

In The  
**Supreme Court of the United States**

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BRIAN P. CORCORAN,

*Petitioners,*

v.

MICHAEL SULLIVAN

*Respondents.*

—◆—

**On Writ of Certiorari To The United States  
Court Of Appeals For The Seventh Circuit**

—◆—

**Jurisdictional And Merits Statements  
In Support of the Respondents**

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October 16, 2003

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## QUESTIONS PRESENTED

- (1) What was the relevant sequence of events (“the transaction”) that led to Corcoran’s being indicted and convicted?
- (2) Did the judges in either or both courts understand the transaction fully? What relevant facts did they miss or misunderstand, if any?
- (3) Based on your understanding of commercial law and intellectual property law, was the Wisconsin Court of Appeals correct to uphold his conviction? Was the Seventh Circuit correct to deny his constitutional challenge to his conviction? Why or why not? (Argue as many alternate grounds for affirmance/reversal as you think relevant.)
- (4) In what ways could Corcoran have avoided prosecution had he taken IS204? Was there any material you have studied in the course that he does not reference that might have helped him avoid conviction or get his conviction overturned?
- (5) Do the two opinions and/or the Wisconsin statute reflect any institutional limitations of courts and legislatures respectively in dealing with problems at the intersection of information technology and law?

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Copyright Act, 17 U.S.C. § 102, 103, 106, 301 . . . . . 2, 4

A consulting firm, Mueller Consulting Services (MCS), acquired the services of Brian Corcoran to compose specialized data processing programs for their company. Corcoran was not an official employee of MCS. Instead, his salary, although based on an hourly wage, was to be paid in full following his successful completion of the specialized software. After months of work, Corcoran worried that MCS would not be content with the quality of his software development, and therefore felt MCS would not pay him for his work. Due to his inquietude mindset, Corcoran intentionally inserted “time bomb” software code into one of these specialized programs, purposely without informing MCS.<sup>1</sup> The additional “time bomb” code was designed by Corcoran to appear to be innocuous in the specialized software. Yet when a particular command in the “time bomb” code was executed, it would erase the copyrighted programs that Corcoran composed. More importantly, the program would also erase any data and database files for use by MCS when MCS entered in new data.

Corcoran later prompted an MCS employee to enter the triggering command. Unbeknownst to MCS, the program written by Corcoran erased itself. At a later point, MCS also entered new data, which triggered the deleting process of all of the data and databases supplied for use in Corcoran’s software.<sup>2</sup> Following the triggered deletion of Corcoran’s software and the data respective to the Corcoran software, MCS alerted the authorities. Corcoran was apprehended and became one of the first people convicted under the Wisconsin Computer Crimes Act (WCCA) that criminalized the willful deletion of computer data.<sup>3</sup>

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<sup>1</sup> Wisconsin v. Corcoran, 186 Wis. 2<sup>nd</sup> 616 (Wis. App. 1994)

<sup>2</sup> Corcoran v. Sullivan, 112 F.3d 836 (7<sup>th</sup> Cir. 1997)

<sup>3</sup> Wisconsin Computer Crime Act, Wis. Stat. § 943.70 (2002)

Following his felony conviction by a jury trial, Corcoran attempted to employ habeas corpus relief by arguing that he had a valid copyright claim in the software programs he composed. In addition, he also argued that due to his work with MCS's supplied data, he had also secured a copyright claim in MCS's data. Using this reasoning, he litigated that the federal Copyright Act authorized him to destroy the programs and the data because they were his copyrighted files, and that the federal Act preempted the WCCA.<sup>4</sup> A district court of Wisconsin rejected his writ of habeas corpus application, a ruling which was affirmed by a panel of Seventh Circuit judges in 1997.

Contrary to Corcoran's arguments, the district court and the Seventh Circuit court did not misjudge when they decided not to recognize Corcoran's habeas corpus defense because Corcoran did not earn a copyright in MCS's data. This is not because he failed to do something correctly, but simply that said data would never be protected by copyright. The courts appropriately cited the Feist case as a guide to whether Corcoran's incorporation of data was sufficient for copyright protection.<sup>5</sup> The Feist case involved a set of telephone directory entries consolidated into another "white pages" directory. This data of telephone entries was found to be facts, which are not copyrightable. The alphabetical system of data compilation was also found not to have any copyright claim since it lacked significant creativity in selection and arrangement, much like Corcoran's software system likely does. The courts should have also cited Warren Publishing v. Microdos Data Corp., in which the court held that even a sophisticated compilation of cable television companies serving each community in the nation was not copyrightable.<sup>6</sup>

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<sup>4</sup> Corcoran argued that the Copyright Act, 17 U.S.C., specifically § 102, 103, 106 and 301 applied.

<sup>5</sup> Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340

<sup>6</sup> Warren Publ. Inc. v. Microdos Data Corp., 522 U.S. 963

In Warren, the selection was not original because every community in the U.S. served by a cable company was included. Like Warren, Corcoran’s software included, for example, every restaurant about which MCS had supplied data. “We hold that Corcoran did not have a copyright to the data on 400 restaurant reviews collected by MCS and included in the file labeled PONQTR2.WK1.”<sup>7</sup>

Unfortunately, we are given very few descriptions in either cases regarding the data supplied by MCS. Nor are there any descriptions on how Corcoran’s program “enabled the process of the data,” or how Corcoran “embedded those data” in his programs. This lack of description provides the appellant with room to argue that the District court did not fully understand just how “embedded” the data was in Corcoran’s program. Judge Posner, however, did cite the Rockford Map case at the same section as that of Feist, suggesting that Posner felt Corcoran’s “embedded” data did not show the same level of significant copyright expression as in Rockford Map. In Rockford Map, the court found sufficient creativity in the creation of drawn maps from aerial photos to grant copyright protection.<sup>8</sup> Although Posner cites this case without any comment, we can assume that he correctly analyzed both Feist and Rockford Map. Based on this analysis, and despite the brief description that the data was “embedded” with Corcoran’s copyrighted program, MCS’s data was still found to be fact instead of expression, thus, not copyrightable. To wit, Posner concluded that Corcoran’s embedding of the data in Corcoran’s software lacked creativity, quite similar to the alphabetical ordering of telephone entries, as opposed to the elaborate Rockford Map’s use of embedding photo information into maps.

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<sup>7</sup> Wisconsin v. Corcoran, 186 Wis. 2<sup>nd</sup> 616, 627 (Wis. App. 1994)

<sup>8</sup> Rockford Map Publishers, Inc. v. Directory Service Co., 768 F.2d 145

In addition, the opinion from *Wisconsin v. Corcoran* did provide brief descriptions of the relationships between Corcoran's software and the incorporated data. Corcoran contends that his program:

“(1) reduced the ‘raw data’ into electronic signals capable of being stored and retrieved in a machine readable format; (2) broke the data down into records and fields; (3) labeled the fields and records to facilitate the recovery and use of the data; and (4) positioned the data in memory relative to other files.”<sup>9</sup>

Again, the qualities of Corcoran's software seem to fit the *Warren* case which found that an arrangement of facts was not copyrightable. Moreover, before the late 1990s, (and before Corcoran composed his software) most courts were not generous with copyright protection to programs or data structures that used only basic systems and procedures to manipulate data, much like what Corcoran claims his software does. A historical perspective can be found in *Baker v. Selden*, where Baker claimed Selden had infringed the copyright by using accountant books with rows, columns and mathematical calculations and processes that were very similar to those found in Baker's copyrighted work.<sup>10</sup> In this famous case, the court decided Selden's book had not violated the copyright of Baker's book and that what made up the book was also not copyrightable.

In a more recent ruling, the Supreme Court held that Lotus's menu command hierarchy was not copyrightable, nor was the menu function itself, since it was a method of operation and, therefore, void from copyright protection.<sup>11</sup> 17 U.S.C. § 102(b) states: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, [or] method of operation...”<sup>12</sup> Since we have not been provided the details of Corcoran's software, it is difficult to analyze his software to

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<sup>9</sup> *Wisconsin v. Corcoran*, 186 Wis. 2<sup>nd</sup> 616, 626 (Wis. App. 1994)

<sup>10</sup> *Baker v. Selden*, 101 U.S. 99

<sup>11</sup> *Lotus Dev. Corp. v. Borland Int'l*, 49 F.3d 807

<sup>12</sup> 17 U.S.C. § 102(b)



determine if it was more than a few procedures and systems of operation. Yet the data associated with Corcoran's software, at the very most, would possibly apply for compilation copyright protection, but no protection on the copyright of the data itself. As the Supreme Court explained, the Copyright Act "makes clear, copyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected."<sup>13</sup> Moreover, Corcoran did not even collect the facts in which he claims to have earned a copyright; the "sweat of brow" work which found the data was supplied by MCS. Considering these cases, the Copyright Act did not authorize Corcoran any rights over MCS's data, nor did the Act prohibit Wisconsin from criminalizing actions that trespass on any Wisconsin company's "property" rights to their data.<sup>14</sup>

Although the Posner court ruled correctly, it also failed to mention perhaps one of the most important section in copyright preemption, Section 301(a) of the Copyright Act. 301(a) preempts any "legal or equitable rights [under state law] that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship and 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) is designed to prevent states from passing or enforcing laws equivalent to copyright. Similar to the Corcoran case, in the ProCD decision, Judge Easterbrook found that section 301(a) does not preempt ProCD's contract terms.<sup>15</sup> Judge Easterbrook writes, "A copyright is a right against the world. Contracts, by contrast, generally affect only their

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<sup>13</sup> Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 378

<sup>14</sup> "Property," as defined by WCCA means "anything of value, including but not limited to financial instrument, information, electronically produced data, computer software and computer programs. (Wisconsin Computer Crime Act, Wis. Stat. § 943.70 (2002))

<sup>15</sup> ProCD, Inc. v. Zeidenberg, 86 F.3d 1447

parties; strangers may do as they please, so contracts do not create ‘exclusive rights.’”<sup>16</sup> Corcoran’s claim that 301(a) preempts the WCCA legislation by applying “exclusive rights” should fail under similar reasoning. The intent of the WCCA is not to prohibit everyone from deleting any data. Rather, it provides protection for data that, due to its respective nature, requires authorization to “willfully [and] knowingly” delete said data.<sup>17</sup> Therefore, just as the ProCD finds that contract terms are not preempted by the Copyright Right Act since the Act does not apply exclusive rights upon everyone, the WCCA applies only to those who use a computer, and have written or implied authoritative restrictions on what they are permitted to do with data and software. Granted, there are parts of the WCCA that would likely be preempted by copyright law, such as criminalization of “[copying] data, computer programs or supporting document.” If the state of Wisconsin were to bring a case against an individual who, like Feist, copied data from one directory to their own, section 301(a) would likely apply and preempt the WCCA.

Even if the Posner court found the judicial enforcement of WCCA was preempted by this analysis of section 301(a), Corcoran’s claim of the WCCA equivalence to the Copyright Act would fail under the “additional element” test for preemption. Under this test, if state law provides a cause of action that requires proof of at least one element, in addition to those required for a copyright claim, the state law survives. The Posner court appropriately cites *National Car Rental System v. Computer Associates*, in which the court held that a claim for breach of license to use a computer program was not preempted under section 301(a) because the claim involved “use” of the program, and

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<sup>16</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454

<sup>17</sup> Wisconsin Computer Crime Act, Wis. Stat. § 943.70 (2002)

“use” of the program was not one of the rights conferred by the Copyright Act.<sup>18</sup> In a more recent case, *Taco Bell Corp. v. Wrench LLC*, the court held that the requirement of “expectation of compensation,” which was an additional element in a claim for implied-in-fact contract preserving the claim from preemption.<sup>19</sup> Although these cases protect a private contract, these cases are relevant because the WCCA, a state law, provides additional restrictions not conferred by the Copyright Act as well. The “additional element” test provides that Wisconsin can proscribe legislation (WCCA) in the general domain of intellectual property, as long as the legislation (WCCA) is greatly different from those subject to federal jurisdiction of intellectual property.

The courts also fail to address the possibility that Corcoran never directly deleted the data; an employee of MCS executed the trigger and deleted the software and data. However, this argument should be rejected under a simple “proximate cause” analysis.<sup>20</sup> Another argument that Corcoran might make is that the WCCA does not properly define what is meant by “destroy data [and] computer programs.”<sup>21</sup> Technically speaking, Corcoran’s “time bomb” software did not “destroy” the data. When a file is deleted, the reference to that file is removed from the computer’s record, but the data of the file is not completely removed from the disk.<sup>22</sup> Even when a deleted file section is overwritten, if the new file does not take up the entire disk cluster, a portion of the old file might remain in the slack space. However, in the court system, there are many opinions that suggest the use of the word “destroyed” by the court system is synonymous with the idea of simple file deletion. In *North Tel v. Brandl*, a debtor used a computer virus to “destroy”

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<sup>18</sup> *National Car Rental System v. Computer Associates*, 991 F.2d 426 (8<sup>th</sup> Cir. 1993)

<sup>19</sup> *Taco Bell Corp. v. Wrench LLC*, 256 F.3d 446, (6<sup>th</sup> Cir. 2001)

<sup>20</sup> see *Archer v. Warner*, 123 S. Ct. 1462

<sup>21</sup> Wisconsin Computer Crime Act, Wis. Stat. § 943.70 (2002)

<sup>22</sup> Casey, E. Digital Evidence and Computer Crime. 2000, Academic Press, p.45.

the creditor's business records.<sup>23</sup> In *GMC v. Lopez*, the Lopez et al stole GM trade secrets, copied them to Volkswagen computers, and then "destroyed" the original computer files (but the files were later recovered because the files were recoverable).<sup>24</sup> Courts seem to be using the "to tear down or break up" definition of "destroyed."<sup>25</sup> In *U.S. v. Lloyd*, the court opinion quotes one of the expert witnesses as saying that computer programs were illegally "destroyed" and then "purged," explaining that "destroyed" meant a simple delete, whereas "purged" meant to render the programs "unusable and unrecoverable."<sup>26</sup> Supported by past opinions, the WCCA's use of "destroyed" seems to define a typical file deletion (which erases the reference to the file) as opposed to the "purged" definition (which yields the file unrecoverable).

The opinions regarding the Corcoran case also subscribe to sound commercial policy, despite the lack of articulation about how important sound policy is to these cases. Had Corcoran prevailed on his copyright claim in respect to the data supplied to him by MCS, the ruling could have started a dangerous trend in U.S. database protection policy toward the European 'sui generis' protection of data and databases, not to mention, undermine the restrictions of the Copyright Act. Had his appeal been successful, the outcome would also undermine the state's ability to create legislation that deals with the growing complexities of unauthorized and destructive computer crimes. If Corcoran had convinced the court of this argument, a classic example of holdup opportunity could be prevalent. Any programmer could insert "time bomb" code, and demand the compensation for the maximum value of uncopyrightable data originally supplied by his

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<sup>23</sup> *North Tel, Inc. v. Brandl (In re Brandl)*, 179 Bankr. 620 (Bankr. D. Minn. 1995)

<sup>24</sup> *GMC v. Ignacio Lopez de Arriortua*, 948 F. Supp. 670

<sup>25</sup> *The American Heritage Dictionary of the English Language*, Third Edition, Houghton Mifflin Company, 1996.

<sup>26</sup> *United States v. Lloyd*, 269 F.3d 228

own firm that he was now holding hostage with criminal impunity. The court was clearly interested in maintaining the integrity of our current Copyright Act, and allowing states to introduce legislation that deters such destructive behavior and helping to overcome the uncertainties produced by rapidly changing computer technology.

There are many legal alternatives that Corcoran could have chosen to use to protect both his software program and his embedded data. Because Corcoran was not an official employee of MCS, with the assistance of an attorney or even a Nolo book, he could have composed a license for the use of his program and the data incorporated with it in a long and verbose form. In this hypothetical license, he could have required that he receive his full payment or else he has the right to delete his licensed software and embedded data. In ProCD, protection was given for computer data that would have otherwise not been protected under copyright law with the use of a shrinkwrap license. However, this strategy may have shortcomings if MCS challenged that they are not a “merchant,” stated in Section 2-207(2), the infamous battle-of-the-forms section. Thus, they could argue ProCD had relevant license because Zeidenberg was a “merchant,” as was argued in *Hill v. Gateway*.<sup>27</sup> But Corcoran, being one of Professor Downes’ finest INFOSYS 204 students, would reject this argument by quoting ProCD: “Our case has only one form; UCC § 2-207 is irrelevant.”<sup>28</sup> Considering that his software may not work exactly as requested by MCS, he should also include a clause in his license that states he provides no liability or implied warranty for his software.

Corcoran could also enhance MCS’s data with some original principle of selection or arrangement of the restaurants, such as estimates on how much a dinner

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<sup>27</sup> *Hill v. Gateway 2000, Inc.* 105 F.3d 1147 (7<sup>th</sup> Cir. 1997)

<sup>28</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452

would cost, an independent score of each restaurant, or cooking expertise on the types of food at the respective restaurants. In the CCC Info Services case, the court found that CCC's book contained more than just compilations of data.<sup>29</sup> The valuations were approximate statements of opinion rather than just ideas, and the creativity found in the book's predictions based on professional judgment and expertise was sufficient to protect the CCC's data under the Copyright Act.

In a more unusual strategy, Corcoran could have also had MCS sign a nondisclosure agreement in an effort to protect his software and embedded data as his own trade secret. In *Cybertek v. Whitfield*, Mr. Whitfield was found to have misappropriated Cybertek's software trade secrets after he signed a nondisclosure agreement upon his resignation from Cybertek.<sup>30</sup> Even though Whitfield did not directly copy Cybertek's software, the court affirmed that his similar combination of software technology to Cybertek's was enough for trade secret misappropriation. Had Corcoran coerced MCS to sign a nondisclosure agreement, not only could he have deleted his software and embedded data, he also could have sued MCS for misappropriating his trade secrets. The remaining, yet more drastic alternative, is that Corcoran could have decided to work in Vermont, where not only are the winters less brutal than Wisconsin, but where there also lacks any computer crime statutes.

The legislative and judicial communities have long understood the concept of real property and tangible objects. Property law has had thousands of years of cases, whether that property may be someone's goat, a home, a car, or even a famous baseball. Advances in the science and the arts have brought a great need for additional

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<sup>29</sup> *CCC Info. Servs. v. MacLean Hunter Mkt. Reports*, 44 F.3d 61

<sup>30</sup> *Cybertek Computer Products, Inc. v. Whitfield*, 203 U.S.P.Q. (BNA) 1020

understanding in intangible property, or what we call intellectual property. For example, the intersection of information technology and law raises many complex philosophical, international, constitutional, economic, and social issues not found in the deep history of traditional property law. Because of the amazing expansion of both technology innovation and its rapidly growing importance in the world, the legislative and judicial communities have shown limitations in their efforts to address many of these issues. Where are these limitations evident in the Corcoran cases?

As found in both Corcoran cases and the WCCA, many state and federal officials are not familiar with the complexities of technology and intellectual property. Although the rulings in general were correct, many detailed, yet very important issues in the Corcoran case were not addressed, such as what kind of data was deleted, the organization of said data, and how embedded it was in Corcoran's specialized software. In the judges' defense, when they attended law school, there was no field even remotely similar to our modern intellectual property landscape, they had no faculty members who specialized in intellectual property, and they did not have thousands or even hundreds of years of past legal precedent on intellectual property. Except in very rare cases, judges do not have advanced degrees in any field outside of jurisprudence, and most likely studied english, political science or philosophy as an undergraduate. Because intellectual property is not required law school curriculum, many of the judges' law clerks also lack technology law knowledge. There is also little specialization opportunity for judges, meaning one appeals judge, in the span of a few months have to rule on a case on the constitutionality of the pledge of allegiance, a case on patent infringement, a case of land use, a case on abortion, a case on trade secret, a case on trade dress, and a case on trademark (which sound as if their similar bodies of law, but are actually quite different

fields requiring a high degree of complexity). Not only are judges, most who are devoid of technological knowledge and who only have a few years of relevant case law to work, faced with highly technical issues, they also must understand how this new field effects other areas of overlapping law. Just imagine how complicated the Corcoran case would be if Corcoran lived in India, and MCS had outsourced this project to him. Technology, especially information technology, not only can span across the U.S., it has transnational flow potential. Which laws govern an information technology crime once a transaction crosses country borders?

In conclusion, a significant limitation of judges and legislators will simply be their endless attempted to keep abreast with evolving technology. For example, Microsoft's next operating system, nicknamed Palladium will have digital rights management (DRM) capabilities. If MCS had been running Palladium, Corcoran's "time-bomb" program would not have to perform the WCCA's illegal procedures such as to "destroy" or "modify" his files. All he would have to do is enable permission-based DRM on the files, and he could still have held his software and embedded data hostage by preventing MCS from accessing the files on their own computers. And if MCS attempted to reverse engineer his files, Corcoran could seek protection under the Digital Millennium Copyright Act. Considering how fast technological innovation occurs, how slow the judicial and legislative bodies are able to react to this innovation, how information technology case can involve many jurisdictions, how few past precedents exist, or how insignificant judges' knowledge of technology and technology law can be, it is understandable why the legislative and judicial bodies struggle with their respective responsibilities in regards to information technology.