Reply to Government's Opposition to Defendant's Motion to Dismiss (United States vs. D. LaMacchia)

Author(s)

Anonymous

Description

David LaMacchia's lawyers' reply to government's opposition to defendant's motion to dismiss the case (United States vs. D. LaMacchia).

Body

United States District Court

District of Massachusetts

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

United States of America v. David LaMacchia

Reply to Government's opposition to defendant's motion to dismiss.

December 28, 1994

***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

We have argued that the indictment against David LaMacchia fails to allege a conspiracy to commit wire fraud because, under the authority of Dowling v. United States, 473 U.S. 207 (1985), the alleged object of the conspiracy --copyright infringement -- is not covered by the wire fraud statute. Def. Mem. at 10. While the government urges this Court to ignore the lengthy discussion of copyright contained in the Dowling opinion and to pretend that the Supreme Court held only that "section 1343 requires a physical taking of the transported goods," Gov. Opp. at 9, this crabbed reading of Dowling is not reasonable, has been rejected by the leading commentators, is not contained in any of the cases cited by the government, and is inconsistent even with the position previously taken by the Department of Justice as to the import of Dowling.

Unable to answer our Dowling argument, the government instead sets up a straw man to knock down. The "legion of cases" cited by the government in support of the proposition that the Copyright Act did not repeal the wire fraud statute by implication (Gov. Opp. at 1, 5 & n.3, 11-12), are inapposite to our actual position, which is that the wire fraud statute, which was enacted long after the Copyright Act, never covered copyright infringement. 1

The government's remaining claims are either false, or were rejected by the Supreme Court in Dowling. First, contrary to the government's repeated assertions that the defense has failed to address the plain language of the wire fraud statute,

Gov. Opp. at 2, 5, & 12,2 we have urged this Court to follow the plain language analysis employed by the Supreme Court in Dowling. Def. Mem. at 10-17. Just as the Dowling Court held that copyright rights cannot be "taken by fraud" within the meaning of 18 U.S.C. Sec. 2314, by the same reasoning, copyright rights cannot be "obtain[ed]" by means of a "scheme or artifice to defraud" within the meaning of the wire fraud statute. Def. Mem. at 16.

Second, Dowling and case law interpreting it disprove the government's assertion that copyright rights are indistinguishable from the type of intangible property protected by the wire fraud statute under Carpenter v. United States, 484 U.S. 19 (1987), Gov. Opp. at 13. The Dowling Court distinguished the unique bundle of rights granted by the Copyright Act from the type of interests -- tangible as well as intangible -- protected by the federal interstate theft statutes. 473 U.S. at 216-218; United States v. Riggs, 739 F. Supp. 414 (N.D. Ill. 1990) (distinguishing copyright rights, which can only be "infringed," from intangible proprietary business information, which may be obtained by a "scheme to defraud").

Third, contrary to the government's assertion, consideration of the scope and history of the criminal copyright provision -- in which Congress demonstrated a clear intent not to criminalize the conduct charged in the indictment -- is not only appropriate, but mandated by Dowling. Here, as in Dowling, the discrepancy between the Congress's sensitive balancing of interests in the Copyright Act, and the government's indirect, "blunderbuss" attempt to use interstate theft statutes to prosecute copyright infringement, supports the conclusion that Congress did not intend the wire fraud statute, any more than the National Stolen Property Act to reach copyright infringement. Finally, the government's claim that the general nonexclusivity provision of the Copyright Act controls this case should be rejected by this Court just as the same argument was rejected by the Supreme Court in Dowling. Since the wire fraud statute does not cover copyright infringement, the general provision of the copyright right act not precluding other applicable statutes has no bearing on this case.

Back to Top

This Case is Controlled by Dowling

The Dowling opinion charted the course for determining whether an interstate theft statute applies to copyright infringement, and thus controls this case. Def. Mem. at 4-7. The leading copyright commentators agree. Def. Mem. at 6 (citing Nimmer and Goldstein treatises). While the government asserts that Dowling stands for nothing more than the proposition that "section 2314 requires a physical taking of the transported goods" Gov. Opp. at 9, this assertion is not based on a fair reading of Dowling and was even rejected by the Justice Department in a previous case.

As even the government acknowledges, the question framed by the Dowling Court was not whether Sec. 2314 requires a physical taking, but rather, whether copyrighted musical compositions used without authorization or payment of royalties "are consequently `stolen, converted, or taken by fraud' for purposes of Sec. 2314.'" 473 U.S. at 216; Gov. Opp. at 7. If, as the government asserts, the Court were concerned only with the distinction between tangible and intangible property, there would have been no reason for the Court to engage in the lengthy discussion of the language and history of the Copyright Act and of the unique bundle of rights created therein. Dowling, 473 U.S. at 216-229. The point of this discussion, which is central to the Court's holding, is that copyright rights are different from the property interests protected by the interstate theft statutes.

Moreover, the government's assertion that "the entire burden of the Dowling decision is that section 2314 requires a physical taking of the transported goods," Gov. Opp. at 9, is directly contrary to the position advocated by the Justice Department in United States v. Riggs, 739 F. Supp.414 (N.D. Ill. 1990). In Riggs, the defendant was charged with violating Sec. 2314 by transmitting confidential, proprietary business information over a computer network. In response to the defendant's argument that, under Dowling, Sec. 2314 does not apply to the transmission of intangible property, the government took the following position:

viewed in its correct context, Dowling was emphasizing that Sec. 2314 sanctions property obtained by theft rather than stating that Sec. 2314 was concerned with the tangible or intangible nature of the thing stolen.

"Government's Response to Defendant Neidorf's Motion to Dismiss Counts Three and Four of the Indictment Relating to Interstate Transportation of Stolen Property" at 14. None of the cases cited by the government support the proposition that Dowling is limited to nothing more than a ruling that section 2314 requires a "physical taking." The government's reliance on the Court of Appeals' decision in Dowling is

misplaced for two reasons. First, contrary to the implication in the government's brief, the fact that the Court did not review the Ninth Circuit's affirmance of the mail fraud conviction does not indicate agreement with the lower court's decision. United States v. Carver, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times."); Stern, et. al, Supreme Court Practice 239 (1993) Rather, the Court's decision to review the section 2314 issue and not the mail fraud issue was evidently due to the fact that a circuit conflict existed on the former, but not on the latter. 473 U.S. at 213 & n.6. Second, the reasoning employed by the Court of Appeals in affirming Dowling's mail fraud conviction was eviscerated by the Supreme Court. The Ninth Circuit based its conclusion that the mail fraud statute covers copyright infringement upon its earlier ruling that Sec. 2314 covers copyright infringement. 739 F.2d at 1448 (citing United States v. Belmont, 715 F.2d 459 (9th Cir. 1983), cert. denied, 465 U.S. 1022 (1984)). The Supreme Court's rejection of the Belmont holding means that there is no reasoning to support the Ninth Circuit decision. See 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."). The other authorities cited by the government shed little or no light on the question before this Court. The decision in 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. McCullock v. United States, 484 U.S. 947 (1987), contains no reasoning. Moreover, based on the description in the district court opinion, it appears that the defendants did not make the argument presented here, namely, that the wire fraud statute, by its terms, does not reach copyright infringement. 3

The citation to RCA Corp. v. Tucker, 1985 WL 26032 (E.D.N.Y. 1985), an unpublished memorandum in a civil copyright case indicating that the defendant had earlier pled guilty to a 1979 information charging him with wire fraud and copyright infringement, is entirely specious, since the plea occurred before the Supreme Court's decision in Dowling, and the defendant did not raise any challenge to the government's use of the wire fraud statute.

Accordingly, this Court should reject the government's crabbed reading of Dowling.

Back to Top

The Conduct Alleged in the Indictment Fails to state an Offense Under the Plain Language of the Conspiracy and Wire Fraud Statutes

Contrary to the government's claims that we have failed to address the plain language of the wire fraud statute, we have argued that Congress did not intend the phrase "obtaining money or property" by means of "a scheme or artifice to defraud" to include copyright infringement. Just as the Supreme Court held in Dowling that copyright rights (including rights to royalties and licensing fees) cannot be "taken by fraud" within the meaning of 18 U.S.C. Sec. 2314, so too here, the allegedly infringing conduct does not amount to "obtaining money or property" by means of a "scheme or artifice to defraud" within the meaning of the wire fraud statute. Def. Mem. at 16. There is no basis for holding that copyright rights cannot be "taken by fraud" under one federal interstate theft statute (Sec. 2314), but can be "obtained" by means of a "scheme or artifice to defraud" under another federal interstate theft statute (Sec. 1343). Indeed, first principles of statutory construction prohibit such an absurd result. Sutherland Statutory Construction 229-230 (1992) (Courts are "under a duty to construe statutes harmoniously where that can reasonably be done.").

Back to Top

Courts have Distinguished Copyright Rights from the Type of Property Interests Protected by the Interstate Theft Statutes

In Dowling, the Court concluded that copyright "infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud," not simply because copyright rights are intangible, as the government

emphasizes, but because 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. As we set out in great detail in our initial memorandum, the financial interest of copyright holders is but a secondary consideration in a delicate balance of rights and remedies designed to promote the production and dissemination of new works. See Def. Mem. at 13-16. The copyright holder's interest, which is "subjected to precisely defined limits," is "distinct from the possessory interest" that can be "converted, stolen, or taken by fraud." 473 U.S. at 217. It is, in the words of the Supreme Court, "the special concerns implicated by the copyright laws," 473 U.S. at 225, that distinguish copyright rights from the type of property - whether physical or intangible - that is encompassed within the general interstate theft statutes.

The government's claim that no distinction can be drawn >between copyright rights and the type of intangible property interests protected by the wire fraud statute, is further undermined by United States v. Riggs, 739 F. Supp. 414 (N.D. Ill. 1990), in which the defendant was charged with transferring intangible, confidential business information on a computer network in violation of section 2314. Rejecting the defendant's argument that Dowling prohibited his prosecution for transmitting intangible information, the Court distinguished confidential business information, "something which has clearly been recognized as a item of property" under Carpenter, from copyright rights, which, under Dowling, can only be "infringed." 739 F. Supp. at 423. The court held that "while the holder of a copyright possesses certain property rights which are protectible and enforceable under copyright law, he does not own the type of possessory interest in an item of property which may be "stolen, converted or taken by fraud." 739 F. Supp. at 422-423.

Indeed, the juxtaposition of Dowling and Carpenter put the lie to the government's position in clear and dramatic fashion. The only rational explanation for the difference in the respective holdings of these two Supreme Court cases -- the reason why the National Stolen Property Act was held inapplicable to the intangible property in Dowling while the mail fraud statute was held applicable to the intangible property in Carpenter, was this: The property interest in Dowling was copyrighted material, while the property in Carpenter was non-copyrighted business proprietary information. It was the unique nature of copyrighted intellectual property that dictated the different results.

Back to Top

The Text and History of the Criminal Copyright Provisions Supports the Conclusion that the Wire Fraud Statute does not Cover Copyright Infringement

In Dowling, the Supreme Court determined that "neither the text or 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. To the contrary, the Court held that "Congress' sensitivity to the special concerns implicated by the copyright laws" as demonstrated in the legislative history of the criminal copyright provisions "convinces us that congress had no intention to reach copyright infringement when it enacted Sec. 2314." 473 U.S. at 225-226. The legislative history of the 1992 amendments to the criminal copyright provisions, wherein Congress specifically declined to criminalize the conduct charged in this indictment, further underscores the distinction between Congress's careful step-by-step approach to copyright infringement and the "blunderbuss" approach suggested by the government in this case.

The government claims that we have argued that Dowling holds that "Congress intended that conduct which does not constitute criminal copyright infringement may not be charged under any other criminal statute."2 This is not our argument. Rather, we argue that the wire fraud statute would not cover LaMacchia's conduct even if his conduct constituted a clear violation of the Copyright Act. Indeed, Dowling itself involved conduct violative of the criminal provision of the Copyright Act, and the Court held that the National Stolen Property Act did not apply. This is because the text and legislative history of the Copyright Act demonstrate that Congress acted with special sensitivity in drafting the copyright laws, and it did not intend that blunderbuss interstate property statute should override those distinctions.

The government also urges this Court to ignore the language and legislative history of the Copyright Act, Gov. Opp. at 15, but its justification for departing from the Dowling analysis rings hollow. The government's concession that the language of section 2314 -- "taken by fraud" -- is ambiguous with respect to copyright infringement, thus necessitating consideration of legislative history, Gov. Opp. at 8, undermines its assertion that the language of the wire fraud statute -- "obtaining money or property" by means of a "scheme or artifice to defraud" -- is so clear as to preclude inquiry into legislative history. 4

The government's claim that "the legislative history of the Copyright Act and its amendments sheds no interpretive light" on Congress's intent, Gov. Opp. at 16, is also flatly inconsistent with the Court's opinion in Dowling. Indeed, if, as the government posits, "reviewing legislative history is like looking over the crowd at a party and picking out one's friends," Gov. Opp. at 15 n.6, then this is clearly a gathering where the government's friends failed to show up. The government cites nothing in the legislative history of the Copyright Act demonstrating congressional approval or awareness of the use of the wire fraud statute to prosecute copyright infringement, and, indeed, there is nothing in the legislative history to support such a claim. To the contrary, the history of the 1992 amendments clearly demonstrates that Congress believed infringement of computer software copyrights was not covered by any then-existing felony provision. Def. Mem. at 22-23.

Back to Top

The Penalty Provision of the Copyright Act does not Extend the Conspiracy and Wire Fraud Statute to Copyright Infringement.

This Court should reject the government's claim that the penalty provision of the Copyright Act contains "controlling language" dictating application of the wire fraud statute, just as the Supreme Court rejected the parallel argument in Dowling. The dissenters in Dowling argued that, prior to the enactment of this provision, many courts had applied section 2314 to copyright infringement, and by enacting a

nonexclusivity provision, Congress implicitly consented to the continued application of section 2314 to copyright offenses. The majority rejected this argument in no uncertain terms:

Neither the text nor the legislative history of either the 1982 Act or earlier copyright legislation evidences any congressional awareness, let alone approval, of the use of Sec. 2314 in prosecutions like the one now before us. In the absence of any such indication, we decline to read the general language appended to Sec. 2319(a) impliedly to validate extension of Sec. 2314 in a manner otherwise unsupported by its language and purpose. Dowling, 473 U.S. at 226 n.18.5 Similarly, Sec. 2319(a) provides no basis for reading the wire fraud statute to apply to copyright infringement, where neither the language nor the legislative history of the wire fraud statute demonstrate any congressional intent to do so.

Back to Top

Conclusion

For these reasons, and for the reasons stated in our initial memorandum, the charge against David LaMacchia of conspiracy to commit wire fraud must be dismissed.

DATED: November 4, 1994

Respectfully submitted,

Andrew Good (#201240), Harvey A. Silverglate (#462640), Sharon L. Beckman (#552077), Silvergate & Good, 89 Broad Street, Boston, MA 02110, Tel. (617) 542-6663, Fax (617) 451-6971

David Duncan (#546121), Zalkind, Rodriguez, Lunt & Duncan, 65A Atlantic Avenue, Boston, MA 02110, Tel. (617) 742-6020

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

Dated: November 4, 1994

Footnotes

- 1. Similarly, the government's citation of cases applying the federal fraud statutes to conduct other than copyright infringement does not "shed light on the question presented by this case." Dowling, 473 U.S. at 218 n.8 (distinguishing noncopyright cases relied upon by the dissent to support a broad interpretation of Sec. 2314).
- 2. The government's claim that we "seem to concede" the plain language issue is puzzling in light of its acknowledgement that we, in fact, argue "that a scheme to defraud software manufacturers of software licensing fees is not encompassed within the wire fraud statute." Gov. Opp. at 12.
- 3. Rather, the defendants argued that their wire fraud convictions should be reversed because they may have been based upon a jury finding of interstate transportation of pirate tapes. 639 F. Supp. at 180.
- 4. The government's assertion that the defense ignores the language of the wire fraud statute and "leaps" immediately to the legislative history of the Copyright Act is, of course, false. Gov. Opp. at 13-14. We turn to the legislative history of the Copyright Act only after demonstrating that the language and legislative history of the wire fraud statute do not evidence any congressional intent to reach copyright infringement. Def. Mem. at 10-19. 5 In its haste to chastise us for not citing this irrelevant provision in our memorandum, the government fails to mention that the Supreme Court has rejected its argument.

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