Tribute to Professor Peter Junger

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The first time I met Peter was outside at a coffee house on a beautiful fall day. I was there with Ray Vasvari, a friend of mine who would also become one of Peter’s lawyers. We were there to meet a Case law professor who was having problems with export laws. He had written some computer code and wasn’t sure what he could do with it because of some arcane export laws. Ray and I at the time worked for the ACLU of Ohio and were always looking for interesting first amendment cases. But all I could focus on that day was an ascot.

Peter arrived a bit shuffled in a gray suit, white shirt and an ascot. I hadn’t seen anybody wear an ascot in a long time so I was more than a bit taken. What kind of person wears an ascot? Peter was, that first day, the way I usually would come to find him. Totally captivated in what he was saying, with a sense of urgency that was hard to ignore.

Peter explained the situation to us. He had written a short cryptographic program called a “one-time pad” because it could only be used securely once and had contacted the State Department after somehow finding out that cryptographic programs fall under the Department’s list of military/civilian “dual-use” items, which required an export license before they could be shared with foreign nationals or, as we would later find out, before they could be posted on a website, including a law professor’s website.¹

Before I talk about Peter’s case, I want to say more about Peter. Sitting here at my computer, I remember hearing him talk of the virtues of papyrus and how things written on them have lasted so long. And how his first computer came in an attractive wooden box.

¹ The State Department was never actually clear about what counted as an “export.” We saw that, of course, as one of the problems
Just imagine, a computer in an attractive, wooden box! I remember his office, and the lateral problem it had. The lateral problem was that there was no lateral space left. Two, sometimes three, computers, cables running everywhere and piles of paper at least three feet high. He seemed to always be looking for something when I came to visit, and I was always tempted to reach and pull out a sheet of fuchsia colored paper near the bottom of a stack. It was probably some old faculty news, and if I had ever been able to get to it, I'm sure we would have been feet deep in paper. But what was truly amazing was how Peter would eventually find what he was looking for. "Oh, I got it somewhere here," and true enough, behind a computer, around the cables and under a pile of books and papers there it would be.

Peter was one of those rare people who could bridge the old and the new. He loved teaching property law. His students (and I) learned about the old English choses of action, chivalry and dueling. And yet he was able to converse with programmers because he programmed himself. The range of his interests was pretty remarkable too. He would spend hours talking to me about Wittgenstein, Quine and Turing, about geology (his father, if I remember correctly, was a geologist), Italy (a relative of his bought a hotel in Portofino after World War II) and the dismal history of English art.

As a teacher, Peter took his profession seriously. When it came to computers and intellectual property law, Peter could not understand how students could be taught the one without the other. He could not understand how students could graduate from Case law school, from any law school, and practice intellectual property law without having an idea of what a computer is and how it runs. Computers are machines that process information and data. Software, for him, was simply text, in particular, a set of detailed instructions, not unlike knitting instructions or the recipe for baking bread or GPS directions to a restaurant. Software, as he explains in the paper published in this volume, should not be patentable because the Supreme Court correctly held that algorithms for processing data (software) are not the subject matter of patents.

It was very important for Peter to get students to understand that computers run on what people write. So, for his course on computers and the law, Peter wrote a short program, and because he had put other course material on his website, he planned on also putting this short program on it. I can't remember exactly how, but he then heard something about export regulations. If he had written a program that displayed "hello world" on a computer screen or a program that did almost anything else, there would not have been a problem. But Peter
wrote an encryption program, and encryption programs fell under U.S. export regulations. Moreover, posting an encryption program on the internet could be considered an export. There began his adventures with the federal bureaucracy, first the U.S. State Department and then, after amendments to the Code of Federal Regulations, the U.S. Commerce Department. Not surprisingly, it was hard to get a straight answer from either State or Commerce. Peter’s program did garble text and then translate it back ungarbled so it was an encryption program, and the export regulations governed encryption programs. But when Peter and then I asked whether his program was covered, the answer was “perhaps,” and when we asked whether putting it on his website (or as we said, “publish it on his website”), the answer was “maybe.”

There was, according to the government, a way for Peter to get a straight answer. He could simply apply for a license. Well, that wasn't going to fly with Peter. He was not going to apply for a license to publish something that he wrote on the internet. From the beginning, Peter saw his problem as a first amendment problem, and the first amendment abhors licensing schemes. Peter would often repeat that “freedom of the press” meant the printing press, and what was fundamental to the speech and press clauses of the First Amendment was that the government would not be allowed to grant or withhold its approval before something written could be published. The First Amendment guaranteed no Star Chambers. The only choice for Peter was to challenge the government in court.

We were actually the third of three cases to challenge export laws governing encryption software. The first case, Bernstein v. United Stated Dept. of State, was brought by a mathematics professor who had written an encryption program and wanted to publish and present the program at academic conferences. Because the program would have been “disclosed” to least some foreign nationals, the government considered it an “export” under the regulations. The second case, Karn v. United States Department of State, was brought by a computer programmer who contested the government’s classification of encryption programs in Bruce Schneier’s book, APPLIED CRYPTOGRAPHY: PROTOCOLS, ALGORITHMS AND SOURCE CODE IN C. In that case, the State Department concluded that the programs written in source code that appeared in the book were not governed by export regulations, but the exact same source code on a computer disk that came with the book was. In other words, the source code

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published in the book, thus the book itself, could be freely exported around the world, but the source code in "electronic form" on the disk could not be exported without a license.

We relied heavily on the two cases that preceded us and received a great deal of help and support from Bernstein's attorneys, Cindy Cohen, Lee Tien and James Tyre and from one of Karn's attorney, Thomas J. Cooper. Ray and I were only a few years out of law school so we asked a friend of ours, Kevin O’Neill, now a professor at Cleveland-Marshall law school, to join us in the litigation. Despite having two inexperienced lawyers litigating against one of the Justice Department’s best trial attorneys, Tony Coppolino, Peter never once complained or questioned his legal representation. Peter was always gracious and appreciative, and his graciousness and gratitude, more than probably anything else, led me to not only respect him more as a person but also to consider him a friend.

Of course, we had some disagreements over how to litigate the case. How could it have been otherwise when your client is a law professor? “Peter, you might think there’s no difference between a program and a Buddhist prayer, but I’m not going to put that in our brief.” Most of the time, however, Peter was right, and I came around to seeing things his way. The analogy between software and a Buddhist prayer found its way into one of our briefs.

Initially, the first amendment was not the main focus of the litigation before the district court. The judge focused on the government’s claim that Peter had no standing because he never submitted his program to the government for a determination of whether it was subject to export licensing. We argued that such a determination, though not called a "license" under the regulations, was part of the government’s licensing scheme, and therefore, Peter did not have to apply for one under first amendment standing grounds. Seeing that the judge was siding with government, Peter agreed, reluctantly, to seek a determination. We submitted his program and other encryption programs, including the source code for the well-known encryption program "Pretty Good Privacy" (PGP) and a short, three-line encryption program written in the Perl programming language, for a "commodity classification request."

The government classified PGP as an item requiring an export license, which was not surprising. The government also classified the Perl program as requiring an export license even though the program was already widely available on the internet! We downloaded a copy, I believe, from a website in the Netherlands. Peter’s short one-time pad program was a different matter. There was no question that the
program was an encryption program, but the government classified it as an item that did not require an export license! At this point, we were as confused, if not more, about the regulations as we were before. I believe Peter kept making references to "Alice in Wonderland." We were somewhere where an encryption program isn't an encryption program and where a program cannot be exported because it is already overseas.

The first amendment became the main focus of litigation after the case was transferred to another district court judge. The government argued that source code, what most programmers write in, was not protected by the first amendment because, although it may be expressive to some, it was essentially functional. That is, it allows computers to perform certain tasks. We argued that whatever functional aspect source code may have, it is inherently expressive. People read and write source code. Other speech, such as commands and Peters favorite examples, instructions to a secretary and, yes, Buddhist prayers, can also be considered "functional," but there is no question that they are expressive and protected by the first amendment. The district court, however, agreed with the government. And so, we were off to the Sixth Circuit.

We drew a three-judge panel which included the chief judge. At oral argument, it was apparent that the court of appeals was more receptive to our first amendment argument than the district court. I remember the chief judge remarking that all this source code was "gobbly gook" to him, to which I responded, "to me too." But that was not the point. Programmers communicate and exchange information and ideas in source code, and although most people cannot read or write in programming languages, that does not diminish their expressiveness. In light of the Supreme Court's recognition that all kinds of expression, including flag burning and the paintings of Jackson Pollock, fall within the ambit of the first amendment, programs written in source code are no different. In a 3-0 decision, the court agreed. Quoting from the court's opinion,

The district court concluded that the functional characteristics of source code overshadow its simultaneously expressive nature. The fact that a medium of expression has a functional capacity should not preclude constitutional protection. . . .

The Supreme Court has explained that "all ideas having even the slightest redeeming social importance," including those concerning "the advancement of truth, science, morality, and arts" have the full protection of the First Amendment. Roth v.
United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (quoting 1 Journals of the Continental Congress 108 (1774)). This protection is not reserved for purely expressive communication. The Supreme Court has recognized First Amendment protection for symbolic conduct, such as draft-card burning, that has both functional and expressive features. See United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

The Supreme Court has expressed the versatile scope of the First Amendment by labeling as "unquestionably shielded" the artwork of Jackson Pollack, the music of Arnold Schoenberg, or the Jabberwocky verse of Lewis Carroll. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). Though unquestionably expressive, these things identified by the Court are not traditional speech. Particularly, a musical score cannot be read by the majority of the public but can be used as a means of communication among musicians. Likewise, computer source code, though unintelligible to many, is the preferred method of communication among computer programmers.

Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment.\(^4\)

After nearly four years of litigation, we got an important ruling, and the ruling is a tribute to Peter's determination, his consistency and his principles. Peter very well may never have been prosecuted for publishing cryptographic programs on his website, but it would not have made any sense to him if the government would have left him alone but not someone else.

Thinking back on Peter's case has brought back many memories. I begin to remember how truly remarkable Peter's mind was. How he seemed to have thought seriously and had thoughtful opinions in so many diverse topics, from philosophy and law to history and art.

I am looking forward to the publication of Peter's paper, You Can't Patent Software: Patenting Software is Wrong, in this volume. It will give readers an example of how clear his thinking can be, what a beautiful writer he was and a bit of his whimsical personality.

Remarking on Congressional committee reports stating that Congress intended "anything under the sun that is made by man" to be patentable, Peter writes,

that software is composed of text, or of numbers, or of information and that it is used, and can only be used, to instruct a computer to process information or data. When one thinks about it for a moment, unless there is something wrong with the way one thinks, it is obvious that texts, numbers, information, and data are not the sort of things that have a spatial location, are not the sort of things that can be said to be "under the sun."

I remember someone with an infectious laugh who introduced me to green tea ice cream with red bean sauce, something for which I will always be grateful. And I remember the time he gave me a gift. Yes, an ascot. I looked at him and said something like, "Thank you, Peter, but you know I'll wear this." He just laughed. What kind of person wears an ascot?

A few months later, I was in Rome visiting friends and relatives. I was at my aunt's house, and after lunch she went into another room to get me something. She came back with a gift for me. Yes.

Peter will be missed.