

**FREE DMITRY? SPARE ME.:**  
**WHY THE FBI WAS RIGHT TO ARREST THE INTERNET'S LATEST MARTYR**

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*Civil liberties advocates, programmers and cryptographers are up in arms about the arrest of a Russian programmer for distributing software that strips Adobe eBook Reader of its copy-protection. They shouldn't be, Inside's legal editor argues*

A hacker has allegedly violated the Digital Millennium Copyright Act -- so you know the drill. It's time for extremely smart people to espouse extremely unpersuasive arguments for why the hacker must swiftly be exonerated and the law struck down as unconstitutional.

This time around the hacker (and I'm trying to use that term in the positive sense) is Dmitry Sklyarov, a 27-year-old Russian computer programmer who was arrested in Las Vegas on July 16. If you get your news from any of the numerous news sources that cater to computer programmers and software enthusiasts -- the online wire services or listserv e-mails from digital civil liberties advocates or cryptographers -- you are doubtless familiar with the outlines of the case, or at least think you are. You have read how Sklyarov was arrested the day after he delivered a lecture at the Def Con 9 convention in Las Vegas -- the ninth annual gathering of what is described on the group's official Web site as "computer underground party for hackers" -- about the flaws in the copy-protection system for the Adobe eBook Reader.

Maybe you have been alerted to the message posted on the Web by Bruce Schneier, the chief technology officer of Counterpane Internet Security and one of the nation's foremost experts on cryptography and computer systems security, who has expressed his outrage that "the FBI arrested (Sklyarov) because he presented a paper on the strengths and weaknesses of software used to protect electronic books." You have probably been told how Alan Cox, an eminent British open-source programmer, resigned his membership in an American-based society of computer engineers as a result of Sklyarov's arrest, explaining: "With the arrest of Dmitry Sklyarov, it has become apparent that it is not safe for non-U.S. software engineers to visit the United States." You may also agree with Sklyarov's defenders that it is deeply ironic that federal

prosecutors are trying to punish Sklyarov at Adobe's behest, when Adobe should really be thanking Sklyarov for having -- in the long and fine tradition of hackers (again in the positive sense of that term) -- pointed out flaws in its copy-control system, which might have done far greater damage had they first been discovered by someone malevolent.

Then again, if you've learned about the case from more mainstream news sources, you probably already realize that Sklyarov's arrest doesn't really have anything to do with the presentation he gave in Las Vegas. (The conference, which listed Sklyarov as a scheduled speaker, was just the event that alerted authorities to the fact that he would be in the United States, enabling them to seize him.) It relates to some software that Sklyarov wrote and that his employer distributed.

But even so, you may still be outraged by his arrest. As Stanford Law School professor Lawrence Lessig recently pointed out in his New York Times op-ed piece urging Sklyarov's release, Sklyarov's software was perfectly lawful in Russia, where he wrote it. Adobe just downloaded it off the Internet, and then asked our government to punish Sklyarov for violating U.S. law. That poses all sorts of very troubling, international jurisdictional issues, doesn't it?

In addition, Professor Lessig stresses, neither Sklyarov nor his employer have even been charged with infringing anyone's copyrights! Sklyarov simply made software that removes certain security protections from the Adobe eBook Reader, enabling people to engage in numberless, marvelous, invaluable, noninfringing uses. "A blind person," for instance, could use it to activate Adobe's "read-aloud function" in order "to listen to a book," even if Adobe had, at a publisher's instructions, disabled that function for a particular title. Alas, has helping the blind to read become a crime in our country? Sklyarov's wonderful creation also enables people to make back-up copies of e-books, explains the Electronic Frontier Foundation's Web site. It also enables them to transfer an e-book from an old computer to a new one. Best of all, Sklyarov's software only works on lawfully purchased e-books. So what in the world could the prosecutors and Adobe and the Association of American Publishers -- which has applauded the prosecution -- possibly be so upset about?

ON THE WEB, IT ONLY TAKES A SINGLE UNPROTECTED COPY ...

Now let's visit Planet Earth. Dmitry Sklyarov works for ElcomSoft Co. Ltd., a Moscow-based company that sells, among other things, the Advanced eBook Processor. That product converts e-books formatted for viewing through the Adobe eBook Reader into

ordinary, unsecured PDF files. Once in that form, the file is in the free and clear, and can be distributed by anyone to anyone throughout the globe via numerous file-sharing programs like Gnutella, KaZaA, iMesh or Freenet, not to mention by e-mail attachment, or by Aimster-style instant-messaging attachment, or by posting on evanescent pirate Web sites, and probably via several other mechanisms that were invented so recently that you and I haven't heard of them yet.

The point is: it only takes a single unprotected copy to have the material spread. The cat is then out of the bag and any attempt to bring a copyright infringement charge against the individual who originally uploaded it becomes laughably futile, even assuming it were possible to identify that individual, which it usually isn't. Accordingly, Congress has tried to protect copyrights in the digital world by prohibiting the distribution of "devices" -- like Elcomsoft's Advanced eBook Processor -- that are "primarily designed" to circumvent copy-control technologies that copyright holders have implemented in an effort to protect their intellectual property. (The DMCA is designed to effectuate two World Intellectual Property Organization copyright treaties that were signed in Geneva in December 1996.)

Most of the people coming to Sklyarov's defense fully appreciate that some sort of anti-circumvention legislation like the DMCA is crucial to maintaining meaningful copyright protection in the digital world. But they simply don't want such protection maintained. They believe that the digital world is fundamentally hostile to copyright law as we have known it and that the copyright laws have grown too protective in any event (which might be true), and they are therefore eager to enter a brave new world in which creators of intellectual property will be effectively forced to turn to unspecified "new business models" in an effort to get paid for their creations. Most of the new business models that have been proposed so far, however -- like having consumers voluntarily donate fees to creators whose works they have downloaded for free -- very closely resemble begging.

In any event, there is little question that ElcomSoft has been knowingly and intentionally violating U.S. law and that the FBI has ample jurisdiction over Sklyarov. Until Sklyarov's arrest -- when ElcomSoft finally discontinued distributing these circumvention products -- ElcomSoft made a demonstration model of its Adobe-targeted circumvention software available on its (English-language) Web site for free. But that demo tantalizingly unlocked only the first 10 percent of an Adobe e-book, according to the ElcomSoft site (which was quoted in the July 10 affidavit of an FBI agent filed in support of the criminal complaint against Sklyarov). If a customer wanted to unlock the whole Adobe e-book, ElcomSoft directed that person to send \$99 -- that's U.S. dollars -- to ElcomSoft's U.S.-

based billing agent, Register Now, which is based in Issaquah, Wash. Upon verifying that payment had been made, ElcomSoft would then e-mail the customer -- including U.S. customers -- a key that would fully activate the software, enabling the customer to unlock and copy entire Adobe-formatted e-books. (By the way, if Sklyarov's or ElcomSoft's goal had been to alert Adobe to potential flaws in its software, the demo version would have fully accomplished that purpose. Evidently, that wasn't the goal.)

Nor should Sklyarov's July 16 arrest have come as a surprise to either ElcomSoft or Sklyarov, unless ElcomSoft was cruelly keeping Sklyarov in the dark about Adobe's dissatisfaction with ElcomSoft's business operations. On June 25, Adobe's anti-piracy unit warned ElcomSoft that its product was illegal and demanded that the product be removed from its Web site. ElcomSoft refused. On June 25, Adobe also demanded that ElcomSoft's Internet Service Provider, Verio Inc., terminate ElcomSoft's service if ElcomSoft did not take down the Adobe circumvention software. After Verio told ElcomSoft of the demand, ElcomSoft switched ISPs, managing to keep its site afloat, though Verio cut off service by June 27. On June 28, Adobe demanded that Register Now stop serving as ElcomSoft's billing agent, prompting ElcomSoft to advise Register Now that it had better protect itself by honoring Adobe's demand. It is unclear whether ElcomSoft planned to arrange a substitute method of payment.

#### WHY CHARGE DMITRY, AND NOT THE COMPANY?

In sum, then, the FBI alleges that ElcomSoft had been marketing software to Americans from an English-language Web site, soliciting payment in American money through an American billing agent, and then sending Americans a key that would enable Americans to defeat the security protections built into an American-made product. So while some may be outraged that the U.S. government would attempt to impose its laws upon a Russian company under these circumstances, I am unmoved.

In fairness, however, the government hasn't charged ElcomSoft with a crime, it has charged its employee, Sklyarov. Why him? An FBI agent noticed that when he called up Elcomsoft's circumvention software on a computer, the software displayed a title page indicating that the software had been copyrighted in the name of Dmitry Sklyarov. (Yes, ElcomSoft's officials evidently believe in protections for some intellectual property -- their own.) That led the agent to conclude that Sklyarov had created the circumvention software that his employer was distributing in the United States. Though the Electronic Frontier Foundation and ElcomSoft's president and owner, Alexander Katalov, are now both suggesting that maybe Sklyarov played only a bit role in creating the Advanced

eBook Processor, Sklyarov in a post-arrest interview with a local television new reporter acknowledged having written it. (A video clip of this interview is still available on the Electronic Frontier Foundation's Web site.) Similarly, an explanatory Web page about the case provided by ElcomSoft asserts that Sklyarov "wrote" the program.

On July 2, the same FBI agent who made the Sklyarov connection visited the Def Con 9 Web site and saw that Sklyarov was scheduled to appear at the convention in Las Vegas on July 13-15. When Sklyarov in fact appeared, he was arrested on a criminal complaint from the Northern District of California, the district that includes San Jose, where Adobe Systems is headquartered. If ElcomSoft president Katalov is now willing to subject himself to U.S. jurisdiction, it would certainly seem preferable to arrest him and release Sklyarov, but in the meantime the FBI seems to have an ample basis for exercising jurisdiction over Sklyarov, and for accusing him of helping to distribute illegal circumvention software in the United States. Whether prosecutors can ultimately prove beyond a reasonable doubt that Sklyarov -- as opposed to ElcomSoft -- "manufactured, imported, offered to the public, provided, or otherwise trafficked" in that software is a question that depends on facts and evidence which neither I nor any other commentator is currently in a position to evaluate.

But what about the fate of all those blind people who now won't be able to read e-books because Adobe will have disabled the read-aloud feature at some publisher's request? Typically, publishers ask Adobe to disable that feature when they fear it might violate their contracts relating to an existing audio version of the same book. But when you think about it, in those circumstances it might actually make more sense for a blind person to pay \$15 to buy the audio book -- a tape of a professional actor or the author of the work reading the book aloud -- rather than pay \$8 for an e-book and \$99 for circumvention software, in order to hear voice-simulation software articulating the words in a robotic monotone.

#### THE EFFECT OF BOYCOTT THREATS

But what will everyone now do when they need to make backup copies? Well, again, since most e-books cost somewhere between nothing and \$8, it might be more sensible to buy a new copy of the book than the \$99 circumvention software required to make a backup. If you save some proof of purchase, you might even be able to talk Amazon.com or the publisher into sending you a new e-book for free. It's a brand new industry, and if it is not yet possible to insure yourself against loss from a crashed system, the exigencies of the market guarantee that it soon will be. It would be surprising if the only possible

solution to this minor inconvenience was to legalize the distribution of circumvention software, thereby guaranteeing the demise of copyright protection as we know it.

On July 23, after meeting with representatives of the Electronic Frontier Foundation -- and faced with imminent protests and commercial boycotts organized by geek activists - - Adobe issued a carefully worded statement recommending release of Sklyarov and withdrawing its support for the government's complaint. "We strongly support the DMCA and the enforcement of the copyright protection of digital content," said Colleen Pouliot, Adobe's senior vice president and general counsel, in the statement. "However, the prosecution of this individual in this particular case is not conducive to the best interests of any of the parties involved or the industry. ElcomSoft's Advanced eBook Processor software is no longer available in the United States, and from that perspective the DMCA worked."

The government has so far declined to drop the case, however. Given that the government's interest in enforcing the nation's laws are always broader than any individual complainant's -- and given the circumstances under which this particular complainant was mau-maued into backing away from a case it had initiated -- the government is probably doing the right thing.

While we can all applaud the Electronic Frontier Society and its allies for their dogged and vigilant commitment to free speech, every once in awhile it would be refreshing to see those advocates show a comparable commitment to candid speech.