

December 19, 2006

Attorney General Kelly A. Ayotte  
New Hampshire Dept. of Justice  
33 Capitol Street  
Concord, NH 03301

Dear Attorney General Ayotte:

This serves essentially as executive summary for an attached Pierce Law Intellectual Property Amicus Clinic memorandum. It respectfully calls on New Hampshire's chief legal and law enforcement officer for action on two copyright-related matters, one legislative and one judicial.

The first matter of concern is N.H. Rev. Stat. Ann. (RSA) §§ 352:1, :2. After Jan. 1, 1978, those sections have been preempted by 17 U.S.C. 301(a). Since then, states' jurisdiction over infringement has been limited to works not yet "fixed in a tangible medium of expression." *Id.*

Remaining State authority is illustrated by RSA § 352-A:2, the statute initially involved in *State v. Cohen*, 907 A.2d 983 (N.H. 2006). Unfortunately, *Cohen* also illustrates that the impact of 17 U.S.C. § 301(a) will escape the notice of New Hampshire prosecutors and judges as long as RSA §§ 352:1, :2 remain on the books. *See* 907 A.2d at 986 ("if Cohen himself did not produce these compact discs, whoever did so likely committed several hundred State misdemeanors.... *See* RSA 352:1, :2...")

We respectfully urge you to pursue repeal of RSA §§ 352:1, 2 as soon as possible. Meanwhile, federal preemption of those sections should be brought to the attention of all State prosecutors.

The second matter of concern is *State v. Nelson*, 150 N.H. 569 (2004). We neither have nor had any stake in that case, but I sent a letter (copy enclosed) to the Court and to both attorneys as soon as I learned of the opinion. My reasons for believing that Mr. Nelson's conviction is null and void were apparently too briefly sketched, but the enclosure should rectify that. Moreover, apparent failure of Mr. Heed and his associates to take action prior to your appointment seems unimportant if justice is to be served in that particular prosecution and future mischief is to be avoided here and elsewhere.

Two colleagues who teach or have taught copyright are in full accord and willing to so state if necessary. Moreover, I am the moderator of an IP Professors list and could get addition support if warranted.

Finally, of course, should you need further research with regard to either matter, the Clinic is eager to cooperate.

Sincerely,

Thomas G. Field, Jr.

Professor of Law

Director, Intellectual Property Amicus Clinic

enclosures

cc: Eileen Fox, Clerk of Court, New Hampshire Supreme Court

**To:** Kelly A. Ayotte, New Hampshire Attorney General  
**From:** Intellectual Property Amicus Clinic, Franklin Pierce Law Center<sup>1</sup>  
**Date:** December 19, 2006  
**Re:** Effect of Federal Copyright Preemption on New Hampshire Law

## I. Overview

This memorandum primarily concerns N.H. Rev. Stat. Ann. (RSA) §§ 352:1, :2 (1995) and *State v. Nelson*, 150 N.H. 569 (2004), but it also bears on RSA § 352-A:2 (Supp. 2006) and *State v. Cohen*, 907 A.2d 983 (N.H. 2006).

It explains why matters addressed in RSA §§ 352:1, :2 and actions for which Nelson was convicted are not within the jurisdiction of any state court. It also explains why, on the record before the N.H. courts, Nelson could not have been convicted in federal court.

## II. Federal-State Copyright Preemption Generally

That federal copyright subject matter is wide ranging is evident from § 102(a) of the Copyright Act of 1976. 17 U.S.C. § 102(a) (2000). Also, 17 U.S.C. §§ 102 and 408 both make it clear that neither publication nor registration is necessary for exclusive federal rights, including those to reproduce and distribute protected works as set out in § 106. Rights may be enforced by criminal as well as by private action. 17 U.S.C. § 506. Jurisdiction is exclusively federal. 28 U.S.C. § 1338(a) (2006).

The key provision concerning preemption is 17 U.S.C. § 301(a):

On or after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright... in works of authorship that are fixed in a tangible medium of expression... 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. (Emphasis added.)

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<sup>1</sup> Clinic participants who were particularly helpful with research and in drafting this memo are Mary Anne Copeland, Graduate Fellow and LL.M candidate, and Yelena Morozova, J.D. and Masters of Intellectual Property candidate.

Congress had several objectives for § 301; two are particularly relevant here. One was to abolish a longstanding dual system of state and federal copyright law that turned on whether works were “published.” H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 129 (1976). Another was to bring U.S. copyright laws into better alignment with those of other countries by having federal copyright run from fixation rather than from publication. H.R. Rep. No. 1476 at 130.

The last sentence of § 301(a) may seem inapplicable to state criminal laws, but the contrary is well established by case law. For example, in *Crow v. Wainwright*, 720 F.2d 1224 (11th Cir. 1983), *cert. denied*, 469 U.S. 819 (1984), it was determined that actions for which a defendant had been prosecuted in Florida were equivalent to those constituting private copyright infringement. The Eleventh Circuit therefore agreed with Crow “that, because the only ‘stolen property’ involved in the case was the copyright of CBS (and not the physical tape itself), the Copyright Act precludes Florida from prosecuting him and renders his conviction void.” 720 F.2d at 1225.

*State v. Perry*, 83 Ohio St. 3d 41 (1998), likewise found prosecution under a generic state statute to be preempted. As the Ohio Court stated, at 46:

The preemption provisions of Section 301 of the Copyright Act are broad and absolute and are “stated in the most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.” Federal courts have repeatedly recognized that allowing state claims where the core of the complaint centers on wrongful copying would render the preemption provisions of the Copyright Act useless. [Citation to H.R. Rep. No. 1476 omitted.]

Although the Ohio statute under which Perry was prosecuted forbade unauthorized use of another’s property, his “uses” comprised “reproduction, distribution, and display, uploading, posting, and downloading” of software, that are all governed by federal copyright law. *Perry*, 83 Ohio St. 3d at 46.

### III. Federal-Federal Preemption in the Criminal Context

It also seems relevant that federal prosecutors may not pursue convictions for copyright infringement under generic criminal statutes. *Dowling v. United States*, 473 U.S. 207 (1985).

At 216, the Court said:

[T]he Government's theory here would make theft, conversion, or fraud equivalent to wrongful appropriation of statutorily protected rights in copyright. The copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections.

Relying on that, *United States v. LaMacchia*, 871 F.Supp. 535, 537 (D. Mass. 1984), dismissed a prosecution under the federal wire fraud statute for a “scheme [that] caused losses of more than one million dollars to software copyright holders.” Citing software industry views to the same effect, the court said:

While the government's objective is a laudable one, particularly when the facts alleged in this case are considered, its interpretation of the wire fraud statute would serve to criminalize the conduct of not only persons like LaMacchia, but also the myriad of home computer users who succumb to the temptation to copy even a single software program for private use. It is not clear that making criminals of a large number of consumers of computer software is a result that even the software industry would consider desirable.

In sum, I agree with Professor Nimmer that... “absent clear indication of Congressional intent, the criminal laws of the United States do not reach copyright-related conduct.”

*LaMacchia*, 871 F.Supp. at 544-45. [Note and citation omitted.]

LaMacchia evaded criminal liability under the 1976 Copyright Act because he did not infringe for financial gain. Now, however, penalties may be imposed if infringement is merely willful. Yet, reflecting just-noted concerns about “making criminals of a large number of consumers,” liability is conditioned on reproducing or distributing, within any 180-day period, protected material having “a total retail value of more than \$1,000.” 17 U.S.C. § 506(a)(1)(B).

### IV. RSA §§ 352:1, :2 are Preempted

RSA § 352:1 reads:

Uncopyrighted Compositions Protected.

Whenever any person, firm, association or corporation is the owner of any

literary, dramatic or musical composition and the rights of the author pertaining thereto, and such composition has not been copyrighted, printed or published, or of any map, charter, engraving, cut, print, photograph or negative thereof, statue, statuary, model or design, which has not been copyrighted or offered for sale, it shall be unlawful for any other person to publish, produce, print, or sell or offer to sell the same without first obtaining the consent of the owner thereof.

That provision was a valuable supplement to federal protection from its enactment in 1895 until the effective date of § 301(a) of the Copyright Act. Since Jan. 1, 1978, however, it has served primarily as a trap for the unwary. Moreover, RSA § 352:2 (“Whoever violates RSA 352:1 shall be guilty of a misdemeanor.”) lacks the *de minimis* exception of 17 U.S.C. § 506(a)(1)(B).

Although potential state protection continues to reside in copyrightable works not yet fixed “by or under the authority of the author,” 17 U.S.C. § 101 (definition of “fixed”), RSA § 352:1 lacks facial applicability to such works. Further, RSA § 352-A:2(I)(b) seems to meet any need for State protection by forbidding unauthorized recording of live works.<sup>2</sup> Also, when Congress later addressed unauthorized recordings of live acts, Pub.L. 103-465, Title V, § 512(a), Dec. 8, 1994, 17 U.S.C. § 1101, it left state jurisdiction intact; *see* § 1101(d) (“Nothing in *this section* shall be construed to annul or limit any rights or remedies under the common law or statutes of any State.”) (Emphasis added.)

Legislation should be introduced to repeal RSA §§ 352:1, :2. How long that might take is unknown. Meanwhile, to avoiding unwarranted prosecutions, it would be in the public interest for New Hampshire’s chief legal and law enforcement officer to advise prosecutors that those provisions have been mainly if not wholly preempted. That this has yet to happen is clear from *Cohen*, 907 A.2d at 986, “if Cohen himself did not produce these compact discs, whoever did so likely committed several hundred State misdemeanors... *See* RSA 352:1, :2.”

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<sup>2</sup> We do not address possible preemption of either this section or RSA § 352-A:5 (1995). Both were amended in 1977, following passage of the 1976 Copyright Act. Thus, those and later amendments should be consistent with § 301. That is far from clear, however, and no reference to the federal statute was found in the annotations.

## V. The Attorney General Should Move to Have the *Nelson* Opinion Withdrawn

*Nelson*, 150 N.H. 569, affirmed a conviction for holding stolen property, but the only property at issue was unauthorized digital reproductions of photographs residing in Nelson's computer. From the prior discussion, it should be clear that federal copyright existed as soon as those photographs were fixed by an unknown author, 17 U.S.C. § 102(a)(5); that their unauthorized reproduction infringed exclusively federal rights of that author, § 106(1); and that state authority to enforce such rights was preempted nearly thirty years ago, § 301.

Although Nelson's infringement appears to have been willful, without proof that his purloined images had a retail value over \$1000, he could not have been convicted under 17 U.S.C. § 506(a)(1)(B). Thus, Nelson's conviction under State law is doubly inconsistent with Congressional objectives.

As the Court recognized in *Koor Communication, Inc. v. City of Lebanon*, 148 N.H. 618, 620 (2002): "Under the Supremacy Clause of the Federal Constitution, state law is preempted where: (1) Congress expresses an intent to displace state law..." Lapse of time changes nothing. "A judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is void." 46 Am. Jur. 2d Judgments § 24 (2006). The State is not estopped. "Either party, even the party that invoked the jurisdiction of the court, can attack the jurisdiction at any time after judgment is rendered." *Id.* See also, e.g., *Gettler-Ryan, Inc. v. Kashulines*, 130 N.H. 15, 18 (failure to raise subject matter jurisdiction no bar to collateral challenge) and *Crow*, 720 F.2d 1227 ("Crow's conviction is null and void.")

It is conceivable that Nelson's behavior constituted criminal trespass or invasion of privacy, but his conviction was not secured on such grounds. Although a thirty-day suspended sentence amounts to little, RSA § 637:11 (Supp. 2006) warrants consideration. If Nelson is convicted of two further class A misdemeanors, the third may be subject to enhanced penalties.

Consequences in other cases should also be considered. Although *Nelson* was criticized in a leading intellectual property publication, *Taking Possession of, Scanning Photos is Receiving Stolen Property Under State Law*, 67 P.T.C.J. (BNA) 424 (2004), that is not

apparent from the title. Moreover, with no reference whatsoever to 17 U.S.C. § 301(a), *Nelson* has been cited for propositions such as “activities considered as copyright infringement may also constitute crimes under state law,” John G. Mills, et al., 2 Pat. L. Fundamentals § 6:87 (2 ed.), n. 20 (Supp. 2006). *See also*, Raymond T. Nimmer, Law of Computer Technology, § 15.39, nn. 18 & 19 (Supp. 2006).

The articulated mission of the New Hampshire Attorney General is “to seek to do justice in all prosecutions.” Apparent failure of Mr. Heed and his associates to rectify Nelson’s unwarranted conviction prior to your appointment seems unimportant, and habeas corpus should be unnecessary to clear the record.