

David E. Kendall (DK 8983)
Paul B. Gaffney (PG 7800)
Joseph M. Terry (JT 0483)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PARAMOUNT PICTURES CORPORATION and
TWENTIETH CENTURY FOX FILM CORPORATION

03 CV No. 7316

Plaintiffs,

- against -

TRITON TECHNOLOGIES, INC.;
WORLD REACH L.L.C.;
QOJ L.L.C.; and PROTO VENTURES, INC.,

Defendants.
-----X

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

This case is brought under the "anti-trafficking" provisions of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 *et seq.* These provisions authorize injunctive relief and damages against those who traffic in "any technology, product, service, device, component, or part thereof" designed to circumvent certain types of protections that copyright owners employ to protect their digital works from piracy. 17 U.S.C. § 1201(a)(2), (b)(1).

Several years ago, after considerable analysis, Judge Kaplan entered an injunction, affirmed by the United States Court of Appeals for the Second Circuit, against persons who were trafficking in software designed to circumvent the Content Scramble System

("CSS") that the motion picture studios use to prevent piracy of films distributed on DVD. See *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) (ordering preliminary injunction); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (ordering permanent injunction); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (affirming permanent injunction). More recently, Judge Pauley entered preliminary injunctions against several defendants who, notwithstanding the *Reimerdes* case, continued to traffic in software designed to circumvent CSS. See *Paramount Pictures Corp. v. Internet Enterprises, Inc.*, No. 03 CV 3493, 2003 WL 21517839, *1 (S.D.N.Y. June 24, 2003); *Paramount Pictures Corp. v. Internet Enterprises, Inc.*, No. 03 CV 3493 (WHP), 6/20/03 Hearing Tr. (attached as Exh. 1).

This case involves the same issues. Plaintiffs Paramount Pictures Corporation and Twentieth Century Fox Film Corporation are two motion picture studios that use CSS to restrict access to, and prevent copying of, copyrighted motion pictures distributed in the DVD format. The defendants named in this case, like the defendants in the *Reimerdes* and *Internet Enterprises* litigation, traffic in computer software designed to circumvent CSS—conduct for which there is no defense, as Judge Kaplan, Judge Pauley, and the Second Circuit have previously found.

For the reasons set forth below, the Court should enter the requested preliminary injunction pursuant to 17 U.S.C. § 1203(b)(1) and Rule 65 of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

The following facts establish the basis for the preliminary injunction requested in Plaintiffs' motion:

1. Plaintiffs are among the world's leading motion picture studios and distributors of filmed entertainment. Through a variety of media, including theatrical release, pay-per-view, and DVDs, Plaintiffs distribute motion pictures and other works in which they own the copyrights or otherwise possess exclusive rights. The widespread use of DVDs by motion picture industry began in the late 1990s. See Decl. of Robert Schumann at ¶ 9; see also *Reimerdes*, 111 F. Supp. 2d at 309-10.

2. A DVD ("digital versatile disc") is a digital storage medium, a plastic disc five inches in diameter that is capable of storing a full-length motion picture. In addition to their compact size, DVDs also offer significant audio and visual advantages over videocassettes or other analog media, as they provide superior audio and visual fidelity and are less subject to deterioration over time. However, the DVD is also a tempting target for would-be copyright pirates because the very nature of the digital format means that the works contained on DVDs can be copied from generation to generation without degradation. Once copied, the content of these DVDs can be burned onto an unlimited number of writable DVDs or CD-Rs, and/or readily distributed over the Internet, virtually instantaneously and to millions of people. This problem is not merely hypothetical. On popular Internet file-copying services, scores of digital copies of films are available free for download. See Schumann Decl. at ¶¶ 7-10, 26.

3. Before proceeding with plans to release their copyrighted works in the DVD format, a number of copyright owners including Plaintiffs adopted the CSS copy- and access-control technology designed to protect digital content from copyright infringement. CSS is comprised of an integrated system of access "locks," encryption technology, and licensing provisions that protect the contents of a DVD from unauthorized access—that is, access other

than by a licensed DVD player—as well as from copying. *Reimerdes*, 111 F. Supp. 2d at 309.

10. As Judge Kaplan explained:

CSS . . . is an access control and copy prevention system for DVDs developed by the motion picture companies, including plaintiffs. It is an encryption-based system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs. The technology necessary to configure DVD players and drives to play CSS-protected DVDs has been licensed to hundreds of manufacturers in the United States and around the world.

Reimerdes, 111 F. Supp. 2d at 308 (footnotes omitted). (A more detailed description of how CSS functions is set forth in paragraphs 11-22 of the Declaration of Mr. Schumann, whose expert testimony on this subject matter was accepted by Judge Kaplan in the *Reimerdes* litigation.)

4. In 1999, the computer “hacker” community began distributing over the Internet a software utility known as “DeCSS,” which allowed a user to decrypt and defeat the access- and copy-control provided by CSS and thereby copy, manipulate, or transfer the content of DVDs. In January 2000, a number of copyright owners, including Plaintiffs, initiated the *Reimerdes* litigation referenced above, with Judge Kaplan eventually finding, after a full evidentiary hearing, that “[t]here is no serious question that defendants’ posting of DeCSS violates the DMCA.” *Reimerdes*, 111 F. Supp. 2d at 304. Relying heavily on “Judge Kaplan’s extremely lucid opinion,” *Corley*, 273 F.3d at 435, the Second Circuit affirmed. *Id.* at 460.

5. Upon entering a permanent injunction, Judge Kaplan stated:

[T]he likelihood is that this decision will serve notice on others that “the strong right arm of equity” may be brought to bear against them absent a change in their conduct and thus contribute to a climate of appropriate respect for intellectual property rights in an age in which the excitement of ready access to untold quantities of

information has blurred in some minds the fact that taking what is not yours and not freely offered to you is stealing.

Reimerdes, 111 F. Supp. 2d at 344-45.

6. Notwithstanding the clear "notice" supplied by Judge Kaplan and the Second Circuit that it is illegal to distribute DeCSS, Defendants separately and subsequently began distributing software that is functionally identical to DeCSS, in that it permits users to circumvent CSS to make copies of the motion pictures contained on DVDs, including copies that can be distributed over the Internet and by other means. However, unlike the defendants in *Reimerdes*—at least one of whom pronounced that he was engaged in "electronic civil disobedience," *Reimerdes*, 111 F. Supp. 2d at 303, 312—Defendants in this case are commercially exploiting this tool of piracy by actively marketing it at prices ranging from \$49.97 to \$69.99.

7. The defendants against whom this injunctive relief is sought operate as follows:

- a. Defendant Triton Technologies, Inc. manufactures, provides, and through its agents, offers to the public, distributes and otherwise traffics in (in New York and elsewhere) the DVD-copying software product "DVD CopyWare." See Brosnan Decl. at ¶ 7. This software product, or a part thereof, performs a function identical to that performed by the DeCSS software. A description of the manner in which this software circumvents CSS is provided in the Schumann Declaration at ¶¶ 51-56.
- b. Defendant QOJ L.L.C offers to the public, provides, and otherwise traffics in (in New York and elsewhere) the DVD-copying software

product "Copies Anything." See Brosnan Decl. at ¶ 8. This software product, or parts thereof, performs a function identical to that performed by the DeCSS software. A description of the manner in which this software circumvents CSS is provided in the Schumann Declaration at ¶ 38.

- c. Defendant World Reach L.L.C. offers to the public, provides, and otherwise traffics in (in New York and elsewhere) the DVD-copying software products that it refers to as "Copy DVD 8.0," "Copy DVD CD," "DVD X One," and "DVD Fast Copy." See Brosnan Decl. at ¶¶ 3-6. World Reach previously offered to the public, provided, and trafficked in the DVD-copying software product "Replicant." Each of these software products, or parts thereof, perform a function identical to that performed by the DeCSS software. A description of the manner in which this software circumvents CSS is provided in the Schumann Declaration at ¶¶ 39-50.

ARGUMENT

The DMCA provides that "[a]ny person injured by a violation of section 1201 . . . may bring a civil action in an appropriate United States Court," which "may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation . . ." 17 U.S.C. § 1203(a), (b)(1). In order to obtain a preliminary injunction in this jurisdiction, "the movant must show (a) irreparable harm, and (b) either (1) a likelihood of success on the

merits, or (2) sufficiently serious questions going to the merits to make them fair grounds for litigation and a balance of the hardships tipping decidedly in its favor." *Reimerdes*, 82 F. Supp. 2d at 215 (internal quotation omitted); see also *Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 135 (2d Cir. 2003).

As in *Reimerdes* and *Internet Enterprises*, this standard is met here. Indeed, a preliminary injunction is even more appropriate in this case than it was in those cases, as these defendants are engaging in the same conduct, but for profit and with prior notice of its illegality. The requested preliminary injunction therefore should issue without delay.

I. **PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.**

The Complaint alleges that Defendants have each violated two independent provisions of the DMCA, known as the "anti-circumvention" provisions: (1) the access-protection provisions of section 1201(a)(2); and (2) the copy-protection provisions of section 1201(b)(1). As explained below, Defendants' liability cannot seriously be questioned.

Section 1201(a)(2) of the DMCA provides that:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that:

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

Section 1201(b) provides that:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that:

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

17 U.S.C. § 1201(b)(1).

While both of these provisions of section 1201 prohibit the trafficking in circumvention technology, they serve distinct purposes: "the focus of subsection 1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of subsection 1201(b)(1) is circumvention of technologies designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes a copyright." *Corley*, 273 F.3d at 441 (emphasis in original). Construed together, these provisions reflect a recognition by Congress that technological safeguards employed by copyright owners can never alone adequately protect creative works against a diffuse global network of Internet-linked individuals who seek to traffic in and profit illegally from the creative works of others. As the Second Circuit explained in

Corley:

Fearful that the ease with which pirates could copy and distribute a copyrightable work in digital form was overwhelming the capacity

of conventional copyright enforcement to find and enjoin unlawfully copied material, Congress sought to combat copyright piracy in its earlier stages, before the work was even copied. *The DMCA therefore backed with legal sanctions the efforts of copyright owners to protect their works from piracy behind digital walls such as encryption codes or password protections.* In so doing, Congress targeted not only those pirates who would circumvent these digital walls (the "anti-circumvention provisions," contained in 17 U.S.C. § 1201(a)(1)), but also anyone who would traffic in a technology primarily designed to circumvent a digital wall (the "anti-trafficking provisions," contained in 17 U.S.C. § 1201(a)(2), (b)(1)).

Corley, 273 F.3d at 435 (first emphasis added).¹

Defendants' conduct at issue in this case is essentially identical to what this Court and the Second Circuit have held violates these provisions of the DMCA. See *Corley*, 273 F.3d at 444; *Reimerdes*, 111 F. Supp. 2d at 318-19. The analysis of the issue is straightforward.

First, as was established by in the *Internet Enterprises* and *Reimerdes* litigation, the CSS utilized by the Plaintiffs is a "technological measure" that both "effectively controls access to a work protected under" Title 17, as required by section 1201(a)(2), and "effectively protects a right of a copyright owner" under Title 17, as required by section 1201(b). *Reimerdes*, 111 F. Supp. 2d at 308, 316 n.133, 319; *Internet Enterprises, Inc.*, 6/20/03 Hearing Tr. at 4 ("CSS is a technological measure that effectively controls access to plaintiffs' copyrighted movies because it requires the application of information or a process with the authority of the copyright owner to gain access."). "[I]t is perfectly clear that CSS is a technological measure that effectively controls access to plaintiffs' copyrighted movies ..." *Reimerdes*, 82 F. Supp. 2d

¹ See also *Reimerdes*, 82 F. Supp. 2d at 221: "In 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." *Id.* (internal quotations omitted).

at 216; *see also* *Corley*, 273 F.3d at 436-37; *Reimerdes*, 111 F. Supp. 2d at 318; Schumann Decl. at ¶¶ 13-22.

Second, each of Defendants' software products is a "technology" within the meaning of the statute. *See Reimerdes*, 111 F. Supp. 2d at 317 ("[A] computer program . . . unquestionably is 'technology' within the meaning of the statute.").

Third, as established in the statement of facts set forth above, it is plain that the software distributed by Defendants (or, at the very least, some "part thereof") (1) is "primarily designed or produced for the purpose of circumventing" CSS, (2) has limited, if any, commercial significance beyond circumventing CSS, and (3) is marketed by Defendants for use in circumventing CSS—any of which is sufficient to render Defendants liable under the DMCA.

(As the plain language of the statute makes clear, "[t]hese three tests are disjunctive. A product that meets only one of the three independent bases for liability is still prohibited."

RealNetworks, Inc. v. Streambox, Inc., 2000 WL 127311, at *7 (W.D. Wash. Jan. 18, 2000)(citation omitted).) Indeed, as demonstrated by the various trade names Defendants use—*e.g.*, DVD CopyWare, DVD Fast Copy, and DVD Wizard Pro—the entire purpose these software products serve, and are marketed as serving, is to copy the content on DVDs. That purpose cannot be accomplished without in some manner circumventing the protections of CSS, which was designed to prevent precisely such access and copying. *See* Schumann Decl. at ¶¶ 37, 38, 43, 49, 55. *Reimerdes*, 111 F. Supp. 2d at 319 ("[T]he only purpose or use of DeCSS is to circumvent CSS..."). The use Defendants' customers make of the software—indeed, whether they use it at all—is irrelevant to the question of Defendants' liability. The statute is a prophylactic measure, which forbids the distribution of circumvention software regardless of the reason for the circumvention. *See Reimerdes*, 111 F. Supp. 2d at 319; *United States v. Elcom*

Ltd., 203 F. Supp. 2d 1111, 1124 (N.D. Cal. 2002). Because Defendants' products are designed and marketed solely for that purpose, they violate sections 1201(a) and 1201(b)(2) of the DMCA.² See *Internet Enterprises*, 6/20/03 Hearing Tr. at 7 (finding that "there are three independent bases for the defendants' liability under both provisions of the DMCA").

II. PLAINTIFFS FACE IRREPARABLE INJURY.

Where a plaintiff demonstrates a likelihood of a succeeding on a claim under § 1201, courts will presume the plaintiff will suffer irreparable injury absent an injunction. *Reimerdes*, 82 F. Supp. 2d at 215 ("just as in the case of direct copyright infringement, the extent of the harm plaintiffs will suffer as a result of defendants' alleged activities cannot readily be measured, suggesting that the injury truly would be irreparable"). "Where a plaintiff demonstrates a likelihood of success on the merits of a copyright infringement claim or under Section 1201 of the DMCA, irreparable harm is presumed." See *Internet Enterprises*, 6/20/03 Hearing Tr. at 7-8. See also *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 2003 U.S. Dist. LEXIS 3734, at *75 (E.D. Ky. Feb. 27, 2003) ("a plaintiff that demonstrates a likelihood of success on the merits of its claim for violation of the anti-trafficking provisions of the DMCA is entitled to a presumption of irreparable injury").

Judge Kaplan's observations upon entering the permanent injunction in *Reimerdes* make plain that the presumption of harm arising from the dissemination of DVD-copying software is well founded:

[T]he availability of DeCSS on the Internet effectively has compromised plaintiffs' system of copyright protection for DVDs,

² In the *Reimerdes* litigation, the defendants argued, as affirmative defenses to liability, that the DMCA's "anti-circumvention" provisions violated the First Amendment, the Copyright Clause, and the fair use doctrine of copyright law. Each of these challenges was held to be without merit. See *Corley*, 273 F.3d at 445-60. Courts elsewhere also have rejected the same challenges to the DMCA. See *Elcom*, 203 F. Supp. 2d 1111; *RealNetworks, Inc.*, 2000 WL 127311.

requiring them either to tolerate increased piracy or to expand resources to develop and implement a replacement system unless the availability of DeCSS is terminated. It is analogous to the publication of a bank vault combination in a national newspaper. Even if no one uses the combination to open the vault, its mere publication has the effect of defeating the bank's security system, forcing the bank to reprogram the lock. Development and implementation of a new DVD copy protection system, however, is far more difficult and costly than reprogramming a combination lock and may carry with it the added problem of rendering the existing installed base of compliant DVD players obsolete.

Second, the application of DeCSS to copy and distribute motion pictures on DVD, both on CD-ROMs and via the Internet, threatens to reduce the studios' revenue from the sale and rental of DVDs. . . .

In consequence, plaintiffs already have been gravely injured. As the pressure for and competition to supply more and more users with faster and faster network connections grows, the injury will multiply.

Reimerdes, 111 F. Supp. 2d at 315 (footnote omitted).

This last observation, made nearly three years ago, has been borne out by events, as unauthorized copies of films owned by Plaintiffs and other studios are increasingly available on the Internet. See Schumann Decl. at ¶ 26. With the aid of DVD-copying software like that distributed by Defendants, the "grave[] injur[y]" identified by Judge Kaplan persists.

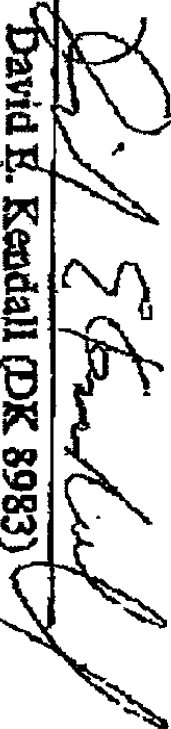
CONCLUSION

For the reasons provided above, Plaintiffs respectfully request that this Court issue a preliminary injunction pursuant to 17 U.S.C. § 1203 and Rule 65 of the Federal Rules of Civil Procedure as set forth in detail in the attached Proposed Order.

Respectfully submitted.

WILLIAMS & CONNOLLY LLP

By:


David H. Kendall (DK 8983)

Paul B. Gaffney (PG 7800)

Joseph M. Terry (JT 0483)

725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Plaintiffs

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