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CORCORAN V. SULLIVAN

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Computers are an increasingly important part of modern society. Unfortunately, they are also playing an increasingly important role in criminal activity. Computer crime creates difficult challenges for traditional criminal law. *Corcoran v. Sullivan*[1] was the first case to address whether a prisoner held for violation of a state law criminalizing the willful destruction of computer data may petition for a writ of habeas corpus by claiming that federal copyright law preempts the state criminal law. In *Corcoran,* Judge Richard Posner wrote the decision for the Seventh Circuit. Though he refused to issue a writ of habeas corpus based upon the merits of the defendant's preemption claim,[2] Posner's opinion could significantly expand habeas corpus subject matter jurisdiction by explicitly allowing review of habeas corpus petitions when state law is potentially subject to federal copyright preemption.

This case may have an impact on many defendants because a number of state computer crime cases could involve copyright preemption analysis.[3] Those cases are now subject to federal habeas corpus review in the Seventh Circuit. This comment will analyze and critique the reasoning in *Corcoran.* It argues that the *Corcoran* court may have misapplied habeas corpus case law, and that federalism concerns cut against allowing habeas corpus jurisdiction for copyright preemption. Finally, this comment reviews potential administrability problems faced by the federal courts when reviewing copyright preemption.

I. CASE BACKGROUND

A consulting firm hired the defendant, Brian Corcoran, to write data processing programs.[4] Corcoran feared that the firm would not pay his fees due to dissatisfaction with the quality of his work.[5] In response, Cor-

1. 112 F.3d 836 (7th Cir. 1997).
2. *See id.* at 838.
3. Almost all of the states have computer crime statutes. Many of these state statutes have intellectual property components that conceivably may be impacted by federal copyright law. *See infra* Part IV.
4. *See Corcoran,* 112 F.3d at 837.
5. *See id.*

coran intentionally added a software "time bomb" to one of his programs.[6] Corcoran designed the "time bomb" to be activated by an operator inputting a harmless-looking triggering command.[7] When it went off, the "time bomb" would erase the copyrighted programs that Corcoran wrote.[8] In addition, it would also erase any data supplied for use by the firm when the firm entered new data.[9]

Later, Corcoran induced the firm to enter the triggering command.[10] The programs written by him erased themselves. Still later, the firm entered new data, thereby erasing all of the firm's data supplied for use in Corcoran's programs.[11] The authorities caught Corcoran, and he was convicted under a Wisconsin state law that criminalizes the willful destruction of computer data.[12]

Corcoran eventually applied for federal habeas corpus relief. He argued that he had a valid copyright in the programs he wrote. He further reasoned that his work regarding the firm's data had also earned him a copyright in the firm's data.[13] Thus, he argued federal copyright law entitled him to destroy that data, and that federal law preempted the state charges. The district court that heard Corcoran's application for a writ of habeas corpus rejected his application. Then, a panel of Seventh Circuit judges heard Corcoran's application.[14]

II. BACKGROUND ON HABEAS CORPUS LAW

The writ of habeas corpus allows a prisoner to demand that he be released because he is being held in violation of the Constitution or laws or treaties of the United States.[15] The Constitution explicitly refers to the writ of habeas corpus and states that it "shall not be suspended arbitrarily."[16] The First Judiciary Act of 1789 created a writ of habeas corpus for federal prisoners,[17] and in 1867 federal judges were given authority to

6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.* at 836.
15. *See* 28 U.S.C. §§ 2241(c)(3), 2254(a) (1994); *see generally* JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 227 (2nd ed. 1994).
16. U.S. CONST. art. I, § 9, cl. 2.
17. *See* LIEBMAN & HERTZ, *supra* note 15, at 28.

grant the writ to state prisoners as well.[18] Federal statutes primarily govern the writ; federal prisoners can apply for a writ via 28 U.S.C. § 2255 and state prisoners can apply via 28 U.S.C. § 2254.

A habeas corpus proceeding is a collateral attack on error leading to the prisoner's detention. It is a civil proceeding that is applicable only when the defendant is in custody.[19] To successfully attack the error, it must have had substantial and injurious effect in determining the verdict.[20] As mentioned above, the detention of any habeas corpus petitioner must violate his or her rights under the Constitution or the laws of the United States.[21] Claims premised exclusively on state law grounds will usually be dismissed.[22] Finally, state prisoners must also exhaust all available state court remedies available at the time of filing.[23] Over time, a wide variety of violations have qualified for the writ. A small sample of such claims includes attacks on illegal investigative or detention practices, suppression of evidence, and incorrect jury instructions.[24]

Historically, the writ's power has been relatively limited.[25] However, there was a dramatic expansion of its power during this century.[26] That expansion was notably supported by the Warren Court.[27] However, it slowed during the Burger Court era.[28] More recently, the Rehnquist court has made a major effort to restrict habeas corpus.[29] In addition, Congress has also recently enacted statutory restrictions on the habeas remedy such

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18. *See id.* at 29.

19. *See* 28 U.S.C. §§ 2241(c), 2254(a).

20. *See* Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (citing Kotteakos v. U.S., 328 U.S. 750, 756 (1946)).

21. *See* 28 U.S.C. § 2254(a).

22. *See, e.g.*, Gilmore v. Taylor, 508 U.S. 333, 344 (1993) ("instructional errors of state law generally may not form the basis for federal habeas relief"); *see generally* LIEBMAN & HERTZ, *supra* note 15, at 229-30.

23. *See* 28 U.S.C. § 2254(b) (1994).

24. *See* LIEBMAN & HERTZ, *supra* note 15, at 304-06, 311.

25. *See, e.g.*, Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1506, 1511 (1996).

26. *See generally id.* at 1517-26.

27. *See* Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-terrorism and Effective Death Penalty Act of 1996,* 30 J. MARSHALL L. REV. 337, 340-42 (1997).

28. *See id.* at 342.

29. *See id.* at 343-51 (detailing further the Rehnquist court's retrenchment); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Foreward: Law as Equilibrium,* 108 HARV. L. REV. 26, 64 (1994).

as new limitations on the filing of habeas corpus petitions and increased deference to the state courts, among others.[30]

III. THE COURT'S HABEAS CORPUS ANALYSIS

It is notable that *Corcoran* involves somewhat unusual issues for a habeas corpus case. Most habeas corpus cases allege a violation of the prisoner's procedural rights. The habeas corpus analysis in *Corcoran* is unusual because it involves substantive analysis of the Wisconsin state law, focusing on whether federal copyright law preempted the state law.

The court could have framed the preemption question as a pure constitutional issue arising under the Supremacy Clause. Instead, it analyzed whether there was a violation of federal statute: specifically "an error in the interpretation of a federal statute."[31] The line separating constitutional analysis and statutory interpretation in this case is somewhat unclear. However, preemption in this case primarily "turns on the interpretation of the [federal] statute claimed to preempt,"[32] namely section 301 of the Copyright Act. Thus, focusing on whether there was a violation of the copyright statute seems to be the more reasonable approach.

The court quickly rejected Corcoran's copyright preemption claim on its merits.[33] What makes the case interesting is the court's analysis of the threshold issue of whether copyright preemption is suitable subject matter for habeas corpus petitions. The court considered the issue of whether copyright preemption qualifies for habeas corpus review to be a matter of first impression. It noted that there have been at least two cases where courts considered copyright preemption cases in federal habeas corpus proceedings, but explained that neither of these earlier cases addressed the jurisdictional issues. The *Corcoran* court concluded that they were not precedent for this case.[34]

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30. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-193, 110 Stat. 1214 (1996) (to be codified in scattered sections of 28 U.S.C.); *see also* Hartman & Nyden, *supra* note 20, at 352 (summarizing briefly how the Act has cut back federal habeas power).

31. Corcoran v. Sullivan, 112 F.3d 836, 837 (7th Cir. 1997).

32. *Id.*

33. *See id.* at 838.

34. *See id.* (citing Anderson v. Nidorf, 26 F.3d 100 (9th Cir. 1994) (denying writ of habeas corpus based on the merits of prisoner's copyright preemption analysis); Crow v. Wainwright, 720 F.2d 1224 (11th Cir. 1983) (reversing denial of writ of habeas corpus based on merits of prisoner's copyright preemption analysis and remanding with instructions to grant the writ).

The court began its analysis by noting that federal case law holds that habeas corpus is available "only to correct fundamental errors in the criminal process of the states."[35] The court then relied on *Davis v. United States*[36] to provide an analytical framework supporting significant expansion of habeas corpus subject jurisdiction. In that case, Davis was convicted for his refusal to report for Selective Service induction.[37] Davis exhausted his regular appeals, and then filed a petition for habeas corpus. He based his petition on a similar case decided after his conviction that he asserted could have been grounds to reverse his own conviction.[38] A federal district court denied his petition and a court of appeals affirmed that denial.[39] However, the United States Supreme Court reversed the Court of Appeals.[40]

In the critical holding for the *Corcoran* case, the *Davis* court held that Davis' claim involved the law of the United States, and that his claim was possibly sufficient for habeas corpus jurisdiction.[41] It held that if the claimed error is a fundamental defect which inherently results in a complete miscarriage of justice, then the subject matter requirement for habeas corpus is satisfied.[42] Thus, the Court established a relatively vague standard that could support expansive habeas corpus subject matter jurisdiction.

In the present case, the court used the *Davis* "fundamental defect" standard. First, the court interpreted *Davis* to hold that habeas corpus is available to someone wrongly convicted of criminal activity: specifically to someone convicted under a repealed statute. It noted that Corcoran claimed the Wisconsin state courts erred in holding that federal copyright law did not preempt the state crime used to convict him.[43] It further rea-

35. *Id.* at 837.

36. 417 U.S. 333 (1974) (habeas corpus analysis of misinterpretation of federal statutes and federal prisoners).

37. *See id.* at 337.

38. The specific facts of *Davis* are rather complicated. Davis had originally appealed his conviction. The court of appeals remanded his appeal because of an intervening decision that could have possibly affected his case. *See id.* at 337-38. On remand the district court concluded that the intervening case did not affect Davis' conviction. *See id.* at 339. Davis appealed again and the court of appeals affirmed his conviction. *See id.* Davis then appealed to the Supreme Court. While his petition was pending, the court of appeals decided a second case on the same issue. On virtually the same facts as Davis' case, the court of appeals overturned the conviction in the second case. *See id.*

39. *See id.* at 340-41.

40. *See id.* at 346-47.

41. *See id.* at 342-47.

42. *Id.* at 346.

43. *See* Corcoran v. Sullivan, 112 F.3d 836, 838 (7th Cir. 1997).

soned that federal preemption nullifies a state statute, and that such a nullified statute is equivalent to a repealed statute.[44] Finally, it held that mistakenly convicting someone under a preempted statute is just like convicting someone under a repealed statute; thus, such a conviction also qualifies as a fundamental defect under *Davis*.[45]

IV. DISCUSSION: *CORCORAN* MAY OVEREXTEND HABEAS CORPUS JURISDICTION

A. Possible Misapplication of Habeas Corpus Case Law

The court's analysis in this case is troubling for several reasons. First, the court itself acknowledges early in its opinion that "it is not altogether easy to see how an error in the interpretation of a federal statute ... unrelated to criminal procedure could be thought fundamental to the propriety of the petitioner's continued imprisonment."[46] It also admits "such an 'error' of statutory interpretation would not appear to be the stuff of which habeas corpus is made."[47]

Second, it is significant that the habeas corpus petition in *Davis* was based on an intervening change in the law that even the Solicitor General admitted would have freed Davis. The appellate court insisted on keeping him in prison based on a technicality: that the direct appeal was the "law of the case" and precluded further appeal.[48] In contrast, there is no such clear, universal agreement that Corcoran's acts were not criminal. In fact, the state courts that spoke on the matter universally agreed that he was indeed guilty of criminal activity. Thus, even the relatively liberal interpretation of *Davis* may not justify habeas corpus jurisdiction in this case. The detention in *Davis* more plausibly constituted an "exceptional circumstance" than a mere disagreement regarding interpretation.

Third, and perhaps most critically, *Davis* probably does not control here. *Davis* involved the application of the "fundamental defect" standard to *federal* prisoners.[49] Corcoran was a *state* prisoner, and a different case, *Reed v. Farley*,[50] controls the "fundamental defect" standard with respect

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44. *See id.* The court supported this conclusion with *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). In *Cipollone*, the Supreme Court held that courts should treat a preempted statute as if it never existed.

45. *See Corcoran*, 112 F.3d at 838.

46. *Id.* at 837.

47. *Id.*

48. *See* Davis v. United States, 417 U.S. 333, 341 (1974).

49. *See id.* at 334.

50. 512 U.S. 339 (1994). The court cited this case but did not analyze it.

to state prisoners.[51] That case extended the Davis "fundamental defect" standard to cover the habeas corpus actions of state prisoners under 28 U.S.C. § 2254. However, *Reed* seemed to provide an interpretation of the "fundamental defect" test that was considerably less generous than *Davis*.

The statute in question in *Reed* was the Interstate Agreement on Detainers (IAD).[52] The IAD is a compact among the states and federal government governing the handling of prisoners.[53] Article IV of the IAD provides that the trial of a prisoner transferred from one participating jurisdiction to another shall commence within 120 days of the prisoner's arrival in the receiving state.[54] Reed's trial did not begin within the time limit. The trial court admitted that it had violated the IAD, but denied Reed's petition for release because the judge was unaware of the deadline, and Reed had not earlier objected to the trial date.[55] On review, the U.S. Supreme Court held that the "fundamental defect" standard also applied to state defendants.[56] The Court went on to find that there was no fundamental defect, and it dismissed Reed's petition. However, there was no clear majority opinion on this point.

Justice Ginsburg, joined by Chief Justice Rehnquist and Justice O'Connor, wrote that Congress intended section 2255 to mirror section 2254 in operative effect.[57] Unfortunately for Reed, she then emphasized that Reed had not asserted his rights in a timely manner.[58] However, she did not preclude the possibility that another more serious violation of the IAD might be a fundamental defect.[59] Justice Scalia (joined by Justice Thomas) concurred that the fundamental defect standard was applicable, but he applied the standard even more cautiously. He felt that an IAD violation could never be a fundamental defect.[60] Further, Justice Scalia implied that there may be no federal statutory violation serious enough to meet the fundamental defect standard.[61]

Justice Blackmun, joined by Justices Stevens, Kennedy, and Souter, dissented. Blackmun argued that the fundamental defect test should not

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51. *See, e.g.*, STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 1375 (1996).
52. *See Reed*, 512 U.S. at 341-45 (plurality).
53. *See id.* at 341.
54. *See id.*
55. *See id.* at 344-45.
56. *See id.* at 350-52.
57. *See id.* at 353-54.
58. *See id.*
59. *See id.* at 355.
60. *See id.* at 356-58 (Scalia, J., concurring).
61. *See id.* at 359 (Scalia, J., concurring).

apply because it was too stringent.[62] He felt the primary purpose of section 2254 was to provide a federal forum to review violations of federal law addressed by the state courts. He reasoned that the fundamental defect standard would filter out too many worthy cases.[63]

Reed was a cautious application of the "fundamental defect" standard to state prisoners. It held that, in many cases, even a blatant violation of a statutory requirement would not qualify for habeas corpus. The violation of the IAD in *Reed* seems more serious than a reasonable disagreement over statutory interpretation of copyright law, and could quite plausibly constitute a miscarriage of justice. Nevertheless, the court denied relief to the prisoner.

As Professor William Eskridge observes, the Rehnquist Court appears to be setting up "roadblocks to invocation of the habeas statute by state prisoners."[64] *Reed* is one of those roadblocks.[65] Thus, *Reed* supports a trend towards limitation, rather than expansion, in habeas corpus jurisdiction. Because *Reed,* not *Davis,* controls for state habeas corpus petitioners, the case law does not support *Corcoran's* unprecedented expansion of habeas corpus jurisdiction to include preemption by a federal statute.

B. Federalism Policy

Federalism concerns arise whenever the power of the federal courts over the state courts expands to a new area. In many cases, however, there is some benefit to federal review. First, review of state misconduct by insulated federal judges with life tenure is a justification for generous habeas corpus subject matter jurisdiction. Such review, in theory, is especially useful in preventing biased state courts from rubber-stamping human rights abuses. Second, allowing the federal courts to review habeas corpus petitions based on copyright preemption may promote national uniformity in copyright law. Such national uniformity would be consistent with the federal courts' exclusive jurisdiction in normal copyright cases. However, both of those benefits are somewhat attenuated in cases like *Corcoran.*

First, the defendant in *Corcoran* does bring forth a very serious allegation: that his conviction was based on an invalid statute and that he, therefore, never actually committed a crime. However, it is notable that the Supreme Court's twentieth-century expansion of habeas corpus has largely been driven by the idea that some errors were simply not correct-

62. *See id.* at 359-360 (Blackmun, J., dissenting).
63. *See id.* at 361-66 (Blackmun, J., dissenting).
64. Eskridge & Frickey, *supra* note 29, at 64-65.
65. *See id.*

able on appeal to state courts.[66] For example, when regional racism or other bigotry taints the state appellate process, then the state courts may not be inclined to correct the errors reviewed. In fact, several of the major cases in the expansion of habeas corpus power specifically involved racism or other bigotry tainting the state judicial process.[67] Strong federal review in such cases makes sense. Arguably, state judges worried about re-election may be unwilling or unable to protect unpopular minorities. Insulated federal judges with life tenure may be more able to rule objectively.

In contrast, *Corcoran* did not involve anything indicating that the alleged error was not correctable on appeal. In *Corcoran*, the main issue was a plain statutory interpretation regarding computer copyright law. As serious as the claim was, *Corcoran* involved no factors like the invidious taint of racism that would prevent a fair hearing. The defendant has not challenged the state appellate process' impartiality and general competence, and there is no evidence that state procedure and direct review were inadequate.

The second federalism argument, that federal habeas corpus review helps promote uniform federal copyright law, is also weaker in cases like *Corcoran*. First, computer copyright is a complex area of law, full of difficult technical and legal issues that can be challenging to litigate. Unlike other technically intensive intellectual property cases, habeas corpus cases with a computer copyright component are the province of the district courts. They cannot be sent to the specialists on intellectual property law: the Federal Circuit. The district and appellate courts, many of whom are less likely than the Federal Circuit to have technical expertise or consistent exposure to computer cases, may have difficulties with this field. As a result, the doctrine in this area may become muddled as circuit splits develop.

Furthermore, it is important to recall that habeas corpus review engenders certain federalism costs. For example, the local courts will have more experience and expertise with the state computer statutes than the federal courts. In addition, and perhaps most importantly, subjecting the results of

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66. *See* O'Neill, *supra* note 25, at 1522.

67. *See id.* at 1517-25 (discussing the modern expansion of habeas corpus and citing Brown v. Allen, 344 U.S. 443 (1953) (African-American convicted of rape who petitioned for habeas relief regarding coerced confession and racially biased jury selection); Moore v. Dempsey, 261 U.S. 86 (1923) (African-Americans convicted for murder of a white man, whose lynch-mob dominated trial including racially biased jury selection); Frank v. Magnum 237 U.S. 309 (1915) (Jewish-American's murder trial tainted by anti-Semitism and apparent gross irregularities)).

the state appellate process to new federal review in the context of habeas corpus will undercut the finality of the state courts' decisions. This will undermine confidence in the state criminal justice system.[68] As one commentator has noted, "Dual sovereignty and principles of comity demand that state courts are accorded respect."[69] In cases like *Corcoran,* the costs in experience and respect for the state courts' decisions outweigh the less than overwhelming benefits.

C. The Administrability of High-Technology Copyright Analysis and *Corcoran*

Corcoran's holding may pose significant administrability problems. Indeed, courts have previously expressed concerns about the administrability of the writ of habeas corpus and its possible abuse. For example, Justice Frankfurter once noted "Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization."[70]

Here, the court's lowering of the standard for habeas corpus subject matter jurisdiction will potentially create a significant increase in habeas cases in general, and those involving computer crime law in particular. Every state, except Vermont, has some sort of computer crime statute.[71] Many of those statutes govern crimes against intellectual property.[72] There is a danger that many of the state convictions involving such crimes will be attacked on copyright preemption grounds.[73] Under *Corcoran,* every defendant who can make an argument that his case involved copyright preemption will be able to raise a habeas corpus claim.

Furthermore, an increased number of cases may make it more difficult to sort out meritorious cases from the frivolous cases.[74] Again, computer copyright law involves complex issues that will be difficult to litigate. Some of the district and appellate courts lack technical expertise and may frequently struggle with these issues. Thus, there is a significant possibility that these tough cases will create circuit splits, and also drain time and resources from an already overworked federal court system. *Corcoran* is

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68. *See id.* at 1527.

69. *Id.* at 1529.

70. *See* SALTZBURG & CAPRA, *supra* note 51, at 1379-80 (quoting Brown v. Allen, 344 U.S. 443 (1953)).

71. *See* Xan Raskin & Jeannie Schaldach-Paiva, *Eleventh Survey of White Collar Crime: Computer Crimes,* 33 AM. CRIM. L. REV. 541, 563 (1996).

72. *See id; see, e.g.,* ALA. CODE § 13A-8-102 (1994); MISS. CODE ANN. §§ 97-45-1, 97-45-9 (1994).

73. *See* Raskin & Schaldach-Paiva, *supra* note 71, at 567.

74. *See* O'Neill, *supra* note 25, at 1528.

an example of problems inherent in this type of copyright analysis. The details of the analysis are not as important as the problems the court had to deal with to come to its conclusion.

In *Corcoran*, the state's case rested on the assertion that, under a state criminal statute, Corcoran illegally destroyed the firm's data. The court focused its preemption analysis around Corcoran's assertion that, when the firm's data commingled with his copyrighted software, he somehow acquired a copyright in the firm's data that preempted the state statute. In other words, Corcoran claimed that his software's re-arrangement of the firm's data gave him a copyright in the data that allowed him to legally destroy it, along with his own software, under federal copyright law. This authorization under federal law, he argued, overrode the state criminal statute. Thus, the copyright preemption analysis in *Corcoran* turned on the court's conclusion that "Corcoran did not have, and could not have, acquired a copyright in the firm's data, even though he embedded those data in his copyrighted programs."[75]

The court first cited Section 103(b) of the Copyright Act. That section states "The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material."[76] Thus, the court apparently reasoned that, even after Corcoran embedded the firm's data in his copyrighted software, the firm's data still constituted "preexisting material" ungoverned by the copyright protection on Corcoran's software.

The court cited some cases to support this contention. First, it cited *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*[77] That case involved a set of telephone directory entries compiled into a "white pages" directory.[78] Under *Feist,* facts are not copyrightable unless there is some minimal creativity in selection or arrangement.[79] The *Feist* court held that rudimentary alphabetical arrangement of the data was insufficient for copyright protection.[80]

Further, the court cited *Rockford Map Publishers, Inc. v. Directory Service Co. of Colorado, Inc.*.[81] In *Rockford Map,* the plaintiff used gov-

75. Corcoran v. Sullivan, 112 F.3d 836, 838 (7th Cir. 1997).
76. 17 U.S.C. § 103(b) (1994).
77. 499 U.S. 340 (1991).
78. *See id.* at 342.
79. *See id.* at 344-45.
80. *See id.* at 361-63.
81. 768 F.2d 145 (7th Cir. 1985).

ernment aerial photographs to create maps of parcels of land.[82] The plaintiff then checked the land titles corresponding to the photographs and drew boundary lines indicating the location and size of each parcel, along with the name of the owner of the parcel.[83] It then sold those maps to local residents and sellers of farm equipment. The court in *Rockford Map* felt that there was sufficient creativity to qualify the maps for copyright protection for compilations.[84]

Unfortunately, the court cited Section 103(b), *Feist,* and *Rockford Map* without any comment to guide the reader. However, the most plausible inference is that the court concluded that, even after being embedded in Corcoran's copyrighted program, the firm's data was still uncopyrightable fact instead of copyrightable expression. In other words, it appears that the court concluded that Corcoran's embedding of the firm's data in his software so lacked creativity that it resembled the *Feist* simple alphabetical ordering of telephone entries rather than the more sophisticated *Rockford Map* incorporation of photos into maps. Thus, the court concluded that Corcoran did not supply enough creativity to give him a copyright in his arrangement of the preexisting material.

If the firm's data was still uncopyrightable fact after being processed by Corcoran's program, then there could be no federal preemption of the state criminal statute. According to Section 301(b) of the Copyright Act, federal copyright statutes only cover copyrightable material. Specifically, Section 301(b)(3) states that nothing in the Copyright Act "annuls or limits any right or remedies ... that are not equivalent to any of the exclusive rights within the general scope of copyright as specified."[85] Thus, the state criminal statute that governed the destruction firm's data would not be preempted if Corcoran had no copyright regarding that data.

Unfortunately, the court's opinion in *Corcoran* did not describe the firm's data, nor how Corcoran's program "enable[ed] the processing of data,"[86] nor how Corcoran "embedded those data in his programs."[87] Thus, it is not completely clear if the data processing by Corcoran resulted in a simple uncopyrightable arrangement like *Feist's* alphabetical ordering, or a more sophisticated combination like *Rockford Map's* maps. The court came to a very plausible, and probably correct, conclusion that Corcoran had no copyright. However, the lack of detail regarding how ex-

82. *See id.* at 147.
83. *See id.*
84. *See id.* at 149.
85. 17 U.S.C. § 301(b)(3) (1994).
86. 112 F.3d 836 (7th Cir. 1997).
87. *Id.* at 838.

actly Section 103(b), *Feist,* and *Rockford Map* apply to the firm's data and Corcoran's software leaves some uncertainty in the court's preemption analysis.

More importantly, the court does not perform some important analysis. Perhaps the key statutory authority in copyright preemption is Section 301(a) of the Copyright Act. Section 301(a) preempts all state law that involves federally copyrightable material and which provides rights equivalent to any of the exclusive rights in federal copyright law.[88] It can be extremely complex to determine whether a state-created right is equivalent to a right under federal copyright law, and this issue has generated much interesting case law.[89] However, the court's opinion makes no mention at all of this critical analysis.

In this case, sound public policy (not explicitly articulated in the decision) supports the court's final conclusion. Granting Corcoran a copyright in the data entrusted to him would create a classic holdup opportunity.[90] Any programmer would be able to plant a "time bomb" and demand almost the full value of the data he threatened, without fear of punishment. The strong public policy interest in deterring such destructive behavior helps overcome the uncertainties produced by rapidly changing computer technology and the difficulty in defining copyrightable material. However, not all cases have such clear policy implications. Such cases will be harder to resolve and be considerably more burdensome on the federal court system.

Again, the details of the court's analysis are not as important as its potential complexity. Distinguishing copyrightable expression from non-copyrightable facts is a common copyright problem. As shown by *Cor-*

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88. [A]ll 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.

89. *See, e.g.,* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); National Car Rental System, Inc. v. Computer Associates Int'l, Inc., 991 F.2d 426 (8th Cir. 1993); *see generally* ROBERT P. MERGES, ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 804-24 (1997).

90. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089, 1106-07 (1972).

coran, that distinction is very fact-intensive and involves determinations that are difficult in any type of case. Determining exactly how much originality is enough usually depends on somewhat arbitrary distinctions, making for difficult cases and muddled doctrine. This problem and others like it are not uncommon in copyright analysis.[91] When combined with complex computer technology, copyright law will often pose a difficult challenge to the courts.

V. CONCLUSION

The *Corcoran* decision is flawed even though Judge Posner correctly rejected the defendant's petition for habeas corpus relief based on its merits. The appellate court created an unprecedented expansion of habeas corpus subject matter jurisdiction. It incorrectly justified this expansion by relying on *Davis* instead of *Reed.* In addition, the appellate court may have overestimated the possible benefits of collateral federal review in copyright preemption cases relative to the costs of undercutting the state courts. Finally, there may be significant administrability problems stemming from the difficult technical and legal issues involved in computer copyright preemption. The above analysis suggests that the appellate court should not have expanded habeas corpus subject matter jurisdiction to copyright preemption.

91. Other difficult problems may involve further defining the scope of software copyright protection, what type of use violates copyright protection, etc. *See* MERGES, *supra* note 89, at 861-938.