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Felony Copyright Infringement in Schools

I. INTRODUCTION

Much copying of books, magazine articles, and computer software occurs in educational settings. The unlawful copying of books, magazines, and software was at worst a misdemeanor offense until 18 U.S.C. §2319 was amended by Public Law 102-561 on October 28, 1992. This act extends federal felony penalties to a broad range of copyright infringements, including the copying of books, magazine articles, and computer software.

The press has shown a misunderstanding of these new criminal provisions. Articles have been printed which show great fear that the extension of felony penalties poses a serious risk to persons who are merely on the edge of fair use or who violate restrictions contained in unreasonable shrink-wrap license agreements.¹

While copying for educational purposes is treated more leniently than copying for other purposes, liability can still occur. Public (but not private) school districts might be immune from suit under the 11th amendment.² Even if the district is immune, this immunity does not protect teachers, employees, or students.³ Under the fair use doctrine, copying for educational purposes is not an excuse, but is treated more leniently than copying for other purposes.

There is as yet no case law on the amended 18 U.S.C. §2319, and how it may apply in schools. This paper will analyze the elements of the felony offense described by the new statute, define these elements through analogy to case law involving similar terms in both the civil law and criminal violations under the old statute,⁴ and predict likely sentences for

1. "Under the new law, just about any computer department manager could be charged as a felon." Mitchell Kapur, *Innocent Felons*, FORBES, 15 Feb. 1993 at 208.

2. See *BV Engineering v. University of California*, Los Angeles, 858 F.2d 1394, (9th Cir. 1988) (State University immune from copyright infringement suit). *Contra Johnson v. University of Virginia*, 606 F. Supp. 321 (D. Va. 1985) (State University liable for infringing copyright on photographs).

3. See *Withol v. Crow*, 309 F.2d 777 (11th Cir. 1962) (holding choir director personally liable for copyright infringement in school choir performance, but releasing the school district from liability as a state agency under the 11th Amendment) (also holding church liable for unauthorized church choir performance).

4. "In order to understand the meaning of criminal copyright infringement it

those who violate the new statute. Finally, it will propose methods by which educators can avoid exposure of their students and employees to federal felony penalties.

II. CHANGES TO THE STATUTE

A. *Prior Law*

The version of 18 U.S.C. §2319⁵ enacted in 1982 provided penalties of up to five years in prison, or fines of up to \$250,000, for a first offense of willful copyright infringement (as defined in 17 U.S.C. §506) involving producing or distributing for profit within a 180 day period

(a) more than one thousand copies of sound recordings, or
 (b) more than sixty five copies of motion pictures or audiovisual works. Penalties of up to two years in prison, or fines of up to \$250,000, were provided for a first offense of willful copyright infringement involving producing or distributing: (a) more than one hundred copies of sound recordings, or (b) more than seven copies of motion pictures or audiovisual works. All other willful copyright infringement was a misdemeanor with a maximum term of one year in prison and a \$25,000 fine. Second offenses were subject to more stringent penalties. Under the old statute, felony copyright infringement was not likely in an educational setting because of these high quantity requirements and because the crime was limited to sound recordings, movies and audiovisual works.

B. *Legislative History*

A bill was introduced by Senator Orrin Hatch (Utah) to add computer software to the enumerated list of categories of copyrighted works for which felony penalties were available in 18 U.S.C. §2319.⁶ After passage in the Senate, and hearings dominated by computer hardware and software representatives, the House Judiciary Committee substituted language that eliminated the list of enumerated categories of works in favor

is necessary to resort to the civil law of copyright. See *United States v. Wise*, 550 F.2d 1180, 1185-6 (9th Cir. 1977) (upholding the predecessor statute to 17 U.S.C. §506(a)).⁷ *United States v. Cross*, 816 F.2d 297, 303 (7th Cir. 1987).

5. (1988).

6. *Criminal Penalties for Copyright Infringement*, H.R. REP. NO. 102-997, 102 Cong. (1992), *Reprinted in* 1992 U.S.C.C.A.N. at 3569; hereinafter: House Report.

of a test based on both quantity and value. The amended bill was then enacted.

C. New Law

The new law reads as follows:

§ 2319. Criminal infringement of a copyright

(a) Whoever violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law

(b) Any person who commits an offense under subsection (a) of this section—

(1) shall be imprisoned not more than 5 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, with a retail value of more than \$2500;

(2) shall be imprisoned not more than 10 years, or fined in the amount set forth in this title, or both, if the offense is a second or subsequent offense under paragraph (1); and

(3) shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, in any other case.

(c) As used in this section—

(1) the terms “phonorecord,” and “copies” have, respectively, the meanings set forth in section 101 (relating to definitions) of title 17; and

(2) the terms “reproduction” and “distribution” refer to the exclusive rights of a copyright owner under clauses (1) and (3) respectively of section 106 (relating to exclusive rights in copyrighted works), as limited by sections 107 through 120, of title 17.⁷

The relevant portions of 17 U.S.C. §506, which defines the criminal offense, reads as follows:

§ 506 Criminal Offenses

(a) Criminal Infringement.—Any person who infringes a copyright willfully and for purposes of commercial advantage or

7. 18 U.S.C.A. §2319 (West Supp. 1993).

private financial gain shall be punished as provided in section 2319 of title 18.

(b) *Forfeiture and Destruction.*—When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.⁸

The new statute provides for a maximum imprisonment of up to five years for willful copyright infringement involving the production or distribution within any 180-day period of “at least 10 copies or phonorecords, of 1 or more copyrighted works, with a retail value of more than \$2500.”⁹ This applies to any copyrighted work, including computer software, books, and magazines. The production of smaller quantities or values of material remains a misdemeanor. A second offense is punishable by a ten-year prison term. Fines are set by 18 U.S.C. §[chapter 227] 3571¹⁰ as not more than \$250,000 for a felony conviction, or not more than \$100,000 for a misdemeanor conviction of an individual. Fines run up to double these amounts for conviction of an organization. Fines may also be computed as not more than twice the profits from the copyright infringement realized by the defendant, or twice the loss suffered by the copyright owner.

17 U.S.C. §507¹¹ sets a three-year statute of limitations for purposes of civil or criminal copyright infringement.

III. ELEMENTS OF THE OFFENSE

A. *Introduction*

Interpreting the new statute, the elements of the felony offense include:

- a. A Willful act of
- b. Copyright infringement, where distributed copies have not been the subject of a “first sale”.
- c. Reproduction or distribution of ten or more copies or phonorecords within a 180-day period

8. 17 U.S.C. §506 (1988).

9. 18 U.S.C.A. §2319 (West Supp. 1993).

10. (1988) (note: there are 2 sections 18 U.S.C. §3571).

11. (1988).

- d. Of one or more copyrighted works.
- e. A quantity reproduced or distributed amounting to a retail value of more than \$2500 within the 180-day period.
- f. A purpose of commercial advantage or private financial gain.
- g. Charges must be filed within the three-year statute of limitations for copyright infringement.

B. *Meaning of Willful Copyright Infringement*

The term "willful" establishes the *mens rea*¹² requirement for criminal copyright infringement. In most of the criminal law, a *mens rea* applies to performance of the act; for most crimes, a conviction may be obtained if the actor knowingly or recklessly committed an act likely to produce the forbidden result. Whether or not the criminal knew that the result was against the law, and whether or not he consulted his attorney first, are both immaterial. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."¹³

The term "willful" is not defined in the statute. The legislative history shows intent that the existing interpretations of this term should remain.¹⁴ *Nimmer on Copyright* defines willful to mean "with knowledge that the defendant's conduct constitutes copyright infringement."¹⁵ Courts in civil cases, where willful is not a factor in liability, but is a factor in determining the amount of statutory damages, have held:

An infringement is 'Willful' if the infringer knows that its conduct is an infringement or if the infringer has acted in reckless disregard of the copyright owner's right. *See International Korwin Corp. v. Kowalczyk*, 855 F.2d 375, 380 (7th Cir. 1988), at 380 & n.10 (quoting *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 807 F.2d 1110, 1115 (2d Cir. 1986)). The determination whether a particular infringer acted willfully is left to the trier of fact, although a finding of willfulness should ordinarily be made where the defendant knows that its conduct is an infringement or is reckless in not knowing that fact. Accordingly, willfulness would ordinarily be

12. *Mens rea* is the required mental state for a crime.

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

14. House Report at 3573.

15. 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §14.04[B], at 14-51 to 14-52 (1992).

demonstrated where the infringer is provided oral or written notice¹⁶

In criminal copyright cases the *mens rea* requirement is substantially tougher than for civil copyright infringement. For example, the Southern District of Indiana omitted the "reckless disregard" language of *Video Views, Inc. v. Studio 21, Ltd.*,¹⁷ using a much stricter jury instruction; "the word 'willfully' as used in the statute means the act was committed by a defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident, or in good faith."¹⁸ In *United States v. Cross*, FBI agents visited a store while investigating previous complaints, explained the statute to the defendants, and warned them of possible civil or criminal liability, all before the acts of infringement for which the defendants were convicted!

Where an infringer relied upon advice of counsel that his planned acts were not likely to produce copyright infringement, that bad advice was held not to be a defense against criminal charges of copyright infringement, but to be admissible as a factor that should be considered in determining whether the infringement was willful.¹⁹ Similarly, willful was defined as a "voluntary, intentional violation of a known legal duty" and found absent when an infringer misunderstood the law and made single copies of videotapes for rental, while keeping the originals in a vault as "insurance."²⁰

The legislative history of the 1992 amendment shows an intent that the standard for willful remain high, so as to exempt from criminal liability parties whose "civil liability is unclear—whether because the law is unsettled, or because a legitimate business dispute exists."²¹ The legislative history

16. *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020-21 (7th Cir. 1991) (Civil case).

17. *Id.*

18. *United States v. Cross*, 816 F.2d 297, 300 (7th Cir. 1987) (sustained on sufficient evidence, but reduced to a misdemeanor for failure to prove the volume of copying required by the old 18 U.S.C. §2319(b)(3)).

19. *United States v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976).

20. *United States v. Moran*, 757 F.Supp. 1046, (D. Neb. 1991) (quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991) (defining willfulness as "voluntary, intentional, violation of a known legal duty" in the context of tax fraud, but holding that doubts as to the validity of the law were irrelevant if the law was actually known)).

21. House Report, at 3573.

specifically refers to reverse engineering²² as an area of copyright law that remains unsettled.²³ Since legal expert testimony and the prior opinion of counsel should both be admissible on the issue of willfulness, it should be quite difficult to successfully prosecute anyone for unauthorized reverse engineering of software. Another area where the law is unclear and proving willfulness will be difficult is violation of shrinkwrap "licenses."²⁴ Where the law is unclear, the "known legal duty" required for willfulness can not really be "known."

Willfulness is easier to prove where the law is definite, as with infringers who buy one copy of software and install it for simultaneous use on multiple machines in a business or an educational setting, or with infringers who produce illicit copies for sale.

With this high standard, the willfulness element will be a hotly contested point in any felony copyright infringement trial. The *mens rea* required for criminal copyright violation is quite different from that required for most crimes; this is an area of the law in which ignorance of the law may be an excuse!

Justice Blackmun, in his dissent to *Sony Corp. v. Universal City Studios, Inc.*,²⁵ implies that prior registration of the copyright in a work is not a prerequisite for criminal liability for infringing copyright in that work. A copyright registration certificate is, however, generally introduced into evidence during trial in cases involving criminal liability.²⁶

C. Prior Registration of Copyright

Copyright registration certificates are readily obtained at minimal cost, even long after publication. Should the copyright owner be unwilling to cooperate with the prosecutor and refuse to obtain a certificate, the defense would argue that the owner has dedicated his work to public use and no infringement exists.

In a civil context, suit for copyright infringement has been upheld although the copyright registration was not filed until

22. Reverse engineering is the process of studying a program or device in order to understand how it works.

23. House Report, at 3573-74.

24. See *infra* text accompanying notes 61 to 67.

25. 464 U.S. 417, 492-93 n.44 (1984).

26. See, e.g., *United States v. Shabazz*, 724 F.2d 1536 (11th Cir. 1984) (10 copyright certificates introduced into evidence).

after the infringing work was published, nine years after the initial publication.²⁷ Long delays, such as thirteen years before filing a registration for copyright of a song that became very popular in the interim (implying dedication to public use through knowing acquiescence in infringement by John Philip Sousa, among many others) have been held to produce an abandonment of the copyright.²⁸

D. Number of Copies, and Works Infringed

The statute requires that ten or more copies be made for felony penalties to attach. Most computer software as distributed consists of several distinct "files," or separately manipulable sub parts, recorded on one or more media. An entire set of these files is likely to be a single infringing copy by analogy to *Robert Stigwood Group, Ltd. v. O'Reilly* (holding that each performance of a musical was a violation, but not a separate violation of the copyright in each song in the musical).²⁹

While evidence is required that the copies reproduced or distributed are copies of one or more copyrighted works, it is not necessary to perform an electronic comparison of the copies and the original works to verify exact identity.³⁰

The legislative history on the quantity and value requirements for felony penalties says that the quantity test was adopted with an intent to exempt the incidental copying of games by children.³¹ The legislative history also shows belief that these requirements exempt reverse engineering of computer software, an intent missed due to a misunderstanding of the manner in which reverse engineering is likely to be conducted in a professional environment.³² Reverse engineering has, how-

27. *Ziegleheim v. Flohr*, 119 F.Supp. 324 (D.C. N.Y. 1954) (photographic copying of 415 pages of a Jewish prayer book which had a notice of copyright).

28. *Egner v. E. C. Schirmer Music Co.*, 48 F. Supp. 187 (D. Mass. 1942), *aff'd* 139 F.2d 398 (1st Cir. 1943) *cert. denied*, 322 U.S. 730 (The Caissons Go Rolling Along).

29. 530 F.2d 1096, 1104 (2d Cir. 1976).

30. *See e.g.*, *United States v. Shabazz*, 724 F.2d 1536 (11th Cir. 1984).

31. House Report at 3574.

32. The author is a computer architect and has been a professional programmer. Although his personal experience with reverse engineering is limited to hardware, he believes that a much larger volume of copies would be made than does the House committee. In any professional environment, copies would be made through performing:

- a. a weekly backup of all files on the system, kept for months,
- b. a daily backup of all files on the system changed within that week,

ever, been held to be a fair use, and thus not an infringement.³³ Whether the copies reproduced be paper copies of books or magazines, or of computer software, the threshold of ten copies is easily reached.

E. Retail Value

Most computer software carries a high list price, but sells through mail order discount houses and other retailers at a much lower price. Much software is available with educational discounts. As "retail value" is not provable by the introduction of manufacturers' suggested retail or "list" prices,³⁴ evidence of actual selling prices of the original work must be used to prove that retail value exceeds \$2500. Discounted prices of bootleg copies is probably immaterial, as it has been held immaterial for purposes of sentencing under the old statute.³⁵

The threshold of \$2500 will be readily reached and proved in cases of infringement of computer software; many packages are priced high enough that if the threshold of ten copies is reached, the value requirement has also been met. The requirement for \$2500 in value will be more difficult to reach with books and magazine articles. A teacher who distributes a package of fifteen magazine articles, valued at one dollar each, to the students in a class would have to distribute 167 packages to reach this threshold.

F. Purpose for Commercial Advantage or Private Financial Gain

The element of a purpose of commercial advantage or private financial gain has been very broadly defined, including copying for internal use to avoid payment for sufficient legal

c. a disassembly listing would be created and maintained on the system,
d. frequent loading into memory (a copying) for execution with breakpoints under the control of debugging software.

33. R. T. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY*, 2d ed. 1992 §1.16 Supp. 1993 citing *Atari Games Corp. v. Nintendo of Am., Inc.*, 1992 Westlaw 217828 (Fed Cir. Sept 10, 1992).

34. *United States v. Willis*, 322 F.2d 548 (3rd Cir. 1963) (holding the retail value of goods transported in interstate commerce is not adequately proven by evidence of manufacturer's list prices for the goods).

35. *United States v. Larracuente*, 952 F.2d 672, 674 (2d Cir. 1992) (conviction of trafficking in 1670 counterfeit videotapes) (holding that application of sentencing guidelines to normal retail price, and not to a discounted bootleg price, was correct).

copies. Actual financial gain is not required for a criminal copyright infringement conviction; “[i]t is only necessary that the activity be for the purpose of financial gain or benefit.”³⁶ The cases frequently refer to “commercial advantage or private financial gain” as meaning for profit—the language of an older version of the statute.³⁷ For profit was broadly interpreted as “in the hope of some pecuniary gain,” with the actual realization of any gain, and whether checks were made payable to a business or to an individual being irrelevant.³⁸ It has been held that high volume sales are sufficient evidence of a profit motive, irrespective of whether the defendants actually made a profit.³⁹ The profit element of felony copyright infringement is not restricted to cases where the copies reproduced are sold; for profit could also be found where the illegal copies are simply used by the infringer in order to avoid the payments required to obtain more legal copies. From this analysis, copying for the following purposes would be covered by this statute, as for “commercial advantage or private financial gain”:

- a. Production of copies of software packages for sale.
- b. Loading of a single copy of software onto several machines used in a school or business to avoid payments required to obtain the required number of legal copies.
- c. Loading of software, on which royalties are not paid, onto machines intended for sale; intending to lure customers away from other sellers who must sell at a higher price because of the royalties they must pay.
- d. Failing to erase software from a used machine, as an enticement to a buyer when the machine is sold, while copying the software onto a replacement machine.
- e. Selling packages of copied magazine articles to students.

36. *United States v. Cross*, 816 F.2d 297, 301 (7th Cir. 1987) (citing *United States v. Moore*, 604 F.2d 1228, 1235 (9th Cir. 1979)) (bootleg copies at a videocassette rental operation).

37. 17 U.S.C §104, prior to the recodification of the copyright act in 1976, read “[A]ny person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be guilty of . . .” *United States v. Wise*, 550 F.2d 1180, 1185 (9th Cir. 1977) *cert. denied* 434 U.S. 929.

38. *United States v. Wise*, 550 F.2d 1180, 1195 (9th Cir. 1977) (*cert. denied* 434 U.S. 929, (quoting *United States v. Taxe*, 380 F. Supp. 1010, 1018 (C.D. Cal. 1974) *aff'd* 540 F.2d 961 *cert. denied* 429 U.S. 1124)).

39. *U.S. v. Shabazz*, 724 F.2d 1536, 1540 (11th Cir. 1984).

G. *Copyright Infringement*

Violation of an exclusive right of the copyright owner constitutes the tort of copyright infringement, and is required for a criminal copyright infringement conviction. These exclusive rights include those of public display; reproduction (copying); making derivative works; distribution to the public by sale, rental, lease, or lending; and of public performance.

This section is intended as a brief overview of what could be infringement. Emphasis will be placed on those areas of the law which remain unsettled, but could arise in a criminal context or which relate to concerns shown in the press. This section on what constitutes copyright infringement is a survey, and is not intended to be in any way exhaustive.

Civil law interpretations of the exclusive rights, together with their exceptions and limitations, generally govern criminal copyright infringement.⁴⁰ Please note that there is no longer a requirement that works carry a copyright notice for copyright to exist in the work. Further, every criminal copyright infringement action can also produce a civil action.

1. *The fair use doctrine*

Originally an equitable doctrine, the doctrine of fair use was codified in 17 U.S.C. §107.⁴¹ This statute provides a list of factors to consider in determining whether an unauthorized use or copying of a copyrighted work is a fair use, and thereby excused from liability for infringement, including:

- a. The nature and character of the use, including whether the use is for profit, or whether the use is for educational purposes,
- b. The nature of the copyrighted work,
- c. The size of the portion of the original work that is used,
- d. The effect of the use on the market for or value of the copyrighted work.⁴²

The fair use doctrine is typically invoked to excuse from copyright infringement a critic who quotes from a book or play in a review thereof, worshipers who perform without charge a copyrighted song in church,⁴³ or students who copy one or two

40. Cross, 816 F.2d 297 at 303.

41. 17 U.S.C. §107 (1988).

42. 17 U.S.C. §107 (1988).

43. F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, 506 F. Supp. 1127, 1133 (N.D. Ill.1981) (also finding copyright misuse through an illegal tying arrangement under the antitrust laws).

articles while writing a paper. It may, however, also apply to cases in which a profit motive existed.⁴⁴

With computer software, the fair use doctrine can be applicable to copying for backup purposes, reverse engineering, or loading software onto two machines where no simultaneous use results, but where 17 U.S.C. §117 does not apply.⁴⁵ While fair use is more readily found in an educational setting than otherwise, a 24 page "learning activity package" incorporating eleven pages of a copyrighted thirty-page booklet, for example, is not fair use.⁴⁶

The legislative history of the 1976 Copyright Act⁴⁷ includes some guidelines as to when fair use exists. These guidelines prohibit copying of consumable materials for classroom use, as likely extinguishing the market for the original work. Subject to many restrictions, low quantities of brief extracts of non-consumable materials may be copied for classroom use if "[t]he inspiration and decision to use the work and the moment of its use for maximum effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission."⁴⁸

Fair use is considered a mixed question of law and fact. Such questions require a court to derive first a standard of law and second to apply it to the facts of the case. Mixed questions are entitled to a broad standard of review on appeal.⁴⁹ A good faith argument that the infringement should have been considered a fair use will weigh heavily upon willfulness.

44. "[T]he mere fact that a work may produce pecuniary gain for its author or publisher is not dispositive of a claim of fair use." *New Era Publications Intern. ApS. v. Carol Pub. Group*, 729 F.Supp 992, 996 (S.D.N.Y. 1990), *aff'd in part, rev'd in part on other grounds* 904 F.2d 152 (1990), *cert. denied* 111 S.Ct. 297 (1991), (unauthorized biography of Science Fiction writer and Church of Scientology founder L. Ron Hubbard, containing excerpts of the author's works; biography is antagonistic to the Church of Scientology; injunction to prohibit publication granted, but reversed by higher court).

45. R. T. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY*, 2d. ed. 1991 §1.16 & Supp. 1992.

46. *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983).

47. House Rep. No. 94-1476, *reprinted at* 17 U.S.C.A. §107 at 111 (West, 1977).

48. *Id.* at 114.

49. *Pacific & Southern Co., Ind. v. Duncan*, 744 F.2d 1490, 1495 (11 Cir. 1984) *reh'g denied* 749 F.2d 733 *cert. denied* 105 S.Ct. 1867, *on remand* 618 F.Supp. 469 (sale of videotapes of television news broadcast not protected by fair use doctrine).

2. *The library and archive exception*

Nonprofit libraries and archives enjoy certain exemptions from the copyright act. For example, the nonprofit rental, lease, or lending of software or of a phonorecord by a nonprofit library is permitted.⁵⁰ This exception would apply to lending by most school libraries.

3. *Section 117 exceptions for software*

The owner of a copy of software has some rights to copy and adapt the software under 17 U.S.C. §117.⁵¹ Copying is specifically allowed for backup purposes and where necessary to run the copy of software on a computer. The statute does not specify the number of legal backup copies that may be made, but does prohibit retention of backup copies when the underlying copy of the software is transferred.

4. *The first sale doctrine*

Many cases under the old criminal copyright statute list the "absence of a prior 'first sale'"⁵² as an element of criminal copyright infringement. This is a misnomer, since the first sale doctrine actually goes to the issue of infringement, and arises from 17 U.S.C. §109.⁵³

50. 17 U.S.C.A. §109 (2)(A).

51. 17 U.S.C.A. §117 (West Supp. 1993) reads as follows:

§ 117. Limitations on exclusive rights: Computer Programs

Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

52. See, e.g., *United States v. Atherton*, 561 F.2d 747, 749 (9th Cir. 1977).

53. 17 U.S.C. §109(a) (1988) reads: "notwithstanding the provisions of section

If the allegedly infringing copy or copies involved in a criminal prosecution for copyright infringement actually originated and were sold by (or with authorization from) the copyright owner, a first sale will be held to have taken place. The requirement that the government prove an absence of a first sale is implicit when the alleged infringement involves unauthorized vending of copyrighted material.⁵⁴ When first sale has occurred, no copyright infringement has taken place although a breach of a contract has likely taken place.⁵⁵ A civil action may lie for breach of the contract against the initial purchaser of the copy.

Much computer software is sold with shrinkwrap license agreements which purport to retain title to the copy of the enclosed software. This ploy is intended to avoid the first sale doctrine and allow the vendor to apply restrictions on resale, use, and copying that go beyond the limitations of 17 U.S.C. §109 and 17 U.S.C. §117.⁵⁶

Proof of lack of a first sale may be made by tracing possible sources of the copies in question, or by showing that the copies were made without authorization from another copy.⁵⁷ Physical differences between authorized copies and the copies in question has been held evidence of the absence of a prior first sale.⁵⁸

A reasonable belief of a defendant that the copies in question were legitimate would negate the high standard of willfulness, and prevent conviction, even if the copies were illegitimate.

106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."

54. *United States v. Wise*, 550 F.2d 1180, 1190 (1977) *cert. denied* 434 U.S. 929, *reh'g denied* 434 U.S. 977, (interpreting a version of the criminal copyright statute, 17 U.S.C. §104, in effect prior to the 1976 recodification of the copyright act).

55. *Id.* at 1189-90 citing *Harrison v. Maynard, Merrill & Co.*, (2d Cir. 1894) (damaged bound and unbound books sold as scrap paper, but later appeared on the market); and *Indep. News Co. v. Williams*, 293 F.2d 510 (3d Cir. 1961) (comics sold as scrap paper, but later appeared on the market).

56. *See infra* text accompanying notes 61 to 67 for a discussion of such "agreements."

57. *See, United States v. Sachs*, 801 F.2d 839 (6th Cir. 1986) (holding that evidence showing that a particular film had never been authorized for production in videocassette form was sufficient evidence of a lack of first sale for copies in videocassette form, especially given the total absence of evidence that the tapes were legitimate).

58. *United States v. Cohen*, 946 F.2d 430 (6th Cir. 1991).

Concern about the potential impact on the software industry of illegal copying done by those who rented or borrowed copies of software led to the addition of 17 U.S.C. §109(b)(1)⁵⁹ as amended in 1990. This statute requires authorization from the copyright holder for the rental, leasing, or lending of computer software or phonorecords for direct or indirect commercial advantage by any party other than a nonprofit educational institution or library. The statute excepts from its coverage software embedded in a product and software for use with limited purpose game machines.

17 U.S.C. §109(b)(4)⁶⁰ allows only civil enforcement of the prohibition of rental, leasing, or lending of legitimate copies of software and phonorecords. Criminal prosecution is prohibited unless other acts of infringement have occurred.

5. *License or sale?*

When a copy is licensed, rented, or leased by a copyright holder instead of being sold; the "first sale" doctrine of 17 U.S.C. 109,⁶¹ and the copy owner's rights under 17 U.S.C. 117 may not apply.⁶² State contract law will determine whether an effective license contract has been formed.

When the purchaser of software has signed an agreement stating that he has purchased only a license, and that the copy is still owned by the vendor according to the terms of that agreement, the transaction is likely the purchase of a license. When software is sold over the counter at retail, where the package contains a license agreement that the purchaser has

59. (Supp. 1992).

60. 17 U.S.C. 109(B)(4) (Supp. 1992) reads:

Any person who distributes a phonorecord or a copy of a computer program . . . in violation of paragraph (1) is an infringer of copyright under section 501 of this title and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509. Such violation shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.

61. "The evidence demonstrated . . . that ISC did not sell copies of its software to its customers, it only licensed them, making the 'first sale' doctrine inapplicable." *I.S.C. Bunker Ramo Corp. v. Altech, Inc.*, 765 F.Supp. 1310, 1314 (N.D. Ill. 1990).

62. David L. Hayes, *Proprietary Rights, Shrinkwrap License Agreements: New Light on a Vexing Problem*, PRENTICE HALL LAW AND BUSINESS, Sep. 1992.

not had an opportunity to read before placing his money on the table, the transaction may in fact be the sale of a copy.⁶³

Shrinkwrap agreements have been held to be ineffective in at least one case involving a suit for breach of warranty, where the form disclaimed all warranties.⁶⁴ It is even less likely that the shrinkwrap agreement is effective between the software vendor and an individual end user, since these are also additional terms to the contract. The argument can be made that since these terms are not visible on the exterior of most software packaging, are clearly not the product of negotiations between the parties, often contain unreasonable terms, and are at best a concealed adhesion contract, they do not have any effect whatsoever against an end user.⁶⁵

Since a reasonable doubt exists that shrinkwrap licenses contained within a software package, or the boxtop⁶⁶ variation held ineffective in *Step Saver Data Systems v. Wyse Technology*,⁶⁷ are indeed effective, a defendant can probably avoid the willfulness requirement for acts prohibited in such a license but permitted when a sale of a copy has occurred under 17 U.S.C. §117. Willfulness would also be obviated in these circumstances if the defendant had obtained and adhered to an opinion from counsel.

6. *The licensed copying defense*

Some reproduction and distribution of copyrighted works is done under license from the copyright holder, and is lawful. The prosecution need not prove that allegedly infringing copies could not possibly have been licensed copies. "If the accused infringer has been licensed by a licensee of the copyright owner, that is a matter of affirmative defense."⁶⁸

63. "Whether the license form becomes part of an enforceable contract in such conditions can be doubted." R.T. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY*, 2d ed. 1992 §7.24[1] at 7-86.

64. David L. Hayes, *Supra.* citing *Step Saver Data Systems v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) (holding that the additional terms of the shrinkwrap agreement had not become a part of the actual contract under the Uniform Commercial Code §2-207 (as adopted by Georgia and Pennsylvania) because they were a material alteration of the sale contract established by the actions of the parties and lost out in the "battle of the forms") (Applicable specifically to transactions between merchants).

65. David L. Hayes, *Supra.*

66. The license held ineffective in *Step Saver* was apparently printed on the exterior of the package.

67. 939 F.2d 91 (3d Cir. 1991).

68. *United States v. Larracuent*, 952 F.2d 672, 674 (2d Cir. 1992); *See also*,

H. Statute of Limitations

17 U.S.C. §507⁶⁹ prescribes a three-year statute of limitations for both civil and criminal copyright infringement actions. In civil cases, this has been held to mean three years from the time the copyright owners became aware of the infringement. Indeed, the cases show that the period may run from the last retail sale of maps sold by an infringer at wholesale where the infringer did not make efforts to remove the infringing product from the market.⁷⁰

IV. POTENTIAL DEFENDANTS IN EDUCATIONAL SETTINGS

Persons liable for criminal copyright infringement include those who manufacture copies, those who cause or control the manufacture of copies, those who distribute copies, and those who knowingly aid and abet the infringement of a copyright. This could include teachers, principals, secretaries, copy center employees, and any commercial copy shop involved in infringing a copyright.⁷¹

While the language of the statute has changed since some of the old cases under former 17 U.S.C. §104 (which mentioned aiding and abetting specifically, while the current 17 U.S.C. §506 does not); coverage of those who aid, abet,⁷² command, induce, or procure a criminal act is present elsewhere in the code:

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.⁷³

United States v. Cohen, 946 F.2d 430 (6th Cir. 1991).

69. 17 U.S.C. §507 (1988).

70. Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983).

71. See, Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (civil liability of copy shop for infringing copyrights in producing course packets).

72. See, United States v. Sachs, 801 F.2d 839 (6th Cir. 1986) (conviction for aiding and abetting copyright infringement involving 18 U.S.C. §2(a) and for conspiracy involving 18 U.S.C. §371).

73. 18 U.S.C. §2 (1988).

Similarly, co-conspirators are also covered by general sections of the code:

Conspiracy to commit offense or to defraud United States:

If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.⁷⁴

V. ELEVENTH AMENDMENT IMMUNITY

The one party who might be immune from prosecution for copyright infringement is the school district.⁷⁵ Some recent cases, including *BV Engineering v. University of California, Los Angeles*,⁷⁶ have held that a state agency can not be sued in federal court for copyright infringement unless the state has waived sovereign immunity under the Eleventh Amendment. Whether the state has waived sovereign immunity is a question of state law and will vary from state to state. As federal courts have exclusive jurisdiction in copyright cases, inability to sue a state in federal court effectively immunizes a state from liability.

Immunity under the Eleventh Amendment requires a finding that a suit is being brought against a state; and does not apply to private schools. Political subdivisions of a state also do not get the state immunity.⁷⁷ In some states school districts are local subdivisions which may be liable,⁷⁸ while in other states school districts are immune state agents.⁷⁹ Sovereign

74. 18 U.S.C. §371 (1988).

75. *Withol v. Crow*, 309 F.2d 777 (11th Cir. 1962) (holding school district immune from copyright infringement suit).

76. 858 F.2d 1394, (9th Cir, 1988).

77. "Municipalities and other political subdivisions of a state are not within the scope of [the eleventh amendment]." *Turpin v. Mailet*, 579 F.2d 152, 160 n.24 (2d Cir, 1978) (*citing*, *Lincoln County v. Luning*, 133 U.S. 529 (1890)).

78. "The answer depends, at least in part, upon the nature of the entity created by state law." *Mt. Healthy School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (holding that a school district was not a state agent and was subject to suit in federal courts).

79. *Martinez v. Bd. of Educ.*, 748 F.2d 1393 (10th Cir. 1984) (holding that a

immunity, however, will not shield individual employees from liability.⁸⁰

VI. OTHER STATUTES UNDER WHICH CONVICTION HAS FAILED

18 U.S.C. §2314⁸¹ prohibits the transportation in interstate or foreign commerce of any goods by one who knows that the goods are stolen, converted, or taken by fraud. In past years, attempts were made to use this statute to obtain criminal convictions against copyright infringers who sold their wares in interstate commerce. The Supreme Court shot down this tactic in *Dowling v. United States*;⁸² reasoning that the language of 18 U.S.C. §2314 did not specifically cover copyright infringement, and that Congress had made a reasoned decision that 18 U.S.C. §2319 should provide the primary criminal penalties for copyright infringement. Three dissenters argued that 18 U.S.C. §2314 does not require that the stolen goods remain in their original form, and that the infringers had reason to believe that the term "stolen" could cover an illegally taped performance.

State copyright laws have been preempted by the federal laws since 1978.⁸³ For a state criminal action to lie there must be something beyond copyright infringement itself, or the work must be grandfathered by having been created before 1978, or 1983 for semiconductors.⁸⁴ Except in unusual circumstances,

school district in New Mexico was a state agent and immune from suit because of the strong state control exercised by the state over the school district).

80. The mere fact that her conduct was undertaken in the course of her state employment does not of course relieve her of individual liability, even if her employer could not be sued for it. A state may no more than an individual principal give its agent authority to commit torts without civil recourse.

State law therefore provides no immunity to Brown against a claim in her individual capacity, though she may obviously invoke any of the numerous defenses that may be available to her under the Act itself.

Richard Anderson Photography v. Brown, 852 F.2d 114, 122 (4th Cir, 1988) (quoting: *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 694 n. 15 (1948)) (holding state university immune from copyright infringement suit, with university official personally liable for damages) (dissent favored holding state university liable on grounds that copyright act language overrode the state's sovereign immunity, citing: *Johnson v. University of Virginia*, 606 F.Supp. 321, 324 (D.Va.1985)).

81. 18 U.S.C. §2314 (1988).

82. 473 U.S. 207 (1985) (interstate transportation of bootleg records).

83. 17 U.S.C. §301 (Supp. 1992).

84. 17 U.S.C. §912(c) (1988).

a copyright infringer need only be concerned about civil liability and the criminal penalties of 18 U.S.C. §2319.

VII. EVIDENCE FROM CIVIL LITIGATION

Virtually all copyright infringement leading to criminal prosecutions can also lead to a civil infringement action. Potential defendants in criminal copyright infringement cases are cautioned that evidence developed in a civil setting, including the existence of a consent decree, will be used against them in criminal proceedings. If proof of criminal conduct would arise during a civil copyright infringement suit, the time to "take the fifth" is during the first action.

Although one commentator notes that admitting prior civil judgments into evidence in subsequent criminal trials may violate a defendant's right of confrontation, McCormick on Evidence, §318 (1984 ed.), we think that Cohen's consent judgment can be characterized better as a personal admission properly admitted under Federal Rule of Evidence 801(d)(2)(A) than as a civil judgment resulting from a jury or bench verdict. The question of burdens of proof never arose, and only Cohen's consent made the judgment conclusive. We have held elsewhere that it is a "familiar rule of evidence that any statement by a party may be offered against him by his opponent," and here Cohen agreed to be enjoined permanently from infringing the plaintiffs' copyrights. . . . The consent judgment is analogous to testimony in a prior civil proceeding, and the admissibility of such testimony in criminal trials is well-settled.⁸⁵

VIII. SENTENCING GUIDELINES FOR COPYRIGHT INFRINGEMENT

The Federal Sentencing Guidelines have not yet been amended to correspond with the changes in 18 U.S.C. §2319. Those sentencing guidelines for copyright infringement already in existence specify a base offense level of 6,⁸⁶ with an increase from the Fraud and Deceit table⁸⁷ for violations involving a re-

85. *United States v. Cohen*, 946 F.2d 430 (6th Cir. 1991) (The dissent argues that the consent decree should have been excluded as an offer to compromise a claim under Fed. R. Evid. 408).

86. Federal Sentencing Guidelines 18 U.S.C.A. App. 4 §2B5.3.

87. Federal Sentencing Guidelines, 18 U.S.C.A. App. 4 §2F1.1 (West Supp. 1993) provides the following adjustments based on the amount of the loss and the

tail value of more than \$2000. Further, an increase of from two to four levels may be made if the defendant was involved in a leadership role.⁸⁸ Fairly harsh adjustments are made if the

character of the offence:

- | | |
|-------------------------------|-------------------|
| (1) Loss (apply the greatest) | Increase in level |
| (A) \$2000 or less | no increase |
| (B) More than \$2000 | add 1 |
| (C) More than \$5000 | add 2 |
| (D) More than \$10000 | add 3 |
| (E) More than \$20000 | add 4 |
| (F) More than \$40000 | add 5 |
| (G) More than \$70000 | add 6 |
| (H) More than \$120000 | add 7 |
| (I) More than \$200000 | add 8 |
| (J) More than \$350000 | add 9 |
| (K) More than \$500000 | add 10 |
| (L) More than \$800000 | add 11 |
| (M) More than \$1500000 | add 12 |
| (N) More than \$2500000 | add 13 |
| (O) More than \$5000000 | add 14 |
| (P) More than \$10000000 | add 15 |
| (Q) More than \$20000000 | add 16 |
| (R) More than \$40000000 | add 17 |
| (S) More than \$80000000 | add 18 |
- (2) If the offence involved
- (A) more than minimal planning, or
 - (B) a scheme to defraud more than one victim, increase by 2 levels
- (3) If the offence involved
- (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization or a government agency, or
 - (B) violation of any judicial or administrative order, injunction, decree, or process, increase by 2 levels. If the resulting offence level is less than level 10, increase to level 10.
- (4) If the offence involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offence level is less than level 13, increase to level 13.
- (5) If the offence involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.
- (5) If the offence
- (A) substantially jeopardized the safety and soundness of a financial institution; or
 - (B) affected a financial institution and the defendant derived more than \$1000000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

88. Federal Sentencing Guidelines, 18 U.S.C.A. App. 4 §3B1.1:

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

defendant has any prior convictions. It is likely that the penalties will not become any lighter under the new 18 U.S.C. §2319. The value applicable to the sentencing guidelines is generally the actual retail value of the infringed product, not the selling price of illegal copies.⁸⁹ Whether available educational discounts will be taken into account in computing this value has apparently not been litigated.

Under the Federal Sentencing Guidelines,⁹⁰ a first conviction of a person who has never been convicted of any other crime is likely to result in the following sentences:

Level	Sentence
6	0-6 Probation, not a felony, as amount < \$2500
7-8	0-6 months probation or supervised release (felony with no factors increasing sentence)
9	4-10 Months imprisonment, or supervised probation with intermittent confinement (weekends in jail)
10	6-12 Months, conditions as for (9)
11	8-14 Months in prison, half of which may be in community confinement or home detention
12	10-16 Months, conditions as for (11)
13-18	12-18 Months of imprisonment; add 3 months to each end of the range for each level beyond 13
19	30-37 Months of imprisonment
20	33-41 Months of imprisonment
21	37-46 Months of imprisonment
22	41-51 Months of imprisonment
23	46-57 Months of imprisonment
24	51-60 Months of imprisonment, term could go to 63 months if convicted on multiple counts with consecutive sentences

Under the guidelines, the maximum five year sentence would be appropriate for a person with no prior convictions who organizes a group of five or more members who infringe

(b)if the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c)If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

89. *United States v. Larracuente*, 952 F.2d 672, 674 (2d Cir. 1992).

90. See table at Sentencing Guidelines, 18 U.S.C.A. App. 4 Ch. 5 Pt. A. The prior criminal record determines which column is used in the table, see 18 U.S.C.A. App. 4 §4A1.1; sentences are higher for those with prior convictions.

\$5,000,000 or more of materials; or for a person who infringes any copyright that was owned by a bank! While a dollar value of \$5,000,000 is highly unlikely in an educational setting, most infringers will not know if the copyright was acquired by a bank in settlement of a loan.

A supervisor of a computer lab having 15 machines, whose first offense involves buying one copy of software having a value of \$800 but loading it on all 15 machines for a total infringement of \$11,200 will have a level nine sentence of from four to ten months. If the copying was done at the request of the school principal, that principal may get a level eleven sentence of from eight to fourteen months.

Actual sentences for criminal copyright infringement sustained by appellate courts include a year of probation with a \$500 fine, six months imprisonment with a \$3400 fine,⁹¹ two years probation with a \$5000 fine,⁹² and about a year in prison.⁹³

IX. AVOIDANCE OF FELONY LIABILITY IN EDUCATION

An educational institution may avoid federal felony liability for copyright infringement under the amended statute by avoiding unauthorized copying, or by avoiding the *mens rea* of willfulness. This likely may be done through creating, following, and enforcing a plan to prevent unauthorized copying by students, teachers, administrators, and others with access to computers and copiers. Such a plan probably should include the following elements:

- a. Teaching those with access to computers and copy machines about their legal and moral responsibility to avoid copying, including some definition of the fair use doctrine.
- b. Having the plan endorsed by an attorney. The plan will then be admissible as legal advice on the issue of willfulness.
- c. Placing copyright reminder notices in computer rooms and on copiers.

91. United States v. Blanton, 531 F.2d 432 (10th Cir. 1975, amended 1976) (before adoption of the sentencing guidelines).

92. United States v. Malicoate, 531 F.2d 442 (10th Cir. 1975) (before adoption of sentencing guidelines).

93. United States v. Larracuent, 952 F.2d 672, 674 (2d Cir. 1992) (conviction enhanced from level 6 to sentencing guideline level 13 by value of 2652 counterfeit videotapes).

- d. Establishing someone to serve as a resource for obtaining permission to copy from the copyright owners. Many faculty and students have no idea of how to obtain this permission themselves.
- e. Periodically auditing the software loaded on school computers, since the felony retail value threshold is most easily reached through unauthorized copying of computer software. This audit should ensure, as a minimum, that adequate legal copies exist, and that no unauthorized software is loaded on the machines.
- f. Auditing any publications and course packets to ensure that permission to copy has been obtained for anything in them that might exceed the fair use exception.
- g. Establishing and enforcing some penalty applicable to those who ignore or do not follow the policy.

It must be understood that a court may find civil liability for copyright infringement under conditions where criminal liability is not found. Civil liability for damages may result even if the criminal element of willfulness is lacking.

X. CONCLUSIONS

The Software Publisher's Association was the primary lobby behind broadening felony copyright infringement by amending 18 U.S.C. §2319.⁹⁴ Computer software is a high value, easily duplicated item that is frequently copied in educational, business, and home settings.

Primarily because of the *mens rea* requirement of willfulness, interpreted as violating a known legal duty, the implications of the act are not nearly so sweeping as some commentators in the press have claimed. Infringements which involve uncertain aspects of copyright law, such as shrinkwrap licenses and reverse engineering, are unlikely to be found willful—especially if an opinion to that effect has been obtained from counsel.

The act does—as intended—pose the threat of substantial fines and prison terms for those who produce or distribute large quantities of counterfeit software or who deliberately evade purchase of the requisite number of copies in a business or educational setting.

Steven K. Barton

94. See, Mitchell Kapor, *Innocent Felons*, FORBES, Feb. 15, 1993, 208.