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ORIGINAL FILED

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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
Plaintiff,
19
v.
20 ELCOM LTD., a/k/a ELCOMSOFT CO.,
21 LTD., and DMITRY SKLYAROV,
22 Defendants.
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Case No. CR 01-20138 RMW

**REPLY 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

In enacting the anti-trafficking provisions of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §1201 *et seq*, Congress prohibited speech that is protected by the First Amendment, rather than concerning itself with the consequences of that speech. Although Congress’ choice may have been expedient, and even might have certain practical advantages, it does not satisfy the exacting requirements of the United States Constitution.

Our opening brief argued that the DMCA was unconstitutional because (a) code is speech; (b) the DMCA regulates that speech based on its content; (c) such regulations must be narrowly tailored; (d) the DMCA is not narrowly tailored, and (e) even if you applied intermediate scrutiny the DMCA still fails to pass muster under the applicable tests. In its opposition, the government essentially concedes (a), and completely concedes (d). The government argues, however, that the DMCA can survive because (i) it does not regulate speech based on its content, and therefore subject to intermediate scrutiny, (ii) it passes that standard, and (iii) in any event, Elcomsoft lacks standing to bring this challenge. The government also attempts to suggest, notwithstanding its concession, that code should not be deemed speech after all. As we explain below, those arguments are unavailing.

II. ARGUMENT

A. THE DMCA VIOLATES THE FIRST AMENDMENT AS APPLIED TO THE SALE OF THE AEBPR

1. Computer Code is Speech

The government concedes, as it must, that computer source code is speech and, as such, is protected by the First Amendment. *See* United States’ Opposition to Defendant’s Motions to Dismiss the Indictment on Constitutional Grounds (“Opposition”) at 19-20. Faced with the logical consequences of that concession, however, the government claims that no consensus has arisen with respect to object code. Although that assertion might have some merit as a purely

1 academic matter, it does not comport with the law.¹ Every court to have considered the issue has
2 concluded that object code is protected expression.² Indeed, in one of the cases that the
3 government cites for the proposition that the courts have “struggled” with the issue, *Universal*
4 *City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), the court held that object code *is*
5 entitled to protection under the first amendment: “If someone chose to write a novel entirely in
6 computer object code by using strings of 1’s and 0’s for each letter of each word, the resulting
7 work would be no different for constitutional purposes than if it had been written in English.”
8 *Id.* at 445-46. The other case cited by the government, *Junger v. Daley*, 209 F.3d 481 (6th Cir.
9 2000), does not consider the first amendment status of object code at all. Moreover, the
10 government’s own descriptions of the other three cases it cites make clear that object code was
11 not at issue. The Government concedes that in *Bernstein v. United States Department of State*,
12 922 F. Supp. 1426, 1436 (N.D. Cal. 1996), the court did “not reach [the] object code question.”
13 The government also relies on dicta in a footnote in *Karn v. United States Department of State*,
14 925 F. Supp. 1, 9 n. 19, but neither the footnote nor the case discusses object code. Finally, the
15 government cites *Name Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000),
16 but that case dealt with top level internet domain names such as “.com” and “.gov,” and the words
17 “source code” and the words “object code” do not even appear in the opinion.

18 The government also suggests that the “functional” element of computer code brings it
19 outside the protections of the first amendment. This precise argument has been rejected in this
20 district. In considering whether export requirements on computer code comported with the first
21 amendment, Judge Patel wrote: “Whether source code and object code are functional is
22 immaterial to the analysis at this stage. Contrary to defendants’ suggestion, *the functionality of a*
23 *language does not make it any less like speech.*” *Bernstein v. United States Department of State*,

24
25 ¹ The government’s claim that object code “*generally* only has meaning to . . . computer[s]” is
26 also not strictly accurate. See Opposition at 20. As the Southern District of New York
27 recognized, “All code is human readable. As source code is closer to human language than is
28 object code, it tends to be comprehended more easily by humans than object code.” *Universal*
City Studio, Inc. s v. Reimerdes, 111 F. Supp. 2d 294, 306 (S.D.N.Y. 2000).

² Moreover, the fact that computer code is offered for sale is of no constitutional significance.
See Section II(B)(2), *infra*.

1 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) (emphasis added).³ The court went further still,
2 rejecting the government’s argument that the distinction between subject code and object code
3 was of constitutional significance, holding “even if [the challenged] source code, which is easily
4 compiled into object code for the computer to read and easily used for encryption, is essentially
5 functional, that does not remove it from the realm of speech.” *Id.*

6 Indeed, the dearth of authority in support of the government’s position is not surprising,
7 because whether computer code is expressed as source code or as object code makes no logical
8 difference to the analysis.⁴ No court has ever adopted the distinction the government urges
9 here.⁵ “It cannot seriously be argued that *any form* of computer code may be regulated without
10 reference to First Amendment doctrine.” *Universal City Studios, Inc., v. Reimerdes*, 111 F.
11 Supp. 2d 294 (S.D.N.Y. 2000), *aff’d*, 273 F.3d 429 (2d Cir. 2001) (emphasis added).

12 2. The DMCA Does Not Only Target Commercial Speech

13 The government argues that the DMCA is valid because it targets commercial speech,
14 and equates commercial speech with speech that is sold. But whether speech is sold – as are the
15 vast majority of books in America – is of no constitutional moment. Commercial speech is
16 speech that “proposes a commercial transaction.” *Children of the Rosary v. City of Phoenix*, 154
17 F.3d 972, 983 (9th Cir. 1998) (citing *Board of Trustees v. Fox*, 492 U.S. 469, 473 (1989); *see*
18 *also Nordyke v. Santa Clara County*, 110 F.3d 707, 710 (9th Cir. 1997). “The fact that expressive
19

20 ³ The Ninth Circuit affirming *Bernstein* has been withdrawn pending *en banc* review. *See* 192
21 F.3d 1308 (9th Cir. 1999). The current procedural ambiguity of the ultimate result
22 notwithstanding, Judge Patel’s analysis remains sound. Indeed, the government cites the district
23 court’s opinion in its opposition.

24 ⁴ Indeed, as technology advances the distinction becomes increasingly less meaningful. The Sun
25 Corporation’s Java programming language allows programs to work on any operating system,
26 thus making the underlying workings of the program increasingly irrelevant to the programmer.
27 *See* <http://java.sun.com/java2/whatis/>.

28 ⁵ Even the law review articles the government cites is inapposite. In one case, the government
quotes a single sentence, devoid of analysis, in an article otherwise directed to the use of
injunctions in copyright cases. *See* Lemley & Volokh, *Freedom of Speech and Injunctions In*
Intellectual Property Cases, 48 Duke L. J. 147, 236 (1998). In the other, the author states his
view that code can be speech, but that *Junger v. Daley*, *supra*, should have been decided with
more reference to what the author believes is traditional first amendment law. *See* Kerr, *Are We*
Overprotecting Code? Thoughts on First Generation Internet Law, 57 Wash. & Lee L. Rev.
1287 (2000).

1 materials are sold neither renders the speech unprotected, nor alters the level of protection under
2 the First Amendment. [Plaintiff] need not give away its [wares] in order to bring them within the
3 ambit of the First Amendment.” *Mattel, Inc. v. MCA Records, Inc.* 28 F. Supp.2d 1120,
4 1137 (C.D. Cal. 1998). Or, to quote Samuel Johnson’s succinct statement: “No man but a
5 blockhead ever wrote, except for money.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,
6 584 (1994) (quoting 3 Boswell’s Life of Johnson 19 (G. Hill ed. 1934)); *see also Virginia State*
7 *Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (“Speech
8 likewise is protected even though it is carried in a form that is sold for profit.”) Thus, the
9 AEBPR does not lose its protected status as expression simply because it can be sold for profit;
10 indeed, that fact is irrelevant to the analysis. The government does not cite a single commercial
11 speech case in its discussion of the issue, and with good reason. It misapprehends the nature of
12 the doctrine.

13 The same is true of the government’s further argument that the DMCA merely prohibits
14 the sale of the AEBPR, not the AEBPR itself. *See* Opposition at 18. The constitution draws no
15 such distinctions. The government cannot prohibit the sale of protected expression in the form of
16 a computer program any more than it can criminalize the sale of expression in the form of books
17 or newspapers. According to the government’s line of reasoning, a statute criminalizing the sale
18 of all daily newspapers in the country would implicate no first amendment concerns because the
19 legislation would target the sale of the newspaper, not the newspaper itself. This is not the law.
20 *See Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 (1987) (invalidating tax on
21 magazines as inconsistent with first amendment); *Simon & Schuster, Inc. v. Members of New*
22 *York State Crime Victims Bd.*, 502 U.S. 105, 116, (1991) (invalidating as inconsistent with the
23 first amendment New York’s “Son of Sam” law, which required a criminal’s income from works
24 describing his crime be deposited in escrow account, which funds were then made available to
25 victims of crime.)

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1 **3. The DMCA Cannot Survive First Amendment Scrutiny, Whether**
2 **Intermediate or Strict**

3 **a. The DMCA Is Not Content Neutral**

4 Whether a statute is content neutral is evaluated with respect to the government's
5 *purpose*. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) “[g]overnment regulation
6 of expressive activity is content neutral so long as it is ‘*justified* without reference to the content
7 of the regulated speech); *Bartnicki v. Vopper* , 523 U.S. 514, 121 S.Ct. 1753, 1760 (2001). In
8 this case, the DMCA’s prohibition is defined with reference to the content of the code. Indeed, it
9 is precisely the content of the code that causes the government to seek to regulate it.

10 The government suggests that Congress’ purpose in enacting the DMCA is content
11 neutral because it targets only the “functional” aspect of software. In so arguing, the government
12 proposes no workable standard — nor any standard of any sort — to define a regulation
13 addresses the “functional” component of speech and when it does not. Instead, the government
14 seems to suggest that Congress can regulate speech whenever the government’s real target is the
15 potential consequences of that speech. But speech frequently has potential consequences.
16 Indeed, often those potential consequences are the very point of the speech. The consequences
17 that *potentially* flow from speech do not change its protected nature.

18 Of course, Congress may regulate speech that is functional in certain circumstances.
19 One would not defend an action for breach of oral contract by invoking the first amendment. In
20 that case, the speech *is* functional, because the words have legal significance in and of
21 themselves. The contract is formed once the words are spoken. Similarly, if someone uses a
22 stolen password in order to gain unauthorized access to a building, he has committed trespass,
23 even though he has done so with words or symbols. Likewise, the Government can regulate the
24 *use* of the AEBPR to decrypt an eBook, in certain circumstances, even though the user types on
25 her keyboard in order to activate the program. Congress could have banned the *use* of the
26 AEBPR for certain purposes without running afoul of the first amendment, even though that use
27 involves the transmission of computer code.

28 While the first amendment might not prohibit the regulation of “functional” speech when

1 the speech is inseparable from its consequences, it does prohibit the regulation of speech that is
2 expressive. Although we recognize that it is a difficult question, we posit that speech is
3 protected by the first amendment when the potential consequences of the speech flow from its
4 effects upon third parties. For example, when a candidate says, "vote for me," he hopes that the
5 listener will indeed vote for him. Indeed, he may convince the listener to do so. Nonetheless,
6 the decision to vote is made by the listener, even if that decision can be traced back to the
7 listener's reaction to the speech. How-to manuals are protected by the first amendment for this
8 reason: a third party must make use of the speech in order for the "functional" act to occur. *See*
9 *Bernstein*, 922 F. Supp. at 1435 ("Instructions, do-it-yourself manuals, [and] recipes" are all
10 "speech").

11 The AEBPR, once sold, simply resides on a computer. It does not perform any function
12 until it is used by the purchaser. The purchaser must make a decision to violate the copyright
13 laws by making an unauthorized copy of an eBook, or to use the AEBPR for a legitimate
14 purpose. As a result, the AEBPR does not become "functional" until it is used by a third party.

15 Where Congress seeks to justify a regulation based in a listener's reaction, the prohibited
16 speech must be so inflammatory that it renders the listeners unable to control themselves. *See,*
17 *e.g., United States v. Poocha*, 259 F.3d 1077 (9th Cir. 2001); *Houston v. Hill*, 482 U.S. 451, 462
18 (1987). Because there is neither evidence that the AEBPR so overbears the power of rational
19 thought, nor reason to believe such evidence exists, the regulation of that speech cannot pass
20 constitutional muster.

21 Moreover, "[f]unctionality and expression are . . . not mutually exclusive." *Name Space,*
22 *Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000) (holding that although current
23 top-level domain names such as ".com" and ".net" are not expression under the first amendment,
24 future domain names, although functional, may be entitled to such protection). In areas where
25 functional and expressive components are inseparably intertwined, the Supreme Court has
26 always found that the first amendment applies. For example, in *City of Ladue*, the Supreme
27 Court invalidated a sign ban even though signs posted on houses or front lawns involved the
28 "functional" creation of "visual blight and clutter," because the functional aspect of the

