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9 **UNITED STATES DISTRICT COURT**  
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
11 **SAN JOSE DIVISION**  
12

13 UNITED STATES OF AMERICA

14 Plaintiff,

15 v.

16 ELCOM LTD.,  
a/k/a ELCOMSOFT CO., LTD.,

17 Defendant.  
18  
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Case No.: CR 01-20138 RMW

**DEFENDANT'S PROPOSED JURY  
INSTRUCTIONS**

Date: October 21, 2002

Time: 9:00 a.m.

The Honorable Ronald M. Whyte

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21 The defense respectfully requests the attached proposed jury instructions be given to the jury  
22 in this case. The defense requests leave of Court to present additional instructions depending on the  
23 evidence or defenses at trial.  
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### 1.1 DUTY OF JURY

Ladies and gentlemen: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. At the end of the trial I will give you more detailed instructions. Those instructions will control your deliberations.

It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law which I will give to you. That is how you will reach your verdict. In doing so you must follow that law whether you agree with it or not. The evidence will consist of the testimony of witnesses, documents, and other things received into evidence as exhibits and any facts on which the lawyers agree or which I may instruct you to accept.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be.

Ninth Circuit Manual of Model Criminal Jury Instructions, 2000 Edition (modified).

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**1.2 THE CHARGE—PRESUMPTION OF INNOCENCE**

This is a criminal case brought by the United States government. The government charges the defendant with criminal tax evasion. The charges against the defendant are contained in the indictment. The indictment is simply the description of the charge made by the government against the defendant; it is not evidence of anything.

The defendant has pleaded not guilty to the charge and is presumed innocent unless and until proved guilty beyond a reasonable doubt. A defendant has the right to remain silent and never has to prove innocence or present any evidence.

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**1.4 WHAT IS NOT EVIDENCE**

The following things are *not* evidence, and you must not consider them as evidence in deciding the facts of this case:

- 1. Statements and arguments of the attorneys.
- 2. Questions and objections of the attorneys.
- 3. Testimony that I instruct you to disregard.
- 4. Anything you may have seen or heard when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

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**1.5 EVIDENCE FOR LIMITED PURPOSE**

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

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**1.6 DIRECT AND CIRCUMSTANTIAL EVIDENCE**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact. You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may explain the water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

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1 **1.7 RULING ON OBJECTIONS**

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3 There are rules of evidence which control what can be received into evidence. When a lawyer

4 asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not

5 permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question

6 may be answered or the exhibit received. If I sustain the objection, the question cannot be answered,

7 and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore

8 the question and must not guess what the answer would have been.

9 Sometimes I may order that evidence be stricken from the record and that you disregard or

10 ignore the evidence. That means that when you are deciding the case, you must not consider the

11 evidence which I told you to disregard.

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**1.8 CREDIBILITY OF WITNESSES**

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- 1. the opportunity and ability of the witness to see or hear or know the things testified to;
- 2. the witness' memory;
- 3. the witness' manner while testifying;
- 4. the witness' interest in the outcome of the case and any bias or prejudice;
- 5. whether other evidence contradicted the witness' testimony;
- 6. the reasonableness of the witness' testimony in light of all the evidence; and
- 7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

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1 **1.9 CONDUCT OF THE JURY**

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3 I will now say a few words about your conduct as jurors.

4 First, do not talk to each other about this case or about anyone who has anything to do with it  
5 until the end of the case when you go to the jury room to decide on your verdict.

6 Second, do not talk with anyone else about this case or about anyone who has anything to do  
7 with it until the trial has ended and you have been discharged as jurors. "Anyone else" includes  
8 members of your family and your friends. You may tell them that you are a juror, but don't tell them  
9 anything about the case until after you have been discharged by me.

10 Third, do not let anyone talk to you about the case or about anyone who has anything to do  
11 with it. If someone should try to talk to you, please report it to me immediately.

12 Fourth, do not read any news stories or articles or listen to any radio or television reports  
13 about the case or about anyone who has anything to do with it.

14 Fifth, do not do any research, such as consulting dictionaries or other reference materials, and  
15 do not make any investigation about the case on your own.

16 Sixth, if you need to communicate with me simply give a signed note to the [bailiff] [clerk]  
17 [law clerk] [matron] to give to me.

18 Seventh, do not make up your mind about what the verdict should be until after you have  
19 gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.  
20 Keep an open mind until then.

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1 **1.11 TAKING NOTES**

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3 If you wish, you may take notes to help you remember what witnesses said. If you do take

4 notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the

5 case. And do not let note taking distract you so that you do not hear other answers by witnesses.

6 When you leave, your notes should be left in the [court room] [jury room] [envelope in the jury

7 room].

8 Whether or not you take notes, you should rely on your own memory of what was said. Notes

9 are only to assist your memory. You should not be overly influenced by the notes.

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1 **1.12 OUTLINE OF TRIAL**

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3 The trial will now begin. First, each side may make an opening statement. An opening  
4 statement is not evidence. It is simply an outline to help you understand what that party expects the  
5 evidence will show. A party is not required to make an opening statement.

6 The plaintiff will then present evidence, and counsel for the defendant may cross-examine.  
7 Then the defendant may present evidence, and counsel for the plaintiff may cross-examine.

8 After the evidence has been presented, [I will instruct you on the law that applies to the case  
9 and the attorneys will make closing arguments] [the attorneys will make closing arguments and I will  
10 instruct you on the law that applies to the case].

11 After that you will go to the jury room to deliberate on your verdict.

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1 **2.1 CAUTIONARY INSTRUCTION—FIRST RECESS**

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3 We are about to take our first break during the trial and I want to remind you of the

4 instruction I gave you earlier. Until the trial is over, you are not to discuss this case with anyone,

5 including your fellow jurors, members of your family, people involved in the trial, or anyone else,

6 nor are you allowed to permit others to discuss the case with you. If anyone approaches you and tries

7 to talk to you about the case, please let me know about it immediately. Do not read or listen to any

8 news reports of the trial. Finally, you are reminded to keep an open mind until all the evidence has

9 been received and you have heard the arguments of counsel, the instructions of the court, and the

10 views of your fellow jurors.

11 If you need to speak with me about anything, simply give a signed note to the [marshal]

12 [bailiff] [clerk] [matron] to give to me.

13 I will not repeat these admonitions each time we recess or adjourn, but you will be reminded

14 of them on such occasions.

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**2.2 BENCH CONFERENCES AND RECESSES**

From time to time during the trial it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

We will, of course, do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

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1 **3.1 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW**

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3 Members of the jury, now that you have heard all the evidence [and the arguments of  
4 attorneys], it is my duty to instruct you on the law which applies to this case. [A copy of these  
5 instructions will be available in the jury room for you to consult if you find it necessary.]

6 It is your duty to find the facts from all the evidence in the case. To those facts you will apply  
7 the law as I give it to you. You must follow the law as I give it to you whether you agree with it or  
8 not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or  
9 sympathy. That means that you must decide the case solely on the evidence before you. You will  
10 recall that you took an oath promising to do so at the beginning of the case.

11 In following my instructions, you must follow all of them and not single out some and ignore  
12 others; they are all equally important. And you must not read into these instructions or into anything  
13 the court may have said or done any suggestion as to what verdict you should return—that is a matter  
14 entirely up to you.

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**§ 3.19 CORPORATE DEFENDANT**

The fact that a defendant is a corporation should not affect your verdict. All persons are equal before the law and corporations are entitled to the same fair and conscientious consideration by you as any other person.

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**PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF**

I instruct you that you must presume the defendant to be innocent of the crime charged. Thus the defendant, although accused of a crime in the indictment, begins the trial with a "clean slate" - with no evidence against him. The indictment, as you already know, is not evidence of any kind. The defendant is, of course, not on trial for any act or crime not contained in the indictment. The law permits nothing but legal evidence presented before the jury in court to be considered in support of any charge against the defendant. The presumption of innocence alone therefore, is sufficient to acquit the defendant.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

O'Malley, Grenig, Lee, Federal Jury Practice and Instructions, §12.10 (Fifth Edition, 2000) (modified). (Formerly Devitt and Blackmar).

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1 **3.5 REASONABLE DOUBT—DEFINED**

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3 Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant  
4 is guilty. It is not required that the government prove guilt beyond all possible doubt.

5 A reasonable doubt is a doubt based upon reason and common sense and is not based purely  
6 on speculation. It may arise from a careful and impartial consideration of all the evidence, or from  
7 lack of evidence.

8 If after a careful and impartial consideration of all the evidence, you are not convinced  
9 beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty.  
10 On the other hand, if after a careful and impartial consideration of all the evidence, you are  
11 convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant  
12 guilty.

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1 **3.6 WHAT IS EVIDENCE**

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3 The evidence from which you are to decide what the facts are consists of:

- 4 (1) the sworn testimony of witnesses, both on direct and cross-examination, regardless of who
- 5 called the witness;
- 6 (2) the exhibits which have been received into evidence; and
- 7 (3) any facts to which all the lawyers have agreed or stipulated.
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1 **3.7 WHAT IS NOT EVIDENCE**

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3 In reaching your verdict you may consider only the testimony and exhibits received into  
4 evidence. Certain things are not evidence and you may not consider them in deciding what the facts  
5 are. I will list them for you:

6 1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses.  
7 What they have said in their opening statements, closing arguments and at other times is  
8 intended to help you interpret the evidence, but it is not evidence. If the facts as you  
9 remember them differ from the way the lawyers have stated them, your memory of them  
10 controls.

11 2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients  
12 to object when they believe a question is improper under the rules of evidence. You should  
13 not be influenced by the objection or by the court's ruling on it.

14 3. Testimony that has been excluded or stricken, or that you have been instructed to disregard,  
15 is not evidence and must not be considered. In addition some testimony and exhibits have  
16 been received only for a limited purpose; where I have given a limiting instruction, you must  
17 follow it.

18 4. Anything you may have seen or heard when the court was not in session is not evidence.  
19 You are to decide the case solely on the evidence received at the trial.

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**3.8 DIRECT AND CIRCUMSTANTIAL EVIDENCE**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Ninth Circuit Manual of Model Criminal Jury Instructions, 2000 Edition.

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**3.10 EVIDENCE OF OTHER ACTS OF DEFENDANT OR ACTS  
AND STATEMENTS OF OTHERS**

You are here only to determine whether the defendant is guilty or not guilty of the charges contained in the indictment. Your determination must be made only from the evidence in the case. The defendant is not on trial for any conduct or offense not charged in the indictment. You should consider evidence about the acts, statements, and intentions of others, or evidence about other acts of the defendant, only as they relate to this charge against this defendant.

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**4.17 OPINION EVIDENCE, EXPERT WITNESS**

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

Ninth Circuit Manual of Model Criminal Jury Instructions, 2000 Edition, Revised March 2002.

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**CREDIBILITY OF WITNESSES - GENERALLY**

You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight that their testimony deserves. After making your assessment concerning the credibility of a witness, you may decide to believe all of that witness' testimony, on a portion of it, or none of it.

In making your assessment you should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness, in your opinion, is worthy of belief. Consider each witness's intelligence, motive to falsify, state of mind, and appearance and manner while on the witness stand. Consider the witness's ability to observe the matters as to which he or she has testified and consider whether he or she impresses you as having an accurate memory or recollection of these matters. Consider also any relation a witness may bear to either side of the case, the manner in which each witness might be affected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to disbelieve or discredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, however, always consider whether it pertains to a matter of importance or an insignificant detail and consider whether the discrepancy results from innocent error or from intentional falsehood.

After making your own judgment or assessment concerning the believability of a witness, you can then attach such importance or weight to that testimony, if any, that you feel it deserves. You will then be in a position to decide whether the government has proven the charges beyond a reasonable doubt.

O'Malley, Grenig, Lee, Federal Jury Practice and Instructions, §15.01 (Fifth Edition, 2000).

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1 **CHARACTER EVIDENCE - REPUTATION OF DEFENDANT**

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3 You have heard evidence of defendants good general reputation for being a law abiding  
4 entity. The jury should consider this evidence along with all other evidence in the case in reaching  
5 its verdict.

6 Evidence of a defendant’s reputation, inconsistent with those traits of character ordinarily  
7 involved in the commission of the crime, may give rise to a reasonable doubt since the jury may  
8 think it improbable or unlikely that a person or company of good character for being a law abiding  
9 entity would commit the crimes charged.

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12 O’Malley, Grenig, Lee, Federal Jury Practice and Instructions, §15.15 (Fifth Edition, 2000)  
13 (modified).

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1 **ELEMENTS OF THE OFFENSE -COUNT 1**

2 **(18 U.S.C. 371)**

3 **8.16 CONSPIRACY—ELEMENTS**

4  
5 The defendant is charged in Count 1 of the indictment with conspiracy to traffic in technology  
6 primarily designed to circumvent and market for use in circumventing, technology that protects a  
7 right of a copyright owner. In order for the defendant to be found guilty of that charge, the  
8 government must prove each and every of the following elements beyond a reasonable doubt:  
9

10 First, that there was an agreement between two or more persons to commit a crime as charged  
11 in the indictment;

12 Second, the defendant became a member of the conspiracy knowing of at least one of its  
13 objects and intending to help accomplish it;

14 Third, one of the members of the conspiracy performed at least one overt act for the purpose  
15 of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was  
16 committed;

17  
18 I shall discuss with you briefly the law relating to each of these elements.  
19

20 A conspiracy is a kind of criminal partnership—an agreement of two or more persons to  
21 commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it  
22 does not matter whether the crime agreed upon was committed.  
23

24 For a conspiracy to have existed, it is not necessary that the conspirators made a formal  
25 agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they  
26 simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one  
27 another. You must find that there was a plan to commit at least one of the crimes alleged in the  
28

1 indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the  
2 conspirators agreed to commit.

3  
4 One becomes a member of a conspiracy by willfully participating in the unlawful plan with  
5 the intent to advance or further some object or purpose of the conspiracy, even though the person  
6 does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully  
7 joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has  
8 no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of  
9 the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a  
10 conspirator merely by associating with one or more persons who are conspirators, nor merely by  
11 knowing that a conspiracy exists.

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13  
14 Ninth Circuit Manual of Model Criminal Jury Instructions, § 8.16, 2000 Edition (modified)

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**ELEMENTS OF THE OFFENSE - COUNT 2**

**(17 U.S.C. 1201(b)(1)(A))**

The defendant is charged in Count 2 of the indictment with trafficking in prohibited technology. In order for the defendant to be found guilty of that count, the government must prove each and every one of the following elements beyond a reasonable doubt:

First, that the AEBPR program was primarily designed and produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under the law;

Second, that on or about the dates alleged, Elcomsoft offered the AEBPR program to the public for sale;

Third, that Elcomsoft's conduct was willful; and

Fourth, that the Elcomsoft did so for purposes of commercial advantage and private financial gain.

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**ELEMENTS OF THE OFFENSE - COUNT 3**

**(17 U.S.C. 1201(b)(1)(A))**

The defendant is charged in Count 3 of the indictment with trafficking in prohibited technology. In order for the defendant to be found guilty of that charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

First, that the AEBPR program was primarily designed and produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under the law;

Second, that on or about the dates alleged, Elcomsoft sold a copy of the AEBPR program;

Third, that Elcomsoft's conduct was willful; and

Fourth, that Elcomsoft did so for purposes of commercial advantage and private financial gain.

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**ELEMENTS OF THE OFFENSE - COUNT 4**

**(17 U.S.C. 1201(b)(1)(C))**

The defendant is charged in Count 4 of the indictment with trafficking in technology marketed for use in circumventing technology that protects a right of a copyright owner.

In order for the defendant to be found guilty of that charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

First, that the AEBPR program was marketed by Elcomsoft as a program for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under the law;

Second, that Elcomsoft marketed the AEBPR program;

Third, that Elcomsoft's conduct was willful; and

Fourth, that Elcomsoft did so for purposes of commercial advantage and private financial gain.

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1 **ELEMENTS OF THE OFFENSE - COUNT 5**

2 **(17 U.S.C. 1201(b)(1)(C))**

3  
4 The defendant is charged in Count Five of the indictment with trafficking in technology  
5 primarily designed to circumvent technology that protects a right of a copyright owner.  
6 In order for the defendant to be found guilty of that charge, the government must prove each and  
7 every one of the following elements beyond a reasonable doubt:

8 First, that the AEBPR program was marketed by Elcomsoft as a program for use in  
9 circumventing protection afforded by a technological measure that effectively protects a right of a  
10 copyright owner under the law;

11 Second, that on or about the dates alleged, Elcomsoft marketed the AEBPR program;

12 Third, that Elcomsoft's conduct was willful; and

13 Fourth, that Elcomsoft did so for purposes of commercial advantage and private financial  
14 gain.

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**“CIRCUMVENT A TECHNOLOGICAL MEASURE” - EXPLAINED**

The phrase "circumventing protection afforded by a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure.

A technological measure “effectively protects a right of a copyright owner” under the copyright law, if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under the copyright law.

17 U.S.C. § 1201(b)(2) (modified)

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1 **"WILLFULLY" - DEFINED**

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3 In order to sustain its burden of proof for the crime of as charged in counts two, three, four  
4 and five of the indictment, in each count the government must prove beyond a reasonable doubt that  
5 defendant Elcomsoft acted "willfully".

6 An act done "willfully" is one which is done knowingly and intentionally with the purpose of  
7 violating a known legal duty; that is, the government must prove beyond a reasonable doubt that  
8 Elcomsoft knew that offering for sale, selling or marketing a program intended to circumvent  
9 protection afforded by a technological measure that effectively protects a right of a copyright owner  
10 was a violation of the law, and that it then intentionally decided to violate that law.

11 Negligent behavior is not sufficient to constitute willful conduct.

12  
13 Ninth Circuit Manual of Model Criminal Jury Instructions, § 5.5, 2000 Edition (modified);  
14 O'Malley, Grenig, Lee, Federal Jury Practice and Instructions, §67.20, Fifth Edition, 2000  
15 (modified)  
16 *Retzlaf v. United States*, 510 U.S. 135 (1994);  
17 *Cheek v. United States*, 498 U.S. 192 (1991);  
18 *United States v. Rose*, 149 U.S.P.Q. (BNA) 820 (S.D.N.Y. 1966);  
19 *United States v. Moran*, 757 F.Supp. 1046 (D.Neb. 1991).

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1 **GOOD FAITH DEFENSE**

2  
3 The good faith of defendant Elcomsoft is a complete defense to the charges contained in each  
4 count of the indictment because good faith is simply inconsistent with willfully attempting to violate  
5 the law.

6 While the term "good faith" has no precise definition, it means, among other things, an honest  
7 belief, a lack of malice, or an intent to act for a good purpose. A person who acts on a belief or on an  
8 opinion honestly held is not punishable under this statute merely because that honest belief turns out  
9 to be incorrect or wrong.

10 A person who is unaware of the law or believes in good faith that his actions do not violate  
11 the law, cannot be found guilty of "wilfully" violating the law.

12 In determining whether or not the government has proven that Elcomsoft willfully marketed,  
13 offered, or sold a prohibited program, or whether Elcomsoft acted in food faith, you must consider  
14 all of the evidence received in the case bearing on Elcomsoft’s state of mind.

15 The burden of proving good faith does not rest with Elcomsoft because Elcomsoft has no  
16 obligation to prove anything to you. The government has the burden of proving to you beyond a  
17 reasonable doubt that the defendant acted wilfully.

18 If the evidence in the case leaves you with a reasonable doubt as to whether Elcomsoft acted  
19 in good faith or acted wilfully, you must acquit Elcomsoft.

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22 O’Malley, Grenig, Lee, Federal Jury Practice and Instructions, §67.25,  
23 Fifth Edition, 2000 (modified).

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**COPYRIGHT - DEFINED (17 U.S.C. § 106)**

Copyright is the exclusive right to copy. This right to copy includes the exclusive right to:

- (1) reproduce the copyrighted work;
- (2) prepare derivative works based upon the copyrighted work;
- (3) distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, lending;
- (4) display publicly a copyrighted work.

It is the owner of a copyright who may exercise these exclusive rights to copy. The term “owner” includes the author of the work, an assignee, an exclusive licensee. In general, copyright law protects against the production, distribution of substantially similar copies of the owner’s copyrighted work without the owner’s permission. Even though one may acquire a copy of the copyrighted work, the copyright owner retains rights and control of that copy, including uses that may result in additional copies or alterations of the work.

Ninth Circuit Manual of Model Civil Jury Instructions, § 20.1, 2001 Edition (modified)

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**FAIR USE (17 U.S.C. § 107)**

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3       There are limitations to a copyright owners exclusive rights. One of these limitations is  
4 called “fair use.” One who is not the owner of the copyright may use the copyrighted work in a  
5 reasonable way under the circumstances without the consent of the copyright owner if it would  
6 advance the public interest. Such use of a copyrighted work is called a “fair use.” Under the law the  
7 owner of a copyright cannot prevent others from making a fair use of the owner’s copyrighted work.

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9 Ninth Circuit Manual of Model Civil Jury Instructions, § 20.18, 2001 Edition (modified)

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1 **7.1 DUTY TO DELIBERATE**

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3 When you retire, you should elect one member of the jury as your foreperson. That person  
4 will preside over the deliberations and speak for you here in court.

5 You will then discuss the case with your fellow jurors to reach agreement if you can do so.  
6 Your verdict, whether guilty or not guilty, must be unanimous.

7 Each of you must decide the case for yourself, but you should do so only after you have  
8 considered all the evidence, discussed it fully with the other jurors, and listened to the views of your  
9 fellow jurors.

10 Do not be afraid to change your opinion if the discussion persuades you that you should. But  
11 do not come to a decision simply because other jurors think it is right.

12 It is important that you attempt to reach a unanimous verdict but, of course, only if each of  
13 you can do so after having made your own conscientious decision. Do not change an honest belief  
14 about the weight and effect of the evidence simply to reach a verdict.

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16 Ninth Circuit Manual of Model Criminal Jury Instructions, 2000 Edition.  
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1 **7.2 CONSIDERATION OF EVIDENCE**

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3 Your verdict must be based solely on the evidence and on the law as I have given it to you in  
4 these instructions. However, nothing that I have said or done is intended to suggest what your verdict  
5 should be—that is entirely for you to decide.

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7 Ninth Circuit Manual of Model Criminal Jury Instructions, 2000 Edition.

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1 **7.3 USE OF NOTES**

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3 Some of you have taken notes during the trial. Such notes are only for the personal use of the  
4 person who took them.

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6 Ninth Circuit Manual of Model Criminal Jury Instructions, 2000 Edition.  
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**7.4 JURY CONSIDERATION OF PUNISHMENT**

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

Ninth Circuit Manual of Model Criminal Jury Instructions, 2000 Edition.

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1 **7.5 RETURN OF VERDICT**

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3 After you have reached unanimous agreement on a verdict, your foreperson will fill in the

4 form that has been given to you, sign and date it and advise the marshal [or bailiff] outside your door

5 that you are ready to return to the courtroom.

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7 Ninth Circuit Manual of Model Criminal Jury Instructions, 2000 Edition.

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1 **7.6 COMMUNICATION WITH COURT**

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3 If it becomes necessary during your deliberations to communicate with me, you may send a

4 note through the marshal [or bailiff], signed by your foreperson or by one or more members of the

5 jury. No member of the jury should ever attempt to communicate with me except by a signed

6 writing; and I will communicate with any member of the jury on anything concerning the case only

7 in writing, or here in open court. If you send out a question, I will consult with the parties before

8 answering it, which may take some time. You may continue your deliberations while waiting for the

9 answer to any question. Remember that you are not to tell anyone—including me—how the jury

10 stands, numerically or otherwise, on the question of the guilt of the defendant, until after you have

11 reached a unanimous verdict or have been discharged.

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13 Ninth Circuit Manual of Model Criminal Jury Instructions, 2000 Edition.

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Dated: October \_\_\_\_, 2002.

DUANE MORRIS LLP

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JOSEPH M. BURTON  
STEPHEN H. SUTRO  
GREGORY G. ISKANDER  
ATTORNEYS FOR DEFENDANT  
ELCOMSOFT COMPANY LTD.

SF-34124

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3 **PROOF OF SERVICE**

4 I am a resident of the state of California, I am over the age of 18 years, and I am not a party to  
5 this lawsuit. My business address is Duane Morris LLP, One Market Plaza, Spear Tower, Suite  
2000, San Francisco, California 94105. On the date listed below, I served the following  
document(s):

6 **DEFENDANT'S PROPOSED JURY INSTRUCTIONS**

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

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

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

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

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

20  by causing personal delivery of the document(s) listed above to the person at the address set  
forth below.

21  by personally delivering the document(s) listed above to the person at the address set forth  
22 below.

23 I declare under penalty of perjury under the laws of the State of California that the above is  
true and correct.

24 Dated: October \_\_\_\_, 2002

25 \_\_\_\_\_  
Lea A. Chase

26 SF-34124