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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNIVERSAL CITY STUDIOS, INC.;)
PARAMOUNT PICTURES CORPORATION;)
METRO-GOLDWYN-MAYER STUDIOS INC.;)
TRISTAR PICTURES, INC.; COLUMBIA)
PICTURES INDUSTRIES, INC.; TIME WARNER)
ENTERTAINMENT CO., L.P.; DISNEY)
ENTERPRISES, INC.; AND TWENTIETH)
CENTURY FOX FILM CORPORATION,)

00 Civ. 0277 (LAK)

Plaintiffs,)

v.)

SHAWN C. REIMERDES; ERIC CORLEY A/K/A)
"EMMANUEL GOLDSTEIN"; AND ROMAN)
KAZAN,)

Defendants.)

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
MOTION TO MODIFY THE
JANUARY 20, 2000 ORDER OF
PRELIMINARY INJUNCTION**

Preliminary Statement

Faced with the increased efforts of defendants Eric Corley a/k/a/ “Emmanuel Goldstein” (“Corley”) and 2600 Enterprises, Inc. (collectively, the “2600 defendants”)¹ to proliferate the DeCSS utility in the wake of this Court’s January 20, 2000 preliminary injunction against “posting,” and the Court having determined that a trial will not be held until December 5, 2000, plaintiffs now move, in accordance with the Court’s suggestion at the January 20, 2000 hearing, to (a) modify the Court’s Order to prohibit the 2600 defendants from deliberately “linking” to other Internet web sites offering DeCSS,² and (b) for leave to amend the complaint to make largely conforming changes.³ At least in this context, and under substantially similar

¹ This Court properly rejected Corley’s claim that he is not the “real party in interest” because 2600 Enterprises, Inc. was the actual “owner” of the web site at which DeCSS was posted. *See* Memorandum Opinion, dated February 2, 2000 (“Mem. Op.”) at 7-8; Defendants’ Memorandum in Opposition, dated January 19, 2000 at 6. Corley has since agreed to allow plaintiffs to amend the complaint to add 2600 Enterprises, Inc. as a defendant, and a stipulation to that effect will be filed shortly. Defendant Roman Kazan has, since the Court’s Order, entered into a Consent Judgment which prohibits both posting *and* linking to DeCSS. *See* Consent Judgment Against Roman Kazan, dated March 17, 2000. Defendant Shawn C. Reimerdes has also agreed to a similar Consent Judgment which will be submitted immediately upon its execution.

² This motion is in keeping with the Court’s invitation to “deal with [the ‘linking’ issue] in the form . . . of an application to modify” (*See* January 20, 2000 Hearing Transcript (“Hr’g. Tr.”) at 85.) On a motion to modify an injunction, the Court “is charged with the same exercise of discretion it exercised in granting or denying injunctive relief in the first place.” *Sierra Club v. U.S. Army Corps of Engineers*, 732 F.2d 253, 256 (2d Cir. 1984). The Court may modify an injunction “when, based on principles of equity, the modification is necessary to preserve the status quo.” *Museum Boutique Intercontinental, Ltd. v. Picasso*, 880 F. Supp. 153, 161 (S.D.N.Y. 1995); *see also Sierra Club*, 732 F.2d at 256 (“An injunction is an ambulatory remedy that marches along according to the nature of the proceeding,” and which is “executory and subject to adaption as events may shape the need”).

³ Plaintiffs seek only to amend the complaint to add a defendant who has already consented to be added, to delete references to defendants that have since settled, to conform the prayer for relief to the proposed modifications to the injunction (modifications which, as discussed herein, are necessitated by developments occurring on the 2600 defendants’ site since the prior amendment), and to make other minor, conforming changes. (*See* Proposed Second Amended Complaint, dated April 4, 2000, attached as Exhibit A to the Notice of Motion to Modify the January 20, 2000 Order of Preliminary Injunction and For Leave to Amend the

(continued...)

circumstances, posting and linking are substantially similar activities, and both constitute “providing” or “offering” DeCSS to the public in violation of section 1201(a)(2) of the Copyright Act.

Statement of Relevant Facts

On January 20, 2000, this Court preliminarily enjoined the defendants from “providing,” “offering to the public,” or “otherwise trafficking in” DeCSS — an unlawful “circumvention device” within the meaning of the anti-circumvention provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 1201 *et seq.* (“DMCA”) — by “posting” the software utility on any of their Internet web sites. (Hr’g. Tr. at 85.) At the time the Court issued its injunction, it expressly left open the question orally raised by plaintiffs at the end of the hearing of whether the 2600 defendants’ provision of “hyperlinks” (or “hypertext links”) to other web sites offering the DeCSS utility for downloading fell within the statutory prohibition against, *inter alia*, “offer[ing] to the public, provid[ing], or otherwise traffic[king] in” illegal circumvention devices. *See* 17 U.S.C. § 1201(a)(2) (1999). Plaintiffs respectfully submit that any attempt to draw lines between the 2600 defendants’ acts of directly “posting” DeCSS on their own servers and providing hyperlinks to other postings on other sites is to create a distinction without a difference.

A “link” or “hyperlink” is a link from one location on the Internet to a second location on the Internet. “Clicking” on a designated signifier (*e.g.*, a picture, several highlighted letters or some other textual indication) at the first location will take a person to the second location. *See Intermatic, Inc. v. Toepfen*, 947 F. Supp. 1227, 1232 (N.D. Ill. 1996). An example of a picture

³(...continued)

Complaint, submitted herewith.) Under these circumstances, leave should be granted. *See* Fed. R. Civ. P. 15(a) (leave to amend a pleading “shall be freely given when justice so requires”); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

hyperlink (or icon) is presented as Exhibit R to the Supplemental Declaration of Bruce E. Boyden, Esq., dated April 3, 2000 (“Supp. Boyden Decl.”). An example of a text hyperlink (or icon) is presented as Exhibit H to the Supp. Boyden Decl. Plaintiffs here seek to enjoin solely the use of such signifiers by the 2600 defendants so that the public cannot receive DeCSS by visiting any of the 2600 defendants’ web sites (the clear intention of this Court’s prior order).

A hyperlink, in the context of the Internet, generally refers to software instructions which, when executed, cause a signal to be sent to another location where data or material can be retrieved for viewing, copying or further transmission. (*See* Supplemental Declaration of Robert W. Schumann, dated April 3, 2000 (“Supp. Schumann Decl.”) ¶2.) Hyperlinks enable a computer user to quickly locate and retrieve data from another file or web site location without the necessity of searching and manually inputting a particular file or site location. (*Id.* ¶ 3.) By making that material readily available through the use of a hyperlink, time and effort is saved by the user, as all the user need do is “click” on the word, text, icon or other “signifier” and the browsing software will execute the embedded linking instructions to locate and retrieve the “linked to” material without further steps having to be taken by the user. (*Id.*) In particular, the user need not rely on a “search engine” to seek out and locate relevant material through the use of keywords that are likely to appear in the desired material — the hyperlink is essentially a “hard-wired” path with specific instructions directly to the desired material. (*Id.*)

Although they are no longer directly posting DeCSS on their web sites, the 2600 defendants continue to offer and provide DeCSS to the public by creating hyperlinks directly to other unlawful postings of DeCSS. (*See* Supp. Schumann Decl. ¶¶ 4-9; *see generally* Supp. Boyden Decl. ¶¶ 3-11.)

At the time plaintiffs filed this lawsuit, the 2600 defendants were posting DeCSS at the 2600.com web site by means of an “interior” hyperlink between two locations within the site.

(Supp. Schumann Decl. ¶ 6.) In order to access and download DeCSS from the 2600.com site, one “navigated” first to the location referenced above, and then clicked on a highlighted “DeCSS.zip” hyperlink to download it. (*Id.*) Currently, by virtue of the 2600 defendants’ linking scheme discussed below, a user can still go to the 2600.com site and easily download DeCSS with only a few clicks of a mouse button — indeed, the site is virtually identical.

There is now (as of March 23, 2000) text on the page of the 2600.com web site, which states “Help us fight the MPAA by leafletting and mirroring DeCSS.” (*Id.* ¶ 7; Supp. Boyden Decl. ¶ 6.) By clicking on the highlighted word “mirroring,” one is taken immediately to another page on the 2600.com web site where a list of hyperlinks to other DeCSS postings appears. (Supp. Schumann Decl. ¶ 7; Supp. Boyden Decl. ¶ 6.)⁴

By clicking on any of the hyperlinks in this list, the user gets direct access to DeCSS in a number of ways. (Supp. Schumann Decl. ¶ 7; Supp. Boyden Decl. ¶¶ 7-11.) The majority of the hyperlinks currently provided at 2600.com contain DeCSS as a downloadable, executable utility. (*See* Supp. Boyden Decl. ¶¶ 7, 11, Exs. G-M; Supp. Schumann Decl. ¶ 7.) Some of these hyperlinks start an immediate download of DeCSS, thereby furnishing the utility without requiring the user to “click” any further (other than to confirm an instruction to download DeCSS). (*See* Supp. Boyden Decl. ¶ 8, Ex. G; Supp. Schumann Decl. ¶¶ 7, 9.) Other hyperlinks take the user to the specific page or directory listing on another web site — without requiring the user to scroll within the site — where a DeCSS icon or highlighted script appears, which the user need only click on to download the utility. (*See* Supp. Boyden Decl. ¶ 9, Ex. H; Supp. Schumann Decl. ¶ 7.) Still others take the user to a page or site that contains DeCSS, although

⁴ Prior to adding this language to their home page, but subsequent to the Court’s issuance of the injunction, the highlighted text on the 2600.com home page read simply “HELP MIRROR DECSS.” (Supp. Boyden Decl. ¶ 6, Exs. C-E.)

the user must scroll down a bit to locate the utility posting before “clicking” to download it. (See Supp. Boyden Decl. ¶10, Ex. I; Supp. Schumann Decl. ¶ 7.) And still others, when clicked on, present the user with another web site location which does not itself contain DeCSS, but rather, a hyperlink to another site or page that does. (See Supp. Boyden Decl. ¶ 11, Exs. J-M; Supp. Schumann Decl. ¶ 7.)

Since this Court issued its preliminary injunction, the 2600 defendants have stepped up and expanded their activities designed to proliferate DeCSS. The 2600 defendants have added 313 hyperlinks to their site since the hearing on January 20. (Supp. Boyden Decl. ¶5, Exs. A & B.) As noted above, and as more fully described in the accompanying declarations, the majority of these hyperlinks cause DeCSS to be downloaded onto the user’s computer, with a few mouse clicks, as quickly and conveniently as it was when DeCSS was posted to the site. (See Suppl. Boyden Decl. ¶¶ 7-11, Exs. G-M; Suppl. Schumann Decl. ¶ 7.) In fact, the 2600 defendants are encouraging others on the Internet to “mirror” or post DeCSS on their own web sites and requesting that those persons who have joined in such illegal conduct furnish the 2600 defendants with the Internet location(s) where the DeCSS posting appears and can be downloaded. (See Supp. Boyden Decl. ¶ ¶ 5-6, Ex. C-F.) The 2600 defendants even provide a convenient “entry window” in connection with their hyperlink list, which enables new DeCSS “posters” to easily submit their web site location (“URL”) to the 2600.com web site. (*Id.*) Indeed, *after* the January 20, 2000 preliminary injunction, the 2600 defendants noted that:

update 01/30/00

We continue to get new links constantly. We thank everyone out there for their support and will continue to update the links *as long as we’re able to.*

(*Id.* Ex. B) (emphasis supplied.)

Obviously, it is immaterial to the end user whether he or she acquires DeCSS through a posting or through a hyperlink to a posting. Thus, through their ongoing activities, the 2600 defendants are accomplishing what Congress clearly prohibited — offering and providing to the public unlawful circumvention devices in violation of 17 U.S.C. § 1201(a)(2).

In fact, the 2600 defendants make perfectly clear that their motive in soliciting and providing these hyperlinks is to “circumvent” the Court’s Preliminary Injunction Order by doing what they are already enjoined from doing by posting -- providing, offering, and disseminating DeCSS to the public on the Internet. The expanded list of hyperlinks on the 2600.com web site is preceded by the following statement:

While we have every intention of sticking this out to the end, we have to face the possibility that we could be forced into submission. For that reason, it’s especially important that as many of you as possible, all throughout the world, take a stand and mirror these files . . . Already, a handful of sites have gone down due to this latest bit of intimidation. We need to replace them and add to their number.

(Supp. Boyden Decl. Ex. B.)

To be clear, plaintiffs do *not* seek to enjoin the 2600 defendants’ generalized statements or “reports” about the “fight” over DeCSS or from expressing their dislike for plaintiffs or their litigation activities. In the instant motion, plaintiffs only seek modification of the Court’s injunction directed to the linking activity described herein. As demonstrated below, such activity -- which is virtually indistinguishable from posting -- violates the anti-circumvention provisions of the DMCA and finds no protection in the First Amendment. Further, through this motion, plaintiffs are not asking the Court to enjoin the parties responsible for the postings of DeCSS at the “linked-to” sites (although plaintiffs have taken, and will continue to take, action against these third party “posters” of DeCSS). This Court can, and should, however enjoin defendants

who are properly before it from emasculating the preliminary injunction by continuing to “provide” DeCSS.

Argument

A. THE 2600 DEFENDANTS’ LINKING SCHEME VIOLATES THE DMCA

1. THE 2600 DEFENDANTS ARE STILL “PROVIDING” DECSS

The facts demonstrate the 2600 defendants are still “providing” DeCSS in violation of Section 1201(a)(2) of the DMCA. Although the DMCA does not define the word “provide,” it is a “fundamental canon of statutory construction” that words not defined in a statute “will be interpreted as taking their ordinary, contemporary, common-meaning.” *Perrin v. U.S.*, 444 U.S. 37, 42 (1979). The ordinary, common-meaning of “provide” is to “supply, afford, contribute, make, procure, or furnish for future use.” *Central Midwest Interstate Low-Level Radioactive Waste Comm. v. Commonwealth Edison Co.*, 113 F.3d 1468, 1474 (7th Cir. 1997) (citing Black’s Law Dictionary 1224 (6th ed. 1990)). *See also* WEBSTER’S II NEW RIVERSIDE DICTIONARY at 552 (rev. ed. 1996) (defining “provide” as “1. To supply or furnish (something needed or useful);” and “2. To have or offer for use.”)⁵ Here, the 2600 defendants have deliberately set up the 2600.com site to function as a distribution center for the ready availability and delivery of DeCSS. (*See* Supp. Schumann Decl. ¶ 10.) The site continues to be a place where a user can obtain a download of DeCSS with a click or two of the mouse. Thus, the 2600 defendants are “procuring,” “supplying,” “furnishing” or “offering [DeCSS] for use.” *Cf. Central Midwest*, 113 F.3d at 1474 (interstate compact governmental entity would be “providing” for waste disposal within meaning of federal waste policy statute by allowing a third party to build and operate a disposal facility); *Dower v. Gamba*, 276 N.J. Super. 319, 326-27, 647 A.2d 1364, 1367-68 (Sup.

⁵ Similarly, the common dictionary definition of “offer” is, *inter alia*, “to provide” or “furnish.” *Id.* at 477.

Ct., App. Div. 1994) (interpreting term “provide” as used in social host liability statute to encompass the indirect furnishing of alcoholic beverages), *cert. denied*, 140 N.J. 276 (1995).

2. THE 2600 DEFENDANTS ARE LIABLE FOR CONTRIBUTORY VIOLATIONS OF THE DMCA

In addition, the 2600 defendants’ scheme also constitutes a “contributory” violation of Section 1201(a)(2). Section 1201 does not expressly address contributory liability principles. Nevertheless, courts have applied such principles, even absent a specific legislative mandate, where they “advance the goals of the particular federal statute which plaintiffs allege has been violated.” *See American Telephone and Telegram Co. v. Winback and Conserve Program, Inc.* (“AT&T”), 42 F.3d 1421 (3d Cir. 1994), *cert. denied*, 514 U.S. 1103 (1995); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (“vicarious liability is imposed in *virtually all areas of the law*, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another”) (emphasis supplied); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 854 (1982) (contributory liability available under Lanham Act despite lack of explicit statutory language providing for such liability). The DMCA was specifically enacted to augment federal copyright law by prohibiting dissemination of technological devices designed to circumvent “technological measure[s] that effectively control[] . . . access to a [copyrighted] work” 17 U.S.C. § 1201(a)(2). This Court expressly found that “[i]n enacting the DMCA, Congress found that the restriction of technologies for the circumvention of technological means of protecting copyrighted works ‘facilitate[s] the robust development and world-wide expansion of electronic commerce, communications, research, development, and education’ by ‘mak[ing] digital networks safe places to disseminate and

exploit copyrighted materials.” (Mem. Op. at 18) (quoting S. REP. NO. 105-90, 105th Cong., 2d Sess. (1998).) “It is a tool to protect copyright in the digital age.” (Mem. Op. at 18, 20.)

Imposing liability on the 2600 defendants for engaging in a scheme which both encourages and provides substantial assistance to others to provide DeCSS for quick and easy downloading unquestionably serves the overall purpose of the DMCA. *See Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999) (defendant contributorily liable for making reference on its web site to other sites containing infringing matter, and encouraging users to go to those sites).

3. THIS COURT HAS BROAD POWER TO FASHION AN EFFECTIVE REMEDY

This Court is empowered to fashion, and plaintiffs are entitled to, a remedy that effectively protects plaintiffs’ rights under the anti-circumvention provisions of the DMCA. There is a critical “distinction between a statutory right and the equitable relief necessary to protect the right.” Timothy R. Cahn & Joshua R. Floum, *Applying The Safe Distance Rule In Counterfeiting Cases: A Call For The Use of Broad Equitable Power to Prevent Black and Gray Marketeering*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 487, 490 (Winter 1998). Thus, “a court’s equitable powers to secure rights created by statute may include the enjoining of conduct otherwise lawful under the statute when the injunction is tailored to vindicate the statutory rights.” *Id.* (citing *ES Development, Inc. v. RWM Enterp., Inc.*, 939 F.2d 547, 557-58 (8th Cir. 1991) (enjoining defendant automobile dealers from communicating with their manufacturers even though such communications constituted commercial speech protected under the First Amendment), *cert. denied*, 502 U.S. 1097 (1992)); 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES 114 (2d ed. 1993) (“Because injunctions can provide many different means and terms, they may

at times be tailored to forbid acts that are not themselves wrongs”).⁶ Here, for the injunction to have any meaning, and to vindicate plaintiffs’ rights under the DMCA, the 2600 defendants must be precluded from engaging in activities which (a) are for all practical purposes identical to the activities which the Court has already enjoined, and (b) accomplish the same thing that the plaintiffs sought to, and the Court did, enjoin — the widespread proliferation of DeCSS. Indeed, the 2600 defendants’ activities described above are part and parcel of what the Court aptly characterized as “frenzied efforts to mirror and otherwise disseminate the program in . . . an attempt . . . to get this so widely disseminated that the genie never could be put back into the bottle” (Hr’g. Tr. at 50; *see also id.* at 61-62; Mem. Op. at 22 (noting that defendants’ “posting is part of a course of conduct the clear purpose of which is the violation of law”).)

In *Playboy Enterp., Inc. v. Chuckleberry Publ., Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996), the Court issued an injunction in 1981 which barred the defendant from, *inter alia*, publishing, printing, distributing or selling, in the United States, an English-language male sophisticate magazine which used the word “PLAYMEN” or any other word confusingly similar to plaintiff’s “PLAYBOY” mark. Fifteen years later, the defendant sought to take advantage of the new Internet technology to circumvent the injunction, by creating an Internet site featuring the “PLAYMEN” name. Defendant created the site by uploading the images onto a web server located in Italy. Recognizing that it had “neither the jurisdiction or the desire to prohibit the creation of Internet sites around the globe,” the Court nevertheless held that although the

⁶ *See also Oral-B Laboratories, Inc. v. Mi-Lor Corp.*, 810 F.2d 20, 24 (2d Cir. 1987) (defendant who had already been enjoined from infringing plaintiff’s trade dress was prohibited from engaging in activities which, if viewed in isolation, might not have been actionable); *Supply Manufacturing Co. v. King Trimmings, Inc.*, 220 F. Supp. 947, 951 (S.D.N.Y. 1963) (although defendants’ marks, when viewed in isolation, might not have been confusingly similar to plaintiffs’ mark, use of those marks by defendant was “transparent attempt to circumvent the injunction against use of “plaintiff’s mark and, in “light of the entire history of defendant’s activities,” was enjoined).

offending activity occurred on a foreign web site, and although the 1981 injunction did not bar defendant from maintaining the foreign web site, the Court retained jurisdiction over the defendant for the purpose of enforcing the injunction, and it could therefore prohibit access to the sites in the U.S. by barring the defendant from accepting subscriptions from U.S. customers. *Id.* at 1036 n.4, 1046. Central to the Court’s analysis was the recognition that “allowing the Defendant to contravene the clear intent of the Injunction by permitting it to distribute pictorial images over the Internet [by virtue of the foreign web site] would emasculate the injunction.” *Id.* at 1037.

Here, similarly, the preliminary injunction does not bar non-party sites from providing DeCSS (unless those non-parties are “doing so in active concert or participation with” the 2600 defendants, *see* Fed. R. Civ. P. 65(d)). Plaintiffs are aware that to prevent such third parties from posting DeCSS, they will have to take action against those third parties (which they have done, and will continue to do). But the Court *does* have jurisdiction over *these* defendants, and can prevent them from acting as a virtual “distribution center” for DeCSS through a linking scheme purposefully designed to emasculate the injunction.

B. THE 2600 DEFENDANTS’ LINKING SCHEME IS NOT PROTECTED BY THE FIRST AMENDMENT

This Court has already concluded that “[a]pplication of the DMCA to prohibit production and dissemination of DeCSS . . . does not violate the First Amendment.” (Mem. Op. at 23.) Plaintiffs respectfully submit that this premise holds true whether that dissemination occurs by reason of direct posting of downloadable DeCSS on one’s own web site, or by deliberately linking to downloadable DeCSS on a third party web site — processes which, for the reasons described above, are effectively identical.

Indeed, if one engages in the balancing approach undertaken by the Court in granting the preliminary injunction (*see* Mem. Op. at 20-21), the scale tips just as decidedly in plaintiffs' favor when the defendants are linking to DeCSS as when they are posting the utility. The hyperlinks to DeCSS -- like DeCSS itself -- are computer code, with minimal, if any,⁷ expressive content (*see id.* at 20), while the interest served by prohibiting such hyperlinks -- maintaining the inviolability of copyrighted DVD motion picture content -- remains just as weighty on plaintiffs' side of the balance.

Even if the Court were to find that the act of linking contained some expressive content, that would not shield such activities from the reach of this Court. As this Court noted, Congress may constitutionally proscribe certain activities -- even if those activities are imbued with some expressive content -- where they are "part of a course of conduct the clear purpose of which is the violation of law." (Mem. Op. at 22 citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (First Amendment did not prohibit injunction against peaceful picketing activities as picketing was integral to course of conduct in violation of a valid criminal statute).) Whether accomplished through posting or linking, the "principal object" of the 2600 defendants' dissemination of DeCSS is copyright infringement (*id.* at 23) and "[a]pplication of the DMCA to prohibit [such] dissemination of DeCSS therefore does not violate the First Amendment." (*Id.*)

Moreover, this case presents a unique situation where the regulation of the 2600 defendants' linking scheme will ultimately serve to foster other constitutional interests, namely,

⁷ For the reasons submitted in support of plaintiffs' original application for a preliminary injunction, under these circumstances providing a hyperlink to a site containing DeCSS is not "speech" within the purview of the First Amendment. (*See* Reply Mem. of Law in Further Support of Plaintiffs' App. for a Preliminary Injunction at 6-7.) As the Court pointed out, even if such links *are* considered "speech," that is merely the "beginning of the analysis." (Mem. Op. at 16.) Similarly, plaintiffs contend that even if linking to sites containing DeCSS involves some expressive content, such linking may be constitutionally enjoined. (*See* Mem. Op. at 22-23.)

the *plaintiffs'* First Amendment right to speak (through their copyrighted motion pictures), and the protection of plaintiffs' constitutionally mandated copyright interests. As the Supreme Court has recognized, copyright protection reflects the notion that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1953). And, as this Court correctly noted, the widespread dissemination of DeCSS "would discourage artistic progress and undermine the goals of copyright" (Mem. Op. at 21), and would therefore undermine the values of free expression.

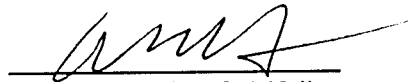
The 2600 defendants may argue, as they began to do at the preliminary injunction hearing, that by enjoining linking, the Court will be stifling expression which may or may not exist on the linked-to sites. Indeed, the 2600 defendants argued at the hearing that such linked-to sites may include the web sites of news institutions such as The San Pedro Mercury News. (*See* Hr'g. Tr. at 82-83.) This argument is a red herring for two reasons. *First*, it ignores the fact that the 2600 defendants are not incidentally or accidentally linking to sites which may or may not include expression and which may or may not include downloadable DeCSS. They are engaged in a deliberate scheme to encourage others to post DeCSS, request the URL Internet addresses of those postings, and then create hyperlinks to those postings to deliver DeCSS "virtually," and no less conveniently, through the 2600 site. Thus the 2600 defendants have full knowledge that the hyperlinks they are providing contain downloadable DeCSS. *Second*, to the extent that any linked-to sites contain expression along with DeCSS, the effect of enjoining the hyperlinks will *not* be to remove that expression. The linked-to sites will still exist, and any expression contained thereon will be available for anyone to read. The injunction will merely prevent *these* defendants from operating a DeCSS utility distribution center.

Conclusion

For the foregoing reasons, the Court should modify the January 20, 2000 preliminary injunction by prohibiting the 2600 defendants from “linking” to DeCSS or any other technological device primarily designed or produced for the purpose of circumventing, or circumventing the protection afforded by CSS, or any other technological measure adopted by plaintiffs that effectively controls access to plaintiffs’ copyrighted works, or effectively protects plaintiffs’ rights to control whether an end user can reproduce, manufacture, adapt, publicly perform and/or distribute unauthorized copies of their copyrighted works, or portions thereof. The Court should also grant plaintiffs leave to make largely conforming amendments to the complaint.

Dated: New York, New York
April 4, 2000

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