Defendant's Motion to Dismiss United States vs. D. LaMacchia

Year

1994

Description

Defendant's motion to dismiss the indictment for failure to state an offense and on constitutional grounds.

Body

United States District Court, District of Massachusetts

United States of America v. CR. No. 94-10092-RGS

Defendant's motion to dismiss the indictment for failure to state an offense and on constitutional grounds.

ATTENTION - The FORMAT of the following article has been modified from its original appearance for ease of reading. No content or information has been removed from this article.

Introduction

David LaMacchia moves this Court to dismiss the indictment for failure to state an offense and on the ground the indictment unconstitutionally infringes upon LaMacchia's rights to due process of law under the Fifth Amendment and the constitutional principle of separation of powers.

A fuller and more detailed statement of the grounds for this motion are set forth in the Memorandum in Support of Defendant's Motion to Dismiss the Indictment for Failure to State an Offense and on Constitutional Grounds, filed herewith. Request for Oral Argument Defendant respectfully requests oral argument on this motion pursuant to Rule 7.1(D).

Introduction

The government has charged a 21 year old Massachusetts Institute of Technology ("MIT") student, David LaMacchia, with conspiracy to commit wire fraud, in violation of 18 U.S.C. Sec. 371. The indictment alleges that, as the systems operator ("SYSOP") of an electronic bulletin board system ("BBS") on MIT's computer network, LaMacchia conspired with unknown persons to engage in a "scheme or artifice to defraud" to permit and facilitate, on an international scale, the illegal copying and distribution of copyrighted software, without payment of software licensing fees or the software purchase price to the manufacturers and vendors of the copyrighted software.(Indictment Par. 5)

LaMacchia contends that the indictment invents a criminal charge, primarily by distorting the wire fraud statute, in order to circumvent Congress's decision not to apply a criminal sanction to LaMacchia's alleged conduct. The indictment's fatal defect can best be seen by noting the words that the indictment avoids using, and the crimes it does not charge.

Although the indictment charges that the goal of the charged conspiracy was the

"illegal copying and distribution of copyrighted software" which caused financial injuries to copyright holders, the indictment avoids using Congress's term of art for such a wrongful appropriation of the copyright holders' rights -- infringement. 17 U.S.C. Sec.501(a). Instead, the indictment contrives to misbrand alleged copyright infringement by renaming it as a "scheme or artifice to defraud" executed by "illegal copying and distribution of copyrighted software" in a vain effort to bring LaMacchia's alleged conduct within hailing distance of activity prohibited by the wire fraud statute, 18 U.S.C. Sec.1343.

But the indictment's legal legerdemain does not end there. Even though the "scheme to defraud" prohibited by the wire fraud statute is itself an inchoate offense, the indictment does not charge that LaMacchia committed, or even aided or abetted the commission of, wire fraud. Indeed, the indictment does not allege that LaMacchia personally copied or distributed any copyrighted software or that he was actually aware of the extent of such activity by others.1 Rather, the government attempts to stretch the already thin reed even further by charging LaMacchia with conspiracy to commit wire fraud, attempting thereby to make him criminally liable for conduct committed by unnamed persons, including conduct he was not actually aware of.

Most significantly, though the true legal name for the goal of the alleged conspiracy is copyright infringement, the indictment does not charge that either LaMacchia or his unnamed co-conspirators committed, or even conspired to commit, criminal copyright infringement in violation of the Copyright Act, 17 U.S.C. Sec. 506. That provision requires proof that the infringement was done "willfully and for purposes of commercial advantage or private financial gain."2 Effectively conceding that the conduct alleged in the indictment was not done for profit and therefore does not constitute criminal infringement or conspiracy to commit criminal infringement,3 the government has nevertheless decided to bring this prosecution because it believes that LaMacchia's conduct should be a crime even if it is not.4 The prosecution's attempt at lawmaking is prohibited, however, by the Supreme Court's decision in Dowling v. United States, 473 U.S. 207 (1985), which held that criminal prosecutions for alleged copyright infringement must be brought, if at all, under the Copyright Act, and cannot be brought under statutes enacted by Congress to prohibit interstate theft and fraud pursuant to its interstate commerce power.

In Dowling, the Supreme Court reversed the defendant's conviction for violation of the National Stolen Property Act, 18 U.S.C. Sec. 2314, in connection with his

interstate distribution of infringing Elvis Presley recordings. In doing so, the Court specifically rejected the government's argument that the infringing recordings were "taken by fraud" so as to be covered by that statute. The Court held that Congress has regulated the copyright area directly, and in great detail, in the Copyright Act pursuant to the special grant of congressional authority contained in Article I, Sec. 8, cl. 8 of the Constitution.5 It ruled that the specific and exclusive term Congress used for the wrongful appropriation of copyright holders' rights is infringement, and that the word "fraud" was "ill-fitting" when applied to copyright infringement.

The Court emphasized that the purpose underlying the interstate fraud and theft statutes enacted pursuant to Congress's power to regulate interstate commerce -- the need to fill gaps in state-by-state law enforcement -- does not apply to the copyright area, where Congress has authority to penalize the distribution of infringing goods directly, whether or not those goods affect interstate commerce. 473 U.S. at 219-220. In light of the special care Congress has shown in crafting the civil and criminal provisions of the Copyright Act, the Court found it "implausible to suppose that Congress intended to combat the problem of copyright infringement by the circuitous route hypothesized by the Government", 472 U.S. at 222, and refused to presume "congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly" in the Copyright Act. 473 U.S. at 227.

The Court acknowledged the temptation to utilize a fraud and theft statute enacted pursuant to the commerce power as an "existing and readily available tool to combat the increasingly serious problem of ... copyright infringement," but concluded that such use was prohibited by the notice and separation of powers concerns underlying the rule that criminal statutes must be narrowly construed. 473 U.S. at 228-229. The Dowling decision establishes that Congress has finely calibrated the reach of criminal liability [in the Copyright Act], and therefore absent clear indication of Congressional intent, the criminal laws of the United States do not reach copyright-related conduct. Thus copyright prosecutions should be limited to Section 506 of the Act, and other incidental statutes that explicitly refer to copyright and copyrighted works.

Nimmer on Copyright, Vol. 3 Sec.15.05, at p. 15-20 (1993); Goldstein, Copyright, Vol. II, Sec.11.4.2, at 304 n.67 (1989) ("although the Court did not directly rule on whether the mail fraud statute encompassed the infringing conduct, its reasoning with respect to the Stolen Property Act, 18 U.S.C. Sec. 2314, suggests that it would

have treated the mail fraud statute similarly"). See United States v. Gallant, 570 F. Supp. 303 (S.D.N.Y. 1983) (distribution and sale of infringing records is not a "scheme to defraud" within the meaning of the federal wire fraud statute). The Dowling holding has been directly applied to schemes involving computer software. United States v. Brown, 925 F.2d 1301 (10th Cir. 1991) (illegal copying and distribution of computer software does not violate Sec. 2314).

The case at bar, involving an allegedly fraudulent scheme to copy and distribute copyrighted material, is four-square with the Dowling case except that the "circuitous" and "blunderbuss" route proposed by the government here is an indictment alleging conspiracy to commit interstate wire fraud, rather than interstate transportation of property "taken by fraud". This distinction is irrelevant, however, because the primary holding of Dowling -- that conduct interfering with copyright rights is punishable, if at all, under the Copyright Act -- applies equally to the wire fraud statute which, like the National Stolen Property Act, makes no reference to copyrighted materials and was enacted by Congress pursuant to its interstate commerce power to fill gaps in state law enforcement.

Moreover, this case is even stronger than Dowling in one important respect: Unlike the defendant in Dowling, who was found guilty of criminal copyright violations, 473 U.S. at 212, LaMacchia is not even charged with any violation of the Copyright Act. To permit the prosecution to use an indictment charging conspiracy to commit wire fraud so as to circumvent Congress's specific decision not to criminalize the conduct in question via the Copyright Act, would give rise to Due Process/notice and separation of powers concerns even more serious than those expressed by the Dowling Court. The indictment charges LaMacchia with conspiring to commit wire fraud, 18 U.S.C. Sec. 1343. Since, under Dowling, the conduct alleged to have been the objective of the conspiracy does not constitute wire fraud, the indictment fails to allege the essential element of agreement to engage in conduct which constitutes a federal crime. United States v. Laub, 385 U.S. 475 (1967); O'Malley v. United States, 227 F.2d 332, 335 (1st Cir. 1955), cert. denied, 350 U.S. 966 (1956). Accordingly, the indictment fails to state an offense and must be dismissed under F.R.Crim.P. 12(b).

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Argument

I. Congress did not Intend the Wire Fraud Statute to Apply to Copyright Infringement

At the core of the Dowling opinion is the Court's recognition that federal crimes are defined by statute, not by prosecutorial nor judicial interpretation. Quoting former Chief Justice Marshall, the Court reiterated that:

"The rule that penal laws are to be construed strictly, is perhaps not much less old that construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court which is to define a crime and ordain its punishment."

473 U.S. at 213-214 (quoting United States v. Wiltberger, 6 Wheat. 76, 95 (1820)). Thus, the Court emphasized that "[d]ue respect for the prerogatives of Congress in defining federal crimes prompts restraint in [the criminal] area, where we typically find a 'narrow interpretation' appropriate." 473 U.S. at 213 (quoting Williams v. United States, 458 U.S. 279, 290 (1982)).

The Court has repeatedly applied this constitutionally required principle of statutory construction by affording deference to the specialized and detailed provisions of the Copyright Act. See, e.g., Dowling, 473 U.S. at 220; Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984). In reversing the conviction under Sec. 2314 in the Dowling case, the Court observed that the deliberation with which Congress over the last decade has addressed the problem of copyright infringement for profit, as well as the precision with which it has chosen to apply criminal penalties in this area, demonstrates anew the wisdom of leaving it to the legislature to define crime and prescribe penalties 473 U.S. at 228. See also Sony, 464 U.S. at 429 ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product.") Here, as in Dowling, Congress has not given any indication that it intended a criminal fraud statute enacted pursuant to its commerce power to be used to protect rights which it created, and designed specific protections for, in the Copyright Act. To the contrary, a comparison of the language, history, and purpose

of the wire fraud statute and the Copyright Act evidence Congress's intent that prosecutions for copyright infringement be brought only under the criminal infringement provision of the Copyright Act.

1. Comparison of the Text of the Copyright Act With the Wire Fraud Statute's Prohibition of a "Scheme or Artifice to Defraud" Shows That the Wire Fraud Statute Does not Encompass Copyright Infringement.

The wire fraud statute requires proof of a scheme or artifice to defraud a victim out of his interest in money or property, Carpenter v. United States, 484 U.S. 19 (1987), however, nothing in Carpenter indicates that wrongful appropriation of the bundle of rights created by the Copyright Act is covered by the wire fraud statute's prohibition of schemes to defraud.5 To the contrary, in Dowling, the Supreme Court held that the wrongful appropriation of the federally created rights conferred by the Copyright Act was not intended by Congress to be reached by its use in Sec. 2314 of the phrase, "taken by fraud". In language which controls here, the Court stated:

It follows that interference with copyright does not easily equate with theft, conversion or fraud. The Copyright Act even employs a separate term of art to define one who misappropriates a copyright: "Anyone who violates any of the exclusive rights of the copyright owner, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute is an infringer of the copyright." 17 U.S.C. Sec. 501(a) Dowling, 473 U.S. at 217, quoting Sony Corp., supra, 464 U.S. at 433 (emphasis supplied).

The Court's refusal to equate wrongful misappropriation of copyright holder's profits with fraud, and its insistence that Congress intended such conduct to be proscribed exclusively by its specialized term of art -- infringement -- was based on far more than the lexical differences between different words used by Congress in the Copyright Act and in an interstate fraud statute. The Court explained that Congress's highly specialized and precise definitions of the circumstances in which the protection of the copyright holders' property interests would be redressed by a civil remedy or punished by a criminal sanction were just as carefully and purposefully phrased as the words Congress used to delineate and create the rights of the copyright holder in a protected work. The definitional boundaries of the copyright holder's property interest and the civil and remedies for its protection work together "correspondingly and harmoniously".

A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections. Dowling, supra, 473 U.S. at 216 (emphasis supplied).

This indictment attempts to evade these "correspondingly exact protections" embodied in Congress's design of the criminal infringement statute, 17 U.S.C. Sec. 506(a). As part of its carefully balanced statutory scheme, Congress purposefully limited the reach of the criminal sanction to those wrongful appropriators of copyrighted works or the profits derived therefrom who, unlike LaMacchia, act "wilfully and for purposes of commercial advantage or private gain". Congress deliberately chose not to impose a criminal sanction, more broadly, upon anyone who executes a scheme to deprive, or actually succeeds in depriving, a copyright holder of his money or property through illegal copying or distribution of his copyrighted work. The indictment seeks to have this court interpret the wire fraud statute, a non-copyright law, so as to reverse this legislative judgment, simply because the Department of Justice believes that Congress's definition of criminal copyright infringement is under-inclusive or inadequate to address rapidly changing technological conditions.

This court should insist, as the Dowling Court instructs, that it will not legislate in this manner. By comparing the texts of the Copyright Act and the interstate fraud statute at issue in that case, the Dowling Court recognized that Congress's exercise of its exclusive copyright power involves sensitive weighing of vitally important economic and non-economic interests.The Constitution authorizes Congress to

confer certain rights upon copyright holders "[t]o promote the Progress of Science and useful Arts." U.S. Const., art. I, Sec. 8, cl. 8. Unlike property rights created by state statutory or common law, the privileges conferred upon copyright holders "are not based upon any natural right that the author has in his writings", and "are neither unlimited nor primarily designed to provide a special benefit." Sony, 464 U.S. at 429 & n. 10 (quoting House Judiciary Report accompanying 1909 revision of Copyright Act, H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909)). "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' Art. I, Sec. 8, cl. 8." Feist Publications, Inc. v. Rural Telephone Service Co., U.S., 111 S.Ct. 1282, 1290 (1991). "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." 464 U.S. at 429 (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)). Copyright law makes profits to the copyright holder "a secondary consideration." Id. 8

Correspondingly, Congress has not criminalized all wrongful misappropriations of copyright holders' profits, nor all misappropriations of such profits accomplished by fraud or intended to be accomplished by a scheme or artifice to defraud. Congress has determined that wrongful conduct which seeks to inflict or actually inflicts a loss of such profits upon the copyright holder -- but which was not engaged in "for commercial advantage or private financial gain" -- not be addressed through a criminal sanction. The limited scope of the criminal sanction which Congress has designed for only a limited subset of wrongful misappropriations of copyright holders' rights is designed to be consonant with the scope of the limited monopoly which Congress granted to copyright holders, and its secondary ranking of the protection of copyright holders' profits as an objective of copyright law. The boundaries of the criminal copyright sanction are part of a comprehensive and exclusive legislative scheme which reflects a careful balance between encouraging both the production and dissemination of new works and widespread access to and use of these works. See Sony, 464 U.S. at 429. The First Amendment value of free dissemination of ideas is part of this balance and is embodied in the Copyright Act. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1165, 1171 (1994) (recognizing the "guarantee of breathing space within the confines of copyright"); Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 558-560 (1985) (recognizing that "the Framers intended copyright itself to be the engine of free expression" and that there are "First Amendment protections already embodied in the Copyright Act").

See Goldstein, supra at Par. 10.3 at 242 (describing consonance between copyright and First Amendment).

Thus, unlike the state law property rights protected by the wire fraud and similar interstate fraud statutes, "the copyright holder's dominion is subjected to precisely defined limits." Dowling, 473 U.S. at 217. For example, a copyright protects only the particular expression of facts or ideas, not the facts or ideas themselves. Campbell, 114 S. Ct. at 1169 & n.5; Harper & Row Publishers, 471 U.S. at 560 (recognizing the First Amendment protection embodied in the distinction between copyrightable expression and uncopyrightable facts and ideas). Similarly, the Copyright Act "has never accorded the copyright owner complete control over all possible uses of his work." Dowling, 473 U.S. at 216. Rather, the Act codifies the traditional privilege of others to make "fair use" of the copyrighted work. 17 U.S.C. Sec. 107; Campbell, 114 S. Ct. at 1170 (observing that the fair use doctrine guarantees "breathing space"). Recognition that a copyright "comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections," 473 U.S. at 216, led the Court in Dowling to conclude that "[w]hile one may colloquially like[n] infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud." 473 U.S. at 217-218 (emphasis supplied). See Sony, 464 U.S. at 451 n. 33 (holding that the copying of copyrighted material "does not even remotely entail comparable consequences to the copyright owner" as "theft of a particular item of personal property.") The government would have this court interpret non-copyright statutes in a manner which plainly interferes with Congress's carefully constructed statutory scheme, even though the Supreme Court assiduously protected the copyright laws from a similar Justice Department assault in Dowling. Here, as in Dowling, the alleged scheme to copy and distribute copyrighted materials does not constitute a "scheme to defraud" a victim out of money or property protected by the wire fraud and similar commerce power statutes. The highly specialized wording, nuanced balancing of interests and exclusively federal nature of Congress's system of protections from and remedies for copyright infringement indicates that Congress did not intend the wrongful misappropriation of copyright holders' profits or works to be punishable as an interstate "scheme to defraud" intended to deprive a person of money or property protected by state law.

As the Court cautioned in Dowling, "when interpreting a criminal statute that does

not explicitly reach the conductin question,...[courts should be] reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'" 473 U.S. at 218. Here, as in Dowling, this Court must conclude that Congress did not intend the wire fraud statute to reach the interference with copyright alleged in the indictment.

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The Legislative History of the Wire Fraud Statute Does not Demonstrate Congressional Intent to Reach Copyright Infringement Schemes

In Dowling the Court reasoned that the premise of section 2314 -- "the need to fill with federal action an enforcement chasm created by limited state jurisdiction" -- simply does not apply to the copyright area, where no such need exists due to Congress's constitutional authority to penalize copyright infringement directly, whether or not the infringement affects interstate commerce. 473 U.S. at 218-221. The Court pointed out that, in dealing with infringing goods, "Congress has never thought it necessary to distinguish between intrastate and interstate activity. Nor does any good reason to do so occur to us." 473 U.S. at 221. Similarly, the legislative history of the wire fraud statute reveals that it, like section 2314, represents a congressional exercise of the commerce power to fill state law enforcement gaps. The wire fraud statute was aimed primarily at preventing "frauds against the public." House Report No. 388, 82nd Congress, 1st Sess. at 1 (1951). Recognizing that fraud is inherently a matter of state rather than federal concern, Congress limited the wire fraud statute, as it had to for jurisdictional purposes, to situations involving interstate wire or radio transmissions. Id., at 3. The wire fraud statute, like the statute at issue in the Dowling case, was Congress's response to "the need for federal action in an area that normally would have been left to state law." 473 U.S. at 220.

As the Court emphasized in Dowling, however, copyright is an area of federal rather than state concern. Congress has regulated this area directly in the Copyright Act

and has chosen not to distinguish between intrastate and interstate infringements. 473 U.S. at 221. In contrast to the wide variety of fraud schemes covered by the wire fraud statute, the states have no interest in nor authority over schemes to infringe federal copyright rights, since Congress has expressly preempted the copyright area from state regulation and control. 17 U.S.C. Sec. 301. In short, since Congress has regulated the copyright area directly in the Copyright Act, there is no need for supplemental federal action under statutes enacted pursuant to Congress's interstate commerce power.

Here, as in Dowling, the premise of the criminal statute which the defendant is charged with violating -- "the need to fill with federal action an enforcement chasm created by limited state jurisdiction -- simply does not apply to the conduct the Government seeks to reach here." 473 U.S. at 221. Thus, in this case, as in Dowling, "it is implausible to suppose that Congress intended to combat the problem of copyright infringement by the circuitous route hypothesized by the Government." Id.

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The History of the Copyright Act Indicates That Congress did not Believe the Wire Fraud Statute Applied to Copyright Violations

In Dowling, the Court reviewed the legislative history of the Copyright Act through 1985 and found that it supplied additional reason not to presume "congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly." 473 U.S. at 221-226. The Court observed that "[n]ot only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, see 18 U.S.C. Sec.Sec.502-505, but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution."

473 U.S. at 221. The Court noted that Congress "hesitated long before imposing felony sanctions on copyright infringers," then "carefully chose those areas of

infringement that required severe response," and "studiously graded penalties even in those areas of heightened concern." 473 U.S. at 225. The Court found that this "step-by-step, carefully considered approach is consistent with Congress' traditional sensitivity to the special concerns implicated by the copyright laws," and utterly inconsistent with the "blunderbuss" idea of prosecuting copyright infringement indirectly through a fraud provision that was neither designed or tailored to apply to the specialized concerns involved in fixing criminal sanctions to protect the interests of copyright holders. 473 U.S. at 225-226. The Court observed that "neither the text nor the legislative history" of the Copyright Act "evidences any congressional awareness, let alone approval, of the use of" section 2314 "in prosecutions for interference with copyright." 473 U.S. at 225 n.18. The discrepancy between Congress's careful balancing of interests in the Copyright Act and the government's "blunderbuss" attempt to prosecute copyright infringement using an interstate fraud statute enacted pursuant to the interstate commerce power, convinced the Court "that Congress had no intention to reach copyright infringement when it enacted" the non-copyright criminal provision. 473 U.S. at 226.

Similarly, the discrepancy between the Congress's approach in the Copyright Act to criminalization of copyright infringement, particularly to criminal infringement of computer software copyrights, and the government's "blunderbuss" attempt to apply the wire fraud statute to this case leads to the conclusion that Congress did not intend for the wire fraud statute to reach copyright infringement. Unlike the wire fraud statute, which Congress has amended only three times in 42 years, Congress has frequently amended the Copyright Act in response to changes in technology. Sony, 464 U.S. at 430 & n.11 ("From its beginning, the law of copyright has developed in response to significant changes in technology."). Congress has shown particular care and precision in designing the copyright protection for computer software.

In 1974 Congress created the National Commission on New Technological Uses of Copyrighted Works (CONTU) to evaluate the need for legislation protecting computer software and to make specific recommendations for such legislation. See 120 Cong. Rec. 41415 (1974) (the evaluation by CONTU "is inherently valuable in our forthcoming review of the copyright laws.") (statement by Rep. Danielson). The Commission spent three years collecting data, holding hearings, and deliberating before recommending that the Copyright Act be amended to protect computer software. National Commission on New Technological Users of Copyrighted Works,

Final Report 2 (1978). Based on CONTU's recommendations, Congress enacted the Computer Software Copyright Act of 1980, which added to the Copyright Act provisions explicitly defining computer programs, 17 U.S.C. Sec.101, and authorizing owners of computer programs to copy them for certain purposes. 17 U.S.C. Sec. 117. Congress initially provided only a misdemeanor penalty for criminal infringement of computer software copyrights, and proceeded with caution before imposing felony penalties for such conduct. In enacting the Piracy and Counterfeiting Amendments of 1982, which created a felony penalty for certain types of copyright infringement, Congress specifically excluded infringements of computer software. Pub.L. 97-180, 96 Stat. 91 (amending 17 U.S.C. Sec.506(a) and enacting 18 U.S.C. Sec. 2319). Congress increased the copyright protection afforded computer software in the Computer Software Rental Amendments of 1990, but did not increase the criminal penalties for software infringement at that time. Pub.L. 101-650 (amending 17 U.S.C. Sec. 109). Congress waited until 1992 before enacting a felony penalty for software copyright infringement. Pub.L. 102-561 (amending 18 U.S.C. Sec.2319 to include computer software).

Far from evidencing any congressional awareness or approval of wire fraud prosecutions in this area, the legislative history of the 1992 amendment to the Copyright Act makes clear that Congress believed that infringement of computer software copyrights was not covered by any then-existing criminal felony provision. The Senate Report accompanying the 1992 amendment states that "[t]he only defense against piracy is the copyright law" and that the amendment creating a felony penalty for copyright infringement was necessary "[b]ecause acts of software piracy are only misdemeanors [and] prosecutors are disinclined to prosecute these criminal acts." Senate Report No. 102-997 192nd Cong., 2nd Sess, at 3 (1992). See Hearings on S. 893 before Subcommittee on Intellectual Property and Judicial Administration of House Judiciary Committee (August 12, 1992) (comment of Rep. James) ("all copyright infringements as they relate to computer programming are as a matter of law nothing more than a misdemeanor at this time. There is no felony involved.")7 Thus, in amending the Copyright Act in 1992, Congress believed it was creating the exclusive felony criminal provision applicable to copyright infringement. The legislative history of the 1992 amendment creating the felony penalty for software copyright infringement makes it especially clear that Congress intended criminal penalties to be imposed only upon "commercial pirates" and not individuals who, without profit motive, make or distribute infringing software for personal use or for friends. Senate Report 102-268 at 2 (provision is aimed at

"thieves who desire to duplicate and sell unauthorized copies"); Id. at 3 (the mens rea "limitation restricts prosecutions to commercial pirates); House Report 102-997 at 5-6 ("Even if civil liability has been established, without the requisite mens rea it does not matter how many unauthorized copies...have been made or distributed: No criminal violation has occurred."); 138 Cong. Rec. S. 17958-59 (October 8, 1992) ("the copying must be undertaken to make money, and even incidental financial benefits that might accrue as a result of the copying should not contravene the law where the achievement of those benefits were not the motivation behind the copying.") (comments of sponsor Sen. Hatch); 138 Cong. Rec. S. 7580 (June 4, 1992) ("the large-scale, commercially oriented copying of computer programs should be treated as a criminal offense") (comments of Sen. Hatch). The government's attempt to circumvent this mens rea requirement by prosecuting LaMacchia for conspiracy to commit wire fraud threatens to undermine the clear and manifest intent of Congress.

Similarly, Congress studiously graduated penalties and remedies under the Copyright Act, differentiating between civil and criminal penalties, and within the later category between misdemeanor (up to one year) and felony punishment (up to 10 years) based upon the extent of infringement involved, and between first-time (up to five years) and repeat (up to ten years) offenders. 18 U.S.C. Sec. 2319 (b). Application of the wire fraud statute in this area would override those graduations, imposing felony punishment regardless of the type or amount of the infringement. 18 U.S.C. Sec. 1343.9 See Dowling, 473 U.S. at 225-226. Use of the wire fraud statute to prosecute copyright infringement would also override Congress's enactment of a shorter statute of limitations for criminal copyright infringement prosecutions. Compare 17 U.S.C. Sec. 507(a) (three year statute of limitations for criminal copyright prosecutions), with 18 U.S.C. Sec. 3282 (general five-year statute of limitations applicable to prosecutions of noncapital offenses, including wire fraud). The Supreme Court has warned that courts should not expand upon the protections afforded by the Copyright Act without "explicit legislative guidance." Sony, 464 U.S. at 431; Dowling, 473 U.S. at 228-229. The government's belief that "[i]n this new electronic environment it has become increasingly difficult to protect intellectual property rights," provides no exception to this rule, for as the Court has stated "[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are

inevitably implicated by such new technology."

Sony, 464 U.S. at 431; Dowling, 472 U.S. at 228 (reversing conviction despite recognition of desire to utilize section 2314 as a tool to combat copyright infringement).

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The Consequences of the Government's Theory Counsel Against Application of the Conspiracy and Wire Fraud Statutes Here.

An additional factor in the Supreme Court's rejection the government's position in Dowling was the Court's recognition that "the rationale supporting application of the statute under the circumstances of this case would equally justify its use in a wide expanse of the law which Congress has evidenced no intention to enter by way of criminal sanction." 473 U.S. at 227. The Court expressed particular reluctance to utilize criminal statutes that do not expressly refer to copyright infringement to impose criminal penalties upon publishers of infringing materials. The Court referred to Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985), a case in which it had recently held that The Nation, a weekly magazine of political commentary, infringed former President Ford's copyright by publishing verbatim excerpts from his unpublished memoirs. Noting that the government's theory in Dowling would permit prosecution of The Nation for interstate transportation of its infringing publication under a criminal provision other than the Copyright Act, the Court stated that it would "pause, in the absence of any explicit indication of congressional intention, to bring such conduct within the purview of a criminal statute." 473 U.S. at 226.

Application of the wire fraud statute to the conduct in this case raises precisely the same concerns. If the wire fraud statute were applicable to the conduct in the case at bar, then it would also apply to anyone who transmits or receives even a single infringing copy of a computer software program through an electronic bulletin board

system or through electronic mail, even if the illicit copy were made solely for personal use, a result Congress clearly sought to avoid. See Part I.C., supra. The government's theory is not limited to computer software or computer networks, but would apply to anyone who copies any type of infringing material and who utilizes a computer, telephone, radio, or television, transmission or broadcast across state lines in connection with such activity.10 Moreover, under the government's theory the charge in this case - conspiracy to commit wire fraud -- would reach not only persons who engage in infringing conduct, but also - as in this case -- the computer systems operators, publishers, and broadcasters whose equipment or media may be used by others to carry out such activity. Just as in Dowling, where the Court refused to adopt an interpretation of a general criminal statute that could result in criminal punishment of magazine publishers for publishing infringing materials, so too here this Court should not interpret the wire fraud and conspiracy statutes to reach the conduct of a systems operator whose BBS is used by others to copy or transmit infringing materials, in the absence of any clear and definite expression of congressional intent to do so. These consequences, it should be noted, implicate First Amendment interests and values. The indictment in this case, which for purposes of a motion to dismiss we must take at face value,11 concedes that the defendant was the Systems Operator ("SYSOP") of a computerized BBS. It makes no allegation that the BBS was devoted exclusively to the copying of copyrighted software, and indeed it concedes that the BBS contained not only software, but "files and messages" which "can consist of virtually any type of data or information." (Indictment, Par. 7) Defendant's BBS, therefore, must be considered to be a general purpose BBS rather than one dedicated solely to the infringement of copyrighted software. The indictment makes no allegation that defendant himself uploaded, downloaded, nor copied any copyrighted software. It alleges simply that he maintained the BBS and thereby was able "to permit and facilitate" others in their copying software (Par. 5), and to permit others "to avail themselves of the opportunity" to do so. (Par. 9) The allegations in the indictment paint a picture of someone managing a BBS used by a wide variety of people for a variety of purposes. It alleges knowledge that software copying was going on, but there is no allegation that defendant provided the software to be copied, nor copied it himself.11 It is thus beyond doubt that the defendant was engaged, at least to some extent, in First Amendment protected activity, wholly aside from the question of the extent to which his alleged knowledge and "facilitation" of copying of copyrighted software on his general purpose BBS might have reduced such constitutional protection in some degree. Since the operation of a computerized

BBS is a communicative activity, First Amendment concerns limit the extent to which blunderbuss criminal statutes and creative prosecutorial attempts at extending the reach of the criminal law may be tolerated by a court. Those who are engaged in First Amendment activity cannot be confused with those who sell ordinary wares, such as food, who may be held strictly liable for the merchandise they sell. See Smith v. California, 361 U.S. at 154. Communicative activity needs "breathing space" in order to survive. N.A.A.C.P. v. Button, 381 U.S. 415 (1963) 12; New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Prosecution of an individual such as David LaMacchia under the wire fraud statute, given the fact that the Copyright statute does not criminalize his activity (see arguments I A-C, supra), is about as chilling to communicative activity as it can get.13

Indeed, courts have been very careful to avoid holding the common carrier distributors of information even civilly liable for such torts as defamation and business disparagement. See Cubby, Inc. v. Compuserve, Inc., 776 F.Supp. 135 (S.D.N.Y. 1991) (carrier that did not have responsibility to "manage, review, create, delete, edit and otherwise control the contents" of a computerized communications system could not be held liable on "a theory of vicarious liability" for the tortious actions of others (id at 143), because of the First Amendment).

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The Rule of Lenity Prohibits the Application of the Wire Fraud Statute to This Case

In refusing to extend a more general criminal statute to the area of copyright infringement, the Dowling Court invoked the "'time-honored interpretive guideline' that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" 473 U.S. at 228-229 (quoting Liparota v. United States, 471 U.S. 419, 427 (1985), quoting Rewis v. United States, 401 U.S. 808, 812 (1971)). See also United States v. Enmons, 410 U.S. 396 (1973); United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985). The primary purposes underlying the rule of lenity -- (1) to promote fair notice to those subject to the criminal laws and (2) to maintain the proper balance between Congress, prosecutors and courts -- require its application

in this case.

The rules governing conduct relating to copyright are spelled out in detail in the Copyright Act. Congress has amended the Copyright Act twice in the past five years to deal specifically with computer software, and has chosen not to make the conduct alleged in the indictment a crime. See Pub.L. 101-650 (amending 17 U.S.C. Sec. 109 to limit computer software rental); Pub.L. 102-561 (amending 18 U.S.C. Sec.2319 to permit felony punishment of commercial computer software infringement). It is reasonable -- indeed it is desirable -- for individuals and businesses to look to the Copyright Act in an effort to conform their copyright-related conduct to the law. Nothing in the Copyright Act provides any warning that the conduct alleged in the indictment constitutes a criminal offense; what message there is, is indeed to the contrary.

The wire fraud statute, in contrast, was enacted in 1952, long before the computer revolution, and cannot reasonably be considered to be a source of software copyright rights or duties. Indeed, we are not aware of any reported case in which the systems operator of a BBS has been successfully prosecuted for wire fraud or conspiracy to commit wire fraud for alleged copyright infringement occurring on his or her system. The government's attempt to use the wire fraud and conspiracy statutes to make new law in this case clearly violates the "fair warning requirements of the due process clause of the fifth amendment." United States v. Anzalone, 766 F.2d at 683.

In addition to the Due Process/notice problem just described, the government's attempt to utilize the wire fraud and conspiracy statutes in a manner which Congress neither foresaw nor intended threatens to undermine the proper balance between Congress, prosecutors and courts, which the rule of lenity is intended to preserve. The Supreme Court has repeatedly emphasized that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." United States v. Bass, 404 U.S. at 348 (cited in Anzalone, 766 F.2d at 680-681). As the First Circuit observed in Anzalone, "in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and thepublic weal." Our Constitution vests such responsibilities in the political branches. 766 F.2d at 683.13

In Dowling the Court recognized that lower courts were attempting "to utilize an existing and readily available tool to combat the increasingly serious problem of bootlegging, piracy, and copyright infringement," but rejected such attempts on the ground that the responsibility for defining federal crimes rests with Congress, not with the judiciary: the deliberation with which Congress over the last decade has addressed the problem of copyright infringement for profit, as well as the precision with which it has chosen to apply criminal penalties in this area, demonstrates anew the wisdom of leaving it to the legislature to define crime and prescribe penalties. 473 U.S. at 228. See M. Tigar, Mail Fraud, Morals and U.S. Attorneys,14 Litigation 22, 53 (1984) (arguing that "[i]f Congress has regulated in an area, there is little sense in letting Assistant United States Attorneys in each judicial district think up their own versions of the rules that everybody should obey and how they should be punished for violating those rules" through the vehicle of the federal fraud statutes.) Similarly, the contrast between the precision with which Congress has addressed the problem of computer software copyright infringement, both criminal and civil, in the Copyright Act, and the serious notice problems created by the government's unprecedented attempt to extend the reach of the wire fraud and conspiracy statutes to cover the conduct in this case, demonstrates the necessity of leaving it to Congress to define crime and punishment in the copyright area.

Here, as in Dowling, "Congress has not spoken with the requisite clarity" to prosecute the defendant for conspiracy to commit wire fraud. 473 U.S. at 229. In stark contrast to the Copyright Act, which deals explicitly with criminal copyright infringement of software, the language of the wire fraud statute does not "plainly and unmistakably" cover the area of copyright infringement; the purpose of the wire fraud statute -- to fill gaps in state law enforcement -- is not applicable to the problem of copyright infringement; and the rationale utilized to apply the wire fraud statute to the defendant's conduct would result in its extension to areas which Congress has not indicated any intent to reach. Id. As is evident from the 1990 and 1992 amendments to the Copyright Act, Congress is not hesitant to amend the Copyright Act as it deems necessary to address changes in computer technology and software development. If Congress deems it appropriate to criminalize the type of copyright-related activity in this case, Congress must do so in language that is "clear and definite." 473 U.S. at 214.

Because the wire fraud statute does not "plainly and unmistakably" cover the conduct alleged in the indictment, and indeed because the Copyright Act explicitly

excludes the alleged conduct from the ambit of criminal activity, the indictment charging David LaMacchia with conspiracy to commit wire fraud must be dismissed. Request for Oral Argument Defendant respectfully requests oral argument on this motion pursuant to Rule 7.1(D).

DATED: September 30, 1994, Respectfully submitted, David M. LaMacchia

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David Duncan (BBO #546121), Zalkind, Rodriguez, Lunt & Duncan, 65A Atlantic Avenue, Boston, MA 02110, (617) 742-6020, fax 742-3269, Certificate of Service, I, Andrew Good, hereby certify that I have this day served the foregoing motion on Jeanne Kempthorne, Assistant United States Attorney, 1000 Post Office & Courthouse, Boston, MA 02109 via hand delivery., Andrew Good

Footnotes

- 1.The indictment alleges that the defendant "knew or reasonably could have foreseen ... [that] traffic into and out of the CYNOSURE BBS for the purpose of unlawfully copying copyrighted software quickly became enormous." Indictment at Par. 12.
- 2.17 U.S.C. Sec. 506 provides that "[a]ny person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18." 18 U.S.C. Sec. 2319 provides for misdemeanor or felony punishment depending upon the degree of the infringement.
- 3.Indeed, it is doubtful whether LaMacchia's conduct as alleged in the indictment -- operating a BBS with actual or constructive knowledge that others are using the BBS to copy and distribute copyrighted materials without the consent of the copyright owners -- constitutes even a civil copyright violation. See Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984) (holding that sale of Betamax recorders does not constitute contributory infringement even where seller knows that customers use the equipment to make infringing copies).
- 4.In the press release issued with this indictment, United States Attorney

Donald Stern explained the government's reason for bringing this indictment as follows: In this new electronic environment it has become increasing difficult to protect intellectual property rights. Therefore, the government views large scale cases of software piracy, whether for profit or not, as serious crimes and will devote such resources as are necessary to protect those rights. U.S. Department of Justice Press Release (April 7, 1994)(emphasis added).

- 5.Article I, Sec. 8, cl.8 provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
- 6.Carpenter was held to have engaged in a scheme to defraud The Wall Street Journal of its property interest in proprietary information. The propriety information in issue was held to have been owned by the newspaper as property created and protected by state law -- not property created and protected by the federal copyright statute.
- 7.In fact, the legislative history of the 1992 amendment to the Copyright Act indicates that the Software Publisher's Association sought to make Congress aware of the Supreme Court's holding in Dowling that the Copyright Act is the exclusive source of criminal penalties for copyright-related crimes. Hearing on S. 893 before House Judiciary Committee Subcommittee on Intellectual Property and Judicial Administration (August 12, 1992) ("in one case the Supreme Court overturned a prosecution for copyright on what was essentially a copyright infringement under other Federal statutes because of the very strong presumption that this is an intellectual property area, and that Congress must legislate through its intellectual property policy authority.") (testimony of Attorney Bruce Lehman for the Software Publisher's Association).
- 8.See Office of Technology Assessment, Intellectual Property Protection for Computer Software, Hearings before the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice (November 2, 1989) ("Thus, the limited monopoly granted to authors via copyright ... is a quid-pro-quo arrangement to serve the public interest, rather than a system established only to guarantee income to creators.").
- 9.Section 1343 authorizes imprisonment for up to 30 years, and a fine of $1,000,000 if the violation affects a financial institution; otherwise imprisonment for up to five years and a $1,000 fine is authorized.
- 10.In 1992, Congress heeded computer industry concerns that the reach of the criminal sanction be clear and limited to commercial software pirates. "There

are millions of people with personal computers to make copies. That is exactly one of the reasons I think you want to be very careful. You do not want to be accidentally making a large percentage of the American people, either small businesses or citizens, into the gray area of criminal law." Hearing on S. 893 before the House Judiciary Subcommittee on Intellectual Property and Judicial Administration (August 12, 1992), Comments of Mr. Black, Vice President and General Counsel, Computer & Communications Industry Association, at 65.

- 11.The defendant does not agree with all of the facts and characterizations set forth in the indictment, particularly with respect to the defendant's role and duties as a computer bulletin board systems operator ("SYSOP"), as well as the nature of the BBS here at issue. However, these factual issues must be left for another day, if there be another day in this case.
- 12."Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." N.A.A.C.P. v. Button, 371, U.S. at 433.
- 13.This case thus touches upon a First Amendment question of first impression -- to wit, whether the SYSOP of a general purpose computerized BBS may be held criminally responsible as a conspirator for the activities of others who upload, download, and hence copy copyrighted software without paying a licensing fee to the copyright-holders, where the SYSOP did not himself upload, download, nor copy such software, and where the SYSOP did not operate the BBS for commercial gain. The Dowling Court expressed reluctance to adopt the government's interpretation of a criminal fraud statute which would have made the editors of The Nation liable even though those editors had complete control over the content of that publication and full knowledge of President Ford's ownership of the copyright in the excerpt of his memoirs which was published. The infant medium of computer bulletin boards operates to a very substantial degree beyond the control of even the most diligent SYSOP. The degree to which human editorial intervention and control are required by law is far from clear. The conspiracy charge would make LaMacchia criminally responsible for his failure to monitor, control, edit and censor the contents of a BBS that the Indictment itself describes as having generated "enormous" communicative traffic. (See Indictment Par. 12). The First Amendment concerns raised by the government's proposed applications of the wire fraud and conspiracy statutes to the activities of this new type of operator of a constitutionally protected medium can and should be avoided by rejecting the government's position, as the Dowling Court did. See "Note: The

Message in the Medium: The First Amendment on the Information Superhighway", 107 Harv.Law Rev. 1062, 1084 (a hallmark of the development of electronic media is that "both interactivity and infinite capacity will reduce the editorial control of network operators") (March 1994); see also Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959), rehearing denied, 361 U.S. 950, 80 S.Ct. 399 (1960) (statute seeking to impose strict criminal liability on bookstore owner for possessing obscene material, held violation of First Amendment).

- 14.As Professor Michael Tigar correctly observed in "Mail Fraud, Morals and U.S. Attorneys," 11 Litigation 22 (1984), the government's effort to enlist this court to approve its abuse of the wire fraud statute is the modern version of a constitutionally prohibited tactic which had been used by British common law judges -- have the courts declare conduct to be a crime after the accused has acted. Tigar quoted Jeremy Bentham's description of this tactic.

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