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FOR ENGINEERING AND SCIENCE

# An Issues Primer in the Criminal Prosecution of United States of America vs. David LaMacchia

## Author(s)

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## Description

Letter written by Harvey A. Silvergate about the history of media distribution and the traditional responsibilities of the distributor as it applies to the David LaMacchia case.

## Body

**\*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.\**

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There has been a lot of mis-information and mis-understanding floating around the electronic and print media concerning the issues in the prosecution of Massachusetts Institute of Technology undergraduate David LaMacchia, who was indicted on April 7, 1994 in the federal District of Massachusetts. This issues primer is meant to clarify what the case is and is not about, and to place into some

perspective the legal issues raised. The purpose of this memo is not, at this stage, to discuss any contested evidence in the case, since that will be played out at a later stage. Some of the case's legal implications are, however, clear from the start.

## **The charge in the indictment**

The indictment charges that David LaMacchia, by operating a computer bulletin board system, or "BBS", at M.I.T. during a period of some six weeks, thereby permitted and facilitated the illegal copying and distribution of copyrighted software by other unknown persons (presumably, the many computer users who logged onto the BBS). It is further alleged that LaMacchia knew that others were using his system for such a purpose, although it is *\*not\** alleged that the BBS was not used for other, lawful communication purposes as well. There is *\*no\** allegation that LaMacchia himself uploaded, downloaded, sold, profited from, used, or actually transmitted any such software. The government does not allege that LaMacchia violated the federal copyright or computer fraud statutes. Rather, the prosecution has charged him with engaging in a criminal conspiracy to violate the federal wire fraud statute, which was enacted in 1952 to prevent the use of the telephone wires in interstate fraud schemes.

## **What this case is NOT about**

This is not a case about whether "software piracy" is illegal under federal law. Both sides in the case are proceeding, and will proceed, on the assumption that it is not lawful to make and distribute copies of copyrighted computer software without paying a licensing or royalty fee to the copyright owner. There is likely to be agreement as well that if copyrighted software above a certain value is willfully copied and sold, a criminal copyright violation has occurred.

David LaMacchia is not alleged in the indictment to have uploaded or downloaded, transmitted to anyone or even used personally, any copyrighted software on the computer bulletin board system ("BBS"), or "node", that he created and operated from an M.I.T. computer.

LaMacchia is not alleged to have sold any copyrighted software, nor profited one penny from the copying or distribution of any such software.

It is not alleged that the computer BBS was used exclusively to transfer copyrighted software. Indeed, the indictment alleges that "part" of the conspiracy was to transmit "files and messages" on the system, part was "to create a library of software", and that "part" of the scheme was to allow some users to "unlawfully download copyrighted software."

## What this case IS about

This case raises the following significant issues in the overall larger question of whether, and how, the principles underlying freedom of speech and of the press (the First Amendment) will be applied to the world of computer communications ("cyberspace"):

1. Under current criminal statutes, may a systems operator ("SYSOP") of a computer BBS be held criminally responsible for what \*users\* of the system do while logged onto the network, including the exchange of copyrighted software or indeed, the publication of other copyrighted materials?
2. If current criminal statutes, including the "wire fraud" statute that LaMacchia is alleged to have "conspired" to violate, are interpreted to reach the SYSOP who does not himself upload, download, copy, use, or sell copyrighted software, do those statutes, as so interpreted, violate the First Amendment, and are they therefore unconstitutional?
3. In light of the uncertainty over whether and how current statutes, including the federal "wire fraud" statute, apply to the activities of a SYSOP of a computer BBS, does the government violate the "Due Process of Law" provision of the Fifth Amendment to the Constitution which prohibits criminal prosecution unless Congress has given citizens clear notice of what conduct is prohibited, by seeking to impose \*criminal\* liability on a SYSOP like LaMacchia, where any reasonable person (even a legal expert, but much less a 20-year-old undergraduate) would not have known that his conduct even arguably was a crime? In short, was LaMacchia given adequate \*notice\* that the wire fraud statute would be stretched to cover his activity? Is it fair, or constitutional, to prosecute such a person before the law is clarified?

## Discussion

The First Amendment to the United States Constitution has long conferred special protection on those engaged in the activity of maintaining communications media. Part of this protection has involved protecting such persons from being held criminally responsible for the criminal misuses of their systems and media by other people. Thus, for example:

It is well-known that certain classified advertisements for "dating services" found commonly in some newspapers are really covers for high-class \*prostitution\* rings. Yet only the people who actually run the prostitution services are prosecuted for those violations of law. Editors and publishers of the newspapers are \*not\* prosecuted on some legal theory that their classified sections -- and therefore they themselves -- somehow "aided" or "conspired with" the prostitution rings in the criminal prostitution enterprise, even if the editors and publishers were well aware of the fact that their newspapers were being misused for an illegal purpose.

It is well-known that gambling "numbers" syndicates utilize newspaper reports of scores of the outcomes of certain athletic events, as the basis for illegal sports-betting operations. Only the bookies are criminally prosecuted for such gambling activity. The newspapers -- their editors, publishers, and reporters included -- are never criminally prosecuted for the illegal activities of those who thus use the published sports reports.

In nearly every lending library in the country, there are one or more photocopying machines sitting in the midst of large number of books, many of which are copyrighted. Librarians surely understand that a certain number of people who make photocopies on those machines are copying \*copyrighted\* material, perhaps in violation of the copyright laws. There does not appear to be a criminal prosecution of any such librarians for "aiding" or "facilitating" breaches of the copyright laws.

The owner or manager of a bookstore may not be criminally prosecuted for the distribution of obscene material if, in a bookstore carrying a wide variety of printed materials, a certain quantity of those materials contain obscene portions. It does not even matter whether the bookstore owner or

manager suspects that some of the material in the store may contain obscene matter. It is not his or her legal responsibility to monitor and censor such materials, according to the United States Supreme Court. (Smith v. California, 361 U.S. 147 (1959))

The reason why the editor, publisher, reporter, librarian, and bookstore-owner and manager are all protected against criminal prosecution, is because the First Amendment protects them from being held criminally responsible for the acts of those who use, or mis-use, their media or their facilities. In short, because of the First Amendment, we do not assign to such people the role of being censors or "media cops."

In the case of a SYSOP (like David LaMacchia) of a computer BBS, the First Amendment would appear to protect him from criminal liability for the arguably illegal actions of other people using (or mis-using) his system to upload, download, transfer, copy, and use copyrighted software. Just as with the owner or manager of a bookstore or the librarian, it would be impossible for a SYSOP to monitor everything being uploaded to or downloaded from his computer BBS. Were such liability imposed, nobody would risk being a SYSOP, and virtually every computer BBS in the country would shut down. This is what the First Amendment is supposed to prevent.

The question in the LaMacchia case is whether the First Amendment protections that have long applied to those in the print medium, should apply fully to those in the computer communications medium. Because the law has been slow in adjusting to the age of digital communications, there have been relatively few legal tests of the scope of First Amendment protections in cyberspace. Civil libertarians have assumed that there surely should be no less constitutional protection for free speech and free press in cyberspace than elsewhere. Those few courts tests that have happened indicate that the First Amendment is indeed alive and well in cyberspace.

Now, in the case of United States v. David LaMacchia, we will learn whether the Department of Justice will be permitted to bend and stretch the old federal criminal "wire fraud" statute to cover the activities of a SYSOP who himself violates no copyright law, does not profit from the activities of others, and who merely runs the system perhaps even suspecting or knowing that it is being used for a wide variety of purposes -- some legal and some arguably illegal, or whether Congress, if it wishes to criminalize such activity, will have to pass a statute clearly making it a crime for a SYSOP to operate in this fashion. If and when such a statute is enacted, the question of whether the First Amendment allows a SYSOP to be treated

differently than a publisher, an editor, or a bookstore owner or manager, would have to be decided of course. But surely no SYSOP should be criminally prosecuted in the absence of such a statute, with no warning at all that he could face prison because it did not (and reasonably could not) occur to him that someone would claim under current law that he was committing a crime.

## **Notes**

(U.S. District Court, Boston, MA), Date: April 11, 1994.

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