***515** In March 1990, officers executed warrants to search petitioners' business premises and Acty's residence. They seized various items, including pipes, bongs,[FN1] scales, roach clips,[FN2] and drug diluents including mannitol and inositol. The officers also seized cash, business records, and catalogs and advertisements describing products sold by petitioners. The advertisements offered for sale such products as "Coke Kits," "Free Base Kits," [FN3] and diluents sold under the names "PseudoCaine" and "Procaine."

FN1. A "bong" is a "water pipe that consists of a bottle or a vertical tube partially filled with liquid and a smaller tube ending in a bowl, used often in smoking narcotic substances." American Heritage Dictionary 215 (3d ed. 1992).

FN2. The statute defines "roach clips" as "objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand." 21 U.S.C. § 857(d)(5).

FN3. The term "freebase" means "[t]o purify (cocaine) by dissolving it in a heated solvent and separating and drying the precipitate" or "[t]o use (cocaine purified in this way) by burning it and inhaling the fumes." American Heritage Dictionary 723 (3d ed. 1992).

Indictments on a number of charges relating to the sale of drug paraphernalia eventually were returned against petitioners and George Michael Moore, Acty's husband. A joint trial took place before a jury in the United States District Court for the Southern District of Iowa.

Petitioners were convicted of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of former 21 U.S.C. § 857(a)(1), and of conspiring to commit that offense, in violation of 18 U.S.C. § 371. Petitioner Acty also was convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1); investing income derived from a drug offense, in violation of 21 U.S.C. § 854; money laundering, in violation of 18 U.S.C. § 1956(a)(1); and engaging in monetary transactions with the proceeds of unlawful activity, in violation of 18 U.S.C. § 1957. Acty was sentenced to imprisonment for 108 months, to be followed by a 5-year term ***516** of supervised release, and was fined $150,000. Posters was fined $75,000.

The United States Court of Appeals for the Eighth Circuit affirmed the convictions. 969 F.2d 652 (1992). Because of an apparent conflict among the Courts of Appeals as to the nature of the scienter requirement of former 21 U.S.C. § 857,[FN4] we granted certiorari. 507 U.S. 971, 113 S.Ct. 1410, 122 L.Ed.2d 782 (1993).

FN4. Compare the decision of the Eighth Circuit in this case with *United States v. Mishra,* 979 F.2d 301 (CA3 1992); *United States v. Murphy,* 977 F.2d 503 (CA10 1992); *United States v. Schneiderman,* 968 F.2d 1564 (CA2 1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1283, 122 L.Ed.2d 676 (1993); and *United States v. 57,261 Items of Drug Paraphernalia,* 869 F.2d 955 (CA6), cert. denied, 493 U.S. 933, 110 S.Ct. 324, 107 L.Ed.2d 314 (1989).

II

Congress enacted the Mail Order Drug Paraphernalia Control Act as part of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207. As originally enacted, and as applicable in this case, the statute, 21 U.S.C. § 857(a), [FN5] provides:

FN5. In 1990, Congress repealed § 857 and replaced it with 21 U.S.C. § 863 (1988 ed., Supp. IV). See Crime Control Act of 1990, Pub.L. 101-647, § 2401, 104 Stat. 4858. The language of § 863 is identical to that of former § 857 except in the general de-

> scription of the offense. Section 863(a) makes it unlawful for any person "(1) to sell or offer for sale drug paraphernalia; (2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or (3) to import or export drug paraphernalia."

"It is unlawful for any person-

"(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;

****1750** "(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or

"(3) to import or export drug paraphernalia."

Section 857(b) provides that anyone convicted under the statute shall be imprisoned for not more than three years and fined not more than $100,000.

***517** A

[1] Section 857(a) does not contain an express scienter requirement. Some courts, however, have located a scienter requirement in the statute's definitional provision, § 857(d), which defines the term "drug paraphernalia" as "any equipment, product, or material of any kind which is primarily intended or designed for use" with illegal drugs.[FN6] Petitioners argue that the term "primarily intended" in this provision establishes a subjective-intent requirement on the part of the defendant. We disagree, and instead adopt the Government's***518** position that § 857(d) establishes objective standards for determining what constitutes drug paraphernalia.

> FN6. Section 857(d) provides in full:
>
> "The term 'drug paraphernalia' means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513) [21 U.S.C. §§ 801 et seq.]. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as-
>
> "(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
>
> "(2) water pipes;
>
> "(3) carburetion tubes and devices;
>
> "(4) smoking and carburetion masks;
>
> "(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;
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> "(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;
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> "(7) chamber pipes;
>
> "(8) carburetor pipes;
>
> "(9) electric pipes;
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> "(10) air-driven pipes;
>
> "(11) chillums;
>
> "(12) bongs;
>
> "(13) ice pipes or chillers;

"(14) wired cigarette papers; or

"(15) cocaine freebase kits."

Section 857(d) identifies two categories of drug paraphernalia: items "primarily intended ... for use" with controlled substances and items "designed for use" with such substances. This Court's decision in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 500, 102 S.Ct. 1186, 1194, 71 L.Ed.2d 362 (1982), governs the "designed for use" prong of § 857(d). In that case, the Court considered an ordinance requiring a license for the sale of items "designed or marketed for use with illegal cannabis or drugs," and concluded that the alternative "designed ... for use" standard referred to "the design of the manufacturer, not the intent of the retailer or customer." *Id.*, at 501, 102 S.Ct., at 1195. An item is "designed for use," this Court explained, if it "is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer." *Ibid.*

The objective characteristics of some items establish that they are designed specifically for use with controlled substances. Such items, including bongs, cocaine freebase kits, and certain kinds of pipes, have no other use besides contrived ones (such as use of a bong as a flower vase). Items that meet the "designed for use" standard constitute drug paraphernalia irrespective of the knowledge or intent of one who sells or transports them. See *United States v. Mishra*, 979 F.2d 301, 308 (CA3 1992); *United States v. Schneiderman*, 968 F.2d 1564, 1567 (CA2 1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1283, 122 L.Ed.2d 676 (1993). Accordingly, the "designed for use" element of § 857(d) does not establish a scienter requirement with respect to sellers such as petitioners.

The "primarily intended ... for use" language of § 857(d) presents a more difficult ****1751** problem. The language might be understood to refer to the state of mind of the defendant (here, the seller), and thus to require an intent on the part of the defendant that the items at issue be used with drugs. Some Courts of Appeals have adopted this construction, see ***519** *Mishra*, 979 F.2d, at 307; *United States v. Murphy*, 977 F.2d 503, 506 (CA10 1992); *Schneiderman*, 968 F.2d, at 1567; *United States v. 57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (CA6), cert. denied, 493 U.S. 933, 110 S.Ct. 324, 107 L.Ed.2d 314 (1989), and this Court in *Hoffman Estates* interpreted the arguably parallel phrase "marketed for use" as describing "a retailer's intentional display and marketing of merchandise," 455 U.S., at 502, 102 S.Ct., at 1195, and thus requiring scienter. On the other hand, there is greater ambiguity in the phrase "primarily intended ... for use" than in the phrase "marketed for use." The term "primarily intended" could refer to the intent of nondefendants, including manufacturers, distributors, retailers, buyers, or users. Several considerations lead us to conclude that "primarily intended ... for use" refers to a product's likely use rather than to the defendant's state of mind.

First, the structure of the statute supports an objective interpretation of the "primarily intended ... for use" standard. Section 857(d) states that drug paraphernalia "includes items primarily intended or designed for use in" consuming specified illegal drugs, " *such as* ...," followed by a list of 15 items constituting *per se* drug paraphernalia. The inclusion of the "primarily intended" term along with the "designed for use" term in the introduction to the list of *per se* paraphernalia suggests that at least some of the *per se* items could be "primarily intended" for use with illegal drugs irrespective of a particular defendant's intent-that is, as an objective matter. Moreover, § 857(e) lists eight objective factors that may be considered "in addition to all other logically relevant factors" in "determining whether an item constitutes drug paraphernalia." [FN7] These factors generally ***520** focus on the actual use of the item in the community. Congress did not include among the listed factors a defendant's statements about his intent or other factors directly establishing subjective intent. This omission is significant in light of the fact that the parallel list contained in the Drug Enforcement Administration's

Model Drug Paraphernalia Act, on which § 857 was based,[FN8] includes among the relevant factors "[s]tatements by an owner ... concerning [the object's] use" and "[d]irect or circumstantial evidence of the intent of an owner ... to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act." [FN9]

FN7. Section 857(e) provides:

"In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

"(1) instructions, oral or written, provided with the item concerning its use;

"(2) descriptive materials accompanying the item which explain or depict its use;

"(3) national and local advertising concerning its use;

"(4) the manner in which the item is displayed for sale;

"(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

"(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

"(7) the existence and scope of legitimate uses of the item in the community; and

"(8) expert testimony concerning its use."

FN8. See *Schneiderman,* 968 F.2d, at 1566.

FN9. See Brief for United States 6a-7a. The Model Act lists 14 factors to be considered in addition to all other logically relevant factors in determining whether an object is drug paraphernalia. Several of the factors are similar or identical to those listed in § 857(e).

An objective construction of the definitional provision also finds support in § 857(f), which establishes an exemption for items "traditionally intended for use with tobacco products." [FN10] An item's "traditional" use is ****1752** not based on the subjective***521** intent of a particular defendant. In 1988, Congress added the word "traditionally" in place of "primarily" in the § 857(f) exemption in order to "clarif[y]" the meaning of the exemption. Pub.L. 100-690, Tit. VI, § 6485, 102 Stat. 4384. Congress' characterization of the amendment as merely "clarifying" the law suggests that the original phrase-"primarily intended"-was not a reference to the fundamentally different concept of a defendant's subjective intent.

FN10. Section 857(f) provides:

"This section shall not apply to-

"(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

"(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory."

Finally, an objective construction of the phrase "primarily intended" is consistent with the natural reading of similar language in definitional provisions of other federal criminal statutes. See 18 U.S.C. § 921(a)(17)(B) ("armor piercing ammunition" excludes any projectile that is "primarily intended" to be used for sporting purposes, as found

by the Secretary of the Treasury); 21 U.S.C. § 860(d)(2) (1988 ed., Supp. V) ("youth center" means a recreational facility "intended primarily for use by persons under 18 years of age").

We conclude that the term "primarily intended ... for use" in § 857(d) is to be understood objectively and refers generally to an item's likely use. [FN11] Rather than serving as the ***522** basis for a subjective scienter requirement, the phrase "primarily intended or designed for use" in the definitional provision establishes objective standards for determining what constitutes drug paraphernalia.[FN12]

FN11. Although we describe the definition of "primarily intended" as "objective," we note that it is a relatively particularized definition, reaching beyond the category of items that are likely to be used with drugs by virtue of their objective features. Among the factors that are relevant to whether an item constitutes drug paraphernalia are "instructions, oral or written, provided with the item concerning its use," § 857(e)(1), and "the manner in which the item is displayed for sale," § 857(e)(4). Thus, while scales or razor blades as a general class may not be designed specifically for use with drugs, a subset of those items in a particular store may be "primarily intended" for use with drugs by virtue of the circumstances of their display and sale.

We disagree with Justice SCALIA insofar as he would hold that a box of paper clips is converted into drug paraphernalia by the mere fact that a customer mentions to the seller that the paper clips will make excellent roach clips. Section 857(d) states that items " *primarily* intended" for use with drugs constitute drug paraphernalia, indicating that it is the likely use of customers generally, not any particular customer, that can render a multiple-use item drug paraphernalia.

FN12. The legislative history of the Mail Order Drug Paraphernalia Control Act consists of one House subcommittee hearing. See Hearing on H.R. 1625 before the Subcommittee on Crime of the House Committee on the Judiciary, 99th Cong., 2d Sess. (1986). We recognize that a colloquy with the principal House sponsor of the Act during this hearing lends some support to a subjective interpretation of the "primarily intended" language of § 857(d). When asked to whose intent this language referred, Rep. Levine initially stated: "The purpose of the language ... is to identify as clearly as possible the intent of manufacturer and the seller to market a particular item as drug paraphernalia, subject to the interpretation of a trial court." *Id.,* at 48. When pressed further, he stated: "[I]t would be the intent on the part of the defendant in a particular trial." *Ibid.* Given the language and structure of the statute, we are not persuaded that these comments of a single member at a subcommittee hearing are sufficient to show a desire on the part of Congress to locate a scienter requirement in the definitional provision of § 857.

B

Neither our conclusion that Congress intended an objective construction of the "primarily intended" language in § 857(d), nor the fact that Congress did not include the word "knowingly" in the text of § 857, justifies the conclusion that Congress intended to dispense entirely with a scienter requirement. This Court stated in *United States v. United States Gypsum Co.,* 438 U.S. 422, 438, 98 S.Ct. 2864, 2874, 57 L.Ed.2d 854 (1978): "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify ****1753** dispensing with an intent requirement."

Even statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct. See *Staples v. United States,* 511 U.S. 600, 607, n. 3, 114 S.Ct. 1793, 1798, n. 3, 128 L.Ed.2d 608 (1994); ***523** *United States v. Dotterweich,* 320 U.S. 277, 281, 64 S.Ct. 134, 136, 88 L.Ed. 48 (1943). We conclude that § 857 is properly construed as containing a scienter requirement.

We turn to the nature of that requirement in this statute. In *United States v. Bailey,* 444 U.S. 394, 404, 100 S.Ct. 624, 631, 62 L.Ed.2d 575 (1980), this Court distinguished between the mental states of " 'purpose' " and " 'knowledge,' " explaining, *id.,* at 408, 100 S.Ct., at 633, that, "except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction." In *Bailey,* the Court read into the federal escape statute, 18 U.S.C. § 751(a), a requirement that "an escapee knew his actions would result in his leaving physical confinement without permission," rejecting a heightened *mens rea* that would have required " 'an intent to avoid confinement.' " 444 U.S., at 408, 100 S.Ct., at 633. Similarly, in *United States v. United States Gypsum Co.,* 438 U.S., at 444, 98 S.Ct., at 2877, the Court addressed the question whether a criminal violation of the Sherman Act "requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the 'conscious object' of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow." The Court concluded that "action undertaken with knowledge of its probable consequences ... can be a sufficient predicate for a finding of criminal liability under the antitrust laws." *Ibid.*

As in *Bailey* and *United States Gypsum,* we conclude that a defendant must act knowingly in order to be liable under § 857. Requiring that a seller of drug paraphernalia act with the "purpose" that the items be used with illegal drugs would be inappropriate. The purpose of a seller of drug paraphernalia is to sell his product; the seller is indifferent as to whether that product ultimately is used in connection with illegal drugs or otherwise. If § 857 required a purpose that the items be used with illegal drugs, individuals could avoid liability for selling bongs and cocaine freebase kits simply by ***524** establishing that they lacked the "conscious object" that the items be used with illegal drugs.

Further, we do not think that the knowledge standard in this context requires knowledge on the defendant's part that a particular customer actually will use an item of drug paraphernalia with illegal drugs. It is sufficient that the defendant be aware that customers in general are likely to use the merchandise with drugs. Therefore, the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs. Cf. *United States Gypsum,* 438 U.S., at 444, 98 S.Ct., at 2877 (knowledge of "probable consequences" sufficient for conviction).[FN13] A conviction under § 857(a)(1), then, requires the Government to prove that the defendant knowingly made use of an interstate conveyance as part of a ****1754** scheme to sell items that he knew were likely to be used with illegal drugs.

> FN13. The knowledge standard that we adopt parallels the standard applied by those courts that have based § 857's scienter requirement on the "primarily intended" language of the definitional provision. See *Mishra,* 979 F.2d, at 307 (Government must prove that defendant "contemplated, or reasonably expected under the circumstances, that the item sold or offered for sale would be used with illegal drugs"); *Schneiderman,* 968 F.2d, at 1567 (Government must prove that defendant "knew there was a strong probability the items would be so used"); *57,261 Items of Drug Paraphernalia,* 869 F.2d, at 957 (Government must prove defendant's

"knowledge that there is a strong probability that the items will be used" with illegal drugs). The scienter requirement that we have inferred applies with respect to all items of drug paraphernalia, while at least some of the lower courts appear to have confined their scienter requirement to those items "primarily intended" (but not "designed") for use with illegal drugs. See, *e.g., Schneiderman,* 968 F.2d, at 1567.

Finally, although the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs, it need not prove specific knowledge that the items are "drug paraphernalia" within the meaning of the statute. Cf. *Hamling v. United States,* 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (statute prohibiting mailing of obscene materials does ***525** not require proof that defendant knew the materials at issue met the legal definition of "obscenity"). As in *Hamling,* it is sufficient for the Government to show that the defendant "knew the character and nature of the materials" with which he dealt. *Id.,* at 123, 94 S.Ct., at 2910.

In light of the above, we conclude that the jury instructions given by the District Court adequately conveyed the legal standards for petitioners' convictions under § 857.[FN14]

FN14. The District Court instructed the jury that, in order to find petitioners guilty, it was required to find that they "made use of [an] interstate conveyance knowingly as part of a scheme to sell drug paraphernalia," that "the items in question constitute drug paraphernalia," defined as items "primarily intended or designed for use" with illegal drugs, and that petitioners "knew the nature and character of the items." The District Court elaborated on the knowledge requirement, describing it as "knowledge of the defendants as to the nature, character, and use of the items being sold or offered for sale at the store." App. 16-35. We think that the instructions adequately informed the jury that it could convict petitioners only if it found that they knew that the items at issue were likely to be used with illegal drugs.

III

[2] Petitioners argue that § 857 is unconstitutionally vague as applied to them in this case. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); see also *Grayned v. Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972). Whatever its status as a general matter, we cannot say that § 857 is unconstitutionally vague as applied in this case.

First, the list of items in § 857(d) constituting *per se* drug paraphernalia provides individuals and law enforcement officers with relatively clear guidelines as to prohibited conduct. With respect to the listed items, there can be little ***526** doubt that the statute is sufficiently determinate to meet constitutional requirements. Many items involved in this case-including bongs, roach clips, and pipes designed for use with illegal drugs-are among the items specifically listed in § 857(d).

Second, § 857(e) sets forth objective criteria for assessing whether items constitute drug paraphernalia. These factors minimize the possibility of arbitrary enforcement and assist in defining the sphere of prohibited conduct under the statute. See *Mishra,* 979 F.2d, at 309; *Schneiderman,* 968 F.2d, at 1568. Section 857(f)'s exemption for tobacco-related products further limits the scope of the statute and precludes its enforcement against legitimate sellers of lawful products.

Finally, the scienter requirement that we have inferred in § 857 assists in avoiding any vagueness problem. "[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice ... that [the] conduct is proscribed." *Hoffman Estates,* 455 U.S., at 499, 102 S.Ct., at 1193.

Section 857's application to multiple-use items-such as scales, razor blades, and mirrors-may raise more serious concerns. Such items may be used for legitimate as well as illegitimate purposes, and "a certain degree of ambiguity necessarily surrounds their classification." *Mishra,* 979 F.2d, at 309. This case, however, does not implicate vagueness or other due process concerns with respect to such items. Petitioners operated a full-scale "head shop," a business devoted**1755 substantially to the sale of products that clearly constituted drug paraphernalia. The Court stated in *Hoffman Estates:* "The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine ... is of no due process significance unless the possibility ripens into a prosecution." 455 U.S., at 503-504, n. 21, 102 S.Ct., at 1196, n. 21. Similarly here, we need not address the possible application of § 857 to a legitimate merchant engaging in the sale of only multiple-use items.

*527 IV

Petitioner Acty's other contentions are not properly before the Court. First, she argues that she was improperly convicted of aiding and abetting the manufacture and distribution of cocaine because the jury instructions created a "presumption" that certain items of drug paraphernalia "were intended for manufacturing with a controlled substance." Brief for Petitioners 17. This argument was neither raised in nor addressed by the Court of Appeals. See *Lawn v. United States,* 355 U.S. 339, 362-363, n. 16, 78 S.Ct. 311, 324-325, n. 16, 2 L.Ed.2d 321 (1958). Second, Acty asserts that her convictions for money laundering, investing income derived from a drug offense, and engaging in monetary transactions with the proceeds of unlawful activity must be reversed. These contentions were not presented in the petition for writ of certiorari, and therefore they are not properly raised here. See this Court's Rule 14.1(a). Finally, the petition presented the question whether the proof was adequate to support Acty's conviction for aiding and abetting the manufacture and distribution of cocaine; but petitioners' brief on the merits fails to address the issue and therefore abandons it. See *Russell v. United States,* 369 U.S. 749, 754, n. 7, 82 S.Ct. 1038, 1041, n. 7, 8 L.Ed.2d 240 (1962).

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SCALIA, with whom Justice KENNEDY and Justice THOMAS join, concurring in the judgment.

I agree with the Court that the sale of items likely to be used for drug purposes, with knowledge of such likely use, violates former 21 U.S.C. § 857; and that a subjective intent on the part of the defendant that the items sold be used for drug purposes is not necessary for conviction. That is all the scienter analysis necessary to decide the present case. The Court goes further, however, and says, *ante,* at 1750-1752, that such a subjective intent is not only not necessary for ***528** conviction but is not sufficient for conviction-*i.e.,* that the sale of an item with the *intent* that it be used for drug purposes does not constitute a violation. I disagree. In my view, the statutory language "primarily intended ... for use" causes a sale to be a sale of drug paraphernalia where the seller intends the item to be used for drug purposes. A rejection of that view, if consistently applied, would cause "primarily intended or designed for use" to mean nothing more than "designed for use." While redundancy is not unheard of in statutory draftsmanship, neither is it favored in statutory interpretation. *Kungys v. United States,* 485 U.S. 759, 778, 108 S.Ct. 1537, 1550, 99 L.Ed.2d 839 (1988).

Some of the provisions of § 857(e), which describes

factors that may be considered in determining whether an item constitutes drug paraphernalia, clearly suggest that what is *not* covered paraphernalia by nature can be *made* such by the seller's intent.[FN*] Section 857(e)(1) lists as one of the relevant factors "instructions, oral or written, provided with the item concerning its use." This envisions, I think, that a drugstore owner who instructs the purchaser how to use the **1756 purchased drinking straw or razor blade in the ingestion of drugs converts what would otherwise be a lawful sale into a sale of drug paraphernalia. Section 857(e)(4) lists as a relevant factor "the manner in which the item is displayed for sale." That would surely not change the nature of the item, but it would cast light upon the use intended by the person who is selling and displaying it. And § 857(e)(5) lists as a relevant factor "whether the owner ... is a legitimate supplier*529 of like or related items." Again, that casts light upon nothing but the seller's intent regarding use.

> FN* For purposes of the present case, all we need decide is that the seller's intent will qualify. It would also seem true, however (since the statute contains no limitation on whose intent-manufacturer's, seller's, or buyer's-can qualify), that the *buyer's* intended use will cause an otherwise harmless item to be drug paraphernalia. To convict a seller on such a basis, of course, the scienter requirement of the statute would require that the seller have *known* of such intended use.

On first glance, the Court's claim that "primarily intended" does not refer to the defendant's state of mind seems to be supported by § 857(f)(2), which exempts from the entire section the sale, "in the normal lawful course of business," of items "traditionally intended for use with tobacco products." This might be thought to suggest that the section applies only to categories of items, and not at all to items sold with a particular intent. On further consideration, however, it is apparent that § 857(f)(2) militates against, rather than in favor of, the Court's view. Unless unlawful intent could have produced liability, there would have been no *need* for the exception. Tobacco pipes are tobacco pipes, and cigarette paper is cigarette paper; neither could possibly meet the Court's test of being "items ... likely to be used with illegal drugs," *ante,* at 1753. Only the criminalizing effect of an unlawful *intent* to sell for drug use puts tobacconists at risk. Because of the ready (though not ordinary) use of items such as cigarette paper and tobacco pipes for drug purposes, tobacconists would have been in constant danger of being accused of having an unlawful intent in their sales-so Congress gave them what amounts to a career exception.

Through most of the Court's opinion, an item's "likely use" seems to refer to the objective features of the item that render it usable for one purpose or another. At the very end of the relevant discussion, however, in apparent response to the difficulties presented by the factors listed in § 857(e), one finds, in a footnote, the following:

"Although we describe the definition of 'primarily intended' as 'objective,' we note that it is a relatively particularized definition, reaching beyond the category of items that are likely to be used with drugs by virtue of their objective features.... Thus, while scales or razor blades as a general class may not be designed specifically*530 for use with drugs, a subset of those items in a particular store may be 'primarily intended' for use with drugs by virtue of the circumstances of their display and sale." *Ante,* at 1752, n. 11.

If by the "circumstances of ... sale" the Court means to include the circumstance that the seller says, "You will find these scales terrific for weighing drugs," or that the buyer asks, "Do you have any scales suitable for weighing drugs?"-then there is really very little, if any, difference between the Court's position and mine. Intent can only be known, of course, *through* objective manifestations. If what the Court means by "a relatively particularized objective definition" is that all objective mani-

festations of the seller's intent are to be considered part of the "circumstances of sale," then there is no difference whatever between us (though I persist in thinking it would be simpler to say that "intended for sale" means "intended for sale" than to invent the concept of "a relatively particularized objective intent"). If, on the other hand, only some and not all objective manifestations of the seller's intent are to be considered part of the "circumstances of sale" (manner of display, for example, but not manner of oral promotion), then the Court ought to provide some description of those that do and those that do not, and (if possible) some reason for the distinction.

Finally, I cannot avoid noting that the only available legislative history-statements by the very Congressman who introduced the text in question, see *ante,* at 1752, n. 12-unambiguously supports my view. I point that out, not because I think those statements are pertinent to our analysis, but because it displays once again that our acceptance**1757 of the supposed teachings of legislative history is more sporadic than our professions of allegiance to it. See *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 219, 114 S.Ct. 771, 782, 127 L.Ed.2d 29 (1994) (SCALIA, J., concurring in part and concurring in judgment); *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 617, 111 S.Ct. 2476, 2483, 115 L.Ed.2d 532 (1991) (SCALIA, J., concurring in judgment).

U.S.Iowa,1994.
Posters 'N' Things, Ltd. v. U.S.
511 U.S. 513, 114 S.Ct. 1747, 128 L.Ed.2d 539, 62 USLW 4354

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EXHIBIT F

Westlaw

97 F.3d 681
(Cite as: 97 F.3d 681)

H

United States Court of Appeals,
Second Circuit.
RICHMOND BORO GUN CLUB, INC., New York State Rifle and Pistol Association, Inc. and John Does I Through VI, Plaintiffs-Appellants,
and
National Rifle Association of America, Plaintiff,
v.
CITY OF NEW YORK, and Lee P. Brown In His Official Capacity as Police Commissioner of the City of New York, Defendants-Appellees.
No. 1209, Docket 95-7944.

Argued March 15, 1996.
Decided Oct. 10, 1996.

Gun club and others sued city and police commissioner, challenging city ordinance criminalizing possession or transfer of certain assault weapons and ammunition feeding devices. The United States District Court for the Eastern District of New York, Reena Raggi, J., 896 F.Supp. 276, granted summary judgment to defendants, and gun club appealed. The Court of Appeals, Parker, Circuit Judge, held that: (1) ordinance was not unconstitutionally vague on its face; (2) gun club's pre-enforcement as applied vagueness challenge to ordinance was premature; (3) ordinance was not preempted by former or current versions of federal statutes governing Civilian Marksmanship Program (CMP); and (4) ordinance did not violate plaintiffs' substantive or procedural due process rights.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⇨776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases
Court of Appeals makes de novo review of district court's legal conclusions on motion for summary judgment.

[2] Constitutional Law 92 ⇨4509(19)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(19) k. Motor vehicle offenses. Most Cited Cases
(Formerly 92k258(3.1))

Weapons 406 ⇨106(2)

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k106 Validity
406k106(2) k. Vagueness and overbreadth. Most Cited Cases
(Formerly 406k3)

Weapons 406 ⇨112(4)

406 Weapons
406I In General
406k109 Weapons or Objects Affected; Definitions
406k112 Firearms in General
406k112(4) k. Automatic or semi-automatic weapons. Most Cited Cases
(Formerly 406k3)
City ordinance criminalizing possession or transfer of certain assault weapons and ammunition feeding devices was not rendered unconstitutionally vague on its face by its identification of "assault weapon"

through phrases referring to guns having "a pistol grip that protrudes conspicuously beneath the action," "no stock," "a threaded barrel designed to accommodate a flash suppressor," and "a barrel shroud," as ordinance neither infringed upon fundamental constitutional right nor was impermissibly vague in all its applications. New York City Administrative Code, §§ 10-131, subds. i, i, par. 6, 10-301, subds. 16, 17, 10-303.1, 10-305, 10-306.

[3] Constitutional Law 92 ⚿978

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k978 k. Ripeness; prematurity. Most Cited Cases
(Formerly 92k46(1))
Gun club's pre-enforcement as applied vagueness challenge to city ordinance criminalizing possession or transfer of certain assault weapons and ammunition feeding devices was premature, and thus would not be entertained until broader use of ordinance was actually initiated, where challenge was based on speculative threat of arbitrary enforcement, since city could choose to limit enforcement to weapons clearly proscribed by the ordinance, such as those specifically identified by police department. New York City Administrative Code, §§ 10-131, subds. i, i, par. 6, 10-301, subds. 16, 17, 10-303.1, 10-305, 10-306.

[4] Weapons 406 ⚿104

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k104 k. Power to regulate. Most Cited Cases
(Formerly 406k3)
City ordinance criminalizing possession or transfer of certain assault weapons and ammunition feeding devices was not preempted by former or current versions of federal statutes governing Civilian Marksmanship Program (CMP). U.S.C.A. Const. Art. 6, cl. 2; National Defense Authorization Act for Fiscal Year 1996, §§ 1611-1615, 1612(a, d), 1614(b)(2), 1614(e), 1618(a), 1624, 1624(c), 110 Stat. 186; 10 U.S.C.A. § 4312; 10 U.S.C.(1994 Ed.) § 4308; 32 C.F.R. §§ 543.13, 543.17(g)(5)(ii, vi); New York City Administrative Code, §§ 10-131, subds. i, i, par. 6, 10-301, subds. 16, 17, 10-303.1, 10-305, 10-306.

[5] States 360 ⚿18.13

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.13 k. State police power. Most Cited Cases
There is strong presumption against federal preemption of state and local legislation, especially in areas traditionally occupied by states, such as health and safety measures. U.S.C.A. Const. Art. 6, cl. 2.

[6] States 360 ⚿18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases
State measure is preempted when it is impossible to comply with both state and federal law, or state law stands as obstacle to accomplishment of full purposes and objectives of Congress. U.S.C.A. Const. Art. 6, cl. 2.

[7] States 360 ⚿18.11

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 k. Congressional intent. Most Cited Cases
Court should only find that state or local law is preempted by congressional legislation if it determ-

ines that Congress intended such preemption. U.S.C.A. Const. Art. 6, cl. 2.

[8] States 360 ⚿18.11

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 k. Congressional intent. Most Cited Cases
Congressional intent to preempt state or local law should not lightly be inferred. U.S.C.A. Const. Art. 6, cl. 2.

[9] Constitutional Law 92 ⚿4509(19)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(19) k. Motor vehicle offenses. Most Cited Cases
(Formerly 92k258(3.1))

Weapons 406 ⚿106(4)

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k106 Validity
406k106(4) k. Violation of other rights or provisions. Most Cited Cases
(Formerly 406k3)

Weapons 406 ⚿112(4)

406 Weapons
406I In General
406k109 Weapons or Objects Affected; Definitions
406k112 Firearms in General
406k112(4) k. Automatic or semi-automatic weapons. Most Cited Cases
(Formerly 406k3)
City ordinance criminalizing possession or transfer of certain assault weapons and ammunition feeding devices did not have sufficiently drastic effect on gun club's state created liberty and property interests in possession of rifles and shotguns to trigger federal substantive due process rights; ordinance was rational legislative response to increased assault weapon violence. U.S.C.A. Const.Amend. 14; N.Y.McKinney's Civil Rights Law § 4; N.Y.McKinney's Penal Law §§ 265.40, 400.00; New York City Administrative Code, §§ 10-131, subds. i, i, par. 6, 10-301, subds. 16, 17, 10-303.1, 10-305, 10-306.

[10] Constitutional Law 92 ⚿4509(19)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(19) k. Motor vehicle offenses. Most Cited Cases
(Formerly 92k258(3.1))

Weapons 406 ⚿106(4)

406 Weapons
406I In General
406k102 Constitutional, Statutory, and Regulatory Provisions
406k106 Validity
406k106(4) k. Violation of other rights or provisions. Most Cited Cases
(Formerly 406k3)

Weapons 406 ⚿112(4)

406 Weapons
406I In General
406k109 Weapons or Objects Affected;

Definitions
406k112 Firearms in General
406k112(4) k. Automatic or semi-automatic weapons. Most Cited Cases
(Formerly 406k3)
City's adoption of ordinance criminalizing possession or transfer of certain assault weapons and ammunition feeding devices did not violate gun club's federal procedural due process rights, where gun club could and did challenge it in federal or state court on ground that it violated their substantive state or federal rights. U.S.C.A. Const.Amend. 14; New York City Administrative Code, §§ 10-131, subds. i, i. par. 6, 10-301, subds. 16, 17, 10-303.1, 10-305, 10-306.
***682** Stephen P. Halbrook, Fairfax, VA (Susan Courtney Chambers, New York City, of counsel), for Plaintiffs-Appellants.

Alan Beckoff, New York City Law Dept, New York City (Paul A. Crotty, Corporation Counsel of the City of New York, New York City, on the brief, Stephen J. McGrath, Albert Fredericks, New York City, of counsel), for Defendants-Appellees.

(Ira S. Sacks, on the brief, Jocelyn Lee Jacobson, Deborah Lifshey, Fried, Frank, Harris, Shriver & Jacobson, New York City, Dennis A. Henigan, Gail Robinson, Center To Prevent Handgun Violence, Washington, DC, all of counsel), for Amicus Curiae Center To Prevent Handgun Violence, New York Association Of Chiefs Of Police, Detectives' Endowment Association, Captains Endowment Association, Lieutenants Benevolent ***683** Association and Sergeants Benevolent Association.

Before: FEINBERG, WALKER, and PARKER, Circuit Judges.

PARKER, Circuit Judge:

Appellants Richmond Boro Gun Club, the New York State Rifle and Pistol Association, and John Does I through VI brought this action challenging New York City Local Law 78 of 1991, amending New York City Administrative Code § 10-131 & §§ 10-301 through 10-310 (hereafter "Local Law 78"), which criminalizes the possession or transfer of certain assault weapons and ammunition feeding devices within the city.[FN1] The United States District Court for the Eastern District of New York (Reena Raggi, *Judge*) denied plaintiffs' initial request for a preliminary injunction and, in a well reasoned opinion, granted defendants' motion for summary judgment. *Richmond Boro Gun Club, Inc. v. City of New York.* 896 F.Supp. 276 (E.D.N.Y.1995). On appeal, plaintiffs press only three of the arguments raised below. Before this court plaintiffs argue that Local Law 78 (1) is unconstitutionally vague; (2) is preempted by federal laws and regulations establishing the Civilian Marksmanship Program; and (3) deprives them of rights to liberty and property without due process. We agree with the district court that plaintiffs' theories do not justify judicial revocation of the decisions of the New York City Council.

FN1. The National Rifle Association was also a plaintiff in the case, but has not joined in the appeal.

I. BACKGROUND

Section 10 of Local Law 78, which added a new Section 10-303.1 to Chapter 3 of the New York City Administrative Code, criminalizes, subject to certain exceptions, possession or transfer of assault weapons. Section 6 of Local Law 78, which amended Section 10-301 of the New York City Administrative Code, defines "Assault Weapon" as

(a) [a]ny semiautomatic centerfire or rimfire rifle or semiautomatic shotgun which has one or more of the following features:

1) folding or telescoping stock or *no stock;*

2) *pistol grip that protrudes conspicuously beneath the action of the weapon;*

3) bayonet mount;

4) *flash suppressor or threaded barrel designed to accommodate a flash suppressor;*

5) *barrel shroud;*

6) grenade launcher; or

7) modifications of such features, or other features, determined by rule of the commissioner to be particularly suitable for military and not sporting purposes. In addition, the commissioner shall, by rule, designate specific semiautomatic centerfire or rimfire rifles or semiautomatic shotguns, identified by make, model and/or manufacturer's name, as within the definition of assault weapon, if the commissioner determines that such weapons are particularly suitable for military and not sporting purposes.

(b) Any shotgun with a revolving-cylinder magazine.

(c) *Any part, or combination of parts, designed or redesigned or intended to readily convert a rifle or shotgun into an assault weapon.*

(d) "Assault weapon" shall not include any rifle or shotgun modified to render it permanently inoperative.

New York City Administrative Code § 10-301(16) (emphasis on sections challenged on vagueness grounds). Local Law 78 also defines and criminalizes the possession and transfer of "Ammunition feeding devices," which are "[m]agazines, belts, feedstrips, drums or clips capable of being attached to or utilized with firearms, rifles, shotguns, or assault weapons." Local Law 78, §§ 4, 6 (creating New York City Administrative Code §§ 10-131.i & 10-301(17)). The law bans possession or disposition of any such feeding devices capable of holding more than five rounds of ammunition designed for use with a rifle or shotgun, Local Law 78, § 13 (amending ***684**New York City Administrative Code § 10-306), or capable of holding more than seventeen rounds of ammunition if designed for use with a handgun, Local Law 78, § 4 (creating New York City Administrative Code § 10-131(i)(6)).

The law exempts from its coverage state and city police or peace officers carrying such items in the lawful performance of their duties, and members of the federal or state armed forces who are authorized by law to carry these weapons. Local Law 78, § 12 (amending New York City Administrative Code § 10-305).

II. DISCUSSION

[1] The district court assumed the truth of all of plaintiffs' allegations and applied the law to those allegations in granting summary judgment for New York City. Our review, then, is of the district court's legal conclusions. We review such conclusions de novo. *Motor Vehicle Mfrs. Ass'n v. New York Dep't of Envtl. Conservation,* 79 F.3d 1298, 1304 (2d Cir.1996).

1. *The "Void for Vagueness" Argument*

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). The principle underlying the doctrine is that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.*

[2] Plaintiffs claim that Local Law 78 is unconstitutionally vague both on its face and as applied. They argue that several of the phrases used to identify an "assault weapon," such as a gun having "a pistol grip that protrudes conspicuously beneath the action," "no stock," "a threaded barrel designed to accommodate a flash suppressor," and "a barrel shroud," fail to provide notice of what is prohibited and is therefore vague facially and as applied to the rifles and shotguns owned by the plaintiffs.

Plaintiff's facial vagueness challenge is plainly without merit. They concede that the local law does not infringe upon a fundamental constitutional right. Courts rarely invalidate a statute on its face because of alleged vagueness if the statute does not relate to a fundamental constitutional right (usually first amendment freedoms) and if the statute provides "minimally fair notice" of what the statute prohibits. 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 17.8 n. 22 (2d ed. 1992). *See also Chapman v. United States,* 500 U.S. 453, 467, 111 S.Ct. 1919, 1929, 114 L.Ed.2d 524 (1991) ("vagueness claim must be evaluated as the statute is applied to the facts of [the] case" when "First Amendment freedoms are not infringed by the statute.").

Plaintiffs could perhaps succeed on a facial vagueness challenge if they could show that the law is impermissibly vague "in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). However, it is obvious in this case that there exist numerous conceivably valid applications of Local Law 78. The district court's analysis of plaintiffs' facial challenge is excellent and we readily adopt it:

> [Plaintiffs] hypothesize some ambiguous application for each factor used by New York City to identify the semiautomatic rifles and shotguns that will be deemed assault weapons under Local Law 78. But such conjectures hardly suffice to establish vagueness in *all* applications of the law.
>
> For example, plaintiffs complain that defining assault weapons to include rifles or shotguns with a "folding or telescoping stock or no stock" is vague because some person might unwittingly violate the law by removing a stock for a brief period to clean or transport a weapon. This possibility ignores the "core" category of weapons within this factor that are clearly intended to be the focus of the legislation: those either equipped with folding stocks or with permanently-removed stocks. The governmental concern is that such weapons can be discharged in a way that is characteristic of military and not sporting weapons. Since persons have plain notice of the applicability of the law to this core ***685** group of weapons, there is no facial vagueness in this factor.
>
> Plaintiffs further complain that defining an assault weapon by reference to "a pistol grip that protrudes conspicuously beneath the action of the weapon" is impermissibly vague because it is unclear what is meant by "conspicuously." The argument is disingenuous. As is made plain in the [Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Weapons (1989) ("ATF Report")] prepared in connection with that agency's ban on the importation of assault weapons, most sporting firearms "employ a more traditional pistol grip *built into the wrist of the stock* of the firearm." ATF Report at 7 (emphasis added). By contrast, "[t]he vast majority of military firearms employ a well-defined pistol grip that *protrudes conspicuously beneath the action of the weapon.* " *Id.* (emphasis added). The latter design is favored in military weapons because it aids in "one-handed firing" at hip level, a technique sometimes required in combat, but "not usually employed in hunting or competitive target competitions" where a firearm is held with two hands and fired at shoulder level. *Id.* Although plaintiffs argue that any rifle can be shot with one hand and at hip level, that is hardly the point. This factor aims to identify those rifles whose pistol grips are designed to make such spray firing from the hip particularly easy. Even a cursory review of the photographs submitted by the parties demonstrates that a sufficient number of assault rifles are so plainly equipped with grips that protrude conspicuously that it cannot be said that the factor is vague in all applications. Indeed, the court notes that Congress itself chose the very same formulation as a defining term for assault weapons in federal legislation. 18 U.S.C. § 921(a)(30)(B)(ii).

Plaintiffs submit that defining assault weapons with reference to features such as a "bayonet mount," "a flash suppressor or threaded barrel designed to accommodate a flash suppressor," a "barrel shroud," or a "grenade launcher," violates due process because a host of items exist that, although not specifically intended to serve these purposes, could arguably do so, thereby subjecting an unsuspecting gun owner to criminal liability. This argument, however, defeats itself. As already noted, when a statute is challenged for facial vagueness, the issue is not whether plaintiffs can posit some application not clearly defined by the legislation. The issue is whether all applications are impermissibly vague. Certainly, there is no vagueness when the statute is applied to firearms advertised to include parts identified as bayonet mounts, flash suppressors, barrel shrouds, or grenade launchers.

Finally, plaintiffs complain that Local Law 78 is impermissibly vague in defining as an assault weapon "[a]ny part, or combination of parts, designed or redesigned or intended to readily convert a rifle or shotgun into an assault weapon." They submit that a rifle manufacturer's intent in designing a gun may not easily be discernable from the mere appearance of a weapon.

The Supreme Court has, however, already rejected vagueness challenges to similar language in other statutes. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* [455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)], the Court upheld a local ordinance requiring businesses to obtain licenses if they sold items "designed or marketed for use with illegal cannabis or drugs." The "designed" standard was held to encompass "at least an item that is principally used with illegal drugs by virtue of its objective features." 455 U.S. at 501, 102 S.Ct. at 1195. Although application of this standard might, in some cases, be ambiguous, it was sufficient to cover "at least some of the items" sold by Flipside and, thus, to preclude a facial vagueness challenge. Similarly, the vagueness challenge to the "marketed" standard was rejected in light of the implicit scienter element, "since a retailer could scarcely 'market' items 'for' a particular use without intending that use." *Id.* at 502, 102 S.Ct. at 1195. *See also Posters 'N' Things, Ltd. v. United States,* [511] U.S. [513], ----, 114 S.Ct. 1747, 1750, 128 L.Ed.2d 539 (1994) (upholding federal statute***686** that defined drug paraphernalia as items "primarily intended ... for use" or "designed for use" with controlled substances, although holding that neither standard required proof of scienter).

Applying the same analysis to this case, this court is persuaded from many of the submitted advertisements for semiautomatic rifles that the objective features of at least some of these firearms clearly bring them within the "designed" standard of Local Law 78. Whether the "intended to convert" standard does or does not require proof of scienter is a question that can be left for the New York courts. The fact remains that plaintiffs have failed to show that all applications of Local Law 78 are unconstitutionally vague.

896 F.Supp. at 289-90.

[3] For similar reasons, appellants' as-applied vagueness challenge is without merit. Appellants have initiated a pre-enforcement challenge to the local law. This court has refrained from ruling on an as-applied challenge to an allegedly vague statute when the ordinance would be valid as applied to at least one activity in which plaintiff is engaged. *Brache v. County of Westchester,* 658 F.2d 47, 52 (2d Cir.1981), *cert. denied,* 455 U.S. 1005, 102 S.Ct. 1643, 71 L.Ed.2d 874 (1982). This conclusion was based upon principles of judicial restraint, principles that bear some resemblance to the doctrine of abstention. In *Brache,* the court sought to avoid:

> unnecessary, premature, or unduly broad pronouncements on constitutional issues, the intrusiveness of a court's considering all the situations in which a law could possibly be applied, and the

possibility of a limiting construction being placed on the law in the event an application of questionable validity was concretely presented.

Id. This court has applied these considerations when, as here, litigants "engage in some conduct that could validly be prosecuted under a statute, [yet] challenge the statute's application to other conduct in which they are currently engaged." *Id.* New York City may choose to limit enforcement of the local law to weapons clearly proscribed by the law, such as those specifically identified by the police department. It would be premature to entertain this vagueness challenge based on a speculative threat of arbitrary enforcement "until a broader use of the ordinance is actually initiated." *Id.* at 53. *See also Village of Hoffman Estates,* 455 U.S at 503-04, 102 S.Ct. at 1195-96 (employing similar reasoning in rejecting a pre-enforcement vagueness challenge to a village ordinance that banned the sale of any "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs").

2. *The Preemption Challenge*

[4] Plaintiffs also claim that Local Law 78 is preempted by federal laws establishing the Civilian Marksmanship Program. Plaintiffs draw our attention to 10 U.S.C. § 4308 (1994), the statute which governs the Army's management of the Civilian Marksmanship Program, and its legislative history, to suggest that Local Law 78 contravenes Congressional intent.

As the district court explained, 896 F.Supp. at 286, Congress established the Civilian Marksmanship Program ("CMP") in 1904. The purpose of CMP was to familiarize young men with the use of firearms and to develop their marksmanship proficiency should they ever be called to duty in the armed forces. CMP funds, which came from army appropriations, provided for, among other things (1) the operation and maintenance of rifle ranges, (2) the instruction of citizens in marksmanship, (3) the promotion of practice in the use of rifled arms, (4) the maintenance and management of matches and competition in the use of those arms, and (5) the sale of surplus M-1 Garand rifles to citizens over 18 who are members of approved gun clubs. 10 U.S.C.A. § 4308 (1959 & Supp.1996). The program is administered by the Director of Civilian Marksmanship, who is appointed by the President. The director approves local gun clubs, such as plaintiff Richmond Boro Gun Club, for participation in the program. The Richmond Boro club has received a number of weapons from the federal government pursuant to federal regulations, possession of which are criminalized by the local law. In addition, ***687** several its members have purchased surplus M-1s, which they can no longer store or use in New York City. CMP regulations forbid them from selling or giving away these weapons.

As a participating club, Richmond Boro must conduct an active rifle marksmanship training program for at least nine months each year. 32 C.F.R. § 543.13. Its members may participate in the National Matches, an annual marksmanship competition conducted each year by the Secretary of the Army. *See* 10 U.S.C. § 4312. These matches are held at Camp Perry Ohio. Competitors in these matches use M1 rifles, M14 rifles, and M16 rifles, all of which are criminalized by the local law.

After the parties filed briefs in this case, Congress repealed the very statute on which plaintiff's rely in their preemption argument. *See* Corporation for the Promotion of Rifle Practice and Firearms Safety Act ("CPRPFSA"), Pub.L. No. 104-106, § 1624, 110 Stat. 186, 522 (1996) (repealing, inter alia, 10 U.S.C. § 4308). Rather than continuing the CMP program as an arm of the government, Congress privatized the operation of the CMP in the newly established private, non-profit, Corporation for the Promotion of Rifle Practice and Firearms Safety (hereafter "the corporation"). *Id.* §§ 1611-1615. The corporation "shall have responsibility for the overall supervision, oversight, and control of the [CMP]." *Id.* § 1612(a). The new corporation is to

be funded by the collection of fees and donations. *Id.* § 1618(a). The new corporation is also authorized to sell firearms, ammunition, and other "accouterments," to qualified individuals. *Id.* § 1614(b)(2). However, such sales "are subject to applicable Federal, State, and local laws." *Id.* § 1614(e).

The transfer of these responsibilities to the corporation from the Army is to occur by September 30, 1996. *Id.* § 1612(d). And the new statute will take effect no later than October 1, 1996. *Id.* § 1624(c).

Because the old CMP statutes are not yet without force, we will conduct the preemption analysis under both the old and the new statutes. But the result is the same: there is no reason to render invalid the law passed by the New York City Council.

[5][6] Consistent with the Supremacy Clause, state laws that interfere with or are contrary to the laws of Congress will not stand. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 210, 6 L.Ed. 23 (1824). However, there is a strong presumption against federal preemption of state and local legislation. *California v. ARC America Corp.,* 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989). This presumption is especially strong in areas traditionally occupied by the states, such as health and safety measures. *English v. General Elec. Co.,* 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990). A state measure is preempted when it is impossible to comply with both state and local law, or the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *California v. Federal Energy Regulatory Comm'n,* 495 U.S. 490, 506, 110 S.Ct. 2024, 2033-34, 109 L.Ed.2d 474 (1990). Plaintiffs do not claim that it is impossible to comply with the requirements of both CMP and Local Law 78. Instead, they claim that the local law stands as an obstacle to the goals expressed by Congress in the CMP legislation and regulations.

[7][8] A court should only find that a state or local law is preempted by congressional legislation if it determines that Congress intended such preemption. *Penn Dairies, Inc. v. Milk Control Comm'n of Penn.,* 318 U.S. 261, 275, 63 S.Ct. 617, 623-24, 87 L.Ed. 748 (1943). This intent should not lightly be inferred. *Id.*

Judge Raggi comprehensively addressed plaintiffs' preemption argument under the old statute, 896 F.Supp. at 285-89, and, again, we need not gild the lily. In the words of the district court:

> Local Law 78 does not prohibit city residents from receiving CMP-issued rifles nor from purchasing M-1 Garand rifles. It requires only that they store and use these weapons outside city limits. Nothing in the applicable federal laws or regulations requires a CMP club or its members to store or practice with these rifles in New York City or at any particular site. Plaintiffs'***688** real complaint then is not conflict between federal and local law but personal inconvenience, since they are barred from keeping assault weapons in their homes and from practicing with them at their club's Staten Island rifle range. But such inconvenience is of no legal import. Home storage of government-issued weapons is only permitted under federal regulation; it is not mandated. 32 C.F.R. § 543.17(g)(5)(ii). The only storage site actively "encouraged" by federal regulation is storage at military or police facilities. 32 C.F.R. § 543.17(g)(5)(vi). Since such storage would necessarily require civilians to travel at least some distance from their homes to gain access to their rifles, and since such access might further be limited by the hours when such facilities are open to the public, it necessarily follows that no link exists between the federal interest in promoting civilian marksmanship and the site where persons store their weapons. Similarly, since federal law does not require CMP clubs to maintain their own ranges, the fact that plaintiffs will not be able to use assault rifles on their Staten Island range but will have to use some other facility does not evidence a conflict requiring preemption.

896 F.Supp. at 288. We cannot improve on the dis-

trict court's analysis, except to add a brief discussion of the new statute.

Congress passed the CPRPFSA as part of the National Defense Authorization Act for Fiscal Year 1996. The CPRPFSA shows that Congress believes the CMP program should continue only if there is enough private financial support, and not as an arm of the government. That Congress has seen fit to further remove the promotion of the purposes originally served by the CMP from the operation of the federal government is further evidence that the New York City legislation is not preempted by federal law. Even if there were any question regarding Congress' intent to override local firearm legislation, it is resolved by the new statute's specific deferral to local law. CPRPFSA § 1614(e) (quoted above).

3. *The Due Process Claim*

[9] Appellants' final claim is that New York state law creates liberty and property interests in the possession of rifles and shotguns which are violated by the local law, thus creating a violation of the Due Process Clause of the Fourteenth Amendment. They point to several provisions of New York law, including (1) the statutory Bill of Rights, which provides that "[a] well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed," N.Y. Civ. Rights Law art 2, § 4 (McKinney 1992); (2) a State Penal law provision providing the right to purchase a rifle or shotgun in a state contiguous with New York and transport it into New York, N.Y. Penal Law § 265.40 (McKinney 1989 & Supp.1996); and (3) licensing provisions for pistols and their ammunition feeding devices. N.Y. Penal Law § 400.00 (McKinney 1989 & Supp.1996).

It is not clear whether plaintiffs assert a substantive or a procedural due process challenge to the local law. Assuming the claim is one of substantive due process, it is rejected. As the district court pointed out, at least one circuit has held that violations of state law generally do not give rise to substantive due process claims. *Weimer v. Amen,* 870 F.2d 1400, 1405-06 (8th Cir.1989). However, this circuit has held that "[s]ubstantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised.' " *Kaluczky v. City of White Plains,* 57 F.3d 202, 211 (2d Cir.1995). The local law challenged by appellants is not sufficiently drastic to trigger substantive due process rights; rather, it is a rational legislative response to increased assault weapon violence in the city of New York. *See Interport Pilots Agency, Inc. v. Sammis,* 14 F.3d 133, 145 (2d Cir.1994) (rejecting substantive due process challenge to legislative act since law was rationally related to a legitimate government interest).

[10] If, plaintiffs' due process argument is procedural in nature, it is similarly without merit. Even assuming they have a liberty or property interest in the possession of assault ***689** weapons, appellants cannot successfully challenge a legislative act on procedural due process grounds. "When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process-the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees." 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 17.8 (2d ed. 1992). *See also Interport Pilots Agency,* 14 F.3d at 142 ("Official action that is legislative in nature is not subject to the notice and hearing requirements of the due process clause.... [D]ue process does not require any hearing or participation in 'legislative' decision-making other than that afforded by judicial review after rule promulgation"). Procedural due process has not been violated in this case because plaintiffs can (and do) challenge the legislative ordinance in federal or state court on the ground that it violates their substantive state or federal rights.

III. CONCLUSION

The judgment of the district court is affirmed.

C.A.2 (N.Y.),1996.
Richmond Boro Gun Club, Inc. v. City of New York
97 F.3d 681

END OF DOCUMENT

EXHIBIT G

96 S.Ct. 316
423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228
(Cite as: 423 U.S. 87, 96 S.Ct. 316)

H

Supreme Court of the United States
UNITED STATES, Petitioner,
v.
Josephine M. POWELL.
No. 74-884.

Argued Oct. 6, 1975.
Decided Dec. 2, 1975.

By a judgment of the United States District Court for the Eastern District of Washington, the defendant was convicted of violation of statute proscribing the mailing of pistols, revolvers and other firearms capable of being concealed on the person, and she appealed. The United States Court of Appeals for the Ninth Circuit, 501 F.2d 1136, reversed, and certiorari was granted. The Supreme Court, Mr. Justice Rehnquist, held that the statute was not unconstitutionally vague and did give defendant adequate warning that her mailing of a 22-inch long sawed-off shotgun was a criminal offense.

Court of Appeals reversed.

Mr. Justice Stewart filed an opinion concurring in part and dissenting in part.

Conviction affirmed on remand, 537 F.2d 371.

West Headnotes

[1] Postal Service 306 ⚿27

306 Postal Service
306III Offenses Against Postal Laws
306k27 k. Violations of Postal Regulations in General. Most Cited Cases
Under statute proscribing the mailing of pistols, revolvers, and other firearms capable of being concealed on the person, phrase "other firearms" capable of being concealed on the person is not limited under doctrine of ejusdem generis to concealable weapons such as pistols and revolvers; to so narrow meaning of language used would not comport with purpose of Congress in enactment of statute which was to avoid having post office act as instrumentality for violation of local laws which prohibited purchase or possession of weapons. 18 U.S.C.A. § 1715.

[2] Statutes 361 ⚿194

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k194 k. General and Specific Words and Provisions. Most Cited Cases
Rule of ejusdem generis is only an instrumentality for ascertaining correct meaning of words when there is uncertainty.

[3] Statutes 361 ⚿194

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k194 k. General and Specific Words and Provisions. Most Cited Cases
Ordinarily rule of "ejusdem generis" limits general terms which follow specific matters similar to those specified but it may not be used to defeat obvious purpose of legislation.

[4] Criminal Law 110 ⚿13.1

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 k. Certainty and Definiteness. Most Cited Cases
(Formerly 110k13.1(1))
Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of facts of case at hand. U.S.C.A.Const. Amend. 1.

[5] Criminal Law 110 ⚖13.1

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 k. Certainty and Definiteness. Most Cited Cases
(Formerly 110k13.1(1))
Statute which proscribes no comprehensible course of conduct at all may not be constitutionally applied to any set of facts.

[6] Constitutional Law 92 ⚖4509(25)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(25) k. Weapons and Explosives. Most Cited Cases
(Formerly 92k258(3.1), 110k13.1(2.5), 110k13.1(2))

Postal Service 306 ⚖2

306 Postal Service
306I Postal Service in General
306k2 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 110k13.1(2.5), 110k13.1(2))
Statute proscribing the mailing of pistols and revolvers and other firearms capable of being concealed on the person is not unconstitutionally vague since it intelligibly forbids a definite course of conduct with respect to the mailing of concealable firearms. 18 U.S.C.A. § 1715.

[7] Constitutional Law 92 ⚖4509(25)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(25) k. Weapons and Explosives. Most Cited Cases
(Formerly 92k258(3.1), 110k13.1(2.5), 110k13.1(2))

Postal Service 306 ⚖2

306 Postal Service
306I Postal Service in General
306k2 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 110k13.1(2.5), 110k13.1(2))
Statute forbidding the mailing of pistols, revolvers and other weapons capable of being concealed on the person gave defendant adequate warning that her mailing of a 22-inch long sawed-off shotgun was a criminal offense, although doubts as to applicability of language in marginal fact situations might be conceived. 18 U.S.C.A. § 1715.

[8] Postal Service 306 ⚖27

306 Postal Service
306III Offenses Against Postal Laws
306k27 k. Violations of Postal Regulations in General. Most Cited Cases
In construing statute proscribing the mailing of pistols, revolvers and other weapons capable of being concealed on the person, it was fair to attribute to Congress the commonsense meaning that such a person would be an average person garbed in manner to aid rather than hinder concealment of weapon. 18 U.S.C.A. § 1715.

[9] Criminal Law 110 ⚖13.1

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 k. Certainty and Definiteness. Most Cited Cases
(Formerly 110k13.1(1))

96 S.Ct. 316
423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228
(Cite as: 423 U.S. 87, 96 S.Ct. 316)

Fact that Congress might, without difficulty, have chosen clear and more precise language equally capable of achieving end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague.

****317 Syllabus*** [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***87** Respondent was convicted of violating 18 U.S.C. s 1715, which proscribes mailing pistols, revolvers, and "other firearms capable of being concealed on the person," by having sent a 22-inch sawed-off shotgun through the mails. There was evidence at the trial that the gun could be concealed on an average person. The Court of Appeals reversed, holding that the quoted portion of s 1715 was so vague as to violate due process. In addition to the constitutional claim respondent contends that as a matter of statutory construction, particularly in light of the ejusdem generis doctrine, the quoted portion does not embrace sawed-off shotguns. Held :

1. The narrow reading of the statute urged by respondent does not comport with the legislative purpose of making it more difficult for criminals to obtain concealable weapons, and the rule of ejusdem generis may not be used to defeat that purpose. Here a properly instructed jury could have found the shotgun mailed by respondent to have been a "firearm capable of being concealed on the person" within the meaning of s 1715. Pp. 318-319.

2. Section 1715 intelligibly forbids a definite course of conduct (mailing concealable firearms) and gave respondent adequate warning that mailing the gun was a criminal offense. That Congress might have chosen "(c)learer and more precise language" equally capable of achieving its objective does not mean that the statute is unconstitutionally vague. United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538, 1541, 91 L.Ed. 1877. Pp. 319, 320.

9 Cir., 501 F.2d 1136, reversed.
Frank H. Easterbrook, Washington, D. C., for petitioner, pro hac vice, by special leave of Court.

***88** Jerry J. Moberg, Moses Lake, Wash., for respondent, pro hac vice, by special leave of Court.

Mr. Justice REHNQUIST delivered the opinion for the Court.

The Court of Appeals in a brief per curiam opinion held that portion of an Act of ****318** Congress prohibiting the mailing of firearms "capable of being concealed on the person," 18 U.S.C. s 1715, to be unconstitutionally vague, and we granted certiorari to review this determination. 420 U.S. 971, 95 S.Ct. 1390, 43 L.Ed.2d 651 (1975). Respondent was found guilty of having violated the statute by a jury in the United States District Court for the Eastern District of Washington, and was sentenced by that court to a term of two years' imprisonment. The testimony adduced at trial showed that a Mrs. Theresa Bailey received by mail an unsolicited package from Spokane, Wash., addressed to her at her home in Tacoma, Wash. The package contained two shotguns, shotgun shells, and 20 or 30 hacksaw blades.

While the source of this package was unknown to Mrs. Bailey, its receipt by her not unnaturally turned her thoughts to her husband George, an inmate at nearby McNeil Island Federal Penitentiary. Her husband, however, disclaimed any knowledge of the package or its contents.[FN1] Mrs. Bailey turned the package over to federal officials, and subsequent investigation disclosed that both of the shotguns had been purchased on the same date. One had been purchased by respondent, and another by an unidentified woman.

FN1. Respondent's husband, Travis Powell, also was an inmate at McNeil Island.

***89** Ten days after having received the first package, Mrs. Bailey received a telephone call from an unknown woman who advised her that a second package was coming but that "it was a mistake." The caller advised her to give the package to "Sally." When Mrs. Bailey replied that she "did not have the address or any way of giving it to Sally," the caller said she would call back. [FN2]

> FN2. Mrs. Bailey testified at trial that she did not know "Sally."

Several days later, the second package arrived, and Mrs. Bailey gave it unopened to the investigating agents. The return address was that of respondent, and it was later determined that the package bore respondent's handwriting. This package contained a sawed-off shotgun with a barrel length of 10 inches and an overall length of 22 1/8 inches, together with two boxes of shotgun shells.

Respondent was indicted on a single count of mailing a firearm capable of being concealed on the person (the sawed-off shotgun contained in the second package), in violation of 18 U.S.C. s 1715.[FN3] At trial there was evidence that the weapon could be concealed on an average person. Respondent was convicted by a jury which was instructed that in order to return a guilty verdict it must find that she "knowingly caused to be delivered by mail a firearm capable of being concealed on the person."

> FN3. Title 18 U.S.C. s 1715 provides in pertinent part:
>
> "Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable . . ..
>
> Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail according to the direction thereon . . . any pistol, revolver, or firearm declared nonmailable by this section, shall be fined not more than $1,000 or imprisoned not more than two years, or both."

She appealed her judgment of conviction to the Court of Appeals, and that court held that the portion of ***90** s 1715 proscribing the mailing of "other firearms capable of being concealed on the person" was so vague that it violated the Due Process Clause of the Fifth Amendment to the United States Constitution. 501 F.2d 1136 (1974). Citing Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939), the court held that, although it was clear that a pistol could be concealed on the person, "the statutory prohibition as it might relate to sawed-off shotguns is not so readily recognizable to persons of common experience and intelligence." 501 F.2d, at 1137.

****319** While the Court of Appeals considered only the constitutional claim, respondent in this Court makes a statutory argument which may fairly be described as an alternative basis for affirming the judgment of that court. She contends that as a matter of statutory construction, particularly in light of the doctrine of ejusdem generis, the language "other firearms capable of being concealed on the person" simply does not extend to sawed-off shotguns. We must decide this threshold question of statutory interpretation first, since if we find the statute inapplicable to respondent, it will be unnecessary to reach the constitutional question, Dandridge v. Williams, 397 U.S. 471, 475-476, 90 S.Ct. 1153, 1156, 25 L.Ed.2d 491 (1970).

[1] The thrust of respondent's argument is that the more general language of the statute ("firearms") should be limited by the more specific language ("pistols and revolvers") so that the phrase "other firearms capable of being concealed on the person" would be limited to "concealable weapons such as pistols and revolvers."

We reject this contention. The statute by its terms bans the mailing of "firearms capable of being concealed on the person," and we would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent

over and above the language of the statute.

[2][3] ***91** In Gooch v. United States, 297 U.S. 124, 128, 56 S.Ct. 395, 397, 80 L.Ed. 522 (1936), the Court said:

"The rule of ejusdem generis, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view."

The legislative history of this particular provision is sparse, but the House report indicates that the purpose of the bill upon which s 1715 is based was to avoid having the Post Office serve as an instrumentality for the violation of local laws which prohibited the purchase and possession of weapons. H.R.Rep. No. 610, 69th Cong., 1st Sess. (1926). It would seem that sawed-off shotguns would be even more likely to be prohibited by local laws than would pistols and revolvers. A statement by the author of the bill, Representative Miller of Washington, on the floor of the House indicates that the purpose of the bill was to make it more difficult for criminals to obtain concealable weapons. 66 Cong.Rec. 726 (1924). To narrow the meaning of the language Congress used so as to limit it to only those weapons which could be concealed as readily as pistols or revolvers would not comport with that purpose. Cf. United States v. Alpers, 338 U.S. 680, 682, 70 S.Ct. 352, 354, 94 L.Ed. 457 (1950).

We therefore hold that a properly instructed jury could have found the 22-inch sawed-off shotgun mailed by respondent to have been a "(firearm) capable of being concealed on the person" within the meaning of 18 U.S.C. s 1715. Having done so, we turn to the Court of ***92** Appeals' holding that this portion of the statute was unconstitutionally vague.

[4][5] We said last Term that "(i)t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." United States v. Mazurie, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975). The Court of Appeals dealt with the statute generally, rather than as applied to respondent in this case. It must necessarily have concluded, therefore, that the prohibition against mailing "firearms capable of being concealed on the person" proscribed no comprehensible course of conduct at all. It is ****320** well settled, of course, that such a statute may not constitutionally be applied to any set of facts. Lanzetta v. New Jersey, 306 U.S., at 453, 59 S.Ct., at 619; Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

An example of such a vague statute is found in United States v. Cohen Grocery Co., 255 U.S. 81, 89, 41 S.Ct. 298, 300, 65 L.Ed. 516 (1921). The statute there prohibited any person from "willfully . . . mak(ing) any unjust or unreasonable rate or charge in . . . dealing in or with any necessaries. . . ." So worded it "forbids no specific or definite act" and "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." Ibid.

On the other hand, a statute which provides that certain oversized or heavy loads must be transported by the "shortest practicable route" is not unconstitutionally vague. Sproles v. Binford, 286 U.S. 374, 393, 52 S.Ct. 581, 587, 76 L.Ed. 1167 (1932). The carrier has been given clear notice that a reasonably ascertainable standard of conduct is mandated; it is for him to insure that his actions do not fall outside the legal limits. The sugar dealer in Cohen, to the contrary, could have had no idea in advance what an "unreasonable rate" would be because that would have been determined***93** by the vagaries of supply and demand, factors over which he had no control. Engaged in a lawful business which Congress had in no way sought to proscribe,

he could not have charged any price with the confidence that it would not be later found unreasonable.

[6][7] But the challenged language of 18 U.S.C. s 1715 is quite different from that of the statute involved in Cohen. It intelligibly forbids a definite course of conduct: the mailing of concealable firearms. While doubts as to the applicability of the language in marginal fact situations may be conceived, we think that the statute gave respondent adequate warning that her mailing of a 22-inch-long sawed-off shotgun was a criminal offense. Even as to more doubtful cases than that of respondent, we have said that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Nash v. United States, 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232 (1913).

[8] The Court of Appeals questioned whether the "person" referred to in the statute to measure capability of concealment was to be "the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season." 501 F.2d, at 1137. But we think it fair to attribute to Congress the commonsense meaning that such a person would be an average person garbed in a manner to aid, rather than hinder, concealment of the weapons. Such straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the "void for vagueness" doctrine, and we will not indulge in it.

The Court of Appeals also observed that "(t)o require Congress to delimit the size of the firearms (other than pistols and revolvers) that it intends to declare unmailable***94** is certainly to impose no insurmountable burden upon it . . .." Ibid. Had Congress chosen to delimit the size of the firearms intended to be declared unmail able, it would have written a different statute and in some respects a narrower one than it actually wrote. To the extent that it was intended to proscribe the mailing of all weapons capable of being concealed on the person, a statute so limited would have been less inclusive than the one Congress actually wrote.

[9] But the more important disagreement we have with this observation of the ****321** Court of Appeals is that it seriously misconceives the "void for vagueness" doctrine. The fact that Congress might, without difficulty, have chosen "(c) learer and more precise language" equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague. United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538, 1541, 91 L.Ed. 1877 (1947).

The judgment of the Court of Appeals is

Reversed.

Mr. Justice STEWART, concurring in part and dissenting in part.

I agree with the Court that the statutory provision before us is not unconstitutionally vague, because I think the provision has an objectively measurable meaning under established principles of statutory construction. Specifically, I think the rule of ejusdem generis is applicable here, and that 18 U.S.C. s 1715 must thus be read specifically to make criminal the mailing of a pistol or revolver, or of any firearm as "capable of being concealed on the person" as a pistol or revolver.

The rule of ejusdem generis is applicable in a setting such as this unless its application would defeat the intention of Congress or render the general statutory language meaningless. See ***95**United States v. Alpers, 338 U.S. 680, 682, 70 S.Ct. 352, 354, 94 L.Ed. 457; United States v. Salen, 235 U.S. 237, 249-251, 35 S.Ct. 51, 53, 59 L.Ed. 210; United States v. Stever, 222 U.S. 167, 174-175, 32 S.Ct. 51, 53, 56 L.Ed. 145. Application of the rule in the present situation entails neither of those results. Instead of draining meaning from the general language of the statute, an ejusdem generis construction gives to that language an ascertainable and intelligible content. And, instead of defeating the intention of Congress, an ejusdem generis construc-

tion coincides with the legislative intent.

The legislative history of the bill on which s 1715 was based contains persuasive indications that it was not intended to apply to firearms larger than the largest pistols or revolvers. Representative Miller, the bill's author, made it clear that the legislative concern was not with the "shotgun, the rifle, or any firearm used in hunting or by the sportsman." 66 Cong.Rec. 727. As a supporter of the legislation stated: "The purpose . . . is to prevent the shipment of pistols and revolvers through the mails." 67 Cong.Rec. 12041. The only reference to sawed-off shotguns came in a question posed by Representative McKeown: "Is there anything in this bill that will prevent the citizens of Oklahoma from buying sawed-off shotguns to defend themselves against these bank-robbing bandits?" Representative Blanton, an opponent of the bill, responded: "That may come next. Sometimes a revolver is more necessary than a sawed-off shotgun." 66 Cong.Rec. 729. In the absence of more concrete indicia of legislative intent, the pregnant silence that followed Representative Blanton's response can surely be taken as an indication that Congress intended the law to reach only weapons of the same general size as pistols and revolvers.

I would vacate the judgment of the Court of Appeals and remand the case to that court for further proceedings consistent with these views.

U.S.Wash. 1975.
U. S. v. Powell
423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228

END OF DOCUMENT

EXHIBIT H

550 F.2d 1180, 194 U.S.P.Q. 59
(Cite as: 550 F.2d 1180)

▷

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Woodrow W. WISE, Jr., dba Hollywood Film Exchange, Defendant-Appellant.
No. 76-1141.

March 28, 1977.

Defendant was convicted before the United States District Court for the Central District of California, A. Andrew Hauk, J., of criminal copyright infringement on charge of willful vending for profit of copyrighted feature-length motion pictures, and he appealed. The Court of Appeals, Jameson, District Judge, sitting by designation, held that statute proscribing copyright infringement is not unconstitutionally vague or overbroad; that agreement contemplating sale of film by studio to television network at network's election was regarded as a sale for purposes of criminal copyright infringement; that provision in agreement for transfer by studio of film to actor of major stature for payment for the cost of the film, standing alone, did not establish a sale, for purposes of criminal copyright infringement, but when taken with rest of language of agreement, it revealed a transaction strongly resembling a sale with restrictions on use of print, and in absence of evidence with respect to whereabouts of print furnished to actor, Government failed to carry its burden of showing that there was no first sale; and that no sale was effected under agreements whereby film was loaned to actors for personal use.

Judgment affirmed as to counts I, IX, XI and XIII and reversed as to counts III and VII.

West Headnotes

[1] Copyrights and Intellectual Property 99 ⇐ 53(1)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k53 Acts Constituting Infringement
99k53(1) k. In General. Most Cited Cases
(Formerly 99k53, 99k51)
Any act which is inconsistent with exclusive rights of copyright holder, as enumerated in statute, constitutes "infringement." 17 U.S.C.A. §§ 1, 5.

[2] Criminal Law 110 ⇐ 13.1

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 k. Certainty and Definiteness. Most Cited Cases
(Formerly 110k13.1(1))
The concept of vagueness is rooted in a rough idea of fairness and requires that laws give person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.

[3] Criminal Law 110 ⇐ 13.1

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 k. Certainty and Definiteness. Most Cited Cases
(Formerly 110k13.1(1))
A statute meets standard of certainty required by constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

[4] Constitutional Law 92 ⇐ 4509(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of

Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(1) k. In General. Most Cited Cases
(Formerly 92k258(3.1), 110k13.1(2.5), 110k13.1(2))

Copyrights and Intellectual Property 99 ⚷2

99 Copyrights and Intellectual Property
99I Copyrights
99I(A) Nature and Subject Matter
99k2 k. Constitutional and Statutory Provisions. Most Cited Cases
(Formerly 110k13.1(2.5), 110k13.1(2))
Viewed in a commonsense manner and in context of copyright statutory scheme, statute proscribing copyright infringement is sufficiently certain and sufficient to put one on notice that unauthorized vending of copyrighted works constitutes an infringement, and thus statute is not unconstitutionally vague because it fails to define the word "infringed" or on an asserted failure to give notice that "vending" copyrighted material constitutes infringement. 17 U.S.C.A. § 104.

[5] Copyrights and Intellectual Property 99 ⚷ 70

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
Statute proscribing copyright infringement requires a willful violation which undercuts any claim of lack of warning or fair notice of the criminal sanctions. 17 U.S.C.A. § 104.

[6] Constitutional Law 92 ⚷1140

92 Constitutional Law
92IX Overbreadth in General
92k1140 k. In General. Most Cited Cases
(Formerly 110k13(1))
Overbreadth doctrine focuses on the potential application of a statute to constitutionally protected conduct.

[7] Copyrights and Intellectual Property 99 ⚷ 2

99 Copyrights and Intellectual Property
99I Copyrights
99I(A) Nature and Subject Matter
99k2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statute proscribing copyright infringement is not overbroad because it prohibits vending, as well as copying, copyrighted material. 17 U.S.C.A. § 104.

[8] Copyrights and Intellectual Property 99 ⚷ 53(1)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k53 Acts Constituting Infringement
99k53(1) k. In General. Most Cited Cases
(Formerly 99k53, 99k68)
The copyright laws protect the right of the copyright proprietor to vend his work, but such right is not absolute and is subject to the "first sale doctrine" as stated in statute. 17 U.S.C.A. § 27.

[9] Copyrights and Intellectual Property 99 ⚷ 53(1)

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k53 Acts Constituting Infringement
99k53(1) k. In General. Most Cited Cases
(Formerly 99k53, 99k68)

Under so-called "first sale doctrine" as provided under statute, where a copyright owner parts with title to a particular copy of his copyrighted work he divests himself of his exclusive right to vend that particular copy. 17 U.S.C.A. § 27.

[10] Copyrights and Intellectual Property 99 ⚿53.2

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k53.2 k. Fair Use and Other Permitted Uses in General. Most Cited Cases
(Formerly 99k68)
Under first sale doctrine, while the proprietor's other copyright rights, that is, reprinting, copying, etc., remain unimpaired, the exclusive right to vend the transferred copy rests with the vendee who is not restricted by statute from further transfers of that copy, even though in breach of an agreement restricting its sale. 17 U.S.C.A. § 27.

[11] Copyrights and Intellectual Property 99 ⚿53.2

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k53.2 k. Fair Use and Other Permitted Uses in General. Most Cited Cases
(Formerly 99k68)
Upon the sale of a copyrighted work, the vendee is endowed with the ordinary incidents of ownership, including the right of alienation. 17 U.S.C.A. § 27.

[12] Copyrights and Intellectual Property 99 ⚿53.2

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k53.2 k. Fair Use and Other Permitted Uses in General. Most Cited Cases
(Formerly 99k68)
If vendee of a particular copy of copyrighted work breaches an agreement not to sell the copy, he may be liable for breach but he is not guilty of infringement. 17 U.S.C.A. § 27.

[13] Criminal Law 110 ⚿13.1

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 k. Certainty and Definiteness. Most Cited Cases
(Formerly 110k13.1(1))
If a judicial explication makes a statute clear, so that fair notice is afforded, vagueness may not be imputed.

[14] Statutes 361 ⚿47

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and Definiteness. Most Cited Cases
Judicial gloss on statute, which requires a transfer of title rather than mere possession before a "first sale" can occur thus giving the vendee of a copy of a copyrighted work the right to vend the transferred copy, provides clear notice of statute's application and precludes any claim that it is unconstitutionally vague. 17 U.S.C.A. § 27.

[15] Judgment 228 ⚿713(1)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(1) k. In General. Most Cited Cases
Collateral estoppel, although first developed in civil

litigation, is embodied in Fifth Amendment guarantee against double jeopardy and means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any further lawsuit. U.S.C.A.Const. Amend. 5.

[16] Judgment 228 ⚿751

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(D) Judgments in Particular Classes of Actions and Proceedings
228k751 k. Criminal Prosecutions. Most Cited Cases
Collateral estoppel doctrine could not bar prosecution for criminal copyright infringement by willfully and for profit vending copyrighted feature-length motion pictures, since identity of issues and identity of parties were absent and prior cases did not involve the same films or the same contractual agreements. U.S.C.A.Const. Amend. 5.

[17] Copyrights and Intellectual Property 99 ⚿70

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
In criminal copyright infringement case, Government must show infringement, that the infringement was willful and that it was engaged in for profit. 17 U.S.C.A. § 104.

[18] Copyrights and Intellectual Property 99 ⚿70

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
To prove criminal infringement by vending, Government must prove the absence of a first sale as to those articles sold by defendant and, since copyright proprietors frequently transfer rights in their works by complicated agreements which cannot simply be called "sales" in each case, court must analyze the arrangement at issue and decide whether it should be considered a first sale. 17 U.S.C.A. § 104.

[19] Copyrights and Intellectual Property 99 ⚿70

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
There is general principle in copyright law of looking to civil authority for guidance in criminal cases.

[20] Copyrights and Intellectual Property 99 ⚿67.1

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)1 What Constitutes Infringement
99k67.1 k. Motion Pictures and Other Audiovisual Works. Most Cited Cases
(Formerly 99k68)
Agreements for distribution of films by studios did not constitute first sales for copyright purposes, since both on their face and by their terms they were restricted licenses and not sales. 17 U.S.C.A. § 104.

[21] Copyrights and Intellectual Property 99 ⚿70

99 Copyrights and Intellectual Property
99I Copyrights

99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
Mere failure by studios to expressly reserve title to films transferred did not require a finding that films were sold for copyright purposes, where general tenor of entire agreement was inconsistent with such a conclusion. 17 U.S.C.A. § 104.

[22] Copyrights and Intellectual Property 99 ⚷70

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
Circumstances required construction that provision of licensing agreement pertaining to films merely allowed studio to compensate television network for out-of-pocket cost of prints produced at network's expense and thus a "sale" was not present for purposes of criminal copyright infringement, especially in view of the immediately following language which indicated that title to all prints and tapes would remain in licensor. 17 U.S.C.A. §§ 27, 104.

[23] Copyrights and Intellectual Property 99 ⚷70

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
Agreement contemplating sale of film by studio to television network at network's election was regarded as a sale for purposes of criminal copyright infringement, since no evidence had been adduced at trial as to whether network had exercised its election, or, if it did, whether it had resold that print and, in absence of such proof, Government failed in its burden of proving the absence of a first sale. 17 U.S.C.A. §§ 27, 104.

[24] Copyrights and Intellectual Property 99 ⚷70

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
Under agreements whereby film studios loaned film prints to actors of major stature pursuant to so-called VIP agreements which restricted use of prints to personal use, terms of agreements were consistent with their designation as loans or licenses and thus they did not effect sales of the motion pictures for purposes of criminal copyright infringement. 17 U.S.C.A. §§ 27, 104.

[25] Copyrights and Intellectual Property 99 ⚷70

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
Provision in agreement for transfer by studio of film to actor of major stature for payment for the cost of the film, standing alone, did not establish a sale, for purposes of criminal copyright infringement, but when taken with rest of language of agreement, it revealed a transaction strongly resembling a sale with restrictions on use of print, and in absence of evidence with respect to whereabouts of print furnished to actor, Government failed to carry its burden of showing that there was no first sale. 17 U.S.C.A. §§ 27, 104.

[26] Copyrights and Intellectual Property 99 ⇐70

99 Copyrights and Intellectual Property
991 Copyrights
991(J) Infringement
991(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
The "first sale" doctrine, for purposes of criminal copyright infringement, is applicable only with respect to the copyrighted article which the vendee is charged with infringing. 17 U.S.C.A. §§ 27, 104.

[27] Copyrights and Intellectual Property 99 ⇐70

99 Copyrights and Intellectual Property
991 Copyrights
991(J) Infringement
991(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
In prosecution for criminal copyright infringement for claimed vending of copyrighted feature-length motion pictures, even if prints of photoplays involved had been sold for salvage, Government's evidence proved beyond reasonable doubt that prints sold by defendant were not films which had been sold for salvage, since evidence proved that prints sold for salvage could not be pieced together to produce a copy of the film. 17 U.S.C.A. §§ 27, 104.

[28] Copyrights and Intellectual Property 99 ⇐70

99 Copyrights and Intellectual Property
991 Copyrights
991(J) Infringement
991(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
In prosecution for criminal copyright infringement arising out of claimed vending of copyrighted feature-length motion pictures, Government had burden to prove, in addition to usual requirement of an act intentionally done in violation of law, that defendant knew that the film which he sold had not been first sold by the copyright owner. 17 U.S.C.A. § 104.

[29] Copyrights and Intellectual Property 99 ⇐70

99 Copyrights and Intellectual Property
991 Copyrights
991(J) Infringement
991(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
In prosecution for criminal copyright infringement arising out of claimed vending of copyrighted feature-length motion pictures, Government sustained its burden of proving that film which defendant allegedly sold had not been first sold by copyright owner.

[30] Copyrights and Intellectual Property 99 ⇐70

99 Copyrights and Intellectual Property
991 Copyrights
991(J) Infringement
991(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
In prosecution for criminal copyright infringement arising out of claimed vending of copyrighted feature-length motion pictures, evidence which, inter alia, disclosed that defendant had a substantial business, regularly mailed out circulars listing films for sale and permitted customers to charge their purchases to major credit cards together with checks made payable to defendant, was sufficient to prove that defendant had infringed copyright for profit. 17 U.S.C.A. § 104.

[31] Copyrights and Intellectual Property 99 ⚿70

99 Copyrights and Intellectual Property
99I Copyrights
99I(J) Infringement
99I(J)2 Remedies
99k70 k. Penalties and Actions Therefor, and Offenses and Prosecutions Therefor. Most Cited Cases
"Profit," for purposes of criminal copyright infringement, includes the sale or exchange of the infringing work for something for value in hope of some pecuniary gain and it is irrelevant whether the hope of gain was realized or not. 17 U.S.C.A. § 104 .

***1183** Gerald M. Singer, argued, Beverly Hills, Cal., for defendant-appellant.

William D. Keller, U. S. Atty., Vincent J. Marella, argued, Asst. U. S. Atty., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS and ANDERSON, Circuit Judges, and JAMESON,[FN*] District Judge.

FN* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

JAMESON, District Judge:

Woodrow Wise, Jr. has appealed his conviction of criminal copyright infringement in violation of 17 U.S.C. s 104. He was charged in a superseding indictment with seven counts of criminal copyright infringement by willfully and for profit vending copyrighted feature-length motion pictures, [FN1] and also with seven counts of interstate transportation of stolen and converted property (the motion picture prints) in violation of 18 U.S.C. s 2314. Following a non-jury trial appellant was convicted on six of the seven copyright infringement counts. [FN2] He was sentenced to consecutive terms of one year imprisonment on each of the six counts and on condition that he serve one month on each count in a jail-type institution, the execution of the remainder of the sentence was suspended and the defendant was placed on probation for five years. The court granted defendant's motion for acquittal on the interstate transportation counts.[FN3]

FN1. The indictment charged appellant with the unlawful sale of the following prints: "The Exorcist" (Count I), "Camelot" (Count III), "Forty Carats" (Count V), "Funny Girl" (Count VII), "The Sting" (Count IX), "American Graffiti" (Count XI), and "Paper Moon" (Count XIII).

FN2. The court found appellant not guilty on Count V, charging criminal copyright infringement of the picture "Forty Carats", because it found that a "first sale" of this movie had been made.

FN3. The court found that the Government had failed to prove the jurisdictional requirement that the property transported had a value of $5,000 or more.

On appeal Wise challenges the constitutionality of 17 U.S.C. ss 27 and 104, contests the sufficiency of the evidence to sustain his conviction, and argues that his conviction is precluded by collateral estoppel. We affirm the conviction on four counts and reverse on two counts.

Factual Background

During the period set out in the indictment, from February to September, 1974, appellant operated a business called Hollywood Film Exchange in Los Angeles, California, which was engaged in the sale of copyrighted feature-length motion pictures, ranging in price from $95 to $575. Appellant***1184** mailed printed lists to film collectors throughout

the United States, offering approximately 349 films for sale and permitting the purchases to be charged to credit cards. Use of the films was restricted to home use in accordance with a provision on each list stating:

"16 and 35 mm. used film for sale. Sold from one private movie collector to another for home showings only. No rights given or implied."

Sales of the films charged in the indictment were made by appellant to persons living in Michigan, Massachusetts, Georgia and North Carolina.

It was stipulated that the films were validly copyrighted by the motion picture studios which had produced them.[FN4] The Government called as witnesses executives and house counsel of the studios, who testified with respect to the policies and procedures of the studios in the distribution of their motion pictures. The testimony indicated that the major areas of film distribution include: theatrical (movie theaters), nontheatrical (private groups), television (both network and cable), airlines and steamships, Armed Services, V.I.P. (prominent member of the motion picture industry or community), and "studio accommodation" (interstudio lending of films for technical or casting purposes).

> FN4. Copyrights were held by the following studios: Warner Brothers Hoya Productions, Inc. "The Exorcist"; Warner Brothers Seven Arts, Inc. "Camelot"; Universal Pictures "The Sting", "American Graffiti"; Paramount Pictures Corp. "Paper Moon"; Rastar Productions, Inc. "Funny Girl"; Frankovich Productions, Inc. "Forty Carats".

The studio witnesses detailed the individual distribution transactions concerning each film, and the written agreements underlying the transactions were introduced into evidence. The testimony and documents revealed that the studios generally do not sell films,[FN5] but rather license their use for limited purposes and for limited periods of time. The license agreements with respect to the films involved in this case generally reserved title to the films in the studios and required their return at the expiration of the license period. Many of the agreements prohibited copying of the prints. The V.I.P. licenses reserved all rights and title in the studios, restricting the licensee to possession of the print for his own personal use. None of the films had been subject to an outright sale.[FN6]

> FN5. Cross-examination of the Government's witnesses revealed that several studios had sold films in the past. In 1954 Universal sold its rights in four Sherlock Holmes movies to a third party. In the 1950's Warner Brothers sold its rights to all its motion pictures produced prior to 1949. There was no testimony that any sales had been made of recent motion pictures, or of the six films on which appellant was found guilty.
>
> FN6. As noted supra, however, the district court found that a license agreement for "Forty Carats" (Count V) was in actuality a sale.

The Government also presented evidence that the studios sell worn-out 35 mm. film to Film Salvage Company, which reclaims the raw film stock and destroys the images thereon. Studio representatives testified that only the film stock, and not the motion picture photoplay, is sold to the salvage company. Before sending the film, the studios remove all identification from the film and send alternate reels from any one picture so that no two consecutive reels are ever sent in the same shipment, nor is a major portion of a picture sent in one shipment. Several of the studios also cut fifty foot segments off the beginning and end of each reel. Upon receipt of the film, Film Salvage chemically removes the images from those portions of the film which are suitable for use as magnetic recording tape. Other portions, suitable for use as picture leader, are cut into 200 foot sections which are spliced together (no two of the segments being from the same

picture) to make 1000 foot reels, and the images on the film are obscured by a wire brush. Remaining portions of the film are ground up, melted down, and used in the plastics industry. Film Salvage then sends the studios certificates of destruction which confirm the destruction of particular film shipments.*1185 Representatives of the studios and Film Salvage testified that it would be impossible, through this process, to put together a complete motion picture.[FN7] The vice president of Film Salvage Company testified that the company does not resell the motion picture photoplays shipped to it for destruction.

> FN7. The average feature-length 35 mm. motion picture ranges in length from 11,000 to 14,000 feet.

Three of the studios, Universal, Paramount and Warner Brothers, destroy old 16 mm. film in-house by physically chopping or sawing the film into small pieces, which are sent to the salvage company. Columbia disposes of its 16 mm. film in the same manner as its 35 mm. film, by shipping it to a salvage company.

On the issue of willfulness, the Government presented consent decrees in actions instituted by various studios against appellant for copyright infringement due to appellant's unauthorized sale of copyrighted motion pictures. The consent decrees issued on December 18, 1970 and January 20, 1971, among other things, enjoined appellant from selling, copying, and dealing in copyrighted feature-length films of the studios involved.

Herbert Earnshaw, the attorney for the studios who negotiated the consent decrees, testified that appellant had several discussions with him concerning appellant's background and business operation. Appellant confided to Earnshaw that he "knew that he was in trouble", that he was "doing something unlawful", and that he had been expecting some sort of action by the film companies. Appellant disclosed to Earnshaw some of the sources of supply for the motion pictures he had been selling. These sources were people who worked for film companies, whom appellant paid to steal films which were to be junked. Appellant stated that he had contacts in Washington, D. C., Boston, and Michigan who supplied him with stolen prints. At the conclusion of their discussions, Earnshaw explained to appellant that "he should not be dealing with prints that had a copyright notice on them".

The defense presented no witnesses but relied on cross-examination of the Government's witnesses in an effort to show that the studios do sell films, that some of the agreements concerning the instant films were actually sales rather than licenses, and that appellant, like any average person, did not know that what he was doing was illegal.

Issues

(1) Is 17 U.S.C. s 104 unconstitutionally vague or overbroad?

(2) Is 17 U.S.C. s 27 unconstitutionally vague?

(3) Is the Government's prosecution barred by collateral estoppel?

(4) Was the evidence sufficient to prove that appellant willfully infringed copyrights for profit?

Constitutionality of 17 U.S.C. s 104

17 U.S.C. s 104 provides in pertinent part:

"(a) (A)ny person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor . . . ."

Appellant contends that the statute is unconstitutionally vague because it fails to define the word "infringe" and fails to give notice that "vending" copyrighted material constitutes infringement. The Government replies that s 104 is sufficiently certain when considered in the context of Title 17, which

provides the statutory scheme for copyright law. We agree.

[1] Section 1 of Title 17 enumerates the rights of the copyright holder, which include the rights "to print, reprint, publish, copy, and vend the copyright work . . . ." (Emphasis added.) Section 5 specifies the types of property subject to ***1186** copyright protection, including "motion picture photoplays". As the Government argues, it is clear that any act which is inconsistent with the exclusive rights of the copyright holder, as enumerated in s 1, constitutes infringement.

[2][3] The concept of vagueness is rooted in a "rough idea of fairness", Colten v. Kentucky, 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) and requires "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly". Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). The standard of specificity required of a penal statute was enunciated in Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367 (1952):

"A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

This court has said: "A statute meets the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9 Cir. 1963).

[4] We find that s 104 satisfies these standards of certainty. Viewed in a common sense manner and in the context of the copyright statutory scheme, the statute is sufficient to put one on notice that the unauthorized vending of copyrighted works constitutes infringement. The court in United States v. Wells, 176 F.Supp. 630, 633 (S.D.Tex.1959) was of a similar view:

". . . To gain any idea of its (s 104) coverage or of the protection afforded by the copyright law one must resort to the civil law of copyright and to the provisions of Title 17 as a whole. The basic question of interpretation involved in Section 104 is the meaning of infringement of copyright. Although there is no statutory definition of infringement of copyright, it may be readily inferred from the provisions of Title 17 United States Code s 1(a), conferring upon the copyright proprietor the exclusive right to print, reprint, publish, copy and vend the copyrighted work. (Emphasis supplied). The grant of these exclusive rights implies the prohibition that others shall not exercise them without the consent of the copyright proprietor; to do so without such consent would be infringement of copyright." [FN8]

> FN8. See also United States v. Taxe, 540 F.2d 961, 965 (9 Cir. 1976), where the court held that while the word "duplication" used in 17 U.S.C. s 1(f) was not statutorily defined, the statutory language was not unconstitutionally vague when read in the context of the entire statute.

[5] Further, the statute requires a willful violation, which undercuts any claim of lack of warning or fair notice of the criminal sanctions. Screws v. United States, 325 U.S. 91, 101-103, 65 S.Ct. 1031,

89 L.Ed. 1495 (1945). We conclude that s 104 is not unconstitutionally vague.

[6][7] Appellant additionally challenges the statute as overbroad because it prohibits vending, as well as copying, copyrighted material. This argument misperceives the nature of the overbreadth doctrine which focuses on the potential application of a statute to constitutionally protected conduct. See Grayned v. City of Rockford, 408 U.S. at 114, 92 S.Ct. 2294. The vending of copyrighted material even when done with proper authorization, is not behavior subject ***1187** to constitutional protection. Consequently, s 104 is not subject to attack on grounds of overbreadth. We hold that the statute is constitutional.

Constitutionality of 17 U.S.C. s 27

[8] While the copyright laws protect the right of the copyright proprietor to vend his work, that right is not absolute, but is subject to the "first sale doctrine" as stated in 17 U.S.C. s 27. That statute provides in pertinent part:

"(B)ut nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

[9][10][11][12] Although the statute speaks in terms of a transfer of possession, the judicial gloss on the statute requires a transfer of title before a "first sale" can occur. Thus, the first sale doctrine provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy. While the proprietor's other copyright rights (reprinting, copying, etc.) remain unimpaired, the exclusive right to vend the transferred copy rests with the vendee,[FN9] who is not restricted by statute from further transfers of that copy, even though in breach of an agreement restricting its sale.[FN10] See Harrison v. Maynard, Merrill & Co., 61 F. 689, 691 (2 Cir. 1894).

FN9. This results because the copyright is distinct from the property which is copyrighted, and the sale of one does not constitute a transfer of the other. See 17 U.S.C. s 27. Upon the sale of a copyrighted work, the vendee is endowed with the ordinary incidents of ownership, including the right of alienation.

FN10. If the vendee breaches an agreement not to sell the copy, he may be liable for the breach but he is not guilty of infringement.

[13][14] Appellant contends that s 27 is unconstitutionally vague because it requires judicial construction to make its meaning clear. It is well settled, however, that "(i)f a judicial explication makes a statute clear, so that fair notice is afforded, vagueness may not be imputed". United States v. Fithian, 452 F.2d 505, 506 n. 1 (9 Cir. 1971), citing, inter alia, United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954). Section 27 has consistently been construed to require a transfer of title rather than mere possession. Harrison v. Maynard, Merrill & Co., supra; Platt & Munk, Inc. v. Republic Graphics, Inc., 315 F.2d 847 (2 Cir. 1963). [FN11] The judicial gloss on s 27 provides clear notice of its application, and precludes any claim that it is unconstitutionally vague.

FN11. In Platt & Munk, it was contended that under s 27 the defendants acquired not merely possession but title as well. In holding that "(s)uch a literal reading of the 'but nothing' clause is unacceptable", Judge Friendly carefully analyzed the provisions of s 27 and its legislative history. 315 F.2d at 851-854.

Collateral Estoppel

Appellant next contends that his prosecution is barred by the doctrine of collateral estoppel, on the basis that previous film piracy cases [FN12] have

found studio transactions with motion pictures to be "first sales". Appellant asserts that these cases are dispositive here and that any factual differences between the cases are "only as to such non-material points as the particular film titles or the identities of purchasers and parties". These so-called "non-material points" are, however, precisely the elements upon which collateral estoppel depends, and upon which appellant's argument must fail.

> FN12. American International Pictures, Inc. v. Foreman, 400 F.Supp. 928 (S.D.Ala.1975); United States v. Nagy, (unreported) (N.D.Ind.1975).

[15][16] Collateral estoppel, although first developed in civil litigation, is embodied in the Fifth Amendment guarantee against double jeopardy. "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any further lawsuit." ***1188**Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970). The two central requirements of collateral estoppel identity of issues and identity of parties are absent here. Appellant was not a party in either of the prior cases upon which he relies.[FN13] Nor did those cases involve the same films or the same contractual agreements. This case involves an entirely separate factual issue (appellant's guilt of infringing the copyrights on these particular films) between entirely separate parties.

> FN13. The Foreman case was not even a criminal prosecution, but rather a civil action for infringement.

Sufficiency of Evidence

Preliminary to a discussion of the evidence in this case, we consider the elements necessary to sustain a conviction of criminal copyright infringement and the Government's burden of proof. We find only two reported cases involving criminal copyright infringement in violation of s 17 U.S.C. s 104 United States v. Wells, supra, and United States v. Bily, 406 F.Supp. 726 (E.D.Pa.1975).

In Wells the court granted defendant's motion for acquittal on eight counts of criminal infringement of the copyright of aerial survey maps owned by Edgar Tobin. Tobin had licensed 107 of his customers to manufacture reproductions of his maps for their own use. Defendant was charged with selling, without authorization, copies of Tobin's copyrighted maps. The pivotal issue was whether the copies sold by the defendant were copies which had been the subject of a first sale, thereby terminating their statutory protection:

". . . If title has been retained by the copyright proprietor, the copy remains under the protection of the copyright law, and infringement proceedings may be had against all subsequent possessors of the copy who interfere with the copyright proprietor's exclusive right to vend the copyrighted work. If title has passed to a first purchaser, though, the copy loses the protection of the copyright law as discussed above." 176 F.Supp. at 633-634.

The court found that "there has been no showing on the record that the copies of the aerial survey maps were not published by a lawful licensee of the copyright proprietor or that title to these copies was retained at all times by the copyright proprietor". 176 F.Supp. at 633. Since the Tobin license did not specify that title to the reproduced maps was to remain in Tobin, title to the maps belonged to the licensees who, under the first sale doctrine, were free to resell the maps. The court concluded: "Lacking the protection of the copyright law, there can be no infringement, and defendant should be acquitted." 176 F.Supp. at 634.

[17][18][19] Bily concerned the issue of probable cause for the issuance of a search warrant for defendant's house and garage, pursuant to which numerous reels of motion picture film were seized, leading to defendant's indictment for criminal copyright infringement. In holding that the Government

had failed to show probable cause for the issuance of the warrant, the court considered the elements necessary for conviction under 17 U.S.C. s 104, and the Government's burden in proving those ele- ments:

"The government has to carry several burdens to convict this defendant under 17 U.S.C. s 102 (sic s 104) it must show infringement, that the infringement was willful, and that it was engaged in for profit. Moreover, each element of the crime must be proven beyond a reasonable doubt." 406 F.Supp. at 733.

To prove infringement by vending, the Government must also prove the absence of a first sale as to those articles sold by the defendant.[FN14] And, since "(c)opyright proprietors*1189 frequently transfer rights in their works by complicated agreements which cannot simply be called 'sales'(,) (i)n each case, the court must analyze the arrangement at issue and decide whether it should be considered a first sale." 406 F.Supp. at 731.

> FN14. In American International Pictures, Inc. v. Foreman, supra, the court held "that the non-occurrence of a 'first sale' is part and parcel of the second element of a plaintiff's infringement action, i. e., vending by the defendant, and that therefore a plaintiff must bear the burden of proof with respect to it". 400 F.Supp. at 933. Although a civil case, Foreman's conclusion was adopted in Bily, 406 F.Supp. at 730, in accordance with the general principle in copyright law of looking to civil authority for guidance in criminal cases.

The question of what constitutes a first sale has been considered in a number of cases, although none of them are precisely in point factually. In Hampton v. Paramount Pictures Corporation, 9 Cir., 279 F.2d 100 (1960), cert. denied, 364 U.S. 882, 81 S.Ct. 170, 5 L.Ed.2d 103 (1960), this court determined that a transaction was a "license" and not an "assignment" in a civil action for copyright infringement. Paramount's suit against Hampton was predicated on Hampton's unauthorized public exhibition of the silent movie "The Covered Wagon", which he had purchased from Kodascope Libraries, Inc. Kodascope had been licensed by the copyright predecessor of Paramount "to product prints of certain films (including 'The Covered Wagon') for non-theatrical exhibitions". In affirming the lower court injunction, this court found that the agreement between Paramount's predecessor and Kodascope was a restricted license. In arguing that the agreement was in fact an assignment of the right to exhibit the films, after which the assignor (Kodascope's predecessor) lost all "power to restrict the use of the picture",[FN15] Hampton pointed to these provisions of the agreement:

> FN15. This definition of assignment appears to be equivalent to the definition of a sale.

"the contract contains no limitation as to time; a flat lump-sum payment was to be made for each film transferred; there was no requirement that outstanding prints and negatives were to be returned; no limitation was placed on the right to alter or abridge the films transferred; and the contract gave Kodascope exclusive territorial rights coextensive with the rights of Paramount." 279 F.2d at 103.
But the court found the agreement on its face to be clearly a license, thereby "precluding a construction that there was an assignment". Moreover, the purpose of the license was to allow Kodascope "to make reproductions of the photoplays 'and to license the use thereof . . .' ", thereby precluding a construction that Paramount gave Kodascope the right to sell the reproductions. The court concluded that Hampton had infringed Paramount's copyright by his unauthorized public exhibition of the movie because "(w)hile Kodascope may have purported to unconditionally sell a positive print, its only authority from Paramount was to reproduce miniature (16 mm) prints and license them for non-theatrical use". 279 F.2d at 103.

Appellant relies primarily on Harrison v. Maynard,

Merrill & Co., 61 F. 689 (2 Cir. 1894) and Independent News Co. v. Williams, 293 F.2d 510 (3 Cir. 1961). In Harrison, a publishing company which owned the copyright on a book entitled "Introductory Language Work" habitually stored printed and unbound sheets of the book with a bindery. Following a fire, the unbound sheets and some bound volumes were sold for waste paper with a restriction that they not be "placed on the market as anything else". Subsequently a quantity of damaged copies of "Introductory Language Work" appeared on the market, being offered for sale by the defendant. The district court granted plaintiff's motion for an injunction to restrain defendant's alleged copyright infringement. On appeal, the Second Circuit set aside the injunction, finding that the sale of the unbound pages for salvage was a "first sale", terminating copyright protection for further sales of the material, even though the first sale had been in breach of contract.

In Independent News, plaintiffs, the distributor, publisher, and copyright owner of comic books, sought to enjoin the defendant, a second-hand periodical dealer, from selling comics which plaintiff's wholesaler had sold for scrap to waste paper dealers, who in turn resold them to defendant. In upholding the district court's denial of the injunction, the Third Circuit found, inter alia, that defendant's sale of the comics did ***1190** not constitute copyright infringement since plaintiffs had engaged in a first sale of the comics. The court so held even though there was a contract between the distributor and the wholesaler that the wholesaler would dispose of the comics "for no other purpose than waste paper".

It is clear that the Government's burden of proof of criminal copyright infringement is threefold: (1) infringement of a copyright (2) done willfully and (3) for profit. Implicit in its burden of proof on infringement by vending is the duty to prove the absence of a first sale as to those copyrighted articles which the defendant is charged with infringing. What constitutes a "first sale" presents a more difficult question.

A. Infringement

Appellant contends (1) that the license agreements for the exhibition of the films and V.I.P. loan agreements were in reality sales of the films, and (2) that each of the photoplays had been sold to salvage companies. Based on these contentions, the crux of appellant's argument is his speculation that the prints could have come from a legitimate source. The Government contends that the various agreements were what they purported to be and were not sales. Upon our review of the record, we find the Government's position to be correct, subject to the exceptions hereafter discussed.

1. License Agreements

The films were distributed by the studios in the major areas of distribution pursuant to agreements termed "licenses", granting the licensees limited rights of exhibition or distribution. The Government presented detailed evidence on each transaction involving each film, and all the written license agreements were admitted into evidence. Typical of the license provisions is the following taken from a theatrical license agreement:

"The Distributor grants the Exhibitor and the Exhibitor accepts a limited license under the respective copyrights of the motion picture . . . to exhibit said motion picture."

The evidence was presented through testimony of studio representatives knowledgeable about the film distribution system and related to the specific films involved in the alleged infringement.[FN16] We now proceed to analyze these transactions to determine whether, in legal effect, any of them may be considered sales.

> FN16. We do not have the problem of the quality of plaintiff's proof which was faced by the court in American International Pic-

tures, Inc. v. Foreman, supra. The court there found that the plaintiffs had failed to prove infringement of their copyrights by a preponderance of the evidence because "the (plaintiffs') testimony consisted primarily of generalities and there were significant gaps in the experience and knowledge of each of the plaintiffs' witnesses. No comprehensive system of accountability for the control of plaintiffs' motion picture prints was ever established by the plaintiffs' evidence." 400 F.Supp. at 934.

[20] Typical of the evidence presented was that relating to the transactions of Universal Pictures with respect to "The Sting" (Count IX) and " American Graffiti" (Count XI). These movies were licensed by Universal for theatrical distribution, nontheatrical distribution, distribution to the U.S. Navy, Army and Air Force, and distribution to steamships and hotels. All but the Armed Services contracts were designated as "licenses", and all purported to transfer only limited rights for the exhibition or distribution of the films for a limited purpose and for a limited period of time. The agreements reserved title to the film prints in Universal, and required their return to Universal following the expiration of the contract term. All but the hotel distribution agreement also prohibited the licensee or any other party from copying or duplicating any film prints. In accordance with the holding and reasoning of Hampton v. Paramount Pictures Corporation, supra, we find that none of these agreements constituted first sales, since both on their face and by their terms they were restricted licenses and not sales.[FN17]

FN17. To the extent that Hampton may be in conflict with Wells and other cases supra with respect to the meaning of "first sale" we adhere to the reasoning of Hampton.

***1191** [21] Without detailing each of the specific transactions, it is clear that most of the agreements pertaining to the other films, which were received in evidence. Likewise constituted licenses rather than sales.[FN18] Although some of the contracts did not provide expressly for reservation of title in the copyright owner, the remaining terms of the agreements were consistent with the theory of a limited license and inconsistent with the concept of a sale. The mere failure to expressly reserve title to the films does not require a finding that the films were sold, where the general tenor of the entire agreement is inconsistent with such a conclusion.

FN18. On this basis this case is factually distinguishable from United States v. Wells, supra, where there was evidence that the copyright holder had sold copies of the copyrighted work to his customers. Since sales had been made it was incumbent upon the Government to trace the films sold.

[22] Two agreements, however, require special consideration. The first is an agreement between Warner Brothers Seven Arts and National Broadcasting Company (NBC) licensing NBC to telecast "Camelot" (Count III) on "free television". Of concern is a provision allowing NBC to order "at its expense" from Warner "such additional prints or negative elements as NBC may reasonably require" in connection with the telecast of "Camelot" and another provision reading in part:

"Licensor may buy from NBC, at such price as the parties may mutually agree, prints made at NBC's expense; as to any prints for which no agreement in price is reached within thirty (30) days after NBC's notice of availability to Licensor, NBC shall destroy such prints and furnish a certificate of destruction." (Emphasis added.) (Ex. 16, P 9, p. 11)

Appellant contends that these provisions indicate "the presence of a 'sale' at least as would satisfy s 27". However, Bernard Sorkin, chief counsel for Warner Distributing Corporation, testified that prints were not sold under this contract and that paragraph nine merely allows Warner to compensate NBC for the out-of-pocket cost of prints

produced at NBC's expense. This interpretation of the provision appears correct, as indicated by the language which immediately follows that previously quoted:
"Title to all prints and tapes shall be and remain in Licensor (Warner) subject to the rights granted to NBC under this agreement."

We find this language and the entire contract to be a license and not a sale.

[23] The second agreement is one between American Broadcasting Company (ABC) and Screen Gems, a division of Columbia Pictures Industries, Inc., granting ABC the right to televise "Funny Girl" (Count VII) on free television. This agreement, which is not phrased in terms of a license, has a provision in paragraph 9(c) for the return of prints similar to that of the NBC contract, except that no provision is made for the retention of title to the prints in Screen Gems.[FN19] In addition, a portion of paragraph 9(a) states that: "At ABC's election and cost a file-screening copy shall be retained, notwithstanding subparagraph 9(c)." [FN20] (Ex. 32) Paragraph 9(c), in failing to provide for the retention of title, approaches a sale-and-buy-back situation. We need not so hold, however, since paragraph 9(a) clearly contemplates the sale of a film print to ABC at ABC's election. No evidence was adduced at trial as to whether ABC exercised its election, or, if it did, whether it resold that print. In the absence of such proof, the Government has failed in ***1192** its burden of proving the absence of first sale of the photoplay "Funny Girl".[FN21] Accordingly, appellant's conviction on Count VII must be reversed.

> FN19. Paragraph 9(c) of the agreement provides:
>
> "Promptly after expiration of the Authorized Broadcast Period ABC shall offer to Licensor, in 'as is' condition, all prints of the Film and other reasonably available material ABC has theretofore ordered at ABC's cost, at a price to be negotiated or, failing agreement between the parties on such price, ABC shall destroy said prints or other material, and ABC will supply Licensor with evidence of such destruction." (Ex. 32, p. 7)
>
> FN20. No restriction on the use or further resale of such a copy is provided in the contract.
>
> FN21. We reach this conclusion in spite of the testimony of Jerome Gottlieb, an employee of the Business Affairs Department of Columbia Pictures Television Division, who testified that to his knowledge Columbia had never sold prints of "Funny Girl" to any of the television networks. (Tr. 763) This testimony is inconsistent with the plain meaning of the language in the contract between Screen Gems and ABC.

2. V.I.P. Contracts

[24] Studio representatives testified that film prints are loaned to actors of major stature on rare occasions, pursuant to V.I.P. agreements which restrict the use of the prints to personal use. No charge is made for the use of the print, other than an occasional charge to reimburse the studio for the cost of making the print.

V.I.P. agreements were made with respect to the photoplays "The Sting", "Camelot", "Paper Moon", and "Funny Girl". The agreement pertaining to "The Sting", made with Robert Redford, George Ray Hill, and the Summa Corporation, granted a "revocable, nonexclusive consent" to use the print and retained title to the print in Universal Pictures. (Ex. 9) "Paper Moon" was "loaned" to Peter Bogdonavich pursuant to an agreement in which Paramount Pictures retained title to the print and required its return upon the request of Paramount. (Ex. 24) The movie "Funny Girl" was furnished to Barbra Streisand, Ray Stark, and William Wyler

under an agreement which reserved to Columbia "all rights in, to and with respect to" the film, "subject to such limited rights" as were granted to the V.I.P's by the agreement which consisted of the right to privately exhibit the film at the residence of the V.I.P. (Exs. 35, 35A, 35B) All of these agreements required the licensee to retain the film print in his possession at all times and prohibited him from copying or duplicating it. We find the terms of these agreements to be consistent with their designation as loans or licenses, and that they do not effect sales of the motion pictures.

[25] The terms of an agreement whereby Warner Brothers furnished a print of "Camelot" to Vanessa Redgrave were substantially different. That agreement provided:

"1. You will pay us our cost for said print (i. e., the sum of $401.59).

"2. Said print is furnished you for your personal use and enjoyment and shall be retained in your possession at all times; said print shall not be sold, leased, licensed or loaned by you to any other person and shall not be reproduced in any size or type prints, or otherwise; and said print shall not be exhibited by you publicly for profit, paid admissions or otherwise, but the use of said print by you shall be confined to private home showings and library purposes." (Ex. 18)

While the provision for payment for the cost of the film, standing alone, does not establish a sale, when taken with the rest of the language of the agreement, it reveals a transaction strongly resembling a sale with restrictions on the use of the print. No evidence was presented with respect to the whereabouts of the print furnished to Vanessa Redgrave. In the absence of such proof we conclude that the Government has failed to carry its burden of showing that there was no first sale. Accordingly we reverse the conviction on Count III.

3. Salvage

Representatives of each of the studios testified that their companies sell worn-out 35 mm. film to salvage companies for recovery of the raw film stock. [FN22] All of the studios sold their old 35 mm. film to Film Salvage Company. 16 mm. film was destroyed in-house by all of the studios except Columbia, which sold its scrap 16 mm. film to Stan's Reclaiming Service, which followed procedures similar to Film Salvage ***1193** Company in disposing of it. The studio representatives testified that they sell only the film base and not the motion picture photoplay.

FN22. The agreements between the studios and the salvage companies are generally oral.

With respect to the general practice followed by the studios in the sale of film for salvage, it was established that Film Salvage Company destroys the photoplays and does not resell them. The executive vice-president of Film Salvage, Larry Stultz, testified that his company destroys the images on "junk film" by either washing, burning, or wire brushing the film base. Film Salvage then issues certificates of destruction to the studios certifying that the photoplays on the film have been destroyed. (Tr. 855)

Film which is of good quality is used to make "picture leader", film with part of the images left on, which is used as leader on other film reels. Picture leader is sold in rolls of 1000 feet, which are made by splicing together film segments 200 feet or less in length, taken from various reels of film. No two pieces of spliced film come from the same motion picture. (Tr. 852) As the film is spliced onto the reel, it is also brushed with a wire brush, severely obscuring the images thereon.[FN23] (Tr. 851) Other portions of film are washed, removing the images, and are used for magnetic recording tape. Black and white film is burned to recover the silver on the film. Unuseable color film is ground into chips and sold to the plastics industry. Stultz testified that in no case does his company ever resell full-length motion pictures. (Tr. 856) His testimony about the salvage operation, which was unre-

butted by appellant, established that it would be impossible to piece together a feature-length motion picture from the products sold by Film Salvage Company.[FN24]

> FN23. Some portion of the images is left on the film so that the side of the film with the emulsion on it can be identified.
>
> FN24. Appellant's argument that there was evidence to the contrary apparently is based upon evidence in the case of United States v. Drebin, C.A. 75-3475 (9 Cir. filed February 19, 1975), another "film piracy" prosecution. While counsel for appellant continually referred to that testimony in his cross-examination of Stultz and other Government witnesses, it was not introduced into evidence in this case and may not properly be considered as proof. Moreover, it is clear that the district court accepted the testimony of Stultz and other Government witnesses.

Relying on Harrison v. Maynard, Merrill & Co., supra, and Independent News Co. v. Williams, supra, appellant contends that the transfer of title to a copyrighted article, even if only for purposes of salvage, is a first sale under the copyright laws. The Government argues that the studios sell only the film and not the copyright photoplay to the salvage company, and that it was established by the evidence that no print of the films here involved had been sold for salvage.

[26][27] Assuming, as appellant argues, that a photoplay cannot exist independent of the film upon which it is depicted, there would of course be a " first sale" of any film sold for salvage. This does not help appellant, however, because the evidence in this case proved that the prints which are sold for salvage cannot be pieced together to produce a copy of the film. The Government established that Film Salvage Company destroyed the photoplays and did not resell them. The "first sale" doctrine is applicable only with respect to the copyrighted article which the vendee is charged with infringing. We conclude that even if prints of the photoplays involved in this case were sold for salvage, the Government's evidence proved beyond a reasonable doubt that the prints sold by appellant were not films which had been sold for salvage.

4. Application of First Sale Doctrine

On the crucial issue of whether there was a "first sale", the district court in finding appellant guilty on five of the six counts, said in part:

"Now, we look in vain here, it seems to me, for any application of the first sale doctrine which is found in 17 U.S.Code ***1194** Section 1727, (sic) or any first sale transaction, because all of the evidence before the Court and, of course, all of the reasonable inferences to be drawn from the evidence makes it absolutely clear beyond any reasonable doubt that there was no first sale of any of the five pictures mentioned in Counts One, Three, Seven, Nine, Eleven and Thirteen." [FN25] (Tr. 1243)

> FN25. This court does not have the benefit of specific findings of fact and conclusions of law of the district court. The trial judge stated at the outset of the trial that he would not try the case without a jury unless the defendant would waive his right to request special findings pursuant to Rule 23(c), F.R.Crim.P. The defendant consented in writing to both the waiver of a jury trial and the request for special findings under Rules 23(a) and (c). While the court did not make formal findings of fact and conclusions of law, it did comment on the evidence in open court in finding the defendant guilty.

As noted supra, the district court did find that there was a first sale of "Forty Carats" and accordingly found appellant not guilty on Count V. We have concluded that the Government fails to establish an absence of a "first sale" with respect to "Funny

Girl", Count VII, and "Camelot", Count III. We agree with the District Court that with respect to Counts I, IX, XI and XIII the Government sustained its burden of proving the absence of a first sale.

B. Willfulness

[28][29] We agree with appellant that the Government had the burden to prove, in addition to the usual requirement of an act intentionally done in violation of the law, that appellant knew that the film which he sold had not been first sold by the copyright owner. From a review of the record we are satisfied that the Government sustained this burden.

As set forth in the statement of facts, on December 18, 1970 and January 20, 1971 appellant consented in writing to the entry of decrees in actions brought by various movie studios.[FN26] The decrees enjoined him from selling, copying, and dealing in copyrighted feature-length films of the studios involved.

> FN26. The studios involved were Twentieth Century Fox Film Corp., United Artists Corp., Columbia Pictures Industries, Inc., Universal City Studios, Inc., Warner Bros. Inc., Walt Disney Productions, Metro-Goldwyn-Mayer, Inc., and Paramount Pictures Corp.

The attorney who represented the studios testified at length regarding several conversations with Wise, in which Wise said he had been involved in the movie business "all of his life", that he expected some action to be taken by the studios against him, and that he "knew that those prints were only sent out on license and they had to be returned . . . ." He told the attorney that he had two sources of supply for the prints he sold: (1) employees of film companies who stole prints and sold them, and (2) other film dealers. At the time Wise signed the consent decrees the attorney told him "that he should not be dealing with prints that had a copyright notice on them".

The Government also presented evidence that when Wise became aware that he was being investigated by the F.B.I. in this case, he sent a letter to many of his customers informing them that he was under investigation and instructing them to "be careful". He told the customers not to talk to the F.B.I. and "for your own protection get all films out of your house and into a safe place that no one knows about until things cool off". In closing he said, "for yours and my own protection please destroy this letter right away".[FN27]

> FN27. Appellant attacks the credibility of the witness Earnshaw, attorney for the studios in the prior cases. The district court, however, in discussing the proof with respect to the required element of "willfulness", referred to the letter appellant wrote "to his customers about the F.B.I., but more particularly the testimony of the witness Earnshaw. I must say that he impressed me very much. I think he was honest in telling us what Mr. Wise said.
>
> "And therefore, from that, we have to conclude that his actions were willful, and he knew what he was doing and did it with a bad purpose to disobey the law or disregard the law, and that he had the specific intent."

The reasonable inference to be drawn from this is that appellant knew that films, ***1195** unlike other copyrighted works such as books, phonograph records, and sheet music, are not generally sold but are licensed for exhibition. Although appellant produced evidence of several sales of films by studios, they were films which had been produced many years ago and were not recent box-office attractions, which are generally not sold until all readily obtainable license revenue has been extracted from them.

It is further reasonably inferable that appellant maintained his illegal sources of supply for films after the prior infringement suits, particularly in

light of the Government's evidence that, with the exceptions discussed previously, none of the films sub judice had been the subject of a first sale. Such illicitly obtained films are not subject to first sale insulation from suit, of which appellant must have been aware. The trial judge could properly find that the Government established the element of willfulness beyond a reasonable doubt.

C. Profit

[30] We find no merit in appellant's final contention that the Government failed to prove that he infringed the copyright for profit. He had a substantial business, regularly mailed out circulars listing films for sale, and permitted customers to charge their purchases to major credit cards. Checks made payable to appellant were received in evidence. Appellant argues that the Government must prove that he actually made a profit, and that because the checks were made payable to him personally and not to his business he was operating privately and not as a business seeking profit. The district court found that the profit element had been proven, stating that "for profit doesn't mean whether or not the person actually makes a profit, but whether or not he is engaged in a business to hopefully or possibly make a profit." (Tr. p. 1245)

[31] We agree with the district court and reject both of appellant's arguments. As the court said in United States v. Taxe, 380 F.Supp. 1010, 1018 (C.D.Cal.1974), aff'd 540 F.2d 961 (9 Cir. 1976):

" 'Profit' includes the sale or exchange of the infringing work for something for value in the hope of some pecuniary gain. It is irrelevant whether the hope of gain was realized or not. The requirement of profit is intended to delineate commercial infringements from infringements for merely personal use and philanthropic infringements."

The question of what name appeared on the checks used to purchase the films is likewise irrelevant. Appellant, whether personally or through his business, was clearly selling films with the expectation of making a profit.

The judgment of the district court is affirmed as to Counts I, IX, XI and XIII and reversed as to Counts III and VII.

C.A.Cal. 1977.
U.S. v. Wise
550 F.2d 1180, 194 U.S.P.Q. 59

END OF DOCUMENT

EXHIBIT I

102 S.Ct. 1186
455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362
(Cite as: 455 U.S. 489, 102 S.Ct. 1186)

Supreme Court of the United States
VILLAGE OF HOFFMAN ESTATES, et al., Appellants,
v.
FLIPSIDE, HOFFMAN ESTATES, INC.
No. 80-1681.

Argued Dec. 9, 1981.
Decided March 3, 1982.
Rehearing Denied April 26, 1982.
See 456 U.S. 950, 102 S.Ct. 2023.

Action was instituted for declaratory and injunctive relief against enforcement of village ordinance. The United States District Court for the Northern District of Illinois, Eastern Division, George N. Leighton, J., 485 F.Supp. 400, entered judgment for defendants, and plaintiff appealed. The Court of Appeals, Sprecher, Circuit Judge, 639 F.2d 373, reversed, and the Supreme Court noted probable jurisdiction. The Supreme Court, Justice Marshall, held that: (1) village ordinance licensing and regulating the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs" did not violate First Amendment rights of retailer which sold smoking accessories, since ordinance did not restrict speech as such, but simply regulated commercial marketing of items that might be used for an illicit purpose, and since the ordinance's restriction on manner of marketing did not appreciably limit retailer's communication of information, except to the extent it was directed at commercial activity promoting or encouraging illegal drug use; (2) the ordinance's language "designed * * * for use" was not unconstitutionally vague on its face, since the standard encompassed at least an item that was principally used with illegal drugs by virtue of its objective features, and the "designed for use" standard was sufficiently clear to cover at least some of the items sold by plaintiff retailer, such as "roach clips" and specially designed pipes; and (3) village ordinance was sufficiently clear that the speculative danger of arbitrary enforcement did not render it void for vagueness.

Reversed and remanded.

Justice White concurred in the judgment and filed an opinion.

West Headnotes

[1] Constitutional Law 92 ⇐1141

92 Constitutional Law
92IX Overbreadth in General
92k1141 k. Substantial Impact, Necessity Of. Most Cited Cases
(Formerly 92k82(4))

Statutes 361 ⇐47

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and Definiteness. Most Cited Cases
(Formerly 92k82(4))

In a facial challenge to overbreadth and vagueness of a law, court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct; if it does not, then overbreadth challenge must fail, and court should then examine the facial vagueness challenge.

[2] Constitutional Law 92 ⇐1140

92 Constitutional Law
92IX Overbreadth in General
92k1140 k. In General. Most Cited Cases
(Formerly 92k82(4))

Statutes 361 ⇐47

361 Statutes

361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and Definiteness. Most Cited Cases
(Formerly 92k82(4))
In a facial challenge to overbreadth and vagueness of a law, assuming the enactment implicates no constitutionally protected conduct, the court should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

[3] Constitutional Law 92 ⚿997

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k997 k. Consideration of Limiting Construction. Most Cited Cases
(Formerly 92k47)
In evaluating a facial challenge to state law, federal court must consider any limiting construction that state court or enforcement agency has proffered.

[4] Constitutional Law 92 ⚿1141

92 Constitutional Law
92IX Overbreadth in General
92k1141 k. Substantial Impact, Necessity Of. Most Cited Cases
(Formerly 92k82(1))
In determining whether an enactment reaches a substantial amount of constitutionally protected conduct, court should evaluate the ambiguous as well as the unambiguous scope of the enactment.

[5] Constitutional Law 92 ⚿735

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)5 Vagueness in General
92k735 k. In General. Most Cited Cases
(Formerly 92k42.2(1))
Plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

[6] Constitutional Law 92 ⚿1600

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(C) Trade or Business
92k1600 k. In General. Most Cited Cases
(Formerly 92k90.2, 92k90.1(1))
Village ordinance licensing and regulating the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs" did not violate First Amendment rights of retailer which sold smoking accessories, since ordinance did not restrict speech as such, but simply regulated commercial marketing of items that might be used for an illicit purpose, and since the ordinance's restriction on manner of marketing did not appreciably limit retailer's communication of information, except to the extent it was directed at commercial activity promoting or encouraging illegal drug use. U.S.C.A.Const.Amend. 1.

[7] Constitutional Law 92 ⚿1538

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)2 Commercial Speech in General
92k1538 k. Overbreadth. Most Cited Cases
(Formerly 92k90.2, 92k90.1(1))
The overbreadth doctrine does not apply to commercial speech. U.S.C.A.Const.Amend. 1.

[8] Constitutional Law 92 ⚿4330

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)14 Environment and Health
92k4330 k. Drugs and Medical Devices. Most Cited Cases
(Formerly 92k296(1))

Constitutional Law 92 ⚖4332

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)14 Environment and Health
92k4332 k. Smoking and Tobacco Regulation. Most Cited Cases
(Formerly 92k296(1))
Village ordinance licensing and regulating the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs" did not violate the substantive due process rights of retailer which sold smoking accessories, since retailer's right to sell smoking accessories, and purchaser's right to buy and use them, were entitled only to minimal due process protection, and the regulation of items that had some lawful as well as unlawful uses was not an irrational means of discouraging drug use in the community. U.S.C.A.Const.Amend. 5.

[9] Constitutional Law 92 ⚖3905

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3905 k. Certainty and Definiteness; Vagueness. Most Cited Cases
(Formerly 92k251.4)

Constitutional Law 92 ⚖3906

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3906 k. Overbreadth. Most Cited Cases
(Formerly 92k251.4)
A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process; however, to succeed, complainant must demonstrate the law is impermissibly vague in all of its applications.

[10] Municipal Corporations 268 ⚖594(2)

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k594 Ordinances and Regulations in General
268k594(2) k. Form and Sufficiency in General. Most Cited Cases
For purposes of village ordinance requiring retailer to obtain a license if it sells any items, paraphernalia or accessories designed or marketed for use with illegal cannabis or drugs, the language "designed * * * for use" was not unconstitutionally vague on its face, since the standard encompassed at least an item that was principally used with illegal drugs by virtue of its objective features, and the "designed for use" standard was sufficiently clear to cover at least some of the items sold by plaintiff retailer, such as "roach clips" and specially designed pipes.

[11] Licenses 238 ⚖16(.1)

238 Licenses
238I For Occupations and Privileges
238k10 Subjects of License or Tax
238k16 Dealings in Particular Articles
238k16(.1) k. In General. Most Cited Cases
(Formerly 238k16)
Under ordinance requiring retailer to obtain license if it sells any items, effects, paraphernalia or ac-

cessories designed or marketed for use with illegal cannabis or drugs, retail store was required to obtain license if it deliberately displayed its wares in a manner that appealed to or encouraged illegal drug use, and plaintiff retailer had ample warning that its marketing activities required a license, because it displayed magazines and books dealing with illegal drugs close to pipes and colored rolling paper.

[12] Administrative Law and Procedure 15A ⇐390.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak390 Validity
15Ak390.1 k. In General. Most Cited Cases
(Formerly 92k82(4))
In reviewing a business regulation for facial vagueness, the principal inquiry is whether the law affords fair warning of what is proscribed.

[13] Licenses 238 ⇐7(1)

238 Licenses
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(1) k. In General. Most Cited Cases
Village ordinance which required retailer to obtain license if it sold items, effects, paraphernalia or accessories designed or marketed for use with illegal cannabis or drugs was sufficiently clear that the speculative danger of arbitrary enforcement did not render it void for vagueness.

****1188** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***489** An ordinance of appellant village requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Guidelines define the items (such as "roach clips," which are used to smoke cannabis, "pipes," and "paraphernalia"), the sale of which is required to be licensed. Appellee, which sold a variety of merchandise in its store, including "roach clips" and specially designed pipes used to smoke marihuana, upon being notified that it was in possible violation of the ordinance, brought suit in Federal District Court, claiming that the ordinance is unconstitutionally vague and overbroad, and requesting injunctive and declaratory relief and damages. The District Court upheld the ordinance and awarded judgment to the village defendants. The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face.

Held: The ordinance is not facially overbroad or vague but is reasonably clear in its application to appellee. Pp. 1191-1196.

(a) In a facial challenge to the overbreadth and vagueness of an enactment, a court must first determine whether the enactment reaches a substantial amount of ****1189** constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications. Pp. 1191-1192.

(b) The ordinance here does not violate appellee's First Amendment rights nor is it overbroad because it inhibits such rights of other parties. The ordinance does not restrict speech as such but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose and thus does not embrace noncommercial speech. With respect to any commercial speech interest implicated, the ordinance's restriction on the manner of marketing does not appreciably limit appellee's communication of information, except to the extent it is directed at commercial activity promoting or encouraging illegal drug use, an activity which, if

deemed "speech," is speech proposing an illegal transaction and thus subject to government regulation or ban. It is irrelevant whether the ordinance has an overbroad scope encompassing other persons' commercial speech, since the overbreadth doctrine does not apply to commercial speech. Pp. 1192-1193.

***490** c) With respect to the facial vagueness challenge, appellee has not shown that the ordinance is impermissibly vague in all of its applications. The ordinance's language "designed ... for use" is not unconstitutionally vague on its face, since it is clear that such standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer. Thus, the "designed for use" standard is sufficiently clear to cover at least some of the items that appellee sold, such as "roach clips" and the specially designed pipes. As to the "marketed for use" standard, the guidelines refer to the display of paraphernalia and to the proximity of covered items to otherwise uncovered items, and thus such standard requires scienter on the part of the retailer. Under this test, appellee had ample warning that its marketing activities required a license, and by displaying a certain magazine and certain books dealing with illegal drugs physically close to pipes and colored rolling paper, it was in clear violation of the guidelines, as it was in selling "roach clips." Pp. 1194-1195.

(d) The ordinance's language is sufficiently clear that the speculative danger of arbitrary enforcement does not render it void for vagueness in a pre-enforcement facial challenge. Pp. 1195-1196.

639 F.2d 373, reversed and remanded.
Richard N. Williams, Hoffman Estates, Ill., for appellants.

Michael L. Pritzker, Chicago, Ill., for appellee.

***491** Justice MARSHALL delivered the opinion of the Court.

This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Village of Hoffman Estates Ordinance No. 969-1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. 639 F.2d 373 (1981). We noted probable jurisdiction, 452 U.S. 904, 101 S.Ct. 3028, 69 L.Ed.2d 404 (1981), and now reverse.

I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside), sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices, and jewelry, in its store located in the ****1190** village of Hoffman Estates, Ill. (village). [FN1] On February ***492** 20, 1978, the village enacted an ordinance regulating drug paraphernalia, to be effective May 1, 1978.[FN2] The ordinance makes it unlawful for any person "to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor." The license fee is $150. A business must also file affidavits that the licensee and its employees have not been convicted of a drug-related offense. Moreover, the business must keep a record of each sale of a regulated item, including the name and address of the purchaser, to be open to police inspection. No regulated item may be sold to a minor. A violation is subject to a fine of not less than $10 and not more than $500, and each day that a violation continues gives rise to a separate offense. A series of licensing guidelines prepared by the Village Attorney define "Paper," "Roach Clips," "Pipes," and "Paraphernalia," the sale of which is required to be licensed.[FN3]

FN1. More specifically, the District Court found:

"[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as 'National Lampoon,' 'Rolling Stone,' and 'High Times.' The novelty devices and tobacco-use related items plaintiff displayed and sold in its store ranged from small commodities such as clamps, chain ornaments and earrings through cigarette holders, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color. Plaintiff sold cigarette holders, 'alligator clips,' herb sifters, vials, and a variety of tobacco snuff." 485 F.Supp. 400, 403 (N.D.Ill.1980).

FN2. The text of the ordinance is set forth in the Appendix to this opinion.

FN3. The guidelines provide:

"LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

"Paper-white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

"Roach Clips-designed for use with illegal cannabis or drugs and therefore covered.

"Pipes-if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

"Paraphernalia-if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered."

***493** After an administrative inquiry, the village determined that Flipside and one other store appeared to be in violation of the ordinance. The Village Attorney notified Flipside of the existence of the ordinance, and made a copy of the ordinance and guidelines available to Flipside. Flipside's owner asked for guidance concerning which items were covered by the ordinance; the Village Attorney advised him to remove items in a certain section of the store "for his protection," and he did so. App. 71. The items included, according to Flipside's description, a clamp, chain ornaments, an "alligator" clip, key chains, necklaces, earrings, cigarette holders, glove stretchers, scales, strainers, a pulverizer, squeeze bottles, pipes, water pipes, pins, an herb sifter, mirrors, vials, cigarette rolling papers, and tobacco snuff. On May 30, 1978, instead of applying for a license or seeking clarification via the administrative procedures that the village had established for its licensing ordinances,[FN4] Flipside filed this lawsuit in the United States District Court for the Northern District of Illinois.

FN4. Ordinance No. 932-1977, the Hoffman Estates Administrative Procedure Ordinance, was enacted prior to the drug paraphernalia ordinance, and provides that an interested person may petition for the adoption of an interpretive rule. If the petition is denied, the person may place the matter on the agenda of an appropriate vil-

lage committee for review. The Village Attorney indicated that no interpretive rules had been adopted with respect to the drug paraphernalia ordinance because no one had yet applied for a license. App. 68.

****1191** The complaint alleged, *inter alia*, that the ordinance is unconstitutionally vague and overbroad, and requested injunctive and declaratory relief and damages. The District Court, after hearing testimony, declined to grant a preliminary injunction. The case was tried without a jury on additional evidence and stipulated testimony. The court issued ***494** an opinion upholding the constitutionality of the ordinance, and awarded judgment to the village defendants. 485 F.Supp. 400 (1980).

The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face. The court reviewed the language of the ordinance and guidelines and found it vague with respect to certain conceivable applications, such as ordinary pipes or "paper clips sold next to *Rolling Stone* magazine." 639 F.2d, at 382. It also suggested that the "subjective" nature of the "marketing" test creates a danger of arbitrary and discriminatory enforcement against those with alternative lifestyles. *Id.*, at 384. Finally, the court determined that the availability of administrative review or guidelines cannot cure the defect. Thus, it concluded that the ordinance is impermissibly vague on its face.

II

[1][2][3][4][5] In a facial challenge to the overbreadth and vagueness of a law,[FN5] a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. [FN6] If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates ***495** no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.[FN7] A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

FN5. A "facial" challenge, in this context, means a claim that the law is "invalid *in toto* -and therefore incapable of any valid application." *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505 (1974). In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered. *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

FN6. In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958); see *Grayned, supra*, 408 U.S. at 109, 92 S.Ct., at 2299; cf. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 58-61, 96 S.Ct. 2440, 2446-2447, 49 L.Ed.2d 310 (1976).

FN7. "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975). See *United States v. Powell*, 423 U.S. 87, 92-93, 96 S.Ct. 316, 319-320, 46 L.Ed.2d

> 228 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, 36, 83 S.Ct. 594, 597-598, 599, 9 L.Ed.2d 561 (1963). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 2561, 41 L.Ed.2d 439 (1974). The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague " 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971). Such a provision simply has *no* core." *Smith v. Goguen*, 415 U.S. 566, 578, 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605 (1974).

The Court of Appeals in this case did not explicitly consider whether the ordinance reaches constitutionally protected conduct and is overbroad, nor whether the ordinance is vague in all of its applications. Instead, the court determined that the ordinance is void for vagueness because it is unclear in *some* of its applications to the ****1192** conduct of Flipside and of other hypothetical parties. Under a proper analysis, however, the ordinance is not facially invalid.

III

[6] We first examine whether the ordinance infringes Flipside's First Amendment rights or is overbroad because it inhibits the First Amendment rights of other parties. Flipside makes the exorbitant claim that the village has imposed a "prior restraint" on speech because the guidelines treat the proximity of drug-related literature as an indicium that paraphernalia are "marketed for use with illegal cannabis or ***496** drugs." Flipside also argues that because the presence of drug-related designs, logos, or slogans on paraphernalia may trigger enforcement, the ordinance infringes "protected symbolic speech." Brief for Appellee 25.

These arguments do not long detain us. First, the village has not directly infringed the noncommercial speech of Flipside or other parties. The ordinance licenses and regulates the sale of items displayed "with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs," Guidelines, *supra* n. 3, but does not prohibit or otherwise regulate the sale of literature itself. Although drug-related designs or names on cigarette papers may subject those items to regulation, the village does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose. The scope of the ordinance therefore does not embrace noncommercial speech.

[7][8] Second, insofar as any *commercial* speech interest is implicated here, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires. We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information [FN8]-with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-564, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). Finally, it is irrelevant whether the ordinance has an ***497** overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech. *Central Hudson, supra*, at 565, n. 8, 100 S.Ct., at 2351, n. 8.[FN9]

> FN8. Flipside explained that it placed items that the village considers drug

paraphernalia in locations near a checkout counter because some are "point of purchase" items and others are small and apt to be shoplifted. App. 43. Flipside did not assert that its manner of placement was motivated in any part by a desire to communicate information to its customers.

FN9. Flipside also argues that the ordinance is "overbroad" because it could extend to "innocent" and "lawful" uses of items as well as uses with illegal drugs. Brief for Appellee 10, 33-35. This argument seems to confuse vagueness and overbreadth doctrines. If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness. We find that claim unpersuasive in this pre-enforcement facial challenge. See *infra* , at 1193-1196. If Flipside is objecting that the ordinance would inhibit innocent uses of items found to be covered by the ordinance, it is complaining of denial of substantive due process. The latter claim obviously lacks merit. A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection. Here, the village presented evidence of illegal drug use in the community. App. 37. Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-125, 98 S.Ct. 2207, 2213-2214, 57 L.Ed.2d 91 (1978).

The hostility of some lower courts to drug paraphernalia laws-and particularly to those regulating the sale of items that have many innocent uses, see, *e.g.*, 639 F.2d 373, 381-383 (1981); *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 928 (CA6 1980), vacated and remanded, 451 U.S. 1013, 101 S.Ct. 2998, 69 L.Ed.2d 384 (1981)-may reflect a belief that these measures are ineffective in stemming illegal drug use. This perceived defect, however, is not a defect of clarity. In the unlikely event that a state court construed this ordinance as prohibiting the sale of all pipes, of whatever description, then a seller of corncob pipes could not complain that the law is unduly vague. He could, of course, object that the law was not intended to cover such items.

****1193** IV

A

[9] A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications. Flipside makes no such showing.

***498** The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972):

"Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omit-

ted).

These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, [FN10] and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.[FN11] Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. [FN12] The Court has also expressed greater tolerance of ***499** enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.[FN13] And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.[FN14]

FN10. *Papachristou v. City of Jacksonville* , 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972) (dictum; collecting cases).

FN11. See, *e.g., United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Cf. *Smith v. Goguen*, 415 U.S., at 574, 94 S.Ct., at 1247.

FN12. See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 49, 86 S.Ct. 1254, 1263, 16 L.Ed.2d 336 (1966); *McGowan v. Maryland*, 366 U.S. 420, 428, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393 (1961).

FN13. See *Barenblatt v. United States*, 360 U.S. 109, 137, 79 S.Ct. 1081, 1098, 3 L.Ed.2d 1115 (1959) (Black, J., with whom Warren, C.J., and Douglas, J., joined, dissenting); *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948).

FN14. See, *e.g., Colautti v. Franklin*, 439 U.S. 379, 395, 99 S.Ct. 675, 685, 58 L.Ed.2d 596 (1979); *Boyce Motor Lines v. United States*, 342 U.S. 337, 342, 72 S.Ct. 329, 331, 96 L.Ed. 367 (1952); *Screws v. United States*, 325 U.S. 91, 101-103, 65 S.Ct. 1031, 1035-1036, 89 L.Ed. 1495 (1945) (plurality opinion). See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67, 87, n. 98 (1960).

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech ****1194** or of association, a more stringent vagueness test should apply.[FN15]

FN15. See, *e.g., Papachristou, supra; Grayned*, 408 U.S., at 109, 92 S.Ct., at 2298.

B

This ordinance simply regulates business behavior and contains a scienter requirement with respect to the alternative "marketed for use" standard. The ordinance nominally imposes only civil penalties. However, the village concedes that the ordinance is "quasi-criminal," and its prohibitory and stigmatizing effect may warrant a relatively strict test.[FN16] ***500** Flipside's facial challenge fails because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside.

FN16. The village stipulated that the purpose of the ordinance is to discourage use of the regulated items. App. 33. Moreover, the prohibitory and stigmatizing effects of

the ordinance are clear. As the Court of Appeals remarked, "few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing their names and addresses to a register available to the police." 639 F.2d, at 377. The proposed register is entitled, "Retail Record for Items Designed or Marketed for Use with Illegal Cannabis or Drugs." Record, Complaint, App. B. At argument, counsel for the village admitted that the ordinance is "quasi-criminal." Tr. of Oral Arg. 4-5.

The ordinance requires Flipside to obtain a license if it sells "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes." Flipside expresses no uncertainty about which drugs this description encompasses; as the District Court noted, 485 F.Supp., at 406, Illinois law clearly defines cannabis and numerous other controlled drugs, including cocaine. Ill.Rev.Stat., ch. 56 1/2 , ¶¶ 703 and 1102(g) (1980). On the other hand, the words "items, effect, paraphernalia, accessory or thing" do not identify the type of merchandise that the village desires to regulate. [FN17] Flipside's challenge thus appropriately focuses on the language "designed or marketed for use." Under either the "designed for use" or "marketed for use" standard, we conclude that at least some of the items sold by Flipside are covered. Thus, Flipside's facial challenge is unavailing.

FN17. The District Court apparently relied principally on the growing vernacular understanding of "paraphernalia" as drug-related items, and therefore did not separately analyze the meaning of "designed or marketed for use." 485 F.Supp., at 405-407. We agree with the Court of Appeals that a regulation of "paraphernalia" alone would not provide much warning of the nature of the items regulated. 639 F.2d, at 380.

1. "Designed for use"

[10] The Court of Appeals objected that "designed ... for use" is ambiguous with respect to whether items must be inherently suited only for drug use; whether the retailer's intent or manner of display is relevant; and whether the intent of a third party, the manufacturer, is critical, since the manufacturer is the "designer." 639 F.2d, at 380-381. For the reasons that follow, we conclude that this language is not unconstitutionally vague on its face.

The Court of Appeals' speculation about the meaning of "design" is largely unfounded. The guidelines refer to "paper***501** of colorful design" and to other specific items as conclusively "designed" or not "designed" for illegal use.[FN18] A principal meaning****1195** of "design" is "[t]o fashion according to a plan." Webster's New International Dictionary of the English Language 707 (2d ed. 1957). Cf. *Lanzetta v. New Jersey*, 306 U.S. 451, 454, n. 3, 59 S.Ct. 618, 619, n. 3, 83 L.Ed. 888 (1939). It is therefore plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items which are principally used for nondrug purposes, such as ordinary pipes, are not "designed for use" with illegal drugs. Moreover, no issue of fair warning is present in this case, since Flipside concedes that the phrase refers to structural characteristics of an item.[FN19]

FN18. The guidelines explicitly provide that "white paper ... may be displayed," and that "Roach Clips" are "designed for use with illegal cannabis or drugs *and therefore* covered" (emphasis added). The Court of Appeals criticized the latter definition for failing to explain what a "roach

clip" is. This criticism is unfounded because that technical term has sufficiently clear meaning in the drug paraphernalia industry. Without undue burden, Flipside could easily determine the meaning of the term. See American Heritage Dictionary of the English Language 1122 (1980) (defining "roach" as "[t]he butt of a marijuana cigarette"); R. Lingeman, Drugs from A to Z: A Dictionary 213-214 (1969) (defining "roach" and "roach holder"). Moreover, the explanation that a retailer may display certain paper "not necessarily designed for use" clarifies that the ordinance at least embraces items that are necessarily designed for use with cannabis or illegal drugs.

FN19. "It is readily apparent that under the Hoffman Estates scheme, the 'designed for use' phrase refers to the physical characteristics of items deemed *per se* fashioned for use with drugs; and that, if any intentional conduct is implicated by the phrase, it is the intent of the 'designer' (i.e. patent holder or manufacturer) whose intent for an item or 'design' is absorbed into the physical attributes, or structural 'design' of the finished product." Brief for Appellee 42-43. Moreover, the village President described drug paraphernalia as items " *[m]anufactured* for that purpose and marketed for that purpose." App. 82 (emphasis added).

***502** The ordinance and guidelines do contain ambiguities. Nevertheless, the "designed for use" standard is sufficiently clear to cover at least some of the items that Flipside sold. The ordinance, through the guidelines, explicitly regulates "roach clips." Flipside's co-operator admitted that the store sold such items, see Tr. 26, 30, and the village Chief of Police testified that he had never seen a "roach clip" used for any purpose other than to smoke cannabis. App. 52. The Chief also testified that a specially designed pipe that Flipside marketed is typically used to smoke marihuana. *Ibid.* Whether further guidelines, administrative rules, or enforcement policy will clarify the more ambiguous scope of the standard in other respects is of no concern in this facial challenge.

2. "Marketed for use"

[11] Whatever ambiguities the "designed ... for use" standard may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. A retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. The standard requires scienter, since a retailer could scarcely "market" items "for" a particular use without intending that use.

Under this test, Flipside had ample warning that its marketing activities required a license. Flipside displayed the magazine High Times and books entitled Marijuana Grower's Guide, Children's Garden of Grass, and The Pleasures of Cocaine, physically close to pipes and colored rolling papers, in clear violation of the guidelines. As noted above, Flipside's co-operator admitted that his store sold "roach clips," which are principally used for illegal purposes. Finally, in the ***503** same section of the store, Flipside had posted the sign, "You must be 18 or older to purchase any head supplies." FN20 Tr. 30.

FN20. The American Heritage Dictionary of the English Language 606 (1980) gives the following alternative definition of "head": " *Slang.* One who is a frequent user of drugs."

V

[12][13] The Court of Appeals also held that the ordinance provides insufficient standards for enforcement. Specifically, the court feared that the ordinance might be used to harass individuals with alternative lifestyles and views. 639 F.2d, at 384. In reviewing a business regulation for facial vagueness, however, the principal inquiry is whether the law affords fair warning****1196** of what is proscribed. Moreover, this emphasis is almost inescapable in reviewing a pre-enforcement challenge to a law. Here, no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech. The language of the ordinance is sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness. Cf. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-171, 92 S.Ct. 839, 846-848, 31 L.Ed.2d 110 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971).

We do not suggest that the risk of discriminatory enforcement is insignificant here. Testimony of the Village Attorney who drafted the ordinance, the village President, and the Police Chief revealed confusion over whether the ordinance applies to certain items, as well as extensive reliance on the "judgment" of police officers to give meaning to the ordinance and to enforce it fairly. At this stage, however, we are not prepared to hold that this risk jeopardizes the entire ordinance.[FN21]

> FN21. The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine, 639 F.2d, at 382, is of no due process significance unless the possibility ripens into a prosecution.

***504** Nor do we assume that the village will take no further steps to minimize the dangers of arbitrary enforcement. The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope. We also find it significant that the village, in testimony below, primarily relied on the "marketing" aspect of the standard, which does not require the more ambiguous item-by-item analysis of whether paraphernalia are "designed for" illegal drug use, and which therefore presents a lesser risk of discriminatory enforcement. "Although it is possible that specific future applications ... may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52, 86 S.Ct. 1254, 1264, 16 L.Ed.2d 336 (1966). [FN22]

> FN22. The Court of Appeals also referred to potential Fourth Amendment problems resulting from the recordkeeping requirement, which "implies that a customer who purchases an item 'designed or marketed for use with illegal cannabis or drugs' intends to *use* the item with illegal cannabis or drugs. A further implication could be that a customer is subject to police scrutiny or even to a search warrant on the basis of the purchase of a legal item." *Id.*, at 384. We will not address these Fourth Amendment issues here. In a pre-enforcement challenge it is difficult to determine whether Fourth Amendment rights are seriously threatened. Flipside offered no evidence of a concrete threat below. In a postenforcement proceeding Flipside may attempt to demonstrate that the ordinance is being employed in such an unconstitutional manner, and that it has standing to raise the objection. It is appropriate to defer resolution of these problems until such a showing is made.

VI

Many American communities have recently enacted laws regulating or prohibiting the sale of drug

paraphernalia. ***505** To determine whether these laws are wise or effective is not, of course, the province of this Court. See *Ferguson v. Skrupa*, 372 U.S. 726, 728-730, 83 S.Ct. 1028, 1029-1031, 10 L.Ed.2d 93 (1963). We hold only that such legislation is not facially overbroad or vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS took no part in the consideration or decision of this case.

****1197** APPENDIX TO OPINION OF THE COURT

Village of Hoffman Estates Ordinance No. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

***506** *Section 1* : That the Hoffman Estates Municipal Code be amended by adding thereto an additional Section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16-ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis

or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

***507** E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2 : That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $150.00

Section 3 : Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

****1198** *Section 4* : That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5 : That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.
Justice WHITE, concurring in the judgment.
I agree that the judgment of the Court of Appeals must be reversed. I do not, however, believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented by the ordinance.

I agree with the majority that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." *Ante*, at 1191. I also agree with the majority's statement that the "marketed for use" standard in the ordinance is "sufficiently clear." There is, in my view, no need to go any further: If it ***508** is "transparently clear" that some particular conduct is restricted by the ordinance, the ordinance survives a facial challenge on vagueness grounds.

Technically, overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not presently before the Court. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615, 93 S.Ct. 2908, 2915-2917, 37 L.Ed.2d 830 (1973). Whether the appellee may make use of the overbreadth doctrine depends, in the first instance, on whether or not it has a colorable claim that the ordinance infringes on constitutionally protected, noncommercial speech of others. Although appellee claims that the ordinance does have such an effect, that argument is tenuous at best and should be left to the lower courts for an initial determination.

Accordingly, I concur in the judgment reversing the decision below.

U.S.Ill.,1982.
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.
455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Sheriff Clay Parker, et al. v. The State of California**

No.: **10CECG02116**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On January 4, 2011, I served the attached

DEFENDANTS' NOTICE OF LODGING FEDERAL AUTHORITIES CITED IN DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE SUMMARY ADJUDICATION/TRIAL BRIEF

by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight courier service, addressed as follows:

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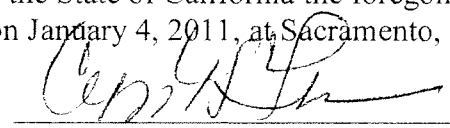
Clint B. Monfort
Sean A. Brady
Michel & Associates, P.C.
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 4, 2011, at Sacramento, California.

Cynthia Fulkerson
Declarant



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SIGN TO AUTHORIZE DELIVERY WITHOUT OBTAINING SIGNATURE

7

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