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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION
13

14 UNITED STATES OF AMERICA,
15 Plaintiff,
16 v.
17 ELCOM LTD.,
a/k/a ELCOMSOFT CO. LTD.,
18 Defendant.
19

No. CR 01-20138 RMW

**DECLARATION OF SPECIAL AGENT
DANIEL J. O'CONNELL IN SUPPORT
OF UNITED STATES' OPPOSITION
TO DEFENDANT'S MOTIONS TO
DISMISS ON CONSTITUTIONAL
20 GROUNDS**

Date: April 1, 2002
Time: 9:00 am
Court: Hon. Ronald M. Whyte

21 I, Daniel J. O'Connell, Special Agent, Federal Bureau of Investigation (FBI), San
22 Francisco Division, San Jose Resident Agency, state the following:

23 1 I have been employed as a Special Agent for the Federal Bureau of Investigation
24 for over twenty-five years. I am currently assigned to the High Tech Squad at San Jose,
25 California which has responsibility for the theft of intellectual property, theft of trade secrets,
26 and violations of U.S. copyright laws. I have participated in a number of such investigations by
27

28 **DECLARATION OF SPECIAL AGENT
DANIEL J. O'CONNELL
[CR 01-20138] [RMW]**

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1 this squad in the past. I participated as the lead case agent in the investigation resulting in the
2 prosecution of defendant Elcomsoft.

3 2. During the course of this investigation I identified and interviewed certain
4 individuals who had purchased the Advanced eBook Reader program ("AEBPR") from
5 Elcomsoft using records obtained from RegNow!, an online distributor of software that had
6 managed transactions for Elcomsoft.

7 3. Following contacts with certain purchasers of the AEBPR program, I attempted to
8 identify and contact certain distributors or publishers of the ebooks to which purchasers of the
9 AEBPR program had either attempted to apply, or did apply, the AEBPR program. My contacts
10 with publishers or distributors included the following:

11 A. On January 2, 2002, I spoke on the telephone with Thomas P. McCormick,
12 Director of the Employee Benefit Institute of America ("EBIA") in Seattle, Washington. I had
13 previously determined that EBIA had published an employee benefits manual purchased by
14 Daniel Sarazin, one of the purchasers of the AEBPR program from Elcomsoft.

15 B. On January 2 and 3, 2002, I spoke on the telephone with Kristene
16 O'Callaghan, Contract and License Manager, Sybex Inc. in Alameda, California. I had
17 previously determined that Sybex had published Cisco Certified Network Associates Study
18 Guide purchased by Shaid Najee-Ullah, one of the purchasers of the AEBPR program from
19 Elcomsoft.

20 C. On January 2 and 3, 2002, I spoke on the telephone with Elizabeth D.
21 Rather, attorney for Forth, Inc., in Hawthorne, California. I had previously determined that
22 Forth had published a software programming manual purchased by Ralph Brooks, one of the
23 purchasers of the AEBPR program from Elcomsoft.

24 4. Thomas McCormick of EBIA informed me that EBIA publishes five different
25 manuals dealing with various employee benefit topics. He stated the manuals are very large and
26 are distributed in both paper and ebook format. He further stated that the ebook versions of the
27 manuals are available in the Adobe Acrobat eBook Reader format with certain protections and
28

1 restrictions enabled. For example, according to McCormick, pursuant to an End User License
2 Agreement (“EULA”), EBIA allows printing of a small number of pages of the ebook version of
3 its manuals, but not all of the pages, and EBIA only allows the manuals to be used on one
4 computer. McCormick informed me that EBIA considers the content of the manuals to be their
5 intellectual property, and that EBIA placed restrictions on the ebook versions of its manuals to
6 protect its copyright rights. Subsequent to my telephone conversation with McCormick he sent
7 me via facsimile a copy of the EBIA EULA in effect in July 2001. A true and correct copy of the
8 EULA I received from McCormick is attached as **Exhibit A** to this declaration.

9 5. Kristene O’Callaghan of Sybex informed me that Sybex specializes in publishing
10 books related to computer software and hardware. She stated that a software manual Sybex
11 publishes titled Cisco Certified Network Associate Study Guide is accompanied by a CD-ROM
12 that can be read using a home computer and an Adobe Acrobat Reader. According to
13 O’Callaghan, the contents of the CD-ROM are in PDF format with certain digital rights
14 management protections that prevent printing, copying, or moving the contents of the CD-ROM
15 to more than one computer. She further stated that Sybex intends the CD-ROM to only be used
16 as a search tool for the large amount of information in the text, and that Sybex intends that users
17 of the CD-ROM not be able to make additional copies of the text. O’Callaghan stated that one
18 exception to Sybex’s policy is that Sybex under a proper license agreement allows the blind or
19 dyslexic customer to remove the protections from the CD-ROM to make the contents an audible
20 book in a Microsoft Word format. Sybex requires that customers obtain a specific grant of
21 permission from Sybex for this use. Subsequent to my telephone conversation with O’Callaghan,
22 she provided me via facsimile an EULA that she stated applied to the Sybex book and CD-ROM.
23 A true and correct copy of the EULA I received from O’Callaghan is attached as **Exhibit B** to
24 this declaration.

25 6. Elizabeth Rather, the attorney for Forth, Inc., informed me that Forth publishes
26 software and accompanying manuals, and that Forth does not publish ebooks. Rather stated that
27 the manuals that Forth publishes to accompany its software are available online as PDF files.

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1 According to Rather, Forth customers who purchase the software can download the manual and
2 accompanying documentation as a PDF file upon which certain restrictions have been placed.
3 Rather stated that in some cases, Forth places restrictions on the PDF files to prevent them from
4 being copied or modified, and that Forth regards these restrictions as protectings Forth's
5 copyright rights. She further stated that Forth distributes its products subject to an EULA that
6 covers both the usage of the software and the accompanying manuals. Subsequent to my
7 telephone conversation with Rather, she provided me via facsimile an EULA that she stated
8 applied to Forth's products, including the manuals. A true and correct copy of the EULA I
9 received from Rather is attached as **Exhibit C** to this declaration.

10 7. During the course of this investigation I obtained from Darryl Spano, a technical
11 investigator for Adobe Systems, various documents he had obtained during Adobe's
12 investigation of Elcomsoft's Advanced eBook Processor. One of these documents, dated June
13 22, 2001, appears to be the web page of the Elcomsoft website advertising the AEBPR program.
14 During the course of the investigation, I have examined versions of this web page that appear to
15 have been drafted following the dispute between Elcomsoft and Adobe. These subsequent
16 versions of the AEBPR web page include additional text not present on the version of the page
17 dated June 22, 2001. A true and correct copy of the page dated June 22, 2001, that I received
18 from Spano is attached as **Exhibit D** to this declaration.


19 I declare under penalty of perjury that the foregoing is true and correct.

20

21 Executed on March 4, in San Jose, California.

22

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DANIEL J. O'CONNELL
Special Agent
Federal Bureau of Investigation

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DECLARATION OF SPECIAL AGENT
DANIEL J. O'CONNELL
[CR 01-20138] [RMW]

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A

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(revised 3/22/01)

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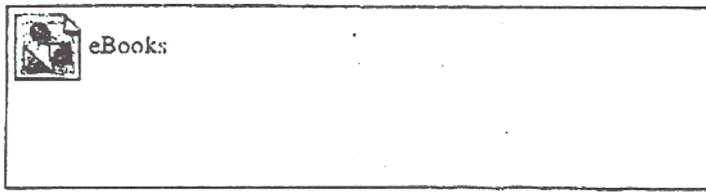
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1
2 **CERTIFICATE OF SERVICE**
3 **U.S. v. ELCOM LTD., a/k/a ELCOMSOFT**
4 **CR-01-20138 (RMW)**

5 I, Lauri Gomez, declare that I am a citizen of the United States, over the age of 18 years and
6 not a party to the within action.

7 I hereby certify that a copy of the foregoing:

- 8 **1. DECLARATION OF SPECIAL AGENT DANIEL O'CONNELL IN SUPPORT**
9 **OF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTIONS TO**
10 **DISMISS THE INDICTMENT BASED ON FIRST AMENDMENT AND**
11 **VIOLATION OF DUE PROCESS.**

12 was served today ___ by hand; X by facsimile; ___ by Federal Express X by first class
13 mail by placing a true copy of each such document(s) in a sealed envelope with postage thereon fully
14 paid, either in a U.S. Mail mailbox or in the designated area for outgoing U.S. Mail in accordance
15 with the normal practice of the United States Attorney's Office; by placing in the Public
16 Defender's pickup box located in the U.S. District Courthouse and addressed to the following
17 Counsel of Record:

18 JOSEPH BURTON, ESQ.
19 Duane, Morris & Hecksher LLP
20 100 Spear Street, Suite 1500
21 San Francisco, California 94105
22 Fax: (415) 371-2201
23 Phone: (415) 371-2214

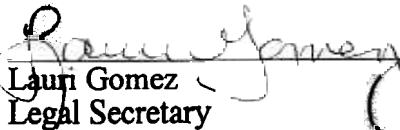
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I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed at San Jose, California.

DATED: March 4, 2002


Lauri Gomez
Legal Secretary