UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

EDWARD W. FELTEN, ET AL.,	.	Case No. 01 CV 2669
	.	
Plaintiffs,	.	
	.	
v.	.	
	.	402 East State Street
	.	Trenton, New Jersey 08608
RECORDING INDUSTRY, ET AL.,	.	
	.	
Defendants.	.	
	.	November 28, 2001
. . . . .	.	1:00 P.M.

TRANSCRIPT OF MOTIONS
BEFORE HONORABLE GARRETT E. BROWN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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For the Defendants:	Sterns & Weinroth By: KAREN A. CONFOY, ESQ. 50 West State Street, Suite 1400 Trenton, New Jersey 08607
Pro Hac Vice Counsel For the Defendants:	Williams & Connolly, LLP By: DAVID E. KENDALL, ESQ. KEVIN HARDY, ESQ. 725 Twelfth Street, NW Washington, DC 20005 LYNDA BRAUN, ESQ. THOMAS WACK, ESQ.
For the Government:	U.S. Department of Justice, Civil Division By: RICHARD G. PHILLIPS, JR., ESQ. 901 E. Street, NW Washington, DC 20530
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TRANSCRIPT

THE COURT: Who do we have on the line?

MR. WACK: Your Honor, this is Thomas Wack [phonetic] on behalf of defendant, Secured Digital Music and Instrument Foundation.

MS. BRAUN: And Lynda Braun on behalf of the Verance Corporation.

THE COURT: Could you give the reporter the spelling of your last names?

MS. BRAUN: Sure. Lynda, L-Y-N-D-A, Braun, B-R-A-U-N.

THE COURT: All right. The case is Felten, et al., v. Recording Industry Association, et al.

Let me have appearances first by the plaintiff.

MS. BARBER: Thank you, Your Honor. I'm the local counsel for the plaintiffs. My name is Grayson Barber. And I'd like to introduce my co-local counsel, Frank Corrado of Rossi, Barry, Corrado and Grassi.

And we have three out-of-state counsel who have been admitted pro hac vice. Gino Scarselli will be presenting argument today. With him are Jim Tyre and Lee Tien of the Electronic Frontier Foundation.

THE COURT: So, who is the lawyer who will actually be speaking when called upon by the plaintiff.

MR. BARBER: This will be Gino Scarselli, Your Honor.

THE COURT: Thank you very much. And for the defense?

MS. CONFOY: Your Honor, Karen Confoy, Sterns & Weinroth as local counsel for the defendants, Recording Industry Association of America, Secured Digital Music Initiative Foundation and Verance Corporation.

And with me to my left is David Kendall, Kevin Hardy, both admitted pro hac vice from the firm of Williams and Connolly for Recording Industry Association of American. Mr. Kendall will be leading the argument today for the defendants.

THE COURT: All right. Now, I assume that you also -- you'll also be speaking on behalf of Secured Digital Musical Initiative and Verance Corporation, is that right?

MR. KENDALL: Your Honor, they --

MR. WACK: Your Honor, this is Thomas Wack.

THE COURT: Okay.

MR. WACK: Mr. -- Mr. Kendall's argument, I believe, will be -- I won't have much to add to what he has to say, although I will have a few comments.

THE COURT: And you're representing whom, Mr. Wack?

MR. WACK: Secured Digital Music Initiative Foundation.

THE COURT: Who's representing Verance?

MS. BRAUN: I am, Lynda Braun, Your Honor. And I will

defer to Mr. Kendall's argument.

THE COURT: Okay. And representing the Attorney General?

MR. PHILLIPS: Richard Phillips, Your Honor, from the Justice Department.

THE COURT: Is there anyone else whose appearance hasn't been noted? All right.

MS. CONFOY: Your Honor, I just have with me representatives from Recording Industry Association of America, Dean Garfield and Matthew Oppenheim, also from the SDMI.

THE COURT: All right. Now we start out with an order permitting filing under seal sought by the plaintiff. Is there any opposition by the defense to their motion to file under seal a computer program entitled Tiny Warp Dot C, the Source Code Used to Defeat Technology F During the SDMI Public Challenge, according to the letter of October 24th of Ms. Barber. Anyone have any opposition to it being filed under seal?

All right, I will sign the order by consent. And the Clerk will file it.

The plaintiffs filed a complaint, and then a first amended complaint. All defendants move to dismiss the letter. We have two sets of motion papers. The defendants -- the private defendants, Recording Industry, Verance and Secure Digital Music move in one set of papers, which the defense has responded to and which we have a series of declarations filed by

both sides. And also, the Attorney General has moved to dismiss, as well.

And, again, the plaintiffs have responded and filed declarations and we have a full set of briefing on both sides.

I have read the briefs and I do not desire to have any party repeat the arguments in their briefs. I think the matter has been fully briefed by both sides. Nonetheless, if either side wishes to be heard briefly on points raised since the briefing, I will permit it.

Perhaps the wisest thing to do since the moving parties have had the last brief is to ask Mr. Scarselli whether he has any response to the briefs.

MR. SCARSELLI: Yes, Your Honor, I have a number of responses to particular points.

THE COURT: All right. Don't repeat your brief and only respond to the last brief that was filed. I've read the rest of it several times.

MR. SCARSELLI: Yes.

THE COURT: Shall we turn first to the private defendant's motions?

MR. SCARSELLI: Yes. May I?

THE COURT: Proceed.

MR. SCARSELLI: May it please the Court, I am Gino Scarselli and I represent the plaintiffs in this action.

Your Honor, with respect to the private defendants' briefs, the reply brief, the last brief, what I would like to point out are simply two things:

One is our concern over the three papers to which the private defendants have represented to the Court --

THE COURT: They say they have no problem, correct? If it weren't for the one Oppenheim letter, you wouldn't be here, would you?

MR. SCARSELLI: No, because of the whole series of events, Your Honor, that took place leading up to the Oppenheim letter --

THE COURT: So, you have one letter which they withdrew before the seminar took place. And since then, they have been saying over and over again we're not going to sue in these papers, we're not going to sue in these papers, we're not going to sue in these papers. Indeed, back last summer you came in for injunctive relief and I told you it didn't make sense.

MR. SCARSELLI: Your Honor, there was no retraction from the other side prior to the filing of the complaint. All there was was a press statement --

THE COURT: Well, that's a matter of dispute. They say that they issued it before but you didn't get it before.

MR. SCARSELLI: No --

THE COURT: Let's talk about the stipulation that you

--

MR. SCARSELLI: Yes.

THE COURT: -- entered into with them or were going to enter into with them. Why wasn't that signed?

MR. SCARSELLI: We didn't -- it wasn't signed because the private defendants refused to sign it. It was a stipulation, first of all, to avoid a need for preliminary relief or extraordinary relief.

THE COURT: And what was it that the private defendants found troubling about that proposed stipulation?

MR. SCARSELLI: I honestly don't know, Your Honor. I don't know the answer to that question.

THE COURT: Then we'll have to ask them when it comes to be their turn. Okay.

MR. SCARSELLI: So --

THE COURT: Go ahead.

MR. SCARSELLI: So what we tried to do -- but, Your Honor, if I may clarify, it wasn't just a matter of a single letter by Mr. Oppenheim that was sent on April 9th. It was a matter of events that occurred post letter, that occurred over the span of two weeks leading up to the date of the conference.

THE COURT: You're talking about the negotiation between the lawyers?

MR. SCARSELLI: Those were -- Your Honor, they -- they

can be construed as negotiations. But they're -- they were clearly considered threats, not just by these plaintiffs, but by University counsels for Princeton or Rice Universities, by the Program Chair of the Information Hiding Workshop who pulled the papers, the decision was reversed by a higher committee the following day. But he actually pulled the paper.

It's not just a matter of these plaintiffs looking and feeling threatened or chilled by the letter and the ensuing negotiations.

In those negotiations, Mr. Turnbull [phonetic] of Verance's outside counsel referred to the paper as a recipe for circumventing technological measures, what would put it clearly under the -- under the Statute.

Mr. Liebowitz [phonetic], Verance's CEO, claimed that the plaintiffs have violated the DMCA strictly by submitting the paper to the conference. Those events --

THE COURT: That one letter is what you seem to be hanging your hat on.

MR. SCARSELLI: It was the negotiations also, and it was also the -- these were -- Mr. Endy [phonetic] of Rice -- of Princeton University -- Princeton's general counsel describes daily and sometimes hourly conversations. Now, they occurred over a short span of time, but they occurred over a short span of time because there was a date certain when the paper was

supposed to be published.

And during that time, threats were -- I mean there's different ways of saying that. We could say that the same threat was reiterated, were -- that other threats were made. But the point is that it was absolutely clear to everyone present on our side of the table, along with the University counsels of two major universities, along with outside counsel of Rice University, because Rice retained outside counsel in anticipation of litigation.

THE COURT: Well, since that time, you've published everything you want to publish without a peep out of the defense, except to say go to it, correct?

MR. SCARSELLI: We have published -- I want to be very specific here.

THE COURT: Okay.

MR. SCARSELLI: There was -- there were three papers we attached to the complaint.

THE COURT: Um-hum.

MR. SCARSELLI: All right? After the paper was pulled, the only -- the plaintiffs had heard nothing from the private defendants. General counsels of Princeton and Rice heard nothing from the private defendants.

Mr. Endy and Mr. Zanzitus [phonetic], both counsels of Rice, stated that they were still concerned at that point. This

is after the paper was pulled and after RIAA/SDMI issued that press statement on that same day. That was all that happened, that was all that the other side did.

So, the concern -- the -- that there still was a live threat of litigation persisted that entire time. One of the papers -- the ICAS [phonetic] paper, this is a paper that Professor Wu, who just graduated from Princeton and is now at University of Maryland College Park, had written principally with Mr. Craver, who's still a graduate student at Princeton. That paper was submitted to another conference. It was a similar paper, but it had -- it wasn't exactly the same. There was some technical details that were different.

What happens, Your Honor, is with all the focus on the SDMI paper, the paper -- excuse me -- the paper that was ultimately pulled from the Pittsburgh conference, this one just sort of -- it fell through the cracks. When they realized it after the paper was pulled, they tried -- they tried to pull it from that conference also.

Professor Liu, who's Professor Wu's advisor, contacted the organizers of the second conference --

THE COURT: I read your submissions. Most of what you're saying is in your submissions, is it not?

MR. SCARSELLI: Yes. Yes.

THE COURT: All right.

MR. SCARSELLI: Excuse me, Your Honor.

THE COURT: Let's not repeat things that we already have.

MR. SCARSELLI: So, --

THE COURT: I mean I've spent hours going over this, I don't intend to spend hours listening to it.

MR. SCARSELLI: I'm sorry, Your Honor. Let me just move on. But that paper has been published. There was an effort to pull it, but it was too late because that conference didn't just -- didn't just present the paper -- publish the papers in paper form, they burn CD's, and they had already burned CD's at that time, so it was too late to pull that paper.

The paper -- the other paper, the paper that was pulled from the Pittsburgh conference was re-advised --

THE COURT: You still haven't answered my question. My question is: Is there anything as of now that these plaintiffs have prepared for publication and sought to publish which has not been published?

MR. SCARSELLI: Well, there is the program Tiny Warp, which we submitted and you've just granted the motion to file under seal. That is written and that's ready for publication.

THE COURT: Have the --

MR. SCARSELLI: But the problem --

THE COURT: Have the defendants said that they will

sue you if you publish that?

MR. SCARSELLI: No, Your Honor. But the initial threat was -- excuse me -- wasn't about one paper. Mr. Oppenheim's letter of April 9th refers to the public discussion of information gained during the --

THE COURT: We're back to the --

MR. SCARSELLI: -- SDMI public challenge.

THE COURT: -- original Oppenheim letter again, aren't we?

MR. SCARSELLI: Well -- well, I mean, yes, we're back there. We're back at those negotiations because that's when the threat occurred.

THE COURT: Maybe it would be profitable to turn to your response to the Attorney General's --

MR. SCARSELLI: Yes.

THE COURT: -- submissions at this point.

MR. SCARSELLI: Yes, sir.

THE COURT: Now, you're asserting that I suppose USENIX fears criminal prosecution by the Attorney General, is that what you're saying?

MR. SCARSELLI: USENIX has a credible -- faces a credible threat of prosecution from the Attorney --

THE COURT: The other plaintiffs have a credible threat of prosecution by the Attorney General?

MR. SCARSELLI: Professor Felten does because the paper that he wants to write for *Scientific American*, he was invited to write it, would place him under the criminal provisions because *Scientific American*, unlike peer review journals, actually pays for articles.

THE COURT: Okay. In your injunctive relief request at Paragraph K, you seek a preliminary and permanent injunction against the Department of Justice --

MR. SCARSELLI: Yes.

THE COURT: -- from enforcing the DMCA against plaintiffs USENIX for violating the Act. But you don't seek it as to the other plaintiffs. Are you saying that they don't fear prosecution by the Attorney General?

MR. SCARSELLI: Your Honor, we have -- this is a very difficult -- it's a complicated Statute and we believed at that time that the only -- the only plaintiff that faced criminal prosecution because of Section 1204, which is the criminal provision, and requires that a violation be done for commercial -- a commercial advantage or private financial gain only apply to USENIX because they gain money through the conference.

Since the arrest of Mr. Sklyarov, we're not sure where that line is drawn any longer.

THE COURT: Well, I'm looking at the amended complaint, you're not seeking that relief. Now, are you saying

that these defendants -- the defendant Attorney General would prosecute your plaintiffs? It seems to me there's a tremendous difference between Mr. Sklyarov and your plaintiffs, isn't there?

MR. SCARSELLI: I don't --

THE COURT: You don't see it?

MR. SCARSELLI: We don't see that -- no, Your Honor.

THE COURT: Okay.

MR. SCARSELLI: He's a grad --

THE COURT: Well --

MR. SCARSELLI: -- student at Moscow State University.

THE COURT: Okay.

MR. SCARSELLI: He came to the United States --

THE COURT: Well, if you don't see it, enough said. We'll deal --

MR. SCARSELLI: Okay.

THE COURT: -- with that later. I mean I -- I see the difference as being night and day, you don't. Let's move on then.

MR. SCARSELLI: Yes, sir. If I could say just one -- if I may follow-up just one more thing.

THE COURT: All right, go ahead.

MR. SCARSELLI: Under the Statute, our point is that under the Statute, the lines aren't clear between Mr. Sklyarov's

case and our case. We don't know all of the facts of that case yet. And reviewing the Government's indictment is just not clear to us.

The other point, though -- and really what is relevant about the Sklyarov case, sir, is that it shows that the Government is intent on enforcing the Statute. This is not a Statute that the Attorney General has dismissed that refuses to enforce. He will enforce it. But exactly --

THE COURT: Does that mean that anyone --

MR. SCARSELLI: Exactly the --

THE COURT: -- can seek an injunction against prosecution, regardless of the circumstance? Regardless of asserting that they are actually going to engage in prohibited acts?

MR. SCARSELLI: Sir, we would -- Your Honor, we would have to amend that complaint because I don't believe injunctive relief is warranted now.

THE COURT: I'm dealing with the complaint as you have amended it the first time.

MR. SCARSELLI: Correct.

THE COURT: That's what they've moved to dismiss.

MR. SCARSELLI: Correct. And I don't think injunctive relief is appropriate against the Government for the USENIX conference, I do believe though that declaratory relief is still

appropriate.

THE COURT: Okay. So, you concede that you don't have standing to bring an injunction action against the Government to stop it from contemplating a prosecution against you that they have not even contemplated, is that what you're saying?

MR. SCARSELLI: Only with respect to the USENIX conference.

THE COURT: Otherwise you think you do?

MR. SCARSELLI: Absolutely.

THE COURT: Okay.

MR. SCARSELLI: Under -- under controlling Third Circuit law, Your Honor. Because under Third Circuit law, if -- I mean a threat from the Attorney General is not required. All that is required is that the plaintiffs want to engage in conduct that's constitutionally protected and that the Statute proscribes their conduct. That's all that's required.

THE COURT: And you assert the Statute --

MR. SCARSELLI: Then a presumption is created.

THE COURT: -- proscribes your conduct, is that what you're saying?

MR. SCARSELLI: I'm saying that the Statute absolutely proscribes the -- proscribes the publication of the Tiny Warp Program.

And as far as the plaintiffs' other conduct --

THE COURT: Even though all your adversaries disagree with you on that.

MR. SCARSELLI: Your Honor, the private defendants threatened -- threatens to sue under the DMCA for the publication and presentation of an academic paper. They obviously must read the Statute and to help draft the Statute so that it covers papers. And it makes sense, though, it's a reasonable reading of the Statute and it's a reasonable reading of part of the intent behind the Statute, which is to prevent the disclosure of information that can be used to circumvent measures that are intended to protect copying and access to copyrighted works.

THE COURT: Anything else?

MR. SCARSELLI: With respect to the --

THE COURT: Either of those two points, then I'm going to give your adversaries no more than five minutes a piece to respond and then I'll rule.

MR. SCARSELLI: Yes, sir. Your Honor, may I comment -- may I have just a moment?

(Pause)

MR. SCARSELLI: Nothing, Your Honor.

THE COURT: Okay. All right, counsel for the private defendants. You heard my injunction to your adversary, I've read the papers, don't repeat them, no more than five minutes,

and please confine yourself to what we've been hearing from your adversary.

MR. KENDALL: May it please the Court, David Kendall --

THE COURT: This is just designed to supplement your papers. No more.

MR. KENDALL: David Kendall for defendant, RIAA. The Court asked why the stipulation was not signed, that stipulation is attached as Exhibit J to Mr. Hardy's declaration in support of our motion to dismiss.

THE COURT: That's right.

MR. KENDALL: The only reason it wasn't signed, Your Honor, is one word. You'll note that there's a signature line for the Court. The one word that is missing from the stipulation is dismissed.

We believe -- and I think -- I thought that the plaintiffs believed that that stipulation resolved both past and present questions. It resolved past questions by giving them assurances from not only --

THE COURT: Who prepared the stipulation?

MR. KENDALL: Excuse me?

THE COURT: Who prepared the stipulation?

MR. KENDALL: It was really prepared by both sides and it's so recites in it --

THE COURT: But you were the ones that wouldn't sign

it, you wouldn't sign it because they wouldn't agree to dismiss this action, as well as everything else that was agreed in there, is that right?

MR. KENDALL: That's correct.

THE COURT: Okay.

MR. KENDALL: And we thought that we had dealt with the three papers in Paragraphs 1, 2 and 3, which gave them categorical assurances, not only RIAA, but SDMI and Verance that no action on those papers would be taken.

They recognize our point in Paragraph 6 that as to the future, nobody knows. We can't -- you know, nobody can give assurances about the future. We thought that ended the case. I said so in my letter sent back to Mr. Scarselli the same day, that we only had one problem, and that was we wanted a dismissal on it. So, that's why the stipulation wasn't signed.

I think it does end the case. I think the case -- for reasons set forth in our papers, is moot. And there's no actual controversy.

As to Mr. Scarselli's second point, he referred to papers. And I think that the short answer to them is that every --

THE COURT: Is it moot or is the issue not ripe? Or do the plaintiffs lack standing?

MR. KENDALL: I think you could say either one of

those, Your Honor. My feeling is that the plaintiffs probably lack standing. I think moot suggests that there was at one time a controversy.

So, I would say that probably they lack standing and the issue isn't ripe. But I think also, if -- even if you gave them the benefit of the doubt, it's been mooted by the stipulation and our assurances.

THE COURT: All right. Anything else?

MR. KENDALL: The only thing I -- in Mr. Scarselli's second point, he mentioned papers. We responded to every paper identified in their amended complaint. They were filed under seal, there's no reason to seal them anymore, Your Honor, because they've been published on the Internet by regular paper and given at conferences.

Thank you.

THE COURT: All right. Mr. Wack, do you have anything on that?

MR. WACK: I have nothing to add, Your Honor.

THE COURT: Ms. Braun?

MS. BRAUN: No, Your Honor.

THE COURT: All right. Mr. Phillips, for the Government?

MR. PHILLIPS: Actually, Your Honor -- Richard Phillips from the Justice Department.

Actually, Your Honor, I appreciate the five minutes, but I believe the briefs covered the waterfront. If the Court has questions, I'd be happy to answer them.

THE COURT: Okay. All right, very well.

MR. PHILLIPS: Thank you.

THE COURT: All right. Well, I certainly have had an opportunity to read the various briefs submitted by the parties and the declarations submitted by the parties, and I have reviewed the first amended complaint in some detail with the attachments.

It's tempting to reserve decision and write a definitive opinion here, but it's unnecessary because the United States Supreme Court -- the United States Court of Appeals for the Third Circuit, among others, have already conclusively spoken on the issues presented. And this would serve no purpose other than to delay this matter further.

I will discuss the issues raised in somewhat of an abbreviated fashion. The question presented is, as the parties have annunciated, do we have a case or controversy. That limitation on the Federal Courts is both a separation of Powers limitation and a Prudential limitation. We don't have roving commissions to go about and consider any statute passed by the Congress, which some party may wish to question. The reasons for that are set forth in the briefs submitted, and I will

hopefully go into that in some greater detail.

But an abstract review of the constitutionality of statutes passed by Congress is beyond the powers of this Court and, of course, is certainly limited by prudential concerns, as well.

The Courts of the United States are quite busy handling real, rather than theoretical cases, between true adversaries with an adequately developed factual record.

I feel that if I were to delay my ruling, it would be unfortunate. I think right now, it's necessary to speak and avoid further expenditure of the resources of the parties and of the Court where we do not have an actual case or controversy.

As Dorothy Parker said in another context, "there is no there there." Looking at the repeated assurances given by the defendants that there is no dispute, that there is no controversy, the plaintiffs seem unwilling to accept that.

You'll have to bear with me and don't interrupt me, I have a series of notes and references here and I will try to dictate an abbreviated opinion into the record, which I think will assist the parties. And when and if they do have a case or controversy, they are certainly free to come back to this Court. But at this point, as I say, they do not.

I think everybody has given me a form of order here if I'm not mistaken, let me just make sure.

(Pause)

THE COURT: Yes, I have a form of order here from the United States and I have one from the Recording Industry Association, one from SDMI and one from Verance.

(Pause)

THE COURT: My apologies to the attorneys that are present by telephone. I'm going to keep you for a while. Is that inconvenient? Are you someplace where you can't stay on the phone for a while?

MR. WACK: No. We -- I can certainly stay on the phone, Your Honor.

MS. BRAUN: So can I, Your Honor.

THE COURT: All right.

(Pause)

THE COURT: The claim here arises out of what is called the SDMI initiative, a letter to the digital community to attack certain technologies, which is referred to in the beginning of the amended complaint, which also sets forth the parties.

The plaintiffs assert that they did enter this contest. They assert that they were successful, at least in part, the defendants assert they were not, but that is irrelevant to the matters that are before us.

In any event, the claim is that the plaintiffs, as

scholars and researchers, intended to publish the results of their examination. And that they were met with a response by Mr. Oppenheim, which is set forth at Paragraph 43 of the complaint. This goes on after allegedly Professor Felten was in correspondence with Mr. Winograd of Verance. And Dr. Winograd said at Paragraph 41 that, "I am most concerned that your paper provides unnecessarily detailed information, in particular relating to detailed numerical measurements, such as frequencies, numeric parameters, etc., you and your colleagues obtain through analysis of the samples provided by SDMI and/or employ in your proposed attacks. It's not clear to me that the inclusion of these specific numeric details either advances your stated goal for furthering the academic body of knowledge regarding security technologies or any other cause other than facilitating the use of your results by others seeking to circumvent the legitimate use of these technologies for copyright protection purposes. I urge you to reconsider your decision to include this information in your publication, I believe that there could be ways in which our individual objectives can be met without potentially compromising the academic value of your work or the security of any of the technologies that were included in the SDMI challenge.

"I welcome the opportunity to discuss these further with you while there is still time to do so."

And it's alleged that three days later, Professor Felten received a letter from Matthew Oppenheim, Esquire, Senior Vice President of Business and Legal Affairs of the Recording Institute of America -- Industry Association of America, Inc., one of the defendants here. And this is the letter which seems to be the crux of the plaintiffs' claimed fears, together with the claimed negotiations thereafter.

Oppenheim said, "As you are aware, at least one of the technologies that was the subject of the public challenge, the Verance Watermark is already in commercial use. A disclosure of any information that might assist others to remove this watermark would seriously jeopardize the technology and content it protects.

"Other technologies that were part of the challenge are either likewise in commercial use or could be utilized in this capacity in the near future.

"Therefore, any disclosure of the information that would allow the defeat of those technologies would violate both the spirit and the terms of the click-through agreement. In addition, any disclosure of information gained from participating in the public challenge would be outside the scope of activities permitted by the agreement and could subject you and your research team to action under the Digital Millennium Copyright Act, DMCA.

"Unfortunately, the disclosure that you are contemplating could result in significantly broader consequences and could directly lead to the illegal distribution of copyrighted materials." Material, singular.

"Such disclosure is not authorized in the agreement, would constitute a violation of the agreement and would subject your research team to enforcement actions under the DMCA and possibly other Federal laws.

"As you are aware, the agreement covering the public challenge narrowly authorizes participants to attack the limited number of music samples and files that were provided by the SDMI. The specific purpose of providing these encoded files and for setting up the challenge was to assist the SDMI in determining which proposed technologies are best suited to protect the content in phase two products." It talks about the limited waiver.

And then goes on -- and I won't read all of it, but what he is saying it would -- you'd be in direct violation of the agreement and would be outside the limited authorization of the agreement, could be subject to the enforcement under Federal laws, including the DMCA. And disclosure could be subject to a DMCA action.

And it's alleged that thereafter, the plaintiffs were concerned, negotiated with the defendants, both themselves and

counsel for the universities, and while finally the paper was cleared for a publication by the presenting organization, the plaintiff, specifically Dr. Felten, decided not to present it.

The plaintiff have four causes of action here, and I will not read the entire amended complaint, which is lengthy. I need not do that, it's part of the record.

They're seeking, first, declaratory judgment, that they're not liable under the Act for submitting the referenced papers. And going beyond that, that they would not be liable for presentation of publication of any research resulting from or relating to the public challenge. And also, a declaration of the Act is not violated by the publication or presentation by plaintiffs or others of future scientific or technical information, including computer code, related to access and copy control measures and copyright management information systems.

They're also seeking a declaration, a second cause of action, that the Act violates the First Amendment of the United States Constitution on its face and as applied.

And, third, a declaration that they will not violate the click-through agreement by certain designated acts.

And, fourth, a declaration that the act is in Act is unconstitutional because it's not a valid exercise of any of Congress' enumerated powers.

The injunctive relief is set forth thereafter. I

referred to the claim for an injunction against the Department of Justice from initiating criminal prosecutions. I understand from counsel that maybe that is not what they're seeking right now, but that's what the complaint says.

Now, when we look at this complaint, of course, the first thing the Court must consider is its own jurisdiction or lack thereof. And as I said initially, we have jurisdiction under Article 3 only for actual cases and controversies. Indeed, early in the founding of the republic, there were some consideration of whether the Court, specifically the Supreme Court, should have advisory powers to pass on the constitutionality of acts of Congress. And, of course, that view was soundly rejected.

What we have here is a situation where we don't have any justiciable case or controversy. We don't have the necessary adversity, which is required for this Court's subject matter jurisdiction. On one side you have people saying we are afraid things are going to happen. On the other side, we have people saying, no, they're not, we're not going to do any such thing. This leads to, at best, a collusive lawsuit, and at worst ... almost a default situation.

We're not here to abstractly consider the merits of legislation, the wisdom of legislation. And I know that the plaintiffs' attack of the wisdom of the legislation is a matter

for the Congress and not for the courts.

The plaintiffs seek a declaration of their rights to publish and present three, and sometimes it's characterized as four if you look at permutations of one of them, specifically identified academic papers.

And the private defendants repeatedly expressed publicly and in correspondence, you can see it in the record and the declarations, they have no objection whatsoever to them publishing or presenting these three papers. And if you look at the proposed stipulation, you'll see how narrow the issue between the parties is. And it basically comes down to is there a present judicable controversy or not? Can this action be dismissed or not?

The plaintiffs don't say, well, it's not true, they really say they are going to sue us. They haven't said that. They rely on the Oppenheim letter, which, as we know, disavowed quite early on.

Now, as far as papers that may be written in the future, again, we have a non-justiciable dispute. It's unripe and speculative.

An analogy came to mind and, of course, all analogies should be approached with caution and are, by nature, imprecise and probably misleading. If we had a party who said I wish to enter into agreements with banks, but I'm afraid of the bank

fraud laws, I'm afraid that my good faith submissions to the bank will be considered as bank fraud and I will be prosecuted for it. Therefore, I would like a declaration in advance.

Well, if the bank says, I'm not going to have any civil remedy under bank fraud. And the Attorney General says, we're not going to prosecute you under that one. I don't see how they can do it then.

If the plaintiff says, well, how about any papers I ever submit to a bank? I think, again, we have something that's unripe and speculative. And one could hardly expect the Attorney General to say any papers you ever submit to a bank or anyone ever submits to a bank will not be prosecuted for bank fraud. It may well be, we don't know.

I'm not in a position to rule on hypotheticals, that's why we try to sharpen the record by adverse interest so I can deal with real cases and real controversies.

The factual scenario is set forth in the declarations of the parties and in the briefs submitted. And I don't think I need to go over all of those.

What we do know, and it's clear, is that the Oppenheim letter, which seems to be the catalyst, has been explained by the RIAA and the SDMI saying that the response was far too strong and threatening, and that there was no intent at any time to sue, nor did they overtly say we are going to sue you. It

could be seen in the Oppenheim letter, but it was not expressed there.

It talks about the possibility of or violations, but it doesn't say we're going to sue you.

Now, the counsel of Princeton and Rice were concerned about a lawsuit, and did discuss them at the time. But the plaintiffs received permission to present this paper in the academic conference which had been notified of the controversy, and they decided to withdraw it. They've subsequently decided to present it.

And we know that the private defendant said that SDMI does not, nor did it ever intend to bring any legal action against Professor Felten or his coauthors.

The record is clear as to whether or not there is a case or controversy that this Court could consider whether it has jurisdiction that the private defendants have plainly, unequivocally, over and over again stated repeatedly that they have no objection to presenting or publishing the Felten paper or the Wu paper.

And, of course, they said that it was never our intention to bring any kind of action against Felten. And this -- we're going back before this lawsuit was filed. The irony is that the defendants having said we're not going to sue you, the plaintiffs decided apparently to catalyze this action by

bringing a suit themselves.

And one thing that I noted was that Mr. Oppenheim, in a letter to plaintiffs' counsel, said that the RIAA and the SDMI do not object to the publication of the academic papers identified in the complaint, and gave a list of published statements, which they've expressly disavowed any intention of initiating litigation and said we, frankly, don't know how we could have been any clearer. Or to paraphrase a popular phrase, what part of the word yes don't you understand?

Of course, after that, we had this request for emergent relief, and I could see no basis for the emergent relief back in June. And specifically expressed my concern about the lack of an actual case or controversy between the parties.

Of course, we have the negotiation of the stipulation. When you look at the stipulation as to the terms, of course the parties can't stipulate as to future events. But as to present events, I agree with the defense that the only dispute between the parties is the justiciability of this case, which is a question of law, and one that I think is not particularly difficult. We're just not here to give advisory opinions on abstract or hypothetical issues. This is an Article 3 limitation.

We can't declare an act of Congress unconstitutional

in such a context. We need true adverse interest and standing.

I can't find any adversity of interest with respect to the Felten paper or the Wu papers. And I would note that the defendants never said they were going to do anything at any time against the Wu paper. That is only Ms. Wu's statement that she felt that she was in danger of being sued.

As the parties focus on the key case in the Third Circuit, Stepsaver Data Systems, Inc. v. Wise Technology, 912 F.2d 643, Third Circuit, 1990, the question in each declaratory judgment case is whether the facts alleged under all the circumstances show there's a substantial controversy between parties having adverse legal interest of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. I cannot find that those questions are met in this case.

As the defendants note in their brief, there's another principle applicable here, avoiding the ruling on Federal Constitutional matters in advance of a necessity for deciding them, which is a factor also to be considered in justiciability.

As I said, we don't have some roving commission to go around declaring acts of Congress unconstitutional because some party would like us to look at them.

The plaintiffs say, well, this is a First Amendment case and, therefore, it is different. Well, as the Third Circuit has noted in the Salvation Army case, again referred to

by both sides, 919 F.2d 183, Third Circuit, 1990, where a plaintiff seeks a declaratory judgment with respect to constitutionality of a State Statute, even when the attack is on First Amendment grounds, there must be a real and immediate threat of enforcement against the plaintiff. And this threat must remain throughout the course of the litigation.

Well, the clear and uncontested record here indicates that there is not a real and immediate threat of enforcement against the plaintiffs, much less one that remains throughout the course of the litigation.

The fact that the plaintiffs assert that they feel chilled, their subjective views are insufficient unless we find evidence that there is an actual immediate threat.

As to the hypothetical future academic papers, I don't think that those provide a sufficient ground for the immediacy asserted by the plaintiffs. The plaintiffs, of course, bear the burden of establishing the elements of the jurisdiction of this Court. I don't see any injury, in fact, here.

Not only would it be premature adjudication, but it is ephemeral adjudication. It is speculative adjudication. It is by analogy. Sort of adjudication that would let the Court peer into the future to determine whether any loan application by a putative plaintiff could conceivably be a fraud. Courts are ill equipped to engage in that sort of speculation.

Indeed, the absence of a controversy can be seen by the fact that there are no mentions of any threat by any private defendant, or the Attorney General with respect to the plaintiffs' future works at all, even if we knew what those works were.

As the defense notes, pre-enforcement review of a statute is the exception, rather than the rule, Artway v. Attorney General [phonetic], 81 F.3d 1235, 1247, Third Circuit, 1996. Pre-enforcement review of a statute may occur only where the plaintiff has alleged an intention to engage in a course of conduct, arguably affected with the constitutional interest, but proscribed by the Statute, and there exists a credible threat of the prosecution thereunder.

Here, the plaintiffs have not alleged that they plan to violate the Statute, only that the Statute appears unclear to them.

I can't see any credible threat of any imminent prosecution, either civilly or criminally. There's no real immediate threat of enforcement.

Indeed, because the papers have not even been written, it's impossible to know whether they will or will not violate the Act, or any other law for that matter. And the Court declines to engage in feudal speculation.

Plaintiffs are also seeking, in addition to the claim

based upon the past papers as to which there is no objection to them publishing them, or future papers that they may prepare seeking to have me invalidate the Act as it applies to, according to the amended complaint, publication or presentation of all scientific, academic or technical speech, including the publication of computer programs. A rather broad and ephemeral, at best and one that would require the Court to engage in useless speculation.

I don't know that I need to further discuss the claims against the individual defendants. I will say that I think that the position taken by the individual defendants as to Third Circuit and Supreme Court law is correct. And that there is no basis for me to find a case or controversy here. Of course, the Salvation Army case from the Third Circuit is particularly instructive here.

Stepsaver factors, which are not met here, are particularly the instructive here, as well.

I can't find any injury in fact here. So, therefore, a pre-enforcement review of a Statute would be inappropriate.

I can't say that the plaintiffs have alleged an intention to engage in a course of conduct arguably affected with a Constitutional interest, but proscribed by the Statute. Indeed, the defendants assert that it's not proscribed by the Statute.

Indeed, the Attorney General, when he talks about the Statute, explains why it is not. There's certainly no credible threat of prosecution here, much less one that is impending.

To feel -- fear or concern asserted by the plaintiffs, again, is subjective. Threats claimed derived from the Oppenheim letter, which the defendants clarified and explained that they were not threatening any lawsuit. Whether it was withdrawn before the complaint or after the complaint, it was -- I don't think we need to reach at this point.

The Wu papers, nobody ever made any reference to the Act concerning the Wu papers.

And, indeed, as I noted, all the papers have since been published. Thus, arguing against the claimed chill and the -- there's an assertion by the defense that the Felten paper was not out of circulation, even if withdrawn from the information hiding workshop because it was already publicly released on the Internet.

So, we have all these repeated protestations that, you know, we're not threatening you, and I don't understand how this one letter or the -- even the negotiations thereafter, in light of the record here, can show me any real case or controversy here.

Certainly the plaintiffs have not demonstrated that the conduct that they seek to engage in is clearly proscribed by

the relevant Statute. To the contrary, the plaintiffs say the Statute is ambiguous and uncertain.

I -- even if there were a case or controversy, which there is not, I would note that the Declaratory Judgment Act gives me discretion. And if I had discretion here, I would not exercise it to consider the constitutionality or applicability of a recent act of Congress in this area where the facts are not developed and where there is no adversity between the parties. But I don't think I need to reach that issue because it seems to me it would be a clear Article 3 violation for me to do that.

Now, I'm going to turn to the suit against the Attorney General. The plaintiffs admit that they haven't been prosecuted nor threatened with prosecution under the Act by the Attorney General. The Attorney General does not indicate that he plans to do so.

The fact that he will not give in advance a non-prosecution agreement or waiver as to any conduct that the plaintiffs or any other party may engage in in the future does not mean that there is a case or controversy here.

The analogy or the concern as to the criminal case that has been brought does not seem to assist the plaintiffs.

The defendants have referred to, I think it's Sklyarov, S-K-L-Y-A-R-O-V, indictment, against Dmitry Sklyarov and Elcom[Soft] Ltd., and it's clear distinction between what is

alleged there and anything that the plaintiffs say they are doing or intend to do.

The indictment charges that these defendants designed a program that circumvents a restriction on copying, distributing and printing of certain electronic books and offered -- and I believe it was Adobe Acrobat, and offered the program for sale to the general public on the Internet specifically for the purpose of circumventing these restrictions.

The plaintiffs do not allege that they have [engaged] or intend to engage in piracy of that nature. They don't assert that they are trying to prepare programs to circumvent restrictions on copying and that they have a constitutional right to do so or that they intend to sell them to the public or have sold them to the public.

Rather, they're saying they published them to fellow scientists as part of a scientific process of improving access controls. I can't see how the prosecution of Mr. Sklyarov assists them in their effort to have the criminal portion of the Statute declared unconstitutional. I'm not sure entirely that that is what they're seeking at this time based upon counsel's argument. But I certainly can't find any adverse legal interest here between the Attorney General and the plaintiffs.

Of course, the other factors of the Stepsaver analysis

-- and I cited that case previously -- the case is susceptible if it concludes a judgment, the judgment would be a practical utility of the parties are as inapplicable here as they are in the case of the private defendants.

The Act which was entered -- passed by the Congress, pursuant to an international copyright treaty, prohibits the manufacturing offering the public and the like of any technology, et cetera, and is primarily designed or produced for the purpose of circumventing the technological measure that effectively controls the access to work protected under the Copyright Act, that's 17 U.S. Code 1201(A)(2), or has only limited commercial significant purpose or use other than to circumvent, and I'm paraphrasing here, or is marketed for use in circumventing. Language such as is primarily designed or produced.

As the Attorney General notes, seven exceptions here. If you look at 1201(D) through J, including conduct which is necessary to engage in encryption research or conduct which is necessary to engage in security testing of computer system. Also, provides for innocent violations where the violator neither knew nor should have known that its acts constituted a violation.

If someone where prosecuted under these, would these exceptions apply? I don't know. I can't speculate. I can't

create an intellectual dichotomy with myself where there is no adversity of -- between the parties.

The Attorney General argues that the plaintiffs' claims are not ripe. So, we don't have an actual case of controversy.

Of course, the doctrines of ripeness and standing, while different, are certainly intertwined. And they're both founded on concerns on the proper limited role of the unelected third branch, Democratic Society.

The Supreme Court has repeatedly admonished us not to entertain constitutional questions in advance of the strictest necessity. And the parties cite Poe v. Allman [phonetic] for that, 367 U.S. 497, 503, 1961, but it has been said on numerous occasions. And, of course, the Attorney General says, again, these are truisms really from the first year of constitutional law. The ability of the judiciary to declare a law unconstitutional does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them, citing Younger v. Harris 401 U.S. 37 52, 1971. Of course, power is legitimate only as a last resort, as a necessity to determine real earnest and vital controversy between individuals, which we don't have here.

There is a danger of premature adjudication. Entangling the Court in abstract disagreements, as the Third

Circuit said in the Artway case that I've previously referred to, 81 F.3d at 1246.

I can't find that the Attorney General has an adverse legal interest to the plaintiffs at this time. He hasn't prosecuted them, or threatened them with prosecution under the Statute. There's no substantial threat of real harm of prosecution. There's no chill that is objectively reasonable. It's not enough for an individual to say I feel chilled. There's no objective reasonableness chilling here. The Attorney General says the mere existence of the Act without more is insufficient here to create a concrete adversity of interest.

Nor does the prosecution, which I believe is in California, Northern District of California, which is completely distinguishable, as I state here. That, on the other hand, I will just note as a footnote. There the Court will have adversity of interest. They will have a real controversy. And any constitutional issues which Mr. Sklyarov or Elcom could raise will properly be before the Court for determination. That is not the case here.

The plaintiffs, on the other hand, allege their conduct falls outside the scope of the Act, that they are not violating the Act. They say, as the Attorney General says, by their own allegations, their purpose is not to circumvent any access control measures, but rather to study and assist other in

bolstering those access controls. They don't say they're going to manufacture or offer any product designed to circumvent access controls or sell them.

The Attorney General also says that the plaintiffs' claim did not admit a conclusive relief as the applicability of the act of their conduct is contingent on the precise papers they intend to publish, which the plaintiff have not yet articulated.

Now, I discussed that in connection with the private plaintiffs, and I don't need to discuss it that much further here. Again, we can't forecast the future, nor can we give an overall determination that anything the plaintiffs may wish to do or that anyone else may wish to do in the future will not violate the Statute or some provision thereof. All we know is at the present time, plaintiffs have published and they have not been prosecuted and don't have any realistic fear of being prosecuted.

Now, the plaintiffs, again, argue, as they did with the private defendants, that this is a First Amendment case and a question of ripeness should be less stringently applied here. But as the Attorney General says, the slender First Amendment exception only applies to those who have suffered some cognizable injury whose conduct is not protected by the First Amendment to assert the Constitutional Rights of others.

Plaintiffs here haven't demonstrated they themselves suffered an injury. In fact, the Statute has never been applied to the plaintiffs. They had -- cannot show that they had at least a substantial threat of real harm from prosecution under the Statute. They haven't shown that their conduct is proscribed by the Statute or they face a credible threat of prosecution under it.

They assert that the Attorney General's view that the plaintiffs' academic pursuits are not proscribed by the Act, seeking to thus create some adversity between the two parties. If you look at the primarily designed language, look at the language in the Statute and look at the Attorney General saying this is the way I interpret it, I certainly can't find any realistic threat of prosecution here whatsoever. Certainly not to speculate as to what may happen in the future.

Now, the plaintiffs take the position that no threat is required. The Attorney General disagrees and says that you can presume a credible threat of prosecution if a reasonable reading of the Statute would include the plaintiffs' conduct, and there's no compelling evidence against that presumption.

Here, plaintiffs' conduct is clearly not covered by the Act which the plaintiffs say is ambiguous. They don't say we plan to violate the Act, please declare the Act unconstitutional. They say it's unclear. The Attorney General

says it's clear, it doesn't apply to them. No credible threat that prosecution can be presumed.

Consider also the fact that much of what the plaintiffs propose to do has been done. And, again, without any repercussions whatsoever from the Attorney General.

The parties' subjective fear that they may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless the fear is objectively reasonable. And here, I can't find that it is.

The Attorney General concludes the only pattern you can glean from plaintiffs' conduct -- this is at his brief, Page 12 of the reply brief, is that they are willing to and, in fact, continue to engage in the very conduct they claim is proscribed by the Act. The decision to publish certain speech and to delay or possibly forego other identical speech does not reflect a fear of prosecution. If it did, then logically plaintiffs would be publishing none of the material. Therefore, any alleged refusals to publish cannot be considered a chill and do not evince a need or basis for declaratory judgment in this case.

Now, a few other points.

(Pause)

THE COURT: The plaintiffs liken themselves to modern Galileos persecuted by authorities. I fear that a more apt analogy would be to modern day Don Quixotes feeling threatened

by windmills which they perceive as giants. There is no real controversy here.

The plaintiffs may wish to strike down the Statute, but their concern is, as the defendants say, political, rather than a legal concern, one that can best be pursued in the halls of the Legislature until they have a real case or controversy to bring before this Court.

At this stage, they do not. That constitutes the opinion of the Court. And I reserve the right to extend or modify it as set forth in the local rules of this Court, but I thought that for the interest of all parties, prompt resolution would assist all of you.

I have entered orders reflecting this opinion as submitted by counsel for the defense. Court stands in recess.

[end]

C E R T I F I C A T I O N

I, KAREN HARTMANN, certify that the foregoing is a correct transcript to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

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J&J COURT TRANSCRIBERS, INC.

Date: December 12, 2001

[Some obvious transcription errors were corrected by the Electronic Frontier Foundation, Dec. 21, 2001.]