Volume 8, Number 2 Spring 1995

DEFRAUDING THE WIRE FRAUD STATUTE: *UNITED STATES v. LaMACCHIA*

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INTRODUCTION

On April 7, 1994, a grand jury in Boston indicted David LaMacchia, a 20-year-old student at the Massachusetts Institute of Technology ("MIT"), on a single count of violating the federal wire fraud statute.[1] According to the indictment, LaMacchia used several MIT computers to create a bulletin board system ("BBS"), Cynosure, which enabled Internet users around the world to illegally upload and download[2] popular commercial software programs.[3] The government estimated that more than one million dollars worth of software was illegally copied between November 21, 1993, and January 5, 1994, the short period in which Cynosure was operational.[4]

When MIT learned that its hardware was being used by the BBS, it notified the Federal Bureau of Investigation, which had already launched an investigation.[5] The indictment did not accuse LaMacchia of obtaining any financial benefit[6] or of actually copying any programs to or from Cynosure. However, the indictment alleged that the BBS had utilized a Finnish network to permit its users to download software anonymously, and that LaMacchia had stressed the need for secrecy on behalf of the BBS's users, lest the system be detected and closed by "net.cops," network and system adminis-

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1. *See* Judy Rakowsky, *MIT Student Is Called Software Piracy Plotter*, BOSTON GLOBE, Apr. 8, 1994, at 1.

2. Generally, a BBS provides substantial storage space accessible to the public or to those members of the public with proper access keys, either by direct connection over a telephone line, or over the international network of computers known as the Internet. "Uploading" occurs when a user copies files from her computer to a BBS so that others can access them. "Downloading" occurs when a user copies files from a BBS to her own computer.

3. *See* Indictment at ¶¶ 9-13, United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994) (Crim. No. 94-10092RGS) [hereinafter LaMacchia Indictment], *available in* World Wide Web, http://the-tech.mit.edu/Bulletins/LaMacchia/indictment.form.html. *The Tech*, MIT's newspaper, has placed a copy of the indictment, press releases, and other related documents on its World Wide Web server at http://the-tech.mit.edu/Bulletins/list.

4. *See* LaMacchia Indictment, *supra* note 3, ¶¶ 5, 13.

5. Rakowsky, *supra* note 1, at 30.

6. Consequently, LaMacchia could not be charged with criminal copyright infringement; criminal liability only attaches if the infringement is "wilful[] and for purposes of commercial advantage or private financial gain." 17 U.S.C. § 506(a) (1988). *See infra* note 62 and accompanying text.

trators.[7] The government charged LaMacchia under the wire fraud statute, which prohibits the use of interstate or foreign wires to execute any "scheme or artifice to defraud."[8] LaMacchia moved to dismiss the indictment on several independent grounds, including claims that the wire fraud statute should not be interpreted to cover what was essentially a copyright infringement case, and that such a broad interpretation of the statute would render it unconstitutionally vague.[9] Judge Stearns granted the defendant's motion to dismiss, accepting the argument that the conduct alleged in the indictment was not prohibited by the wire fraud statute[10]; the government did not appeal.[11]

This Note begins with a brief general discussion of the scope of the federal mail and wire fraud statutes, focusing on interpretations of the "scheme or artifice to defraud" language in both statutes. Next, this Note discusses *Dowling v. United States*, in which the Supreme Court held that the National Stolen Property Act could not be applied to defendants who transported and sold bootleg Elvis Presley records.[12] This Note then analyzes Judge Stearns' opinion in *LaMacchia*, concluding that he interpreted *Dowling* in an exceptionally broad manner while applying an unnecessarily cramped view of the wire fraud statute. Finally this Note discusses the desirability of closing the statutory gap created by *LaMacchia* and two possible methods of accomplishing this.

I. MAIL AND WIRE FRAUD STATUTES

The wire fraud statute provides that:

> Whoever, having devised . . . any *scheme or artifice to defraud*, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits

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7. LaMacchia Indictment, *supra* note 3, ¶¶ 11, 18, 20.

8. 18 U.S.C. § 1343 (Supp. V 1993).

9. *See* Harvey A. Silvergate et al., *An Issues Primer in the Criminal Prosecution of* United States of America v. David LaMacchia (Apr. 11, 1994) (memorandum of LaMacchia's counsel), *available in* World Wide Web, http://the-tech.mit.edu/Bulletins/LaMacchia/defense-primer.txt. LaMacchia also urged that it would violate the First Amendment to hold a systems operator liable for the actions of those who use the bulletin board, analogizing the operator of a BBS to a newspaper editor or publisher. This argument appears to have little merit, since LaMacchia allegedly specifically encouraged the BBS's users to illegally copy software and provided the means to conduct this activity.

10. United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994).

11. *See US Will Not Appeal in Internet Case*, BOSTON GLOBE, Jan. 28, 1995, at 17.

12. 473 U.S. 207, 228-29 (1985).

> . . . by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, [or] signals . . . for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned for not more than five years, or both.[13]

The "scheme or artifice to defraud" language has been part of the federal criminal code since 1872, but it has never been accorded a more precise statutory definition by Congress. However, it has been clear for nearly a century that Congress did not simply intend to codify the common-law notion of fraud, which requires a "misrepresentation as to some existing fact."[14] Even law dictionaries in the late nineteenth century offered a broad definition: "[t]o defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice."[15] The one clear theme running through interpretations of the mail fraud statute is that Congress intended the law to be given a broad reading, consistent with its general purpose of protecting the integrity of the mails.[16]

The Court's recent attempt in *McNally* to limit the mail fraud statute to schemes designed to deprive people of *property* rights sheds some light on the proper interpretation of the statute. In the late 1970s and early 1980s, federal prosecutors successfully used the mail fraud statute to convict government officials of defrauding the public of its "intangible right" to honest government.[17] In a paradigmatic case, Governor Marvin Mandel of Maryland was convicted of mail fraud for promoting certain legislation beneficial to the owners of a racetrack in violation of his obligation to render the citizens of the state fair and impartial service free from bribery.[18] The Fourth Circuit affirmed his conviction under the "intangible rights doctrine"; it concluded its background discussion of the mail fraud statute with the following observation:

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13. 18 U.S.C. § 1343 (1988) (emphasis added). The mail fraud statute, 18 U.S.C. § 1341 (1988), utilizes the same definition of fraud. Consequently, cases interpreting the mail fraud provision are of equal precedential value where, as in *LaMacchia*, the defendant is accused of wire fraud.

14. Durland v. United States, 161 U.S. 306, 314 (1896) (holding that false promises were covered by an earlier version of the statute which included only the "scheme or artifice to defraud" language).

15. 1 BOUVIER'S LAW DICTIONARY 530 (1897), *quoted in* McNally v. United States, 483 U.S. 350, 370 (1987) (Stevens, J., dissenting).

16. *McNally*, 483 U.S. at 365 (Stevens, J., dissenting).

17. *See generally* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 163-66 (1994).

18. *See* United States v. Mandel, 591 F.2d 1347, 1360 n.7 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

> As a result of the failure to limit the term "scheme or artifice to defraud" to common law definitions of fraud and false pretenses and schemes prohibited by State law, the mail fraud statute generally has been available to prosecute a scheme involving deception that employs the mails in its execution that is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing.[19]

In *McNally* itself, the Supreme Court rejected *Mandel* and numerous cases with similar holdings, concluding that Congress's desire in enacting the mail fraud statute was to protect individual property rights, and that therefore conduct which deprives the people of intangible, non-property rights is not covered by the statute.[20]

In dissent, Justice Stevens strongly criticized the Court's entire approach to the problem, especially its conclusion that since there was no clear evidence that Congress intended to protect "intangible rights," the statute should be read as excluding schemes which defraud people of non-property rights.[21] Justice Stevens found this method of interpretation insupportable, because Congress had used broad language specifically designed to permit the courts to construe the statute "to achieve the remedial purposes that Congress had identified."[22] Finally, he noted that the mail fraud statute had historically been applied to "novel species of fraud," and that "'where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.'"[23]

Congress agreed with Justice Stevens and quickly amended the fraud statutes to restore the pre-*McNally* interpretations.[24] Clearly, Congress intended the broad language of the phrase "scheme or artifice to defraud" to receive an equally broad interpretation by the courts.

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19. *Id.* at 1361.

20. *McNally*, 483 U.S. at 359-60.

21. *Id.* at 374-75 (Stevens, J., dissenting).

22. *Id.* at 372-73.

23. *Id.* at 374 (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute*, 18 DUQ. L. REV. 771, 772-73 (1980)).

24. *See* 18 U.S.C. § 1346 (1988) (defining "scheme or artifice to defraud" as including a "scheme or artifice to deprive another of the intangible right of honest services"); *see also* Moohr, *supra* note 17, at 169-70.

II. *DOWLING v. UNITED STATES*: APPLYING THE NATIONAL STOLEN PROPERTY ACT TO "BOOTLEG" PHONORECORDS

In *Dowling v. United States*,[25] the Court addressed the question of whether individuals who produced and sold bootleg[26] copies of Elvis Presley performances could be prosecuted under the National Stolen Property Act ("NSPA"). The NSPA attaches criminal liability to the transportation in interstate commerce of "goods, wares, merchandises, securities, or money" that were "stolen, converted or taken by fraud."[27] The government argued that Dowling's actions were covered by the NSPA, because his unauthorized use of musical compositions violated the copyright laws, rendering the records "taken by fraud."[28]

The Court, however, concluded that the NSPA did not cover Dowling's activities. First, the Court observed that the NSPA "contemplate[s] a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods."[29] Consequently, the statutory language was "ill-fitting" when applied to goods which were stolen or "taken by fraud" only in the sense that they violated the copyright in the musical composition.[30] Since the "property rights of a copyright holder have a character distinct from the *possessory interest* of the owner of simple goods," the language of the statute did not plainly cover record bootlegging.[31]

The Court then turned to an examination of Congress's purpose in enacting the NSPA to determine whether Congress had clearly intended for the conduct in question to be covered, despite its choice of "ill-fitting language."[32] The fundamental goal of the NSPA was to eliminate the enforcement gaps in state laws which arose from the ease with which criminals could move from state to state, thereby circumventing the law enforcement capabilities of *every* state.[33] This "need to fill with federal

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25. 473 U.S. 207 (1985).

26. The Court distinguished between "bootlegging," which involves the unauthorized distribution of commercially unreleased recordings, and "pirating," where illegally produced copies of commercially released recordings are sold. *See id.* at 209 n.2.

27. 18 U.S.C. § 2314 (1988 & Supp. V 1993).

28. *Dowling*, 473 U.S. at 215-16.

29. *Id.* at 216.

30. *Id.* at 217-18.

31. *Id.* at 217 (emphasis added) (internal quotation marks omitted).

32. *Id.* at 218.

33. *Id.* at 219-20.

action an enforcement chasm created by limited state jurisdiction" could not be applied to Dowling's conduct, because the Constitution specifically grants Congress the power to legislate in the area of copyright.[34] Hence, it was "implausible" to think that Congress sought to enforce the copyright laws by means of the "circuitous route hypothesized by the Government," especially since Congress had enacted a careful and specific statute dealing with criminal copyright infringement.[35]

III. *LaMACCHIA*: USING THE WIRE FRAUD STATUTE TO REACH COPYRIGHT-RELATED CONDUCT

The *Dowling* case was about the proper interpretation of a narrow statute concerning the physical transfer of goods across state lines. Yet, when confronted with an indictment charging LaMacchia with conspiring to permit individuals to copy illegally more than one million dollars of commercial software, Judge Stearns found *Dowling* to be dispositive, concluding that LaMacchia's conduct did not fall within the reach of the wire fraud statute.[36]

Unfortunately, the opinion is largely an exercise in misdirection and obfuscation. After describing the facts alleged in the indictment, Judge Stearns proceeded with a lengthy background discussion of *Dowling* and the history of the criminal copyright provisions.[37] The opinion does not address the meaning of the wire fraud statute until it begins its discussion of the legal arguments before the court.[38] Judge Stearns does set out the statutory language at issue; he also relates the legislative purpose behind the enactment of the wire fraud statute: namely, to supplement the mail fraud statute by permitting prosecution of frauds perpetrated over the airways, especially through radio and television.[39] However, the opinion does not investigate or analyze the purpose behind the original mail fraud statute, despite the court's acknowledgment that the wire fraud statute was designed only to extend the jurisdictional reach of the mail fraud statute. Moreover, the discussion of the scope of the fraud statutes is limited to a brief

34. *Id.* at 220-21.
35. *Id.* at 220-21, 226.
36. United States v. LaMacchia, 871 F. Supp. 535, 545 (D. Mass. 1994).
37. *Id.* at 537-40.
38. *Id.* at 540.
39. *Id.* at 540-41.

recounting of the "intangible rights doctrine," which bears little direct relevance to the actual issues in *LaMacchia*.[40]

After disposing of an ill-conceived argument surrounding the Ninth Circuit's analysis in *Dowling*,[41] Judge Stearns finally confronted the core issue of the case. The government's position was ultimately defeated by the manner in which the court characterized the legal conflict: "The issue is thus whether the 'bundle of rights' conferred by copyright is unique and distinguishable from the indisputably broad range of property interests protected by the mail and wire fraud statutes."[42] It is hard to see, however, why this is the "issue" at all, since nothing in the language or history of either statute indicates that some "unique and distinguishable" class of property rights is excluded from coverage.[43] Even the Supreme Court, prior to having its *McNally* decision statutorily overruled, acknowledged no distinction among the types of property interests protected by the wire fraud statute. For example, the Court has upheld the fraud conviction of a reporter for the *Wall Street Journal* who disclosed confidential information before publication, noting that it was enough that the paper was "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."[44]

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40. *Id.* at 541-42.

41. *Id.* at 542-43. In *Dowling*, the Supreme Court did not grant certiorari to determine the status of Dowling's related conviction under the mail fraud statute. The government thus attempted to argue that by agreeing to hear only the NSPA portions of Dowling's appeal, the Court had implicitly approved of some use of the mail fraud statute in cases of copyright-related conduct. The argument is not terribly revealing, however, and Judge Stearns was clearly correct to proceed directly to the key issues. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 15.05 at 15-25 to -26 & n.27 (1994) (criticizing the Ninth Circuit's decision as questionable, because it affirmed the mail fraud convictions on the incorrect ground that Dowling had failed to file a notice to obtain a compulsory license, where there was in fact no absolute statutory duty to file such a notice).

42. *LaMacchia*, 871 F. Supp. at 543.

43. Judge Stearns also criticized the government for its reliance on 18 U.S.C. § 2319(a) (1988), which provides that penalties for criminal violations of the Copyright Act "shall be in addition to any other provisions of title 17 or any other law." *LaMacchia*, 871 F. Supp. at 543. He reasoned that since LaMacchia was not charged with criminal violations of the Copyright Act, the government could not rely on the non-preemption clause of 18 U.S.C. § 2319(a) (1988). If this point were actually dispositive, it would lead to the strange possibility that civil copyright infringement could provide a *defense* to mail fraud prosecution, while an individual who engaged in criminal copyright infringement could be successfully prosecuted under the wire fraud statute. This would contravene both Judge Stearns' concern that Congress had carefully calibrated punishments under the copyright law and the accepted doctrine that a violation of the mail fraud statute need not be predicated on a violation of any other federal or state law.

44. Carpenter v. United States, 484 U.S. 19, 26-27 (1987).

A comment in a footnote indicates Judge Stearns' striking disregard for the purpose behind the mail fraud statute: "The suggestion that the felony provisions of the wire fraud statute were enacted with the punishment of copyright infringement in mind is somewhat difficult to accept when one remembers that in 1952 [the year the statute was enacted] the Copyright Act authorized only misdemeanor prosecutions . . . ."[45] As Judge Posner has noted, the argument that "the meaning of fraud in the mail-fraud statute was frozen by the conception of fraud held by the framers of the statute when it was first passed back in the nineteenth century" is indefensible.[46] However, Judge Stearns appears to have adopted an even stranger limiting construction—that the scope of the *wire* fraud statute is governed by the specific intentions of those who enacted it to supplement the existing mail fraud statute. In doing so, the court ignored the lesson of *McNally* and prevented the fraud statutes from serving as weapons against innovative forms of fraud which attack all types of property rights.

The court ultimately held that *Dowling* flatly prohibited the prosecution of LaMacchia under the wire fraud statute. According to the court, *Dowling* conclusively resolved the question of whether rights of a copyright holder were "unique and distinguishable" from the property interests protected by the fraud statutes.[47] Not only does Judge Stearns' formulation of the question begin from the wrong premise, but he also gives the wrong answer to his own question by affording *Dowling* a far broader interpretation than its language justifies. The conclusion of the Court in *Dowling* was that the language of the NSPA "contemplate[s] a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods."[48] The different nature of the property interest protected by a copyright was relevant only because it differed from the "*possessory* interest" in tangible items of property protected by the NSPA.[49] Since the NSPA was designed to close the jurisdictional gap created when physical goods are carried across state lines, the non-possessory nature of the copyright holder's property interest proved fatal to reading the statute to cover Dowling's conduct. In contrast, the mail fraud statute's primary purpose was to prevent the use of the mails to deprive people of a broad range of property and even non-property rights.[50] The use of the mails

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45. *LaMacchia*, 871 F. Supp. at 543 n.13.

46. United States v. Holzer, 816 F.2d 304, 310 (7th Cir. 1987), *quoted with approval in* McNally v. United States, 483 U.S. 350, 373 (1987) (Stevens, J., dissenting).

47. *LaMacchia*, 871 F. Supp. at 543.

48. Dowling v. United States, 473 U.S. 207, 216 (1985).

49. *Id.* at 217.

50. *See* 18 U.S.C. § 1346 (1988) (overruling *McNally* and bringing schemes to defraud

or interstate wires constitutes only a jurisdictional element of prosecution under these fraud statutes[51]; use of the mails gives rise to the federal interest in protecting the integrity of the mails.

Nonetheless, Judge Stearns concluded that *Dowling*'s analysis was equally applicable to the LaMacchia prosecution. Otherwise, he asked, why would Justice Blackmun have spent so much time discussing whether the purpose of the NSPA was to punish copyright infringement?[52] The answer rests in the Court's interpretation of the NSPA as "contemplat[ing] a physical identity," which led the Court to ask whether, despite the "ill-fitting language," Congress might have intended Dowling's conduct to be covered by the NSPA.[53] The wire fraud statute, unlike the NSPA, contemplates no such physical identity, and there is consequently little difficulty in finding that the language of the statute clearly reaches copyright-related property rights.

The flaw in Judge Stearns' reasoning manifests itself when he remarks: "A scheme or artifice to defraud, the object of which was to fraudulently obtain possession of the copyright itself would, I believe, be clearly punishable under the mail and wire fraud statutes."[54] He then notes the argument in *Dowling* that the copyright infringer "does not assume physical control over the copyright."[55] If the wire and mail fraud statutes can protect the individual's property right in a copyright when someone attempts to fraudulently obtain the copyright itself, why should the same analysis not apply when someone is depriving the copyright holder of his property right in the exclusive use or distribution of the material? If the "'bundle of rights' conferred by copyright [were] unique and distinguishable from the indisputably broad range of property interests protected by the mail and wire fraud statutes,"[56] how can these same statutes be read to cover a scheme where the object of the fraud is the copyright itself?[57] In essence, Judge Stearns has read the "intangible rights" distinction back into the fraud

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individuals of their "intangible right of honest services" within the scope of the mail and wire fraud statutes); Carpenter v. United States, 484 U.S. 19, 26-27 (1987) (interpreting the fraud statutes as protecting the intangible property right of exclusive use of confidential information). *See also supra* notes 13-24 and accompanying text.

51. *See* Moohr, *supra* note 17, at 159-62.

52. United States v. LaMacchia, 871 F. Supp. 535, 543-44 (D. Mass. 1994).

53. Dowling v. United States, 473 U.S. 207, 217-19 (1985).

54. *LaMacchia*, 871 F. Supp. at 545 n.19.

55. *Id.* (quoting *Dowling*, 473 U.S. at 217).

56. *Id.* at 543.

57. On the other hand, it is perfectly sensible to say that the rights protected by the NSPA do not cover copyright infringement cases, but do apply where the defendant has obtained *physical control* over the copyright itself, and transported this physical item across state lines.

statutes by requiring the government to prove a defendant sought to obtain control over a tangible property right, instead of permitting prosecution for the violation of intangible property rights.[58]

IV. THE FUTURE IN PROSECUTING COMPUTER PIRACY

Congress has several options to combat the situation addressed in *LaMacchia*. First, and most simply, Congress could allow the issue to percolate through the courts until it becomes apparent whether the *LaMacchia* decision is an aberration or the norm. This would enable society and the courts to reach some form of consensus over the extent to which the copying of software and other types of deprivations of property rights should be subject to criminal penalties.

One factor which appears to have motivated Judge Stearns' decision was the concern that permitting a wire fraud prosecution for copying computer software, even in the limited circumstance of a case involving conduct on a massive scale, would accidentally make every person who has ever copied a piece of software a criminal.[59] There is a safeguard built into the system, even assuming that the courts were to disagree generally with *LaMacchia*; specifically, federal prosecutors are only likely to attack the largest violators. Even under current law, an individual who intentionally copies one software program could be subject to statutory fines of up to $100,000, plus costs and attorney's fees.[60]

Congress could also amend the mail and wire fraud statutes, either to make explicit that a "scheme or artifice to defraud" can include the deprivation of rights guaranteed by the copyright, or by specifically excluding from the statute any conduct which violates the copyright laws. Some commentators have already concluded from *Dowling* and the copyright statute that the sole remedy for copyright infringement rests in the Copyright Act.[61] A sound approach would be for Congress to amend the Copyright Act to make it clear that it preempts other federal law with respect to copyright infringement; that Congress has never done so should indicate

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58. *See supra* note 50.

59. *See* David M. Hornik, *Combating Software Piracy: The Softlifting Problem*, 7 HARV. J.L. & TECH. 377, 394 (1994) (noting that the extent of unlawful private copying of copyrighted software is unknown, but unquestionably significant). This article also contains an excellent account of both the scope of the current problem and the various legal mechanisms currently available for attacking software piracy.

60. *See* 17 U.S.C. §§ 504(c)(2), 505 (1988).

61. *See* NIMMER & NIMMER, *supra* note 41, at 15-24 to -26.

its uneasiness with the preemptive approach. Clarifying that the mail fraud statute does not absolutely exclude copyright-related conduct would reestablish the historic meaning of that statute and permit the courts to engage in a more calibrated, case-by-case approach to determining when the fraud statutes could apply, and when the remedies should be limited to those available under the Copyright Act itself.

However Congress acts with respect to the fraud statutes, it should immediately close the gap in criminal copyright law caused by the statutory requirement that the copying be done for "commercial advantage or private financial gain."[62] The provisions which calibrate the seriousness of punishment to the quantity of copying[63] are sufficient to protect the private individual who copies a couple of programs. Society generally does not immunize behavior simply because it was not done for financial gain; if LaMacchia had broken into a computer software warehouse and then shipped the software for free, there would be little difficulty in concluding that criminal liability should attach. Where an individual illegally distributes more than one million dollars worth of software, the problem should not become any more difficult.

CONCLUSION

Through an overly expansive reading of precedent and an unjustifiably narrow reading of the wire fraud statute, the *LaMacchia* court withdrew from the government an important tool in fighting new and innovative methods of fraud which attack intellectual property rights. The mail fraud statute was stripped of its historic status as the "first line of defense" against all newly invented schemes and frauds, in derogation of both the plain language of the statute and the clear congressional intent that the statute be given a broad reading by the courts. Judge Stearns repeated the mistake of the Supreme Court in *McNally* by asking whether the fraud statutes were intended to cover a specific type of conduct, instead of inquiring whether the statutes' broad purpose of protecting the integrity of the mails and wires would be served by protecting the rights in question from schemes and deception.

Prosecutors can and should go to Congress to clarify the legal landscape. Congress should ensure that the mail fraud statute does not become an easily evaded specific catalog of prohibited conduct. Finally, the criminal copyright laws should not reward an individual who conspires to copy

62. 17 U.S.C. § 506(a) (1988).
63. 18 U.S.C. § 2319(b) (Supp. V 1993).

substantial quantities of software with immunity simply because the individual is not acting out of private financial interest. The information era will raise a slew of important constitutional and statutory issues. *LaMacchia* does not bode well for the courts' ability to apply old principles to new technologies.