

Case No. 09-2131

ORIGINAL

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IN THE SUPREME COURT OF OHIO

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ON APPEAL FROM THE COURT OF APPEALS  
FOR CUYAHOGA COUNTY, OHIO  
CASE NO. 92455

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STATE OF OHIO

Appellant-Movant

-v-

WELTON CHAPPELL

Appellee-Respondent

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**MEMORANDUM IN RESPONSE**

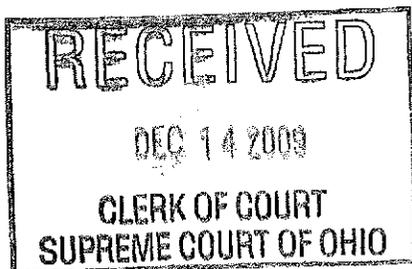
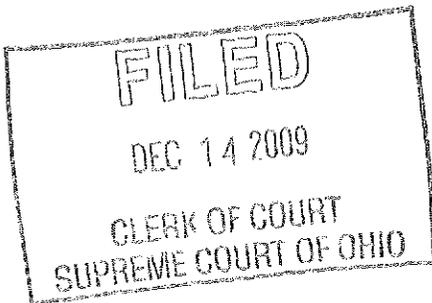
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## **STATEMENT OF APPELLEE**

This case does not present a substantial constitutional question nor is it a case of public or great general interest.

The prosecutor's memorandum presents an argument that is clearly controlled by an Ohio statute that is plain on its face. Moreover, the Ohio Constitution makes a clear statement as to how a defendant is to be charged with a felony. Also, this court has previously addressed federal preemption in a criminal copyright case and that decision is jurisdictional and unambiguous.

This court should deny jurisdiction.

## **STATEMENT OF THE CASE AND FACTS**

On May 16, 2007 the grand jury returned a six-count indictment charging the defendant, Welton Chappell, in three of the counts with co-defendant, Christopher Steward. The charges against Chappell are: Counts 3 and 4, Criminal Simulation of music and movies, a violation of O.R.C. § 2913.32; Count 5, Receiving Stolen Property, a laptop computer, in violation of O.R.C. § 2913.51 and Count 6, possessing criminal tools, i.e., money, automobile, hard drives, laptop computer, and packaging material, a violation of O.R.C. § 2923.24.

Defendant Stewart pled guilty to some of the charges and his case was disposed of separately by the court.

Defendant Chappell was tried on all charges. Count 5 was dismissed at trial pursuant to Rule 29. The jury could not reach a verdict on any of the counts, a mistrial was declared and the jury was dismissed. Afterwards, defendant filed a motion to dismiss all of the remaining counts as a matter of law which was partially granted in a memorandum opinion dismissing the criminal simulation charges only, leaving the criminal tools charge (PCT), Count 6, for jury trial.

Defendant filed a second Motion for Bill of Particulars and Discovery as to the PCT charge demanding that the prosecution state what underlying criminal act the defendant intended and what additional evidence the state had to support the remaining PCT charge. The prosecution served on the defense its Supplemental Bill of Particulars which makes clear the State “intends to introduce evidence that the underlying felony contained in Count 6 of the Indictment, Possessing Criminal Tool, is an intent to violate Federal law under 17 U.S.C. § 506.” This United States Code section is the criminal copyright infringement statute and the statement was clear; the State would attempt to prove that defendant intended to violate a federal copyright law as its underlying basis for the criminal tools charge.

Defendant filed its Motion to Dismiss Count 6 on legal grounds and on the date of trial, the court agreed with the defense and dismissed Count 6 from the bench before the jury was impaneled. All counts being closed, the prosecution filed a notice of appeal asking the court to review the dismissal of the criminal tools charge only; the defendant filed a cross-appeal.

On October 22, 2009 the Eighth District Court of Appeals affirmed the trial court’s dismissal of Count 6, Possessing Criminal Tools, and dismissed the cross appeal as untimely.

The State seeks this Court’s jurisdiction to consider whether it can proceed to trial based on proof that the defendant intended to violate a federal criminal copyright statute as the underlying basis for the PCT charge under the Ohio statute.

## **LAW AND ARGUMENT**

The Ohio Constitution, Art. I, §10, demands that a grand jury charge the crime and also, that the defendant has a right to demand a copy of the charge against him. However, the State with a Supplemental Bill of Particulars has in effect recharged Chappell — that he intended to

violate a federal criminal copyright statute, therefore, it claims that he possessed the items with the intent to violate the Ohio criminal-tools statute. No grand jury has made such a charge here.

Further, the R.C. §2901.03(A) clearly states that no conduct constitutes an offense unless it is so defined in code, and there is no federal copyright violation offense in the Revised Code. This was the basis of the trial court's decision dismissing the PCT charge and affirmed by the Court of Appeals.

In addition, there is a clear federal preemption against state-court litigation under federal copyright laws which is jurisdictional (see 17 U.S. C. §301(a)).

**Proposition of Law:**

**The State cannot proceed to prove that the defendant intended to violate a federal criminal copyright statute as its basis for a violation of possessing criminal tools.**

The State maintains that because the PCT statute does not state specifically that the possessor must intend to violate Ohio law as its basis for such a violation, therefore, it is free to use federal law (or municipal laws) to prove that a person intends to use the items criminally. The State maintains that it presents a legal issue of great public interest and involves a substantial Constitutional question; the respondent disagrees.

The Ohio Constitution, Ohio Revised Code, Ohio case law and Federal copyright law prohibit the state's method of using the law of another jurisdiction to provide the underlying basis for showing intent to violate that law as its basis for prosecuting a defendant under the Ohio criminal-tools law. Most important here, this court has made clear that the federal copyright preemption is *jurisdictional* and cannot support a state-court conviction.

The following discussion is contrary to the prosecution's intended method of prosecution and shows that there is no great public interest and no Constitutional issue in its petition.

**The Ohio Constitution:** The Ohio Constitution, Art. I, §10, provides in pertinent part that “no person shall be held to answer for a capital, or otherwise infamous crime, *unless on presentment or indictment of a grand jury*” and the party accused has the right “*to demand the nature and cause of the accusation against him and to have a copy thereof.*” (emphasis added) The county grand jury has not charged the defendant with the crime of federal copyright infringement under federal law, nor could it. Notifying Chappell of a new charge in the prosecutor’s response to defendant’s bill of particulars is no substitute for a required indictment charging the defendant, or at least informing him of the basic facts that constitute the underlying criminal offense upon which the PCT charge is predicated. The prosecution’s intention to proceed in this matter, without an indictment, does not comply with the Ohio Constitution and dismissal of the charge was warranted. See also Ohio R. Crim. P. 7(A).

**The Revised Code:** Section 2901.03(A) makes clear that “[n]o conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.” And section (B) states that “an offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibitions or failure to meet such duty.” (emphasis added)

None of the above requirements has been met by the prosecutor’s method here; there is no indictment charging the intended crime of federal criminal copyright infringement (or a municipal criminal violation), much less could one be charged. Also, there could not have been an underlying felony basis for the PCT charge since “copyright infringement” is not “defined as an offense in the Revised Code”, nor could there be a penalty for a non-existent violation. Also,

the Revised Code makes no exception for a municipal criminal violation.<sup>1</sup> There is no compliance with the Revised Code in this instance.<sup>2</sup> This was also the conclusion of the Court of Appeals in affirming this case.

**Federal Preemption and Jurisdiction:** The following are the words of Chief Justice Moyer in his opening paragraph (partial quote) in *State of Ohio v. Perry*, 83 Ohio St.3d 41; 697 N.E. 624 (1998); 1998-Ohio-422, and his statement of law sets forth the court's jurisdictional holding as to the application of the federal preemption statute in copyright matters in Ohio which must apply to *Chappell* as well.<sup>3</sup>

“The federal copyright laws expressly preempt any state law action which govern ‘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 or 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 \* \* \*’ Section 301(a), Title 17, U.S. Code.” (p. 42, emphasis added)

In addition, Justice Moyer makes clear that the federal copyright law is a *jurisdictional* bar to any state prosecution involving matters touching on copyright laws; he states:

We recognize that because *preemption is a jurisdictional bar to prosecution*, a no contest plea or even a guilty plea, cannot support a conviction on a state charge that is preempted by federal law. (p. 43, emphasis added)

The lack of state-court jurisdiction in copyright matters has been decided by this court.

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<sup>1</sup> The prosecution maintains in its proposition of law that it may use also municipal criminal law to prove that a person possess an item illegally. The State has not made this argument previously nor is the instant case about an intended municipal violation, nevertheless it attempts to equate a municipal criminal offense (misdemeanors) with a federal felony copyright violation.

<sup>2</sup> See also R.C. §2901.04 (A) and (B).

<sup>3</sup> Section 301(a) clearly states that copyright is “governed exclusively by this title . . . [and] no person is entitled to any such right or equivalent right in any such work under the common law or statutes on any state.” (17 U.S.C. §301)

The pertinent facts are that Perry was indicted for two counts of unauthorized use, two counts of theft and significantly, one count of possessing criminal tools in connection with his operation of a computer bulletin board selling copyrighted software.

This is what the State claims; that Chappell made unauthorized copies of music and video belonging to the owners with the intent to distribute the disks in violation of the federal copyright law. Unlike the application of Ohio's unlawful use, theft and possessing criminal tools statutes, which by their nature implied a federal copyright violation in *Perry*, but in *Chappell* the prosecution made clear that it specifically intended to use the federal criminal copyright infringement statute (17 U.S.C. §506) as its underlying felony basis for the PCT charge. *Perry* sustained dismissal of the unlawful use and theft charges as well as the PCT count.

This Court goes through a detailed discussion of preemption noting that “[f]ederal courts have repeatedly recognized that allowing state claims where the core of the complaint centers on wrongful copying would render the preemption provisions of the Copyright Act useless.”

(p. 43, citations omitted) *Perry* states:

*Reproduction, distribution, and display, uploading, posting, and downloading are all ‘uses’ of the software. They are the uses alleged by the state and are all exclusively governed by the copyright law.*  
(emphasis added, p.46)

This Court continues:

The only ‘property’ at issue in Perry’s case that has an owner and therefore could fulfill the element of unauthorized use is the property right conferred by copyright law. *Fatal to the state’s argument, the federal copyright laws expressly preempt any state law actions which govern ‘legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright.’* Section 301(a), Title 17, U.S. Code.  
(emphasis added, p.50)

As in *Perry* and *Chappell*, proof of intended reproduction, distribution, uploading and downloading etc., are all uses of the software that the state intends to prove in *Chappell*, but they are specifically preempted by federal copyright law.

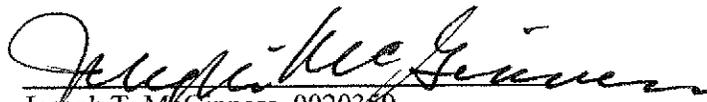
The appellate decision in *Chappell* did not address *Perry*, although it was briefed.

## CONCLUSION

This case presents nothing new; the Revised Code is clear, there is no criminal offense unless it is defined in the Ohio statutes. Moreover the Ohio Constitution demands that a grand jury present charges and the defendant has a right to receive a copy of them. Furthermore, this Court has made a clear statement that federal copyright law specifically preempts state litigation on this subject and is jurisdictional. These matters are established law.

There is neither an issue here of public or great general interest nor a substantial Constitutional question. The respondent asks this Court to deny jurisdiction.

Respectfully submitted,



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## Proof of Service

A copy of the foregoing Memorandum in Response was sent to Thorin Freeman, Asst. Cuyahoga County Prosecutor, Justice Center Bldg., 8<sup>th</sup> Floor, 1200 Ontario St., Cleveland, OH 44113 by 1<sup>st</sup> Class U.S. Mail on December 11, 2009.



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