

## **Making a Record With a Criminal Record: Can the State Seize Your Copyright?**

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This paper confronts state seizure of copyrights under “Son of Sam” laws intended to compensate victims of crime. Court cases have focused on Free Speech, while litigants should instead be raising “preemption” under the federal Copyright Act and Dormant Commerce.

### **I. INTRODUCTION**

“Sex, Drugs, and Rock and Roll” generates considerable legal issues and keeping many lawyers in business. Few in the music industry might suspect that if their client goes to criminal court she could be stripped of royalties. This paper confronts state seizure of copyrights under “Son of Sam” laws intended to compensate victims of crime. Current jurisprudence focuses on Free Speech, yet fails to include an intellectual property analysis. The federal Copyright Act and Dormant Commerce clause should be invoked to preempt state obstacles in this field.

Section I illustrates the confusion these laws create for the entertainment industry. Section II provides a history of these laws and context for curtailing citizens’ rights. Section III assesses current state copyright burdens. Section IV discusses preemption by the Copyright Act and the Dormant Commerce clause. Section V provides a conclusion.

### **“Son of Sam” Sends Copyright Down the Rabbit Hole**

In 1976 and 1977, David Berkowitz shot six people dead and wounded seven others in New York City. Under the name “Son of Sam,” his letters to the police and media generated international attention.<sup>1</sup> When the New York legislature learned Berkowitz was negotiating the

rights to his story,<sup>2</sup> they passed a broad law preventing people from capitalizing on writings about their crime.<sup>3</sup> The “Son of Sam” law was later replicated, including federally.<sup>4</sup>

Over a decade later, Simon and Schuster, Inc. contracted a writer to co-author a book with a mobster. New York ultimately sought to intervene, as they had successfully intervened in other contracts before.<sup>5</sup> The case proceeded to the U.S. Supreme Court, based on a Free Speech argument. The Court ultimately struck down the original Son of Sam law with language suggesting a more tailored law would survive such challenges.

Since the *Schuster* decision, other state laws have been successfully challenged.<sup>6</sup> Some states have amended their law, such as New York, while California’s was struck down and abandoned. These laws continue to loom as a litigation challenge in the entertainment industry.

### **Exhibit A: Tupac Shakur**

Tupac Shakur (“2Pac”) has officially sold over 75 million albums worldwide. Soon after his New York incarceration, the 1995 album “Me Against the World” was released and went multi-platinum. His conviction potentially brought his contracts under the power of Son of Sam. Contracting entities are expected to know that 2Pac might be capitalizing on his crime and should submit contracts to the state. They would then be required to pay his proceeds into an escrow account.

While on bail pending appeal, “All Eyez On Me” was released. Death Row, Interscope, Universal, and Vivendi were also exposed to more state laws from a misdemeanor assault conviction in Michigan,<sup>7</sup> charges in Atlanta (later dismissed),<sup>8</sup> and an assault conviction in California that could have, until 2002, put his contracts under California’s since-repealed law.<sup>9</sup> 2Pac was in contracts with Death Row Records<sup>10</sup> and Interscope, a subsidiary of Universal Music

Group,<sup>11</sup> when he was murdered in 1996.

## **II. BACKGROUND**

The United States has the largest number of prisoners in the world in real numbers and per capita.<sup>12</sup> Currently there are over two million people incarcerated, nearly seven million on probation or parole, and over sixty-five million bearing the mark of a criminal record.<sup>13</sup> Growth in mass incarceration coincides with new laws controlling people with criminal records.<sup>14</sup>

Son of Sam laws generally apply where there is a victim. Between property crimes and interpersonal violence, approximately 70% of incarcerated people have victimized someone.<sup>15</sup> One of every 50 free people in America is currently under government supervision.<sup>16</sup> Any of them could create copyrightable material, prior to, during, or following incarceration.

Over 700,000 people were released from prison each year over the past decade.<sup>17</sup> Some policymakers use this group for state revenue,<sup>18</sup> and may render convicted people to indentured servitude.<sup>19</sup> Under Son of Sam, property (intellectual and otherwise) is targeted due to the state's legitimate interest in compensating victims. However, appropriation of property against all law-breakers, including drug users, illustrates the danger that copyrights may be targeted for payments to the judicial and corrections systems. As one writer began his warning: "First they came for the Socialists..."<sup>20</sup>

### **Enacting the New York law and Progeny**

New York's 1977 law authorized the state to seize royalties from both accused and convicted people who profit from their crimes.<sup>21</sup> In 1983, New Jersey became the first state to

enact a copycat law.<sup>22</sup> By 1986, thirty-two states had followed suit,<sup>23</sup> and ultimately, only North Carolina, Vermont, and New Hampshire did not enact such a law.

The broad statute applied to writings that have casual or incidental references to their authors' crimes.<sup>24</sup> The definition of "convicted" persons includes people who are deemed to have "admitted," in their writings, "the commission of a crime for which such person is not prosecuted."<sup>25</sup> The statute originally applied to all crimes, although the court eventually held it does not apply to victimless crimes.<sup>26</sup> It encompassed federal as well as state crimes,<sup>27</sup> and applied retroactively to crimes committed before its enactment.<sup>28</sup> It revives the statute of limitations whenever someone's writing mentions the crime, thus earning a royalty.<sup>29</sup> The state applied the statute even where it cannot identify or foresee the existence of any victim of the crime.<sup>30</sup>

The law places an onus on entities contracting with accused and convicted people to submit their contracts to the state. Agents, publishers, and record companies would need to know the criminal history of a writer,<sup>31</sup> and if any creative content is covered by the statute. Finally, contracting entities would need to know if old copyrights are triggered by a new crime, and vice-versa.

### **SCOTUS Ultimately Speaks**

Simon & Schuster contracted with Henry Hill and Nicholas Pileggi to write "Wiseguy," (adapted into the movie "Goodfellas.")<sup>32</sup> The book was published in 1986, garnering a letter from the New York State Crime Victims Board. The Board ordered seizure of all Hill's payments and royalties, along with the 10% fee earned by Hill's agent. Interestingly, Hill was not convicted; he entered the federal Witness Protection Program.<sup>33</sup>

Schuster asserted that the law violates the First Amendment guarantee of freedom of speech, and is vague and overly broad in violation of the Fourteenth Amendment. They further alleged that the law impairs its ability to enter publishing contracts, thus having a chilling effect on writings concerning crime, of which the public has a right to know. They also argued that the law affects editorial decisions, resulting in self-censorship of certain subjects.<sup>34</sup>

After losing in the lower courts, the Supreme Court held that the statute was presumptively inconsistent with the First Amendment, and it was not narrowly tailored to achieve the State's objective of compensating victims from profits of crime.<sup>35</sup> Instead, it targeted one mode of income: writings. Considering New York's response, this was a simple fix.

### **III. NAVIGATING CURRENT RESTRICTIONS ON COPYRIGHT**

Publishers, record labels, artists and others must wonder if any law applies to them. Jurisdiction depends on where the creator was convicted, or where the victim holds legal residency. Musicians, above all, travel often. Lil' Wayne, for example, is perhaps the most commercially successful musician from New Orleans.<sup>36</sup> Now a Miami resident, his home neighborhood is one of the most highly policed and incarcerated communities in America. Wayne was convicted in New York and spent eight months on Rikers Island for weapons offenses. Fortunately, his is a victimless crime, as Wayne's book, "Gone Till November,"<sup>37</sup> is based on his prison diaries and likely generated profits over \$10,000. If a victim were present, the Board could argue *all* of his copyrights are enhanced from criminal notoriety, and review all crime references in his repertoire. Hypothetically, if any victim were to make a compensation claim upon the escrow account, the Board can then keep a penalty of 10% of the remaining

account. After imposing the charge, the state comptroller would keep 50% of what remains. The seizures are not solely for victims.

### **“Son of Sam” Laws: post-*Schuster***

In the wake of *Schuster*, states revised their statutes in an attempt to make them more precise and not focus seizures on writings. Seven states have repealed their laws and not enacted new versions, including California and Texas.<sup>38</sup> State courts have provided mixed interpretations of the laws.

In 1991, Sammy “The Bull” Gravano pled guilty to federal racketeering charges in New York. “Underboss” was published in 1997, and eventually Gravano was arrested for drug distribution in Arizona. The Arizona court upheld the seizure of “Underboss” royalties even where the crime and victims were in New York.<sup>39</sup> In that case, Arizona brought suit against entertainment titans Harper Collins, Twentieth Century Fox, and International Creative Management, and alleged the creation of an elaborate scheme to avoid Son of Sam.<sup>40</sup>

Massachusetts approved a probationary condition preventing a defendant, or any assignees, from profiting from her story.<sup>41</sup> Maryland held that a writer was entitled to invoke the Fifth Amendment where the convicted person refused to provide the contract in question.<sup>42</sup> California held the statute to be over-inclusive, despite targeted limitations,<sup>43</sup> as was Rhode Island’s.<sup>44</sup> Nevada struck down their law as a violation of the First Amendment.<sup>45</sup>

New York’s revised statute applies to anyone who has committed a felony in New York, as well as a crime occurring anywhere, that victimizes a New York state resident.<sup>46</sup> It applies to *all* property obtained or income generated as a result of having committed the crime.<sup>47</sup> The period covered includes up to three years after the completion of a sentence, including

probation.<sup>48</sup> Whereas copyright attaches upon fixation in a tangible medium, it is unclear if this timeframe refers to creation or commercial exploitation. Publishers, record companies, agents and others are required to include New York state in their contract, and pay the Board rather than the creator, as soon as the income reasonably will exceed \$10,000. It is unclear how the law impacts prior contracts.

The federal law applies to all people federally convicted for harming any individual and applies to such property creation *at any time* after conviction.<sup>49</sup> Tennessee's law also applies to people awaiting trial.<sup>50</sup> Thus, upon arrest of any Nashville songwriter their contracting entities are expected to come forward to pay funds into an escrow account.

#### **IV. COPYRIGHT ACT PREEMPTS STATE "SON OF SAM" LAWS**

When one thinks of writings and royalties: one thinks of copyright. Thus, it is surprising that such a claim does not exist in the jurisprudence. Federal *copyright* law should condemn Son of Sam laws as state interference under "Field Preemption." The Constitution mandates federal law as the supreme law of the land, superseding any state law to the contrary.<sup>51</sup> Where Congress creates a comprehensive regulatory scheme, states are precluded from legislation in this field unless explicitly allowed. Immigration laws are a prime example of such a comprehensive federal scheme.<sup>52</sup> The Court has, however, expressed latitude where states have historically held an expression of power.<sup>53</sup> Recent laws regarding drug enforcement illustrate this tension where states are bound by federal prohibition, through the power of the commerce clause.<sup>54</sup> However, new state drug laws are forcing the federal government to back away from previously strong positions.<sup>55</sup>

The Court's test to determine Congress' preemption intention is whether the state law stands as an obstacle to the full purposes and objectives of Congress, and if it poses a significant burden on the federal scheme.

### **Explicit Preemption**

The federal Copyright Act of 1976<sup>56</sup> comprehensively regulates all copyright issues. Congress enacted the first federal copyright law in May 1790, mandated by the U.S. Constitution.<sup>57</sup> The Office yearly registers half a million claims to copyright, and collects a quarter of a billion dollars in cable television, satellite carrier, and Audio Home Recording Act compulsory license funds.

The Copyright Act covers, among other things, songs, movies, and books, i.e. the same material listed within "Son of Sam" statutes.<sup>58</sup> These state laws, when describing the monies to be diverted into escrow accounts, refer to all financial compensation, including all "royalties." The legal basis for a royalty is drawn from copyright and the rights of reproduction and distribution.<sup>59</sup>

States enacting statutes that duplicate or encroach upon the subject matter covered in Sections 102, 103, and 106 are *explicitly* annulled. Section 301 specifically bars states from granting any copyright rights, or equivalent rights in any work of authorship. Thus, they cannot grant equivalent rights (such as royalty collection) to a victim's compensation fund, a state treasurer, or generally to the citizens of a state.<sup>60</sup>

### **Involuntary Transfer of Copyright**

Lacking the power to create an equivalent right, states blatantly intrude upon the rights of authors to preemptively seize royalties. Copyright cannot be involuntarily transferred.<sup>61</sup> Section



201(e) protects authors from involuntary transfers, and declares that no governmental body, official, or other organization can “seize, expropriate, transfer, or exercise rights of ownership with respect to copyright.”<sup>62</sup> Congress subsequently made one exception to this provision, regarding seizure of assets under the Bankruptcy Act.<sup>63</sup> This specific cross-referenced exception excludes other vague exceptions.

Although the Act defines "transfer" of copyright,<sup>64</sup> the Act fails to define "seizure," "expropriation," or "exercise." States may argue that seizing proceeds does not curtail attribution, nor right to exclude others from publishing, distributing, reproducing, or profiting from the work (except the state). The author could *choose* not to profit, yet the state is still exercising ownership over the work.

In one Bankruptcy case, *In re Peregrine Entm't, Ltd.*, a federal district court held that although creation of a lien on the copyright may not give a creditor an immediate right to control the copyright, creation of a lien amounts to a sufficient transfer of rights to come within the Copyright Act's broad definition of “transfer” recognized by the Copyright Act and governed by the Act's priority scheme for conflicting transfers of interests in copyright.<sup>65</sup> This is similar to Son of Sam, where the interest is transferred into escrow, and then various parties may file claims over a five-year period.

### **Appropriating the Right to Exclude**

Courts protect the financial incentive to create and disseminate ideas by stopping copyright infringement. This requires standing, counsel, and an incentive to file suit. Under Son of Sam, however, these things remains unclear. Any judgment for damages would likely be owned by the state, and copyright attorneys would require an explicit contractual arrangement to be paid. The state holds all power regarding copyright infringement protection. Thus, the right

to exclude others has been expropriated or abandoned.

States may burden *some* profits of a copyright holder, or licensee, with various regulations and taxation as long as it conforms to non-discriminatory principles. A movie producer unsuccessfully challenged a state regulatory statute under preemption because there was still an avenue to exploit the work and earn a profit.<sup>66</sup> By contrast, the Court struck down a statute that seized the copyright itself, taking away the power to earn profits.<sup>67</sup>

### **Interstate Activity and the Dormant Commerce Clause**

Imagine a former Michigan prisoner moving to Texas. She signs with an agent in New York, and a recording contract in Tennessee. After her album is released, Michigan determines that the contracts should be filed with their Victims Advocacy Board and all her proceeds should be remitted to the escrow account. Because they did not, Michigan files a claim against the two companies, forcing them to retain counsel on the matter. Furthermore, Ohio also puts in a claim based on the victim's residency. Finally, she is paid for a national tour, and every local vendor is also expected to comply.

In such a morass of litigation, some entities may try to comply and yet not know which state holds priority. Others may feel the creative material does not fall under the statute. Others may believe Michigan and Ohio lack jurisdiction to enforce any orders, outside their respective states, directing them how to make payments. This is clearly interstate commerce, being regulated and burdened with an obstacle by state statutes. It is for just such a reason that the federal government holds exclusive powers to regulate.<sup>68</sup>

## VI. Conclusion

The state has a legitimate interest in compensating the victims of crime. It makes rational sense to redistribute earnings to the victims of crimes. It makes less sense, however, that publishers and agents are forced to navigate various laws and create a contractual relationship with states. Furthermore, it makes no sociological or historical sense to suppress the creativity and insights of convicted artists. Where states have legitimate interests, they also have a responsibility to pursue them in ways least offensive to constitutional principles of Copyright, First Amendment, Due Process, and Equal Protection. Those states should instead utilize tort suits and judicial orders for victims' compensation.

The issue is a classic slippery slope. Whether complicated by exonerations, repealed laws, drug prohibition (and legalization), political acts, or controversial convictions,<sup>69</sup> there are many people potentially exposed to Son of Sam.<sup>70</sup> The seizure of property under drug prohibition may be an indication of the slope's direction. To avoid a legal quagmire, state laws of this nature should be repealed or abandoned through litigation or legislation.

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<sup>1</sup> Books about this case include: LAWRENCE D. KLAUSNER, SON OF SAM: BASED ON THE AUTHORIZED TRANSCRIPTION OF THE TAPES, OFFICIAL DOCUMENTS AND DIARIES OF DAVID BERKOWITZ (McGraw-Hill 1980); DAVID ABRAHAMSEN, CONFESSIONS OF SON OF SAM (Columbia Univ. Press 1985); DAVID BERKOWITZ, SON OF HOPE (Morning Star Communications 2006).

<sup>2</sup> In years past, it was common for attorneys in such cases to take over such rights in exchange for representation. The Code of Ethics has been modified, as this practice carries the potential to influence the lawyers' behavior to make a better story.

<sup>3</sup> The Son of Sam law supplements pre-existing statutory schemes authorizing the Board to compensate crime victims for their losses, *see*: N.Y. EXEC. LAW § 631 (McKinney 1982 and Supp. 1991), permitting courts to order the proceeds of crime forfeited to the State; N.Y. CIV. PRAC. LAW §§ 1310–1352 (McKinney Supp. 1991), providing for orders of restitution at sentencing, N.Y. PENAL LAW § 60.27 (McKinney 1987), and affording prejudgment attachment procedures to ensure that wrongdoers do not dissipate their assets, N.Y. CIV. PRAC. LAW §§ 6201–6226 (McKinney 1980 and Supp. 1991). The escrow arrangement established by the Son of Sam law enhances these provisions only insofar as the accused or convicted person earns income within the scope of § 632–a(1). *See*: Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 111 (1991)

<sup>4</sup> 18 U.S.C.A. § 3681 (West).

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<sup>5</sup> See: S. Roberts, *Criminals, Authors, and Criminal Authors*, N.Y. TIMES BOOK REVIEW, March 3, 1987, at 34. By this time, New York had seized profits in at least seven cases, including the writer of *Dog Day Afternoon*, a bank robbery film starring Al Pacino. Warner Brothers had paid \$100,000 to John Wojtowicz.

<sup>6</sup> See below.

<sup>7</sup> MICH. COMP. LAWS ANN. § 780.768 (West).

(1) A person convicted of a crime shall not derive any profit from the sale of any of the following until the victim receives any restitution or compensation ordered for him or her against the defendant, expenses of incarceration are paid . . . :

- (a) The person's recollections of or thoughts or feelings about the offense committed by the person.
- (b) Memorabilia related to the offense committed by the person.
- (c) The person's property if its value has been enhanced or increased by the person's notoriety.

(2) Upon the conviction of a defendant for a crime involving a victim . . . the attorney general may petition . . . that the defendant forfeit all or any part of proceeds . . . from any of the following:

- (a) Contracts relating to the depiction of the crime or the defendant's recollections, thoughts, or feelings about the crime, in books, magazines, media entertainment, or live entertainment.
- (b) The sale of memorabilia relating to the crime.
- (c) The sale of property of the defendant, the value of which has been enhanced or increased by the defendant's notoriety arising from the crime.

(3) Proceeds . . . shall be held in an escrow account for a period of not more than 5 years.

(4) . . . proceeds in the account shall be distributed in the following priority to satisfy the following:

- (a) An order of restitution . . .
- (b) Any civil judgment in favor of the victim against the defendant.
- (c) Any reimbursement ordered under the prisoner reimbursement to the county act . . . or the state correctional facility reimbursement act . . .
- (d) Fines, costs, and other assessments ordered against the defendant.

(5) A balance . . . shall be paid to the crime victim's rights fund . . .

<sup>8</sup> GA. CODE ANN. § 17-14-31 (West).

(a)(1) Every person, firm, corporation, partnership, association, or other legal entity contracting with any person or with the representative or assignee of any person who has been accused or convicted of a crime in this state with respect to the reenactment of the crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or live entertainment of any kind or with respect to the expression of the accused or convicted 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 any moneys which would otherwise, by the terms of the contract, be owing to the accused or convicted person or to his representatives.

(c) Upon dismissal of charges or acquittal of any accused person, the board shall immediately pay over to the accused person the moneys in the escrow account established on behalf of the accused person.

<sup>9</sup> California's operative statute, CAL. CIV. CODE § 2225 (West), was held unconstitutional in 2002, when attempting to apply it to the kidnapper of Frank Sinatra's child. *Keenan v. Superior Court of Los Angeles County*, 27 Cal. 4<sup>th</sup> 413 (Cal. S. Ct. 2002), held: (1) the state statute appropriating, as compensation for crime victims, all monies due convicted felons from expressive materials including story of their crimes was facially invalid under First Amendment to the United States Constitution and equivalent provision of state constitution; (2) limitation of statute's applicability to persons actually convicted of felonies in state court did not cure the statute's over-inclusiveness; and (3) limitation of statute's applicability to expressive materials in which the felony was depicted, portrayed, or reenacted, and express exemption for materials making mere passing mention of felony, did not cure the statute's over-inclusiveness.

<sup>10</sup> Co-founded in Los Angeles by Dr. Dre, Suge Knight, et. al., the label filed for bankruptcy in 2006. In 2009, the label was bought at auction for \$18 million by WIDEawake Entertainment Group (Toronto, Canada). See: Staff, *Death Row Assets Auctioned For \$18 Million*, BILLBOARD (Jan. 16, 2009, 10:38 AM), <http://www.billboard.com/articles/news/269598/death-row-assets-auctioned-for-18-million>.

<sup>11</sup> Interscope is one third of Interscope Geffen A&M, and home to roughly 150 artists. Universal Music Group (Santa Monica, CA) is America's largest music corporation, although it is a subsidiary of Vivendi, a Paris-based media conglomerate with 2012 revenue hovering at \$29 billion. See: Vivendi, *Annual Report, 2012*, [http://www.vivendi.com/wp-content/uploads/2013/04/20130403\\_Annual\\_report\\_2012\\_ENG.pdf](http://www.vivendi.com/wp-content/uploads/2013/04/20130403_Annual_report_2012_ENG.pdf).

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- <sup>12</sup> International Centre for Prison Studies, University of Essex, [http://www.prisonstudies.org/info/worldbrief/wpb\\_stats.php?area=all&category=wb\\_poprate](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate). The U.S. (716 per 100,000) leads St. Kitts (714). Notable nations are Cuba (6<sup>th</sup>, at 510), Rwanda (7<sup>th</sup> at 492), Russia (10<sup>th</sup> at 475), Poland (66<sup>th</sup> at 217), U.K.: England and Wales (102<sup>nd</sup> at 148).
- <sup>13</sup> Rodriguez & Emsellem, *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment*, National Employment Law Project (March, 2011). *See also*: Bureau of Justice Statistics, *Correctional Populations in the United States, 2011*, (November 2012), <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>. Over the past decade, between 1 in 31 and 1 in 34 Americans was in prison, on parole, or probation.
- <sup>14</sup> The American Bar Association has a project that strives to compile collateral consequences (i.e. other than what is ordered by a criminal statute) to a conviction. *See*: <http://www.abacollateralconsequences.org>.
- <sup>15</sup> Bureau of Justice Statistics, *Prisoners In 2012 – Advance Counts*, (July, 2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>. Leading state crimes are Robbery (13.5%), Rape/Sexual Assault (12.3), Murder/Manslaughter (12.2), Assault (10.3), and Burglary (9.6).
- <sup>16</sup> Bureau of Justice Statistics, *Probation and Parole in the United States, 2011*, Appendix Table 1 (November, 2012), <http://www.bjs.gov/content/pub/pdf/ppus11.pdf>.
- <sup>17</sup> Guerino, Harrison, & Sabol, *Prisoners in 2010*, Dept. of Justice BJS (Revised 2/9/12), <http://www.bjs.gov/content/pub/pdf/p10.pdf>. In year 2000, 600,000 people were released. A steady climb topped 700,000 in 2005 and has climbed to 750,000. *See*: Figure 6.
- <sup>18</sup> *See, e.g.*: Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 834 (2013).
- <sup>19</sup> In *Fuller v. Oregon*, 417 U.S. 40 (1974), the Court approved states’ power to charge fees for indigent services. Often, however, indigency is determined not as a snapshot in time, but as a lifetime assessment. Ergo, a person will have a lifetime debt of “pay what you can,” where \$5000 is not abnormal. *See*: Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. Mich. J.L. Reform 323 (2009).
- <sup>20</sup> Martin Niemuller (1892-1984) was a prominent Protestant pastor who emerged as an outspoken public foe of Adolf Hitler and spent the last seven years of Nazi rule in concentration camps. “*First they came for the Socialists, and I did not speak out--Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out-- Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out-- Because I was not a Jew. Then they came for me--and there was no one left to speak for me.*”
- <sup>21</sup> N.Y. EXEC. LAW § 632-a (McKinney 1982).
- <sup>22</sup> N.J. STAT. ANN. § 52:4B-26 (West Supp. 1986).
- <sup>23</sup> *See*: P.N. Gillard, *The Expansion of Victim Compensation Programs: Today’s ‘Son of Sam’ Legislation and Its Susceptibility to Constitutional Challenge*, 18 Toledo L. Rev. 155 (1986).
- <sup>24</sup> *Children of Bedford, Inc. v. Petromelis*, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989), *aff’d without op.*, 556 N.Y.S.2d 483 (1st Dep’t 1990).
- <sup>25</sup> Section 632-a (10)(b). The use of “convicted” and “accused” to describe criminal dispositions becomes inaccurate when the statute’s reach is invoked merely by this de facto confession. One can imagine the trouble with discerning which realistic songs are about fictional crimes, or determining whether a writer is confessing, or simply using the ‘first person’ as a storytelling technique.
- <sup>26</sup> *Children of Bedford, Inc. v. Petromelis*, 573 N.E.2d 541, 548 (1991). If there is no victim a necessary requirement for implementation of the statute is lacking, section 632-a does not apply and the criminal may discuss the crime without restraint; *e.g., compare*, *Halmi v. Crime Victims Bd.*, N.Y.L.J., June 5, 1986, at 12, col. 3 (Sup.Ct., N.Y.County), *aff’d. on opn below*, 512 N.Y.S.2d 650 (prostitution is victimless crime); *St. Martin’s Press v. Zweibel*, N.Y.L.J., Feb. 26, 1990, at 25, col. 1 (Sup.Ct., N.Y.County) (securities fraud based on leaking market information); *with Simon & Schuster v. Fischetti*, 916 F.2d 777.
- <sup>27</sup> *St. Martin’s Press v. Zweibel*, No. 12273/89, N.Y.L.J., at 25, col. 1 (Sup. Ct. N.Y. Co. Feb. 26, 1990) (application to Foster Winans for federal securities fraud).
- <sup>28</sup> *St. Martin’s Press v. Zweibel*, *supra*; *In re Johnsen* (Berkowitz), 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979).
- <sup>29</sup> Section 632-a(7).
- <sup>30</sup> *See: In re Bernhard Goetz*, slip op. at 5, 6 (New York State Crime Victims Board, Mar. 17, 1988) (whether law applies “must be determined . . . without consideration of whether any victim exists”).
- <sup>31</sup> Interesting complications could arise where a state pursues a successful, albeit convicted, performer who does not write the first-person lyrics.

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<sup>32</sup> *Goodfellas* (1990) earned \$46.8 million at the box office, and was nominated for six Academy Awards, including Best Adapted Screenplay for Nicholas Pileggi and Martin Scorsese. Pileggi is co-author of WISEGUY. According to the documentary *The Real Goodfella*, Robert DiNiro repeatedly called Henry Hill to consult on various aspects of his character. Joe Pesci won an Oscar for Best Supporting Actor. Coincidentally, Phil Spector created the soundtrack. He was convicted of 2<sup>nd</sup> degree murder after authoring an extensive music library. His royalties are not in jeopardy under California law.

<sup>33</sup> Hill was charged with narcotics charges and, most notoriously, the “Lufthansa Heist” at JFK Airport. The book admits to his role in those crimes and many others. Believing his colleagues would murder him to keep him from snitching about the Lufthansa Heist, he sought to protect himself by doing exactly what they feared: becoming a cooperating witness. Henry Hill died of natural causes in 2012, at age 69. He committed multiple crimes while in the Witness Protection Program, and was ultimately expelled.

<sup>34</sup> *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 724 F. Supp. 170, 173 (S.D.N.Y. 1989) *aff’d sub nom.* *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (2d Cir. 1990) *rev’d sub nom.* *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991).

<sup>35</sup> *Id.*, 502 U.S. 105.

<sup>36</sup> Forbes ranks the 31-year old musician as #69 on their 2012 Celebrity 100, <http://www.forbes.com/profile/lil-wayne/>. His latest album, *Carter IV*, sold nearly one million albums in its first week. He has launched a clothing line, signed a multimillion endorsement with Pepsi, and concerts gross upwards to \$600,000 per night.

<sup>37</sup> Lil’ Wayne, *GONE TILL NOVEMBER: EIGHT MONTHS ON RIKERS ISLAND* (Grand Central Publishing 2013).

<sup>38</sup> 725 ILL. COMP. STAT. ANN. § 145/1 to 14 (repealed 1992); LA. REV. STAT. ANN. § 46:1831 to 1839 (repealed 1997); MASS. GEN. LAWS ANN. § 258A § 8; §§ 1 to 9 (repealed 1993 (eff. Jan. 1, 1995)); MO. ANN. STAT. § 595.045(14) (repealed 1993); NEV. REV. STAT. ANN. § 217.265 (repealed 1993); TEX. REV. CIV. STAT. ANN. Art. 8309-1 (repealed 1993); CAL. CIV. CODE § 2225 (Statute held unconstitutional on first amendment grounds by *Keenan v. Superior Court of Los Angeles County*, 117 Cal. Rptr. 2d 1 (Cal. 2002)). See: Jessica Yager, *Investigating New York’s 2001 Son of Sam Law: Problems with the Recent Extension of Tort Liability for People Convicted of Crimes*, 48 N.Y.L. Sch. L. Rev. 433, 488 (2004).

<sup>39</sup> *State ex rel. Napolitano v. Gravano*, 60 P.3d 246 (Ariz. Ct. App. 2002), holding: (1) application of forfeiture statutes to royalties from book did not violate constitutional free speech guarantees; (2) royalties had causal connection with racketeering as required for forfeiture; and (3) state had jurisdiction over forfeiture proceeding. Incidentally, the New York Crime Victims Board unsuccessfully brought a claim against Gravano, with the New York appellate court holding that the Board, itself, has no standing to bring a cause of action because a victim is needed. *New York State Crime Victims Bd. v. T.J.M. Prods., Inc.*, 705 N.Y.S.2d 320 (2000).

<sup>40</sup> *Id.*, at 323. Other defendants in this case are Peter Maas, the author of the book, T.J.M. Productions, Inc. (which the Board alleges Maas created in order to funnel compensation to Gravano for his work on the book and a movie) and International Creative Management, Inc., agent for T.J.M. and Maas as well as Gravano.

<sup>41</sup> *Com. v. Power*, 420 Mass. 410, 650 N.E.2d 87 (1995), holding (1) special condition of probationary sentence, precluding defendant from profiting from sale of her story to news media, did not violate defendant's First Amendment rights, and (2) extension of condition to defendant's “assignees and representatives acting on [her] authority” did not impermissibly burden unconvicted third parties. This decision came months after providing an Advisory Opinion unfavorable to a proposed revision of their Son of Sam law. *In re Opinion of the Justices to the Senate*, 764 N.E.2d 343 (2002). Provisions concerning works that described, reenacted, or otherwise were related to the commission of a crime were content-based regulation of speech and were not narrowly tailored to advance compelling State interests; and the proposed bill would operate as prior restraint on speech which lacked required procedural protections.

<sup>42</sup> *Curran v. Price*, 638 A.2d 93, 107 (1994). “[C]ompelling a defendant to produce a contract under § 764, would implicate the defendant's constitutional privilege against self-incrimination if the act of production would amount to testimony which would incriminate the defendant.”

<sup>43</sup> *Keenan v. Superior Court of Los Angeles Cnty.*, 40 P.3d 718 (2002).

<sup>44</sup> *Bouchard v. Price*, 694 A.2d 670 (R.I. 1997). The Criminal Royalties Act R.I. GEN. LAWS ANN. § 12-25.1-3 (West) has since been amended by P.L. 1983, ch. 328, § 1; P.L. 2001, ch. 86, § 24.

<sup>45</sup> *Seres v. Lerner*, 102 P.3d 91, 92 (2004). The law was deemed over-inclusive with many undefined, and unqualified categories of application. This decision *sua sponte* raises the concurrence of Justice Kennedy in *Schuster*:

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“Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld.

Borrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference.

*The inapplicability of the compelling interest test to content-based restrictions on speech is demonstrated by our repeated statement that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”* *Id.* at 100-01.

<sup>46</sup> N.Y. EXEC. LAW § 632-a (McKinney), (a) “Crime” means (i) any felony defined in the laws of the state; or (ii) an offense in any jurisdiction which includes all of the essential elements of any felony defined in the laws of this state and: (A) the crime victim, as defined in subparagraph (i) of paragraph (d) of this subdivision, was a resident of this state at the time of the commission of the offense; or (B) the act or acts constituting the offense occurred in whole or in part in this state.

<sup>47</sup> N.Y. EXEC. LAW § 632-a (McKinney), (b) “Profits from a crime” means (i) any property obtained through or income generated from the commission of a crime of which the defendant was convicted; (ii) any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such sale, conversion or exchange; and (iii) any property which the defendant obtained or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, a crime, as well as any property obtained by or income generated from the sale, conversion or exchange of such property and any gain realized by such sale, conversion or exchange.

<sup>48</sup> *Id.*, (c)(iii).

<sup>49</sup> 18 U.S.C.A. § 3681(a) (West). All proceeds will be paid into an escrow account for five years, to satisfy any fines, legal defense, or victims’ claims.

<sup>50</sup> TENN. CODE ANN. § 29-13-402 (West)

<sup>51</sup> U.S. CONST. Art. VI.

<sup>52</sup> Most recently in Arizona, where certain portions of a law aimed at immigrants were struck down, while others were left untouched. The Supreme Court decided to wait and see how the state applied the law. *See: Arizona v. United States*, 132 S. Ct. 2492, 567 U.S. \_\_\_\_ (2012). *Cf. Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011) (Provision of Arizona law allowing suspension and revocation of business licenses fell within Immigration Reform and Control Act's (IRCA) explicit savings clause.)

<sup>53</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>54</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>55</sup> In 2012, both Washington and Colorado fully legalized marijuana in a manner like alcohol. They join twenty states and the District of Columbia to legalize medical marijuana, and dozens of state and local measures that have rendered marijuana possession into a civil fine. The federal government has indicated it would not seek to impose its enforcement standard where a state has decided to amend their own longstanding drug policies.

<sup>56</sup> Title 17 of the United States Code.

<sup>57</sup> U.S. CONST. Art. I, § 8, cl. 8.

<sup>58</sup> *e.g.* NY EXEC. LAW §632-a (McKinney).

<sup>59</sup> 17 U.S.C.A. § 106 (1982).

<sup>60</sup> Section 301, regarding 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.”

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<sup>61</sup> § 201(e). 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.” The exception for Title 11 allows a bankruptcy court to transfer copyrights.

<sup>62</sup> *Id.*

The Copyright Act was amended by Pub. L. No. 95-598, § 313, 92 Stat. 2676 (1978); Bankruptcy Act: 11 U.S.C.A. §§ 101-1,330 (Supp. 1988).

<sup>64</sup> § 101. 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.

<sup>65</sup> *In re Peregrine Entm't, Ltd.*, 116 B.R. 194, 205-06 (C.D. Cal. 1990). In this case, Judge Kozinsky (9<sup>th</sup> Circuit, sitting by designation) was tasked with determining the priority of payees where a debtor-in-possession's principal assets were copyrights of a film library. Not only is such a case distinguished as falling explicitly within the Bankruptcy exception to copyright transfer, it also hinged on the property liens being specifically recorded and ordered *prior to* a transfer of ownership.

The Copyright Act recognizes transfers of copyright ownership “in whole or in part by any means of conveyance or by operation of law.” § 201(d)(1). Transfer is defined broadly to include any “assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright . . . whether or not it is limited in time or place of effect.” § 101. A judicial lien creditor is a creditor who has obtained a lien “by judgment, levy, sequestration, or other legal or equitable process or proceeding.” § 101(32). Such a creditor typically has the power to seize and sell property held by the debtor at the time of the creation of the lien in order to satisfy the judgment or, in the case of general intangibles such as copyrights, to collect the revenues generated by the intangible as they come due. *See, e.g.*, CAL. CIV. P. CODE §§ 701.510, 701.520, 701.640. Thus, while the creation of a lien on a copyright may not give a creditor an immediate right to control the copyright, it amounts to a sufficient transfer of rights to come within the broad definition of transfer under the Copyright Act. *See: Phoenix Bond & Indemnity Co. v. Shamblin (In re Shamblin)*, 890 F.2d 123, 127 n. 7 (9th Cir.1989) (under the Bankruptcy Code, “[t]his court has consistently treated the creation of liens on the debtor's property as a transfer”).

<sup>66</sup> *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 662-63 (6th Cir. 1982).

<sup>67</sup> *Interstate Hotel Corp. v. Remick Music Corp.*, 157 F.2d 744 (8th Cir. 1946).

<sup>68</sup> U.S. CONST. Art. I § 8

<sup>69</sup> *e.g.* Mumia Abu Jamal, Leonard Peltier, the “Angola Three,” and Mike Tyson.

<sup>70</sup> Some artists who were convicted of crimes that involve a victim include Jay-Z, 50 Cent, Immortal Technique, Sid Vicious (Sex Pistols), Chuck Berry, Lisa “Left Eye” Lopes (TLC), Johnny Paycheck, Jim Gordon (Derek and the Dominoes; co-writer of “Layla”), James Brown, Merle Haggard, Leadbelly, Rick James, Phil Spector, David Allan Coe, Wilson Pickett, The Prisonaires, Saigon, Big Lurch, C-Murder, and Styles P; as well as notables such as O.J. Simpson, and political figures such as George Jackson, Martin Luther King, Jr., and Malcolm X.