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# Lawyers File Pre-Trial Motion to Dismiss LaMacchia Case

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## Year

1994

## Description

An article outlining the facts of the case and detailing the pre-trial motion to dismiss introduced by the defendant (LaMacchia).

## Body

The counsel for David M. LaMacchia '95 filed a pre-trial motion two weeks ago to dismiss the federal government's case against him. The motion bases its arguments on an incorrect use of the wire fraud law and on constitutional infringements of LaMacchia's rights, said Harvey A. Silverglate, one of LaMacchia's attorneys.

The U.S. District Court in Boston is handling the case.

Though the motion is a standard procedure, LaMacchia's attorneys are confident that it could get the case dismissed. "I believe that David has a very good chance that his motion to dismiss will succeed," said Harvey A. Silverglate, one of LaMacchia's attorneys.

LaMacchia was indicted on a charge of conspiracy to commit wire fraud on April 7. He is charged with using two workstations in the Student Center Athena cluster to "permit and facilitate, on an international scale, the illegal copying and distribution of copyrighted software," according to the indictment. Using a server running on the two workstations, Internet users could exchange copyrighted software, such as Microsoft Excel and Wordperfect.

Information Systems determined that the servers were running between Nov. 21, 1993 and Jan. 5, 1994. Many of the people who accessed the pirated software over the Internet concealed their location by dialing up via an anonymous service in Finland. Losses of the pirated software are expected to exceed \$1 million, according to a statement from the U.S. Attorney's office last spring.

If convicted, LaMacchia could face up to five years in prison and \$10,000 in fines, according to an agent with the Federal Bureau of Investigation.

The document that was filed includes a motion to dismiss the indictment and a memorandum supporting this motion.

The motion reads: "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, interests and values protected by the First Amendment, and the constitutional principle of separation of powers."

The memorandum challenges the conspiracy charge on two separate issues. One argument questions the relevance of the wire fraud laws; the second claims that LaMacchia is protected under the free speech clause of the First Amendment since he did not personally copy or upload any of the copyrighted software on the server.

In the memorandum, LaMacchia's counsel writes that the indictment invents a criminal charge by distorting the wire fraud statute "in order to circumvent Congress' decision not to apply a criminal sanction to LaMacchia's alleged conduct."

"The motion to dismiss argues that if activity such as David LaMacchia is charged with is to be prosecuted criminally, it has to be prosecuted under the right statute," Silverglate said. "Since the essence of the charge is that David misappropriated the intellectual property of other people, then he should be charged under our intellectual property statute, the Copyright Act," Silverglate said.

Under the copyright statute "there is no doubt that what David did was lawful," Silverglate said. Instead, the government charged LaMacchia with violating the federal wire fraud law because his allegedly fraudulent conduct was committed on telephone lines via modems, Silverglate said. The wire fraud law prohibits the use of the telephone system to perpetrate frauds, he said.

According to the document, "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."

This was not a scheme to defraud, said Daffodil Tyminski, a paralegal who is working on the case. "The only thing [LaMacchia] could be charged with is copyright infringement," she said. However, copyright infringement is a civil matter, not a criminal matter, she added.

The pre-trial motion also considered free speech and free press protections, Silverglate said. "Playing fast and loose like this with criminal statutes creates a 'chilling effect' that will deter people like David - systems operators of computerized bulletin board systems - from engaging in First Amendment protected activity," he said.

"Since the operation of a computerized [bulletin board system] 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," according to the memorandum.

## **Case will set a precedent**

Many observers of this case have noted that there are no legal precedents in this area.

Silverglate emphasized the importance of the case: "There have been very few 'computer fraud' indictments brought, and we are testing the proposition that the Bill of Rights and their protections apply in cyberspace. This is a frontier for people

who worry about civil liberties."

Whether the case is dismissed or goes to trial, there will definitely be an appeal, Tyminski said. "This will be a precedent-setting case, and because of that you'll have a lot of interest on both sides to get clearer laws out of this," she said.

If the trial is dismissed as Silverglate predicts, the government would then appeal the dismissal to the Court of Appeals for the First Circuit in Boston, Silverglate said.

The U.S. Attorney's office was expected to respond to the defense's motion by today, but the lawyers asked for a two-week extension last week, Silverglate said. The judge granted the extension, and their response is now due on Oct. 28, Silverglate said.

It is not certain if the trial date will now be postponed. The trial date was originally set for Nov. 28.

Philip G. Greenspun G, who worked with LaMacchia at the Artificial Intelligence Laboratory, has established a defense fund for him. So far, the fund has collected about \$7,400, Greenspun said.

## Notes

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