

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-589

TITLE PAUL EDMOND DOWLING, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE April 17, 1985

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PAUL EDMOND DOWLING, :

4 Petitioner : No. 84-589

5 v. :

6 UNITED STATES :

7 - - - - -x

8 Washington, D.C.

9 Wednesday, April 17, 1985

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 10:05 o'clock a.m.

13  
14 APPEARANCES:

15 MICHAEL D. ABZUG, ESQ., Los Angeles, Cal.;

16 on behalf of Petitioner.

17 CAROLYN FRANCES CORWIN, ESQ., Assistant to the

18 Solicitor General, Department of Justice,

19 Washington, D.C.; on behalf of Respondent.



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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: I believe we'll hear  
3 arguments first this morning in Dowling against the  
4 United States. Mr. Abzug, you may proceed whenever  
5 you're ready.

6                    ORAL ARGUMENT OF MICHAEL D. ABZUG, ESQ.

7                    ON BEHALF OF THE PETITIONER

8                    MR. ABZUG: Mr. Chief Justice, and may it  
9 please the Court:

10                   The issue before the Court today is whether  
11 the shipment of records across state lines by Petitioner  
12 which contained copyrighted musical compositions used  
13 without their copyright owner's consent falls within the  
14 proscriptions of the National Stolen Property Act.

15                   Preliminarily, I'd like to begin my discussion  
16 today by replying to two points that were raised by the  
17 Respondent in its brief. The first point concerns the  
18 nature of the theft in this case. Counts two through  
19 nine of the indictment, which contain the National  
20 Stolen Property Act counts, charge that the phono  
21 records were stolen, converted, and taken by fraud, in  
22 that they were manufactured without the consent of the  
23 copyright proprietors.

24                   As such, the theft charge in this case is  
25 nothing more than copyright infringement. The reason

1 that it's important to emphasize this statement at the  
2 outset about the nature of the theft is that the  
3 Respondent in his brief goes to great lengths in making  
4 note of the fact that the Petitioner and his  
5 co-conspirators obtained some of the sound materials for  
6 the albums that they used in methods that are  
7 traditionally associated with theft and stealing.

8 For example, their brief is replete with  
9 examples of how some of the co-conspirators in this case  
10 bribed employees of NBC to get some of the source  
11 material for their records and the sounds. In one  
12 instance, there's an allegation that there was Mr. Abzug  
13 that Mr. Dowling went to a fan of Elvis Presley and  
14 asked him to borrow an acetate of one of the Elvis  
15 Presley performances and didn't tell him he was going to  
16 use it for commercial purposes.

17 But the Petitioner submits that these facts  
18 have nothing to do with this case because he is not  
19 charged with infringing the copyright to the sounds and  
20 he's not charged with stealing the copyrighted material  
21 from NBC.

22 Our argument is simply that the Congressional  
23 intent to include acts of copyright infringement as  
24 goods, wares, and merchandise which are capable of being  
25 stolen and converted or taken by fraud is ambiguous.

1 The common meaning of the language used by Congress in  
2 the National Stolen Property Act we think is ambiguous  
3 and does not necessarily entail items like the copyright  
4 privilege.

5 This brings me to the second point that I  
6 wanted to bring to the Court's attention, which is that  
7 Congress could have expressed itself more clearly when  
8 it drafted the National Stolen Property Act if it wanted  
9 to include items such as copyright infringement. Now,  
10 I'm not saying that Congress when it drafted the  
11 National Stolen Property Act had to include an  
12 exhaustive laundry list, as it were, of every type of  
13 property that it wanted to protect under the Act.

14 But I am basing this observation on this  
15 Court's opinion in Williams versus United States, which  
16 held that when a choice has to be made between two  
17 readings of what Congress has made a crime, it is  
18 appropriate before choosing the harsher alternative,  
19 which in this instance is the National Stolen Property  
20 Act, which has felony penalties, to require that  
21 Congress should have spoken in language that is clear  
22 and definite.

23 Now, in this connection I'd like to invite  
24 your attention to the fact that in 1981, for example,  
25 Senator Strom Thurmond introduced a bill before Congress



1 which was a proposed revision of the federal criminal  
2 code, which comprehensively defined property and would  
3 have eliminated a lot of the ambiguities in the National  
4 Stolen Property Act that we face today.

5 In that bill, which is Senate Bill 1630, they  
6 define property in a much different manner and a much  
7 more detailed manner than it was defined in 1934. It  
8 was defined as anything of value, including tangible or  
9 intangible property, including rights, privileges, and  
10 interests.

11 Now, unfortunately --

12 QUESTION: Well, Mr. Abzug, isn't the property  
13 here the records that were transported, not the  
14 copyright?

15 MR. ABZUG: Well, it's of course undeniable,  
16 Your Honor, that the physical means of transporting the  
17 musical composition was the phono record. It's also --

18 QUESTION: Well, there's no question that  
19 phonograph records would fit the definition of property  
20 under the Act without any question, isn't it?

21 MR. ABZUG: Well, there is no question that a  
22 phonograph is a tangible article, that's true. But the  
23 point, in answer to your question, Your Honor, the point  
24 that I'm trying to make clear to the Court is that the  
25 property interest that Congress is seeking to protect

1 under the National Stolen Property Act in this interest  
2 and the property interest that the indictment identifies  
3 as stolen and as of value to the copyright holder is the  
4 copyright privilege itself. That is an intangible  
5 article.

6 QUESTION: Well, but hasn't the Court and  
7 haven't lower courts generally treated intangible rights  
8 that are incorporated into tangible form as the tangible  
9 article in question for purposes of this Act? For  
10 instance, Xeroxes, Xerox copies of stolen trade secrets  
11 or geographic maps, things of that kind, have all been  
12 treated as though it's the map we're looking at or the  
13 Xerox copy or whatever it may be.

14 MR. ABZUG: Well, there's two -- yes, you're  
15 right. There's two -- the short answer is you're  
16 right. The lower answer is that in the first instance  
17 we would contend, the Petitioner would contend, that  
18 although the weight of authority is to construe property  
19 under the National Stolen Property Act as including  
20 articles of mixed character, if you can put it that way,  
21 articles that contain not only an intangible or tangible  
22 component, that's not the same as saying that that was  
23 Congress' intent.

24 And the underlying theoretical underpinning of  
25 our argument, I suppose, is that it's for Congress, when

1 it enacted the National Stolen Property Act, to make it  
2 clear that the courts could indeed include the kind of  
3 articles that you're talking about in the prosecutions  
4 under the National Stolen Property Act. And our  
5 argument is that the language itself doesn't really make  
6 that clear, for the reasons cited in the decision of  
7 United States versus Smith.

8 QUESTION: Your point is that the physical  
9 properties that make up the phonograph record were not  
10 stolen from anyone.

11 MR. ABZUG: Yes, that's one point. The second  
12 thing that I'd like to bring to your attention is that  
13 -- and this gets us into a discussion that really was  
14 termed metaphysical, almost, by the court in United  
15 States versus Atherton, is that if you focus on, as the  
16 Government does, the tangible aspect of the item that  
17 Mr. Dowling shipped across state lines, if you say it's  
18 solely a tangible good, it's just a record and since  
19 it's a tangible record that's the subject of the  
20 indictment and therefore there's no question but it  
21 falls within the definition of goods, wares, and  
22 merchandise, you fall into another conceptual difficulty  
23 that was identified by the Second Circuit in United  
24 States versus Bottone.

25 And that conceptual difficulty is this. Let's

1 take an example where somebody goes into an office and  
2 they memorize a chemical formula which is confidential.  
3 And the office let's suppose is in New Jersey, and then  
4 they memorize the formula. They don't write it down on  
5 a piece of paper. They run across the river to New York  
6 and they write it down, and then they use the  
7 information to the disadvantage of the person that owned  
8 it.

9 In a sense, even though the information is  
10 transferred across the state border without being  
11 reified in a tangible object, nonetheless the loss to  
12 the person that has the information, the property  
13 interest that presumably Congress was supposed to be  
14 trying to protect under the National Stolen Property  
15 Act, is just the same.

16 It doesn't really make any difference whether  
17 you write it down on a piece of paper and bring that  
18 across the state border or memorize it in your head and  
19 walk across the river and then write it down.

20 So I guess the overall point that I want to  
21 make is that this whole question of tangible versus  
22 intangible articles in a way is almost kind of a red  
23 herring. I mean, you really can't resolve the intent of  
24 Congress, at least through the words of the statute, by  
25 trying to decide if a certain article was tangible or if



1 it's intangible.

2 Our point simply is that this whole  
3 discussion, the whole litigation that's been inspired  
4 over the intangible/tangible dichotomy, is really given  
5 birth to by the ambiguity of the statute that was  
6 drafted in 1980 -- excuse me, in 1934. And under the  
7 decision of United States versus -- under the decision  
8 of Williams versus United States, it's up to Congress to  
9 have eliminated the potential for this kind of a  
10 discussion.

11 QUESTION: Well, is it your point that the  
12 statute as drafted by Congress includes only tangible or  
13 reified property?

14 MR. ABZUG: Yes, that is our point. Our point  
15 is that Congress -- to state it a different way if I  
16 may, Your Honor, I suppose our point is that in drafting  
17 the statute Congress did not use language that would  
18 have included tangible articles with a substantial  
19 intangible component, like copyrighted records.

20 And it could have drafted the statute more  
21 clearly, and I've cited this example of the bill  
22 introduced by Strom Thurmond to the Court's attention.  
23 It didn't, and because of the principles that we have to  
24 construe criminal statutes narrowly and --

25 QUESTION: Well, certainly in 1934 there were

1 concepts of property in existence -- you know, customer  
2 lists and covenant not to compete cases and that sort of  
3 thing -- which were not really reified, as you put it,  
4 were not tangible. Now, would you say that a theft of a  
5 customer list, even though it was not embodied on any  
6 piece of paper, was not property within the Stolen  
7 Property Act?

8 MR. ABZUG: I would say that there would be  
9 difficulty in making that prosecution under the National  
10 Stolen Property Act as presently drafted. It is true,  
11 of course, that there were -- the whole notion of  
12 copyright protection was in existence in 1934, and  
13 indeed there was a specific statute that was designed to  
14 deal with it in the criminal fashion, the Copyright Act  
15 of 1909.

16 The point is that Congress didn't explicitly  
17 include intangible types of articles like the copyright  
18 privilege when it drafted the National Stolen Property  
19 Act, although it did include articles which had an  
20 intangible component like customer lists in the  
21 statutory language.

22 For example, the full language of the statute  
23 is "goods, wares, merchandise, money and securities."  
24 Now, money and securities are perhaps different than  
25 traditional goods, wares and merchandise, closer in

1 concept to the stolen records that are at issue in this  
2 case.

3 QUESTION: Let me ask you a question. I must  
4 say, I'm a little puzzled by your argument. You don't  
5 deny that the phono records, the physical objects that  
6 were shipped across state lines, as I understand what  
7 the indictment charges, were goods, wares, or  
8 merchandise within the meaning of the Act, do you? I  
9 thought you took the position they weren't stolen or  
10 converted or taken by fraud, that that was the issue?

11 MR. ABZUG: Well, we're contending -- we make  
12 two arguments, Your Honor. We're first contending that  
13 this is not a stolen vinyl case, as it were; it's really  
14 a stolen copyright case. I mean, the article that is  
15 stolen in this case is not the vinyl on the records;  
16 it's the property interest that is at issue here.

17 QUESTION: Well, the indictment talks about  
18 the thing that was shipped across, the record, were  
19 phono records containing Elvis Presley vocal  
20 performances. I guess they proved that some Elvis  
21 Presley records were shipped across state lines. You  
22 don't deny they were goods, wares or merchandise, do  
23 you?

24 MR. ABZUG: Well, but you didn't read the  
25 entire language of the statute.

1 QUESTION: "Knowing them to be stolen,  
2 converted, or taken."

3 MR. ABZUG: Stolen in that they were  
4 manufactured without the copyrighter's --

5 QUESTION: So that the issue, then, is whether  
6 they were stolen or not.

7 MR. ABZUG: That's one of the issues, yes.

8 QUESTION: I don't see, what's the other  
9 issue? Tell me again the other issue?

10 MR. ABZUG: I'm sorry. The other issue is --  
11 let me state it as clearly as I can -- goods, wares --  
12 in 1934 --

13 QUESTION: I'll agree with you. Let's just  
14 assume for a moment that goods, wares, and merchandise  
15 doesn't include copyrights. But they didn't accuse you  
16 of shipping copyrights across state lines.

17 MR. ABZUG: Well, I guess the thrust of our  
18 argument is that the article that was transported across  
19 the state line was in a very real sense the copyright  
20 privilege, because the --

21 QUESTION: But that's the only thing that was  
22 stolen.

23 MR. ABZUG: That's right.

24 QUESTION: Well, but then you're argument that  
25 the article that was shipped across state lines was not



1 -- well, I don't know.

2 QUESTION: So supposing I go into a record  
3 store and steal 100 records and ship them across state  
4 lines. Certainly those records are goods, wears, and  
5 merchandise, are they not? You can answer that yes or  
6 no.

7 (Laughter.)

8 MR. ABZUG: I would have to say that the  
9 thrust of our argument would be yes.

10 QUESTION: But are you saying that when the  
11 person simply takes an idea and puts it on a recording,  
12 that that's comparable to, if not the same as, going in  
13 and memorizing a secret document or trade secret and  
14 then later going and writing it out, that therefore  
15 there is no tangible property being transported across  
16 state lines? Is that it?

17 MR. ABZUG: Yes, that's our position, Your  
18 Honor. There's really, in a sense there's no  
19 difference. If you say that it turns on whether the  
20 right protected, the copyright privilege in this  
21 instance, is reduced or reified into a physical form, it  
22 really shouldn't make any difference, because the damage  
23 to the person that holds the copyright is the same, or  
24 holds the information in your example is the same,  
25 whether it's reduced to a physical form when it's

1 brought across the state border or not.

2 So I simply suggest to you that the whole  
3 notion of goods, wares, and merchandise and what  
4 constitutes stolen and taken by fraud is ambiguous in  
5 the sense that it inspires the kinds of discussions that  
6 we're having today. I don't think -- and it was up to  
7 Congress to eliminate this ambiguity.

8 QUESTION: Counsel, is there a right of action  
9 against your client for making these records and  
10 stealing the copyright?

11 MR. ABZUG: If he hadn't -- the right of  
12 action underlying the counts two through nine is the  
13 stealing or the trespass upon the copyright. Clearly,  
14 if these --

15 QUESTION: Would you have a right of action  
16 for stealing the copyright?

17 MR. ABZUG: Yes.

18 QUESTION: Well, isn't that what this case is  
19 all about?

20 MR. ABZUG: I think that's our position, Your  
21 Honor.

22 QUESTION: Your position is that there's  
23 nothing else there?

24 MR. ABZUG: Well, I mean, there's also the  
25 aspect of interstate transportation. But the heart of

1 the indictment as far as the National Stolen Property  
2 Act is concerned --

3 QUESTION: Well, why do you have to stretch  
4 the law to apply to interstate commerce when you have a  
5 right of action without that? Or am I wrong? Don't you  
6 have a right of action?

7 MR. ABZUG: Well, if I understand --

8 QUESTION: Don't you have a right of action  
9 for stealing the copyright, without including commerce?

10 MR. ABZUG: Oh, that's absolutely true. Under  
11 the Constitution -- under the Copyright Act there are  
12 criminal provisions for trespassing upon the copyright  
13 privilege. It's not necessary to deal with the problem  
14 by enacting a statute under the commerce clause.

15 QUESTION: Well, Mr. Abzug, I guess at the  
16 time this Act took place it would have been a  
17 misdemeanor offense under the Copyright Act, wouldn't  
18 it?

19 MR. ABZUG: Yes, it would have been.

20 QUESTION: And it is certainly possible that  
21 Congress in the National Stolen Property Act thought  
22 that shipping thousands of dollars of bootleg records  
23 across state lines deserved protection under the  
24 National Stolen Property Act as well.

25 MR. ABZUG: Yes, except -- I didn't mean to

1 interrupt you, Your Honor.

2 QUESTION: That's all right.

3 MR. ABZUG: That's a possible argument, except  
4 that its weakened in my judgment by the breadth of the  
5 Copyright Act itself as it was drafted in 1909. In  
6 other words, if we had a situation where it was simply  
7 intrastate, if I can put it that way, reproduction of  
8 records in violation of somebody's copyright privilege  
9 was a misdemeanor and that was the limited jurisdiction  
10 of the statute, and then once you take it across state  
11 lines that was in the jurisdiction of another statute  
12 and that would be felony activity, then I think your  
13 argument, which is made by the Respondent in its brief,  
14 would have a lot of force.

15 The situation here is quite different,  
16 however. The Copyright Act as it was drafted in 1909  
17 and as it was in existence in 1979 when Mr. Dowling was  
18 indicted would have punished not only the copying  
19 activity itself, but the interstate distribution also.  
20 In other words, the Copyright Act as it was drafted made  
21 criminal anybody that infringed the copyright or anybody  
22 that aided and abetted an infringement.

23 Infringement was defined quite broadly, as it  
24 is today, as any act where you reproduce or copy a  
25 copyrighted article for public gain or for private



1 advantage.

2 QUESTION: Well, there's no question that it  
3 violated the Copyright Act. But it certainly is  
4 possible, it seems to me, and likely that Congress was  
5 concerned about focusing attention and imposing greater  
6 penalties on mass shipments across interstate lines for  
7 a big bootleg operation like we have here, as opposed to  
8 an individual copyright infringement.

9 MR. ABZUG: Well, except that the purpose of  
10 the National Stolen Property Act, which is discussed in  
11 this Court's opinion in United States versus Sheridan,  
12 gives a more limited purpose to the statute. The  
13 purpose of the National Stolen Property Act really is  
14 twofold, as identified in the Supreme Court's opinion.

15 First of all, Congress identified a problem  
16 whereby people were escaping prosecution by the state  
17 authorities by the simple expedient of stealing  
18 merchandise in one state and transporting it across the  
19 border to another. So Congress enacted the National  
20 Stolen Property Act to fill this jurisdictional gap.  
21 That is, they criminalized the transportation of the  
22 merchandise across state lines, and in so doing brought  
23 the whole panoply of federal investigative resources to  
24 bear.

25 The second purpose of the National Stolen

1 Property Act was to make sure that all aspects of the  
2 crime were punished, not only the theft itself, which  
3 would be punishable under state law, but the  
4 transportation, too, which often did not fall within  
5 state jurisdiction.

6 So the reason I'm stating the purposes of the  
7 National Stolen Property Act in response to your  
8 question is this: that if you presume, as your question  
9 did, that the Petitioner's conduct in this instance  
10 transporting the article across state lines was  
11 punishable under the Copyright Act, then the  
12 jurisdictional gap, this window of vulnerability if I  
13 can put it this way, that Congress was trying to close  
14 when it passed the National Stolen Property Act really  
15 was not there, because it was already treated under  
16 existing federal jurisdiction.

17 And I think it would be an anomalous result in  
18 my judgment, and I would submit in Congress' as well, to  
19 punish the activity that the Respondent identifies in  
20 its brief as the most significant activity in treating  
21 record piracy, which is the reproduction, the  
22 unauthorized reproduction of the records themselves, as  
23 a misdemeanor, and then transmitting it, basically  
24 ancillary behavior which is the transportation of the  
25 records and distribution to the public, as a felony.

1 I would submit that that would not be  
2 Congress' intent.

3 QUESTION: Well, but Congress it seems to me  
4 ought to be much more concerned about making a business,  
5 an interstate business of shipping and selling  
6 commercially bootlegged records than it would be out of  
7 an isolated instance, for instance of somebody home  
8 recording in an unauthorized fashion a copyrighted  
9 material.

10 MR. ABZUG: I agree with you, and I'm not  
11 disputing what you're saying. What I am saying,  
12 however, is that Congress already criminalized that  
13 behavior under the Copyright Act. It wasn't necessary  
14 to enact the National Stolen Property Act to deal with  
15 the kind of behavior that you're talking about.

16 It was already dealt with under the Copyright  
17 Act, and therefore the express purposes behind the  
18 enactment of the National Stolen Property Act, which is  
19 to make people who transported allegedly stolen articles  
20 across state borders subject to federal jurisdiction, is  
21 not present in this case, because the business aspect,  
22 the transportation aspect, the distribution aspect, is  
23 already punishable under federal law. That's the point  
24 that I'm trying to make to the Court.

25 That will conclude my presentation today,

1 unless the Court has any other questions.

2 CHIEF JUSTICE BURGER: Very well.

3 Ms. Corwin.

4 ORAL ARGUMENT OF

5 CAROLYN FRANCES CORWIN, ESQ.,

6 ON BEHALF OF RESPONDENT

7 MS. CORWIN: Thank you, Mr. Chief Justice, and  
8 may it please the Court:

9 I'd like to begin by going back to the facts  
10 of this case, because I think it's important to  
11 understand just what was going on here. The evidence to  
12 whic Petitioner stipulated shows that he was engaged in  
13 an illicit commercial venture of significant magnitude.  
14 As the first step in that venture, the Petitioner and  
15 his co-conspirators managed to obtain unreleased  
16 recordings of Elvis Presley performances that had been  
17 stolen from RCA and other studios. They also  
18 fraudulently obtained materials from individuals.

19 QUESTION: Ms. Corwin, you say that these  
20 recordings had been stolen. Do you mean by that that  
21 the physical record itself had been stolen?

22 MS. CORWIN: The evidence in the record does  
23 show that the master tapes, the physical master tapes,  
24 the acetates, which is a form of disk, had been stolen  
25 in the sense that employees apparently had taken them



1 out of NBC vaults or RCA vaults. You had things like  
2 the Petitioner writing on the outside of a box "RCA  
3 stolen tapes."

4 QUESTION: Larceny by trick.

5 MS. CORWIN: I think there were a lot of  
6 variations, because you had a lot of different sorts of  
7 material in this case. But I think all of them did  
8 involve some sort of original tangible object that was  
9 somehow stolen or converted or taken by fraud.

10 Now, I'll diverge for a moment because Mr.  
11 Abzug has suggested tha we cannot properly make that  
12 point in this Court because of the way.the indictment is  
13 drafted. I think if you look at the indictment as a  
14 whole it is clear that it is talking about more than a  
15 mere act of composition copyright infringement. It's  
16 clear we're talking about Elvis Presley performances,  
17 particularly when you go back to the conspiracy count  
18 which is incorporated by reference in the 2314 counts.

19 Now, I think there are a couple of other  
20 reasons that that issue remains in this case. One is  
21 that Mr. Abzug has never in the courts below suggested  
22 that the evidence on that point is irrelevant or that  
23 there's some sort of a variance from the indictment.

24 QUESTION: May I ask you a question about  
25 that. Were any of those stolen originals shipped across

1 state lines?

2 MS. CORWIN: No, as far as I am aware the  
3 evidence does not show that the originals were shipped.

4 QUESTION: Would your indictment be good if  
5 none of that material had been stolen, if merely they  
6 had just infringed?

7 MS. CORWIN: Yes, we would take the position  
8 that there were --

9 QUESTION: So you don't really rely on the  
10 stealing?

11 MS. CORWIN: Well, I think we want the Court  
12 to be aware of the full range of activity in this case.

13 QUESTION: This is a really bad guy.

14 MS. CORWIN: Well, our position is there  
15 were --

16 ! (Laughter.)

17 MS. CORWIN: -- there was more than one  
18 wrongful taking going on here, and I think we have  
19 several ways to indicate that the albums were stolen,  
20 converted or taken by fraud.

21 QUESTION: My point is, I don't think that  
22 sheds any light on the issue, because your position  
23 really is it would be the exactly the same if this  
24 hadn't happened, I think.

25 MS. CORWIN: Well, I think that you can look

1 at the two different situations, because the cases that  
2 have come up in which this issue has been litigated in  
3 the Courts of Appeals have had some of both sorts of  
4 situations.

5 You have some in which there is no original  
6 wrongful taking, like someone going to a record store  
7 and buying a record and manufacturing cassettes. Then  
8 you have cases like this one and like many of the motion  
9 picture cases, in which there has been an original  
10 stealing of a tangible object.

11 QUESTION: Well, I understand there are two  
12 kinds of cases, but as I understand the Government's  
13 position the answer is the same for both kinds of  
14 cases.

15 MS. CORWIN: The answer is the same, but I  
16 think that if you have any doubt about the second point  
17 it is at least clear that we ought to prevail on facts  
18 of the sort we have in this case.

19 Now, as to this question of whether the  
20 evidence on this point is properly in the case, I note  
21 that in the trial court Mr. Abzug put on live testimony  
22 on this very point. His attempt was to show that his  
23 client did not know that these materials had an illicit  
24 origin.

25 I don't think he succeeded and I think the

1 general verdict of the court against him establishes  
2 that he did not prevail on that point. I think it's too  
3 late for him to say that that particular issue is not in  
4 the case.

5 QUESTION: Did the judge instruct the jury you  
6 had to prevail on that point?

7 MS. CORWIN: There was no jury in this case.  
8 There was a bench trial, and Petitioner stipulated to a  
9 general verdict, so we don't have findings, either.

10 QUESTION: May I just ask, supposing there  
11 were no copyrights on these materials, but they'd been  
12 patented, and that the Defendant knew they were patented  
13 and knew that they were stolen. The same set of facts;  
14 would the statute be violated?

15 MS. CORWIN: I guess I have a few reservations  
16 about your question, because I'm not sure this sort of  
17 material could be patented. But assuming --

18 QUESTION: Well, the process of making  
19 records. Say they were made in a fancy color or an  
20 unusual shape or something.

21 MS. CORWIN: You mean in the process of making  
22 the records there was a patent infringement.

23 QUESTION: There was a patented process for  
24 making records of this kind, which he found out about  
25 and deliberately infringed, and then shipped the product



1 of his infringement in interstate commerce and made  
2 millions of dollars.

3 MS. CORWIN: I think that's somewhat different  
4 from the case we have here and I would have some  
5 reservations. But I see some similarities. I would  
6 just not want to say for sure that it's within the  
7 statute.

8 It seems to me that, for one thing, I don't  
9 know that we've ever tried to apply the statute to that  
10 situation, so I can't think of case law that would tell  
11 me how to analyze that. But I would also be concerned  
12 about differences in this case. I think we have a  
13 stronger case in that you have this precise duplication  
14 of the valuable component of the property, the Elvis  
15 Presley performance.

16 QUESTION: You have that in every patent  
17 infringement case, too. All you have to do is change  
18 the language of the indictment to substitute a different  
19 federal statute and it would read right on my  
20 hypothetical.

21 QUESTION: Well, let's put it another way.  
22 You have a man that violates a man's patent and he's  
23 absolutely guilty of stealing the man's patent, and he  
24 ships the stuff in interstate commerce. Would he  
25 violate the statute?

1 MS. CORWIN: I think it is possible he would,  
2 because there are similarities to this case.

3 QUESTION: Well, how would he violate this  
4 statute?

5 MS. CORWIN: Well, I'm not sure he would, but  
6 I'm suggesting that you may have some similarities to  
7 this case in that you have the idea of the patent, the  
8 expression of the idea that it's used to make something  
9 that shows up in the patent, that is described in the  
10 patent.

11 But I think the analogy to this case is if  
12 somebody took the patent, the piece of paper that has  
13 the patented instructions on it, and made a photostatic  
14 copy of that. I mean, that's essentially what was going  
15 on here.

16 QUESTION: That's not in our case.

17 MS. CORWIN: Well, I understand --

18 QUESTION: Our case is he took the patent and  
19 made a product.

20 MS. CORWIN: Right.

21 QUESTION: And he violated the patent and he's  
22 liable for that. And if he ships it across state lines  
23 does he violate this statute?

24 MS. CORWIN: I think there are similarities to  
25 this case, but I'm suggesting why I think your

1 hypothetical is the harder one for us than the case we  
2 have here.

3 QUESTION: You're going to have to convince me  
4 of that.

5 (Laughter.)

6 MS. CORWIN: Well, I would just suggest that  
7 in the patent case, if you think that Congress was  
8 looking for a sameness in the property, some degree of  
9 sameness at the time property was taken and the time it  
10 was transported, then you may have a gut reaction that  
11 what we've got here is more same than what you've got in  
12 the patent case, just because you can perceive the same  
13 Elvis Presley performance from both tangible items.

14 I would have reservations about patent also in  
15 that I'm not sure that patent infringement is a criminal  
16 offense, and we might want to take a look at that when  
17 we got into questions of intent under the statute.

18 QUESTION: Well, how can that possibly make  
19 any difference to the meaning of this statute, which was  
20 enacted a long time ago? I mean, the criminal offense  
21 is transporting the stolen property. It doesn't matter  
22 whether it's also in violation of the patent law.

23 MS. CORWIN: Well, I understand that, but when  
24 you talk about stolen, converted or taken by fraud, I  
25 don't necessarily think that Congress meant to tie this

1 into an antecedent crime when it used broad language  
2 like "converted or taken by fraud." You may have a  
3 question about whether someone acted with criminal  
4 intent in the patent infringement. I would just have to  
5 think a little bit more about that angle of it as well.

6 QUESTION: Well, in each case he knows he's  
7 taking an idea that someone else developed and he knows  
8 the law prohibits it because there are patent laws out  
9 there just as there are copyright laws. I mean, it  
10 seems to me the elements of scienter are the same. You  
11 don't have to know it's a felony in order for it to be  
12 adequate intent.

13 MS. CORWIN: I think ultimately I would  
14 probably agree with you, but I would want to take a  
15 close look at the facts of the situation and perhaps  
16 what the person thought about when they were infringing  
17 the patent.

18 Now, I agree that there are similarities in  
19 the situation you suggest, and it may be that we would  
20 say that would be covered. But I think it's not as easy  
21 to see that as within the center of what Congress was  
22 concerned with as it is in the case you have here.

23 QUESTION: Well, you keep saying that, but you  
24 have to explain for me why this case is different than  
25 the patent case. If you say maybe in the case of the



1 patent, why isn't it maybe here?

2 MS. CORWIN: Well, I think here you have some  
3 things that --

4 QUESTION: That's what I want to know, what  
5 they are.

6 MS. CORWIN: All right. I think, to begin  
7 with, I guess I would say it would be perfectly clear,  
8 as Justice Rehnquist suggested, I think, that if this  
9 Petitioner had gone to RCA warehouses and taken  
10 thousands of Elvis Presley albums and taken those across  
11 state lines, I don't think anyone would question that he  
12 would fall within 2314.

13 QUESTION: That would have no connection with  
14 the copyright laws at all.

15 MS. CORWIN: Well, my suggestion --

16 QUESTION: He's just stolen some property and  
17 sent it across state lines.

18 MS. CORWIN: Well, that is so. But I don't  
19 think that what happens there is that much different  
20 from what happens here. And I think that if you are  
21 looking for some sort of sameness in the property that  
22 was taken and the property that was transported, we  
23 certainly have that here. You have the taking of the  
24 property and the extraction, the lifting of the valuable  
25 part of this property, and the transfer or transcription

1 onto another physical object.

2 QUESTION: What if the property that was  
3 stolen out of the warehouse isn't copyrighted at all or  
4 patented. You just steal it, and then say they're  
5 uncopyrighted records, but you like the way it's done.  
6 And then you copy them. You don't ship the stolen stuff  
7 across state lines. You just copy them, send them  
8 across state lines.

9 I take it you would say that the Stolen  
10 Property Act covers it, just because you've got an  
11 identity between what you sent across state lines and  
12 what you stole?

13 MS. CORWIN: Well, in some sense, in the same  
14 way that you had that in the trade secret information  
15 cases.

16 QUESTION: Is that right? Wouldn't you say  
17 that the statute covers that in my example?

18 MS. CORWIN: The trade secret information?

19 QUESTION: No, no. Just in my example. You  
20 steal some records and they are not copyrighted. You  
21 duplicate them and send the duplicates across state  
22 lines. You would say they're covered?

23 MS. CORWIN: I would say they're covered, and  
24 I think we have several ways --

25 QUESTION: So your theory in this case has

1 nothing to do with copyrights?

2 MS. CORWIN: Well, I think copyright  
3 infringement is one of the reasons we can regard these  
4 bootleg albums as having been stolen, converted or taken  
5 by fraud. But I think we have a couple of other ways  
6 that we can say they were stolen, converted or taken by  
7 fraud, and one of them is the original stealing of the  
8 tangible object and the lifting of the valuable  
9 component of that property.

10 Another is the tradition of state law  
11 protection both under common law and under California  
12 statute that protects against the unauthorized  
13 duplication of sound recordings. So I think we have  
14 several strings to our bow on that particular point.

15 QUESTION: Ms. Corwin, maybe you've answered  
16 this already, but to be clear, what if the Petitioner  
17 had purchased Elvis Presley records at the store and  
18 then, in violation of the Copyright Act, made pirated  
19 copies, so to speak, and shipped them across interstate  
20 lines?

21 MS. CORWIN: Our position would be that that  
22 would be a violation of Section 2314, that the  
23 unauthorized duplication in itself, even if you don't  
24 have the original taking of a tangible object, is  
25 sufficient to render these unauthorized duplicates

1 stolen, converted or taken by fraud.

2 QUESTION: Would you take the same position if  
3 a copyrighted song were plagiarized and the plagiarized  
4 material was then sold across state lines?

5 MS. CORWIN: I think we probably would. But  
6 let me say first that I don't think we've ever brought a  
7 case in which you have had only that composition  
8 copyright infringement. All of the cases in which this  
9 issue has arisen have been cases involving unauthorized  
10 duplication, so that you have this precise lifting and  
11 reproduction of the sound information. And I don't know  
12 whether --

13 QUESTION: Well, in a sense you don't need to  
14 take that position, I guess, for this case, because you  
15 could have any stolen item not involving copyright at  
16 all under Justice White's example and reproduce it and  
17 ship it, and in your view it would be stolen?

18 MS. CORWIN: Well, so long as there was some  
19 tangible -- I mean, not tangible, but component that was  
20 transferred from one tangible object to the other. And  
21 that is why I invoke the trade secret information cases,  
22 because I think there you have the taking of the piece  
23 of paper, but the courts have recognized that what's  
24 valuable about the property taken is the trade secret  
25 information and not the piece of paper, and that for



1 purposes of Section 2314 it's really immaterial that you  
2 transfer the information from one piece of paper to  
3 another by mechanical means.

4 Now, I think in the example of taking the  
5 record from the record store you do have, as I've  
6 suggested, a couple of ways in which that taking is  
7 wrongful. One is the violation of copyright. Another  
8 is this body of state law which has suggested that  
9 unauthorized duplication, which is the usual manner in  
10 which this comes up, is a form of theft or conversion.  
11 You have that both under common law and criminal  
12 statutes in California.

13 You have Congress, when it put the felony  
14 penalties for copyright infringement into Title 18,  
15 putting them into the stolen property chapter. And I  
16 think against that background it's reasonable to think  
17 that Congress would have regarded this sort of  
18 unauthorized duplicate as having been stolen, converted,  
19 or taken by fraud.

20 But I think at the very least, when you're  
21 looking at the facts of this case, when you do have the  
22 original taking of the tangible item, that the statute  
23 covers in that case.

24 QUESTION: May I ask another question on that  
25 point. We had the case argued earlier this term that

1 involved acquisition of a copyrighted manuscript, then a  
2 magazine published excerpts of it and sent it across  
3 state lines.

4 And assuming that the copyright law protected  
5 the manuscript, as it might have, and assuming it was  
6 stolen, would the shipping of the magazines constitute a  
7 violation of the statute? They were in the form of a  
8 book review with big excerpts, and assume they violated  
9 the copyright law.

10 MS. CORWIN: I think, assuming you met the  
11 \$5,000 limit -- and there may be some tricky points  
12 about valuation -- if I understand your hypothetical,  
13 you would have this precise duplication of the  
14 information, the creation, being shipped across state  
15 lines. That sounds enough like what we've got here that  
16 I think it would be covered, assuming you established a  
17 copyright violation and property interests in this sort  
18 of thing, that's right.

19 Now, I think there may be some hangup, if any,  
20 in this statute about the question of whether you've got  
21 the same property that's being taken and transported.  
22 Let me just suggest that I think it's clear that  
23 Congress did not mean that there had to be some precise  
24 identity between what is taken and what is transported.  
25 I don't think we ought to get hung up on questions of

1 format here.

2 QUESTION: You mean identity in a tangible  
3 sense?

4 MS. CORWIN: Identity -- yes, I guess tangible  
5 is the easiest way to think about it. And I might use a  
6 couple of tangible examples to mention that. If I go  
7 down the street and I go into the Smithsonian  
8 Institution and I take the Hope Diamond and carry it  
9 away and cut it into 50 different diamonds, and then I  
10 go across the state line into Virginia, I don't think  
11 anyone's going to question that I have come within  
12 Section 2314 even though what I'm carrying across state  
13 lines, the 50 small diamonds, looks very different and  
14 indeed has quite a different character from what I took  
15 from the Smithsonian.

16 And from the other angle, if I take ten pieces  
17 of gold jewelry and melt them down into a bar of gold  
18 bullion and take that across state lines, again I don't  
19 think anyone's going to question, even though the  
20 character and the appearance of the property is quite  
21 different.

22 QUESTION: Yes, but in each of those examples  
23 the physical property as embodied in each of the -- I  
24 mean, the property which you remove from the Smithsonian  
25 has been transported across the river into Virginia,

1     albeit in a somewhat different form. I think you have  
2     another hurdle to get over when you talk about putting  
3     something on another record and that sort of thing.

4             MS. CORWIN: Well, it's true that the  
5     continuity in the examples I offered has been in a  
6     tangible property sense. You've got the same tangible  
7     property going throughout the whole sequence of events.  
8     But I submit that that is not significantly different  
9     when you recognize that what is valuable about the  
10    property in this case is not the iron oxide particles  
11    and the backing on the magnetic tape on the one hand, or  
12    the vinyl on the record on the other.

13            What people care about and the reason these  
14    master tapes were stolen is that they contain actual  
15    Elvis Presley performances, and the reason anyone is  
16    going to buy these bootlegged phono records is that they  
17    contain those very Elvis Presley performances.

18            QUESTION: So the duplication itself is an act  
19    of conversion?

20            MS. CORWIN: Certainly.

21            QUESTION: And each duplication contains in  
22    itself the property that makes it valuable.

23            MS. CORWIN: Well, I think that's right. And  
24    as I say, I don't think anyone would be interested in  
25    stealing the tapes or purchasing the records if you

1 didn't have that very property embodied in the phono  
2 records. So I think that you --

3 QUESTION: So what you've stolen or converted  
4 is contained in that record?

5 MS. CORWIN: I think that's right, and  
6 California cases we've cited and the California criminal  
7 statute --

8 QUESTION: That would be true whether the  
9 tapes were stolen or lawfully acquired?

10 MS. CORWIN: I think that's right, and that is  
11 the second branch of our argument, that even if you  
12 didn't have this original taking of tangible property  
13 you would nevertheless have a wrongful taking in the  
14 sense of a conversion, both on the theory that you had a  
15 copyright infringement and on the theory that under  
16 state law there has been protection for this sort of --  
17 against this sort of unauthorized duplication of sound  
18 recordings.

19 QUESTION: Am I correct that your position is  
20 that if the material were not copyrighted you wouldn't  
21 have any case?

22 MS. CORWIN: That's not so in the particular  
23 context of this case. We have a bit of an odd situation  
24 here in that, for example, the sound recordings prior to  
25 1972 were not subject to copyright protection under



1 federal laws. The compositions were. The sound  
2 recordings, Presley's performance fixed on a tape, were  
3 not.

4 But there is a body, a fairly strong body of  
5 case law under the common law and under the criminal  
6 statute in California, that would protect that  
7 non-copyrighted recording against unauthorized  
8 duplication. And the courts have regarded that as a  
9 form of theft statute or larceny statute.

10 QUESTION: What would you say about the  
11 situation where a person is employed to infiltrate some  
12 private office where there is copyrighted material and  
13 then, using a recording machine, reads it to the  
14 recording machine, dictates it, and then proceeds to  
15 carry it across state lines after it's transcribed?  
16 That's about what your friend suggested as an analogy  
17 here. What do you say about that?

18 MS. CORWIN: Well, I think you'd have to look  
19 at that situation carefully to see whether there had  
20 been some sort of theft or conversion within some  
21 established body of law.

22 QUESTION: Well, it's a trade secret.

23 MS. CORWIN: Yes.

24 QUESTION: So that there is clear conversion  
25 of a property right.

1 MS. CORWIN: Right. I think if you have a  
2 trade secret you do certainly have a stealing or  
3 conversion. Now, the problem may come when you try to  
4 figure out whether it is a good, ware or merchandise,  
5 and while I think that Congress spoke broadly about  
6 that, I still think you probably have some element of  
7 saleable nature or commercial nature.

8 The question is whether what you've got is in  
9 a form that fits within those words of the statute. I'm  
10 not sure that the example that Mr. Abzug gave about the  
11 person just putting this into his memory and walking  
12 across state lines is something that would fit into the  
13 statute, simply because I think "goods, wares and  
14 merchandise" suggests you have something outside of  
15 yourself, something you can have in a saleable form.

16 So I think his example may be a problem for  
17 us. If someone who has recorded and has this on some  
18 sort of tape that can be sold, then I would feel far  
19 more comfortable and say that is like the trade secret  
20 cases or not so far from that.

21 But we think at a bedrock minimum, when you  
22 have the situation like this, in which it's quite clear  
23 that you do have the original stealing or conversion of  
24 the master tapes and you have the lifting of what is  
25 most valuable from those tapes and placing it on new

1     tangible items, that that comes within the statute.

2             I think it would be a hypertechnical reading  
3     of the statute to say that that, that clever  
4     technological trick of transcribing the information from  
5     one item to another, somehow lifts you out of Section  
6     2314. We just don't think that when Congress enacted  
7     the statute it had in mind that people could by this act  
8     of transcription somehow get themselves out of reach of  
9     Section 2314.

10            Now, it's clear that when Congress amended the  
11     National Stolen Property Act in 1934 it was trying to  
12     get at all of the ways in which professional thieves  
13     were operating. They were trying to close the loopholes  
14     that had allowed these so-called gangsters to move  
15     stolen goods from one state to another, thereby escaping  
16     the reach of the local authorities.

17            In that connection, I think it's useful to  
18     return to the facts of this case. Petitioner was  
19     clearly aware of the illegal nature of what he was  
20     doing. He was aware, I think the record shows he knew  
21     about the illicit origin of these source materials. He  
22     knew that there had been payments to NBC, he knew that  
23     there had been payments to the radio recorder studio.

24            He also knew that the unauthorized duplication  
25     was in violation of the copyright owner's rights and the

1 rights of people like RCA. And he was fully aware that  
2 these bootleg albums, these thousands of dollars worth  
3 of albums that he was transporting, embodied that  
4 valuable part of the information. What had been taken  
5 to begin with, the Elvis Presley performances, was  
6 precisely what was on those bootleg records.

7 With that knowledge and in connection with a  
8 significant commercial enterprise, Petitioner shipped  
9 these albums from one side of the country to the other,  
10 for the express purpose of escaping FBI surveillance in  
11 California. Now, that's not quite like escaping state  
12 law authorities, but I submit it comes fairly close, and  
13 I think that there's no question that the statute has  
14 always covered situations in which the antecedent  
15 offense, the antecedent stealing or conversion, has been  
16 a violation of a federal criminal statute. So I don't  
17 think that's a significant difference here.

18 Now, this sort of stealing or conversion and  
19 transportation of the large numbers of illegal  
20 duplicates is precisely what is causing some very  
21 significant financial damage to the entertainment  
22 industry, to the recording industry. As I've suggested,  
23 it is not really different in effect and process from  
24 someone who goes into the RCA warehouses and steals  
25 albums and takes those across state lines.

1           In light of Congress' broad purpose in  
2   enacting Section 2314, we think there's every reason to  
3   read that provision to cover Petitioner's interstate  
4   shipments.

5           Thank you.

6           CHIEF JUSTICE BURGER: Do you have anything  
7   further, Mr. Abzug?

8                   REBUTTAL ARGUMENT OF  
9                   MICHAEL D. ABZUG, ESQ.,  
10                  ON BEHALF OF PETITIONER

11          MR. ABZUG: I'd just like to make one very  
12   brief summary point. I think Mr. Justice Stevens'  
13   question to the Respondent, Respondent's counsel,  
14   focuses the Court's attention on the fact that the theft  
15   in this case is simply the unauthorized use of the  
16   copyright privileges. The case, as I said in my opening  
17   remarks, doesn't really have anything to do with whether  
18   or not he bribed anybody or got the originals by any  
19   unlawful means, other unlawful means.

20          Once you say that unauthorized use of a  
21   copyright is equivalent to a conversion, stealing or  
22   taking by fraud, you really have extended the borders of  
23   the National Stolen Property Act beyond the bounds of  
24   probably what Congress intended, including into areas  
25   traditionally reserved to civil penalties. For example



1 Mr. Justice Marshall's example of patent infringement is  
2 one example.

3 You can think of another example, cited by Mr.  
4 Justice Stevens, where there might be a contract dispute  
5 between litigants where property is used, a manuscript  
6 is used in an unauthorized way and then shipped, copies  
7 of it are shipped across state boundaries. We submit  
8 that the unauthorized use of the copyright privilege is  
9 analogous to these issues that are raised by the Court,  
10 and that the statute is not clearly designed to treat  
11 those issues, and that therefore the Petitioner's  
12 conduct should not be punishable under the National  
13 Stolen Property Act.

14 Thank you.

15 CHIEF JUSTICE BURGER: Very well. Thank you,  
16 counsel. The case is submitted.

17 (Whereupon, at 10:57 a.m., the argument in the  
18 above-entitled was submitted.)

19 \* \* \*

CERTIFICATION.

Person Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-589 - PAUL EDMOND DOWLING, Petitioner V. UNITED STATES

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BY Paul A. Richardson

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