10-1984

# Dowling v. United States

Lewis F. Powell, Jr.

rkl
12/10/84

X-deny
Langevitz

PRELIMINARY MEMORANDUM

January 11, 1985, Conference
List 1, Sheet 2

No. 84-589-CFY

DOWLING (Elvis Presley record pirate) Cert to CA 9 (Tang, Chambers Boochever)

v.

UNITED STATES Federal/Criminal Timely

1. SUMMARY: Petr argues that (1) interstate transportation of stolen copyrighted material is not transportation of "goods, wares or merchandise" under the National Stolen Property Act; and (2) use of the mails to promote the sale of copyright-infringing materials cannot canstitute mail fraud.

2. FACTS AND PROCEEDINGS BELOW: Petr operated a massive mail order business in "bootleg" Elvis Presley phonograph records. He marketed seven phonograph albums that petr himself created, using copyrighted Elvis Presley recordings without consent from the copyright holders. The recordings were made from TV shows, movies, and studio "out-takes" -- recorded material never used on RCA's final albums. Petr obtained the out-takes by bribing NBC-TV officials or by other fraudulent means.

Petr, who lived in Maryland, mailed 50,000 catalogues in 1979 via California mailing service, which in turn mailed petr any orders received. Petr would then mail out bootleg albums to states across the nation. Petr's postal bills were over $1,000/week.

Petr was convicted in a stipulated bench trial for interstate transportation of stolen property (18 U.S.C. §2314), conspiracy to do same, copyright infringement (17 U.S.C. 506(a), and mail fraud (18 U.S.C. §1341). He does not challenge his copyright infringement convictions (which, at the time, were misdemeanors).

CA 9 affirmed on all counts. First, it ruled that prosecution under the Copyright was not exclusive, and the additional mail fraud charges were proper. Nothing in the legislative history of 17 U.S.C. §506(a) indicates Congressional intent to make the criminal copyright law exclusive, and the 1982 Piracy and Counterfeiting Amendments (not applicable to petr's offenses because committed prior to 1982) indicated clear Congressional intent to make the penalties of §506(a) apply "in addition to any

other provisions of Title 17 or any other law." The Court relied on its prior decision to the same effect, United States v. Belmont, 715 F.2d 459 (CA 9 1983), cert. denied, 104 S.Ct. 1275 (1984).

Second, the court ruled that petr's actions constituted a "scheme to defraud" within the meaning of the mail fraud statute, 18 U.S.C. §1341. Petr had a statutory duty to notify copyright holders of his intention to market their copyrighted materials, under 17 U.S.C. § 115. By failing to act consistently with the statute, petr was defrauding the copyright holders. Violation of this statutory duty was sufficient to constitute a basis for a "scheme to defraud," even though CA 9 had suggested in other cases that only violation of a fiduciary duty would suffice.

Third, CA 9 held that although petr's mailings were not directed to the copyright holders, they certainly were "in furtherance of" the scheme by which those holders were defrauded of their right to claim royalties.

Fourth, the court held that interstate transportation of bootleg recordings constituted transportation of a "good, ware, or merchandise" under the National Stolen Property Act, 18 U.S.C. §2314, again relying on its prior Belmont decision. There CA 9 had held to the same effect, stating (715 F.2d, at 461-62) that

> "The rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property. When society creates new kinds of property and thieves devise new ways of appropriating that property ... the law against transporting property expands with the growth of varieties of property."

The court also rejected petr's argument that Sony Corp. v. Universal City Studios, 104 S.Ct. 774 (1984) somehow overruled this reasoning in Belmont.

Finally, the court rejected an argument that admission of a statement made by a third party was error because it was hearsay. Petr does not challenge this ruling in his cert petition.

3. CONTENTIONS:

**Petr:** First, Congress did not intend for laws other than the copyright laws to protect against defrauding copyright holders. That's why there is a criminal portion of the Copyright Act, conviction under which petr does not protest. By referring to "the judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance" in Sony, 78 L.Ed 2d, at 585, this Court has in effect overruled CA 9's Belmont decision. "The remedies for infringement 'are only those prescribed by Congress.'" Ibid. Here the copyright infringement statute under which petr was convicted explicitly reaches the conduct at issue, whereas mail fruad and transportation of stolen property do not. In the face of such ambiguous general statutes, the rule of lenity, inter alia, requires that the more specific statute be applied to the exclusion of the others.

Second, CA 5 in United States v. Smith, 686 F.2d 234 (CA 5 1982) held that recording and distributing copyrighted television programs could not sustain a conviction for interstate transportation of stolen goods under § 2314, and that copyright infringement does not constitute "taking by fraud." Id., at 239. In the face of this argument, CA 9 explicitly stated that "if, indeed,

the Fifth Circuit takes a different view of the matter, we are not bound to follow it. Thus there is a direct conflict between this case and CA 5.

Third, misappropriating someone's copyright rights is not at all the equivalent to stealing their property. This Court rejected such simple-minded analogies in Sony. See 78 L. Ed. 2d at 586 & n.13 (copyright holders never have absolute control of their material, e.g., it is subject to "fair use" exception); id. at 597 n.33 (private copying of copyrighted video material for "timeshifting" purposes not at all like stealing jewelry for private use). No evidence indicates that any of the material used by petr to produce his records was itself stolen. It streches the National Stolen Property Act beyond all fairness and common sense to apply it here.

Fourth, this decision conflicts with applications of the mail fraud law in United States v. Brewer, 528 F.2d 492 (CA 4 1975) and United States v. Gallant, 570 F.Supp. 303 (SDNY 1983). Brewer held that someone who used the mails to sell cigarettes so that customers could avoid paying sales tax could be convicted of mail fraud. But here petr did not allow customers to avoid paying taxes, or even royalties, since none were due from the customers. And Gallant held that an interstate distributer of bootleg records could not be convicted of mail fruad. CA 9's attempt to distinguish petr's case because he was a manufacturer is specious, because under the Copyright Act both manufacturers and distributors of copyrighted mnaterials have the identical duty to

give notice of their intent to the copyright holders. 17 U.S.C. §115.

**Resp:** Smith was wrongly decided, and is an anomoly among many other decisions that are consistent with this one. Moreover, Smith is distinguishible, because there the defendant had taped copyrighted materials "off the air," whereas here the copyrighted materials themselves were fraudulently obtained by petr. This Court has denied cert in many other cases raising the same conflict petr points to.

Nothing in the legislative history of §506 indicates that Congress did not intend more traditional, general, criminal statutes to apply if their elements could be proven, and the 1982 legislative history confirms that this is Congress's view. Also, since Congress made offenses like these felonies in the 1982 amendments to the Copyright Act, this case presents no important question for review.

As for mail fraud, this Court has ruled that that crime merely requires proof of "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." Pereira v. United States, 347 U.S. 1,8 (1954). Thus CA 9's suggestion that violation of any type of specific duty is required goes farther than the law actually requires. Under Pereira's reasoning, Brewer and this case are entirely consistent. As for Gallant, the government there made the mistake of conceding that a distributor owed no statutory duty to copyright holders. In any case, CA 2 has adopted the Brewer reasoning,

specifically avoided by SDNY in Gallant, since Gallant was decided. United States v. DeFiore, 720 F.2d at 761.

4. DISCUSSION: There is a direct conflict between this case and Smith, and the distinction that the SG proposes is illusory. But the Court has consistently denied cert in other cases raising that conflict, apparently on the premise that Smith was wrong and that CA 5 will reconsider Smith if given the chance. See, e.g., Nos. 84-328, 5163, 5219, 5319 (all cert. denied Nov. 26, 1984, White, J., dissenting).

The 1982 legislative history is irrelevant here, I think. But the normal rule is that criminal statutes will apply to conduct which fits the illegal elements, unless there exists legislative intent to the contrary. Moreover, the SG is right that in light of the 1982 Piracy amendments, which makes pirating of copyrighted material a felony, the government is unlikely to feel the need to prosecute for mail fraud or interstate transportation in cases like these in the future.

I also think it clear that Sony has nothing to do with this case; the question there was whether video recording for one-time, personal use constituted copyright infringement. The majority held that it was not infringement but "fair use," and did not address broader issues not presented on the record before it. Sony did not even touch upon possible criminal prosecutions, and it seems clear that by no stretch of the imagination can petr's scheme be termed "fair use."

The SG is entirely right that application of the mail fraud statute is proper in a case like this, and no cases actually con-

flict (although Gallant comes close). At most, this issue should perk awhile in the CAs.

The concept that copies of copyrighted audio or video recordings represent "stolen goods" is not an intuitively obvious one. The Smith conflict is clear, and the Smith position is not an unreasonable one by any means. But this Court's prior refusals to review the conflict, and the fact that this case came out the "right" way, suggest that cert should be denied.

5. RECOMMENDATION: Unless the Conference wants to take up the Smith conflict, I recommend denial.

There is a response.

December 19, 1984 Little Opn in petn

file

April 1, 1985

DOWLING GINA-POW

84-589 Dowling v. United States(CA9)

(April 17 Argument)

MEMO TO FILE

This case was granted to resolve a conflict. The case involves the unauthorized production and distribution in interstate commerce of record albums containing copyrighted compositions peformed by Elvis Presley. The facts are stipulated. Dowling, with others, was operating a major business of producing an selling albums in violation of the copyright laws. Petitioner was indicted and convicted, however, of violating the National Stolen Property Act, 18 U.S.C. § 2314. He also was convicted of mail fraud and of conspiracy to transport stolen property in interstate commerce in violation of 18 U.S.C. § 371.

We limited the grant of cert to whether the courts below erred in holding that petitioner had violated the National Stolen Property Act. That act, in simple terms, provides as follows:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud" shall be fined not

> more than $10,000 nor imprisoned for more than 10 years, or both.

Petitioner's brief makes rather a persuasive case for the view that the National Stolen Property Act does not apply to copyright. He contends that the usual and common sense meaning of the terms "goods, wares and merchandise" simply does not include copyright. A copyright is an intangible right or privilege that is distinct from the physical or tangible object in which it is embodied. Goods, wares and merchandise, on the other hand, conote a tangible object. Petititioner relies on the legislative history as well as the plain language of the act.

Petitioner also heavily relies on this Court's recent decision in Sony Corporation v. Universal City Studios (by JPS). In that case, the Court said:

> "The protection given to a copyright is wholly statutory" and "the remedies for infringement are only those prescribed by Congress". As copyright law is purely statutory, the plausible argument is made that the Judiciary - in the absence of clear legislative intention - cannot expand remedies for copyright infringements beyond those specifically adopted by Congress.

The SG's brief has not been filed (at least has not been brought to my attention). His brief in opposition to the granting of cert lists a number of cases in which this Court previously has denied cert on claims similar to those made by petitioner. See p. 5 of the SG's brief in opposition, where he cites - among other cases - four cases in which Justice White dissented from denial of cert.

The SG did not address Sony, or do more than mention that the case is now of limited importance anyway since the adoption in 1982 of the Piracy and Counterfeiting Act.

In general, the SG's brief in opposition is not particularly helpful.

Until the SG's principal brief is filed, I will withhold even a tentative judgment beyond saying that - at leat on the face of it - petitioner makes a rather persausive argument. I will only want a very brief memorandum from my clerk, as the case is not of vast importance.

LFP, JR.

Jaunary 11, 1985

*Court* .....
*Argued* ....., 19...
*Submitted* ....., 19...

*Voted on*....., 19...
*Assigned* ....., 19...
*Announced* ....., 19...

No. 84-589

DOWLING

vs.

UNITED STATES

Grant limited question 17

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | G | D | N | POST | DIS | AFF | REV | AFF | G | D | | |
| Burger, Ch. J. | | | ✓ | | | | | | | | | | |
| Brennan, J. | | ✓ | | | | | | | | | | | |
| White, J. | | ✓ | | | | | | | | | | | |
| Marshall, J. | | ✓ | | | | | | | | | | | |
| Blackmun, J. | | | ✓ | | | | | | | | | | |
| Powell, J. | | | | | | | | | | | | | |
| Rehnquist, J. | | | ✓ | | | | | | | | | | |
| Stevens, J. | | ✓ | | | | | | | | | | | |
| O'Connor, J. | | | ✓ | | | | | | | | | | |
| | | | | | | | | | | | | | |

File

aml 04/06/85 Renewed 4/6 - Persuasive

This is the "Elvis Presley" case, Annmarie recommends Affirm, & contrary to my initial reaction I * now am inclined to agree.

BENCH MEMORANDUM

To: Justice Powell April 6, 1985

From: Annmarie

Re: No. 84-589, Dowling v. United States. (CA 9)
(April 17)

Question Presented

Does the interstate shipment of bootleg "record albums" constitute the interstate transportation of stolen property within the meaning of 18 U.S.C. §2314?

Background

Petr and his codefendants were involved in a large-scale operation to manufacture, transport, and sell bootleg copies of Elvis Presley recordings. They made their records from tapes of unreleased performances and illegal recordings of Presley's concerts. They acquired recordings by Presley in a variety of

illegal ways, e. g., petr paid an employee of a legitimate recording studio to steal copies of Presley tapes and paid bribes to another for access to NBC tapes of a Presley television program. Petr and his codefendants mailed over 50,000 catalogs advertising their bootleg products and sold thousands of records.

Petr was convicted of one count of conspiracy to transport stolen property in interstate commerce and to distribute records without the consent of the copyright owners, in violation of 18 U.S.C. §371; eight counts of interstate transportation of stolen property, in violation of 18 U.S.C. §2314; nine counts of copyright infringement, in violation of 17 U.S.C. §506(a); and three counts of mail fraud. On appeal, petr argues, inter alia, that the NSPA did not cover his activities, because copyright infringement did not constitute "goods, wares, or merchandise" within the meaning of the Act. CA9 affirmed his conviction. The Court granted cert to review the question whether his activities constitute an offense under the National Stolen Property Act (NSPA), 18 U.S.C. §2314.

## Statutes at Issue

Section 2314 of the NSPA provides:

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

Section 506(a) of the Copyright Act, 17 U.S.C. §506(a), provides:

> Any person who infringes a copyright willfully and for purposes of commercial advantage or private gain shall be punished as provided in section 2319 of Title 18.

Section 2319 of Title 18, The Piracy and Counterfeiting Amendment Act of 1982, provides fines and prison terms for violations of §506(a). The penalties vary according to the number of articles the copyright infringer used and whether the defendant had been convicted previsouly of copyright offenses.

Discussion

At first glance, petr makes a strong case. He contends that CA9 in effect has legislated a new category of copyright offenses, in violation of Art. 1, §8 of the Constitution, which gives Congress exclusive authority over copyrights. In the context of a criminal statute, the court's expansive reading of the NSPA is especially inappropriate. Petr maintains that the plain meaning of §2314 does not encompass copyright infringement, for a copyright is not a "good, ware, or merchandise" in the ordinary use of those terms. Moreover, according to petr, the legislative history does not provide any clear indication that Congress intended intangible property to be covered by §2314. He views the legislative history of the 1982 piracy and counterfeiting amendments to the copyright statute as demonstrating that Congress did not think the NSPA was otherwise applicable to the offense of copyright infringement.

I am persuaded by the SG's response. The "goods" that petr was convicted of transporting across state lines were not copyrights, but record albums. Although the albums themselves were not stolen, converted, or taken by fraud, the Elvis Presley

performances copied thereon clearly were. The recordings of the various copyrighted works were illicitly obtained at petr's instigation by bribes, theft, and petr's misrepresenting his purpose. There was evidence that petr was well aware that the recordings from which he made his bootleg albums were stolen and that the unauthorized use of copyrighted material was illegal.

The question would be closer if petr's original acquisition of the Presley recordings had not been unlawful. The SG contends that even in this case, §2314 should be applicable, and I am inclined to agree. The SG argues that wrongful duplication of musical sounds or images would be grounds for characterizing the copies as "stolen, converted or taken by fraud," because these statutory terms cover a broad range of wrongful takings. For example, the SG notes that the courts have interpreted "stolen" for purposes of the National Motor Vehicle Theft Act as any felonious taking with intent to deprive the owner of the rights and benefits of ownership. The lower courts likewise have interpreted §2314 broadly.

In sum, I think petr has misconstrued the case against him by focusing on the "copyrights" rather than the bootleg albums as the stolen property transported across state lines. Thus, I don't think this is a case like Sony where the court of appeals in effect legislated a new copyright offense, but rather engaged in the routine interpretation of a criminal statute involving stolen property. The original acquisition of the recordings rather easily brings petr's bootleg records within §2314, I think, because the performances themselves were "stolen,

converted or taken by fraud." I think the SG may be right that even apart from the original shenanigans, the wrongful duplication itself may make the bootleg records "stolen" property, for the duplication was clearly intended to deprive the copyright owners of the benefit of their property.

Recommendation

I recommend affirming.

Tulz

4/6 I + P.

84-589 Dowling v. U.S. (CA 9)

(Elvis Presley Case) Prop. Act

Affirm (Cert. limited to Stolen)

Petr. stole copies of Presley tapes & bribed a person to provide access to NBC tapes. He engaged in business of mfg. & selling bootleg cc of Presleys copyrighted recordings. He was convicted of (1) transporting stolen property in interstate commerce (2) interstate transportation of stolen prop., & (3) violation of copyright laws.

CA 9 aff'd conviction.

Albums worthless w/o the stolen recordings.

Petr. contends a "copyright infringement does not constitute "goods, wares or merchandise" - the statutory language. § 2314.

SG argues persuasively that the "goods" transported were "albums of recordings" - not copyrights.

Altho the albums themselves were not stolen, the Presley recordings included in albums were stolen. Even the reproductions might be viewed as stolen.

Summaries

84-589 DOWLING v. UNITED STATES Argued 4/17/85

(Elvis Presley record album case)

Alzueg (Pet+)

Theft charge is merely a copyright violation. There is no charge of that.

(Pets. was convicted of violating Nat. Stolen Prop. Act)

(SOG said Xerox cc of stolen trades secrets would be stolen "property.")

Corwin (Resp)(SG)

The stolen articles were Presley recordings.

Affirm - 5 - 4

No. 84-589, Dowling v. United States Conf. 4/19/85

**The Chief Justice** Aff'm

albums are covered by statutes

**Justice Brennan** Rev.

Act requires "goods" be stolen.

What was stolen was not transported across state lines

Don't agree with "5 G's approach"

Confusing case.

**Justice White** Affirm - tentatively

Not much of a case -

Under 1982 amend. to Copyright laws would cover this case.

The "property" stolen was in the album

**Justice Marshall** Rev.

An analogy to patents, applies.
Peh. did not send what he stole
across state lines

**Justice Blackmun** Affirm

Records are not "same" as what
was stolen

But every record included
stolen map.

**Justice Powell** Affirm

See my notes

**Justice Rehnquist** Rev

What was stolen was not shipped.

Gov't ~~case~~ case doesn't depend on fact that album included stolen goods.

~~Courts~~

Goods, ~~wares~~ wares & such-did normally ~~don't~~ do not include intangibles

**Justice Stevens** Rev.

The statute is part of RICO.

Civil litigants will take advantage of this case if we affirm (I don't understand this)

Statute should be construed strictly.

**Justice O'Connor** Affirm

Records were the "goods" - not copyright

like J. Friendly's approach

Write narrowly to avoid JPS's concerns

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1985

No. 84-589

Dowling v. United States

Dear Harry,

If four others join you to reverse, as I do, and it falls to me to assign the opinion for the Court, I assign the opinion to you.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 4, 1985

MEMORANDUM TO THE CONFERENCE

Re: No. 84-589, Dowling v. United States

This is the Elvis Presley records case. At conference, the vote was 5 to 4 to affirm, but several of the votes, mine included, indicated that they were distinctly tentative. I suppose the case was assigned to me on the "least persuaded" theory.

In any event, I am now inclined to reverse. I am not satisfied that the narrow interpretation we typically give federal criminal statutes permits §2314 to reach petitioner's conduct. I am particularly influenced by Congress' authority to regulate copyright infringement directly; this makes me reluctant to conclude, absent firm indications in the text or the legislative history, that it intended commerce power legislation to do so indirectly.

I shall be glad to write up the case on a reversal basis, but, of course, Bill Brennan may prefer to assign it elsewhere.

The others who voted to affirm were the Chief, Byron, Lewis, and Sandra. Someone may wish to think about writing an opinion for affirmance.

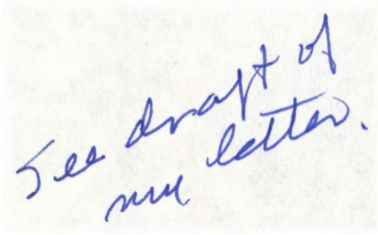
HAB.

aml 6/4/85

To: Justice Powell
From: Annmarie
Re: No. 84-589, Dowling v. United States

As you know, Justice Blackmun switched his vote in this case and now will be writing for the Court coming out the other way. The opinion will reverse CA9 and hold that the transportation of records containing performances that violate the copyright laws does not constitute transportation of stolen goods within the meaning of the National Stolen Goods Property Act, 18 U.S.C. §2314. Although I initially recommended that you vote to affirm CA9, from talking with a number of other clerks, I think I may have been wrong. The biggest problem with CA9's view is that there is no way to limit its application. Every violation of the copyright or patent laws that involved a product involved in interstate commerce would be covered by the National Stolen Goods Property Act. As a result, the normal enforcement scheme for "intellectual property" violations would be displaced by prosecutors seeking stiffer penalties under the NSGA. There is virtually no indication that Congress intended this to happen.

Thus, at this point, I would recommend waiting to see what Justice Blackmun's opinion says before deciding whether you want to write or join a dissent coming out the way you originally voted.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1985

Re: No. 84-589 - Dowling v. United States

Dear Harry:

Bill has reassigned this case to you for a reversal.

You are quite right that there were some "tentative" votes: Rehnquist tentative to reverse; White tentative to affirm. It may be that, given a close case, others may shift votes, but that cannot be determined until your opinion is circulated.

Regards,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1985

Re: No. 84-589 - Dowling v. United States

Dear Lewis:

My notes on your views in this case were that you thought an "easy affirm."

If so, would you like to take on a dissent?

Regards,

WEB

Justice Powell
Justice White
Justice O'Connor

June 7, 1985

84-589 Dowling v. United States

Dear Chief:

This refers to your two letters of June 16 about the above case, one to Harry and one to me.

In the letter to Harry, you note that there were some "tentative" votes, and that "others may shift votes" that can be determined only when Harry's opinion is circulated.

Your note to me inquires whether I would write the dissent. I will, of course, do so unless someone else is more interested and certain of his or her position. At Conference I did think the case was an "easy affirm", but on further consideration I can see a good deal of merit to Harry's current views.

Nevertheless, if you want me to do the best I can with a dissent - recognizing that quite possibly I may not agree with it - I will be glad to give it a try.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

CJ asked me to write dissent. But this may be will persuade me to continue.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: JUN 11 1985

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84–589

PAUL EDMOND DOWLING, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June ——, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

The National Stolen Property Act provides for the imposition of criminal penalties upon any person who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more, knowing the same to have been stolen, converted or taken by fraud." 18 U. S. C. §2314. In this case, we must determine whether the statute reaches the interstate transportation of "bootleg" phonorecords, "stolen, converted or taken by fraud" only in the sense that they were manufactured and distributed without the consent of the copyright owners of the musical compositions performed on the records.

I

After a bench trial in the United States District Court for the Central District of California conducted largely on the basis of a stipulated record, petitioner Paul Edmond Dowling was convicted of one count of conspiracy to transport stolen property in interstate commerce, in violation of 18 U. S. C. §371; eight counts of interstate transportation of stolen property, in violation of 18 U. S. C. §2314; nine counts of copyright infringement, in violation of 17 U. S. C. §506(a); and

Join- I'm quite convinced by Justice Blackmun's opinion.

three counts of mail fraud, in violation of 18 U. S. C. § 1341.[1] The offenses stemmed from an extensive bootleg record operation involving the manufacture and distribution by mail of recordings of vocal performances by Elvis Presley.[2] The ev-

[1] Only the § 2314 counts concern us here. Counts Two through Seven of the indictment, referring to the statute, charged:

"On or about the dates listed below and to and from the locations hereinafter specified, defendants THEAKER and DOWLING knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than $5000, containing Elvis Presley performances of copyrighted musical compositions, which phonorecords, as the defendants then and there well knew, were stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors." App. 6–7.

A chart then identified six shipments, each from Los Angeles County, Cal., to Baltimore, Md., the first dated January 12, 1979, and the last November 8, 1979. *Id.*, at 7. Counts Eight and Nine of the indictment referred to § 2314 and continued:

"On or about the dates listed below and to and from the locations hereinafter specified, defendants THEAKER, DOWLING and MINOR knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than $5000, containing Elvis Presley performances of copyrighted musical compositions, which phonorecords, as the defendants then and there well knew, were stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors." *Id.*, at 7–8.

A chart then identified two shipments, each from Los Angeles County, Cal., to Miami, Fla., the first dated November 8, 1979, and the second June 4, 1979. *Id.*, at 8.

Dowling's case was severed from that of codefendants William Samuel Theaker and Richard Minor. Theaker pleaded guilty to six counts of the indictment. Minor was convicted in a separate trial on all counts naming him, and the United States Court of Appeals for the Ninth Circuit affirmed in all respects. *United States* v. *Minor*, 756 F. 2d 731 (1985).

[2] A "bootleg" phonorecord is one which contains an unauthorized copy of a commercially unreleased performance. As in this case, the bootleg material may come from various sources. For example, fans may record concert performances, motion picture soundtracks, or television appearances. Outsiders may obtain copies of "outtakes," those portions of the tapes recorded in the studio but not included in the "master," that is, the final edited version slated for release after transcription to phonorecords or

idence demonstrated that sometime around 1976, Dowling, to that time an avid collector of Presley recordings, began in conjunction with codefendant William Samuel Theaker to manufacture phonorecords of unreleased Presley recordings. They used material from a variety of sources, including studio outtakes, acetates, soundtracks from Presley motion pictures, and tapes of Presley concerts and television appearances.[3] Until early 1980, Dowling and Theaker had the records manufactured at a record-pressing company in Burbank, Cal. When that company later refused to take their orders, they sought out other record-pressing companies in Los Angeles and, through codefendant Richard Minor, in Miami, Fla. The bootleg entrepreneurs never obtained authorization from or paid royalties to the owners of the copy-

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commercial tapes. Or bootleggers may gain possession of an "acetate," which is a phonorecord cut with a stylus rather than stamped, capable of being played only a few times before wearing out, and utilized to assess how a performance will likely sound on a phonorecord.

Though the terms frequently are used interchangeably, a "bootleg" record is not the same as a "pirated" one, the latter being an unauthorized copy of a performance already commercially released.

[3] See n. 2, *supra*. For example, according to the stipulated testimony of the Presley archivist at RCA Records, which held the exclusive rights to manufacture and distribute sound recordings of Presley performances from early in his career through the time of trial in this case, the "Elvis Presley Dorsey Shows" contained performances from Presley's appearances on a series of six television shows in January, February, and March 1956; "Elvis Presley From the Waist Up" contained performances from three appearances on "The Ed Sullivan Show" in September and October 1956 and January 1957; "Plantation Rock" included a version of the title song recorded from an acetate, which other testimony indicated Dowling had purchased from the author of the song; "The Legend Lives On" included material from unreleased master tapes from the RCA Records inventory; "Rockin' with Elvis New Year's Eve" derived from a recording by an audience member at a 1976 concert in Pittsburgh; and "Elvis on Tour" came from the master tape or the film source of the film of the same name. Stipulated Testimony of Joan Deary 24, 25, 35, 37, 40, 44. With the exceptions of "Plantation Rock" and "Elvis on Tour," quantities of each of these albums were included in the shipments giving rise to the § 2314 counts.

rights in the musical compositions.[4]

In the beginning, Dowling, who resided near Baltimore, handled the "artistic" end of the operation, contributing his knowledge of the Presley subculture, seeking out and selecting the musical material, designing the covers and labels, and writing the liner notes, while Theaker, who lived in Los Angeles and had some familiarity with the music industry, took care of the business end, arranging for the record pressings, distributing catalogs, and filling orders. In early 1979, however, having come to suspect that the FBI was investigating the West Coast operation, Theaker began making shipments by commercial trucking companies of large quantities of the albums to Dowling in Maryland. Throughout 1979 and 1980, the venturers did their marketing through Send Service, a labeling and addressing entity, which distributed at least 50,000 copies of their catalog and advertising flyers to addresses on mailing lists provided by Theaker and Dowling. Theaker would collect customers' orders from post office boxes in Glendale, Cal., and mail them to Dowling in Maryland, who would fill the orders. The two did a substantial business: the stipulated testimony establishes that throughout this period Dowling mailed several hundred packages per week and regularly spent $1000 per week in postage. The

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[4] See Stipulation re Copyrights, Royalties and Licenses 111–125, and Stipulation re Songs on Albums 127–145. The Copyright Act requires record manufacturers to obtain licenses and pay royalties to songwriters and publishing companies upon pressing records that contain performances of copyrighted musical compositions. 17 U. S. C. § 115.

While motion-picture copyrights protect the soundtracks of Presley's movies, Congress did not extend federal copyright protection to sound recordings until the Sound Recording Act of 1971, Pub. L. 92–140, 85 Stat. 391, and then only to sound recordings fixed after February 15, 1972. See *Goldstein* v. *California*, 412 U. S. 546, 551–552 (1973). Therefore, most of the sound recordings involved in this case, as opposed to the musical compositions performed, are apparently not protected by copyright. In any event, the § 2314 counts rely solely on infringement of copyrights to musical compositions. See n. 1, *supra*.

men also had occasion to make large shipments from Los Angeles to Minor in Miami, who purchased quantities of their albums for resale through his own channels.

The eight § 2314 counts on which Dowling was convicted arose out of six shipments of bootleg phonorecords from Los Angeles to Baltimore and two shipments from Los Angeles to Miami. See n. 1, *supra*. The evidence established that each shipment included thousands of albums, that each album contained performances of copyrighted musical compositions on which no royalties had been paid, and that the value of each shipment attributable to copyrighted material exceeded the statutory minimum.

Dowling appealed from all the convictions save those for copyright infringement, and the United States Court of Appeals for the Ninth Circuit affirmed in all respects. 739 F. 2d 1445 (1984). As to the charges under § 2314, the court relied on its decision in *United States* v. *Belmont*, 715 F. 2d 459 (1983), cert. denied, —— U. S. —— (1984), where it had held that interstate transportation of videotape cassettes containing unauthorized copies of copyrighted motion pictures involved stolen goods within the meaning of the statute.[5] As in *Belmont*, the court reasoned that the rights of copyright owners in their protected property were indistinguishable from ownership interests in other types of property and were equally deserving of protection. 739 F. 2d, at 1450, quoting 715 F. 2d, at 461–462.

We granted certiorari to resolve an apparent conflict among the Circuits[6] concerning the application of the statute

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[5] See also *United States* v. *Atherton*, 561 F. 2d 747, 752 (CA9 1977) (motion pictures); *United States* v. *Drebin*, 557 F. 2d 1316, 1328 (CA9 1977) (motion pictures), cert. denied, 436 U. S. 904 (1978); *United States* v. *Minor*, *supra* (sound recordings).

[6] In *United States* v. *Smith*, 686 F. 2d 234 (CA5 1982), the court held that interstate transportation of unauthorized copies of copyrighted motion pictures recorded "off the air" during television broadcasting did not fall within the reach of § 2314. The other courts which have addressed the issue have either agreed with the Ninth Circuit that interstate transporta-

to interstate shipments of bootleg and pirated sound recordings and motion pictures whose unauthorized distribution infringed valid copyrights. —— U. S. —— (1985).

## II

Federal crimes, of course, "are solely creatures of statute." *Liparota* v. *United States*, —— U. S. ——, —— (1985) (slip op. 5), citing *United States* v. *Hudson*, 7 Cranch 32 (1812). Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a "narrow interpretation" appropriate. See *Williams* v. *United States*, 458 U. S. 279, 290 (1982). Chief Justice Marshall early observed:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820).

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tion of copies of infringing motion pictures and sound recordings comes within the statute, or assumed the same. See *United States* v. *Drum*, 733 F. 2d 1503, 1505–1506 (CA11) (sound recordings), cert. denied, —— U. S. —— (1984); *United States* v. *Gottesman*, 724 F. 2d 1517, 1519–1521 (CA11 1984) (motion pictures); *United States* v. *Whetzel*, 191 U. S. App. D. C. 184, 187, n. 10, 589 F. 2d 707, 710, n. 10 (1978) (sound recordings); *United States* v. *Berkwitt*, 619 F. 2d 649, 656–658 (CA7 1980) (sound recordings); *United States* v. *Gallant*, 570 F. Supp. 303, 310–314 (SDNY 1983) (sound recordings); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. 380, 385–391 (EDNY 1981) (sound recordings). See also *United States* v. *Steerwell Leisure Corp.*, 598 F. Supp. 171, 174 (WDNY 1984) (video games).

Thus, the Court has stressed repeatedly that "'"when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."'" *Williams* v. *United States*, 458 U. S., at 290, quoting *United States* v. *Bass*, 404 U. S. 336, 347 (1971), which in turn quotes *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952).

A

Applying that prudent rule of construction here, we examine at the outset the statutory language. Section 2314 requires, first, that the defendant have transported "goods, wares, [or] merchandise" in interstate or foreign commerce; second, that those goods have a value of "$5000 or more"; and, third, that the defendant "kno[w] the same to have been stolen, converted or taken by fraud." Dowling does not contest that he caused the shipment of goods in interstate commerce, or that the shipments had sufficient value to meet the monetary requirement. He argues, instead, that the goods shipped were not "stolen, converted or taken by fraud." In response, the Government does not suggest that Dowling wrongfully came by the phonorecords actually shipped or the physical materials from which they were made; nor does it contend that the objects that Dowling caused to be shipped, the bootleg phonorecords, were "the same" as the copyrights in the musical compositions that he infringed by unauthorized distribution of Presley performances of those compositions. The Government argues, however, that the shipments come within the reach of § 2314 because the phonorecords physically embodied performances of musical compositions that Dowling had no legal right to distribute. According to the Government, the unauthorized use of the musical compositions rendered the phonorecords "stolen, converted or

taken by fraud" within the meaning of the statute.[7] We must determine, therefore, whether phonorecords that include the performance of copyrighted musical compositions for the use of which no authorization has been sought nor royalties paid are consequently "stolen, converted or taken by

[7]The Government argues in the alternative that even if the unauthorized use of copyrighted musical compositions does not alone render the phonorecords contained in these shipments "stolen, converted or taken by fraud," the record contains evidence amply establishing that the bootleggers obtained the source material through illicit means. The Government points to testimony, for example, that the custodians of the tapes containing the outtakes which found their way onto Dowling's records neither authorized their release nor permitted access to them by unauthorized persons. App. 22–23, 34, 38–39, 42–43, 46. According to the Government, the wrongfully obtained tapes which contained the musical material should be considered "the same" as the phonorecords onto which the sounds were transferred, which were therefore "stolen, converted or taken by fraud" within the meaning of § 2314. Cf. *United States* v. *Bottone*, 365 F. 2d 389 (CA2), cert. denied, 385 U. S. 974 (1966).

For several reasons, we decline to consider this alternative basis for upholding Dowling's convictions. The § 2314 counts in the indictment were founded exclusively on the allegations that the shipped phonorecords, which contained "Elvis Presley performances of copyrighted musical compositions," were "stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors." See n. 1, *supra*. The decision of the Court of Appeals does not rely on any theory of illegal procurement; it rests solely on a holding that "Dowling's unauthorized sale of phonorecords of copyrighted material clearly involved 'goods, wares or merchandise' within the meaning of the statute." 739 F. 2d 1445, 1450–1451 (CA9 1984). Moreover, even assuming that the stipulated testimony contained sufficient evidence to establish the unlawful procurement of the source material, the Government made no attempt in the District Court to address the difficult problems of valuation under its alternative theory. For example, it introduced no evidence that might have established the value of the tapes allegedly stolen from the RCA archives, nor how that value might relate to the value of the goods ultimately shipped. Instead, its evidence concerning the value of the interstate shipments of records attempted to isolate the value attributable to the copyrighted musical compositions. App. 24–33. Under these circumstances, we assess the validity of Dowling's convictions only under the allegations made in the indictment.

fraud" for purposes of § 2314. We conclude that they are not.

The courts interpreting § 2314 have never required, of course, that the items stolen and transported remain in entirely unaltered form. See, *e. g.*, *United States* v. *Moore*, 571 F. 2d 154, 158 (CA3) (counterfeit printed Ticketron tickets "the same" as stolen blanks from which they were printed), cert. denied, 435 U. S. 956 (1978). Nor does it matter that the item owes a major portion of its value to an intangible component. See, *e. g.*, *United States* v. *Seagraves*, 265 F. 2d 876 (CA3 1959) (geophysical maps identifying possible oil deposits); *United States* v. *Greenwald*, 479 F. 2d 320 (CA6) (documents bearing secret chemical formulae), cert. denied, 414 U. S. 854 (1973). But these cases and others prosecuted under § 2314 have always involved physical "goods, wares, [or] merchandise" that have themselves been "stolen, converted or taken by fraud." This basic element comports with the common-sense meaning of the statutory language: by requiring that the "goods, wares, [or] merchandise" be "the same" as those "stolen, converted or taken by fraud," the provision seems clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods.

In contrast, the Government's theory here would make theft, conversion, or fraud equivalent to wrongful appropriation of statutorily protected rights in copyright. The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections. "Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright," which include the rights "to publish, copy, and distribute the author's work." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, —— U. S. ——, —— (1985) (slip op. 6). See 17 U. S. C. § 106. How-

ever, "[t]his protection has never accorded the copyright owner complete control over all possible uses of his work." *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. ——, —— (1984) (slip op. 13–14); *id.*, at —— (dissenting opinion) (slip op. 7). For example, § 107 of the Copyright Act "codifies the traditional privilege of other authors to make 'fair use' of an earlier writer's work." *Harper & Row, supra*, at —— (slip op. 6). Further, both the limitations on the copyright holder's rights and the rights themselves have been devised in pursuit of a public goal. "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158 (1948). The grants these statutes confer are

> "'intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.' *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984). 'The monopoly created by copyright thus rewards the individual author in order to benefit the public.' *Id.*, at 477 (dissenting opinion)." *Harper & Row, supra*, at —— (slip op. 5–6).

It is apparent, then, that the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple "goods, wares, [or] merchandise," for the copyright holder's dominion is subjected to precisely defined limits and conferred, in the end, in order to ensure continued incentives to the production of creative works.

It follows that interference with copyright does not easily equate with basic thievery. The Copyright Act defines one who misappropriates a copyright as an infringer: "'Anyone who violates any of the exclusive rights of the copyright owner,' that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, 'is an infringer

of the copyright.' [17 U. S. C.] § 501(a)." *Sony Corp.*, *supra*, at —— (slip op. 15). There is no dispute in this case that Dowling's unauthorized inclusion on his bootleg albums of performances of copyrighted compositions constituted infringement of those copyrights. Given the fundamentally different character of the property right at issue, however, it is clear that whatever taking occurs when an infringer arrogates the use of another's protected work differs markedly from the physical removal associated with the terms employed by § 2314. The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially link infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of concerns than does run-of-the-mill theft, conversion, or fraud. As a result, it fits but awkwardly with the language Congress chose—"stolen, converted or taken by fraud"—to describe the sorts of goods whose interstate shipment § 2314 makes criminal. "And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'" *Williams* v. *United States*, 458 U. S., at 286.

B

In light of the ill-fitting language, we turn to consider whether the history and purpose of § 2314 evince a plain congressional intention to reach interstate shipments of goods infringing copyrights. Our examination of the background of the provision makes more acute our reluctance to read § 2314 to encompass merchandise whose contraband character derives from copyright infringement.

Congress enacted § 2314 as an extension of the National Motor Vehicle Theft Act, Pub. L. 70, 41 Stat. 324, currently codified at 18 U. S. C. § 2312. Passed in 1919, the earlier

Act was an attempt to supplement the efforts of the States to combat automobile thefts. Particularly in areas close to state lines,[8] state law enforcement authorities were seriously hampered by car thieves' ability to transport stolen vehicles beyond the jurisdiction in which the theft occurred.[9] Legislating pursuant to its commerce power,[10] Congress made unlawful the interstate transportation of stolen vehicles, thereby filling in the enforcement gap by "strik[ing] down State lines which serve as barriers to protect [these interstate criminals] from justice." 58 Cong. Rec. 5476 (1919) (statement of Rep. Newton).[11]

Congress acted to fill an identical enforcement gap when in 1934 it "extend[ed] the provisions of the National Motor Vehicle Theft Act to other stolen property" by means of the National Stolen Property Act. Act of May 22, 1934, 48 Stat. 794. See S. Rep. No. 538, 73d Cong., 2d Sess., 1 (1934);

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[8] See 58 Cong. Rec. 5472 (1919) (statement of Rep. Reavis); *id.*, at 5474 (statement of Rep. Bee).

[9] See *id.*, at 5471 (1919) (statement of Rep. Dyer) ("State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines").

[10] See, *e. g.*, *id.*, at 5471–5472 (statement of Rep. Dyer); *id.*, at 5475–5476 (statement of Rep. Newton).

[11] This Court has explained:

"By 1919, the law of most States against local theft had developed so as to include not only common-law larceny but embezzlement, false pretenses, larceny by trick, and other types of wrongful taking. The advent of the automobile, however, created a new problem with which the States found it difficult to deal. The automobile was uniquely suited to felonious taking whether by larceny, embezzlement or false pretenses. It was a valuable, salable article which itself supplied the means for speedy escape. 'The automobile [became] the perfect chattel for modern large-scale theft.' This challenge could be best met through use of the Federal Government's jurisdiction over interstate commerce. The need for federal action increased with the number, distribution and speed of the motor vehicles until, by 1919, it became a necessity. The result was the National Motor Vehicle Theft Act." *United States* v. *Turley*, 352 U. S. 407, 413–414 (1957) (footnote omitted).

H. R. Rep. No. 1462, 73d Cong., 2d Sess., 1 (1934); H. R. Conf. Rep. No. 1599, 73d Cong., 2d Sess., 1, 3 (1934). Again, Congress acted under its commerce power to assist the States' efforts to combat the "roving criminal," whose movement across state lines stymied local law enforcement officials. 78 Cong. Rec. 2947 (1934) (statement of Attorney General Cummings).[12] As with its progenitor, Congress responded in the National Stolen Property Act to "the need for federal action" in an area that normally would have been left to state law. *United States* v. *Turley*, 352 U. S. 407, 417 (1957).

No such need for supplemental federal action has ever existed, however, with respect to copyright infringement, for the obvious reason that Congress always has had the bestowed authority to legislate directly in this area. Article I, § 8, cl. 8, of the Constitution provides that Congress shall have the power

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

By virtue of the explicit constitutional grant, Congress has the unquestioned authority to penalize directly the distribution of goods that infringe copyright, whether or not those goods affect interstate commerce. Given that power, it is implausible to suppose that Congress intended to combat the

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[12] The Attorney General explained: "These criminals have made full use of the improved methods of transportation and communication, and have taken advantage of the limited jurisdiction possessed by State authorities in pursuing fugitive criminals, and of the want of any central coordinating agency acting on behalf of all of the States. In pursuing this class of offenders, almost inevitably breakdown of law enforcement results from this want of some coordinating and centralized law enforcement agency. . . . [T]he territorial limitations on [local law enforcement authorities'] jurisdiction prevent them from adequately protecting their citizens from this type of criminal." 78 Cong. Rec. 2947 (1934).

problem of copyright infringement by the circuitous route hypothesized by the Government. See *United States* v. *Smith*, 686 F. 2d 234, 246 (CA5 1982). Of course, the enactment of criminal penalties for copyright infringement would not prevent Congress from choosing as well to criminalize the interstate shipment of infringing goods. But in dealing with the distribution of such goods, Congress has never thought it necessary to distinguish between intrastate and interstate activity. Nor does any good reason to do so occur to us. In sum, the premise of § 2314—the need to fill with federal action an enforcement chasm created by limited state jurisdiction—simply does not apply to the conduct the Government seeks to reach here.

C

The history of copyright infringement provisions affords additional reason to hesitate before extending § 2314 to cover the interstate shipments in this case. Not only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, see 17 U. S. C. §§ 502–505, but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution.

The first full-fledged criminal provisions appeared in the Copyright Act of 1909, and specified that misdemeanor penalties of up to one year in jail or a fine between $100 and $1000, or both, be imposed upon "[a]ny person who willfully and for profit" infringed a protected copyright.[13] This provision was

[13] Act of Mar. 4, 1909, § 28, 35 Stat. 1082.

Congress first provided criminal penalties for copyright infringement in the Act of January 6, 1897, 29 Stat. 481, which made a misdemeanor punishable by imprisonment for one year of the unlawful performance or presentation, done willfully and for profit, of a copyrighted dramatic or musical composition. See also Act of May 31, 1790, § 2, 1 Stat. 124 (fixed civil penalties, one-half payable to the United States, for unauthorized copying of copyrighted book, chart, or map). See generally Young, Criminal Copyright Infringement and a Step Beyond, reprinted in ASCAP Copyright Law Symposium Number Thirty 157 (1983); Gawthrop, An Inquiry Into

little used. In 1974, however, Congress amended the section, by then 17 U. S. C. § 104 by virtue of the 1947 revision,[14] substantially to increase penalties for record piracy.[15] The new version retained the existing language, but supplemented it with a new subsection (b), which provided that one who "willfully and for profit" infringed a copyright in sound recordings would be subject to a fine of up to $25,000 or imprisonment for up to one year, or both. 17 U. S. C. § 104(b) (1975 ed., Supp. V).[16] The legislative history demonstrates that in increasing the penalties available for this category of infringement, Congress carefully calibrated the penalty to the problem: it had come to recognize that "record piracy is so profitable that ordinary penalties fail to deter prospective offenders." H. R. Rep. No. 93–1581, p. 4 (1974). Even so, because it considered record piracy primarily an economic offense, Congress, after serious consideration, rejected a proposal to increase the available term of imprisonment to three years for a first offense and seven years for a subsequent offense. *Ibid.*

When in 1976, after more than 20 years of study, Congress adopted a comprehensive revision of the Copyright Act, see *Mills Music, Inc.* v. *Snyder*, —— U. S. ——, —— (1985) (slip op. 5–7); *Sony Corp.*, 464 U. S., at ——, n. 9 (dissenting opinion) (slip op. 7), it again altered the scope of the criminal infringement actions, albeit cautiously. Section 506(a) of the new Act provided:

> "Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $10,000 or impris-

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Criminal Copyright Infringement, reprinted in ASCAP Copyright Law Symposium Number Twenty 154 (1972).

[14] Act of July 30, 1947, Pub. L. 80–281, 61 Stat. 652.

[15] Act of Dec. 31, 1974, Pub. L. 93–573, 88 Stat. 1873.

[16] A second violation subjected the offender to a fine of up to $50,000 or imprisonment for not more than two years, or both. 17 U. S. C. § 104(b) (1975 ed., Supp. V). See H. R. Rep. No. 93–1581, p. 4 (1974).

> oned for not more than one year, or both: *Provided, however*, that any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsections (1), (2), or (3) of section 106 or the copyright in a motion picture afforded by subsection (1), (3), or (4) of section 106 shall be fined not more than $25,000 or imprisoned for not more than one year, or both, for the first such offense and shall be fined not more than $50,000 or imprisoned for not more than two years, or both, for any subsequent offense." 17 U. S. C. § 506(a) (1976 ed.).

Two features of this provision are noteworthy: first, Congress extended to motion pictures the enhanced penalties applicable by virtue of prior § 104 to infringement of rights in sound recordings; and, second, Congress specified the precise infringing uses that could give rise to this enhanced liability. It is also noteworthy that despite the urging of representatives of the film industry, see Copyright Law Revision: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 716 (1975) (statement of Jack Valenti, President of the Motion Picture Association of America, Inc.), and the initial inclination of the Senate, see S. Rep. No. 94–473, p. 146 (1975), Congress declined once again to provide felony penalties for copyright infringement involving sound recordings and motion pictures.

Finally, by the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97–180, 96 Stat. 91, Congress chose to address the problem of bootlegging and piracy of records, tapes, and films by imposing felony penalties on such activities. Section 5 of the 1982 Act revised 17 U. S. C. § 506(a) to provide that "[a]ny person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18." Section 2319(b)(1), in turn, was then enacted to provide for a fine of up to $250,000, or imprisonment of up to five years, or

both, if the offense "involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least one thousand phonorecords or copies infringing the copyright in one or more sound recordings [or] at least sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works." Subsection (b)(2) provides for a similar fine and up to two years' imprisonment if the offense involves "more than one hundred but less than one thousand phonorecords or copies infringing the copyright in one or more sound recordings [or] more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works." And subsection (b)(3) provides for a fine of not more that $25,000 and up to one year's imprisonment in any other case of willful infringement. The legislative history indicates that Congress set out from a belief that the existing misdemeanor penalties for copyright infringement were simply inadequate to deter the enormously lucrative activities of large-scale bootleggers and pirates. See 128 Cong. Rec. H1951 (May 10, 1982) (remarks of Rep. Kastenmeier); The Piracy and Counterfeiting Amendments Act of 1981: Hearings on S. 691 Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 8 (1981) (statement of Renee L. Szybala, Special Assistant to the Associate Attorney General). Accordingly, it acted to "strengthen the laws against record, tape, and film piracy" by "increas[ing] the penalties . . . for copyright infringements involving such products," thereby "bring[ing] the penalties for record and film piracy . . . into line with the enormous profits which are being reaped from such activities." S. Rep. No. 97-274, pp. 1, 7 (1981).[17]

Thus, the history of the criminal infringement provisions of the Copyright Act reveals a good deal of care on Congress'

[17] The Act also substantially increased penalties for trafficking in counterfeit labels affixed to sound recordings, motion pictures, and other audiovisual works. 18 U. S. C. § 2318.

part before subjecting copyright infringement to serious criminal penalties. First, Congress hesitated long before imposing felony sanctions on copyright infringers. Second, when it did so, it carefully chose those areas of infringement that required severe response, and studiously graded penalties even in those areas of heightened concern. This step-by-step, carefully considered approach is consistent with Congress' traditional sensitivity to the special concerns implicated by the copyright laws.

In stark contrast, the Government's theory of this case presupposes a congressional decision to bring the felony provisions of § 2314, which make available the comparatively light fine of not more than $10,000 but the relatively harsh term of imprisonment of up to 10 years, to bear on the distribution of a sufficient quantity of *any* infringing goods simply because of the presence here of a factor—interstate transportation—not otherwise thought relevant to copyright law. The Government thereby presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly. To the contrary, the discrepancy between the two approaches convinces us that Congress had no intention to reach copyright infringement when it enacted § 2314.

## D

The broad consequences of the Government's theory, both in the field of copyright and in kindred fields of intellectual property law, provide a final and dispositive factor against reading § 2314 in the manner suggested. For example, in *Harper & Row*, *supra*, this Court very recently held that The Nation, a weekly magazine of political commentary, had infringed former President Ford's copyright in the unpublished manuscript of his memoirs by verbatim excerpting of some 300 words from the work. It rejected The Nation's argument that the excerpting constituted fair use. Presented with the facts of that case as a hypothetical at oral argument

in the present litigation, the Government conceded that its theory of § 2314 would permit prosecution of the magazine if it transported copies of sufficient value across state lines. Tr. of Oral Arg. 35. Whatever the wisdom or propriety of The Nation's decision to publish the excerpts, we would pause, in the absence of any explicit indication of congressional intention, to bring such conduct within the purview of a criminal statute making available felony penalties for the interstate transportation of goods "stolen, converted or taken by fraud."

Likewise, the field of copyright does not cabin the Government's theory, which would as easily encompass the law of patents and any other form of intellectual property. If "the intangible idea protected by the copyright is effectively made tangible by its embodiment upon the tapes," *United States* v. *Gottesman*, 724 F. 2d 1517, 1520 (CA11 1984), phonorecords, or films shipped in interstate commerce as to render those items stolen goods for purposes of § 2314, so too would the intangible idea protected by a patent be made tangible by its embodiment in an article manufactured in accord with patented specifications. Thus, as the Government as much as acknowledged at argument, Tr. of Oral Arg. 29, its view of the statute would readily permit its application to interstate shipments of patent-infringing goods. Despite its undoubted power to do so, however, Congress has not provided criminal penalties for distribution of goods infringing valid patents.[18] Thus, the rationale supporting application of the

[18] Congress instead has relied on provisions affording patent owners a civil cause of action. 35 U. S. C. §§ 281–294. Among the available remedies are treble damages for willful infringement. § 284; see, *e. g.*, *American Safety Table Co.* v. *Schreiber*, 415 F. 2d 373, 378–379 (CA2 1969), cert. denied, 396 U. S. 1038 (1970). See generally 2 P. Rosenberg, Patent Law Fundamentals § 17.08 (2d ed. 1984). The only criminal provision relating to patents is 18 U. S. C. § 497, which proscribes the forgery, counterfeiting, or false alteration of letters patent, or the uttering thereof. See also 35 U. S. C. § 292 ($500 penalty, one-half to go to person suing and one-half to the United States, for false marking of patent status).

statute under the circumstances of this case would equally justify its use in wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction.[19] This factor militates strongly against the reading proffered by the Government. Cf. *Williams* v. *United States*, 458 U. S., at 287.

III

No more than other legislation do criminal statutes take on straightjackets upon enactment. In sanctioning the use of § 2314 in the manner urged by the Government here, the Courts of Appeals understandably have sought to utilize an existing and readily available tool to combat the increasingly serious problem of bootlegging, piracy, and copyright infringement. Nevertheless, the deliberation with which Congress over the last decade has addressed the problem of copyright infringement for profit, as well as the precision with which it has chosen to apply criminal penalties in this area, demonstrates anew the wisdom of leaving it to the legislature to define crime and prescribe penalties.[20] Here, the lan-

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[19] The Government's rationale would also apply to goods infringing trademark rights. Yet, despite having long and extensively legislated in this area, see federal Trademark Act of 1946 (Lanham Act), 15 U. S. C. § 1051 *et seq.*, in the modern era Congress only recently has resorted to criminal sanctions to control trademark infringement. See Trademark Counterfeiting Act of 1984, Pub. L. 98–473, ch. XV, 98 Stat. 2178. See also S. Rep. No. 98–526, pp. 1–2, 5 (1984); 2 J. McCarthy, Trademarks and Unfair Competition § 30.39 (2d ed. 1984).

[20] Indeed, in opposing the petition for a writ of certiorari in this case, the Government acknowledged that it no longer needs § 2314 to prosecute and punish serious copyright infringement. Adverting to the most recent congressional copyright action, it advised the Court:

"[A]pplication of Section 2314 . . . to the sort of conduct involved in this case is of considerably diminished significance since passage, subsequent to the offenses involved in this case, of the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97–180, 96 Stat. 91 *et seq.* (codified at 17 U. S. C. 506(a) and 18 U. S. C. 2318, 2319). The new statute provides for felony treatment for most serious cases of copyright infringement involving sound recordings and audiovisual materials and trafficking in counterfeit

guage of § 2314 does not "plainly and unmistakably" cover petitioner Dowling's conduct, *United States* v. *Lacher*, 134 U. S. 624, 628 (1890); the purpose of the provision to fill gaps in state law enforcement does not couch the problem under attack; and the rationale employed to apply the statute to petitioner's conduct would support its extension to significant bodies of law that Congress gave no indication it intended to touch. In sum, Congress has not spoken with the requisite clarity. Invoking the "time-honored interpretive guideline" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,'" *Liparota* v. *United States*, —— U. S. ——, —— (1985) (slip op. 8), quoting *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), we reverse the judgment of the Court of Appeals.

*It is so ordered.*

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labels, while prior law provided only for misdemeanor treatment for first offenses under the copyright statutes. In view of the increased penalties provided under the new statute, prosecutors are likely to have less occasion to invoke other criminal statutes in connection with copyright infringing activity." Brief for the United States in Opposition 8.

These observations suggest the conclusion we have reached—that § 2314 was not in the first place the proper means by which to counter the spread of copyright infringement in sound recordings and motion pictures.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 11, 1985

Re: 84-589 - Dowling v. United States

Dear Harry:

Please join me.

Respectfully,

John

Justice Blackmun

Copies to the Conference

See HAB final ¶. 9 + in pennsive. If I decide to join HAB, I'll convert my dissent draft into a Mem. & send it to CJ + BRW

x x x

I've decided to stay with my dissent as circulated 6/21

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1985

Re: No. 84-589 Dowling v. United States

Dear Harry,

Please join me.

Sincerely,

WHR

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 12, 1985

No. 84-589

Dowling v. United States

Dear Harry,

I agree.

Sincerely,

Bill

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 12, 1985

84-589 - Dowling v. United States

Dear Harry,

I shall await the dissent.

Sincerely yours,

Byron

Justice Blackmun
Copies to the Conference

Excellent

Dowling v. United States

No. 84-589

Addition to dissent of Justice Powell

File no. 4$0589G

The Court invokes the familiar rule that a criminal statute is to be construed narrowly. This rule is intended to assure fair warning to the public, e. g., United States v. Bass, 404 U.S. 336, 348 (1971); McBoyle v. United States, 283 U.S. 25, 27 (1931), and is applied when statutory language is ambiguous or inadequate to put persons on notice of what the legislature has made a crime. See, e. g., United States v. Bass, supra; Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955). I disagree not with these principles, but with their application to this statute. As I read §2314, it is not ambiguous, but simply very broad. The statute punishes individuals who transport

goods, wares, or merchandise worth $5,000 or more, knowing "the same to have been stolen, converted, or taken by fraud." 18 U.S.C. §2314. As noted above, this Court has given the terms "stolen" and "converted" broad meaning in the past. The petitioner could not have had any doubt that he was committing a theft as well as defrauding the copyright owner.[1]

The Court also emphasizes the fact that the copyright laws contain their own penalties for violation of their terms. But the fact that particular conduct may violate more than one federal law does not foreclose the Government from making a choice as to which of the statutes should be the basis for an indictment. "The Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." United States v. Batchelder, 442

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[1]Indeed, there was stipulated testimony by a former employee of petitioner's, himself an unindicted co-conspirator, that petitioner and his partner "were wary of any unusually large record orders, because they could be charged with an interstate transportation of stolen property if they shipped more than $5,000 worth of records." App. at A19 (Stipulation Regarding Testimony of Aca "Ace" Anderson).

U.S. 114, 123-124 (1979).

L.F.P.
6/18
An excellent draft.

Dowling v. United States

No. 84-589

JUSTICE POWELL, dissenting.

The Court holds today that §2314 does not apply to this case because the rights of a copyright holder are "different" from the rights of owners of other kinds of property. The Court does not explain, however, how the differences it identifies are relevant either under the language of §2314 or in terms of the purposes of the statute. Because I believe that the language of §2314

fairly covers the interstate transportation of goods containing unauthorized use of copyrighted material, I dissent.

Section 2314 provides for criminal penalties against any person who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more, knowing the same to have been stolen, converted, or taken by fraud." 18 U.S.C. §2314. There is no dispute that the items Dowling transported in interstate commerce -- bootleg Elvis Presley records -- are goods, wares, or merchandise. Nor is there a dispute that the records contained copyrighted Elvis Presley performances that Dowling had no right to reproduce and distribute. The only issue here is whether the unauthorized use of a copyright may be "equate[d] with

basic thievery" for purposes of §2314. Ante, at 10. Virtually every court that has considered the question has concluded that §2314 is broad enough to cover activities such as Dowling's. See, e. g., United States v. Drum, 733 F.2d 1503, 1505-06 (CA11), cert denied, ___ U.S. ___ (1984); United States v. Whetzel, 191 U.S. App. D.C. 184, 187, n. 10, 589 F.2d 707, 710, n. 10 (1978); United States v. Berkwitt, 619 F.2d 649, 656-658 (CA7 1980); United States v. Sam Goody, Inc., 506 F. Supp. 380, 385-391 (EDNY 1981). Cf. United States v. Smith, 686 F.2d 234 (CA5 1982). The Court's reasons for holding otherwise are not persuasive.

The Court focuses on the fact that "the copyright owner . . . holds no ordinary chattel." Ante, at 9. The Court quite correctly notes that a copyright "comprises of

carefully defined and carefully delimited interests," ibid., and that the copyright owner does not enjoy "'complete control over all possible uses of his work,'" id., at 10, quoting Sony Corp. v. Universal City Studios, Inc., 464 U.S. ___, ___ (1984) (slip op. at 13-14). But among the rights a copyright owner enjoys is the right to publish, copy, and distribute the copyrighted work. Indeed, these rights define virtually the entire scope of an owner's rights in intangible property such as a copyright. Interference with these rights may be "different" from the physical removal of tangible objects, but it not clear why this difference matters under the terms of §2314. The statute makes no distinction between tangible and intangible property. The basic goal of the National Stolen Property Act, thwarting the interstate

transportation of misappropriated goods, is not served by the judicial imposition of this distinction. Although the rights of copyright owners in their property may be more limited than those of owners of other kinds of property, they are surely "just as deserving of protection . . . ." United States v. Drum, supra, at 1506.

The Court concedes that §2314 has never been interpreted to require that the goods, wares, or merchandise stolen and transported in violation of the statute remain in unaltered form. Ante, at 9. See also United States v. Bottone, 365 F.2d 389, 393 (-394) (CA2 1966). It likewise recognizes that the statute is applicable even where the misappropriated item "owes a major portion of its value to an intangible component." Ante, at 9. The difficulty the Court finds with the application of §2314

here is in finding a theft, conversion, or fraudulent taking, in light of the intangible nature of a copyright. But the Court's difficulty, it seems to me, has more to do with its views on the relative evil of copyright infringement versus other kinds of thievery, than it does with interpretation of the statutory language.

The statutory terms at issue here, i. e., "stolen, converted or taken by fraud," traditionally have been given broad scope by the courts. For example, in United States v. Turley, 352 U.S. 407 (1952), this Court held that the term "stolen" included all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether the theft would constitute larceny at common law. Similarly, in Morissette v. United States, 342 U.S. 246 (1952), the

Court stated that conversion "may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." Id., at 271-272.

Dowling's unauthorized duplication and commercial exploitation of the copyrighted performances were intended to gain for himself the rights and benefits lawfully reserved to the copyright owner. Under Turley, supra, his acts should be viewed as the theft of these performances. Likewise, Dowling's acts constitute the unauthorized use of another's property and are fairly cognizable under the Court's definition of conversion in Morissette.

Finally, Congress implicitly has approved the Government's use of §2314 to reach conduct like Dowling's. In adopting the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97-180, 96 Stat. 91, Congress was aware that §2314 was being used to prosecute those who made large interstate shipments of pirated goods. See S. Rep. 97-274, 97th Cong., 1st Sess. 2 (1981); The Piracy and Counterfeiting Amendments Act of 1981: Hearings on S. 691 Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 37 & n. 5 (1981). There is no indication that Congress disapproved of this use of §2314. Indeed, Congress provided that the new penalties adopted in the 1982 Act "shall be in addition to any other provisions of title 17 or any other law." 18 U.S.C. §2319(a) (emphasis added).

The Senate Judiciary Committee specifically added the italicized language to clarify that the new provision "supplement[s] existing remedies contained in copyright law or any other law." S. Rep. No. 274, 97th Cong., 2d Sess. 2 (1981). ~~reprinted in 1982 U.S. Code Cong. & Ad. News 127, 128~~ (emphasis added). ~~Thus, Congress was aware of the use of §2314 to reach shipment of goods containing unauthorized use of copyrighted material.~~ Many courts had used §2314 to reach the shipment of goods containing unauthorized use of copyrighted material prior to the enactment of the Piracy and Counterfeiting Amendments Act. By choosing to make its new felony provisions supplemental, Congress implicitly consented to continued application of §2314 to these offenses.

Dowling and his partners "could not have doubted the criminal nature of their conduct . . . ." United States v. Bottone, (supra,) ~~365 F.2d~~ at 394. His claim that §2314 does not reach his clearly unlawful use of copyrighted performances

evinces "the sort of sterile formality" properly rejected by the vast majority of courts that have considered the question. United States v. Belmont, 715 F.2d, at 462 (459, 6 CA9 1983)

Accordingly, I dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 19, 1985

Re: No. 84-589-Dowling v. United States

Dear Harry:

Please join me.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 19, 1985

No. 84-589 Dowling v. United States

Dear Harry,

Please join me.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

lfp/ss 06/20/85 DOW SALLY-POW

MEMORANDUM

TO: Annmarie DATE: June 20, 985

FROM: Lewis F. Powell, Jr.

84-589 Dowling v. U.S.

The Court opinion relies on the rule of "strict or narrow constuction of criminal laws". There must be decisions that say the strict construction rule applies only (or particularly) where the statutory language identifying or defining the criminal conduct is ambiguous or not readily understandable by the public. The purpose of the rule is to make sure that the public is fairly warned.

If there are cases helpful in this respect, perhaps we could say something along the following lines:

"The Court emphasizes the familiar rule that a criminal statute is to be construed narrowly. This rule is intended to assure fair warning to the public, and is applied where the language making certain conduct criminal is ambiguous or inadequate to put persons on notice of a criminal violation. In this case §2314 proscribes the transporting in commerce of 'any goods, wares, merchandise * * * knowing the same to have been stolen, converted or taken by fraud.' It is conceded that the Presley records transported by petitioner came within the language 'goods, wares, or merchandise'. As we have noted above, the only issue is whether this use of copyrighted material fairly may be viewed as constituting a 'theft, conversion, or fraud'. It

seems to me that the language hardly could be stated more broadly or that petitioner could have had any doubt that he was committing a theft as well as defrauding the copyright owner. This has been the view of every court, with one exception, that has considered this question. See cases cited supra.

The Court perceives a distinction between the theft of copyrighted material and the defrauding of the owner of such material as somehow being different from stealing other types of property. Reliance is placed particularly on the fact that the copyright laws also provide for penalties where copyrighted material is pirated. But the fact that particular conduct may violate more than one federal law does not foreclose the government from making a choice as to which of the two statutes should be the basis for an indictment (Annmarie: Are there not cases to this effect?)"

Annmarie: Without having taken a second look at Harry's opinion or the statutes, are the penalties different? Has the statute of limitations run against pursuing the copyright remedy? Does the SG's brief give any reason why the government proceeded under §2314 rather than the copyrighted law?

L.F.P., Jr.

ss

lfp/ss 06/20/85 DOW SALLY-POW

MEMORANDUM

TO: Annmarie DATE: June 20, 985

FROM: Lewis F. Powell, Jr.

84-589 Dowling v. U.S.

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The Court perceives a distinction between the theft of copyrighted material and the defrauding of the owner of such material as somehow being different from stealing other types of property. Reliance is placed particularly on the fact that the copyright laws also provide for penalties where copyrighted material is pirated. But the fact that particular conduct may violate more than one federal law does not foreclose the government from making a choice as to which of the two statutes should be the basis for an indictment (Annmarie: Are there not cases to this effect?)"

Annmarie: Without having taken a second look at Harry's opinion or the statutes, are the penalties different? Has the statute of limitations run against pursuing the copyright remedy? Does the SG's brief give any reason why the government proceeded under §2314 rather than the copyrighted law?

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1985

Re: No. 84-589 - Dowling v. United States

Dear Harry:

I will wait on the dissent.

Regards,

Warren

Justice Blackmun

Copies to the Conference

06/21

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

JUN 21 1985

Circulated: _____

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84-589

PAUL EDMOND DOWLING, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June ——, 1985]

JUSTICE POWELL, dissenting.

The Court holds today that § 2314 does not apply to this case because the rights of a copyright holder are "different" from the rights of owners of other kinds of property. The Court does not explain, however, how the differences it identifies are relevant either under the language of § 2314 or in terms of the purposes of the statute. Because I believe that the language of § 2314 fairly covers the interstate transportation of goods containing unauthorized use of copyrighted material, I dissent.

Section 2314 provides for criminal penalties against any person who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." 18 U. S. C. § 2314. There is no dispute that the items Dowling transported in interstate commerce—bootleg Elvis Presley records—are goods, wares, or merchandise. Nor is there a dispute that the records contained copyrighted Elvis Presley performances that Dowling had no right to reproduce and distribute. The only issue here is whether the unauthorized use of a copyright may be "equate[d] with theft, conversion, or fraud" for purposes of § 2314. *Ante*, at 10. Virtually every court that has considered the question has concluded that § 2314 is broad enough to cover activities such as Dowling's. See,

*e. g.*, *United States* v. *Drum*, 733 F. 2d 1503, 1505–06 (CA11), cert denied, —— U. S. —— (1984); *United States* v. *Whetzel*, 191 U. S. App. D. C. 184, 187, n. 10, 589 F. 2d 707, 710, n. 10 (1978); *United States* v. *Berkwitt*, 619 F. 2d 649, 656–658 (CA7 1980); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. 380, 385–391 (EDNY 1981). The only case cited by the Court that lends support to its holding is *United States* v. *Smith*, 686 F. 2d 234 (CA5 1982).[1] The Court's decision today is thus contrary to the clear weight of authority.

The Court focuses on the fact that "[t]he copyright owner . . . holds no ordinary chattel." *Ante*, at 9. The Court quite correctly notes that a copyright is "comprise[d] . . . of carefully defined and carefully delimited interests," *ibid.*, and that the copyright owner does not enjoy "'complete control over all possible uses of his work,'" *id.*, at 10, quoting *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. ——, —— (1984) (slip op. at 13–14). But among the rights a copyright owner enjoys is the right to publish, copy, and distribute the copyrighted work. Indeed, these rights define virtually the entire scope of an owner's rights in intangible property such as a copyright. Interference with these rights may be "different" from the physical removal of tangible objects, but it not clear why this difference matters under the terms of § 2314. The statute makes no distinction between tangible and intangible property. The basic goal of the National Stolen Property Act, thwarting the interstate transportation of misappropriated goods, is not served by the judicial imposition of this distinction. Although the rights of copyright owners in their property may be more limited than those of

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[1] In *United States* v. *Drum*, 733 F. 2d 1503 (CA11), cert. denied, —— U. S. —— (1984), the Court of Appeals for the Eleventh Circuit considered and rejected the arguments offered in *United States* v. *Smith*, 686 F. 2d 234 (CA5 1982) and reiterated by the Court today. I agree with *Drum* that neither the language nor purpose of § 2314 support the view that the statute does not reach the unauthorized duplication and distribution of copyrighted material.

owners of other kinds of property, they are surely "just as deserving of protection . . . ." *United States* v. *Drum*, *supra*, at 1506.

The Court concedes that § 2314 has never been interpreted to require that the goods, wares, or merchandise stolen and transported in violation of the statute remain in unaltered form. *Ante*, at 9. See also *United States* v. *Bottone*, 365 F. 2d 389, 393–394 (CA2 1966). It likewise recognizes that the statute is applicable even when the misappropriated item "owes a major portion of its value to an intangible component." *Ante*, at 9. The difficulty the Court finds with the application of § 2314 here is in finding a theft, conversion, or fraudulent taking, in light of the intangible nature of a copyright. But this difficulty, it seems to me, has more to do with its views on the relative evil of copyright infringement versus other kinds of thievery, than it does with interpretation of the statutory language.

The statutory terms at issue here, *i. e.*, "stolen, converted or taken by fraud," traditionally have been given broad scope by the courts. For example, in *United States* v. *Turley*, 352 U. S. 407 (1957), this Court held that the term "stolen" included all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether the theft would constitute larceny at common law. *Id.*, at 417. Similarly, in *Morissette* v. *United States*, 342 U. S. 246 (1952), the Court stated that conversion "may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." *Id.*, at 271–272.

Dowling's unauthorized duplication and commercial exploitation of the copyrighted performances were intended to gain for himself the rights and benefits lawfully reserved to the copyright owner. Under *Turley*, *supra*, his acts should

be viewed as the theft of these performances. Likewise, Dowling's acts constitute the unauthorized use of another's property and are fairly cognizable as conversion under the Court's definition in *Morissette*.

The Court invokes the familiar rule that a criminal statute is to be construed narrowly. This rule is intended to assure fair warning to the public, *e. g.*, *United States* v. *Bass*, 404 U. S. 336, 348 (1971); *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931), and is applied when statutory language is ambiguous or inadequate to put persons on notice of what the legislature has made a crime. See, *e. g.*, *United States* v. *Bass*, *supra*; *Rewis* v. *United States*, 401 U. S. 808, 812 (1971); *Bell* v. *United States*, 349 U. S. 81, 83 (1955). I disagree not with these principles, but with their application to this statute. As I read § 2314, it is not ambiguous, but simply very broad. The statute punishes individuals who transport goods, wares, or merchandise worth $5,000 or more, knowing "the same to have been stolen, converted, or taken by fraud." 18 U. S. C. § 2314. As noted above, this Court has given the terms "stolen" and "converted" broad meaning in the past. The petitioner could not have had any doubt that he was committing a theft as well as defrauding the copyright owner.[2]

The Court also emphasizes the fact that the copyright laws contain their own penalties for violation of their terms. But the fact that particular conduct may violate more than one federal law does not foreclose the Government from making a choice as to which of the statutes should be the basis for an indictment. "The Court has long recognized that when an act violates more than one criminal statute, the Government

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[2] Indeed, there was stipulated testimony by a former employee of petitioner's, himself an unindicted co-conspirator, that petitioner and his partner "were wary of any unusually large record orders, because they could be charged with an interstate transportation of stolen property if they shipped more than $5,000 worth of records." App. at A19 (Stipulation Regarding Testimony of Aca "Ace" Anderson).

may prosecute under either so long as it does not discriminate against any class of defendants." *United States* v. *Batchelder*, 442 U. S. 114, 123–124 (1979).

Finally, Congress implicitly has approved the Government's use of § 2314 to reach conduct like Dowling's. In adopting the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97–180, 96 Stat. 91, Congress provided that the new penalties "shall be in addition to any other provisions of title 17 *or any other law.*" 18 U. S. C. § 2319(a) (emphasis added). The Senate Judiciary Committee specifically added the italicized language to clarify that the new provision "supplement[s] existing remedies contained in copyright law *or any other law.*" S. Rep. No. 274, 97th Cong., 2d Sess. 2 (emphasis added). Many courts had used § 2314 to reach the shipment of goods containing unauthorized use of copyrighted material prior to the enactment of the Piracy and Counterfeiting Amendments Act. By choosing to make its new felony provisions supplemental, Congress implicitly consented to continued application of § 2314 to these offenses.

Dowling and his partners "could not have doubted the criminal nature of their conduct . . . ." *United States* v. *Bottone*, *supra*, at 394. His claim that § 2314 does not reach his clearly unlawful use of copyrighted performances evinces "the sort of sterile formality" properly rejected by the vast majority of courts that have considered the question. *United States* v. *Belmont*, 715 F. 2d 459, 462 (CA9 1983). Accordingly, I dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 24, 1985

84-589 - Dowling v. United States

Dear Lewis,

Please join me.

Sincerely yours,

Justice Powell

Copies to the Conference

Stylistic Changes
Footnotes Renumbered
Pages: 2, 4, 5, 11, 14, 16, 18

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

file

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 25 1985

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84–589

PAUL EDMOND DOWLING, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 28, 1985]

No response as indicated L.F.P.

JUSTICE BLACKMUN delivered the opinion of the Court.

The National Stolen Property Act provides for the imposition of criminal penalties upon any person who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." 18 U. S. C. §2314. In this case, we must determine whether the statute reaches the interstate transportation of "bootleg" phonorecords, "stolen, converted or taken by fraud" only in the sense that they were manufactured and distributed without the consent of the copyright owners of the musical compositions performed on the records.

I

After a bench trial in the United States District Court for the Central District of California conducted largely on the basis of a stipulated record, petitioner Paul Edmond Dowling was convicted of one count of conspiracy to transport stolen property in interstate commerce, in violation of 18 U. S. C. §371; eight counts of interstate transportation of stolen property, in violation of 18 U. S. C. §2314; nine counts of copyright infringement, in violation of 17 U. S. C. §506(a); and

Justice, agree

Only the changes on pp. 11 & 18 respond to our dissent. I don't think we need to respond!

Ans

three counts of mail fraud, in violation of 18 U. S. C. § 1341.[1] The offenses stemmed from an extensive bootleg record operation involving the manufacture and distribution by mail of recordings of vocal performances by Elvis Presley.[2] The ev-

[1] Only the § 2314 counts concern us here. Counts Two through Seven of the indictment, referring to the statute, charged:

"On or about the dates listed below and to and from the locations hereinafter specified, defendants THEAKER and DOWLING knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than $5,000, containing Elvis Presley performances of copyrighted musical compositions, which phonorecords, as the defendants then and there well knew, were stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors." App. 6–7.

A chart then identified six shipments, each from Los Angeles County, Cal., to Baltimore, Md., the first dated January 12, 1979, and the last November 8, 1979. *Id.*, at 7. Counts Eight and Nine of the indictment referred to § 2314 and continued:

"On or about the dates listed below and to and from the locations hereinafter specified, defendants THEAKER, DOWLING and MINOR knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than $5,000, containing Elvis Presley performances of copyrighted musical compositions, which phonorecords, as the defendants then and there well knew, were stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors." *Id.*, at 7–8.

A chart then identified two shipments, each from Los Angeles County, Cal., to Miami, Fla., the first dated November 8, 1979, and the second June 4, 1979. *Id.*, at 8.

Dowling's case was severed from that of codefendants William Samuel Theaker and Richard Minor. Theaker pleaded guilty to six counts of the indictment. Brief for United States 2, n. 1. Minor was convicted in a separate trial on all counts naming him, and the United States Court of Appeals for the Ninth Circuit affirmed in all respects. *United States* v. *Minor*, 756 F. 2d 731 (1985).

[2] A "bootleg" phonorecord is one which contains an unauthorized copy of a commercially unreleased performance. As in this case, the bootleg material may come from various sources. For example, fans may record concert performances, motion picture soundtracks, or television appearances. Outsiders may obtain copies of "outtakes," those portions of the tapes recorded in the studio but not included in the "master," that is, the final

idence demonstrated that sometime around 1976, Dowling, to that time an avid collector of Presley recordings, began in conjunction with codefendant William Samuel Theaker to manufacture phonorecords of unreleased Presley recordings. They used material from a variety of sources, including studio outtakes, acetates, soundtracks from Presley motion pictures, and tapes of Presley concerts and television appearances.[3] Until early 1980, Dowling and Theaker had the records manufactured at a record-pressing company in Burbank, Cal. When that company later refused to take their orders, they sought out other record-pressing companies in Los Angeles and, through codefendant Richard Minor, in Miami, Fla. The bootleg entrepreneurs never obtained au-

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edited version slated for release after transcription to phonorecords or commercial tapes. Or bootleggers may gain possession of an "acetate," which is a phonorecord cut with a stylus rather than stamped, capable of being played only a few times before wearing out, and utilized to assess how a performance will likely sound on a phonorecord.

Though the terms frequently are used interchangeably, a "bootleg" record is not the same as a "pirated" one, the latter being an unauthorized copy of a performance already commercially released.

[3] See n. 2, *supra*. For example, according to the stipulated testimony of the Presley archivist at RCA Records, which held the exclusive rights to manufacture and distribute sound recordings of Presley performances from early in his career through the time of trial in this case, the "Elvis Presley Dorsey Shows" contained performances from Presley's appearances on a series of six television shows in January, February, and March 1956; "Elvis Presley From the Waist Up" contained performances from three appearances on "The Ed Sullivan Show" in September and October 1956 and January 1957; "Plantation Rock" included a version of the title song recorded from an acetate, which other testimony indicated Dowling had purchased from the author of the song; "The Legend Lives On" included material from unreleased master tapes from the RCA Records inventory; "Rockin' with Elvis New Year's Eve" derived from a recording by an audience member at a 1976 concert in Pittsburgh; and "Elvis on Tour" came from the master tape or the film source of the film of the same name. Stipulated Testimony of Joan Deary 24, 25, 35, 37, 40, 44. With the exceptions of "Plantation Rock" and "Elvis on Tour," quantities of each of these albums were included in the shipments giving rise to the § 2314 counts.

thorization from or paid royalties to the owners of the copyrights in the musical compositions.[4]

In the beginning, Dowling, who resided near Baltimore, handled the "artistic" end of the operation, contributing his knowledge of the Presley subculture, seeking out and selecting the musical material, designing the covers and labels, and writing the liner notes, while Theaker, who lived in Los Angeles and had some familiarity with the music industry, took care of the business end, arranging for the record pressings, distributing catalogs, and filling orders. In early 1979, however, having come to suspect that the FBI was investigating the West Coast operation, Theaker began making shipments by commercial trucking companies of large quantities of the albums to Dowling in Maryland. Throughout 1979 and 1980, the venturers did their marketing through Send Service, a labeling and addressing entity, which distributed at least 50,000 copies of their catalog and advertising flyers to addresses on mailing lists provided by Theaker and Dowling. Theaker would collect customers' orders from post office boxes in Glendale, Cal., and mail them to Dowling in Maryland, who would fill the orders. The two did a substantial business: the stipulated testimony establishes that throughout this period Dowling mailed several hundred packages per

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[4] See Stipulation re Copyrights, Royalties and Licenses 111–125, and Stipulation re Songs on Albums 127–145. The Copyright Act requires record manufacturers to obtain licenses and pay royalties to copyright holders upon pressing records that contain performances of copyrighted musical compositions. 17 U. S. C. § 115.

While motion-picture copyrights protect the soundtracks of Presley's movies, Congress did not extend federal copyright protection to sound recordings until the Sound Recording Act of 1971, Pub. L. 92–140, 85 Stat. 391, and then only to sound recordings fixed after February 15, 1972. See *Goldstein* v. *California*, 412 U. S. 546, 551–552 (1973). Therefore, most of the sound recordings involved in this case, as opposed to the musical compositions performed, are apparently not protected by copyright. In any event, the § 2314 counts rely solely on infringement of copyrights to musical compositions. See n. 1, *supra*.

week and regularly spent $1,000 per week in postage. The men also had occasion to make large shipments from Los Angeles to Minor in Miami, who purchased quantities of their albums for resale through his own channels.

The eight § 2314 counts on which Dowling was convicted arose out of six shipments of bootleg phonorecords from Los Angeles to Baltimore and two shipments from Los Angeles to Miami. See n. 1, *supra*. The evidence established that each shipment included thousands of albums, that each album contained performances of copyrighted musical compositions for the use of which no licenses had been obtained nor royalties paid, and that the value of each shipment attributable to copyrighted material exceeded the statutory minimum.

Dowling appealed from all the convictions save those for copyright infringement, and the United States Court of Appeals for the Ninth Circuit affirmed in all respects. 739 F. 2d 1445 (1984). As to the charges under § 2314, the court relied on its decision in *United States* v. *Belmont*, 715 F. 2d 459 (1983), cert. denied, —— U. S. —— (1984), where it had held that interstate transportation of videotape cassettes containing unauthorized copies of copyrighted motion pictures involved stolen goods within the meaning of the statute.[5] As in *Belmont*, the court reasoned that the rights of copyright owners in their protected property were indistinguishable from ownership interests in other types of property and were equally deserving of protection under the statute. 739 F. 2d, at 1450, quoting 715 F. 2d, at 461–462.

We granted certiorari to resolve an apparent conflict among the Circuits[6] concerning the application of the statute

[5] See also *United States* v. *Atherton*, 561 F. 2d 747, 752 (CA9 1977) (motion pictures); *United States* v. *Drebin*, 557 F. 2d 1316, 1328 (CA9 1977) (motion pictures), cert. denied, 436 U. S. 904 (1978); *United States* v. *Minor*, *supra* (sound recordings).

[6] In *United States* v. *Smith*, 686 F. 2d 234 (CA5 1982), the court held that interstate transportation of unauthorized copies of copyrighted motion pictures recorded "off the air" during television broadcasting did not fall within the reach of § 2314. The other courts which have addressed the

to interstate shipments of bootleg and pirated sound recordings and motion pictures whose unauthorized distribution infringed valid copyrights. —— U. S. —— (1985).

II

Federal crimes, of course, "are solely creatures of statute." *Liparota* v. *United States*, —— U. S. ——-, —— (1985) (slip op. 5), citing *United States* v. *Hudson*, 7 Cranch 32 (1812). Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a "narrow interpretation" appropriate. See *Williams* v. *United States*, 458 U. S. 279, 290 (1982). Chief Justice Marshall early observed:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820).

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issue have either agreed with the Ninth Circuit that interstate transportation of copies of infringing motion pictures and sound recordings comes within the statute, or assumed the same. See *United States* v. *Drum*, 733 F. 2d 1503, 1505–1506 (CA11) (sound recordings), cert. denied, —— U. S. —— (1984); *United States* v. *Gottesman*, 724 F. 2d 1517, 1519–1521 (CA11 1984) (motion pictures); *United States* v. *Whetzel*, 191 U. S. App. D. C. 184, 187, n. 10, 589 F. 2d 707, 710, n. 10 (1978) (sound recordings); *United States* v. *Berkwitt*, 619 F. 2d 649, 656–658 (CA7 1980) (sound recordings); *United States* v. *Gallant*, 570 F. Supp. 303, 310–314 (SDNY 1983) (sound recordings); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. 380, 385–391 (EDNY 1981) (sound recordings). See also *United States* v. *Steerwell Leisure Corp.*, 598 F. Supp. 171, 174 (WDNY 1984) (video games).

Thus, the Court has stressed repeatedly that "'"when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."'" *Williams* v. *United States*, 458 U. S., at 290, quoting *United States* v. *Bass*, 404 U. S. 336, 347 (1971), which in turn quotes *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952).

A

Applying that prudent rule of construction here, we examine at the outset the statutory language. Section 2314 requires, first, that the defendant have transported "goods, wares, [or] merchandise" in interstate or foreign commerce; second, that those goods have a value of "$5,000 or more"; and, third, that the defendant "kno[w] the same to have been stolen, converted or taken by fraud." Dowling does not contest that he caused the shipment of goods in interstate commerce, or that the shipments had sufficient value to meet the monetary requirement. He argues, instead, that the goods shipped were not "stolen, converted or taken by fraud." In response, the Government does not suggest that Dowling wrongfully came by the phonorecords actually shipped or the physical materials from which they were made; nor does it contend that the objects that Dowling caused to be shipped, the bootleg phonorecords, were "the same" as the copyrights in the musical compositions that he infringed by unauthorized distribution of Presley performances of those compositions. The Government argues, however, that the shipments come within the reach of § 2314 because the phonorecords physically embodied performances of musical compositions that Dowling had no legal right to distribute. According to the Government, the unauthorized use of the musical compositions rendered the phonorecords "stolen, converted or

taken by fraud" within the meaning of the statute.[7] We must determine, therefore, whether phonorecords that include the performance of copyrighted musical compositions for the use of which no authorization has been sought nor royalties paid are consequently "stolen, converted or taken by

[7] The Government argues in the alternative that even if the unauthorized use of copyrighted musical compositions does not alone render the phonorecords contained in these shipments "stolen, converted or taken by fraud," the record contains evidence amply establishing that the bootleggers obtained the source material through illicit means. The Government points to testimony, for example, that the custodians of the tapes containing the outtakes which found their way onto Dowling's records neither authorized their release nor permitted access to them by unauthorized persons. App. 22–23, 34, 38–39, 42–43, 46. According to the Government, the wrongfully obtained tapes which contained the musical material should be considered "the same" as the phonorecords onto which the sounds were transferred, which were therefore "stolen, converted or taken by fraud" within the meaning of § 2314. Cf. *United States* v. *Bottone;* 365 F. 2d 389 (CA2), cert. denied, 385 U. S. 974 (1966).

For several reasons, we decline to consider this alternative basis for upholding Dowling's convictions. The § 2314 counts in the indictment were founded exclusively on the allegations that the shipped phonorecords, which contained "Elvis Presley performances of copyrighted musical compositions," were "stolen, converted and taken by fraud, in that they were manufactured without the consent of the copyright proprietors." See n. 1, *supra*. The decision of the Court of Appeals does not rely on any theory of illegal procurement; it rests solely on a holding that "Dowling's unauthorized sale of phonorecords of copyrighted material clearly involved 'goods, wares or merchandise' within the meaning of the statute." 739 F. 2d 1445, 1450–1451 (CA9 1984). Moreover, even assuming that the stipulated testimony contained sufficient evidence to establish the unlawful procurement of the source material, the Government made no attempt in the District Court to address the difficult problems of valuation under its alternative theory. For example, it introduced no evidence that might have established the value of the tapes allegedly stolen from the RCA archives, nor how that value might relate to the value of the goods ultimately shipped. Instead, its evidence concerning the value of the interstate shipments of records attempted to isolate the value attributable to the copyrighted musical compositions. App. 24–33. Under these circumstances, we assess the validity of Dowling's convictions only under the allegations made in the indictment.

fraud" for purposes of § 2314. We conclude that they are not.

The courts interpreting § 2314 have never required, of course, that the items stolen and transported remain in entirely unaltered form. See, *e. g.*, *United States* v. *Moore*, 571 F. 2d 154, 158 (CA3) (counterfeit printed Ticketron tickets "the same" as stolen blanks from which they were printed), cert. denied, 435 U. S. 956 (1978). Nor does it matter that the item owes a major portion of its value to an intangible component. See, *e. g.*, *United States* v. *Seagraves*, 265 F. 2d 876 (CA3 1959) (geophysical maps identifying possible oil deposits); *United States* v. *Greenwald*, 479 F. 2d 320 (CA6) (documents bearing secret chemical formulae), cert. denied, 414 U. S. 854 (1973). But these cases and others prosecuted under § 2314 have always involved physical "goods, wares, [or] merchandise" that have themselves been "stolen, converted or taken by fraud." This basic element comports with the common-sense meaning of the statutory language: by requiring that the "goods, wares, [or] merchandise" be "the same" as those "stolen, converted or taken by fraud," the provision seems clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods.

In contrast, the Government's theory here would make theft, conversion, or fraud equivalent to wrongful appropriation of statutorily protected rights in copyright. The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections. "Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright," which include the rights "to publish, copy, and distribute the author's work." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, —— U. S. ——, —— (1985) (slip op. 6). See 17 U. S. C. § 106. How-

ever, "[t]his protection has never accorded the copyright owner complete control over all possible uses of his work." *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. ——, —— (1984) (slip op. 13–14); *id.*, at —— (dissenting opinion) (slip op. 7). For example, § 107 of the Copyright Act "codifies the traditional privilege of other authors to make 'fair use' of an earlier writer's work." *Harper & Row, supra*, at —— (slip op. 6). Likewise, § 115 grants compulsory licenses in nondramatic musical works. Thus, the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple "goods, wares, [or] merchandise," for the copyright holder's dominion is subjected to precisely defined limits.

It follows that interference with copyright does not easily equate with theft, conversion, or fraud. The Copyright Act even employs a separate term of art to define one who misappropriates a copyright: "'Anyone who violates any of the exclusive rights of the copyright owner,' that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, 'is an infringer of the copyright.' [17 U. S. C.] § 501(a)." *Sony Corp., supra*, at —— (slip op. 15). There is no dispute in this case that Dowling's unauthorized inclusion on his bootleg albums of performances of copyrighted compositions constituted infringement of those copyrights. It is less clear, however, that the taking that occurs when an infringer arrogates the use of another's protected work comfortably fits the terms associated with physical removal employed by § 2314. The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially link infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud. As a result, it

fits but awkwardly with the language Congress chose—"stolen, converted or taken by fraud"—to describe the sorts of goods whose interstate shipment § 2314 makes criminal.[8] "And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'" *Williams* v. *United States*, 458 U. S., at 286.

B

In light of the ill-fitting language, we turn to consider whether the history and purpose of § 2314 evince a plain congressional intention to reach interstate shipments of goods infringing copyrights. Our examination of the background of the provision makes more acute our reluctance to read § 2314 to encompass merchandise whose contraband character derives from copyright infringement.

Congress enacted § 2314 as an extension of the National Motor Vehicle Theft Act, Pub. L. 70, 41 Stat. 324, currently codified at 18 U. S. C. § 2312. Passed in 1919, the earlier Act was an attempt to supplement the efforts of the States to combat automobile thefts. Particularly in areas close to state lines,[9] state law enforcement authorities were seriously

[8] The dissent relies on *United States* v. *Turley*, 352 U. S. 407 (1957), and *Morissette* v. *United States*, 342 U. S. 246 (1952), to give § 2314 a "very broad" reading. *Post*, at 3–4. In *Turley*, after considering the purpose of the National Motor Vehicle Theft Act to combat interstate transportation of feloniously taken vehicles, the Court rejected an interpretation of "stolen" which would have limited that term to common-law larceny. 352 U. S., at 417. Similarly, in *Morissette*, in considering the language of 18 U. S. C. § 641 providing that "whoever embezzles, steals, purloins, or knowingly converts" Government property be subject to specified penalties, the Court pointed out that conversion extends beyond the common-law definition of stealing. 342 U. S., at 271–272. Neither *Turley* nor *Morissette* involved copyright law specifically or intellectual property in general; neither, therefore, sheds light on the particular problems presented by this case. See Part II B–D, *infra*.

[9] See 58 Cong. Rec. 5472 (1919) (statement of Rep. Reavis); *id.*, at 5474 (statement of Rep. Bee).

hampered by car thieves' ability to transport stolen vehicles beyond the jurisdiction in which the theft occurred.[10] Legislating pursuant to its commerce power,[11] Congress made unlawful the interstate transportation of stolen vehicles, thereby filling in the enforcement gap by "strik[ing] down State lines which serve as barriers to protect [these interstate criminals] from justice." 58 Cong. Rec. 5476 (1919) (statement of Rep. Newton).[12]

Congress acted to fill an identical enforcement gap when in 1934 it "extend[ed] the provisions of the National Motor Vehicle Theft Act to other stolen property" by means of the National Stolen Property Act. Act of May 22, 1934, 48 Stat. 794. See S. Rep. No. 538, 73d Cong., 2d Sess., 1 (1934); H. R. Rep. No. 1462, 73d Cong., 2d Sess., 1 (1934); H. R. Conf. Rep. No. 1599, 73d Cong., 2d Sess., 1, 3 (1934). Again, Congress acted under its commerce power to assist the States' efforts to foil the "roving criminal," whose movement across state lines stymied local law enforcement offi-

[10] See *id.*, at 5471 (1919) (statement of Rep. Dyer) ("State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one State to another and ofttimes have associates in this crime who receive and sell the stolen machines").

[11] See, *e. g.*, *id.*, at 5471–5472 (statement of Rep. Dyer); *id.*, at 5475–5476 (statement of Rep. Newton).

[12] This Court has explained:

"By 1919, the law of most States against local theft had developed so as to include not only common-law larceny but embezzlement, false pretenses, larceny by trick, and other types of wrongful taking. The advent of the automobile, however, created a new problem with which the States found it difficult to deal. The automobile was uniquely suited to felonious taking whether by larceny, embezzlement or false pretenses. It was a valuable, salable article which itself supplied the means for speedy escape. 'The automobile [became] the perfect chattel for modern large-scale theft.' This challenge could be best met through use of the Federal Government's jurisdiction over interstate commerce. The need for federal action increased with the number, distribution and speed of the motor vehicles until, by 1919, it became a necessity. The result was the National Motor Vehicle Theft Act." *United States* v. *Turley*, 352 U. S. 407, 413–414 (1957) (footnote omitted).

cials. 78 Cong. Rec. 2947 (1934) (statement of Attorney General Cummings).[13] As with its progenitor, Congress responded in the National Stolen Property Act to "the need for federal action" in an area that normally would have been left to state law. *United States* v. *Turley*, 352 U. S. 407, 417 (1957).

No such need for supplemental federal action has ever existed, however, with respect to copyright infringement, for the obvious reason that Congress always has had the bestowed authority to legislate directly in this area. Article I, § 8, cl. 8, of the Constitution provides that Congress shall have the power

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

By virtue of the explicit constitutional grant, Congress has the unquestioned authority to penalize directly the distribution of goods that infringe copyright, whether or not those goods affect interstate commerce. Given that power, it is implausible to suppose that Congress intended to combat the problem of copyright infringement by the circuitous route hypothesized by the Government. See *United States* v. *Smith*, 686 F. 2d 234, 246 (CA5 1982). Of course, the enactment of criminal penalties for copyright infringement would not prevent Congress from choosing as well to criminalize the inter-

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[13] The Attorney General explained: "These criminals have made full use of the improved methods of transportation and communication, and have taken advantage of the limited jurisdiction possessed by State authorities in pursuing fugitive criminals, and of the want of any central coordinating agency acting on behalf of all of the States. In pursuing this class of offenders, almost inevitably breakdown of law enforcement results from this want of some coordinating and centralized law enforcement agency. . . . [T]he territorial limitations on [local law enforcement authorities'] jurisdiction prevent them from adequately protecting their citizens from this type of criminal." 78 Cong. Rec. 2947 (1934).

state shipment of infringing goods. But in dealing with the distribution of such goods, Congress has never thought it necessary to distinguish between intrastate and interstate activity. Nor does any good reason to do so occur to us. In sum, the premise of § 2314—the need to fill with federal action an enforcement chasm created by limited state jurisdiction—simply does not apply to the conduct the Government seeks to reach here.

C

The history of copyright infringement provisions affords additional reason to hesitate before extending § 2314 to cover the interstate shipments in this case. Not only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, see 17 U. S. C. §§ 502–505, but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution.

The first full-fledged criminal provisions appeared in the Copyright Act of 1909, and specified that misdemeanor penalties of up to one year in jail or a fine between $100 and $1,000, or both, be imposed upon "[a]ny person who willfully and for profit" infringed a protected copyright.[14] This provision was

[14] Act of Mar. 4, 1909, § 28, 35 Stat. 1082. Interestingly, however, the 1909 Act did not extend criminal liability to infringement by unauthorized mechanical reproduction of copyrighted musical compositions subject to compulsory licensing, the category of infringement underlying the § 2314 counts here. See § 25(e), 35 Stat. 1081. Congress did not remove this bar until the Sound Recording Act of 1971, Pub. L. 92–140, 85 Stat. 391, which, while for the first time extending federal copyright coverage to sound recordings, see n. 4, *supra*, also made willful infringement of copyright in musical compositions subject to the general criminal provision. See 85 Stat. 392.

Congress first provided criminal penalties for copyright infringement in the Act of January 6, 1897, 29 Stat. 481, which made a misdemeanor punishable by imprisonment for one year of the unlawful performance or presentation, done willfully and for profit, of a copyrighted dramatic or musical composition. See also Act of May 31, 1790, § 2, 1 Stat. 124 (fixed civil penalties, one-half payable to the United States, for unauthorized copying of

little used. In 1974, however, Congress amended the section, by then 17 U. S. C. § 104 by the 1947 revision,[15] substantially to increase penalties for record piracy.[16] The new version retained the existing language, but supplemented it with a new subsection (b), which provided that one who "willfully and for profit" infringed a copyright in sound recordings would be subject to a fine of up to $25,000 or imprisonment for up to one year, or both. 17 U. S. C. § 104(b) (1975 ed., Supp. V).[17] The legislative history demonstrates that in increasing the penalties available for this category of infringement, Congress carefully calibrated the penalty to the problem: it had come to recognize that "record piracy is so profitable that ordinary penalties fail to deter prospective offenders." H. R. Rep. No. 93–1581, p. 4 (1974). Even so, because it considered record piracy primarily an economic offense, Congress, after serious consideration, rejected a proposal to increase the available term of imprisonment to three years for a first offense and seven years for a subsequent offense. *Ibid.*

When in 1976, after more than 20 years of study, Congress adopted a comprehensive revision of the Copyright Act, see *Mills Music, Inc.* v. *Snyder*, —— U. S. ——, ——–—— (1985) (slip op. 5–7); *Sony Corp.*, 464 U. S., at ——, n. 9 (dissenting opinion) (slip op. 7), it again altered the scope of the criminal infringement actions, albeit cautiously. Section 506(a) of the new Act provided:

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copyrighted book, chart, or map). See generally Young, Criminal Copyright Infringement and a Step Beyond, reprinted in ASCAP Copyright Law Symposium Number Thirty 157 (1983); Gawthrop, An Inquiry Into Criminal Copyright Infringement, reprinted in ASCAP Copyright Law Symposium Number Twenty 154 (1972).

[15] Act of July 30, 1947, Pub. L. 80–281, 61 Stat. 652.

[16] Act of Dec. 31, 1974, Pub. L. 93–573, 88 Stat. 1873.

[17] A second violation subjected the offender to a fine of up to $50,000 or imprisonment for not more than two years, or both. 17 U. S. C. § 104(b) (1975 ed., Supp. V). See H. R. Rep. No. 93–1581, p. 4 (1974).

> "Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $10,000 or imprisoned for not more than one year, or both: *Provided, however,* that any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsections (1), (2), or (3) of section 106 or the copyright in a motion picture afforded by subsection (1), (3), or (4) of section 106 shall be fined not more than $25,000 or imprisoned for not more than one year, or both, for the first such offense and shall be fined not more than $50,000 or imprisoned for not more than two years, or both, for any subsequent offense." 17 U. S. C. § 506(a) (1976 ed.).

Two features of this provision are noteworthy: first, Congress extended to motion pictures the enhanced penalties applicable by virtue of prior § 104 to infringement of rights in sound recordings; and, second, Congress recited the infringing uses giving rise to liability. It is also noteworthy that despite the urging of representatives of the film industry, see Copyright Law Revision: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 716 (1975) (statement of Jack Valenti, President of the Motion Picture Association of America, Inc.), and the initial inclination of the Senate, see S. Rep. No. 94–473, p. 146 (1975), Congress declined once again to provide felony penalties for copyright infringement involving sound recordings and motion pictures.

Finally, by the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97–180, 96 Stat. 91, Congress chose to address the problem of bootlegging and piracy of records, tapes, and films by imposing felony penalties on such activities. Section 5 of the 1982 Act revised 17 U. S. C. § 506(a) to provide that "[a]ny person who infringes a copyright willfully and for purposes of commercial advantage or private financial

gain shall be punished as provided in section 2319 of title 18." Section 2319(b)(1), in turn, was then enacted to provide for a fine of up to $250,000, or imprisonment of up to five years, or both, if the offense "involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least one thousand phonorecords or copies infringing the copyright in one or more sound recordings [or] at least sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works." Subsection (b)(2) provides for a similar fine and up to two years' imprisonment if the offense involves "more than one hundred but less than one thousand phonorecords or copies infringing the copyright in one or more sound recordings [or] more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works." And subsection (b)(3) provides for a fine of not more that $25,000 and up to one year's imprisonment in any other case of willful infringement. The legislative history indicates that Congress set out from a belief that the existing misdemeanor penalties for copyright infringement were simply inadequate to deter the enormously lucrative activities of large-scale bootleggers and pirates. See 128 Cong. Rec. H1951 (May 10, 1982) (remarks of Rep. Kastenmeier); The Piracy and Counterfeiting Amendments Act of 1981: Hearings on S. 691 Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 8 (1981) (statement of Renee L. Szybala, Special Assistant to the Associate Attorney General). Accordingly, it acted to "strengthen the laws against record, tape, and film piracy" by "increas[ing] the penalties . . . for copyright infringements involving such products," thereby "bring[ing] the penalties for record and film piracy . . . into line with the enormous profits which are being reaped from such activities." S. Rep. No. 97-274, pp. 1, 7 (1981).[18]

[18] The Act also substantially increased penalties for trafficking in counterfeit labels affixed to sound recordings, motion pictures, and other audio-

Thus, the history of the criminal infringement provisions of the Copyright Act reveals a good deal of care on Congress' part before subjecting copyright infringement to serious criminal penalties. First, Congress hesitated long before imposing felony sanctions on copyright infringers. Second, when it did so, it carefully chose those areas of infringement that required severe response—specifically, sound recordings and motion pictures—and studiously graded penalties even in those areas of heightened concern. This step-by-step, carefully considered approach is consistent with Congress' traditional sensitivity to the special concerns implicated by the copyright laws.

In stark contrast, the Government's theory of this case presupposes a congressional decision to bring the felony provisions of § 2314, which make available the comparatively light fine of not more than $10,000 but the relatively harsh term of imprisonment of up to 10 years, to bear on the distribution of a sufficient quantity of *any* infringing goods simply because of the presence here of a factor—interstate transportation—not otherwise thought relevant to copyright law. The Government thereby presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly. To the contrary, the discrepancy between the two approaches convinces us that Congress had no intention to reach copyright infringement when it enacted § 2314.

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visual works. 18 U. S. C. § 2318.

The dissent suggests that by providing that the new penalties "shall be in addition to any other provisions of Title 17 or any other law," 18 U. S. C. § 2319(a), Congress "implicitly" approved the interpretation of § 2314 urged by the Government. *Post*, at 5. Neither the text nor the legislative history of either the 1982 Act or earlier copyright legislation evidences any congressional awareness, let alone approval, of prosecutions like the one now before us. In the absence of any such indication, we decline to read the general language appended to § 2319(a) impliedly to validate extension of § 2314 in a manner otherwise unsupported by its language and purpose.

D

The broad consequences of the Government's theory, both in the field of copyright and in kindred fields of intellectual property law, provide a final and dispositive factor against reading § 2314 in the manner suggested. For example, in *Harper & Row*, *supra*, this Court very recently held that The Nation, a weekly magazine of political commentary, had infringed former President Ford's copyright in the unpublished manuscript of his memoirs by verbatim excerpting of some 300 words from the work. It rejected The Nation's argument that the excerpting constituted fair use. Presented with the facts of that case as a hypothetical at oral argument in the present litigation, the Government conceded that its theory of § 2314 would permit prosecution of the magazine if it transported copies of sufficient value across state lines. Tr. of Oral Arg. 35. Whatever the wisdom or propriety of The Nation's decision to publish the excerpts, we would pause, in the absence of any explicit indication of congressional intention, to bring such conduct within the purview of a criminal statute making available serious penalties for the interstate transportation of goods "stolen, converted or taken by fraud."

Likewise, the field of copyright does not cabin the Government's theory, which would as easily encompass the law of patents and other forms of intellectual property. If "the intangible idea protected by the copyright is effectively made tangible by its embodiment upon the tapes," *United States* v. *Gottesman*, 724 F. 2d 1517, 1520 (CA11 1984), phonorecords, or films shipped in interstate commerce as to render those items stolen goods for purposes of § 2314, so too would the intangible idea protected by a patent be made tangible by its embodiment in an article manufactured in accord with patented specifications. Thus, as the Government as much as acknowledged at argument, Tr. of Oral Arg. 29, its view of

the statute would readily permit its application to interstate shipments of patent-infringing goods. Despite its undoubted power to do so, however, Congress has not provided criminal penalties for distribution of goods infringing valid patents.[19] Thus, the rationale supporting application of the statute under the circumstances of this case would equally justify its use in wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction.[20] This factor militates strongly against the reading proffered by the Government. Cf. *Williams* v. *United States*, 458 U. S., at 287.

III

No more than other legislation do criminal statutes take on straightjackets upon enactment. In sanctioning the use of § 2314 in the manner urged by the Government here, the Courts of Appeals understandably have sought to utilize an existing and readily available tool to combat the increasingly serious problem of bootlegging, piracy, and copyright infringement. Nevertheless, the deliberation with which Congress over the last decade has addressed the problem of copy-

[19] Congress instead has relied on provisions affording patent owners a civil cause of action. 35 U. S. C. §§ 281–294. Among the available remedies are treble damages for willful infringement. § 284; see, *e. g.*, *American Safety Table Co.* v. *Schreiber*, 415 F. 2d 373, 378–379 (CA2 1969), cert. denied, 396 U. S. 1038 (1970). See generally 2 P. Rosenberg, Patent Law Fundamentals § 17.08 (2d ed. 1984). The only criminal provision relating to patents is 18 U. S. C. § 497, which proscribes the forgery, counterfeiting, or false alteration of letters patent, or the uttering thereof. See also 35 U. S. C. § 292 ($500 penalty, one-half to go to person suing and one-half to the United States, for false marking of patent status).

[20] The Government's rationale would also apply to goods infringing trademark rights. Yet, despite having long and extensively legislated in this area, see federal Trademark Act of 1946 (Lanham Act), 15 U. S. C. § 1051 *et seq.*, in the modern era Congress only recently has resorted to criminal sanctions to control trademark infringement. See Trademark Counterfeiting Act of 1984, Pub. L. 98–473, ch. XV, 98 Stat. 2178. See also S. Rep. No. 98–526, pp. 1–2, 5 (1984); 2 J. McCarthy, Trademarks and Unfair Competition § 30.39 (2d ed. 1984).

right infringement for profit, as well as the precision with which it has chosen to apply criminal penalties in this area, demonstrates anew the wisdom of leaving it to the legislature to define crime and prescribe penalties.[21] Here, the language of § 2314 does not "plainly and unmistakably" cover petitioner Dowling's conduct, *United States* v. *Lacher*, 134 U. S. 624, 628 (1890); the purpose of the provision to fill gaps in state law enforcement does not couch the problem under attack; and the rationale employed to apply the statute to petitioner's conduct would support its extension to significant bodies of law that Congress gave no indication it intended to touch. In sum, Congress has not spoken with the requisite clarity. Invoking the "time-honored interpretive guideline" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,'" *Liparota* v. *United States*, —— U. S. ——, —— (1985) (slip op. 8), quoting *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), we reverse the judgment of the Court of Appeals.

*It is so ordered.*

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[21] Indeed, in opposing the petition for a writ of certiorari in this case, the Government acknowledged that it no longer needs § 2314 to prosecute and punish serious copyright infringement. Adverting to the most recent congressional copyright action, it advised the Court:

"[A]pplication of Section 2314 . . . to the sort of conduct involved in this case is of considerably diminished significance since passage, subsequent to the offenses involved in this case, of the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97–180, 96 Stat. 91 *et seq.* (codified at 17 U. S. C. 506(a) and 18 U. S. C. 2318, 2319). The new statute provides for felony treatment for most serious cases of copyright infringement involving sound recordings and audiovisual materials and trafficking in counterfeit labels, while prior law provided only for misdemeanor treatment for first offenses under the copyright statutes. In view of the increased penalties provided under the new statute, prosecutors are likely to have less occasion to invoke other criminal statutes in connection with copyright infringing activity." Brief for United States in Opposition 8.

These observations suggest the conclusion we have reached—that § 2314 was not in the first place the proper means by which to counter the spread of copyright infringement in sound recordings and motion pictures.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1985

Re: No. 84-589 - Dowling v. United States

Dear Lewis:

I join your dissent.

Regards,

WEB

Justice Powell

Copies to the Conference

# SUPREME COURT OF THE UNITED STATES

No. 84-589

PAUL EDMOND DOWLING, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 28, 1985]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

The Court holds today that § 2314 does not apply to this case because the rights of a copyright holder are "different" from the rights of owners of other kinds of property. The Court does not explain, however, how the differences it identifies are relevant either under the language of § 2314 or in terms of the purposes of the statute. Because I believe that the language of § 2314 fairly covers the interstate transportation of goods containing unauthorized use of copyrighted material, I dissent.

Section 2314 provides for criminal penalties against any person who "transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud." 18 U. S. C. § 2314. There is no dispute that the items Dowling transported in interstate commerce—bootleg Elvis Presley records—are goods, wares, or merchandise. Nor is there a dispute that the records contained copyrighted Elvis Presley performances that Dowling had no right to reproduce and distribute. The only issue here is whether the unauthorized use of a copyright may be "equate[d] with theft, conversion, or fraud" for purposes of § 2314. *Ante*, at 10. Virtually every court that has considered the question has concluded that § 2314 is

broad enough to cover activities such as Dowling's. See, *e. g.*, *United States* v. *Drum*, 733 F. 2d 1503, 1505–1506 (CA11), cert denied, —— U. S. —— (1984); *United States* v. *Whetzel*, 191 U. S. App. D. C. 184, 187, n. 10, 589 F. 2d 707, 710, n. 10 (1978); *United States* v. *Berkwitt*, 619 F. 2d 649, 656–658 (CA7 1980); *United States* v. *Sam Goody, Inc.*, 506 F. Supp. 380, 385–391 (EDNY 1981). The only case cited by the Court that lends support to its holding is *United States* v. *Smith*, 686 F. 2d 234 (CA5 1982).[1] The Court's decision today is thus contrary to the clear weight of authority.

The Court focuses on the fact that "[t]he copyright owner . . . holds no ordinary chattel." *Ante*, at 9. The Court quite correctly notes that a copyright is "comprise[d] . . . of carefully defined and carefully delimited interests," *ibid.*, and that the copyright owner does not enjoy "'complete control over all possible uses of his work,'" *id.*, at 10, quoting *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. ——, —— (1984) (slip op. at 13–14). But among the rights a copyright owner enjoys is the right to publish, copy, and distribute the copyrighted work. Indeed, these rights define virtually the entire scope of an owner's rights in intangible property such as a copyright. Interference with these rights may be "different" from the physical removal of tangible objects, but it not clear why this difference matters under the terms of § 2314. The statute makes no distinction between tangible and intangible property. The basic goal of the National Stolen Property Act, thwarting the interstate transportation of misappropriated goods, is not served by the judicial imposition of this distinction. Although the rights of copyright

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[1] In *United States* v. *Drum*, 733 F. 2d 1503 (CA11), cert. denied, —— U. S. —— (1984), the Court of Appeals for the Eleventh Circuit considered and rejected the arguments offered in *United States* v. *Smith*, 686 F. 2d 234 (CA5 1982) and reiterated by the Court today. I agree with *Drum* that neither the language nor purpose of § 2314 supports the view that the statute does not reach the unauthorized duplication and distribution of copyrighted material.

owners in their property may be more limited than those of owners of other kinds of property, they are surely "just as deserving of protection . . . ." *United States* v. *Drum*, *supra*, at 1506.

The Court concedes that § 2314 has never been interpreted to require that the goods, wares, or merchandise stolen and transported in violation of the statute remain in unaltered form. *Ante*, at 9. See also *United States* v. *Bottone*, 365 F. 2d 389, 393–394 (CA2 1966). It likewise recognizes that the statute is applicable even when the misappropriated item "owes a major portion of its value to an intangible component." *Ante*, at 9. The difficulty the Court finds with the application of § 2314 here is in finding a theft, conversion, or fraudulent taking, in light of the intangible nature of a copyright. But this difficulty, it seems to me, has more to do with its views on the relative evil of copyright infringement versus other kinds of thievery, than it does with interpretation of the statutory language.

The statutory terms at issue here, *i. e.*, "stolen, converted or taken by fraud," traditionally have been given broad scope by the courts. For example, in *United States* v. *Turley*, 352 U. S. 407 (1957), this Court held that the term "stolen" included all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether the theft would constitute larceny at common law. *Id.*, at 417. Similarly, in *Morissette* v. *United States*, 342 U. S. 246 (1952), the Court stated that conversion "may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." *Id.*, at 271–272.

Dowling's unauthorized duplication and commercial exploitation of the copyrighted performances were intended to gain for himself the rights and benefits lawfully reserved to

the copyright owner. Under *Turley*, *supra*, his acts should be viewed as the theft of these performances. Likewise, Dowling's acts constitute the unauthorized use of another's property and are fairly cognizable as conversion under the Court's definition in *Morissette*.

The Court invokes the familiar rule that a criminal statute is to be construed narrowly. This rule is intended to assure fair warning to the public, *e. g.*, *United States* v. *Bass*, 404 U. S. 336, 348 (1971); *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931), and is applied when statutory language is ambiguous or inadequate to put persons on notice of what the legislature has made a crime. See, *e. g.*, *United States* v. *Bass*, *supra*; *Rewis* v. *United States*, 401 U. S. 808, 812 (1971); *Bell* v. *United States*, 349 U. S. 81, 83 (1955). I disagree not with these principles, but with their application to this statute. As I read § 2314, it is not ambiguous, but simply very broad. The statute punishes individuals who transport goods, wares, or merchandise worth $5,000 or more, knowing "the same to have been stolen, converted, or taken by fraud." 18 U. S. C. § 2314. As noted above, this Court has given the terms "stolen" and "converted" broad meaning in the past. The petitioner could not have had any doubt that he was committing a theft as well as defrauding the copyright owner.[2]

The Court also emphasizes the fact that the copyright laws contain their own penalties for violation of their terms. But the fact that particular conduct may violate more than one federal law does not foreclose the Government from making a choice as to which of the statutes should be the basis for an indictment. "The Court has long recognized that when an

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[2] Indeed, there was stipulated testimony by a former employee of petitioner's, himself an unindicted co-conspirator, that petitioner and his partner "were wary of any unusually large record orders, because they could be charged with an interstate transportation of stolen property if they shipped more than $5,000 worth of records." App. at A19 (Stipulation Regarding Testimony of Aca "Ace" Anderson).

act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States* v. *Batchelder*, 442 U. S. 114, 123–124 (1979).

Finally, Congress implicitly has approved the Government's use of § 2314 to reach conduct like Dowling's. In adopting the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97–180, 96 Stat. 91, Congress provided that the new penalties "shall be in addition to any other provisions of title 17 *or any other law.*" 18 U. S. C. § 2319(a) (emphasis added). The Senate Judiciary Committee specifically added the italicized language to clarify that the new provision "supplement[s] existing remedies contained in copyright law *or any other law.*" S. Rep. No. 274, 97th Cong., 2d Sess. 2 (emphasis added). Many courts had used § 2314 to reach the shipment of goods containing unauthorized use of copyrighted material prior to the enactment of the Piracy and Counterfeiting Amendments Act. By choosing to make its new felony provisions supplemental, Congress implicitly consented to continued application of § 2314 to these offenses.

Dowling and his partners "could not have doubted the criminal nature of their conduct . . . ." *United States* v. *Bottone*, *supra*, at 394. His claim that § 2314 does not reach his clearly unlawful use of copyrighted performances evinces "the sort of sterile formality" properly rejected by the vast majority of courts that have considered the question. *United States* v. *Belmont*, 715 F. 2d 459, 462 (CA9 1983), cert. denied, —— U. S. —— (1984). Accordingly, I dissent.

84-589 Dowling v. United States (Annmarie)

HAB for the Court 4/26/85
1st draft 6/11/85
2nd draft 6/18/85
3rd draft 6/25/85
Joined by JPS 6/12/85
SOC 6/19/85
TM 6/19/85

LFP dissenting
1st draft 6/21/85
Joined by BRW 6/24/85
CJ 6/26/85

BRW awaiting dissent 6/12/85
HAB decided to vote to reverse 6/4/85
WJB will reassign opinion to HAB 6/4/85
CJ awaiting dissent 6/20/85