

1 JOSEPH M. BURTON - #142105
STEPHEN H. SUTRO - #172168
2 DUANE MORRIS LLP
100 Spear Street, Suite 1500
3 San Francisco, CA 94105
Telephone: (415) 371-2200
4 Facsimile: (415) 371-2201
5 Attorneys for Defendant
ELCOMSOFT COMPANY, LTD.
6

ORIGINAL FILED

MAR 18 2002

Richard W. Winking
Clerk, U.S. District Court
Northern District of California
San Jose

7 SPECIALLY APPEARING AS OF COUNSEL:
KEKER & VAN NEST, LLP
8 JOHN W. KEKER - #49092
DARALYN J. DURIE - #169825
9 MICHAEL D. CELIO - #197998
710 Sansome Street
10 San Francisco, CA 94111-1704
Telephone: (415) 391-5400
11 Facsimile: (415) 397-7188

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.
23
24
25
26
27
28

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

TABLE OF CONTENTS

1
2 I. INTRODUCTION1
3 II. ARGUMENT1
4 A. THE DMCA VIOLATES THE FIRST AMENDMENT AS APPLIED
5 TO THE SALE OF THE AEBPR.....1
6 1. Computer Code is Speech.....1
7 2. The DMCA Does Not Only Target Commercial Speech3
8 3. The DMCA Cannot Survive First Amendment Scrutiny,
9 Whether Intermediate or Strict.....5
10 a. The DMCA Is Not Content Neutral5
11 b. The DMCA Cannot Survive Intermediate Scrutiny.....7
12 B. THE DMCA IS OVERBROAD8
13 1. Elcomsoft May Bring a Facial Challenge to the DMCA8
14 2. The DMCA Eliminates Fair Uses9
15 C. THE DMCA IS UNCONSTITUTIONALLY VAGUE12
16 D. The DMCA Is Not A Valid Exercise of Congress' Enumerated Powers13
17 III. CONCLUSION.....14
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

4805 Convoy, Inc. v. City of San Diego,
183 F.3d 1108, 1111 9

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987)..... 4

Bantam Books, Inc. v. Sullivan,
372 U.S. 58, (1963)..... 11

Bartnicki v. Vopper ,
523 U.S. 514, 121 S.Ct. 1753 (2001)..... 5

Bernstein v. United States Department of State,
922 F. Supp. 1426, 1436 (N.D. Cal. 1996)..... 2, 3, 8, 11

Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) 8

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994)..... 4

Children of the Rosary v. City of Phoenix,
154 F.3d 972, 983 (9th Cir. 1998) 3

Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.,
518 U.S. 727 (1996)..... 10

Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.
122 F.3d 1211 (9th Cir. 1997) 11

Forsyth County v. Nationalist Movement,
505 U.S. 123, 130-137 (1992) 10

Harper & Row, Publishers Inc. v. Nation Enterprises,
471 U.S. 539 (1985)..... 9

Houston v. Hill,
482 U.S. 451 (1987)..... 6

Junger v. Daley,
209 F.3d 481 2, 3, 8

Karn v. United States Department of State,
925 F. Supp. 1, 2

Mattel, Inc. v. MCA Records, Inc.
28 F. Supp.2d 1120, (C.D. Cal. 1998) 4

Members of the City Council of the City of Los Angeles et. al. v. Taxpayers for Vincent,
466 U.S. 789 (1984)..... 7, 8

Name Space, Inc. v. Network Solutions, Inc.,
202 F.3d 573, 586 (2d Cir. 2000) 2, 6

New York State Club Association, Inc., v. City of New York,
487 U.S. 1 (1988)..... 8, 9

