Old Wine In New Bottles:
Cyberspace and the Criminal Law

by Harvey A. Silverglate & Philip G. Cormier

"This case," wrote U. S. District Judge Richard G. Stearns in his December 1994 opinion dismissing a federal wire fraud[1] indictment against a sophomore at the Massachusetts Institute of Technology ("MIT"), "presents the issue of whether new wine can be poured into an old bottle."[2] Specifically, Judge Stearns found that David LaMacchia's use of MIT's computer system to facilitate a "worldwide traffic" in free software, some subject to copyright, was not a criminal violation of the wire fraud statute, and that it was up to Congress to enact legislation to cover this kind of conduct.

In arriving at this conclusion, Judge Stearns cited the Supreme Court's decision in Dowling v. United States,[3] which held that the government could not use the National Stolen Property Act[4] (criminalizing the interstate transportation of stolen property) to prosecute interstate traffic in pirated or bootleg sound recordings. Copyright, the Court held, is not like ordinary property. Rather, it is intellectual property that is regulated and protected by its own statute, namely the Copyright Act,[5] which Congress fine-tunes every so often when it perceives that evolving changes (including technological advances) in the intellectual property arena require corresponding changes in the law. Since LaMacchia was not alleged to have charged for, nor profited from, the software exchange network that he created, his actions were not criminal under then-existing copyright laws, which explained why the government attempted to charge him under the wire fraud statute. While acknowledging that the "theft" of intellectual property by means of the Internet was an enormous and complex problem for those seeking to protect the economic value of their intellectual property, Judge Stearns concluded that this "new wine" would require "new bottles." Thus, the crime allegedly committed by LaMacchia was not a crime unless and until Congress declared it as such.

The LaMacchia case was just one of the more visible examples of a phenomenon that has confronted federal prosecutors and courts (and, to a lesser extent, state criminal justice systems[6]) with a vengeance since the explosion of widely available computerized communications. Current criminal laws have been found woefully inadequate to meet the challenges of the new electronic age. Although the law usually lags somewhat behind social and technological developments, computer technology has been changing so quickly in recent years that the usual gap between law and technology has become a yawning chasm.

In LaMacchia, the result was that conduct that many people (including Judge Stearns[7]) felt should have been criminal, slipped through the cracks pending anticipated remedial legislation from the Congress. Principles of statutory construction, as well as constitutional doctrines, prevented the old statute from being stretched to cover a situation not intended nor envisioned by the Congress that enacted it. LaMacchia is a good example of how the criminal law, in particular, is not an appropriate vehicle for "creative" approaches, since the downside of such prosecutorial inventiveness is that citizens are denied fair notice as to what the law prohibits. Creative prosecution not only defies the intent of legislators, but usually creates due process problems as well.

However, on the other side of the coin, vital civil liberties that have historically protected the print medium and, to a large extent, older electronic media (i.e., telephone and television), have not readily been applied to computer communications. Law enforcement authorities and legislatures have been hesitant to accept that speech sent by computer telecommunications is as worthy of protection as speech published in a newspaper or uttered from a soapbox. Something about computer communications has frightened the old order (defined, roughly, as anyone over perhaps the age of forty). The computer is described by such neo-Luddites more as a weapon or burglarious instrument than as a communicative tool.

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The result of this fear of technology has been numerous civil liberties atrocities. In one case, for example, the Secret Service, believing erroneously that a computer hacker had compiled a "handbook for computer crime" on the Internet, sought a search warrant for the computer system where the suspected hacker was employed. The

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result: the Secret Service seized the computer system of a well-respected publisher of game books and utterly destroyed the publisher's upcoming book, for which the government ended up paying a judgment for violation of the publisher's constitutional rights.[8] Sexually suggestive ("indecent," but not "obscene") language that is common in the print medium is also thought to pose a special threat in cyberspace. For example, raunchy and violent fantasies exchanged by e-mail between two college students were turned over to the Federal Bureau of Investigation, resulting in a prosecution for using interstate communications for the purpose of making threats. These same fantasies, however, in print, would not have appeared quite so fearsome.[9] Another recent abomination is the enactment of the Communications Decency Act of 1995 ("CDA"), passed overwhelmingly by the Congress and signed by the President, despite a widespread belief that the statute is unconstitutional.[10]

With the evolving law still unclear--and particularly unclear, it seems, to law enforcement agencies inclined to assume that long-standing protective provisions of law (constitutional and statutory) do not cover new media--it may be some time before new electronic media are protected to the same extent as older media. After all, when the Supreme Court first took up the issue whether wiretapping violated the Fourth Amendment's proscription against unreasonable searches and seizures, it concluded that the Fourth Amendment was meant to protect physical papers and effects, not sound traveling along telephone wires.[11] It took quite some time before the Fourth Amendment caught up with technology and the Court decided to protect "people, not places."[12]

Indeed, precisely in order to bring the state of civil liberties squarely into the electronic age, Harvard Law School Professor Laurence H. Tribe first proposed in a 1991 lecture entitled "The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier," the following as a Twenty-Seventh Amendment to the U. S. Constitution:

> This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.[13]

At present, no groundswell of support for such an amendment has arisen, and so we appear to be condemned to a case-by-case, statute-by-statute interpretive process to determine how the rights and liberties developed in the Eighteenth, Nineteenth, and Twentieth centuries are going to be honored in the Twenty-first. Whereas due process requires that old criminal statutes not be stretched out of shape in order to cover new activities not contemplated by the legislatures that drafted them, the preservation of liberty likewise requires that ancient freedoms be interpreted broadly in order to preserve a civilized and decent society in the coming electronic age. ❖

Endnotes

[1] 18 U.S.C. § 1343

[2] *United States v. LaMacchia*, 871 F.Supp. 535 (D. Mass. 1994).

[3] 473 U.S. 207, 105 S. Ct. 3127, 87 L.Ed.2d 152 (1985).

[4] 18 U.S.C. § 2314.

[5] 17 U.S.C. § 1, *et seq.*

[6] We say "to a lesser extent" only because it is generally conceded that effective protection of intellectual property must be accomplished on the federal level to be truly effective.

[7] "This is not, of course, to suggest that there is anything edifying about what LaMacchia is alleged to have done. If the indictment is to be believed, one might at best describe his actions as heedlessly irresponsible . . .", *LaMacchia*, 871 F. Supp. at 545.

[8] *Steve Jackson Games v. U.S. Secret Service*, 816 F.Supp. 432 (W.D.Tex. 1993), aff'd, 36 F.3d 457 (5th Cir. 1994). Silverglate & Good participated in this litigation on behalf of Steve Jackson Games, Inc. Notably, the book was not a "handbook for computer crime," but a fantasy role-playing book entitled *GURPS Cyberpunk*, by Lloyd Blankenship, ultimately published by Steve Jackson Games, Inc., in 1990.

[9] The trial court dismissed the indictment, *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995), on the ground that the communications constituted protected speech under the First Amendment. The Court of Appeals affirmed in *United States v. Alkhabaz*, 1997 WL 30655 (6th Cir.), holding that the fantasies were not true threats within the ambit of the statute.

[10] As of this writing, a special 3-judge panel of federal judges has declared the CDA unconstitutional. *See American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996). The Supreme Court has agreed to review the case, ___ U.S. ___, 117 S. Ct. 554 (1996), and it is pending on the court's docket.

[11] *Olmstead v. United States*, 277 U.S. 438, 72 L.E. 944, 48 S. Ct. 564 (1928)

[12] *Katz v. United States*, 389 U.S. 347, 351 (1967).

[13] The speech was delivered as the Keynote Address at the First Conference on Computers, Freedom and Privacy, March 26, 1991.

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