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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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EDWARD W. FELTEN, et al. )  
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 Plaintiffs, )  
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 v. )  
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 RECORDING INDUSTRY ASSOCIATION )  
 OF AMERICA, INC., et al. )  
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01-CV-2669 (GEB)

**Defendant John Ashcroft's  
Memorandum in Support of  
Motion to Dismiss**

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## **PRELIMINARY STATEMENT**

Plaintiffs in the present case ask this Court to strike down the Digital Millennium Copyright Act (“DMCA”), or to declare that their conduct, academic research into computer technology, is not prohibited by that statute. Their claim should be dismissed because it is not justiciable.

Plaintiffs have not been prosecuted under the DMCA, nor have they been threatened with such prosecution. Although they allege that they are “concerned ” about the applicability of the DMCA to their future publications, they do not allege with any specificity what those future publications might be, and thus neither they (nor, indeed, this Court) can say with any certainty whether the DMCA would apply to their conduct. Moreover, whatever concerns Plaintiffs actually harbor, it appears that they have not foregone a single publication of any material as a result of those concerns, and they do not allege that they will actually forego any conduct in the future. On the contrary, all indications are that Plaintiffs' research and publications are proceeding apace. Indeed, they have now published a number of articles that they claim were the genesis of their fears of prosecution. In short, Plaintiffs' speech has not been chilled. Their claim, therefore, is not justiciable<sup>1</sup> and should be dismissed.

## **STATUTORY BACKGROUND**

The DMCA is the result of the WIPO Copyright Treaty (1996), which the United States

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<sup>1</sup>The present motion addresses justiciability primarily in terms of ripeness. Indeed, courts have traditionally treated pre-enforcement review cases such as the present one as a ripeness issue. However, because the Plaintiffs have in fact suffered no chill, and therefore no injury whatsoever, see § 3, infra, the Court may also dismiss the present case for lack of standing.

signed on April 12, 1997 and ratified on October 21, 1998. That treaty contains a provision requiring party states to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures . . . that restrict acts . . . which are not authorized by the authors concerned or permitted by law." see WIPO Copyright Treaty, S. Treaty Doc. No. 105-17, 105th Cong., 1st Sess. (1997), 1997 WL 447232 at \*8, \*17.

The DMCA gives effect to this treaty through three distinct prohibitions. First, it prohibits the actual circumvention of any "technological measure that effectively controls access to a work protected [by the Copyright Act]." 17 U.S.C. § 1201(a)(1). Second, the DMCA states 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 [the Copyright Act];
- (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 [the Copyright Act]; 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 [the Copyright Act].

17 U.S.C. § 1201(a)(2). The third protection afforded by the DMCA is in § 1201(b)(2), which states 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 protects a right of a copyright owner

under this title in a work or portion thereof;

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

17 U.S.C. § 1201(b)(1). Thus, while § 1201(a)(2) protects technology that *blocks access to a* copyrighted work, § 1201(b)(2) protects technology that *protects the copyright itself*, that is, technology that prevents unlicensed copying or other reproduction of copyrighted works.

The DMCA provides seven exceptions, of widely varying extent, to its prohibitions. The exceptions cover, in whole or in part, conduct (1) by a school or library to determine whether to purchase a copyrighted product; (2) for law enforcement purposes; (3) to achieve interoperability of computer programs; (4) necessary to engage in encryption research; (5) necessary to limit the Internet access of minors; (6) necessary to protect personally identifying information; or (7) necessary to engage in security testing of a computer system. 17 U.S.C. § 1201(d)-(j).

The statute states explicitly that nothing in §1201 "shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products." 17 U.S.C. § 1201(c)(4).

The DMCA provides for civil remedies for a violation of any of the above three prohibitions. 17 U.S.C. § 1203. In particular, the statute allows a court: (1) to grant temporary and permanent injunctions to prevent or restrain a violation (though not such as to impose a prior restraint violative of the First Amendment); (2) to impound devices involved in violations of §§

1201 and 1202; (3) to award damages (both actual and statutory); (4) to award costs, except to the United States; (5) to award attorney's fees; and (6) to order the destruction or modification of any device impounded under § (b)(2). 17 U.S.C. § 1203(b)(1)-(6). The statute also allows for damages up to triple the actual damages for repeat violators. 17 U.S.C. § 1203(c)(4). The statute provides, however, for "innocent violations," in which the violator neither knew nor should have known that its acts constituted a violation. 17 U.S.C. § 1203(c)(5). In these circumstances, the judge may reduce or remit the damages awarded. Id.

The DMCA provides for criminal penalties for violations of the above three prohibitions, if the violator acted willfully and for purposes of commercial advantage or private financial gain. 17 U.S.C. § 1204(a). However, the statute's criminal penalties do not apply to nonprofit libraries, educational institutions, and public broadcasting entities. 17 U.S.C. § 1204(b).

### **FACTUAL BACKGROUND**

The Plaintiffs in this case are a group of scientists: Edward W. Felten, Bede Liu, Scott A. Craver, Min Wu, Dan S. Wallach, Ben Swartzlander, Adam Stubblefield, Richard Drews Dean as well as the USENIX Association, a Delaware corporation that organizes conferences on computer security issues. Plaintiffs allege that they all work in the field of access control technology, and that they speak about this technology to each other and to other scientists. They attempt to allege standing and ripeness through varying examples of the DMCA's potential impact on their speech.

#### **The Individual Plaintiffs**



Despite the breadth of the different factual allegations, the crux of this case is (or was) a controversy concerning the individual plaintiffs' presentation of a paper concerning access control technology at a recent USENIX conference. Plaintiffs' First Amended Complaint ("Compl.") ¶ 1. The genesis of this paper was Plaintiffs' response to a public challenge issued by Defendant Secure Digital Music Initiative ("SDMI") a non-profit corporation that sets standards for maintaining the security of digital, copyrighted works. SDMI had been testing different technologies intended to protect digital copyrighted works, and on September 6, 2000, issued a public challenge to attack a number of these proposed technologies. Compl. ¶ 24. The challenge was to remove a "watermark" (a form of access control technology) from a sample of music, without altering the music itself. Compl. ¶ 24. The SDMI website gave those accepting the challenge a set of three music samples with which to work. Compl. ¶ 30. Plaintiffs allege that they defeated four (and possibly five) of the different technologies presented for attack by SDMI. Compl. ¶ 35. Plaintiffs then wrote a scientific paper about their attempts to defeat the SDMI technologies. Compl. ¶ 37. This paper, entitled "Reading Between the Lines: Lessons from the SDMI Challenge," was submitted to Plaintiff USENIX for publication at its Tenth Security Symposium. Compl. ¶ 51. Although Plaintiffs alleged fear of both civil and criminal liability if they went forward with the publication, upon receiving assurances from the private Defendants that they would not seek civil remedies under the DMCA, Plaintiffs went forward with publishing the paper. It was presented on August 14, 2001. See <http://www.cs.princeton.edu/sip/sdmi> (attached hereto at Attachment A);

«<http://www.usenix.org/events/sec01>» (attached hereto at Attachment B).<sup>2</sup> No civil or criminal proceedings have ensued.

### **Edward Felten**

Professor Felten further alleges that he is working on two conferences on different aspects of encryption technology. Compl. ¶¶ 80-84. He alleges that he is concerned that his work will subject him and others to "liability or threats" of liability under the DMCA. Compl. ¶ 84. He states that he believes "many other people are worried" about the effect of the DMCA. Compl. ¶ 84. He cites no conduct which he has intended to undertake, but has foregone in response to the DMCA. Compl. ¶ 84

### **Min Wu**

Dr. Wu has written a second paper on the SDMI challenge entitled "Analysis of Attacks on SDMI Audio Watermarks." Compl. ¶ 53. This paper was presented at the Institute of Electrical and Electronics Engineers ("IEEE") Signal Processing Society's Twenty-Sixth International Conference on Acoustics, Speech and Signal Processing. Compl. ¶ 53.

Dr. Wu alleges that she also included a discussion of the SDMI challenge in Chapter Ten of her doctoral dissertation. Compl. ¶ 54. She now alleges "a credible fear of being sued if she should publish that chapter," and further alleges that she posted her dissertation on the Internet, but her fear of civil liability under the DMCA has led her to withdraw Chapter Ten from the

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<sup>2</sup>Because the present motion concerns subject matter jurisdiction, the Court may examine these and other matters outside the pleadings. See Robinson v. Dalton, 107 F.3d 1018, 1021 (3rd Cir. 1997).

Internet. Compl. ¶ 54. She does not allege that she fears criminal prosecution, and she does not allege any basis for a conclusion that posting the chapter would be for "commercial advantage or private financial gain." Compl. ¶¶ 53, 54. Further, she has published her dissertation, including Chapter Ten, elsewhere. The dissertation has been, and remains, available to the public in its entirety. See [http://www.geocities.com/mw11wm/chapt10\\_YH.html](http://www.geocities.com/mw11wm/chapt10_YH.html)» (attached hereto at Attachment C); see also [http://catalog.princeton.edu/cgi-bin/Pwebrecon.cgi?Search\\_Arg=PRIN+685+2001.9864&Search\\_Code=CALL\\_&PID=19246&SEQ=20010919143407&CNT=25&HIST=1](http://catalog.princeton.edu/cgi-bin/Pwebrecon.cgi?Search_Arg=PRIN+685+2001.9864&Search_Code=CALL_&PID=19246&SEQ=20010919143407&CNT=25&HIST=1)» (attached hereto at Attachment D).

Dr. Wu further alleges that she has recently received an offer to publish her dissertation, as a book, but has put the publication "on hold" because of feared liability under the DMCA. Compl. ¶ 62. Dr. Wu also alleges that she is "concerned that her proposals for . . . future research will be thwarted by threats of litigation . . . She cannot tell whether she would be allowed to pursue these avenues of study." Compl. ¶ 69.

### **Scott Craver**

Mr. Craver alleges that he is working on a Ph.D. project "that could be chilled by the DMCA." Compl. ¶ 56. He alleges in particular that he is "in the process of creating" software that more efficiently analyzes music, but fears he may not be able to publish his paper "due to threats from the Defendants and others that it violates the DMCA." Compl. ¶ 59. Mr. Craver further states that he is reluctant to ask collaborators to help him in his project, and that this will delay the project. Compl. ¶ 59. Thus, he alleges that he "is concerned that . . . his Ph.D. project

will be chilled or prevented by the Defendants or others." Compl. ¶ 60.

### **Dan Wallach**

Professor Wallach alleges that he plans to finish studying the last two of the five technologies presented in the SDMI challenge, "[w]hen the technology appears in production[.]" Compl. ¶ 70. In addition, he alleges that he is "developing a proposal to study and publish" research into new technologies that might be protected by the DMCA. Compl. ¶ 71. He states that he "is concerned that both of these projects will be subject to threats and other chilling effects due to the DMCA." Compl. ¶ 72. He does not allege that he has altered, or plans to alter his conduct in any way as a result of the DMCA.

### **Bede Liu**

Professor Liu alleges first that he "is currently continuing his research into watermarks and attacking technologies." Compl. ¶ 73. He further alleges that he "hopes to follow the traditional course of presenting any new research result at conferences." Compl. ¶ 74. He then alleges that he "may also present the results at seminars at other academic institutions and industrial research labs." Compl. ¶ 74. Finally, he alleges that "[w]ithout clarity about the scope of the DMCA, he is uncertain about whether this research and publication can go forward." Compl. ¶ 74.

### **USENIX**

USENIX alleges that it organizes approximately eight to ten symposia each year and at

six of these symposia, "an issue about the anti-dissemination provisions could arise." Compl. ¶ 77 (emphasis added). USENIX further alleges that it does not receive its paper proposals until approximately six months prior to the date of the symposium. Compl. ¶ 77. Thus, it alleges, to avoid litigation USENIX will have to ask potential civil claimants for permission to publish some of these papers, or seek emergency relief from the courts. Compl. ¶ 77.

### **Plaintiffs' Claims**

Plaintiffs seek a declaratory judgment absolving them of DMCA liability. They claim first that none of their conduct (which is all related to the academic study of access control technologies) is covered by the DMCA. Compl. ¶¶ 87-94. They then claim that the civil and criminal provisions of the DMCA violate the First Amendment of the United States Constitution, because "they are overbroad, vague, and discriminate as to content." Compl. ¶ 102. Plaintiffs also allege that the DMCA violates the First Amendment "as it might be applied to Plaintiffs' conduct in this case." Compl. ¶ 103. Finally, Plaintiffs claim that enacting the DMCA fell outside Congress' intellectual property power because the DMCA protects technology, not copyrighted material. Compl. ¶ 112.

## **ARGUMENT**

### **PLAINTIFFS' CLAIMS ARE NOT RIPE.**

Plaintiffs in the present case ask this Court to take the constitutionally extraordinary step

of striking down a federal statute.<sup>3</sup> Their request is all the more extraordinary in light of the fact that the statute in question has never been applied to them; they have not foregone any conduct as a result of it; and, at least according to their allegations, their conduct falls outside its purview. Their claim is thus unripe, and should be dismissed.

Article III of the Constitution confines federal courts to adjudicating only "actual cases or controversies." Allen v. Wright, 468 U.S. 737, 750 (1984). An essential aspect of the case or controversy requirement is that a plaintiff have "'such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498-99 (1975), quoting Baker v. Carr, 369 U.S. 186, 204 (1962). The doctrines of standing and ripeness, which have developed "to elaborate [this case or controversy] requirement[, and] are 'founded in concern about the proper -- and properly limited -- role of the courts in a democratic society.'" Allen, 468 U.S. at 750, quoting Warth, 422 U.S. at 498.

Article III concerns "press with special urgency in cases challenging legislative action . . . as repugnant to the Constitution" because "[t]he best teaching of th[e Supreme] Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." Poe v. Ullman, 367 U.S. 497, 503 (1961) (internal quotation marks and citation omitted). The ability of the judiciary to declare a law unconstitutional thus "does not amount to

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<sup>3</sup>Although the present motion addresses primarily the Plaintiffs' attempt to strike down the DMCA, their request for a declaration that the DMCA does not apply to their conduct suffers from the same deficiencies. Without some indication of what Plaintiffs actually intend to publish, or that they have in fact been chilled, or that any chill they may feel is reasonable under the circumstances, Plaintiffs' claims are not ripe. This is true whether one is examining their request for a declaration concerning the applicability of the DMCA *ab initio*, or the constitutionality of that statute.

an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them." Younger v. Harris, 401 U.S. 37, 52 (1971). To the contrary, that power "is legitimate only in the last resort, and as a necessity in the determination of a real, earnest and vital controversy between individuals." Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892); See also Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

In keeping with these principles, a Plaintiff seeking judicial review of a federal statute must establish that its claim is ripe. "The basic rationale of the ripeness doctrine is 'to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" Artway v. Attorney General of State of New Jersey, 81 F.3d 1235, 1246-47 (3rd Cir. 1996), quoting Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967). The Supreme Court has time and again explained the importance of this doctrine in maintaining a balance of powers in the federal government, and in preserving the power of the courts:

The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill defined controversies over constitutional issues, they would become the organ of political theories.

United Public Workers of America v. Mitchell, 330 U.S. 75, 90 (1947). Because ripeness reflects not only a limit on the judicial power to entertain certain suits, but also on the wisdom of

entertaining those suits, federal courts "presume that [they] lack jurisdiction 'unless the contrary appears affirmatively from the record.'" Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1462 (3rd Cir. 1994), quoting Renne v. Geary, 501 U.S. 312, 316 (1991). "It is the plaintiff's responsibility to allege facts that invoke the court's jurisdiction." Id., citing Renne, at 316. This onus is not diminished where, as here, Plaintiffs seek a declaratory judgment. See d. at 1462 ("The existence of a case or controversy is a prerequisite to all federal actions, including those for declaratory or injunctive relief.").

The Third Circuit applies a three part test to determine ripeness in pre-enforcement review cases such as this one. Ne Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 342 (3rd Cir. 2001). The plaintiff must show the following points. First, the parties must have adverse legal interests; second, the case must be a "real and immediate controversy" susceptible to a conclusive judgment, and; third, a judgment in the case must be of practical help or utility to the parties. See Step-Saver Data Sys., Inc. v. Wyse Tech., 912 F.2d 643, 647 (3rd Cir. 1990). In the present case Plaintiffs have met none of the three Step-Saver requirements.

1. **The Parties Do Not Have Adverse Legal Interests**

The Plaintiffs do not have legal interests adverse to the United States with respect to the DMCA, because they have not been prosecuted or threatened with prosecution under that statute. Under this first part of the Step-Saver analysis, the Plaintiffs must show that a "concrete" adversity exists between themselves and the defendants. Cities Service Co. v. Dep't of Energy, 520 F. Supp. 1132, 1140 (D. Del. 1981). Because the DMCA has never been applied to them, Plaintiffs must show at least a "substantial threat of real harm," from prosecution under the



statute. Presbytery of New Jersey, 40 F.3d at 1462. In the First Amendment context, this means the plaintiff must show that his speech has been chilled, and that this chill is objectively reasonable in light of the threat of enforcement of the statute in question. See Travelers' Insurance Co. v. Obusek, 72 F.3d 1148, 1154 (3rd Cir. 1995). Plaintiffs' allegations fail this test in two ways.

First, Plaintiffs have failed to allege any facts beyond the mere existence of the DMCA to support their claim that they face a threat of prosecution. Second, the only allegations which Plaintiffs do submit would, if true, render the DMCA inapplicable to them, and therefore render the threat of prosecution nil. Compare Compl. ¶ 1 (plaintiffs' work on SDMI challenge part of "normal scientific research.") with 17 U.S.C. § 1201(a) (prohibiting only technologies expressly designed or marketed for the purpose of circumventing access control technologies).

**A. The Mere Existence of the DMCA, Without More, Is Insufficient to Create a Concrete Adversity of Interests.**

In assessing the likelihood of a prosecution in the pre-enforcement context, courts are to examine "the full panoply of the circumstances." Navegar v. United States, 103 F.3d 994, 999 (D.C. Cir. 1997). Despite the breadth of this test, there are some clear rules in making the determination. For one, it is established that "[t]he mere possibility of prosecution or the possibility that sanctions authorized under a general regulatory scheme may be imposed . . . is insufficient to create a case or controversy under Article III." Cities Services, 520 F. Supp. at 1141, citing Martin Tractor Co. v. F.E.C., 627 F.2d 375, 379 (D.C. Cir. 1980) (internal quotation marks omitted). The mere "existence of the law and the regulations," is not enough to show a

likelihood of prosecution. United Public Workers, 330 U.S. at 90; see also Poe, 367 U.S. at 507 ("It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of [that statute's] constitutionality.").

Plaintiffs' claim fails even this most cursory test. The only evidence to which Plaintiffs point to establish that they fear prosecution is that the DMCA exists. They do not allege that their conduct falls within its terms (in fact, as noted below, they contend explicitly to the contrary). They also do not allege that they have received any threats of prosecution or that any federal prosecutor has taken any steps against them, even though they have in fact published the very speech that they claim was chilled by the DMCA. See § 3, infra. They do not even claim that other, similar conduct has been prosecuted in the past. Rather, Plaintiffs point only to the existence of the DMCA to argue that they fear prosecution under its terms. Under United Public Workers, this is simply not enough, and Plaintiffs' claim should be dismissed.

One exception to the United Public Workers rule illustrates quite clearly why Plaintiffs' claim should be dismissed. In Navegar v. United States, a firearms manufacturer sought pre-enforcement review of a federal statute that made it unlawful to manufacture, transfer, or possess a semiautomatic weapon. 103 F.3d 994, 996 (D.C. Cir. 1997). The United States moved to dismiss, arguing that the plaintiff had only shown that the statute existed, not that there was a likelihood that *it* would be prosecuted. Id. The D.C. Circuit rejected this argument, noting that the important distinction between that case and the doctrine enunciated in United Public Workers was the fact that, by proscribing only the specific firearms manufactured by the plaintiff, the statute in question in Navegar "in effect singles out appellants as its intended targets, by prohibiting weapons that only the appellants make." Id. at 1000. Therefore, the court said,

"[b]ecause it is clear to whom these provisions of the Act would be applied were they to be applied at all, the imminent threat of such prosecutions can be deemed speculative only if it is likely that the government may simply decline to enforce these provisions at all." Id. at 1000.

The distinction between Navegar and the present case is evident. Unlike the Navegar plaintiff, in the present case Plaintiffs challenge a statute of general applicability. The Plaintiffs are not "singled out" by the DMCA for prosecution. Moreover, because the DMCA addresses the distribution of technology, with the intent of circumvention of access control measures, it is quite conceivable that the statute would be enforced very strictly, without ever being applied to Plaintiffs' conduct. Indeed, the recent indictments of Dmitry Sklyarov and Elcomsoft Co. Ltd., under the DMCA illustrate this point clearly. Elcom and Sklyarov have been indicted for producing and selling for profit a program that was primarily designed and marketed to circumvent the technological access controls in the Adobe Acrobat eBook Reader. See Press Release of United States Attorney's Office of the Northern District of California (attached hereto at Attachment E); see also Indictment (attached hereto at attachment F). That case does not concern academic publications such as Plaintiffs'. It concerns instead the sale of a computer program aimed at preventing lawful copyright protection. Under these circumstances, all that Plaintiffs can point to in order to show a fear of prosecution is the fact that the DMCA exists. Under the direct application of United Public Workers, this is insufficient, and Plaintiffs' claim should be dismissed.

**B. By Their Own Allegations, Plaintiffs Cannot Reasonably Fear Prosecution Under the DMCA, As Their Conduct Falls Squarely Outside Its Scope.**

In the First Amendment<sup>4</sup> context, where a Plaintiff seeks pre-enforcement review of a statute, the Third Circuit requires not only that the Plaintiff subjectively fear prosecution under the challenged statute; but also that the threat of prosecution objectively be "real and substantial." Travelers, 72 F.3d at 1154; see also Navegar, 103 F.3d at 999 (allegations of subjective chill insufficient; fear of prosecution must also be "realistic" to satisfy ripeness doctrine). "A plaintiff who challenges a statute must demonstrate a *realistic* danger of sustaining a direct injury as a result of the statute's operation or enforcement." Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979) (emphasis added) (noting that plaintiff need not wait for consummation of injury, so long as injury is "certainly impending."); see also Western Mining Council v. Watt, 643 F.2d 618, 625-26 (9th Cir. 1981) ("Plaintiffs cannot . . . create a justiciable case or controversy simply by misreading statutes, and claiming as injury fears born of their own error."). According to Plaintiffs' allegations, the DMCA does not apply to their conduct, and therefore there can be no reasonable likelihood of prosecution, and thus no cognizable chill.

The relevant sections of the DMCA make it unlawful to "manufacture, import, offer to

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<sup>4</sup>The fact that Plaintiffs bring a First Amendment challenge to the DMCA does not substantially alter this analysis. It is true that plaintiffs enjoy a certain slackening of the ripeness standard with respect to overbreadth claims (see Complaint ¶ 102), but that slackening does not alter the requirement that a plaintiff actually, and reasonably, have been chilled by the statute he challenges. See Sec'y of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 956-57 (1984) (plaintiff in First Amendment context must show injury-in-fact). Rather, "the exception only allows those who have suffered some cognizable injury, but whose conduct is not protected under the First Amendment, to assert the constitutional rights of others." Bordell v. General Electric Co., 922 F.2d 1057, 1061 (2d Cir. 1991) ("[t]his slender exception to the prudential limits on standing does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction.").

the public, provide, or otherwise traffic in" any technology, product, service device, component, or part thereof, that: is primarily designed or produced for the purpose of circumventing an access control; has only limited commercially significant purpose or use other than to circumvent such a control, or; is marketed for use in such circumvention. 17 U.S.C. § 1201 (a)(1), (a)(2).

By their own allegations, Plaintiffs' conduct is not proscribed by the DMCA, because Plaintiffs' purpose is not to circumvent any access control measures, but rather to study, and to assist others in *bolstering*, those access controls.<sup>5</sup>

Scott Craver alleges that he "believes that his computer program would be a boon to both data hiding research as well as those studying audio compression or other aspects of signal processing." Compl. ¶ 58. He further alleges that, despite the fact that he is creating his software to "more efficiently perform the forensic analysis of music . . . [s]ince it can [also] be used to detect watermarks, however, he is concerned that he will be prevented from publishing or presenting it[.]" Compl. ¶¶ 57, 58. Min Wu's academic research at the University of Maryland, regards "multimedia security." Compl. ¶ 61. She alleges that she expects "that the publication of her dissertation as a book would bring [a benefit] to her and to the scientific community . . ." Compl. ¶ 67. The goal of Professor Wallach's research "is to investigate the strength of the

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<sup>5</sup>It is possible that making available a publication that describes in detail how to go about circumventing a particular technology, if written or marketed for the express purpose of actually circumventing that technology, would be prosecuted under the statute. The Department of Justice has not yet addressed such conduct and has not yet determined whether it will enforce the statute in this way. More important, Plaintiffs do not allege that they are doing this. According to the complaint, the Plaintiffs are scientists attempting to study access control technologies. The DMCA simply does not apply to such conduct. Those allegations are sufficient to dismiss Plaintiffs' complaint. See Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) (directing courts to examine "facts alleged, under all the circumstances," in determining jurisdiction).

technological protection measures and to write a publishable paper about his findings." Compl. ¶ 71. Professor Felten says he would like to serve on the Workshop on Security and Privacy in Digital Rights Management, which works on "technologies to control access to, or use of, digital works." Compl. ¶ 80.

Nowhere do Plaintiffs allege that have in the past, or will in the future, manufacture or offer any product of any nature that is primarily designed or marketed for circumvention of these technologies, or that has limited commercial purpose other than the circumvention of such technologies. Moreover, Plaintiffs themselves explicitly allege that their activities fall *outside* the purview of the DMCA. Citing *inter alia* the provisions of the DMCA that require that the technology be primarily designed for the purpose of circumvention, Plaintiffs allege that their conduct, which relates to technological *protection* measures, does not qualify under the statute. Compl. ¶¶ 91-94. Under the facts as alleged by Plaintiffs, the DMCA would not apply to their conduct, and any fear of an immediate prosecution would be unreasonable. Plaintiffs' claim should therefore be dismissed.

**2. Plaintiffs' Claim Does Not Admit of Conclusive Relief, As The Applicability of the DMCA to Their Conduct Is Contingent on The Precise Papers They Intend to Publish, Which Plaintiffs Have Not Yet Articulated.**

Under the second prong of the Step-Saver test, the court must determine whether the case is a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as opposed to an opinion advising what the law would be upon a hypothetical state of facts." Step-Saver, 912 F.2d at 649. Thus, a court may not issue a declaratory judgment that itself would be a contingency, or would not change the legal status of the parties. Id.

"Conclusiveness is a short-hand term for whether a declaratory judgment definitely would decide the parties' rights. It also addresses the extent to which further factual development of the case would facilitate decision, so as to avoid issuing advisory opinions, or whether the question presented is predominantly legal." Ne Hub at 343 (internal citations omitted).

In keeping with this principle, a Plaintiff must allege his intended course of conduct with sufficient specificity that the court may determine the likelihood of a prosecution. United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947) (no case or controversy where court could "only speculate as to the kinds of political activity the [plaintiffs] desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication."); see also WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3532.5 (court must examine "the likelihood that the complainant will disobey the law [and] the certainty that such disobedience will take a particular form."); Acevedo Montalvo v. Hernandez Colon, 440 F. Supp. 238, 242 (D.P.R. 1977) (physician's facial challenge to statutory prohibition on advertising abortions not ripe where plaintiffs presented no more than "conjectural allegations" future conduct). As shown below, it is not at all clear what the Plaintiffs actually will publish.<sup>6</sup> It is impossible to tell, therefore, whether their publications would be covered by the DMCA, and, therefore, whether Plaintiffs would be affected by the declaratory judgment they seek.

United Public Workers illustrates the level of specificity required under this prong. In

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<sup>6</sup>The ambiguity of Plaintiffs' allegations with respect to the material they intend to publish does not undermine the fact that according to their allegations they are not covered by the statute. On the contrary, by failing to allege exactly what they wish to publish, but at the same time alleging quite clearly that whatever they publish will be intended to advance scientific research and bolster encryption technologies, Plaintiffs manage to assure that their claim is at once too contingent to satisfy step two of Step-Saver and that their conduct falls too clearly outside the statute, under step one of that test.

that case the plaintiffs were federal employees who wished to challenge the Hatch Act's limits on their political activities. Plaintiffs there alleged that they "desire[d] to engage in the following acts: write for publication letters and articles in support of candidates for office; be connected with publications which are identified with the legislative program of UFWA[] and candidates who support it; solicit votes, aid in getting out voters, act as accredited checker, watcher, or challenger; transport voters to and from the polls without compensation therefor; participate in and help in organizing political parades; initiate petitions, and canvass for the signatures of others on petitions; serve as party ward committeeman or other party official . . ." Id. at 83, n.

11. Plaintiffs in that case also said that they wanted to "participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend." Id. One plaintiff in that case even alleged his "wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and other periodicals . . ." Id. at 88, n. 18. The Court found that these allegations were not specific about the precise speech and other activities plaintiffs wished to undertake. Based on this "hypothetical threat," it could only "speculate" about the interference of the Hatch Act with those activities. Id. at 90. Because of this lack of specificity, "[n]o threat of interference by the Commission with rights of these appellants appear[ed] beyond that implied by the existence of the law and the regulations." Id. at 91.

In the present case, Plaintiffs' allegations are not even as specific as those in United



Public Workers. Except with respect to the papers that have already been published, the detail about their proposed publications is scant to say the very least. Like the allegations in United Public Workers, Plaintiffs's allegations in this case give only a broad field of interest, without describing with specificity the particular works Plaintiffs intend to publish, and do not offer this Court sufficient facts to determine whether the DMCA would apply, or how that application might be affected by the First Amendment.

Scott Craver says that as part of his Ph.D. project he "is in the process of creating" a software program that can analyze music. Compl. ¶ 57. He does not describe the project beyond giving its general nature, and he does not allege that it has been, or will be chilled. Min Wu alleges that she has been hired by the University of Maryland to research "multimedia security," "multimedia representation and content analysis," and "multimedia communication over network and wireless channels." Compl. ¶¶ 61, 68. She further alleges that she "cannot tell whether she would be allowed to pursue these avenues of study." Compl. ¶ 69. She does not present the Court with a detailed study, only a field of study in which she is interested. Daniel Wallach alleges that he intends to write about research (which he has not yet begun) into encryption technologies that had been part of the SDMI Challenge, but which had not been cracked by Plaintiffs. He also alleges that he wants to "investigate the strength" of technologies that protect consumer audio CD's. Compl. ¶ 71. Again, there only scant detail about the research, let alone the publication, in which he is interested.

Similarly, Bede Liu alleges generically that he would like to study "watermarks and attacking technologies." Compl. ¶ 73. USENIX alleges that at six conferences a year, "an issue about the [DMCA's] anti-dissemination provisions could arise." Compl. ¶ 77. It does not allege

that it will not accept these papers, or that it knows what the papers will say. Finally Dr. Felten alleges that he is working for the program committee of the Workshop on Security and Privacy in Digital Rights Management "DRM", and Publications Chair of the Association for Computing Machinery Conference on Computer and Communications Security ("CCS"). Compl. ¶¶ 80, 81. Felten alleges that while CCS "covers all areas of computer security," the DRM Workshop addresses access control technologies. Compl. ¶ 82. He claims that the DRM Workshop will deal with "the evaluation, publication and presentation of information about the vulnerabilities of technological protection measures as defined in the DMCA." Compl. ¶ 83. Felten's allegations (like those of the other Plaintiffs) give no greater detail than the broad subject matter of the conference.

The detail given by Plaintiffs does not even rise to the level of that offered by the plaintiffs in United Public Workers. In that case, the plaintiffs articulated the types of speech they wanted to utter, and the general subject of that speech. They also described particular, well-defined job functions that they intended to perform, such as party ward committeeman, accredited checker or monitor, or in voter transportation. Nonetheless, so long as plaintiffs did not describe their desired conduct with enough specificity to assure that court of the manner in which the challenged statute might apply to that conduct, the allegations were insufficient. The Court simply lacked a factual basis on which determine the constitutionality of a federal statute. In the present case, the Plaintiffs only say that they are interested in proceeding with research that relates to the general subject of the DMCA. Without an idea of what specifically Plaintiffs intend to say, it is impossible to say whether they require adjudication of their claim, whether the DMCA would even apply to their activity, and if so, whether that application would be within the

confines of the First Amendment. Adjudicating Plaintiffs' claims on such a scant record would run afoul of United Public Workers, and would disregard the Supreme Court's stark admonition in that case:

"[t]he power of courts, and ultimately this Court to pass upon the constitutionality of acts of Congress arises only when the interests of the litigants require the use of this judicial authority for their protection against actual interference."

330 U.S. at 89-90.

3. **An Adjudication of Plaintiffs' Claims Would Be of Little Practical Utility.**

"Practical utility goes to 'whether the parties' plans of actions are likely to be affected by a declaratory judgment,' and considers the hardship to the parties of withholding judgment." Ne Hub at 344-45. Plaintiffs do not allege that any one of their future projects will not go forward as a result of the DMCA, and if past events are prologue, Plaintiffs will continue to publish their work without repercussion. A declaratory judgment will therefore not affect their conduct. Given these circumstances, addressing Plaintiffs' claims would be of little practical utility to the parties.

Scott Craver says that a project he is interested in "could be chilled." Compl. ¶ 56. He does not allege that it has been, or will be chilled. Min Wu alleges with respect to her research that she "cannot tell whether she would be allowed to pursue these avenues of study." Compl. ¶ 69. Like Craver, Wu is apparently proceeding with her research. She does not allege an actual, present chill, only a possible future one. Daniel Wallach alleges that he "is concerned that [two] projects will be subject to threats and other chilling effects." Compl. ¶ 72. Again, there is no allegation of an actual chill. Bede Liu, like the others, alleges no present chill. See Compl. ¶ 73.

USENIX alleges that at six conferences a year, "an issue about the [DMCA's] anti-dissemination provisions could arise." Compl. ¶ 77. It does not allege that it will not accept these papers. Finally Dr. Felten alleges that he is working for the program committee of the Workshop on Security and Privacy in Digital Rights Management "DRM", and Publications Chair of the Association for Computing Machinery Conference on Computer and Communications Security ("CCS"). Compl. ¶¶ 80, 81. Felten alleges that he is "concerned" about liability under the DMCA, and that others are "worried" about the consequences. Compl. ¶¶ 84, 85. Felten's work, like the others, is proceeding apace. He may be "concerned," and his colleagues may in fact be "worried," but no one, apparently, is actually chilled.

In fact the only specific papers referred to in the Complaint have all been published by Plaintiffs without repercussion. It is axiomatic that there is no chill with respect to speech that has been uttered. See, e.g., Bordell, 922 F.2d at 1061. The SDMI Paper was published at a USENIX Symposium on August 15, 2001. See Attachments A, B. Plaintiff Min Wu's paper, "Analysis of Attacks on SDMI Audio Watermarks," was published at the Institute of Electrical and Electronics Engineers Signal Processing Society, 26th International Conference, on May 7-11, 2001. Compl. ¶ 53. Chapter Ten of Min Wu's dissertation, which had been posted in its entirety on the Internet, is currently available through the Princeton University Libraries. See Attachments C, D. Plaintiffs have therefore failed to meet their burden to "proffer some objective evidence to substantiate [their] claim that the challenged conduct has deterred [them] from engaging in protected activity." Bordell, 922 F.2d at 1062.

Moreover, because the Plaintiffs have in fact uttered the very type of speech which they claim would subject them to criminal penalties, *and absolutely nothing has happened to them*,

their current claims of chill fail to raise a justiciable controversy. Bordell, 922 F.2d at 1061 (where a plaintiff has uttered related speech in the past and "has never been punished or threatened with punishment for his past conduct, there is no reason to believe that he will be prosecuted in the future[.]"). One example of this principle at work is Min Wu's dissertation. Regardless of whether Wu decides to publish her work as a book, or post it on the Internet, the dissertation has been published through Princeton University and is publicly available. She cannot now claim that it has been chilled. See The Pitt News v. Fisher, 215 F.3d 354, 364 (3rd Cir. 2000) (First Amendment challenge to ban on advertisements for alcohol not justiciable where "the very same ads are available . . . through other newspapers.").

Between the prospective research, which by Plaintiffs' own allegations is all proceeding, and the papers which have already been published, Plaintiffs have failed to allege any actual chill, and Plaintiffs' case should be dismissed.

### CONCLUSION

For the foregoing reasons, Defendant John Ashcroft's Motion to Dismiss should be granted.

Respectfully submitted,

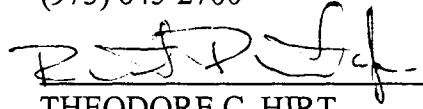
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