THE PROTECTION OF DIGITAL INFORMATION AND PREVENTION OF ITS UNAUTHORIZED ACCESS AND USE IN CRIMINAL LAW

Carrie Leonetti
Moonho Song

Available at: https://works.bepress.com/carrie_leonetti/23/
The Protection of Digital Information and Prevention of Its Unauthorized Access and Use in Criminal Law

Moonho Song*
Carrie Leonetti+

I. INTRODUCTION

Discussions of the modern era as an “information-based society” may seem outdated, since the world is already flooded with information, with the rapid growth of the information-technology industry at the core of such development. The expansion of cyberspace has been part of modern life for quite some time. All kinds of communicative media, including voice, visual, and text media, have been digitalized, and various mass media have been integrated with one another. The integration and exchange between various media have changed the pattern of daily life. Today, cyberspace is no longer a world of virtual reality separated from the real world, but rather makes up a substantial portion of the real world that merely may not be felt or touched by our senses.

The history of computer-related crime begins with the history of computers. The emergence of the information society, which greatly values and depends on incorporeal values and information, in the latter part of the twentieth century, has outpaced the development of new laws to protect digital items of intangible value.1

* Moonho Song is a Professor at the Chonbuk National University School of Law. His work was supported by the National Research Foundation of Korea Grant funded by the Korean Government (NRF-2010-013-B00040).
+ Carrie Leonetti is an Assistant Professor at the University of Oregon School of Law
1 For a primer on the history of computer-related crime and international legislation, see generally Marc D Goodman, Susan W. Brenner, The Emerging Consensus On
In this context, the role of intellectual-property law has particularly expanded with copyright and patent protection being extended to items like computer software and software-related inventions. Legislation all over the world on sui-generis legal systems for intangible property has also been developing.\(^2\)

Nonetheless, there are a number of valuable intangible properties that do not have specific legislation devoted to their criminal regulation and protection. These include: (1) intangible creations that are not protected by special laws; (2) ideas that have not been developed or reduced to material form for the purposes of patent or copyright law;\(^3\) (3) inventions that have been kept “secret” to protect their value; and (4) valuable confidential information and trade secrets.

This Article focuses on these four categories of intangibles when they are stored within a computer system. This list is not exhaustive, but it gives some indication of the types of digital property that society may want to protect against unauthorized use by, or interference from, third parties. The world’s legal systems have had an unsatisfactory track record in protecting valuable information over the course of the previous century, giving rise to the need for laws that specifically address issues related to the protection of the integrity of digital information.

---


\(^{3}\) Copyright law generally protects the form of expression of information without protecting the content of that information. Trademark law does not protect information, only the names, marks, and logos used by a business. See, e.g., Copyright, Designs and Patents Act, 1988, c 3(2) and Trade Marks Act, 1994, c 1(1) (Eng.).
storage systems. Criminal law is not presently fit to intervene in disputes involving these types of information.

As a result, in order to establish the proper development and function of an information society, there is a need to make progress in defining the meaning of information that warrants protection under criminal law. This Article proposes, therefore, the creation of a statutory unlawful-use offense to regulate the illegal use of digital property containing important information, analogous to the common statutory crime of unlawful use of a vehicle.

Section II provides an overview of the traditional limitation of the crime of larceny to moveable property and some of the difficult issues of interpretation of the modern theft offence that are related to the inclusion of intangible property within its definition in both Korean and Anglo-American law. It discusses whether the crimes of larceny and/or fraud can be proven if important digital information is stolen, whether intangible digital information can be considered property for the purpose of the crime of larceny, and whether the asportation and specific-intent elements of larceny can be proven with the theft of digital information.

---

4 See Lipton, supra note xxx, at 2.
5 This Article distinguishes between the traditional, common-law crime of larceny and the modern, statutory crime of theft by using the terms larceny and theft, respectively. It uses the term steal to indicate the unauthorized taking of some item that does not belong to the taker, which may or may not constitute larceny, theft, or some other statutory theft-like crime, depending upon the item taken and the presence or absence of other statutory elements.
Section III highlights the confusion within existing criminal-law systems that has arisen with the criminal, unauthorized access to digital files, and it examines relevant histories and cases that have wrestled with the issue of whether digital property containing critical information can be regarded as property under new statutes and expansive judicial interpretations for the purpose of the criminal law of larceny/theft in the United States and Korea.

Section IV surveys the scholarly literature addressing both the problems outlined in Section II and the legislative and judicial “solutions” traced in Section III. In particular, it recounts the two primary solutions that are proposed for the dilemma posed by stealing of digital information: including digital information within the definition of property for the purpose of the law of larceny/theft and the creation of specific statutes dealing with the taking of digital property.

Section V critiques these two most popular legislative, judicial, and scholarly approaches to the problem of “stealing” digital information, and Section VI argues that it is necessary to legislate to solve the problem of the unauthorized taking of digital information and the form that such legislation should take.

II. THE PROBLEM

New forms of criminal activity in the digital era mostly involve highly advanced technology, and, thus, are more susceptible to frequent advances and changes.\(^6\) Personal computer usage has been common since the mid-1980s, and,  

\(^6\) The Korean cyber-police received 122,902 cyber-crime complaints and arrested 103,809 suspects in 2010. See http://www.netan.go.kr/. According to the Korean Ministry of Justice, 26,537 computer crimes occurred in 2009. See KOREAN MINISTRY
since that time, crimes involving computers and the internet have increased. Since
cyberspace itself is constantly evolving at a faster pace than criminal laws, potential
crimes occur that are not obstructed by limits in time and space, making their
punishment by conventional, consequentialist criminal laws difficult, for example: a
virtual entity committing acts against another entity in cyberspace that would be
crimes if they occurred between human beings in earthly realm; illegal profit
making from e-money transactions and transfer of property on-line; alteration or
forgery of digital documents and media contents; theft of trade secrets, information,
and domain addresses; and interference with business through computer hacking.

Therefore, because it is possible to manage and care for information in
cyberspace just like tangible property and there is realistically a need to protect
such information under the criminal law in the same manner as tangible property,
the issue of whether intangible information should be recognized as an object of
property crimes can not be determined from a “property interest” point of view,
but instead from a “property” point of view. If various types of information
available in cyberspace are recognized as “property” under the criminal law, any
act of trespass or violation against such information could be classified as any one of
these property crimes, depending on the circumstances: theft, robbery,
embezzlement, receiving stolen property, fraud, and/or robbery.

The current majority view is that information itself is not protected by the
law of theft/larceny because it is not a material object or movement of power and,
therefore, not property. This conclusion is supported by the fact that information

has its own unique characteristics differentiating it from other goods, and, therefore, the transfer of its ownership is difficult to recognize. This interpretation is based on both the current Korean Penal Code ("KPC") and Anglo-American common-law tradition. In order to understand the extent of this dilemma, therefore, it is necessary first to examine the scope of larcenable property.

**Property under the Korean Penal Law**

A problematic boundary within the definition of larceny is that it is restricted to moveable, tangible property. Under the KPC, the direct object of a property crime must be either the property or interest on property, and the KPC distinguishes those two varieties of object strictly. Theft-of-property crimes under the KPC include larceny, embezzlement, possession/receipt of stolen property, criminal damage, obstruction of exercising legal rights, unlawful use (of automobiles, etc.), misappropriation, and robbery. The definitions of the crimes of breach of trust, computer fraud, and unjust enrichment include property interest as their only direct object, while the direct object for robbery, fraud, blackmail, unlawful use of accommodations, and false acquittal from compulsory execution include both property and interest in property.

If information is considered to be property, and if one steals information secretly, the crime of larceny may be established.\(^7\) However, there is no larceny if the thing taken is not considered to be property. Article 346 of the KPC provides

---

\(^7\) Under Article 3 of the Korean Framework Act on National Information, “information” is defined as all types of data and knowledge expressed as symbols, characters, audio, sound, and video that are processed in an optical or electronic form for a specific purpose.
that "[e]nergy that is subject to human control shall be deemed to be property".

Thus, in order to determine whether an intangible item taken by use of a computer is property for the purpose of a larceny prosecution, one must first ascertain whether it the elements of 'material things', 'human control', and 'energy' have been met.

**Material Things**

Material things include any object that takes the form of a solid, liquid, or gas. For instance, the sun and moon count as material things (although, because they are not under “human control” (at least yet), they still are not property for the purpose of a larceny prosecution). Therefore, where one’s legal rights are inscribed in writing, such as with negotiable securities, the securities themselves are property. However, it is well-established, under Korean law, that other rights, such as claims or bonds, do not take up any space, so they are not regarded as material things and, therefore, are not property for larceny purposes.

According to the Korean Supreme Court, copies of real-estate contracts taken by an employee without permission are property for the purpose of the crime of larceny. Property does not necessarily have to have objective monetary value, and even if it is not being used by others, the owner possesses its subjective value.

---


10 Korean Supreme Court Decision 2007Do2595.
Thus, diaries, old photos of an ex-lover,\textsuperscript{11} and torn promissory notes\textsuperscript{12} are considered to be property and are, therefore, larcenable.

\textit{Human Control}

Human control comprises physical management, but not operational management. Things like hydraulic power, wind force, artificial cooling, and artificial heating, which are physically manageable, are property. So, where one uses another's phone without consent and talks over the phone, one is unjustly using the sound sending/receiving function, which is available through a common carrier, but, because one gained only intangible property, which is not physically manageable, the crime of larceny cannot be established.\textsuperscript{13}

\textit{Energy}

Traditionally, the concept of property started with material things. However, as electricity gained wide usage at the end of the 19th century, there began to be debates about whether electricity was property that could be “stolen.” According to Article 242 of the German Penal Code (“StGB”), the property element of larceny is limited to a ‘movable thing (bewegliche Sache)’, and there is no doubt that this is limited strictly to material things. Thus, pursuant to the precedents from the German courts, because electricity is in the form of energy with vibration of macromolecules, it is not considered to be a movable thing. Since electricity cannot

\textsuperscript{11} See Oh, Criminal Law, supra note xxx, at 296

\textsuperscript{12} Korean Supreme Court Decision 87Do1240.

\textsuperscript{13} Korean Supreme Court Decision 98Do700. This leaves open the question, unanswered by the courts, of whether any kind of "services" can be regarded as intangible “quasi-property.” Some commentators have treated telecommunications services as such and have written about dishonest misappropriation and/or “theft” of such services. \textit{See} Peter Grabosky & Russell Smith, Crime In The Digital Age: Controlling Telecommunications And Cyberspace Illegals (1998), at 63-88.
satisfy one of the elements for larceny, punishing one for larceny for the act of stealing electricity is an analogical interpretation, which is not permitted by the court.\textsuperscript{14} This has been the predominant position taken by German scholars upon this point,\textsuperscript{15} and Germany has separately defined theft of electricity in Article 248c of the StGB.

According to the Japanese Supreme Court’s ruling in 1903, however, property includes electricity as a material thing under the law criminal law, because "electricity is not a material thing but its existence is an object identifiable by the five senses, and it can be produced artificially and has usefulness to human life, and it can be randomly dominated as one assigns or possesses those."\textsuperscript{16} There was considerable controversy in Japanese academia over this decision at that time, and, to solve this problem, Article 245 of criminal law of Japan was amended explicitly to declare that "electricity is considered to be property."

So, in sum, Germany follows a materiality theory with respect to the theft of energy, while Japan follows a managing-potential theory. The KPC attempted to embrace both the German and Japanese theories of property under Article 346. As such, in the process of adopting foreign-law systems, the original law is somewhat distorted and deteriorated, but this ambiguity also creates an opportunity for the Korean criminal law to develop and become more enhanced. While Article 346 of the KPC provides that "[e]nergy that is subject to human control shall be deemed to

\begin{flushright}
\textsuperscript{14} RGSt (Entscheidungen des Reichsgerichts in Strafsachen) 29, 111, 116; 32, 165, 185 f.
\textsuperscript{15} See, e.g., Wessek/Hilenkamp, Strafrecht BT 2, 28. Aufl., § 2 II 1 Rn. 64.
\textsuperscript{16} Japanese Supreme Court, Meiji 36(1903), 5. 21.
\end{flushright}
be property," there are still possible areas of controversy regarding the essence of "property." Consequently, the concept of property under the KPC is limited to material objects and manageable power, and the majority view of scholars and case law suggests that section 346 of the KPC is a mere cautionary provision.\footnote{See, e.g., Oh, Criminal Law, supra note xxx, at 294; Jaesang Lee, Criminal Law Special Part (5th. Ed.), at 16/10; Woong Im, Criminal Law Special Part (2d. Ed.), at 263-64.}

In interpreting the KPC, it is generally agreed that the principle view of identifying material objects as property is in accordance with the principle of legality. In light of such interpretation, section 346 of the KPC seems to be the exception rather than the rule.\footnote{See Kim/Seo, supra note xxx, at 274; Park, supra note xxx, at 244; Jongdae Bae, supra note xxx, at 64/6; Ilsu Kim, Korean Criminal Law III, at 527.} Therefore, according to the majority view and prevailing cases, even though information is a subject of care that holds sufficient economic value in today’s information society, it does not constitute property as it is understood under the criminal law.

Nevertheless, these concepts of controllability and manageability are relative concepts, and, thus, subject to change as time passes. This can be also seen from the debate that occurred approximately thirty years ago in Korea surrounding the inclusion of the concept of manageable power as property under section 346 of the KPC. Although debates as to whether putting one’s property in another person’s refrigerator and then later removing the frozen object is an act of stealing another person’s cold air or whether attaching one’s vehicle to another person’s vehicle to have it moved from one place to another is an act of stealing another person’s force of movement may seem like simple discussions about the scope of
manageable power as property,\textsuperscript{19} they still have significance to the question of digital property in today’s world.

The controversy over the theft of electricity a hundred years ago is similar to that over information larceny today, and criminal law is at a turning point due to the development of information technology. Information today is mostly found in small microchips, disks, optical disks, and other electronic media, instead of the conventional printed material that was dominant during the print-media era. This intangible property has become a valuable asset in business transactions in society today, and we need to reconsider the value of information processed within information systems.

\textbf{Property in Anglo-American Criminal Law}

In the United States, “property” is defined by a combination of three sources: common-law doctrines, statutes, and custom and practice.\textsuperscript{20} At common law, larceny was limited to misappropriations of goods and chattels -- \textit{i.e.}, tangible personal property.\textsuperscript{21}

Today, the most influential definition of what constitutes "property" for the purpose of theft law is that found in the Model Penal Code of 1962. Property is

\textsuperscript{19} See, \textit{e.g.}, Goojin Kang, \textit{Property In Criminal Law}, Gosigye, (Feb. 1980), at 68.


\textsuperscript{21} See Bell v. United States, 462 U.S. 356, 360 (U.S. 1983) (“[C]ommon-law larceny was limited to thefts of tangible personal property”); \textit{see e.g. People v. Zakarian}, 121 460 N.E.2d 422, 425 (Ill. App. xxxx) (noting that, at common law, “only tangible personal property could be the subject of larceny. Written documents such as deeds and contracts . . . were not considered property for the purpose of larceny”); \textit{see also} 2 \textsc{Blackstone}, \textit{Commentaries on the Laws of England}, Book IV, at 230 (1879) (defining larceny as “the felonious taking and carrying away of the personal goods of another”); \textsc{Wayne R. LaFave, Principles of Criminal Law} (2d ed. 2010), at 704.
defined in the MPC as "anything of value, including … tangible or intangible personal property." The MPC Commentary, clarifying this definition, characterizes property as "anything that is part of one person's wealth and that another person can appropriate." While originally only tangible property was subject to criminal theft under the common law, recent state criminal statutes, modeled after the MPC, define property as "anything of value," including both tangible and intangible property. Under this definition, intangible property can be a protectable property as long as it possesses value. The language within these theft statutes broadly defines the property interests protected. However, legislatures tend to specifically enumerate the unconventional forms of protected personal property. Intangible property is usually protected in this manner.

The Anglo-American law system holds a uniform view that a property interest is a part of the concept of property. The United Kingdom’s Theft Act of 1968 defines property as an object of larceny under section 4 (1) to include

---

“money and all other property, real or personal, including things in action and other intangible property.” 26 Under the UK’s Theft Act, therefore, property has the broadest possible meaning. Nonetheless, the question of whether these broad definitions apply to theft of intangible property remains.

An attempt to steal or illegally use information belonging to another person without being in a justifiable legal relationship is an attempt to acquire such information without any consideration, and it may result in an economic loss to the other person (at least with regard to the lost consideration). Although information is an intangible form of value in which the actual transfer of its possession or control cannot be visually distinguished like the transfer of a specific object or power, it is a good that has a great deal of value in present-day information society. Therefore, if the criminal law does not regard the illegal use of information as a form of theft, it is left with a considerable void for such damaging acts. The result of this confusion is that current law lags behind the developments of the information society by leaving unremedied a gap between the economic value of information in today’s information based society and the normative evaluation of such information.

The Necessity for Protection of Digital Property Beyond Fraud in Criminal Law

After a wave of revisions during the 1980s and 1990s, most criminal-law statutes in developed countries include provisions regulating crimes committed using computers. The typical computer crime at which these statutes are aimed is the act of intellectual-property infringement using a computer or the internet. The

26 Australian jurisdictions have also adopted this model of theft. See Alex Steel, Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property, 30 SYDNEY L. REV. 587 (2008).
problem with the present statutory schemes is that, in an information-based society, computers and the internet are only the means to an end. What is more important is the information contained in such media. The information-communication network, therefore, must also be recognized as a legal interest to be protected under the criminal law.

In order to recognize the intangible value of information as an object of larceny, information must still be recognized either as personal property or as having property interest. Korean criminal law distinguishes property and property interest strictly. However, the concept of a property interest usually covers more than the property, and instead considers property as one of the special forms of property interest. Under the current law, with regard to property crimes involving the nonconsensual taking of intangible information, only deception and misappropriating third-party property are criminalized as computer fraud. If the law recognized the property interest of information in cyber space, the fraudulent taking of an individual’s information – for example, through the internet – would constitute the crime of fraud, but the unlawful taking of such information by other means (other than fraud), would not constitute the crime of theft because information is not recognized as “property” when it is the object of a larceny. For example, if an individual uses another’s credit card and transfers money from that person’s account to his/her own account, the act of entering false information into the information-processing device and processing it without authorization is considered to be an act of computer fraud (but not larceny). If, however, that same

27 See supra.
individual simply withdraws money from an ATM using his/her own credit card or debit card after the fraudulent transfer, the withdrawal is not an act of larceny (despite the permanent asportation of the other person’s money) because the perpetrator used his/her own card to remove the money.  

Caption, Asportation, and the Specific Intent to Deprive

Although the concept of property is very broadly defined in the MPC and various American jurisdictions, its unauthorized taking still rarely fits within the definition of larceny because it is hard to satisfy the common-law elements of caption ("taking") and asportation ("carrying away"). The traditional definition of larceny requires the defendant to take and carry away or exercise control over the property by illegal means. Applying these caption and asportation elements to the theft of digital information creates many difficulties, as Raymond Nimmer has noted:

Reading, copying or memorizing information appropriates value, but leaves the information exactly where it began, in the possession of the owner. The belief that information theft is a crime led early criminal law to strained attempts to extend the idea of "taking" to exclude the necessity that the owner be deprived of the property or to look closely for peripheral copies taken by the criminal to fit this requirement. In the absence of these fortuitous events, taking information or services under older criminal statutes was not theft.

Traditional theft statutes also required that the defendant intend to permanently deprive the other party of the property. Copying a [computer] program or data does not meet this standard because the original owner is not permanently deprived of the program or data, but merely loses some control of the property.  

In other words, when intangible property is "taken," the owner generally still possesses the property and may continue to use the information or idea.

III. JUDICIAL AND LEGISLATIVE RESPONSES

Confusion Surrounding Criminal Law in the Digital Era

Korea

Many cases reflect the mismatch between this online theft of information and the traditional criminal law. For example, imagine that large amounts of cyber money, initially purposed for on-line gambling, have instead been transacted off-line and used as a way to money-launder illegal profits. The crime of illegal gambling may only be committed with the use of real cash (property). Nonetheless, the Korean courts have decided that the use of cyber money on, and the operation of, illegal on-line gambling sites can be prosecuted under existing criminal gambling statutes, despite the fact that cyber money is a form of electronic information electronically created by a program, not property, as is usually required as an element of an illegal-gambling conviction.

In a different case involving the forgery of a cell-phone-subscription form that was then scanned as an image file and e-mailed to a third party, the Court ruled that the act of enabling a third party to view the resulting image file on a computer screen could be viewed as the act of utilizing the forged subscription form, and thus, such conduct was legally sufficient to constitute the crime of using a false

---

*see also* Lipton, *supra* note xxx, at n.92.

30 Korean Supreme Court Decision 2001Do5802; Korean Supreme Court Decision 2002Do6303.
document,\textsuperscript{31} even though the scanned-image file itself did not meet the definition of “document” in the corresponding criminal code. The Court’s reasoning that the act of electronically sending a file that is not a “document” constituted the crime of using a forged document is, needless to say, problematic.

Today, the documentary character of electronic commerce is already widely accepted in administrative law in Korea. For example, cyber money is treated like real cash by many internet game users, so that, for sales-tax purposes, a 10% value-added tax is levied on cyber money similar to the tax rate applied for tangible goods.\textsuperscript{32} On the other hand, in the context of the criminal law, because Article 243 of the KPC stipulates that computer-program files do not constitute documents, drawings, films, etc.,\textsuperscript{33} the Korean Supreme Court has held that an act of selling computer files containing illegal pornographic material over the internet did not establish the crime of illegally distributing pornographic material.\textsuperscript{34}

Further confusion results from contradictory decisions by the Korean Supreme Court in cases involving similar legal intrusions. One case involved the theft of a compact disc containing unit prices for and dealers of vessel-engine parts, as well as business secrets and business “know-how” for such entities. The Korean

\begin{itemize}
\item \textsuperscript{31} Korean Supreme Court Decision 2008Do5200.
\item \textsuperscript{32} The Seoul Administrative court rejected the claim that cyber money was simply intangible computer code. See Seoul Administrative Court 2009Guhap4418, 2009. 8. 28.
\item \textsuperscript{33} Article 243 provides:
\begin{quote}
“Any person who distributes, sells, lends, openly displays or shows any obscene documents, drawings, pictures, films or other things, shall be punished by imprisonment for less than one year or by a fine not exceeding USD 5000.”
\end{quote}
\item \textsuperscript{34} Korean Supreme Court Decision 98Do3140.
\end{itemize}
Supreme Court concluded that the theft of the CD was larceny because it was done with the purpose of gaining unlawful profit.\textsuperscript{35}

In other similar factual situations, however, the Korean Supreme Court has held that information cannot be regarded as property, so as to satisfy the elements of larceny. In a case in which an employee took a drawing of a textile rubber-coating system design and a manufacture-process chart from a computer from his research and development lab where he worked, with the purpose of giving it to another person, the Korean Supreme Court held:

The element of larceny is limited to property, including energy subject to human control, and, to establish the crime of larceny, the owner or other possessor of property excludes the possibility of possession or use, and there must be the act of exclusive taking away from under one's possession. Thus, information saved in the computer itself cannot be considered to be a material thing, and also it is not energy with materiality thus it is not considered to be property. Also, even if it is being copied or printed, it does not decrease the availability of information or possibility of possession and use, and thus such act of copying or printing does not constitute the crime of larceny.\textsuperscript{36}

The Court reached this conclusion despite the facts that the drawing in question had been exclusively developed by the company, was not known to others outside the company, and had economic value at the time the damage occurred, and the company had made its best efforts in managing them secretly.

Consequently, as the law in Korea now stands, if one steals information contained on a CD, such action constitutes larceny, but if one copies or prints the information itself, such action does not constitute larceny. The result is a problem of

\textsuperscript{35} Korean Supreme Court Decision 2008Do5364.
\textsuperscript{36} Korean Supreme Court Decision 2002 Do745.
disproportionality among unlawful acts and their requisite criminal liability. For instance, if an individual steals documents containing business secrets worth one million dollars or a disc containing the designs for semi-conductors worth one-hundred million dollars, the criminal law proscribing larceny can punish only for the theft of the documents or the disc but not for the value of the information contained therein (the business secrets or designs).37

Although such cases clearly show the need for criminal laws that can be appropriately applied to new forms of criminal activity arising from the advent of the digital age, they also show that the Court has not yet been able to put forth a uniform and clear standard regarding the application of existing criminal laws to cyber crimes. These cases also highlight the potential problems with the creation of what appear to be “new” crimes through the process of analogical interpretation is permissible under the principle of legality.38

37 This distinction plays out in a variety of examples across Korea. For example, one defendant, upon resigning from his company, took company resources related to firewall-program development: 'com20 proposal', 'idc-shield introduction', 'and 'is8000r proposal,' which were stored in the hard disc of his work computer and copied those files to a CD. The Seoul District Court concluded that his actions did not constitute the crime of larceny (Seoul District Court 2001.7.18. 2001No942). In another case, an employee copied work documents drafted by other employees, returned the original, and removed only the duplicate, and the Korean Supreme Court held that the taking of the copied documents was not larceny. Korean Supreme Court 1996. 8. 23. 95Do192.

38 The creation of new crimes through the process of analogical interpretation is generally prohibited under the principle of legality. See, e.g., United States v. Hudson and Goodwin, 11 U.S. 32, 33-34 (1812) (“The only ground on which it has ever been contended that [the jurisdiction of the courts] could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to do it . . . If it may communicate certain implied powers to the general Government, it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the
Between 1985 and 1992, the Korean Ministry of Justice proposed a series of amendments to the KPC to create computer-specific crimes. By 1995, several new computer-specific crimes had been created by statute. The main computer-specific amendments to the KPC are as follows: (1) the addition of crimes prohibiting the unlawful manipulation of resources, forgery of public and private electronic records, and alteration, forgery, and fraud by use of computer; (2) the addition of crimes relating to the destruction of computers, including the crimes of interference with business by destruction of computers and criminal damage in destroying electronic records; and (3) a provision criminalizing the invasion of confidential information by technical tools.

Prior to these amendments to the KPC, because of the legality principle, fraud by use of a computer was effectively legal since the act of manipulating the information could not be construed as acquiring property by deceiving a person.

39 There have also been subsequent enactments of special laws (codified outside of the Penal Code) regulating crimes using computers, such as the Act on Promotion of Information and Communication Network Utilization and Information Protection, the Computer Programs Protection Act, the Copyright Act, and the Protection of Communications Secrets Act.

40 The KPC provision outlawing fraud by use of computer (KPC Article 347-2) was based on Article 263a of the German Penal Code (“STGB”), but, unlike the STGB, the KPC originally only regulated the acts of entering false information or unlawful orders and did not regulate the unauthorized use of data and other unauthorized exercises of power (“durch unbefugte Verwendung von Daten oder sonst durch unbefugte Einwirkung auf den Ablauf”). This omission gave rise to issues regarding the potential for analogical interpretation, and, as a result, the KPC was explicitly amended in 2001. See Taehoon Ha, *Illegal Use Of ATM In Criminal Interpretation*, 4 Study Of Crim. Cases 335 (1996); Hyungjoon Kim, *Cybercrime & Current Criminal Law*, 10 Internet Law 29, 29-31 (2002); Youngwan Kim, *Difficulties With Illegal Use Of Credit Card In Criminal Interpretation*, 3 Study Of Crim. Cases 318 (1995).

and/or misidentifying oneself. \textsuperscript{42} Furthermore, the direct object for fraud by use of a computer is limited to property interest, not property. For example, if an individual has been issued a credit card by unlawfully using another person’s name and withdraws cash from an ATM using that card, such cash is property in itself not an interest that the individual acquired from property, and so there has been no fraud by use of a computer. \textsuperscript{43} Thus, the act of taking information does not establish the crime of fraud by use of a computer based under the Court’s current interpretation of the KPC.

\textit{China}

Since the 1979 penal code was amended in 1997, Chinese criminal law, by statute, contains a specific provision regarding the property element for the crime of invasion of property. Following the development of science technology, energy (an intangible), including electricity, gas, natural gas, heat, cold air, and wireless phone numbers, has been recognized to be an object of criminal activity under Chinese criminal law since it can be controlled by an individual. \textsuperscript{44} The scope of interpretation of this provision is very broad: illegal copying or taking of the long-distance phone number, communication cables, or telegraphic numbers of another

\textsuperscript{42} See Oh, \textit{Criminal Law}, supra note xxx, at 433; Wessels/Hilkenkamp, \textit{supra} note xxx, at \S 13 VI 1 Rn. 598-600.

\textsuperscript{43} Korean Supreme Court Decision 2002Do134; Korean Supreme Court Decision 2003Do1178.

\textsuperscript{44} Sungsu Kim, \textit{Relationship on the property in civil law and criminal law}, POLICE L. REV. 5/2 (2007), at 127.
and the use of illegally copied communication cables and facilities can be punished as unlawful takings.\footnote{Article 265 of the PRC Penal Code.}

The United Kingdom

English courts have been reluctant to treat intangible property as property under theft law. The property element does not necessarily extend to all intangible property, such as information. In \textit{Oxford v. Moss}, for example, the Queen's Bench Divisional Court held that the information contained in a stolen (but returned) university exam was not property for the purpose of a theft prosecution.\footnote{\textit{See Oxford v. Moss}, 68 Cr. App. Rep. 183 (Q.B.D. 1979). The defendant, Moss, was a University student at the University of Liverpool. He managed to obtain an advanced copy of his upcoming civil-engineering exam, read it, and replace it before the exam was administered. The parties stipulated that, because he had always intended to return the original copy of the exam, he therefore could not be convicted of theft of the exam itself. The prosecution asserted, however, that the information contained within the copy was intangible property capable of being "stolen" under section 4 of the Theft Act of 1968, but the court rejected that argument, holding that information contained within the exam could not be deemed to be intangible property and therefore was incapable of being stolen within the meaning of the Theft Act.}

The United States

Similar issues have arisen under the National Stolen Property Act ("NSPA") in the United States. In \textit{United States v Brown},\footnote{925 F2d 1301, 1308-09 (10th Cir. 1991).} Brown was charged with violating the NSPA for allegedly stealing a computer program and source code. Brown moved to dismiss the indictment for failure to state an offense, and the United States District Court for the District of New Mexico agreed. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the dismissal, holding that a computer program was intangible intellectual property and, as such, did not constitute stolen goods within the meaning of the NSPA. The court of appeals’ holding in \textit{Brown} leads

\begin{itemize}
\item The use of illegally copied communication cables and facilities can be punished as unlawful takings.
\item \textit{The United Kingdom}
\begin{itemize}
\item English courts have been reluctant to treat intangible property as property under theft law. The property element does not necessarily extend to all intangible property, such as information. In \textit{Oxford v. Moss}, for example, the Queen's Bench Divisional Court held that the information contained in a stolen (but returned) university exam was not property for the purpose of a theft prosecution.
\end{itemize}
\item \textit{The United States}
\begin{itemize}
\item Similar issues have arisen under the National Stolen Property Act ("NSPA") in the United States. In \textit{United States v Brown}, Brown was charged with violating the NSPA for allegedly stealing a computer program and source code. Brown moved to dismiss the indictment for failure to state an offense, and the United States District Court for the District of New Mexico agreed. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the dismissal, holding that a computer program was intangible intellectual property and, as such, did not constitute stolen goods within the meaning of the NSPA. The court of appeals’ holding in \textit{Brown} leads
\end{itemize}
\end{itemize}
to the strange result of punishing theft via a particular medium regardless of the
message. For example, if Thief 1 uses his/her own diskette to steal a computer file
worth $10,001, and Thief 2 steals a diskette worth $1 including a file worth $10,000,
under Brown, Thief 2 can be prosecuted under the NSPA for theft of $10,001 worth
of property, while Thief 1 may not be prosecuted under the NSPA, even though their
conduct is the same in terms of moral culpability.\textsuperscript{48} For this reason, the United
States District Court for the District of Arizona declined to follow the Tenth Circuit’s
interpretation in \textit{United States v. Alavi}.\textsuperscript{49}

While American courts rarely recognize the crime of theft of information,
there are a few counter examples. In \textit{United States v. Riggs},\textsuperscript{50} the Government
prosecuted Riggs under the federal wire-fraud statute\textsuperscript{51} and the federal statute
prohibiting interstate transportation of stolen property\textsuperscript{52} for engaging in a scheme

\textsuperscript{48} See Todd H. Flaming, \textit{The National Stolen Property Act and Computer Files: A New
Form of Property, a New Form of Theft}, 1993 U Chi L Sch Roundtable 255, 270.
\textsuperscript{49} 2008 WL 1971391. The Brown and Alavi courts were both attempting to follow
the Supreme Court’s decision (or lack thereof) in \textit{Dowling v. United States}, 473 U.S.
207 (1985). In \textit{Dowling}, the Supreme Court considered a related, but not identical
question: whether bootleg phonograph records transmitted across state lines were
“‘stolen, converted or taken by fraud’ for purposes of § 2314.” \textit{Id.} at 216. The
indictment was “founded exclusively on the allegations that the shipped
phonorecords, which contained ‘Elvis Presley performances of copyrighted musical
compositions,’ were ‘stolen, converted and taken by fraud, in that they were
manufactured without the consent of the copyright proprietors.’ ” \textit{Id.} at 215 n.7.
Because the case presented “no theory of illegal procurement” of the musical
compositions, the Court expressly declined to consider that theory as a basis for
upholding Dowling’s conviction. \textit{Id.}
\textsuperscript{50} 739 F. Supp. 414 (N.D. Ill. 1990).
\textsuperscript{51} 18 U.S.C. § 1343.
\textsuperscript{52} 18 U.S.C. § 2314. Section 2314 provides, in relevant part:
Whoever transports, transmits, or transfers in interstate
or foreign commerce any goods, wares, merchandise,
securities or money, of the value of $5000 or more,
knowing the same to have been stolen, converted or
to defraud the telephone company by stealing proprietary information contained in “911” computer text file, transferring it across state lines, and publishing that information in a computer newsletter.\footnote{See Riggs, 739 F. Supp. at 417, 422.} In denying Riggs’ pretrial motion to dismiss the indictment, the United States District Court for the Northern District of Illinois held that confidential information was property. The court noted that the statute was enacted to cover all stolen property worth at least $5000 and that the computer file containing business information satisfied the value requirement.\footnote{See id. at 421-22.} Thus, the court decided the property issue on the basis of whether it had market value. The court also refused to distinguish between information stored on paper or disk (which precedent had held was property) and information stored electronically in a computer’s hard drive.\footnote{See id.}

Federal appellate courts have had several occasions to address the definition of stolen “property” as it applies to tangible government documents in situations in which such documents have been photocopied (and the photocopies containing the intangible information from the originals have been removed) without authorization, but the original (tangible) documents were left in the government agency. In United States v. DiGilio,\footnote{538 F.2d 972 (3d Cir. 1976).} the United States Court of Appeals for the Third Circuit concluded that duplicate copies are still “records” of the United States and that the unauthorized removal of copied FBI violated the statute proscribing the
conversion of government “records.” In *United States v. Girard*, a case involving the unauthorized removal of information from a computer file at the Drug Enforcement Administration (“DEA”), the United States Court of Appeals for the Second Circuit reached a similar conclusion, holding that information that was printed using the DEA computer system and removed from the office by an employee was property for the purpose of the same statute.

Nonetheless, the idea that intangible property should be protected by theft laws is gaining popularity. For instance, the Economic Espionage Act (EEA) imposes criminal penalties on anyone who “steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains” any trade secret related to a product in interstate business. And the No Electronic Theft Act (“NET Act”) establishes aggravated criminal penalties for various violations of the copyright law, including the receipt of “anything of value.”

In addition to the diverse federal statutes criminalizing the misappropriation of intangible property, some states have enacted statutes to protect against the theft

---

57 See id; see generally 18 U.S.C. § 641. In DiGilio, the photocopying was performed on government equipment using government supplies. An FBI clerk-typist copied the original documents related to an investigation of DiGilio “during her working hours and with government papers and copying equipment. The original records were returned ... to the proper files.” The clerk-typist then removed the copies from the office. DiGilio eventually received the copies through a series of middlemen. These activities were conducted frequently over approximately a six-month period. See DiGilio, 538 F.2d at 976. In 1979, the United States Court of Appeals for the D.C. Circuit followed the rationale of DiGilio in *United States v. Hubbard*, 474 F. Supp. 64 (D.D.C. 1979).
58 601 F.2d 69 (2d Cir. 1979).
59 See id. at 70.
60 18 U.S.C. § 1832 (a).
or use of intangible property or revelation of another’s trade secrets. These federal and state statutes vary greatly in their range and penalties. Some states have criminal codes that specifically mention trade secrets or utility services. Others have general criminal statutes broad enough to cover trade secrets without specifically enumerating them, use civil codes like the Uniform Trade Secrets Act to confer protection, or both. In other states, the scope of protection is limited to the theft of tangible items.

**Special Legislation for Digital Property**

Intangible digital objects and other types of information are already being regulated under several laws. Theft of traditional forms of intellectual property, such as inventions, utility models, designs, trademarks, and copyrights, is subject to criminal regulations specific to those media. However, even in the area of intellectual-property law, because of the constant development of digital technology, new types of intellectual property are created almost every day that are not subject to the protection of existing intellectual-property laws. Laws such as the Framework Act on Electronic Commerce and the On-line Digital Contents Industry Promotion Act are focused on the support and promotion of relevant industries and

---


63 *See, e.g.*, CAL. PENAL CODE §§ 498 (defining and proscribing penalties for the theft of utility services), 499c (criminalizing the theft of trade secrets).

64 *See, e.g.*, N.H. REV. STAT. ANN. § 637:2 (1996) ("'Property' means anything of value, including . . . trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him."); UTAH CODE ANN. §§ 76-6-401, 76-4-404 (1999) (same); *see generally* Grimm, *et al.*, *supra* note xxx, at 757 n.125.

65 *See, e.g.*, GA. CODE ANN. § 16-8-13.
government policies that promote the growth of such industries rather than providing a legal framework for normative and legal guidelines in electronic transactions of digital information.

IV. THE SCHOLARLY LITERATURE

Recognition of the Crime of Theft of Intangible Digital Property

Some scholars have argued that current criminal statutes should not be used to prosecute virtual-good thefts because it might prove too difficult, impractical, or impossible.

Michael Carrier and Greg Lastowka argue that, because of the civil law’s fundamental characteristics, cyberproperty cannot be confirmed by the ideas of Loke’s labor theory, Hegel’s personhood rationale, or general utilitarian justifications. They also argue that the concept of cyberproperty is not supported by property’s rationales and lacks effective limits.66

Alex Steel has argued that the crime of theft does not apply to intangible property. Over time, the simple *actus reus* of theft of a certain form of (tangible) property is now becoming broad and uncertain. Even if property rights exist in intangible cyberproperty, it is not easy to find out whether a theft of such property has occurred because the right to the property could be appropriated or the owner indissolubly deprived of it, and he argues that it is undesirable to maintain an offense that includes forms of property within the offense definition but then

---

removes them by reliance on another element. In most instances, the appropriation of a chose in action amounts to a form of fraud not theft.\textsuperscript{67}

Geraldine Moohr has argued that "the criminal law forum is a deficient one in which to consider the policy implications of creating property rights in information" because intangible property is unformed and shapeless. In other words, because intangible property cannot be considered as a chattel, it should not be subject to property protection. As a result, intangible property cannot be subject to criminal theft statutes because theft of intangible property does not deny the plaintiff the right to possess, use, and enjoy the res (even though the victim of such taking may lose her right to exclude other from such property) and the theft of intangible property only causes damage to the value of the property but does not deny the plaintiff its actual possession and use.\textsuperscript{68}

On the other hand, there are diverse opinions that insist that intangible property should be included as the subject of theft. Stuart Green claims that theft law only protects things that are able to be bought or sold. Theft law bans the misappropriation of "anything of value," which refers to both tangible and intangible property.\textsuperscript{69}

According to Andrea Vanina Arias, virtual goods in Massively-Multiplayer Online Role-Playing Games ("MMORPGs") fit the five characteristics of chattel property: the abilities to (1) possess; (2) use; (3) enjoy; (4) transfer; and (5) exclude

\textsuperscript{67} See Steel, \textit{supra} note xxx, at 612-13.
others ("rivalrousness"). If a player possesses a particular virtual good, other people cannot possess the same good. If only one person uses a virtual good, then other players are not be able to use or enjoy it at the same time. A person can definitely transfer virtual goods to other players. Finally, a person can exclude others from using their virtual goods.\(^70\) Therefore virtual goods, under current state penal statutes, should be classified as "property." Moreover, virtual goods must be afforded the property rights of chattels for their owners to be protected effectively from theft. As a result, jurisdictions in the United States could use current criminal-theft statutes to prosecute the theft of virtual goods.\(^71\)

Joshua Fairfield broadens the definition of property rights and how they should extend to virtual worlds. Fairfield asserts that there are three "characteristics that virtual property shares with real property" that define when virtual resources should be infused with property rights: (1) rivalrousness, (2) persistence, and (3) interconnectivity.\(^72\) Fairfield also attempts to summarize virtual resources within his concept of a "code." This concept is not one of code in the programming sense, but rather code-based objects, such as accounts, virtual land, and items in virtual worlds.\(^73\) If one person owns and controls them, others do not. They do not go away when the computer is turned off.\(^74\)

Stuart Green argues that something is a "thing of value" for purposes of theft law if and only if it is "commodifiable," which he defines as "capable of being bought

\(^70\) See Arias, supra note xxx, at 1315-23.
\(^71\) See id. at 1344-45.
\(^73\) See id. at 1077-78.
\(^74\) See id. at 1049.
or sold.” The term *property*, therefore, denotes nothing more than a bundle of rights, a legal construct. Using this definition allows digital property to be located within a unified concept of property as long as the digital property in question has economic value and is marketable.

Todd H. Flaming has argued that, in an era in which computers will soon replace paper as the medium of information storage, the simple recognition that cases involving the theft of digital information involve a new form of property and a new form of theft, in which physical possession is no longer relevant, is inevitable.

Several Korean scholars have also argued in favor of expanding the definition of property subject to the criminal law of theft. Daehun Bae has proposed that expansion without statutory revision can be borrowed from civil law by recognizing the crime of theft of intangible property by applying the constructive-possession (or semi-possession) concept of civil law to the criminal law. Under this proposal, property in criminal law would follow the concept of ‘thing’ defined in the civil law. He argues that there are no normative differences between property in civil and criminal law. The concept of property under the criminal law of theft is based on the potential ability to manage or exercise dominion. “Dominion” presupposes that the owner can use, make a profit, or dispose of the thing in question. A thing in civil law is an object that can be subject to an action for property rights, and it can be dominated or managed depending on the legal possessor’s exercise of his/her

---

75 Green, *supra* note xxx, at 218.
76 See id. at 212; see also Nelson, *supra* note xxx; see, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (viewing property as a “bundle of rights”).
77 See Flaming, *supra* note xxx, at 290-91.
78 For example, Korean Civil Code Article 98 provides: “[T]hings mentioned in this Code shall mean material things, electricity, and other manageable natural forces”.
power to use, make profits, and dispose thereof. Rights in property law are not limited to the material objects. Article 210 of Korean Civil Code protects interests other than the object itself as semi-posessions, such as possession pursuant to which one actually dominates the object. The objects for constructive possession are intellectual property and the right to receivables. In other words, he argues that digital information should be protected in the same way pursuant to both civil and criminal laws.\textsuperscript{79} Thus, when Article 346 of the KPC says that "[e]nergy that is subject to human control shall be deemed to be property," energy can be regarded as property that is in fact not property If, however, intangible materials under human control can be regarded as property, it is not necessary to distinguish energy among the intangible materials, and Article 345 can be interpreted instead merely as an illustrative provision.

Insu Whang has argued that the materiality of digital property can be recognized on the basis that information saved in a computer is subject to the physical management of the owner’s operation.\textsuperscript{80}

Haesung Yoon has argued that property should not be limited property to energy subject to human control, but rather extended to include the property value of all material under human control.\textsuperscript{81}

**Broad Legislation Regarding Theft of Digital Property**


Korean scholars have also asserted that the concept of property under the
criminal law should not only include tangible objects and manageable power but
also radio waves, lasers, ray-light energy, and documents and items in electronic
form.\footnote{See Taeyoung Ha, \textit{An Argument for the History of “Property” in Korean Criminal Law}, J. COMPARATIVE CRIM. L. 5/2, (December 2003), at 318.}

V. THE CRITIQUE

Information as Property

The information society represents a paradigmatic shift from a natural-
resource-based economy that centers around the three traditional elements for
production, land, labor, and capital, to an information-based economy. The result is
that information value and digital property have taken on the role of a major
commodity and production element.\footnote{See e.g., John William Nelson, \textit{The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea}, 41 MCGEORGE L. REV. 281, 287 (2010); According to a recent White Paper from the Korean National IT Industry Promotion Agency, the Korean software market was worth approximately $77.2 billion in 2010.} Ultimately this may also result in the birth of legal interests in newly developing areas like the free access to intangible property, which will require an entirely different legal theory of larceny that is not based on tangible objects. Even though the law may not surpass society in today’s rapidly changing information society, it needs to be flexible and adjust to the changes of society. From a criminal-law perspective, when the protection of an object by the criminal law varies from tangible objects to intangible information, this allows criminal activity impunity when it is committed using computers and other
machines, even though the identical action committed by an individual in-person would be a crime.

One common response to this problem, by legislatures, courts, and commentators, has been to regulate (or propose the regulation of) the unauthorized taking of digital information as larceny of digital “property.” There are four problems with this solution. First, digital information does not fit well into preexisting common-law and statutory definitions of property.

Second, the unauthorized use of digital information rarely, if ever, satisfies the asportation (“taking and carrying away”) and specific-intent (“with the intent permanently to deprive” elements of larceny/theft. As a result, the only way to fit “stealing” digital information into a general larceny/theft crime would be to water down those elements for all larcenies/thefts, a classic example of using a bazooka to swat a fly.

Third, it is difficult to define the scope of the “information” that should qualify for protection as property. The concept of intangible digital property can be even more artificial than the concept of physical property. For example, inventions, utility models, designs, and marks are called industry information. New information, including any data acquired during a transaction saved on a computer in the form of digital materials, or transferred to others by information-communication networks, could be treated as digital information.\(^4\) The difficulty of defining intangible digital property is aggravated by the fact that the concept of

\(^4\) See Daehun Bae, supra note xxx, at 307.
property generally has a problematic history of inexact meaning.\textsuperscript{85} Theft law generally prohibits the misappropriation of "anything of value" -- a term that refers, in its expansive, modern form, to both tangible and intangible property.

Fourth, expanding the current definition of property to include digital property containing important information for the purpose of theft prosecutions can, at least in many jurisdictions, only be done by analogical judicial interpretation extending statutory definitions of theft to contexts that their drafters did not imagine.\textsuperscript{86}

\textbf{Special Legislation for Digital Property}

The discussions concerning simple claims for damages and penalties based on civil law and the government’s right to punish illegal conduct are entirely different, with different legal effects on the lives of citizens and individuals, their self-consciousness, and society as a whole.\textsuperscript{87} One reason why it is necessary to approach this issue from the perspective of the general criminal law is because this issue is not a disconnected, one-time event, but rather it is a universal social issue in an information-based society. To regulate this issue within the scope of general law means that it will be recognizable (at least constructively) with common knowledge. A specialized law only purporting to regulate within a narrow legal realm would not familiar to lay individuals. This may be one reason why many individuals are not

\textsuperscript{85} See Nelson, \textit{supra} note xxx, at 284-85.
\textsuperscript{86} See Seunghee Hong, Protection and Limit of Information-Property, Korean Institute of Criminology (2005), at 115.
\textsuperscript{87} For an excellent discussion of the policy reasons for allowing some form of criminal-law control over the theft of virtual goods, see Arias, \textit{supra} note xxx, at 1337-38.
aware of the illegality of their behavior when they illegally download, upload, or attach links to files protected by law. This can only result in the violation of individual rights and impair the preventive role of criminal law because it does not provide the individual with an expectation of punishment upon its violation.

A second reason why it is necessary to approach this issue from the perspective of the general criminal law is that the legal purpose of some specialized laws is not refined enough. Many specialized laws are enacted and executed based on notions of administrative expediency, which decreases the opportunity for academic examination and vetting.88

A third reason why it is necessary to approach this issue from the perspective of the general criminal law is that a penal regulation comprising multiple specialized laws rather than one uniform general one creates the possibility that the normative purpose of the different laws conflicts with one another and an opportunity for uniformity of legal norms within society is lost. Moreover, issues concerning the interpretation of criminal law, such as the conflict and contradiction between property and property interests and the documentary quality of digital files, constantly occur across a broad spectrum of types of theft of digital property.

Broad Legislation Regarding Theft of Digital Property

The problem with broad language governing the theft of digital property is that it may breed the endless expansion of related subject matter. What types of digital information should be protected by criminal legal systems? Unlike the terms

of entry in physical establishments, cyberspace “Terms of Use” are often extraordinarily broad and grant extraordinary rights to the proprietor.

VI. PROPOSAL:
A UNIFORM THEORY OF THE CRIME OF UNAUTHORIZED USE OF DIGITAL INFORMATION

While there was controversy about whether electricity could be subject to the crime of larceny in the early 20th century, one hundred years later, there are no doubts that the theft of electricity is a crime, both by statute and court decision. It is difficult to interpret electricity as an object of common-law larceny because it is difficult to imagine a scenario in which an electricity thief would satisfy the element of taking and carrying away, and so electricity theft can only be understood as an act of unlawful use of intangible materials.

For the historical, logical, and teleological meaning of property in criminal law, it would be proper to consider as property intangible materials that cannot be included in the meaning of tangible property if they have the potential of being subject to human control in a similar degree as tangible materials in situations in which society requires intangible ones to have the same protection.89 Such thefts would not constitute larceny because intangible materials are subject to human physical control, but rather because such intangible materials should be legally protected to the same degree as tangible property because of their potential for being subject to human physical control.

In 1995, the concept of electronic recording was introduced to the criminal law in the KPC. At that time, it was understood that such electronic recordings were recordings saved in the form of electronic and magnetic waves and that such information had strong recording characteristics that were fundamentally identifiable. This is a good example of how, as information society advances, objectively controllable and relatively clear digital information can be included in the criminal law. The legislative intent for these statutory additions includes the recognition of the necessity of protection of scientific developments in situations in which controllable intangible materials are stolen.

Nonetheless, it is difficult to regard electricity and digital property as the same kind of direct object of theft crimes. With regard to electricity, it is easy to calculate any economic loss arising from its theft. Information, on the other hand, is an intellectual creation and the value of its loss (including the profits lost from the exclusive use thereof) is hard to measure or estimate. Thus, those advocating that digital property should be treated as a kind of property subject to larceny have been taking the wrong path by attempting to regulate larceny in criminal law by weighing whether digital property with economic value is property. Rather than examining whether digital property is worth protecting, it would make better sense to regulate the use of digital property because it is difficult to regard the unauthorized usage of digital property as an object of theft.

The KPC takes the position that a theft crime does not necessarily have to satisfy all the elements of traditional (common-law) larceny. Instead, it creates exceptions in which the proof of one or more of the traditional elements of larceny
is excused in situations in which such excuse is necessary to protect society as a whole. For example, Article 331.2 prohibits, *inter alia*, the unlawful use of automobiles. This statute came into effect as automobile ownership became common to prevent the unlawful uses of another's car without consent. Since the crime of unauthorized use does not satisfy the 'intention to permanently deprive' element of larceny, the statute provides compensation to the owner of the automobile to fill this legal gap.

In our modern information-based society, there is no less necessity for the criminal law to protect against the unlawful use of information in digital forms than against the unlawful use of automobiles. Therefore, the crime of illegal use of digital information should be created by statute. In doing so, legislatures should consider the following factors:

(1) Whether the information in question is known to the public (i.e., whether it can be acquired by means other than through the holder of the information);

(2) Whether the information is secured and under the management or control of its rightful holder; and

(3) Whether the information has independent economic value and whether its economic value has been diminished by its unlawful use.

---

90 Article 331-2 provides:

*Any person who uses temporarily another person's automobile, ship, air craft or motor-equipped bicycle, without consent of the person having the right to it, shall be punished by imprisonment for less than three years, fine not exceeding USD 5000, detention or a minor fine.*

Because of the potentially expansive prosecutorial discretion that a crime with such a broad definition as the unauthorized use of information would have and because this article proposes the creation of such crime as a means of protecting personal digital property rights as thefts because doing so is in the public interest, such offense should require a complaint by the rightful holder of the information as an element in order to minimize the misuse of prosecutorial power. The article further recommends that such statutory crime be codified within the general criminal law (the penal code), rather than in a specialized statutory section (e.g., an intellectual-property code).

With regard to the unauthorized use of telephone electromagnetic waves, the development of modern technology has made it possible to pirate the use of wireless phones. Since such waves are neither property nor manageable, they cannot be the object of a larceny. Since electromagnetic waves are intangible, their unauthorized use does not classify as theft, and so such taking also requires a specialized statutory solution.

VII. CONCLUSION

Developments in the criminal law of theft have closely reflected evolving concepts of property in civil law. According to Jerome Hall’s study of the history of laws related to theft, the increase in the complexity of social and economic organization was accompanied by the transformation of free goods (those existing in nature independently of any human effort and not appropriated by anyone) into

---

92 See Steel, supra note xxx, at 582 et seq.
economic goods. This transformation represented effort and acquisition. Goods so far as thus acquired and transformed became valuable and recognized as the "property" of the individuals who obtained or possessed them. As intangible property, such as licenses, franchises, and interests in stock, began to occupy an increasingly important place in the economy, it was not surprising that society would look to the criminal law as a means of protection.

Many types of digital properties generated online and through computers in late 20th century have been used in the commission of crimes, but confusion has arisen in existing criminal-law systems as to how to regulate and prevent such thefts. If an individual creates false information, uses a computer without consent, or changes information without authorization and, in the process, acquires property or a property interest, such individual has committed computer fraud. The act of stealing important information, however, has proven more elusive to regulate as the crime of theft/larceny in criminal law. Existing efforts to fill in these legal gaps have been inadequate for many reasons.

---

93 Jerome Hall, Theft, Law and Society 6 (2d ed. 1952), at 100.