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Government's Opposition to Dismissal (United States vs. D. LaMacchia)

Author(s)

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Year

1994

Description

The US Government's response to David LaMacchia's request for dismissal.

Body

United States District Court District of Massachusetts

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

Government's Opposition to motion to dismiss

The United States, by its attorneys, hereby opposes the defendant's Motion to Dismiss the Indictment.

David M. LaMacchia

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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Introduction

The gist of the defendant's argument, culled from 37 pages of rhetoric, is that the United States, by charging the defendant with conspiracy to commit wire fraud, has "invent[ed] a criminal charge . . .". Def. Mem., [1](#) Defendant claims that Congress did not intend to criminalize copyright infringement unless the infringement is for profit, and therefore, no criminal charge can stand even if the conduct alleged in the indictment falls within the purview of another federal criminal statute. Defendant asserts: "Congress deliberately chose not to impose a criminal sanction . . . 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." Def. Mem., 12.

Defendant's argument rests almost exclusively on the Supreme Court decision *Dowling v. United States*, 473 U.S. 207 (1985), which defendant characterizes as holding "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." Def. Mem.,[2](#)

Defendant's motion to dismiss should be denied. Defendant makes no showing -- indeed, does not attempt to show -- that the indictment does not state a violation of conspiracy to commit wire fraud, under the plain language of the conspiracy and wire fraud statutes. He seems to concede that it does. Instead, defendant argues that *Dowling* holds that Congress intended that conduct which does not constitute criminal copyright infringement may not be charged under any other criminal statute. *Dowling* simply does not so hold, nor do principles of statutory construction

support defendant's argument.

The government submits that it is well settled that in the absence of an express indication to the contrary, one criminal statute does not preclude enforcement under another applicable statute. Defendants do not cite or distinguish the legion of cases which so hold, and Dowling is not to the contrary. Indeed, the Copyright Act itself makes plain that Congress did not intend its provisions to be exclusive.

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The Indictment

The Indictment charges David LaMacchia with one count of conspiracy to commit wire fraud in violation of 18 U.S.C. Sec. 371. The Indictment alleges that LaMacchia combined and agreed with individuals unknown to the Grand Jury, to devise and execute a scheme and artifice to defraud, and for the purpose of executing and attempting to execute such scheme, to transmit and cause to be transmitted in interstate commerce, wire communications. Indictment, Par. 1. Specifically, the Indictment alleges that, using computer aliases, the defendant set up, participated in setting up, and operated a computer bulletin board system named "Cynosure" to permit and facilitate on an international scale the illegal copying and distribution of copyrighted software, without payment of licensing fees or purchase price to manufacturers and vendors of the copyrighted software. The Indictment charges that the purpose of Cynosure was "to pirate and distribute copyrighted software . . .". Indictment, Par. 8.2

Identified as overt acts in furtherance of the conspiracy are the defendant's posting of messages instructing users which directories to use to download files, which to use to upload files ("please do!"), which to use for private encrypted messages, as well as messages requesting specific software packages, including Sim City 2000, Excel 5.0, and WordPerfect 6.0. Defendant also warned users, under threat of taking the site private, not to disseminate the site address too widely, and complained that the system and back-ups had been "wiped clean" while he was away, possibly by "net.cops." Indictment, Pars. 14-20.

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Argument

I. The Copyright Act Does Not Preclude Enforcement of the Conspiracy and Wire Fraud Statutes.

A. The Dowling Decision Does Not Preclude the Charged Violation of the Conspiracy Statute.

Defendant argues 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." The watery soup of rhetoric seems to boil down to something akin to a preemption³ argument: that any activity that affects interests in copyright must be prosecuted, if at all, under the federal copyright statute even if the charged conduct falls within the purview of another criminal statute. Notwithstanding defendant's lengthy argument, premised almost solely on *United States v. Dowling*, 473 U.S. 207 (1985), defendant simply fails to demonstrate that the conspiracy and wire fraud statutes do not apply to schemes to defraud commercial software copyright holders of their license fees.

Defendant relies on *Dowling* for the proposition "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." Def. Mem., ⁴ *Dowling* does not stand for this proposition, or anything remotely like it. *Dowling* and his co-defendants were charged with 27 counts encompassing copyright infringement in violation of 18 U.S.C. Sec. 506(a), mail fraud in violation of 18 U.S.C. Sec. 1341, interstate transportation of stolen property in violation of Sec. 2314, and conspiracy to transport stolen property interstate in violation of 18 U.S.C. Sec. 371. The case involved the unauthorized production and distribution of record albums containing copyrighted material, specifically Elvis Presley music. *Dowling*, whose trial was severed from his co-defendants', was found guilty on all counts. He appealed. Defendant argued in the Ninth Circuit, among other things, that mailing catalogs advertising his bootleg records is not punishable under the mail fraud statute. The Ninth Circuit disagreed, finding that all of the elements of mail fraud were met. *Dowling* also argued that he could not be convicted of interstate transportation of

stolen goods under 18 U.S.C. Sec. 2314, because what he transported was not a "good, ware or merchandise" within the meaning of the statute. The Ninth Circuit disagreed, holding that the unauthorized sale of copyrighted material "clearly involved 'goods, wares or merchandise' within the meaning of the statute." 739 F.2d at 1451.

The Supreme Court granted certiorari only with respect to the section 2314 conviction in order to resolve a conflict among the Circuits on the application of that statute to copyright infringement. The Court framed the issue as follows: "In this case, we must determine whether the statute reaches the interstate transportation of 'bootleg' phonorecords, 'stolen, converted or taken by fraud' only in the sense that they were manufactured and distributed without the consent of the copyright owners of the musical compositions performed on the records." 473 U.S. at 206. The mail fraud and copyright convictions, upheld by the Ninth Circuit, were allowed to stand. The Supreme Court did not frame the section 2314 issue as the Ninth Circuit had. Whereas the Ninth Circuit focused on whether the bootleg copies constituted "goods, wares, and merchandise," the Supreme Court focused on whether the property which moved interstate had been "stolen, converted, or taken by fraud." It concluded that it had not.

The Court's analysis, unlike LaMacchia's, started with the language of the statute of conviction. Parsing section 2314 in light of interpretive authority, the Court concluded that the physical items which were transported across state lines must have themselves been physically stolen, converted, or taken. Dowling's bootleg phonorecords had not themselves been stolen; they had been manufactured by Dowling.

[T]hese cases and others prosecuted under Sec. 2314 have always involved physical "goods, wares, [or] merchandise" that have themselves been "stolen, converted or taken by fraud." This basic element comports with the common-sense meaning of the statutory language: by requiring that the 'goods, wares, [or] merchandise' be "the same" as those "stolen, converted or taken by fraud," the provision seems clearly to contemplate a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods.

Id. at 206. Finding that it "is less clear, however, that the taking that occurs when an infringer arrogates the use of another's protected work comfortably fits the terms

associated with physical removal employed by Sec. 2314" (id. at 217), the Court concluded that the crime charged "fits but awkwardly with the language Congress chose -- 'stolen, converted or taken by fraud' -- to describe the sorts of goods whose interstate shipment Sec. 2314 makes criminal." Id. at 218. This, then, is the holding of Dowling: that infringement of copyright is not a physical taking or removal within the ambit of the National Stolen Property Act, as codified in 18 U.S.C. Sec. 2314. The discussion in Dowling, upon which LaMacchia relies so heavily, about the legislative history of copyright protection serves only to provide "additional reason to hesitate before extending Sec. 2314 to cover the interstate shipments in this case." Id. at 221. The Dowling Court manifestly did not hold, as LaMacchia would have this Court believe, that any crime having anything to do with copyrights must be prosecuted, if at all, under the Copyright Act. Rather, Dowling held that, with respect to section 2314, "Congress has not spoken with the requisite clarity." Id. at 229.

Just as the Supreme Court did not hold that any crime involving copyrights must be prosecuted under the copyright statute, the Supreme Court did not hold that the copyright holder's interest may not be the subject of a scheme to defraud. While defendant claims that Dowling characterized the word "fraud" as "ill-fitting" when applied to copyright infringement (Def. Mem., 5), the defendant takes that language completely and misleadingly out of context. The Dowling Court was construing the terms "stolen, converted, and taken by fraud," not, as the defendant would have this Court believe, the term "fraud." The entire burden of the Dowling decision is that section 2314 requires a physical taking of the transported goods. To emphasize the word "fraud" over the word "taken" (Def. Mem. 10) is to ignore the import and meaning of the decision.

In short, whether copyright infringement may be the subject of a scheme to defraud was not even at issue in Dowling. Defendant blithely ignores decisions which do address whether a wire or mail fraud charge may be brought in connection with a scheme to distribute infringing goods. For example, defendant does not cite a post-Dowling decision squarely on point, *Cooper v. United States*, 639 F. Supp. 176 (M.D. Fla. 1986), *aff'd without opinion*, 822 F. 2d 63 (11th Cir.), *cert. denied sub nom. McCulloch v. United States*, 484 U.S. 947 (1987). There, the court refused to vacate wire fraud convictions premised on copyright violations, stating:

In this Court's opinion, Dowling cannot be interpreted so as to remove from the reaches of the wire fraud statute a scheme to defraud copyright

owners, musicians and the public from the protections afforded by the copyright laws of this country. Accordingly, the Court will uphold all of petitioners' convictions involving the crime of wire fraud.

639 F. Supp. at 180. Indeed, the Supreme Court in Dowling left undisturbed the Ninth Circuit's decision upholding a mail fraud conviction in addition to a copyright infringement conviction, a fact one cannot glean from defendant's lengthy memorandum. Nor can one discern from defendant's citation of *United States v. Gallant*, 570 F. Supp. 303 (S.D.N.Y. 1983), [5](#) (Def. Mem., 6) that the case addresses whether the copyright infringement at issue constituted a "scheme to defraud." It does not come close to holding that enforcement of the conspiracy or wire fraud statutes is precluded by the Copyright Act.

B. The Copyright Act Expressly Does Not Preclude Other Criminal Enforcement.

Defendant's argument, variously expressed, that Congress intended that "prosecutions for copyright infringement be brought only under the criminal infringement provision of the Copyright Act" (Def. Mem., 10) is not only not supported by Dowling; it is expressly at odds with the language of the Copyright Act itself. Title 18, section 2319(a) provides:

Whoever violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law.

Notwithstanding repeated adjurations to this Court to respect "Congress's carefully constructed statutory scheme" (Def. Mem., 16), defendant nowhere in his 37-page brief ever advises this Court of this statutory language -- controlling language which is manifestly at odds with defendant's central preemption argument.

C. Enactment of the Copyright Act Did Not Carve Out from the Scope of the Wire and Mail Fraud Statutes Schemes to Defraud Victims of License Fees and other Property Related to Copyright.

To the extent that defendant argues that enactment of the Copyright Act somehow constricted the scope of the wire and mail fraud statutes, that argument must be rejected. It has been held repeatedly that enactment of particularized federal interest statutes does not oust a more general interstate commerce statute from

application. As then-Chief Justice Burger stated in his dissent in *United States v. Maze*:

The mail fraud statute continues to remain an important tool in prosecuting frauds in those areas where legislation has been passed more directly addressing the fraudulent conduct. 414 U.S. 395, 406 (1974). Contrary to defendant's claims, this is true even in situations where Congress does not need to rely on the interstate commerce clause for jurisdiction. Thus, the mail and wire fraud statutes continue to have vitality in the areas of tax evasion (see. e.g., *United States v. Mangan*, 575 F.2d 32 (2d Cir.), cert. denied, 439 U.S. 931 (1978); *United States v. Dale*, 782 F. Supp. 615 (D.D.C. 1991); *United States v. Regan*, 713 F. Supp. 629, 633-35 (S.D.N.Y. 1989), and cases cited therein); federal securities cases (see. e.g., *Carpenter v. United States*, 484 U.S. 19 (1987)), cases involving the Commodity Futures Trading Act (see e.g., *United States v. Brien*, 617 F.2d 299, 310 (1st Cir.), cert. denied, 446 U.S. 919 (1980), and the Food, Drug and Cosmetic Act (*United States v. Dino*, 919 F.2d 72 (8th Cir. 1990), cert. denied, 112 S.Ct. 50 (1991)). Defendant neither acknowledges nor distinguishes this well-established line of authority.

II. Copyright Infringement May Be the Subject of a Scheme to Defraud.

Defendant vaguely argues, at Def. Mem., 10-17, that a scheme to defraud software manufacturers of software licensing fees is not encompassed within the wire fraud statute. Defendant points to nothing in the language of the wire and nothing in the case law so holding. Defendant does not contest that, by its terms, the conspiracy and wire fraud statutes encompass the acts charged in the indictment: to wit, a conspiracy to engage in a scheme to defraud software manufacturers and vendors from license fees, that is, money, using the interstate wires to further the scheme.

Instead, defendant argues, in the negative, that nothing in *Carpenter v. United States*, 484 U.S. 19 (1987), "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." The problem with this analysis is that nothing in *Carpenter* indicates that it is not.

Carpenter held that intangible property rights, in that case, confidential business information consisting of the publication schedule and contents of the Wall Street Journal's "Heard on the Street" column, was held to be protected "property" within the purview of the mail fraud statute. The Court's words rejecting the petitioners' argument in Carpenter translates readily to a software manufacturer's copyright:

Petitioners' arguments that they did not interfere with the Journal's use of the information or did not publicize it and deprive the Journal of the first public use of it . . . misses the point. The confidential information was generated from the business, and the business had a right to decide how to use it prior to disclosing it to the public [I]t is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter.

Id. at 26-27. Absolutely nothing in the case distinguishes intangible rights to copy, distribute, and license computer software from other intangible property interests, and defendant makes no effort to flesh out any principled distinction between them.

Instead, defendant leaps to purported legislative history, not of the charging statute, criminal conspiracy, but of the copyright enforcement statute, a statute which defendant has not been charged with violating. Defendant argues that "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." Def. Mem., 23. Defendant's argument ignores virtually every principle of statutory construction. "It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985), quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 856 (1975) (Powell, J. concurring). See also *Mosquera-Perez v. Immigration and Naturalization Service*, 3 F. 3d 539, 542 (1st Cir. 1993) ("Whenever a court is charged with statutory interpretation, the text of the statute must be its starting point."). "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2594 (1992). See also *Laracuent v. Chase Manhattan Bank*, 891 F. 2d 17, 23 (1st Cir. 1989) ("Absent a clearly expressed legislative intention to the contrary, the plain language of the statute is conclusive."). Here, the defendant never reaches, much less starts with, the plain

language of the conspiracy and wire fraud statutes. He does not even acknowledge, much less explain away, the express non-preemptive language of 18 U.S.C. Sec. 2319.

Defendant does not assert any ambiguity in the language of the conspiracy or wire fraud statutes other than to claim generally that the statutes do not speak with the "requisite clarity," parroting Dowling. He does not point to a single phrase in the extensively interpreted conspiracy and wire fraud statutes which eludes clear definition. In the absence of an ambiguity, there is no call to investigate supposed legislative intent.⁶ "When a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart*, 112 S.Ct. at 2594. See also *State of Rhode Island v. Narragansett Indian Tribe*, 19 F. 3d 685, 698 (1st Cir. 1994) ("When a statute's text is encompassing, clear on its face, and productive of a plausible result, it is unnecessary to search for a different, contradictory meaning in the legislative record."). As the First Circuit recently stated: We "assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose," *Stowell v. Ives*, 976 F. 2d 65, 69 (1st Cir. 1992) (quoting *Morales v. Trans World Airlines. Inc.*, -- U.S. --, 112 S.Ct. 2031, 2036, 119 L.Ed.2d 157 (1992), and we "resort to the legislative history and other aids of statutory construction only when the literal words of the statute create ambiguity or lead to an unreasonable result, n id. (quoting *United States v. Charles Georae Truckina Co.*, 823 F. 2d 685, 688 (1st Cir. 1987)). If the statutory language makes the intent of Congress clear and unambiguous, we give full effect to that intent . . .

3 F.3d at 554. Defendant has the process backwards. He resorts to the legislative history of an uncharged statute in order to create clouds and confusion obscuring the clear meaning of the statute that was charged. That the conspiracy and wire fraud statutes are broad in scope does not render them ambiguous; there is therefore no call to investigate the legislative history of the various amendments to the Copyright Act.

Even if the Court should properly consider legislative history in order to clarify legislative intent, the legislative history of the Copyright Act and its amendments sheds no interpretive light on the scope of the conspiracy and wire fraud statutes. The fact that the Copyright Act does not and was not intended to criminalize noncommercial infringement,⁷ does not mean that Congress intended to carve out from the existing conspiracy and wire fraud statutes an exemption for conspiracies

to engage in widespread noncommercial infringement utilizing worldwide computer networks. Defendant points to nothing in the legislative history which is susceptible to an interpretation that Congress intended to so limit the broad scope of the conspiracy and wire fraud statutes, neither of which requires that the defendant profited from the criminal scheme. Once again, defendant ignores a contrary rule of construction: "Ultimately, 'absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction. '" United States v. Ferryman, 897 F.2d 584, 589 1st Cir. 1990), quoting Johnson v. First National Bank, 719 F.2d 270, 277 (8th Cir. 1983).

III. The Rule of Lenity Has No Application to this Case.

Defendant argues that the rule of lenity prohibits the application of the wire fraud statute to this case. Defendant argues that the Copyright Act provides no warning that the conduct alleged in the indictment constitutes a criminal offense, and the wire fraud statute "cannot reasonably be considered to be a source of software copyright rights or duties." Def. Mem., 32-33. Defendant continues: "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." Defendant's rule-of-lenity argument should be rejected. An indispensable requirement for application of the rule is an ambiguous statute:

Under the rule of lenity, a "[c]ourt will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). But an indispensable condition for the rule's operation is statutory ambiguity. See *Bifulco v. United States*, 447 U.S. 381, 387 (1980). The doctrine is not invoked until a court, "[a]fter 'seiz[ing] every thing from which [legislative intent] can be derived . . . [is] left with an ambiguous statute.'"

Ferryman, 897 F.2d at 590, quoting *United States v. Bass*, 404 U.S. 336, 347 (1971). While defendant had no reason to believe that his conduct could be prosecuted under 18 U.S.C. Sec. 2319, he had every reason to know that his agreement with others to embark on a scheme to use the Internet to distribute a vast amount of commercial software packages in fraud of the software manufacturers right to receive licensing fees was a criminal conspiracy to commit wire fraud. That conduct does not amount to a crime under one statute provides small comfort if the conduct

does meet the elements of another crime. See *United States v. Hurley*, 957 F.2d 1, 4 (1st Cir.), cert. denied, 113 S.Ct. 60 (1992); *United States v. Barker Steel Co.*, 985 F.2d 1123, 1129 (1st Cir. 1993) (rejecting fair warning defense to sec. 371 charge; defendants may be guilty of criminal conspiracy to defraud United States even though Minority Business Enterprise programs did not impose criminal sanctions or penalties for defendants' conduct and defendants did not violate any duty imposed upon them by the program).⁸ See also *United States v. Tarvers*, 833 F.2d 1068, 1075 (1st Cir. 1987) ("The statute does not require that the means used to achieve the unlawful goal of the conspiracy be unlawful."). While the defraud clause is not at issue in this case, the reasoning of these cases is directly analogous to the issue whether the "scheme to defraud" under sec. 1343 must involve criminal conduct. The Copyright Act does not provide a safe harbor for infringers who utilize the wires or mails to further a fraudulent scheme, simply because the scheme involves copyrighted materials. Indeed, the wire or mail fraud statutes have been used to prosecute copyright infringement.⁹ See, e.g., *Dowling*, 739 F.2d 1445 (9th Cir. 1984); *RCA Corp. v. Tucker*, 1985 WL 26032 (E.D.N.Y. 1985) (noting that defendant had earlier pleaded guilty to a criminal information charging him with wire fraud and criminal copyright infringement). That Congress may have decided not to criminalize infringing copying done for personal use or to distribute to friends, as defendant argues, hardly means it did not intend the wire and mail fraud statutes to apply to schemes, using aliases and secret addresses to elude detection and to deceive the software manufacturers, to collect, archive and distribute good-as-original unlicensed copies of commercial software worldwide over computer networks.

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Conclusion

For the foregoing reasons, the United States respectfully submits that the defendants Motion to Dismiss should be denied.

Respectfully submitted,

Donald K. Stern, United States Attorney, By: [signed] Jeanne M. Kempthorne,
Assistant U.S. Attorney, Certificate of Service, Suffolk, ss. Boston, Massachusetts,
October 24, 1994

I, Jeanne M. Kempthorne, Assistant U.S. Attorney, do hereby certify that I have caused a copy of the foregoing to be served on David Duncan, Esq., Zalkind, Rodriguez, Lunt & Duncan, 65a Atlantic Avenue, Boston, Massachusetts 02110, and on Harvey Silverglate, Esq., Silverglate & Good, 89 Broad Street, 14th Floor, Boston, Massachusetts 02110-3511 by hand delivery. [signed] Jeanne M. Kempthorne, Assistant U.S. Attorney.

Footnotes

- [1.](#) The conspiracy statute, 18 U.S.C. Sec. 371, provides in relevant part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each [shall be subject to specified criminal penalties].

The wire fraud statute, 18 U.S.C. Sec. 1343, provides in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate ~ or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be [subject to specified criminal penalties].

- [2.](#) Defendants characterization of the indictment does not bear even cursory scrutiny. The notion that defendant was running a general purpose BBS (as he is at pains to assert at Def. Mem., 29) is nowhere supported in the indictment; as defendant knows, it is not supported by the evidence either. Similarly, defendants attempt to characterize the indictment as not alleging that the defendant himself uploaded, downloaded or copied copyrighted software (Def. Mem., at 29), strains credulity. Paragraph 17 of the indictment alleges that defendant himself requested particular software packages. Defendant also ignores paragraph 18 where he is alleged to have advised his coconspirators that he is periodically "moving stuff" to Cynosure I from Cynosure II, which he designated the upload site. Obviously, the import of paragraph 18 is that by "moving stuff" from one workstation to another, defendant is alleged to have

copied materials in managing his archive site. Again, the evidence in this case, as defendant knows, is that he copied software files not only between the Student Center workstations which operated as FSP (File Service Protocol) upload and download sites, but also from the Student Center workstations to his directory (designated "dml") at a workstation at the Artificial~ Intelligence Laboratory at MIT. Defendant also copied at least one "cracker" package which disabled the licensing restriction on a copyrighted package he copied from the Student Center workstation to the AI workstation "dml" directory.

- [3.](#) Technically, the term "preemption" is a Supremacy Clause concept applicable only to the relationship between state and federal law. "The proper mode of analysis for cases that involve a perceived conflict between two federal statutes is that of implied repeal." *State of Rhode Island v. Narragansett Indian Tribe*, 19 F. 3d 685, 703 (1st Cir. 1994).
- [4.](#) See also Def. Mem., 7 (" . . . the primary holding of *Dowling* -- that conduct interfering with copyright rights is punishable, if at all, under the Copyright Act -- . . .).
- [5.](#) More recently, the Southern District of New York in *United States v. Regan*, 713 F. Supp. 629, 634-35 (S.D.N.Y. 1989), questioned the continuing validity of *United States v. Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1874), authority which Gallant cited in support of its reasoning that the "fraud statutes are not needed as 'stop gaps' because there is particularized legislation -- the Copyright Act -- which has already been developed to deal with the instant offense." Gallant, 570 F. Supp. at 309. Reaan refused to follow Henderson's holding that federal tax evasion could not also be prosecuted under the mail fraud statutes. The court stated:

The third argument on which the Henderson decision rests is that the mail fraud statute was intended for use only where specialized legislation has not yet been developed to deal with a particular species of fraud. If this is so a very large portion of mail and wire fraud case law is in error. As former Chief Justice Burger noted in the very dissent that Judge Weinfeld cited in support of his holding in Henderson, "[t]he mail fraud statute continues to remain an important tool in prosecuting frauds in those areas where legislation has been passed more directly addressing the fraudulent conduct." *United States v. Maze*, 414, U.S. 395, 406 (1974) (Burger, C.J., dissenting) . . .

713 F. Supp. at 635. This issue is addressed more fully in Sec. I, C, *infra*, at pp. 11-12.

- [6](#). The First Circuit, in *Stowell v. Secretary of Health & Human Services*, noted: "[R]eviewing legislative history is like looking over the crowd at a party and picking out one's friends." 3 F. 3d 539, 543 (1st Cir. 1993), quoting Patricia J. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 86 Iowa L. Rev. 195, 214 (1983) (quoting Leventhal, J.).
- [7](#). The legislative history makes plain that, in amending 18 U.S.C. Sec. 2319 to make volume software copyright infringement a felony rather than a misdemeanor, Congress was concerned with the magnitude of the losses caused by software piracy. Senator Hatch, the cosponsor of the bill, stated:

Mr. President, the willful infringement of copyright in computer software programs is a widespread practice that is threatening the United States software industry. The easy accessibility of computer programs distributed in magnetic media format, together with the distribution of popular applications programs, has led to persistent large-scale copying of these programs. Studies indicate that for every authorized copy of software programs in circulation, there is an illegal copy also in circulation. Losses

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