

Fall 1988

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Recommended Citation

James P. Broderick, In the Forest of Copyright Law, Are Son of Sam Laws Barking up the Wrong Tree, 22 J. Marshall L. Rev. 111 (1988)

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IN THE FOREST OF COPYRIGHT LAW, ARE SON OF SAM LAWS BARKING UP THE WRONG TREE?

JAMES P. BRODERICK*

No man but a blockhead ever wrote, except for money.¹

- Samuel Johnson

Doctor Johnson's sentiments were remarkably congruent with those of the drafters of the United States Constitution who, without much fine discrimination, decided that authorship is a good thing. The formative document of our republic embodied this policy by providing that Congress should have the power "[t]o promote the progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²

In 1977, the state of New York passed a law authorizing the confiscation of royalties from accused persons or convicts who capitalize on their crimes by reenacting them in the media.³ The purpose of the New York law is to provide an escrow account for the compensation of victims of crime.⁴ Two years later the New York law survived a court test.⁵ In 1983, New Jersey passed a similar measure,⁶ which also survived constitutional challenges based on the

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1. J. BOSWELL, *LIFE OF SAMUEL JOHNSON* 358 (Doubleday ed. 1946).

2. U.S. CONST. art. I, § 8, cl. 8.

3. N.Y. EXEC. LAW § 632-a (McKinney 1982).

4. The law stated that:

The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by (i) such convicted person; or (ii) such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representative.

N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

5. *Matter of Johnsen*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (N.Y. Sup. Ct. 1979).

6. N.J. STAT. ANN. § 52:4B-26 (West Supp. 1986).

contract clause and the first and fourteenth amendments.⁷ Currently, similar laws exist in over thirty states.⁸ These "Son of Sam" laws, named after the mass murderer who prompted the New York provision, have been the subject of a number of legal commentaries.⁹ Neither the court cases testing the laws nor the commentaries, however, have addressed the relationship of these laws to the copyright clause in the United States Constitution or to the 1976 Copyright Act. Interestingly, Son of Sam laws, such as the New York and New Jersey versions, appear to contravene the underlying policies of the copyright clause both facially and analytically.¹⁰ Also, the 1976 Copyright Act appears to pre-empt the laws, rendering them void.¹¹

PRE-EMPTION IN FEDERAL LAW

The supremacy clause of the United States Constitution provides that the Constitution itself, together with any laws passed pursuant to it, shall be binding notwithstanding any contrary provisions in a state constitution or law.¹² Thus, in the exercise of plenary powers, Congress may create a comprehensive scheme of federal regulation by explicitly forbidding state activity in a particular field. States may not legislate in that field unless Congress explicitly indicates an intention to leave room for local regulation. By contrast, in

7. *Fasching v. Kallinger*, 211 N.J. Super. 26, 510 A.2d 694 (1986).

8. ". . . Since 1978, thirty-two . . . states have enacted similar statutes, either supplementing existing victim compensation programs, or creating new criminal procedure provisions." Comment, *The Expansion of Victim Compensation Programs: Today's "Son of Sam" Legislation and Its Susceptibility to Constitutional Challenge*, 18 TOLEDO L. REV. 155 (1986). The author cites statutes from numerous jurisdictions.

9. See Comment, *supra* note 8; Note, *Alabama's Anti-Profit Statute: A Recent Trend in Victim Compensation*, 33 ALA. L. REV. 109 (1981); Note, *Compensating the Victim from the Proceeds of the Criminal's Story - The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROBS. 93 (1978); Note, *Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problem*, 68 CORNELL L. REV. 686 (1983); Note, *Criminals Selling Their Stories: The First Amendment Requires Legislative Reexamination*, 72 CORNELL L. REV. 1331 (1987); Note, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443 (1979); Note, *In Cold Type: Statutory Approaches to the Problem of Offender as Author*, 71 J. OF CRIM. L. & CRIMINOLOGY 255 (1980); Note, *The Son-of-Sam Laws: When the Lunatic, the Criminal, and the Poet Are of Imagination All Compact*, 27 ST. LOUIS U.L.J. 207 (1983); Note, *Crime Doesn't Pay: Authors and Publishers Cannot Profit From A Criminal's Story: Fasching v. Kallinger, No. L-069197-83, slip op. (N.J. Super Ct. Law Div. July 24, 1985)*, 55 U. CIN. L. REV. 831 (1987).

10. See *supra* note 2.

11. 17 U.S.C.A. § 201(e) (1982); see also 17 U.S.C. §§ 301 (a), 502 (1982).

12. The supremacy clause states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

areas where states have historically exercised the police power, a presumption exists in favor of state regulation unless Congress expresses a "clear and manifest purpose" to govern exclusively.¹³

Although previously states had common law jurisdiction over copyright matters, Congress clearly and manifestly pre-empted the entire field. Title 17 of the United States Code, which regulates copyright matters, pre-empts all state rights and remedies coming within the subject matter of sections 102 and 103 and respecting activities specified in section 106.¹⁴ Thus, the Copyright Act of 1976 protects all works of authorship fixed in a tangible medium of expression; no person is entitled to an equivalent right under state law.¹⁵

When it is not clear whether Congress has intended to pre-empt a field of regulation, the Supreme Court uses various tests to determine whether there is a conflict between federal law and state regulation. Today, the Court adheres to the principle articulated by Mr. Justice Black, that in the final analysis the Court's function is to determine whether the state statute "stands as an obstacle to the full purposes and objectives of Congress."¹⁶

In addition to such pre-emptive restrictions on state regulation, the fifth amendment forbids the taking of private property for public use without just compensation.¹⁷ In *Interstate Hotel Co. v. Remick Music Corp.*,¹⁸ the state of Nebraska sought to regulate the distribution of sheet music. The statute provided that distributors who did not meet its requirements would lose their exclusive right to

13. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

14. Title 17 addresses pre-emption in the following manner:

Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to-

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

17 U.S.C. § 301(b) (1982).

15. The Committee Notes continue: "PREEMPTION OF STATE LAW. The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of Federal Copyright Protection." *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980), quoting Notes of the Committee on the Judiciary, H.R. REP. No. 94-1476, 94th Cong., 2d Sess. (1976).

16. *Hines v. Daviclowitz*, 312 U.S. 52, 67 (1941); see also *Allied Artists Pictures Corp.*, 496 F. Supp. at 441-42.

17. ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

18. 157 F.2d 744 (8th Cir. 1946).

perform copyrighted works for profit within Nebraska. The provision redistributed that right to the citizens of the state. In striking down the statute, the district court said:

While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution (Amendment 14), and it is also violative of the Federal Copyright Act.¹⁹

Although rendered under the Copyright Act of 1909, this decision exemplifies how state regulation of copyrighted material for the public good can exceed its sphere and damage the federal scheme for protecting copyrighted works.

THE ARENA OF COPYRIGHT

Protection for an author begins at the moment he fixes his story or work of art in a tangible medium of expression.²⁰ This means that federal law protects a work from the point of creation regardless of publication or copyright registration. According to the United States Code, copyright protection subsists in original works of authorship fixed in any tangible medium of expression, including literary, musical, dramatic, pantomime, choreographic, pictorial, graphic, and sculptural works, motion pictures, audiovisuals, and sound recordings.²¹ A recent amendment also provides copyright protection for computer software.²²

Before the Copyright Act of 1976, statutory copyright protection was not available until publication or at least registration.²³

19. *Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523, 543 (D. Neb. 1944) (quoting *Buck v. Swanson*, 33 F. Supp. 377, 388 (D. Neb. 1939)), *aff'd*, 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809 (1947). *Remick* has been quoted for the proposition that rights elected to be reserved to the copyright owner are not waived or lost by reason of a grant of one or another of them. M. NIMMER, *NIMMER ON COPYRIGHT* § 8.01[A] (1987).

20. Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. 17 U.S.C. § 102(a) (1982).

21. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

17 U.S.C. § 102(a)(1)-(7) (1982).

22. 17 U.S.C. § 117 (1982).

23. The Copyright Act of 1909 states:

Under the old law, a publisher could more easily obtain control of an author's work during the transfer of the work from common-law copyrighted or registered status to a published work.²⁴ The present Copyright Act makes it more difficult for a publisher to obtain an author's copyright in the context of a collective work, such as a book of separately authored stories or articles.²⁵ This change in the law indicates a concern to protect authors as opposed to publishers and others. Consequently, the often repeated admonition that "no part of this publication may be reproduced without the permission of the publisher" — seen in almost every magazine — is often inaccurate. In most cases, an author of a magazine article is able to authorize reproduction independently of the publisher, because it is the author who retains the copyright under the law.²⁶

Copyright law grants authors exclusive rights to reproduce, distribute, perform, and display copyrighted material, to prepare derivative works, and to authorize others to do the same.²⁷

Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; or a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; or a photographic print if the work be a photograph; or a title and description with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale.

Copyright Act of 1909, as amended, section 12 (repealed 1976).

24. Most problems arose because of the definition of publication - the point at which common law protection died and statutory protection potentially began. A. MILLER & M. DAVIS, *INTELLECTUAL PROPERTY* 285 (1983).

25. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series. 17 U.S.C. § 201(c) (1982). See also *infra* note 54 and accompanying text for a discussion of copyright transfer.

26. Subject to sections 107 through 118, the owner of copyright under Title 17 has the exclusive right to reproduce the copyrighted work and to authorize reproduction. 17 U.S.C. § 106(1) (1982).

27. In addition to the right of reproduction, the statute lists the other rights as follows:

-
- (2) to prepare derivative works based upon the copyrighted work;
 - (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or transfer of ownership, or by rental, lease, or lending;
 - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
 - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individ-

The term "author" has two definitions in copyright law. First, an author is a person who originally fixes a work in a tangible medium of expression.²⁸ In this context, an author is one who writes down the words, records them on tape, or draws pictures. Second, an author is a person who hires another, such as a professional writer, to prepare a work in tangible form.²⁹ For example, if a wall street arbitrager or the owner of a brothel hires a writer to tell his or her story, then the arbitrager or madam, not the writer, is the author of the book.³⁰ According to Title 17, United States Code, section 201, the status of authorship is available to anyone either who can write his own story or who has access to a lawyer with sufficient expertise to draft a work-for-hire agreement. Leaving aside the question of expertise, lack of access to lawyers is not a prominent complaint of contemporary society. Therefore, of those authors who hire a professional to do their writing, only the authors who lack cleverness, resist exploitation, or who have no interest in doing so will fail to establish themselves as copyright holders.

THE SON OF SAM LAWS

It is interesting to conjecture why over thirty states passed laws which the pre-emptive force of the Copyright Act of 1976 may render void. There was not much judicial commentary on the Act in the late seventies, when the first Son of Sam laws were passed. Perhaps the pre-emption issue was simply not well understood. On the other hand, Son of Sam disputes included publishing companies whose counsel presumably made their livings on the understanding of copyright law.

The New York³¹ and New Jersey³² Son of Sam provisions dis-

ual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106(2)-(5) (1982).

28. See *supra* notes 20-21 for a discussion of the protection copyright rights.

29. Section 201(b) of the Copyright Act states:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

U.S.C. § 201(b) (1982).

30. *Id.* This is a presupposition that the conditions described in § 201(b) are met and that the parties have not agreed otherwise.

31. The pertinent text of the New York "Son of Sam" statute is as follows:

Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assigns of any person, accused or convicted of crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys

cuss the disposition of money arising from the commercial exploitation of products such as books, movies, etc. Consequently, one might expect that litigation arising from these provisions would involve copyright questions.³³ Up to this time, however, both courts and commentators have focused their analysis elsewhere. For example, in *Fasching v. Kallinger*,³⁴ the most important case involving a Son of Sam statute, the New Jersey Superior Court avoided copyright issues altogether.

Kallinger concerned proceeds from a book about the murder of a young woman. A professional writer had written the book from the point of view of the man who killed her. The lower court determined that all the proceeds from the book, including those due the writer and publisher, were to be turned over to the New Jersey Violent Crimes Compensation Board.³⁵ In holding for the state, the court also ruled on a number of constitutional issues, namely issues pertaining to the first amendment, validity and due process, and the contract clause. The lower court judge found that the statute did not restrict the right to publish accounts of crimes in violation of the first amendment, but "merely provided reasonable time, place and manner guidelines in which to publish such accounts of the criminal mind."³⁶ The judge found further that the statute did not restrict the right of the press to information, because "a criminal who wishes to speak to the media 'will speak regardless of any monetary incentives.'³⁷ Thus the statute was "a reasonable restriction on that portion of speech which causes the convicted criminal or his assigns to profit."³⁸ He found that any burden on expression was incidental and would survive constitutional scrutiny.³⁹ The judge

which would otherwise by terms of such contract, be owing to the person so accused or convicted or his representative.

N.Y. EXEC. LAW § 632-a (McKinney 1982).

32. The New Jersey statute reads in pertinent part as follows:

Every person, firm, corporation, partnership, association or other legal entity contracting with a person convicted or accused of a crime in this State or an agent, assignee, beneficiary, conservator, executor, guardian, representative, relative, friend, associate or conspirator of a person convicted or accused of a crime in this State, with respect to the reenactment of the crime, by way of a movie, book, magazine article, other literary expression, recording, radio or television presentation, live entertainment or presentation of any kind, or from the expression of the person's thoughts, feelings, opinions or emotions regarding the crime, shall submit a copy of the contract to the board and shall pay over to the board all moneys which would otherwise by terms of the contract, be owing to the person convicted or accused of a crime in this State.

N.J. STAT. ANN. § 52:4B-28 (West Supp. 1985).

33. See *supra* note 21 for a more complete discussion of copyright protections.

34. 211 N.J. Super. 26, 510 A.2d 694 (1986).

35. *Id.* at 33-34, 510 A.2d at 699.

36. *Id.* at 34, 510 A.2d at 699.

37. *Id.*

38. *Id.*

39. *Id.*

also rejected the defendant's arguments that the statute was void for vagueness and that it violated defendants' right to due process under the fourteenth amendment.⁴⁰ Furthermore, the judge found that the statute did not impair the defendant's right to freedom of contract.⁴¹ The foregoing issues have been the subject of numerous legal commentaries.⁴²

Without reaching the constitutional claims,⁴³ the Superior Court of New Jersey decided that the statute applied not to the writer or publisher of the book, but only to the convicted criminal, Kallinger.⁴⁴ The court stated that the mandated confiscation of royalties in the New Jersey statute did not apply to authors, because "[t]he manifest purpose of the statute was to prevent criminals from profiting from media reenactment of their crimes."⁴⁵ From this language it is clear that the court did not believe that the criminal was the true author of the book. The court did not analyze the meaning of the term "author;" it merely assumed that when a criminal relates his story to a writer for publication, the writer automatically becomes the "author" of the book.

Thus the question remains: was the criminal in *Kallinger* the author, or wasn't he?⁴⁶ As we have already seen, an author is one who originally fixes a work in a tangible medium. But what if a criminal writes down his version of his story or records it on a tape recorder, and a professional writer incorporates those words into the finished book? The Copyright Act of 1976 provides an answer: "The authors of a joint work are co-owners of copyright in the work."⁴⁷ The Act tells us that authors are joint authors if they collaborate or prepare their works separately with the intention of merging them into a unitary whole.⁴⁸ For example, a criminal writing an autobiography is an author. A criminal who hires a writer to tell his story is an author. A criminal who cooperates with a writer by contributing accounts of his thoughts and feelings which the writer fixes in a tan-

40. The judge rejected a "void-for-vagueness" challenge to the statute as well as claims it violated defendants' right of due process. *Id.* He found the scope and terms of the statute clear and said that defendants did not have a cognizable interest in the profits they expected to generate from the contracts. *Id.* However, the judge did not mention the exclusive rights under copyright or how they elude cognizance.

41. *Id.*

42. See *supra* note 9 for additional commentaries on "Son-of-Sam" Laws.

43. *Kallinger*, 510 A.2d at 704.

44. *Id.* at 702-03.

45. *Id.* at 704.

46. Defendant Flira Schreiber is a professor of English and Speech and Assistant to the President of the City University of New York's John Jay College of Criminal Justice. She authored a book, *The Shoemaker: Anatomy of a Psychotic*, a "psycho-biography of Joseph Kallinger," which was the subject of litigation. *Kallinger*, 510 A.2d at 697.

47. 17 U.S.C. § 201(a) (1982).

48. 17 U.S.C. § 101 (1982).

gible medium for publication is a co-author. Under the Copyright Act of 1976, authors and co-authors are entitled to copyrights which continue to exist even despite omission of a copyright notice.⁴⁹

In the recent case of *Quinto v. Legal Times of Washington, Inc.*,⁵⁰ a federal district court found the need to explain one of the most fundamental principles of copyright law: that an author's permission is generally necessary for the use of his work. The editor of the *Legal Times* had formed a vague verbal agreement with the former editor of the *Harvard Record* to include material from the *Harvard Record* in the *Legal Times*.⁵¹ Quinto had written an article on summer clerkships for the *Harvard Record*. When Quinto published his article in the *Harvard Record*, the editor of the *Legal Times* made an attempt to clear it with the *Harvard Record* editor presently in office.⁵² Unable to make contact, he included the article in the *Legal Times* on the basis of the former verbal agreement.⁵³

In granting Quinto relief for infringement of his copyright, the court stated that the copyright belonged to Quinto, because the copyright originated with Quinto, and he had not transferred it.⁵⁴ A transfer of copyright from the *Harvard Record* to Quinto was thus not necessary for Quinto to obtain relief. The court highlighted the failure of a lawyer working for a legal publication to observe copyright law when it stated:

On the facts of this case, Beckwith, a member of the bar acting on behalf of a legal newspaper, could not reasonably rely upon the vague oral permission given him to reprint any article from the *Harvard Law Record* as constituting permission to republish the Quinto article, particularly since the permission was given by a previous editor at least nine months before the Quinto article was ever written.⁵⁵

Because of copyright law, in failing to recognize that the copyright in Quinto's article belonged to the author, the editor failed to fulfill a legal duty. As the court noted, "[a]t a minimum Beckwith had a duty to inquire whether the *Record* owned the copyright to Quinto's article in order to claim he was misled and acted in good faith."⁵⁶

49. 17 U.S.C. § 405 (1982).

50. 506 F. Supp. 554 (D.D.C. 1981).

51. *Id.* at 561.

52. *Id.*

53. *Id.*

54. The court stated:

There was no express transfer of copyright from Quinto to the *Record*, so the *Record* had no rights in the article except those pertaining to the collective work. It is immaterial that the plaintiff did not record the assignment from the *Record* to him, since plaintiff's claim to the copyright was by virtue of *authorship* and not by virtue of *transfer*.

Id. at 559.

55. *Id.* at 562-63 (footnote omitted).

56. *Id.* at 563 (footnote omitted).

In the *Kallinger* case, there was apparently no mention of a copyright issue and no evidence that Kallinger had either fixed his story in a tangible medium or signed a work-for-hire agreement with his writer. The methodology of the *Kallinger* court in regarding the professional writer rather than the criminal as the author may have been justified on the facts of that case. The *Kallinger* court and other courts dealing with similar fact scenarios nevertheless have failed to identify and test the question of whether any of the criminals involved was an author.⁵⁷ Instead, courts have further obscured the issue by casually referring to the professional writer as the author in the same breath, while relegating the criminal to the role of the story's "producer."⁵⁸

Congressional intent seems to indicate that persons should have a choice: to write their own stories or to have the stories represented by a professional writer. The intent seems to include room for the view that persons who choose to rely on another's writing ability should not have to engage in literary champerty by selling story rights to a hack writer.⁵⁹ Consistently with this intent, the Copyright Act of 1976 appears to include not only the legally armed but also the legally unarmed and untrained criminal within the definition of an author and copyright holder.⁶⁰ If the definition includes all such persons, the criminals which Son of Sam laws regard as having profited from reenactments of their crimes attain a *de facto* congruity with the criminals the Copyright Act regards as copyright holders. At this point, the failure of Son of Sam laws to distinguish between criminals who are authors and those who are not emerges as a subterfuge for regulating copyright holders as copyright holders outside the parameters of the federal scheme. Of course, the analogy to champerty is not strict; some criminals may wish to sell their stories or copyrights. Presently, however, some criminals are undoubtedly copyright holders, and an attempt to regulate proceeds of their copyrighted works must withstand federal scrutiny.

Another way to avoid application of copyright law is to mistake another, probably more popular rule of law as dispositive of the

57. *Fasching v. Kallinger*, 211 N.J. Super. 26, 45, 510 A.2d 694, 704 (1986).

58. Without commentary, the *Kallinger* court quoted the state attorney general as follows:

The trial court's construction of the Amendment as requiring that the profits earned by the author and publisher of a literary account of a crime (as related by a criminal defendant) be forfeited to the Violent Crimes Compensation Board for distribution to victims of the crime and others is at odds with the express language of the Amendment, its title and the legislative history thereof.

Id. at 43-44, 510 A.2d at 704.

59. See *supra* text accompanying notes 47-49 for a discussion of ownership rights of joint authors.

60. *Id.*

matter at hand. This was done in the *Kallinger* case where the court applied the doctrine of commercial speech,⁶¹ which permits the regulation of for-profit communication.⁶² The application of the doctrine in the *Kallinger* case might seem questionable, however, because, while most commercial speech cases arise from attempts to regulate public distribution of advertising, *Kallinger's* book was not advertising. Furthermore, there was no claim that *Kallinger* was throwing copies of the book at unwilling passersby in a shopping mall. When otherwise constitutionally protected speech strains the tolerance of society, courts use the doctrine of commercial speech as a judicial gloss to diminish first amendment protection.

The books of criminals are not advertisements for artifacts but rather artifacts themselves. They are the writings of authors, and as such they are specifically protected by the copyright clause of the United States Constitution and the Copyright Act of 1976. These specific constitutional and statutory protections should make it unnecessary for criminal-authors to seek more general protection under the first amendment.

THE COPYRIGHT ACT OF 1976 V. THE SON OF SAM LAWS

Section 301 of the Copyright Act of 1976⁶³ of the United States Code provides that state laws may not grant legal or equitable rights equivalent to the rights of copyright holders under the federal law. Since the Son of Sam laws do not seek to grant equivalent copyrights, but rather seek to seize money due to certain authors, we must bypass section 301 and focus on section 201(e). Section 201(e) specifies that when an author has not made a voluntary transfer of a copyright, no governmental body, official, or other organization can "seize, expropriate, transfer, or exercise rights of ownership with re-

61. Without considering the constitutional implications, the appellate court reported the lower court's determination that the statute is "a reasonable restriction on that portion of speech which causes the convicted criminal or his assigns to profit." *Kallinger*, 211 N.J. Super at 34, 510 A.2d at 699.

62. To support this proposition, the Court in *Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976), stated that "[t]he First Amendment, as we construe it today, does not prohibit the State from ensuring that the stream of commercial information flow cleanly as well as freely."

63. Section 301 of the Copyright Act reads:

Preemption with respect to other laws (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301 (1982).

spect to the copyright."⁶⁴ The original language of this subsection recognized no exceptions. A 1978 amendment,⁶⁵ however, made an exception for copyright divestiture resulting from the application of the Bankruptcy Act.⁶⁶ According to a rule of statutory construction,⁶⁷ a list of specific items operates to exclude other, although related, items; therefore, where Congress specifically excepted only divestiture due to bankruptcy, no exception would be available for Son of Sam laws. As laws seeking to seize, expropriate, or exercise rights of ownership respecting works properly within the subject matter of copyright, Son of Sam laws thus have no effect under section 201(e).⁶⁸

The materials listed in the Son of Sam laws, including movies, books, television presentations, and magazine articles, specifically overlap with the list of copyright-protected material in Title 17 of the United States Code.⁶⁹ In light of this congruity, let us examine the New York and New Jersey Son of Sam laws. These statutes provide that contracts for "reenactments" of a crime must include a clause mandating the payment to the victim's escrow account of proceeds otherwise belonging to the criminal.⁷⁰ One commentator stated that Son of Sam laws are unconstitutionally vague because, for one, "there are no guidelines provided for determining exactly when a crime has been 'reenacted.'"⁷¹ However, it is difficult to see how a "reenactment" of a crime could be anything else but that particular crime fixed in a tangible medium of expression. As long as the reenactment consists of a reproduction, distribution, performance, display or production of a derivative work in such a tangible medium, the reenactment belongs to a category of works entitled to copyright protection under Title 17.⁷²

Son of Sam laws speak of regulating rights emanating from reenactments of a criminal's thoughts and feelings fixed in books and movies and other media.⁷³ As we have just seen, these media are the same media addressed by the Copyright Act of 1976.⁷⁴ Son of Sam

64. 17 U.S.C. § 201(e) (1982).

65. Pub. L. No. 95-598, § 313, 92 Stat. 2676 (1978).

66. 11 U.S.C.A. §§ 101-1,330 (Supp. 1988).

67. "*Expressio unius exclusio alterius*. If one or more specific items are listed, without any more general or inclusive terms, other items, though similar in kind are excluded." J. JACKSON, *CONTRACT LAW IN MODERN SOCIETY* 1020 (1973).

68. See *supra* note 64 and accompanying text.

69. See *supra* notes 21, 31-32.

70. See *supra* notes 31-32 and accompanying text.

71. Comment, *The Expansion of Victim Compensation Programs: Today's "Son of Sam" Legislation and Its Susceptibility to Constitutional Challenge*, 18 *TOLEDO L. REV.* 155, 176 (1986).

72. See *supra* notes 26-27 and accompanying text.

73. See *supra* notes 31-32 and accompanying text.

74. See *supra* note 21 and accompanying text.

laws direct the payment of proceeds from the reenactments to victims' escrow funds.⁷⁵ In a case concerning disposition of proceeds from a book about David Berkowitz, the Son of Sam, the court referred to the money as "royalties."⁷⁶ Of course, royalties are the tangible economic aspect of the right to reproduce and distribute the work of authorship. Therefore, Son of Sam laws attempt to regulate the same matter and affect the same rights as those regulated and affected by the Copyright Act of 1976.

THE PURPOSE OF COPYRIGHT

It is well-established that a state may regulate copyrighted works for the public benefit. In *Allied Artists Pictures Corp. v. Rhodes*,⁷⁷ a film distributor sought to enjoin the state of Ohio from enforcing a motion picture licensing statute. In affirming the trial court's decision to uphold the Ohio law, the Sixth Circuit stated: "[T]urning to the copyright preemption challenge, we do not find authority for the argument that state trade regulation which affects the distribution procedures and, indirectly, monetary returns from copyrighted property is invalidated implicitly or explicitly by the terms of the Copyright Act . . . or the Copyright Clause."⁷⁸ Highly operative in the above ruling is the word "indirectly." Under the Ohio law, movie distributors retained the capability to distribute their copyrighted material for profit. Despite whatever burden or tax state law placed on such activity, the potential remained for economic gain. Thus, state regulation sits as a permissible "overhead" above the exercise of exclusive economic rights.

Another example of state regulation occurred in *Interstate Hotel Co. v. Remick Music Corp.*⁷⁹ In *Remick*, the Eighth Circuit struck down a Nebraska statute which deprived music distributors who did not meet certain requirements of their rights. Specifically, the distributors lost their exclusive right to perform copyrighted works for profit within the state.

The critical difference between *Allied Artists* and *Remick* is that in the former the state regulated the copyright, and in the latter the State took the copyright. In *Allied Artists* the copyright owners were left with a way of making money from their copyrights, whereas in *Remick* they were not. This factual difference provides

75. See *supra* notes 31-32 and accompanying text.

76. *Matter of Johnsen*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (1979). "She must not, therefore, be exposed to a substantial potential liability for failure as a fiduciary, to report to the Internal Revenue the royalties payable under the contract." *Id.* at 826, 430 N.Y.S.2d at 907.

77. 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd*, 679 F.2d 656 (6th Cir. 1982).

78. *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 662-63 (6th Cir. 1982).

79. 157 F.2d 744 (8th Cir. 1946).

the key to the underlying policy considerations which reconcile the seemingly contradictory decisions. The court in *Allied* made the point that the primary purpose of the grant of copyright is public benefit. In doing so, the court said: "[C]opyright law, like the patent statutes, makes reward to the owner a secondary consideration."⁸⁰ The inescapable secondary purpose of copyright law is to reward the author. This secondary purpose of economic motivation to potential authors secures the primary purpose of public benefit. Without such motivation, the whole federal copyright scheme would fall apart. Therefore, state statutes which totally deprive an author of his copyright and derivative right to profit are invalid legislation.

On September 2, 1987, the following news item appeared in *USA Today*: "A New York judge ordered the conservator for imprisoned 'Son of Sam' killer David Berkowitz to pay \$118,433 earned from movie and book deals to eight of Berkowitz's 13 victims."⁸¹ A court had adjudged David Berkowitz mentally incompetent; therefore his conservator decided all subsequent courses of action in his stead.

Joan Harris and Sydney Biddle Barrows proved to be less compliant addressees of Son of Sam laws. Sydney Barrows was convicted of promoting prostitution and wrote a book about it. The Crime Victims Board subpoenaed her publishing contract. The court, however, found that promoting prostitution was a "victimless crime," and Ms. Barrows won a dismissal of her subpoena.⁸² Having been convicted of murder, Ms. Harris wrote an autobiography. She proposes to donate the proceeds of her book to charity.⁸³

Douglas H. Forde recently published an article on reducing taxes by the use of Subchapter S. Corporations. *USA Today* noted the following: "*Inc.* decided to hire Forde, who said he was a financial consultant, after his agent sent proof of Forde's book, *Keep the Profits*. Only after publication did *Inc.* learn from a reader that Forde was doing time in the Collins Correctional Facility in Hel-muth, New York, for two counts of second-degree grand larceny."⁸⁴ Forde had planned to write two books. Two publishers, Viking Press and Fact on File, decided not to observe their contracts with him, and Forde declined to further pursue publication.⁸⁵ The exact reasons for such cancellations may never reach the public. However,

80. United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

81. USA Today, Sept. 2, 1987, § A at 2, col. 6.

82. See Comment, *The Expansion of Victim Compensation Programs: Today's "Son of Sam" Legislation and Its Susceptibility to Constitutional Challenge*, 18 TOLEDO L. REV. 155, 165 (1986).

83. *Id.* at 166.

84. USA Today, Aug. 27, 1987, § B at 2, col. 3.

85. *Id.* at col. 7.

since Forde's conviction and incarceration are in New York, a "Son of Sam" state, the spectre of litigation will linger over the royalties from his books.⁸⁶ The prospect of such litigation is unappealing to publishers, even if they were likely to win.

WHAT IS SEIZURE OF INTANGIBLE PROPERTY?

One common presumption about tangible property is that it belongs to the one who possesses it. One cannot so easily distinguish intangible property. One cannot presume, for instance, that someone carrying a copy of *Treasure Island* is the author or copyright owner. Most tangible property consists of material which existed before its owner and will survive him. As the world's population grows, the amount of tangible property is unlikely to increase. On the other hand, intangible property is usually the production of an individual or society. A novel emanates from its author; a law from a legislature. Both lose meaningful existence when everyone ceases to understand them. Intangible property is created every day, and, as the population increases, even more is likely to appear. As governments look around for property to confiscate, their gaze is likely to fall on intangible property.

Perhaps envisioning this probability, Congress provided in the Copyright Act of 1976 that a copyright may not be taken for a public purpose, with or without just compensation.⁸⁷ The Copyright Act forbids any governmental body to "seize," "expropriate," "transfer," or "exercise" a copyright involuntarily. Although the Act defines "transfer" of copyright,⁸⁸ the Act fails to define "seizure," "expropriation," or "exercise." It is reasonable to suppose that Congress omitted definitions of these terms in order to leave them with the meanings they bear in ordinary language. Ordinary language has less precision than legal terminology; by the same token, however, it has

86. "He had bilked New York clients of more than \$280,000." *Id.* at Col.5.

87. The Act provides in pertinent part:

Involuntary Transfer. —When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title except as provided under Title 11.

17 U.S.C. § 201(e) (1982). The exception for Title 11 allows a bankruptcy court to transfer copyrights.

88. A "transfer of copyright" is defined in the statute as follows:

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

17 U.S.C. § 101 (1982).

larger scope. By leaving the description of forbidden activities undefined, Congress effected the invocation of the broadest possible scope of meaning for the terms, and, consequently, for copyright.

When one examines what these terms mean in ordinary use, it is clear that the seizure of a copyright is an activity. The contemporary English philosopher Gilbert Ryle generally analyzed the concept of activity by stating that "characterizing activity a certain way does not determine its true effect. The state of affairs the activity causes must be examined to determine that."⁸⁹ To relate the analysis to the concept of seizure, one might say that mere characterization of a seizure of all economic proceeds as being less than a seizure of copyright can have no determinative force. Even the foundation of such a claim on a fact can have no force if the fact is not an essential one. Only a particular state of affairs can validate a concept, so that "[f]or a runner to win, not only must he run, but also his rivals must be at the tape later than he . . ."⁹⁰ To say that a runner won when he ran a race with no one else on the track would be a misuse of the concept of winning. Often we have different names for different components of the same activity. Thus, Ryle commented further that "[w]hen a person is described as having fought and won, or as having journeyed and arrived, he is not being said to have done two things, but to have done one thing with a certain upshot."⁹¹ As another example, student A does all of his work for four years but does not pay his tuition. He receives no diploma. Student F turns in plagiarized work. He graduates. How is each to answer the question "Did you finish high school?"

A state enforcing a Son of Sam law may be disposed to say that seizure of all beneficial proceeds from a copyright leaves the owner with the right to exclude others from using his property.⁹² However, as a legitimate option, this must be in distinction to getting less than hoped.⁹³ Excluding others against the alternative of getting nothing at all does not seem to be part of the copyright scheme.⁹⁴ Hence, taking all the proceeds and leaving the owner with the right

89. G. RYLE, *THE CONCEPT OF MIND* 150 (1949).

90. *Id.*

91. *Id.*

92. Further stated: "The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property." *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980) (quoting *Fox Film v. Doyal*, 286 U.S. 123 (1932)).

93. "The first three contentions proceed from the erroneous premises that the copyright confers on its owner the right to dispose of its subject matter on the optimum terms and that the fundamental purpose of the copyright laws is to reward the owner. *Allied Artists Pictures Corp.*, 496 F. Supp. at 446.

94. See *supra* note 78 and accompanying text. The ability to exclude individuals from exercising an exclusive right under copyright *apart from financial considerations* may be a mere "moral" right.

to exclude others from his property does not seem to be the same as taking the proceeds and leaving the owner with his copyright.

There is a certain medieval paradigm which postulates the existence of "bare rights" which can exist like angels or souls without bodies. Certain authors explained this concept as follows: "If such beings exist, their substance is not composite; they are not substantially determinable and so cannot undergo a substantial change."⁹⁵ Furthermore, their substance is entirely determinate; they are entirely what they are. There is nothing else in their substance except their specific perfection.⁹⁶ Underlying this medieval idea is the erroneous assumption that an element of a compound (such as the soul of a man or the right to exclude others from use of property) can be separated from the other elements (such as the body of a man or the proceeds of a copyright) without a qualitative change in the essence of the compound. As a more modern view of components and compounds indicates: "The composition of water is explained by the assumption that the oxygen atom has 16 times the mass of the hydrogen atom and that the water molecule contains 2 atoms of hydrogen and 1 atom of oxygen."⁹⁷ We see that removing the hydrogen, even if leaving the oxygen, would destroy the water. Oxygen is not water bare of hydrogen; oxygen has different qualities than water. Whoever drinks only oxygen will remain thirsty. Similarly, removing the economic proceeds from a copyright, even if leaving the right not to distribute one's story, would destroy a copyright.

An essential characteristic of copyright is its economic component. In a case wherein the defendant claimed the doctrine of fair use as a basis to publish excerpts from President Ford's autobiography, the Supreme Court vividly described the economic component like this: "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."⁹⁸

In cases testing the validity of state laws against the Copyright Act of 1976, courts have determined that states may not create rights, whether statutory or common law, which are equivalent to any of the rights under federal copyright law. Thus, adding elements to a cause of action will distinguish that cause from copyright only if, as a result, the cause takes on a qualitatively different form. In

95. G. KLUBERTANZ, *INTRODUCTION TO THE PHILOSOPHY OF BEING* 104 (2d ed. 1963).

96. *Id.*

97. F. VERWIEBE, G. VAN HOOFT, & R. SUCHY, *PHYSICS-A BASIC SCIENCE* 256 (4th ed. 1963).

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

Mayes v. Josiah Wedgwood & Sons,⁹⁹ the plaintiff sought relief on the common law theories of conversion and misappropriation. In ruling that copyright law pre-empts such causes of action, the court said that "[the] extra element, however, must be one which changes the nature of the action so that it is *qualitatively* different from a copyright infringement claim."¹⁰⁰

The sparse jurisprudence interpreting section 201(e) of the Act does not yet present a full codex for its application. It seems clear, nevertheless, that federal copyright law should pre-empt any state seizure of a component element of a copyright if the seizure renders the remaining elements qualitatively changed. It seems also obvious that, by seizing all of the economic proceeds of a work, Son of Sam laws not only substantially lessen copyrights, but also change their essential character.

EFFECT OF SON OF SAM'S LAWS ON INFRINGEMENT OF COPYRIGHT

The Copyright Act of 1976 provides a full range of remedies for copyright infringement. A court may enjoin an infringer to prevent or restrain infringing activities.¹⁰¹ A court may impound and destroy infringing articles.¹⁰² Finally, a court may impose not only actual damages related to the infringer's gross revenue, but statutory damages as well.¹⁰³ Son of Sam laws, on the other hand, provide that all

99. 601 F. Supp. 1523 (S.D.N.Y. 1985).

100. *Id.* at 1535 (emphasis in original).

101. The Copyright Act of 1976 provides in pertinent part:

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

17 U.S.C. § 502(a) (1982).

102. The Copyright Act of 1976 provides in pertinent part:

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecord claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction of other reasonably disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

17 U.S.C. § 503 (1982).

103. The Copyright Act of 1976 provides in pertinent part:

(a) In General — Except as otherwise provided by this title, an infringer of copyright is liable for either-

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

17 U.S.C. § 504(a) (1982).

royalties from copyrighted works must go to victim compensation funds.¹⁰⁴ The goals of these very distinct federal and state provisions often compete, creating even more reasons why the two sets of laws make such poor bedfellows. Unfortunately for a criminal-author in a Son of Sam state, the Copyright Act starts from the belief that a copyright holder will face an infringer as one businessman to another, that is, with revenues in hand and a potential recovery from the infringer.

Let us imagine that criminal-copyright holder John Doe contracts with Publisher to publish his story in a Son of Sam state. Doe retains the copyright. After publication, Infringer copies and distributes the story without license from Doe. If Doe sues Infringer and obtains damages, the damages go to a criminal instead of a victim's fund because the recovery proceeds not from a contract between Doe and Infringer, but from a federal lawsuit.¹⁰⁵ Such a result not only frustrates the purpose of the Son of Sam law, but also prompts a criminal-copyright holder to foster infringement.

In an alternative situation, a federal court orders the copyright infringer to pay damages to the copyright holder. The Son of Sam state simultaneously orders the infringer to pay the money to the victim's fund. If the federal court decides that the victim's fund is the rightful recipient of the damage money, all possibility of recovery disappears, and no criminal-copyright holder will ever again sue for infringement in that state.¹⁰⁶

Son of Sam laws may succeed in preventing criminals from profiting from their crimes in the context of a common scheme for distributing copyrighted work. If Doe sells his copyright directly to Publisher who then pays royalties intended for Doe to the victim's fund, Infringer can count on a lawsuit from Publisher. This result benefits the federal scheme in that the victim of infringement, here Publisher, retains his right to sue, but harms the state scheme in that the victim's fund will never see the infringement damages. Unless copyright holders gratuitously sue infringers on behalf of victims' funds, states will be powerless to capture the profits generated by infringement except by some state action equivalent to the federal scheme for redressing infringement.

Additional evidence that Son of Sam laws are blind to the structure of copyright law appears after further scrutiny of the New

104. See *supra* notes 31-32 and accompanying text.

105. See *id.*

106. Since the state is not the legal copyright holder, it may not sue for infringement under any circumstances. The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. See 17 U.S.C. § 501(b) (1982).

York statute, which states in relevant part:

8. Notwithstanding the foregoing provisions of this section the board shall make payments from an escrow account to any person accused or convicted of crime upon the order of a court of competent jurisdiction after a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process.¹⁰⁷

Of course, criminal defendants are entitled to the services of a public defender, and copyright holders have a statutory basis for recovering attorney's fees. Nevertheless, Son of Sam states like New York provide for a criminal's defense from the profits of a "reenactment" of his crime. These states do not, however, allow criminal authors to use their divested royalties for defending copyrights in infringement suits. If the various Son of Sam states recognize that an individual will not have funds to defend himself in criminal court, the states must also recognize that he will not have funds for a copyright lawyer.

The omission of such attorneys' fees provisions is particularly pernicious against a person accused of a crime who is not subsequently convicted.¹⁰⁸ By the time funds find their way back to the former defendant, who could use the funds for infringement suits, the remedy of injunction may be useless. Thus, infringers may "run wild" while the state impounds copyright royalties.

The effect of this aspect of Son of Sam laws on the pursuit of remedies for infringement is consistent with the general effect of the laws, which is to weaken not only the federal protection for a certain set of copyright holders, but also the entire federal scheme. The provision of copyright royalties to pay for legal services would surely motivate copyright owners to battle infringement. Reasonably supposing that Congress envisioned such use of royalties in designing the copyright scheme, state legislatures should reexamine the devastating effects of Son of Sam provisions on federal copyright law.

POLICY CONSIDERATIONS

The copyright clause of the United States Constitution¹⁰⁹ expresses the policy of the Copyright Act of 1976. This policy is to promote progress "in Science and the useful Arts" by providing authors with control over their writings. The intent and rationale of the Act is that providing authors with control over their writings

107. N.Y. Exec. Law § 632-a (McKinney 1982).

108. The Son of Sam laws operate not only against convicted felons, but also against persons accused of crime. See *supra* notes 31-32 and accompanying text.

109. See *supra* note 2 and accompanying text.

will give them incentive to create. Removing that control will also remove the incentive.

The commission of a crime is evil and should be deterred. The writing of a book is good and should be encouraged. The heading on the New York Son of Sam statute, "Distribution of moneys received as a result of the commission of a crime,"¹¹⁰ most blatantly trumpets the failure to make this distinction.

Whereas the New York legislature identified writing a book about crime with the crime itself, the New Jersey *Kallinger* court distinguished the two acts when it stated: "There are no cases suggesting that an author or publisher producing a book about a criminal and compensating him for his story aids the criminal in his illegal goal."¹¹¹ This was a keen observation because, indeed, committing a crime does not produce a book; the efforts of the author do. Similarly, producing a book does not produce royalties; the desire of the buying public does. Causes which are necessary for the production of a result, but not sufficient to produce it, are called conditions. To claim that such conditions produce results is absurd. For example, certainly *Kallinger* could not have produced a book about his crime unless he had avoided being hit by a truck as a five-year-old, but to claim that his royalties were the result of not being hit by a truck is confused and meaningless. To claim that his royalties were the result of his crime is equally confused and meaningless. The confusion disperses only when one recognizes that the criminal's book is a direct result of the criminal's authoring efforts coupled with public demand.

Knowledge of how the criminal mind operates or how it may be controlled can be a valuable asset. The phenomenon of computer criminals who have turned into "security analysts" sometimes for the very companies they have robbed provides an appropriate example.¹¹² Had the programs of these criminals been confiscated and auctioned, there would have been as little demand for them as for burglar tools. Who would know how to use them? Also, the royalties from the books of two or three famous criminals a year would provide little relief for the tens of thousands of crime victims each year in this nation, whereas books unlocking the secrets of the criminal mind would provide great benefit to society, the criminal justice system at large, and potential victims. If criminal-authors lose the monetary incentive, society may lose a valuable benefit.

The Son of Sam laws are some of the most poorly structured

110. See *supra* note 31 and accompanying text.

111. *Fasching v. Kallinger*, 510 A.2d 700 (1986).

112. See Lewyn, *Ex-cons Help Thwart Theft by Computer*, USA Today, Feb. 24, 1988 § B, at 1, col. 3.

legal rules of the twentieth century. Their ineffectiveness in aiding victims is outweighed only by the damage they do to the rights of authors and publishers.

CONCLUSION

The Son of Sam laws of New York and New Jersey and the copycat provisions of other states attempt to regulate matter preemptively regulated by the Copyright Act of 1976. Consequently, these laws impermissibly interfere with the rights of authors under federal law. By stripping the economic proceeds from copyrighted works, Son of Sam provisions qualitatively change the copyright into something worth substantially less than federal law intends, thereby destroying the federal scheme to promote creativity. By channeling all economic gain toward parties who do not have a right of action against infringers, the laws also destroy the federal copyright scheme to combat infringement. For these reasons the state laws are void under section 201(e) of the Copyright Act of 1976.

The result is just from the point of view of public benefit. The paltry amount of money states glean from a few celebrity criminal authors scarcely outweighs the damage to the rights of authors recording and analyzing their crimes. The Son of Sam laws were misconceived because states failed to adequately understand and enforce the rights of authors under federal copyright law.