptcy Code, 11 U.S.C. § 523(A)(1)(C) (1993).

251. *Bryan*, 524 U.S. at 193.

252. *Unites States v. Bailey*, 444 U.S. 394, 408 (1980).

253. 471 U.S. 419, 425 (1985).

254. *Id.*

255. *Id.* at 420 (citing 7 U.S.C. § 2024(b)(1) (1982)).

256. *Id.* at 425. In *Liparota* the Supreme Court required the prosecution to prove that the defendant had knowledge that the activity was in violation of the law, but not necessarily that the defendant knew the activity was criminal.

257. A court may decide which of these interpretations to employ only if the statute is ambiguous as to what is meant by the use of the term “knowingly.”

welfare offense,²⁵⁸ the term *knowingly* does not include knowledge of the law prohibiting the act because such offenses regulate behavior that “a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.”²⁵⁹ In other words, a public welfare offense is the kind of offense that is generally condemned by society because of the potential harm involved. For all other regulatory offenses, a knowing violation of the law also requires proof that the defendant was aware that the conduct was proscribed by law.²⁶⁰

While the Supreme Court has never addressed whether copyright infringement is a public welfare offense, copyright infringement is not akin to the types of offenses the Court has found to be public welfare offenses. Copyright infringement, while it may significantly threaten a copyright owner’s wallet, does not seriously threaten a community’s health or safety. Therefore, if one were to follow the reasoning used for the interpretation of “knowing” crimes, proof of knowledge of copyright law should be required to obtain a conviction.

Similar to the term *knowingly*, the term *willfully* also maintains a dual meaning within criminal regulatory statutes. Generally, the Court has held that to sustain a case of a willful violation of a statute “the Government must prove that the defendant acted with knowledge that his conduct was unlawful.”²⁶¹ This has been described by the Court as requiring the jury to “find that the defendant acted with an evil-meaning mind”²⁶² The knowledge of the unlawfulness of the conduct need not involve a specific awareness of the statutory offense committed. Rather, a general knowledge that the type of activity involved is unlawful is all that is required.²⁶³

258. *Liparota*, 471 U.S. at 432. Offenses that the Court has found to fall into this category include possession of unlawful firearms, *see* *Rogers v. United States*, 118 S. Ct. 673, 674-76 (1998), *Staples v. United States*, 511 U.S. 600 (1994), *United States v. Freed*, 401 U.S. 601 (1971); transporting hazardous chemicals, *see* *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971); and prison escape statutes, *see* *Bailey*, 444 U.S. 394.

259. *Liparota*, 471 U.S. at 433.

260. *Id.* at 428-30. *See also* Mandiberg, *supra* note 243, at 1198-99 (noting that for offenses not within the “public welfare offenses” category the Court has required “something more” than just awareness of the activity, which can be met by either proof of awareness of the law prohibiting the activity or awareness of the probable consequences of the activity).

261. *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994).

262. *Bryan*, 524 U.S. at 193.

263. *Id.* In *Bryan*, the Court rejected the defendant’s argument that he could not be convicted of knowingly violating a statute when he did not have a specific awareness of the statutory section under which he had been charged, when the evidence supported the conclusion that the defendant knew generally that the activity in which he was engaging was unlawful.

However, an existing exception to this general interpretation of the term *willful* requires that the government prove that the defendant was aware that his conduct was generally unlawful. This heightened standard also provides that ignorance of the provisions of the law or a good-faith belief in the lawfulness of the activity will negate willfulness.²⁶⁴ To date the Supreme Court has applied this heightened standard in two contexts: willful violations of currency transaction structuring laws²⁶⁵ and willful violations of tax laws.²⁶⁶

In *United States v. Ratzlaf*²⁶⁷ the Supreme Court held that establishing a willful violation of the law requires proof “that the defendant acted with knowledge that his conduct was unlawful.”²⁶⁸ The statute at issue involved the prohibition of the practice of structuring a transaction with a financial institution so as to avoid federal reporting requirements.²⁶⁹ The trial judge had required that the prosecution prove only that the defendant knew of the reporting requirements and that the defendant attempted to evade those requirements. The trial judge did not require the government to prove that defendant knew that structuring the transaction so as to avoid the reporting requirements was unlawful. Finding that not all transaction structuring is done with a bad purpose and that “currency structuring is not inevitably nefarious,”²⁷⁰ the Court held that the willfulness requirement is not satisfied without evidence that the defendant knew that the structuring of transactions was prohibited by law.

In *United States v. Cheek*²⁷¹ the Supreme Court held that in order to prove a willful violation of the tax laws, the government must prove that the defendant was aware of the duty at issue. The Court stated that to carry its burden of proving willfulness the government must negate a defendant’s claim of either ignorance of the law or that as a result of a misunderstanding of the law the defendant had a good-faith belief that he was not violating the law.²⁷² The Court found that this negation is properly part of the government’s burden because one cannot be aware of a legal duty when the person believes that the duty does not

264. *See id.* at 1946.

265. *Ratzlaf*, 510 U.S. at 138.

266. *Cheek*, 498 U.S. at 201.

267. *Ratzlaf*, 498 U.S. 135.

268. *Id.* at 137.

269. *Id.* at 136 (citing 31 U.S.C. § 324 (1994)). Structuring a transaction involves breaking up a single transaction that exceeds the reporting requirement level into two or more separate transactions that do not exceed that level for the purpose of evading the reporting obligation. 31 U.S.C. § 5324 (1993).

270. *Id.* at 143-44.

271. *Cheek*, 498 U.S. at 201.

272. *Id.* at 202.

exist.²⁷³ Thus, the required awareness cannot exist if the jury credits testimony showing that the defendant had a good-faith misunderstanding concerning the duty imposed by law, even if that claimed misunderstanding is otherwise objectively unreasonable.²⁷⁴ To judge a person's belief by an objective standard could remove from the finder of fact consideration of the defendant's knowledge and belief by making the inquiry a legal one, not a factual one.²⁷⁵ The Court believed that to prevent the jury from considering evidence of a good-faith but unreasonable belief concerning the law could also implicate a defendant's right to a jury trial.²⁷⁶

In cases where the Supreme Court has required that the government prove a subjective awareness of the provision of the statute that the defendant is charged with violating, the Court has based this requirement on two grounds. First, the technical and complex nature of the tax laws and the currency laws create "the danger of ensnaring individuals engaged in apparently innocent conduct."²⁷⁷ Because of this risk, showing "willfulness" requires proof of knowledge of the law.²⁷⁸ This interpretation of the willfulness requirement represents an exception to the traditional rule that ignorance of the law is not a defense justified by the complexity of the law at issue.²⁷⁹

The second justification provided for requiring proof of a defendant's awareness of the law is that the tax code or the currency laws "sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful."²⁸⁰ Not requiring proof of knowledge of the law could lead to an unfair result—criminal prosecutions of "individuals who subjectively and honestly believe they have not acted criminally."²⁸¹ In both of these areas of law, the Court has interpreted the willfulness requirement to require proof of mens rea in the normative sense. Showing that the defendant was subjectively aware of the provisions of the law allegedly violated proves an evil-meaning mind and justifies criminal liability for what might otherwise be innocent activity.

The distinct interpretations of the requirements for proving "willfulness" in

273. *Id.*

274. *Id.*

275. *Id.* at 203.

276. *Id.*

277. *Bryan*, 524 U.S. at 193-95. *See also Cheek*, 498 U.S. at 199-200, 205; *Ratzlaf*, 510 U.S. at 149.

278. *Bryan*, 524 U.S. at 195.

279. *Id.*

280. *Bryan*, 524 U.S. at 195 n. 22 (quoting then Chief Judge Breyer concurring in *United States v. Aversa*, 984 F.2d 493, 502 (1st Cir. 1993)).

281. *Id.* at 1947.

the criminal law have a direct bearing on how courts should interpret what must be shown to prove that a defendant has engaged in infringement “willfully” for purpose of the criminal provisions of the Copyright Act.

C. The Appropriate Standard for Determining Willful Infringement Under the NET Act

The importance of a clear understanding of the contours of the willfulness standard for determining whether the government has carried its burden of showing that the infringing conduct was criminal cannot be overstated. In determining whether a defendant’s activity constitutes infringement, the Copyright Act is complex.²⁸² Not only is the statute relatively long, but it is counterintuitive and filled with exceptions.²⁸³ Broad rights are granted to copyright owners, but those rights are expressly subject to rights granted to users of copyrighted works. The rights of users are set forth in fourteen separate sections of the Copyright Act.²⁸⁴ Some of these sections are specifically tailored to certain industries,²⁸⁵ certain practices,²⁸⁶ or certain types of works,²⁸⁷ while other sections grant rights to users that are very open-ended.²⁸⁸ Additionally, many have begun referring to the recent changes made to the Copyright Act pursuant to the Digital Millennium Copyright Act²⁸⁹ as the “tax-codification” of the copyright law.²⁹⁰

For the lay person, knowing whether a particular use constitutes

282. See Mark Lemely, *Dealing with Overlapping Copyrights on the Internet*, 22 UNIV. DAYTON L. REV. 548, 577 (1997).

283. Justice Story believed intellectual property was one of the most difficult areas of the law: “Patents and copyrights approach nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be very subtle and refined, and sometimes, almost evanescent.” *Folsom v. Marsh*, 9 F.Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

284. 17 U.S.C. § 106 states that the rights granted to copyright owners are “[s]ubject to sections 107 through 120.” Sections 107 through 120 provide various limitations on the rights granted to copyright owners. See 17 U.S.C. §§ 107-120 (1994).

285. See 17 U.S.C. § 108 (1994) (providing for reproduction rights for libraries and archives); 17 U.S.C. § 111 (1994) (providing for secondary transmissions of primary transmissions by cable operators).

286. See 17 U.S.C. § 115 (1994) (providing for a scheme of compulsory licensing for the recording and distribution of nondramatic musical works).

287. See 17 U.S.C. § 113 (1994) (limiting the rights of copyright owners of pictorial, graphic, and sculptural works), 17 U.S.C. § 114 (limiting the rights of copyright owners of sound recordings).

288. See 17 U.S.C. § 107 (1994).

289. Pub. Law No. 105-304 (1998).

290. This phrase was used repeatedly by many law professors present at the American Association of Law Professors Workshop on Intellectual Property, held March 11-13, 1999 in San Francisco, California.

infringement can be extremely difficult.²⁹¹ This is especially true when the use does not involve any kind of profit motive because, under the fair use provisions of the Copyright Act,²⁹² a non-commercial use is presumptively a fair use,²⁹³ and a fair use “is not an infringement of copyright.”²⁹⁴ Fair use remains one of the most troublesome and unsettled areas of the law.²⁹⁵ The doctrine has been said to be “so flexible as virtually to defy definition.”²⁹⁶ Described by one scholar as an “elusive legal doctrine,”²⁹⁷ fair use can involve the straight reproduction of an entire copyrighted work.²⁹⁸ A fair use can also involve the reproduction *and* public distribution of an entire work.²⁹⁹ Yet the statute defines non-commercial criminal infringement as the “reproduction or distribution” of more than the threshold value of copyrighted work,³⁰⁰ and the activities that constitute criminal infringement are defined with reference to civil infringement.³⁰¹

After the passage of the NET Act, for someone accused of non-commercial criminal infringement, the willfulness requirement is the only vehicle by which a court can consider the defendant’s belief that the activity did not constitute infringement because it was, for example, a fair use. If the activity is, in fact, ruled to be a fair use, obviously there can be no conviction. A fair use is, by definition, not an infringement of copyright.³⁰² But, if the court rejects an argument that the use is fair, yet defendant had nonetheless believed the use to be fair, would he still be a criminal? Must his belief be objectively reasonable to avoid criminal liability? What if his belief could be described as in reckless disregard of the copyright owners’ rights?

An individual could easily make a mistake concerning whether a certain

291. See Lemley, *supra* note 282, at 577. There is a noticeable gap between what many people think the law is and what, in fact, is the law. See Jessica Litman, *Copyright Noncompliance*, 29 N.Y.U. J. INT’L L. & POL. 237 (1997).

292. 17 U.S.C. § 107.

293. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

294. 17 U.S.C. § 107 (1994).

295. See *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381 (6th Cir. 1996) (en banc).

296. *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

297. MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 319 (1995).

298. See, e.g., *Sony*, 464 U.S. 417.

299. See *Belmore v. City Pages*, 880 F. Supp. 673 (D. Minn. 1995). *But see Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

300. 17 U.S.C. § 506(a)(2) (1994).

301. See *Cross*, 816 F.2d at 303 (holding that the use of civil definitions of infringement in jury instructions was appropriate).

302. 17 U.S.C. § 107 (1994).

activity constitutes infringement. That mistake also could appear unreasonable or in reckless disregard of the rights of copyright owners, to those trained in copyright law. Because the policy underlying copyright is the promotion of knowledge and learning, reliance on the various rights granted to users of copyrighted works, including the fair use rights, should be encouraged.³⁰³ Making an error in that reliance already carries with it with the sanctions of civil infringement actions; it should not turn an individual into a criminal. One way to assure that the criminal provisions are not overly broad is to employ the heightened standard of willfulness used by the Supreme Court in other complex and sometimes counter-intuitive areas of law that apply broadly to members of the general public.³⁰⁴

Similarly, because a doctrine as elusive as fair use will play a vital role in many non-commercially motivated infringements, the appropriate standard for determining willfulness should be set at a heightened level.

1. The Proposed Standard for Willfulness

A defendant should be guilty of willfully infringing copyright only if the government can prove an intentional violation of a known legal duty. To carry this burden, the government should be required to negate a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law the defendant had a good-faith belief that he was not violating any provisions of the Copyright Act. This good-faith belief must only be judged subjectively, with no requirement that the belief be objectively reasonable.³⁰⁵

2. Supporting Authority for the Standard

The application of this standard is supported by the statutory language of the Copyright Act, the legislative history of the NET Act, and case law interpreting criminal copyright infringement prior to the passage of the NET Act. Finally, Supreme Court precedent concerning the interpretation of willfulness, together with the policy behind the Copyright Act provide perhaps the most persuasive

303. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

304. Environmental protection statutes are also complex yet do not inspire the same concern in the Court. This may be attributed to the fact that environmental statutes apply only to specific industries and thus those within the industry regulated can be expected to know the laws governing them. Copyright law, on the other hand, like tax and currency structuring laws, applies to the public at large.

305. The articulation of the this standard parallels that set out by the Supreme Court in *Cheek v. United States*, 498 U.S. 192, 202 (1998).

support for this standard.

Before discussing the supporting authority for the proposed standard, it is important to clarify that the proposed standard does not create a mistake of law defense. First, the definition of the offense contains a legal element: *willfully* infringing copyright is required. Lack of proof that the defendant was aware that her actions violated a legal duty, namely that her actions constituted infringement, translates into a failure to prove an element of the offense: *willful* infringement.³⁰⁶

a. Statutory Language

When seeking to determine the appropriate standard to apply, the statutory language must first be consulted. The NET Act does provide one piece of guidance on how to determine if an infringement is willful. The Act specifies that for criminal infringement actions, “evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.”³⁰⁷ Thus, the NET Act requires more than general intent and clearly rejects any application of the purported minority view of what constitutes willfulness.³⁰⁸ This statutory language indicates that to prove a defendant has willfully infringed, the government must show more than merely an intentional act of copying or distribution. However, what additional proof is needed is not specified in the Act.

The additional proof that should be required is a showing that the defendant *knew* her activities were in violation of a legal duty under the Copyright Act. In other words, the government should be required to prove that the defendant knew her actions constituted copyright infringement.³⁰⁹

306. See *Liparota*, 471 U.S. at 425 n.9. In *Liparota*, the Court explained that in the case of a receipt-of-stolen-goods statute there is the legal element that the goods were stolen. It is not a defense to such a statute that the defendant did not know that such receipt was illegal, but it is a defense that the defendant did not know that the goods were stolen. *Id.* Thus, in the Copyright context it would not be a defense to argue that the defendant did not know that willfully infringing copyright was illegal, but it would be a defense to argue that the defendant did not believe his activity to be infringing.

307. NET Act § 2(b), 17 U.S.C. § 506(a)(2) (Supp. III 1997). This provision was added in response to the concerns of libraries and Internet access providers that “willfulness” might be broadly interpreted by the courts and possibly reach to those providing the equipment that makes the reproduction or distribution of unauthorized copies possible. See 143 CONG. REC. S12,689 (daily ed. Nov. 13, 1997) (statement in support of passage of the NET Act by Sen. Leahy). As written, this addition also should provide some safe harbor for an individual who makes copies for friends and is unaware of the restrictions imposed on that activity by the Copyright Act.

308. See *supra* notes 230-42 and accompanying text (describing the “minority view” as holding that willful means only an intent to copy, not an intent to infringe).

309. The government should be required to show the defendant knew her actions were in violation of

b. Legislative History

In urging passage of the NET Act, Senator Hatch, the bill's sponsor, stated that he "placed great store by the 'willfulness' requirement."³¹⁰ He then described his understanding of the meaning of the word as "the intent to violate a known legal duty."³¹¹ In support of this standard, Senator Hatch cited *United States v. Cheek*, among other Supreme Court precedent.³¹² Senator Hatch also stated that an educator who believed in good faith that her use was fair use would not be a criminal infringer,³¹³ indicating an intent to permit a good-faith belief in the lawfulness of the activity to negate willfulness. The Register of Copyrights also urged that under the language of the NET Act, a good-faith belief in the lawfulness of one's conduct should insulate an individual from criminal liability.³¹⁴

Although the legislative history does contain support for the proposed standard, statements by others indicate an understanding that a more relaxed standard of willfulness was intended. For example, Representative Goodlatte asserted that the government does not need to prove "the defendant's state of mind" or "that the defendant was familiar with the criminal copyright statute or violated it intentionally."³¹⁵ Representative Goodlatte went on to state that "[p]articularly in cases of clear infringement, the willfulness standard should be satisfied if there is adequate proof that the defendant acted with reckless disregard of the rights of the copyright holder."³¹⁶ In those circumstances, he asserted, "a proclaimed ignorance of the law should not allow the infringer to

the Copyright Act, not necessarily that the defendant knew her action constituted criminal violations.

310. 143 CONG. REC. S12,689 (daily ed. Nov. 13, 1997) (statement in support of passage of the NET Act by Sen. Hatch).

311. *Id.* Senator Hatch also expressly recognized that he was relying on the "good sense of prosecutors and judges" in curbing the reach of the NET Act, giving the example of treating a "college prankster" leniently under the Sentencing Guidelines. *See id.* *See also supra* Part III.B.2 (discussing the dangers of relying on prosecutorial discretion to curb the reach of an otherwise overly-broad criminal law). Senator Hatch also fully acknowledged the potential that the bill might turn out to be draconian, in which case the issue of criminal copyright infringement would need to be revisited by Congress. *See* 143 CONG. REC. S12,689 (statement in support of passage of the NET Act by Sen. Hatch).

312. *See id.*

313. *Id.*

314. *The No Electronic Theft Act, 1997: Hearing on H.R. 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (1997)* (statement of MaryBeth Peters, Register of Copyrights) (suggesting the legislative history specifically refer to *United States v. Cross*, 816 F.2d 297, 300 (7th Cir. 1987) and *United States v. Moran*, 757 F. Supp. 1046 (D. Neb. 1991)).

315. 143 CONG. REC. H9886 (daily ed. Nov. 4, 1997) (statement of Rep. Goodlatte); *see also* CONG. REC. H9884 (daily ed. Nov. 11, 1997) (statement of Rep. Coble).

316. 143 CONG. REC. H9883, H9886 (statement of Rep. Goodlatte).

escape conviction.”³¹⁷

However, as discussed above, the requirement that a criminal defendant willfully infringe copyright should be read as a clear indication from Congress that a heightened mental awareness of the legality of one’s action *is* an element of the offense. Representative Goodlatte may have been more concerned with the problems of proof associated with any specific intent crime, as indicated by his statement that “[w]illfulness is often established by circumstantial evidence and may be inferred from the facts and circumstances of each case.”³¹⁸ However, this does not mean that proof of a defendant’s awareness of the relevant legal duties is not required.

c. Prior Case Law Under the Copyright Act

As discussed above, several cases interpreting the willfulness requirement for criminal copyright infringement³¹⁹ under the prior law held that proving willfulness required showing an intentional violation of a known legal duty. This case law also supports permitting a good-faith belief in the lawfulness of the conduct to negate willfulness, even if that belief is unreasonable. In *Moran*, the court clearly held that a good-faith belief, even if unreasonable, does not amount to willful infringement. The court observed that the more unreasonable the defendant’s alleged good-faith belief, the more likely it is that the finder of fact will not find the proof of such belief to be credible.³²⁰ But there is no requirement that the defendant’s belief must be objectively reasonable.³²¹

In addition to *Moran*, one other criminal copyright infringement case also seemed to assume that a good-faith belief in the lawfulness of the conduct would establish a lack of willfulness. In *United States v. Sherman*,³²² the defendants were convicted of reproducing and distributing copyrighted sound recordings.³²³ Defendants asserted that they believed the sound recordings were merely “sound

317. *Id.*

318. *Id.*

319. As discussed above, lawyers, judges, and individuals must take care to only consult cases determining willfulness under the criminal provisions of the Copyright Act, not the cases deciding the standard to be applied in civil infringement cases. *See supra* notes 205-28 and accompanying text.

320. *Moran*, 757 F. Supp. 1046, 1051 (D. Neb. 1991). *See also Liparota*, 471 U.S. at 434 n.17 (noting the fact that the transaction took place in a “back-room” as circumstantial evidence that the defendant was aware of the unlawful nature of his activities).

321. A defendant’s *disagreement* with a known legal duty does not amount to a good-faith belief that the legal duty does not exist. *See Cheek*, 498 U.S. at 202-03 and n. 8.

322. *United States v. Sherman*, 576 F.2d 292 (10th Cir. 1978).

323. *Id.* at 297.

alikes” of popular performers and therefore, because they were not reproducing the actual copyrighted sound recordings, they were not infringing on those copyrights.³²⁴ The court concluded, however, that the evidence of this alleged good-faith belief was not credible. In its opinion, the court indicated that if the evidence of defendant’s belief had been credible, the requisite willfulness would have been lacking.

Both of these cases indicate that a defendant’s credible good-faith belief in the lawfulness of his conduct negates the required element of willfulness, even if that belief is unreasonable.

d. Supreme Court Precedent

The justifications for a heightened standard of willfulness articulated by the Supreme Court under certain statutes persuasively support the application of the standard proposed above. The Supreme Court has required a more demanding approach to interpreting the mental state requirement in highly technical statutes that apply to a broad range of individuals, for example federal tax law and currency structuring, so long as the statute is not criminalizing conduct that is inherently dangerous to public health and safety.³²⁵ The Supreme Court has held that this heightened mental state standard is appropriate in cases involving highly technical statutes because they present the danger of ensnaring average individuals engaged in apparently innocent conduct.³²⁶ The Copyright Act fits into this category of statute.

The Copyright Act is a highly technical statute³²⁷ requiring a mastery of

324. Under the Copyright Act, while copyright owners of sound recordings are given the right of reproduction under section 106, that right is limited by section 114: “The exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.” 17 U.S.C. § 114(b) (1994).

325. Even in highly technical statutes, the Supreme Court has been unwilling to apply a heightened mental state standard if the statute criminalizes conduct that is inherently dangerous to public health and safety. The Supreme Court has referred to this category of criminal offenses as “public welfare offenses.” See *supra* notes 254-60 and accompanying text. A violation of the Copyright Act does not pose an inherent danger to public health and safety. Therefore, there is no bar to applying the heightened standard for the willfulness requirement.

326. See *Bryan*, 524 U.S. at 193-194.

327. See *supra* Part II.B.1 (discussing difficulties interpreting the Copyright Act). A colleague of mine who teaches exclusively in the tax area brags that his code is the only code that can stop a bullet (this is done while holding the two volume set of the current tax code in front of his heart). While the Copyright Act may not be as verbose and technically detailed as the Internal Revenue Code, it is, nonetheless, as complex and difficult to understand, perhaps due to its lack of specificity.

subtleties unique to a law concerning rights in intangibles,³²⁸ yet it applies to all individuals in society.³²⁹ In the case of non-commercial infringers, which have now been brought within the “net” of criminal infringement, there exists a clear danger of ensnaring people engaged in apparently innocent conduct. Many people believe that if one does not make money from the reproduction or distribution of a copyrighted work, it constitutes a fair use and is not infringement.³³⁰ While this certainly holds true in some litigated cases,³³¹ it is not always true.³³² Yet, to criminally penalize someone who has made an incorrect assumption or misunderstands the law is inappropriate. Such an incorrect assumption or mistake in the context of copyright law does not reflect a mens rea or evil-meaning mind. In fact, many unauthorized copies of works are transmitted electronically or otherwise in order to comment on the work or spread knowledge about a subject. While a court may determine that such activity is, in fact, infringing, it should not be criminal.

The highly technical nature of the Copyright Act coupled with the subtle nature of this evanescent law of intangibles borders on not giving adequate notice to individuals of the conduct proscribed. In our society, in order to permit an individual to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity know what conduct is prohibited. This is particularly important when the statute imposes criminal sanctions. The Supreme Court has indicated that a heightened standard for the mental element of a statutory crime may mitigate a vagueness problem that a criminal statute might otherwise contain, particularly with respect to the

328. As Justice Story described over 150 years ago, “[p]atents and copyrights approach nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may, be very subtle and refined, and sometimes, almost evanescent.” *Folsom v. Marsh*, 9 F.Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

329. Because it applies to all individuals, the Copyright Act is not similar to various environmental statutes that are highly technical as well. In these environmental statutes, the courts have been unwilling to apply a heightened standard of the mental element in part because the offenses defined may be seen as “public welfare offenses,” and also because those statutes only apply to industry participants. *Compare United States v. Int’l Minerals & Chemical Corp.*, 402 U.S. 558, 569 (1971) (noting that industry participants should know the law that applies to their business) with *Cheek*, 498 U.S. at 199-200 (noting that the “average citizen” has difficulty keeping up with their duties and obligations under the tax laws). With the removal of the requirement that the infringement be for profit, the criminal provisions of the Copyright Act now apply to “average citizens.”

330. Most individuals, unless trained in copyright law, do not identify such use as a fair use, using the term of art under the copyright law, but they will state that there is nothing wrong with their activity, or that their activity is not illegal. *See Litman, supra* note 107, at 27-29 & n. 3.

331. *See, e.g., Sony*, 464 U.S. 417.

332. *See Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231 (N.D. Ca 1995).

adequacy of notice as to what activities are prohibited.³³³

The risk of catching innocent, albeit misguided, individuals within the scope of a criminal provision of a highly technical and vague law has led the Supreme Court in other contexts to require proof of knowledge of the legal duties imposed by that law. This risk has also led the Court to hold that a good-faith belief, even if objectively unreasonable, negates the “willfulness” required in these contexts. These same standards should be applied in the context of the Copyright Act.

Supreme Court precedent also supports judging the defendant’s knowledge of the legal duties imposed subjectively only. First, even if a good-faith belief is objectively *unreasonable*, a defendant still cannot be said to have *known* of the duty the law imposes.³³⁴ Second, if a defendant’s belief must be an objectively reasonable one, that requirement “transforms the inquiry into a legal one and would prevent the jury from considering [the defendant’s belief].”³³⁵ Removing this evidence from the jury’s consideration would create a serious problem under the Sixth Amendment’s jury trial provision.³³⁶

e. The Policy of the Copyright Act

In addition to Supreme Court precedent concerning the importance of heightened standards of willfulness in certain statutory crimes, the policy goals of the Copyright Act provide even greater support for the application of a heightened standard. The fundamental purpose of copyright law is to encourage the promotion of the progress of knowledge and learning.³³⁷ This purpose is imbedded in the Constitutional grant of power to Congress to enact the Copyright Act and informs the interpretation of the law.³³⁸

Competing social policies underlie the scheme of copyright. One policy favors wide dissemination of new ideas and new forms of expression while the other policy encourages the production of new works by providing the economic incentive of a monopoly to ensure that creators are rewarded for their

333. See, e.g., *Village of Hoffman Estates v. Flipside, Hoffman Estate, Inc.*, 455 U.S. 489, 499 (1982) (citing cases).

334. See *Cheek*, 498 U.S. at 203.

335. *Id.*

336. *Id.* (citing *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Morisette v. United States*, 342 U.S. 246 (1952)).

337. U.S. CONST. art. I, § 8 cl.8. While the Constitution provides that the monopoly of the copyright is to be granted in order to promote “science,” at the time of its drafting “science” denoted broadly knowledge and learning. See Seidel, *supra* note 2.

338. See *Campbell*, 510 U.S. at 579 (1994); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

endeavors. The public benefit predominates,³³⁹ however, with the remuneration of authors being a means to achieve that public benefit.³⁴⁰ Therefore, courts must “be careful not to chill dealing in creative works, when . . . conduct approaches, but does not cross, the borderline of infringement.”³⁴¹ The current copyright law enacted by Congress reflects this underlying policy by encouraging certain uses of copyrighted works without the permission of the copyright owner.³⁴² An interpretation of the willfulness requirement of criminal infringement that does not require proof of knowledge of the legal duties in the Copyright Act will thwart the underlying, constitutionally mandated goal of copyright law by making individuals more reluctant to engage in activities that may, in fact, be permitted by the copyright law.

Criminal sanctions and the threat of criminal sanctions are extremely chilling, even to activity that does not cross the line into criminal activity, but only comes near it.³⁴³ This chilling effect creates a dilemma in the context of the Copyright Act, which seeks to encourage use of copyrighted works while simultaneously providing protection for copyright owners that results in the incentive to create these works. One way to assure that the activities which are close to the borderline of infringement are not chilled is to require proof of an intentional violation of a known legal duty for a criminal conviction, with a good-faith belief in the lawfulness of the activity negating willfulness.

Importantly, copyright doctrine is also affected by First Amendment concerns. Our founding fathers believed that the copyright monopoly would be the “engine of free expression”³⁴⁴ and would, in fact, be a tool of democracy.³⁴⁵ The threat of criminal sanctions acts as a significant deterrent for questionable activity. In order to facilitate copyright law as an engine of free expression, an individual who is ignorant of the law or who possesses a good-faith, albeit

339. *United States v. Bily*, 406 F. Supp. 726, 731 (E.D. Penn. 1975).

340. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts.”).

341. *Bily*, 406 F. Supp. at 730.

342. Fair use is a clear example of the type of use authorized by the Copyright Act. Many other specific uses abound, e.g. public performance or display of copyrighted works in the course of face-to-face learning activities, 17 U.S.C. § 110(1) (1994); certain photocopying activities by libraries and archives, 17 U.S.C. § 108 (1994); and making and distributing phonorecords of nondramatic musical works, 17 U.S.C. § 115 (1994) (compulsory license provisions).

343. After the passage of the NET Act, many noted its significant chilling effect. *See, e.g.*, Grossman, *supra* note 157.

344. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

345. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 288-89 (1996).

erroneous, belief that the conduct at issue is lawful, should not be at risk of being convicted of a felony.

Some may argue that an individual who crosses the line into infringement, even under a good-faith belief in the lawfulness of their activity, should nonetheless be held criminally accountable under the NET Act. Under this line of reasoning, engaging in conduct that is near the line separating non-infringing from infringing behavior should be discouraged. But it is important to remember that those who cross the line because of ignorance of the law or a good-faith belief in the lawfulness of their conduct will still be civilly liable for their infringement. Civil liability is a strict liability offense.³⁴⁶ A good-faith belief, even one that is objectively reasonable, is not a defense to civil infringement. Imposing criminal sanctions on those who cross the line, without requiring proof of a heightened mens rea, may result in an over-deterrence of the types of legal activities that approach the border between infringement and non-infringement. Yet, in many cases, it is those types of activity that copyright law is designed to encourage.³⁴⁷

3. *Proving Defendant Willfully Infringed*

Unless the defendant chooses to testify, the government must establish willfulness by circumstantial evidence.³⁴⁸ The type of evidence that may be used to show the required mens rea in a criminal copyright infringement action can vary. The *Attorney's Manual for the Department of Justice* encourages prosecutors to consider the evidence of criminal intent carefully, noting that "the possession and use of elaborate duplicating equipment and accessories will normally supply effective evidence of criminal intent."³⁴⁹ While such equipment

346. See *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963). See also H.R. REP. NO. 102-997 (1992).

347. In the context of antitrust violations, the Supreme Court recognized the importance of requiring the government to prove a mens rea element because without it "overdeterrences would occur when business people refrained from engaging in the "gray zone of socially acceptable and economically justifiable business conduct." *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978). In determining that attorney's fees should be awarded to prevailing copyright defendants under the same standards as fees are awarded to prevailing copyright plaintiffs, the Supreme Court stated: "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." *Fogerty*, 510 U.S. at 527 (1994).

348. See *United States v. Sherman*, 576 F.2d 292 (10th Cir. 1978) (noting willfulness is often proved by circumstantial evidence); *United States v. Rose*, 149 U.S.P.Q. (BNA) 820, 825 (S.D.N.Y. 1966) (same).

349. UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-71.010 (Oct., 1997).

would be necessary for certain kinds of criminal infringement, and often is necessary for infringement engaged in for profit, elaborate duplicating equipment is not required in a digital environment, nor is it needed to reach the minimal \$1,000 threshold for non-commercially motivated infringement. Other types of evidence will be necessary to prove the defendant was aware of the illegality of his actions.

Often, statements that the defendant made to others concerning the legality or questionable nature of the activity can be used to show that the defendant was aware of the law prohibiting the conduct.³⁵⁰ While advice of counsel can assist a defendant in showing a subjective, good-faith belief in the lawfulness of her actions,³⁵¹ advice of counsel may also show that the defendant was aware of the legal obligations imposed upon her.³⁵² Courts should be careful, however, when permitting testimony concerning statements made to the defendant by counsel for the copyright owner. These statements can be self-serving and overreaching. Such statements, even by counsel for the copyright owners, may be used to negate a claim of ignorance of the law, but it is critical that statements by the copyright owners and their counsels not be weighed too heavily in determining the defendant's good-faith belief.

Still another factor that may assist in proving the willfulness of a defendant's infringement is the existence of prior civil judgments against the defendant for similar acts of copyright infringement. These judgments indicate an awareness that courts interpret the statute as prohibiting the conduct at issue. After such a judgment, while the defendant may disagree with the court's interpretation, a *good-faith* belief that the conduct is lawful would be difficult to maintain.³⁵³

While prior civil judgments against a defendant can provide circumstantial proof of the defendant's knowledge of the lawlessness of her conduct, rulings in other civil cases should not be used as circumstantial evidence of the willfulness of defendant's conduct without proof that the defendant was aware of those rulings. Even an awareness of those rulings, however, may not conclusively

350. See *United States v. Backer*, 134 F.2d 533, 535 (2d Cir. 1943) (noting evidence on willfulness included testimony that defendant had instructed others to copy the works at issue "as closely as they might without 'copyright trouble'"). See also *United States v. Drebin*, 557 F.2d 1316, 1324 (9th Cir. 1977) (describing letters sent to customers warning them that the FBI was asking questions and the customers needed to "be careful about it" and should probably store the copies in a safe place).

351. See *Cheek*, 498 U.S. at 196 (noting defendant's evidence included a letter from an attorney providing legal support for the belief that the defendant's conduct was lawful).

352. See *United States v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976) (noting that advice from counsel should be considered only in determining whether defendant's actions were willful).

353. See *Cheek*, 498 U.S. at 202 (noting that if the defendant knows what the law is but believes it should be otherwise, knowledge of the legal duty has nonetheless been shown).

prove the lack of a good-faith belief in the lawfulness of the conduct. Circuit splits in copyright law are common³⁵⁴ and the Supreme Court often reverses lower courts on whether certain actions constitute infringement or involve copyrightable material.³⁵⁵ Additionally, the difference in merely a single, seemingly insignificant fact can change the infringement analysis, especially in the context of fair use.³⁵⁶

Evidence of rulings in other cases can, of course, help to show the reasonableness of the defendant's belief. However, even if these decisions show the defendant's belief to be unreasonable, the court may not remove the decision on willfulness from the jury. Rather the court should instruct the jury that in deciding whether to credit the defendant's claim of a good-faith belief, the jury is free to consider her awareness of prior court decisions rejecting her interpretation of the law.³⁵⁷

Turning to the hypotheticals posed earlier,³⁵⁸ none of the individuals making the copies or distributing the copyrighted works engaged in the conduct for commercial advantage or private financial gain.³⁵⁹ Each could quite legitimately claim they believed their copying did not constitute infringement. Despite authority to support their claims,³⁶⁰ it is also possible that a court might find

354. Current examples of circuit splits include the interaction between the first sale doctrine and the creation of derivative works; *compare* *Mirage Editions v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (holding greeting card mounted on tile constitutes a derivative work and thus not protected by the first sale doctrine) *with* *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997) (holding greeting card mounted on tile does not constitute a derivative work and therefore is protected by the first sale doctrine). While not a circuit split, the recent ruling concerning the public domain nature of Dr. Martin Luther King Jr.'s "I Have a Dream" Speech, *Estate of MLK, Jr., Inc. v. CBS, Inc.*, 13 F. Supp.2d 1347 (N.D. Ga. 1998), which resulted in an opposite ruling, based on nearly identical facts, from a case decided more than thirty years prior, *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963), also shows the volatile and sometimes unpredictable nature of copyright rulings in this country.

355. *See supra* note 170 (discussing the Supreme Court's reversal of the lower court decisions in each of the major fair use cases it has decided in the last two decades). *See also* *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998) (reversing the court of appeal's decision that the first sale doctrine did not apply to imported copies).

356. For example, in the context of a public performance right, a hotel may provide VCRs and televisions in the room while renting movies from the front desk without infringing. *See* *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989). If, however, the VCRs are kept at the desk but connected to the televisions in the rooms, the rental of the movies will constitute an infringement. *See* *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991).

357. *See* *Cheek*, 498 U.S. at 202 (applying this standard in the context of the tax code).

358. *See supra* notes 150-70 and accompanying text.

359. Some might argue that Janet's copying was, in fact, done for private financial gain. Certainly Janet was not selling the copies of the articles that she provided, but she most likely hoped that her thoughtfulness in sending the articles would be rewarded with increased sales of her products.

360. *See supra* notes 171-87 and accompanying text.

their activities to be infringement. Given the nature of their conduct, however, the government would bear a heavy burden to negate their claims of a good-faith belief that they were not violating the law.

CONCLUSION

The continuing expansion of the copyright monopoly threatens to cause significant harm to the underlying purpose of copyright in the United States. The NET Act has the potential to exacerbate this damage. Even if properly interpreted by the courts, the vague nature of the “willfulness” requirement as seen through the eyes of the public unfortunately will deter many activities that should, instead, be encouraged in order to promote the ultimate goal of copyright in this country, the promotion of knowledge and learning.

The adoption of the NET Act in 1997 marked a significant turning point in the law of criminal copyright infringement by eliminating proof of a profit motive as a requirement for conviction. The promise of the digital age brings with it a very real threat of unlimited and unauthorized copying of copyrighted works. In addition to the challenge presented by the digitization of society, copyrighted works have increasingly been viewed as “just like” any other property and thus deserving of protection against theft, regardless of the motivation for that theft.

Both civil and criminal law seek to shape the behavior of individuals in ways that are beneficial to society by deterring actions that are determined to be harmful to society as a matter of public policy. It has been argued that the only real basis for distinction between crimes and civil wrongs rests in the moral condemnation which society places on the criminal.³⁶¹ A civil wrongdoer does not suffer the same condemnation, at least not to the same degree, as one who is found guilty of a crime. Therefore, society should not designate as criminal those acts which lack the blameworthiness deserving of such moral condemnation.³⁶² Civil infringement provides a legal cause of action against infringers without regard to knowledge or profit motive.³⁶³

Unlike the approach adopted by the NET Act, criminal infringement

361. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-406 (1958).

362. See *id.*

363. While infringement is not affected by the fact that a defendant engaged in the conduct for non-commercial reasons, the determination of whether the conduct is infringement in the first place can be influenced by the nonprofit character of the use. This is particularly true in the fair use area. 17 U.S.C. § 107 (1994). See *supra* notes 159-65 and accompanying text.

previously required not only proof of willfulness, but proof that the defendant was engaging in the infringing conduct for commercial advantage or private financial gain. With the adoption of the NET Act, the only element of the offense of criminal copyright infringement that stands between legitimate protection for copyright owners and illegitimate criminalization of widespread practices of individuals is the requirement that the infringement be willful. The willfulness requirement in criminal law generally is subject to varying interpretations depending on the context of its use. For copyright to continue to be an engine of free expression and a vehicle for promoting the progress of knowledge and learning, the appropriate interpretation of willfulness in the criminal infringement context is critical. Proving willfulness in the context of criminal copyright infringement while maintaining the constitutional aim of the copyright act requires proof of a violation of a known legal duty. Credible claims of ignorance of the law or a good-faith belief in the lawfulness of the activity should negate willfulness.

The language of the NET Act, its legislative history, and prior case law all support the application of a standard of willfulness which requires proof that the defendant was aware that his or her activities constituted infringement. Due to the highly technical, complex, and at times extremely vague nature of the Copyright Act, the government also must be required to negate a claimed good-faith belief in the lawfulness of the activity. Otherwise there lurks a very real danger of catching within the net of criminal infringement those individuals who are engaged in apparently innocent conduct. Just as currency structuring is not inevitably nefarious,³⁶⁴ the reproduction and distribution of copyrighted works is not always motivated by a desire to *steal* another's property.

364. See *Ratzlaff v. United States*, 510 U.S. 135, 144-145 (1994).