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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA Plaintiff, v. ELCOM LTD., a/k/a ELCOMSOFT CO., LTD. and DMITRY SKLYAROV, Defendants.		Case No.: CR 01-20138 RMW **NOTICE OF MOTION AND MOTION TO DISMISS INDICTMENT FOR LACK OF JURISDICTION** Date: March 4, 2002 Time: 9:00 a.m. Judge: The Honorable Ronald M. Whyte

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NOTICE

TO THE UNITED STATES ATTORNEY, PLEASE TAKE NOTICE that at 9:00 a.m. on March 4, 2002 or as soon thereafter as the matter can be heard, in Courtroom 6 of this court, located at 280 South 1st Street, San Jose, California 95113, defendant Elcomsoft Company, Ltd., ("Elcomsoft") will move this court for an order dismissing the criminal complaint brought against it by the United States of America ("United States").

Elcomsoft seeks an order dismissing the indictment against it because of lack of jurisdiction. Said motion is based on the Notice and Memorandum of Points and Authorities in Support of Motion attached hereto, the Declaration of Alexander Katalov filed herewith, the files and records of the case, and such other argument as may be offered at the time of the motion.

INTRODUCTION

This motion presents an issue of first impression – may section 1201 of the Digital Millenium Copyright Act ("DMCA") be applied to a foreign corporation for conduct allegedly within its purview, but which occurred entirely on the Internet in cyberspace.[1] We believe that law and logic

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[1] The indictment against Elcomsoft is also based on §§ 2 and 371 of title 18 of the United States Code. Section 2 states:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

However, because prosecution under these statutes is dependant upon the court having jurisdiction the DMCA, an analysis of the extraterritoriality application of these statutes is not necessary and taken. *See, e.g., United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9th Cir. 1991) (recognizin "the crime of 'accessory after the fact' gives rise to extraterritorial jurisdiction to the same extent underlying offense. That is, if the underlying substantive statute applies extraterritorially, the s making it unlawful to assist another in avoiding apprehension, trial or punishment also a extraterritorially when invoked in connection with an extraterritorial violation of the underlying stat *cert. denied*, 508 U.S. 906 (1993). *See also Chua Han Now v. United States*, 730 F.2d 1308, 1311 (9 1984), *cert. denied,* 470 U.S. 1031 (1985).

compels the court to conclude that it may not be so applied. Elcomsoft believes and asserts that because of the unique nature of the Internet, it's alleged conduct, which only took place on and by means of the Internet occurred outside of the territorial jurisdiction United States. That is, it was extraterritorial in nature. As such, the DMCA can apply to the extraterritorial conduct of a foreign corporation only if (1) Congress expressed an intent that such an application be permitted *and* (2) application of the DMCA under these circumstances comports with Fifth Amendment due process standards. Neither of these conditions is met in this case. Moreover, limiting the extraterritorial application of the DMCA in this case is consistent with international law. The exercise of jurisdiction under the facts of this case would violate principles of international law and would be "unreasonable." Accordingly, this court should hold that it may not exercise jurisdiction over a foreign corporation for activities that occurred entirely on the Internet allegedly in violation of 17 U.S.C. § 1201 and grant Elcomsoft's motion to dismiss.

Elcomsoft brings this motion pursuant to Rule 12 of the Federal Rules of Criminal Procedure on the ground that the court lacks subject matter jurisdiction. Rule 12 provides Elcomsoft with the authority to bring this motion by providing, *inter alia*: "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." Fed. Rules of Crim. Proc. § 12(b). *See also United States v. Ayarza-Garcia*, 819 F.2d 1043 (11th Cir. 1987) (stating: "Questions of subject matter jurisdiction may be raised under Rule 12(b)"), *cert. denied*, *Ayarza-Garcia v. United States*, 484 U.S. 969 (1987). The burden to prove subject matter jurisdiction rests with the government. *Thornhill Publ'g Co., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). The plaintiff must "present affidavits or any other evidence necessary to satisfy its burden." *St. Clair v. City of Chico*, 880 F.2d at 199, 201 (9th Cir. 1989). The plaintiff's allegations are not presumed to be truthful. *Thornhill Publ'g Co., Inc. v. General Telephone & Electronics Corp.*, *supra*, 594 F.2d at 733.

BACKGROUND

Elcomsoft is a company which is headquartered in Moscow, Russia and develops and sells computer software. The technology at issue in this case is an Elcomsoft program called advanced e-

book processor ("AEBPR"). The AEBPR program permits a legitimate purchaser of an electronic book ("e-book") formatted in the Adobe Acrobat e-book reader format to convert that e-book from the Adobe e-book reader format to a format readable by any Adobe Acrobat reader. Declaration of Alexander Katalov in Support of Motion to Dismiss for Lack of Jurisdiction ("Declaration of Katalov"), ¶ 3. The e-book reader format was designed by Adobe to permit the publisher or distributer of an e-book to restrict or limit the exercise of certain copyright rights of an owner of the copyright such as the ability to copy, distribute, print, or have the text of the book read audibly by a computer. The conversion accomplished by the AEBPR program enabled a legitimate purchase of an e-book to exercise his or her rights of fair use under the copyright laws.

Elcomsoft employees developed the AEBPR program in Russia. It was first made available for purchase on or by June 20, 2001 on the Internet. Declaration of Katalov, ¶ 3. The indictment charges Elcomsoft with offering to the public, trafficking, marketing, and selling, the AEBPR program. The indictment also makes clear that each of these forms of conduct occurred on the internet. The indictment states:

> [D]efendant Elcomsoft and others made the AEBPR program available for purchase on the Elcomsoft.com website. Individuals wishing to purchase the AEBPR program were permitted to download a partially functional copy of the program from the Elcomsoft.com and then were directed to pay approximately $99 to an online payment service, RegNow, based in Issaquah, Washington. Upon making a payment via RegNow website, Elcomsoft and other persons provided purchasers a registration number permitting full use of AEBPR program. Indictment, para. 3.

The government does not, nor could they in good faith allege that the conduct at issue (i.e. the offering to the public, marketing, or selling) occurred other than over the internet.

ARGUMENT

A. INTERNATIONAL TRANSACTIONS CONDUCTED BY A FOREIGN CORPORATION SOLELY ON THE INTERNET ARE INHERENTLY EXTRATERRITORIAL.

The Internet is a "unique and wholly new medium of worldwide human communication," which was develops to serve as such. *American Civil Liberties Union v. Reno*, 929 F.Supp. 824, 844 (E.D. Penn. 1996), *aff'd*. *American Civil Liberties Union v. Reno*, 217 F.3d 162 (3rd Cir. 2000). "[T]he Internet has an *'international, geographically- borderless nature*,'" which is "accessible to all other

Internet users worldwide." *American Civil Liberties Union v. Reno*, *supra*, 217 F.3d at 169 (citations omitted), *cert. granted*, 121 S. Ct. 1997 (2001) (emphasis added). The internet has not physical locus.

As explained by the Supreme Court of the United States:

> The Internet is an international network of interconnected computers. . . . The Internet has experienced "extraordinary growth." The number of "host" computers--those that store information and relay communications-- increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.
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> * * *
>
> Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. . . .Taken together, these tools constitute a unique medium--known to its users as "cyberspace"--*located in no particular geographical location* but available to anyone, anywhere in the world, with access to the Internet.

Reno v. American Civil Liberties Union, 521 U.S. 844, 849-851 (1997). (emphasis added).

Similarly, the district court described the Internet as "a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communic without direct human involvement or control, and with the automatic ability to re-route communicatio one or more individual links were damaged or otherwise unavailable." *American Civil Liberties Unio Reno*, 929 F.Supp. 824.

Another significant characteristic of the internet is that information is most often distributed to use "pull"rather than by "push." That is consumers (of information) choose to come to the resource, rathe having information thrust upon them. Most importantly information distributed in this way is availabl users pervasively, simultaneously and instantly.

> Once a provider posts its content on the Internet, it cannot prevent that content from entering any community. Unlike the newspaper, broadcast station, or cable system, Internet technology necessarily gives a speaker a potential worldwide audience. Because the Internet is a network of networks . . ., any network connected to the Internet has the capacity to send and receive information to any other network.

American Civil Liberties Union v. Reno, *supra*, 929 F.Supp. at 844. "Communications over the Intern not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encou content 'by accident.' . . . Although content on the Internet is just a few clicks of a mouse away from t

user, the receipt of information on the Internet requires a series of affirmative steps more deliberate an directed than merely turning a dial." *Id*. Furthermore,

> [t]here is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms. An e-mail address
>
> provides no authoritative information about the addressee, who may use an e-mail "alias" or an anonymous remailer. There is also no universal or reliable listing of e-mail addresses and corresponding names or telephone numbers, and any such listing would be or rapidly become incomplete.

Id. at 845.

A person selling an item on the Internet cannot direct or prevent that content from entering any community. Instead, it is the purchaser who must take an affirmative step. Furthermore, in the arena o Internet sales, the seller cannot determine the identity of a user. An e-mail address provides no authori information about the addressee. There is no universal or reliable listing of e-mail addresses and corresponding names or telephone numbers. Accordingly, in a transaction occurring purely over the Internet, the seller cannot assess the location of the buyer. The buyer could be located anywhere in the world. Even in situations where one may be able to decipher some information about the purchaser fro his/her e-mail address, one often cannot be certain where that person is located. For example, the attor at the law firm of Duane Morris have e-mail addresses that end with @DuaneMorris.Com (i.e., Joseph Burton's e-mail address is JMBurton@DuaneMorris.Com). Although the e-mail address indicates the addressee is affiliated with the law firm of Duane Morris, a firm based in the United States, it does not reflect his or her location. Duane Morris maintains an office in London, England, and attorneys practi out of that office have e-mail addresses with the same ending (e.g., JSCohen@DuaneMorris.Com).

The Internet belongs to no country alone, but to all countries collectively. It is in a jurisdictional se like the oceans or the air and space. Because it is an omnipresent shared resource, it is, and must be, b nature extraterritorrial. While transactions occurring solely on the Internet may have an impact on nati and/or their citizens, this fact does not and should not automatically imbue the effected country with jurisdiction over the actions of persons transacting on the Internet. Whether jurisdiction over the actio persons operating exclusively on the Internet can be asserted is, like all questions regarding the applica of extraterritorial jurisdiction, a matter of law and policy.

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B. CONGRESS DID NOT INTEND THE DMCA TO HAVE EXTRATERRITORIAL EFFECT.

The Constitution does authorize the Congress to enact laws that have extraterritorial effect. Howev for a court to conclude that a statute has such an effect, it must apply the two-pronged test first establis in *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991). First, ther must be a finding that Congress expressed an intent to give the statute extraterritorial effect. *Id*. at 248 Second, extraterritorial application must not violate basic principles of due process. *Id*. at 248-249.

Congress expressed no intent that the DMCA have extraterritorial application in general or, specifi that it apply to purely Internet transactions in particular. "It is a long-standing principle of American l that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territori jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). There is presumption against extraterritorial application. *Id*. Without a clear expression of congressional inten court must "conclude that the statutes are "primarily concerned with domestic conditions." *Id.* Here, t is no expression of Congress' intent that the statute in question should apply extraterritorially.

In *United States v. Davis, supra*, 905 F.2d 245, the Ninth Circuit concluded that Congress intended act in question, the Maritime Drug Law Enforcement Act, to apply extraterritorial. The court rendered holding because Congress explicitly provided: "This section is intended to reach acts of possession, manufacture, or distribution outside the territorial jurisdiction of the United States." 46 U.S.C. app. § 1903(h). Congress did not include such a statement with respect to section 1201. Accordingly, "again backdrop of the presumption against extraterritoriality, this court must conclude that the DMCA is "primarily concerned with domestic conditions." *EEOC v. Arabian Am. Oil Co.*, *supra,* 499 U.S. at 24 (internal quotation omitted).

A conclusion that section 1201 does not apply extraterritorially is also supported by case law. For example, a similar issue as the one presented here, albeit involving a different section of title 17, was considered by the Ninth Circuit in *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, (9th Cir. 1994). In that case, the Ninth Circuit refused to "overturn over eighty years of

consistent jurisprudence on the extraterritorial reach of the copyright laws [17 U.S.C. § 106] without fi guidance from Congress." *Id.* In rendering this holding, the court recognized:

> Congress chose in 1976 to expand one specific "extraterritorial" application of the Act by declaring that the unauthorized importation of copyrighted works constitutes infringement even when the copies lawfully were made abroad. *See* 17 U.S.C.A. § 602(a) (West Supp.1992). Had Congress been inclined to overturn the preexisting doctrine that infringing acts that take place wholly outside the United States are not actionable under the Copyright Act, it knew how to do so.

Id. at 1096 (emphasis in original) (*citing Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S 428, 440 (1989) for the proposition that "[w]hen it desires to do so, Congress knows how to place the l seas within the jurisdictional reach of a statute. (Internal citation and quotation omitted)"). The same i with respect to section 1201. Had Congress been inclined to overturn the preexisting doctrine and mak section 1201 apply to acts that take place wholly outside the United States, it knew and was required to so explicitly. Congress, however, did not do that. Accordingly, application of 1201 to a foreign comp for extraterritorial activities would be inconsistent with Congress' intent and would be improper.

C. PRINCIPLES OF DUE PROCESS PROHIBIT EXTRATERRITORIAL

Even if the court were to find that Congress intended for section 1201 to apply extraterritorially, yo must nevertheless conclude that the exercise of jurisdiction in this case does not meet constitutional standards. Application of section 1201 extraterritorially is also improper because its application in tha manner would violate the norms of due process, including: (1) the rule of lenity; (2) the right of fair warning; and (3) the requirement of a sufficient nexus between the alleged conduct and the United Stat "Under the rule of lenity, an ambiguous criminal statute is to be strictly construed against the Governm *United States v. Bin Laden*, 92 F.Supp.2d 189, 216 (S.D.N.Y.2000). The principle of fair warning requ those subject to the law have a "fair warning . . . in language that the common world will understand, o what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the l should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). In this case, regardless of whethe actions of Elcomsoft are

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deemed to have occurred within or without the United States, Elcomsoft had no warning that section 1 could be applicable to its actions.

Section 1201 is a relatively new statute whose scope of applicability is unclear. The plain words o section 1201 do not provide any company, particularly one operating from a location outside of the Un States, with an understanding and fair warning of the type of activities that it restricts. Indeed, Elcoms a foreign company operating its business from Russia over the Internet, was unaware that its developm and sale of the AEBPR program were subject to the laws of the United States, and more specifically, potentially fell within the type activities prohibited by the DMCA. As such, application of section 120 Elcomsoft would violate its due process right to fair warning. *United States v. Davis*, *supra*, 905 F.2d (9th Cir. 1990).

As noted above, due process also requires the existence of a "sufficient nexus" between the defend and the United States such that application of the statute extraterritorially would not be arbitrary or fundamentally unfair. *United States v. Davis*, *supra*, 905 F.2d at 248-249. *See also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981) (stating: "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregatio contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfai *reh'g denied*, 450 U.S. 971 (1981). To establish a sufficient nexus, the United States must show that th plan for the activity was likely to have effects in the United States. *See, e.g., United States v. Kahn*, 35 426, 429 (9th Cir. 1994). The attempted transaction must be *"aimed* at causing criminal acts within th United States." *Id.* (Citation and internal quotation omitted).

For jurisdiction to exist, courts have consistently required a clear intent to cause criminal acts in th United States. For example, in *United States v. Gonzalez*, 810 F.2d 1538 (11th Cir. 1987), the court addressed an appeal by defendants who were convicted of conspiring to import marijuana into United States, of conspiring to possess marijuana aboard stateless vessel with intent to distribute, of possessin marijuana aboard stateless vessel with intent to distribute, and of possessing marijuana with intent to i it into United States. On appeal, the defendants' claimed, in part, that the

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district court improperly applied criminal statutes – 21 U.S.C. §§ 955a(a), 955c – to their extraterritori activities. The Court of Appeals rejected this claim.

The court recognized that to apply sections 955a(a) and 955c extraterritorially, the United States m show "that the [ship's] *intended* destination was the United States or that the crew members' *purpose* send [the drugs] into this country." *Id*. at 1542 (emphasis added). Follow this directive, the court conc that a sufficient nexus existed between the defendants activities and the United States. *Id*. To support t conclusion, the Court found that the defendants intent was supported by evidence that their vessel was course for United States at the time it was sighted by the Coast Guard, and that vessel had previously a as a "mother ship" for smaller vessel. *Id*

Elcomsoft's activities with regard to the AEBPR program are simple and straightforward. Elcoms placed an advertisement on its webpage for the AEBPR program from its headquarters in Russia. Dec Katalov, ¶ 4. From this location, Elcomsoft also upload the AEBPR program onto the Internet. Decl. Katalov, ¶ 4. Individuals accessing Elcomsoft's webpage and, those interested in purchasing the AEB program directed payment to RegNow. Decl. of Katalov, ¶ 5. After RegNow received payment, RegN forwarded to the purchaser a registration number allowing full use of the program. Decl. of Katalov, ¶ After the transaction was completed, RegNow sent the transaction information to Elcomsoft, including payment verification, the registration number given to the purchaser, and the purchaser's e-mail addres Decl. of Katalov, ¶ 5. Thus, the e-mail address is the extent of the information Elcomsoft knew about purchaser. Elcomsoft did not know the location of the purchaser, as Elcomsoft did not send by traditio mail a copy of the software to the purchaser. Decl. of Katalov, ¶ 5. As a result, Elcomsoft's sale of th AEBPR program occur exclusively over the Internet in cyberspace. This business arena is outside of t United States.

The facts of this case do not establish the proper nexus between the United States and Elcomsoft, a such, application of section 1201 to the conduct of Elcomsoft would be arbitrary and fundamentally ur Elcomsoft did not: (1) offer the AEBPR program for sale with the intent of causing criminal acts withi United States; (2) develop a plan for the sale of the AEBPR program in the United States; (3) direct th of the program towards the United States; or

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(4) advertise the AEBPR program in publication distributed or sold in the United States. Elcomsoft si offered the AEBPR program for sale on the Internet. Decl. of Katalov, ¶¶ 4, 5.

Elcomsoft, from Russia, uploaded the AEBPR program onto the Internet. Decl. of Katalov, ¶ 4. A such, anyone with access to the Internet could purchase the AEBPR program. Elcomsoft could not pre the AEBPR program from entering the United States. *See American Civil Liberties Union v. Reno*, *su* 929 F.Supp. at 844. Thus, the United States cannot be found to be the intended destination for the AE program nor can it be found that Elcomsoft had an intent to send the AEBPR program into this country Accordingly, there is no sufficient nexus between the United States and Elcomsoft. Therefore, due pro requires this court to find that it does not have jurisdiction over Elcomsoft.

D. INTERNATIONAL LAW PRINCIPLES DO NOT SUPPORT EXTRATERRITORIA APPLICATION OF THE DMCA.

International law does not create any limitation on the congressional power to enact laws with extraterritorial application. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Unite States v. Pinto-Mejia*, 720 F.2d 248, 259 (2nd Cir. 1983), *opinion modified on denial of reh'g*, 728 F.2 (2nd Cir. 1983). It does, however, "in the absence of an explicit Congressional directive, courts do no extraterritorial effect to any statute that violates principles of international law." *United States v. Vasq Velasco*, 15 F.3d 833, 839 (9th Cir. 1994)(citations omitted). Given the unique circumstances of this c jurisdiction would not be supported under principles of the international law.

The exercise of extraterritorial jurisdiction may be appropriate under one or more of the following principles of international law:

1. **Objective Territorial Principle** – Jurisdiction based on acts performed outside the United States that produce detrimental effects therein.
2. **Protective Principle** – Jurisdiction based on acts committed outside the United States that may impinge on the United States' integrity, security, or political independence.
3. **Territorial Principle** – Jurisdiction is based on the place where the offense is committed.
4. **National Principle** – Jurisdiction is based on the nationality or national character of the offender.
5. **Universal Principle** – Jurisdiction is based on the fact that the crime or crimes allegedly committed are so heinous that any nation with control over the Supreme Court may assert jurisdiction.

6. **Passive Personality Principle** – Jurisdiction is based on the nationality of the victim.

See, e.g., id. at 840. Further, even when the exercise of jurisdiction comports with one of these princip international law may still be violated by the exercise of jurisdiction extraterritorially if such an action "unreasonable." *See* Restatement (Third) of Foreign Relations Law of the United States § 403, Comm (stating that "[t]he principle that an exercise of jurisdiction on one of the bases indicated ... is nonethel unlawful if it is unreasonable . . . has emerged as a principle of international law").

1. Extraterritorial Application Does Not Satisfy International Principles.

It is beyond reasonable dispute that the facts of this case do not fall within protective, national and universal principles of international law, because the alleged activities: (1) do not impinge on the Unit States' integrity, security, or political independence; (2) where performed by Russians citizens; and (3) not the type to be classified as so heinous that any nation with control over the Supreme Court may ass jurisdiction. Thus, the remaining question is whether the alleged activity justifies jurisdiction under th Objective Territorial, Territorial or Passive Personality principles.

1. *Objective Territorial Principle*

The objective territorial principle provides a justification for the exer of jurisdiction based on extraterritorial acts only if the acts produce a substa and detrimental effects in the United States. This applies only to "[a]cts don outside a jurisdiction, but intended to produce and producing detrimental eff within it." *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). Under similar circumstances, for jurisdiction to lie, the Ninth Circuit has required: (1) the actions be intentional, expressly aimed at the forum and caused or likely to c harm, the brunt of which was or would have been suffered-and which the defendant knows was likely to be suffered-in the forum state; and (2) the act were targeted at one whom the defendant knows to be a resident of the forur *See, e.g., Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993); *Bancroft & Masters Inc. v. Augusta National Inc.*, 223 F.3d 1082 (9tl

2000).[2] As previously discussed the facts of this case do not permit the Uni States to meet this burden.

Elcomsoft did not intend to cause detrimental effects within the Unit States. Decl. of Katalov, ¶ 6. Its sale and distribution of the AEBPR progra were not targeted at one whom Elcomsoft known to be a resident of the Unit States. Elcomsoft simply uploaded the AEBPR program onto the Internet. of Katalov, ¶ 4. Elcomsoft recognizes that this action made the AEBPR pro accessible to anyone with Internet capabilities. However, Elcomsoft, by uploading the AEBPR program, targeted no location. As cited above, recog by the Court of Appeals and the United States in *American Civil Liberties U* "Once a provider posts its content on the Internet, it cannot prevent that cont from entering any community." *American Civil Liberties Union v. Reno*, *su* 929 F.Supp. at 844. For this reason, the court cannot conclude that the acts Elcomsoft, which were committed on the Internet, were *intended* by Elcoms produce detrimental effects within the United States, and therefore, the obje territorial principle cannot provides a justification for the exercise of jurisdic

2. *Territorial Principle*

The territorial principle allows for jurisdiction based on the location offense. In this case, the territorial principle does not justify the application section 1201 of the DMCA extraterritorially because the "place" where the alleged offenses were committed is outside of the United States. As noted a Elcomsoft has been accused of: (1) conspiring to traffic for gain in technolo primarily designated to circumvent, and marketed for use in circumventing, technology that protects a right of a copyright owner; (2) trafficking for gain

[2] A similar, albeit more direct, standard has been expressed by the Fifth Circuit, which simply requires an appropriate nexus be shown between the acts and the United States. *See e.g., United States v. Loalza- Vasquez*, 735 F.2d 153, 156 (5th Cir.1984); *United States v. Gray*, 659 F.2d 1296, 1298 (5th Cir.1981); *United States v. DeWeese*, 632 F.2d 1267, 1271 (5th Cir. 1980), *reh'g denied*, 641 F.2d 879 (5th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981).

technology primarily designated to circumvent technology that protects a rig
a copyright owner; and (3) trafficking for gain in technology marketed for us
circumventing technology that protects a right of a copyright owner. These
accusations are based on alleged activities that occurred outside of the Unite
States. Accordingly, this principle cannot justify the exercise of jurisdiction
this case.

All of the activities taken by Elcomsoft to develop and sell the AEBI
program occurred in Russia or in cyberspace. Elcomsoft designed the AEBI
program in Russia. Elcomsoft uploaded the AEBPR program onto the Inter
Russia. Decl. of Katalov, ¶ 4. Elcomsoft was not responsible for any other
of the transaction. Decl. of Katalov, ¶ 5. As such, even if the activities of
Elcomsoft violated section 1201, which Elcomsoft denies, those activities
occurred in Russia and over the Internet, not in the United States. *See gener*
Decl. of Katalov. Accordingly, the territorial principle does not allows for
jurisdiction in this case.

3. *Passive Personality Principle*

The passive personality principle allows for jurisdiction based on the
nationality of the victim. Here, the nationality of the alleged victim does no
justify the application of section 1201 extraterritorially. The passive persona
principle, despite its apparent broad nature, is applied narrowly.

> The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials.

Restatement (Third) of Foreign Relations Law of the United States § 403, Comment G. Because of the limited application of this principle and the nature Elcomsoft's activities, the passive personality princi does not provide a justification for the application of jurisdiction.

As noted throughout this memorandum, the United States is accusing Elcomsoft of violating sectio 1201 of title 17 of the United States Code. By its terms, section 1201 is intended to prevent circumver of software that protects the rights of a copyright owner. *See* 17 U.S.C. § 1201. Thus, the potential victim(s) of the alleged section 1201 violation in this case is any publisher of an eBook, utilizing the A eBook reader software, regardless of location. The indictment does not identify a victim or victims in case and thus there is no indication of their nationality. For these reasons, the notion that the nationali the victim provides a justification for this court to exercise jurisdiction is without merit.

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2. Extraterritorial Application Would Be Unreasonable.

Notwithstanding the analysis and conclusions expressed above, the exercise of jurisdiction in this c would remain improper even if this court were to find that the principles of international law justified t exercise of jurisdiction. As noted above, where the exercise of jurisdiction would comport with one of principles, international law will still be violated by the exercise of jurisdiction extraterritorially if such action is "unreasonable."

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

Restatement (Third) of Foreign Relations Law of the United States § 403(2).[3] In this case, application these factors makes plain that it would be unreasonable, and therefore unlawful for this court to exercis jurisdiction over Elcomsoft, a foreign corporation, for activities occurring in cyberspace, based on alle violations of section 1201 to title 17 of the United States Code.

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[3] One of the considerations to determine if the exercise of jurisdiction is reasonable is whether the character of the activity to be regulated provides a justification for the exercise of jurisdiction. This consideration is addressed throughout this memorandum and is therefore not addressed separately hereunder.

Initially and as discussed above, there is little or no link between the activities of Elcomsoft and th United States. *See generally* Decl. of Katalov. Elcomsoft develops software in Russia and sells it ove Internet in cyberspace. Decl. of Katalov, ¶ 2. It does not direct the sale of the program towards the Ur States. *See generally* Decl. of Katalov.

A ruling that the court may exercise jurisdiction over Elcomsoft would also substantially and adve effect commerce over the Internet. Again, as noted above, recognized by the courts of the United State and stipulated by the United States itself: "Anyone with access to the Internet may take advantage of a variety of communication and information retrieval methods. These methods are constantly evolving a difficult to categorize precisely." *Reno v. American Civil Liberties Union*, *supra*, 521 U.S. at 851.

> Once a provider posts its content on the Internet, it cannot prevent that content from entering any community. Unlike the newspaper, broadcast station, or cable system, Internet technology necessarily gives a speaker a potential worldwide audience. Because the Internet is a network of networks . . ., any network connected to the Internet has the capacity to send and receive information to any other network.

American Civil Liberties Union v. Reno, *supra*, 929 F.Supp. at 884. Thus, because of this amorphic na of the Internet, a ruling by this court that it may exercise jurisdiction over a foreign corporation for act that occurred in cyberspace and alleged to be in violation of section 1201 of title 17 of the United State Code would in essence make the law of the United States international law. Foreign companies would obligated to conform the information posted or merchandise placed for sale on the Internet to comport the law of the United States, thereby requiring them to constantly monitor the laws of the United State ensure their businesses are being operated in compliance with United States law. This requirement wo cripple use of the Internet outside of the United States.

Furthermore, although the importance of regulating the activities prohibited under section 1201 ma significant to the United States, application of the law is not consistent with the traditions of the international system, as its application to a foreign corporation for activities that occurred in cyberspac would conflict with the laws of Russia. Elcomsoft is a Russian company that conducted its activities consistent with the laws of that county. Russian law permits the development and sale of the AEBPR

program. If this court were to find that it has jurisdiction over Elcomsoft pursuant to an alleged violati section 1201 of title 17 of the United States Code, this court would be subjecting Elcomsoft to a law th conflicts with the regulations of another sovereignty. In sum, the principles of international law do not support the application of section 1201 extraterritorially. The factors enumerated in the Restatement o Foreign Relations Law of the United States lead to a finding that the exercise of jurisdiction over Elcor would be unreasonable.

This court should not ignore the fact that, even if it concludes that the principle of international law justify the exercise of jurisdiction, the exercise of jurisdiction remains improper because Congress has chosen to extend section 1201 to the circumstances of this case. This point was highlighted in *National Transportation Safety Board c. Carnival Cruise Lines, Inc.*, 723 F.Supp. 1488 (1989). In that case, the addressed the issue of whether the National Transportation Safety Board had jurisdiction under Indepe Safety Board Act to investigate an accident in international waters between two foreign-flag vessels ur provisions specifically limiting National Transportation Safety Board's authority to conduct extraterrit investigations to those accidents involving a vessel of United States. *Id*. at 1490.

The court held that the National Transportation Safety Board did not have jurisdiction to conduct s an investigation. *Id*. at 1494. The court rendered this holding despite finding that,

> the conduct of Carnival, and similar cruise lines, has a substantial, direct, and foreseeable effect in the territory of the United States, and it would appear reasonable for Congress to prescribe legislation authorizing the [National Transportation Safety Board] to investigate accidents such as this.

Id. at 1491. The court reconciled its holding with this finding by stating: "[T]he dispositive question is whether Congress has chosen to exercise that power." *Id*. Thus, were this court to find that the princip international law justify the exercise of jurisdiction over a foreign corporation for activities that occurr cyberspace and alleged to be in violation of section 1201 of title 17 of the United States Code, it must nevertheless find that jurisdiction does not lie because section 1201 does not express Congress' intent the statute apply extraterritorially.

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CONCLUSION

For the above stated reasons, Elcomsoft respectfully requests that this court dismiss the indictm against it with prejudice.

Dated: January 14, 2001

DUANE MORRIS LLP

By:
JOSEPH M. BURTON
Attorneys for Defendant
ELCOMSOFT COMPANY, LTD.

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PROOF OF SERVICE

I am a resident of the state of California, I am over the age of 18 years, and I am not a party to t lawsuit. My business address is Duane Morris, LLP, 100 Spear Street, Suite 1500, San Francisco, California 94105. On the date listed below, I served the following document(s):

NOTICE OF MOTION AND MOTION TO DISMISS INDICTMENT FOR LACK OF JURISDICTION

_ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date during normal business hours. Our facsimile machine reported the "send" as successful.

_ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as set forth below.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. According to that practice, items are deposited with the United States mail on that sar day with postage thereon fully prepaid. I am aware that, on motion of the party served, service presumed invalid if postal cancellation date or postage meter date is more than one day after th of deposit for mailing stated in the affidavit.

John Keker
Keker & Van Nest
710 Sansome Street
San Francisco, CA 94111

_ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, deposited with Federal Express Corporation on the same date set out below in the ordi course of business; to the person at the address set forth below, I caused to be served a true cop the attached document(s).

Scott H. Frewing
Assistant United States Attorney
United States District Court
Northern District of California
280 South First Street
San Jose, CA 95113

_ by causing personal delivery of the document(s) listed above to the person at the addres forth below.

_ by personally delivering the document(s) listed above to the person at the address set fo below.

I declare under penalty of perjury under the laws of the State of California that the above is tru correct.

Dated: January ____, 2002

Lea A. Chase

SF-27818