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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION
16

17 UNITED STATES OF AMERICA,
18
19 Plaintiff,
20 v.
21 ELCOM LTD., a/k/a ELCOMSOFT CO.,
LTD., and DMITRY SKLYAROV,
22 Defendants.

Case No. CR 01-20138 RMW

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS BASED ON
FIRST AMENDMENT**

Date: April 1, 2002
Time: 9:00 a.m.
Judge: Hon. Ronald M. Whyte

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I. Introduction

The anti-trafficking provisions of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §1201 *et seq.*, prohibit the dissemination of computer code on certain subjects because Congress believed that the availability of such computer code might enable third parties to violate the copyright laws. No matter how worthy Congress’ goals may be, the DMCA is fundamentally flawed because it targets expression rather than the conduct with which it purports to be concerned. Computer programs are a form of expression. The First Amendment demands that when the government regulates expression there must be an exceptionally tight fit between the ends the government seeks to serve and the means it has chosen. There is no such tight fit here. In the anti-trafficking provisions of the DMCA, Congress has sought to remedy potentially widespread copyright violations not by targeting the violations themselves, but by targeting computer programs that could be used to circumvent copyright protections.

The government’s content-based regulation of this speech is not narrowly tailored and, as a result, the anti-trafficking provisions of the DMCA violate the First Amendment to the United States Constitution. The DMCA is fatally flawed for the additional reason that it tramples on the first amendment rights of scholars and others who need access to certain technologies in order to exercise their first amendment rights. The DMCA is also unconstitutionally vague. Finally, the DMCA is constitutionally flawed because Congress exceeded its Article I powers. For these reasons, set forth more fully below, the DMCA does not pass Constitutional muster.

II. Background

A. The Indictment

According to the indictment in this case, Dmitry Sklyarov, a 27 year old Russian graduate student in cryptology,¹ wrote a program called Advanced eBook Processor (AEBPR) as part of his Ph.D. thesis. Sklyarov is employed by Elcomsoft. The business of Elcomsoft is described more fully in the Motion to Dismiss Based on Vagueness of 17 U.S.C. § 1201.

EBooks are books in digital format that can be read on a personal computer or other

¹ Cryptology is the scientific study of the enciphering and deciphering of messages in secret code or cipher. Merriam-Webster Collegiate Dictionary, 2001.

1 electronic device. A purchaser of an eBook must first download a free computer program that
2 displays the eBook. One such program is Adobe Corporation's eBook Reader. After
3 downloading the eBook Reader, the purchaser then buys and downloads an eBook from an
4 online retailer such as amazon.com or barnesandnoble.com. The customer may read the eBook
5 on the computer onto which the eBook was downloaded. Depending on the settings chosen by
6 the publisher, however, the customer may not be able to print, copy, manipulate or transfer the
7 file to another computer.

8 AEBPR disables the controls set by the publisher. It allows the legitimate purchaser of
9 an eBook to make a digital copy of the eBook in order, for example, to print a portion of it, to
10 copy the work from an office computer to a home computer or to a handheld computer such as a
11 Palm Pilot, or to use the eBook in conjunction with other programs.

12 AEBPR was available for sale on Elcomsoft's website for approximately two weeks,
13 starting on June 20, 2001. Only a handful of copies were sold in the United States.

14 **B. The DMCA**

15 The DMCA does not address copyright infringement *per se*. Instead, Congress chose to
16 focus on the security of technical measures that could be used to protect intellectual property.
17 The so-called "anti-circumvention provision," 17 U.S.C. § 1201 (a)(1)(A), states that "No person
18 shall circumvent a technological measure that effectively controls access to a work protected
19 under this title." The DMCA also contains an "anti-trafficking provision, codified at 17 U.S.C.
20 §1201(b)(1), which states²:

21 No person shall manufacture, import, offer to the public, provide, or otherwise
22 traffic in any technology, product, service, device, component, or part thereof,
that -

23 (A) is primarily designed or produced for the purpose of circumventing protection
24 afforded by a technological measure that effectively protects the right of a
copyright owner to a work protected under this title in a work or portion thereof;

25 (B) has only limited commercially significant purpose or use other than to
26 circumvent protection afforded by a technological measure that effectively

27 ² 17 U.S.C. §1201(a)(2) is essentially identical, but omits the words "in a work or a portion
28 thereof" in each subsection. Section 1201(a) is described more fully in the motion to dismiss
based on vagueness.

1 protects the right of a copyright owner to a work protected under this title in a
2 work or a portion thereof; or

3 (C) is marketed by that person or another acting in concert with that person with
4 that person's knowledge for use in circumventing protection afforded by a
5 technological measure that effectively protects the right of a copyright owner to a
6 work protected under this title in a work or portion thereof.

7 17 U.S.C. § 1204 makes the violation of the DMCA punishable by a \$500,000 fine and 5
8 years imprisonment for a first offense, and a \$1 million fine and 10 years imprisonment for each
9 subsequent offense.

10 III. Argument

11 A. The DMCA Violates the First Amendment Because It Burdens More Speech Than 12 Is Necessary to Serve the Government's Interest

13 1. Computer Code is Speech Protected By the First Amendment

14 Computer code is a form of expression. As such, it is speech, and is protected by the
15 First Amendment. See *Universal Studios v. Corley*, 273 F.3d 429, 447 (2d Cir. 2001); *Karn v.*
16 *U.S. Dep't of State*, 920 F. Supp. 1 (D.D.C. 1996).

17 Whether computer code is expressed as source code or as object code makes no logical
18 difference to the analysis. Source code and object code are the languages used by humans to
19 express ideas in forms understandable to and usable by computers. Most programmers write in
20 source code languages, which involve a series of letters and symbols, with specific vocabulary,
21 syntax and expository conventions. One simple example of the Visual BASIC programming
22 language is as follows:

```
23 If Month(Date) = 2 And Day(Date) = 12 Then  
24 Print "Don't forget that today is your anniversary."  
25 End If
```

26 The meaning of that example is as clear to those who read Visual BASIC as is this
27 sentence to those who read English.³ Object code has a simpler structure: a sequence of
28 instructions, each of which is a sequence of fields, each of which has a fixed size.

All computer code is human readable. Some forms are simply more convenient to read

³ Consider what those not trained in the language of legal citation would make of "111 F. Supp. 2d 294, 326 (S.D.N.Y. 2000)."

1 than others.

2 All computer code is expressive. Many of the ideas expressed in source code are also
3 expressed in the assembly language code that results from compiling that code, and again in the
4 binary machine language that is the output of the assembler. Some content may be lost: source
5 code comments are typically not preserved in object code. But some ideas that are only implicit
6 in the source code may be made more apparent in the object code, such as how a particular
7 sequence of actions should be expressed in terms of processor operations in order to obtain
8 maximum performance from the machine.

9 All computer code is executable. In some instances it may be advantageous to transform
10 the code into another form first, but transformation is by no means mandatory. Because object
11 code is just a translation of source code into another language, it should receive no less
12 protection than any other translation. Indeed, all speech on the internet is part of the digital
13 universe. All such speech is thus nothing more than a string of 0s and 1s. Speech on the internet
14 does not lose its First Amendment protection merely because it has been translated into 0s and
15 1s, rather than being expressed in words or in symbols. The District Court for the Southern
16 District of New York put it best:

17 It cannot seriously be argued that any form of computer code may be regulated
18 without reference to First Amendment doctrine. The path from idea to human
19 language to source code to object code is a continuum. As one moves from one
20 to the other, the levels of precision and, arguably, abstraction increase, as does the
21 level of training necessary to discern the idea from the expression. Not everyone
22 can understand each of these forms. Only English speakers will understand
23 English formulations. Principally those familiar with the particular programming
24 language will understand the source code expression. And only a relatively small
25 number of skilled programmers and computer scientists will understand the
26 machine readable object code. But each form expresses the same idea, albeit in
27 different ways.

28 *Universal City Studios, Inc., v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd*,
273 F.3d 429 (2d Cir. 2001).

Indeed, even “source code” itself is a relative term. The notion of what is source code
changes rapidly as developments in computer technology occur. Consider the following: if one
has watched even a few episodes of “Star Trek”, one is familiar with the concept of humans
speaking directly to and interacting with computers. In such a scenario, the source code for the

1 computer is the human speech itself. But that concept is not just science fiction; it is now being
2 developed at the Spoken Language Systems (SLS) group at MIT's Laboratory of Computer
3 Science. SLS has developed a system where humans can speak with a computer by telephone,
4 using conversational English, to obtain information about weather forecasts, airline schedules
5 and Boston area restaurants. See [Http://www.sls.lcs.mit.edu/sls/whatwedo/](http://www.sls.lcs.mit.edu/sls/whatwedo/). What SLS has
6 developed is not as advanced as the computer interface on the starship Enterprise, of course, but
7 it is a working example of human speech as the "source code" for a computer. It is easy to
8 extrapolate, in the not so distant future, to computers being able to process far more complex and
9 detailed instructions issued directly in English. The line between human speech and historic
10 understandings of "source code" is becoming at least as blurred as the line between source code
11 and object code. In this dynamic an area, drawing legal lines in the sand is, at best, a risky
12 venture. Cf. *Denver Area Educational Television Consortium v. FCC*, 518 U.S. 727, 768 (1996)
13 (Stevens, J., concurring) ("[I]t would be unwise to take a categorical approach to the resolution
14 of novel First Amendment questions arising in an industry as dynamic as this").

15 The government may argue that object code is not speech because it is "functional." This
16 is a shorthand way of saying that code is understood both by humans and by computers. Of
17 course, computer code can, at the instruction of a person, cause a computer to execute the
18 instructions contained in the code. But the fact that speech can be put to use by a person does
19 not mean that it is no longer speech. *Bernstein v. United States Department of State*, 922 F.
20 Supp. 1426, 1435 (N.D. Cal.1996) ("Instructions, do-it-yourself manuals, [and] recipes" are all
21 "speech").

22 This issue can perhaps be best understood by analogy. Suppose Congress finds that there
23 is a problem with the theft of luggage from lockers in interstate bus terminals. Further suppose
24 that these thefts are occurring because the lockers have combination locks, and the combinations
25 have been published in a book. Locker combinations, like computer code, have a "functional"
26 component: they communicate information that allow a user to "unlock" something, whether a
27 locker or an eBook. However, the possibility that such protected expression might, with some
28 additional effort on the part of the recipient, lead to conduct (even potentially illegal conduct)

