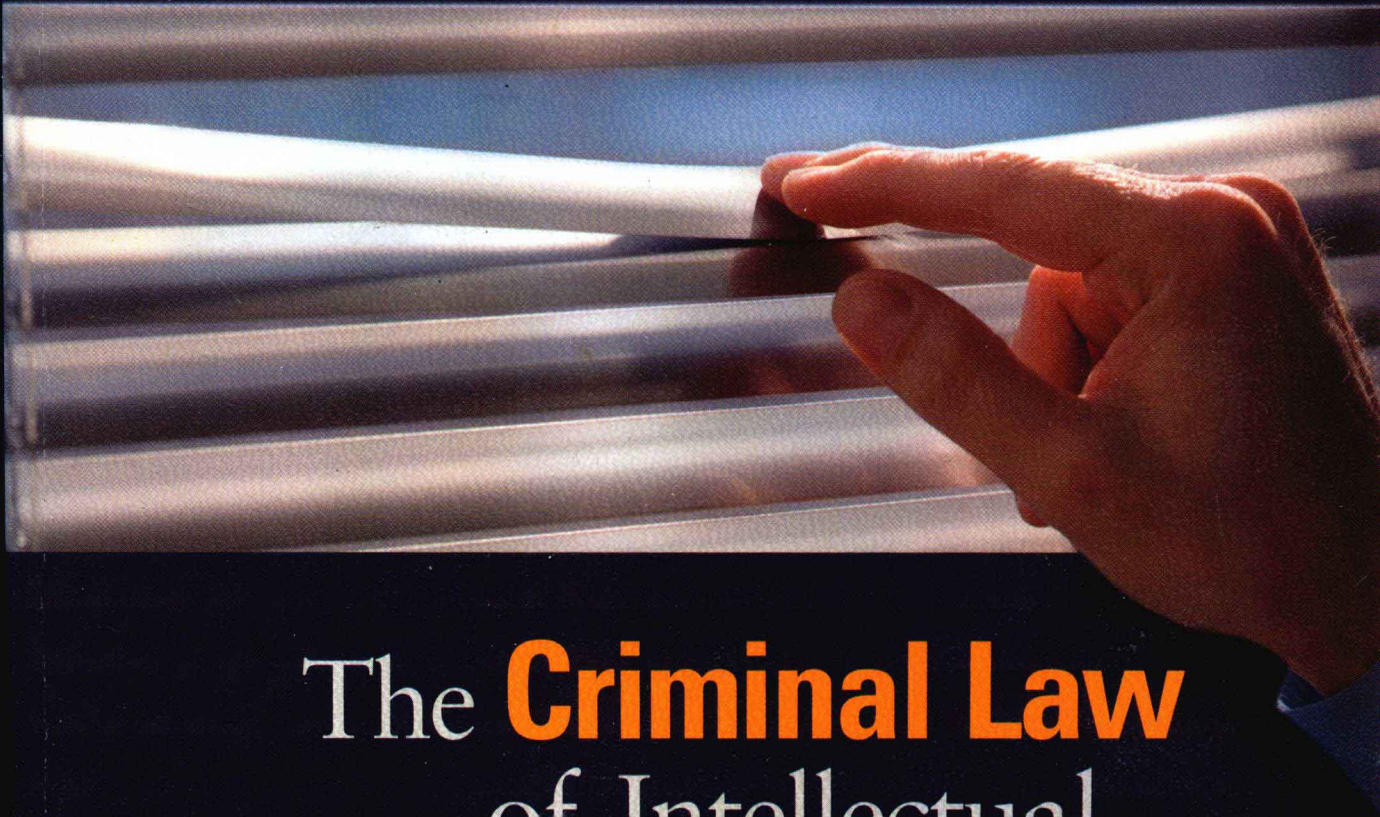


Geraldine Szott Moohr



The **Criminal Law** of Intellectual Property and Information

CASES AND MATERIALS

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THE CRIMINAL LAW OF INTELLECTUAL PROPERTY AND INFORMATION: CASES AND MATERIALS

By

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*This book is dedicated to my husband, Roger Sherman,
whose good advice and indulgent support
contributed mightily to this effort.*

*

Preface

A truism of criminal law is that bad actors “follow the money.” As today’s headlines make clear, “the money” now resides in information products such as software, music, videos, and trade secrets. Digitization, the internet, and generous broadband capacity make such information products more valuable by expanding the market for them. The same forces make these products more vulnerable to unauthorized use.

To deter unauthorized use of intellectual property and information, federal authorities initially relied on traditional statutes that were designed to deal with tangible property. Congress then passed specific criminal laws that apply to trade secrets and copyrighted material. More recently, Congress has strengthened existing laws and enacted new criminal statutes, directed at such diverse conduct as trafficking in code-circumvention software, engaging in identity theft, and damaging computers or using them to commit fraud and other crimes.

These initiatives indicate that the criminal law is destined to play a significant role in preventing misappropriation and infringement. Ten years ago, only one federal statute was used to deal with criminal misappropriation of intangible property in the private sector; now there are a dozen criminal statutes. Driven by the inexorable need to safeguard an important new segment of the economy, this expansion indicates that the field will only grow in importance. The body of new law that has developed—and that is still developing—is the subject of this casebook.

The subject involves two fields that are usually treated independently, criminal law and the law of information and intellectual property. This casebook is designed so that students need only a first-year background in criminal law, and it is suitable for those interested in either criminal law or intellectual property.

A. Purpose

The major purpose of this casebook is to introduce the criminal law of intellectual property and information. An equally important goal is for students to evaluate the recent developments involving information products. Consequently, the materials trace recurring issues that have developed in this transitory period, such as finding the appropriate balance between interests of owners and users of information and intellectual property.

A third purpose of this book, related to the goal of evaluation, is to acquaint students with the theoretical rationales for protecting information products. Those rationales may or may not be well-served by using criminal law, which can result in a broader conception of property rights

in intangible information products and an expanded view of prohibited conduct. Students are exposed to policy considerations that motivate legislators to enact new crimes, a topic that is not normally covered in other criminal law courses where such issues have long been settled.

Finally, and in addition to reinforcing basic principles of criminal law, the text introduces students to white collar crime and themes that permeate that field—prosecutorial discretion, overcriminalization, federalization, and the relation between civil and criminal law. As criminal solutions are brought to bear on socio-economic problems, tension develops between the consequentialist approach to criminal law, which relies on costs and benefits, and the retributive view, which focuses on morality. The material illustrates that tension.

B. Organization

The criminal law in this area closely follows and supports parallel developments in civil information and intellectual property laws. The book is divided into three parts that generally reflect those developments. Part I reviews the common law of theft, introduces the concept of misappropriation through civil cases, and treats civil and criminal conversion. Part II turns to specific federal crimes that protect trade secrets, business information, and copyrighted material. In Part III, the material treats related offenses: identity theft, damage to computers, and use of computers to commit fraud and other crimes.

Each chapter first introduces the general rationales for protecting intellectual property or information, usually through civil cases. The relevant criminal laws are then introduced in cases that analyze and apply the statutes and consider issues that arise from that application.

C. Contents

Chapter 1, *Introduction*, launches Part I by reviewing the law of theft and the concept of property. In protecting intangible property, legislators and courts broadened the kind of interests that the law has traditionally protected, largely by classifying such interests as property of one form or another. In addition, they have expanded the type of conduct that merits punishment, thus criminalizing a greater range of behavior. These twin axes, property and conduct, thread through the materials that follow.

Chapter 2, *The Common Law of Theft Offenses*, begins by reviewing the law of theft as it applies to physical property. The cases indicate that even without the complication of intangible property, theft law is not a simple subject. The chapter ends with cases that illustrate the problems that ensue when traditional theft laws are applied to use of computers.

Chapter 3, *Misappropriation and Conversion*, reviews the doctrine of misappropriation through the contrasting opinions in *International News Service v. Associated Press*. Misappropriation, or unauthorized use of material, is at the heart of most of the crimes in this field. Conversion is

introduced in its civil form through the infamous spleen case, *Moore v. Regents of the University of California*. Succeeding cases show how the federal criminal law of conversion has been applied to intangible property.

Chapter 4, *Trade Secrets and the Economic Espionage Act*, is the first of three chapters in Part II that focus on specific federal crimes. Civil case law explains what a trade secret is and the various rationales for protecting them. The federal Economic Espionage Act, which prohibits misappropriation of trade secrets, is presented through various opinions and decisions of the *Hsu* case. This section highlights several enforcement issues: the Act's definition of a trade secret, the rejection of the impossibility defense to charges of attempt, whether the statute is unconstitutionally vague, and its relation to other federal crimes. The chapter also includes a discussion of two unintended consequences of the statute on employee mobility and reverse engineering.

Chapter 5, *Fraudulent Misappropriation of Information*, traces how the federal fraud offense evolved to treat civil misappropriation as a crime. The relation between civil and criminal laws is particularly relevant to fraud, as are intuitions about overly vague criminal statutes. The materials in Chapter 5 also include cases that limit the notion of property for purposes of federal fraud. The chapter concludes with insider trading through Supreme Court cases that culminate in accepting a theory of misappropriation fraud.

Chapter 6, *Criminal Copyright Infringement*, begins with the rationale for protecting creative expression through the Supreme Court opinion in *Feist Publications v. Rural Telephone Service Co.* This rich and complex subject is divided into three parts. First, the traditional infringement offense, which required financial gain, is reviewed, including defenses based on civil infringement. The second part reviews the largely unsuccessful treatment of infringement as theft and fraud in cases such as *Dowling v. United States* and *United States v. LaMacchia*. Finally, new copyright crimes, such as the No Electronic Theft Act are presented, as well as quasi-copyright crimes such as bootlegging. Students will also consider the criminal aspects of such common activities as file-sharing and tape-trading.

Chapter 7, *Identity Theft*, begins Part III, which treats related offenses that involve some measure of intangible information. The identity theft material surveys this new federal crime and the congressional response. Topics include jurisdictional challenges to criminal legislation, the responsibility of companies that collect personal data, and the use of enhanced punishment to deter conduct.

Chapter 8, *Computer Fraud and Abuse*, presents a comprehensive, much-amended federal criminal statute that exemplifies problems legislators face in keeping pace with technological developments that provide new ways to obtain intangible property that belongs to another. This material includes cases that apply the law to damaging computers or using them to obtain information and to commit fraud.

D. Editing Conventions

The cases are edited, sometimes extensively. Omissions of text are indicated by ellipses, asterisks, and brackets. Citations, footnotes, and textual headings in cases and scholarly extracts are usually omitted, and these omissions are not indicated. The cases retain their original footnote numbers; editorial footnotes in cases are indicated by alphabetic letter. Readers are advised to consult the primary sources rather than relying on or quoting directly from these materials.

GERALDINE SZOTT MOOHR
Houston, Texas

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